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Semicentennial of Karol Wojtyła's *The Acting Person*: Ideas—Contexts—Inspirations (II)

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On Karol Wojtyła's Aristotelian Method Part II Induction and Reduction as Aristotelian Induction (ἐπαγωγή) and Division (διαίρεσις)

Abstract: This is the second of a two-part study treating Karol Wojtyła's Aristotelian methodology. Having presented Aristotle's method of induction (ἐπαγωγή/*epagoge*) and analysis (ἀνάλῡσις/*analusis*) or division (διαίρεσις/*diairesis*) in Part I, Part II discloses the logical form and force of Wojtyła's method of induction and reduction as Aristotelian induction and division. Looking primarily to the introduction to *The Acting Person*, it is shown that Wojtyła utilizes the logical forms of *reductio ad impossibile* and reasoning on the *hypothesis* of the end, or effect-cause reasoning, which is special to the life sciences and the power-object model of definition as set down by Aristotle. By use of this Aristotelian methodology, Wojtyła obtains definitive knowledge of the human person that is necessary and undeniable: he discloses the εἶδος (*eidos*) or *species* of the person in the Aristotelian, Thomistic, and Phenomenological sense of the term.

Keywords: Karol Wojtyła, method, induction, reduction, Aristotle, definition, division, person, act, philosophical anthropology

Introduction

In his introduction to *The Acting Person*,[1] Karol Wojtyła sets down and utilizes a philosophical methodology for disclosing the essence of the human person, which he refers to as a two-stage process of *induction* and *reduction*. Wojtyła explicitly identifies induction as an Aristotelian method.[2] He does not explicitly identify reduction as Aristotelian methodology, though it will be shown that it is, in fact, the Aristotelian method of division. The goal in what follows is to present Wojtyła's inductive and reductive methodology, demonstrating that this twofold method is equivalent to Aristotelian induction (ἐπαγωγή/*epagoge*) and division (διαίρεσις/*diairesis*), as presented in Part I of this study.

In order to properly disclose Wojtyła's method, the presentation given here will closely follow the order of the text in the Introduction to *The Acting Person*. As will become apparent, Wojtyła first sets down his methodology and actually utilizes or practices it to establish his subject (3–14), and then he gives a reflective account of this methodology (14–18). Thus, in the text, we find somewhat

[1] It is unfortunate—and I fear detrimental to the philosophical legacy of Karol Wojtyła—that a good number of scholars have questioned the legitimacy and authenticity of *The Acting Person* as a work of Karol Wojtyła, taking it as a bad translation of an original Polish text, or as corrupted by edits and redactions from Anna-Teresa Tymieniecka, who collaborated with Wojtyła in the production of the text as an English composition. See, for example, Rocco Buttiglione, *Karol Wojtyla: The Thought of the Man Who Became Pope John Paul II*, 117, note 1; Kenneth L. Schmitz, *At the Center of the Human Drama: The Philosophical Anthropology of Karol Wojtyla/Pope John Paul II*, 58–61; and, Miguel Acosta and Adrian J. Reimers *Karol Wojtyla-'s Personalist Philosophy: Understanding Person and Act* (Washington, DC: The Catholic University of America Press, 2016), 9. Acosta goes as far as to recommend that "English-speaking scholars and students, at least at the graduate level of studies, should probably avoid using this translation." These scholars offer no textual evidence in support of their criticism of *The Acting Person*. Showing that the text differs from the original Polish work, *Osoba i czyn*, in the use of Thomistic and Phenomenological terminology, etc., of course, is not *evidence* that the work is inauthentic, a bad translation, or not in line with Wojtyła's scholarly and philosophical intentions. There is no need to defend the legitimacy of the work here, which should be understood as a stand-alone, English composition, as Jameson Taylor has already accomplished this task in the manner of a *tour de force*, in his "*The Acting Person* in Purgatory: A Note for Readers of the English Text," in *Logos: A Journal of Catholic Thought and Culture*, vol. 13, no. 3 (Summer 2010): 77–104. The published version of *The Acting Person* states explicitly on its title page that it is the "definitive text of the work established in collaboration with the author by Anna-Teresa Tymieniecka," and Wojtyła's own preface to the text indicates his support of its publication as a stand-alone work. There is no textual or historical evidence to suggest that the work is not the authentic work of Wojtyła, setting aside gossip and conspiracy theories. Contra the advice of Acosta, scholars and students should continue to study *The Acting Person* as an English composition and authentic work of Wojtyła, along with the rest of his work.

[2] *AP*, 14.

a circling back and forth between setting out methodology and practicing it *and then* an explicit and reflective logical account of method. This style, perhaps, is one of the reasons that commentators have found the text difficult and confusing, though it is by no means in itself an inherently flawed or unphilosophical approach, and it makes sense in Aristotelian terms, since a method is fitted in accord with an already given subject of theoretical inquiry.[3] Here, there is now an essential advantage, which will be manifest in the following presentation: we have, in unequivocal terms, an understanding of what induction and division mean in Aristotle, who is their ultimate source, so that we will be able to clearly identify them in systematic fashion as they are presented and utilized by Wojtyła.

Experience (ἐμπειρία/*emperia*) & Induction (ἐπαγωγή/*epagoge*)

Immediately taking a cue from Aristotle, Karol Wojtyła commences *The Acting Person* by making the methodological point of departure for his treatment of the human person the "experience of man":

> The inspiration to embark upon this study came from the need to objectivize that great cognitive process which at its origin may be defined as the *experience of man*; this experience, which man has of himself, is the richest and apparently the most complex of all experiences accessible to him. Man's experience of anything outside of himself is always associated with the experience

[3] See, for example: Kenneth L. Schmitz, *At the Center of the Human Drama*, 58; and, Jameson Taylor, "The Acting Person in Purgatory: A Note for Readers of the English Text," 78. The very fact of the extensive commentary work on the methodological approach of Wojtyła in *The Acting Person* is sufficient to show that it is no easy thing to understand. Wojtyła's approach is in line with that of Aristotle. See, for example, *Nicomachean Ethics*, I.3 (1094b11-14). Having set out a general conception of the human good as the subject of the enquiry, Aristotle states: "And our account would be stated sufficiently, if it were shown with clarity in accord with the subject matter (κατὰ τὴν ὑποκειμένην ὕλην)." The founder of the phenomenological tradition, Edmund Husserl, understands the formulation of method in the same terms. See, *Logical Investigations*, Vol. I, 1, § 11, tr. J.N. Findlay (London: Routledge, 2001): "Sciences are creations of the spirit which are directed to a certain end, and which are for that reason to be judged in accordance with that end. The same holds of theories, validations and in short every thing that we call a 'method.' Whether a science is truly a science, or a method a method, depends on whether it accords with the aims that it strives for." For more on this topic in Husserl, see also, Daniel C. Wagner, "On the Foundational Compatibility of Phenomenology & Thomism."

> of himself, and he never experiences anything external without having at the same time the experience of himself.[4]

By "experience," then, Wojtyła means a cognitive state of understanding, presupposing concept formation, which generally includes personal awareness of both an internal and external nature. By "experience," Wojtyła means Aristotelian ἐμπειρία (*empeiria*), as we have seen Aristotle use the term in *Posterior Analytics* II.19 and *Metaphysics* I.1 in Part I of this study. Recall that experience, in the sense of ἐμπειρία (*empeiria*), means a factual understanding of the world we are aware of, which can be expressed in judgement by the application of concepts formed through sense-perception, memory, and reason or the rational faculty.[5] As Aristotle expressed in *APo* II.19 and *Metaphysics* I.1, *experience* provides the point of departure for proper knowledge in the technical arts and in theoretical science or philosophy. The move from experiential knowledge to refined technical or theoretical understanding occurs when the knower makes such experiential concepts in relation to the particulars of experience objects of knowledge themselves and seeks by reason to refine them, drawing distinction, so that they express the essential aspects of the particulars that are their referents. Human knowers are capable of this act because human experience is itself already a form of knowledge and understanding, as Wojtyła has stated. The experience of man is a possible object of knowledge precisely because it is itself an act of understanding where I am subject and object, simultaneously.[6] To put it in the more traditional terms of being as the object of the intellect,[7] we can say, by way of further explanation, that the being that knows the being of itself and the world can turn by a reflective act of the same faculty and know the experiential concepts by which he experiences the world, because these too *are*.[8] What is more, knowing these concepts, he can then seek to refine and develop them in light of the very world itself (this latter, reflective act, being *reduction* and division, which will be treated in detail presently). According to Wojtyła, then, as human beings, we already have cognitive awareness of ourselves, oth-

[4] *AP*, 3. Emphasis added.

[5] Wojtyła calls experience a "fact," in line with the Aristotelian position that ἐμπειρία constitutes basic factual knowledge (τὸ ὅτι/*to hoti*), at *AP*, 3.

[6] *AP*, 4: "Intimately associated with the relation is the process of comprehension that also has its own distinctive moments and its continuity. Ultimately, our comprehension of ourselves is composed of many separate moments of understanding, somewhat analogous to experience, which is also composed of many distinctive experiences; it thus seems that every experience is also a kind of understanding."

[7] See, Aristotle, *Metaphysics* IV.7 (1011b24-28) and St. Thomas Aquinas, *Questiones Disputates de Veritate*, a. 1, response. A debt is owed here to Brian Kemple who, in our discussions pertaining to knowledge, first made me aware of the *de Veritate* text.

[8] That Wojtyła mirrors this traditional approach is even more clear, as we will see below, in his treatment of the method of reduction.

ers, and the world, and there is a need to make this *experience* and the concepts that constitute it an object of knowledge in itself—that is, to "objectivize" this "cognitive process" and define it in rigorous terms. Here, thus, Wojtyła has set down the better-known to us, general datum which we must divide or analyze to gain proper knowledge of the person: the "experience of man."

In line with Aristotle's expression that human scientific enquiry moves from a better-known to us, complex, and indistinct sense-perceptive conception of a subject to proper understanding by division (*APo* I.2 and *Physics* I.1), Wojtyła explicitly signals that this experience is a general notion composed of many individual moments:

> There are in it some vividly expressive moments and also whole, dull sequences, but they all sum up to make the specific totality of experience of that individual man who is myself. The totality is composed of a multitude of experiences and is, as it were, their resultant.[9]

As Aristotle, then, Wojtyła understands that experience is constituted in the sense-perceptive and cognitive process whereby general conceptions are formed from the particulars (again, *APo* I.2, II.19, *Physics* I.1, and *Metaphysics* I.1). Emphasizing this point, Wojtyła will echo Aristotle's statement in *APo* II.19, that the source of knowledge in art and science is "experience or every universal being established in the soul—the one in relation to the many, which *one* would be the same in all the many particulars."[10] The "universal" and the "one in relation to the many," of course, is the conceptual meaning. As Wojtyła says,

> Undoubtedly every experience is a single event, and its every occurrence is unique and unrepeatable, but even so there is something that, because of a whole sequence of empirical moments, may be called the "experience of man." The object of experience is the man emerging from all the moments and at the same time present in every one of them (we disregard here all other objects).[11]

Thus, Wojtyła understands in Aristotelian terms that, after many repeated, individual moments of awareness, one experiential conception is formed—it "emerges" to the intellect from the particulars as it is immanent in them.

In treating "experience and comprehension," Wojtyła's Aristotelian position that experience as a knowledge state is constituted by concept formation from sense-perception, memory, and reason, becomes even more manifest. Recall

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[9] *AP*, 3.

[10] *Posterior Analytics*, II.19 (100a6-9).

[11] *AP*, 3–4. We note, here, in passing, Wojtyła simultaneous use of the phenomenological method of the *epoche*, whereby we "disregard all other objects."

again, that at *APo* II.19, in giving his genetic account of human knowledge, Aristotle had noted that, after sense-perception, memory, and the use of the rational faculty, "the universal/conception" is "established" in the soul. Selecting another English term, with the same Latinate root source as *established—stabilio*, meaning "to make firm, steadfast, stable, or fixed"—Wojtyła well describes concept formation after sense-perception as a form of "stabilization."[12] Like Aristotle, he indicates that animals have something of this capacity and experience, though in them it is not with reason or rational, that is, it lacks λόγος (*logos*): "It is in this way that a dog or a horse, for example, recognizes its master from a stranger."[13] He then describes *stabilization* in the case of human concept formation with reason or λόγος (*logos*) in the constitution of experience:

> The stabilization of experiential objects peculiar to the human experience is essentially different and is accomplished by mental discrimination and classification. It is owing to this kind of stabilization that the subject's experience of his own ego is kept within the bounds of the experience of man and that these experiences may be subsequently superimposed on one another.[14]

Clearly, then, Wojtyła understands the human concept formation constitutive of experience as already rational, allowing for "mental discrimination and classification"—something for which there is no evidence in animal cognitive behavior. *Superimposition*, we must understand, is part of the continued process of the collection and division of universal attributes given in sense-perceptive experience of the particulars. Of course, here, Wojtyła is speaking of the experience of the phenomenon of the human person, and it is worth noting that he is simultaneously utilizing the phenomenological method, as he "disregards" other objects of experience, which is to say he exercises an ἐποχή (*epoche*) with respect to them, placing them out of consideration.

As Aristotle explains in *Physics* I.1, our study of the natural world commences with a better-known to us, general and indistinct sense-perceptive universal and proceeds by analysis and division to express its essential aspects or elements. Similarly, Wojtyła is explicit that "experience" is "the basis of the knowledge of man"[15]—as just such an indistinct universal:

> It becomes clear in our considerations that the need for explaining the meaning of experience in general, and the meaning of the experience of man in particular, is becoming increasingly evident, and we shall have to return to

[12] The Greek term that Aristotle uses is ἠρεμέω (*eremeo*), meaning "to be still, remain, at rest, unmoved, or fixed."

[13] *AP*, 6.

[14] *AP*, 6.

[15] *AP*, 4.

> this point later. In the meanwhile, before proceeding to an explanation of this fundamental concept, we shall sketch in rough outlines the highly complex and intricate cognitive process, which we have here called the "experience of man."[16]

Indicating the need, then, to give a general outline of his subject genus, Wojtyła turns next to the process of reduction and division.

Reduction as the *Reductio* form of Aristotelian Division

To begin, this "general," experiential conception of man with which Wojtyła commences his inquiry includes as distinct and irreducible aspects[17] the self or ego along with other selves or egos, that is, "other men," and the world and all its objects as given intersubjectively.[18] This fact is given as essential to experience through the phenomena of my interior, outerness, and the "peculiar interior" of other human beings, simultaneously.[19] My interior is constituted by an inner experience itself that is "untransferable by and out of the ego,"[20] while I am aware of the outer world and other, non-transferable egos, through sense-perception and intellect.[21] Wojtyła is emphatic that both inner and outer experi-

[16] *AP*, 5. The use of the phrase "rough outlines," here, smacks of Aristotle's use of the term παχυλῶς to describe the manner of defining a subject in generic terms. See, for example, *Nicomachean Ethics*, I.3 (1094b19-27). This adverbial from literally means "thickly," and is often translated "roughly," though I suggest the term "broadly" in order to avoid the suggestion that the account/definition is lacking any essential generic feature (for Aristotle, this is certainly not the case). See, *The Aristotelian Foundations of the Human Good*, 344–345. In any case, the point is to indicate that we are engaged in a process of division already, seeking to define our subject-genus.

[17] An "aspect" is an essential defining part, which is not itself a whole or the whole to which it belongs. See, *AP*, 28. In general, this corresponds to the Husserlian notion of a "moment." Cf. Robert Sokolowski, *Introduction to Phenomenology*, 23.

[18] See, *AP*, 4: "The experience of man is composed of his experience of himself and of all other men whose position relative to the subject is that of the object of experience, that is to say, who are in a direct cognitive relation to the subject."

[19] *AP*, 7.

[20] *AP*, 7.

[21] See, *AP*, 7. He notes, here, regarding apprehension of the interior of the other: "While I do not experience this interior directly, I know of it: I know about people in general, and in the case of individuals I may sometimes know very much." Wojtyła's approach to intersubjectivity and the problem of other egos, here, though brief, is on very solid ground as it is not unlike

ence are essential to the whole datum of the experience of the human being. Actually utilizing the Aristotelian method of division, which presently we will see him label *reduction*, Wojtyła argues that these "aspects" or elements are essential to the experience of man by a form of *reductio ad impossibile*, showing that they cannot be reduced to each other.[22] The inner and outer experience are irreducible, meaning that they must stand—it is impossible for this not to be the case—as essential elements or aspects of experience.

Referring to this general, experiential conception of man including the inner and the outer in relation to intellect and sense-perception, note, then, Wojtyła's use of the term *impossible*, to indicate such reasoning:

> All this has to be taken note of when considering the experience of man. It is impossible to isolate artificially this experience from the whole range of cognitive acts that have man as their object. It is also impossible to separate it artificially from the intellectual factor. The nature of the whole set of cognitive acts directed at man, both at the man I am and at every man other than myself, is empirical as well as intellectual. The two aspects interpenetrate, interact, and mutually support each other.[23]

Here, his primary point is that we must include both intellectual and empirical, that is, sense-perceptive qualities as essential, and co-permeating aspects of experience of the person as a whole. This, of course, is to reject any mind-body type dualism, idealism, solipsism, and also behaviorism, at the outset. Reflecting on his Aristotelian empirical approach and distinguishing it from phenomenalism, then, Wojtyła identifies this reasoning in dividing the general conception of the experience of man as a form of "argument" and the process of defining "with greater precision."[24] His reasoning comes in the *reductio* form, the trademark of which, as we know, is the derivation of a contradiction where the principle is supposed to be false in defense of the truth of the principle. Here, he makes this point, showing that it is impossible to reduce experience to sensation alone: "To reduce the range of experience to the functions and the content of sense alone would lead to deep *contradictions* and serious misunderstandings."[25]

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that of Edith Stein treatment of empathy in *On the Problem of Empathy*, and Edmund Husserl's treatment of empathy at *Cartesian Meditation* V. This, however, Is a topic for another study.

[22] Cf. Aristotle, *Physics* I.5-7, where Aristotle distinguishes form, privation, and subject, showing that they cannot be reduced to each other, by way of *reductio ad impossibile*.

[23] *AP*, 8.

[24] See, *AP*, 8. The title of the section is "The Empirical Standpoint Is Not Identifiable with Phenomenalism." Here, referring back to the division of experience into the inner and outer aspects, he notes: "In the course of the preceding argument, it seemed necessary to define with greater precision the meaning of experience in general in connection with the experience of man."

[25] *AP*, 8. Emphasis added.

There cannot be a phenomenalist, Cartesian divorce of what is given in sense-experience from actual things, as this leads directly to contradiction in the very meaning of sensitive experience—inner and outer—as it is given.[26] Thus, while dividing my inner ego from that of the outer other, and from other objects given in sense-perceptive experience, I yet recognize that these aspects are essential to the whole of experience of man, or I would be contradicting the very meaning of that experience as it has already been given.

In the following section of the Introduction, Wojtyła focuses in on the phenomenologically, or experientially given datum, "man-acts," which is, as he says, the beginning of his argument for the nature of the person.[27] This concept is a "dynamic totality," which is to say that it is a universal of awareness better-known to us that is in potential to being divided into its essential elements or aspects.[28] Here, again, having a datum via sense-perceptive experience, Wojtyła utilizes the Aristotelian conception of division by *reductio* to show with necessity that phenomenalism is false:

> It would be *impossible* to accept as true that in grasping this fact experience only reaches to the "surface," that it would be restricted to a set of sense data, which in every particular case is unique, while the mind is, so to speak, awaiting these data so as to make of them its objects, which it will then call either "action" or "acting person." On the contrary, it seems that the mind is engaged already in experience itself and that the experience enables it to establish its relation to the object, a relation also, although in a different sense.[29]

Experience cannot be reduced to the sensually perceived aspects in the phenomenon of "man-acts" because the experience "man-acts" already requires the formation of the universal conception (that is what experience is) with the inner or the ego as an essential meaning of "man-acts" when we have the experience of man acting. Thus, to bring out the argument more explicitly, the error and contradiction here would entail that 'I do have an experience/conceptual mean-

[26] *AP*, 8–9. Wojtyla, here, puts the argument primarily in rhetorical terms, indicating that a Cartesian, Humean, and Kantian divorce between objects of sensation and sense concepts or ideas contradicts the very sense or functional meaning of sense-perceptive concepts. Cf., Edmund Husserl, *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy* I, §43, trans. F. Kersten, *Collected Works*, vol. 2 (The Hague: Martinus Nijhoff, 1983).

[27] *AP*, 8–9: "An experience is indubitably connected with a range of data which we have as given. One of them is evidently the dynamic totality of 'man-acts.' It is this fact that we take as the starting point, and on it we shall primarily concentrate in our argument."

[28] In his commentary on the *Physics*, St. Thomas Aquinas explains this point with precision. See, St. Thomas Aquinas, *In Physic*., lib. 1 l. 1 n. 7. For a helpful exposition, see, Daniel Wagner and John Boyer, "Albertus Magnus and St. Thomas on What is 'Better-Known' in Natural Science," in the *Proceedings of the American Catholic Philosophical Association*, vol. 93 (2020): 8–11.

[29] *AP*, 9–10. Emphasis added.

ing of "man-acts" (P), but I do not have an experience/conceptual meaning of man acts (not P). To experience merely the sensed data of man-acts is not to experience man-acts—it is a contradictory reduction and distortion of the datum. The perceived attributes of person without judgement of person in terms of ego or other does not constitute the experience of man. On this account, it is non-sensical (as it results in this contradiction), to reduce the meaning of man acts to mere particulars of sense experience as though man acting is merely some material mechanistic reality (again, that would contradict the sense of "man-acting" as I know it in experience). Therefore, to have an experience of "man-acts" is not merely to experience perceivable movement, etc., but it also includes experience of the person as the cognitive, conscious, or knowing agent of the actions.[30] This reasoning allows Wojtyła to distinguish his phenomenological approach, where there is a "unity of acts of human cognition," from the phenomenalist approach, upholding sense-perceptive and cognitive acts as distinct, but essential aspects of the phenomenon.

Expressing the unity of experience along these lines, Wojtyła immediately indicates the need for further exploration of this datum by the process of division, or the second sense of Aristotelian induction:

> For our position is that action serves as a particular moment of apprehending—that is, of experiencing—the person. This experience is, of course, inherently connected with a strictly defined understanding, which consists, as already mentioned, in an intellectual apprehension grounded on the fact that man acts in innumerable recurrences. The datum "man-acts," with its full experiential content, now opens itself for *exfoliation* as a person's action.[31]

Here, showing his originality and philosophical insight, Wojtyła draws a brilliant analogy between the process of division and *exfoliation*. In English, exfoliation is a process of separating layers that rest on or adhere to each other. The term is from the Latin verb, *exfoliare* literally meaning "out of/from-leafing," *folio* meaning "leaf." Thus, we are to understand that the experience, "man-acts," is an object with many *layers* or *leaves*, interconnected and adhering to each other, which are in need of exfoliation, which just is division in the Aristotelian sense. "It is only in this way," Wojtyła notes, "that the whole content of experience reveals the fact with characteristic manifestness."[32] Wojtyła immediately defines the meaning of "manifest," as a kind of intellectual *seeing*, *presentation*, or *visualization*, which we also know as the moment after Aristotelian induc-

[30] Again, this is because human experience as a whole is permeated by the act of conscious understanding: "Thus in every human experience there is also a certain measure of understanding of what is experienced."

[31] *AP*, 10. Emphasis added.

[32] *AP*, 10.

tion called νοῦς (*nous*) or intellectual-judgement. In this act of manifestation, Wojtyła notes,

> […] the interpretation of the fact that "man-acts," in terms of the person's action—or rather in terms of the acting-person's totality—finds full confirmation in the content of experience, that is, in the content of the datum "man-acts" in its innumerable recurrences.[33]

Here, he is describing how, after beginning with general experience and then refining it by division, we confirm the leaves or elements divided by returning to the original datum itself for verification. This is the process of inductive division in Aristotle. Describing the method "more accurately," he then states:

> Indeed, the interpretation of the fact of man's acting in terms of the dynamic person-action conjunction is fully confirmed in experience. Neither is there anything in experience that would be opposed to this interpretation when the fact that "man-acts" is objectivized in terms of a person's action is confirmed.[34]

Wojtyła has identified "man-acts" as the fact and experiential point of departure of *The Acting Person*, utilizing Aristotelian induction in the first sense. He has used Aristotelian induction in the second sense of division, employing the *reductio* to show the necessity of the meaning the "experience of man," as including empirical and cognitive or intellectual aspects. A universal conceptual meaning is apprehended from the particulars, and its validity is then verified in and by the particulars themselves in an act of intellectual-judgment. This is what Wojtyła means by "confirmation." It is absurd and a lack of education to ask if this concept is valid in the sense of signifying a real subject of inquiry. This fact is known inductively in the perceptive, intellectual-judgement itself, wherein the human act discloses itself time and time again in confirmation of the experiential concept of the person. In fact, this is the same reasoning that Aristotle provides, in *Physics* II.1, having defined nature, in response to those who would ask for a demonstration that nature exists.[35] Just as the meaning of

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[33] *AP*, 10.

[34] *AP*, 10

[35] *Physics*, II.1 (193a3-8): ὡς δ' ἔστιν ἡ φύσις, πειρᾶσθαι δεικνύναι γελοῖον· φανερὸν γὰρ ὅτι τοιαῦτα τῶν ὄντων ἐστὶν πολλά. τὸ δὲ δεικνύναι τὰ φανερὰ διὰ τῶν ἀφανῶν οὐ δυναμένου κρίνειν ἐστὶ τὸ δι' αὐτὸ καὶ μὴ δι' αὐτὸ γνώριμον (ὅτι δ' ἐνδέχεται τοῦτο πάσχειν, οὐκ ἄδηλον· συλλογίσαιτο γὰρ ἄν τις ἐκ γενετῆς ὢν τυφλὸς περὶ χρωμάτων), ὥστε ἀνάγκη τοῖς τοιούτοις περὶ τῶν ὀνομάτων εἶναι τὸν λόγον, νοεῖν δὲ μηδέν. In the first line, ὡς is equivalent to ὅτι. Or, "But to attempt to demonstrate (δεικνύναι) *that nature is*, is absurd; for it is manifest (φανερὸν) *that* (ὅτι) there are many such things among existing things (τῶν ὄντων). And to [try to] show manifest things through things not manifest belongs to one who is not able to discern that which is known on account of itself from that which is not known on account of itself (and that suffe-

nature is necessary because the particulars are as they are, so too "person-act" is a valid subject matter as it is confirmed in the particulars of sense-perceptive experience. Like Aristotle, thus, Wojtyła lets particulars of experience regulate and become the measure of refined theoretical conception.

Reduction as Power-Object Division, Effect-Cause and Suppositional Reasoning

Beginning with "person-act" as fundamental datum of experience, Wojtyła next expresses his intention to utilize the third form of Aristotelian inductive division: the method of division constituted by effect to cause reasoning, where the actions of the particulars being studied are taken as the point of departure for apprehending their essential nature. Here, then, we have the method of beginning from τά ἔργα (*ta erga*) taken as effects that Aristotle set it down in *De Anima* and *De Partibus Animalium*:

> The title itself of this book, *The Acting Person*, shows it is not a discourse on action in which the person is presupposed. We have followed a different line of experience and understanding. For us action reveals the person, and we look at the person through his action. For it lies in the nature of the correlation inherent in experience, in the very nature of man's acting, that action constitutes the specific moment whereby the person is revealed. Action gives us the best insight into the inherent essence of the person and allows us to understand the person most fully. We experience man as a person, and we are convinced of it because he performs actions.[36]

Establishing that value in the ethical sense is an essential aspect of the phenomenon of the act of the person,[37] Wojtyła restates this methodology, this time

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ring this is possible is not unknown; for someone being blind from birth might reason about colors), so that it is necessary for any such proof to be an account of terms, and not an act of intellect (νοεῖν)."

[36] *AP*, 11. Here, Wojtyła contrasts his approach to a traditional approach in ethics, which assumes the person. It is of great import to note that Aristotle uses this same methodology in the philosophical anthropology that he gives in *Nicomachean Ethics* I. See, again, Daniel C. Wagner, *The Aristotelian Foundations of the Human Good*. Below, at 14, using the phenomenological method, he will use the epoche again to set aside considerations about the good.

[37] *AP*, 11–12. Here, Wojtyła refers to *Nicomachean Ethics* as inspirational. Of course, he will yet use the epoche to suspend judgement about the value of action, per se, in this work, fo-

explicitly identifying it with exfoliation which, as we have seen, is his technical term for division:

> This book is not a study in ethics. The person is not presupposed, is not implied in it; on the contrary, all our attention is centered on possibly the most comprehensive explanation of that reality which is the person. The source of our knowledge of the reality that is the person lies in action, but even more so in the dynamic or existential aspects of morality. In this approach we shall rely on the real objective unity of the experience of moral value and the experience of man, rather than try to retain the traditional lines of anthropology with ethics. This is the fundamental condition of *exfoliating* and then progressively comprehending the person.[38]

As we saw Aristotle explain and utilize it in both *De Anima* and *De Partibus Animalium*, then, Wojtyła will utilize the power-object model of division, beginning with the apprehension of act or ἔργον (*ergon*) of the human being in experience taken as an effect, and then culminating by the reasoning to the essence and capacity required in the nature of the person as the source of the act. Looking forward to the content of *The Acting Person* to follow, this method of exfoliation is most important. As he does not explain it in further detail in his Introduction, which remains at a high level of abstraction in its discussion of exfoliation, pause is warranted here for further explanation and connection to the Aristotelian method.

Wojtyła's approach to consciousness and self-knowledge as essential and essentially related aspects of the person-act phenomenon provides an excellent example of his use of both the *reductio* style and the power-object model of division. First, Wojtyła distinguishes consciousness from intentional, cognitive objectivization. Consciousness, as distinct from cognition of objects of experience and self, is a reflective or "mirroring" function that is "the understanding of what has been constituted and comprehended," so that it is a kind of awareness presupposing intentional knowing acts, or cognitive subject-object relations.[39] That consciousness is necessarily distinct from intentional cognitive acts of the person is shown by inductive reasoning with a necessity of constraint, with reference to the experience of person-act: to deny this distinction is contrary to the very sense of the experience of person-act, as we find in that datum particulars corresponding not only to cognitive action but also, and even in and with the cognitive action, the conscious mirroring function. Wojtyła further argues by *reductio* that it is impossible to sever the mirroring

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cusing narrowly on philosophical anthropology. This account, of course, will provide the foundation for evaluative claims in ethics, as with Aristotle.

[38] *AP*, 13.

[39] *AP*, 32.

functioning of consciousness from self-knowledge, because it presupposes it and the content it provides in its action.[40] Finally, in further disclosing the dynamic powers of self-knowledge in relation to consciousness, Wojtyła utilizes the suppositional form of reasoning in conjunction with the power-object model. First, he identifies the capacity or power in relation to an object. Here, the couple is self-knowledge-consciousness:

> […] the objectivizing turn of self-knowledge toward the ego and toward the actions related to the ego is also a turn to consciousness as such, so far as consciousness also becomes the object of self-knowledge.

Having set out the power and the object in this manner, Wojtyła next uses suppositional reasoning to show why it is necessary, fitting, or best that this power and object be connected in this manner:

> This explains why, when man is conscious of his acting, he also knows he is acting; indeed, he knows he is acting consciously. He is aware of being conscious and of acting consciously. Self-knowledge has as it object no only the person and the action, but also the person as being aware of himself and aware of his action.

Recall, first, that the Aristotelian conception of reasoning on the hypothesis or supposition of the end is properly causally explanative. On the supposition that there is to be such and such a form of normative behavior, for example, marsh-dwelling, it is necessary that such and such morphology be present. The end, that is the functional life activities of the organism, explain why it is that it possess the morphological capacities that it possess. Here, using the term "explain" appropriately, then, we can see Wojtyła reasoning in just this manner: on the supposition of the end or effect that the person is to know himself as acting, it is necessary that consciousness is also the object of the power of self-knowledge.[41] Thus, having first divided these aspects of the experience of person-act by division by *reductio*, Wojtyła has now connected them in the power-object relation by hypothetical reasoning, which is also a cause-effect reasoning.[42]

[40] *AP*, 36: "Because of self-knowledge consciousness can mirror actions and their relations to the ego. Without it consciousness would be deprived of its immanent meanings so far as man's self is concerned—when it presents itself as the object—and would then exist as if it were suspended in the void." This hypothetical is an absurdity, which Wojtyła attributes to the "idealists."

[41] In Aristotelian terms, this is an example of moving from knowledge of the fact of the division of attributes, to knowledge of the cause of the fact.

[42] While I have chosen these examples because they come early in the text, and because of the clarity with which they are given, we rightly expect Wojtyła to utilize the Aristotelian me-

Wojtyła's Method: Beginning Again

Wojtyła's propaedeutic treatment of methodology now hits its crescendo, in Section Three of the Introduction to *The Acting Person*, on the "stages of comprehending and the lines of interpretation." At this point, having stated his method and utilized it to set out his generic subject matter, Wojtyła circles back to give a reflective account of the logical method of *The Acting Person*. Here, immediately treating "induction and the unity of meaning," and referring to his prior presentation of "experience" and "stabilization," Wojtyła explicitly identifies the method of the text with Aristotelian sense-perceptive induction:

> The transition from the multiplicity and complexity of "factual" data to the grasping of their essential sameness, previously defined as the stabilization of the object of experience, is achieved by induction. At any rate this is how Aristotle seems to have understood the inductive function of the mind. This view is not shared by modern positivists, such as J.S. Mill, for whom induction is already a form of argumentation or reasoning—something which it is not for Aristotle. Induction consists in grasping mentally the unity of meaning from among the multiplicity and complexity of phenomena. In connection with our earlier assertions, we may say that induction leads to that simplicity in the experience of man which we find in it in spite of all its complexity.[43]

It is clear that for Wojtyła, the term *induction* in Aristotle is limited to the sense of concept formation and intellectual-judgement, prior to the forms of reasoning used in division proper. The fact that Wojtyła does not include the reasoned process of division by *reductio* or the power-object model, as Aristotle does, is merely a semantic difference. He will understand these latter senses of Aristotelian, reasoned induction as division, as his own "reduction." Both induction and reduction, then, in the senses that Wojtyła utilizes them, are Aristotelian. This fact becomes more clear in his explicit treatment of the terms, to which we now return.

Wojtyła explains that induction is the process of concept formation, whereby a sameness and unity of meaning is formed in the understanding following on sense-perception of the manifold of particulars. In this case, the key unity or *one form the many* is that of the person-action relation.[44] Here, in Wojtyła, we can see the description of concept formation and formation of the universal that Aristotle calls the beginning of knowledge in art and science, in *APo* II.19:

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thod of division (induction and reduction) throughout *The Acting Person*. A comprehensive approach must be left for a future study.

[43] *AP*, 14.

[44] *AP*, 14. "Sameness is undestood here as equivalent to the "unity of meaning."

> The whole wealth and diversity of "factual" data accumulated from individual details is retained in experience, while the mind disengages from their abundance and grasps only the unity of meaning.[45]

Wojtyła is careful to ensure that, in treating the constitution of experience by concept formation and induction, we do not commit the error of abstraction:

> In order to grasp this unity the mind, so to speak, allows experience to predominate without, however, ceasing to understand the wealth and diversity of experience. The grasping by the mind of the unity of meaning is not equivalent to a rejection of experiential wealth and diversity (though sometimes this is how the function of abstraction is erroneously interpreted). While comprehending (say) the acting person on the ground of the experience of man, of all the "factual" data of "man-acts," the mind still remains attentive in this essential understanding to the wealth of diverse information supplied by experience.[46]

It is clear, once again, that Wojtyła appropriates and utilizes the first sense of induction, that is, the induction of sense-perception, as first formulated by Aristotle. As we know, however, this is the source—the ἀρχή—of refined scientific, or theoretical knowledge. Having set out this realist-empiricist point of departure, Wojtyła presents the method of *reduction*, which is Aristotelian division.

In the next section, explaining that "reduction allows us to explore the experience of man," Wojtyła helpfully distinguishes the division and refinement sense of induction as "reduction." As he says: "Induction opens the way to reduction."[47] Etymologically speaking, the term "reduction" provides a fitting name for induction as division and analysis, and Aristotle would be pleased with the terminological nuance. As indicated in Part I of this study, in the Greek and Latin, both ἐπαγωγή (*epagoge*) and *inductio* mean a "leading into." Thus, "reduction" signifies a second stage of "leading into" after the first stage is complete—a "re-leading into." First, as we have seen, starting from sense-perception and a grasp of the particulars, induction is the leading into the formation, *establishment*, or *stabilization* of a "unity of meaning," that is, a concept by which the particulars can be judged constituting experience. However, once we have this concept and we make it an object of the intellect itself in relation to what it signifies, we can preform a "reduction," refining it by division, making judgements as to its essential elements or aspects through eliminative, hypothetical, and power-object style reasoning, and by the experimentative comparison of it back to what it signifies. This is why Wojtyła speaks at the very outset of the

[45] *AP*, 14.
[46] *AP*, 15.
[47] *AP*, 14.

need to "objectivize" the phenomenon of the person. Thus, we are engaged in a *reduction*, or a re-leading-into the formation of a higher order, refined concept or universal of the human person. So, says Wojtyła:

> It is precisely the need for examining, explaining, or interpreting the rich reality of the person, which is given together with and through actions in the experience of man, that has inspired this study. Thus, we think it a waste of time to demonstrate or prove that man is a person and his acting is "action." We assume these to be irreducibly given in the experience itself of man's acting. Nevertheless, it is necessary to explain in detail the various aspects of the reality of the acting person on the ground of a fundamental understanding of person and action.[48]

Here, then, is an initial statement of the method of division as Aristotle sets it out at *Physics* II.1: in order to know the essence of the person, we begin with our better-known, general experiential concept of the person-act, and we divide it into its aspects. That Wojtyła understands this process of reduction as analysis and division—that these terms are synonymous—becomes immediately apparent:

It is by an *analytic* argument and reductive understanding that experience is explored.[49]

As with Aristotle, who holds that division leads to actual understanding unlocking the meaning of the whole by disclosure of its essential elements, Wojtyła is careful to distinguish his sense of "reduction" from reductionism, which eliminates essential aspects of the whole being studied:

> We have to remember, however, the correct meaning of the term "reductive," which does not indicate here any reduction in the sense of diminishing or limiting the wealth of the experiential object. On the contrary, our aim is to bring it out more fully. The exploration of the experience of man ought to be a cognitive process in which the original apprehension of the person in and through his actions is continuously and homogenetically developed. At the same time, this first apprehension has to be enriched and consistently extended and deepened.[50]

Like Aristotle, who begins in his studies of natural being with a better-known to us, indistinct universal and proceeds to divide it in a manner that remains true to the whole that is being defined in relation to the particulars, so also Wojtyła's approach works in an analytic and "non-reductive" (in a Cartesian sense) manner.

[48] *AP*, 14.
[49] *AP*, 16. Emphasis added.
[50] *AP*, 16.

Wojtyła proceeds to add further clarity along these lines, emphasizing that reduction and interpretation have as their point of departure for the study of person the general experiential conception "issuing from human praxis," which already includes a non-Cartesian intersubjective aspect.[51] After induction has occurred, an experiential concept of the person-act phenomenon being formed as a "factual datum," we can then inquire theoretically, via reduction as exfoliation or division, into the nature of this datum—it becomes, in Aristotelian terms, a *problem* for us in our apprehension and judgement of its being:[52]

> Induction, however, makes of it a problem for and a subject of reflection, and it is then that it comes within the scope of theoretical considerations. For being an experience, that is to say, an experiential factual instance, the person-action relation is also partaking of what in traditional philosophy was called "praxis." It is accompanied by that practical understanding which is necessary and sufficient for a man to live and to act consciously.[53]

We must understand, then, that the rigorous philosophical object of *The Acting Person* is not to somehow justify, prove, or validate in some manner this basic experiential conception of the person-act relation along with aspects of value and intersubjectivity. Again, it is not reasonable to reject the basic meaning of this experience along Cartesian or phenomenalist lines of argument, because induction confirms this experiential conception whereas it actually shows the alternative reductionistic approaches to be false. Given the existence of this datum of experience, following the Aristotelian method of definition that we saw set out in *APo* II.1, the question of *The Acting Person* is not "how the person acts consciously, etc.," but "what is conscious action and the person as its source." So, says Wojtyła:

> The line of understanding and interpretation that we have chosen here leads through a theoretical treatment of this praxis. The question thus facing us is not how to act consciously but what conscious acting or action really is, how the action reveals the person and how it helps us to gain a full and comprehensive understanding of the person.[54]

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[51] *AP*, 16.

