

# SOME CONFLICTS BETWEEN THE CANON LAW AND THE CIVIL CODE IN THE LAW OF MARRIAGE

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The principles of the law no matter how lofty in purpose and clear in phraseology too often remain abstract until they are brought down into the arena of practical life and application. In the short space of this article, it would be impossible to cover all aspects of the two legal systems under consideration. Suffice it to say that there is a strong similarity in the two systems for they do have a juridical kinship, each by different genealogical lines tracing its ancestry to the ancient law of Rome as finally elaborated in the Code of Justinian. But other tributaries have contributed their riches to both systems so that now there are significant differences between them. Indeed one could say that despite the obvious similarities, there is a very radical difference in the basis of the two matrimonial laws under consideration. That our discussion may be more down-to-earth, it seems helpful to present some actual cases, and from these examples, to illustrate the juridical principles involved. For purposes of brevity, the discussion will be limited to five specific case situations.

## CASE I

### *The Status of a Civil Marriage in Canon Law*

Juan Cruz, Filipino, of legal age, and a baptized Methodist, married Stella Santos, Filipina, of legal age, a non-baptized person with no religious affiliation, before a judge in June 1968. In 1971, the marriage broke up and Stella, who was a nurse, emigrated to the United States. There she obtained a civil divorce and remarried an American. After learning of the stateside divorce and remarriage of Stella, Juan Cruz brought an action for legal separation in the Court of Domestic Relations and won his suit. In the meantime he fell in love with another woman, Clara, a Roman Catholic, with whom he is now living maritally. Clara wants to have her union with Juan Cruz validated in the Catholic Church so that she may return to the sacraments. Both parties to the first marriage would like to be civilly free to remarry.

### QUESTIONS:

- 1) Can Juan remarry Clara in the Catholic Church? Why?

2) Can he marry her in a valid contract according to the Civil Code? Why?

3) Given the same circumstances as above but presupposing that Juan and Stella were both baptized Protestants, would the answer be the same according to the Canon Law? Why?

The first case which I have presented illustrates the fundamental difference between the basis of the Canon Law and that of the Civil Code in judging the status and obligations of a marriage relationship. The basis of all Canon Law and especially that of the Marriage Law goes back to the theology of the sacraments of the Catholic Church which in turn is founded on the data of Scripture and its theological interpretation. The two pivotal points on which the canonical doctrine of marriage rests were worked out by the medieval canonists and theologians in a long series of disputes. There were two issues at stake in that debate, whether the marital contract, and hence the sacrament itself, arose from mere consent or was carnal knowledge (physical consummation) necessary to produce the full force of the contract. Gratian, the foremost legalist of that age, defended the theory that without physical consummation there was no completed contract. He was opposed vigorously by others and eventually a compromise was reached under Pope Alexander III which is expressed in the Code of Canon Law of 1918 by the conjuncture of two canons: Canon 1081, #1 which states that "Marriage is effected by the consent of the parties lawfully expressed between persons who are capable according to law . . ." and Canon 1118 which states that "A marriage which is *ratum* (*i.e.* sacramental) and *consummatum* (physically consummated) cannot be dissolved by any human power, nor by any cause save death." These two canons presuppose the principle enunciated in Canon 1012, #2, the opening canon of this treatise which states that Christ raised the marriage contract between the baptized to the dignity of a sacrament and hence by the very fact that a valid marriage contract exists between the baptized, the sacrament comes into existence. Thus the Church's concept of her jurisdiction over the marriage contract arises from her conviction that the baptized are members of the Church and their sacramental actions come under her discipline. The contract of marriage is a unique type of contract, its ministers are not the priest but the parties themselves who exchange their free marital consent with each other. Like the judge or mayor in the Civil Code, the officiating priest in Canon Law is merely the official witness of the Church to the fact that two Christians have pledged their marital vows to one another. Hence in certain defined circumstances even the presence of this official witness can be dispensed with.<sup>1</sup>

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<sup>1</sup>For example, Can. 1098.

Our conclusion, therefore, is this: a valid marital contract exists between two Christians who are free to marry, and who express their consent in the form prescribed by law. By that very consent they become the recipients of the Sacrament of Matrimony. Once that consent is further confirmed by an act of sexual union, we have what the Canon Law terms a '*ratum et consummatum*' marriage — a marriage which is both sacramental (between two Christians) and consummated.<sup>2</sup> This is the only marriage which is completely indissoluble. All others are capable of dissolution in one way or another. Consequently, the absoluteness of the precept against divorce in Roman Catholic theology and law is only applicable to this type of union. If even one party to the union is not a baptized Christian or if in the case of two Christians, the marital consent is not subsequently confirmed by sexual union, and hence remains unconsummated, then this marriage may for certain reasons be dissolved through the powers conceded to the Church. Under the present practice, such a dissolution demands the personal intervention of the Pope. It should be noted that the Canon Law applies this concept of unbreakable union not only to her own communicants but to all the baptized. Hence in her eyes, at least under the present Code, the marriage of two baptized Protestants, once consummated, would be considered to be just as untouchable in its perpetuity as the similar union of two Catholics. Obviously this gives rise to many misunderstandings, and in our more ecumenical age, calls for some clarification. More obviously still, the theological presuppositions of Catholic marriage lead to inevitable conflicts with the Civil Code of the Philippines. Thus, when the marital bond between a Catholic and a non-baptized person or a non-consummated Christian marriage is dissolved by the Holy See, the parties are still bound by the absolute prohibition of divorce in our own Civil Code; with the result that a conflict arises in which the parties to the first marriage are considered canonically free to marry but civilly they are bound until death. With this in mind, we can consider our first case.

