LEGAL STATUS OF PERSONS MARRIED AT CHURCH UNDER THE CANON LAW AND LITHUANIAN CIVIL LAW

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Abstract: The article deals with the regulation of religious marriages in Lithuania, focused on the co-ordination of Canon Law and Lithuanian Law on different topics (nullity of marriage, canon legal dissolution, judicial decisions in both Canon and Secular Law, etc).

Keywords: Domestic Relations, Marriage, Catholic Church, Canon Law, Lithuania

Resumen: El artículo analiza la regulación de los matrimonies religiosos en Lituania, centrada en la relación entre el Derecho Canónico y el Derecho civil lituano sobre diversas cuestiones del sistema matrimonial de éste. Este trabajo permite igualmente conocer la situación del Matrimonio civil y del Derecho de Familia en Lituania.

Palabras clave: Derecho Matrimonial civil, Derecho Canónico, Lituania, Presupuesto de Reconocimiento de Actos religiosos, Reconocimiento de Matrimonio religioso.

INTRODUCTION

After declaring its independence Lithuania had to join various international conventions, including the family law, as well. That situation confirmed the necessity to develop the family laws in compliance with the international legal requirements. That had been stated in the Civil code of the Lithuanian Republic which defines that "Family relations are regulated by the Constitution of the Republic of Lithuania along-side with the Civil code or other legal norms and the international agreements obligatory in the Lithuanian Republic" (art. 3.2).[1] Thus, the efforts, so that the marriage and family legal norms com-

[1] *Lietuvos Respublikos civilinio kodekso komentaras*, III, *Šeimos teisė*, Vilnius 2002, p. 27-29.

ply with the international standards. Though in the beginning the family code had been started as an independent codified legal act, later it was incorporated into Civil code under separate chapter known as Family law, which is a traditional practice in the Western states while preparing the draft of French, German, Canadian (Quebec province), Swiss Civil codes, as well as the marriage law and some other legal acts of Sweden had been taken into consideration.[2]

It's evident that the legal system of each country does not exist in isolation from the similar systems of other countries, and the law itself, just like the mankind, is the product of evolution and its legal systems interfuse with each other. In this way the related legal systems do develop, establishing the general French, German, Scandinavian and likewise systems' convergence.

It is apparent that the foreign law and court practice inspires the comparative dimension of legal thinking. This comparative method is determined by the relationship of kindred legal systems and their historical connection. In fact, the Constitution of the Republic of Lithuania and the European Convention of human rights declare the same human values and rights. However, the true meaning of the Convention's legal norms might be realized only analyzing the practice of the European Court of human rights, which is exclusively empowered to interpret the Convention. This is the clear relation between unification and harmonization of law, which can be effective only if explained and applied identically. So, while applying the international agreements it is vital to consider their interpretation and practice in the court-rooms of foreign countries.[3] No doubt, the comparison of different legal systems would bring to light certain diversity in the Christian, Protestant and Muslim states, which is only the natural reflection of their culture and legal ethics. It is also very true, that religious communities have an important impact on the legal process subject to the role of religion it plays in the society and how wide the later allows the religious norms inside the social life.

After long years of ignoring and even persecuting the Church in Lithuania during the Communist era, the true revival in the relations between the state and Church had finally started. It is interesting, which direction these relations would take and which legal interpretations would dominate in Lithuania in the nearest future.

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[2] Mikelėnas V., *Trečioji Civilinio kodekso knyga "Šeimos teisė"* in *Teisės problemos*, 1998, nr.2, p.14.

[3] Mikelėnienė D., Mikelėnas V., *Teismo procesas: teisės aiškinimo ir taikymo aspektai*, Vilnius 1999, p.222-223.

Recognition of religious liberty and Church legal jurisdiction

After fifty years of the Soviet Russia occupation and atheization the newly elected Lithuanian Parliament (Supreme Council, which was given back the ancient name of Seimas from 1992) on March 11, 1990 declared the independence of the Republic of Lithuania. Recognizing the statehood of Lithuania and the European legal tradition's continuity, firstly the Supreme Council passed the law "On restoration of validity of the May 12, 1938 Lithuanian Constitution".[4]

The period of the validity of 1938 Constitution, however short, still was an important guarantor of the state and justice continuity. That very day, when the Provisional Fundamental Law of the Republic of Lithuania came to power and simultaneously the 1938 Constitution became invalid, the other important proposition had been confirmed, which meant the gradual reform and liquidation of the Soviet system of justice.[5] The newly adopted Provisional Fundamental Law stated, that the former laws which do not contradict the Provisional Fundamental one remain valid in the Republic of Lithuania.[6] The Provisional Fundamental Law basically reflected the 1978 Constitution provisions, which were partially amended and complemented.[7] The provision on law validity or invalidity (in case of conflict with Constitution) remained in the Law on Coming into Force of the Constitution (Art. 2)[8] and in the new Constitution of the Republic of Lithuania, which was adopted by the referendum on October 25, 1992 (Art. 7).[9]

The Article 26 of Constitution of the Republic of Lithuania confirmed the religious liberty and thus guaranteed its accomplishment. That expressed the official state attitude towards the religious communities, as the Constitution declared: "Freedom of thought, conscience and religion shall not be restricted; Every person shall have the right to freely choose any religion or faith and, either individually or with others, in public or in private, to manifest his or religion or faith in worship, observance, practice or teaching; No person may

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[4] Lietuvos Respublikos įstatymas *Dėl 1938 metų gegužės 12 dienos Lietuvos Konstitucijos galiojimo atstatymo,* 1990 03 11, nr. I-13 in *Valstybės Žinios,* nr. 9-223.

[5] Lietuvos Respublikos Laikinasis Pagrindinis Įstatymas, 1990 03 11, nr. I-14 in *Valstybės Žinios,* nr. 9-224.

[6] Lietuvos Respublikos įstatymas *Dėl Lietuvos Respublikos Laikinojo Pagrindinio įstatymo,* 1990 03 11, nr. I-14 in *Valstybės Žinios,* nr. 9-224, p. 287.

[7] Valančius K., *Bažnytinės (kanoninės) santuokos institucionalizacija ir konstitucionalizacija: raida ir problemos* in *Metraštis,* XIX, Katalikų mokslo akademija, Vilnius 2001, p. 273.

[8] Lietuvos Respublikos įstatymas *Dėl Lietuvos Respublikos Laikinojo Pagrindinio įstatymo,* 1990 03 11, nr. I-14 in *Valstybės Žinios,* nr. 9-224, p. 287.

[9] *Lietuvos Respublikos Konstitucija,* Vilnius, 1996.

coerce another person or be subject to coercion to adopt or profess any religion or faith; A person's freedom to profess and propagate his or her religion or faith may be subject only to those limitations prescribed by law and only when such restrictions are necessary to protect the safety of society, public order, a person's health or morals, or the fundamental rights and freedoms of others; Parents and legal guardians shall have the liberty to ensure the religious and moral education of their children in conformity with their own convictions" (Art. 26).

The Article 25 confirmed the right of any individual to have his/her own religious views and freely express them. Freedom to express convictions or impart information shall be incompatible with criminal actions – the instigation of national, racial, religious, or social hatred, violence, or discrimination, the dissemination of slader, or misinformation. However, such a freedom cannot be limited unless the limitations are prescribed by law, when it is necessary to protect the health, reputation, dignity and private life of a person, morals or constitutional order. So, "a person's convictions, professed religion or faith may justify neither the commission of a crime nor the violation of law" (Art.27).

The State emphasized in the Constitution the value of human rights and declared, that a "person may not have his rights restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions, or opinions" (Art. 29).

The Article 43 of the Constitution stated, that the state "shall recognize traditional Lithuanian churches and religious organizations provided that they have a basis in society and their teaching and rituals do not contradict morality or the law; Churches and religious organizations recognized by the State shall have the rights of legal persons; Churches and religious organizations shall freely proclaim the teaching of their faith, perform the rituals of their belief, and have houses of prayer, charity institutions, and educational institutions for the training of priests of their faith; Churches and religious organizations shall function freely according to their canons and statutes; The status of churches and other religious organizations in the State shall be established by agreement or by law; The teachings proclaimed by churches and other religious organizations, other religious activities, and houses of prayer may not be used for purposes which contradict the Constitution and the law; There shall not be State religion in Lithuania."

It may look from the first sight that the exceptional recognition of all traditional confessions and religious organizations is not compatible with the principle not to grant them any privileges. However, this collision is only imaginary and outward, as the Art. 29 of the Constitution recognizes the equality

of individuals in respect of the law, court and other state institutions or officials, thus expressing in the Art. 43 the state attitude towards the religious communities, considering their importance on state formation and development. The priority is usually given to the religion or culture, which is primary source and has the greatest influence on the country's spiritual, cultural and social life. The differentiated approach towards the religions and cultures in every state, as well as in Lithuania, depends on the evaluation of the very religions and cultures, as part of the national heritage. So, it is evident, that Art. 29 and Art. 43 compliment each other and guarantee every Lithuanian citizen the freedom of religious and cultural expression. It also respects and protects the religions, which gave the Lithuanian society the existential meaning and created the essential historical, spiritual, social and cultural heritage.

The Art. 43 Paragraph 2, of the Constitution gives the Status of legal persons to the traditional confessions and religious organizations. Yet, the legalization of particular religious community and establishment of its status as legal person takes place when the authorities of the organization report to the Ministry of Justice and foresee the continuity of community's traditions, considering its religious canons, regulations and other norms. The Article 5 of the Law on religious Communities and associations adopted on March 25, 1995 enumerates the following traditional confessions recognized by state: Roman Catholics, Catholics of Greek rite, Evangelical Lutherans, Evangelical Reformers, Orthodox, Orthodox old-believers, Israelites, Moslem sunnies and Caraites.[10] Additionally, On July 12, 2001 the Decree Nr. IX-464 of Seimas recognized the Evangelical Baptists' community.[11]

The State may recognize other confessions and religious organizations (untraditional) on condition that they have support in the society and their teaching and rites do not violate the law and morals. The Law on Religious Communities and Associations in Article 6 established that religious communities may apply to Seimas for state recognition after at least 25 years from being registered in Lithuania. If the permission denied, the repeated application is allowed 10 years later from the denial date.

On June 13, 2000 the Constitutional Court of the Republic of Lithuania passed a judgement, which stated that the constitutional acknowledgement of the traditional confessions and religious organizations meant it was irrevoca-

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[10] *Lietuvos Respublikos religinių bendruomenių ir bendrijų įstatymas* in *Valstybės žinios*, 1995, nr. 89-1985.