[52] Aristotle, *Topics*, I.4 (101b15-16): γίνονται μὲν γὰρ οἱ λόγοι ἐκ τῶν προτάσεων· περὶ ὧν δὲ οἱ συλλογισμοί, τὰ προβλήματά ἐστι. Or, "For rational discourses (οἱ λόγοι) come to be from premises; and, the syllogisms concerning these are the problems (τὰ προβλήματά)."

[53] *AP*, 16.

[54] *AP*, 16. Reductioistic, dualist, and solipsistic philosophies that call into question the basic experience of the acting person, the world, and the intersubjective relation of acting persons are incoherent precisely because they contradict the very sense of experience that is presupposed to the question or problem they set out to answer. The question or problem, as Husserl rightly identified it, as that of the relation of knower to known object. Without already having a lived expe-

Setting proper parameters for the philosophical inquiry of *The Acting Person* in this manner, Wojtyła proceeds to express the nature of reduction as a form of reasoning, along with the logical force of understanding that he intends it to achieve. First, and again emphasizing his non-reductionist approach, Wojtyła tells us that reduction is process of reasoning:

> The term reduction, as here used, has no limiting or diminishing implications: to "reduce" means to convert to suitable arguments and items of evidence or, in other words, to reason, explain, and interpret.[55]

As with the Aristotelian process of division and analysis, thus, Wojtyła understands reduction as a form of reflective arguments, explanation, and interpretations making what is indistinct about the experiential conception of the person distinct. He expresses explicitly that reduction takes concepts of experience as given, and "works" on them as its subject:

> When reasoning and explaining we advance step by step to trace the object that is given us in experience and which directs our progress by the manner in which it is given.[56]

This is a description, then, of critically examining the concept of experience by relating it back to the object it signifies. This critical act of reasoning, that is a form of comparison and judgment of essential and non-essential elements in the universal, is division and the process of defining the object of knowledge. It is "seeking for evidence and adequate arguments to explain fully and comprehensively the reality of person and action."[57] In this manner, it also becomes clear that reduction is both a part of experience and that it transcends it. It is a part of experience because, after one engages in it, it too is given as an experiential datum. On the other hand, it transcends experience precisely because, as we have seen, it makes experience the object of its rational reflection and reasoning which are exfoliation and division.[58] Indicating the Aristotelian aim in

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rience of acting persons and their intersubjective relation, however, one could not even question how it is that mind is related to body, world, and other persons. Thus, any position that seeks to deny this sense of experiense is, from the outset, engaged in a pernicious contradiction and untenable. I have made similar argument in defense of sense-realism, in gernal, in my article, "The Logical Terms of Sense Realism: A Thomistic-Aristotelian & Phenomenological Defense."

[55] *AP*, 17.

[56] *AP*, 17.

[57] *AP*, 17.

[58] AP, 17: "Thus also reduction, and not only induction, is an inherent factor of experience without at the same time ceasing to be, though different from induction, transcendent with respect to it." And, "Generally speaking, understanding is intrinsic to human experience but also transcends it, not only because experience is an act and process, the nature of which is sensuous

scientific inquiry of moving by division from experience as what is better-know to us to what is better-known in itself or by nature, Wojtyła then expresses the goal of reduction as interpretation:

> The aim of interpretation is to produce an intentional image of the object, an image that is adequate and coincident with the object itself.[59]

Of course, producing a definition that properly captures the essence of the object being studied is no easy task. The primary error that must be avoided, Wojtyła emphasizes, is any form of *reductionism* that begins with erroneous principles and results in the exclusion of essential aspects of the experience of "person-act." Thus, Wojtyła emphasizes that *reduction* as a method is reflectively holistic, seeking to give an account of the whole nature of the person beginning with act of the person.[60] Having the experiential concept of "person-act" as a datum, we turn on it and seek to *exfoliate* it—to divide it into its essential aspect or element, being careful not to exclude anything essential. Wojtyła makes this point, explicitly showing that *reduction* is *analysis* and *exfoliation*:

> Once the problem is put in these terms, it immediately becomes evident that the *analyses* in this study are not going to be conducted on the level of consciousness alone, though they will necessarily include also the aspect of consciousness. If action is, as already mentioned, the special moment of revealing the person, then naturally we are concerned not with action as the intentional content constituted in consciousness, but instead with that dynamic reality itself which simultaneously reveals the person as its efficacious subject. It is in this sense that in our *analyses* we will consider action; and it is in this sense that we intend to *exfoliate* the person through action.[61]

Consciousness, of course, is special essential aspect of the acting-person phenomenon because the human act always arises through consciousness. So, Wojtyła immediately qualifies:

> At the same time, however, we must keep clearly in mind that action as the moment of the special apprehension of the person always manifests itself through consciousness—as does the person, whose essence the action discloses in a specific manner on the ground of the experience of man, particularly the inner experience.[62]

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while the nature of understanding and interpretation is intellectual, but because of the intrinsic nature of one and the other. To experience is one thing and to understand and interpret (which implies understanding) is quite another."

[59] *AP*, 17.

[60] *AP*, 18–19. In this context, Wojtyła single's out behaviorism.

[61] *AP*, 19–20.

[62] *AP*, 20.

Accordingly, Wojtyła will commence *The Acting Person*, in chapter 1, with reductive, exfoliating, and division of the aspect of consciousness. Utilizing the method of exfoliation, he tells us here in the introduction, the goal of *The Acting Person* is to examine "consciousness and what constitutes the essence of the dynamism pertaining to man's action."[63] Concluding his Introduction, Wojtyła concisely states for us the method and its goal, of which we have been seeking an understanding:

> [*The Acting Person* is] an essay in analysis aimed at developing a synthetic expression for the conception of person and action. The essence of this conception has for its prime objective the understanding of the human person for the sake of the person himself; it is thus designed to respond to the challenge that is posed by the experience of man as well as by the existential problems of man in the contemporary world.[64]

Wojtyła, thus, will utilize the Aristotelian method of induction and division, or induction and reduction as exfoliation, to place it in his terms, to obtain a proper definition of the human person. This philosophical anthropology, achieving logical necessity in disclosing the essence of the person, in turn, will provide the foundation for ethics proper. The stakes cannot be higher and the method provided is sufficient to ensure success.

Conclusion

This two part-study has shown that Karol Wojtyła's methodology of *induction* and *reduction*, in *The Acting Person*, is equivalent to Aristotle's method of induction (ἐπαγωγή/*epagoge*) and division (διαίρεσις/*diairesis*) or analysis (ἀνάλῦσις/*analusis*). Like Aristotle, Wojtyła uses a threefold method of division, achieving logical necessity at each stage in disclosing the essence of the person. First, he employs the induction of sense-perception beginning with concept formation and culminating in state of experience. A necessity of constraint pertains to this form of induction, which constitutes the first reasoning act of the mind by *reductio ad impossibile*. Denying the meanings of concepts of experience results in manifest contradiction of the sense or meaning of "experience" itself. While reasonable puzzles and questions arise after reflection on experience, it can never be reasonable to reject Wojtyła's Thomist, Aristotelian, and phe-

[63] *AP*, 20.
[64] *AP*, 22.

nomenological realist interpretation of experience. Attempts to do so contradict themselves in presupposing the very thing they seek to undermine, that is, experience. Second, Wojtyła employs reduction as the division into kinds, which also accomplishes its goal by the *reductio* form of argument, showing that the truth of a definition is necessary. Third, in order to define the essence of the human person—a kind of living being—he employs the power-object model of division, which is also a form of effect to cause reasoning. In this manner he is able to achieve explanative understanding of what is being defined by reasoning on the hypothesis/condition/supposition of the end, which is the *act*, to the necessity of the essential features, capacities, or dynamisms of the person. Thus, this Aristotelian methodology will allow Wojtyła to obtain a refined, better known-to-nature conception of the essence of the human person, that is, the εἶδος/*eidos* or *species* in the Aristotelian, Thomistic, and Phenomenological sense, which is necessarily true in accord with the Aristotelian canons of the principles of science set down in *APo* I.2. In this manner, this study has sought to contribute to scholarly studies of the philosophical thought of Karol Wojtyła, showing in precise textual terms the intelligibility of his methodology. The hope is that the full force of the logical necessity present in the account of the person given in *The Acting Person* will be appreciated. Using such a methodology, the philosophical anthropology of St. Pope John Paul II the Great stands on firm and undeniable ground, providing the foundational principles for ethics as a proper science in the Aristotelian sense.[65]

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[65] An extension of this study further showing the relation and compatability of Wojtyła's phenomenological and Aristotelian methodology is already apparent. Having shown that *reduction* is Aristotelian division, an identity between *eidetic* analysis and *reduction* suggests itself. This topic will have to be taken up in another study.

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Daniel C. Wagner

Sur la méthode aristotélicienne de Karol Wojtyła Partie II. Induction et réduction comme induction aristotélicienne (ἐπαγωγή) et division (διαίρεσις)

Résumé

Ce texte constitue la deuxième partie de l'analyse consacrée à la méthode aristotélicienne de Karol Wojtyła. Après la présentation de la méthode aristotélicienne d'induction (ἐπαγωγή / *epagoge*) et d'analyse (ἀνάλῡσις / *analusis*) ou de division (διαίρεσις / *diairesis*) dans la partie I, la partie II démontre la forme logique et l'élan de la méthode d'induction et de réduction de Wojtyła comme induction aristotélicienne et division. En se basant principalement sur l'introduction de *La personne et l'acte*, l'auteur de cette étude utilise les formes logiques de *reductio ad impossible*

et d'inférence provenant de l'*hypothèse finale*, ou bien d'inférence résultat-cause, caractéristique des sciences naturelles, et aussi de modèle de la définition du type puissance-objet développée par Aristote. Grâce à cette méthodologie, Wojtyła obtient une connaissance décisive de la personne humaine, connaissance nécessaire et indéniable : elle révèle εἶδος (*eidos*) ou les *types* de personnes au sens aristotélicien, thomiste et phénoménologique du concept.

Mots-clés : Karol Wojtyła, méthode, induction, réduction, Aristote, définition, division, personne, acte, anthropologie philosophique.

Daniel C. Wagner

Sul metodo aristotelico di Karol Wojtyła
Seconda parte. Induzione e riduzione come induzione aristotelica (ἐπαγωγή) e divisione (διαίρεσις)

Sommario

Il presente testo costituisce la seconda parte dell'analisi dedicata al metodo aristotelico di Karol Wojtyła. Dopo la presentazione del metodo aristotelico di induzione (ἐπαγωγή / epagoge) e di analisi (ἀνάλῠσις / analusis) o di divisione (διαίρεσις / diairesis) nella parte I, la parte II dimostra la forma logica e lo slancio del metodo di induzione e di riduzione di Wojtyła in quanto induzione e divisione aristoteliche. Basandosi principalmente sull'introduzione dell'opera *La persona e l'atto*, l'autore di questo studio utilizza le forme logiche di *reductio ad impossibile* e di inferenza provenienti dall'*ipotesi finale*, o quelle di inferenza causa-risultato, caratteristica delle scienze naturali, e anche quelle di modello della definizione tipo potere-oggetto sviluppata da Aristotele. Grazie a questa metodologia, Wojtyła ottiene una conoscenza decisiva della persona umana, conoscenza necessaria e innegabile, la quale rivela εἶδος (*eidos*) ovvero i tipi di persone nel senso aristotelico, tomista e fenomenologico del concetto.

Parole chiave: Karol Wojtyła, metodo, induzione, riduzione, Aristotele, definizione, divisione, persona, atto, antropologia filosofica.

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The Consumer Ideology and the Truth about Man

"[M]an, who is the only creature on earth which
God willed for itself, cannot
fully find himself except through a sincere gift of himself."[1]

Abstract: The formation of the human conscience is a controverted question in both philosophical ethics and moral philosophy. Conscience refers to one's conception and understanding of the moral good. An especially significant manifestation of the problem of conscience in the 20th and 21st centuries is the impact of ideology on the individual person's moral sense. This article considers the impact of two 19th century philosophies—Mill's utilitarianism and Marxism—on contemporary moral thought insofar as the interaction of these two produce a powerful materialist ideology to determine the modern European and American conscience. We then turn to the thought of Pope John Paul II (Karol Wojtyła), who in his encyclical *Veritatis Splendor* and in his earlier philosophical writings developed an account of moral truth by which the dangers of materialistic ideology can be overcome. It is argued, with John Paul II, that only in the context of truth can a coherent account of freedom of conscience under the moral law be developed.

Keywords: conscience, morality and moral law, utilitarianism, Marxism, John Paul II, Karl Marx, John Stuart Mill

Returning to Poland in June 1991, Pope John Paul II rejoiced with his fellow Poles that after the fall of the Communist empire Poland was again free. However, addressing the world of culture in Warsaw, he sounded an unwelcome

[1] Vatican Council II, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* (Vatican City: Libreria Editrice Vaticana, 1965), 24.

note, an admonition about materialism and the use of freedom.[2] After praising the recovery of the treasures of Polish art and music, he proceeded to warn his countrymen about the dangers of Western materialism.

> The ideological system which conferred on us the tone of our existence during the period of the past decades, consonant with its materialistic premises, did indeed propose the primacy of *having*. It tried ultimately to see the culture in terms of production–consumption. […] Individuals habituated to seeing their own existence according to the primacy of 'having' (and hence of the primacy of material values) are often found in the West, where this primacy of human *having* is better consolidated. […] In every case, systematic materialism, in its dialectical form and again in this practice, sacrifices the human *being* in favor of *having*.[3]

Having escaped the materialism of communist materialism, Poland must not fall into another materialism, because the issue of freedom is not about the freedom to *have* but the freedom to *be*. The central issue before his newly independent fatherland was not the administration or things but the communal life of human beings, of persons. Like Solzhenitsyn's sharper, but similar, address at Harvard University thirteen years earlier to Americans, John Paul II's address was not well received. The danger to Poland, and indeed the other central European nations, was the compelling lure of materialist utilitarianism. In this paper, we shall examine the implicit ideology of utilitarianism in relation to John Paul II's moral proposal, especially as found in *Veritatis Splendor*.

Karol Wojtyła/John Paul II on Utilitarianism

Throughout his academic and pastoral career, Karol Wojtyła strongly and consistently opposed the utilitarianism foreshadowed by Hume and articulated by Bentham and Mill. Without entirely agreeing with them, he could admire and make use of the thought of Plato, Scheler, or even Kant, but Wojtyła never grants a favorable nod toward utilitarianism. To the end of his life, Karol Wojtyła's firm

[2] John Paul II, "Discourse to Representatives of the World of Culture, Warsaw, Poland," June 8, 1991. *The Holy See*, accessed May 28, 2012.

[3] Ibid.

opposition to philosophical utilitarianism never softened.[4] The problem with utilitarianism is that it neglects the truth about the nature of the human person. As early as *Love and Responsibility* he wrote,

> The utilitarian considers pleasure important in itself, and, with his general view of man, fails to see that he is quite conspicuously an amalgam of matter and spirit, the two complementary factors which together create one personal existence, whose specific nature is due entirely to the soul.[5]

He will later develop this thought more deeply and thoroughly in his papal encyclical *Veritatis Splendor*. Before examining that critique, however, we turn to the *ideology* of western utilitarianism.

Ideological Utilitarianism

We use the term ideology advisedly, for we are not confronted so much with an ethical theory as with a system of thought that explains everything and invalidates what it does not explain. Speaking of the ideology regnant in Communist Czechoslovakia, Václav Havel wrote that this system:

> Commands an incomparably more precise, logically structured, generally comprehensible and, in essence, extremely flexible ideology that, in its elaborateness and completeness, is almost a secularized religion. It offers a ready answer to any question whatsoever; it can scarcely be accepted only in part, and accepting it has profound implications for human life. In an era when metaphysical and existential certainties are in a state of crisis, when people are being uprooted and alienated and are losing their sense of what this world means, this ideology inevitably has a certain hypnotic charm. To wandering humankind it offers an immediately available home.[6]

Utilitarianism also constitutes such an ideology. Let us examine its elements through the writings of John Stuart Mill.

[4] Karol Wojtyła, *Wykłady lubelskie* (Lublin: Towarzystwo Naukowe KUL, 2006), 214–250. Karol Wojtyła, *Lubliner Vorlesungen*, trans. Anneliese Danka Springer and Edda Wiener (Stuttgart–Degerloch: Seewald Verlag, 1981), 304–356; Wojtyła, *Love and Respomsibility*, 35–37.

[5] Karol Wojtyła, *Love and Responsibility*, trans. Harry T. Willetts (San Francisco: Ignatius Press, 1981), 35.

[6] Václav Havel, "The Power of the Powerless," in *Open Letters: Selected Prose 1965–1990* (London: Faber & Faber, 1991), 127–214.

The Purpose of Life

Although we do live in "an era when metaphysical and existential certainties are in a state of crisis," Mill argues that the purpose of life is given to our immediate experience. The goal of life is to be happy, to enjoy pleasures of the body and mind, and the ultimate end is:

> An existence exempts as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality. […] in an existence made up of few and transitory pains, many and various pleasures, with a decided predominance of the active over the passive and having as the foundation of the whole not to expect more from life than it is capable of bestowing.[7]

This sort of life is for everyone in a reasonable and well-ordered industrial-commercial society with universal education and well-formed public opinion. For the most part, Westerners are reasonably well-fed and literate, provided with medications for ordinary pains, good hospitals, and almost universal medical care. Life in western societies is reasonably safe for most people, and the threat of warfare is distant from most citizens. Life in Europe, the United States, Australia, and other nations formed by western law and traditions really can be good. Mill goes on to write:

> Poverty, in any sense implying suffering, may be completely extinguished by the wisdom of society combined with the good sense and providence of individuals. […] As for vicissitudes of fortune and other disappointments connected with worldly circumstances, these are principally the effect of either gross imprudence, of ill-regulated desires, or of bad or imperfect social institutions.[8]

Indeed, Mill goes so far as to maintain that his greatest happiness principle, that the good is coextensive with happiness understood as pleasure and the absence of pain, is the clearest indicator of God's will for his creatures.[9]

The greatest happiness principle applies to all human beings (indeed, to all sentient beings), and no one is warranted in giving priority to his own personal happiness. The greatest happiness to which one must attend is the happiness of all concerned with one's decision:

> In an improving state of the human mind, the influences are constantly on the increase which tend to generate in each individual a feeling of unity

[7] John Stuart Mill, *Utilitarianism* (Cambridge, Indianapolis: Hackett, 2001), 13.
[8] Ibid., 15.
[9] Ibid., 22.

> with all the rest; which, if perfect, would make him never think of, or desire, any beneficial condition for himself in the benefits of which they are not included.[10]

Indeed, Mill proposes that such an ethic be given even the "psychological power and the social efficacy of a religion, making it take hold of human life, and color all thought." Mill stresses the importance of forming individual consciences according to this standard, conscience being "a feeling in our own mind; a pain, more or less intense, attendant on violation of duty."[11] The ultimate sanction of morality is this subjective feeling, a discomfort with one's violation of duty. Whatever the objective source of this feeling may be, its importance is such that it be fostered in relation to the greatest happiness principle.

Justice and Individual Rights

"Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right."[12] There are no preordained, transcendent, and objective rules of justice. "Justice" is the set of practices that enable members of society to feel safe in their lives, to have their basic rights protected. In Mill's day—the Victorian era of England—human rights were not a matter of controversy. In our day, they are. If, as the greatest happiness principle holds, the good is identical with happiness—pleasure and the absence of pain—then each individual human being is ultimately his own judge of the good for himself. In many respects, this is unproblematic. I love opera, even if my neighbor finds it intolerable—"chacun a son goût."[13] If we can assume (as Mill apparently does) that all human beings enjoy the same basic pleasures—everyone enjoys *some kind* of music, after all—then this question of the good is unproblematic. However, if we turn to Mill's own *On Liberty*, we read:

> Over himself, over his own body and mind, the individual is sovereign. […] The only Freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.[14]

[10] Ibid., 33.
[11] Ibid., 28.
[12] Ibid., 50.
[13] "Each has his taste." Sung by Prince Orlofsky in Johann Strauss's *De Fledermaus*.
[14] Mill, *On Liberty* (Indianapolis: Hackett Publishing, 1978), 9, 12.

Mill goes on to amplify this and the reason for it:

> Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.[15]

Whatever one identifies as his own good is his happiness. To enjoy one's own pleasures is his right, with which others are not entitled to interfere. This is the fundamental intellectual principle underlying Hugh Hefner's "Playboy philosophy," which he promulgated in his popular magazine in the 1960s. On a more serious level, Steven Pinker cites this hypothetical, but plausible, case:

> Julie is traveling in France on summer vacation from college with her brother Mark. One night they decide that it would be interesting and fun if they tried making love. Julie was already taking birth-control pills, but Mark uses a condom, too, just to be safe. They both enjoy the sex but decide not to do it again. They keep the night as a special secret, which makes them feel closer to each other. What do you think about that—was it O.K. for them to make love?[16]

Pinker's point is precisely that according to the utilitarian calculus, which he endorses, it is impossible to label the behavior of Julie and Mark as evil or bad. They both enjoyed it. No one was hurt, and because they were away in France, there was no scandal.

In our age, this subjectivation of rights has powerfully impacted our civilization. Practices previously identified as immoral—premarital sex, nonmarital cohabitation, homosexual practices, transexual self-identification—are widely accepted as morally acceptable. Indeed, in both common practice and, increasingly, in law the public disapproval of such behavior is sanctioned. Similarly, religious belief or lack thereof is a matter of taste. Those who find religious expression uplifting or comforting are free to enjoy their devotions, provided that they do not infringe on others, who may find religion pointless or even annoying. Where religious teachings and values impinge on moral views, then the religious values must be suppressed. Thus, in many jurisdictions Christian minsters who preach publicly on Scriptural teachings on sexual morality may find themselves in trouble with the law. In my own country, where religious freedom has been sharply debated in recent years, advocates for LGBT+ rights argue what religious freedom is simply a license of bigotry.

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[15] Ibid., 54.

[16] Steven Pinker, "The Moral Instinct," in *New York Times Magazine* (January 13, 2008), accessed August 18, 2020, https://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html.

The Essential Marxist Step

A fundamental principle of Marx's *Communist Manifesto* reads: "The history of all hitherto existing societies is the history of class struggles."[17] In Marx's day, there were economic, workers, and capitalist classes. But today, they are classes of people defined by where they find their happiness or identity. As a result, today we have conflicts of women vs. men, black vs. white, gay vs. straight, etc. Each of the oppressed classes has its rightful claims (according to the greatest happiness principle) upon the oppressors. And the oppressors have no legitimate authority to refuse those rights that are claimed by the oppressed. Claims of justice become increasingly difficult to sort out.

Living in Truth

In his address cited at the beginning of this paper, Pope John Paul II warned his listeners against precisely this materialism of consumption, which I have characterized here as an ideology. As he insisted in that address and on other occasions, this ideology arises from a false conception of what it is to be human. That is to say, the human being is not reducible to matter and to this-worldly principles. In his theology of the body, John Paul II argues for the development of an "adequate anthropology" in order to address what is truly human:

> "Adequate" anthropology relies on essentially "human" experience. It is opposed to reductionism of the "naturalistic" kind, which often goes hand in hand with the theory of evolution about man's beginnings.[18]

An adequate account of the human cannot be reduced either to biological theories or to sensation alone. As he repeated in his Warsaw address, we must see our existence according to the primacy of *being* rather than of *having.* An antidote, if we may call it that, to living according to the materialist ideology is to live in truth, because this ideology is founded on principles that are only partially true. Freedom in truth is the central theme of *Veritatis Splendor.* The utilitarian ideology is founded on *having*, especially on having desirable experi-

[17] Karl Marx, "The Communist Manifesto," in *The Portable Karl Marx*, ed. Eugene Kamenka (New York: Penguin Books, 1983), 203.

[18] John Paul II, *Man and Woman He Created Them: A Theology of the Body*, ed. Michael Waldstein, trans. Michael Waldstein (Boston: Pauline Books & Media, 2006), 179 fn.

ences, but also on having good things that help to provide those experiences. As we have noted above, to deprive a person of the opportunity for pleasant experiences is wrong.

From its first chapter, which is structured on Christ's encounter with the rich young man (Matt 19: 16—21), *Veritatis Splendor* addresses the *being* of man. The young man asks, "What must I do to have eternal life?" John Paul II comments, "For the young man, the *question* is not so much about rules to be followed, but *about the full meaning of life*."[19] Christ immediately directs the young man to God, who is *the Good*:

> *Only God can answer the question about what is good, because he is the Good itself. To ask about the good,* in fact, *ultimately means to turn towards God*, the fullness of goodness.[20]

God transcends every other good, for indeed every good thing comes from God the Creator. Therefore, the life of which Jesus speaks has to consist in some sort of union with the Good, who is God. When the young man, having averred that he has kept the commandments, pushes further his question to Jesus, the Lord responds, "If you would be perfect, […] follow me."[21] Because Jesus is the incarnate Word of God, this is precisely an invitation to union with God.

Although John Paul II's argument is clearly theological, it resonates clearly with the philosophical tradition. Four hundred years before Christ, Socrates maintained that he was called by the God whom he did not know to prod his fellow Athenians to care more for their souls than for their property or public positions.[22] For his part, Aristotle commended the life of contemplation, because it is the most god-like of activities.[23] For these ancient Greeks, the highest good was not the acquisition of some material thing or condition, nor was it to be the enjoyment of a nexus of pleasures (Mill's assertion in *Utilitarianism* notwithstanding). The highest good for the human being could only be an imitation of or participation in the life of the divine—even though, as they realized, their understanding of the divine was only partial and very imperfect.

Christian thinkers from the earliest Fathers, through Saints Augustine and Thomas Aquinas to John Paul II, recognized the truth of this ancient principle.

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[19] John Paul II, *Encyclical: Veritatis Splendor* (Vatican City: Libraria Editrice Vaticana, 1993), § 7

[20] Ibid., § 9.

[21] Mt 19:21.

[22] Plato, "Apology," in *The Complete Works of Plato*, by Plato, trans. Benjamin Jowett (New York, Oxford: Oxford University Press, 2011), 30ab.

[23] Aristotle. *Nicomachean Ethics*, trans. David Ross, revised by John L. Ackrill and James O. Urmson (New York: Oxford University Press, 1988), 1178b8–24. Thomas Aquinas, *Commentary on the Metaphysics of Aristotle*, trans. John P. Rowan (Chicago: Henry Regnery Company, 1961), 936a6.

Unlike Socrates and Aristotle, however, they knew that God can be known, because God had revealed himself, partially to the Jews and fully in Christ. Hence, it follows that the Christian ethics differs essentially from any utilitarian or consequentialist ethics, as indeed it does from Kant's deontology, too. The good to be attained is not a possession, a state of the human being who attains it, or an ecstatic, all-consuming experience. Rather, it is a union with the perfect good, which is necessarily transformative of the one who attains it. This is a good that the person *becomes* by following Christ:

> *Jesus asks us to follow him and to imitate him along the path of love, a love which gives itself completely to the brethren out of love for God:* "This is my commandment, that you love one another as I have loved you."[24] […] Jesus' way of acting and his words, his deeds and his precepts constitute the moral rule of Christian life.[25]

Therefore, attainment of the highest good—the perfect good—is ultimately something that is beyond the natural capacity of the human being in this life, even if it is well foreshadowed by the life of virtue described by Aristotle.

Freedom and Conscience

Although in this essay, we cannot analyze the entire encyclical *Veritatis Splendor*, we do well to look closely at two principal themes of that encyclical: freedom and conscience. In 1991, the Polish people were at long last free. The independence taken from them by the Nazis in 1939 and then seized by Soviet arms had finally been regained. And now, in June 1991, when all seemed good, the Polish pope was warning them against the misuse of their freedom. In the consumer society, freedom results from having a variety of options. In this sense, one who can choose among peas, green beans, corn, and broccoli, is freer than one who has only cabbage to eat. Freedom thereby consists in having a variety of options from which to select. This is indeed a kind of freedom, but it is not fundamental. In *Gaudium et Spes* we read that:

> Authentic freedom is an exceptional sign of the divine image within man. For God has willed that man remain "under the control of his own decisions" (Sir 15:14), so that he can seek his Creator spontaneously, and come to utter and

[24] Jn 15:12.

[25] John Paul II, *Veritatis Splendor*, § 20.

> blissful perfection through loyalty to his. Hence man's dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not under blind internal impulse nor by mere external pressure.[26]

For his part, Karol Wojtyła, who played an important role in drafting the Pastoral Constitution, characterized freedom in terms of self-determination.[27] Misled by the conception of freedom as simply the capacity to choose among options, many thinkers have absolutized freedom:

> Certain currents of modern thought have gone so far as to *exalt freedom to such an extent that it becomes an absolute, which would then be the source of values.* This is the direction taken by doctrines which have lost the sense of the transcendent or which are explicitly atheist.[28]

Later in the encyclical, John Paul II remarks that on this basis, "Man would be nothing more than his own freedom!"[29] The model of freedom at work in this is of a capacity to choose among options external to the person himself. These may be very personal options, such as to marry this person or that, to seek work in law or medicine. Plato presents an amusing, but accurate image of such freedom in his description of the "democratic man":

> And so he lives on, yielding day by day to the desire at hand. Sometimes he drinks heavily while listening to the flute; at other times, he drinks only water and is on a diet; sometimes he goes in for physical training; at other times he is idle and neglects everything, and sometimes he even occupies himself with what he takes to be philosophy. […] There's neither order nor necessity in his life, but he calls it pleasant, free, and blessedly happy, and he follows it for as long as he lives.[30]

Of course, few, if any, such persons really exist, except perhaps for a time during youth, but Plato's argument does not depend on this. Clearly, the "democratic man" cannot sustain such a scattershot freedom without order or necessity. In his narrative, he argues that if such a person does not discover and live by wisdom, he will fall prey to a dominant tyrannical desire that will supress and dominate all his desires and his will. In other words, the purported freedom

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[26] Vatican Council II, *Gaudium et Spes*, § 17.

[27] Wojtyła, *Osoba i czyn – oraz inne studia antropologiczne* (Lublin: Towarzystwo Naukowe KUL), 161; Wojtyła, *Love and Responsibility*, 47.

[28] John Paul II, *Veritatis Splendor*, § 32.

[29] Ibid., § 46.

[30] Plato, *Republic*, 561cd, trans., rev. D. C. Reeve and George M. A. Grube (Indianapolis, IN: Hackett, 1992), 428–429.

of the democratic man to choose among his options will necessarily be guided by either some predominant appetite or by reason. If his freedom is to be his own, then the principle guiding his choices must come from within, from his own rational power. Otherwise, his choices will be dictated by appetites within or by forces without. An indeterminate freedom is nothing at all.

If freedom means to be guided by one's own reason, then freedom is inextricably joined to truth. The object of reason is truth. The human person is therefore able rationally to direct his own life according to how things really are, that is, according to truth. This encounter with the truth brings us directly to the question of conscience:

> Consequently, *in the practical judgment of conscience*, which imposes on the person the obligation to perform a given act, *the link between freedom and truth is made manifest*.[31]

The truth at stake in this encounter of conscience is inevitably the truth about the good.[32] The human being, gifted with intellect, is enabled to recognize the truth about the good, which is to say to recognize moral norms.

Two Norms and Great Commandments

In the writings of Karol Wojtyła/Pope John Paul II, we find two such truths about the good—norms—from which we infer the two great commandments. We have already seen that in *Veritatis Splendor*, Christ tells the rich young man that God alone is good, that he is indeed the good from which all goods derive. God is the highest, the supreme good. From this we infer the first great commandment, "You shall love the Lord your God with all your heart, with all your soul, with all your mind, and with all your strength" (Mt 22:37). If the first principle of the natural law is to seek and do good and to shun and avoid evil,[33] then this commandment follows with logical necessity from the truth that God is the supreme good.

Expanding on his answer to the Pharisee, Jesus cited a second great commandment which is like the first: "You shall love your neighbor as yourself"

[31] John Paul II, *Veritatis Splendor*, § 61.

[32] Adrian J. Reimers, *Truth about the Good: Moral Norms in the Thought of John Paul II* (Ave Maria, FL: Sapientia Press of Ave Maria University, 2011).

[33] St. Thomas Aquinas, *Summa Theologiae*, Ia, IIae q. 94, a. 2. [Great Books of the Western World]. Trans. Fathers of the English Dominican Province. Vols. 19–20 (Chicago, London, Toronto: Encyclopedia Britannica, 1952).

(Mt 22:39). This second great commandment, which underlies the commandments of the so-called second table of the law, is inferred from the truth about the good of the human person. Let us note, too, that most of the text in chapter two of *Veritatis Splendor* is concerned with the morality of interpersonal relationships, and not with idolatry, taking God's name in vain, or observance of the sabbath. Our author first lays out this norm as the personalist norm in *Love and Responsibility*. There we read:

> The person is the kind of good which does not admit of use and cannot be treated as an object of use and as such the means to an end. In its positive form, the personalistic norm confirms this: the person is a good towards which the only proper and adequate attitude is love.[34]

The basis for this norm is found not in scripture or the Catechism but in human experience, if we attend closely to it. The human being is a person, that is, a rational being capable of self-determination on the basis of its own understanding and free will.[35] Like Kant before him,[36] Karol Wojtyła insists that the person cannot be reduced simply to the status of a tool, a thing, because whereas a tool is subject to the will of its user to achieve the tool-user's end, the person lives from his interior to attain the ends of his own choosing. To use a person against his will was to violate his nature and in this his dignity. Karol Wojtyła carries the analysis a step further than Kant.

After stating that the person is not to be treated as an object for use, he writes that "the person is a good towards which the only proper and adequate attitude is love."[37] He argues this philosophically and not on theological or religious grounds. For one to access the services of another, to get the other to help him or to work with him, it is necessary for that person to agree to do so.[38] Because the person acts on the basis of his own will (rational appetite), he must make that act his own, as it were, by agreeing to perform it. That is to say, without agreeing to some good he will not act. The basis, therefore, for acting in common is the mutual embrace of some common good. Karol Wojtyła remarks that this is clearly realized in marriage.[39] However, this also applies even in situations where a manifest inequality is at work, such as between the commander and the soldier, in which case a proper understanding of the rela-

[34] Wojtyła, *Love and Responsibility*, 41.

[35] Ibid., 23–24; Wojtyła, "Człowiek jest osobą," in *Osoba i czyn – oraz inne studia antropologiczne* (Lublin: Towarzystwo Naukowe KUL, 2000), 418.

[36] Immanuel Kant, *Grundlegung der Metaphysik der Sitten*. Kant's gesammelte Schriften, vol 4 (Berlin: Georg Reimer, 191), 428–429.

[37] Wojtyła, *Love and Responsibility*, 42

[38] Ibid., 28.

[39] Ibid., 30; Wojtyła, *Person: Subject and Community*, trans. Teresa Sandok, O.S.M. (New York: Peter Lang. 2006), 247.

tionship is that both parties act out of love for their country and fellow citizens. Even in the realms of commerce and industry, the dynamic of the common good governs proper human interactions. Workers and their supervisors foster the common good of the society by their ordered work to produce goods and services. Wojtyła argues that it is precisely the common good and common aim that joins two persons in love. Their love is constituted and, as it were, formed by the nature of the common good that joins them.

Here, we can and often do encounter an abuse of the love that should exist between persons. The general may command his soldiers to act not for victory over the enemy, but for the commander's own advantage; consider King David's orders to his commander Joab to see to the death of Uriah the Hittite in order to cover up David's adultery with Uriah's wife.[40] The slaveholder seeks to acquire wealth, but he does not expect the slave to share this aim. Rather, he threatens the slave with pain, which he avoids only by following orders. One could multiply examples, of course, but the principle is always the same. One person *uses* another and treats him as a *thing* by threatening evil or depriving his subject of some good. Uriah fought and died for king and country, but David commanded him to engage in a specific sortie in order to hide his own sin. The slave wants not to pick cotton or mine salt, but to preserve himself from torture or death. He lives and acts for a good different from that proposed by the superior. In ordinary less dramatic situations, the same pattern is repeated as persons manipulate each other by means of seduction, emotional pressure, financial inducements, promises of future pleasure, and the like. Even two partners in sin who support and cooperate with each other in wrongdoing do not work for a common good, violate the personalist norm, for they work not for a common good but so that each can enjoy a personal good.

From this personalist norm, we can validly infer the evangelical commandment of the love of neighbor.[41] As we have noted above, in his dialogue with the rich young man, Christ cites the commandments of the second table of the Law, which are summed up in the commandment of the love of neighbor. John Paul II continues:

> In this commandment we find a precise expression of *the singular dignity of the human person*, "the only creature that God has wanted for its own sake."[42] The different commandments of the Decalogue are really only so many reflections of the one commandment about the good of the person, at the level of the many different goods which characterize his identity as a spiritual and bodily being in relationship with God, with his neighbor and with the material world.[43]

[40] 2 Sam. 11:14–25.

[41] Wojtyła, *Love and Responsibility*, 41.

[42] Vatican Council II, *Gaudium et Spes*, § 24.

[43] John Paul II, *Veritatis Splendor*, § 13.

This text supports and complements the argument that Karol Wojtyła had developed in *Love and Responsibility*. Let us note especially his reference to the *good of the person* in the second sentence of this text. Because of the "singular dignity of the person" one is commanded to act for the good of the person. The continuation of this sentence makes it clear that fostering the good of the person amounts to more than simply providing material or sensual benefits, although these may certainly be included; the Good Samaritan bound up the victim's wounds and took him to an inn for care. However, the good of this person involves many different goods related to his spiritual and bodily being. In every case, the one to be loved is a spiritual and bodily being with both spiritual and bodily needs. If the hungry and homeless man turns out to be the prodigal son, then to love him may require one to encourage him to swallow his pride and return to his father. Implicit in the text too is the requirement that the agent too act in accordance with his own dignity as a person, whom "God has wanted for his own sake."[44]

Intrinsece Malum

It is in this context of the love of God and one's neighbor that the notion of intrinsically evil acts becomes intelligible:

> Reason attests that there are objects of the human act which are by their nature "incapable of being ordered" to God, because they radically contradict the good of the person made in his image. These are the acts which, in the Church's moral tradition, have been termed "intrinsically evil" (*intrinsece malum*): they are such *always and per se*, in other words, on account of their very object, and quite apart from the ulterior intentions of the one acting and the circumstances.[45]

The first and second great commandments oblige the person—every human person—to act in love. Hence, Father Józef Kowalski refused to stomp on his rosary when a Nazi guard at the concentration camp ordered him to. Love for God, the first great commandment, obliged him to refrain from this act, which predictably resulted in Fr. Kowalski's experiencing greatly increased torment and eventual martyrdom.

At this point we do well to consider the concept of the *object of the act*. John Paul II writes:

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[44] John Paul II, *Gaudium et Spes*, § 24.

[45] Ibid., § 80.

> The object of the act of willing is in fact a freely chosen kind of behavior. […] By the object of a given moral act, then, one cannot mean a process or an event of the merely physical order, to be assessed on the basis of its ability to bring about a given state of affairs in the outside world. Rather, that object is the proximate end of a deliberate decision which determines the act of willing on the part of the acting person.[46]

In the case of Fr Kowalski, the act in question was deliberate—to step on a rosary. One does not necessarily do wrong by stepping on a rosary. If the rosary has fallen unseen to the floor, someone may accidentally step on it. The object of the act is what deliberately intends to perform. Every human act includes a decision of the will to *perform this act*, which has its specific end. The inept murderer whose manipulation of his weapon results in the capture of a criminal and not in the death of his intended victim is, in his heart at least, a murderer and not a public servant. Fr. Kowalski certainly knew that to disobey a Nazi guard would result in severe punishment. He doubtlessly realized that no matter what he should do, his rosary would be desecrated. Had he stepped on the rosary, he could go more freely about his activities and even help other inmates. But the act that he was to perform was more than a simple motion of placing his foot in a designated spot. He was to step on an object that represents Christ's sacrifice on the cross and that is intended for devotion to the Virgin Mary. It was to be an act of contempt for God and what belongs to him. To perform this act—here we may think of the ancient martyrs disobeying the emperor's demand that they pinch the incense in homage to an idol—was an act incompatible with the love of God. It was to show contempt for God.

