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Part One

Ecumenical Juridical Thought

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"Accompanying Migrants" as a Touchstone of the Realisation of the Synodal Church Idea A Canonist's Remarks

Abstract: "Synodality is a style, it is walking together, and it is what the Lord expects of the Church in the third millennium" (Francis). The specific motto and wording of this study in the quoted "programme" thought of Pope Francis, articulated in the *Address to Members of the International Theological Commission* (2019). The Pope expresses appreciation for the extensive work of the Commission crowned with the "theological clarification" of the mentioned idea, and above all by demonstrating the importance in the perception of the mission of the Church today. If, in the opinion of the Holy Father, factual and competent expert argumentation, step by step, reveals the truth that "a synodal Church is a Church of participation and co-responsibility," such a determination cannot remain without impact on the *praxis* of undertaking the most serious pastoral challenges of the present time — on various levels of realization: local, regional, and universal, including ecumenical commitment.

This applies in its entirety to the creation of strategies and specific actions of the Church towards the growing phenomenon of human mobility, especially in its forms that manifest themselves as dramatic and devastating to families and individuals. What we mean here is the Church's multi-track postulate — or more precisely: communion, synodal — efficiency (with its determinants: dynamics, efficiency, effectiveness), for which in 2016 Francis coined the term: "accompanying migrants". Consequently, in recent years there have been a number of normative and operational activities of the present successor of St. Peter, which in our time — rightly called: "the era of migration" (Francis) — set a new trend of clothing/embellishing the aforementioned critical area of *salus animarum* with synodal accents.

As it is showed in the study, a canonist, with the horizon of the principle of *ius sequitur vitam* before his eyes, cannot remain passive towards the pressing challenges delineated here. Indeed, within the orbit of the study of canon law a weighty question

appears — what conclusions of a canonical nature stem from the "millennium" project of the realization of the Synodal Church Idea.

Keywords: *kairós* of synodality, mission of synodal Church, Pope Francis, "accompanying migrants", rights of (Christian) migrants, the "millennial" path of the Church's renewal, the postulate of the Church law renewal, ecumenical context

1. "The *kairós* of synodality"

"Much has also been done since the Second Vatican Council for the reform […]. But there is certainly much more to be done, in order to realize all the potential of the instruments of communion, which are especially appropriate today in view of the need to respond promptly and effectively to the issues which the Church must face in these rapidly changing times."[1] It is no coincidence, one may say, that this — "programme" statement of the Great Shepherd of the Universal Church — made at the beginning of the 3rd millennium in the *Apostolic Letter "Novo Millennio Ineunte"* — became a reference point for the works of the International Theological Commission.[2] What is also significant, recalling the millenary papal message, the theologians of the Commission did not hesitate to direct this correctly diagnosed *urgente opus* of decoding the present "signs of the times"[3] to the path of the "communal discernment" — that is, the same way it was anticipated at the end of his pontificate by St. John Paul II.[4] In the opinion of the Pope at that moment, there was a time when the realization of the mission of the entire People of God (invariably according to the indications of the social teaching of the Church: upholding the dignity and freedom of a person, respecting human life, protection and promotion of family, promotion of justice, solidarity, and peace[5]) must

[1] John Paul II: *Apostolic Letter "Novo Millennio Ineunte"* [6.01.2001], n. 44.

[2] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 8, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20180302_sinodalita_en.html (accessed: 28.12.2020).

[3] Cf. Vatican Council II: *Dogmatic Constitution on Divine Revelation "Dei Verbum"* (November 18, 1965), n. 4; Vatican Council II: *Pastoral Constitution on the Church "Gaudium et Spes"* [7.12.1965] [hereinafter: GS], nn. 4, 11.

[4] "Communal discernment allows us to discover God's call in a particular historical situation". International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 113.

[5] Cf. John Paul II: *Discorso alla Chiesa Italiana per la celebrazionedel III Convegno Ecclesiale* [23.11.1995], n. 10.

mean — "today more than ever"[6] (!) — Ecclesiastical adoption of the principles and methods of a way of discernment that is not only personal but also communitarian.[7] Therefore, in the further development of the papal thought, the said Commission has no doubts: "It is a matter of the Church, by means of the theological interpretation of the signs of the times under the guidance of the Holy Spirit, travelling the path that is to be followed in service of God's plan brought to eschatological fulfillment in Christ, which also has to be fulfilled in every *kairós* throughout history."[8]

"The *kairós* of synodality"[9] is the path of the authentic *renovatio Ecclesiae*,[10] accurately captured and defined at the Second Vatican Council,[11] and today (*hic et nunc*) defined by the authority of the Office of Peter: in the *ad intra* dimension — through the revitalisation of synodal structures and consequently energising the communal life of the Church[12] and her primary task of the New Evangelization,[13] in the *ad extra* dimen-

[6] Ibidem.

[7] Ibidem.

[8] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 113.

[9] Ibidem, n. 1 [Introduction].

[10] See A. Pastwa: "Synodality — Participation — Co-Responsibility. Remarks on the Determinants of the *Aggiornamento* of the Church Law." In: *Idea of Synodality: Contexts, Challenges and Perspectives (I). Ecumeny and Law* 7 (2019), pp. 95—114.

[11] "Ausdrücklich bezog sich das Konzil in seinem Dekret über die Hirtenaufgabe der Bischöfe auf synodale Zusammenkünfte. In Christus Dominus (CD 36) werden sie als „ehrwürdige Einrichtungen" bezeichnet. […] In Ergänzungen der Herausstellung der päpstlichen Vollmacht auf dem I. Vatikanischen Konzil bildet das Zweite Vatikanum die Kollegialität der Bischöfe mit einer synodalen Ausübung ihrer Vollmacht zusammen. Hinzu kam, dass das Konzil die theologische Position der Leien stärke. Auch sie nehmen an der Heilssendung der Kirche teil, wie die Kirchenkonstitution LG 33 hervorhebt, und üben eine „wertvolle Wirksamkeit zur Evangelisation der Welt" (LG 35)" — a quote from J. Schmiedl: "Synodalität in der katholischen Kirche — ein »Zeichen der Zeit«. Anmerkungen im Anschluss an ein Dokument der Internationalen Theologenkommission." In: *Rechtskultur und Rechtspflege in der Kirche. Festschrift für Wilhelm Rees zur Vollendung des 64. Lebensjahres*. Eds. Ch. Ohly, St. Haering, L. Müller [Kanonistische Studien und Texte, Bd. 71]. Berlin 2020, p. 341.

[12] Cf. International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 103.

[13] See Benedict XVI: *Apostolic Letter in the Form of Motu Proprio Establishing the Pontifical Council for Promoting the New Evangelization "Ubicumque et Semper"* [21.09.2010], http://www.vatican.va/content/benedict-xvi/en/apost_letters/documents/hf_ben-xvi_apl_20100921_ubicumque-et-semper.html (accessed: 28.12.2020); cf. also G. Gänswein: "Neuevangelisierung. Weg und Herzmitte der Kirche in unserer Zeit." In: *Theologia Iuris Canonici. Festschrift für Ludger* Müller *zur Vollendung des 65. Lebensjahres*. Eds. Ch. Ohly, W. Rees, L. Gerosa. [Kanonistische Studien und Texte, Bd. 67]. Berlin 2017, pp. 41—51.

sion — through the credible response of the Church to the global challenges in the "particular historical situation"[14] that the world is today (*missio ad gentes*[15]).

This conciliar ecclesiology reverberates already in the title of the quoted document of the International Theological Commission: *Synodality in the Life and Mission of the Church* (2018), while the authenticity of the chosen azimuth (the *kairós* of synodality) is confirmed by the developed criteria of "conversion to renew synodality," such as: formation for the spirituality of communion; the practices of listening, dialogue and communal discernment; its relevance for the ecumenical journey and for *diakonia* in building a social ethos based on fraternity and solidarity.[16] Suffice it to say that these and other desiderata — the fruit of five years of work of the outstanding experts of the Commission — offer a creative potential that will not only enrich theological (ecclesiological) thought, but also — one may surmise — encourage the Shepherds of the Church to give a new dynamism to the Church's evangelising mission and appropriate activity in the area of establishing, interpreting and applying *ius communionis*. Indeed, since we live in a time when "communion must be cultivated and extended day by day and at every level in the structures of each Church's life,"[17] the hinted upon "new" communion/synodal pastoral strategy[18] cannot go hand in hand with the *novum* of the established (adapted) law. It is especially true due to the fact that the assumed (and in the logic of *Ecclesia iuris* — even necessary![19]) correlations bring

[14] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 113.

[15] See Benedict XVI: *Address to the Participants of the International Conference on Occasion of the 40th Anniversary of the Conciliar Decree "Ad Gentes"* [11.03.2006], http://www.vatican.va/content/benedict-xvi/en/speeches/2006/march/documents/hf_ben-xvi_spe_20060311_ad-gentes.html (accessed: 28.12.2020); Francis: *Apostolic Exhortation "Evangelii Gaudium"* (November 24, 2013) [hereinafter: EG], nn. 52—75.

[16] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 103.

[17] John Paul II: *Apostolic Letter "Novo Millennio Ineunte"* [6.01.2001], n. 45.

[18] "Synodality is the specific *modus vivendi et operandi* of the Church." International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 6.

[19] This logic is well reflected in the passage of the apostolic constitution *Sacrae disciplinae leges*, announced by John Paul II on the occasion of the promulgation of Code of Canon Law (1983): "It appears sufficiently clear that the Code is in no way intended as a substitute for faith, grace and the charisms in the life of the Church and of the faithful. On the contrary, its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to faith, grace and the charisms, it at the same time renders easier their organic development in the life both of the ecclesial society and of the individual persons who belong to it." John Paul II: *Apostolic Constitution "Sacrae disciplinae*

the desired synergy effect: "While the wisdom of the law, by providing precise rules for participation, attests to the hierarchical structure of the Church […], the spirituality of communion, by prompting a trust and openness wholly in accord with the dignity and responsibility of every member of the People of God, supplies institutional reality with a soul."[20]

Magisterial, radical strengthening of this "millennium" stream of the renewal of the Church — based on Peter's charism of reading the *kairós* of the new era,[21] we owe today to the Pope, who placed the synodal programme high on the standard of his pontificate.[22] Pope Francis, since it is him who the above refers to, in a famous speech delivered on October 17, 2015 on the occasion of commemorating the 50th anniversary of the institution of the Synod of Bishops, dispels any doubts stating: "It is precisely this path of synodality which God expects of the Church of the third millennium."[23] Additionaly, the symptomatic papal decision to establish synodality the main theme of the forthcoming Synod of Bishops in Rome in 2022 should be mentioned here.[24]

The beginning of Francis' pontificate should be linked to a valuable pastoral analysis of contemporary reality: "In our time humanity is experiencing a turning-point in its history […]."[25] The Pope extends his diagnosis to "many fields,"[26] among which there is no shortage of sensitive pastoral themes concerning: on the one hand, the evangelisation and missionary enthusiasm and the inculturation of faith (and as a consequence:

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leges" [25.01.1983]. Cf. also A. Pastwa: "The Law of the Church — the Law of Freedom." *Religious Freedom Today. Ecumeny and Law* 4 (2016), pp. 110—119.

[20] John Paul II: *Apostolic Letter "Novo Millennio Ineunte"* [6.01.2001], n. 45; cf. International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 107.

[21] Cf. Acts 15:7—12.

[22] Cf. J. Schmiedl: "Synodalität in der katholischen Kirche…," pp. 345—346; a similar opinion, however with elements of criticism — Th. Schüller: „Das Pontifikat Papst Franziskus' aus kirchenrechtlicher Perspektive." *Theologische Revue* 116 (2020) January, pp. 14—15.

[23] Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015], http://www.vatican.va/content/francesco/en/speeches/2015/october/documents/papa-francesco_20151017_50-anniversario-sinodo.html (accessed: 28.12.2020).

[24] The General Secretary of the Synod of Bishops, Card. Lorenzo Baldisseri, has announced that Pope Francis has convoked the 16th Ordinary General Assembly of the Synod of Bishops, which will be held in the month of October 2022 — with the theme: "For a Synodal Church: Communion, Participation and Mission", http://www.synod.va/content/synod/en/news/theme-for-the-16th-ordinary-general-assembly-of-the-synod-of-bis.html (accessed: 28.12.2020).

[25] EG, n. 52.

[26] See ibidem, nn. 52—-75.

canon law),[27] on the other hand, "finding solutions to problems affecting peace, social harmony, the land, the defense of life, human and civil rights," and in a more concrete dimension — solidarity and concern "for those in greatest need."[28] It was soon to have turned out that the last of the important "fields" would be largely "filled" — with the benefit of the hindsight: reasonably — by the multilevel activity of the Shepherds and the Legislator of the Universal Church encouraging a synodal (!) response to the problem of migration and migrants. The announcement of the "new path" appears on the occasion of the annual *Message for the World Day of Migrants and Refugees (2014)*. The revealed *spiritus movens* of the entire papal speech is the constatation: "Contemporary movements of migration represent the largest movement of individuals, if not of peoples, in history."[29] What is difficult to overlook — these words are the introduction to the formulation of the universal appeal of the Head of the Church to its members to return from the anti-evangelical path of "throwaway [sic] culture" and return to the path of the "culture of encounter" — an appeal, completed with the stringent pastoral indication: "a change of attitude towards migrants and refugees is needed on the part *of everyone* [emphasis mine — A.P.]."[30]

Thus, the (hypo)thesis (which is at least *implicite* put forward by Pope Francis, and for this reason alone, merits scientific verification) that in the preparation of a comprehensive/systemic Church response to the situation of "those in greatest need"[31] it is precisely "*synodality*, as a constitutive element of the Church," that offers "the most appropriate interpretive framework," acquires credibility.[32]

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[27] Th. Schüller: "Das Pontifikat Papst Franziskus' aus kirchenrechtlicher Perspektive." *Theologische Revue* 116 (2020) January, p. 2. See also J. Hahn: *Church Law in Modernity. Toward a Theory of Canon Law between Nature and Culture*. Cambridge 2019, pp. 116—173.

[28] EG, n. 65.

[29] Francis: *Message for the World Day of Migrants and Refugees (2014)*, http://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20130805_world-migrants-day.html (accessed: 28.12.2020).

[30] Ibidem.

[31] EG, n. 65.

[32] Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015]; cf. Idem: *Apostolic Constitution on the Synod of Bishops "Episcopalis Communio"* [15.09.2018], n. 6.

2. Synodal accents of Pope Francis' normative and operational activities on "accompanying migrants"

The attention of the researchers of the specificity of the present pontificate (with the hallmark: *kairós* of synodality), was captured by a *passus* of the previously quoted document issued by the International Theological Commission (2018), in which the theologians of the Commission highlighted the inspiring potential of the papal "millennium" reading of the conciliar teaching about the Church's mission: "In conformity with the teaching of *Lumen Gentium*, Pope Francis remarks in particular that synodality 'offers us the most appropriate framework for understanding the hierarchical ministry itself' and that, based on the doctrine of the *sensus fidei fidelium*, all members of the Church are agents of evangelisation. Consequently making a synodal Church a reality is an indispensable precondition for a new missionary energy that will involve the entire People of God."[33]

The "magisterial" caesura — "new threshold" of the Conciliar thought on *communio Ecclesiae*,[34] carefully noted at the beginning of the document, indeed, goes far beyond the official authorization of the source (evangelical)[35] rooting of *synodality*. It is already visible in the recognition of Pope Francis of the extensive work of the Commission crowned with the "theological clarification" of the mentioned idea, and above all by demonstrating the importance in the perception of the mission of the Church today.[36] If, in the opinion of the Holy Father, factual and competent expert argumentation,[37] step by step, reveals the truth that "a synodal

[33] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 9.

[34] "The fruits of the renewal promised by Vatican II in its promotion of ecclesial communion, episcopal collegiality and thinking and acting 'synodally' have been rich and precious. […] Hence the *new threshold* [emphasis mine — A.P.] that Pope Francis invites us to cross." Ibidem, nn. 8—9.

[35] Ibidem, n. 9.

[36] The words addressed directly to the members of the Commission speak for themselves: "You have shown how the practice of synodality, traditional but always to be renewed, is the implementation, in the history of the People of God on their journey, of the Church as a mystery of communion, in the image of Trinitarian communion. As you know, this theme is very close to my heart: synodality is a style, it is walking together, and it is what the Lord expects of the Church in the third millennium." Francis: *Address to Members of the International Theological Commission* [29.11.2019], http://www.vatican.va/content/francesco/en/speeches/2019/november/documents/papa-francesco_20191129_commissione-teologica.html (accessed: 28.12.2020).

[37] The most important (in the opinion of the Commission itself) conclusion, summarising the first two chapters of the document is worth quoting: "[…] synodality denotes

Church is a Church of participation and co-responsibility,"[38] such a determination cannot remain without impact on the *praxis* of undertaking the most serious pastoral challenges of the present time — on various levels of realisation: local, regional and universal, including ecumenical commitment.[39] Obviously, this applies in its entirety to the creation of strategies and specific actions of the Church towards the growing phenomenon of human mobility, especially in its forms that manifest themselves as dramatic and devastating to families and individuals. What we mean here is the Church's multi-track postulate — or more precisely: communion, synodal — efficiency (with its determinants: dynamics, efficiency, effectiveness), for which in 2016 Pope Francis coined the term: "accompanying migrants."[40]

No wonder that in recent years there have been a number of normative and operational activities of the present successor of St. Peter, which in our time — rightly called "the era of migration"[41] — set a new trend of dressing the aforementioned critical area of *salus animarum* with synodal accents.

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the particular *style* that qualifies the life and mission of the Church, expressing her nature as the People of God journeying together and gathering in assembly, summoned by the Lord Jesus in the power of the Holy Spirit to proclaim the Gospel. Synodality ought to be expressed in the Church's ordinary way of living and working. This *modus vivendi et operandi* works through the community listening to the Word and celebrating the Eucharist, the brotherhood of communion and the co-responsibility and participation of the whole People of God in its life and mission, on all levels and distinguishing between various ministries and roles." Ibidem, n. 70a.

[38] Ibidem, n. 67. Cf. A. Pastwa: "Synodality — Participation — Co-Responsibility…," pp. 105—110.

[39] "The world in which we live, and which we are called to love and serve, even with its contradictions, demands that the Church strengthen cooperation in all areas of her mission." Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015]. "Ecumenical commitment marks out a journey involving the whole People of God […] in order to discover, share and rejoice in the many riches that unite us as gifts of the one Lord in virtue of the baptism we share: from prayer to hearing the Word and experiencing the love we have for each other in Christ, from witnessing to the Gospel to serving the poor and outcasts, from commitment to a society of justice and solidarity to a commitment to peace and the common good." International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 115.

[40] Francis: *Apostolic Exhortation "Amoris Laetitia"* [19.03.2016], n. 46.

[41] Idem: *Message for the 105th World Day of Migrants and Refugees 2019*, http://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20190527_world-migrants-day-2019.html (accessed: 28.12.2020).

2.1. In the service of dignity and holiness of every person (the context of the rights of Christian migrants)

"In all her being and actions, the Church is called to promote the integral development of the human person in the light of the Gospel."[42] This sentence in the form of a kind of personalistic manifesto opens the Apostolic Letter of 2016, announced by Pope Francis on the occasion of the establishment of the new Dicastery of the Roman Curia: Dicastery for Promoting Integral Human Development. Thus, by the act of the supreme ecclesiastical legislator,[43] the traditional commitment of the Holy See to migrants (so far under the responsibility of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People) gains a chance — it must be clearly stated! — of rising to a new, higher level.[44] The Pope expressed *explicite* such hope two years later in the annual *Message for the 104th World Day of Migrants and Refugees*[45] — an enunciation not stripped of personal accents,[46] but above all carrying a valuable substantive message. Apart from the justification of this critical structural and organisational change, there are at least several reasons to consider this official Message (2018) as worthwhile of special attention. First, it should be noted that the papal words of the commentary are accompanied by a reference to the teachings of the predecessor on the See of Peter, who in the great

[42] Francis: *Apostolic Letter Issued Motu Proprio Instituting the Dicastery for Promoting Integral Human Development* [17.08.2016], http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160817_humanam-progressionem.html (accessed: 28.12.2020).

[43] The Pope made proper changes in special law, mainly in John Paul II: *Apostolic Constitution "Pastor Bonus"* [28.06.1988] — art. 142—153 were abrogated.

[44] "This Dicastery will be competent particularly in issues regarding migrants, those in need, the sick, the excluded and marginalized, the imprisoned and the unemployed, as well as victims of armed conflict, natural disasters, and all forms of slavery and torture." Ibidem. A harbinger of positive changes is the activity of Migrants & Refugees Section (within the new dicastery) — see last document: Dicastery for Promoting Integral Human Development — Migrants & Refugees Section: *Pastoral Orientations on Internally Displaced People*. Vatican City 2020.

[45] Francis: *Message for the 104th World Day of Migrants and Refugees 2018*, https://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20170815_world-migrants-day-2018.html (accessed: 28.12.2020).

[46] "Throughout the first years of my pontificate, I have repeatedly expressed my particular concern for the lamentable situation of many migrants and refugees fleeing from war, persecution, natural disasters and poverty. […] When I instituted the new Dicastery for Promoting Integral Human Development, I wanted a particular section — under my personal direction for the time being — to express the Church's concern for migrants, displaced people, refugees and victims of human trafficking." Ibidem.

social encyclical *Caritas in Veritate* (2009): firstly, places the phenomenon of migration ("a social phenomenon of epoch-making") in the context of an "integral human development,"[47] secondly, he concludes his position with an instructive proclamation: "Every migrant is a human person who, as such, possesses fundamental, inalienable rights that must be respected by everyone and in every circumstance."[48] Further reflection, especially on the cited *memento* of Benedict XVI, prompts Francis to affirm the basic criterion of the social teaching of the Church, namely to emphasise the importance of the *personalistic norm* in the design/implementation of the mission of "accompanying migrants."

The universal ideological message seems to be quite clear. The highlighting in the 2018 Message of "the principle of the centrality of the human person"[49] — as indicated, in full harmony with the teaching of the post-conciliar popes[50] — should be read as a methodical presentation of the primacy of this *norm* which defines the order of justice: ethical[51] and legal/canonical.[52] In relation to the discussed pastoral challenge, among others, it means that at the centre of the adequate (!) activity of the bodies responsible for applying the law (in the sphere of international organisations, states, the Church) — including the new legislation[53] —

[47] Benedict: *Encyclical Letter on Integral Human Development in Charity and Truth "Caritas in Veritate"* [29.06.2009], n. 62.

[48] Ibidem. Cf. also Pontifical Council for the Pastoral Care of Migrants and Itinerant People: *Instruction Erga Migrantes Caritas Christi* [3.05.2004] [hereinafter: EMCC]. *Acta Apostolicae Sedis* 96 (2004), pp. 762—822, n. 27.

[49] Francis: *Message for the 104th World Day of Migrants and Refugees 2018*.

[50] For complete information, in addition to Benedict XVI, Popes Paul VI and John Paul II are also quoted. At this point, it is worth recalling the not mentioned words of St. John Paul II: "I wish to invite you to an ever-deeper awareness of your mission: to see Christ in every brother and sister in need, to proclaim and defend the dignity of every migrant, every displaced person and every refugee. In this way, assistance given will not be considered an alms from the goodness of our heart, but an act of justice due to them." John Paul II: *Address to the Participants in the Assembly of the Council of the International Catholic Migration Commission* [12.11.2001], n. 2, http://www.vatican.va/content/john-paul-ii/en/speeches/2001/november/documents/hf_jp-ii_spe_20011112_icmc.html (accessed: 28.12.2020).

[51] Cf. J. Gocko: "Istotne aspekty teologii migracji." *Teologia i Moralność* 12 (2017), no. 1(21), p. 55.

[52] Cf. L. Sabbarese: "Die Seelsorge unter/für Migranten. Ein Appell an die »katholische Vielfalt« der Kirche." In: *Migration und Flucht. Zwischen Heimatlosigkeit und Gastfreundschaft*. Eds. K. Krämer, K. Vellguth. [Theologie der Einen Welt. Bd. 13]. Freiburg im Breisgau 2018, p. 273.

[53] The determinants of such a global strategy of promotion of human rights — on the basis of the transcendent dignity of the human person — was formulated by Pope Francis already in 2014. In a loud speech at the European Parliament in Strasbourg, he concluded: "Europe will be able to confront the problems associated with immigra-

always remains the person of the migrant, their natural and supernatural dignity, reinforced by the principle of fundamental equality of all people, without any discrimination. Here Francis' thought culminates in an original synthesis. The personalistic *par excellence* illumination of the horizon of universal fundamental rights (universal and inalienable) is clothed by the Pope with a neat idea and logical suit — a logical chain whose links are four verbs. The programme of "welcoming, protecting, promoting and integrating migrants and refugees"[54] will now become an inseparable theme of the consecutive enunciations on the World Day of Migrants and Refugees.[55] But that is not all: the important *novum* of the 2019 Message specifying the format of the said programme (which of course deserves a deeper contemplation[56]) — is the conclusion that those four verbs "do not apply only to migrants and refugees" because "they describe the Church's mission,"[57] and as such they are "synodal verbs" (!).[58]However, the effectiveness of such a tailored Church programme of "accompanying migrants" in the universal dimension (*missio ad extra*) is to a large extent conditioned by fidelity to the assumptions of the Church's *aggiornamento* (*missio ad intra*). Therefore, the present Pope — by revitalising the message of the Second Vatical Council on "ecclesial conversion as openness

tion only if it is capable of clearly asserting its own cultural identity and enacting adequate legislation to protect the rights of European citizens and to ensure the acceptance of immigrants." Francis: *Address to the European Parliament* [25.11.2014], https://www.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html (accessed: 28.12.2020).

[54] Francis: *Message for the 104th World Day of Migrants and Refugees 2018*; Idem: *Address to Participants in the International Forum on "Migration and Peace"* [21.02.2017], http://www.vatican.va/content/francesco/en/speeches/2017/february/documents/papa-francesco_20170221_forum-migrazioni-pace.html (accessed: 28.12.2020).

[55] Francis: *Message for the 105th World Day of Migrants and Refugees 2019* [29.09.2019]; Idem: *Message for the 106th World Day of Migrants and Refugees 2019* [27.09.2020], https://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20200513_world-migrants-day-2020.html (accessed: 28.12.2020).

[56] This thread will be touched upon again in the third point of this study.

[57] Francis: *Message for the 105th World Day of Migrants and Refugees 2019* [29.09.2019).

[58] The Fathers of the Synod of Bishops (2018) competently express their opinions on this issue: " 'Welcome, protect, promote and integrate', the four verbs with which Pope Francis synthesizes the action needed to support migrants, are synodal verbs. Implementing them requires the Church's action at all levels and it involves all the members of Christian communities. For their part, migrants, appropriately accompanied, can offer spiritual, pastoral and missionary resources to the host communities." Synod of Bishops. XV Ordinary General Assembly: *Young People, the Faith and Vocational Discernment. Final Document* [October 27.10.2018], n. 147, http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20181027_doc-final-instrumentum-xvassemblea-giovani_en.html (accessed: 28.12.2020).

to a constant self-renewal born of fidelity to Jesus Christ"[59] — links the pastoral activity in question with the fulfillment of an elementary condition. It is "missionary conversion": the renewing mentalities, attitudes, practices in order to be ever more faithful to her vocation.[60] The value and depth of the papal recommendation was perfectly captured by the International Theological Commission, which sees this programme idea as closely akin to promotion of the synodal principle[61] of co-essentiality between hierarchical gifts and charismatic gifts in the Church.[62] "Pastoral conversion for the implementation of synodality means that some paradigms often still present in ecclesiastical culture need to be quashed because they express an understanding of the Church that has not been renewed by the ecclesiology of communion. These include: the concentration of responsibility for mission in the ministry of Pastors; insufficient appreciation of the consecrated life and charismatic gifts; rarely making use of the specific and qualified contribution of the lay faithful, including women, in their areas of expertise."[63]

The synodal horizon of the "accompanying migrants" programme, emerging from the developed guidelines, undoubtedly strengthens the postulates of renown expert-canonists,[64] to anchor the appropriate ecclesiastical activity in the field of *missio ad intra* — that is, on the one hand, updating the rights of Christian migrants (with the fundamental right to use redeeming measures[65]), on the other hand, a universal and

[59] The principle formulated in the Decree on Ecumenism turns out to be pivotal: "Every renewal of the Church essentially consists in an increase of fidelity to her own calling [...] Christ summons the Church as she goes her pilgrim way [...] to that continual reformation of which she always has need, in so far as she is a human institution here on earth." Vatican Council II: *Decree on Ecumenism "Unitatis Redintegratio"* [21.11.1964], n. 6.

[60] EG, n. 26.

[61] Cf. Vatican Council II: *Dogmatic Constitution on the Church "Lumen Gentium"* [21.11.1964] [hereinafter: LG], n. 4.

[62] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 74.

[63] Ibidem, n. 105.

[64] E. Baura: "L'Istruzione 'Erga Migrantes Caritas Christi'. Profili giuridici." *People on the Move* 37 (2005), no. 98, pp. 100—103 (97—107); L. Gerosa: "Mitbürger der Heiligen (Eph 2,19). Das Fördern der Heiligkeit der Kirche als Verpflichtung: ein Paradigma für die kanonistische Hermeneutik?." In: *Theologia Iuris Canonici*..., pp. 53—55.

[65] "The Christian faithful have the right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word of God and the sacraments." *Codex Iuris Canonici* (*Code of Canon Law*, promulgated: January 25, 1983) [hereinafter: CIC], can. 213; Cf. *Codex Canonum Ecclesiarum Orientalium* (*Code of Canons of the Eastern Churches*, promulgated: 18.10.1990) [hereinafter: CCEO], can. 16. The universal character of this norm is sealed by the princliple of "true equality." CIC, can. 208; CCEO, can. 11.

shared commitment to evangelisation (with the fundamental duty/right of all Christians to spread God's message of salvation[66]) — in the paradigmatic[67] for the whole *ius Ecclesiae* can. 210 CIC: "All the Christian faithful must direct their efforts to lead a holy life and to promote the growth of the Church and its continual sanctification, according to their own condition."[68] In other words, today it is difficult to ignore the serious voices of the canonistic doctrine, which recommend (whether *explicite*[69] or *implicite*[70]) perceiving the legal and pastoral system created/modernised to meet the challenges of the era of migration[71] through the prism of the conciliar doctrine of the universal call to holiness.[72]

This "path" directed at the service of the dignity and holiness of a migrant — which in fact promotes the missionary vocation on an unprecedented scale (including by emphasising the participation and co-responsibility of the lay people in order to achieve the desired effect of "synodal synergy"[73]) — it is clearly visible in the recent decisions of the highest ecclesiastical legislator. Considering that the salvation goods: the word and the sacraments, have been entrusted to the Church for giving them to the Christian faithful, and as such they constitute their due right —

[66] "All the Christian faithful have the duty and right to work so that the divine message of salvation more and more reaches all people in every age and in every land." CIC, can. 211; cf. CCEO, can. 14.

[67] R. Sobański: "C. 210 als Rechtssatz". In: *Iuri canonico promovendo. Festschrift für Heribert Schmitz zum 65. Geburtstag*. Eds. W. Aymans, K.-Th. Geringer. Regensburg 1994, pp. 72—73; G. Dalla Torre: *Santità e diritto. Sondaggi nella storia del diritto canonico*. Torino 1999, p. 2; L. Gerosa: Mitbürger der Heiligen (Eph 2,19)…, p. 55.

[68] Cf. CCEO, can. 13.

[69] E. Baura: L'Istruzione 'Erga Migrantes Caritas Christi'…," pp. 100—103.

[70] L. Gerosa: Mitbürger der Heiligen (Eph 2,19)… pp. 54—55.

[71] The elements of the mentioned system that has its foundations in the appropriate provisions of CIC (cf. can. 34) and CCEO, are created, first and foremost, by the already mentioned Instruction Erga Migrantes Caritas Christi (2004). See also Pontifical Council for the Pastoral Care of Migrants and Itinerant People, Pontifical Council Cor Unum: *Welcoming Christ in Refugees and Forcibly Displaced Persons. Pastoral Guidelines*. Vatican City 2013; Dicastery for Promoting Integral Human Development — Migrants & Refugees Section: *Pastoral Orientations on Internally Displaced People*, Vatican City 2020.

[72] LG [Chapter V: *The Universal Call to Holiness in the Church*], nn. 39—42, especially n. 37.

[73] "Synodality is lived out in the Church in the service of mission. *Ecclesia peregrinans natura sua missionaria est;* she exists in order to evangelise. The whole People of God is an agent of the proclamation of the Gospel. Every baptised person is called to be a protagonist of mission since we are all missionary disciples. The Church is called, in synodal synergy, to activate the ministries and charisms present in her life and to listen to the voice of the Spirit, in order to discern the ways of evangelisation." International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 53.

it is not surprising that most of the legislative changes undertaken in the last five years by Pope Francis should be read today in this key. This is undoubtedly the case of the 2016 *Motu Proprio "De Concordia inter Codices"*, a document which modifies a number of provisions of the Code of Canon Law — with the arguments disclosed: (1) bringing in harmony between the provisions of the CIC and the CCEO, especially in cases in which it is necessary to regulate relations between subjects that belong respectively to the Latin Church and an Oriental Church; (2) meeting the challenge of the signs of the our times, namely, "the mobility of the population."[74] In this spirit we should interpret the most characteristic changes in the norms concerning the sacrament of baptism and the sacrament of marriage. A completely new paragraph has been added to two others in can. 111. After a slightly amended (at the end) paragraph 1: "Through the reception of baptism a child is ascribed to the Latin Church if the parents belong to that Church or, should one of them not belong to it, if both parents agree in choosing that the child be baptized in the Latin Church; but, if the agreement is lacking, the child is ascribed to the Church '*sui iuris*', *to which the father belongs*" — a new, second paragraph follows now: "However, if only one parent is Catholic, the child is ascribed to the Church to which the Catholic parent belongs."[75] The essential supplement of can. 868 with paragraph 3 concerns also the sacrament of baptism with the final clause, conceptually close to the solution adopted in can. 844: "An infant of non-Catholic Christian parents is baptized licitly if the parents, or at least one of them or the person who lawfully takes their place requests it and if it is physically or morally impossible for them to obtain access to the actual ministry."[76] The same weight (and a similar conceptual foundation) has the extension of can. 1116 — regulating an extraordinary form of the celebration of marriage — with an additional third paragraph: "§ 1. If a person competent to assist according to the norm of law cannot be present or approached without grave inconvenience, those who intend to enter into a true marriage can contract it validly and licitly before witnesses only: 1/ in danger of death; 2/ outside the danger of death provided that it is prudently fore-

[74] The fragment of the papal document is as follows: "This is particularly evident in our times, in which the mobility of the population has resulted in the presence of a significant number of Eastern faithful in Latin territories. This new situation generates numerous pastoral and juridical questions, which demand to be resolved by means of appropriate norms." Francis: *Litterae Apostolicae Motu Proprio Datae "De Concordia Inter Codices" Quibus Nonnullae Normae Codicis Iuris Canonici Immutantur* [31.05.2016], https://www.vatican.va/content/francesco/la/motu_proprio/documents/papa-francesco-motu-proprio_20160531_de-concordia-inter-codices.html (accessed: 28.12.2020).

