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**THE APPLICATION OF CANON 11 OF THE CODE OF CANON LAW
TO MEMBERS OF THE CHURCH OF ENGLAND
IN REGARD TO NULLITY OF MARRIAGE**

by
Michael P. SAUNDERS

A dissertation submitted to the Faculty of Canon
Law, Saint Paul University, Ottawa, Canada, in
partial fulfillment of the requirements for the
degree of Doctor of Canon Law.



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ABBREVIATIONS

<u>A.A.S.</u>	<u>Acta Apostolicae Sedis</u>
<u>A.S.S.</u>	<u>Acta Sanctae Sedis</u>
c. (or cc.)	canon (or canons)
<u>C.I.C.</u>	<u>Codex iuris canonici (1917)</u>
<u>C.L.D.</u>	<u>Canon Law Digest</u>
<u>C.L.R.</u>	<u>Canon Law Report 1947</u>
<u>C.O.D.</u>	<u>Conciliorum oecumenicorum decreta</u>
<u>E.C.R. 1954</u>	<u>Ecclesiastical Courts Report</u>
<u>F.A.M.</u>	J. JACKSON, <u>The Formation and Annulment of Marriage</u>
<u>F.L.M.</u>	SWEET and MAXWELL'S, <u>Family Law Manual</u>
<u>L.A.P.</u>	B. PASSINGHAM and C. HARMER, <u>Law and Practice in Matrimonial Causes</u>
<u>L.R.S.</u>	<u>The Law Reports: Statutes</u>
MIGNE, <u>P. G.</u>	J. MIGNE (ed.), <u>Patrologiae [...] graeca</u>
MIGNE, <u>P. L.</u>	J. MIGNE (ed.), <u>Patrologiae [...] latina</u>
<u>P.G.A.</u>	<u>Public General Acts</u>

INTRODUCTION

The Catholic Church teaches that admission into the Church of Christ is effected through baptism. This creates a spiritual bond among all the baptized and brings with it certain rights and obligations. In the past, the Catholic Church claimed that all baptized persons came under its jurisdiction. In addition to being subject to the provisions of natural law and divine positive law, all baptized persons, unless specifically exempted, were also subject to the prescriptions of merely ecclesiastical law. This was explicitly stated in canon 12 of the 1917 Codex iuris canonici. Thus, even baptized non-Catholics were considered bound by such laws.

The revised Code of Canon Law, normative since November 27, 1983, reflects the ecclesiology of the Second Vatican Council. Canons 204 and 205 make clear that membership in the Church of Christ is not necessarily the same thing as membership in the Catholic Church. Although the Church which Christ founded finds its fullest expression of truth and grace in the Roman Catholic Church, this Church is not now seen as being identical with the Church of Christ. Canon 11 of the revised Code clearly asserts that those members of the Church of Christ who have been baptized into the Catholic Church -- not all the baptized -- are subject to the latter's laws. This declaration by the legislator shows a radical departure from the former practice.

The process of nullity of marriage is well known within the Catholic Church. It is also known to some members of other Churches and communions. Periodically, Catholic diocesan tribunals receive requests from baptised non-Catholics for an investigation into the alleged nullity of a marriage that has not involved a Catholic. Such cases form a small part of their normal business. In certain English and Welsh tribunals, for instance, the judgements given are a pastoral help to non-Catholics, in particular to those who have applied only for conscience's sake and do not intend to

marry a Catholic in a subsequent marriage. Tribunal officials base their competence to hear such cases on cc. 1476 and 1671 of the Code, since the Catholic Church recognizes that all persons possess a right to introduce a marriage cause before an ecclesiastical tribunal. By proper right, an ecclesiastical judge may address such a cause. Right somehow implies a relationship of necessity between the baptised non-Catholic and the determination of a marriage case by an ecclesiastical judge.

Few ecclesial communities in England, other than the Roman Catholic Church, have a process that can judge the validity of a marriage impugned by one of its members. However, an alternative exists for applicants to obtain a decree of nullity from a court other than a diocesan or regional tribunal of the Catholic Church. Members of the Church of England retained the right after the Reformation to petition for nullity of marriage before their Church courts and did so until 1857. In that year the Church of England closed its marriage tribunals and permitted a new civil court to act in its stead. Conditional with this concession by the Church of England was the proviso that the new lay court adjudicate cases according to the traditional canonical laws of the Church of England. Cases today are judged by the civil judiciary which, in addition to its own authority, acts as the agent of the Church of England in matters of this kind. Hence, the civil authority in England claims a judicial power over the marriages of the baptized granted to it by statutory provision and seemingly with the approbation of the Church of England. While some British Anglicans accept their Church's right to delegate a civil court to hear and judge marriage cases according to traditional jurisprudence, others do not. Both the established Church and the State in England accept civil decrees of nullity granted by the secular courts as being legally binding in the public and Anglican ecclesiastical *fora*, unlike a Catholic declaration of nullity of marriage which has no legal standing in the law of England and Wales.

These facts give rise to certain practical questions concerning the Catholic Church's claims

of jurisdiction over the baptized and its competence to judge their marriage cases in relation to the Code of Canon Law. It should be noted, however, that the 1983 Codex iuris canonici while restating the Church's ancient assertion to adjudicate exclusively cases concerned with the spiritual (c. 1401, l°), no longer lays claim to the "exclusive" right that an ecclesiastical judge examine such causes (c. 1671), as did the 1917 Codex iuris canonici (c. 1960). This paper will consider a number of practical situations faced by those baptized non-Catholics throughout the world, but more particularly in England and Wales, who wish to impugn their marriage before the Catholic Church. If a petition for nullity of marriage based on a prescription of divine or ecclesiastical law is advanced by a baptized non-Catholic, what right, if any, does a diocesan tribunal have to accede to the request for a judgement?

The answer to this question is the scope of this paper which will begin by showing the bases of the Church's previous claims to jurisdiction over the baptized in matters of divine, positive and merely ecclesiastical laws. A study of the Vatican II teachings on the subject and an examination of the revision of the 1917 legislation, particularly in regard to c. 12 which became c. 11 of the 1983 Code, will follow. Various aspects of Catholic canon law related to nullity of marriage and to the right of the baptized to ask an ecclesiastical tribunal of the Catholic Church to pronounce on the validity of a sacramental marriage will then be addressed. A comparison will be made between civil nullity of marriage and Catholic canon law in England. Finally, there will be a consideration of whether English civil decrees of nullity of marriage could be accepted by a Catholic ecclesiastical tribunal when both parties to the previous marriage are baptized non-Catholics, and the nuptials were celebrated either before or after November 27, 1983.

CHAPTER ONE

THE APPLICATION OF CHURCH LEGISLATION TO BAPTIZED NON-CATHOLICS BEFORE VATICAN II

Jesus lived. During his earthly life, he gathered a group of persons around him and inspired them by his teachings and actions. Some of them recognized him to be the Christ, and following the Pentecost experience, they proclaimed him to be the Son of God. His existence, many of his words, and some of his deeds were recorded in various ecclesiastical and secular historical works.

Confirmed in their beliefs, his followers appropriated to themselves the mandate given by Jesus to continue his work of restoring the covenant relationship between God and humanity. Following the vicissitudes of being considered a sect within Judaism, the group eventually declared itself a distinct society, no longer bound in a geographical way to its place of origin. Its mission was catholic. Perceiving itself as the *Ecclesia* with a spiritual mission, this fledging band set out boldly in the power of the Spirit of God to establish similar groups. The New Testament works, particularly the Acts of the Apostles, the Pauline corpus and the Pastoral Epistles showed the evolution and development of local churches. At Antioch the group members were called Christians for the first time.¹ These early Christian enclaves saw themselves linked to the apostolic college by foundation, unity of belief and common worship. Gradually, they developed forms of recognized hierarchical structures. Because they acknowledged Peter's pre-eminence, the apostles did not challenge his position as their leader. The evangelists saw him as the one to whom Jesus had entrusted the care of the whole Church.² This responsibility was transmitted to those who succeeded Peter in his office as bishop of Rome. Even during the apostolic era while the apostle John was still alive, deference

¹ Acts 11:26.

² Mt. 16:18; Jn. 21:15-19.

seemingly was given to Peter's successors.³ Church members recognized the Petrine authority as a divinely willed fact.

The Church flourished and floundered within the cultural milieu of Roman society depending on the whims of emperors and politicians. The nascent Church used whatever means were available to further its end and to fulfil the Lord's command: teach, baptize and grow in numbers.⁴ To continue as a society, it had to enrol new members. A visible sign was needed to designate them as such. Thus, the criterion of valid baptism was established and used by successive ecclesiastical authorities to determine membership in the Church of Christ. This dominical instruction remains normative even to this day. If one is baptized, one is a member; if one is not baptized, one is not a member.⁵ While existentially, a baptized person may renounce membership in the Church or in the ecclesial group to which that person belongs, on the other hand, those who accept the spiritual aspect of baptism do not recognize the rejection of baptismal effects on this plane. A person cannot renounce baptismal status: *semel christianus, semper christianus*.⁶

Most people recognize the Church as a society (a group of persons who together pursue a common goal), or as a community (group members with a common possession) which makes

³ The customary date of the apostle John's death is said to be after A.D. 96; the generally accepted date for the composition of Pope Clement I's Letter to the Corinthians is A.D. 96. See J. BAILLIE, J. McNEILL and H. VAN DUSEN (eds.), The Library of Christian Classics: Early Christian Fathers, vol. I, London, S.C.M. Press, 1953, p. 33.

⁴ Mt. 28:19-20.

⁵ Baptism as a requisite for membership is a defined dogma of faith. See H. DENZINGER (ed.), Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum, quod primum edidit Henricus Denzinger at quod funditus retractavit, auxit, notulis ornavit Adolfus Schönmetzer, ed. 35 emendata, Friburgi Brisgoviae, Herder, 1973, xxxii-954p. Third Council of Valence (855 A.D.), c. 5 (see p. 211, n. 632); Council of Florence (1439), *Decretum pro Armenis*, (p. 333, n. 1314) and Council of Trent (1551), *Doctrina de Sacramento poenitentiae*, (p. 392, n. 1671).

⁶ See E. CORECCO, "La sortie de l'Eglise pour raison fiscale: le problème canonique", in L. CARLEN (ed.), Austritt aus der Kirche: sortie de l'Eglise, Freiburg, Universitätsverlag, 1982, p. 19.

its own laws and requires its members to observe them.⁷ By the same corollary the Catholic Church recognizes other laws which bind all societies: divine law, in its natural and positive division, as well as certain civil laws. The Church has recognized that civil laws may directly affect its members. Through positive ecclesiastical laws it has given canonical effect to some civil prescriptions that are not contrary to its own laws and teachings. However, the baptized are the members of the Church of Christ, and as such are subject to God's law. The Catholic Church's own positive law -- canon law -- is also addressed to the baptized. It is the Catholic Church's understanding and perception of its jurisdiction over baptized non-Catholics that is the subject of this chapter.

1. TYPES OF LEGISLATION BINDING THE BAPTIZED

a. Divine law

The Catholic Church recognizes a plethora of laws which not only support its mission but also circumscribe its actions. Without going into an in-depth study of the philosophy of law and its various schools, some attention must be paid to the binding force of two distinct but related types of law as they pertain to the baptized: divine law and ecclesiastical law. Both systems have divisions. Divine law has traditionally been identified as natural or positive law, while Church laws are understood to be either ecclesiastical or merely ecclesiastical.

i. Natural law

Drawn to some extent from Greek Stoic philosophy, natural law was assimilated readily into Roman law which had a significant influence on the legal system of Western civilization. In his

⁷ See W. ONCLIN, "Church and Church Law", in Theological Studies, 28(1967), pp. 734-739.

famous definition of natural law,⁸ Cicero declared: "True law is right reason in agreement with nature, it is of universal application, unchanging and everlasting, it summons to duty by its commands and averts from wrong doing by its prohibitions." According to M. Crowe the natural law theory developed along two distinct, but parallel lines. One -- the theological segment -- may be traced down through St. Paul⁹ and the Fathers to the medieval theologians -- the theological development. The other more juridical line came down through the Roman lawyers and St. Isidore of Seville to the canonists and jurists of the Middle Ages.¹⁰

During the second and third centuries, Roman jurists began to perceive natural law in different ways. Ulpian (d. A.D. 228), the famous jurist, offered a threefold division of law: natural law, a law known to all; *ius gentium*, law proper to and observed by rational beings; civil law, better known today as Roman law. Although few of his contemporaries and successors agreed with his definition and division of law, these were adopted by the Emperor Justinian (died 565) for inclusion in the Digest (I,1,1) and in the Institutes (I,2,2), parts of the sixth century Corpus iuris civilis.

⁸ The passage is preserved in the Institutes of Lactantius (De Republica, liber 3, 22; see J. MIGNE (ed.), Patrologiae cursus completus, sive Bibliotheca universalis, integra, uniformis, commoda, oeconomica, omnium SS. patrum, doctorum scriptorumque ecclesiasticorum qui ab aevo apostolico ad usque Innocenti III tempora floruerunt. Series latina, vol. VI, Parisiis, excudabat Migne, 1844, cols. 660-661 [hereafter cited as MIGNE, P. L.]). In translation it reads: "There is a law, right reason, agreeable to nature, known to all, constant and eternal, which calls to duty by its precepts, deters from evil by its prohibitions [...]. This law cannot be departed from without guilt; it is not allowable to abolish any part of it, nor is it possible to abrogate it entirely. Neither can the Senate or the people loose us from this law [...]. Nor is there one law at Rome, another at Athens, one thing now and another afterwards; but the same law, unchanging and eternal, binds all peoples at all times; there is one common, as it were, master and ruler, God the author, promulgator and mover of this law. Whoever does not obey it departs from [his true] self, condemns the nature of man and inflicts upon himself the gravest penalties, even though he escape other things which are considered punishments." See M. CROWE, "The Natural Law Before St. Thomas", in Irish Ecclesiastical Record, 76(1951), pp. 195-196. See also M. CICERO, De la république: des lois, Paris, Gardiner, 1954, pp. 162-163 for a variation in the Latin text.

⁹ See D. GREENWOOD, "St. Paul and Natural Law", in Biblical Theology Bulletin, 1(1971), pp. 262-279 for another viewpoint.

¹⁰ See M. CROWE, loc. cit., p. 196.

(Although Ulpian's tripartite division appeared in both tomes, they differed seriously in their understanding of the *ius gentium*, perhaps due to the interpretations and explanations of the codifiers.) Apart from the Bible, it would appear that no other book has had more influence on humanity's development and history than the Corpus iuris civilis.¹¹

Ulpian's natural law definition reads:

Natural Law is that which nature has taught all animals, for this law is not peculiar to the human race, but applies to all creatures which originate in the air, or the earth and in the sea. Hence arises the union of the male and the female which we designate marriage; and hence are derived the procreation and the education of children; for we see that other animals also act as though endowed with knowledge of this law.¹²

Developing the juridical line of natural law, Saint Isidore of Seville (560-636) redefined and modified the Ulpian notions of law. He deemed natural law to be the "law common to all nations and set up by natural instinct, and not by any positive institution."¹³ For Saint Isidore, natural law was a law common to all persons. Yet, the medieval jurists in their day had different interpretations of natural law also. Nonetheless, they agreed it was superior to all laws and known to all people. Writing in

¹¹ Compiled by a body of Byzantine lawyers at the command of the Emperor Justinian, it was completed in A.D. 529 and consisted of: Institutes, Digest or Pandects, and Code. The Novels are now usually included as part of the Corpus iuris civilis although they were laws enacted by Justinian between A.D. 529 and 565. *The ius civile* concerns the law of the state for a particular community; *ius gentium* focuses on the law of nations which regulates relationships between them and *ius naturale* -- the highest or ultimate law to which law makers are subject.

¹² "Ius naturale est, quod natura omnia animalia docuit, nam ius istud non humani generis proprium est, sed omnium animalium quae in caelo, quae in terra, quae in mari nascuntur. Hinc descendit maris atque feminae coniugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: videmus etenim cetera quoque animalia istius iuris peritia censerit." See Corpus iuris civilis, Berolini, Weidmannos, 1928, vol. I, p. 1, lib. 1, tit. 2.

¹³ D. I, c. viii. "Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habitur" taken from St. Isidore, Etymologiarum, liber V, cap. IV. See MIGNE, P. L., vol. 82, col. 199.

the twelfth century, Gratian inserted Isidore's renewed definition(s)¹⁴ without change into the canonical work Concordia discordantium canonum, also known as the Decretum Gratiani. Crowe wrote:

But St. Isidore had also said that the law was of two kinds, human and divine.¹⁵ One of Gratian's problems was to reconcile this twofold division with the long standing division of law into natural law, *jus gentium* and civil law. His solution was to identify the natural law with the divine law revealed in the Scriptures and so to give currency to a regrettable confusion.¹⁶

This confusion was evident in the opening to the Decretum Gratiani where natural law became identified with divine positive law. It stated:

Humanity is guided by two things: evidently by the law of nature which is known as natural law and by the law contained in the Gospel. Each commands the other in order to ensure its wishes are carried out and prohibits the other from doing what it wishes not to happen. Christ in the Gospel said: Treat others the way you wish they would treat you. This sums up the law and the prophets.¹⁷

The theological stream of development encouraged patristic reflections on a Pauline text.¹⁸

In doing so, the theologians posited the idea that natural law was an eternal divine law of

¹⁴ For the species of law, see D. I, c. vi, (*ius aut naturale est, aut civile, aut gentium*). For the definitions of law see: D.I, c. vii, (natural law), D.I, c. viii, (civil law) and D.I, c. ix, (*ius gentium*). See Corpus iuris canonici, editio Lipsiensis secunda post Aemilii Ludovici Richter curas ad librorum manu scriptorum et editionis Romanae fidem recognovit et adnotatione critica instruxit Aemilius Friedberg, vol. I, Lipsiae, ex officina Bernhardi Tauchnitz, 1879, cols. 2-3.

¹⁵ St. Isidore wrote: "Omnes autem leges, aut divinae sunt, aut humanae. Divinae natura, humanae moribus constant; ideoque hae discrepant, quoniam aliae aliis gentibus placent." See MIGNE, P. L., vol. 82, col. 198, cap. II.

¹⁶ M. CROWE, loc. cit., p. 198.

¹⁷ "Humanum genus duobus regitur, naturali videlicet iure et moribus. Ius naturae est, quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in evangelio: 'Omnia quaecumque vultis ut faciant vobis homines, et vos eadem facite illis. Haec est enim lex et prophetarum.'" See D. I., *proem*.

¹⁸ "When Gentiles who do not have the law keep it as by instinct, these men although without the law serve as a law for themselves. They show that the demands of the law are written in their hearts. Their conscience bears witness together with that law, and their thoughts will accuse or defend them." Rom. 2:14-15. In this dissertation, the English-language version of the Bible used is the New American Bible, New York, Nelson, 1970.

providence that governed the world, or an element of reason behind Divine Providence. Therefore, what was natural to rational man was a law willed by the Creator God for every person. Speculating on this law, the medieval theologians generally agreed that the eternal law governed all natural things and their actions, and that this law was an innate quality (*habitus*) in every person, a law truly known to all persons as the natural law, a law that was immutable.¹⁹ Saint Thomas Aquinas, the great exponent of this legal principle, preferred the theologians' concept of natural law to the notions of Ulpian and Gratian. For Aquinas²⁰ and the Scholastics natural law was

divine in the sense that it does not depend on human will, [...] for natural law is discoverable by reason alone. Natural law has been promulgated in the intellect. At least as regards its more fundamental principles it is knowable through the conscience.²¹

Consequently, a rational person could come to know natural law without the aid of the Judaeo-Christian revelation. This scholastic understanding or doctrine on natural law held a prominent position in dogmatic theology and influenced the canonical development and legal history of the Church. Preferring the scholastic notion over others, the Church continues to uphold the existence and applicability of this law to all persons irrespective of their relationship with Christianity.

This eminent form of law recognizes that persons predate their natural societies; that they develop the kind of society that will serve them best. "Human nature antedates its laws, human rights flow from human nature, and human duties rise when rights are seen."²² Thus, before the society came to be, law existed. This law instinctively enables persons to know intellectually not only their duties, but also how to act and interact with other members of society while respecting their

¹⁹ See M. CROWE, *loc. cit.*, pp. 199-204.

²⁰ See *Summa theologiae*, I-II, q. 94.

²¹ B. BROWN, "The Natural Law, the Marriage Bond and Divorce", in *The Jurist*, 15(1955), p. 4.

²² D. READ, "The Great Debate: Natural Law Theories and/ or Human Wisdom", in *The American Ecclesiastical Review*, 165(Sept.-Dec. 1971), p. 189.

rights. Consequently, there are rights natural to all persons that predate and take precedence over all other laws. The Church affirmed this notion at the Second Vatican Council in the Pastoral Constitution *Gaudium et spes*. Section seventy-nine of the Constitution unequivocally declares:

Contemplating this melancholy state of humanity, the Council wishes to recall first of all the permanent binding force of universal natural law and its all embracing principles. Man's conscience itself gives even more emphatic voice to these principles.²³

In a similar fashion the Declaration *Dignitatis humanae* (§ 2) alluded to natural law.²⁴ In this Declaration, the Church rejected what it considered erroneous opinions on the natural law, namely, the Kantian notion that law is not drawn from reason but emerges from freedom and choice, and that persons must be free for the sake of freedom itself. Instead, the Church asserted that persons must be free to search for truth; to search and find the truth -- the truth which subsists in the Catholic Church.²⁵ It also repudiated the Barthian view of Christological natural law which enjoys greater influence and widespread belief among some in the Protestant tradition.²⁶ According to C. Kindregan,²⁷ *Dignitatis humanae* adopted a form of revealed natural law, which he claimed had

²³ See W. ABBOTT, The Documents of Vatican II, New York, Herder and Herder, 1966, p. 292.

²⁴ See *ibid.*, p. 679.

²⁵ In the Dogmatic Constitution *Lumen gentium*, § 8, the Fathers of Vatican II distinguished the Church of Christ from the Roman Catholic Church by acknowledging that the fullest expression of the *Ecclesia Christi* is to be found in the *Ecclesia Catholica Romana*. A report of the relationship of baptised non-Catholics to the Catholic Church is found in A. GRILLMEIER, "Lumen gentium", in H. VORGRIMLER, Commentary on the Documents of Vatican II, vol. 1, New York, Herder and Herder, 1967, pp. 171-182. See also F. SULLIVAN, "'Subsistit in': The Significance of Vatican II's Decision to say of the Church of Christ not that it 'is' but that it 'subsists in' the Roman Catholic Church", in One in Christ, 22(1981), pp. 115-123.

²⁶ Karl Barth suggested that natural rights exist only within the framework of Christ's salvific act. Christological natural law has its roots in the Reformation tradition which sees nature as essentially corrupted by sin. A corrupt nature can experience no natural good unless Christ restores it to humanity. Catholic theologians insist that humanity possesses natural rights simply because they are human persons. Redemption is not the source of those rights. See C. KINDREGAN, "Natural Law Theory and the Declaration of Religious Freedom of the Second Vatican Council", in Catholic Lawyer, 16(1976), p. 55.

²⁷ See *ibid.*, p. 56, n. 58.

its origins in the writings of Gratian who thought that the natural law was identifiable with the Decalogue.²⁸ He chose quotations from section nine of the Declaration to suggest revelation to be the source of man's knowledge of his natural rights and duties. Indeed, paragraph two does state: "the right to religious freedom has its foundation in the very dignity of the human person, as this dignity is known through the revealed Word of God and reason itself."²⁹ The same section makes it clear, though, that the dignity of the human person is known through reason and centuries of experience. Kindregan concluded that the dignity of the person, known from reason but influenced by revelation, is the source of those rights and duties which collectively are known as the natural law. This interpretation has other supporters.³⁰

Most persons accept the fact of a natural law although they may hold divergent opinions regarding its source, its recognition and its application. For deists and theists, the source is God. Catholics traditionally recognize that the Church of Christ is the guardian and expounder of natural law. Likewise, other Christians accept the existence of a natural law. According to the Anglican Bishop of London (England), Dr. Graham Leonard:

Man by his very nature has to be obedient to an authority over and above himself. The rejection of such authority leads not to freedom but to tyranny [...] which springs [...] from the bestowal of absolute authority on the expression of what individuals, or a group, believe to be self-evident truths but which, in fact, only reflect contemporary fashions.³¹

²⁸ He quotes D. I., *proem.* as the source for this statement. Neither the word *decalogue* nor a synonym appears in the text unless *prophets* is considered to be a synonymous term. See footnote 17.

²⁹ W. ABBOTT, *op. cit.*, p. 679.

³⁰ See M. HUGHES, The Act of Membership of the Catholic Church and the Nature of Ecclesiastical Juridicity, Rome, Pontificia Universitas Gregoriana, 1973, p. 86.

³¹ *Times* (London), September 19, 1987, p. 12, being an extract from the Fulton Lecture given at Westminster College, Fulton, Missouri, on September 18, 1987.

The natural law is a source for some canonical laws in the Catholic Church. These laws flow directly³² or indirectly³³ from precepts of reason common to all persons. Consequently, the canons of the Code of Canon Law which reflect natural law bind all persons always since these laws are immutable.

ii. Divine positive law

Divine positive law is distinguishable from natural law in that the former has been communicated directly from God to humans through revelation in Scripture and in tradition while the latter has its origin in the very nature of humanity. The Church itself is supernatural in origin. Therefore, its existence, its purpose for being and its mandate are of divine positive law. Laws classified by the supreme authority of the Church as divine positive laws have a basis in the New Testament and occasionally in the Old.³⁴ Some matters associated with the sacraments when they find legal expression, usually fall into this category. Divine traditions "have God for their author. [...], are divine, or divine and apostolic, according as they originated with Christ [...] or the apostles under divine inspiration. These traditions [and positive laws] are immutable."³⁵ However, as Cardinal J. Soglia Ceroni pointed out, the precepts or laws made by the apostles as "rectors of

³² For example, the 1917 Code listed antecedent and perpetual impotence as a marriage impediment of natural law.

³³ For example, support of the clergy is allegedly a determination of natural law, and belongs under this category according to A. Cicognani who quoted I Cor. 9:13-14, to support his opinion. See A. CICOGNANI, Canon Law, 2nd rev. ed. Authorised English version by Joseph O'Hara and Francis Brennan from the Latin original as revised and enlarged by the author, Philadelphia, Dolphin Press, 1935, pp. 63-64.

³⁴ The indissolubility of marriage, an Old Testament principle confirmed by Christ in the New Law, is an example.

³⁵ A. CICOGNANI, op. cit., p. 102. See also Council of Trent, session IV, Decree on canon of holy Scripture.

Churches" can be changed by the pontiff.³⁶

Although the Second Vatican Council did not address the subject of divine positive law directly, the Dogmatic Constitution *Dei verbum*, section six, reminded the Church that God communicated to us "the eternal decisions of His will regarding the salvation of men."³⁷ Moreover, section ten of that Constitution made it clear that the authentic interpretation of God's Word, written or unwritten (tradition), belonged exclusively to the Church's magisterium and was exercised in a vicarious fashion.³⁸ Consequently, divine positive laws as interpreted by the Church's supreme teaching authority and tradition were binding on all persons, except the non-baptized when the obligations of these laws presupposed the reception of baptism.

b. Church law

The Church's system of ecclesiastical law emerged from its own understanding of divine law in its natural and positive aspects. A historical review of the sources of ecclesiastical law would reveal that many "tributaries of knowledge" including Roman civil law, make up the sources of canonical and ecclesiastical laws.³⁹ In their critiques on the 1917 Codex iuris canonici, commentators provided comprehensive histories and theological reflections on the development of the science and theology of ecclesiastical law, its divisions and its subdivisions. Its implications and applications are now effectively conditioned by the conciliar decrees and declarations.

³⁶ The cardinal explained that the difference is conveyed sometimes by the words of the author, viz., in I Cor. 7:10 Paul mentions a divine command, while in v. 12 Paul himself speaks, not the Lord. See S. SMITH, Elements of Ecclesiastical Law, New York, Benzinger Brothers, 1893, pp. 16-17.

³⁷ W. ABBOTT, op. cit., p. 114.

³⁸ See ibid., pp. 117-118.

³⁹ See C. MUNIER, "Les sources patristiques de droit de l'Eglise du VIII^e au XIII^e siècle", in Revue de droit canonique, 4(1954), pp. 184-192.

According to U. Navarrete, canonists since the Council of Trent have accepted the distinction between the power proper to the Church as a "perfect society" and the power it exercises in the name of Christ. The Second Vatican Council, he believes, has returned to the medieval concept of ecclesiastical power since all power in the Church is now seen as vicarial.⁴⁰

M. Hughes pursues the concept a stage further by suggesting that the distortion engendered by the "perfect society" theory effectively made divine law part of ecclesial law.⁴¹ It was only by the Church's approbation that the "whole complex of ecclesiastical law, even including what is divine in origin, has the Church as its author."⁴² Whatever has been the understanding of the sources of law for the Church in the past, canonists will continue to evaluate these sources, divine and human, in the light of the teachings of the Second Vatican Council.

i. Ecclesiastical law

The boundary between divine and ecclesiastical laws is not unambiguously defined and differences of opinion can arise over which [*ius*] has proper claim to a particular provision.⁴³ General ecclesiastical laws are the legislations of popes and ecumenical councils. These may or

⁴⁰ See U. NAVARRETE, "Potestas vicaria Ecclesiae: evolutio historica conceptus atque observationes attenta doctrina Concilii Vaticani II", in Periodica, 60(1971), pp. 415-486.

⁴¹ W. Onclin explains the matter in a different way. Reflecting on the opinions of some twentieth century canonists, he states: "The divine laws, natural or positive, [...] are equally imposed on the Church, however these divine laws do not become canonical laws, [...] except in the case when, in view of the end which is proper to the society which is the Church, they have been positively sanctioned by the authority on whom, according to the will of its Founder, it is incumbent to direct the faithful [to their supernatural end]." See W. ONCLIN, "Church and Church Law", in Theological Studies, 28(1967), pp. 743-744.

⁴² M. HUGHES, op. cit., p. 84.

⁴³ See L. VISCHER, "Reform of Canon Law: An Ecumenical Problem", in The Jurist, 26(1966), p. 400.

may not be based on some aspect or precept of divine law; they may be declarative or interpretative of a divine axiom. In those cases, although considered ecclesiastical laws, they are traditionally classed with the divine law itself. Sometimes these laws go under the title of quasi-divine laws. Ecclesiastical laws of this nature bind persons in the same manner as divine positive law.

The Second Vatican Council did not elucidate on the content or place of ecclesiastical law in the Church.⁴⁴ No new idea on the topic was proposed or discussed by the Council Fathers. Accordingly, the traditional teachings on the subject remain generally normative. However, not all ecclesiastical laws are based on the precepts of the divine law. Because it recognizes this, the Church makes a division between *ius ecclesiasticum* and *ius mere ecclesiasticum*.

ii. Merely ecclesiastical law

Merely ecclesiastical laws are those laws which contain prescriptions about a matter not determined by natural or divine positive law. The competent ecclesiastical legislator is the source for such laws. It is important to bear in mind that merely ecclesiastical laws do not reduce the community of faith to an institution of law.⁴⁵ For these laws, too, are directed towards achieving the Church's purpose: *salus animarum*. It is for that reason such laws are made, and for the same reason that the competent authority in the Church can dispense his subjects from the observance of these laws.

Disciplinary laws generally fall into the category of merely ecclesiastical laws and the Code

⁴⁴ See F. URRUTIA, "De natura legis ecclesiasticae", in Monitor ecclesiasticus, 100(1975), p. 410.

