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Pillars of the System of *ius matrimoniale canonicum* According to Remigiusz Sobański

Abstract: "The *Gaudium et spes* Constitution does not approach [matrimony] a priori—as the *Casti connubii* Encyclical did—but, instead, it analyzes the reality of matrimony as it is reflected in the Christian consciousness shaped by the teaching of the Church." This characteristic sentence, derived from *Śląskie Studia Historyczno-Teologiczne* [Silesian Studies in History and Theology] (1968), which debuted at that time on the market of theological periodicals, shows in itself the epistemological sensitivity and sharp methodical sense of the Author and the Executive Editor of the periodical. This study adopts a hypothesis, which suggests that in this and similar lines of the famous article from 1969—perfectly set in the current of the conciliar *aggiornamento*—a key to understanding the phenomenon and scientific format of the work of Rev. Professor Remigiusz Sobański (1930–2010) appeared. Positive verification of this hypothesis is not in doubt: the experience of half a century of work as a scientist and person with real-life experience (a judge and officials in the Katowice Tribunal) and the related fact that he has become an undisputed authority in the field of canonical matrimonial law, resulted in the Author's exposition of the systemic principles of the codified *ius matrimoniale* (CIC 1983). This finding makes it necessary to reflect, with sharpened attention, on the title area "Pillars of the system of *ius matrimoniale canonicum* according to Remigiusz Sobański" in the following order: (1) "the principle of matrimonial indissolubility" (*irrevocabilis consensus personalis—vinculum indissolubile*), (2) "the principle [that] shapes from within all the canonical norms on marriage" (*favor matrimonii*), (3) "the principle of the right to marriage" (*ius connubii*), (4) "sacrament—one of the structural elements of the Church" (*sacramentum matrimoni*; principles: *eo ipso sacramentum* and *favor fidei*).

Keywords: Remigiusz Sobański, methodology of the canon law, matrimony, sacrament of matrimony, matrimonial consent, principle of matrimonial indissolubility, *favor matrimonii*, *ius connubii*, principle *eo ipso sacramentum*, *favor fidei*

Introductory Remarks

"The *Gaudium et spes* Constitution does not approach [matrimony] a priori—as the *Casti connubii* Encyclical did—but, instead, it analyzes the reality of matrimony as it is reflected in the Christian consciousness shaped by the teaching of the Church."[1] This characteristic sentence, derived from *Śląskie Studia Historyczno-Teologiczne* (1968) [Silesian Studies in History and Theology], which debuted at that time on the market of theological periodicals, shows in itself the epistemological sensitivity and sharp methodical sense of the author and the executive editor of the periodical in the years 1968–1975. We may risk a claim that in this and similar lines of the famous article from 1969—perfectly set in the current of the conciliar *aggiornamento*—there is a key to understanding the phenomenon and scientific format of the work of Rev. Professor Remigiusz Sobański (1930–2010). Similarly to the above-quoted text on matrimony, which appeared at the beginning of his writing activity,[2] his entire impressive output, with a considerable share of *de matrimonio* studies—is distinguished by a well-recognized trademark: faithfulness to the hermeneutics of Vaticanum II. After all, this valued expert in the field of interpretation and application of Church law—deservingly honored with a double title of "Iustus iudex et Pastor bonus"[3]—perfectly understood the importance of the paradigm of the reform of the Church (and its law) as a "renewal in the continuity"[4]; a paradigm, it should be added, which he himself, as an outstanding theo-

[1] Remigiusz Sobański, "Symulacja częściowa w ujęciu k. 1086 § 2 a nauka o małżeństwie konstytucji Gaudium et spes," *Śląskie Studia Historyczno-Teologiczne*, vol. 2 (1969): 40.

[2] More specifically, it is the second article by the Canonist dedicated to the problem of canonical marriage. See an earlier publication: Remigiusz Sobański, "Instrukcja o małżeństwach mieszanych," *Wiadomości Diecezjalne*, vol. 34 (1966): 99–102.

[3] See *Sędzia i pasterz. Księga pamiątkowa w 50-lecie pracy ks. Remigiusza Sobańskiego w Sądzie Metropolitalnym w Katowicach (1957–2007)*, ed. Honorata Typańska (Katowice: Księgarnia Św. Jacka, 2007); cf. Grzegorz Leszczyński, "Iustus iudex et Pastor bonus," in *Wkład Księdza Profesora Remigiusza Sobańskiego w rozwój kanonistyki. W dowód wdzięcznej pamięci o zasługach dla rozwoju kanonistyki. Materiały z konferencji naukowej zorganizowanej na Wydziale Prawa Kanonicznego UKSW w dniu 11 grudnia 2013 roku,* ed. Tomasz Gałkowski (Warszawa–Kraków: Scriptum, 2014), 120; Andrzej Pastwa, "Promotor idei *dispensatio gratiae*. Uwagi o wkładzie ks. prof. R. Sobańskiego w kulturę prawną (Archi)diecezji Katowickiej," in *Wkład Księdza Profesora Remigiusza Sobańskiego w rozwój kanonistyki*, 164–165.

[4] Benedict XVI, "Address to the Roman Curia Offering them his Christmas Greetings" (December 22, 2005), https://www.vatican.va/content/benedict-xvi/en/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia.html, accessed February 28, 2022; 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 February 28, 2022.

retician and at the same time a recognized Church practitioner-judge, fully affirmed/applied, among others, in reference to the doctrine and discipline of marriage.[5] Therefore, it is not surprising that in the latter area, following the thought of the post-Conciliar popes Paul VI, John Paul II, and Benedict XVI—having in mind the famous theological principle *sentire cum Ecclesia*[6] and the immanent connection of *canones* with the unity and mission of the Church[7] dictated by this principle—the Professor consistently follows the rule that the work of the interpreter cannot be deprived of a vital contact with ecclesial reality.[8]

This is how Remigiusz Sobański's decisive and somewhat prophetic words should be understood, as they accurately predict the direction of the reform of *ius matrimoniale*[9]: "The canonical interpretation of matrimony must not deplete its theological reality. Canon law must reflect the current consciousness of the Church. Deeper immersion of theology into the teaching on matrimony should consistently be reflected in the Church matrimonial law."[10] These words are voiced in a situation when the blatant insufficiency/incompatibility of the current code formulations (CIC 1917) is all too clearly demonstrated by the difficulty of interpreting certain canons of matrimony or even their uselessness in jurisprudence,[11] as in the case of the famous formula defining the object of marital consent: *tradit et acceptat ius in corpus*.[12]

[5] 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 February 28, 2022.

[6] Paulus VI, "Allocutio ad Praelatos Auditores, Officiales et Advocatos Tribunalis Sacrae Romanae Rotae, novo litibus iudicandis ineunte anno coram admissos" (23 ianuarii 1967), *Acta Apostolicae Sedis*, vol. 59 (1967): 143; cf. Antoni Stankiewicz, "*Sentire cum Ecclesia* e l'interpretazione della legge canonica," *Periodica de re canonica*, vol. 102 (2013): 398–402.

[7] Cf. John Paul II, "Address to Members of the Tribunal of the Roman Rota" (January 29, 2005), n. 6, http://www.vatican.va/content/john-paul-ii/en/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota.html, accessed February 28, 2022.

