Alberto Cano Merino, *La preparación para la celebración del matrimonio en la diócesis de Barcelona (1983-2003).* Hoy día, ante la manifiesta secularización de nuestra sociedad, se hace más necesaria e imprescindible que nunca una seria preparación a nivel humano y cristiano para la recepción del sacramento del matrimonio, no sólo para evitar posibles fracasos, sino sobre todo para conseguir una vivencia y desarrollo mucho más pleno del mismo matrimonio y la familia. El Código vigente ha recogido esta necesidad en los cánones 1063-1072, donde se establecen las normas básicas que garanticen la correcta preparación catequética del matrimonio y su celebración válida y lícita, remitiéndose para la mayor parte de los distintos aspectos concretos sobre la materia a la legislación particular de cada una de las Iglesias locales, resultando de esta forma operativo, puesto que son éstas las que realmente conocen sus propias necesidades, los medios más adecuados de los que disponen y sus posibilidades de realización.

Uno de los ámbitos en el que la diócesis de Barcelona más tiempo y esfuerzos ha dedicado, desde el Concilio Vaticano II y la entrada en vigor del nuevo Código de 1983 hasta nuestros días, ha sido precisamente al de la pastoral matrimonial, creando ya en 1974 el Secretariado Diocesano de Pastoral Familiar e incluyendo en sus diferentes planes diocesanos de pastoral el tema del matrimonio y la familia, por considerarla como la célula primera y vital de nuestra sociedad. Asimismo, también se han dado y establecido las orientaciones pastorales y la normativa más adecuada a cada momento, primordialmente sobre la preparación *inmediata* a la celebración del matrimonio, la confección del preceptivo expediente matrimonial, el lugar de la celebración del matrimonio, su misma celebración litúrgica, etc., sin olvidar aquellas situaciones peculiares que merecen una especial atención, como son las diversas circunstancias en las que pueden encontrarse las parejas que solicitan el matrimonio porque esperan un hijo y aquellas otras que solamente han contraído un matrimonio civil. La propia Vicaría General ha emitido durante este periodo de tiempo diversas Notas que venían a aclarar diferentes puntos sobre toda esta materia (v.gr.: la edad mínima para contraer matrimonio lícitamente, las parejas que se casan fuera de la propia parroquia, la inscripción del matrimonio en el Registro civil, etc.). Además, teniendo en cuenta que las dificultades reales de las parejas no residen en el hecho de casarse, sino que se dan principalmente después de haberse casado, no sólo se les ha indicado a los presbíteros y diáconos aquellas circunstancias más habituales en las que las familias acostumbran a renovar su *contacto* con la comunidad eclesial, que deben convertirse en momentos privilegiados de atención pastoral por su parte, sino que también se han creado diversos servicios de atención en la diócesis —tanto en el propio Secretariado Diocesano de Pastoral Familiar como en el Tribunal Eclesiástico— a fin de ayudar a los nuevos matrimonios a buscar las soluciones más adecuadas a

los problemas de convivencia sobrevenidos después de casados y a superar las inevitables crisis que se van presentando.

María Cruz Musoles Cubedo, *Evolución histórica del proceso de reunificación de la Iglesia en Oriente.* En los inicios del cristianismo, al no estar fijada con precisión la formulación del dogma, se produjeron las primeras desviaciones heréticas que quebraron la unidad de las Iglesias apostólicas. Posteriormente, la impugnación de las fórmulas dogmáticas de los Concilios ecuménicos de Éfeso (431) y Calcedonia (451), así como el cisma de Oriente (1054), contribuyeron a la división de la cristiandad y al distanciarniento definitivo de los patriarcas orientales y la sede de Roma.