[11] Lietuvos Respublikos Seimo 2001 07 12 nutarimas nr. IX-464 *"Dėl Valstybės pripažinimo suteikimo Lietuvos evagelikų baptistų bendruomenių sąjungai"* in *Valstybės žinios*, 2001, nr. 62-2249; Meilius K., Sagatys G., *Bažnyčios (konfesijų) nustatyta tvarka sudarytų santuokų kelias į pripažinimą* in *Jurisprudencija*, vol. 28 (20), 2002, p. 129.

ble, since the traditions are neither just the act of creation, nor the expression of legislators' will. It isn't the act of establishment of confessions or religious organizations, but rather the confirmation of their traditional character. It should be noted that the difference in the social status of one or another confession or religious organization is only possible according to certain criteria, defined by Constitution. The provision of Article 43, part one, stating the existence of traditional confessions and religious organizations, is the constitutional foundation according to which their status within the state could be established differently than of other confessions or religious organizations. Moreover, the Constitutional Court in the same judgement stated that the principle of non-existence of the state religion consolidated in the Art. 43 of the Constitution indicates that traditional confessions and religious organizations should not be identified with the national ones. The confessions and religious organizations do not interfere with the functions of state, its institutions and officials, do not develop the state policy; correspondingly, the state does not intervene in the internal affairs of the confessions and religious organizations, which have the right to settle their issues in compliance with their own canons and regulations.[12]

In every state, where faith is a permanent life helpmate to people, they have the right to confess and exercise their own religion, never renouncing it, just as their own culture and ethnicity. However, different religious communities belong to different traditions, have different doctrine and holidays calendar; so the state laws not always coincide with the religious canons of each confession. In democratic states the laws aim to reflect the religious norms and requirements of at least the greater majority of citizens, especially in the fields of human rights, freedom of conscience, religion and faith.

Speaking about the freedom of Church and religious organizations to settle their own issues according to their internal regulations, it is of utmost importance for us, Catholics to protect the categories of rights and obligations of the faithful (cann. 204-227 of the Code of Canon Law). These canons contain a declaration with the force of law, of rights and obligations that are fundamental to the faithful. Strictly speaking, only those fundamental rights that derive from baptism – the only ones that can be described as fundamental rights of the faithful. Many, but not all, of the rights and obligations listed are rights and obligations stemming from divine law. Can. 209 expresses a fundamental obligation incumbent upon the baptized. This obligation refers to two aspects:

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[12] Lietuvos Respublikos Konstitucinio teismo nutarimas *Dėl Lietuvos Respublikos Švietimo įstatymo 1 straipsnio 5 punkto, 10 straipsnio 3 ir 4 dalių, 15 straipsnio 1 dalies, 20 straipsnio, 21 straipsnio 2 punkto, 32 straipsnio 2 dalies, 34 straipsnio 2 , 3 ir 4 dalių, 35 straipsnio 2 ir 5 punktų atitikimo Lietuvos Respublikos Konstitucijai,* Vilnius, 2000 m. birželio 13 d.

the internal, personal response to the divine invitation to enter into a relationship with God and the external expression of that personal response within the community of faith through reception of baptism. The first aspect may be expressed as the obligation of being obligation, the second as a right and duty obligation.[13]

Various confessions have their own canons and articles of religious rights. For example, the Russian Orthodox church already in the XIII cent. compiled its legal articles known as "Kormčaja Kniga", which basically relied on Byzantine nomocanons. Then, the Israelites have their own articles of religious and ethical norms, that is Talmud, and also the requirements of the Old Testament. In pre-war Lithuania the Synod of the Evangelical reformats every year issued several canonic decisions, which regulated particular church affairs.

Every religious community has its own priority and social goals, that is why the Article 43 of Lithuanian Constitution defines that the Status of confessions and religious organizations in the state is established by the agreement or by law. This rather flexible definition allows the state in its agreements with the religious communities to consider the specifics of each confession and to satisfy the justified needs of a certain part of citizens. Since various religious communities may have different legal characteristics, which regulate the believers' life and their relations with the social environment, the state law on confessions cannot always be universal and satisfy the interests of all the religious unions. Besides, the legalization of the goals of each religious community might be not acceptable for whole state. Protecting by law the specific needs of certain religious communities the state, as the main executive of the majority's will, tries to reflect the basic interests of the traditional confessions, which to certain extent coincide with the state interests.

While signing the agreement, rather the positive aspects, expressing the historical differentiation of certain groups and their right to state protection is being emphasized, than the intention to discriminate. Of course, drafting an agreement the attention is paid that the established regulations do no violate neither the canons of the religious community, nor the state Constitution. All this means that there might function a separate religious system with its particular world outlook and policies, which is in a way beyond the state system established on that territory. Such an agreement between the state and the authorities of local and international religious communities definitely help to avoid undesirable influence of the religious communities over the indivisibility of the country and its citizens' consolidation.

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[13] *Code of Canon Law Annotated,* ed. by E. Caparros, M. Thériault, J. Thorn, Montréal 1993, p. 190-191; *New Comentary on the Code of Canon Law,* ed. by J. P. Beal, J. A. Coriden, T. J. Green, New York /Mahwah, N.J. 2000, p. 259-261.

In this connection the meaning of the Article 43 becomes especially significant: "The status of Churches and other religious organizations in the State shall be established by agreement or by law".

On May 5, 2000 an Agreement between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State was signed. The Art 1 of the Agreement states that "[t]he Holy See and the Republic of Lithuania agree that the Catholic Church and the State shall be independent and autonomous each within their field and, adhering to the said principle shall co-operate closely for the spiritual and material welfare of every individual and of society. The competent authorities of the Republic of Lithuania and the competent authorities of the Catholic Church shall co-operate in ways acceptable to both Parties on educational, cultural, family and social issues and, in particular, in the field of protecting public morals and human dignity".[14] By the same token the Article 2 provides that "[t]he Republic of Lithuania shall recognize the status of juridical person for the Catholic Church".

The Agreement between the Holy See and the Republic of Lithuania on Co-operation in Education and Culture in its Preamble emphasizes a particular "role of Catholic Church, especially in strengthening the moral values of the Lithuanian nation, as well as its historical and current contribution to the social, cultural and educational spheres" as well acknowledge that in Lithuania "Catholics constitute the largest community among the traditional religious communities in Lithuania recognized by the State".

THE RECOGNITION OF CHURCH MARRIAGE BY CIVIL LAWS IN LITHUANIA

Shortly after the Soviet occupation of Lithuania on June 15, 1940, the authorities issued a series of new laws and decrees regarding the Church, religion, and religious practices: the Church was separated from the State,[15] all records of baptism, marriage, and death were taken away from the clergy,[16] an obligatory civil marriage was introduced etc.[17] According to the laws, the Church had to stop all registration procedures and to pass the registration books to the civil registry offices. After the civil registration it was allowed to perform the

[14] *AAS*, XCII, 2000, p. 783-816; *Šventojo Sosto ir Lietuvos Respublikos sutartis bendradarbiavimo švietimo ir kultūros srityje. Šventojo Sosto ir Lietuvos Respublikos sutartis dėl santykių tarp Katalikų Bažnyčios ir valstybės teisinių aspektų. Šventojo Sosto ir Lietuvos Respublikos sutartis dėl kariuomenėje tarnaujančių katalikų sielovados* in *Valstybės žinios*, 2000, nr. 67-2014.

[15] *Lietuvos Tarybų Socialistinės Respublikos Konstitucija*, 96 str., in *Vyriausybės Žinios*, nr. 730 (1940), p. 657-663.

[16] *Vyriausybės Žinios*, nr. 725 (1940), p. 623-626.

[17] Ibid.., p. 619-623.

religious marriage ceremony, which, however, had no legal power, because the church marriage wasn't considered a legal fact. In 1969 a new Code of Marriage and Family of Lithuanian Soviet Socialist Republic was adopted and came to force in January 1, 1970. The Code incorporated previous Soviet legal provisions and confirmed that, the marriage was legitimate only when it was registered in the state civil registry office. The exception was made for birth, marriage, divorce and death cases, which had been registered before the Soviet civil registry offices' existence.[18]

Only after the re-establishment of the independency the new Constitution of the Republic of Lithuania adopted in 1992 recognized the church marriage. The legal status of the marriage contracted in the Church was reinforced by the Agreement Between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the relations Between the Catholic Church and the State of May 5, 2000 which became an essential part of the new Lithuanian family law. Moreover, any international agreement is, first of all, a part of the international law. Then, the agreement should be applied and interpreted according to the principles of the international law interpretation, which were established by the Vienna Convention on International Treaties[19] in 1969 and the Constitution of the Republic of Lithuania (Art. 135). Besides the Civil Code requires that the international agreements, being an important part of the national law have the priority power over the domestic laws: "[i]f the international agreements of the Republic of Lithuania establish the regulations different from those in the Civil Code or other laws of the Republic of Lithuania, then the norms of the international agreements are applied" (Art. 1.13.1). The marriage registration procedure is established according to the corresponding marriage law of the state. The marriage is considered legitimate, if its registration procedure was carried out in compliance with the legal requirements of the permanent residence *(lex loci celebrationis)*, or country of presence at the moment of marriage of at least one of the couple (Art.1.26, Civil Code).[20]

For the majority of Lithuanian faithful, who are Catholics marriage registration and legalization is of utmost important. For Christians, especially Catholics, marriage is primarily a sacrament and a moral event; yet, it is important from legal point. The Art.13 of the abovementioned Agreement Between the Holy See and the Republic of Lithuania, establishes the following: "A canoni-

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[18] *Lietuvos Tarybų Socialistinės Respublikos santuokos ir šeimos kodeksas,* Vilnius 1981; Bareikis S., *Civilinė metrikacija Lietuvoje,* in *Teisės apžvalga,* 1991, nr. 1, p. 44-45; Valančius K., *Bažnytinės (kanoninės) santuokos institucionalizacija* ..., op. cit., p. 272-273.

[19] *1969 m. Jungtinių Tautų Vienos konvencija dėl sutarčių teisės nuostatų* in *Valstybės Žinios,* 1991, nr. 4-115.

[20] *Lietuvos Respublikos civilinio kodekso komentaras,* I, *Bendrosios nuostatos,* Vilnius 2001, p. 113-114.

cal marriage will have civil effects pursuant to the legal acts of the Republic of Lithuania from the moment of its religious celebrations provided there are no impediments to the requirements of the laws of the Republic of Lithuania; The time and manner of recording a canonical marriage in the civil register shall be established by the competent authority of the Republic of Lithuania, in co-ordination with the Conference of Lithuanian Bishops; The preparation for a canonical marriage shall include informing future spouses of the teaching of the Catholic Church on the dignity of the sacrament of marriage, its unity and indissolubility, as well as the civil effects of the marriage bond as provided for by the laws of the Republic of Lithuania; Decisions of ecclesiastical tribunals on the nullity of marriage and decrees of the Supreme Authority of the Church on the dissolution of the marriage bond are to be reported to the competent authorities of the Republic of Lithuania with the aim of regulating legal consequences of such decisions in accordance with the legal acts of the Republic of Lithuania".

