

# THE CATHOLIC CONCEPT OF 'FAMILY' IN THE SECULAR STATE

Judith HAHN

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Among the different legal approaches toward the family there are not only approaches of state law but also those of religious law which coexist, and sometimes conflict, with each other. This chapter aims to elucidate the finding that a coexistence of diverse legal systems involves various coexisting secular systems as well as the coexistence of secular and religious law. Ecclesiastical marriage and family law is a traditional example of religious law existing in parallel with secular law on a global scale. The chapter will closely examine this religious tradition of marriage and family law by focusing specifically on Roman Catholic canon law, which provides a number of legal norms in this area. While some are fairly compatible with the law of many states, some are rather at odds with modern, secular and increasingly plural understandings of 'family'.

Referring to 'marriage' and the 'family' in the singular implies a kind of synonymy across traditions that, we have come to find, does not in fact exist. Martha Nussbaum asserts that:

... marriage, it soon becomes evident, is no single thing. It is plural in both content and meaning. The institution of marriage houses and supports several distinct aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child-rearing, and mutual responsibility. Marriages can exist without

each of these. ... Each of these important aspects of human life, in turn, can exist outside of marriage, and they can even exist all together outside of marriage, as is evident from the fact that many unmarried couples live lives of intimacy, friendship, and mutual responsibility, and have and raise children.<sup>1</sup>

While it is convenient to view marriage and family as universal concepts, sociological study has taught us to be sceptical of this claim. On the contrary, 'marriage' and 'family' appear to belong to those concepts which ethnologist Clifford Geertz criticises as 'proposed universals'<sup>2</sup> that suggest common human conventions that transcend culture or time. Geertz is convinced that concepts such as 'marriage', 'property', 'shelter' and 'religion' are much less universal than we like to assume. He notes:

And as with religion, so with 'marriage', 'trade', and all the rest of what A. L. Kroeber aptly called 'fake universals', down to so seemingly tangible a matter as 'shelter'. That everywhere people mate and produce children, have some sense of mine and thine, and protect themselves in one fashion or another from rain and sun are neither false nor, from some points of view, unimportant; but they are hardly very much help in drawing a portrait of man that will be a true and honest likeness and not a ... sort of cartoon.<sup>3</sup>

Following Geertz, we might also include 'family' among the concepts used in debates as 'fake universals'. Certainly, family concepts across time and culture may share an understanding of marriage and family as contexts of mating and producing children. However, when comparing the different concepts of marriage and family in various legal traditions, we discover that they are indeed very diverse and that they may change over time. In recent years, our increasingly pluralistic society has come to realise that the traditional understanding of the 'family' is not as homogenous or as universal as previously suggested. The secular state may be slow to learn, but legislative efforts to modernise concepts of 'family' show that governments have come to understand the concept as being contingent. At the same time, legislation still tends to preserve certain understandings of 'family', determining which ways of living should be protected or ignored.

Unsurprisingly perhaps, the Catholic Church is rather reluctant to view 'marriage' and 'family' as 'fake universals'. To elaborate on its position more

<sup>1</sup> M. NUSSBAUM, 'A Right to Marry? Same-Sex Marriage and Constitutional Law' (2009) 56 *Dissent* 43, 43-44.

<sup>2</sup> C. GEERTZ, 'The Impact of the Concept of Culture' in C. GEERTZ (ed), *The Interpretation of Cultures: Selected Essays*, Basic Books, New York 1973, pp. 33-54, 39-40.

<sup>3</sup> C. GEERTZ, above n. 2, p. 40, with reference to A.L. KROEBER, 'The Concept of Culture in Science' (1949) 3 *The Journal of General Education* 182, 187-88.

fully, will involve three steps: First, the Roman Catholic concept of marriage and family will be introduced. Second comes a brief comparison of the Catholic understanding of the family with the concept in state law (this will focus on and use examples from German law), and a consideration of how these two approaches manage to coexist in a plural society. To this end, the chapter will examine how the secular state deals with ecclesiastical law as part of the diverse legal traditions within its purview. Third, and lastly, this analysis concludes by alluding to the current challenges which ecclesiastical marriage and family concepts face at present, outside and inside the church.

## 1. THE CATHOLIC CONCEPT OF FAMILY

### 1.1. GROUNDED IN NATURAL LAW

The Roman Catholic Church seems determined to defend marriage and family against the finding that they are contingent concepts. Catholic teaching and law, on the contrary, support marriage and family as universal concepts. This understanding has a theoretical foundation. As the institutions of marriage and family, according to Catholic doctrine, have their roots in natural law, the magisterium regards them as expressions of God's will for God's creation with regard to mating and procreating. As concepts deriving directly from God's will for the whole of humanity, 'marriage' and 'family' are regarded as natural concepts which can be perceived by all of humanity through the use of reason. Hence, the Catholic Church not only understands its concepts of marriage and family as binding for all Catholics but for all of humanity. They apply to anyone who can perceive the truth of the Catholic doctrine on marriage and family as reasonable and therefore as suited to serve humanity and all cultures at all times. According to Catholic teaching, humans all over the globe can discover through reason that family is a natural community,<sup>4</sup> endowed with natural rights and duties,<sup>5</sup> such as the duty of parents to procreate, morally educate and spiritually form their children, and the duty of children to obey their parents.<sup>6</sup> The following sections will examine more closely the universal aspects of marriage and family which, according to Catholic teaching, human beings can perceive as elements of natural law.