A lo largo de la historia se han llevado a cabo intentos de unión entre las Iglesias orientales separadas con Roma. Los métodos más conocidos hasta el Concilio Vaticano II han sido la latinización, el unionismo y el uniatismo, por lo que algunas de las Iglesias separadas volvieron a la comunión con Roma. Son las actuales Iglesias orientales católicas, veintidós Iglesias en perfecta unidad de fe y en plena comunión jerárquica con Roma, que aportan un *speciale munus* en el campo ecuménico. El Concilio Vaticano II aportó un nuevo talante eclesiológico en el acercamiento a las Iglesias orientales. En esta línea, Pablo VI fue el gran impulsor del diálogo teológico internacional y Juan Pablo II el artífice de un gran empeño reunificador, firmando documentos con algunas Iglesias. En la actualidad, el proceso de reunificación encuentra dificultades en las relaciones con la Iglesia Ortodoxa, por su diferente concepción y aceptación de la figura del primado romano. No se debe perder la esperanza de llegar a la comunión plena, reconociendo la gran tradición litúrgica y espiritual de las Iglesias de Oriente. La riqueza de la diversidad no se opone a la unidad de la Iglesia.

Pablo Ormazábal Albistur, *La naturaleza procesal del Defensor del Vínculo en su desarrollo legislativo. Perspectiva histórica.* El presente artículo quiere ser una contribución al estudio de la naturaleza procesal del Defensor del Vínculo. Nuestra perspectiva es la del desarrollo legislativo en la historia del proceso matrimonial canónico (desde la C. Ap. *Dei Miseratione* de Benedicto XIV al Código de Derecho Canónico de 1983) y dejando otras cuestiones de tipo fundamental y más técnico de lado. Concluimos con un análisis de algunos decretos de la Rota Romana, posteriores a la promulgación del CIC de 1983, para ver, en sede jurisprudencial, cómo ha sido recibida la configuración jurídica actual del Defensor del Vínculo.

La figura del *Matrimoniorum Defensor,* como oficio propio para la defensa pública del vínculo matrimonial, surge con la C. Ap. *Dei Miseratione* de Benedicto XIV, con la intención de procurar una mejor defensa del vínculo matrimonial en los procesos canónicos. La condición procesal de parte es puesta de relieve por la Constitución apostólica. A lo largo de los siglos XVIII y XIX se van ampliando las funciones y las competencias del *Defensor* (que ya a finales de siglo se denominará *Defensor Vinculi),* haciéndole aparecer cada vez más en una postura intermedia entre las partes privadas y el Tribunal.

Con la promulgación del *Codex Iuris Canonici,* y sobre todo con la Instrucción *Provida Mater Ecclesiae,* al Defensor del Vínculo se le atribuyen competencias

que desfiguran su condición de parte en el proceso, haciéndole parecer muchas veces como un delegado del juez más que como un defensor de un bien de carácter público.

Tras el anuncio de la reforma del *Codex*, la comisión encargada de revisar el Derecho procesal realiza sus trabajos, entre otras muchas tareas, con la intención de clarificar la naturaleza procesal del Defensor como parte pública, haciendo una mayor equiparación a las partes y encuadrando su ministerio dentro de la defensa de la verdad del matrimonio. Estos trabajos de revisión quedarán recogidos en el CIC 83.

Por último, una mirada a la recepción de la nueva configuración legislativa del Defensor en sede jurisprudencial subraya la condición de parte procesal en el proceso, así como pone en evidencia los abusos y la falta de defensa del matrimonio como un bien eclesial cuando no se comprende bien la figura del Defensor del Vínculo.

Juan Manuel Alonso Montero, *La tutela de las personas incapacitadas que pertenecen a Institutos de Vida Consagrada*. Este trabajo es un comentario a un caso concreto referente a una persona perteneciente a un Instituto de Vida Consagrada, que fue declarada incapaz y que posteriormente se pretendió, por su familia, que la tutela recayera en su hermana o en su sobrina, y, por otro lado, el Instituto pretendió que fuera la directora de la residencia que éste tenía.

La resolución del Juzgado de Primera Instancia atribuyó la tutela a dicha directora, siendo apelada por la familia, y la Audiencia desestimó el recurso y mantuvo la misma resolución. Ambos autos se apoyaron en la posibilidad del juez civil de alterar el orden de nombramientos establecido en el Código civil, y la designación de otra persona teniendo en cuenta el beneficio del incapacitado. Este beneficio se explicaba por la mejor atención y cuidados que la incapacitada siempre había tenido por parte de sus compañeras y por el vínculo contractual que había adquirido al hacer votos perpetuos.

En el comentario se plantea la no obligatoriedad para el juez civil de las leyes canónicas, salvo las materias acordadas con el Estado. Sin embargo, se destaca en este caso el respeto que las resoluciones civiles han tenido a la situación contractual adquirida por el miembro del Instituto, pero que no siempre es así, y se aboga por una solucion concordataria.

