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CANONICAL MARRIAGE OF PERSONS AFTER CIVIL DIVORCE

Introduction

Based on the data published by the Central Statistical Office, the number of divorces in 2018 was one third of the number of (civil) marriages concluded in the same year.¹ In other words, every third marriage ends in divorce. The average duration of marriage is 14 years. Divorce is a major problem in itself, but it also affects several other spheres of life, including individuals who intend to marry someone else after the conjugal disunion.

More and more often, as part of the pre-marriage course, parish offices and diocesan curias face cases of persons who wish to contract marriage with someone who was married civilly before and now intends to enter into a valid canonical marriage. This paper takes a closer look at the situation of persons who used to live in canonically invalid marriages, i.e. in civil unions. In other words, the author does not discuss the status of individuals who contracted a canonical marriage, got divorced civilly and, having had their marriage declared null, wish to enter into a new canonical marriage.

Ignored is also the complicated moral problem that arises along with the question of whether it is really possible to cherish the fact that someone who used to live “in sin” is now willing to enter into a sacramental marriage, will be able to enjoy the sacraments, and live in accordance with the moral teaching of the Church. Meanwhile, divorce, regardless of how we approach

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¹ In 2018, there were slightly over 192 thousand marriages, and almost 63 thousand were dissolved by divorce. See Central Statistical Office, *Sytuacja demograficzna Polski do 2018 r. Tworzenie i rozpad rodzin* (1.08.2019), p. 89, <https://stat.gov.pl/obszary-tematyczne/ludnosc/ludnosc/sytuacja-demograficzna-polski-do-2018-roku-tworzenie-i-rozpad-rodzin,33,2.html> [accessed: 7.12.2019].

a civil union concluded by Catholics, always involves a personal tragedy: the hurting of someone's feelings, abuse of trust in another person who has been expected to be a life partner, conflicts, betrayal of the partner,² deserted children... This problem is even greater when the marriage is concluded with an unbaptized or a non-Catholic person who, without going deeper into the meanders of canon law, was convinced in good faith that he or she was entering into a valid marriage. Hence, traditional canon law, even if it disapproves of civil-only marriages between Catholics, follows the primary goal of validating the defective relationships, rather than pushing towards divorce, to put an end to a morally unacceptable situation.³

There are three issues to be highlighted that pertain to the contracting of marriage after a civil divorce: (1) determination of the single state of such a person, (2) the problem of natural obligations incurred in a previous relationship, and (3) the impact of the experience of an unsuccessful civil union on the understanding of marriage and on marriage consent.

1. Determination of single state

This matter has been repeatedly addressed in the canon law literature, especially with regard to non-Catholics;⁴ therefore, the author will focus only on the most essential issues. It is common property that after the 11 July 1984 authentic interpretation of old can. 1686, to determine the single state of those who, while being obliged to maintain the canonical form of marriage, that is, in a situation where at least one of the spouses is a Catholic (see can.

² Obviously, such conduct cannot be equated with failure to maintain marital fidelity. Even if there are some similarities, it should be strongly emphasized that in the case of non-marital unions, the reason for respecting the duty of fidelity does not stem from the mutual giving and accepting each other (cf. can. 1057 § 2) but rather from loyalty to the partner. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

³ See can. 1675 CIC/83, and more clearly the corresponding can. 1676 from before the reform of Pope Francis under Motu Proprio: Franciscus PP., *Litterae apostolicae motu proprio datae Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de causis ad matrimonii nullitatem declarandam reformantur (15.08.2015), AAS 107 (2015), p. 958-70 [henceforth cited as: MIDI].

⁴ See, among others, Adamowicz 2008, 39-62; Majer 2011, 207-12; Jakubiak 2013, 25-72; Nowicka 2014, 119-35.

1117), attempted to get married before a civil servant or a non-Catholic minister, it is not necessary to conduct a trial to declare the nullity of the document-based marriage, but a premarital examination according to the provisions of can. 1066-1067 will suffice.⁵ Therefore, it is enough to carefully study the documents, especially the baptism certificate of the Catholic party, to confirm the single state in accordance with the law. Moreover, it does not need to be the baptism certificate of the person who wants to contract marriage if he or she is not a Catholic.⁶ If, however, serious difficulties and doubts arise that cannot be resolved through administrative proceedings, the matter should be referred to court.⁷

The above-mentioned 11 July 1984 authentic interpretation provoked a theoretical debate on the legal value of a civil union concluded by Catholics.⁸ At this point, however, some practical remarks will be made.

