

Legitimation of Children in the New Codex

Notion

In general terms legitimation may be defined as the gracious act of the competent authority, by which illegitimate children are, by fiction of the law, considered as legitimate fully or partially regarding the juridical effects of legitimacy. This may be effected through a prescription of the law or through a special administrative act of the Superior. Legitimation, at any rate, is regarded as a legal remedy to erase the juridical effects produced by the illegitimacy of origin. Children who were not conceived nor born in legal unions are, by fiction of law, considered as if they were conceived by or born of married parents. Compared with adoption legitimation is a product of nature and of law, while legal adoption merely creates by fiction of law a relation which does not in fact exist. In legitimation the law makes legal what exists by nature.¹

Legitimation may be considered in two aspects, namely, as a *juridical act*, inasmuch as the intervention of the competent authority to grant the favor is involved, or as a *legal favor* which equates, to some extent, the illegitimate offspring to the legitimate ones. Taken in the latter sense, legitimation is defined as

¹ Arturo M. Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines*, v. I, Manila, 1953. p. 520.

the favor granted to illegitimate offsprings extending them the benefits proper to the legitimate children. In other words, legitimation taken as a juridical act is the act of granting the benefit, while taken as a legal favor is the granted benefit itself.

In legitimation, taken as a juridical act, the offspring who owes life to an illegal union is considered, through a fiction of law, as if they were born of a legal marriage. Legitimation frees, so to say, the illegal children from the condition of being juridically illegitimate in regards to the juridical effects, assimilating them to the legitimate offspring. It is clear, however, that legitimation being a juridical act does not erase the condition of illegitimacy which is naturally attached to the offspring from its birth. Hence legitimated children are not, properly speaking, legitimate. The law gives them the privileges enjoyed by legitimate children, not the quality of being legitimate. One thing is legitimacy, another the effects that accompany the condition of being legitimate.²

Legitimation differs from acknowledgement, through which paternity and filiation, unknown before, are determined, without changing the juridical condition of the offspring. Parental recognition is according to some codes an essential requisite to obtain legitimation. Thus legitimation cannot legally be effected without parental recognition, though the opposite is possible. In Church's law, however, it is not so, since legitimation is effected without parental acknowledgement, as we will see later on.

Legitimation differs from legitimacy. Legitimated children are not legitimate. Legitimation does not grant the offspring the honor of legitimacy. It only assimilates the legitimated children to the legitimate ones in regards to all or some juridical rights derived from legitimacy. One thing is the quality of legitimacy, another the juridical effects derived from this quality. Legitimation does not erase the mark of having been born illegitimately. It only eliminates the juridical effects that follow that fact. In other words, legitimation annuls the effects of illegitimacy without erasing off the illegitimacy itself. Hence canon 1140 of the new Code declares that "as far as canonical effects are concerned,

² BAC. *Comentarios al Código de Derecho Canónico*, II, 1963, p. 682.

legitimated children are equivalent to legitimate children in all respects, unless it is otherwise expressly provided by the law".

Legitimation is twofold, namely *full* or *partial*. Full legitimation grants all the canonical and civil effects of legitimacy to the legitimated offspring; partial legitimation grants them only some of these effects.

Forms of Obtaining Legitimation

Legitimation can be effected in two ways, namely by concession of the law and by particular rescript of the competent authority. The concession of legitimation made by law implies the realization of an act, to which the law has implicitly attached the virtue of legitimating the offspring. The concession granted through a particular rescript is effected by a positive act of a competent Superior who, notwithstanding the illegal origin of the offspring, grants it the rights which are proper to the legitimate children. In the new Code there are two forms of legitimation granted by law, namely:

- a) the subsequent marriage of the parents;
- b) the convalidation *in radice* of the marriage of the parents.

The legitimation granted through the dispensation of diriment impediment admitted by the 1917 Code, in canon 1051, has been eliminated by the new Code.

Let us, therefore, discuss legitimation under the following headings:

- a) Legitimation through the subsequent marriage of the parents;
- b) Legitimation through the convalidation *in radice* of the marriage of the parents;
- c) Legitimation through a particular rescript.

