CANONICAL DEVELOPMENT THROUGH DIALOGUE:
MARRIAGE AND DIVORCE IN THE PRE-CONCILIAR PERIOD AND IN THE ALL-RUSSIAN CHURCH COUNCIL OF 1917–1918

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ABSTRACT

The revolutionary reforms of Peter the Great in 1721 radically changed the whole Russian State. The changes which affected the Church’s canonical and juridical status for the entire Synodal period during the early twentieth century’s social and church-cultural metamorphosis, raise significant questions from the viewpoint of Orthodox canon law regarding marriage and divorce. The study’s main focus is how were these questions treated during the Pre-Conciliar period and in the All-Russian Church Council of 1917–1918. The All-Russian Church Council of 1917–1918 was in many ways a unique and unparalleled phenomenon in the Russian Orthodox Church, State and in Russian social history. The Pre-Conciliar movement of the early twentieth century in Russia included the first and only experience in the Russian Orthodox Church of an open discussion with elements of dialogue touching all sides of Church life.

The sources of this study, the documents and decrees of the Holy Synod and the preparatory bodies of the general Council of 1917–1918, raise the following questions regarding marriage and divorce:

1. How did the Russian Orthodox Church understand the state law in relation to its own ecclesiastical law?
2. How was the ancient canonical tradition concerning matrimonial issues interpreted in Russia?

By examining the canonical views of matrimonial matters in the Russian Orthodox Church in the early 1900s, especially through secular laws and canonical commentaries, it is possible to create a picture of a canonical marriage model eventually formed in the Russian Orthodox Church after the General Council of 1917–1918.

The bureaucracy appeared to be a permanent barrier between the Church and the people, as well as between the Church and the State. Ecclesiastical regulations were joined to civil law, creating norms of marriage law that conformed to the State’s viewpoint. This led to a situation before the 1917 Bolshevik Revolution where divorces were difficult to obtain. Eventually, the religious institution of marriage, which had been protected by the Russian judiciary from the eighteenth to the early twentieth centuries, was destroyed by the Revolution. Animosity towards traditional Christian family values began to pervade the social climate in Russia after the Revolution, and the laws of the
Russian Orthodox Church came to reflect this.

The study argues that after the All-Russian Church Council of 1917–1918, a new “divorce model” of the Russian Orthodox Church appeared. The Orthodox Church did not immediately abolish its previous bureaucratic model, especially when resolving the divorce cases in the Soviet State in 1918, but new pastoral aspects nevertheless were incorporated. The form of a petition was retained: one of the approved reasons for divorce had to be stated, as well as a detailed and correct statement of the circumstances under which the collapse of the marital union took place. The canonical spirit and the norms established in the Pre-Conciliar period were retained in this matter. Thus, any reasons that were not justified by the canons and their authoritative commentaries were not accepted as lawful causes for ecclesiastical divorce. However, the final resolution concerning the grounds for the dissolution of marriage appear as if the Council expected the Church to remain as it was in the past, namely with complete jurisdiction over marriage.
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It seems that there is no question about which so many have spoken and written as the question of marriage. Nevertheless, little has been done regarding the study of the creative canonical thoughts of the All-Russian Church Council of 1917–1918 regarding this institution. One can indeed feel alone in the small circle of Orthodox canon lawyers studying this less than well-known subject. I hope that this study will generate interest regarding this subject in the academic world.

Completing a doctoral dissertation has been an ongoing process, and there are many people I would like to thank for their support and encouragement on this path.

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International connections are most useful when studying Orthodox canon law and theology, and I found my studies in Greek between 2010 and 2011 at the University of Athens, Faculty of Philosophy as a scholar
of the Holy Synod of the Greek Orthodox Church to be of great value. During my dissertation project I have had an opportunity to participate in the conferences of the Society for the Law of the Eastern Churches between 2011 and 2015 in Athens, Bari and Thessaloniki. This—indeed the whole dissertation—would not have been possible without generous support of several funds. The Orthodox Church of Finland provided half of the funding, while the Finish Cultural Foundation, the Finish Academy of Science and Letters, the University of Helsinki and the Russian Charity Association in Finland provided the remainder. Their funding made it possible for me to fully focus on my studies and on my research.

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In conclusion, I am reminded of the thoughts of a distinguished Russian Professor of canon law, I. M. Gromoglasov, during one of the sessions of the All-Russian Church Council:

Пред нами с одной стороны, несущиеся из жизни вопли и сетование, с другой – определенные требования "канонической древности."¹

October 27, 2015 in Espoo

Jelisei Heikkilä

¹ [In front of us are, on the one hand, cries and sorrow coming from life, on the other – certain requirements of "canonical antiquity." ГАРФ. Ф. 3431. ОП. 1. Д. 316. Л, 184.]
1. INTRODUCTION

1.1 Overview of the Synodal Period of the Russian Orthodox Church

Along with other undeniably key events in Russian history – the baptism of Rus’ by Saint Vladimir and the Tatar conquest of Russia – the revolutionary reforms of Peter the Great in 1721 should be recognized as events that opened a new period in the history of the Russian Church, known as the Synodal period. The Synodal period was a peculiar time in the development of the Russian Church, and Peter’s reform of the Church was not an incidental episode. In fact, it was quite the opposite. As the famous Russian theologian Georgi Florovski noted, “It constituted the principal and the most consequential reform in the general economy of the epoch: a powerful and acute experiment in state–imposed secularization, and it was, so to speak a transfer from the West of the heresy of state and custom.”

The basis of the reforms lies in the fact that legal and cultural principles were imported into Russian society from the West. V. Kartašev holds that this novelty fundamentally changed the “symphony” of Church and State that had been operative in the East. Florovski, however, noted that Muscovite Russia turned toward the West much earlier than the actual reform in the eighteenth century. In Moscow an entire generation was educated in its thoughts about the West by the Kievian scholars. In such an environment Peter discovered an initial sympathy toward his cultural enterprises. What was innovative in Peter’s Church reform was

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2 A period in the Russian Orthodox Church which was started by the reforms of Peter the Great in 1721 and introduced into Russia by Feofan Prokopovitš, when the Patriarchal See was changed into the Holy Synod. It lasted until the election of a new Patriarch in 1917. The term “Synodalis” comes from the Greek root “σύνοδος” (council) and the Latin suffix “-al.” In parallel with the Latinized official term the eighteenth-century Russificated form “синодский” was used with the Russian suffix “-ck,” although it was eventually replaced with the term “синодальный.” Карташев 1992, 311.

3 Florovsky 1979, 114.

4 Карташев 1992. 311.
not westernization, but secularization, as seen later in the Code of Laws of the Russian Empire.⁵

What were then the actual Church reforms of Peter the Great? After the death of the eleventh Patriarch of Muscovite Rus, Adrian, in 1700, Peter refused to appoint a successor to the Patriarchal See. Instead, a few years later he formally abolished the Patriarchate and established the Holy Synod, along with Spiritual Regulation and Ecclesiastical Consistories to govern the Russian Church. After the patriarchs, Peter wanted to organize Church administration in Russia along the lines of Protestant countries, a totally new situation in the Orthodox world. The patriarchate was not revived until the All-Russian Church Council elected a new patriarch in 1917. The abolition of the patriarchate had no effect on the relations between the Russian Orthodox Church and the Orthodox Churches. The Emperor, with his growing power and the title of emperor that he had assumed, became the highest authority of the Church and was regarded more than ever as the Protector of the Orthodox Church, or “chef de l’Église,” as Catherine the Great called herself.⁶

The Church was in a metaphorical and technical sense beheaded. When viewing Peter’s reform from the canonical point of view, it is clear that it was not only a turning point, but a revolution. He produced a real metamorphosis or transformation in Russia,⁷ so that the canons of the Orthodox Church lost their status. In ecclesiastical legislation, of decisive importance were now the interests of the state and the mission of the Church to serve these interests. The rights of the Holy Synod and its power over the bishops did not arise from the canonical foundation of Orthodoxy, and the Spiritual Regulation of 1721 was recognized as the supreme authority over the bishops.

The government introduced the practice of transferring bishops from one diocese to another, which offered great opportunities for replacing them with more compliant clergy and getting rid of the unwanted.⁸ Accordingly, the authority of the Church was supplemented by certain executive, and to some extent, political government functions. These

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⁵ Article 64 says that the Emperor, “as the Christian Emperor, is the supreme defender and the keeper of the dogma of the dominant faith and the guardian of Orthodoxy.” Свод законов Российской империи 1912, Т. 1, Ч. I, 5.


⁷ Florovsky 1979, 114.

functions included leadership in primary education, civil registration and monitoring the political trustworthiness of the faithful. The clergy were obliged by oath to communicate actions that might be “harmful to the civil authorities.” In the Holy Synod, such empty titles as “president” and “vice–president” were introduced, being then replaced by the equally nominal title of “primatial member.” In the late eighteenth and nineteenth centuries, power was instead transferred to the ministerial figure of the Holy Synod, the chief procurator. The Church and its faithful nonetheless did not disappear.

Compared with the previous Patriarchal period, the Church, which consisted of 20 dioceses with twenty bishops, grew almost tenfold during the Synodal period. The Russian population during Peter the Great’s time numbered 21 million, approximately 15 million being Orthodox Christians. By the time of Nicholas II, according to the census of 1915, of 182 million Russians, 115 million were Orthodox Christians.

In 1722, Russia contained 15,761 church buildings, in 1908 the number was 61,959 with 20,610 chapels. At the end of the imperial period, the Russian Orthodox Church had 64 dioceses and about 40 vicariates, led by more than 100 bishops. The total number of clergy in 1722 consisted of 61,111; in 1908 there was 48,879 priests, 14,779 deacons and 44,248 lower clerics. However, the number of monasteries, when compared to 1701, fell more than three times in the first 40 years of reforms from a total of 1,201 (965 male and 236 female) to 387 (319 male and 68 female). In 1724 there was 25,207 monks and nuns, but in 1796 only 5,861. Over the time monasticism rose again in the Russian Empire, for example in 1914 there was already 1,025 monasteries (550 male and 475 female) with 94,629 monastics (11,845 monks and 17,283 nuns). In 1738 Russian Orthodox Church had two theological academies, one in Kiev and one in Saint Petersburg, 17 seminaries with a total of 2,589 students. By 1807 the number of academies doubled, with one added in Moscow and one in Kazan; the number of seminaries rose to 46 with 24,167 students in all. By 1914 the number of seminaries had increased by

9 Православная энциклопедия 2007, Т. XVI, 433.
10 Караташев 1992, 312.
12 The number of chapels is unknown.
eleven and the total number of students annually was more than 50,000, adding to the count of students from 185 diocesan schools.¹⁴

This quantitative growth was not only the automatic result of population growth. This was the result of active and systematic internal and external missionizing by the Russian Church to an extent never practiced before. Missionary acquisition of new church members by the Russian Church outside the hereditary growth of the Russian Orthodox population accounted for a few million, as Professor Pospielovsky noted, albeit not giving any detailed numbers. Traditional religious tolerance towards all religions, nationalities and tribes forming a part of Russia did not deter the Russian Orthodox Church from rapidly expanding missionary work among them. Traditionally, Islam, Judaism and Buddhism (Lamaism) enjoyed special privileges of immunity from foreign missionaries, although Orthodox missionary work among the Islamic Tatars in Kazan in the nineteenth century was very active. In the areas and regions that rejoined the Russian Empire, missionary work was even more active. Naturally, during the three partitions of Poland and the reunification with the Orthodox Church, the primordially Russian population, which at one time was in union with Rome, increased the Russian population by 5 million. The gradual conquest of the Caucasus began the restoration of former ancient Christianity there. Consequently, missionary work of the Russian Orthodox Church became one of its major achievements during the Synodal period; it had activities in Siberia, the Far East, Alaska, Japan, China and Korea, as well as among the Nestorian Assyrians in the Ottoman Empire.¹⁵

The Russian Church began to build ecumenical ties with the other Western Churches, which began a new page in the history of the Russian Orthodoxy. The Protestant world, represented by Anglican priests in the nineteenth century, started the dialogue with the Russian Orthodox Church aiming in a union with them. This was, as Florovski pointed out, the first application of ecumenical relations.¹⁶ After this, the Old Catholic

¹⁴ Цыпин 2006, 793–796.
¹⁶ Pospielovsky 1998, 173. The rapprochement of Anglicans with the Orthodox Church was the result of the bull “Apostolicae Curae” in 1896, in which Pope Leo XIII announced the invalidity of Anglican ordinations. Representatives of the Church of England turned to Orthodox theologians to give their opinion on the matter. Unlike A. I. Roždestvenski and other theologians, Professors V. A. Sokolov and A. I. Bulgakov criticized the papal bull, and came to the conclusion
movement of the nineteenth century established close ecumenical ties with the Russian Orthodox Church, although the Old Catholics and Orthodox theologians never achieved any consensus. Ecumenical dialogue was continued in the twentieth century; contacts with the Anglicans were once again renewed shortly before World War I. On September 20, 1918, the All-Russian Church Council declared in its resolution on ecumenism that it “authorizes the Holy Synod to organize a Permanent Commission with departments in Russia and abroad for the further study of Old Catholic and Anglican obstacles in the way of union, and for the furtherance [...] of the speedy attainment of the final aim.”

An educational and theological rise in the Russian Church can be also seen in connection with another original cultural phenomenon, which became a hallmark of Russian Church history: a prominent part of theological studies was made by the Russian lay people, by non-professionals from theological academies, who represented the secular culture and became authors of many classical works in the field of Orthodox theology and religious philosophy. These “secular” theologians were, for example, the Slavophiles Homjakov, the brothers Aksakov, the westernizer Vladimir Solovjov and his followers the brothers Trubetskois. Parallel to this should be placed the religious–orthodox element in Russian literature, which became equally well known worldwide.

The Russian Orthodox Church during the Synodal period, beheaded in the canonical and juridical sense, was forced to cope with its new bureaucratic–administrative status in the State, which underwent massive reforms as well. The Church’s power was centralized and was seen as no more than an empirical institution that organized religious life for Orthodox citizens. The Spiritual Regulation, the highest law of the Church was however only a program for reform – not the achievement of reform as such. This is why the reform did not succeed in its entirety: it

that, under the principle of “oikonomia” (leniency), the Orthodox Church can recognize Anglican ordinations. The Russian Orthodox Church eventually decided to laicize all Anglicans on their acceptance into Orthodoxy. Православная энциклопедия 2001, Т. II, 314.

17 Карташев 1992, 319. Old Catholics were a group of Roman Catholic clergy and theologians that in 1871 rejected the newly–formulated doctrine on papal infallibility and broke communion with Rome. In contrast with the Anglicans, the Old Catholics had a much clearer theological connection with the Orthodox Church once they rejected the papacy. Pospielovsky 1998, 173.

was not carried through because not everything proved practical, as Florovski noted. 19 Nevertheless, this period of the Russian Church revealed in many ways its spiritual forces and achievements and became a “golden era” in two theological–religious spheres: theological education and missionary work.

1.2 Matrimonial Norms of the Russian Orthodox Church at the Beginning of the 20th Century as a Subject of Study

The All-Russian Church Council of 1917–1918 itself was a unique, in many ways, unparalleled phenomenon in the Russian Orthodox Church, the State and in Russian social history. Church and society had been approaching this Council for a long time if not throughout the entire Synodal period, when the Church was deprived of the opportunity to hold councils, then at least during the last few decades of this era.

At the beginning of the twentieth century, there were approximately 115 million adherents of the Orthodox confession in Russia. Non-denominational status in the country during that period was not possible. The Church was entrusted to manage the parish registers. Patriarchal governance of the Church had been abolished by Emperor Peter the Great in 1721, and from 1721 until 1917, the Holy Synod was the supreme state body of ecclesiastical administrative power in the Russian Empire. Criticism of the Synodal structure of the Church and the reforms of Peter the Great from the canonical point of view started to be expressed in the public press at the beginning of the twentieth century. 20

During the great reforms of Alexander II, the first open discussions about conciliarity in the Russian Church and the need to transform its administrative system began. 21 At the same time diocesan congresses (which initially treated only the economic problems of the estates) began to gather regularly; this was an important step towards conciliar church

19 Florovsky 1979, 120.
20 Белякова 2004, 38.
administration as well. Perhaps the most significant development regarding the reform of the Church occurred in February 1905, when the Chairman of the Committee of Ministers Sergei Juljevitš Witte published a memorandum “The Present Situation of the Orthodox Church,” which was in fact composed by the professors of the Saint Petersburg’s theological academy. The memorandum stated that due to the freedom of and protection by the State, the Orthodox Church was enmeshed in heavy chains. Rejection of the principle of conciliarity in Church life led to a change in its spirit. The main reason for disorganization was attributed to Peter's Church reform, meaning that Church administration had became one of the “numerous wheels complex state machine.” The bureaucracy appeared to be a permanent barrier between the Church and the people, as well as between the Church and the State; and the only way to “wake up non-viable life” was a return to the earlier canonical norms of administration.

Witte’s memorandum repeatedly demanded reorganization of the ecclesiastical structure. A slogan for the time could very well have been “returning to the canonical norms.” Judging from documents from the mentioned period this “return” was often understood, in the first place, as the criticism of the Synodal structure and the need for convocation of the All-Russian Church Council to solve the acute problems of the Church. However, the Church faced a great problem in understanding how it should return to these canonical norms.

The Pre-Council Presence started its work on March 8, 1906, holding regular sessions March 14 – June 13 and November 1 – December 15 of the same year, for a total of four and a half months. A possible reason for this was an unstable social situation in the country, a result of the Revolution of 1905. The work took place in the general meetings of seven departments; the third department addressed issues such as

23 Фирсов 2002, 151.
24 Фирсов 2002, 151.
26 A literal translation from the “Предсоборное присутствие,” a body of the Russian Orthodox Church that prepared the Council of 1917–1918 that time.
27 Possible causes for the Russian Revolution of 1905 were: the agrarian problem, the nationality problem and the labor problem.
reasons for dissolution of marriages, which undoubtedly was the most painful question that had a direct effect on the personal lives of believers. The preparatory period of the All-Russian Church Council was reflected in the canonical debates of bishops and canon lawyers in theological publications and in the Church press. Those involved brought forth a number of views and models for reforming Russia’s obsolete divorce and marriage law. Later, the All-Russian Church Council aimed to solve these problems and to find a new canonical model for married life in a new anti-religious society. Apart from traditional grounds for divorce, namely the adultery of a spouse as specified in Scripture, other proposed reasons given in the Pre-Council Presence were: the incapacity for conjugal relations, a disease which eliminated the possibility of conjugal relations and had a detrimental effect on the offspring (leprosy, syphilis, postnuptial madness, etc.); prolonged absence of one of the spouses; malicious abandonment by one of the spouses that lasted for five years or more; administrative exile decided by the court; and spousal abuse with the determination of guilt given by a civil court.28

Despite the great amount of work carried out by the participants of the Pre-Council Presence in a relatively short period, its results were not utilized at the time, since in May 1907 Emperor Nicholas II decided to postpone the convening of the Council. The preparatory work of the Council resumed in 1912 when the Holy Synod established Pre-Conciliar meetings, but the Council did not met regularly and worked slowly. By the beginning of 1917, its work still remained unfinished. These events undoubtedly affected the history of the preparation of the All-Russian Church Council of 1917–1918. Strangely, the leaders and enthusiasts of this preparatory work did not know exactly when the actual Council would gather. The Revolution of February-March 1917, may have added a stimulus to the urgent setting up of the Council.29

The Spring of 1917 was a decisive period in Pre-Conciliar history. On the one hand, the measures taken by the Holy Synod for the immediate preparation of the Council and the results of the work of the Pre-Conciliar Board made a special, albeit small step in the modern history of the Russian Church. On the other hand, the documentary heritage of the Board was transferred to the Office of the Council and became a part of the archives of the Council. The preparation for the Council was carried

29 Кривошеева 2012, 6.
out primarily by the Holy Synod, the supreme body of ecclesiastical administration and the chief procurator of the Holy Synod. According to the decision of the ecclesiastical authority, the duty of immediate elaboration of materials for the Council was given to the Pre-Conciliar Board. The official publication of documents of the Pre-Conciliar Board became impossible after their meetings came to an end in September 1918.30

The All-Russian Church Council of 1917–1918 was the culmination of the reform movement in the Russian Orthodox Church, which had begun in 1905. The Council itself started to project a relaxed model of the strict divorce practice of that time. Just before the end of the Council, an amended decree on the rules on marriage was adopted. In the ecclesiastical law department of the Church Council of 1917–1918, an extensive discussion was held regarding the acceptable definitions of divorce matters. It is noteworthy that the Council’s academics, bishops, lawyers, procurators of the Holy Synod, and most of the clergy, supported extending legal reasons for divorce. At the same time they also supported partial transfer of the divorce process to the civil courts. The Council’s lay people, as well as the clergy from the countryside, forcefully opposed these reforms.31

In ancient Russia, marriage was regulated by the law borrowed from the Church of Constantinople. Initially, all marital affairs, as we know from the first Russian Church statutes, were recognized in Russia as purely ecclesiastical. That was because the government at that time had neither a reason nor the means to introduce popular marriage customs into the institution of Christian marriage.32 Until the 18th century all marital matters were managed by the church. Under Peter the Great, the canons of the Church and its regulations were joined to civil law, including some partly new norms of marriage law in accordance with the State’s view. This “matrimonial model” was used in Russia until the early 20th century.33

At the beginning of the nineteenth century, Russian marriage law, in comparison with that of other European countries, was strict. The State

30 Кривошеева 2012, 6.
32 Павлов 1902, 325.
33 Горчаков 1909, 249.
recognized only marriages between persons in the religious communities sanctioned by the State. Therefore, marriages between Old Believers and other “dissenter” groups were prohibited. However, in 1874, a new form of marriage for dissenters was introduced into Russian civil law. These marriages were recorded in special parish registers that were managed by the State police. In the opinion of some Orthodox canon lawyers, this legal accommodation established the first civil marriages in Russia.

Divorces were difficult to obtain before the 1917 Bolshevik Revolution. From the eighteenth to the beginning of the twentieth century, Russian divorce law was stricter than it was in Ancient Russia. The State granted divorces only with the support of the Holy Synod. The Department on Church Discipline took up reasons for divorce as one of its most important projects. Various plans to reform the divorce process continued to surface until 1916, after which they were introduced in the All-Russian Church Council of 1917–1918. The 1917 Revolution brought about many legal reforms in Russia, including reform of the old marriage law. On December 16, 1917, the Russian Central Executive Committee and the Council of People’s Commissars revised the law regarding divorce and civil marriage. The reformed law did not address the possible causes

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34 Old Believers (“староверы; старообрядцы”) are a religious group that separated after 1666 from the official Russian Orthodox Church as a protest against church reforms introduced by Patriarch Nikon between 1652 and 1666. Old Believers continue liturgical practices that the Russian Orthodox Church maintained before the implementation of these reforms. There are two major strains of Old Believers: “Priestless,” (“Безпоповцы”) – a group that rejects a number of sacraments of the Orthodox Church, such as the Eucharist, marriage and priesthood, and “Priested Ones” (“Поповцы”) – a group who recognize the same sacraments as the Orthodox Church. See Paert 2004, 556.

35 The Russian term “раскольник,” which literally means “one who brings disorder,” is usually used in an official context when talking about Old Believers. It can be translated as dissenter, splitter or schismatic, ultimately meaning a member of a non-established church or a nonconformist.

of divorce: it was enough that the two parties decided to divorce. This created a large discrepancy in existing practice, since marriage was a sacrament of the Orthodox Church. The Church was forced to deal with the State’s new divorce law, which it ended up protesting in the All-Russian Church Council.37

Eventually, the religious institution of marriage, which had been protected by the Russian judiciary from the eighteenth to the early twentieth centuries, was destroyed by the Revolution. Animosity toward traditional Christian family values would pervade the social climate in Russia, and the law and canonical practice of the Russian Orthodox Church came to reflect this.

1.3 Study Task and Methods

Reforms that changed the whole Russian State in 1721 affecting the Church’s canonical and juridical status for the entire Synodal period, and later during the early twentieth century’s social and church–cultural metamorphosis, raises some questions from the viewpoint of Orthodox canon law regarding marriage and divorce. In particular, how these questions were treated during the Pre-Conciliar period and in the All-Russian Church Council of 1917–1918. We shall ask the following questions:

1. What was the general marriage law in the Russian Empire at the beginning of the twentieth century? Did it have a canonical foundation? Did the Holy Synod decree regulations that conflicted with the matrimonial practice at that time?
2. What were the canonical views of the preparatory commissions of the All-Russian Church Council, as well as the views on matrimonial matters of the General Council itself in 1917–1918? What matrimonial norms were eventually reformed?
3. What type of foundation did the canons themselves, as well as their primary and contemporary commentaries, establish for matrimonial issues? How did Russian canonists at the time

37 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 4–5.
interpret canons when marriage issues were considered? What was the relationship between interpretation and practice? Did the revised model of marriage differ significantly from the canonical tradition of the Orthodox Church?

The second chapter of the study concentrates on matrimonial norms and divorce according to the canons of the Orthodox Church. This chapter will give an overall picture of canonical regulations regarding marriage and divorce.

The third chapter studies the Russian legal practice on marriage and divorce at the beginning of twentieth century, including the introduction to the particular laws of the Russian Orthodox Church at that time.

The fourth chapter analyzes the canonical views of the preparatory commissions of the All-Russian Church Council on matrimonial matters. The chapter is divided thematically to discuss the conditions for marriage and reasons for divorce. These conditions for marriage and reasons for divorce are analyzed from the canonical point of view, using primary Greek and contemporary Russian canonical commentaries from that time. Differences are examined as well.

The fifth chapter studies the resolutions regarding marriage and divorce of the All-Russian Church Council, comparing them to the past decrees and practice of the Holy Synod.

The study is limited to the period of 1900–1918, which is central to the practical reforms of matrimonial matters in the Russian Orthodox Church. The canonical perspective in the present study refers to canons, canonical commentaries and particular laws of the Russian Orthodox Church, which were constituted for the practical guidance and government of the Church and its members. When the canonical praxis of marriage and the particular Russian laws are analyzed in the present study, attention is paid to their original purpose, as well as how they were applied in practice. Only then is it possible to find a creative synthesis of the examples that are generally applicable to the matrimonial questions of the Orthodox Church.

A thorough presentation of the history of matrimonial matters in Russia, patristic thoughts and as well the liturgical aspects of the matrimonial service are excluded from this study. The purpose of the study is not to give a unified canonico–dogmatical presentation on Orthodox marriage. Instead the study focuses on the subject’s recent history.
1.4 Methodology of the Study

The present study takes a historical–analytical approach. The nature of the study combines historical, juridical and dogmatic perspectives on marriage in the context of the twentieth-century Russian Empire. The research strategy includes a number of different methods of use, which are selected for each specific research area or goal. The questions of this study are examined from the point of view of the canonical tradition of the Orthodox Church. The canonical regulations of marriage confront us with a dual problem:

1. How did the Russian Orthodox Church understand the state law in relation to its own ecclesiastical law?
2. How was the ancient canonical tradition concerning matrimonial issues interpreted in Russia?

By examining the canonical views of matrimonial matters in the Russian Orthodox Church in the early 1900s, especially through secular laws and canonical commentaries, it is possible to create a picture of a canonical marriage model eventually formed in the Russian Orthodox Church after the General Council of 1917–1918. Therefore, for this study it is essential to analyze the canons which were used as a primary source for Russian marriage law.

The purpose of this study of the primary source material and literature is to find an overall thematic structure which supports the whole data. The documents and decrees of the Holy Synod and the preparatory bodies of the General Council of 1917–1918 regarding matrimonial questions are the sources for this study. The material is taken from the Russian Federation State Archive (ГАРФ) and the Russian Historical State Archives (РГИА). The information provided by literature explores the study of canon law, especially concerning marriage issues.

The canons of the Orthodox Church are used to assess the sources of this study. English translations of the canons of the first seven ecumenical councils are collected from the second series, volume 14 of *Nicene and Post-Nicene Fathers*, edited by Philip Schaff and Henry Wace. English translations of Apostolic canons, the canons of the local
councils and Holy Fathers, are collected from the Rudder. Translations of canons and their commentaries into English are also checked against the original Greek sources; canonical commentaries however are collected almost exclusively from the Greek source, Syntagma of Canons, compiled by G. Ralles and M. Pottles between 1852 and 1859. The Syntagma includes the Nomokanon of Fourteen Titles with the commentary of Balsamon, the Alphabetical Collection of Matthew Blastares, Apostlecanons, the canons of the Holy Fathers, the

38 In Greek Πηδάλιον, is a collection of canons with the commentaries of Saint Nicodemus of the Holy Mountain. It was translated into English in 1957 by D. Cummings.

39 Σύνταγμα τῶν θείων καὶ ἑρών κανόνων τῶν τε ἁγίων καὶ πανευφήμων Ἀποστόλων, καὶ τῶν ἑρών Οἰκουμενικῶν Σύνοδων καὶ τῶν κατά μέρος ἁγίων Πατέρων, ἐκδόθεν, σὺν πλείσταις ἄλλαις τὴν ἐκκλησιαστικὴν κατάστασιν διεπόσαις διατάξεις, μετὰ τῶν ἁρχαίων ἐξηγητῶν, καὶ διαφόρων ἀναγνωσμάτω, is an extensive body of the main sources of the Byzantine canon law, published in Athens in 1852–1859 by two Greek scholars – lawyers Γ. Ράλλη (1804–1883) and Μ. Ποτλή (1812–1863). The first volume contains Nomokanon of Fourteen Titles with the commentaries of Theodore Balsamon. The second volume the Apostolic canons and canons of the ecumenical councils, with the addition of the rules of the 869 and 879 Synod of Constantinople, with the commentaries of Balsamon, Zonaras and Arsitenos. The third volume contains the canons of the local synods, the fourth volume the canons of the Holy Fathers with the commentaries of the aforementioned exegetes. The fifth volume contains the conciliar decisions of archbishops and the patriarchs of Constantinople and the novellas of the Byzantine Emperors, as well as answers, letters, and information on various canonical issues. The sixth volume contains The Alphabetical Collection of Matthew Blastares. The textual basis of the Σύνταγμα is the manuscript of the National Library of Athens of the Trebizond Codex of 1311, against which all canonical editions appearing until 1852 were compared. Ohme 2012, 27.


41 Theodore Balsamon (born in Constantinople between ca. 1130 and 1140 and died after 1195) was a canonist, patriarchal nomophylax and chartophylax, and the patriarch of Antioch (although he remained in Constantinople). The Oxford Dictionary of Byzantium 1991, 249.

42 Σύνταγμα κατά στοιχείον [του Ματθαίου Βλάσταρη] is a canonical collection made by Matthew Blastares in 1335. The author arranged his matter in alphabetical order. He made 24 general divisions, each marked off by a letter of the Greek alphabet. These sections he then subdivided into 303 titles. Matthew Blastares was a canonist and theologian, monk and priest in the monastery of Kyri Isaac in Thessalonika; he died in Thessalonika after 1346. The Oxford Dictionary of Byzantium 1991, 295.
canons of the local synods and the canons of the first seven ecumenical councils with the commentaries of Zonaras, Balsamon and Aristenos, Byzantine exegetes of ecclesiastical rules. It also includes a number of letters (encyclicals) of the Patriarchs of Constantinople, resolving some canonical problems regarding marriage. Civil law collections of the Byzantine Empire like Basilika, Procheiron, 49

43 Κανόνες τῶν Ἁποστόλων is, a collection of 85 canons, whose authorship is attributed to Apostles; they form an appendix to the Apostolic Constitutions. The Oxford Dictionary of Byzantium 1991, 141.

44 The canons of the Holy Fathers according to the Rudder include rules from: Saint Dionysius the Alexandrian († 265), Saint Gregory of Neocaesarea († ca. 270), Saint Peter the Martyr († 311), Canonical Epistles of Saint Athanasius the Great († 373), Saint Basil the Great († 379), Saint Gregory of Nyssa († 394), Saint Gregory of Nazianzus († 390), Saint Amphilochnus of Iconium († ca. 394–403), Saint Timothy of Alexandria († 384), Saint Theophilus of Alexandria († 412), Saint Cyril of Alexandria († 444), the Canonical Epistle of Saint Gennadius of Constantinople († 471), Saint John the Faster († 595), the Canonical Epistle of Saint Tarasius of Constantinople († 806), Saint Nicephorus the Confessor († 828) and canonical questions and answers concerning the Patriarch Nicholas († 1152).

45 Local councils included the following synods in: Ancyra (314 AD), Neocaesarea (ca. 314–315 AD), Gangra (340 AD), Antioch (341 AD), Laodicaea (ca. 363–364 AD), Sardica (343 AD), Constantinople (382 AD) and Carthage (397 AD).

46 The First Seven Ecumenical Councils are: First Council of Nicaea (325 AD), First Council of Constantinople (381 AD), Council of Ephesus (431 AD), Council of Chalcedon (451 AD), Second Council of Constantinople (553 AD), Third Council of Constantinople (680 AD), Second Council of Nicaea (787 AD).

47 John Zonaras (died probably after 1159) was a historian, canonist, theologian and high-ranking official at the court of Alexios I. The Oxford Dictionary of Byzantium 1991, 2229.


49 Basilika (τὰ Βασιλικά) is an extensive collection of Byzantine [imperial] laws divided into six volumes or 60 books, begun under Emperor Basil I and completed in the first years of the reign of Leo VI. The Oxford Dictionary of Byzantium 1991, 265.

50 Procheiros Nomes (Ο Πρόχειρος νόμος), literally, “Handbook,” or “The Law Ready at Hand,” is a Byzantine law book divided into 40 titles that used to be dated to 870–879, but must be regarded as a revision of the Epanagoge ordered by Leo VI in 907. The Oxford Dictionary of Byzantium 1991, 1725.
Ekloga, and Epanagoge are used to demonstrate how the ecclesiastical regulations and the Byzantine civil law influenced each other concerning matrimonial matters. They were brought up as well in the commentaries of Russian canonists. In this study Byzantine civil law is also referred to in cases where there is a need to crystallize various aspects of matrimonial matters.

1.5 A Note on Terminology

When considering matrimonial issues, especially divorce, it should be noted that Roman law uses both, divorce and dissolution, in reference to the termination of marriage. This is the case in the Digest of Justinian, where it is said that “Marriage is dissolved by divorce, death, captivity, or other kind of slavery of either of the parties.” The word divorce is derived either from the diversity of views it involves or because those who dissolve their marriage go in different ways. Hence, “divorce” applies to the procedural act. “Dissolution” is used after the fact, to describe a marriage which has dissolved as a result of an impediment which could make the marriage null or external circumstances which impede the realization of the aims of marriage, such as captivity of one of the spouses, prenuptial impotence or an infectious disease which could make the marriage nullifiable. Acts caused by one of the spouses, such as adultery or the prolonged absence in Roman law, may entitle the aggrieved spouse to initiate the procedure for a judicial act of divorce, which may result in the dissolution of the marriage. The term divorce (развод) can be found in Russian literature and even in manuals on canon and civil law as if it was synonymous with dissolution.


54 Dig. XXIV, 2, 2. Watson 1985, Vol. 2, 714.
(растворение). However, the Charter of Diocesan Consistories (Устав духовных консисторий) uses it more precisely. The term “divorce” is used only in two instances as grounds for dissolution: adultery and prenuptial impotence.55

“Dissolution” is applied to all other terminations of marriage except in the case of death, and is even used to terminate an invalid or illegal marriage. This distinction is very important in determining whether the ecclesiastical court was acting as one of the judicial parts of the government, or whether it was carrying out the pastoral function of the Church.56 This can be seen especially in the fact that claims of adultery could have a dual purpose: either private prosecution of the party who was guilty of adultery, or these claims were intended to dissolve the marriage and were subjected to ecclesiastical punishment.57

1.6 An Overview of the Most Important Sources

“РГИА. Ф. 796. ОП. 445. Д. 422” (Журналы заседаний Совещания о пересмотре поводов к расторжению браков и проект устава о расторжении браков и признании браков незаконными и недействительными) Fund 796, Register 445, Case 422 is a collection of materials from the Russian State Historical Archives from the meeting of May 11–13, 1917, treats the review of reasons for divorce and the project of rules for divorces and recognition of some marriages as illegal and invalid. Archive materials are divided into two parts: the project of rules and the memorandum of the debate between different academics, doctors and theologians about the foregoing case.

“РГИА. Ф. 796. ОП. 445. Д. 417” (Журналы заседаний Совещания по выработке законопроекта о поводах к разводу и материалы к нему) is a collection of materials from the Russian State Historical Archives.

55 Article 241, 245. Устав духовных консисторий 1843, 92–93. However, Article 256 of the Charter of Diocesan Consistories speaks about dissolution of the marriage if impotence or adultery is proven. Устав духовных консисторий 1843, 96.


57 Победонощцев 2003, 103.
Archives, dated January 1908 – 1917, concerning a special meeting of the Holy Synod to discuss the question of grounds for divorce. Some projects had been sent to the Holy Synod as early as 1907, but as Fund 796, Register 445, Case 417 suggests, their handling started in 1908. This file also contains an important canonical study of Professor Ilja Berdnikov (1839–1915), who published his findings in the study “Concerning the Question of the Reason for Divorce” on March 5, 1909, regarding the draft of a special meeting of the Holy Synod in 1907.

“РГИА. Ф. 796. ОП. 445. Д. 227.” (Журналы заседаний Междуведомственной комиссий Предсоборного Совещания о выработке проекта устава о расторжении браков и признании их незаконными и неидействительными) is a collection of materials from the Russian State Historical Archives from January 16–20, 1916, considering a Pre-Conciliar meeting of the Interdepartmental Commissions on the drafting of the statute of divorces and the recognition of some marriages as illegal and invalid. This archive file is primarily a continuation from the previous meeting. The 43-page long material is a diary of the debate about the final form of the foregoing project.

“РГИА. Ф. 796. ОП. 445. Д. 780.” (Определение Собора Православной Российской Церкви по поводу декретов о расторжении браков и о гражданском браке) is a collection of materials from the Russian State Historical Archives, which holds the definitions of the All-Russian Church Council on the decrees of dissolution of marriages and civil marriage. The material differs from all the previous material in that the source of the decrees was the Holy Synod and the supreme head of the Church, the Patriarch himself. These decrees were issued between March 4 and September 17, 191858 and were the final legislations of the Church, before the repressions of the Bolshevik government began.

“ГАРФ. Ф. 3431. ОП. 1. Д. 316.” (Протоколы заседаний Отдела о церковной Суде) is a collection of protocols during the meetings of the Department on Church Discipline from August 29, 1917 – April 19, 1918. These protocols contain discussion about kinship and affinity. These protocols are from the Russian Federation State Archive.

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58 It should be noted that the decree regarding dissolution of marriages and about civil marriage, first introduced on March 4 and approved on March 10, 1918, can be also found in ГАРФ. Ф. 3431. Оп. 1. Д. 264, 22–23.
“ГАРФ. Ф. 3431. ОП. 1. Д. 264.” (Запросы с мест о порядке расторжения церковных браков), materials about the general regulations on dissolution and invalidation of marriages that have been blessed by the Church. This file is stored in the Russian Federation State Archive and considers the period August 17–20, 1918. Журналы и протоколы Высочайше учрежденного ПредсоборногоПрисутствия is a four-part book series containing the material of the Pre-Conciliar Presence from 1906–1907. The present study uses the fourth part of the book from 1907, which concentrates on matrimonial issues.

Сборник церковных и гражданских законов о браке и разводе, узаконение, усыновление и внебрачные дети, a collection of ecclesiastical and civil laws on marriage and divorce, legalization, adoption and illegitimate children, compiled by S. P. Grigorovski (Григоровский, С. П.). It comes with the additions and clarifications to the circular or individual decrees of the Holy Synod, a separate article about kinship and affinity and an attached table which presents degrees of kinship up to 1908. Циркулярные Указы СвятейшагоПравительствующаго Синода 1867–1900, circular decrees of the Holy Synod between the period 1867–1900. A collection of separately printed decrees by which the Holy Synod informed institutions and individuals within its jurisdiction. The collection consists of imperial commands, new laws, instructional rules and administrative orders of the Holy Synod. The book was compiled by A. Zavyjalov.

Алфавитный указатель действующих и руководственных канонических постановлений, указов, определений и распоряжений Святейшего Правительствующего Синода, an alphabetical index and guide to existing canonical regulations, decrees, rulings and civil laws concerning the Office of Orthodox confession and the orders of the Holy Synod between 1721–1901. The collection was compiled by S. V. Kalashnikov, whose other work Сборник духовных и гражданских законов по делам брачным и о законности рождения, a collection of spiritual and civil laws regarding marriage cases and about the legitimacy of birth, is also used in this study.

“РГИА. Ф. 831. ОП. 1. Д. 115–123.” (О разрешении...) is a collection of nine cases from the Russian State Historical Archives regarding different matrimonial issues that were observed in the Holy Synod between the end of 1917 and the end of 1918. The cases were: permission to enter into a fourth marriage; permission to marry a sister of his brother’s wife; permission to marry a sister of a brother–in–law;
permission to marry a cousin; permission to marry the sister of a deceased wife; permission to marry a niece of a deceased wife; permission to marry a deceased wife’s nephew’s widow; and permission to marry the widow of a brother.

“РГИА. Ф. 796. ОП. 445. Д. 456.” (О Выработке новых правил делопроизводство по расторжению церковных браков, с целью облегчение бракоразводного процесса), considers the development of new rules on the dissolution of religious marriages, with the aim of facilitating the divorce process. This material, collected from the Russian State Historical Archives, contains a manual of rules regarding revoking the blessing of a religious marriage and a new edition of the fourth chapter, third section of the Charter of Diocesan Consistories regarding the dissolution of marriages.

1.7 Significance of the Study

The scientific, social and ecclesiastical innovation of the documentary and creative heritage of the All-Russian Church Council is an urgent and still uncompleted task. The subject under discussion is innovative both nationally and internationally, since there are no critical studies from the canonical point of view which consider the matrimonial issues of the Council of 1917–1918 and its preparatory commissions. This work will provide new information on rarely studied issues and will hopefully serve as a guide in situations where matrimonial questions relating to the Orthodox Church are discussed in the 21st century. This study will hopefully illustrate the field of Russian civil law and its jurisdictional relation of matrimonial questions during the 20th century as well. The commissions, meetings and working groups of the preparatory period of the Council of 1917–1918 included a number of canon law scholars and professors from religious academies and universities. Their opinions provided in-depth interpretations of Orthodox canon law which are still, for the most part, unknown in the academic world to this day.
2. THE FOUNDATION, CONDITIONS AND IMPEDIMENTS FOR ENTERING INTO MARRIAGE AND NORMS FOR DIVORCE IN THE CANON LAW OF THE ORTHODOX CHURCH

2.1 The Nature of Marriage

One can be justified in saying that marriage is without doubt the most important institution of family law, including ecclesiastical institutions. Marriage, as a complex social phenomenon comprises several facets: biological, moral, legal, economic, and religious. Human and salvation history begins and ends with marriage, as can be seen in the Bible. From the first couple, Adam and Eve, this history ends with marriage between the Bride and the Lamb (Rev. 19:7–9). The Orthodox Church interprets this as earthly marriage fulfilled in heaven, showing the eternal nature of the sacrament.

As a sacrament, marriage joins husband and wife in the image of the mystery of the union of Christ with His Church for full communion of undivided life and shares with them the gifts of God’s grace. Saint Gregory the Theologian says: “it is good for a wife to honor Christ in the person of her husband, and for her husband not to disgrace the Church in the person of his wife.” Marriage, according to Saint John Chrysostomos,

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59 Бондач 2009, 127.
60 The Orthodox Study Bible gives us the following interpretation: “The Church is betrothed to Christ by faith. She awaits the coming of the Bridegroom for the marriage supper of the Lamb, the final eschatological union of Christ and His Church.” Orthodox Study Bible 2008, 626.
61 For Orthodox Christians marriage is a sacrament. It is defined through the prayers and actions of Orthodox wedding rites and through them the Church proclaims the presence of Christ in the Spirit and believes that it is the Lord who unites a man and a woman in a life of mutual love. The Sanctity of Marriage 1978, 318; Никодим 1897, 573.
is “the mysterious image of the Church and Christ.” It was fulfilled in the Church from its very origin (Ephesians 5:22–24; 1 Corinthians 7:39).62

The perfecter of the sacramental rite of marriage is a bishop or presbyter. Entering into the marriage, the bride and the groom in front of the priest and the Church make a promise of mutual fidelity. The priest asks God’s grace for them in everything and the blessings of fertility and Christian parenting. The necessity of a priestly blessing of marriage in the ancient Church is testified by Saint Basil the Great, Saint Gregory the Theologian, Saint John Chrysostomos, Hieromartyr Methodios of Patara and other fathers of the Church as well.63

Hieromartyr Ignatius of Antioch in his Letter to Hieromartyr Polycarpos, Bishop of Smyrna wrote: “But those who marry and get married should enter into alliance with the approval of the bishop, so that the marriage was in the Lord and not in lust.” Marriages that are not made known to the Church community, according to Tertullian, were equal to fornication and adultery; “True marriage,” he says, “was undertaken in the front of the Church, sanctified with the prayer and fastened with the Eucharist.”64 Saint Basil the Great wrote “adultery is not a marriage, or even the beginning of marriage.”65 In the time when Saint Basil wrote this rule, there was not yet a legalized binding form of marriage, as a conditio sine qua non.66

62 Православная энциклопедия 2003, Т. VI, 147.

63 Православная энциклопедия 2003, Т. VI, 148. The Roman Catholic Church’s teaching on seven sacraments, which also includes marriage, was adopted in the Council of Trent (1545–1563). It refers to the resolution of the second Council of Lyons (1274) and the Council of Florence (1439). In the Latin rite, ministers of the sacrament of marriage are considered to be celebrant themselves, when the priest or deacon serve as “assistants.” If there is no priest, then the “assistant” can be a lay person delegated by the bishop. In special cases (e.g. under threat of death), marriage may be concluded exceptionally in front of witnesses; such a marriage is also considered valid by the Roman Catholic Church. Here we should also note that the Eastern Catholic Churches have the same doctrine and practice as the Orthodox Churches.

64 Православная энциклопедия 2003, Т. VI, 150.

65 Роль в 1854, Т. IV, 159.

66 Павлов 1897, 199–200. However, the civil law given by Balsamon in the interpretation of Basil the Great, canon 6 allowed for the possibility of considering as a valid marriage those sexual unions which started without any formalities, as simple affairs, but in their continuation received external signs of legitimate marriage. Роль в 1854, Т. IV, 109.
All other norms concerning family life are regulated by various consequences of marriage or different aspects of marital life. In the Roman world marriage was an agreement between two parties. To have the character of marriage, the union of a man and a woman should receive a public vocation. For this reason it was necessary that the marriage was publicly contracted with the knowledge and consent of the concerned parties, in compliance with the form established in the law or custom.\footnote{Бердников 1913, 312. This is also the case in canon 1 of Laodikeia, where the canon states that marriage should be concluded freely and legally (ἐλευθέρως καὶ νομίμως). Рάλλη 1853, Т. III, 171.} The best way to summarize Roman marital law is the following principle: “It is not coitus that makes marriage, but consent” (nuptias non concubitum, sed consensus facit).\footnote{Мейдорфф 2000, 16.}

Later the Roman marital law was accepted by the Christian Church. A good example of this can be found in Title 12, Chapter 13 of the Nomokanon in Fourteen Titles of Patriarch Photios, where marriage as the “optimal” (τὰ μάλιστα) is defined as “a union of man and woman, an association for an entire lifetime, a communion of both divine and human law” (γάμος ἐξὶν ἀνδρὸς καὶ γυναικὸς συνάφεια, καὶ συγκλήρωσις πάσης τῆς ζωῆς, θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία).\footnote{Рάλλη 1852, Т. I, 271. This exact paragraph is also cited in 28 title, 4.1 chapter of Basilika. Zhisman 1864, 93: see the translation in Viscuso 2008, 91. Epanagoge 16 title, 1 chapter gives us the following definition: “γάμος ἐστιν ἀνδρὸς καὶ γυναικὸς συνάφεια καὶ συγκλήρωσις πάσης τῆς ζωῆς εἴτε δὶ εὐλογίας εἴτε δία στεφανώματος ἢ δία συμβολαίου.” Zachariae 1852, 106.} These three facts are taken from the teaching of non-Christian Roman lawyer Modestinus: “Nuptiae sunt conjunctio maris et foeminae, consortium omnis vitae, juris divini et humani communicatio.”\footnote{This reference is also given in the Digests of Justinian. Павлов 1902, 317.} The first point of the definition (Nuptiae sunt conjunctio maris et foeminae) points to the natural aspect of marriage. The second point (consortium omnis vitae) indicates the domestic and public aspect, and the third point (divini et humani juris communicatio) demonstrates the legal side of the marriage. This meant that in the marriage contract, a woman acquired personal and material rights within the husband’s family and joined the religious cult of his household.\footnote{A woman who lived in a legal marriage with a man for one year came under her husband’s authority. However, if the woman did not wish to remain under her life, she could provide evidence of marriage, but not registration of marriage. This was possible if one of the parties did not receive the public vocation of marriage. This is also seen in the Digests Justinian, 12 title, 4.1 chapter.}
Thus, the aforementioned definition of an old pagan Roman marital law was formally adopted in Byzantine legal works and in the canonical collections of the Church: in the Syntagma of Matthew Blastares,72 in the commentaries of Basil the Great73 and in the Slavic version of the Nomokanon, Kormtšaja Kniga,74 adopted from the Procheiron nomos, a collection of laws of Basil the Macedonian.75 Judging by the character of the aforementioned Roman law, some canonists have even held that it was compiled under Christian influence and did not represent the authentic development of Roman pagan law.76 Indeed, in this definition are indicated all the essential features of marriage as an institution, which has its foundation in the very nature of man.

In the first place, this law specified the natural or physical nature of marriage – the difference between the sexes that is established by nature with the purpose of becoming one, is a fact without which the human race could not continue to live and exist. This marital connection in Modestinus’ teaching represents the union of one man with one woman.

husband’s authority, she had every year to leave her husband’s house for three days. Бердников 1913, 317.

72 Ράλλη 1859, Т. VI, 153–154.
73 Ράλλη 1852, Т. II, 472–473; Ράλλη 1854, Т. IV, 188–189.
74 Kormtšaja Kniga defines marriage as follows: “Брак есть мужеви и жене сочетание, и событие во всей жизни, божественныя же и человеческия правды общение.” [Marriage is a partnership of husband and wife and a lifetime bond; it is the union of divine and human truth] (Громогласов 1907, 72.) Kormtšaja Kniga (Кормчая книга), the “Book of the Rudder,” was the foundation of canon law in Slavic countries; in Russia it was used until the eighteenth century. After the reform of Peter the Great it was replaced with the Charter of Spiritual Consistories. For a complete study of Kormtšaja Kniga, see Zazek, Ivan. Kormcaja Kniga. Studies on the Chief Code of Russian Canon Law. Roma, 1964; Павлов, А. С. 50–я глава Кормчей книги, как исторический и практический источник русского брачного права. Москва, 1887; Громогласов, И. М. Определения брака в Кормчей и значение их при исследовании вопроса о форме христианского бракозаключения. Москва, 1908.
75 It should be noted that canonist A. S. Pavlov in his book A Course in Ecclesiastical Law refers to the fact that the fourth title, the first chapter of the Procheiron, was the 49th chapter of the Kormtšaja Kniga, whereas in I. M. Gromodglasov’s study of the same law it is given as the 48th chapter. Павлов 1902, 317; Громогласов 1908, 35.
76 Громогласов 1908, 36. For a complete historical–canonical study of this law, see Zhisman 1864, 93.
Second, this definition also states the ethical nature of marriage, which consists in full and unbroken communion between spouses and, in particular, the communion of religion and law, which is possible only in the union of one man and one woman. The Church, adopting this definition in the Nomokanon, based it on the direct regulations of the positive law of God and gave it honorable Christian meaning, as the canonist Pavlov notes.77

Finally, divine revelation clearly shows us that marriage is blessed by God and the married couple is the image of Christ and the Church (Genesis 2:22–24, Matthew 19:4–6, Mark 10:6–8; Ephesians 5:22–33). Where the Roman lawyers took into consideration only the realization of a marriage contract, the practice of priestly blessing of marriage and the early Church Fathers’ teaching of marriage as a mystery became the foundation of the Orthodox Church’s teaching about marriage as a sacrament. At the end of the twelfth century, Church father and canonist Theodore Balsamon considered spouses to be both participants in a sacrament and the subjects of marital relations. His theological teachings of marriage are summarized in Patrick Viscuso’s study Theodore Balsamon’s Canonical Images of Women as follows:

Marriage was characterized as the sharing of one human nature by two hypostases with more or less the same soul. Female and male were viewed as possessing human nature according to a particular mode of existence (τρόπος τῆς ὑπάρξεως), two different realizations of humanity, with distinct characteristics that at once unite and distinguish them in their hypostatic relations. The hypostases of male and female after the marital union manifested their continued existence by a difference of sexual roles and functions, different modes of existence for the same humanity; and yet were united by these very same functions through their marital relations in which they mutually partook of their common human nature.78

There is no doubt that the ancient Church regarding the direct instruction of Apostle Paul, “This is a great mystery: but I speak concerning Christ and the Church” (Ephesus 5:32), always saw in marriage one of the sacraments of the new covenant, i. e., a Christian way

77 Павлов 1902, 318.

78 Viscuso 2005, 318.
of life that must be made under the redeeming grace of Christ. This reality of Christian marriage cannot be reduced to Roman legalism – it is a choice and the task given to spouses to metamorphose their marital agreement into the reality of the Kingdom.\textsuperscript{79} The Church was not granted any definite form by which to celebrate marriages as a sacrament, it only confirmed the law of marriage as a union joining husband and wife in one flesh. This law had been spoken by the Creator of the world through the mouth of the first created man, whose wife was bone of his bones and flesh of his flesh (Genesis 2:23–24, Matthew 19:5–6).\textsuperscript{80} In this sense, the Church always believed that the union between man and women has its own foundation in the divine plan of the creation of the world. The creation of the first human couple is the beginning of mankind and a union which should remain unchanged for all time.\textsuperscript{81}

Thus the natural nature of marriage as defined by this law in the sense of an indissoluble union of two and only two people of different sexes, remained the same in the New Testament. Rebellion against God, i. e., sin, is a reality as long as man lives in the present “fallen world.” This is understood by the Church and that is why the “mystery” of the Kingdom disclosed in marriage, to which the apostle Paul refers, is not reduced in Orthodox practice to a set of legal rules, as John Meyendorff notes. Without appreciating the eschatological dimension in the correspondence of apostle Paul ("Time is short, so that from now on, those who have wives should be as though they had none" 1 Corinthians 7:29), the canonical rules of the Orthodox Church would be impossible to understand.\textsuperscript{82} However, true understanding and justified disdain of human weakness are possible only in such cases if the absolute norm of the New Testament’s doctrine of marriage is recognized as a sacrament, Meyendorff concludes.\textsuperscript{83}

\begin{footnotes}
\textsuperscript{79} Meyendorff 2000, 18.
\textsuperscript{80} Павлов 1887, 57. Gen. 2:24 is interpreted in the Orthodox Church as prefiguring the mystery of the union of Christ and the Church. Stylianopoulos 1977, 282.
\textsuperscript{81} Павлов 1902, 318.
\textsuperscript{82} Meyendorff 1990, 99.
\textsuperscript{83} Meyendorff 2000, 20.
\end{footnotes}
2.2 The Jurisdiction of Legislation on Matrimonial Matters

We have above viewed both the natural-legal and moral-religious aspects of Christian marriage. Marriage is determined by legislation, but the moral and religious aspect of marriage concerns the unrevealed, spiritual side of man and his conscience, and this is a spiritual or ecclesiastical matter. The purely civil, secular elements of marriage are determined exclusively by secular or civil authorities, but the jurisdiction of the legislation on matrimonial matters is divided between the Church and the state.\(^8\) In the early times of the Church and for several centuries, marriage had a civil meaning and was subject to civil jurisdiction, with no direct relationship to the Church. Roman legislation concerning marriage was *jus sacrum* [sacred right], when the marriage was concluded *per confarreationem* [marriage through a religious rite, involving a sacrifice], and then when *confarreatio* had gone out of use, Roman legislation on marriage was exclusively civil.\(^5\)

Christians entered into religious marriage under the existing civil laws. Only if a marriage conformed to the requirements of the law, if there was *legitimum, justum matrimonium* (legitimate, valid marriage), was it recognized by the Church. A Christian marriage did not have a civil meaning in the Roman State and was considered in the eyes of the law to be non-existent. In order for a Christian marriage to have civil effects, it needed to be concluded according to the requirements of civil law, regardless of the Church’s blessing. Under these circumstances, the Church itself offered to its faithful a civil marriage to maintain proper political relations with the state, and afterwards the Church faithful could receive a blessing for their marriage from the priests.\(^6\)

Canon 102 of the Council of Carthage (407) ordered the emperor to enact a law which prohibited self-imposed separated couples from entering into new marriages.\(^7\) In such a case where the Church took the initiative to publish norms of marriage law, it acted in the belief that the

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\(^8\) Павлов 1902, 323–324.

\(^5\) Горчаков 1909, 249.

\(^6\) Никодим 1897, 575.

\(^7\) Рάλλη 1853, Т. III, 548.
State would approve published norms, as was usually the case. It is also a well-known fact that all the norms adopted by the Eastern Church concerning divorce law were established by secular, not ecclesiastical legislation, that is, by the legislation of Justinian. In the fifth century, Emperor Justinian took the first step towards concordance of civil marriage with ecclesiastical marriage regarding the marital relations of middle class persons in the Roman State. Leaving upper class persons with the old formalities of the civil law the right to marry as before for without any formalities, Justinian allowed middle class persons to go to the Church and make a statement about their intention to enter into marriage for the *ekdikos* [ecclesiastical lawyer].

After this Justinian law, religious marriage gradually started to spread in the Byzantine-Roman State. Eventually in 893 Emperor Leo the Wise published Constitution 89, which made marriages blessed by the Church solely legal ones, stating that “marriages shall not be confirmed without the sacred benediction.” In 1095 the law was extended by Emperor Alexios I Komenos by Constitution 35 to involve marriages of the poor as well (which had not been not included in Leo’s Constitution 89). In

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88 Павлов 1902, 324; Бердников 1913, 327.
89 Νικόδημος 1897, 575. Ekdikos (in Greek Ἐκδίκος) was an ecclesiastical lawyer in the Byzantine Empire.
91 Zachariae 1857, 185. Constitution 89 declares that: “Just as antiquity neglected the general formalities of adoption, which it considered an important act, although it allowed it to take place without the offering of prayer and the celebration of sacred rites, so also, it appeared to have neglected the most important part of marriage, since it permitted it to be consummated without the bestowal of the nuptial benediction. But while the ancients may, perhaps, have had good reason for doing this, We, aided by Divine grace, have preferred to adopt a mode of life much more honorable and holy, and have not failed to observe the things above mentioned. Therefore, as We have directed that prayers shall accompany the act of adoption, We desire that marriage shall likewise be confirmed by the bestowal of the holy benediction, so that if anyone should be married without it, he cannot be said to have entered the matrimonial state, or to enjoy its rights. For there is no medium between marriage and celibacy which should not be considered reprehensible. Have you a desire to embrace conjugal life? If you do, it will be necessary for you to observe the laws relating to marriage. Do the annoyances of the marriage state deter you? You may live unmarried, but do not disgrace matrimony, and conceal your faults under the mask of a spurious celibacy.” Scott 1932, 277.
92 Zachariae 1857, 404.
1306 Patriarch of Constantinople Athanasios I and Emperor Andronikos II Palaiologos established perpetually in Constitution 26 that a marriage could not be contracted without the blessing of a parish priest.\textsuperscript{93} Thus Christian marriage had ecclesiastical and civil value; therefore the contracting of marriages naturally came under the control of the Church, which had the right to give or withhold its blessing for one or the other party.\textsuperscript{94}

Regarding fundamental competence in marital legislation, the decree of Patriarch Athanasios and Emperor Andronikos, developed in some countries into a particular private law. This was also the case in Russia, where Church and State authorities worked together in the formation of marriage law. One of the most known Orthodox canonists, Nikodim Milaš, Bishop of Dalmatia, summarized his views on matrimonial law in the Orthodox Christian State as follows:

1. To the Church belongs the right to decree rules regarding marriage matters, but it recognizes the right of the State in regard to civil and, in particular, the economic aspects of marriage contracts.
2. The State cannot overrule a marriage recognized by the Church.
3. Only the Church has the right to recognize the marriage as valid or invalid as a sacrament. The State has the right to evaluate a marriage only as a social contract.
4. In matters of marriage impediments, the Church and the State act in harmony and the regulations of one side are obligatory for the other.\textsuperscript{95}

### 2.3 Internal Condition for Concluding Marriage

In the notion of Orthodox marriage in civil relations, but also as a sacrament, the first and most essential condition regarding marriage is

\textsuperscript{93} Zachariae 1857, 632.