<sup>4</sup> Cf. *Catechism of the Catholic Church*, United States Conference of Catholic Bishops, Libreria Editrice Vaticana, Vatican City 1994, no. 2207.

<sup>5</sup> Cf. *ibid.*, nos. 2214–31.

<sup>6</sup> Cf. *ibid.*, no. 2221.

## 1.2. A HETEROSEXUAL UNION

Catholic teaching understands marriage as the universal fundament of family. Marriage is defined as a heterosexual union between one woman and one man, in which there is a potential for having children. The Catechism states: 'A man and a woman united in marriage, together with their children, form a family'.<sup>7</sup> John Paul II, in a similar vein, spoke of the family as a reality

founded on marriage, in which the mutual gift of self by husband and wife creates an environment in which children can be born and develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny.<sup>8</sup>

The magisterium understands the love between spouses and family members as the glue that holds together both marriage and family. The family is thus regarded as a social community. It, however, is not merely based on contractual relations, as many other social entities are, but on the natural bond of love. Love is not to be understood as a feeling, but a commitment.<sup>9</sup> The spouses' love for each other, which binds together the family, is supported by their fidelity and the indissolubility of their marriage.

Clearly, the church's concepts of marriage and family are traditional conceptions that also reflect typical Western traditions of 'marriage' and 'family'. Hence, to discover conflicts deriving from understanding marriage as a union between one woman and one man, it is not even necessary to contrast ecclesiastical doctrine with modern secular law. Indeed, the church's doctrine has also faced criticism from within. Theologians, canonists and Catholic intellectuals from Africa, for instance, have criticised the church's doctrine for its narrowness and incapacity to recognise positive attributes in broader concepts of marriage and family. With regard to marriage as regulated in canon law and in particular the legal code of the church, the Code of Canon Law (1983 *Codex Iuris Canonici* (CIC/1983)), legal scholar Steven Bwana states bluntly: 'There is nothing in the Code which is more touchy for most Christians in Africa than marriage'.<sup>10</sup> Bwana gives several examples where ecclesiastical marriage

<sup>7</sup> Ibid., no. 2202.

<sup>8</sup> JOHN PAUL II, 'Encyclical Letter *Centesimus annus* on the Hundredth Anniversary of *Rerum novarum*' [01.05.1991, para. 39] (1991) 83 *Acta Apostolicae Sedis* 793, 841.

<sup>9</sup> E.g. *Catechism of the Catholic Church*, above n. 4, no. 2201; JOHN PAUL II, 'Address to the Tribunal of the Roman Rota' [21.01.1999, para. 3] <[www.vatican.va/content/john-paul-ii/en/speeches/1999/january/documents/hf\\_jp-ii\\_spe\\_19990121\\_rota-romana.html](http://www.vatican.va/content/john-paul-ii/en/speeches/1999/january/documents/hf_jp-ii_spe_19990121_rota-romana.html)> accessed 29.09.2021.

<sup>10</sup> S. BWANA, 'The Impact of the New Code in Africa' in J. PROVOST and K. WALF (eds), *Canon Law – Church Reality* (Concilium 185), SCM Press, Edinburgh 1986, pp. 103–9, 105; cf. R. MWAUNGULU, 'Possibilities of Inculcating the Roman Law in Africa' in J. PROVOST and K. WALF (eds), *From Life to Law* (Concilium 1996, issue 5), SCM Press, London/Maryknoll NY 1996, pp. 81–87, 82.

doctrine and canonical marriage law conflict with African values and customs. He refers, for instance, to the role of polygamy as a social reality in some African regions. In a similar vein, systematic theologian Robert Schreiter criticises the one-sided Western view of polygamy as largely an issue of male dominance over women and of sexual exploitation. It could also be viewed as an instrument that provides women and children some measure of economic security, particularly in rural areas.<sup>11</sup> Bwana also criticises canon law's narrow focus on spouses as partners in marriage. This tends to downplay the role of parents as essential for marriage in many African cultures. As an example, he cites the marginalised role which parents play in the Catholic wedding rites of their children. While many African Catholics have embraced the essential Catholic principle of spousal consent, as Bwana finds, it is a sticking point for many that parental consent does not play a part in the canonical rite, at least not for marriages between adult spouses.<sup>12</sup> Missiologist Aylward Shorter criticises that: 'The Code emphasises the Western, nuclear concept of the family.'<sup>13</sup> In doing so, it omits marriage and family concepts that go beyond the nuclear concept, in which a woman and a man form a union for the purpose of begetting children.