[8] Cf. Benedict XVI, "Address for the Inauguration of the Judicial Year of the Tribunal of the Roman Rota (January 21, 2012), https://www.vatican.va/content/benedict-xvi/en/speeches/2012/january/documents/hf_ben-xvi_spe_20120121_rota-romana.html, accessed February 28, 2022.

[9] For the sake of completeness, the majority of the Canonist's deductions concerning the personalistic reinterpretation of the partial simulation of the title (and the conclusions *de lege ferenda*) is consistent with the position of the first reviewer of the achievements of the Commission preparing the reform of the matrimonial law Urbano Navarrete, considered quite commonly as the most outstanding canonist of the 20th century. See Urbano Navarrete, *Structura iuridica matrimonii secundum Concilium Vaticanum II. Momentum iuridicum amoris coniugalis* (Roma: Editrice Pontificia Università Gregoriana, 19942).

[10] Sobański, "Symulacja częściowa," 44.

[11] Sobański, "Symulacja częściowa," 45.

[12] *Code of Canon Law* (promulgated: May 27, 1917) [further: CIC 1917], can. 1086 § 1.

This methodological and hermeneutical inquisitiveness of the young researcher,[13] sharpened by the experience of half a century of work as a scientist and person with real-life experience (a judge and officialis in the Katowice tribunal), is well reflected in the retrospective statement of the 80-year-old Jubilarian at the scientific conference combined with a ceremony of presenting him a memorial book. "The art is to make laws (*ars leges ferendi*), the art is to apply them in such a way that the regulations produce *in concreto* good law—*ius esto, iudex ius dicit*."[14] Here an important circumstance cannot be overlooked: since the specificity of the aforementioned *ius* is measured by the presence of God's law (positive and natural) in the Church law,[15] the jubilee lecture (the last one, as it turned out, delivered by the Professor) could not fail to mention the pillars of the system[16] of *ius matrimoniale canonicum*. Indeed, this time leaving the principle of "irrevocable personal consent"[17] in the background, Remigiusz Sobański explicitly emphasizes the importance of the systematic principles of the codified matrimonial law (CIC 1983),[18] which—when put into practice (defined, interpreted, applied)—invariably demand "operational" concretization.[19] This rule should be applied to the following principles: (1) "the principle of matrimonial indissolubility"[20] (*irrevocabilis consensus personalis—vinculum indissolubile*), (2) "the principle [that] shapes from within all the canonical norms

[13] The author's stance presented before the codification work began attests to this: "Should we not break away from the scheme of the three goods? These goods fall undoubtedly within the doctrine of the Constitution *Gaudium et spes*, but probably do not exhaust it." Sobański, "Symulacja częściowa," 43; cf. Andrzej Pastwa, "*Sacramentalitas* czwartym dobrem małżeństwa?" in *"Ars boni et aequi." Księga pamiątkowa dedykowana Księdzu Profesorowi Remigiuszowi Sobańskiemu z okazji osiemdziesiątej rocznicy urodzin*, ed. Józef Wroceński and Helena Pietrzak (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2010), 391–409.

[14] Remigiusz Sobański, "Między rygoryzmem a laksyzmem. Kanoniczny proces o nieważność małżeństwa na tle kondycji małżeństw sakramentalnych w Polsce," *Prawo Kanoniczne*, vol. 53, no. 3–4 (2010): 162.

[15] See Remigiusz Sobański, "Niezmienność i historyczność prawa w Kościele: Prawo Boże i prawo ludzkie," *Prawo Kanoniczne*, vol. 40, no. 1–2 (1997): 23–44.

[16] "The God's law does not appear […] in the Church law in isolated sentences, but instead it 'belongs to the system,' forming a coherent whole with the sentences coming formally and materially from the Church legislator. In this 'system,' there are sentences of which the Church is convinced that […] faithfully and 'directly' express the will of the Lord, there are those which have been formulated as a necessary consequence of the former, and there are finally those which are considered necessary precisely because of fidelity to the law of God." Remigiusz Sobański, *Metodologia prawa kanonicznego* (Katowice: Gnome, 2004), 44.

[17] Remigiusz Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," *Śląskie Studia Historyczno-Teologiczne*, vol. 30 (1997): 116.

[18] *Code of Canon Law* (promulgated: January 25, 1983), cann. 1055–1165.

[19] Sobański, *Metodologia prawa*, 44.

[20] Sobański, "Między rygoryzmem a laksyzmem," 164, 166.

on marriage"[21] (*favor matrimonii*), (3) "the principle of the right to marriage"[22] (*ius connubii*), (4) "sacrament—one of the structural elements of the Church"[23] (*sacramentum matrimonii*).

Irrevocabilis consensus personalis / vinculum indissolubile— The Principle of the Indissolubility of Marriage

In the opinion of the valued experts in the area of matrimonial law—among them Remigiusz Sobański—indissolubility[24] is such a fundamental determinant of the Church marriage that without it *matrimonium canonicum* could not be understood at all.[25] It is connected, according to the Professor, with the simple fact that "the norms of canonical substantive and formal matrimonial law […] are 'ultimately' a concretization of the principle of matrimonial indissolubility, recognized by the Church as a principle of the God's law."[26] It is not difficult to see that the two statements above address the fundamental methodological issue of affirming the way in which the content of Revelation—deduced through theological inference, using the rule of the "order of truths"—is objectified in the Church law.[27] The fidelity to the process of *aggiornamento*, that is, making the Church "present,"[28] determines the only cor-

[21] 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. 3, http://www.vatican.va/content/john-paul-ii/en/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rota.html, accessed: February 28, 2022; Remigiusz Sobański, "Ochrona małżeństwa w kanonicznym prawie procesowym," *Prawo Kanoniczne*, vol. 52, no. 3–4 (2009): 161–162.

[22] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 117; Sobański, "Między rygoryzmem a laksyzmem," 163.

[23] Sobański, "Między rygoryzmem a laksyzmem," 162.

[24] *Code of Canon Law* (promulgated: January 25, 1983) [further: CIC 1983], can. 1056.

[25] "Die Unauflöslichkeit (® 1056) ist diejenige Eigenschaft der kirchlichen Ehe, ohne die das kanonische Eherecht nicht zu versehen ist." Klaus Lüdicke, "Kommentar vor c. 1059," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Dezember 2013), Einf. vor 1059/2.

[26] Sobański, *Metodologia prawa*, 45, note 82.

[27] "The principle of the 'order of truths' serves as an interpretive tool useful for differentiating between content that is binding because of Revelation and that which is 'merely' legitimate and right. This 'difference of proximity' applies not only to sentences referring to God's law, but to all provisions of Church law." Sobański, *Metodologia prawa*, 44.

[28] Sobański, "Niezmienność i historyczność prawa w Kościele," 44.

rect way to communicate the truth about the principle of the indissolubility of marriage, according to the classical triad: proclaim—announce—apply. This, at the level of canon law, means that the communication *in canones* of this truth (promulgation— interpretation—application), that is, the articulation (according to the measure of the anthropological paradigm[29]) of the "substance of the God's law" which neither the Church nor anyone else has the power to abolish or change[30]—invariably "seeks" the support of the current conciliar doctrine on marriage[31] and the authoritative interpretation of the latter in the Papal magisterium.

