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Protestantism and the Secularisation of Marriage in France: Historical and Ethical Approaches

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RÉSUMÉ

Michel Johner présente un bref aperçu historique des formes de mariage en France dans les 400 dernières années, avant de considérer la question de savoir si un mariage religieux sans mariage civil est possible. On peut avancer les arguments suivants à l'encontre d'un tel affranchissement : outre le fait que le mariage est conçu en théologie protestante comme un acte de nature civile et politique, il est nécessaire que l'union soit reconnue par le droit commun (en cas de divorce et de remariage) et que la filiation des enfants soit reconnue comme légitime (en matière de succession notamment). L'auteur considère ensuite comment les chrétiens peuvent combiner un mariage civil et un mariage chrétien, de sorte que, quand ils se marient, ils honorent à la fois les lois nationales et les lois de Dieu. Les façons dont les chrétiens peuvent compléter les mariages civils sont suggérées. Dans la mesure où certains chrétiens sont susceptibles de s'opposer à cette approche de l'accommodation, qui repose sur une stricte distinction entre ce qui est autorisé et ce qui est imposé, l'article conclut en envisageant d'éventuelles objections.

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ZUSAMMENFASSUNG

Michel Johner präsentiert einen kurzen, historischen Überblick über Ehemodelle während der letzten 400 Jahre in Frankreich, bevor er die Frage erörtert, ob eine religiöse Trauung ohne eine zivile Eheschließung überhaupt möglich ist. Zu den stichhaltigen Argumenten, dass dies nicht geht, zählen der rechtliche Status von Kindern, und das Potential von Konflikten. Danach untersucht der Autor, auf welche Weise Christen zivile und kirchliche Trauung miteinander verbinden können, sodass sie bei ihrer Heirat sowohl die zivilen Gesetze respektieren als auch Gottes Gebote ehren. Möglichkeiten werden aufgezeigt, wie Christen eine zivile Eheschließung komplementieren können. Da manche Christen vermutlich mit dieser Vorgehensweise von Anpassung nicht einverstanden sind, die auf einer strikten Unterscheidung zwischen Erlaubtem und Gebotenem beruht, diskutiert der Artikel abschließend mögliche Einwände.

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SUMMARY

Michel Johner provides a brief historical overview of the forms of marriage in France in the last 400 years, before discussing the question whether a religious marriage without a civil marriage is at all possible. He defends a negative answer to that question with the following arguments: in Protestant theology, marriage is seen as a civil and political act; in the case of divorce and remarriage, the marriage bond has to be recognised in civil law; the filiation of children who inherit needs to be properly ascertained. The author then examines how Christians can combine a civil marriage and a Christian marriage so that when they marry, they honour both the national laws and God's laws. Ways in which Christians can supplement civil weddings are suggested. As some Christians are likely to object to this approach of accommodation, which relies on a strict distinction between what is authorised and what is imposed, the article concludes with a discussion of possible objections.

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1. Introduction[2]

1.1 Historical background: an 'objective alliance' between French Protestantism and civil marriage?

1.1.1 Is marriage just a 'civil matter'?[3]

In their critique of the sanctity of marriage, since the beginning of the sixteenth century, Protestant theologians have acknowledged that earthly rulers (and the civil authorities that act for them) have the authority to define the general laws of marriage and to arbitrate any contentious issues relating to them. In these matters Protestantism upholds that submission is due to the rulers as to God. This stance, however, does not confer upon the state the authority to conduct marriages. Contrary to common belief, before the eighteenth century few Protestants had thought or even imagined that the right to conduct marriages might be the state's prerogative. With few exceptions, only ordained ministers were authorised to exercise this authority, which, while being free of 'sacramentality', still maintained a degree of 'sacredness'.

The fact that it is acknowledged that the ruler has jurisdictional authority does not in any way eliminate the existence, alongside civil law, of a kind of 'constitutional' framework that Protestants called 'Divine Law' or the 'Word of God', the text of *Discipline ecclésiastique* being its guarantor. Hence the existence of two types of marriage law, civil and ecclesiastical, which Protestants have always kept separate and which, at different times (or on different subjects), have been at variance or even in opposition.

How did the churches deal with this conflict in the past? To answer this question, it is important to distinguish between what civil law permits and what it imposes. Not all that the law authorises is mandatory. It is only in the domain of what the law imposes (or forbids) that conflict might arise.

1.1.2 Before the French Revolution

The Edict of Nantes (1598-1685) for the first time gave the French Protestants some legal recognition and religious freedom. In this period, civil law was more *restrictive* than ecclesiastical law; it forbade what biblical doctrine authorised, such as the right to divorce (i.e. an unfaithful spouse) and the right of first cousins to marry. In such cases, the pastors and synods exhorted the faithful to submit willingly to the authority of the ruler 'as unto the Lord', but at the cost of traumatic self-denial.

After the revocation of the Edict of Nantes (1685-1787) civil law extended its requirements *beyond* what religion tolerated. The validity of marriage was subjected to religious observances that Protestants deemed intolerable.[4] After the reorganisation of the semi-clandestine synods this scenario gave rise to rebellion, resistance and civil disobedience on a large scale as with the *mariage du désert* (see 3.5 below).

The next stage of history began with the 1787 *Edict of Toleration*, which was patterned on the *Patente autrichienne* signed by Emperor Joseph II in 1781 and which applied to various countries in the Holy Empire and its dependents: the inhabitants of the Austrian Lowlands, Germans, Slavs, Hungarians, Belgians, Luxembourgers and Italians.[5] In ushering in the *secularisation* of marriage,[6] the 1787 edict created a third scenario for Protestants in which civil law became more 'liberal' or permissive than ecclesiastical law. Examples of what was allowed are marriage between uncle and niece, and even bigamy,[7] which civil law may well authorise, but are prohibited in the Pentateuch.

Equally astonishing, during this period, is the energy with which the synods themselves sought to enforce practical regulations in the churches; they rendered the new legal declarations mandatory, while also upholding the pre-eminence of Protestant marriage.