### 1.3. OPENNESS FOR CHILDREN

Many African Christians, however, are very receptive to the ecclesiastical doctrine with regard to its connection between marriage and procreation. According to church doctrine, the marital union between a woman and a man is the primordial unit which brings about the 'family'. This idea is tied to the biblical story of creation: God, after having made humankind, commanded man and woman to multiply. Genesis 1:28 reads as follows: 'God blessed them, and God said to them, "Be fruitful and multiply, and fill the earth and subdue it"'. Based on this biblical narrative, the church understands procreation as God's plan for humanity. The union between woman and man is intended for producing offspring. Ecclesiastical teaching, accordingly, calls family a 'sanctuary of life' and 'the heart of the culture of life'.<sup>14</sup> The church even distinguishes it from modernity's 'so-called culture of death' – a culture which promotes abortion and euthanasia while showing a general ignorance about the sanctity of human life.

Following church doctrine, the law defines marriage as the union between a woman and a man which 'is ordered by its nature to the good of the spouses and the procreation and education of offspring'.<sup>15</sup> Couples who deliberately exclude

<sup>11</sup> Cf. R. SCHREITER, *Constructing Local Theologies*, Orbis Books, Maryknoll NY 1985, p. 2.

<sup>12</sup> Cf. S. BWANA, above n. 10, pp. 105–06.

<sup>13</sup> A. SHORTER, *Toward a Theology of Inculturation*, Orbis Books, Maryknoll NY 1988, p. 69.

<sup>14</sup> JOHN PAUL II, above n. 8, p. 842.

<sup>15</sup> Canon 1055 §1 CIC/1983.

the good of procreation when marrying do not therefore have a valid marriage,<sup>16</sup> because an openness to having children is constitutive of a valid marriage. According to ecclesiastical teaching, this openness also implies the basic fundamental capacity to procreate and thus the spouses' ability to have sexual intercourse. Impotence at the time of contracting the marriage consequently invalidates it;<sup>17</sup> sterility, however, does not.<sup>18</sup> If couples are capable of having sexual intercourse, the church regards them as meeting the basic precondition of procreation. Whether or not a child-bearing relationship is in fact possible does not affect the marriage's validity.

Interestingly, this ecclesiastical regulation has also been contested by African theologians and canonists. They argue that for many African couples, having children in their marriage is essential. Bwana thus mentions the opposition of many African Catholics to the fact that sterility, according to canon law, is not a reason to invalidate a marriage. For them, a marriage without children hardly seems valid.<sup>19</sup> In a similar vein, theologians note that many African Catholics prefer a traditional marriage over a canonical one, as they do not feel the church's view of marriage reflects their own understanding of marriage as a gradual process involving several steps from betrothal to childbirth. Benezeri Kisémbó, Laurenti Magesa and Aylward Shorter emphasise this problem in their book *African Christian Marriage*.<sup>20</sup>

#### 1.4. MARRIAGE, SEX AND FAMILY

While many African Catholics take issue with the church's understanding of marriage as a spousal union open for children, but not necessarily involving children, many Catholics of the Northern Hemisphere currently question whether the heterosexual restriction of the Catholic concept is still tenable. Moreover, they question the necessity of the spouses' openness to having children, arguing that the church should allow Catholic couples to decide for themselves. The magisterium, however, remains fairly reluctant to sever the link between marriage and procreation. It regards as legitimate only those sexual relations between individuals which are open to procreation and condemns all sexual acts which cannot – at least potentially – result in the generation of offspring. The magisterium thus often cites this as the main reason homosexual sex is sinful. As homosexual sex is not conducive to procreation, it would seem

<sup>16</sup> Cf. Canon 1101 §2 CIC/1983.

<sup>17</sup> Cf. Canon 1084 §1 CIC/1983.

<sup>18</sup> Cf. Canon 1084 §3 CIC/1983.

<sup>19</sup> Cf. B. KISEMBO, L. MAGESA and A. SHORTER, *African Christian Marriage*, G. Chapman, London/Dublin 1977, pp. 24–25; S. BWANA, above n. 10, pp. 105–6.

<sup>20</sup> Cf. B. KISEMBO, L. MAGESA and A. SHORTER, above n. 19, p. 22.

to merely serve a couple's pleasure. In this respect, the church still officially follows Augustine's view that all sex is sinful when not justified by a good cause, such as the begetting of children.<sup>21</sup>

This teaching on marriage and family necessarily gives rise to the question of who is capable of entering a marriage according to the Catholic magisterium. Following church doctrine, homosexual couples have traditionally been regarded as incapable of marrying because they lack the essential 'interpersonal complementarity'<sup>22</sup> of heterosexual spouses on a physical and psychological level. The church has thus traditionally not only excluded homosexuals from marriage, but it has also strongly opposed changes in secular legislation allowing homosexual couples to enter civil marriages. Correspondingly, the church has also regarded homosexual partners as being incapable of establishing a 'family' in the Catholic sense of the word.