So, the Article 13 provides that the church marriage involves the legal and civil consequences only if registered according to the laws of the Republic of Lithuania. Accordingly, the Articles 3.25 and 3.304 of Lithuanian Civil Code meet the requirements of the present international agreement. Besides, in order to ensure the collaboration between Government and the Church, the Agreement provides that "[a] Mixed Commission comprised of representatives of both Parties shall be set up for the implementation of the provisions of the present Agreement" (Article 17). In case of any arisen divergences concerning the interpretation or implementation of the Agreement, the Parties agreed to proceed by common accord to an amicable solution (Article 18).

Here we should recall Article 7 of the Constitution of the Republic of Lithuania which states that "[n]one of the laws or legal acts contradicting the Constitution are valid". Yet, the similar provision is included into the Code of Canon Law from 1983: "*Leges civiles ad quas ius Ecclesiae remittit, in iure canonico iisdem cum effectibus serventur, quatenus iuri divino non sint contrariae et nisi aliud iure canonico caveatur*" (can.22). The canonized norm must be interpreted according to the criteria proper to canon law. For the Catholic, two systems of law oblige simultaneously, canon law, including divine law, and legitimate civil laws. While both are binding within separate but parallel systems, the canon law prevails whenever it conflicts with the civil law. Nevertheless, a contrary civil law can still influence the canonical system. For example, canon law does not recognize the validity of civil divorce, yet many ecclesiastical tribunals will not admit petitions for the invalidity of marriage unless civil divorce proceedings have been finalized, in order to prevent interference from civil authorities in an exclusively ecclesiastical proceeding.

Canon law also does not recognize a merely civil marriage by a Catholic, yet such an invalid marriage may have consequences in canon law (cann. 194 §1,3; 694 §1,2; 1041,3; 1394).[21] Civil law impediments, for example, minimum age required for marriage, degree of consanguinity permitted, etc. or laws regarding remarriage may be different from canon law impediments. If a marriage cannot be recognized in civil law, special care needs to be taken so that church practice is not unnecessarily in conflict with civil law. *"Exeptio casu necessitatis, sine licentia Ordinarii loci ne quis assistat...matrimonio quod ad normam legis civilis agnosci vel celebrari nequeat"* (can. 1071,2). However, there may be circumstances in which, for good reason, the local ordinary can allow a marriage to be celebrated despite the prohibition of civil law.[22]

The Constitution of the Republic of Lithuania emphasizes that "Family is the basis of the society and state. The latter protects and guards the family, mother-, father-, and childhood. The marriage is established by a free agreement between a man and a woman. The State registrates the acts of marriage, birth and death. The State also recognizes the Church marriage registration. The rights of the spouses are equal. The responsibility of parents is to raise their children in the spirit of morality and patriotism; parents support their children until the full age. The responsibility of children is to respect parents, take care of them in the mature age and save their heritage" (Article 38).

The aforementioned constitutional provisions although in different wording could find analogies in canon law, such as *"Pastores animarum obligatione tenentur curandi ut propria ecclesiastica communitas christifidelibus assistentiam praebeat, qua status matrimonialis in spiritu christiano servetur et in perfectione progrediatur* (can. 1063). *"Ordinari loci est curare ut debite ordinetur eadem assistentia, auditis etiam, si opportunum videatur, viris et mulietibus experientia et peritia probatis"* (can. 1064). *"Episcoporum conferentia statuat normas de examine sponsorum, necnon de publicationibus matrimonialibus aliisve opportunis mediis ad investigationes peragendas, quae ante matrimonium necessaria sunt, quibus diligenter observatis, parochus procedere possit ad matrimonio assistendum"* (can. 1067).

In Lithuania marriage is contracted in accordance with the order established by civil laws or church (confession) regulations. The Civil Code does not regulate a church marriage and therefore it shall be contracted in accordance with regulations established by canon law of respective religions (Art.3.24 Part 1). However, recognition of a church (confession) marriage is not absolute. "Legal consequences resulted from a church marriage do not differ from those of a civil marriage provided that: 1) terms and conditions of contracting a mar-

[21] *New Commentary on the Code of Canon Law,* op. cit., p. 84-86.
[22] Ibid., p. 1268.

riage established by Art. 3.12-3.17[23] of the Civil Code are not violated;[24] 2) a marriage is contracted in accordance with the procedure established by canon

[23] Civil Code Art.3.12: "Marriage may be contracted only with a person of the opposite sex"; Art.3.13: 1. Marriage shall be contracted by a man and a woman of their own free will. 2. Any threat, coercion, deceit or any other lack of free will shall provide the grounds on which the marriage declared null and void"; Art.3.14: "1) Marriage may be contracted by persons who by or on the date of contracting a marriage have attained the age of 18. 2) At the request of a person who intends to marry before the age of 18, the court may, in a summary procedure, reduce for him or her the legal age of consent to marriage, but by no more than three years. 3) In the case of a pregnancy, the court may allow the person to marry before the age of 15. 4) While deciding on the reduction of a person's legal age of consent to marriage, the court must hear the opinion of the minor person's parents or guardians or curators and take into account his or her mental or psychological condition, financial situation and other important reasons why the person's legal age of consent to marriage should be reduced. Pregnancy shall provide an important ground for the reduction of the person's legal age of consent to marriage. 5) In the process of deciding on the reduction of the legal age of consent to marriage, the state institution for the protection of the child's rights must present its opinion on the advisability of the reduction of the person's legal age of consent to marriage and whether such a reduction is in the true interests of the person concerned"; Art.3.15: "1) A person who has been declared by a *res judicata* court judgement) to be legally incapacitated may not contract a marriage. 2) If there is knowledge of a case pending before a court for the declaration of one of the parties to an intended marriage to be legally incapacitated, the registration of the marriage must be postponed until the judgement of the court becomes *res judicata*"; Art3..16: "A married person who has not terminated his or her marital bond in accordance with the procedures laid down by the law may not enter into a second marriage"; (A previous marriage means both a marriage contracted in a civil registry office and a church marriage duly registered with a civil registry office or termination of a partnership, which can be confirmed by a birth certificate of a partner or a court's decision declaring a partner to be dead, a courts decision about termination of a marriage (marriage termination certificate) or its invalidity, also documents established by law confirm discontinuation of a partnership); Art.3.17: "Marriage between parents and children, adopters and adoptees grandparents and grandchildren, real or foster-brothers and real or foster-sisters, cousins, uncles and nieces, aunts and nephews shall be prohibited"; See: *Lietuvos Respublikos civilinio kodekso komentaras*, III, *Šeimos teisė*, Vilnius 2002, p. 48-54. It should be pointed out that Chapter XV Living Together of Persons not Legally Married (Cohabitation) was drafted with reference to the Swedish law on Cohabitation. Two essential differences between these two legal systems are those that regulations of the Lithuanian Civil Code are exceptionally applied to cohabitants of an opposite sex and, contrary from Sweden, Lithuania following the Netherlands lead established a registered partnership system for opposite sex individuals. Taken into account the essence of a partnership institute, definition of partnership is analogous to definition of a marriage because opposite sex individuals voluntarily pursue to create monogamous legal family relations. In partnership sham is excluded, partnership registration requirements shall be fulfilled, partners shall be of age, competent and shall not be close relatives. Nevertheless the partnership institute differs from marriage because it does not regulate personals relations of cohabitants and is mostly applicable to property relations of partners, which are narrower in their scope as well. The provisions of Chapter XV of the Civil Code shall regulate the relations in property of a man and a woman who, after registering their partnership in the procedure laid down by the law, have been cohabiting at least for a year with the aim of creating family relations without having registered their union as a marriage (cohabitees).

[24] Prior to registering a marriage, an officer of a civil registry office shall once more check whether all the requirements of Art. 3.12-3.17 of the Civil Code are fulfilled. After recording a marriage a

law of religious organisations registered in the Republic of Lithuania and recognized by the State (Art.3. 24 Part 2).

Art. 3.304 of the Civil Code explaining a procedure of recording church marriages[25] establishes that: "1) A person authorised by an appropriate religion organisation within 10 days following a marriage contraction in accordance with the order established by the church laws shall notify a local civil registry office about registration of a marriage in accordance with the order defined by the church by sending an appropriate form established by Ministry of Justice. 2) Following the receipt of the form the civil registry office shall make an entry about the marriage into a marriage notice book and issue a marriage certificate in accordance with the procedure stipulated by Art. 3.303 Part 2, 3 and 4 provided that provisions of Art. 3.12-3, 3.17 are observed. In such a case a marriage in considered to be contracted on the day of its registration in accordance with the procedure established by church. 3) If a civil registry office is not provided with a marriage notification within the term indicated in Part 1 of this article, the marriage is considered to be contracted from the date of its entry into a marriage notice book.

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marriage certificate shall be issued (Art.3.23; 3.303 Part 2 and 3). A marriage certificate is a *prima facie* proof. But a marriage is deemed to be contracted from the moment when a marriage parties and an officer of a civil registry office undersign a marriage contraction act. A marriage record and a marriage certificate are the only proofs of contraction of a marriage. See., *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.60-61. In accordance with the Civil Code that is currently in force: "1) A marriage shall be considered to be dissolved on the date when the divorce judgement becomes *res judicata*. 2)The court must send a copy of the divorce judgement to the local Register Office for the registration of the divorce within three business days of the date of *res judicata* of the judgement" (Art.3. 66). Comparing with Art. 40 of the former Marriage and Family Code of the Soviet period, a marriage shall be terminated after registration of termination with a civil registry office. However this provision caused a legally indefinite situation because if none of the spouses registered termination of a marriage with a civil registry office, officially it remained valid, which often resulted in infringement of the parties or one of the parties rights and legitimate interests. For instance, with still effectual paternity presumption a former husband might have been recorded as a father of a child born after termination of a marriage. Since in accordance with a current Civil Code a marriage shall terminated only by court procedure, it is logical to establish that a marriage is terminated on the date when the divorce judgement becomes *res judicata*, which is within 14 days, i.e. when the term for filing an appeal is over (Art.279). See *Lietuvos Respublikos civilinio proceso kodeksas,* Vilnius 2002*; Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.138-139.

[25] Religious communities and societies that the State recognises as traditional ones. After registration of a marriage such religious organisations may authorise an officer of the organisation or marriage parties to notify a civil register office about a marriage and register it with a civil registry office. It must be noted that a church marriage shall be recorded with a civil registry office of the place where a church or meeting-house is situated but not " in the place of residence of the marriage parties or their parents or consular posts of the Republic of Lithuania (3.298). See., *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.549-550.