To the first question, namely, "Can Juan Cruz remarry Clara in the Catholic Church?", the answer is affirmative. Based on the theological concept of a sacramental (*ratum*) marriage, the bond between Juan Cruz and Stella Santos was not sacramental because Stella before and during the entire period of her marriage was a non-baptized person. In the eyes of the Canon Law, their union was a legitimate one but not sacramental. It can be dissolved under certain conditions by the direct intervention of the Pope. After this papal dissolution, the parties are free to remarry. It is quite clear that judged by the Civil Code, this second marriage would be bigamous and hence invalid. In such a situation, there is a

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<sup>2</sup>Can. 1015.

direct conflict between the Civil Code and the matrimonial practice of the Code of Canon Law, which would permit the dissolution of the first marriage by direct papal intervention in order to allow the second sacramental marriage to take place. But interestingly enough, were Stella a baptized non-Catholic, *e.g.* a Methodist, Baptist, etc., the Catholic Church could not permit the second marriage to take place because the first marriage was between two baptized persons, and whether or not they were aware of it, this union is judged to be sacramental and indissoluble. This case demonstrates the fundamental difference between the Canon Law and the Civil Code of marriage. In the former, the principal focus is on the sacramental nature of the contract. The fundamental theological principle involved here is that between Christians, *i.e.*, two baptized persons, a matrimonial bond cannot exist without it being at the same time a sacrament. The two cannot be separated. The Civil Code on the other hand, abstracting from all religious values, simply looks at the marriage bond as a contract between two citizens who are legally capable of consenting to the contract. Inevitably there are conflicts between these two viewpoints which often have serious practical consequences for the persons concerned.

#### *The Engagement Contract*

The canonical engagement contract or betrothal, has no strict parallel in the Civil Code. Canon Law recognizes this customary pre-marriage agreement and by the very fact that it gives it a place in the Code, sanctions its use. However, the informal engagement that society and custom recognizes in almost every culture ordinarily does not embody all the requirements of Canon Law for the engagement contract to have legal effect. Hence no moral or canonical obligation will arise unless the formalities of Canon 1017 are strictly complied with. To give rise to any obligation either moral or legal, the engagement contract must be in writing, signed by the parties, and then witnessed either by the pastor or the bishop or, in the lieu of these official witnesses, then by two common witnesses. It is to be noted that even though all these formalities are complied with, paragraph #3 of the same Canon makes it clear that this engagement contract gives no right of action to compel marriage, but at the most to an action for damages, if there are any.

After setting forth the theological basis and the unique nature of the sacrament of matrimony together with its essential properties, the Code of Canon Law then considers the preliminaries to marriage which include the engagement contract and the pre-marital investigation which the pastor is obliged to conduct before admitting the parties to the sacra-

ment. The whole object of the pre-marital investigation is to assure that the parties are free to marry, or as the Civil Code puts it, that they have the legal capacity to contract, and secondly, that they are entering the contract willingly and not under any constraint or condition that would invalidate their consent.<sup>3</sup>

The Code of Canon Law then takes up in order, the three areas necessary to produce a valid contract, namely, freedom from impediments, consent, and then the form in which this consent is to be expressed. Consequently, it can be seen that the order of the Code of Canon Law differs somewhat from that of the Civil Code. The latter, in Articles 53 to 57, takes up the essential requisites of marriage, and starts by setting forth the requirements of a license, the basic age required for consent, and those empowered to solemnize the contract.