Some observers have recently identified a change in the Catholic debate, though. Comments on homosexual partnerships from the current pope have been viewed as signalling an adjustment to traditional doctrine. In the 2020 documentary *Francesco*, Pope Francis, for instance, states the following:

Homosexuals have a right to be a part of the family. They're children of God and have a right to a family. Nobody should be thrown out, or be made miserable because of it. What we have to create is a civil union law. That way they are all legally covered. I stood up for that.<sup>23</sup>

Some voices celebrated Francis's statement as a first step toward doctrinal change on marriage and family. Others, however, suggested that the pope probably supports civil unions for homosexuals precisely to prevent them from entering marriages. The Vatican, in any case, was quick to state that Francis's words were taken out of context and that he did not intend to change the traditional doctrine. The Secretariat of State even went so far as to send a note to the nuncios, explaining that Francis was misquoted by the filmmakers, who pieced together two different interviews.<sup>24</sup>

<sup>21</sup> Cf. AUGUSTINE, 'De Genesi ad Litteram Libri Duodecim' book 9 chapter 7 para. 12 in J.P. MIGNÉ (ed), *Patrologiae cursus completus: Series Latina*, vol. 34: Sancti aurelii Augustini, Hipponensis Episcopi, opera omnia, part 3, Excudebat Sirou, Paris 1865, pp. 246–485, 397; AUGUSTINE, 'De bono coniugali' chapter 24 para. 32 in J.P. MIGNÉ (ed), *Patrologiae cursus completus: Series Latina*, vol. 40: Sancti aurelii Augustini, Hipponensis Episcopi, opera omnia, part 6, Excudebat Sirou, Paris 1865, pp. 373–96, 394.

<sup>22</sup> JOHN PAUL II, above n. 9, para. 5.

<sup>23</sup> E. AFINEVSKY (Dir.), *Francesco* (2020), released 26.03.21. P. PULLELLA, 'Pope says Homosexuals Should be Covered by Civil Union Laws' [21.10.2020] *Reuters* <[www.reuters.com/article/idUSL1N2HC1NH](http://www.reuters.com/article/idUSL1N2HC1NH)> accessed 11.01.2022.

<sup>24</sup> E.g. C. WOODEN, 'Pope Not Changing Church Teaching on Gay Unions, Secretariat of State says' [02.11.2020] *Catholic News Service* <[www.catholicnews.com/pope-not-changing-church-teaching-on-gay-unions-secretariat-of-state-says/?fbclid=IwAR24dgMBjr0CdBkclVFrkonp2q9KGW9wMdQj0opP6kly9jpXn0vMQet2Y](http://www.catholicnews.com/pope-not-changing-church-teaching-on-gay-unions-secretariat-of-state-says/?fbclid=IwAR24dgMBjr0CdBkclVFrkonp2q9KGW9wMdQj0opP6kly9jpXn0vMQet2Y)> accessed 29.09.2021.

Francis's attitude towards sexuality in general, and homosexuality and gender in particular, has been ambivalent to say the least. I truly cannot see that Francis's position on marriage and family in any way departs from traditional teaching. While he occasionally sounds more pastoral and less doctrinal than his predecessors on sexual matters, he has not given us any reason to assume that he actually wants to adjust ecclesiastical doctrine to integrate homosexual couples into the church's concept of marriage. And neither has he given any good reason to assume that he wants to open up the ecclesiastical concept of family to include non-married couples with children. Christian ethicist Bryan N. Massingale argues, however, that Francis and his statements clearly represent a shift of the official ecclesiastical teaching on LGBTQ+ issues. He identifies three points where this development becomes visible: Francis's use of different and less derogatory semantics to refer to homosexuality; his recognition of homosexuals as spiritual individuals; and his acknowledgment that they serve as spiritual leaders of Christian communities. Inasmuch as these acknowledgements depart from the traditional way of referring to homosexuals, Massingale is certain that Francis's approach signals fundamental change. He states: 'Pope Francis's intervention is not only a shift in tone or a mere pastoral overture to gay Catholics. ... I argue that it constitutes a doctrinal development.'<sup>25</sup>

This author is less certain of that. While Massingale's argument is convincing in many respects, Francis's shift from a doctrinal to pastoral tune can be viewed rather as a strategy to 'camouflage' the traditional teaching than to truly change it, making classical doctrine sound more agreeable to modern Catholics without changing an inch of the doctrine itself. Francis has not brought any recognisable change to any pressing sex and gender issues that are on the table, including contraception, teaching on marriage and sexuality, the role of women in the church (particularly the issue of female ordination), power relations between clerics and laypeople, etc. While he has commented on these issues repeatedly, he has not initiated any effective legal or structural changes to adjust them. With regard to the assessment of homosexual unions this is unsurprising, given that the church not only ties morally acceptable sex to the potential openness of a partnership for children, but also connects it with marriage. According to Catholic doctrine, no sexual act is justified outside marriage. Therefore, sex between unmarried heterosexual couples is regarded as just as sinful as homosexual sex.