The same kind of analysis applies to offenses against another human being. John Paul II cites a list of such acts from *Gaudium et Spes*:

> Murder, genocide, abortion, euthanasia or willful self-destruction […] mutilation, torments inflicted on body or mind, attempts to coerce the will itself […]. Such acts are a supreme dishonor to the Creator.[47]

The problem with such acts is that they directly offend the dignity of the human person, not so much in their effect, but in the nature of the act itself according to its object. To cut into a human body is, on the physical level, an evil insofar as skin tissue is damaged and the blood that it normally restrains begins to flow out of the body. To open the wound and remove tissue inside is arguably a greater evil, because it damages the integrity of the body. However, when a surgeon performs this action to remove a kidney for transplantation to another patient, the act is regarded as good. Peter Knauer asks whether this means that

[46] Ibid., § 78.

[47] Vatican Council II, *Gaudium et Spes*, § 27.

it is licit to do something evil in order to attain some good. His answer is that the injuring of the body is not an evil act. He explains:

> Self-mutilation may be an evil means. […] Here it is not at all a matter of two different acts, the first of which [mutilation of the donor's body] would be evil and therefore cannot be justified through the second [transplanting a healthy organ]. Rather, from the start it is only a single act, whose "object" or "objective of action" is the saving of another human being's life.[48]

Knauer has confused the intention with the object of the act. The surgeon's act is to remove a healthy and nonessential organ from a donor. Indeed, we may properly speak of a joint act by the donor and the physician. The donor is probably incompetent and, in any case, must be incapacitated to remove his own organ. He asks a surgeon to perform the operation. The act, which involves a degree of suffering and even self-mutilation is properly described as the surgical removal of a nonessential organ. The object of the act is to remove an organ, with the intention of giving it to a sick person. The act is not accurately described as self-mutilation (indeed, every step will be taken to minimize both pain, disfigurement, and health risk to the donor). Although deliberately to mutilate one's body may be evil, the act of donating one's organ may be a noble and generous act of love. Knauer (unwillingly) helps us to see this more clearly when he goes on to apply this principle to the action of performing an abortion to save the mother's life. In that case the unborn child is deliberately and directly killed—a violation of that human person's dignity. On the other hand, although no one is justified in the unauthorized removal of another person's kidney—to do so would indeed violate that person's dignity—one can freely forsake a spare kidney to save another.

We dwell here on Knauer not only because he was a pioneer in consequentialist moral reasoning,[49] whose subtle reasonings have profoundly influenced subsequent discussion in moral theology, but also because his argumentation clearly illustrates the kinds of confusion that John Paul II seeks to correct in *Veritatis Splendor*. Knauer states, "There is fundamentally no act for which the description of the physical process of the act is sufficient to determine it as morally evil."[50] In one trivial sense, Knauer is right. What his argument intends, however, is to show that the act can be evaluated morally only on the basis of its premoral consequences, whether these are good or evil. The cutting open of two bodies in order to move a kidney from one to the other is justified morally

[48] Peter Knauer, "Zu Grundbegriffen der Enzyklika *Veritatis Splendor*," 25, *Stimmen der Zeit*, 212. Band, Heft 1 (Januar 1994), 14–26.

[49] See also Peter Knauer, S.J., "Teleologische als deontologische Normenbegründung," *Theologie und Philosophie*, Vol. 55, Heft 3 (1980): 321–360.

[50] Knauer "Teleologische als deontologische Normenbegründung," 348.

by the continued life of a patient who would otherwise have died. However, John Paul II's point is that the description of the physical process is *never* a satisfactory description of the act. The act must be regarded from the *perspective of the acting person*.[51] If the organ donor is unwilling, then to cut into his body is indeed an evil. The spy who sleeps with the enemy general may well be serving her country's war effort,[52] but the object of her act is to engage in sexual intercourse with a man who is not her husband. The term to describe this act, whether patriotically motivated or not, is adultery. And as such it is a violation of the dignity of the person who is seduced—even as he is a willing partner in the seduction. In short, any act by which one offends the dignity of another human being cannot be an act of love. It is incompatible with the Creator's love for that person and is therefore intrinsically evil.

Conclusion

In his address to Poland's cultural leaders in 1991, Pope John Paul II warned against a materialist culture—a culture of *having* rather than of *being*—and the ideology of utilitarianism. This distinction between *being* and *having* is central, because it parallels and, indeed, reflects the distinction between the interior and the exterior of the human being, between what belongs to him as a person and what pertains to a particular human being. The utilitarian or consequentialist calculus depends on what is external to the human being. John Stuart Mill writes, "He who saves a fellow creature from drowning does what is morally right, whether his motive be duty, or the hope of being paid for his trouble."[53] Peter Knauer provides the following criterion for an act evil in itself: "An act is 'evil in itself' only if one allows or causes in it a harm without an appropriate or corresponding reason [*entsprechenden Grund*]."[54] In both instances, even if more crudely in Mill, the ultimate standard lies outside the acting person. A physician's act of slicing into a healthy body is justified as morally good only if for the sake of a correspondingly important good. In a limited sense, this is correct. An act that is not expected to result in some good is not justified. To

[51] John Paul II, *Veritatis Splendor*, § 78.

[52] Lest this example appear sexist, men have also used sexual seduction to obtain secrets from national enemies. See Christopher Andrew and Vasili Mitrokhin. *The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB* (New York: Basic Books, 1999).

[53] Mill, *Utilitarianism*, 18.

[54] Peter Knauer, "Handlungsnetze: Über das Grundprinzip der Ethik," *Knauer – Handlungsnetze.* March 17, 2017, accessed January 4, 2021, http://peter-knauer.de/knauer-ethik.pdf.

plant rice in a region where winters are normally harsh is foolish, a bad choice. We are happy to pay the lifeguard who saves the careless swimmer's life. The question of moral evil lies deeper than the evaluation of possible outcomes to one's act. The seducer spy may be very effective, saving the lives of scores of soldiers. Nevertheless, we may question whether such acts of sexual intercourse are morally good.

The interior, or the 'heart,' of the human being is the core of his personal reality, in his conscience. John Paul II writes, "The relationship between man's freedom and God's law is most deeply lived out in the 'heart' of the person, in his moral conscience."[55] Furthermore, "in the far reaches of the human heart, there is a seed of desire and nostalgia for God."[56] In his personal notebook, John Paul II wrote that the heart is to be a library of God's spoken word in Scripture.[57] This interior, this 'heart' is not an emotional center founded on the person's subjective feelings and desires. Rather, personal interiority itself arises from human rationality.[58] It is in his interior that the person relates to truth and goodness, freely determining himself in accordance with the truth about the good. Hence, the spy may love her country to the point of readiness to sacrifice her own life for its welfare and security. However, she also knows that the gift of her body in sexual intercourse is far more than a (possibly) pleasurable physical interaction. Its true and objective meaning is the gift of one's whole self to another, a gift that she does not at all intend to give to an enemy of the homeland that she loves.[59] By her actions, the spy denies her own human dignity, reducing her body to a tool for deception, as well as that of her target, deceiving him in his moral weakness. The abortionist directly kills another human being—for the fetus is a human being and not something else—to deny the motherhood of the pregnant woman for the sake of his own profit and the temporary alleviation of the mother's anxieties.

The utilitarian ideology behind contemporary western materialism ignores the principle expressed in *Gaudium et Spes*, namely, "Man, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself," the principle that only in love can the human being truly become his proper self. Otherwise, the human person becomes nothing more than a tool of the totalitarian state or—transferring the discussion to the West—a political and economic cipher to be manipulated by the greater powers within society.

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[55] John Paul II*, Veritatis Splendor*, § 54.

[56] John Paul II, *Fides et Ratio*, § 24.

[57] Wojtyła, *Jestem bardzo w rękach Bożych: Notatki osobiste, 1962–2003* (Kraków: Wydawnictwo Znak, 2014), 243.

[58] Wojtyła, *Love and Responsibility*, 22–23.

[59] Ibid., 34, 131; John Paul II, *Theology of the Body*, 531 ff.

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Adrian J. Reimers

L'idéologie du consumérisme et la vérité sur l'homme

Résumé

La formation de la conscience humaine est une question controversée à la fois en éthique philosophique et en philosophie morale. La conscience se rapporte à la vision humaine et à la compréhension du bien moral. Une manifestation exceptionnellement significative du problème de la conscience aux XXe et XXIe siècles est l'influence de l'idéologie sur la conscience d'un individu. Cet article discute de l'influence des philosophies du XIXe siècle, à savoir de l'utilitarisme de Mill et du marxisme, sur la pensée morale contemporaine en fonction de l'influence que ces systèmes philosophiques ont eue sur la naissance d'une idéologie matérialiste forte qui détermine la conscience européenne et américaine contemporaine. Ensuite, le texte attire l'attention du lecteur sur les idées du pape Jean-Paul II (Karol Wojtyła), qui, dans l'encyclique *Veritatis splendor* et dans ses premiers écrits philosophiques, a élaboré le concept de vérité morale, grâce à laquelle il est possible de surmonter les dangers de l'idéologie matérialiste. L'auteur soutient, après Jean-Paul II, que ce n'est que dans le contexte de la vérité qu'un concept cohérent de liberté de la conscience et conforme à la loi morale peut être développé.

Mots-clés: conscience, morale et loi morale, utilitarisme, marxisme, Jean-Paul II, Karl Marx, John Stuart Mill

Adrian J. Reimers

L'ideologia del consumismo e la verità sull'uomo

Sommario

La formazione della coscienza umana è una questione controversa sia nell'etica filosofica che nella filosofia morale. La coscienza si riferisce alla visione umana e alla comprensione del bene morale. Una manifestazione eccezionalmente significativa del problema della coscienza nei secoli XX e XXI è l'influenza dell'ideologia sulla coscienza di un individuo. Questo articolo discute l'influenza delle filosofie del XIX secolo, in particolar modo quelle dell'utilitarismo di Mill e del marxismo, sul pensiero morale contemporaneo in termini di influenza che questi sistemi

filosofici hanno avuto sulla nascita di un'ideologia materialista forte che determina la coscienza europea e americana contemporanea. Il testo richiama poi l'attenzione del lettore sulle idee di Papa Giovanni Paolo II (Karol Wojtyła), che nell'enciclica *Veritatis splendor* e nei suoi primi scritti filosofici, sviluppò il concetto di verità morale, grazie alla quale è possibile superare i pericoli dell'ideologia materialista. L'autore sostiene, dopo Giovanni Paolo II, che solo nell'ambito della verità si può sviluppare un concetto coerente di libertà della coscienza e conforme alla legge morale.

Parole chiave: coscienza, morale e diritto morale, utilitarismo, marxismo, Giovanni Paolo II, Karl Marx, John Stuart Mill

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Participation in the "Synodal Way": A Few Comments in the Light of Karol Wojtyła's Theory of Participation

Abstract: Announcing in the German Church the so called synodal way provoked discussions concerning the participation and joint responsibility of all the faithful in the implementation of the Church mission, especially with regard to exercising power and making binding decisions. The aim of the presented reflections (comments) is to look at the discussion in the light of the theory of participation, analysed by Karol Wojtyła in his work *The Acting Person*. The co-existence of the community of action and the personal value of the act and experiencing as one's own jointly made decisions may set the direction for new paradigms of exploring *sensus fidei*.

Keywords: synodal way, participation, Karol Wojtyła, theory of participation

Addressing the issue of participation and responsibility, especially with regard to exercising power has been provoked by current discussions concerning the so called synodal way in the Church, which is a supernatural community as the sign and instrument of salvation. Therefore, it is the community in which and through which the vocation to life of the saved ones is realized, as "it pleased God to call men to share His life, not just singly, apart from any mutual bond, but rather to mold them into a people in which His sons, once scattered abroad might be gathered together."[1]

[1] Vatican Council II, Decree on the Mission Activity of the Church *Ad gentes divinitus* (7.12.1965), n. 2

Such a community is for the baptized persons the environment which allows them to follow their vocation. The presence in the community is not passive. At the same time, the community becomes an obligation for the believer, since its development and growth result from Christ's order to pass on the gift of community which was first experienced by a person. The believer in the Church is endowed with the community and undertakes joint actions for its sake and for himself. The decision of faith is made at the level of an individual person ("myself") and remains a personal act, but has its source in the faith of the united "ourselves."

A personal act of faith has a community nature and expresses itself and is present at many levels of the Church community life. Building up a community and concern about its development is also expressed in decisions taken for its benefit. In this context, we can observe the appearance of voices demanding participation in decision-making concerning the community, including sovereign decisions.

It seems that Wojtyła's philosophical deliberations do not refer to the situation of the Church and the issue of participation from the perspective of current attempts to understand the issue of synodality. This aspect should be considered at the level of theological reflections. However, in the theory of participation presented in the work *Osoba i czyn*,[2] Wojtyła emhasizes "the aspect of a dynamic correlation between an act and a person, which results from the fact that people perform acts jointly with other people."[3] No different are the acts of participation of all the faithful in *modus vivendi et operandi* of the Church community.[4] The synodical dimension of the Church both reflects and shapes the participation and responsibility of all the faithful building this Church.

In Wojtyła's reflections one can also find a methodical hint leading to conclusions in the context of theological deliberations. It is the distinction that the concept of participation is granted in the colloquial and philosophical meaning. Following this direction, one should refer to the concept of participation which has a long and rich history—in the language of both philosophy and theology.[5] Pursuing this thought, it can be added that the idea of participation might turn out to be acceptable also in the system of canon law only with great difficulty and mental effort. The condition of making this effort gives the concept of participation a meaning characteristic for the Church community, noting at the

[2] The book by Karol Wojtyła was published in English under the title *The Acting Person*. I am using the text: *Persona e atto*. Testo polacco a fronte (Santarcangelo di Romagna: Rusconi Libri, 1999).

[3] Wojtyła, *Persona e atto*, 614.

[4] International Theological Commision, *Synodality in the Life and Mission of the Church* (2.03.2018), n. 6, accessed May 15, 2020, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20180302_sinodalita_en.html.

[5] Wojtyła, *Persona e atto*, 630.

starting point that its structural foundations result from Christ's will. Thus, this notion will considerably differ from the one granted by the theory and dogma of law.

The theory of participation discussed by Wojtyła is also far from contemporary problems concerning the contextual understanding of the issue of participation.[6] It results from the fact that today's ways of understanding this idea restrict it to the category at the core of which is the distinction between the state and society, which in turn results in two different concepts: a citizen and a human person.[7]

The concept of a citizen is alien to the language of religion and the reality of Church different from the state. Closer to the language of religion and canon science is the definition of a person who in the Church is the baptized person. A man becomes a person in the Church thanks to receiving holy baptism (can. 96). However, this definition of a person has a technical connotation which is used to describe the position of the baptized person in the Church with his rights and responsibilities and not to express fully who he is. It is another reason why deliberations concerning the participation of the person in undertaking actions together with other people might not be fully adequate to the theory of the person analyzed by Wojtyła. A starting point for theological and canonistic reflections is the baptized person living and acting together with other people in the community of the Church.

The concept of participation indicates close connections between people and their joint actions through which and thanks to which the person is able to recognize his or her transcendence. Nevertheless, the same concepts not always turn out to be adequate to express the content they refer to.[8] Similar wording, as pointed out by comparative linguistics, also has to take into consideration the position of words which they occupy in the structure of languages. Material similarity or vocabulary correlations co-exist with different, structural position of words in the language structure. Showing the structural relation of the word with its position in the language contributes to adequate presentation of connections related to vocabulary. Similarity of words does not equal similarity of meanings, even if the same words are used to express and name similar realities in different communities. The Church institutions, which might seem similar to secular ones, occupy a different structural position in the Church due to the fact that everything in the Church is subject to its redemptive mission. The language which describes it, although it uses similar vocabulary understandable

[6] Aristide Savignano, "Partecipazione," in *Enciclopedia del diritto*, vol. 32 (Milano: Giuffrè, 1982), 1–14.

[7] Libero Gerosa, *Interpretacja prawa w Kościele. Zasady, wzorce, perspektywy* (Kraków: WAM, 2003), 188.

[8] Marian Żurowski, *Współuczestnictwo kościelne. "Ius ad Communionem"* (Kraków: WAM, 1979), 13.

for the listeners, reflects the structural position of the described things and gains a new meaning.[9]

The above comments indicate that the concept of participation—as long as it is used with due care and refers to the structural position and place of the phenomena described by it—is not immediately doomed to failure and might find its place in the Church. However, the starting point cannot be a secular and political meaning of the concept which refers to the state organization. Participation in the Church is more and more widely discussed in the context of the so called synodal way, especially in terms of initiatives undertaken in the Church in Germany.

Synodal Way of the Church in Germany

In March 2019 German bishops with regard to the scandals of sexual abuse and loss of credibility announced the so-called synodal way, whose aim is internal purification leading to regaining the trust of the faithful. The process proposed by the bishops concerns a debate with participation of the faithful the subject of which is supposed to be the issue of broadly defined place of women in the Church, celibacy, changes in the Catholic sexual ethics as well as the issue of division of powers in the Church.[10] The suggested topics were to become the subject of "binding synodal way," planned for the end of the year 2019, which the German bishops took together with the Central Committee of German Catholics (Zentralkomitee der deutschen Katholiken, ZdK). The current situation invokes, though not so clearly, the theses made by Karl Rahner who pointed out the need to establish a Germany-wide (or national) synod, consisting of bishops, presbyters and lay faithful. Such a synod would constitute the most important governing body in the national churches whose decisions would also have to be obeyed by the bishops.[11]

The statements of different German bishops regarding the character of decisions which will be made during this synodal way are not entirely explicit. Defining problems and raising questions is one thing and another thing is the

[9] Joseph Ratzinger, "Demokratyzacja Kościoła," in *Demokracja w Kościele. Możliwości i ograniczenia*, ed. Joseph Ratzinger and Hans Maier (Kraków: Wydawnictwo Salwator, 2005), 21–22.

[10] Krzysztof Tomasik, "Droga synodalna – tak, ale dokąd?" eKAI.pl, *Magazyn internetowy Katolickiej Agencji Informacyjnej* (September 16, 2019), accessed November 4, 2019, https://ekai.pl/droga-synodalna-tak-ale-dokad/.

[11] Ratzinger, "Demokratyzacja Kościoła," 35–36.

binding character of the solutions and answers. From this perspective, the participation of the faithful in the matters of religion requires adequate answers but also the ones whose source is in one common faith of the Church. The faithful have the right to receive theological answers to the posed questions and recognized problems. The bishop of Műnster Felix Genn expressed it by stating that "theological deepening of issues has not done harm to anybody so far, especially the Church."[12]

The issue of greater meaning, which provoked a reaction of the Vatican and a letter of Pope Francis to the German bishops (29 June 2019), in which he expressed at first his appreciation of the German Catholics for their readiness to undertake reforms, regards the binding character of the synodal path. The Vatican criticized the bishops' stance, the fact that they want to decide about the issues which can be determined only on the forum of the universal Church. In addition, objection was raised against the equal right of bishops and secular people in voting. Cardinal Marc Ouellet, the Prefect of Congregation for Bishops, in the letter to the German bishops pointed out that decisions made in this way cannot have ecclesiological validity.[13] Archbishop Niokola Eterović, the Apostolic nuncio in Germany added his voice, reminding the bishops gathered at a meeting of the Episcopal Conference in Fulda (23–26 September 2019) about the words of the papal letter that the synod is not a parliament and the decisions of the bishops cannot have far-reaching consequences not only for the Church in Germany, and that issues connected with the heritage of faith cannot be the subject of negotiations of the particular Church.[14] However, the tone of expression of the German bishops cannot be unambiguously interpreted as making the decisions taken by them together with the lay faithful absolutely binding. As a matter of fact, the bishop of Mainz Peter Kohlgraf defending the synodal way indicated the binding character of the discourse process, but added that it can be an impetus coming from the Church in Germany which should also be discussed at the level of the universal Church.[15] The chairman of the Central Committee of German Catholics Thomas Sternberg went even further and while calling for binding decisions he stated: "If the decisions shall concern the universal Church, we will bring them to Rome."[16] The statement of Sternberg, which can be interpreted in the light of concern about regaining the

[12] eKAI.pl, "Niemieccy biskupi odrzucają stanowisko Watykanu ws. drogi synodalnej," eKAI.pl (September 24, 2019), accessed November 4, 2019, https://ekai.pl/niemieccy-biskupi-odrzucaja-stanowisko-watykanu-ws-drogi-synodalnej/.

[13] Tomasik, "Droga synodalna – tak, ale dokąd?"

[14] eKAI.pl (September 24, 2019), "Nuncjusz wzywa niemieckich biskupów do posłuszeństwa papieżowi," accessed November 4, 2019, https://ekai.pl/nuncjusz-wzywa-niemieckich-biskupow-do-posluszenstwa-papiezowi/.

[15] eKAI.pl, "Niemieccy biskupi odrzucają stanowisko Watykanu ws. drogi synodalnej."

[16] Ibid.

trust lost by the Church, arouses some controversy but is also a challenge for the Magisterium of the Church. The controversy also relates to the possibility to make binding decisions in the particular Church with the participation of the lay faithful. A challenge for the Magisterium is presenting the character of power in the Church clearly by a comprehensible message which will unambiguously indicate the position of laymen in it so that it removes all the temptations to treat it as a form of escape from difficult and unclear issues. All the faithful have the right to receive a theological answer.

The objections to the planned activities involve fears that they can lead to breaking the unity with the universal Church, resulting in the creation of the national Church, which is what the archbishop of Cologne card. Rainer Maria Woelki warned against.[17] The issue concerning making binding decisions on the synodal way is revived again and this is the reason for presenting them duly and constantly, but first of all making them present in all possible forms.

Another issue, apart from the form of exercising power and making binding decisions, which came to light in the situation of the Church in Germany concerns the power itself. The aforementioned bishop, Felix Genn, claimed in one of the interviews that the Church needs a new division of powers, especially a new relationship between the lay faithful and priests, chief and honorary ones, men and women. He added that he is willing to share his administrative authority so that the laymen could have their say.18 The reaction of the Vatican was strong. The objection concerned the equal rights of the bishops and laymen in voting.

The above two issues related to binding decisions made on the synodal way and the character of the ecclesial authority indicate that all the discussions on this subject require a theological response and theological reasons concerning the ecclesial character of the power and decisions binding the Church community. The bishop of Eichstät, Gregor Maria Hanke, drew attention to this element stating that in the beginning it should be explained to what extent the decisions made during the discussion can be binding.[19] Without prior and clear explanation of the nature of the decisions taken by the congregation, the congregation can deny what it exists for and reduce this kind of assembly to one of the forms characteristic for non-ecclesial policies. "The arrogance of auto-dogmatization will definitely not heal the Church in the future."[20] However, the solution does not lie in the negation of the stances expressing such a belief. It does not lead to

[17] Marek Trojan, "Arcybiskup Kolonii przestrzegł przed schizmą w Kościele w Niemczech," accessed November 4, 2019,

https://kresy.pl/wydarzenia/arcybiskup-kolonii-przestrzegl-przed-schizma-w-kosciele-w-niemczech/.

[18] eKAI.pl, "Niemieccy biskupi odrzucają stanowisko Watykanu ws. drogi synodalnej."

[19] Ibid.

[20] Ratzinger, "Demokratyzacja Kościoła?," 61.

any explanations but, instead of provoking deeper self-reflection, leads to bigger and bigger separation and also further loss of trust. "The era of democracy is a challenge for the Church. The challenge it has to face up to in a critical and, at the same time, open-minded way," Ratzinger continues.[21]

Synodal and Personal Structure of Power in Church

The problem of philosophical interpretation of the issues and usefulness of the proposed solutions regards the reality to which it refers to. Therefore, one should start with its description. The reality is the Church and the tasks it is entrusted with by Christ, through which his person is made present. All the baptized people participate in Christ's priesthood in a given manner due to the substantial difference between hierarchical and universal priesthood. The reason for the difference between these two types of priesthood is not the relation of primacy or subordination (they differ from one another not only in degree but in essence[22]), which could be described in the category of quantity but the essential difference that indicates a new kind of priestly mission and power. The difference does not concern the jurisdictional nature but the sacramental one, which means that the priest, contrary to the lay faithful, is an effective sign of the presence of Christ in His Church, of which He is the Lord.[23]

The issue of synodality and participation in the exercising of power in the Church might only become comprehensible with regard to the communion structure of the Church which is based on the intermingling (immanence) of the universal Church and particular churches. This idea is opposed by the principle of autocephality of the particular Church (the universal Church as a federation of particular churches) and the principle of the monistic concept of the Church, according to which particular churches serve the function of administrative districts within the universal Church. According to the teaching of the Second Vatican Council, the universal Church and the particular Church reflect two constitutive dimensions of one Church of Christ.[24] It is not appropriate to recognize the relations between two intermingling dimensions in the Church using

[21] Ibid., 62.

[22] Vatican Council II, Dogmatic Constitution on the Church *Lumen Gentium* (21.11.1964), n. 10.2.

[23] Gisbert Greshake, *Być kapłanem dzisiaj* (Poznań: Wydawnictwo W Drodze, 2010), 159–160.

[24] Gerosa, *Interpretacja prawa w Kościele*, 182.

the political criteria of centralization or decentralization, or by referring to the principle of subsidiarity. The universal Church, which exists through particular Churches, is present in the particular Church. All the issues regarding power and exercising it in the Church, as well as participation in it, should be recognized in the light of *communio Ecclesiarum*.

Today's voices demanding participation in taking binding decisions, that is, in fact, participation in exercising power, seem to refer to the scholastic concept of the episcopal power (Stephen of Tournai), according to which the power of Holy Orders (*potestas ordinis*) was separated from the power of jurisdiction (*potestas iurisdictionis*). The latter was not, according to how the centuries-long tradition was understood, granted by virtue of the sacrament of Holy Orders but the mission received by a bishop from the pope.

The issue of participation in exercising power is related to the power of governance and teaching. The division of power in the light of conciliar teaching about it becomes an old-fashioned category and there is no point using it. However, subconscious referral to it requires an explanation why due to *communio* nature and one power in the Church the above categories lose rationality. While the above categories are still being used, one should always remember about the lack of objective distinction between them. The possibility of differentiation might concern only the formal level, since these are two different formal ways of exercising the only power of the same saving content.

The issue of participation in the Church power requires defining the character of the power in the first place. The conciliar concept of the Church power is based on two principles: (1) sacramental origin; (2) inseparability of the personal and synodal element. Power in the Church is the element anticipating the Church. It does not have a delegated character.[25] It is fully granted to bishops in the sacrament of Holy Orders.[26] The personal character of power results from its sacramental character. Only the bishop personally represents Christ who works through him *ex opere operato*. He is the only one to represent the particular Church within the universal Church and the universal Church inside the particular one.

The opposite to the bishop's personal action is the activity undertaken by bishops as a college in which the will of an individual integrates with the will of the college as the will of the responsible entity. It is not a synodal character of the bishop's activity. Synodality and personality are not in contraposition. The synodal dimension of the personal power results from its sacramental character. Synodal foundation of exercising power lies within the communion structure of the Church, in which each bishop receives from Christ the same power of re-

[25] Eugenio Corecco, "Sinodalità e partecipazione nell'esercizio della «potestas sacra»," in Eugenio Corecco, *Ius et Communio. Scritti di Diritto Canonico* (Casale Monferato: PIEMME, 1997), 112.

[26] *Lumen Gentium*, 27, 1.

vealing in a legally binding way the unity of word and sacrament. The dynamics of the communion between particular churches and the universal Church at the ontological level is reflected at the operational level in the dimension of synodality, which does not have its source in casual relationships between bishops, but in their reference to the Petrine ministry. It was mentioned by Pope Francis when he made a speech on the 50th anniversary of the Synod of Bishops, stating that bishops are united with the Bishop of Rome with the bond of episcopal communion (*cum Petro*), and, at the same time, they are subordinate to him as the head of the college (*sub Petro*).[27]

In the same speech the pope added, reminding the words of Saint John Chrysostom, that "the Church and Synod are synonyms." Therefore, synodality is a form of exercising power which is not an alternative to a personal character. The two forms intermingle, which results from their ontological unity even if one of them may prevail over the other. The act of the bishop's power always remains a personal and synodal act since only thanks to such character of power can he exercise it over God's people entrusted to him. Synodality gives a deeper meaning and, to some degree, extends the episcopal ministry as it thus shows the relations between all the services in the Church, as well as it expresses its communion nature.[28] This structure is rooted in the word and sacrament as the elements previously granted by Christ, whereupon the Church is created and developed. As such, they cannot be subject to being changed by free will.

Degrees of Participation in the Power of the Church

Synodality, which is an ontological dimension of power in the Church, does not concern only the bishops but also those who received it (presbyters and deacons). However, it can only be discussed analogically to the synodality of bishops. They do not fully participate in Christ's power, but merely in the fullness of power of the episcopal ministry. Lack of sacramental autonomy causes that the synodal character of their service cannot be recognized as equal with the synodal character of the episcopal ministry. It may concern only a par-

[27] Francis, *Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops*, 17.10.2015, accessed November 15, 2019,
http://www.vatican.va/content/francesco/en/speeches/2015/october/documents/papa-francesco_20151017_50-anniversario-sinodo.html.

[28] Gerosa, *Interpretacja prawa w Kościele*, 188.

ticular church, and in the universal Church only under the mandate granted by the College of Bishops itself. Synodality of the presbyters has its foundations in the synodality of the universal Church as its structural element. Thus, the presence of presbyters in a particular church is the consequence of the existence of synodality of the universal Church, and not only the result of the pastoral needs of the bishop. The monistic structure of the Church organized only around the bishop would not be able to fulfil the synodal nature of the Church and thus would not reflect the mutual immanence of the universal Church and a particular one.[29]

The synodal character of the Church is also made present in relation to the lay faithful. It results from the universal priesthood, which is anticipatory towards the ministerial (hierarchical) priesthood but, at the same time, different from it. In the past, laymen participated in various congregations of synodal character. At present, it is also possible with the consent of the College of Bishops. Medieval councils were not only the congregation of the Church but of the whole Latin Christianity with the elements of political and economic assembly. Laymen as the representatives of secular power had a casting vote in the matters connected with the relations with the outside world. With regard to the Church matters, the principle of the first "council" in Jerusalem was applicable, at which debates were conducted in front of the whole Church, but decisions were made by the Apostles and the elders (Dz 15, 6. 22).[30]

Contrary to bishops and presbyters, a secular person, who by virtue of baptism takes part in Christ's triple mission, does not participate in the episcopal ministry, whose function is creating the Church on the basis of communion bonds granted to the faithful through baptism and protection of the authenticity of the Word and Sacrament together with a guarantee of the unity of the Church communion.[31] Synodality is the essential element of the episcopal ministry and therefore imposes on each bishop a responsibility to implement it. Lay faithful might be called to participate in synodal acts but it is not their duty for ontological reasons, such as lack of participation in the episcopal ministry. Thus, lay faithful can be allowed to exercise the power of governance, in accordance with the provisions of law (can. 129 § 2). However, the principles of this collaboration are referred to as cooperation (*cooperatio*), because such a form does not assume participation in power of the subject holding it. In case of presbyters, who are not granted the fullness of the sacrament of Holy Orders, their cooperation refers to the participation in the power of the episcopal ministry and not only to its implementation. With respect to lay faithful, what comes into play is only cooperation in exercising the power of governance and entrusting them with

[29] Corecco, "Sinodalità e partecipazione nell'esercizio della «potestas sacra»," 113–115.

[30] Ratzinger, "Demokratyzacja Kościoła?," 37– 39.

[31] Eugenio Correco, "Sinodalità," in Eugenio Corecco, *Ius et Communio. Scritti di Diritto Canonico* (Casale Monferato: PIEMME, 1997), 77.

ministries intended to fulfil spiritual purposes or connected with pastoral tasks (cann. 145 § 1, 151, 228 § 1, 536, 874).

The Theory of Participation

Synodality and participation are expressions describing the reality of the Church communion. Their source is in one *communio*, whose validation is on the structural level of relationality of specific Church communities. They indicate two different dimensions of these relations. Synodality is a specific and characteristic element of sacramental ministry resulting from the ministry of the bishop and presbyter. The category of participation refers to the activity of lay faithful in their relationship with the sacramental ministry. Both dimensions of the Church reality occur simultaneously and are inseparable because they result from the nature of interpersonal relations in the Church community.

The Church exists as *communio* not only in an individual dimension but also a community one. As an organic community of communities it does not realize itself only by individual relationships creating its reality, but it contains co-participation of different community organisms mutually associated and intermingling. In such a community, there exist interpersonal bonds, unique and typical of it, in which the elements of divine origin become one with the human elements. By the very fact of being incorporated into the Church, the elements of social and natural interpersonal relations do not disappear, but they gain a new meaning, transformed and refined with divine elements. This dimension of the Church community affects the rights and responsibilities of all the faithful in one community of the Church.[32]

The participation of the faithful in the implementation of the triple mission of Christ is realized by the testimony of faith, which constitutes their contribution to the building of the Church community. It results from the participation in universal priesthood of all faithful, in which *sensus fidei* corresponds with the accepted and proclaimed Word. Such an intention of believers' faith should not be ignored in formulating judgements of doctrinal nature by bishops and presbyters.[33] An example of such sense of faith are some dogma of faith, whose proclamation was an appreciation of the convictions and faith of believers. The testimony of faith enjoying autonomy based on the sacrament of baptism is not synonymous with the demanding attitude of the participation in the fullness of episcopal power or the power of presbyters, whose source is in the sacrament

[32] Żurowski, *Współuczestnictwo kościelne*, 61–63.

[33] Corecco, "Sinodalità e partecipazione nell'esercizio della «potestas sacra»," 128–129.

of Holy Orders. Universal priesthood as well as ministerial one are two inseparable elements establishing the Church structure, although in an essentially different way.

Participation in the power of governance refers to the category of having or not the competences which allow undertaking sovereign operations. Possessing them provides an opportunity to undertake such operations, which is equivalent to participation. Such possibilities are granted by current law of the Church, allowing lay faithful to hold Church offices to realize the spiritual goal.[34]

The same word—participation—is used by Karol Wojtyła while describing the person's activities performed together with other people. Philosophical meaning of participation guides us to search for the foundations of such action. In this context, it can turn out to be useful for describing the participation of the faithful in the power of governance. The question posed in the context of communio principle concerning the foundations of such action has its answer in the character of synodality of the Church community and sacred power in the Church. However, it can contribute to the understanding of the action which is not reduced only to the forms provided for it by the law. It concerns personal actions as a testimony of faith in these forms. Wojtyła writes that "the characteristic of participation indicates that a man acting together with other people retains in this action the personalistic value of his own act and, at the same time, implements what results from joint actions," that is, in other words, "thanks to participation a man acting together with other people retains everything that results from joint actions and, in this way, implements the personalistic value of his own act."[35] Thus, the person acting with others fulfils himself.[36] It is not important whether a man acting with other people "chooses what the others choose or even when he chooses because others do it, seeing in such an object of choice somehow his own and homogeneous value."[37] In consequence, the person can experience the decisions made by the community as his own, which happens when choices are directed at the common good and are made as part of joint responsibility (co-responsibility). A privileged place for such decisions certainly are communities which are homogeneous in some sense, whose members are connected with similar or even the same bonds which provoke taking joint decisions.[38]

In Wojtyła's formulations concerning cooperation with others by way of participation, one can find elements which determine that it truly relates to partici-

[34] Carmen Peña, "Sinodalidad y laicado. Corresponsabilidad y participación de los laicos en la vocación sinodal de la Iglesia." *Ius Canonicum* 59, n. 118 (2019): 746–756.

[35] Wojtyła, *Persona e atto*, 630.

[36] Ibid., 632–634.

[37] Ibid., 634–636.

[38] Rocco Buttiglione, *Il pensiero dell'uomo che divenne Giovanni Paolo II* (Milano: Mondadori, 1998), 203–204.

pation and not some other form of joint action. These are: the co-existence of the community of action with the personalistic value of the act and experiencing as one's own jointly made decisions.

According to Wojtyła, the Church community as a homogeneous community designated by the Word and the Sacrament is a privileged place for various forms of participation. The impassable border for the possibility of joint action is constituted by the episcopal ministry together with the power granted to it, and thus we can observe the lack of possibility of joint action by lay faithful and clergymen while making these decisions which are connected with the held power.

Therefore, it is difficult to exclude secular persons from the category of participation in a broader range referring to the testimony of faith together with the clergy. Such acts will be simultaneously individual, emphasizing their entirely personal and communal character. They are performed in syntony with the acts undertaken by virtue of power, acknowledged as one's own. In this sense, one can declare the participation of lay faithful in the Church power. In case of the lack of agreement on sovereign decisions and lack of identification with them, it is hard to talk about any forms of participation since the essence of participation is retaining personal character of one's own acts. However, clergymen making sovereign decisions and involving in it the faithful entrusted to them, and thus engaging them in participation should listen to the "voice of the people," which is the voice of the Christian community and not only its chosen representatives, often usurping the right to speak on behalf of the whole community. Joint listening to the Word which lives in the Sacrament is the dimension of the community's life, "which is difficult to be put into a legal framework; however, despite this it has great value."[39]

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The category of participation in philosophical terms seems to be more productive in building the Christian community than when used in recognizing it in the state and political systems, while making use of the models unfamiliar to the Church. The latter ones demand constant revelation of differences in meaning with regard to the Church community. They also have some negative connotation since they have impact on the feeling of separation between a believer and a clergyman by way of state power and citizens that are subjected to it. Philosophical understanding of participation and building joint responsibility around it has a positive tone. In this light, the bond existing between all the faithful by virtue of universal priesthood might adopt a more comprehensible dimension contributing to the development of the Church community. The encouragement

[39] Ratzinger, "Demokratyzacja Kościoła?," 60.

to participate calls for deeper insight into the faith of the Church, in which each baptized person becomes a depositary. However, this process requires from clergymen meeting two conditions: noticing and accepting *sensus fidei* and opening to the theology of synodality.

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Tomasz Gałkowski

Participation à la « voie synodale » : *Quelques commentaires à la lumière de la théorie de la participation de Karol Wojtyła*

Résumé

L'annonce dans l'église allemande dudit chemin synodal a suscité des discussions sur la participation et la coresponsabilité de tous les fidèles dans la mission de l'Église, notamment en ce qui concerne l'exercice de l'autorité et la prise de décisions contraignantes. L'objectif des réflexions présentées dans cet article est d'examiner la discussion à la lumière de la théorie de la participation analysée par Karol Wojtyła dans son ouvrage *La personne et l'action*. La coexistence d'une communauté d'action et la valeur personnelle d'un acte ainsi que l'expérience de décisions prises conjointement peuvent orienter de nouveaux paradigmes d'exploration du *sensus fidei*.

Mots-clés: voie synodale, participation, Karol Wojtyła, théorie de la participation

Tomasz Gałkowski

Partecipazione al "percorso sinodale": *Alcuni commenti alla luce della teoria della partecipazione di Karol Wojtyła*

Sommario

L'annuncio nella Chiesa tedesca del cosiddetto cammino sinodale ha suscitato discussioni sulla partecipazione e corresponsabilità di tutti i fedeli nella missione della Chiesa, soprattutto per quanto riguarda l'esercizio della potestà e il processo decisionale. L'obiettivo delle riflessioni presentate in questo articolo è quello di esaminare la discussione alla luce della teoria della partecipazione analizzata da Karol Wojtyła nel suo libro *La persona e l'azione.* La coesistenza di una comunità d'azione e il valore personale dell'atto così come l'esperienza delle decisioni prese congiuntamente possono orientare nuovi paradigmi di esplorazione del *sensus fidei.*

Parole chiave: cammino sinodale, partecipazione, Karol Wojtyła, teoria della partecipazione

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Human Person in the Code of Canon Law of John Paul II

Abstract: The Code of Canon Law, promulgated by John Paul II in 1983, is a synthesis of the earlier 1917 Code and the doctrine of the Second Vatican Council. The Code contains norms which go well beyond a reform of the inner legal relations within the Catholic Church. A lot of them deal with the value and dignity of the human person, which shows a clear impact of the pontificate of John Paul II, who put a lot of emphasis on the given issue. The article discusses the fields of legal regulations in the Code which touch upon the issue of the human person, esp. freedom of religion, protection of unborn life, social rights, legal standing of women and the education of future generations. It points out the main difference between civil law (which also serves the dignity of the human person) and canon law, namely, the latter aims at the salvation of souls.