## CASE II

### *The Juridical Form of the Marital Consent*

a) On 5 June 1965, Rogelio and Rita, both Roman Catholics, entered into a civil marriage contract before the mayor of Pasig. Two children were born of the marriage. In 1970, Rogelio, becoming successful in business, acquired a *querida* and after several efforts to break up this liaison, Rita took her children and returned to her parents. Two years later, she fell in love with Mario, also a Catholic. They went to the parish priest to inquire if they could be married in the Catholic Church. He assured them that they could since the Catholic Church does not recognize the marriage bond created by a purely civil ceremony. With that they happily departed and after obtaining a marriage license by fraud, they were married in a Catholic ceremony by the parish priest. Since Rogelio is now fully settled with his second wife, by mutual agreement, both parties continue on in relative happiness.

b) In 1950, in an upland town of Cavite where there was no resident parish priest, Zenaida and Epitacio, both Catholics, being poor barrio people, felt that they could not get to the distant town of Indang. Neither did they have money for a civil license, indeed, they hardly thought about it. Since banditry was rife at that time in the province, they were all the more loath to go to the town which was 10 kilometers away. The customary engagement had taken place a month before, both parties wanted to get married, so, finally, following the ancient customary ritual of the rice ceremony and the conducting of the bride to the groom's house, they entered into married life. Everyone in the barrio accepted them as man

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<sup>3</sup>CIVIL CODE, art. 53 (1) & (2).

and wife. A child was born, and on the feast of Sto. Niño, was baptized in the parish Church of Alfonso. In 1952, for the first time since 1898 a parish priest was appointed to the town of Magallanes. He began a mission in the outlying barrios, and before admitting anyone to the sacraments, declared that all those not married in Church, had to do so.

#### QUESTIONS:

1) In the first situation are Rita and Mario free to marry according to the law of the Catholic Church? Why? Are they civilly free to marry? Why?

2) Are Zenaida and Epitacio obliged to renew their marriage vows in the presence of the parish priest and two witnesses before they can receive the sacraments? Why? What is their civil status? Why?

The Code of Canon Law takes up the question of the juridical form of marriage after treating of the capacity of the parties and their consent. In the next case to be presented, the canonical form or the law governing the expression of consent will be treated in order to parallel the order of the Civil Code. Two different sets of circumstances are described in order to show the basic concepts underlying the canonical requirements.

Unlike the Civil Law, Canon Law requires no license to marry. The decision to permit a couple to marry belongs to the parish of either party with preference being given to the parish of the bride. The supposition of the Code of Canon Law is that the pastor knows his flock personally, is acquainted with his parishioner and so will be in a position to know, at least in a general way the circumstances of the party contemplating marriage.<sup>4</sup> He is required to obtain similar information from the other party's pastor and for this purpose the banns or as they are called in Tagalog, the *Tawag*, are read out publicly in the Church.<sup>5</sup> A personal investigation of the parties is also conducted by the parish priest of the Church where the marriage will be celebrated.<sup>6</sup> But the actual authority to officiate at a marriage is governed by the law itself and in this regard, it is strictly territorial. Every bishop has authority to officiate at marriages but only within his own diocese. Every duly appointed parish priest has authority to officiate at marriages but only within the territorial limits of his own parish. Any other priest, to officiate validly at a marriage, must have express authorization from either a bishop or a parish priest. In the case of permanently appointed assistant parish priests, this delegation of authority is general and continuous; in all other cases it must be granted to a particular priest for a particular marriage. In this way

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<sup>4</sup>Can. 1020.

<sup>5</sup>Can. 1097.

<sup>6</sup>Can. 1022.

a certain check is kept on the parochial and community aspect of a marriage. It must be admitted, however, that in our rapidly expanding urban society, many of these means have lost their force and often parish priests in crowded areas scarcely know the parties they are called on to marry.<sup>7</sup>

It may be asked, what happens in an area such as Mindanao, or some of the remote islands which have no regular parish priest, or where a missionary priest may come occasionally? Unlike the Civil Code, Canon Law does make a provision for such cases. This is based on the theology of the sacrament which recognizes that the marriage contract is founded on personal consent. It is not the officiating priest who confers the sacrament of marriage, as in the case in baptism, but rather it is the parties themselves who, in the very act of consenting to the natural marital contract, thereby also confer the sacrament on each other. The priest is merely the official witness of the Church. Therefore, in circumstances where the authorized priest cannot be present, for example, in danger of death, or in remote areas without permanent priests, or whenever it is foreseen that the parties cannot approach the authorized priest, then their simple consent before two common witnesses suffices. Often in mission situations, a well-instructed lay catechist is taught how to conduct the ceremony and how to note down the names and witnesses, so that this information eventually can be registered in the parish books. The marital consent expressed in this manner is recognized as valid, licit, and sacramental. Such a marriage, duly attested to, is just as unbreakable as one performed with magnificent ceremony in a full cathedral.<sup>8</sup>

In some respects this extraordinary canonical form resembles what the Civil Code calls marriages of exceptional character;<sup>9</sup> but with this exception, that, in the Civil Code, the authorized official or minister is always required for the validity of the civil act. But this is not true in Canon Law. Hence we again see the application to our case and we also see the conflict of laws that can arise.

