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"QUESTO MATRIMONIO NON S'HA DA FARE".
THE INTRODUCTION OF CIVIL MARRIAGE IN ITALY, FRANCE AND SPAIN BETWEEN THE CATHOLIC CHURCH'S REACTIONS AND STATE LEGISLATION

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"Questo matrimonio non s'ha da fare". The introduction of civil marriage in Italy, France and Spain between the Catholic Church's reactions and State legislation[*]

ABSTRACT: ***Pre-Unitarian Italy struggled to implement the formalization of marriage mandated by the Council of Trent. The push for civil marriage over religious marriage caused tension with the Church. Italy aimed to assert its secular sovereignty post-unification, differing from France and Spain in their approaches to regulating matrimonial matters.***

L'Italia preunitaria ha faticato ad attuare la formalizzazione del matrimonio voluta dal Concilio di Trento. La spinta per il matrimonio civile rispetto al matrimonio religioso ha causato tensioni con la Chiesa. L'Italia mirava ad affermare la propria sovranità secolare post-unitaria, differenziandosi da Francia e Spagna nell'approccio alla regolamentazione delle questioni matrimoniali.

SUMMARY: 1. Civil marriage in Italy: from the pre-unification period to the liberal State. – 2. The "subsidiary" civil marriage system in Spain. – 3. Civil and religious rite in France. – 4. Concluding reflections.

1. *Civil marriage in Italy: from the pre-unification period to the liberal State*

"Questo matrimonio non s'ha da fare, né domani, né mai"[1].

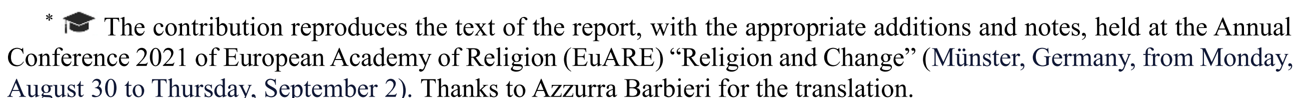
This was the phrase said by the "bravo" in the ears of Don Abbondio in a solemn tone, to prevent Renzo and Lucia from getting married "justly". And indeed, from a historical-legal point of view, the introduction of civil marriage as the only legitimate institution for the recognition of marital status by secular law, seems to echo Manzoni's words, referring to the matrimonial discipline contemplated by the laws of various countries of 19th century Europe, this would have inevitable consequences not only in the legal sphere, but also in the relations between Church and State.

Moreover, marriage, as the foundation of the family understood as a natural society by Article 29 of the Constitution, is not only a legal act, but also a human and social fact, an act from which moral and emotional relationships arise, as the Roman jurist Modestino himself noted:

«*nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*»[2].

A phenomenon, therefore, in which the law is interested, but which pre-exists the law itself, since it is its source. In Italy, the legal profiles of the family in general, and of marriage in particular, have always constituted a reason for intense debate in the political and legislative panorama, also because of the numerous religious and ethical implications that derive from them, and which have historically determined their regulation. With the Council of Trent in 1563, the process of regulating marriage was completed with the precise indication of the legal forms necessary for the celebration of a valid marriage, and for a long-time marriage was regulated according to the rules of the Catholic Church, while the State claimed the right to regulate the relationship. In Italy, this process did not take place until 1865, when civil marriage was introduced and represents the only form of bond valid for all citizens, so much so that its regulation constitutes one of the postulates of the secularism of the modern State, which did not intend to sacrifice the freedom of the Church and of believers, but rather to ensure citizens equal opportunities to build a legitimate family outside of confessional relations[3].

During the Restoration, with Napoleon's downsizing of private law institutes and the "return to the past", the "secularising" will of the more moderate monarchies - which considered the French codictic experience as the most effective means to consolidate their power and at the same time to achieve a



[*] The contribution reproduces the text of the report, with the appropriate additions and notes, held at the Annual Conference 2021 of European Academy of Religion (EuARE) "Religion and Change" (Münster, Germany, from Monday, August 30 to Thursday, September 2). Thanks to Azzurra Barbieri for the translation.

[1] A. MANZONI, *I promessi sposi*, Capitolo I, Milano, 1825, 27.

[2] D.23.2.1 Mod.*1 reg.*180.

[3] Cfr. A. FASANO, *La famiglia e il matrimonio*, nel sito Giappichelli, 6-7.

desirable 'nationalisation' of the law - was temporarily put aside in order to move towards a model of regulation of family matters in general and matrimonial matters in particular, based on traditions that had never been entirely forgotten, allowing a return to more relaxed relations with the Church[4]. The Napoleonic codification did not succeed in profoundly changing the foundations of the family tradition that had always permeated its regulation, both because of the short period of its validity and because of the influence of Church law, which was especially visible in matters of divorce and property regimes, where it was more difficult to adapt to customs and principles that were contrary to or in any case distant from deeply rooted religious convictions. With the fall of the Napoleonic regime, the secularisation of marriage subsided, and canon law and the rules of the Council of Trent once again became the reference law for marriage. Each State had its own rules, but they all followed an inspiring principle, recognising that the Church had full jurisdiction over everything to do with marriage. The Albertine Code, adopting the sacrament-contract theory, made the civil effects of marriage dependent on the celebration of the religious rite.[5], whereas the Code of the Kingdom of the Two Sicilies of 1819 had already attributed civil effects to canonical marriages if the couple had carried out a series of civil formalities, before and after the marriage[6]. In both codes, the idea of civil marriage was completely abandoned, and divorce gave way to separation, the only remedy for the impossibility of continuing cohabitation[7].

In the Duchy of Modena and Reggio, the law of 8 May 1841 already excluded all interference by secular magistrates in matrimonial cases, with the exception of that relating to civil effects, emphasising in its Preamble that the Duke had acted after consulting with the Pope and, therefore, manifesting a sort of ante literam concordat mentality[8]. The natural consequence of this legislation was the formulation and promulgation, in October 1851, of the Code by Francis V, which left the nuptial rites to the Church, following the Parma Code, and the tolerated cults to celebrate them according to their own rites. Articles 73 and 74 were limited to the civil effects of marriage and therefore established the formalities that had to precede the celebration, their validity, the resulting rights, and duties, delegating the regulation of family separation to the ecclesiastical courts and leaving intact the jurisdiction of the ordinary courts in the area of assets.

From the 1850s onwards, the lack of a single matrimonial law valid for all the States making up the Peninsula had led public opinion to be divided between supporters of the Austrian system, inspired by the principle of the widest respect for State rights and based on the establishment of different disciplinary regimes according to the religious denomination to which they belonged, and the

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[4] For a synthetic and effective fresco on the evolution of the marriage institution in Italy during the restoration cfr. F. SCIARRA, *Il matrimonio nell'Ottocento italiano fra potere civile e potere ecclesiastico*, in Historia et ius, 9/2016, paper 21.

[5] Art. 108 provided for the celebration of the marriage «giusta le regole e colle solennità prescritte dalla Chiesa Cattolica», except for non-Catholics and Jews for whom the celebration took place according to the rules dictated by civil law. it was entirely left to the Church the discipline inherent in the form of the celebration of marriage, the solemnities to be respected, the impediments and the capacity of the nubendi (for further information on the themecfr. G. PONCINI, *Commenti sul Codice civile ossia Codice civile spiegato e ragionato*, Torino, 1840; for an effective historical-juridical fresco on the Piedmontese codification cfr. G. S. PENE VIDARI, *Studi sulla codificazione in Piemonte*, Torino, 2007).

[6] «Il matrimonio che nel regno delle Due Sicilie non sarà celebrato in faccia della Chiesa colle forme prescritte dal Concilio di Trento, non produce effetti civili né riguardo a' coniugj, né riguardo a' loro figli. non gli produce egualmente, se sarà celebrato in faccia della Chiesa, senza che sien preceduti gli atti necessarj che si enunciano dall'art. 68 all'art. 81. i giudici competenti degli effetti civili sono i tribunali ordinarj» (F. MAGLIANO – F. CARRILLO, *Commentarj sulla prima parte del Codice per lo Regno delle Due Sicilie relativa alle leggi civili*, Napoli, 1819, art. 189, 325-326). Among the acts following the religious celebration and indispensable for the purpose of producing civil effects was the transcription of the marriage act in the kept registers of civil status.