\textsuperscript{94} Никодим 1897, 577.

\textsuperscript{95} Никодим 1897, 577.
internal consent, ουναίειος, consensus. This is how a man and a woman, in a manner recognized by law, express their free will to enter into a marital union. Therefore, marriage is considered to be contracted at the moment when the will of a man and a woman externally express that their decision is made in consensus. In order for this free consent to be the essential foundation of marriage, it must correspond to all the requirements of the law, and above all, that the contracting parties possess all the necessary moral and physical qualities. When all these moral and physical qualities exist and when mutual consent has been expressed in the established form, only then does this mutual agreement serve as the basis of marriage and correspond to its internal condition. This first condition is associated with a second, namely the complete lack of any impediments to entering into marriage recognized by ecclesiastical (and civil) authorities. These are the so-called marriage obstacles. They can occur due to lack of conditions, without which the marriage is not possible.

If the marriage cannot take place without the mutual consent of the spouses, it follows that neither from the ecclesiastical, nor from the civil perspective could a marriage be considered valid, if:

1. It is contracted under duress (either physical or moral).
2. Marriage is contracted by mistake, perhaps in most cases as a result of fraud, i.e. the substitution of one person for another. Respected Russian canonist A. C. Pavlov gives the following examples of such cases of fraud: “contracting marriage of a blind or unconsciously drunk person, or when the marriage is contracted at night or when the bride is covered with a thick blanket.” In Russia, deception of a person into marriage was regulated by the Penal Code, but only as a crime sui generis [of

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97 To physical qualities Zhisman adds “appropriate age and the ability to perform conjugal duty.” Zhisman 1864, 195.
98 Никодим 1897, 578.
99 Only the first case can be proven in court. In Russia, forced marriage was subject to a secular court, but the judgment about the validity of marriage contracted by duress to a ecclesiastical court. See chapter 3.
100 Павлов 1902, 328.
101 See Article 1551, Уложение о наказаниях 1897, 628.
its own kind] without prejudice to the marriage itself, because the validity of the marriage in such a case was decided on the basis of ecclesiastical laws."\textsuperscript{102}

From the ecclesiastical perspective, the mistake of one of the spouses, or both, no matter whose fault or by what accident it occurred, precludes a valid marriage between them, since marriage is established only between certain individuals who intended to become spouses. Hence, if consent to the marriage is given to one person, in reality, it refers also to another. In such a case, the marriage will be imaginary, mistaken, invalid; it does not matter whether one party was mistaken in the other or both together, because marriage is contracted only by mutual agreement of both parties.\textsuperscript{103} Canonist Gortšakov, however, believed that in the above cases marriage is still valid. If there is one of the aforesaid obstacles which belongs to the *impedimenta prohibitae*, i. e. where marriage is unlawful but not invalid, it is considered to be illegal, although it is not extinguished on account of invalidity, but entails punishment of perpetrators who have neglected the law. This might be, for example, marriage without the parents’ permission.\textsuperscript{104}

2.4 Absolute Impediments to Marriage

Matrimonial impediments (κώλυμα τοῦ γάμου) are cases that prevent the contracting of marriage, or, if a marriage has already been contracted, will be deprived of legitimate marriage. Marriage impediments in general are divided into *absolute* (ἀπόλυτα κωλύματα) and *relative* impediments (οχετικά κωλύματα), according to whether they prevent contracting marriage with any person without distinction or just with certain persons. Among the first type of impediments certain contracted marriages are eliminated. Such cases are called *dissolving* impediments (ἀνατρεπτικά κωλύματα). Others do not eliminate the

\textsuperscript{102} Article 218, Устав духовных консисторий 1843, 85–86.

\textsuperscript{103} Павлов 1902, 328.

\textsuperscript{104} Горчаков 1909, 251.
marriage, but only make them unlawful. Such cases are called *prohibitive* impediments (ἀπαγορευτικά κωλύματα).\textsuperscript{105}

**Incapacity for conjugal relationship**

Besides having children, an essential purpose of marriage is the fact that the husband and wife can meet their physical needs, and therefore be capable of complete sexual intercourse with each other. The inability to meet this goal makes its absence an absolute impediment to marriage. There are no canonical rules about this particular impediment, but Novella 98 Emperor Leo the Wise prohibits the marriage of eunuchs.\textsuperscript{106} This rule was included in the *Alphabetical Collection of Matthew Blastares*, and thus also received canonical value in the Orthodox Church.\textsuperscript{107}

**Mental deficiencies**

Wishing to enter into marital union, the spouses must be aware what is to be done and what legal obligations they are responsible for. It is required from everyone when concluding any contract. According to this, Byzantine civil and ecclesiastical law formally forbids the marriage of those who are affected by madness.\textsuperscript{108}

\textsuperscript{105} Νικόδημ 1897, 590. The terminology behind the Greek word “κώλυμα” was first used by Patriarch John VIII of Constantinople in Synodal decrees from April 26, 1066 and from March 19, 1067. (Ράλλη 1855, T. V, 52, 54.) After him, Byzantine commentator of canons, Theodore Balsamon used the term “παρεμποδισμός,” with the meaning of obstruction, obstacle, in his commentary to Canon 68 of Basil the Great. (Ράλλη 1854, T. IV, 223.) However, the above terminology was rarely used in the Orthodox Church’s canon law and was replaced by the more frequently used term “γάμοι κεκωλύμενοι,” as seen from the texts of Demetrios Syngellos – “τά πρός γάμου κοινωνίαν κωλυόμενα πρόσωπα.” (Ράλλη 1855, T. V, 359.) For a more complete study of the terminology of impediments, see Zhismann 1864, 212–213.

\textsuperscript{106} Ο Πρόχειρος νόμος XI, 2. Zachariae 1837, 73.

\textsuperscript{107} Ράλλη 1859, T. VI, 297.

\textsuperscript{108} Viscoso 2008, 125; Ράλλη 1859, T. VI, 184.
Already existing legal marriage

Since ancient times, marriage with one wife (μονογαμία) was considered the only one that fulfilled the objectives and the essence of the marriage union. The Church of the Old Covenant proclaimed it as divine law (Genesis 2:22, 4:19). Under this influence, Roman law ruled that anyone who wishes to have two wives was without honor and should be punished. 109 Prohibition of polygamy gained new strength in the Christian Church, which regarded every man’s sexual relations with a woman other than his legitimate wife as fornication.110 Because of this, the existing legal marriage became an unconditional obstacle to a new marriage. Therefore, the man who remarried during the lifetime of his wife or a woman who remarried another man when her husband was still alive, were subject to both ecclesiastical and civil penalties.111

Remarriage was permitted only when for whatever reason the existing marriage was terminated according to law and one of the spouses received from the authorities permission to remarry. A spouse who remarried out of ignorance was not subject to punishment, assuming that

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110 Ράλλη 1852, T. II, 64; Ράλλη 1859, T. VI, 160. Matthew Blastares gives Novella 93 of Leo in his Alphabetical Collection, chapter Γ, Article 15, “if the wife has been discovered to be impregnated from semen belonging to another,” which states that: “This is not mentioned in any of the ancient laws, but We, supplying the deficiency, do hereby decree that marriage shall be dissolved not only on account of a difference of religious opinion, and because of insanity, or for other reasons, but also for the one which We have just stated, because nothing is more adverse to marriage than this; since, under these circumstances, husband and wife are only united nominally and not in fact. For how can true matrimony exist in a union where there is nothing genuine or natural, where licentiousness, which is a source of discord and hate, and an alienation of minds prevail (a condition which has great influence in inducing women to seek intercourse with strangers)? How can matrimonial concord and pure conjugal love be maintained under such circumstances? Moreover, reason does not permit anyone to have a child belonging to another under his control. Nor is it just that he who has taken a wife into his house, in the expectation of the enjoyment of a chaste and honorable marriage, should be obliged to recognize as such a woman who has deceived him; who insults the laws of marriage, and delivers herself without hesitation to the lascivious embraces of another? (Scott 1932, 280; Viscuso 2008, 123.) See Balsam’s commentary on Canon 98 of Trullo: Ράλλη 1852, T. II, 541.

111 Ράλλη 1852, T. II, 505; Ο Πρόξειρος νόμος XXXIX, 70. Zachariae 1837, 253; Ηνίκοδιμ 1897, 591,
the person to whom he or she was married was not alive. This new marriage in any case would cease to exist. In Roman law, however, a widow should not marry before a year of mourning had passed. This rule also applied in Russia and was even followed by the project of the Civil Code of the Russian Empire.

**Priesthood and monastic order**

The question of the second marriage of priests and their celibacy can be observed from hermeneutical, patristic and canonical point of views. This study, however, will focus on the canonical praxis of the Orthodox Church, leaving aside the question of allowing second marriage for clerics. One of the main sources for the question about married clergy is a verse in the New Testament in which the Apostle Paul advises Timothy regarding the organization of the new Church of Ephesus “A bishop must be the husband of one wife” (να εἶναι μιας γυναικός ἀνήρ) (1 Timothy 3:2). The prohibition of marriage after ordination is of a different nature than the requirement which insists that a priest can only be married once and that his wife should have a good reputation. In the first case, the Church requires pastoral propriety and discipline; in the second case, the absolute monogamy of the clergy protects the scriptural, doctrinal and sacramental teaching on marriage in the Orthodox Church.

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112 Ράλλη 1852, Τ. ΙΙ, 523; Ράλλη 1854, Τ. IV, 196.

113 Бердников 1913, 347.

114 Проект гражданского уложения Российской Империи 1810, 62. According to Article 159, a widow can enter into a new marriage after sixth months of mourning. If she is pregnant, the time will be reduced to three months. Article 160 says that a widowed man can enter into a new marriage after six weeks of mourning.

115 Meyendorff 2000, 67. These regulations are also repeated in Canon 14 of the fourth Ecumenical Council and in Canons 3 and 6 of Trullo. It should also be noted that the Apostolic Canon 26 speaks about those who are already part of the clergy as unmarried and for those only marriage is prohibited. It does not, however, require celibacy from all who join the clergy. Canon 3 of Trullo underlines that priests, deacons, and subdeacons who have married a widow or married after ordination have to do penance. After that they can be restored to their former rank with the prohibition of applying for any higher degree. Monks cannot marry according to their vows (celibacy and complete separation from the world). According to the canons, marriages of such individuals are
Lack of consent of parents

As in ancient civil and ecclesiastical law, one of the greatest obstacles to marriage was a person who did not have an independent position in society, but wanted to marry without the knowledge and consent of those who had power over them. Roman laws were strict in their requirements in this respect. Ecclesiastical law, in view of the Christian character of the marriage and responsibilities for youth to respect elders (Ephesus 6:2, Matthew 15:4, Mark 7:10), was also strict in its regulations in this matter. Basil the Great, in his canon 42, regards as fornication every marriage concluded without the consent of the parents. This canon, together with any similar regulations of Byzantine law, can be found in all the canonical collections of the Orthodox Church.

Widowhood after the third marriage

A second marriage is allowed by divine right (1 Corinthians 7:8, 39–40, Romans 7:3). Over time, when the Church began to look at a celibate life as a higher state than married life, the second marriage was already deemed a sign of incontinence. The Church requires that:

1. Anyone who wants to marry a second time is subject to a certain penance.
2. The second marriage is not celebrated like the first one, but with its own particular rite.


116 Νικόδημος 1897, 593.
119 Νικόδημος 1897, 594; Ράλλη 1852, T. I, 275.
120 Ράλλη 1854, T. IV, 438.
3. The priest must not participate in the marriage celebration of a second marriage.\textsuperscript{122}
4. The holy orders are not permitted for those who enter into a second marriage.\textsuperscript{123}

If the Church was strict regarding second marriages, it was even stricter with regard to the third. Ecclesiastical legislation considered a third marriage quite inexcusable and regarded it as immoderate fornication.\textsuperscript{124} In Saint Basil’s Canon 4, it is said that the third marriage (τριγάμων) is no longer to be called a marriage, but polygamy (πολυγαμία) disguised under the pretense of marriage (κεκολασμένη πορνεία). Church practice judged severely these kinds of marriage. Saint Basil, along with other Fathers, condemned trigamists to be excommunicated for five years, but not be excluded from the church entirely; instead they were obliged to abstain from communion.\textsuperscript{125} Balsamon in his commentary to the above-mentioned canon, concludes about fourth marriages: a person who decides to enter such cohabitation (συνοικέσιον) will be disqualified even from entering a church as long as the cohabitation continues. He makes it clear that fourth marriages are foreign to a Christian community\textsuperscript{126} and what Saint Basil in his Canon 80 considers the greatest of sin and even bestiality (ως κτηνώδη).\textsuperscript{127} This teaching of Basil was common in the entire Church at that time and was also recognized by Byzantine civil law.\textsuperscript{128}

\textsuperscript{121} Ράλλη 1854, T. IV, 427; Ράλλη 1855, T. V, 441
\textsuperscript{122} Ράλλη 1853, T. III, 81.
\textsuperscript{123} Ράλλη 1855, T. V, 399; Ράλλη 1852, T. I, 59, 211; Viscuso 2008, 93–95.
\textsuperscript{124} Ηνικοδιμ 1897, 594.
\textsuperscript{125} Ράλλη 1854, T. IV, 402.
\textsuperscript{126} Ράλλη 1854, T. IV, 103–106.
\textsuperscript{127} Ράλλη 1854, T. IV, 242.
\textsuperscript{128} The canons never made it absolutely clear whether the unlawful fourth marriage should be re-considered when receiving a violator back into the church. This loophole in Byzantine canon law had been made use of during the tetragamy dispute in order to find arguments to support Emperor Leo VI’s (886–912) fourth marriage. For more about Leo VI’s fourth marriage, see Nicolas Oikonomides. “Leo VI’s Legislation of 907 Forbidding Fourth Marriages: An Interpolation in the “Procheiros Nomos”’” – Dumbarton Oaks Papers, Vol. 30, 175–193. Washington, D.C., 1976; Nicholas I, Patriarch of Constantinople, Letters, ed. R. J. H. Jenkins and L. G. Westernik, Washington, D.C. 1973; L. G.
In terms of ecclesiastical law, Byzantine legislation also treats this issue, prescribing miscellaneous rules about third marriages which are subject to canonical penalties. This was also the case in Novella 90 of Leo the Wise.\textsuperscript{129}

Therefore, widowhood after the second marriage was not a complete impediment to marriage, but only a conditional impediment. After Emperor Leo, with the approval of the Church, entered into a fourth marriage after the death of his third wife, the Constantinople Patriarchal Synod assembled in 920 and decreed that no one should enter into a fourth marriage. However, if persons did so, such a marriage should be considered null and void, and such individuals should be punished with excommunication, including the prohibition of entering a church while they remain in that marriage.\textsuperscript{130} The above tetragamy case of Emperor Leo VI provoked long disputes in the Church and ended with the publication of \textit{Ο Τόμος ενώσεως} (920). The \textit{Τόμος} contains seven rules, the first three of which refer to questions about the right to re–marry more than twice. The first rule states that thereafter no one can enter into a fourth marriage. However, if someone does enter into one, the marriage is not recognized and the culprit will lose any connection to the church and is even forbidden to enter one, as long as the illegal cohabitation continued.\textsuperscript{131}

Regarding third marriages, the second rule states that these marriages must be considered prohibited, allowing exceptions only in certain cases. Prohibitions and exceptions concerning a third marriage were as follows:

1. A person who is 40 years old and does not have children after entering the third marriage is prohibited from participating in Holy Communion for five years;
2. A person who is 40 years old and has children is forbidden to marry for a third time;
3. A person who is 30 years old and has children from a previous marriage after entering the third marriage is prohibited from participating in Holy Communion for four years;

\textsuperscript{129} Scott 1932, 277–278.
\textsuperscript{130} Νικοδημ 1897, 595.
\textsuperscript{131} Ράλλη 1855, T. V, 4–10.
4. A person who is 30 years old and does not have children is allowed to marry for a third time, but will be subject to penance (επιτίµιον).

The third rule gives seven years of penance for those who enter a first or second marriage in cases where they have lived with each other before the wedding.\textsuperscript{132}

\textbf{Age for marriage}

According to the ethical and physical purpose of marriage, it is necessary that those who are willing to be married be of legal age. The age for the physical and the spiritual ability for marriage, presumes by its very nature in a state of sexual maturity. Since there is no way in each individual case to predetermine when individual persons achieve puberty, a legitimate need for the presumption of such a condition is required.\textsuperscript{133}

Roman and ecclesiastical law required that only adult men and women can marry. The lowest age for entering into marriage in Roman law was determined at 12 years for women and 14 for men.\textsuperscript{134} However, in the \textit{Ekloga} of Leo and Constantine the age was increased by one year for both spouses.\textsuperscript{135} Later, the \textit{Procheiron nomos}, a Byzantine law book, nevertheless changed back to the Justinian law, where age was determined at 12 years for women and 14 for men.\textsuperscript{136} Both of these Byzantine sources were later included in the Slavic \textit{Nomokanon}.\textsuperscript{137} According to these laws, the Russian metropolitan Photios in the early fifteenth century wrote a letter to the people of Novgorod that girls should not enter into marriage before the age of 12. Such was a practice

\textsuperscript{132} Zachariae 1857, 232.
\textsuperscript{133} Павлов 1902, 329.
\textsuperscript{134} Павлов 1902, 329; Горчаков 1909, 252; Никодим 1897, 596; Бердников 1913, 327.
\textsuperscript{135} \textit{Ekloga} II, 1. Zachariae 1852, 15.
\textsuperscript{136} Ο Πρόχειρος νόμος IV, 3. Zachariae 1837, 25.
\textsuperscript{137} Павлов 1902, 329.
in Russia before the Council of a Hundred Chapters\footnote{In Russian “Стоглавый Собор,” translated variously as the Hundred Chapter Synod, the Council of a Hundred Chapters, etc. This church council was held in Moscow in 1551, with the participation of Tsar Ivan IV, Metropolitan Macarius, and representatives of the Boyar Duma. In 1551 the tsar summoned a synod of the Russian Church to discuss the ritual practices that had grown up in Russia which did not comply with the practice of the Greek Church. The decrees issued by the Synod, known as the Stoglav, rule that they were all correct. This evoked much criticism; the monks of Athos protested against the decisions, while the Russian monks went even further and regarded the decisions of the council as invalid. Runciman 2003, 325.} (1551), which forbade a man from marrying before 15 years of age.\footnote{Бердников 1913, 327.}  

If the marriage was contracted before the legal age, it was considered invalid, but as soon as the spouses reached the legal age and wished to stay in the marital union, then the marital impediment of under age is eliminated and the marriage is considered legal.\footnote{Горчаков 1909, 252.} Contrary to the marital impediment of minority, ceasing with time, an extreme old age is also considered a marital impediment, and recognized as ethically and physically impossible. Old age was mentioned by the Byzantine-Roman law as well.\footnote{Никодим 1897, 597.} Physically it is impossible, because the ability for sexual intercourse is not possible in old age. Ethically it is not possible, since the advanced age of a person should make that person think about life after death, not about the jubilation of a honeymoon, as canonist Pavlov expresses it.\footnote{Павлов 1902, 330.}  

Roman law in the first centuries set the age limit for a man at 60 and for a woman at 50. However, Emperor Justinian changed this rule and granted the right for old people to marry freely at any age.\footnote{Бердников 1913, 329.} The Church disapproved of the Justinian regulation about marriage at old age and in its canons ruled the age limit after which marriage is considered improper or not possible. In Canon 24 of Basil the Great, a widow is not allowed to marry after the age of 60.\footnote{Рάллη 1854, T. IV, 155.} For a man, Canon 88 of the same saint established the age at 70,\footnote{Рάллη 1854, T. IV, 269.} and in the same spirit the Holy Synod of
the Russian Orthodox Church ruled that after 80 years of age marriage was not possible.146

2.5 Conditional Impediments to Marriage

Conditional impediments are factors that impede marriage with certain persons. Of these, some obstacles are raised concerning the concept of kinship, while others are outside this concept. In the theological thinking of Eastern Orthodoxy, the primary purpose of marriage is to establish two separate individuals as one entity, “one flesh.” When children are born from these relationships, they will also aid in establishing a new bloodline. The ideal situation is when a couple is not so closely related to the point where they come close to being duplicates of each other, since this is a health issue as well. One can say that when the degree of blood relationship between the couple is closer to being homogenous, then they are further and further from the aims of marriage, both natural and spiritual.

Kinship

Kinship is a natural bond (φυσική συγγένεια), a relationship between two persons arising from the birth of one or the other, or from the birth of such persons from one ancestor, or the consequence of marriage between two persons relations, similar to kinship. Therefore, kinship in general terms is divided into blood relation, the relationship that arises from the union of two or three generations, spiritual kinship, semi-relationship and adoption.147

146 Павлов 1902, 330. In this context, the apostle Paul's teaching should be also noted “Let not a widow be taken into the number under threescore years old, having been the wife of one man” (1 Timothy 5:9).

147 Никодим 1897, 601. Constitution 24 of Leo decreed that “those who become brother and sister by adoption cannot change this relationship through matrimonial union.” Scott 1932, 227.
Kinship was considered to be an impediment to marriage in Mosaic Law (Leviticus 18: 6–17; 20: 17–21; 27: 20, 22, 23) and in Roman law. Byzantine and Roman law assimilated this requirement of ancient legislation and, under the influence of the Church, issued a regulation concerning both the ethical and the physiological conditions of marriage. This is why the Church canonized such conditions, incorporating them into the canonical collections. Marriage impediments in relationship by blood in both vertical lines are forbidden, unlike in the lateral line to a certain degree of relationship. Until the late nineteenth century the ecclesiastical laws of the Church of Constantinople generally forbade marriages in the lateral line up to the seventh degree. Exceptions to this were made in some local churches, such as in Russia. With the encyclical letter of 1873 the Greek Orthodox Church forbade marriages to the seventh degree, allowing, for example, a marriage of a man to his second cousin’s daughter. Kinship in the sense of an impediment to marriage is divided into natural (blood relationship) and artificial (spiritual and civil). Individuals in a natural relationship are called blood relatives (συγγενεῖς). To identify the limits and make an accurate determination of blood relations, Byzantine law imposed certain definite forms, separating kinship by lines and degrees. The Byzantine theory of degrees (βαθμολογία) is the distance from one person to another by birth. The uninterrupted continuing relationship of these degrees is determined by lines and steps (τάξις, γραμμή). A step which results in two or more lines is a generation. Lines are divided into:

1. Vertical (ευθεία), which are subdivided into

149 See the study of Demetrios of Kyzikos in Ράλλη 1855, T. V, 354–366; Demetrios Chomatenos and Michael of Thessaloniki’s commentary on kinship in Ράλλη 1855, T. V, 421–427, 397–398.
150 Ράλλη 1859, T. VI, 127–128.
151 Никодим 1897, 609.
152 Павлов 1902, 336.
153 Zhisman 1864, 217. See Balsamon’s commentary on kinship by sideline: Ράλλη 1854, T. IV, 556, 560; and Demetrios Chomatenos study in Ράλλη 1855, T. V, 421–422.
2. Ascending (ἀνιύσα) lines, which are from the known person to his or her parent, in continuous relation degrees, hence, to his or her grandfather, great-grandfather, etc.
3. Descending (κατιούσα) lines, which are from the father to his son or daughter, to his grandson/granddaughter and great-grandson/great-granddaughter, etc.
4. Lateral (πλαγίαι) lines, which go from the known person to the others who have common individual ancestors.

A lateral line does not connect directly with a vertical line. These lines go from the person to his brothers, uncles, nephews, etc. In the thirteenth century Byzantine canonist Demetrios Chomatenos, Archbishop of Bulgaria, wrote that “three lines that connect the descents are arranged clearly into ascending, descending and lateral lines.” In the last years of the Roman Empire, cousins were permitted to marry. Emperor Claudius, in order to marry Agripina, issued a law allowing his marriage to his brother’s daughter (his niece). The Christian Church from the very beginning forbade marriages by blood in the lateral line of kinship up to the third degree, as seen in Canon 19 of the Apostolic Canons. This was also the case in the imperial laws of Constantine the Great. Emperor Theodosius I ordered the execution of those who married even in the fourth degree of kinship. However, in 405 Emperor Arcadius annulled this prohibition for the Eastern Roman Empire; and such marriages were allowed later under the laws of Justinian until the Council of Trullo, which forbade marriages between the children of brothers in Canon 54. This decision was also adopted in the civil laws. In 1057 under the Patriarch Michael I Cerularios of Constantinople restrictions can be found about marrying up to the seventh degree. These restrictions were made law one hundred years later in 1168 under Patriarch Luke of Constantinople.

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154 Ράλλη 1855, T. V, 422. Compare with Nomokanon XIII, 2 Ράλλη 1852, T. I, 280; and with the Alphabetical Collection of Matthew Blastar, B, 8, Ράλλη 1859, T. VI, 126.
155 Бердников 1913, 334.
156 The Rudder 1983, 30.
157 Бердников 1913, 334.
159 Ράλλη 1855, T. V, 95–98; Бердников 1913, 334.
Distance of relationship between two individuals is measured by birth. Every birth is counted as one degree. Therefore, as many births between the two parties, so many relation degrees.\textsuperscript{160} Birth shows the distance between known individuals. The fewer births and, therefore, the degrees of relationship between them, the closer the relationship. Consequently, with more births and degrees, the more distant the relationship is. To determine the degree of relationship between two known individuals, Byzantine and Roman lawyers established a special “στέμματα,” a family tree which was also published in the Justinian \textit{Institutions} and in chapter 45 of the \textit{Basilika}.\textsuperscript{161} According to these sources, the Greek and Slavic “στέμματα” diagrams were relatively expansive in the manuscripts and included a great number of different family tree variations. This is, however, understandable because the Eastern Church had connected with the Byzantine and Roman law in the calculation of degree.\textsuperscript{162} Degree calculation is best seen in \textit{Scheme 1} below, which follows the calculations found in the teachings of Demetrios Chomatenos from the thirteenth century.\textsuperscript{163} An explanation of some names found in the \textit{Scheme 1} are:


\textsuperscript{160} Ράλλη 1855, T. V, 421; Ράλλη 1859, T. VI, 125.

\textsuperscript{161} Ferrini 1897, 9.

\textsuperscript{162} Zhisman 1864, 219–220.

\textsuperscript{163} Ράλλη 1855, T. V, 422–423; Ηνίκοδιμ 1897, 605.
For the designation of persons among whom kinship is examined, this research uses the following symbols:

![Symbols for kinship](image)

When calculating degrees in a vertical line, the number of births including the person, and those included in the calculations the degree of kinship, the number of births is the same as the number of degrees. For example, from A to great-grandfather D by an ascending vertical line there are three births: D → C → B → A, that is why A in relation to his great-grandfather is the third degree of kinship; D in relation to A is the same degree.

When calculating degrees in a lateral line of birth, the same rule as calculating in a vertical line applies. When it is necessary to find the degree of relationship between persons, one of whom is in the vertical line and the other in the lateral, those persons who do not originate from one another and are not directly related by birth, go up to the closest common ancestor or to the person in which the degree of relationship is sought. The total number of births in these lines shows the degree of kinship between individuals. With this calculation from B to A one birth can be found, hence, one degree. From A to C one birth can also be

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164 Demetrios Chomatenos writes in his canonical teaching that "Δύο αὐτάδελφοι, διότι ἐκ δύο γεννήσεων προέρχονται, καὶ δύο ἀποτελούσι βαθμοὺς" [Two brothers, because they come from two births and have two degrees]. Ράλλη 1855, Τ. V, 422.

165 Павлов 1902, 338.
found, i.e. one degree, but altogether two births, hence, two degrees.\textsuperscript{166} From A to D we can find three births, hence three degrees which is shown in Scheme 2. The fourth degree of kinship, four births in the descending vertical is shown in Scheme 3.

\begin{itemize}
  \item \textbf{Scheme 2}
  \begin{itemize}
    \item GREAT-GRAND-FATHER
    \item GRAND-FATHER
    \item FATHER
    \item SON
  \end{itemize}

  \begin{itemize}
    \item GREAT-GRAND-SON
    \item GRAND-SON
    \item GREAT-GREAT-GRAND-SON
  \end{itemize}

166 The rest of the degree of kinship can be found using the above calculation: nephew and uncle are in the third, cousins are in the fourth, second cousins are in the sixth, and the third cousins are the eight degree of kinship.
The calculation of kinship degrees follows the rules below:

1. Husband and wife are not related with each other in different degrees, because they are seen to be one body.
2. Children are always considered to be in the first degree in relation to their parents.
3. Brothers and sisters are always considered to be in the second degree in relation to each other.
4. Children of one father and different mothers, or one mother and different fathers, are considered brothers and sisters.
5. Relatives of the female line are calculated in the same manner as the relatives of the male line.
6. The limits of kinship are usually limited to seven degrees: in the vertical line this is explained by the fact that according to the laws of nature, it is impossible for someone to survive beyond the seventh degree of kinship; therefore there is no need to define this degree of kinship further. In the lateral line, the definition of the relationship, while it would be very difficult, would have passed the boundaries of the rules about kinship because the mutual relation of kinship after the seventh degree is too distant to fear the unnatural mixing of blood or it would be impossible to establish them based on some sort of rules.\textsuperscript{167}

\textbf{Affinity}

Affinity (\acute{\alpha}γχιστεία) is a relationship between two families that occurs as a consequence of marriage. It is equivalent to kinship by blood, because the husband and wife by ecclesiastical law make one flesh.\textsuperscript{168} Affinity, the connection of two families by marriage, is referred to in the canonical sources as “cousin relations” (\acute{\alpha}γχιστεία ἐκ διγενείας), unlike the relations of another form that occur between the three families due to two different marriages. This is called second cousin relations (\acute{\alpha}γχιστεία ἐκ τριγενείας), or trilineage affinity. Canonical foundations of affinity are

\textsuperscript{167} Никодим 1897, 609.
\textsuperscript{168} Красножен 1900, 134.
found in Apostolic Canon 19: “Whoever marries two sisters, or a niece, may not be a clergyman,” and in a more complete form in the canons of Basil the Great. Canon 87 was originally a Basil epistle to Diodore, Bishop of Tarsus, which can be seen from his Canon 23, where he writes: “Concerning men who marry two sisters, or women who marry two brothers, a little epistle has already been addressed to you, a copy of which we sent to your reverence.”

During the period when Basil’s epistle was written, Roman law did not prohibit such marriages, nor did Mosaic Law examine them directly. Therefore Bishop Diodore considered them to be lawful marriages. However, Basil the Great refutes this, stating in Canon 87:

> For what could be more nearly related, or near of kin, to man than his own wife, or rather to say his own flesh? Through the wife her sister attains to a state of close familiarity with the husband. For just as he must not take the mother of his wife, so must he not take her daughter either, because he is not allowed to take either his own mother or his own daughter to wife. Thus he is not allowed even to take a sister of his wife, because neither is he even allowed to take his own sister to wife, and vice versa, neither is a woman permitted to cohabit with relatives of her husband; for the rights of both and to both are held in common, by both sides of the relationship.

Hence, marital cases that combine a third line are permitted more easily than those combined from two lines. This is the case in marriages which are less than two degrees than those of two-line marriages. As a result, they are permitted in the fourth degree.

In the first division when determining the degree of affinity between the persons of two genera (διγενεία), ecclesiastical as well as Byzantine law follows the same rules that apply to the relations of kinship by blood. These bases are included in the concept of the unity of husband and wife.

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170 The Rudder 1983, 810.
171 Павлов 1902, 346.
172 The Rudder 1983, 843.
173 Viscuso 2008, 75; Ράλλη 1859, T. VI, 133.
and their mutuality in all personal relationships that each has individually.\textsuperscript{174}

Because of the unity and mutuality of spouses, the husband’s relatives are not only considered kin in relation to the husband’s wife. The relatives of the wife in relation to her husband are in exactly the same degree as the in–laws are in relation to him; they stand in relation to his wife in the same degree and vice versa. The only difference is that the relatives (συγγένεις) of one spouse are called cousins–in–law (ἀγχιστεῖς) and the relationships between the two genera are not considered to be close relatives in the strict sense (συγγένεια), but rather an affinity, as canonist Nikodim Milaš describes it.\textsuperscript{175} Therefore, the degree of relationship a certain person to one of the spouses is the degree of affinity in which he or she stands to another.

Similar to kinship, affinity is also divided into vertical and lateral lines. Therefore, the affinity can occur between one spouse and the ascending and descending relatives of another; between one spouse and relatives on the lateral line of the other; between the relatives of one spouse and family members of another; between a husband and his relatives on the one hand, and the relatives of the spouse by the first marriage on the other.\textsuperscript{176}

The number of degrees in affinity are the same as in kinship: for as many births, so many degrees. Therefore, when one wishes to determine the degree of affinity between two parties in a direct or lateral line, as in the determination of kinship, one counts birth from a given relative by blood of the spouse and continues the count by the corresponding line to a certain family member by blood of another spouse. The resulting number of births will show the degree of affinity between these two parties, i.e., between the blood relatives of one spouse and the blood relatives of the other.

For example: my wife and I make one body. In relation to her, her mother is a first degree relative, since between them there exists one birth. So, I stand to my mother–in–law in the first degree of affinity. To my wife and I my sister–in–law stands in the second degree of affinity, because between us exist two births. My father in relation to my sister–

\textsuperscript{174} Горчаков 1909, 263.

\textsuperscript{175} Никодим 1897, 610.

\textsuperscript{176} Никодим 1897, 611.
in-law is in the third degree of affinity, since between him and me exists one birth, one between my mother-in-law and my wife, one between my mother-in-law and my sister-in-law, a total of three births, i.e., three degrees. My grandfather and my sister-in-law are in the fourth degree of affinity, since between him and my father there is one birth, between my father and me one, then between my wife and her mother or my mother-in-law one, between my mother-in-law and her second daughter or my sister-in-law there is one birth: four births, i.e., four degrees.

My cousin is in relation to my mother-in-law in the fifth degree of affinity, and to my sister-in-law in the sixth. My cousin, by taking as his wife a widow, who had by the first husband a daughter (who is now his stepdaughter), therefore, is with her in the first degree of affinity, because in the same degree of kinship is his stepdaughter to her mother, who is now his wife and therefore is one with him. The results are the same when calculating the degrees of affinity with the other calculation method, that is when the first birth is calculated in one kinship of a known person up to another spouse. This is followed by a different kinship from one spouse to the other person, and then the total of these births is considered. According to the first calculation method, my cousin is in the fifth degree of affinity to my mother-in-law. Calculating by the second method, we counted in my relationship from me to my nephew, four births, therefore, four degrees; from my wife to my mother-in-law is therefore one degree. Adding all the degrees found in the current and in the other kin, we get $4 + 1 = 5$, i.e. the fifth degree. The degrees of affinity are drawn up in Scheme 4:

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177 B, 8. Ράλλη 1859, T. VI, 134.
178 Ηνκοδιμ 1897, 613. Compare these two calculation models with the teachings of Patriarch Eustathios of Rome, Υπόμνημα περί δυο ἡξαδέλφων λαβόντων δυο ἡξαδέλφους [A note concerning two cousins marrying two cousins] (Ράλλη 1855, T. V, 341–353.) and Joseph Zhisman’s study Bestimmung der Nähe oder der Entfernung Schwägerschaft [Determination of the distance or closeness of the affinity], in the book Das Eherecht der Orientalischen Kirche. Zhisman 1864, 298–305.
The Church has prohibited marriages since ancient times in the second degree of affinity, more specifically between a man and the sister of the wife and with the wife of a deceased brother. Around the end of the seventh century, the Council in Trullo prohibited marriages in the fourth degree of affinity (canon 54).\footnote{Красножен 1900, 135.} With the publication of the conciliar tome (τόμος συνοδικός)\footnote{Ράλλη 1855, Τ. V, 11–19.} of patriarch Sisinianos on 996, marriages of two brothers with two cousins, i.e. the sixth degree of affinity, were forbidden for the first time. Here it should be noted that the Slavic translation of the conciliar tome in the Kormtšaja Kniga (соборный свиток)\footnote{Кормчая 1913, 1219.} goes even further in the determination of the possible combinations of affinity, wherein marriage is not possible. Kormtšaja added two more cases to the original conciliar tome from 996, where the canonical teaching included the seventh degree of affinity. Hence, Kormtšaja forbids marriages of two cousins (братья братьев двема) with an aunt (тетку) and a niece (сестрицу); or an uncle (стриеви) and grandson (сестричника) with two cousins (двое брата чада).\footnote{Павлов 1887, 109.} In the Greek Church, this combination was never forbidden. A good example of this is the canonical teaching of an unknown author, which can be found in some Greek collection with the name “Περί γάμων γνώμη συνοδική” (De matrimoniiis decretum synodale).\footnote{Bandinius 1764, 80.} The respected Russian canonist, Pavlov, has however published the aforesaid original Greek text in his study about the Fifty Titles of Kormtšaja as a historical and practical source of Russian matrimonial law. The aforementioned unknown canonical author solves the problem concerning the seventh degree of kin and affinity differently, because of their internal differences.\footnote{Павлов 1887, 110–113.} This view is also supported in the writings of another unknown author-patriarch, whose teaching was stated by Ioannos “bookkeeper” of Ioanopoulos. In the writings attributed to an unknown metropolitan, the patriarchal decision concerning marriages concluded in
the seventh degree of kinship: these marriages will stay in force, but the spouses are subject to two years of penance.\(^{185}\)

The purpose of the Orthodox canon law in determining the degrees of affinity as marriage impediments also lies in the fact that persons who are related by affinity, do not cause confusion with their names. By this is meant that the result of the marriage will not change the name and the natural relationships between the two parties. The older relatives cannot take the place of the younger and vice versa. The principle of such order supposedly has its origin in Canon 87 of Basil the Great,\(^{186}\) stating that: “to which of the two sexes shall they ascribe the offspring? Shall they say that they are brothers and sisters of each other, or that they are cousins.”\(^{187}\) The canon itself was not used in a specific legal context.\(^{188}\)

To emphasize the importance of understanding the kinship and affinity degrees, the Russian theological journal *Orthodox Interlocutor* (Православный собеседник) in 1852 provides an excellent example of how close ties can create canonical impediments to marriage, such as who is related to whom:

A marriage of an uncle and a nephew with two sisters results in the following: The former remain related to each other by blood and now are related *ex digenia* (from two families) as brothers-in-law. Their wives, while remaining sisters, now become aunt and niece to each other. The uncle’s children becomes nephews to his nephew as well as cousins. The nephew’s children become nephews to his uncle and grandchildren *ex digenia* through the father.\(^{189}\)

Likewise, in kinship by blood in a vertical line, all marriages are also prohibited in accordance with the affinity between the ascending and descending persons. Even after the death of one spouse, the other spouse is not allowed to marry relatives in the vertical line of the deceased. This

\(^{185}\) Ράλλη 1855, T. V, 92–93. Zhisman, as well as the compilers of the collection of canons known as “syntagma,” put this act between the years of 1043–1156. Zhisman 1864, 38.

\(^{186}\) Troianos 2012, 166.

\(^{187}\) *The Rudder* 1983, 844.

\(^{188}\) Troianos 2012, 166.

\(^{189}\) English translation in Smirensky 1995, 62.
rule can also be found in ecclesiastical and Byzantine law.\textsuperscript{190} In the lateral line, marriage is forbidden up to the fifth degree. Marriage is allowed in the sixth degree if there is no confusion over names. Therefore, my stepson could take the daughter of my cousin as his wife, since they are in the sixth degree of affinity and there is no confusion about names. But my grandson cannot marry my wife's cousin, although he is in the sixth degree of affinity with her, because in that case a cousin of my wife would have been my granddaughter, and my wife would be the grandmother of her cousin. Therefore, there would be some confusion over names and marriage would not be possible between them.

With regard to the trilineage affinity, in the fourteenth century the Eastern Church established a practice to prohibit such marriages in the third degree.\textsuperscript{191} After entering into a second marriage the widowed husband forms a union of one body with his new wife. In-laws of the husband from his first marriage are related by affinity with the relatives of the second wife.\textsuperscript{192} In trilineage affinity, the relationship is determined in consequence of two separate marriages between three kins (τριγενεία). The definition and calculation of the degree of affinity follows the same rule as the definition of affinity in the cases of one marriage. Canonist Matthew Blastares included in his alphabetical collection a law treating trilineage affinity which was compiled from the various sources of Byzantine imperial laws, such as Basilika,\textsuperscript{193} Epanagoge,\textsuperscript{194} and Procheiron nomos:\textsuperscript{195}

I am not able to take the former wife of my stepson, nor can a stepmother take the former husband of her stepdaughter, because there is trilineage in these cases. Because a stepson and a stepdaughter hold the position of son or daughter in relation to a stepfather or stepmother, and because his wife or her husband hold the position of daughter-in-law or son-in-law in relation to

\textsuperscript{190} See Canons 79 and 87 of Saint Basil the Great; Canon 54 of Trullo; Basilika XXVIII, 5, 1.

\textsuperscript{191} Красножен 1900, 135.

\textsuperscript{192} Горчаков 1909, 264.

\textsuperscript{193} Basilika XXVIII, 5, 4 (3). Scheltema 1962, 1346.

\textsuperscript{194} Epanagoge XVII, 11–12. Zachariae 1852, 111.

\textsuperscript{195} Ο Πρόχειρος νόμος VII, 13–14. Zachariae 1837, 55.
them, such marriages are unlawful. The husband and wife, the closest point of two lineages, do not hold a degree either among themselves or in relation to the intermediate lineage. For we do not assign the union of husband and wife a degree, but reckon it to be a unity seen by itself. Indeed the wife of my brother, on account of her close union with him, holds a second degree in relation to me, through careful consideration of the law uniting them. However when the degree is sought for another person related to her, we do assign the union of husband and wife a degree. Thus my sister-in-law’s sister is of the second degree in relation to her sister, but of the fourth in relation to me. My sister-in-law’s aunt in relation to the sister is of the third degree, but is of the fifth in relation to me. Likewise also in other cases. Thus, it is not possible that a brother is also reckoned one flesh with his sister-in-law, as if he was a husband, and by a device of thought is joined with her through the power of the law. For they do not occupy the first lateral decree but, begin from the second. Therefore the law has prohibited only trilineal marriages of the first degree, as has been said. However, prevailing custom does not hold things in accordance with what is unprohibited beyond the first degree of trilineage.\textsuperscript{196}

Affinity in consequence of two separate marriages will exist in the following cases: between a spouse and the spouse of another relative’s spouse (\textit{Scheme 5}); between a spouse and a person consisting in affinity of a remarried spouse from his first marriage (\textit{Scheme 6}); among family members of the two parties, who one after the other married a third person (\textit{Scheme 7}).

\textsuperscript{196} Viscuso 2008, 76; Ράλη 1859, T. VI, 134.
As seen above, there are three families: mine (father, sister, me), my brother–in–law and my wife. My brother–in–law and my sister are one as husband and wife, like my wife and I. My sister and I are in the second degree of kinship as family members by blood. A husband’s or wife’s relatives are in the same degree of affinity, hence my brother–in–law will be in the second degree of trilineage affinity with my wife, as seen before in the Alphabetical collection of Matthew Blastares.\textsuperscript{197}

\textsuperscript{197} Viscuso 2008, 76; Ράλλη 1859, T. VI, 134.
When the degrees are calculated in *Scheme 6* between the stepfather and the second stepdaughter of his stepdaughter, i.e., the first stepdaughter: the first stepdaughter is in the first degree of kin to her mother and in the first degree of affinity with him. The second stepdaughter is in the first degree of kin with his father and in first degree of affinity with his stepmother. From this calculation we can see that the stepfather is in second degree of affinity with the second stepdaughter.
In *Scheme 7*, the degree of affinity is calculated between the brother–in–law from the husband’s first marriage and the sister–in–law from his second marriage as follows: his brother–in–law is in the second degree of kin to his sister; likewise, the husband’s second wife is also in the second degree of kinship to his sister. This makes altogether four degrees, i.e. the husband’s brother–in–law from the first marriage is in the fourth degree of affinity to his sister–in–law. The husband, who represents alone a third relation, cannot be taken into account when calculating degrees, since one person in the affinity in itself does not create any degree. Therefore, based on the above–stated rules, in relation to the relatives of the first or second wife, a husband in the above case cannot constitute a separate degree.

Until the middle of the thirteenth century matrimonial impediments in the second division of affinity were included only to the first degree, namely the affinity between the stepfather and the stepson’s wife, and between the stepmother and the stepdaughter’s husband. After the thirteenth century canon lawyers started to pay attention to confusion over names (*σύγχυσις τῶν ὀνόματων*). Marriage was forbidden in the third degree of second trilineage affinity.\(^{198}\)

**Spiritual affinity**

Spiritual affinity (πνευματική συγγένεια) designates a relationship which arises as a consequence of baptism between the godfather and his relatives from the one side, and between the godson and his relatives from the other. The basis for such a relationship is a spiritual one – the relationship between the godfather and the newly baptized person. In view of responsibilities, the relation between the godfather and the godson was seen as equal with the relationship between the father and his child, where the godfather replaced the godson’s own father. From

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\(^{198}\) Павлов 1887, 162; Никодим 1897, 615. See also the “answers” of Demetrios Syngellos concerning the illegal aspect of trilineage marriages (Ράλλη 1855, T. V, 366–369.); Teaching of Matthew Blastares “Περί τῶν ἐχ γερμενείας” (Ράλλη 1859, T. VI, 133–134.); the law VIII, 127 of Procheiron Auctum and the commentary to it: “ὡς ἐκ τριγενείας συνιστάμενον ἀκωλυτόν ἐδοξεν εἶναι. ἐχει δὲ οὕτω. θέσεις καὶ γαμβρός ἐπ’ ἀνεψια πρώτη ἐλαβον εἰς γυναίκας ἄδελφας δύο.” Zachariae 1870, 103
this appeared the concept of spiritual kinship, which, according to the Trullan Canon 53, should be considered more important than a blood relationship, as seen in the following:

Since it has come to our knowledge that, in some places, certain persons who become sponsors to children in holy salvation—bearing baptism, afterwards contract matrimony with their mothers (being widows), we decree that in the future nothing of this sort is to be done. But if any, after the present canon, shall be observed to do this, they must, in the first place, desist from this unlawful marriage, and then be subjected to the penalties of fornicators.\textsuperscript{199}

When the concept of spiritual affinity was confirmed in the early Christian Church as analogous with a blood relationship, the Church began to take into consideration the appropriate degree of affinity in which a godfather and his family stood to his godson and his godson’s relatives. Since kinship by blood was determined by the known degrees regarding the matrimonial impediments, the same thing was done in a spiritual kinship. According to the tradition of the Church of the first centuries, the Emperor Justinian in 530 ruled that godfathers cannot later marry the newly baptized child.\textsuperscript{200}

The publication of this canon resulted in increasing the number of matrimonial impediments. The publication of Basilika established in this regard the constant boundary, and marriage in the spiritual affinity were prohibited in the following cases: between godfather and godchild; between the godfather and the mother of the baptized person; between

\textsuperscript{199} Schaff 2007, 390; See Balsamon’s commentary on Canon 53 of Trullo: Ράλλη 1852, Τ. ΙΙ, 428–429.

\textsuperscript{200} “Nevertheless, he that receives a female godchild from holy baptism cannot afterward take her in marriage because she now becomes his daughter. Nor may he marry his godchild’s mother or daughter. This also applies to the sponsor’s son. Nothing else can introduce a paternal state and impediment of marriage like this bond by which God mediates the joining of their souls.” (Viscuso 2008, 80.) See the law 7, 28 in Procheiros nomos: “Ο μέντοιος ἀπὸ τοῦ ἁγίου βαπτίσματος τινα δεξιάμενος οὐ δύναται αὐτὴν ὑστερον πρὸς γάμον ἀγαγέσθαι, ὡς δήθεν θυγατέρα αὐτοῦ γεωμένην, οὐδὲ τὴν ταύτης μητέρα ἢ θυγατέρα ἢ ἀλλ’ οὔδε ὁ νιός αὐτοῦ. ἐπειδὴ οὔδεν ἄλλο ὀὕτως δύναται εἴσαγαγὴν πατρικὴν διάθεσιν καὶ δικαίαν γάμου κόλυσαν πρὸς τὸν τοιούτον δεσμόν, δὴ οὐ θεόν μεσάζοντος αἱ ψυχαὶ αὐτῶν συνάπτονται.” O Πρόχειρος νόμος VII, 28. Zachariae 1837, 58.
the son of godfather and his goddaughter; between the godfather and the daughter of the baptized person; between the son of the godfather and the daughter of the baptized person. This Byzantine practice was later introduced in nineteenth-century Russia, where on January 19, 1810 the Holy Synod of the Russian Orthodox Church decreed that the Church should follow the dictate of Trullan Canon 53 literally, thereby prohibiting marriages between godchildren and their parents and sponsors. Later with the decree from December 31, 1837 the Holy Synod prohibited marriages between two sponsors, the godfather and the godmother.

This was motivated by the early Christian tradition and rules that allowed only one sponsor for baptized persons. The Russian canonist A. S. Pavlov notes that the practice of sponsorship in the early Church did indeed require only one sponsor – a male or female, depending on the sex of the baptized person. This was mentioned in the Apostolic Constitutions (Διαταγαί τῶν ἁγίων Ἀποστόλων) and in the works of Dionysius the Areopagite. Emperor Justinian and the early records of the baptismal rite also knew the practice of only one sponsor. Pavlov without hesitation assumed that this was the practice followed during the Council in Trullo. However, another respected Russian canonist, Ilja Berdnikov, saw some conflicts in this presupposition, since Pavlov mentioned later in his study of Kormtšaja that before the Council in Trullo existed in some cases when the baptized person was received by two sponsors, male and female, namely by the married couple. In this

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202 Горчаков 1909, 264.
203 A newborn male should be received by the deacon and the female by the diaconess. (Павлов 1887, 169.) Symeon of Thessalonika allowed baptism of children of non-Christian parents if the newly baptized child was raised as a Christian by his or her sponsors. Павлов 1897, 292.
204 Бердников 1892, 4–5. The debate between two professors regarding spiritual affinity as an impediment to marriage has been published in the following ecclesiastical journals: Чтение Общество любителей духовного просвещения 1891 – Май–Июнь; Март–Апрель 1893, and as an appendix to the Православный Совбеседник from 1893, with the title Ответ проф. Павлову на его продолжающееся недоумение по вопросу о восприемничестве, as well as with the separate brochure from 1892 О восприемничестве при крещении и духовном родстве, как препятствии к браку.
sense, the law from 1837 could be seen only as a requirement of ancient practice, not as a necessity. Professor Gortšakov noted that the law of 1837 was formally followed until 1873 when the Holy Synod decreed that the sponsors could enter into marriage with the children of their godchildren only if they were of different sex from their parents.\footnote{Горчаков 1909, 264.}

The aforementioned decree of the Holy Synod is difficult to understand in the light of Trullan Canon 53, which prohibits marriage between the sponsors and mothers of godchildren, i.e., it forbids marriage in the second degree of spiritual affinity. It is true that Canon 53 provides only one example regarding the relationship in the second degree. However, the following calculations of the second degree should also be included when interpreting the aforementioned canon: Marriages between 1. Sponsor and the children of the godchildren; 2. Children of the godchildren and children of the sponsor; 3. Two godparents of the same godchildren, which makes them spiritual brothers and sisters. Such an understanding of the Trullan canon, namely expanding its meaning to all three aforementioned combinations, is justified not only by the positive ecclesiastical regulations found in the different canonical collections, but by the general nature of all the ancient laws of the universal Church regarding marriages that are prohibited in the specified degree of affinity or kinship. Canons and ancient practice do not recognize situations in which marriages are prohibited in the second degree of affinity in one case, but allowed in another. Metropolitan Filaret (1782–1867) of Moscow and Kolomenskoe noted such a problem of double standards in his report to the Holy Synod, while president. Despite the laws from January 19, 1810 and December 31, 1838, Metropolitan Filaret did not allow marriages that conflicted with the Trullan Canon 53 during his presidency.\footnote{Филарет 1888, 390–391.}

The \textit{Ekloga} of Leo III the Isaurian, which influenced the law regarding spiritual affinity in \textit{Basilika},\footnote{Христинáкис 2003, 122.} also forbade marriages in the same degrees as already mentioned.\footnote{Π, 2. Zachariae 1852, 15–16.} Over the centuries on the basis of the Trullan Canon 53, where it is said that the spiritual relationship is greater than blood affinity, matrimonial impediments concerning spiritual
affinity were given nearly the same status as marriage forbidden by blood, i.e., up to the seventh degree. Both the Church fathers and the canon lawyers Balsamon and Blasters indicated this.\textsuperscript{209} One can argue that the practice of the Church followed the laws set by the \textit{Basilika} and \textit{Ekloga}. However, Balsamon, in his commentary to Trullo’s Canon 53, included all the previous rules concerning spiritual affinity. His statements follow the full text of the Synodal act of Patriarch Nicholas, who already knew the calculation of degrees of spiritual affinity and prohibited such marriages in the fifth degree.\textsuperscript{210} Balsamon repeated the conclusions in his answers to the Alexandrian patriarch Mark, however emphasizing this time that spiritual affinity is calculated in the same way as the blood relations.\textsuperscript{211}

Blastares followed Balsamon’s position and asserted that spiritual affinity is determined to be stronger than blood relationship and that it is necessary for those who are united spiritually to observe the degrees that impede marriage up to the seventh degree.\textsuperscript{212} This fourteenth–century attitude towards the important role of godparents made the Church gradually calculate degrees of spiritual kinship as follows: the degrees are calculated only in the direct descending line, i.e. from the godfather to his descendants and from the baptized to his direct descendants. In the ascending line only the mother of the baptized counts, with whom the godfather and his descending relatives cannot marry. Calculating degrees of spiritual birth is identical with that of the blood relationship; the same general rule applies: the number of births between the parties constitutes the number of degrees. This is demonstrated in Scheme 8:

\begin{quote}
\textsuperscript{209} Ράλλη 1852, T. II, 429; Ράλλη 1859, T. VI, 138.
\textsuperscript{210} Ράλλη 1852, T. II, 430–431.
\textsuperscript{211} "γέγονε σημείωμα συνοδικόν ἐπὶ τοῦ ἀγιωτάτου ἐκείνου πατριάρχου κυρίου Νικολάου κατὰ μήνα Μάιον τῆς ἰ. ἐπινεμθέος, ἐπὶ ἑρωτήσει τοῦ ύπερτιμοῦ ἐκείνου κυρίου Γρηγορίου τοῦ Ἱηροῦ, διοριζόμενο τοὺς αὐτοὺς ὀρθὸς συνορίγεσθαι καὶ ὑφασπάλοσθαι τὴν διὰ τῆς συντικνίας συστάσιαν πνευματικῆς συγγένειαν, ὦς καὶ αἱ σωματικαὶ συγγένειαι περιορίζονται." Ράλλη 1854, T. IV, 482.
\textsuperscript{212} Ράλλη 1859, T. VI, 140; Viscuso 2008, 81.
\end{quote}
Between the godfather and the baptized there is one birth; thus, they are in the first degree of affinity. The godfather along with the mother of the baptized is in the second degree of affinity, because there is one spiritual birth between the godfather and the baptized and one birth by blood between the mother and the baptized. Likewise, the son of a godfather and the baptized person are in the second degree of affinity. The godfather is to the daughter of the baptized person in the same second degree, and the godfather’s son to her in the third degree. Professor Berdnikov notes that the Greek Orthodox tradition also knew a practice whereby the baptized persons from two different families and their descendants entered into a spiritual relationship with each other if they were baptized by the same godfather. These persons were called “spiritual brothers” (αδελφοί πνευματικοί) and they, along with the descendants, could not marry each other in the seventh degree of spiritual affinity.\textsuperscript{213}

\textsuperscript{213} Бердников 1913, 336.
Canonist Pavlov also includes a sworn brotherhood (ἀδελφοποιία) under the category of spiritual affinity, known as “brother adoption,” common to all Indo-European nations of antiquity. It consisted in the fact that two persons, who had no blood relationship between them, gave each other a vow of fraternal love and mutual support. The union was solidified with vows and with the exchange of crosses and other external rites. From here arose different impediments for marriage, namely, between the sworn brothers, if into this union were joined man and woman, between one sworn brother and the wife, or with a close relative or another person, etc. However, since Byzantine civil laws did not give any legal value to sworn brotherhood, the Church did not hesitate to take the same view, especially since the spiritual brotherhood often concluded with direct criminal purposes or led to crimes. Matthew Blastares considered adoption of a brother an illegal act. From the above perspective, brother adoption can be considered a late addition to Orthodox canon law without having a genuine canonical or legal foundation.

**Half affinity**

Half affinity (quasi adfinitas, οιονεί αγχιστεία) designates relations that occur after the engagement between the groom or bride with the relatives from the one side, and between the groom or bride from the other. Engagement is the foundation of half affinity and arose from the concept of identical meanings of engagement and marriage. As it is seen in the concept of affinity and blood relationship which arise from the marriage, the degrees of half affinity are calculated in the same way. The Byzantine law books, namely the Basilika knew as well the concept of half affinity and prohibited marriage between a son and the engaged bride of

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214 Павлов 1897, 311; Zhisman 1864, 286.
216 Никодим 1897, 619.
his father and vice versa; between the person and his brother’s engaged bride and between the engaged groom and the bride’s mother.\textsuperscript{217}

Canon 98 of Trullo decrees that: “He who brings to the intercourse of marriage a woman who is betrothed to another man who is still alive, is to lie under the charge of adultery.”\textsuperscript{218} This Trullan canon served as a source for the Synodal decree of the Patriarchate of Constantinople of 1868, wherein the marriages between the betrothed groom and the widowed mother of his deceased bride was prohibited.\textsuperscript{219} The provisions of this decree can be seen in Scheme 9.

**SCHEME 9**

![Scheme 9](image)

We can see that between the betrothed groom and the widow there is one birth, i.e. they are in the first degree of half affinity. As seen in Scheme 10, the decree of the Patriarchate of Constantinople rules also that the betrothed bride cannot marry a son of his deceased groom, who is in the first degree of half affinity or the brother of groom, who is in the

\textsuperscript{217} Basilika XXVIII, 5.1–2. Scheltema 1962, 1342–1345. Russian canon lawyer Ilja Berdnikov mentions that these same rules are also found in the Procheiron nomos. Бердников 1913, 339.

\textsuperscript{218} Schaff 2007, 406.

\textsuperscript{219} Никодим 1897, 619.
second degree of half affinity. Marriages in the third degree of half affinity are permitted.²²⁰

**SCHEME 10**

Particularly interesting is Professor Berdnikov’s opinion that divorced spouses after the divorce are also considered to be related in half affinity. In his opinion, since Byzantine law restricted such affinity to one degree, it prohibited marriage between one of the divorced spouses and children of the other spouse from his new marriage.²²¹ Proof for such a restriction in Byzantine law is, however, hard to find and no ecclesiastical rules recognize specific regulations on this subject. In the Russian canon law books from the nineteenth and twentieth centuries, only Professor

²²⁰ Никодим 1897, 620.
²²¹ Бердников 1913, 339.
Berdnikov and Bishop of Dalmatia Nikodim mention the case of half affinity.

**Adoption**

From adoption arise an affinity that is called legal or fictional kinship (νομική ἢ πλασματική συγγένεια). Such an affinity is between the adoptive parents and their relatives, and between the adopted son or daughter and their relatives. A legally adopted person has the same degree of affinity with his stepparents as a blood relationship would.

_Basilika, Procheiron_ and _Epanagoge_ defined the law on adoption in more detail: “I am not able to take aunts on my father’s or mother’s side for a wife, even if indeed they are adopted, because these who happened to be adopted by my grandfather hold the rank of mothers and occupy the position of sister in relation to my father, and of aunt to myself. A stepfather cannot marry the daughter or granddaughter of a

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222 Νικόδημ 1897, 620.

223 Novella 24 of Emperor Leo states that: “Adoptions formerly were devoid of pomp or ceremony and took place without sacrifices or any sacred melodies, and the law permitted those who desired to be adopted to do so in an extremely informal manner. The result of this was that the name of sister was frequently changed into that of wife; that of daughter into that of daughter-in-law; that of son into that of son-in-law; and then adoptive sons or daughters contracted matrimonial alliances with their natural brothers or sisters, which could take place because the service of the Church not being employed in adoption, no hindrance was offered to them. But although marriage was, under such circumstances, considered to some extent disgraceful, there was nothing criminal about it, since adoption was accomplished without any religious rites. But at present, as it is accompanied with all due solemnity, as the names of adoptive father and son are bestowed during the holy sacrifice, there is no longer any reason why marriage between natural and adoptive children of the same father should be permitted. Hence, We decree that those who become brother and sister by adoption cannot change this relationship through matrimonial union.” Scott 1932, 227.


stepson; nor can an adopted son marry the spouse of a stepfather, or her mother, her sister, or her granddaughter by son.”

