

The Concept of Marriage In the Family Code of the Philippines and Its Parallels in Canon Law

By:

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Justice Makasiar stressed that marriage is a social institution whose sanctity is recognized by the State, and is not a matter within the exclusive jurisdiction of the church.¹ Both institutions respecting the independence of each other, each nonetheless "serves the personal and social vocation of the same human beings. This service can be more effectively rendered for the good of all, if each works better for wholesome mutual cooperation, depending on circumstances of time and places."² This implies the recognition by the State that the Church has a juridical personality equipped with laws to foster solidarity of the family, the basic unity of society:

"The Creator of all made the married state the beginning and foundation of human society; by his grace he has made of it too a great mystery in Christ and in the Church (Eph.5,32), and so the apostolate of married persons... has a special importance for both church and civil society."³

Great cooperation between the State and the Church is needed to develop our families spiritually, morally and materially in solidarity. Family solidarity is a national virtue well-enshrined in our 1987 Constitution:

¹*Famil vs. Teleron*, 86 SCRA 419.

²*Gaudium et Spes* (GS), no.76. Cf. The edition used is that of Austin Flannery, O.P., *Documents of Vatican II*, (Pasay City: Daughters of St. Paul, M.Manila, 1986).

³*Dei Verbum*, no. 11.

"The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic social institution. It shall equally protect the life of the mother and the life of the unborn from conception."⁴

Human conditions change. That is why laws, whose life is logic and experience, must also be adjusted in step with human realities and for the common good, by the sovereign. Among the legal revisions of this decade is the Family Code of the Philippines which was promulgated on July 6, 1987 by Executive Order No. 209 as amended on July 17, 1987 by Executive Order No. 227, and which took effect on August 4, 1988. The Code in effect revises nearly totally the 1950 Civil Code, book one on Persons and Property Relations. Then the Catholic Church promulgated the new Code of Canon Law on January 25, 1983 which took effect on November 27, 1983. Both Canon Law and the Family Code have substantial revisions of law concerning marriage, hence, this comparative study is undertaken.

I. DESCRIPTION AND NATURE OF MARRIAGE

A. *Family Code*

The Family Code describes marriage as "a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this code." (Art.1)

The basic elements of marriage as described by Article 1 are:

1. *Marriage is a special contract.* In ordinary contracts, the terms are determined by the parties. In marriage, the contract establishes between the parties a social or domestic relationship, that of husband and wife; the obligations arising therefrom do not come from the parties, but are the creations of law.⁵ It is more than a civil contract. Upon cohabitation, it ripens into a status, which affects the parties thereto, their posterity and the whole community.⁶ What can be stipulated by the parties are only their property relations.

2. *It is a permanent union.* The nature of union in marriage is permanent. The parties cannot stipulate to live together for a fixed period only, and then they marry again.⁷ Marriage is a contract *sui generis*,

⁴The 1987 Constitution of the Philippines, Article II, Section 12.

⁵Adams vs. Palmer, 51 Me 480.

⁶Richardson vs. Richardson, 246 Mass.363-354.

⁷Ernesto L. Pineda, *The Family Code of the Philippines Annotated*. (Quezon City: Central Lawbook, 1989).

differing in notable aspects from ordinary contracts chiefly because it cannot be dissolved by the parties, but only by the sovereign power of the state and for valid causes.⁸ It creates a civil status not subject to dissolution by mere agreement of the couple, unlike ordinary contracts.⁹ Marriage is an inviolable social institution. Therefore, it is subject to state regulation as to its nature, consequences and property rights.¹⁰ Marriage being permanent and the most important of all civil relations, the law will not lightly allow any inducements that will disturb it.¹¹

3. *The union is between a man and a woman.* Two males cannot marry each other; neither two females. Family life directed to procreation cannot spring from such union. It is against nature

4. *It is entered into in accordance with law.* Marriage is an institution of society regulated and controlled by public authority.¹² The public has an interest in marriage. This is shown by the safeguard which the statute has thrown around the contract.¹³ The nature and incidents of the status are governed by law and not by the will of the parties.¹⁴

5. *Its purpose is the establishment of conjugal and family life.* Marriage is the voluntary union for life of one man and one woman who take each as husband and wife and who discharge towards each other the duties imposed by law upon their conjugal life.¹⁵ The rationale of the phrase "establishment of conjugal and family life" is that there may be a marriage entered into by parties who are beyond their reproductive years, for companionship.¹⁶

B. Canonical Parallel

Canon 1055 states: "The marriage covenant by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children has, between the baptized, been raised by Christ the Lord to the dignity of a sacrament.