This ambiguous situation on the entry of legal effects caused legal disputes among professors of M. Romeris University. The reason for such disputes is a collision between two legal systems in the field of marriage regulations. The insufficient understanding of the Church legal system may be due to the outlook of the senior generation. During the soviet period the atheistic propaganda portrayed the Church to the public as medieval and backward institution and made great efforts to isolate and separate it form the public life. Therefore the public's understanding of the church is low enough whereas knowledge about the canon law in most cases does not exist at all. Another reason might be absence of the translation of Canon Code in the Lithuanian language. No wonder that critics who are mostly familiar with the civil law support the civil law position and come to a conclusion that K. Meilius and G. Sagatys had exclusively presented the requests of the Catholic Church in their publication[26] whereas the authors' conclusion about a possibility to decide marriage termination cases both in secular and church legal institutions they think to be a misconception (in their paraphrases the critics either did not know or forgot that the ecclesiastical tribunal does not adjudicate marriage termination cases and take decisions only on its invalidity) because it is in contradiction with Article 13 Part 1 of the Agreement Between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations Between the Catholic Church and the State of May 5, 2000, which defines that a church marriage from the very moment of its contraction shall cause civil consequences in accordance with legal regulations of the Republic of Lithuania provided provisions of the laws of the Republic of Lithuania have been observed.[27]

This indeterminacy had also raised doubts during discussions of the Civil Code draft in the Law Department of the Seimas. Since Art.3.304 Part I of the Civil Code provides that a person authorised by church shall notify about contraction of a church marriage, it may occur that the marriage parties will not be aware or will not be able to be aware that the said obligation has not been performed or has been unduly performed. Then who will be responsible for the consequences and how disputes shall be decided in such cases?[28]

It should be noted that indeterminacy in relation to the status of the church marriages might have impacted appearance of a provisional agreement between the Government of the Republic of Lithuania and the Lithua-

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[26] Meilius K., Sagatys G., *Bažnyčios (konfesijų)* ..., op. cit., p. 128-136.

[27] Papirtis L.V., Kudinavičiūtė I., *Bažnytinių santuokų teisinis reglamentavimas ir apskaita* in *Jurisprudencija,* vol. 37 (29), 2003, p. 90.

[28] Conclusion No 2271 of March 27, 2000 by Law Department of the Seimas of the Republic of Lithuania concerning draft of the Civil Code (Book III), www.lrs.lt; Meilius K., Sagatys G., *Bažnyčios (konfesijų)* ..., op. cit., p. 131

nian Bishops' Conference (July 11, 2001) on registration of church marriages contracted in accordance with the order established by the Catholic Church with a civil registry office although recognition of the church marriages and occurrence of civil consequences are provided by the Civil Code Art. 3.24 and 3.304 that compels the church authorised person to notify a civil registry office about contraction of a marriage within 10 days in order the marriage assumed civil legal consequences. Due to such a situation, when the Church does not undertake the said obligation, this obligation has been passed over to the marriage parties that within 10 days shall notify a civil registry office about the church marriage and acquire the right to civil legal consequences resulted from this marriage. Otherwise the marriage shall produce civil legal consequences only following its entry into the registry. This agreement between the Government of the Republic of Lithuania and the Bishops' Conference appeared on the basis of Art. 13 Part 2 and Art. 18 of the *Agreement Between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State* and due to the Lithuanian Government's objective to supplement the Civil Code Art.3.304 with a new provision recognising the fact resulted from international agreements maintaining that "subject to international agreements there might be established another procedure of notification a civil registry office about a church marriage."

On February 11, 2003 in its address (No 1-65/03) to Minister of Justice the Lithuanian Bishops' Conference reminded that a competent institution of the Republic of Lithuania in coordination with the Bishops' Conference should establish a procedure of entry of the church marriage into the State Registry. Art. 3.304 of the Civil Code , which came into force after the Seimas had ratified the mentioned above international agreement, established an obligation requiring a person authorised by an appropriate religion organisation to notify a civil registry office about contraction of a church marriage by sending an appropriate form set by Ministry of Justice. In its address the Bishops' Conference claims that the said provision does not conform to the provisions of the mentioned above international agreement and the Constitution that recognizes the church marriage and does not require persons authorised by the Catholic Church to perform, within 10 days' term, any additional actions. Contrary to the Civil Code Art.3.304, Part 3, it does not provide that in case of failure to perform such additional actions, a marriage shall be considered invalid. Due to this, in accordance with Order No 193 point 4 of June 30, 2003 by Minister of Justice of the Republic of Lithuania all religious organisations except the Latin rite of the Catholic Church were ordered to follow the mentioned above provision of the Civil Code. Point 6 of the Order confirms the previous procedure

and the obligation of notifying about contraction of a church marriage has been passed over to the marriage parties.

Therefore parties or a party of the church marriage should apply to a civil registry office with a request to make an entry of a marriage into a registry, which is performed by making a usual entry into a marriage registration book (attesters' signatures are not required) and a marriage certificate is issued. For instance, the civil registry office of the Vilnius city indicates in its check-list that it shall register birth, marriage, marriage termination, adoption, recognition and establishment of parentage, change of name, surname or nationality, make entries of deaths, church marriages or marriages registered abroad, make supplements or corrections of entries related to civil status acts, re-establish entries related to civil status acts and issue archival documents. Entry of a church marriage (if marriage was concluded after November 2, 1992) requires presenting passports or identity cards or a permit of permanent residence in Lithuania, a church marriage certificate, and birth certificates (2.3). Point 2.5 defines an 80 Litas (Lt) charge for a solemn registration of marriage, a 20 Lt charge for an ordinary registration and a 15 Lt charge for entry into the registry of a church marriage or marriage contracted abroad.[29] Taken into account the mentioned above charges it seems that the legal principles of the Soviet period Marriage and Family Code[30] that became invalid after the Civil Code came into force are still applied to the church marriage. According to those principles a marriage terminated by court remained valid until registration of its termination with a civil registry office (Art 40).

All that points out to the fact that although a regulation related to recognition of a church marriage is based on Art.38 of the Constitution, acceptance of the requirement to register church marriages makes constrictions to this rule and only the provision of the Civil Code Art. 3.304, Part 2 is recognised, which provides that a marriage is recognised valid provided an entry of the marriage is made in a civil registry book in accordance with the procedure established by the Civil Code. A marriage certificate issued by a civil registry office becomes a marriage substantiation,[31] which means that prior to registration a church marriage shall not originate any property relations between the parties of the marriage. Even a marriage contract does not render legal power after a church marriage since the law requires registration of a church marriage with a civil registry office. Cohabitation parties have also

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[29] 1 Eur=3,45 Lt; see *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.550.

[30] *Lietuvos Respublikos santuokos ir šeimos kodeksas ir kiti pagrindiniai norminiai aktai, reglamentuojantys vaiko teisių apsaugą, įvaikinimą, globą, pašalpas šeimai // Oficialių dokumentų tekstai su pakeitimais ir papildymais iki 1999 m. gruodžio 10 d.*, Vilnius 1999.

[31] *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.61.

the right to conclude a marriage contract regulated by Art.3. 101-308 of the Civil Code.[32]

Art. 3.101 of the Civil Code establishes a property regime of the parties in accordance with a marriage contract. A marriage contract is defined as an agreement between the parties that sets their property rights and obligations in marriage, after termination of marriage and in separation. The principal feature of a marriage contract is that that a legislator ascribes it to civil agreements (Art. 6.154 – 6.199) although in comparison with other agreements it is characterised by strict form and content requirements (Art.3.103-3.104). A marriage contract may be concluded prior to a marriage registration (premarital) or at any time following registration of a marriage (post marital). The difference between these two types of contracts is that that a contract made prior to a marriage registration comes into force on the date of marriage registration. Meanwhile a post marital contract comes into force from the date of concluding the contract if the contract provisions do not provide otherwise (Art. 3.102). In case of a premarital contract nothing is said about the term within which a marriage shall be registered after concluding a contract. Although the contract establishes rights and obligations of the parties in regard to property handling, maintenance, participation of the parties providing for the family needs and expenses, also division of the property between the parties in case of termination of the marriage and other issues related to property relations (Art.3.104), the main provision remains registration of a marriage because otherwise the contract shall be void.[33]

Regardless contraction of a church marriage no judicial disputes in relation to regulation of property relations (equality of rights [(3. Art.26), inheritance (5. Art.7), the parties' obligation to support each other morally and materially (3. Art.27) etc.], shall arise. Since the Church does not regulate property relations of persons and the State of Lithuania shall undertake this obligation only following registration of a marriage with a civil registry office, the parties of a marriage find themselves in a rather ambiguous situation, which becomes especially indefinite in case of death of either of the parties, when a remaining party has no inheritance right, or when the parties decide to separate they do not have such rights as civil marriage parties or church marriage parties that have recorded their marriage with a civil registry office or as partnership parties. At best, the church marriage parties shall exercise the rights provided by institute of cohabitation.

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[32] Šimkūnienė A., *Sužadėtuvės ir vedybų sutartis // Teisės konsultantas*, 2002 m. vasario 1 d., nr. 1, p. 18-20; *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.447-449.

[33] Ibid., p.213-228.

From a marriage definition given in Art.3.7 of the Civil Code it comes out that: 1) A marriage is a voluntary agreement between a male and a female to start legal family relations executed in accordance with the procedure established by law. 2) A male and a female that have registered their marriage in accordance with the procedure established by law are spouses." Any lack of will that might raise any doubt whether a marriage has been contracted on a voluntary basis, can serve grounds for recognising a marriage invalid (Art. 3.13; 3.15; 3.40). Consistent with requirements of the law marriage relations shall be contracted between a male and a female of an appropriate age defined by the law, who have not entered into any other marriage relations nor have registered any partnership relations and who are not close relatives and according to the law shall be prohibited to enter into marriage relations (Art.3.12; 3.14; 3.16; 3.17). An agreement that infringes the said requirements shall be not voted a marriage. In addition, a marriage objective, which is to establish legal consequences, family legal relations, i.e. a family, should not be neglected either. If this objective has been abandoned, a marriage is nothing else but simulation. A marriage shall exceptionally be an agreement concluded in a civil registry office (Art. 3.18-3.22; 3.298-3.303) or in accordance with the order set by church in conformity with the requirements of Art. 3.24-3.25 and 3.304. Therefore a male and a female entering into marriage relations acquire a new legal status. They become parties of the marriage and acquire property and personal non-property rights and obligations. Individuals living together without registration of their marriage (cohabitants) in accordance with the Civil Code Art. 3.229 shall not be marriage parties.[34] Therefore an individual after entering into marriage relations shall have no right to contract a new marriage or register a partnership (Art.3.16), but in case of a church marriage and failure to register it with a civil registry office he or she may contract new marriage relations or register a partnership. A previous marriage means a marriage contracted in a civil registry office or a church marriage duly registered with a civil registry office or validation of partnership that can be confirmed by a death certificate of a spouse (partner) or by a court's decision to terminate the marriage (marriage termination certificate), which recognises it invalid, or termination of partnership confirmed by documents established by law.[35]

To avoid violation of a principle of monogamy "an individual who has concluded a marriage and has not terminated it in accordance with the procedure established by law shall not contract new marriage relations" (Art.3.16). The said prohibition is also applied to partnership parties (Art.3.229). If a registered partnership has not been terminated in accordance with the procedure

[34] Ibid., p.41-42.
[35] Ibid., p.53-54.

established by law or if it has not discontinued due to a partner's death, a new marriage or registration of partnership with a new individual shall be prohibited. There is nothing said about a church marriage recorded in a church register but not registered with a civil registry office. It makes us to arrive at a conclusion that existing church marriage is not an impediment for a new marriage or partnership. Thus individuals married in church are not secured from violations of the monogamy principal and find themselves in a different situation then those who have contracted a civil marriage.