I. LEGITIMATION THROUGH THE SUBSEQUENT MARRIAGE OF THE PARENTS

The first form or way of legitimation vinculated to a juridical act is the celebration of the subsequent marriage of the pa-

rents. The Church took this way of legitimating the offspring born outside of wedlock from Roman Law, according to which only the natural offspring³ could be legitimated by the subsequent marriage of the parents. It was Constantine the Great who, having in mind the legitimation of illegal unions and the welfare of the offspring, allowed in 336 that the *natural* children of a concubine may be legitimated by the subsequent marriage of the parents. This provision was confirmed by Justinian⁴. But it was only in the XII century when this form of legitimation was mentioned in the Church's legislation. The first Pope who spoke about it was Alexander III (a. 1159-1181) who declared: "The efficacy of marriage is such that the offspring conceived before its celebration can be regarded as legitimate after the same"⁵. Later Sixtus V declared on December 3, 1586: "We consider that the efficacy of marriage is such that . . . those who were conceived by two free persons who could, at that time, marry each other, may be considered as legitimate after the celebration of their marriage".⁶

Among the peoples of Germanic origin legitimation by the subsequent marriage was formerly unknown. It was unacceptable to them due to the practical inconvenience derived from it regarding the inheritance of the legitimated children. Gregory XI, mentioned by some authors in this regard, did not condemn their attitude; he only reproved their excessive and unjust practice of denying the legitimacy of the offspring *born after* the celebration of marriage⁷ with a woman who has given birth to an illegitimate child before such marriage.

The 1917 Code stated: "By the subsequent marriage of the parents, whether real or putative, whether newly contracted or convalidated, even only ratified, the offspring becomes legitimate,

³ Cfr. Wernz-Vidal, *Ius Matrimoniale*, 1925, n. 609.

⁴ § 13 Inst. de nupt. I, 10; L. 6, 10, 11. Cod. de nat. lib.; Novell. 12. cap. 4; Novel. 18. cap. 11.

⁵ "Tanta est vis matrimonii ut qui antea sunt geniti, post contractum matrimonium, legitimi habeantur" (C. 6., 4, p. 17).

⁶ "Considerantes, quod licet tanta sit vis et efficacia sacramenti matrimonii . . . ut qui antea geniti erant ex soluto et soluta, inter quos rite matrimonium constare poterat, post illud contractum legitimi habeantur" (Fontes I. C., Vol. I, p. 290).

⁷ Gregory XI. Const. *Salvator*. April 8, 1374. § 6, art. 10, 11. Wernz-Vidal, *l.c.* nota 19, n. 609.

provided the parents were able to contract marriage at the time of the conception, of the pregnancy or of the birth". The new Code retains this norm, though the last restrictive clause has been suppressed.⁸

Needless to say, only the offspring who has been born before the celebration of the marriage may be legitimated by the subsequent marriage of the parents. The child born after its celebration is to be considered as legitimate if the norms prescribed in canon 1137 and 1138 are fulfilled.

Marriages Effecting the Legitimation

When declaring that the subsequent marriage of the parents may effect the legitimation of the offspring, the legislator is very careful in pointing out which marriage can produce it. He says: "By the subsequent marriage of the parents, whether valid or putative". It has already been explained, when dealing on legitimacy, when marriage is to be considered as valid and when as putative. If marriage is the source of legitimacy, it is but natural that the favor of legitimation granted to those who do not share its benefits, be somehow vinculated to the celebration of the marriage of the parents.

Before the 1917 Code it was disputed whether a *putative* marriage could effect the legitimation of the offspring already born. Reiffenstuel and others denied this virtue to the *putative* marriage. Sanchez⁹ with some others sustained that the putative marriage could legitimate the offspring born before its celebration. If the offspring born of a valid or a *putative* marriage is regarded as legitimate, it is but logical to attribute to the putative marriage the efficacy of legitimating the offspring which was born before its celebration, as it is attributed to a valid marriage. After the 1917 Code there was no room for any doubt in this regard. The celebration of a putative marriage produces the legitimation of the offspring already born of the couple.

The 1917 Code had a restrictive clause regarding legitimation: "dummodo parentes habiles exstiterint ad matrimonium in-

⁸ Canon 1139.

⁹ Sánchez, lib. III. disp. 42. n. 2.

ter se contrahendum tempore conceptionis, vel pregnationis, vel nativitatis" (canon 1116). This clause has been suppressed in the new Code. In other words, the 1917 Code considered in canon 1116 only the legitimation of the *illegitimate natural* children, not the legitimation of the *spurious* children, while the new Code extends the legitimation through the celebration of the marriage of the parents to all illegitimate children, natural and spurious alike.

