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**The Spanish State Ecclesiastical
Law and the Internal Law of the
Catholic Church**

PhD theses

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SUMMARY

I. The choice of this subject as my doctoral study was decisively influenced and determined through the course of my institutional studies at the Postgraduate Institute of Canon Law of the Pázmány Péter Catholic University, where my interest increasingly turned to the subject of Spanish State Ecclesiastical Law.

Thereafter, during my studies in Spain, I intended to deepen my knowledge on this unique subject. In order to promote this aim, I got valuable help from the professors of the University of Navarra in Pamplona and by those courses which were attended by me there.

Both my studies in Hungary and those in Spain further guided me to the recognition of the fact that the Spanish State Ecclesiastical Regulation contains numerous elements which through precise study and presentation could be useful in the Hungarian context too. Therefore, my intention by the preparation of this dissertation was certainly the contribution into a more detailed dissemination of the most important specific aspects of the Spanish State Ecclesiastical Law for the Hungarian legislation and jurisprudence, and to offer it as a possible detailed system based on a long tradition, which is much more complex than the Hungarian one, and initiates concrete directions and practical solutions, particularly for further developments of the Hungarian ecclesiastical regulation system.

In my doctoral dissertation, within the extent of my study, I wish to present the sources of the Spanish State Ecclesiastical Law, the particular regulations concerning ecclesiastical legal entities, the civil and ecclesiastical aspects of marriage law and the jurisdiction concerning the protection of the religious freedom. These fields should take place in a PhD dissertation on this particular topic because the Spanish State Ecclesiastical Law contains the greatest number of elements and solutions which, on the basis of the Spanish experiences, could be established in Hungarian Ecclesiastical Law following the legislator's favorable decision.

In the effective Spanish regulation, the relationship between the Spanish State and the Catholic Church is based on the model of cooperative separation, which is really consequent in the Spanish legal tradition from the 70s of the 20th century. The same principle is effective in the relationship between the Spanish State and the Association of the Spanish Lutheran Congregations, the Association of the Spanish Jewish Communities and the Islamic Committee of Spain. The crucial point in cooperative separation certainly is that the State and the Church and the other denominations are equal parties who mutually recognize the

autonomy of the others, the fact that their competence is not due to any other of them, and that the questions concerning several of the parties shall be resolved by mutual agreement. For this reason, the Spanish State takes into consideration the social importance of the religious congregations and does not refuse the cooperation. Cooperation is regulated by contracts recognizing the reciprocal autonomy of the parties.

Because of the historical roots of the cooperation between the Catholic Church and the Spanish State, powerful impacts of Canon Law can be observed in the Spanish Civil Law and System. This is especially true for civil marriage law in the case of which some of the terminology and several notions and provisions of the Spanish Civil Code correspond to those which are explained in the Code of Canon Law (e.g., the Civil Code, similarly to the Code of Canon Law, discusses the marriage creating impact of the marriage consent, secret matrimony, the marital separation along with the continuity of the marriage bond, marriage annulment, et cetera). The Civil Code includes several provisions concerning ecclesiastical marriage law as well, and there are also some canons of the Ecclesiastical Law with aspects relating to Civil Law too. The most important element of Spanish Ecclesiastical Law is definitely that once church matrimonial bond can be recognized by the State, and in these cases the religious matrimonial bond has consequences in the Civil Law as well; moreover, that decisions concerning marriage annulment judgments by the Ecclesiastical Tribunal and also by the reserved Papal exemptions (i.e. *ratum et non consummatum*) become recognized also in the Civil Law if the competent Civil Court clarifies by an announced decision the legal effects of the canonical stand point as one which can be found in Civil Law as well.

II. In general, we may lay down that in Spain the Ecclesiastical Law has always existed as the events of the long continuous history of the country has been woven through by the religious phenomenon since the beginnings, which made it necessary for the prevailing governmental authority to create legislation in connection with that. It has happened especially often that the civil government took over or reinforced provisions originally included only in Ecclesiastical Law. This was virtually unavoidable since everyday life was completely infiltrated with the religious aspects. However, this does not mean that all the Spanish legal regulations concerning religion which have come into force throughout the history have their roots in the contemporary Ecclesiastical Law.