⁴⁵ See R. METZ, L'Eglise a ses lois, Je sais, je crois 79, Paris, Fayard, 1962, pp. 12-14; see also M. HUFTIER, "La loi ecclésiastique: sa valeur et son obligation", in L'Ami du clergé, 74(1964), p.381.

of Canon Law contains many such laws.⁴⁶ Since 1917, the binding force of these laws was controlled by c. 12 of the Code. The conciliar and postconciliar decrees of the Second Vatican Council (1962-1965) abrogated or derogated from particular prescriptions in some of these laws. The Latin Church's principal legislative document today is the 1983 Code of Canon Law which reflects the conciliar teachings on the nature of the Church, its purpose and its members. Canon 11 now regulates the binding force of merely ecclesiastical laws.

c. Civil ecclesiastical law

Some countries possess a civil ecclesiastical law which circumscribes actions and has its roots in divine and ecclesiastical laws. In England, the Anglican Church (the Church of England) is in this position. Abstracting from parliamentary law, which may affect it and its members purely as an institution or as British citizens, that Church is also bound by its own canon law and by civil ecclesiastical law. The sources of these laws and the question whether the Roman Catholic Church may be able to recognize and to accept any legal prescription emanating from this Church or State in matrimonial matters will be discussed in Chapters Four and Five.

2. THE APPLICATION OF CHURCH LEGISLATION TO BAPTIZED NON-CATHOLICS BEFORE VATICAN II

a. The first centuries

The history of the early Church recounted the ecclesiastical authorities' concern with essentially theological and structural matters. As theological speculation gave way to conciliar declarations by ecumenical councils and provincial synods, heresies and their espousers seemed

⁴⁶ For example, laws on the form of marriage (cc.1108-1123) and penal laws (cc.1311-1399).

to increase in number. Similarly, problems with schism and apostasy increased proportionally as the membership in the Church grew. To combat these intricate issues, legislation of a general nature was enacted that prescribed the acceptance of the creedal formulae. Individual or corporate reconciliation with the Church was effected in an uncomplicated manner as St. Augustine made clear in his argument with the Donatists. Speaking to them, Augustine affirmed the Church's benevolent custom of correcting whatever was false in the schismatics and heretics themselves, but not of repeating what had been given by them, that is, baptism; of healing what had been wounded, not of curing what was healthy.⁴⁷

With the passage of time, the Church attended to other pressing matters, namely, the status of the non-baptized. Although the Pauline statement, "for what have I to do with judging those outside"⁴⁸ was well known, infidels and Jews figured prominently in the merely ecclesiastical laws issued by the Church.⁴⁹ Using the natural law principle that a society enjoyed the right to defend itself against anyone unjustly preventing it from attaining a duly -- and in the Church's case, a divinely -- appointed end, ecclesiastical authorities enacted general laws and synodal regulations that indirectly touched persons who were not its subjects.⁵⁰

Merely ecclesiastical laws that applied to baptized non-Catholics were not apparently an

⁴⁷ See MIGNE, P. L., vol. 43, col. 133, St. Augustine, *De baptismo*, 2, 7.

⁴⁸ I Cor. 5:12-13.

⁴⁹ The first indication of a merely ecclesiastical law affecting the non-baptized was c. 10 of the III Council of Arles in A.D. 538. It concerned affinity. Even though they had married within the degrees prohibited by the Church, the spouses were not to be separated after their conversion and baptism. See J. MANSI, Sacrorum Conciliorum nova et amplissima collectio, vol. XI, Parisiis, Welter, 1901, cols. 14-15.

⁵⁰ The Council of Elvira, A.D. 305, in c. 16 forbade Christians to marry Jews. Thus began the copious legislation of merely ecclesiastical laws directly or indirectly affecting the Jewish people. See *ibid.*, vol. II, col. 8.

issue in the early centuries of the Church. Since baptized non-Catholics were not recognized as an entity outside of the Catholic Church, the Church did not enact general laws pertaining to them. As its membership and influence grew, the Church became a powerful force in secular matters. At times, it joined forces with secular powers to overcome and resolve difficulties associated with heretics and their beliefs. As the Latin Church developed, its legal system improved. Laws were codified and disseminated. By the twelfth century some harmony and redaction of these codes became necessary. The task fell to Gratian.

b. The Decretals

Gratian, father of the science of canon law,⁵¹ taught that the Church could not bind non-members by its own laws. He quoted an 1198 instruction from Innocent III which directed that infidels who contracted marriage within the merely ecclesiastical degrees of consanguinity prohibited by canon law and were later baptized, were not to be separated.⁵² The *infideles* were the non-baptized and the Church as a spiritual power knew that its laws did not directly apply to them. As a secular power, the Church legislated for all its subjects.

Even from the earliest times the Church had to contend with heresy, schism and apostasy. Each problem was usually dealt with at a local level. While there were many references in Gratian and the Decretals to those who were formally estranged from the Church as heretics, schismatics or apostates, the legislation cited by Gratian did not directly address the question of the baptized non-Catholic's subjection to merely ecclesiastical laws.⁵³ This was not surprising since no dissident

⁵¹ See S. KUTTNER, "The Father of the Science of Canon Law", in The Jurist, 1(1941), p. 2.

⁵² X, IV, 14, 4. See also X, IV, 19, 8, which stated that non-baptised persons are not subject to the Church's own laws.

⁵³ See C. XXIV, q. 1, cc. 29-31.

Church existed in the Western Patriarchate at that time. Heretics, apostates and schismatics were considered to be Catholics in bad faith and naturally subject to the Church. Alexander IV (1254-1261) deprived heretics of their rights in the Church, namely, of holding public office, of receiving ecclesiastical benefices and of having a Christian burial.⁵⁴ This loss also applied to their heirs to the second generation.

c. The Council of Trent and the commentators

The Gratian codification of ecclesiastical laws, although covering an epoch, apparently did not contain any specific legislation addressed to Western baptized non-Catholics as a corporate group. General decrees on this matter were not promulgated until the Middle Ages when, as a result of the Reformation, national ecclesiastical communities came into existence in the Western Church. The Catholic Church had to face the question of who were subject to its laws. The Council of Trent (1545-1563) was the first general council to face this situation and to enact specific legislation on the observance of ecclesiastical laws by baptized non-Catholics. This Council confronted the problems associated with the ecclesiastical upheaval in Europe by providing a coherent and extensive summary of the Catholic Church's teaching and legislation in its various decrees, canons and pronouncements.⁵⁵ Moreover, the Council Fathers answered inquiries concerning the juridical status of former Catholics who had joined heretical sects and of those children who were being baptized in the new ecclesial communities by parents who were dissident Catholics. Did merely ecclesiastical laws continue to bind these persons?

The Council Fathers answered the question in their decree on the sacraments. They stated

⁵⁴ See VI^o, V, 2, 2-3. It was slightly modified by Pope Boniface VIII, in VI^o, V, 2, 15.

⁵⁵ See J. ALBERIGO et al, Conciliorum oecumenicorum decreta, Bologna, Istituto per le scienze religiose, 1973, pp. 657-799 (hereafter cited as C.O.D.).

that the baptized were bound to the observance of the whole law of Christ: "If anyone says that those baptized are by baptism made debtors only to faith alone, but not to the observance of the whole law of Christ, let him be anathema."⁵⁶ The decree also said that the baptized were obliged to comply with all the precepts of the Church: "If anyone says that those baptized are free from all the precepts of holy Church, whether written or unwritten, so that they are not bound to observe them unless they should wish to submit to them of their own accord, let him be anathema."⁵⁷ By enacting specific legislation, the Council of Trent settled the doubts and confirmed what had been a generally accepted principle, namely, that all baptized persons were bound by the divine law, and by all ecclesiastical laws and customs. These *dicta* were not open to canonical or theological interpretation by any authority below the Roman Pontiff.⁵⁸ Baptized non-Catholics and "former Catholics" remained intrinsically and extrinsically subject to the jurisdiction of the Church. Accordingly, heretics, apostates and schismatics were obliged to observe its laws. As A. Cicognani pointed out:⁵⁹

The Council of Trent at that time had strong reasons for such legislation, for when the so-called Reformation began all such heretics and schismatics were in bad faith, or at least they were presumed to be; hence they were regarded as

⁵⁶ Concilium Tridentinum, sessio VII (March 3, 1547), canones de sacramento baptismi, c. 7. "Si quis dixerit baptizatos per baptismum ipsum solius tantum fidei debitores fieri non autem universae legis Christi servandae anathema sit", in C.O.D., p. 685. The English translation is taken from H. SCHROEDER, Canons and Decrees of the Council of Trent, St. Louis, Herder Books, 1941, pp. 53-54.

⁵⁷ Canon 8, "Si quis dixerit, baptizatos liberos esse ab omnibus sanctae ecclesiae praeceptis, quae vel scripta vel tradita sunt, ita ut ea observare non teneantur, nisi se sua sponte illis submittere voluerint anathema sit", in C.O.D., p. 686. English translation taken from H. SCHROEDER, op. cit., p. 54.

⁵⁸ Confirmation was given to its decrees on January 26, 1564, by Pius IV in the Bull *Benedictus Deus*. He prohibited commentaries of any description. If a matter was unclear, recourse to the Apostolic See was necessary. See Magnum bullarium Romanum; bullarum, privilegiorum ac diplomatum Romanorum Pontificum amplissima collectio, Graz, Akademische Druck -- U. Verlagsanstalt, 1964, tomus IV, pars secunda, pp. 168-169. See also G. FRANSEN, "L'application des décrets du Concile de Trente: les débuts d'un nominalisme canonique", in L'Année canonique, 27(1983), pp. 7-9.

⁵⁹ A. CICOGNANI, op. cit., p. 569.

heretics and schismatics from crime, and consequently in no way could they be considered free from the observance of laws.

Cardinal R. Bellarmine (1542-1621), who wrote some time after the Council, made a useful distinction: the indelible mark of baptism is not a means which unites one with the Church but it is a sign of union with the Church and of its power over those who possess this mark.⁶⁰ Thus he clarified the difference between a member of the Church and one who was but a subject of the Church.⁶¹ F. Suárez (1548-1617) also made a similar distinction by contrasting the baptized with the catechumens. He did not consider the latter to be subjects of the Church, but he did see them as members of it. Baptism by water made individuals subjects of the Church; but faith made them members.⁶² These notions retained their popularity with many canonists until fairly recent times.⁶³ While the Bellarmine contrast was widely accepted inside the Catholic Church, it was Cardinal J. De Lugo's (1583-1660) written reflection on the application of the Church's laws to baptized non-

⁶⁰ The idea is not explicitly stated. Rather it is deduced from the article quoted. "Praeterea haeretici retinent characterem Baptismi [...]. Praeterea, non proprie unit character hominem cum capite, sed est signum potestatis et unionis cujusdam [...]." See R. BELLARMINO, *Opera omnia*, ex editione veneta, pluribus tum additis tum correctis, iterum edidit Justinus Fèvre, vol. II, Parisiis, Vivès, 1870, liber III, *De Ecclesiae natura et proprietatibus*, cap. IV, p. 321. He also acknowledged the binding force of merely ecclesiastical laws on all persons after the reception of baptism. See *ibid.*, tom. III, *De baptismo*, liber I, cap. XVI, pp. 560-564.

⁶¹ J. Hannan makes the analogy of a citizen convicted of a crime against the state who loses many of the privileges of citizenship but remains subject to the authority of the state; so a baptized person who is separated from membership in the Church is deprived of rights incidental to membership but remains subject to the Church's authority. See J. HANNAN, "Subjection of Non-Members to the Church", in *The Jurist*, 8(1948), p. 348.

⁶² See H. LACERTE, *The Nature of Canon Law According to Suárez*, Series canonica nova 6, Ottawa, University of Ottawa Press, 1964, p. 108.

⁶³ "Tandem cum homo baptizatus ratione characteris indelebilis vero vinculo cum Ecclesia aliqua ex parte sit coniunctus, etiam potestati legiferae, iudiciariae, coactivae Ecclesiae manet subjectus. Quare notio subditi Ecclesiae latius patet quam membri corporis Ecclesiae; multi enim sunt vere subditi Ecclesiae velut haeretici, schismatici, excommunicati, qui membra Ecclesiae simpliciter non iam existunt." See F. WERNZ, *Ius Decretalium*, vol. I, Prati, Giachetti, 1913, p. 126, note 78.

Catholics that soon achieved the status of a "quasi-canonical" norm. J. McCloskey⁶⁴ wrote:

As recorded by De Lugo there arose in the seventeenth century a discussion about the obligation of heretics to observe the decree on annual confession⁶⁵ which had been enacted by the Fourth Lateran Council⁶⁶ and renewed by the Council of Trent. Some theologians at that time taught that heretics were not bound by that law, particularly in view of the use of the word *fidelis*, which they claimed referred only to Catholics. And, besides, they contended that it would not seem prudent or reasonable to extend this law to heretics who certainly would not observe it, and thus there would be occasions given for new sins when the law was violated by these heretics.⁶⁷

De Lugo explained that the word *fidelis* included all baptized persons⁶⁸ and was used to differentiate them from the word *infidelis* -- which included the non-baptized. He pointed out the absurdity⁶⁹ of considering heretics free from the obligations of ecclesiastical laws. De Lugo argued

⁶⁴ J. McCLOSKEY, The Subject of Ecclesiastical Law According to Canon 12, Canon Law Studies, n. 165, Washington, D.C., The Catholic University of America, 1943, xvii-246p.

⁶⁵ This law was probably the occasion for one of the first attempts after the Council of Trent to treat the exemptions of heretics from ecclesiastical laws, even though the law of annual confession cannot be considered a merely ecclesiastical law in as much as it is based on the divine law itself as the Tridentine Council acknowledged in its decree of November 25, 1551. See C.O.D., pp. 705-707, sessio XIV, *De poenitentia*, c. 5.

⁶⁶ Held in 1215. See C.O.D., p. 245, c. 21, *Omnis utriusque sexus*. This norm became cc. 859 and 906 in the 1917 Codex iuris canonici and c. 920 in the revised Code.

⁶⁷ J. McCLOSKEY, op. cit., pp. 115-116.

⁶⁸ "[...] sed nomine Christifidelium, omnes baptizatos comprehendit. [...] nomine infidelium non comprehendi haereticos baptizatos: [...] sic ergo in illo textu nomine fidelium, comprehenduntur etiam haeretici ut distinguantur ab iis, qui fidem Christi nunquam professi sunt." See J. DE LUGO, Disputationes scholasticae et morales, ed. nova, diligenter recognita, notis illustrata, et documentis pluribus quae a morte auctoris ad hunc usque diem e Romana Curia prodierunt, nec non indicibus copiosissimis locupletata et ornata, accurante J. B. Fournials, tom. IV, *De sacramento poenitentiae*, disp. XV, sect. VII, n. 146, Parisiis, Vivès, 1892, p. 864.

⁶⁹ "Nec etiam obstat confirmatio adducta ex eo, quod lex illa esset inutilis, et nociva, si ad haereticos extenderetur: hoc enim argumentum multo magis probaret de aliis legibus ecclesiasticis quod non debeant haereticos obligare, atque adeo ipsos non peccare contra legem jejunii, vel abstinentiae a carnibus, nec incurrere excommunicationem, et censuras latas pro variis criminibus. Quae tamen omnia absurdissima sunt. Ratio autem est, quia ad hoc, ut lex aliqua universalis sit prudens et justa, non debemus attendere, an sit futura utilis huic personae, vel illi, sed tota communitati; cui si utilis sit, lex est rationabilis, nec debet restringi ad solas illas personas, quae eam probabiliter observabunt: nam per hoc daretur ansa, ut multi malitione se subtraherent a legum obligatione, ponendo se in tali statu, in quo propter ipsorum perversitatem non crederentur observaturi legem, et sic non intelligerentur obligati [...]", in *ibid.*, p. 864, n. 147.

that baptism obliged a heretic to observe ecclesiastical laws, whereas the non-baptized was not. Even though he spoke about an ecclesiastical law (*i.e.*, a quasi-divine law, since it was based on a divine precept) De Lugo was an influential force against those who tried to exempt heretics from any Church laws, including those which were merely ecclesiastical. McCloskey's research on the subject of the binding force of merely ecclesiastical laws allowed him to conclude that De Lugo's observation (about the absurdity of the position denying that heretics were bound by ecclesiastical laws) was widely accepted by canonists who were the cardinal's contemporaries and successors.

The post-Tridentine canonists -- Suárez,⁷⁰ De Lugo,⁷¹ J. Gibalin (1592-1671),⁷² A. Reiffenstuel (1642-1703),⁷³ F. Schmalzgrueber (1663-1735)⁷⁴ and V. Pichler (1670-1736)⁷⁵ -- continued to state the general principle of subjection of baptized non-Catholics to ecclesiastical laws in their writings. They did not normally distinguish between fundamental and actual subjection,⁷⁶ or between ecclesiastical laws in general and merely ecclesiastical laws. Both theologians and canonists argued among themselves that a differentiation had to be made between formal and material heretics. In 1741, Pope Benedict XIV (1740-1758) did this while drawing the distinction

⁷⁰ See F. SUAREZ, Opera omnia, vol. V, Parisiis, Vivès, 1856, pp. 405-407.

⁷¹ See J. DE LUGO, op. cit., tom. IV, p. 863, note 144.

⁷² See J. GIBALIN, Scientia canonica et hieropolitica, vol. I, Lugduni, Arnaud et Borde, 1670, pp. 64-65.

⁷³ See A. REIFFENSTUEL, Ius canonicum universum, vol. I, Parisiis, Vivès, 1864, p. 162.

⁷⁴ See F. SCHMALZGRUEBER, Ius ecclesiasticum universum brevi methodo ad discentium utilitatem explicatum, seu lucubrationes canonicae in quinque libros Decretalium Gregorii IX, Pontificis Maximi, vol. I, Romae, Tipographia Rev. Cam. Apostolicae, 1843, pp. 203-204.

⁷⁵ See V. PICHLER, Ius canonium secundum quinque Decretalium Titulos Gregorii Papae IX explicatum, Ravennae, Pezzana, 1741, p. 25.

⁷⁶ The distinction between fundamental subjection and actual subjection to ecclesiastical laws is as follows: the former condition arises from the fact of valid baptism, while the later acknowledges the legislator's will to exempt or dispense those baptized *extra Ecclesiam Catholicam* from one or more enactments of such laws.

between ecclesiastical law and merely ecclesiastical law. In his official declaration on the form of marriage,⁷⁷ the pope stated that heretics in the Federated States of Belgium and Holland, when marrying among themselves, were not bound by the Tridentine requirement of *Tametsi*, a merely ecclesiastical law which required that a marriage be celebrated before a priest and two witnesses.⁷⁸ This relaxation in the law was gradually extended to other parts of the world.⁷⁹

During the nineteenth century canonists tenaciously adhered to the principle that heretics remained fundamentally subject to the Church's jurisdiction. The canonical writings of C. Tarquini (1810-1874),⁸⁰ F. De Angelis (1824-1881),⁸¹ F. Santi (1830-1884)⁸² and S. Sanguineti (1829-

⁷⁷ S.C.C. Declaration *Matrimonia*, November 4, 1741. See P. GASPARRI (ed.), Codicis iuris canonici fontes, Romae, Typis polyglottis Vaticanis, 1926-1939, n. 3527, [vols. 7-9 edited by Cardinal I. Serédi] (hereafter cited as Fontes).

⁷⁸ "In this document the following answers were given concerning the marriage of heretics: (1) provided that there was no other canonical impediment, the marriages which heretics contracted with each other in the past without observing the form prescribed by the Council of Trent are valid and all such marriages henceforth will be valid; (2) mixed marriages -- provided there be no other canonical impediment -- in the same provinces were valid and, henceforth, will be considered valid, even though the form of marriage prescribed by the Council of Trent is not observed." See J. CARBERRY, The Juridical Form of Marriage: An Historical Conspectus and Commentary, Canon Law Studies, n. 84, Washington, D.C., The Catholic University of America, 1934, p. 31.

⁷⁹ See the list of places in A. LEINZ, Der Ehevorschrift des Concils von Trient: Ausdehnung und heutige Geltung: eine canonistische Studie, Freiburg, Herder, 1888, pp. 54-56. Besides the Benedictine declaration, the Holy See granted dispensations for places where the Tridentine law was in force and binding on all the baptized. Decrees validating all clandestine mixed marriages were given for: Ireland (1785), Bavaria (1834), Hungary (1841), Russia, including Russian Poland (1844) and Georgia in Asia (1845). These were not extensions of the Declaration since that decree referred primarily to heretical marriages and secondarily to mixed marriages only. Further decrees followed: for Malta in 1890 (heretical marriages were valid, mixed marriages were invalid if not conducted according to *Tametsi*); for the German Empire in 1906 (heretical and mixed marriages were exempt from the requirements of *Tametsi*). See J. CARBERRY, op. cit., pp. 36-37. The decree *Provida* was granted to the German Empire on January 18, 1906 by Pius X. See Acta Sanctae Sedis, 39(1906), pp. 81-84 (hereafter cited as A.S.S.). This provision was extended by the Congregation of the Council to Hungary on February 27, 1909. L. De Smet provides a reflection on the subject matter of these documents. See L. DE SMET, Betrothment and Marriage: A Canonical and Theological Treatise with Notices on History and Civil Law, 2nd. ed., translated from the third Latin edition of 1920 by W. Dobell [and A. Owens], vol. I, Bruges, C. Beyaert, 1923, pp. 91-92.

⁸⁰ See C. TARQUINI, iuris ecclesiastici publici institutiones, Romae, Typographia polyglotta S. C. de Propaganda Fide, 1862, pp. 66-70.

1893)⁸³ make this clear. By this time the discussions among canon lawyers focused on whether heretics were actually bound by merely ecclesiastical laws. Although canonical writers proffered some nuances and minor distinctions, there was hardly any concession given to the baptized non-Catholic. Some commentators offered what might have been considered liberal speculations: contending that most baptized non-Catholics were material heretics and therefore not in bad faith, this small group of canonists taught that baptized non-Catholics were not actually bound to the observance of fast and abstinence.⁸⁴ Formal heretics, however, did not enjoy the benefits of this new opinion because they would seemingly profit from their "evil deeds". Except for the 1741 privilege granted by Pope Benedict XIV, and notwithstanding the new legal opinions, the Church made no general ecclesiastical legislation to release the growing numbers of non-Catholic Christians from becoming actual subjects of the Church's jurisdiction.

The common position of earlier canonists continued to be expounded during the first part of the twentieth century. F. Cavagnis (1841-1906) suggested that those born and educated in heterodoxy were subject to those [merely] ecclesiastical laws which were directed towards the common good, but were not bound to laws which pertained to personal sanctification, such as fast, abstinence and the observance of feast-days.⁸⁵ F. Wernz (1842-1914) rejected Cavagnis' opinion

⁸¹ See F. DE ANGELIS, Praelectiones juris canonici ad methodum Decretalium Gregorii IX exactae, vol. I, Romae, Typographia della Pace, 1877, pp. 54-56.

⁸² See F. SANTI, Praelectiones juris canonici, vol. I, Ratisbonae, Pustet, 1904, p. 24.

⁸³ See S. SANGUINETI, Iuris ecclesiastici institutiones in usum praelectionum, Romae, Typographia polyglotta S. C. de Propaganda Fide, 1896, p. 29.

⁸⁴ The reason for this approach was their belief that baptized non-Catholics would remain contumacious in these matters and nothing would be accomplished by the multiplication of sins, if they were held to the observance of the law. See F. DE ANGELIS, op. cit., p. 56.

⁸⁵ See F. CAVAGNIS, Institutiones iuris publici ecclesiastici, vol. I, Romae, Typis Societatis catholicae instructivae, 1889, pp. 347-348, nn. 562-564.

and declared De Lugo's statement to be normative on the matter.⁸⁶ The literature of the day testified to the fact that canonists agreed substantially with De Lugo; indeed no canonical writer since Trent seems to have rejected his statement. This has been due largely to what was considered the inescapable fact that the legislation binding the baptized to observe all precepts or merely ecclesiastical laws of the Church was promulgated by a general council imbued with inerrancy through the guidance of the Holy Spirit.

In August 1907 by virtue of the decree *Ne Temere*,⁸⁷ the Holy See extended the privilege of exemption from the Catholic form of marriage to all baptized non-Catholics (heretics) who married among themselves.⁸⁸ A distinction was made between those baptized *in Ecclesia Catholica* and those baptized *extra Ecclesiam Catholicam*, expressions which became a part of canon law, and were later incorporated into the 1917 Code.⁸⁹ A dual classification of "Christian" emerged in the minds of some people. With this delineation introduced into the legal system, the Church not only gave relative freedom to non-Catholic Christians, but also saved itself many difficulties, particularly

⁸⁶ "At haec distinctio cum partiali et generali quadam immunitate acatholicorum hucusque in fontibus iuris, qui generatim et indiscriminatim loquuntur, [...] nullum habet fundamentum. Ratio autem a patronis istius sententiae ex praesumptione petita nititur coniectura cum textibus iuris vix conciliabili et in aliquo argumento, quod, cum de omnibus legibus ecclesiasticis valeat, nimium probat, et insuper non attendit, quod lex quaedam iusta et prudens debeat esse utilis toti communitati, non solis personis, quae illam probabiliter sint observaturae." See F. WERNZ, *op. cit.*, vol. I, p. 127, n. 80.

⁸⁷ See *A.S.S.*, 40(1907), pp. 525-530. See also *Fontes*, n. 4340.

⁸⁸ A provision of *Ne Temere* (paragraph XI, § 2) permitted the provisions of *Provida* to retain force of law in Germany and Hungary. These two exemptions to the general law remained in force until the promulgation of the 1917 *Code of Canon Law*. See *Canon Law Digest*, 1(1917-1933), p. 545 (hereafter cited as *C.L.D.*).

⁸⁹ Since this decree dealt only with marriage legislation, the terminology was confined to this area. The 1917 Code retained the phraseology of the decree and used it in cc. 1070, § 1 and 1099, § 1, 1°. See also F. SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, *Canon Law Studies*, n. 51, Washington, D.C., The Catholic University of America, 1929, pp. 103-104.

in the area of marriage. The terms did not touch any dogma of the Church.⁹⁰ Therefore, it was the common and incontrovertible opinion of canonists from the time of Trent until the codification of canon law in 1917 that juridically all baptized non-Catholics were fundamentally and actually subject to all ecclesiastical laws, unless specifically exempted. The general exemptions given to baptized non-Catholics concerned marriage and only in the matter of merely ecclesiastical law since the Church at that time considered that it could grant privileges only in that forum of law.

d. Other documents listed in the "Fontes"

In the Apostolic Letter *Singulari nobis*, Benedict XIV clarified the juridical status of baptized non-Catholics.⁹¹ He declared:⁹²

Lastly, We hold that it is certain that those persons who have received baptism from heretical ministers are cut off from the unity of the Church, if after they attained the age when they could normally distinguish between right and wrong they still adhere to the erroneous tenets of said ministers; and they are deprived of all goods enjoyed by those in the Church, but they are not freed from the authority and legislation of the same.

Pius VII (1820-1823) in turn confirmed the Church's stand that heretics remained bound to all the

⁹⁰ See A. MARX, "The Question of Those Baptized 'in Ecclesia Catholica'", in *The Jurist*, 18(1958), p. 454.

⁹¹ The letter dated February 9, 1749, was addressed to Henry, Cardinal Duke of York. It concerned the marriage of a member of the "Anglican sect" with a Jew, both of whom later became Catholics. The question was: were they validly married? Benedict XIV ruled in the negative. Even though her baptism was administered by a non-Catholic minister, it made her a member of the Catholic Church. Although she ceased to be a member of the Church because of her decision to remain in the sect, she remained subject to the laws of the Catholic Church and therefore to the invalidating impediment of disparity of worship. See *Fontes*, n. 394.

⁹² § 14. "Postremo exploratum habemus, ab haereticis baptizatos, si ad eam aetatem venerint, in qua bona a malis dispicere per se possint, atque erroribus baptizantis adhaereant, illos quidem ab Ecclesiae unitate repelli, iisque bonis orbari omnibus, quibus fruuntur in Ecclesia versantes, non tamen ab eius auctoritate, et legibus liberari [...]." See *Fontes*, n. 394. The English translation is taken from A. CICOGNANI, *op. cit.*, p. 568.

Church's laws.⁹³ Both papal pronouncements were used later in the reform and codification of canon law at the beginning of this century.

In 1912 Cardinal Pietro Gasparri published a schema for the new Codex iuris canonici.⁹⁴ The proposed c. 11 § 1, read: "Only the baptized are subject to ecclesiastical laws."⁹⁵ No differentiation was made in the proposed canon between ecclesiastical and merely ecclesiastical law. The cardinal cited seven sources for § 1: one from the Decretals,⁹⁶ four from the Council of Trent⁹⁷ as well as two from papal letters reflecting the Tridentine canons.⁹⁸ This canon was

⁹³ See *Etsi fraternitatis*, in Fontes, n. 477. It was given on October 8, 1803.

⁹⁴ Codex iuris canonici Sanctissimi Domini Nostri Pii PP. X Codex iuris canonici cum notis Petri Card. Gasparri. Schema codicis iuris canonici. Sub secreto pontificio, Romae, Typis polyglottis Vaticanis, 1912, vii-281p.

⁹⁵ "§ 1. Legibus ecclesiasticis subduntur soli baptizati." The proposed canon had two more sections. "§ 2. Legibus generalibus tenentur ubique terrarum omnes pro quibus latae sunt. § 3. Legibus conditis pro peculiari territorio tantum ii subiiciuntur pro quibus latae sunt quique ibidem domicilium vel quasi-domicilium habent et simul actu commorantur, nisi leges sint etiam personales." See *ibid.*, p. 5.

⁹⁶ X, IV, 19, 8. See footnote 52.

⁹⁷ Concilium Tridentinum, sessio VII, *de baptismo*, cc. 7 et 8. See footnotes 56 and 57. Canon 14: "Si quis dixerit, huiusmodi parvulos baptizatos, cum adoleverint, interrogandos esse, an ratum habere velint, quod patrini eorum nomine, dum baptizarentur, polliciti sunt, et ubi se nolle responderint, suo esse arbitrio relinquendos nec alia interim poena ad Christianam vitam cogendos, nisi ut ab Eucharistiae aliorumque sacramentorum perceptione arceantur, donec respiciant, anathema sit", in C.O.D., p. 686. ("If anyone says that those who have been baptized when children, are, when they have grown up, to be questioned whether they will ratify what their sponsors promised in their name when they were baptized, and in case they answer in the negative, are to be left to their own will; neither are they to be compelled in the meantime to a Christian life by any penalty other than exclusion from the reception of the Eucharist and the other sacraments, until they repent, let him be anathema." Translation taken from H. SCHROEDER, op. cit., p. 54.) See also session XIV, *de poenitentia*, c. 2: "Si quis sacramenta confundens, ipsum baptismum poenitentiae sacramentum esse dixerit, quasi haec duo sacramenta distincta non sint, atque ideo poenitentiam non recte secundam post naufragium tabulam appellari: anathema sit", in C.O.D., p. 711. ("If anyone confusing the sacraments, says that baptism is itself the sacrament of penance, as though these two sacraments were not distinct, and that penance is therefore not rightly called a second plank after shipwreck, let him be anathema." Translation from H. SCHROEDER, op. cit., p. 102.)

⁹⁸ See Benedict XIV's letter *Singulari nobis*, as well as Pius VII's *Etsi fraternitatis*.

augmented by the proposed c. 1, *Liber Secundus, De Personis*:

§ 1. Emerging from the font of baptism a human being is constituted a person in the Church of Christ with all the rights and duties of Christians.

§ 2. Heretics, schismatics, and those who are censured remain subject to the Church, and are licitly deprived of those rights enjoyed by others; they are unable to be restored to their former condition, unless they are formally reconciled with the Church.⁹⁹

Gasparri quoted for this canon three of the references used previously for c. 11, § 1, as foundations that established the Church's jurisdiction over baptized non-Catholics.¹⁰⁰

A revised schema was published in 1916.¹⁰¹ Canon 11 had become c. 12. The sources cited for the canon remained unaltered. In the revision the canon was formulated thus:

Merely ecclesiastical laws do not bind those who have not received baptism, nor the baptized who do not have sufficient use of reason, nor those who have the use of reason but are under seven years of age, excepting what is prescribed in canon 854, if approaching holy communion.¹⁰²

e. Canon 12 of the Codex iuris canonici (1917) and the commentators

Canon 12 and its sources testified to the Church's understanding that all the baptized were its proper subjects. When the Code was promulgated in 1917, c. 12 read:

⁹⁹ "§ 1. Baptismatis fonte renatus homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis. § 2. Haeretici, schismatici aliive censuris innodati manent Ecclesiae subiecti, licet iuribus priventur quibus alii gaudent; nec in pristinum restituti possunt, nisi legitime cum Ecclesia reconcilientur." See Codex iuris canonici [...], 1912, p. 25.