[75] Cf. CCEO, can. 29.

[76] Cf. CCEO, can. 681.

seen that the situation will continue for a month. § 2. […]. § 3. In addition to the provisions established in §1, nn. 1 and 2, the local ordinary can confer to any Catholic priest the faculty to bless the marriage of faithful Christians of the Eastern Churches who are not in full communion with the Catholic Church if they request it spontaneously, and provided there is nothing to preclude the valid and licit celebration of the marriage. The same priest, however, with the necessary prudence, shall inform the competent authority of the interested non-Catholic Church of the case."[77]

A natural consequence of Francis' repeated statements (sometimes very personal[78]) on the role of women in the synodal Church — which in the context of accompanying migrants most strongly echoes in *Apostolic Exhortation "Querida Amazonia"* (2020)[79] — is the legislative decision, the importance of which is best emphasised by the fact that it is for the authorisation of the lay people to act in the name of the Church.[80] It can be safely said that drawing final conclusions from the principle of fundamental equality of all the faithful (can. 208),[81] determined the intervention of the highest ecclesiastical legislator[82] in the matter of equating the position of a woman with a man in access to the ministries of lector and acolyte, performed on a permanent basis. Modified can. 230 § 1 CIC now reads as follows: "Lay persons who possess the age and qualifications established by decree of the conference of bishops can be admitted

[77] Cf. CCEO, can. 833.

[78] Pope Francis: *Let Us Dream: The Path to a Better Future*, New York 2020, pp. 66—68.

[79] Francis: *Apostolic Exhortation "Querida Amazonia"* [2.02.2020] [hereinafter: QA]; Idem: *Apostolic Exhortation "Christus Vivit"* [25.03.2019], n. 245, http://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20190325_christus-vivit.html (accessed: 28.12.2020). See also Synod of Bishops. XV Ordinary General Assembly: *Young People, the Faith and Vocational Discernment. Final Document* (October 27, 2018), n. 148; S. Wendel: "Partizipation von Frauen am kirchlichen Handeln nach »Querida Amazonia«." *Zeitschrift für Pastoraltheologie* 40/1 (2020), pp. 159—168.

[80] St. Schwarz: "Handeln im Namen der Kirche. Die Leien mit kanonischer Sendung in der Diözese." In: *Rechtskultur in der Diözese. Grundlagen und Perspektiven*. Ed. I. Riedel-Spangenberger. Freiburg im Breisgau 2006, pp. 393—405.

[81] P. Boekholt: "Sedung durch Taufe und Firmung. Rechte und Pflichten der Christgläubigen *in der Diözese*." In: *Rechtskultur in der Diözese…*, pp. 52—53.

[82] Francis: *Apostolic Letter Issued Motu Proprio "Spiritus Domini" Modifying Canon 230 §1 of the Code of Canon Law Regarding Access of Women to the Ministries of Lector and Acolyte* [10.01.2021], http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20210110_spiritus-domini.html (accessed: 28.12.2020); Idem: *Letter to the Prefect of the Congregation for the Doctrine of the Faith Regarding Access of Women to the Ministries of Lector and Acolyte* [10.01.2021], http://www.vatican.va/content/francesco/en/letters/2021/documents/papa-francesco_20210110_lettera-donne-lettorato-accolitato.html (accessed: 28.12.2020).

on a stable basis through the prescribed liturgical rite to the ministries of lector and acolyte. Nevertheless, the conferral of these ministries does not grant them the right to obtain support or remuneration from the Church."

Finally, it is difficult not to identify the same concern of the highest legislator for the *salus animarum*[83] of all people in today's world of mobility and migration — in the announcement of the Apostolic Constitution on Ecclesiastical Universities and Faculties "Veritatis Gaudium" (2017),[84] which is the long-awaited act of reform of ecclesiastical higher education law.[85] To see the important role Pope Francis assigns to the reform of education[86] and higher education[87] in the synodal way of creating "culture of encounter," it is enough to quote the very instructive words of Foreword to the above-mentioned document: "The primary need today is for the whole People of God to be ready to embark upon a new stage of 'Spirit-filled' evangelization. This calls for 'a resolute process of discernment, purification and reform'. In this process, a fitting renewal of the

[83] "Dem kirchlichen Recht kommt [...] im Blick auf die salus animarum dienende Funktion zu. Dies bedeutet, Rechtsvorschriften müssen in der Kirche stets geeignet sein, dass die Gläubigen als Einzelne und in der Gemeinschaft durch die Verkündigung des Wortes Gottes sowie durch den Empfang der Sakramente und Sakramentalien (vgl. c. 213 CIC) näher zu Gott zu finden, um der Pflicht der Heiligung des eigenen Lebens nachzukommen und zum Wachstum der Kirche beizutragen (vgl. c. 210 CIC)." R. Althaus: "Das Kirchenrecht — ein überzeitlicher Fels in der Brandung oder Wegbereiter der Veränderung?." In: *Kirche im Wandel. Ekklesiale Identität und Reform*. Ed. St. Kopp. Freiburg im Breisgau 2020, p. 334.

[84] Francis: *Apostolic Constitution on Ecclesiastical Universities and Faculties "Veritatis Gaudium"* [8.12.2017] [hereinafter: VG], http://www.vatican.va/content/francesco/en/apost_constitutions/documents/papa-francesco_costituzione-ap_20171208_veritatis-gaudium.html (accessed: 28.12.2020).

[85] Cf. Th. Schüller: *Das Pontifikat Papst Franziskus' aus kirchenrechtlicher Perspektive*..., pp. 11—12.

[86] An interesting initiative by Francis is undoubtedly Reinventing the Global Compact on Education (the global discussion under the auspices of the Pope, inaugurating this project, is scheduled for May 14, 2020, but due to the COVID-19 pandemic, it is to take place at a later date. In the mind of the Holy Father, the purpose of this educational alliance is, among others, train individuals who are willing to contribute to the service of the community: "Service is a pillar of the culture of encounter: »It means bending over those in need and stretching out a hand to them, without calculation, without fear, but with tenderness and understanding, just as Jesus knelt to wash the Apostles' feet. Serving means working beside the neediest of people, establishing with them first and foremost human relationships of closeness and bonds of solidarity«". Francis: *Message for the Launch of the Global Compact on Education* (September 12, 2019), http://www.vatican.va/content/francesco/en/messages/pont-messages/2019/documents/papa-francesco_20190912_messaggio-patto-educativo.html (accessed: 28.12.2020).

[87] Dicastery for Promoting Integral Human Development — Migrants & Refugees Section: *Pastoral Orientations on Internally Displaced People*, p. 14.

system of ecclesiastical studies plays a strategic role. These studies, in fact, are called to offer opportunities and processes for the suitable formation of priests, consecrated men and women, and committed lay people. At the same time, they are called to be a sort of providential cultural laboratory in which the Church carries out the performative interpretation of the reality brought about by the Christ event and nourished by the gifts of wisdom and knowledge by which the Holy Spirit enriches the People of God in manifold ways — from the *sensus fidei fidelium* to the magisterium of the bishops, and from the charism of the prophets to that of the doctors and theologians."[88]

2.2. In the name of a "common path" towards unity (the ecumenical context of the pastoral operability of Church structures)

Already at the beginning of the pontificate of Francis the *Apostolic Exhortation "Evangelii Gaudium"* (2013) showed the potential[89] and pivotal importance[90] of synodal bodies for the "millennium" renewal of the Church, namely, the liberation of the missionary dynamism proper to its essence.[91] It can be assumed that such a "programmed" manifesto of the pontificate — with a universal, deeply humanistic message of evangelical truths, still evokes a wide social response. It is not only about making original theoretical diagnoses of how to overcome "excessive centralisation" in looking at the Church.[92] Synodal undertaking of the most serious challenges of the present time, such as the problem of migrants,[93] forces — in the name of realising the postulate of greater efficiency of

[88] VG, n. 3

[89] Cf. J. Schmiedl: "Synodalität in der katholischen Kirche…," pp. 345—346.

[90] Th. Schüller: "Das Pontifikat Papst Franziskus …, " p. 14.

[91] EG, n. 32.

[92] "Excessive centralization, rather than proving helpful, complicates the Church's life and her missionary outreach." Ibidem. However, this is not the place here to reflect on the ideas of the "Synodal Way", initiated in 2020 in Germany, it is worth noting the long-standing intellectual ferment in posing fundamental questions, such as: *Kan man dieselbe Kirche anders denken?* [Can one the same Church, another thinking?]. M. Seewald: *Reform — Dieselbe Kirche anders denken*. Freiburg im Breisgau 2019, p. 11.

[93] EG, n. 210.

the Church structures[94] — *praxis* of making efforts to "not walk alone"[95] through evangelisation. This has to mean: in the personal dimension — consistent dissemination among pastors (especially those who have the title: *pastor proprius*)[96] and the lay faithful attitudes of co-responsibility, participation and, above all, fruitful cooperation, and in the institutional dimension — authentic evangelisation commitment, both to every parish (as "a community of communities"), and basic communities, small communities, movements, and forms of association.[97] It is about a joint work, bonded/optimised by the logic of "missionary communion"[98] — with its indispensable characteristics: dialogue and communal discernment, the building of a social ethos based on fraternity and solidarity, the united efforts of committed Christians of every denomination.[99]

The ecclesiastical work of integration of migrants, which should give an impulse to launch this synodal potential and the resources primarily at the basic level (diocese — parish)[100] — through the help of individu-

[94] However, it is worth remembering that while the effectiveness of church structures potentially generates the progress of the missionary efforts, it is "without new life and an authentic evangelical spirit, without the Church's 'fidelity to her own calling', any new structure will soon prove ineffective." EG, 26.

[95] "Pastoral ministry in a missionary key seeks to abandon the complacent attitude that says: 'We have always done it this way'. I invite everyone to be bold and creative in this task of rethinking the goals, structures, style and methods of evangelization in their respective communities. A proposal of goals without an adequate communal search for the means of achieving them will inevitably prove illusory. I encourage everyone to apply the guidelines found in this document generously and courageously, without inhibitions or fear. The important thing is to not walk alone, but to rely on each other as brothers and sisters, and especially under the leadership of the bishops, in a wise and realistic pastoral discernment." EG, n. 33.

[96] "Der Leiter als eigenberechtigter Hirte der Pfarrei ist gemäß cc. 515, 519, 521 und 526 CIC/1983 (cc. 279,280 und 287 CCEO) immer und allein Pfarrer. In dieser Hirtensorge (cura pastoralis) ist er nicht zu ersetzen. Zugleich sieht c. 519 CIC/1983 (c. 281 § 1 CCEO) für die Pfarrei die Bildung von »Pastoralteams« vor, in denen durch bischöfliche Sendung weitere Priester, ständige Diakone sowie pastorale Mitarbeiterinnen und Mitarbeiter an und in der Seelsorge (cura animarum) unter der Leitung Pfarres beteiligt werden. " Ch. Ohly: "Der Pfarrer als »Pastor proprius«. Erinnerung an ein verfassungsrechtliches Grundprinzip." In: *Rechtskultur und Rechtspflege in der Kirche*…, pp. 287—288.

[97] EG, nn. 28, 29.

[98] EG, nn. 23, 31.

[99] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 103.

[100] "The first level of the exercise of *synodality* is had in the particular Churches. After mentioning the noble institution of the Diocesan Synod, in which priests and laity are called to cooperate with the bishop for the good of the whole ecclesial community, the *Code of Canon Law* devotes ample space to what are usually called 'organs of communion' in the local Church: the presbyteral council, the college of consultors, chapters

als and groups, volunteer associations and movements, parochial[101] and diocesan[102] organisations, in cooperation with all people of good will[103] — has significant ecumenical implications.[104] After all, it is all about true integration of migrants and asylum seekers without neglecting the religious dimension, fundamental for every person.[105] *Ergo*: if it is known that Christians will certainly be in the orbit of this mission, coming from various parts of the world, then the attention to the religious dimension entails inevitable ecumenical dialogue (broadly understood).[106]

This is where the quoted motto of Francis finds its application, reflecting the sy- nodal *par excellence* of this ecclesiastical mission: "The important thing is to not walk alone, but to rely on each other as brothers and sisters, and especially under the leadership of the bishops, in a wise and realistic pastoral discernment."[107] What testifies to the fact that the papal words need to be treated as an urgent task of disseminating the rules and methods of dialogue[108] proper to synodal assemblies (diocesan

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of canons and the pastoral council. Only to the extent that these organizations keep connected to the 'base' and start from people and their daily problems, can a synodal Church begin to take shape: these means, even when they prove wearisome, must be valued as an opportunity for listening and sharing." Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015].

[101] See for example V. De Paolis: "Parrocchia personale." In: *Migrazioni. Dizionario socio-pastorale*. Ed. G. Battistella. Cinisello Balsamo 2010, pp. 783—789.

[102] See for example A. Kaptijn: "Gli Ordinariati per i fedeli cattolici orientali privi di gerarchia propria." In: *Cristiani orientali e pastori latini*. Ed. P. Gefaell. Milano 2012, pp. 233—267; A. E. Grassmann: "Die lateinischen Ordinariate für Gläubige orientalischer Riten. Genese, verfassungsrechtliche Verortung und Darstellung der gegenwärtigen Gestalt." In: *Lebendige Kirche in neuen Strukturen: Herausforderungen und Chancen*. Eds. H. Hallermann, Th. Meckel, S. Pfannkuche, M. Pulte. Würzburg 2015, pp. 219—265.

[103] Benedict: *Message for the World Day of Migrants and Refugees (2013)* [12.10. 2012]; https://www.vatican.va/content/benedict-xvi/en/messages/migration/documents/hf_ben-xvi_mes_20121012_world-migrants-day.html (accessed: 28.12.2020).

[104] Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015].

[105] "Indeed, it is to this [religious — AP.] dimension that the Church, by virtue of the mission entrusted to her by Christ, must devote special attention and care: this is her most important and specific task." Benedict: *Message for the World Day of Migrants and Refugees (2013)* (October 12, 2012).

[106] Obviously, the fruitful implementation of the wider missionary goal, which is integration of migrants-believers of non-Christian religions, assumes conducting an interreligious dialogue. See EG, nn. 247—-254.

[107] EG, n. 33.

[108] H. Hallermann: "Beratung und Beispruch. Formen der Mitverantwortung in der Diözese." In: *Rechtskultur in der Diözese*…, pp. 300—321; N. Witsch: "Gemeinsam auf dem Weg. Synodale Strukturen der Diözese." In: *Rechtskultur in der Diözese*…, pp. 406—435; G. May: "Der Ruf nach mehr Synodalität." In: *Theologia Iuris Canonici*…, pp. 223—248.

synod, particular and regional councils, synod of bishops[109]) is, at least, the similarity of this statement of the well-known “millennium” enunciation of St. John Paul II: “The Bishop is responsible for bringing about this unity in diversity by promoting […] a collaborative effort which makes it possible for all to journey together along the common path of faith and mission.”[110] Teaching on the one hand about “the importance of consultation,”[111] and on the other, about the “need for a new impetus to inculturation,”[112] Francis confirms, with his authority, the validity of the ideological assumptions[113] of *Instruction “Erga Migrantes Caritas Christi”*

[109] The order of the institutional dialogue bodies mentioned here is not accidental. Francis — on the basis of the ecclesiological perspective of LG, sketches with great consequence the image of a synodal Church as “an inverted pyramid”: “The Synod of Bishops is the point of convergence of this listening process conducted at every level of the Church’s life. The Synod process begins by listening to the people of God, which ‘shares also in Christ’s prophetic office’. […] The Synod process then continues by listening to the pastors. […] The Synod process culminates in listening to the Bishop of Rome, who is called to speak as ‘pastor and teacher of all Christians’, not on the basis of his personal convictions but as the supreme witness to the *fides totius Ecclesiae*, the guarantor of the obedience and the conformity of the Church to the will of God, to the Gospel of Christ, and to the Tradition of the Church.” Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015].

[110] John Paul II: *Apostolic Exhortation on the Bishop, Servant of the Gospel of Jesus Christ for the Hope of the World “Pastores Gregis”* ([16.10.2003], n. 44.

[111] “In this way, it can be seen that the synodal process not only has its point of departure but also its point of arrival in the People of God, upon whom the gifts of grace bestowed by the Holy Spirit through the gathering of Bishops in Assembly must be poured out.” Francis: *Apostolic Constitution on the Synod of Bishops “Episcopalis Communio”* [15.09.2018], n. 7; cf. Idem: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* ([17.10.2015]. Cf. also International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 68.

[112] QA, n. 95.

[113] Yes, the same can be said about the validity of the provisions of the Instruction based on these assumptions. This is confirmed by the relevant legal and pastoral criteria adopted in the document regarding the service to migrants — for example: (a) the local Church must be pastorally involved with people on the move through the services of parishes, whether territorial or personal, *missiones cum cura animarum* [EMCC, n. 91]; national and/or diocesan/eparchial pastoral structures have to be set up, when necessary [EMCC, n. 26; cf. EMCC, n. 79]; (b) in accordance with the principle of promotion and observance of the “rites of the Eastern Churches as patrimony of the universal Church of Christ” (CIC, can. 39; EMCC, n. 26), Eastern Rite Catholic migrants deserve particular pastoral attention (CIC, can. 383 § 2, can. 518; EMCC, 52—54); (c) indispensability of the collaboration between the Churches of origin and of arrival (EMCC, n. 70); (d) the engagement of the laity, lay associations and ecclesial movements on tasks of *diakonia* (EMCC, n. 86); (e) the shortage of priests for migrants can be partly remedied by entrusting certain activities in the parish to suitably prepared laity (CIC, can.

from 2004. It is enough to quote the very[114] "ecumenical" line from this document: "[Cultural and religious plurality — A.P.] is a treasure, and dialogue is the as yet imperfect and ever evolving realization of that final unity to which humanity aspires and is called."[115]

Ecumenical commitment in the work of the Church "accompanying migrants" marks out a path/journey involving all the People of God.[116] Speaking of the practical expression of *koinonía*, updated *hic et nunc* by the power of the Holy Spirit —following the example of the Trinitarian mystery[117] — in each local Church and in its relation with the other Churches through synodal structures and processes.[118] If so, then migration as an object of ecclesial pastoral work should be directly linked to the renewal of the Church of Christ. Luigi Sabbarese is right that it is not just a matter of the ordinary relations between particular Churches, Churches of origin and host Churches, but it is a fundamental ecclesiological and ecumenical problem.[119] In consideration of this, the authors of *Ecumenical Vademecum* (2020) rightly extended the list of priorities of practical ecumenism to include a new crucial area: "coordinated Christian action to care for displaced and migrant peoples"[120] — making an important remark in the commentary that cooperation between Christian

228, §1; can. 230 § 3, can. 517 § 2; EMCC, n. 45) [today, we may add: "and women" — QA, n. 103].

[114] Cf. J. Voss: "Ökumenische Dimensionen in der Instruktion *Erga migrantes caritas Christi*." *People on the Move* 37 (2005), no. 98, p. 53.

[115] This sentence is preceded by passage: "Openness to different cultural identities does not, however, mean accepting them all indiscriminately, but rather respecting them — because they are inherent in people — and, if possible, appreciating them in their diversity. The 'relativity' of cultures was also stressed by the Second Vatican Council (cf. GS 54, 55, 56, 58)." EMCC, n. 30.

[116] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 115.

[117] Francis: *Address to Members of the International Theological Commission* (November 29, 2019); Roman Catholic Church and the Orthodox Church: *Ecclesiological and Canonical Consequences of the Sacramental Nature of the Church Ecclesial Communion, Conciliarity and Authority*, Ravenna, 13 October 2007, n. 5, http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/ch_ortho dox_docs/rc_pc_chrstuni_doc_20071013_documento-ravenna_en.html (accessed: 28.12.2020).

[118] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 116; cf. K. Koch: "Synodalität in der Katholischen Kirche in der ökumenischer Perspektive: Papst und Bischöfe, Konzilien und Synoden." In: *Synodalität in der katholischen Kirche. Die Studie der Internationalen Theologischen Kommission im Diskurs*. Eds. M. Graulich, J. Rahner [*Quaestiones disputatae*, Bd. 311]. Freiburg im Breisgau 2020, pp. 220—242.

[119] L. Sabbarese: "Die Seelsorge unter/für Migranten…," p. 271.

[120] Pontifical Council for Promoting Christian Unity: *The Bishop and Christian Unity: An Ecumenical Vademecum*. Città del Vaticano 2020, p. 34, n. 38.

churches in service of the poor is “a driving force in promoting the desire for Christian unity.”[121]

3. In the face of contemporary challenges: “Synodality” as a paradigm of canonistic hermeneutics?

The central point of the “millennium” diagnosis of the state and prospects of implementing the conciliar idea[122] of the reforming the Church by John Paul II is the implementation of *Communio*. The statement of the Holy Father speaks for itself: “[…] there is certainly much more to be done, in order to realize all the potential of the instruments of communion, which are especially appropriate today in view of the need to respond promptly and effectively to the issues which the Church must face in these rapidly changing times.”[123] What is worth noting here, in this (and similar) context, is that the ecclesiological thought of all the popes of the first two decades of the 21st century goes to the Divine Animator of the dynamics of the testimony of the priestly people — the testimony of faith and love worthy of the challenges of the present time. It is the Holy Spirit who, by distributing hierarchical and charismatic gifts,[124] generously ensures the continuation of the *aggiornamento* of the Church community (*communio*) and its law (*ius communionis*). Above all, the activity of the Creator of unity — uniting the action of the Holy Spirit in the Eucharist, which makes that the community as a whole becomes ever more the body of Christ[125] — defines the profile of the ecclesial synodal

[121] Ibidem.

[122] Cf. GS, nn. 43, 44.

[123] John Paul II: *Apostolic Letter “Novo Millennio Ineunte”* [6.01.2001], n. 44.

[124] “The gifts of the Spirit are given for the building up of Christ’s Body (1 Cor 12) and for ever greater witness to the Gospel in the world.” Benedict XVI: *Apostolic Exhortation “Sacramentum Caritatis”* (February 22, 2007) [hereinafter: SacCar], n. 17. It should be added here that in the sacramental structure of the Church (*communio)*, both hierarchical and charismatic gifts converge in the service of the bishop who updates — according to the logic of the ecclesiological principles of the Vatican II: collegiality, synodality and subsidiarity — the fullness of Christ’s service: as Prophet, Priest, and King (*tria munera Christi*); cf. A. Pastwa: “Synodality — Participation — Co-Responsibility…,” pp. 97—98.

[125] SacCar, no. 13. “The Church’s synodal path is shaped and nourished by the Eucharist.” International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 47

path[126] on the sensitive *hic et nunc* sections of "united" responsibility for the work of evangelisation. Consequently, the specificity of *ius Ecclesiae*[127] determines that the same action of the Third Divine Person also determines the shape of the law-making processes in the Church. After all, *proprium* of the Church law is immanently inscribed renewal potential in it, thereby making the Church "contemporary," according to the principle of the *Sacrae disciplinae leges* Constitution: "fidelity in newness and of newness in fidelity."[128]

With the horizon of the principle of *ius sequitur vitam* before our eyes, we can ask at this point what pivotal or even strategic conclusions of a canonical nature can be drawn on the basis of the previously articulated premises: a) mobility and migration constitute in today's world[129] and the Church[130] "a structural phenomenon, and not a passing emergency"[131]; b) the legal-pastoral programme "accompanying migrants" in its optimal project goes hand in hand with the Realisation of the Synodal Church Idea[132]; c) personalistic determinants of each and every synodal programme are in fact: "welcome," "protect," "promote," and "integrate"[133]; d) synodality, after it is translated into the established institutions and procedures of the Church, "expresses the ecumenical dimension of canon law."[134]

Synthetically speaking,[135] it should be noted that the millennium

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[126] Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015].

[127] See R. Sobański: "Charisma et norma canonica." In: *Ius in vita et in missione Ecclesiae. Acta symposii internationalis Iuris Canonici occurrente X anniversario promulgationis Codicis Iuris Canonici diebus 19—24 aprilis 1993 in Civitate Vaticana celebrati*. Città del Vaticano 1994, pp. 75-—90.

[128] John Paul II: *Apostolic Constitution "Sacrae disciplinae leges"* [25.01.1983].

[129] "[…] migrants are a 'paradigm' able to shed light on our times." Synod of Bishops XV Ordinary General Assembly: *Young People, the Faith and Vocational Discernment. Final Document* [27.10.2018], n. 25.

[130] Cf. D. Markl: "Die Kirche als Migrantin. Zu den biblischen Ursprüngen des sich wandelndes Gottesvolkes." In: *Kirche im Wandel…*, pp. 83—99.

[131] Francis: *Apostolic Exhortation "Christus Vivit"* (March 25, 2019), n. 91.

[132] "Synodality is the method by which the Church can address ancient and new challenges." Synod of Bishops XV Ordinary General Assembly: *Young People, the Faith and Vocational Discernment. Final Document* [27.10.2018], n. 144.

[133] " 'Welcome, protect, promote and integrate', the four verbs with which Pope Francis synthesizes the action needed to support migrants, are synodal verbs." Ibidem, n. 147.

[134] Francis: *Address to Participants in the Conference Promoted by the Society for the Law of the Eastern Churches* [19.09.2019], https://www.vatican.va/content/francesco/en/speeches/2019/september/documents/papa-francesco_20190919_diritto-chieseorientali.html (accessed: 28.12.2020).

[135] The merely sketchy form of the conclusions, dictated by the format of this study, may be treated as an invitation to further scientific research of the issues presented here.

"package" of Church's renewal announced in numerous statements by Pope Francis is an announcement of a wider transfer[136] of revitalised ecclesiological ideas to the *ius Ecclesiae* ground. The importance and potential of the new "path" presented here are already shown by the contextual penetration of two areas of the methodology of the Church law, closely related to each other.

The first area: getting to know and legislating. Taking into account the original *proprium* of the reflected law (*ordinatio fidei*), including its systemic frameworks, which are determined by the dialectic of continuity and changeability — the paradigmatic significance is confirmed by the rule that the *ius communionis* at no stage of its development can break away from its theological base; this is particularly true for the first two links in the chain of the Church's legal practice.[137] Thus, the universal legislator and consequently particular legislators, together with the ecclesial community[138] united around the pastoral office (successors of Peter, successors of the Apostles), face today the challenge of making, step by step, a dynamic/concretising reception of Revelation.[139] This is all to make sure that "the new canonical legislation will prove to be an efficacious means"[140] of the People of God's mission, which is active undertaking of responsibility for the evangelical testimony of delivering the revealed truth.

In Francis' opinion there is an urgent need to unblock the paths of communication/dialogue today (including "decentralization,"[141] "increasing the spirit of episcopal collegiality"[142]), so that the will of Christ could better shape the law of the community — traditionally using the magisterial/pastoral content of data and inscribed as legal,[143] or at least legal as

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[136] John Paul II: *Apostolic Constitution "Sacrae disciplinae leges"* [25.01.1983].

[137] The wide methodological horizon of the practice of law covers the basics of its recognition and creation, and then interpretation, application and observance.

[138] The programme of activating ministries and charisms — in order to achieve the desired effect of synodal synergy on the paths of evangelisation — assumes that not only the pastors of the Church, but all the faithful share the responsibility for the shape of the *ius communionis*.

[139] Cf. H. Pree: "Zur Wandelbarkeit und Unwandelbarkeit des *Ius Divinum*." In: *Theologia et ius canonicum. Festgabe für Heribert Heinemann zur Vollendung seines 70. Lebensjahres*. Ed. H.J.F. Reinhardt. Essen 1995, p. 123.

[140] John Paul II: *Apostolic Constitution "Sacrae disciplinae leges"* [25.01.1983].

[141] EG, nn. 16, 32.

[142] Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015].

[143] An adequate and complete depiction of the current "Corpus iuris canonici" is the theme of John Paul II's famous statement about the intrinsic connection of juridical norms with Church doctrine: "In fact, the authentic interpretation of God's Word, exercised by the Magisterium of the Church [ ] has juridical value to the extent that it

well.[144] In this respect, fidelity to "the principle of synodality" in undertaking lawmaking activity must mean broad openness to the action of the Holy Spirits "in the communion of the Body of Christ and in the missionary journey of the People of God."[145] This is the context of the papal invitation of the Pastors and their communities to the ecclesiastical *synodal process*,[146] which as "the process of decision-making"[147] will certainly constitute a privileged form of law-making in the field of *ius communionis*. It also seems obvious that since this *process* involves a comprehensive renewal of the Church's synodal structures, then an adjusted (adequate) renewal of community law is to be expected not only at the universal level, but also at local and regional levels.

Second area: interpretation and application of law. The two enunciations of the papal magisterium, by their categorical or even imperative character, illuminate the "millennium" context of canonistic hermeneutics. The first one, by John Paul II, in his final *Address to the Roman Rota* (2005), is an authoritative, strong voice against any attempt to positivist deformation of the canonical laws: "[A canonist — A.P.] must never lose sight of the intrinsic connection of juridical norms with Church doctrine. Indeed, people sometimes presume to separate Church law from the Church's magisterial teaching as though they belonged to two separate spheres; they suppose the former alone to have juridically binding force, whereas they

concerns the context of law, without requiring any further formal procedure in order to become juridically and morally binding." John Paul II: *Address to Members of the Tribunal of the Roman Rota* [29.01.2005], https://www.vatican.va/content/john-paul-ii/en/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota.html (accessed: 28.12.2020). In short, juridical value is not only represented by ecclesiastical laws, which are promulgated as such; the same value may also have statements of the papal magisterium in areas immanently connected with the legal dimension. Cf. L. Gerosa: Mitbürger der Heiligen (Eph 2,19)…, p. 57.

[144] R. Sobański: "Niezmienność i historyczność prawa w Kościele: prawo Boże i prawo ludzkie." *Prawo Kanoniczne* 40 (1997) no. 1—2, p. 25.

[145] International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, no. 46.

[146] See note 24.

[147] The remarks of International Theological Commission regarding synodal process at the diocesan level are valuable: "The synodal process must take place at the heart of a hierarchically structured community. In a diocese, for example, it is necessary to distinguish between the process of *decision-making* through a joint exercise of discernment, consultation and co-operation, and *decision-taking*, which is within the competence of the Bishop, the guarantor of apostolicity and Catholicity. Working things out is a synodal task; decision is a ministerial responsibility. A correct exercise of synodality must contribute to a better articulation of the ministry of the personal and collegial exercise of apostolic authority with the synodal exercise of discernment on the part of the community." International Theological Commission: *Synodality in the Life and Mission of the Church (2018)*, n. 69.

value the latter merely as a directive or an exhortation. Such an approach basically reveals a *positivist mindset* which is in contradiction with the best of the classical and Christian juridical tradition concerning the law. […] For a healthy juridical interpretation, it is indispensable to understand *the whole body of the Church's teachings*."[148] The second enunciation is connected with the doctrinal (ecclesiological) leitmotif of Francis, which gives rise to a bold hypothesis: "synodality" is a paradigm of canonistic hermeneutics. These are the words from the already quoted famous speech from 2015 delivered on the occasion of commemorating the 50th anniversary of the institution of the Synod of Bishops: "*Synodality*, as a constitutive element of the Church, offers us the most appropriate interpretive framework for understanding the hierarchical ministry itself."[149]

Without going into an in-depth analysis of the extensive subject matter, which is primarily determined by the precise provisions of canons 17 and 19 CIC (parallel — canons 1499 and 1501 CCEO), it is worthwhile to briefly refer to these normative "modules" in the content of the mentioned canons, which directly or at least indirectly correspond to the *meritum* of papal recommendations. They are the formulas that are a clear testimony to disagreement either with the static shape of legislation ("guardian" of the fossilised structures) or its positivist deformation,[150] namely: "the mind of the legislator"[151] and "general principles of law."[152] Importantly, both formulas (and not only the latter one, as in the codified text of the canons) are closely related to *aeqitas canonica*. After all, the latter one, apart from its specific role of correcting *rigor iuris*, constitutes the internal and formal impetus for justice and dynamic principle of creation and development of law.

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[148] John Paul II: *Address to Members of the Tribunal of the Roman Rota* [29.01.2005], n. 6.

[149] Francis: *Address at the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops* [17.10.2015].

[150] Cf. Th. Schüller: "Auslegung von Gesetzen im Kirchenrecht. Ein rechtshistorischer und antekanonistischer Beitrag zur Debatte." In: *Theologia Iuris Canonici…*, pp. 127—128; A. Pastwa: "Synodality — Participation — Co-Responsibility…," pp. 107—108.

[151] CIC, can. 17: "Ecclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse must be made to parallel places, if there are such, to the purpose and circumstances of the law, and to *the mind of the legislator*." Cf. CCEO, can. 1499.

[152] CIC, can. 19: "If a custom or an express prescript of universal or particular law is lacking in a certain matter, a case, unless it is penal, must be resolved in light of laws issued in similar matters, *general principles of law applied with canonical equity*, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons." Cf. CCEO, can. 1501.