The Polish Scholar follows this path when in his commentary to the still fresh passages of the matrimonial constitution *Gaudium et spes* he highlights a new pattern of the methodical approach of the fathers of the Second Vatican Council to *essentialia in matrimonio*—a renewed optics that can be described in one word: "personalization."[32] In turn, the personalistic view of matrimonial consent[33] resulted in an important change: the Council document explicitly links matrimonial indissolubility to love. Understandably, such a key systemic turning point deserved a longer authorial comment: "Not without surprise, some commentators have drawn attention to this moment by recalling that previous Church documents have justified indissolubility with respect to offspring, and with respect to childless marriages with the good and necessity of the institution of matrimony. […] Indissolubility (and unity) arise from the nature of the marriage community, not from the law of offspring. For only irrevocable and exclusive devotion corresponds with human dignity. This natural indissolubility is strengthened […] by the sacramentality of marriage, since it is an image of Christ's unity with the Church."[34]

[29] Andrzej Pastwa, "Kanonické paradigma nerozlučitelnosti. O vztahu přirozenosti a kultury v katolickém chápání manželství," *Studia theologica*, vol. 22, no. 2 (2020): 85–98.

[30] Sobański, *Metodologia prawa*, 44.

[31] Vatican Council II, "Pastoral Constitution on the Church *Gaudium et spes*" (December 7, 1965) [further: GS], nn. 47–52; Vatican Council II, "Dogmatic Constitution on the Church *Lumen gentium*" (November 21, 1964), n. 11; Vatican Council II, "Decree on the Apostolate of the Laity *Apostolicam actuositatem*" (September 18, 1965), n. 11.

[32] Here it is worth quoting a characteristic explanatory note of a great ally of the reform from Poland: "The idea was […] to personalize the matrimonial consent by detaching it from merely biological or contractual elements." Sobański, "Symulacja częściowa," 45.

[33] Sobański, "Symulacja częściowa," 46.

[34] Sobański, "Symulacja częściowa," 42–43. Hence the detailed commentary on the relevant passage of the *Gaudium et spes* constitution is not trivial: "Quae intima unio, utpote mutua duarum personarum donatio, sicut et bonum liberorum, plenam coniugum fidem exigunt atque indissolubilem eorum unitatem urgent" (GS, n. 48,1). The canonist notes, "The fact that the constitution links the matrimonial indissolubility with love allows us to understand in what sense the verb *urgent* is used; […] in light of the drafting committee's explanation, it appears that it was chosen deliberately to emphasize that the very nature of love requires fidelity and indissolubility." Sobański, "Symulacja częściowa," 43.

The same epistemological and methodological approach distinguishes Sobański's deep analysis of the doctrinal foundations of the systemic principle in question in the Papal teaching, or more precisely in the special magisterium addressed to the employees of the Church justice system.[35] It is no coincidence that the choice fell on the excellent, probably the most important during the pontificate of Pope Benedict XVI, *Address to the Tribunal of the Roman Rota* in 2007, the motto of which are the words: "the legal truth presupposes the 'truth of the marriage' itself."[36] It was here that the world of matrimonialistics[37] saw precise indications—so close to Remigiusz Sobański's scientific *credo*—on the one hand, dictating the requirement to base law on a firm anthropological (and ecclesiological) foundation, and, on the other, unveiling the false logic of positivistic discourse.[38] The Pope's strongly articulated fidelity to the "hermeneutics of the Council" points—as a first step—towards the generally signaled set of principles of the God's law underlying the *ius matrimoniale*: "The Council certainly described marriage as *intima communitas vitae et amoris*, but this partnership is determined, in accordance with the tradition of the Church, by a whole set of principles of the divine law which establish its true and permanent anthropological meaning."[39] This makes it all the more valuable to focus—in the next step—on the characteristics of the internal bond of justice between the persons of man/husband and woman/wife, which in a way crowns the papal lecture. This apt logic reveals the truth of the importance of the fundamental and first principle of the system of the

[35] See 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), 75–85.

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

[37] Cf. Ombretta Fumagalli Carulli, "Verità e giustitia nella giurisprudenza ecclesiale," *Ius Ecclesiae*, vol. 20 (2008): 463–478; Carlos José Errázuriz Mackenna, "Riflessioni circa il 'bonum coniugum' e la nullità del matrimonio," in *"Iustitia et iudicium." Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*. Edited by Janusz Kowal, Joaquín Llobell, vol. 1 (Città del Vaticano: LEV, 2010), 169–182; Paolo Bianchi, "L'interpretazione positivistica del momento costitutivo del matrimonio," *Periodica de re canonica*, vol. 101 (2012): 463–476.

[38] Remigiusz Sobański quotes in extenso the teaching of Benedict XVI: "['Truth of the marriage'] loses its existential importance in a cultural context that is marked by relativism and juridical positivism" (Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota," January 27, 2007). He adds of his own accord: "[This affects] the way many of the faithful also think about marriage. They perceive matrimonial indissolubility as an ideal to which all 'normal' believers cannot be committed. Remigiusz Sobański, "Prawda jako entelechia procesu o nieważność małżeństwa w świetle przemówień Piusa XII do Roty Rzymskiej," *Ius Matrimoniale*, vol. 13 (2008): 40.

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

canonical matrimonial law. This is how Sobański reads the papal[40] proclamation: "The essential juridical character of marriage is inherent precisely in this [indissoluble—R.S.] bond."[41]

The active attitude of the Church towards the *ius divinum* is already connected, as indicated earlier, with the initial work of "concretization," namely, the activity of the Church legislator of promulgating the norms of God's positive law (the "living" law—inscribed in the current context of history, owing to the "dynamics" of the hierarchical and charismatic gifts of the Holy Spirit[42]) in the surroundings of the sentences of Church law.[43] In the case of the first and other systematic principles of matrimonial law—in addition—an important role at the legislative stage is played by the application of the mentioned rule of "order of truths," which determines the normative order of the Church. The post-conciliar reform of the *ius matrimoniale* system shows this well. The reintegration of its framework—invariably around the principle of matrimonial indissolubility—had to take into account the "equal" presence in the system of other principles ("from God's law"), and what is related to this—the existence of potential tensions[44] generated by this presence. Therefore, the process of positivization (in the norms of the Church law) of the said principle required the Church legislator to precisely determine the cases in which the norm in question "from God's law" find (absolutely![45]) application and in which it does not. The result of the implementation of these assumptions in the matrimonial normative order (CIC 1983) is presented by Remigiusz Sobański as follows: "In applying the principle of matrimonial indissolubility, the Church at the same time generally defines cases in which it does not apply this principle or sets conditions

[40] Benedict XVI formulates the nodal idea of his Address to the Rota by invoking the context of John Paul II's anthropological thought: "The indissolubility of marriage does not derive from the definitive commitment of those who contract it but is intrinsic in the nature of the 'powerful bond established by the Creator' (John Paul II, *Catechesis*, General Audience 21 November 1979, n. 2; *ORE,* 26 November 1979, p. 1)." Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007).

[41] Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007); Sobański, "Prawda jako entelechia," 40.

[42] Andrzej Pastwa, "*Sensus fidei fidelium*. Legal and Ecumenical Reflection," in *Remaining United in Diversity*, ed. Andrzej Pastwa, *Ecumeny and Law*, vol. 6 (2018): 231–236.

[43] Sobański, *Metodologia prawa*, 43.