A parallel matrimonial discipline was set up, or rather maintained, after 1787, with the publication of banns, an enquiry into the marital status of both parties, and the consultation of ecclesiastical registers. The synod of April 1789 made it clear that this was to be able to 'prove that religious marriage was being upheld in churches' and especially that the synod was to 'take into account anything that could be an obstacle to the legitimacy of the marriage'. These rulings show that the Reformed authorities were not prepared to give way to the movement of secularisation that the Edict of Tolerance had ushered in, much in the same way that they had resisted 'catholicisation'.

Among the freedoms authorised by the law of 1787 was the possibility, unheard of in the history of marriage, that after their marriage was registered by the civil authorities, Protestants might dispense with the church blessing or consider it as merely optional. To stem the tide, the synods declared it mandatory that religious ceremonies in church precede civil registration (just the opposite of what is practised today), under the threat of excommunication.

1.1.3 The turning point: the French Revolution

After the Revolution the large-scale injustices (even tyranny) to which the French Protestants had been subjected under the Ancien Regime gave way to a situation in which an ecclesiastical institution held sway over the jurisdiction of marriage. No one would have been surprised if the Protestants had been among the first to support civil marriage in this era, but this was not the case. In the archives we find no evidence that Protestant representatives played an active part in the parliamentary debates (1791-1792) that brought the Republic into violent conflict with the Roman Catholic Church during the era of the 'Civil constitution of the clergy'. The case of the Protestants is not mentioned in any speech, either because it was not worthy of note or because it was simply considered as settled by the Edict of November 1787. As Fontez points out, the Protestant doctrine of marriage would not be brought up again until the speeches of Portalis under the Consulate (1802-1804).[8]

The question raised by Dufour remains unanswered, however, as to whether the philosophy of natural law had any bearing on these deliberations, because intellectuals of Protestant training such as Grotius, Pufendorf and Burlamaqui had been thinking along these lines since the seventeenth century.[9] The same question can be asked of the influence of the political thought of Rousseau. According to Dufour, it seems as though, contrary to the ideas widely disseminated by Conrad's thesis in the 1950s,[10] this influence was much more obvious in the development of civil marriage in German law than in French law. Dufour writes:

> Without contesting the role of the French Revolution in bringing in mandatory civil marriage, we do not think France should be held responsible, as was postulated by H. Conrad, of being the exclusive motivating force in the secularisation of marriage during the Enlightenment. On the contrary, we are convinced, as R. Derathé has demonstrated with respect to the sources of Jean-Jacques Rousseau's political thought, that the principal themes of the 18th century in the realm of natural law originated in Germany.[11]

Between 1791 and 1804, French Protestants were only passive observers of the secularisation of marriage. If they supported it at all, it was only tacitly, in a rather ambiguous way. Did they support the secularisation of marriage for purely political reasons? According to Jean Carbonnier, under the Revolution a form of 'objective alliance' was established between French Protestantism and the institution of civil marriage, for political and empirical reasons: civil marriage was what stood in the way of a return to marriage as a sacrament.[12] Or did they support it out of theological and ideological kinship? It seemed as if the Protestants were giving their 'blessing' to the secularisation of marriage, something that the provincial synods of 1788-1789 had radically opposed.

At the beginning of the nineteenth century, under the Empire, during the consultations for the drawing up of the civil code of law by Portalis (1802-1804), the process of the secularisation of marriage was finalised in the ruling that civil formalities take precedence. None of the Protestants continued to defend the doctrine of church marriage that had been proposed by the synods just before the Revolution. It is worth noting that through the 1804 'Code civil' (Napoleonic code), which was adopted by several European countries during the nineteenth century, the French version of the secularisation of marriage was exported to several European countries of Protestant leanings, notably the Netherlands and Switzerland. In France under the Revolution, therefore, the Protestant marriage procedure disappeared, giving way permanently to civil law, and thus the secularisation of marriage seems to have been finalised.

On the face of it, the figures seem to indicate that the Protestants had capitulated: in the eighteenth century only 164 synods or 'ecclesiastical assemblies' out of the 503 known to us, working semi-clandestine between 1715 and 1796, deliberated on the discipline of marriage (voting on nearly 413 measures). But after the French Revolution, the Empire and the resumption of synods, we find hardly any significant work on marriage before the synod of Dourdan in 1984.

1.2 Contemporary period: the downside of secularisation and the reactions of Protestant churches

After the secularisation of marriage, there was, in most Europeans countries, progressive separation between legal marriage (civil marriage) and Christian marriage (as the churches define it). In the contemporary period (i.e. over the last thirty years) this withdrawal has gained momentum, mostly because divorce has become commonplace and quite recently because marriage is no longer the prerogative of heterosexual couples.

This abrupt development later led the Protestant evangelical churches to ask questions, previously unheard of, concerning the continuation of the 'objective alliance' which had formerly linked Protestantism to the institution of civil marriage. But has this development not taken on such proportions that it is more proper to speak of opposition, or even of 'divorce' between the two? And, in church discipline, can the traditional position, which makes civil marriage obligatory, be held any longer? It is, of course, a legal requirement in France, but does Protestant theology support this? If a young couple were, for reasons of conscience, to request to make a commitment in church without contracting a civil marriage, could the church refuse to perform it?

In the realm of faith, which is caught between the concessions required by the duty to submit to temporal authorities and a wholesale sell-out (which would be a betrayal of God's law), what might lead the churches to adopt different modes of resistance, if not engage in civil disobedience? Has the time now come for Christians in Protestant churches to work towards the (re)creation of an ecclesiastical alternative to civil marriage[13] or for the setting up of parallel marriage ceremonies like the *mariage du désert* which would be justifiable in view of the problems we face in our times?

Faced with this development, which some see as a major turning point, how can the churches react? Unless they obey the national law and align their teaching on marriage with civil mores, following the example set by several Reformed churches with liberal tendencies (for instance, in the Netherlands and Switzerland), Protestant churches will have the choice between two stances. The first possible stance is to yield to the *temptation of withdrawal*, to distance themselves from the world or from society at large, and to separate notions of Christian marriage from civil society. By way of analogy, the church seems to be sailing in a kind of little dinghy that is still attached to the stern of the great ship, and it is in the process of discussing whether it should sever its moorings. The second stance could be to undertake a kind of audit or critical evaluation of civil marriage (which has not been practised in Protestant churches), which might allow churches to find some harmony between the legal requirements and church marriage; that could overcome some of the shortcomings so that Christians might marry in a way that honours *the national law and God's Law* in a satisfactory manner.