Finally, it is not difficult to define the sphere of principles — relevant to healthy canonistic hermeneutics[153] — with which the *credo* of the synodal ecclesiological "path" resonates. Well, "the mind of the legislator" in can. 17 CIC combines: the principles that the Church legislator follows ("legislative guiding principles"[154]), the principle of the primacy of theological sources resulting from the specificity of the church law,[155] values protected and promoted by Church law, and above all canonical equity, which should be connected with the intention of the legislator to create equitable law.[156] In turn, the *generalia iuris principia*[157] in can. 19 CIC should be treated "as a tool of mitigating the harmful antinomy mostly between: formal and material justice, what is public (*bonum commune / bonum communionis*) and what is private (*bonum personae*). At the end of the day it is about the principles that convey the potential of supporting — system in *ius Ecclesiae* — 'alliance' of law and ministry (see John Paul II's famous address to the Roman Rota from 1990), directed towards real protection/promotion of subjective rights of the faithful in the Church, in the name of the realisation of the *salus animarum* goal."[158]

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[153] John Paul II: *Address to Members of the Tribunal of the Roman Rota* [29.01.2005], n. 6.

[154] Th. Schüller: Auslegung von Gesetzen im Kirchenrecht…, p. 133.

[155] "All regulators of [the Church life — AP] ultimately originate from the same source, that is, from the faith proclaimed by the Church. Therefore, it should be assumed that the sources of faith and the practice of faith found their reflection and legal translation in church law." R. Sobański: *Metodologia prawa kanonicznego*. Katowice 2004, p. 57.

[156] Cf. R. Sobański: "Komentarz do kan. 17." In: *Komentarz do Kodeksu Prawa Kanonicznego*. Vol. 1. Ed. J. Krukowski. Poznań 2003, p. 71.

[157] See T. Gałkowski: *Ogólne zasady prawa w prawie kanonicznym*. Warszawa 2020.

[158] A. Pastwa: *Review*: Tomasz Gałkowski, *Ogólne zasady prawa w prawie kanonicznym* [*General Principles of Law in the Canon Law*], Warszawa: Wydawnictwo Naukowe Uniwersytetu Kardynała Stefana Wyszyńskiego, 2020, 221 pp. In: *Semicentennial of Karol Wojtyła's "Person and Act": Ideas — Contexts — Inspirations (II). Philosophy and Canon Law* 7 (2021), no. 2, (in press).

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Andrzej Pastwa

« Accompagnement des migrants » comme pierre de touche de l'idée d'une Église synodale. Remarques d'un canoniste

Résumé

„La sinodalità è uno stile, è un camminare insieme, ed è quanto il Signore si attende dalla Chiesa del terzo millennio" (le pape François). Cette pensée cardinale du programme du pape François, articulée dans *Address to Members of the International Theological Commission* (2019), constitue la devise et le fondement de la présente étude. Le Pape apprécie le travail d'une grande portée de la Commission, culminant dans l'idée d' « una puntualizzazione teologica » de la synodalité et démontrant son importance dans la perception de la mission de l'Église aujourd'hui. Si, selon le pape, l'argumentation d'experts, étant concrète et compétente, révèle progressivement la vérité que l'Église synodale est une Église de participation et de responsabilité partagée, alors une telle opinion ne peut rester sans influence sur la *praxis* de relever les défis pastoraux les plus sérieux à l'heure actuelle et à divers niveaux de mise en œuvre : local, régional et universel, y compris l'engagement œcuménique.

Cela s'applique, dans son intégralité, à la création de stratégies et d'activités concrètes de l'Église face au phénomène croissant de la mobilité humaine, en particulier sous les formes qui se manifestent comme dramatiques et destructrices pour les familles et les individus. Il s'agit du postulat de l'opérativité ecclésiale et mulidirectionnelle — ou plus précisément de l'opérativité de communion et synodale (avec ses indices : dynamique, efficacité, productivité), pour laquelle en 2016, le pape François a proposé le terme : « accompagnement les migrants ». Il n'est pas étonnant que, ces dernières années, toute une série d'actions normatives et opérationnelles du successeur actuel de Saint Pierre, qui à notre époque - appelée à juste titre « l'ère de la migration » (le pape François) — indiquent une nouvelle tendance consistant à donner des accents synodaux à la zone de *salus animarum*.

Comme le montre l'étude, le canoniste, ayant devant ses yeux l'horizon du principe de *ius sequitur vitam*, ne peut rester passif face aux défis critiques ici exposés. En effet, dans l'orbite des études canoniques se pose une question importante, à savoir quelles

conclusions de nature juridique résultent du projet « millénaire » de mise en œuvre de l'idée d'une Église synodale.

Mots clés : *kairós* de la synodalité, mission de l'Église synodale, Pape François, « accompagnement les migrants », droits des migrants (chrétiens), cours « millénaire » pour le renouveau de l'Église, postulat du renouveau du droit de l'Église, contexte œcuménique

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« Accompagnamento ai migranti » come pietra di paragone per l'idea di una Chiesa sinodale. Alcune osservazioni di un canonista

Abstract

„La sinodalità è uno stile, è un camminare insieme, ed è quanto il Signore si attende dalla Chiesa del terzo millennio" (Papa Francesco). Questa idea di programma del Papa Francesco, articolata in *Address to Members of the International Theological Commission* (2019) costituisce il motto e il fondamento del presente studio. Il Papa apprezza l'ampio lavoro della Commissione, culminato nell'idea di „una puntualizzazione teologica" della sinodalità, lavoro che ha anche confermato la sua importanza nell'adeguata percezione della missione della Chiesa d'oggi. Se, come sostiene il Papa, la concreta e competente argomentazione di esperti rivela progressivamente la verità che la Chiesa sinodale è una Chiesa di partecipazione e di corresponsabilità, allora tale opinione non può restare ininfluente sulla *praxis* nell'affrontare le sfide pastorali sempre più serie e presenti a vari livelli di attuazione: locale, regionale e universale, compreso l'impegno ecumenico.

Ciò si applica, nella sua totalità, alla creazione di strategie e attività concrete della Chiesa di fronte al crescente fenomeno della mobilità umana, specialmente nelle forme che si manifestano come drammatiche e distruttive per le famiglie e gli individui. È questo il postulato dell'operatività ecclesiale e multidirezionale — o più precisamente dell'operatività di comunione e di sinodalità (con i suoi indici: dinamica, efficienza, produttività), per la quale nel 2016, il Papa Francesco ha proposto il termine: "Accompagnamento ai migranti". Non stupisce che, negli ultimi anni, tutta una serie di interventi normativi e operativi dell'attuale successore di San Pietro, che nel nostro tempo — giustamente chiamato „l'era delle migrazioni" (Papa Francesco) — indichino una nuova tendenza a conferire accenti sinodali alla zona di *salus animarum*.

Come mostra lo studio, il canonista, avendo davanti agli occhi l'orizzonte del principio di *ius sequitur vitam*, non può restare passivo di fronte alle sfide critiche qui presentate. Nell'orbita degli studi canonici si pone infatti una questione importante, ovvero quali conclusioni di natura giuridica derivino dal progetto "millenario" di attuazione dell'idea della Chiesa sinodale.

Parole chiave: *kairós* della sinodalità, missione della Chiesa sinodale, papa Francesco, "accompagnamento ai migranti", diritti dei migranti (cristiani), corso "millenario" per il rinnovamento della Chiesa, postulato del rinnovamento del diritto ecclesiale, contesto ecumenico

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Pastoral Care for Migrants Canonical and Religious Related Legal Requirements on Asylum and on the Change of Religion

Abstract: Refugees and migrants have always been of particular concern to the Roman Catholic Church and its pastoral care. Even if the large influx of refugees happening in 2015 and 2016 is no longer the case, flight and migration are still relevant topics in Austria. The contribution deals with the historical development of canonical regulations, the situation of refugees and migrants in Austria, the legal basis, the implementation of asylum procedures and numbers, the statements of the Austrian Bishop's Conference, the access to a Church or religious community and converting from one to another, the question of the Catholic Church's necessity of salvation, regulations concerning catechumenate and the question of church asylum. It provides figures, data and facts, presents the canonical and state legal situation and analyses it. It tries to make weak points obvious and would like to provide help for future considerations.

Keywords: refugees, migration, canon law, asylum, Republic of Austria

Even if the large influx of refugees happening in 2015 and 2016 is not the case any longer, flight and migration are still relevant topics in Austria.[1] In December 2017, the Protestant Church of Austria criticised

[1] Cf. Statistik Austria: *Migration & Integration. Zahlen. Daten. Indikatoren 2019.* Wien 2019. Available online: https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Integrationsbericht_2019/Migration-Integration-2019.pdf (accessed 10.06.2020); for details see: W. Rees: "»Migration ist eine Schlüsselfrage für die Zukunft der Menschheit« (Papst Franziskus 2019). Kirchen- und religionsrechtliche Vorgaben

"increasingly absurd" practices in the context of interviews conducted during asylum procedures,[2] which are still carried out today. As a member of the High Consistory Karl Schiefermaier mentioned, the questions asked as a part of credal tests "could not be answered by 90% of Austrian Protestants." Subsequently, applications for asylum are rejected due to lack of knowledge or the assumption that the applicant has undergone a fake conversion.[3] Apart from that, Free Church generous practice of baptism and the idea of affecting one's own asylum procedure positively by receiving baptism made inquiries regarding ecclesiastical baptismal practice and lead to questions concerning sincerity of single person's wish for baptism. According to Islamic law, denouncing Islam (apostasy) is illegal; converted people have to expect persecution, jail and death penalty, as well as discrimination in terms of inheritance and matrimonial law once they return to their home country. This is why the deportation of Muslims who converted to Christianity — forz ecample, back to Iran — is more difficult. On the other hand: "What would Austria be without migrants?" Certainly "a much less populated country than it is today," a country with less individual and economic gain and a country with substantial staff sortages within the branches of tourism and care.[4] In his message to International Day of Peace 2001 Pope John Paul II (1978—2005) also pointed towards this: "In the case of many civilizations, immigration has brought new growth and enrichment" or at least "have shown that they

zu Asyl, Religionswechsel und Seelsorge an Migranten in Österreich." In: *Festschrift für Johann Hirnsperger (KST)*. Eds. W. Rees, S. Haering. Berlin 2020 (in press).

[2] According to UNHCR Österreich: *Flucht und Asyl in Österreich. Die häufigsten Fragen und Antworten*. 5Wien (available online: http://www.unhcr.org/dach/wp-content/uploads/sites/27/2018/01/AT_UNHCR_Fragen-und-Antworten_2017.pdf — accessed 10.06.2020), asylum procedure is to decide "if an asylum seeker is granted asylum and if he can stay in Austria as a recognised refugee or if he receives a different form of protection (e.g. subsidiary protection). See also Republik Österreich. Bundesministerium für Inneres: *Asyl. Begriffsbestimmungen*. Available online: https://www.bmi.gv.at/301/Allgemeines/Begriffsbestimmungen/start.aspx (accessed 10.06.2020); Österreich.gv.at: *Asyl. Aktuelle Informationen zu Asyl, Asylverfahren, Familienverfahren, Ausweise und Dokumente, Rechtsberatung* [1.01.2020]. Available online: https://www.oesterreich.gv.at/themen/leben_in_oesterreich/asyl.html (accessed 10.06.2020); Diakonie: *Kleines Asyl-Lexikon*. Available online: https://diakonie.at/kleines-asyl-lexikon (accessed 10.06.2020).

[3] Karl Schiefermaier quoted from Evang.at: *Pfarrgemeinden leisten wertvolle Integrationsarbeit. Oberkirchenrat Schiefermair kritisiert „absurde" Glaubensprüfungen im Asylverfahren* [20.12.2017]. Available online: https://evang.at/oberkirchenrat-pfarrgemeinden-leisten-bei-fluechtlingen-wertvolle-integrationsarbeit [accessed 10.06.2020].

[4] I. Brickner: *Wie wäre Österreich ohne Migranten? Wie wäre Österreich heute, hätte man die Grenzen vor Jahrzehnten dichtgemacht? Die Vision eines Landes ohne Zuzug von außen* [1.09.2018]. Available online: https://derstandard.at/2000085768375/Wie-waere-Oesterreich-ohne-Migranten (accessed: 4.05.2019).

are able to live together, respecting each other and accepting or tolerating the diversity of customs."[5] However, also fear and anxiety arise, so that migration and flight become a safety issue.[6]

1. The Roman Catholic Church and refugees and migrants

Refugees and migrants have always been of particular concern to the Roman Catholic Church and its pastoral care.[7] Caritas and other organizations as well as individual Christians are heavily involved in the ministration to migrants and refugees.

The Second Vatican Council (1962—1965) explicitly turned towards "migration" as a phenomenon (cf. Art. 63; 65; 84; 85; 87 VatII GS), inculcated "reverence for man" (Art. 27 VatII GS) and demanded a "more humane and just condition of life" for all persons (Art. 29 VatII GS). The Community of nations and international organizations have been called "to alleviate the distressing conditions in which refugees dispersed throughout the world find themselves, or also to assist migrants and their families" (Art. 84 VatII GS). Therefore, particular responsibility is incurred by bishops, Bishops' Conferences (Art. 18 VatII CD), and laypersons (Art. 10 VatII AA). Thus, also *Catechism of the Catholic Church* binds the wealthy nations to "receive foreigners in need for safety and possibility of living which cannot be found in their home country" (Nr. 2242 KKK). The current legal canonical code (Codex Iuris Canonici 1983 (CIC/1983)) contains regulations regarding parish priests (c. 529 §1 CIC/1983) and

[5] John Paul II: *Nuntius ob diem paci dicatum: Diálogo entre las culturas para una civilización del amor y la paz* [8.12. 2000], Nr. 12. AAS 93 (2001), pp. 234—247. Available online: https://w2.vatican.va/content/john-paul-ii/de/messages/peace/documents/hf_jp-ii_mes_20001208_xxxiv-world-day-for-peace.html (accessed 10.06.2020); further messages at https://w2.vatican.va/content/john-paul-ii/de/messages/peace.index.html (accessed 10.06.2020); cf. Idem: *Epistula Apostolica „Novo millennio ineunte" Episcopis clero fidelibus Magni Iubilaei anni MM sub exitum* [6.01. 2001], Nr. 55. AAS 93 (2001), pp. 266—309. Available online: https://w2.vatican.va/content/john-paul-ii/la/apost_letters/2001/documents/hf_jp-ii_apl_20010106_novo-millennio-ineunte.html (accessed 10.06.2020).

[6] Cf. G. Hauser: "Migration — ein Sicherheitsproblem?" In: *Westliche, universelle oder christliche Werte? Menschenrechte, Migration, Friedenspolitik im Europa des 21. Jahrhunderts* (= Ethica Themen. Institut für Religion und Frieden). Eds. G. Marchl, C. Wagnsonner. Wien 2012, pp. 75—99.

[7] See W. Rees: *Migration* (Fn 1).

diocesan bishops (c. 383 §1 CIC/1983; cf. c. 192 §1 CCEO).[8] Furthermore, the local ordinary is obliged to nominate chaplains (*cappellani*) responsible for pastoral care regarding migrants and refuges (cf. c. 568 CIC/1983), which is reinforced by the *Directory for the Pastoral Ministry of Bishops* (22nd of February 2004).[9] In addition, Pontifical Council for the Pastoral Care of Migrants and Itinerant People tailored pastoral care with migrants to this situation due to the instruction *Erga migrantes caritas Christi* (EM) in May 2004.[10] During his first trip, which lead him to Lampedusa in 2013, Pope Francis emphasised that "advocacy of refugees and people in need will be one of the priorities of his papacy."[11] His deep concern for the vulnerable and especially for refugees and migrants, above all is expressed in his *Apostolic Letter "Evangelii Gaudium"* (24th of November 2013).[12] Moreover, in his *Post-synodal Apostolic Exhortation "Christus vivit"* (25th of March 2019) he admonishes young people, "not to play into the hands of those who would set them against other young people, newly arrived in their countries, and who would encourage them to view the latter as a threat, and not possessed of the same

[8] Cf. S.J. Lederhilger: "Seelsorge am Menschen unterwegs." In: HdbKathKR3, pp. 768—775, esp. pp. 771—775; V. De Paolis: "L'impegno della Chiesa nella pastorale della mobilità umana secondo il Codice di Diritto Canonico." *Seminarium* 25 (1985), pp. 130c—155c.; G. Katzinger: *Kirchenrechtliche Anmerkungen zur Migrantenseelsorge in einer globalisierten Welt*. In: *Recht — Bürge der Freiheit. Festschrift für Johannes Mühlsteiger SJ zum 80. Geburtstag* (= KST 51). Eds. K. Breitsching, W. Rees. Berlin 2006, pp. 787—826, here pp. 807—813.

[9] Cf. Congregatio pro Episcopis: *Direttorio per il Ministero pastorale dei Vescovi „Apostolorum successors*." Città del Vaticano 2004, Nr. 206a and b. Available online: http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20040222_apostolorum-successores_en.html (accessed 10.06.2020).

[10] Cf. Pontificium Consilium de Spirituali Migrantium atque Itinerantium Cura: *Instruktion „Erga migrantes caritas Christi*" (3 May 2004). AAS 96 (2004), pp. 762—822. Available online: http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/rc_pc_migrants_doc_20040514_erga-migrantes-caritas-christi_ge.html (accessed 10.06.2020); G. Katzinger: *Anmerkungen* (Fn 8), pp. 813—825.

[11] Cf. Vatican News: *Vor fünf Jahren: Franziskus bei Migranten auf Lampedusa. Es war die erste Reise als Papst überhaupt: Vor genau fünf Jahren besuchte Franziskus Migranten auf der Insel Lampedusa vor Sizilien. Und warf einen Kranz ins Meer, zum Gedenken an alle während der Überfahrt nach Europa Verstorbenen* [6.07.2018], https://www.vaticannews.va/de/papst/news/2018—07/franziskus-papst-besuch-fluechtlinge-lampedusa-migranten.html (accessed 10.06.2020).

[12] Cf. Francis: *Adhortatio Apostolica „Evangelii gaudium" Episcopis, Presbyteris ac diaconis viris et mulieribus consecratis omnibusque christifidelibus laicis de evangelio nuntiando nostra aetate* [24.11.2013]. AAS 105 (2013), pp. 1019—1137. Available online: http://w2.vatican.va/content/francesco/de/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html (accessed 10.06.2020).

inalienable dignity as every other human being."[13] Within the current reform of the Curia,[14] Vatican established the Dicastery for Promoting Integral Human Development on 1st of July 2017. According to *Motu Proprio "Humanam progressionem"* (31st of December 2016), this dicastery "will be competent particularly in issues regarding migrants, those in need, the sick, the excluded and marginalised, the imprisoned and the unemployed, as well as victims of armed conflicts, natural disasters, and all forms of slavery and torture."[15] As Tobias Keßler mentions, the incorporation of different Vatican authorities (e.g. the Pontifical Council for the Pastoral Care of Migrants and Itinerate People) within this superagency is questionable as it "counteracts" growing significance of migration in the process of globalisation. Although, Pope Francis "does not tire of emphasizing the needs of refugees and migrants and of advocating for them," this superagency "causes certain insecurities regarding the Catholic Church's future commitment concerning the importance of flight and migration."[16]

[13] Francis: *Nachsynodales Apostolisches Schreiben „Christus vivit" an die jungen Menschen und an das ganze Volk Gottes* [25.03.2019], Nr. 94. Available online: http://w2.vatican.va/content/francesco/de/apost_exhortations/documents/papa-francesco_esortazione-ap_20190325_christus-vivit.html (accessed 10.06.2020).

[14] On the reform of the Curia, see W. Rees: "Reformen in der römisch-katholischen Kirche. Kirchenrechtliche Neuerungen und Visionen von Papst Franziskus." ÖARR 64 (2017), pp. 410—427 (= Herbert Kalb zum 60. Geburtstag).

[15] Francis: *Litterae Apostolicae Motu Proprio datae "Humanam Progressionem" quibus Dicasterium ad integram humanam progressionem fovendam constituitur* [17.08.2016]. AAS 108 (2016), p. 968. Available online: https://w2.vatican.va/content/francesco/la/motu_proprio/documents/papa-francesco-motu-proprio_20160817_humanam-progressionem.html (accessed 10.06.2020);

see also Idem: *Statuto del Dicasterio per il Servizio dello sviluppo umano integrale* (17.08.2016). AAS 108 (2016), pp. 969—972. Available online:

http://w2.vatican.va/content/francesco/it/motu_proprio/documents/papa-francesco_20160817_statuto-dicastero-servizio-sviluppo-umano-integrale.html (accessed 10.06.2020). Art. 142—153 of *Pastor bonus* ceased to be in force. On current regulations see John Paul II: *Constitutio Apostolica "Pastor Bonus" de Romana Curia* [28.06.1988], Nr. 149—151. AAS 80 (1988), pp. 841—912, here pp. 899—900. Available online: http://w2.vatican.va/content/john-paul-ii/la/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-index.html (accessed 10.06.2020).

[16] T. Kessler: *Kurienreform. Die Zusammenführung verschiedener Dikasterien betrifft auch die Migrantenseelsorge*. Available online: https://iwm.sankt-georgen.de/kurienreform-betrifft-auch-migrantenseelsorge (accessed 10.06.2020).

2. On the situation of refugees and migrants in Austria

"Austria has always been a country of immigration."[17] Moreover, the asylum law of the Austrian Republic is based on international, European and national state law.

2.1. Legal basis in Austria

In Austria foreigners have three options to claim the right of permanent residence: EU-/EEA-citizens and their relatives receive the right of permanent residence after five years of legal residence[18] and third-country-nationals receive it by residence permit,[19] while persons qualified for asylum first receive a temporary residence permit valid for three years before they receive an unlimited right of permanent residence.[20] As far as international law is concerned, Austria pledges itself to grant asylum and provide cover to those people who left their home country for reasons defined either in Geneva Refugee Convention (GRC, 28th of July 1951) or in New

[17] L. Vencser: "Der pastorale Dienst für Migranten/Migrantinnen — Muttersprachliche Seelsorge." In: *Migration und Integration: Pastorale Herausforderungen und Chancen*. Eds. W. Krieger, B. Sieberer. Linz 2013, pp. 54—75; esp. pp. 59—61, here p. 59.

[18] Cf. *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance)*. Available online: https://eur-lex.europa.eu/legal-content/DE/ALL/?uri=CELEX%3A32004L0038 (accessed 10.06.2020); *Bundesgesetz über die religiöse Kindererziehung 1985, §5*. In: BGBI. Nr. 155/1985. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004242 (accessed 10.06.2020).

[19] Cf. §§ 41—46 NAG (Fn 18).

[20] *Novelle „Asyl auf Zeit"* (in force since June 2016); on this: Kurier: *Regierung beschließt „Asyl auf Zeit". ÖVP zufrieden: Österreich habe nun eines der schärfsten Asylgesetze in ganz Europa* [26.01.2016]. Available online: https://kurier.at/politik/inland/regierung-beschliesst-asyl-auf-zeit/177.262.265 (accessed: 10.02.2020).

York Protocol relating to the status of refugees (31st of January 1967).[21] [22] Article 33 GRC prohibits expulsion and allocation on the part of the host country in cases where refugee's life or freedom are endangered. European Convention on Human Rights (ECHR, 4th of November 1950),[23] which in Austria has constitutional rank by Federal Constitutional Law (BGBI 1964/59), does not mention flight or asylum directly, though it grants right to life (Art. 2 ECHR). Furthermore, it contains prohibition of torture (Art. 3 ECHR) and right to privacy and family life (Art. 8 ECHR). Article 18 of the Charter of Fundamental Rights of the European Union (hereafter: the Charter) appoints the right to asylum.[24] The Treaty on the Functioning of the European Union demands common asylum policy in Europe.[25] Moreover, the European Council implemented numerous regulations and directives realised by the Republic of Austria, for instance, the still disputed Dublin III Regulation ((VO/EU) 604/2013). This regulation contains criteria and procedures on the provision of the respective EU member state, which is responsible for asylum applications, whereby the competence of member states is defined.[26]

In accordance with Article 10(1) B-VG, in Austria the federal government is responsible for legislation and implementation concerning regu-

[21] Cf. UNHCR: *Convention relating to the status of refugees and Protocol relating to the status of refugees*. Available online: https://www.unhcr.org/3b66c2aa10.html (accessed 10.06.2020); concerning Austria: BGBl. Nr. 55/1955 und BGBl. Nr. 78/1974. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005235 (accessed 10.06.2020) and https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005394 (accessed 10.06.2020).

[22] As Ralf Geisler: "Art. Asyl, Asylrecht (Th)." In: EvStLex9, Sp. 122—126, here Sp. 125, mentions there were only a few countries with a "subjective legal claim to asylum (as in Germany, where the right of political asylum is a fundamental right)."

[23] Cf. *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* [4.11.1950]. Available online: https://www.humanrights.ch/en/standards/ce-treaties/echr/ (accessed 10.06.2020); für Österreich BGBl. Nr. 210/1958. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000308 (accessed 10.06.2020).

[24] *Charter of Fundamental Rights of the European Union*. Available online: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12012P%2FTXT (accessed 10.06.2020).

[25] Cf. *Treaty on the Functioning of the European Union*. Available online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (accessed 10.06.2020).

[26] Cf. *Regulation (EU)NO 604/2013 of the European parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*. Available online: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF (accessed 10.06.2020).

lating and monitoring the entrance and leaving of federal territory, in addition to being in charge of deportation and surrender. According to Article 15a B-VG, the federal government is also "responsible for supplying asylum seekers during the procedure. If the asylum procedure is approved, the federal provinces take over responsibility, which means that they have to take care for housing and supplying of the asylum seekers. Unaccompanied minors and Dublin-cases remain in federal minimum guarantee (*Bundesbetreuung*). Federal law on asylum (Asylgesetzt 2005 — AsylG 2005) (BGBI. I Nr. 100/2005)[27] specifies conditions and procedure of awarding and withdrawal of international protection. The Austrian Asylum Court has been responsible for issues of asylum from 1st of July 2008 until 31st of December 2013.[28] In the course of the amendment of administrative jurisdiction 2012 this Court was merged with the Federal Administrative Court as of 1st of January 2014. As the Federal Ministry for the Interior emphasises, persons in need are granted "a fair asylum procedure, which complies to the rule of law and adheres the relevant European and International regulations."[29]

2.2. Implementation of asylum procedures and numbers

Since 1st of January 2014 the *Bundesamt für Fremdenwesen und Asyl* (BFA) is responsible for the "implementation of first-instance asylum procedures along with residence permits for reasons to consider." While visa processes, rejections, monitoring etc. are still exercised by immigration

[27] Cf. *Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird, ein Asylgesetz 2005, ein Fremdenpolizeigesetz 2005 und ein Niederlassungs- und Aufenthaltsgesetz erlassen, das Bundesbetreuungsgesetz, das Personenstandsgesetz, das Bundesgesetz über den unabhängigen Bundesasylsenat, das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991, das Sicherheitspolizeigesetz, das Gebührengesetz 1957, das Familienlastenausgleichsgesetz 1967, das Kinderbetreuungsgeldgesetz und das Tilgungsgesetz 1972 geändert werden sowie das Fremdengesetz 1997 aufgehoben wird (Fremdenrechtspaket 2005).* In: BGBl. I Nr. 100/2005. Available online: https://www.ris.bka.gv.at/eli/bgbl/I/2005/100 (accessed 10.06.2020).

[28] The legal basis was Article 129c to 129f B-VG and the Asylgerichtshofgesetz. Cf. *Bundesgesetz über den Asylgerichtshof (Asylgerichtshofgesetz — AsylGHG).* In: BGBl. I Nr. 4/2008. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20005660&FassungVom=2013—12—31 (accessed 10.06.2020).

[29] Republik Österreich. Bundesministerium für Inneres: *Asyl. Begriffsbestimmungen* (Fn 2), Genfer Flüchtlingskonvention (GFK).

policing, "coordination measures in the field of voluntary and compulsory return" also fall into the competence of BFA.[30]

Due to legislative change in 2016 (*Asyl auf Zeit*), persons with refugee status in the sense of the definition according to GRC (entitled to asylum, convention-refugee or recognised refugee) are granted legal residence for at least three years before they receive a permit to stay in Austria. Provided that the applicant does not have a relevant reason for flight corresponding to GRC, he or she cannot be recognised as refugee. However, if there is a "relevant danger" of breaching Article 2 and 3 of the ECHR[31] by sending a person back to their home country, he or she receives the status of subsidiary protection. If this is not the case, legitimacy of expulsion from Austria according to Article 8 of ECHR has to be considered. Nevertheless, expulsion is illegal, if there is another right of residence according to federal law (Niederlassungs- und Aufenthaltsgesetz-NAG) and according to European law or if expulsion would infringe upon Article 8 of the ECHR. Klaus Burger mentions expulsion and deportation ban enshrined within the "protection of human dignity."[32] Provided that Article 8 of the ECHR applies and if the asylum seeker is not recognised as refugee or as a person with subsidiary protection, he or she is to be deported to his or her home country. If the deported person does not fulfill this obligation, he or she will be brought out of the country ("zwangsweise Außerlandesbringung").[33] The asylum seeker is allowed to lodge a complaint against a negative decision at the Federal Administrative Court (BVwG). In turn, he or she is allowed to lodge an appeal against the decision of the Federal Administrative Court at Higher Administrative Court (VwGH) or to lodge a complaint to constitutional tribunal (VfgH).

Similar to Germany, the Republic of Austria has incurred a large influx of refugees and migrants during the recent years.[34] In 2017, 1.97 million

[30] Cf. Bundesamt für Fremdenwesen und Asyl: *Asylverfahren*. Wien o.J. Available online: https://www.bfa.gv.at/bmi_documents/1954.pdf (accessed 10.02.2020); see also Republik Österreich. Bundesministerium für Inneres: *Asyl. Begriffsbestimmungen* (Fn 2).

[31] Art. 2 ECHR bzw. 6. and 13. ZProtEMRK grant protection against death penalty or extralegal homicide. Article 3 of the ECHR protects against torture, inhumane or humiliating treatment or penalty. Available online: http://www.emrk.at/emrk.htm (accessed 10.06.2020).

[32] K. Burger: *Das Verfassungsprinzip der Menschenwürde in Österreich* (= Europäische Hochschulschriften, Reihe II Rechtswissenschaft, Bd. 3429). Frankfurt a.M. u.a. 2002, p. 317; see also ibidem, p. 318.

[33] Bundesamt für Fremdenwesen und Asyl: *Asylverfahren* (Fn 30), p. 22.

[34] According to Republik Österreich. Bundesministerium für Inneres: *Asyl. Begriffsbestimmungen* (Fn 2) migrants are "people who wander from one residence or country to another in order to live and work there or to enhance their live conditions. They differ

people with migrant background (23%) lived in Austria, which is 72,400 people more than in 2016 (2015: 1.81 million).[35] According to Statistik Austria, 154,700 people immigrated (2016: 174,300; 2015: 214,400); 15,400 of those were returning Austrians and 86,600 were people from the EU/EFTA. As much as 34% of the immigrants came from third countries. Similarly to 2014 (28,064) there were 24,735 asylum applications in 2017, which is significantly fewer than in 2015 (88,340) and 2016 (42,285). Almost 40% of the applications were lodged by women (2016: 22,307; 2015: 14,413) and more than 5% came from unaccompanied under- 18-years-olds (1,352).[36]

The numbers of persons who were granted asylum in 2017 was 21,767 (2016: 22,307; 2015: 14,413)[37] and most of them were Syrian citizens (11,827). In addition, 7,081 (2016: 3.699) persons received a limited right of residence (with subsidiary protection). Followed by Germany, Austria has the largest number of positive decisions (237 per 100,000 inhabitants) in Europe. Apart from Eastern European states, France, Italy, and Spain are far below that.[38] As a "dissuasive measure", Austria implemented a "maximum for asylum procedures", which accounted 35,000 in 2017 but has been considerably undercut with about 20,000 approved procedures.[39]

Most recently, the number of asylum applications has been similar to that in 2010 (11,012) and 2011 (14,416). In 2018, the number of migrants (146,900) and asylum applications (13,476) was significantly below the previous year's level. Furthermore, Austria granted asylum to 14,696 persons, which is a decrease from 2017 (21,767) by an amount of almost a third. Most of these negative decisions were given to Afghan citizens.

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from refugees in not being haunted or prosecuted, but leaving their home country voluntarily and having the opportunity to go back without being suppressed."

[35] Cf. in detail: Statistik Austria: *Migration & Integration. Zahlen. Daten. Indikatoren 2018*. Wien 2018, p. 9. Available online: https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Integrationsbericht_2018/Statistisches_Jahrbuch_2018.pdf (accessed 10.06.2020).

[36] Cf. ibidem, pp. 8, 36. An application for asylum has to be filed directly and in person in an Austrian admission district or at a police station.

[37] According to Republik Österreich. Bundesministerium für Inneres: *Asyl. Begriffsbestimmungen* (Fn 2), asylum seekers are "people who search for asylum outside of their home country. Their asylum process is not completed yet. If they receive a positive message, their status changes from asylum seeker towards recognized refugee."

[38] Cf. Statistik Austria: *Migration & Integration. Zahlen. Daten. Indikatoren 2018* (Fn 35), p. 38.

[39] Cf. ORF: *Hunderte Muslime wechseln zum Christentum. Die Flüchtlingskrise beschert der katholischen Kirche in Österreich eine Rekordzahl an Menschen, die vom Islam zum Christentum wechseln. Allein in Wien haben sich 260 Menschen aus 15 Nationen taufen lassen* [13.01.2018]. Available online: https://religion.orf.at/stories/2889262/ (accessed 10.06.2020).

4,191 persons (2017: 7,081) especially from Afghanistan (2,062), Somalia (665), Iraq (536), and Syria (414) received a limited right of residence (with subsidiary protection).[40] In 2019 the number of asylum applications totaled 12,886.[41]

3. The Austrian Catholic Church and migration

As stated by Làzló Vencer, the Austrian Catholic Church strived to "offer special pastoral care to migrants and refugees" after the Second World War and in the years thereafter.[42]

3.1. Statements of the Austrian Bishops' Conference

Currently, the foreign-language pastoral care of the Austrian Roman Catholic Church conforms with the relevant pastoral and legal directives of the Austrian Bishops' Conference (6th of November 1997)[43] and with the directives for ministration of National Director for foreign-language communities in the area of Austrian Bishops' Conference (6th of November 1997).[44] Within the Austrian Bishops' Conference, Bishop Ägidius J.