⁵ The authentic interpretation was promulgated in AAS 76 (1984), p. 747. In their response of 18 November 2015 (Prot. No. 15182/2015), the Pontifical Council for Legal Texts recognized that the authentic interpretation of old can. 1686 remained valid in relation to current can. 1688 after the MIDI reform. This interpretation is contained in Art. 5 § 3 and Art. 297 § 2 *Dignitas connubii*. Pontificium Consilium de Legum Textibus, Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii *Dignitas connubii* (25.01.2005), “Communicaciones” 37 (2005), p. 11-92. The problem arises with regard to the law of the Eastern Churches because in *Motu Proprio Mitis et misericors Iesus* there is no canon corresponding to old can. 1372 § 2 of the Code of Canons of the Eastern Churches, which accommodated the said authentic interpretation to Eastern law. Franciscus PP., *Litterae apostolicae motu proprio datae Mitis et misericors Iesus* quibus canones Codicis Canonum Ecclesiarum Orientalium de Causis ad Matrimonii nullitatem declarandam reformantur (15.08.2015), AAS 107 (2015), p. 946-57. *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045-363 [henceforth cited as: CCEO]. In their response of 25 November 2015 (Prot. No. 15170/2015), the Pontifical Council for Legal Texts recognized that, in accordance with applicable can. 1374 CCEO, in the Eastern Churches, in order to declare the single state of a person who, while being obliged to maintain the canonical form of marriage, entered into a civil union, it is necessary to conduct a document-based process to declare the nullity of marriage on grounds of the lack of its proper form.

⁶ This sometimes creates difficulties as a non-Catholic candidate often cannot or does not want to contact the former civil spouse. It may also happen that the person refuses to cooperate (then, the *ex officio* procedure must take its course). Sometimes a non-Catholic does not even know the persuasion of their former civil spouse.

⁷ See Stankiewicz 2007, 32-33.

⁸ See de Diego-Lora 1984, 795-803; Andrés 1984, 389-92.

The determination of the single state in the case of civil marriages concluded by Catholics (if at least one of the parties is member of the Roman Catholic Church) is commonly referred to in Poland as *nihil obstat*,⁹ to distinguish between this administrative procedure and a court process to declare the nullity of marriage.

When the previous civil union was concluded with a non-Catholic of the Eastern rite (e.g. the faithful of the Orthodox Church), the procedure is the same as with Catholics. Since for Eastern Christians, in order to be valid, a marriage requires a sacred rite (*ritus sacer*), including the priestly blessing, if the parties enter only into a civil marriage, it is not necessary to initiate a court process to declare the nullity of the marriage. Yet, such cases should be resolved by the local bishop ordinary or a parish priest, after consultation with the bishop during the premarital inquiry.¹⁰ In the case of Eastern Christians, however, the baptism certificate cannot be used because the rules in place in a specific Eastern Church do not need to require that marriage be recorded in the baptism certificate, as it is the case in the law of the Roman Catholic Church.¹¹ Therefore, other evidence must be relied upon, the most important of which will be sworn testimony of the party him or herself and witnesses.

It is different when a civil union is entered into by persons who were not obliged to maintain a specific religious form for the marriage to be valid. This will be the case for the unbaptized and Protestant Christians, including Anglicans.¹² In their case, the fact of entering into a civil marriage, if neither

⁹ See Wenz 2008, 88-90.

¹⁰ *Supremum Signaturae Apostolicae Tribunal, Responsum in casu particulari* (3.01.2007), "Periodica" 97 (2008), p. 45-46. However, no administrative procedure can be initiated if there are doubts as to whether the marriage could not have been concluded without observance of the "sacred rite" due to some existing serious inconvenience or if one of the parties had been unbaptized at the time of entering into the marriage, or if another serious doubt had arisen. In case of such doubts, the matter would have to be resolved by the competent ecclesiastical tribunal and not the bishop ordinary or parish priest. For more, see Majer 2009, 553-63; Nowicka 2012, 173-249.