[44] The axis of these tensions, as Remigiusz Sobański has repeatedly stated, is marked by ontically inscribed in the system guarantees of protection and promotion of two—allegedly competing—basic goods: on the one hand, the good of the individual (*bonum personae*), and on the other hand, the common good (*bonum commune*), which is the authenticity and identity of the community of faith, with its inherent matrimonial indissolubility. Sobański, "Ochrona małżeństwa," 168.

[45] "A marriage that is ratum et consummatum can be dissolved by no human power and by no cause, except death." CIC 1983, can. 1141.

of its application—dispensation of non-consummated marriage, dissolution of a marriage in favor of the faith."[46]

Obviously, the Church's task of making specific the principles "of God's law"—here, specifically, the principle of matrimonial indissolubility—goes beyond the domain of the legislature. At this point it suffices—following Sobański—to point to the sphere of the Church's responsibility, related to the activity of its official representatives in interpreting and applying the law. Here the role of judges-members of collegiate tribunals who declare the truth about marriage in a court judgment—involving the authority of the Church (*ex officio*)—is invaluable: *iudex dicit ius*.[47] It is worth asking what currently (in the era of "society's crisis of values […], crisis of knowledge enlightened by faith"[48]) can, or even should, be the determinant of the reliability of fulfilling the above mentioned task? The Professor's recommendation, supported by many years of judicial experience, is not surprising: "I believe that it would be just to expound the principle of indissolubility in the legal motivation of judgments in matrimonial cases, including when nullity is declared."[49]

Favor matrimonii—"Principle [that] Shapes from within all the Canonical Norms on Marriage"

The words of the title formula, taken from John Paul II's Address to the Roman Rota in 2004,[50] perfectly resonate with Remigiusz Sobański's expert com-

[46] Sobański, *Metodologia prawa*, 44, note 81.

[47] See CIC 1983, cann. 1611–1612; Pontificium Consilium de Legum Textibus, "Instructio 'Dignitas connubii' servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii" (January 25, 2005), art. 247, 250–254; see Remigiusz Sobański, "Iudex veritatem de matrimonio dicit," *Ius Matrimoniale*, vol. 4 (1999): 181–196.

[48] Francis, Address to the Officials of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year (January 23, 2015), https://www.vatican.va/content/francesco/en/speeches/2015/january/documents/papa-francesco_20150123_tribunale-rota-romana.html, accessed February 28, 2022.

[49] Sobański, "Prawda jako entelechia," 40. It is worth noting that this recommendation is a practical interpretation of John Paul II's appeal to the judges of Church tribunals: "Judicial activity must […] be inspired by a *'favor indissolubilitatis.*'" 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 February 28, 2022.

[50] The broader context of the papal statement is as follows: "*To evaluate these new attitudes correctly, one should first of all identify the foundation and limitations of the favor* in ques-

mentary to can. 1060 (CIC 1983)[51] in a study under a title that carries a lot of meaning "The Protection of Marriage in the Procedural Canon Law." Here we can see the methodological mastery in approaching the nodal principle of *processus matrimonialis*. Indeed, from the point of view of a legal theorist, it was necessary to first emphasize the importance of the favor of the law (*favor iuris*) that marriage enjoys, and of the associated presumption of its validity in case of doubt.[52]

> The law [Church law—A.P.] —the Canonist remarks—must protect formally-performed legal actions, without this the certainty of legal transactions would be undermined. Hence the presumption of the validity of the marriage, in accordance with the general principle of law according to which legal acts lawfully performed—in their external elements—are considered valid as long as the contrary is not proven.[53]

In Professor Sobanski's opinion, for this reason alone we can speak of an important systemic principle governing the canonical trial for marriage nullity.[54]

Of course, the above diagnosis is only the starting point for exploring the relevance of another of the title's "Pillars of the System." Looking through the prism of the theology of law or following the directives of the supreme legislator of the Church,[55] the Polish canonists had to: first, reflect on the place of can. 1060 in the systematic arrangement of the Code of Canon Law on Matrimony;

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tion. Indeed, this principle easily transcends the presumption of validity since it shapes from within all the canonical norms on marriage, both substantial and procedural." 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. 3.

[51] "Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven." CIC 1983, can. 1060.

[52] "Die Gültigkeitsvermutung spricht für die formal korrekte Ehe, eine solche also, die dem äußeren Rechtsschein nach ordnungsgemäß geschlossen wurde. Immer wenn eine Ehe in der für sie geltenden Rechtsform eingegangen wurde, wird sie in der Rechtssphäre so behandelt, als sei sie gültig. Das gilt gleicherweise für die Ehen der Getauften wie der Ungetauften. […] Anwendung des 1060 auf einzelne Fragestellungen finden sich in den 1084 § 2, 1085 § 2, 1101 § 1, 1107." Klaus Lüdicke, "Kommentar zum c. 1060," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Februar 2009), 1060/2–3. Cf. Juan Ignacio Bañares, "El 'favor matrimonii' y la presunción de validez del matrimonio contraído. Comentario al Discurso de Juan Pablo II al Tribunal de la Rota Romana de 29.I.2004," *Ius canonicum*, vol. 45, no. 89 (2005): 243–257.

[53] Sobański, "Ochrona małżeństwa," 161.

[54] Sobański, "Ochrona małżeństwa," 161.

[55] 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. 2; John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 7; see also Andrzej Pastwa, *"Przymierze miłości małżeńskiej." Jana Pawła II idea małżeństwa kanonicznego* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2009), 265–274.

second, include the legal-pastoral perspective in order to show the real (full) meaning of *favor matrimonii* in the system of *ius matrimoniale.*

Going beyond the literal wording of the canon in question, which *de facto* remains with the old formula of the analogous norm of the Code of 1917,[56] the experienced commentator, author of *Methodology of the Canon Law* (2004), highlights the importance of a contextual reading of the place of can. 1060 among the preliminary canons, which underwent—it is worth recalling—a thorough reform in the course of the personalization of the matrimonial consensus.[57] The author's commentary reads:

> It should be noted that this provision is placed […] among the general, preliminary norms of matrimonial law. It is preceded by the following canons: the canon stating the sacramentality of marriage for the baptized (1055 § 1—with an indirect legal definition of matrimony), the canon enumerating the essential qualities of marriage (1056), the canon showing the efficient cause of marriage and defining it (can. 1057), the canon stating the right to marriage (can. 1058), and the canon on the legal authority for marriage (can. 1059)."[58]

It is this circumstance that authorizes the author to formulate a relevant conclusion: "This positioning of can. 1060 leads us to infer that its meaning goes beyond the canonical rules of establishing the facts in a nullity trial."[59]

The above statement, which *implicite* refers the principle of *favor matrimonii* to a coherent personal-ecclesial vision of the matrimonial covenant (*matrimonium in fieri*), is a prelude to an adequate outline of the teleology of the matrimonial process—in accordance with the aforementioned magisterial directive, which, for the sake of precision, must be reproduced in the Italian original: "Non dobbiamo però dimenticare che nelle cause di nullità matrimoniale la verità processuale presuppone la 'verità del matrimonio' stesso" (Benedict XVI).[60] This is where the quintessence of the service of the magisterial pastor,[61] which—

[56] CIC 1917, can. 1014.