Consequently, a valid marriage contract cannot exist between baptized persons without its being by that very fact a sacrament.

⁸Corpus Juris 1275.

⁹John W. Morland, *Keezer on the Law of Marriage and Divorce* (Indianapolis: Bobbs-Merrill, 1946), p.260.

¹⁰*Neilson vs. Kilgore*, 145 U.S.487.

¹¹*Welch vs. Mann*, 92 S.W.98,101.

¹²*State ex rel. Foster vs. Andus*, 135 Fla. 59.

¹³*Bacon vs. Bacon*, 85 N.C. 1030; 43 Ind.App.218.

¹⁴*Jimenez vs. Republic*, 1091 Phil. 273.

¹⁵James A. Ballentine, *Law Dictionary with Pronunciations* (Rochester, N.Y.: Lawyers' Cooperative Publishing, 1948), p. 797.

¹⁶Alicia Sempio-Diy, *Handbook on the Family Code of the Philippines* (Quezon City: Joer Printing Service, 1988), p.1.

Like the Family Code, the provision isolates marriage from the notion of an ordinary contract; marriage is a covenant and a sacrament. As a covenant, it is a "solemn compact" between the man and woman, who are both covenantor and covenantee to each other, to observe the object of their mutual marital consent, as well as the duties and responsibilities attendant thereof. The distinction of marriage from an ordinary contract lies in the fact that in ordinary contracts, the parties determine the purpose, the subject and the stipulations of the contract, while in marriage, the parties have nothing to do regarding determining the substantial elements thereof -these are already determined by the "author of nature himself."¹⁷

We find the following elements of Canon 1055:

1. *Marriage is a covenant.* The notion of covenant in Christian marriage sinks deeper than that of an ordinary contract. The term "contract" is viewed "as a legal concept with emphasis on the law and not on the theological and personalistic dimension of marriage."¹⁸ Hervada¹⁹ explains that in marriage, the object of consent is no other than the man and the woman in their conjugality or maybe in their natural potencies of sex insofar as they relate to the ends of marriage. Simply said, through the conjugal covenant the woman gives herself to the man and the man gives himself to the woman as spouse, and both accept each other as such. In canon 1061,1 this reciprocal self-giving which is perpetual and exclusive is perfected when the spouses will have done between themselves in a human manner the conjugal act which through itself is apt for the procreation of children towards which marriage by its own nature is designed and by which the couple become one flesh.

2. *It is entered into by a man and a woman.* It cannot countenance any homosexual marriage, and is founded on God's creating man male and female whom He blessed to increase, multiply, fill the earth and conquer it. (Gen.1,27-28).

3. *In marriage, the spouses establish a partnership of the whole life between themselves.* This partnership is the bonum coniugum, the good of the spouses. We see here the emphasis on the personalist rather than the contractual, outlook of marriage, the "mutual exchange of love, married love as the source of the institution; the need for growth in this love within the sacrament itself..."²⁰ The personalistic doctrine of Chris-

¹⁷Andrew Quinn, "Defects in Marriage Consent," in *The Jurist*, Vol.V, p.535.

¹⁸Florencio Testera, O.P., "The Nature of Christian Marriage" in *Philippiniana Sacra*, Vol.XXI, No.61, January-April, 1986, p.60.

¹⁹J. Hervada, *Código de Derecho Canónico*, p. 629. Cited in *Sacrae Rotae Romanae Decisiones*, Coram Palestro, March 13, 1987. Published in *Monitor Ecclesiasticus*, Vol. CXIII, Series XXIII (1988), p. 487. Henceforth, the abbreviation SRRD and ME will be used.

²⁰Rev. Ignatius Kelley, OFM, "The Church's Understanding of Marriage" in *Studia Canonica*, Vol. IX (1975), p. 278.

tian marriage is anchored in *Gaudium et Spes*, paragraph 47-52, with specific stress on paragraph 48 which describe marriage as "an intimate partnership of life and love," which only mature persons are capable of undertaking. That is why, ecclesiastical jurisprudence underscores maturity as comprising the "existential suppositum of true and valid matrimonial consent."²¹ The juridical philosophy, says Cushieri,²² "follows from the two-fold premise: (1) that the matrimonial consent is not only the product of the intellect and will, but of the personality as a whole; (2) that this personality is the subject, as well as the object of true and valid matrimonial consent."²³