Pedro Mendonça Correia, *O matrimónio canónico-concordatário em Portugal*. O presente texto é uma sinopse dos pontos de maior interesse prático da legislação vigente sobre o matrimónio canónico (impròpriamente denominado «casamento católico») em Portugal. A *legislação* em si é descrita na primeira parte do texto; na segunda parte, analisam-se algumas *dificuldades* que ela suscita.

1. Sem prejuízo dos princípios da aconfessionalidade e da separação entre a Igreja e o Estado mantidos pela Constituição da República, a Concordata assinada com a Santa Sé em 7 de Maio de 1940 continua em vigor. O casamento católico só pode ser celebrado por quem tenha a capacidade matrimonial exigida pela lei *civil:* necessita de ser transcrito na competente repartição do Estado para produzir efeitos na ordem jurídica interna. Não se reconhece à Igreja competência legislativa ou ju-

dicial em matéria de separação de cônjuges; mas o conhecimento das causas de declaração de nulidade do casamento católico e de dissolução do casamento rato e não consumado está reservado aos tribunais e às repartições eclesiásticas, cujas decisões se tornam executórias independentemente de revisão e confirmação. Actualmente, o casamento católico pode ser dissolvido por *divórcio*. A convalidação e a sanação «in radice» produzem os seus efeitos na transcrição do assento do casamento católico cumpridos determinados requisitos.

2. A Constituição não impõe que a lei civil fixe os presupostos e os efeitos do casamento católico *da mesma maneira* para todas as formas de casamento. A teoria a adoptar sobre a natureza da transcrição do assento do casamento católico é a da recepção normativa ou genérica. A recusa da transcrição está minuciosamente regulada na lei: não é aplicável ao casamento católico celebrado sob condição. A declaração *civil* de morte presumida não permite a celebração de novas núpcias ao cônjuge do ausente casado catòlicamente, ainda que o Direito Canónico o permita: é um impedimento matrimonial discriminatório, portanto inconstitucional. Não é possível a anulação de casamentos católicos pelos tribunais *civis* desde a entrada em vigor do Decreto-Lei n.º 30.615, de 25 de Julho de 1940. Uma causa de declaração de nulidade de casamento católico ou de dissolução de casamento rato e não consumado é prejudicial da de divórcio: ainda que seja posterior, nunca se pode negar o «exequatur» à respectiva decisão. Declarado nulo ou dissolvido por rato e não consumado um casamento católico de duas pessoas entre si unidas por casamento civil anterior, o que parece ser mais conforme ao espírito do sistema é que se declara nulo ou se dissolve o vínculo matrimonial *tout court*.

Piero Pellegrino, *El principio de igualdad y el principio de diversidad*. Desde el Concilio de Trento el régimen de la Iglesia se definía como *monárquico absoluto* ya que toda la potestad se concentraba en la persona del Romano Pontífice. Este hecho contrasta con la doctrina moderna de la separación de poderes del Estado moderno.

El contraste se hace aún más evidente por el hecho de que, mientras la sociedad civil se fundamenta en la igualdad de sus miembros, la Iglesia, sin embargo, se constituye como una sociedad desigual fundada en la distinción de dos clases de sujetos. Distinción proveniente del Derecho divino que crea dos *status* jurídicos diferentes, clerical y laical. Esta distinción tradicional ha sido matizada, de alguna forma, por el Concilio Vaticano II, que ha incidido en el principio de igualdad de todos los fíeles.

La necesidad de frenar la revolución protestante llevó a la teología y a la canonística desde aquella época a resaltar los aspectos visibles, institucionales y jerárquicos de la Iglesia. La *Lumen Gentium* ha venido a corregir esa visión unilateral acentuando no sólo el aspecto humano y visible de la Iglesia, sino también el divino e invisible. Con ello ha puesto de manifiesto el fundamental *status* de igualdad de los fíeles cristianos, reconocido en el Código de 1983 y manifestado en una triple igualdad: personal, social y jurídica.