[57] Sobański, "Symulacja częściowa," 46–47; José María Serrano Ruiz, "L'ispirazione conciliare nei principi generali del matrimonio canonico," in *Matrimonio canonico fra tradizione e rinnovamento* (Bologna: EDB, 19912), 45–48.

[58] Sobański, "Ochrona małżeństwa," 161.

[59] Sobański, "Ochrona małżeństwa," 161–162.

[60] Benedetto XVI, "Discorso al Tribunale della Rota Romana in occasione dell'inaugurazione dell'anno giudiziario (27 gennaio 2007).

[61] In his famous Address to the Tribunal of the Roman Rota in 1990, John Paul II outlined the ontic foundations of the office of ecclesiastical judge and the original profile of his activity: "L'attività giuridico-canonica è per sua natura pastorale. […] Ne consegue che ogni contrapposizione tra pastoralità e giuridicità è fuorviante." 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/hf_jp-ii_spe_19900118_rota-romana.html, accessed February 28, 2022. Cf. Francis, "Address to the Officials of the Tribu-

in John Paul II's matchless analysis—is described as a true *diakonia* ("a precious service") on behalf of the Christian community is revealed.[62] Indeed, in such a delicate matter as judging whether or not a marriage exists—without losing sight of the individual well-being of those seeking to have a broken marriage declared null and void and to be able to enter into a new one[63]—just this pastoral perspective "calls for the constant effort to develop more fully the truth about marriage […] as a necessary condition for administering justice in this field."[64] Fidelity to the rule *veritas facit legem* presents the judge with a serious challenge of responsibly carrying out *in casu* the "operative concretization" mentioned above, which: on the one hand, will guarantee that the *favor veritatis* will determine the entire dynamics of the process of *de nullitate matrimonii*; on the other hand, will make it possible to resist the nowadays artificially created opposition between *favor matrimonii* and *favor personae* (*favor libertatis*).[65] In the end, this means consistently overcoming the apparent[66] conflict between the good of the society (*bonum communionis*) and the good of the individual (*bonum personae*).

Obviously, Professor Sobański notices and correctly defines various (!) types of tensions between an individual and a community that occur in the system of the matrimonial law (and globally—in the whole canon law). But does the ecclesial importance of the problem itself—highlighted by the papal diagnosis of the causes generating the mentioned conflict[67]—not explain enough why the Canonist so often and with such care interprets the systemic principle of *favor matrimonii*. To see this, it is enough to quote the key links in the chain of analysis provided in two of his articles. The excerpt from the first text prepares the aforementioned interpretation with exposition and a preliminary weighing of supposedly oppositional goods:

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nal of the Roman Rota for the Inauguration of the Judicial Year" (January 24, 2014), https://www.vatican.va/content/francesco/en/speeches/2014/january/documents/papa-francesco_20140124_rota-romana.html, accessed February 28, 2022; cf. also Zenon Grocholewski, "La función del juez en las causas matrimoniales," *Ius canonicum* vol. 45, no. 89 (2005): 25–26.

[62] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 1.

[63] Sobański, "Ochrona małżeństwa," 161.

[64] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 1.

[65] John Paul II, "Address to the Prelate Auditors," n. 7; Cf. Janusz Kowal, "Conflitto tra 'favor matrimonii' e 'favor libertatis?,'" *Periodica de re canonica*, vol. 94 (2005): 243–273.

[66] Sobański, "Między rygoryzmem a laksyzmem," 166.

[67] "At times, in recent years some have opposed the traditional '*favor matrimonii*' in the name of a '*favor libertatis' or 'favor personae.*' In this dialectic it is obvious that the basic theme is that of indissolubility, but *the antithesis is even more radical with regard to the truth about marriage itself*, more or less openly relativized." John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 7.

> "[The existing—A.P.] tension between the individual and the community raises […] the question whether the law is made and applied to protect, guarantee, and realize the rights of the faithful in the Church by making possible and encouraging Church coexistence founded on responsible faith, or whether it is applied to protect the community of faith by safeguarding the authenticity of those elements in which salvation is realized, i.e., the word and the sacrament. The rationale of the first stance is that participation in a community presupposes its existence in a definite shape with not blurred contours: a community losing its distinctness would cease to be a sign. The rationale of the second stance is that community really does not exist except in the testimony of the faithful: The church is a community of believers responding by a free act of faith to God's call.[68]

In contrast, Sobański's argument in the next article already quoted is clearly conclusive: "The norm of canon 1060 obliges [the judge—A.P.] to presume the validity of the marriage, the libellus instructs him to determine whether at the time of contracting the marriage there were causes recognized by law that rendered it invalid. It is in the interest of the litigants, and it may look like a conflict between a social good (the identity of the community), protected by a legal presumption, and an individual good, but this is an apparent conflict, for the sacrament is not an individual good, but the good of the community, which is the same good of each of the faithful."[69] Finally, it is worth dotting the i's and crossing the t's—if it were otherwise, *favor matrimonii* would not deserve to be called a systemic principle, a pillar of the system of canonical matrimonial law.

Ius connubii—Principle of the Right to Marriage

The necessary broadening of the perspective in the epistemological and methodological reflection on the pillars of the system of *ius matrimoniale canonicum* is marked by the *ius connubii*—the fundamental right of the person and at the same time the fundamental rights of the Christian.[70] Indeed, the

[68] Sobański, "Iudex veritatem de matrimonio dicit," 190–191.

[69] Sobański, "Między rygoryzmem a laksyzmem," 166.

[70] "All persons who are not prohibited by law can contract marriage." CIC 1983, can. 1058; see Juan Ignacio Bañares: "Comentario al c. 1058," in *Comentario exegético al Código de Derecho canónico*, ed. Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña, vol. 3/2 (Pamplona: EUNSA, 20023), 1067–1075.

high profile[71] of everyone's right to marriage as a systemic principle is evidenced by the fact that the object of analysis thus far, namely the presumption of can. 1060 (*favor matrimonii*) is in fact another aspect of the statement of can. 1058, indeed, the objectively autonomous proclamation of natural law (*ius connubii*).[72] Professor Sobański did not fail to precisely illuminate this relationship in his legal and legal-pastoral analyses. It is safe to say that, although Sobański did not have time to get acquainted with the famous address of Benedict XVI to the Roman Rota in 2011, for a long time he he directed the attention of the audience to the *clou* of the papal teaching in the scientific discussion of the *favor matrimonii—ius connubii* relation:

> The right to contract marriage presupposes that the person can and intends to celebrate it truly, that is, in the truth of its essence as the Church teaches it. No one can claim the right to a nuptial ceremony. Indeed, the *ius connubii* refers to the right to celebrate an authentic marriage.[73]

The consequences of (mis)understanding are extremely serious, because both the parish priest in his pastoral ministry of preparation and admission to marriage, and the judge in the trial judgment of an unsuccessful relation due to its possible invalidity—only through an adequate evaluation of the two (!) mentioned fundamental principles can they gain a full insight into the nature of the matrimonial interpersonal relationship, which is so desirable in *pro futuro* estimation or ex-post verification of the veracity of the matrimonial consensus *in casu*. This is also the legal and pastoral "strategy," which requires that the *ius connubii* be harmonized with the natural requirements of the *consensus matrimonialis*, that John Paul II "programmed" in his Rotal Allocutions, as evidenced in a passage from the 2003 Allocution:

> The church does not refuse to celebrate a marriage for the person who is well disposed, even if he is imperfectly prepared from the supernatural point of view, provided the person has the right intention to marry according to the natural reality of marriage. In fact, alongside natural marriage, one can-

[71] See Andrzej Pastwa, "Ius connubii Today—Legal and Pastoral Perspective," in *Youth—Church—Evangelism*, ed. Andrzej Pastwa, *Ecumeny and Law*, vol. 5 (2017): 235–261.