The magisterium, by the same token, does not convincingly explain why women and men are destined to only procreate within marriage. There is not

<sup>25</sup> B. MASSINGALE, 'Beyond "Who Am I to Judge?" The Sensus Fidelium, LGBT Experience, and Truth-Telling in the Church' in P. PHAN and B. HINZE (eds), *Learning from All The Faithful: A Contemporary Theology of the Sensus Fidei*, Pickwick Publications, Eugene OR 2016, pp. 170–83, 175.



much talk about marriage in the creation myth of Genesis. Hence, it is not clear why procreation intrinsically belongs to marriage. With regard to the church's concept of 'family,' one also wonders why the family, according to ecclesiastical doctrine, is only 'a man and a woman *united in marriage*, together with their children'. There seems to be an aspect of institutional control here: marital partnerships tame the sexual relations between women and men, making them less sinful according to church doctrine. However, it is by no means obvious why marriage as an institution should be capable of transforming 'mortally sinful' sex between unmarried women and men into a legitimate act that follows God's plan for humanity. Rather than speculating on this transformational power of marriage to convert sin into an act following God's will for God's creation, this section will continue by examining how Catholic doctrine defines 'family.'

### 1.5. NUCLEUS OF THE SOCIAL

The church's concept of 'family' is defined by the line that doctrine draws between marriage, sex and procreation. According to ecclesiastical doctrine, couples living outside a valid marriage are incapable of being the nucleus of a 'family' in the truest sense. Hence, just as the church has opposed extending 'marriage' to include homosexual partners, it has also traditionally opposed the equal treatment of non-married heterosexual partners with children in state legislation. The concern has been that this would weaken the Christian model of the family. To promote this family model, the magisterium has branded the idea of a non-married partnership as an erroneous concept. According to ecclesiastical doctrine, non-married partners with children represent a false understanding of both individual freedom and the partnership as a private matter. Understood correctly, marriage and family are to be regarded social entities, not private issues. Here, the church brings together its family and social doctrines. The family is considered a natural entity deriving from the marital union of a woman and a man, which is the nucleus of society.<sup>26</sup> The familial is exemplary of the social. Therefore, it has priority over society and the state, which are both in service of the family. With regard to the family, the Catechism maintains that 'this institution is prior to any recognition by public authority, which has an obligation to recognise it'.<sup>27</sup> Hence, it is the duty of the political community to protect the family.<sup>28</sup> Married Christians are called 'to defend the

<sup>26</sup> E.g. SECOND VATICAN COUNCIL, 'Decree *Apostolicam actuositatem*' [18.11.1965, para. 11] (1966) 58 *Acta Apostolicae Sedis* 837, 848; *Catechism of the Catholic Church*, above n. 4, no. 2207.

<sup>27</sup> *Catechism of the Catholic Church*, above n. 4, no. 2202.

<sup>28</sup> Cf. *ibid.*, no. 2211.

dignity and lawful autonomy of the family<sup>29</sup> vis-à-vis the political community and the state.

The magisterium also regards the family as the nucleus of the church. It even speaks of the family as a 'domestic church'<sup>30</sup> or 'domestic sanctuary of the Church.'<sup>31</sup> Parents are regarded as essential means for their children's education and for providing them with Catholic-based instruction<sup>32</sup> 'to educate them by word and example for the Christian and apostolic life.'<sup>33</sup> In its educational function, the family therefore serves both the church and the political community. This 'is reflected in the specific duties of Christian families, which serve ecclesiastical as well as general social purposes. As the Second Vatican Council explained, the specific duties of the family include:

... the adoption of abandoned infants, hospitality to strangers, assistance in the operation of schools, helpful advice and material assistance for adolescents, help to engaged couples in preparing themselves better for marriage, catechetical work, support of married couples and families involved in material and moral crises, help for the aged not only by providing them with the necessities of life but also by obtaining for them a fair share of the benefits of an expanding economy.<sup>34</sup>

## 2. MARRIAGE AND FAMILY IN CHURCH AND STATE

### 2.1. CANON LAW AND STATE LAW

Studying the church's concepts of marriage and family might seem to have a retrospective quality. Such an analysis is necessarily a look back at a time when binary concepts of women and men and their respective roles predominated, and when both genders were forced to couch their sexual relations within institutional frames predetermined by the church and the state. Times have certainly changed. Nevertheless, comparisons of church and state concepts of marriage and family, however different, reveal some striking similarities. To illustrate this, this section will reference German marriage law. Both legal orders – secular German law and canonical marriage law – understand marriage as an institution that requires legal backing.<sup>35</sup> A marriage comes into being through the partners' consent.<sup>36</sup>

<sup>29</sup> SECOND VATICAN COUNCIL, above n. 26.

<sup>30</sup> *Catechism of the Catholic Church*, above n. 4, no. 2004.

<sup>31</sup> SECOND VATICAN COUNCIL, above n. 26.

<sup>32</sup> Cf. Canons 226 §2, 774 §2, 793, 798 CIC/1983.

