

# New Marriage Law

## A. PRELIMINARY INTRODUCTION

### *Need of a Marriage Law in the Church*

"The Church, said Paul VI, since 'by the will of her Founder she exists as a perfect social body'<sup>1</sup> is necessarily visible and therefore must be ruled by laws"<sup>2</sup>. And on May 27, 1977,<sup>3</sup> the same Pontiff said: "The life of the Church cannot be conceived without a set of juridical laws . . . according to St. Paul's saying 'Omnia autem honeste et secundum ordinem fiant' " (I Cor. XIV, 40).

Ecclesiastical marriage law is the set of Church's norms regulating Christian marriage. It comprises some norms established by divine law, natural and positive, rooted on human nature or imposed by God Himself independently from any positive disposition of any human legislator. However, ecclesiastical marriage law is mainly composed of norms enacted by the legitimate ecclesiastical authority throughout the centuries from its beginning to the present time. Likewise, there are in the Church's

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<sup>1</sup> Pius XII, Enc. *Mystici Corporis*: AAS, XXXV, 226.

<sup>2</sup> Paul VI, *Allocution* to the Commission for the Revision of the Codex, Nov. 20, 1965: *The Jurist*, XXVI, s. 35.

<sup>3</sup> *Communicationes*, 1977, vol. IX, n. 1, p. 81.

marriage law some elements of civil legislation accepted by the Church in order to smooth her relations with the secular power.

The conditions in which marriage had been held in relatively early times of the Church even among some Christian communities were deplorable. Salvian, a priest of Marseilles in the middle of the fifth century, twitted his Christian fellow countrymen by saying that in cleanness of life they were inferior to the pagans<sup>4</sup>. In nations with Germanic influence, woman was little more than a chattel. Marriage was the object of bargain between the suitor and the guardian of the woman. Her wishes in the matter seem to have been hardly taken into account. The need for a set of laws on marriage was more and more keenly felt with the passage of time.

The sources wherefrom the Church draws her laws are pointed out by Paul VI addressing the Commission for the revision of the Codex in the following terms: "Canon Law, which is drawn from divine natural law, Sacred Scripture, tradition, decretals and other sources has evolved with a certain progress. But in this matter we must make careful distinctions. Since 'theology and canon law are found associated in a very strong mutual bond'<sup>5</sup>, certain primary matters, namely those pertaining to divine constitutive law, can in no way be changed, as seems to be characteristic of institutions which have a very strong duration"<sup>6</sup>.

### *Marriage Law through the Centuries*

Restricting our topic to the laws on Christian marriage and summarizing the different periods in the development of the Church's law, we can mention the following stages in its development:

1) *The first three centuries.* It was St. Ignatius of Antioch who pointed out the need of the faithful to seek the approval of the ecclesiastical superiors before getting married<sup>7</sup>. Likewise

<sup>4</sup> G. H. Joyce, S.J., *Christian Marriage*, London, 1948, p. VI.

<sup>5</sup> Pius XII, *Enc. Mystici Corporis*; AAS, XXXV, 244; *Allocution*, April 29, 1952: AAS, XLIV, 376.

<sup>6</sup> Paul VI, *Allocution* to the Commission for the Revision of the Codex, Nov. 20, 1965: *The Jurist*, XXVI, p. 36.

<sup>7</sup> Ad Polycarp, V. 2: cfr. G. H. Joyce, l.c., p. 164.

Pope Calixtus explained the Church's views on the substantial equality of personal rights when he authorized women of senatorial ranks to contract marriage with men of an inferior condition, which Hippolytus bitterly criticized.<sup>8</sup>

2) *Local legislations (300-1000)*. The first collection of matrimonial laws is undoubtedly the Collection of the Council of Elvira, Spain (1303), in which some impediments were established and freedom in giving the mutual consent was required. From that time on different conciliar dispositions on marriage appeared. Prevailing circumstances of the time favored to elucidate solutions to practical cases regarding absent spouses, attempt of divorce of Lotarius II, etc. In this way a body of legal principles was developed which eventually was accepted in Europe up to the year 1000.

3) *Classic Canonical doctrine*. In the eleventh century the Church appeared to enjoy full control on marriage both in its religious and civil aspects. It was universally accepted that where a Christian marriage was concerned only the Church was the ruler. The State might regulate such matters as the dowry, inheritance, etc. Only the ecclesiastical courts could decide whether a marriage was valid or invalid. This made necessary for her to draft and develop a marriage law. She drew the fundamental principles of this legislation from Revelation. She also accepted some legal norms from Roman Law. At the end of the thirteenth century a well developed set of laws on marriage was already in force throughout Christendom. The classic canonical doctrine shaped up in the eleventh century with the Gregorian reform, with the renaissance of Roman Law and with the theological schools that preceded the appearance of the Decretals. It comprises of the following stages:

a) *Divulagation of the Decree of Gratian (1140)*. Gratian gathered legal prescriptions without giving them unity. It provoked a series of controversies with the followers of Peter Lombard (1150), who, inspired in Hugh of St. Victor, came up with different solutions for the same problems. Peter Lombard stressed the value of free consent while the importance of the conjugal act was over-emphasized by Gratian.

<sup>8</sup> Hippolytus, *Philosophumena* 1. IX, c. 12: P. G. XVI, col. 3386: cfr. G.H. Joyce, *l.c.* p. 43.

b) *Ecclectic School*. This originated from the debates between the followers of Gratian and Peter Lombard. It offered legal solutions to the problems discussed. It was Rolandus Bandinelli, who later became Pope Alexander III, who formulated the distinction between a ratified and a consummated marriage, pointing out that while the former could be dissolved, the latter was indissoluble, a distinction which still subsists in our Codex.

c) *Period of the classic doctrine (1245-1258)*. During this period numerous theological problems on marriage were discussed and solved through the writings of Alexander of Hales, St. Albert the Great, St. Thomas Aquinas and St. Bonaventure. The decree for the Armenians issued by the Council of Florence (Nov. 22, 1439) on the sacramentality of marriage and the matrimonial consent reflects the doctrine of these luminaries.

4) *Protestant position and the Counter-reform of Trent*. The reformation of the sixteenth century assailed the sacramentality of Christian Marriage, causing serious damage. The Christian ideal of marriage, however, continued enjoying its powerful influence. Matrimonial cases continued being discussed before the ecclesiastical tribunals alone. It was generally considered that Christian marriage could not be touched by civil laws. But the classic doctrine on marriage based on the solid principles of St. Thomas Aquinas was soon the target of attacks by Kings and Princes whose personal lives were directly affected by somewhat inflexible norms, as well as by the humanists like Eyb, Erasmus and Rabelais and by the reformists like Luther and Calvin. To reinforce the Catholic tenets on marriage the Council of Trent defined the sacramentality of Christian marriage, its unity and indissolubility; pointed out the competence of the Church, established some impediments, gave some rules for legal separation, and issued the famous Decree *Tametsi* on the canonical form in celebrating marriage to do away with clandestine unions.

5) *Post-Trent consolidation*. Though the Church's position on marriage was strengthened by the Council of Trent, the controversies on the minister of marriage, its contractual nature and the role of the State went on. The nineteenth century however brought a deep change. Marriage was not looked on as endowed of a sacred character anymore. Marital faithfulness was not

considered as accepted and ratified by God. Marriage was regarded as a merely civil contract, deriving its binding force from the law, which therefore could similarly put it aside, if and when an adequate reason existed. Divorce was introduced in different countries, at the beginning under very definite and limited conditions, then under any trivial reasons and excuses. Consequently marriage was reduced in those countries to the status of a simple contract which could be dissolved either by mutual consent or by the desire of one of the spouses.

As a consequence, the idea that the family is the foundation of human society faded away. The responsibilities of spouses were severed from the idea of any social order. The interest of civil rulers to safeguard and reinforce the family ties dwindled. Moreover this new concept of marriage changed the attitude of public opinion in regard to conjugal faithfulness. Adultery, which before was reproved as against God's law and as an offense to the social order, was looked upon with indifference. Unfaithfulness was considered a purely private affair about which no outsiders should meddle.