4. *The union is ordered also toward the procreation and education of offspring.* St. Augustine calls this end as *bonum prolis*. This was the objectivist concept of marriage obtaining in the 1917 Code in that it was founded on an external element, the procreative end considered as a duty of nature (*officium naturae*) to proliferate the human species, with hardly any emphasis on the person of the couple. The vigen Code however, has initiated if added a subjectivist notion where the spouses take the central core and the intersubjective relation is the essential element. There is, therefore, a qualitative shift; personhood assumes preeminence over biology.²⁴ The elements of this partnership of conjugal life, says Kenyon,²⁵ are "oblativity, mutuality, inseparable intimacy of life, cohabitation and conjugal love." Therefore, to the three goods as marriage of Augustinian vintage (offspring, fidelity, perpetuity) recognized before Vatican II is added a fourth good equally essential to marriage: the good of spouses.²⁶ Wrenn sums up six qualities that constitute the essence of the good of spouses: partnership; benevolence; companionship; friendship; caring and love.²⁷ Pope Paul II summarizes the totality of conjugal love as a sharing in Christ's life that is open to procreation:

"The content of participation in Christ's life is also specific: conjugal love involves a totality, in which all the elements of the person enter - appeal of the body and instinct, power of feeling and affectivity, aspiration of the spirit and of will. It aims at a deeply personal unity, the unity that beyond union in one flesh, leads to

²¹Toronto Regional Tribunal, C. Andrew Cushieri Mary 31, 1982 in *Studia Canonica*, Vol. XIX (1985), p.196.

²²Ibid.

²³Ibid.

²⁴Juan Goti Ordenana, "Observaciones al Nuevo Canon 1055, 1" in *Revista Española de Derecho Canónico*, Vol.40, No.2 (1984), pp.284-286. Henceforth, the Abbreviation REDC will be employed.

²⁵Roger A. Kenyon, "Nature and Nullity of Matrimonial Consent" in *Studia Canonica*, Vol XIV (1980), p.110.

²⁶Lawrence Wrenn, "Refining the Essence of Marriage" in *The Jurist*, Vol.46 (1986), p.535.

²⁷Ibid., pp. 537-547.

forming one heart and soul; it demands indissolubility and faithfulness in definite mutual giving; and it is open to fertility."²⁸

Earlier Pope Paul VI²⁹ also outlined the main characteristics of Christian marriage as human, that is, of the senses and spirit; total, that is, spouses share in everything; faithful and exclusive, until death, and fecund, that is destined to procreate and educate children.

Pope John Paul II underlines the cooperation between the state and church to assist the families in educating the children:

"The State and the Church have the obligation to give families all possible aid to enable them to perform their educational role properly. ...the public authorities share all those aids -economic, social, educational, political and cultural assistance- that they need in order to face all their responsibilities in a human way."³⁰

Understandably, the Church assumes the role of the moral and spiritual educator, above all else, of the young.

5. *Marriage among baptized is a sacrament.* Every valid marriage covenanted by a certainly baptized man and a certainly baptized woman, be he/she a Catholic or not, is of its nature a sacrament, reflecting the union of Christ with the church. Its sacramentality is not a superimposition on the contract. "For this reason a matrimonial contract cannot validly exist between baptized persons unless it is also a sacrament by that fact," states Canon 1055,2. Marriage as a sacrament is thus regarded as "an action of the church by which the spouses, in view of their baptismal commitment, express their willingness to enter into a new dimension of their relationship with the Church."³¹ Effected by the mutual consent of spouses, the matrimonial contract is elevated to the supernatural order by Christ:

"In raising the natural contract to the supernatural order endowing it with the power of conferring sacramental grace, Christ did not change the nature of the contract. He merely lifted it from the natural level to the supernatural order. It is only on this account that Christian marriage is superior to the old marriage and those of non-Christians."³²

Thus, Christian marriage is superior to other marriages in the order of grace.

²⁸John Paul II, *Familiaris Consortio*, no.13.

²⁹Paul VI, *Humanae Vitae*, July 25, 1968, par. 8.

³⁰*Familiaris Consortio*, par.40.

³¹James A. Coriden, Thomas J. Green, Donal E. Heintschal, eds., *The Code of Canon Law. A Text and Commentary*. (New York: Mahuwah: Paulist Press, 1985), p.741.

³²F. Testera, *Op. Cit.*, p.78.

C. Annotations

Conjugal life or family is a basic institution both of civil and church society. Article 149 fittingly provides:

"The family, being the foundation of the nation, is a basic social institution which public policy cherishes and protects. Consequently, family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect."

This Article parallels with the policy of the State enshrined in the 1987 Philippine Constitution:

"The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution..." (Art.11,Sec.12)

"The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development." (Art.XV, Sec.1)

The web of and interlocking relations in the family includes those between spouses, parents and children, among other ascendant and descendants and among siblings, whether of the full or half blood.³³

Tolentino³⁴ gives a juridical concept of the family, citing Valverde 8-9:

"The family is the natural and social institution, founded on the conjugal union, that binds together the individuals composing it, for the common accomplishment of the material and spiritual ends of life, under the authority of the original ascendant who heads it."