2. First stance: the church breaks away

2.1 The absence of legal recognition: the civil effects of marriage

If our churches adopted the first stance and yielded to the temptation to withdraw from society, the immediate practical problem to emerge would be that marriage (even between two Christians) *cannot dispense with legal recognition.* In order to have any 'civil effects' (see below), a marriage must be recognised by law and protected by a national legal system. Marriage may take on diverse forms at different times and in different cultures, but it has always been recognised as the fundamental structure of the social bond. Huguenots, more than other Protestants, know the value of this civil right, because for more than a century (i.e. after the revocation of the Edict of Nantes) they were denied it, a situation that they called 'civil death'.

So what are the civil and legal consequences of marriage? In the first place, it constitutes *a specific legal bond between the spouses* which varies in scope according to the country, and includes:

- the passing on of the surname (the rules on this issue are subject to change)
- the right of inheritance between spouses (total or partial)
- the right of the surviving spouse to receive pensions and other funds
- in France, the joint appointment of couples (for government appointees such as civil servants, teachers, military personnel, etc.) which is only done for legally married couples (or legal equivalents)

In the second place – this point would come first for French law – *the legal consequences of civil marriage are to establish the bond of direct descent* between each of the spouses and the children born of their union so that the children have a double filiation, both maternal and paternal. The main legal effect of marriage is what legal texts call 'the presumption of legitimate paternity', the *a priori* link for *all* the children who might be born to this couple (and not *a posteriori* on a case-by-case basis). Long ago Augustine noted that marriage was not merely about assuring the continuity of the human species, because for this purpose marriage would not be necessary:

> You deceive yourselves completely, if you think that marriage was instituted to compensate for the death of some by the birth of others. Marriage was instituted so that by means of the

> faithfulness of women, sons might be known by their fathers, and fathers by their sons. Certainly, children could be born of chance relationships, of any partner, but then there would have been no bond of paternity between fathers and sons.[14]

Marriage can be seen as guaranteeing the survival of the species, but it is especially a covenant which allows fathers and sons, or fathers and daughters, to recognise each other as such, and to live accordingly.

This is why, from time immemorial, a distinction has been made between legitimate and illegitimate children. This is an anthropological fact, maybe not universal, but at least a very widespread practice,[15] and biblical theology fully supports it. Human filiation is always more than a biological reality. It implies the decisive bond of adoption: though the biological bond might be absent, the legal bond cannot be.

2.2 Marriage by a state official?

Therefore, if Christians decided not to go through with the formalities of civil marriage, is there an alternative which could give their union the modicum of legal recognition which it needs? One could well imagine, for example, that a legal procedure could be carried out by a solicitor at the same time as a marriage ceremony in church, if the state accepted to delegate this authority to solicitors, in a similar way to handling probate. But in this case a difficulty would arise, which would quickly have a crippling effect on churches and what they are striving for: in most Western countries – and especially France – it is inconceivable that marriage rights would not be the same for all citizens. (The principle of the oneness and universality of republican law applies here.) In France, in particular, there has been a backlash, sometimes expressed violently, against any concessions to minorities or any legislation in favour of specific groups. This is why in 1999 the French government refused to entertain the possibility of a specific legal partnership for homosexuals, such as there is in other European countries. The government took the same stance more recently when passing specific legislation on same-sex marriage. By definition, marriage is 'one', the exclusive prerogative of the state.

There is another reason why the oneness of marriage law is important in Western countries, partly because of the problems posed by immigration and the rising influence of Islam. Imagine that, in a court of law in the French Republic, one of the parties should plead to being married on the basis of the law of another country. This is also a question of international law: in the case of 'mixed' marriage, or of immigration, which marriage law is to be applied to the settlement of conflicts or to social entitlements? What are the limits of the mutual recognition of marriages between nations? In the eyes of the law, marriage is not a private contract, but a social institution and its legal definition is the same for all. It is only in the manner of managing material goods that there are several options or 'matrimonial regimes'. Apart from this practical aspect, the marriage contract cannot be customised. If I were to introduce you to 'my wife', even though you didn't know her or anything about us, you would know precisely what was the nature of the bond that united us. This is not the case with a civil partnership, known in France as a Pacte Civil de Solidarité or PACS.

In concrete terms, this means that even if the members of our churches were to obtain the right to be married by a solicitor, their union would not be founded on marriage law. If specific clauses were included in the contract but not covered by common law (for example, should the couple exclude the possibility of divorce), they would not, in case of conflict, be recognised by any tribunal. The intended goal would thus not be reached.

Counterbalancing the idea of specific marriage for Christians is the reality of *mixed* marriage (meaning that the spouses are of different religions), which is of some importance from a sociological point of view, even if Protestant churches have always frowned upon it and their discipline condemns it. It was, for example, a major drawback of the Edict of Toleration of 1787 not to have taken the following question into consideration: Under which legal regime should two people of different denominations be married? Therefore, calling for our pluralistic society to recognise several types of matrimonial law is a process which is inevitably doomed to run into major political difficulties, and it is likely this would bring with it ramifications that churches would come to regret, notably with respect to Islam.

2.3 Can Christians dispense with legal formalities altogether? Human nature and the Christian condition

Should not vows alone suffice, in that they are made in the presence of God and in church in front of witnesses?[16] Why should we wish to involve the

state and public law in this 'matter'? Can Christian marriage not be 'privatised' totally or partially, that is, confined to the spheres of the family and the church?

With regard to society, first of all: marriage, as has been stated, is not simply an individual matter, but also a collective affair which has meaning beyond the sphere of the church. It has concrete consequences for the children, grandchildren, brothers and sisters of the couple, who may or may not or no longer be members of the church. For a marriage to be valid, it has to be recognised and legally protected outside the sphere of the church. We need to examine in greater detail the present health of civil marriage, which is in rather bad shape, and to analyse in what way civil marriage and Christian marriage could be combined so that when Christians marry they might honour both the laws of the land and God's laws. To ensure civil validity (for several generations), a marriage must be recognised and protected by common law.