The law of the Republic of Lithuania as well as laws of many other contemporary states provides a basis for termination of a marriage. A marriage is deemed terminated in case of death of one of the parties or when a marriage is terminated in accordance with the procedure established by law, which can be done by mutual agreement of the parties, at the parties' (or one of the parties) request or due to the parties' (or one of the parties) fault (Art. 3.49-3.72of Civil Code).[36] With the introduction of a new Civil Code in Lithuania's legal system is discernible an interpretation trend tending to apply civil laws in explaining church marriage relations. Thus such an interpretation provides civil courts with the instrument to render a church marriage a status of a terminated marriage although actually such a marriage remains valid until an appropriate ecclesiastical tribunal's decision is issued. Only when an ecclesiastical court declares a marriage invalid, appropriate entries are made in a church marriage and baptism register.

An ambiguous treatment of a church marriage becomes a favourable precondition for individuals to maintain church marriage relations with one person and civil marriage relations with another person since a church marriage (although recognised in accordance with Art. 38 of the Constitution) if not registered with a civil registry office does not result in legal consequences and therefore makes it possible to enter into new marriage relations. Secondly, when a church marriage is registered with a civil registry office, it is treated as a civil marriage and may be decided in accordance with civil laws. Thus recognition of a church marriage again is missing its sense.

If an engaged couple wishes to contract a church marriage, firstly, they prefer to obey church norms and later confirmation of their marriage with a civil registry office. Art.7 on religious communities and societies in the Republic of Lithuania stipulates that religion communities do not perform state functions whereas the state does not perform functions of religion communities or

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[36] Ibid., p.109-156.

[37] *Lietuvos Respublikos religinių bendruomenių ir bendrijų įstatymas // Valstybės žinios,* 1995, nr. 89-1985.

societies. Part 2 of the said article[37] as well as Art. 43 Part 4 of the Constitution stipulate that religious communities as well as societies have the right to act freely in accordance with their canons, statutes and other regulations. Thus if the Catholic Church Canons define an independent fundamentals and procedures for marriage contraction, marriage nullity or other marriage termination (for instance *privilegium Paulinum, matrimonium ratum et non consumatum, praesumptae mortis coniugis* etc.), it should be understood that the marriage parties acquire the right to decide disputes both in secular and church courts. It is quite obvious that if marriage partners have chosen a church marriage, their marriage relations are being regulated not only by the civil law regulations but the church regulations as well.[38]

It is quite obvious that keeping marriage records is important both in the State's (statistics, prevention of polygamous marriages, etc.) and the marriage parties' interests. If in accordance with the Constitution the State recognises church marriages, it should also recognise the rights and consequence resulted from a church marriage from the very its registration moment like it is in case of a civil marriage. While explaining provisions of Art.38 of the Constitution and Civil Code Art. 3.24 and 3.304, one might find it difficult to determine the moment from which a church marriage shall be deemed contracted (for instance, if within 10 days from a church marriage it is failed to register it with a civil registry office). In such a case a church marriage should result in civil legal consequences from the day of its contraction because a church marriage is valid or invalid from the very moment of its contraction.[39]

Moreover, this problem becomes a matter of great concern to the Catholic Church[40]: the marriage cannot be concluded *sub conditione de futuro* referring to a norm of the Code of Canon law where "§1 *Matrimonium sub condicione de futuro valide contrahi nequit.* §2. *Matrimonium sub condicione de praeterio vel de praesenti initum est validum vel non, prout id quod condicioni subest, existit vel non.* §3. *Condicio autem, de qua in* §2, *licite apponi nequit. Nisi cum licentia Ordinari loci scripto data* (can. 1102). The result of such canon

[38] Meilius K., Sagatys G., *Bažnyčios (konfesijų)* ..., op. cit., p.134.

[39] Ibid., p. 128-136.

[40] The Book IV *De Ecclesiae munere santificandi,* Title VII *Marriage*: Chapter I – Pastoral Care and the Prerequisites for the Celebration of Marriage (cann. 1063-1072); Chapter II – Diriment Impediments in General (cann. 1073-1082); Chapter III – Individual Diriment Impediments (cann. 1083-1094); Chapter IV – Matrimonial Consent (cann.1095-1107); Chapter V – The Form of Celebration of Marriage (cann. 1108-1123); Chapter VI – Mixed Marriages (cann. 1124-1129); Chapter VII – The Secret Celebration Marriage (cann. 1130-1133); Chapter VIII – The Effects of Marriage (cann.1134-1140); Chapter IX – The Separation of the Spouses (cann. 1141-1155; Chapter X – The Validation of Marriage (cann. 1156-1165), speaks not only about objectives of a marriage, contraction of a marriage, marriage impediments, validation, admissibility of a marriage and obligations of parties.

provisions is to combine the respect for the consensual principle as the efficient cause of marriage, and the need to prevent the bond being suspended because of the will (conditioned consent) of the other. If following the above mentioned civil law interpretation on the very moment when the church marriage acquires legal effect, from the point of view of canon law there occur future conditions when the efficacy of marriage consent remains suspended and the emergency of bond is actually deferred to the moment when the event (i.e. record entry with Civil Register office) is fulfilled.

According to the Code of Canon law "*Omnes possunt matrimonium contrahere, qui iure non prohibentur*" (can. 1058*)* the right to marry or *ius connubii* is a person`s natural right. It includes the right to enter into marriage and the right to choose a partner freely. Since it is a natural law, it may only be restricted for serious and just reasons, and the restrictive laws must be strictly interpreted; thus, when there is any doubt, the right to enter into marriage must be defended. In this relation canon law considers laws invalidating[41] or incapacitating[42] which expressly that a certain act is null or that a certain person is incapable (can. 10). Consequently, "*[a]ntequam matrimonium celebretur, constare debet nihil eius validae ac licitae celebrationi obsistere*" (can. 1066), including "*invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quamquam non consummati*" (can. 1085). In our examined case the civil law interpretation on the contraction of church marriage can not be canonized as foreseen by can.22 since it is contrary to the canon law provisions. Furthermore, the deferment of the moment when the church marriage acquires legal effect would represent a non-justifiable restriction to the realisation of *jus conubii* which lacks a sound reason from the point of view of canon law.

By describing marriage as a partnership or *consortium* of the whole of life, the actual code retrieves the classic Roman law definition of the jurist Modestinus: *"Marriage is the union of a man and a woman, and a lifelong fellowship (consortium omnis vitae), a sharing of sacred and human law"* (D.

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[41] Invalidating laws establish the necessary requirements of a juridic act, such that their non-fulfillment would render the act invalid, null and void, not recognized as legally existing. For example, canon 1108 § 1 states that the marriage, a juridic act, of Catholic is valid only if celebrated according to the canonical form.

[42] Disqualifying laws establish the necessary qualifications required of a person validly to perform or benefit from a juridic act, such that the act is invalid if the person lacks an essential requirement. For example, canon 1095 establishes: "*Sunt incapaces matrimonii contrahendi: 1° qui sufficienti rationis usu carent; 2° qui laborant gravi defectu discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda; 3° qui ob causas naturae psychicae obligationes matrimonii essentiales assumere non valent". Or canon 1083 established: "§ 1. Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium validum inire non possunt.* § 2. "*Integrum est Episcoporum conferentiae aetatem superiorem ad licitam matrimonii celebrationem statuere.*"

23.2.1). Can. 1055 of the Canon law defines marriage as follows: "§ 1) *Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.* § 2) *Quare inter baptizatos nequit matrimonialis contractus validus consister, quin sit eo ipso sacramentum.*"

The marriage bond arises from consent, or to be more exact, from the marriage covenant. Consent is the most decisive element of the marriage covenant and the one that causes its efficacy. Since marriage contains extremely personal rights which affect the availability and use of the body, consent cannot be supplied in any way by the juridical system, nor by the parents of the persons entering into marriage, nor by any other human power: "*Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet*"(can. 1057§1). Consequently, human law cannot recognize the validity of marriage if there is some defect that renders it void according to natural law, due of some substantial defect or fault in the naturally sufficient consent: "*Consensus matrimonialis est actus voluntatis, quo vir et mullier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium*" (can. 1057 § 2). Regarding matrimonial consent canon 1101 § 1 establishes "*Internus animi consensus praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis,* § 2 *At si alterutra vel utraque pars positive voluntatis actu excludat matrimonium ipsum vel matrimonii essentiale aliquod elementum, vel essentialem aliquam proprietatem, invalide contrahit*". There is a presumption of law, that the contracting parties outwardly express the same thing that they will internally. In order to disprove that presumption contrary proof is admitted since there are cases where such discrepancy between the external manifestation and the internal will which causes the nullity of marriage..

Art. 3.28 of the Civil Code provides that "[m]arriage parties create family relations as a basis for communal life". Family relations are based on mutual love, respect, loyalty and trust. Therefore it is assumed that a marriage generates family relations between the marriage parties. Art. 3.7 Part 1 exceptionally recognises a marriage agreement that aim at creating family relations.[43]

A church marriage concluded without *bonum coniugum, bonum prolis, bonum fidei* or by other ways that contain not acceptable or characteristic marriage elements from the point of view of its form or content make that marriage invalid. Therefore if it is invalid, then how it can turn valid after its registration with a civil registry office. When making a marriage entry into a marriage

[43] *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p.67-68.

register a distinction is drawn between a religious and civil marriage. If it is a religious marriage, then it is inexplicable how it *ab initio* be recognised invalid on a basis of civil law. Also, if such a marriage is not registered with a civil registry office, then it may be recognised invalid by appropriate church institutions (ecclesiastical courts). In such a case we confront a serious problem: What is more important? Is it conclusion of a marriage with all obligations of the marriage parties, when family relations are created *de facto* and *de jure* or records of registration of such relations, which are performed only after implementation of marriage conclusion requirements?