The basic document of the Spanish constitution is the fundamental law proclaimed in Bayona on 7th July, 1808, which stated, for the first time at this level of legislation, that the Spanish State is of Catholic denomination. According to the definition given in the

fundamental law, the State was intolerant towards the religious congregations apart from the solely accepted Catholic Church.

The Constitution of the Republic – which was ratified by the Constituting Parliament on 9th December, 1931 – had broken the idea of the congregationally committed state therefore, it reflected to the ecclesiastical political conception of the radical separation of Church and State. The negative phrasing of the Constitution stated that the Spanish State had no official religion. As for the positive content of the freedom of religion, the Constitution stated that the freedom of conscience and the freedom of choice and practice of any religion on Spanish territory were guaranteed by law provided the requirements of public moral were respected. However, when we attempt to examine the extent to which the Constitution of the Republic protected the community dimension of this right, we find that this protection was fairly limited. It happened because according to the Constitution each religious denomination/congregation was to be regarded as an association, which was subject to the laws referring to associations. As for religious manifestation, it stated that the practice of religions was to be handled as private affaire and the practice of religion was only allowed to be public if its specific cases were approved one by one by the government.

In the course of the Spanish Civil War (1936-1939), the Church on the territories under the control of the republicans endured the most severe persecution of the latest fifteen centuries: more than 7000 priests and countless Catholics became victims of the indiscriminating killing. After the end of the Civil War (1st April, 1939), the traditional relationship between Church and State was restored as the new government intended to achieve that the Church should function in the country in accordance with the Concordat of 1851. The new government not only restored into force the Concordat of 1851, but also started the preparation of a new Concordat with the Papal See.

The Franco age (1939-1975) was a distinctly active period in the relationship between the Holy See and the Spanish State, which is proved by the five signed agreements and the Concordat of 1953. The most important features of the Concordat of 1953 were: the intervention of the State in the fields of the life and organization of the Church, the support and protection of the Catholic Church, the general positive discrimination of the Catholic Church in relation to the other religious and social groups, and the most important was that the Spanish State committed itself to Catholic religion.

After the death of general Franco (20th November, 1975), the new head of the state became the young Juan Carlos I. (1975-), who, with the help of prime minister Adolfo Suarez, had lead Spain from the weakened dictatorship to democracy peacefully. In this situation, as

always, the Catholic Church wanted no more than the ability to fulfill its mission further on as well, and only asked for the freedom necessary to continue the work it had already started.

Those agreements which were made between the Holy See and the Spanish State are international legal contracts for the ratification of which the approval of the Parliament was needed. Between 1976 and 1994, altogether six such agreements were made by the parties: on 28th July, 1976, the agreement on the renouncement of the introduction of the bishops and some jurisdictional prerogatives; on 3rd January, 1979 the agreement on legal matters, educational and cultural questions, on the pastoral activity at military forces and the military service of clericals and monks, on economic matters and finally, on 21st December, 1994 on questions concerning the Holy Land. All of them follow the same basic principle, which was phrased in the Preamble of the Agreement of the 28th July, 1976, according to which considering the profound transformation processes that the Spanish society had recently undergone and the changes taking place in the relationship between Church and State and the basic principles announced by the Second Vatican Council (1962-1965), which reinforced the obligation of the Civil Laws to accept the right to the freedom of religion, the relationship of State and Church has to be transformed so that they mutually acknowledge the autonomy of the other party, their independent, autonomous law and order while preserving a healthy cooperation between themselves.

The Summa of these mutual agreements are equal to a new Concordat, therefore, they make up a new normative regulation in the relationship of the Catholic Church and the Spanish State which sets aside even the Concordat of 1953. The agreements were signed and ratified separately because like this, they can be modified or, if needed, set aside separately.

With the creation of the 7/5th July, 1980 Constitution Supplement Law on the freedom of religion, the basic right to the freedom of religion and the equality before the law of the different religions were declared and regulated in detail.