The old marriage law of the Philippines considered only the time of conception, not the time of pregnancy nor the time of the birth, as to the period when the parents must be qualified to marry each other, in order that their offspring may be regarded as natural children, and consequently capable to be legitimated. Article 269 stated: "Only natural children can be legitimated. Children born outside wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other, are natural". The new Family Code states in its Art. 177: "Only children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other may be legitimated."

Legitimation is actually effected when the marriage is celebrated, not when it could be performed. In this regard the legitimation arising from the subsequent marriage of the parents differs from the one produced by the convalidation *in radice* of their marriage. The latter retroacts the legitimation to the moment when the parents gave the original consent which was at that time inefficient due to the presence of a diriment impediment or due to lack of canonical form.

The norm contained in the civil legislation is more ample and generous in this respect than the one given by the Church's Code in canon 1139, since the former grants the subsequent marriage of the parents an actual retroactive effect in regards to the legitimation of natural children. Article 180 of the Family Code states: "The effects of legitimation shall retroact to the time of the child's birth". No doubt the intention of the legislator is to protect the welfare of the offspring. Some-

times the parents delay the celebration of their marriage with great harm to the children born before its celebration. In case of inheritance from relatives who died before the celebration of the marriage, the illegitimate children are deprived thereof, because they are not yet legitimated at that time.

How Legitimation is Effected

Legitimation according to the Church's law is produced *ipso facto*, by virtue of the law itself, only when the celebration of the marriage takes place. It is not retroacted to any moment before the celebration of marriage. The opinion therefore of Wernz-Vidal and Bank¹⁰ holding that "*legitimatio per subsequens matrimonium vim retroactivam habet, conditio iuridica prolis sic legitimatae aequiparatur conditioni prolis ex legitimo matrimonio ortae, idque a momento natiuitatis*" is not correct. The subsequent marriage of the parents does not produce any retroactivity in the legitimation of the offspring, as the convalidation *in radice* does. Nothing is said to this effect in canon 1139. It simply states: "*Filii illegitimi legitimantur per subsequens matrimonium parentum*". The legitimation, therefore, effected by the subsequent marriage cannot be retroacted to any time before its celebration. The new Family Code of the Philippines however gives retroactivity to the effects of legitimation. Art. 180 says: "The effects of legitimation shall retroact to the time of the child's birth".

There is no need mentioning legitimation expressly or otherwise on the part of the priest solemnizing or convalidating the marriage. Neither is it necessary to have any intention, desire and consent, or to perform any positive act either on the part of the parents or of the illegitimate children regarding the legitimation to be effected. Moreover, legitimation follows notwithstanding any possible refusal of either the parents or the illegitimated children. Once acquired legitimation is not lost even though other persons should impugn it. Art. 182 of the Family Code, however, states that legitimation may be impugned only by those who are

¹⁰ Wernz-Vidal, *l.c.*, n. 614; J. Bank, *Connubia Canonica*, 1959, p. 533.

prejudiced in their rights, within five years from the time their cause of action accrues”.

The old marriage law of the Philippines, however, expressly stated that the subsequent marriage of the parents will not produce the legitimation of the offspring, unless the former acknowledge the latter either before or after the marriage. Marriage itself was not considered as an implicit acknowledgement of the children born of them before the marriage celebration. An act distinct from the marriage itself was required by law in order to legitimate the offspring. Article 271 stated: “Only natural children who have been recognized by the parents before or after the celebration of the marriage, or have been declared natural children by final judgement, may be considered legitimated by subsequent marriage. If a natural child is recognized or judicially declared as natural, such recognition or declaration shall extend to his or her brothers or sisters of the full blood: Provided, that the consent of the latter shall be implied if they do not impugn the recognition within four years from the time of such recognition, or in the case they are minors, within four years following the attainment of majority”. And Article 281 stated: “A child who is of age cannot be recognized without his consent. When the recognition of a minor does not take place in a record of birth or in a will, judicial approval shall be necessary. A minor can in any case impugn the recognition within four years following the attainment of his majority”.

Though the canonical legitimation is automatically produced by the celebration of marriage itself, it should be observed, however, that the legitimation is not effected by any intrinsic virtue of matrimony, but by express disposition of the law, which has attached to the marriage celebration the efficacy of imparting the illegitimate offspring the rights that are proper to the legitimate children, except those effects denied perhaps by the law itself.¹¹ Consequently the legitimation cannot be regarded as an inseparable effect of marriage, since it is not produced by any intrinsic virtue of matrimony, but by concession of the law. Legitimation

¹¹ Canon 1140.

cannot be demanded in the civil forum for the temporal effects, unless it be recognized by the Civil Code.