Obviously the view of marriage just pointed out is basically different from the Christian concept of matrimony. Unfaithfulness and divorce are contrary to right reason and are likely to bring ruin and disaster on human civilization as well as on religion itself. Where these deviations prevailed the Church's doctrine on marriage was regarded as irrational and tyrannical.

6) *Promulgation of the Codex.* The Codex in force up to now was promulgated on Pentecost Sunday, May 27, 1917 and took effect on Pentecost, May 19, 1918. It is well known that the codification was ordered by St. Pius X and came to an end during the Pontificate of Benedict XV. The whole work was done under the able leadership of Cardinal Gasparri.

The main characteristics of the Codex of 1917 consist in fixing the terminology of marriage discipline, stressing its nature, properties, ends and sacramentality. It points out the competence of the Church and the State, modifies the betrothal, specifies the preliminaries to be carried out before its celebration, outlines the impediments of age and relationship, defines canonical form and

legal separation, restricts the binding force of some norms to only Catholics and stresses the need of free consent in the contracting parties.

7) *Period after the Codex.* The marriage law has not showed any substantial change after our Codex was issued in 1917. However some modifications can be pointed out:

Besides the numerous interpretative resolutions given by the Pontifical Commission, some fundamental norms have been issued before the Vatican II:

a) the decree "Catholica Doctrina" of May 7, 1923, on the norms to be followed in cases of ratified non-consummated marriages;

b) Instruction of August 15, 1936, on the rules to be observed by ecclesiastical tribunals in declaring the nullity of marriages;

c) Instruction of June 29, 1941, on the manner to perform the investigations before the celebration of marriage.

Likewise, since the celebration of the Vatican II other important documents have appeared:

a) the Const. "Gaudium et Spes" dealing with the dignity of marriage and family;

b) Motu proprio "Pastorale Munus" of Paul VI, granting new faculties and privileges to the local Ordinaries;

c) Motu proprio "De Episcoporum Muneribus" of Paul VI giving the local Ordinaries more faculties to dispense from ecclesiastical laws;

d) Instr. "Matrimonii Sacramentum" of March 18, 1966, on the celebration of mixed marriages;

e) Decree "Crescens Matrimoniorum" of February 22, 1967, on mixed marriages between latin Catholics and Oriental baptized non-Catholics;

f) Motu proprio "Matrimonia Mixta", of March 31, 1970, giving some norms of mixed marriages;

g) Motu proprio "Causas matrimoniales" of March 28, 1971, giving norms to expedite matrimonial cases;

h) Instr. "Dispensationis Matrimonii," of March 7, 1972, on some amendments of the norms on the process of ratified non-consummated marriages.

At times it has been necessary for the Church to raise her voice against errors on matrimonial matters. Thus Pius XI explained in a masterly way the true doctrine of Christian marriage in his Enc. *Casti Connubii* of Dec. 31, 1930. Likewise Pius XII elucidated the Catholic principles on marriage in numerous allocutions to newly married couples, especially on its effects and on its worthy celebration.

For denying the possibility of divorce, for constituting diriment impediments, for refusing to acknowledge the validity of civil marriage for Catholics, and for issuing decrees of nullity of some vitiated marriages, the Church has been constantly attacked and blamed of blindness and perversity as well as denounced as hostile to human progress.

### *Marriage in the Codex of 1917*

The Code of 1917 was the golden crown of so many efforts exerted by the Holy See and by Catholic theologians and canonists after the Councils of Trent and of Vatican I. Its need had been deeply felt in the ecclesiastical curias and tribunals. Compared to the previous Church's legislation it did not mean a radical change or deviation. It simply implied an important development of the Church's law and an orderly and systematic presentation of ecclesiastical legislation. This also applies squarely to the marriage law.

The three characteristics of marriage law of 1917 can be summarized as follows<sup>9</sup>:

1) The marriage law has spiritual overtones, by leaving to a secondary place the material aspect of many concepts and juridical institutions. Thus, in the impediment of affinity, as a modifying circumstance of the person, the factor which formerly had created the impediment by sexual intercourse disappeared in the

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<sup>9</sup> Knecht, *Derecho Matrimonial*, Madrid, 1932, p. 22.

Codex of 1917, its basis was only a valid marriage, as in the Roman Law. Marriage consummation or non-consummation and the illicit copula outside marriage did not affect in any way the concept of affinity. The impediment of public propriety was established on an entirely new basis. The impediment of spiritual relationship, coming exclusively from baptism and restricted to the baptized and the baptizing minister or his godparents, showed in a clear way the mysterious efficacy of the sacrament of regeneration. Another spiritual aspect was shown in the more active participation of the priest solemnizing a marriage by requiring and accepting from the contracting parties their matrimonial consent. The same applied to the extraordinary form in case of danger of death and casual need of celebrating the marriage, since the contractual will appeared as the efficient cause of marriage. The same criterion moved the ecclesiastical legislator in transferring from the chapter of diriment impediments the celebration of marriages under the influence of violence, fear, error or condition to the chapter of matrimonial consent. Finally, this spiritual tone of Canon Law could be appreciated in the interest and earnest desire that the spouses should receive the nuptial blessing.

2) A second peculiar note which can be appreciated in the Codex of 1917 is its restriction of certain norms that formerly were binding all Christians to Catholics alone. Thus, the connotation of "Catholic" in regards to the impediment of mixed religion depends on the valid reception of baptism in the Catholic Church and on being converted to her fold. The diriment impediment of disparity of cult is restricted to the marriage of Catholics with non-baptized, instead of comprising all Christians as before. The canonical form for the celebration of marriage binds only Catholics.

The observance of the canonical form by those born of non-Catholic parents, but baptized in the Catholic Church, depended on this reception of baptism and on their Catholic education from their childhood. The portion of canon 1099, § 2, dealing on this matter was abrogated by Pius XII in 1948<sup>10</sup>. Marriages contracted by faithful of the Oriental Church with faithful of the

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<sup>10</sup> AAS, XI. 305.



Latin Church should be celebrated according to the canonical form of the latter.

3) The third peculiar note of the Codex of 1917 is its recognition of the competence of the civil power in regards to the civil effects of matrimony. Likewise, the Church accepted as her own the legal prescriptions of each country on legal adoption. The Codex regards as actions *mixti fori* the indemnization due to the breaking of the betrothal. Lastly, the reception in the Codex of the banns in writing and the increase of two years for the required age to marry was also a sign of goodwill on the part of the Church to go along with civil legislation in matters that are not purely spiritual.

#### *Need for Revision of the Marriage Law*

Though the Codex of 1917 exceeded the expectations of both Catholics and non-Catholics, nevertheless it was not a perfect Codex. Time changes and new needs are felt. Human life is conditioned by such a change and the Church herself could not in her social life be free from the need of development. Forty two years of effectivity showed that the Codex needed a revision and "aggiornamento". Pope John XXIII thought in this direction when on January 25, 1959 he expressed his intention to update the Church's law, a thing that should take place after the celebration of the Second Vatican Council, convoked by the same Supreme Pontiff. Paul VI reiterated this need by saying<sup>11</sup>: "With the changed conditions of things life seems to move along with greater speed. We must recognize with due prudence that Canon Law must be adapted to the new mentality of the Second Ecumenical Council from which great contributions are being made to pastoral duties and the new needs of the people of God."

A revision of the Codex as far as the matrimonial law is concerned has been considered by different authors and bodies differently.

1) The Codex should be rendered more precise and should be rid of inconsistencies in terminology according to some. Ciprotti, for instance<sup>12</sup> mentioned the expressions "conjugicidium patravit"

<sup>11</sup> Paul VI, Allocution, l.c.

<sup>12</sup> Ciprotti, *Observationes al Codex Iuris Canonici*, Salamanca, 1950.

(can. 1075, 2o) which he would replace with "suum coniugem occidit"; "matrimonium... contractum cum impedimento iuris naturalis vel divini" (can. 1139, § 2) with "cum impedimento iuris divini sive naturalis sive positivi" more in consonance with can. 6.6; "uxores" (can. 600 3o) with "conjuges". Likewise, the inconsistency in using the expression of "legitimum matrimonium" in canons 331, §, 1o. and 1015, § 3 should be corrected.