¹⁰⁰ Concilium Tridentinum, sessio VII, *de baptismo*, cc. 7 and 8; Benedict XIV's *Singulari nobis*.

¹⁰¹ Codex iuris canonici cum notis Petri Card. Gasparri, Schema codicis iuris canonici. Sub secreto pontificio, Romae, Typis polyglottis, 1916, vii-1013p.

¹⁰² "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, salvo praescripto c. 854, si ad sacram communionem accedant." See *ibid.*, p. 5. Canon 854 was solely concerned with the matter of first eucharist.

Merely ecclesiastical laws do not bind those who have not received baptism, nor the baptized who do not have sufficient use of reason, nor those who have the use of reason but are under seven years of age, unless the law expressly rules otherwise.¹⁰³

The canon restated the then universally accepted canonical principle that all the baptized were fundamentally and actually bound by merely ecclesiastical laws, unless expressly exempted from observance. Some of the references in the 1916 schema under this canon were deleted from the *fontes* to the 1917 Code,¹⁰⁴ while other sources were added for the promulgated text.¹⁰⁵ According to the commentators,¹⁰⁶ it was therefore necessary to have recourse to other canons in the Code to establish the actual application of merely ecclesiastical laws to baptized non-Catholics.¹⁰⁷

¹⁰³ "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi aliud iure expresse caveatur." See Codex iuris canonici: Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus. Praefatione, fontium annotatione et indice analytico-alphabetico ab Em.mo Petro Card. Gasparri auctus, Romae, Typis polyglottis Vaticanis, 1933, p. 5 (hereafter cited as C.I.C.).

¹⁰⁴ References deleted were: Concilium Tridentinum, sessio VII, *de baptismo*, cc. 7, 8 and 14. With the addition of c. 13 from the same session the four canons here cited became sources for c. 87 in the 1917 Code and were listed in the Fontes. Canon 13 states: "Si quis dixerit, parvulos eo quod actum credendi non habent, suscepto baptismo inter fideles computandos non esse, ac propterea, cum ad annos discretionis pervenerint, esse rebaptizandos, aut praestare omitti eorum baptismum, quam eos non actu proprio credentes baptizari in sola fide ecclesiae: anathema sit." See C.O.D., p. 686. ("If anyone says that children, because they have not the act of believing, are not after having received baptism to be numbered among the faithful, and that for this reason are to be rebaptized when they have reached the years of discretion; or that it is better that the baptism of such be omitted than that, while not believing by their own act, they should be baptized in the faith of the Church alone, let him be anathema." Translation from H. SCHROEDER, op. cit., p. 54.)

¹⁰⁵ X, IV, 14, 4; Benedict XIV, ep. encycl., *Inter omnigenas*, February 2, 1744, in Fontes, n. 339; S.C.S.O., instr. ad arch. Quebecen. September 16, 1824 ad § 2, in *ibid.*, n.866; (Tunkin, *Occident*), April 19, 1837, in *ibid.*, n. 875; inst. ad vic. ap., Nankin, August 26, 1891, in *ibid.*, n. 1145; S.C.de P.F., (C.P. -- Jaffnae), August 23, 1852, ad 5, in *ibid.*, n. 4835.

¹⁰⁶ See A. VAN HOVE, De Legibus ecclesiasticis, vol. I, Mechliniae, H. Dessain, 1930, pp. 194-201; F. CLAEYS-BOUUAERT and G. SIMENON, Manuale iuris canonici, prostat apud auctores in Seminariis Gandarensi et Leodiensi, 1934, pp. 93-94.

¹⁰⁷ See C.I.C., cc. 1070, § 1 and 1099, § 2.

Founded on a strong tradition in the Church, a new canonical formulation became c. 87 of the 1917 Codex iuris canonici. It upheld the principle of application by stating:

By baptism a human being is made a person in the Church of Christ with all the rights and duties of Christians, unless, in as far as rights are concerned, there is some obstacle impeding the bond of communion with the Church or a censure inflicted by the Church.¹⁰⁸

The canon gave legal force to the generally held belief that baptism constituted a human being as a person in the Church of Christ, and that juridical effects arose from that status.¹⁰⁹ Furthermore, this canon allowed commentators to make the expressions "person in" and "member of" the Church synonymous. F. Cappello pointed out:

By the law of Christ all those who are validly baptized are subject in ecclesiastical matters to the authority of the Church, so that their own will cannot release them from the jurisdiction of the Church, nor can the Church universally and absolutely declare them independent of ecclesiastical authority.¹¹⁰

Among the definitions in the 1917 Code were those which applied to apostates, schismatics and heretics.¹¹¹ These persons shared certain characteristics: they were validly baptized, were separated from full communion with the (Catholic) Church, and were fundamentally and actually

¹⁰⁸ "Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstat obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura." See footnote 99 for a comparison with the draft form.

¹⁰⁹ See B. OJETTI, Commentarium in Codicem iuris canonici, Romae, Universitas Gregoriana, 1928, p. 10.

¹¹⁰ "Omnes vaiide baptizati in rebus ecclesiasticis subsunt ex Christi ordinatione potestati Ecclesiae, adeo ut neque ipsi privata sua voluntate possint se iurisdictioni ecclesiasticae subducere neque Ecclesia valeat eos universaliter atque absolute liberos et independentes declarare a potestate ecclesiastica." See F. CAPPELLO, Tractatus canonico: moralis de sacramentis, vol. III, pars I, Romae, Marietti, 1939, p. 69.

¹¹¹ See C.I.C., c. 1325, § 2. An apostate is one who after having received baptism rejects totally the Christian Faith. A schismatic -- one who after having received baptism refuses to remain subject to the supreme pontiff or to communicate with the members of the Church who are subject to the supreme pontiff. A heretic -- one who after having received baptism pertinaciously denies any of the truths that must be believed with divine or Catholic faith. See also Vatican II's *Unitatis redintegratio*, § 3 and c. 751 of the revised Code.

subject to ecclesiastical laws. Although the Catholic Church applied these terms to those who defected by the formal acts described in the definitions, other persons who were material offenders were similarly bound. In the latter case, since no positive act against the virtue of faith had been perpetrated by baptized non-Catholics, certain *de iure* exceptions were made in the universal law.¹¹² Referring to a supposedly contrary centennial custom and prescription, some canonists held that laws of personal sanctification did not bind those both baptized and reared outside the Catholic Church.¹¹³

Like their predecessors, commentators on c. 12, such as M. Bargilliat,¹¹⁴ F. Maroto,¹¹⁵ A. Van Hove,¹¹⁶ C. Augustine,¹¹⁷ C. Berutti,¹¹⁸ S. Romani,¹¹⁹ Cappello,¹²⁰ G. Michiels¹²¹ and A. Vermeersch¹²² continued to hold to the traditional opinion that valid baptism alone made

¹¹² On disparity of cult and the canonical form of marriage, see footnote 107.

¹¹³ See A. CICOGNANI, *op. cit.*, pp. 568-569.

¹¹⁴ See M. BARGILLIAT, *Praelectiones iuris canonici*, vol. I, Parisiis, Berche et Tralin, 1909, p. 51.

¹¹⁵ See F. MAROTO, *Institutiones iuris canonici ad normam novi Codicis*, vol. I, Romae, apud Commentarium pro Religiosis, 1921, pp. 203-204.

¹¹⁶ See A. VAN HOVE, *op. cit.*, p. 201.

¹¹⁷ See C. AUGUSTINE (BACHOFEN), *A Commentary on the New Code of Canon Law*, vol. I, St. Louis, Herder, 1931, pp. 87-88.

¹¹⁸ See C. BERUTTI, *Institutiones iuris canonici*, vol. I, Romae, Marietti, 1936, p. 78.

¹¹⁹ See S. ROMANI, *Institutiones iuris canonici*, vol. I, Romae, Editrice Iustitia, 1941, pp. 83-84.

¹²⁰ See F. CAPPELLO, *Summa iuris publici ecclesiastici ad normam Codicis iuris canonici [sic] et recentiorum S. Sedis documentorum concinnata*, ed. 5a. accurate recognita, Romae, Pontificia Universitas Gregoriana, 1943, pp. 261-263.

¹²¹ See G. MICHIELS, *Normae generales iuris canonici: commentarius libri I Codicis iuris canonici*, ed. altera penitus retractata et notabiliter aucta, vol. I, Tornaci, Desclée, 1949, pp. 351-356.

¹²² See A. VERMEERSCH, *Epitome iuris canonici*, vol. I, Mechliniae, H. Dessain, 1963, pp. 122-123.

one a subject of ecclesiastical jurisdiction.¹²³ Along with this view, they espoused various secondary positions on matters regarding the public or private good as well as good or bad faith affecting culpability and obedience on the part of the baptized non-Catholic. Naturally, certain classes of baptized persons in the Western Church were not bound to observe merely ecclesiastical laws in virtue of c. 12 itself: those baptized who were under seven years of age unless the contrary was specified, those who were insane or without the habitual use of reason, and the baptized non-Catholic who, at the will of the legislator, was dispensed from the observance of a prescription of merely ecclesiastical law.

Pius XII (1939-1958) saw the Church of Christ and the Catholic Church as identical realities¹²⁴ -- a reflection of the Church's ecclesiology at the time. Since there was no official theological development in the Church's understanding of who its members and subjects were, all baptized persons were considered bound by the duties belonging to Christians.¹²⁵ Therefore, under the 1917 legislation, baptized non-Catholics who had the use of reason and had completed seven years of age remained permanently subject to the spiritual jurisdiction of the Church whether they knew it or wished it. While acknowledging that these same persons had rights in the Church, the exercise of those rights was restricted if an obstacle prevented them from being in full

¹²³ In the external forum if the doubt concerns the validity of the baptism, it is considered valid until the contrary is proven; if the doubt concerns the fact of conferral, the presumption of baptism is not held. Consequently, the common canonical opinion is that merely ecclesiastical laws bind persons in the former state and not in the latter. For a synopsis on the matter of the doubtfully baptized and their subjection to the Church's jurisdiction, see J. McCLOSKEY, *op. cit.*, pp. 163-178.

¹²⁴ See *Mystici corporis*, in *Acta Apostolicae Sedis*, 35(1943), p. 199 (hereafter cited as *A.A.S.*); also *Humani generis*, in *ibid.*, 42(1950), pp. 561-578.

¹²⁵ (Translation) "Baptism is the juridical act determined by Christ to mark incorporation into his Church. Every valid baptism *per se* makes the baptized person a member of the Catholic Church. The common teaching is that all who are validly baptized in infancy become members of the Roman Catholic Church and remain such until, having attained the use of reason at about the age of seven, their external conduct indicates that the person does not wish to be in visible communion with the Church." See G. VAN NOORT, *De Ecclesia Christi*, Hilversum in Hollandia, Sumptibus societatis anonymae P. Brand, 1932, pp. 176-177.

communion with the Catholic Church. Any relaxation of merely ecclesiastical laws for the baptized non-Catholic was given at the pleasure of the supreme authority in the Church, and then only by concession. This was the position of the Church at the time Pope John XXIII called the Second Vatican Council.

Conclusion

In the past, the Catholic Church has claimed that all baptized persons were subject to its jurisdiction and bound by the prescriptions of ecclesiastical law, in addition to the provisions of natural law and divine positive law. The most important declarations on the binding force of merely ecclesiastical laws for baptized non-Catholics were the Tridentine cc. 7 and 8 on baptism of session seven in 1547.¹²⁶ While the wording of the two canons did not explicitly state that baptized non-Catholics were fundamentally and actually subject to all the laws of the Catholic Church, such an interpretation was steadfastly upheld by post-Tridentine canonical opinion.

Canon 12 of the 1917 Codex iuris canonici repeated this principle, although certain exceptions were noted in that Code of laws. The teachings and spirit of the Second Vatican Council however, were to affect these provisions of positive ecclesiastical law in the revision process called for by John XXIII, guided by Paul VI and completed under John Paul II. The revision of c. 12 is the subject matter of the next chapter.

¹²⁶ See footnotes 56 and 57.

CHAPTER TWO

THE 1983 LEGISLATION AND ITS APPLICABILITY TO BAPTIZED NON-CATHOLICS

Many people have called the Second Vatican Council a "pastoral" council since it was not convoked to pronounce on a heresy or to heal a schism. Rather, it was a concerted effort to bring about renewal within the Church, and to improve relationships with those outside its visible confines. Pope John XXIII asked for *aggiornamento* in the Church. Obedient to the mandate given them, the Council Fathers produced documents imbued with both the richness of traditional teachings and current theological developments. These treasures, old and new, reflected not only the bright light of the conciliar teachings, but also a new spirit of openness and dialogue within the Church.

Although Pope John XXIII announced his intention to revise the Codex iuris canonici in 1959,¹ expediency required that the task be held in abeyance until the conclusion of the Second Vatican Council. He appointed a pontifical commission² under the presidency of Cardinal Peter Ciriaci³ to oversee this work.⁴

On November 20, 1965, Pope Paul VI held a solemn session of the commission that publicly

¹ January 25, 1959. See A.A.S., 51(1959), p. 68.

² Pontificia Commissio Codici Iuris Canonici Recognoscendo; see A.A.S., 55(1963), pp. 363-364.

³ He died December 30, 1966 and was succeeded by Archbishop (later Cardinal) Pericle Felici. See Communicationes, 1(1969), p. 35. Bishop Rosalio Castillo Lara (now Cardinal) succeeded to the pro-prefectship on the latter's death. See *ibid.*, 14(1982), p. 9.

⁴ During the conciliar period the cardinal members of the commission held plenary sessions on November 12, 1963 and November 25, 1965. See Communicationes, 1(1969), pp. 35-36, 42. The consultors were appointed later. The list of members is found in *ibid.*, p. 30, and *ibid.*, 5(1973), p. 189.

inaugurated the work of revision of the 1917 Code of Canon Law. At that meeting Pope Paul VI reminded those present that canon law flowed from the nature of the Church, was rooted in the power of jurisdiction given by Christ to his Church, and had as its purpose the salvation of souls. Pope Paul indicated that the teachings of the Council were to form the legislative bases of the new canons, while the former norms would provide the traditional language and form for the revised Code.⁵

In the light of some of the teachings of Vatican II expressed in legal form in the revised Code of Canon Law, this chapter will consider first how the commission addressed the revision of c. 12 of the 1917 Code; then the applicability of the Church's merely ecclesiastical laws to Western baptized non-Catholics.

1. PRINCIPLES ESTABLISHED BY VATICAN II

During the almost two millennia of the Christian world, fractions have arisen among Christians. During that time, baptized persons have for various reasons formed themselves into (or been baptized into) Christian communities and Churches that may or may not have a direct link with the Catholic Church. On the other hand, there are many Eastern and Western Christian groups and Churches that acknowledge Catholic roots, and reflect this in their praxis and teaching. The two forms of ecclesial communities referred to are made up of baptized persons whom the Catholic Church has traditionally considered to be its subjects -- an affiliation determined solely by baptism.

The Council's Decree on Ecumenism clearly states that baptism is a bond of unity linking all who have been reborn by means of it. The primary tenet, therefore, that determines the

⁵ See A.A.S., 57(1965), pp. 985-989.

relationship of the Catholic Church to non-members is baptism. The present reality of one baptism and numerous Churches, or one Church and many separated ecclesial communities linked by the act of baptism raises several theological questions. Not least among these is the interlocking reality or mystery of perfect and imperfect *communio* coming from divine law, and the "society" brought into being by ecclesiastical law. Reflections on this matter, while momentous, are outside the scope of this paper. Of relevance, however, is the canonical question regarding the binding force of merely ecclesiastical laws on baptized non-Catholics. In attempting to arrive at an answer, cognizance should be taken of three themes: the nature of the Church, the role of baptism, and the Church's understanding of who are its subjects or members.

The deliberations of the Council Fathers resulted in a reexamination of the Catholic Church's relationship with other groups of baptized Christians. This study and reflection on the nature of the Church enabled the Council to distinguish between the Church of Christ and the Catholic Church. The former "constituted in the world as a society subsists"⁶ in the latter, and while elements of truth and sanctification can be found outside the visible structure of the Catholic Church, they are nonetheless directed towards Catholic unity. This is only a beginning, however, for this baptism is wholly directed towards acquiring incorporation into the system of salvation that Christ established,⁷ that is, the Catholic Church.⁸ Consequently, it seems reasonable to assert that from a Catholic point of view no group calling itself a "Christian Church" can come into being, or continue to be such, without having the *Ecclesia Christi*, subsisting in the Catholic Church, as a reference point for its practices, teachings and model of governance.

⁶ *Lumen gentium*, § 8.

⁷ See *Unitatis redintegratio*, § 22.

⁸ See *Lumen gentium*, §§ 13 and 14.

By corollary, it would appear that the Catholic Church has a responsibility to encourage baptized non-Catholics to foster in their own Churches those elements that truly reflect God's revelation to the Church. Similarly, the Catholic Church has a concurrent obligation to promote the observance of both natural and divine laws in those ecclesiastical communities and to discourage any teaching which is at variance with these norms. While the binding force of natural and divine positive law will be addressed throughout this work, the remaining theme engenders a question: how does merely ecclesiastical law apply to the baptized members of a Western Church not in communion with the See of Rome, as a consequence of the Council and as reflected in c. 11 of the 1983 Code of Canon Law?

2. THE REVISION PROCESS FOR CANON 11 OF THE 1983 CODEX IURIS CANONICI

a. Draft 1

The first study session took place in Rome, after the closing of the Second Vatican Council, between May 24-27, 1966. The consultors preparing the schema of canons on law and custom assembled to discuss whether the existing legislation on these matters in the 1917 Code would receive confirmation and adoption for use in the revised Code.⁹ Other areas of concern were: the binding force of the present laws (*titulus de legibus*), the Church's right to legislate, and the need to justify the Church's power to make laws. The study group rightly concluded that these questions belonged in the realm of doctrine and not to the area of legislation.¹⁰ The group then directed its attention to other contentious questions. It decided not to include a definition of law¹¹ in the

⁹ See Communicationes, 16(1984), pp. 143-144.

¹⁰ See *ibid.*, p. 143, n. 1.

¹¹ See *ibid.*, p. 144, n. 2.

section on ecclesiastical law and to set aside the question of who are the lawgivers in the Church.¹² The group recommended that the latter question be addressed in the proposed *Lex Ecclesiae fundamentalis* (Fundamental Law of the Church) then under consideration by Church authorities. Turning to divine laws, the assembly addressed the question of having the new Code affirm the Church's power to declare laws authentically and to define such laws. If this declaration was to be made, the revision of c. 8¹³ of the 1917 Code proposed for the new Code would stand alone. The consultors expressed their view on the importance of the removal of the second part of c. 8 in a revised canon; this paragraph concerned merely ecclesiastical laws which were presumed to be territorial and not personal. They argued that the pericope on merely ecclesiastical law should not be linked with a canon on divine positive law but could be propitiously placed in some other part of the Code.¹⁴ Their final consideration of this section related to the nature of the obligation of law binding in conscience under pain of sin.¹⁵

The *coetus* next examined the introductory canons of the 1917 Code. Their deliberations on c. 12 were to raise a novel issue. Canon 12¹⁶ referred to those persons bound by merely ecclesiastical laws. Some consultors proposed that changes be made to the canon to establish that merely ecclesiastical laws bind only those baptized in the Catholic Church. In addition, a resolution was advanced that those baptized in the Catholic Church who have grown up outside the Church not be subject to such laws. Coupled with this proposition was the suggestion that this principle be adopted as a general norm in the revised Code. Other consultors maintained that such an

¹² See *ibid.*, p. 144, n. 3.

¹³ The proposal was that the paragraph "Leges divinae, sive naturales sive positivae a Magisterio Ecclesiae proponuntur, declarantur et definiuntur" be added to c. 8. See *ibid.*

¹⁴ See *ibid.*, p. 144, n. 4.

¹⁵ See *ibid.*, p. 144, n. 5.

¹⁶ See *ibid.*, pp. 146-147.

arrangement was inadmissible since [all] ecclesiastical laws are binding on all the baptized. No reason was given for this statement since the basis for the position is found in the Church's traditional teaching on baptism and its effects. While acknowledging that particular laws in "certain [unspecified] places" might take care of this dilemma, general law could not do so. No reason appears in the official report on how or why this problem might find a solution at the local level. The opinion of the study group was that the text of c. 12 should be transferred intact from the 1917 Code to the revised Code.¹⁷

Further issues raised at the meeting concerned the subject of natural and divine positive laws, the reception of law by those capable of receiving it, and the parameters of its binding force. Most of the consultors present felt these questions were not appropriate to the canons under discussion. It was proposed that these areas be addressed under different canons in the projected section on general norms.¹⁸ Although minor changes to other canons in the section *de legibus* were suggested, the text of c. 12 (draft 1) proposed after the first study group meeting remained unchanged from its 1917 precursor. Thus, the former c. 12 of the 1917 Code became the "revised c. 12" in the 1966 *Textus recognitus*:

Merely ecclesiastical laws do not bind those who have not received baptism, nor the baptized who do not have sufficient use of reason, nor those who have the use of reason but are under seven years of age, unless the law expressly rules otherwise.¹⁹

¹⁷ See *ibid.*, p. 146.

¹⁸ See *ibid.*, p. 147.

¹⁹ "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi aliud iure expresse caveatur." See *ibid.*, p. 154.

b. Draft 2

The study group met a second time between November 13-17, 1967. This meeting focused on customs and administrative acts. Before considering these matters, however, the group needed to ratify the revised canonical texts finalized at the first session.²⁰ Some consultors wanted changes made to that document before giving it their approval. Their reflective study on c. 12 caused the issue already mentioned to be raised again. One consultor wanted two changes made to c. 12. Firstly, he proposed that only those persons baptized in the Catholic Church or received into it should be bound by merely ecclesiastical laws. The consultor acknowledged that the Church can legislate for all the baptized. Yet, there are baptized non-Catholics who are not in full communion with the Church. Since they evidently do not fully belong to the Church, the Church should weigh the wisdom of binding such persons to the full rigour of merely ecclesiastical laws. Laws demand observance, and the baptized do not in fact observe some merely ecclesiastical laws prescribed by the Church. Presumably, this was made in reference to Catholics who do not observe some laws or to non-Catholics who do not know of or observe these laws. Secondly, invoking the spirit of the Second Vatican Council, the consultor reminded those present of the obligation incumbent upon them to allow themselves to be led by this spirit as they reordered the law. He held that Vatican II decreed that full communion with the Church was achieved only through eucharistic initiation. Accordingly, those who have formally received the three sacraments of initiation were fully in the communion of the Church and only they, unless expressly exempted, should be bound by merely ecclesiastical laws.²¹ The adjunct secretary, Monsignor W. Onclin, immediately responded to the proposition. He posited the view that the doctrine of the Second Vatican Council's teaching of incorporation into the Church by baptism was undeniably clear. This doctrine was repeated in the

²⁰ See *ibid.*, 17(1985), p. 29.

²¹ See *ibid.*, p. 31.

Constitution *Lumen gentium*²² and affirmed in other conciliar documents.²³ For this reason it was not possible to admit that some of the baptized were not bound by merely ecclesiastical laws until their sacramental initiation into the Church was complete.²⁴

Following the discussions the secretary posed the question to the study group members in preparation for their votes: "Do ecclesiastical laws oblige and bind all the baptized, unless expressly exempted, or do they bind only those baptized in or received into the Catholic Church?"²⁵ Before taking the vote, however, he underscored the fact that the one and only Church of Christ is constituted by and includes all the baptized. He presented not only the canonical difficulties that would emerge if a change in the traditional juridical teaching were made by legislating that those not in full communion with the Church are no longer held to the observance of merely ecclesiastical laws, but also the theological challenge created to the notion of full communion. The secretary also dismissed the consultor's concern about ecumenical relations as being misplaced should c. 12 remain unaltered since the separated brethren do not accept the [Catholic] Church's position. He added that should the Church declare that baptized non-Catholics are not bound to observe ecclesiastical laws, unless specifically mentioned, some instances when they are bound would need to be stated in the canons. In his view this form of inclusion might seem to be going against the ecumenical spirit in a more obvious way.

²² *Lumen gentium*, § 14.

²³ See *Unitatis redintegratio*, § 22.

²⁴ At this point another consultor inquired whether an ordained Anglican who receives the priesthood is bound to the law of celibacy? The secretary replied that such a person would not be bound because he would not be recognized as a priest by the (Catholic) Church. This was an unusual place to find a comment on the validity of Anglican orders. See *Communications*, 17(1985), p. 31.

²⁵ *Ibid.*, p. 32.

The observations of the members of the study group to the question posed for the vote raised more questions. Some consultors wanted the canon to remain unaltered and transposed from the 1917 Code. One advanced the proposition that the canon read in the negative, namely, merely ecclesiastical laws do not bind those who have not received baptism. In this way the force of the [former] canon would remain unaltered. In his response to the proposal, another consultor argued that the notion was unrealistic since it was contrary to the new proposal that baptized non-Catholics not be bound by merely ecclesiastical laws. To accept this negative wording would support an element subordinate to the Church's affirmation of the unity of all the baptized who made up the Church of Christ. In other words, non-baptism would become the canonical criterion for determining the passive subject of merely ecclesiastical legislation, and the binding nature of such laws on those baptized in the Catholic Church would not be stated in a positive manner.

Four consultors then presented a joint theological consideration which declared that the one Church of Christ exists in which are incorporated all the baptized. Presumably, these consultors were questioning the desirability of introducing a canon that would appear to legislate for the non-baptized over whom the Church has no jurisdiction, other than a natural law interest. Although not all the baptized are in full communion with the Church of Christ, they said, if the proposed canon were adopted this unity would be jeopardized. They wondered if the negatively worded canon would be more acceptable -- an ecumenical consideration -- rather than take the projected risk involved in making a canonical distinction between those bound to merely ecclesiastical laws, namely, Catholics and the baptized members of other ecclesial communities who would not be constrained by these laws. In other words, would the idea find acceptance by the *coetus* that baptized non-Catholics would no longer be passively bound by merely ecclesiastical laws?²⁶

²⁶ See *ibid.*, p. 32, n. 1.

Other consultors encouraged the study group to adopt the idea that baptized non-Catholics not be obliged to observe merely ecclesiastical laws. One consultor suggested a realistic approach. He affirmed the reality that ecclesiastical laws do not bind those not in full communion with the Church. Even if such laws were known by baptized non-Catholics they would not obey them. (He added by way of example, that West Germany cannot make laws for East Germany.) Three consultors agreed. Continuing with his interjection, the speaker appealed to an ecumenical reason by alleging that c. 12, as stated in the 1917 version, was contrary to the ecumenical spirit. Those not in full communion with the Church would not understand the principle behind the unrevised canon. Furthermore, those non-Catholics who were in ecumenical dialogue would not approve of the canon as it was written.²⁷ Following this statement, one consultor wondered if the revised canon could anticipate this problem by including a statement decreeing when laws would definitely bind the baptized.²⁸ It can only be assumed that he had the baptized non-Catholic and merely ecclesiastical laws in mind when making this assertion.

The vote was taken. Four consultors approved the proposition that the text of the canon remain as it appeared in the 1917 Code and in the schema from the first session. Four others voted for the suggestion that a new text be introduced to the effect that ecclesiastical laws would bind only baptized Catholics unless an exception was written into the statute. One consultor abstained. Faced with a tied vote, and aware that the cardinal president of the study group did not wish for the canon to remain in its original form, the secretary declared that he would submit the question to the coordinating *coetus* of the Code commission for the judgement of others.²⁹ Consequently, for the time being, the text of c. 12 remained unaltered from that of the 1917 Code and of the prior schema

²⁷ See *ibid.*, p. 32, n. 2.

²⁸ See *ibid.*, p. 33.

²⁹ See *ibid.*

of May 1966. That is how the canon appeared (draft 2) in the final text emanating from the study group of the second session.

When the text of the unchanged c. 12 was printed, a suggestion for a revised canon was appended. No doubt this was the work of the coordinating *coetus* redactor. The proposed text (draft 2, alternate) read:³⁰

Merely ecclesiastical laws bind only the baptized for whom they are made, and indeed only the baptized with sufficient use of reason and, unless the law provides otherwise, who have completed seven years of age.

Three reasons were given for this proposition. Firstly, some consultants wanted the text to read in a positive fashion. Secondly, using the words "only the baptized for whom they are made" predicated that definite laws could be made known and that the use of such laws would bind only those who have been baptized in or received into the Catholic Church. Thirdly, the words "until they have completed their seventh year" anticipated cases where laws would bind and would not be fulfilled before this age was reached, as well as cases in which the law would not bind. For example, in applying this concept to the law of fast and abstinence the proposed text foresaw both possibilities; hence the canon states a general rule: the baptized who have the use of reason and are over seven years of age are bound by merely ecclesiastical laws, unless specifically exempted.

c. Draft 3

Session Three took place February 19-23, 1968.³¹ Before attending to the main business of the meeting, the nature of privileges, the secretary sought approval from the study group for the

³⁰ "Alius textus propositus, forma positiva redactus: Legibus mere ecclesiasticis tenentur soli baptizati pro quibus latae sunt, et quidem soli baptizati qui sufficienti rationis usu gaudet et, nisi aliud iure expresse caveatur, qui septimum aetatis annum expleverunt." See *ibid.*, 17(1985), p. 39.

³¹ See *ibid.*, 19(1987), pp. 19-67.

adoption of the newly revised c. 12 (draft 2, alternate), as well as for other norms in the schema on laws and customs. An opportunity also arose to introduce changes to other texts in the general norms section previously approved during the last session. Two consultors again inquired whether ecclesiastical laws should oblige all the baptized, or only those baptized in the Catholic Church or received into it. They also asked for the rationale behind the Church's position.³² The secretary to the study group began by reminding them that the matter had been freely discussed and explained at the previous session and that their deliberations culminated in a proposal to formulate the canon in a positive way. Accordingly, the suggestion was accepted that merely ecclesiastical laws bind only the baptized for whom they are made and, only the baptized who have sufficient use of reason. By saying "only the baptized" for whom the laws are made, the foundation for the removal of certain laws from the 1917 Code during the revision process would be laid. Then the laws could be seen (or understood) fully to bind only those baptized in the Catholic Church or received therein without specifying in the text of the canon that merely ecclesiastical laws apply only to Catholics and not to those baptized outside of the Catholic Church.³³

A consultor, desirous of avoiding repetitions in the redactor's proposed text as well as keeping the wording in a positive framework, agreed that changes would have to be made to its present form. He suggested the words "and indeed only the baptized" be removed, allowing the text to read: "Merely ecclesiastical laws bind only the baptized for whom they are made, who have sufficient use of reason ... etc."³⁴ The Secretary put the proposal to the *coetus* asking if this new form was acceptable to them. All the consultors responded: "*placet*," it seems good.³⁵ Thus c. 12

³² See *ibid.*, p. 20.

³³ See *ibid.*, p. 21.