[40] See in detail Statistik Austria: *Migration & Integration. Zahlen. Daten. Indikatoren 2019* (fn 1), pp. 36—41.

[41] See at https://www.migration-infografik.at/asyl/at_asylstatistiken_2019/ (accessed 10.06.2020); for numbers for 2020, see https://www.migration-infografik.at/asyl/at_asylstatistiken_2020 (accessed 10.06.2020). https://de.statista.com/statistik/daten/studie/293189/umfrage/asylantraege-in-oesterreich (accessed 10.06.2020).

[42] L. Vencser: *Der pastorale Dienst für Migranten/Migrantinnen — Muttersprachliche Seelsorge* (Fn 17), p. 61.

[43] Österreichische Bischofskonferenz: "Pastorale und rechtliche Richtlinien für die fremdsprachige Seelsorge in Österreich." In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 22 vom 20. Mai 1998*, Nr. II.1, pp. 4—8. Available online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/fremdsprachig.html (accessed 10.06.2020); https://www.bischofskonferenz.at/dl/klrsJKJKKoKKlJqx4nJK/Amtsblatt_der_Bischofskonferenz_Nr._22—20.05.1998.pdf (accessed 10.06.2020); https://www.bischofskonferenz.at/pages/glossary_list.siteswift?s=3804&t=bbd0a0a9e0bef15c&ts=1591176337 (accessed 10.06.2020).

[44] Regarding Austria, see: Österreichische Bischofskonferenz: "Pastorale und rechtliche Richtlinien für die fremdsprachige Seelsorge in Österreich." In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 22 vom 20. Mai 1998*, Nr. II.1, pp. 8—9. Available

Zifkovics is responsible for the resort "Flight, Migration and Integration" and therefore he is accountable for pastoral care for migrants and foreign-language pastoral care.

Austrian Bishops' Conference (herafter: ABC) commented on questions of flight and migration in various statements.[45] On the 21st of April 2016, the ABC vehemently rejected the increase of asylum, which has been suggested by the federal government,[46] and on the 5th of October 2016 they spoke out against an asylum emergency decree.[47] As ABC's General Secretary Peter Schipka emphasised on the 12th of April 2019, asylum seekers "should be able to be engaged in a paid and useful activity voluntarily during the ongoing procedure while the determination of maximum financial compensation for such activities of public utility should be avoided."[48] Within a statement on the law change of asylum system scheduled for the 12th of April 2019, the ABC resolutely demanded "legally valuable and independent asylum legal counsel, which 'explicitly sides with the asylum seeker'."[49] Cardinal Christoph Schönborn even

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online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/nationaldirektor.html (accessed 10.06.2020); https://www.bischofskonferenz.at/dl/klrsJKJK-KoKKlJqx4nJK/Amtsblatt_der_Bischofskonferenz_Nr._22—20.05.1998.pdf (accessed 10.06.2020); Österreichische Bischofskonferenz: "Fremdsprachige Seelsorge." In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 61 vom 5. Februar 2014*. Nr. II.3, p. 11. Available online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/seelsorge_fremdsp.html (accessed 10.06.2020); see also L. Vencser: *Der pastorale Dienst für Migranten/Migrantinnen — Muttersprachliche Seelsorge* (Fn 17), pp. 61—67.

[45] Cf. Österreichische Bischofskonferenz: *Asyl und Migration*. Available online: https://www.bischofskonferenz.at/positionen/asyl (accessed 10.06.2020).

[46] See Österreichische Bischofskonferenz: *Bischofskonferenz lehnt geplante Asylverschärfung ab. Bischöfe kritisieren Gesetzesentwurf als negativen Paradigmenwechsel und nicht akzeptablen Eingriff in Grundrecht, der bestehendes Recht auf Asyl maßgeblich einschränkt — Warnung vor europaweiter Dynamik, die das Recht auf Asyl faktisch aushebelt* [22.04.2016]. Available online: https://www.bischofskonferenz.at/asyl/bischofskonferenz-lehnt-geplante-asylverschaerfungen-ab (accessed 10.06.2020).

[47] See Österreichische Bischofskonferenz: *Bischofskonferenz gegen Asylnotverordnung. Bischöfe orten keinen öffentlichen Notstand — Gegen Verschärfung des Asylrechts*. Available online: https://www.bischofskonferenz.at/asyl/bischofskonferenz-gegen-asylnotverordnung (accessed 10.06.2020); statement at https://www.bischofskonferenz.at/dl/rllNJKJKKMMmMJqx4KJK/2016_10_05_Bischofskonferenz_Stellungnahme_Asyl_Notverordnung_BMI.pdf (accessed 10.06.2020).

[48] Peter Schipka, quoted from Österreichische Bischofskonferenz: *Bischofskonferenz gegen Asylnotverordnung. Bischöfe orten keinen öffentlichen Notstand — Gegen Verschärfung des Asylrechts*. Available online: https://www.bischofskonferenz.at/asyl/bischofskonferenz-gegen-asyl-notverordnung (accessed 10.06.2020).

[49] See Österreichische Bischofskonferenz: *Bischofskonferenz fordert eine parteiische Rechtsberatung* [12.04.2019]. Available online: https://www.bischofskonferenz.at/125366/bischofskonferenz-fordert-parteiische-rechtsberatung (accessed 10.06.2020); text available for a download: https://www.bischofskonferenz.at/dl/lpLuJKJKkMLm-

described the asylum policy of the former Austrian federal government as "inhumane."[50]

In this context, questions concerning the request for baptism of refugees and migrants arose for the Austrian Bishops' Conference. As the figures of ABC's coordination office for catechesis and asylum show that 750 adults have been baptized in 2017, of whom "75% had a Muslim background."[51] For 2019 ,the Catholic Church expected 500 baptisms of persons of 14 or above.[52] Within the Protestant Church A.B. 209 asylum seekers were baptized in 2017.[53]

3.2. Access to a Church or religious community and converting from one religion to another

The freedom of joining a Church or religious community and converting from one religion or ideology to another is guaranteed by fundamental rights and self-evident to a free and democratic constitutional state. This fundamental right is based on religious and ideological neu-

mJqx4KJK/2019_04_12_BMI_BBU-Errichtungsgesetz_Stellungnahme_PDF.pdf (accessed 10.06.2020).

[50] Cf. Die Presse: *„Unmenschlich": Schönborn rechnet mit Asylpolitik der Regierung ab. In der ORF-„Pressestunde" übt Kardinal Christoph Schönborn scharfe Kritik an der Regierung: „Eine kleine Gruppe von Menschen wird offensichtlich systematisch in ein schiefes Licht gerückt"* [14.04.2019]. Available online: https://diepresse.com/home/panorama/religion/5612554/Unmenschlich_Schoenborn-rechnet-mit-Asylpolitik-der-Regierung-ab (accessed 10.06.2020); on the programme of the new government see Die Neue Volkspartei/die Grünen — die Grüne Alternative: *Aus Verantwortung für Österreich. Regierungsprogramm 2020—2024*, Nr. 04. Available online: https://www.dieneuevolkspartei.at/Download/Regierungsprogramm_2020.pdf (accessed 10.06.2020).

[51] Erzdiözese Wien: *Österreichweit gab es 2017 bis zu 750 Erwachsenentaufen. Hauptgrund für die Zunahme von Taufbewerbern — sogenannten „Katechumenen" — aus muslimischen Ländern, die im Zuge der Flüchtlingsbewegung nach Österreich kamen und Christen werden wollen* [15.01.2018]. Available online: https://www.erzdioezese-wien.at/site/home/nachrichten/article/62769.html (accessed 10.06.2020). In 2014 the ABC's statistics counted 305 baptisms of adults, in 2015 there were 322 and 2016 there were 433 baptisms of adults. On details and current numbers see: https://www.katholisch.at/statistik (accessed 10.06.2020).

[52] Cf. Katholische Kirche Österreich: *Weiterhin hohe Zahl an katholischen Erwachsenentaufen. Kirche rechnet für 2019 mit 500 Taufen von Personen ab 14 Jahren, davon über 200 aus der Erzdiözese Wien* [8.03.2019]. Available online: https://www.katholisch.at/aktuelles/124945/weiterhin-hohe-zahl-an-katholischen-erwachsenentaufen (accessed 10.06.2020).

[53] Evang.at: *Pfarrgemeinden leisten wertvolle Integrationsarbeit* (fn 3).

trality and the right of religious freedom. The Austrian Republic grants "full freedom of religious and conscience" (art. 14 abs. 1 StGG),[54] while it leaves the regulation of membership to a particular Church or religious community in sense of an internal affair (cf. art. 15 StGG).[55] Paragraph 3 of the legal act of the 20th of May 1874 concerning legal recognition of religious communities (RGBI 1874/68; AnerkennungsG) explicitly assigns "the questions of belonging and accessing to a recognised religious community to their particular constitutions."[56] According to §4 abs. 1 l. 4 of the federal law on legal personality of religious denominations (in German: BekGG)[57] the membership in recognised Churches and religious communities and the membership in officially registered religious denominations[58] are to be settled internally. As Herbert Kalb, Richard Potz and Brigitte Schinkele mention, hence, "the decision regarding the question if a person joining a religious community complies with the conditions is deprived of governmentally judgement."[59] Regulations of a particular Church or religious community, in turn, are binding for the secular sector. The religious conversion of adolescents is regulated by federal law on religious parenting.[60] Article 9 abs. 1 ECHR[61] (which pertains to Austrian

[54] *Staatsgrundgesetz vom 21. December 1867 über die allgemeinen Rechte der Staatsbürger für die im Reichrathe vertretenen Königreiche und Länder*, Art. 14 Abs. 1. In: RGBl. Nr. 142/1867. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000006 (accessed 10.06.2020).

[55] *Staatsgrundgesetz vom 21. December 1867* (Fn 54), Article 15.

[56] *Gesetz vom 20. Mai 1874, betreffend die gesetzliche Anerkennung von Religionsgesellschaften (AnerkennungsG)*. In: RGBl. Nr. 68/1874. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10009173 (accessed 10.06.2020). Liste der Gesetzlich anerkannten Kirchen und Religionsgesellschaften in der Republik Österreich to be found at: https://www.bundeskanzleramt.gv.at/kirchen-und-religionsgemeinschaften (accessed 10.06.2020).

[57] On the particular state-registered religious communities in Austria see https://www.bundeskanzleramt.gv.at/religiose-bekenntnisgemeinschaften (accessed 10.06.2020). Available online:

https://www.oesterreich.gv.at/themen/leben_in_oesterreich/kirchenein___austritt_und_religionen/3/Seite.820016.html (accessed 10.06.2020); J. Bair,W. Rees: *Staatlich eingetragene religiöse Bekenntnisgemeinschaften in Österreich* (= Religion und Staat im Brennpunkt 3). Innsbruck 2018.

[58] Cf. *Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*. In: BGBl. I Nr. 19/1998. Available online: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010098 (accessed 10.06.2020).

[59] Cf. H. Kalb, R. Potz, B. Schinkele: *Religionsrecht*. Wien 2003.

[60] Cf. *Bundesgesetz über die religiöse Kindererziehung 1985, §5*. In: BGBI. Nr. 155/1985.

[61] Cf. *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* (FN 23), Art. 9 Abs. 1.

federal constitution[62]?) and Article 18 UDHR both guarantee "the freedom of individuals to change religions or ideology" explicitly.[63]

3.3. Concerning the question of the Catholic Church's necessity of salvation

According to Second Vatican Council all people "are bound to seek the truth, especially in what concerns God and His Church, and to embrace the truth they come to know, and to hold fast to it" (art. 1 abs. 2 VatII DH). The council concludes, that "whosoever, therefore, knowing that the Catholic Church was made necessary by Christ, would refuse to enter or to remain in it, could not be saved" (art. 14 abs. 1 VatII LG; cf. art. 7 abs. 1 VatII AG). Thus, belonging to the Catholic Church and therefore also the baptism seems to be necessary when it comes to salvation. Baptism incorporates into the Church of Jesus Christ and accordingly into the community of all baptized people, but it also incorporates into a particular church or church community. In case of adult baptism, a catechumenate is required (cf. c. 851, 1° CIC/1983; cf. art. 64 VatII SC and art. 14 VatII AG), which has to be specified by the actual bishop's conference (cf. c. 788 §3 CIC/1983; c. 587 § 3 CCEO). In case of infant baptism, parents and godfather/godmother "are to be instructed properly on the meaning of this sacrament and the obligations attached to it" (c. 851, 2° CIC/1983; cf. c. 686 § 2 CCEO), e.g. by conversation.[64]

3.4. Regulations concerning catechumenate

In Austria the catechumenate of adults conforms to ABC's order from the 6th of November 1992,[65] which is binding to candidates aged 14 or

[62] According to V-VG (BGBI. Nr. 59/1964) the European Human Rights Convention is constitutional in Austria. See: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000308 (accessed 10.06.2020).

[63] Cf. *Universal Declaration of Human Rights. Resolution 217 A (III)* [10.12.1948]. Available online: http://hrlibrary.umn.edu/instree/b1udhr.htm (accessed 10.06.2020).

[64] Cf. *Österreichische Bischofskonferenz*, Richtlinien für die Einführung eines Taufgesprächs mit den Eltern vor der Spendung der Taufe vom März 1971, u.a. in: Verordnungsblatt für die Diözese Innsbruck, 46. Jg., Nr. 6 vom 1. Juni 1971, Nr. 47, p. 34.

[65] Cf. Österreichische Bischofskonferenz: "Dekret über die Ordnung des Katechumenats can. 788 § 3 und can. 851, beschlossen am 6. November 1992. Recognitio durch

older (§1). Due to the increasing number of asylum seekers searching for baptism, the Austrian bishops decided to specify the regulations on catechumenate of asylum seekers in 2015 as they felt a need for "special attention and mentoring regarding this area."[66] When it comes to the catechumenate of asylum seekers, preparation takes "one year according to possibility"; if it is necessary, the preparation time "may take longer." The Austrian bishop's point out that — in line Austrian legal situation — "the desire for conversion to Christianity or a conversion already performed has to be taken into account for the asylum procedure if the change of religion caused the flight or if the conversion leads to the risk of being prosecuted in one's home country. Above all, this applies to the conversion of refugees coming from countries where Islam is the dominant religion." In the process the authorities have to ensure "that the conversion is not a mock one and results only from the scarcity of other reasons for asylum." Thus, the Church has to "verify the authenticity of the desire for baptism and she also has to pay attention to accurate implementation and sufficient duration of catechumenate." The Austrian bishop's point out that "an ongoing asylum procedure may also affect other family members." "If there is a desire for conversion of the whole family, the question remains if this corresponds to the will of all members. Adolescents who reached the age of 14 have to decide on their own and even young children must not be baptized or involved in catechumenate against their declared will."

The Austrian bishops emphasise that "discreetness within the whole process of baptism is vital to some asylum seekers." Furthermore, "the contact with Christians from concrete communities should be supported, so that the integration into the churchly community can take place." This may also be a way "to find appropriate sponsors." It is required that the concrete parishes have to be made ready for the inclusion of such persons." Even after the further support of baptism is required.

die Kongregation für die Bischöfe am 14. Januar 1994." In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 11 vom 28. April 1994*, Nr. II.2, pp. 3—4. Available online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/katechumenat.html (accessed 10.06.2020); see Generalsekretariat der Österreichischen Bischofskonferenz (Ed.): *Katechumenat. Pastorale Orientierung* (= Die österreichischen Bischöfe 14). Wien 2016. Available online: http://www.bischofskonferenz.at/dl/NpLLJKJKKoolOJqx4KlJK/Heft14_Katechumenat.pdf (accessed 10.06.2020).

[66] Österreichische Bischofskonferenz: "Richtlinien der österreichischen Bischöfe zum Katechumenat von Asylbewerbern." In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 65 vom 20. April 2015*, Nr. II.1, pp. 9—14. Available online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/katechumenat-asylwerber.html (accessed 10.06.2020).

When it comes to Muslims, the Austrian bishops request special clarity concerning particular content of faith, whereby "the belief in God as the One and Triune One, in Jesus Christ as true human being and true God, the role of the Mother of God within the salvation event, death and resurrection of Jesus, the forgiveness of sin, the Christian concept of humanity and the thereto related position of man and woman" are mentioned expressly. These firm regulations may be seen as discriminating; but at least they are necessary, as admitting persons to baptism, who are assessed as unreliable within the authority's procedure may lead to incredibility of the Church or the catechumenate in Austria."

With a view to adult catechumens the matrimonial situation has to be taken into account, which means that the canonical validity as well as opportunities to remediate the current marriage should be checked. From a pastoral point of view, it may be reasonable to permanent asylum seekers at a later time in order to spend the meantime for further catechumenate.

Just as the ABC did, also the Theologische Ausschuss der Generalsynode der Evangelischen Kirche A. und H.B. in Österreich published a guidance for baptism requests, baptism preparation lessons and baptism of asylum seekers in October 2014.[67]

4. On the question of Church asylum

In connection with flight, migration, and state legislation in Austria,[68] church asylum has to be considered more detailed. Just recently there are various cases of parishes accommodating refugees in order to counteract deportation and to cause a reopening of the asylum proceeding or an examination of government action.[69]

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[67] Theologischer Ausschuss der Generalsynode der Evangelischen Kirche a. und h.b. in Österreich: *Handreichung für Taufanfragen, Taufunterricht und Taufe von Asylsuchenden vom Oktober 2014*. Available online: http://www.okr-evang.at/handreichung_Taufe_Asylsuchende/dokumente/Richtlinien_Generalsynode.pdf (accessed 10.06.2020).

[68] Cf. Die Presse: *Kurz zu UNO-Migrationsbericht: „Lasse es nicht zu, Österreich schlechtzureden". Das hiesige Asylverfahren weise Mängel auf, kritisiert das UN-Menschenrechtshochkommissariat. Kanzler Kurz weist die Vorwürfe zurück und fordert im Gegenzug eine Prüfung aller übrigen EU-Staate*n [9.05.2019]. Available online: https://www.diepresse.com/5625131/kurz-zu-uno-migrationsbericht-lasse-es-nicht-zu-osterreich-schlechtzureden (accessed 10.06.2020).

[69] Cf. Die Presse: *Salzburger Lehrling nach Kirchenasyl in Schubhaft. Nach zwei negativen Asylbescheiden wurde der 23-jährige Ali Wajid in Schubhaft genommen. Der Men-*

Christianity assumed the "institution of religious asylum from ancient religions" and — after its establishment as state religion in 380 AC — "enshrined it for over 1,500 years within European legal culture."[70] From the beginning of modernity church asylum was increasingly seen as hindrance to state judicature, so that it has been repressed due to the separation of state and church and, until now, it is no longer accepted.[71]

The CIC of 1917 (CIC/1917) granted an asylum right to the Church as well as it sanctioned breaches (cf. cc. 1179; 1160; 2325 CIC/1917). This right was not explicitly included into canonical law of 1983 (CIC/1983). Some canonical legal experts state that the Church waived an own asylum right, while others tried to proof the continued existence of this right. As Stephen Hearing mentions, the Roman Catholic Church "did not claim the holding of a ecclesiastical exception from state monopoly any longer."[72] Nevertheless, the Church may "expect that the public authority pays appropriate regard to the sanctity and to the special character of ecclesiastical places, so that they act in a respectful and gentle way, if they operate within this area."[73] Actions happening at a holy place, that "hurt or upset the faithful in a serious way" may lead to the desecration of this place (cf. c. 1211 CIC/1983). The right to "always and everywhere […] announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it" (c. 747 §2 CIC/1983; cf. c. 595 §2 CCEO) remains with the Church.

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schenrechtsaktivist ist nach wie vor um eine freiwillige Ausreise bemüht [24.01.2019]. Available online: https://diepresse.com/home/panorama/oesterreich/5568110/Salzburger-Lehrling-nach-Kirchenasyl-in-Schubhaft (accessed 10.06.2020); Katholische Kirche Österreich: *Erzdiözese Salzburg stützt „Gewissensentscheidung" des Unkener Pfarrers, einen von Abschiebung bedrohten afghanischen Kochlehrling zu beherbergen* [12.11.2019]. Available online: https://www.katholisch.at/aktuelles/127874/kirchenasyl-in-unken-kirche-fuer-vernunft-und-barmherzigkeit (accessed 10.06.2020).

[70] M. Pulte: *Grundfragen des Staatskirchen- und Religionsrechts* (= Mainzer Beiträge zu Kirchen- und Religionsrecht 1). Würzburg 2016.

[71] Regarding the abrogation in Austria see especially M. Babo: *Kirchenasyl — Kirchenhikesie. Zur Relevanz eines historischen Modells im Hinblick auf das Asylrecht der Bundesrepublik Deutschland* (= Studien der Moraltheologie 20). Münster—Hamburg—London 2003, pp. 125—129.

[72] S. Haering: "Kirche und Staat in der Sicht des Zweiten Vatikanischen Konzils und die Auswirkungen im Codex Iuris Canonici. Zur modernen Antwort der katholischen Kirche auf eine jederzeit aktuelle Frage." In: *Ius canonicum in communione christifidelium. Festschrift 65. Geburtstag von Heribert Hallermann* (= KStKR 23). Eds. M. Graulich, T. Meckel, M. Pulte. Paderborn 2016, pp. 83—98, here p. 91.

[73] S. Haering: *Kirche und Staat in der Sicht des Zweiten Vatikanischen Konzils* (Fn 72), pp. 91—92.

Church asylum "assumes that federal order submits itself to the bids of religion or at least that federal order grant religion a legal vacuum."[74] As Ralf Geißler emphasises, modern sovereign states are not able to tolerate varying law nor legal vacuum."[75] Christian Traulsen rightly states that "a parish's accommodation of refugees does not change their legal position as well as it does not prevent the state to give effects to its rights."[76] The granting of church asylum is not covered by law in Austria.[77] Church asylum contradicts the existing separation of state and church. Even though "the primary motivation for acting may be reasoned by Christian's duty to support rather than it is motivated by disagreeing to federal law," Brigitte Schinkele mentions "that church asylum comes close to the legal figure of 'civil disobedience'."[78] Thus every person has to act according to his or her conscience while taking the risk of legal consequences.

5. Perspectives

As Statistik Austria stated in 2018, "41% of questioned Austrian assess integration of migrants as 'rather bad' and further 13% assess integration of migrants 'as very bad'. In contrast, there are merely 4% who assess integration as 'very good' and 42% as 'rather good'. When it comes to integration, pessimism prevails as more than 50% of the Austrian people are skeptical. In 2010, 68% of the questioned thought, that 'integration of migrants functions rather badly or very bad'. Till 2014 these pessimistic assessments decreased down to 51%. In 2015 and 2017 the mood became increasingly darker; about 60% assessed integration in Austria negatively. While in 2018 the negative assessments went down to 54%,[79] in 2019 the integration process was assessed 'rather bad' by 44%

[74] C. Traulsen: "Art. Kirchenasyl." In: *100 Begriffe aus dem Staatskirchenrecht*. Eds. H.M. Heinig, H. Munsonius. Tübingen 22015, pp. 105—107, here p. 106.

[75] R. Geisler: Art. Asyl, Asylrecht (Fn 22), p. 125.

[76] C. Traulsen: Art. Kirchenasyl (Fn 74), pp. 106—107.

[77] See Republik Österreich. Bundesministerium für Inneres: *Brief von Mag.a Johanna Mikl-Leitner an die Präsidentin des Nationalrates Mag.a Barbara Prammer vom 1. Juli 2011 (GZ: BMI-LR2220/0454-II/3/2011)*. Available online: https://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_08439/fname_226384.pdf (accessed 10.06.2020).

[78] B. Schinkele: "Gewissensgebot und Normativität des positiven Rechts. Überlegungen unter besonderer Berücksichtigung des so genannten »Kirchenasyls«." ÖARR 50 (2003), pp. 448—480, here p. 480.

[79] Statistik Austria: *Migration & Integration. Zahlen. Daten. Indikatoren 2018* (Fn 35), p. 92.

and ‘very bad’ by 14%. 3% experienced integrational processes as ‘very good’ and 39% as ‘rather good’.”[80] State and society are needed. Austria and Europe cannot repress or go over flight and migration. In the context of his first encyclical *Redemptor Hominis* (1979), John Paul II already emphasised that “the way of the Church” is the human being.[81] Therefore, refugees and migrants “must not be excluded.” “They must not be put into pigeonholes as foreigners, but they have the right to find a home in society and church.”[82] Wrong images and unjustified fears have to be shattered. The respective Bishop’s Conferences, the individual bishops and priests have a special responsibility, which also impacts parishes and every single Christian. As the ABC’s regulations show, baptism of adult asylum seekers demands special attention. The Austrian Bishop’s Conference has planned stronger involvement of lay people by enacting a bylaw (1st of February 2002) on courses of catechist-education (in German: *Lehrgang zur Ausbildung von Katechisten* (LAK)) with a special qualification to foreign-language catechumenate at the Philosophisch-Theologische Hochschule Heiligenkreuz in order to establish the position of catechists in Austria.[83]

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[80] See Statistik Austria: *Migration & Integration. Zahlen. Daten. Indikatoren 2019* (Fn 1), p. 94.

[81] John Paul II: *Litterae Encyclicae “Redemptor Hominis” ad Venerabiles Fratres in Episcopatu, ad Sacerdotes et Religiosas Familias, ad Ecclesiae filios et filias, necnon ad universos bonae voluntatis homines Pontificali eius ministerio ineunte* [4.03.1979], Nr. 14. AAS 71 (1979), pp. 257—324, here 285. Available online: https://w2.vatican.va/content/john-paul-ii/la/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis.html (accessed 10.06.2020).

[82] L. Vencser: *Der pastorale Dienst für Migranten/Migrantinnen — Muttersprachliche Seelsorge* (Fn 17), p. 55.

[83] Cf. Österreichische Bischofskonferenz: “Lehrgang zur Ausbildung von Katechisten (LAK) mit besonderer Befähigung für das fremdsprachige Katechumenat an der Philosophisch-Theologischen Hochschule Heiligenkreuz — Statut.” In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 32 vom 1. Februar 2002*, II.2, pp. 11—14. Available online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/katechisten.html (accessed 10.06.2020); see also https://www.hochschule-heiligenkreuz.at/willkommen/lak-katechistenkurs/ (accessed 10.06.2020); s. also Österreichische Bischofskonferenz: “Verlängerung des Statuts auf unbestimmte Zeit.” In: *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 44 vom 15. August 2007*, II.2, p. 16. Available online: https://www.uibk.ac.at/praktheol/kirchenrecht/teilkirchenrecht/oebiko/katechisten_2.html (accessed 10.06.2020).

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Successors". Città del Vaticano 2004. Available online: http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20040222_apostolorum-successores_en.html (accessed 10.06.2020).

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Wilhelm Rees

Aide pastorale aux migrants. Dispositions du droit canonique et religieux concernant l'asile et le changement de confession

Résumé

Les réfugiés et les migrants ont toujours fait l'objet d'une préoccupation particulière de l'Église catholique romaine et de ses activités pastorales. Même si l'afflux important de réfugiés en 2015 et 2016 en Autriche est terminé, la fuite et la migration y restent des sujets d'actualité. Cet article porte sur plusieurs questions : l'évolution historique des réglementations canoniques, la situation des réfugiés et des migrants en Autriche, les

bases juridiques, la mise en œuvre des procédures d'asile et des chiffres, les déclarations officielles de la Conférence épiscopale autrichienne, l'adhésion à l'Église ou à la communauté religieuse et la conversion, le problème de l'appartenance à l'Église catholique comme condition nécessaire au salut, les règlements sur le catéchuménat et sur l'asile ecclésiastique. L'auteur présente des chiffres, des données et des faits, il présente et analyse le statut canonique et juridique apportant des clarifications aux questions peu claires pour éventuellement aider dans leur étude plus approfondie.

Mots clés : réfugiés, migration, droit canonique, asile, République d'Autriche

Wilhelm Rees

Assistenza pastorale ai migranti. Disposizioni di diritto canonico e religioso in materia di asilo e di cambio di religione

Abstract

Rifugiati e migranti sono sempre stati oggetto di particolare interesse della Chiesa cattolica romana e delle sue attività pastorali. Anche se il grande afflusso di rifugiati del 2015 e 2016 in Austria è terminato, la fuga e la migrazione rimangono questioni di attualità. Questo articolo affronta diverse questioni: lo sviluppo storico delle norme canoniche, la situazione dei rifugiati e dei migranti in Austria, le basi legali, l'attuazione delle procedure di asilo e i numeri, le dichiarazioni ufficiali della Conferenza episcopale austriaca, l'adesione alla Chiesa o alla comunità religiosa e la conversione, il problema dell'appartenenza alla Chiesa cattolica come necessaria per la salvezza, le norme sul catecumenato e sull'asilo ecclesiastico. L'autore presenta cifre, dati e fatti, espone e analizza lo status canonico e giuridico chiarendo questioni offuscate per aiutare eventualmente nel loro ulteriore studio.

Parole chiave: rifugiati, migrazione, diritto canonico, asilo, Repubblica d'Austria

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Pastoral Care of Migrants in the Catholic Church in the Czech Republic

Abstract: This article deals with the pastoral care of migrants in the Czech Republic. It starts from a description of the ethnic composition of inhabitants of the Czech Republic and of permanently settled foreigners from 1918 to the present. It also acquaints the reader with the principles and individual structures of pastoral care for migrants coming from special Church documents and codes of canon law. On this basis, it presents specific structures existing in the Czech Republic and evaluates them.

Keywords: Catholic Church, migration, local church, parish, diocese, exarchate, conference of bishops

Introduction

To describe and understand the current form of pastoral care of migrants in the Czech Republic, it is necessary to start from the demographic situation: the ethnic composition of the population of the Czech Republic and the number and composition of foreigners who reside there over a long period of time. This is the content of the first section of this article.

The second section, which has more of a general nature, deals with the principles of pastoral care for migrants, as contained in the official documents of the universal Catholic Church.

The third section, in turn, deals more specifically with the description of individual pastoral structures, as discussed in the already mentioned official documents of the Catholic Church and especially in the regulations of canon law.

The fourth section presents the structures of pastoral care that exist for migrants in the Czech Republic.

1. National diversity, unity and renewed diversity in the Czech Republic since 1918

Although the method of official recognition of nationality has varied over the years (from emphasis on the mother tongue to a subjective sense of belonging), quite reliable conclusions can be drawn from the data obtained.[1]

1.1. National diversity in 1918—1938

The period between the two world wars was characterised by a relatively large ethnic diversity, partially distorted by the idea of Czechoslovakism — one Czechoslovak nation and one Czechoslovak language existing in two versions or tongues, namely Czech and Slovak, to which members of this "nation" professed. Therefore, we can also distinguish Czech and Slovak nationality for this period.[2]

In the Czech lands, there were thus two strong entities in 1921 in terms of mother tongue: the Czech one with 67.5% and the German one with 30.6% of the population. Other minorities were Polish with 1.0% and Slovak with 0.2%.[3] However, it must be admitted that, especially at the beginning of the existence of the new state, some members of national minorities, for opportunistic reasons, generally declared themselves to be Czechoslovak, while the majority of the Jewish population declared themselves to be German. The dominance of the two main nationalities was confirmed by the census in 1930, when 68.4% declared Czech nationality and 29.5% German, then Polish 0.9% and Slovak 0.4%.[4]

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[1] Český statistický úřad [Czech Statistical Office]: *Národnostní struktura obyvatel — 2011* [Nationality Structure of the Population — 2011], pp. 1—2.

[2] The concept of Czechoslovakism is based on the concept of a nation-building nation and language — and thus neither the Czech nor the Slovak nation could be in Czechoslovakia after the First World War due to the existence of very strong German minority in the Czech lands and of Hungarians in Slovakia.

[3] Český statistický úřad: *Národnostní struktura obyvatel — 2011*..., p. 3.

[4] Ibidem.

1.2. Changes resulting from World War II (1938—1948)

The consequence of the Munich Agreement of 30 September 1938 was the secession of the predominantly German territories of the Sudetenland, and shortly thereafter the predominantly Polish territories (Zaolzie — 'trans-Olza Silesia') too. During World War II, the Jewish ethnic group was systematically killed.

At the end of the war in 1945, there was, to a lesser extent, a spontaneous departure of the German population to areas controlled by the Western Allies. The German population was further reduced by post-war *de jure* illegal deportation, often associated with manifestations of blind revenge; the decline of the German population culminated in the legally carried out deportation after the Potsdam Conference, held in July 1945, until 1946. The remaining German-speaking population in the Czech lands was subjected to various forms of persecution. As a result of these changes, the population in the Czech lands also decreased significantly: from 11,109,341 in 1944 and 10,692,912 in 1945 to 9,523,266 in 1946 and even to only 8,765,230 in 1947.[5]

The consequence of these changes was the creation of a nationally homogeneous society in the Czech lands. To illustrate it, one ought to read the results of the nearest census, conducted in 1950. The Czech nationality became completely dominant with 93.8%, the largest minority was Slovak with 2.9% (mainly due to the resettlement of border areas from which the German population was displaced, from less industrialised Slovakia), the second largest was the German minority with 1.8% and the third was the Polish minority with 0.8%.[6]

1.3. A nationally homogeneous society after World War II until 1990

Throughout the period of the communist regime (1948—1989), the territory of today's Czech Republic represented a nationally homogeneous society.

[5] Český statistický úřad [Czech Statistical Office]. *Obyvatelstvo — roční časové řady, Tab. 1: Pohyb obyvatelstva v Českých zemích 1785—2018, absolutní údaje* [Population — Annual Time Series, Tab. 1: Population and Vital Statistics in the Czech Lands 1785—2018, Absolute Data].

[6] Český statistický úřad [Czech Statistical Office]. *Národnostní struktura obyvatel — 2011* [Nationality Structure of the Population — 2011], p. 3.