If Art.38 Part 4 of the Constitution of the Republic of Lithuania stipulates that the state makes marriage, birth and death records and recognises registration of church marriages, then it should be questioned if the state recognises registration of a church marriage or only its records in a civil registry office. Such an ambiguous problem emerges because the Canon law establishes express obligations in relation to marriage registration: "§ 1) *In unaquaque paroecia habeantur libri paroeciales, liber scilicet baptizatorum, matrimoniorum, defunctorum, aliique secundum Episcoporum conferentiae aut Episcopi diocesani praescripta; prospiciat parochus ut iidem libri accurate conscribantur atque diligenter asserventur.* § 2) *In libro baptizatorum adnotentur quoque confirmatio, necnon quae pertinent ad statum canonicum christifidelium, ratione matrimonii salvo quidem praescripto can. 1133...* § 5. *Libri paroeciales antiquiores quoque diligenter custodiantur, secundum praescripta iuris particularis*" (can. 535). "§ 1) *Matrimonium contractum adnotetur etiam in regestis baptizatorum, in quibus baptismus coniugum inscriptus est.* § 2) *Si coniux matrimonium contraxerit non in paroecia in qua baptizatus est, parochus loci celebrationis notitiam initi coniugii ad parochium loci collati baptismi quam primum transmittat.*" After conclusion of judicial procedures "*Statim ac sententia facta est exsecutiva, Vicarius iudicialis debet eandem notificare Ordinario loci in quo matrimonium celebratum est. Is autem curare debet ut quam primum de decreta nullitate matrimonii et de vetitis forte statutis in matrimoniorum et baptizatorum libris mentio fiat*" (can. 1685).

Marriage invalidity means that some essential non-conformity with the law occurred at the moment of marriage and therefore the marriage was deemed void and fictitious from the very moment of its contraction. The said situation is recognised by Civil Code, Art.3.37. Part 3. Canon 1060 of the Canon law provides that "*[m]atrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur*". In the civil law as well an appropriately registered marriage shall be valid until it is declared invalid by court. Validity of a marriage presumption is based on a certainty presumption

of civil status records (Art. 3.286). However this presumption may be denied in accordance with the procedure established by law (Art. 1.78).[44] Strange as it may seem, in accordance with the Civil Code Art.3.37 Part 2 validity of a church marriage can be recognised only by civil courts. In practice, although the state has recorded a church marriage, it does not recognise it because it exceptionally applies regulations of the civil code to it. Having in mind that the Canon law also has a complete judicial system that is applied deciding cases within the competence of the ecclesiastic tribunal, it seems to be logical for a public office to recognise a church marriage invalid after the church court's decision on annulment of that marriage becomes effective.

COMPETENCE OF ECCLESIASTIC AND CIVIL COURTS IN RESOLVING MARRIAGE CASES

Irrespective that canon law also includes a procedure of declaring marriages invalid, under the Civil Code of the Republic of Lithuania the canon law shall not be applicable to church marriages entered into records of the Civil Registry offices, because marriages contracted under the procedure established by the Church (confessions) norms and entered into marriage records at the Civil Registry offices shall become civil marriages under the procedure established by Art. 3. 304 of the Civil Code. As the Civil Code states that "[o]nly the court may declare the marriage invalid" (Art. 3.37.2), evidence or documents, collected when resolving the marriage invalidity under the procedure established by the Church (confessions), may be used as the means of proof only when the marriage invalidity is resolved at the civil court. The marriage is recognized invalid since its contraction, i.e., registration, and not since the moment of coming into force of the court's decision (Art. 3.37.3). However, if under the procedure established by the Church (confessions) the contracted marriage is recognized invalid before it enters into the marriage records of the Civil Registry, such marriage is treated as non-existent from the civil law perspective, thus there is no need to declare it invalid also through the judicial procedure.[45]

The Code of Canon Law of the Catholic Church states that *"Obiectum iudicii sunt: 1. Personarum physicarum vel iuridicarum iura persequenda aut vidicanda, vel facta iuridica declaranda"* (can. 1400); *"Ecclesia iure proprio et exclusivo cognoscit: 1. de causis quae respiciunt res spirituales et spiritualibus adnexas; 2. de violatione legum ecclesiasticarum deque omnibus in quibus inest ratio peccati, quod attinet ad culpae definitionem et poenarum ecclesias-*

[44] Ibid., p.83-107; *Lietuvos Respublikos civilinio kodekso komentaras*, I, op. cit., p. 177-179
[45] *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p. 61-62, 549-550

ticarum irrogationem" (can. 1401);"§1) *Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet.* § 2) *Consensus matrimonialis est actus voluntatis, quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium*" (can. 1057); "*Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio christiano ratione sacramenti peculiariarem obtinent firmitatem* (can. 1056); "*Causae matrimoniales baptiztorum iure proprio ad iudicem ecclesiasticum spectant*" (can. 1671); "*Causae de effettibus matrimonii mere civilibus pertinent ad civilem magistratum, nisi ius particulare statuat easdem causas, si incidenter et accessorie agantur, posse a iudice ecclesiastico cognosci ac defeniri*" (can 1672).

This clearly indicates that the valid marriage contracted at the Catholic Church is indissoluble and may be declared as invalid only through the canon law procedure. Therefore, upon civil dissolution of the marriage, its church (confession) registration remains in force. Especially, that the Constitution of the Republic of Lithuania recognizes registration of the church marriage, thus also its validity (Art 38). Therefore it appears that whether the law of the Republic of Lithuania is in conflict with the fundamental law of the Republic of Lithuania – the Constitution. It seems that the legality of the church marriage dissolution permitted by the Civil Code is subject to the content ascribed to the *marriage registration.* If a marriage is recognized as a contract between the parties concluding it, the state, recognizing their marriage contract, should take account of and accept its content, the intention of the marrying persons. Regretfully, the state does not question the content of the church marriage and neither adds nor deducts anything, but merely requests a guarantee from the very Church regulations to request the contract conforming to the state marriage content from the very marrying parties. This allows thinking that the Civil Registry offices register, and the state recognizes the church marriage and not the ecclesiastical formality of concluding the civil marriage. Such recognition presupposes that the church marriage should be recognized as long as it continues and remains the church marriage. In many confessions the civil dissolution of the church marriage does not truly dissolve the church marriage and the latter remains in force until it is dissolved by the very religious communities under their own regulations. Dissolution of the church marriage in line with the Civil Code provisions is unacceptable to certain confessions as the state interference with the canon procedure. Beside this, the question is whether this is in conflict with the state Constitution stipulating that the state shall also recognize the church marriage (Art.38).[46]

[46] Brilius V., *Sakramentinės santuokos pripažinimo problemos Lietuvos Respublikos civilinėje teisėje* in *Soter,* 10 (38), 2000, p.54-55.

In 1992 when the Republic of Lithuania promulgated the Constitution with Art.38 recognizing the church marriage registration, the conflict arose with the-then Marriage and Family Code, Art.6.2, which established that only marriages contracted at the Civil Registry offices were recognized and that religious ceremonies of marriage, as well as other religious ceremonies were not legally significant. Art. 11 of the Marriage and Family Code stipulated that marriages had to be contracted at the State Civil Registry bodies. Art. 12.2 of the same Code provided that the rights and duties of spouses were only created by the marriage contracted at the State Civil Registry bodies. Such rights and duties had to arise only since the date of registering the marriage with the State Civil Registry bodies. On January 5, 1994, this conflict was noted by Plunge District Court having heard the civil case regarding the refusal of Plunge District Notary Public to issue the inheritance right certificate as provided by law.

Having reviewed the received material the Constitutional Court stated that the following rule existed in the theory of law and the legal tradition: laws had no retroactive effect. Especially that neither the very Constitution, nor the Law on Coming into Force of the Constitution stipulated any procedure. Therefore provisions of Art.38 of the Constitution stipulating that the state recognition of the church marriage registration came into force together with the Constitution and had no retroactive effect. According to the temporary official recording procedure for church marriages applicable since 1994, the church marriage had to be re-registered with the civil registry office. However, as noted by the Constitutional Court, the so-called re-registration could have been treated as the temporary marriage recording rather than the legal fact of marriage registration. Registration (state or church one), and not *re-registration* constituted the beginning of legal marriage relations and related rights and obligations. Such recording procedure for church marriage registration was treated by the Constitutional Court as merely a temporary measure because the state should have established a statutory provision for a clear and permanent procedure of official recording of church marriage registration, realization of legal consequences arising on the grounds of such marriage, and resolution of the related disputes. Thus it was confirmed that the provision established by Art.6.2 of the Marriage and Family Code establishing that only marriages contracted at the civil registry bodies were recognized and that religious ceremonies were not legally significant, was *ipso facto* in conflict with the above Constitutional provision.

Art.11 of the-then Marriage and Family Code stipulated that marriages had to be contracted only at the State Civil Registry bodies. To the opinion of the Constitutional Court this norm was not in conflict with Art.38 of the

Constitution because "the state shall register marriages, births and deaths." This norm detailed institutions performing the registration. But with respect to the fact that the Marriage and Family Code was passed in 1969, when only the state marriage registration existed, and recognized only civil registry offices by the Constitution in force, the Constitutional Court treated the absence of the church marriage in the law as a legal gap. Art.12.2 of the-then Marriage and Family Code stipulated that rights and duties of spouses were established only by the marriage contracted at civil registry bodies and that the rights and duties arose only since the date of registering the marriage at a civil registry office. Two independent legal meanings were established by the above Article: 1) the rights and duties of spouses were established only by a marriage contracted at the State Registry bodies (in conflict with the Constitution), and 2) the moment of arising of the rights and duties. The conclusion of the Constitutional Court was that the rights and duties were established also since the date of the church marriage registration because the context of this norm emphasized the legal fact of the marriage conclusion registration instead of the subject: the importance was given to that rights and duties of spouses arose since the marriage registration date instead to the entity having registered the marriage.[47]

The same is confirmed by the Decision of the Supreme Court of the Republic of Lithuania of April 19, 2000.[48] Based on the cassation appeal the above Court heard the Decision of November 25, 1999, of Klaipeda County Judge College stating that the laws in force did not establish the grounds for recognizing the church marriage and that the marriage contracted at State Civil Registry bodies was recognized in the Republic of Lithuania. The religious marriage, if not recorded with a civil registry office, was legally insignificant (Art.6).[49] This motivation of the Decision by the County Court was recognized as incorrect because it was in conflict with Art.38.4 of the Constitution. However, to the opinion of the Supreme Court, the County Court, observing Art.243.1 of the Code of Civil Procedure, had reasonably nonsuited the case as out of the Court's jurisdiction, because laws in force had no provision on recognizing the church (confession) marriage unrecorded with a civil registry office invalid. By the Restitution Act of the Catholic Church Status in Lithuania, of June 12, 1990, the Supreme Council of the Republic of Lithuania had declared that the state recognized the right of the Church to handle its internal

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[47] Lietuvos Respublikos Konstitucinio Teismo 1994 04 12 nutarimas *Dėl Lietuvos Respublikos Santuokos ir šeimos kodekso 6 straipsnio 2 dalies, 11 straipsnio ir 12 straipsnio 2 dalies atitikimo Lietuvos Respublikos Konstitucijai* in *Valstybės žinios*, 1994, nr. 31-562.