[72] "Die Kirche ist nicht frei, die Gültigkeit eingegangener Ehen in Frage zu stellen. Denn das Recht auf die Ehe meint nicht nur das Eingehen, sondern auch die Achtung vor dem Bestand der eingegangenen Ehe. Die Vermutung des 1060 ist nur ein anderer Aspekt der Aussage des 1058." Klaus Lüdicke, "Kommentar zum c. 1058," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Dezember 2013), 1058/2.

[73] 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 February 28, 2022.

> not describe another model of Christian marriage with specific supernatural requisites.[74]

An expert elaboration of the papal thought is the identification of potential fields of tension,[75] which is related to the operative delineation of the boundary (first at the level of lawmaking[76] and then at the level of its application) between the natural law principles of *consensus matrimonialis* and *ius connubii*—in the authorial legal and pastoral discourse of Remigiusz Sobański. Pointing towards indissolubility as the basic determinant of marriage (and the first systemic principle of *ius matrimoniale*), the Canonist does not hesitate to categorically condition the adequate application of the canonical norms of marriage on having a minimum of knowledge that the mentioned principles of the law of nature, which constitute basis for these norms, need to be harmonized (!). Thus, the parish priest, who is responsible for preparing the nupturients for marriage, should be aware that, on the one hand, "a law would go against natural justice if it bound two people for life if each of them did not truly, consciously and voluntarily decide to enter into such a relationship."[77] But also, on the other hand, "it would be going against the natural right of man for a law to prevent a person capable and willing to enter into marriage from doing so."[78]

Contemplating on the truth of the principle of *ius connubii*, one of the pillars of the System of *ius matrimoniale*, leads Remigiusz Sobański to emphasize

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[74] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 30, 2003), n. 8, https://www.vatican.va/content/john-paul-ii/en/speeches/2003/january/documents/hf_jp-ii_spe_20030130_roman-rota.html, accessed February 28, 2022.

[75] For the record, two outstanding canonists Klaus Lüdicke (as the first) and Remigiusz Sobański anticipated the theses of the papal lecture and, in a sense, prepared the ground for the reception of the magisterium quoted here; Klaus Lüdicke, "Kommentar vor c. 1095," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Oktober 1987), Einf. vor 1095/1–2; Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 116–117.

[76] "Die Grenzziehung zwischen beiden Polen gehört zu den schwierigsten und bedeutendsten Entscheidungen des kirchlichen Gesetzgebers." Lüdicke, Kommentar vor c. 1095, Einf. vor 1095/2.

[77] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 116. On the grounds of the principle of indissolubility, the Canonist explains: "It would be at odds with Christian anthropology and would be downright inhumane for a law to condemn people to remain in a forced or extorted marriage or with a person unfit for married life" (116).

[78] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 116. And here, on the part of Sobański, an important addition could not be missed: "Marriage—and this indissoluble marriage—is for human beings. We must assume that people are by their very nature capable of living in one indissoluble relationship. This assumption also belongs to the truth about marriage." Sobański, "Prawda jako entelechia," 40.

the importance of a well-conducted examination of spouses.[79] The parish priest conducting pre-marital investigations, while aware that he does not have the right to allow people whose wills are defective to marry, will nevertheless assume each time that everyone has the right to marriage unless there are legal impediments. Generalizing, according to Sobański, the harmonization of the above-mentioned principles of natural law is governed by the following regularity: the optics of the parish priest in the matter at hand is different from that of the Church judge. Just as in the first case the principle of *ius connubii* (right to marriage)[80] prevails, once the marriage has taken place the legal presumption[81] argues for its validity.[82]

Sacramentum matrimonii—"One of the Structural Elements of the Church"

"Canon matrimonial law is determined by the Catholic understanding of matrimony."[83] This truly programmatic statement of Professor Sobański, which may seem to be a truism only to a layman, announces an important sector of the *ordinatio fidei*—the Church's legal order.[84] The epistemological and methodological position manifested here—close to the concepts of perhaps the most eminent legal theologian of the twentieth century, Eugenio Corecco—is distinguished by a very characteristic approach to the sources of faith. According to the Polish Scholar, if we assume that the law is not the only regulator of the Church life, and that all the regulations ultimately stem from the same source, that is, from the faith preached by the Church, then this fact indeed determines the *modus procedendi* of the Canonist. Consequently, his methodical orientation towards the handling of the texts of Holy Scripture and Tradition together

[79] See CIC 1983, can. 1067.

[80] CIC 1983, can. 1058.

[81] CIC 1983, can. 1060.

[82] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 117.

[83] Remigiusz Sobański, "Kanoniczne prawo małżeńskie stosowane w działalności misyjnej," *Nurt SVD*, vol. 31, no. 3 (1997): 44.

[84] Remigiusz Sobański, "Ustawa kościelna—ordinatio rationis czy ordinatio fidei?," *Collectanea Theologica*, vol. 48, no. 1 (1978): 27–35; Eugenio Corecco, "'Ordinatio rationis' o 'ordinatio fidei'? Appunti sulla definizione della legge canonica," in *Ius et Communio. Scritti di Diritto Canonico*, ed. Graziano Borgonovo and Arturo Cattaneo, vol. 1 (Lugano–Casale Monferrato: Piemme, 1997), 135–156; cf. also Libero Gerosa, "La legge canonica quale 'ordninatio fidei.' La lezione di Eugenio Corecco sul metodo scientifico nella canonistica," *Il diritto ecclesiastico*, vol. 106 (1995): 140–159.

with their magisterial interpretation—admittedly with an awareness of the limits of own competence—must mean that he applies the principles of theological hermeneutics.[85] With one reservation, however—reaching to the sources of faith, the Canonist cannot remain a passive receptor of their message and their interpretation in the theological disciplines.[86]

The adoption of these assumptions strengthens the persuasive power of the discourse, especially when Sobański extends the "matrimonial" research horizon to a sacrament, for example, in a study the content of which is foreshadowed by a title with a famous conciliar formula:[87] "*Velut Ecclesia domestica*…" (1983).[88] The ideological message is clear: Christian marriage as a dynamic "mystery"[89] of reality immersed in the Church *Communio* makes present in human/salvation history (!) the fundamental structure of the love of Christ-Betrothed for the Church-Betrothed. In other words, marriage, being the sacramental sign of the said God's Caritas,[90] is the historical site of the Church's realization[91] and as such fully deserves to be defined: "Church in miniature"[92] or "a living image and historical representation of the mystery of the Church."[93]

Within this context, two subject areas attract the attention of the diligent Researcher of the foundations of the canonical matrimonial law system. The horizon of the first area—in Sobański's methodical approach—is revealed by the observation that the dynamic presence of the Church through the sacramental marriage has a special character (i.e., definitely different from all other forms of the mysterious presence): "This uniqueness comes from the fact that […] mar-

[85] Sobański, "Metodologia prawa," 57.