According to the census results from 1950, 1961, 1970, and 1980, the size of the Czech population was steadily dominant with a slight increase: 94.3% (as compared to 93.8% in 1950), 94.5%, and 94.6%, and the number of the Slovak population grew similarly: 2.9%, 2.9%, 3.3% and 3.5%. In contrast, the share of German nationals fell sharply: 1.8%, 1.4%, 0.8%, and 0.6%. The share of Polish nationals also decreased slightly: 0.8%, 0.7%, 0.6%, and 0.6%.[7]

Data on the number of foreigners living in the Czech lands are only available from the end of this period: from a very small number of 37,177 in 1985, there was a decrease to 35,198 in 1990,[8] with a mean population of 10,336,742 in 1985 and 10,362,740 in 1990.[9] The relative number of foreigners as part of the population thus ranged from 0.34 to 0.36%.

1.4. Change in the ethnic composition of the population of the Czech Republic since 1990

The census still remains the basic source for determining the ethnic composition. However, the methodology of this census, which has changed, plays an important role.

In the 1991 census, nationality meant belonging to a nation or nationality, leaving it to everyone to register a nationality according to his or her own convictions. In 2001 and 2011, in accordance with international methodology, nationality was understood to mean belonging to a nation, or national or ethnic minority, regardless of the language they speak. It was thus permissible to list more than one nationality, but it was not obligatory to indicate nationality. This results in a significant decrease in affiliation to Czech nationality in the 2011 census, apparently related to a significant increase in persons who did not state their nationality.[10]

[7] Ibidem. It is not uninteresting that even in the 75 years after the end of World War II, the size of population at the end of World War II has not been reached.

[8] Český statistický úřad [Czech Statistical Office]: *Data — počet cizinců, R03 Trvale a dlouhodobě usazení cizinci v ČR v letech 1985—2018 (k 31. 12.)* [Data — Number of Foreigners, R03 Permanently and Long-term Settled Foreigners in the CR, 1985—2018 (31 December)].

[9] Český statistický úřad [Czech Statistical Office]: *Obyvatelstvo — roční časové řady, Tab. 1: Pohyb obyvatelstva v Českých zemích 1785—2018, absolutní údaje* [Population — Annual Time Series, Tab. 1: Population and Vital Statistics in the Czech Lands 1785—2018, Absolute Data].

[10] Český statistický úřad: *Národnostní struktura obyvatel — 2011…*, pp. 3—5.

Table 1. Population by nationality in 2001 and 2011

Nationality	2001		2011		Index 2011/2001 [%]
	N	%	N	%	
Total population	10 230 060	100.0	10 436 560	100.0	102.0
Persons applying for one nationality	**10 044 255**	**98.2**	**7 630 246**	**73.1**	**76.0**
Czech	9 249 777	90.4	6 711 624	64.3	72.6
Moravian	380 474	3.7	521 801	5.0	137.1
Silesian	10 878	0.1	12 214	0.1	112.3
Slovak	193 190	1.9	147 152	1.4	76.2
Polish	51 968	0.5	39 096	0.4	75.2
German	39 106	0.4	18 658	0.2	47.7
Roma	11 746	0.1	5 135	0.0	43.7
Hungarian	14 672	0.1	8 920	0.1	60.8
Vietnamese	17 462	0.2	29 660	0.3	169.9
Ukraine	22 112	0.2	53 253	0.5	240.8
Russian	12 369	0.1	17 872	0.2	144.5
other	40 501	0.4	58 289	0.6	143.9
Persons applying for two nationalities	**12 978**	**0.1**	**163 648**	**1.6**	**1261.0**
Czech and Moravian	—	—	99 028	0.9	x
Czech and Slovak	2 783	0.0	17 666	0.2	634.8
Czech and Roma	698	0.0	7 026	0.1	1006.6
Czech and German	—	—	6 158	0.1	x
Other combinations	9 497	0.1	33 770	0.3	355.6
Not specified	**172 827**	**1.7**	**2 642 666**	**25.3**	**1529.1**

It is obvious that Czech nationality still clearly predominates among the citizens of the Czech Republic (especially if we combine it with Moravian nationality); on the other hand, Ukrainian, Vietnamese, and Russian nationality is growing significantly.

1.5 The increase in the number of foreigners after 1990 and their composition

The democratisation of society since 1990 has resulted not only in far greater tourism, but also in significantly greater migration of population. Because of relatively good economic development, the Czech Republic has also become an interesting country in terms of immigration, which has been reflected in an enormous increase in the number of foreigners, as shown by the official table of the Czech Statistical Office:

Table 2. Permanently and long-term residing foreigners in CR in the years 1985—2018 (as of 31 December)

Year	Type of residence			
	total	permanent stay	long-term stay over 90 days*	Stateless
1985	37 177	27 892	8 891	394
1986	34 803	27 278	7 146	379
1987	34 933	27 310	7 263	360
1988	35 298	27 320	7 615	363
1989	35 561	27 325	7 899	337
1990	35 198	27 204	7 695	299
1991	38 002	28 457	9 204	341
1992	49 957	29 145	20 428	384
1993	77 668	31 072	46 070	526
1994	104 343	33 164	71 179	—
1995	159 207	39 242	119 965	—
1996	199 152	46 388	152 764	—
1997	210 311	56 797	153 514	—
1998	220 187	64 352	155 835	—
1999	228 862	66 754	162 108	—
2000	200 951	66 855	134 096	—
2001	210 794	69 816	140 978	—
2002	231 608	75 249	156 359	—
2003	240 421	80 844	159 577	—
2004	254 294	99 467	154 827	—
2005	278 312	110 598	167 714	—
2006	321 456	139 185	182 271	—
2007	392 315	157 512	234 803	—
2008	437 565	172 191	265 374	—
2009	432 503	180 359	252 144	—
2010	424 291	188 952	235 339	—
2011	434 153	196 408	237 745	—
2012	435 946	212 455	223 491	—
2013	439 189	236 557	202 632	—
2014	449 367	249 856	199 511	—
2015	464 670	260 040	204 630	—
2016	493 441	271 957	221 484	—
2017	524 142	281 489	242 653	—
2018	564 345	289 459	274 886	—

* Long-term stay over 90 days: since 1985—1999 long-term residence, 2000—2003 90-days-and-over visa, since 2004 temporary EU, long-term residence and 90-days-and-over visa (long-term visa) are included.

Source: Czech Statistical Office, Directorate of the Alien Police Service (table R03).

It can therefore be stated (with some simplification) that the number of foreigners in the Czech Republic has increased radically since 1990 from 0.034% to 5.311% of the population in 2018.

The Czech Statistical Office also publishes an overview of foreigners in the Czech Republic by citizenship, without publishing detailed data on the nationality or linguistic composition of foreigners. This can be deduced with a certain degree of inaccuracy from the list of countries from which foreigners come (in the following table limited to countries with at least 5,000 people in the Czech Republic)[11]:

Table 3. Overview of foreigners in the Czech Republic according to their country of origin (2018)

2018		Citizenship
Total	long-term stays over 90 days	
564 345	**274 886**	**Total**
131 302	46 412	Ukraine
116 817	66 588	Slovakia
61 097	9 729	Vietnam
38 033	16 542	Russian Federation
21 279	10 464	Poland
21 267	16 781	Germany
15 593	10 322	Bulgaria
14 684	10 955	Romania
9 510	6 084	United States of America
9 075	3 914	Mongolia
7 485	3 036	China
7 093	4 902	United Kingdom
6 645	5 810	Hungary
6 161	3 276	Belarus
6 034	3 696	Kazakhstan
5 811	2 022	Moldova (the Republic of)
5 268	3 523	Italy

Nevertheless, it is possible to find out important facts from these data:
— the most numerous group are the people of Ukraine, who usually profess to be the followers of the Orthodox or Greek Catholic Church;
— the second largest group are the inhabitants of the Slovak Republic, who mostly belong to the Catholic Church (Roman Catholic or Greek Catholic) or to Evangelical Churches;

[11] Cf. Český statistický úřad [Czech Statistical Office]: *Data — počet cizinců, R04 Cizinci v ČR podle státního občanství v letech 1994—2018 (k 31. 12.)* [Data — Number of Foreigners, R04 Foreigners in the Czech Republic by citizenship, 1994—2018 (31 December)]. Updated on 28.04.2020.

— other significant groups of foreigners come from countries with a predominantly Orthodox tradition and usually also with a significant number of Greek Catholics (Russian Federation, Bulgaria, Romania, Belarus, Moldova);
— quite a lot of foreigners are also from countries with a significant representation of both Catholics and Protestants (Germany, Hungary);
— fewer foreigners come from countries with a Roman Catholic tradition (Poland, Italy).

It is therefore clear that the number of Eastern Christians has increased significantly in recent years: Orthodox and Greek Catholics, which must be reflected in pastoral practice.

2. Principles of pastoral care for migrants in documents of the Catholic Church

The most important special document of the Catholic Church on the issue of migration is the instruction *Erga migrantes caritas Christi* (hereafter EMCC)[12] of 2004. Other important documents are the joint pastoral directives of the two papal councils, for the Pastoral Care of Migrants and *Cor Unum*, entitled *I Rifugiati, una sfida alla solidarietà* of 1992 (hereafter *Rifiugati*)[13] and *Accogliere Cristo nei rifugiati e nelle persone forzatamente sradicate Orientamenti pastorali* of 2013 (hereafter *Accogliere Cristo*).[14]

Further stimuli for the pastoral care of migrants are given by the annual papal messages on World Migrants' Day. In accordance with the overall pastoral focus of the current pope, the Catholic Church's approach

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[12] Pontificio consiglio della pastorale per i migranti e gli itineranti: *Istruzione Erga migrantes caritas Christi* [3.05.2004]. Available at: http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/rc_pc_migrants_doc_20040514_erga-migrantes-caritas-christi_it.html (accessed 28.04.2020).

[13] Pontificio Consiglio *Cor Unum* e il Pontificio Consiglio per la Pastorale dei Migranti e gli Itineranti: *I Rifugiati, una sfida alla solidarietà* (June 1992). Available at: http://www.vatican.va/roman_curia/pontifical_councils/corunum/documents/rc_pc_corunum_doc_25061992_refugees_it.html (accessed 28.04.2020).

[14] Pontificio Consiglio *Cor Unum* e il Pontificio Consiglio per la Pastorale dei Migranti e gli Itineranti: *Accogliere Cristo nei rifugiati e nelle persone forzatamente sradicate. Orientamenti pastorali* (June 2013). Available at: http://www.vatican.va/roman_curia/pontifical_councils/corunum/corunum_it/pubblicazioni/Rifugiati-2013-ITA.pdf (accessed 28.04.2020).

to migrants can be described as: acceptance, protection, support, and integration.[15]

All the documents of the dicasteries of the Roman Curia contain texts of a more general nature about migration and refugees themselves and about the Church's relationship to these facts and to the persons affected in this way. Because the emphasis in the present article is on the practical side, we would like to introduce the basic practical rules contained in the instruction *Erga migrantes caritas Christi*. With regard to Catholic migrants, it emphasises the need for specific pastoral care according to language, origin, culture, race, and tradition or belonging to a particular Church *sui iuris*, so that the uprooting caused by migration is not accompanied by uprooting from the migrant's religious identity (EMCC No. 49). Particular emphasis is placed on the pastoral care of Catholic migrants of Eastern rites (EMCC Nos. 52—55) in order to preserve their specific identities, while in cases of displacement of entire Christian communities, especially from the Middle East, the aim is to preserve the very existence of a particular Church *sui iuris* and its rite.

At the same time, in the spirit of apostolic love, due consideration must be given to helping Christians of other Churches and ecclesial societies, while maintaining the requirements of due ecumenical endeavour (EMCC Nos. 56—58).

3. Specific guidelines for the creation of pastoral structures for the care of migrants

Specific instructions for migrant pastors are systematically contained in the Juridical Pastoral Instructions given at the end of the *Erga migrantes caritas Christi* instruction as well as in the joint instructions of the two dicasteries *Rifiugati* and *Accogliere Cristo*. I will try to present them at different levels, and these guidelines do not, for obvious reasons, deal with Church-wide pastoral structures for the care of migrants,[16] but only by

[15] Cf., for example, Francis: *Message to the World Day of Migrants* [14.01.2018]. Available at: http://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20170815_world-migrants-day-2018.html (accessed 8.04.2020).

[16] Church-wide structures of care for migrants are clearly presented, for example, in the article: M. Menke: "Kanonicko-právní rozměr pastorace migrantů" [The canonical-juridical dimension of the pastoral care of migrants]. In: *Vzťahy štátu a cirkví a náboženské menšiny: Zborník zo sekcie „Vzťahy štátu a cirkví a náboženské menšiny" medzinárodného vedeckého kongresu Trnavské právnické dni, ktorý sa konal 20.—21. septembra 2018* [Rela-

particulate structures. At the same time, we will take into account the provisions of the two currently valid codes: the Code of Canon Law of 1983 (further CIC)[17] and of the Code of Canons of the Eastern Churches (further CCEO).[18]

3.1. Structures at the level of local Churches

3.1.1. The mission and tasks of the local Church itself

The oldest *Rifiugati* instruction in No. 26 emphasises that the primary responsibility for the care of migrants lies with the local Church, as confirmed by the *Accogliere Cristo* instruction in No. 89.

The local Church is to develop care for migrants in two directions. The first direction is oriented externally mainly by the effort to cooperate with the local Church of origin of migrants and to help this "home" local Church (*Rifiugati* No. 30, EMCC Art. 1 § 3, *Accogliere Cristo* No. 93) above all by the effort to avoid reasons of the migration, especially conflicts (*Accogliere Cristo* No. 81). The second direction is focused on the inside by creating the necessary structures of special pastoral care and by formatting and entrusting persons suitable for this service — we will continue to focus on this direction.

In the description of personal structures, we will proceed from the bottom up, that is, from less autonomous structures to more autonomous ones.

tions between the state and churches and religious minorities: Proceedings of the section "Relations between the state and churches and religious minorities" of the international scientific congress Trnava Legal Days, which took place on 20—21 September 2018]. Ed. M. Moravčíková. Trnava 2018, pp. 30—32.

[17] *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus* [25.01.1983]. AAS 75 (1983) pars II, pp. I—320, correctiones: *Appendix de die 22 Septembris 1983*, pp. 321—324.

[18] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* [18.10.1990]. Roma 1990.

3.1.2. Personal parish

A personal parish (or quasi-parish) can be created on the basis of nationality, language and affiliation to the Church *sui iuris* (CCEO can. 280, cf. CIC can. 518 — the western code uses the rite as a criterion, which is rather inaccurate and which has been corrected by provisions of the motu proprio of Pope Francis *De concordia inter Codices* of 2016[19]). This structure as a suitable pastoral tool for larger and relatively homogeneous groups of migrants is explicitly mentioned in *Rifiugati* No. 27, cf. EMCC Article 16 § 2 and *Accogliere Cristo* No. 91.

In accordance with the social doctrine of the Church, in addition to the requirement of a larger group of believers, it is necessary that whole families be part of this group as the basic cells of the Church and of civil society.

3.1.3. *Missio cum cura animarum*

Missio cum cura animarum is not explicitly mentioned in the codes, but only implicitly as another way of the bishop's pastoral care for a certain community of believers (CIC can. 516 § 2) or a certain community of persons excluded from parish care (CCEO can. 283).

But special documents concerning the pastoral care of migrants deal with it in great detail. While we do not find their regulation in the *Rifiugati* instruction, the EMCC in Nos. 90—91 describes them as a classic but not exclusive form of pastoral care for migrants. In particular, it describes the mission and formation of missionaries/chaplains in pastoral law in Articles 4—10. There is emphasised, on the one hand, their subordination to the diocesan bishop; on the other hand, they are described there as priests entrusted with the pastoral care of migrants of the same language, same nationality or the same *sui iuris* Churches. They have to carry out their mission in close cooperation with the territorial pastor or pastors in the territory in which they carry out their missionary/chaplain ministry.

The formation of missionaries/chaplains and the requirements for them and their collaborators (deacons and religious, as well as lay

[19] Franciscus: *Litterae apostolicae motu proprio datae quibus nonnullae normae Codicis Iuris Canonici immutantur De concordia inter Codices*. AAS 108 (2016), pp. 602—606.

people) are specified in more detail in the instructions of *Accogliere Cristo* in Nos. 97—101.

From the point of view of canon law, it is important that the missionary/chaplain has the same rights and obligations as the chaplain according to CIC can. 566 § 1, and his assistants then a position similar to parish vicars according to CIC can. 545—552.[20]

3.1.4. Other Structures in Local Churches

In this area, a large field of creativity is left to local ordinaries subsequent to the local pastoral situation. The EMCC explicitly mentions pastoral national or linguistic centres at the regional level in No. 91, and pastoral units in No. 95.

In addition, *Accogliere Cristo* mentions in No. 92 the need for stable pastoral care in large refugee camps and the need for proper stable pastoral care in them — outgoing from personal parishes to other forms of pastoral structures.

As support for the stimulation and formation of pastoral workers dedicated to migrants, the EMCC appoints, in No. 94, centres for specific youth and vocational pastoral care, centres for the formation of lay people and other pastoral workers, and centres for the study and reflection of pastoral care.

3.1.5. The figure of episcopal vicar

Another structural possibility to support the pastoral care of migrants in the local Church is the appointment of an episcopal vicar or *syncel* (CIC can. 476, CCEO can. 246). This person then manages the pastoral care of migrants from his office in the position of a local ordinary with a vicarious power (*potestas vicaria*) according to his mission, possibly within a broader mandate.

[20] Unlike the CIC, the CCEO does not contain regulations for chaplains.

3.1.6. Establishment of an independent “specialised” local Church

The establishment of local Churches in the CIC is reserved to the highest ecclesiastical authority (CIC can. 372 and 373), and in the CCEO — with the exception of non-autonomous structures within the patriarchal Church or supreme archbishopric — the Apostolic See also (CCEO can. 172 § 2, 311 § 2 and 152).

While the Apostolic See completely opposes the establishment of local Churches based on national or linguistic principle, in the case of ceremonial minorities the Apostolic See is far more open to seeking appropriate solutions. It may be an eparchy or exarchate subordinate to the patriarchal Church or the High Archbishopric (*sui iuris*) and located outside its territory (cf. CCEO can. 149), or eparchies or exarchates directly subordinate to the Apostolic See (CCEO can. 174 and 175).

3.2. Structures at the national level

In the case of a large number of missionaries/chaplains in a given country, it is appropriate to appoint a national coordinator (EMCC No. 73 and Art. 11). The mission of the coordinator is fraternal supervision, moderation, and the interconnection of various activities in the territory of usually one conference of bishops. However, he has no direct jurisdiction over them, as they remain under the jurisdiction of the local Ordinary.

Similarly, in the case of a larger number of missionaries, a national migration commission with a secretary may be established at the level of the Episcopal Conference and similar structures of the Eastern Churches, or in the case of a smaller number of missionaries/chaplains, a promoter bishop may be appointed (EMCC Art. 19). Cooperation between the commission or the promoter-bishop and the individual bishops is to be mediated by the national director of care for migrants (EMCC Art. 20).

4. Implementation of care for migrants in the Czech Republic

4.1. Personal parishes

In the Czech Republic, academic parishes have been established in some larger cities, but this is not the subject of our research. Not a single parish has been established for a ceremonial minority, but — indeed only in Prague — several personal parishes have been established for linguistic minorities: Slovak, Polish, and Hungarian.

As an example of the personal definition of a parish, I present an excerpt from the decree establishing the Hungarian personal parish:

> The Hungarian Roman Catholic Parish (further referred to as the "parish") is a personal parish and community of Roman Catholic Christians of Hungarian nationality and their family members within the meaning of can. 518 and 204 CIC.
> Catechumens of Hungarian nationality also belong to the community of this parish in a special way, according to the provisions of can. 206 and 1183 § 1 CIC.
> The provision on parish affiliation fully respects Article 15 of the Charter of Fundamental Rights and Freedoms, according to which freedom of thought, conscience and religion is guaranteed. Everyone has the right to change his or her religion or belief or to be without religion.
> Belonging to the parish is acquired by fulfilling both of the following conditions simultaneously:
> 1. She or he is a Roman Catholic Christian (catechumen) of Hungarian nationality;
> 2. Obtaining permanent or temporary canonical residence in the Archdiocese of Prague in the sense of can. 102 CIC (without prejudice to can. 262 CIC).
> Parish members of these persons also acquire parish membership, and family members are considered to be the spouse, children, and children living in the same household as the parishioner meeting the conditions set out in points 1 and 2 above.
> Parish membership is lost when at least one of the above conditions is not met (see points 1 and 2); at the same time, the family members of these persons lose their membership in the parish unless they have at the same time become members of the parish for another reason.

4.2. Special spiritual administrations

Directly in the CIC in can. 564 (but not in the CCEO) there are specified special spiritual administrations, headed by a priest bearing the title of "chaplain."

In the Czech Republic, specifically only in Prague, separate spiritual administrations have been established for the following language groups: English, Spanish, French, Italian, and Vietnamese.

4.3. Determination of pastoral care in a part of the local Church

For a larger number of believers, in our case usually for more parishes, a vicar episcopal may be appointed in the Latin Church, and *syncel* in the Eastern Catholic Churches. This possibility has not yet been used in the Czech Republic; no diocesan vicar for migrants and other minorities has been established in any diocese.

4.4. Establishment of an independent "specialised" local Church

In addition to Roman Catholics, there has been a relatively large group of Greek Catholics in the Czech Republic for decades. They were traditionally subordinated to the eparchy based in Prešov in eastern Slovakia,[21] which led to administrative problems after the disintegration of Czechoslovakia into the Czech Republic and the Slovak Republic on 1 January 1993. Therefore, it was necessary to look for a viable "national" solution.

After the time of the existence of the Czech vicariate of the eparchy of Prešov (Eastern Slovakia), an apostolic exarchate was established in 1996, with a not entirely standard definition: a designation for all Eastern Catholics of the Byzantine rite, regardless of their affiliation with various *sui iuris* Churches and to their nationality.[22] This solution is given by the

[21] J.R. Tretera, Z. Horák: *Církevní právo*. Praha 2016, p. 139.

[22] Ioannes Paulus II: *Constitutio apostolica Quo aptius pro fidelibus byzantini ritus. Exarchia apostolica pro christifidelibus byzantini ritus in Republica Cecha commorantibus constituitur*. AAS 88 (1996), p. 614.

situation of the Greek Catholic diaspora in the Czech Republic (compared to Roman Catholics), as well as by the very diverse ethnic composition of Greek Catholic believers in the Czech Republic: most exarchate believers are foreigners (migrants and workers returning home), especially from Ukraine.[23]

The legal status of this exarchate is not entirely clear. According to the analysis of its charter and *de facto* status, it does not follow that it is a *sui iuris* Church, but rather a multi-ethnic *sui generis* structure.[24] The future of this exarchate is also shrouded in ambiguity, not only due to the development of the number of its believers, but also in terms of the future concept chosen by the Apostolic See. It could be either a separate eparchy *sui iuris* or an incorporation into the Slovak metropolitan church *sui iuris*, or an eparchy forming a part of the Ukrainian Church *sui iuris* outside its territory.[25]

4.5. Structures on the national level

In the Czech Republic, no specialised national coordinating body has been established for the pastoral care of migrants. The only structure within the Czech Conference of Bishops is the Council for Roma, Minorities and Migrants. However, its activities are not observable from publicly available sources.

Conclusions

Since the 1990s, the Czech Republic has become a country in which foreigners and migrants are increasingly present. Unlike neighbouring countries, where these people form significant and relatively homogeneous groups, the national and religious structure of migrants in the Czech Republic is very diverse. Nevertheless, it can be stated that the larg-

[23] Cf. above the final text of section 1 of this article.

[24] J. Dvořáček: *Die Apostolische Exarchie in der Tschechischen Republik. Studien zur Geschichte, Gegenwart und Zukunft einer griechisch-katholischen Ostkirche*. [Habilitationsschrift.] Eichstätt: Katholische Universität Eichstätt-Ingolstadt, Theologische Fakultät, 2019, pp. 183—188.

[25] Ibidem, pp. 195—197.

est number of foreigners and migrants come to the Czech Republic from Slavic countries, mostly from Ukraine. The Eastern Christian tradition, both Orthodox and Greek Catholic, predominates in these countries.

This situation determines the pastoral reaction of the Catholic Church in the Czech Republic. The most significant response (but not only to the phenomenon of migration) is the establishment of the Apostolic Exarchate in the Czech Republic for all Catholics of the Byzantine rite, regardless of their nationality and belonging to any Catholic Eastern Church *sui iuris*. Significantly, in reality, most of the believers of the exarchate are Ukrainians who have come to the Czech Republic for work — some have settled here permanently, and most of them return to their homeland on the biggest feasts and holidays.

Within the structures of the Roman Catholic Church, the necessary structures were set up in Prague: three ethnic or linguistic personal parishes (Slovak, Hungarian, and German) and *de facto* pastoral administrations caring for other language groups (English, Spanish, French, Italian, and Vietnamese).

No diocese of the Czech Republic has a *missio cum cura animarum* or similar structure or a vicar episcopal for migrants or linguistic minorities.

At the level of the Conference of Bishops, there is a Council for Roma, Minorities and Migrants, which is, however, not observable.

Above all, unlike other countries, there is no significant group of Eastern Christians in the Czech Republic other than Greek Catholics from Slavic countries. Rather, there are dozens of people, mainly from the Middle East, who are taken care of by a Catholic charity, trying to help also in their countries of origin.

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Damian Němec

Souci pastoral pour les migrants dans l’Église catholique en République tchèque

Résumé

L’article traite de la pastorale des migrants en République tchèque. Il est basé sur une description de la composition ethnique de la population en Tchéquie et des étrangers installés de façon permanente à partir de 1918 jusqu’à nos jours. L’auteur analyse également les principes et les structures individuelles de la pastorale des migrants dans des documents ecclésiastiques spéciaux et des codes de droit canonique. Sur cette base, il présente et évalue les structures spécifiques existantes en République tchèque.

Mots clés : Église catholique, migration, Église locale, paroisse, diocèse, exarchat, conférence épiscopale

Damian Němec

Cura pastorale dei migranti nella Chiesa cattolica in Repubblica Ceca

Abstract

Il presente articolo tratta della pastorale dei migranti nella Repubblica Ceca. Si basa su una descrizione della composizione etnica della popolazione nella Repubblica Ceca e degli stranieri stabilmente insediati dal 1918 ai giorni nostri. L’autore analizza anche i principi e le singole strutture della pastorale dei migranti in appositi documenti ecclesiastici e codici di diritto canonico. Su questa base presenta e valuta le strutture specifiche esistenti nella Repubblica Ceca.

Parole chiave: Chiesa cattolica, migrazione, Chiesa locale, parrocchia, diocesi, esarcato, conferenza episcopale

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Migration in the Human Rights Context

Abstract: The phenomenon of migration concerns 3.3% of the general population living in the world and its number is still increasing. In order to stop migration measures are taken, which are largely against human rights to migration. The right to migration itself is denied. The activities that aim to restrict the right and not to regulate it become an alarming tendency. As a category of mixed rights, whose title is in the human nature (dignity), measure is positive regulation of exercising these rights as its internal element.

Keywords: migration, human rights, mixed rights, regulations, solidarity

Population movements have been and still are a common phenomenon, from the great migrations of nations to today's migration phenomena. On the basis of numerous publications, one can asses the scale of the modern migration phenomenon. According to the UN data from 2018, migration phenomenon concerns 244 million people living outside their country of birth, which constitutes 3.3% of the general population living in the world.[1] During the last five years this number has increased by 12 million. It can be forecasted that this trend will be constantly growing, an example of which are the attempts to limit it. On the one hand, the right to migration contained in the *Universal Declaration of Human Rights* is emphasised, but on the other hand, present efforts to limit it are, at the first evaluation attempt, somewhat inconsistent with this right. An example of such activity is a communication issued by the European Council after the meeting on 23 April 2015 concerning the incident on

[1] United Nation: *World Migration Report 2018*, https://www.iom.int/wmr/chapter-2 (accessed: 16.04.2019).

the Mediterranean Sea, when a ship transporting hundreds of African emigrants from Libia to Europe sank. In the communication one can read that "[T]he European Union will mobilise all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of the human emergency that we face, in cooperation with the countries of origin and transit."[2] Despite these declarations, from the remainder of the communication it can be inferred that the planned initiatives aim to stop the phenomenon of migration from Africa to Europe by taking certain steps, such as fighting the phenomenon of people smuggling, destroying the ships used by smugglers, or taking actions resulting from joint security and protection policy of the European Union. The goal of the above proposals is to prevent illegal migration flows. What is understood by illegal? The position of the European Council, presented here as one of the examples of attempts to solve today's migration problem, indicates internal contradictions in the system of human rights' protection. On the one hand, the human right to migration is acknowledged and considered undeniable, but on the other illegality of migration is indicated and eventually steps to limit the phenomenon and the right itself are taken. Illegality concerns unlawful activity. To show illegality of such an activity one should first define the scope of the right to migration in the context of human rights, and next draw attention to defining individuals who are entitled to exercise this right.

In today's discussion concernig the phenomenon of migration, and especially accepting refugees by some European countries and attempts to solve this problem, there are voices stating clearly that migration is not a human right, as was said in April 2018 by the Hungarian minister of foreign affairs Péter Szijjártó before the debate on "migration pact" in New York. In response to statements that migration is right and should be accepted, he expressed his country's position that migration is dangerous. This statement made in the context of care for the safety and sovereignty of Hungary is contradicted by the imposed necessity to accept illegal migrants. However, in the minister's utterance one can notice that his opinion concerns the phenomenon of illegal migration, which does not prevent him from making a general statement that the right to migration is not a fundamental human right. The aim of countries should be stopping and not supporting migration.[3]

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[2] *Special meeting of the European Council, 23 April 2015 — statement*, https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ (accessed: 16.04.2019).

[3] "ONZ naraża świat. Migracja niebezpieczeństwem, a nie prawem," https://www.tvp.info/36363951/onz-naraza-swiat-migracja-niebezpieczenstwem-a-nie-prawem (accessed: 16.04.2019).

During the summit in Marrakesh 164 UN member states, in the face of final opposition of about 30 countries, signed the GCM agreement (Global Compact for Safe, Orderly and Regular Migration), commonly referred to as "migration pact," which confirmed that migration is a human right. The pact concerned setting international standard procedures and facilitating international migration-related cooperation.[4] The document is not legally binding, but one can expect that its acknowledgement by so many countries will cause pressure to apply it. Resistance and reluctance to accept this document at the session of the General Assembly of the United Nations, as reported by the Polish Government Information Center, resulted from the right to protect one's own sovereignty and to decide what can be accepted within the state, as well as lack of clear definition and differentiation between legal and illegal migration. From the perspective of the Polish government, the issues concerning the attempts to solve the problem of migration should aim at defining illegality of the phenomenon, that is establishing clear norms, trespassing of which would allow to stop migration process.

Looking at the contemporary discussion on the right to migration one can notice that it is inspired by the current problems connected with the flow of population from Asia and Africa to Europe or the USA. Actually, it is not a discussion about the right to migration but about the necessity to differentiate legal migration from illegal one. It is difficult to determine, though, whether the decision to clearly define these two phenomena will cause a change in approach of the countries which now refuse to accept immigrants. They do not try to enable "legal," in their opinion, migrants to reside within the territory of their own country. Therefore, is defining legality or illegality of a migrant an element facilitating implementation of the right to migration?

From migrants' rights to the right to migration

The rights that migrants are entitled to confirm the earlier fact of migration. They are the consequence of the expressed right to migration. There is some co-dependence between them, because migration motives and defining the boundaries of its "legality" determine the legal status of the migrant at the moment of his or her crossing the border of another country and staying on its territory.

[4] M. Strzałkowski: "Pakt migracyjny ONZ przyjęty," https://www.euractiv.pl/section/migracje/news/pakt-migracyjny-onz-przyjety/ (accessed: 16.04.2019).

The situation and legal status of migrants changed when the right to migration as a human right was announced. Before this, the rights of people residing outside their own country were protected as rights of foreigners, as long as their country of origin had the possibility of protection and wanted to do it also on its own territory. It resulted from the reciprocity rule (*do ut des*) based on the interest of the state, according to which a migrant should be protected on the territory of a given country, as long as the same right and to a similar extent was guaranteed by the country of their origin. International norms did not impose an obligation to accept strangers in one's own state territory. Countries were free to decide which people could reside on its territory, subject to the earlier adopted inter-state agreements and obligations. To a large extent, accepting foreigners was based on the evaluation of their usefulness for the receiving country.[5] The capital and commercial factors fostered and encouraged emigration. It is believed that the same factors extensively contributed to the growth of population migration at the beginning of this century. In the face of numerous objections, these factors and not the human right to migration accelerated and fostered the migration phenomenon.[6] Acceptance and permission to stay in a new country resulted in the acquisition of legal rights which exist in it (e.g. acknowledgment of legal personality, civil and political rights). It was the receiving country that was accountable for the legal protection of people having rights given by the state.

Together with the declaration of the human right to migration,[7] the attitude to the motives of accepting immigrants and defining their rights has changed, at least in its assumptions if not in reality. The current relationship based on nationality, typical of the reciprocity rule, is being replaced with the common requirement of protection of a human being as a subject who is entitled to basic rights by virtue of his personal dignity. Human rights as a result of certain necessity provoked by human solidarity, and in case of the right to migration the situation of solidarity and concern about the lives of people after World War II, have become a catchy idea to express the right to migation and migrants' rights. However, in case of particular solutions provoked by unexpectedly occurring situations, the idea is experienced and appreciated in the era of globalisation — cosmopolitan solidarity from the stoic point of view[8] is not fully

[5] A. Cassese: *I diritti umani nel mondo contemporaneo*. Roma—Bari 2000, pp. 86, 89—90.

[6] S. Bin: "Migrare è un diritto. Ma per tutti?," https://www.unimondo.org/Notizie/Migrare-e-un-diritto.-Ma-per-tutti-160385 (accessed: 16.04.2019).

[7] *Universal Declaration of Human Rights*, Article 13.

[8] R. Sobański: "Prawo jako wartość." *Prawo Kanoniczne*42, nos. 3—4 (1999), p. 19.

reflected in facts. In everyday situations there occur meetings and necessity to make decisions not in reference to ideas but particular people, whose rights are respected regardless of where they come from. Humanity contained in the category of human rights is not a result of collectivisation or solidarity but becomes tangible in the one whose personal dignity constitutes the foundation of available and acknowledged rights.