2) Others wanted a more substantial revision. There were some who mentioned the need of solving existing doubts derived from vague and ambiguous laws through the incorporation of the various authentic interpretations given by the Pontifical Commission for the Interpretation of the Codex.

3) Likewise, it seemed that some impediments were not relevant nowadays. They should be revised and perhaps be deleted. Such are abduction, public propriety, crime, legal adoption and spiritual relationship. In regards to mixed marriage it should be left to the local hierarchy to determine whether it should constitute an impediment or not. The circumstances and environment of various countries are so different that to enact the same law for all is not conducive to treat their cases with fairness.<sup>13</sup> Besides the Holy See has lately issued some directives on the matter. This legislation should be incorporated in the new Codex.

4) Some felt that the Codex should be more explicit in determining concrete situations, for instance:

a) that Catholics are not free to marry except in accordance with the laws of the Church, and to fail to do so means to cut themselves off from all participation in the Church's sacramental life;

b) that some explicit concession be made to non-Catholic churches to regulate the marriage of their faithful, and similarly even to the State;

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<sup>13</sup> Ladislav M. Orsi, S.J., *Quantity and Quality of Laws after the Vatican II*: THE JURIST, XXII, 395.

c) that lawful civil marriages be treated as defective marriages rather than as invalid unions so that they be susceptible of convalidation.

5) It is an undeniable fact that the Codex of 1917 considers marriage mainly as a contract or "in fieri" rather than a state of life or "in facto esse". Hence the subject of family life is touched only in passing in a few canons that deal on the effects of marriage. If the family is the cell of both the Church and the State, the new Codex should give more attention to marriage as a state of life. It might point out the responsibilities of the spouses first to one another, then to their children. It might even suggest the concern of Christian spouses for other couples, especially for those in crisis, as well as for other individuals, by the exemplary life they should lead before society and the assistance they might give to the Church.

6) Others wanted a more radical revision. Undoubtedly marriage has always been considered in the Church's law primarily in its biological aspect, since the procreation of children has been insistently emphasized. In declaring the ends of marriage the Codex of 1917 says: "The primary end of marriage is the procreation and education of the offspring; the secondary end is the mutual help and the remedy of concupiscence" (can. 1013, § 1). Likewise, the Codex defines matrimonial consent as "the act of the will by which each party gives and accepts a perpetual and exclusive right over the body for the acts which are by themselves apt for the generation of the offspring." This explicit and dominant biological approach to marriage can be traced up to St. Augustine who had to defend the sanctity of marriage against the Manichaeans. God, according to him, wanted the human race to multiply and this demands the stability of matrimony.

However, the Church has at present a more comprehensive and integral concept of marriage, as she has shown at the Second Vatican Council. The Constitution on *The Church in the Modern World*, for instance, declares that the "other purposes of marriage" ought not to be regarded as "of less account" than the procreation and education of children (n. 50). Likewise, the same Constitution does not define the marital consent as the giving and accepting of a right over the body for the acts suitable for

generation, but as "that act whereby spouses mutually bestow and accept each other". In other words, the Church focuses her attention on the dignity and importance of the spouses rather than on the biological aspect of their union.<sup>14</sup>

7) A careful preparation for marriage is undoubtedly, if not an absolute guarantee for its success, at least an effective deterrent to so frequently confused, disappointed and unhappy unions not to say divorces.<sup>15</sup> Numerous couples enter the married state without any previous examination of their mutual compatibility on social, cultural, religious, financial and sexual levels. Sometimes, even if they are compatible, they are never told what marriage state entails in terms of sacrifice for each other and for the offspring. An adequate preparation for these couples can certainly be of invaluable service. Though the pastors of souls are required by the Codex to "teach the people about matrimony and its impediments with prudence," it is a real fact that this instruction is obviously insufficient to render couples well prepared for marriage. Moreover, the average priest is not suited to impart the necessary guidance to many couples with peculiar problems.

Hence, the establishment of some kind of diocesan office for this purpose is desirable. It can be directly under the Bishop's curia. But said office should be equipped with well prepared personnel, able to guide the young people with apostolic zeal, complete maturity and exemplary life. This requires that in the new Codex the preliminaries of marriage be left to the local hierarchy, who can give, according to the local needs, more appropriate and effective measures in order to determine the freedom of the contracting parties and their due preparation to get married. The general and vague directives of the Codex of 1917 and

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<sup>14</sup> Lawrence G. Wrenn, *Updating the Law on Marriage*: THE JURIST, XXVII, p. 266.

<sup>15</sup> "The divorce rate — the number of divorces per 1,000 Americans — doubled to 5 between 1965 and 1976. Largely as a result, the number of one-parent households has increased by 100 percent since 1970 — and the number of married couples with children has actually declined. Today there are 109 divorced people for every 1,000 married ones, and among blacks, the ratio is even higher: 233 divorces per 1,000 married people. Nine out of every 10 one-parent families are maintained by Mom (and 48 percent of all black families with kids under 18 are headed by a mother alone). But over the past decade, the number maintained by single fathers has more than doubled, a trend many experts predict will accelerate as child-custody laws are reformed". (Newsweek the International Magazine, *Death of the Family?*, January 17, 1983).

the one subsequently given by the S. Congr. in 1941 become impractical and hard to be carried out.

8) Marriage has been considered as an innate right which can not be denied, unless incapacity renders the person concerned unable to marry. Leo XIII stated in his encyclical *Rerum Novarum* that "no human law can abolish the natural and original right of marriage." This consideration has led the Church to maintaining and requiring a minimum degree of aptitude both physical and psychical to get married.

On the other hand, it seems ridiculous to allow a sixteen year old boy who has hardly reached the faculty to generate and has no means to support a family to enter a valid marriage with a fourteen year old girl who obviously is not prepared to be a mother and cannot handle properly the affairs of a home. The chance of success for this kind of marriage is minimal. Would it not be far better if the age to marry be raised so as to give the contracting parties enough time to develop physically and get ready to confront the financial difficulties of married life?<sup>16</sup>

9) Likewise, quite often marriage is tragically a failure due to unknown facts that escape and elude human scrutiny during a normal courtship. Some persons suffer psychic disorders that disable them from living a responsible love relationship or from assuming the responsibilities demanded by family life or from fulfilling them. Such defects surface after the celebration of marriage, making one of the parties victim of the situation since such spouse in good faith and ignorant of the fact entered such a marriage. Couldn't it be possible to declare these unions null and void from the beginning by creating an impediment to this effect?<sup>17</sup>

10) Catholics sometimes resort, for one reason or another, to the celebration of a civil marriage, which obviously is invalid for lack of canonical form. As such it is null and void from the beginning before the Church? If afterwards they are disappointed of this union, one of them may leave the other party with the children and even enter a valid canonical marriage which the Church considers as indissoluble. This creates confusion among

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<sup>16</sup> Lawrence G. Wrenn, l.c.

<sup>17</sup> Ibid., l.c.

the faithful and constitutes at times an injustice on the other party who intended to contract a permanent marriage. It is also some kind of scandal to many people who consider the law of the Church as rewarding the evil and punishing the good. Couldn't possibly the civil marriage be accepted by the Church as a valid marriage in certain circumstances and under certain conditions?<sup>18</sup>

11) The acceptance in the new Codex of prevailing common opinions of canonists that have been consistently used by ecclesiastical jurisprudence will be a very useful criterion to take into consideration for the revision of the Church's Law, according to many.

12) Numerous laws and directives have been given by the Church after the promulgation of the Codex. Most of them should be incorporated into the new Codex. Likewise, the new legislation on marriage given for the Oriental Church through the *Motu proprio* "Crebrae allatae sunt" of Feb. 22, 1949, could be a great help in the revision of the new Codex. Most of the above mentioned points have already been embodied in the Oriental Code.<sup>19</sup> Finally, the recent celebrated Second Vatican Council and the numerous postconciliar documents on marriage issued by the Holy See should be an important source for the complete updating of the new laws on marriage.