In Byzantine law practice, adoption was soon replaced with the ecclesiastical custom of adoption, which included a specific ritual and prayers. As might be expected given the cultural context, the ecclesiastical form of adoption was considered more permanent than juridical adoption. In the eleventh century, Emperor Leo the Philosopher decreed that an ecclesiastically adopted person could not marry children of the adoptive family. Adoption through the Church was similar to spiritual affinity. After the Byzantine Church practice established regulations regarding impediments to marriage in spiritual affinity, including the seventh degree, the same practice was followed in the regulations regarding adoption.

2.6 Other Impediments to Marriage

**Different religions**

Impediments to marriage that arise from differences in religion between two spouses are divided into two groups: a) marriages between the Orthodox Christian and non-Christian spouse, and b) marriages between the Orthodox Christian spouse and the spouse who belongs to another Christian confession. The first case is entirely prohibited in Orthodox canon law; the second case is accepted under certain conditions. Marriages between Christians and non-Christians existed in the first centuries of Christianity. The Church tolerated these marriages, hoping that the non-Christian spouse would eventually convert to Christianity, as seen in 1 Corinthians 7:12–14, 16. As soon as Christianity became the dominant religion in the Roman Empire, a fear that the Jews would convert Christians to their religion arose. This led to a Constantinian law in 339, which forbade marriages between Christians and Jews. The Emperors Valentinian II, Theodosios I and Arkadios later confirmed the

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227 Viscuso 2008, 79.

228 Павлов 1902, 352–353.
Constantinian law. The law was first published in the Codex Justinianus and later in the Basilika in following form: "Ἰουδαίοις Χριστιανοὶ πρός γάμου μὴ συνερχέσθωσαν τὸ περί μοιχείας ἐντεθεν ύφορώμενοι δημόσιον ἐγκλήμα. Οἱ τὸν οὐρανὸν σεβόμενοι, εἰ μὴ Χριστιανοὶ γένονται, ὡς αἱρετικοὶ τιμωρεῖθωσαν καὶ τὰς τούτων ἡ ἐκκλησία συναγωγάς ἐκδικεῖτω." This law was later included in the ecclesiastical law books of the Orthodox Church, e.g., Nomokanon of Fourteen Titles and the Alphabetical Collection of Matthew Blastares.

The Council of Laodicea in Canon 10 states that, “the members of the Church shall not indiscriminately marry their children to heretics.” Zonaras and Balsamon believed that the restriction only applied to the children of the clergy. Zeger Bernhard van Espen, a Belgian canonist and Roman Catholic bishop, noted, however, that there is no doubt that the marriage of children of the clergy to heretics would be indecent according to this Canon. Marriage with heretics was universally condemned and to be avoided. This ruling was also confirmed with Canon 31 of the same council. Canon 14 of the fourth ecumenical council dealt with a case wherein readers and singers were not allowed to marry a heterodox and were not to give their children in marriage to a heretic, “unless the person marrying the Orthodox child shall promise to come over to the orthodox faith.” Matthew Blastares commented on this canon stating that marriages between heretics and those of the Orthodox faith should be delayed until the promise of a heretic is confirmed by action. Roman Catholic men who marry Orthodox women are also required to do the same things. Those who do not comply with these rulings are subject to canonical penalties.

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229 Бердников 1913, 367.
230 Basilika I, 1.34, Scheltema 1955, 7.
232 Ράλλη 1852, T. I, 271; Ράλλη 1859, T. VI, 175.
233 Schaff 2007, 129.
234 Ράλλη 1853, T. III, 180.
235 Schaff 2007, 129.
236 Ράλλη 1853, T. III, 198.
237 Schaff 2007, 278.
238 Ράλλη 1859, T. VI, 173.
the aforesaid canon commented that apparently (ὡς ἔοικεν) on the basis of this rule, Orthodox believers (τὸ μέρος τῆς ἐκκλησίας) obliged Roman Catholics to renounce their faith when they wanted to take wives from the Eastern Empire.239

Pavlov notes that the imprecise tone in which this comment was expressed suggests that Balsamon did not mean the general ecclesiastical, firmly established practice of his time, but some local practice from which it was impossible to derive a general rule. Further, there was no formal reason to recognize Roman Catholics as heretics at the time. The establishment of such a general rule was not favored in the Greek Church and there are frequent examples of marriages between Byzantine queens and Western Catholic sovereigns. They were not expected to convert, nor was a conversion to Orthodoxy required of the spouse.240 Examples of such marriages are also known in ancient Russia, although there from the very beginning they generated condemnation from ecclesiastical authorities. Already in the eleventh century Metropolitan Ioann II, in his canonical responses to monk Iakov, stated that to give daughters of a faithful prince to the non-Orthodox, who take communion in the form of unleavened bread, is an unworthy and very improper thing to do. Because the prince was a pious Orthodox, his children would be ordered to undergo the canonical penance for entering into such marriages.241

Later, such opposition of the Church hierarchs regarding such marriages is reflected in the fact that the Russian form of an episcopal oath included a special article by which the newly ordained bishop pledged not to allow into his diocese marriages between the Orthodox and Armenians or Latins, except with the special permission of the metropolitan.242 The “special permission” clause shows that marriages of Russians with Christians of other denominations were not forbidden absolutely. In fact, they were quite frequent in southwestern Russia, which during the fourteenth century was under the authority of Catholic (Polish and Lithuanian) sovereigns. A completely different social situation existed in northeast Russia. Due to the known condition of political life there, this part of Russia was kept in strict isolation from the

239 Ράλλη 1852, Τ. ΙΙ, 253–254.
240 Павлов 1897, 182; Zhisman 1864, 533.
241 See the rule 13. Русская историческая библиотека 1880, 7.
242 Русская историческая библиотека 1880, 454–455.
Christian West in religious and social terms. During the so-called Moscow period of Russian history, the canonical principle of not allowing marriages with non-Orthodox was violated only once: the marriage of the daughter of Grand Duke Ivan III Helena with the Lithuanian Grand Prince Alexander.\footnote{Павлов 1897, 183.}

But this exception only proves the vital necessity at the time to comply with the general rule that both spouses have the same faith. All further attempts of Western European sovereigns to marry their children with the Russian royal family generally remained unsuccessful due to the fact that every seeker of the hand of a Russian princess was required to become an Orthodox. Only in the era of political and social reforms of Peter the Great did the canonical principle lose its binding authority in Russia. In 1721 the Holy Synod, shortly after it opened at the insistence of the tzar, published an extensive discourse on interdenominational marriages as a supplement to its Spiritual Regulation. On the basis of numerous examples from Greek and Russian history it permitted such marriages under two conditions that were observed until the Revolution of 1917: a) the free exercise by the Orthodox spouse of his faith, and b) raising the children in the Orthodox faith.\footnote{Павлов 1897, 183.}

The question regarding weddings between an Orthodox and a Roman Catholic became important after some Polish provinces were returned to the Russian Empire, where the Latin priests often crowned such marriages without dealing with the Orthodox clergy and without noting the marriage in the register when baptizing children into the Orthodox Church. Regarding this, an imperial order was issued in 1832: such marriages were not deemed valid until an Orthodox priest wed the couple. This rule as a general law was introduced into the Russian Civil Code of Laws. In 1846, there was a proposal to redraft the article, but it was rejected due to the opinion of Metropolitan Filaret. Among the arguments was the idea that the marriage, crowned by a Roman Catholic priest might not be appropriate under the terms of Russian Orthodox ecclesiastical law. It would seem that for the execution of the law, there should have been a rule that a Roman Catholic priest, under pain of law, should not bless such a marriage before it was contracted in the Orthodox Church. But there was no such a provision in the law and the sanction of

\footnote{Павлов 1897, 183.}
the annulment of marriage proved in many cases to be not entirely consistent.\textsuperscript{245}

Canon 72 of Trullo confirmed all the previous rules.\textsuperscript{246} It generally forbids marriages between an Orthodox and heretics, but since they did in fact take place, the Church accepted them as legal and therefore accepted so-called mixed marriages. The terminology about “heretics” (αἱρετικοὺς) is mainly used in both Roman law and in the language of canons when speaking about the heterodox and non-Christians. This can be seen in Justinian law, where he includes among heretics Nestorians, Acephali, and Eutychians,\textsuperscript{247} and Mathew Blastares in his commentary to Canon 14 of the fourth ecumenical council which calls “heretic” those who receive the sacraments, but who are mistaken in some things.\textsuperscript{248}

Another term used to distinguish Orthodox from heterodox is “schismatics” (σχίματικοὺς), which is frequently accompanied with the word “heretic.”\textsuperscript{249} In the Byzantine Empire, civil law made it a requirement that marriage between schismatics and members of the official Church would be prohibited. In the original Latin versions of the Synod of Hippo of 393, Canon 12 forbade the sons of bishops and clergy to marry gentiles (non-Christians), heretics or schismatics. This canon is found in a modified form, with the omission of the term “schismatics” in Canon 21 of the Synod of Carthage.\textsuperscript{250} The permissibility of marriage with schismatics is based on the Church’s interests, in the concept of

\begin{footnotes}
\item[245] Победоносцев 2003, 66.
\item[246] “An orthodox man is not permitted to marry a heretical woman, nor an orthodox woman to be joined to a heretical man. But if anything of this kind appear to have been done by any [we require them] to consider the marriage null, and that the marriage be dissolved. [...] But if any who up to this time are unbelievers and are not yet numbered in the flock of the orthodox have contracted lawful marriage between themselves, and if then, one choosing the right and coming to the light of truth and the other remaining still detained by the bond of error and not willing to behold with steady eye the divine rays, the unbelieving woman is pleased to cohabit with the believing man, or the unbelieving man with the believing woman, let them not be separated.” Schaff 2007, 397.
\item[247] Scott 1932, 130.
\item[248] Рάλλη 1859, T. VI, 173.
\item[249] For example, see Canon 33 of Laodicea.
\item[250] Zhisman 1864, 524–525.
\end{footnotes}
oikonomía (οἰκονομία), dispensation, since otherwise the Church would need to forbid such marriages in much larger numbers.\textsuperscript{251} In this sense, by virtue of oikonomía, marriages with the heterodox might be permitted, since Canon 72 of Trullo even allowed intermarriages between believers and non-believers.

Orthodox canonists later concluded that the distinction between heretics and schismatics, which was made at Hippo, should also be assumed to be made at Carthage and elsewhere. Since other canons which forbid marriages with heretics speak more broadly regarding the intermarriages of Orthodox Christians who are not the children of clergymen, this could be interpreted to mean that marriages with schismatics was permitted.\textsuperscript{252} As canonist Nikolai Suvorov noted, Canon 72 of the Trullan Council was established when multiple Christian Churches did not exist. There existed one universal Catholic Church, which was faced with Christian heresies and sects.\textsuperscript{253} Although intermarriages were eventually tolerated, as we have seen, Byzantine civil law insisted that the children of such marriage unions must be baptized in the Orthodox Church and the Orthodox spouse should enjoy all the benefits in the case of divorce.\textsuperscript{254}

From the pastoral-canonical point of view, disagreement over faith and spiritual matters resulted from the absence of Eucharistic communion of one of the spouses.\textsuperscript{255} Herein lies the canonical anomaly – the non-Orthodox spouse may not take part in Eucharistic communion due to the fact that the spouses do not share the same faith.\textsuperscript{256} Zonaras asked on this matter that if the condition of the soul concerning faith is in contradiction for the spouses, how will they be one soul?\textsuperscript{257} The canonical discipline of the early Church, which later became a practice in the

\textsuperscript{251} Zhisman 1864, 525.

\textsuperscript{252} Caridi 2009, 414.

\textsuperscript{253} Суворов 1889, 280–281.

\textsuperscript{254} Patsavos 2000, 435; Basilika I, 1.51, Scheltema 1955, 9–10.

\textsuperscript{255} A word “communion” (κοινωνία) relating to marriage is also used in the Photian Nomokanonical work with the meaning of “Θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία” [communion of both divine and human law]. Viscuso 1995, 232; Ράλλη 1852, T. I, 271.

\textsuperscript{256} Patsavos 2000, 434.

\textsuperscript{257} Ράλλη 1852, T. II, 472; Viscuso 1995, 233.
Orthodox Church regarding marriage with the heterodox, can only be understood in the light of the theological teaching articulated in the Epistle to the Ephesian 5:23: "marriage mirrors the union of Christ and the Church."  

**Adultery**

In contrast to the notion of fornication (πορνεία), adultery (μοιχεία) is the case when someone has intercourse with another person who is not his or her spouse. If adultery is proved, then it is an impediment to marriage. The canons consider adultery to be a more serious crime than fornication and require strict punishment for it. Canon 20 of Ancyra states that “If the wife of anyone has committed adultery or if any man commit adultery, he must for seven years undergo the different degrees of penance. After this he shall be restored to full communion.”  

This interpretation can be somehow problematic from the textual point of view, since the sentence “αὐτὸν τύχειν” in the Greek text can refer only to the husband. The simplest way to understand this canon is that “an adulteress and an adulterer are to be cut off for seven years.” In this case “αὐτὸν” means only the guilty party and can be applied to either a man or a woman. Basil the Great in his Canon 58 excludes from Holy Communion for fifteen years a man guilty of having committed adultery. The length of the penance is, however, changed in his Canon 77.

Apostolic Canon 61 forbids a man who has committed adultery, fornication or any forbidden act, to enter into the clergy at all.  

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258 Regarding the modern discussion of the topic, the aforesaid Epistle was cited as well in the “Agreed Statement on the Sanctity of Marriage” between the Eastern Orthodox — Roman Catholic Consultation, following its nineteenth meeting, which took place on 7 and 8 December 1978 at the Greek Orthodox Archdiocese in New York City. *The Sanctity of Marriage 1978*, 320, 318.

259 Hefele 1894, 219; Schaff 2007, 73;

260 Ρᾶλλη 1853 T. III, 62.


263 *The Rudder* 1983, 106.
of Neocaesarea goes even further and decrees that the husband of an adulterous woman shall not enter into a ministry of any degree whatsoever. However, if a priest’s wife committed adultery, the priest could either be divorced from her or, if he did not wish to separate, he should leave the priesthood.\textsuperscript{264}

Byzantine law interprets adultery in the same sense as the canons of the Orthodox Church. \textit{Procheiron} includes the law which forbids a man who is accused of adultery with a woman from marrying her: “Ὁ ἐπὶ μοιχεία γυναῖκος κατηγορηθεὶς οὐ δύναται ταύτῃ γαμετὴν ἀγαγέσθαι.”\textsuperscript{265} The same law is also included in the \textit{Alphabetical Collection of Matthew Blastares},\textsuperscript{266} in \textit{Basilika}\textsuperscript{267} and in \textit{Epanagoge}.\textsuperscript{268}

Justinian Novella 134, chapter 10 ordered that if the adulterer has a wife, the dowry and prenuptial donation shall be returned to her. The adulteress shall suffer corporal punishment and be confined in a monastery. If her husband desires to take her back within two years, he can do so; he can cohabit with her without subjecting himself to any risk on this account.\textsuperscript{269} Emperor Leo thought that the crime of adultery is one of those for which a most severe and terrible penalty should be exacted, and one not less appalling than that for homicide. Emperor Leo decreed that both guilty parties shall have their noses slit after being beaten and sheared and as the husband must be indemnified for the injury which he has suffered, it was ordered that he shall be entitled to his wife’s dowry. Moreover, the guilty party was forbidden to marry again. As already seen in the Justinian Novella 134, Emperor Leo also ordered that the adulteress should be confined in a convent, where, by repentance, she can lessen the severity of the penalty, just as if she had been sent into exile.\textsuperscript{270}

\begin{footnotes}
\item [264] \textit{The Rudder} 1983, 514.
\item [265] VII, 24. Zachariae 1834, 54.
\item [266] M, 14. Ράλλη 1855, T. VI, 377–379; Viscuso 2008, 152.
\item [267] \textit{Basilika} XXVIII, 5.12. Scheltema 1962, 1347.
\item [268] \textit{Epanagoge} XVII, 17.28. Zachariae 1852, 113.
\item [269] Scott 1932, 143; \textit{Basilika} XXVII, 7.1. Scheltema 1962, 1358.
\item [270] \textit{Ο Πρόχειρος νόμος} XXXIX, 45. Zachariae 1834, 245; \textit{Epanagoge} XL, 51. Zachariae 1852, 213; See also \textit{Nomokanon} XIII, 5. Ράλλη 1852, T. I, 302; Scott 1932, 235.
\end{footnotes}
Instigation to divorce

Both ecclesiastical and civil law allow for a legally divorced person to marry again, yet the new person with whom the divorced person will conclude a new marriage cannot be involved in a divorce process. This is clearly said in Canon 1 of Laodicea: “By concession, communion should be allowed to those who have liberally and legally contracted a second marriage, but not a clandestine one, after a short time has passed, and they have spent it in praying and fasting.”\(^{271}\) Zonaras, Balsamon and Aristenus treated second marriage that is contracted legally, identically, giving a penance of one year in such cases.\(^{272}\)

2.7 Conclusion of Marriage

Betrothal

Betrothal (µνηστεία) is a promise of a man and a woman to enter into marriage. Betrothal according to Church custom before the wedding was borrowed from Roman law. According to this law, betrothal was performed as soon as the decision to get married was made. For the marriage itself it had no legal value, though there was no doubt that after the betrothal a marriage would take place and although the promise was made mutually in front of witnesses, nevertheless the betrothed persons were not yet obliged to fulfill the promise to marry, and they were given the power to break the engagement and marry another person. This was a logical consequence of the basic teachings of the Roman law – a marriage can be terminated as soon as one party so desires. However, the one who becomes betrothed again without a formal statement that he or she refuses the former marital union, according to the law was subjected to dishonor, and moreover, if during the betrothal were given gifts by both

\(^{271}\) See the note for the correct translation for this canon in The Rudder 1983, 552.

\(^{272}\) Ράλλη 1853, Т. III, 171–172.
sides, a divorcing party had to return twice as much as was received before without the right of claiming back the former gifts.273

As the Church required from its members to enter into marriage only with its blessing, so it required the same respect for the betrothal. The Church subjugated to its jurisdiction the marriage just as it subjugated the betrothal. The freedom from obligation to enter into marriage in Roman law was restricted by the Church from the beginning of its legislative activities and its blessing for the betrothal gave it moral significance, similar to the meaning of marriage. In Canon 69 of Saint Basil the Great and in Balsamon's commentary on the same canon we can find expression of the idea that the betrothal should be strictly kept and be compulsory for every engaged party.274 Canon 98 of Trullo continues in the same spirit with the aforementioned canon and goes even further by giving a penance like for adultery to those who marry a person who is already engaged to somebody else.275

This requirement of the Trullan Council was adopted in Byzantine law as well. The strictness in respect of betrothal was relaxed, however, by Emperor Leo the Wise, who by his two laws ordered that in order to get engaged a person should have reached an age that is prescribed by law, so that promises given at the betrothal were firmer and less likely to be broken. In his 74th (Ὁ αὐτὸς βασιλεὺς στυλιανῷ τῷ αὐτῷ) and 109th (Περὶ τοῦ μὴ γίνεσθαι μνηστείαν ἐνδοθεν τῶν ἔπτα ἐτῶν, εἴτε ιερολογίαν ἐνδοθεν τεσσαρεσχαιδεκαετοὺς χρόνου, καὶ τοῦ τρισκαιδεκάτου ἐπὶ γυναικῶν) Novella he decided that a betrothal had the same force as a marriage and that dissolution could only take place according to the same reasons by which a marriage was dissolved.276

This was confirmed with Novellas 24 and 31 of Emperor Alexius I Comnenus. In light of the definition of the Synod under Patriarch John VIII, according to which kinship and originating from the kinship impediments should have exactly the same meaning in the betrothal as in the conclusion of marriages, it was decreed that a person who was engaged in the Church, and after the death of the betrothed married another, was considered as married as if the before betrothed person was

273 Zhisman 1864, 603.
274 Ράλλη 1854, Τ. IV, 225.
276 Zachariae 1857, 172, 211.
married to the first espoused. Borrowing from Roman law the concept of betrothal, the Church gave its blessing to a promise (ἐπαγγελία) accompanying engagement, so that the promise was started to be seen as sacred, as given before God and accepted by God. In this sense the betrothal is the beginning of the marriage, since it already has the necessary condition which constitutes the essence of marriage, namely, mutual consent of the spouses concerning marital life. Therefore, just like the Mosaic, so too the New Testament law considers the betrothed person to be the wife or husband of the betrothed. Moses refers to “a wife of his neighbor’s" damsel, who was engaged with a known man (Deuteronomy 22:23–4). In the New Testament, the Blessed Virgin, being only betrothed to Joseph, is called his “wife,” and Joseph her “husband” (Matthew 1:18–20).

The time between the betrothal and marriage is not precisely defined either in ecclesiastical or in civil law. It was left for the betrothed to decide, who usually allowed some time to elapse after the betrothal before the wedding, following what was then prohibited by the laws, namely celebrating both at the same time, since they were understood essentially as two different things. Subsequently, in order to avoid cases that could arise in the already mentioned Trullan canon, the Church established that an engagement was made simultaneously with the wedding.

**Time of concluding the marriage**

The time of concluding the marriage in the Orthodox Church is related to the fasting periods and to important religious holidays, during which Christians are advised to leave all earthly things and spend time in spiritual celebration and gladness. In view of this, the days when there should not be such feasts, and therefore, when marriage could not be sealed, were precisely defined by ecclesiastical legislation. With the gradual legalization of days of fasting and major holidays, the time when

277 Zachariae 1857, 359, 376; Zhisman 1864, 154.

278 See Novella 24, Article 2 of Alexius Comnenus. Zachariae 1857, 363; Syntagma of Matthew Blastares, chapter Γ, Article 15 on “περὶ µνηστείος” Ράλλη 1859, T. VI, 180.
someone can or cannot enter into marriage was set. The first record regarding this question can be found in Canon 52 of Laodicea: "Οτι ού δει εν τη Τεσσαρακοστη γάμους ή γενέθλια ἐπιτελεῖν"279 (That weddings and birthday celebrations must not be held during Great Lent). Later Theodoros Balsamon affirmed this practice in his 57th canonical answer280 and Mathew Blastares clarified this rule by stating that it is not fitting that one should participate for pleasure–seeking reasons during the (Church’s) feasts and festivals.281 Canonist Pavlov notes that by the time when the aforementioned canon was interpreted by Blastares, Apostolic Canon 69 and Canon 15 of Peter the Martyr (Alexandrian) ordered Wednesday and Friday as fasting days, and later in the twelfth century the Orthodox Church had established all the fasts which exist to the present time.282

The established days when wedding ceremonies were prohibited were:

1. From November 14, the beginning of Christmas lent until January 6;
2. From the Sunday of Cheesefare week until the first Sunday after Easter;
3. From the first Sunday after the day of Holy Trinity until June 29;
4. During the lent of Dormition of the Mother of God, i.e., from August 1 – August 15;
5. On the days of the Beheading of Saint John the Baptist (August 29), the Feast of the Cross (September 14), and on every Wednesday and Friday of the year.283

However, should a wedding be celebrated on a day when the Church prohibits it, the marriage remains valid and does not lose its legal value if nothing else contradicts the existing laws on marriage. The priest who

280 See Ερώτησις NZ’. Ράλλη 1854, T. IV, 489.
281 T, 5. Ράλλη 1859, T. VI, 463.
282 Павлов 1887, 90–91.
283 Нечаев 1915, 220–221.
contracted the marriage on such a day is subject to penance.\textsuperscript{284} The Russian Orthodox Church at the beginning of twentieth century prohibited contracting marriages also on the feasts of the Protection of the Blessed Virgin Mary, Our Lady of Kazan, the Beheading of Saint Nicholas, as well as on the eve of the temple and other honored local parish holidays.\textsuperscript{285}

\textit{Weddings}

Weddings, when there are no impediments to marriage and all the prescribed preconditions are fulfilled, must be performed in public with witnesses and established ecclesiastical rites. The very character of marriage requires this, as a foundation of social life and as a great sacrament of the New Testament. A secret marriage (\textit{λαθρογαμία}) is strongly condemned by the canons; it is considered illegal,\textsuperscript{286} and the priest who secretly weds someone is condemned to the most strict punishments.\textsuperscript{287} In connection with these ecclesiastical regulations on secret marriages, they were condemned by the laws of the Byzantine Emperors as well, and adopted to the canonical collections of the Orthodox Church, where they became a general law for the Church. This can be seen in the second section of chapter \textit{Γ} of \textit{Synatagma kata stoicheion} of Matthew Blastares\textsuperscript{288} and in the fourth chapter, section \textit{27 of Procheiron}.\textsuperscript{289}

Later, the practice and rules of the Church indicated that the place of a wedding must be a parish church to which both spouses belonged.\textsuperscript{290} The fourth canonical answer of Peter Chartophylax states that it is forbidden for monks to wed, or to celebrate weddings in monasteries (\textit{Ἐρώτημα}).

\textsuperscript{284} See the teaching of Patriarch Manuel II of Constantinople († 1254). \textit{Ῥάλλη} 1855, T. V, 116.
\textsuperscript{285} Нечаев 1915, 234.
\textsuperscript{286} See Canon 1 of Laodicea and its interpretation. \textit{Ῥάλλη} 1853, T. III, 172.
\textsuperscript{287} \textit{Ῥάλλη} 1855, T. V, 116.
\textsuperscript{288} \textit{Ῥάλλη} 1859, T. VI, 154.
\textsuperscript{289} Zachariae 1837, 34.
\textsuperscript{290} Симеон 2009, 399–340.
In exceptional cases a marriage could be celebrated outside the Church building, as Balsamon illuminates in his fourteenth canonical answer. In his answer, Balsamon quotes the fourth Novella of Emperor Leo the Wise and says that some Church rituals, baptism for example, can be celebrated outside the Church. This interpretation is analogical to his commentaries in Canons 31 and 59 of Trullo, which he also cites in the commentary to Canon 58 of Laodicea. As the fiftieth title of Kormtšaja Kniga indicates, in Slavic Churches a practice was established in which the wedding must be celebrated before midday after the liturgy, or before the liturgy.

The legitimate marriage requires witnesses, in front of whom the celebrants testify their free will to enter into marriage. The number of witnesses in the wedding is standardized in the ecclesiastical regulations according to the teaching in the Scriptures, which points out cases when witnesses are required. Besides this, the canons indicate that only one witness is not sufficient. The canonical collections of the Orthodox Church decreed that weddings must be celebrated in front of no less than two witnesses. Witnesses were required to be of legal age and to fulfill all the conditions that were needed regarding any agreement.

Balsamon in his commentary to Canon 70 of Trullo also points out that women were prohibited from being witnesses in marriages. The right to wed belongs to priests and weddings must be concluded by the rite of the Church found in the prayer book in accordance with set prayers for the first time or the second time of marriage. The Orthodox Church does not recognize as legal any other form of marriage, even if it

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291 Ράλλη 1855, Τ. V, 369.
292 Ράλλη 1854, Τ. IV, 458.
293 Ράλλη 1852, Τ. ΠΙ, 372, 400.
294 Ράλλη 1853, Τ. ΠΙΙ, 224.
295 Παβλού 1887, 236.
296 See Matthew 18:16.
297 See Apostolic Canon 75. The Rudder 1983, 134;
298 Nomokanon IX, 2. Ράλλη 1852, Τ. Ι, 178; Blastares Τ, 2. Ράλλη 1859, Τ. VI, 154.
299 Ράλλη 1852, Τ. ΠΙ, 469.
follows all the precedent conditions and there are no marital impediments.300

2.8 Divorce

Divorce is an act carried out by competent authorities, consisting in the dissolution of a legal and valid marriage. In order that this act takes place, such justification is required that would, so to speak, outweigh the idea of the indissolubility of marriage as a union entered into for a lifetime. Among the Jews and the Romans extensive freedom to divorce existed. According to Roman law, the basis of a divorce could serve as a legitimate reason, but also simply the mutual agreement of the spouses was adequate. When Christianity became the dominant religion in the Roman Empire, the Roman emperors, due to the insistence of the Church, tried to limit arbitrariness in the case of divorce. But a decisive prohibition against the divorce commonly found in the Roman Empire namely divorce by mutual agreement, against which the teachers of the Church revolted, can be found for the first time in the legislation of the Emperor Justinian.301

Legal standards concerning the dissolution of marriage in the Byzantine Church before the end of the ninth century were expressed to the full extent in the Nomokanon of Patriarch Photios. Rules concerning divorce are placed in the fourth chapter of the thirteenth title, with the heading “About those who divorce” (Περὶ τῶν διαζευγνυμένων). Under this heading all the canons related to this issue are mentioned.302 From the canons mentioned in the Nomokanon, the fifth Apostolic canon forbids bishops, priests and deacons from divorcing their wives under pretext of reverence, threatening those who are found guilty of this with excommunication (ἀφοριζέσθω),303 and those who disobeyed would be removed from office.304

300 Милаш 1897, 588.
301 Красножен 1900, 142–143.
302 Рάλλη 1852, Т. I, 294.
303 It should be noted that in Orthodox canon law, “ἀφοριζέσθω,” when speaking about the laity, means excommunication from the Holy Mysteries, from
Byzantine exegesis of the Holy canons, such as Zonaras, explained
that this rule prohibited divorce in which no reasons for dissolving the
marriage were given (χωρὶς αἰτιῶν). Aristine for his part spoke about the
blessed reason (ἀνευ ἐνόμον αἰτιῶν), i.e. false imaginary motives as a
cause for anathema, as if marriage in this case were impure
(ἄκαθαρσία). The second rule that Nomokanon mentions is Canon 14
of the Synod of Gangra, which decrees anathema to a wife (ἀνάθεμα
ἐστιν) who abominates her marriage, abandons her husband and wishes
to depart from him. Regarding this rule, Theodore Balsamon refers to
Apostle Paul. A wife who abandons her husband on account of his
hatefulness, was not considered a reason for divorce in Balsamon’s view.
Zonaras in his turn added that if a wife leaves her husband who did not
want to live separately, or a husband puts away his wife who did not want
to divorce (τὸ διαζύγιον), in such case if one of the spouses wants to
dissolve the marriage (λύειν τὸν γάμον), avoiding legal cohabitation as
an impurity, then the spouse will fall under anathema. Canon 14 of Synod
of Gangra hereby prohibits the separation of spouses, not to mention
divorce.

The third rule which is added to Nomokanon under the title of
divorce, is Canon 102 of the Synod of Carthage. In this case, a willful
termination of joint married life, from the side of the husband or the wife,
is not consistent with the teachings of the Holy Scriptures. Byzantine
commentators of canons considered that this rule was based on the

participation in some prayers, and placing a layperson in the rank of penitents
for a set period. When speaking about the priesthood, “ἁφορισμός” means
prohibition in ministering, removing from office and place of service, but it does
not prohibit participation in the Holy Mysteries and communion with the
Church. See the Apostolic Canon 25, Canon 36 of the Synod of Carthage, and
Canons 3, 32 and 51 of Basil the Great.

304 Ράλλη 1852, T. II, 7.
305 Ράλλη 1852, T. II, 7–8.
306 “Do not deprive one another except with consent and the wife does not have
authority over her own body, but the husband does. And likewise the husband
does not have authority over his own body, but the wife does (1. Corinthians 7:4–
5).”
307 Ράλλη 1853, T. III, 110.
words of Christ.\textsuperscript{308} Carthagean fathers saw that adultery was the only valid reason for divorce, and a spouse who committed adultery was to live either in celibacy, or to be reconciled with the other spouse.\textsuperscript{309} When this rule was violated, Zonaras and Aristine thought that the perpetrators must be subjected to repentance in having committed the sin of adultery. In order to make everyone follow this rule, the Synod of Carthage asked for the publication of the corresponding royal law (νόμον βασιλικόν).\textsuperscript{310}

Regarding the dissolution of marriage by the aforementioned Carthagean rule, besides adultery, if there was good reason for it, this rule did not apply. One could conclude that neither the husband nor the wife could ever remarry, despite the fact that there was just cause why their marital life had stopped. In the conclusion of this rule, the Carthagean fathers spoke of the necessity to apply to the State the right to publish a particular royal law concerning a regulation that they compiled. This can be regarded as proof that the Christian Church recognized certain rights of civil law in relation to marital issues, since only the State could guarantee all the civil implications of marriage as a legal contract.

\textit{Nomokanon} continues to observe Canons 9, 35, 48 and 77 of Saint Basil the Great. In the ninth canon Saint Basil points out that Christ’s dictum regarding the impermissibility of divorce, except in cases of fornication which apply equally to husband and wife, according to the established tradition (συνήθεια), was not accurate. The tradition refers to wives more strictly (πολλὴ ἀκριβολογία) than to husbands; but even if the husbands were the adulterers, Basil the Great recommends that wives keep them. Consequently, a wife becomes an adulteress if she leaves her husband for another man. The husband is worthy of leniency (συγγνωστὸς ἔστι) and the woman cohabiting with him in the new

\textsuperscript{308} “Whoever divorces his wife for any reason except sexual immorality causes her to commit adultery; and whoever marries a woman who is divorced commits adultery” (Matthew 5:32); “Now to the married I command, yet not I but the Lord: A wife is not to depart from her husband. But even if she does depart, let her remain unmarried or be reconciled to her husband. And a husband is not to divorce his wife” (1 Corinthians 7:10–11); and “The one bound to a wife should not seek divorce. The one released from a wife should not seek marriage” (1 Corinthians 7:27).

\textsuperscript{309} Here it should be noted that the Slavic \textit{Nomokanon} recognizes divorce only in cases when the wife has committed adultery, and does not mention husbands.

\textsuperscript{310} Ράλλη 1853, Τ. III, 548–549.
marriage will not be condemned. In this case the guilt is on the shoulders of the first wife who left her husband, no matter for what reason. If, for example, the wife left her husband because she was subjected to beatings and could not stand the blows, then she was advised to bear them better rather than divorce her husband.\textsuperscript{311}

Further, if the divorce was motived with the reason that the wife could not take the beatings, this excuse (πρόφασις) was not worthy of respect. In addition, if a wife abandoned her husband because he was living in fornication (ἐν πορνείᾳ), this was not a valid reason either, because in that case she had to live with her husband in order to save him (1 Corinthians 7:16). When then did Saint Basil give a wife a reason to legally leave her husband? If the husband left his wife and took another woman, in that case not just the husband but the new wife as well would be guilty of adultery. This rule characterizes the ecclesiastical custom or divorce practice in force in Saint Basil’s time. The essence for such strict divorce practice can only be the fact that husband and wife have equal rights in a Christian marriage. The holy father does not, however, recognize reasons for divorce, such as spousal abuse, dissolution of property, different beliefs, or the fact that a husband is living in sin.\textsuperscript{312}

In view of the fact that Saint Basil the Great in his Canon 9 and 21 speaks about the dominant custom of that time whereby a husband who has engaged in fornication with another woman after leaving his first wife, is given leniency before taking this woman as his second wife after a given penance. We can assume that the Church father understands here the so-called concubinatus, i.e. the permission given by Roman law to the long-term sexual union of an unmarried man with an unmarried woman, who did not become his wife. Undeniably it was contrary to good morals to have a concubine and at the same time to live with a wife. Concubinage became a sort of quasi-legal relationship that was not

\textsuperscript{311} Ράλλη 1854, T. IV, 120–121. Compare the subject of beating to Justinian 117 Novella, 14th chapter, which says that: “If a man should beat his wife with a whip or a rod, without having been induced to do so for one of the reasons which We have stated to be sufficient, where the woman is at fault, to cause dissolution of the marriage, We do not wish it to be dissolved on this account; but the husband who has been convicted of having, without such a reason, struck his wife with a whip or a rod, shall give her by way of compensation for an injury of this kind (even during the existence of the marriage) a sum equal in value to the amount of the antenuptial donation to be taken out of his other property.” Scott 1932, 59.

\textsuperscript{312} Ράλλη 1854, T. IV, 120–121.
adulterous (since that would be a crime in Roman law) but also did not entitle the concubine to anything; any children would follow her status. The practice of concubinage in the Roman Empire was confronted with the problem, namely how to determine whether a given relationship was marriage or concubinage.\(^\text{313}\) Saint Basil, though condemning concubinage and giving penance for the husband’s fornication, did not recognize adultery as the only legitimate reason for divorce. The custom of the time was to be lenient towards a husband who cohabited with another woman when left by an adulterous wife, but with adultery Saint Basil blamed not only the husband when he left his wife and took another woman, but also the woman who cohabited with him.\(^\text{314}\)

Canon 35 of the same Saint says that if the husband is abandoned by his wife, it is necessary to consider the reason (αἰτία) for such abandonment and if it turns out that his wife has left her husband for no reason (ἀλόγως) then he is worthy of leniency, and his wife is subject to penance; leniency to the husband was given because he was in communion with the Church. The term “ἀλόγως” can also be understood as a purely technical expression, meaning a divorce without the presence of legal conditions and formal permission for it, i.e. without the compliance of legal order and process.\(^\text{315}\) In the interpretation of this rule, Zonaras explains that leniency for the husband is given only when his wife left him without any reason (χωρίς εὐλόγου αἰτίας). This reason does not lie in the fact that the husband enters into another marriage, but in the fact that he will not be excluded from the Church. Hence, divorce, regarding the ninth and eighth canon of Basil the Great is possible only due to the fault of adultery, for which the wife bears a penance when she leaves her husband.\(^\text{316}\)

Canon 48 of Basil, which was also mentioned in the Nomokanon says that a women who was left by her husband should continue her life in

\(^{313}\) Frier 2004, 51. Men normally took as concubines women of a lower social class than themselves – often their ex-slaves. Respectable women were not supposed to enter into concubinage.

\(^{314}\) Ράλλη 1854, T. IV, 122–123.

\(^{315}\) Μιχαηλ 1904, 680–681.

\(^{316}\) Ράλλη 1854, T. IV, 179–180.
celibacy. Balsamon’s commentary indicates that the meaning of this canon is whether or not a woman should unite in matrimony with a lawful husband while she is unlawfully divorced from her previous husband (εἰ ὁφείλει νομίμως ἀνδρὶ συνάπτεσθαι ἢ παραλόγως διαζύγειος τοῦ οἰκείου ἄνδρός). Basil, basing his opinion on the famous words of the Lord, stated that a wife who was left by her husband for reasons other than adultery, which was the only legal reason for divorce, turns out to be an adulteress when entering into a new marriage with the another man (ἐὰν ἐτέρω συζεύχεται). Such a women, in Balsamon’s opinion, should live in silence (ὥστε ἐξ οὐκ ἀξίων), which no doubt meant living in a monastery. She was advised to bear the unlawful divorce and to encourage her husband to return to her, but if she instead of this entered into a new marriage with another man, then she should be condemned as an adulteress, though she did not give a reason for abandoning him in the first place, while her husband did.

Hence, if the husband leaves his wife without a legitimate reason, this marriage cannot be considered terminated. Therefore, the husband and wife, when entering into another marriage, both commit adultery, and in the Church’s opinion are considered guilty. To avoid this sin, the wife, even if she was left innocently, should not enter into another marriage until there is a legitimate reason for a valid divorce from her first husband. This canon was also applied vice versa in cases where a wife left her husband.

In Canon 77, Saint Basil continues to define the reason and consequences of divorce by stating that a man who abandons his legally wedded wife and marries another woman is liable to the judgment of adultery. Saint Basil the Great ruled that such persons must weep for a year, listen at the side of the Church’s doors for two years, confessing their sins to parishioners and asking for their prayers. They must kneel

317 “But the woman abandoned by her husband ought, in my opinion, to stay. For if the Lord has said that if any man leaves his wife except on grounds of fornication, he is causing her to commit adultery (Matt. 5:32), since as a result of his calling her an adulteress he has debarred her from communion with any other man. For how can a husband be considered irresponsible as the cause of adultery, while the wife, deemed an adulteress by the Lord on account of communion with another man, is so denominated?” The Rudder 1983, 824.

318 Ράλλη 1854, T. IV, 200.

319 Compare with Canons 87 and 93 of Trullo.
(ὑποπίπτειν) and listen to the prayers that are read to them for three years, in the seventh year stand together with the faithful, and then be deemed worthy of participating in the Holy Communion, if with tears they do penance. It should be noted that Basil the Great only follows here the regulations of other fathers, and in his Canon 58 he already condemned a person as guilty of adultery by excluding him or her from holy communion for fifteen years. For penance the adulterer must weep for four years, listen to the Holy Scriptures for five years, kneel for four years and stand for two years with the other faithful without participating in Holy Communion.

Nomokanon also mentions Canon 87 of Trullo, which provides a synthesis of the already mentioned canons of Saint Basil. The canon states that she who has left her husband because of another man is an adulteress. If a wife appears to have departed from her husband without a reason (ἀλόγως), the husband is deserving of pardon (συγγνώμη) and she of penance. Pardon shall be given to the husband so that he could be in communion (τὸ κοινωνεῖν) with the Church. But the husband who leaves his lawful wife (τὴν νομίμας συναφθέγγονα) and takes another, is guilty of committing the sin (κρίματι) of adultery. As it has been decreed by the Fathers, such sinners must be “weepers” for a year, “hearers” of the Holy Scriptures for two years, “kneelers” for three years, and in the seventh year stand with the faithful and thus be counted worthy of the Oblation [if with tears they do penance].

As we can see here, the discipline that Saint Basil the Great set was relaxed after 200 years when the Church fathers first laid down the rules on adultery. Zonaras refines the situation of the adulterous wife who without reason (ἀναρτίως) leaves her husband for another man, that even if she wanted to come back to her previous husband against the husband’s will (ακοντος αὐτοῦ), she should not be taken back because she has been defiled. Regarding this adulterous desecration, according to the Holy Fathers, she is to be ordered to do penance, and her husband

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320 Ῥάλλη 1854, T. IV, 239–240.
321 Ῥάλλη 1854, T. IV, 216.
322 Schaff 2007, 402.
323 Schaff 2007, 403.
would suffer no punishment and would remain in communion with the Church.\textsuperscript{324}

Besides adultery and malicious abandonment of one of the spouses, some reasons for divorce can be also interpreted as impediments.\textsuperscript{325} Canon 53 of Trullo prohibits the marriage between a godfather and the godson’s widowed mother; such marriages must be dissolved if they for some reasons were contracted. Based on this rule, some who wanted to find a legitimate reason for divorce became godfather or godmother to their own child and in that way achieved their goals without fear of punishment. In order to stop such misuse, in the eighth century an imperial novella was published which legally established the aforementioned reason for divorce with the corresponding heavy punishment and prohibition of the perpetrator entering into a new marriage.\textsuperscript{326} Other well-founded reasons for divorce were ordination as bishop in cases where the priest’s wife allows such a separation, as mentioned in Canons 12 and 48 of Trullo. On the same grounds, divorce can also be allowed for those who entered into monkhood.

Nomokanon included Byzantine and Roman civil laws regarding divorce as well. These laws were later adopted in Rus’, although they were not fully implemented. In Rus’ the custom and partly the law allowed divorces in cases which would be prohibited by Byzantine law, and vice versa. For example, divorce would not granted on the grounds of the illness of one of the spouses, but was granted in the cases of cruelty to a wife or when the husband drank away her property. Also in cases where the wife suffered from infertility, divorce was at times granted. Such a custom was unknown for the Slavic Nomokanon. Finally, in the case of a criminal offense committed by one of the spouses, the innocent wife was obliged to follow her husband into exile, but the husband in such cases did not share the fate of his wife if she was found guilty.\textsuperscript{327}

\textsuperscript{324} Ράλλη 1852, Τ. ΙΙ, 505–506.

\textsuperscript{325} Abandonment of the Christian faith is one of them, and as pointed out in chapter 2.6, this is based on Canon 72 of Trullo.

\textsuperscript{326} Compare Blastares B, 8 (Ράλλη 1859, Τ. Υ, 139.) and 15th canonical response of Peter Chartophylax. Ράλλη 1859, Τ. Τ, 371.

\textsuperscript{327} Павлов 1902, 383–384.
Thus, examining the canons of the Church quoted by Patriarch Photios in the thirteenth title of his *Nomokanon*, the following conclusions can be made:

1. Marriage should not be dissolved without an acceptable reason.\(^{328}\)
2. Such reasons as abominating the marriage, false piety, cruel treatment by the husband of his wife, embezzlement and taking a concubine were not considered to be acceptable reasons.\(^{329}\)
3. Adultery is considered a lawful reason for divorce\(^{330}\) and as a dogmatical reason for divorce has equivalent application for both husband and wife.\(^{331}\)
4. The tradition of the Church has developed a more lenient attitude towards the husband than the wife.\(^{332}\) That is why having a concubine was not recognized as a lawful reason for divorce, and the wife should not leave her husband on account of adultery if he repented.\(^{333}\) The wife, however, could not be taken back against the will of her husband.\(^{334}\)
5. A spouse who is guilty of adultery is subjected to seven years of repentance, after which entrance into a new marriage is denied – the guilty party is only allowed to be restored to communion with the Church.\(^{335}\) Leniency was only given to the innocent spouse, who could enter into a new marriage after the lawful divorce.\(^{336}\)
6. Divorce is considered legal as well in cases when the wife is willing to separate from her husband for the sake of his ordination

\(^{328}\) Fifth Apostolic canon and Canon 14 of Gangra.

\(^{329}\) Fifth Apostolic canon, Canon 14 of Gangra and Canon 9 of Saint Basil the Great.

\(^{330}\) Canon 102 of the Synod of Carthage, Canon 9 of Saint Basil the Great, Canons 48, 77 and 87 of Trullo.

\(^{331}\) Canon 9 of Saint Basil the Great.

\(^{332}\) Canon 35 of Saint Basil the Great.

\(^{333}\) Canons 9 and 21 of Saint Basil the Great.

\(^{334}\) Canon 9 of Saint Basil the Great, Canon 87 of Trullo.

\(^{335}\) Canon 107 the Synod of Carthage, Canons 48 and 77 of Saint Basil the Great, Canon 87 of Trullo.

\(^{336}\) Canon 35 of Saint Basil the Great.
as bishop, and for joint or separate entry of spouses into monastic life.\textsuperscript{337}

\textsuperscript{337} Canon 12 and 48 of Trullo.
3. RUSSIAN LEGAL PRACTICE AND MATRIMONIAL NORMS AT THE BEGINNING OF THE TWENTIETH CENTURY

3.1 Particular Laws of the Russian Orthodox Church

The *Spiritual Regulation*[^338] (Духовный Регламент) was the primary document defining the legal status of the Orthodox Church in Russia during the Synodal period until 1917. From a historical point of view, the publication of the *Spiritual Regulation* draws a clear distinction between the former and the new law of the Russian Church. In relation to the past, it abolished the ancient Russian Church regulations in all those cases where Church jurisdiction extended over cases that were non-ecclesiastical in nature.[^339] With regard to the future development of Russian ecclesiastical law, the *Spiritual Regulation* was the basis that directly or indirectly supported the legal system of the Russian Church.[^340] It was signed by the bishops, archimandrites, senators, and finally by the

[^338]: *Spiritual Regulation* is an official translation of “Духовный Регламент.” “Регламент” or “regulation” is a translation of the Latin term word “regulamentum,” which means “rule.” The term “регламент” is foreign to Orthodox canon law, and for that reason the translation of Latin words into Greek might be problematic. Orthodox canon law uses a Greek word “κανόνας” instead. In 1911 the *Spiritual Regulation* was translated into Greek by Archbishop Eugenios Bulgarisa. Бердников 1913, 880–885; Павлов 1902, 184–185.

[^339]: Muller 1972, XXXVII.

[^340]: Православная энциклопедия 2007, Т. XVI, 433. The *Spiritual Regulation* was the work of a professor at Kiev’s Theological Academy, Feofan Prokopovitš, who supported the concept of a Russian national Church under the authority of the tsar as the “supreme bishop.” Feofan argued that an ecclesiastical council would be more appropriate to govern the Church than a single patriarch. Significantly, this critical document contained much more than a mere justification of the decision of Peter the Great to replace the patriarchate with a collegial board (at first called the “Spiritual College,” but soon renamed the “Most Holy Synod”). Feofan had already written a draft regulation in 1719, i. e., two years before the constitution of the Holy Synod. After the tsar made the revisions, the draft was read twice in the senate and supplemented by new observations.
tsar himself. With these signatures it was sent to Moscow and other places for the signatures of those who had not attended the senate. It was then published with the manifesto of January 25, 1721.  

The Spiritual Regulation established the Spiritual Board as the highest body of ecclesiastical authority of the Church while being at the same time a governmental department. From the moment of opening the Holy Synod on February 14, 1721 the Spiritual Regulation defined the structure and functions of the Holy Synod, thereby establishing a system of state control over Church activities. The initial publication of the Spiritual Regulation was followed by a second publication on September 16, 1721. In both form and content, the Spiritual Regulation is not only a legislative act, but also a literary monument. It is filled with general theoretical arguments, e.g., for example, the superiority of collective management over individual management, and contains different projects, such as the establishment of academies in Russia. On occasion it descends into absurd detail.

Spiritual Regulation determined the structure of the Synod: 12 members: 3 bishops and archimandrites, abbots and archpriests. It was headed by the President (chairman). However, according to the manifesto of January 25, 1721, it included the President of the Synod, two vice presidents, four advisors and four assessors, i.e., a total of 11 persons. The structure was to change often. All members of the Synod, including the President, had equal votes. The President only symbolically represented the First Hierarch; in practice the President did not differ in rights from the other members of the Synod. Although it was the highest judicial authority and administrative body of the Russian Church, the Synod did not have the authority of the Patriarch. However, it acted on behalf of the tsar; it received from him the authority to execute decrees and orders related to all Church affairs.

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341 Верховской 1916, 3
342 Православная энциклопедия 2007, Т. XVI, 433.
343 For example, such is the case when it comes to the power and honor of the bishop during an episcopal visitation to their dioceses. Here are explained how the bishops should make a visit to the diocese during the summer, because products are cheaper in that period of time and how the bishops should set up a tent near to the city, not bothering the presbyterate by finding an apartment during the visit. Духовный Регламент 1897, 40.
The *Spiritual Regulation* presented in a strictly legal manner only the general principles and procedures of Synodal administration from the establishment of the Holy Synod in place of the Patriarchate, the central Church administration, to the relationship of the Holy Synod to the imperial power and to diocesan administration. Everything remained in the same form as had been defined by Peter I, but the new regulations required to be submitted for imperial approval. The earliest of such amendments were published in 1722 and were usually printed at the end of the Spiritual Regulation as additions.\(^{345}\) The *Spiritual Regulation* was the rule for the faithful of every rank; all Church administration had ecclesiastical-juridical and state-juridical obligations.\(^{346}\)

As noted by the respected canonist A. S. Pavlov, the relation of the Holy Synod to the supreme power of the State was the same as the relations of other institutes to the supreme power: “The Holy Synod receives for execution imperial decrees and commands concerning all cases of the Russian Orthodox Church.”\(^{347}\) A decision of the Synod has the force of law only after approval by the supreme authority. In general, all cases provided for the Holy Synod by the *Spiritual Regulation* of Peter the Great, were expressed “by order of His Imperial Majesty”; this was the customary form of Synodal orders and decrees.\(^{348}\)

All the tsar’s edicts and manifestos were read in the parishes during Sunday services and parishioners were forbidden to leave the Church before they were read. Priests were threatened with defrocking if they did not apply these regulations. In addition, decrees regulating cult activities were issued, which can be regarded as an intrusion of secular power into

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345 Павлов 1902, 186. These additions created an ambitious program to enlighten and eradicate superstitions in the Church and among the laity by improving ecclesiastical administration and establishing seminaries to educate parish clergy, defining their qualities and duties (especially the duties of the spiritual fathers), and introducing the parish registers and rules concerning the monastic life, among many other regulations.

346 Заозерский 1888, 129.

347 Павлов 1902, 178.

348 In fact, the Church became part of the state apparatus: the Synodal oath of allegiance to the imperial family pledged to uphold the public interest and to honor the monarch himself as the supreme judge in spiritual matters. The Holy Synod changed the form of oath in 1901. Православная энциклопедия 2007, Т. XVI, 433.
the canonical affairs of the Church. The legislation prescribed annual confession of parishioners, which was recorded in the parish registers.349

The Charter of Diocesan 350 Consistories (Устав Духовных Консисторий) was a body of laws governing the Diocesan administration of the Russian Church under the ruling bishop that operated as a deliberative and executive institution. Unification in the Diocesan Office was introduced by the Decree of the Holy Synod on July 9, 1744, which defined that all the diocesan administrative bodies should have the same name, “Diocesan Consistory.” Prior to 1768, only monastics of priestly ranks, i.e., archimandrites, abbots and monks, could participate in the Diocesan Consistory. Afterwards the secular clergy were appointed as members of the consistory. In 1797, Emperor Paul I decreed that half of the members of the Diocesan Consistory were to be monks and the other half were priests from the secular clergy. On March 27, 1841 (nearly 100 years after the widespread introduction of the Diocesan Consistory as a body of the Diocesan Office), the Charter of Diocesan Consistories, which

349 Полное Собрание Постановлений и Распоряжений 1869, 25, 52, 224. By the edict of the tsar, parishioners who did not make an annual confession were given a fine. Priests were strictly to account for the parishioners who had not made confession and were to inform not only ecclesiastical but also secular authorities. This measure was to identify “heretics” who evaded confession. In doing this, state law demanded Orthodox priests to violate basic rules of canon law, that is, the secrecy of the confession. For violation of the secrecy of confession, see Canon 132 of the Synod of Carthage; Canon 34 of Saint Basil; and Canon 27 of Saint Nichephoros.

350 The word “духовных,” literally “spirituals,” is translated here as “diocesan,” since by “spirituals” were meant the highest administrative body of dioceses. Originally, consistories (Latin consistorium, “place of assembly”) were secret councils of the Roman emperors, first introduced by Emperor Adrian (117–138). The term was used to designate the emperor’s cabinet. In the Roman Catholic Church consistories refer to the assembly of cardinals presided over by pope. The name also came to be used to refer to diocesan consultative boards of the ruling bishop of the Roman Catholic Church, as well as to parish councils in some Protestant churches. In Russia in the beginning of eighteenth century, a consistory became known as an institution that helped in the management of the ruling bishop of the diocese. The first consistories were established in the dioceses of Novgorod and Staraja Russa in 1725; Astrahan and Jenotajevsk in 1728; Tambov and Mitšurinsk, Nizhnyi Novgorod and Arzamas, Pskov and Velikiye Luki in 1730; Vladimir, Suzdal, Tobolsk and Tjumen in 1731; Irkutsk and Angarsk in 1732. Until 1744 there were no uniform names regarding the diocesan institutions. They were not only called a consistory, but also spiritual orders, dicastery (law-court), offices and spiritual boards. Православная энциклопедия 2007, Т. XVI, 392.
had been approved by the Holy Synod, was published for the first time.\footnote{Рункевич 2005, 230. Runkevitš notes that there is evidence that the idea of creating uniformity among Diocesan Consistories belongs to Emperor Nikolai I in consideration of the report of the chief procurator, Count Pratasov recommending an increase in the staff of Saint Petersburg’s Consistory.} It was composed of 364 articles, and divided into four sections. The Charter was reprinted and revised for the first time in 1852 to conform with the latest legislation. The reissue of the Charter in 1883 did not bring any major changes in the new edition. In its new form, the Regulations for Ecclesiastical Consistories was enacted on April 9, 1883.\footnote{Православная энциклопедия 2007, Т. XVI, 392.}

The Book of Rules (Книга Правил) is a collection of canonical rules. Emperor Nicholas I proposed the renewal of the Holy Synod; as a result, the Book of Rules was published based on the report of Count Pratasov, the procurator of the Holy Synod. The drafting of the Book of Rules was started in 1734, but then remained an incomplete publication of the edition concerning canonical rules of the Orthodox Church. The Book of Rules contains Apostolic canons, canons of the Holy Fathers, canons of the local Synods and canons of the seven Ecumenical Councils. The translation of the edition was undertaken by a special commission of the Holy Synod. Metropolitan Filaret of Moscow oversaw the work of the commission and made necessary revisions. The work was successfully published in 1839. In 1840 Archimandrite Platon at the request of the Holy Synod, compiled the index, which, after correction by Metropolitan Filaret, was published separately in addition to the earlier publication of the Book of Rules. In 1842 it was included in the new edition.\footnote{Рункевич 2005, 228.}

Complete Collection of Regulations and Orders by the Office of the Orthodox Confession of the Russian Empire (Полное Собрание Постановлений и Распоряжений по Ведомству Православного Исповедания Российской Империи). The Complete Collection was published between 1869 and 1915. It consisted of sixteen books, which included all the imperial commands and decrees, the decrees of the Holy Synod approved by His Majesty, the reports of the Procurator and the views of the State Council relating to the Orthodox faith in Russia for the years 1721–1772, 1796–1801 and 1825–1835.\footnote{Суворов 1889, 348.} Laws relating to various

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\[351\] Рункевич 2005, 230. Runkevitš notes that there is evidence that the idea of creating uniformity among Diocesan Consistories belongs to Emperor Nikolai I in consideration of the report of the chief procurator, Count Pratasov recommending an increase in the staff of Saint Petersburg’s Consistory.

\[352\] Православная энциклопедия 2007, Т. XVI, 392.

\[353\] Рункевич 2005, 228.

\[354\] Суворов 1889, 348.
aspects of the external situation of the religious institution in the State were placed not just in the *Complete Collection*, but also in the *Code of Laws of the Russian Empire*.  

Most of the sources of Russian ecclesiastical law were scattered in different publications. Very few of them were related to the particular branches of Church government and were published in separate books and pamphlets similar to the *Spiritual Regulation* and the *Charter of Diocesan Consistories*. These were: statutes of the religious institutions, instructions to church warders, deans of the parishes and monasteries, positions of the patronages, brotherhoods, missionary societies, etc.

Many decrees of the Holy Synod and other legal acts of the Office of Orthodox Confession were not codified. For this reason, in 1868, the Holy Synod established a special drafting committee for the publication of a *Complete Collection of Regulations and Orders* by the Office of the Orthodox Confession of the Russian Empire in chronological order, using material stored in the archives of the Holy Synod collections and indices of Russian ecclesiastical laws, drawn from the manuscripts of the period before the beginning of the Synodal period. The committee also included in its publication the laws from the *Spiritual Regulation* of Peter the Great. However, as professor of canon law, S. V. Suvorov noted, the publication of the complete collection of decrees of the Russian Orthodox Church was difficult and challenging, and for this and other reasons, the project was never finished.

*The Book of Positions of the Parish Priests* (*Книга о должностях пресвитеров приходских*). Russia’s first guide to pastoral theology was published in Saint Petersburg in 1776. By 1833 it was reprinted twenty times. Most scholars recognize the authors of this work as Bishop of Smolensk Parfeni and Archbishop of Mogilev Georgi. It contains instructions regarding the execution of duties of parish priests. Since 1776 it was published under the auspices of the Holy Synod, without an

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355 Справка 1914, 150–151.
356 Суворов 1889, 347.
357 Павлов 1902, 187.
358 See the foreword in *Полное Собрание Постановлений и Распоряжений*.
359 Суворов 1889, 348.
360 See the introduction to the book in *О должностях пресвитеров приходских*.
author’s name. Along with instructions, which were mostly borrowed from Kormtšaja Kniga, writings of the Fathers, and the Spiritual Regulation, there are Synodal decrees which were compiled before the publication of the pastoral guide. The Book of Positions of the Parish Priests also contains rules that were completely new for Russian canon law.361 The Holy Synod had repeatedly used the book to impose ecclesiastical penances for different crimes.362 Nevertheless, Russian Church legislation was based on the fact that any new legislative measure undertaken, subject to whatever diocesan administration and court it belonged to, must conform in spirit and substance with the ancient ecumenical decisions, which always retain their force.363

The Code of Laws of the Russian Empire and the Penal Code (Свод Законов Российской Империи) serves as a source of law for the Russian Orthodox Church in all those cases not defined by legislation specific to the Orthodox confession.364 In the period under consideration, the Russian State by its legislation encroached upon the field of ecclesiastical law. The emphasis on the mutual influence of the Church and secular law dramatically shifted toward the latter. This situation stemmed from the fact that the Emperor, “as the Christian Emperor, is the supreme defender and the keeper of the dogma of the dominant faith and the guardian of Orthodoxy.”365 Accordingly, the religious foundation of the Russian Empire, as part of its social and political system, was guarded by the State and this approach was reflected in secular law.