The idea of the right to migration faced specific obstacles and clashed with other rights and interests of states which, unlike in the past, concern the capital and market area connected with the economic development and affluence of the state. More and more frequently, safety reasons or even loss of civilisational, cultural, and above all national identity lead to protecting and closing the borders to the arriving immigrants. In such situations, the state justifies its stance referring to the right to protect its own territory from violation by other countries, to control and protect its own borders. Crossing country borders is a characteristic element of migration. It is the reason why border control plays a major role in all kinds of discussions and arguments about the phenomenon of migration. International law guarantees stability of state borders, which is the condition of peaceful coexistence of countries and nations. It is the *erga omnes* right of the country. As a consequence, it also protects its own right to control those who are leaving it but also those who want to cross its borders. The category of what is inside and outside determines not so much the attitudes to the phenomenon of migration as above all to particular persons. It is not a common phenomenon of migration that is a problem but a particular person who is at the border of a country. This "methodological nationalism," to use the term coined by Ulrich Beck, which clearly differentiates between what is inside and outside, reduces the state's attitude to a migrant to the category of clearly defined political affiliation.[9] It leaves aside a serious doubt about the actual shift from the category of reciprocity in migration matters, based on the relationship of nationality to the actual protection of a human being in case of his or her migration. It seems that the status of a citizen, who is entitled to full protection, outweighs the status of a human being demanding the same protection. The argument for the accomplished change is the fact of accepting the right to immigration and the rights of an immigrant coming from another country, regardless of the same situation of this very country's own citizens residing in the territory of a foreign country. Reciprocity was replaced by the category of the human right, which in turn results in at least the appearance of reciprocity.

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[9] U. Beck: *Władza i przeciwwładza w epoce globalnej. Nowa ekonomia polityki światowej*. Warszawa 2005, p. 83.

Particular situations forced a revision of grandiloquent phrasing. The right to migration, in order to be something that really exists not just in the domain of desires and declarations but as thing that a human being is entitled to and can freely enjoy, requires a precise subjective and objective specification as along with determining the breadth of this term. Making this right precise can be regarded as an expression of human solidarity. Solidarity can exist without law but "no legal community cannot afford not to be based on solidarity."[10] However, this statement reqires an assumption that there will be an agreement on the rightness of the legal regulation. In order for law to fulfil its role and be effective, first people's beliefs have to converge in the mutual will to survive and coexist peacefully.

The right to migration

Human right to external migration was defined in Article 13 of the Universal Declaration of Human Rights.[11] From the formulation of the right results the possibility to choose (the right to the freedom of choice) the place of residence and to move within the borders of one's state, as well as the right to leave any country, including one's own and to return to it. As it results from the character of each declaration, its content is not binding but constitutes the foundation for the legal rules of international law and as such becomes binding for all its subjects. The right to move freely was confirmed by the International Covenant on Civil and Political Rights in Article 12. It is implied by the above documents, though their interpretation allows different interpretations, that at least the right to freedom of movement is by principle a basic right as it is part of the right to live and settle down within a "common home," which is the area of the Earth. As human rights, that is common, inherent, inalienable, inviolable and indivisible, they should be enjoyed by everybody residing in the territory of a given country. One can assume that countries respecting human rights should in equal measure respect migrants' rights. Countries that do not respect human rights should not be expected to give advantageous position to migrants' rights with regard to other rights exercised

[10] R. Sobański: "Prawo jako wartość…," p. 19.

[11] Article 13.1: "Everyone has the right to freedom of movement and residence within the borders of each state"; 13: "Everyone has the right to leave any country, including his own, and to return to his country."

by a human. However, the phenomenon of migration from the beginning of the 20th century illustrates that even in the countries which take pride in their protection and promotion, migrants are not treated accordingly with their rights and do not enjoy solidarity equally to the other society members.[12]

According to the principles expressed in the above quoted documents, the right to migration as a form of exercising the guaranteed liberties should be exercised by all people, excluding any form of discrimination on grounds of national or social origin, sex, race, colour of skin, religion, citizenship, affiliation with social groups, or political beliefs.[13] A migrant can be any person who decides to leave his or her country or foreign place of residence. The concept of migrant includes different categories of people whose common element is leaving one's place of residence in order to stay temporarily or permamently in another country. It concerns both people who make the decision to move (resettle) of their own free will and those who were forced to do it. Therefore, one should differentiate migration from other forms of population movements, which are not connected with the intention of temporary or permanent settlement in the territory of a foreign country. Thus, migration phenomenon is determined by the motives it is induced by. They also determine the legal status of a migrant residing in a foreign country.

In international law, "migration" does not exist as a general legal category. This term is used in different sectors of international law, depending on specific ways which are the reason for undertaking it. Migration is dependent on the economic, social, political context as well as legal culture in which the migration phenomenon is recognised, which is indicated by different international documents concerning particular categories of migrants: asylum seekers or refugees, displaced persons, economic migrants, the so-called environmentally displaced persons (environmental migrants).[14]

Additionally, irrespective of reasons which force the migration phenomenon, the right to migration should include all the possible conditions, which allow taking advantage of this right. They include, for instance, obtaining relevant documents allowing movement, leaving the country of residence and entering a foreign country. Lack of possibility to have such documents or their revocation is considered to be a violation

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[12] A. Popławska: "Migracje a prawa człowieka w kontekście stosunków międzynarodowych." *Kultura i Polityka* 17 (2015), p. 89.

[13] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 14.

[14] S. Trevisanut: "Immigrazione (dir. int.)." In: *Treccani. Diritto on line*, http://www.treccani.it/enciclopedia/immigrazione-dir-int_(Diritto-on-line)/ (accessed. 17.04.2019).

of the right to leave the place of residence. All the restrictions connected with the so-called selective and exclusive migration policy, bureaucratic provisions about receiving documents allowing departure or arrival (visas, residence permits) are against this right. Processes connected with receiving the documents instead of enabling people to exercise the right to migration often illustrate some form of its restriction.[15]

Illegal migration

The right to external emigration, as confirmed by the history of the migration phenomenon, is not always advantageous from the point of view of the country which is the aim of migration. One of the fundamental functions of the state is securing its borders, which is the consequence of care about the security of the country and its citizens. The necessity to control the borders and flow of population is connected with it. However, countries should not limit the freedom to leave their territory by those who reside on it as its citizens or immigrants.

The right to leave and reside in the territory of a foreign country cannot be derived from the right to migration, although it might seem to be its consequence. Such a right is not guaranteed. A country does not have the duty to accept others on its territory as well. It is against the fundamental function of the country to guard its borders and safety of its citizens as a consequence of its sovereignty. It was confirmed in the International Covenant on Civil and Political Rights, according to which the right to leave any country, including one's own, "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."[16] These restrictions do not concern those who want to come to their own country.[17]

According to the above regulations of the Covenant, limitations concern the freedom of movement and the freeedom to choose a place of residence of a person remaining on the territory of any country, as

[15] S. Bin: "Migrare è un diritto. Ma per tutti?"

[16] Article 12.3.

[17] *Universal Declaration of Human Rights*, Article 13.1: Everyone has the right to freedom of movement and residence within the borders of each state. *International Covenant on Civil and Political Rights*, Article 12.4: No one shall be arbitrarily deprived of the right to enter his own country.

long as this residence is legal, and the possibility to leave it.[18] Nothing is said, though, about restrictions concerning the possibility to enter the country as clearly as in the case of the freedom to move or leave. However, such a possibility is not excluded. Article 12.3 mentions conditions necessitating the restrictions which determine the stable functioning of a country and thus affect risk assessment also from the arriving people. However, in case of people seeking to be accepted in the territory of a given country the circumstances mentioned in the Covenant might actualised on the basis of assumptions or probablilities. In case of residing or leaving the above circumstances can be verified. It is very difficult to assume that the risk posed by the citizen of a given country in its territory will be the argument justifying full permission for his or her departure and similar behaviour in the territory of a foreign country. The state has other legal means aiming to curb the illegal activity of its citizen rather than condemning him to "wilful banishment." Nevertheless, the statement contained in Article 12.3 of the Covenant is significant for the global state solidarity, which can be secured by restricting free exercise of the right to migration, including the right to leave one's own country.

Regulations concerning restrictions of free migration contained in Article 13 of the Covenant are not limitless. They cannot be used arbitrarily. Therefore, the Covenant provides stable forms of legal regulations which can be executed only under legislation, thus excluding other normative acts. Some arbitrariness may occur in the assessment of the range of circumstances allowing the introduction of restrictions. Together with the above-mentioned predictions concerning the probablity of occurence of incidents specified in Article 12.3, they require verifiable assessment, and in my opinion, individual approach to every person applying for their right to migration. It is a human right, and a right of a particular person. As they are entitled to a commonly recognised right, they are in a situation described in legal regulations. It would help to secure the right to migration if the state cooperated with the social environment, which in the country opening its borders, is rooted in it and is an immigrant's own environment.[19]

An additional form of protecting migrant's rights in the territory of a foreign country is the prohibition of expulsion of people having asylum or refugee status, regulated by appropriate provisions of international law. In relation to people not having asylum or refugee status the ban to return people applying to reside on the territory of a foreign country (the princi-

[18] Articles 12.1 and 12.2.

[19] A. Popławska: "Migracje a prawa człowieka...," pp. 93—94.

ple of non-refoulement) applies with regard to expulsion countries of the so called increased risk, on the area of which the expelled person can be extradited or returned.[20]

Determining whether illegal migration (emigration and immigration) can exist concerns establishing precise conditions which verify generally formulated legal norms restricting the freedom to exercise the right to migration. Legal norms do not allow arbitrary decisions, but because of their general and abstract character are exposed to interpretation ambiguity and thus the possibility to be applied in the way that suits the people making decisions about migrants. Legality or illegality of migration should be judged depending on the definition and status of the migrating person to whom these norms refer.

A few conclusions

1. The right to migration includes a wide range of behaviours connected with free movement within one's country of origin or outside it. It also concerns the possibility to reside permanently or temporarily in the territory of a foreign country. However, such a possibility is not a human right and is regulated by appropriate legal norms. Normative restrictions result from the state's right to self-determination within its borders and are an expression of its autonomy and sovereignty.

2. The person's right to migration is specifically expressed in the definition of the migrant's status. It determines, having at the same time the possibility to restrict, the rights he or she is particularly entitled to. On the one hand, these restrictions protect the state, but on the other enable a person to exercise their basic right to migrate. They are restrictions for the state itself, preventing it from making arbitrary decisions.

3. The right to migrate, due to the fact that it can be limited, belongs to the category of mixed rights, whose title has natural foundation (the right to free movement), but the measure is positive.[21] The change of terminology in defining its range would be more appropriate and corresponding with the right to migration, since what matters is regulating the migration phenomenon and not restricting the right. Positivity of the

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[20] O. Łachacz: "Zasada non-refoulement w międzynarodowym prawie uchodźczym — zwyczaj międzynarodowy czy też peremptoryjna norma prawa międzynarodowego?" *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 15 (2017), pp. 134—142.

[21] J. Hervada: *Introduzione critica al diritto naturale*. Milano 1990, pp. 72—73.

right's measure results from the right to migration and the state's right to self-determination.

4. The right to migration cannot be confined in one of theoretical legal categories, in line with the commonly accepted categorisation developed by Czech-French lawyer Karel Vasak at the end of 1970s.[22] The right to migration does not concern only the freedom to move, but at its foundation lies the right to life and choice of possibly the best conditions which will foster it and contribute to to the development of decent individual and social (most often family) life. Thus, liberties are connected with the category of social rights (economic, social, cultural), that is those requirements whose fulfilment a social group can demand from a community in order to secure a decent life for themselves.[23] Social rights are an expression of migrant's legal status, they are migrant's rights. However, they are related with the right to migration because the opportunity to live a decent life is intertwined with the assessment of the possibility of its realisation in a given country. These conditions greatly influence the choice of a country which is the destination of migration. Due to legal regulations protecting migrants, the right to migration can be placed in the category of solidarity rights (rights to peace, environment, development), which serve a person, his o her certain goods and values and require supportive cooperation of the whole society, or at least the one which shares these goods and values.

5. The right to migration can remain merely a slogan referring to human solidarity. In its deeper meaning, though, it can contribute to developing and strengthening this solidarity as long as it takes the measure of its own range.

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[23] H. Skorowski: *Problematyka praw człowieka*. Warszawa 1996, p. 27.

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Tomasz Gałkowski

La migration dans le contexte des droits de l'homme

Résumé

Le phénomène de migration concerne 3,3% de la population vivant dans le monde et son nombre ne cesse de croître. Afin d'arrêter la migration, des mesures sont prises, toutefois elles sont largement opposées au droit humain de migrer. Ce droit, lui-même, est également nié. Des actions visant à limiter réellement la loi, et non à la réglementer

s’avèrent un phénomène perturbateur. En tant que catégorie de droits mixtes, lesquels sont de nature humaine (dignité), la mesure devient la régulation positive de l’exercice des droits en tant que leur élément interne.

Mots clés : migration, droits humains, droits mixtes, réglementation, solidarité

Tomasz Gałkowski

Migrazione nel contesto dei diritti dell’uomo

Abstract

Il fenomeno della migrazione concerne il 3,3% della popolazione che vive nel mondo e quel numero continua a crescere. Per fermare la migrazione vengono adottate varie misure, nella maggior parte contrarie al diritto umano di migrare. Perfino questo stesso diritto in sé è negato. Le azioni per limitare effettivamente la legge, non per regolamentarla, si stanno rivelando dirompenti. In quanto categoria di diritti misti, intrinseci alla stessa natura umana (dignità), la misura diventa regolazione positiva dell’esercizio dei diritti come il loro elemento interno.

Parole chiave: migrazione, diritti umani, diritti misti, regolamentazione, solidarietà

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The Legal Status of "Migrants" according to the European Union Legislation

Abstract: Given that "migration" is a global phenomenon, the international community as a whole had to provide it with a legal basis and to find global solutions, as proven à *l'évidence* by both the international and the European legislation and the "Global Compact for Migration" approved by the European Council.

As is well known, the European Union legislation consists of the texts of its official instruments, such as conventions, treaties, declarations, etc., in which we also find, in fact, the principles stated in the international instruments, which have, indeed, the force of *jus cogens* for all the states of the world, concerning the universal human rights, including, thus, the rights of the migrants. However, even in terms of their policy regarding migrants, the member states of the European Union have not only applied the principles stated in these international instruments, but they also have enacted a special legislation, and they have taken concrete measures for the implementation of its rules.

In the present article I offer the reader the possibility to become acquainted not only with the text of the legislation of the European Union regarding migrants, but also with the policy and the actions taken by the European states for the implementation of the international legislation, and of the European one regarding the social rights of the migrants as workers.

Keywords: the legal status of migrants, the social rights of migrants, international legislation, European legislation

Introduction

The "phenomenon of migration" or the "migration crisis" is a real problem for the entire mankind, including for the United Nations organisation (New York) and the member states of the European Union, which

requested from their main organisations, both international and of the European Union, to create a legal framework for migrants, as clearly proven by the texts of the main legal European instruments (conventions, treaties, declarations etc.), in which we find stated the principles also stipulated in the text of the main international legal instruments[1] — enacted by the United Nations General Assembly — which peremptorily has attested to the fact that the legislation of the European Union regarding migrants has reaffirmed all the international legal principles regarding the legal status of migrants.

In the texts of the main legal instruments of the European Union, we could also notice the fact that the problem of human rights,[2] including the rights of migrants, refugees, and stateless persons, has always been at the core of the European legislation.

Indeed, from the first legal instruments of the European Union, that is, from *The European Convention on Human Rights*[3] (Rome, 1950), until the Decision of the European Council for a Regular Migration (21 March 2018),[4] we could easily realise the fact that the key words of all these instruments are the fundamental rights and liberties[5] of the man, also invoked specifically in the texts of all the international and European documents concerning the policy regarding migrants.

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[1] N. V. Dură, C. Mititelu: "International Covenant on Economic, Social and Cultural Rights." In: *8th Edition of International Conference the European Integration — Realities and Perspectives Proceedings*. Galați 2013, pp. 130—136; C. Mititelu: "The Children's Rights. Regulations and Rules of International Law." *Ecumeny and Law* 3 (2015), pp. 151—169.

[2] N. V. Dură: "The Fundamental Rights and Liberties of Man in the E.U. Law." *Dionysiana* 1 (2010), pp. 431—464; C. Mititelu: "Provisions of Principle with European Constitutional Value on the Person's Right to Freedom and Security." *Journal of Danubius Studies and Research* 2 (2016), pp. 158—165.

[3] C. Mititelu: "The European Convention on Human Rights." In: *10th Edition of the International Conference The European Integration — Realities and Perspectives*. Galati 2015), pp. 243—252.

[4] E. Guild, K. Weatherhead: "Tensions as the EU negotiates the Global Compact for Safe, Orderly and Regular Migration," https://eumigrationlawblog.eu/tensions-as-the-eu-negotiates-the-global-compact-for-safe-orderly-and-regular-migration/ (accessed 12.07.2020).

[5] N. V. Dură, C. Mititelu: "The Treaty of Nice, European Union Charter of Fundamental Rights." In: *8th Edition of International Conference The European Integration — Realities and Perspectives Proceedings*. Galați 2013, pp. 123—129; N. V. Dură, C. Mititelu: "The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe." In: *Exploration, Education and Progress in the Third Millennium*. București 2015, pp. 7—22.

The European Convention on Human Rights (Rome, 1950)

The member states of the Council of Europe ratified in Rome, on 4 November 1950, the first European legal instrument, that is, the *European Convention on Human Rights*, in which they stated their main purpose, namely to contribute to "the maintenance and further realization of Human Rights and Fundamental Freedoms," and "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"[6] (Preamble), that is, the *Universal Declaration of Human Rights*.[7]

As it is well known, in its articles, the *European Convention* also categorically prohibited any kind of slavery and forced labor.[8] Indeed, according to the aforementioned Convention, "no one shall be held in slavery or servitude" (Art. 4 para. 1), and "no one shall be required to perform forced or compulsory labour" (Art. 4 para. 2).

The same Convention also prohibited "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Art. 14).

In Protocol No. 4 to the *Convention for the Protection of Human Rights and Fundamental Freedoms* — signed on 16 September 1963 — it was also stipulated that "everyone" has "the right to liberty of movement and freedom to choose his residence" (Art. 2 para. 1), and "everyone shall be free to leave any country, including his own" (Art. 2 para. 2). In other words, everyone is free to migrate and to choose his or her residence or their new country, including any migrant.

In "Protocol No. 12 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*," signed in Rome, on 4 November 2000, the "Member States" of the Council of Europe also reaffirmed "the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law" (Preamble).

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[6] *European Convention on Human Rights*, https://www.echr.coe.int/documents/convention_eng.pdf (accessed 10.10.2020).

[7] N. V. Dură: "The Universal Declaration of Human Rights." In: *10th Edition of the International Conference The European Integration — Realities and Perspectives*. Galati 2015, pp. 235—242.

[8] N. V. Dură, C. Mititelu: "Human rights and their universality. From the rights of the 'individual' and of the 'citizen' to 'human' rights." In: *Exploration, Education and Progress in the third Millennium*. Galați 2012, pp. 103—127; C. Mititelu: "The Human Rights and the Social Protection of Vulnerable Individuals." *Journal of Danubius Studies and Research* 1 (2012), pp. 70—77.

This fundamental principle, which was indeed stipulated by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6), remains in fact a basis principle for the legal system of the European Union's states.

The same member states who signed Protocol No. 12, in its first Article, reaffirmed the general principle concerning the prohibition of any kind of discrimination stipulated in Article 14 of the *European Convention on Human Rights*, and therefore "the enjoyment of any right set forth by law shall be secured without discrimination" (Art. 1 para. 1).

One should also consider the fact that the principles asserted by the first *European Convention on Human Rights* were constantly reiterated in all of the documents concerning the rights and liberties of man issued by the Council of Europe.[9]

The *European Social Charter* (Turin, 18 October 1961)

Among other things, the Council of Europe stated — in the Preamble of this Charter, published in Turin (Italy) on 18 October 1961 — that its "aim" was "the maintenance and further realization of human rights and fundamental freedoms,"[10] which were, in fact, proclaimed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

In the same Preamble of the Charter, the Council of Europe considered that "the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin."[11] And, among these "social rights," according to the text of this Charter are "the right of migrant workers and their families to protection and assistance" (Art. 19).

Regarding "migrants," the Council of Europe had, therefore, as a main source for the content of Article 19 of the *European Social Charter* — the text of the *European Convention on Human Rights* (Rome, 1950).

The *European Convention on the Legal Status of Migrant Workers* (24 November 1977).

On 24 November 1977, the member states of the Council of Europe — assembled in Strasbourg — signed the "European Convention on the

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[9] C. Mititelu: "Europe and the Constitutionalization Process of EU Member States." "*Ovidius*" *University Annals, Economic Sciences Series* 2 (2013), pp. 122—127.

[10] *European Social Charter*. Turin, 18 October 1961, https://rm.coe.int/168006b642 (accessed 18.10.1961).

[11] Ibidem.

Legal Status of Migrant Workers," as they realised that "the legal status of migrant workers who are nationals of Council of Europe Member States should be regulated so as to ensure that as far as possible they are treated no less favorably than workers who are nationals of the receiving State in all aspects of living and working conditions" (Preamble).[12]

In terms of this Convention, a "migrant worker" is only "a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment" (Art. 1). And, regarding the residence permit, the Convention stipulated that this one shall be issued "in accordance with the provisions of national legislation" (Art. 9, 2).

Among other rights stipulated in this Convention, migrant workers and members of their families have the right to "family reunion" (Art. 12), the right to have access "to housing and rents" (Art. 13), the right to be entitled "on the same basis and under the same conditions as national workers, to general education and vocation training and retraining" (Art. 14, 1), the right of the migrant worker's children to be taught "the migrant worker's mother tongue" (Art. 15), the right to transfer "all or such parts of the earnings and savings of migrant workers" (Art. 17, 1), the right to have "equality of treatment with its own nationals, in the matter of social security" (Art. 18, 1), to be provided with "social and medical assistance" (Art. 19), to receive the "full legal and judicial protection of their persons and property and of their rights and interests" (Art. 26, 1), etc.

Since 1980, for the citizens of European Union's member states, the freedom of movement beyond national borders has been of "specific value and established in the Treaty of the European Union,"[13] which changed, in fact, EU's policy concerning migrants. However, according to a "European study," the decisive factor which determined the European States to act together in order to implement such a policy in the field of migration, was in fact the "fears of migration."[14]

In 1989, the European Union adopted the *Community Charter of the Fundamental Social Rights of Workers*,[15] based on which

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[12] *European Convention on the Legal Status of Migrant Workers*. Strasbourg [24.11.1977], https://rm.coe.int/1680077323 (accessed 24.11.1977).

[13] D. Jackson, A. Passarelli: *Mapping Migration, Mapping Churches' responses in Europe. Belonging, Community and Integration: the Witness and Service of Churches in Europe*, https://ccme.eu/wp-content/uploads/2018/12/2016-01-08-Mapping_Migration_2015_Online__lo-res___2_.pdf (accessed 15.11.2020).

[14] Ibidem.

[15] *Community Charter of the Fundamental Social Rights of Workers*, https://www.eesc.europa.eu/resources/docs/community-charter--en.pdf (accessed 22.10.2020).

President Delors (European Community) intended to build "a social Europe."[16]

According to the decision taken by the Member States of the European Community of that time, by this "Community Charter," "the implementation of these social rights […] may take the form of laws" (Preamble),[17] creating, in fact, a real European social law.

Since the said Charter has stipulated the fundamental social rights of the workers — among which we have to also include migrants workers — we have to underline the fact that, in conformity with its decisions, "every worker of the European Community shall have the right to freedom of movement throughout the territory of the Community" (Title I, Art. 1)[18]; every worker has to be engaged "in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country" (Title I, Art. 2); and "all employment shall be fairly remunerated" (Title I, Art. 5) and "every worker of the European Community shall have a right to adequate social protection" (Title I, Art. 10).

As is well known, the European Union's decisions regarding the migration and asylum policy, taken in 1999, in Tampere, Finland, are regarded "as a turning point towards a more realistic migration policy,"[19] which was, however, in line with the 1951 Refugee Convention. Moreover, the decisions taken in Tampere prove *à l'évidence* the fact that, in time, there was an evident necessity for the European Union's states to have "a more comprehensive approach towards migration."[20]

In December 2005, the Commission of the European Communities adopted a global approach to migration, and in December 2006, the European Council proposed to the EU's member states to consider how the "legal migration opportunities can be incorporated into the Union's external policies."[21]

As such, by a "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee

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[16] See Declaration of President Delors on 8 December 1989 at the European Council of Strasbourg. In: *Community Charter of the Fundamental Social…*

[17] *Community Charter of the Fundamental Social…*

[18] Ibidem.

[19] D. Jackson, A. Passarelli: *Mapping Migration, Mapping Churches' responses Europe study*, https://ccme.eu/wp-content/uploads/2018/12/2008-05-28_CCME_Publ_-_Mapping_migration_-_Mapping_Churches_responses.pdf (accessed 12.10.2020).

[20] Ibidem.

[21] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Brussels, 16.05.2007, COM(2007) 248 final, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0248:FIN:EN:PDF (accessed 15.09.2020).

and the Committee of the Regions, on circular migration and mobility partnerships between the European Union and third countries,"[22] — adopted on 16 May 2007 — the Commission identified "novel approaches to improve the management of legal movements of people between the EU and third countries ready to make significant efforts to fight illegal migration"[23] and to look "at ways to facilitate circular migration, [...]."[24]

The Treaty on European Union

In 2012, the consolidated versions of the two treaties were published, that is, the Treaty on European Union and the Treaty on the Functioning of the European Union.[25]

In the Preamble of the Consolidated version of the Treaty on European Union, the signatories declared expressly that they drew "inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."[26]

Therefore, the universal values of Europe, such as the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law, drew their inspiration from the European cultural, religions and humanistic inheritance, to which the religions of the Jewish people and the Christians brought a substantial and peremptory contribution.

On the same occasion, the signatories of this Treaty expressed "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,"[27] as well as "their attachment to fundamental social rights as defined in the European Social Charter [...] and in the 1989 Community Charter of the Fundamental Social Rights of Workers"[28] (Preamble).

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[22] Ibidem.

[23] Ibidem.

[24] Ibidem.

[25] Published in *Official Journal C 326, 26/10/2012*, pp. 0001—0390.

[26] *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN (accessed 7.09.2020).

[27] Ibidem.

[28] Ibidem.

The Consolidated version of the Treaty on European Union

The Consolidated version of the Treaty on European Union stipulates that "[T]he Union shall define and [...] work for a high degree of cooperation in all fields of international relations"[29] (Art. 21, 2), in order to "consolidate and support democracy, the rule of law, human rights and the principles of international law"[30] (Art. 21, 2b).

Among other things, from the text of this Treaty we also have to remember the fact that the European Union reaffirmed the fundamental principles stated in the International Law in order to consolidate and support the legal protection of human rights, including, thus, the human rights of migrants, foreseen expressly in the text of the international instruments issued by the General Assembly of the United Nations.

The main policies and actions of the European Union, and, *ipso facto*, of "the Member States" are to "comply with the commitments and take account of the objectives they have approved in the context of the United Nations"[31] (Art. 208, 2).

Under the auspices of the United Nations, different international instruments, such as pacts, conventions, declarations etc., which have the force of *jus cogens*[32] for all the world's states, have been adopted. And, among other things, in the text of these documents we also find a special reference to the problem of migration, and the texts issued from the offices of the European Parliament and European Council expressly reveal this reality.

One of this type of texts is the *Proposal for a Council Decision authorizing the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy*,[33] which was adopted on 10—11 December 2018 at the Intergov-

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[29] Ibidem.

[30] Ibidem.

[31] Ibidem.

[32] See N. V. Dură, C. Mititelu: *Principii şi norme ale Dreptului Uniunii Europene privind drepturile omului şi protecția lor juridică* [Principles and norms of the European Union Law concerning human rights and their judicial protection]. Constan'a 2014), pp. 12—13; N. V. Dură: "The Right to Religion: Some Considerations on the Principal International and European Juridical Instruments." In: *Religion and Equality. Law in conflict*. Eds. W. C. Durham Jr., D. Thayer. UK: Routledge, 2016, pp. 15—24.

[33] *Proposal for a Council Decision authorizing the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy*, Brussels [21.03.2018]. COM(2018) 168 final 2018/0078 (NLE), https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-168-F1-EN-MAIN-PART-1.PDF (accessed 23.11.2020).

ernmental Conference held in Morocco under the auspices of the United Nations.

In the Agreements regarding the “Cooperation Agreement between the European Union and its Member States” and the other world states, we, indeed, find a reference point for the national strategies concerning migration. For example, from the text of one of these agreements, namely “Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part” (2017), we find out that The Parties reaffirmed “the importance of the joint management of migratory flows between their territories”[34] (Art. 16, 1), and that the Parties considered that “Migration concerns shall be included in the national strategies/national development framework for economic and social development of countries of origin, transit and destination of migrants” (Art. 26, 1).[35]

This national strategy concerning “migration” indeed implies not only a national development framework for the economic and social development of the countries of origin, but also for the countries of transit and destination of migrants, hence the necessity to have both a common legal norm, and common actions of all the countries which are hosting migrants.

The *Joint Declarations* of 2017, the 2030 Agenda for Sustainable Development, and the New European Consensus on Development

In the *Joint Declarations*[36] signed on 30 June 2017 by *the representatives of the governments of the Member States and of the European Council, European Parliament and European Commission* — it was stated that

[34] *Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part*. Official Journal of the European Union L 343/3, [22.12.2017], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A1222(01)&from=EN (accessed 15.11.2020).

[35] Ibidem.

[36] *Joint Declarations. European Parliament, Council, European Commission, Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission*. Official Journal of the European Union (2017/C 210/01) [30.06.2017], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:210:FULL&from=EN (accessed 23.10.2020).

"The 2030 Agenda for Sustainable Development (2030 Agenda), adopted by the United Nations in September 2015, is the international community's response to global challenges and trends in relation to sustainable development"[37] (no. 1).

In the text of *Joint Declarations* it is also mentioned that migration is "a complex global, long-lasting phenomenon" (Art. 39) requiring, "[a] ddressing migration cuts across many policy areas, including development, good governance, security, human rights, employment, health, education, agriculture, food security, social protection and environment, including climate change"[38] (no. 40).

Therein it was emphasised that "through development policy, the EU and its member states will address the root causes of irregular migration and will, inter alia, contribute to the sustainable integration of migrants in host countries and host communities and help ensure the successful socioeconomic integration of returning migrants in their countries of origin or transit"[39] (no. 41).

Formally, under the auspices of the new European "Consensus on Development," the EU and its members states decided to engage, since development "education and awareness raising can play an important part in raising levels of engagement among the public and in addressing the SDGs at national and global level, thus contributing to global citizenship"[40] (no. 122).

In other words, in the processes of education of every country of the European Union, the migrant people (children or adults) should not be neglected.

The Global Compact for Migration

In the text of the above-mentioned *Proposal for a Council Decision*,[41] adopted during the Intergovernmental Conference held on 10—11 December 2018 in Morocco, the Council of the European Union mentioned that "since 2016, the European Union has been strongly and continuously engaged in the process of elaboration of the Global Compact for Migration"[42] (no. 8), and that even "over the past years, the European

[37] Ibidem.
[38] Ibidem.
[39] Ibidem.
[40] Ibidem.
[41] *Proposal for a Council Decision authorizing…*
[42] Ibidem.

Union has built a comprehensive long-term strategy on migration covering all aspects of this phenomenon, from saving lives, offering protection to those in need, addressing the root causes of irregular migration and forced displacement as well as providing support to forcibly displaced populations around the world"[43] (no. 9).

Among other things, the *Proposal for a Council Decision* underlined the fact that "migration can only be addressed effectively by the international community as a whole" (no. 4), since "[m]igration is a global phenomenon that requires global solutions based on the principles of solidarity and shared responsibility"[44] (no. 4).

In the same *Proposal for a Council Decision…*, which was adopted in December 2018, the European Council insisted that "the final text of Global Compact on Migration" will be fully "consistent with the E.U. acquis and policy"[45] (no. 12).

The final text of this "Global Compact on Migration" is, indeed, fully consistent with the acquis and policy of the European Union regarding migrants.

In the "Attachment" to *Proposal for a Council Decision…*, it was also underlined that "this Global Compact rests on the principles espoused in the Charter of the United Nations"[46] (Preamble, no. 1), "on the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the other core international human rights treaties; the United Nations Convention against Transnational Organized Crime, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery," etc. (Preamble, no. 2), and that "this Global Compact expresses our collective commitment to improving cooperation on international migration" (Our vision and guiding principles, no. 8).[47]

For the European Council, this Global Compact on Migration "is based on a set of cross-cutting and interdependent guiding principles" (no. 15). The main principle "is based on international human rights law"

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[43] Ibidem.

[44] Ibidem.

[45] Ibidem.

[46] *Resolution adopted by the General Assembly on 19 December 2018, Global Compact for Safe, Orderly and Regular Migration*, United Nations A/RES/73/195, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 (accessed 4.12.2020).

[47] Ibidem.

(no. 15, f), hence it has "a strong human dimension"[48] (no. 15, a). The second principle rests on the "International cooperation," and the third principle rests on the "National sovereignty," since "the Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law"[49] (no. 14, c).

The objectives and implementation of the policy of the European Union asserted by the Global Compact for Migration

Among the main Objectives of the policy of European Union, regarding "migration," we find mentioned the commitment of the European Council "to ensure, through appropriate measures, that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration"[50] (Objective 4, 20).

Another objective of the European Council was to provide specialised protection and assistance "with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, children, especially those unaccompanied or separated from their families"[51] (Objective 7, 23, b).

At the same time, the European Union committed itself "to take legislative or other measures to prevent, combat and eradicate trafficking in persons in the context of international migration by strengthening capacities and international cooperation to investigate, prosecute and penalize trafficking in persons, discouraging demand that fosters exploitation leading to trafficking, and ending impunity of trafficking networks"[52] (Objective 10, 26).

EU also committed itself to the objective of "developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment of all migrants"[53] (Objective 12, 28).