The relationships in the second preceding paragraph do not include sister-in-law, nephews or nieces.³⁵ The relationship is grounded on consanguinity except that between the couple which is founded on marriage.

Pursuant to Art. 15 of the New Civil Code, the laws affecting family rights and duties bind Filipino citizens, even those living abroad. Philippine laws follow them.³⁶ The Filipino family is lodged on the altar of sacralty by the Civil Code, to the point of disregarding foreign laws or judgments adverse to it:

"Prohibitive laws concerning persons, their acts or property and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations of conventions agreed upon in a foreign country." (Art.17, par.3)

³³Family Code, Art.150, New Civil Code, Art.217.

³⁴Arturo Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines* (Quezon City: Central Lawbooks, 1983), p.515.

³⁵Gayon vs. Gayon, 36 SCRA 105.

³⁶Yanez vs. Fuster, 29 Phil. 606.

As a practical illustration, where Filipino citizens obtain an absolute divorce of their marriage abroad such judgment will not be given effect here where absolute divorce is against state policy. The only exception is that found in Article 26, paragraph 2, recognizing absolute divorce in favor of a Filipino married to a foreigner who obtains a valid divorce abroad; in which case, the judgment also benefits the Filipino partner and legally capacitates him/her to remarry.

Two types of relationship existing in the family are the internal and external relations. The first concerns the spiritual and moral attitudes confined within the family unit. The second is that in which the exercise of the rights and obligations of a family member affects third persons and public interests. Only the second type is regulated by law to establish matters where society has an interest in family relations.³⁷ The church primarily is interested in the first type of relations.

The word "marriage" is used in two senses. First, it means the act or ceremony of entering into such a relation, or marriage *in fieri*. Second, it refers to the marriage relation, the status or marriage *de facto esse*.³⁸

The State safeguards marriage to maintain its purity, continuity and permanence.³⁹ That is why the state is considered a party to the contract⁴⁰ in order, as an authority, to regulate it.⁴¹

Canon Law has some provisions on the pastoral care of families. In Canon 226, bishops are to take care of the family by proper legislation and pastoral action. Canon 786,2 urges preachers to teach on the unity, stability and role of the family. Canon 774,2 admonishes parents to provide education in faith of their children. Canons 793, 796 and 979 emphasize Catholic education for the young. Canons 867, 850 and 914 provide that children are to be taught and prepared to receive the sacraments of initiation. Finally, Canon 1063 advises on the pastoral care for those getting married.

Vatican II laid the basis for the care of families. *Lumen Gentium*, nos. 11 and 35 picture the family as the "domestic Church" wherein parents by way of special vocation bear witness of the faith mutually and to their children for whom they are the "first heralds of faith." *Gaudium et Spes*, nos. 47-52 discuss the dignity of marriage and the family. *Gravissimum Educationis* delineates the rights and duties of parents on the total education of their children. This idea is reinforced in *Dignitatis*

³⁷A. Tolentino, *Civil Code of the Philippines* (Manila: Acme Publishing, 1960), Vol.I, pp.481-482, citing 4 Valverde 13-14 and 5 Sanchez-Roman 41.

³⁸Melquiades J. Gamboa, *An Introduction to Philippine Law* (Quezon City: Central Lawbook, 1969), p.100.

³⁹*Jimenez vs. Republic*, Supra

⁴⁰*Reese vs. Reese*, 40 N.Y.S. 468-470.

⁴¹*State ex re Foster vs. Andus*, 135 Fla.59.

Humanae, no.5. In *Apostolicam Actuositatem*, no. 11, Christian couples are called to be cooperators of grace, to uphold the indissolubility and holiness of marriage, to educate the children as Christians, and so on.

In his Apostolic Exhortation *Familiaris Consortio*, in December 1981, Pope John Paul II outlined four general tasks of the family: (1) forming a community of persons; (2) serving life; (3) participating in the development of society and (4) sharing in the life and mission of the church.⁴²

II. ESSENTIAL CHARACTERISTICS OF MARRIAGE

A. Family Code

The concept of marriage discussed above under Article I stresses the two-fold essential characteristics of marriage: unity and indissolubility. Article 35, no.4 declares a bigamous marriage as void from the beginning. The two constitutional provisions cited earlier stress the same characteristics. That is why, there is no absolute divorce for Christians in the Philippines. Muslims have their divorce -and simultaneous polygamy- acknowledged by virtue of P.D.No.1083 or the Muslim Code of Personal Laws of February 4, 1977.⁴³

From the provisions of the Family Code and the 1987 Constitution, the reason for the exclusion of absolute divorce here appears to be that the state, like the church, considers marriage from its very nature as a sacred obligation, although it is also a civil contract and is regulated by law. As general rule, the state does not look with favor upon a petition for nullity, annulment or legal separation. It discourages the bringing up of such actions except for sufficient cause shored up by solid evidence.⁴⁴

B. Canonical Parallel

In Canon 1056, we read: "The essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a special firmness in virtue of the sacrament."