[7] Cfr. *Codice per lo Regno delle Due Sicilie* [1819], Napoli, 1844, *Parte I*, *Leggi civili*, artt. 217-233, 20-21; *Codice civile per gli Stati di S.M il Re di Sardegna* [1837], Torino, 1846, artt. 140-144, 26.

[8] «La legge limita le sue disposizioni intorno il matrimonio agli effetti civili. a questo fine determina le formalità che debbono precedere la celebrazione, la loro validità, i diritti ed i doveri che ne risultano» (*Codice Civile per gli Stati Estensi*, Modena. 1851, art. 73, 16); «il matrimonio si celebra tra cattolici secondo le regole e colle solennità della Chiesa Cattolica. il matrimonio tra coloro che professano culti tollerati si celebra giusta i riti dei rispettivi loro culti» (*ibid*., art. 74, 16).

supporters of the Piedmontese model, in which the celebration of marriages for Catholics was left entirely to the Church and that of non-Catholics to the State, the latter limiting itself, with regard to Catholics, to regulating the civil consequences of the bond[9]. The ideas of the Risorgimento, aimed at freeing the State from the power of the Church, reopened the debate on the appropriateness of introducing civil marriage and the possibility of the dissolution of the bond for reasons other than death.[10]. In this climate, on 12 June 1852, the draft law on marriage and civil status reform signed by the Minister of Justice Carlo Boncompagni di Mombello was presented to the Piedmontese Chamber.[11].The bill, reaffirming the contractual theory of the marriage bond, stated in Article 1 that: "marriage is a contract; it therefore prescribes the forms of its celebration; it lays down the qualities and conditions of the person entering into it, its validity and the civil effects deriving therefrom"[12]. The draft was rejected by the Senate in the session of December 6, 1852, mainly because of the influence exerted on public opinion by the firm opposition expressed by the Catholic world, contrary to a reform that would have led to the downsizing of the hitherto exclusive ecclesiastical jurisdiction in matrimonial matters[13]. Catholic society made its voice heard through an exchange of letters between Pius IX and Victor Emmanuel II. The Pontiff, after reading the decree and the presentation of the Keeper of the Seals, wrote on 2 July 1852 to Vittorio Emanuele stressing that the new law was not "Catholic" and stating that.

«In a Catholic state, such as Piedmont, the Minister seems ashamed that matrimonial legislation is based on the Catholic concept of marriage-sacrament»[14].

The Pontiff then continued, branding the bill as "a new seed of calamity". The indignation for the new law among the Catholics was general, so much so that petitions of protest were promoted, and the sovereign tried in vain to protect the bill, through a prolific correspondence with the Pontiff in order to illustrate the goodness of the choice of state, but the Pope returned to forcefully reaffirm the sacred character of Christian marriage and ecclesiastical authority in the matter, therefore the

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[9]It was clearly in this political and cultural climate that the Church's drive towards the exclusive "dominion" of the entire matrimonial matter was strong. In the Catholic context, the voice of Antonio Rosmini who opposed the introduction in Piedmont of a matrimonial law not in conformity with Catholic doctrine was particularly distinguished (cfr. A. ROSMINI, *Opere edite e inedite, aggiuntovi un ragionamento sul bene del matrimonio cristiano*, Milano, 1938).

[10] These were the years in which the school reorganization was voted, going towards the marginalization of ecclesiastical power in the field of public and private education; in which the Siccardi laws accentuated the separation between Church and State obtaining the abolition of ecclesiastical immunity and religious orders not dedicated to assistance and education; the years of journalistic campaigns for and against the temporal power of the Pontiff, in which anticlericalism showed itself in all its forms (cfr. C. MIRTO, *Indissolubilità del matrimonio e laicità dello Stato*, in *AIAF Rivista dell'Associazione italiana degli avvocati per la famiglia e per i minori*, 1/2014, 7-8).

[11] Carlo Boncompagni of Mombello (Turin 25 July 1804-14 December 1980) was Minister of Grace and Justice from 21 May to 4 November 1852 with the government chaired by M. D'Azeglio and held the same position with the Cavour government until 27 October 1853, He was later elected Speaker of the House. (for further information cfr. F. TRANIELLO, v. *Boncompagni di Mombello*, in *Dizionario Biografico degli Italiani*, vol. XI, Roma, 1969, 695-703).

[12] The project also considered that the dissolution was possible only by the death of one of the spouses, reaffirming the indissolubility of the bond, since it considered that this element ensured that the «benefica influenza che il matrimonio deve esercitare nella nostra condizione sociale».

[13]The concerns of the Church regarding the desire to «take away from the clergy the registers of civil status», were forcefully expressed by the bishops of the ecclesiastical province of Chambery in a Declaration of Principles to be published in all the parishes of the province, in which on the one hand the Boncompagni bill was defined as unconstitutional, immoral, antisocial and anti-Catholic » (*Dichiarazione dei Vescovi della provincia ecclesiastica di Ciamberì relativa al progetto di legge sul matrimonio civile*, excerpt from the newspaper l'Armonia, Genova s.d., 7.); on the other hand, it was proposed to impose the penalty of the latae sententiae excommunication on the faithful subject to their jurisdiction who had contracted marriage differently from the prescribed form by the Church, who would have been deprived of participation in the sacraments in life and at the time of death, unless they had proceeded to canonically validate the marriage or had separated from the person deemed concubine by the Church (cfr. *ibid.,* 15-16).

[14] PIO IX, *Lettera di Sua Santità Pio IX a Sua Maestà Vittorio Emanuele*, in G. AUDISIO, *Questioni politiche. Il matrimonio e la ragion di Stato*, 88-92. Sul punto cfr. anche E. VITALE, *Il tentativo di introdurre il matrimonio civile in Piemonte (1850-1852)*, Roma, 1951, 107 ss.

sovereign, not wanting to upset the balance State-Church, intervened politically to facilitate the withdrawal of the bill [15].

The controversies that developed at the time in the Savoy Kingdom lasted well beyond the rapid rejection of the Boncompagni bill, proposing itself vividly in the elaboration of the new unitary civil code, when the Minister of Grace and Justice Giovanni Battista Cassinis, in the wake of the favourable opinions expressed by the legal practitioners on the introduction of civil marriage, presented to the chamber on 19 June 1860 a project (also later shelved) in which it was established that the law should consider marriage solely in civil relations and, while respecting the duties imposed by religion, in the interest of society it should determine the conditions under which marriage is to be contracted, the form to be respected for the validity and effectiveness of the nascent relationships[16].In this regard, Carlo Francesco Gabba, between 1861 and 1862, in his studies leading to the civil codification of matrimonial matters stated that it was necessary to introduce as soon as possible in civil marriage in Italy, accepting the doctrine elaborated by Pothier on the contractual nature of the bond, inviting his colleagues to take a position on this with the intention of gradually adapting the structure of marriage to the needs of the new society and advocating a change in the institutional relations between the Church and the State[17].

The Church's reaction to this proposal was not long in coming. In 1861 the bishops of the Marche signed a document in which, referring to the letter of Pius IX of 19 September 1852, openly expressed their concern about a bill that would greatly erode the ecclesiastical jurisdiction in matrimonial matters, provoking the undue interference of the State in a matter that did not fall within its authority given the sacramental nature of the bond, strenuously defended by the Marches episcopate, which at the same time condemned the falsity of the doctrines according to which the regulation of marriage should have been the exclusive object of civil jurisdiction[18]. This debate once again highlighted the depth of concern about the regulation of civil marriage, how decisive was the influence of the ecclesiastical magisterium on the subject and how much this question more than others - being a matter common to canon law and state law - could generate divisions and contrasts in public opinion, becoming one of the central themes in the preparatory projects of the future unitary civil code[19].It was no coincidence, therefore, that Giuseppe Pisanelli, then Guardasigilli and from then on the main

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[15] Cfr. G. ZICHI, *I cattolici sardi e il Risorgimento*, Milano, 2015², 242.