Now to the questions asked in the second case, "Canonically speaking, can Rita, who entered a civil marriage with Rogelio, now contract a marriage in the Catholic Church with Mario?" The reply to this is "Yes, *per se!*" There is no canonical bar to their marriage, since the prior civil marriage of Rita was never convalidated or sanctioned by the Catholic Church. It was not a sacramental marriage; in canonical terminology it would be considered mere concubinage and would not even be designated

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<sup>7</sup>Cans. 1094, 1095.

<sup>8</sup>*Cf.* Can. 1098.

<sup>9</sup>Arts. 58 & 72.

as a putative marriage. Obviously the second marriage is bigamous in terms of the Civil Code. If the other party wished to bring a case against Rita, he could easily do so. In practice many of these situations continue on because both parties find it mutually convenient. It is worth noting that the priest who officiated at the second marriage is also protected from prosecution as long as he was presented with a marriage license; that the license was fraudulently obtained is not his concern.

The second situation, namely, the apparent common-law marriage of Zenaida and Eпитacio in the uplands of Cavite, illustrates just the opposite principles. Given the absence of any duly qualified priest to officiate at their marriage, the mere expression of a sincere marital consent before two witnesses suffices to unite them in a valid and sacramental marriage. The customary ritual of the sharing of the rice bowl, the conducting of the bride to the groom's house, etc., in full view of the barrio more than fulfill the requisites for the extraordinary form of Canon 1098. This being so, there is no need for them to renew their marital consent before the priest when he arrives two years later. They are in a valid and sacramental marriage in so far as the Canon Law is concerned. Quite clearly such a marriage is not sanctioned by the Civil Code. Hence they are in the conflicting legal situation of being canonically married but civilly in concubinage. Once again there is a fundamental conflict between the two laws affecting the marital status.

### CASE III

#### *The Teen-age Marriage*

Miguel, aged 19, and Lolita, aged 17, both Roman Catholics, elope and then decide to get married. With fake residence certificates, which give their ages as 25 and 23 respectively, they obtain a pre-dated license and are married in the town of Cainta by the mayor. With their civil marriage contract, they then approach the parish priest of Taytay, telling him that they are already married civilly and now they wish to get married in Church so they will not be living in sin. The parish priest duly obliges them and they return home to announce the joyful tidings to their parents. Unfortunately, the mother of Miguel is not too happy about the matter and considers that her son has been trapped by the young lady for his money. She initiates a suit in the courts of the Philippines to have the marriage declared null and void because of lack of parental consent despite the fact that Lolita was pregnant. The case is won and the couple are forcibly separated. Several years later, Miguel wants to contract another marriage. When he explained his situation to the parish priest, the latter asked him if he had freely and willingly entered into his

marriage with Lolita. He said that he did. The priest replied, "Well then, you are still validly married to your wife, Lolita. Your marriage was consummated and no power on earth can break it. Your mother was wrong to have had the marriage annulled in the civil court." Miguel sadly informs his bride-to-be that they will have to be content with a civil marriage.

#### QUESTIONS:

- 1) What is the impediment of age in Canon Law? Is the consent of the parents required for any canonical marriage? Why?
- 2) In what does the Civil Code differ from the Canon Law on this point?

The capacity to contract marriage is a natural right inherent in the human person. It is one of the most fundamental of all rights and limitations of human freedom and in this regard can only be placed for the most serious reasons of public policy. Hence, such limitations must be clearly expressed in the law, and the Church, in the course of the centuries, responding to various needs, has deemed it within her rightful jurisdiction to impose such limitations on her own subjects. Indeed she did so long before the advent of the modern state with its civil code of marriage. These limitations on the capacity to contract a marriage are called impediments. An impediment in Canon Law may be defined as a circumstance which, according to divine or human law, either renders a person incapable of marriage or prevents him from contracting it licitly.<sup>10</sup> Such a circumstance affects the quality of the person himself; hence, it is conceived as directly affecting the contract and only mediately the sacrament. The party with the impediment is excluded from contracting and, consequent on this, from receiving the sacrament.

Impediments in Canon Law are of two kinds according to their effect.<sup>11</sup> One is classed as *prohibitive* or *impedient*, and a party knowingly entering a marriage with such an impediment commits a fault, or, in other words, acts illicitly or sinfully. However, despite this fault, the marriage itself is valid. But the other class of impediment, known as *diriment* or *invalidating*, goes beyond this and causes the contract to be null and void from its inception. The Canon Law knows no distinction between a marriage that is null and void, and one that is annulable. Hence, in Canon Law a marriage is either valid or it is not.

One other device of the Canon Law which does not exist in the Civil Code is that of dispensation. The legislator who framed the law may in

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<sup>10</sup>*Cf.* CAPELLO, DE MATRIMONIO, (Rome, 1947) ed. 5.

<sup>11</sup>Can. 1036.

certain more difficult situations remove the obligation of the law, and suspend as it were the impediment, thus enabling the connatural consent to have its lawful effect. One of the most famous instances in history of the use and effect of the power of papal dispensation was the notorious marriage of Henry VIII to Catherine of Aragon. The Church is rather liberal in her use of dispensation and this often has the effect of creating more conflicts of laws.