Since unity and indissolubility are essential, any exclusion thereof by a positive act of will of the contractant voids the marriage (Canon 1101,2).

A party can be in error concerning unity and indissolubility of marriage. A simple error thereof does not vitiate matrimonial consent (Canon 1099). Testera⁴⁵ views simple error as "one which remains in the mind of the person and has no influence on the will or consent." Once

⁴²*Familiaris Consortio*, no.17.

⁴³Three objectives were realized by this decree: (1) it recognizes the legal system of the Muslims in the Philippines as part of the law of the land; (2) it codifies Muslim personal laws and (3) it provides for their effective administration and enforcement.

⁴⁴*New Civil Code*, Art. 220.

⁴⁵Testera, *op. cit.*, p. 75.

error affects the will of the contractant who rejects one of the essential properties, it is a case of simulation, not of error. Rejection of marriage itself, the partnership of life constitutes total simulation. Denial of the properties or goods of marriage makes partial simulation.⁴⁶ However, there is what is called as "error pervicax," which is so deeply rooted in a person's mind which has become ingrained as a second nature and from which there seems no reason to shrink; nullity of marriage may obtain:

"Pompedda says that it is a principle now universally accepted in Rotal jurisprudence that when error is so deeply rooted that it is second nature (Fagiolo) -and there is no reason to recede from this error- there is a prudent conclusion of nullity. For the will ordinarily follows the intellect; and so only with difficulty is the will otherwise deflected, especially when the error is deep, strong and conscious."⁴⁷

Also called "stubborn error" in some Rotal decisions, error pervicax is so deeply fixed in a person that it readily begets an act of the will ending in invalidity,⁴⁸ *vi ipsius erroris*, on the strength of such an irreversible error or, if it is slight, when this error is the proximate cause for influencing the will.⁴⁹ Thus, it appears that simulation, whether total or partial, is similar to error pervicax.

Coriden⁵⁰ rightly observes that the two essential properties be contextualized within the concept of sacramental marriage as the intimate community of the whole life to which the contractans place their consent.

1. *Unity*. Unity signifies unicity of the bond of marriage⁵¹ between the spouses to the exclusion of all other partners. Consequently, the *bonum fidei* or the good of fidelity excludes extramarital conjugal acts or companionship of the whole life with partners other than the spouses themselves for, as Canon 1134 states, the bond between the spouses is by its very nature perpetual and exclusive.

Unity excludes polyandry or the marriage of a woman with several husbands, and polygyny, the marriage of one man with several women, in both cases simultaneously.⁵²

Marital fidelity (*bonum fidei*), a concept juridically different from unity, means for spouses not only refraining from extramarital exploits

⁴⁶*Ibid.*

⁴⁷David E. Felhauer, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence", in *Studia Canonica*, Vol. 14 (1975), p.126.

⁴⁸*Ibid.* p.128

⁴⁹*Ibid.*, p.129.

⁵⁰Coriden, *op. cit.* p.742.

⁵¹Augustine Mendonca, "The Theological and Juridical Aspects of Marriage in *Studia Canonica*, Vol. 22 (1988), p.294.

⁵²Testera, *op. cit.* pp. 75-76.

but also giving one's entire person to the other for the whole life.⁵³ No limitation of consent contrary to the observance of fidelity is allowed. The contractant should bind himself/herself to exclude sexual affairs with others not his/her partner, and to be faithful to interpersonal relationship.

Among the criteria of proof of exclusion of fidelity, the confession of the simulating spouse must be given weight, confirmed by the witnesses of good reputation, who refer to matters known in non-suspect times. Toward this end, jurisprudence always takes into consideration the peculiar character and trait of the simulator, together with his personality in social gatherings and habit formed by education. Thus Palestro⁵⁴ meant when he wrote:

"Inter criteria probationis, in casu bene perpendi debet simulantis confessio, a testibus dignis confirmata, qui referant de rebus tempore non suspecto cognititis. Ad hunc finem, nostri S. fori jurisprudentia semper prae oculis habet peculiarem indolem, ingenium simulantis una cum natura (personalitas) ex coetu sociali, habitu educatione efformata."