[16] Cfr. *Lavori preparatori del Codice Civile del Regno d'Italia*, II, parte I, *progetto di revisione del Codice civile Albertino presentato al Parlamento dal Ministro di Grazia e Giustizia G. B. Cassinis*, titolo VI, art. 104. On the contribution made by the Cassinis project to the regulation of family law at the beginning of the unit cfr. S. Solimano, *«Il letto di Procuste». Diritto e politica nella formazione del codice civile unitario. I progetti Cassinis (1860-1861)*, Milano, 2003, 280-291. On the fundamental role played on the subject by the major periodicals of the time cfr. C. VALSECCHI, *In difesa della famiglia? Divorzisti e antidivorzisti in Italia tra Otto e Novecento*, Milano, 2004, 1-131; on the doctrinal positions held on the subject by the main jurists of the second half of the nineteenth century cfr. F. SCIARRA, *Il matrimonio nell'Ottocento italiano*, cit., 8-11.

[17] Cfr. C. F. GABBA, *Studi di legislazione civile comparata in servizio della nuova codificazione italiana*, Milano, 1862, 200-284.

[18] 9 Cfr. *Sul progetto di matrimonio civile. I vescovi delle Marche*, Senigallia 1861. Strong criticism of this project was moved by Carlo Francesco Gabba who, between 1861 and 1862 in his studies prior to civil codification, dealing with matrimonial matters stated that it was necessary to introduce as soon as possible in civil marriage in Italy, accepting the doctrine elaborated by Pothier on the contractual nature of the bond, inviting his colleagues to take a position on this with the intention of gradually adapting the structure of marriage to the needs of the new society and advocating a change in the institutional relations between the Church and the State (cfr. C. F. GABBA, *Studi di legislazione civile comparata*, cit., 200-284 e ID., *Intorno al matrimonio civile*, in *Il Monitore dei Tribunali*, V, 1864, 553-561).

[19]The succession of controversies between parliamentarians and jurists of the opposing factions led to the preparation of a new proposal made by the Tuscan lawyer Andreucci, then supported also by deputy Giambattista Giorgini, which was articulated in four points, providing for the possibility of choosing between the celebration of marriage according to the conditions, forms and effects prescribed by the religion professed by the Nubendites, and the contracting of marriage exclusively in the civil form, while it is up to the state legislator in both cases to establish the rules necessary for the respect of public order (cfr. G. CARCANO, *Sul matrimonio civile*, in *Il Monitore dei Tribunali* I, 1860, 101-102. Carcano himself proposed a position that posed itself as a mediator between the idea of Andreucci and that of Giorgini, supporting the importance of the moral aspect of future legislation regarding the predisposition of matrimonial discipline).

architect of the first Civil Code of United Italy, presented in the parliamentary sessions of July 15 and November 26, 1863 a proposal that was expected, in the wake of the Code Napoléon, that the marriage should be celebrated in the municipal house and publicly in front of the civil registry officer of the municipality in which one of the spouses had his domicile or residence, stressing in his speech before the Senate that public opinion was now ready to welcome the separatist principle in matrimonial matters and that the State should have the entire competence[20].In particular, the Catholic Front made a proposal, rejected later by the Commission, to establish an optional civil marriage, subject to divorce, to which only those who do not profess any religion or cult recognized by the State could be admitted. Although in the dissent of leading exponents of the Catholic world, who saw in Pisanelli's proposal the antechamber for the approval of the possibility of dissolution of the bond, the project with a small majority managed to pass the examination of the Senate unscathed[21].

The definitive text of the United Civil Code of 1865 thus contained in Book I art. 93 of Title VI dedicated to marriage, the reception of the position expressed by the Minister, recognizing as the only form of conjugal bond valid for the State that arising from civil marriage, although Catholic citizens were not forbidden to celebrate religious marriage. In the 1865 Civil Code, the celebration of a civil marriage had no effect on a religious marriage, which remained an entirely internal matter of canon law[22].

Notwithstanding this regulation of matrimonial matters, in the years immediately following the entry into force of the Unitary Civil Code the links contracted with the celebration of the religious rite only and from which, Thus, the rise of irregular situation before the civil law, continued to be very high (as many as 120,000 between 1866 and 1872, according to the investigations of the Government)[23]. Marriage in post-Nice Italy, therefore, continued to be the one consecrated and blessed by the Church and the family was "healthy" only because it was born from the union recognized by canon law. In a society so steeped in religious values, the honorable Angelo Mazzoleni and the honorable Pasquale Stanislao Mancini tried to make their voices heard. The projects presented by both - the first in 1872 and the second in 1873 - with the intention of affirming the "legislative necessity" of the civil marriage which was proposed as obligatorily preceding the religious marriage by imposing a pecuniary penalty on the transgressor minister, even though he had no follow-up,

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[20] Cfr. *Progetto di legge per l'approvazione del primo libro del Codice civile del Regno d'Italia presentato su iniziativa al Senato dal Ministro Guardasigilli (Pisanelli) nella tornata del 15 luglio 1863*, 16-19. In particular, the Catholic Front made a proposal, rejected later by the Commission, to establish an optional civil marriage, susceptible to divorce, to which only those who do not profess any religion or cult recognized by the state (cfr. F. FRANCESCHI, *I progetti per l'introduzione del divorzio in Italia in epoca post-unitaria*, in Stato, Chiese e pluralismo confessionale, 34/2012, 7).

[21] Cfr. *Svolgimento del progetto Pisanell*i, nel vol. *Atti parlamentari, Camera dei Deputati, sessione 1863-1864-1865*, XVI, *Discussion*i, tornata del 13 febbraio 1865, 8180. On post-unification attempts to introduce the institution of divorce cfr. F. FRANCESCHI, *I progetti per l'introduzione del divorzio in Italia*, cit., 9-60).

[22]When the Pisanelli Code came into force, the Holy See was particularly concerned about the difficulty that the introduction of civil marriage would encounter among many of the population of the Kingdom, and prepared an instruction, which was issued on January 15 of that same year by S. Penitenzieria, with which it was clarified that civil marriage is not only lawful to the faithful, but also mandatory indirecte, and for accidens», moreover to avoid the "duplicity of the spouses, «la S. Congregazione dei Sacramenti dispose che i parroci non ammettessero a celebrare il matrimonio religioso coloro che non potessero contrarre matrimonio civile» (A. BOGGIANO PICO, *Il matrimonio nel diritto canonico con riferimenti alla legislazione concordataria*, Torino, 1936, 425). As for the Church-State relationship in relation to the matrimonial institution following the promulgation of the Code, extremely clear is the letter sent by Leo XIII on 8 February 1893 on the occasion of the presentation in Parliament of a new draft law on the compulsory precedence of civil marriage over religious marriage, in which the Pontiff specified how the civil power could dispose of the "civil effects" of marriage, but should leave to the Church «ciò che riguarda il matrimonio in se stesso» (LEONE XIII, Lettera Apostolica *Il Divisamento*, in *Acta Apostolicae Sedis*, vol. XXV, 1892-1893, 450).

[23] Cfr. P. UNGARI, *Storia del diritto di famiglia in Italia (1796-1942)*, Bologna, 1974, 188-189 (on the theme cfr. also S. FERRARI, *Religione e Codice Civile. Dinamiche istituzionali e problematica amministrativa del diritto matrimoniale post-unitario*, in *Storia contemporanea*, Milano, 1976, 123-167. The initial reluctance towards the civil form of the alley, took over within a few years the acceptance of this rite also by Catholics (who continued to marry even in the Church), due to the fact that the civil form of marriage had in any case as a reference the canonistic model (cfr. in this regard O. GIACCHI, *Riforma del matrimonio civile e diritto canonico*, in *Jus*, 1-2/1974).

triggered heated debates that led in December 1873 to the presentation of yet another legislative bill (welcomed, but not come to discussion because of the premature dissolution of the Chamber) by the Guardasigilli Paolo Onorato Vigliani[24]. To Article 5 of that draft provided that religious marriage would acquire the same effectiveness as civil marriage, limited to the loss of those rights by law linked to the status of celibacy or widowhood, principle that from that moment was inserted in all the projects subsequently elaborated[25]. The above proposal, recalling the guidelines of the Mancini project, attempted to act as a deterrent against the will of the spouses to celebrate the only religious rite in order not to lose the aforementioned rights. The minister proposed the precedence of the civil act to the religious one, punishing with a pecuniary penalty or with the prison penalty for two and six months in case of recidivism, both the spouses and the officiating minister, ceasing the effects of the sentences if, within three months of the celebration of the religious wedding were those civil[26].