Keywords: human person, John Paul II, Code of Canon Law, dignity, women, marriage, family, education

The Need For a New Code of Canon Law

The value and dignity of the human person was one of the central issues of Pope John Paul II's pontificate. As a representative of the Catholic Church, he followed the doctrinal line of the Second Vatican Council (where he himself was present), however, he also had his own philosophical and theological inspirations, which led him to this viewpoint. Even though he was firmly rooted in the legacy of the traditional philosophy and theology pursued in the Church, he was also influenced by newer philosophical movements of personalism and

existentialism. Moreover, the situation of a world divided into two irreconcilable power blocs, as well as acquaintance with communist ideology, contributed to the formation of the pope's distinctive viewpoint.[1]

His private and public discussions, statements and many official documents of his magisterium made it possible to directly formulate a philosophically formed notion of the human person. For example, in his encyclical letter *Veritatis splendor* on the basis of the moral doctrine of the Church (1993), the pope makes the following statement: "It is in the light of the dignity of the human person—a dignity which must be affirmed for its own sake—that reason grasps the specific moral value of certain goods towards which the person is naturally inclined."[2] However, the collection of legal norms, that is, the Code of Canon Law, works in a different way. The legal language is different from the language of philosophy and theology, and different is also the specifically legal treatment of reality. The concept of the human person does exist in law, however, what makes it different is its projection into the legally defined *natural person*, who has his/her rights and obligations, or even *legal/artificial person*, which from a philosophical point of view is not a real person at all.[3]

Nevertheless, the Code of the Canon Law is a source of law for the Catholic Church. The pope called the document promulgated in 1983—somewhat hyperbolically—"the last document of Vatican II" although 18 years have passed since between the last approved document of the Council. However, the Code is also not the result of collective voting, as it was with the documents of the Council. It is, above all, a primatial act of the pope himself, even though a number of cardinals, bishops and other specialists/canonists took part in the genesis of the code, as it is emphasized in the promulgatory apostolic constitution of John Paul II:

> For this reason, therefore, the bishops and the episcopates were invited to collaborate in the preparation of the new Code, so that by means of such a long process, by a method as far as possible collegial, there should gradually mature the juridical formulas which would later serve for the use of the entire Church. In all these phases of the work, there also took part experts, namely,

[1] This is also proved by the Pope's first visit to Poland in 1979: "Although during his stay in his native land John Paul II behaved in a correct, if not friendly, manner towards its rulers, uttered no word against the regime and avoided political topics, what he said about human rights and human dignity based on the Christian faith sufficed to shatter the régime." František X. Halas, *Fenomén Vatikán* (Brno: Centrum pro studium demokracie a kultury, 2004), 445.

[2] John Paul II, *Veritatis Splendor*, 48, in AAS 85 (1989): 1172.

[3] "The addressees [of the legal norms] are defined by the law itself and the law specifies their eligibility to be subjects of law and of the obligations which arise from the legal norm (or on the basis of the legal norm, respectively), their eligibility to establish such rights and obligations, or their eligibility for illegal conduct—this determines their *legal subjectivity*." Ignác Antonín Hrdina and Miloš Szabo, *Teorie kanonického práva* (Praha: Karolinum, 2018), 155.

> specialists in theology, history, and especially in canon law, who were chosen from all over the world.[4]

Alongside the documents of Vatican II, the second most important source used in the preparation of John Paul II's Code is its predecessor, the Code of Canon Law promulgated in 1917, also known as the Pio-Bendectine Code, on the basis of the two popes who were instrumental in creating the code, namely Pius X and Benedict XV. The concept of the code constituted a real breakthrough in the whole history of the Canon Law; and in terms of the legislative and technical aspects it can be considered a masterpiece.[5] However, at the time of its promulgation, there had not been enough reflection on the necessity of canon law as such, and the legislator focused more on the need to have a single code for the whole church.

Nevertheless, the period after Vatican II also brought waves of theological and disciplinary dissent, including calling into question the very existence and necessity of canon law. Within the Catholic Church, there was also a belated and uncritical reception of overthrown theses of liberal Protestantism, including the Rudolph Sohm's thesis about the incompatibility of the church with canon law.[6] John Paul II knew about the turmoil caused by the critique—which sometimes went to self-destructive extremes—and reflected on it in his first encyclical letter *Redmeptor Hominis*:

> This growing criticism was certainly due to various causes and we are furthermore sure that it was not always without sincere love for the Church. Undoubtedly one of the tendencies it displayed was to overcome what has been called triumphalism, about which there was frequent discussion during the Council. While it is right that, in accordance with the example of her Master, who is "humble in heart," the Church also should have humility as her foundation, that she should have a critical sense with regard to all that goes to make up her human character and activity, and that she should always be very demanding on herself, nevertheless criticism, too, should have its just limits. Otherwise, it ceases to be constructive and does not reveal truth, love

[4] John Paul II, *Sacrae disciplinae leges*, IX, in AAS 75, Pars II (1983): IX.

[5] "In terms of the general perspective, the Code of Canon Law of 1917 represented an official, authentic, unified, universal and exclusive code used in the Latin Church which was in force for 66 years. With the advantage of hindsight, we may state that this code made a great and profound difference in the life of the church and that his scientific and legal merits are still generally acknowledged." Vojtech Vladár, *Dejiny cirkevného práva* (Praha: Leges, 2017), 504.

[6] "For Sohm, there is no law in the church to be found in formal documents. Sohm rejects the concept of a visible church, which disposes of the external institutional notion of a confessing church to which an individual can be joined by an act of external confession, as well as a notion of a visible church which serves the invisible church […] For Sohm, the church—following a profoundly Lutheran notion—is an invisible entity to be to be grasped by faith alone." Carlo Frantappiè, *Ecclesiologia e canonistica* (Venezia: Marcianum Press, 2015), 83–84.

> and thankfulness for the grace in which we become sharers principally and fully in and through the Church.[7]

The need to defend the very reason for the existence of canon law in the Church led John Paul II to provide reasons for normative legal regulation in the life of the Church which can be found in the promulgation constitution of the code. The code is needed in the service to the Church, because it brings about a necessary order (*ordo*) in its multilayered organism:

> This being so, it appears sufficiently clear that the Code is in no way intended as a substitute for faith, grace and the charisms in the life of the Church and of the faithful. On the contrary, its purpose is rather to create such an order in the ecclesial society (*ordinem in ecclesiali societate*) that, while assigning the primacy to faith, grace and the charisms, it at the same time renders easier their organic development in the life both of the ecclesial society and of the individual persons who belong to it.[8]

The very ending of the extract from the promulgation constitution makes clear that the focus of attention is not just the church as a community, but also every individual alike who belongs to the church. This is not just the direct addressee of the code, that is, *christifidelis* "ecclesiastical laws bind those who have been baptized in the Catholic Church or received into it."[9]

The Freedom and Dignity of the Human Person

In fact, the regard to human dignity is even more visible in places, where the code goes beyond the circle of its immediate addressees and addresses everybody:

> All persons (*omnes homines*) are bound to seek the truth in those things which regard God and his Church and by virtue of divine law are bound by the obligation and possess the right of embracing and observing the truth which they have come to know.[10]

[7] John Paul II, *Redemptor Hominis*, Encyclical Letter from 4 March 1979, Art. 4, in AAS 71 (1979): 262–263.

[8] John Paul II, *Sacrae disciplinae leges*, XI, in AAS 75, Pars II (1983): XI.

[9] Cf. Canon 11 CIC/1983.

[10] Canon 748 § 1 CIC/1983.

Fully in the line of Vatican II, John Paul II turns his attention to the human person who is not generally bound to be "a member of the Catholic Church," or—to use the words of the 1917 Code "be duly taught the doctrine of the Gospel."[11] If the earlier concept focused on the *truth* of Christ and his church, which has solely the *right to truth*, John Paul II Code proceeds from "down up": it stands on the side of man who has *the right to truth* and thus also the obligation to seek it and observing the truth.[12] External conditions that are necessary for a human person to seek and find the truth are nothing more than the conditions of religious freedom as understood by the declaration *Diginitatis Humanae*:

> This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.[13]

The church itself rejects any form of coercion in relation to accepting its faith, as it is clear from the transposition of the requirements of the declaration into the language of the canonical norm: "No one is ever permitted to coerce persons to embrace the Catholic faith against their conscience."[14] This means not just external physical coercion, as in some regrettable cases in the past, but also freedom from all psychological coercion which would prevent the individual from being able to make his/her own choice and from the responsibility for such a decision. In fact, the requirement of religious freedom has a biblical ground which cannot be missed out, based on the personal example set by Jesus himself who expected personal decision for his discipleship[15] and also conceded the possibility of disciples would leave voluntarily.[16]

In fact, the idea of basic human rights and their embedding in international legal documents and in constitutions made the church act accordingly in relation to its faithful.[17] The 1917 Code was clearly issued in a situation in which

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[11] Cf. Canon 1322 CIC/1917.

[12] "A century old tradition that error has no right was replaced with an idea based on the right of the human person: his/her dignity was violated, if the person was denied freedom of religion." Helmut Weber, *Všeobecná morální teologie* [*General Moral Theology*] (Praha: Zvon–Vyšehrad, 1998), 153.

[13] Concilium Vaticanum II, *Dignitatis Humanae*, 2, in AAS 58 (1966): 930.

[14] Canon 748 § 2 CIC/1983.

[15] "If you want to be perfect…": Cf. Mt 19:21.

[16] "You do not want to leave too, do you?" Cf. John 6:67.

[17] "In the meantime – in the last decades – an international codification of human and civil rights has been undertaken (cf. esp. *International Pact on Civil and Political Rights* and *International Pact on Economic, Social and Cultural Rights*, passed in 1966), which contributed a great deal to making the legal defence of these rights a unifying element of constitutions

such a need had not yet arisen. At that point the Church drew from two legal inspirations. The first was Roman law—as it is demonstrated by the structure of the Code *personae—res—actiones*, which is known from Gaius's textbook. The presence of persons is also visible here, but these are natural and legal persons in the legal sense of the word. The second inspiration were the big codifications of civil law: we can only point out the time proximity of the German General Civil Code (*Bürgerliches Gesetzbuch*) which came into force in 1900 and the issuing of Pius X's motu proprio *Arduum sane munus* in 1904, where the pope commands the preparations of an ecclesiastical code. This inspiration has no direct bearing on the concept of human dignity, however, the 1917 Code introduces its second book "On Persons" (*De personis*) with a general formulation acknowledging the right of legal persons in the Church:

> By baptism a person is constituted a person in the Church of Christ with all the rights and duties of Christians, unless if what applies to rights, some bar (*obex*) obstructs, impending the bond of ecclesiastical communion, or there is a censure laid down by the Church.[18]

This introductory norm is basically reproduced in the Code of John Paul II:

> By baptism one is incorporated into the Church of Christ and is constituted a person in it with the duties and rights which are proper to Christians in keeping with their condition, insofar as they are in ecclesiastical communion and unless a legitimately issued sanction stands in the way.[19]

The 1983 Code emphasizes the difference in status, while also stressing the fundamental equality of all faithful, as it can be found in the canon introducing the catalogue of the obligations and rights of Christians:

> From their rebirth in Christ, there exists among all the Christian faithful a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ according to each one's own condition and function.[20]

This basic programmatic norm is intended for Christians/Catholics, whereas a wider universalistic focus as regards human person is taken by the social doctrine of the church, developed by important papal encyclical letters, including *Laborem exercens* (1981), *Sollicitudo rei socialis* (1987) and *Centesimus annus*

of civilized countries." Viktor Knapp, *Velké právní systémy. Úvod do srovnávací právní vědy* (Praha: C. H. Beck, 1996), 88.

[18] Canon 87 CIC/1917.

[19] Canon 96 CIC/1983.

[20] Canon 208 CIC/1983.

(1991), where equality of people is based on the value of the human person. Following the teaching of the Council,[21] the *Compendium of the Social Doctrine of the Church*, published at the end of John Paul II's pontificate, in Art. 144, says the following:

> Since something of the glory of God shines on the face of every person, the dignity of every person before God is the basis of the dignity of man before other men. Moreover, this is the ultimate foundation of the radical equality and brotherhood among all people, regardless of their race, nation, sex, origin, culture, or class.[22]

Such an all-embracing concept of the human person corresponds to the theological and anthropological concept to be found in the Sermon on the Mount, namely, the image of God as Father who "causes his sun to rise on the evil and the good, and sends rain on the righteous and the unrighteous."[23] However, the force of the Code of Canon Law is, given its addressees, limited to the community of the church, where a basic equality of all its members is a prerequisite. A common feature in the church is not a generally understood human dignity, but the reality of a new life founded on Christ via baptism. Such a concept is matched more by a postulate of all the faithful, expressed most aptly in Paul's letter to the Galatians. "There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus."[24] However, John Paul II's Code of Canon Law makes clear that the Church has a mandate to announce its message not only to the faithful, but to all people: "It belongs to the Church always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it."[25]

The Specifics of Penal Canon Law

In fact, the focus of John Paul II's pontificate in the field of human rights was a practical application of this norm of the Code. The dignity of the human per-

[21] Concilium Vaticanum II, *Gaudium et Spes*, 29, in AAS 58 (1966): 1048–1049.

[22] *Compendio della dottrina sociale della Chiesa* (Città del Vaticano, Libreria Editrice Vaticana, 2004), 101.

[23] Cf. Mt 5:45.

[24] Gal 3:28.

[25] Canon 747 § 2 CIC/1983.

son may be seen as the common denominator of this engagement in the field of human rights, rights of workers, women, but also in the important field of protecting unborn life. In the latter case, it is clear that the moral sensitivity of majoritarian society has been breached, as John Paul II says in his encyclical letter *Evangelium Vitae* on life as an inviolable good:

> At the same time a new cultural climate is developing and taking hold, which gives crimes against life a *new and-if possible-even more sinister character*, giving rise to further grave concern: broad sectors of public opinion justify certain crimes against life in the name of the rights of individual freedom, and on this basis they claim not only exemption from punishment but even authorization by the State, so that these things can be done with total freedom and indeed with the free assistance of health-care systems.[26]

Canon law was, therefore, to remain the pillar of the conscience of the faithful (although John Paul II's Code reduced penal sanctions significantly,[27]) and the sanction for the crime of abortion was not mitigated in relation to the 1917 Code: "A person who procures a completed abortion incurs a latae sententiae excommunication."[28] Canon law cannot be expected to provide a speculative explanation of the penal norm. In fact, the threat of punishment serves only as an *ultima ratio*, ultimate form of regulation, once all the other have failed. John Paul II in his encyclical, however, gives a detailed and urgent explanation for prohibiting abortion:

> This doctrine, based upon that unwritten law which man, in the light of reason, finds in his own heart (cf. Rom 2:14–15), is reaffirmed by Sacred Scripture, transmitted by the Tradition of the Church and taught by the ordinary and universal Magisterium. The deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end.[29]

Nevertheless, the penal law of the Code has already adopted basic standards characteristic to the guarantees given by modern democratic rule-of-law states.

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[26] John Paul II, *Evangelium vitae*, 4, in AAS 87 (1995): 401.

[27] "The new penal law underwent a major change, both in terms of its contents, but also in its spirit. The preceding penal regulation was valued highly for its extraordinary technical and scientific perfection, however, it seemed inappropriate for some time and, in the end, was not applied very much, either. A true reform took place which animated the penal law with pastoral spirit which had penetrated all new canonical law-making." Luigi Chiappetta, *Il Codice di Diritto Canonico. Commento giuridico-pastorale II* (Napoli: Edizioni Dehoniane, 1988), 421.

[28] Canon 1398 CIC/1983.

[29] John Paul II, *Evangelium vitae*, 57, in AAS 87 (1995): 465.

The principle of legality of the court proceedings as well as the punishments (*nullum crimen sine lege, nulla poena sine lege*) is here extended with the obligation to apply a specifically canonical principle of canonical equity (*aequitas canonica*):[30]

> If they are summoned to a trial by a competent authority, the Christian faithful also have the right to be judged according to the prescripts of the law applied with equity. The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.[31]

In the law of democratic countries, the legality of a punishment is exceptionless,[32] however, the canon law in its flexibility must allow that this legality be breached. Nevertheless, this must not be applied arbitrarily at the expense of the perpetrator. In the sixth book of the Code containing penal law, this principle is stated in a lonely "general norm" (*norma generalis*):

> In addition to the cases established here or in other laws, the external violation of a divine or canonical law can be punished by a just penalty only when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals.[33]

The very text of the norm defines the circumstances which mark the specific character of canon law. Its goal is not to be found in organizing legal relations within an earthly ecclesial community where the church is constituted and organized as a society (*ut societas constituta et ordinata*).[34] The law also represents the means to help the faithful attain the eternal goal: "the salvation of souls (*salus animarum*), which must always be the supreme law in the Church, is to be kept before one's eyes."[35] The penal norm, the *norma generalis*, thus seems

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[30] "The application of the legal principles has to be accompanied by canonical equity, i.e. love and mercy, which do not concern the interpretation, but the application of the law, and must not be in contradiction with justice, but—rather—mitigate it." Julio García Martín, *Le norme generali del Codex Iuris Canonici* (Roma: Ediurcla, 1996), 24.

[31] Canon 221 § 2 and § 3 CIC/1983.

[32] "The consequence of the principle *nullum crimen sine lege scripta* is that the source of penal law can only be written law found in actual acts of law or in international treaties, respectively […] The source of penal law is neither the custom, nor an administrative or court decision, a revolutionary decree, or unwritten law. The conditions and the degree of penal responsibility must be regulated by law." Jiří Jelínek, *Trestní právo hmotné. Obecná část. Zvláštní část* (Praha: Leges, 2019), 34.

[33] Canon 1399 CIC/1983.

[34] Cf. Canon 204 § 2 CIC/1983.

[35] Cf. Canon 1752 CIC/1983.

more justifiable.[36] The canon law with its *instrumentarium* differs in many aspects from civil law, which does not recognize a supernatural goal.[37]

The Theological Basis for Legal Norms

The preferential orientation of canon law on *salus animarum* proves its "divine-human" character, which is typical for the very mystery of the Incarnation. One could say that canon law is not just an assembly of legal norms, it is also an applied ecclesiology. It shares the main features with civil law; however, the goal of eternal salvation elevates it to a theological level. In John Paul II's Code, this is especially clear in comparison with the Pio-Benedictine Code which emphasized its strictly juridical character. The new code, however, introduces individual, thematically defined groups of legal norms in relation to their respective gravity and necessity with more general norms which often have a theological focus.

For example, the canon introducing the thematic field of the sacraments consists of three parts separated by semicolons. The first part is Christological, the second is ecclesiological, and only the third part represents a run-up to the actual legal regulation whose meaning is clarified with theological qualification given beforehand:

> The sacraments of the New Testament were instituted by Christ the Lord and entrusted to the Church. As actions of Christ and the Church, they are signs and means which express and strengthen the faith, render worship to God, and effect the sanctification of humanity and thus contribute in the greatest way to establish, strengthen, and manifest ecclesiastical communion. Accordingly, in the celebration of the sacraments the sacred ministers and the other members of the Christian faithful must use the greatest veneration and necessary diligence.[38]

[36] "Unlike the secular systems which adhere strictly to the principle of legality, the Church sometimes needs the discipline of canon 1399 to address an especially grave violation of a divine or canonical law to which no penalty is attached when there is an urgent need to prevent or repair scandals. Such 'weakening' of the strict principle of legality intends to assure the ultimate purpose of Church, the *salus animarum*." John A. Renken, *The Penal Law of the Roman Catholic Church* (Ottawa: Faculty of Canon Law, Saint Paul University, 2015), 378–379.

[37] "Canon law is a *religious* law which foreshadows its goal: it is not (just) the regulation of 'horizontal' relations within the church in accordance with the will of ecclesial authority, but also (and above all) the formation of Christians in their existential, 'vertical' (or transcendental) orientation to God, on the basis of the main principle of canon law, namely *suprema lex salus animarum*." Antonín Hrdina, *Kanonické právo* (Plzeň: Aleš Čeněk, 2011), 60.

[38] Canon 840, CIC/1983

The canon talks about "sanctifying humanity" and the focus again is the human person, who is, however, drawn into the process of salvation. In fact, John Paul II expresses this profound reality already in the first encyclical letter *Redemptor Hominis*, which represents the program of his pontificate:

> In reality, the name for that deep amazement at man's worth and dignity is the Gospel, that is to say: the Good News. It is also called Christianity. This amazement determines the Church's mission in the world and, perhaps even more so, "in the modern world." This amazement, which is also a conviction and a certitude—at its deepest root it is the certainty of faith, but in a hidden and mysterious way it vivifies every aspect of authentic humanism—is closely connected with Christ.[39]

Canon law has its own specific instruments to work with the existential problem of human salvation, especially with the problem of eternal life. This is true, for example, in the danger of death (*periculum mortis*), where the problem of eternal salvation finds its specific urgency. If the code gives conditions and rules for legal acts in ordinary situations, the situation of grave need leads to major easing of the discipline and the danger of death reduces the mentioned conditions and rules only to a necessary minimum. This is the case of baptism, that is, with a sacrament necessary for salvation "by actual reception or at least by desire" (*in re vel saltem in voto*),[40] where danger of death makes it impossible to complete the whole process of the catechumenate:

> An adult in danger of death can be baptized if, having some knowledge of the principal truths of the faith, the person has manifested in any way at all the intention to receive baptism and promises to observe the commandments of the Christian religion.[41]

Social Aspects of Canon Law

John Paul II focused his attention on justice in the layout of the society, that is, how to organize economic relations in a way that serves the good of the human person, for example, as it is expressed in his first social encyclical *Laborem Exercens* in relation to human labour:

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[39] John Paul II, *Redemptor Hominis*, 10, in AAS 71 (1979): 275.

[40] Cf. Canon 849 CIC/1983

[41] Canon 865 § 2.

> It only means that *the primary basis of the value of work is man himself*, who is its subject. This leads immediately to a very important conclusion of an ethical nature: however true it may be that man is destined for work and called to it, in the first place work is "for man" and not man "for work."[42]

The struggle for social justice is to be not just an ideal, but an obligation: the Code thus lays down a key norm, whose immediate addressees are Catholic Christians, but its impact goes beyond the Catholic community and has a universal human appeal: "They are also obliged to promote social justice and, mindful of the precept of the Lord, to assist the poor from their own resources."[43] Reference to the very commandment of the Lord evokes a statement from the Gospel of St John: "My command is this: Love each other as I have loved you."[44] This aspect of the mission of the church and its members is aptly characterized by John Paul II in his encyclical *Sollicitudo rei socialis* from 1987:

> Thus, part of the teaching and most ancient practice of the Church is her conviction that she is obliged by her vocation—she herself, her ministers and each of her members—to relieve the misery of the suffering, both far and near, not only out of her "abundance" but also out of her "necessities."[45]

It is thus no surprise to find out the concept that the owners of all the possessions of the church are the poor is very old. Legally speaking, it is untenable,[46] however, it points out an ideal how to deal with material wealth in the church.

In the Code of John Paul II, the Church has the obligation to treat its ordained and un-ordained employees who are entrusted with a particular form of service in the Church in accordance with the same principles which it demands from other subjects, that is, based on its own social doctrine. These servants of the Church, labourers and employees have "the right to decent remuneration appropriate to their condition so that they are able to provide decently for their own needs and those of their family. They also have a right for their social provision, social security, and health benefits to be duly provided."[47] The administrators of goods within the Church's legal persons "are to pay a just and decent wage to employees so that they are able to provide fittingly for their own needs and those of their dependents."[48]

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[42] John Paul II, *Laborem Exercens*, 6, in AAS 73 (1981): 589–590.

[43] Canon 222 § 2 CIC/1983.

[44] John 15,12.

[45] John Paul II, *Sollicitudo rei socialis*, 31.

[46] "The efforts to view the poor as the owners of church wealth, as if this was determined by law, have a rather historical value." Hans Heimerl, Helmuth Pree, and Bruno Primetshofer, *Handbuch des Vermögensrechts der katholischen Kirche* (Regensburg: Pustet Verlag, 1993), 61.

[47] Cf. Canon 231 § 2 CIC/1983.

[48] Cf. Canon 1286 2° CIC/1983.

The Position of Women and Lay Faithful in the Code of Canon Law

John Paul II focused also on the position of women in the society and in the Church. His apostolic letter *Mulieris Dignitatem* on the dignity and vocation of women, promulgated on the occasion of the Marian year of 1988, is a first document of this kind in the history of the Magisterium. In relation to women, the pope takes the anthropological viewpoint focused on the human person: "In this broad and diversified context, a *woman represents a particular value by the fact that she is a human person*, and, at the same time, this particular person, *by the fact of her femininity.* This concerns each and every woman, independently of the cultural context in which she lives, and independently of her spiritual, psychological and physical characteristics, as for example, age, education, health, work, and whether she is married or single."[49] The Code promulgated by John Paul II no longer contains numerous norms which may now seem discriminating for women in the Church, for example, the discipline of the sacrament of penance:

> Confessions of female penitents should never be heard outside a confessional, except in the case of illness or some other real necessity, and observing then such precautionary measures as the local Ordinary deems opportune. Confessions of men, however, may be heard even in a private home.[50]

The new code, whenever talking about lay Christian faithful, almost always addresses both men and women. The only exception is to do with the permanent access to liturgical services:

> Lay men who possess the age and qualifications established by decree of the conference of bishops can be admitted on a stable basis through the prescribed liturgical rite to the ministries of lector and acolyte.[51]

There is, in fact, a separate catalogue of obligations and rights in the Code in which the equality of *all* Christians in the Church is emphasized:

> Since, like all the Christian faithful, lay persons are designated by God for the apostolate through baptism and confirmation, they are bound by the general obligation and possess the right as individuals, or joined in associations, to

[49] John Paul II, *Mulieris Dignitatem*, 29, in AAS 80 (1988): 1723.
[50] Canon 910 § 1 a § 2 CIC/1917.
[51] Cf. Canon 230 § 1. CIC/1983.

> work so that the divine message of salvation is made known and accepted by all persons everywhere in the world.[52]

It is worth noting that the church—contrary to the constitutions of democratic countries and international documents on human rights—puts the obligations before the rights.[53] The legal regulation of the position of the lay Christian faithful in the code represents a disciplinary basis of the multiple possibilities they have to participate on the life of the church. This was debated on the bishops' synod of 1987 which became the basis of the post-synodal apostolic exhortation *Christifideles Laici*. In the spirit of continuity with the preceding pontificates, the pope points out that even prior to Vatican II the lay faithful were not an "oppressed majority" as it is often falsely claimed:

> Pius XII once stated: "The Faithful, more precisely the lay faithful, find themselves on the front lines of the Church's life; for them the Church is the animating principle for human society. Therefore, they in particular, ought to have an ever-clearer consciousness *not only of belonging to the Church, but of being the Church*, that is to say, the community of the faithful on earth under the leadership of the Pope, the head of all, and of the Bishops in communion with him. These *are the Church* […]."[54]

In the same exhortation, John Paul II again emphasizes his doctrine on the dignity of the human person:

> *To rediscover and make others rediscover the inviolable dignity of every human person* makes up an essential task, in a certain sense, the central and unifying task of the service which the Church, and the lay faithful in her, are called to render to the human family. Among all other earthly beings, *only a man or a woman is a "person," a conscious and free being* and, precisely for this reason, the "center and summit" of all that exists on the earth.[55]

However, it is certainly not at the expense of the dignity of the lay Christian faithful, if the offices in the hierarchical organism of the church are given on the

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[52] Cf. Canon 225 § 1 CIC/1983.

[53] "The enumeration of the obligations may be explained with a reference to the fact that each given right presupposes also a corresponding obligation. A specific approach, in which the enumeration favours obligation and these obligations often pass to the rights can be explained by the specific character of these obligations. In the diverse forms, they focus on the general good in the community of the church." Sabine Demel, *Handbuch Kirchenrecht. Grundbegriffe für Studium und Praxis* (Freiburg im Breisgau, 2010), 401.

[54] John Paul II, *Christifideles Laici*, 9, in AAS 81 (1989): 406, quoted in the *Discourse to the New Cardinals*, Feb. 20, 1946, in AAS 38, 149.

[55] John Paul II, *Christifideles Laici*, 37, in AAS 81 (1989): 460–461.

basis of the criteria for the administration of the power of governance reserved for the clerics, as it was confirmed by the Code of John Paul II: "[…] the power of governance, which exists in the Church by divine institution and is also called the power of jurisdiction. Lay members of the Christian faithful can cooperate (*cooperari possunt*) in the exercise of this same power according to the norm of law."[56] The pope was thus forced to disprove a number of widespread misconceptions which would only seemingly place the lay faithful into a position suggesting their greater dignity:

> In the same Synod Assembly, however, a critical judgment was voiced along with these positive elements, about a too-indiscriminate use of the word "ministry," the confusion and the equating of the common priesthood and the ministerial priesthood, the lack of observance of ecclesiastical laws and norms, the arbitrary interpretation of the concept of "supply," the tendency towards a "clericalization" of the lay faithful and the risk of creating, in reality, an ecclesial structure of parallel service to that founded on the Sacrament of Orders.[57]

Marriage and Family in the Code of Canon Law

John Paul II's attention to issues related to marriage, family and children can also be traced back to his strictly Christocentric focus connected with the respect to the dignity of the human person. The code he promulgated obviously abandoned the earlier definition of the secondary goal of marriage as *remedium concupiscentiae*, which would indicate that a partner in marriage could be used as a "means to remedy physical concupiscence."[58] This rather objectifying conception, remote from the personalistic conception of John Paul II, was connected with another goal, namely "mutual assistance of the spouses" (*mutuum adiutorium*).[59] In John Paul II's Code, both these goals were replaced by a broadly conceived goal of the mutual "good of the spouses" (*bonum coniugum*).[60] Moreover, this widely conceived good of the spouses became an equal goal of marriage together with procreation and education of the offspring. In fact,

[56] Canon 129 § 1 and § 2 CIC/1983.
[57] John Paul II, *Christifideles Laici*, 23, in AAS 81 (1989): 431.
[58] Cf. Canon 1013 § 1 CIC/1917.
[59] Ibid.
[60] Cf. Canon 1055 § 1 CIC/1983.

the former comes first in the new Code: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses (*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."[61] The turning point was clearly the doctrine of Vatican II on marriage, as given in the constitution *Gaudium et Spes*,[62] which also points to the personalistic approach so dear to John Paul II.[63] Clearly, this does not mean that education of new generations are beyond the pope's focus, in fact, quite the contrary. It can be proved by a general norm of the code, defining the goals of education. The emphasis again is put on the holistic development of the human person:

> Since true education must strive for complete formation of the human person that looks to his or her final end as well as to the common good of societies, children and youth are to be nurtured in such a way that they are able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life.[64]

This is how the code characterizes "Catholic" education,[65] although it is clear that what is meant is not just religious education, but a holistic, integral form of education, focused on the unity of the human person.

Catholics also have a generally formulated "constitutional" right to Catholic education:

> Since they are called by baptism to lead a life in keeping with the teaching of the gospel, the Christian faithful have the right to a Christian education by which they are to be instructed properly to strive for the maturity of the human person and at the same time to know and live the mystery of salvation.

[61] Canon 1055 § 1 CIC/1983.

[62] Cf. *Gaudium et Spes*, 47–52.

[63] "The gradual rise of personalism refused to view marriage as just a means in which the society makes use of men and women to its own reproduction. One should also bear in mind the biological changes, esp. longer life expectancy. The main goal of marriage, lasting often for decades after the female menopause, can no longer be just procreation and education of children." Dominik Opatrný, "Dobro manželů v kontextu biblické etiky" [The Good of the Spouses in the Context of Biblical Ethics], *Revue církevního práva* [Canon Law Revue], vol. 57, no. 1(2014): 50.

[64] Canon 795 CIC/1983.

[65] "Education is *Catholic*, i.e. not just Christian, as it was given in the *Schema* canonum, published in 1977. This title suggests that it contains norms for Catholics, i.e. for those who are members of the Catholic Church and are bound by its laws (Canon 11). However, it also means that it is education based on and inspired by Catholic anthropology." Agostino Montan, *L'educazione cattolica (cann. 793–821)*, in Gruppo italiano docenti di diritto canonico, *La funzione di insegnare della Chiesa* (Milano: Glossa, 1994), 76.

The education here is not viewed only as the doctrine of the faith, the center of gravity is yet again the human person in its integrity. Even seminarians preparing for priesthood are to be led to such an approach:

> Through their spiritual formation, students are to become equipped to exercise the pastoral ministry fruitfully and are to be formed in a missionary spirit; they are to learn that ministry always carried out in living faith and charity fosters their own sanctification. They also are to learn to cultivate those virtues which are valued highly in human relations so that they are able to achieve an appropriate integration between human and supernatural goods.[66]

Conclusion

The code promulgated by John Paul II is clearly a purely legal document, that is, it is not a philosophical treatise on the value and uniqueness of the human person. Its immediate addressees are Catholic Christians, but it contains norms with a widespread radiation. Numerous norms of the code clearly show that it was not only inspired by the doctrine of Vatican II, but it was issued in the period of the reception of the Council doctrine during the pontificate of John Paul II. This pontificate paid extraordinary attention to the human person and, as a result, this reality found its imprint in the individual norms of the code and its overall conception. The human person in the code is understood as a basic reference point in human society and in the life of the church and has an intrinsic value. The church is the actual locus where it is sanctified by the salvific action of Christ Himself.

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[66] Canon 245 § 1 CIC/1983.

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La personne humaine dans le droit canonique de Jean-Paul II

Résumé

Le Code de droit canonique promulgué par Jean-Paul II en 1983 est une synthèse du Code antérieur de 1917 et de la doctrine du Concile Vatican II. Le Code contient des normes qui vont au-delà de la réforme des relations juridiques internes à l'Église catholique. Beaucoup d'entre

elles concernent la question de la valeur et de la dignité de la personne humaine, ce qui indique la forte influence du pontificat de Jean-Paul II, qui attachait une grande importance à la question susmentionnée. Cet article examine les champs d'application des réglementations juridiques du Code concernant la personne humaine, en particulier la liberté de religion, la protection de la vie conçue, les droits sociaux, le statut juridique de la femme et l'éducation des générations futures. Les principales différences entre le droit civil (qui sert aussi à la dignité de la personne humaine) et le droit canon, dont le but est de sauver les âmes, sont également y mentionnés.

Mots-clés: personne humaine, Jean-Paul II, Code de droit canonique, dignité, femme, mariage, famille, éducation

Stanislav Přibyl

La persona umana nel diritto canonico di Giovanni Paolo II

Sommario

Il Codice di diritto canonico promulgato da Giovanni Paolo II nel 1983 è una sintesi del precedente Codice del 1917 e della dottrina del Concilio Vaticano II. Il Codice contiene norme che vanno oltre la riforma dei rapporti giuridici interni alla Chiesa cattolica. Molte di esse riguardano la questione del valore e della dignità della persona umana, il che indica la forte influenza del pontificato di Giovanni Paolo II, che attribuiva grande importanza alla suddetta questione. L'articolo esamina i campi di applicazione delle norme giuridiche del Codice concernenti la persona umana, in particolare la libertà di religione, la tutela del concepito, i diritti sociali, la condizione giuridica della donna e l'educazione delle generazioni future. Vi si accenna anche alle principali differenze tra il diritto civile (che serve anche alla dignità della persona umana) e il diritto canonico, il cui scopo è salvare le anime.

Parole chiave: persona umana, Giovanni Paolo II, Codice di Diritto Canonico, dignità, donna, matrimonio, famiglia, educazione

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"Person" in CIC and CCEO Matrimonial Law. On the Idea of Vetera et Nova Harmonization in the Church Doctrine and Jurisprudence

Abstract: A serious confrontation with the subject: "Person" in the Code of Matrimonial Law (CIC and CCEO), is an—invariably relevant—challenge that the study of canon law and jurisprudence have to face. The argument for the validity of this conclusion is provided by the famous John Paul II's thesis, proclaimed in the *Familiaris Consortio* exhortation (1981) and the famous 1997 Address to the Roman Rota, which can be summarized in the following words: the foundation and structural principle of interpersonal (ethical and legal!) relationships in marriage is matrimonial love. This axiom—still insufficiently present in the thoughts of canonists and church judges—reflects the deepest truth, of which "prophetically" the author of the monumental works *Love and Responsibility* and *The Acting Person* gave testimony; the truth that not elsewhere, but in the conciliar spiritually person-centric vision of matrimonial community (*communio*/*consortium*), a hermeneutic key should be sought for an adequate and complete understanding of the structure of marriage, harmoniously integrating its two personal and institutional dimensions.

Karol Wojtyła's/John Paul II's brilliant thought deserved to be confronted with the premises that prove the hypothesis that the mere declarative identification in the expressed judgments/concepts with the idea of a personalistic *aggiornamento* ("programmed" especially in numbers 47–52 of the Council's Constitution *Gaudium et Spes*) does not yet guarantee the adequacy and completeness of the canonistic approaches to the "truth of matrimony." This is both in the sphere of theological exposure in accordance with the Magisterium (in the light of the "Image of God") and at the *praxis* level: the interpretation and application of the normative records in the nodal canons of CIC and CCEO. The first part of the study is dedicated to illustrating such a state of affairs – in various proposals of doctrine and jurisprudence: from a concept that is completely misguided and destined to fail in advance; through a concept that, because of its extremely conservative approach to the need for *vetera et nova* harmonisation, has not stood the test of time, to concepts, indeed, universally acknowledged in the study of canon law, whose authors

(or their adherents), after all, should be suggested to implement certain necessary corrections: bigger or smaller. In the second part, the research contemplation focuses on the conclusions of the realization of the conciliar postulate of "harmonization" in presenting a person-centric vision of matrimony. These synthetic remarks constitute an attempt to show the basis for an adequate interpretation of the formula adopted by the two codes announced in the title: "a partnership of the whole of life".

Keywords: person, Karola Wojtyła's/ John Paul II's personalism, legal anthropology of matrimony, the Code Matrimonial Law (CIC and CCEO), personalistic concepts of canonical matrimony, the conciliar postulate of "harmonization"

Introductory Remarks

According to the famous proclamation of the Second Vatican Council, the universal measure of humanism is "a sincere gift of self."[1] More than half a century after the announcement of this fundamental truth about Man, the question of the degree of its assimilation and cultural influence remains relevant ("civilization of love"[2]). Therefore, it is possible for us to ask what the results of the Church's evangelizing effort ad intra and *ad extra* in this regard are. Already a preliminary contemplation reveals a radically ambivalent picture of the understanding of the conciliar personalistic thought. In the course of these several decades, the statement that being a person is to go beyond oneself in the direction of communion with others, has grown to the rank of an axiom in the broad public perception. At the same time, the same period—and certainly the "breakthrough of the millennia," a time of unprecedented cognitive and axiological confusion, or even a new "cultural revolution," with its "program" of subjective relativization and reduction of the dualistic reduction of the personal structure of humanity[3]—revealed the urgent need for an anthropological affirmation of the triad: nature—person—freedom,[4] including, above all, the defence/promotion of the truth about binary diversity in the metaphysical plan *esse et agere* of the human person. It goes without saying how high is the price

[1] Vatican Council II, Pastoral Constitution *Gaudium et Spes* on the Church (December 7, 1965),no. 24.

[2] John Paul II, Letter to Families *Gratissimam Sane* (February 2, 1994), no. 13.

[3] The fact that before our eyes the process of decomposition of axioms concerning the human person is taking place, "adapting" moral and legal norms to the changing socio-cultural conditions cannot be questioned. See: *"Mężczyzną i niewiastą stworzył ich". Afirmacja osoby ludzkiej odpowiedzią nauk teologicznych na ideologiczną uzurpację genderyzmu*, ed. Andrzej Pastwa [Studia Teologiczne i Humanistyczne, vols. 2, 3], (Katowice: Księgarnia św. Jacka, 2012).

[4] Cf. Czesław St. Bartnik, *Personalizm* (Lublin: Oficyna Wydawnicza "Czas," 1995), 284–286.

of accepting or rejecting the *integrum* of the Church's teaching: the *sovereignty of the family*,[5] based on the marriage of a man and a woman, is at stake. To put it simply, the family is and should remain "the basic cell of society […] primary place of 'humanization' for the person."[6]

No wonder, therefore, that after Vatican II, invariably at this crucial point—marking the paradigm of a holistic(!) approach[7] to the achievements of magisterial personalistic thought—there is a focus of scientific interest on the part of theologians and canonists, including representatives of matrimonialistics, who study the substance of marriage. After all, it is only by combining in one discourse on *communio personarum*, whose exemplary (*ex natura*) phenomenon is the matrimonial community of persons, that the conclusions flowing from the logic of "gift" with what is implied by the dynamics of the sexual structure inscribed in the personal existence of a man and a woman—that the very foundation of the canons of the renewed Church matrimonial law is revealed. And this is a remarkable diagnosis, especially for a Church canonist-judge, if one considers that an adequate interpretation of the *ius matrimoniale* nodal provisions is a prerequisite for the reliable performance of judicial service in Church tribunals, which examine the validity of marriages.