³⁴ See *ibid.*

³⁵ *Ibid.*

appeared in the 1968 *Textus definitivus canonum de legibus et de consuetudine* (draft 3) as follows:

Merely ecclesiastical laws bind only the baptized for whom they are made, who have sufficient use of reason, and unless the law provides otherwise, have completed seven years of age.³⁶

d. Draft 4

The subcommission handling ecclesiastical law and custom held three other meetings.³⁷ The fourth session agenda included c. 12 in a list of norms already approved, namely those of cc. 8-23.³⁸ No further mention was made of c. 12 by the members of this group during the fifth and sixth meetings. The third plenary meeting of Commission Fathers held April 20, 1968, endorsed the outline to the framework of the new Code without seeming to approve any of its specific canons.³⁹

The study group then produced a synopsis of its work.⁴⁰ In referring to c. 12 the report mentioned the positive tone and framework of the revised canon. It went on to reiterate the traditional teaching that validly baptized persons constitute the Church of Christ and are subject to its laws; this teaching implicitly includes canonical obligations⁴¹ for all the baptized.⁴² The report

³⁶ "Legibus mere ecclesiasticis tenentur soli baptizati pro quibus latae sunt, quique sufficienti rationis usu gaudent, et nisi aliud iure expresse caveatur, qui septimum aetatis annum expleverunt." See *ibid.*, p. 56.

³⁷ Session 4, January 28-31, 1969; Session 5, September 29-October 4, 1969, and Session 6, January 25-30, 1971. See J. FOX, "A General Synthesis of the Work of the Pontifical Commission for the Revision of the Code of Canon Law", in *The Jurist*, 48(1988), pp. 805-806. According to *Communicationes*, 1(1969), p. 47, session 4 took place between January 28 and February 1, 1969.

³⁸ See *Communicationes*, 19(1987), p. 92.

³⁹ See *ibid.*, 1(1969), p. 44.

⁴⁰ See *ibid.*, 3(1971), pp. 81-94.

⁴¹ See *ibid.*, p. 85.

was undated. However, since the text of the canon was not altered after the third session (February, 1968), and since the sixth (and last) session was held in January, 1971, it may be assumed that the synthesis of the group's work was not produced until after the latter date when the work on general norms was completed. The reflection was published in June, 1971.⁴³ Between May 13-17, 1974 and January 12-14, 1976⁴⁴ the study group on general norms joined the group working on physical and juridic persons in its thirteenth and fourteenth sessions. The fourth plenary session of the Commission Fathers was held May 24-27, 1977.⁴⁵

An addition was made to c. 12 some time between January, 1971 and November, 1977. For, on November 15, 1977 the Pontifical Commission for the Revision of the Code of Canon Law sent a letter and five schemata to the bishops of the Church for consideration and comment. The *praenotanda* to Book One⁴⁶ under Title One, Sources of Law,⁴⁷ stated that the canons in Title One of Book One, *De legibus*, newly proposed by the Code commission, would remain substantially the same as in the prior Code.⁴⁸ No specific reference was made to c. 12 in these notes. The

⁴² In February, 1971 the text of the proposed *Lex Ecclesiae fundamentalis* was sent to the world's bishops for comments. At the sixth session of the *coetus* commissioned to oversee this work (held November 20-24, 1972), a reflection -- arising out of the replies received from various conferences of bishops -- was held on the question whether non-Catholic Christians were bound, or not, by canonical laws. No distinction was made in the group's report between the different bases for canonical laws. The matter did not seem to be urgent and could be remitted to the future Codes of the Latin and Oriental Churches. See *ibid.*, 4(1972), pp. 148-149.

⁴³ See *ibid.*, 3(1971), pp. 81-85.

⁴⁴ See J. FOX, *loc. cit.*, p. 808.

⁴⁵ See *Communicationes*, 9(1977), pp. 62-82.

⁴⁶ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema canonum libri I de normis generalibus*, Romae, Typis polyglottis Vaticanis, 1977, 57p. (hereafter cited as *1977 Schema*).

⁴⁷ *Communicationes*, 9(1977), p. 232.

⁴⁸ See *ibid.*

commission was concerned with difficulties associated with universal and personal laws and the relationship between general and particular laws. However, something radical and new had found its way into the proposed c. 12 printed in the 1977 schema. The canon was expanded from the 1968 *textus definitivus* to include a second paragraph (draft 4).⁴⁹ In translation⁵⁰ it reads:

§ 1. Merely ecclesiastical laws bind only the baptized for whom they were made, and who have sufficient use of reason and, unless otherwise expressly provided by law, who have finished the seventh year of age.

§ 2. Baptized persons who are members of Churches or communities separated from the Catholic Church, are not considered to be directly obliged by merely ecclesiastical ordinances, unless an exception is provided in law.

At this juncture two questions presented themselves, namely, when and why was § 2 added to the canon. To find the answers to these questions this writer consulted Monsignor J. Herranz, secretary to the Pontifical Council for the Interpretation of Legal Texts. He replied:⁵¹

[regarding] the addition of § 2 to can. 12 of the 1977 *Schema Canonum Libri I De Normis Generalibus*. It was the practice of the Commission for the Revision of the Code to send each schema to the Secretariat of State for its observations prior to printing and distributing the document for consultation. [...]. So, § 2 was added after receiving the response of the Secretariat of State to the draft of the 1977 schema.

The animadversions on the schema received by the Code commission from the bishops and those consulted were taken seriously. The Canon Law Society of Great Britain and Ireland on behalf

⁴⁹ "§ 1. Legibus mere ecclesiasticis tenentur soli baptizati pro quibus latae sunt, quique sufficienti rationis usu gaudent, et, nisi aliud iure expresse caveatur, qui septimum aetatis annum expleverunt. § 2. Baptizati qui Ecclesiis aut communitatibus ab Ecclesia catholica seiunctis adscripti sunt, ordinationibus mere ecclesiasticis directe obligari non intelliguntur, nisi exceptio statuatur." See 1977 Schema, p. 14.

⁵⁰ The English text for the schema of Book One of the 1977 Codex recognitus was distributed for purposes of study and consultation by the National Conference of Catholic Bishops of the U.S.A. See Codex recognitus (schema) liber I: Normae generales. Draft of the Canons of Book One: General Norms, translated under the auspices of the Canon Law Society of America by Dennis Burns, Rome, Vatican Polyglot Press, 1977, p. 4.

⁵¹ PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, Private Response, June 5, 1990, Prot. No. 2419/90.

of the bishops of England and Wales made a comment on the proposed canon in its report on the schema: "It is not clear why the word *ordinationibus* is employed (in § 2) as opposed to *legibus* in § 1."⁵² In the same manner the Canadian Conference of Catholic Bishops questioned the use of "ordinances" and made the comment: "We do not think they are law, and therefore we ask how they can bind those who are not in communion with the Church."⁵³ These opinions, and perhaps others making the same point, were seemingly accepted by the Code commission and were taken into account as it worked on a new revision of Book One.

e. Draft 5

A revised schema for the new Code appeared in 1980.⁵⁴ This document saw the proposed c. 12 renumbered as c. 11 and somewhat developed in presentation (draft 5). Previously, paragraph one had not qualified the working party's 1968 intention (draft 3) that merely ecclesiastical laws should bind only the baptized "for whom they were made", namely, Catholics. However, the canon's second paragraph, suggested by the Secretariat of State in response to the 1977 schema, had clarified the matter. In the 1980 schema, the new form of the proposed canon in paragraphs one and two specified that, generally, Catholics -- not the baptized -- were the subjects of merely ecclesiastical laws. Also, a third paragraph had been added to the proposed canon. This addition

⁵² Report on the Schema canonum libri I de normis generalibus, London, The Canon Law Society of Great Britain and Ireland, 1978, p. 5.

⁵³ Response of the Canadian Conference of Catholic Bishops to the Pontifical Commission for the Revision of the Code of Canon Law on the "Schema canonum libri I de normis generalibus", in Report of Task Force Committee on the Draft of the Canons of Book One: General Norms, Washington, D.C., Canon Law Society of America, 1978, p. 5.

⁵⁴ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Schema codicis iuris canonici iuxta animadversiones S.R.E. cardinalium, episcoporum conferentiarum, dicasteriorum curiae Romanae, universitatum facultatumque ecclesiasticarum necnon superiorum institutorum vitae consecratae recognitum, Romae, Libreria editrice Vaticana, 1980, xxiii-382p. (hereafter cited as 1980 Schema).

was no doubt strongly recommended by some conference(s) of bishops, canonists or other experts. Monsignor Herranz was also asked about the addition of the third paragraph to this canon. He responded:

This paragraph was added during the first session of the so-called "Series Altera" of the *coetus studiorum* in response to a proposal of one of *organa consultationis* which submitted comments during the period of consultation for the 1977 schemata. The report for that session of 7-11 May, 1979 will be published in Communicationes within the next year or so according to our publication schedule.⁵⁵

In translation the proposed canon read:

§ 1. Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy the sufficient use of reason, and, unless the law expressly provides otherwise, who have completed seven years of age.

§ 2. The baptized who are members of Churches or ecclesiastical communities separated from the Catholic Church, are not directly obliged by those laws.

§ 3. Without prejudice to the provision of § 2, the same laws apply to those who defect from the Catholic Church, unless the law expressly provides otherwise.⁵⁶

f. Draft 6

Some of the discussions and observations which took place among the Code commission members and consultors on the 1980 schema were reported in the *Relatio* published *stricte reservata* in 1981.⁵⁷ In the ensuing discussion on the proposed c. 11, Cardinal L. Suenens

⁵⁵ See footnote 51.

⁵⁶ "§ 1. Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent, et, nisi aliud iure caveatur, qui septimum aetatis annum expleverunt. § 2. Baptizati qui Ecclesiis aut communitatibus ecclesialibus ab Ecclesia catholica seiunctis adscripti sunt, iisdem legibus directe non obligantur. § 3. Firmo praescripto § 2, eaedem leges iis applicantur qui ab Ecclesia catholica defecerint, nisi aliud iure expresse caveatur." See 1980 Schema, p. 5.

⁵⁷ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Relatio complectens synthesim animadversionum ab Em. mis atque Exc. mis Patribus Commissionis ad novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis,

questioned its form and basis. He recognized that § 3 expressed a universal norm, namely, that ecclesiastical laws continue to bind those who defect from the Catholic Church unless another provision is made by the Church as it already did so for the form of marriage. However, the cardinal wondered whether this proposed statute was in line with the spirit of the Gospel and therefore legitimate. He asked that it be put aside and consequently not apply indiscriminately to those who seem to have left the Catholic Church, pointing out that the more intelligent person might use such a norm to personal advantage. He suggested that persons contemplating abandoning the Catholic Church be required to make a voluntary and formal act to this effect. Thus the confusion that might be created in trying to ascertain a person's status in the Church could be alleviated by the requirement of a compulsory and formal act of defection. Furthermore, the cardinal recommended that the proposal contained in § 3 should be rejected because it did not agree with the testimony of faith and of conscience mentioned in the proposed c. 707 § 2.⁵⁸ He submitted that § 3 be suppressed and § 1 be redrafted to read: "Merely ecclesiastical laws bind those baptized in the Catholic Church or who are received into it, unless by a formal (and public) act they defect from the same [...]."⁵⁹ Archbishop J. Bernardin expressed his support for the suggestion that the words "by a formal act" be added to the canon since it was not enough just to use the words "those who defect" [from the Church].⁶⁰ He went on to say that it was desirable to have uniformity in the canons. He averted to suggested cc. 191,⁶¹ 692,⁶² 1072⁶³ and 1078⁶⁴ of the 1980 schema in

Città del Vaticano, Typis polyglottis Vaticanis, 1981, 358p. (hereafter cited as Relatio).

⁵⁸ § 2 of this canon reads: "Ad amplectendam fidem catholicam a nemine unquam homines contra propriam conscientiam coactione adduci possunt." See 1980 Schema, p. 170. It became c. 748 § 2 in the 1983 Code as: "Homines ad amplectendam fidem catholicam contra ipsorum conscientiam per coactionem adducere nemini unquam fas est."

⁵⁹ See Relatio, p. 23.

⁶⁰ See ibid.

⁶¹ "§ 1 Ipso iure ab officio ecclesiastico amovetur: 1) qui statum clericalem amiserit; 2) qui a fide catholica aut a communione Ecclesiae publice defecerit; 3) clericus qui matrimonium etiam civile tantum attentaverit. § 2. Amotio de qua in nn. 2 et 3 urgeri tantum valet si de eadem auctoritatis

support of his proposal.

The relator, Monsignor W. Onclin, was unable to admit the validity of the notion that Catholics who defect from the Church were not bound by merely ecclesiastical laws.⁶⁵ He reasoned that the proposal allowing Catholics to defect formally from the visible Church was based on an unacceptable ecclesiastical concept proffered by Joseph Klein under the title of *Kirche der Freieigenschaft*⁶⁶ which seemingly allowed a person to exercise a capacity to belong to or depart freely from the Church. The Code commission did not intend to affirm a "right" on the part of Roman

competentis declaratione constet." See 1980 Schema, p. 41. With the substitution of *potest* for *valet* in § 2, this became c. 194 in the revised Code.

⁶² "§ 1. Qui fidem catholicam notorie abiecerit vel publice a communione ecclesiastica defecerit vel excommunicatione irrogata aut declarata irretitus sit, valide in consociationibus publicis recipi non potest. § 2. Qui legitime adscripti in casum inciderint de quo in § 1, praemissa monitione, a consociatione dimittantur, servatis propriis statutis et salvo iure recursus ad auctoritatem ecclesiasticam de qua in c. 686, § 1." See *ibid.*, p. 166. After minor modifications this became c. 316 in the Code.

⁶³ "Statuta superius forma servanda est, si saltem alterutra pars matrimonium contrahentium in Ecclesia catholica baptizata vel in eandem recepta est nec actu formali ab ea defecerit, salvis praescriptis c. 1081, § 2." See *ibid.*, p. 243. After a stylistic change (*sit neque* for *est nec*) this became c. 1117.

⁶⁴ "Matrimonium inter duas personas baptizatas, quarum altera sit in Ecclesia catholica baptizata vel in eandem post baptismum recepta, quaeque nec ab ea actu formali defecerit, altera vero Ecclesiae vel communitati ecclesiali plenam communionem cum Ecclesia catholica non habenti adscripta, cum periculum sit ne plenae spirituali coniugum communioni obstet, sine praevia auctoritatis competentis dispensatione prohibitum est." See *ibid.*, p. 245. The final text is found as c. 1124 and reads: "Matrimonium [...] adscripta, sine expressa auctoritatis competentis licentia prohibitum est."

⁶⁵ See Relatio, p. 23.

⁶⁶ In 1947 Joseph Klein published his Grundlegung und Grenzen des kanonischen Rechts, *Recht und Staat in Geschichte und Gegenwart* no. 30, Tübingen, Verlag von J.C.B. Mohr (Paul Siebeck), 1947, 32p. This work, the text of his inaugural lecture given at the University of Bonn on May 17, 1946, posits that ecclesial law lacks the essential element of coercion (*zwang*) found in secular law. Accordingly, the Church is unable to pressure individuals to observe its laws unless persons freely accept those laws. Consequently, punishment in the Church is only effective if members submit themselves to it. The Church is really a Church of free following. His book was placed on the Index of Proscribed Books in 1950. See A.A.S., 42(1950), p. 739.

Catholics' to leave the Church. To accept such a proposition based on an inadmissible theological premise, Onclin asserted, would lead to an absurd conclusion, namely, that the force of ecclesiastical laws would be taken away. If a formal act is required of those who leave the Church, the law does not then oblige; the obligation of law for the private person is then suspended and the delict of apostasy would no longer be punishable. The relator pointed out that the proposed c. 707, § 2, was not applicable. Rather, it makes the point that persons are not to be forced to embrace the Catholic faith when it is against their conscience. Therefore, that canon considers whether the first embrace of faith, professed in such a situation, truly incorporates one into the Church. Continuing the discussion on this canon, the relator emphasized that all persons are bound to the truth whereas they are not (directly) bound to the Church.⁶⁷ While the Catholic Church believes that the truth in its fullest expression is to be found within itself, it does not oblige people to accept Catholicism, but rather to accept the truth. In finding the full expression of truth they will find the Catholic Church.

Archbishop J. Henríquez Jimenéz offered further comments.⁶⁸ He pointed out that until the condition of apostates and schismatics in relation to [merely] ecclesiastical law was defined, the proposed canon would labour under another ambiguity. Are they [Catholics] not subject to [all] ecclesiastical laws even though they have defected from the Catholic Church or only when they have inscribed themselves in some other Church or ecclesial communion? In summing up the discussion, the relator agreed that Archbishop Henríquez Jimenéz had a valid point. To avoid all ambiguity in the formulation of the proposed c. 11, the study group decided that § 2 should be modified to read: "Those baptized outside the Catholic Church, and who have not been received into it, are not directly obliged by its laws."⁶⁹ The members also agreed to suppress the proposed

⁶⁷ See Communicationes, 15(1983), p. 90.

⁶⁸ See *ibid.*

⁶⁹ "§ 2. Baptizati extra Ecclesiam catholicam, qui in eandem recepti non sunt, iisdem legibus directe non obligantur." See Relatio, p. 23.

section 3 of the canon. No changes were made to § 1. The commission did not publish the revised text in a public document. This canon, along with the text of the revised Code, received the approval of the Commission Fathers at the conclusion of the Fifth Plenary Meeting which was held October 20-28, 1981.⁷⁰

g. The promulgated text

Between the end of October, 1981 and April, 1982 the commission prepared the final schema of the revised Code of Canon Law.⁷¹ Canon 11, as approved at the Fifth Plenary Meeting and contained in the final schema, read:

§ 1. Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy the sufficient use of reason, and, unless the law expressly provides otherwise, have completed seven years of age.

§ 2. Those baptized outside the Catholic Church, or who have not been received into it, are not directly obliged by its laws.⁷²

The final schema was presented to John Paul II on April 22, 1982. A detailed revision of the Code was then undertaken by the pope with the assistance of a small group of selected experts. The Code was promulgated on January 25, 1983.

In the final authorized text c. 11 in translation read:

⁷⁰ See Communicationes, 13(1981), p. 267.

⁷¹ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Codex iuris canonici: Schema novissimum post consultationem S.R.E. cardinalium, episcoporum conferentiarum, dicasteriorum curiae Romanae, universitatum facultatumque ecclesiasticarum necnon superiorum institutorum vitae consecratae recognitum, iuxta placita patrum commissionis deinde emendatum atque Summo Pontifici praesentatum, E Civitate Vaticana, Typis polyglottis Vaticanis, 1982, xviii-308p.

⁷² "§ 1. Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent et, nisi aliud iure expresse caveatur, septimum aetatis annum expleverunt. § 2. "Baptizati extra Ecclesiam catholicam, qui in eandem recepti non sunt, iisdem legibus directe non obligantur." See *ibid.*, p. 2.

Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy the sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age.⁷³

Paragraph 2 of the canon was deleted at some time during the final editing by the papal *coetus*. It seems reasonable to assert that since § 1 legislated that in the future only Catholics would be bound by merely ecclesiastical laws, it already included the norm stated in § 2 that baptized non-Catholics would not be bound by these laws. Consequently, nothing was lost canonically by the deletion of the paragraph. Two other reasons suggest the wisdom of its deletion from the final text: the canon retains its positive mode which was so important to the drafters of the canon, and prevents legislating for those persons whom the Church would not bind by merely ecclesiastical laws. If the second part of the canon had been retained, a merely ecclesiastical law would have continued to bind baptized non-Catholics.

3. THE APPLICATION OF CANON 11 TO BAPTIZED NON-CATHOLICS

a. Those not subject to merely ecclesiastical laws

The 1917 Codex iuris canonici used terms which make it unquestionably clear that the law was addressed to all the baptized and therefore binding in all cases. Canon 13 § 1 ruled that general laws obliged all for whom they were made, everywhere.⁷⁴ Using a reference from the Decretals⁷⁵ as a source, A. Cicognani commented:

⁷³ "Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent et, nisi aliud iure expresse caveatur, septimum aetatis annum expleverunt." Latin and English texts taken from Code of Canon Law: Latin-English Edition, translation prepared under the auspices of the Canon Law Society of America, Washington, D.C., Canon Law Society of America, 1983, pp. 4-5.

⁷⁴ See C.I.C., c. 13 § 1.

⁷⁵ X, V, 33, 22.

General terms are to be understood in a general sense, that is, without exception unless exception is provided for in another law. [...] the legislator, though able to do so, established no exception. [...] An unrestricted expression is equivalent to one that is universal.⁷⁶

Merely ecclesiastical laws applied to all the baptized, unless they were exempted *de iure*.⁷⁷ This was the canonical position outlined at Trent and reiterated in c. 12 of the former Code. However, in the wake of the Second Vatican Council, new ideas on the matter began to surface. The significance of baptism *extra Ecclesiam* allowed some commentators to question the identification of membership in the Church with juridical personality.⁷⁸

On June 1, 1966, Paul VI, in a general audience, spoke on membership in the Church, more specifically on who belongs to the Church. He reminded his listeners: "It is enough to note that a person belonging to the Church is called one of the faithful that is one who adheres, who coheres, who is permanent."⁷⁹ Pointing to the fact that the whole of Christian tradition has always recognized baptism as the gateway to membership into the Church, and again more recently in conciliar pronouncements,⁸⁰ the pope proceeded to ask: "Are all those who are baptized, even if they are separated from Catholic unity, in the Church? In the true Church? In the one Church?" The pope answered in the affirmative. He continued: "This is one of the great truths of Catholic tradition; and the Council [Vatican II] has repeatedly confirmed it. [...] It is connected also with the great

⁷⁶ A. CICOGNANI, *op. cit.*, p. 573.

⁷⁷ See E. REGATILLO, *Institutiones iuris canonici*, vol.I, Santander, Sal Terrae, 1941, pp. 50-52. See also U. BESTE, *Introductio in Codicem*, Ed. 5a., Neapoli, D'Auria, 1961, pp. 70-72.

⁷⁸ W. Bertrams, for example, argued towards degrees of communion with the Catholic Church, rather than towards membership (without the exercise of rights for baptized non-Catholics) and non-membership. Quoted in M. HUGHES, *op. cit.* p. 92.

⁷⁹ PAUL VI, "Who Belongs to the Church?", in *The American Ecclesiastical Review*, 155(July-Dec. 1966), pp. 122-123.

⁸⁰ See *Lumen gentium*, §§ 11 and 15; *Unitatis redintegratio*, § 3.

theological debates of the first centuries, concluded especially with the authority of St. Augustine [in his exchange with the Donatists]."⁸¹ The pontiff cited the well known document *Mystici corporis* of Pius XII: "With the washing of the purifying water, those who are born into this mortal life, are reborn from the death of (original) sin and are made members of the Church."⁸² Basing his words on *Lumen gentium*, § 15, he continued:

This doctrine is the basis of our ecumenism, which also makes us consider the Christians who are separated from us as brothers, so much the more so if, with Baptism and with faith in Christ and in the mystery of the Blessed Trinity, they conserve so many other treasures of the common Christian patrimony.⁸³

During the revision period, some authors suggested that those baptized outside the Catholic Church even though they were members of the Church of Christ, were not in fact bound to the observance of the laws of the Catholic Church. For instance L. Örsy produced some insightful notions on the subject of separated Christians. He contended that since the baptized non-Catholic was unaware of the Catholic Church's claim to enjoy universal jurisdiction over the baptized, and since the intention of the legislator was not known to the subject, in reality there was no [merely] ecclesiastical law binding upon these individuals.⁸⁴

A. De Jorio presented an interesting argument to demonstrate why merely ecclesiastical laws did not bind Anglicans.⁸⁵ Quoting the phrase *pro quibus latae sunt* of c. 13 of the 1917 Code and c. 1 which restricted the Code to the Latin Church, he asked in what sense could Anglicans be

⁸¹ See Chapter One, footnote 47.

⁸² PAUL VI, *loc. cit.*, p. 123, quoting *Mystici corporis*, n. 18.

⁸³ *Ibid.*

⁸⁴ See L. ÖRSY, "The Canons on Ecclesiastical Laws Revisited: Glossae on Canons 8-24", in *The Jurist*, 37(1977), pp. 112-159.

⁸⁵ See A. DE JORIO, "Acatolici baptizati tenentur legibus ecclesiasticis?", in *Ephemerides iuris canonici*, 32(1976), pp. 28-31.

said to belong to the Latin Church or to the Latin Rite? According to De Jorio's view, the opinion of canonists⁸⁶ who taught that these persons were bound by such laws was without foundation. To answer him, it could be noted that the history of the English Reformation leaves no doubt concerning the origin of the Church of England. The Book of Common Prayer is based on the Sarum (Salisbury) Missal which served as the proper Missal of the English Catholic Church (along with the rites of York and Bangor) for many centuries until the use of the Sarum rite fell into disuse (during the Reformation period) among English Catholics faithful to the Holy See. Following the Council of Trent and the introduction of the reformed Roman Missal in 1570, the Sarum rite was no longer in official use by English Catholics. Following his break with the See of Rome, King Henry VIII made the Sarum rite compulsory throughout his realm. Consequently, it would be difficult to find anything in the historical -- and in the present day -- Church of England that does not testify to its Latin rite origins and its members' understanding of their place in the evolution of ecclesiastical structures in this ecumenical age.⁸⁷

Then, in 1977, a small group of parishes of the American Episcopal Church formed the Pro-Diocese of Saint Augustine of Canterbury. These members of the Anglican Communion made an

⁸⁶ See T. RICHARDSON and E. MAHONEY, "The Canonical Position of Non-Catholic Christians", in The Clergy Review, 37(1952), pp. 449-462.

⁸⁷ *Unitatis redintegratio*, § 13 states: "Still other divisions arose in the West [...], many communions [...] were separated from the Roman See. Among those in which some Catholic traditions and institutions continue to exist, the Anglican Communion occupies a special place." In 1970 Paul VI called the Church of England [the Roman Catholic Church's] "ever beloved sister". See J. WITMER and J. WRIGHT (eds.), Called to Full Unity: Documents on Anglican-Roman Catholic Relations 1966-1983, Washington, D.C., U.S. Catholic Conference, Office of Publishing and Promotion Services, 1986, p. 54. In recent years ecumenical sights have been heightened in various ways. At a colloquium an Anglican canon from Chichester, England asked whether the debate on the distinction between *ius divinum* and *ius ecclesiasticum* had undeniable ecumenical overtones. An entire section of the Anglican and Roman Catholic International Commission's second text on authority in the Church is devoted to this question. It could be asked, for example, if there is a link between this distinction and that made by the Reformers in the sixteenth century between fundamental doctrines and adiaphora. See R. GREENACRE, "*Causa nostra agitur?* An Anglican Response", in The Jurist, 48(1988), p. 395.

approach to the Holy See seeking admission into the Roman Catholic Church while retaining some type of spiritual and liturgical common identity.⁸⁸ In 1980 the Congregation for the Doctrine of the Faith replied in the affirmative and a pastoral provision⁸⁹ was approved for the former Episcopalians. Although, some commentators believe Protestants do not have any semblance of a rite,⁹⁰ former members of that Church,⁹¹ now members of the Catholic Church, have a designation which testifies to the Holy See's understanding of their appropriate rite. Anglican use Catholic parishes celebrate a slightly modified Anglican liturgy (based on the Sarum rite) in many of its services. As Latin rite Catholics, the members of the common identity parishes are bound by the canonical legislation of the Latin rite, merely ecclesiastical laws included, unless exempt.

A new terminology for baptized non-Catholics has appeared in the 1983 Code of Canon Law as a consequence of the ecclesiology of Vatican II. A. Taché wrote:⁹²

"Heretics and Schismatics" become those who are not in full communion with the catholic Church, or "brethren"; "heretical and schismatic sects" become

⁸⁸ See B. LAW, "The Episcopal Priests who seek Roman Catholic Priesthood", in Origins, 11(1981-1982), pp. 516-518.

⁸⁹ See C.L.D., 10(1982-1983), pp. 19-21. See also F. CHALUPA, Erection of the Personal Parish of St. Margaret of Scotland for Anglican Use, M.C.L. diss., Ottawa, Saint Paul University, Faculty of Canon Law, 1986, p. 10.

⁹⁰ See W. WOLFE, "The Eastern Code: A View from the West", in Proceedings of the Fiftieth Annual Convention, Washington, D.C., Canon Law Society of America, 1989, p. 173. See also J. FARIS, "Observations on the 1986 Schema Codicis iuris canonici Orientalis", in Proceedings of the Forty-Ninth Annual Convention, Washington, D.C., Canon Law Society of America, 1987, p. 344.

⁹¹ According to the conciliar document *Orientalium ecclesiarum*, § 3, the factors central to the notion of rite are: liturgy, ecclesiastical discipline and spiritual heritage. See also A. MENDONÇA, Interecclesial Legislation, Ottawa, Saint Paul University, Faculty of Canon Law, 1989, pp. 9-10 (class notes). The Holy See has approved a slightly modified Book of Divine Worship taken from the Book of Common Prayer for use by members of the Anglican use Catholic parishes. See F. CHALUPA, op. cit., p. 1, (appendix J).

⁹² A. TACHÉ, "The Code of Canon Law of 1983 and Ecumenical Relations", in The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, orgaized by Saint Paul University and held at the University of Ottawa, August 19-25, 1984, Michel Thériault and Jean Thorn, editors, Ottawa, Saint Paul University, Faculty of Canon Law, 1986, pp. 405-406.

"Churches and ecclesial communities." [...] a distinction is made between Christians who are baptized and educated outside the Catholic Church, and those Catholics who publicly consent to abjure the faith; only the latter are to be called apostates, heretics or schismatics.

He acknowledged that the difficulties raised by the former c. 12 -- as applied to baptized non-Catholics -- were avoided by agreeing that good faith excused these persons from the obligations of law. Taché rightly admitted that the new cc. 11 and 96 did bind Catholics. From this he concluded:

We find here the application of the principle that a Christian is directly subject only to those ecclesiastical laws of the Church or ecclesiastical community in which he or she is baptized and into which he or she is incorporated. [...] Thus the declaration of Canon 11 is an implicit acknowledgement of the legal system of other Churches and Christian communities.⁹³

It is difficult to concur with Taché's opinion for two reasons. Firstly, c. 96 restates the traditional doctrine that a person is baptized into the *Ecclesia Christi*. Canon 11 refers only to merely ecclesiastical laws that no longer bind those members of the Church of Christ who do not enjoy communion with the pope and the bishops. If the Roman Catholic Church could make the assertions mentioned in the quotation, then it would appear to support permissive laws that are held and heralded by some occidental non-Catholic communities which are contrary to Catholic teachings. Although some might construe the Catholic Church's silence to denote its consent to and recognition of the legal system and laws of some post-Reformation Western Churches and ecclesial communities, the proposition would cede easily to contrary proof as the praxis of the Roman Curia makes clear. Secondly, Taché did not differentiate between ecclesiastical laws and merely ecclesiastical laws. A member of the *Ecclesia Christi* remains subject to the divine laws, as well as to some aspects of those ecclesiastical laws which are otherwise known as quasi-divine, even when such laws are rejected by a "reformed" Church, Christian society or community.

⁹³ Ibid., p. 406.

The question arises: to which laws, then, are baptized non-Catholics bound? L. Pivonka made the observation that the Catholic Church has shown a willingness to accept some laws of the Orthodox Churches if they affect the validity of an ecclesiastical act.⁹⁴ He asks: "But what about Christians of the Protestant or Western communities of faith? I would suggest that they are bound to follow the truth as it is expressed in their own Church community, in the Bible, and in other sources of truth."⁹⁵ Pivonka based his opinion on c. 748 § 1 of the 1983 Code which states that all persons are bound to embrace and observe that truth which they have recognized.⁹⁶ Truth comes from divine revelation and belongs in a realm distinct from that of merely ecclesiastical law, and they can readily be distinguished from each other. Canon 11 neither acknowledges the obligation nor obliges the baptized of the Western Churches not in full ecclesiastical communion with the See of Rome to observe the particular ordinances of the ecclesial community to which persons adhere.