## B. THE NEW MARRIAGE LAW

### *Various Opinions*

The various parts of the new Codex were sent during the preceding years to the Conferences of Bishops throughout the world as well as to the various Dicasteries of the Roman Curia and to the Faculties of Ecclesiastical Studies for consultation.

As regards the matrimonial law, 172 position papers were sent to the Commission for the Revision of the New Codex. A great number of suggestions were made. To study and evaluate these suggestions on marriage law, a committee of members of the Commission was formed.<sup>20</sup>

<sup>18</sup> Frederick R. Mcmanus, *The Second Vatican Council and the Canon Law*: THE JURIST, XXII, p. 259.

<sup>19</sup> AAS, XLI, 89.

<sup>20</sup> Cfr. *Communicationes*, Vol. IX, N. I, 1977, p. 117.

In general, the schema on marriage law was praised by the bodies with whom consultation was made. Only three out of them all rejected the *schema* either because no great changes, as they expected, were introduced, or because the time is not yet ripe for a new marriage law, the new theology not being still well developed; or because, in their opinion, the schema contemplated only situations prevailing in European or American countries, not in mission regions.<sup>21</sup> One Conference of Bishops held that the Schema was rather bent on preventing possible dangers for marriage and in constituting sources of nullity, without mentioning Christ's love for and union with the Church as signified by marriage. For one University the schema emphasized too much the logical principle of a contract while it downgraded the ecclesiastical dimension of marriage. Others held that many words and expressions used by the Vatican Council with a pastoral meaning cannot be taken juridically with the view to consider the validity of marriage. Some suggested that the faculties given to the Conferences of Bishops be restricted only to those affecting the licitness of the celebration of marriage and not its validity, in order to avoid confusion. Others, on the contrary, advocated for more ample faculties for the Conferences of Bishops, especially regarding the extraordinary form in solemnizing a marriage, the separation of spouses, legitimation of the offspring, etc. Somebody even pointed out that the competence of the Church regarding marriage should be restricted to those things that pertain to its sacramentality, giving to the civil power those things that refer to marriage as a natural institution, like impediments, consent, etc.

The foregoing opinions were indeed expressed by only a few. The great majority of the bodies consulted believed that the Schema on the marriage law was well prepared and satisfactory.

### *General Considerations*

One notable feature of the new marriage law is its consideration of marriage in *facto esse*. Hence the personal relationship of the spouses is stressed, as well as the natural destination of matrimony to procreation.<sup>22</sup>

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<sup>21</sup> *Communicationes*, l.c.

<sup>22</sup> Cfr. *Communicationes*, V. III, 1971, pp. 70-71.

It is left to the particular law of each country to issue the norms on betrothal, by considering the customs of the region (can. 1062, § 1). Likewise, it is left to the Conference of Bishops to formulate rules on the things that precede the celebration of marriage, like investigation, banns, etc., in order to ascertain the freedom of the parties to marry (can. 1067). Only a few norms on the preliminaries of marriage are given in the new Codex (cc. 1063-1072).

There was a proposal as to exempt from the canonical impediments those who formally and publicly have abandoned the Church, but such proposal was turned down. However, they are not bound by the impediment of disparity of cult, as well as by the canonical form in celebrating marriage (Can. 1086, 1117).

Dispensation from the impediments is easier both in ordinary and extraordinary circumstances. The so-called prohibent impediments have been suppressed. Likewise the multiplication of impediments has been curtailed. Though in the first draft of the marriage law the public temporal vow of chastity, the legal adoption and the mixed religion were retained as prohibent impediments, the Commission, after receiving the various position papers with suggestions from the different consulted bodies throughout the world, decided to delete these impediments from the Codex. The impediment of crime has been restricted to only conjugicide committed in order to get married (c. 1090). Likewise, it is stated that in case of dubious impotence marriage not only should not be impeded but also must not be declared null and void (c. 1084, § 2).

On matrimonial consent the new Codex offers a new description of its object, since consent is defined as "actus voluntatis, quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendam matrimonium (c. 1057, § 2). Considering this definition of matrimonial consent and the notion of marriage given in canon 1055, § 1, it is obvious that the right to the common life appears to be an essential element in the object of matrimonial consent, its exclusion rendering marriage null and void.<sup>23</sup> However, "vitae communio" created by the interpersonal

<sup>23</sup> Cfr. *Communicationes*, vol. VII, n. 1, 1975, pp. 38-39.

<sup>24</sup> Francis G. Morrissey, O.M.I., *Preparing Ourselves for the New Marriage Legislation*: THE JURIST, Vol. XXXIII, page. 343. He mentions the



relations and simple cohabitation are to be distinguished.<sup>24</sup> Though the principles on incapacity to elicit a valid matrimonial consent are implicitly contained in the Codex of 1917, the Commission deemed it proper to enumerate them in detail in the new Codex (c. 1095). The fraudulent error of one party on the quality of the other which by its very nature is likely to create a serious perturbation in the marital life is also considered by the new Codex as a source of nullity of marriage, provided that the fraud was committed in order to obtain the affected party's consent (c. 1098). Finally the validity of marriages contracted with a condition of a future event is discarded by the new Codex (c. 1102, § 1).

Regarding the canonical form for the celebration of marriage some changes are offered to facilitate a valid celebration of matrimony. The general delegations to any priests and deacons to solemnize marriage that the Codex of 1917 disallowed are admitted in the new Codex (c. 1111). Likewise, in places where there are no priests and deacons, the local Ordinary may, with the favorable vote of the Bishops' Conference and the permission of the Holy See, delegate laymen to assist in the celebration of marriages (c. 1112).

An important innovation appears in Chapter VI which is devoted in its entirety to mixed marriages (cc. 1124-1129). It contains the discipline regulating the celebration of this kind of marriages, which has been drawn from the various documents issued by the Holy See after Vatican II.

Various changes are introduced on the dissolution of the matrimonial bond, some by way of clarification, others as more appropriate norms on the matter. Norms on legal separation are presented in a shorter and clearer form.

On the convalidation of marriage there are a few not substantial changes. Likewise, some changes regarding the "sanatio in radice" refer to the order of the subject matter as well as to the form in presenting it.

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words of a Rotal Decision *coram* Anne regarding this matter: "It does not concern the instauration of the community of life, but the right and obligation to this intimate community of life, which has as its most specific element the intimate union of persons by which a man and a woman become one flesh, and to which, as a summit, this community of life tends."

*Preliminary Canons*

The first of the preliminary canons was perhaps one of the most debated canons on Christian marriage by the members of the Commission. There were suggestions in order that the word "contractus" be eliminated and substituted with the term "foedus". The Commission, however, held that such substitution could not be done, since marriage is in some instances taken as a natural institution which was elevated to the dignity of a sacrament. Marriage considered as a natural institution is a contract. Besides, the word "contractus" applies to marriage *in facto esse*. In canon 1055, § 1, therefore, the word "foedus" is used, while the term "contractus" remains in § 2.<sup>25</sup>

At any rate the personal dimension of marriage is really stressed in the first canon by using the expressions "quo vir et mulier intimam inter se constituunt totius vitae communionem" and "indole sua ad bonum coniugum... ordinatam". Both the welfare of the parties and the community of life refer directly to the personal relationship of the spouses.

In spite of some requests to modify § 2 of the first canon in order to avoid the assertion that all valid marriages between the baptized is always a sacrament, the Commission deemed it proper to retain intact the redaction of the 1917 Codex, namely, "quare inter baptizatos nequit matrimonialis actus validus consistere, quin sit eo ipso sacramentum".<sup>26</sup>

The second preliminary canon (c. 1056) deals with the essential properties of marriage, i.e. unity and indissolubility. It is the § 2 of canon 1013 of 1917 Codex, its § 1 on the ends of marriage having been eliminated. This does not mean that the new Codex rejects these ends. The new Codex, following the attitude of Vatican II has evaded the treatment of marriage ends *ex professo*. Hence, there is no distinction into primary and secondary ends, as in the 1917 Codex. But the same ends are firmly sustained. Both are included in the first canon (c. 1055) which states: "Matrimoniale foedus quo vir et mulier totius vitae consortium, inter se constituunt, *indole sua naturali ad bonum coniugum et ad prolis procreationem et educationem ordinatum...*"

<sup>25</sup> Cfr. *Communicationes*, vol. IX, no. 1, pp. 120-122.