It is not without reason that John Paul II, the giver of Church matrimonial law (in two sets of laws: *Codex Iuris Canonici* 1983,[8] *Codex Canonum Ecclesiarum Orientalium* 1990[9]) and its authentic interpreter, presents with great consistency "a partnership of the whole of life"[10] in the key of the council's *aggiornamento*, that is, in an arrangement of closely linked: *ordinatio naturalis* of marriage and the ethos of the matrimonial gift.[11] Indeed, this original harmonious union between the metaphysics of the person and the authentic sense of freedom[12] is the "trademark" of the first penetrating philosophical ideas in the outstanding work

[5] See: Pedro-Juan Viladrich, "La famiglia sovrana." *Ius Ecclesiae* [further: IusEcc] 7 (1995): 539–550; Wojciech Góralski and Andrzej Pastwa, *Rodzina suwerenna – Kościół domowy. W nurcie współczesnej myśli prawnej Kościoła powszechnego i Kościoła w Polsce* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2015).

[6] John Paul II, Apostolic Exhortation *Christifideles Laici* (December 30, 1988), n. 40.

[7] Helmut Pree, "Die Ehe als Bezugswirklichkeit – Bemerkungen zur Individual- und Sozialdimension des kanonischen Eherechts," *Österreichisches Archiv für Kirchenrecht* vol. 33 (1982): 386.

[8] *Code of Canon Law* (promulgated: January 25, 1983) [further: CIC 1983], can. 1055–1165.

[9] *Code of Canons of the Eastern Churches* (promulgated: October 18, 1990) [further: CCEO], can. 776–866.

[10] CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1.

[11] See: Jaroslaw Kupczak, *Gift and Communion: John Paul II's Theology of the Body* (Washington, D.C.: The Catholic University of America Press, 2014).

[12] See: John Paul II, Encyclical Letter *Veritatis Splendor* (August 6, 1993).

The Acting Person[13] and then the invaluable lecture of personalistic realism[14] in the papal *de matrimonio* teaching.[15]

Karol Wojtyła's philosophical "theory of participation" and its theological incarnation, justly called John Paul II's "anthropology of the gift," show the depth of this unique participation in the humanity of the other, which is personal/intermediate matrimonial communion, created on the ontic foundation of the relational dimension of the person (in the sex-determined, dialectic of "I" and "you"). What is important, in both these perspectives, anthropological and anthropological-theological thought is complemented by ethical contemplation. It is not a coincidence that this integral argument, complete in its ideological layer, leads to the proclamation of the personalistic norm: "A person is a good towards which the only proper and adequate attitude is love."[16] After all, since the condition of true love,which defines the ethos of a person's gift, is selflessness (affirmation of the person for oneself: *bene-volentia/bene-ficentia*), the highest form of the communion dimension of *persona humana* is the love of the betrothed. That is how benevolence, which in an anthropological, theological and legal sense constitutes a real—ontically durable—foundation of this personal and interpersonal *sui iuris* reality, reveals its significance.[17].

Therefore, first of all, matrimony as an institution of natural law has its foundations in an authentic matrimonial love, and, secondly, precisely this love, which constitutes due in marriage,[18] defines, in the legal-institutional sense,[19] the "basic" interpersonal relationship (*matrimonium in facto esse*), constituted by

[13] Cardinal Karol Wojtyla, *The Acting Person*, trans. Andrzej Potocki, ed. Anna-Teresa Tymieniecka (Dordrecht: D. Reidel Publishing. Company, 1979).

[14] Andrzej Pastwa, "Realism of Personalist Vision of Marriage: Legal-canonical Cogitations," in *Personalizmus v procese humanizácie ľudskej spoločnosti*, ed. Pavol Dancák (Prešov: Prešovská univerzita v Prešove, 2014), 343–355.

[15] See: Andrzej Pastwa, *"Przymierze miłości małżeńskiej". Jana Pawła II idea małżeństwa kanonicznego* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2009).

[16] Karol Wojtyla, *Love and Responsibility*, trans. Harry T. Willetts (New York: Farrar, Straus and Giroux, 1981), 41.

[17] See: Andrzej Pastwa, "Responsible Procreation – Co-Responsibility of Spouses. From Adequate Anthropology to the Legal Anthropology of Matrimony," in *Philosophy and Canon Law*, [*Between the Culture of the Right to Responsible Parenthood and the Culture of the "New" Human Rights: Reproductive and Sexual*], vol. 6 (2020): 37–55.

[18] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 3, http://w2.vatican.va/content/john-paul-ii/en/speeches/1997/january/documents/hf_jp-ii_spe_19970127_rota-romana.html, accessed: December 13, 2018.

[19] Cf. Javier Hervada, "Libertad, naturaleza y compromiso en la sexualidad humana," *Persona y Derecho*, vol. 19 (1988): 106–109; Giacomo Bertolini, "Il matrimonio come istituzione: un vincolo di giustizia in quanto verità dell'amore," *Anthropotes*, vol. 31 (2015): 213–252.

"irrevocable personal consent"[20] /*actus essentialiter amorosus*[21] (*matrimonium in fieri*)—it is worth today, in retrospect, raising the issue announced in the title of this study: What was supposed to guarantee the success of the implementation of the idea of harmonizing marital doctrine in the spirit of the Council's *aggiornamento* in the Pontifical Commission for the Revision of the Code of Canon Law and experts preparing the reform of the Code *ius matrimoniale*?[22]

The Pope, teacher of personalism, John Paul II, took an authoritative stand on this issue. In his famous 1997 speech to the Roman Rota, and later in the doctrinal introduction to *Instruction Dignitas Connubii*, he included the following declaration: "In a vision of authentic personalism, the Church's teaching implies the affirmation that marriage can be established as an indissoluble bond between the persons of the spouses, a bond essentially ordered to the good of the spouses themselves and of their children."[23]

Obviously, the work on the revision of the canonical matrimonial law was based on a diagnosis of the pre-conciliar model of the "procreative institution," that is to say, the image of marriage that emerged from the rules of Pius X and Benedict XV's *Codex Iuris Canonici*,[24] an image which, as well-known theologians (especially German)[25] have shown, had little to do with the affirmation of the personal order but, on the contrary, sealed the old order: the reification and juridicalization of the whole sacramental reality of matrimony.

The need, established at the beginning of the work of the said Pontifical Commission, for a thorough revision of the formal approaches, which were injected by contractualizm (with the ideological background of neo-scholastic dogmatics), opened the way for the reception of the person-centric paradigm in the renewed *ius matrimoniale*. The dominance of ahistorical approaches, characterized by a mixture of abstract and naturalism,[26] finished, and their place

[20] *Gaudium et Spes*, no. 48.

[21] Urbano Navarrete, *Structura iuridica matrimonii secundum Concilium Vaticanum II. Momentum iuridicum amoris coniugalis* (Roma: Pontificia Università Gregoriana, 19942), 146.

[22] Ombretta Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici con cinque sentenze rotali commentate a cura di Anna Sammassimo* (Milano: Vita e Pensiero, 2008), 103–107; cf. Ombretta Fumagalli Carulli, "Armonizzazione conciliare e tutela della persona nel nuovo codice di diritto canonico," *Il diritto ecclesiastico* [further: DrE], vol. 98 (1987), no. 2, 500–511.

[23] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4; Pontificium Consilium de Legum Textibus, "Instructio »Dignitas connubii« servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii (January 25, 2005)," *Communicationes* [further: ComCan], vol. 37 (2005): 12.

[24] *Code of Canon Law* (promulgated: May 27, 1917) [further: CIC 1917], can. 1012–1143.

[25] Cf. Waldemar Molinski, *Theologie der Ehe in der Geschichte* (Aschaffenburg: Paul Pattloch Verlag 1976), 159–229; see also: Urs Baumann, *Die Ehe – ein Sakrament?* (Zürich: Benziger 1988), 73–85, 262–268.

[26] Cf. Joseph Ratzinger, "Zur Theologie der Ehe," *Theologische Quartalschrift*, vol. 149 (1969): 63.

was taken—irreplaceable in the spread of "*the culture of indissolubility*, in the Church and in the world"[27]—by an anthropological discourse based on the Council's definition of matrimony: "the intimate partnership of married life and love."[28] In the matrimonial covenant of love, that is, the personal gift of a man and a woman (and accepting this gift at the same time), a hermeneutic key to the knowledge of the full (!) truth about the matrimonial *communio personarum* was identified.

This is where the *clou* of the problem lies, which is worth a methodical thought. The intensive reform of matrimonial law in the 1970s (codification work and discussion in scientific circles around it)[29] also clearly shows that the mere declarative identification in the expressed judgments/concepts with the idea of a personalistic *aggiornamento* ("programmed" especially in numbers 47–52 of the Council's Constitution *Gaudium et Spes*) does not yet guarantee the adequacy and completeness of the canonistic approaches to the "truth of matrimony."[30] This is both in the sphere of theological exposure in accordance with the Magisterium (in the light of the "Image of God"[31]) and at the *praxis* level: the interpretation and application of the normative records in the nodal canons of CIC and CCEO.[32]

The first part of this study will be devoted to illustrating such a state of affairs[33] in various proposals of doctrine and jurisprudence: from a concept that is completely misguided and destined to fail in advance (A), through a concept that due to its extremely conservative approach to the need for *vetera et nova* harmonization has not stood the test of time (B), to conceptsuniversally acknowledged in the study of canon law, whose authors, after all, should be suggested to implement certain necessary corrections: bigger (C) or smaller (D). In the second part, the research contemplation will focus on the conclusions of the realization of the conciliar postulate of "harmonization" in presenting a person-centric vi-

[27] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 7, http://www.vatican.va/content/john-paul-ii/en/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota.html, accessed: December 13, 2018.

[28] *Gaudium et Spes*, no. 48.

[29] See Andrzej Pastwa, *Istotne elementy małżeństwa. W nurcie odnowy personalistycznej* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2007), 111–199.

[30] See: Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007), http://www.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070127_roman-rota.html, accessed: December 13, 2018.

[31] Cf. Piero Antonio Bonnet, "Essenza, proprietà essenziali, fini e sacramentalità (cann. 1055–1056)," in *Diritto matrimoniale canonico*, vol. 1, ed. Piero Antonio Bonnet and Carlo Gullo [*Studi Giuridici*, vol. 56], (Città del Vaticano: LEV, 2002): 96–98.

[32] Cf. CIC 1983, can. 1055–1057, 1135; CCEO, can. 776–777, 817 § 1.

[33] The barely draft nature of the discussions announced here is imposed by the adopted framework of this paper.

sion of matrimony. These synthetic remarks will attempt to show the basis for an adequate interpretation of the formula adopted by the two codes announced in the title: "a partnership of the whole of life."

1. "An Indissoluble Bond between the Persons"—In Model Concepts of Matrimonialistics

A. In the first years of the code reform it was not possible to avoid an excessive concentration on seeking a legal formula for the so-called personalistic purpose of matrimony. Unfortunately, often in isolation from "objective criteria drawn from the nature of the human person and of his acts"[34] (with a subjective relativization of the sexual experience[35]) and somehow at the expense of a traditional institutional goal: "the good of offspring" and even, with undermining the very foundation of this natural institution,[36] which is the essential propriety of indissolubility.[37]

Such "reformist" optics—in a bright form!—appeared in Professor Jean Bernhard's famous "working hypothesis" from 1970,[38] which introduced to the discussion on the *ius matrimoniale* reform the postulate of an existential reinterpretation of the existential legal approach to the indissolubility of the matrimonial bond. According to the "doctrinal truth that the Church has always held,"[39]

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[34] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 2, http://www.vatican.va/content/john-paul-ii/en/speeches/2001/february/documents/hf_jp-ii_spe_20010201_rota-romana.htm, accessed: December 13, 2018; cf. Gaudium et Spes, no. 51.

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

[36] See the famous rotational allocation: John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001).

[37] CIC 1983, can. 1056; CCEO, can. 776 § 3.

[38] Jean Bernhard, "A propos de l'hypothèse concernant la notion de consommation existentielle du mariage," *Revue de Droit Canonique* [further: RDC], vol. 20 (1970): 184–192.

[39] John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 2000), n. 6, http://www.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000121_rota-romana.html, accessed: December 13, 2018. See also: Janusz Kowal, "L' indissolubilità del matrimonio rato e consumato. Status quaestionis," *Periodica de re canonica*, vol. 90 (2001): 273–304; Carmen Peña García, "El fundamento de la absoluta indisolubilidad del matrimonio rato y consumado en la teología actual," *Estudios Eclesiásticos* 79 (2004): 599–647.

marriage is absolutely—intrinsically[40] and extrinsically[41]—indissoluble if it has been validly ratified and consummated by the marriage certificate.[42] If the Catholic Church reserves the right to dissolve an unfulfilled marriage, then only by the power of the Roman Pontiff and for a just cause.[43] This state of affairs did not prevent the mentioned canonist, the author of the famous magazine "Revue de droit canonique" (Strasbourg) from raising a fundamental objection: Is not the current formula of the *matrimonium consummatum* too rigid and formalistic, since it attributes so much importance to a single marriage certificate? The author's answer proposes a "personalistic" redefinition of the notion of "the completion of matrimony," which would no longer designate only a physical completion: one sexual act of the spouses. Matrimony should be considered "completed" only when the love communion of spouses achieves a certain degree of integration/perfection in the interpersonal matrimonial bond, and in the marriage of the baptized—in expressing the sign of the perfect covenant of the betrothed. In this way, the biological (bodily) element of the spouses' union would gain the missing elements: psychological, affective, spiritual, and religious. In proposing an "integral" concept of complementation, the author—contrary to the principle of *solus consensus*—does not hesitate to separate two stages of the constitution of marriage: the first one—the *matrimonium initiatum*: through the exchange of consensus; the second—the *matrimonium consummatum*: through the unity of life and love, after some time, when marital love has already reached a certain human and Christian perfection.[44]

The fact that the theory of the so-called existential complementation can only seemingly be stamped with a personalistic renewal of the marriage does not need to be contemplated upon too much. It is enough to point to the fleeting argumentation,[45] which is not subject to the rules of law, and also to the

[40] Cf. International Theological Commission, "Propositions on the Doctrine of Christian Marriage" (1977), n. 4.3, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html, accessed: December 13, 2018.

[41] Cf. Ibid., no. 4.4.

[42] CIC 1983, can. 1061 § 1, 1141; CCEO, can. 853.

[43] CIC 1983, can. 1142; CCEO, can. 862; John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 2000), no. 7.

[44] Bernhard, A propos de l'hypothèse, 184–192. Jean Bernhard returns to his "hypothesis" in subsequent studies: Jean Bernhard, "Réinterprétation (existentielle et dans la foi) de la législation canonique concernant l'indissolubilité chrétien," RDC, vol. 21 (1971): 243–278; Jean Bernhard,"Perspectives renouvelées sur l'hypothèse de la «consummation existentielle et dans la foi» du mariage chrétien," *RDC*, vol. 24 (1974): 334–349.

[45] He sums up well this proposal of ideas ("la reazione pastoralista"). Fernando Puig: "La reazione pastoralista nega che il matrimonio abbia un'essenza giuridica: la distinzione tra realtà matrimoniale essenziale e vita matrimoniale vissuta è inesistente. […] Il fatto è che la reazione pastoralista non è propriamente una teoria, e moltomeno una teoria giuridica. L'uso di una ter-

radical questioning of the paradigm of the inseparability of legal and pastoral dimensions,[46] that is, the truth that "marriage remains an indissoluble personal reality, a bond of justice and love."[47] One can only wonder that, as the research of experts on the subject shows,[48] the view presented was not at all isolated. At the same time, as the director of the Institut de Droit Canonique in Strasbourg, not too distant ideological views were presented by the Spanish canonist José María de Lahidalga Aguirre.[49] In turn, among the theologians, Jean Bernhard's ideas were still alive in the 1980s.[50]

B. What was generally characteristic of the just discussed ideological proposal was certainly its unorthodox character. Diametrically different was the trend in the study of canon law associated with the name Cormac Burke. Just as the "reformist" hypothesis is an emblematic example of a free approach to the doctrine of the Church,[51] so the author's reading of the substance of mar-

minologia giuridica in questo contesto,è puramente strumentale, in vista di soluzioni pragmatiche". Fernando Puig, "Realismo giuridico e dottrina canonistica contemporanea sull'essenza del matrimonio," *IusEcc*, vol. 16 (2004): 448.

[46] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota (January 18, 1990), n. 4, http://www.vatican.va/content/john-paul-ii/it/speeches/1990/january/documents/hfjp-ii_spe_19900118_rota-romana.html, accessed: December 13, 2018; Benedict XVI, "Address on the Occasion of the Inauguration of the Judicial Year of the Tribunal of the Roman Rota" (January 22, 2011), http://www.vatican.va/content/benedict-xvi/en/speeches/2011/january/documents/hf_ben-xvi_spe_20110122_rota-romana.html, accessed: December 13, 2018. See Andrzej Pastwa, "L'»alleanza« sistemica del diritto e della pastorale. Osservazioni sull'arte dell'applicazione del diritto nell'intera preparazione canonica alla celebrazione del matrimonio," *Annuarium Iuris Canonici*, vol. 2 (2015): 75–93.

[47] John Paul II, "Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year" (January 29, 2004), n. 7, http://www.vatican.va/content/john-paul-ii/en/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rota.html, accessed: December 13, 2018.

[48] Cf. Silvio Botero, *Divorciados vueltos a casar: un problema humano, una tradición eclesial, una perspectiva de futuro* (Bogotà: Editorial San Pablo, 2002), 116; Augusto Sarmiento, *El matrimonio cristiano* (Pamplona: EUNSA, 20073), 328.

[49] José María de Lahidalga Aguirre, "La indisolubilidad absoluta del matrimonio y el matrimonio en la Iglesia hoy: estado de la question," *Lumen*, vol. 20 (1971): 289–330.

[50] Denis J. Doherty, *Divorce and Remarriage. Resolving a Catholic Dilemma* (St. Meinrad, IN: Abbey Press, 1974), 67–84; Günter Gerhartz, "La indisolubilidad del matrimonio y su disolución por la Iglesia en la problemática actual" in *Matrimonio y divorcio*, ed. René Metz and Jean Schick (Salamanca: Sigueme, 1974), 207–243; André Guindon, "Case for a 'consummated' sexual bond before a 'ratified' marriage," *Eglise et Théologie*, vol. 8 (1977): 137–182; J. Edward Hudson, "Marital consummation according to ecclesiastical legislation," *Studia Canonica*, vol. 12 (1978): 93–123; Michael J. Curran, *Conjugal Consummation in the Catholic Church. A Problem for Human and Theological Sciences* (Roma: Pontificia Università Lateranense, 1988), 383–422; Theodore Mackin, *The Marital Sacrament* (Mahwah, NY: Paulist Press, 1989), 647–675.

[51] It can be assumed that the apologists of this 'hypothesis' were the recipients of the famous words of Benedict XVI on "the practical effects of […] 'the hermeneutic of discontinuity and

riage in the depictions of the aforementioned Irish canonist and judge of Roman Rota are distinguished by the care taken to anchor the analyses in their sources. This is evidenced above all by the "programme" emphasis on the importance of the doctrinal content included in numbers 47–52 of the Constitution *Gaudium et Spes* or the use of the papal magisterium, starting with Pius XI's encyclical *Castii Connubii*[52]—both in scientific publications (including the famous 1997 monograph *L'oggetto del consenso matrimoniale. Un'analisi personalistica*[53]), as well as carefully edited rotal judgments. Furthermore, there are: the original and creative analysis of the biblical sources of *de matrimonio* and the reference to St. John Paul II's personalistic vision of matrimony (with exposing the legally relevant idea of the pope, expressed by means of the formula "personalistic realism"). In turn, in the context of the paradigmatic "matrimonial" formulas transformed from *Gaudium et Spes* to code norms—a factual emphasizing of the importance[54] of the phrase defining the object of matrimonial consent: *sese mutuo tradunt et accipiunt*.[55] All this together constituted the potential for the puzzle of the components of the "personalistic analysis"—if we use the phrase used by the canonist himself,[56] to form a comprehensive and complete picture *essentia et essentialia in matrimonio*. Already the draft (as it was announced in the introductory remarks) presentation of the theory constructed in such a way—which undoubtedly deserves extensive studies[57]—reveals the reasons for the failure of the whole "project." It allows us to understand that certain shortcomings/deficits in the scope of the adopted methodology of testing the substance of matrimony had to ultimately translate into incorrect research results.

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rupture.'" The pope states: "[…] it seems to some that the conciliar teaching on marriage, and, in particular, the description of this institution as *intima communitas vitae et amoris* [the intimate partnership of life and love] (Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, no. 48), must lead to a denial of the existence of an indissoluble conjugal bond because this would be a question of an 'ideal' to which 'normal Christians' cannot be 'constrained.'" Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007).

[52] Pius XI, Encyclical Letter *Casti Connubii* (December 31, 1930).

[53] Cormac Burke, *L'oggetto del consenso matrimoniale. Un'analisi personalistica* (Torino: Giappichelli, 1997).

[54] Cf. Wojciech Góralski, "Przedmiot kanonicznej zgody małżeńskiej," *Śląskie Studia Historyczno-Teologiczne*, vol. 34 (2001): 173–183.

[55] CIC 1983, can. 1055 § 1; cf. GS, n. 48.

[56] As indicated earlier, Cormac Burke gave this monograph a subtitle: *Un'analisi personalistica* ("a personalistic analysis").

[57] See the detailed discussion of the ideological position of this famous judge of Roman Rota: Andrzej Pastwa, *Il bene dei coniugi. L'identificazione dell'elemento ad validitatem nella giurisprudenza della Rota Romana* [Biblioteca Teologica, Sezione Canonistica, 7], (Lugano–Siena Eupress FTL–Edizioni Cantagalli, 2018), 129–177.

It is worth starting a brief illustration of this state of affairs by quoting the final passus in the *in iure* section of the famous Cormac Burke's judgment of 26 November 1992[58]:

> The 1983 Code, in c. 1057, gives a renewed and more personalist description of matrimonial consent, by which the spouses "mutually give and accept each other in order to establish a marriage". One gives oneself as one is; and, in particular, one accepts the other, as he or she is. Therefore, sincere marital commitment implies not only an unreserved spousal gift, but also an unreserved spousal acceptance. This reflects the genuine personalism of Vatican II[59]

Clearly, in his carefully chosen words, Burke draws an authentic picture of the *fieri* of matrimony, adequate in the terms of canon law. Whatever one may say, this neat synthesis sheds light on the essential *novum* of the person-centric approach to the matrimonial consent. All the more astonishing must be the fact that immediately afterwards the ponens-apologist of "realism" of the renewed matrimonial doctrine[60] introduces a passus into the sentence, which, although theologically correct, does not easily fit in with the optics of the canonical approaches, and certainly argues with the logic of marking a "bridge"—from anthropological realism towards juridical realism[61]:

> Casti connubii insisted that the true purpose of marital love is "that man and wife help each other day by day in forming and perfecting themselves in the interior life, so that through their partnership in life they may advance ever more and more in virtue, and above all that they may grow in true love towards God and their neighbor" (AAS 22 (1930) 547–548). *Gaudium et Spes* teaches that "as spouses fulfil their conjugal and family obligations… they increasingly advance towards their own perfection, as well as towards their mutual sanctification." (48)[62]

The author of the sentence concludes this statement by saying: "A key to the actual scope of the 'bonum coniugum' is surely to be found in these words."[63]

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[58] "Sentence of Nov. 26, 1992 coram Burke (Armagh)," in Apostolicum Rotae Romanae Tribunal, *Decisiones seu sententiae* [further: RRDec.] (Città del Vaticano: LEV, 84/1992), 577–587; [English version: *SCan*, vol. 27 (1993): 496–505].

[59] Ibid., 585, n. 18.

[60] Oficially, this is Cormac Burke's stance in another renowned sentence: Sentence of Mar. 26, 1998, coram Burke (*Pelplinen*)," in RRDec. 90/1998, p. 276, n. 35.

[61] Cf. Pastwa, *Il bene dei coniugi*, 113–123.

[62] Sentence of Nov. 26, 1992, coram Burke, p. 581, n. 10.

[63] Ibid.

The next part of the *in iure* reasoning reveals why in Cormac Burke's discourse, there is a need to include in the canonistic discourse the ideal image of the purpose of marriage— clearly one that does not fit here: *bonum coniugum*[64]; the purpose that the canonist wants to consistently combine on the legal ground not only with the term "personalistic" but also, and in equal measure, with the term "(legal-)institutional."[65] The sentence is:

> It follows that any [legal—A.P.] analysis which identifies the *bonum coniugum* with some form of easy or gratifying human relationship between the spouses is fundamentally flawed.[66]

To experts in the subject matter, the intention of the procedure used here appears to be too clear. In view of the tendency, already evident at the turn of the 1980s and 1990s, to grant "the good of the spouses"—a structural element of marriage[67] (obviously not the same as the purpose of marriage[68])—autonomy[69] in the *ius matrimoniale* system, Cormac Burke, who aspired at that time to the role of a promoter (or even an oracle)[70] in the work of the so-called "personalization" of canonical marriage, deliberately positions himself as a defender of the old order. And just as in numerous articles[71] and rotal judgements which deal with the possibility of making *simulatio* and *incapacitas* hypotheses in the context of *bonum coniugum*,[72] in the quoted judgment of 26 November 1992, the canonist ends his *in iure* judicial argument with the same "sacramental," and it must be said clearly, far too easy, point: "[…] the Augustinian bona which

[64] Cf. CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1.

[65] Sentence of Nov. 26, 1992, coram Burke, p. 581, n. 10. The elaboration on this thread was included by the author in the article: Cormac Burke, "I fini del matrimonio: visione istituzionale o personalistica?" *Annales Theologici*, vol. 6 (1992): 227–254.

[66] Sentence of Nov. 26, 1992, coram Burke, p. 582, no. 11.

[67] Cf. CIC 1983, can. 1101 § 1; CCEO, can. 824 § 2.

[68] The point of reference here is the well-known recommendation of the Pontifical Commission for the Revision of the Code of Canon Law from the time of work on the *ius matrimoniale* reform: "The ordination of matrimony to the *bonum coniugum* is truly an essential element of the matrimonial covenant." *ComCan*, vol. 15 (1983): 221. See more: Pastwa, *Istotne elementy małżeństwa*, 142–156.

[69] See Pastwa, *Il bene dei coniugi*, 236–396.

[70] See the characteristic (not without an ironic note) statement of the critic of the ideological position of Cormac Burke: *Burke hat in den vergangenen Jahren eine große Zahl an Aufsätzen in den meisten abendländischen Sprachen veröffentlicht. Zum Teil waren es Rechtsausführungen aus seinen Rota-Urteilen. Angesichts des hier zu würdigenden Buches* [*L'oggetto del consenso matrimoniale*…—A.P.] *ist festzustellen, daß Burke ein Meister der kleinen Form ist, daß der Raum aber, den ein Buch ihm bietet, sein Gestaltungsvermögen überfordert.* Klaus Lüdicke, "*Rez. Burke, Cormac, L'oggetto del consenso matrimoniale*…," *De processibus matrimonialibus* [further: DPM] 6 (1999): 267–268.

[71] See bibliography in: Pastwa, *Il bene dei coniugi*, 419–420.

[72] See ibid., 396.

fundamentally characterize marriage, also provide the basic structure on which the *bonum coniugum* can be built."[73]

In conclusion, the creation of the main theses of the author's "personalistic analysis," with the complete exclusion (!) of the premises resulting from the renewed interpersonal-finalistic optics of the St. Thomas's scheme,[74] and the consequent artificial embedding of "an indissoluble bond between the persons"[75] in the Augustinian *bona matrimonii* matrix: the offspring, the faith, the sacrament—is a distinguishing feature of the ideological position in matrimonialistics related to the name Cormac Burke. A stringent standing by the opinion[76] that in the area of *substantia matrimonii*, there is no place for an autonomous "element" of the good of the spouses only confirms the evident lack of courage to go beyond the rigid framework of the scheme of the *tria bona* in the scientific and juridical marking *iura et officia essentialia*.

C. At the basis of the conciliar concept of matrimony, closely related to the theological model of covenant, lies love—a structural principle of the whole matrimonial reality, both in the *fieri* dimension and in *facto esse*. Thus, the Council's magisterium brings to the understanding of marriage—in the spirit of *communio* (*Gestaltungsprinzip konkret wirksam*[77])—a fundamentally personal line. It is, after all, about entering into the matrimonial covenant in the act of an integrally personal unconditional "yes" of a man and a woman as a gesture of devotion and acceptance of each other, in order to create a community of life and love which is marked by exclusivity, unlimited duration and orientation towards personal partnership and offspring.[78] What is not insignificant is that the

[73] Sentence of Nov. 26, 1992, coram Burke, p. 583, n. 13.

[74] Cf. Pastwa, *Il bene dei coniugi*, 236–241.

[75] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4.

[76] It is worth noting that a decade after the end of his judicial activity in the Court of the Roman Rota, Cormac Burke has maintained his position in all respects. Cormac Burke, "Challenges to Matrimonial Jurisprudence Posed by the 1983 Code," *The Jurist*, vol. 41 (2007): 445–448.

[77] Hubert Müller, "Communio als kirchenrechtliches Prinzip im Codex Iuris Canonici von 1983," in *Im Gespräch mit dem dreieinen Gott. Elemente einer trinitarischen Theologie. Festschrift zum 65. Ge-burtstag von Wilhelm Breuning*, ed. Michael Böhnke and Hanspeter Heinz (Düsseldorf: Patmos Verlag, 1985), 482.

[78] *Das konziliare, im Modellbegriff des Bundes notionell gebündelte Eheverständnis ist geprägt von einem sich in der Erfassung der Liebe als Strukturprinzip der gesamten Ehewirklichkeit in Entstehung wie Bestand niederschlagenden fundamental personalen Ansatz, der die Schließung des Ehebundes versteht als das gesamtpersonale bedingungslose konsensuale Ja der Partner zueinander im Blick auf eine primär sittlich-personale Lebens- und Liebesgemeinschaft, die durch die wesentlichen Werthaltungen der Ausschließlichkeit und unbeschränkten Dauer sowie der Hinordnung auf Partnerschaft und Nachkommenschaft gekennzeichnet ist.* Norbert Lüdecke, *Eheschließung als Bund. Genese und Exegese der Ehelehre der Konzilskonstitu-zion "Gaudium et spes" in kanonistischer Auswertung* [Forschungen zur Kirchenrechtswissenschaft, Bd. 7] (Würzburg: Echter, 1989), 912–913. Cf. Ibid., 848.

aggiornamento of the teachings of Vaticanum II on marriage is the clear idea of overcoming harmful dualisms in the grasping of this phenomenon. This is what the programmatic *clou* of the reform of the old law (in CIC 1917)[79] should be connected with, namely, the adaptation of the normative description of the institution of matrimony (*Ordnungsgestalt*) to its contemporary perception in the changed socio-cultural conditions (*Erfahrungsgestalt*).[80] In the face of such assumptions, the *ius matrimoniale* renewal program, focused on the person-entity of the law,[81] gave a chance to realize the basic criterion of codification: the matrimonial *Canones* (in CIC 1983 and CCEO) "should be in the service of marriage and family as a priority."[82] These characteristic conclusions that apart from personalistic provenance also unveil the epistemological-methodological strategy of the author's research, were included by Norbert Lüdecke in a well-known 1989 monograph entitled *Eheschließung als Bund. Genese und Exegese der Ehelehre der Konzilskonstituzion "Gaudium et spes" in canonistischer Auswertung*. The success of this project is proved not only by the popularity of the abovementioned work and the number of quotations, but, above all, by the credible conclusions, precisely showing the inconsistencies in transforming the theological model of the covenant into the language of canons, including the conscious reduction of the religious and sacramental dimension of marriage[83] and—proving this deficit—the further maintenance of systemically incoherent legal figures (*fragwürdige Rechtsfiguren*) in 1983 CIC. Here, in particular, the absence of a legislative decision to adopt a fully legitimate CCEO standard in the canon on "condition"[84]: *Matrimonium sub condicione valide celebrari non potest*,[85] as well as the tacit consent of the legislator to the presence of the figure of the celebration of marriage by proxy in system.[86]

[79] CIC 1917, can. 1012–1143.

[80] Lüdecke, *Eheschließung als Bund*, 847, 913.

[81] *Subjekt aller Lebenswirklichkeit ist die durch Individualität, Sozialität und Kreativität ausgezeichnete Person, deren so verstandene Würde mit der neuzeitlichen Auffassung von der freien verantwortlichen Person konvergiert. Als solche ist die Person auch Subjekt des rechtlicher Normierung durchaus zugänglichen Lebenssektors Ehe und mithin auch der eherechtlichen Ordnung.* Ibid., 847–848.

[82] Ursula Beykirch, *Von der konfessionsverschiedenen zur konfessionsverbindenden Ehe?: Eine kirchenrechtliche Untersuchung zur Entwicklung der gesetzlichen Bestimmungen* [Forschungen zur Kirchenrechtswissenschaft, Bd. 2] (Würzburg: Echter, 1987), 208; Lüdecke, *Eheschließung als Bund*, 913.

[83] See Lüdecke, *Eheschließung als Bund*, 870, 892–912.

[84] CIC 1983, can. 1102.

[85] CCEO, can. 826; Lüdecke, *Eheschließung als Bund*, 963–974.

[86] CIC 1983, can. 1105. Lüdecke, *Eheschließung als Bund*, 974–978. Nota bene, pity that the author's argumentation lacked any mention of the premises resulting from the ecclesiastical tradition of the East: "Marriage cannot be validly celebrated by proxy unless the particular law of one's own Church sui iuris establishes otherwise, in which case it must provide the conditions under which such a marriage may be celebrated." CCEO, can. 837 § 2. Cf. Andrzej

To the problem of conceptual inertia and succumbing to the temptation to petrify the old order, namely, the still insufficient affirmation of the "person" in the interpretation and application of the new norms of the matrimonial canon law, the German canonist returns six years later when he publishes an article in the magazine *De processibus matrimonialibus* under the significant title: "Der Ausschluss des 'bonum coniugum. Ein Ehenichtigkeitsgrund mit Startschwierigkeiten."[87] It is here, which cannot be omitted, that the author reaches for a previously formulated idea, which, repeated with no less emphasis from now on, will turn out to be a "showcase" of his doctrinal stance. The analysis of what is meant by the concept of the "good of the spouses" in the detailed context of the process of applying canon 1101 § 2[88] norm (with the submission of arguments for the value of the autonomy of the new essential element of marriage) is based on the thesis of a paradigm shift (!) in the adequate treatment of marriage as a personal reality. The structural *specificum*, as this is the case here, which allows juridically to distinguish a marriage from other communities is no longer sexuality but totality.[89]

Norbert Lüdecke has no doubt: such a conclusion is directly dictated by the ethical principle of marriage (marital love).[90] The question can be asked whether this last conclusion really gives rise to a thesis about the alleged paradigmatic change? Of course, it can be theoretically assumed that more or less purposeful use of the hyperbole was simply to emphasize the importance of the presented research conclusions, and then, instead of sexuality (*Sexualität*), genitaliaty (*Genitalität*) and procreativity (*Prokreativität*) should be inserted by default. This, still acceptable, form of the (hypo)thesis of model change would be suggested by the words of the very canonist:

Pastwa, "Consent and Sacrament in the Orthodox Matrimonial Law. An Ecumenical Perspective," in *Conclusion of Marriage by Proxy in the Internal Law of Churches and Other Religious Associations*, ed. L. Świto and M. Tomkiewicz [*Studi Giuridici*, vol. 58], (Città del Vaticano: LEV, 2018), 50–51.

[87] Norbert Lüdecke, "Der Ausschluss des *bonum coniugum*. Ein Ehenichtigkeitsgrund mit Startschwierigkeiten," *DPM*, vol. 2 (1995): 117–192.

[88] Cf. CCEO, can. 824 § 2.

[89] *Sexualität ist nicht mehr Inhalt des Ehekonsenses und keineswegs Spezifikum der Ehe* […] *nicht die Sexualität, sondern die Totalität* […]. Lüdecke, *Eheschließung als Bund*, 960. It should be added that this idea has a protoplast in canonistics. In 1970, Luigi De Luca addressed the following Pontifical Commission for the Revision of the Code of Canon Law desideratum to take into account in the new matrimonial law that it is no longer the sexual aspect but conjugal love (*multiformis dilectio*) that characterizes the conjugal community, distinguishing it from other types of community (*societas*). Luigi De Luca, "La Chiesa e la società coniugale," *DrE*, vol. 81 (1970), no. 1, 269–271, 274.

[90] *Dasjenige, was eheliche Liebe als ehelich qualifiziert, ist nicht (mehr) die Sexualität, sondern die Totalität dieser Liebe.* Lüdecke, Der Ausschluss des *bonum coniugum*, 143.

> The traditional definition of the essence of marriage was determined by an inadequate, because abbreviated, procreative understanding of sexuality. First, the primary purpose of marriage was closely related to the function of the genital apparatus (*Funktion des Genitalapparates*), and then marriage was designed as the most appropriate form to achieve this purpose. Sexuality in the form of *ius in corpus* filled the content of the concept of marriage and the concept of marriage consent.[91]

The problem is that immediately afterwards the author categorically states: "The conciliar science on matrimony sees the *specificum* of matrimonial love not in its sexual dimension, but in its totality. This distinguishes it from other forms of love."[92]

As it turns out, the dualistic peculiarities of this discourse, which weaken the power of personalistic argumentation—as the one that go "against the current" of the idea of harmonization discussed here—do not only concern the arbitrary disconnection of the equally (!) "matrimonial" paradigms: sexuality and totality. A similar display of Norbert Lüdecke's attachment to the method of "separation" can be seen both in the reflections of the results of the Pontifical Commission for the Revision of the CIC[93] and in the author's plan of structuring: *essentia matrimonii—elementa essentialia matrimonii*. In order to give more examples, it is enough to point to the characteristic subtitle in the study under discussion: *Die Hinordnung der umfassenden Lebensgemeinschaft auf Grund ihrer natürlichen Eigenart (auf zwei Wesenssektoren)*.[94] This is, of course, a conceptual construction in parentheses (which refers to two *sectors* of the essence of marriage), which can and should be questionable. The canonist explains: the Pontifical Commission has not taken the view at any stage of the reform that there is only one *sector* of the essence of a marriage with two profiles, and has already strongly contested any hierarchical subordination.[95] It is worth wondering whether the attachment to the concept of "sector" in these terms carries the risk of at least partial distortion of the research results? It is clear with the naked eye that the "sector" vision of the essence of marriage—a concept of completely separate, autonomous sectors—is not an adequate tool in the explanation of *essentialia in matrimonio*. Indeed, the fundamental shortcoming of using here the method of "separation" is ignoring the truth that the natural orientation of

[91] Ibid. Cf. Lüdecke, *Eheschließung als Bund*, 59–64, 101–102.

[92] Lüdecke, Der Ausschluss des *bonum coniugum*, 143.

[93] Indeed, in a way, it is understandable. From the beginning, the codification work was accompanied by the assumption that in the "area" of the essentia matrimonii—until now (in CIC 1917), which referred exclusively to procreation—the "area" corresponding to the personal partnership (*relatio personalis coniugum*) should be distinguished (in other words: separated, detached). Cf. *ComCan*, vol. 3 (1971): 70; *ComCan*, vol. 7 (1975): 37.

[94] Lüdecke, Der Ausschluss des *bonum coniugum*, 152.

[95] Ibid., 159.

marriage (cf. CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1) is in fact a unitary *ordinatio ad famialiam*.[96] He rightly points out ponens in the not yet published rotal judgment: "Matrimonial aims are so interconnected and synchronized with one another that they cannot be separated."[97]

D. The program connecting of *vetera et nova*[98] is one of the determinants of the ideological trend in matrimonialistics associated with the name of Javier Hervada, carried out as part of a broad project of the Pamplona School entitled "Juridical Realism."[99] What needs to be noted at the beginning of this brief description[100]—this prominent canonist finds an optimal, "personalistic" foundation for his concepts. He emphasizes the importance of matrimonial love in decoding and describing the legal structure of canonical marriage.[101]

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[96] Cf. John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 5. cf. Joan Carreras, "La dimensione giuridica del matrimonio e della famiglia," in *Il concetto di diritto canonico. Storia e prospettive*, ed. Carlos J. Errázuriz and Luis Navarro (Milano: Giuffrè, 2000), 191–205.