The legitimation effected by the subsequent marriage of the parents presupposes that the filiation of the offspring is undisputedly certain, i.e. that the children to be legitimated were begotten by the couple who get married. The offspring, therefore, conceived by the woman with a man other than her husband cannot be legitimated in the ecclesiastical forum, even though a decree to this effect has been obtained in the civil forum. It is presumed, however, that the offspring proceeds from the couple, unless the contrary is proved. In case two men acknowledge the same child as their own, he is presumed to be the father who marries the mother of the child. It is, therefore, advisable even in the ecclesiastical forum that the couple make a declaration before or after the celebration of marriage, stating that the offspring already born is theirs.¹² Likewise, express mention to this effect should be made in the entry of their marriage in order that any future doubt be dissipated.¹³ This does not mean, however, that the express recognition of the father be necessary in order that the legitimation be produced. This is automatically effected, though perhaps it may remain unknown for lack of acknowledgement of the father. Since an express acknowledgement of the parents might be required by the Civil Code, we deem that the parish priests should ask the couple to make this acknowledgement in order that the legitimation may produce civil effects. Otherwise, the offspring could be deprived of the benefits granted by the law.

Aside from the above mentioned legal provisions of the old marriage law of the Philippines, there were others that refer to the way how the acknowledgement of the offspring by the parents could be made. Article 276 stated: "A natural child may be recognized by the father and the mother jointly, or only by one of them". And Article 277 said: "In case the recognition is made

¹² Knecht, *Derecho Matrimonial*, Madrid, 1932, p. 542.

¹³ Knecht suggests that the parish priest who solemnizes the marriage should draft a document whereby the contracting parties acknowledge the illegitimate children who will be legitimated by their marriage. In case the contracting parties do not know how to write, two witnesses should sign the written declaration (i.e.).

by only one of the parents, it shall be presumed that the child is natural, if the parent recognizing it had legal capacity to contract marriage at the time of the conception”.

It should be borne in mind, however, that a baptismal certificate or a Church's record for that matter is not a proof of recognition before the civil forum. Moreover, the written recognition signed by the father at the time of baptism and joined to the Church's records, is not acknowledged as a legal document, hence it is not a sufficient recognition. The only proof of recognition before the civil forum is the one stated in Article 278: “Recognition shall be made in the record of birth, a will, a statement before a court of record, or in any authentic writing”.

The purposes the legislator has in mind in attaching to the celebration of marriage this efficacy of granting legitimation to the children already born are various, namely: to show the great esteem and honor due to matrimony, to encourage the parents to legalize their union and to give the offspring the benefits that they would be deprived of if they were not legitimated. This confirms the fact that the Church regards matrimony as the fountain and source of legitimacy, and when this is wanting she tries to supply it through the legitimation by relating this to the celebration of marriage.

Effects of Legitimation

“As far as canonical effects are concerned, legitimated children are equivalent to legitimated children in all respects, unless it is otherwise expressly provided by the law”.¹⁴

It should be borne in mind that even in old times the legitimated children enjoyed the same rights as the fully legitimate ones. Their rights were for the first time restricted by Sixtus V in his Const. *Postquam* of Dec. 3, 1586, § 12, where he declared the legitimated offspring by the subsequent marriage of the parents debarred from the cardinalship, norm which was still in force in 1917 Codex.¹⁵ In the 1917 Codex the offspring which

¹⁴ Canon 1140.

¹⁵ Canon 232, § 2, 1o.

had been legitimated by the subsequent marriage of the parents were debarred not only from the cardinalship but also from bishopric, abbotship and prelatureship *nullius*.¹⁶

Though canon 1363, § 1 of the 1917 Codex forbade the admission of illegitimate children into the Seminary, the *Motu Proprio Pastorale Munus* of Nov. 30, 1963¹⁷ granted Bishops faculty to admit them, on condition that they were not adulterous or sacrilegious. Likewise, canon 542, 2o, forbade the licit admission of illegitimate children to the novitiate if they aspired to the priesthood. This applied also to the admission into a religious Institute, if its constitutions required legitimacy even for those who did not aspire for the priesthood. It should be borne in mind, however, that illegitimacy, as an irregularity, ceased to be through the solemn religious profession, according to the 1917 Code, can. 984, 1o. By virtue of the faculty n. 36 of the *Pastorale Munus* the Bishops could, if requested by the competent religious Superior, dispense from the impediment into the novitiate. However, it should be taken into account that the irregularity subsisted as long as there was no dispensation from it.