<sup>26</sup> Cfr. *Communicationes*, *ibid*, *ibid*, p. 122.

A significant change is to be noted in the preliminary canons of marriage. Canon 1081 of the Codex of 1917 dealing on the matrimonial consent has been transferred to the preliminary canons of the new Codex (can. 1057). Logical order requires this change. After giving the notion of marriage and pointing out its essential properties, the efficient cause of marriage, the consent of the contracting parties and its definition is treated. Thus the consent of the spouses takes a prominent place in the new Codex. The object of the matrimonial consent appears now to be more ample than before. While in the 1917 Codex the object of the matrimonial consent was "ius in corpus", in the new Codex is the "mutual giving and accepting by the spouses to get married."

The statement affirming the natural right to marry unless the legitimate law deprives somebody of it, which headed Chapter II on impediments in the 1917 Codex, is now more precise by including the clause "etsi una tantum pars sit baptizata" (c. 1059). The Church's competence on a marriage between a Catholic and a pagan is deduced from the ordination of such marriage to its sacramentality as well as from its sacred nature. Leo XIII said: "Matrimonium est sua vi, sua sponte, suapte natura sacrum".

A *ratified* marriage is more properly defined now by substituting the words "matrimonium baptizatorum" for "matrimonium *inter baptizatos*", and the words "nondum consummatione completum est", for "si non est consummatum" (c. 1061). This rewording corrects the wrong impression that a ratified marriage lacks some constitutive element. Likewise a marriage is *ratified and consummated* "si conjuges inter se humano modo posuerunt coniugalem actum." The words *humano modo* make clear that there is no conjugal act unless performed *modo humano*.

It should be noted that the definition of a *legitimate marriage* restricting it to a marriage among pagans has been abandoned, since this terminology is never used in marriage legislation and its canonical effects are not different from the effects of a valid marriage.

Worth noting is the intended innovation which appeared in the Schema of 1980 in regards to *civil marriage*. It was stated

that "matrimonium invalidum intelligitur etiam matrimonium civiliter contractum, quod est propter defectum formae invalidum." This reference to civil marriage has been eliminated.

Finally, the discipline on the betrothal is now left by the new Codex to the particular laws to be issued by the Conferences of Bishops according to the customs and laws of the respective country (c. 1062).

### *Pastoral Care and Preparation to the Marriage Celebration*

The first thing to be noted in the title of Chapter I of the new Codex is the inclusion of the words "de cura pastorali" that the 1917 Codex did not allude to, as well as the omission of the words "et praesertim de publicationibus matrimonialibus". With this omission redundancy is eliminated since the banns are included among those things to be done before the celebration of marriage.

A great number of experts that were consulted on the new Codex earnestly requested the Commission that the matter of pastoral ministry for marriage be dealt with in detail. The Commission, taking into consideration this request as well as other suggestions on the matter, reworded entirely canon 1063. This canon comprises canon 1018 of the 1916 Codex, and stresses the obligation of pastors to create a favorable environment in their parishes whereby marriage be regarded as a state of holiness, to teach their faithful doctrine on marriage, even by using the means that social progress affords nowadays, to prepare personally those who want to get married, to carry out the liturgical celebration of marriage in such a way that Christ's love for his Church be vividly portrayed, and to help married couples in the fulfillment of their duties and the achievement of a higher degree of holiness.

The importance of a good preparation for the marriage celebration is obvious. Many unhappy unions can be prevented if the parties were sufficiently instructed on the dignity of the sacrament and their future responsibilities as spouses and parents. This means the preparation of the persons who will receive the

sacrament, not the external celebration of marriage, and less the pompous celebration of the wedding.

The local Ordinaries are requested to get the assistance of mature couples and experts in order to succeed in preparing prospective couples in getting married (c. 1064). Suggestions were made<sup>27</sup> during the revision of the Codex to create a special commission for the implementation of these efforts, to appoint a Vicar who will take care of this apostolate, or to have special councils at the parochial level.

The Conference of Bishops is given the power to give norms on the investigation to be carried out before the celebration of marriage: personal investigation of the parties and banns (c. 1067). The new Codex does not have the detailed mention of what is to be done, as the 1917 Codex has.

Like the Codex of 1917, the new Codex makes an invitation to the parties to receive the sacraments of Penance and Holy Eucharist on the celebration of marriage, and the sacrament of Confirmation to those who have not received it yet (c. 1065).

The need of proving the freedom of the parties, even in danger of death, is reaffirmed (c. 1068), as well as the duty of the faithful to notify the parish priest or local Ordinary of the existence of whatever impediments they may know (c. 1069). Likewise, the obligation of the investigating priest to inform the parish priest who will solemnize the marriage about the result of the investigation conducted by him (c. 1070).

No parish priest is allowed without the permit of the local Ordinary to assist in the celebration of the following marriages (c. 1071):

- 1) of those who have no domicile or quasi-domicile;
- 2) of those who cannot marry according to the civil code;
- 3) of those who have a natural obligation to other party or to the children born of another union;
- 4) of those who publicly rejected the Catholic faith;

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<sup>27</sup> *Communicationes*, vol. IX, no. 1, 1977, p. 138.

- 5) of those who are punished with a censure;
- 6) of minors, whenever their parents do not know of their marriage and when they oppose its celebration with good reason;
- 7) when the marriage is to be celebrated through a procurator.

Finally, pastors of souls are enjoined to convince the young not to marry before reaching the age of getting married according to the customs of the region (c. 1072).

#### *Diriment Impediments in General*

The Commission on the revision of the Codex believed that the impedient impediments of the 1917 Codex should be suppressed.<sup>28</sup> Such impediments were first reduced to three, namely public temporal vow of perfect chastity, legal adoption for regions where the civil legislation considers it as such, and mixed religion. But after a careful study the Commission decided to do away with them all.

The impediment of public temporal vow of perfect chastity was never directly dispensed, since the impediment springs from the vow itself. Once this is dispensed, the impediment ceases to exist. Regarding the impediment of legal adoption, it should be noted that sometimes it is not easy to say whether such impediment is regarded by civil legislation as merely prohibent or as diriment. On the other hand, it has been provided in Chapter I, canon 1071, n. 2 that no marriage prohibited by the civil legislation should be solemnized in the church without the permission of the local Ordinary. Hence there is no need of this impediment. Finally, the norms regulating the celebration of a mixed marriage are presented in a new Chapter (chapter VI). The Commission deemed it proper not to consider simple mixed religion as an impediment but rather as a prohibition in order not to hinder the spirit of ecumenism.

The new Codex reaffirms the right of the supreme authority of the Church to authentically declare when the divine law renders

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<sup>28</sup>Cfr. *Communicationes*, vol. IX, no. 1, 1977, p. 133.

a marriage invalid or illicit, as well as to establish other impediments for the baptized (c. 1075). The local Ordinaries may prohibit those who actually reside in their territory and their respective faithful even outside of their territory to get married in a particular case, temporarily and while a serious motive exists. They, however, may not add a diriment clause to such prohibition. This is reserved to the supreme authority of the Church (c. 1077).

Faculty is given to the local Ordinaries to dispense all residents of their territory and their subjects elsewhere from all ecclesiastical impediments, except those reserved to the Holy See, namely, the impediments originated from sacred ordination or public perpetual vow of chastity in an institute of consecrated life of pontifical right and the impediment of crime (c. 1078). Out of the five impediments that appeared as reserved to the Holy See in the first Schema sent out by the Commission, three have been dropped, namely, the impediment of age, the impediment of consanguinity up to the third degree in the collateral line, and the impediment of affinity in the direct line.