This meant the beginning of a period for the society in which all individuals and communities have their basic right to express freely their faith, religion, conviction and worldview. Thanks to the Constitution Supplement Law, the religious minorities so far closed between four walls can function totally freely, and the citizens can be freely informed about their existence and get to know them. In the life of Spanish society, a new period began in which provided ways and possibilities to get to know new cultures and to accept and support new religions. The agreements made between the State and the Association of the Spanish Lutheran Congregations, the Association of the Spanish Jewish Communities and the Islamic Committee of Spain clearly demonstrate that the clear intention of the State is to assure the

equality of the different religions and to make it possible in the widest sense for the basic rights for the freedom of religion to be effective. These basic rights of freedom of religion can only be limited by the legal obligation of the preservation of public peace and order and the respect of the rights of the others.

III. The application of the concept of legal entity used for the groups of people or objects the objective of which conforms to the mission of their own religion may have numerous functions. One is that based on its internal legal system, it can exclude those who do not assist the religious legal entity in achieving its objective with their religious activity. This is why, based on the Royal Decree no. 142/9th January, 1982 on the Organizational Construction and Functioning of the Records of the Religious Organizations, for the registration of a religious legal entity, its religious objective shall be indicated. Of course, this decree aims also to assure that the organizations which are created e.g., for business purposes cannot become religious legal entities. Namely, a religious organization can become a legal entity in the Civil Law when it is registered in the Records of the Religious Organizations, which means that in Spanish Law and Order, religious legal entities make up a subgroup of legal entities. The second is that religious legal entities are also empowered in the Civil Law to total power of right and disposal. The third is that the religious organizations becoming religious legal entities by registration are also subject to their own internal regulations. Thus, the canons no. 113-123 of the Code of Canon Law, which regulate the questions concerning ecclesiastical legal entities from the point of view of Ecclesiastical Law, also influence the power of right and disposal of the ecclesiastical legal entities in the Civil Law.

According to the Spanish laws, religious legal entities can acquire all groups of properties by the methods conforming Spanish laws. However, the acquisition of any property almost always implies the payment of taxes and dues. Nevertheless, the donations given to churches, congregations and religious denominations are subject to special regulation, which facilitate giving and accepting donations for both the grantor and the recipient.

According to the agreement made between the Holy See and the Spanish State the 3rd January, 1979, in the course of the three fiscal years following the signing of the agreement, the State can annually transfer to the Catholic Church a determined percentage of the revenue coming from income tax or from GDP or of any other revenue choosing the technically most appropriate procedure. For this, it is necessary that all taxpayers should have the opportunity to clearly express their will, with the help of a declaration filled personally, on the use of a determined percentage of the taxes paid by them. In the case of the absence of such a declaration, the sum is used for other objectives. This latter method was intended to replace a

former solution, in which the State granted a certain sum to the Catholic Church from the national budget according to the decision of the Parliament, and after that, the taxpayers could decree whether or not they wanted to support the Catholic Church with a certain part of the taxes paid by them to the national budget.

This system of governing one part of the personal income tax is not regarded as the best method by the Catholic Church – as the Spanish Episcopal Conference has stated it several times – but according to the agreement made between the Holy See and the Spanish State the 3rd January, 1979 on economical matters, the Catholic Church reinforced its standpoint according to which after a certain transition period, the sum coming from tax donation will be sufficient to assure the necessary financial sources for the Church to fulfill its commitments.

The system of governing one part of the personal income tax can only be applied in the case of the Catholic Church as the agreements of 28th April, 1992, made between the State and the Spanish Lutheran Congregations, the Association of the Spanish Jewish Communities and the Islamic Committee of Spain do not include this option. In the course of the preparatory negotiations with the Protestant and Jewish Associations, the representatives of these religions preferred a self-financed system encouraged by tax allowances by the State, though the Muslim Committee explicitly asked for the possibility of applying the system of governing one part of the personal income tax for them as well, but the State did not support this request.