F. Urrutia made the observation that the principal reason why merely ecclesiastical laws no longer bound baptized non-Catholics was the Church's recognition of religious liberty.⁹⁷ He considered the matter doctrinally open since laws do not exclude faith, worship and community. Urrutia further suggested that the theologians had not considered the effects arising from baptism *per se*, but focused on the observance of ecclesiastical law which resulted from incorporation into

⁹⁴ L. Pivonka's statement requires nuances, lest any misunderstanding arise. This is a complex matter, and not as simple as he suggests. The ecclesiastical act in question concerned a marriage between an Orthodox Christian and a Protestant which was submitted to the Apostolic Signatura for judgement. The *caput* was the diriment impediment established by the Synod of Trullo, c. 72, that an Orthodox Christian invalidly marries a heretic. The negative judgement, *coram* Staffa, is reported in *C.L.D.*, 8 (1973-1977), pp. 3-29. See L. PIVONKA, "The Revised Code of Canon Law: Ecumenical Implications", in *The Jurist*, 45(1985), p. 531.

⁹⁵ *Ibid.*

⁹⁶ Section one of the canon is based on *Dignitatis humanae*, § 1, in which the Second Vatican Council affirmed its belief that the one true religion subsists in the Catholic Church.

⁹⁷ See *Unitatis redintegratio*, § 3.

the "Church-Faith Community" under hierarchial authority.⁹⁸ It appeared, therefore, that membership in the community while effected by baptism, seemed to take precedence over baptism itself and the consequences of that sacrament in the life of the individual. There seemed to be a triumph of the "invisible community" over the "visible society", and that affiliation with the Roman Catholic Church was less important than membership in the Church of Christ. For Urrutia, as a community, the Church cannot be governed solely by prescriptions of law. Responsibilities which arise among members are moral duties which result from *communio*. As a society, the Church must have laws from which juridical duties arise; competent authority has the obligation to help members pursue their supernatural end by creating conditions advantageous to that purpose. The Church is both a society and a community, although inseparable.⁹⁹

While F. Connell would not have disagreed with this position, he argued that the traditional doctrine had been retained.¹⁰⁰ The Vatican II Declaration on Religious Liberty, according to him, was concerned only with relations between civil authority and individual citizens.¹⁰¹ The coercive power of the Church remains immutable, namely, the Church possesses legislative, judicial and executive power in spiritual matters over all the baptized.

The revised Code of Canon Law clearly acknowledges in c. 208 that all the Christian faithful

⁹⁸ See F. URRUTIA, De normis generalibus, adnotationes in codicem: liber I, Romae, Pontificia Universitas Gregoriana, 1983, pp. 15-16.

⁹⁹ See *Lumen gentium*, § 8.

¹⁰⁰ See F. CONNELL, "The Church's Coercive Power", in American Ecclesiastical Review, 154(Jan.-June 1966), pp. 346-347.

¹⁰¹ See A. NICHOLS, "Lessons of the Lefebvre Affair" in the *Times* (London), December 19, 1988. His article would support this contention.

possess a true equality with regard to dignity arising from baptism. In cc. 96¹⁰² and 204 the Church recognizes that every baptized person has a relationship with the Church of Christ. The *Christifideles*¹⁰³ are the baptized. As J. Gaudemet explained:

The importance of this formula [incorporation into the Church as outlined in c. 96] cannot be underestimated. The Code does not envisage the quality of 'person' so much as the Christian person incorporated into the Church by baptism. The rights and obligations of this 'person' are envisioned by canon law in so far as they are proposed for the Christian. The Code did not have to consider the rights or obligations of any person who, by mere existence, is a 'person'. Thus one finds here the distinction, often badly made or even not made, between the 'rights of the person' and the 'rights of the Christian'. Undoubtedly, the Church does not ignore the rights of the person. It can assert them and demand that they be respected. But, in such instances it refers to the doctrines of natural law. The Code of Canon Law did not have to go along this path. Its role consisted in defining that which, for the canonist, was constitutive of the 'Christian person'.¹⁰⁴

During this century there has been an increased awareness and understanding in magisterial

¹⁰² Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Romae, Libreria editrice Vaticana, 1989, pp. xxxii-669p. (hereafter cited as Codex). The fontes to canon 96 list c. 87 of the 1917 Code and the following: S.C.S.O., Resp. I, January 27, 1928, in A.A.S., 20(1928), p. 75: a non-Catholic must apply to the Holy See for the right to introduce a marriage case; S.C.S.O., January 15, 1940, in ibid., 32(1940), p. 52: an apostate is bound by merely ecclesiastical law; *Mystici corporis*, in ibid., 35(1943), pp. 203-204; Vatican II, *Lumen gentium*, §§ 11 and 14; *Unitatis redintegratio*, §§ 3 and 4; *Ad gentes*, § 7 and *Ordo baptismi parvulorum*, § 4, June 10, 1969.

¹⁰³ For a treatment of how this term came to be used see F. COCCOPALMERIO, "De conceptibus 'Christifidelis' et 'laici' in Codice iuris canonici", in Periodica, 77(1988), pp. 381-424.

¹⁰⁴ "L'importance de cette formule ne saurait être sous-estimée. Le code n'envisage la qualité de 'personne', qu'en tant que personne du chrétien incorporé à l'Eglise par le baptême. Les droits et les obligations de cette 'personne' sont donc envisagés par le droit canonique dans la mesure où ils sont proposés au chrétien. Le code n'avait pas à s'attacher aux droits ou aux obligations de tout homme, qui, du seul fait de son existence, est une 'personne'. Ainsi se trouve impliquée la distinction, souvent mal ou même non-faite, entre les 'droits de l'homme' et les 'droits du chrétien'. Sans doute l'Eglise n'ignore pas les droits de l'homme. Elle peut les faire valoir et en exiger le respect. Mais elle se réfère alors aux doctrines du droit naturel. Le code de droit canonique n'avait pas à s'engager dans cette voie. Il lui revenait de définir ce qui, pour le canoniste, était constitutif de 'la personne du chrétien'." See J. GAUDEMET, "Réflexions sur le livre I 'De normis generalibus' du Code de droit canonique de 1983", in Revue de droit canonique, 34(1984), pp. 103-104.

documents of the rights and duties of the baptized.¹⁰⁵ Based on the natural law that existence precedes essence, the Church proclaims that human dignity is anterior to any other consideration. Theologically and canonically, the baptized person is recognized as having a sacramental dignity that defers only to human dignity.

Canons 96 and 849 reaffirm the traditional Catholic doctrine that there is only one baptism, the *ianua Ecclesiae*, which constitutes one as a person in the Church of Christ. Baptism makes that person a juridical subject (of rights and duties) in the Church of Christ.¹⁰⁶ A subject of rights and duties could have membership in a nebulous or ethereal state, the "communion of the baptized" and not in an organized community. How can these rights and duties be proclaimed then and undertaken? Of necessity, this relationship must also pertain to that reality which manifests the Church of Christ, the Roman Catholic Church. Consequently, the baptized must also have a relationship, however indirect, with the Roman Catholic Church, the guardian of law. The Roman Catholic Church, the organ in which Christ's Church subsists, has the responsibility to make known the divine laws of Christ's Church as part of its mission and its end, the *salus animarum*.¹⁰⁷ Mindful of that end, the Church has decreed that baptized non-Catholics are no longer bound by

¹⁰⁵ For example, *Rerum novarum*; *Mater et magistra*; *Pacem in terris* and various documents from the Second Vatican Council.

¹⁰⁶ See W. ONCLIN, "Membres de l'Eglise: personnes dans l'Eglise", in *L'Année canonique*, 9(1965), pp. 11-32. He provides a comprehensive study of the status in the Church of the non-baptized and baptized non-Catholics. On page 31 he states: "Les chrétiens séparés sont en effet personnes dans l'Eglise, sujets non seulement d'obligations canoniques, mais également de droits canoniques." (Separated Christians are persons in the Church, subject not only to canonical obligations, but also [subjects] of canonical rights.) However, by 1979, it appears that Onclin had changed his mind. He was the relator for the *Coetus studiorum de populo Dei*, held October 16, 1979. Responding to the fourth Consultor, Onclin said: "Il Relatore risponde che il battesimo è necessario perché un uomo diventi nella Chiesa soggetto di diritto canonico. I non battezzati non hanno né diritti canonici. Questo vale anche per i protestanti." (The Relator replies that baptism is necessary for a human being to become in the Church a subject of canon law. The non-baptized have neither canonical rights nor obligations. And this applies to Protestants also.) See *Communicationes*, 12(1980), p. 56.

¹⁰⁷ See *Unitatis redintegratio*, § 3.

the merely ecclesiastical laws of the Roman Catholic Church; it does not remind them either that they remain bound by the laws of the *Ecclesia Christi*, irrespective of whether the members of the Church of Christ recognize these laws, or the Tridentine declaration on this matter.

b. Those subject to merely ecclesiastical laws

The Second Vatican Council's ecclesiology moved away from the models of the perfect society and institution towards the ancient, more scriptural ideas of *communio*¹⁰⁸ and *mysterium*. In this "new way of thinking", Churches and people were linked in mutual relationships, which in their juridical sense, possess the characteristics mentioned in c. 205 of the 1983 Code of Canon Law: profession of faith, sacraments and ecclesiastical governance. Who then are now the subjects of merely ecclesiastical laws? Canon 11 states it clearly:

Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy the sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age.¹⁰⁹

Thus Catholics are bound by the inescapable fact of baptism and full membership in the Roman Catholic Church. Catholics who grow up outside the Church are also bound by merely ecclesiastical laws even though they may be unaware of that fact. In virtue of c. 206, catechumens have a special link with the Church, they are not, however, directly bound by the stipulations of c. 11. Finally, those

¹⁰⁸ See H. MÜLLER, "Utrum *communio* sit principium formale-canonicum novae codificationis iuris canonici *Ecclesiae latinae*?", in Periodica, 74(1985), pp. 85-108.

¹⁰⁹ See Codex. The *fontes* to c. 11 refer to c. 12 of the 1917 Code and four sources: a January 3, 1918 reply from the Commission for the Authentic Interpretation of the Code concerning annual confession and communion for children, in II Monitore ecclesiastico, 30(1918), p. 112; S.C.C., *Saepenumero (ad 2)*, July 14, 1941, in A.A.S., 33(1941), p. 390, those who enjoy use of reason are bound to attend Mass on days of obligation; S.C.Clerici, addendum, inter alia, April 11, 1971, in *ibid.*, 64(1972) p. 173; S.C.Sac. et Cultu Divino et S.C.Clerici, letter, March 31, 1977, in C.L.D., 8(1973-1977), pp. 603-607. The latter references concern matters on first eucharist and sacramental confession.

who leave the Church by a formal act¹¹⁰ remain subject to its laws except where the contrary is specified.¹¹¹

Canon 11 is a mixture of divine and ecclesiastical laws. In light of the previous discussion on the nature of natural law and divine positive law, one sees the former operative in the canon by its recognition of persons lacking sufficient reason,¹¹² and of those incapable of performing a human act as exempted from merely ecclesiastical laws. The merely ecclesiastical law establishes the prescription that a child who has reached the point of reason is not bound to these laws until his seventh year is complete,¹¹³ unless another canon intervenes.¹¹⁴ The unbaptized, because they are not members of the Church of Christ, are not directly subject to any ecclesiastical legislation.

Conclusion

This chapter has recounted the numerous revisions of c. 12 of the 1917 Code from May 1966 to its promulgation as c. 11 of the 1983 Codex iuris canonici. The revised canon is based on the ecclesiology of the Second Vatican Council and the theological facts of full and partial membership of the baptized in the Catholic Church. Moreover, it is directed to Catholics and

¹¹⁰ This action has not been defined in the revised Code.

¹¹¹ Canons 1086, § 1, 1117 and 1124 are examples.

¹¹² Although a distinction should be made between habitual and temporary lack of sufficient use of reason, the probable opinion is that persons in both categories are not bound by merely ecclesiastical law. See E. REGATILLO, op. cit., pp. 51-52; U. BESTE, op. cit., p. 71. See also c. 99 of the 1983 Code of Canon Law.

¹¹³ Age is calculated according to the norm of c. 203; hence a child becomes subject to merely ecclesiastical laws on the day after his/her seventh birthday.

¹¹⁴ Canons 891, 913, § 2, 1252, and 1323 are examples.

designates the three conditions which must be present before the individual becomes subject to a prescription of merely ecclesiastical law.

However, situations do arise where a baptized non-Catholic is indirectly affected by such a law, as in the situation of a marriage between a Catholic and a baptized non-Catholic when the former is bound by an impediment of merely ecclesiastical law established by the Church. A dispensation might solve the problem. In other situations it is possible that such a case might require a judicial investigation by the Church concerning a person's freedom to marry. Similarly, an administrative procedure might be warranted in certain cases. What rights does the Catholic Church claim for itself to judge such marriages? Do non-Catholics possess a right to challenge a sacramental marriage in an ecclesiastical tribunal of the Catholic Church.¹¹⁵ If so, is this right affected in any way by the prescriptions of c. 11 when the parties are baptized non-Catholics? The next chapter will address the question of the Catholic Church's competence over marriage cases of the baptized.

¹¹⁵ Canon 1674, 1°.

CHAPTER THREE

THE COMPETENCE OF THE CATHOLIC CHURCH OVER MARRIAGE CASES

Marriage is generally recognized as a natural right that is freely chosen.¹ It is neither essentially a Christian concept, nor religious in form or origin. Some Christians, however, believe that Christ raised marriage to the dignity of a sacrament² and proclaimed it to be indissoluble;³ this is a teaching of the Catholic Church. As a sacred entity, marriage comes under the care of the *Ecclesia Christi*. Consequently, the Church's theological and philosophical reflection on the matter resulted in legislation that circumscribed particular secular notions associated with marriage and certain sexual relationships that seemed contrary to the sacrament.⁴ History shows that the sacramental and non-sacramental views of marriage, while not of themselves mutually exclusive, engendered tensions between Church and State, vis-à-vis their respective rights and claims to have competence over marriage, its effects, and dissolution or annulment.

The Catholic Church teaches that normally valid marriages of baptized persons are

¹ The Church maintains that no human authority may withhold the exercise of this right from any naturally capable person. See P. GASPARRI, *De Matrimonio*, vol. I, [Romae], Typis polyglottis Vaticanis, 1932, pp. 20-21, n. 13. See also L. McREAVY, "Church Laws and the Natural Right to Marry", in *The Clergy Review*, 46(1961), pp. 486-490.

² For the purpose of this study the writer assumes that marriage between the baptized is sacramental as stated in *C.I.C.*, c. 1012 and *Codex*, c. 1055.

³ See Mk. 10: 2-12 and parallel texts. An exegetical explanation of the Matthean *προειρα* clauses is outside the scope of this paper. P. Hoffmann concludes that Jesus in his teaching on divorce did not lay down a law but rather an imperative which invites interpretation. See P. HOFFMANN, "Jesus' Saying about Divorce and its Interpretation in the New Testament Tradition", in *Concilium*, 6(1970), n. 5, pp. 51-66.

⁴ Indissolubility can also be derived from natural law. See L. RYAN, "The Indissolubility of Marriage in Natural Law", in *Irish Theological Quarterly*, 30(1963), pp. 293-310; 31(1964), pp. 62-77.

perpetual and exclusive once they have been consummated.⁵ However, all baptized persons who are in a fractured marriage may seek an investigation into the validity of their union before a Church tribunal where a declaration of nullity of marriage might be obtained after a judicial process. Some cases, however, are better suited to an administrative investigation and submission for judgement, usually *in favorem fidei*, to the supreme authority in the Church. This chapter explores the position of Christians who are not members of the Roman Catholic Church when they are plaintiffs in a marriage cause before an ecclesiastical tribunal.

1. MATRIMONIAL CAUSES

a. Christian influence and imperial laws

The Jewish notion of marriage admitted divorce and remarriage.⁶ By contrast Roman society viewed marriage as a state of life that lasted at the spouses' pleasure based on the marital affection of the parties (*affectio maritalis*). Initially, Church members were civilly obliged to follow the empire's requirements concerning marriage. However, an ecclesiastical counteraction to the Roman understanding of divorce-remarriage began to appear. For instance, St. Ignatius of Antioch (d. circa 107), in his *Epistola ad Polycarpum*, admonished Christian couples to seek the bishop's permission or blessing before entering into (civil) marriage.⁷ From this exhortation, it would appear

⁵ Seemingly, the Church could dissolve such marriages but has generally stopped short of doing so; see W. O'CONNOR, "The Indissolubility of a Ratified, Consummated Marriage", in *Ephemerides theologicae Lovanienses*, 13(1936), pp. 692-722.

⁶ The rabbinical school of Hillel allowed a man to divorce his wife almost at will; the school of Shammai adopted a more stringent position. For an overview of the biblical notions of marriage and divorce, see M. LAWLER, *Secular Marriage: Christian Sacrament*, Mystic, Connecticut, Twenty-Third Publications, 1985, pp. 5-21 (marriage), 83-93 (divorce).

⁷ See J. MIGNE (ed.), *Patrologiae cursus completus, seu Bibliotheca universalis, integra, uniformis, commoda, oeconomica, omnium SS. patrum, doctorum scriptorumque ecclesiasticorum, sive latinorum, sive graecorum, qui ab aevo apostolico ad aetatem Innocenti III (ann. 1216) pro*

that Christians who intended to marry needed to present themselves to the bishop not only for his approval and as a way of avoiding clandestinity within the community, but also to contract a recognized ecclesiastical, as well as civil marriage. This practice resulted in the requisite that merely ecclesiastical laws should be followed by the members of the Church;⁸ theologians then began to insist that Christians marry *in facie Ecclesiae*.⁹ Abstracting from some rigorous patristic beliefs concerning marriage and sexuality, most second and third century Christians saw marriage as something sacred, counselled by the Scriptures and sanctioned as an authentic social convention.¹⁰ Naturally, the primitive Church believed marriage contributed to the spiritual well-being of its members, which made it a religious concern and therefore subject to ecclesiastical control. Although the Church continued to accept the civil marriage system, and to recognize the civil authority's considerable dominion over marriage, it persevered with its internal discussions on marriage and enactments of disciplinary laws.¹¹

Under Roman law, divorce was *divortium ab intrinseco*.¹² It was a private transaction and

latinis et ad Concilii florentini tempora (ann. 1439) pro graecis floruerunt. Series graeca, vol. V, Lutetiae Parisiorum, J. P. Migne, 1894, col. 723 (hereafter cited as MIGNE, P. G.).

⁸ For patristic sources, see F. WERNZ, Ius canonicum, ed. tertia, vol. V, Romae, Universitas Gregoriana, 1946, pp. 663-667.

⁹ The earliest extant recorded ecclesiastical legislation concerning marriage *in facie Ecclesiae* is c. 13 of the IV Council of Carthage (398); see MANSI, III, col. 952. In the matter of form in the early Church, see J. BERNHARD, "Le décret *Tametsi* du concile de Trente: triomphe du consensualisme matrimonial ou institution de la forme solennelle du mariage?", in Revue de droit canonique, 30(1980), pp. 211-223.

¹⁰ See St. Clement of Alexandria, *Stromata*, 2.23, in MIGNE, P. G., vol. VIII, col. 1095.

¹¹ The earliest extant disciplinary legislation was from the Spanish Council of Elvira (306) with 15 of its 81 canons dealing with marital conduct; see MANSI, II, cols. 6-19. The Councils of Ancyra (314) and Arles (314) also dealt with matters of adultery, bigamy and incestuous relationships.

¹² See W. BUCKLAND, A Textbook of Roman Law from Augustus to Justinian, 2nd ed., Cambridge, University Press, 1932, p. 117.

not usually a matter for civil action. Although the notions of marriage¹³ and divorce in Roman society changed somewhat during the periods of the Republic and the Empire,¹⁴ a person's right to a divorce remained constant almost to the end of the imperial era. Cases involving divorce which went before the civil judge did not usually concern the divorce itself, but financial and penal matters associated with the persons involved.¹⁵ The spasmodic persecution against the Church during the first three centuries of the Christian Era also deterred members from appearing in secular courts on matters associated with divorce.¹⁶ Conversely, the fourth century *Didascalia apostolorum* admonished Christians as Christians to submit all cases for judgement to the bishop and his clergy and to refrain from civil litigation.¹⁷ The works of many of the Church's Fathers and Doctors disclosed the fact that the prohibition on divorce and remarriage in the early Church was not as

¹³ For a detailed description of the various forms of Roman marriage, see P. CORBETT, The Roman Law of Marriage, Oxford, Clarendon Press, 1930, xii-254p.

¹⁴ The laws of the Roman Republic on marriage regulated who was permitted to marry together with its legal effects (*matrimonium iustum*), while all other associated matters of these legal marriages were left to the *paterfamilias*. Other marriages (*matrimonium iniustum*) had no protection in law. See C. HOHENLOHE, Einfluß des Christentums auf das Corpus juris civilis, Wien, Hölder-Pichler-Tempsky A.G., 1937, pp. 26, 136, 157-159, 207-208. By the end of the Republic, moral decay was widespread and marriage held little but legal significance. A change came with the Empire (27 B.C.) under Augustus (27-14 B.C.) who began to enact civil legislation (the first being *Lex Julia de adulteriis*, circa 18 B.C.) concerning rights and obligations of marriage and divorce. This legislative trend continued under various emperors.

¹⁵ Ulpian, the great advocate of natural law, said consent makes marriage and also ends marriage. He saw it as natural that an obligation end in the same way that it was entered into. Hence a verbal contract was annulled by words, and an obligation based upon consent was dissolved by a contrary consent, in Digest, 50.17.35; see also Corpus iuris civilis, vol. I, p. 921. A matrimonial union created by consent could be "dissolved" by consent if a couple entered religious life according to C. 33, q. 5, cc. 11 and 20; see Corpus iuris canonici, vol. I, cols. 1253, 1256.

¹⁶ Lactantius in his *Liber ad donatum confessorem, de moribus persecutorum*, xiii, writes about an imperial edict from Diocletian (284-305) which debarred Christians from being plaintiffs in questions of wrong, adultery, or theft. See MIGNE, P. L., vol. VII, col. 214.

¹⁷ See R. CONNOLLY, Didascalia apostolorum: The Syriac Version translated and accompanied by the Verona Fragments, Oxford, Clarendon Press, 1969, pp. 101-119.

absolute as it appeared to be.¹⁸ There were also statements and rulings from other sources which apparently permitted Christians a second marriage while the former partner was living.¹⁹ The topic of divorce among the patristic authors would seem to indicate that it was not simply a speculative question in the Christian Church of Roman society.

Following its legalization in 313, Christianity made an impact upon the imperial legal system and enjoyed an enhanced status in society. Not surprisingly, in 318, the Emperor Constantine (d. 337) granted a limited temporal judicial power to the bishops living within the empire.²⁰ This endowment was to increase. At the Council of Nicaea (325) Constantine made known his intentions behind the basic tenets which were to regulate the judicial alliance of Church and State. To the bishops he said:

God has constituted you priests, and He has given you power to judge even us. Rightly, therefore, are we judged by you, but you cannot be judged by men. For this reason you must await the judgement of God alone upon you; and your disputes, whatever they may be, are to be reserved for the scrutiny of the Divinity. For you have been given to us as gods, and it is not fitting that men

¹⁸ See P. ADNES, "De indissolubilitate matrimonii apud patres: opiniones recentiores et observationes", in Periodica, 61(1972), pp. 195-223. See also V. POSPISHIL, Divorce and Remarriage: Towards a New Catholic Teaching, New York, Herder and Herder, 1967, pp. 54, 141-200.

¹⁹ P. HARRELL, Divorce and Remarriage in the Early Church, Austin, Texas, R.B. Sweet, 1967, pp. 180-181, makes much of the verbal differences between the Synod of Elvira's c. 8 (a woman who leaves her husband without a precedent cause and marries another is denied communion even at the last), and c. 9 (a woman who leaves an adulterous husband and marries another is allowed communion at the end). H. WILKINS, The History of Divorce and Remarriage for English Churchmen, London, Longmans Green, 1910, pp. 71-74, compares the Elvira c. 9 with c. 10 of the Synod of Arles (a man is advised not to enter a second marriage after departing from an adulterous wife). The latter imposed no ecclesiastical penalty on a man who re-married, while the former excommunicated a woman who entered a second marriage. He sees the difference to be cultural and gender relative.

²⁰ Codex Theodosianus, 1.27.1, allowed a litigant to request that a case be transferred to an episcopal court. In 1.27.2, (408), the judgement of the episcopal court was valid in civil law for parties who consented to being heard by bishops (*sacerdotes*). See C. PHARR, The Theodosian Code and Novels and the Sirmundian Constitutions, Princeton, N.J., Princeton University Press, 1952, pp. 31-32. The Theodosian Code (438) was a methodical collection of all imperial constitutions in force at the time.

should judge gods, but only He, of whom it is written, 'God stood in the synagogue of the gods, in their midst does God judge'.²¹

According to J. Bourque four distinct statements of intention may be drawn from the emperor's text. They are: (1) civil acknowledgment of the judicial power of the Church; (2) the exclusive jurisdiction of the Church in spiritual matters; (3) the impunity of spiritual persons from the jurisdiction of the civil courts and (4) the superiority of the authority of the Church.²² This imperial pronouncement inaugurated the historical development of the Church's understanding of its own status and legal position as a (perfect) society, of its own and its delegated judicial functions, as well as of its superiority over the State.

Although some emperors respected the Church's position in society and its claim to independence, ecclesiastical power in judicial matters was somewhat restricted under Constantine's successors.²³ This did not prevent the Church from establishing merely ecclesiastical laws, asserting its ideas on various subjects and making them known to the civil authorities. Marriage, divorce and remarriage were no exception.²⁴ Some civil laws were refined to accommodate

²¹ "Ad episcopos: Deus vos constituit sacerdotes et potestatem vobis dedit de nobis [al. de vobis] quoque iudicandi, et ideo nos a vobis recte iudicamur. Vos autem non potestis ab hominibus iudicari. Propter quod Dei solius inter vos expectate iudicium, et vestra iurgia quaecumque sunt, ad illud divinum reserventur examen. Vos etenim nobis a Deo dati estis dii, et conveniens non est ut homo iudicet deos, sed ille solus de quo scriptum est: *Deus stetit in synagoga deorum, in medio autem deus discernit* [Ps. 81:1]", in MIGNE, P. L., vol. XXI, col. 468. Translation taken from J. BOURQUE, The Judicial Power of the Church: Canon 1553, § 1, Canon Law Studies, n. 337, Washington, D.C., The Catholic University of America Press, 1953, p. 27.

²² See *ibid.*, pp. 27-28.

²³ See W. BOYD, The Ecclesiastical Edicts of the Theodosian Code, New York, AMS Press, 1969, pp. 21-24, 93-96.

²⁴ "The tendency of the Christian emperors was to regard second marriage as a vice." See P. CORBETT, *op. cit.*, pp. 250-251. In 331 the Emperor Constantine introduced limitations for the juridic causes of divorce and remarriage, which were included in the *Codex Theodosianus*, 3.16.1; see C. PHARR, *op. cit.*, pp. 76-78. Finally, in 542 Justinian forbade all divorces *communi consensus* (novel 117.10) unless the couple agreed to complete their marriage in chastity; see *Corpus iuris civilis*, vol. III, pp. 560-561. Divorce by mutual consent was re-sanctioned by Justin II in 556 (novel 140.1); see *ibid.*, pp. 702-703. See also M. TROPLONG, De l'influence du christianisme sur le droit civil des

Christian principles and the ecclesiastical authorities and were incorporated into the civil Code of Justinian (published *circa* A.D. 527 in the eastern part of the Empire) and enforced by public authority.²⁵

b. Judicial procedures

i. The early centuries

How did the early Church organize its formal judicial procedures and process marriage cases? Since Roman law had no formal method for adjudicating the validity or non-validity of a marriage, the Church could not borrow or adapt a form from that legal system. In the pre-Constantinian era, the assembled bishops of a province judged the actions of persons accused of major violations of divine or ecclesiastical laws.²⁶ Questions touching marriage were sometimes serious enough to warrant an episcopal judgement.²⁷ These informal trials were most probably simple affairs and akin to what later centuries would call a summary procedure.

The provincial synodal procedure was modified and used at the diocesan level to settle

Romains, Paris, Typographie de Plon Frères, 1855, pp. 167-179.

²⁵ In 326 a man was prohibited from having a wife and a concubine at the same time, (Code, 5.26.1); see Corpus iuris civilis, vol. II, p. 216. Bigamy became a crime in 449, (Code, 5.17.8.4); see *ibid.*, p. 212. Marriage among consanguines was also restricted; see W. WOOD, The Comparative Law of Marriage and Divorce, London, Sweet and Maxwell, 1910, p. 21.

²⁶ See A. DIACETIS, The Judgement of Formal Matrimonial Cases: Historical Reflections, Contemporary Developments and Future Possibilities, J.C.D. diss., The Catholic University of America; Ann Arbor, Michigan, University Microfilms, 1988, pp. 11-13.

²⁷ See C. LEFEBVRE, "Origines et évolution de l'action en déclaration de nullité de mariage", in Revue de droit canonique, 26(1976), p. 24. See also J. KING, The Canonical Procedure in Separation Cases, Canon Law Studies, n. 325, Washington, D.C., The Catholic University of America Press, 1952, p. 8.

contentious issues, marriage causes sometimes being among them. The bishop together with his own clerics would hear the case. Although the bishop would listen to the advice of his clergy, he remained the sole judge.²⁸ This practice became normative through ecclesiastical legislation.²⁹ It was also recognized in the civil forum.³⁰

ii. The Middle Ages

The history of the marriage courts from the fourth to the twelfth centuries was one of shifting authority or competence between the diocesan bishop and the provincial council.³¹ By the fifth and sixth centuries, canonical issues became more complex and an expertise in ecclesiastical law was needed.³² In dioceses where bishops lacked this knowledge, matrimonial causes were returned to the competence of the provincial synod.³³ Some individual bishops continued to treat matrimonial causes in their own diocesan synods.³⁴

²⁸ See F. WERNZ, lus decretalium, vol. I, p. 83.

²⁹ The Council of Hippo (397) declared in c. 5a that a bishop was to hear all local cases in his own diocese in the presence of his own clergy and in c. 8 that a bishop alone could investigate and decide the cases of persons who were not priests or deacons. See C. MUNIER, Concilia Africae a.345-a.525, Corpus christianorum: series latina 149, Turnholti, Brepols, 1974, pp. 34-36, 100.

³⁰ See footnote 20.

³¹ Council of Agde (506), c. 25, in MANSI, VIII, col. 329. See also A. BOTTOMS, The Discretionary Authority of the Ecclesiastical Judge in Matrimonial Trials of the First Instance, Canon Law Studies, n. 349, Washington, D.C., The Catholic University of America Press, 1955, p. 12.

³² For example, the "new" impediments of nonage and ligamen became widely known. See A. DIACETIS, op. cit., p. 50.

³³ The enacted legislation required bishops to judge cases (see Synod of Leptin (743), c. 3, in MANSI, XII, col. 371), and that the province be the usual tribunal; see Archbishop Hincmar's account of these matters in Synod of Tousy II (860), in MANSI, XV, cols. 571-589.

³⁴ For examples see T. KAY, Competence in Matrimonial Procedure, Canon Law Studies, n. 53, Washington, D.C. The Catholic University of America, 1929, pp. 50-51.

With their publication in Italy in A.D. 529, Justinian's law books became accessible and were readily accepted in the Western part of the Empire. Pope Gregory I (590-604) encouraged the use of Roman law in ecclesiastical legal procedure as an ancillary medium for judicial processes.³⁵ Another major innovation in the development of the ecclesiastical tribunals was the synodal court. In continental Europe, from the eighth century onwards, the bishop sat in judgement over ecclesiastical and civil cases in his own right and as a civil emissary.³⁶ The Church undoubtedly adopted Roman, Visigoth and Carolingian judiciary praxis in the matrimonial trials held in the episcopal courts. While the Church adopted some secular legal traditions concerning the rights (and presence) of the parties, other conventions were not acceptable, in particular the hearing of marriage cases by laymen³⁷ in the courts³⁸ of Christian princes.³⁹

³⁵ See W. BOYD, *op. cit.*, p. 105.

³⁶ See H. ZAPP, "Diocesan Jurisdiction: An Historical Survey", in *Concilium*, 107(1977), pp. 12-13.