La igualdad jurídica no debe confundirse con la capacidad jurídica. Siendo la primera la que, por el bautismo, dota de personalidad en la Iglesia; mientras la

segunda supone el contenido de la personalidad misma, ya que incluye la idoneidad del sujeto para ser titular de relaciones jurídicas. La personalidad jurídica es una cualidad preliminar del *status* eclesial, mientras la capacidad jurídica incide directamente sobre el *status* mismo. Por ello no puede identificarse la cualidad de laico con la de bautizado.

Mientras el principio de igualdad opera en el plano de la potencialidad y de la abstracción, el principio de diversidad opera en el plano de la actualidad y de la concreción. Esta diversidad se aplica tanto en el ámbito de la *jerarquía de orden*, como en el de la *jerarquía de jurisdicción*, pudiéndose hablar de una diversidad personal, social y jurídica.

Miguel Rodríguez Blanco, *El Plan Nacional de Catedrales: Contenido y desarrollo.* El balance que ofrecen los seis años de vigencia del Acuerdo marco sobre el Plan Nacional de Catedrales, si se atiende al número de convenios dictados en su desarrollo y a las medidas contempladas en ellos, es, sin duda, positivo. Dicho Plan constituye una muestra evidente de lo fructífera que puede llegar a ser la cooperación entre el Estado y las Confesiones religiosas en la realización de actuaciones de interés para ambas partes. A través de él se ha mantenido un adecuado equilibrio entre el valor religioso de los templos y su signifcación cultural, dejándose a un lado las discrepancias y múltiples desconfianzas que en este punto existían entre la Iglesia y el Estado, motivadas por unas circunstancias históricas y por una legislación hoy día superadas. El mutuo entendimiento entre ambas partes, tomando como base el principio de cooperación recogido en el artículo 16.3 de la Constitución, constituye una garantía para conciliar el respeto a la libertad religiosa y al valor cultural de determinados bienes eclesiásticos.

Alberto Cano Merino, *Preparation for the celebration of marriage in the diocese of Barcelona (1983-2003).* To day, faced with the rampant secularisation of our society, a serious preparation for the celebration of marriage at both human and Christian levels is more necessary than ever; this is not only in order to avoid breakdowns but also to achieve the survival and growth of the marriage itself as it develops into a family. The current Code has recognised this need in cc. 1063-1072 where basic norms are laid down which guarantee the correct catechetical preparation for marriage and its valid and licit celebration, remitting the majority of different practical issues to the particular legislation of each local Church, given that it knows its own needs, the best means available to achieve them and the realistic possibilities of bringing these about.

One of the areas to which the Diocese of Barcelona has devoted most time and energy since Vatican II and the publication of the new Code until the present has been precisely that of a pastoral marriage service; as far back as 1974 a Diocesan Secretariate for Family Matters was created and the theme of marriage and the family has always been present in all diocesan planning, given that the family is the primary social cell and vital to society. At the same time pastoral suggestions and norms have been given and established for specific moments: principally about the immediate preparation for the celebration of marriage, the filling

in of the compulsory pre-nuptial enquiry, the place of celebration, the liturgical celebration etc., without forgetting those individual situations which merit special attention, such as the different circumstances in which couples find themselves who request marriage because they are expecting a child or who are only married civilly. The Vicariate General has publishes various Notes over this period which tried to clarify different points (e.g.: the minimum age for contracting marriage, couples who get married outside their own parish, the inscription of the wedding in the Civil Register etc.). Furthermore, given that couples' real difficulties do not arise from getting married but rather from what happens afterwards, not only have those more usual circumstances been pointed out to priests and deacons when families tend to renew their contact with the ecclesial community and which they must turn into privileged moments of pastoral attention but different services have also been set up in the diocese —both the Diocesan Secretariat for Pastoral Attention to the Family and the Ecclesiastical Tribunal— in order to help new families seek the best solutions to those problems and overcome those crises which inevitably arise after marriage.

María Cruz Musoles Cubedo, *The historical evolution of the process of reunification of the Church in the East.* Right at the beginning of Christianity, as the formulation of dogma was not specifically spelled out, the first heretical deviations appeared which broke down the unity of the Church. At a later stage, the challenge to the dogmatic formulations of the Ecumenical Councils of Ephesus (431) and Chalcedon (451), a well as the schism of the East, contributed the definitive distancing of the Eastern Patriarchates and the See of Rome.