IV. In Spain, before the Law of 7th July, 1981 came into effect, marriage law was basically the area of Ecclesiastical Law, and civil marriage *de iure* and *de facto* only existed as a supplementary option beside church marriage. Still, after the Constitution and the Law cited above came into effect, marriage is regarded undoubtedly as an institution of Civil Law as well in Spain, and thus, there is nothing to prevent civil marriage law to become an autonomous area of science. But similarly, nothing prevents the Catholic Church or any other religious communities to apply their own provisions regarding marriage for the persons who are subjects to their own competence.

It is a general basic principle that in favor of the realization of basic human objectives, the permanent cohabitation of two persons of different sexes in the institution of marriage has to be encouraged and supported according to the requirements of moral and social order. Therefore, the Constitution states that men and women have equal right to contract a marriage, that the form of the contraction of marriage, the minimum age and abilities required for marriage, the rights and responsibilities of the married parties and the reasons and

consequences of the separation and the divorce of the married parties are determined by the law. This is what determined how these should work until the proclamation of the Law no. 13/1st July, 2005, which modified the legal content of the Civil Code in that it also granted the right of marriage to same-sex couples considering the social legitimating and acceptance of the permanent cohabitation of same-sex persons. This new notion of marriage refers to the Constitution which entrusts the legislative power the creation of the regulations concerning marriage and does not exclude the possibility for same-sex persons to get married. Moreover, the Constitution assures true equality between the citizens, the free formation of identity, and protects the right of all citizens to freely choose the form of their cohabitation, and creates the frames of a legal equality in that it prohibits the negative discrimination of any person based on gender, opinion or any other personal or social feature.

In spite of this, some more questions remain unsolved in connection with the cohabitation of same-sex and different-sex couples, in connection with the marriage of people the sex of who was changed physically by surgical intervention, which are not yet regulated by the Spanish legislation.

In the effective Spanish law, marriage can be determined as a legally regulated life form realized in full matrimony between two same-sex or different-sex people coming to existence in the course of well-determined marriage service or legal forms.

Marriage has legal character because marriage comes to existence with the consent of the married parties, and this consent is the basis of marriage.

For the consent, the resolution to live a common life is necessary, which, in the initial moments, means full partnership or oneness of the life of the married parties, although this unity may disintegrate as a result of unexpected reasons, which, further on, prevent the realization of the original intention and makes it impossible for marriage to fulfill its function. Consent is the basis of the realization of the intention for a common life as well as of its subsequent failure. If marriage is deprived of a regular life-form, other forms of partnership exist as well, but in these cases, we cannot talk about the unity of marriage. This is because temporary relationships cannot be attributed the elements which are necessary for their classification as marriage.

The necessity of marriage consent brings about the obligation of keeping the form of marriage service and of legal forms. Marriage is a legal contract, thus, it is regulated by the Civil Code. Marriage is a ceremonial contract conforming to the formal requirements determined by the law. In modern law, many people consider the insistence on forms and ceremonies meaningless and exaggerated, but these are necessary in the future as well, since

marriage as a contract comes into being by the consent given according to the instructions given by the Civil Code, and only in that case can it be attributed legal effects.

Marriage is one of the most basic social institutions in Spain as well, and this feature also differentiates it from cohabitation relationships, from concubine relationships and from other liberal forms of partnership. But apart from the fact that marriage is a basic social institution, by contracting a marriage, the marital status of the spouses changes, the effect of which manifests itself in different areas of life according to the provisions referring to married persons.

The agreement made between the Holy See and the Spanish State the 3rd January, 1979 states that the Spanish State acknowledges the consequences of the marriages contracted according to the Ecclesiastical Law in Civil Law, and then adds that the consequences of church marriages in the Civil Law are effective from the moment of the contraction of the marriage, and that in order to fully recognize it, the marriage must be registered in the State Register, which takes place based on a simple certificate issued by the Church.

The agreement also states that the married parties shall proceed according to the provisions of church law by the Ecclesiastical Tribunal in the case of a suit initiated for the annulment of their marriage and the request for Papal exemptions from contracted but not consummated marriages. This request may come from either party. The decisions of the Church are also effective in the Civil Law if the competent Civil Court declares that these legal effects can be found in the Civil Law and order.