Next, Christians must not delude themselves concerning human nature and the human condition by any form of spirituality, idealism or eschatological anticipation. Believers have not become angels nor are they exempt from the risks that render legal oversight necessary: they cannot live as if dashed hopes, the temptation of infidelity, the souring of conjugal relations, wandering from the faith, spiritual coldness, becoming lax in church attendance or even apostasy were impossible to those who today are committed Christians.[17] In the world and in the times in which we live, still marked by the Fall and the corruption of sin, marriage law must have clear rulings on the question of divorce.[18] Legal formalities may seem superfluous before the event, in the optimism that goes with a wedding or when people are deeply in love. But they become important, sometimes unexpectedly, *when conflict arises or when there is a deterioration in the relationship*, a situation that Christians are not spared even if they start off with the best of intentions.

The underlying soteriological and eschatological issue is that Christians remain human, subject to all the frailties of humanity, so their promises need to be reinforced by legal commitments, of which they might need to be reminded. We must accept Luther's perspective of *simul peccator et justus (et penitens)*. If we were angels, it would perhaps be otherwise, but in this age the church has not yet been perfected, so the legal framework has not yet been rendered obsolete or superfluous. God himself, whose promise alone would have been sufficient and whose Word is perfectly trustworthy, added an oath to his promise (Hebrews 6:13-20) in order to 'give us a supplementary proof of the immutable character of his promise', 'in order that by two immutable acts, by which it is impossible that God might lie, we should have a powerful encouragement, we whose only refuge is to seize the hope which is offered us'. Why bypass legal commitment? Is the word of Christians more trustworthy than that of God?

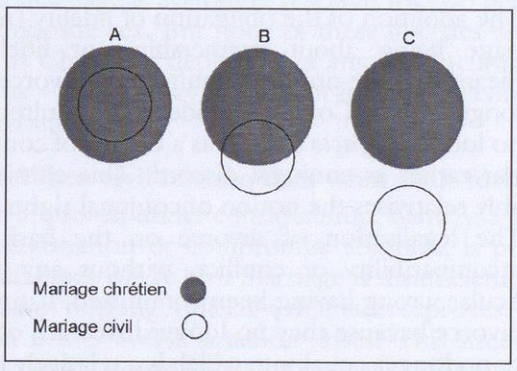
3. Second stance: complementarity

3.1 Can a complementary solution be found?

The second approach – which I believe to be more promising, as stated in the introduction – would consist in carrying out a kind of audit or critical evaluation of civil marriage in all the countries in which we live, which might permit churches to find a new harmony between the legal requirements and religious marriage so as to overcome some shortcomings.

We need to examine in greater detail the present health of civil marriage, which is in rather bad shape, and to analyse how civil marriage and Christian marriage could be combined so that when Christians marry they might honour both national laws and God's laws. In the matter of marriage, what does it mean for Christians to be 'in the world' without being 'of the world' (John 17:16, 18)?

We might represent the evolution in the relationship between Christian marriage and civil marriage in the modern era through the picture below: two concentric circles, then two secant circles, then two separate circles:



In phase A, the circle which represents the obligations of Christian marriage (dark grey) is larger

than that of legal marriage, as it has greater demands. There have always been discrepancies between church and state in the jurisdiction of marriage, in both Catholic and Protestant countries. In phase B, civil marriage gives up some of the requirements of Christian marriage and adds others of its own, which are in opposition to the Christian faith. In the hypothetical phase C, there would be a break and radical opposition between the two.

Our evaluation must take into account the following question: In our respective countries, where on the socio-cultural time scale is the secularisation of marriage located? Is it in phase A (civil law requires less than ecclesiastical law) or phase B (civil law imposes obligations which the Christian conscience reproves)? The question supposes a clear distinction, along the lines of traditional French Protestantism, between what public law authorises and what it imposes. It is only in the realm of what it imposes that conflict might arise.

3.2 The breakdown of civil law

There is no space to enter into detail concerning everything that has been modified in marriage law since it was taken over by the state after the French Revolution, namely, matters concerning parental approval, parental authority, the rights of women, divorce, adultery, age discrepancy between the partners, engagement, the legal age of marriage, etc. But over the last fifty years civil marriage law has been stripped of several factors to which Christian doctrine formerly attached fundamental value. Most of these factors concern the development of the *right to divorce*. (An essential part of marriage law is written in reverse, like a photographic negative, with the possibility of divorce in mind.) I mention four such developments:

1. The abolition of the obligation of fidelity (marriage being about partnership not fidelity) means that the notion of fault-based divorce no longer exists. Conjugal infidelity or adultery is no longer *de facto* treated as a breach of contact but rather as conjugal discord. This considerably relativises the notion of conjugal rights.
2. The legalisation of divorce on the basis of incompatibility or conflict, without any particular wrong having been committed. Couples divorce because they no longer love each other or no longer get along, which is a relatively new concept in law.
3. The removal of divorce from the jurisdiction of the courts: in some countries divorce can be pronounced by a brief administrative procedure. In France there is opposition to this administrative route; divorce still requires legal proceedings. But the fact that it can be obtained 'by mutual consent' means that the judge does not need to delve into the private lives of the petitioners. He only ratifies a decision on which the two parties have previously agreed.

Taken in isolation these three developments are not all negative; we must not darken the picture and we should remember where we came from and how society has evolved. (Remember the way in which adultery was handled in the nineteenth century, or the hypocrisy and tyranny that existed when divorce was not possible.) But one thing is certain: together these developments have made divorce a commonplace which casts a shadow over the institution of marriage. Even if marriage is still intended to be of lasting duration (this is made clear in the French Code Civil, formulated by Portalis, among others) it is seen more and more, practically speaking, as a contract (not unlike a business contract), and either party can annul it unilaterally at any time, by simply cancelling it (as with civil partnership or repudiation). In this way it has more and more come to resemble the 'contracts of limited duration' in French labour law rather than the 'contracts of unlimited duration'.

4. Finally, of course, the latest reform to date, and not the least important (many people see it as a real anthropological revolution): the suppression of *the distinction between the sexes* which brings with it a (downward) redefinition of marriage as a mere 'social recognition of love' (all former distinctions being discarded).