On Nov. 6, 1964 the Holy See granted the Superiors General of clerical religious Institutes *iuris pontificii* and the Abbots President of Monastic Congregations the faculty of dispensing from the impediment which precluded the admission of illegitimate children into the religious state, including those who aspired for priesthood, except only the sacrilegious and adulterous.¹⁸ Similar faculty was granted to the Supreme Moderators of lay Institutes, on May 31, 1966.¹⁹ The new Codex has suppressed all these restrictions by equating the legitimated children to the legitimate ones. Whether the legitimation effected by the subsequent marriage of the parents produces or not any effect in the civil forum, depends on the legal prescriptions of each country.

The new Family Code of the Philippines states in its Art. 179: "Legitimated children shall enjoy the same rights as legitimate children." And Art. 180 reads: "The effects of legitimation shall retroact to the time of the child's birth."

¹⁶ Canons 331, § 1, 1o: 320, § 2.

¹⁷ AAS, 56, 1964, pp. 5-12, I, n. 31.

¹⁸ AAS, 59, 1967, pp. 374-378, I, n. 7.

¹⁹ AAS, 59, 1967, pp. 362-364, I, n. 1.

II. LEGITIMATION THROUGH THE CONVALIDATION "IN RADICE"

Notion

The second way or form of legitimating the offspring is the convalidation "in radice" of the marriage of the parents. The convalidation "in radice" of a marriage implies: a) a dispensation from the possible diriment impediment; b) a dispensation from observing the canonical form if this was not observed before; c) a dispensation from the obligation of renewing the consent when this virtually perseveres; d) the convalidation of the marriage itself and, e) by a fiction of law, retroaction as regards the canonical effects. The convalidation *in radice* of the marriage takes place only when the favor has been granted. The retroaction, however, is understood to reach back to the beginning of the invalid marriage, unless the contrary be stated.²⁰

The root or basis of a marriage is the consent of the contracting parties, since only the consent is the efficient cause of the marital bond created through the marriage contract, and no human power can supply this consent.²¹ The consent of the contracting parties, however, is juridically ineffective whenever marriage is contracted with a diriment impediment or when marriage is contracted without the canonical form. Notwithstanding this fact, the consent of the contracting parties, once given, is presumed to persist virtually until it be expressly revoked.²² This is the reason why to convalidate a marriage "in radice" the renewal of the consent is not necessary. Presumed to persevere virtually, the consent becomes active and effective to create the marital bond, when the diriment impediment has been removed or the defect of canonical form has been dispensed.

A diriment impediment has two effects, one depending from the other, namely: 1) it renders the consent, which is naturally sufficient, juridically ineffective to produce the marital bond; and 2) creates the illegitimacy of the offspring, save only

²⁰ Canon 1161, §§ 1-2.

²¹ Canon 1057, § 1.

²² Canon 1107.

in the case of a *putative* marriage. When the marriage is convalidated *in radice*, the diriment impediment of ecclesiastical origin or obex contrary to the validity of the marriage is removed, thus leaving the marital consent, which virtually perseveres, free to create the marriage bond. Since the convalidation *in radice* implies also, by fiction of law, the retroaction of matrimony to the past in regards to the canonical effects, the legitimation of the offspring is pushed back to the past, i.e., to the moment when the mutual consent of the parents was originally given.

It is always implied in the convalidation *in radice*: a) that the consent, as originally given by the contracting parties, was naturally sufficient, and b) that this consent has not yet been revoked by either of the contracting parties, but continues existing virtually. Otherwise, the matrimony could not be convalidated *in radice*, but it should be convalidated in the normal way, according to law.²³

The prescribed canonical form affects the validity of marriage.²⁴ When this form is not followed, the matrimony is null and void. Since the canonical form has been prescribed by the competent authority, it may be dispensed from by the same authority. Its dispensation is implied in the convalidation "*in radice*."