<sup>33</sup> SECOND VATICAN COUNCIL, above n. 26, p. 847.

<sup>34</sup> *Ibid.*, p. 848.

<sup>35</sup> Cf. Section 1353 German Civil Code; Canons 1055 §1, 1057 §2, 1096 §1 CIC/1983.

<sup>36</sup> Cf. Section 1310 (1) German Civil Code; Canons 1057, 1095–1107 CIC/1983.

It establishes a lifelong bond between the spouses.<sup>37</sup> While canon law understands a valid marriage to be indissoluble, German marriage law allows for a divorce. Here, marriage is also internally indissoluble by the spouses, but the union can still be dissolved by divorce courts.<sup>38</sup> According to most legal orders, marriage is restricted to two persons. The partners must also be unmarried upon entering marriage.<sup>39</sup> Some disagreement exists as to whether the partners must be of opposite sexes to enter marriage. While many secular orders have come to allow for partners of the same sex to enter marriage in recent years, canonical marriage law, again, still defines marriage as a union only between a woman and a man.<sup>40</sup>

With regard to family, Article 6 (1) of the German Basic Law emphasises the state's need to subject marriage and family to special protection. Article 6 (2) underlines that parents enjoy a '*natural right*' to care for and raise their children – this formulation can be read as one of the last relics of natural law theory in German statute law. It is the parents' primary duty to care for their children. The German Basic Law introduces the state as a secondary institution that watches over parents while they exercise their parental rights and duties. Similarly, in canon law, it is the natural right and primary duty of parents to nurture their children physically, morally and spiritually.<sup>41</sup> In this case, the church is the secondary institution supporting the parents.<sup>42</sup> Article 6 (5) of the German Basic Law grants the same rights to children born outside of marriage as to those born within marriage. Canon law, however, does not have an equivalent provision. On the other hand, since current canon law, unlike the old law, does not ascribe any disadvantages to being born outside of marriage, it effectively treats individuals born inside and outside of marriage the same.

## 2.2. CHURCH CONCEPTS IN THE SECULAR STATE

The obvious similarities between state and church concepts of marriage have historical reasons. They are grounded not least in the fact that many concepts of secular law have their roots in ecclesiastical law.<sup>43</sup> It was a rather arduous task for modern nation-states to free the institutions of marriage and family from their ecclesiastical embrace and integrate them into secular legislation and

<sup>37</sup> Cf. Section 1353 (1) German Civil Code; Canons 1055 §1, 1056, 1134, 1141 CIC/1983.

<sup>38</sup> Cf. Section 1564 German Civil Code.

<sup>39</sup> Cf. Section 1306 German Civil Code; Canon 1085 §1 CIC/1983.

<sup>40</sup> Cf. Canons 1055 §1, 1057 §2 CIC/1983.

<sup>41</sup> Cf. Canons 226 §2, 774 §2, 793, 798 CIC/1983.

<sup>42</sup> Cf. Canon 794 CIC/1983.

<sup>43</sup> E.g. H.-J. BECKER, 'Spuren des kanonischen Rechts im Bürgerlichen Gesetzbuch' in R. ZIMMERMANN, R. KNÜTEL and J. MEINCKE (eds), *Rechtsgeschichte und Privatrechtsdogmatik*, C.F. Müller, Heidelberg 1999, pp. 159–69, 167–68.

adjudication. In Germany, historical incidents such as the *Kölner Ereignis*<sup>44</sup> and the *Kulturkampf*<sup>45</sup> were key moments of conflict between the state and the church with regard to their legal purview over these matters. The German state was not able to claim its secular prerogative for these issues before the second half of the 19th century. Moreover, the German state never fully asserted its authority over the issues of marriage and family. Instead, it developed a law to supplement the traditional canonical approach to marriage. In Germany, civil marriage has been obligatory since 1875 for couples who want their union to be acknowledged as a legal marriage according to state law. Religious ceremonies do not have any civil significance. The situation obviously differs in legal orders where the state provides optional models and where couples can decide if they prefer to enter a marriage accepted by the state by means of a secular or a religious ceremony, such as South Africa.<sup>46</sup> With its so-called ‘concordat marriage’, Italy, for instance, allows Catholics to enter a canonical marriage in church, which simultaneously constitutes a valid civil marriage. At the same time, other states do not even have a secular marriage model: Israeli marriage law only provides for the religious form of marriage, which is also valid according to civil law. While the state of Israel accepts secular marriages or registered partnerships entered into abroad, it does not offer a separate secular option for entering a marriage or a registered partnership.