3.3 Christian theology can still endorse what remains

Such are the principal changes and modifications in civil marriage law, which Evangelical Protestant churches have had cause to regret. Yet this does not mean that civil marriage law, such as we know it today, does not retain some elements, even some positive elements, to which Christian theology can subscribe, even if same-sex marriage has become law. (In phase A these elements are represented by the central segment of the two concentric circles, since they are common to civil ideology and religious teaching.)

1. The requirement of *public announcement* and a background investigation, made public by the

publication of wedding 'banns', which amounts to a kind of *investigation into moral character* that mainly seeks to prevent bigamy and to make the information available to families, even if their formal consent is not required. We find ourselves here at the opposite end of the spectrum from secret marriage, a practice that Protestants have opposed for a long time.

2. The legal requirement of *monogamy* (in Western society, in any case): if it is discovered that a previous marriage has been concealed or that a prevenient divorce has not yet been officially finalised, a second marriage is considered null and void.
3. *Prohibition of incest*, a ban which still remains in effect today in spite of fears expressed recently by opponents of same-sex marriage. The definition of incest (and the prohibited degrees of kinship) has given rise to numerous differences of opinion and controversies especially between Catholic and Protestant teachings, for example regarding marriage between first cousins. However, the prohibition in its most restricted definition (that is, the nuclear family such as also found in the Pentateuch)[19] is not challenged in principle by either confession.[20]
4. The legal requirement of a *minimum age* (a fixed age of consent which excludes children) without which the freedom of consent would be deemed invalid; thus the need for free and conscious consent.
5. The legal requirement of *mutual assistance* between the two spouses, that is, mutual support, shared liability of debts, etc.
6. The legal requirement *to live together*. In France, marriages of convenience are subject to scrutiny when they are suspected of being a way to get over the immigration hurdles.
7. Finally, *commitment for life* ('until death do you part', in the British phrase; 'of lasting duration', to use the term coined by Portalis in the French Code Civil) and even beyond. This element might be surprising after what we have said about *divorce having become commonplace*, but the statute still exists in law: a marriage continues to be valid until the death of both spouses (as regards pensions, annuities... for the surviving partner) and even beyond, with regard to inheritance and the line of succession. The legal consequences of marriage are in effect permanent.

So we see that seven elements of marriage still survive in Western civil law which are also recognised as fundamental by Christian theology. It is in fact the Judeo-Christian tradition itself that inspired their presence in Western law. These requirements are a kind of residual continuation of its influence. Christians, having no real quarrel with these principles, have no *a priori* reason to refuse to observe them or even to consider that observing them might be optional. As and when on these seven points any national law is in conformity with that of God, it must be observed.

3.4 Churches can supplement civil marriage

The Christian ethics of marriage would certainly appear to be *more* demanding to believers than civil morality, not *less* demanding. What civil law imposes, however little, Christian ethics also imposes, but it adds further obligations that spring from its profession of faith and from its understanding of the analogy between earthly marriage and that of Christ and his Church.

Nothing would prevent churches from performing additional ceremonies of a specifically Christian nature for couples wishing to reinforce or renew their marriage vows; this would of course be in addition to the legal commitment made through the civil authorities and would in no way replace it. It would have to be understood – and this shows the limitations of the proposition – that anything going beyond the legal requirements is valid only on moral or spiritual grounds. No church ceremony could be presented as evidence in a court of law in the case of conflict.

In other words: Christians may deplore the fact that civil law has widened the scope of marriage, that it does not require more of marriage, that divorce has been made commonplace, that conjugal fidelity is no longer a legal requirement, or that marriage is no longer reserved for two people of opposite sex. But none of these liberties which we as Christians deplore is in any way incumbent on us – and so they would not in any way compel us to sin.

3.5 When civil law requires what faith forbids

The approach under consideration, namely, a kind of negotiation or compromise solution, is possible in cases where civil marriage is insufficient and requires nothing, officially, that faith reproves. But what if the reverse situation arises? This situation has already come about in history: in France, in the era of the *Désert* after the revocation of the Edict of Nantes, legal marriage entailed observ-

ing Roman Catholic practices which Protestants deemed unacceptable for reasons of conscience. They were forced to deny the faith, to attend mass and to take the sacrament which Protestant tradition regards as a form of idolatry ('this cursed idolatry', as the Heidelberg Catechism puts it).

In that period the obedience due to the ruler was in direct opposition with the obedience due to God (cf. Acts 5); obedience to the fifth commandment of the Decalogue (in deference towards the King as father of the nation) was in conflict with obedience to the first commandment, the commandment against worshipping idols. In this situation the Protestants in France resorted to civil resistance with regard to marriage. Between 1720 and 1787 their secret synods organised on a large scale what has been called the *mariage du désert*. I discovered that between 190,000 and 470,000 marriages were performed illegally in the *désert* during the period in question.[21] No civil rights were recognised for couples married in secret. The law did not recognise Protestant marriages so the couples were simply seen as cohabiting couples, with the result that their children were considered illegitimate and found themselves, by the same token, deprived of their right to inheritance in favour of their Catholic counterparts.

Rendering the *mariage du désert* obligatory, the secret synods called the Reformed people of France to singular forms of courage: to live in legal insecurity, accepting that the rights of the family would no longer be assured, as the price for their religious commitment, as an aspect of the cross they were called to bear, in keeping with the sacrificial spirituality of Huguenot martyrs. It was not just that these marriages had no legal validity, but even more significantly, couples entering into forbidden marriages were liable to prosecution, punishable by the strictest of sanctions. At best, these couples were subjected to heavy fines for 'flagrant cohabitation' and obliged to separate until they could be married (with proper accreditation) by a Catholic priest. In the worst cases, during the period of the most severe repression (circa 1750), they were hit with heavy penalties: the men were condemned to be galley slaves until death, the women had their heads shaved and were imprisoned for life, their children taken away by force and brought up in the Catholic faith in convents, their goods seized and sold in order to finance their Catholic upbringing. All for the crime of Protestant marriage!