State legislation provided that within the State, only the dominant Orthodox Church had the right to convince other Christian denominations and other religious groups to accept the teachings of its faith. The priests and laity of other Christian confessions and religious groups were strictly forbidden to interfere in the religious life of others, under threat of criminal penalty by the law. Any influence on the

361 For example, a rule that allowed non-Orthodox Christians to be godfathers for Orthodox parents, provided that the godfather read the symbol of faith as it is read in the Orthodox Church during the celebration of the sacrament, i.e., without the formula “and the Son” Павлов 1902, 186.

362 Павлов 1902, 187.

363 Справка 1914, 103.

364 Павлов 1902, 188.

365 Article 64. Свод законов Российской империи 1912, Т. 1, Ч. I, 5.
Orthodox Church in order to change the order of its rules was strictly forbidden. Religious freedom was provided to all foreigners living in Russia. However, freedom of religion for aliens did not mean recognition of the equality of religions. The propaganda of foreign faith in Russia was categorically prohibited. The seduction of Orthodox believers to another faith was punished, whereas conversion to Orthodoxy was strongly encouraged.366

In the case of the proselytization of an Orthodox believer to a non-Orthodox faith, the relevant law states that the person who abandons Orthodox faith in favor of another Christian or non-Christian confession will be sent to his spiritual superior for exhortation and admonition.367 The convert will lose his civil rights until he changes his faith back to Orthodox. Converts to non-Christian faith did not enjoy civil rights. People that were guilty of “proselytism from Orthodoxy,” spreading heresies and schisms, founders of sects, people who impeded converting to Orthodoxy, or Orthodox parents who raised their children according to the teachings of another religion, were subject to criminal penalties.368

The Penal Code (Уложение о Наказаниях) of 1845 was the first Russian penal code and served as a codified normative act that regulated the general issues of criminal law as well as establishing penalties for specific criminal offenses. In the 1885 edition of the Penal Code, the system of penalties was liberalized. In the Penal Code of 1845, under the title “Offenses against the faith and the violation of protecting regulations,” the law provided criminal penalties in Articles 182–189 for matters such as the following things: blasphemy, or censure of the Christian faith of the Orthodox Church, desecration of sacred objects, rude insults for clerics during a time of worship, destruction of crosses

366 Тимашев 1916, 115.

367 Articles 196–197. Уложение о наказаниях 1892, 185, 188.

368 Articles 191–193, 200. Уложение о наказаниях 1892, 184, 189. The Russian State, as canonist Berdnikov saw it, as a political body, should ask God’s blessing and protection in all important matters of public life. It saw in the Christian religion a guarantee of morality, and with it the prosperity of the nation. Therefore, the State did not seek to be the sole influence in society. The State honored religious saints and ensured respect for them and for the people. It was concerned with religious education of the faithful and provided all means necessary for that. It helped promote the morally educating activities of the Church among Christians and foreigners. It punished severe insults against the faith and the Church. Бердников 1889, 231–232.
and sacred images set in a public place done in order to show contempt for the faith of Christ, insulting the Orthodox priest by foreigners or showing disrespect for the Church, violation of decorum during a Church service or in the streets, squares, or in a private home, a sacrilege, illegally opening graves, robbery and desecration of dead bodies, destruction or damage of graves, a false oath.\textsuperscript{369} However, the State not only ensured respect for the Orthodox Church by criminal penalties, but also obliged Orthodox subjects of the Empire and parents of children who were more than seven years old to go to confession.\textsuperscript{370}

\textit{Judicial Statutes of Alexander II} (Судебные уставы Александра II) is a fundamental document, related to a comprehensive reform of the judicial system and legal proceedings, developed between the years 1861–1863, approved in 1864 and in force 1866–1899. The reform of Alexander II provided a complete change of the judicial system; the main results were the introduction of a unified judicial system. The reform imposed four Regulations: the Establishment of Judicial Settlements, Regulations

\textsuperscript{369}Уложение о наказаниях 1845, 62–66. This showed that the Russian law by means of legal norms seriously tried to maintain religious and moral values. In the Russian Empire could be seen a clear trend of morality and religion that was regulated by law in terms of absolute values. Interpenetration of the norms of Canon Law and State law raised many problematic issues connected with the delimitation of the field of regulation of public law. The State through its statutes concerning the Church, intervened not only in State–Church relations, but also attempted to regulate the internal life of the Church itself. The purpose of these changes from the legal point of view was to ensure a more detailed regulation of the life of society, which was for a long time associated with the Christian religion. The attempt to establish the regulation of relations by combining public and ecclesiastical law at the State level met with mixed results. On the one hand, the State had access to those areas of public life which had for a long time been entrusted to the Church and were regarded as purely ecclesiastical institutions. On the other hand, the Church lost its autonomy and control in some important issues, which raised some new problems. A great amount of regulatory material was based upon the Russian Orthodox Church’s own canon law, meaning that State legislation followed in its establishments the basics of religious dogmatic and canonical principles. In addition, ecclesiastical legislation pointed out that one of the bases for Church administration was the norms of State laws that did not contradict with the basic principles of the Christian religion.

\textsuperscript{370}Article 208–209. Уложение о наказаниях 1892, 196. The law required Christians to fulfill their duties. Religious and moral values were established on the basis of relations between the supreme political authority and citizens. The \textit{Code of Laws of the Russian Empire} instructed subjects about obeying the Emperor's power as “God himself commanded.” Article 58. Свод законов Российской империи 1906, Т. 1, Ч. I, 4.
of Civil Proceedings, Regulations of Criminal Proceedings, and Regulations of Punishments Imposed by Justices of the Peace.\textsuperscript{371} 

\textbf{The Question Regarding the Codification of the Canons in the All-Russian Church Council}

On October 28, 1917, the Board of the All-Russian Church Council received from the thirty members of a Council a statement which recommended the establishment of a commission of canon lawyers and jurists to draft a collection of rules, and to publish such a book as a valid collection of canon law alongside the \textit{Book of Rules}. The Board of the Council saw it important and necessary not just for the work of a Council, but also for Church life as well to have a full and valid collection of canonical rules. The Board consulted the professor of canon law, V. N. Beneševitš regarding this question. Beneševitš noted that the codification of canons was a relevant issue, but considered that since such a collection needed the approval of a Council, the project must address the following problems:

1. The \textit{Book of Rules} itself cannot be considered to be satisfying from the point of view of its Russian translation, nor the value of the Greek text from which the translation was made.

2. To draft another collection from the rules of \textit{Kormtšaja Kniga}, \textit{Nomokanon}, \textit{Nomokanon in the Euchologion} (Номоканон при Большом Требнике), \textit{Synatagma kata stoicheion of Matthew Blastares} and from the other collection will be very difficult, partly because some collections (for example \textit{Nomokanon} and \textit{Nomokanon in the Euchologion}) had rules that did not exist in the \textit{Book of Rules} and vice versa. Besides, not all the rules of different collections were studied sufficiently. Lastly, the Russian

\textsuperscript{371} Articles 1001–1016. Щегловитов 1915, 564–567. The basic principles underlying the judicial reform among other things were: a complete separation of the judiciary from the administrative; procedural independence of the judiciary; unified court for all classes; transparency of the proceedings; the right of the parties and the defendants for a legal defense in court; transparency for the parties and defendants of all evidence brought against them; the right parties and convicted persons for a cassation complaint.
translations should be adjusted to the already extant translation of the *Book of Rules*.

3. The existence of such a collection alongside with the *Book of Rules* would not be possible because to set it out in the form of a set of rules would be simply impossible, since the collection would need to be arranged thematically. From this fact there would arise inconsistencies regarding the *Book of Rules*. Such a collection would not do justice to the practical use of both collections.

From another point of view, the codification of the canons would simply not be possible to execute in a couple of months during the Council. The All-Russian Church Council would not even have enough time to review the Russian translation of the text of the *Book of Rules*. Yet, Beneševitš saw it necessary to establish a commission for the codification of the canons. Such a commission could prepare for the Council, if not the very code of the canons, then reliable material for the execution of this question. After hearing these arguments, the Board of the Council decided to establish a commission of specialists. This commission was also ordered to work in the Holy Synod.372 On April 17, 1918 members of the Council gathered to discuss the possible structure of the commission, and as a consequence professor V. N. Beneševitš, I. I. Sokolov, P. D. Lapin, I. M. Gromoglasov and N. N. Fioletov were chosen as members of the commission.373 However, the codification commission never started its work.374

### 3.2 Marriage Law Concerning Orthodox Christians in Russia

According to laws of the Russian Empire, all Orthodox subjects could freely contract a marriage with each other and with the other Christian

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372 ГАРФ. Ф. 3431 ОП. 1. Д. 576. Л, 7–8.
373 ГАРФ. Ф. 3431 ОП. 1. Д. 576. Л, 11.
374 Белякова 2004, 79.
denominations, without asking special permission from the government. However, those who wished to enter into marriage should follow all the rules concerning the marriage law. Marriages of Russian Orthodox subjects, according to Russian Law, were valid if they were celebrated by religious rites in the Orthodox Church and observed by two or three witnesses.\textsuperscript{375} To celebrate a marriage outside the Church (i.e. in the chapels), permission had to be given by the diocesan bishop; all marriages had to be recorded in the parish registers as well.\textsuperscript{376} Witnesses testified to the celebration of the marriage with their signatures in the parish registers. Two copies of the parish registers were maintained: one was kept in the Consistory, the other in the parish.\textsuperscript{377}

The law which abolished the common custom – an agreement that was made between the parents regarding the future marriage of their children – was passed in Russia in 1702. To counter this custom a penalty was imposed that provided freedom for both sides not to marry each other, even for couples that were betrothed in church. However, such a civil resolution was contrary to the regulations of the Council of Trullo, which provided that ecclesiastical betrothal should be as inviolable as marriage. Therefore, the Holy Synod in 1775 ordered the priests to perform an ecclesiastical betrothal at the same time of marriage.\textsuperscript{378} In late Russian civil legislation the number of obstacles to marriage accepted by the Church was greatly reduced, especially those that appeared in the \textit{Kormtšaja Kniga}, which outlined the concept of various types of relationships.\textsuperscript{379}

\textsuperscript{375} Добровольский 1903, 33; Articles 1 and 61. Свод законов Российской Империи 1912. Т. 10, Ч. 1, 1, 6–7.

\textsuperscript{376} Article 31. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 3. Marriages of Russian subjects of Greek origin in the Russian Empire could also be celebrated in homes. See Бердников 1913, 322.

\textsuperscript{377} Григоровский 1908, 157. Formulation of parish registers were first established in 1724, there were three types of records: birth and baptism, matrimony and funeral.

\textsuperscript{378} In 1867, the Senate examined the question of whether arranged marriages for an agreed fee could be considered a legal civil contract. The Senate resolved the question negatively, declaring that such a fee was contrary to the teachings on the purity of the marriage union, insulted dignity, potentially affected the morality and decorum in families, and could not be the subject of a contract, in the sense of Articles 1528 and 1529 of Penal Code. Победоносцев 2003, 60–61.

\textsuperscript{379} Павлов 1912, 325–326.
Mixed marriages in which one of the parties was a Russian subject of the Orthodox or the Roman Catholic faith, were forbidden to marry non-Christians and non-baptized. Russian subjects of the Protestant faith were also forbidden to marry non-baptized persons. Regulations regarding the rules of mixed marriages can be dated as far back as June 23, 1721, when the Holy Synod gave the right for Swedish prisoners in Siberia to marry local women without changing their religions. The practice to bless mixed marriages became simpler after Civil decrees No. 13278 and 13906, and decrees No. 56 and No. 57 of the Holy Synod of 1849, when parish priests were given the right to bless such marriages without asking permission from the local bishop. It should be noted that the maintenance of parish registers was considered an important duty of those responsible. “By the rules — failure to record a marriage in the parish register inflicts those responsible with legal accountability, but does not destroy the marriage itself.” Marriages must be celebrated in the parish where the bridegroom or the bride lives. Legislation concerning conditions to contracting a marriage in the Russian Empire during the twentieth century is mainly found in the Russian Code of Civil Laws.

The Russian Code of Civil Laws adhered to the following conditions, according to which it was required that: “Marriage could not be legally contracted without the mutual and unconstrained agreement of both parties.” The law required entering into a marriage with a free will; on the other hand, in some cases it restricted freedom for familial reasons and required that the will of a spouse be complemented in this decisive action with the will of another. On this basis, parental and guardian consent was required. Entering into marriage without this consent was prohibited. On the other hand, it was prohibited for parents and

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380 Article 85. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 10. Articles 1568, 1585. Уложение о наказаниях 1892, 632, 636.
381 Шеин 1907, 232–233.
382 Article 78. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 9.
383 Духовный регламент 1897, 77.
384 Article 12. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 2.
385 Law No. 9252 from June 4, 1836. Полное Собрание Законов Российской Империи 1836, 651.
guardians of children to force them to marry against their will.\textsuperscript{386} Such a marriage was not legal.

If parents prevented the marriage, the law did not indicate a direct means to marry without their consent. However, when persons reached adulthood, which was set at 21 years, they could enter into marriage without the consent of their parents, if the latter had abused their power.\textsuperscript{387} To enter marriage, a “healthy state of mental abilities was required from both parties”\textsuperscript{388} that did not preclude the ability to express one’s free will. Therefore, it was prohibited to marry an insane person.

“Individuals employed by the State,” whether civil or military, were required to get permission, a written certificate from their superiors, allowing them to contract a marriage.\textsuperscript{389} Here should be noted that in the \textit{Kormtšaja Kniga} and in the Byzantine laws in general no such regulations exist regarding individuals employed by the State and who could marry only with the permission of their superiors. This was not even possible in ancient Rus’, since it had no State employees in the sense of what its role was in the nineteenth and twentieth century. State service was introduced by the reforms of Peter the Great 1722; midshipmen were prohibited from marrying without the permission of the board of admirals. Hereafter this was expanded to concern all military departments, and in the \textit{Code of Civil Laws} of 1833 all the individuals employed by the State.\textsuperscript{390}

\textsuperscript{386} Article 1586 of the \textit{Penal Code} determined the penalties in the cases, if the parents forced their children to marry. (Уложение о наказаниях 1892, 638.) Abduction of the bride was also considered a criminal offense. See Article 1549. Уложение о наказаниях 1892, 626.

\textsuperscript{387} Победоносцев 2003, 33.

\textsuperscript{388} Article 5. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 1.

\textsuperscript{389} Article 9. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 1. The rule originally established for military personnel under Peter the Great and not before the first edition of the Code of Laws was extended to all employees in the civil service. (Победоносцев 2003, 33.) Violators of this rule were subjected only to disciplinary action. Article 1565. Уложение о наказаниях 1892, 632.

\textsuperscript{390} Павлов 1902, 363.
Premarital investigation of impediments

In the current practice of the Orthodox Church, a betrothal is only given the meaning of an ecclesiastical rite that is required to be accomplished before the wedding. In order that known persons can be allowed to the above-mentioned rite and in order to obtain assurance in the existence of all the prerequisites needed for a legal marriage and in the lack of obstacles to it, the Church in Byzantium and in Rus’ set a so-called premarital investigation (examen sponsorum). In Russia as in Byzantium, the marital process began with an appeal by the bride and groom petitioning the bishop to bless their marriage. The bishop issued a decree to the petitioner in the name of the priest with a proposal to conduct a pre-“search,” i.e., to identify whether there were any impediments to marriage. This decree was called a “crowning record,” (венечный память). When granting such a “crowning record,” a fee was collected, which was increased when second or third marriages were petitioned.391

This investigation was divided into two parts: the first part concerned the conditions for marriage; the second part the aspect of Christian teaching on marriage. The first part was usually performed by the parish priest in the presence of parents or guardians and witnesses of the bride and groom, the second one with the spouses.392

When performing the investigation, the parish priest must obtain information from the bride and groom that they wish to marry, that nobody is forcing them into this and that between them there is no kinship, and generally that there is no impediment to their marriage. Then, during an investigation in Russian practice in the nineteenth and twentieth centuries, the parish priest had to make sure that the bride and groom knew the foundations of the Christian religion and the main prayers. This was done in order that the spouses knew the essence of the sacrament and the sanctity of the union to which they were entering into and in order that they were able to pass on faith and piety to their children. If a priest noticed that the couple did not have enough

391 Православная энциклопедия 2003, Т. VI, 151.
392 Symeon of Thessalonika (c. 1381–1429) refers to the first part of the investigation, mentioning that a marriage should not be concluded between an Orthodox and a heterodox, (Симеон 2009, 398.) later the Slavic Kormtšaja Knīga followed the same teaching. Павлов 1887, 81–82.
knowledge of faith or the main prayers, then his duty was to teach them and not marry them until they fulfilled this condition.\textsuperscript{393}

\textit{Freedom from the Bonds of Marriage}

Entrance into a second marriage was strongly considered to be illegal. It was subject to certain restrictions and formalities. It was necessary before entering into a subsequent marriage to certify the termination of the former (which could require special formalities, for example, in the case where it is not known if the former spouse is alive or dead).\textsuperscript{394} In some cases with the dissolution of marriage, the law by way of punishing the spouse for the guilt of the crime did forbid the spouse from entering into marriage again. Such a case was considered bigamy.\textsuperscript{395} Bigamy cases of army officials were tried in the Military Criminal Court.\textsuperscript{396} The abandoned spouse, if he or she did not wish to restore the union with a former spouse, was allowed to remarry. If the fault was on both sides, both were condemned to celibacy. The spouse who left the other spouse and was hiding for more than five years was subject to the same punishment. Upon the death of one of the spouses, the other partner could without restriction enter into marriage, but only up to the third marriage, i.e., neither of the parties were previously married more than three times.\textsuperscript{397} The fourth marriage has always been considered prohibited under the laws of the Greek Orthodox Church; the norm that was also adopted in Russia.

\textsuperscript{393} Никодим 1897, 582.
\textsuperscript{394} Булгаков 1993, 1194.
\textsuperscript{395} Article 1013. Щегловитов 1915, 565.
\textsuperscript{396} Калашников 1899, 54.
\textsuperscript{397} Article 21. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 2.
The parties could not be related to each other by any of the bonds of relationship, according to the laws of the Church

Russian civil law did not define the prohibited degrees of kinship and affinity, relegating this task to the Church. Accordingly, all cases concerning illegal marriages, contracted in forbidden degrees, fourth marriages and marriages between the Orthodox and non-Christians were subject to the ecclesiastical court. Such marriages were tried in the secular court.398

The bridegroom may not be under 18 and the bride under 16 years old

An ecclesiastical legal age of 15 for the groom and 13 for the bride was observed throughout Russia until 1830, after which it was changed by law on July 19 to 18 and 16 years of age.399 Exception was made for the native people of Trans–Caucasus, where the bridegroom could be 15 and the bride 13 years old. Diocesan bishops were empowered to decide if such marriages were necessary, when the groom or bride were six months away from marital adulthood. Army officers were not permitted to enter into marriage before 23 years old age. If it was found that a marriage had been contracted before the previously defined adulthood, then the married couple were separated. After they reached legal adulthood, they could, if they wished, continue the marriage and their union was blessed by the Church. Marriage was also prohibited for persons over eighty years old.400 Although marriages were legally permitted for persons more than 60 years old, the parties needed permission from the diocesan bishop. Violations of such kinds of cases were subject to the Office of Church authorities.401

398 Articles 1560, 1593–1596. Уложение о наказаниях 1892, 631, 642–644; Article 1014. Щегловитов 1915, 565.
399 Темниковский 1915, 6.
400 Articles 3–4. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 1.
401 Калашиков 1899, 32.
If it was proved that a priest, deacon or reader did not take appropriate measures to find out the legal age of those whose marriage they were crowning in cases where the intended spouses were underage, they were punished without being removed from their positions by sending them to a monastery for a certain period. If, say, the couple were two years under the official age of marriage, then a priest would be one year, i.e. half that time in a monastery. Deacons and readers were sent for six months to a monastery. If the amount of time lacking was more than a year, the priest was removed from his position and reduced to the rank of reader until the legal age to marry was reached. Clerics who were charged with this crime for the second time were removed from office and reduced to the rank of reader for at least six months, depending on the circumstances of the case.402

Upon entry into marriage it was also presumed that the spouses would be able to physically copulate.403 Russian civil law did not mention this among the legal conditions of marriage before, but in 1806 with the instructions to the deans of parishes, it was forbidden for mutilated persons and those incapable of conjugal cohabitation to enter into marriage.404

Neither of the parties can be members of any monastic order or ordained to the priesthood

According to the Charter of Diocesan Consistories, the marriage of those in a monastic state or in a clerical state of priest or deacon were considered illegal and invalid, as long as they remained in that state. Their marriages were allowed after laicization.405

402 Григоровский 1908, 118–119; Article 140 of the ecclesiastical punitive statute. Документы 2012, 516–517.
403 Articles 48–49. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 5.
404 Победоносцев 2003, 43–44.
405 Article 2. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 1; Article 1015. Щегловитов 1915, 565.
Differences in Religion

Obstacles to entering into marriage could also depend on the religion of the spouses. If in an existing marriage between non-Christians, one of the parties was baptized a Christian, the marriage was not invalid by virtue of this fact. If the Orthodox priest blessed the non-Orthodox marriage, then the celebration and dissolution of the marriage must also be performed according to Orthodox traditions. Marriages between Roman Catholics and Orthodox were not valid if they were celebrated alone by Roman Catholic priests. Those marriages became legal after the blessing of an Orthodox priest.\footnote{Калашников 1899, 12.} According to Russian law, the children of marriages in which one or both parents were Orthodox must be baptized and raised in the Orthodox faith. A non-Orthodox person who married an Orthodox must give a written agreement that he or she will not try to abuse or convert an Orthodox husband or wife to their faith. However, this only applied to Russian subjects.\footnote{Articles 61, 65, 67, 72, 75, 85, 87. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 6–10.}

Proclamation

A proclamation (proclamatio) is set for the complete testimony of all who know the bride and groom, in order to ensure that there are no obstacles to the marriage. Proclamations were first established in the Western Church.\footnote{Павлов 1887, 199–200.} Ecclesiastical rules regarding the proclamation in the Slavic Churches can be found in the fiftieth title of Kormtšaja Kniga. These rules are the following:

1. The parish priest is obliged, before the betrothal and wedding, to announce in the Church after the liturgy the intention of certain known persons to enter into marriage, and this must be repeated three times on separate occasions, inviting the faithful to tell him if they know any impediments to the marriage.
2. If the spouses who enter into a marriage belong to different parishes, then the proclamation should be made in both parishes.
3. If there is a reasonable suspicion that someone wishes to prevent the marriage, then the priest, with the approval of the bishop, may give only one announcement or conclude the wedding with two or three witnesses without an announcement.
4. The priest can make the proclamation only after the established premarital test.
5. If, within two months after the proclamation a wedding does not take place, the proclamation shall be repeated if the bishop does not otherwise order it.409

It should be noted that the proclamation does not exist in the Eastern Orthodox Patriarchates of the Greek tradition, but it existed in the Serbian Orthodox Church and in the Austro-Hungarian Kingdom. In twentieth-century Russia, the proclamation was subject to civil law as well.410

### 3.3 Dissolution, Illegal and Invalid Marriages

After accepting Christianity, divorce cases were adjudicated in Russia according to the rules of *Kormtšaja Kniga*; ecclesiastical courts soon became the highest administrative institution for dealing with them. However, the Church for a long time led the fight against informal folk customs concerning marriage and arbitrary divorce. Divorce in Russia, as canonist Krasnožen noted, was permitted in those cases where no such permission was given in Justinian law. On the contrary, some of the grounds for divorce mentioned in the novellas of this emperor, could not be applied in Russia. For example, according to Justinian law, a husband could ask for a divorce when his wife, against the will of her husband feasted with strange men or washed in the bathhouse with them. These grounds for divorce, which had meaning and consequences in Byzantium

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409 Павлов 1887, 199–200.

410 Никодим 1897, 584.
due to the peculiarities of the life of that time, could not be applied in Russia.\textsuperscript{411}

In the upper classes, there was first of all the need to determine the legality of the formal features of marriage and divorce. Even here the conscience of individuals and public opinion had already been satisfied for a long time by the fact that a divorce took place with the permission of a simple priest, a spiritual father, even though according to the regulations of jurisdiction in matters of divorce this responsibility belonged only to the highest hierarchy. Spiritual fathers wrote and issued with no difficulty certificates of divorce, and, through ignorance or abuse, there could not be strict ecclesiastical discourse on legitimate reasons for divorce. Already in the eighteenth century, in 1730 and 1767, a Senate Order prohibited clergymen from writing certificates of divorce.\textsuperscript{412}

From the time of Peter the Great, the government aimed to establish a solid basis for divorce cases and identify legitimate reasons for divorce in civil law. Until 1805, decisions on divorce could be, at least in many cases, decided by the diocesan authorities without the involvement of the Holy Synod.\textsuperscript{413} Since 1805, it was decreed that such cases could not to administered without the consideration and approval of the Holy Synod (with a few exceptions).\textsuperscript{414} The \textit{Charter of Diocesan Consistories} of 1841 and the decree on matrimonial matters from February 6, 1850, finalized rules on ecclesiastical and secular jurisdiction in cases of marriage.\textsuperscript{415}

A sampling of Russian literature during the Pre-Conciliar period clearly shows that the question of divorce was indeed a troublesome one, since even some canon lawyers were unsure how this question should be addressed. Canonist Zaizerski asked in the \textit{Ecclesiastical Public Herald} on November 8, 1912, to whom jurisdiction over divorce belonged, the Holy Synod or the State Duma?\textsuperscript{416} In the same journal on January 24, 1913, V. Pravdin noted that divorce would always be an ecclesiastical

\textsuperscript{411} Красножен 1899, 11.

\textsuperscript{412} Победоносцев 2003, 96.

\textsuperscript{413} Способин 1881 55.

\textsuperscript{414} See the law No. 21585. Полное Собрание Законов Российской Империи 1805, 774.

\textsuperscript{415} Law No. 23906. Полное Собрание Законов Российской Империи 1850, 103–111.

\textsuperscript{416} Заозерский 1912, 9.
matter. However, it needed to be reformed. The most important reform was the increase in reasons for divorce, because the number of reasons was too limited at that time and usually divorce cases bypassed the law in this matter. On April 4, 1913, the same author noted that the Council of State accepted a bill of legal separation for married women in 1913. This bill had a long history: it had already been examined in the period before the reformation of the Council of State. Pravdin praised the bill and noted its importance, since it gave a legal value to a common practice that was practiced illegally. According to the laws of that time, it was almost impossible for a wife to receive permission to separate if her husband was against it. Pravdin hoped that with the publication of the new law a time would come when the reform of divorce would be done according to the modern requirements of life.

Russian law generally recognized two ways of ending a marriage, besides the death of a spouse. First, recognition of marriages as illegal and invalid when the marriage at the very moment of its conclusion was illegal, and second, dissolution of marriage following its conclusion, when the marriage itself was for some reason practically over.

The marriage was considered invalid when one of the persons who entered into it, at a moment when it was concluded, had no legal capacity to marry, i.e. was in a state of insanity, in a forbidden kinship or affinity, was not free from another marriage (bigamy), was under the legal prohibition to enter into marriage, was not of legal age, had entered into a fourth marriage, belonged to the priesthood or was a monastic, and consisted a case of an Orthodox Christian marrying a non-Christian. Marriage was considered invalid as well when there was no free agreement and forceful action was involved. The law clearly mentioned

417 Привдин 1913а, 1–3.
418 Привдин 1913б, 1–3.
419 Article 43. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 5; Булгаков 1993, 1195. Some Orthodox theologians argue whether the marriage continues in heaven after the death of the spouses. This topic, however, was not argued in Orthodox canon law, which is the focus of this study.
420 Черкасский 1911, 176.
421 Article 37. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 4; Добровольский 1903, 44.
422 In the Charter of Penal Proceedings, under the chapter Crimes connected with the violation of ecclesiastical rules, in Article 1012 it was stated that
force, but did not mention nothing about fraud. Yet there was no doubt that, depending on the circumstances of the case, the latter could be considered a reason for the dissolution of the marriage, because in committing fraud, knowledge and free agreement in marriage are broken — an essential condition for the validity of a union.

Russian legal history at the very end of the nineteenth century knew a famous case of fraud, which was examined in the Moscow Trial Chamber’s criminal appeal department of the Senate on October 11, 1894. In this case, a dissenter husband entered into marriage by a schismatic Priestless 423 rite, but years later, he converted to Orthodoxy and concealed his first marriage.424 The Trial Chamber ended up accusing the former dissenter of bigamy, i. e. fraud, and found him to be guilty of the act, provided in the second part of the Article 1554 of the Penal Code. According to the Article 1554:

Whoever among the Christians within a marital union will enter into a new marriage with the existence of a former, is subject to deprivation of all special, personal, and according to the condition, appropriated rights and benefits. He will be sent in exile to live in Siberia or returned to the penitentiary department in virtue of the third or fourth degree of Article 31 of the Penal Code. However, if it is proved that a person bound to a prior marriage, concealed this to enter into a new illegal marriage and declared himself free, then he is guilty of fraud and is subject to deprivation of all special, personal rights and benefits and will be sent to exile to live in Siberia. When, during the perpetration of the fraud, a person presents any false acts or makes a forgery, marriages, contracted by force, deception, or in madness of one or both spouses, were handled in a criminal trial. Verdicts concerning compulsion or fraud were reported to the ecclesiastical court for a decision on the validity or invalidity of the marriage. This was done to determine the responsibility of the clergy who blessed such a marriage. Щегловитов 1915, 565.

423 In Russian Безпоповцы — this is one of the two major strains of Old Believers, one that rejects a number of sacraments of the Orthodox Church, such as the Eucharist, marriage and the priesthood. See Heikkilä 2013, 24.

424 Heikkilä 2013, 28. This case started a wide debate about civil marriages in Russia. It was also observed from the point of view of Orthodox canon law in the debates between two professors, Ilja Berdnikov and Nikolai Zaozerski. Their debate consisted of a total of six articles in the journals Orthodox Interlocutor (Православный собеседник) and Theological Journal (Богословский вестник) between 1895 and 1897.
then the person is subject to punishment for forgery and for polygamy, according to the rules of combination of offenses. The perpetrator is above all, in any case, subject to canonical penalties at the discretion and the order of his spiritual leader.\textsuperscript{425}

Article 1551 of the Penal Code also threatened serious criminal punishment as well, as can be seen in the following:

A person, who, as a result of pressure, enters into marriage against his or her own will, who brings him or her by means of drink or some other way into a state of perfect unconsciousness or temporary insanity, or by means of fraud will contract a marriage; the cheater will be subjected to deprivation of civil rights and to exile for settlement into distant places in Siberia. The one who takes advantage of someone’s madness or dementia and pressures him or her to enter into marriage, shall be subject to a punishment one degree lower, as already defined in this article.\textsuperscript{426}

Another case which received the attention of jurists in early twentieth-century Russia was the case of Anna and Georgi Ju. Georgi started a divorce process in the local Diocesan Consistory, accusing his wife of adultery. However, the wife, Anna, submitted a counter claim to the same Consistory, in which she asked for the dissolution of her marriage based on the insanity of her husband, a madness which had started before the marriage. From the claim one can see that she was pressured by relatives of her husband to enter into marriage with him in 1906. Soon after the marriage Georgi was expelled from the army for reasons of insanity. The claim found its basis in Article 1551 of the Penal Code and in Article 1012 of Regulations of Punishments.\textsuperscript{427} However, since in the claim no actual crime other than the pressure of relatives was mentioned, jurist I. Tšerkasski found that Article 1551 was not a proper one to use in this case, and instead Article 1571 should be applied, which decreed more specifically about concealment of possible impediments to marriage.\textsuperscript{428}

The question of the legality or illegality of marriage was always subject to the ecclesiastical court. These matters were started according to the

\textsuperscript{425}Heikkilä 2013, 29.

\textsuperscript{426}Уложение о наказаниях 1892, 628.

\textsuperscript{427}Черкасский 1911, 176–178.

\textsuperscript{428}Черкасский 1911, 190; Уложение о наказаниях 1892, 633.
reports of public officials; matters related to secular criminal courts; matters related to denunciations, when the marriage was connected to the crime. Cases concerning minors, however, could only be initiated by the minor spouse, and not until marital adulthood had been reached and no pregnancy was involved.\textsuperscript{429} Cases concerning violence could only be initiated by the coerced person or the parents of a spouse and by the guardians within six months of the day of marriage or termination of the circumstances that prevented filing the request.\textsuperscript{430}

The unchastity of a wife discovered after a marriage, could not serve as a reason for divorce, even if it turned out that she had pretended to the groom to be chaste before the marriage. Marriage cases that were forcefully contracted due to deception or insanity of one or both spouses were treated in a criminal court. Verdicts regarding forcefully contracted marriages or frauds were reported to the ecclesiastical court for a decision on the validity or invalidity of the marriage, but also to determine the responsibility of those clerics who married the couple.\textsuperscript{431} The formal rule of Article 1012 of \textit{Regulations of Punishments} makes an ecclesiastical court dependent on the verdict of the criminal court in matters of compulsion and fraud. But in cases when the accused has disappeared or died, the criminal proceedings were logically terminated and the ecclesiastical court could not make a criminal conviction concerning the fault of the defendant. In such cases, the Holy Synod was left to decree its decision contrary to Article 1012.\textsuperscript{432}

Cases of insanity upon entry into marriage were initiated in the Diocesan Consistory, if it was proved that when entering into marriage, insanity by hereditary or by organic predisposition was hidden. If there was an indication of force or fraud, such cases were treated in the criminal court. Diocesan Consistories (diocesan authorities) based their decisions in these cases on the canonical rules and decrees of the Holy Synod, after which they submitted these decisions to the Synod for approval. Secular criminal courts gave a decision about criminal or incorrect practices, about forgery and deception, according to which a marriage could be recognized as invalid. Some of these cases, e.g.,

\textsuperscript{429} Ивановский 1900, 248–249.

\textsuperscript{430} Ивановский 1900, 246; Серебренников 1914, 21.

\textsuperscript{431} Article 1012. Щегловитов 1915, 565.

\textsuperscript{432} Победоносцев 2003, 98.
polygamy, incest, compulsion and insanity, if they had previously been started in a secular court, could not be resolved before the opinion of the ecclesiastical court. If the ecclesiastical court declared the marriage to be illegal and invalid, then the diocesan authorities together with the local authorities would dissolve such marriages. Further, by the decision of a court, the guilty party in an illegal marriage would be subjected to penance.

After the dissolution of a bigamous illicit union, the former union was restored if the former spouse did not refuse and wished its restoration. When both sides were guilty, their former union was restored without additional considerations being made. In some cases when the marriage was dissolved, in cases of bigamy and abandonment of a spouse, the person found guilty was condemned to celibacy. All children begotten in an invalid marriage were considered illegitimate. If the marriage was dissolved because of fraud or abuse, the fate of the children begotten in such marriage, as well as the fate of the aggrieved party rested at the special discretion of the highest authority of Russia.

**Adultery of one of the spouses**

A legitimate reason for the dissolution of marriage was the adultery of one of the spouses. Dissolution of the marriage was made with the formal request of a spouse. The case was subject to diocesan authorities of the diocese where the spouse (i.e., the husband) had a residence permit. The marriage was dissolved with the approval of the

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433 Боровиковский 1902, 26–27.
434 Article 38. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 4; Серебренников 1914, 20.
435 Articles 41–42. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 4–5.
436 Ивановский 1900, 247.
437 Articles 132–133. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 14–15; Победоносцев 2003, 99.
438 Article 1016. Щегловитов 1915, 566.
439 Юридические заметки 1869, 41. At the end of the nineteenth century, only a husband could ask for the dissolution of a marriage in the case of a wife’s adultery.
Synod, which also gave permission to the petitioner to enter into a new marriage. Claims for adultery could have a dual purpose: it concerned private prosecution of the party who was guilty in adultery and was a criminal case. The case should be adjudicated in the criminal court within two years after the perpetration of the crime; or these claims were intended to dissolve the marriage and were subject to ecclesiastical punishment. In the latter case, the claims must be presented in a ecclesiastical court.\textsuperscript{440}

One must assume that both these claims were incompatible since it was impossible to present a double punishment in two courts for the same crime. When the accusation of adultery was brought against both sides and both sides were guilty, dissolution of the marriage did not take place. Therefore, these kinds of cases were instituted by a private lawsuit in the ecclesiastical court, with the purpose of dissolving the marriage.\textsuperscript{441}

Therefore, in cases where such a claim was presented, the ecclesiastical court was first and foremost responsible for encouraging both sides to reconcile, and only if this attempt was to no avail, to start a formal procedure, during which it still sought an opportunity to reconcile the parties. To achieve this goal, it was decided that the court would require the couple to make a personal appearance.\textsuperscript{442}

Since the proof of adultery (acts, witnesses, etc.) is usually to be found at the place where the adultery occurred, another difficulty relating to the collection of evidence arose. In the Diocesan Consistories, such cases started between the parties who made pleads following the old form, which remained from the decree of 1723. The old form meant a court register that recorded the speeches of the plaintiff and the defendant. Regarding the discussion of evidence, the ecclesiastical court was restricted compared with the secular. It was possible that the secular criminal court recognized adultery as proved by introducing new charters that allowed free discussion considering the evidences, whereas the ecclesiastical court was the opposite and did not find adultery proven.

\textsuperscript{440} Победоносцев 2003, 103.

\textsuperscript{441} Articles 238. Устав духовных консисторий 1843, 91.

\textsuperscript{442} Article 244. Устав духовных консисторий 1843, 92; Победоносцев 2003, 104.
This theory was especially insufficient when applied to adultery, which eliminated the evidence of eyewitnesses.\textsuperscript{443}

\textbf{Incapacity for conjugal relationship}

This defect was considered to be the reason for divorce only in the case when it is a natural defect or when it started before the marriage.\textsuperscript{444} Therefore, the reason for termination was based on a condition that existed from the very moment that the marriage was concluded, but which was discovered during it.\textsuperscript{445} In these kinds of cases, the main basis for the solution was the inspection and conclusion of the medical experts in the local Medical Department and in the Medical Council.\textsuperscript{446} A. D. Kosortov interpreted the juridical practice of that time, from the standpoint of a naturalist and Medical Council. For sexual life, the following was required a) on the part of men: the ability to copulate (\textit{potentia coeundi}), and the ability to fertilize (\textit{potentia foecundandi}) and b) on the part of women: the ability to copulate, the ability to conceive (\textit{potentia concipiendi}), the ability to gestate (\textit{potentia gestandi}), and the ability to give birth (\textit{potentia generandi}). However, in terms of the legislation of that time, only the first aspect was essential for both men and women as a condition of marriage, and only marriage without this prerequisite could be terminated.\textsuperscript{447}

\textsuperscript{443} Победонощцев 2003, 104.

\textsuperscript{444} Article 241. Устав духовных консистории 1843, 93. The Russian word “неспособность,” literally “inability” in this context means only the physical inability to perform sexual intercourse. All other physical and mental inabilities, such as madness or venereal disease, which de facto made marital cohabitation impossible, were not considered to be a reason for divorce. See Григоровский 1908, 233; Красношеник 1899, 19.

\textsuperscript{445} Булгаков 1993, 1173.

\textsuperscript{446} Победонощцев 2003, 100.

\textsuperscript{447} Косоргов 1916, 88. Kosortov made an important note when he criticized the practice of the Medical Council and the decision of the Holy Synod in one particular case from 1905–1906. After six years of marriage a man filed a case for divorce due to his wife’s inability to bear children. The Medical Council concluded that this inability started before the marriage. The Holy Synod from other hand did not recognize this inability and asked the Council whether the wife had \textit{potentia coeundi}, in which case she was technically fertile. Kosortov’s
A court verdict sentencing one of the spouses to punishment which results in the loss of civil rights and the means of existence or sentencing to live in Siberia

Both spouses had the right to request a divorce, and the innocent spouse could choose whether he or she followed the convicted spouse. Deportees could submit the requests after two years from the date when the court verdict came into force, as specified in the first paragraph, Article 182 of the Charter about exiles. A request for divorce should be submitted to the diocesan authorities at the place where the marriage was contracted. The Diocesan Consistory or the court, giving its decision concerning the divorce, reported about the dissolution of marriage to the provincial government and the Synod.

Absence of a spouse for over five years

In this case, the remaining spouse could request a divorce from the diocesan authorities and permission to enter into a new marriage. This rule extended to the wives of the lower rank military personnel’s who disappeared during wartime without any information and persons taken prisoner. Russian Orthodox wives of foreign prisoners whom they married in Russia, were allowed to remarry if their husbands were sent abroad to their homelands and were absent for more than two years. In cases of the joint entrance of the spouses into monasteries by mutual main criticism was understanding a marriage only as potentia coeundi; in that case, the law should allow for castrated males and hermaphrodites to enter into marriage as well. The practice of potentia coeundi was also against the meaning of Article 4 of the Code of Laws of the Russian Empire, which forbade marriages after a person turned eighty. Косортов 1916, 89–90

448 Свод законов Российской Империи 1912, T. 14, 248.

449 Ивановский 1900, 252. If both spouses were deprived of civil rights, one must understand by this that their marriage remains valid. Law No. 27231. Полное Собрание Законов Российской Империи 1818, 68.

450 Булгаков 1993, 1195.

451 Ивановский 1900, 255; Article 56. Свод законов Российской Империи 1912, T. 10, Ч. 1,

452 Article 77. Свод законов Российской Империи 1912, T. 10, Ч. 1,
agreement, the Russian Code of Laws did not list it as a reason for dissolution of the marriage.\footnote{Победоносцев 2003, 102.} However, it is clear that this law was not observed in practice, since the Spiritual Regulation allowed the aforementioned practice,\footnote{See the chapter on \textit{Who and how to accept into monkhood}, paragraph 5. Духовный регламент 1897, 116.} and the canonical rules knew in addition the practice of dissolution of marriage due to the election of the husband as bishop.\footnote{Добровольский 1903, 74–75.}

The Russian Code of Laws mentioned the following rules as well concerning permission to remarry: if after holy baptism of the non-Christian wife, the husband did not agree to have her as his wife or he did not give her a testimony, or it turned out that his wife, before holy baptism, was forced not to cohabit with the husband;\footnote{Article 83. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 10. It should be noted that if both spouses were baptized, their previous marriage perdured, even if it was contracted within the degrees of kinship. Article 84. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 10.} if the newly baptized husband did not want to live with an unbaptized wife;\footnote{In Russian “Молокане.” This can be translated as “Spiritual Christians;” they were also a special ethnic group of Russians. In the Russian Empire Molokans were classified as “a particularly pernicious heresy” and were persecuted until the decree of Alexander I, relating to 1803, which gave the Molokans a certain freedom. See Православная энциклопедия 2007, Т. XVI, 362–368.} and marriages between the Orthodox and resettled to the distant places of Molokans\footnote{Григоровский 1908, 234.} which were terminated at the request of the first, were given a permission to remarry from the diocesan authorities. Molokan wives who converted to Orthodox were entitled the same rights. Wives who voluntarily castrated themselves were permitted, at their request, to enter into marriage with others as well.\footnote{Григоровский 1908, 234.}

It took seventy-four years to reform the \textit{Charter of Diocesan Consistories}; the new edition was approved by the Holy Synod on May 1, 1917 with definition No. 2547. According to the new edition of the \textit{Charter of Diocesan Consistories}, a marriage could be dissolved at the request of one of the spouses in the case of the conviction of the other; or
by sending the spouse to penal servitude or sentencing him or her to live in a remote place; or by the unknown absence of the other. Marriage was dissolved based on the claims of spouses in an ecclesiastical court. An action for divorce may have been made due to the inability of one of the spouses to engage in marital cohabitation or due to insulting the sanctity of marriage by committing adultery by one or both spouses. An action for divorce was started by the spouse by filing a request to diocesan authorities, paying the stamp tax and application fees, and providing an extract from parish registers about the marriage and copies of the lawsuit.

Upon receiving the lawsuit, the Diocesan Consistory sent it to the rectors of parishes, in lieu of place of residence of the spouses, with the hope that they should stop their disagreements by means of Christian reconciliation and remain in the marital union. Appeals from spouses continued until the completion of the divorce process and did not delay the further progress of the case and its resolution. A party that wished to appeal a decision made by the Diocesan Consistory, was free to do so. After incapacity for conjugal relations had been proved, a marriage was dissolved along with a ban placed on the incapable spouse from entering into a new marriage. If the violation of the sanctity of marriage by adultery of one or by both spouses was proven, then the marriage was dissolved. Divorced spouses in their first or second marriage were granted the right to enter into a new marriage. Before entering into a new marriage, persons guilty of violation of the sanctity of marriage by committing adultery were, according to the degree of guilt and remorse, subjected to ecclesiastical penance at the discretion of the ecclesiastical court, in accordance with the rules of the Church. In cases where the sanctity of a new marriage had been violated by committing adultery for the second time, the guilty spouse was condemned to perpetual celibacy and was subjected to ecclesiastical penance.460

A document of the Pre-Conciliar Board from August 1917 revealed that the fourth department of the Pre-Conciliar Board concentrated on the reforms of the ecclesiastical court. The fourth department among other things edited 175 articles of the project of ecclesiastical punitive statutes. 461 The Punitive statutes had a section on crimes against

461 РГИА. Ф. 796. ОП. 445. Д. 238. Л, 5.
marriages and family unity; the rules of the statutes were combined from the articles of the penal code and canons of the Orthodox Church. The punitive statutes punished a person who, according to the court verdict, brought about a marriage as a result of pressure or threats or forced somebody into a state of perfect unconsciousness or temporary insanity, or entered into marriage with an obviously insane person. The punishment for a layperson in these cases was excommunication from Communion for ten years. A layperson who according to the court verdict was convicted of bigamy was punished with excommunication from Communion for eight years.

Marriages of laypersons in prohibited degrees of kinship or entering into a fourth marriage, or if a layperson caused a spouse or children injury or carried out serious beatings, torture or torment was punished with excommunication from Communion for seven years. Where a marriage between an adopted child and an adoptive parent had taken place, the parent was punished with excommunication from Communion for four years. Entering into marriage without the consent of parents was punished with excommunication from Communion for three years. In all the above cases, if the offender was a cleric, he was excluded from the clergy and deprived of holy orders and monastic status. The only illegal act whereby clerics were sentenced to prohibition from the priestly service for up to one year with the appointment to other ecclesiastical obedience, such as to work in the church choir, was the act of forcing their children into marriage or tonsuring them and forcing them into the monasticism or forcing them to follow monastic obedience. If the offender was a deacon or other church minister, he was sentenced to other ecclesiastical obedience for up to one year. A layperson was punished with excommunication from Communion for five years.462

There were also penalties with regard to the duties that were contravened with the blessing of marriages, the wedding of a cleric without adherence to prescribed rules and other precautions which were not permitted, as well as blessing someone’s marriage who came to the parish temporarily without a proper certificate of freedom to marry. When the offense was committed for the first time, the offender was subjected to reprimand by adding him to a special record; for a second

462 Articles 79–86. Документы 2012, 503–504. Compare to Articles 1477–1496, 1550, 1551, 1554, 1555, 1559, 1564, 1566, 1581, 1583, 1586 of the Penal Code Уложение о наказаниях 1892.
time the priest was excluded from the clergy for three months and given lesser ecclesiastical duties. A cleric could also be found guilty of marrying outside the church, as well as marrying a person who served in public service without the permission of their superiors, or blessing marriages during days that were prohibited by the Church. In these cases, first time offenders were verbally chastised, while second time offenders were sentenced to ecclesiastical obedience for one month.\footnote{Articles 136–137. Документы 2012, 515–516.}

Clerics who wed couples who were already married or were condemned to live in celibacy, or couples who were prohibited in the first four degree of kinship or in spiritual kinship, were also guilty of a punishable offense. If the offense was committed due to non-compliance of precautions, then the offender was sentenced to ecclesiastical obedience to a bishop’s residence or to a monastery for six months. If the cleric knew in the aforementioned cases about the committed illegal marriage, despite the punishment that he received from the civil court, he was excluded from the clergy and deprived of holy orders. Priests who married a person whose marriage was dissolved due to adultery and was married without the permission of diocesan authorities and before the end of the penitential period, were sentenced to ecclesiastical obedience for three months if this was a first–time offense, and was prohibited from serving and demoted to the rank of psalter for up to one year for a second offense. If a priest married a couple who were more than eighty years, he was verbally condemned in doing so if it was the first time, while second-time offenders were sentenced to ecclesiastical obedience for three months.\footnote{Articles 138–139, 141. Документы 2012, 516–517.}
4. EXAMINATION OF GROUNDS FOR DIVORCE IN THE PRE-CONCILIAR PERIOD

Historical background of the question

The Pre-Conciliar Commission gathered on December 13, 1906 to start a series of actions in order to reach a solution regarding the reformation of grounds for divorce. A number of scholarly Russian canon lawyers, such as A. I. Almasov, Professor N. N. Glubovski, Professor–Archpriest M. I. Gortšakov, Professor N. A. Zaozerski, Professor M. E. Krasnožen and S. P. Grigorovski participated in the first meeting.\textsuperscript{465} The secretary of the meeting, S. G. Runkevitš, gave an account of three critical questions that the preparatory commission should address: 1. The transfer of divorce cases to the civil court; 2. The practicality of the divorce process in force at the time; and 3. Reconsideration of the grounds for divorce. Further, canonist S. P. Grigorovski noted to the Pre-Conciliar Commission that the current Russian law allowed divorce in the cases of adultery, incapacity for conjugal relationship, conviction of one of the spouses to exile and unknown absence. The Commission was asked whether to leave them in force or add new grounds to them.\textsuperscript{466}

Bearing in mind these questions, the secretary of the preparatory commission underlined that following the introduction in 1864 of new legal regulations, the Holy Synod recognized the need to proceed to a fundamental transformation of the entire ecclesiastical court. For such an action, they sought royal permission for the establishment of a special committee, which would consist of spiritual and secular persons who would seek to transform the ecclesiastical court according to the principles of legal regulations, as far as these grounds were applicable to the ecclesiastical court. The committee found that it would be more desirable if petitions for divorce due to incapacity for conjugal relations or in cases of adultery should be addressed to the diocesan bishop, who would then exhort the spouses to remain in the marital union. If the exhortation did not succeed, then a person was ordered to turn to the

\textsuperscript{465} Журналы и протоколы 1907, 97.

\textsuperscript{466} Журналы и протоколы 1907, 118.
civil court and make a formal application for divorce. In the event of recognizing the incapacity for conjugal relationship the civil court would inform the diocesan bishop of its decision regarding divorce. A person wishing to divorce due to the violation of the sanctity of marriage by committing adultery would also address the petition to the diocesan bishop, who would follow the same procedure. The committee in its examination particularly emphasized that the starting point for the aforementioned question should be the sacramental nature of marriage in the Orthodox Church. From the above procedure a conclusion was reached that marriage could be terminated only by the spiritual authorities who had the authority to perform such a sacrament and determine whether the marriage was lawfully contracted and whether the state of sacrament had ended in the particular case.  

Valuable information regarding what was the actual process at the time is found in the Memoirs of the Last Archpriest of the Russian Army and Navy by Georgi Šavelski, who worked in the Holy Synod between 1915–1917. From Šavelski’s memoirs it is known that the Holy Synod held meetings on Mondays, Wednesdays and Fridays from 11 am to 1 pm. In urgent cases, meetings were arranged at other times as well, sometimes in the evening. Cases that came to the Synod were “digested” in the Synodal Chancery beforehand, and only later were presented to the secretaries and chief secretary of the Chancellery during the meetings of the Synod.

Members of the Synod discussed new divorce cases at each meeting. Archpriest Šavelski recalled the following: “Now it is terrible to recall that the discussion and solution of adulterous cases occupied so much of the time of the highest governing body of the Church. Yes, divorce cases actually occupied the Synod in most of its meetings!” Matrimonial matters might have been different in Russia at this time if the dissolution of marriages could have been handled at the local level by the bishop and his office.

In Šavelski’s opinion, before the Revolution cases were dealt with in a strange, unnecessary and pointless order in which all divorce cases from regional offices were submitted for approval to the Holy Synod. In some

\[467\] Журналы и протоколы 1907, 97–98.
\[468\] Шавельский 1954, 152.
\[469\] Шавельский 1954, 154.
dioceses the number of divorce cases reached up to thousands a year, and every year the number increased. However, the majority of such cases were solved and prepared by the local Synodal offices, which contradicted to some extent the very ecclesiastical nature of bishops and their dioceses. The bishop and their office could not annul the sacrament itself; on the other hand, the Synod officials had such power and their decisions were approved with the signatures of the members of the Holy Synod.\textsuperscript{470}

A definition was made by the Holy Synod dating from 28 February 1907, and under its guidance was formed a special committee to prepare a project regarding the grounds for divorce for the future divorce law. This committee had eight meetings in March – May 1907 during which they prepared to update and change the current definitions of the grounds for divorce in the Russian Orthodox Church. The results of the meetings developed into a project concerned with the grounds for divorce.\textsuperscript{471} After the meetings, each member of the Holy Synod prepared a review regarding previously drawn provisions of the meetings of the preparatory commission. Metropolitan Vladimir of Moscow and Kolomenskoe, in his statement 9 December 1908, noted that it was necessary to determine exactly in the preliminary discussion of the project from which point of view it would be desirable to examine the questions in the Holy Synod. It was his opinion that the points of view could be considered 1. from a medical, namely from the physical point of view; 2. from the point of view of civil law; and 3. from the point of view of daily life.\textsuperscript{472}

Archbishop Guri of Novgorod and Staroruski in his statement from 16 October 1907, noted that the existing legislation on divorce was intended to reduce the possible number of divorces. If divorce was made too easy it could shake the foundations of the family and public life and might give rise to a careless attitude toward marriage. The archbishop also noted that it was widely acknowledged that from the social and moral point of view, freedom in the dissolution of marriages and the excessive difficulty of divorce were equally harmful. As long as marriage was an institution sanctified by the Orthodox Church, and as long as marriage was a

\textsuperscript{470} Шавельский 1954, 155.

\textsuperscript{471} Суворов 1908, I (Foreword).

\textsuperscript{472} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 5.
sacrament, the basis of marriage laws should include ecclesiastical
regulations that were in full accordance with the canons.

Archbishop Guri continued analyzing the work of the project and
remarked that their decisions should correlate with the canonical rules of
the Orthodox Church and this would rebuild the practice of divorce which
existed in Russia before the reforms of Peter the Great. It was noted that
even the legislation of the Byzantine Church recognized more reasons for
divorce than what existed in the Russian Orthodox Church at that time.
According to the new rules, divorce was given only in the case when a
family was at the point of break up (due to abuse), or when the marriage
virtually ceased to exist (due to sickness, madness or for malicious
abandonment), i.e. any hope for the restoration of marriage was lost.
Archbishop Guri admitted that the new blueprint of the divorce laws was
imbued with the spirit of humanity. This new blueprint concentrated on
the situation in which further action or progress by spouses seemed
impossible, and where marital life was unhappy, in most cases due to the
fault of one side.473

Besides the minutes of meetings of the Pre-Conciliar period, there
were a number of serious studies on the subject of divorce.474

On 5 March 1909 Professor Ilja Berdnikov published his findings,
providing us with the most abstract introduction to the subject that was
discussed in the Holy Synod and generally in Pre-Conciliar period.
Professor Berdnikov approaches the problem from ancient and
contemporary viewpoints. His study gives a perfect example of the use of
ancient laws in modern times to approach a fundamental problem in
Orthodox canon law. He stated that divorce in the practice of the ancient
Church did not allow divorcees to contract new marriages; instead,
ecclesiastical discipline persuaded them to reconcile and to resume their

473 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 12.

474 Some of them, like I. I. Sokolov’s study About the Reasons for Divorce in
Byzantium from the Mid-Ninth to the Mid-Fifteenth Century, was partly used as
a report for the meeting of a special committee under the Holy Synod in 1909.
Other studies were: Ilja Berdnikov’s For the Question of the Reason for Divorce
(About the Draft of a Special Meeting of the Holy Synod in 1907); Nikolai
Suvorov’s Remark to the Draft of the Grounds for Divorce, Constituted by the
Special Meeting of the Holy Synod; Nikolai Zaozerski’s What is the Basis of
Ecclesiastical Jurisdiction in Matrimonial Matters? and Malicious
Abandonment of a Spouse by the Other as a Reason for Dissolution of
Marriage.
interrupted marital communication. It is clear that here Berdnikov was referring to Apostolic Canon 48, Canon 87 of Trullo, Canon 115 of Carthage and Canons 9 and 77 of Basil the Great.\textsuperscript{475} Ecclesiastical discipline in ancient times was strict concerning divorce due to adultery as we have seen in the second chapter. It was natural not to expect from that time other, less justifiable permissions, for reasons to divorce. In the ancient Church, priests were guided in the question of divorce with the literal commandments of the Lord and the Apostles. In support of this idea, indications were found in the testimonies of the ancient fathers and teachers of the Church – Clement of Alexandria (ca. 150–215), Theophilus of Antioch (died between 183–185), Gregory the Nazianzus (ca. 329–390), Asterius of Amasea (ca. 350–410) and others.\textsuperscript{476}

Berdnikov saw as well the importance of the Byzantine legal tradition for the future of Russian marriage law. One such law was Justinian Novella 117, which established a practice prohibiting free divorce, with the view that persons who violated this law were to be confined to a monastery and deprived of the right to enter into a new marriage. However, this law, according to Berdnikov, was impossible to execute in the already morally relaxed society of the Byzantine Empire.\textsuperscript{477}

Probably knowing already Archbishop Guri’s statement from 16 October 1907, Berdikov continued to observe the question of free divorces. Such a question from the Byzantine legal, and to some extent, from the canonical point of view started to develop after Justinian II thought that it was better to restore the freedom of divorce by mutual agreement of the spouses. Church authorities for their part continued to

\textsuperscript{475} Ράλλη 1852, Τ. ΙΙ, 63, 505–506; Ράλλη 1853, Τ. ΙΙΙ, 568–569; Ράλλη 1854, Τ. ΙV, 120–121, 239–240.

\textsuperscript{476} See more in Zhisman 1864, 101–102.

\textsuperscript{477} РГИА. Ф. 796. ОП. 445. Д. 417. Л, 14. The first manifestation of the influence of ecclesiastical discipline on divorce legislation of Byzantine emperors was seen in a gradual restriction of so-called free divorce by mutual consent of the spouses, without specifying the particular reason for divorce. At first, the emperors tried to create some obstacle, indicating in the law the reasons one could give to divorce either to the husband or to the wife, without undergoing any disadvantageous consequences from it. In the Empire there were two types of divorces, repudia justa and repudia injusta – a legal divorce, i.e. under the conditions stated in the law, and illegal divorce, contracted illegally, without paying attention to the standards specified in the law. РГИА. Ф. 796. ОП. 445. Д. 417. Л, 14
insist on inadmissibility of free divorce without a legitimate ground, which was expressed in Canon 87 of Trullo. This canonical insistence was then adopted in the *Ekloga* of the Emperor Leo III Isaurian (ca. 685–741), and his son Constantine in the eighth century. The *Ekloga* of Leo and Constantine with their regulations regarding marriage, adapted by far the most canonical discipline from all the other monuments of Byzantine legislation. Legislative Byzantine monuments from the end of the ninth and the beginning of the tenth century, namely *Procheiron nomos* of Basil the Macedonian from 870, *Eisagoge* of Emperors Basil, Leo and Alexander from 884 and the *Basilika* from 905–911, prohibited both free divorce at the discretion of the spouses and the second marriage of a divorced spouse who committed such a divorce.

Was the prohibition of free divorce then no more than a legal theory during the tenth century or was it followed in practice? Berdnikov thought that the *Ekloga* could not immediately abolish the custom of free divorce, yet it promoted streamlining it. In the opinion of the Russian canonist, at the end of the twelfth century, Byzantine society did not know anymore the practice of free divorce. It must be said that such a view is only a presumption, though it can be justified if one pays close attention to the commentary of Alexios Aristenos (died after 1166) on Canon 9 of Basil the Great, a commentator of canons who actually lived at the time of the Emperor John II Komenos (1087–1143): “Σήμερον δὲ οὔτε ἀνήρ, οὔτε γυνὴ διάλύειν τὸ συνοικέσιον δύναται, εἰ μὴ τὶς αἰτία εὐλογος ὑπεστιν, ἀφ’ ᾗν ῥήτως ἢ ίουστινιάνειος νομοθετεῖ νεαρᾶ [At present, neither husband nor wife can dissolve the marriage without such blessed reason that the Justinian Novella directly points to].”