If we compare the impediments of the Code of Canon Law with those of the Civil Code, we shall find that there are seven impediments held in common although they are not identical in content. These are: Age, Impotence, the Bond of an Existing Valid Marriage, Crime, Consanguinity or Kinship, Affinity (relationship by marriage), and Legal Relationship, namely, the relationship arising from the process of legal adoption. Some comments on these impediments are in place at this point. While both codes agree entirely on the age limits for the capacity to contract, namely, the sixteenth year completed for the male and the fourteenth year completed for the female, thereafter differences arise. The Canon Law, while it makes provision in the pre-marital investigation for due respect to the wishes and opinions of parents, does not allow their opposition to deprive their children of the right of giving a valid marital consent.<sup>12</sup> But the Philippine Civil Code, in the case of males below twenty years of age, or females below the eighteenth year, requires the consent of the parents or guardian for the unqualified validity of the marriage.<sup>13</sup> Failure to obtain this consent will make the marriage annulable at the instance of the parents or guardian prior to the attainment of the respective age limit or by the parties themselves within four years after reaching the ages of eighteen or twenty respectively. In this the Civil Code departs both from the *Codigo Civil* of Spain and from the prior law under the Commonwealth. It reinforces traditional parental power in accord with Filipino culture, which normally thrusts great responsibility on the parents for the successful marriages of their children. With this in mind, we can review the questions in Case III.

From the viewpoint of age alone, Miguel and Lolita were canonically capable of contracting consent. The canonical age for marriage is 14 for the female and 16 for the male. This is the same basic age required by the Civil Code. The big difference between the two laws lies in the fact that Canon Law requires no consent of the parents for the validity of the marriage of minors while the Civil Code demands the consent of the parents for validity unless the female has completed her 18th year and the male his 20th year. Consequently, the action of the mother of Miguel in the

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<sup>12</sup>Can. 1034.

<sup>13</sup>Art. 61.

cited case was legally permissible in Civil Law but it creates a serious conflict with the Canon Law. Now the parties to the original marriage are civilly free to contract another marriage but this second union will not obtain the sanction of the Church unless there is some other ground for annulment.

#### CASE IV

##### *Impotence*

Carola and Jaime, both Catholics, of legal age, and apparently capable of marriage, were married with much splendor in the Manila Cathedral by the Cardinal Archbishop. The marriage endured for several years but no children were born thereof and the usual caustic remarks were made by over-solicitous relatives. Finally, the girl broke the relationship and the case was brought simultaneously for annulment both in the civil and ecclesiastical courts on the grounds of antecedent and perpetual impotence on the part of the woman. The facts were these: the woman in question had a severe case of psychic frigidity. Despite all efforts on the part of the husband, physical consummation was impossible because on the slightest approach to her genital organs, she experienced pain and repulsion, despite the fact that she really loved her husband. After many unsuccessful efforts, the help of a psychiatrist was sought and therapy begun. However, other factors militated against a cure although the psychiatrist felt that there was still hope for one. At one point, in order to do all in her power to cooperate, the woman underwent an operation to open the hymen but still to no avail. By this time the situation had become so abrasive that she could tolerate it no longer. The marriage broke up and the courts took over.

#### QUESTIONS:

- 1) Was this marriage null and void in Canon Law? Why?
- 2) What other canonical solution was possible?
- 3) Are there sufficient grounds for declaring the marriage null in Civil Law? Why?

Certain impediments even in ecclesiastical law are regarded as indispensable such as perpetual and antecedent impotence on the part of either party and the existence of a prior valid marriage.<sup>14</sup> These are considered impossible of dispensation as are certain grades of blood-relationship. All other impediments of Church law are capable of dispensation given proper cause. The impediment of impotence is not as clearly

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<sup>14</sup>Can. 1068.

defined in the Civil Code as it is in Canon Law. Both agree that the impotence must be antecedent to the marriage and perpetual. Subsequent impotence or mere sterility does not invalidate the marriage contract. As I see it, the Civil Code is silent on the point of relative or absolute physical incapacity to marry and the entire psychological aspect of impotence. The case of the homosexual and the lesbian are situations that have to be interpreted by court decision.

In the case just outlined above, the woman is suffering from a severe case of psychic impotence. The long period of attempted consummation, the assistance of a psychiatrist, and even the intervention of surgery did not alleviate her condition. It was certainly a condition that would have required extraordinary means to resolve and even then it offered no certain hope of a favorable solution. The impotence in question existed prior to the marriage and was to all intents perpetual, certainly as regards this man, if not all men. The canonical grounds of impotence were sustainable and would have been so declared. Actually, this was also a marriage in which no consummation took place, so an alternative solution was also possible, namely, that of a dissolution of a sacramental but non-consummated marriage. This was, in fact, the solution invoked. But in the civil court, the marriage was declared null and void on the grounds of prior and perpetual impotence. This was the result of wise judicial interpretation of which instances there should be more as the courts take into consideration the psychological aspects of this impediment.