[48] Ibidem.
[49] Ibidem.
[50] Ibidem.
[51] Ibidem.
[52] Ibidem.
[53] Ibidem.

In the policy of the European Union concerning migrants, human rights were also correlated with the identification and status determination of all migrants, and, for this reason, the EU member states are fully committed to "condemn and counter expressions, acts and manifestations of racism, racial discrimination, violence, xenophobia and related intolerance against all migrants in conformity with international human rights law"[54] (Objective 17, 33).

Therefore, the European Union member states have to be fully committed to condemn any kind of racial discrimination, xenophobia and intolerance, including those based on race, religion or belief,[55] against all migrants, in conformity with international human rights law.[56]

In the "Attachment" to the *Proposal for a Council Decision*... — published in Brussels, by the European Commission — the European commentators of this document also noticed other EU objectives, namely "to adapt options and pathways for regular migration in a manner that reflects demographic and global labour market realities, optimizes education opportunities, reunites families, and facilitates access to protection in emergency situations" (Objective 5, 20).[57]

Another objective of the European Union — noticed by European commentators — is that "to protect all migrant workers against all forms of exploitation," and to "prohibit, through national legislation, non-State entities from confiscating or retaining travel or identity documents, as well as work contracts from a migrant in order to prevent abuse and exploitation, and allow migrants to fully exercise their human rights" (Objective 6, 21).[58]

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[54] Ibidem.

[55] N. V. Dură: "About the Freedom of Religion and the Laicity. Some Considerations on the Juridical and Philosophical Doctrine." *Bulletin of the Georgian National Academy of Sciences* 4 (2019), pp. 156—164; C. Mititelu: "About the Right to the Freedom of Religion." In: *Rethinking Social Action. Core Values*. Ed. A. Sandu et al. Bologna 2015), pp. 833—838.

[56] See N. V. Dură: "The Right to the 'Freedom of Conscience'. Legal Basis for the Educational and Missionary Activity of Religious Denominations." *Ecumeny and Law* 5 (2017), pp. 147—170; C. Mititelu: "The Right to Life. From the Prevention of Torture and Inhuman Punishment to the Abolition of the Death Penalty." *"Ovidius" University Annals, Economic Sciences Series* 2 (2013), pp. 128—133; N. V. Dură, C. Mititelu: "The Freedom of Religion and the Right to Religious Freedom." In: *Conference on Political Sciences, Law, Finance, Economics & Tourism* I. Sofia 2014, pp. 831—838.

[57] *Attachment to the Proposal for a Council Decision Proposal for a Council decision authorizing the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration, in the area of immigration policy*. Brussels [21.03.2018] (OR. en), 7391/18 ADD 1, https://data.consilium.europa.eu/doc/document/ST-7391-2018-ADD-1/en/pdf (accessed 17.09.2020).

[58] Ibidem.

Certainly, for the implementation of all these objectives, "concerted efforts at global, regional, national and subnational levels, including a coherent United Nations system" (Implementation, no. 38)[59] is, indeed, required.

In the said document's Conclusions, the European Council proposed that "the High-level Dialogue on International Migration and Development, currently scheduled to take place every fourth session of the General Assembly, shall be repurposed and renamed 'International Migration Review Forum' (Implementation, 45 a), and that the International Migration Review Forum shall take place in 2022, 2026 and 2030"[60] (Implementation, no. 45 c).

Therefore, we could say that the text of the Global Compact for Migration — proposed by the European Council on 21 March 2018, and adopted in Marrakesh, Morocco, on 10—11 December 2018 under the auspices of the UN General Assembly — also reveals a real and meritorious contribution of the representative organisations of the European Union to the genesis of an "unprecedented" event,[61] and, *ipso facto*, to a new concrete policy regarding the legal status of migrants.

Indeed, above all, from the text adopted by the Heads of State and Government and High Representatives of the United Nations, in December 2018, we could also remember the fact that "the Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law"[62] (Preamble, 14, c). And, by such statements, the UN undoubtedly reaffirmed the national sovereignty of the states even in their national policy regarding migration and migrants.

In the same final text, adopted in Morocco on 10—11 December 2018, the UN States committed themselves "to strengthen consular protection of and assistance to our nationals abroad, as well as consular cooperation between States, in order to better safeguard the rights and interests of all migrants at all times"[63] (Objective 14). In other words, all the states of the European Union are committed to take concrete measures to safeguard the rights and interests of all migrants in conformity with the international law.

[59] Ibidem.

[60] Ibidem.

[61] *Intergovernmental Conference on the Global Compact for Migration, 5th—8th Plenary Meetings*, https://reliefweb.int/report/world/speakers-call-robust-implementation-landmark-global-compact-protect-migrants-worldwide (accessed 19.10.2020).

[62] *Resolution adopted by the General Assembly on 19 December 2018…*

[63] Ibidem.

In lieu of conclusion

Addressing the issue of migration — one of today's international phenomena — has given us the opportunity to notice the fact that the "migration crisis" is, indeed, a problem for the entire mankind, hence the responsibility belonging to all the authorities, both at international, and at local level.

From the analysis of the texts of the different documents, the reader was able, in fact, to understand that the problem of migration determined the General Assembly of the United Nations, and also the Parliament and the Council of the European Union to stipulate not only a clear common policy, but also to create a legal status of the migrants, which compels both the states of the world, and their citizens, to know and to protect their fundamentals rights.

Therefore, for the accomplishment of this *pium desiderium*, we not only have to know the international legal status of the "migrants," but also to support the multilateral efforts to better manage migrant flows based on the respect for human rights according to the European legislation

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Nicolae V. Dură

Statut juridique des « migrants » selon la législation de l'Union européenne

Résumé

Considérant le fait que la « migration » est un phénomène mondial, la communauté internationale dans son ensemble a dû intégrer ce phénomène dans le système juridique et trouver des solutions globales, comme en témoignent à l'évidence le droit international et européen, entre autres *Global Compact for Migration* approuvé par le Conseil européen. Comme on le sait, dans la législation de l'Union européenne, c'est-à-dire dans ses instruments juridiques officiels, tels que conventions, traités, déclarations, etc., on retrouve les mêmes principes que dans les instruments internationaux. Ils ont donc le pouvoir de *jus cogens* pour tous les pays du monde en termes de droits humains universels, y compris les droits des migrants. Par conséquent, c'est précisément en matière de la politique à l'égard des migrants que les États membres de l'Union européenne ont non seulement appliqué les principes énoncés dans les instruments internationaux susmentionnés, mais ont également adopté une législation spéciale et ont pris des mesures spécifiques pour mettre en œuvre ses dispositions. L'intention de l'auteur de cet article est d'offrir au lecteur l'occasion de se familiariser non seulement avec la législation de l'Union européenne sur les migrants, mais aussi avec la politique et les actions menées par les pays européens. En particulier, il s'agit de la mise en œuvre du droit international et européen sur les droits sociaux des migrants en tant que travailleurs.

Mots clés : statut juridique des migrants, droits sociaux des migrants, législation internationale, législation européenne

Nicolae V. Dură

Status giuridico dei “migranti” secondo la legislazione dell’Unione Europea

Abstract

Considerando che la “migrazione” è un fenomeno globale, la comunità internazionale nel suo insieme ha dovuto integrare questo fenomeno nell’ordinamento giuridico e trovare soluzioni globali, come lo testimoniano *à l’évidence* il diritto internazionale ed il diritto europeo, tra l’altro *Global Compact for Migration* approvato dal Consiglio europeo. Come si sa, nella legislazione dell’Unione Europea, cioè nei suoi strumenti giuridici ufficiali quali convenzioni, trattati, dichiarazioni, ecc. troviamo gli stessi principi che negli strumenti internazionali. Hanno quindi il potere di *jus cogens* per tutti i paesi del mondo in termini di diritti umani universali, compresi i diritti dei migranti. Pertanto, è proprio nel campo della politica nei confronti dei migranti che gli Stati membri dell’Unione Europea non solo hanno applicato i principi enunciati nei summenzionati strumenti internazionali, ma hanno anche adottato una legislazione speciale e adottato misure specifiche per attuare le sue disposizioni. L’intenzione dell’autore di questo articolo è quella di offrire al lettore l’opportunità di familiarizzarsi non solo con la legislazione dell’Unione Europea sui migranti, ma anche con la politica e le azioni svolte dai paesi europei. In particolare, si tratta dell’attuazione del diritto internazionale ed europeo sui diritti sociali dei migranti in quanto lavoratori.

Parole chiave: status giuridico dei migranti, diritti sociali dei migranti, legislazione internazionale, legislazione europea

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Challenges Related to the Increase in Religious Diversity in the Light of the Judicial Decisions of the European Court of Human Rights

Abstract: European states responded in different ways to tensions related to the increase in religious diversity, and the restrictions introduced were considered appropriate when they resulted from public security and the need to protect others, especially if the state presented a credible justification. On this occasion, the case-law of the ECHR developed two key concepts for the determination of the presence of religious symbols in public places: a powerful external symbol and an essentially passive symbol. An important achievement of the Tribunal is also the introduction of the concept of "improper proselytism." Certainly, a further increase in religious diversity in Europe may lead to new areas of controversy, which will then be assessed by the ECHR. However, the existing instruments used by the Court, such as the idea of the Convention as a living document, the theory of the margin of appreciation or the analysis of the existence of the European consensus, enable it to develop its interpretation in this regard.

Keywords: the European Court of Human Rights, religious diversity, religious symbol, proselytism

Religious diversity has challenged the legislation of many European countries for centuries. On the one hand, it was seen as an opportunity for faster economic development (e.g. Protestant settlement in Poland or Russia), or as humanitarian aid (e.g. in the case of Huguenots in Protestant countries). On the other hand, it violated the religious *status quo* in a given area, sometimes arousing a sense of threat or reluctance due to the very fact of being different. Currently, in Europe, religious diver-

sity is progressing mainly due to migration, and then due to a quantitative increase resulting from the statistically higher fertility rate of Muslim communities. In the case of post-communist countries, an additional or rather marginal element is the emergence of non-traditional religious denominations. Currently, the legal actions of state authorities in this area are subject to assessment by the European Court of Human Rights, that is, by the body of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Journal of Laws 1993, No. 61, item 284), signed in Rome on 4.11.1950 in order to "promote and uphold the ideals and values of a democratic society."[1] Complaints about violations of human rights may be brought due to the interference by a party to the convention, including in the sphere of freedom of conscience and religion (Art. 9) or the prohibition of discrimination on grounds of religion (Art. 14 in conjunction with Art. 9).

Religious diversity in the opinion of the Court of Human Rights

The European Court of Human Rights has repeatedly referred to freedom of conscience and religion as "one of the foundations of a democratic society," perceiving its great value also for "atheists, agnostics, skeptics and the indifferent," as well as the indispensability of the principle of pluralism, "acquired dearly over the centuries," as foundations of democracy.[2] The Court also pointed out that "true religious pluralism [...] is critical to the survival of a democratic society,"[3] adding that "pluralism, tolerance and open-mindedness are features of a democratic society," because "although individual interests must sometimes be subordinate to the group, democracy does not simply mean that the views of the majority must always prevail: a balance must be struck that ensures the proper treatment of the minority and prevents the abuse of the dominant

[1] *Church of Scientology Moscow v. Russia*, No. 18147/02, ECHR judgment of 5.04.2007, § 74.

[2] *Kokkinakis v. Greece*, No. 14307/88, ECHR judgment of 25.05.1993, § 31; *Jehovah's Witnesses of Moscow v. Russia*, No. 302/02, ECHR judgment of 10.6.2010, § 99.

[3] *Leyla Sahin v. Turkey* [GC], No. 44774/98, ECHR judgment of 10.11.2005, § 108; *Manoussakis and Others v. Greece*, No. 18748/91, ECHR judgment of 26.09.1996, § 44; *97 Members of the Gladani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, No. 71156/01, ECHR judgment of 3.05.2007, § 130 and *Casado Coca v. Spain*, No. 15450/89, ECHR judgment of 24.02.1994, § 55.

position."[4] Therefore, the Court considers that "pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily requiring various concessions to individuals or groups of such persons who are justified in order to uphold and promote the ideals and values of a democratic society."[5]

Freedom of conscience and religion has been defined as "freedom to manifest independently and privately as well as in communion with others, publicly and in a circle sharing one faith. Art. 9 lists various forms that the manifestation of religion (denomination) or belief may take, such as service, teaching, practicing or maintaining customs."[6]

However, Article 9 "does not protect every act motivated or inspired by religion or belief,"[7] because "in democratic societies where several religions coexist among the same population, it is necessary to establish restrictions for the manifestation of religion or beliefs in order to reconcile the interests of different groups and ensure that everyone's beliefs may be respected."[8] In view of this the Court appreciates "the role of the state as a neutral and impartial regulator of conditions in which religion and religious beliefs are professed" in order to ensure public order, religious harmony and tolerance in a democratic society.[9] The state should seek to ensure mutual tolerance between opposing religious groups,[10] but it cannot assess the "validity of religious beliefs or the ways in which they are expressed."[11] More precisely, "the role of the authorities in such circumstances is not to remove the cause of tensions by eliminating pluralism, but to ensure mutual tolerance between opposing groups."[12] This sometimes means the need to limit the rights of some people in order to

[4] *Leyla Sahin v. Turkey* [GC]…, § 108; *Chassagnou and Others v. France* [GC], no. 25088/94, 28331/95 and 28443/95, ECHR judgment of 29.04.1999, § 112.

[5] *Leyla Sahin v. Turkey* [GC]…., § 108 *in fine.*

[6] Ibidem, § 105.

[7] Ibidem, § 105 *in fine*; also: *Kalaç v. Turkey*, No. 20704/92, ECHR judgment of 23.06.1997, § 27, *Arrowsmith v. The United Kingdom* No. 7050/75, Commission report of 12.10.1978; *C. v. The United Kingdom*, no. 10358/83, Commission decision of 15.12.1983 and *Tepeli and Others v. Turkey* (dec.), No. 31876/96, decision on the admissibility of the complaint of 11/9/2001, § 47; *Hasan and Chaush v. Bulgaria* [GC], No. 30985/96, ECHR judgment of 26.10.2000, § 78; *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], No. 41340/98, 41342/98 and 41244/98, ECHR judgment of 13.02.2003., § 91.

[8] *Leyla Sahin v. Turkey* [GC]…, § 105 *in fine*

[9] Ibidem, § 107; also: *Refah Partisi and Others v. Turkey…*, § 51; *97 Members…*, § 131 and many others.

[10] *United Communist Party of Turkey and Others v. Turkey* [GC], No. 133/1996/752/951 ECHR judgment of 30.01.1998, § 57.

[11] *Leyla Sahin v. Turkey* [GC]…, § 107.

[12] Ibidem; *Serif v Greece*, no. 38178/97, ECHR judgment of 14.12.1999, § 53.

legitimately protect the rights of others.[13] In the judicial decisions of the ECHR, decisions regarding the admissibility of such limitations or omissions by the state appeared in relation to several issues:
1) the presence of Muslim religious symbols in public space;
2) the admissibility of proselytism;
3) the involvement of foreigners in mission work;
4) the protection of religious minorities from aggression by other religious groups or foreign states in the event of deportation.

Presence of religious symbols

Regulations concerning the presence of religious symbols in the 21st century turned out to be one of the most common areas of ECHR's judicial decisions. This occurred most often with regard to restrictions on female Muslim attire in public places, including in the judgments *Dahlab v. Switzerland*, *Leyla Şahin v. Turkey*,[14] and *Dogru v. France*.[15] The case of *Dahlab v. Switzerland* was an occasion for the Court to introduce the concept of "a powerful religious symbol." Such a symbol, due to its visibility, ease of identification with a specific religion and linking to the hierarchical position of a given person (e.g. when worn by a teacher or judge) "has a kind of proselytical effect,"[16] which forces other people to adopt certain religious views (e.g. a specific reception of the Koran by female students), or it may lead to a conflict with other values — the prohibition of discrimination (e.g. the principle of sexual equality). For example, in the case of *Leyla Şahin v. Turkey* the claimant was a Muslim female, who challenged the prohibition of the use of Muslim headscarves during academic classes and exams. It was crucial for the decision by the ECHR to take into account the model of denominational law applicable in Turkey, that is, the constitutional principle of secularism of the state, resulting in the creation of a "religion-free space in which all citizens will be guaranteed equality regardless of religion."[17] National courts have found that wearing a Muslim headscarf may lead to discrimination against non-practicing

[13] *Leyla Sahin v. Turkey* [GC]…, § 108 *in fine*.

[14] *Leyla Sahin v. Turkey*, No. 44774/98, ECHR judgment of 29.06.2004 and *Leyla Sahin v. Turkey* [GC], no. 44774/98, Grand Chamber judgment of 10.11.2005.

[15] *Dogru v. France*, No. 27058/05, judgment of the ECHR of 4.12.2008.

[16] *Dahlab v Switzerland*…, p. 9.

[17] *Leyla Sahin v. Turkey* [GC]…, § 29.

Muslims or non-believers on the grounds that they are a minority.[18] In its judgement, the ECHR drew attention to the difficulty of reconciling the Koran with the principle of sexual equality, as well as the principle of secularism in Turkey,[19] which supports the protection of human rights, including "protecting students who do not practice this religion or belong to a different religion against pressure on the part of fundamentalist religious movements."[20] Similarly, in March 2010 the complaint was found inadmissible in the case of *El Morsli v. France*,[21] in which the female Muslim claimant refused to remove her Muslim headscarf during identity verification by male personnel from the French Consulate General in Marrakesh. In this case, the inadmissibility of the complaint was related to the court's belief that this requirement was for security reasons.

In the case of *Dogru v. France* (similar to the case of *Kervanci v. France*[22]), the female claimant was expelled from the public school due to her failure to comply, despite repeated requests to comply with the school regulations, which required appropriate clothing for PE lessons, including not wearing a headwear, as well as a confrontational approach to this situation. The Court ruled that the French state did not breach the Convention and that the prohibition of wearing religious symbols or clothes may be justified by the aim of protecting the rights and freedoms of others and maintaining public order.[23] The decision in the case of *Dogru v. France* was used to reject another six similar cases concerning Muslim scarves (*kershif*) or Sikh turban (*keski*): *Aktas v. France*,[24] *Bayrak v. France*,[25] *Gamaleddyn v. France*,[26] *Ghazal v. France*,[27] *J. Singh v. France*,[28]

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[18] Ibidem, § 36.

[19] Cf. J. Falski: "Zderzenie państwa świeckiego z państwem wyznaniowym. Turecki spór o laickość." In: *Państwo wyznaniowe. Doktryna, prawo i praktyka*. Ed. J. Szymanek. Warsaw 2011, p. 128.

[20] *Leyla Sahin v. Turkey* [GC] …, *in fine*; similar to *Refah Partisi and Others*…, § 95.

[21] *El Morsli v. France*, No. 15585/06, decision on the admissibility of the complaint of 4.03.2008.

[22] *Kervanci v. France*, No. *31645/04*, judgment of the ECHR of 4.12.2008.

[23] Ibidem, § 60.

[24] *Aktas v. France*, No. 43563/08, decision on the admissibility of the complaint of 30.06.2009.

[25] *Bayrak v. France*, No. 14308/08, decision on the admissibility of the complaint of 30.06.2009.

[26] *Gamaleddyn v. France*, No.18527/08, decision on the admissibility of the complaint of 30.06.2009.

[27] *Ghazal v. France*, No. 29134/08, decision on the admissibility of the complaint of 30.06.2009.

[28] *J. Singh v. France*, No. 25463/08, decision on the admissibility of the complaint of 30.06.2009.

and *R. Singh v. France*.[29] The subject of the judicial decisions of the European Court of Human Rights was also the Belgian law prohibiting the use of face-covering clothing in public places for reasons of public safety. The Muslim claimants considered that this provision was against them. However, in cases *Belcacemi and Oussar v Belgium*[30] and *Dakir v. Belgium*[31] the Court found that the provisions were not formulated in a discriminatory manner.

The judicial decisions of the ECHR become more and more nuanced with regard to Muslim attire. In the light of the latest judgments *Lachiri v. Belgium* of 18 September 2018[32] and *Hamidović v. Bosnia and Herzegovina*[33] of 5 December 2017, it can be concluded that the assessment of the admissibility of prohibiting their use in public places depends on the role of a given person (e.g. whether he or she is a person performing public functions), the nature of his or her presence (e.g. whether his or her presence is of a secondary nature), the degree of accessibility of a public place (e.g. the courtroom was found to be less public than a street or school) and the behaviour of that person. In the cases concerned, it was found that not allowing a family member of the defendant to enter the courtroom on account of hijab or to impose a penalty on the accused who refused to remove his religious headwear was in breach of Article 9 of the Convention.

However, the Court still has not addressed the legality of the Swiss prohibition on building minarets. The prohibition was introduced as a result of a referendum in 2009. Admittedly, an action against this provision was immediately brought in the cases of *Ouardiri v. Switzerland*[34] and *Ligue des Musulmans de Suisse and Others v. Switzerland*,[35] where the claimants were, respectively, the spokesman of the Geneva mosque and three associations and foundations in Switzerland dealing with the provision of social and spiritual assistance to Muslims, the complaints were declared inadmissible on the grounds that the claimants could not be regarded as aggrieved and therefore the merits of the case were not resolved.

The known case of *Lautsi v. Italy*, referring to the presence of the crucifix in the public space, and therefore going beyond the issue of

[29] *R. Singh v. France*, No. 27561/08, decision on the admissibility of the complaint of 30.06.2009.

[30] *Belcacemi and Oussar v Belgium*, No. 37798/13, ECHR judgment of 11.07.2017.

[31] *Dakir v. Belgium*, No. 4619/12, ECHR judgment of 11.07.2017.

[32] *Lachiri v. Belgium*, No. 3413/09, ECHR judgment of 18.09.2018.

[33] *Hamidović v. Bosnia and Herzegovina*, No. 57792/15, ECHR judgment of 5.12.2017.

[34] *Ouardiri v. Switzerland*, No. 65840/09, decision on the admissibility of the complaint of 8.07.2011.

[35] *Ligue des Musulmans de Suisse and Others v. Switzerland*, No. 66274/09, decision on the admissibility of the complaint of 8.07.2011.

increasing religious diversity, taken up in this article, after the final sentence of the Grand Chamber, confirmed the findings set out in the above cases, emphasising the importance of the strength of the impact of a religious sign, that is, its proselytising nature as well as leading to sexual discrimination. In the case of Christian symbols, such risk seems to be definitely limited. The Grand Chamber disagreed with the Chamber's earlier judgment, which held that a crucifix hanging on a wall, due to its noticeability, should be classified as *powerful external symbol*.[36]

The admissibility of proselytism

Rationalism, as along with the personalistic and irenistic trends in Christian community, influenced the abolition of the criminality of conversion as well as proselytism in the 19th and 20th centuries in Europe. It was also influenced by the stabilisation of interfaith relations due to the lack of strong proselytic tendencies in contemporary Christianity. However, increasing religious diversity in Europe increases the probability of such practices both by Muslim community and by new religious movements, especially in the event of a significant increase in their number. In such a situation, there may be social pressure to protect against aggressive proselytism, which was already the subject of the judicial decisions of the ECHR in the case *Kokkinakis v. Greece* of 25 May 1993[37] concerning a Jehovah's Witness repeatedly punished for proselytising. The Court indicated in its judgment that freedom of conscience and religion also includes the "right to try to persuade" other persons,[38] finding that the possibility of restricting this freedom is permissible when it is necessary to reconcile the interests of various groups and to ensure respect for the views of all. The Court also found that, in principle, the prohibition of proselytism falls within such definition, especially if the purpose of the prohibition is "to protect the beliefs of others against actions that undermine their dignity and identity."[39] Interestingly, the Court relied on the documents of the World Council of Churches, indicating that proselytism may "take the form of activities consisting in offering material or

[36] Cf. M. Kowalski: "Symbole religijne w przestrzeni publicznej — w poszukiwaniu standardów europejskich." In: *Prawne granice wolności sumienia i wyznania*. Eds. R. Wieruszewski, M. Wyrzykowski, L. Kondratiewa-Bryzik. Warsaw 2012, p. 63.

[37] *Kokkinakis v. Greece*, No. 14307/88, ECHR judgment of 25.05.1993.

[38] Ibidem, § 31.

[39] Ibidem, § 34.

social benefits in order to attract new members to the Church or exerting improper pressure on people in poverty or need; it may even involve the use of force or *brainwashing*."[40] Such actions are not protected by the Convention, and therefore the penalisation of inappropriate proselytism understood in this way is possible and even desirable.[41] The jurisprudence regarding proselytism was confirmed by the Court in 1998 alongside the case of *Larissis and Others v. Greece*,[42] in which the claimants were Pentecostalists serving as military air force officers. It was then found that the claimants had used the subordination to a unit's chain of command relationship for religious purposes, which constituted the so-called wrong proselytism.

Religious activities of foreigners

The rights of foreign missionaries were also a specific issue decided by the ECHR. Human rights are granted regardless of state affiliation; in particular, a foreigner has the right to manifest his or her religious beliefs, in accordance with Article 9 of the Convention, while in the territory of a country. However, they are not guaranteed the right of entry, permission to take up employment or permanent residence in a country in order to carry out a religious mission, as was decided in cases before the ECHR in the context of Christian missionaries in Turkey, Muslim imams in European countries or new religious movements in post-Communist countries. In particular, on the basis of the Convention, a foreigner does not have the right to obtain a residence permit in connection with his appointment to a clerical post in a given country, and this status does not protect him, in principle, against expulsion if there are appropriate grounds for it. This was already confirmed in the 1980s by the decision in the case of *Swami Omkarananda and Divine Light Zentrum v. Switzerland*, in which the claimant had used a Hindu house of prayer for criminal activities.[43]

It is, however, a violation of Article 9 of the Convention to prevent the entry or expulsion of a foreigner on the sole ground that he is manifesting

[40] Ibidem, § 48.

[41] Ibidem, § 48 *in fine*.

[42] *Larissis and Others v. Greece*, No. 23372/94, 26377/94 and 26378/94, judgement of 24.2.1998.

[43] Cf. *Swami Omkarananda and Divine Light Zentrum v. Switzerland*, no. 8118/77, decision on the admissibility of the complaint of 19.03.1981, where the claimant was deported for combining religious beliefs with criminal activity.

his religion, including through missionary activity, when those religious beliefs cannot be alleged to be unworthy of protection. Some of the key cases of this type were: *Perry v. Latvia*[44] and *Nolan and K. v. Russia*.[45] In the first case, an Evangelical pastor was denied residency in Latvia due to the authorities' finding that he was an activist of a totalitarian or terrorist organisation and a member of a secret anti-state organisation. In the second case, Russia denied re-entry to the country to an American citizen, a missionary of a legally operating Unification Church (the so-called Moon movement) in connection with internal instructions to combat a threat to national heritage.[46] The failure of both Russia and Latvia to indicate the missionaries' specific actions justifying such a restriction on their freedom led the Court to conclude that the expulsion was solely on account of their religion, and thus that there had been an unauthorised violation of Article 9.[47]

Similarly, in the case of *Al-Nashif v. Bulgaria*[48] the ECHR found non-compliant with the Convention the withdrawal by the Bulgarian authorities of a permanent residence permit from the claimant, a Palestinian Muslim cleric lawfully certified by the Supreme Muslim Council and the Grand Mufti of Bulgaria, and his subsequent expulsion from the country for alleged religious extremist activities endangering state security. The Court found that the authorities' arguments for declaring the claimant a dangerous religious extremist were of very dubious value, being limited to the incorrect statement that he had taught the Koran to a group of children without legal situation and that the extremist organisations with which he was alleged to be associated were operating legally in Bulgaria and the authorities had not brought any criminal charges against their representatives.[49] Nor does acting as a cleric automatically guarantee the right to prolongation of residence or employment in the territory in the light of the cases *Öz v. Germany*[50] and *El Majjaoui and Stichting Touba Moskee v. the Netherlands*.[51] Both cases concerned imams. The latter case is interesting in that the mosque's failure to show that it had exhausted the possibility of finding a suitable imam with a European passport was considered a legitimate reason. An exception to these negative decisions for

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[44] *Perry v. Latvia*, no. 30273/03, ECHR judgment of 8.11.2007.

[45] *Nolan and K. v. Russia*, no. 2512/04, ECHR judgment of 12.02.2009.

[46] *Nolan and K. v. Russia*, § 12 and 39.

[47] Ibidem, § 75; *Perry v. Latvia*, § 51.

[48] *Al-Nashif v. Bulgaria*, no. 50963/99, ECHR judgment of 20.06.2002.

[49] Ibidem, §§ 48 and 58; cf. similar Bulgarian actions against Jehovah's Witnesses: *Lotter and Lotter v. Bulgaria*, no. 39015/97, ECHR judgment of 19.05.2004.

[50] *Öz v. Germany*, no. 32168/96, ECHR decision of 3.12.1996.

[51] *El Majjaoui and Stichting Touba Moskee v. the Netherlands*, no. 25525/03, ECHR judgment of 20.12.2007.

the complainants was the case of *Jehovas Zeugen in Österreich v. Austria*,[52] where the reason for the recognition of the complaint was the differentiation of the rights of recognised and unrecognised religious associations, which was found to be discrimination under Article 14.

Protection of religious minorities by the state

According to the Convention, states have a positive obligation to act as regulators of the exercise of freedom of conscience and religion in order to defend persons under their jurisdiction against the actions of third parties. A key ruling in this regard came in the case of *97 Members of the Gladani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*,[53] in which Jehovah's Witnesses from Georgia were victims of a violent religious assault during a religious meeting in their congregation's building. The notified security authorities did not assist Jehovah's Witnesses, and the attackers were not charged.[54] The Court concluded that "the claimants […] faced total indifference and inaction on the part of the public authorities who, because of the claimants' membership of a religious community considered a threat to Christian orthodoxy, failed to act on their complaints. Deprived of means of enforcing their rights, the claimants were unable to seek protection of their freedom of conscience and religion before the national courts."[55] The judges recalled that "in the name of freedom of religion, improper pressure cannot be put on others to promote one's religious beliefs. […] The role of the State is to aid public order, religious harmony and tolerance in a democratic society."[56] In the light of events, it was noted that "by their inaction, the relevant authorities had failed in their duty to take the necessary measures to ensure that a group of orthodox extremists […] tolerated the existence of the claimants' religious community and allowed them to freely exercise their right to freedom of religion."[57] A similar decision was reached

[52] *Jehovas Zeugen in Österreich v. Austria*, no. 27540/05, ECHR judgment of 25.09.2012.

[53] *97 Members of the Gladani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, no. 71156/01, ECHR judgment of 3.5.2007.

[54] Ibidem, § 115—116.

[55] Ibidem, § 133.

[56] *97 Members…*, § 132; cf. also *Larissis and Others v. Greece…*, § 54 and 59; *Serif v. Greece….*, § 53 and *Refah Partisi and Others v. Turkey…*, § 91.

[57] *97 Members…*, § 134—135.

in a case against Serbia in relation to attacks on a follower of Hare Krishna.[58]

Significantly, the positive obligations of the State also extend to ensuring that persons deprived of their liberty are able to practice different religions. Increasing religious diversity in prisons due to the incarceration or conversion of inmates following religions with specific dietary requirements (e.g. Islam, Eastern religions) must be adequately taken into account by the penitentiary authorities, even if it results in additional costs for the functioning of the prison system. An example of such a case was *Jakóbski v. Poland*[59] involving a convert to Buddhism who followed the Mahayan dietary principles, which he believed excluded the consumption of meat.[60] The Polish authorities unsuccessfully argued that Buddhism does not require adherence to such a rule, using only the *Great PWN Encyclopedia* and the online Wikipedia (sic!). The Court emphasised that dietary requirements may constitute a manifestation of religious beliefs, and had no doubt that the claimant's vegetarianism was related to the requirements of his well-known religion.[61]

Another obligation of the parties to the Convention is to refrain from deporting illegal immigrants to states where they face the death penalty or inhuman treatment because of their religious beliefs. This is related primarily to the right to life (Article 2 of the Convention) and Article 3 (prohibition of torture),[62] and in later case law has also been extended to the right to a court and a fair trial (Article 6) and the rights to liberty and security (Article 5).

Conclusions

In conclusion, European states have reacted in different ways to the tensions associated with increased religious diversity, whereby restrictions have been deemed legitimate when based on public safety and the need to protect others, especially if the state provides a credible justification. The jurisprudence of the ECHR has on this occasion developed two concepts that are key to resolving the presence of religious symbols in public places:

[58] *Milanović v. Serbia*, no. 44614/07, ECHR judgment of 14.12.2010, § 89.

[59] *Jakóbski v. Poland*, no. 18429/06, ECHR judgment of 7.12.2010 r.

[60] Ibidem, § 6—7.

[61] Ibidem, § 45.

[62] Cf. *A. v. Switzerland*, No. 60342/16, ECHR sentence of 19.12.2017.

1) a powerful external symbol;
2) an essentially passive symbol.

These terms are used depending on the recognition of the strength of the impact on third parties, particularly minors or persons dependent on the state. There is an obligation on the contracting parties to protect third parties from strong external symbols. In practice, Muslim outfits, due to differences in civilisation, are seen by the ECHR as posing a threat to the assertion of their Convention rights by vulnerable persons due to the discriminatory and authoritarian nature of Islam's mainstream. At the same time, however, relevant to the legitimacy test remains the wide margin of assessment available to the state due to cultural-religious differences and the lack of European consensus in this area.[63]

An important achievement of the Court is also the introduction of the concept of "improper proselytism." As K. Warchałowski points out, "the promotion of religious doctrine or other views by individuals as well as churches and other religious organizations should be done in a positive way without demeaning other religions or beliefs and taking advantage of a stronger position in interpersonal relations."[64] However, in his commentary L. Garlicki emphasises that "it is a positive duty of the public authorities to allow religious assemblies to take place peacefully and to ensure their protection against violence and attacks by religious extremists."[65] The protection of freedom of conscience and religion cannot be limited due to economic aspects or a small group of believers. The importance of the positive involvement of European states in the protection of this freedom is also shown by the cases before the ECHR concerning the expulsion of Christian converts from Islam to Muslim countries, where such conversion is punishable by imprisonment or death.[66] Certainly, further expansion of religious diversity in Europe may lead to new areas of controversy, subsequently assessed by the ECHR. Nonetheless, the existing instruments used by the Court, for instance, the idea of the Convention as a living document, the theory of the margin of assessment or the analysis of the existence of a European consensus enable it to develop its interpretation in this area.