The refusal to accept Catholic marriage came to be associated with the Protestant refusal to partake in the Eucharist; the refusal to abjure became a reason for the persecution of the Huguenots. But this civil disobedience, once again, arose from the fact that the law had required a commitment contrary to that which they thought to be genuine faithfulness to God. In particular, the law tried to force them into what they considered to be idolatrous practices in the worship they owed to God.

3.6 The future: developments in marriage law

If we try to look into the future, without trying to second-guess what might come about in ethics, we wonder what future marriage laws might require that would justify Christians refusing to submit to them. In the eighteenth century, royal law made the validity of marriage subject to religious obligations which Protestants deemed idolatrous, but these days we are far removed from a return to this type of confessional requirement, even if no legislation is ever truly neutral on the spiritual and ideological front.

In recent debates, some have expressed fears about future developments, for example, that...

- marriage will be legitimised for what are now considered incestuous relationships: between brothers and sisters, or in the direct line of descent;
- marriage will be redefined in terms of a 'community of choice and kinship', as a unit whose composition could vary, potentially open to all configurations; recognition of (multi)partnerships of every sort, the opening of marriage to a form of multisex polygamy;
- marriage will be transformed from a 'permanent contract' to a contract of limited duration, say for five years (renewable) or, more probably, that it becomes similar to a commercial contract, which either party could decide to terminate at any moment without needing the consent of the other partner;
- administrative divorce: the court of law could no longer mediate between spouses in conflict to protect the interests of those in a weak position, notably the female spouse (and especially with children) or the party who is lacking in financial means. The 'privatisation' of the couple would thus be complete.

But we note that in all these cases, except for the last, we remain in the sphere of permission or authorisation. So none of these developments would become, strictly speaking, mandatory.

4. Answers to criticism of the second position

Some Christians would object to this second approach, which relies on a strict distinction between what is authorised and what is imposed, for being based on rather superficial analyses and for affirming too rashly that what is required by civil law is in conformity with the law of God. I will look into these objections.

4.1 Has the residual content been misrepresented?

Should we Christians not be more radical and admit that the entire marriage law has been corrupted by the reforms discussed above? For example:

- Does the extension of marriage to two persons of the same sex not imply a *de facto* redefinition of marriage, for example as a 'social recognition of love'? Does this not corrupt legal marriage for all, whether homo- or heterosexual?
- If in the near future we were to see permanent contracts replaced by contracts of limited duration, we could say, superficially, that nothing forbids Christians from renewing them indefinitely. But we could maintain that, more to the point, the idea of a life-long commitment is from the very outset foreign to the contract, and is of another nature. The spouses, in this case, *lend* themselves momentarily to one another, but do not *give* themselves truly to one another. We have passed here from the evangelical notion of the 'gift' to the economic notion of the 'loan'. A life-long commitment is, from the start, something other than just a series of temporary commitments.
- If one day the family were to be redefined as a 'community of choice' or an 'association of kinship', the line of direct descent would lose an element of the legal objectivity which is essential to it. In the case of remarriage, for example, a step-father (the second spouse of the mother) would progressively take the place previously held by the legal, biological father. In case of dispute or of conflict, the wronged father could always claim his rights and object that such was not, from the outset, their conception of marriage. But in vain.

In all these cases, real or imaginary, we could object that the aspect of the commitment that is still possible in the framework of civil law is in reality of *another nature* than the commitment that was previously more extensive. A life-long commitment, from the outset, is something other than a series of temporary commitments.

4.2 Theology and politics

However, in closing, I am concerned about the conclusions that could be drawn from this radical criticism, if they were applied to the political sphere without any further adjustment. Christians cannot reason in absolute terms or ideals when it comes to politics, as they could regarding church discipline, for example. To distinguish between the state and the church implies allowing that the discipline of the church may be more demanding than that of civil society; on the other hand, submission to temporal authority could be seen as a relativistic compromise. Our society has no other vocation than to allow believers and unbelievers to live together in relative peace until the second coming of Christ, during which time the Gospel may be preached.[22]

A Reformer once said that there is no political law that could not be enriched by the Word of God (the salt of the earth). It is the vocation of Christian politicians to ensure that their voices be heard, to promote what they believe to be for the promotion of the common good. But that in no way means that they see the Bible as a sort of 'sharia' or Islamic law, or that they wish to submit the whole of society to ecclesiastical discipline. In the present time there is a fruitful dialogue between theology and politics, but no mingling. Theology and politics are not seen as one and the same thing in either the Koran or the Bible. This is not because of weakness on the part of Christians, as if they were going along with the de-christianisation of society, but it comes from a clear vision of what the Bible itself teaches concerning the nature of the present time in the eyes of God and *the distinct roles that he entrusts to the church and the state*. We must not confuse the present with what belongs to the age to come, or confuse the 'already' and the 'not yet' in our eschatological thinking.

Keeping in mind these distinctions, it will not come as a surprise to churches if marriage contracts, in the civil law of contemporary society, are not written in black and white, but rather in pastel shades, in relativistic terms that are out of sync with the law of God and ecclesiastical law. And this is not new! We must neither demonise the recent reforms nor idealise previous laws, as if an unprecedented revolution had taken place.

4.3 Limits to our duty to obey the civil authorities

In the theology of politics there is another question relating to the discipline of marriage: how do we as Christians consider the authority entrusted by God to temporal rulers and the civil authorities (who represent them) in the social sphere, and what is the nature of the submission due to them (Rom 13:1-7; 1 Tim 2:1-4)? In respecting the authority of civil government, is it not in some ways the authority of God that is respected? And how far does this duty of submission go? Where are the limits in Protestant thought that makes resistance to the authority of a king (should he turn tyrant) a duty of conscience?

The classic response, in what has been called Protestant 'monarchomachy',[23] is that God requires that Christians submit to temporal rulers in principle, as long as they do not impose acts or behaviour that God's law condemns. As long as the national law does not require disobedience to God's law and, in particular – and this is a sensitive point in Protestant tradition – as long as it does not interfere with freedom of worship, submission is due 'as unto the Lord'. It is only when this limit is transgressed that the rule of Acts 5:29 applies, 'We must obey God rather than men.'