¹¹ See can. 1122 § 1-2 CIC/83.

¹² In the Polish Catholic Church of the Republic of Poland, as in the Roman Catholic Church, pursuant to § 47 of Matrimonial Law of the Polish Catholic Church in the Republic of Poland of 20 June 2003, the ecclesiastical form of contracting marriage is required for its

party was obliged to observe the canonical form or a sacred rite, in other words, neither party to the civil union was a Catholic or an Eastern Christian, causes the marriage to be presumably valid, indissoluble and, if concluded by two baptized persons, sacramental. No non-Church form of the determination of the single state, dissolution of marriage (divorce), invalidation or declaration of nullity of marriage is recognized. Therefore, even if the interested party maintained that the marriage had already been dissolved and presented documents that he or she considered sufficient to confirm it, neither such documents nor the person's assurance must be trusted, but they should be informed that the bond is still considered valid in the Roman Catholic Church which is guided by God's law. In such a case, administrative proceedings in the diocesan curia are not sufficient to determine the single state, and the matter should be referred to an ecclesiastical tribunal.¹³

Certainly, referring a case to an ecclesiastical tribunal is only reasonable if there are some grounds for declaring a marriage null.¹⁴ The tribunal cannot be treated as an administrative institution that will grant divorce. Therefore, it would be a mistake for a diocesan curia or parish to inform candidates as follows, "We cannot allow the solemnisation of marriage; you have to go to a church court to settle it." Such a response may lead to a false belief that it is only about submitting the case to a different body and follow a different procedure, and that the determination of the single state is already done. In point of fact, the difference is significant because in the latter case marriage validity is presumed, and the ecclesiastical tribunal may declare a marriage null only if there is a legal ground to do so, which, of course, is not always the case. Therefore, it is not appropriate to misinform persons wishing to marry in such a situation that it is only a bureaucratic procedure that will permit marriage in any case.

validity [see Kijas 2004, 290]. Therefore, when declaring the single state of the faithful of the Polish Catholic Church, the same rules apply as in the case of the Orthodox Church.

¹³ Even if the law of the Church or a religious community under which a marriage was contracted recognized the institution of nullity of marriage, it would still be necessary to refer to an ecclesiastical tribunal of the Roman Catholic Church in order to verify that the decision to invalidate the marriage was not contrary to God's law; for example, whether the non-Catholic discipline against the indissolubility of marriage was not followed.

¹⁴ On the declaration of nullity of marriages contracted outside the Roman Catholic Church by (Catholic) tribunals, see Kraiński 2013.

In connection with the foregoing, several practical recommendations can be made. First, persons responsible for the training of priests should constantly instruct them to observe these principles. Admittedly, some priests are not familiar with the law in force and want to apply to the same criteria to non-Catholics as they apply to Catholics: since there was no church marriage, a civil divorce will suffice for the bond to cease to exist. Therefore, Art. 40 of the new General Decree of the Polish Episcopal Conference on Conducting Canonical and Pastoral Dialogue with the Parties Prior to Concluding Canonical Marriage, dated 8 October 2019,¹⁵ resolves, “Particular attention should be attached to the confirmation of the single state of persons who did not belong to the Roman Catholic Church but entered into marriage according to the law of their persuasion or religion, or in the civil form. It should be presumed that such a marriage is valid and indissoluble, regardless of the fact that the person concerned may maintain, even by producing relevant documents, that it was dissolved [...]. Given that, whenever one of such candidates previously contracted a marriage outside the Roman Catholic Church, according to any religious or civil form, the pastor should warn the candidates about the need to thoroughly verify their single state and should ask the local bishop ordinary to consent to this assisting at the marriage by advising the diocesan curia of the details of the case and submitting the relevant documents.”

In such situations, the pastor may not arrange a wedding date with the engaged couple or make any other promises until he has received the written consent of the bishop ordinary to assist at the marriage. Quite the contrary, the pastor should make it clear to the candidates that they must take into account that their intended marriage may not be contracted because of the impediment of prior bond (can. 1085 § 1 CIC/83). This will help prevent disappointment as well as moral and financial losses.