Throughout history there have been various attempts at union between the separated Eastern churches and Rome. Until Vatican II the most widely known methods were «latinization», «unionism» and «uniatism» by which some of the separated Churches returned to communion with Rome. These are the present Eastern Catholic Churches, twenty-two Churches in perfect unity of faith and in full hierarchical communion with Rome which bring a *speciale munus* to the ecumenical field. Vatican II brought a whole new ecclesiological approach to getting nearer to the Eastern Churches. Paul VI was the great promoter of international theological dialogue and John Paul II was the artificer of a great effort towards reunion, signing documents with some Churches. At present the process of reunion is finding difficulties in relationships with the Orthodox Church, due to its conception and acceptance of the figure of Roman primacy. We must not lose hope of reaching full communion, recognising the great liturgical and spiritual traditions of the Eastern Churches. The richness of diversity is in no way opposed to the unity of the Church.

Pablo Ormazábal Albistur, *The procedural nature of the Defender of the Bond and its legislative development: historical perspective.* The present article seeks to be a contribution to the study of the procedural nature of the Defender of the Bond. Our perspective is the legislative development in the history of canonical processes of marriage (from the Apostolic Letter *Dei Miseratione* of Benedict XIV to the Code of Canon Law of 1983), leaving aside other technical and fundamen-

tal questions. We conclude with an analysis of some decrees of the Roman Rota since the 1983 promulgation of the CIC, in order to see, from the jurisprudential angle, how the present configuration of Defender of the Bond has been received.

The figure of *Matrimoniorum Defensor* as a proper office for the public defence of the marriage bond arises with the Ap. Letter *Dei Miseratione* of Benedict XIV with the intention of procuring a better defence of the marriage bond in canonical processes. The procedural condition of the party is highlighted by the Apostolic Constitution. Throughout the XVIII and XIX centuries the functions and competences of the *Defensor* (who by the turn of the century will be known as *Defensor Vinculi*) become ever wider, making him increasingly appear in an intermediate posture between the private parties and the Tribunal.

With the promulgation of the *Codex Iuris Canonici* and, above all, with the Instruction *Provida Mater Ecclesiae*, competencies are being attributed to the Defender of the Bond which disfigure his condition as a part of the process, often making him appear more as a delegate of the judge than as a defender of a good which has a public character.

After the announcement of the reform of the *Codex* the commission charged with revising the law on processes got down to work with, among other things, clarifying the procedural nature of the Defender as a public party, establishing a greater equality among the parties and situating his ministry within the defence of the truth of the marriage. These works of revision were taken up in the Code of '83.

Lastly, we glance at the reception of the new legislative configuration of the Defender from the angle of jurisprudence, underlining his condition as a party to the process, as is evidenced by the abuses and lack of defence of marriage as an ecclesial good when the figure of Defender of the Bond is not properly understood.

Juan Manuel Alonso Montero, *Guardianship of incapacitated people who belong to Institutes of Consecrated Life*. This article is a commentary on a concrete case of a person belonging to an Institute of Consecrated Life who was declared incapable and for whom the claim was later made: the family claimed that guardianship was the responsibility of her sister or niece; on the other hand, the Institute claimed that it fell to the Director of the residence which belonged to the Institute.

The decision of the First Instance Court gave awarded guardianship to the director; this was appealed by the family but the higher court turned down the appeal and handed down the same decision. Both edicts were based on the possibility of a civil judge altering the order established by the Civil Code and designating someone else, taking into account the welfare of the incapacitated person. The benefit to the person was explained by the better care and attention which the incapacitated woman had always received from her companions and by the contractual link which she had acquired on taking perpetual vows.

In the commentary we state that canon law is not binding on a civil judge, except in those matters which have been formally agreed with the state. In this case however, we note the respect which the civil resolutions accorded to the con-

tractual situation which a member of an Institute acquires; however, things do not always work out this way, and we propose a solution by means of a Concordat.

Pedro Mendoça Correira, *Canonical Marriage in the Portuguese Concordat.* The present text is a synopsis of the points of greater interest in the current legislation on canonical marriage (improperly called *catholic marriage*) in Portugal. In the first part of the article we describe the legislation itself, while in the second we analyse some of the difficulties it raises.