[97] "Hoc est significatum quod Codex, recolens terminologiam Concilii Vaticani II, exprimit cum asserit quod consortium totius vitae quod constituunt coniuges per foedus matrimoniale est "Indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum" (c. 1055 § 1), fines qui sunt inter se connexi et coordinati quin separari possint. Unusquisque finis alterum exigit, et ad suam realizationem collaborat. Haud agitur veluti de duobus partibus saparatis vel superpositis, sed de una tantum realitate – consortio ab utroque coniuge constituto – quae ex natura sua illam duplicem dimensionem progressus vitalis continet: relatio propria coniugum, bonum integrale alterius quaerens, exigit donationem et acceptationem integram dimensionis "sexuatae" uniuscuiusque consortis, et consequenter potentialem paternitatem et maternitatem eius. Quaerere bonum coniugum (mutuum adiutorium, compenetratio affectiva et solidalis inter eos) haud est possibile sine ordinatione ad prolem, id est, sine apertura ad generationem (et educationem) filiorum. Immo, bonum coniugum secum fert ordinationem ad prolem. Secus, haud datur bonum coniugum, secundum ordinationem naturalem matrimonii. Itemque, haud possibile erit quaerere bonum prolis, veluti praescindendo a persona coniugis seu a suo bono; aut intentio filium generandi simpliciter ad sibi providendum haeredem vel aliquem qui suipsius continuitatem repraesentet, omnino sine consideratione personae alterius coniugis, qui hoc modo uti merum instrumentum vel medium ad talem finem obtinendum tractatus esset. Breviter, fines, omnes, matrimonii inter se connexi et harmonice coordinati et complementares sunt in unitate matrimonii, ac non est possibilis exclusio alicuius." Sentence of Oct. 29, 2012 coram Heredia Esteban (*Paulopolitana et Minneapolitana*), n. 7. Prot. N. 20.428.

[98] This symbolic title was given by the Canonist to the famous, two-volume-long issue of his works: Javier Hervada, *Vetera et Nova. Cuestiones de Derecho Canónico y afines (1958–1991)* (Pamplona: Servicio de Publicaciones de la Universidad Navarra, 1991).

[99] See: Javier Hervada, *Qué es el derecho? La moderna respuesta del realismo jurídico* (Pamplona: EUNSA, 20082).

[100] More on this leading trend in matrimonialistics: Pastwa, *Istotne elementy małżeństwa*, 275–312.

[101] Javier Hervada, *Diálogos sobre el amor y el natrimonio* (Pamplona: EUNSA, 19873); Javier Hervada and Pedro Lombardía: *El Derecho del Pueblo de Dios. Hacia un sistema de Derecho canónico*, vol. 3/1: *Derecho Matrimonial* (Pamplona: Universidad de Navarra, 1973), 93–105.

And because in his scientific contemplation he distances himself from any innovative ideas of breaking with the tradition or, even more so, undertaking "Copernican Revolutions"—he defends the importance of the natural directing of marriage towards the "good of offspring" (*bonum prolis*) and consistently devotes a lot of space to emphasizing the parental dimension of *amor coniugalis*.[102]

In such a formal and substantive context, the key[103] to the entire *de matrimonio* theory of the Spanish canonist is situated. This is about a famous formula, the influence of which on the direction of research of both the Pamplona master himself and the followers of his thoughts cannot be overestimated today—it is the defining of marriage as "unity in nature" (*unidad en la naturalez*; *possibly unidad en las naturalezas*). What is important is that, according to Javier Hervada, this central matrimonial concept (and at the same time a paradigmatic starting point for analyses in the area of *essentia matrimonii*) cannot be by any means treated as an axis of abstract speculative considerations. On the contrary, its "personalistic" realism,[104] which by its very nature refers to the immanence of the right to a concrete interpersonal matrimonial reality, goes hand in hand with the methodical, well thought-out source embedding of the research contemplation. Here, the canonist sends out a strong signal: as it is true that in the face of contemporary subjective and libertarian relativization of the person's sexual sphere,[105] the whole (!) "Church's tradition affirms the natural juridical character of marriage."[106] It is also true that "unity in nature" is invariably (!) a metaphysical and legal incarnation of the biblical *una caro*,[107] as proven by the brilliant thought of, among others, St. Thomas Aquinas.

Indeed, the above idea acquires a convincing force when the personalistic profile of the reconstructed structure of marriage is—following Aqui-

[102] Hervada, Lombardía, *El Derecho del Pueblo de Dios*, 96.

[103] Zob. Carlos Juan Errázuriz, "La capacità matrimoniale vista alla luce dell'essenza del matrimonio," *IusEcc*, vol. 14 (2002): 634–637.

[104] Here it should be noted that Javier Hervada's general vision of the law as "what is right or just" is complemented by the programmatic reduction of the right to specificity: *La legge naturale è sempre un giudizio deontologoci che nasce in relazione ad una situazione concreta*. Javier Hervada, *Introduzione critica al diritto naturale* (Milano: Giuffrè, 1990), 158. See in-depth studies on this concept of (marital) law: Carlos Juan Errázuriz, *Il diritto e la giustizia nella Chiesa. Verso una Teoria Fondamentale del diritto canonico* (Milano: Giuffrè, 2000); Fernando Puig, *La esencia del matrimonio a la luz del realismo jurídico* (Pamplona: Navarra Gráfica Ediciones, 2004).

[105] Cf. Francis, Apostolic Exhortation *Amoris Laetitia* (April 8, 2016), nn. 41–42.

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

[107] Hervada and Lombardía, *El Derecho del Pueblo de Dios*, 23–31. On the convergence of this concept with the papal magisterium of John Paul II, see: Juan Carreras, "Commento al discorso di Giovanni Paolo II al Tribunale della Rota Romana in occasione dell'apertura dell'anno giudiziario," *IusEcc*, vol. 9 (1997): 774–782.

nas—based on the analyses of the legal value of *dilectio* (love of choice). Javier Hervada rightly states that it is only in the context of the "covenant of love" that it is possible to see, in a proper and full light, not so much the separated objectives but the purposefulness of the institutional "unity of two." Purposefulness—which appears to belong to the spouses': man (husband) and woman (wife), potentiality.[108] It is rooted in their personal nature *vis unitiva et operativa*,[109] with a unique dynamic and historical profile.[110] "No different is a man's understanding of the dimension of potential paternity and a woman's understanding of potential motherhood. Indeed, opening up to children is about loving another person in terms of a potential father or mother."[111]

However, there is a certain scratch on such a carefully drawn Pamplona concept of canonical matrimony. Paradoxically, the discovery and promotion of this incisive idea (*unidad en la naturaleza*) has translated into a clear domination of the optics of *esse*—a focus on the "static" matrimonial node and, at the same time, a noticeable deficiency of *fieri* optics—omitting some of the rationale dictated by the dynamics of the personal covenant.[112] And is it not so that the biblical *una caro* ("matrimonial" archetype in the research of the Spanish canonist), read through the prism of the "personalistic principle,"[113] in terms of content, goes beyond what the concept of the "unity in nature" implies? In fact, this kind of objection is directly triggered by the problem of the "person" in matrimonial law, which is reflected here. It is therefore worth asking in more detail about the conformity of the nodal thesis of the founder of the Pamplona School: the subject of matrimonial consent are the betrothed, the man and the

[108] "Given that man and woman have a natural ontological structure whose dynamism is subordinated to natural goals, true conjugal love consists in loving the other according to this natural structure and according to these goals. In this way, authentic conjugal love extends to the purposes". Javier Hervada, "Obligaciones esenciales del matrimonio," *Ius Canonicum*, vol. 31 (1991): 72.

[109] St. Thomas Aquinas, *Summa theologica*, I, q. 20, a. 1.

[110] Cf. Hervada, *Libertad, naturaleza y compromiso*, 100–103.

[111] Ibid., 73.

[112] The almost exclusive presence of the *facto esse* perspective in Javier Hervada's theory of marriage naturally raises doubts as to whether the program attention to the continuity of the doctrinal tradition allows the canonist to actually distance himself from the ideological 'baggage' of CIC 1917 and fully reject the neo-scholastic treatment of the person in the utilitarian and instrumental sense—as subordinated to *ordinatio ad fines*.

[113] It is perfectly legitimate for José María Serrano Ruiz to point out that the 'body' in Biblical (Hebrew) language has a deep meaning: it embraces the whole life and human condition. And that is why it is a good conclusion: *Mi sono permesso di esprimere „tout court" il vero senso della locuzione biblica „una sola carne" per „una sola vita umana."* José María Serrano Ruiz, "L'esclusione del consortium totius vitae," in *La simulazione del consenso matrimoniale canonico* [Studi Giuridici, vol. 22] (Città del Vaticano: LEV 1990), 113, n. 54.

woman in their "matrimoniality"[114]—with the implications of the magisterial, John Paul II's hermeneutics of the "gift of a person."[115]

The suggestions of certain corrections made by the research trail—precisely by reference to the authority of the CIC 1983 and CCEO Code Giver—do not seem unreasonable. In short, the two substantive issues in Javier Hervada's excellent output require clarification, or perhaps reevaluation. The first one is connected with the demonstrative caution when it comes to the results of the work of the Pontifical Commission for the Revision of the Code of Canon Law; to put it bluntly, the famous canonist was not eager to rush to modify his already widespread theory of marriage under their influence. That is the only explanation for the total omission (!) of "the good of the spouses" (*bonum coniugum*) in the commentary to can. 1055 § 1 (CIC 1983), issued in 1987.[116]

While in the abovementioned subject it was only a matter of time before the state of full compatibility[117] with official doctrine was reached (yes, the fact is that the canonist's position has evolved), the second issue is already more serious, because it is systemic. In Javier Hervada's presentations of matrimonial obligations (and rights)—also when their listing is announced by the title of the study[118]—it is useless to look for an essential obligation of the betrothed: equality of matrimonial rights, with the content of can. 1135, CIC 1983. It can be said that the omission of this hermeneutical context is detrimental to the authenticity of the "program" formula: "marriage is a unity in nature, which means a community of life and love."[119] There is no important link in the chain of *de substantia matrimonii*: marriage is a community of persons with equal dignity and equal rights, modified by sexual diversity. Needless to say, this missing link affects the truthfulness (and "personalistic" realism!) of every specific project of a marriage covenant, in which the betrothed: man and woman, enjoy the same right of co-design, co-determination and cooperation[120] "to those things which belong to the partnership of conjugal life."[121]

Thus, there is one remarkable conclusion: the appropriateness of the research on *essentialia* in marriage—and its location in the very center of the personalis-

[114] Javier Hervada, *Studi sull'essenza del matrimonio* (Milano: Giuffrè, 2000), 288.

[115] Podobnie stawia kwestię: Juan Carreras, "L'antropologia e le norme di capacità per celebrare il matrimonio (I precedenti remoti del canone 1095 CIC '83)," *IusEcc*, vol. 4 (1992): 134–135.

[116] Javier Hervada, "Il matrimonio /cc. 1055–1062/," in *Codice di Diritto Canonico. Edizione bilinque commentata*, vol. 2, ed. Pedro Lombardía and Juan Ignacio Arrieta (Roma: Logos, 1987), 749.

[117] See the change of standpoint of the canonist: Hervada, *Studi sull'essenza*, 335–340.

[118] Hervada, "Obligaciones esenciales del matrimonio," 59–83.

[119] Hervada, *Studi sull'essenza*, 271.

[120] Cf. Klaus Lüdicke, "Matrimonial Consent in Light of a Personalist Concept of Marriage: On the Council's New Way of Thinking about Marriage," *SCan*, vol. 33 (1999): 489–492.

[121] CIC 1983, can. 1135; cf. CCEO, can. 777.

tic current of Vaticanum II's renewal—can only guarantee a harmonious agreement between the two planes of the canonical matrimony: *fieri* and *facto esse*.[122]

2. "An Indissoluble Bond between the Persons"—The Relevance of the "Harmonisation" Postulate

The scientific exploration of the original concepts of canonical matrimony in the broad stream of the personalistic renewal, in terms of the quality of communication of the *esse et agere* of the people-authors of the matrimonial covenant event (depicted in the canons of CIC 1983 and CCEO), brings—one might think—relevant conclusions. The analysis shows, above all, that before doctrine and jurisprudence, there is still an unfulfilled (!) task of full adaptation of the conciliar image of "the intimate partnership of married life and love,"[123] a picture that harmoniously integrates two dimensions of marriage: personal and institutional. What needs to be made clear at the same time is that it is neither an exaggerated nor an isolated assessment. The deficit of this all-embracing, coherent vision in the interpretation/application of the norms of the code of matrimonial law was very bluntly revealed in 1997 by the outstanding canonist of the Pontifical Gregorian University, a great authority in the field of canonical matrimonial law, Urbano Navarrete:

> In the last thirty years since the Council, the opposition between the personal and institutional dimension of marriage has been a thorn in matrimonial doctrine and Church judicial decisions. Until now […] neither doctrine nor jurisprudence has been able to produce a "harmonious synthesis" of all the structural elements [matrimonium canonicum—A.P.]. The consequences of this should be considered as highly negative.[124]

In the famous monograph *Il matrimonio canonico tra principi astratti e casi pratici*,[125] published a decade ago, the famous Italian canonist Ombretta

[122] Cf. Andrzej Pastwa, "Il matrimonio: comprensione personalistica e istituzionale," *IusEcc*, vol. 25 (2013): 394–396.

[123] *Gaudium et Spes*, no. 48.

[124] Urbano Navarrete, "Commentarium ad allocutionem Ioannis Pauli II ad praelatos et officiales Rotae Romanae, die 27 ianuarii 1997 habitam," *Periodica de re canonica*, vol. 86 (1997): 375.

[125] Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*.

Fumagalli Carulli, in a way meeting the abovementioned postulate ("harmonious synthesis"), announces a program of consolidation of the theory and practice of the renewal of canonical matrimonial law around the project of "an indissoluble bond between the persons"[126]—with a precisely defined methodological strategy: a radical appreciation of the "person" in marriage, in accordance with the parameters of a renewed theological anthropology (*tutela della persona*) in the broader context of harmonizing the personal description of marriage with the criteria of the canonistic tradition according to the paradigm of the *aggiornamento* of the Second Vatican Council (*armonizzazione conciliare*).[127] This program approach, concentrated on an adequate and comprehensive illumination of the truth about *essentialia in matrimonio*, is in practice a testimony: on the one hand, of highlighting/concentrating on the importance of historical sources, the legal anthropology of marriage and the rules of juridical hermeneutics (with the key requirement to reconcile the letter of the law with the spirit of the Council's magisterium), on the other hand, of being very consistent in harmonizing current statements with traditional ones and, above all, ensuring harmony within the *substatnia matrimonio* between *ordo procreationis* and *ordo caritatis*.[128]

From what has been presented so far, it is clear that it is still reasonable to ask how the study of canon law and Church judicature relates to the passages of the Council's magisterium, which adapts the long tradition of Catholic teaching on matrimony to the present day[129]? More precisely, what meaning is attached in this context to the paradigmatic idea of "harmonization,"[130] which, after all, has been taken up and affirmed by the authors of the CIC and CCEO reforms themselves? The importance of such an approach is best demonstrated by the fact that only a correct reading of the "irrevocable personal consent"[131] (of a strictly "personalistic" profile, as opposed to the overly institutionalized "contractualistic" version) makes it possible to harmoniously integrate in the covenant—on

[126] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4.

[127] This strategy is heralded by the title of a study announced by the author 20 years earlier: "Armonizzazione conciliare e tutela della persona nel nuovo codice di diritto canonico."

[128] Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*, 95; cf. Fumagalli Carulli, *Il governo universale della Chiesa e i diritti della persona. Con cinque Lezioni magisteriali di: Giovanni Battista Re, Crescenzio Sepe, Mario Francesco Pompedda, Jean-Louis Tauran, Julián Herranz* (Milano: Vita e Pensiero, 20083), 173–189.

[129] Andrzej Pastwa, "Kanonické paradigma nerozlučitelnosti. O vztahu přirozenosti a kultury v katolickém chápání manželství," *Studia Theologica*, vol. 22 , no. 2 (2020): 91–97.

[130] Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*, 103–104; Fumagalli Carulli, "Il Concilio Vaticano II e il matrimonio canonico: capacità e consenso nella convergenza tra pastorale e diritto," *Jus*, vol. 60, no. 2 (2013): 211–229.

[131] *Gaudium et Spes*, n. 48; see José María Serrano Ruiz, "Visione personale del matrimonio nel CCEO: aspetti sostanziali e di diritto procedurale," *Iura Orientalia*, vol. 7 (2011): 121–139; Andrzej Pastwa, "*Irrevocabilis consensus personalis*. Antropologické předpoklady systému manželského práva v CCEO," *Studia Theologica*, vol. 18, no. 2 (2016): 75–89.

the basis of the axio-normative order: the rationality and purposefulness of *persona humana* nature—of the "matrimonial" project with the "family" project.

Therefore, valuable in matrimonialistics are programs of consolidation[132] of theory and practice, like the one of the aforementioned Italian canonist. In her opinion, the "idea of harmonization" of the matrimonial doctrine in the spirit of the Council, an idea which the Pontifical Commission for the Renewal of the CIC had before its eyes, both then and nowadays, finds its concrete shape in the weave of seven key doctrinal threads which are like links in a single chain in relation to one other. These are: (a) a personalistic reconstruction of the subject of consensus, invoking the *totalitas* of the personal dedication of the spouses, (b) the identification of marital *communio-consortium* as constituted in the covenant of inter-personal communion/communication of the spouses, (c) the clarification of the legal value of marital love, (d) the full adaptation of the formula *una caro*—in the meaning: "unity of heart" and not only "unity of body" in the definition of the completion of marriage, (e) the deepening of the relationship between consensus and faith in the context of the inviolability of the principle *eo ipso sacramentum*, (f) the application of the conciliar inspirations relating implicitly to *bonum coniugum* in the Church jurisprudence.[133]

At this point, the matter should be made clear: a canonist (theoretician) and a Church judge (practitioner) cannot dispense from answering the nodal questions in contemporary matrimonialistics: how to effectively implement the "program" of levelling the opposition between the personal and institutional dimension of marriage if we refer to the negative Urbano Navarrete's desideratum; and, following in the footsteps of Ombretta Fumagalli Carulli's program thought, how to positively present a harmonized picture of matrimonial doctrine? Indeed, these questions are unavoidable and their contents cannot be ignored if one takes seriously the appeal/testament of Pope John Paul II from his last speech to the Roman Rota (2005) about "the duty to conform to the truth about marriage as the Church teaches it."[134] It is not difficult to see what is the quintessence of the message formulated by unparalleled promoter of personalism—the Pope of the Family. How could it be otherwise—fidelity towards the assumptions of the conciliar idea of "harmonization," that is, looking at marriage through the prism of a coherent personal and institutional perspective. Consequently, acceptance

[132] An example of this is the scientific activity of the eminent Swiss canonist Eugenio Corecco, who strongly argued in particular for overcoming the dualism between the natural dimension of the institution of matrimony and the spiritual reality of the sacrament. See: Eugenio Corecco, "Il matrimonio nel nuovo Codex Iuris Canonici. Osservazioni critiche," in *Studi sulle fonti del diritto matrimoniale canonico* (Padova: Cedam, 1988), 105–130.

[133] Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*, 105–120.

[134] John Paul II, "Address to Members of the Tribunal of the Roman Rota" (January 29, 2005), n. 1, http://www.vatican.va/content/john-paul-ii/en/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota.html, accessed: December 13, 2018.

of this idea means, no more no less, a confirmation of a simple relationship: the full/integral truth about the "unity of two" flows, as from the spring, from the full/integral truth about the human person. Such and only (!) such reading of the "signs of the times" (and their response in the form of a methodical turn towards an "adequate" anthropology) can place an effective stop to the permeating the Church anthropological and legal thought of "an individualistic culture, which is antithetical to a true personalism,"[135] with accompanying negative phenomena: "unjust formalism"[136] and "pragmatic or convenient minimalism"[137]—as John Paul II repeatedly appealed to the dignified body of judges of the Roman Rota and the church judiciary. Today, it is no longer necessary to convince anyone that the lack of an adequate response, decisive and synchronized reaction in both areas of matrimonializm (the theory of doctrine and praxis of ministry) is *de facto* a consent to the spread of "culture of the ephemeral."[138] The far-reaching consequences are easy to predict. To paraphrase Benedict XVI, the interpersonal reality of life and conjugal love will remain in the consciousness of Christians extrinsic to the "juridical" institution of marriage.[139]

It is, therefore, clear that the thought of the interpreter (and the one applying the law) of the normative description of marriage in CIC 1983 should invariably be accompanied by a renewed reading of the anthropological paradigm ("they are no longer two, but become one"),[140] taking into account the contemporary socio-cultural context.[141] In other words, if one follows the "true legal anthropology of marriage,"[142] recommended in the papal teaching, then an adequate interpretation of the canons of matrimonial law asks to take into account the *integrum* of the human person in all its metaphysical richness (as a sexually diverse personal structure of man and woman). What should be borne in mind here—the existential realization of the matrimonial-family covenant project means, as a matter of fact, the fulfilment of the content of a love commitment (*consensus essentialiter amorosus*)—according to the rule: the personal

[135] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4.

[136] John Paul II, "Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year" (January 29, 2004), n. 5.

[137] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4.

[138] Francis, Apostolic Exhortation *Amoris Laetitia* (April 8, 2016), n. 39.

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

[140] See: Andrzej Pastwa, "'Już nie są dwoje, lecz stają się jednością'. Paradygmat antropologiczny wyznacznikiem prawno-kanonicznego ujęcia natury węzła małżeńskiego," in *"Mężczyzną i niewiastą stworzył ich". Afirmacja osoby ludzkiej odpowiedzią nauk teologicznych na ideologiczną uzurpację genderyzmu*, ed. Andrzej Pastwa (Katowice: Księgarnia św. Jacka, 2012), 134–152.

[141] Pastwa, *Kanonické paradigma nerozlučitelnosti*, 85–86.

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

good of each spouse becomes the good of his or her children.[143] Does the essence of the matrimonial-family bond not express itself in the fact that each of the mentioned persons "asserts his personal dignity by living in accordance with the profound truth of his being"[144]? Hence the importance of the proclamation of Pope John Paul II: "An authentically juridical consideration of marriage requires a metaphysical vision of the human person and of the conjugal relationship."[145]

The assumptions formulated in such a way are encountered by a "personalistic" reading of the important *locus theologicus* from the Book of Genesis,[146] which goes far beyond simply confirming the importance of human sexuality in the constitution and realization of the conjugal community of destiny (*consortium*). Suffice it to say that the objective (rooted in nature) binarism of the sexes is manifested *in concreto* in the "unity of the two" which is brought to life according to the rules of structural union of the person with his sexuality.[147] Indeed, the value of the latter in the act of consensus taken up by the betrothed should be considered as a personal and communion-forming dynamism integrated in oblative love. Thus, sexuality defines the overall dynamics of mutual giving of oneself and acceptance of persons in a concrete "partnership of the whole of life,"[148] and thus equally "stigmatizes" the profile of its complementary aims: the personal well-being of spouses and the personal well-being of their children.[149]

The proclamation of the anthropological paradigm in the contemporary magisterium *de matrimonio* reaches a specific climax in the truth about the covenant of matrimonial love. It is in the love of the spouses that this totality (*totalitas*) has its source, which is revealed by the essential qualities of marriage: unity and indissolubility. The true personal gift that underlies the matrimonial *consortium*/*communion* is undivided and definitive (because the essence of the loving gift of persons is its integrity and irrevocability). Only on such foundation can a "unity of two" emerge: a faithful and inseparable communion of persons with a "programmed" transformational dynamism of a personal and interpersonal nature of

[143] John Paul II, Letter to Families *Gratissimam Sane* (February 2, 1994), n. 10.

[144] John Paul II, Encyclical Letter *Veritatis Splendor* (August 6, 1993), n. 53.

[145] John Paul II, "Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year" (January 29, 2004), n. 7.

[146] Gen 2, 24; cf. Mt 19, 6.

[147] Tonino Cantelmi and Martina Aiello, "Il modo di essere e farsi persona-uomo e persona-donna nella relazione interpersonale," in *La centralità della persona nella giurisprudenza coram Serrano*, vol. 3, ed. Maria C. Bresciani [Studi Giuridici, vol. 86], (Città del Vaticano: LEV, 2009), 8–9.

[148] CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1.

[149] Cf. José María Serrano Ruiz, *L'ispirazione conciliare nei principi generali del matrimonio canonico*, in: *Matrimonio canonico fra tradizione e rinnovamento* (Bologna: EDB, 19912), 55–58.

a man ("husband of wife") and a woman ("wife of husband").[150] In the present optics, matrimonial consent[151] can be described as a matrimonial-family project of personal growth, covering the welfare of spouses, offspring, the Church and human community.

Even in a synthetic study of the subject, it is difficult not to contemplate upon the content of the canon, which is not yet sufficiently exposed in CIC 1983 (see chapter: "The Effects of Marriage"), but already occupies a prominent place in the CCEO, right after the first canon defining marriage. This is a recipe with a simple but important message: "Each spouse has an equal duty and right to those things which belong to the partnership of conjugal life." [152] The eminent German canonist Klaus Lüdicke is right when he states that the principle of equal rights in marriage, expressed in can. 1135, is the basic structure[153] of the conjugal community described by the Church legislature as *consortium*. Accepting the spouse (in his or her masculinity/femininity) and making him or her an inseparable companion of the "all-embracing" community of destiny means an axiological confirmation of the person of the married partner as an equal subject and co-creator of the "unity of two." The personalistic vision of marriage as a community of persons with equal dignity and equal rights, which is fully revealed here, is legally relevant in the practice of married life assumed *in consenso*: co-design, co-deciding, and cooperation in everything.[154]

* * *

In conclusion, a serious (in a much broader research) confrontation with the subject, that is, the "Person" in the Code of Matrimonial Law (CIC and CCEO), is an invariably relevant challenge that the study of canon law and jurisprudence have to face. The argument for the validity of this conclusion is provided by the famous John Paul II's thesis, proclaimed in the Exhortation *Familiaris Consortio* (1981)[155] and the famous 1997 Address to the Roman Rota,[156] which can be summarized in the following words: the foundation and structural principle of

[150] See: Andrzej Pastwa, "Intima personarum et operum coniunctio – personalistyczny profil José Marii Serrano Ruiza idei małżeństwa kanonicznego," in *"Servabo legem tuam in toto corde meo." Księga pamiątkowa dedykowana Księdzu Profesorowi Józefowi Krzywdzie CM, Dyrektorowi Instytutu Prawa Kanonicznego UPJPII z okazji 70. rocznicy urodzin*, ed. Arkadiusz Zakręta and Andrzej Sosnowski (Kraków: Uniwersytet Papieski Jana Pawła II w Krakowie. Wydawnictwo Naukowe, 2013), 397–410.

[151] CIC 1983, can. 1057; CCEO, can. 776 § 1, 817 §§ 1–2.

[152] CIC 1983, can. 1135.

[153] Klaus Lüdicke, *Die Nichtigerklärung der Ehe. Materielles Recht*, [Beihefte zum Münsterischen Kommentar, Bd. 62], (Essen: Ludgerus Verlag, 2012), 23.

[154] Lüdicke, "Matrimonial Consent," 489–492.

[155] John Paul II, Apostolic Exhortation *Familiaris Consortio* (November 22, 1981), no. 13, 17.

[156] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), no. 3.

interpersonal (ethical and legal!) relationships in marriage is matrimonial love. Indeed, this axiom—still not quite present in the thoughts of canonists and church judges—reflects the deepest truth, of which "prophetically" the author of the monumental works *Love and Responsibility* and *The Acting Person* gave testimony; the truth that not elsewhere, but in the conciliar spiritually person-centric vision of marriage community (*communio*/*consortium*), a hermeneutic key should be sought for an adequate and complete understanding of the structure of marriage, harmoniously integrating its two personal and institutional dimensions.

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Andrzej Pastwa

La « personne » en droit matrimonial CIC et CCEO Autour de l'idée d'harmonisation *vetera et nova* dans la doctrine ecclésiastique et dans la jurisprudence

Résumé

Aborder sérieusement le sujet de la « Personne » dans le droit matrimonial du Code Canonique (CIC et CCEO) constitue un défi – invariablement actuel – auquel sont confrontés les études canoniques et la jurisprudence. L'argument en faveur de la validité de cette affirmation est fourni par la célèbre thèse de St. Jean-Paul II proclamée dans l'exhortation *Familiaris consortio* (1981) et dans le fameux discours en 1997 ; on peut la résumer ainsi : le fondement et le principe structurel des relations interpersonnelles (éthiques et légales !) dans le mariage est l'amour conjugal. Cet axiome – encore assez peu présent chez des canonistes et des juges d'église – reflète la vérité la plus profonde dont l'auteur des œuvres monumentales « Amour et responsabilité » et « La personne et l'action » a témoigné « prophétiquement » ; il est vrai que ce n'est que dans la vision de la communauté matrimoniale (*communio*/*consortium*), vision centrée sur la personne et issue de l'esprit conciliaire, il faut chercher une clé herméneutique pour une compréhension adéquate et complète de la structure du mariage, unissant harmonieusement ses deux dimensions personnelle et institutionnelle.

La brillante pensée de Karol Wojtyła / Jean-Paul II est confrontée dans cette étude aux prémisses confirmant l'hypothèse que l'identification déclarative avec l'idée d'*aggiornamento* personnaliste ("programmé" en particulier dans les nombres 47–52 de la constitution conciliaire *Gaudium et spes),* présente dans les opinions / concepts exprimés, ne garantit en aucun cas l'adéquation et l'exhaustivité des concepts canoniques de la « vérité du mariage ». Tant dans le domaine de l'exposition théologique conforme au Magistère (à la lumière de « l'image de Dieu ») qu'au niveau de la *praxis* : interprétation et application des dispositions normatives dans les canons fondamentaux du CIC et du CCEO. La première partie de l'étude est consacrée à une illustration d'un tel état de l'art – dans diverses propositions de doctrine et de jurisprudence : en commençant par une conception totalement inexacte et vouée à l'échec ; par une conception qui, en raison d'une approche très conservatrice à la nécessité de l'harmonisation *vetera et nova*, n'a pas résisté à l'épreuve du temps, jusqu'à des conceptions qui sont, en effet, communément reconnues dans les études canoniques, mais aux auteurs desquelles (ou à leurs adhérents) on peut, cependant, proposer des suggestions de corrections nécessaires : plus grandes ou plus petites. Dans la deuxième partie, la réflexion porte sur les conclusions découlant de la mise en œuvre du postulat conciliaire de « l'harmonisation » dans la présentation de la vision du mariage centrée sur la personne. Les remarques synthétiques faites mènent à montrer les fondements d'une

interprétation adéquate de la formule adoptée par les deux codes annoncés dans le titre : « une communauté de vie ».

Mots-clés : personne, personnalisme de Karol Wojtyła / Jean-Paul II, anthropologie juridique du mariage, code du droit matrimonial (CIC et CCEO), conceptions personnalistes du mariage canonique, postulat conciliaire de l'« harmonisation »

Andrzej Pastwa

La "persona" nel diritto matrimoniale CIC e CCEO Intorno all'idea di armonizzazione *Vetera e Nova* nella dottrina ecclesiastica e nella giurisprudenza

Sommario

Affrontare seriamente il tema della "Persona" nel diritto matrimoniale del Codice Canonico (CIC e CCEO) costituisce una sfida– invariabilmente attuale – che si confronta con gli studi canonici e la giurisprudenza. L'argomento della validità di questa affermazione è fornito dalla famosa tesi di san Giovanni Paolo II proclamata nell'esortazione *Familiaris consortio* (1981) e nel famoso discorso del 1997; lo si può riassumere così: il fondamento e il principio strutturale delle relazioni interpersonali (etiche e legali!) nel matrimonio è l'amore coniugale. Questo assioma – ancora poco presente tra canonisti e giudici ecclesiastici – riflette la verità più profonda di cui l'autore delle opere monumentali quali "Amore e responsabilità" e "La persona e l'azione" ha testimoniato "profeticamente"; è vero che solo nella visione della comunità matrimoniale (*communio/consortium)*, visione centrata sulla persona e risultante dallo spirito conciliare, si deve ricercare una chiave ermeneutica per una comprensione adeguata e completa della struttura matrimoniale, unendo armoniosamente le sue due dimensioni: personale e istituzionale.

Il brillante pensiero di Karol Wojtyła/Giovanni Paolo II si confronta in questo studio con le premesse confermanti che l'ipotesi dell'identificazione dichiarativa con l'idea di *aggiornamento* personalista ("programmato" in particolare nei numeri 47–52 della costituzione conciliare *Gaudium et spes*), presente nelle opinioni/concetti espressi, non garantisce in alcun modo l'adeguatezza e l'esaustività dei concetti canonici della "verità del matrimonio". Sia nel campo dell'esposizione teologica conforme al Magistero (alla luce dell'"immagine di Dio"), che a livello della *praxis*: interpretazione e applicazione delle disposizioni normative nei canoni fondamentali del CIC e del CCEO. La prima parte dello studio è dedicata all'illustrazione di tale stato dell'arte – in diverse proposizioni dottrinali e giurisprudenziali: a partire da una concezione totalmente imprecisa e perciò inevitabilmente destinata al fallimento; per un approccio molto conservatore alla necessità di armonizzazione *vetera e nova* che non ha resistito alla prova del tempo, fino a progetti che sono, appunto, comunemente riconosciuti negli studi canonici, ma ai cui autori (o ai loro aderenti) possiamo, tuttavia, offrire suggerimenti per le correzioni necessarie più o meno significative. Nella seconda parte, la riflessione si sofferma sulle conclusioni che scaturiscono dall'attuazione del postulato conciliare di "armonizzazione" nella presentazione della visione del matrimonio centrata sulla persona. Le sintetiche considerazioni fatte portano a mostrare i fondamenti di un'adeguata interpretazione della formula adottata dai due codici annunciati nel titolo: "una comunità di vita."

Parole chiave: persona, personalismo di Karol Wojtyła / Giovanni Paolo II, antropologia giuridica del matrimonio, codice di diritto matrimoniale (CIC e CCEO), concezioni personaliste del matrimonio canonico, postulato conciliare di "armonizzazione"

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"Person" in the Polish Family and Guardianship Code

Abstract: The article presents the issues related to the understanding of the person in the Polish Family and Guardianship Code. It shows the complex issue of acquiring legal capacity, including the legal capacity of the conceived child, the relation between parental authority and the child, adoption of the child, the acquisition and scope of capacity for legal acts, as well as some limitations resulting from incapacitation were showed.

Keywords: person, child, conceived child, parental authority, incapacitated person

The Family and Guardianship Code,[1] which has been in force in Poland since 1964, is a set of norms regulating family relations and matters pertaining to the protection of the interests of minors over whom no parental authority is exercised as well as the interests of fully incapacitated adults. It is considered to be a section of the Civil Code due to the civil approach to regulating family relations whereby all sides have equal status, and any resulting disputes are settled by the court.[2] However, given the specificity of legal relations arising from family law, it constitutes a separate codification. The article presents the term

[1] Ustawa Kodeks rodzinny i opiekuńczy, 25 II 1964, Dz. U. 1964, nr 9, poz. 59 z późn. zm. (last amendment: Dz. U. z 2020 r. poz. 1359). The Code has been amended many times. The English translation after: *The Family and Guardianship Code*, trans. Nicholas Faulkner (Warszawa: Wydawnictwo C. H. Beck, 2018). All the subsequent translations will be from this edition (hereinafter referred to as FG-C), unless otherwise specified.

[2] Marek Andrzejewski, *Prawo rodzinne i opiekuńcze. 5 wydanie zmienione i uaktualnione* (Warszawa: Wydawnictwo C. H. Beck, 2014), 3.

"person" as understood by the legislator in the Family and Guardianship Code and points to the complexity in its application to selected areas.

Each human being is a person from the very moment of their existence, however, a proper understanding of this concept was achieved only in Christianity which became the cradle of personalism. The theology of the person, which was developing throughout the first five centuries of Christianity, became the philosophy of the person owing to Boethius. He was a Roman philosopher, logic and theologian who lived at the turn of the 5th and 6th centuries. Boethius defined a human being as *rationalis naturae individua substantia*, that is, an individual substance of a rational nature.[3] This definition became the basis for all the subsequent attempts to define a human being.[4]

Since the beginning of Roman law, it has been recognized that a person in the legal sense is the one who can be a subject in legal relations.[5] In the Code, the term "person" refers to subjects of law with general legal capacity and capacity for legal acts such as: a spouse, a child, a minor, an incapacitated person, a guardian or a custodian.

Art. 8 § 1 of the Civil Code states: "Every human being has legal capacity from the moment of birth."[6] Legal capacity is the ability to be a subject of rights and obligations in civil law relations. "Birth" should be understood as the appearance of a living child outside the mother's body. According to the Regulation of the Minister of Health of 6 April 2020 on the types, scope and templates of medical documentation and the method of its processing,[7] a live birth is understood as "the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of

[3] Mieczysław Albert Krąpiec, *Człowiek i prawo naturalne* (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1986), 137. Boethius, Anicius Manlius Severinus Boëthius, Severinus of Pavia, born c. 480, died c. 524, More see: Marian Kurdziałek, "Boecjusz," in *Encyklopedia Katolicka* (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1985), vol. 2, col. 704–706.

[4] Bp Edward Ozorowski, "Personalizm chrześcijański," in *Rocznik Teologii Katolickiej*, IV(2005), 7–17, accessed January 25, 2021, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/5037/1/RTK_4_2005_E.Ozorowski_Personalizm_chrzescijanski.pdf.

[5] Wacław Osuchowski, *Rzymskie prawo prywatne. Zarys wykładu*, (Warszawa: Państwowe Wydawnictwo Naukowe, 1980), 158.

[6] The English translation after: *The Civil Code*, trans. Ewa Kucharska (Warszawa: Wydawnictwo C. H. Beck, 2018). All the subsequent translations will be from this edition (hereinafter referred to as CC), unless otherwise specified.

[7] Rozporządzenie Ministra Zdrowia z dnia 6 kwietnia 2020 r. w sprawie rodzajów, zakresu i wzorów dokumentacji medycznej oraz sposobu jej przetwarzania. The Regulation includes an appendix which contains the evaluation criteria used when making entries in the documentation regarding the duration of pregnancy, miscarriages, live and stillbirths, Dz. U. poz. 666 (as last amended on December 3, 2020, item 2350, legal state as per January 25, 2021).

voluntary muscles, whether or not the umbilical cord has been cut or the placenta has been severed."[8] Whereas a stillbirth is understood as "the complete expulsion or extraction from its mother of a product of conception, provided it occurs after the 22nd week of pregnancy, which, after such expulsion or extraction, does not breathe or show other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles."[9]

According to Art. 9 of the Civil Code it is presumed that when the child is born, he/she is born live.[10] Then, at the time of his/her birth,[11] the child becomes a natural person. Human rights are strictly connected with this very moment as each human being is entitled to them from the moment they are born into the world. The inherent dignity of a person is a source of human rights, which means that they stem from natural laws and are not granted by the state. They are inherent, which means that each person is entitled to them regardless of the will of the authorities. Human rights are also inalienable, which means that they cannot be waived. They are also inviolable and it is the duty of the state to guarantee their implementation and protection. Moreover, they are universal and concern each human being without any exceptions.

Recognizing the Conceived Child as the Person

The status of the conceived child is still a complex legal matter. The unborn child is defined as *nasciturus*,[12] which means "one who is to be born." Some jurists do not consider such a child to be a natural person and, thus, he/she does not have legal capacity.[13] Moreover, in the Family and Guardianship Code the

[8] Trans. Anna Bysiecka-Maciaszek.

[9] Trans. Anna Bysiecka-Maciaszek.

[10] It is a rebuttable presumption, the so-called *praesumptio iuris tantum*, that is, an assumption taken to be true unless proven otherwise.

[11] "The age of a natural person is calculated in years, with the time limits running from the day of birth (not the moment)" (trans. Anna Bysiecka-Maciaszek) – see Stefan Grzybowski, *Prawo cywilne. Zarys części ogólnej*, *Wydanie III poprawione*, (Warszawa: Państwowe Wydawnictwo Naukowe, 1985), 164.

[12] *Nasciturus* (from Latin *nascor, nasci, natus sum – one who is to be born*) is a term commonly used to refer to a conceived child and the unborn child. See: Antoni Dębiński and Maciej Jońca, *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia* (Warszawa: Wydawnictwo C.H. Beck, (2016), 244, 245.