¹⁵ The decree was promulgated on 26 November 2019 through its publication on the website of the Polish Episcopal Conference: <https://episkopat.pl/aktakep312019/> [accessed: 7.12.2019].

2. Natural obligations

The social consequences of divorce affect minors (under 18 years of age), i.e. children who “are in any case innocent victims of such a situation.”¹⁶ This has major implications for the life of split-up families and drives up the number of single mothers (most often) with children. The number of minors from divorced marriages in Poland exceeds 50 thousand annually. In 2018 there were 53 thousand of them from 36 thousand divorced marriages.¹⁷

The contracting of marriage by a person after a civil divorce requires the priest to draw special attention to the case, not only in terms of determining the single state but also in relation to the natural and legal obligations incurred in the previous relationship or relationships. Can. 1071 § 1, 3^o CIC/83 requires the permission of the local ordinary to assist at the marriage of persons bound by such obligations.¹⁸ Unfortunately, the current Instruction on Preparation for Marriage in the Roman Catholic Church adopted by the Polish Episcopal Conference on 5 September 1986¹⁹ does not devote too much space to this apparently serious problem, and the natural obligations were only touched upon briefly. Indeed, the Report on a Canonical and Pastoral Dialogue with the Parties prior to Contracting Marriage contains a question, “Are there any obligations to the spouse, children or other persons from the previous marriage or civil union?”, but the question that should naturally be there, “How are these obligations met?” is missing.

Perhaps, such a position stems from the jurisdictional conflict between the Church and the state regarding marriage and the consequence of not recognizing civil unions as a source of obligations, even natural ones.²⁰ This tran-

¹⁶ Franciscus PP., *Adhortatio apostolica post-synodalis Episcopis Presbyteris Diaconis Personis Consecratis Christianis Coniugibus omnibus Christifidelibus de Amore in Familia Amoris laetitia* (19.03.2016), AAS 108 (2016), p. 311-446, no. 245.

¹⁷ See Central Statistical Office, *Sytuacja demograficzna Polski do 2018 r.*, p. 104.

¹⁸ This problem is explored in more detail in the study, Majer 2008, 63-82.

¹⁹ “Akta Konferencji Episkopatu Polski” 1(1998), no. 1, p. 85-137.

²⁰ This position was voiced in the response of the Sacred Congregation of the Council of 1866, cited after Lalaguna Domínguez 1961, 284(34): “An contrahens non servata Concilii solemnitate, obligatus sit saltem obligatione naturali, cujus vigor aliquo ecclesiastico remedio compelli possit ad observanda promissa. Resp. Non esse obligatum etiam obligatione

slated into ignoring the issue of natural obligations towards the offspring and, possibly, the partner from a previous relationship and focusing in practice only on whether that previous union had not been validated canonically.

This can still be seen in some curial forms today where permission is sought to assist at marriages of persons after a civil divorce. For example, on the website of one of the diocesan curias, there is an official form titled, Determination of Single State and Permission Granted to a Divorced Person after a Civil Union for Sacramental Marriage, with a model formula to be signed by the pastor, “This union has not been confirmed by the Sacrament of Marriage and has already been dissolved by a civil court. Based on documents and testimonies, the relationship has not been validated, and no dispensation has been sought from the canonical form of marriage. I kindly request that the candidate be recognized as unmarried and be allowed a sacramental marriage with the person named above.”²¹ The form fails to make any reference to any obligations that the candidate may have towards children from their former civil union and, in special cases, towards the former civil spouse.

Therefore, it should be regarded as positive that the entry into force on 1 June 2020 of the new General Decree on Conducting Canonical and Pastoral Dialogue with the Parties Prior to Concluding Canonical Marriage, supplanting the 1986 Instruction, attaches more attention to this problem (see Art. 48) and instructs that the candidate be carefully inquired about what obligations (e.g. alimony) they have incurred, and how they are met. Any relevant documents are also recommended to be verified, primarily the decree of divorce and records confirming the fulfilment of obligations, e.g. proof of payment of alimony.²² To consult the candidate’s former spouse, yet only when absolutely necessary, is not ruled out, either. To facilitate this procedure, the rele-

naturali.” The Congregation found that a civil marriage could not be made equal with an engagement.