[86] Sobański, "Metodologia prawa," 58. "For among the tasks of the professional canonist is also the work of developing church law, including the improvement of its ecclesial quality" (58).

[87] GS, n. 11,2; cf. AA, n. 11,4.

[88] Remigiusz Sobański, "*Velut Ecclesia domestica* a cywilna forma zawarcia małżeństwa," *Roczniki Teologiczno-Kanoniczne*, vol. 30, no. 5 (1983): 27–40.

[89] Winfried Aymans, "Gleichsam häusliche Kirche. Ein kanonistischer Beitrag zum Grundverständnis der sakramentalen Ehe als Gottesbund und Vollzugsgestalt kirchlicher Existenz," *Archiv für katholisches Kirchenrecht*, vol. 147 (1978): 424–446.

[90] "Indeed, by means of baptism, man and woman are definitively placed within the new and eternal covenant, in the spousal covenant of Christ with the Church. And it is because of this indestructible insertion that the intimate community of conjugal life and love, founded by the Creator, is elevated and assumed into the spousal charity of Christ, sustained and enriched by His redeeming power. By virtue of the sacramentality of their marriage, spouses are bound to one another in the most profoundly indissoluble manner. Their belonging to each other is the real representation, by means of the sacramental sign, of the very relationship of Christ with the Church." John Paul II, Apostolic Exhortation *Familiaris consortio* (November 22, 1981), [further: FC], n. 13.

[91] Sobański, "*Velut Ecclesia* domestica," 35.

[92] FC, n. 49.

[93] FC, n. 49

riage, a reality already existing in the natural order, that is, the order of creation, takes on its full dimension in the order of salvation realized by the Church, that is, in the sacramental order."[94] Within this optics, the natural covenant of man and woman as the Old Testament mystery "sign" and the "event" of the sacrament—the participation of the baptized nupturients in the New Testament *mystērion*: the love of Christ-Betrothed for the Church-Betrothed—remain inseparable, since the plan of Redemption cannot be separated from the plan of Creation. Thus, in the economy of Redemption, there can be no other true covenant of matrimony than the covenant in the form of the "event" of the sacrament.[95] The logic of this argument, based on true premises, leads to a clear[96] conclusion: a valid marriage cannot exist between the baptized without it being a sacrament. *Ergo*, on the one hand, this circumstance, and on the other, the official testimony[97] of *doctrina catholica seu theologica certa*,[98] confirmed by the papal magisterium, constitute an affirmation of the principle of the systemic inseparability of sacrament and matrimonial contract; a principle traditionally[99]

[94] Sobański, "*Velut Ecclesia* domestica," 35.

[95] Eugenio Corecco, "Il sacramento del matrimonio: cardine della costituzione della Chiesa," in *Diritto, persona e vita sociale. Scritti in memoria di Orio Giacchi*, vol. 1 (Milano: Vita e pensiero, 1984), 401.

[96] The author is aware of, but does not agree with the contrary stance in the study of Canon Law regarding marriages of baptized non-Catholics belonging to communities that do not recognize the sacramentality of marriage—Winfried Aymans,"Die Sakramentalität christlicher Ehe in ekklesiologisch-kanonistischer Sicht. Thesenhafte Erwägungen zu einer Neubestimmung," *Trierer Theologische Zeitschrift* 83 (1974): 321–338; Remigiusz Sobański, "Procesy o nieważność małżeństwa w Polsce na przełomie tysiącleci ery chrześcijańskiej," *Prawo Kanoniczne*, vol. 49, no. 3–4 (2006): 30, note 39.

[97] The conclusions of the research conducted by the International Theological Commission have their own weight (which is not mentioned by Sobański). The recently formulated one (2020) reads as follows: "According to the theological doctrine and canonical practice currently in force, every valid marriage contract between baptized persons is 'by itself' sacrament." International Theological Commission, "The Reciprocity Between Faith and Sacraments in the Sacramental Economy" (2020), n. 143, https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20200303_reciprocita-fede-sacramenti_en.html, accessed February 28, 2022; cf. International Theological Commission, "Propositions on the Doctrine of Christian Marriage" (1977), n. 3.3; International Theological Commission, "Christological Theses on the Sacrament of Marriage" (1977), n. 9, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html, accessed February 28, 2022.

[98] Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Relatio complectens synthesim animadversionum ab Em-mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Città del Vaticano: LEV, Typis Polyglottis Vaticanis 1981), 245; cf. Wojciech Góralski, "Nierozdzielność ważnej umowy małżeńskiej zawartej między ochrzczonymi i sakramentu (kan. 1055 § 2 KPK i kan. 776 § 2 KKKW)," *Ius Matrimoniale*, vol. 12 (2007): 19.

[99] Cf. CIC 1917, can. 1012 § 2.

symbolized by the Latin formula of the first of the Code canons of matrimony: *eo ipso sacramentum*.[100]

Just as the personal and ecclesial implications declared by the above systemic principle (the "matrimonial" expression of the universal principle of *salus animarum suprema lex*[101]) definitely go beyond the "mere" sacramental effect of grace received for individual sanctification, the conclusions coming from the deep analysis of another (second) dimension of the integration of *sacramentum matrimonii* into the system of the Code matrimonial law—another fruit of the research of Sobański—emphasize and intensify the force of the Polish Scholar's *memento* to "not deplete the theological reality of marriage."[102] Here the Author's discourse is based on familiar premises: while *ex natura* only the irrevocable and exclusive personal devotion of the nupturients corresponds to human dignity,[103] in the marriage of the baptized this natural indissolubility is strengthened by the grace of the sacrament, so that the completed marriage of the baptized[104] becomes absolutely indissoluble[105] as "a complete—*una caro*—sign of the unity of Christ and the Church."[106] Leaving aside the details, it is this methodological approach that leads to an important finding: an in-depth analysis of the relationship between indissolubility and the sacrament of marriage[107] is the *sine qua non* for an adequate understanding of the systemic principle of *favor fidei*—at the interpretative and applied level. Indeed, generally speaking, the rule "in a doubtful matter the privilege of faith possesses the favor of the law"[108]

[100] CIC 1983, can. 1055 § 2; cf. Eugenio Corecco, "Die Lehre der Untrennbarkeit des Ehevertrags vom Sakrament im Lichte des scholastischen Prinzips Gratia perfecit, non destruit naturam," *Archiv für katholisches Kirchenrecht*, vol. 143 (1974): 379–442; Sobański, "Procesy o nieważność małżeństwa," 29–30.

[101] Cf. CIC 1983, can. 1752.

[102] Sobański, "Symulacja częściowa," 44.

[103] 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; Sobański, "Procesy o nieważność małżeństwa," 29.

[104] See FC, n. 20; John Paul II. "Address to the Tribunal of the Roman Rota" (January 21, 2000). http://www.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000121_rota-romana.html, accessed February 28, 2022.

[105] CIC 1983, can. 1141. It should be recalled that John Paul II officially affirmed the doctrine of absolute extrinsic indissolubility "as being peacefully held." John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 2000), n. 7. Cf. also Janusz Kowal, "L'indissolubilità del matrimonio rato e consumato. Status quaestionis," *Periodica de re canonica*, vol. 90 (2001): 273–304.

[106] Sobański, "Symulacja częściowa," 42–43.