The reasons of the spouse who refuses fidelity should be weighed well together with the antecedent and concomitant circumstances upon the celebration of marriage, in accordance with Canon 1536,²⁵⁵

2. *Indissolubility.* Indissolubility of marriage has basis in the Gospel. Mark 10:9-12 has Jesus discussing the question of divorce before the Pharisees who asked him whether it was a sin against the law for man to divorce his wife. Jesus replies, "So then, what God has united, man must not divide... The man who divorces his wife and marries another is guilty of adultery against her..." The second sentence in the quoted text is found basically the same in Luke 16:18 and Matthew 19:9. Thus, the matrimonial bond cannot be severed by agreement of the spouses, but by death of one of them.

It is precisely the sacramentality of marriage that makes it indissoluble:

"By virtue of the sacramentality of their marriage, spouses are bound to one another in the most profound indissoluble manner. Their belonging to each other is the real representation by means of the sacramental sign, of the very relationship of Christ with the Church."⁵⁶

Indissolubility of marriage, then, images the faithful love between Christ and the Church. When baptized Christians give their marital

⁵³*Ibid.*, Cfr. *Gaudium et Spes*, no.48.

⁵⁴*SRRD*, Coram Palestro, March 13, 1987 in ME, Vol. CXIII, Series XXIII (1988) IV, p.489.

⁵⁵*Ibid.*

⁵⁶*Familiaris Consortio*, no. 13.

consent, they perform an act of the will to accept marriage itself and its essential properties of exclusivity and indissolubility.

C. Annotations

St. Augustine in his fight against the manichaeans believed in the necessity to justify marriage: (1) the good of the offspring (*bonum proles*); (2) the good of fidelity (*bonum fidei*) and (3) the good of perpetuity (*bonum sacramenti*) relating them to the essence of marriage.⁵⁷

Augustine's thought thereon appears to influence the personalist outlook of the conciliar teaching (*Gaudium et Spes*, par.48): the essence of marriage is the "intimate community of the whole life" which Rotal judge Jose Serrano Ruiz calls as "interpersonal relationship."⁵⁸

Analyzing Rotal decisions, Izquierdo⁵⁹ finds five key elements in the term "essential obligations" that already include the concept of unity and indissolubility": (1) companionship between the man and woman; (2) which encompasses throughout the whole life; (3) which is perpetual and lasting; (4) which must be ordered toward the reciprocal good of the spouses and (5) and toward the generation and education of children.

This exclusive bond between one man and one woman in marriage constitutes its unity; its encompassing through the whole life, its being perpetual and lasting, constitutes its indissolubility. Where the contractant by a positive act of the will excludes both properties, the marriage is null. Where he/she does not intend to observe fidelity but intends to engage in adultery, the marriage is null.⁶⁰

Marriage is "intrinsically indissoluble by the primary precepts of natural law and extrinsically indissoluble by the secondary precepts."⁶¹ Intrinsic indissolubility means that marriage cannot be broken by the will of the spouses on their own private authority. Extrinsic indissolubility means that no outside human authority can dissolve marriage. A ratified and consummated Christian marriage can be dissolved only by the death

⁵⁷Juan Goti Ordenana, "Observaciones al nuevo Canon 1055,1" in *REDC*, vol. 40, no.2 (1984), p. 312.

⁵⁸*SRRD* Coram Serrano, April 5, 1973; April 30, 1974; July 9, 1976. Cited by Thomas Doyle, O.P., "The Theology of Marriage: Where We are Today" in *Studia Canonica*, Vol.XIX (1985) p. 93.

⁵⁹Guitarte Izquierdo, "Una contribución a la teoría de la incapacidad psíquica en el negocio jurídico matrimonial a partir del Canon 1095" in *REDC*, Vol. 45, no. 125 (1988), p. 644.

⁶⁰*SRRD*, Coram Palestro, March 13, 1987, in *ME*, vol.CXIII, Series XXIII (1988) IV, p. 488. He says: "Certe ut matrimonii nullitas ob exclusum fidei declaratur, necesse omnino est ut nupturiens ob facultatem adulterandi positivo voluntatis actu sibi reservet."

⁶¹William Goldsmith, "On the Competence of the Church and State over Marriage - Disputed Questions" in *The Jurist*, Vol. VI, p. 500.

of one party, it being the only type of marriage endowed with intrinsic and extrinsic indissolubility (Can. 1141).