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[63] M. Hucal: *Wolność sumienia i wyznania w orzecznictwie ETPCz*. Warsaw 2012, pp. 104—123.

[64] K. Warchalowski: *Prawo do wolności myśli, sumienia i religii w Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności*. Lublin 2004, p. 119.

[65] L. Garlicki: *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*. Warsaw 2011, t. 1, p. 567.

[66] Cf. the thoroughness of the analysis performed in the case of such a claimant's argument: *F. H. v. Sweden*, no. 32621/06, ECHR judgment of 20.01.2009, § 66—67 and 97.

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Michał Hucał

Défis liés à l'accroissement de la diversité religieuse à la lumière de la jurisprudence de la Cour européenne des droits de l'homme

Résumé

Les États européens ont répondu de différentes manières aux tensions liées à l'augmentation de la diversité religieuse, et les restrictions introduites ont été considérées comme appropriées lorsqu'elles relevaient de la sécurité publique et de la nécessité de protéger les autres, surtout si l'État présentait une justification crédible. A cette occasion, la jurisprudence de la Cour européenne des droits de l'homme a introduit deux notions clés pour la détermination de la présence de symboles religieux dans les lieux publics : un symbole externe fort *(a powerful external symbol)* et un symbole essentiellement passif *(an essentially passive symbol)*. Une réalisation importante du Tribunal est également l'introduction du concept de « prosélytisme inapproprié » *(improper proselytism)*. Certes, la continuation de la croissance de la diversité religieuse en Europe peut conduire à de nouveaux domaines de controverse, qui seront ensuite évalués par la Cour. Cependant, les instruments existants utilisés par la Cour, tels que l'idée de la Convention perçue comme un document vivant, la théorie de la marge d'appréciation ou l'analyse de l'existence du consensus européen, lui permettent de développer son interprétation dans ce domaine.

Mots clés : Cour européenne des droits de l'homme, diversité religieuse, symbole religieux, prosélytisme

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Sfide legate all'aumento della diversità religiosa alla luce della giurisprudenza della Corte europea dei diritti dell'uomo

Abstract

Gli stati europei hanno risposto in modi diversi alle tensioni legate alla crescente diversità religiosa, e le restrizioni introdotte sono state ritenute appropriate quando dovevano garantire la sicurezza pubblica e la protezione di terzi, soprattutto se lo Stato presentava una giustificazione credibile. In questa occasione, la giurisprudenza della Corte Europea dei Diritti dell'Uomo ha introdotto due concetti chiave per determinare la presenza di simboli religiosi nei luoghi pubblici: un simbolo esterno forte (*a powerful external symbol*) e un simbolo essenzialmente passivo (*an essentially passive symbol*). Una realizzazione importante del Tribunale è anche l'introduzione del concetto di "proselitismo improprio" (*improper proselytism*). Naturalmente, un ulteriore aumento della diversità religiosa in Europa può portare a nuovi ambiti di controversia, che saranno poi valutati dalla Corte. Tuttavia, gli strumenti esistenti utilizzati dalla Corte, come l'idea della Convenzione in quanto un documento vivo, la teoria del margine di discrezionalità o l'analisi dell'esistenza del consenso europeo, consentono di sviluppare la sua interpretazione in questo dominio.

Parole chiave: Corte europea dei diritti dell'uomo, diversità religiosa, simbolo religioso, proselitismo.

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Cross-Border Flow of Personal Data in the Context of Emigration of the Faithful of the Catholic Church from Poland

Abstract: The increased emigration of Poles has caused numerous problems of legal and canonical nature, also relating to the activity of the Catholic Church. The article concerns the cross-border processing of personal data carried out by the Catholic Church entities in the context of the emigration of the faithful. Processing of the data of believers takes place, for example, in the formalities related to preparation for entering marriage. From the point of view of canon law the article deals with such issues as: the legality of the process of cross-border data processing, the obligations of the data controller carrying out such a process and the role of the supervisory authority.

Keywords: GDPR, Decree on the protection of personal data, Catholic Church in Poland, personal data, emigration

Introduction

The cross-border flow of personal data in the area of globalisation is an irremovable element of the contemporary world. This issue becomes particularly relevant in the case of Poland and the Catholic Church. It is because of the big number of Poles who go abroad as emigrants.[1] Cur-

[1] The intensification of the emigration phenomenon took place after 2004 when Poland became a member of the European Union, see: M. Ćwiek, P. Ulman: "Emigracja Polaków po wstąpieniu Polski do Unii Europejskiej." In: *Prawne i ekonomiczne aspekty migracji*. Eds. M. Butrymowicz, P. Kroczek. Kraków 2016, pp. 31—49 or A. Bobrowska:

rently, this number is estimated at 2.5 million Poles living as emigrants outside Poland.[2] As statistical data allow to predict, most of them are Catholics.[3] Outside the home country, they want to practice their faith by also receiving the sacrament.

Canon law plays an important role in the activity of the Catholic Church. This law makes certain administrative demands for receiving or recording sacraments in the form of the necessity of various certificates (certificate of baptism or confirmation), permissions, or other documents. They all contain personal data. Sometimes, the data are, by their nature, particularly sensitive. It is because the data are concerning a natural person's sex life or sexual orientation, medical conditions, etc. It is especially so in the case of the inquiry carried out before marriage. Canon law requires to create a premarital protocol (can. 1067).

In law and literature on the subject, they are called "special categories of personal data" or "sensitive data." Their processing could create significant risks to the fundamental rights and freedoms, as well as *bona fama* of the faithful (see can. 220 CIC). The documents in question must be sometimes transferred, for example, from the baptismal parish to the parish of his or her canonical domicile or quasi-domicile, which is abroad. Without a doubt, this form of data processing must also be carried out in such a way as to ensure an adequate level of protection for individuals both during and after the process.

The issue the numerous canonical questions arise concerning, among others: 1) the conditions for the legality of the process, 2) extra duties of the Church data controller exercising such a process, and 3) the role of the supervisory authorities in the process of the data transfer abroad. These questions create an elaborate research problem of the present article. After this theoretical background has been presented, 4) some examples of data transfer problems in the parish will be offered.

The perspective for this research is a canonical one. It means that only canon law is involved. The element of civil law (state law regulating the persona data protection) is not included. In this context, one fact must be acknowledged. The main law that governs the subject in the Church in

"Migracje Polaków po przystąpieniu do unii europejskiej." C*olloquium wydziału nauk humanistycznych i społecznych* 2 (2013), pp. 49—64.

[2] Główny Urząd Statystyczny [Central Statistical Office of Poland]: *Informacja o rozmiarach i kierunkach emigracji z Polski w latach 2004—2016*, https://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-zagraniczne-ludnosci/informacja-o-rozmiarach-i-kierunkach-emigracji-z-polski-w-latach-20042016,2,10.html?pdf=1 (accessed 2.01.2021).

[3] According to the Central Statistical Office of Poland, in 2012 ca. 87% of the population of Poland declared to be Catholic, *Rocznik demograficzny 2013* (Główny Urząd Statystyczny: Warszawa 2013), p. 76.

Poland is issued by the Polish Bishops' Conference. It is General Decree on the protection of individuals with regard to the processing of personal data in the Catholic Church issued in 2018.[4] Unfortunately, the law does not contain many provisions that regulate the transfer of data abroad. It means that in practice, a lot of norms are not taken directly from the text of the law, but they are built in the process of interpretation according to canon 19 CIC. The canon orders, that in the case when in a particular matter there is not an express provision of law, nor a custom, then, the question is to be decided by taking into account laws enacted in similar matters, the general principles of law observed with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned authors. Of course, every law or every data protection system contains loopholes (*lacunae legis*), that is, no legal solution for a given factual situation. Unfortunately, in the case of the Decree, the lacunae are particularly numerous and fundamental rather than incidental.[5]

1. The conditions for the legality of the process

As the principle of legalism orders, the controller may not transfer data outside the territory of Poland, if there is no legal basis for this action.[6] The legal grounds for the procedure are given in the Decree.

Article 34 (1) of the Decree states that the transfer of data by the controller to another ecclesiastical data set can only take place upon request:
1) the data subject for any reason, or
2) the data controller when that requested data is to be used in its data set.

Additionally, according to Article 34 (2) of the Decree, the transfer of personal data, but only by the ecclesiastical public legal person (can. 116 § 1 CIC), to any other (that is also to non-canonical) legal person may take place in case when:
1) it is necessary to complete the tasks specified in the law;
2) the data subject has been informed about the transfer and has previously consented to the transfer in writing;

[4] *Akta Konferencji Episkopatu Polski* 30 (2018), pp. 31—54; hereinafter: Decree.

[5] P. Kroczek: *Przetwarzanie danych osobowych przez podmioty Kościoła katolickiego w Polsce: transfer pomiędzy państwami*. Kraków 2020), 26—27 and 97—99.

[6] The rule in question sometimes can be limited by the application of the supreme rule of the canon law, that is *salus animarum*.

3) the transfer is necessary for the performance of an agreement to which the data subject is a party;
4) the transfer is necessary for the interest of the data subject;
5) the transfer is necessary for important reasons of public interest.

The controllers which are private legal persons (can. 116 § 1 CIC) and other organisational units cannot transfer the data outside the territory of Poland based on the presented Article. However, they may invoke Article 34 (1) of the Decree and transfer the data not on their own initiative, but at the request of the data subject.

Other legal and canonical grounds for data transfer available to any controller is the transfer of data:
1) for research purposes, in compliance with the methodological and deontological criteria relating to historical research, and in particular those indicated in the regulations on the Church archives;
2) for statistical purposes, after the prior removal of personal identification data (Article 34 (3) of the Decree).

2. Extra duties of the data controller exercising the such process

Due to the risky nature of the data transfer outside the country, the Church legislator imposed some extra duties on the data controller exercising the process in question.

One of the extra duties is the extension of the right to information of persons whose data are transferred outside of Poland. This right generates duty on the side of a data controller. As the Decree orders, a controller always must offer to the data subject the standard information, such as 1) the data identifying the controller, 2) contact details of the data protection officer, 3) the aim or aims along with 4) the legal basis of the processing, 5) the information about the recipients, 6) the period for which the personal data will be stored, or, at least, the criteria used to determine that period; and finally 7) the rights of the data subjects (Article 8 (1) and (2) of the Decree).

In case of transferring data abroad, the controller must, first of all, manifest the intention to transfer the data to a public ecclesiastical legal person based outside the territory of Poland. The subject which is the target of the transfer should be described at least by the official name. Also, some other information about safeguards related to the transfer is to be given.

As a rule, the decree does not specify the deadlines within which a controller is to perform the actions in question. However, since the

Decree "specifies the provisions of CIC" (as it is stated in the Preamble to the Decree), it must be assumed that all the time limits not expressly provided for in the Decree are three months from the date of receipt of the letter by the administrator (see can. 57 CIC).

Another duty of a controller refers to the record of processing activities which in accordance with Article 21 (1)(5) of the Decree, each controller shall keep. This register must contain among many information almost the data about the transfer of data outside the territory of Poland.

3. The role of the supervisory authorities

In the full realm of all the activities of the Church, the Decree is to be applied. For these operations, a special supervisory authority is competent to supervise data processing. The authority is established under Article 91(2) of the GDPR,[7] which states that "Churches and religious associations which apply comprehensive rules in accordance with paragraph 1 of this Article shall be subject to the supervision of an independent supervisory authority, which may be specific, provided that it fulfills the conditions laid down in Chapter VI of this Regulation." The Polish Bishops' Conference established such authority, as an ecclesiastical office (see can. 145 CIC) in 2018. Its official name is the Church Inspector for Data Protection (hereinafter: ChIDP).

According to Article 37(1)(6) of the Decree, the tasks of ChIDP include "deciding on the admissibility of the transfer of data to a public ecclesiastical legal person established outside the territory of the Republic of Poland, if there are reasonable doubts about the protection of such data."

In the cases of the member of EU and European Economic Area and some other countries like Israel, Argentina, Canada, New Zealand, Switzerland, Uruguay, Monaco, Andorra, Guernsey, Jersey, the Isle of Man, the Faroe Islands, to which the European Commission has granted, employing a decision, an adequate level of protection, safe country status, the transfer of personal data should be considered secure and may take place without the need to obtain a decision from the ChIDP authorising the transfer. When transferring data to another country, a controller should

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Official Journal of the European Union, No. 119, 4 may 2016, L 119/1, p. 1.

make a special assessment, if the action will be safe for personal data. The assessment made by a controller should be reliable and, in accordance with the principle of accountability applicable to the controller (Article 6(2) of the Decree), documented.

There is a problem concerning the legal (canonical) nature of the "decisions on the admissibility of data transfers" mentioned above. It should be assumed that it is not a decision of an administrative nature, that is, binding on a controller. It is rather an opinion of the ChIDP and it is the implementation of the task of this organ indicated in Article 37(1)(3) of the Decree, which is to advise controllers on personal data protection. The decision to transfer data outside the borders of the Republic of Poland is made by a controller and it is a controller who is responsible for its consequences in the form of a possible breach of security of personal data processing.

Concerning a controller's decision whether or not to transfer the data, whether, under or contrary to the opinion of the ChIDP, the data subject may lodge a complaint with the ChIDP regarding the failure of the controller to comply with the regulations established in the Church regarding the protection of personal data (Article 37(1)(5) of the Decree). In this case, the ChIDP will decide the case on an individual basis. The opinion of the ChIDP in the subject matter should be (for evidential purposes) given in writing.

4. Examples of data transfer problems in parish operations

In the context of emigration, in the activity of the Catholic parishes, transferring personal data abroad usually would be in connection with the sacraments, especially marriage. It means that the norms of the Decree are be applied in the situations created by another law, that is the Decree on Canonical and Pastoral Interviews with Fiancées before Canonical Marriage of 2019.[8] The Decree on preparation for marriage creates situations when data are to be transferred abroad — before or after the celebration of marriage.

One of the situations happens before the marriage celebration. The parish in which the documents necessary for marriage are prepared must

[8] The Polish Bishops' Conference: "Decree on Canonical and Pastoral Interviews with Fiancées before Canonical Marriage." *Akta Konferencji Episkopatu Polski* 31 (2019), pp. 28—93.

send a license to a parish where the marriage will be celebrated. The license is needed because the general rule states that marriages are to be celebrated in the parish in which either of the contracting parties has a domicile or a quasi-domicile or a month's residence (can. 1115 CIC). With the permission of the proper Ordinary or the proper parish priest, marriages may be celebrated elsewhere. The form of permission is the license in question. The Decree on preparation for marriage states that abroad parish of domicile or a quasi-domicile of the fiancées, which is the parish of preparation of marriage, must send the license through its diocesan curia to the competent diocesan curia in Poland, which, will authorise the parish in Poland to perform the celebration of the marriage (No. 12 of the Decree on preparation for marriage).

In turn, after the celebration of the marriage, the parish of celebration, according to can. 535 § 2 CIC and can. 1122 § 2 CIC, must notify the parish of the baptism of the spouses that the marriage was concluded (can. 1070 CIC), and also must notify the parish from which the license was obtained. If the above notifications are to be sent abroad, they can be sent through the Polish diocesan curia (No. 113 of the Decree on preparation for marriage).

Conclusion

Summarising the reflections in the article, it should be stated that cross-border transferring of persona data is a difficult and complicated task. The article offers a few glimpses in the problem from the canonical perspective, but — as it was said — there is also a perspective of the secular law. The Church subjects that transfer data in many cases (almost always) are to implement both the canonical norms and the norms of the secular law. It can be the starting point for another research.

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Piotr Kroczek

Flux transfrontalier de données personnelles dans le cadre de l'émigration des fidèles de l'Église catholique de Pologne

Résumé

L'intensification de l'émigration des Polonais a causé de nombreux problèmes d'ordre juridique et canonique, y compris dans les activités de l'Église. Cet article concerne le traitement transfrontalier de données personnelles par l'Église catholique dans le cadre de l'émigration des fidèles. Les données des fidèles sont traitées, par exemple, lors des formalités liées à la préparation au mariage. L'article traite des questions du point de vue du droit canonique ; ces questions sont : la légalité du traitement de données transfrontalier, les obligations du responsable d

Mots clés : GDPR, décret sur la protection des données personnelles, l'Église catholique en Pologne, données personnelles, émigration

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Flusso transfrontaliero di dati personali nel contesto dell'emigrazione dei fedeli della Chiesa cattolica in Polonia

Abstract

L'intensificarsi dell'emigrazione dei polacchi causò molti problemi di natura giuridica e canonica, anche nelle attività della Chiesa. Questo articolo riguarda il trattamento transfrontaliero dei dati personali da parte della Chiesa cattolica nel contesto dell'emigrazione dei fedeli. I dati dei fedeli sono trattati, ad esempio, durante le formalità legate alla preparazione al matrimonio. L'articolo affronta questioni dalla prospettiva del diritto canonico; tali questioni sono: la legalità del trattamento transfrontaliero dei dati, gli obblighi del responsabile di trattamento che attua tale trattamento e il ruolo dell'autorità di controllo.

Parole chiave: GDPR, decreto sulla protezione dei dati personali, Chiesa cattolica in Polonia, dati personali, emigrazione

Part Two

Reviews

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Lucjan Świto: *Zawarcie małżeństwa przez pełnomocnika w formie wyznaniowej ze skutkami cywilnymi w prawie polskim* [Entering into a marriage by proxy in the denominational form with civil consequences under Polish law]. Olsztyn: Wydawnictwo UWM, 2019, 254 pp.

Marriage as a form of legal union between a man and a woman has accompanied human beings from their very beginning. To some extent, it was treated not only in a legal way, but also as a form of a cultural and religious rite. At the dawn of Christianity, before the theology of marriage had come into existence, the Christians followed the already existing models of entering into marriage inherited from Judaism, and later from the Roman Empire.

The monograph of Fr. Lucjan Świto is an attempt to look at the special form of entering into a marriage by proxy in the denominational form with civil consequences under Polish law. Entering into a marriage by proxy applies both to a marriage concluded exclusively in the secular form, that is, before a registrar or a consul, and to a marriage concluded in the denominational form with consequences in the civil law. The latter situation takes place when spouses, in the presence of a cleric, simultaneously declare their will to conclude a marriage which is subject to Polish law.

The book titled *Zawarcie małżeństwa przez pełnomocnika w formie wyznaniowej ze skutkami cywilnymi w prawie polskim* [Entering into a marriage by proxy in the denominational form with civil consequences under Polish law] consists of four chapters, each preceded by a list of abbre-

viations and a separate introduction. Lucjan Świto made an attempt to answer the main research problem whether the internal law of churches and religious associations, for which the Polish legislator allows the possibility of entering into marriage with civil-law consequences, provides for the possibility of concluding a marriage by proxy. While answering the question, the author based his elucidation of the issue in question on the internal legal regulations — the own law — of the following churches and religious associations: the Catholic Church (Roman Catholic Church, Orthodox Catholic Churches in Poland: Greek Catholic, Armenian and Neo-Uniate), the Seventh-day Adventist Church in the Polish Republic, the Polish Autocephalous Orthodox Church, the Baptist Christian Church in the Polish Republic, the Evangelical Church of Augsburg Confession in the Polish Republic, the Evangelical Methodist Church in the Polish Republic, the Evangelical Reformed Church in the Polish Republic, the Polish Catholic Church in the Polish Republic, the Old Catholic Mariavite Church in the Polish Republic, the Pentacostal Church in the Polish Republic, and Jewish Religious Communities in the Polish Republic.

This publication is a very interesting study provoking reflection on entering into a marriage by proxy in the denominational form with civil consequences under Polish law. At the same time, this reflection is strongly integrated into the ecumenical dialogue that focuses on Church-legal regulations and concerns detailed solutions in the field of relations between churches and religious associations. Moreover, the book will allow practitioners and theorists of Church law and internal law of churches and religious associations in Poland to take a stance on the issue of entering into a marriage by proxy in the denominational form with civil consequences. This is the first study in the Polish legal literature on entering into a marriage by proxy in the denominational form with civil consequences under Polish law. Lucjan Świto not only focused on Church-legal regulations, but also presented a wider dimension of relations taking place between churches and religious associations. The work is also part of the celebrations of the 55th anniversary of the Decree on Ecumenism *Unitatis redintegratio* of the Second Vatican Council. This Decree enacted on 21 November 1964 became a landmark document for the ecumenical involvement of the Roman Catholic Church with other churches and religious associations.

Without any doubt the book the reviewed book will get a great number of readers, among whom will be clergy of various Christian denominations and lawyers.

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Jiří Rajmund Tretera, Záboj Horák: *Právní dějiny církví. Synagoga a církve v průběhu dějin* [Legal History of Churches, Synagogue and Churches yesterday and today]. Praha: Leges, 2019, 288 pp.

The new book is thematically and in terms of content closely related to two already published books by the same authors, both renowned canon law and religion law scholars: *Konfesní právo* ([Religion Law], Prague: Leges, 2015) and Církevní právo ([Church Law], Prague: Leges, 2016). From this point of view, the reviewed book is a logical completion of a scholarly-pedagogical work, the concluding instalment of a trilogy.

This very book is also related to the earlier publication by J. R. Tretera, *Synagoga a církve kdysi a dnes* ([Synagogue and Churches, then and today], Prague: J. Krigl, 1994). In comparison with the recent book, however, the current publication documents significant development of research and pedagogical experience over a quarter of a century.

It is obvious that if the book was primarily intended only for students of theological disciplines, it could pay much more attention to the legal issue itself in the narrower and technical sense, since theologians obtain information about many facts mentioned in the book in other subjects or it would be assumed that they already have this knowledge. Yet, the degree of secularisation in the Czech Republic is such that the benefit for a wider audience can be guaranteed precisely by the approach of the authors, who explain the very realities of the Christian religion in some parts of the presented publication. The book thus becomes an interdisciplinary work, dealing with the basics of theology, biblical studies, history of the Church

and the Jewish synagogue; the effort of the authors to instruct the reader with relatively detailed geographical data is very evident.

The approach of the authors is quite methodical; they deal, for example, with etymological and spelling issues concerning ecclesiastical terminology. In this basic context, issues related specifically to Church law and, to a large extent, religious law are also presented. It should be noted that in the Czech specialised or popular literature, some experts focus solely on Catholic canon law, while the approach of the authors is broadly ecumenical. There is also a focus on Orthodox or the Reformed Churches, and at the same time the development of Jewish law is included as an integral part of the book, which clearly emphasises the inner connection between Judaism and Christianity.

In matters of the relationship between Churches and the state, the authors clearly give priority to the autonomy and independence of the former as well as of synagogues and their right to resist any oppression from the state.

The core of the book consists of two parts of unequal length. The first is shorter, divided into five chapters, and discusses the legal history of Israel from the very beginning to the establishment of the Roman rule. The second part, far more extensive, deals with the Church and the Synagogue from the first to the 21st century and is thus divided into 21 chapters, each of which deals with one century.

The authors deliberately decided not to have separated the history of Judaism from the history of Christianity; thus, the second part of the book combines the history of Christianity with the development of Judaism. For example, the Amoraites, the interpreters of sacred Jewish texts from the 3rd century AD appear between the decrees of the popes of the 3rd century and the writings of Origen (p. 119). The authors do not avoid the sensitive issue of Christian anti-Semitism, for which, according to them, anti-Judaism is a more appropriate term (p. 30), and add: “Public resistance to the Church and thus to all Christians has become similar in intensity in recent decades to anti-Semitism” (p. 31).

The description of the foundations of Christianity is in some places even typical of confessors — Mary is “in the tradition reverently called the Virgin Mary” (p. 66), Jesus’ miracles are listed as unswerving facts (“Jesus thaumaturgos” — p. 71), because so the Church teaches, and canon law is in consistent relation to the teaching of the Church. Therefore also Jesus’ twelve apostles are described as “the beginning of the hierarchy” (p. 72).

On the page 95, the section of the book having much in common with the genre of so-called biblical history concludes and the story of the Church of the first centuries begins to be described, bringing the subject closer to Eusebius’ *Church History* and the successors of this historically

first written work on history of the Church. Of course, the authors pay special attention to legal monuments, especially the gradually increasing number of decrees of popes and the canons of synods and councils. They do not neglect the charismatic element of the Church, operating through religious orders, either.

The authors also analyse the relationship between the Church and state power, as well as interfaith relations, century after century. I find particularly interesting the following statement by the authors: "Nestorians and Monophysites, initially often welcomed (Arabic, resp. Islamic) occupation as a release from the Byzantine yoke. What a self-deception it was!" (p. 156).

The Czech lands enter the scene from the page 164 onwards, so the missionary work preceding Saints Cyril and Methodius is already included in the overall context of ecclesiastical legal history. Then, close attention is paid to the work of Saints Cyril and Methodius and the fate of the first Czech saints, Ludmila and Wenceslaus. Jan Hus and the Hussite movement (pp. 191—192) are also discussed.

The description of conditions in the medieval Church includes appreciation of the Church for the ban on ordeals (p. 182), but also information on the origin and effect of the Inquisition (pp. 182—184). A relatively extensive passage is dedicated to the Protestant Reformation (pp. 198—211). The authors evaluate the French Revolution with its excesses rather critically (pp. 226—229). Bismarck's so-called culture struggle against the Catholic Church is also denounced, and the authors find that it was carried out "contrary to its name, as a considerably uncultured act" (p. 238). It is only logical that the authors condemn the horrific actions of the totalitarian regimes of the 20th century, the Soviet Russia from its beginnings (1917) and in the time of the Soviet Union (1922—1991), as well as Nazi Germany (1933—1945).

The current century, which has passed by only one fifth, is described in the chapter 21 (pp. 271—274) with particular emphasis put on three aspects of development of Churches that the authors consider to be the main tendencies: great expansion of categorical pastoral care to the non-Church sphere, spreading the Christian faith in America, Africa, and Asia, as well as reducing the gap between popular and confessional Churches: "Confessing revival Churches in many countries, such as the Czech Republic, are growing in both the number of their members and local congregations. This is due to a certain degree of aridity of the society that previously turned irreligious, where a part of non-believers, who are not members of any church, seeks new religious experiences. In addition to the Protestant and Eastern churches, the religion of South Asian origin is also growing. There is a growing interest among Catholics in the

older form of the liturgy" (p. 272). Numerous amendments to the codes of canon law (pp. 272—274) are mentioned as important ecclesiastical events of this century.

The book is not overloaded with quotations that would make the text incomprehensible, but even so the list of sources contains 26 items, secondary literature is represented by 86 items, while the most mentioned works were written by Professor Antonín Ignác Hrdina (Prague). Of course, there are also foreign publications, namely Polish, German, and English. There is also a factual and nominal register.

The publication *Legal History of Churches* as the culmination of the co-author's book trilogy may, with its far-reaching perspective, serve a wider group of readers. Primarily, it will certainly attract attention of the legal community, especially those who deal with the Church life and need to know their internal regulations. The authors involve them in the historical and ideological matrix, from which the law-making activity of the Churches originates. And last but not least, the book has a chance to become a convenient study aid for students of law and humanities.

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Jirí Dvorácek: *Die Apostolische Exarchie in der Tschechischen Republik. Studien zur Geschichte, Gegenwart und Zukunft einer griechisch-katholischen Ostkirche* [The Apostolic Exarchate in the Czech Republic. Studies on the history, the present, and the future of an Eastern Greek Catholic Church] [Eichstätter Studien — Neue Folge. Band 83]. Regensburg: Friedrich Pustet, 2020. 272 pp.

In recent years, we have seen an unprecedented wave of migration in Europe, which brings with it new questions and challenges for political communities and for church communities, too. In both cases, the right answer must be sought, also in the legal sense — both in secular law and in canon law. This situation is present to a limited extent also in the Czech Republic.

For religious communities this creates a need for appropriate pastoral care for the newly forming groups of believers, who often belong to other groups of God's people than the predominant part of God's people, for whom pastoral care and its necessary structures have been created over the centuries. Since immigrants come to a large extent from Eastern countries, where the Eastern Catholic Churches have been in operation and their members have been living for a long time, special knowledge of the life and structures of the Eastern Catholic Churches is required, especially with regard to the structures that are used for smaller or "fringe" groups

of Catholics. From this perspective, the choice of subject of the Author is very effective, precisely because not only the situation of the Greek Catholic Church in the Czech Republic is considered and elaborated upon, but also the legal institution of an exarchate in Eastern Catholic Churches is much more generally presented.

The book is divided into three parts. The first, Part A, deals with the history of the apostolic exarchate in the Czech Republic with a long perspective. First, it deals with the history of the Greek Catholic Church and the territory of former Czechoslovakia. It starts from the mission of Sts Cyril and Methodius in the 9th century and continues with a description of the practice of Slavic liturgy in medieval Bohemia. Based on two unions, the Brest-Lithuanian (1595) and the Uzhhorod (1646), it describes the emergence of the Greek Catholic eparchy in Mukachevo and its continuation after the establishment of Czechoslovakia in 1918. Their continuity was disrupted by violent and illegitimate state intervention in 1950, when the Greek Catholic Church in Czechoslovakia "voluntarily returned to the womb of Orthodoxy" and was not restored by the state until 1968 in the form of a unique eparchy based in Prešov, Slovakia. After the split of Czechoslovakia in 1993, separate structures were created: first, the vicariate of the Prešov eparchy was erected in 1993, and finally in 1996 an apostolic exarchate was established with a somewhat unusual definition: for all Catholics of the Byzantine rite in the Czech Republic. Subsequently, in 1997, a number of married priests (originally Roman Catholic), secretly ordained up to 1989, were included in this exarchate.

Part B of the book, in turn, first deals with the legal status of exarchates in general within the formulation of the codes of law of the Eastern Catholic Churches in the 20th century. It emphasises the proper distinction between the terms "rite" and "church *sui iuris*," taking into account the ecclesiology of the Second Vatican Council. It then thoroughly describes the legal status of the apostolic exarchate in the Czech Republic. From the point of view of canon law, it describes the structures of the apostolic exarchate for the exercise of the Church's three powers — legislative, executive, and judicial — and offers a presentation of individual bishops working in the exarchate. From the point of view of Czech State ecclesiastical law, it mentions both general legislation regulating the position of ecclesiastical institutions and especially the position of the apostolic exarchate, with an emphasis on the difficult question of its financing.

Part C of the book deals with the question of the possible future canonical status of the apostolic exarchate. First, it finds a solution to the difficult question of whether this exarchate is a church *sui iuris*, and answers it in the negative. It then analyses the possible future eventualities of the position of the exarchate: transformation in the eparchy *sui iuris*,

incorporation into the Slovak metropolitan church *sui iuris*, the position of the extraterritorial eparchy of the Ukrainian Greek Catholic Church *sui iuris* (affiliation to the eparchy in Mukachevo, subordinate directly to the Apostolic See), or incorporation into the structures of the Latin Church *sui iuris* in the Czech Republic. At the same time, it points out the advantages and disadvantages of particular solutions, without, however, it being possible to submit a proposal for clearly the most suitable solution.

The work contains an extensive bibliography, focused mainly on the German-language publications, along with 19 appendices, which suitably illustrate the data described in the book.

The reviewed book is an amended version of the habilitation thesis defended in 2019 at the Catholic University of Eichstätt. Its author, Jiří Dvořáček, has long been devoted to the topic of the Eastern Catholic Churches and he has the appropriate training — he is currently the only holder of the title Doctor of Oriental Canon Law (*doctor iuris canonici orientalis*) in the Czech Republic. In order to deepen his knowledge, he participates in the annual informal scientific meetings of the professors of oriental canon law associated with the Pontificio Istituto Orientale Roma (both their teachers ad their graduates). He not only has extensive knowledge of the academic literature and legal sources on the Eastern Catholic Churches and the structures of the Greek Catholic Church in the Czech Republic and the Slovak Republic, which were written in Czech or Slovak, but also has many publications published in Italian, German, and English. He has deepened and completed this fundamental knowledge through his practical involvement in the Apostolic Exarchate in the Czech Republic, especially since 2011 as a judge at the Metropolitan Court in Prague, where he is primarily responsible for legal matters relating to the faithful of the Apostolic Exarchate.

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1,000 pages, *Le Régime de la synodalité selon la législation canonique, conciliaire, oecuménique, du Ier millénaire*, published in Bucharest in 1999; A. D. Xenopol Award granted by Romanian Academy in 2001 etc. Author of books, studies and articles (on theology, canon law, law, history, ecclesiology, the history of ancient literature, philosophy etc.), amounting to thousands of pages published in different languages.

Tomasz Gałkowski CP, Professor UKSW, born in 1967, he graduated from the Pontifical Faculty of Thelogy "Bobolanum": SJ in Warsaw. In the years 1991—1995 he studied canon law at the Pontifical Gregorian University in Rome, where on the basis of the dissertation "Il quid ius nella realta umana e nella Chiesa" he received his doctoral degree. He was awarded with the Bellarmin's Prize for his publication (Analecta Gregoriana 269, Roma 1996). In 2007, he received a postdoctoral degree at the Faculty of Canon Law of the University of Card. St. Wyszyński in Warsaw. His monograph *Right-Duty. Priority and interdependence in the law orders: Canonical and the secular society* was awarded with the Prize of the Rector of the University. He is an author of about 70 scholarly publications. His research interests include issues related to the *ratio legis* of the canonical norms and issues of common law and canon law. Currently he is a professor and director of the chair of the Theory of Canon Law at this University.

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Wilhelm Rees, Dr. theol. habil, born in 1955 in Augsburg, studied Catholic Theology in Augsburg. He worked as Visiting Professor of Canon Law at the School of Catholic Theology of the University of Bamberg

from 1992 to 1996. Since 1996 he is a Full Professor of Canon Law at the Theological School of the Leopold-Franzens-University, Innsbruck. He has published numerous papers on Canon Law, ecclesiastical law, and civil law concerning religion. He is the co-editor of the new edition of the *German Handbook of Catholic Canon Law* (*Handbuch des katholischen Kirchenrechts*) (2015) and the co-editor of the German scientific book series Canonistic Studies and Texts (Kanonistische Studien und Texte, published by Duncker & Humblot, Berlin).

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