For its part, the German system provides a dual regulation. Marriages in Germany exist as both civil and religious institutions. Civil marriage and family issues fall under secular jurisdiction; religious marriage and family matters, by contrast, are part of the jurisdiction of the respective religious communities. Federal German law even explicitly refrains from dealing with the issue of ecclesiastical marriage. Section 1588 – the so-called *Kaiserparagraph* (‘Emperor’s Clause’) – of the German Civil Code reads: ‘The church duties with regard to the marriage are not affected by the provisions of this division.’ It is worth noting, though, that a previous regulation blurred the boundary between the secular and the ecclesiastical spheres. Until 2008, Sections 67 and 67a of the *Personenstandsgesetz* (German Personal Status Act) contained a regulation which prohibited and penalised religious marriages lacking a civil union *prior* to the religious ceremony. This relic from *Kulturkampf* proved to

<sup>44</sup> The Cologne turmoil or the Cologne event was a climax of the conflict between the Catholic Church and the Prussian state in the western provinces of Prussia, which led to the imprisonment of the Archbishop of Cologne in 1837. A starting point for the disputes was the question of interdenominational marriages.

<sup>45</sup> A conflict from 1872 to 1887 between the German government (headed by Bismarck) and the papacy for the control of schools and Church appointments, in which Bismarck was forced to concede to the Catholic Church.

<sup>46</sup> For South Africa see C. RAUTENBACH, ‘Families and Legal Pluralism in South Africa: Celebrating Diversity but at what Cost?’ in this volume.

greatly conflict with religious freedom. The provisions were eventually abolished; individuals may now enter just a religious marriage if they wish to do so. When this happens in church, these strictly ecclesiastical marriages, however, have no relevance under civil law. A recognised ecclesiastical marriage therefore has no consequence for secular marriage and family, probate, or tax law. Couples, then, who want to benefit from the civil institution of marriage must enter into a civil marriage. As religious marriages alone do not bear the legal advantages attached to civil marriage, Catholic authorities do not in fact encourage Catholics to marry only in church.<sup>47</sup> Couples preferring to only enter into a canonical marriage even require a declaration of non-objection (*nihil obstat*) from their bishop to do so.<sup>48</sup> The purpose here is to ensure that they know the consequences of having a purely religious union. Catholic bishops encourage spouses to bind themselves to secular maintenance law prior to the religious ceremony, for they are in strong agreement that partners and children need the security of the law's maintenance provisions for social reasons. The bishops are thus well aware of the social limitations of canon law, even though it does contain some norms on support obligations.<sup>49</sup> German bishops, accordingly, appear to acknowledge the benefits of secular marriage law and want to secure them for church members. This shows that the dual concept of church and state marriage today is less a source of conflict than in the past, and viewed more as an additive model. Despite past disagreement on the issue of institutional authority regarding marriage and family, church authorities have thereby come to understand the merits of civil marriage and family concepts. In current practice in Germany, the relationship between religious and civil marriage is now less about competing institutions than it is an arrangement of gradual understanding in which ecclesiastical marriage is perceived in terms of a religious solemnisation of an existing civil union.

### 3. CONCLUSION

Germany's dualistic approach of tolerating church concepts and law on marriage and family within the secular state effectively ensures that religious groups can freely provide their own laws, while keeping them wholly distinct from the civil sphere. The secular state thus allows religious concepts to exist under its roof,

<sup>47</sup> Cf. DEUTSCHE BISCHÖFE, 'Die kirchliche Trauung bei fehlender Zivileheschließung' (01.12.2008, para. 11) *Amtsblatt für das Bistum Limburg (Official Gazette of the Diocese of Limburg)* 123.

<sup>48</sup> Cf. DEUTSCHE BISCHÖFE, 'Erklärung der Brautleute bei der Bitte um das *Nihil obstat* für eine kirchliche Trauung bei fehlender Zivileheschließung' (01.12.2008, para. 11) *Amtsblatt für das Bistum Limburg (Official Gazette of the Diocese of Limburg)* 123.

<sup>49</sup> Cf. Canons 1148 §3, 1154, 1689 CIC/1983.

without there being any legal repercussions in secular law. This division not only underscores the separation of church and state, but it acknowledges that religions can provide their own regulations on marriage and family within the framework of religious freedom in a plural society and secular state.

That state law is a frame for the plural concepts of marriage and family implies that the state is open to plural approaches to marriage and family in society. However, this is only true insofar as these approaches do not fundamentally conflict with state law. As the title of this chapter suggests, its focus is on church concepts of marriage and family *within* the secular state. Religious law regulating marriage and family is autonomous law – law that is sanctioned by religious institutions acting as sovereign agents within their legal sphere. Nonetheless, these concepts exist within the common order of the state. They are not equivalent regulations, but rather integrated into the common legal order under state law. They are what the sociology of law calls ‘sub-state law’ or law of ‘subnational communities.’<sup>50</sup>

At present, however, the greater challenge to ecclesiastical marriage and family concepts in Germany and in many other countries of the Global North is less the state and more the church members themselves. The number of marriages in church is dwindling. The number of families who identify with the Catholic concept of the ‘family’ is also decreasing. Many couples do not find their individual concepts of marriage and family to be compatible with church doctrine. Many Catholics have lost their faith in the church’s teachings on many issues, especially on matters of ‘natural law’, such as sex, procreation and gender. With the 1968 Encyclical *Humanae vitae* on birth control, the magisterium sowed the seeds of disbelief and distrust in its authority on natural matters.<sup>51</sup> In addition, the Apostolic Letter *Ordinatio sacerdotalis* of 1994, which reserved priestly ordination to men, along with similar documents on the nature and role of women in church and society, have discredited the official church in matters of gender.<sup>52</sup> More recently, the Congregation for the Doctrine of the Faith’s 2021 *Responsum* that Catholic pastors cannot bless homosexual unions has been a further nail in the coffin for the magisterium’s credibility.<sup>53</sup> Likewise, many bishops have contributed just as much to discrediting the church’s teachings

<sup>50</sup> P. SCHIFF BERMAN, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’ (2005) 51 *The Wayne Law Review* 1105, 1111.