³⁷ Some heretical sects taught that no Christian could, in good conscience, contract marriage. "One sectarian group at Orléans in 1122 adopted the view that marriage was profane because it dealt with sex. The Church should therefore have nothing to do with it [...] and should leave marital matters entirely in the hands of the laity. This was not a view that Church authorities were prepared to tolerate -- they made that point clear by burning fourteen heretics alive." See J. BRUNDAGE, *Law, Sex, and Christian Society in Medieval Europe*, Chicago, The University of Chicago Press, 1987, p. 186. See also J. TURLAN and P. TIMBAL, "Justice laïque et lien matrimonial en France au moyen âge", in *Revue de droit canonique*, 30(1980), pp. 347-363.

³⁸ According to c. 52 of the Council of Mayence (813), in spite of the triple division of bishops, abbots and laymen, marriage causes were proposed before the bishops alone; see MANSI, XIV, col. 75. Bernard of Pavia (d. 1213) taught that lay civil judges had no power in ecclesiastical cases and insisted that only an ecclesiastical judge was competent in affairs of divorce; see BERNARDUS PAPIENSIS, *Summa decretalium*, ad librorum manusccriptorum fidem cum aliis eiusdem scriptoris anecdotis edidit Ern. Ad Theod. Laspeyres, Graz, Akademische Druck -- U. Verlagsanstalt, 1956, lib. II, tit., I, n. 5, p. 33. In 1234 Gregory IX warned the Hungarian King Andrew II that secular judges must refrain from judging matrimonial causes; see A. ROSKOVANY, *Matrimonium in Ecclesia Catholica*, vol. I, Pestini, Typis Athenaei, 1870, pp. 60-62. It clarified the Church's earlier enactments that lay persons were not competent to judge spiritual cases; see Council of Rheims (1148), c. 5, in MANSI, XXI, col. 715; Lateran IV (1215), c. 40, in MANSI, XXII, cols. 1026-1027. Local synods reiterated this teaching; see Synod of Bremen (1266), *Statuta provincialis*, in MANSI, XXIII, col. 1159; Council of Bourges (1286), c. 1, in MANSI, XXIV, cols. 626-627.

³⁹ See E. KENNEDY, *The Special Matrimonial Process in Cases of Evident Nullity*, Canon Law Studies, n. 93, Washington, D.C., The Catholic University of America, 1935, p. 11.

In the matter of grades and kinds of tribunals, there are few manifestations of the determined constituents for marriage trials during this period. No definite set of rules for ecclesiastical competence in matrimonial causes is extant for this era (the latter part of the first millennium). According to the available evidence it is probable that one of two customs were followed. Since episcopal judgements were pronounced at both diocesan and provincial levels, this could mean that either there was an embryonic first and second instance procedure, or that diocesan bishops judged the validity of a marriage on grounds and laws they understood while referring more complex cases to a collective expertise at another level. As litigation increased in the Middle Ages, many criminal and matrimonial cases that were previously entrusted to the provincial or diocesan synods or to the civil authorities devolved upon the local bishop -- the civil and ecclesiastical judge in many communities. To cope with the great number of actions during this epoch, bishops in various parts of the Church gradually introduced delegated courts of archdeacons, archpriests⁴⁰ and deans to judge marriage causes and matters of public morality.⁴¹ The procedure in these courts was somewhat fluid, except in cases of adultery.⁴²

Leo IX (1048-1054) inaugurated the reform process, known eventually as the Gregorian Reform. A key element of this movement was the renewal of canon law and of Church courts so that they could play a central part in the overseeing of society.⁴³ A number of canonical

⁴⁰ For the situation in Spain, see H. KELLY, Canon Law and the Archbishop of Hita, Binghampton, New York, Center for Medieval and Early Renaissance Studies, 1984, pp. 39-41.

⁴¹ For an historical overview of these offices, see B. KURTSCHIED, Historia iuris canonici, Romae, Officium libri catholici, 1951, pp. 263-270.

⁴² See J. BRUNDAGE, op. cit., pp. 223-224.

⁴³ See W. ULLMANN, Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas, London, Sources of History Ltd., 1975, pp. 133-134. See also A. GARCIA Y GARCIA, História del derecho canónico, vol. I, El primer milenio, Salamanca, Instituto de historia de la teología Española, 1967, pp. 280-283.

compilations⁴⁴ were written to supplement the great collection or *Decretum* of Bishop Burchard of Worms published between 1008-1012. Although no detailed litigation records have survived from this era,⁴⁵ it appears that some time in the eleventh century most, but not all, questions relating to marriage came under the exclusive control of the Church. However, during "the seventh to the eleventh centuries the Church concerned [itself] more with the preliminaries to marriage and the liturgical celebration of the marriage than with the problems of marital failure",⁴⁶ as the incredibly small number of cases of nullity in the ancient archives testifies.⁴⁷

iii. The Classical Age

The revival of Roman law studies during the twelfth and thirteenth centuries resulted in many jurisprudential developments, namely, Gratian's *Concordia discordantium canonum* and the prolific writings of Popes Alexander III (1159-1181) and Innocent III (1198-1216).⁴⁸ These two pontiffs permitted the use of a simplified procedure in judging marriage causes.⁴⁹ This streamlined

⁴⁴ Among these works were: *Collectio canonum in V libris*, (1014-1023) from the Italian monastery of Farfa; *Diversorum patrum sententie; sive collectio in LXXIV titulos digesta*, (before 1076), from an unknown author; *Collectio canonum una cum collectione minore* (1083), from Anselm of Lucca; Collection of Cardinal Deusdedit (1083-1086); Bishop Bonizo's *Liber de vita Christiana* (1090) and Ivo of Chartres' *Decretum*, *Panormia* and *Collectio tripartita* (about 1095).

⁴⁵ See J. BRUNDAGE, *op. cit.*, p. 223.

⁴⁶ A. DIACETIS, *op. cit.*, p. 48.

⁴⁷ See A. LEFEBVRE-TEILLARD, "Règle et réalité: les nullités de mariage à la fin du moyen-âge", in *Revue de droit canonique*, 32(1982), p. 145.

⁴⁸ The *Corpus iuris civilis* was rediscovered. Systematic teaching began around 1100 in Bologna.

⁴⁹ Alexander III permitted it in 1160; see X, 2, 1, 6. He also insisted on evidence from more than one witness in a nullity trial which could not be proven from the testimony of a single witness, unless that witness's evidence was corroborated by public notoriety; see X, 4, 13, 3. When two or more witnesses agreed -- even interested parties -- Alexander ruled that a presumption of fact existed, which only conceded to rebuttal when a greater number of credible witnesses overturned the presumption; see X, 4, 17, 3. By 1198 Innocent III complained that marriage cases were not being properly handled and submitted to the regular procedure; see X, 2, 6, 1. The remark was

procedure was soon developed further with the addition of a notary,⁵⁰ or two competent men, at all criminal and possibly also at civil trials; seemingly "marriage trials were not exempt from these same formalities."⁵¹ The process was aided further by the new collections of decretals beginning with Bernard of Pavia's *Compilatio prima* (1191) and ending with Raymond's *Liber extra* (1234) that supplemented Gratian's work and had been published during this period. The juridical collections contained new canonical interpretations and papal judgements and facilitated the possibility of a somewhat uniform canonical jurisprudence in the Church's lower courts.

In his constitution *Saepe*,⁵² Pope Clement V (1305-1314) introduced a brief one instance trial for all types of marriage cases.⁵³ *Saepe* outlined the summary or abbreviated judicial procedure for processing trials and removed any doubts concerning the procedure, composition

probably occasioned by the non-appearance of a *reus* for a trial in Rome. In 1209 the same Pope, speaking of the need for a *litis contestatio*, acknowledged that formal trials in Rome were cumbersome, burdensome and expensive and understood why bishops proceeded with marriage cases without formalities; see X, 2, 6, 5.

⁵⁰ Lateran IV in 1215, c. 38, see C.O.D., p. 252.

⁵¹ E. KENNEDY, op. cit., p. 13.

⁵² The constitution *Saepe* in its present form must have been proclaimed after May 6, 1312 and before March 21, 1314 when publication of the Clementine constitutions began. See S. KUTTNER, Medieval Councils, Decretals and Collections of Canon Law: Selected Essays, London, Variorum Reprints, 1980, article XIII, "The Date of the Constitution 'Saepe', the Vatican Manuscripts and the Roman Edition of the Clementines", p. 432. On May 6, 1312 in the third session of the Council of Vienne (1311-1312) Pope Clement promulgated the decree *Dispendiosam* (Clem., 2, 1, 2); see ibid., p. 428. The constitution *Saepe* seems to refer to *Dispendiosam (in quibus per aliam constitutionem nostram)*.

⁵³ The new procedure required: citation, oaths to speak the truth, proofs, questioning of the parties by the judge and rendering of the sentence. As a means of obtaining a swift conclusion to the case two restrictions were also imposed: a simple verbal statement of the point of issue replaced the formal *Libellus conventionis* adopted from Roman law, no *litis contestatio* was required, the number of available days on which the courts could sit were increased, useless *exceptiones* were discouraged, the *conclusio in causa* was no longer essential, the written sentence could be delivered to the *actores* however it pleased the judge, and useless appeals (in cases of evident nullity) to delay the closing of the case were not admitted. Formal trials were still allowed if the *actores* wished it. See Clem., 5, 11, 2.

or validity of the new one instance trial. According to S. Kuttner, this constitution is commonly recognized as the most important single piece of medieval legislation in the history of summary judicial procedure. He wrote:⁵⁴

A century and a half of complex developments (in papal responses, in statutory enactments, and in the often conflicting teachings of the glossators of both the civil and the canon law) had left a great number of ambiguities in the practical application of those procedures that were distinguished from the regular *ordo iudiciorum* as *de plano*, *summatim* or *simpliciter cognoscere*, *sine iudiciorum strepitu*, *sine forma iudicii*, or by similar terms.⁵⁵ The constitution *Saepe* fixed once and for all the meaning of these clauses in a unified doctrine: henceforth the formalities that remained necessary and those that could be dispensed with in summary procedure were clearly defined for the theory and practice of both laws.

Other important developments were also taking place between the thirteenth century and the calling of the Council of Trent: the Church's unfolding theological insight into the sacraments and the nature of marriage, its recognition of causes of nullity anterior to *matrimonium in fieri*, and the increasing exercise of papal authority in formulating and promulgating merely ecclesiastical laws.⁵⁶ This period was also marked by minor developments in procedure, the continuing curtailment by provincial synods of the competence of inferior courts at diocesan level to judge marriage causes, and the establishment and development of the Roman Rota.

The new ideas on marriage expressed by the supporters of the Reformation movement encouraged the Fathers of the Council of Trent to direct their full and unequivocal attention to the procedure of nullity of marriage. By a general law, they rescinded the rights of deans and

⁵⁴ S. KUTTNER, *op. cit.*, p. 427.

⁵⁵ For the steps of this development, see C. LEFEBVRE, "Les origines romaines de la procédure sommaire aux XII^e et XIII^e siècles", in *Ephemerides iuris canonici*, 12(1956), pp. 149-197.

⁵⁶ For a fuller treatment of these developments, see A. DIACETIS, *op. cit.*, pp. 53-64.

archdeacons⁵⁷ to hear matrimonial causes and gave competence solely to the bishop to judge matrimonial matters.⁵⁸ The Council also approved of the appointment of synodal judges to hear such causes in the bishop's name.⁵⁹ Thus, the episcopal court was once more the court of first instance for the introduction of a marriage nullity case. The provincial court was usually designated as the appeal court⁶⁰ with all judgements being reserved to clerical judges,⁶¹ many of whom were the same inferior prelates who had functioned before from ordinary authority but now acted by episcopal mandate.

iv. Pope Benedict XIV

In a 1741 encyclical entitled *Quamvis paternae*⁶² Benedict XIV addressed the continuing lack of expertise among ecclesiastical judges and abuses in ecclesiastical tribunals. Later that same year he published the constitution *Dei miseratione*⁶³ that regulated the juridical method applicable

⁵⁷ Conc. Trent., session XXIV, (November 11, 1563), *decretum de reformatione matrimonii*, c. 20; inferior prelates were deprived of their rights as judges in criminal and matrimonial matters, see *C.O.D.*, pp. 772-773. The powerful archdeacon was counteracted by the introduction of the office of *officialis* (and of vicar general) into the diocesan curia. Although the title *officialis* was introduced in the fourth century, it was not used in the modern sense before the middle of the eleventh century; see F. ROBERTI, *De processibus*, vol. I, Romae, Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1941, pp. 263-267.

⁵⁸ Except in cases reserved to the Apostolic See, session XXIV, *decretum de reformatione matrimonii*, c. XX. See *C.O.D.*, pp. 772-773.

⁵⁹ Boniface VIII enumerated the qualifications for such persons in *Statutum* (see VI^o, 1, 3, 11). Session XXV, c. 10 allowed for the appointment of pro-synodal judges; see *C.O.D.*, p. 791.

⁶⁰ Session XIII, *de reformatione*, c. II; see *C.O.D.*, p. 699.

⁶¹ c. 12. "Si quis dixerit causas matrimoniales non spectare ad iudices ecclesiasticos anathema sit"; See *C.O.D.*, p. 755.

⁶² August 26, 1741. See *Fontes*, n. 315.

⁶³ November 3, 1741. See *ibid.*, n. 318.

to marriage causes. This historical and fundamental reform, the first major overhaul of the procedure since Clement V issued *Saepe*, directed that every *iudicium de nullitate matrimonii* be regarded as a controversy. As E. Egan wrote:

It seems that very early in his Pontificate Benedict had come to realise that in many trials concerning the nullity of marriage before ecclesiastical courts, only one of the parties to the marriage was active or, when both were involved, they were frequently on the same side, that is both in favour of the nullity. Thus in such cases, all proofs were in one direction and counter-proofs non-existent. What was therefore being called a trial was in truth no trial at all.⁶⁴

The reform was achieved through the introduction of three elements: the appointment of a defender of the bond (*defensor matrimoniorum*) who would be a party to each case, a mandatory appeal (regardless of the evidence) after a first instance decision in favour of nullity of marriage, and the introduction of a stricter procedure.

A number of bishops applied for dispensations from the rigours of the Benedictine process. Such a dispensation was granted to the bishop of Eger (Hungary) on August 28, 1794,⁶⁵ and others followed.⁶⁶ Although authors disagree whether or not Benedict XIV's constitution *Dei miseratione* abrogated the use of the summary process of Clement V, a summary mechanism was

⁶⁴ See E. EGAN, "Appeal in Marriage Nullity Cases: Two Centuries of Experiment and Reform", in *Monitor ecclesiasticus*, 107(1982), pp. 80-81.

⁶⁵ An indult was granted by Pius VI to the bishop of Eger in a decree from the Holy Office dated August 28, 1794 permitting a summary procedure in cases where a civil court had granted a divorce; see A. ROSKOVANY, *op. cit.*, vol. I, pp. 295-297, *monumentum*, n. 94. In 1795 the same bishop received a quinquennial faculty to handle similar cases; see *ibid.*, pp. 297-298, n. 95. Another faculty was given to the diocese of Angoulême (France), on September 5, 1888 not only for cases touched by civil divorce, but when the nullity was evident; see "Procédure à suivre dans les causes matrimoniales: sa nécessité, indults", in *Nouvelle revue théologique*, 20(1888), p. 633.

⁶⁶ The Holy Office issued some private decrees which were derogations from the common law. A general decree was issued on June 5, 1889, mitigating the Benedictine prescription that all cases of nullity require concordant sentences; see *Fontes*, n. 1114. No appeal was needed if the invalidity was proven to be one of six preexisting diriment impediments (consanguinity, affinity, ligamen, disparity of cult, spiritual relationship and clandestine marriage) and the defender agreed. See T. KAY, "Canon 1990 and the S.C.S. Instruction of 15 August, 1936, on Matrimonial Procedure", in *American Ecclesiastical Review*, 98(Jan.-June 1958), pp. 263-265.

"reintroduced" in 1889.⁶⁷ Both the summary judicial process of Clement V -- or the practically administrative judicial process allowed by the 1889 decree, since some canonists believed this abolished the Clementine process -- and the formal procedure of Benedict XIV remain substantially in use today in the Church's courts.⁶⁸

2. THE CHURCH'S COMPETENCE OVER MARRIAGE CASES OF THE BAPTIZED

a. Pre-Reformation Europe

When did the Church assume competence over marriage cases? Since there had been no dissolution of a marriage by a secular judge in Roman society, the Church seemingly felt no urgency to state its opposition to the civil control of legal effects associated with divorce cases. Historical studies show that certain bishops enjoyed a developing judicial authority granted to them by the Visigoths (418-507 in France, 418-711 in Spain), the Merovingian kings (500-751) and the Carolingian rulers (751-987). In this milieu, the bishops were able to address the subject of marriage directly in provincial synods, albeit in a disciplinary rather than a legislative mode.⁶⁹ Eventually,

⁶⁷ In a response (March 20, 1889) to the bishop of Fort Wayne, the Holy Office explained an extrajudicial process encompassing any diriment impediment; see A.S.S., 22(1893-1894), p. 638. Following a letter from the archbishop of Paris to the Holy Office inquiring whether the Fort Wayne concession could be used by any bishop in similar circumstances, the dicastery replied on June 5, 1889 that it was applicable to the whole Church; see Fontes, n. 1118. In a response to the bishop of Albany on June 10, 1896 the Holy Office pointed out that a summary and extra-judicial process was possible as it had been since 1889; see ibid., n. 1180.

⁶⁸ See E. KENNEDY, op. cit., pp. 41-42.

⁶⁹ For a synopsis on marriage, divorce and remarriage in this part of Europe at the time, see K DREW, "The Law of the Family in the Germanic Barbarian Kingdoms: A Synthesis", in Law and Society in early Medieval Europe: Studies in Legal History, London, Variorum Reprints, 1988, article VIII, pp. 18-23. See also P. DAUDET, Études sur l'histoire de la juridiction matrimoniale: les origines carolingiennes de la compétence exclusive de l'Eglise, Paris, Sirey, 1933, 183p.

however, the Church was faced with persons who also believed in divorce *a vinculo*.⁷⁰

Some European kingdoms on the continent which adapted the Theodosian Code and developed their own civil laws found many parallels with canon law on the matter of marriage. Thus, it was easier for the regal authorities to leave such matters to the Church. Encouraged by the feudal system itself, the status bishops enjoyed as local lords, and the decline of royal powers in the tenth century, the states facilitated the slow but gradual transference of legal competence over judicial matters to the ecclesiastical authorities. However, it was generally understood that any civil enactments on marriage would refer solely to civil rights.⁷¹ Stimulated by the somewhat loose sexual mores of eleventh and twelfth century Europe, the Gregorian reformers reorganized marriage and brought it under the exclusive control of the Church's law and courts when it was necessary to do so, rather than the secular court. They outlined seven principles: (1) marriages must be monogamous, (2) indissoluble, (3) freely contracted; (4) concubinage is to be eliminated; (5) all sexual activity outside of marriage eliminated; (6) all sexual activity would fall solely under ecclesiastical jurisdiction, and (7) all marriages must be exogamous.⁷²

b. The historical view

Canonical historians disagree as to when the Church assumed control over marriage cases.

⁷⁰ During the second half of the first millennium, the Anglo-Saxon and Frankish penitentials allowed divorce *a vinculo* and remarriage. The practice ceased during the Carolingian reforms of the 9th century. See C. VOGEL, Les "Libri Paenitentiales", Turnhout, Brepols, 1978, pp. 107-108; see also L. ÖRSY, Marriage in Canon Law, Wilmington, Delaware, Michael Glazier, 1988, pp. 23-24. See also P. ADNES, loc. cit., p. 219.

⁷¹ The Synod of Tribur (895) denied recognition to secular marriage enactments; see MANSI, XVIII, cols. 151-152, can. 39.

⁷² See G. DUBY, Medieval Marriage: Two Models from Twelfth-Century France, Baltimore, Johns Hopkins University Press, 1978, pp. 7-21.

Perhaps the most suitable answer is given by J. Joyce. He stated:

We cannot assign a precise date at which the Church commenced to exercise jurisdiction over matrimonial causes in her own name, and the civil authorities recognized that these matters lay outside the province of the secular tribunal. The change took place gradually, and was not effected by a formal grant [...]. It began as a matter of custom, and gradually was recognized as a matter of right.⁷³

Joyce felt this change-over was completed towards the middle of the eleventh century,⁷⁴ whereas A. Esmein and G. Duby dated the completion by the end of the tenth century.⁷⁵ A. Nace, on the other hand, wrote: "Only in the latter eleventh and twelfth centuries [...] did the norms governing a person's right to question judicially the validity of a marriage begin to crystallize."⁷⁶ T. Doyle believes this matter was not resolved in the Church's favour until the twelfth century,⁷⁷ which was the case in England.⁷⁸ By the end of Alexander III's pontificate in 1181 it seemed that the Church had achieved an "exclusive authority" over marriage and matrimonial causes. The nobility and the populace had come to accept the Gregorian reformers' ideas on marriage and sexual behaviour.⁷⁹ Based on Esmein's date, J. Goldsmith concluded that the Church developed its own jurisprudence during its first ten centuries and extended its jurisdiction over marriage from a mere disciplinary

⁷³ J. JOYCE, Christian Marriage, London, Sheed and Ward, 1933, pp. 223-224.

⁷⁴ See *ibid.*, p. 225.

⁷⁵ See A. ESMEIN, Le mariage en droit canonique, vol. I, Paris, Sirey, 1929, p. 27. See also G. DUBY, *op. cit.*, p. 20.

⁷⁶ A. NACE, The Right to Accuse a Marriage of Invalidity, Canon Law Studies, n. 418, Washington, D.C., The Catholic University of America Press, 1961, p. 9.

⁷⁷ See T. DOYLE, "The Individual's Right to Marry in the Context of the Common Good", in Studia canonica, 13(1979), p. 258.

⁷⁸ See P. DELHAYE, "The Development of the Medieval Church's Teaching on Marriage", in Concilium, 6(1970), n. 5, p. 84.

⁷⁹ See G. DUBY *op. cit.*, p. 44.

control in the early period to a fully recognized jurisdiction by the High Middle Ages.⁶⁰ Goldsmith validated his position further by citing the matrimonial legislation found in the Decretum Gratiani⁶¹ and other extant rulings concerning marriage found in the Decretals.⁶² His detailed research allowed him to state:

A careful study of the various papal decretals and of the conciliar material contained in the collections of Gratian and of Gregory IX fails to reveal any such clear-cut statement of principle. Nowhere in them do we find a letter from any of the pontiffs or a decree of any of the councils that appear to have been elicited by some dispute between civil and ecclesiastical authorities regarding jurisdiction over marriage.⁶³

Thus, there is no available evidence either of the Church's direct assertion of its right to legislate on marriage or the extent of its jurisdiction. It was sufficient for the Church to believe that the adjudication on the marriage bond was fully within its competence; that (merely) civil effects were within the competence of the State.

Although there were disputes during the Middle Ages between popes and kings, bishops and princes over their respective jurisdictions, the Church's exclusive right to judge marriage causes

⁶⁰ See J. GOLDSMITH, The Competence of Church and State over Marriage: Disputed Points, Canon Law Studies, n. 197, Washington, D.C., The Catholic University of America Press, 1944, p. 3.

⁶¹ Gratian discussed the marriage bond, the institution of marriage, the sacramental dignity of marriage, qualities of a valid marriage, the impediments to marriage and the procedure and grounds for separation in Causes XXVII-XXXVI. (Gratian recalls in C. 32, q. 7, c. 18, a letter Pope Gregory II sent to the Englishman Boniface, Bishop in Germany: a husband with a sick wife who cannot allow him his marital rights might marry again while continuing to support the sickly first wife. See also the interesting statement of E. Hillman concerning Gregory II's *dictum*: "We also know, from a number of existing documents, that Pope Clement VII came very close to granting the same concession to King Henry VIII", see in "The Development of Christian Marriage Structures", in Concilium, 6(1970), n. 5, p. 33.)

⁶² See X, 4. This book contains not only the law on matrimony itself, but also the law on such closely related matters as espousals, dowry, legitimacy and separation.

⁶³ J. GOLDSMITH, op. cit., pp. 3-4.

-- apart from merely civil effects -- remained intact.⁸⁴ The "reawakening" of the Renaissance period encouraged persons in the fourteenth century to question much in their societies. Various princes scrutinized and challenged some of the Church's teachings as well as its position as a secular power. Other rulers championed the new and reformed ideologies of the respective positions of Church and State sweeping throughout Europe. One repercussion of this "new view" was the increasing infringements by civil governments upon the (civil and ecclesiastical) judicial authority of the Church.⁸⁵ During the fourteenth and fifteenth centuries secular judges succeeded in extending their competence over the customary civil effects of marriage to include judgements on sexual crimes,⁸⁶ but failed on the bond itself.⁸⁷ The unprecedented number of judicial records from the mid-fourteenth century onwards show that a very high percentage of cases heard in ecclesiastical courts pertained to the efforts to control sexual behaviour and not to the validity of marriage.⁸⁸ Secular interference in ecclesiastical matters was only one of the many questions that pre-occupied learned and unlearned persons at that time. What began among Catholics in Europe as a spark of enquiry smouldered for a time and eventually became the sweeping and destructive conflagration known as the Reformation.

⁸⁴ For example, the thirteenth century French barons, who supported the papally deposed Frederick II, formed a pact in November, 1241, and agreed not to submit any dispute to the clergy save those of usury, heresy and marriage. See R. CARLYLE and A. CARLYLE, A History of Mediaeval Political Theory in the West, London, Blackwood and Sons, 1950, vol. 5, p. 313.

⁸⁵ For example, in 1335 Louis of Bavaria dissolved the bond of marriage between John of Bohemia and Margaret so that the latter could marry Louis' son, Louis of Brandenburg. See W. STUBBS, Germany in the Later Middle Ages, 1200-1500, New York, Fertig, 1969, p. 112.

⁸⁶ See J. BRUNDAGE, op. cit., p. 517.

⁸⁷ The Church threatened secular judges who presumed to treat marriage cases with excommunication. For example, Council of Merciac (1326), c. 10 in MANSI, XXV, col. 779; Council of Mainz (1549), cap. 76 in MANSI, XXXII, cols. 1427-1428; Council of Colone II (1549), tit. 6, cap. 3 in MANSI, XXXII, col. 1382. During the same period, the ecclesiastical courts also fought to appropriate unto themselves maximum judicial authority in "mixed" areas of law (*i.e.* matters touching on the sacred). See also L. WRENN, "The Scope of the Church's Judicial Competence", in The Jurist, 45(1985), p. 640.

⁸⁸ See J. BRUNDAGE, op. cit., p. 545.

c. The Reformation effect

The "Reformers'" teaching on marriage only served to intensify the civil usurpation of ecclesiastical authority over marriage.⁸⁹ Ulrich Zwingli (1485-1531),⁹⁰ Martin Luther (1483-1546),⁹¹ Martin Bucer (1491-1551)⁹² and John Calvin (1509-1564),⁹³ taught that marriage was a secular reality, a human institution -- not a sacrament since it predated the Church.⁹⁴ However, they held different views on its dissolution and on the precipitating grounds.⁹⁵ Luther,⁹⁶ Philip Melancthon (1497-1560),⁹⁷ Bucer,⁹⁸ Calvin⁹⁹ and Zwingli¹⁰⁰ maintained that ecclesiastical tribunals had no

⁸⁹ This also happened in some Catholic countries. For a synopsis of the various civil encroachments in continental Europe, see T. KAY, Competence in Matrimonial Procedure, pp. 10-15.

⁹⁰ See U. ZWINGLI, Commentary on True and False Religion, edited by S. Jackson and C. Heller, Durham, North Carolina, Labyrinth Press, 1981, p. 184.

⁹¹ In 1520 in *De captivitate babilonia*; see M. LUTHER, Works, vol. 36, Philadelphia, Muhlenberg Press, 1952, pp. 92-96.

⁹² See M. CHEMNITZ, Examen concilii Tridentini, Berolini, G. Schlawitz, 1861, pp. 488-493.

⁹³ See J. CALVIN, Opera quae supersunt omnia, vol. 51, Brunsvigae, Schwetschke, 1895, col. 227, reprinted in Corpus reformatorum, vol. 76, New York, Johnson Reprint Corporation, 1964.

⁹⁴ For a succinct overview of the reformers' ideas on marriage, see A. MICHEL, "La doctrine du mariage chez les chrétiens non-catholiques", in L'Ami du clergé, 61(1951), pp. 225-227. See also P. HUIZING, "La dissolution du mariage depuis le concile de Trente", in Revue de droit canonique, 21(1971), pp. 129-130.

⁹⁵ See P. FRANSEN, "Divorce on the Ground of Adultery. The Council of Trent(1563)", in Concilium, 6(1970), n. 5, pp. 90, 97.

⁹⁶ In a 1522 "sermon" entitled "The Estate of Marriage" Luther permitted divorce and remarriage in cases of adultery. The decision to proceed with the case belonged to the civil authority. If that body refused to act, the plaintiff could proceed in the action with the knowledge of the Church congregation; see M. LUTHER, op. cit., vol. 45, p. 32. In Luther's 1532 commentary on Matthew, v, vi, vii he maintained that marriage was subject to the civil ruler in all matters; quoted in J. JOYCE, op. cit., p. 236.

⁹⁷ In his 1537 *De potestate et primatu papae*; see P. MELANCHTHON, Opera quae supersunt omnia, vol. 3, Halis, Saxonum, 1836, col. 285, reprinted in Corpus reformatorum, vol. 3, New York, Johnson Reprint Corporation, 1963.

jurisdiction over marriage. On the other hand, Martin Chemnitz (1522-1586)¹⁰¹ and Benedict Carpzov (1595-1666)¹⁰² questioned whether marriage was a purely civil matter and solely the responsibility of the civil jurisdiction.¹⁰³ However, in much of Protestant Europe civil matrimonial boards became the norm and were eventually replaced by divorce courts. The role of the ecclesiastical courts in cases dealing with sexual transgressions declined precipitously in the post-Tridentine period, in Catholic and Protestant countries where local government agencies assumed the regulation of offenses against public morality.

The canonical situation was unchanged until Benedict XIV published *De synodo diocesana*¹⁰⁴ in 1755 in which he outlined the three classes of matrimonial causes: questions of the bond itself, the inseparable or civil effects, and the separable or merely civil effects.¹⁰⁵ While

⁹⁸ See M. BUCER, *Opera latina*, edidit F. Wendel, vol. XV, *De regno Christi*, 2.7.15, Paris, Presses universitaires de France, 1955, pp. 152-153.

⁹⁹ See R. CASEWELL, "Calvin's View of Ecclesiastical Discipline", in F. BATTLES et al, *John Calvin*, Abingdon, Berkshire, Sutton Courtney Press, 1966, pp. 220, 223-225.

¹⁰⁰ See G. POTTER, *Zwingli*, Cambridge, Cambridge University Press, 1976, pp. 214-216.

¹⁰¹ See M. CHEMNITZ, *op. cit.*, p. 503.

¹⁰² In his *Jurisprudentia*, lib. 2, tit. 1, del. 1, quoted in J. JOYCE, *op. cit.*, pp. 238-239.

¹⁰³ Nevertheless, some of the Reformed Churches assimilated substantial elements of the Catholic canon law of marriage into their own regimen. See W. MAURER, "Reste des kanonischen Rechtes im Frühprotestantismus", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung*, 51(1965), pp. 190-253.

¹⁰⁴ BENEDICT XIV, *Opera omnia*, vol. XI, Prati, in typographia Aldina, 1844, liber IX, caput 9, nn. 3-4, pp. 317-318.