The *simple convalidation* and the *convalidation in radice* resemble in that, through them both, an invalid marriage becomes valid *ex nunc*, i.e., once the diriment impediment is removed or what was wanting is supplied. They *differ*, however: a) *in the way* they effect its validity. In the simple convalidation, the validity of marriage is produced by the renewal of the consent which is required by the Church,²⁵ even though the one given before was naturally sufficient and it perseveres up to the present. In the convalidation *in radice* the validity of marriage is effected *ipso facto* by the concession itself. The law dispenses from any renewal of the consent, which while not retracted perseveres virtually. b) *In the effects* they produce. The simple convalidation does not have any retroactive power. Its effects start at the moment the marriage is convalidated, *ex nunc*. The convalida-

²³ Canon 1156 and ff.

²⁴ Canon 1108, § 1

²⁵ Canon 1156, § 2.

tion *in radice* renders the marriage valid *ex nunc*, but its effects are, by fiction of law, considered as produced *ex tunc*, i.e., from the moment the marriage was invalidly celebrated.

Convalidation in radice of marriage and retroaction of the canonical effects.

The convalidation *in radice* creates the marital bond *ex nunc*²⁶, i.e., at the moment when the favor of convalidation is granted by the authorized superior, since only then the diriment impediment or obex contrary to its validity is removed or dispensed and the consent given before, still subsisting, becomes juridically effective. The consent, which was dormant so to say, while the impediment or obex existed, becomes efficient when this obex is removed. However, the juridical effects of marriage, the legitimation of the offspring included, are, by a legal fiction of law, placed backwards *ex tunc*, i.e., at the moment when the consent was originally given by the contracting parties²⁷. Through this legal fiction the marriage is considered as if having been validly contracted at that time, but only for its juridical effects, not for its objective validity.

Since the convalidation *in radice* does not require a new celebration of the marriage, it is convenient and important to determine the precise moment when it becomes valid. Canonists point out said moment by saying that the void marriage becomes valid *ex nunc*, i.e., at the moment when the competent Superior grants the favor of the convalidation *in radice*. In this regard it is important to distinguish the two kinds of convalidation granted, namely, *gracious* and *commissory*. The former takes place when the Superior grants directly the favor to the petitioner, without any intermediary; the latter is given through an intermediary who in turn may grant the favor to the petitioner either *necessarily*, once he finds out the petition to be true and reasonable,

²⁶ Cfr. Wernz-Vidal, *l.c.*, n. 658, footnote 12; Gasparri, *De Matrimonio*, II, 1932, n. 1208.. Some authors, Barbosa among them, held that the convalidation of marriage took place *ex tunc*, taken the real and objective convalidation for the fictitious created by law.

²⁷ Canon 1162, § 2. Cfr. AAS. v. I. p. 190; Wernz-Vidal, *l.c.*, nn. 670 and ff.

or *freely* if he is given a free hand in granting or denying the favor according to his best judgment.

When the favor is granted *graciously*, or when it is *commissioned necessarily* to the executioner, the convalidation *in radice* is actually effected at the moment when the Superior grants it; if the favor, however, is commissioned to the executioner in a way that the latter may grant or deny the favor, the convalidation *in radice* is effected only when the executioner acts favorably upon the petition²⁸.

There is no need of mentioning the legitimation of the offspring, when this is granted in a gracious form, because it will be automatically effected through the concession itself. Unless expressly excepted, legitimation is produced once the convalidation *in radice* of the marriage takes place.

The retroaction of the convalidation *in radice* regarding the juridical effects, among them the legitimation, to the time when the marriage was invalidly celebrated, is effected through a fiction of law. To realize this it is important to see when a legal fiction can be invoked. The object of a fiction is not a real, but only a possible fact, created by the law itself in order to produce certain juridical effects. Thus, a void marriage which was invalidly celebrated 10 years ago is not only fictitiously but actually null and void till it is convalidated. The convalidation *in radice* gives value to a void marriage, but it cannot change the fact of the marriage having been null and void for 10 years. That is why the validity of a marriage which is convalidated *in radice* takes place *ex nunc*, i.e., at the moment it is convalidated, not before. In other words, the marriage which up to now has really been void starts being actually valid *from now on*. Likewise the children who were born during these 10 years have been certainly illegitimate. If their illegitimacy was, during that period, the origin or cause of any juridical relation, say of a void canonical provision of an ecclesiastical office, the Church cannot make such a juridical relation not to have taken place invalidly. The reason is

²⁸ There is no concrete form of executing the concession of convalidation *in radice* of a marriage. The following form may serve the purpose: "By virtue of the faculty granted to me by the Holy See, I convalidate your marriage *in radice* and declare your offspring to be legitimated."

simple. Past events or facts are irrevocable and unchangeable. They cannot be changed in their real and objective entity.