[107] Andrzej Pastwa, "*Indissolubilitas… quae ratione sacramenti peculiarem obtinet firmitatem* (kan. 1056). Uwagi o relacji nierozerwalność – sakrament małżeństwa," *Śląskie Studia Historyczno-Teologiczne*, vol. 44 no. 2 (2011): 590–606.

[108] CIC 1983, can. 1150.

appears as "the governing principle of all canon law."[109] However, even if it is true that "the protection of faith precedes the principle of indissolubility, sets its limits,"[110] it must be remembered that the norms of can. 1143–1150 (CIC 1983) are only an exception to the rule. For the rule is the indissolubility of marriage, and the exceptions confirm it.[111]

* * *

"Understanding canonical matrimonial norms," as Remigiusz Sobański wrote in 2006, "requires seeing their ontological foundations, including a metaphysical vision of the human person. Without that, marriage is *sovrastruttura estrinseca*, a fruit of law and social conditions. Thus, the truth about marriage must be rediscovered again and again."[112] This last thought of the eminent Canonist is worth extending by recalling the source of inspiration he revealed, namely, the key passage of John Paul II's 2004 Address to the Tribunal of the Roman Rota:

> An authentically juridical consideration of marriage requires a metaphysical vision of the human person and of the conjugal relationship. Without this ontological foundation the institution of marriage becomes merely an extrinsic superstructure, the result of the law and of social conditioning, which limits the freedom of the person to fulfil himself or herself. It is necessary instead to rediscover the truth, goodness and beauty of the marriage institution. Since it is the work of God himself, through human nature and the freedom of consent of the engaged couple, marriage remains an indissoluble personal reality, a bond of justice and love, linked from eternity to the plan of salvation and raised in the fullness of time to the dignity of a Christian sacrament. It is this reality that the Church and the world must encourage! This is the true *favor matrimonii!*.[113]

[109] Sobański, "Kanoniczne prawo małżeńskie," 64. The Canonist argues: "The benefit of faith is the rationale for specific regulations which define exceptional situations and which constitute exceptions to the principle of marital indissolubility, an essential attribute of marriage. These exceptions are: 1) the Pauline privilege (can. 1143–1147), 2) the dispositions regarding polygamous unions (can. 1148), as well as 3) the impossibility of continuing the conjugal community (can. 1149), and 4) the Petrine privilege" (64).

[110] Sobański, "Kanoniczne prawo małżeńskie," 64.

[111] Sobański, "Kanoniczne prawo małżeńskie," 65; cf. Juan Fornés, "Comentario al c. 1150," in *Comentario exegético al Código de Derecho canónico*, ed. Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña, vol. 3/2 (Pamplona: EUNSA, 20023), 1579.

[112] Sobański, "Procesy o nieważność małżeństwa," 29.

[113] 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.

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Andrzej Pastwa

Piliers du système du *ius matrimoniale canonicum* vus par Remigiusz Sobański

Résumé

« La Constitution *Gaudium et Spes* n'aborde pas [le mariage] a priori – comme le faisait encore l'encyclique *Casti Connubii* – mais analyse la réalité du mariage telle qu'elle se présente dans la conscience chrétienne formée par l'enseignement de l'Église. » Cette phrase caractéristique, extraite de la revue théologique *Silesian Historical-Theological Studies* (1968), qui a fait en ce temps-là ses débuts sur le marché, trahit déjà à elle seule la sensibilité épistémologique et le sens méthodologique aigu du fondateur et rédacteur en chef de la revue. La présente étude adopte l'hypothèse que c'est dans cette phrase et dans les phrases similaires du célèbre article de 1969 – bien intégrées dans le courant de l'*aggiornamento* conciliaire – qu'a été révélée la clé de la compréhension du phénomène et du format scientifique de l'œuvre du Révérend Professeur Remigiusz Sobański (1930–2010). La vérification positive de cette hypothèse ne soulève aucun doute : un demi-siècle de travail académique, une riche pratique (juge et fonctionnaire au tribunal de Katowice) ainsi que le fait connexe qu'il est devenu une autorité incontestable dans le domaine du droit canonique du mariage, ont abouti à l'exposition par l'auteur des principes systémiques du *ius matrimoniale* codifié (CIC 1983). Cette constatation rend nécessaire une réflexion approfondie sur les titres des piliers du système du *ius matrimoniale canonicum* selon R. Sobanski, dans l'ordre suivant : (1) « le principe de l'indissolubilité conjugale » (*irrevocabilis consensus personalis – vinculum indissolubile*), (2) « le principe [qui] inspire toute la législation canonique sur le mariage » (*favor matrimonii*), (3) « le principe du droit au mariage » (ius connubii), (4) « le sacrement – un des éléments structuraux de l'Église » (*sacramentum matrimoni* ; principes : *eo ipso sacramentum* et *favor fidei*).

Mots-clés : Remigiusz Sobański, méthodologie du droit canonique, mariage, sacrement du mariage, consentement matrimonial, principe d'indissolubilité matrimoniale, *favor matrimonii, ius connubii*, principe *eo ipso sacramentum, favor fide*

Andrzej Pastwa

I pilastri dello *ius matrimoniale canonicum* secondo Remigiusz Sobański

Sommario

"La Costituzione *Gaudium et spes* non affronta [il matrimonio] a priori – come ha fatto l'enciclica *Casti connubii* – ma analizza la realtà del matrimonio così come si presenta nella coscienza cristiana formata dalla dottrina della Chiesa". Questa frase caratteristica, tratta dall'allora esordiente periodico teologico *Śląskie Studia Historyczno-Teologiczne* (1968), rivela già di per sé la sensibilità epistemologica e un acuto senso metodico del creatore e direttore della rivista. Nel presente lavoro è stata assunta l'ipotesi che in questo e simili versi del celebre articolo del 1969 – perfettamente inserito nella corrente dell'aggiornamento conciliare – si rilevasse la chiave per la comprensione del fenomeno e del formato scientifico dell'opera del sacerdote professor

Remigiusz Sobański (1930–2010). La verifica positiva di questa ipotesi non solleva dubbi: mezzo secolo di lavoro e di pratica dello studioso (giudice e funzionario del tribunale di Katowice), e il fatto che egli è diventato un'autorità indiscussa nel campo del diritto matrimoniale canonico, hanno portato a un'originale esposizione dei principi sistemici dello *jus matrimoniale* codificato (CIC 1983). Tale constatazione fa riflettere con viva attenzione sull'area del titolo dei pilastri del sistema ius matrimoniale canonicum secondo R. Sobański, nel seguente ordine: (1) "principio di indissolubilità coniugale" (*irrevocabilis consensus personalis – vinculum indissolubile*), (2) "principio [che] ispira tutte le disposizioni canoniche in materia di matrimonio" (*favor matrimonii*), (3) "principio del diritto al matrimonio" (*ius connubii*), (4) "sacramento – uno degli elementi strutturali della Chiesa" (*sacramentum matrimoni*; i principi: *eo ipso sacramentum* e *favor fidei*).

Parole chiave: Remigiusz Sobański, metodologia del diritto canonico, matrimonio, sacramento del matrimonio, consenso matrimoniale, principio di indissolubilità coniugale, *favor matrimonii*, *ius connubii*, principio *eo ipso sacramentum*, *favor fidei*