#### *The Remaining Invalidating Impediments*

The bond of an existing canonical marriage stands against all successive marriages unless the first marriage was declared null or dissolved.<sup>15</sup> Much the same concept is found in the Civil Code with regard to an existing civil marriage except in the case where one spouse has been absent and not heard from for seven years.<sup>16</sup> The mere fact of not having heard from the absent spouse for this period of time exculpates the party contracting a second marriage from the crime of bigamy. For all practical purposes, the second marriage is presumed valid unless subsequently annulled. In canonical jurisprudence, certain presumptions are also used to determine whether or not the absent party is dead. Mere absence in itself is not considered proof unless there are other positive indications accompanying it which would point to death.

The canonical impediment of crime is wider in extent than the m-

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<sup>15</sup>Can. 1069 (2).

<sup>16</sup>Art. 83 (2).

pediment of the Civil Law. But this is also comprised in the canonical impediment. Relationship by blood or consanguinity is counted differently in the two codes although in practical effect, they come to the same thing. In counting the degrees of consanguinity, the Canon Law follows the Germanic law<sup>17</sup> while our Civil Code follows the system of counting of the Roman law.<sup>18</sup> The end effect is the same and the prohibition extends equally to first cousins inclusively. Again the power of dispensation often enters in to allow the Church marriage and usually no one demurs when a civil license is somehow obtained. But this is a real conflict of laws because the marriage is always civilly null and void, although canonically valid.

Affinity is the relationship that arises through marriage. It is not the relationship between the spouses themselves but between the man and the blood relatives of the woman and vice-versa. Canonically, this affects all the degrees of the direct line and in the collateral line up to the second degree inclusively (the canonical second degree means first cousins).<sup>19</sup> The Civil Code does not use the term degree in this impediment but simply names those affected, namely stepbrothers and stepsisters, stepfathers and stepdaughters, and stepmothers and stepsons.<sup>20</sup> Both Canon Law and the Civil Code base this impediment on a previous valid marriage.

With regard to legal relationship, that is, relationship arising from adoption, the Canon Law simply canonizes the Civil Code.<sup>21</sup> Whatever the degree or extent of the Civil Code impediment, the very same is adopted by the Canon Law. Hence this impediment will vary or be non-existent depending on the Civil Law of each country.<sup>22</sup>

Apart from these invalidating impediments held in common, Canon Law has eight additional impediments not recognized by the Civil Code at all. These are Disparity of Cult (marriage of a Catholic with a non-baptized persons), Sacred Orders, Solemn Religious Profession, Abduction, Public Propriety and Spiritual Relationship. Time prevents our treating of them in detail here but they give the canonist a few more headaches today, especially with the present fall-out from priestly and religious life. Suffice it to say that all of them are dispensable and have been dispensed with when circumstances so warranted.

The so-called impediment or prohibitive impediment of Canon Law

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<sup>17</sup>Cans. 96 & 1076.

<sup>18</sup>Art. 81 (1).

<sup>19</sup>Can. 1077 (1).

<sup>20</sup>Art. 81.

<sup>21</sup>Can. 1080.

<sup>22</sup>Can. 1059.

may puzzle the civil jurist. It is an impediment in the sense that the Catholic party to a marriage is forbidden by the law to enter a marriage while under the impediment unless he obtains a dispensation. If, however, notwithstanding the existence of the impediment, the marriage is contracted anyway, it will be held valid, although the party willingly violating the law is considered culpable and would have to seek absolution from the moral fault.<sup>23</sup> There are only two impediments of this kind. The first concerns those who have taken vows of virginity or chastity whether in religious life or merely privately.<sup>24</sup> Such a vow precludes the use of marriage as long as it endures. Hence one who while under vow would enter a marital relationship would be placing himself in the circumstance where he would inevitably violate the vow. Hence the need for a prior dispensation.

The other situation wherein a similar prohibition exists is what is known as the Mixed Marriage, technically called in Canon Law, Mixed Religion.<sup>25</sup> There are actually two possible situations here. One concerns the marriage between two baptized Christians, one a member of the Roman Catholic communion and one a member of some Christian denomination. The other situation is that of a proposed marriage between a Roman Catholic and a non-baptized person, whether they be members of a religious belief, such as Muslims and Jews, or not. The fact of non-baptism suffices. Canon Law recognizes a difference in the two situations. Hence, if a Catholic and a baptized Protestant were to marry according to the Catholic form, even without a dispensation, that marriage would be regarded as valid and sacramental and after physical consummation, indissoluble by any power. On the other hand, a marriage between a Catholic and a non-baptized person, even though celebrated according to the Catholic form and before the parish priest, etc., would still be invalid. In this case the canonical dispensation is necessary for the valid celebration of the marriage.