²¹ See <http://ksieza.archwwa.pl/formularze/> [accessed: 7.12.2019].

²² Obviously, the Church is not an institution established to enforce alimony and does not replace the state administration in this procedure. However, arrears in the payment of alimony cannot be ignored by the Church, both with respect to a canonical marriage, which cannot be contracted while violating the rights of others (children and the parent who takes care of them single-handedly), as well as for the reason that the upbringing of children is one of the primary responsibilities of every parent (see can. 1136 CIC/83). For more, see KroczeK 2011, 179-94.

vant questions are provided in the Report on a Canonical and Pastoral Dialogue with the Parties prior to Contracting Marriage:²³ “Do you have are children from the previous relationship (provide the number and age of children)? How do you meet the natural obligations towards the children? Do you meet you alimony obligation, if any? Do you have any other financial and moral obligations incurred in the previous relationship (e.g. towards your spouse)? If so, how do you meet them? Is the other party aware of the above facts?” Failure to disclose such important matters would mean the risk of the nullity of the marriage (can. 1098 CIC/83).

This would be contrary to the elementary sense of justice to allow such a person to enter canonical marriage while ignoring their existing natural obligations towards their own children and, in some cases, also towards the person with whom he or she was previously in a relationship.

After gathering all relevant information and making sure that the party meets any previously assumed obligations (usually towards their own children), the local bishop ordinary should be approached for permission required under can. 1071 § 1, 3° CIC/83 and should be informed about all the circumstances.²⁴ Approaching this matter so seriously in a dialogue with the engaged couple shows that the Church, even if she does not recognise the previous civil relationship as a valid marriage, does not ignore the obligations arising from natural law that were incurred in such a relationship. In a situation of radical disregard for the natural obligations and the risk of umbrage, the local bishop ordinary may refuse permission to assist at the marriage and take advantage of the possibility of prohibiting marriage (can. 1077 CIC/83).

3. Influence of divorce on the understanding of marriage

The situation of a person who concludes a canonical marriage after a previous civil union and divorce implies another important problem, namely the

²³ A special attachment was prepared for the report of the canonical and pastoral dialogue; it is completed whenever one of the parties (or both) was previously in a marriage union, civil union or cohabitation with another person.

²⁴ Such a model request has the following wording, “Having examined of the case thoroughly, I am convinced that the candidate duly fulfils his/her obligations incurred in the previous relationship. The other party has been made aware of these obligations.”

disruptive influence of a failed civil union on the consent to a canonical marriage. The experience of an unsuccessful civil relationship ended by divorce has an impact on the understanding of marriage as a man and woman's community of the entire life in eternal and unconditional love. Being aware that your partner used to have a civil spouse – or even several spouses as it is not uncommon that someone wishes to enter into a canonical marriage after two or more consecutive civil marriages or cohabitations – and has offspring born out of that relationship or relationships can cause the principle of indissolubility of marriage to be approached less seriously than expected. Since someone got divorced before, perhaps a number of times, they may enter into a canonical marriage with a similar attitude. Some even term this a divorce mentality,²⁵ which is a conviction that unconditional marriage commitments should not be absolutely expected; moreover, this may raise doubts, often based on one's own painful experience, as to whether a real and successful marriage is even attainable.²⁶ Persons who were hurt and harmed in a previous relationship may find it difficult to trust and devote themselves fully to their current spouse. For this reason, they may wish to conclude a "test" marriage so as to be able to withdraw in the event of failure.

Some even purport that the requirement of a compulsory canonical form is an excuse for the deliberate conclusion of invalid marriages by Catholics, aware that a marriage contracted without the canonical form is null anyway, so that they can easily dissolve it and remarry without any consequences.²⁷ Such easy and cynical proliferation of invalid marriages would also be conducive to the divorce mentality to the detriment of souls. Therefore, and mindful of what has been said earlier about natural obligations, to approach a civil union too leniently as completely non-binding to a Catholic would in a sense frustrate the institution of marriage and favour the divorce mentality

²⁵ See, e.g. Sobański 2008, 5-19.