On the other hand, extrinsic dissolubility of the matrimonial bond is that by which it can be dissolved by a higher authority under certain circumstances and for certain restricted causes. We have the example of a ratified non-consummated marriage between baptized Christians or a non-consummated marriage between a baptized person and an unbaptized which can be dissolved by the Roman Pontiff for a just reason, upon request of both parties, or one of them, even if the other party is unwilling (Can.1142). The Pauline privilege is the dissolution of a natural-bond marriage contracted by two pagans or non-baptized parties, where one party subsequently gets baptized and the unbaptized departs, which means to say that the unbaptized party seriously is unwilling to live with the baptized party or to live peacefully without offense to the Creator. The baptized party must not cause the unbaptized one to depart (Can.1143). The third case is that of an unbaptized polygamist who upon baptism may choose which wife or husband to stay with; the others are to be dismissed (Can.1148). The fourth case is an abnormal situation in which two unbaptized parties to a marriage are separated due to captivity or persecution. A party who received baptism during the separation may marry again even with a non-baptized person. If both parties are baptized during the separation but before any subsequent marriage by either party, their natural marriage becomes sacramental, although non-consummated due to the separation.⁶² From the very beginning of the Church, the indissolubility of marriage has been accepted as an irrefutable doctrine, a postulate of divine-positive law, Christ forbade dissolution of the bond by any human authority, public and private (Mt.16:6; Mk.10:9; Lk.6:18).⁶³

The Catholic church has always regarded marriage as indissoluble. Of the Protestant churches, Warren⁶⁴ has written that "they are divided. However, all of them regard adultery as sufficient cause for divorce; some consider desertion equally so; others, cruelty."

III. KINDS OF MARRIAGES

A. *Family Code*

Civil Law in general has three forms of marriage: valid, void and voidable. Valid marriages are those where the essential and formal requisites are present (Arts.2-4). The essential requisites are legal capacity of age (18 years) and not barred by any impediment to marry and free

⁶²Coriden and others, *op. cit.*, p.817; canon 1149.

⁶³Toronto Regional Tribunal Jurisprudence, *Coram* Andrew Cushieri, OFM, *supra*, p. 197.

⁶⁴Oscar Leroy Warren, *Schouler Divorce Manual* (Albany, N.Y.:Banks and Co., 1944), p.5.

consent of parties. The formal requisites are authority of the solemnizing officer, a valid marriage license for the parties and public ceremony, except in marriages of exceptional character (Arts.27-34). Absence of any thereof makes a marriage void, unless the law provides otherwise.

The voidable marriage are those found under Article 45 of the Family Code.

B. Canonical Parallel

In Canon Law, there are generally two kinds of marriage; valid and void. However, a sub-classification is found in different canons.

(I) By Reason of Validity

1. *Valid marriages.* They are those (1) which observe canonical form; (2) which have no diriment impediment and (3) where the parties give their free consent. This union produces juridical effects (Canon 1061,1).

a. Among the baptized:

- 1) *Ratified.* A valid sacramental marriage not yet completed by consummation (Can. 1061,1)
- 2) *Ratified and Consummated.* A valid sacramental marriage in which the parties consummated the conjugal act in a human manner, and directed to procreation. Cohabitation gives rise to the presumption of consummation until the contrary is proven (Can. 1061,2).

b. Among the Unbaptized:

- 1) *Legitimate.* A non-sacramental marriage validly celebrated between unbaptized persons. Natural law and just civil law bind the parties.
- 2) *Natural.* A non-sacramental marriage between a baptized and non-baptized person.

2. *Invalid Marriages.* They are those that are vitiated by either lack of form, the existence of a diriment impediment, or lack of a true and valid consent. This union produces no juridical effects (Can.1061,3).

- a. *Good Faith.* Also called putative marriage, it is one contracted in good faith by at least one of the parties. It is considered putative until such time when both parties become aware of the nullity. However, it produces a legal effect in that the children born thereto are considered legitimate (Can. 1061, 3).
- b. *Bad Faith.* A marriage is considered in bad faith if one or both of the parties have knowledge of the nullity and have gone through the external form of a matrimonial contract.

(II) By Reason of the Celebration

1. *Public*. A marriage celebrated according to the canonical form which is accepted by the church as public (Can. 1108).

2. *Secret*. A marriage contracted before the pastor and two witnesses in a secret manner for some very serious reasons (Can.1130). A special permission is needed to perform such marriage (Can.1131). No records are kept in the parish matrimonial book. All documents are sent to the secret archives of the Chancery (Can.1133). It is also called "Marriage of Conscience" (Can.1130). The parties are not given a copy of the marriage contract.