<sup>51</sup> Cf. PAUL VI, ‘Encyclical *Humanae vitae* on the Regulation of Birth’ [25.07.1968] (1968) 60 *Acta Apostolicae Sedis* 481–503.

<sup>52</sup> Cf. JOHN PAUL II, ‘Apostolic Letter *Ordinatio sacerdotalis* on Reserving Priestly Ordination to Men Alone’ [22.05.1994] (1994) 86 *Acta Apostolicae Sedis* 545–48.

<sup>53</sup> Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, ‘*Responsum* to a *Dubium* Regarding the Blessing of the Unions of Persons of the Same Sex’ [22.02.2021] <<https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2021/03/15/0157/00330.html#ing>> accessed 29.09.2021.

on marriage and family in the eyes of the general public and many Catholics. In Germany, it is particularly striking that it is not so much ecclesiastical doctrine itself which has discredited the church's teachings on marriage and family, but rather the bishops' inconsistent stance towards state legislation. Over the history of German legislation on marriage and family, German bishops have loudly protested changes in secular marriage and family law whenever the state adopted a more liberal attitude. In commenting on the bishops' protest after a marriage reform law in 2017, journalist Ulrich Sander pointedly noted that, in the 20th century, German Catholic bishops had decried the destruction of marriage and family through liberal legislation after every single reform of German marriage law.<sup>54</sup> In 1953, German bishops protested the decision to abolish the legal concept of men as the heads of their families. In 1977, the bishops fought the decision to change German divorce law from fault-based to no-fault divorce after an irretrievable breakdown of marriage (*Zerrüttungsprinzip*). In 2017, the bishops denounced the decision to open up civil marriage to include homosexual partners.<sup>55</sup> Notably, the bishops relied on the very same argument in each of these cases: the legal reform violated natural law and, therefore, would ultimately destroy marriage, the family and the natural social order.

However, the bishops changed their stance each time shortly after voicing their objections. Within just a few years of their respective protests, they backed the reform and even went as far as presenting themselves and the Catholic Church as supporters of equal rights. Sander ironically observes that 'nature' seems to be a flexible concept when used by church officials. Thus, while the bishops protested against gay marriage and campaigned for the traditional understanding of marriage as a heterosexual union in 2017, many now take issue with the Congregation for the Doctrine of the Faith's response that blessing homosexual unions is impossible. More than a few bishops have not only objected to the Congregation's declaration, but also indicated their willingness to either infringe it themselves or to tolerate any infringements from their ministers. One bishop who branded homosexuality a sin a couple of years ago on a public talk show recently opposed the Congregation's decision as inhumane and contended that the church's teaching on homosexual unions needed urgent reform.<sup>56</sup> Many bishops, at least in Germany, therefore seem to have mastered

<sup>54</sup> Cf. U. SANDER, 'Reformen des Eherechts: Katholischer Protest mit langer Tradition' [11.07.2017] *Frankfurter Allgemeine Zeitung* <[www.faz.net/aktuell/feuilleton/debatten/katholischer-protest-gegen-reformen-des-eherechts-15100232.html](http://www.faz.net/aktuell/feuilleton/debatten/katholischer-protest-gegen-reformen-des-eherechts-15100232.html)> accessed 29.09.2021.

<sup>55</sup> The bishops' protest was fully in line with the demands of the CONGREGATION FOR THE DOCTRINE OF THE FAITH and their 'Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons' [03.06.2003] <[www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html)> accessed 29.09.2021.

<sup>56</sup> E.g. KATHOLISCH.DE, 'Bischof Overbeck für kirchliche Neubewertung von Homosexualität' [19.03.2021] <[www.katholisch.de/artikel/29154-bischof-overbeck-fuer-kirchliche-neubewertung-von-homosexualitaet](http://www.katholisch.de/artikel/29154-bischof-overbeck-fuer-kirchliche-neubewertung-von-homosexualitaet)> accessed 29.09.2021.

the Catholic art of cognitive dissonance: on the one hand, they represent and promote the church as a traditional institution, while, on the other, they applaud liberal secular policies which embrace a more inclusive understanding of marriage and family. One may admire their ability to learn quickly or question why they are so flexible. Catholic teachings on marriage and family, in any case, are currently experiencing unprecedented levels of criticism, even among the Catholic bishops themselves.