Though it is impossible to undo past events or facts, it is nowever juridically possible to consider them, by a fiction of law,²⁹ as different from what they are. For instance, a marriage which has been null and void for 10 years due to the existence of a diriment impediment established *by the Church*, can be considered, by a fiction of law, as if it were valid from the beginning, and it can be granted the juridical effects of a valid marriage. A different thing would be if the nullity of marriage derived from a diriment impediment of divine law from which the Church cannot dispense.

This is what exactly happens in the convalidation *in radice* of a marriage. The marriage becomes valid *ex nunc*, when the favor of convalidation is granted. But, by a fiction of law, its validity is retroacted for its effects to the moment when the contracting parties gave invalidly their original consent. The juridical effects are granted from that moment, *ex tunc*³⁰ as if the marriage were validly contracted at that moment. The legitimation of the offspring is not an inseparable effect of marriage. It does not necessarily presuppose the validity of marriage. Legitimation is simply a concession of law, which ordinarily is attached to the celebration of marriage, but it can also be granted without any celebration of the marriage contract.

Once the convalidation *in radice* is granted, the children are to be regarded as legitimated since birth. They are considered as if born of a legitimate marriage in regards to the juridical effects. The juridical relations that start existing after the convalidation are not affected by the past illegitimacy. Those, however, that sprang from the illegitimate birth and had fully materialized cannot be altered anymore, since they are *facts of the past* that cannot be undone.

²⁹ By fiction of law it is considered as existing something which does not exist, i.e. that a child was born of a valid marriage when it is certain that such marriage was null and void. Fiction of law is different from presumption which considers as existing what is believed to be so considering some reasonable arguments. Fiction does never conform with the reality, presumption quite often does.

³⁰ Wernz-Vidal, l.c., n. 658, footnote 12; Gasparri, l.c. n. 1427.

What to say about the offspring born of a putative marriage, which is convalidated *in radice* once both parties become aware of its nullity? The offspring conceived or born while the marriage was still putative are undoubtedly *legitimate*, according to canon 1137. But those conceived after their marriage ceased to be putative and before its convalidation *in radice* are *illegitimate*, and will be legitimated by the marriage convalidation *in radice*.

Kinds of Convalidation in radice. — The convalidation *in radice* of a marriage in regards to the juridical effects it produces, can be either *full* or *partial*. The convalidation is *full* when with the dispensation from the diriment impediment and from renewing the marital consent the retroaction of the canonical effects is granted to the beginning of the invalid marriage, as explained above. The *partial* convalidation *in radice*, however, is twofold: a) either the concession of the favor fixes a time for its effectivity between the celebration of the invalid marriage and the concession itself, (can. 1162, § 2), or b) the dispensation from the impediment or from the renewal of consent is granted without any determination whatsoever.³¹

Sometimes the convalidation *in radice* is impossible. Such is the case when one or both contracting parties became insane or are already dead. In such cases the canonical effects, especially the legitimation of children are granted through a special rescript. There is no convalidation of marriage, but only the legitimation of the offspring is granted.³²

There is no certainty as to when the Church started granting the convalidation *in radice* of matrimony. In the Decretals there was no mention of this kind of convalidation. The first convalidations *in radice* mentioned in the Church's history are those granted by Boniface VIII in 1301.. Since the XVI century they have been and still are frequent.³³

³¹ Wernz-Vidal, *l.c.*, n. 659. Gasparri, *l.c.* n. 1212.

³² Wernz-Vidal, *l.c.*, n. 661. Gasparri, *l.c.* n. 1515; Gougard, *De Matrimonio*, Mechliniae, 1937, p. 626; Nájera, *El Código de Derecho Canónico*, II, 1944, pp. 403-404.

³³ Cfr. BAC. *l.c.*, p. 734, footnote 25.

Effects

The legitimation obtained through the convalidation *in radice* may differ from the one effected by the subsequent marriage of the parents. The latter is clearly described by law in regards to the persons benefited by the legitimation and in regards to the rights granted to the person or persons legitimated.³⁴ In the 1917 Code not all illegitimate children were legitimated. The new Code grants the legitimation to all illegitimate children without any distinction. They are given the rights of the legitimate children, unless otherwise established by law. The legitimation, however, effected by the convalidation *in radice* extends to all the *illegitimate* children, *natural* and *spurious*, unless the Superior who grants the concession, expressly makes an exception. In regards to the rights granted, the terms of the concession should be considered. If nothing is stated, the rights granted to the legitimated children are those stated in can. 1140.