Parallel ideas can indeed be found between the question of divorce during the Byzantine period and twentieth century Russia. Byzantine laws on divorce aimed at stopping personal arbitrariness in the dissolutions of marriages and providing grounds for divorce, and these laws were respected by the Church as well. The purpose was obvious: to help and strengthen the bonds of marriage and to ensure family peace and order. For the sake of this good and beneficent goal, the Church

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478 Ράλλη 1852, Τ. ΙΙ, 505–506.
479 Православная энциклопедия 2003, Τ. ΒΙ, 162–164.
480 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 15.
481 Ράλλη 1854, Τ. ΙV, 123.
authority took the responsibility of controlling this issue not just in the Byzantine Empire, but in Russia as well. If anyone got divorced for a legitimate reason, the Church could not punish the divorcee with a penance. A person who followed the law could not deprive the divorcee of his rights to enter into a new marriage. When Emperor Leo the Philosopher in his 111 and 112 Novella, and after him Emperor Nikephoros III Botaneiates (1078–1081) allowed divorce on specific grounds, afterwards ecclesiastical lawyers began to speak out more openly in favor of divorce.\(^{482}\) The previously mentioned change in the positions of canon lawyers can be seen in Balsamon’s commentary to rule 30, chapter 13 of *Nomokanon*, and in Blastares’ commentary to rule 26 of the third (Г) chapter of his *Alphabetical Collection*.\(^{483}\)

Solemn evidence of total solidarity of ecclesiastical authorities with secular authorities in the matter of regulating the subject of divorce can be found in Berdnikov’s quoted fact that the Justinian laws regarding the grounds for divorce were placed in *Photian Nomokanon* on a par with ecclesiastical rules to guide the divorce practice at that time.\(^{484}\) Regarding this, Berdnikov added the view that the Church on the basis of secular Byzantine laws considered such reasons to be an adaptation of *oikonomia* to the spirit of the time, showing leniency towards human weakness.\(^{485}\)

\(^{482}\) Zachariae 1857, 213, 216.

\(^{483}\) Рάλλη 1852, Τ. Ι, 330; Рάλλη 1859, Τ. VI, 198.

\(^{484}\) ΡΓΙΑ. Φ. 796. ΟΠ. 445. Δ. 417. Λ, 15.

\(^{485}\) ΡΓΙΑ. Φ. 796. ΟΠ. 445. Δ. 417. Λ, 15–16. It should be noted that the ecclesiastical authorities, in cases of divorces, practiced leniency with regard to the weaknesses of human nature even before the divorce laws of the Christian emperors. For example, Origen stated that for the Christian it could sometimes be very difficult to meet the strict requirement of the commandments of the Gospel regarding the indissolubility of the marriage bond except in cases of adultery. Origen gave the example of a husband having to live with a wife who is hostile and tries to take his life by poisoning him, or tries to kill the fetus or sets his house on fire. From his argument it is clear to see that Origen leaned towards leniency in the case of an unfortunate husband who is put into such a critical situation. Church father Epiphany also mentions other reasons for divorce between Christians in addition to adultery. For more about *oikonomia*, see: ‘Αλιβιζάτος ’Α. – Ἡ οἰκονομία κατά τὸ κανονικόν δίκαιον τῆς Ὑπερβοδόξου Ἐκκλησίας. ᾨθήναι, 1949; Κοσσώνης Ἰ., Ἀρχιερ. – Προβλήματα τῆς Ἐκκλησιαστικῆς Οἰκονομίας. ᾨθήναι, 1957; Χνοστόβ Β. Μ. – Ὀπτιμ χαρακτηριστικοί πονητικοί aequitas и aequum ius в римской классической юриспруденции. Москва, 1895; Erickson J. H. – “Oikonomia in Byzantine
The Church was not the only institution to practice “legal” leniency. For example, Christian emperors also issued legislations on additional causes for divorce, which the ecclesiastical authorities then quietly accepted. In spite of the practice of leniency in the Byzantine Church, courtrooms and in jurisprudence, Metrophanes Kritopoulos (ca. 1589–1639), Patriarch of Alexandria between 1636 and 1639, claimed in his work *Orthodox Confession of Faith* (1624) that divorce was permitted only because of the sin of adultery, in exact accordance with the commandment of the Gospel.

Before Professor Berdnikov indicated the particular grounds for divorce which were allowed by the *Nomokanon* in the ancient Church, he found it appropriate to ask whether there was a theoretical basis and a practical use to adopt the ancient canonical and Byzantine legal tradition in a new Russian marriage law? This opinion was treated skeptically by one of the respected Russian canonists, Nikolai Suvorov (1848–1909). This can be clearly seen in Suvorov’s study entitled “Remark to the Draft of the Grounds for Divorce, Constituted by the Special Meeting of the Holy Synod”, which was criticized by Professor Berdnikov. Suvorov saw that the grounds on which the project stood did not differ that much from previous proposals and so would not improve procedural divorce law. To him, neither the Church’s teaching on marriage as a sacrament, nor the canons of the Eastern Church could serve as a basis for a divorce law that would meet the needs and requirements of modern life. Efforts to

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486 See, for example, the *Ekloga* of Leo, title II, chapter 12. Zachariae 1852, 20. Other emperors who issued legislations based on *oikonomia*, were Theodosius II and Valentinian III. For an indepth study of "διαζύγιον κατὰ συναίνεσιν," divorce by consent, see Zhisman 1864, 99–119.

487 Pelikan 2003, 528. The title *Confession* (ομολογία) is used in accordance with several earlier Eastern Orthodox affirmations of faith, which dealt with the Christian doctrines. Metrophanes Kritopoulos’ *Confession* is known for its Protestant influence, since the author studied in the University of Helmstedt, a major center of Lutheran Reformation. The *Confession* adopted the spirit of ecumenical goodwill and of doctrinal flexibility. (Pelikan 2003, 475.) Compare Kritopoulos’ teaching with the commentary of Rudder’s author to the Apostolic Canon 48: “If any layman who has divorced his wife takes another, or one divorced by another man, let him be excommunicated.” *The Rudder* 1983, 76.

488 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 16; Суворов 1908, 49.
find in the canons of the Eastern Church justification for individual grounds for divorce would always be in vain, because the canons were established during times when the Church preserved discipline and strict moral beliefs that originated in the first three centuries of Christianity. For these reasons Suvorov thought that carrying out such strictness within the contemporary discipline of Church life would be impossible.\(^4\)

Berdnikov, on the other hand, argued that when there was a question of improving some legal institution whether in the field of public or private law, it is common to turn to the past of this institution, to try and find out its legal nature and its historical forms of development. Berdnikov was also wary of Professor Suvorov’s risky statement that the rules of the ancient Church and the laws of the Byzantine emperors have already outlived their days and were not applicable to modern conditions of life anymore. These fundamentals were, however, approved in their essential features in the draft of the Civil Code of 1902, and published with the Church’s influence. It introduced the *Nomokanon* as an addition to these rules. Berdnikov stressed that ignoring these laws was not possible regarding the Orthodox view on the matter. In the aforementioned laws were instructions for almost all the private reasons for divorce which were debated in the early twentieth century.\(^5\)

When studying the planned reasons for divorce, it is worthwhile to note that the *Civil Code* did not separate divorce cases for different categories. They were all under one title “Divorce at the Request of One of the Spouses.”\(^6\) Meanwhile, in the *Charter of Diocesan Consistories*, divorce cases were submitted by only one of two types of cases at the request of the spouses. According to the *Charter of Diocesan Consistory*, there was no difference between these categories of cases and other matters concerning divorce. They both initiated a legal action only upon the request of the spouses.

Professor Berdnikov suggested that during the grouping of reasons for divorce, especially if it was found necessary to increase the number of reasons for divorce and to introduce sub-divisional categories for them,

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\(^4\) Суворов 1908, 49.

\(^5\) РГИА. Ф. 796. ОП. 445. Д. 417. Л. 17.

\(^6\) “О расторжении браков по просьбе одного из супругов.” Article 45. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 5.
this should be done in the spirit of norms which were already provided by the Byzantine laws.\textsuperscript{492} Both Professor Berdnikov and Professor Suvorov examined these sub-divisional categories from the legal, practical and canonical points of view, as can be seen in the following subsections.

### 4.1 Adultery

According to Saint John Chrysostom, a universal Church father, any sexual act must take place within marital union, and in order for intercourse to be legitimate, it must be chaste.\textsuperscript{493} The antonym for such faithfulness is adultery. Adultery (\textit{μοιχεία}) was considered in the Byzantine law and in the ancient ecclesiastical rules as extra–marital carnal copulation, from the wife’s part with all other men, and by the husband with another married woman. Regarding adultery, canonist Berdnikov, for example, did not mention that the latter “unequal” judicial practice, examined in the second chapter of our study, left an option for a man to commit a crime of adultery with another unmarried woman. This can be actually understood in the light of the teaching of Basil the Great. Basil the Great and Byzantine law, according to his ninth canon, prohibits women from seeking divorce from her husband, despite how badly the husband insulted matrimonial fidelity.\textsuperscript{494}

Adultery was also seen as an apparent reason for divorce in the Pre-Conciliar Commission in 13 December 1906, when Professor Zaozerski expressed the opinion that according to strict canonical sense, only

\textsuperscript{492} РГИА. Ф. 796. ОП. 445. Д. 417. Л, 21.

\textsuperscript{493} Trenham 2013, 160.

\textsuperscript{494} \textit{Ράλλη} 1854, Т. IV, 120–121. Saint John Chrysostom provides guidance for married Christians with regard to sexual desire and intercourse. He refers to the teaching of Saint Paul, who “permitted the enjoyment of this desire,” but also “often laid down rules for lawful intercourse.” These rules were given, according to Saint John, to secure the virtue of the body, which is a temple of the soul. Concerning desire, Chrysostom explains that some are necessary (\textit{ἀναγκαῖα}), some natural (\textit{φυσικαί}), some neither of the two. Desire itself is not a sin, but becomes sinful when it goes beyond the laws of marriage. The body has a natural desire, not for fornication, nor for adultery, but for pleasure. Trenham 2013, 159–160.
fornication was a valid reason for divorce. When considering testimonies and witnesses, a question considering the function of formal testimonies could be asked. According to the Russian civil law of that time, testimonies were strictly divided into two categories: primary and secondary. If the plaintiff brings just the primary without the secondary testimony, the lawsuit could be respected, leading to the dissolution of marriage. This did not work vice versa and, as Professor M. E. Krasnožen noted, the Holy Synod occasionally indicated not holding strictly to formal testimonies, indeed canonist S. P. Grigorovski even suggested abandoning them.\textsuperscript{495} Almazov joined Grigorovski’s view and argued that what was the point of having formal testimonies in such a crime, which by its very essence needed to be hidden from the witnesses?\textsuperscript{496} Almazov agreed in principle, but only if the groom filed for premarital violation regarding the virginity of his wife and proved himself to be a virgin.\textsuperscript{497}

When considering the mutual adultery of spouses, canonist Grigorovski considered that the marriage should be dissolved in such a case, since the sanctity of a marriage was violated twice. This interpretation raises a question: Since in the cases of adultery according to the laws and practice of that time, the guilty spouse was condemned to celibacy, should, in such cases of mutual adultery, both spouses be condemned? Regarding mutual adultery, no such cases were found in the practice of the Holy Synod until the nineteenth century, and a new trend appeared only in the beginning of twentieth century. Yet, they were not dissolved, since Article 45 of the tenth volume of Code of Laws specified that marriage could only be dissolved in cases where the other spouse was adulterous, and the Holy Synod even added in their notes to such cases “but not both spouses.”\textsuperscript{498} This was a perfect example how the law could be forced to take a wrong direction, against the ancient canonical

\textsuperscript{495} Журналы и протоколы 1907, 114, 116. This indication, however, contradicted the fact that the Holy Synod did not dissolve marriages because of adulterous behavior if there were no eyewitness testimonies. Further, the Charter of Diocesan Consistories provided three types of testimonies: eyewitnesses, begotten children from unlawful relationships and a set of circumstances that convinced the judges of the guilt of the respondent party. Журналы и протоколы 1907, 116.

\textsuperscript{496} Журналы и протоколы 1907, 118.

\textsuperscript{497} Журналы и протоколы 1907, 119.

\textsuperscript{498} Журналы и протоколы 1907, 120.
tradition, namely to not allow the dissolution of marriages when in fact the marriage was already an adulterous act. With regard to this, Professor Gortšakov asked: “If the marriage is observed solely from a religious point of view and the marriage is recognized exclusively as a religious establishment, it cannot be justified. Why must adultery be regarded as an occasion and a cause of divorce only when one of the spouses has committed it, whereas mutual adultery of the spouses is not included in the number of reasons? The sanctity of marriage as a sacrament and ecclesiastical establishment is violated by the adultery not only by one side, but by the mutual adultery of both spouses.”

Metropolitan Antoni of Saint Petersburg defined the position of the diocesan authority of Saint Petersburg concerning the grounds for divorce in the decree No. 7932, from 12 September 1908. The diocesan authority found that in mutual adultery, both parties were considered to be guilty, and neither of them had the moral right for divorce or entry into a new marriage after the divorce. Mutual adultery also increased the number of divorces, multiplied the number of children born of wayward parents and generally increased the number of violations of marital fidelity. Therefore, it sullies the image of marriage as sacred and transforms it from a religious–moral institution into a carnal one. Later this was supported with the view that when the marriage was dissolved on account of the fault of one of the spouses under the current law, the other spouse who sought a divorce would refrain from maintaining the illegitimate children. In other words, the diocesan authority of Saint Petersburg found the possibility of divorce in mutual adultery impracticable.

When reflecting on divorce by mutual adultery, Archbishop Guri of Novgorod and Staroruski noted that the drafted Article did not indicate who possesses the right to ask for a divorce in the above matter. A Special Meeting of the Holy Synod suggested amending the existing law in the sense that “mutual adultery of spouses provides a reasonable basis for divorce; both are subject to ecclesiastical penance.” Berdnikov first approached the question of mutual adultery from the historical

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499 Журналы и протоколы 1907, 121.
500 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1.
501 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 12.
perspective, pointing to the following formulation of the Special Meeting: “In divorce law and in the ancient practice of the Russian Orthodox Church until the nineteenth century, one cannot find indications that the adultery of one of the spouses alone could serve as a reason for divorce, and mutual adultery would serve as an obstacle to the marriage.”

Berdnikov believed that this historical inquiry was not a credible one. When studying the Byzantine laws regarding the expressed question, it can be seen that they directly expressed the position that the spouse who was guilty of adultery was deprived of the right to grant a divorce to the other spouse for the same reason. Berdnikov restated the words of Joseph von Zhisman (1820–1894) that the Church followed the same practice, as can be seen from Zhisman’s study *Das Eherecht der Orientalischen Kirche*. In the practice of the Russian Orthodox Church in the Diocese of Moscow, whenever a person sought a divorce on the grounds of adultery, the other spouse was asked under oath by Metropolitan Amvrosi whether a legal action had been submitted by the other spouse. The dogmatic point of view was stated by the Special Meeting as follows: “If the adultery of one of the spouses as a sin violates the divine grace bestowed in the sacrament of marriage, the sanctity of the marital union as a sacrament and the ecclesiastical establishment, then the mutual fornication of spouses will disturb and offend the sanctity of marriage even more.” This can raise the following opinion: until the inner union of souls of the husband and wife was broken


504 Диг. XXIV. 3.39. “Where a husband and wife accuse each other of immorality in court and it is declared that both of them have given cause for repudiation, the decision should be taken to mean that since they have both treated the law with contempt, neither can make use of it in their claims, as their faults disappear when set against each other.” (Watson 1985, Vol. 2, 725.) Диг. XXIV. 3.47. “Where a woman commits adultery at the instigation of her husband, he cannot keep any of her dowry. For why should a husband disapprove of morals by which he either corrupted himself in the first place or encouraged later? If anyone maintains that according to the intention of the statute, a husband who allowed his wife to prostitute herself cannot accuse her, this view demands a hearing.” Watson 1985, Vol. 2, 726–727; Basil. XXVIII 8.37, 45. Scheltema 1962, Vol. IV, 1384, 1386.

505 Zhisman 1864, 593.

through the offense of one of the spouses, the sacrament of marriage continued to exist.

This syllogism would indeed be correct if the fact of adultery automatically meant divorce as a punishment for sin. This was not the case, and other than the aggrieved spouse, no one could initiate the question of divorce due to adultery. It would also be logical that fornication as a sin would be subject to the disciplinary court of the ecclesiastical authority and seeking a divorce due to adultery belonged exclusively to the injured spouse. Would such an attitude on the part of the ecclesiastical authorities regarding instituting divorce proceedings be conceivable if the adultery of one of the spouses was truly an indelible insult against the sanctity of marriage, violating the grace of this mystery?

Here one should note the important fact that the Russian divorce process differed from the European one of the time in two aspects, as Professor Gortšakov noted in his study from 1909. First of all, in European countries at that time one or other principle was observed which determined the essence of the process: indictment or adversarial, i.e., trial or legal procedure in which the parties in a dispute have the responsibility for finding and presenting evidence. This appeared to be a problematic legal factor in the cases of possible mutual adultery when trying to ascertain the guilty part by evidence.

The order of divorce proceedings in cases of mutual adultery was the focus during the Special Meetings. The blueprint, adopted by the Special Meeting, provided an opportunity to allow for both fornicators to file their claims at the same time or in a certain sequence. Professor Berdnikov believed that such a practice would be a mockery and the Special Meeting itself did not permit such an order, since at the end of the project it was recorded that “the right to sue for divorce due to adultery belongs to the non-guilty spouse.” From this can be drawn the conclusion that in the case of mutual adultery, a claim is started by one of the spouses who takes the role of the guilty party, and another offender must file a counterclaim or objection only at the proceedings. This argument still left open the question what would the other spouse request in the counterclaim? Whether to maintain the marriage, despite adultery

507 Горчаков 1909, 286.
508 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 27.
having been committed by both sides, or the dissolution of the existing marriage at the request of the first spouse or only on account of the guilt of the first spouse? What if, instead of an objection, the innocent spouse—respondent declares a willingness to divorce the plaintiff—adulterer under special conditions, would that mean divorce by mutual agreement of the spouses? In conclusion to this question, Berdnikov asked whether there was a need to create a new ground for divorce by mutual consent of spousal adulterers? His opinion regarding this was very clear: there was not.509

Article 256 of the Charter of Diocesan Consistories at the time was clear regarding perpetual celibacy: If a person was proved incapable of marital cohabitation, or violated the sanctity of marriage by committing adultery, the marriage was dissolved and the perpetrator was condemned to perpetual celibacy and penance according to the canons.510 This article obviously refers to Canon 39 of Basil the Great and adheres to a strict interpretation; if a woman lives with an adulterer, she is an adulteress from that moment on (Ἡ τῷ μοιχῷ συζώσα, μοιχαλίς ἐστι πάντα τὸν χρόνον).511

Balsamon, however, did not interpret this canon so strictly. In his teaching, he did not consider all women who lived with an adulterer were adulteresses. For example, the wife of an adulterer, while living with him, is not subject to penance; this canon instead refers to a married wife who is unfaithful to her lawful husband and begins to live with the adulterer. Balsamon provides a historical example from the era of Basil the Great; one woman, after the death of her lawful husband, wanted to marry the adulterer with whom she was living. Saint Basil answered this action with the requirement that such a woman was not permitted to do so and should remain under penance while living with the adulterer, despite the fact that she had already submitted to a fifteen-year penance for adultery.512

Ecclesiastical regulations were more strict towards women in both the Byzantine period and in the time of the Russian Empire. From the beginning of the rule of Peter the Great, the old Russian penal practice of

509 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 27.
510 Устав духовных консисторий 1843, 96.
511 Рάλλη 1854, Т. IV, 184. For a translation, see The Rudder 1983, 819.
512 See canon 58. Рάλλη 1854, Т. IV, 216.
sending an adulterous wife to a nunnery, was changed to exile to remote places such as Siberia. The tone of the penance, however, stayed the same; an adulteress should remain there until her death. Adulterous husbands, on the other hand, were more privileged in Russia. After committing the crime of adultery, they were only subjected to observation by their spiritual father; whereas wives could not even file for divorce on this ground.513

The Pre-Conciliar Interdepartmental Commission which was drafting the charter on divorce, gathered on January 16, January 20 and on 11 May 1917. The Chairman of the Commission was Sergi, Metropolitan of Finland and Vyborg. However, Archbishop of Nizhny Novgorod Ioakim replaced him during the session. On 16 January 1917, the Commission decreed that a person whose marriage was terminated due to violation of its sanctity by fornication or by malicious abandonment of a spouse, could enter into a new marriage not earlier than the completion of the penance imposed. The same restriction of the rights also applied to mutual adultery. A person whose marriage was terminated twice due to adultery was condemned to perpetual celibacy.514 As noted before, the new edition of the Charter of Diocesan Consistories was approved by the definition of the Holy Synod from 1 May 1917 according to ruling No. 2547.

4.2 Incapacity for Conjugal Relationship or Childbearing

During the Pre-Conciliar Commission in 13 December 1906, Professor and canonist A. I. Almazov noted that incapacity for a conjugal relationship should be constituted from a much broader viewpoint as a reason for divorce, since the law at that time merely saw incapacity from the technical point of view, i.e., it was a legal ground only when the

513 Красножен 1909, 66. Krasnožen cites here the protocol of the Diocesan Consistory of Voronež from September 16, 1800 concerning the case of Captain Buturlin.

person was incapable of a conjugal relationship for physical reasons. However, in Almazov’s view the lawmakers forget that there is a physical condition which made a physical relationship between the spouses possible, but on the other side made the more moral connection between the spouses impossible. Such a condition was syphilis, which from the ecclesiastical point of view stopped a full marital relationship. As a result, from such a marital relationship there was no offspring, therefore, no marriage. Professor M. E. Krasnožen did not agree with such a viewpoint and referred to cases where syphilis had been cured. This, however, was an exception.  

It should be pointed out that the decrees at the time required a three-year period of living in marriage while suffering from an incapacity to have a conjugal relationship, after which the divorce process could be started. It might be asked why the time period could not have been reduced to one year, as though a pre-marital or natural incapacity might disappear after a longer period? Guidelines on this subject were not available in the practice of the Synod. From this one can come to the conclusion that a marriage should be dissolved not only on account of the inability to fulfill marital cohabitation of one of the spouses, but in the event that these physical defects affect both parties.

According to the opinion of the diocesan authority of Saint Petersburg, the law relating to divorce on the grounds of the incapacity for conjugal relationship or childbearing, regardless of when this incapacity started, did not justify the right for both spouses to enter into a new marriage. This could lead to a possible abuse of the law. If the incapacity for conjugal relationship was biological or inborn, it must already have occurred before the marriage. The current law at the time regarding incapacity was formulated as the following: “This reason cannot be the basis for a claim for divorce if the inability of one of the spouses is not natural.” This outcome was not clear, as V. I. Dobrovolski pointed out in his study from 1903. The incapacity to have a conjugal relationship may continue throughout marital cohabitation, but at the same time it

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515 Журналы и протоколы 1907, 114.
516 Журналы и протоколы 1907, 118.
517 Добровольский 1903, 137.
518 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1.
519 Добровольский 1903, 137.
might not be a physical incapacity. The term “natural incapacity,” used by law, was incorrect, since it was necessary only that it was premarital and that the marriage lasted at least three years.\(^{520}\)

The diocesan authority of Saint Petersburg saw that pathological incapacity could be a temporary phenomenon and curable, and could also occur after marriage, even after already having children. Examining mental incapacity, the same authority did not see it as a subjective reason for divorce, since it was difficult to prove and would open up a wide scope for arbitrariness.\(^{521}\) However, they hoped that in the future divorce law, the incapacity to have children would be introduced as a reason for divorce.\(^{522}\)

Metropolitan Vladimir of Moscow and Kolomenskoe stressed that it would be unthinkable to accept \(\text{impotentiam coeundi}\) ("incapacity for conjugal relationship") as a sufficient reason for a divorce in the case of its occurrence after entering into a marriage. The doctors who had prepared the proposed law admitted that such an incapacity might also disappear, causing only a temporary unfortunate condition. They found it necessary to allow for the spouse whose marriage was dissolved due to a diseased state, to only enter into a new marriage after providing a medical certificate showing that the disease was over.

As for \(\text{impotentia generandi}\) ("incapacity for childbearing"), Metropolitan Vladimir noted that if the Church were to permit such a new reason for divorce, then it would enter a non-ecclesiastical path which went against the Gospel. Moreover, it would also show that by recognizing the three-year or even less infertility of the marriage as a sufficient ground for termination, the Church would have forgotten about the marriages of the great saints — the Ancestors of God, Joachim and Anna, the holy righteous Zechariah and Elizabeth, the mother of the prophet Samuel, and others.\(^{523}\) Archbishop Guri paid attention to the following paragraph: “about mental, so-called subjective incapacity, which develops only in relation to a particular person and cannot take place when dealing with other persons.” Archbishop Guri asked whether this quotation was an \(\text{odium capitale inter conjuges}\), known in the

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\(^{520}\) Добровольский 1903, 138.

\(^{521}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1.

\(^{522}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 3.

\(^{523}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 5.
Protestant Church as “an insuperable aversion of the spouses to each other,” a reason unknown to Orthodox canon law. This reason for divorce had a legal statute in the Austrian civil law of 1811 and in Romanian civil law of 1864, concerning divorce cases of Orthodox spouses. One can ask whether this reason is known in the Orthodox canon law, or in the civil legislation that dealt with the divorce cases of Orthodox spouses. If this was the case, then it is a new motive for divorce, as the article regarding the incapacity for conjugal relationship and childbearing clearly refers to physical disability.

The incapacity to have a conjugal relationship was acknowledged as a reason for divorce in the Byzantine law, in the Basilika and the Nomokanon of Photios in the sense of an incapacity to fulfill carnal cohabitation that occurred after entering into marriage. Emperor Justinian was the initiator of a constitution in 528 which replaced the existing two-year term with a three-year period concerning incapacity. Such Russian canonists as Suvorov, Berdnikov and Krasnožen agreed with the fact that this was done because some husbands who were impotent for more than two years, later turned out to be able to sire children.

If there had been a method to recognize incapacity before marriage, it would have been recognized as an obstacle to a legal marriage in Byzantine legislation, as it eliminates the natural conditions for marriage. However, if an incapacity was recognized after the marriage, the only option was to allow the healthy spouse to divorce the party incapable of matrimonial life. The ecclesiastical law of the Russian Orthodox Church was formulated in the same sense, and the civil law as well, with the particularity that in addition to physical incapacity, it also

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524 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 12.
525 Никодим 1897, 644–645.
526 XIII. 4. Рάллη 1852, Т. I, 294–301.
527 Красноžен 1904, 15.
528 Суворов 1908, 13; Красноžен 1904, 15; РГИА. Ф. 796. ОП. 445. Д. 417. Л. 19. To identify the incapacity, the Byzantine civil court could base their opinion on the testimony of the impotent person’s wife. If the latter did not want to do this, then the investigation of incapacity was carried out by a doctor.
529 Articles 245–247. Устав духовных консисторий 1843, 93.
530 Article 49. Свод законов Российской Империи 1912, Т. 10, Ч. 1, 5.
distinguished incapacity which occurred before the marriage. Berdnikov thought that the Special Meeting of the Synod expanded the scope of the meaning of incapacity so as to make it unworkable under the ruling of medical expertise. The Special Meeting offered to adopt as grounds for divorce an incapacity which not only occurred before marriage, but which might start after it. This addition was justified by the fact that it was often difficult for professionals to determine whether it was premarital or postnuptial incapacity that was in question. That is why medical expertise in such cases was forced “to make a rough estimate.”

Berdnikov, nevertheless, suggested that medical experts did not have any difficulties in ascertaining the form of the diseased state when examining cases. The legislator on the other hand will have in mind a simple phenomenon, commonly found in life. If here is added incapacity which started after the marriage, one must assume that this includes such cases of incapacity about which one can no longer be sure whether it started before or after the marriage. There was also a possibility for such cases in which one or both of the spouses is unable to continue living a normal marital life. Incapacity arising during the period of marriage could be the result of sexual fatigue or of a dissolute life. This type of incapacity cannot in Berdnikov’s opinion be equated with natural and premarital impotence. The latter case is of a permanent nature, the first is only temporary. A temporary state of incapacity was never recognized as grounds for divorce and did not qualify as such. Being recognized as such would be completely in disagreement with the spirit of ecclesiastical discipline, which grants leniency only in cases of positive necessity and not to the detriment of the general rule or situation. With regard to incapacity of a mental and subjective kind, these cannot be subject to regulation. The law sets standards for the ordinary phenomena of life, and not for exceptional circumstances in the field of psycho–pathology.

It is also interesting to see that Western-European civil law at the time held a view where it tried to find, so to speak, a way out of the artificial practical difficulty created by the incapacity for a conjugal relationship of one of the spouses. In the German Code of Law and in the Hungarian matrimonial legislation at the time, as Suvorov clarifies, incapacity was

531 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 23.
532 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 23.
one of the grounds that dissolved a marriage. This was believed to be heavily influenced by the Roman Catholic canon law, which views incapacity not as a grounds for divorce, but as an obstacle which tears it apart, a reason which recognizes that the marriage de facto never took place and is therefore invalid. Suvorov for his part feared that such a broad understanding of incapacity would open the door wide to arbitrariness and promiscuity.

Canonist Suvorov continued to examine the views of medical experts that took part in the working group of the Special Meeting of the Holy Synod. He agreed with the findings that reasoned that in many cases it was indeed difficult to ascertain whether the incapacity of a person occurred before the marriage or after. Both cases of inabilities to matrimonial life were considered to have the same impact. Suvorov, however, asked, with the assumption of post–nuptial incapacity as a reason for divorce, whether the ecclesiastical court in such cases would more often encounter misuses with which it would have to struggle, and perhaps not always successfully? The Russian canonist concluded his views with the judgment that since mental incapacity is a broad and uncertain subject connected with the physical incapacity after entering into marriage, it was unlikely to be a helpful innovation for Russian legislation.

Medical experts additionally made an interesting point when recognizing incapacity as a reason for divorce, not only in the sense of facultas coeundi but also generandi. They based their views on the following statement:

In a marriage, in its substance, the existence of the ability generandi rather than coeundi is much more important, since childbearing is the main purpose of a marriage. Therefore it is necessary to recognize the incapacity for sexual intercourse and fertility as equally founded reasons for divorce. [Currently] The Church dissolves the marriage due to the incapacity of one of the

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533 Суворов 1908, 13–14.

534 Regarding incapacity as an impediment in both the Eastern and the Western Catholic Churches, see Canon 801 of CCEO and Canon 1084 of CIC.

535 Суворов 1908, 13–14.

536 Суворов 1908, 14.

537 Суворов 1908, 15.
spouses for copulation, but at the same time avoids dissolution of marriage in the case of the incapacity to bear children, as if it [the Church] blesses only the desire of the spouses for carnal pleasure.\textsuperscript{538}

The above view however, particularly the point that “childbearing is the main purpose of a marriage” was stretched in Berdnikov’s comments, as shown when comparing his statement to the biblical meaning of a marriage (1 Cor. 7:1–2, 5). On the other hand, childlessness would give a married couple the easiest way to reach a divorce in the case of their mutual desire to separate. This can be argued from another perspective as well. For example, this case would represent a direct danger to the community of that time in cases when a wife could just artificially make a healthy body incapable of giving birth through medication. This was supported by both Berdnikov and Suvorov, who had the same opinion of maintaining the existing divorce law regarding incapacity.\textsuperscript{539} It can be asked, would it have been relevant to add to the Russian matrimonial law at that time the permission for a legal divorce in the case of voluntary or enforced castration?

The Interdepartmental Commission stated on 16 January 1917 that a spouse whose marriage was terminated by his or her incapacity for conjugal relationship, could enter into a new marriage with the permission given to him or her by the Diocesan Court which annulled the prior marriage and which recognized such an incapacity. A petition for permission to enter into a new marriage could not be instituted earlier than after the expiration of three years of the former marriage.\textsuperscript{540}

Jatskevitš made an explanatory note regarding the above formulation. He explained that in past years, such cases were forwarded from the Holy Synod to the Medical Council through the office of the Procurator of the Holy Synod. The examination of these cases showed that many divorce cases involved a real incapacity for conjugal relationship, but the inability in some cases was recognized without any investigation, as Jatskevitš pointed out. For that reason it would be logical and, in some cases, even necessary to delay the permission to remarry for three years. Runkevitš explained that in the meetings the grounds for divorce stated that many

\textsuperscript{538} РГИА. Ф. 796. ОП. 445. Д. 417. Л, 24.
\textsuperscript{539} РГИА. Ф. 796. ОП. 445. Д. 417. Л, 24.
\textsuperscript{540} РГИА. Ф. 796. ОП. 445. Д. 227. Л, 30.
couples got married at a very young age and for the first three years of marital life they did not engage in conjugal union. Since a period of three years was required before initiating a divorce case, the three-year period was now set up as a deadline to make a request for divorce and for the restoration of rights to enter into a new marriage. The administration of local purview 544

541 М. А. Ostromoukh made canonical observations and clarified that the three-year period was taken from the Kormtšaja Kniga, which itself was adopted from Byzantine legislation. After this clarification, the above request was accepted without any changes.542

In 11 May 1917 the Interdepartmental Commission, basing its views on the sub-commission’s suggestion, noted that a spouse had the right to ask for a divorce in matters related to copulation or childbearing, regardless of when this incapacity started, either before or after the marriage, and regardless of its origin, either organic or neuro–psychological. However, this did not apply when the incapacity to copulate or bear children occurred after the couple had had children from their marriage, or when the incapacity to copulate or bear children depended on age.543

The Commission’s expression “the spouse whose marriage was terminated due to incapacity to engage in a conjugal relationship, may enter into a new marriage, except with the permission of the court, on the basis of a medical statement regarding the terminations of incapacity,” started a broad debate in the meeting. A. P. Pilkin noted that recognizing the dissolution of a marriage due the incapacity for conjugal relationship in the presented form would create legislation which was unknown to any law, except for the Jewish, i.e. the Mosaic Law. Pilkin also noted the statement in the explanatory note to the project of the Ministry of Justice concerning divorce and to the regulations of religious rights of Jews regarding divorce due to infertility in marital life. He came to the

541 РГИА. Ф. 796. ОП. 445. Д. 227. Л. 31. In Runkevits’ opinion it was necessary to clarify the sentence “according to the decision of the court” by adding to it “and by the conclusion of the medical examination.”

542 РГИА. Ф. 796. ОП. 445. Д. 227. Л. 32.

543 РГИА. Ф. 796. ОП. 445. Д. 422, Л. 3.

544 Косоргов 1916, 76. Medical examination of a judicial nature fell within the purview of higher medical institutions in the Empire, namely the Medical Board of Ministry of Internal Affairs, although such cases were handled beforehand by local collegial institutions, and physicians’ offices of provincial and regional administrations.
conclusion that the drafted law had lost its practical value. During the drafting of the Civil Code, rabbis were interviewed with the purpose of finding out essential reasons for a divorce among Russia’s Jewish population. The rabbis responded that in the Jewish understanding, divorce due to infertility in marital life was not found anymore. An attempt by one of the spouses to demand a divorce for the aforementioned reason would be met with opposition from the rabbi and the entire community, because from the moral viewpoint of modern Jewish intellectuals, such a divorce was considered inadmissible. 

Archpriest M. P. Тёлтсов clarified that childbearing was not the only goal in marriage; it was only one of the purposes. The main purpose of marriage aims at the mutual improvement of spouses.

The proposed ground was put to the vote. After hearing all the comments, a majority was in favor of recognizing the incapacity for a conjugal relationship as a valid reason. When discussing additional conditions, a further definition was voted by the majority: “A spouse has the right to ask for a divorce if the other spouse during the marriage fails to engage in sexual relations, there are no children from the marriage, and the incapacity lasts for at least two years, regardless of the age [of the other spouse].”

Since a medical examination of a judicial nature was debated, the Pre-Conciliar decision to allow divorce due to incapacity during the marriage might have been a more complex issue from the technical viewpoint than it seemed. In 1916 in the Medical Board of Ministry of Internal Affairs and in the physicians’ offices resolved cases regarding incapacity clearly showed that the decisions often depended on the “human factor” – on professional skills and on familiarity with the formal side of things of medical experts. It was not unusual that cases of an identical nature received a totally different resolution depending on the circumstances of

545 РГИА. Ф. 796. ОП. 445. Д. 422, Л, 4–5.

546 РГИА. Ф. 796. ОП. 445. Д. 422, Л, 5. Archpriest A. Р. Рождествевский agreed with Father Тёлтсов and stressed that according to the Bible, a wife was created to help her husband. Only afterwards did they receive a commandment to be fruitful and multiply. Examples of infertility occur in the Bible, but the situation is not found where a divorce was sought in such cases. Instead, those who suffer from infertility prayed to God for the gift of children.

547 РГИА. Ф. 796. ОП. 445. Д. 422, Л, 6.

548 РГИА. Ф. 796. ОП. 445. Д. 422. Л, 9.
individual characters. One can also ask whether a better formulation in this case could be for example, “The validity of a marriage could be challenged by a spouse, who, when entering into marriage, did not know about such personal features of another spouse, which would prevent him or her from entering into marital union.” Such a formulation would not necessarily categorize parties as “guilty” or “innocent.”

4.3 Unknown Absence of One of the Spouses

Regarding the dissolution of the marriage due to the absence of one of the spouses, the diocesan authority of Saint Petersburg considered that such a problem should be posed in such a way that the ecclesiastical court would guarantee that the absence was valid and not fictitious. The Metropolitan of Moscow clarified that the unknown absence of one of the spouses existed earlier in Russian ecclesiastical and civil law, establishing a five-year period for absence. In the plan concerning the grounds for divorce, unknown absence was proposed to be reduced to three years, and in the case of soldiers who went missing in war, to two years. Divorce due to unknown absence should not be allowed in Metropolitan Vladimir’s viewpoint, who cited Canon 31 of Saint Basil the Great, in which such a prohibition can be clearly seen. The diocesan authority of Saint Petersburg, on the other hand, concluded its view by stating that the absence of one of the spouses and the mental illness of a spouse should be adopted in the future divorce law without any changes.

It should be clarified here that the absence of a spouse for over five years, as seen already in chapter three, existed as a reason for legal divorce in Russia at the time. The Code of Laws with Article 54 ruled a five-year waiting period for the missing person before granting a right for the other spouse to remarry. However, in 1906 due to the war between

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549 Косортов 1916, 77.
550 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1.
551 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 5.
552 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 3.
553 Свод законов Российской Империи 1912, Т. 10, Ч. 1, 6.
Russia and Japan, Article 56 was revised in such a way that not only the wives of the lower rank soldiers, but also wives of any military personnel could file for divorce after a two-year absence of their spouse. Interestingly, the aforementioned reform concerned not just Orthodox spouses, but also Old Believers, dissidents and Lutherans. The Pre-Conciliar Commission mainly discussed expanding the reformed article’s value to concern all Russian Orthodox spouses, and in such a way lowering the waiting period for spouses to remarry.

In Byzantine-Roman laws, unknown absence (ἀποδημία) was distinguished from the home and place of residence of the ordinary citizen and soldier. In the latter case, the wife of a husband who absents himself from home for a long journey, could have married another man. She was not subject to severe condemnation if afterwards the husband returned. Ecclesiastical regulations verify this fact, as Metropolitan Vladimir pointed out, in Canon 31 and 36 of Basil the Great and Canon 93 of Trullo.

This particular reason for divorce was discussed during the Special Meeting of the Holy Synod and was in close connection to another discussed issue – the abandonment of one spouse by the other. It was

554 Красножен 1909, 4.


556 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 18. Canon 93 of Trullo repeats the exact meaning of Canons 31, 36 and 46 of Basil the Great with some additions. It speaks about a) a wife whose husband did not let her know about his whereabouts, so that the wife entered into a second marriage without waiting for the news of the death of her first husband; b) the same thing is said about the wife of a soldier whose location was unknown and it was impossible to determine whether he was alive; and c) a wife who out of ignorance married a man who was temporarily left by his lawful wife. When the first wife returned, the man sent away his second wife. (Ῥύλλη 1854, T. IV 173, 180; Ρύλλη 1852, T. II, 522–523.) The wife of a soldier who had been missing could in ancient Roman law marry again after five years from the date the absence occurred. Emperor Justinian in Novella 117, chapter 11, ruled that a female soldier was considered to be free for a new marriage after the death of her soldier husband. For information about the fate of her husband, she had to turn to the military governor, under whose command her husband was located, and take from him a written statement about the death of her husband, confirmed by oath as well. Novella 117 was later introduced in Photian Nomokanon. XIII, 3. Ρύλλη 1852, T. I, 293; Dig. XXIV. 2, 6. Watson 1985, Vol. 2, 715.

557 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 18.
confirmed that the contemporary practice of the ecclesiastical courts distorted the proper understanding of the above reason for divorce when it called it an unknown absence of one of the spouses, rather than the abandonment of one spouse by the other. It was also expressed that the law of 1895 was directed precisely to eliminate such misunderstandings. Berdnikov gave the impression that such mixing of two specific reasons for divorce could not be tolerated. Under unknown absence was not meant the intentional abandonment of a spouse, with the purpose of interrupting marital cohabitation, but instead a disappearance of a person that could not be foreseen by anyone. In such cases, divorce was given to the spouse who had remained at home and had assumed that the absent spouse was dead. There was no assumption about the guiltiness of a missing spouse, nor about a spouse remaining at home.  

Canonist Suvorov, for his part, did not consider it practical to use canonical rules to justify a divorce law which would take into consideration the needs of modern life. He could not allow the incoherence which the drafters permitted. The incoherence in Suvorov’s opinion concerned circumstances in which a particular canon could be interpreted in the drafter’s opinion to fit any engineered regulation, even if it was only partly suitable for that purpose. However, when the canon could not be directly used in the planner’s regulation, it was not mentioned. One could apply this way of thinking, for example, to the case in which changing the five-year period of absence to three years was discussed. Such an “economy” could not be justified by the canons in Suvorov’s opinion. Even though canonist Suvorov did not accept the aforementioned interpretation of the canons, it could be justified by twentieth-century circumstances in which the flow of information was faster. However, on the other hand the planned three-year period was not practical in cases where one of the spouses was sentenced to imprisonment in a house of correction for five to six years. The drafters did not, however, mention this option.

There was also another kind of absence which required more attention, namely an intentional, arranged absence of a spouse with the aim of achieving an easy divorce. The Special Meeting of the Holy Synod

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558 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 18. Berdnikov thought that this was a case of unfortunate coincidences which interrupted the existing marital union.

559 Суворов 1908, 16, 18.
considered the dissolution of marriage on the basis of unknown absence to be an incomplete form of procedure, and called for greater strictness in searching for missing persons. Canonist Berdnikov believed that the unfortunate phenomenon of fictitious absence did not match with the proposal drafted by the Special Meeting of shortening the period for divorce due the unknown absence, since in spite of indications to the contrary, abandoned spouses could be suspected of involvement in fictitious absences.\footnote{РГИА. Ф. 796. ОП. 445. Д. 417. Л, 22.}

Regarding fictitious absence, we might ask whether the purpose of the ecclesiastical courts was to search for a missing spouse in such divorce cases. The purpose was in the fact for the court to legally establish the validity of an unknown absence of a spouse who had left the family. Hence, a person requesting a divorce on the grounds of unknown absence must attach to the request a certificate of the civil court, which declared a spouse to be missing.\footnote{РГИА. Ф. 796. ОП. 445. Д. 417. Л, 22.} Suworov, however, found this notion impossible to accept. He emphasized that marriage was not a private matter in which spouses were interested. The court for its part, depending on the character of the case, was obliged to undertake the investigation, without being limited to the formal establishment of the fact alleged by the plaintiff, but starting from the idea that marriage was an institution that the government should support.\footnote{Суворов 1908, 17–18.} It can be argued whether the above view was suited to the ecclesiastical court rather than the secular court. If the ecclesiastical court did not have all the appropriate legal means and the authority to search for the actual residence of the absent spouse, then from this followed a new argument in favor of transferring divorce cases from the jurisdiction of the ecclesiastical court to the secular court.

### 4.4 Physical and Mental Illness

On 13 December 1906, the Pre-Conciliar Commission discussed mental illness as a reason for divorce. Professor and canonist М. Е. Красножен
noted that the mental illness of one of the spouses was not accepted as a legal reason for divorce in Russia at the time, and that some psychiatrists believed that mental illness was curable, and hence a such it was not a valid reason.\textsuperscript{563} Canonist Almazov noted that long–term mental and incurable physical illness could lead to fornication by the other spouse.\textsuperscript{564}

The discussion regarding mental illness in Russia at the time was raised by the Medical Council of the Ministry of Internal Affairs in the Holy Synod. Their consideration of the issue was based on the fact that from the medical point of view, insanity meant mental and civil death if it became long lasting and was uncured. It also inevitably weighs down the other spouse. Psychiatrists have provided many examples of cases in which for one spouse, the mental illness of the other was more tragic than the actual death of a sick spouse. In 1896 during the sixth Pirogov Congress\textsuperscript{565} in Kiev, Doctor S. I. Steinberg for the first time in Russia officially raised the question about the need to include mental illness as a legal reason for divorce.\textsuperscript{566}

Steinberg’s report caused a lively discussion, after which the Congress passed the question to Russian psychiatric and legal societies and the collected material was subsequently presented in the seventh Pirogov Congress.\textsuperscript{567} On this issue, the board of the Pirogov Congress received

\textsuperscript{563} Журналы и Протоколы Заседаний 1907, 114.

\textsuperscript{564} Журналы и Протоколы Заседаний 1907, 115.

\textsuperscript{565} In Russian “Пироговские съезды” was a congress of doctors held in the Russian Empire in the late nineteenth to early twentieth century. These meetings were organized in 1883 under the patronage of “the Society of Russian doctors in memory of N. I. Pirogov,” better known as the Pirogov Society (“Пироговское общество”). In Russia in the period from 1885 to 1913 twelve Pirogov Congresses were organized. The Pirogov Congresses discussed not only medical but also political issues. For more, see the periodical \textit{Pirogov Medical Society} (“Пироговского общества врачей”) printed in Moscow between 1895 and 1908.

\textsuperscript{566} Розенбах 1899, 53.

\textsuperscript{567} P. Ja. Rozenbah, however, came to the conclusion in his 1899 article “Divorce Due to Insanity,” published by the Ministry of Justice, that divorce due to mental illness should be allowed in Russia. His view was motivated by a fact that in insanity a sick person will die spiritually. Regarding alcoholism, Rozenbah found that the reason to be the impossibility of cohabitation between the spouses, which did not just bring about the moral decline one of the spouses, but was also a risk to the entire family. Rozenbah concluded his article by stating that it was not just the mental illness of a spouse that was a valid reason for divorce, but alcoholism as well. (Розенбах 1899, 68–69.) It should also be noted that insanity
responses from the psychiatric societies of Saint Petersburg, Moscow and Kazan, and from the scientific meetings of doctors of mental and nervous diseases clinics in Saint Petersburg and the Law Society of Saint Petersburg. All these societies came to the following propositions: the incurable mental illness of one of the spouses should be recognized as a legal reason for divorce only in those cases when it had continued for at least five years. Only the healthy spouse could raise a petition for a divorce and no less than three psychiatric experts should say whether the illness was incurable or not. The decision on divorce was decreed by the court on the basis of expertise. The children of divorced parents remained until their adulthood under the care of the healthy spouse and retained full inheritance rights. Divorce was allowed only on the condition that the care of the mentally ill spouse was secured at the expense of the healthy spouse or at public expense.

In the learned societies, as well in the following Pirogov Congresses, objections to the above provisions can be categorized into three groups: 1. the sacramental aspect; 2. inability to initiate a divorce case, and 3. additional reasons. With reference to the first group, marriage as a sacrament of the Church, based on solid canonical rules, could be changed only by the Church. Here it should be noted that judging from the cases that the Medical Council received from the Holy Synod, the Church did not see divorce due to mental illness as contradictory to canons. Regarding the second group, the vast majority of the Russian population, namely the peasantry, were considered unable to initiate a divorce case in cases where one of the spouses was insane, and it was seen that there were no reasons to constitute a law for a small minority. However, it was also mentioned that according to the statistics of the Medical Council, the majority of the divorce cases (60%) relating to incapacity for conjugal relationship due to mental illness were made by

and alcoholism as a reason for divorce was approved by the Evangelical Church in Russia at that period. Способин 1881, 116.

568 Some of the societies allowed even less than a three-year period for continuous mental illness if it was proved to be undoubtedly incurable. Журналы и Протоколы Заседаний 1907, 131.

569 The Law Society of Saint Petersburg made the following addition: “If the insanity of one of the spouses arises due to the fault of the other spouse, then divorce is not allowed.” Журналы и Протоколы Заседаний 1907, 131–132.

570 Журналы и Протоколы Заседаний 1907, 132.
Regarding the third group the question might be asked why only cases of incurable insanity, and why should not other serious diseases like hemiplegia, paraplegia, etc., serve as a reason for divorce? In both these mentioned diseases the ill spouse needed nursing care and often could not participate physiologically in the marriage.

The insanity of one of the spouses could also be caused by the other spouse, and thus should be considered from both the legal as well as the medical point of view. From the medical standpoint, the aforementioned cases might be considered exceptional and unusual, but in the beginning of the twentieth century such cases usually resulted in a criminal trial rather than the divorce process. The insanity of one of the spouses caused by the other could, for example, occur from a traumatic head injury. If in such cases the use of violence was proven on the husband’s or from the wife’s side, then it would be difficult to justify the nature of the mental illness in such a case, since its origins were in malicious violence. Here lies the core problem of such a difficult task as reforming the law regarding divorce in Russia: a reason for divorce could be intentionally inflicted and start a criminal trial which did not always end in divorce, even though the injury caused should be accepted as a legal reason for divorce. One practical difficulty would be an intentionally caused head injury causing an “insane” state of mind, making a divorce plea null and void.

Mental illness could also originate from physical factors, however. The Medical Council considered these as combinations of conditions in which various heredity and chronic diseases, especially syphilis and chronic poisoning from alcohol, morphine, etc. should be in first place. Based

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571 Журналы и Протоколы Заседаний 1907, 132.
572 Hemiplegia is paralysis of the arm, leg, and trunk on the same side of the body.
573 Paraplegia is an impairment in the motor or sensory function of the lower extremities.
574 Here, the Medical Council noted that incurable mental illness did not only need nursing care, but the ill spouse would lose the ability of mental communication with others. Журналы и Протоколы Заседаний 1907, 132.
575 Журналы и Протоколы Заседаний 1907, 134. Almost all Western-European legal codexes that allowed insanity as a reason for divorce, also allowed alcoholism as a valid reason. (Розенбах 1899, 68.) A review of the history of mental illness in the Poltava province during the nineteenth century shows that mental illness could also occur from such reasons as: the impact of various
on the foregoing, the Medical Council recognized that the introduction of the insanity of one of the spouses as a legal reason for divorce was not only timely, but also necessary. Periodic and circular psychosis may serve as a legitimate reason for divorce in cases when after five years of existence of the disease it is recognized by experts as incurable by the signs shown of mental weakness.\textsuperscript{576}

Professors of canon law who were represented in the Pre-Conciliar Commission gave their opinions on the topic as well. Professors M. I. Gortšakov and M. E. Krasnožen stood unanimously in favor of accepting mental illness as a reason for divorce. Professor Krasnožen pointed to the five-year period which was given by Byzantine law for the possible healing of an insane spouse, after which a divorce was possible, although Krasnožen did not mention the sources for this law. From Constantine

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national calamities, economic conditions of life, the significance of nationality and nation (Jews, in comparison with other nationalities, gave the highest percentage for having mental illnesses, 0.55%), marital status (especially the incidence of psychosis among unmarried men and widows). Мальцев 1902, 523–530.
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\textsuperscript{576} The Medical Council concluded their study with a statement that the decision about divorce should be decided by no less than three experts, i.e. psychiatrists. (Журналы и Протоколы Заседаний 1907, 135.) The Western European legal practice at the time differed a great deal among different countries. The most liberal divorce laws were found in Zurich in 1854, where among numerous diseases, mental illness was one of the legal reasons for divorce. In 1876, according to Article 92 of the Genevan Codex, these reasons were permitted throughout Switzerland. The Matrimonial Causes Act of England did not include insanity as a valid reason for divorce. However, actions for divorce due to the insanity of one of the spouses were sometimes solved in a positive way, depending on the condition of the case. In France during the period of revolution in 1792, a law was passed that permitted divorce due to insanity, though in 1816 the law was changed. A civil law of 1882 which regulated divorce matters did not give insanity as one of the reasons. In 1878, a French deputy Naket tried to introduce insanity as a grounds for divorce ground; he was supported by deputy Louis Gile, who proposed a paragraph that the insanity of one of the spouses which lasted at least two years and was recognized as incurable, could be given as a reason for divorce. This proposal was sent to the Commission of Psychiatrists for consideration, though they did not approve it. This started an intense debate in the medico–psychological society of Paris and in the French professional journals, where only a few French psychiatrists approved of uncured insanity as a reason for divorce. See Михаил 1906, 852; Розенбах 1899, 56–57.
Harmenopoulos\textsuperscript{577} (1320 – ca. 1385) Hexabiblos,\textsuperscript{578} in the 15th title of the fourth book we can read all the reasons for divorce that were in use in fourteenth century Byzantine Empire. The fifth chapter of the 15th title decrees that if one person becomes insane, then the marriage is terminated by virtue of the 111th and 112th Novellas of Leo the Wise, by which divorce comes into force after three years after the beginning of the insanity of the wife if it not did occur by the fault of the husband or his relatives, and after five years in the case of the illness of the husband. If the insanity of one of the spouses is determined on the day of marriage, then the marriage is immediately terminated.\textsuperscript{579}

Should the same practice of Byzantine law from the canonical standpoint also be applied in Russia? Archimandrite Mihail in his 1906 article, “Insanity as a Reason for Divorce,” mentioned that the Russian Orthodox Church always followed the norms of the Greek Church and its Nomokanon. As mentioned earlier, Emperor Leo’s 111 and 112 Novellas allowed divorce on the grounds of the insanity of one of the spouses. Yet, as the Nomokanon became the legal source of the Russian Orthodox Church, Novellas 111 and 112 although they were not included in any Russian legislative works, were nevertheless followed even in the eighteenth century and were given completely legitimate status. This can

\textsuperscript{577} A Byzantine lawyer and canonist. His exact dates are unknown. In 1345 he was a judge in Thessalonica, and up to 1349 received the title of nomophylax (in Greek “νομοφύλαξ,” literally "the guardian of law," was an office originated by Constantine IX in 1043; the office quickly changed character after its creation, and became a position between the state and church administration) and the office of a judge of the “royal secret.” The Oxford Dictionary of Byzantium 1991, 1491; Православная энциклопедия 2001, Т. III, 322.

\textsuperscript{578} In Greek “Εξάβιβλος,” a set of Byzantine civil and criminal laws. It was intended primarily as a practical guide for judges. The basis of the work came from Procheiron, a collection of Byzantine laws. It incorporated excerpts from Isagoge, novels of emperors, laws of the Patriarchs, a treatise of Julian of Ascalon on urban development, collections of the Small Synopsis (composed from the materials of Michael Attaleiates) and Peira’s (Πειρα, literally “experience”), a collection of court decisions from the eleventh century. Harmenopoulos reorganized this material into an independent compilation by making its construction easier. The composition of Hexabiblos consists of six books, which in turn are divided into titles (chapters), and the titles into paragraphs. Hexabiblos concerns canon law in its laws about marriage and in the additions to the fourth title, which refers to the ordination of bishops and presbyters. Православная энциклопедия 2001, Т. III, 322.

\textsuperscript{579} Соколов 1911, 87.
be clearly seen in the Synodal decree from 22 March 1723, which says that the illness of one of the spouses should be testified by doctors before the dissolution of the marriage. On 18 December 1725, the Diocesan Consistory of Moscow gave permission for a wife to divorce as her husband had suffered from insanity for 15 years since entering into marriage. This marriage was interestingly dissolved on the grounds of Kormtšaja kniga.580

Sometimes in Russia, however, the practice of divorce due to mental illness was challenged. This happened, for example, in the teachings of Metropolitan Danil, a great zealot of fidelity and defender of the indissolubility of marriages. He thought that marriage should not be terminated in the case of insanity or the contagious diseases of one of the spouses, citing here the Biblical teaching of Job, who suffered many years from leprosy.581 Professor Zaozerski had the same viewpoint about insanity and cited Canon 15 of Saint Timothy of Alexandria to prove his case.582 In an unusual way Constantine Harmenopoulos in his fourth book of Hexabiblos, in the seventh chapter of the 15th title contradicts himself in his own fifth chapter by stating that every man who wants to take another wife in the case of insanity of his current one, is an adulterer, therefore supporting the meaning of Canon 15 of Saint Timothy of Alexandria.583

According to Byzantine-Roman law, insanity (μάνια) was considered an obstacle to marriage, but if it happened during the married life, it did not prevent its continuation.584 A healthy spouse was even encouraged to bear the illness of the other spouse patiently.585 In accordance with this, Professor Berdnikov reminded that Canon 15 of Saint Timothy of Alexandria should be understood in the same way. This canon, which is a

580 Михаил 1906, 851.
581 Михаил 1906, 850.
582 Журналы и Протоколы Заседаний 1907, 136.
583 Соколов 1911, 87.
question to Saint Timothy, asks: “If a wife is so betaken of spirits that she will wear irons, while her husband say, ‘I can’t contain myself, and I want to take another wife,’ ought he to take another, or not? Timothy answers that adultery is involved in this matter, and I have no reply to make concerning it, nor can I find any by thinking about it.” 586 If nervous attacks of insanity were so strong, making the cohabitation of couples impossible and no hope for recovery of a sick spouse is given, then the other spouse was allowed to divorce. This law was subsequently confirmed by Novellas 111587 and 112588 of Emperor Leo the Philosopher. To the uniqueness of this, which canonist Berdnikov also brought up, was the fact that Nomokanon in chapter 13, title 30 did not recognize insanity as a reason for divorce, because Novella 117 of Emperor Justinian already addressed this question. 589

The Nomokanon mentions that, by law, insanity did not dissolve marriage, since Justinian’s Novella 117 clearly points out that: “οὐτε διὰ μανίαν εὐλόγως λύεται γάμος, τῆς περὶ ἱπποδίων μιζ. νεαρᾶς ῥητᾶς αἰτίας λεγούσης.” 590 However, the Nomokanon lists all the rules of the Roman law which speak in favor of this particular reason for divorce. The practical significance of Emperor Leo the Philosopher’s novellas was confirmed by the fact that their substance was repeated in a later novella of Emperor Nikephoros III Botaneiates, as well as with references to these novellas by later canonists, as Berdnikov clarified. 591 When referring to later canonists, this can be seen especially in Balsamon’s commentary to the thirteenth title, chapter 30 of the Nomokanon, and


587 “If a wife should lose her mind and this is due to the malice of her husband, or without anyone else having caused it by witchcraft with her husband’s knowledge, and her affliction should last more than three years, the marriage may be dissolved, and the husband shall be at liberty to marry again.” Scott 1932, 293.

588 “When the husband becomes insane during marriage it cannot be dissolved until after the expiration of five years; but after this period has elapsed, it may be dissolved if he still remains demented.” Scott 1932, 295.

589 “Номоканон не признавает сумашествие основанием к разводу, потому что об нем упомянуто в 117 новелле императора Юстиниана.” РГИА. Ф. 796. ОП. 445. Д. 417. Л. 19.

590 Рάλλη 1852, Т. I, 330.

591 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 19.

When considering a request for a divorce on the grounds of insanity, attention must be paid to the fact whether the insanity had occurred through the fault of one of the spouses, and if this assumption was confirmed, then the guilty spouse, besides ecclesiastical repentance, was subject to all the consequences of a divorce. After a divorce, an insane spouse was given over to the care of relatives; if there were no relatives, the insane spouse was given over to the care of the local bishop.

The Special Meeting of the Holy Synod summarized incurable mental illness as follows: it permanently removed the person from the normal track of life, separated them from society and made them mentally alien to society and their families. For such a person, the Special Meeting saw that the only possibility was effective care, a treatment which could be given only by a special medical institution. The Editorial Commission for the preparation of a new Civil Code refrained from the assumption of this ground for divorce, referring to the difficulty of determining incurable illness in each particular case. In Berdnikov’s opinion the assumption of this reason for divorce would not be a big risk: First, because it was already recognized for a long time, and secondly, because during the last decade, Russia were well acquainted with the characteristics of this disease. For its treatment mental health professionals had in their hands a lot of material for a correct evaluation of particular cases of this disease and its curability. One could, however, see that mental illness might introduce some dissonance into the system of reasons for divorce, as all the other reasons stemmed from culpability. In the case of mental illness, the patient was hence innocent and blameless. A similar way of thinking was expressed by Berdnikov’s critic, canonist Suvorov.