Among the bills on the obligation of precedence of civil marriage to the religious rite, particular luck was that presented to the Chamber on 3 December 1878 and discussed from 13 to 19 May 1879 by the Minister of Justice and Worship Raffaele Conforti, against which there was no lack of criticism even among the parliamentarians, whose observations pro and contra had given rise to heated debates culminating in the approval of the draft with only 52 votes (153 in favour and 101 against) in its seven articles. This project was not even discussed in the Senate because of the dissolution of the chambers, and the criticism of Catholic jurists, the episcopate and the Pontiff[27].Very severe penalties were provided for spouses, witnesses and the minister of worship in the event that they had contracted the religious marriage before the civil one, and in order to facilitate the nubendi to the completion of the acts necessary for the celebration of the same, the exemption from the expenses for all the documents concerning the preparation of the civil rite was established, guaranteeing the gratuitousness of the service provided to the needy subjects by the legal operators involved in the procedure[28]. Stigmatized by Leo XIII in his Letter to the Archbishops and Bishops of the Ecclesiastical Provinces of Turin, Vercelli and Genoa of 1879 as

«insulting and inauspicious, both to Religion and the Priesthood and to freedom of conscience and to public morality»[29],

the Conforti project was the subject of the reflections of the Piedmontese and Ligurian episcopate, which had hastened to submit to the Senate its petition in defense of religious marriage, resigning the claim in the session of 17 May 1879. The Subalpine and Ligurian bishops considered the bill unjust and detrimental to the rights of the faithful and the Church, and demanded loudly that it was the religious marriage to always precede the civil one, both because the marriagecontract could not be considered in a separate manner from marriage-sacrament, the only true and legitimate bond, both because such a regulation of matrimonial matters would have involved the invasion of the ecclesiastical field[30]. There remained the problem arising from the failure to celebrate the civil rite, also involving the search for practical solutions by the judiciary. As in the case of the magistrate Antonio Raimondi, who in the three years spent in Polesine since 1882, to overcome the reluctance of the peasants and force them to "put in order their religious unions and their descendants", hit them

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[24] Cfr. V. MARCADÈ, *Spiegazione teorico-pratica del Codice Napoleone*, vol. II, *Del matrimonio*, Napoli-Parigi, 1872, 10-23.

[25] Cfr. G. SIGHELE, *Della necessità di ordinare la precedenza del matrimonio civile rispetto al religioso e di statuire una sanzione penale al ministro del culto che contravvenisse*, Milano, 1873, 120-121.

[26] Cr. V. SCIALOJA, *Studi giuridici*, vol. III, *Diritto Privato*, Roma, 1932, 119-120.

[27] Cfr. *Votazione a scrutinio segreto sull'obbligo di contrarre il matrimonio civile prima del rito religioso*, nel vol. *Atti parlamentari*, Camera dei deputati, sessione 1878-1879, CXCVIII, *Discussioni*, tornata del 19 maggio 1879, 6343; A. C. JEMOLO, *Chiesa e Stato in Italia negli ultimi cento anni*, Torino, 1963, 326.

[28] Cfr. F. IACOMETTI, *La precedenza obbligatoria del rito civile nel matrimonio presa ad esame dall'avvocato Francesco Iacometti*, Roma, 1879, 35-37.

[29] LEONE XIII, *Lettera di Sua Santità Papa Leone XIII agli Arcivescovi e Vescovi delle ecclesiastiche provincie di Torino, Vercelli e Genova*, Mondovì, 1879, 14

[30] *Petizione dell'episcopato piemontese e ligure al Senato italiano in difesa del matrimonio religioso*, Mondovì, 1879, 4-6.

with the tax burden of the "domestic tax": not being a wife according to the law, the woman who lived with them could not but consider herself only a maid, for whose services they would have to pay the relevant municipal tax[31].

The protests from the Catholic world in general and from the clergy in particular remained unchanged, which found a voice in the authority of Pope Leo XIII, who in the encyclical Arcanum divinae sapientiae of 10 February 1880 reiterated his position on the sacramentality of marriage, invited the consciences of the faithful to remain firm in their faith towards the precepts of Christian marriage, and condemned anyone who wanted to remove from the Church the regulation of matrimonial matters, emphasizing the impracticability of the distinction between contract and sacrament[32].The doctrinal contrasts between supporters of the reform in the matter of civil marriage and opponents did not lose, therefore, of intensity in the years following the presentation of the bill Conforti, but of course the political vicissitudes of the time meant that the parliamentary history on the issue stopped until 1890, when Vittorio Scialoja again addressed the issue of the compulsory precedence of civil marriage by starting a series of projects and debates on the subject that lasted until the end of the nineteenth century, a period in which interests shifted to the theme of divorce, highlighting how the concerns expressed by the Church regarding the link between the legislative projects on the obligation of civil marriage and the denial by the State of the indissolubility of the bond, were founded[33]. It was only with the conciliation of 1929 that both of these problems, until that time due to further considerable tensions between the State and the Church, were no longer, to be repeated with different but equally understood accents, following the strong socio-cultural changepolitical in place, in the late sixties[34].

2. *The "subsidiary" civil marriage system in Spain*

The situation was different in Spain, which well before Italy achieved a kind of 'national unity', whose slow process of realisation, in which relations with the Church of Rome also played an important role, started as early as the 15th century[35]. In Spain, where since July 1564 the Tridentine decrees were adopted and maintained by Philip II and therefore only one form of marriage was recognized, the canonical, the events that led to the elaboration and affirmation of the civil codification in their contents and in the ways in which they took place as peculiarities the constant influence exerted on the political scene and in the social life of the Church. This, in fact, for the preservation of its authority in the matter of matrimonial discipline could count not only on the support of the sovereigns - who had every interest in maintaining on the level of calm and collaboration relations with the Roman Pontiff - but also on the support for the population, who in

[31] Cfr. A. RAIMONDI, *Mezzo secolo di Magistratura. Trent'anni di vita giudiziaria milanese*, Bergamo, 1951, 21.

[32] Cfr. in proposito A. C. JEMOLO, *Il matrimonio nel diritto canonico. Dal Concilio di Trento al Codice del 1917*, Bologna, 1993, 90-91.

[33] Cfr. A. MANTINEO, *I prodromi della questione cattolica in Italia. Note intorno al difficile dialogo tra la Chiesa cattolica e lo Stato unitario in Italia*, in *Diritto e religioni*, 2/2011, 407. Sull'evoluzione storico-giuridica dell'istituto del divorzio in Italia cfr. A. MANIACI, *L'evoluzione storica del divorzio in Italia dall'età delle codificazioni al 1970*, in Stato, Chiese e pluralismo confessionale, 17/2021.

[34] On the conflicts and tensions characterizing the relations between the state and the Church in the Risorgimento and until the conclusion of the Lateran Pacts, cfr. lastly C. CARDIA, *Risorgimento e religione*, Torino, 2011. For an overview of the attempts to introduce compulsory civil marriage and the reactions of the Catholic world I would like to refer to D. TARANTINO, *In difesa del matrimonio religioso. La reazione dell'episcopato italiano al disegno di legge sull'obbligatorietà delle nozze civili all'indomani dell'Unità*, in Supplemento alla rivista Diritto e religioni. *i Quaderni*, 11/2017, 3-22 e ID., *Secundum legum praecepta: l'obbligatorietà del matrimonio civile nell'Italia post-unitaria*, in Supplemento alla rivista Diritto e religioni. *i Quaderni*, 12/2017, 3-28; per approfondimenti sul sistema concordatario in tema matrimoniale cfr. N. MARCHEI, *La giurisdizione dello Stato sul matrimonio "concordatario" tra legge e giudice*, Torino, 2013.