For Protestants who see things from this classic perspective, the simple fact of having to make a critical evaluation of the marriage law, and feeling saddened by its impoverishment, and deploring its laxness and restrictions, does not exempt them from submitting to it for conscience's sake (Rom 13:5), that is, to honour the authority which God has given to the ruler in temporal things. In upholding the authority of the law, Protestants are also respecting the authority of God, even in such complex issues.

While saying this, I am fully aware that this political doctrine has been a subject of controversy amongst Protestants. Reformed people of orthodox leanings and those with a more radical stance have differed on the subject, even vigorously, which may explain the diversity of attitudes to the authority of the State in matters of marriage law in the Protestant groups represented at the present conference.[24] After several years of research on the Protestant discipline of marriage, I have come to the conviction that the very question of the duty of submission to the civil authorities plays a more important role than at first appears, perhaps even a decisive role. It is, in any case, one of the theological keys to the topic.

5. Conclusion

By way of conclusion, I pose some questions as starting points for debate.

- We all know, in our respective countries, of discrepancies (of more or less significance) between civil conceptions of marriage and religious/biblical ones; in some countries they may be on different points from the examples from France presented here. How do we cope with or manage these discrepancies today in pastoral ministry and church discipline?
- Do the members of our churches feel free to use all the freedoms which civil law affords them? Or do they want to adopt a more rigorous marriage discipline in the Church, to add stricter moral commitments to their civil commitments?
- How do we find a balance between the fine art of compromise (which the duty of submission to civil authorities authorises, or even imposes) and wholesale surrender (which would be a way of denying the evangelical ideal)?
- Where is the point at which Christians might be justified in breaking with civil marriage law and re-introducing the *mariage du désert*?

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Endnotes

1 Michel Johner, *Les protestants de France et la sécularisation du mariage à la veille de la Révolution française. Rabaut Saint-Étienne et l'édit de tolérance de 1787*, doctoral thesis in modern history, under the direction of Hubert Bost, Ecole Pratique des Hautes Etudes, December 2013. The thesis may be consulted at the Bibliothèque de la Société d'Histoire du Protestantisme Français in Paris (rue des Saint-Pères) or at the Bibliothèque de la Faculté Jean Calvin in Aix-en-Provence. Other publications by the author on the theme of marriage and the family: Michel Johner, *A quoi sert le mariage?* (Aix en-Provence: Kerygma, 1997); Michel Johner, *La célébration religieuse du mariage étendue au PACS et au concubinage?*, Collection Etincelles no 1 (Aix-en-Provence: Kerygma, 2002), also in *La Revue Réformée* 216 (2002) 1-22; M. Johner, 'La famille, produit culturel ou ordre créationnel fondateur?', *La Revue Réformée* 220 (2002) 27-52; M. Johner, *Divorce et remariage*, Collection Etincelles no 7 (Aix-en-Provence: Kerygma, 2006); M. Johner, 'La vocation chrétienne de la sexualité' in Paul Wells (ed.), *Bible et sexualité* (Cléon d'Andran / Aix-

en-Provence: Excelsis / Kerygma, 2005) 97-118, Italian translation by Antonio Morlino, 'Sessualità' in P. Bolognesi, L. De Chirico and A. Ferrari (eds), *Dizionario di teologia evangelica, Marchirolo* (Varese: Edizioni Uomini Nuovi 2007) 667-669.

2 This article is based on a lecture at the biennial conference of the Fellowship of European Evangelical Theologians (FEET), in Orsay near Paris, August 2014; English translation by Damon Di Mauro and Alison Wells.

3 To echo the phrase attributed to Luther in his *Table Talk*, 'marriage does not pertain to the Church, it is outside it, it is a secular matter, temporal, which pertains to the domain of officialdom'. Martin Luther, *Propos de table* (Paris: Éditions d'Aujourd'hui, 1975) II.347. For a more extensive analysis, see E. Doumergue, 'La pensée ecclésiastique et la pensée politique de Calvin' in *Jean Calvin, les hommes et les choses de son temps* (Lausanne: Georges Bridel, 1889-1927) V.394, 458-459; E. Stoquarte, *Le mariage des protestants de France* (Bruxelles, 1903) 291; P. Bels, *Le mariage des protestants français jusqu'en 1685, fondements doctrinaux et pratique juridique*. Bibliothèque d'histoire du droit et droit romain XII (Paris: Librairie générale du droit et de la jurisprudence, R. Pichon et R. Durand-Auzias, 1968) 89.

4 This measure, in force for more than a century, was tantamount to outlawing marriage for a group representing 5% of the nation.

5 Between 1781 and 1788 Joseph II adopted several different positions: 1) October 13, 1781: *La patente autrichienne de tolérance*; 2) January 16, 1783: *Mariages, Première ordonnance de l'empereur pour les états héréditaires d'Allemagne, Bohême, Autriche*; 3) September 28, 1784: *Second édit de l'empereur concernant le mariages pour les Pays Bas, Édit de l'empereur concernant les mariages du 28 sept 1784, signé à Bruxelles par Joseph II*, et *Ordonnance concernant les mariages considérés comme contrats civils et leurs conséquences pour toutes les sectes chrétiennes de nos États* ; 4) in 1788: *l'Édit prussien de religion* de 1788. For a detailed study, see Ch. Lebeau, 'La patente autrichienne de tolérance (1781) et l'édit prussien de religion (1788): vers la constitution du Saint-Empire?' in G. Saupin, R. Fabre and M. Launay (eds), *La Tolérance. Colloque international de Nantes (mai 1998). Quatrième centenaire de l'édit de Nantes* (Rennes: Presses universitaires de Rennes et Centre de recherche sur l'histoire du monde atlantique, 1999) 171-179.

6 When speaking of the 'secularisation' of marriage, we mean the process by which, in modern Western history, the formation of legal marriage (the 'matrimonial competence' as it is expressed in legal texts) is progressively withdrawn from the ecclesiastical authority and handed over to (or given back to, according to one's viewpoint) the temporal authority of the ruler (represented by the civil authorities) and the validity of legal marriage disconnected from all religious consideration.