During the Pre-Conciliar Commission, S. P. Grigorovski focused on the legal aspect and said that in any legal provision there should be no virtually non-existent conditions. The condition for a divorce in this case

\[592 \text{Pálλη 1852, T. I, 331; Pálλη 1859, T. VI, 198.}\]

\[593 \text{Scott 1932, 293–294.}\]

\[594 \text{Therefore, Berdnikov suggested that before the divorce, the patient would be put into a special hospital to observe the nature and progress of his disease and to properly assess it from the viewpoint of its curability. РГИА. Ф. 796. ОП. 445. Д. 417. Л, 25.}\]

\[595 \text{Суворов 1908, 24.}\]
rested with the question of who would be responsible for the sick spouse. How is the fulfillment of this condition ensured? Before whom is the person who accepts this condition responsible and in whose care will lie the obligation to guard the interests of a sick spouse? Gortšakov suggested that the spouse who is seeking a divorce should promise to nurse a sick spouse. In this the marriage will be terminated only in cases where the sick spouse will be properly treated. This condition was accepted unanimously in the Pre-Conciliar Commission, the period when the divorce could be sought was set from three to five years, depending on the condition of a sick spouse. Contagious diseases such as leprosy and syphilis, if they were legally testified, were also included as reasons for divorce. The above reasons, as we have seen previously, could not be justified by the canons, since leprosy as a reason for divorce was specified only in the Ekloga of Leo III Isaurian, in the 12th and 13th chapters of the second title. According to this law, a husband would be granted a divorce if the wife suffered from leprosy (λωβή ἐστιν), the wife could be divorced from her husband similarly if he suffered from this same illness (λωβος). Hence, suffering from leprosy and syphilis as a reason for divorce was instituted in Russia in the sense of stewardship, the theology of oikonomia which the Orthodox canon law followed.

On 12 September 1908 the diocesan authority of Saint Petersburg suggested that in the cases of divorce due to the mental illness of one of the spouses, the healthy spouse who sought a divorce must provide financial support for the mentally ill spouse. This was considered the sphere of civil rather than ecclesiastical law. The Metropolitan of Moscow paid attention to the spiritual side of the human situation. He stated that mental illness was not tantamount to spiritual death and, therefore, was not different from any other disease which is taken care of by the medical treatment. It cannot destroy the sacrament of marriage. By this argument, mental instability cannot affect the spiritual side of a human and does not mean that the spouses are unable to make the gift of

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596 Журналы и Протоколы Заседаний 1907, 136.
597 Журналы и Протоколы Заседаний 1907, 136.
599 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1.
600 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 6.
grace, i.e. make the sanctity of marriage fruitful. Such thinking was criticized by Archimandrite Mihail. He referred to the metaphysical connection between spouses after death. Insanity will automatically end such a connection. In his opinion, an insane spouse does not have a soul; there is no consciousness, such a spouse is dead in the spiritual sense, hence there is no marriage.

One can of course argue under which conditions the sacramental state of the marriage ends. Does it automatically end after various conditions of inability? Or does only the civil part end? Paradoxically, the same metaphysical condition to which Archimandrite Mihail referred can be viewed from Saint Paul’s point of view when he presupposes that marriage does not end after death, “love never fails” (Cor. 13:8). This is even more clearly expressed in John Meyendorff’s theology:

By affirming that the priest is the minister of the marriage, as he is also the minister of the Eucharist, the Orthodox Church implicitly integrates marriage in the eternal Mystery, where the boundaries between heaven and earth are broken and where human decision and action acquire an eternal dimension.

If the marriage however is viewed only as an earthly affair, mainly as a human agreement, then the human “body” must be taken into consideration as well. In cases where a disorder of the human body prevails the very meaning of marriage, a view where “two becomes one,” is placed in jeopardy. Such a possibility, however, is not discussed in the Eastern Orthodox Canons. The diocesan authority of Saint Petersburg nevertheless considered it possible to accept it also in ecclesiastical law. Their motivation for this was that it would be done in the name of humanity.

Introducing a mental illness as a reason for divorce would in Archbishop Guri’s opinion facilitate divorce. He required as well that the spouse who made the claim, must present a certificate of support.

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601 Meyendorff 2000, 54.
602 Михаил 1906, 835.
603 Meyendorff 2000, 23.
604 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1. The original Russian text regarding the terminology for “humanity” uses a word “человеколюбие” instead of ὠἰκονομία (икономия), which is identical in meaning.
605 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 12.
for the mentally ill spouse. For the wealthy classes such a requirement
should have been enforceable by law.\footnote{606} Saint Petersburg’s diocesan authority considered it impossible to
recognize syphilis as a cause for divorce. Nevertheless, they agreed that a
healthy spouse whose partner had syphilis could remarry. On the same
grounds, the diocesan authority found it sufficient to recognize a divorce
based on leprosy, where the disease would jeopardize the life of the
spouse and of descendants.\footnote{607} Divorce from a spouse with syphilis was
recommended, and the infected spouse should be condemned to
perpetual celibacy. Both leprosy was and syphilis were regarded as valid
reasons for divorce.\footnote{608}

Contagious diseases in Metropolitan Vladimir’s arguments were,
however, recognized only in the pre-marital sphere. He proposed that the
government issued a relevant law for syphilitics, lepers, etc., which could
prohibit such marriage and hence protect others from infection and
prevent the birth of diseased offspring. These diseases, he argued, could
not dissolve Christian marital union, because Christ had established
marital union, and Christ himself did not recognize contagious diseases,
such as leprosy, as a reason for divorce. Therefore, from the ecclesiastical
point of view, the proposed new reasons for divorce should in his opinion
be clearly rejected. Metropolitan Vladimir also applied the same
strictness to cruelty as a reason for divorce, citing Canon 9 of Saint Basil
the Great.\footnote{609} However, canonist Berdnikov accepted syphilis as a reason
for divorce in the interest of protecting the health of a family. The
conditions of defining a specific illness in the draft of the Special Meeting
were made with sufficient precaution.\footnote{610}

\footnote{606} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 13. Attention was also paid to cases where,
for example, a poor peasant woman requested a divorce, but was not unable to
provide a livelihood for the sick spouse. Archbishop Guri suggested that the
dissolution of the marriage by insanity should not be so categorical dependent
on obligations to provide a livelihood for a sick spouse.

\footnote{607} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 1.

\footnote{608} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 3.

\footnote{609} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 7. Archbishop Aleksi of Tver and Kašinsk
in his statement from November 5, 1907, saw it necessary to add that in the case
of syphilis, the spouse who sues for divorce should provide material security and
treatment for the sick spouse. РГИА. Ф. 796. ОП. 445. Д. 417, Л. 11.

\footnote{610} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 25. Berdnikov, as well as Archbishop
Aleksi, suggested that it would perhaps be necessary to deal with the material
In the opening meeting of the Interdepartmental Commission on January 16, 1917, the assembly was reminded that in the preceding meeting, the Commission had mentioned syphilis, leprosy and other incurable loathsome diseases as valid reasons for divorce. A. P. Pilkin proposed that “the spouse has the right to ask for a divorce if the other spouse is contaminated with an incurable, obnoxious and contagious disease that poses a risk to offspring and the life of the other spouse.”

The basis for such a particular article was that the defined diseases, like syphilis and leprosy, made by their very nature marital cohabitation impossible. The Interdepartmental Commission ultimately decided that a spouse whose marriage was terminated due to insanity, or a spouse who suffered from leprosy or syphilis, could enter into a new marriage with a preliminary permission of the diocesan court, if the diseased condition had ended; and a spouse whose marriage was terminated due to violation of the sanctity of marriage by unnatural vices, was deprived of the right to enter into a new marriage.

The conclusions of the sub-commissions that were based on decisions of medical professionals were reported on May 11, 1917. The sub-commissions suggested that a spouse had a right to ask for a divorce in cases where marital cohabitation was violated or was not realized because of the unnatural inclinations of the other spouse. A. P. Pilkin indicated possible difficulties in situations when the investigation of such cases would go to court. This was, however, rather a strange argument,

aspect as well regarding provision for children who may be left without resources due to a divorce. He also asked whether there is a need to include in the conditions for divorce an obligation for guilty spouses to give a certain portion of their funds for the maintenance of the former family if they have enough funds to do that, or to assign a legal separation rather than a full divorce, since in separation the mother and father are not exempt from the obligation to provide for their children and each other.

612 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 32–33.
613 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 33.
614 For example, such issues as “self–abuse” should undoubtedly be discussed by competent authorities when speaking about reasons for divorce. The sub-commission used the term “unnatural inclinations” to cover a person’s tendency or urge to act in an unnatural way, which in twentieth-century Russia could meant self–abuse, homosexuality, pedophilia, etc. РГИА. Ф. 796. ОП. 445. Д. 422. Л, 8.
because there was a clear need for medical examinations since the court was spiritual, and for the resolution of divorce issues medical examinations was crucial. Such medical experts did not resolve divorce cases, they only illuminated the issues.

The question of ensuring a livelihood for a spouse seeking a divorce due to the mental illness of the other spouse was raised earlier when the question was developed in one of the committees of the preparatory commission. It was recognized that this question would be difficult to resolve as a separate case, even in those cases where the healthy spouse had no resources. Therefore, in Behterev’s and Pilkin’s opinions, the divorcee should be required to care for a sick spouse and there should not be a clause in the law allowing for cases where the divorced spouse might not wish or would be unable to ensure a livelihood for a sick spouse.\(^{615}\)

The Interdepartmental Commission concluded their views on May 11, 1917 that the incurable mental illness of a spouse served as a reason for divorce at the request of the healthy spouse. The spouse had the right to ask for a divorce in the case of the constant incurable mental illness of the other spouse which continued for at least three years, and at least five years in cases where the mentally ill spouse had lucid intervals. Recovery from mental illness eliminated the right to seek a divorce, but did not invalidate the termination of a marriage which had already taken place.\(^{616}\)

### 4.5 Abandonment of a Spouse

The prospective divorce law regarding the abandonment of a spouse was considered to create great instability in many marriages, especially in the marriages of couples who lacked serious commitment.\(^{617}\) For this reason Archbishop Guri considered that malicious abandonment should be introduced as a new reason for divorce.\(^{618}\) To justify consideration of intentional abandonment, Metropolitan of Moscow Vladimir used the

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\(^{615}\) РГИА. Ф. 796. ОП. 445. Д. 422. Л. 8.

\(^{616}\) РГИА. Ф. 796. ОП. 445. Д. 422. Л. 9.

\(^{617}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 2.

\(^{618}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 13.
Old Testament Jews as an example: Moses allowed husbands to reject their wives, giving them a certificate of divorce. Metropolitan Vladimir challenged the views of the committee and accused them of believing that abandoning a spouse was recognized as a valid reason for divorce in the rules of Basil the Great. Such a view, however, was perhaps inspired by the professor of canon law, Nikolai Zaozerski’s article “What is the Basis of Ecclesiastical Jurisdiction in Matrimonial Matters?” published in Theological Bulletin (Богословский Вестник) in 1902. Professor Zaozerski was accused by members of the committee that his article openly declared that the planned marriage law reforms of the Russian Orthodox Church were intended to “make it convenient in Christ.” However, after studying Zaozerski’s article, it can be seen that the particular quotation to which Metropolitan Vladimir referred dealt with the canonical basis of lifelong celibacy. Canonist Zaozerski, in the light of the immutability of the law, attempted to point out the possibility of mitigating it on the basis of other canonical considerations, and on the basis of his proposed changes, namely, the double punishment of adulterers. Zaozerski emphasized that his purpose was not to weaken the force of the law of the Gospel, but only to mitigate the punishment for violating it.

In opposition to Zaozerski, Metropolitan Vladimir noted that Zaozerski’s canonical analysis was not made without stretching the facts and that the canonist failed to mention Canon 48 of Basil the Great in his article. Vladimir was concerned that if Canon 48 of Basil the Great was viewed together with Canon 9 of the same saint, then the results would not be the same. Hence, it would be improper to claim that Basil the Great recognized the abandonment of a spouse as a valid reason for divorce. Further, the Metropolitan had even more difficulties with the views of Professor Zaozerski on other rules, e.g., Canons 35 and 46 of Basil the Great.

Pilkin noted during the Interdepartmental Commission's meeting on January 16, 1917 that the proposed inclusion of abandonment of a spouse among the reasons for divorce caused the most disagreement between the

619 See Matthew 19:8–9; Mark 10:2–9; Luke 16:18
620 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 8.
621 Заозерский 1902, 295–296.
members of the Pre-Conciliar Commission. A practice already existed whereby the abandonment of a spouse which lasted for at least five years, was considered a sufficient reason for divorce. Main objections to the proposed reason for divorce came down to observations regarding the lack of canonical rules to support it; the creation of new possibilities for an easy divorce in this way would result in greater instability in marital unions. Extremely divergent interpretations regarding Canons 9, 35 and 46 of Saint Basil the Great were also noted, which indicated that the canons did not seem to provide as indisputable rules as at first appeared. Rather, the canons were only mandatory for such period of time when they appeared, and with progress, they lost their value and could only be viewed as historical monuments. As for the approval of divorce in cases of malicious abandonment by a spouse in the practice of the Orthodox Church, the most significant decisions regarding the matter related to the earliest times. Pilkin, for example, noted that malicious abandonment is contained in a document of Patriarch Neophytos I of Constantinople.\textsuperscript{623}

According to the Commission’s proposed document, a wife whose husband leaves her for at least three years, taking no interest in her and providing no funds for her maintenance, could, if she wished, obtain a legal divorce and the right to enter into another marriage. Pilkin noted that an analogous decision was made by the Ecumenical Patriarch Joachim III in a document from 1882, which stated that a divorce is possible in cases where the husband was absent for three years and did not take care of his wife and children. It was suggested that for Russian legislation it would be necessary to include the proposed reason in the group of other reasons for divorce, because daily life and society demanded it. The main concern was that spouses who have lived separately for a minimum of five years might manage to be reunited with the family again. This, however, was believed by most to be virtually impossible. Pilkin relied on these aforesaid reasons to leave malicious abandonment as a reason for divorce in force.\textsuperscript{624}

S. Utin, a member of the Pre-Conciliar Commission, did not support Pilkin’s view on canons and said that the canons did not conform to the teaching of the Orthodox Church. According to Utin, it was necessary to distinguish two aspects in the canons: 1. the material part, relating to the

\textsuperscript{623} РГИА. Ф. 796. ОП. 445. Д. 227. Л. 4–5
\textsuperscript{624} РГИА. Ф. 796. ОП. 445. Д. 227. Л. 6–7.
substance of the case; and 2. the legal proceedings. The first part of Utin’s opinion remained obligatory for that period of time. He continued to declare that when the other spouse leaves, the marital life will de facto end. This was known in Roman and Mosaic Law (Deuteronomy 24:1), but cannot find its place in the current canons of the Orthodox Church. Therefore, from a strictly canonical point of view, divorce is only permissible in the case of adultery of one of the spouses. Utin concluded his thoughts with a remark that from a practical point of view, the inclusion of malicious abandonment among the reasons for divorce was not tenable, since, in most cases, the divorce was necessary because the spouses did not get along or because one of them violated the sanctity of marriage by adultery, was incapable of marital cohabitation or had a serious, incurable disease.625

V. I. Jatskevitš, a Pre-Conciliar member, for his part recommended that malicious abandonment needed to remain in the divorce charter. Jatskevitš based his views on the fact that under the existing reason for divorce, malicious abandonment was most often included as the reason for absence of one of the spouses. He was convinced that in cases where one of the spouses was abandoned, an unknown absence was occasionally used as an excuse to evade the Office of the Chief Prosecutor.626 As we can see, in practice the difference between unknown absence and malicious abandonment was relatively small. Unknown absence could serve as a proxy for malicious abandonment, which was not accepted as a legal reason for divorce at that time. But was there a place in Orthodox canon law to “force” the law to apply to a range of different reasons? Here we should make a distinction between norms that have universal authority and norms that have local authority. The first is more flexible, each local Church being able to modify its own law; the latter promotes a set of norms and values that bind the local Churches and their faithful to follow them. In this sense, canon law originates and remains firmly tied to a hierarchy of values. In this regard, in the reformed Russian marriage law, spouses who seek divorce because of a fictional unknown absence, would not have to use the unknown absence as a reason in cases where the true reason for divorce was abandonment, which is considered an adulterous act against the sanctity of marriage.

625 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 7, 9.
M. A. Ostroumov declared himself opposed to allowing malicious abandonment as a reason for divorce. Ostroumov believed that the use of malicious abandonment as a reason for divorce would be contrary to the canons and teaching of the Orthodox Church. Ostroumov, however, did not mention or provide a more detailed commentary on the canons. He stated that malicious abandonment as a reason would eventually affect the destiny of the State and suggested that in such cases, it would be more appropriate to give a fine or some other kind of penalty. The chairman of the session, Archbishop Ioakim agreed with Ostroumov’s views. He noted that Jatskevitš’s stance did not meet the practice of the Diocesan administration of Nizhny Novgorod. During his period of work in the diocese, only one case out of many was indeed malicious abandonment rather than unknown absence.627

Under the title “Abandonment of a spouse,” or “Malicious abandonment of a spouse,” as it was referred to by the Russian canonists, meant actual abandonment by one spouse of the other, separate living for a long period, or secret or explicit rejection of joint matrimonial cohabitation. Professor Suvorov noted that abandonment did not have a canonical basis, unlike the case dealt with by the Preparatory Commission’s session in the Department of the Ecclesiastical Court (Suvorov likely meant the meeting of December 13, 1906628) suggested. It was not a valid reason for divorce in almost any European country at that time. Furthermore, it was not proposed for the Editing Commissions of the new Civil Code in Russia.629

Malicious abandonment as a reason for divorce was known in Russia only in the charter of the Evangelical (Lutheran) Church. Such cases were rare in the ecclesiastical courts, since it was impossible at that time to establish some sort of definition or general principles for systematic solutions for such cases. During the meeting of the Special Committee from March 21, 1907, a juridical consultant of the Holy Synod, expressed the notion that it was necessary to place cases under the guidance of a single ecclesiastical authority, the Holy Synod.630 This indication was not

627 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 10–12.
628 Журналы и Протоколы Заседаний 1907, 125–130.
630 Суворов 1908, 28.
entirely clear and did not resolve the existing problem, since divorce cases were mainly solved under the guidance of the Holy Synod.

The canonical debate concerning malicious abandonment as a reason for divorce apparently started in 1904, when Professor Zaozerski started the discussion by publishing his study in the **Theological Journal (Богословский вестник)**. Zaozerski’s argument was that malicious abandonment (*malitiosa desertio*) by one of the spouses was a crime equal to adultery, which was expressed by the fact that the wife left her husband’s house (or the husband left his wife and his family), lived alone and despite the exhortation by the abandoned party, persisted in living apart. Zaozerski saw that the above reason was recognized as such in the canon law of the Eastern Church, since it was regulated in Byzantine civil law. Here he seems to rely on Balsamon’s commentary to Canon 93 of Trullo, which mentions the Justinian law that the wife or the husband should wait for five years if either of them was taken into captivity and it was unclear whether he or she was alive. After five years they could remarry: “Ἡ μὲν τοι κρ’ [22th Novella] Ἰουστινιάνειος νεαρά, ἢτοι τὸ ἐ. κεφ. [5th chapter] τοῦ ζ. [7th title] τίτλου τοῦ κή. βιβλίου [28th book of Basilika] διορίζεται ἐπὶ πενταετίαν ἀναμένειν τὴν γυναῖκα, ἢ τὸν ἄνδρα, ὅταν τις ἐξ αὐτῶν αἰχμαλωσιοθῇ, καὶ ἀδηλία ἐστὶ τῆς τοῦτον ζωῆς. μετὰ δὲ τὴν πενταετίαν ἐτερον συναλλάττειν γάμον.” Similarly, this was recognized in the ancient Rus’ law throughout the fifteenth century, and was excluded from the grounds of divorce only at the beginning of the nineteenth century.  

Zaozerski made the following definition, which merits examination: “Upon divorce through malicious abandonment, it is necessary to certify that the abandonment is in fact malicious. When requesting divorce in such case, a spouse must notify the Consistory of the absence of the other spouse, after which divorce should be ordered in a year. A wife who illegally leaves her husband, upon returning must provide evidence of her faithful behavior during her absence, otherwise, the husband may demand a divorce.” Interestingly, the charter of Evangelical Church allowed divorce due to long-term absences even at the request of an absence spouse, if he could not come back home. Zaozerski’s essential

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631 Заозерский 1904, Т. 3. №. 10, 318.


633 Способин 1881, 115.
idea was to prove that is was timely in Russian society to improve divorce law and procedure. In his opinion, the malicious abandonment of a spouse had a firm canonical and historical base.

In the meeting of the Preparatory Commission on December 13, 1906, Professor Zaozerski for the most part used his previous article as the basis for a canonical analysis of the case of malicious abandonment. Reflecting on Canon 9 of Basil the Great, which stated that “The man, [...] whom she has left is pardonable, and a woman who cohabits with him is not to be condemned,”634 he summarized that malicious abandonment is a crime against marital fidelity. Professor Zaozerski continued the attempt to justify his views by referring to the Scriptures, which, in his opinion, allowed for the abandoned husband to enter into a second marriage.635

Zaozerski referred to his analysis of Canons 35 and 46 of Saint Basil the Great. Canon 35 provides that if a wife leaves her husband, an examination must be made to ascertain the cause and reason she left him. If the wife left without a valid reason, she was subjected to penance and the husband was pardoned.636 Canon 46 stated that a woman who unintentionally married a man who had been abandoned by his wife for a time, and afterwards left him because his former wife returned, has committed fornication, albeit accidentally. In this case a woman was allowed in principle to enter into a second marriage, though Basil the Great considered that it was better for her to remain single.637 As can be seen, all three canons speak about the case where a wife leaves her husband and his home. In the first case, Professor Zaozerski considered desertion to be malicious, which was connected with a wife’s fornication. In the second case, abandonment was not indicated as a motive or purpose; as a consequence, it destroyed a marital union. In the last case,

634 The Rudder 1983, 797.
635 Заозерский 1904, Т. 3. No. 10, 320. “He who cleaves to a harlot is one body with her.” (1 Corinthians 6:16) “If a man divorces his wife, and she goes from him to become another man’s, may she turn back and return to him again? Would not such a woman be greatly defiled?” (Jeremiah 3:13) “He who casts out a good wife casts out good things, And he who keeps adulteresses is without discernment and is ungodly.” (Proverbs of Solomon 18:23) “For how do you know, O wife, whether you will save your husband?” (1 Corinthians 7:16)
636 The Rudder 1983, 818.
637 The Rudder 1983, 823.
abandonment was already a temporary absence of the wife from her husband, without a connection to any malicious or unlawful intention to break the marriage or even without any quarrel between the spouses. The marital union between them is reestablished by the return of the wife, even though during her absence, the husband had initiated an unlawful cohabitation with another woman.\textsuperscript{638}

Which of these three cases could serve as a basis for divorce that could give a husband the right to remarry? It should be noted that in the first case, Canon 9 speaks clearly about fornication in the sense of a woman leaving her husband and joining another man: “Ὡστε ἧ καταλποῦσα, μοιχαλίς, εἰ ἐπ’ ἄλλον ἠλθεν ἄνδρα. ὁ δὲ καταλειφθεὶς, συγγνωστός, καὶ ἡ συνοικοῦσα τῷ τοιῷ ὦ κατακρίνεται.”\textsuperscript{639} The tone of the canon is so straightforward that it does not give rise to doubts: in order to achieve the dissolution of marriage according to this rule, it is necessary to prove not only the fact of abandonment of the husband by his wife, but also her unlawful union with another man. Canonist Zaizerski, however, opposed such a categorical interpretation. He considered that the intentional abandonment of the husband to be more important, because the established ecclesiastical practice did not allow deliberate abandonment of the husband, no matter how difficult the wife’s life was with him. That being said, fornication was considered only as a circumstance, aggravating earlier misconduct, i.e., deliberate abandonment, and was viewed only as a secondary crime. The professor then claimed that the husband was granted the right to enter into a second marriage simply by stating that he was abandoned. By the common rules of the Church, the second marriage was subject to two years of penance as well.\textsuperscript{640}

This practice, although not fully approved by Basil the Great, was approved in his Canon 35 if sufficient reason for abandonment could be given. If there was a clear reason, the husband could enter into a second marriage without being subject to excommunication from the Church. How, then, should the ecclesiastical court deal with those cases where the husband was abandoned with sufficient reason? The Church Father does

\textsuperscript{638} Журналы и Протоколы Заседаний 1907, 126.

\textsuperscript{639} Ράλλη 1854, Τ. IV, 121. For \textit{maltiosa desertio}, abandonment, Basil the Great uses the Greek word \textit{ἐγκατάλειψις}. For more, see Zaizerski’s definition on this. Заозерский 1908, 250.

\textsuperscript{640} Журналы и Протоколы Заседаний 1907, 126–127.
not give a direct answer, but a comparison of Canons 9 and 35 concludes that a husband who was the guilty party in his abandonment is unworthy of leniency. What did leniency mean in this case? Was it in relation to the second marriage or to communion? Zaozerski found that the husband was unworthy of leniency in both cases, though the Church could not deprive him of the right to marry during the period the aforementioned canons were decreed; it could only approve or refuse to contract the marriage.\textsuperscript{641}

Zaozerski discovered that the correct interpretation of these canons can be found if one consults the Byzantine commentator Aristine. Aristine interpreted Canon 35 of Basil the Great stating that, “She, who abandoned her husband and without the reason left him, should be under penance and even more so if she marries another man, for then she is condemned as an adulteress, according to the ninth rule. And the husband left by her is worthy of pardon and therefore is not subjected to penance [even] if he will take another [spouse.]”\textsuperscript{642}

Worthy of attention is the fact that Saint Basil the Great in both rules does not discuss so much a question of the right of the husband abandoned by his wife to remarry, i.e. marriage as an event, but about the case which is subject to moral evaluation from the standpoint of the Gospel. From the point of view of civil law at the time, the right of the husband who was abandoned by his wife to marry another woman did not give rise to any doubts. From the point of view of the law, the wife was considered so attached to the house of her husband that its arbitrary abandonment by itself destroyed marriage and freed her from her husband’s power over her. Vice versa, the residence of a new bride in the groom’s house, without any concluded rites within a year, kept her under the groom’s power. Such a position of a wife in ancient society can be understood from the standpoint of the written and customary norms of civil law that Christians evaluated in terms of the teachings of the Gospel and the moral teaching of the Old Testament. This consequently created Christian or Church discipline and a basis for the ecclesiastical court.

Zaozerski’s views regarding the regulations of Byzantine civil law that were praiseworthy and welcomed by ecclesiastical court – and vice versa, ideas that were subject to open condemnation – are understandable. If

\textsuperscript{641} Журналы и Протоколы Заседаний 1907, 127.

\textsuperscript{642} Рълъп 1854, Т. IV, 179–180.
the rules and laws were concerned with the principles of right and wrong, since Basil the Great himself in Canon 9 does not raise a question about the legality or illegality of a certain type of cohabitation, he considered it from the moral and Gospel perspective. This can be clearly seen in the following passage: “A woman who is cohabiting with a man who has been left can be accounted an adulteress. For the fault here lies in the woman who divorced her husband.” 643 The tolerance for husbands is also expressed in Canon 46 of Saint Basil. Concerning the bigamy of a husband, Basil observes it with complete indifference, as if it were perfectly legal. In this canon, Saint Basil states that a harlot is every woman who enters into marriage, albeit unwittingly, with a man who has been left by his lawful wife, even if temporarily, and later, on account of his wife’s returning, will be let go. Basil does not condemn the second wife, who lives with a man abandoned by his first wife, and says that such a wife is a harlot (ἐπόρνευσε), albeit unwittingly. 644

To clarify this canon, it should be taken into account that Basil the Great in his Canon 9 speaks of a man who has been completely abandoned (διόλου) by his wife, who no longer wishes to return to him. Therefore, Saint Basil pardons such a man, nor does he condemn the woman who entered into a second marriage with him either. In Canon 46, however, he speaks of a wife who, for some reason, has temporarily (πρὸς καιρόν) left her husband. Therefore, if any woman enters into marriage with a man whose lawful wife has temporarily abandoned him, and that woman knew about it, then she is guilty of adultery because she usurped someone else’s husband, as written at the end of Canon 9. If she did not know about it, because, for example, she came from another area or city, and the wife who temporarily abandoned him subsequently returns, in such cases the first marriage will be restored. In that case the second wife is guilty of fornication, though unwittingly (ἐν συνοία). As this woman had no intention of committing fornication, but legally entered into marriage, she is consequently not forbidden to remarry another person. However, having said that, it would be better that she remains unmarried, concludes Basil. 645

643 The Rudder 1983, 797.
644 Ράλλη 1854, T. IV, 195.
645 Ράλλη 1854, T. IV, 195.
Zonaras, an exegete of the Holy Canons, made it clear as well that such an interpretation is also known in the requirements of civil law, according to which when entering into marriage, attention should not be given to what is permitted, but to what is fair (οὐ τὸ ἐπιτετραμμένον, ἀλλὰ τὸ εὐπρεπές). In his canon Basil the Great also used the Gospel teaching of the Savior: “Whoever marries a woman who is divorced commits adultery” (Matthew 5:32) when speaking about abandonment (ἀπόλυσις) by one of the spouses of the other (except in the cases of fornication), and by this he makes clear what kind of abandonment he means.

This canon raises a question: Why does the church father not condemn the bigamy of the husband as heavily as that of a woman? Professor Zaizerski tried to answer this question and believed that the answer could be found by studying Basils’ Canon 9. By this canon and on the basis of the established ecclesiastical custom, a wife must be faithful to her husband, even if he is living in fornication. Only the husband who has completely abandoned his wife for another woman makes himself and the woman an adulterer and adulteress. Hence Zaizerski made one important conclusion: from a moral point of view, on which Saint Basil the Great likely based his views, the decisive abandonment by a husband of his wife can be seen as a more grievous sin than a casual affair, a temporary lapse in which the husband does not leave his wife. Similarly, abandonment by a husband of his wife and his home was considered a much more serious crime than a thoughtless lapse of an affair. Hence, malicious abandonment was to a greater extent a legal reason for divorce than temporary, albeit proven, adultery.

The practice of Spiritual Consistories in Russia failed to honor Zaizerski’s standpoint. A good example of this was the absurd practice in which the Consistory required evidence of sexual intercourse proved by actual eyewitnesses in order to grant divorce on the grounds of adultery.

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646 Ράλλη 1854, Т. IV, 196.
647 Суворов 1908, 30.
648 Журналы и Протоколы Заседаний 1907, 128
649 Заозерский 1904, Т. 3. No. 10, 326.
650 Заозерский 1904, Т. 3. No. 10, 326.
Studying the canons of Basil the Great, canonist Zaozerski came to the conclusion that malicious abandonment of a spouse was indeed a morally legal reason for divorce and was even greater than an occasionally committed adultery. Canonist Zaozerski, however, found that in Byzantine law before 870 and in the rules of Saint Basil, unknown absence meant only the absence of the husband and only gave the wife the right to enter into a new marriage. This fact conflicted with Basil’s Canon 31, which Aristenus, for example, thinks is clear – “Σαφῆς.” Aristenus continued his interpretation summarizing the meaning of the canon by saying: “Ἡ πρὸ τοῦ πληροφορηθήναι θανείν τὸν ἄνδρα ἀλλὰς γαμουμένη, μοιχᾶται.” [[A wife] who marries another before ascertaining the death of her husband, commits adultery.]

According to Byzantine ecclesiastical discipline, it was enough for a husband to state that his wife was absent from home for a long enough period in order to receive the right to enter into a new marriage. A wife, however, had to wait for her missing husband until she could prove his death, which only then gave her the right to enter into a new marriage. Professor Zaozerski regarded this position as an axiom of canon law for those Byzantine emperors who wished to reform the divorce law according to the Gospel and canonical inspiration. Malicious abandonment was also constantly affirmed in the history of Byzantine jurisprudence, except during the period of Leo III Isaurian (740–870), when his set of laws, the *Ekloga*, were in force. Justification for malicious abandonment was therefore found in the *Procheiron nomos* of Basil the Makedonian, which returned to the roots of Justinian law, not only completely reconstituting it, but also making further steps towards equality concerning responsibility for marital fidelity for both husband and wife. In reality, Zaozerski admitted that this was not followed in legal practice. Instead, the *Ekloga* was re-published and modified with new laws, particularly with laws from *Procheiron nomos*, often published side by side with the laws of the *Ekloga*. This fact is indeed clearly seen in the Slavic version of the *Nomokanon*, in the 48th chapter of the printed *Kormtšaja kniga*. Professor Zaozerski nonetheless presented three

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651 Рάλλη 1854, Т. IV, 173.
652 Заозерский 1904, Т. 3. No. 10, 328.
653 Журналы и Протоколы Заседаний 1907, 129.
654 Громогласов 1908, 29.
cases in which Byzantine canonist Demetrios Chomatenos, Archbishop of Ohrid, interpreted Justinian law 117 as being in favor of malicious abandonment (malitioso desertio) as a reason for divorce.655

Using these three medieval divorce proceedings as a justification for divorce on the grounds of malitioso desertio was highly disputed by other Russian canonists at the time. Their main argument that divorce in the aforementioned cases was motivated using the Justinian novella, is also found in the Basillika of Leo, which refers to a wife’s willful abandonment of the conjugal bed (ἡ κοίτη) and her stay in someone else’s house at least one night. Such a conviction by witnesses of abandonment, adopted by the ecclesiastical court as well, was made on the grounds of the wife’s adulterous life.656

Zaozerski also noted that in draft of the Civil Code from 1809, one of the reasons for divorce was “A wife’s running away (побег) and hiding from her husband.”657 However, a year later in the draft of the Civil Code, the only mention about running away was law §270, which ordered not to treat the case as a crime when a wife was forced to depart for a crime committed by her husband.658

During the twentieth century a prevailing Russian practice concerning a fictitious marriage is clearly seen in the following Preparatory Commissions remark: “The wife living apart from her husband” and “the husband who refuses to accept a wife” have become common phenomena, acquiring for itself, so to speak, the rights of citizenship even in the eyes of the Governing Senate. The only remnant of legal guarantees under such duties is the rights of the wife to claim for herself maintenance from her husband who refuses to cohabit with her, and the right of the husband to refuse to grant maintenance to his wife who does not want to cohabit with him. Meanwhile, escape from an abnormal situation (a fictitious marriage) is simple: a long separate cohabitation is in itself convincing proof of the end of a marriage. The ecclesiastical court here should not separate a husband from his wife and vice versa, because they are already parted, but its duty is only to state that on account of

656 See I. I. Sokolov’s and I. Berdnikov’s commentary in Соколов 1911, 133; РГИА. Ф. 796. ОП. 445. Д. 417. Л, 29.
657 Заозерский 1904, Т. 3. №. 11, 431.
658 Проект Гражданского Уложения Российской Империи 1810, 104–105.
separation the dissolution of the marriage has already taken place. In particular, for the legislative power there is no formal difficulty in publishing our proposed law. In reality, it is not about the establishment of the new law, but about the restoration of the old, based on a very stable canonical, ecclesiastical and civil foundation.\textsuperscript{659}

From this statement, Zaozerski considered that by accepting malicious abandonment, which he believed was based on the canons of Basil the Great, the Church and civil law would eventually be reformed. At the end of the discussion, the meeting of the Preparatory Commission made a unanimous decision to establish a five-year period before a divorce can be granted in cases of malicious abandonment.\textsuperscript{660}

The five-year period could, to some extent, be motivated by the findings of canonical cases from Byzantine legal practice, such as the case that was sent for resolution to the Patriarch of Constantinople Manuel II (1244–1255), from whom was asked the following question: “Some [men] have left their wives due to hatred or for whatever reason (διὰ μὴνς, ἢ ἄλλην ὁποιανδήτινα αἰτιαν) and live in a foreign country; their wives remain in this position for five or more years. Their husbands do not return and it is unknown where they live. Should such wives marry other husbands?” The Patriarch gave the following answer: “Husbands, leaving their wives for whatever reason and living in a foreign country deserve excommunication (ἀφορισμοὶ εἰσὶν ἄξιοι), if staying carefree and are unwilling to return to their wives. Now, if there is no news about them, [and] at least the search [of them] took place on the initiative of their wives, and five years pass since their husbands went missing, whether they are prisoners or otherwise disappear, then their wives can without hindrance enter into marriage with another husband under the existing law, and those wives whose husbands are still alive must search for them.”\textsuperscript{661}

Professor Zaozerski’s attempt to prove that malicious abandonment was truly a legitimate reason for divorce on the basis of regulations of the ancient Church was a complete failure in Berdnikov’s and Suvorov’s opinion. Professor Suvorov believed that the canonist made a mistake in understanding the ancient regulations of the Church, confusing divorce

\textsuperscript{659} Журналы и Протоколы Заседаний 1907, 129–130.

\textsuperscript{660} Журналы и Протоколы Заседаний 1907, 130.

\textsuperscript{661} Рάλλη 1855, T. V, 114–115; Соколов 1911, 97.
as an act that destroys marital union with the actual abandonment of another spouses without the destruction of marital union. The Special Meeting in one of its sessions stated that it was common that shortly after the dissolution of the marriage by the unknown absence of a spouse, a missing person returned home. Herein some cases the malicious absence of a spouse was hidden under an unknown absence. The malice of such untraceable absentee was found only after the spouse’s return to his home to seek permission to remarry.662

Of course, it is impossible to think that in ancient times in the Byzantine Empire the abandonment of spouses did not take place. There were, of course, cases of women escaping from the beatings and ill treatment of their husbands. These cases were guided by the rules of Basil the Great and later by the rules of the Council of Trullo. However, such cases did not constitute a particular reason for divorce. They were considered in life and in judicial practice in relation to other motives to divorce. Such motives were unknown absence, the willful running away of a wife, and so on. This is clearly shown in the three medieval divorce proceedings in the Greek Church presented by Professor Zaozerski.

Zaozerski did not clarify clearly enough the nature of the abandonment in his canonical analysis. First of all, it should be established what an abandonment is, no matter what it is called: malignant, malicious, intentional, or simply abandonment. For legislators who had to legislate on this subject, there was no doubt that under the notion of abandonment must not be understood the legal termination of marriage, but the actual withdrawal of one spouse from the other without any act, public or private, which would have expressed the will to terminate the marriage and without requesting a divorce. Hence, one spouse actually abandons the other without breaking the legal relationship, which is established by a marital union, and which therefore continues to exist.

Interestingly, Professor Suvorov referred to the very same Canon 9 of Saint Basil the Great as canonist Zaozerski, when trying to justify the the impossibility of malicious abandonment as a cause for divorce from the

662 This example can also be found in Sergi Grigorovski’s study from 1908, in the Collection of Ecclesiastical and Civil Laws on Marriage and Divorce, Legitimation, Adoption and about Illegitimate Children, with Additions and Elucidations on Circular or Individual Decrees of the Holy Synod. See Григоровский 1908, 253–255.
canonical viewpoint. The idea of the aforementioned canon is the following: the decision of the Lord with respect to the order of the sense applies equally to men and women so far as it concerns the prohibition of divorce except on the ground of fornication (περὶ τοῦ μὴ ἐξείναι γάμου ἔξιστασθαι παρεκτὸς λόγου πορνείας). Many strict sayings can be found about adulteresses in the canon, based on the teaching of the Apostle Paul and the Prophet Jeremiah. Men were obliged not to keep them at their homes and not to continue to cohabit with them. If they did so, they were found to be foolish and impious.\(^663\) On the other hand, the canon commands that men who are guilty of adultery or of acts of fornication must be kept by their wives. Therefore, the Church Father says he does not know whether one can call directly an adulteress the woman who lives with a husband whose wife has left him, since here the fault is on the side of the woman who left her husband (τὸ γὰρ ἐγκλημα ἐνταῦθα τῆς ἀπολυσός τὸν ἄνδρα) and not on the one who took her place. Here it might be asked why did the woman walk away from the marriage (ἀπέστη τοῦ γάμου)? Possibly because her husband beat her, and she could not stand the blows? Perhaps because she could not bear the loss of property? Maybe because her husband lived in fornication? In this case the Church custom did not allow for the wife to be separated from the unfaithful husband (ἀπίστου ἄνδρος χωρίζεσθαι οὐ προσετάχθη γυνὴ), but obliged her to stay with him, given the uncertainty of the final outcome. Here the teaching of Paul the Apostle (1 Cor. 7:16) is referred to.\(^664\)

Canon 9 of Saint Basil the Great speaks about divorce in the sense of breaking the legal relationship between the spouses, but not in terms of actual abandonment of one of the spouses by the other. Byzantine law did not have at the time any official divorce forms, except the private expression of the unwillingness to live in a marriage, following the ancient Mosaic Law.\(^665\) One can only wonder how it was possible to find in Canon 9 the notion of the actual abandonment of another spouse without prior separation as a sufficient reason for divorce.

Karl Eduard Zachariae von Lingenthal (1812–1894) in his study *Geschichte des Griechisch-römischen rechts* (History of the Greco–

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\(^{663}\) See the Proverbs of Solomon 18:22.

\(^{664}\) Πάλιη 1854, Τ. IV, 120–121.

\(^{665}\) Красноожен 1898, 7.
Roman law) of 1892, described that the following terminologies: “λίσις, ἀπόλυσις, διάλυσις, διάζευξις, χωρισμός τοῦ γάμου,” were used for divorce in the Byzantine Empire, and they always meant a legal termination or dissolution of marriage. According to the law, such spouses continued to live together rather than actually separate.666 Therefore, in all official and private collections of the Byzantine laws, a set of laws on divorce are placed under the heading: “περὶ λύσεως γάμων,”667 and as Professor Suvorov points out, most occasions for the termination of marriage start with the phrases: “λύεται ὁ ἄνδρα ἀπὸ γυναικὸς (the man is separated [“dissolved”] from the woman); διαλύεται ὁ γάμος (the marriage is dissolved) [...in such cases...]; or ἀπίαι τῆς διαλύσεως (the reasons for divorce) [...]are such and such...]”668

Canonist Suvorov, who was highly influenced in his commentaries by von Lingenthal’s famous study in Byzantine law, noted that the husband who sent his wife a certificate of divorce could marry again without committing adultery.669 Thus, one can interpret Canon 9 to speak about legal not factual abandonment.670 If the husband who sent his wife a certificate of divorce was not condemned for marrying another woman, then he and the woman who took the place of his first wife would not be condemned. The situation is different if the initiative for divorce came from the husband, namely if a husband divorces his wife by sending her a certificate of divorce, and after that marries another – in such a case he is an adulterer. Basil the Great speaks in the same sense in his 77th canon:

666 Zachariae 1892, 76. Here one should note the Greek words and phrases in the ninth canon of Basil the Great that correspond to the Russian word for abandonment or leaving, оставление, which were used and translated by Suvorov. Such words are: “ἀπολυσός τὸν ἄνδρα – οσταβιλε μιχὰ,” “ἀπέστη τοῦ γάμου – οστυτιπαλ ο βρακα,” “διαζεχθῆναι συνοιτοῦντος – ραζβωμιτες σοιχιτελε,” “χωριζοσθαι – οτελαντει,” “ἀποστάς τῆς γυναικός ἐπ’ ἄλλην ἠλθε – οστυπιβ οτ ζην κες βεργε δρογιου βεν,” “γάμου εξιστασθαί – βοιουθε ἵ α βρακα.” (Суворов 1908, 30.) The translation of the phrase “γάμου εξιστασθαί” was challenged by Professor Zaizerski, who argued that it was incorrect and used out of the context. See Заозерский 1908, 251–252.

667 Ekloga II, Zachariae 1852, 15; Epanagoge XXI, Zachariae 1852, 135; O Πρόχειρος νόμος XI, Zachariae 1837, 72.

668 Суворов 1908, 31.

669 Суворов 1908, 31; Zachariae 1892, 77.

670 Заозерский 1908, 252.
“Ὁ μέντοι καταλιμπάνων τὴν νομίμως αὐτῷ συναφθείσαν γυναῖκα καὶ ἐτέραν ἀγόμενος, κατὰ τὴν τοῦ Κυρίου ἀπόφασιν, τῷ τῆς μοιχείας ὑπόκειται κρίματι.”

A man who abandons his legally wedded wife, and marries another woman is liable to the judgment of adultery, but logically the woman is guilty in adultery as well, since she divorced from her husband (sending him a certificate of divorce), for whatever reason: cruel treatment, extravagance, fornication, and so on.

For a complete canonical analysis of the subject it is necessary to analyze Canon 87 of Trullo as well, since its foundation are based on Canons 9, 35, and 77 of Basil the Great. The Trullan canon even states in the beginning that: “A woman who has abandoned her husband is an adulteress if she has betaken herself to another man, according to the sacred and divine Basil.”

Canon 87 of Trullo consequently speaks 1. about the wife who left her husband, 2. about the wife who left her husband without any reason, 3. about the husband who left his legal wife to marry another. Abandonment here is understood in the same sense as in the canons of Basil the Great, i.e. in the sense of the legal dissolution of marriage. This was the case, even though at the time of the Trullan council the Justinian divorce law that was adopted in Nomokanon did not exist. It opened a possibility for innocent divorced spouses to remarry. Zonaras, for example, interpreted this canon as the following:

Now therefore, the woman who walks away from her husband for no reason, according to the rules, deserves a penance, i.e. a penance given for committing adultery if she will be with another [man]. Her husband may receive forgiveness and be worthy of the ecclesiastical communion. Thus, in the opposite case it can be concluded that if she without reason walked away from her husband, who, perhaps to an extent, was angry with her or treated her poorly, or if she had any other reasons on her husband’s part, [in that case] she will be innocent, if she made [herself] the wife of another. [In that case] the husband should be subjected to a penance, because he was the culprit in the sin of his wife. The rule says: but he who leaves his wife and takes another [wife],

671 Ράλλη 1854, T. IV, 239–240.

672 The Rudder 1983, 836.

673 Суворов 1908, 32.

674 The Rudder 1983, 391.
according to the word of the Lord, is guilty of adultery, and [the rule] further adds, how such [a person] should be punished and corrected. Apparently, these fathers admit the contradiction with Basil the Great, because the husband, while still married, copulated with another wife, called an adulteress, and it is said that he should banish her from his home. But the first wife should take back her fornicating husband, because he [Basil the Great] says, we have no rights to subject the husband to the guilt of adultery, because the sin was committed free from marriage. These rules do not contradict each other, since Basil the Great speaks about falling into fornication while being married, and of copulation with another, free from being a husband. But the current rule [Canon 87 of Trullo] speaks about [a husband] who without reason banished his wife and brought another to his house as a legal wife. The Lord in his Gospel called such a man an adulterer.675

Professor Suvorov considered that Zonaras’ (and Balsamon’s) interpretation “deviated from the true meaning of the canons.” 676 Suvorov’s accusations can be justified if Zonaras’ interpretation of adultery could be applied not only to the case of falling into fornication during the existence of a previous marriage, but also contracting a new marriage by dissolving the former one.677 We can find grounds for Suvorov’s view, since Zonaras himself in his commentary to Canon 35 of Saint Basil cited Basil’s Canon 9, and did not recognize it as legal for a wife to dissolve the marriage because of the husband’s violence, adultery or even his infidelity: “Ἐν δὲ τῷ Θ’. κεφαλαίω ὁ ἄγιος οὕτως, οὐτε τὸ τύπτεσθαι παρὰ τοῦ ἄνδρος, οὐτε τὸ εἰς χρήματα ζημιοῦσθαι, ἀλλ’ οὕτε τὸ πορνεύειν ίσως τὸν ἄνδρα, εὐλογοὺς αἰτίας ἐκρίνει εἰς τὸ ἀποστῆναι τὴν γυναῖκα τοῦ γάμου, οὐδὲ μὴν τὸ ἀπίστων εἶναι.”678 With reference to Balsamon, it is hard to find in his interpretation a difference between abandonment for a legitimate reason and abandonment without legitimate reason. Hence, he explains Canon 87 of Trullo in the sense that any abandonment of a husband, even for a legitimate reason, was not

675 Ράλλη 1852, Τ. ΙΙ, 506.
676 Суворов 1908, 36.
677 See the ninth canon of Basil the Great.
678 Ράλλη 1854, Τ. IV, 179.
permissible without the permission of a court.679 Suvorov thought that the correct way, rather than the interpretations of Zonaras and Balsamon, was to see that under the “ἀναχωρήσις” in the Trullan Canon 87, was meant the divorce of a wife from her husband without the reason of fornication – “χωρίς λόγου πορνείας.”680

Unfortunately, in the session of the Special Meeting, it was not clarified how the Diocesan authorities would act in cases of “runaways,” i.e. whether they could remarry or not. The Diocesan bishops of the Holy Synod were instructed that these runaways could be allowed to enter into marriage only if they presented serious proof that their unknown absence did not mean concealing their whereabouts from the other spouse but was caused by other valid reasons.681 The Special Meeting considered that in essence the intentional abandonment of one of the spouses was a crime against matrimonial fidelity, which entailed a profound disintegration of the family. In view of this highly destructive influence of malicious abandonment to the institution of marriage, Berdnikov considered the recognition of this phenomenon as a naturally legitimate reason for divorce at the request of one of the spouses in such a formula as was offered by the Special Meeting. However, Berdnikov also noted that attention should be paid to the technical preparation of divorce

679 Ράλλη 1852, Τ. Π, 507–510.

680 Суворов 1908, 38. An interesting historical note was also made by canonist Suvorov: In Germany in the fifteenth century during the era of the Reformation movement, the disappearance of a person and malicious abandonment became a trend of the time. A spouse who was bored or uncomfortable in married life might in some cases run away into another territory, i.e. to another German State. The small size of territories encouraged the possibility of escape, and because of the solidarity of these territorial governments was not difficult to grant the status of fugitive during this time of religious strife. Malicious abandonment of many different types (desertio and quasi-desertio) had always had an independent status in all Protestant statutes. Certain Lutheran theologians even used the concept of desertion to justify divorce in some other cases, for example, in cases of abuse and attempts on one’s life. In such cases, theologians demanded the expulsion of the criminal spouse from the territory, so that he or she was considered a deserter. The German Civil Code at the beginning of the twentieth century, having replaced all regional laws, classified malicious abandonment (bösliche verlassung) in the first category of grounds for divorce, along with adultery, bigamy, unnatural vices and attempt on another’s life. Суворов 1908, 40–41.

proceedings on the specified subject, as was the case in Western European countries at the time.682

Berdnikov suggested that it was necessary for the new divorce procedure to bring in a claim for the restoration of marital cohabitation. If within a certain period of time when the spouses lived separately, a court order to resume the disturbed matrimonial life was not received, then it would serve as a basis for a request to dissolve the marriage. An action for the renewal of marital cohabitation should be considered in the secular court, which would consider the requests and claims about spouses living separately. In Berdnikov’s view, a legitimized practice of separate living between two spouses would be desirable only by their mutual agreement. This was motivated with a view that would accurately determine the procedure of parenting and material support for the other spouse who lived separately.683 Parenting and alimony rights were not just part of a legal problem in Russia; it was part of a much wider question of gender consciousness, closely related to the liberation movement in the beginning of twentieth century. Ariadna Tvrkova, a woman activist described in detail in her memoirs “На путях к свободе” (On the Road to Freedom) the difficulties that any single mother and divorcee could confront. A broken marriage that resulted in separate living was a difficult move at that time on the wife’s part, since the “twin sanctions” – the civil law of the Russian Empire and social custom made such a move emotionally disturbing or distressing. Apart from social

682 It is possible that Berdnikov was influenced in his views by Professor Suvorov. See Суворов 1908, 42.

683 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 30. At first, the appeal practice in nineteenth century Russia did not categorically allow a court order regarding alimony for wives who lived separately from their husbands (see, for example, decisions from 1868, No. 461 and 1875, No. 291). However, at the beginning of the twentieth century we can already find changes in court decisions. With the decision from 1906, No. 8, the court ordered that, “if such marital cohabitation which was meant by the law was impossible, there was no reason to deprive the wife of the right to demand alimony from her husband.” Having thus established in its decision that spouses living separately was an everyday fact that the court had to consider and somehow normalize, the Senate started to order a number of instructions regarding the regulation of the aforementioned relations. Быховский 1912, 42.
sanctions, women also faced severe economic pressure if they ended up living without the support of their husbands.\textsuperscript{684}

Interestingly, when Professor Berdnikov brought up the question of alimony, the administrative practice actually provided such support in cases when husbands: exhibited erratic behavior, e.g., drunkenness, beatings, extortion and embezzlement of property; treated their wife badly; failed to provide for the family; were violent; committed adultery; were vagrant; had mental disorders; had sexually transmitted diseases; were unable to fulfill conjugal life.\textsuperscript{685}

Alimonies were issued from three months to three years, or until certain conditions were reached, for example, after the husband exhibited proper behavior or his income level rose, etc.\textsuperscript{686} How then did Berdnikov’s proposal differ from actual divorce, since from the legal perspective it was close to being complete separation, i.e. a divorce? Perhaps in many cases, separate living would be positively necessary in order to stop, at least for a time, a family upheaval. It might be very useful in that it could force the other spouse to reconcile and restore normal marital life. It could in many cases replace divorce.\textsuperscript{687}

Abandonment of a spouse was also related to reasons that could occur, for example, from deviating from the Orthodox faith of one or other of the spouses. In such a case abandoning the other spouse is motivated not by personal arbitrariness or the inconveniences of life, but by the supreme principle of freedom of conscience. Such abandonment as a reason for divorce merges with a reason that stems from disagreements, enmities, strife and oppression between the spouses, initiated by different religious beliefs.

\textsuperscript{684}Ruthchild 2010, 35. It should be noted that where dissolution of the marriage was granted, the wife was not in all cases the injured party. For example, Tyrkova’s future nemesis, Alexandra Kollontai, exclaimed to her friend that she “hated marriage. It was an idiotic, meaningless life.” Such an act of leaving matrimonial life could “liberate” one, yet at the same time it brought with it the prospect of poverty.

\textsuperscript{685}Быховский 1912, 48.

\textsuperscript{686}Быховский 1912, 48–49.

\textsuperscript{687}РГИА. Ф. 796. ОП. 445. Д. 417. Л, 30–31. Berdnikov offered to introduce a rule that in certain cases, before permitting a divorce, a pre-assigned legal separation for a certain period of time was necessary, since the possibility of reconciliation always existed. The only question was to put this rule correctly through a competent court, which in Berdnikov’s view was a secular one.
In Russia at the time, in cases where there was no possibility for an abandoned spouse to prove marital infidelity, the spouse was denied the opportunity to obtain a formal divorce, hence, their marriage existed only on paper. To include malicious abandonment among the reasons for divorce was not only desirable from the point of view of private interests, but from the point of view of public law as well. Regarding the interest of public good, which was one of the State Church’s own priorities, it would be impossible to assert that the State was interested in the preservation of those marriages where the marriage did not actually exist anymore. Foreseeing this, the Commission voted in favor of adding malicious abandonment to the divorce charter as a valid reason for divorce. The Commission accepted A. V. Vilev’s idea that determining precisely when abandonment took place could serve as a justification for divorce.688

4.6 Abandonment of the Orthodox Faith

At the beginning of the twentieth century, among other questions related to Orthodox canon law, the question of religious freedom of Russian subjects was debated in various circles from different viewpoints.689 These debates led to a reformed law that was published in the Special Journal of Committee of Ministers on April 17, 1905, in the following form:

1. [A person] falling away from the Orthodox faith to other Christian confession or creed shall not be prosecuted and this should not entail any disadvantage implications in relation to private or civil

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688 РГИА. Ф. 796. ОП. 445. Д. 227. Л. 13–15. S. Utin’s proposition to expand the timeframe from five years to ten, after which a spouse who was maliciously abandoned could seek a divorce, and V. G. Ignatievna’s proposal to reduce it to two to three years, were not accepted.

rights. A person who upon reaching adulthood leaves the Orthodox Church, is recognized as belonging to the religion or creed which he or she choses;

2. When a spouse who professes the same Christian faith [as the other spouse] converts to another religion, all the children who have not reached adulthood, remain in the same faith professed by the other spouse. When both spouses convert, children under 14 years of age follow the faith of their parents. Children who have reached the age of 14, remain in their former religion;

3. In addition to these rules, establish that the persons who are registered as Orthodox Christians but in reality profess non-Christian faith to which they or their ancestors belonged before joining the Orthodox Church, are subject to exclusion, at their own request, from [the list of] Orthodox Christians;

4. To allow for Christians of all confessions to educate and baptize by the rites of their faith those non-baptized foundlings and children of unknown parents whom they have adopted.\(^\text{690}\)

Among the diocesan authorities, one of the permitted reasons for divorce from the ecclesiastical point of view was the abandonment of the Orthodox faith.\(^\text{691}\) During the Pre-Conciliar period the diocesan authority of Saint Petersburg placed great importance on the fact that it should be made clear that the right to ask for a divorce belonged only to the Orthodox spouse. Otherwise, it would be possible to abuse the law. Thus, it was seen as desirable that in order to guard the Orthodox faith, the divorcing Orthodox spouse should receive a legal part of the belongings.\(^\text{692}\) Abandonment of the Orthodox faith might only become a reason for divorce when the party who remained an unbeliever did not agree to continue marital cohabitation with the other spouse, who adopted Christianity, or first agreed, but afterwards began to repress the religious conscience of the converted spouse, and harassing and opposing the Christian education of the children.\(^\text{693}\) An analogy to this can be found in Canon 72 of Trullo.\(^\text{694}\)

\(^{690}\) Бердников 1914, 19–20.

\(^{691}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 2. Compare this to apostolic teaching “Reject a divisive man after the first and second admonition.” (Tit. 3:10)

\(^{692}\) РГИА. Ф. 796. ОП. 445. Д. 417, Л. 2.

\(^{693}\) РГИА. Ф. 796. ОП. 445. Д. 417. Л, 19.

\(^{694}\) Пальн 1852, Т. II, 471–472.
Abandonment of the Orthodox faith was the only reason in the entire project that Metropolitan Vladimir of Moscow and Kolomenskoe supported. In his belief, it responded to the needs and requirements of the human spirit. Logically, it could be a much clearer and more convincing reason for believers, since if the spiritual union between the spouses in a such primary area of life as religion would stop, then there would be nothing to give to a sexual relation, and it would thus become a purely animal act. The Metropolitan regretted that there was little or no consideration of the sacramental side of marriage in the arguments of the planned reforms. Archbishop Aleksi of Tver and Kašinsk suggested to add the opinion of Metropolitan Jevlogi of Holm regarding the abandonment of the Orthodox faith: “Marriage shall be terminated also in the case if the spouse who remains faithful to Orthodoxy is unwilling to continue marital cohabitation with a lapsed spouse, due to disorders in family relations.”

The Special Meeting of the Holy Synod formulated the issue as follows: “The Orthodox spouse whose marriage was dissolved due to deviation of the other spouse from Orthodoxy, is given the right to remarry.” Regarding this, the Meeting did not explore all sides of the question. It did not pay attention to those cases of mixed marriages where non-Orthodox spouses converted to Orthodoxy, and cases where one of the spouses abandoned Orthodoxy and joined a non-Christian faith. One could argue that these cases and aspects of the question should have been included in the formula of the new law. The Meeting also found, among other things, that deviation of one of the Orthodox spouses from Orthodoxy could not in itself serve as a basis for divorce. In the case of a mixed marriage between a believing spouse and a nonbeliever, from the perspective of the Orthodox faithful this marriage was not allowed to be terminated. Once a Christian spouse notices and experiences that the nonbelieving spouse offends religious belief, and promotes the

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696 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 11.
697 Суворов 1908, 45.
698 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 30. For Berdnikov, the starting point of reasoning regarding mixed marriages was the commandment of the Apostle in 1 Corinthians 7:12–14. Berdnikov concluded from this that religious interests should stand in the foreground when dealing with the divorce cases of mixed-marriage couples.
customs of a non-Christian faith, then termination of marriage with the nonbeliever could be possible.

The unity of faith and of confession between the spouses can be argued as the origin for this whole question. Canonist Berdnikov in his arguments operates on the basis of Canon 72 of Trullo, Canon 31 of Laodicea and Canon 30 of Carthage. In his remarks, the canonical tradition of the Orthodox Church in the strict sense could not allow mixed marriages with Catholics, Protestants and other Christian denominations. This fact was also observed by S. Tšistoserbov, who pointed out that marriage, as a whole juris divini communicatio between the spouses, should require a unity of religion, since different religions should serve as an impediment to marriage on the basis of impedimentum disparitatis cultus. Such a strict view was also met in the Ecclesiastical Bulletin, when in 1909 Metropolitan of Volyn Antoni suggested adopting a general rule, by which Orthodox Christians were forbidden to marry even other Christians. Answering such a request, the Holy Synod did not approve it; it justified its opinion by stating that the Church does not have a right to take something which is granted it by civil law. Such a prohibition would also act against the Church and would not bring any religious–moral benefit to the people.