[48] Lietuvos Aukščiausiojo Teismo civilinių bylų skyriaus 2000 04 19 nutartis civilinėje byloje nr. 3K-3-462/2000 in www.lat.lt

[49] *Lietuvos Respublikos santuokos ir šeimos kodeksas* ..., op. cit.

life activities independently according to the canon law norms. Art.7 of the Law on Religious Communities and Societies of the Republic of Lithuania stipulated that religious communities do not perform state functions and the state does not perform functions of religious communities.[50] As stated by the College of the Supreme Court, as only the church marriage was concluded in this case, the issue of recognition of this marriage invalidity may be resolved by the Diocesan ecclesiastical court in line with the provisions of the Canon law. Disputes regarding recognition of church marriages invalid were out of the jurisdiction of civil courts (Art.26 of the Code of Civil Procedure).[51]

The following was said by the Communication of the Ministry of Justice of the Republic of Lithuania to civil registry offices *On records of marriages contracted at church*, of 1998[52]: "the following recording procedure is recommended for marriages contracted at church until spouses initiate re-registration (recording) of such marriages with civil registry offices: 1) only marriages registered at church observing Arts. 15-17 of the Marriage and Family Code shall be registered at a civil registry office; 2) persons wishing their church-registered marriage to be recorded at a civil registry office shall submit a church marriage certificate (of a prescribed format), their passports and an application; 3) the stamp duty at the tariff applicable to marriage registration shall be requested from such persons (11 Lt); 4) the head of a civil registry office shall shorten the 1 month time period established by Art.13 of the Marriage and Family Code down to 1 day; 5) no witnesses shall be invited for recording the church-concluded marriage; 6) the church-contracted marriage shall be recorded at a civil registry office by making a marriage entry, issuing a marriage certificate and making relevant entries into the passports of spouses; 7) the name of the location having registered the marriage shall be the names of the Roman Catholic Church (or any other confession church) and of the civil registry [office]; 8) the marriage contraction date shall be the date specified in the church marriage certificate data; 9) if more than 1 year passed from the marriage registration at church, such marriage shall be recorded at the civil registry office by making the reconstituted (re-established) marriage entry; 10) when one spouse having registered the marriage in the church[53] after November 6, 1992, is deceased, such marriage shall not be recorded by the civil registry office. Similar provi-

[50] *Lietuvos Respublikos religinių bendruomenių ir bendrijų įstatymas*, op. cit.

[51] Meilius K., *Bažnytinė santuoka civilinių ir bažnytinių teismų praktikoje* in *Soter*, 11 (39), 2003, p. 43-46.

[52] Lietuvos Respublikos Teisingumo Ministerijos pranešimas Civilinės metrikacijos įstaigų vadovams *Dėl bažnyčioje sudarytų santuokų apskaitos*, 1998 08 24, nr. 6-1956

[53] At that time the good-will agreement between the Bishops' Conference of Lithuanian Catholic Church, the Ministry of Justice and heads of the Civil Registry offices applied to marriages concluded after November 6, 1992.

sions were found in the Order by Minister of Justice of March 23, 1999, approving temporary rules for registration of civil status acts. They stressed that the church marriage had to be recorded at a civil registry office if desired by the marriage parties and if contracted in line with the requirements of the *Marriage and Family Code of the Republic of Lithuania*.[54]

With such procedure of concluding and recording marriages spouses had a choice to either include or not include the church marriage into the records of a civil registry office. Therefore civil registry offices were dissatisfied with the vague marriage recording requirements. They said that the doubtful value of the church marriage in the country was no problem to anyone until there was a conflict between spouses regarding the duty to raise children or regarding rights to the joint property. Church ceremonies sometimes helped to retain a good reputation among others, demonstrate loyalty to tradition and help to retain state-granted privileges. When persons having married only at church arrived at the state institutions to be married to other persons they most often did not even hint about their church marriage. Civil registry staff was also concerned about the divorce procedure, which had no regulation whatsoever. Upon the spouses' request the office could only annul the recorded entry but the very marriage could then be dissolved only by the ecclesiastical leadership according to their own canons. To their opinion only upon recording the church marriage spouses could be issued a conventional marriage certificate specifying the church marriage date, and entries should be made into passports about the marriage, thus only then the church marriage becomes recognized by the state irrespective of the Church rights declared by the Constitution.[55] But this dissatisfaction of civil registry offices may not always be agreed with, because Arts.3.12-3.17 of the Civil Code valid in Lithuania clearly list the conditions for contracting the marriage, provide for public announcement of the planned marriage registration intending to clarify if any obstacles to contract a marriage exist, so that every person aware of them could make a representation about them before contraction of the marriage (Arts.3.19, 3.22). In addition, Art.3.20 states: "when submitting a marriage registration application, persons wishing to marry must confirm in writing that the latter conditions are met." A person aware of the existence of such barriers and making misstatements through giving false information known in advance may be made liable under the criminal procedure stipulated by Art.217 of the Criminal Code. Suppressing such circumstances may be the basis to request declaring the marriage invalid.[56] Just in

[54] *Civilinės būklės aktų registravimo laikinosios taisyklės*, 1999 03 03, nr. 65 in *Valstybės žinios*, 1999, nr. 29.

[55] Kontrimavičius T., *Net susituokęs gali likti viengungis* in *Lietuvos rytas*, 2000 03 02, nr. 51, p. 6.

[56] *Lietuvos Respublikos civilinio kodekso komentaras*, III, op. cit., p. 48-60.

this case, as mentioned before, the concept of the previous marriage includes the marriage contracted at a civil registry office, the marriage contracted at the church and later recorded, and the partnership.

The viewpoint to the case law of civil courts[57] is also important to determine how *unrecorded* marriages are treated if contracted before the Civil Code of the Republic of Lithuania came into force. A female applicant applied to Vilnius 3rd District Court on March 26, 2002 with a complaint and asked to reinstate the overdue deadline to complain about the unjustified refusal to perform a notary deed, i.e., to issue the inheritance right certificate to her and asked to oblige the Notary Public to make such a notary deed. The applicant stated that the church marriage with her spouse was concluded on November 8, 2000, and after 7 days her spouse deceased. After the death of the spouse she applied to a notary office requesting to issue the inheritance right certificate within the time period specified by law, but the Notary Public refused to do this, and Vilnius 1st District Court refused to accept her application. The applicant was certain that the church marriage gave rise to the same legal consequences as the marriage registered in a state institution and that the statutory inheritance deadline was overdue not because of her fault. On March 26, 2002, the Notary Public, who participated in the court hearing as a privy, explained that she could not issue the inheritance certificate within the established time period because the marriage of spouses was not registered with a civil registry office, and secondly, the Notary Public received a belated response from ecclesiastical institutions.[58] Beside the Notary Public, the hearing was attended by relatives of the deceased who also confirmed that the marriage was not valid because it was not registered under the civil procedure and, secondly, they became aware of the marriage contracted between the applicant and their relative only after the latter's death. As the applicant's marriage was contracted before the current Civil Code came into force, the Temporary Rules of Civil Status Acts Registration approved by Order No.65 of Minister of Justice of the Republic of Lithuania, of March 26, 1999, were in force. They prescribed that marriages contracted after November 2, 1992, had to be recorded at the civil registry office when it was requested by spouses (Clause 58 of the Rules). Therefore Vilnius 3rd District Court obliged the Notary Public to make the notary deed, i.e., issue the inheritance right certificate to the applicant.[59]

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[57] Meilius K., *Bažnytinė santuoka...*, op. cit., p. 46-49.

[58] The case in the ecclesiastic court was initiated by the promotor of justice about the potential violations of the form. When the case was resolved under the summary procedure, the decision was issued to the female spouse according to the canon law norms. When the female spouse presented the ecclesiastical court decision it was not accepted from her, and later the Notary Public started requesting the same document directly from the Church Tribunal, *cfr.*, Vilniaus arkivyskupijos tribunolas, *Sant. byla* nr. MR-01-21.

[59] Vilniaus m. 3-osios apylinkės teismas, *Civ. Byla,* nr. 2-1871-10/02.

In the other case a son of a deceased father litigated with his father's cohabitant/wife about the marriage validity (which determined inheritance) both in civil courts and in church tribunal, because his father had lived about 20 years with this woman. But the son had never considered cohabitants to be spouses (because his mother was still alive) especially that only after the father died and the due time passed to handle inheritance documents everybody was told by the female applicant about the marriage concluded in one of churches in the Republic of Belarus approximately in 1998. According to the applicant Art.38 of the Constitution and other laws and legal regulations stated that the church marriage registration was recognized, thus such conclusion of the marriage established legal consequences, i.e., the right to inherit the property of the deceased spouse. Witnesses having participated at the civil court procedure witnessed that the church marriage had been contracted and both spouses had lived together. When hearing this case Vilnius 1st District Court based on Art. 13 part 1 of the Agreement Between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State, recognising the church marriage, if not in conflict with the requirements of the Marriage and Family Code of the Republic of Lithuania. The Court found no civil violations of marriage conclusion requirements at the time of the church marriage contraction, and with respect to the fact of their long marital life the Court made an analogous conclusion and recognized their marital life.[60] When the son appealed asking to revoke such decision, Vilnius County Court refused this appeal on the grounds of the Ruling of the Constitutional Court of Republic of Lithuania dated April 21, 1994, which treated the marriage *re-registration* merely as a temporary official recording but not the legal fact of the marriage registration; and that the marriage (civil, church) registration instead of its *re-registration* was the beginning of the marriage and the related rights and duties. The statement of Art.38 of the Constitution that the state shall recognize the church marriage registration, as well, allowed concluding that the rights and duties of spouses arose from the date of the church marriage registration. The Court recognized the legal fact of registration, however, it was insignificant if the due entity registered the church marriage to solution of the issue about recognizing the inheritance right certificate issued to the female applicant invalid. Whether the entity having registering the church marriage was the due one could be significant only for challenging the legal fact of the church marriage registration.[61]

Upon finding out other circumstances of the marriage contraction, the son again applied to Vilnius 1st District Court stating that the Local Ordinary had de-

[60] Vilniaus m. 1-osios apylinkės teismas, *Civ. byla*, nr. 2^3 1044/2001.