[13] Grzybowski, *Prawo cywilne. Zarys części ogólnej*, 157–158, 162. Bronisław Walaszek was of a different opinion, "Nasciturus w prawie cywilnym," *Państwo i Prawo* (1956), zeszyt 7, 121 et seq. See: Jacek Mazurkiewicz, "Nasciturus w prawie cywilnym i karnym," *Palestra* 17/11(191), (1973), 37–43.

Polish legislator grants parental responsibility not earlier than at the time of child's birth. Therefore, in the doctrine, there is a dispute over legal capacity of the unborn child.[14] In Poland the Act on family planning, protection of the human foetus, and conditions for termination of a pregnancy[15] entered into force in 1993. Art. 1 point 1 regulates that "Each human being from the moment of their conception has the right to life," whereas point 2 guarantees as follows: "The life and health of the child shall be subject to protection from the moment of his/her conception."[16] Under the Act on Family Planning the unborn child acquired legal capacity and, consequently, a new paragraph was added in Art. 8 of the Civil Code stating that also the conceived child has legal capacity, however property rights and obligations are granted only if he/she is born alive. *Nasciturus* acquired full legal capacity to such non-property rights as: life, health, marital status—rights arising from being born to particular parents and the resulting consanguinity, as well as legal capacity—provided he/she is born live—as regards property rights. The provision included in § 2 of Art. 8 was in force for three years and was deleted in 1996 as a result of the Amendment to the Act on Family Planning,[17] which, in turn, was connected with the introduction of some regulations on abortion for social reasons. This created a possibility to terminate pregnancy "at woman's request"[18] and violated previous arrangements. However, in the judgement of 28 May 1997, the Polish Constitutional Tribunal overruled the provisions allowing termination of pregnancy for social reasons and in the justification it defined the standards of health and life protection of the conceived child.[19]

[14] Although legal capacity was not recognized in the Civil Code, in certain situations it was recognized in court judgements, for example see: the Judgement of the Supreme Court of 8 October, 1952, C 756/51, *Nowe Prawo* 5 (1953), 70–72; the Judgement of the Supreme Court of 8 January 1965, II CR 2/65, *Państwo i Prawo* 10(1957), 633; the Judgement of the Supreme Court of 4 April 1965, OSNC 1966/9/158; the Judgement of the Supreme Court of 3 May 1967, II PR 120/67, OSNC 1967/10/189.

[15] Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Dz. U. 1993, nr 17, poz. 78. The Act on family planning, protection of the human foetus, and conditions for termination of a pregnancy (hereinafter referred to as the Act on Family Planning) changed Ustawa z dnia 27 kwietnia 1956 r. o warunkach dopuszczalności przerywania ciąży (the Act of 27 April 1956 on the conditions of permissibility of abortion), Dz. U. 1956, nr 12 poz. 61.

[16] Trans. Anna Bysiecka-Maciaszek.

[17] Ustawa z dnia 30 sierpnia 1996 r. o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży i niektórych innych ustaw, Dz.U. 1996, nr 139, poz. 646.

[18] Dz.U. 1996, nr 139, poz. 646: Art. 4a. point 4 states that a termination of pregnancy may be performed only by a doctor, when a pregnant woman is in difficult living conditions or in a difficult personal situation.

[19] Wyrok Trybunału Konstytucyjnego z dnia 28 maja 1997 r., K26/96, OTK ZU 1997, no. 2, item 19; Jacek Szczot, "Prawne aspekty ochrony życia poczętego w Polsce," in *Етичні та*

On 22 October 2020 the Polish Constitutional Tribunal adjudicated that Art. 4a (1)(2) of the Act of 7 January 1993 on family planning, protection of the human foetus, and conditions for termination of a pregnancy (Dz. U. Nr 17, poz. 78, ze zm.) is inconsistent with Art. 38 of the Constitution of the Republic of Poland[20] in conjunction with Art. 30 in conjunction with Art. 31(3) of the Constitution of the Republic of Poland.[21] Upon the publication of this judgement in *Monitor Polski* on 27 January 2021, the previously binding provision of the Act on Family Planning expired, thus making it impermissible to terminate a pregnancy where "on the basis of prenatal tests and/or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness."[22]

Despite repealing § 2 of Art. 8 of the Civil Code in 1996 the Polish legislator guarantees the conceived child legal protection under relevant provisions of the Family and Guardianship Code. For example, as regards the recognition of

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правові аспекти абортів і евтаназії. Etyczne i prawne aspekty aborcji i eutanazji, ed. Elżbieta Szczot, and Jacek Szczot (Lutsk: Publishing House of Volyn Orthodox Theological Academy ΈΙΚΩΝ, 2015), 84; see Wyrok Trybunału Konstytucyjnego z dnia 29 maja 1996 r., III ARN 96/95, OSNP 1996, no. 24, item 366.

[20] Wyrok Trybunału Konstytucyjnego z dnia 22 października 2020 r., accessed January 28, 2021, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy.

[21] Art. 38 of the Constitution of the Republic of Poland contains the legal principle of the protection of life: "The Republic of Poland shall ensure the legal protection of the life of every human being." Art. 30 refers to the protection of human dignity: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." Art. 31 point 3 refers to freedom and the premises of its restriction: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights" (the English translation quoted after: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm), see Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. Nr 78, poz. 483 z późn. zm.; Ogłoszenie uzasadnienia do wyroku Trybunału Konstytucyjnego w sprawie o sygn. akt K 1/20 wraz ze zdaniami odrębnymi do wyroku oraz zdaniami odrębnymi do jego uzasadnienia, *Monitor Polski.* Dziennik Urzędowy Rzeczypospolitej z dnia 27 stycznia 2021 r., poz. 11.

[22] Ustawa z dnia 30 sierpnia 1996 r. o zmianie ustawy o planowaniu rodziny art. 4a ust. 1 pkt 2. Dz. U. Nr 17, poz. 78. For the so-called abortion compromise in Poland see: Marek Andrzejewski, "Rozważania o prawnej ochronie życia nienarodzonych dzieci (z nawiązaniem do pewnej debaty sprzed lat)," in Jacek Mazurkiewicz and Piotr Mysiak, *Nasciturus pro iam nato habetur. O ochronę dziecka poczętego i jego matki* (Wrocław 2017), 7–23; Franciszek Longchamps de Bérier, "Emocje w interpretacji prawa a opis rzeczywistości. Refleksje na marginesie książki Ernesta Bianchiego *Per un'indagine sul principio 'concepto pro iam nato habetur*,' *Forum prawnicze* 3(11) 2012, 63–67, accessed January 29, 2021, https://forumprawnicze.eu/pdf/11-2012.pdf.

paternity Art. 75 § 1 states that "it is possible to recognize paternity before the birth of a conceived child." The recognition of the child prior to his/her birth is a way of determining paternity. In this case the conceived child is understood as a child whose father is a man not married to the child's mother—but who is for example in cohabitation, or as a child who is born in a non-marital partnership, or if a man who is not the mother's husband claims to be the child's father and recognizes the child of his own free will and thus admits to being the child's biological father and assumes the responsibilities resulting from such recognition.[23] Under Art. 62 of the Family and Guardianship Code a child born during a marriage or within three hundred days from its termination or annulment is presumed to be the child of the mother's husband. Under Art. 75 § 1 the provision does not apply if the child is born to the mother after she concludes a marriage with a man other than the man who recognized paternity.[24] The recognition of the conceived child results in particular legal consequences: the child bears the surname indicated in unanimous statements filed by the parents under Art. 89 of the Family and Guardianship Code, the man recognizing the child is granted parental authority, and the right of succession and reciprocal alimentary duties arise. If the man who is not the mother's husband recognized the child, the mother may demand that he, even prior to the child's birth, set aside an appropriate sum of money for the cost of maintaining the mother for three months during pregnancy and the costs of maintaining the child during the first three months after the birth. The court determines the date and manner of payment of this sum. Thus, indirectly, under Art. 142 of the Family and Guardianship Code the conceived child was granted legal protection.[25]

If it is necessary to protect the future rights of the child conceived but not yet born, a custodian may be appointed in accordance with Art. 182 of the Family and Guardianship Code. These rights include any future subjective rights of the child such as health and life, and not solely succession rights. In this case the custodian is referred to as *curator ventris nomine*[26] (the guardian of the womb; Polish *kurator łona*). The custodianship ceases upon the child's birth

[23] Andrzejewski, *Prawo rodzinne i opiekuńcze*, 127; cf. Bronisław Walaszek, *Uznanie dziecka w prawie rodzinnym* (Kraków: Państwowe Wydawnictwo Naukowe, 1958).

[24] Olaf Szczypiński, *Uznanie dziecka poczętego i jego ochrona*, accessed January 20, 2021, https://depot.ceon.pl/bitstream/handle/123456789/6013/uznanie_dziecka_poczetego.pdf?sequence=1&isAllowed=y.

[25] See Art. 754 of the Code of the Civil Procedure: Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz. U. 1964 nr 43 poz. 296; Orzeczenie NSA z dnia 28 listopada 1985 r., III SA 1183/85, OSP 1987, nr 2, poz. 28.

[26] On the institution of the guardian of the womb (*kurator łona*), see: Helena Pietrzak, "Curator ventris" dla "nasciturusa," *Studia nad Rodziną*, 15 /1–2 (28–29), (2011), 145–164; more on the responsibilities of *curator ventris* see: Olaf Szczypiński, *Uznanie dziecka poczętego i jego ochrona*.

and parents, by virtue of parental authority, take over their responsibilities over the child. Legal capacity with regard to succession rights was included in the provisions of the Civil Code but subject to certain conditions. Art. 927 of the Civil Code states that "§ 1. A natural person who is not alive at the time the succession is opened and a legal person which does not exist at that time cannot be an heir. § 2. However, a child that has already been conceived when the succession is opened can be an heir if it is born alive." According to the Roman rule *nasciturus pro iam nato habetur quotiens de commodo eius agitur*, that is, the unborn child is considered born whenever it is to his/her advantage, the child conceived at the time of opening the succession can be an heir, provided he/she is born alive. This rule became the minimum standard for the protection of the rights of the unborn child.[27]

Parental Authority and the Child

The Polish legislator does not provide any definition of parental authority in the Family and Guardianship Code. It is assumed in the doctrine that parental authority is a set of rights and obligations of parents towards their minor child, which guarantee due care over the child and his/her property.[28] In accordance with Art. 95 § 1: "Parental responsibility covers, in particular, the rights and duties of the parents to exercise care over the person and the property of the child and the child's upbringing, respecting his/her dignity and rights." Additionally, § 3 emphasizes that "parental responsibility should be carried out as required for the welfare of the child and in the social interest." Therefore, the guiding principle of exercising parental authority is to act for the welfare of the child. The provisions of the Family and Guardianship Code include the term "welfare of the child," yet it has no statutory definition. Wanda Stojanowska notes that these provisions constitute a normative source of the principle of protection of this welfare in its specific forms, for example Art. 56 § 2 of the Family and

[27] See Marta Banyk, "Status prawny dziecka poczętego na tle jego prawa do ochrony życia i zdrowia, wynagradzania szkód doznanych przed urodzeniem oraz ochrony dóbr osobistych matki," *Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM*, 4: 18 (2014), accessed 18 January, 2021.

[28] Rafał Łukasiewicz, "Władza rodzicielska, Instytucje prawa rodzinnego," ed. Jakub M. Łukasiewicz, Stanisław Grobel, Jakub M. Łukasiewicz, Rafał Łukasiewicz, and Jerzy Wiktor, *Praktyczny komentarz. Wzory pism i dokumenty* (Warszawa: Wolters Kluwer 2014), 186; for more see: Tomasz Sokołowski, *Władza rodzicielska nad dorastającym dzieckiem* (Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, 1987); Wanda Stojanowska, *Władza rodzicielska* (Warszawa: Wydawnictwo Prawnicze, 1988).

Guardianship Code lists the welfare of the child as a negative legal prerequisite for divorce.[29] Whereas constitutional norms are a normative source of the general principle of protection of the child's welfare included in Art. 72 of the Constitution of the Republic of Poland.[30] As Stojanowska rightly observes, lack of a statutory definition of the child's welfare proves that the Polish legislator leaves the decision to the discretionary judgement of a judge, whereas this term requires a contextual definition.[31]

It should be emphasized that anyone who exercises parental authority or has guardianship or care over a minor is forbidden to use corporal punishment.[32] Such a ban was only introduced in Poland in 2010 (to compare, in Sweden it was in 1979) when the Act of 10 June 2010 amending the Act on counteracting domestic violence and some other acts (Journal of Laws no. 125, item 842) amended the Family and Guardianship Code by adding Art. 96^1. The child remains under parental authority until he/she reaches the age of majority. According to Polish law, an individual who has attained 18 years of age is recognized as an adult, however, a female minor becomes an adult upon conclusion of a marriage (Art. 10 of CC), that is, the guardianship court may permit a woman who has reached the age of sixteen to marry (Art. 10 § 1 of FGC).

The Family and Guardianship Code does not define the beginning of parental authority. It is assumed that the moment the child is born parents are granted this authority, however, interestingly, some grant this right upon the conception

[29] "However, despite the irretrievable and complete breakdown of matrimonial life, a divorce is not permitted if it would be detrimental to the welfare of the minor children of both spouses, or if there are other reasons why the decision to divorce is contrary to the principles of social coexistence" (Art. 56 § 2 of FGC).

[30] Art. 72: "The Republic of Poland shall be the common good of all its citizens." Quoted after www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[31] Wanda Stojanowska, "Dobro dziecka w aspekcie sprawowanej nad nim władzy rodzicielskiej," *Studia nad Rodziną* 4/1(6), 55–65, (2000), 62; see: Art. 2 and 3 of the Convention on the rights of the child, Konwencja o Prawach Dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., ratyfikowana przez Polskę 7 lipca 1991 r., Dz. U. z 1991 r., Nr 120, poz. 526.

[32] The amendment to Art. 96 of the Family and Guardianship Code was introduced in 2010 by the Act of 10 June 2010 amending the Act on counteracting domestic violence and certain other acts, Dz. U. 2010, nr 125, poz. 842. In accordance with Art. 2 point 2 of the Act on counteracting domestic violence, "domestic violence—shall be understood as a single or recurring willful action or negligence infringing upon the personal rights or wellbeing of persons listed in point 1, in particular exposing these persons at the risk of losing life, health, compromising their dignity, physical integrity, freedom, including sexual freedom, causing damage to their physical or psychical health, and causing pain and moral suffering in persons subjected to violence" (quoted after https://archiwum.mpips.gov.pl/przeciwdzialanie-przemocy-w-rodzinie-nowa/ogolne/akty-prawne-z-zakresu-przeciwdzialania-przemocy-w-rodzinie/akty-prawne-w-jezyku-angielskim-/), see: Ustawa z dnia 29 lipca 2005 r. (Dz. U. nr 180, poz. 1493).

of a child.[33] As a rule, parental authority is vested in both parents (Art. 93 of FGC), however, if one of the parents is dead or does not have full capacity for legal acts, then it is vested in the other parent. Moreover, if neither of the parents has parental authority (e.g., because the court deprived parents of their parental authority) or the parents are unknown, the court appoints a custodian for the child (Art. 94 of FGC). If parental authority is vested in both of the parents, then each of them is entitled and obliged to exercise it (Art. 97 § 1 of FGC). If both parents have parental authority over the child but are not in a marriage (e.g., due to divorce) or they are in a marriage but they are separated, the court may give parental authority to one of the parents, limiting parental authority of the other parent to particular rights and responsibilities (Art. 107 of FGC). However, it is important that parents make a joint decision on important matters of the child (Art. 97 § 2 of FGC) such as going abroad, a choice of school or medical treatment.

The opposite of the exercised parental authority is the obligation of the child to obey the parents: "A child under parental responsibility should obey his/her parents, and in matters where he/she can take his/her own decisions and submit declarations of intent, he/she should listen to the opinions and recommendations of his/her parents for his/her own welfare" (Art. 95 § 2 of FGC). This regulation is an example of a norm without sanctions whose aim— according to Marek Andrzejewski—is to show "a model approach to the relation between parents and a child."[34] Obedience towards parents should be understood as submission to the will of parents.

The child's welfare may also be implemented by adoption.[35] Only a minor can be adopted and the adoption may only be for his/her welfare (Art. 114 § 1 of FGC). The criteria for minority, that is, being under 18 years of age, must be

[33] Janusz Borucki, "Istotne obowiązki małżeńskie w świetle przepisów prawa kanonicznego i polskiego," *Studia Włocławskie* 8(2005), 262. The Act on the Ombudsman for children in Art. 2, point 1 defines a child as follows: "a child is every person from the moment of conception until the age of majority" (quoted after http://brpd.gov.pl/sites/default/files/ustawa_o_rpd_en.pdf), Dz.U., nr 6, poz. 69 z dnia 6 stycznia 2000 roku. The definition of a child included in the Convention on the rights of the child, which was ratified by Poland in 1991, does not refer to the beginning of a child's life. Art. 1 states the following: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (quoted after https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx).

[34] Andrzejewski, *Prawo rodzinne*, 147. Trans. Anna Bysiecka-Maciaszek.

[35] Andrzejewski, P*rawo rodzinne*, 193–196. In the Polish language the word "przysposobienie" ("adoption)" is synonymous with "adopcja" and "usynowienie." The Polish canon law uses the term "adopcja" (Latin *adoption, -are*, Cann. 110, 535 § 2, 877 § 3, 1094 of the Code of Cannon Law; *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 25 I 1983, Acta Apostolicae Sedis 75 (1983) pars II, 1–37 and *Kodeks Prawa Kanonicznego*. Przekład polski zatwierdzony przez Konferencję Episkopatu, Pallottinum, Poznań 1984), whereas the term "przysposobienie" is used in civil law.

fulfilled on the date of submitting an application for adoption (Art. 114 § 2 of FGC). Adoption results in establishing a legal bond between the adopter and the adoptee which is similar to the bond between parents and the child, according to the rule *adoptio naturam imitatur* (Art. 121 of FGC). These two legal bonds are only similar and not identical since in some cases adoption can be dissolved. Adoption is not a uniform legal institution, sometimes it can create a legal relation only between the adopter and the child, with no consequences for other family members (the so-called incomplete adoption). However, the arising rights and obligations are the same as between the child and his/her natural parents.[36] As a result of the established relation a legal obstacle arises, namely, the obstacle of consanguinity and affinity.[37]

Person and Capacity for Legal Acts

After reaching the age of majority, that is, 18 years of age, or in the case of a woman who reached the age of 16 and concluded a marriage with the consent of the court (she does not lose the age of majority even if the marriage was annulled, Art. 10 § 2 of CC), each natural person obtains capacity for legal acts. It means that such a person has legal right to exercise his/her own will in his/her own person and on his/her behalf.[38]

[36] Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze. Analiza i wykładnia* (Warszawa: Wydawnictwo C.H. Beck, 2001), 331–332.

[37] The scope of the obstacle of consanguinity is broader in cannon law than in the provisions set forth in the Family and Guardianship Code. In civil law, the obstacle concerns only the parties to the adoption and, as if, mirrors the obstacle of consanguinity in a straight line. Art. 14 § 1 of the Family and Guardianship Code does not forbid a marriage between an adoptee and relatives of the adopter (Art. 15 § 1: It is not possible for an adopter and an adoptee to marry"). In the culture of European countries sexual intercourse between close relatives is not allowed and incestuous intercourse is considered a crime ("Whoever has sexual intercourse with an ascendant, descendant, or a person being an adopted, adopting relation or brother or sister shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years," quoted after https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf, see Art. 201 of the Criminal Code). The obstacle of affinity results from the accepted customs and concerns relatives in a straight line (father-in-law – daughter-in-law, mother-in-law – son-in-law, daughter-in-law – stepfather, stepmother – stepson, stepfather – stepdaughter). The court may authorize a marriage between relatives by affinity but only because of important reasons (Art. 14 § 1 of FGC)—see Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze*, wydanie 5. uzupełnione i uaktualnione (Warszawa: Wydawnictwo C. H. Beck, 2009), 48.

[38] Osuchowski, *Prawo rzymskie prywatne*, 181; Grzybowski, *Prawo cywilne*, 163–164.

The Civil Code distinguishes three significant periods in human life: the first, from birth to reaching the age of 13 (Art. 12 of CC), the second, from 13 to 18 years old (Art. 15 of CC) and the third, from reaching the age of majority till death (Art. 10 of CC). The first two periods define the person—the child—as a minor, whereas the third period is the time of majority. As a result of reaching a particular age, each person acquires a certain degree of capacity for legal acts.

Minors who have reached the age of 13 and persons partially legally incapacitated have limited capacity for legal acts (Art. 15 of CC), whereas persons who have not reached the age of 13 and persons fully legally incapacitated do not have any capacity for legal acts (Art. 12 of CC). A person who has reached the age of 13 may be fully legally incapacitated if he/she is incapable of controlling his/her behavior due to mental illness, mental retardation or other mental disorder (Art. 13 § 1 of CC). If a fully legally incapacitated person is not under parental control, a guardian is appointed (Art. 13 § 2 of CC). Persons who do not have full capacity for legal acts cannot exercise parental responsibility (Art. 94 § 1 of FGC), they cannot adopt (Art. 114^1 § 1 of FGC) or be a guardian[39] or custodian (Art. 148 § 1 of FGC, Art. 178 § 2 of FGC). Fully legally incapacitated persons[40] cannot conclude a marriage (Art. 11 § 1 of FGC).

Under Article 183 of the Family and Guardianship Code the Polish legislator defines the premises relating to the appointment of a custodian for a disabled person, however, the provision does not define such a person.[41] It is only stated in § 1 that this person requires help to "carry out any issues or matters of a particular type, or to settle a particular case. The scope of rights and duties of a custodian is appointed by the guardianship court." Also the court may revoke

[39] See Art. 148 § 1a. "It is not possible to appoint as the guardian of a minor anyone who has been deprived of parental responsibility; or sentenced for a crime against sexual freedom […]." The Polish legislator defines the requirements for the adopting parent in Art. 114^1 § 1 of the Family and Guardianship Code. This person should meet the following requirements: full capacity for legal acts, personal qualifications justifying the belief that they will properly carry out the obligations of an adopter, an assessment opinion and a certificate of completing training organized by an adoption center, referred to in the provisions on supporting the family and foster care system.

[40] The Polish legislator did not include the term "incapacitation" in the Code, see Art. 175–177 of FGC.

[41] The explanation of who is considered a disabled person can be found in the Act on vocational and social rehabilitation and employment of disabled persons, Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych, Dz. U. 1997 r., Nr 123, poz. 776 (last amended in 2021, poz. 159). The act defines the degrees of disability and sets forth the requirement of care and assistance from other people to perform social roles. Therefore, the court may appoint a custodian for a person with a significant degree of disability: "Art. 4 1. The significant degree of disability applies to the person with disturbed efficiency of the body, unable to work or capable of working only in the conditions of sheltered employment, who in order to perform social roles requires permanent or long-term care and help of other people because of his/her inability to exist independently" (trans. Anna Bysiecka-Maciaszek).

custodianship at the request of the person for whom a custodian was appointed (Art. 183 § 2 of FGC).

All regulations included in the Family and Guardianship Code basically concentrate on the protection of minors who—due to their age, do not have full capacity for legal acts, or persons who reached the age of majority but do not have full capacity for legal acts due to their illness, mental retardation, and alcohol or drug addiction, or who need assistance or help due to their disability. This is reflected indirectly in the provisions on the child conceived but not yet born, and directly in the provisions referring to parental authority or other institutions regulated in the Code. The understanding of the person, especially the unborn, is deepened once the person is granted with the ability to be a subject of rights and obligations in legal relations. For the last 57 years of their validity, the provisions of the Family and Guardianship Code have been frequently amended, particularly because of the doctrine and judicature, but also the will of the legislator.

Translated by Anna Bysiecka-Maciaszek

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Ogłoszenie uzasadnienia do wyroku Trybunału Konstytucyjnego w sprawie o sygn. akt K 1/20 wraz ze zdaniami odrębnymi do wyroku oraz zdaniami odrębnymi do jego uzasadnienia, *Monitor Polski.* Dziennik Urzędowy Rzeczypospolitej z dnia 27 stycznia 2021 r., poz. 114.

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Elżbieta Szczot

« Personne » dans le Code polonais de la famille et de la tutelle

Résumé

L'article présente la question liée à la compréhension d'une personne dans le Code polonais de la famille et de la tutelle. L'auteur y montre le problème complexe de l'acquisition de la capacité juridique, y compris la capacité juridique d'un enfant conçu, la relation entre l'autorité parentale et l'enfant, l'adoption de l'enfant et l'acquisition et l'étendue de la capacité juridique. Les limitations résultant de l'incapacité ont été indiquées.

Mots-clés : personne, enfant, enfant conçu, autorité parentale, personne inapte

Elżbieta Szczot

“Persona” nel codice polacco della famiglia e della tutela

Sommario

Il presente articolo espone la questione relativa alla comprensione del concetto di persona nel Codice della famiglia e della tutela polacco. L’autore mostra il complesso problema dell’acquisizione della capacità giuridica, compresa la capacità giuridica del concepito, il rapporto tra la potestà genitoriale e il bambino, l’adozione del bambino e l’acquisizione e l’estensione della capacità giuridica. Sono state indicate le limitazioni derivanti dall’incapacità giuridica.

Parole chiave: persona, bambino, bambino concepito, potestà genitoriale, persona incapace

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"Person" in the Law of Religious [Institutes]

Abstract: The emphasis on the human person and his dignity was significantly applied in the new regulation of the law of consecrated life, which is dealt with in the new Code of Canon Law of 1983 *in integrum* compared to the previous Code of Canon Law of 1917. This paper describes only some of the changes in the law of religious institutes in the Latin Church.

The first section regards mainly the person who has taken religious vows and focuses on the question of religious vows as the basis of religious life. It also discusses confessors viewed as a necessary tool for the renewal of religious life as well as modifications in the concept of poverty as a very important element of religious life. The second section focuses on the government of religious institutes, discussing the strengthened position of internal superiors over external superiors in religious congregations, the strengthened position of the superior of monasteries of nuns, and the extended powers of superiors on release from a religious institute due to illegitimate absence from a religious house.

As this is in some cases a very recent legal regulation, the author does not hesitate to express his critical observations.

Keywords: person, Catholic Church, canon law, religious, nuns, confession, property

Introduction

The emphasis on the human person and his dignity was significantly applied in the new regulation of the law of consecrated life, which is dealt with in the new Code of Canon Law of 1983 (further CIC/1983) *in integrum* compared to the previous Code of Canon Law of 1917 (further CIC/1917). Due to the extent of the

changes, it is necessary in this paper to limit ourselves to discussions about only some of the changes that, however, significantly point to the personal emphasis in the new legal regulation.[1]

The personal emphasis is manifested both in the individual area, concerning the religious life, and in the institutional area, especially concerning the government of religious institutes. Although the two areas are really so interconnected in real terms that they cannot be completely separated from each other, it is possible to distinguish them according to the predominant focus of legal regulation.

For the sake of clarity, we will therefore divide our paper into only two sections. The first one targets mainly the person who has taken religious vows and focuses on the question of religious vows as the basis of religious life. It also discusses the role of confessors viewed as a necessary tool for the renewal of religious life, as well as modifications in the concept of poverty as a very important element of religious life. The second section focuses on the government of religious institutes, discussing the strengthened position of internal superiors compared to external superiors in religious congregations, the strengthened position of superior of monasteries of nuns, and the extended powers of superiors on release from a religious institute due to illegitimate absence from a religious house.

As this is in some cases a very recent legal regulation, we will not hesitate to express our critical observations in the text.

1. Emphasis on the Consecrated Person

1.1. Division of Religious Vows

The new CIC/1983 retained most of the divisions of religious vows contained in CIC/1917. At the same time, however, it introduced a significant drafting change in that it no longer usually speaks of vows (*vota*), but of religious profession (*professio*), therefore, it also puts more emphasis on the actions of the promiser.

In one thing, however, there is a clear fundamental difference: although CIC/1983 held in the general treatise on promises in can. 1192 § 2 the distinction into solemn and simple wows, this distinction does not apply at all in the field of the law of consecrated life.[2] Nevertheless, in the legal regulation of CIC/1917 this distinction had very significant consequences, for example:

[1] We deliberately limit ourselves to the Latin Church sui iuris, because in the field of religious law the legal regulation in the Eastern Catholic Churches is so different that a treatise on it would require the elaboration of another study.

[2] Individual authors disagree on the importance of distinguishing between solemn and simple vows, which is stated, for example, by Joachim Roman Bar, *Prawo zakonne po soborze*

— according to can. 1073, the solemn vow of chastity by its nature acted as an obstacle to the conclusion of a marriage, but with a simple permanent vow of chastity only if it was given this effectiveness by a special rescript of the Apostolic See;
— when transferring to another order, according to the diction of can. 632–636 in the whole context of the former religious right to transfer to a religious institute of the same or higher nature (i.e., from an institute with simple vows to an order with solemn vows), or very exceptionally "below" (i.e., from an order with solemn vows to an institute with simple vows);
— other consequences were in the area of property, which we want to treat separately.

The legal regulation of CIC/1983 legally equates solemn vows with the simple ones, both in the area of the emergence of an obstacle to the conclusion of a marriage, which, according to can. 1088, is every perpetual vow of chastity in a religious institute (*votum publicum perpetuum castitatis in instituto religioso*), as well as in the regulation of transfer into another religious institute, which is no longer defined by the legal nature of vows in individual religious institutes (can. 684). In this way, it clearly prefers the element of personal response to God's call to the legal distinction between the various types of religious institutes and the vows made in them.

1.2. Conditions for Admission to the Novitiate and for Religious Profession

The definition of the conditions for entry into the novitiate has changed in CIC/1983 in comparison to the more extensive regulation in CIC/1917. The new regulation no longer contains any conditions for illicit but valid admission to the novitiate, as defined in can. 542 of CIC/1917. Simplification is also apparent in the definition of circumstances giving rise to invalid acceptance on the following points:

— The minimum age for all religious is unambiguously set at a minimum age of 17, while the regulations of one's own law were decisive for the entry into the novitiate, while the crediting of the novitiate according to can. 555 CIC/1917 required the age of 15;

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watykańskim II (Warszawa: Akademia Teologii Katolickiej, 19773), 187. The classical view accentuating the concept that only solemn vows are religious vows in the full sense of the word and simple vows, all the more temporary simple vows, are only analogous to them, is presented by, for example, José F. Castaño, *Gli istituti di vita consacrata (cann. 573–730)* (Roma: Millenium Romae, 1995), 35–38.

— The barrier to entry for those who previously belonged to a non-Catholic church or ecclesial society has been removed;
— The barrier to entry for bishops and clergy bound by the oath of service in a particular diocese or mission has been removed;
— The barrier to entry in the event of imminent punishment for a criminal offense (both according to secular and canon law) has been removed;
— For admission to the monasteries of nuns or to other religious institutes with simple vows, the composition of the dowry is no longer required, the details of the dowry being determined by one's own law—the constitution or, in the case of nuns, also by legal custom (cf. can. 547 of CIC/1917);
— In connection with the abolition of different classes of religious in individual institutes (especially choral brothers and lay brothers, choir sisters and auxiliary sisters), a different novitiate is no longer required for individual classes of religious (cf. can. 558 of CIC/1917).

Significant changes are also evident in the area of religious vows. On the one hand, CIC/1917 already orders temporary vows for all religious (can. 574)[3] but, on the other hand, there are also significant differences:

— For the temporary profession, CIC/1917 required the age of only 16 years (can. 573), while can. 656 of CIC/1983 requires the age of 18 years;
— If vows were to be made for another class of religious, according to can. 558 CIC/1917 the novitiate had to be undertaken again for the relevant class of religious, which CIC/1983 no longer presupposes;[4]
— The duration of the temporary vows was given in CIC/1917 primarily by reaching the minimum age for a permanent profession of 21 years (can. 573), this age was also maintained in CIC/1983 (can. 658), while superiors could extend the period of temporary vows according to can. 574 § 2 of CIC/1917 by a maximum of three years, while according to can. 657 § 2 of CIC/1983 superiors may provide for a longer extension, with the provision that the temporary vows may not last longer than nine years.[5]

It is clear that the legal regulation in CIC/1983 gives both a greater opportunity to take into account the personal situation of those candidates for

[3] Cf. Damián Němec, "Ewolucja regulacji CIC/1917 dotyczącej profesji czasowej," in *Kodeks pio-benedyktyński między tradycją a rozwojem*, ed. Zbygniew Janczewski, Jan Dohnalik, and Igor Kilanowski (Warszawa: Spes, 2017), 115–146.

[4] The need to carry out the second novitiate was abolished by provision No. 27 of the Instruction of the Sacred Congregation for Religious and Secular Institutes *Renovationis causam* of January 6, 1969: Sacra Congregatio pro Religiosis et Institutis saecularibus. Instructio *Renovationis causam* de accomodata renovatione institutionis ad vitam religiosam ducendam, 6 Ianuarii 1969, AAS 61 (1969): 103–120.

[5] This new definition of temporary vows is contained in No. 37 of the *Renovationis causam* instruction, and the introduction of this new arrangement had to be given by a decision of the General Chapter under this provision—this restriction ceased with CIC/1983 entering into force.

entering the religious institute and also of novices and religious with temporary vows, as well as a far greater responsibility for superiors and chapters or councils co-deciding in the field of religious formation. It should be noted that this quite often creates difficult situations in which it is difficult to find a suitable solution.

1.3. The Position and Role of Confessors

CIC/1917 contained in can. 518– 528 detailed regulations concerning confessors. A sufficient number of confessors was to be appointed in each religious community. Their provision was tied to the prescription of can. 595 § 1 3°, obliging superiors to ensure that the religious make a confession once a week. In the case of nuns and lay communities of religious, regular and extraordinary confessors were to be appointed, or at the request of individual religious sisters a special confessor for them. There was an obligation to appoint a single full confessor to whom all members of the community were to come (with the exception of authorized special confessors), more of which could be appointed in the case of numerous communities. Extraordinary confessors were to come at least four times a year, and there was an obligation to speak to them and ask for blessings from them, even if they were not confessed. The appointment of confessors belonged – with the exception of clerical institutes – to the local Ordinary after consultation with the religious superiors, or if need be with the whole community. Can. 876 required special jurisdiction for the confession of religious sisters, given by the local Ordinary.

Changes were introduced by a short decree of the Sacred Congregation for Religious and Secular Institutes *Dum canonicarum legum* of December 8, 1970, which significantly modified the existing regulations. In particular, in No. 4, it abolished the requirement of a special jurisdiction for the confession of religious sisters and made it clear that they could confess to any priest authorized to confess in a given territory (this jurisdiction was most often tied to the territory of the local church). However, ordinary confessors should continue to be appointed for monasteries of nuns, houses of formation and more numerous cloisters, and extraordinary confessors should also be established for monasteries of nuns and for houses of formation without the obligation to come to them; regular confessors may be appointed by the local Ordinary for other cloisters, however, in consultation with the community. According to No. 3 of the same instruction, religious should confess at least twice a month.

This legal regulation was transferred to CIC/1983 with only minimal modifications. On the one hand, there is set out the duty to frequent the sacrament of penance (without a more specific definition of frequency) in the title on the rights and duties of religious in can. 664 but, on the other hand, there is en-

shrined the freedom of religious in the choice of confessor in the article on superiors and counsel in can. 630, while maintaining the obligation to appoint ordinary confessors in monasteries of nuns, houses of formation and in larger lay cloisters by decision of the local Ordinary after consultation with the community, without imposing an obligation to approach them.

Here, too, emphasis is placed on the possibility of personal choice of the confessor, although in fact quite limited, especially in contemplative monasteries. The absence of a more specific timing of the obligation to approach frequently the sacrament of penance often leads to a very diverse practice, even with the threat of spiritual damage that sometimes occurs.

1.4. Ownership of Property by Individual Religious

Property ownership is a fact that is strongly affected by the vow of poverty. CIC/1917 dealt with this area relatively strictly. According to can. 569, before taking simple vows, temporary or permanent, novices or a religious with temporary profession had to entrust the management of his or her existing property to persons selected by himself or herself for the duration of the vows, unless the constitutions of the religious institute provided otherwise. Every religious with simple vows continued to own his or her property and had the legal capacity to acquire additional property according to can. 580, with whatever he or she acquired as a religious belonging to the religious institute. In contrast, the religious became legally incapable of owning and acquiring property after solemn vows according to can. 582; therefore, the religious with temporary vows was obliged, according to can. 581, to give up his property within 60 days before the solemn vows and under the condition of professing the solemn vows.

This somewhat rigid division was mitigated by provision 13 of Decree *Perfectae caritatis* of Vatican Council II, by which religious congregations could allow their members in their constitutions to renounce already owned or future property.[6]

This provision was followed by the implementing norms of the motu proprio of Pope Paul VI *Ecclesiae sanctae*,[7] which in its second part in No. 24 empowers the General Chapters to decide and incorporate into the constitutions that individual members may or should renounce ownership of their property, either before or several years after permanent vows.

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[6] Concilium Vaticanum II, "Decretum de accomodata renovatione vitae religiosae *Perfectae caritatis*," AAS 58 (1966): 702–712.

[7] Paulus VI, Litterae apostolicae motu proprio datae *Ecclesiae sanctae* quibus normae ad quaedam exsequenda ss. Concilii Vaticani II decreta statuuntur, 6 Augusti 1966, AAS 58 (1966): 758–787.

This norm was adopted by CIC/1983 in can. 668, where § 4 distinguishes between religious institutes in which religious are obliged to give up their property from other religious institutes, while in the latter the possibility remains for individual religious to give up their property, in whole or in part, with the permission of their superiors.

It is clear that also in the area of personal property of religious, there is a much greater emphasis on both the charism of entire religious institutes, which is also a personal gift, and the personal charisms of individual religious.

2. Emphasis on the Person in the Government of Religious Institutes

2.1. Strengthening of the Role of Internal Superiors in Religious Congregations

According to CIC/1917, religious congregations already enjoyed relatively great autonomy. The subordination of the female religious congregation (of which there was and is a majority) to the male order is in can. 500 § 3 understood as an exception and is bound to the apostolic indult, however, this situation was relatively common. It followed that the constitutions of individual female congregations enshrined the positions of the director and visitor of the congregation, who exercised care and management towards it (*cura et directio*).[8] In addition, the legal regulation brings relatively strong dependence on the local ordinary:

— The individual houses of the lay religious congregations were subject to visitation by a local Ordinary, according can. 512 § 2 3°, at least once every five years not only with regard to their external service but also in the field of internal discipline according to can. 618 § 2 2°;
— The election of the general superior in the female congregations was presided over by a local Ordinary or his delegate, according to can. 506 § 4, who, even in the case of congregations of diocesan law, had the power to confirm or revoke the election.

None of these provisions were retained in CIC/1983 and were gradually deleted from the constitutions of individual religious congregations, especially female ones, while it is still true that with the exception of the clerical religious

[8] Bar, *Prawo zakonne*, 89–90.

institutes of papal law the proper ordinary of religious is the local ordinary, who does not have the authority to intervene in the internal government of religious congregations (cf. can. 683). In this way, the role of internal superiors has been effectively strengthened, especially in female religious congregations of papal law, and the role of women in general has been emphasized.

2.2. Strengthening of the Role of the Inner Superiors in the Monasteries of Nuns

External superiors have always been entrusted with the care and protection of monasteries of nuns. The legal matter in this area is quite extensive, even for the period since CIC/1917, and its proper elaboration would require more space than this paper allows, so it will only be possible to address recent developments based on the provisions of CIC/1983.

2.2.1. Subordination of individual monasteries

CIC/1983 distinguishes between two types of subordination of the monasteries of nuns to external superiors: either the religious superior (can. 614) or the local ordinary (can. 615).

Modification in this matter was brought about by norms in the time of the pontificate of Pope Francis: his apostolic constitution *Vultum Dei quaerere*[9] in Art. 9 § 1 orders the inclusion of all monasteries in federations (an exception is given by the Apostolic See) and in § 4 prefers the association of monasteries to the corresponding male order. Implementation instructions of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life *Cor orans*[10] in No. 75, dealing with the ecclesiastical supervision of the monastery, appoints in the first place the chairwoman of the Women's Congregation of Nuns, then the relevant superior of the male order, and only in the third place the local Ordinary.

Generally speaking, the *Cor orans* instruction gives great powers to the superiors of the Federation of Monasteries of Nuns, especially in the field of visitation: according to No. 111, the president of the federation may be not only the co-visitor during the ordinary canonical visitation, but according to No. 113

[9] Franciscus, Constitutio apostolica *Vultum Dei quaerere* de vita contemplativa mulierum, 29 Iunii 2016, AAS 108 (2016): 835–861.