[35] Sul tema cfr. D. SANTARELLI, *Dal conflitto all'«alleanza di ferro». A proposito delle relazioni tra il Papato e la Spagna nella crisi religiosa del Cinquecento*, in HAL Open Science.

the vast majority professed the Catholic faith. The law that introduced marriage in the civil form was signed on 18 June 1870 by Eugenio Montero Rios, professor of canon law at the University of Madrid and fervent liberal, by which publications and civil celebration were prescribed as necessary forms to be complied with for the production of the legal effects of the constraint[36]. In particular art. 2 of the 1870 law it was stated that the marriage contracted without respect for the provisions of the law established, would not produce any civil effect. The 1870 law was the fruit of a political will desirous of emancipating itself from all ecclesiastical conditioning, but it did not reflect the demands of a society composed in the majority of Catholics. Although in art. 90 the perpetual and indissoluble nature of the same was confirmed, the Catholic feeling was deeply shaken by his approval. Subsequently, in April 1872, the Government did not allow the inheritance of the pension by children born from exclusively religious marriages, which were therefore considered illegitimate children, in addition to the circular of 20 June 1874, based on a consultation of numerous municipal judges, it was established the impossibility to proceed to the celebration of civil marriage between people already bound by a previous bond only canonical to different subjects[37].

The fiery atmosphere that had arisen led the legislature, by the decrees of January 22 and February 9, 1875 (supplemented by the Instruction of the 19th of the same month), to grant validity again to the canonical marriage, acknowledging civil effects to marriages contracted since 1870, while setting an eight-day deadline by which, under penalty of fine, the extract from the parish register attesting to the celebration of the wedding should have been presented to the registrar, and considering the civil form of celebration of the bond as a substitute for the canonical one[38]. The only civil rite, according to a royal decision of 27 February 1875, remained in force exclusively for non-Catholics [39].

With the promulgation of the Civil Code in 1889 - the content of which was certainly influenced by the events that had preceded its elaboration and in particular by the 1880 encyclical of Leo XIII - a single legislation replaced the numerous sources of law up to that current moment, having regard necessarily to the elements of tradition which found in the law of the Church their principal source, while considering the possibility of personal separation and stressing the role of the family as the foundation of the country's social and political life[40].In this vein art. 42 of the Código Civil recognized two forms of marriage, the canonical - celebrated by all those who professed to be Catholics - and the civil - to be celebrated according to the forms established by the same codicystic legislation; art. 51 established that both the canonical marriage and the civil marriage would not have produced civil effects in the event that one or both spouses had already contracted another valid marriage; art. 52 ordered the dissolution of the bond only on the death of one of the spouses[41]. To art. 75 there was a sort of authentic reception of the canonical matrimonial order in establishing that the formal and substantial requirements for the celebration of canonical marriage would be governed by the provisions of the Catholic Church and the Council of Trent and allowed as laws of the Kingdom; art. 76, on the other hand, granted the canonical marriage all the civil effects with regard to the persons and property of the spouses and their descendants; finally art. 80 decreed that the jurisdiction of the cases concerning the nullity and divorce of canonical marriages was a matter for the ecclesiastical

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[36] F. GARCÍA GOYENA, *Concordancias*, *motivos y comentarios del Código Civil español*, tomo I, Madrid, 1872, 1-2. The promulgation of this law came also as a result of the controversy that arose from the declaration of Pope Pius IX during the Consistory of 1852, in which the Pontiff had defined civil union as concubinage (cfr. J. M. MANRESA Y NAVARRO, *Comentarios al Código civil español*, tomo I, Madrid, 1914, 241).

[37] Cfr. *Colección legislativa*, tomo CXIII, Madrid, 1872, 427.

[38] Cfr. M. GONZÁLEZ DEL VALLE – P. LOMBARDÍA – M. LÓPEZ ALARCÓN – R. NAVARRO-VALLS – P. J. VILADRICH, *Derecho eclesiástico del Estado español*, Pamplona, 1983², 412

[39] Cfr. V. Mangano, *Matrimonio e divorzio nelle legislazioni comparate del sec. XIX*, Siena, 1902, 125-127. For further information on the meaning of canonical marriage and its regulation see. J. BRAVO, *El Concilio de Trento y el Concordato vigente*, tomo I, Madrid, 1887, 210-264; on marriage in civil law cfr. P. GÓMEZ DE LA SERNA – J. M. MONTALBÁN, *Elementos* de *Derecho civil y penal de España*, tomo I, Madrid, 1870, 336-506.

[40] Cfr. *Codigo Civil español con notas*, Madrid, 1888, VI.

[41] For further information on the evolution of matrimonial law in Spain and a comment on the aforementioned articles cfr. J. T. MARTÍN DE AGAR Y VALVERDE, *El matrimonio canónico en el Derecho civil español*, Pamplona, 1985, 61-71.

courts[42]. With the promulgation of the Code a subsidiary civil matrimonial system was thus established that, using as the key word at the base of its legislation the non profession of the Catholic faith, would have lasted a long time, even if subjected to criticism and reform proposals. In particular the content of art. 42 was the clear product both of the vicissitudes of matrimonial law and of the principle of constitutionally guaranteed tolerance, whose effects were also recognizable in the faculty of couples constituted by a single Catholic party to proceed to the celebration of the civil rite only. Of course, the wording of the article, in affirming the legislative recognition of the two forms of marriage, gave rise to important questions about the way in which civil marriages should be requested (that is, if a mere manifestation of will in this sense were enough or instead a formal declaration was needed about being non-Catholic), about the rise of a simple moral duty of the Catholic faithful to the celebration of the canonical wedding or the imposition of a real legal obligation, and about the validity or otherwise of the bond contracted by the Catholic faithful in the civil form alone[43].

A first answer to these questions came from the order of the Dirección de los Registros dated 28 December 1900, which stated that art. 42 imposed on those who professed the Catholic religion the obligation to contract canonical marriage[44]. A Real Orden intervened to define the boundaries of this resolution on 27 August 1906, stressing that the legislature, in regulating matrimonial matters, had intended to recognize another form of marriage, without claiming from the contracting parties to the canonical marriage the declaration of their being Catholics, nor from the contracting parties to the civil marriage the declaration of professing another religious faith, because obtaining the priestly blessing for the Catholic faithful united in the bond of marriage was a requirement proper to the conscience of the faithful, independent of any canonical or civil provision in this regard[45].On the one hand, the conscience of the individual was not a matter for the State, and on the other hand, the law, based on the lack of the official declaration of religious affiliation by the two nubendi, could not assume the right to annul the act or dissolve the bond[46].

Finally, the Real Rden of 28 June 1913 intervened on the subject, establishing that the declaration of one or both of the contracting parties on the fact of not professing the Catholic faith was sufficient to celebrate civil marriage, and in this case, the judge who had denied the celebration on the pretext of no demonstration by the contracting parties of the separation from the Catholic Church, would have been responsible before the law[47]. Unlike Italy, Spain, with its anti-French feeling due to the sad memory of the occupation suffered, refused any kind of influence in this matter, therefore the spirit of secularism produced by the French Revolution did not touch the Iberian lands, in which the need for codification cultivated the link with the traditions, with the local fueros, with the religious sentiment to complete the intent of legislative unification. That is why the introduction of civil marriage in Spain and its regulation by the legislature were accompanied by a strenuous defense of the canonical rite by the Catholic team of the country, and the will of the government to achieve a harmonization between the two disciplines, the state and the canonical, recognizing both forms of celebration as well as the production of the civil effects of religious marriage by the transcription of the same in the Civil Register.

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[42] Cfr. M. GONZÁLEZ DEL VALLE – P. LOMBARDÍA – M. LÓPEZ ALARCÓN – R. NAVARRO-VALLS – P. J. VILADRICH, *Derecho eclesiástico,* cit., 412.

[43] Cfr. J. M. MANRESA Y NAVARRO, *Comentarios al Código civil español*, 247-248.

[44] Cfr. *ibidem*, 248.

[45] Cfr. *ibidem*, 249.