The strict policy of mixed marriages was followed in the Greek Orthodox Church at the time. The Russian Orthodox Church, as Berdnikov noted, deviated however from this strict norm by the desire of the State and in recognition of its political views, but with the indispensable condition that the non-Orthodox party in the mixed marriage did not promise to constrain the religious conscience of the Orthodox spouse by mocking, threatening or propagandizing non-Orthodox confession. The children should also be raised in the Orthodox faith and the same principles should be followed when the Orthodox spouse falls into heterodoxy, as already seen. Professor Berdnikov paid attention as well to the nature of adopting Judaism, Islam or any other non-Christian faiths of one of the spouses, as an action which consequently terminated the marriage at the request of Orthodox spouse


700 Чистосербов 1903, 489.

701 Вопрос о смешанных браках 1910, 1169.
as a result of different religions. Falling into heterodoxy on the other hand was not seen as a reason for divorce in itself, but only in cases where the heterodox spouse did not want to continue marital life.\textsuperscript{702}

We can here pay attention to the fact that the respected Russian canonist used the term “falling from the Orthodox faith” (отпадание от православной веры), when describing the process of a person who might have been forced to join the Orthodox Church and afterwards returned to the former faith of his or her ancestors. Although the decree of April 17, 1905 allowed individuals the freedom to return to their previous creed, Article 3 of the statute made such a return confusing for those Russian subjects who originally belonged to one of the non-Christian confessions (Judaism, Islam, Budhism) traditionally tolerated by the State.\textsuperscript{703}

Eugene M. Avrutin in his article “Returning to Judaism after the 1905 Law on Religious Freedom in Tsarist Russia,” paints a rather realistic picture regarding the 1905 decree and how it was applied in Russia at the time:

The law did not allow all non-Christians to return to their former religions, “only those individuals who were formally registered as Russian Orthodox, but who in reality continued to confess a non-Christian faith that they or their ancestors belonged to prior to converting to Orthodoxy.” Baptized Jews who wished to return to Judaism not only needed to prove that they or their “ancestors” (predki) were Jewish, they also had to demonstrate that they had in fact continued to observe their ancestral religion prior to the April statute. The law allowed only those Jews who had converted to Russian Orthodoxy for “pragmatic” or insincere reasons to return legally to Judaism (those persons who were considered nominal “Christians”). To put it another way, the law permitted legal transfer to petitioners who had not observed their baptismal

\textsuperscript{702} РГИА. Ф. 796. ОП. 445. Д. 417. Л, 31.

\textsuperscript{703} Avrutin 2006, 102. The Department of Spiritual Affairs and Foreign Confessions reported that 409 Jews who had converted to Orthodoxy returned to Judaism between April 17, 1905 and January 1, 1908. In 1909 and 1910, 67 and 69 Jews respectively were permitted to transfer. Only 684 former Jews returned to Judaism by 1912, which was a relatively small number when compared to other non-Orthodox Christians transfer rates: 2,932 individuals transferred to Catholicism, 1,500 to Lutheranism, and 2,106 to Old Belief.
obligations and who had continued to practice their former religion; it did not permit any new conversions to Judaism.\textsuperscript{704}

Professor Suvorov noted that it should not be the very fact of changing the religion or deviation from Orthodoxy that should be a reason for divorce, but the unwillingness of the lapsed spouse to continue the marriage with the spouse who remained faithful to Orthodoxy. Consequently, the planned reason gained an addition which did not conform to its essence. If the reason for divorce was not the fact of deviation, then it should not be mentioned as a motive; what should be given as the motive was the real reason, i.e., the unwillingness of the lapsed spouse to live with the Orthodox spouse.\textsuperscript{705} When the proposed draft is observed from Suvorov's point of view, it can also be asked whether it concerned both reasons, unwillingness to live together and constraint, or rather one reason should be given. Canonist Suvorov answered this by referring to a court practice of the Ecclesiastical Department regarding leaving the Orthodoxy for another religion and constraining the religious conscience as reasons for divorce. He mentioned that although Russian civil law at the time did not mention them, such cases were met and resolved on the basis of the words of the Apostle Paul. Sometimes, however, divorce was permitted as well for the Orthodox believer who was unwilling to live with the spouse who transferred to another religion.\textsuperscript{706}

From the point of view of Russian civil law, the draft could present some difficulty. The case of a spouse who remained in the former faith during the other spouse’s deviation from it, could occur not only with Orthodox Russian subjects, but with non-Orthodox subjects as well. For example, one Lutheran spouse may convert to Catholicism in the Polish provinces, or one of the Catholic spouses may adopt Lutheranism in the Baltic provinces and constrain the religious freedom of a spouse who remained in the former faith. Professor Suvorov did not deny the importance of the question concerning Orthodox spouses who lived in the Polish provinces, Chelm Land and in the nine West–Russian provinces. However, he thought that civil law should take a look at the

\textsuperscript{704} Avrutin 2006, 101.

\textsuperscript{705} Суворов 1908, 45.

\textsuperscript{706} Суворов 1908, 46.
question from a broader view. He wished that a Special Meeting could formulate the concerned law in such a form which would protect the religious freedom of spouses, no matter which denomination they belonged to.\(^{707}\)

In the conclusion, canonist Suvorov summarized that even if we are only concerned with the Orthodox ecclesiastical court’s jurisdiction over individuals within the realms of its competence, the draft should have a different formulation which will emphasize not the fact of the deviation, but the unwillingness of the fallen spouse to continue cohabitation with an Orthodox spouse and constraining the religious conscience of the latter. Secondly, the proposed draft would also embrace those mixed marriages in which one of the spouses belonged to Orthodoxy.\(^{708}\)

In the meeting of the interdepartmental commission from January 16, 1917, Jatskevitš, due to the considerations of S. G. Runkevitš regarding the abandonment of a spouse, considered it necessary to draw attention to the abandonment of the Orthodox faith in favor of Old Belief or any other sect which did not confess the Lord Jesus Christ as the true Son of God, the Redeemer of the world. This meant a sect that did not accept properly administered and unrepeated water baptism, or rejected marital union. In Jatskevitš’ opinion, seeking divorce in those cases belonged to the spouse remaining in Orthodoxy. This raises a question: Who would determine the respective nature of the dissolution of marriages of sectarians? Archbishop Ioakim answered Jatskevitš that there was nothing dogmatic in this matter and only an indication was given in the teaching of the Church that blessing the continuation of such marriages was an obstacle. V. P. Šein asked if the dogmatic characteristics of the sects could be replaced by an authoritative definition given by the Church authorities.\(^{709}\)

\(^{707}\) Суворов 1908, 47. French legislation at the time subsumed under the rubric *excès, sévices et injures graves*, all sorts of violence and cruelty by one spouse towards the other that was based on religious matters. French legislation decreed even a decision that if one of the Protestant spouses, namely the wife, changed her faith from Lutheranism to Catholicism, a husband could obtain a divorce as soon he was able to prove that he married her because of her Protestant faith, and the wife in this sense caused him a heavy offense.

\(^{708}\) Суворов 1908, 50.

\(^{709}\) РГИА. Ф. 796. Оп. 445. Д. 227. Л. 20, 23, 24. V. G. Ignatev supported Šein’s view and stated that there was no doubt that the question of the nature of sects belonged to the competence of spiritual authority.
I. D. Morduhaj-Bolovskoj made an important remark from the juridical point of view. He stressed that the reason for falling from Orthodoxy into a sect will be established by the Holy Synod and not by the legislative institutions. This was also the case regarding contagious diseases as grounds for divorce. Deciding how contagious disease provides such a reason, will depend on the conscience of the court. In his opinion, the Holy Synod will not publish a list of diseases on this matter, just as it probably will not publish a list of different sects, as Pilkin suggested before, or that defining the nature of the sect would depend on the court. The Holy Synod may in that respect act only as a legislative body and not as a higher administrative authority. It would be necessary either to keep the current wording, or completely abandon this cause for divorce.

From the above discussion, regarding which institution should take care of the cases where a spouse has abandoned the Orthodox faith, we can see that the general opinion was that these cases should be decided by the spiritual authorities. However, it should also be noted that this part dealt with the area where the Holy Synod was the legislative institution de facto, rather than being an administrative institution and thus it was understood to have a legislative rather than an interpretive role. The Commission ended up adopting the following form: “An Orthodox spouse has the right to ask for a divorce in cases where the other lapsed spouse joins the Old Belief sect, or a sect, which distorts, according to the ecclesiastical court, the very essence of the Christian faith and rejects the marital union.”

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710 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 24. А. Р. Pilkin suggested that a list of sects should be compiled. In certain cases, when there would be a claim for divorce due to the “falling” of one of the spouses from Orthodoxy into a sect, the only question in such case would be whether that sect belonged among those listed.

711 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 24. S. Utin supported the view that the definition of the nature of the sects should be a matter of ecclesiastical authority and secular authorities should not be involved in this matter.


713 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 28. Orthodox subjects were also prohibited from entering into marriage with persons whose previous marriage was annulled due to abandonment of Orthodoxy.
4.7 Other Reasons

On October 16, 1907 Archbishop Guri proposed that the planned reasons for divorce should be supplemented with “obscenity as a reason for divorce for the innocent spouse,”714 and with “administrative exile of spouses punished by society for their vicious behavior.”715 On January 20, 1917 the Interdepartmental Commission discussed terms for the restoration of a marriage. It was decided that “by a joint petition, the marriage of divorced spouses could be restored by the definition of the Diocesan Court regarding the second wedding, if neither of the former spouses had remarried. Otherwise, divorced spouses whose new marriage was ended by the death or divorce of their second spouses, were not condemned to perpetual celibacy. They could marry in compliance with the general rules if from the day of the dissolution of their marriage, conditions did not arise that constituted an obstacle to the conclusion of their marriage.”716

Analyzing the foregoing clause, we can notice that the rule of law departed from the path of church-civil relations and entered into the sphere of purely ecclesiastical affairs. The article underlines the fact that a marriage which was to be restored, was legally contracted according to the rules of the Church immediately after the couples entered into marriage. This decision of the Interdepartmental Commission established a new phenomenon in Russian marriage law. There were also other articles in Code of Laws that addressed marriage contracts. To avoid any confusion, Runkevitš suggested eliminating the reason from the bill, or at least, to exclude the words “second wedding,” replacing it with “under existing Church order.” He paid attention to two cases: a)

714 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 12. The Russian Penal Code included obscenity in the category of crimes that particularly insulted morality. If a spouse was convicted of this offense, his or her marriage remained valid in the Russian legal practice. According to Article 994 of the Penal Code, unmarried couples engaged in illegal cohabitation by mutual consent were found to be guilty of obscenity. If they were Christians, they were subjected to ecclesiastical repentance by order of their spiritual leader. See Уложения о наказаниях 1897, 437–439.

715 РГИА. Ф. 796. ОП. 445. Д. 417, Л. 12.

716 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 17.
whether the former spouse did not remarry, and b) if the new marriage was stopped by the death of the second spouse. Here it can be seen that the first case relates to the restoration of the broken marriage, in the second, it relates to the material consequences of divorce and remarriage.

A. P. Pilkin explained, the phrase “to marry only in compliance with the general rules” raised a number of questions in the Interdepartmental Commission. This phrase not only indicated the necessity to marry and obey the ecclesiastical rules, but also to follow the civil law on questions of marital impediments. Professor M. A. Ostroumov shared Pilkin’s idea and noted that the Syntagma of Matthew Blastares provided commentary regarding the time for the restoration of a dissolved marriage, namely, that the husband of an adulterous wife could take her back after two years. By this was meant that for two years she was forced to live in a nunnery. S. Utin clarified that the procedure for the restoration of a dissolved marriage “without a wedding” was not a well-established phenomenon. It was a liturgical question which was not convenient to include in the draft law as such due to the introduction of the State’s legislative enactments. Runkevitš’s believed that the foremost reason regarding this issue was that granting the right to re-marry “without a wedding” belonged only to ecclesiastical authority. If it was established with the law enacted by the State’s Duma and the State’s Council, then it would not, in his opinion, be established by competence. Logically, such a situation would mean that to change the aforementioned order required re-applying it to the State’s Department of Justice.

On May 11, 1917 the Interdepartmental Commission noted a subcommittee’s standpoint that an article should be introduced into the new law about habitual alcoholism as a reason for divorce in the following form: “A spouse has the right to ask for divorce if the habitual intemperance of the other spouse creates deep disorder for the marital life.” The article was adopted unanimously with the addition of including experts to evaluate habitual intemperance. Expert opinion would eventually clarify each case and help the decision of the court.

717 РГИА. Ф. 796. ОП. 445. Д. 227. Л, 18.
719 РГИА. Ф. 796. ОП. 445. Д. 422. Л, 9.

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Cruel treatment of a spouse as a basis for divorce was considered to be a loose concept by all the metropolitans of the Holy Synod. It might lead to despotism by judges who dealt with such divorce cases in future.\textsuperscript{720} Metropolitan did not wish to see it in the future law, since it could lead to severe weakening of the moral foundations of family life and to considerable arbitrariness in divorce cases. This was also the case in the mutual adultery of spouses and in cases of pathological and mental incapacity for conjugal relationships. \textsuperscript{721} Byzantine laws, however, considered an attempt on the other spouse’s life to be grounds for divorce, because by this act, marital fidelity was violated more than in the case of adultery. In cases where the spouse used physical actions to hurt, damage, or kill, marital life became impossible. \textsuperscript{722} In the law of Theodosius II and Valentinian III, as noted in the Preparatory Commission, among the reasons for divorce was mentioned beatings inflicted by the husband, as well as “audacious hands” lifted by the wife against her husband. However, in the later Justinian Novella 118, chapter 14, the emperor removed removed family violence as a grounds for divorce, treating it as a personal insult to be penalized with a fine.\textsuperscript{723} The latter law was as well closely related to the canon 9 of Basil the Great as can be seen.

The question of cruel treatment as a reason for divorce, which was brought up in the sessions of the Holy Synod, was interestingly added to the project of the Civil Code of that time. As can be seen in the project of the Civil Code from 1910, Article 284, paragraph 3, divorce was allowed in the case of “encroachment by one of the spouses on the life of the other or cruel treatment which is dangerous to the life and health of the other spouse.”\textsuperscript{724} The draft referred to the Synodal definition from 1723 and to the instruction of the Commission of the Civil Code from 1766. In the commentary to the project of the Civil Code, an attempt on the spouse’s life and cruel treatment was defined as “Such action of one spouse in relation to another, not only eliminates the possibility of their life together, but also makes a serious, deep and lasting shock to matrimonial

\textsuperscript{720} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 2.
\textsuperscript{721} РГИА. Ф. 796. ОП. 445. Д. 417, Л. 3.
\textsuperscript{722} Рάλλη 1854, Т. IV, 112–120.
\textsuperscript{723} РГИА. Ф. 796. ОП. 445. Д. 417, Л, 20.
\textsuperscript{724} Гражданское уложение 1910, 264.
union, and that is why the victim should be given the right to demand a termination of the marriage itself.”

Professor Berdnikov noted in his study that cruel treatment of one of the spouses was not recognized as a reason for divorce by the canons of the Orthodox Church. If, however, the beatings were frequent and systematic and had the character of torture, threatening the health and life of the tortured, then they started to resemble in their criminal nature an attempt on another’s life, and therefore in his opinion should be recognized as a reason for divorce. In such cases canonist Berdnikov saw it as appropriate to establish first a legal separation as a measure, which would partly replace divorce.

For Professor Suvorov, cruel treatment as a motive for divorce gave a reason to explore this question more closely. In his belief, it was impossible to justify divorce law by applying canonical rules. He pointed to the commentary of Zonaras on Canon 87 of Trullo, where the Byzantine canonist reasoned that if a wife without any reason walked away from her husband, who might have been bad–tempered with her, or treated her poorly, or if the wife had any other reasons against her husband, then she will be innocent in marrying a second time. Suvorov saw that Zonaras’ previously mentioned idea argued against the canons of Basil the Great and the very meaning of the council of Trullo, and his commentary therefore could not consequently be used in modern times. What then can be said about the judicial divorce practice in tenth–century Byzantium and its possible interpretation in twentieth-century Russia? Byzantine canonist Balsamon went even further in his commentary regarding the foregoing canon. He imagined divorce not as a private act between spouses, as it was until the tenth century, but as a result of a judicial decision. Without a legitimate reason, a wife cannot leave her husband without the court’s permission.

However, it can be expected that Zonaras exemplified the judicial practice of his time; this fact was also recognized by canonist Suvorov. To verify this supposition, an answer should be sought from Epanagoge, a Byzantine law book from the tenth century. In Epanagoge, in addition to

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725 Гражданское уложение 1910, 265.
726 Compare this to Canon 9 of Basil the Great.
727 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 28.
728 Палах 1852, Т. II, 507–510.
those reasons which are mentioned in Justinian’s Novella 117, it is decreed that if a wife was able to prove that her cohabitant was guilty of murder, produced harmful drugs, was a vagrant and practiced sinful burial rites (τάφους),279 counterfeited coins, robbed graves, blasphemed, robbed or that he was one of those who were called “ἀπέλατων,”280 or that he was selling free people into slavery, or subjected a wife to whippings. In that case the law gave her the right to divorce and remove her dowry.281

The reasons that were granted to a husband for divorce were primarily the same as those granted to a wife, with the exception of specific actions, such as the wife raising audacious hands against her husband (ἐὰν τὰς τολμηρὰς αὐτῆς χεῖρας τῷ ἀνδρὶ ἐπιβάλοι), or she kills her fetus, and thus saddens her husband and takes from him the hope of children (μηχανήσαι τὸ ἐξεπίτηδες ἀμβλώναι καὶ τὸν ἄνδρα λυπήσαι καὶ ἀφελέσθαι τῆς ἐπὶ τοῖς παισίν ἐλπίδος), or before entering into marriage with her husband, promises herself to someone else (ἔως συνέστηκε τὸ πρός αὐτὸν συνοικέσιον πρός ἐτέρους περὶ γάμων ἑαυτῆς διαλέγειτο).282 The content of these additional regulations were not original or newly penned by the author of Epanagoge. They were taken from the legislation that preceded Novella 117 of the Theodosian law of 449 that was repeated in the Justinian Novella 22. Suvorov explained that this was the reason why in the Nomokanon only those reasons for divorce are applied that are mentioned in Novella 117. Suvorov asked hypothetically whether the same Patriarch Photios could officially publish the Nomokanon with the divorce law that was in accordance with the earlier Justinian Novella 117 and participate later in the drafting of Epanagoge, which deviates significantly from the Nomokanon on this subject?

279 This can also be translated “martyr cults.” Be that as it may, it was an act that was considered to be sinful.

280 Men who were cattle thieves, who exercised the art of driving off cattle. Those who stole cattle were more severely punished than those who stole smaller things. The punishment was condemnation to the mines, relegation to doing public work or death if done when armed. Mac Chomaich De Colquhon 1854, 671.

281 Epanagoge XXI, 6. Zachariae 1852, 142.

282 Epanagoge XXI, 6. Zachariae 1852, 141.
Suvorov concluded his opinion stating that in spite of the additional reasons for dissolution of marriages permitted by Justinian, these additional reasons were not approved by the common legal consciousness of the Orthodox east. The latter view can be accepted from the standpoint that in the later editions of Epanagoge, the aforementioned paragraphs were not adopted either in other private collections, or even in the Epanagoge aucta, a compilation that greatly expanded and supplemented the original Epanagoge.

Canonists Berdnikov and Suvorov added some new reasons to the above-mentioned discussion. These reasons were: monastic vows, killing of the fetus and intentional interference with fertility, entering into marriage with godchildren, conviction of one of the spouses to a sentence that was connected to disfranchisement, and bigamy and unnatural vices.

Professor Berdnikov thought that the proposed reason by the Special Meeting formulation regarding the conviction of one of the spouses to a sentence that was connected to disfranchisement as a reason for divorce was less convincing than the idea already expressed in Article 50 of the

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733 Суворов 1908, 27.

734 A law book that consists of 54 titles and an appendix; it is based on the Epanagoge and, from Title 17 onward, the Procheiron. The Oxford Dictionary of Byzantium 1991, 704.

735 РГИА. Ф. 796. ОП. 445. Д. 417. Л, 19. According to Roman law, deprivation of citizenship rights (servitut poenae et deportatio) was connected to criminal penalties like condemnation to forced labor and imprisonment. These criminal penalties necessarily entailed the destruction of a marriage. Emperor Justinian, however, abolished such heavy punishment. After this, only the committing of serious criminal offenses could serve as a reason for divorce. Other reasons, besides adultery, were murder, making poisonous drugs, treason or evil willfulness against the emperor, counterfeiting coins, grave robbery and sacrilege. The obligation to prove guilt belonged to the side who sought a divorce. By unnatural vices Berdnikov meant sodomy and bestiality. Canons do not contain specific guidelines about divorce on account of these these vices, because they were heavily punished by the ancient Criminal Law. РГИА. Ф. 796. ОП. 445. Д. 417. Л, 28.

736 “In the case of a conviction by the Criminal Court of one of the spouses to a sentence that is connected to disfranchisement, if an innocent spouse cannot follow the convicted to the place of exile, the spouse will have the right to ask for a divorce.” Суворов 1908, 18–19.
Code of Laws. Suvorov criticized the drafters by saying that their formulation did not express to whom the legal action belonged when the other spouse was punished by disfranchisement. In his opinion, this was so obvious to the drafters that they did not see any reason to specify it, even though the draft plan was titled To whom belongs the right for legal action? This was, however, in contrast with the law from 1892, which allowed legal action in the mentioned cases for both guilty and innocent parties.

When considering the monastic vows, if one of the spouses felt a calling to monastic life, then Byzantine law did not prevent him or her from carrying out that wish according to the respect given to monastic life as a superior way of living. Entering into monastic life by one of the spouses was seen as separation from the world and was recognized as a fact that breaks a marriage, as a natural death would. Since the Byzantine civil laws did not impede the spouse from remaining in the world to enter into a new marriage, therefore the policy of the Church followed the same practice. The practice of joint entry into monasticism was known and allowed as well. Summa summarum, Byzantine laws granted the right for one of the spouses to enter into monasticism, as seen above. By one of the spouses taking monastic vows this freed the other spouse from the marital relationship, as in the case of the death of a spouse. In Russia since Peter I, entering into monastic life was allowed for both spouses at the same time only if they did not have children who required parental care. Berdnikov considered that it was possible to abandon such a practice; thus, monasticism that was accepted by one of the spouses should be included in the number of reasons for divorce bona gratia.

Professor Berdnikov thought that the intentional killing of a fetus should be recognized as a reason for divorce in the future, especially since it was a fashionable tendency at the time for couples to enter into marriage and not have children. It was not in accordance with the divine purpose of marriage, and therefore violated the marital union. It also directly affects a spouse who wanted to have offspring. Killing the fetus

737 Свод законов Российской Империи 1912, Т. 10, Ч. 1, 5.
738 Суворов 1908, 20.
739 Рάλλη 1852, Т. II, 422.
740 Epanagoge XXI.I. Zachariae 1852, 135.
was recognized as a reason for divorce in the 22nd Justinian Novella. Emperor Leo the Philosopher in his Novella 31 confirmed the former Justinian ruling. This law was also introduced in the Nomokanon.\textsuperscript{742}

\textsuperscript{742} XIII. 10. Ράλλη 1852, Τ. Ι, 312.
5. DEFINITIONS OF THE ALL-RUSSIAN CHURCH COUNCIL CONCERNING MATRIMONIAL MATTERS

5.1 Regarding Kinship

Regarding the question of kinship and affinity in the Russian Orthodox Church during the Synodal period, the official journal of the Holy Synod, *Church Bulletin* in number 44 in 1896 instructed that if cases of kinship or affinity occurred, a priest should not wed the parties before seeking instructions from the Diocesan bishop.\(^743\)

The Special Commission of the All-Russian Church Council, under the chairmanship of His Eminence Serafim, Bishop of Serdobol assembled on September 6, 1917. Bishop Iosaf of Dmitrovsky District, Moscow Oblast mentioned to the Commission the practice of the Russian Church at that time, which allowed marriages in the fifth degree of kinship and in the fourth degree of bi–lineage affinity. He then posed a question regarding authorization of marriages in the fourth degree of kinship. This, according to the bishop, brought many difficulties and troubles to each parish priest who served in the Western territories of Russia where Orthodox faithful lived alongside of Catholics and Protestants, whose marriages in the fourth degree were freely contracted. Hence, the requirement to marry in the fourth degree was often asked; not permitting them caused dissatisfaction, irritation, and sometimes even falling into heterodoxy. These exigencies were also encountered in the diocese of Moscow, where the bishop served at that time.\(^744\) In Russia, by the Synodal decree of the Holy Synod from January 19, 1810, marriages were allowed in the fifth decree of kinship, that is, to marry a cousin was forbidden, to marry a cousin's daughter was, however, allowed with the recognition of the local bishop.\(^745\) What was then the practice at the time and suggestions to resolve such cases?

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\(^743\) Калашников 1902, 391.

\(^744\) ГАРФ. Ф. 3431. ОП. 1. Д. 316, Л. 19.

\(^745\) Калашников 1899, 37; Григоровский 1908, 15.
In Bishop Iosaf’s view, such cases should not be treated differently. Due to repeated petitions that were submitted by the bishops of the western dioceses, the Holy Synod decided to allow private resolution of marriages in the fourth degree. These permissions were given confidentially for specific areas of the Empire; Iosaf pointed out that in 1904 bishops were granted the right to allow marriages in the fourth degree of bi–lineage affinity, except for marriage with the sister of a fiancée (brother’s wife) and with the sister of a son–in–law (sister’s husband). In the diocese of Riga, even these marriages were allowed.\textsuperscript{746}

Due to the fact that the Russian Orthodox Church was largely involved with the State, Church laws relating to important questions of the internal church order were often issued with the seal of His Majesty and approved by the State Council, or the Committee of Ministers. Such a case was, for example, the explanatory register (объяснительный реестр) of the ancient names of kinship, which can be found in the Kormtšaja’s edition from 1786.\textsuperscript{747} But if the letter of the old church law still remained intact, then its force in the practice of the Holy Synod increasingly weakened. The Synod did not terminate marriages anymore in those degrees of kinship which were previously forbidden, like the fifth degree of kinship and the fourth degree of bi–lineage affinity. Marriages in further degrees were not dissolved by the Synod even in cases when spouses themselves cited the illegal degree of kinship between them.\textsuperscript{748}

In this respect, and generally in the history of the issue regarding the limits of kinship prohibiting marriage, a noteworthy case was the marriage between Count Musin–Pushkin to a Brjus, who were related in the sixth degree of kinship. The divorce case was started in 1804 at the request filed by the wife in Saint Petersburg’s Diocesan Consistory. The case was settled so that the marriage should be dissolved. However the Synod, which had the final decision, took the opposite view. The Synod justified its decision by stating that as in Kormtšaja kniga such marriages were considered forbidden, this was the reason why Brjus and Musin–Pushkin should not have been married in the first place. But as their marriage was contracted in 1793 with the consent of the Countess Brjus, who asked for a divorce eleven years later referring to her painful

\textsuperscript{746} ГАРФ. Ф. 3431. ОП. 1. Д. 316, Л. 23.

\textsuperscript{747} Горчаков 1880, 105.

\textsuperscript{748} Павлов 1887, 152–153.
condition because of her sense of guilt, the Synod underlined that the canons of the ecumenical and local councils did not provide for divorces of such marriages, and ordered the Diocesan authorities not to dissolve such marriages, but rather to subject the married couple to penance.749

The Synod based its decision on the writings of Ioannos Chartophylax of Ioanopoulos. The document of the patriarch was published in the Syntagma of Canons of G. Ralles and M. Pottles, and also in the 51st title of Kormtšaja, to which the Synod referred in its decision.750 In the writings, the patriarch instructs an unnamed metropolitan with the following decision (ψήφισμα): leave the marriage in force, but subject the spouses to a two-year penance. As mentioned before, this patriarchal decree was not addressed to those who were in the sixth degree of kinship, but to those who were in the seventh degree.751 On this basis, it can be concluded that the Synod enacted the decision against the ancient rules of Kormtšaja, confusing the degrees of kinship. However, the Holy Synod at the time gave lenience to some couples to stay in the marriage who were in the fifth or sixth degree of kinship with each other. This lenience was given only at the will of the spouses – there was no cases where the marriage was ordered to continue against the will of the spouses, as was the case in the Brjus and Musin-Pushkin marriage.752

Marriages in the fourth degree of bi-lineage affinity were forbidden in nineteenth-century Russia according to the draft of the civil code (1810), Article 124.753 However, with numerous applications coming to the Holy Synod in 1864 concerning permission to marry in the fourth degree of bi-lineage affinity, the Holy Synod of the Russian Orthodox Church took the case under consideration. With the edict from January 13, 1864, the Holy Synod asked the opinion of Metropolitan Filaret of Moscow, who voted against the renewal of the ancient canonical practice in Russia, citing the strict canonical-dogmatic teaching of Orthodox canon law, where husband and wife are considered one. Until the death of the respected metropolitan (November 19, 1867), his opinion had a decisive

749 See the appendix X in Горчаков 1880, 38–46.
750 Павлов 1887, 153.
751 Regarding the discussion to which period this decree should relate, see Ράλλη 1855, Т. V, 92; Zhisman 1864, 38; Павлов 1887, 114–116.
752 Павлов 1887, 154.
753 Проект 1810, 50.
role in the practice of the Holy Synod. This was soon changed; in 1870 the Synodal practice of the Russian Orthodox Church started to accept marriages in the fourth degree of bi–lineage affinity, as respected Canonist Pavlov noted.\(^{754}\) However, the practice during the history of the Synod knew cases where marriages in the fourth degree of bi–lineage affinity were still prohibited. For example, on October 11, 1885, the Holy Synod ruled with decree No. 3553 that a non-commissioned officer, Avraam Rezuntsov, could not marry his deceased wife’s cousin. On the same date, according to decree No. 3557, it was ruled that a peasant, Gavril Korotan, could not marry his cousin’s widow. On October 15, 1885, the Holy Synod ruled in decree No. 3580 that a peasant, Iakov Ignatiev, could not enter into marriage with his stepmother’s niece.\(^{755}\) On October 21, 1885, with decree No. 3665 the Holy Synod ruled that a retired soldier, Ivan Kostenka, could not enter into marriage with his stepfather’s niece. A theological journal of that time, \textit{Pastoral Interlocutor}, noted that these decisions merited special attention, since the fourth degree of bi-lineage affinity was not always seen as practical or useful.\(^{756}\)

Here one should also bear in mind that the right to allow marriages in the fourth degree to which bishop Iosaf referred, was actually granted for the first time on May 13, 1903, with circular edict No. 5. On June 20, 1904, with circular edict No. 13, it became generally recognized in the Russian Orthodox Church, replacing the old rule of the Holy Synod of January 19, 1810 regarding the prohibition of marriages in the fourth degree of bi–lineage affinity.\(^{757}\) The relationship chart of the old rule from 1810, which existed until 1903, can be seen in \textit{Scheme 11} below.

\(^{754}\) Павлов 1887, 202.

\(^{755}\) However, on December 13, 1876, a decree was issued by the Bishop of Jaroslavl, whereby such marriages were permitted. Калашников 1902, 392.

\(^{756}\) Свод указаний 1899, 213–214.

\(^{757}\) Григоровский 1908, 32.
SCHEME 11

MY BROTHER

MY WIFE

ME

MY WIFE'S BROTHER

MY WIFE'S NIECE

MY WIFE'S NIECE

MY NEPHEW

MY NEPHEW
Consequently, the old rule ruled that the marriage of my brother to my wife’s niece was legal because it was in the fifth degree of bi–lineage affinity, since in the husband’s subfamily, two degrees existed and in the wife’s subfamily three. In the same way the marriage of my nephew with my wife’s niece was legal, because in both subfamilies three degrees existed, making the relationship legal in the sixth degree. Marriages in the trilineage affinity were prohibited in the first decree, according to the rules of the Holy Synod from April 25, 1841, and March 28, 1859. The Synod obviously based its views on the rule in the Fifty Titles of Kormtšaja, which says that “еже от трехродных, сие в первом доходности запрещается по закону: обычай убо запрещает и прочее.”

Regarding marriages in the second and in the third degree of trilineage affinity, the Synod ruled that the Diocesan bishops could permit such marriages for legitimate reasons (decree of 1841), or according to necessity (decree of 1859).

It is impossible not to notice a significant difference between the old decree of January 19, 1810, and the two later decrees. The decree of 1810 gave the right to the Diocesan bishops to give permission to marry in the fifth, sixth and in the seventh degree of kinship and affinity, stating that, “the Eminences have to give permission for that.” The wording in the decree of 1841 was changed from “have to” to “by legitimate reasons; according to necessity” in the later decree of 1859. According to the precise meaning of the 1810 law, there was no other choice for bishops than to allow marriages in other degrees of kinship and affinity beyond the fourth degree. Thus, episcopal permission itself as stated in the decree of 1810, which permits marriage according to specified degrees of kinship and affinity, was not in the proper sense a dispensation. The rule of April 25, 1841, determined that the Diocesan bishops should not prohibit marriages beyond the third degree of trilineage affinity, but the decree of 1859 allowed for such a dispensation by the bishops: they had a right not to allow marriages in the second and in the third degrees of trilineage affinity, as can be understood from the wording of the decree:

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758 Калашников 1902, 391.
759 Калашников 1899, 40.
760 Руководственные 1879, 443–444.
761 Павлов 1887, 161.
“to not prohibit in any case marriages between the persons in fourth
degree of trilineage affinity.”762

Since the fourth degree of trilineage affinity was never prohibited by
the canons or by the later decrees of the Greek Church, one of the
possible reasons why the Synod spoke about the fourth degree of
trilineage affinity could be the mistranslation of the original rule in the
Kormtšaja. The original rule in Greek states, “Τούς δὲ ἐκ τριγενείας εἰς
gάμον συνάπτειν ἀνάγκη τοὺς ἀπὸ τοῦ τετάρτου βαθμοῦ καὶ ἐπέκεινα,”763
meaning that it is necessary that those who are in trilineage affinity will
enter into marriage from the fourth degree and further. Kormtšaja
translates this as “αςε от трехродных превышает четвертый степень,
прощено бывает,” expressing the notion that marriage in the fourth
degree of trilineage affinity is not yet prohibited.764 This contradicts the
fact that such a prohibition never existed in the Greek Church. This is
clearly expressed in the Synodal “τόμος” of Patriarch Gregorios VI of
Constantinople of February 10, 1839: “καὶ εἰς τὴν ἐκ τριγενείας μέχρι τοῦ
tetartou, ἐπὶ δὲ τοῦ ἁγίου βαπτίσματος.”765 The expression “μέχρι το
tetartou βαθμοῦ” should be understood in the same sense as “[εἰς μὲν
τὴν ἐξ ἀμαρτος συγγένειαν] μέχρι τοῦ ὁγδοῦν βαθμοῦ” that was expressed
in the same tome earlier.766 Hence, from this naturally follows that there
is no canonical basis to put marriage in the fourth degree on the same
level with marriages in the second and third degrees, i.e., prohibiting the
parish clergy from performing such marriages without the bishop’s
permission.

Bishop Ioasaf continued by stating that the demands of life go on and
that it is impossible to ignore them; he provided a historical background
to the question in which he identified a variety of practices in the history
of the Orthodox Church. Until the fifth century, marriages in the fourth
degree of kinship were permitted, but after that they were banned. Under
the Emperor Justinian the Great they were again allowed. The Council of
Trullo in Canon 54 prohibited such relations, later the Church rules

762 Павлов 1887, 161.
763 Павлов 1887, 39.
764 Павлов 1887, 39.
765 Ράλλη 1855, Т. V, 175.
766 Ράλλη 1855, Т. V, 175.
extended the prohibition to the seventh degree. He then asked if the All-Russian Church Council would consider, because of the extreme anxiety of modern people, to allow a general authorization of marriages in the fourth degree of kinship in order to avoid unnecessary difficulties of no benefit to the Church and that could even result in the abandonment of the Orthodox faith. Bishop Ioasaf concluded his views by stating that the religious grounds for prohibiting such marriages were not strong. The Western Christian nations do not speak against the admissibility of such marriages. 767 The All-Russian Church Council left Bishop Ioasaf's proposal regarding the allowance of marriages in the fourth degree of kinship without taking any action, but during the Council the Holy Synod adopted a practice, as seen from subsequent cases, that permitted marriages in the fourth degree of affinity.

When studying Canon 54 of Trullo in the Russian Orthodox context, it is important to be attentive as to how the fourth degree of kinship that Bishop Ioasaf mentioned, was understood at the time in Russia. The canon reads: “[...] he who shall marry his father's daughter [τῇ οίκειᾳ ἔξαδέλφῃ] [...] falls under the canon of seven years, provided they openly separate from this unlawful union.” 768 The canon's most important word, “ἐξαδέλφη,” is debatable. One could think that it means the daughter of a brother or a sister, a niece, and forbid the marriage as with the third degree of kinship. Others might think that it refers to the daughter of an uncle or aunt, a cousin, i.e. a marriage forbidden within the fourth degree of consanguinity.769

The term “cousin,” ἕξαδέλφη,-[ος].” according to the definition of the Greek lexicon Λεξικόν τῆς ελληνικῆς γλώσσης, a work of a famous Greek scholar, Byzantios Skarlatos, in 1852, can mean either born from a brother or sister to me, i.e., a nephew or niece, as well as born from brothers and sisters who are related to each other, i.e. cousins (ὁ υἱός τοῦ ἢ τῆς ἀδελφ., ὁ υἱός τοῦ θείου ἢ τῆς θείας). When speaking about a nephew or niece, “ἀδελφιδοῦς,-[η]” was also used, for cousins – ἀνεψιός,-[α].”770 The term “ἐξαδέλφη, ἕξαδελφός” appeared in a period

767 ΓΑΠΦ. Φ. 3431. ΟΠ. 1. Δ. 316, Λ. 24.
768 Schaff 2007, 390–391; Ράλλη 1852, Τ. Π, 432.
770 Σκαρλάτος 1852, 445.
when it became customary to invent completely new words in the written language that were up till then used in common everyday parlance, as the Russian canonist Laškarev in the nineteenth century saw it.\textsuperscript{771}

When it was published in Russia for the first time as a complete text of canons, the first editions of the \textit{Book of Rule} (Книга правил) used the word “ἐξαδέλφη” in Canon 54 of Trullo to mean the furthest distance of kinship that was prohibited for marriage. It was translated as “дщерь брата,” – nephew, niece. This is how the well-known Russian canonist Archimandrite Ioann translates the word and says in his commentary that a marriage not only in the fourth degree (запрещено вступать в брак не только двоюродным), but in the fifth degree (но и детям их) as well was only forbidden between the eighth and ninth centuries.\textsuperscript{772} Canon 54 stresses the special closeness of the relationship between the parties in the given case, forbidding a marriage not only with “ἐξαδέλφη” but with “τῇ οἰκείᾳ ἕξαδελφῇ” – not simply with “a” niece but with “one’s own” niece. This qualification has a significantly important meaning, as can be seen from the following interpretation of Canonist Troitski:

One can call a cousin (двоюродная сестра) a niece since I share a common uncle with her and she is in effect, a “co-cousin” with me but in no way can she be called my own niece, since she is not my, but my uncle’s own niece. Thus, the history of the term “ἐξαδέλφη” leads us to the same conclusion to which we arrived in analyzing the lexical structure of this word, that Canon 54 forbids

\textsuperscript{771} Canonist Laškarev points to Phrinichi, a writer from the Roman period, who gives to the word “εξαδελφος” another meaning in his work \textit{Epitome diction atticarum sive ecloga}. Phrinichi mentions that he who wants to speak in an archaic way, should avoid the words and phrases that he mentions. In the end he also mentions that the word “εξαδελφος” should not be used and instead “ανεψιος” is preferable (εξαδελφος ἀποδιοικομπητων, ἀνεψιος δη ρητεον). In a written form the term “εξαδελφη, εξαδελφος” can also be found in the Septuagint, in the Book of Tobit. In the Greek text of Tobit, 1:21, the phrase “my brother Anael’s son” is expressed periphrastically as “τὸν Ἀναήλ υἱὸν τοῦ ἄδελφον μου,” but in the next paragraph, 1:22, “[and he was] my brother’s son” was changed to [ἡν δὲ] “εξαδελφος μου.” In the aforementioned sentence, the word “εξαδελφος” logically means a nephew. Laškarev 1869, 97.

\textsuperscript{772} Иоанн 1851, 435, 437–439. Between the tenth and eleventh centuries marriages started to be prohibited in the sixth degree, seventh degree was prohibited from the twelth century in ecclesiastical and civil law of Byzantium. Иоанн 1851, 440.
a marriage only in the third degree of consanguinity. The context
in which we find this word in Canon 54 leads us to the same
conclusion, as well as the history of consanguine relationship as
impediments to marriage.\textsuperscript{773}

In the sources of canon law, the word “ἐξάδελφος, ἀδελφη” does not
appear before the Trullan Council; the Trullan Council used it for the first
time in Canon 54. In the terminology of Byzantine law it appeared for the
first time in \textit{Ekloga}. But after the Council in Trullo, and the publication
of \textit{Ekloga}, the word “ἐξάδελφος, ἀδελφη” was very often used in the
ingratulations of civil laws of the Byzantine, and always meant cousins.\textsuperscript{774}

In the editions of canon law, the word “ἐξάδελφος, ἀδελφη” is used
for the first time in the conciliar “τόμος” of Patriarch Sisinnius II of
Constantinople, prohibiting marriages between relatives on one side, and
with the cousins from the other, as already seen in the second chapter of
this study.\textsuperscript{775} From the translations of Canon 54, not only in the Russian
\textit{Book of Rule}, but also in some Latin editions, such as in \textit{Συνοδικόν [Sive
pandectae canonum ss. Apostolorum, et conciliorum ab Ecclesia Græca
receptorum]} by the known English canonist Beveridge, and in some
editions of interpretations of Zonaras of 1618, the word “ἐξάδελφος,
ἀδελφη” is translated as nephew, niece – “fratris sui filia [matrimonii
focietatem coierit]”.\textsuperscript{776} Canonist Laškarev believed that such a variation in
translation was motivated by the Book of Tobit.\textsuperscript{777}

Russian canonist Pavlov agreed with Laškarev, but added valuable
information about the use of this canon in the practice of the Holy Synod
in the Russian Church. The Synodal mandate from the eighteenth
century defined that: “Children not born from the lawful wife, when
married, are considered to be equal to legitimate children regarding the
degree of kinship.” Later this edition was accepted for the draft of the
Civil Code from 1814 as well. The Commission entrusted with this draft
understood the paragraph to mean that, “Marriage is prohibited in the
vertical line between all the ascending and descending relatives, in the

\textsuperscript{773} Тройцкий 1929, 295.

\textsuperscript{774} Лашкарев 1869, 98–99; Павлов 1897, 162.

\textsuperscript{775} Лашкарев 1869, 100.

\textsuperscript{776} Тройцкий 1929, 291.

\textsuperscript{777} Лашкарев 1869, 101.
lateral line only to the second degree.” As Pavlov noted, the poor understanding of Canon 54, which prohibits marriage in the fourth degree of kinship in the lateral line, was the reason why the Holy Synod did not dissolve the marriage of a widower and his illegitimate cousin on October 30, 1775.778

Pavlov also noted that to distinguish generations, numerical order was added in the Byzantine laws regarding cousins. So “ἐξαδέλφη πρώτη” is a first cousin, “ἐξαδέλφη δευτέρα,” a second cousin. In the Russian Nomokanon these names were translated unintelligibly as “сестрина первая сестра,” sister's first sister and “второсестрина,” the second sister.779 Nevertheless, canonist S. V. Troitski did not agree with Laškarev and Pavlov. He referred to philological, historical, and contextual factors in his analysis of Canon 54. Even before the age of computers, Canonist Troitski was able to create a complicated mathematical method of determining “yes” or “no” or “maybe,” when calculating the prohibited degrees for marriage.780

It would seem that the clear position of Byzantine law’s understanding of the term “ἐξάδελφος, ἕξαδέλφη,” and likewise, the position of Canonist Laškarev and Pavlov, is communis opinio doctorum. The word “ἐξαδελφός, ἕξαδελφη” should be understood in Russian to mean “cousin,” not “nephew” or “niece.” This would also be the possible answer as to why the All-Russian Church Council took no action concerning Bishop Iosaf’s proposal regarding the allowance of marriages in the fourth degree of kinship: Bishop Iosaf did not understand that Canon 54 prohibits marriages not just in the third, but also the fourth degree of kinship, i.e., with the first cousin.

On December 13, 1917, Serafim, Bishop of Serdobolsk, who temporary administered the diocese of Finland, wrote a petition (No. 5737) to the Holy Synod. In the petition, he introduced a case in which a peasant, Iosif Harjumen, from the village of Varpakylä, approached the Diocesan Consistory of Finland with a petition on October 9, 1917, to allow him to enter into a legal marriage with the sister of his brother’s wife, Evdokia Makkonen, a peasant from the village of Moisenvaara. Bishop Serafim noted that with decree No. 7662 of the Holy Synod of July 18, 1906, the

778 Павлов 1887, 182–185.
779 Павлов 1897, 162.
780 Тройцкий 1929, 301–303.
discretion of allowing spouses to enter into marriage with the sister of a brother’s wife and with the sister of a husband’s sister was granted to the head of the Finnish diocese. Before granting permission, these resolutions were to be submitted to the discernment and approval of the Holy Synod. Upon consideration of this request, the Diocesan Consistory of Finland reported that it would submit the request of Iosif Harjunen, who was in the fourth degree of affinity, for the consideration and approval of the Holy Synod.

With decree No. 32 of January 1918, the office of the Holy Synod in Petrograd decided to allow Iosif Harjunen to marry Evdokia Makkonen, the his brother’s wife’s sister, if no other legal obstacles existed.781 On January 8, 1918, there was a similar case, a petition to Metropolitan Benjamin of Petrograd and Gdov from the peasant, Grigori Zubov, from Jasher village, Petrograd province. Grigori was initially denied the right to enter into a lawful marriage with his brother’s wife’s sister, Olimpiada Guseva, by the local bishop.782 The relationship chart named Scheme 12 in this study helps to understand the issue better.

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781 РГИА. Ф. 831. ОП. 1. Д. 117. Л, 1–2.
782 РГИА. Ф. 831. ОП. 1. Д. 117. Л, 3.
SCHEME 12

FATHER OF THE GROOM
GRIGORI TIMOFEJEV ZUBOV

FATHER OF THE BRIDE
LEONTI AREFEVITŠ GUSEV

GROOM GRIGORI
GRIGOROVITŠ

DIMITRI
ZUBOV

JEKATERINA
LEONTEVNA

BRIDE OLIMPIADA
GUSEVA
As result, the Petrograd office of the Holy Synod from an unknown date in January 1918, determined to inform the Diocesan authorities of Petrograd to give the peasant, Grigor Zubov, the right to enter into a lawful marriage with Olimpiada Guseva. Altogether, in 1918 there were eight petitions in which the Holy Synod allowed marriages with the sister of the bride. In the fourth degree of affinity are also included the cases of marriages with a brother–in–law’s sister (husband’s sister), of which Holy Synod received twelve in 1918. On January 15, 1918, Feodosy, Bishop of Smolensk presented the case of Gavril Druzhin to the Holy Synod. The future bride of Gavril was related in the fourth degree of affinity to him, i.e., a brother–in–law’s sister. The diocesan authorities of Smolensk considered it desirable to permit the marriage of Druzhin with his chosen bride, since marriages in the fourth degree of affinity were repeatedly permitted by the Holy Synod. With decree No. 241 some time in April 1918, the office of the Holy Synod in Petrograd decided to allow the marriage.

On January 14, 1918, the Holy Synod received a petition (No. 280) from Ivan Shamshurin, a peasant from the village of Kiasova, since the local priest did not want to allow him a new marriage. Shamshurin was a widower after a second marriage and intended to enter into a third legal religious marriage with a chosen bride who happened to be his niece, the wife of the deceased nephew of his previous deceased wife. The relationship is represented in Scheme 13:

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783 РГИА. Ф. 831. ОП. 1. Д. 117. Л, 6.

784 РГИА. Ф. 831. ОП. 1. Д. 118. Л, 7, 10.
The Holy Synod with decree No. 262 of April 28, 1918, as seen in the petition of Shamshurin, defined an explanation of kinship between him and his chosen bride as follows: the petitioner makes one kin, the brother of his deceased wife to his deceased son, makes second kin, and the widowed wife of the latter, the third kin. Therefore, Ivan Shamshurin with his chosen bride are in the third degree of trilineage affinity. As mentioned before, with the circular decrees of the Holy Synod from April 25, 1841, and March 28, 1859, the Diocesan bishops were permitted to allow marriages in the second and in the third degree of trilineage affinity. Hence, the Petrograd office of the Holy Synod informed the Diocesan administration of Vyatsk to allow the third marriage of Ivan Shamshurin with his chosen bride.⁷⁸⁵

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⁷⁸⁵ РГИА. Ф. 831. ОП. 1. Д. 122. Л, 2–3.
5.2 Divorce, and Civil and Unlawful Marriages

Unlawful marriages

From the unknown date of April 1918, the Consistory of Petrograd received a petition of peasant Tihon Moskalev, whose first three wives had passed away, to permit him to enter into a fourth marriage. The Consistory noted that according to Article 21 of the Code of Laws and Article 205 of the Diocesan Consistory, fourth marriages were not permitted and therefore Tihon Moskalev could not enter into a fourth marriage. Historically, the Russian Orthodox Church fought for many years against the practice of entering into a fourth marriage. The Council of 1572 approved the fourth marriage of Ioann Groznyi by giving him a penance, but at the same time paradoxically threatened with excommunication anyone who dared to enter into a fourth marriage. Later, according to the instruction of Patriarch Adrian from December 26, 1697 to archpriests, a fourth marriage was prohibited by Article 64. Even in 1767, the Holy Synod dissolved a number of marriages applying decree No. 12856.

Between January 4 and April 12, 1918, the Holy Synod received five cases regarding marriage with a cousin. The office of the Holy Synod in Petrograd took into account that according to ecclesiastical rules and the circulation decree stated by the Holy Synod on January 19, 1810 (No. 24091), marriages in the fourth degree of kinship were prohibited. Therefore, all five cases were left without further consideration. This rule was also applied in five cases of petitions to marry a deceased wife’s sister and in one case of marrying a deceased wife’s niece.

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786 РГИА. Ф. 831. ОП. 1. Д. 116. Л, 1–2.
787 Юридическия заметки 1869, 44.
788 РГИА. Ф. 831. Оп. 1. Д. 119. Л, 2, 4, 8, 10.
789 Cases were between January 27 and April 12, 1918.
790 РГИА. Ф. 831. Оп. 1. Д. 120. Л, 2, 5, 10, 15.
791 О разрешении Петру Кириченку вступать в брак с племянницею умершей его жены Параскевою Колодкиною. РГИА. Ф. 831. Оп. 1. Д. 121. Л, 3.
Prohibition to marry a deceased wife’s niece was certainly an abnormal practice during a time which allowed marriage with the sister of a fiancée (brother’s wife) and with the sister of a son–in–law (sister’s husband) in the diocese of Riga. However, this prohibition was probably based on the practice of the Holy Synod and on the rules which prohibited marriages in the first degree of trilineage affinity. Nor on January 25, 1918 (No. 334), did the Holy Synod give its approval to Jelisei Hohotov from the province of Kharkov to marry his deceased brother’s wife, referring to the above rule from 1810.792

**The social aspect of family life**

To understand better the social aspect of family life in Russia and women’s status in society, we should examine the statistics and historical beliefs of that period. At the beginning of the twentieth century, Russia had one of the highest birth rates in Europe as well as the highest child mortality rates.793 People in the countryside usually married between the age of sixteen and eighteen for the woman, and the age of eighteen and twenty years old for the man. Young newlyweds did not form an independent ‘new family,’ but instead attached themselves to the ‘extended family’ formed from the three preceding generations. Marriages in Russia were not based on mutual feelings and romantic sentiments, but were decided and established by tradition and the will of the parents of the marriage parties.794 This did not seem to discourage marriage since almost everyone who reached the legal age to enter into marriage in the Russian Empire were eventually married. At the end of the nineteenth century, only 4% of men and 5% of women between the ages of 45 and 49 were still unmarried.795 However, at the same time, extended families faced widespread division in Russia. Russia’s social development divided many of these patriarchal families as urban expansion drew much of the rural population into the cities. Males left

792 РГИА. Ф. 831. ОП. 1. Д. 123. Л, 1–2.

793 Жиромская 2000, 27.

794 Белякова 2004, 196.

795 Жиромская, 2000, 35. For a comparison, the numbers in France at the same time were 12% and 11%.
their families in search of employment, resulting in rapid destruction of patriarchal families and an increase in the divorce rates. Official divorce rates were nevertheless very low and did not contain prolonged absence. For example, in 1913 in the Russian Empire, among a population of 98.5 million Orthodox Christians, 3,791 divorces were sought and granted by the State (0.038%),\(^{796}\) which clearly shows that a lawful divorce was hard to achieve.

Families were particularly heavily affected by the First World War, when husbands were sent to the front with a consequent sharp rise in the number of widows. Villages faced not only economic, but also demographic crises. In 1917 there were 65% fewer marriages contracted in the Russian Empire than in 1913.\(^{797}\) The question about maintaining marriage reached a new level. In the cities demographic processes gave rise to a new – in comparison with the villages – creation: the ‘nuclear family.’ A nuclear family was a family of children and parents where the birth rate was lower than average in Russia at that time. If the average Russian family in the entire Empire consisted of 5–7 children, a family in Saint Petersburg consisted of 1–2 children.\(^{798}\)

The nature of marriage also changed in the cities, where the number of unmarried people rose.\(^{799}\) A previously unknown group of people, ‘unmarried women,’ was now found in the cities. Nevertheless, strict divorce laws led to the fact that although the divorce rate steadily increased in the whole country, it remained negligible when compared with the total number of marriages. The number of illegitimate children in Russia also rose. By ‘illegitimate children’ is meant the children of parents who had not entered into legal marriage, i.e., the marriage was not blessed by the Church. In 1867 in Saint Petersburg there were 19,342 newborn children, of which 4,305 were illegitimate. In 1889 the number was 28,640 newborns, of which 7,907 were illegitimate. Interestingly, in 1906 in Moscow there were more illegitimate children than in Saint Petersburg: 43,801 legitimate 13,466 and illegitimate, while in Saint Petersburg of the 43,153 births, 11,927 were illegitimate.\(^{800}\)

\(^{796}\) Жиромская, 2000, 50.

\(^{797}\) Жиромская, 2000, 73.

\(^{798}\) Жиромская, 2000, 46.

\(^{799}\) Жиромская, 2000, 34.

\(^{800}\) Урланис 1968, 77.
The reduction of legal marriages, the increasing number of unlawful relationships and illegitimate births and infanticides slowly affected the entire society. A. D. Sposobin noted in his book *Divorce in Russia* that the strict divorce law resulted in a decline in moral values in society. Sposobin wrote that the institution of marriage at that time was a union in which the individual found happiness or destruction. The risk involved in getting married was huge; it was an irreparable and irreversible step. In society at large people did not want to risk it. This resulted in illegal relations where people could find almost all the benefits of marriage. This was an equally strong motive for men and for women. These phenomena indicated that ‘traditional marriages’ in the Russian Empire were in a state of crisis. The increasing number of abortions among working-class families in the late nineteenth century testifies to Sposobin’s view as well.

Women’s rights and the feminist movement were also much-discussed phenomena before the Russian Revolution of 1917. “Revolutions have served as impediments to women’s rights, as was the case with the French Revolution” Rochelle Ruthchild states in her study *Equality & Revolution. Women’s Rights in the Russian Empire, 1905–1917.* In Russia however, the Revolution of 1905 and February 1917 stimulated the movement of women’s activism.

Finnish women won suffrage as part of a national independence revolt against Russian authority. The February Revolution began with women’s demonstrations on International Women’s Day. While these revolutions increased the hopes for greater rights, they brought challenges that had to be overcome. The toppling of the tsar did not in itself bring the hoped-for democratic freedoms for women. The dual authorities, the Soviets and the Provisional Government, that emerged with the end of the autocracy both temporized on women’s suffrage.

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802 Урланис 1968, 88; In 1893 in Kharkiv, the number of abortions from all births was 22.1%, in Saint Petersburg 20%. Жиромская, 2000, 44.

803 Ruthchild 2010, 240.

804 Ruthchild 2010, 240.
We have already explored the practice of abortion, which spread rapidly among the workers. Educated female doctors were in favor of the legalization of the practice of abortion, which could not but lead to protests among Orthodox believers. In 1906 Metropolitan Vladimir wrote in his sermons about the importance of drawing in women to preserve Orthodoxy and the morals of the people. With an overall deterioration of the situation in the country, and with the calling of the male population to the front, women became the main force in the Russian Church. 805

Knowing all the aforementioned reasons regarding the women’s movement, what could the Church possible have against this movement? The question of women in society and their role in the Church was raised in the first sessions of the All-Russian Church Council on October 23, 1917, in the Department of Church Discipline. It is particularly interesting to examine the point of view of one of the members of the session, I. I. Galahov: A woman was not interested in the movement of women’s rights by her own will, nor did she voluntarily leave her family, motherhood, or the role of housewife. She was forced to do so because of circumstances that were completely beyond her control. In Galahov’s view, a woman would be in an entirely different position with respect to the question of marriage and family if she had complete economic independence from men. Then she would be wholly free to choose for herself a marriage or celibacy: and under such conditions she would be on a par with men – a party equally responsible for all the anomalies of modern family life. He ended his statement by saying that the Church should pray for God’s blessing for the success of women’s effort in winning their independence.806

Civil divorce

An extract from the definition of the Holy Synod from January 31, 1918 was forwarded to the office of the All-Russian Church Council, where it referred to the report of the Metropolitan of Petrograd from December 21, 1917 considering the decree of the Council of People’s Commissars, published in the 36th number of the Provisional Workers’ and Peasants’

805 Белякова 2004, 430.
806 Белякова 2004, 435.
The decree abolished all religious divorce cases in the ecclesiastical courts and transferred them to the jurisdiction of civil courts, making them a purely civil matter. The Holy Synod also heard a report of the Secretary of the Diocesan Consistory of Vladimir, considering the opposition from the local authorities in counties to divorce suits, because of the above-mentioned decree. Local authorities refused to execute the order of the Consistory in Vladimir.\textsuperscript{807} This decree was published without communication with the authority of the Orthodox Church and was described as being in complete disregard of the requirements of the Christian faith.\textsuperscript{808} The Commissariat’s decree permitted divorce in the civil court at the request of both spouses or of one of them. Moreover, by the above decree, entering into marriage was fairly simple, just requiring a document from the civil court. Divorced spouses could enter into a new marriage for an unlimited number of times, without any prohibition.

The Holy Synod, after discussing these issues, found that the disposition of the government to transfer divorce cases to the jurisdiction of the civil courts on account of the law which established civil marriage, did not relate to ecclesiastical marriages, which were concluded according to the rules of the Church and subjected to termination on grounds accepted by the Church. Bringing divorce cases to the Diocesan Consistories, the Holy Synod saw that they would be subject to nullification or cessation by applicants or by their lawful representatives. That was sufficient reason why it was not considered possible, by the action of the Consistory, to transfer such cases to the civil courts. In addition, because of the difficulties for the Diocesan Consistory to maintain relations with the government or public institutions in divorce cases, it seemed to be appropriate to use existing ecclesiastical bodies for this means, especially parish priests to handle the required documents with the civil authorities and execute the orders of the ecclesiastical court. With the above statement, the Holy Synod notified bishops, Synodal Offices and the Office of All-Russian Church Council with circular decrees.\textsuperscript{809}

\textsuperscript{807} ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 18.
\textsuperscript{808} РГИА. Ф. 796. ОП. 445. Д. 780. Л, 3.
\textsuperscript{809} ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 18.
The decree of the Council of People’s Commissars left the ecclesiastical court of the Russian Orthodox Church in a problematic situation: how would the divorce process be carried out and how would divorce cases be treated? How, moreover, would the Church deal with its faithful who wanted an ecclesiastical divorce, when at the same time civilian authorities categorically demanded the transfer of all divorce cases from Diocesan Consistories to the civil courts?