3. *Clandestine*. A marriage contracted without the presence of the pastor and witnesses.⁶⁵

C. Annotations

The marriages of exceptional character are those where the license is not required. The instances in Articles 27-34 are: (1) marriage *in articulo mortis*; (2) marriage in remote places where the party lives quite far away from the municipal hall and there is no communication by railroad or highway between the two places; an affidavit instead is to be executed by the solemnizing officer as to the marriage *in articulo mortis* or in remote places; (3) marriage *in articulo mortis* during voyage; (4) marriage *in articulo mortis* within the zones of military operation; (5) marriage between Muslims or members of ethnic groups and (6) where parties with no impediments to marry have cohabited for at least five years.

IV. MARRIAGE FAVORED BY LAW; PRESUMPTIONS

A. Family Code

Article 48 is emphatic in its bias for marriage by having the state intervene in marriage proceedings:

"In all cases of annulment or declaration of absolute nullity of marriage, the court shall order the prosecuting attorney or fiscal assigned to it to appear on behalf of the State to take steps to prevent collusion between the parties and to take care that the evidence is not fabricated or suppressed.

In the cases referred to in the preceding paragraph, no judgment shall be based upon a stipulation of facts or confession of judgment."

The philosophy behind the intervention of the trial fiscal is that a marriage is not just a contract between the parties which they can revoke at will, but a social institution which the state is interested in preserv-

⁶⁵Cfr. Testera, *op. cit.*

ing.⁶⁶ State laws favor marriage. We have seen supra the constitutional policies on the family which the State guarantees to protect in its solidarity, and to promote its total development.⁶⁷ The Rules of Court, Rule 131, Section 5(bb) gives disputable presumption that a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage,⁶⁸ unless the contrary is proven. Every intendment of law leans towards legalizing matrimony.⁶⁹ Public cohabitation as husband and wife is competent to show or prove marriage.⁷⁰ The mere fact that no record of the marriage exists in the marriage register does not invalidate the marriage, provided all requisites for its validity are present.⁷¹ In another case, the Supreme Court held that a man and a woman who are living under the same roof are presumed to be legitimate spouses.⁷² The reason for the presumption as was enunciated in the case of *Adong vs. Cheong Seng Gee*, 43 Phils. 43, is that such is the common order of society and if the parties were not what they thus hold themselves but as being, they would be living in the constant violation of decency and law. Public policy should aid acts intended to validate marriage and should retard acts intended to invalidate it.⁷³

B. Canonical Parallel

Canon 1060 gives the same idea favoring marriage: "Marriage enjoys the favor of law. Consequently, in doubt the validity of a marriage must be upheld until the contrary is proven."

Once the ceremony has publicly taken place, the law presumes the validity.⁷⁴ Marriage being a contract, the general principle of contract law governs; the contract stands valid once it has been perfected.

C. Conclusions

The concept of marriage having been explained under both the Family Code and Canon Law, the following conclusions are in order.

⁶⁶Sempio-Diy, *op. cit.* p.67.

⁶⁷1987 Constitution, Art. II, Sect. 12; Art. XV, Sec.1

⁶⁸Florenz D. Regalado, *Remedial Law Compendium* (Mandaluyong, M.M.: Premium Printing Press, 1982), p. 842; *People vs. Opena*, 102 SCRA 472; *People vs. Majuri*, 96 SCRA 472.

⁶⁹*Alavado vs. City Government of Tacloban*, G.R. No. 49084, Oct. 10, 1985.

⁷⁰*People vs. Memoracion*, 34 Phil. 63; *Perido vs. Perido*, 63 SCRA 97; *People vs. Borromeo*, 133 SCRA 106.

⁷¹*People vs. Borromeo*, 133 SCRA 106.

⁷²*Que Quay vs. Col. of Customs*, 33 Phil.128; *Sison vs. Ambulada*, 30 Phil.118.

⁷³1963 C. Velayo 210.

⁷⁴Rev. Clarence Gallagher, "Marriage and the Family in the Revised Code" in *Studia Canonica*, Vol. 17 (1983), p. 159.

1. The Family Code views marriage as a contract *sui generis* in that, unlike ordinary contracts, the spouses cannot make regulations governing their celebration. Moreover, the spouses on their own cannot dissolve it. On the other hand, Canon Law sees marriage deeper than a contract; it is a covenant, that is, a solemn compact between baptized Christians who establish a partnership of life and love ordained for their good and for the procreation and education of children.

2. Marriage among baptized is seen as a sacrament under Canon Law, as distinguished from its concept under the Family Code as a special contract.

3. Both laws concur on the sanctity and inviolability of marriage.

4. Both laws agree that marriage is the foundation of the family.

5. Both laws accept the essential properties of unity and indissolubility.

6. Finally, marriage validity enjoys the favor of both laws, in case of doubt. □