Whether this legitimation effected by the convalidation *in radice* is acknowledged or not in the civil forum, will depend on what the local legislation states. Except for the Vatican State and countries that accepts the Church's legislation, no nation will acknowledge this legitimation as regards to the civil effects. The old discussion regarding this matter has no practical value nowadays. Hence, the effects of this legitimation will be limited to the canonical rights extended to the legitimated children as stated in can. 1140.

III. LEGITIMATION BY PARTICULAR RESCRIPT

Description

The legitimation of children as the one granted by the Church's law through the subsequent valid marriage of the parents and through the convalidation *in radice* of their marriage can also be granted by the competent authority through a positive concession

³⁴ Canons 1137 and 1140.

in particular cases. There is no need that this concession be dependent on the celebration or convalidation of the marriage itself. This way of granting the legitimation was expressly mentioned in canon 1051 of the 1917 Codex. Though the contents of this canon do not appear in the new Codex this does not mean that a similar concession might not be extended to this effect. The suppression of said canon 1051 affects the particular cases covered by the same and the way the legitimation was effected. Obviously canon 1051 referred to the rescripts granted by the Holy See in *commissory way*, i.e., through an intermediary. But the power of the legislator in granting similar concession is obviously not denied. Moreover, canon 1139 says clearly that legitimation may be obtained through a rescript of the Holy See.

This way of legitimating the offspring existed already in Roman Law. Justinian, for instance, extended the possibility of legitimation of children to the direct concession of the lawmaker when the offspring could not be legitimated by the marriage of the parents. He excepted, however, the incestuous and adulterous children from this privilege. The Decretal *Per Venerabilem* of Innocentius III is the first ecclesiastical document mentioning this way of legitimation "per specialem indulgentiam Domini Papae."³⁵ Innocentius IV pointed out with authority and precision some exaggerated opinions on the matter.³⁶

Way of requesting and granting it

The legitimation of children through a particular rescript is usually requested by the parents when their offspring can not be legitimated by the subsequent celebration or by the convalidation *in radice* of their marriage.³⁷ They address their petition directly to the Holy See or course it through their local Ordinary.

What we have said in regards to the concession of convalidation of marriage *in radice* in a *gracious* or *commissory* way applies in whole to the legitimation by a particular rescript. The

³⁵ Cited by Tancredus, *Summa*, p. 106; Cfr. Wernz-Vidal, *l.c.*, n. 609.

³⁶ Cfr. Wernz-Vidal, *l.c.*, n. 809.

³⁷ It happens when marriage is simply convalidated, not *in radice*, or it could not be contracted due to one parent's death (Cfr. Bank, *l.c.*, p. 531.)

gracious concession of legitimation takes effect upon the concession itself. But when the concession is done through an *intermediary* we have to make a distinction. If the intermediary is commissioned to effect the concession *necessarily*, the concession takes effect the moment it is granted. If the intermediary, however, is given a *free hand* in granting or denying the favor according to his best judgment, the legitimation is effected when the intermediary actually grants it.

Effects

We have already said that legitimation is not effected by any intrinsic virtue of marriage, but by an express disposition of the lawmaker, who can grant this favor through the celebration or convalidation *in radice* of the marriage of the parents, or through a direct concession without any connection with the matrimony. The legitimation granted by particular rescript is not restricted to the natural offspring as some authors held in the past. All illegitimate children can be legitimated — natural and spurious children alike.³⁸

The juridical act of legitimating eliminates all or some canonical effects created by the illegitimate origin of the offspring. The Church can do this. The extension of the legitimation granted has to be drawn from the text of the concession itself. It may be full or partial, granting all the effects of legitimate children, or only some of them.³⁹

The legitimation effected by particular rescript does not have any effect in the civil forum. Only countries that have an agreement through a Concordat with the Vatican State in this regard will acknowledge this legitimation.

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³⁸ Benedicto XIV, *Redditae Nobis*, Dec. 5, 1744, §40; ASS, 16, 461; 17, 213.

³⁹ Cfr. Wernz, *l.c.*, n. 687.