Considering the issue of ecclesiastical divorce, the All-Russian Church Council over a period of four months began to solve the above issue. On February 18, 1918, a meeting of the Department of the Ecclesiastical Court stated that distribution of court cases, as well as divorce cases between the Holy Synod and the Supreme Church Council was not well-founded and was difficult to implement. In view of these reasons, the Department considered that the All-Russian Church Council should adopt the following resolution: All the cases of the ecclesiastical court and, in particular, cases regarding the dissolution of religious marriages and recognizing them as illegal and invalid, were subject to consideration and resolution by the Holy Synod until such time as the All-Russian Church Council would adopt new regulations regarding the ecclesiastical court.810

The question of civil marriage in Russia was not a new one; discussions concerning it started in the nineteenth century and it was actively observed in the studies of Orthodox canon law as well. For example, canonist Suvorov in the conclusion to his books Civil Marriage, which can be seen as a summary of the whole discussion during that time, discusses civil marriage and its relation to the parish registers.811

The All-Russian Church Council, which was very concerned about the salvation of the faithful of the Orthodox Church, urged its followers not to embark on a path of sin that leads to destruction. It urged them to keep the ecclesiastical laws, and recalled that those who violate the ecclesiastical decrees brought the wrath of God and the Church’s condemnation on themselves. It also noted that the new marriage decree

810 ГАРФ. Ф. 3431. ОП. 1. Д. 258. Л, 83. The Chairman of the All-Russian Church Council, Metropolitan Arseni of Novgorod, forwarded to the Holy Synod a conciliar definition, accepted on March 4, 1918, regarding the decree of the Council of People’s Commissars on divorce and civil marriage. РГИА. Ф. 796. ОП. 445. Д. 780. Л, 4.

of the State was aimed to overthrow the ecclesiastical laws, and this could not be accepted by the Church. The All-Russian Church Council, after reviewing the marriage and divorce decrees issued by the Council of People’s Commissars, issued the following general rules:

a) Marriage, blessed by the Church, cannot be terminated by the civil authorities. The Church does not recognize such termination as valid. Those who dissolve a religious marriage with a simple statement at the secular authorities are responsible for insulting the sacrament of marriage.

b) Orthodox Christians whose marriages were blessed by the Church and not dissolved by the Church authorities, if entering into a new civil marriage only on the grounds of civil divorce, were guilty of polygamy and adultery. Such marital cohabitation would never obtain the recognition or the consecration of the church and would be a great sin. It is punished, according to the ecclesiastical rules, with penance and excommunication from the Holy Mysteries that were set in Canon 87 of Trullo and in Canon 77 of Basil the Great.  

Contracting a civilian marriage could not replace the wedding as a holy sacrament, which sanctifies and strengthens the marital union of husband and wife with the power of grace. Therefore, marital cohabitation on the basis of a single record in the civil registers, or so-called civil marriages, should also be blessed with a church wedding. Celebrating a wedding is possible only when there are no canonical impediments to the marriage. The Patriarch and the Holy Synod in the presence of the Higher Church Council heard the above case on March 15, 1918 and decreed that the decision should be printed in the Church Bulletin and sent to the Diocesan metropolitans as a guide. The conciliar decision underwent

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812 Canon 77 of Basil the Great was also cited in the decision of the Holy Synod from October 24, 1852, regarding entering into a new marriage while the previous one still existed. In such a case the Holy Synod decreed seven years of penance, which was reduced to three and a half in cases where the guilty party was sentenced by criminal law as well. Григоровский 1908, 108.

813 РГИА. Ф. 796. ОП. 445. Д. 780. Л. 4–5.

814 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 1–2.
even further development. When considering the question of polygamy, when a spouse enters into a new marriage not blessed by the Church, i.e., into civil marriage, the Russian Orthodox Church in 1918 took a more tolerant stand regarding the regulations and punishment in comparison with the former practice. In the past, the Holy Synod condemned cases of polygamy and adulterous behavior to perpetual celibacy, in conformity with a circular decree from June 28, 1888. This decision was particularly motivated by the fact that such marriages were increasingly contracted at that time. In such cases one should bear in mind that a spouse who entered into a new marriage while the former marriage was still valid or was not dissolved, committed a crime. However, on May 28, 1904 Russian marriage law was changed. In this law adulterers were not condemned adulterer to perpetual celibacy but were instead subjected to seven years of penance. However, this ruling caused an outcry among women, primarily for financial reasons: they were deprived of rights and the maintenance of their husbands, and could not enter into new marriages. This discussion can be dated back as far as 1828, when the President of the Holy Synod, Metropolitan Filaret of Moscow allowed with Synodal decree No. 1687 General-Adjutant Kleijnmihel to enter into a new marriage. Later, in 1867, according to the Commission Report of the Holy Synod, some members supported an amendment of the law.

The political status of the upper class might have been a factor as to how marriage law was interpreted and possibly changed during Russia’s history. There were many Westerners in the upper class at the time who had close connections with Western Europe. Russian civil authorities might ignore Byzantine laws concerning prohibited degrees to some extent just because they were not always convenient for royal persons who married foreign royalty who were often related to each other in affinity. It might also have been possible that some upper-class families would pressure the ecclesiastical authorities to grant them the desired divorce, as one can speculate in General-Adjutant Kleijnmihel’s case.

815 Завьялов 1901, 263.

816 Белякова 2011, 418. However, in 1753, the government considerably strengthened married women’s control over their own property. However, this seemed to affect mainly noblewomen and the dowry they brought with them into the marriage. Interestingly, women at the time in Russia had more rights in this regard than English or French women. Moss 2005, 305.

817 Григоровский 1908, 221.
Catherine the Great’s love affairs were widely known and give us a glimpse of the upper-class’s social lifestyle in eighteenth-century Russia, which assumedly continued throughout the nineteenth century as well. However, her adultery did not terminate her marriage because of her important status as the empress.\textsuperscript{818}

The transition from ecclesiastical to civil marriage is a phenomenon that touched the lives of the general Russian population. However, this process continues to be outside the attention of researchers, and demographers mention it only occasionally. In fact, it had a bigger influence in the mass resignation of the population from the Church than the well-known Bolshevik campaign to confiscate relics and church property. The important materials on the subject can be divided into two groups: 1. Cases reflecting the preparation of the reform of the ecclesiastical court and its function in the divorce process; and 2. Divorce cases which were directly dealt with in the Synod.

The main issue was the organization of the ecclesiastical court, which the All-Russian Church Council ended in not adopting in its resolution, and the Consistory in charge of the court was abolished at the time. Who and how should execute the judgments was not quite clear, and the backlog of divorce cases was enormous; in the Kharkiv Consistory in 1917 alone 1,163 divorce cases appeared.\textsuperscript{819}

Each divorce case that is stored in the archives of РГИА and ГАРФ has dramatic individual features which represent various aspects of domestic drama. Especially the Synod examined cases that triggered one of the spouse’s disagreement about the Diocesan Courts decision. The Synod also received cases when the decision was made without the participation of the respondent. The trial procedure itself required the presence of both parties. The non-appearance of the defendant postponed the trial for six months. During the civil war, it was impossible to bring to the court a man who was in the war zone where there was no mail service. In most divorce cases, the case was transferred to the court not when the divorce occurred, but when one of the parties wished to remarry.

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\textsuperscript{818} One of the men that Catherine took up with, Sergei Saltykov, may have been the father of Catherine’s son, who later became the Emperor Paul. Catherine also had a daughter in 1757 with her lover of Polish origin, Stanislas Poniatowski. Later she gave birth to a boy – Count Aleksei Bobrinskoi – the father of her latest lover, the Guards officer Grigori Orlov. Moss 2005, 269.

\textsuperscript{819} Белякова 2011, 417–418
Subsequent to the new government’s decree, cases regarding the termination of ecclesiastical marriages still came to the Synod for approval. In 1918, the estimated numbers of divorce cases handled by the Synod continued to grow in February – April to 145, in May to 46, in June to 44, in July to 62, and in November to 73. The decree of the Council of People’s Commissars was not at first taken seriously by the public either. More importantly, even a second marriage still required a wedding ceremony in order to recognize its legitimacy in the eyes of society.820

One Orthodox journal wrote, “The disintegration of the family . . . is one of the most grievous social ills of the present time,” a sentiment that had been earlier expressed by famous Russian writers, such as Dostojevski and Tolstoi. The most sweeping proposals for changes in family life, as Walter G. Moss notes, came from socialists like Lenin, Krupskaia, and Kollontai, who were able to put their ideas on civil marriage into practice after the 1917 Revolution.821 And as seen from the pre-revolutionary women’s movement, some of the ideas regarding family values were uncommonly radical for the time not just in Russia, but in Europe as well.822

**Ecclesiastical divorce**

The Orthodox Church was forced to deal with the State’s new marriage law, not necessarily because it had a legal power that the Church recognized, but because the divorce numbers among the faithful were increasing as never before in Russia’s history. On March 8, 1918, the Department of the Ecclesiastical Court considered that the new rules about termination of marriage should be applied as soon as possible. V.

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821 Moss 2005, 542.
F. Tverdin was concerned about the fact that the civil authorities categorically demanded that divorce cases be discontinued in the Consistories. He recommended how the Secretary of the Consistory should act in these cases. According to his views, most divorcing spouses wished to receive an ecclesiastical divorce. They did not want to divorce in the civil court, bearing in mind that getting a divorce and entering into a new religious marriage could not be done after the marriage had been terminated by the civil power. Tverdin asked whether it would be possible to rename divorce cases that were, according to the decree of Council of People’s Commissars, subject for transfer to the civil authority. He suggested that the divorce cases should be renamed “permission to enter into a new religious marriage.” In such a form, these cases could remain in the Consistory.

V. V. Radzimovski found it more suitable to return to the model of the Interdepartmental Commission, where matrimonial matters were examined from the following viewpoints: increasing the number of reasons for divorce; eliminating the formalities of such cases; and the establishment of special regulations of proceedings for matrimonial cases. A developed proposal of the Interdepartmental Commission was not, however, implemented. The main reason was the lack of financial support to establish such a proposed court. Further difficulties were the lack of knowledgeable persons to establish new courts. It was required that developed proposals should have been introduced for the approval of the legislative institutions: the State Duma and the Council of State. The Interdepartmental Commission set up three Sudebniks823 to explore the proposals further. The third Sudebnik dealt with matrimonial matters, introducing new requirements for a simplified workflow as well as new grounds for divorce. Radzimovski suggested that the department should establish temporary regulations for divorce and shorten the third Sudebnik. He admitted that such work would require a lot of time. At the end of the meeting, the Department approved the idea to give the drafting of the law to Radzimovski, with the help of V. F. Trelin and P. P. Smerdynski, in participation with the Departments’ clerks.824

In the meeting of the Department of the Ecclesiastical Court of April 8, 1918, Radzimovski reported about the adoption of the draft of a law

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823 In Russian “Судебник,” translates into the Code of Law.
824 ГАРФ. Ф. 3431. Оп. 1. Д. 258. Л, 93–94.
developed by the All-Russian Church Council. Although there were controversial points, the Council adopted it unanimously. A member of the Department, V. V. Radzimovsky indicated that in order to fulfill the task of drawing up the rules of the divorce process, some instruction was needed. The Department of the Ecclesiastical Court suggested introducing new rules of divorce proceedings in the manner of the Supreme Ecclesiastical Control. However, the All-Russian Church Council requested knowledge of how divorce cases would be dealt with and suggested that they would be brought to the parish–level. At the same time it expressed a desire that the new grounds for the termination of marriages which were blessed by the Church were not put into effect until the new rules for divorce proceedings were published. As has already been shown, the rules of legal proceedings were not considered at the Council. Therefore, it was necessary to decide who or which instance would solve the divorce cases and develop the rules of the process itself.

S. P. Rudnev proposed choosing several members from the Council of Bishops, adding as well elected members from the parishes to form a special commission to resolve divorce cases. Examining appeals in a commission, Rudnev saw it possible to join the commission with other members of the Council of Bishops. Radzimovsky indicated that divorce cases often did not require any particular examination. A special investigation in Radzimovsky’s opinion was required in two cases: in adultery, and in cases of abuse and moral deviation between the spouses. Therefore, it was assumed that many cases would be dealt with in the countryside courts.\textsuperscript{825}

Metropolitan Sergi pointed out that the Diocesan Consistories suffered from slow office work because they were overburdened with cases. “In the Councils of Bishops there will also be a lot of cases, while the number of members remains the same and most members are elected for a specified period of time. There is no doubt that the productivity of the work in the Council of Bishops will fall,” the Metropolitan explained. It was also noted that if these Councils were all of a sudden entrusted with the task of judging by the new method, they would not cope with the work and the office work would be even slower than it was in the Diocesan Consistories. The Metropolitan believed that a new beginning could be possible, even if only for divorce cases.

\textsuperscript{825} ГАРФ. Ф. 3431. Оп. 1. Д. 258. Л, 126–127.
The Department noted that 1. The old episcopal establishments and forms of judicial process did not comply with the new provisions of the dissolution of marriages; 2. The establishment of the ecclesiastical court needed to be presented to the All-Russian Church Council; 3. Establishing temporary judicial places to control divorce cases according to procedures developed by the Department was not considered reasonable and did not adequately represent the situation of the cases. The Department of the Ecclesiastical Court concluded the meeting by requesting the Board of the All-Russian Church Council to introduce new regulations considering the ecclesiastical courts.826

The urgent need to reform divorce procedures and the divorce law itself was heard. On April 20, 1918, the All-Russian Church Council under the vice-chairmanship of the Archpriest N. A. Ljubimov, came up with a detailed definition about the grounds for the dissolution of marriages which had been blessed by the Church.827 The definition clarified the very meaning of the marriage, stating that the “conjugal union of husband and wife, blessed and strengthened in the sacrament of matrimony by the power of grace must, among all Orthodox Christian married partners, be held inviolable and sacred. Having submitted their lives and destiny to the will of God, they must bear both the joys and sorrows of married life until the end of the days, trying to implement the words of our Lord and Savior ‘Therefore what God has joined together, let not man separate.’”828

It was decided that the Church tolerated the dissolution of marriage only in clemency for human weakness, and concern for people’s salvation. The dissolution of marriage should be possible in order to prevent unavoidable crimes and to relieve unbearable misery which rends apart the matrimonial union or prevents the possibility of its realization. A matrimonial union blessed by the Church could be dissolved in no way except by a decision of the Church Court, initiated by a petition of one of the spouses on specific grounds, properly substantiated and in accordance with the conditions specified in the

826 ГАРФ. Ф. 3431. Оп. 1. Д. 258. Л, 127.
827 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 19.
following articles.\textsuperscript{829} Divorce was possible only on duly proved occasions which were in compliance with the grounds set in the following conciliarly defined Articles of the Russian Orthodox Church:

1. Falling away from the Orthodox faith;
2. Adultery and unnatural vices;
3. Incapacity for conjugal relationship;
4. Contracting of leprosy or syphilis;
5. Unknown absence (desertion);
6. Sentence of one of the spouses to punishment resulting in loss of civil rights and means of support;\textsuperscript{830}
7. Attempt upon the life or health of a spouse or children;
8. \textit{Snokhatšestvo},\textsuperscript{831} procurement, deriving of profit from obscenity or lewd acts;

When resolving cases of dissolution of religious marriages and recognizing such marriages as invalid in the ecclesiastical court of the Russian Orthodox Church, the resolutions of the civil authorities on religious marriages no longer had legal force for the ecclesiastical court. Facts determined by a civil court could, however, be taken into account. The ecclesiastical court resolved marriage cases only upon the

\textsuperscript{829} The project of the All-Russian Church Council from August 3, 1918 stated that marriages blessed by the Church had to be respected as valid until they were terminated, or otherwise the decision of the ecclesiastical court did not enter into legal force. A divorce entered into legal force only after it was implemented by bishops, or if the case was approved after consideration by the ecclesiastical court. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 36.

\textsuperscript{830} The Diocesan authority of Kharkov, regarding a case in which both of the spouses were converted from Judaism to Orthodoxy, and later the wife was sent to Siberia and deprived of the rights and privileges of a free inhabitant, ordered that the husband could enter into a new marriage without being formally divorced from his wife. The Holy Synod however overruled this decision, explaining that the spouses were joined to Orthodoxy through baptism and chrismation, and that it was recorded in the parish register as well. With decree No. 516 from March 20, 1870, the Holy Synod ordered that the spouses should undergo a divorce process, according to the civil law. Калашников 1899, 113.

\textsuperscript{831} In Russian “снохачество” referred to illicit sexual relations between the male head of a Russian peasant family/household and his daughter–in–law during the absence of his son.
presentation of verbal or written explanations of litigant spouses or their legal representatives.\textsuperscript{832}

In cases where one of the spouses had fallen away from the Orthodox faith, the right to petition a Church Court for a release from the marriage bond and the dissolution of marriage belonged to the spouse who had remained in the Orthodox faith.\textsuperscript{833} The innocent party was entitled to petition for the dissolution of marriage in the event of a violation of the sanctity of marriage on the part of the other spouse through adultery or unnatural vices. Adultery committed by both spouses did not prevent the bringing of a suit for the dissolution of marriage by either spouse. A petition for the dissolution of marriage on the grounds of adultery could be initiated not later than three years from the time when the violation of the sanctity of marriage by adultery was made known to the spouse initiating the petition for divorce. In the event that the violation of the sanctity of marriage involved habitual adulterous relations, then the petition could be initiated at any time while such habitual adulterous relations existed or continued, and also for a period of not more than three years after the habitual adulterous relations had ceased. However, the initiation of the suit for the dissolution of marriage was not permitted

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\textsuperscript{832} The written petition regarding the dissolution of a marriage should contain instructions and indications of the Court of Bishops as well. Compound grounds for the petition of nullity were not allowed to be drawn up. Dissolution of marriage cases were examined behind closed doors. Only persons involved in the case or their representatives were allowed in the court. Unauthorized persons were allowed at the request of parties, but not more than three persons from each side. Litigating spouses or their representatives could be present during all actions of the court, with the exception of the meeting of judges; they were also given an explanation for each judicial action and evidence and could observe the case during the process. During the examination of the divorce cases, the court had the right, regardless of the evidence presented by the parties, to collect for the clarification of the case necessary information from the parish clergy and parish councils. A case regarding the annulment of a marriage could be raised, based on the applications of the spouses themselves, their legal representatives, and the spiritual authorities of parish councils, if the marriage was contracted in violation of the rules of the Church. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 36, 39.

\textsuperscript{833} When asking for the dissolution of a marriage due to one of the spouses lapsing from Orthodoxy, a proper certificate of such apostasy should be presented. In light of the administrative process of divorce itself, the All-Russian Church Council stated that in dissolution of marriages that were blessed by the Church when one or both spouses were Orthodox, the divorce case and proceedings were subject to the jurisdiction of the Ecclesiastical and Episcopal Court. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 37, 39.
if from the time of the commission of adultery or from the time habitual adulterous relations have ended, a period of ten years had elapsed.\textsuperscript{834} Adultery committed by one spouse could not serve as grounds for the dissolution of marriage if performed with the consent or at the suggestion of the other spouse, having the intention by this act to obtain grounds for the dissolution of marriage.

The incapacity of one of the spouses for a conjugal relationship could serve as a reason for the other spouse seeking a divorce, only if the incapacity started before the marriage and was not conditioned by old age. Where dissolution of a marriage due to the incapacity of a spouse to have conjugal relations or due to syphilis was concerned, proper medical certificates and other documents relating to these matters were required as well. At this point, incapacity due to old age was still possible according to the regulations of the Russian Church. Regarding the question of old age, the Holy Synod decreed on February 20, 1861 that if they were contracted by persons who were unsuitable for each other, or significantly unequal in years and they asked to marry, the inescapable duty of all priests should be to present them with all the facts that could occur later due to difference in years. If they then still wished to get married, then the priest was obliged to marry them without hindrance.\textsuperscript{835} The All-Russian Church Council considered that the case of the dissolution of the marriage by premarital incapacity for conjugal relationship could be initiated at the earliest at two years from the time of entering into marriage.\textsuperscript{836}

\textsuperscript{834} РГИА. Ф. 796. ОП. 445. Д. 780. Л, 21. When one of the spouses was living abroad, the case was treated based on the permanent residence of the other spouse. If both spouses were living abroad, such divorce cases were treated in the Diocesan Court of Petrograd. When the cases arose in a foreign diocese, a double payment was charged by the ecclesiastical court. Petition for the dissolution of a marriage needed to come directly from the spouse who was seeking the divorce. This rule also applied to those who were denied, according to the civil law, the right to start an action (minors being in custody due to profligacy, or under guardianship due to deafness or dumbness). All further action required for the prosecution of a divorce cases could be carried out by the spouses’ attorneys as well. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 37–39.

\textsuperscript{835} Калашников 1902, 48.

\textsuperscript{836} РГИА. Ф. 796. ОП. 445. Д. 780. Л, 22. The indicated period was not obligatory in the event that the inability to have conjugal relations on the part of one spouse was undoubtedly the result of the absence or abnormal anatomical construction of the genital organs. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 39.
The inability to have conjugal relations on the part of one of the spouses which commences after the marriage could serve as grounds for the dissolution of marriage provided it resulted from bodily mutilation intentionally performed for that purpose by the spouse himself or by someone else with the spouse’s consent. Diseases, such as leprosy, gave the right to request a divorce both for the healthy spouse and for the spouse afflicted with leprosy. The contracting of syphilis served as grounds for the dissolution of marriage on the petition of the unaffected spouse if further conjugal relations served as a danger to the health of the unaffected spouse and children.\textsuperscript{837}

In the nineteenth century, the Holy Synod saw in the decree from February 25, 1868 that there was no dissolution of marriage in the strict sense in cases where wives who intentionally “castrated” themselves (female circumcision) entered into a new marriage. This view was also adopted for those who, according to Article 201 of the Penal Code, were subjected to disfranchisement\textsuperscript{838} which led to the destruction of their previous marriage. The Synod permitted circumcised wives to remarry with the permission of the Diocesan authority.\textsuperscript{839} Later this rule was revised to mean only women who were sent to Siberia because of belonging to the heretical female circumcision movement. After they condemned their beliefs, they were allowed to enter into marriage according to Article 186 of the Charter on Exiles.\textsuperscript{840} Before the reformation of the grounds regarding incapacity, the general practice knew only the rule regarding natural incapacity, that if started before the marriage, the marriage could be dissolved after a period of three years.\textsuperscript{841}

The All-Russian Church Council determined that absence, if it lasted at least three years, became a valid reason for dissolving a marriage. The three-year period was reduced to two years in cases where: 1. The spouse was lost or missing as a result of acts of war or a public uprising and; 2. the spouse was aboard a ship lost at sea and has not been heard of since the loss. The indicated period of years was computed as being from the

\textsuperscript{837} РГИА. Ф. 796. Оп. 445. Д. 780. Л. 22.

\textsuperscript{838} Уложение о наказаниях 1892, 189–193; Тимашев 1916, 115.

\textsuperscript{839} Григоровский 1908, 234.

\textsuperscript{840} Свод законов Российской Империи 1912, Т. 14, 248.

\textsuperscript{841} Калашников 1902, 55.
end of a calendar year during which the last information from the missing spouse was received.\textsuperscript{842}

We can see that this was not a particularly new ground for divorce, since the Holy Synod on February 27, 1884, decreed that the wives of soldiers of lower ranks whose husbands disappeared during the war or were taking to captivity\textsuperscript{843} could dissolve their marriage after five years from the beginning of the absence.\textsuperscript{844} Later the practice of a five-year period was reaffirmed in more detailed way with the decree from January 14, 1895.\textsuperscript{845}

A petition for the dissolution of marriage based on a sentence of a court which deprived a spouse of all civil rights and means of existence could be initiated by the spouse of the sentenced person only when the sentence became effective. It could be instituted also by the convicted spouse, according to the rules set out in Article 181 and in the first paragraph of Article 182 of the Charter on Exiles.\textsuperscript{846} The pardoning of a sentenced person or a delay in execution while awaiting appeal eliminated the right to petition for the dissolution of marriage but it did not nullify any existing decision concerning the dissolution of

\textsuperscript{842} РГИА. Ф. 796. ОП. 445. Д. 780. Л, 21. The court decision regarding the termination of the marriage by unknown absence of those persons who participated in war or disappeared in connection with military operations, could not be used as grounds for the dissolution of marriage earlier than one year after the cessation of the war. It also required an appropriate certificate. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 39.

\textsuperscript{843} Among the ancient people, persons taken into captivity were usually forced into slavery if their countrymen did not ransom them within a short period of time. Therefore, captivity dissolved the marriage automatically, without the will of the spouses. Emperor Justinian gave permission to seek a divorce for the innocent party, i.e., the party who was left without a spouse. The innocent party could then enter into marriage after five years dating from the beginning of captivity. Emperor Leo the Philosopher found this law inhuman in respect of the captive and ordered the wife to wait for the return of the captive, no matter how much time she had to wait, even in cases where she had not received any oral or written information from the captive. According to Balsamon’s commentary on Canon 93 of Trullo, Emperor Leo’s law was indeed practiced in the Byzantine Empire. Dig. XXIV. 2.1. Watson 1985, Vol. 2, 714; Zachariae 1857, 119–120, Рωληδ 1852, Т. II, 524–527.

\textsuperscript{844} Калашихников 1902, 55.

\textsuperscript{845} Калашихников 1902, 62–65.

\textsuperscript{846} Свод Законов Российской Империи 1912, Т. 14, 247–248.
marriage. In the event of a sentence with the loss of civil rights and the means of existence, a marriage was not dissolved if the conjugal life of the spouses continued or was resumed after the release of the sentenced spouse from confinement. The innocent spouse was entitled to petition for a dissolution of marriage in cases of attempted murder of one of the spouses or of children by the other and of intentional infliction of severe injuries by one spouse. The innocent spouse was entitled to petition for the dissolution of marriage in cases of incest or procurement by one spouse of the other, the inclination to earn one's living by lewd acts or the realization of profit from lewdness and in the event where the other spouse contracts a bigamous marriage.

The Holy Synod of the Russian Orthodox Church in its decrees starting from February 1918 no longer proposed perpetual celibacy as a penance in matters of infidelity. This can be seen from the divorce cases regarding adultery, which were solved without the participation of a respondent. On July 17, 1918 the Holy Synod received one such case from the Diocesan authorities of Moscow regarding the dissolution of marriage.

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847 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 22. In the journal Ecclesiastical Social Life of November 2, 1907, an unsettled divorce case was mentioned in which the husband was first sentenced to punishment and then sent to Siberia. His wife did not want to follow him and eventually they got divorced. The wife entered into a new marriage; and after a while the husband was pardoned. Coming back from Siberia, the ex-wife applied for a divorce and claimed that she wanted to be reunited with her first husband. The local Diocesan Consistory did not know how to resolve the case and sent it to the Holy Synod. Should the Synod restore the first marriage by simply recognizing it on paper or conclude a new wedding in church? There might be a risk with the first option of falling into contradiction, since the second marriage is blessed by the Holy Synod and would then become illegal. This action would indeed be close to the Roman Catholic practice. The second option raises a question regarding the repeatability of the practice. The article concluded with views on how the aforementioned case should be resolved – not by the ecclesiastical laws and canons, but though the teaching of the Scripture. Леонтович 1907, 1353–1356.

848 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 23. The Council also made a note that marriages should be dissolved only if the ecclesiastical court thought that continuation of marital life would be unbearable for the spouse seeking a divorce. In cases of an attempt on the life or health of a spouse or children, a copy of the corresponding sentence or the decisions of the judicial authorities needed to be included if the spouses appealed to the judiciary. ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 39.

849 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 23.
of a petitioner due to the adultery of his wife. The case was ruled in favor of the petitioner and gave permission for him to enter into a new marriage; the adulterous wife, on the other hand, was condemned to penance.\textsuperscript{850}

It was not always clear to the Synod on what grounds the marriage of the spouses should be dissolved. One such example can be found from a case that was sent to the Holy Synod for resolution on June 19, 1918 by the Metropolitan of Vladimir. The case regarded a petition of a peasant Paraskeva Naumova, to grant her a certificate for the right to enter into a new marriage, her previous marriage having been terminated in 1915 as a result of the adultery of her husband. The marriage was terminated by the decision of the Diocesan authorities. The Holy Synod decreed on June 25, 1918 that it did not matter that the adultery of the husband was proven by the Diocesan authorities of Vladimir, for the case was not approved by the Holy Synod. Further, without the participation of the defendant in the legal process and considering that the residence of the defendant was unknown for nearly three years after the printed publication to trace him, a norm which was set by the All-Russian Church Council on April 20, 1918, such a situation instead – unknown absence – was considered sufficient reason for dissolution of marriage.\textsuperscript{851}

The other case that was sent to the Holy Synod on April 11, 1918 by the Diocesan authorities of Finland, considered a case where a husband, Ipati Lukin, wanted to dissolve his marriage due to the adultery of his wife and her unknown domicile in Russia, to where she had moved with her new partner. On June 8, 1918 the Holy Synod gave him the permission that he requested. Other permissions where one of the spouses committed a crime against the sanctity of marriage, after which they disappeared, were given relatively freely. In some of the cases, no crimes were committed against the marriage; the other spouse just simply disappeared. One such case was on June 7, 1918, where Maria Sidorova was given permission to initiate a divorce process against her husband, whose lifestyle was dissolute and, further, he was hiding from his wife.\textsuperscript{852} Altogether, there were sixteen divorce cases regarding adultery that were solved without the participation of the respondent and that were

\textsuperscript{850} РГИА. Ф. 831. ОП. 1. Д. 107, Л. 3.

\textsuperscript{851} РГИА. Ф. 831. ОП. 1. Д. 107, Л. 9.

\textsuperscript{852} РГИА. Ф. 831. ОП. 1. Д. 107, Л. 25, 38.
addressed to the newly–elected Patriarch of Moscow and the Holy Synod between February and October 1918.

The All-Russian Church Council, however, did not explore all the possible cases in its April definition. For example, the question concerning mental illness and malicious abandonment of the other spouse were still not confirmed as canonical reasons for divorce. Regarding cases of mental illness, on March 29, 1918, the Holy Synod and the Patriarch of the Russian Orthodox Church examined the divorce case of a peasant, Ivan Kachalin, presented by the Metropolitan of Tula, due to the post–nuptial mental illness of Kachalin’s wife. The Holy Synod decreed that under the current law (which was not necessarily in force anymore at that time), only premarital insanity of one of the spouses constituted insanity. Kachalin’s application was transferred to the Department of the All-Russian Church Council of the Russian Orthodox Church for consideration when the new reasons for divorce were examined.

On August 2, 1918, the Department of the Ecclesiastical Court gathered to formulate administrative procedure regarding the termination of marital unions that were blessed by the Church. Bishop Serafim expressed the view that the reason for malicious abandonment should be maintained as a ground for divorce. For such a decision, Serafim cited Canon 93 of Trullo, Canons 9, 31 and 46 of Saint Basil the Great, the commentaries of Zonara, Balsamon and known canonist, Bishop Nikodim of Dalmatia. Having read Canon 93 of Trullo during the meeting, Bishop Serafim particularly stressed the case of soldier’s wives whose husbands were long–term absenteees who remarried. He then examined the following explanation according to this practice:

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853 Article 37, Свод Законов Российской Империи 1912, Т. 10. Ч. 1, 4.
854 РГИА. Ф. 831. ОП. 1. Д. 110. Л, 1, 3.
855 ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 36. On August 3, 1918, with protocol No. 138, the Conciliar Council (Соборный Совет) decided to propose to the All-Russian Church Council to transfer the project of general regulations and administrative work regarding divorces and dissolution of marriages blessed by the Church, to the Department of the Ecclesiastical Court. This proposition was accepted a few days later on August 10, 1918.
856 ГАРФ. Ф. 3431. ОП. 1. Д. 265. Л, 96–97.
With some additions, here are repeated literally the 31st, 36th and 46th canons of Basil the Great. The case here is about a wife of a soldier, who does not know whether he is alive. There may be only a slight leniency applied towards the wife, because with strong probability, it can be assumed that her husband, a soldier, did die. The rule, therefore, supposes that such a wife can marry a second time, if any news about her first husband was not received for a long period of time and when the assumption of his death is quite justified. The wife in this case is forgiven her sin (a second marriage before the return of the first husband). Her second husband is forgiven as well, entering with the same conviction (if this is the case) into illegal marriage with her. The marriage is dissolved if the first husband is alive, comes back, but does not want to take his wife back. In that case his wife is released, and as such, she is not allowed to marry again.\textsuperscript{857}

Continuing his reading of Canon 9 of Basil the Great, Seraphim turned his attention to Zonara’s commentary. In his commentary, Zonara pointed out that marriage should not be dissolved except on the grounds of adultery. A wife who left her husband and joined with another man was considered an adulteress; in the same way a husband who left his wife and joined with another woman also committed adultery. Zonara clarified that this was the practice during the time of Basil the Great, and only later after the Justinian period were some new reasons for divorce added to the seventh title, the 28th book of \textit{Basilika}.\textsuperscript{858} On the basis of canons and their interpretation that Bishop Serafim presented during the meeting, he came to the conclusion that malicious abandonment can be associated with unknown absence, which has an analogy with death and adultery, and this can be a valid reason for divorce and by no means will it be contrary to the canons.\textsuperscript{859}

Serafim discussed the possibility of the mental illness of one of the spouses as a reason for dissolution of marriage. From the canonical perspective, insanity as a reason for divorce would not in his opinion be wrong. He turned his attention to Canon 15 of Saint Timothy and found that it hardly contained any prohibition concerning this question. As seen before, Professor Berdnikov in his interpretation of this canon mentioned

\textsuperscript{857} ГАРФ. Ф. 3431. ОП. 1. Д. 265. Л, 98.

\textsuperscript{858} Рълъп 1854, Т. IV, 121–122.

\textsuperscript{859} ГАРФ. Ф. 3431. ОП. 1. Д. 265. Л, 98.
Novellas 111 and 112 of Emperor Leo the Philosopher, which gave the right for a spouse to dissolve the marriage if the other spouse suffered from insanity. Bishop Serafim continued his reflections on Balsamon’s commentary on the above canon, who interestingly — contrary to Serafim’s views — condemned dissolving such marriages, since the dissolution of marriage did not give someone the right to enter into a legal marriage with another.

Bishop Serafim’s canonical views were not implemented in practice in case No. 578, from August 22, 1918, when the Holy Synod and the Patriarch examined the case dated on June 19, 1918, presented by the Metropolitan of Voronezh, regarding the future of the divorce cases of spouses Juryn, Pochersk, Cherny, Ljapyn, Vostrikov and Udodov, due to the mental illness of their wives. The Holy Synod authorized the Diocesan administration of Voronezh to resolve the case about the health status of the wives of the spouses, based on the available data. The decision must have been made without the opinion of the Medical Council under the Ministry of Internal Affairs, since the Council no longer existed at that time. For guidance in making a decision on these matters, the Holy Synod stated again that according to the law, insanity did not serve as a basis for the dissolution of marriage. It recognized it as valid only in cases where it was pre-marital.

On September 2, 1918, however, the Church Council produced additional grounds for divorce, which the Holy Synod accepted with decree No. 324 on September 17, 1918. The additions consisted of the following definitions: 1. Such properly proved incurable mental illness of a spouse that eliminated the possibility of a continuation of marital life; 2. Malicious abandonment of a spouse was a valid reason for divorce if the ecclesiastical court saw that such a reason made it impossible to continue marital life; 3. Recovery from a mental illness that occurred before the decision of the ecclesiastical court on divorce did not invalidate a decision which had already taken place; 4. The right to seek a

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860 ГАРФ. Ф. 3431. ОП. 1. Д. 265. Л, 99–100.
861 Рълъп 1854, Т. IV, 340.
862 РГИА. Ф. 831. ОП. 1. Д. 110. Л, 6.
863 РГИА. Ф. 796. ОП. 445. Д. 780. Л, 25.
divorce in the case of malicious abandonment belonged to the spouse who was abandoned.864

On December 9, 1918, the Holy Synod together with the Patriarch examined case No. 1163 of a peasant, Taras Starostin, from the province of Tula, regarding divorce from his mentally ill wife for which the Diocesan administration of Tula did not give permission. The decision of the Diocesan administration was motivated by the fact that mental illness started after the marriage. The explanatory presentation (No. 1663) of the Metropolitan of Tula from November 10, 1918, reported the inability to deliver a review of the aforesaid case, after taking the matter to the Commissariat of Justice in June 1918. The Holy Synod noted that by the decision of the All-Russian Church Council of September 2, 1918, one of the reasons for a divorce blessed by the Church was the incurable mental illness of a spouse. The new regulation considered that the mental illness of one of the spouses should be appropriately proved and should be of such a nature that it eliminated the possibility of continuing married life.

The Holy Synod resolved the case of Taras Starostin, stating that he should either take his case from the Commissariat of Justice and return it to the Diocesan administration, or file a new case on the grounds of the mental illness of his wife. If his case is returned from the Commissariat of Justice, he should re-examine it or consider filing a new case by following the instruction of the definition of the All-Russian Church Council from September 2, 1918, regarding the grounds for the dissolution of marriages blessed by the church.865 From this point, with the above decree of the Holy Synod, mental illness was seen as a valid legal reason for divorce in the Russian Orthodox Church. Clearly, Starostin’s case acted as a precedent for this.

By the end of December, 1918, the Russian Orthodox Church published new rules for proceedings on the termination of religious marriages, known as “Guidelines of regulations, when removing blessing from the religious marriage.” By this it was decreed that removing blessing from the religious marital union was done only with the power of the bishop, if it was the fault of one of the spouses that the marital union truly collapsed or it was impossible for the spouses to live together any longer because of the illness of one of them. The spiritual father’s

864 РГИА. Ф. 796. ОП. 445. Д. 780. Л. 27.
865 РГИА. Ф. 831. ОП. 1. Д. 110. Л. 9.
conclusion and interrogations of the witnesses were given exceptional importance in cases where the circumstances of the spouses were unknown to the priest. The conclusion of the spiritual father was important, since the decision to remove the blessing from religious marriage was based upon it. The spiritual father was able to make certain conclusions on marriage cases which concerned the removal of the blessing from the religious marriage. For him it was not necessary to wait for instructions from the office of the Metropolitan each time.\textsuperscript{866}

The spiritual father’s role in the divorce process itself was actually decreed in the project of the All-Russian Church Council on August 3, 1918. It was desired that divorce cases based on the reasons of adultery, disease, and an attempt upon the life or health of the spouse or children, could not be resolved substantially without all possible measures being taken, such as pastoral exhortation of spouses. Pastoral exhortation was used so that the couples would stop their disagreement through Christian reconciliation and thus remain in the marital union. However, if a divorce case was started in a lawful order by one of the spouses, it was discontinued in the case of the death of one or both of the spouses or the dissolution of their marriage, in the case of reconciliation between the

\textsuperscript{866} According to the instructions, the removal of the Church’s blessing from the marriage on account of the absence of one of the spouses was made at the place of residence of the applicant and at the place of the wedding of a new marriage. On all other occasions, in the place of residence of a spouse who was guilty of destroying the marital union or in the place of residence of the mentally ill spouse. In the petition to remove the blessing from the religious marriage it was necessary to indicate: a) the time and the sacrament of the marriage. One of the above reasons for removing the blessing from the religious marriage and the detailed and correct statement of the circumstances under which the collapse of the marital union took place was also needed; b) the people who knew both spouses and had the opportunity to observe their lives and who could confirm the circumstances set out in the petition, including their addresses, as well to indicate if there were other documents on which the petitioner sought the removal of the blessing of religious marriage, and the address of the petitioner, the other spouse and his spiritual father. The marriage certificate, the certificate of civil divorce and the birth register were also required. However, if it was impossible to obtain the birth register, a certificate with the signature of two individuals, certified by the priest with the seal of the Church replaced it. Listed reasons were considered sufficient for dissolution of marriage and such reasons as: the dissimilar characters of the two parties, the mutual consent of the spouses to separate, entering into a new marriage, etc., were not accepted or regarded as sufficient reasons. РГИА. Ф. 796. Оп. 445. Д. 456. Л, 16–17.
spouses, or in the case in which the petitioners refused to proceed with the divorce case.  

After analyzing the All-Russian Church Council’s above definitions of reasons for divorce, we can divide these reasons into two categories:

1. Reasons that do not depend on the will of the spouses and do not entail advantageous consequences for any of the parties.
2. Reasons that are made on the part of one of the spouses by committing adultery and offending the marital union. Therefore it brings upon him various kinds of unfavorable consequences, including the prohibition of a new marriage.

To the first category were applied such reasons that were accepted as the ground for divorce, since they violated the natural conditions of proper matrimonial life. These reasons were: unknown absence, incapacity for conjugal relationship, the sentencing of one of the spouses to punishment resulting in loss of civil rights and means of support, physical illness, such as syphilis and leprosy, and mental illness. To the second category was applied reasons that have one way or another flagrantly violated the moral basis of the marital union and marital fidelity. To the latter category can be included adultery, abandonment of the Orthodox faith, bigamy, unnatural vices, *snokhatšeštvo* and attempt on the life or health of the spouse or children. One might wonder why killing the fetus and intentional interference with fertility were not also in the list of reasons.

Taking into account the ‘framework’ that the canons of the Orthodox Church provides, this reality provides theologians and canonists freedom for interpretations of the context, serving at the same time the locality of the Church, the place and time of its communities. This gives a dual purpose for the ministry of canon law: genuine

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867 ГАРФ. Ф. 3431. ОП. 1. Д. 264. Л, 36.

868 This is known in canon law as “repudia sine damno” (“repudiation without damage”).

869 This is known as “repudia cum damno” (“repudiation with damage”).

870 By frame here is understood the canonical context regarding marriage and divorce that is discussed in the second chapter.
Christian freedom and good order. In addition, the ideal purpose of every ecclesiastical law should be such that the faithful can understand its true meaning and values. In this way compliance with such laws becomes a moral action in the mind of the faithful that would implant a sense of right and wrong.

This raises a fundamental question in the field of canon law: how does the local Church create new decrees and regulations to govern itself? This problem can be also approached with a counter question: how does the Church identify and envision itself? The Church does not just consist of individuals of the same faith; it is a body of one person in many persons. This oneness also applies to questions of dogma in the Orthodox Church. Once the Church has identified itself as a social body, a place of sacraments, the legal norms and decrees in this action play an essential role. With the help of rules, the Church advises its faithful to establish appropriate social balances that oblige the spiritual growth of its members in the very operation of the Church. Such rules included updated regulations concerning the dissolution of marriage. They were precisely decreed to establish an admirable social balance during the deepest social crisis that Russian society had undergone. The new rules were decreed by contemplating the Orthodox understanding of leniency towards human weakness. The oikonomos himself, or in our case, the Holy Synod of the Russian Orthodox Church, brought deliverance to situations where the canonical structures were out of order or had started to collapse. This said, leniency in this case was more than the law could offer and there is no single exact answer how the concept of oikonomia operated here.

As we have seen in the previous chapter, many of the newly-adopted reasons for divorce were added from Byzantine law. The answer to problems was actively sought from ancient canonical practice, no matter that Russian society itself was radically transforming due to the 1917 Revolution. Russian canonists like Berdnikov and Krasnožen openly supported such a practice, proving in their studies that such a development would be more fruitful for the Church at the beginning of a new era, under the Patriarch of Moscow. Krasnožen clearly expressed this thought in his commentary to the draft of a new Criminal Code, saying that the Emperor Justinian was not ashamed to harmonize his Novella

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871 Coriden 2000, 59.
131 with the canons of the Church.\textsuperscript{872} As we look more closely, this approach was directly suggested in the legislation of Justinian.\textsuperscript{873} Krasnožen clearly saw here a harmony between the State and the Church, especially regarding the law. Not only did the later Byzantine Emperors follow Justinian examples, but the Russian Emperors too, not only for the good of the Orthodox Church, but also for the Russian State and the Russian people.\textsuperscript{874}

\textsuperscript{872} Красноžен 1909, 63.
\textsuperscript{873} Zhisman 1864, 20.
\textsuperscript{874} Красноžен 1909, 63.
6. CONCLUSIONS

The transformation of the family in twentieth-century Russia created questions of a practical nature and raised other questions of a more theoretical kind. Family was and is the primary social unit and source of the reproduction of society; it is an educational, interpretative environment in which the ideological, cultural and moral foundations of society are formed and fixed. It is remarkable that the Synod of the Russian Orthodox Church was able to maintain as much control as it did over the laws governing marriage for almost two hundred years. The assumption that a Russian citizen was Orthodox, made Orthodoxy a loyal partner to the State and thus made a religious marriage the only form available. One could say that it did a lot of harm both to the Church and to the conscience of individuals.

There is no question that stable marriages were of interest to the State. The Synodal period was saturated by laws emanating both from the Church and the State; all such laws were in effect part of the fundamental laws of the Empire. The procedure and the conditions for entering into a valid or lawful marriage and the procedures and requirements for the dissolution of marriage more or less reflected the laws of the Church with more than occasional infringements by the State. Such things as, for example, penalties following criminal acts involving marriage, fell within the jurisdiction of the State. As for the Synod, the decisions on the validity of marriages, especially those within close degrees of relationship, were inconsistent.

In examining the norms of marriage law, it can be clearly seen that the Russian civil law and the Charter of Diocesan Consistory at the beginning of twentieth century were in many ways influenced by the laws of the Byzantine emperors and the Slavic Nomokanon. For example, according to the law, the only valid marriage for an Orthodox Christian was a religious one with another Christian. Marriage with non-Christians was prohibited. Yet, the influence of the ancient ecclesiastical regulations were not exactly applied in the case of norms regulating divorce. After the reforms of Peter the Great and the development of Russian civil law, regulations regarding matrimony were transferred from the jurisdiction of the Church to civil law. However, in the cases of kinship and affinity as an impediment to marriage, Russian civil law referred directly to the ecclesiastical regulations and ordered that such issues needed to be
guided by the regulations of the Church. The ecclesiastical regulations in Russia regarding kinship and affinity were modified in comparison with the strict tradition of ancient Orthodox canon law. Later the norms of affinity were relaxed even more in the practice of the Holy Synod in 1918, due to the social demands coming from the Western parts of the Empire, which were in close relation with Western Christians.

Transformation of the ecclesiastical regulations into purely civil legislation made divorce practices more complex. From the time of Peter the Great to the beginning of the twentieth century, Russian divorce law was stricter than in ancient Russia. The Holy Synod had a key role in this process, the State granting divorces only in cases when the Synod supported them. Hence, the religious institution of marriage was protected by the Russian judiciary during the entire eighteenth, nineteenth and early twentieth centuries. Over time this bureaucratic movement of managing divorce cases led to marriage in the Russian Empire being placed in a state of crisis: the risk involved in getting married was too big and the mass of people did not want to take this risk. This can be understood when the strict divorce laws are examined. By the Russian laws of the twentieth century, marriage could be dissolved in cases of proven adultery; pre-marital incapacity for conjugal relationship; the sentence of one of the spouses to punishment or exile to Siberia resulting in loss of civil rights and means of support; and the unknown absence of one of the spouses for least five years. Divorce was also permitted in the case of the consent of both spouses to enter monastic life if they did not have young children.

Indeed, Russian divorce norms acquired a ludicrous juridical aspect when dealing with the cases of proven adultery, for the recognition of the fault by the defendant was not considered to be evidence or a legal reason for divorce. The Charter of Diocesan Consistory claimed that the main evidence of the crime should be considered the testimony of two or three eyewitnesses, or children begotten outside of a lawful marriage. Here we encounter the most delicate point, a judicial farce which was debated in the Pre-Conciliar period and at the All-Russian Church Council of 1917–1918: adultery proven by eyewitnesses.

Along with the State’s conservative regulations regarding reasons for divorce and the impracticality of their management, the spread of sexually transmitted diseases and mental illness were also constantly debated at medical congresses. The position of illegitimate children and abandoned families required legislative intervention as well. It is clear that the question of divorce was to become the subject of public policy.
From the second half of the nineteenth century to the beginning of twentieth century, various legal studies on the issue of divorce were released in Russia. During the first decade of the twentieth century, a number of canonical studies of marriage and divorce were also released. From the understanding that marriage was a civil institution followed an insistence that the government should change this institute to reflect the needs of society. The denominational status of the State did not conflict with this idea; the State could delegate to the Church matrimonial cases not because it recognized its right to manage them at their own discretion, but because for the State it was more convenient and more beneficial to allocate such cases to a special government’s instance, in this case the Orthodox Church. Such reasoning was based on the general principle that approved of different courts with general and specific tasks, in this case, ecclesiastical.

This created a situation in the State wherein canon lawyers started to demand the improvement of divorce regulations in order to respond to the needs of society and the canonical norms of the Church. The Church had to decide to allow indulgence, liberalization, modernization, abandoning the purely formal approach to matrimonial issues. Should the Church in cases where the family had completely disintegrated, recognize this fact and allow divorce, thus preventing many of life’s tragedies? It was decided to examine these questions in the All-Russian Church Council, a Church Council that had not gathered since the reforms of Peter the Great. Before the Council, the Church established preparatory commissions, meetings and working groups to prepare for the General Council; included in them were a number of canon law scholars and professors from religious academies and universities. The Pre-Conciliar period of the All-Russian Church Council started in 1906, but in 1917, its work still remained unfinished. Members of this period suggested that apart from the traditional grounds for divorce (the adultery of a spouse as specified in Scripture), among the reasons for divorce should be added the incapacity for conjugal relations or childbearing, a disease which eliminated the possibility of conjugal relations and had a detrimental effect on the offspring (leprosy, syphilis, postnuptial madness, etc.); malicious abandonment by one of the spouses that lasted for five years or more; administrative exile through a decision of the court; cruel treatment, abandonment of the Orthodox faith and spousal abuse with determination of guilt by a civil court.

Not every participant in the commissions and meetings agreed with the aforementioned reasons. Professorial members of the commissions
nonetheless provided a valuable contribution to show the canonicity of the aforementioned reasons. Analyzing these reasons from the canonical point of view, we can see that incapacity for a conjugal relationship was already acknowledged in chapter 13, title 4 of Nomokanon of Photios. Insanity is mentioned in Canon 15 of Saint Timothy of Alexandria, its rather neutral message suggesting bearing the illness of the other spouse, and Ekloga of Leo III Isaurian, in the 12th and 13th chapters of the second title permitted divorce due to the leprosy of one of the spouses.

Malicious abandonment of a spouse was one of the most discussed topics. The canons that were used to support this reason in the professors’ arguments were Canons 9, 35, 46 and 77 of Saint Basil the Great and Canon 87 of Trullo. The canons of Basil the Great diverged in their messages, and their interpretations were often misconstrued by the other members of the commissions. Malicious abandonment was supported by some Greek Church fathers already in the twelfth and thirteenth centuries as we observed; however, the commentary to Canon 87 of Trullo required court permission even if the abandonment was for a legitimate reason.

From the ecclesiastical point of view, abandonment of the Orthodox faith was considered an allowable reason and was unanimously supported by Pre-Conciliar members. Repression of the religious conscience of another spouse was also closely related to this issue and was motivated with such reality as unity of faith and unity of confessions between the spouses. This reason was supported by Canon 72 of Trullo, Canon 31 of Laodicea and Canon 30 of Cathage. A phenomenon which reflected the confrontation between the pastoral aspect and the canonical tradition was the fact that cruel treatment of a spouse was considered a vague concept by all the metropolitans of the Holy Synod in the early twentieth century. Some canonists wished to drop it from the future law, since it could lead to a severe weakening of the moral foundations of family life and to considerable arbitrariness in divorce cases. Nevertheless, Zonaras’ commentary to Canon 87 of Trullo clearly supported this reason for divorce, even if the canon’s authoritative commentary argued against the regulations of Basil the Great. The evidence that Zonaras testified to a judicial practice of his time can be found in the Epanagoge, chapter 21, title 6.

In the context of early twentieth-century Russian Orthodoxy, we must point out that due to rapidly changing conditions of the world over the past hundred years and the challenges that the Church’s life faced back then, there might not necessarily be rules for every conceivable situation.
One can perhaps say that the principle of true faithfulness to canons includes the possibility, or rather the need to clarify, supplement and even examine materials inherited from previous ecumenical councils. Thus, it is also understandable how some customs that serve a specific principle can be respected, even though it may differ from the strictly formal point of view in a corresponding canon, because it is the principle and the particular objective that should be served, promoted and respected. Good examples are provided here by Basil the Great, who apparently accepted the simultaneous existence of customs and canons that differed somewhat, but aimed at the same goal, and Zonaras too is a similar case.

One can argue that the bureaucratic manner of handling divorce cases in the Holy Synod of the Russian Orthodox Church during the nineteenth and twentieth century were not ideal in serving to develop the community, since the very laws were viewed as too strict and sometimes even absurd. In other words, the manner in which the laws were applied and adopted failed to bring about through its values the overall wellbeing of the community. Since the civil law in Russia was closely tied to the rules of the Orthodox Church during the period that is examined in this study, it provides a possibility of studying the rules inside and outside the Church. Having said that, in the Orthodox Church only the ecclesial approach can do full justice to the texts of canons, since they were created in a specific ecclesiastical context. It is this field where the norms were born.

When the All-Russian Church Council finally started its work, it encountered new problems at the end of 1917. The Soviet authorities began an active fight with the Church, part of which was the fight against the ecclesiastical court of the Orthodox Church. With the decree from December 19, 1917, the Soviet State abolished all religious divorce cases in ecclesiastical courts and transferred them to the jurisdiction of civil courts, making them purely a civil matter. The question of civil marriage in Russia was not new, for the discussion regarding it had already started in the nineteenth century. Still, the Church was not ready for it and with this forced action the Church was facing a new kind of struggle for the first time in its history; how would matrimonial cases and divorce cases be dealt with in a new society which was antagonistic towards traditional Christian family values?

The contrast between the ease of getting a divorce in the new civil courts and the slowness of the ecclesiastical divorce process within strictly limited reasons affected the overall cultural and demographic
situation. The All-Russian Church Council started to be extremely concerned about the new situation and salvation of the faithful of the Orthodox Church and urged its faithful not to embark on a path of sin, which was how civil marriage was viewed. The first response from the Church to the new situation was a dictate to those who wished to contract a civil marriage or dissolve their religious marriage in the civil court. The Church Council decreed that such persons should be punished with penance and excommunication from the Holy Mysteries that had been established in Canon 87 of Trullo and in Canon 77 of Basil the Great. Later in April 1918, the Russian Orthodox Church published new rules regarding the norms on marriage and divorce. Special attention was paid to the reasons according to which the religious marriage could be dissolved. These reasons were amended later in December 1918.

Here we can see that the canonical spirit and the norms set in the Pre-Conciliar period were retained in this matter, and reasons that were not justified by the canons and their authoritative commentaries were not accepted as lawful reasons for ecclesiastical divorce. These reasons could be, for example, dissimilarity of character, the mutual consent of the spouses to divorce, the conclusion of new marriage, and so on. We cannot emphasize enough the legacy of the conciliar tradition that has an extremely demanding and important practical role in the Church’s life: this tradition exists in order to preserve unity in order to create the right relation between faith and life. Canonicity cannot be merely passive obedience, because it cannot be just a legalistic, formalistic attitude. Canonicity could rather be described as active obedience or creative fidelity. Fidelity to the canonical heritage requires the active reception and understanding of this principle. In this sense, the preservation and respect of canons is always more than a mechanical repetition or imitation: it includes responsibility for the actual goal of serving and promoting the canons.

In the Soviet State in 1918, the Orthodox Church did not immediately abolish its previous bureaucratic model, especially when resolving the divorce cases. The form of a petition was retained, and one of the above reasons was necessary, as well as a detailed and correct statement of the circumstances under which the collapse of the marital union took place. On the other hand, the new ‘divorce model’ of the Russian Orthodox Church was more transparent, incorporating the pastoral aspect as well. Such evidence can be seen from the fact that the divorcing spouses’ spiritual father’s opinion was given exceptional importance, since the decision to remove the blessing from religious marriage was based on it.
The debates on the dissolution of marriage continued in the Council even after they were informed that the government decreed the separation of Church and State. The final resolution on the grounds for the dissolution of marriage may sound as if the Council expected the Church to remain as it was in the past, with complete jurisdiction over marriage.

If we put the bureaucratic model aside, the decisions of the All-Russian Church Council were not only made out of fidelity to the laws of the local Church or formal loyalty to the canonical tradition, but also followed the practical principles of tradition. This principle should therefore be faithful to the context in which it is found. This makes it possible to take into account the fact that canons will not be perfectly observed. On the other hand, the holy canons always pay attention to the conditions under which they are observed and where they should be implemented.

The task of a Church regarding the formulation of norms for daily life that correspond to the norm of its faith, is associated not only with the problem of actual ecclesiastical order, but with the ability of the Church to respond to new issues of the day, remembering its history and keeping a living relationship with its tradition. This fidelity to its present, past and future creates the preconditions for internal Church dialogue. The Pre-Conciliar movement of the early twentieth century in Russia is of special interest for Orthodox canon law because it included the first and only experience in the Russian Orthodox Church regarding open discussion with the elements of dialogue touching all sides of Church life. The most distinctive part of this discussion was the church–wide discussion about the canonical tradition, particularly issues regarding marriage and divorce. Participants of the Pre-Conciliar movement shared a view regarding rejection of the Synodal system and a desire to build a church life on the traditional canonical forms. Nonetheless, this positive view on the participants’ part often met with difficulties, since the questions were frequently about fundamentally different ideals of marital life, which, paradoxically, could be justified by reference to the same canons.

How was the fundamental unity between canon law and the social and moral problems of marriage in twentieth-century Russia seen? The sacramental teaching of marriage in the Orthodox Church defines many of the values that canons of the Church promote. From another perspective, they also create obligations that have important and widely applicable implications in the field of morality. How was mutual understanding and a well-balanced relationship between canons, human weakness and morals sought in the preparatory period of the All-Russian
Church Council? It is clear that there was mutual interest on both sides – modern medicine at that time gave totally new reflections to such problems which during the Byzantine period were already considered legal. Although, they were not mentioned in the canons themselves, the Church accepted these human weaknesses since they were included in Byzantine law.

Elements of dialogue, no doubt, were present in the Pre-Conciliar movement as it was alive in the spirit of a quest for canonical creativity. These elements suggest that it opened some important aspects and dimensions of dialogue as a method of searching for necessary standards in Church life that should correspond to its faith. How then can these questions be measured? The experience of the All-Russian Church Council of 1917–1918 occupies an exceptional position in the history of the Russian Church in the light of the tradition of the ancient councils. From the analysis of Russian canonical opinions, it can be ascertained that generally all eras of canonical creativity contain two similarities. On the one hand, it is of interest to the modern mind of the Church and its issues and problems; on the other, it is manifested in an interest in the canons, in rules as sources of tradition and a desire to understand what is actually said about the canonical tradition. This is the premise for canonical dialogue.

Finally, in our study we have seen that every law in the Orthodox Church must be first defined by theological reflections, in order to be fully recognized by the community of the faithful and by the bishops of the Church. It is they (and the Church) who have the power to use the practice of oikonomia and akribeia, which gives the power to accept or deny a particular canonical case. This however, does not mean that the Church cannot have a legal system, in fact quite the opposite; it should have a legal system in the ecclesial sense. The Christian community, the Church, is the community of love and therefore its law should remain tightly bound to theology.

If there is anything to be learned from the Russian experience it is that pro forma compliance with the legal requirements for solemnizing marriages in the Church did not always result in happy marriages nor did unhappy marriages end only after all the procedures for their dissolution were carried out. When examining regulations regarding matrimonial norms in the Pre-Conciliar period and in the All-Russian Church Council, the question of conditions under which canons were examined and where and how they were implemented was particularly important for this subject. However, the search for the Church’s canonical tradition and
position on marriage and divorce acquired a new meaning and a new content at the Council – it created a dialogic approach in the Russian canonical thought.
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ABBREVIATIONS

ГАРФ  Государственный архив Российской Федерации
РГИА  Российский государственный исторический архив
Д  Деяние
Л  Лист
ОП  Опись
Ф  Фонд

UNPUBLISHED SOURCES

РГИА. Ф. 831. ОП. 1. Д. 107.
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РГИА. Ф. 831. ОП. 1. Д. 110.
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РГИА. Ф. 831. ОП. 1. Д. 117.
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РГИА. Ф. 831. ОП. 1. Д. 119.
О разрешении вступать в брак с двоюродной сестрой.

265
О разрешении вступать в брак с сестрой умершей жены.

О разрешении Петру Кириченку вступать в брак с племянницей умершей его жены Параскевою Колодкиной.

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Докладная записка группы членов Собора о необходимости кодификации канонического права, постановление Собора о создании кодификационной комиссии и положение о комиссии, 21 октября 1917 – 20 апреля 1918 г.

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