Likewise, the local Ordinaries are given the faculty of dispensing, in urgent danger of death, their subjects throughout the world and all residents in their territory from observing the canonical form and from each and all impediments of ecclesiastical origin either public or occult, except the impediment of priesthood (c. 1079, § 1). The clauses "ad consulendum conscientiae", "si casus ferat, legitimationi prolis", "remoto scandalo", that appeared in the 1917 Codex have been deleted in the new Codex. Likewise, the exception made in the 1917 Codex regarding the impediment of affinity in the direct line has been removed. As in the 1917 Codex this faculty is granted to the parish priests, to the delegated sacred minister and to the priest or deacon who assist in the celebration of marriage in danger of death and in a remote place (c. 1116). But this power is restricted to whenever the local Ordinary cannot be contacted (can. 1079 § 2), except by phone or telegram. In regard to the Confessor, his faculty is restricted to the *occult* impediments and for the internal forum only (Ib., § 3).

Finally, the typical case when an impediment is discovered when "omnia parata sunt ad nuptias" is dealt with in canon 1080,

§ 1). Only the local Ordinaries may dispense from the impediments of ecclesiastical origin, except those reserved to the Holy See, when the case is *public*. Parish priests and other sacred ministers may only dispense from those impediments when the case is *occult*.

### *Diriment Impediments in Particular*

As we have said before, the new Codex has done away with the impedient impediments. Only diriment impediments remain as contained in the 1917 Codex with little changes.

The impediment of *age* remains as before. Paragraph 2 of canon 1067 of the 1917 Codex has been transferred to chapter I of the new Codex, which deals with pastoral ministry (c. 1072). Though many requests were addressed to the Commission in order to raise the age, the Commission held that it cannot easily be done, since marriage is a natural right and biological as well as psychical maturity is already attained at the age stated by the Codex. Since the law considers the biological development and peculiar norms on psychical maturity are given in the Chapter dealing with matrimonial consent, the age established by the Codex should not be changed. However the Conference of Bishops is given the faculty to raise the age, without affecting the validity of marriage (c. 1083, § 2). Likewise there were some requests that the Church's law on the age to get married should conform to the civil law. The answer of the Commission was that there is a norm in chapter I forbidding, without the permission of the local Ordinary, the celebration of marriages not allowed by the civil code.<sup>29</sup>

The impediment of *impotence* remains substantially the same. In § 2 of canon 1084, however, there is an important addition, namely that ecclesiastical tribunals may not declare null and void a marriage contracted with a doubtful impediment of impotence. It would be illogical to declare invalid a marriage expressly allowed by the Church.

Regarding *sterility* there is also an important addition in the chapter on marital consent which can affect sterile persons who

<sup>29</sup> Cfr. *Communicationes*, vol. IX, n. 2, 1977, p. 360.



intentionally might hide their condition from the other party. Reference is made to canon 1098 which deals with fraud in order to get the matrimonial consent. This means that any wilful misinformation about one's own sterility may render invalid a marriage. Such misinformation is likely to perturb and even ruin the marital life, which canon 1098 admits as a valid ground for declaring invalid a marriage.

Regarding the impediment of *sacred orders* (c. 1087), an exception was made for the married deacons in the Schema of the Codex presented by the Commission in 1980. In the first draft presented by the Commission deacons were bound by the same diriment impediment, so that they were debarred for a subsequent marriage. Due to many requests that such an impediment should not bind married deacons, the Commission acceded to the request. The reason given for this was that married deacons do not choose celibacy and a subsequent marriage might be the best solution for the children they might have had from the previous marriage. This exception, however, has been eliminated in the final draft approved and promulgated on Jan. 25, 1983.

The impediment coming from the *solemn vows* is now reworded in this way: "Invalidum matrimonium attendant qui voto publico perpetuo castitatis in instituto religioso adstricti sunt" (c. 1088). A public perpetual vow of perfect chastity will therefore constitute a diriment impediment. The Codex of 1917 required a solemn vow.

The impediment of *abduction* is redacted in a shorter and clearer way (c. 1089).

The impediment of *crime* is restricted now to the third form of the impediment contained in the 1917 Codex, namely, to the crime of conjugicide committed with intention of getting married, even without adultery (c. 1090).

*Consanguinity* in the collateral line constitutes an impediment to marriage when the contracting parties are related within the fourth degree (c. 1091), counting the degrees according to the Roman Law, i.e. counting both lines.

*Affinity* constitutes an impediment to marriage in any degree in the direct line (c. 1092). In the collateral line it has been

suppressed, since quite often this kind of marriage is the best solution for the offspring of a previous marriage. Multiplication of the impediments of consanguinity and affinity is suppressed.

The impediment of *public propriety* extends only to the first degree of the direct line between the male and those related by consanguinity to the female and vice versa (c. 1093).

The impediment of *spiritual relationship* has been suppressed.

Finally legal *adoption* is rephrased in the following way: "Matrimonium inter se contrahere nequeunt qui cognatione legali ex adoptione orta, in linea recta aut in secundo gradu lineae collateralis, coniuncti sunt" (c. 1094). With this change the Commission accepted the request of a Conference of Bishops that the impediment of legal adoption as established in the civil code should not be canonized by the Church. As it is now in canon 1094, legal adoption will be an ecclesiastical diriment impediment whether the same be considered as such by the civil law or not. However, parish priests should bear in mind that they are not allowed to solemnize a marriage which is forbidden by the civil law because of adoption, without the permission of the local Ordinary (c. 1071, 2o).

### *Matrimonial Consent*

We have said before that the canon giving the definition of matrimonial consent as well as the object of the act of the will has been transferred to the chapter dealing with the preliminaries of marriage (c. 1057).

There are some new norms on matrimonial consent. The first canon enumerates the persons regarded as incapable of getting married validly for lack of sufficient consent: 1o. those who have not sufficient use of reasons; 2o. those affected by a serious defect of discretion and judgment in appreciating the marital rights and duties to be given and accepted by the contracting parties; 3o. those who due to causes of psychical nature cannot assume the essential obligations of marriage.

On the knowledge about marriage required in the contracting parties there is no substantial change. The norm on error re-

mains also unchanged. Only paragraph 2 of canon 1083 of the 1917 Codex has been rephrased in a shorter and clearer way. Worth noting is the omission of the words "*etsi det causam contractui*" of canon 1084 of the 1917 Codex, that are substituted by the words "*dummodo non determinet voluntatem*" (c. 1099). In the Schema of 1980 there was no mention of error "*circa sacramentalem dignitatem*". In the promulgated Codex these words appear anew.

A new canon on fraud has been added (can. 1098). It states that when a person marries having a misconception on a quality of the other party which is likely to seriously perturb or ruin the marital life and this misconception is due to a fraud committed in order to obtain the matrimonial consent, such marriage is null and void. Considering the concept of human dignity which nowadays prevails as well as the personalistic values of marriage, it is logical that personal dignity to contract marriage with the person really envisioned without any type of fraud that might ruin the marital life be defended. Hence the Commission admitted fraud as a source of defect of marital consent under certain conditions, namely, that fraud should be perpetrated in order to obtain the matrimonial consent and that it should concern a quality of the other party, which would render very difficult the community of life. Whether the fraud be committed by one of the contracting parties or by a third person is immaterial. Many of the bodies consulted have expressed their fear that this canon is likely to open wide the door for marriage nullity.

Regarding the presumption that the internal matrimonial consent conforms to the external manifestation made by the contracting parties there is no substantial change. However, the words "*ius ad matrimonii essentiale aliquod elementum*" replace the words "*ius ad coniugale actum*" of the 1917 Codex. The question that can be raised is what are the elements that are considered as essential to the state of marriage? Canon 1101 states that the positive exclusion of the right to those elements which make up marriage renders it invalid. It is expected that Jurisprudence will come up with some kind of enumeration of these elements.

Marriage contracted under a condition of a future event is considered as null and void in the new Codex. A marriage can be

lawfully celebrated however under a condition of a past or present event with the permission of the local Ordinary (c. 1102).

Regarding force and serious fear (c. 1103) the words "etsi inconsulto incusum" now replace the term "iniuste" used by the 1917 Codex. The second paragraph of canon 1087 has also been omitted.