¹⁰⁵ In a Christian marriage (at least one partner baptized) the state's power is limited to prescribing reasonable regulations and governing merely civil effects. These regulations should not infringe on divine or ecclesiastical laws. They are imposed for public order and for the general health and safety of society. The civil effects (or consequences of marriage in civil life) are many and varied and are mostly inseparable from the substance of marriage. They concern parental authority, and the spouses' right to cohabitation. Merely civil effects or civil consequences separable from the substance are: the wife's right to husband's name, to dowry and succession. These latter effects are within the power of the state in all marriages, although subject to divine and ecclesiastical laws.

the first two areas were clearly the Church's jurisdiction, the secular forum was properly competent in the last (area).¹⁰⁶ This became,¹⁰⁷ and remains,¹⁰⁸ official Church teaching.¹⁰⁹

3. BAPTIZED NON-CATHOLIC PLAINTIFFS

a. The first twenty centuries

A study of the Corpus iuris canonici enabled Nace to contend that explicit "legislation delineating the substance of the law governing the right of accusation or denunciation of marriage

See J. de REEPER, "Power of the Civil or Tribal Authority over Marriage of non-Baptized Persons", in The Jurist, 19(1959), p. 363.

¹⁰⁶ Kay details the respective competence of secular and ecclesiastical courts; see T. KAY, op. cit., pp. 19-48. The notion of the Church and State as perfect societies is the basis for a shared jurisdiction in "mixed matters" matrimonial. In this context, see J. GOLDSMITH, op. cit., pp. 16-27

¹⁰⁷ See C.I.C., cc. 1016 and 1961.

¹⁰⁸ See Codex, cc. 1059 and 1672.

¹⁰⁹ His successors also defended the rights of the Church in this matter: Pius VI (1775-1799) on August 28, 1794, condemned the 58th and 59th articles of Synod of Pistoia and vindicated the exclusive jurisdiction of the Church over the marriages of Christians; see Fontes, n. 475. Pius VII (1800-1823) denied the competence of a secular court to dissolve a "mixed marriage", October 8, 1803; see ibid., n. 477. Pius IX (1846-1878) on August 22, 1851 condemned the opinion that the contract could be separated from the sacrament; see ibid., n. 511 § 2. On December 8, 1864 he published the encyclical *Quanta cura* (see ibid., n. 542) along with a *Syllabus errorum* (see ibid., n. 543) listing eighty errors he had previously condemned. Among these errors were the notions that matrimony belonged by its nature to the civil forum, that it could be judged there and that the state could judge matters concerned with the sacraments; see ibid., propositions 44, 65-74. Leo XIII (1878-1903) in the 1880 encyclical *Arcanum* declared that marriage ought not to be regulated by the civil ruler since it is a sacrament. To maintain that even the smallest fraction of such power had been transferred to the civil ruler was absurd; see ibid., n. 580. He also addressed the same matter in his encyclical *Immortale Dei*, Nov. 1, 1885, in ibid., n. 592. Pius XI (1922-1939) in *Casti connubii* quoting Pius VI on the inability of civil law to judge any marriage case in A.A.S., 22(1930), pp. 551-552. Pius XII (1939-1958) in *Sollicitudinem nostram*, n. 468; ibid., 42(1950), p. 100. See also his talks to the Rota on the differences between the civil and ecclesiastical judicial systems; ibid., 37(1945), pp. 256-262; 38(1946), pp. 391-397 and 39(1947), 493-498. Paul VI (1963-1978) in *Causas matrimoniales*, nn. I-II in ibid., 63(1971), p. 442, repeated for the Oriental Churches in *Cum matrimonialium*, I-II in ibid., 65(1973), p. 578.

is not to be found¹¹⁰ in the Decretum Gratiani.¹¹¹ However, an important distinction is found in the Decretals differentiating between the right to "accuse" and the right to "denounce" a marriage.¹¹² Unfortunately the glossators and commentators were not always canonically accurate when writing about these rights and sometimes juxtaposed the two terms. The right to accuse was founded on the spouse's duty to contract a valid marriage, and belonged solely to one or both of the parties since no one else's right was prejudiced or impaired. The right to denounce a marriage was based on a Christian's duty, arising from the virtue of charity, to condemn sin and to prevent others from living in a sinful state (*ratione peccati*).¹¹³ As such, it was open to a Christian not specially prohibited by law from doing so. In notorious cases of invalid marriage, the diocesan bishop was expected to declare publicly that specific marriages were null.

The question concerning the right of a baptized spouse, Catholic or non-Catholic, to introduce a matrimonial cause into an ecclesiastical tribunal was not treated during the Council of Trent. However, it became the concern of some seventeenth and eighteenth century canonists.¹¹⁴ They delineated the circumstances when, and by whom, a marriage could be attacked or denounced. Their writings indicated a common policy that only the Catholic party -- baptized non-Catholics were considered to be heretics -- could impugn a union said to be invalid due to a defect of consent or (occult) impotence. Fraud, deceit, collusion or a subsequent consummation of the

¹¹⁰ A. NACE, op. cit., p. 11.

¹¹¹ See footnote 81.

¹¹² The historical development of these rights and the copious legislation concerning them can be found in the Corpus iuris canonici and the commentators; see A. NACE, op. cit., pp. 10-30. For a fuller treatment of the differences between the two rights, see A. DIACETIS, op. cit., pp. 16-30.

¹¹³ The Church claimed exclusive jurisdiction in cases involving sin. See Pope Innocent III's decree of 1204, *Novit*, in X, 2, 1, 13. This perdures in the Code of Canon Law as c. 1401, 2° in that disruptive actions in the Church's social order are subject to the procedure outlined in cc. 1717-1731.

¹¹⁴ For a list of these canonists, see A. NACE, op. cit., pp. 31-37.

marriage after an accusation of defective consent rendered the spouses' right ineffective. The canonical opinions of the time upheld the right of a Catholic third party to denounce a marriage said to be invalid due to an impedient impediment. These canonical convictions were only refinements of items found in the Corpus iuris canonici.¹¹⁵ The canonists of the time did not discuss whether a non-Catholic had the right to present a matrimonial cause before an ecclesiastical court.¹¹⁶ However, they did support the contention that as heretics, such persons were denied the prerogative to accuse or denounce a Catholic in a criminal trial before a Church court.¹¹⁷ By a corollary, it may be assumed that the common post-Tridentine canonical supposition was that baptized non-Catholics could not present a matrimonial cause.¹¹⁸

Almost a hundred years after Pope Benedict XIV's 1741 constitution *Dei miseratione*,¹¹⁹ the Congregation of the Council issued an instruction, *Cum moneat glossa*,¹²⁰ in 1840 to complement the Benedictine statutes. Neither document addressed the question of the right of a spouse to attack the validity of a marriage.¹²¹ In 1883 the Holy Office produced an instruction,

¹¹⁵ See footnote 112.

¹¹⁶ For example, see A. REIFFENSTUEL, Jus canonicum universum, vol. 5, Parisiis, Vivès, 1867, p. 497.

¹¹⁷ See C. II, q. 7, cc. 23-26; C. IV, q. 1, c. 1.

¹¹⁸ See F. CAPPELLO, "De acatholicorum incapacitate agendi in foro ecclesiastico", in Miscellanea Vermeersch, Vol. I, Roma, Universitas Gregoriana, 1935, pp. 393-396.

¹¹⁹ See footnote 63.

¹²⁰ See Fontes, n. 4069.

¹²¹ Pius IX approved particular norms for the Austrian-Hungarian Empire in 1855 in preparation for an 1856 concordat. Known as the *Instructio Austriaca*, it was a norm, *pro judiciis ecclesiasticis quoad causas matrimoniales*. Article 115 addressed the rights of persons to enter a case. See Acta et decreta Sacrorum Conciliorum recentiorum, Collectio Lacensis, vol. V, Friburgi, Herder, 1879, cols. 1286-1316.

Quemadmodum matrimonii foedus,¹ which addressed this specific question, albeit for the bishops of the Oriental rites. General legislation on the subject appeared a few months later with the instruction, *Causae matrimoniales*,² from the Congregation for the Propagation of the Faith. This was substantially similar to the Holy Office's document *Quemadmodum matrimonii foedus*. No provision was made in these four documents for the baptized non-Catholic to introduce a marriage case before an ecclesiastical tribunal. Although specific legislation had not been enacted to prevent baptized non-Catholics from introducing a cause into a tribunal, as heretics they were denied the use of the right of accusing or denouncing a marriage. Yet, an action³ was possible if the Ordinary permitted a non-Catholic⁴ or the promoter of justice to attack the marriage in matters of the public good.⁵

¹ See *Fontes*, n. 1076.

² See *ibid.*, n. 4901. Force, fear and impotence were identified as three marriage impediments which gave the spouses the exclusive right to attack the marriage; see *ibid.*, §§ 36-40, 46. Third parties retained their right to denounce the marriage in other cases; see *ibid.*, § 3.

³ For example, marriages between two non-Catholics were judged *non constat* at the Rota on July 24, 1904 (see *A.A.S.*, 1(1909), pp. 660-667) and *constat* on January 11, 1912 (see *ibid.*, 4(1912) pp. 182-186).

⁴ Since 1903 (see *Fontes*, n. 1266), "the diocesan court was competent to pass judgement on [non-Catholic marriages] in order to establish the free state of the non-Catholic party whom the Catholic desired to marry, or had already married and is now desirous of convalidating the marriage." See J. CARROLL, *The Promoter of Justice: His Rights and Duties*, Canon Law Studies, n. 101, Washington, D.C., The Catholic University of America, 1936, pp. 175, 190.

⁵ In matters of public good, the promoter of justice could impugn the marriage. Marriage impediments have been divided into *iuris privati et iuris publici*. "Impediments public by their very nature are all those which have principally, though not exclusively, been instituted for the sake of the common good and the public respect and sanctity of marriage. [...] A Rotal decision in 1928 (see SACRAE ROMANAE ROTAE, *Decisiones seu sententiae*, 20(1928), pp. 402-412 [hereafter cited as *Decisiones*]) settled the matter by stating that all impediments, with the exception of servile condition, of force and fear, and of occult impotency are public by their nature." See J. RABBITT, "Five Examples of Juridical Basis for Institution of Marriage Cases", in *The Jurist*, 14(1954), p. 143.

b. The 1917 legislation -- canon 1646

The 1917 Code of Canon Law did not explicitly exclude non-Catholics from acting as plaintiffs.¹²⁷ However, the ante-Code opinion that heretics were not ordinarily permitted to institute nullity proceedings before an ecclesiastical tribunal persisted. On April 8, 1925, the Holy Office, in a private and unpublished reply to the archbishop of Freiburg concerning non-Catholic plaintiffs, restricted their right to introduce a cause and required individual recourse for a judicial (but not in an administrative¹²⁸) procedure in a marriage involving one (who wished to be the plaintiff) or two

¹²⁷ See C.I.C., c. 1646. "Quilibet potest in iudicio agere, nisi a sacris canonibus prohibeatur, reus autem legitime conventus respondere debet." The source for this canon is listed as X, 5, 1, 11. It seems more likely to be X, 5, 1, 2.

¹²⁸ This was allowed before the Code by the Holy Office declaration of June 23, 1903, see Fontes, n. 1266. (See also Fontes, nn. 1114, 1180 and 1293.) This same rescript was used in 1925; see J. HARING, "Kodex und älteres Recht", in Theologisch-Praktische Quartalschrift, 79(1926), p. 829. It was allowed after the Code, as a private reply to the bishop of Harrisburg from the Holy Office (April 20, 1931) indicates; see "Competence of Ordinary in a Case under Canon 1990", in American Ecclesiastical Review, 85(July-Dec. 1931), pp. 308-310. See also C. PARK, "Competence of Ordinary in a Case under Canon 1990", in ibid., 86(Jan.-June 1932), pp. 68-73. See A.A.S., 36(1944), p. 94. In a 1931 decision *coram* Wynen, the Rota stated it was an administrative process; see Decisiones, vol. 23(1931), p. 252, n. 5. By permitting the non-Catholic party to accuse a marriage in certain cases in which an administrative process would suffice to establish with moral certainty the invalidity of the union, some experts argued that c. 1990 vitiated the need for recourse to the Holy See. However, on December 6, 1943 the Code commission declared that the summary process of c. 1990 was a judicial and not an administrative process. This ruling, coupled with the 1928 reply from the Holy Office, prompted some authors to state as an opinion that non-Catholics were not permitted to be plaintiffs in marriage cases without prior recourse to the Holy Office. For example, W. DOHENY, Canonical Procedure in Matrimonial Cases, Milwaukee, Bruce Publishing Company, 2nd ed., vol. 2, 1944, pp. 152-153, 162. See also J. HANNAN, "Non Catholics Petitioners and Plaintiffs", in The Jurist, 4(1944), pp. 623-626. Nevertheless, the contrary opinion found favour with the majority of canonists. For example, see P. GASPARRI, De matrimonio, vol. II, p. 293, n. 1260. Nace explains how the contrary opinion could be safely held. The kernel of his argument focuses on the use by the Holy Office of the Code commission's sole competence to interpret the meaning of a canon. See A. NACE, op. cit., pp. 101-104. See also C. PARK, "Is Judicial or Particular Interpretation Authentic Interpretation", in The Jurist, 7(1947), pp. 294-301. In opposition to Nace's view it could be said that a Code commission reply is a declaration of the commission's understanding of the canon concerned. In publishing the opinion the commission indicated its agreement with the Holy Office's declaration.

non-Catholics.¹²⁹

The adjudication (*coram* Quattrococo)¹³⁰ of the celebrated Vanderbilt-Marlborough¹³¹ case of 1926¹³² caused a negative reaction and gave rise to a delicate situation. Undoubtedly, that case prompted the questions posed to the Pontifical Commission for the Authentic Interpretation of the Code.¹³³ Could a non-Catholic be a plaintiff and introduce a cause before an ecclesiastical tribunal? Did the Holy Office enjoy exclusive competence in causes involving a non-Catholic? The commission gave a negative answer to the first question and an affirmative one to the second.¹³⁴ This proscription on non-Catholics was applicable whether the person was baptized or not. The reason was clearly stated in c. 87¹³⁵ of the 1917 Codex iuris canonici and focused on the

¹²⁹ See N. HILLING, "Eine Entscheidung des Hl. Offiziums über die kirchliche Gerichtsbarkeit in Ehenichtigkeitsprozessen zweier akatholischer Eheleute", in Archiv für katholisches Kirchenrecht, 107(1927), pp. 569-574.

¹³⁰ See Decisiones, 18(1926), pp. 280-287.

¹³¹ Consuela Vanderbilt and Charles, Duke of Marlborough (England), were baptized Anglicans and married in a non-Catholic Church in New York on November 6, 1895, separated in 1905, obtained a civil divorce in 1920 and received an affirmative judgement in the Southwark (England) tribunal on February 9, 1926 on the ground of force and fear in the plaintiff (Consuela's reverential fear), with a second instance affirmative decision at the Rota on July 29, 1926.

¹³² For the *species facti*, see A.A.S., (18)1926, pp. 501-506. See also A. TOSO, "Ad quendam S. R. Rotae sententiam adnotationes", in Jus pontificium, 1(1927), pp. 30-36.

¹³³ Benedict XV (1914-1922) established the commission in 1917 to interpret the Codex iuris canonici, and to extend or restrict the interpretation of the canons. See A.A.S., 9(1917), pp. 483-484.

¹³⁴ "I. Utrum in causis matrimonialibus *acatholicus*, sive baptizatus sive non baptizatus, *actoris* partis agere possit. II. Utrum in quibuslibet causis matrimonialibus inter partem catholicam et partem *acatholicam*, sive baptizatam sive non baptizatam, quocumque modo ad Sanctam Sedem delatis, Suprema Sacra Congregatio Sancti Officii exclusivam habeat competentiam. Ad I.: *Negative*, seu standum Codici I. C., praesertim c. 87. Siquidem autem speciales occurrant rationes ad admittendos *acatholicos* ut *actores* in huiusmodi causis, recurrendum ad Supremam Sacram Congregationem Sancti Officii in singulis casibus. Ad II.: *Affirmative*, habita praesertim ratione c. 247 § 3, et salvo praescripto c. 1557 § 1, 1°." S.C.S. Officii, January 27, 1928. See A.A.S., 20(1928), p. 75.

¹³⁵ "Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura." See C.I.C., c. 87.

"obstacle" affecting the non-Catholic. However, that was not the complete answer since a baptized non-Catholic was a subject of ecclesiastical law, had juridical status in the Church, and could, strictly speaking, take the part of an actor in a matrimonial cause.¹³⁶ In virtue of this canon, a baptized non-Catholic enjoyed a judicial condition to enforce personal rights in court.¹³⁷ Unfortunately, it was the exercise of the right¹³⁸ that was denied to such persons since an obstacle impeded their communion with the *Ecclesia Christi*.¹³⁹

Further questions seeking clarifications to the 1928 reply were addressed to the Code

¹³⁶ See A. CICOGNANI, *op. cit.*, p. 565.

¹³⁷ The contrary view that a non-Catholic was not the subject of rights in the Church was also held as a canonical opinion; see B. FAIR, "The Promoter of Justice and his Duty to Impugn the Validity of a Marriage", in *The Jurist*, 7(1947), pp. 393-394.

¹³⁸ The positive law of c. 1667 protected rights which could be fortified by an action. Canons 1646 and 1971, rather than c. 87, delineated a person's right to accuse a marriage. An ecclesiastical authority was needed to assume the exercise of rights of individuals so that they could obtain a judicial remedy for the object of the substantive right. Consequently, in individual cases non-Catholics were permitted recourse to the Congregation of the Holy Office in accordance with the 1928 response. That dicastery also claimed exclusive competence in causes involving a non-Catholic in virtue of c. 247, § 3, without prejudice to the norm of c. 1557, § 1, 1°.

¹³⁹ V. Schaff explains: [The Church] "has a care too for those outside her fold; but her first solicitude is for their conversion. If they refuse, however, to recognize her as the divinely instituted Church, then she cannot listen to their plea regarding their marriage. [...] But the baptized non-Catholic denies the divinely given authority of the Church by refusing submission to her. Why then should he not be deprived of the benefits of the Church as indicated in c. 87 and the decision of the Holy Office of 27 January, 1928. [...] It is therefore entirely fitting that the Church should not permit the question as to the validity of a marriage between two non-Catholics to be brought before her court; not even when this case might open the way for a Catholic to contract [...] marriage with one of the non-Catholics." See V. SCHAFF, "Diocesan Tribunal Lacks Competence over Marriages between Non-Catholics", in *The American Ecclesiastical Review*, 91(July-Dec. 1934), pp. 79-80. A. Cicognani explains the basis of the 1928 replies in another way: "From the above replies it appears that the Church does not absolutely deny juridical capacity of a baptized non-Catholic to appear as the plaintiff in a matrimonial cause, but states that the permission for the non-Catholic to bring the matrimonial cause as actor to the ecclesiastical tribunal must first be obtained from the Holy Office. For the Holy Office guards the doctrine of faith and morals by exclusive right, and since matrimonial causes relate to faith and morals (for there is always danger in a particular case of showing signal favour to heresy or schism), the Holy Office alone is competent to judge such matters." See A. CICOGNANI, *op. cit.*, p.565.

commission,¹⁴⁰ and to other Congregations.¹⁴¹ In 1936 the Congregation for the Discipline of the Sacraments issued the instruction *Provida*¹⁴² which pertained to judicial procedure in matrimonial causes.¹⁴³ Subsequently, there still remained a number of unanswered questions relating to the rights of baptized non-Catholics. These were the object of some responses from the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law.¹⁴⁴

c. The establishment of the right of non-Catholics

A private reply¹⁴⁵ from the Congregation for the Doctrine of the Faith on February 12, 1966, seemed indirectly to remove the legal force of the 1928 instruction embodied in article 35, §

¹⁴⁰ See *A.A.S.*, 21(1929), p. 171; *ibid.*, 22(1930), p. 196; *ibid.*, 25(1933), p. 345; *ibid.*, 26(1934), p. 494. See also E. GRAZIANI, "Limitazioni al diritto del coniuge di accusare la nullità del matrimonio", in *Il diritto ecclesiastico*, 46(1935), pp. 114-126.

¹⁴¹ See replies of the Congregation of the Sacraments to the bishop of Berlin on November 3, 1931 (the Ordinary or promoter of justice can institute proceedings without permission of the Holy See, unless it is reserved under the 1928 decree), and on November 30, 1931 (in the denunciation of an invalid marriage between non-Catholics made by a Catholic who wishes to marry one of the non-Catholic parties, recourse must be had), in *Apollinaris*, 7(1934), pp. 279-280.

¹⁴² See *A.A.S.*, 28(1936), pp. 313-361.

¹⁴³ Based upon the Code commission's 1928 answer, article 35, § 3, prohibited a non-Catholic from being a plaintiff in a matrimonial cause, while article 12 incorporated the answer to question II of that same reply and designated the competent *fora* in which the right may be used. Henceforth, cases involving one non-Catholic could be heard in the diocesan and appeal tribunals. Special cases could be referred to the Holy Office whose officials might then remand the cause to the Rota.

¹⁴⁴ See *Periodica*, 26(1937), p. 400; *A.A.S.*, 31(1939), p. 131; *ibid.*, 32(1940), p. 52; *ibid.*, 34(1942), p. 241. (For a comment on this response; see J. PENDOLA, "De iure accusandi matrimonium ad normam decl. auth. d. 27 iulii 1942", in *Periodica*, 38(1949), pp. 140-165, 235-251.) Further responses appeared in *A.A.S.*, 36(1944), p. 94; *ibid.*, 37(1945), p. 149; *ibid.*, 38(1946), p. 162. On this last response, see H. GRAZIAN, "De iure accusandi matrimonium", in *Ephemerides iuris canonici*, 2(1946), pp. 128-131, 145-148.

¹⁴⁵ See *C.L.D.*, 6(1963-1967), p. 828.

3, of *Provida*.¹⁴⁶ In this case the parties were non-Catholics. Expressed as though a canonical *dubium* did not exist, permission was requested to allow a non-Catholic to stand in court. The Congregation replied that the bishop competent to hear the case in first instance could also give the spouse the faculty to stand in court, even though the person was a non-Catholic and the case concerned nullity of marriage.¹⁴⁷ No reason was given for the decision.

Questions of clarifications on a number of issues linked with the 1928 instruction were sent to other dicasteries of the Holy See. Answers of some importance were given in 1968 and in 1970. Firstly, a private reply¹⁴⁸ from the Secretariat of State to the Apostolic Delegate to Scandinavia on August 12, 1968, stated that the apostolic constitution *Regimini Ecclesiae universae*¹⁴⁹ eliminated the need for a dispensation before a non-Catholic could be a plaintiff in virtue of *Provida*, 35, § 3. Consequently, a non-Catholic could institute proceedings for nullity of marriage before an ecclesiastical diocesan tribunal. Secondly, the archbishop of Ottawa submitted to the Apostolic Signatura a number of questions which were specific to the non-Catholic's incapacity to stand in court. In its private reply of January 1970, the Signatura replied that according to the norms in *Regimini Ecclesiae universae* non-Catholics, baptized or not, no longer needed to request permission to stand in court.¹⁵⁰ This applied at both instances (of tribunals) even though the non-

¹⁴⁶ Paul VI reformed and renamed the Holy Office by an apostolic letter, *Integrae servandae*, of December 7, 1965; see *A.A.S.*, 57(1965), pp. 952-955.

¹⁴⁷ Apparently, a number of dioceses were in possession of similar rescripts. See *C.L.D.*, 6(1963-1967), p. 828.

¹⁴⁸ Reported in *ibid.*, 7(1968-1972), p. 935.

¹⁴⁹ In 1967, by virtue of *Regimini Ecclesiae universae*, § 109, the Roman Rota gained competence to handle matrimonial matters submitted to the Holy See involving non-Catholics, except in matters of doctrine. See *A.A.S.*, 59(1967), pp. 897, 922.

¹⁵⁰ Reported in *C.L.D.*, 7(1968-1972), pp. 936-937.

baptized plaintiff was the cause of the nullity.¹⁵¹

To a question posed in plenary session on this matter, the Pontifical Commission for the Interpretation of the Decrees of Vatican II issued the following reply on January 8, 1973: the prohibition on non-Catholics, baptized or not, acting as plaintiffs in matrimonial causes was no longer in force.¹⁵² The Dean of the Rota, Monsignor B. Filipiak,¹⁵³ explained that the commission's affirmative response was the result of theological developments expressed in conciliar¹⁵⁴ and postconciliar¹⁵⁵ decrees. By way of confirmation and clarification the Signatura declared in a private reply on October 31, 1977, that a non-Catholic possessed the "right" to stand as a plaintiff in a matrimonial cause without need of recourse to the Holy See.¹⁵⁶

¹⁵¹ A private reply to the bishop of Augsburg from the Signatura on June 23, 1970, reported in *Archiv für Katholisches Kirchenrecht*, 139(1970), p. 175.

¹⁵² "Utrum, attentis decretis Concilii Oecumenici Vaticani II, atque prae oculis habitis Constitutione Apostolica *Regimini Ecclesiae Universae*, diei 15 augusti 1967, et Litteris Apostolicis *Causas Matrimoniales*, diei 28 martii 1971, vigeat adhuc responsum S.S.C.S. Officii diei 27 ianuarii 1928, et art. 35 § 3 Instructionis S. Congregationis de disciplina Sacramentorum *Provida mater*, diei 15 augusti 1936, vi cuius acatholici, sive baptizati sive not baptizati, actoris partes agere in causis matrimonialibus nequeunt, nisi de licentia S. Congregationis pro Doctrina Fidei, singulis in casibus impetranda. Resp. *Negative*, seu amplius non vigere." See *A.A.S.*, 65(1973), p. 59.

¹⁵³ See B. FILIPIAK, "De jure acatholicorum accusandi matrimonium", in *Monitor ecclesiasticus*, 99(1974), pp. 84-88.

¹⁵⁴ *Unitatis redintegratio*, §§ 3 and 12 in *A.A.S.*, 57(1965), pp. 92-94, 99-100; *Directorium ad ea quae a Concilio Vaticano Secundo de re oecumenica promulgata sunt exsequenda*, § 19, in *A.A.S.*, 59(1967), p. 581.

¹⁵⁵ They are: *Integrae servandae* and *Regimini Ecclesiae universae*, as well as *Matrimonia mixta*, March 31, 1970 (see *A.A.S.*, 62(1970), pp. 257-263) and *Causas matrimoniales*.

¹⁵⁶ Reported in X. OCHOA, *Leges ecclesiae*, vol. 5, Roma, Commentarium pro Religiosis, 1980, n. 4536.

d. The 1983 legislation

Canons 1646¹⁵⁷ and 1960¹⁵⁸ of the 1917 Codex iuris canonici were modified and promulgated in the 1983 Codex iuris canonici as cc. 1476¹⁵⁹ & 1671¹⁶⁰ respectively. The revised canons show very little change. The *coetus* responsible for the revision of this part of the Code held a number of meetings between 1966 and 1972.¹⁶¹ It appears that c. 1646 was revised by the group during the February/March 1967 meeting, while c. 1960 was reviewed during the March 1970 assembly.¹⁶² The spirit of Vatican II was to be the basis or general principle underlying the improvements. Unfortunately, the reports of the revision process are sparse and not annotated with specific references to conciliar documents.¹⁶³

At the February/March 1967 meeting the *coetus* acknowledged that a non-baptized person could not at that time be a plaintiff in a matrimonial cause. Reference was then made to a proposal put forward by the committee on the *Lex Ecclesiae fundamentalis*, namely, that if non-baptized persons were to seek the judicial ministry of the Church, they should be admitted. The *coetus* on procedural law agreed *a fortiori* that baptized non-Catholics should be able to do likewise.¹⁶⁴

¹⁵⁷ See footnote 127.

¹⁵⁸ "Causae matrimoniales inter baptizatos iure proprio et exclusivo ad iudicem ecclesiasticum spectant", in C.I.C., c. 1960.

¹⁵⁹ "Quilibet, sive baptizatus sive non baptizatus, potest in iudicio agere; pars autem legitime conventa respondere debet." See Codex, c. 1476.

¹⁶⁰ "Causae matrimoniales baptizatorum iure proprio ad iudicem ecclesiasticum spectant." See *ibid.*, c. 1671.

¹⁶¹ See Communicationes, 2(1970), pp. 181-191; 4(1972), pp. 59-72.

¹⁶² See *ibid.*, 2(1970), pp. 181-182.

¹⁶³ See *ibid.*, p. 184, n. 9.

¹⁶⁴ See *ibid.*, p. 185.

Acknowledging that the current discipline of requiring non-Catholics to seek permission from a Roman dicastery before introducing a matrimonial cause would be difficult to retain in the new schema,¹⁶⁵ the *coetus* adopted the principle that the revised Code should not place a limitation on an individual's legal ability to impugn a marriage before an ecclesiastical court. This attitude was reflected in the schema *De processibus*, and c. 1646 was amended to permit this right to all non-Catholics. The group cited the good of persons and a wish for judicial clarity as the rationale for their position.¹⁶⁶ In 1976 the schema *De processibus* was distributed for consultation and comment.¹⁶⁷ The former c. 1646 was numbered 82 and stated: "Anyone, whether baptized or not baptized, is able to act in a trial; the accused party who has been legitimately cited must respond."¹⁶⁸

There is no reference to c. 1960 in the pre-schema working party reports. The first mention of it is found in the 1976 schema itself. Article 50 of the *praenotanda* refers to it and the removal of the word "exclusive" when alluding to the ecclesiastical judge's "proper and exclusive" right to hear marriage causes. The *coetus* reasoned¹⁶⁹ that the word "exclusive" had already been deleted from article I of the 1971 *motu proprio Causas matrimoniales*.¹⁷⁰ The revised canon (No. 335) was thus

¹⁶⁵ See *ibid.*

¹⁶⁶ See *ibid.*, p. 189.

¹⁶⁷ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Schema canonum de modo procedendi pro tutela iurium seu de processibus, [Romae], Typis polyglottis Vaticanis, 1976, xx-96p. (hereafter cited as De processibus).

¹⁶⁸ "Quilibet, sive baptizatus sive non baptizatus, potest in iudicio agere; reus autem legitime conventus respondere debet." See *ibid.*, c. 82.

¹⁶⁹ See Communicationes, 8(1976), p. 193.

¹⁷⁰ It appears that the word "exclusive" was first used in a canonical text when speaking of the ecclesiastical judge's right as recently as the 1917 Code. Of the 13 sources listed as fontes to c. 1960 in that Code, not one uses the word "exclusive" when referring to the right of the ecclesiastical judge to hear marriage causes; see C.I.C., c. 1960. Although not listed as sources, Clement V's *Saepe* and Benedict XIV's *Quamvis* and *Dei miseratione* do not use the word either. Of the four

rephrased: "Marriage causes of the baptized belong by proper right to the ecclesiastical judge".¹⁷¹

Following the worldwide consultation, the 1976 schema was revised. The *coetus* adopted the suggestion that in the heading of *caput I, titulus IV* of the schema the word *reus* be replaced by the "softer" term *pars conventa*.¹⁷² The proposed canon was discussed at the May 1978 meeting. Some consultors were content to accept the canon as it appeared in the 1976 schema with the omission of the words concerning the right of non-baptized persons to approach the Church in marriage causes, since the matter concerned indirect subjection to the Church of non-members. However, the consultors were cognizant of the 1973 decision of the Pontifical Commission for the Interpretation of the Decrees of Vatican II acknowledging the right of the non-baptized to approach the Church in such matters.¹⁷³ The majority of consultors then rejected a proposal that the phrase *nisi lege prohibeatur* be added to the proposed canon, and the canon was accepted as it was written in the schema.¹⁷⁴

At a meeting held on March 28, 1979, the *coetus* reviewed the proposed c. 335 and deleted the words *et exclusivo* as they appeared in the 1917 Code. In explaining its position, the committee stated that the words "and exclusive" added little to the canon and could be ecumenically contentious.¹⁷⁵

sources listed in the 1983 Code as fontes to c. 1671 only two, (the 1936) *Provida mater*, 1, § 1, and (the 1950) *Sollicitudinem nostram*, c. 468, use the term "exclusive"; see *Codex*, c. 1671.

¹⁷¹ "Causae matrimoniales baptizatorum iure proprio ad iudicem ecclesiasticum spectant", in *De processibus*, p. 77.

¹⁷² See *Communicationes*, 10(1978), p. 212.