In the legal management of marriage matters, the category of nullity can be applied, but not entirely precisely because the legal directives on the nullity of contracts cannot entirely be applied for marriages, nor can all the legal categories that come to effect in the case of contracts (e.g. absolute and relative nullity or invalidation, et cetera). An annulled contract suffers from serious faults at the moment of its creation which make it *ipso iure* inapt to elicit the aimed legal effects, and thus, it is qualified legally as non-existent. The special features of the legal institution of marriage require a specific legal system. This is also proved by the traditional dispute on putative marriage and the necessity for a juridical declaration of the nullity of marriage. Before the legal reform of 1981, in Spain, marriage was seen as undissolvable, therefore, the question of the nullity of marriage was considered to be much more important before the reform than nowadays.

According to the effective Spanish system of marriage the nullity of marriages contracted on the basis of the rules of Ecclesiastical Law can be declared by the courts of the Catholic Church as well on the obvious condition that if the married parties prefer the

procedure of the Civil Court, they are not obliged to turn to the Ecclesiastical Tribunal with their suit for the nullity of their marriage. This is because church marriages do not make up a distinctive group since considering the civil legal effects the regulations of Spanish Civil Law apply to them with equal force as in the case of marriages contracted in totally different forms. Although in the case of marriages contracted in ecclesiastical form, the declaration by the Ecclesiastical Court of the nullity or marriage will only be able to elicit the appropriate effects in Civil Law if it is reinforced by the decision of the Spanish State Court. It has to be taken into consideration that the Civil Courts shall declare the nullity of a marriage if one of the reasons listed in the Civil Code is verified and they do not act according to the regulations of the Catholic Church even though the marriage was contracted in ecclesiastical form.

The papal decision on the annulment of a contracted but not consummated marriage is the Pope's measure of grace and the requesting person is not entitled to get it. In Spanish Civil Law, this reason does not exist, nor the notion of unconsummated marriage, neither any authority possessing this much power. This is why it is impossible to reflect the harmonization to the essential aspects of the papal decisions, and we can only reflect it to formal and litigious aspects. According to the basic principle of contradiction, in the strict sense of the world, there is no legal proceeding for the decision and the interrogation of the parties is omitted. Similarly, the married parties must be heard beforehand since the evidences can only be assessed this way (see Code of Canon Law, canons no. 1697-1706). The judgments of the Spanish Constitutional Court of 23th November, 1995 and 17th June 1996 ratified the legal effects of the papal exemptions in Civil Law postulating that the appellant party can request the invalidation of the result of the preliminary hearing of the ecclesiastical legal procedure. The nullity judgment of the Church Court and the papal decision on the dissolving of contracted but unconsummated marriages obtain their objective *exequatur* in Civil Law, similarly to the case of the judgments made by foreign judiciary.

V. The effective Penal Code promulgated with the Constitution Supplement Law no. 10/23rd November, 1995 considers it an aggravating circumstance if a criminal act is committed with the intention of racist, anti-Semitic, or other discrimination concerning the views, religion or religious conviction, ethnicity, race or nationality, sex or sexual orientation, illness or handicap of the victim.

The Penal Code penalizes hindering religious practice, forcing religious practice, disturbing the religious events, violating religious places and ceremonies, hurting religious feeling, shaming someone for his/her religious practice, genocide, crimes against humanity,

crimes committed against religious personalities under international protection and negative discrimination based on religion.

Spanish Law makes it possible to act against destructive sects, protects the right of freedom of religion of minors, assures religious holidays and the possibility of taking meals according to religious prescriptions.

The protection of the freedom of religion is possible also by legal redress at the courts, at the Constitutional Court and the European Court of Human Rights.

VI. According to the effective Hungarian legal regulations, in the relationship between the Hungarian State and the Catholic Church, the model of cooperative-supportive separation prevails, which is somewhere between the model of the state-church and a radical separation. In this model, civil and canonical marriage law keeps a certain distance, but in practice, the freedom of the Church is acknowledged. This situation conforms to the basic principle of the Hungarian Constitution stating the separated functioning of Church and State.