[46] Cfr. *ibidem*, 250.

[47] Important changes to the content of art. 42 were achieved by the approval of the Law of 24 April 1958 approving the Concordat between the Spanish State and the Holy See signed in 1953 (cfr. M. GONZÁLEZ DEL VALLE – P. LOMBARDÍA – M. LÓPEZ ALARCÓN – R. NAVARRO-VALLS – J. M. VILADRICH, *Derecho eclesiástico*, cit., 413-414).

3. *The civil and religious rite in France*

In a socio-political-cultural context such as France, in which the concept of citizenship becomes the basis for the elaboration of the principle of equality generated by full membership of a community, the different factors of which the same is composed go to bind each other so as to constitute the attributions assigned to the same subject, first of all those relating to family dynamics[48]. For this reason, the revolutionary legislation on marriage and divorce is not only particularly important because of the intersection of these factors, especially that of substantive equality, but it is also the result of an evolutionary and innovative path that sees in the age of the Ancien Régime the first fertile ground in which to graft deep roots[49]. The sixteenth century, in fact, was a period marked by the Protestant Reformation, and in important marriage was the clash between the sacramental model professed by the Catholic Church and the models coming so much from doctrinal elaborations of a contractual mold, as from the reflections of other religious confessions that, as in the case of the Lutherans and the Calvinists, proposed social models based on agreement[50]. Starting from the edicts of Henry II of 1556 and Henry III of 1580, the marriage, seen more in its religious ritual than in its civil effects, was made subject, by the political authorities that succeeded each other over time, of a series of ordinances conforming to religious norms, but which did not deny the indissolubility of the bond, so much so as not to admit divorce as the cause of the dissolution of the bond but only separation[51].The gradual erosion of ecclesiastical jurisdiction in the matter to the advantage of the civil one found confirmation and support in the contractualistic theories on marriage elaborated by the philosophes, formed in the bed of Gallicanism, they brought the marriage back to the jurisdiction of the State, an authority to which the regulation of the validity of the bond, considered as a natural contract by God himself left to the control of the monarchs who, according to the principle of tolerance, should have recognized its dissolution through the institution of divorce at least to Protestants and Jews, denying it to Catholics[52].

At the heart of the doctrinal reflection on the family during the Old Regime was, in accordance with the principles of natural law, the theme of freedom of choice, which was part of the wider process of redefining the state and its powers vis-à-vis individuals, so that marriage - for the validity of which it was necessary to exchange consent between the spouses to whom the officiating priest assisted as a mere witness - constituted the basis on which the State could define status and confer rights[53]. Only after the Revolution, in compliance with the principle of equality between citizens, was it possible to start the secularization of marriage, starting from the Decree of 20 September 1792. The introduction of civil marriage and registry records represented nothing more than two results of those tendencies to change already visible in previous centuries, which they had seen in the proposals drawn up under the reign of Louis XVI, the introduction of a subsequent registration of marriages between Protestants by a state magistrate or a minister of worship acting as a public official, the clear signs of a change already underway. This went hand in hand with the demands by the French people for equal treatment

[48] Cfr. P. COSTA, *La cittadinanza: un tentativo di ricostruzione archeologica*, in D. Zolo (edited by), *La cittadinanza. Appartenenza, identità, diritti*, Roma-Bari, 1999, 47-52.

[49] Cfr. J. F. TRAER, *Marriage and the Family in the Eighteenth-Century France*, Ithaca-London 1980, 60-69, 80-87.

[50] For further details cfr. L. BONFIELD, *Gli sviluppi del diritto di famiglia in Europa*, in M. Barbagli – D. Kertzer (edited by), *Storia della famiglia in Europa. Dal Cinquecento alla Rivoluzione francese*, Roma-Bari, 2001, 126 ss. In particular, the concept of the family was influenced by the appearance on the European scene of the right naturalistic doctrines, who considered marriage as an institution of natural law devoid of economic and political connotations as a private society characterized by the values of freedom and equality for its members, aspiring to happiness (cfr. L. GARLATI, *La famiglia tra passato e presente*, cit., 18).

[51] Cfr. J. JR. WITTE, *From Sacrament to Contract. Marriage, Religion and Law in the Western Tradition*, Louisville 1997, 194 ss.; L. BONFIELD, *Gli sviluppi del diritto di famiglia in Europa*, cit., 121 ss.; on the non-acceptance by France of the Tridentine disciplinary decrees, cfr. A. TALLON, *Il Concilio di Trento,* Cinisello Balsamo, 2004, 85-88.

[52] Cfr. L. LUZI, *Riflessioni su matrimonio civile e divorzio all'epoca della Rivoluzione francese*, in *Mediterranea. ricerche storiche*, 22/2011, 282-283.

[53] Cfr. *ibidem*, 282-283.

of all subjects before the law, instances conveyed in the revolutionary concepts of citizenship as the principle of equality and law as a tool that could provide the citoyens with the clear perception of forming a single community in a single law, so that we could achieve not only a normative unity, but also and above all a unity of the subjects to whom it was addressed and at the same time achieve the unification of civil law and the unity of the Nation[54]. The demands of equality could not but also affect the family, where the desire of women to strengthen or at least rebalance their position intensified[55].

The requests made concerned not the regulation of civil marriage, but rather the necessity of the introduction of divorce as a consequence of the principle of freedom of contract[56],the greater flexibility of the rules relating to the celebration of the wedding, the improvement of civil status registers, the lowering of the age for access to marriage without parental consent, a stronger protection of the dowry, all needs that highlighted both the importance acquired by marriage as a relationship originated by the reciprocity of feelings and not by choices of family opportunism, both the greater visibility that the woman claimed not only within society, but also within the home[57]. With the Decree dated August 11, 1789, the bishops were instructed to provide the matrimonial dispensations without additional charges and without delay, thus intensifying the debates on the contractual nature of marriage and on the resulting right to dissolve the bond through the institution of divorce. In March 1791 these questions were put to the National Assembly: since marriage was considered as a pre-existing contract to the sacrament, the consent, qualified as a shop potentially the subject of a civil act, must necessarily be regulated in its manifestation by the nubendi by the state authority alone, while it is up to the Church the only discipline of the religious rite[58]. The Constitution of 3 July 1791 defined marriage as a civil contract freely and voluntarily assumed by the parties and therefore separable from the same will, a sort of symbol of individual freedom (and remained so until the Civil Code)[59] which the legislator used to determine not only the status of citizens, but also the link with the concept of "nation"[60]. By now the secularization of the matrimonial institution and the removal of its regulation from ecclesiastical competence was being completed. From March 17, 1792, discussions were opened to vote on the marriage law and a decision was made on the retention of registers by municipal officials. Thus came the Decree of 20 September of the same year governing the registration of births, marriages and deaths and the requirements for the celebration of the wedding. Through this decree the legislator took up the theory of Pothier and the Gallican jurists about the nature of marriage, the regulation of which was fully secularized. According to Pothier, in fact, marriage as a contract should belong to the political order and, therefore, be subject to secular power, willed by God himself in order to regulate and govern the good order of civil society, given the distinction between contract and sacrament, the subsidiarity of the second element to the first and the pre-existence of the contractual nature to the sacramental, which derived exclusively from the nuptial blessing whose eventual absence would have entailed between the spouses the existence of the only civil bond[61].

The matrimonial institution, therefore, was completely removed from the ecclesiastical monopoly since civil marriages, the only ones capable of producing valid effects for the State, had to necessarily

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[54] Cfr. G. DUBY – P. ARIÈS (edited by), *La vita privata. L'Ottocento*, Roma-Bari, 1988-2001, 25 ss.; P. NORA, v. *Nation*, in F. Furet – M. Ozouf (edited by), *Dictionnaire critique de la Révolution française*, Paris, 1992, 339-358.

[55] Sul tema cfr. D. GODINEAU, *De la rosière à la tricoteuse : les répresentations de la femme du peuple à la fin de l'Ancien Régime et pendant la Révolution*, in *Sociétés & Répresentations*, 8/2000, 68-74; E. DE MARCHI, *L'emancipazione femminile dalla rivoluzione francese alla Grande Guerra*, in Pearson.