7 The former marriages of the *désert* not being recognised by the new law, separated Protestants could seek to legalise their marriage with a new partner. In such cases, the synods said, divine law had to take precedence. Out of obedience to civil law Protestant Churches were to refuse to bless any union which had not been conducted by the suitable authorities. But not all the marriages legalised by the authorities were automatically recognised as 'blessable' by the church. The churches had no say in the legal definition of marriage, but they remained sovereign in 'imparting the nuptial benediction' on which the authorities had no say.

8 F. Fontez, *Les diverses étapes de la laïcisation du mariage en France*, the abridged text of a thesis on canonical law defended at the Gregorian university of Rome (Marseille: P. Fontez, 1972) 41.

9 A. Dufour, *Le mariage dans l'école allemande de droit naturel moderne au XVIIIe siècle,* Bibliothèque d'histoire du droit et du droit romain tome XVIII (Paris: Librairie générale de droit et de jurisprudence, 1972) 6.

10 H. Conrad, 'Die Grundlegung der modernen Zivilehe durch die französische Revolution', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* GA (1950) 336-372.

11 Dufour, *Le mariage dans l'école allemande*, 6; cf. F. Gauthier, *Triomphe et mort du droit naturel en Révolution, 1789-1795-1802* (Paris: Presses Universitaires de France, 1992).

12 In the history of France, which was marked by long painful conflicts, and in a society with a great disparity in numbers between the denominations, French Protestantism, he says, was 'forced to make an objective alliance with civil marriage'. Civil marriage was not an idol, but it was a victory. J. Carbonnier, 'La vertu du mariage civil' in *Couples d'aujourd'hui, réflexion protestante* (Paris: Les Bergers et les Mages, 1983) 37, 42, 45, 46; cf. J. Carbonnier, 'L'évolution contemporaine des mœurs', *Fac Réflexion* 16 (1990) 5-17; J. Carbonnier, 'L'amour sans la loi. Réflexions de psychologie sociale sur le droit de la filiation, en marge de l'histoire du protestantisme français', *Bulletin de la Société de l'Histoire de Protestantisme Français* 125 (1979) 45-75; J.Carbonnier, 'Terre et ciel dans le droit français du mariage' in *Le droit privé français au milieu du XXe siècle: Etudes offertes à Georges Ripert, Mélanges*, Vol. I (Paris: R. Pichon et R. Durand-Auzias, 1950) 325-345.

13 This would also be a return to a Catholic notion of ecclesiastical marriage.

14 Augustine, *De bono conjugali* 24.32, ed. by Patrick Gerard Walsh (Oxford: Clarendon Press, 2001); cited by E. Fuchs, *Le désir et la tendresse* (Genève:

Labor et Fides, 1999) 114.

15 Cf. Claude Lévi-Strauss, *Les structures élémentaires de la parenté* (1948); English *The Elementary Structures of Kinship* (1949). In this vast comparative fresco, Lévi-Strauss attempts to reunite under a single explanatory schema (the Testament) the great variety of marriage practices observed in human societies. According to Françoise Héritier, more liberal in her conclusions, there are six possible combinations of systems of filiation, of which four have been realised by human societies: unilinear (patri- or matrilinear), bilinear, cognation (ours). Every ideal system of filiation represents a particular montage of possible combinations, and eludes any necessity perceived as natural. Cf. www.humanite.fr/tribunes/francoise-heritier-rien-de-ce-qui-nous-parait-natu513170#sthash.td62Q7Ba.dpuf [accessed 18-07-2014].

16 Cf. the warnings in James 5 against oaths.

17 The assurance of salvation is not accessible without personal faith.

18 Or of its annulment/dissolution in the periods when there is no legal divorce.

19 The law against incest in the Pentateuch: Leviticus 18:6-18 mentions among the prohibited sexual relations: in verse 7 those of a son with his mother; in verse 8 those of a son with another wife of his father; in verse 9 with his sister or half-sister; in verse 10 with his grandchildren; in verse 11 with the children of another wife of his father; in verse 12 with his aunt; in verse 14 with his uncle's wife; in verse 15 with his son's wife; in verse 16 with his brother's wife; in verse 17 with a woman and her daughter concurrently; and in verse 18 with his wife's sister. Deuteronomy 27:20-23 mentions the relation with a father's wives (verse 20), with a half-sister and with a wife's mother (verse 23). The biblical law of the Levirate (Gen 38:6-10 and Deut 25:5-10) might seem to contradict the rule of Leviticus in commanding a man to take as his wife the wife of his deceased brother (cf. Lev 18:16), but this provides a key to the taboo on marriage between uncle and niece in that the uncle is presented as a sort of substitute father by default.

20 Before the legalisation of same-sex marriage, marriage was defined as the institution which makes a link between the joining of the sexes and successive generations.

21 See my doctoral research, cf. note 1 above, p. 625.

22 1 Timothy 2:1-2: 'First of all, then, I urge that supplications, prayers, intercessions, and thanksgivings be made for everyone, for kings and all who are in high positions, so that we may lead a quiet and peaceable life in all godliness and dignity.'

23 'The 'monarchomachs' (literally 'those who fight against the Sovereign') were Protestant theologians such as François Hotman (1573), Theodore de Beza (*Du droit des magistrats*, 1574) and Nicolas Barbaud (1574) who protested against religious tyranny. Soon after the Saint Bartholomew massacre they sought to define the limit beyond which it would be legitimate for people to oppose an unworthy government in open rebellion. They were agreed that there are cases when a sovereign must be impeached. They particularly promoted the idea that power must not be absolute, but accountable to the representatives of the people (later developed in the Puritan idea of a conventional foundation of political power) and resting on the basis of a Protestant understanding concerning the right and duty to resist. Cf. E. Doumergue, 'La pensée ecclésiastique et la pensée politique de Calvin', in *Jean Calvin, les hommes et les choses de son temps* (Lausanne: Georges Bridel, 1889-1927) V; M. Cottret, *Tuer le tyran. Le tyrannicide dans l'Europe moderne* (Paris, Fayard, 2009), chapter 3; I. Bouvignies, 'Monarchomachie: tyrannicide ou droit de résistance?' in N. Pique (ed.), *Tolérance et Réforme* (Paris: L'Harmattan, 1999) 71-98.

24 Cf. note 2 above.