1. Without prejudice to the principles of non-confessionality and separation between Church and State found in the Constitution of the Republic, the Concordat signed with the Holy See on the 7th May 1940 remains in force. Catholic marriage may only be celebrated by someone who has the capacity for marriage demanded by civil law and must be registered civilly in order to have effect in the internal juridical system. No legislative or judicial competence is recognised to the Church with regard to the separation of the spouses: knowledge of cases of declaration of nullity of catholic marriage and of the dissolution of *ratum et non consummatum* marriages is reserved to the Church tribunals and registers whose decisions can be executed independently of any revision or confirmation. Convalidation and *sanatio in radice* produce effects upon inscription of a catholic marriage settlement, once determined conditions are fulfilled.

2. The Constitution does not oblige civil law to establish the presuppositions and effects of catholic marriage in the same way as for all forms of marriage. The regulation to adopt on the nature of the registration of a catholic marriage settlement is done by means of a general norm. However, challenging a transcription is meticulously regulated in law and cannot be applied to catholic marriage celebrated under condition. The civil declaration of presumed death does not permit the spouse of the missing person who has been married in the catholic church to marry again, even though Canon Law would permit this. In this case we would be dealing with an discriminatory marriage impediment which would be unconstitutional. Ever since the *Decreto-Ley* nº 30.615 of the 25th July 1940, a catholic marriage cannot be annulled by civil tribunals. Proceedings to declare a catholic marriage null or the dissolution of a *ratum et non consummatum* marriage is prejudicial to divorce proceedings; even though it comes later the *exequatur* can never be denied to such a decision. It seems more in tune with the spirit of the system to declare a previous civil marriage null or dissolve it on the grounds of *ratum et non consummatum*, thus declaring the null or dissolving the marriage bond *tout cour*.

Piero Pelegrino, *The Principle of Equality and the Principle of Diversity.* Ever since the Council of Trent the regime of the Church has been defined as absolute and monarchical, given that all power was concentrated in the person of the Roman Pontiff. This is in sharp distinction to the modern doctrine of separation of powers in a modern state.

This contrast is made ever more evident by the fact that, while civil society is founded on the equality of its members, the Church is constituted as an unequal society founded on the distinction between two classes of subjects. The distinction

comes from Divine law which creates two different juridical states, the clerical and the lay. This traditional distinction has been nuanced to an extent by Vatican II which brought up the principle of equality of all the faithful.

The need to put the brakes on the Protestant revolution drove the theology and canon law of that time to highlight the visible, institutional and hierarchical aspects of the Church. *Lumen Gentium* corrected this unilateral vision, accentuating not only the human and visible aspect of the Church but also the divine and invisible. With this we have come to see the fundamental *state* of equality of the Christian faithful, recognised in the code of 1983 and manifested in a triple equality: personal, social and juridical.

Juridical equality should not be confused with juridical capacity. The first gives us, though baptism, personal membership of the Church; while the second supposes the content of personhood itself, given that it includes the suitability of the subject to play a titular role in juridical relationships. Juridical personality is a preliminary quality of ecclesial *state,* while juridical capacity has to do directly with the state itself. Because of that we cannot identify the quality of being a layperson and that of being baptised.

While the principle of equality operates at the level of potentiality and abstraction, the principle of diversity works at the level of reality and concreteness. This diversity both in the realms of *hierarchy of order* and that of the *hierarchy of jurisdiction,* allowing us to speak of a personal, social and juridical diversity.

Miguel Rodríguez Blanco, *The national plan for cathedrals: content and development.* If we heed the number of agreements reached and the measures contemplated in them, then the balance which the six years of operation of the National Plan for Cathedrals is undoubtedly positive. This plan gives evident proof of how fruitful cooperation between churches and the State can be in matters which are of interest to both. By means of the Plan we have reached an acceptable balance between the religious value of the churches and their cultural importance, leaving aside the differences of opinion and lack of trust which existed over this point between Church and State, due to historical circumstances which have been superseded by today's legislation. The mutual understanding between both parties, taking as their basis the principle of cooperation found in Art. 16.3 of the Constitution, provides a guarantee of reconciling respect for religious freedom and the cultural value of certain ecclesiastical goods.