On the presence of the contracting parties during the celebration of marriage, either personal or through a proxy, the new Codex adds the words "una simul" (c. 1104). Simultaneity of their presence is therefore necessary. The appointment of the proxy is explained in a clearer way (c. 1105). An important addition is found in the new Codex, namely that the appointment done in an authentic valid document according to the civil legislation is admitted (Ib., § 2).

The presumption that the matrimonial consent given in an invalid marriage continues to exist, is re-affirmed in the new Codex, not only when marriage was invalid due to a diriment impediment but also to lack of canonical form (c. 1107).

### *Canonical Form*

The first canon on the canonical form (c. 1108) reproduces the basic principle stated in the 1917 Codex, namely that a marriage is only valid when solemnized by the local Ordinary or the parish priest, or by another priest or deacon legitimately delegated, in the presence of two witnesses. Its second paragraph states the active role of the sacred minister, inasmuch as he is required to ask and accept the matrimonial consent of the contracting parties. This active presence of the qualified witness is again stressed in canon 1120. In this way the legislator rejects the opinion of those holding that it is enough if the contracting parties mutually manifest their consent in the presence of the officiating minister without any active role of the latter.<sup>30</sup> Two changes are to be noted in the second canon (c. 1109): the words "vi officii" replacing the words "a die tantum adeptae possessionis officii", and the addition "dummodo eorum (contrahentium) alteruter sit ritus latini".

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<sup>30</sup> Cfr. *Communicationes*, vol. x, no. 1, 1978, p. 86.

There is a new provision stating that the personal Ordinary and parish priest may "*vi officii*" validly solemnize the marriage of their subjects only and within the limits of their jurisdiction (c. 1110).

An important deviation is found regarding the delegation needed by ordinary priests and deacons. While in the 1917 Codex only a restricted and determined delegation could be given to them, the new Codex (c. 1111) admits of a general delegation. The person granted the delegation, however, has to be determined in order to be valid. General delegation should be given in writing. For delegation other than general, the marriage to be solemnized is to be determined.

The new Codex admits the possibility to delegate laymen to solemnize a marriage whenever there are no priests or deacons, provided that the local Ordinary has the favorable endorsement of the Conference of Bishops and obtains this faculty from the Holy See. These lay people should be worthy and capable to teach the contracting parties and are fit to perform the liturgical celebration of marriage (c. 1112).

Before giving a delegation other than general, the freedom of the contracting parties should be beyond any reasonable doubt (c. 1113). Likewise, this freedom must be known to the person assisting to the marriage, who in his turn should notify the parish priest when the celebration of marriage takes place by virtue of a general delegation (c. 1114).

On the persons bound to marry according to the canonical form a change is made in behalf of those who formally have abandoned the Church (c. 1117).

The celebration of marriage must be carried out in the proper parish church. To celebrate it in another place, the permission of the local Ordinary or the proper parish priest should be obtained (c. 1115). The prohibition to solemnize a marriage in the churches or in chapels of religious women or of seminaries has been abolished. Likewise there is no restriction in the new Codex regarding the time or season to solemnize marriages.

In the celebration of a marriage the liturgical rites approved by the Church should be observed. The Conferences of Bishops

are granted the faculty to prepare the proper rites to be approved by the Holy See, that in accordance with the customs of their people are likely to foster Christian devotion. Here again the assisting minister is reminded that his presence is to be active by asking and receiving the matrimonial consent of the parties (c. 1120).

The celebration of marriage has to be registered by the parish priest of the place where it is celebrated or by the one taking his place, even if they did not assist at its celebration personally. The name of the parties, the solemnizing minister, the place and date should appear in the register, according to the instructions given by the Conference of Bishops or the local Ordinary. When the marriage is celebrated in danger of death or in a remote place without observing the ordinary canonical form, the assisting priest or deacon or in their absence the witnesses and contracting parties should notify the parish priest or the local Ordinary about the celebrated marriage as soon as possible. When a dispensation from the canonical form is granted, the local Ordinary granting the dispensation will take care that said dispensation and celebration of marriage be registered in the Curia and in the parish of the Catholic party, whose parish priest performed the investigation on the freedom of the parties. The Catholic party must inform the local Ordinary and the parish priest on the celebration of marriage as well as on the place and the public form performed in said celebration (can. 1121).

The celebrated marriage must be also registered in the book of baptisms of the place where the parties were baptized. Whenever the marriage is solemnized outside the parish where the party was baptized, the parish priest of the place where the marriage was celebrated will notify the parish priest of the place where the party was baptized as soon as possible (c. 1122).

Finally, whenever a marriage is convalidated in the external forum or declared null and void, or nullified, the parish priest of the place where said marriage took place should be notified so that the proper adnotation be made in the books of marriages and baptisms (c. 1123).

*Mixed Marriages*

The chapter on mixed marriages is entirely new. In the 1917 Codex the discipline on mixed marriages was contained in canons 1060-1064 and 1070-1071. The impedient impediments having been abolished in the new Codex, the whole discipline on the matter has been summarized in this chapter in accordance with the various directives given by the Church after the Second Vatican Council. The following documents are the bases for this chapter: the Instruction "Matrimonii Sacramentum" of March 18, 1966,<sup>31</sup> the Decree "Crescens Matrimoniorum" of February 22, 1967,<sup>32</sup> and the "Matrimonia Mixta" of March 31, 1970.<sup>33</sup>

The first provision on mixed marriages states that a marriage between a Catholic and a baptized non-Catholic cannot be celebrated without a dispensation from the competent authority (c. 1124). The local Ordinary may grant this dispensation if there is a just and reasonable cause (c. 1125). Before giving this dispensation, however, the following conditions should be fulfilled:

- 1) The Catholic party must declare that he or she is decided to remove any danger of losing the faith and should promise to try his or her best to have the offspring baptized and educated in the Catholic Church;
- 2) The non-Catholic party should be notified about the promise made by the Catholic party so that his or her knowledge about this promise and its corresponding obligation be unquestioned;
- 3) Both parties should be taught about the ends and essential properties of marriage, never to be excluded by either of them.

The Conference of Bishops will decide the way of carrying out the foregoing declarations and promises, always to be done, as well as how they should be made in the external forum (c. 1026).

In the celebration of mixed marriages the usual canonical form is to be observed. In case of a marriage of a Catholic with

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<sup>31</sup> AAS., LXVIII, 235-239

<sup>32</sup> AAS., LIX, 165-166

<sup>33</sup> AAS., LXII, 257-263

a non-Catholic of the Oriental rite, the non-observance of the canonical form does not affect its validity, but the absence of a sacred minister will render the marriage null and void (c. 1127, § 1).

For a marriage between a Catholic and a non-Catholic, the local Ordinary may grant a dispensation in particular cases from observing the canonical form, if there are serious difficulties for its observance, but some kind of public form of celebration is necessary for its validity. It belongs to the Conference of Bishops to give some norms for this kind of dispensation (Ibid., § 2).

It is never allowed to hold another religious celebration before or after the canonical celebration in order to give or renew the matrimonial consent. Likewise it is not allowed to have a simultaneous religious celebration performed jointly by the Catholic and non-Catholic ministers, wherein each of them will do their respective rites and ask and receive the matrimonial consent (Ibid., § 3).

Finally, the local Ordinary and other pastors of souls are enjoined to take care so that the Catholic spouse and the offspring born of a mixed marriage will not lack the spiritual assistance needed for the fulfilment of their religious obligations (c. 1128). These couples need a special help in order to keep their conjugal loyalty and unity.

### *Secret Marriages*

For a serious and urgent cause the local Ordinary may allow the celebration of a secret marriage (c. 1130). His permission implies the following (c. 1131):

- 1) to conduct secretly the investigations that usually are done before the celebration of marriage;
- 2) secrecy about the marriage celebration to be kept by the local Ordinary himself, the assisting minister, the witnesses and the contracting parties.

It is worth noting that the investigation for this kind of marriages are also to be conducted, though secretly. The publication of the marriage is naturally omitted.