[56] In this regard cfr. P. SAGNAC, *La legislation civile de la Révolution française (1789-1804)*, Paris, 1898, 284-286.

[57] Cfr. J. F. TRAER, *Marriage and the Family*, cit., 40-44, 82-84, 139-142.

[58] *Ibidem*, 88-89.

[59] Cfr. K. S. ZACHARIAE VON GENTHAL, *Manuale del diritto civile francese rimaneggiato da Carlo Crome*, Milano, 1908, 6-7.

[60] Cfr. S. DESAN, *The Family on Trial in Revolutionary France*, Berkeley-Los Angeles-London, 2004-2006, 48 ss.

[61] Cfr. M. LE CHANOINE ALLEGRE, *Le Code Civil commenté a l'usage du clergé*, tome premier, Paris-Lyon, 1888, 134-135.

precede religious ones. From the point of view of the form of the celebration, civil marriage was almost devoid of solemnity, especially when compared to the religious rite, a problem which the legislator tried to overcome, also with a view to making civil marriage more palatable to the spouses and to strengthening the concept of citizenship by reorganizing family life, by the decree of 25 October 1795. With this was formalized the fête des époux, civic ceremony that, through the exaltation of the coincidence of the patriotic, domestic, and civil virtues, raised marriage to a secular symbol, so that the sacramentality of which canon law had cloaked him by erecting him as a metaphor of the union of Christ with the Church, could be replaced by a kind of civic sacredness that would awaken consciences[62].

From the first Cambacérès project of 1793 to the Code Civil of 1804, on the one hand, the proclamation by the State of exclusive jurisdiction over the discipline relating to the marriage contract with regard to what had hitherto been an ecclesiastical monopoly on the matter, and on the other hand the introduction of divorce as a symbol of freedom, continued to trigger heated debates on the political and doctrinal scene[63]. In Napoleonic France the codicystic regime in family matters was characterized by the desire to protect the collective interest - put to the test during the era of droit intermédiaire by the invocation to the extreme of individual freedom - on the interest of the individual, drawing a model of a "strong" family, in which patriarchal and marital authority were modeled on the example of the supreme state authority. If the Revolution had led to the deconstruction of the society of Ancien Régime filling with substance and giving authority to the principles and ideas circulating in the previous era and that saw marriage as an elective choice and freely carried out by the spouses in the name of a feeling and therefore reversible in the name of individual freedom, Codification was concerned with consolidating the marriage contract theory. While leaving behind the most conspicuous reformist initiative inherited from philosophes, the Code Civil connoted the marriage of a civil function as well as secularizing[64], entrusting to the State the leading role and provoking the harsh reaction of the clergy who scolded the editors of

«ne considérant plus le mariage que comme un contrat civil… comme un contrat de bail à chute, sans avoir aucun égard aux lois de la religion et de l'Église»[65].

Through an extremely clear and linear juridical language, which found in the desire for secularism its first foundation, the legislators emphasized the consensual character of marriage, reaffirmed its contractual nature, consolidated the civil ritual forms (posting of publications for ten days at the municipal house, receipt of joint declarations by the registry officer, declaration of the union in marriage in the name of the law, drafting of the act of civil status in replacement of parish registers) and regulated the matter by protecting first of all the freedom of marriage, which necessarily resulted in the freedom to divorce, although more limited in its explanation than the recent past[66]. From the formulation of art. 165, according to which the marriage was to be publicly celebrated in the presence of the registrar of the domicile of one of the two spouses, and from the fact that it was up to the same officer to draft the written act from which he ascertained the celebration of the bond and provided at the same time evidence, already emerged strong sense of "secularization" which permeated the matrimonial matter and which was inseparably linked to that principle of equality between citoyens so dear to the Revolution. The Code emphatically demanded that the civil marriage preceded the religious rite, and that the civil[67]. While not abandoning the achievements of the Revolution, the Code

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[62] Cfr. J. P. BERTAUD, *La vita quotidiana in Francia ai tempi della Rivoluzione*, Milano, 1988, 177-180 and O. MARTIN, *La crise du mariage dans la législation intermédiaire*, Paris, 1901, 179.

[63] Cfr. M. BARBAGLI – D. KERTZER, *Storia della famiglia in Europa*, 65 ss.

[64] Cfr. L. LUZI, *Riflessioni su matrimonio civile e divorzio*, 300-312; S. SOLIMANO, *Verso il Code Napoléon*, Milano, 1998, 391 ss.; L GARLATI, *La famiglia tra passato e presente*, cit., 30-34.

[65] T. GOUSSET, *Le Code civil commenté dans ses rapports avec la Théologie morale*, Paris 1829², 59.

[66] Cfr. J. GAUDEMET, *Traditions canoniques et philosophie des Lumières dans la legislation révolutionnaire. Mariage et divorce dans les Projets de Code civil*, in M. Vovelle (edited by), *La Révolution et l'ordre juridique privé*, 305 ss.

[67] Cfr. artt. 199 e 200 *Code Penal*, 1810 and M. LE CHANOINE ALLEGRE, *Le Code Civil commenté à l'usage du clergé*, cit., 148.

Civil in its attempt to achieve a compromise between the past and the present, protected those principles that were considered to be most deeply embedded in the social fabric, first of all the principle of secularism and equality that in the family were expressed above all in the secularization of marriage obtained through the recognition of civil effects to the sole rite celebrated before the registrar with all the conditions laid down in the relevant codicystic framework. The limitation of the institution of divorce did not depend on the acceptance of the sacredness of the bond that was considered indissoluble by canon law, but on the will on the one hand to ensure that the eventual dissolution reflected a real awareness of the spouses, and on the other hand to strengthen the matrimonial institution, constitutive cell of the social organization[68]. The secularization achieved by codification meant on the one hand that marriage was not a purely private act, capable of being formed and existing without the intervention of public authority, and at the same time that it possessed no religious character, but it was merely a civil contract; on the other hand that the family emerging from the codicystic discipline was conceived as a constitutive cell of social organization. The recovery of the traditional patriarchal model severely limited the field of action of women and children - whose possible illegitimate nature further restricted rights in keeping with the tradition of the Old Regime - subordinated to the authority of the chief family, on whose strength the State must have known that it could count at times when it was necessary to make up for the laws or to correct the customs[69]. The Restoration, if on the one hand it did not lead to the rejection of the codified right that remained in full force, on the other hand it saw, with regard to the matrimonial institution, the preservation of civil marriage unlike what happened in Italy, where almost everywhere (even where the French code had been retained) was deleted. The only significant intervention in this sense was the repeal of the divorce, which occurred in 1816, was maintained until the reintroduction of this institution in 1884 under the Third Republic.

4. *Concluding reflections*

Napoleonic codification, although largely imported into Italian territories as early as 1806, failed to profoundly change the foundations of the family tradition that had always permeated its regulation, due both to the brevity of its period of validity and to the influence exerted by Church law, most clearly visible in matters of divorce and property regime, where it was more difficult to adapt to customs and principles contrary to or in any case distant from deep-rooted religious convictions. The Restoration, with the downsizing of the institutions qualifying the private law wanted by Napoleon and the "return to the past", put momentarily set aside the "secularising" will in order to approach to a model of regulating family matters in general and in general and matrimonial matters in particular, marked by traditions that had never been fully allowing a return to more relaxed relations with the Church[70]. The pre-unitary Italian States in their legislation excluded the divorce for Catholics, referred in a manifest manner to canon law as the canon law as a source of reference for regulating the main matrimonial profiles (suffice it to think of the Grand Duchy of Tuscany, the Piedmont, the Duchy of Modena, the Kingdom of the Two Sicilies in which a royal decree of 16 June 1815 declared null and void marriages celebrated not in conformity with the norms of the Council of Trent), or made civil effects of the marriage directly from the religious marriage, as in the case of the marriage, as in the case of the Albertine Code, which in Art. 106 saw the lack of consent as the only civil impediment

[68] Cfr. P. A. FENET, *Recueil complet des travaux préparatoires du Code Civil*, tome VI, Paris, 1836, 46.