²⁶ In his speech to the Tribunal of the Roman Rota of 1 February 2001, St John Paul II said, "To a certain widespread mentality today this view may seem to conflict with the demands of personal fulfilment. What is difficult for this mentality to understand is the very possibility of a true marriage that has not succeeded." John Paul II, *Dziela zebrane*, vol. V, Wydawnictwo „M”, Kraków 2007, p. 726, no. 6.

²⁷ See Kroczek 2009, 23-30; Idem 2010, 857-79.

by promoting a belief that marriage is not a definitive life choice but only a transient condition that is relatively easy to discontinue.

Such a conviction may have a devastating effect on the marriage consent, thus leading to the defect of consent and, consequently, giving grounds to declare the nullity of the marriage. These may include, for example, the exclusion (even if only hypothetical, e.g. caused by anxiety) of the indissolubility of marriage (can. 1101 § 2 CIC/83) or an error concerning the essential attribute of indissolubility (can. 1099 CIC/83).

Therefore, persons who got divorced civilly (and also having experienced a different life *more uxorio*, e.g. in cohabitation) should be treated with special care when preparing for a canonical marriage, so that their own life experience does not translate into defects of the marriage consent that might result in marital nullity. An individual and non-standard formation is necessary that takes into account the life experience of the candidate for a canonical marriage.

For this reason, Art. 44 p. 1 of the General Decree on Canonical Marriage issued in 1990 by the Italian Episcopal Conference²⁸ requires the permission of the local bishop ordinary to a canonical marriage of persons who were bound by a civil union before. This requirement is driven by the need to prepare them specifically for a (sacramental) marriage. They should not approach this act only in bureaucratic terms as legitimizing the existing condition but should be aware of receiving a sacrament through faith. The pastor should ask about the reasons why they previously entered into a civil marriage only and expose the motivation behind their current decision to get married *coram Ecclesia*. For it is not possible to treat a new marriage (a canonical one after a previous civil union) only as an opportunity to legalize the marital status before the Church.²⁹

The new Report on a Canonical and Pastoral Dialogue with the Parties prior to Contracting Marriage contains a question to be asked to each of the candidates, “Why do you want to enter into marriage in the Catholic Church?” By asking this question, hearing the answer, and then asking addi-

²⁸ Decreto generale sul matrimonio canonico (5.11.1990), in: *Enchiridion della Conferenza Episcopale Italiana*, vol. IV, Edizioni Dehoniane, Bologna 1991, p. 1312-340.

²⁹ See Fusco, Marras, Palumbo and Santoro 2014, 99-104.

tional questions, the priest is given the opportunity to engage in a friendly conversation with the couple in order to show them the beauty of marriage, the beauty of indissoluble devotion to each other, the leading and instrumental role of the sacrament in the life of the baptized, and thus the fundamental difference between a civil union and a marriage entered into before the Church.

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Canonical Marriage of Persons after Civil Divorce

Summary

The subject of the article are the duties of a pastor in preparation for entering a marriage of someone who had previously been married, and after a civil divorce wishes to marry in the Church. The following issues were discussed: 1) establishment the freedom to marry, 2) the problem of the natural obligations contracted in a previous marriage, and 3) the impact of the experience of a failed previous civil marriage on the understanding of marriage and matrimonial consent.

Key words: canonical marriage, preparation for entering a marriage, civil divorce, marriage of persons after civil divorce, declaration of marital status, natural obligations, divorce mentality

Małżeństwo kanoniczne osób po rozwodzie cywilnym

Streszczenie

Przedmiotem artykułu są obowiązki duszpasterza w przygotowaniu do zawarcia małżeństwa kanonicznego kogoś, kto wcześniej pozostawał w małżeństwie cywilnym z inną osobą, a po rozwodzie cywilnym pragnie zawrzeć małżeństwo z kimś innym. Omówione zostały następujące zagadnienia: 1) stwierdzenie stanu wolnego takiej osoby, 2) problem zobowiązań naturalnych, jakie zaciągnęła w poprzednim związku oraz 3) wpływ doświadczenia nieudanego związku cywilnego na pojmowanie małżeństwa i konsens małżeński.

Słowa kluczowe: małżeństwo kanoniczne, przygotowanie do małżeństwa, rozwód cywilny, małżeństwo osób po rozwodzie cywilnym, stwierdzenie stanu wolnego, zobowiązania naturalne, mentalność rozwodowa

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