This may be the logical point on which to say a few words about the so-called Mixed Marriage and its present status in Canon Law. The Code of Canon Law is very much the product of the Council of Trent and the First Vatican Council. The spectre of heresy and the acrimonious atmosphere following the Protestant Reform and the subsequent wars of religion in Europe created a situation of fear and mistrust between Catholics and Protestants whose effects are still with us. Since marriage was an institution wherein and where the non-Catholic spouse could seriously influence the religion of the children, the impediment of

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<sup>23</sup>Can. 1093.

<sup>24</sup>Can. 1058.

<sup>25</sup>Can. 1060.

Mixed Religion was imposed as a defensive measure.

Canon 1060 makes it clear that at the time of the promulgation of the Code of Canon Law, the Church frowned on such marriages, and consequently preached against them and sought to make them as difficult as possible. In order to obtain a dispensation, both parties had to sign promises to the effect that the Catholic party would be free to practise the faith or his faith and that all children born of the marriage would be baptized and educated as Catholics. Moreover, the celebration of such a marriage could not take place in a church but had to be done in the rectory with the least possible publicity. In this regard, the prohibitions were almost penal in their intent.

In parts of the world where the Catholic population was in the minority or almost equally divided with the Protestant population, this negative attitude caused much pain and bitterness. Two trends of the latest council, Vatican II, moved to change the attitude of the Church. One was the ecumenical movement with its growing awareness of the need for unity among all Christians. The other was the clear evidence that marriage itself as an institution was faced with unprecedented difficulties. The divorce rate has continued to rise and the number of broken marriages even among Catholics was fast approaching the percentages of the rest of the population. Hence, the general strengthening of the marriage bond was seen as a more important value than an emphasis on differences between Christians. Following Vatican II, a series of papal documents have come out changing the pattern of Mixed Marriages. Such marriages always entail greater risk because the parties differ on certain fundamental religious viewpoints which can become the source of quarrels and disputes. Moreover, the Church considers that the Catholic party is to be concerned about transmitting his faith to his children. The resulting new legislation, promulgated in 1970 and effective in October of that year, is a compromise. The impediments still exist in the same degree as they are in the Code and require dispensation but this is more readily granted. The non-Catholic party is no longer obliged to sign any promises at all to bring up the children in the Catholic faith as this may be contrary to his own conscience. Instead he is simply informed of the obligation of the Catholic party. As long as the latter agrees to do all that is possible to raise the children as Catholics, the dispensation will be granted. Only one ceremony is to be performed. If it takes place in the Catholic Church, then the minister of the non-Catholic is to be invited and is to take part in the ceremony. If the circumstances demand it, the bishop may permit the marriage to take place in the Church of the non-Catholic. In this case, the ritual of that denomination is followed with the Catholic pastor taking part

therein. This is a decided breakthrough in the heretofore universal obligation of marrying according to the Catholic form. Thus, what the new legislation seeks to emphasize is the seriousness and sanctity of the marriage bond itself and the right of the non-Catholic party not to promise something that is contrary to his own conscience. All the difficulties have not disappeared and among Catholic circles, especially in Europe, many would like to see the impediment removed altogether. But with or without the impediment, one fact must not be lost sight of. When two parties to a contemplated marriage are of different religious beliefs and when these are held tenaciously and affect their entire lives, then a potential element of conflict enters the marriage and this has to be faced beforehand and its implications spelled out. Otherwise the marriage itself will be endangered. Of this the parties should be warned.

### CASE V

#### *Legal Separation*

Consuelo and Ricardo, both Catholics and married in the Catholic Church in accordance with canon and civil law, have lived together for fifteen years and now have five children. Consuelo, noticing the lack of attention she was receiving from her husband, suddenly discovered that he was supporting another woman, visiting her almost every day although he always came home at night and slept in the house. Ricardo is a good father to his children but cold and neglectful of his wife. When confronted with the fact of his infidelity, he denied it. Finally, in exasperation after a long argument, he admitted it but would not promise to amend or to give up the other woman. With this Consuelo decided to leave him, took all the children, and went to her own family in the province.

#### QUESTIONS:

- 1) Is Consuelo justified in instituting this separation unilaterally according to Canon Law?
- 2) Does she have any remedy in Civil Law? Does she have grounds for legal separation?

Neither the Civil Code of the Philippines nor the Canon Law allow for an absolute divorce with the permission to remarry. Consequently, the only remedy to an intolerable marital situation is legal separation, namely, a judicial right to separation from bed and board and to have an equitable share of the conjugal property. Canon Law in Canon 1129 gives either party the equal right to terminate the common life, even permanently, and without any judicial intervention, by reason of adultery on

the part of the other, unless this was consented to, or was caused by or expressly condoned by the first party, or he himself was guilty of the same crime.