[10] Congregazione per gli Istituti di vita consacrata e le Società di vita apostolica, Istruzione applicativa "Cor orans" della Costituzione apostolica *Vultum Dei quaerere* sulla vita contemplativa femminile, 1 aprile 2018, AAS 110 (2018): 814–864.

she can in the case of necessity hold the visitation herself, accompanied by one co-visitor selected from the councillors of the federation. The Apostolic See must be informed about the result of the visitation and, therefore, also about its holding. It must be stated that, on the one hand, these provisions entail an enormous strengthening of the mission and position of the nuns, and, on the other hand, they introduce an untested solution that is not free of pitfalls and risks and thus is sharply criticized by many voices.[11]

2.2.2. Permission to leave the enclosure

In the case of monasteries of nuns, the regulations on the papal enclosure play an important role. Unlike CIC/1917, these regulations are not included in CIC/1983 itself but are left to non-code regulation. Until recently, the starting documents in this matter were the apostolic constitution of Pius XII *Sponsa Christi* of 1950,[12] modified by the provisions of the instruction *Ecclesiae sanctae* of 1966[13] and supplemented successively by the implementing instructions of the relevant congregation of the Roman Curia *Inter cetera* of 1956,[14] *Venite seorsum* of 1969[15] and *Verbi sponsa* of 1999.[16] Pursuant to provision No. 17 of the latter instruction, it was within the authority of the superior of the monastery of nuns, with the possible consent of the council or of the chapter of the monastery, to grant permission to leave the enclosure for serious reasons for up to seven days, for up to three months with the approval of the religious superior or diocesan bishop, and for a longer time with the permission of the Apostolic See, while the provisions of can. 665 § 1 CIC/1983 concerning the permission of a long absence of a religious in a religious house must not be applied.

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[11] Cf., for example, Aldo Maria Valli, *Claustrofobia. La vita contemplativa e le sue (d)istruzioni* (Hong Kong: Chorabooks, 2018), 26–65.

[12] Pius XII, Constitutio apostolica *Sponsa Christi* de sacro monialium instituto promovendo, 25 Novembris 1950, AAS 43 (1951): 5–24. This constitution distinguished between a larger papal enclosure (*clausura maior*) for purely contemplative monasteries and a smaller papal enclosure (*clausura minor*) for monasteries with limited apostolic activity.

[13] *Ecclesiae sactae II*, n. 32: this provision abolished the minor papal enclosure and replaced it with a constitutional enclosure, usually called the "constitutional enclosure." Cf. Bar, *Prawo zakonne*, 245–247.

[14] Sacra Congregatio pro Religiosis. Instructio *Inter cetera* circa monialium clausura, 25 Martii 1956, AAS 48 (1956): 512–526.

[15] Sacra Congregatio pro Religiosis et Institutis saecularibus, Instructio *Venite seorsum* de vita contemplativa et de monialium clausura, 15 Augusti 1969, AAS 61 (1969): 674–690.

[16] Congregatio pro Institutis vitae consecratae et Societatibus vitae apostolicae, Instructio *Verbi sponsa* de vita contemplativa deque monialium clausura, 13 Maii 1999, in *Enchirion Vaticanum* 18 (1999): 514–578, nn. 931–1000, www.vatican.va/roman_curia/congregations/ccscrlife/documents/rc_con_ccscrlife_doc_13051999_verbi-sponsa_lt.html, accessed July 20, 2020.

The recent regulation is represented by two documents: the Apostolic Constitution of Pope Francis *Vultum Dei quaerere* of 2016 and the implementing instructions of the Congregation for Institutes of Consecrated Life and the Societies of Apostolic Life *Cor orans* of 2018.

It should be remembered, however, that the path to a greater role for the nuns' superiors in the area of going out from the enclosure began with the specific exercise of episcopal collegiality—the Synod of Bishops' on consecrated life held on 2–28 October 1994 and the subsequent post-synodal exhortation of Pope John Paul II *Vita consecrata*.[17] On the one hand, No. 59 advises on extending the powers of the superior of monasteries of nuns to authorize leaving from the enclosure, and, on the other hand, for the first time in connection with these monasteries, it speaks not only of the papal and constitutional enclosure but also of the monastic enclosure.

A more concrete implementation of this recommendation was brought about by the Apostolic Constitution of Pope Francis *Vultum Dei quaerere* of 2016 in No. 31, which discusses three possible types of enclosure for monasteries of nuns, and in normative Art. 10, which empowers each monastery with regard to the constitution of its order to ask the Apostolic See for changing the current form of the enclosure, while explicitly admitting the possibility of different forms of the enclosure in the same order. Therefore, many constitutional provisions concerning the enclosure (including the prohibition of the application of the provisions of can. 665 § 1 of CIC/1983) have been explicitly repealed by this constitution but, at the same time, no new precise provisions are given—these are to be given by an implementing instruction. This led to the creation of a lacuna of law and, therefore, to practical uncertainties. On the other hand, great emphasis is placed on the personal distinction and subsequent decision of the nuns.

It was not until 2018 that the instructions of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life *Cor orans* in Nos. 172–218 gave a clearer definition for all types of enclosures. The fundamental changes regarding the leaving the papal enclosure are the following:

— Permission regarding the enclosure no longer falls within the competence of external superiors (religious superior or diocesan bishop) according to No. 174, although they are to continue to monitor compliance with the regulations on enclosure according to No. 173,
— The major superior herself gives permission regarding the enclosure within the term of 15 days according No. 175, despite this period with the consent of her council,
— The same superior may, with the consent of her council, grant permission to stay outside the community in accordance with can. 665 § 1 CIC/1983.

[17] Ioannes Paulus II, Adhortatio apostolica post-synodalis *Vita consecrata* de vita consecrata eiusque missione in Ecclesia ac mundo, 25 Martii 1996, AAS 88 (1996): 377–486.

Moreover, the major higher superior can with the consent of her council give indult exclaustration for a maximum of one year according to No. 177. Extension of the exclaustration for a maximum of two years belongs to the president of the Federation of Monasteries of Nuns with the consent of her council according to No. 178.

It is quite obvious that the role of the inner superiors is enormously strengthened there compared to the external superiors, which also reflects respect for the value of the person of the nuns themselves. Again, it should be noted that this is a new and untested solution, which also arouses controversy.

2.3. Solution of the Irregular Sojourn of Religious Outside the Religious House

The regulations regarding the illegitimate stay of religious outside the religious house have changed significantly. CIC/1917 judged this situation strictly: according to can. 644, for several days, an illegitimately absent religious intending to return to the religious house in the future was called a runaway (fugitive); without an intention to return, he was called an apostate. According to can. 655 § 2, the superiors are to look for them carefully and, in the case of penance, to receive them; in the case of nuns, the local ordinary is obliged to look for them. If they do not return, such religious are subject to the punishments set forth in can. 2385 and 2386: automatic excommunication was reserved in exempt religious institutes to the superior, in other religious institutes—to the local ordinary of the place of the actual residence of the religious, and the religious automatically lose offices held in their order, and clerics with higher ordinations moreover fall into suspension reserved for the major superior.

CIC/1983 retained of these provisions in can. 665 § 2 only the obligation of the superiors to find an illegitimately absent member and to help him or her return and persevere in his or her vocation.

In addition, both codes know the sanction of the release of a religious ipso facto for particularly serious reasons: CIC/1917 lists in can. 646 public apostasy from the Catholic faith (*apostata a fide catholica*), a religious fugitive with a person of the opposite sex and a religious attempting to marry or becoming married, even if only in a civil form. Until recently, similar norms were contained in can. 694 § 1: public apostasy from the Catholic faith and the attempt to enter into or having entered into a marriage, even if only in a civil form.

However, because there have been many cases in which a religious has left the religious house with the intention of not returning without the circumstances listed in can. 694 § 1 CIC/1983, and it was not possible to establish contact with him or her, he or she could not be released from the religious institute for reasons leading to compulsory or optional release (can. 695 § 1 and 696)

because it was not possible to follow the procedure prescribed in can. 695 § 2 (gathering of evidence, communication to the dismissed and his defence) and in can. 697 (gathering of evidence, double reprimand, evaluation by the superior and his council). Therefore, it was necessary to resort to extraordinary measures similar to the case of release from the clerical state.[18] These measures were set out in the motu proprio of Pope Francis of 2019,[19] by which was added to can. 695 § 1 a new § 3 stipulating the possibility of declaring the release ipso facto of those religious who are illegally absent from the religious house according to can. 665 § 2 for at least a continuous 12 months. A new § 3 was added to the same canon, stipulating the obligation to confirm this declaration by an external superior: the Apostolic See, or in the case of religious institutes of diocesan law by the diocesan bishop according to the place of the seat of the institute. The effectiveness of this new norm of the Code of Canon Law was set for 10 April 2019, without retroactivity.

It should be noted that this amendment to CIC/1983 raised considerable questions about the method of its application. Therefore, as early as in September 2019, the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life issued a circular paper specifying the application of the motu proprio *Communis vita*:[20]

— It must be not only an illegitimate absence from the community, but also untraceability (No. 1);
— Untraceability is also the case when only the phone, e-mail, social network profile or fictitious address is known (No. 2);
— In order to trace a religious, the major superior must request information from the confreres or co-sisters, former major superiors, bishops, the local clergy, family members or relatives, or—in accordance with state laws—from civil authorities (No. 3);
— The major superior must document in writing the attempts to trace the religious (No. 4);
— In the case of its untraceability, together with the Council, the major superior has to officially declare its untraceability and set the date of the beginning of the untraceability or *dies a quo* as well as the date of expiry of the period of 12 consecutive months (No. 5);

[18] Congregazione per il clero, Lettera circolare a tutti gli Eminentissimi ed Eccellentissimi Ordinari loro Sedi, Prot. N. 2009 0556, 18 aprile 2009 and Congregazione per il clero, Lettera circolare a tutti gli Eminentissimi ed Eccellentissimi Ordinari loro Sedi, Prot. N. 2010/0823, 17 marzo 2010.

[19] Franciscus, Litterae apostolicae motu proprio datae *Communis vita* quibus nonnullae Codicis Iuris Canonici normae mutantur, 19 Martii 2019, *L'Osservatore Romano* (27 marzo 2019): 9.

[20] Congregazione per gli Istituti di vita consacrata e le Società di vita apostolica, Lettera circolare sul Motu proprio *Communis vita*, 8 settembre 2019 (Città del Vaticano: Libreria editrice Vaticana, 2019).

— After 12 consecutive months, it shall issue a declaration on the fact of absence for the required period (*declaratio facti*) and forward this declaration to the external superior, that is, the Apostolic See (the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life), in the case of religious institutes of diocesan law to the bishop of the seat of the institute (No. 6); only with the confirmation of this declaration do the legal effects of the dismissal ipso facto from the religious institute occur.

It is clear that even in this difficult and delicate matter, the personal decision of the religious is seriously taken into account, albeit in this case in the negative direction—departure from the religious institute.

Conclusions

It can be stated that the recent regulation of religious law, not only in the Code of Canon Law of 1983, but to a large extent in later documents, puts a real greater emphasis on the personal decisions and actions of religious in all the areas of research: religious vows as the basis of religious life, in particular by abolishing the legal effects of the distinction between solemn and simple vows; confessors as a necessary tool for the renewal of religious life, especially by guaranteeing the free choice of a confessor and abolishing the obligation to contact a regular or extraordinary confessor (although the freedom to choose a confessor is necessarily restricted in the case of contemplative monasteries); enabling the surrender of property as a result of canonical incapacity to own property and the acquisition of property, both for entire religious institutes with simple vows and, exceptionally, for their individual members; the strengthened position of internal superiors over external superiors in both religious congregations, especially female ones, and in nun's monasteries, although the newly imposed obligation to include monasteries in federations and the strong position of president of the federation is an untested fact, provoking resistance even in professional circles; and finally, this time in a rather negative sense, the extended authority of the superiors in charge of dismissal from the religious institute due to illegitimate absence from the religious house.

We dare to say that there is again a frequent and intractable dilemma at play, not just a legal one: how to balance respect for the individual and his or her freedom and responsibility on the one hand, and to establish institutional instruments aimed more at protecting the common good, on the other.

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Damián Němec

La « personne » en droit monastique

Résumé

L'accent mis sur la personne humaine et sa dignité a été appliqué de manière significative dans la nouvelle réglementation du droit de la vie consacrée, dont le nouveau Code de droit canonique de 1983 s'occupe ; ce droit est traité *in integrum* par rapport à l'ancien Code de droit canonique de 1917. Cet article ne décrit que quelques changements au droit des instituts religieux dans l'Église latine.

Le premier chapitre examine principalement la personne du moine et se concentre sur la question des vœux religieux comme base de la vie religieuse, sur les confesseurs comme outil indispensable pour renouveler la vie religieuse et pour modifier le concept de pauvreté, élément très important de la vie religieuse. Le deuxième chapitre est consacré à la gestion des instituts religieux ; y sont discutés la position renforcée des supérieurs internes par rapport aux supérieurs externes dans les congrégations religieuses, la position renforcée des supérieures des moniales et les pouvoirs étendus des supérieures en cas de renvoi d'un institut religieux en raison d'une absence illégale à la maison religieuse.

Comme il s'agit dans certains cas d'une toute nouvelle réglementation juridique, l'auteur n'hésite pas à exprimer ses critiques dans un texte professionnel.

Mots-clés : personne, Église catholique, droit de l'Église, religieux, religieuses, confession, propriété

Damián Němec

La "persona" nel diritto monastico

Sommario

L'accento messo sulla persona umana e sulla sua dignità è stato applicato in modo significativo nel nuovo ordinamento del diritto della vita consacrata, di cui si occupa il nuovo Codice di Diritto Canonico del 1983; tale diritto è trattato *in integrum* in relazione al vecchio Codice di Diritto Canonico del 1917. Questo articolo descrive solo alcune modifiche al diritto degli istituti religiosi nella Chiesa latina.

Il primo capitolo prende principalmente in esame la persona del monaco e si sofferma sulla questione dei voti religiosi come fondamento della vita religiosa, sui confessori come strumen-

to indispensabile per rinnovare la vita religiosa e sulla modificazione del concetto di povertà, elemento molto importante della vita religiosa. Il secondo capitolo è dedicato alla gestione degli istituti religiosi; si discutono la posizione rafforzata dei superiori interni nei confronti dei superiori esterni nelle congregazioni religiose, la posizione rafforzata dei superiori di monache e i poteri estesi dei superiori in caso di dimissione da un istituto religioso a causa di un'assenza illegale dalla casa religiosa.

Trattandosi in alcuni casi di una norma giuridica completamente nuova, l'autore non esita ad esprimere le sue critiche in un testo professionale.

Parole chiave: persona, Chiesa cattolica, diritto ecclesiastico, religioso, religioso, confessione, proprietà

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Personal Data Protection as an Expression of Personalism

Abstract: Human-related issues are the objected personalism. One of the current problems contemporarily recognized and widely known is data protection. The article aims to present a mutual connection between legal regulations of data protection, taking under consideration GDPR, and personalism. The conclusion is that there are many elements in legal regulations that justify the conviction that the protection of personal data can be seen as an expression of personalism.

Keywords: data protection, personalism, Karol Wojtyła, GDPR

Personalism as a Universally Applicable Idea

Karol Wojtyła worked on the issue of the human person, among others, from the point of view of philosophy. The result of this work is the book entitled *The Acting Person*. Karol Wojtyła was fully aware that the results of his research may have also a vital significance for the theology. The author, certainly acquainted with the principle of *philosophia ancilla theologiae*, believed that the philosophical view of a man as a person is a preparation of the basis for taking up personalistic issues in the field of theology. At the same time, the author in question pointed out that personalistic issues are not limited to philosophy or theology, but they have a universalistic meaning. The personalistic viewpoint

is of paramount importance for every human being and for the entire, ever-growing, human family in the contemporary world.[1]

There is a very close connection between the real person and the main object of interest in personalism. All it takes is the presence of a human being in some area of reality and this is already drawing on the reflection concerning him as a person. The connection has at least two consequences. First of all, considerations based on personalism are never a pure theory, but they touch upon human life. Secondly, the personalistic approach will apply to each and every problem, even the smallest one on whose horizon a person is even hardly visible.

The number and complexity of these human-related problems, also legal ones, turns out to be increasing over time. They are caused also by the development of various new technologies and new fields of science or law. One of the causative factors is the issue of personal data protection. Personalism must also face a new topic. As one of the principles of legislation teaches, law, to be receipted by the addressees of the law, should be aimed at specific people in their current situations. Law cannot be a relict without a touch with the current affairs.[2] The idea of making a law that is close to man can be called the personalism of the law.[3]

This article aims to present the link between personal data protection law and personalism, namely to prove that this regulated protection can be seen as the result of personalism.

Too Narrow and Proper Outlook on the Data Protection

The protection of personal data can only be seen as a purely technical legal directive that requires designated entities to perform certain formalities related to the processing of personal data and to carry out certain formalities connected with the processing of personal data, for example, the execution of the obligation to inform the data subject,[4] determination of the scale of risk connected with

[1] Karol Wojtyła, *Osoba i czyn* (Kraków: Polskie Towarzystwo Teologiczne, 1969); Karol Wojtyla, *The Acting Person*, trans. Andrzej Potocki, 18, https://www.scribd.com/doc/57487848/The-Acting-Person, accessed October 28, 2020.

[2] Piotr Kroczek, *The Art of Legislation: the Principles of Lawgiving in the Church* (Kraków: Unum Publishing House 2017), 229.

[3] Cormac Burke, "Renewal, Personalism and Law," *Forum* 7 (1996): 327–340.

[4] Article 12, 13, and 14 of the Regulation (Eu) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing

the processing of data,[5] provision of technical or organizational measures to ensure the security of the processing of such data.[6] These formalities imposed by law are sometimes assessed in the context of European law (GDPR) as unnecessary formalisms that only complicate people's lives and the functioning of institutions or business entities. From this point of view, the rules given in GDPR—when they are misinterpreted or misapplied and when they that even paralyze the proper functioning of society—are so-called "the absurdities of GDPR."[7] The protection of personal data is therefore seen only as a product of administrative idealism, which is a tendency to unquestionably arrange the world according to artificial legal rules.

This outlook on the data protection problem is too narrow, and it is for at least several reasons. First of all, personal data always concern a particular person, that is, his/her characteristics or the circumstances of his/her functioning. As a consequence, the protection of personal data can also be examined from a personalistic perspective. Secondly, the protection of personal data is an element of human protection by declaring and formulating various human rights—as the title of the GDPR states: "on the protection of natural persons concerning the processing of personal data." The basis of these rights is human dignity, which is inalienable and inviolable. This human dignity is one of the main elements of personalism.

Data Protection as an Element of the Right to Privacy and Human Dignity

Looking at the issue of personal data protection in a more detailed way, it should be noted that the protection of personal data is related to the right to privacy. This right is widely recognized and guaranteed in international and other normative acts, such as European or Polish.[8] Its basis, as well as the basis of other

of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) *Official Journal of the European Union*, L 119/1, 04.05.2016—herein referred to as GDPR.

[5] Article 24, 25, 32 and 35 of the GDPR, and also 27, 30, 33, and 34.

[6] Articles 25, 28, and 32 of the GDPR.

[7] See examples: https://bezprawnik.pl/absurdy-rodo-10-najwiekszych/, https://www.prawo.pl/biznes/absurdy-w-rodo-debata-prawopl.319431.html, accessed October 28, 2020.

[8] For instance, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), Article 7 of the Charter of Fundamental Rights of the European Union, Article 47 of the Constitution of the Republic of Poland of April 2, 1997.

human rights, is human dignity. Personal data protection, although having origin in the right to privacy, today functions alongside it as a full-fledged separate legal institution.[9]

Data protection, privacy, and dignity are clearly and mutually connected, for instance: the collection of geolocation data, information about the web pages visited using a given profile on the Internet, whether access to a phone call log can result in control over a person's life, preferences as a consumer, ways of spending free time or work, the identity of callers, etc. Too easy access to this personal information violates not only private life, but also the sense of dignity, integrity, and self-determination.

A human being cannot be the subject of commercial transactions, so why his data, sometimes very detailed, can be? One can say that situation when data is sold or exchanged is some kind of slavery.[10] At some point, this problem started to be noticed in the past. The development of technology made it possible to obtain more data, combine them into logical sequences from different sources and transfer between different entities. The answer to this problem in the international level, after long time of studies and theoretical disputes, was *The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*[11] known as "Convention No. 108" by Council of Europe. This treaty purpose is "to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection")" (Article 1).[12]

[9] In the Charter of Fundamental Rights of the European Union they are stipulated simultaneously—the right to privacy in Article 7 and the right to the protection of personal data in Article 8.

[10] See: Michał Duszczyk, "W Darknecie handlują danymi i tożsamościami. Zaskakujące ceny," https://cyfrowa.rp.pl/it/49567-nielegalny-handel-danymi-osobowymi-kwitnie-w-darknecie-zaskakujace-ceny, accessed January, 2 2021.

[11] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108, accessed October, 28 2020.

[12] The process of examining the degree of protection of the right to privacy by the European Convention on Human Rights and the internal law of the Member States and the conclusions drawn at each stage are described on pages 1–6 of the Explanatory Report to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.01.1981, https://rm.coe.int/16800ca434access29.12.2020, accessed October 28, 2020.

Definition of Personal Data as an Expression of Personalism

Continuing the reflection on personal data protection from a personalistic perspective, it is worthwhile to look at the very definition of personal data contained in Article 4 point 1 of the GDPR. Nota bene this definition has been receipted to other legal systems, including the law of the Catholic Church, and it is applied *mutatis mutandis* in them.[13]

At the beginning of the analysis of this definition, it should be noted that there is no enumerative list of which specific information constitutes personal data. The information must have the following characteristics:

1. information (any message, image, sound, smell, or other data in any form);
2. any form (regardless of its type, form or technical medium on which it is contained, true or not);
3. subject (a consistency that indicates that information must relate to a specific sphere of reality);
4. concerning an individual;
5. data reference, that is:
   a) identified (one whose identity we already know)
   b) or identifiable:
      i. directly (through her name or other information that will be sufficiently distinctive in the given facts), whether
      ii. indirectly (when the data form a "unique combination" to identify a person and distinguish him/her from others).

The definition of "personal data" constructed in this way allows for an individual approach to a given factual situation. It is always necessary to assess in a specific situation whether given information allows to identify a person or not. In some situations, the name alone will be able to identify a specific person (e.g., when the group is small or the name is original), while in others the name

[13] See, for example, Article 5 (1) of Dekret ogólny w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim wydany przez Konferencję Episkopatu Polski, w dniu 13 marca 2018 r., podczas 378. Zebrania Plenarnego w Warszawie, na podstawie kan. 455 Kodeksu Prawa Kanonicznego, w związku z art. 18 Statutu KEP, po uzyskaniu specjalnego zezwolenia Stolicy Apostolskiej z dnia 3 czerwca 2017 r., *Akta Konferencji Episkopatu Polski* 30 (2018), 31–54, and Article 2 point 1 of Conferenza Episcopale Italiana, Decreto generale *Disposizioni per la tutela del diritto alla buona fama e alla riservatezza* (21–24.05.2018), https://www.chiesacattolica.it/wp-content/uploads/sites/31/2018/05/25/Decreto-generale.pdf (25.04.2020), or Article 4 point 1 Gesetz über den Kirchlichen Datenschutz (KDG) in der Fassung des einstimmigen Beschlusses der Vollversammlung des Verbandes der Diözesen Deutschlands vom 20. November 2017, https://www.erzbistum-muenchen.de/cms-media/media-41655420.pdf, accessed October 28, 2020.

alone will not be sufficient (e.g., when the group is large). Sometimes information that is usually not personal will suddenly become such by combining it with other information (e.g., a signed artwork of a child hung outside a kindergarten in a smaller town or a geolocation data joined with data from the phone). Due to such an approach and the construction of the above-mentioned definition one can be sure that each time it is not meaningless formalities that are required but the real human and his personal data are protected, and likewise, there is no situation in which they are not, even if the protected data could seem as not personal.

Personalism in the Practical Application of Personal Data Protection Regulations

A personalistic approach is also necessary when applying data protection regulations. They impose specific obligations on data controllers (the person responsible for processing data). Some of these obligations are clearly formulated, while others shall be properly read by the controller. It is the controller himself, taking into account the specific realities in which he operates, who decides what documents he should draw up, what organizational rules he should establish, etc. This is due to the fact that it is not the formalities that are to be fulfilled but the real protection of the personal data that should be created.

The duties seen outwardly in the form of creating appropriate documentation are to be only an emanation of basic assumptions, which are the protection of man and his dignity by protecting his personal data. If the administrator approaches his duties purely formally, without a vision of the human being on the horizon, then his actions will not really fulfill the purpose of the introduced standards. They will not lead to the protection of human dignity, but only to the creation of meaningless documents, tables, and statements. The creation of a fat binder of authorization to process data will not cause personal data to be processed only by persons authorized to do so. It is still necessary to make these persons aware of what their authorizations involve and what the protection of personal data is all about. Failure to provide information about the hospital's residents may and will result in personal data not being leaked out of the hospital, but it will also prevent parents from knowing which hospital their child is being transported to, and therefore will not safeguard the child's need for contact with his or her relatives. Another example would be the situation when two people with conflicting interests will have their rights (for example, a person who crushed the car and the car's owner) and the need of assessing

will arise whether the data protection is stronger in such situation or the other right (for example, if the place of the car crush was filmed, the stronger right would have the owner of the car to get the film to prove his damage or the person who crushed the care to protect his or her personal data). Therefore, it is always necessary to see a human being and the need to protect them on many levels.

Conclusion

To sum up, it must be said that the right to data protection is now a clearly defined right, whose presence in legal systems is not only forced by external circumstances—for example, technological developments—but also by the needs of a more conscious person. The protection of personal data is, after all, the protection of his or her privacy, and ultimately his or her dignity as a human being. This individual approach in defining personal data, the need to interpret the regulations taking into account the circumstances accompanying an individual and, above all, by realizing the need to protect the real person, the protection of personal data can be justly seen as an expression of personalism.

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Małgorzata Chojara-Sobiecka, Piotr Kroczek

La protection des données personnelles comme expression du personnalisme

Résumé

Le personnalisme porte sur des questions liées à l'homme. L'un des problèmes actuels communément reconnu est la protection des données personnelles. L'objectif de l'article est de présenter la relation entre les réglementations légales sur la protection des données personnelles, dont le RGPD, et le personnalisme. L'auteur conclut qu'il existe de nombreux éléments dans les réglementations légales qui justifient la conviction que la protection des données personnelles peut être perçue comme une manifestation du personnalisme.

Mots-clés : protection des données personnelles, personnalisme, Karol Wojtyła, GDPR

Małgorzata Chojara-Sobiecka, Piotr Kroczek

La protezione dei dati personali come espressione del personalismo

Sommario

Il personalismo riguarda le questioni legate all'uomo. Uno dei temi attuali comunemente riconosciuto è la protezione dei dati personali. L'obiettivo dell'articolo è presentare il rapporto tra le norme di legge in materia di protezione dei dati personali, incluso il GDPR, e il personalismo. L'autore conclude che vi sono molti elementi nelle norme giuridiche che giustificano la convinzione che la protezione dei dati personali possa essere vista come una manifestazione del personalismo.

Parole chiave: protezione dei dati personali, personalismo, Karol Wojtyła, GDPR

Part Two

Reviews

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Tomasz Gałkowski CP, *Ogólne zasady prawa w prawie kanonicznym* [General Principles of Law in the Canon Law] Warszawa: Wydawnictwo Naukowe Uniwersytetu Kardynała Stefana Wyszyńskiego, 2020, 221 pp.

The well-known Polish canonist, head of the Department of the Theory of Church Law in the Faculty of Canon Law of the Cardinal Stefan Wyszyński University in Warsaw, created a monograph, which, even though written in Polish (with all the restrictions connected with it), has a chance to trigger a broader interest beyond the circle of its natural addresses: lawyers that focus on the theory and praxis of law. Three chapters, well-edited within the substantive and formal plain, preceded by the means of an Introduction and concluded not only by the means of a standard Conclusion, as well as Deductions closing the consecutive research stages—yield a holistic and cohesive image of these issues. What should be immediately emphasized is the fact that it concerns an issue, which anyone familiar with the heritage of the European legal culture, and even more a lawyer-canonist who understands the system specificity: *ordo Caritatis—Ecclesia iuris*, recognizes as fundamental. The author, distant from—not infrequently (unfortunately!) encountered in canon law literature eclectic depictions of "general rules of law" (here, obviously, we should not confuse the lack of respecting the autonomy of systems marked by the state *leges* and church *canones* in the affirmation of much desired creative dialog of legal cultures), from time to time shifts the emphasis of the discourse towards the last part of the title: "[…] in the canon law." The technique is both original and methodologically apt, since the only thing we can do is to applaud such thought-out and consistently

implemented hermeneutical circle figure. The author explains: "The existing legal system is a basis for understanding the principles, which contributed to its creation and which should be located in the normative solutions included therein. They reflect the preferences, constitute criteria, which explain the choices made by the legislator and are a basis of the coherence between the regulations of law" (p. 103). The established perspectives of contextual contemplation of the title "principles" are: (1) Code of Canon Law (*nota bene* the lack of the Code of Canons of the Eastern Churches in author's analysis was not appropriately justified, for example, in pointing direction towards the existence of strict/based on necessity relation between law and the Community; the negligible remark in reference 29 (pp. 27–28) does not compensate for it), (2) theory of canon law, (3) theology of canon law. The author reveals, in these three scenes, the program (!) favoring of "historical and redemptive orientation of practicing the study of canon law" (p. 14). The characteristic sign of such positioning is the repeatedly quoted thought suggesting that an adequate cognitive horizon, on which *generalia iuris principia* should be situated, is the theological context of *ius Ecclesiae*. Consequently, their meanings in the canon law system cannot be brought down to merely the function of a tool solving legislative loopholes (the author justly emphasizes the insufficiency of theoretical and legal depictions that would refer to the common legal culture heritage and analogous functioning of the title principles in the canon and state legal systems). That is how a proper, accurately determined, space of subject contemplation is opened. The central place in the monograph belongs to the following supposition: since it is true that the "positive law system is not the only source of Church law" (p. 147), then the main reference point in the proper exegesis and application of can. 19/CIC 1983 should be the two paradigmatic theses: (1) *lex canonica* should be understood as *ordinatio fidei*, (2) the elementary criterion in complementing law (determining a specific case and confirming law—understand: acknowledging the existence of subjective rights/duties of a believer—in the face of the lack of an explicit general or particular act, or common law) is a hermeneutical triad: *salus animarum—aequitas canonica—generalia iuris principia*. We can boldly say that it is owing to these assumptions that the author managed to credibly present the *clou* of the specific nature of Church law and realize the planned research goal. What seals it is the central positioning in the determination of the title issue of the "canonical equity" institution, the role of which is not brought down by the author merely to filling legislative loopholes. Indeed, it was necessary to draw conclusions from the fact that *aequitas canonica* constitutes *par excellence* the internal and formal impetus for justice and dynamic principle of creation and development of law. The author's statement addresses the issue: "The aim of canonical equity […] is to correct every situation where there is a risk of *rigor iuris*. The function of canonical equity is to complement law, which, as a result, leads to its rule-making function and correcting law where it is defective"

(pp. 147–148). In conclusion, I personally see the main value of the reviewed item in the indication towards *generalia iuris principia* as a tool of mitigating the harmful antinomy mostly between: formal and material justice, what is public (*bonum commune*/ *bonum communionis*) and what is private (*bonum personae*). At the end of the day it is about the principles that convey the potential of supporting—system in *ius Ecclesiae*—"alliance" of law and ministry (see John Paul II's famous address to the Roman Rota from 1990), directed towards real protection/promotion of subjective rights of the faithful in the Church, in the name of the realization of the *salus animarum* goal.

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Carlo Fantappiè, *Ecclesiologia e Canonistica* Venezia: Marcianum Press, 2015, 439 pp.

The title of the discussed Carlo Fantappiè's publication suggests that the content it includes concentrates around the issues of reciprocity of the two scientific disciplines which are ecclesiology and the science of canon law. The title of the book is very widely defined. It may concern both the methodological issues and the practical normative solutions. What should not escape the attention of an interested reader is the additional issue, namely, the question of the very law in the Church. The connection between ecclesiology and the study of canon law is not so much the consequence of the existence of law in the Church but the law of the Church as her structural element. Every way of practicing ecclesiology, from a preferential point of view, does not remain indifferent to the fact of law in the Church. Ecclesiology yields an answer to the question about law in the Church. I believe, however, that an issue presented in such a way is not a point of interest of canonists, for whom the subject of research, especially within the theology of canon law, should be the fact of law within the vista of redemption, that is, the role which law has in the redemptive act that is realized in the Church and because of the Church. The title of the paper triggers interest in a great many scientific areas.

Carlo Fantappiè divided the content of the book into two parts. The first one is entitled Historical Acquisitions (Acquisizioni storiche). The second one was entitled Border Problems (Problematiche di confine). However, both parts constitute a set of Fantappiè's hitherto publishedpapers (seven) and one new, not published before. Fantappiè's decision to place all of his publications in one volume does not present a juxtaposition of the subsequent studies, but requires a proper key that would make it possible to read it as one piece. Obviously, as the author writes (p. 65), it also required an intervention into thecontent of the publication with a view to adapting and unifying the text, as well as giving

it a logical and chronological unity. In this way the studies can be viewed as a whole, which proves the fruit of the methodological correctness of the undertaken issue presented in the Introduction to the consecutive parts of the study.

In the reader's eyes, though, the Introduction to the paper fulfills an additional function since from the historical perspective it presents problems connected with a mutual coexistence of two somehow related theological disciplines (i.e., ecclesiology and the study of canon law) and also what undoubtedly is the most interesting thing for the contemporary researchers of the issue, namely, the adroitness at placing the problems that appear on the border of ecclesiology and law in relevant context. The above problems, presented by the Author in particular chapters, do not disclose scientific contemplation but, instead, they uncover practical issues triggered by changes happening in the Church as a result of specific situations.

Reading Fantappiè's book I have an impression that he is familiar with methodological correctness, proper approximation of ecclesiology and the study of canon law enabling the defininition of means of solving the appearing issues, making it possible to continue the discussion, taking up proper normative solutions. Such an approach can be characteristic of every researcher from the outside of the Church community and derive not always concise and real conclusions. The Author of the book directs our attention towards issues resulting from the inside of the Church community, from self-awareness of the Church in the way in which she currently reveals herself. He does not, however, leave questions without answers, suggesting that the renewal of connections between ecclesiology and the study of canon law, which according to him constitute the problems that came to light after the Second Vatical Council, requires proper recognition of new problems with the mutual relation between ecclesiological and canon law knowledge. It will make it possible to avoid unilateral and deficient solutions of Church issues, suggesting that, on the one hand, theology is not far-detached from the real problems requiring finding a solution, and, on the other, canon law is not a tool of achieving the intended goals, incomprehensible without referring them to the essence and goal of the Church.

A proper cooperation of ecclesiology and the study of canon law does not require mere openness of one discipline to the other. The Author turns our attention to traditions and historical references of both scientific disciplines, as well as the necessity of a context reference to various ideas, which appeared in the Church and which influence the process of shaping Church's official doctrine. In order for the relations of ecclesiology and the study of canon law to have a theoretical value and practical reference they cannot focus on the ecclesiological proposal for practical references. The proper relation between ecclesiology and canon law, which is a conveyor translating ecclesiology into the language of canon law requires reaching out for motives, which not only shaped the official doctrine of the Church, but also to the real reasons that influence

the appearance of new currents of thought within ecclesiology. Since what is connected with these theological concepts creating new and different situations from the accepted ones inside the Church are canon law doctrines referring to the constitution of the Church and problems, which are currently present within both disciplines. The fruitful cooperation of ecclesiology and the study of canon law requires a mutual method of analyzing own claims from a broad historical perspective conditioning their existence, and not only in the light of solutions stemming from the presented wordings.

Carlo Fantappiè does not carry out his speculations as part of theoretical analyses. Each and every detailed issue undertaken by the Author constitutes a valuable reference point for the understanding of the existing situations, which trigger particular questions. The Authormakes it possible to take a closer look on the motives of the situations, indicating towards the possible effects of the cooperation of ecclesiology and study of canon law. Carlo Fantappiè's book of essays constitutes a good basis for a deeper insight into the Church reality and conclusions derived from it, including these of normative character. It allows us to notice the perspective, which does not restrict the needs of the moment.

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Spiritual Care in Public Institution in Europe, eds. Jiří Rajmund Tretera and Záboj Horák. Berlin: Berliner Wissenschafts-Verlag, 2019, 140 pp.

Pastoral care in public institutions is one of the current issues of state ecclesiastical law. It concerns areas traditionally referred to as *res mixtae*, namely, health care, the army and the armed forces, the police, prisons, but also other public institutions as well as emerging areas (e.g., migrants). The churches are aware that it is necessary to prepare experts for these areas, who know not only theology and the given fields, but who are capable of ecumenical cooperation and often primarily non-missionary work too. Their activities in these areas are based on the principle of religious freedom, guaranteed by concordat treaties in the case of the Catholic Church, similar treaties with other churches and religious societies, and the legislation of individual countries.

Presented monograph Spiritual Care and Public institutions in Europe edited by doc. Záboj Horák and prof. Jiří Rajmund Tretera from Charles University in Prague captures the current legislation and various tasks of chaplains, volunteers, and teams in many European countries in eleven chapters of individual authors. It is also an output from the international conference *Fourth Prague Dialogues on Church and State Relations: Spiritual Care in Public Institutions*, held at the Prague Faculty of Law on 13–14 June 2019.

In the introductory chapter, Jiří Rajmund Tretera recapitulates the general characteristics and new trends in the approach to pastoral care in public institutions in Europe. It thus presents the starting points for further reading of the monograph.

Chapter two by Gerhard Robbers of Trier describes pastoral care in public institutions in Germany, and briefly mentions pastoral care in the area of im-

migrant centers, transport (airports, motorways, railways) or in the German parliament too. In the third chapter, the English author Mark Hill QC summarizes the historical, legal, and practical context of pastoral care in public institutions and presents it to the reader as a long-term integral part of English society. On the opposite, there is the French approach described by Francis Messner (Strasbourg) in his paper on these services in the French secular lay model.

The Swiss situation is summarized by Adrian Loretan, who explains the pastoral service in Swiss direct democracy and in their systems of diversity. Wolfgang Wiesheider's contribution summarizes the Austrian approach, including the data protection provided by the law of the European Union. Chaplaincy in Hungary, including a brief introduction to historical and sociological assumptions, is presented by Balázs Schanda from Budapest. The Polish model of church-state relations and individual areas of traditional church activities (army, health care, prisons) is described by Piotr Stanisz from Lublin. The last three papers are devoted to the region of the Czech Republic and Slovakia. Martin Šabo and Michaela Moravčíková present the Slovak situation, specifically the role of individual ministries (of defence, justice, finance, health care and others) in cooperation with the provision of this care with individual churches.

The penultimate chapter of the author Damián Němec focuses in detail on the area of Czech healthcare and thus goes beyond the overall concept of other contributions. The reason for this deeper exposition was precisely the topicality of the issue in the Czech Republic and the difficulty of negotiations and clarification of the views of stakeholders.

The last chapter by Záboj Horák then summarizes the overall pastoral care in public institutions in the Czech Republic, both in terms of theoretical principles, bases and historical experience, as well as current legislation in individual areas.

Most of the contributions recapitulate the situation of spiritual care in public institutions in individual countries in a general way. The only difference is the concept of the contribution of Damián Němec, who focused in more detail on the sphere of healthcare in the Czech Republic. The reason for this choice was the current situation in the Czech Republic. After a long period of negotiations between the churches represented by the Czech Bishops' Conference and the Ecumenical Council of Churches and between the Ministry of Health of the Czech Republic, there was managed the legislative base in the trilateral agreement between the Czech Bishops' Conference, the Ecumenical Council of Churches and the Ministry of Health of the Czech Republic on 11 July 2019.

The book was published in the German language Berliner Wissenschafts-Verlag in the series Kirche und Recht-Beihefte in English. In this way it offers better linguistic approach and it can be a summary presentation of this issue,

but also a contribution to the presentation of the current situation in not only the European area and an incentive to enrich other legislation and discussion in not only the European legal area.

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