[69] Cfr. G. DI RENZO VILLATA, v. *Persona e famiglia nel diritto medievale e moderno*, in *Digesto delle discipline privatistiche. Sezione civile*, t. XIII, Torino, 1995, 518-520.

[70] It should be noted in this regard that «gli istituti del matrimonio civile, del divorzio e della comunione legale dei beni, non bene accolti… in quanto contrastanti con le tradizioni giuridiche della penisola, furono pressoché ovunque abrogati dai Governi restaurati» (L. SINISI, *Tra reazione e moderatismo: attività legislativa e progetti di codificazione nella restaurata Repubblica di Genova*, in *Studi in onore di Franca De Marini Avonzo*, Torino, 2000, 356).

capable of having patrimonial consequences on the bond, but not of invalidating its validity[71]. The family regime of the Restoration derived, therefore, from «un compromesso tra le norme di *ancien régime* e quelle del codice napoleonico»[72], the harshness of which, ill-suited to the dominant conceptions of Italian society society of the time, were to be 'sweetened' to make them conform to to men and times. Although with united Italy there were numerous attempts to make compulsory the precedence of the civil celebration of marriage over the religious one, this was not achieved by establishing, with the unified civil codification, the recognition civil effects only to marriages celebrated before the State, without prohibiting Catholic citizens from also celebrating the religious rite. The Pisanelli Code was, after all, the result of the political unity achieved the country and therefore had to be a sort of trait d'union between the various trends that emerged within the legislation of restored Italy. restored. The secularisation of marriage did not mean the acceptance of divorce but rather maintaining the institution of separation, not so much for religious reasons as for reasons of social ethics which saw in the indissolubility of the bond a form of protection against cultural and economic inferiority of women[73]. The principle of secularism that inspired the Pisanelli Code did not preclude, therefore, the presence of institutions and values typical of canon law, not conflicting or incompatible with it. canonical law, not conflicting or incompatible with the prerogatives proper of the State, which in claiming the potestas matrimonii had abolished the exclusiveness of ecclesiastical jurisdiction in matrimonial matters paving the way for future reforms[74].

In Spain, on the other hand, the events that led to the elaboration and affirmation of the civil codification, in their content and the way they unfolded, had as a peculiarity the constant influence exerted on the political scene and social life by the Church. The Church, in fact, for the preservation of its authority in the field of matrimonial discipline, could count not only on the support of the sovereigns - who had every interest in maintaining peaceful and cooperative relations in the area of marriage - but also on the support of the Pope relations with the Roman Pontiff at a peaceful and cooperative level - but also on the support of the population, the vast majority of whom professed the Catholic faith. Unlike Italy, Spain, with its anti-French sentiment due to the sad memory of the occupation it had suffered, refused any kind of influence in this matter, so the spirit of secularism that saw in the revolutionary experience therefore, the spirit of secularism that saw the revolutionary experience take root, the Napoleonic codification produce its fruits and the imposition of this on the territories conquered by the renewed empire implement its diffusion did not touch the Iberian lands, where the codification requirement cultivated the link with traditions, with local fueros and with religious sentiment to bring the intent of legislative unification to fruition. If France was the State in which the re-founding of marriage in a secularist sense was most marked, Spain was undoubtedly the country in which the defence of religious marriage was most tenaciously attempted, and in which the political and social tensions between the different ideological conceptions around the same institution were greatest. This is why the introduction of civil marriage in Spain and its regulation by the legislature was accompanied by a strenuous defence of the canonical rite on the part of the country's Catholic community, and by the government's desire to harmonise the two disciplines, the State and the canonical, recognising both forms of celebration, as well as the production of civil effects of religious marriages through their transcription in the Civil Registry[75].

In Napoleonic France, the codictic regime in family matters was characterised by the desire to

[71] Cfr. G. Di Renzo Villata, *Persona e famiglia*, cit., 520-521.

[72] G. Vismara, *Il diritto di famiglia in Italia dalle riforme ai codici. Appunti*, Milano 1978, 118.

[73] Cfr. G. Di renzo villata, v. *Separazione personale (storia)*, in *Enciclopedia del Diritto*, XLI, Milano, 1989, 1350-1376.

[74] Cfr. G. Di renzo villata, *Persona e famiglia*, cit., 522-523. For more on the dynamics between civil law and canon law in matrimonial matters cfr. S. Ferrari, *Religione e codice civile. Dinamica costituzionale e problematica amministrativa del diritto matrimoniale post-unitario*, in *Storia contemporanea*, Bologna, 1976, 123-167.

[75] For a concise but effective fresco on the current Spanish discipline on marriage and the impact on it of the previous matrimonial legislation previous cfr. de F. De P. Blasso Gascó, *La regulación del matrimonio en el Código civil*, in *tirant libreria*, 1-14 e J. N. lafferriere, *¿Qué regula la ley cuando regula el matrimonio?* in *Revista de instituciones, ideas y mercados*, 54/2011, 261-275.

protect the collective interest - put to the test during the era of the droit intermédiaire by the all-out invocation of individual freedom - over the interest of the individual, designing a “strong” family model in which patriarchal and marital authority were modelled on the example of the supreme state authority. While not setting aside the achievements of the Revolution, the Code Civil, in its attempt to achieve a compromise between the past and the present, protected those principles considered to have most penetrated into the social fabric, first and foremost the principle of secularity and equality. These in the family sphere were expressed mainly in the secularisation of marriage, achieved through the recognition of civil effects only to the rite celebrated before the civil registrar, with all the civil registrar, with all the conditions foreseen by the relevant codictic discipline. The limitation of the institution of divorce did not depend on the acceptance of the sanctity of the bond, which in canon law was considered indissoluble canon law was considered indissoluble, but rather from the desire on the one hand to ensure that any dissolution reflected a real awareness of the spouses, and on the other to strengthen the institution of marriage, constitutive cell of social organisation, because

«Ces familles sont autant de petites sociétés particulières dont la réunion forme l'Etat, c'est-à-dire, la grande famille qui les comprend toutes»[76].

The confrontation concerning the introduction of civil marriage and the attempt to make it compulsory as opposed to the religious rite in Italy, France and Spain is of particular interest as in that, although the same three Western European States oldest Catholic tradition, they reacted in different ways to the different manner to the need felt by the political power to regulate the matrimonial matters. Pre-Unitarian Italy, politically and territorially fragmented political and territorial point of view, transposed with difficulty in popular practice the formalisation of marriage by the Tridentine Council, in an epoch in which the regulation of the matter was the exclusive ecclesiastical prerogative. exclusivity that began to waver during the Restoration, when during the Restoration, when the consolidation of political power consolidation of political power also passes through the 'nationalisation' of the family sphere, until it was heavily affected by the heated parliamentary and parliamentary and doctrinal debates of the liberal period on the advisability of the obligatory precedence of the civil rite over the religious one. Debates that, even if they did not lead to the approval of the relative law, caused great law, led to great tensions in relations with the Church, which was worried to see its 'control' in matrimonial matters eroded and inevitably undermined the principle of the indissolubility of the bond. Spain, although strongly defending the prerogatives of royal rights did not manifest excessively contrasting attitudes to the Catholic doctrine and the Church's will to maintain its legislation in matrimonial matters, elaborating between 1875 and 1932 a formally subsidiary civil marriage system, although at times, as a consequence of the exegesis of Article 42 of the Civil Code Civil Code carried out by administrative hermeneutical means, it becomes de facto an optional matrimonial system. France, finally, guardian of Gallican freedoms, expressed a more markedly jurisdictionalist, resulting in a more pronounced reluctance towards interference by the Catholic Church and a more intense desire of emancipation and autonomy from the same, arriving in post-revolutionary era to the complete secularisation of the institution of marriage[77].

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[76] P. A. FENET, *Recueil complet des travaux préparatoires du Code Civil*, tome VI, Paris, 1836, 46.

[77] For more on the comparison of the introduction of civil marriage between the three different Countries cfr. D. TARANTINO, *L'introduzione del matrimonio civile in Italia, Francia e Spagna: spunti di analisi storicogiuridica comparata*, in *Veritas et Jus*, 17/2028, 127-168.