There is tacit condonation, if after knowledge of the adultery, the innocent party accepts the other with conjugal affection; this is presumed to have occurred if within six months the injured party neither expels nor deserts the adulterer nor brings a legal accusation against him.<sup>26</sup> Moreover, the innocent party who has departed, is never bound to accept the adulterous partner again, even though neither can enter another valid marriage.<sup>27</sup>

For all other causes of separation, the local bishop is the judge unless to delay the separation would place the innocent party in danger.<sup>28</sup> These reasons are: loss of faith and adherence to another faith if both were originally Catholics; danger to the faith of the Children; a criminal life; threat of spiritual or bodily danger; excessive cruelty; and the like.

In the case of Consuelo and Ricardo, Canon Law gives Consuelo every right to initiate a perpetual separation from bed and board. It does not demand that she do so. She may continue to condone her husband's action for the sake of the children. But she has no obligation to accord him any right to intercourse and even without the intervention of ecclesiastical authorities, she may initiate physical separation as in fact she did. In Civil Law, such a right to separate would have to be preceded by a formal litigation wherein the fact of the husband's concubinage would have to be established. This is not always easy and often leaves the injured spouse without the means of adequately protecting her natural right to equality of treatment. There is a certain pharisaism in a law which punishes female infidelity so severely and yet allows for so much male irresponsibility. No doubt women's liberation will soon agitate for changes in this respect.

From this brief summary, it is evident that the Canon Law acknowledges the radical equality of the spouses in the marriage relationship. The innocent party, be it the man or the woman, can, even of his or her own accord, initiate a permanent separation for one proven act of infidelity. In so stating, the Canon Law recognizes the equal dignity of both persons in the marital relationship and, in this most fundamental of human commitments, rejects any semblance or inequality. In this the Canon Law is more in conformity with the basic rights inherent in the human person than is the Civil Code which makes the cause of legal

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<sup>26</sup>Can. 1129 (2).

<sup>27</sup>Can. 1130.

<sup>28</sup>Can. 1131.

separation adultery on the part of the woman and concubinage on the part of the man.<sup>29</sup>

With regard to process law, the ecclesiastical courts place no statute of limitations to actions for nullity. Nor does a decision ever become *res judicata*. New evidence, if discovered, can always reopen the case upon appeal. Nevertheless it must be admitted that the lack of trained personnel, the insistence on mandatory appeals, and the uneven interpretation of the various grounds for annulment often make the process an arduous one, so that today, in view of the theological developments following Vatican II, many canon lawyers are asking for the complete abolition of the judicial process and a resort to more pastoral measures with regard to those in broken or second marriages. A few words, therefore, must be added regarding the change in the theological and canonical outlook on marriage which has come about as a result of the last Vatican Council.

#### *New Perspectives*

At the outset it was stressed that the canonical provisions for marriage followed upon the theology of marriage as delineated in traditional Catholic doctrine. This theology derived in large part from the Augustinian outlook which was often anti-flesh and somewhat gnostic, and justified marital relations only by the fact that this was necessary to preserve the human race. Hence, progeny and not the personal development of the two people concerned became the justifying cause for marriage. Reflecting this theology, the Code of Canon Law speaks of the primary purpose of marriage as being the generation and education of offspring and its secondary purposes being mutual aid and a remedy for concupiscence;<sup>30</sup> a legitimate channel, in other words, to restrict the otherwise vagarious sexual urge.

For the first time in its history, the Catholic Church in Vatican II sought for a new and more profound theology of marriage. In effect, it avoided the scholastic terminology of primary and secondary ends. Instead it considered marriage in the full context of human development. Thus, married love is treated extensively as the most important basis of marriage. It is the giving to one another of husband and wife as a free gift which establishes their unity and promotes the well-being of others. In this the Council attempted to come to grips with the positive aspects of marriage in the light of revelation and in view of the highly developed personalistic philosophy which has marked recent secular thinking. The

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<sup>29</sup>Art. 97 (a).

<sup>30</sup>Can. 1013.

result has been an impetus to re-study almost every aspect of Christian marriage. Undue attention to the problem of contraception has obscured the advances made by the Council in the positive theology of marriage. The conciliar emphasis on the dignity of persons and their right to justice has also focused attention on the need of reappraising the entire approach to the question of the dissolution of marriage, annulment procedures, and the readmission to the sacraments of Catholics who have entered into second marriages while the prior bond still endured. The New Testament transmits to us both the basic teaching of Jesus on the subject of marital commitment and the Pauline solution to certain practical problems that arose very early in the history of the Christian community. Today, Canon Law is a human effort to provide norms which will maintain the ideal for those Christians who for one reason or another have been unable to enter a viable sacramental marriage. It is with the balancing of these two values that the future of marital law is concerned.