The obligation of keeping secrecy does not bind the local Ordinary whenever there is any danger of scandal or the sanctity of marriage is endangered. This should be explained to the contracting parties before the celebration of marriage (c. 1132).

Though there were various suggestions to include also the case of parents neglectful to have the offspring baptized and educated in the Catholic Church, the Commission however held that such a reason does not conform to the conditions of the modern age.

It is but natural that a marriage celebrated secretly be registered only in a secret book to be kept in the secret archives of the Curia (c. 1133).

Chapter VIII of the 1917 Codex which dealt with the time and place for the celebration of marriage has been suppressed, since the norms on this matter are incorporated in the chapter on the canonical form.

### *Marriage Effects*

On the effects of marriage there are some differences between the new Codex and that of 1917.

The dogmatic clause "matrimonium christianum conjugibus non ponentibus obicem gratiam confert" has been changed (c. 1134) into "in matrimonio christiano coniuges ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur".<sup>34</sup>

An important change is the suppression of the clause of canon 1114 of 1917 Codex: "nisi parentibus ob sollemnem professionem religiosam vel susceptum ordinem sacrum prohibitus tempore conceptionis fuerit usus matrimonii antea contracti". This exception having been suppressed, all children conceived in or born of a valid or putative marriage are to be regarded as legitimate (c. 1137).

Likewise, legitimation by the subsequent marriage of the parents is now extended by the new Codex to all illegitimate children

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<sup>34</sup> Canon 1134.

without any exception (c. 1039). The clause "dummodo parentes habiles extiterint ad matrimonium inter se contrahendum tempore conceptionis, vel pregnationis, vel nativitatis" has been eliminated. The distinction therefore of illegitimate children into *natural* and *spurious* has no bearing any longer in the Church's law. Whether future particular rescripts granting the legitimation will consider or not the traditional classification of illegitimate children remains to be seen.

### *The Dissolution of the Bond*

In the first canon (c. 1141) on the dissolution of the bond the word "validum" has been omitted as unnecessary, since any ratified and consummated marriage is understood to be valid.

The dissolution of a ratified, non-consummated marriage is restricted to the intervention of the Roman Pontiff (c. 1142). The Commission received various requests that the faculty to dispense from a ratified, non-consummated marriage be given also to the Bishops, or that at least the words "a Romano Pontifice" be rephrased "ab auctoritate ecclesiastica", so that the theological discussions on the vicarious power and the possibility of its being delegated remain open. The Commission, however, unanimously decided that notwithstanding the opinion of some authors that such power belongs also to the Bishops, the present discipline should be sustained by reserving it to the Roman Pontiff.<sup>35</sup>

The norms on the Pauline privilege are now clearer and are elaborated on in a more detailed manner. Canon 1126 of the 1917 Codex which explained when the first marriage is dissolved has been absorbed in the first canon on the Pauline privilege (c. 1143, § 1), while the meaning of the term "discedere" of canon 1124 of the 1917 Codex is now given in § 2 of the same canon. There is no need anymore to consult the Holy See on how to proceed in making the interpellations or in dispensing from them. The local Ordinary is empowered to decide on the matter (c. 1144, § 2).

It is worth noting that the baptized party in using the Pauline privilege can, with the permission of the local Ordinary, marry a

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<sup>35</sup> Cfr. *Communicationes*, vol. X, no. 10. 1978, p. 108.

baptized non-Catholic or even a non-baptized, so long as what is prescribed on mixed marriages is observed (c. 1147).

Canon 1125 of the 1917 Codex, which merely mentioned the Constitutions "Altitudo" of Paul III, "Romani Pontificis" of Pius V, and "Populis" of Gregory XIII, is now substituted with a specific short enumeration of the cases dealt with in those apostolic documents (cc. 1148-1149). Thus, a newly baptized who has several wives not baptized, may choose whom he prefers and dismiss the others, when it is hard for him to retain the one whom he married first. This applies also to a newly baptized woman who has several husbands not baptized.

Likewise, a non-baptized who is converted to the Catholic faith and cannot, due to captivity or persecution, resume his or her marital life with the lawful non-baptized spouse, may marry again even if the other spouse be also baptized during this period of time.

In all these cases it is clear that none of the marriages is a ratified and consummated marriage. Consequently they may be dissolved by the vicarious power of the Roman Pontiff.

Considering the moral, social and economic situation of persons and places, the local Ordinary is enjoined to see to it that the needs of the first spouse or of other spouses dismissed be provided for according to the principles of Christian charity and natural equity (c. 1148, 3). Some authors have considered this provision as an intolerable burden imposed upon the local Ordinary. The Commission, however, explained that it only enjoins him to take care that the provision be carried out by the persons concerned.

### *Legal Separation*

The norms regulating legal separation remain substantially the same. There is, however, a new prescription stating that when the disruption of the marital life has been due to the initiative of the innocent spouse, he or she must bring the case to the competent authority within six months, so that something may be done in order to reconcile both parties and to resume their living together, or at least to prevent that their separation be protracted indefinitely (c. 1152, § 3).

The causes enumerated for legal separation in canon 1131 of the 1917 Codex have been reduced in the new Codex (c. 1153).

The affiliation of one of the spouses to a non-Catholic sect, non-Catholic education of the offspring, ignominious and criminal life and cruel treatment have been deleted from the new Codex.

### *Simple Convalidation of Marriage*

On simple convalidation of marriage there is no change to be noted. In convalidating a marriage invalid due to lack of canonical form, a new celebration observing this form is necessary, except in the case of a marriage of a Catholic and a non-Catholic when a dispensation of the local Ordinary from observing such form was called for. In such case some kind of public celebration is necessary as required in canon 1127, § 2. We think a typographical error is found in the Codex can. 1060 where can. 1127, § 3 is mentioned. It seems that § 2 should be instead of § 3.

There were some questions raised during the revision of the Codex on how the norm on the ecclesiastical requirement of the renovation of the consent for a convalidation can be reconciled with the general principle of presuming the persistence of the marital consent given at the celebration of an invalid marriage. The Commission did not answer directly these questions.

### *Sanation in Radice*

Sanation *in radice* is now defined as follows: "Matrimonii irriti sanatio in radice est eiusdem, sine renovatione consensus, convalidatio, a competenti auctoritate concessa, secumferens dispensationem ab impedimento, si adsit, atque a forma canonica, si servata non fuerit, necnon retrotractionem effectuum canonicorum ad prateritum" (c. 1161, § 1).

The possibility of granting the favor of sanation *in radice* in case one or both the contracting parties are unaware of it, has been more aptly changed by the following norm: "Sanatio in radice ne concedatur nisi probabile sit partes in vita conjugali perseverare velle" (Ibid., § 3).

Whenever there is no consent of one or both parties from the beginning or when such consent was revoked, no sanation *in radice* is possible. In case, however, there had been no consent at the

beginning, but later on it was given, sanation *in radice* may be granted from the moment the consent was given (c. 1162).

A marriage which is invalid due to an ecclesiastical impediment or to lack of the canonical form may be convalidated *in radice* as long as the consent of both parties persists. But when the nullity of a marriage is due to the existence of an impediment of the natural or divine positive law, no convalidation is possible until such impediment should disappear (c. 1163, § 2). This is a deflection from the norm of the 1917 Codex which stated that the Church did not convalidate *in radice* such marriage even from the moment the impediment disappeared.

On the authority by which the favor of sanation *in radice* may be granted there is an important change. While the 1917 Codex stated that it could be granted only by the Holy See, the new Codex has eliminated the word "unice" (c. 1165, § 1). Moreover, the diocesan Bishops are granted the faculty of convalidating *in radice* "in singulis casibus" a marriage even if several reasons for its nullity are found, as long as the conditions specified in canon 1125 for the sanation *in radice* of mixed marriages are fulfilled. The diocesan Bishops, however, may not grant this favor whenever an impediment reserved to the Holy See exists and when an impediment of natural or divine positive law has disappeared (c. 1165, § 2).

The foregoing observations reflect, in our opinion, the main salient features differentiating the new Codex and that of 1917. It is hoped that its study will help solving difficulties that might appear in our priestly life.

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