[61] Vilniaus apygardos teismas, *Civ. byla*, nr. 2A-628-2001.

prived the priest, in which presence the marriage between the defendant and the applicant's father was contracted, to perform any actions related to the parson's or priest's duties and that the same priest had been suspended for 6 years by the virtue of the Bishop's decree. The male applicant applied to Vilnius Archdiocesan Tribunal and to the civil court involving the Archdiocesan Curia as the third party. Therefore the District Court summoned the Curia representative to take part in the case as the third party. To avoid the legal precedent the response to the civil Judge had to include explanations that: the church marriage cases were in the competence of ecclesiastical courts (can. 1671); that can. 1453 allowed resolving the case at the first instance for 1 year; that Judges of church tribunals were bound to observe always the secret of the office and they could also oblige other parties to swear an oath to observe secrecy (can. 1455), that can. 1457 even provided for a possibility to either respectively punish the Judge with appropriate penalties or even dismiss him for the disclosure of the secret; and can. 1615 also clearly stated that the publication or notification of the judgements can be effected by giving a copy of the judgement only to the parties or to their procurators. Therefore the ecclesiastical court, only upon hearing the above marriage case, determined that there was an impediment to the marriage relationship on the basis of the bound of a previous marriage (can.1085), (because this church marriage was not the first one to the respondent and the marriage in question was contracted with the first spouse still alive) and that the marriage contraction involved material violations of the canonical form (can. 1108). The suspended priest's behaviour and the common error of people could not be justified by can. 144, when *in errore communi supplet Ecclesia.* Upon analyzing the marriage contraction circumstances the Church Tribunal declared this marriage invalid.[62]

After the decision of the Church Tribunal Vilnius 1st District Court referred to the decision of Vilnius Archdiocesan Tribunal. As the church marriage was not registered with a civil registry office, thus, on the basis of the Restitution Act of the Catholic Church Status in Lithuania, of June 12, 1990, by the Supreme Council of the Republic of Lithuania, recognizing the right of the Church to handle its internal life activities independently, when the state does not perform Church functions, the civil court decided to nonsuit the claim as out of the civil court's jurisdiction because such case could not be heard by this Court.[63] Later the Judge of Vilnius 1st District Court acknowledged the inheritance right certificate issued by the Notary Public to the female applicant null and void and overruled the right to the property granted by the previous judicial proceedings.[64]

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[62] Vilniaus arkivyskupijos tribunolas, *Sant. byla,* nr. KG-01-23.

[63] Vilniaus m. 1-osios apylinkės teismas, *Civ. byla,* nr. 2-1142-20/2001.

[64] Vilniaus m. 1-osios apylinkės teismas, *Civ. byla,* nr. A-2-1143-04-2002.

The female applicant disagreed with the Church Tribunal decision because under Art.3.37.2 of the Civil Code only the court could declare the marriage invalid. The female applicant appealed against the District Court decision and Vilnius County Court reviewed the case. Upon considering the collected material this Court noted that the above marriage was not registered with a civil registry office therefore the decision of the ecclesiastical court constituted the basis to state that the church marriage was invalid, therefore no legal consequences could have been caused by it, including the deriving right to inherit. The County Court reminded of the Agreement between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State art. 13 Part 4, stipulating that, upon recognizing the canonical marriage invalid, the competent institutions of the Republic of Lithuania must be notified in order to administer legal consequences of this decision in line with the laws of the Republic of Lithuania. The Court lacked such information from the Church Tribunal because no institution except the District Court was informed about it (there is no agreement so far between the government of the Republic of Lithuania and Lithuanian ecclesiastical authorities on institutions to be notified about decisions of church tribunals). The Court also made the provision that, as this church marriage was not included into the records, the failure to inform other institutions was legally insignificant in this case. The Court also stressed that the church marriage could not have been recognized invalid by a civil court, and that it could have been recognized invalid only in line with the canon law provisions, and this was the exclusive decision by the ecclesiastical tribunal. In addition, the County Court noted that Art.3.24 of the Civil Code, which came into force on July 1, 2001, stipulated that the marriage contraction according to the procedure established by church (confessions) gives rise to the same legal consequences as the marriage contraction at civil registry offices, if the marriage was contracted according to the procedure established by canons of religious organizations registered in and recognized by the Republic of Lithuania. The ecclesiastical court shall decide whether the canon-established procedure was observed, and the Republic of Lithuania shall recognize the full competence of the Catholic Church in its area. Thus the court of the 1st instance had no legal basis to make a decision about the circumstances whether the spiritual court had justifiably found out that the canon law had been violated at the marriage contraction time. Under such circumstances it was concluded that the female applicant's appeal was dissatisfied and the decision of the District Court remained in force.[65]

[65] Vilniaus apygardos teismas, *Civ. byla,* nr. 2A-816-2002..

Regarding the issue whether the case about dissolution of the church marriage is subject to the civil court jurisdiction when the marriage contracted according to the church– (confession-) established procedure has been entered into the records of a civil registry office, the Consultation of the Supreme Court says that "under Art. 38.4 of the Constitution of the Republic of Lithuania the state shall recognize the registration of the church marriage. The law, Art.3,24.2 of the Civil Code, realizing this constitutional provision prescribes that the marriage contracted according to the church– (confession-) established procedure and entered into the marriage records of a civil registry office in line with the procedure set forth by Art. 3.304 of the Civil Code, shall give rise to the same legal consequences as the marriage contraction at a civil registry office, i.e., shall cause the legal outcomes established by Volume III of the Civil Code – such persons shall become spouses, acquire personal pecuniary and non-pecuniary rights and duties of spouses (Art. 3.26.1). Therefore upon entering the church marriage into the records at a civil registry office the application regarding the civil legal outcomes – the marriage termination, property distribution, child maintenance, establishment of the residence for children, etc. (Art. 3.49.2; Art.3.59) – shall be heard at court (Art. 22.1; Art. 381.).[66] The church marriage shall not be dissolved by the court decision. Issues of the church marriage termination shall be resolved by respective ecclesiastical institutions (Art. 43.4 of the Constitution of the Republic of Lithuania).[67]

Thus the case law features the informal and undoubted recognition of the church marriage arising from the Constitution of the Republic of Lithuania (Art.38), and of legal consequences caused by the church marriage contraction. Considering the fact that the Agreement between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State was signed on May 5, 2000, and the Civil Code was passed by the Seimas of the Republic of Lithuania on July 18, 2000, it may be concluded that with the Civil Code both the Agreement between the Holy See and the Republic of Lithuania, the Church and State relations, and the legal status of the spouses married by church were obscured. With the new wordings the legal status became especially vague for spouses who failed to register their church marriage with a civil registry office not due to their fault (the above case when the male spouse died before expiry of the deadline for registering the marriage could serve an example). In the state where legal relations are not tuned up they have consequences both to the Church and State

[66] *Lietuvos Respublikos civilinio proceso kodeksas*, op. cit.

[67] Lietuvos Aukščiausiojo Teismo 2004 01 29 konsultacija, nr. A3-97 in *Lietuvos Aukščiausiojo Teismo biuletenis "Teismų praktika"*, 2004, nr. 20, p. 282-284.

relations, and especially to individuals subject to both civil and ecclesiastical legal systems.

Conclusions

Though many modern states, including Lithuania, feature secular legal systems, i.e., they profess no religion, their citizens have the right to personally decide about professing faith and act in line with it, and be members of religious communities. Religions give marriages a religious nature and turn them into the object subordinate to their church law, therefore marriage rights and duties are bonding both on the external level of the social life, and on the internal level of conscience. Modern democratic systems also respect obligations of their citizens to the confession law. Thus the marriage institution features both the inherent social and also the religious dimension. Talking about the relations between the Church and the State in Lithuania it may be stated today that a peaceful coexistence of these two major systems is observed, and mutual sovereignty and cooperation is recognized. Regretfully, development of democracy and modern thinking has always had the purpose to deny the Church role and free from its influence. But the state independency from value systems is very much conditional because the power is exercised also through persons having certain value orientation. Tension between the Church and the State remains there not only because of the historical heritage but also because of contemporary issues. A citizen of religiously indifferent state aims for various objectives and solves diverse problems most often directly unrelated with religion. However, as a member of a certain confession such a citizen undertakes certain obligations to it. Just at first it seems that his actions *unrelated* to the religion are exclusively subject to the secular law, however his actions are judged on the basis of moral religious attitudes from the moral viewpoint. Persons confessing another or no religion, when proclaiming their ideas and committing certain acts are judged with respect to their moral systems. It happens so that certain systems gain support meanwhile others experience suppression. If the state may easily change its moral position because none truly exists, then the Church-professed truth originating from the Lord are eternal and unchanging, appealing to the inherent laws established by the Creator. The Church recognizing such value system may not follow norms that are in conflict with them. Thus the different recognition systems of the Church– and State-protected values precondition the conflict of these institutions irrespective of both of them aiming for the social welfare and mutually recognizing their sovereignty in respective areas.[68]

[68] Brilius V., *Sakramentinės santuokos pripažinimo problemos* ..., op. cit., p. 48-50.

It is clear that like all European countries Lithuania is not a confessional state. But when talking about the autonomy of a secular state we should not forget its ethical and spiritual dimension and the Christian tradition. This condition should not be identified with the recognition of the social reality, when one certain religion coexists with other ones. Regretfully, in secular states religious neutrality originates from the human rights to be free instead of the abstract viewpoint to religions. When evaluating national cultural aspects, the spiritless global support is obvious though the fundamental state law – the Constitution acknowledges traditional churches and religious organizations recognising their legal entity status. Though there is no state religion in Lithuania, but there is more support to indifference towards regulations of traditional churches which historically formed the country law, culture and social relations in general. This is reflected by the selected legal provisions especially from legal systems of the states not having very close relations with the Catholic Church or any religion in general. It may be stated that due to this reason the norms of the Civil Code of the Republic of Lithuania introduced sufficient uncertainties regarding the church marriage status, as well.

Recognizing the autonomy of the State and the Church in their areas it would be desirable that the State remembers its cultural heritage and respectively considers the consequences of atheism in the life of the country life, and contrary to the situation under the previous atheistic legislature, allows members of traditional communities to freely organize their lives under their canons. Non-value-based laws should not replace the marriage and family traditions having formed under the influence of traditional religions, which laws, in the name of freedom, encourage the traditional communities to disobey their canon principles giving a vague position to the very religion with its legal system. This was shown by the church marriage recognition problems we analyzed, when the legal status established by provisions of the Civil Code has become so narrowed that it becomes unclear whether the state recognizes the church marriage registration or just its recording at the Civil Registry office. The attitude to church marriages was much clearer before the *Civil Code* was passed. Then the Constitution of the Republic of Lithuania and the-then laws in force (later supported by the international Agreement between the Holy See and the Republic of Lithuania) allowed to easily clarify family relations and problems originating from them, and this was clearly and unambiguously seen from the case law of civil and spiritual courts.

Upon such ambiguous interpretation of the church marriage the Agreement between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State art.17 and art. 18 should be turned back to, under which the mixed panel representing

both parties and aiming for amicable settlement would interpret and resolve disagreements about this Agreement and its fulfilment. And may be it should be established whether articles of the Civil Code limiting the legality of the church marriage violate Arts.38 and 43 of the Constitution of the Republic of Lithuania?

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