¹⁷³ See footnote 152.

¹⁷⁴ See *Communicationes*, 10(1978), p. 265.

¹⁷⁵ See *ibid.*, 11(1979), p. 256.

In the 1980 schema, the original c. 1646 appeared as c. 1428 with the words *pars conventa* substituted for *reus*. The original c. 1960 became c. 1623 and remained unaltered from its 1976 form.¹⁷⁶ These canons received no comment in the 1981 Relatio.¹⁷⁷ When the 1982 Schema novissimum was published, the proposed canons remained textually unchanged.¹⁷⁸ The canons were not modified during the papal revision and were promulgated in their present form in 1983.¹⁷⁹

Conclusion

The consideration of the competence of the Church and State in matrimonial matters is in itself an extensive sphere for analysis, not to mention the history of the relations between the ecclesiastical and secular governments. What appears here is but a summary sketch showing the historical development of ecclesiastical courts. The ecclesiastical regulations concerning marriage grew out of the political situation in which the Church existed, and were based on its doctrinal teachings, in particular its developing understanding of the sacramentality of marriage as well as the causes leading to nullity of marriage.

¹⁷⁶ See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Schema codicis iuris canonici iuxta animadversiones S.R.E. cardinalium, episcoporum conferentiarum, dicasteriorum curiae Romanae, universitatum facultatumque ecclesiasticarum necnon superiorum institutorum vitae consecratae recognitum, Romae, Libreria editrice Vaticana, 1980, p. 358.

¹⁷⁷ ID., Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis, Città del Vaticano, Typis polyglottis Vaticanis, 1981, 358p.

¹⁷⁸ Save for their enumeration: cc. 1428 became 1476 and 1623 became 1671. See ID., Codex iuris canonici. Schema novissimum post consultationem S.R.E. cardinalium, episcoporum conferentiarum, dicasteriorum curiae Romanae, universitatum facultatumque ecclesiasticarum necnon superiorum institutorum vitae consecratae recognitum, iuxta placita patrum commissionis deinde emendatum atque Summo Pontifici praesentatum, e Civitate Vaticana, Typis polyglottis Vaticanis, 1982, pp. 259, 289.

¹⁷⁹ See footnotes 159-160.

Some hold that during the first millennium of the Christian Era, the bishops recognized and accepted the jurisdictional power of the state in matrimonial affairs.¹⁸⁰ Such statements need to be nuanced and supported by arguments other than those derived from silence. Although few details of the procedures in matrimonial causes during the first millennium have survived, they were the foundations on which later jurists built. Popes Clement V and Benedict XIV provided the Church with a summary and a judicial form for use in its courts when dealing with matrimonial matters. Today these forms remain substantially unaltered. It is evident that from its earliest days the Church favoured a collegiate process of some sort, either deliberative or consultative, when rendering a judgement on the validity of a marriage. No doubt this procedure has its genesis in the Scriptures¹⁸¹ and the praxis of various secular laws with which it was involved. While ecclesiastical records of matrimonial causes are very scarce before the 1500s it does seem that both before and after that date the Church was more involved with legislating for moral matters than in judging causes of invalid marriage.

The Reformation period brought contentions that the Church acted in matrimonial affairs solely as the vicar of the civil ruler. While the reformers referred to various enactments of the Roman emperors to legitimize their opinions, they did not appear to take cognizance of the statement of Constantine who recognized the Church as a society *sui iuris* with real jurisdiction in spiritual matters. Truly, the Church throughout history has acted in legal matters on behalf of various States, not solely and primarily as a delegate of those entities, but in any way it could act because of its own responsibility for sacred matters and its members.

¹⁸⁰ See H. CROUZEL, "Divorce et remariage dans l'Eglise primitive", in Nouvelle revue théologique, 98(1976), pp. 912-913. See also E. SCHILLEBEECKX, Marriage: Human Reality and Saving Mystery, London, Sheed and Ward, 1978, p. 272.

¹⁸¹ For example see Mt. 18: 15; and I Tim. 5: 19 as well as parallel and associated texts in both the Old and New Testaments.

In hindsight, it was unfortunate that in the post-Reformation age full membership of the Catholic Church seemed more important than the validity or invalidity of a sacramental marriage between baptized non-Catholics and their inability to have the matter adjudged by the Church. However, the request for a nullity investigation by baptized non-Catholics was inextricably linked with personal faith, conscience and historical circumstances. It was not surprising then, that both the Church and baptized non-Catholics paid little attention to this matter until recently.

The revised canons reflect the spirit and the decrees of Vatican II. While many Christians still have an imperfect communion with the Catholic Church, they are fully incorporated into the *Ecclesia Christi*. Since the Catholic Church most clearly manifests the Church of Christ in the world, it has the responsibility of judging the existence of a valid sacramental marriage for any member of the *Ecclesia Christi*, and indeed the marriages of the non-baptized. The ecclesiastical judge's loss of exclusivity in judging marriage causes is really no more than the loss of a word, unless deference is being made to those other ecclesial communities that preserved and use some aspects of the Church's formal procedure in matrimonial causes. The Church of England is a case in point. The next chapter will investigate nullity of marriage in the Church of England.

CHAPTER FOUR

THE CHURCH OF ENGLAND AND NULLITY OF MARRIAGE

Any reflection on nullity of marriage in present day England must begin with a study of the canon law and practice of the Catholic Church in matrimonial causes in pre-Reformation England. In post-Reformation England, however, the Church of England's canon law and ecclesiastical marriage courts must be examined in terms of the distinctive affiliation existing between the State and its established and protected Church, the latter being generally subject to the legislative supremacy of Parliament and to the executive and judicial supremacy of the Crown. This alliance can hardly be possible and acceptable to both the State and the Church of England unless it is presupposed that both the law and the State are Christian.

An examination of these matters, albeit in summary form, will show either a continuance or a diminution of divine and ecclesiastical laws and Catholic practices legislated by Parliament and the Church of England following the vicissitudes of the Reformation.

1. CIVIL ECCLESIASTICAL LAW IN ENGLAND

a. Ecclesiastical jurisdiction until 1532

The laws of England may be classified into two kinds: the unwritten (or common) law and written (or statute) law. In pre-conquest Britain, statutes of King Edgar III (944-975) and King Canute (1020-1034) prescribed the presence of a bishop (or his delegate, an archdeacon, in some of the lower courts) when the county and borough courts were in session. Justice was administered by the secular authorities tempered by the episcopal presence and, when warranted, by ecclesiastical

law.¹ Important ecclesiastical cases, however, were decided in synods without secular interference.

King William I (1066-1087) established separate ecclesiastical and secular courts and a dual system of jurisdiction.² In a document entitled Episcopal Laws, circa 1072, episcopal courts³ were "instituted" to render judgements on all spiritual matters in accordance with universal and particular canon law rather than according to secular legislation.⁴ He did not create the judicial functions which were exercised in those courts; since the ecclesiastical courts derived their power from the *Ecclesia* -- their jurisdiction was received not from any secular power, but as an intrinsic right ensuing on the Church's divinely given authority over the sacraments. Moreover, the Church secured its coercive support elsewhere. Notwithstanding sporadic minor skirmishes and an occasional major conflict between Church and State, William I's ordinance held good for many years.⁵

The monarch and English Christians generally accepted and acknowledged the principle that they were subject to the Church's legislator(s) and its laws in spiritual (and related) matters. Both the ecclesiastical and secular legal systems were operative and the former was respected and

¹ See C. STEPHENSON and F. MARCHAM, Sources of English Constitutional History, vol. I, New York, Harper and Row, 1972, pp. 19-23.

² However, King Henry I (1100-1135) reunited the civil and ecclesiastical courts. "This revival of the old union was ill relished by the clergy. Under the guidance of Anselm, Archbishop of Canterbury, they evinced their disapproval; and in their synod at Westminster (3. Hen. I), they ordained that no bishop should attend the discussion of temporal causes (*ne episcopi saecularium placitorum officium suscipiant*). This dissolved the union." See E. PENNINGTON, loc. cit., p. 214.

³ Soon after the Norman Conquest of England in 1066 the dioceses were divided into archdeaconries each with its own court modelled after that of the sheriff's court. See E. PENNINGTON, "Christianity and Law", in Anglican Theological Review, 29(1947), p. 211.

⁴ See A. ROBERTSON, The Laws of the Kings of England: From Edmund to Henry I, Cambridge, University Press, 1925, pp. 234-235.

⁵ For examples, see J. BOURQUE, op. cit., pp. 64-66.

defended by the Crown because it was the law of God and his Church. However, in 1532 King Henry VIII (1509-1547) disturbed the *status quo* by issuing a statute which forbade any person from having recourse to the Holy See in any matter.⁶ Matrimonial causes and divorce were specifically mentioned in the ordinance. With this legislation the disavowal of papal authority in England began.

b. The statutes of 1533 and 1534

What was the status of canon law in view of the 1532 act? The ruling had transferred ecclesiastical supremacy from the pope to the king in matters of appeals. As a result, canon law now assumed a subsidiary role to English law.⁷ In 1533 a statute⁸ was issued in "response" to a resolution passed by the clergy assembled in Convocation at which they had "asked" for an examination and a judgement concerning the current condition of all ecclesiastical laws.⁹ In summary, the 1533 act legislated that any future Convocation would meet only with royal permission; that all future ecclesiastical laws could be enacted and executed only with royal assent; that canon law was to be reviewed by a thirty-two person commission appointed by the king for that purpose. The commission had a statutory mandate to advise him on the laws that were to be abrogated or retained. (Canonists and historians disagree whether Henry intended to revise the Corpus iuris canonici or just the provincial ecclesiastical law.) Furthermore, the act (§ 7) prescribed that existing ecclesiastical laws would retain their force of law until the commission had reported

⁶ 24 Henry VIII, c. 12. See Statutes at Large, vol. 2, London, Mark Basket, 1770, pp. 177-179 (hereafter cited as Statutes). Now known as the Ecclesiastical Appeals Act 1532.

⁷ The term, "the King's Ecclesiastical Laws of the Church of England" made its first appearance in 1535 in 27 Henry VIII, c. 20 § 1. See *ibid.*, p. 235.

⁸ 25 Henry VIII, c. 19. See *ibid.*, pp. 189-191. Now known as the Submission of the Clergy and the Restraint of Appeals Act 1533. An earlier act of the same year, 25 Henry VIII, c. 14, mentioned that many canons were contrary to the king's prerogative. See *ibid.*, p. 187.

⁹ May 15, 1532. The provincial synods of the two ecclesiastical provinces, Canterbury and York.

to the king. In subscribing to the statute, the clergy "accepted" the position that canonical laws were now binding on them but only because of the king's licence and authority.¹⁰

In another 1533 statute¹¹ the king postulated his "adoption theory" which maintained that canon law had been operative in his realm not because of papal authority but from the choice of the populace to accept and live by those laws. Since canon law had been adopted and accepted by the English people in the past, it would continue to be accepted by them in the future. Henry VIII resolved the difficulty associated with the national reception of canon law by claiming for himself the position held by the pontiff. By espousing the adoption theory, many people were "helped" to see a continuity between pre- and post-Reformation canon law, as well as an "undisturbed" continuation between the pre- and post- 1532 Church in England.

Through a 1534 ordinance, the king declared himself head of the English Church.¹² By virtue of that act, Henry VIII became "the source and font" of canon law in England, and the pre-Reformation canons retained their force as long as they were not contrary to the monarch's prerogative and other laws. Hence, the new national ecclesiastical law of England derived its authority solely from the king's majesty, and in that form was sequentially binding on the English

¹⁰ In this act (combined with 24 Henry VIII, c. 12) the King adopted for himself the maxim, *rex in regno suo est imperator*. He assumed the role and functions of the late Roman emperor as outlined in the *Corpus iuris civilis*. One aspect of this function was that of "overseer of external matters" concerning the Church, and on the basis of Roman public law such matters belonged to the king and not to the bishops. For a scholarly, if somewhat pro-regal article on this matter, see W. ULLMANN, *Jurisprudence in the Middle Ages*, London, Variorum Reprints, 1980, article XII, "This Realm of England is an Empire", pp. 175-203. For a simpler and somewhat less subtle work, see R. PORTER, *The Crown & The Church*, London, Church Literature Association, 1977, 18p. For a more reasonable interpretation, see W. HOLDSWORTH, *A History of English Law*, seventh revised edition, vol. I, London, Methuen, 1956, pp. 588-598.

¹¹ 25 Henry VIII, c. 21. The act concerns Peter's Pence and Dispensations. See *Statutes*, vol. 2, pp. 194-200.

¹² 26 Henry VIII, c. 1. See *ibid.*, p. 203.

people. Canon law was transformed into civil ecclesiastical law and through other statutory enactments it came to be known as customary law. In effect, these acts severed canon law from its true source and authority and the papal office seemingly had no legal jurisdiction in the realm.¹³

c. The post 1535 situation

Because King Henry VIII did not appoint a commission to examine the ecclesiastical laws as was provided in the 1533 act, a similar statute was enacted in 1535.¹⁴ Once again no appointees were named. Parliament promulgated another bill in 1543¹⁵ empowering a thirty-two member board with authority to review ecclesiastical laws and to formulate new canons for submission to the sovereign. A commission was eventually appointed and the civil ecclesiastical law was revised in some form; but for an unknown reason the king withheld approval of the new canons.¹⁶

Edward VI (1547-1553) succeeded Henry VIII. In 1549 an act was passed establishing a new thirty-two member commission to examine the ecclesiastical laws.¹⁷ Although there was some progress in formulating new canons, no royal or parliamentary decision was made on the status of pre-Reformation canon law. Catholic Queen Mary (1553-1558) then ascended the throne. Together with her husband Philip of Spain, they restored the communion between England and the Apostolic

¹³ This was confirmed by a 1536 statute, 28 Henry VIII, c. 10. See *ibid.*, p. 254.

¹⁴ The act has no title; it is referred to as 27 Henry VIII, c. 15. See *ibid.*, p. 234.

¹⁵ 35 Henry VIII, c. 16. See *ibid.*, p. 366.

¹⁶ Political expediency seems the most plausible motive, since Henry VIII was engaged in common pursuits with the Catholic emperor and was perhaps unwilling to risk precipitating a religious war with a political ally. See L. DIBDIN and C. CHADWYCK HEALEY, English Church Law and Divorce, London, John Murray, 1912, pp. 4-8.

¹⁷ 3 & 4 Edward VI, c. 11. See Statutes, vol. 2, p. 435.

See. In 1554 the act of reconciliation was performed by Cardinal Reginald Pole, papal legate and the last Catholic Archbishop of Canterbury. The act was part of a lengthy statute¹⁸ which also repealed the anti-Catholic laws of Henry VIII and Edward VI. When Elizabeth I (1558-1603) became queen, the first statute¹⁹ of her Parliament repealed part of the aforementioned act of Philip and Mary²⁰ and restored some of the legislation and regimen established by Henry VIII and Edward VI. During Elizabeth's reign and that of her successor, King James I (1603-1625), no full scale revision of the civil ecclesiastical law established by Henry VIII took place.

What is the force and status then of the pre-1533 canon law? Many post-Reformation English ecclesiastics and lawyers supported the "adoption" or "reception" theory. Perhaps its greatest proponent in recent times was Dr. W. Stubbs (later bishop) of Oxford whose views found formal endorsement in an 1883 report composed by a royal commission which had been established to inquire into the workings of the ecclesiastical courts.²¹ Nevertheless, Cambridge professor F. Maitland's²² masterly work on the subject, showed the "adoption" theory to be fallacious. There is no doubt that the supremacy of the pope and the binding force of the universal

¹⁸ 1 & 2 Philip and Mary, c. 8. See *ibid.*, pp. 473-482.

¹⁹ 1 Elizabeth 1, c. 1. See *ibid.*, pp. 517-522 [printed as 517-514]. Now known as the Act of Supremacy 1558.

²⁰ This act was totally repealed in 1863 by 26 & 27 Victoria, c. 125 (Statute Law Revision Act). See The Statutes of the United Kingdom of Great Britain and Ireland, vol. 26, London, Eyre and Spottiswoode, 1864, p. 353 (hereafter cited as Statutes U.K.).

²¹ Ecclesiastical Courts Commission: Report of the Commission appointed to inquire into the Constitution and Working of the Ecclesiastical Courts, London, Eyre and Spottiswoode, 1883, 2 vols. Dr. Stubbs' comprehensive report of the workings of the English courts before the Reformation is found in vol. 1, pp. 21-51.

²² See F. MAITLAND, Roman Canon Law in the Church of England, London, Methuen, 1898, 184p.

canon law of marriage were fully recognized and accepted in pre-Reformation England.²³ Not surprisingly, the Church of England eventually and officially rejected the "adoption" theory in a 1947 report on its own canon law.²⁴

The 1533 act²⁵ prescribed that the Church of England alone could enact canon law subject to the control of the sovereign, but not of Parliament. Taken with the 1534 act,²⁶ this created a constitutional position which remains essentially unaltered down to the present. Henry VIII and Parliament gave statutory vigour to the canon law in use at that time. After the Reformation, it remained in force, albeit diminished by its fragmentary acceptance and erosion by statute law.²⁷ Consequently, England retained its link with the *ius commune* of the Church Universal although the juridical coupling with Rome had been severed. Since Parliament has not wholly repealed that body of law, those laws still have legal force within the kingdom to the degree they have not been modified or abrogated. Hence, in trying to ascertain the status of a general or particular law, the notions of desuetude or contrary custom must be taken into consideration and argued in the secular

²³ For some attempted refutations and eventual acceptance of Maitland's conclusions, see F. CREMIN, "Canon Law in England: A Recent Admission", in The Irish Theological Quarterly, 18(1951), pp. 39-41. According to H. Davies "it is impossible that future research will invalidate the positive conclusions of Maitland." Quoted in W. HOLDSWORTH, op. cit., vol. I, p. 582. See also J. CAMERON, Frederick William Maitland and the History of English Law, Norman, University of Oklahoma Press, 1961, pp. 62-82.

²⁴ The Canon Law of the Church of England: Being the Report of the Archbishops' Commission on Canon Law, together with Proposals for a Revised Body of Canons, London, S.P.C.K., 1947, pp. 36-37 (hereafter cited as C.L.R.).

²⁵ See footnote 8.

²⁶ See footnote 12.

²⁷ See R. MORTIMER, Western Canon Law, London, Adam & Charles Black, 1953, p. 62. See also P. WARD, "The Past and Present of Canon Law in the Church of England", in J. BULLARD (ed.), Standing Orders of the Church of England, London, Faith Press, 1934, p. 8.

legal forum.²⁸

Today the civil ecclesiastical law, which is a constituent part of the law of England, is not considered to be a foreign law. It falls into the divisions of either common or customary (*i.e.* canon) law, and of statute or parliamentary (*i.e.* post-Reformation ecclesiastical) law. Either or both can directly and indirectly influence the nation. English ecclesiastical law is composed then of six strands:

- 1) the ecclesiastical common law of ancient usage (part of the *lex non scripta*);
- 2) the pre-Reformation canon law as found in the Corpus iuris canonici and provincial legislation;
- 3) relevant parts of the Corpus iuris civilis;²⁹
- 4) parliamentary ecclesiastical statutes from 1533 until the Enabling Act 1919;³⁰
- 5) measures of the Church Assembly after 1919 and later the General Synod;³¹ and

²⁸ A third condition is mentioned, viz., that a pre-Reformation canon must have been recognized, continued and acted upon after the Reformation. See LORD HAILSHAM OF ST. MARYLEBONE (ed.), Halsbury's Laws of England, 4th ed., vol. 14, London, Butterworths, 1975, p. 142, para. 307 (hereafter cited as Halsbury). This condition seems superfluous since all universal and particular canon law became civil ecclesiastical law by statute. Accordingly, it was recognized by and continued in the English legal system, and so it was acted upon.

²⁹ For example, aspects of the doctrine of marriage found in the Book of Common Prayer are derived from this source.

³⁰ Parliament established (9 & 10 George V, c. 76) the National Assembly of the Church of England and empowered it to pass measures. A measure is affirmed by a resolution in both Houses of Parliament and receives the royal assent after presentation to the monarch by Parliament. It has the same legal force as an act of Parliament. See The Public General Acts, London, Eyre and Spottiswoode, 1920, pp. 348-350 (hereafter cited as P.G.A.).

³¹ In 1969 the National Assembly gave way to the General Synod of the Church of England which is made up of the former body and the joint Convocations of Canterbury and York. The General Synod retains the power of the former National Assembly to pass measures and also has the power of Convocations to draft and present canons for the sovereign's assent and licence. See The Public General Acts and Church Assembly Measures 1969, vol. I, London, Council of Law Reporting, 1970, pp. 1713-1765.

6) the post-Reformation canons of the Church of England as approved by the monarch.³²

From a Catholic viewpoint the *ius commune* was affected by the 1917 Codex Iuris Canonici and may be further influenced by the 1983 Code of Canon Law. Those laws and customs of the "Catholic common law" which were not expressly provided for in these Codes were abrogated by a pope -- the same authority who promulgated the (non-customary part of the) *ius commune*.

2. NULLITY OF MARRIAGE IN THE CHURCH OF ENGLAND

a. Ecclesiastical marriage courts: before 1533

After 1072 the ecclesiastical court system developed a large field of jurisdiction which included matrimonial causes and cases. The Church considered marriage a sacrament and therefore a spiritual matter. Judgments concerning its validity fell exclusively within the competence of the ecclesiastical courts; the state did not disagree. On its behalf these courts also dealt with offenses against morals.³³ Since the temporal courts had no legal competence in substantial matters concerning marriage, questions about the validity of a union which might be incidental to suits concerning dower or inheritance³⁴ were sent to the ecclesiastical court for decision. Using the

³² By the Worship and Doctrine Measure (1974), the Church of England can order and declare its worship by canon, although doctrine remains statutorily established and is grounded in the Scriptures and in the teachings of the ancient Fathers and Councils of the Church in accord with the Scriptures and as found in the Thirty-Nine Articles of Religion, the Book of Common Prayer, and the Ordinal. See Q. EDWARDS, "The Canon Law of the Church of England: Its Implications for Unity", in Law and Justice, 96/97(1988), pp. 5-6. See also D. GRAY, "The Revision of Canon Law and its Application to Liturgical Revision in the Recent History of the Church of England", in The Jurist, 48(1988), pp. 638-652.

³³ A statute of 1285 (13 Edward 1, stat. 4, *Circumspecte agatis*) referred to the spiritual power and the punishment of fornication, adultery and similar offenses. See Statutes, vol. 1, pp. 118-119.

³⁴ The responses of the secular courts to some of these incidental questions later led the House of Lords in 1843 to assert that the presence of an ordained clergyman was necessary to constitute a valid marriage in defiance of the canon law of the Middle Ages. See W. HOLDSWORTH, op. cit.,

judgement of the spiritual court, the secular court would then rule in a case.

Inevitably, the Church Universal became concerned with the assumed prerogatives of local tribunals and the skills of their members to judge causes according to canon law.³⁵ The decisions of inferior (archdiaconal/decanal) courts were sometimes shockingly erroneous when compared with the Church's authentic teaching. Although this problem was prevalent throughout the whole Church, particular rather than general legislation addressed the issue. Thus it was that local councils prohibited archdeacons without a sound knowledge of ecclesiastical law or canonical jurisdiction from judging causes³⁶ and required them to consult the bishop before rendering a definitive sentence.³⁷ Similarly, deans were forbidden to hear matrimonial causes because they lacked the required knowledge and had no access to experts.³⁸ The appointment of the *officialis*, who was to stay in the (See) city and judge causes, reduced the judicial role of the archdeacon.³⁹ Any cleric

vol. I, pp. 621-622.

³⁵ This was to present a problem for the archdeacons who had "came to consider their jurisdiction as ordinary [...] with appeal from their courts of first instance to the court of the bishop." See A. DIACETIS, *op. cit.*, p. 24. Boniface VIII prohibited this practice insisting that the official (or archdeacon) formed one court with the bishop, see VI^o, 1, 4, 2. Abbots had also usurped episcopal functions and were judging matrimonial matters in their own courts. Lateran Council IV (1215) addressed the powers and abuses of the abbatial courts. Canon 60 prohibited abbots from hearing matrimonial cases without a special reason. See MANSI, XXII, col. 1047.

³⁶ Perhaps the local Church was not fully responsible for an uneducated clergy. On November 22, 1219 Honorius III (1216-1227) extended to secular priests the prohibition of studying (Roman) civil law, then applicable to monks and regulars, see MANSI, XXI, col. 459. Innocent IV (1243-1254) extended this prohibition to England, Wales, and Scotland. See W. ULLMANN, "Honorius III and the Prohibition of Legal Studies", in Law and Jurisdiction in the Middle Ages, [ed. by G. Garnett], London, Variorum Reprints, 1988, article XIII, pp. 177, 183.

³⁷ Council of Durham (1220), cap. *Nullius officialis*, in D. WILKINS, Concilia Magnae Britanniae et Hiberniae, a synodo verolamiensi A.D. 446 ad londinensem A.D. 1717, vol. I, Londini, R. Gosling, 1737, p. 582 (Reprint by Culture et Civilisation, Bruxelles, 1964). See also Council of London (1237), c. 23, in *ibid.*, p. 654.

³⁸ Council of Oxford (1222), c. 20, see *ibid.*, p. 588 and Synodal Constitutions of an Unknown Bishop (1237), *Sequitur de matrimonio*, see *ibid.*, p. 660.

³⁹ Statutes of Archbishop Robert of Canterbury (1295), cap. 4, in MANSI, XXIV, col. 1149.

who usurped the role of the official and presumed to judge a cause was threatened with the penalties of suspension and excommunication.⁴⁰

Although the lower ecclesiastical courts appeared to have had undisputed jurisdiction in matrimonial cases in the immediate post-Conquest era, the Consistory courts of bishops and the courts of Audience asserted cognizance over these causes during the course of the second half of the twelfth century. By the latter part of the thirteenth century, each diocesan bishop had a Consistory court, over which the bishop's official, who was qualified in one or both laws, presided and judged marriage causes.⁴¹ The diocesan and archiepiscopal courts of Audience sometimes exercised concurrent, and occasionally appellate jurisdiction in marriage causes. The former adjudicated cases submitted directly to the Ordinary, while the latter acted as a first instance court on the provincial level for cases directed to the metropolitan by way of complaint.

In 1225 the lower courts were forbidden to handle these matters.⁴² It would be injudicious to say they disregarded provincial legislation and continued to judge such suits. Rather, a customary jurisdiction in matrimonial causes had been "retained" by these courts for use when hearing cases concerned with public morality, and, faced with an incidental question of an accusation of alleged nullity, the judge sometimes decided this question as in cases *sub pena nubendi*, a matter unknown in the *Decretum* or *Decretales*, and seemingly peculiar to England. This was a custom whereby people convicted of fornication abjured sexual relations under penalty of being declared married for

⁴⁰ Council of York (1367), cap. 8, in MANSI, XXVI, cols. 468-476.

⁴¹ See F. POWICKE and C. CHENEY (eds.), Councils and Synods, with Other Documents Relating to the English Church, vol. I, Oxford, Clarendon Press, 1964, pp. 85, 353, 377, 413, 718.

⁴² Synodal Statutes for an English Diocese (1222-1225), c. 42. See *ibid.*, p. 147.

any subsequent offence.⁴³ To enforce the conditional contracts in such marriages the lower courts sometimes proceeded at a later date to hear and determine suits involving the same parties. These and other cases involving incidental questions concerning validity should have been sent to the diocesan tribunal, but in some situations they were not.

In the thirteenth century, the canonist Tancredè (1185-1236) set forth the grounds for canonical nullity of marriage. They were all diriment impediments which *ipso iure* invalidated any marriage. However, this was not a taxative list, for the Corpus iuris canonici included other grounds.

Summarily taken together,⁴⁴ they were:

- 1) error concerning the person
- 2) error concerning a condition
- 3) clandestinity
- 4) consanguinity to the fourth degree
- 5) affinity and illicit *copula* to the same degree
- 6) spiritual relationship
- 7) legal relationship
- 8) crime
- 9) disparity of cult
- 10) force and fear
- 11) abduction
- 12) holy orders and solemn vows
- 13) prior bond
- 14) public honesty
- 15) insanity
- 16) impotence
- 17) nonage and
- 18) lack of or defective consent.

In a study based on surviving English ecclesiastical court records covering the latter part

⁴³ This custom seems to have been introduced in the thirteenth century and fallen into disuse by the end of the fifteenth century. See R. HELMHOLZ, Canon Law and the Law of England, London, Hambledon Press, 1987, pp. 145-155.

⁴⁴ *Error, conditio, votum, cognatio, crimen, cultus disparitas, vis, ordo, ligamen, honestas, dissensus, et affinis, si clandestinus et impos, raptave sit mulier, loco nec reddita tuto, haec facienda vetant connubia, facta retractant.* See The Church and the Law of Nullity of Marriage. The Report of a Commission appointed by the Archbishops of Canterbury and York in 1949 at the request of the Convocations, London, S.P.C.K., 1955, pp. 57-59 (hereafter cited as Nullity Report).

of the thirteenth century through to the end of the fifteenth century, R. Helmholz showed that both the grounds and the procedure in English nullity causes corresponded to those laid down in the Corpus iuris canonici.⁴⁵ From *libellus* to sentence it seemed that cases were conducted in an informal manner in open court.⁴⁶ This procedural flexibility was affected by papal legislation.⁴⁷ Helmholz's primary sources were the various diocesan (act books or) recordings of the *acta* and procedural steps required by Lateran IV,⁴⁸ and what he called "cause papers". These were prepared forms used by the parties to introduce their cause, and by the court to embody its rulings. The cause papers consisted of six separate sets of documents: (1) *libellus* (although an oral petition was often substituted and included in the acts), (2) positions (a longer version of the *libellus* stating reasons), (3) articles which were often combined with the positions and included a series of questions for the witnesses, (4) interrogatories or questions for the plaintiff's witnesses submitted by the respondent,⁴⁹ (5) witnesses' depositions, and (6) the sentence.

The parties to the suit were expected to be in court for the commencement of the action

⁴⁵ See generally, R. HELMHOLZ, Marriage Litigation in Medieval England, Cambridge, Cambridge University Press, 1974, pp. 6-24.

⁴⁶ For an example of an Ely diocesan court judging matrimonial causes and cases, see M. SHEEHAN, "The Formation and Stability of Marriage in Fourteenth Century England: Evidence of an Ely Register", in Medieval Studies, 33(1971), pp. 228-263. For examples from the archdioceses of Canterbury and York, with references to procedure in other dioceses, see R. HELMHOLZ, op. cit., p. 114-140.

⁴⁷ For a gloss on the procedure, see W. LYNDWOOD, Provinciale seu Constitutiones Angliae cui adjiciuntur constitutiones legatinae D. Othonis et D. Othobonis cardinalium et Sedis Apostolicae in Anglia legatorum, cum profundissimis annotationibus Johannis de Athona, Oxoniae, excudebat H. Hall, Academiae typographus, impensis Ric. Davies, 1679, [Facsimile printed by Gregg International, Farnborough, England 1968], pp. 79-81. Although the formal process was somewhat flexible, this procedure was nonetheless influenced by Clement V's constitution *Saepe* which permitted a summary procedure without stipulating its form, while still permitting the parties the benefit of the formal process.

⁴⁸ Notaries and recording of the *acta*, see X, 2, 19, 11.

⁴⁹ These were not given to the plaintiff before or during the suit.

and the summons was often enforced by appropriate canonical sanctions. Should the respondent not be present, after having been legitimately cited, the suit could proceed (if personal contact was impossible, the citation was read in the respondent's parish church or near the person's home). Litigants were often represented in court by clerical proctors (equivalent to our procurators). The plaintiff could posit in the *libellus* as many reasons as existed in fact and in law as grounds for the alleged nullity. The parties named at least two and usually no more than five witnesses. An unwilling witness could be forced to attend the court by a judicial decree threatening canonical sanctions for non-appearance. Witnesses gave their evidence in secret and without rules of exclusion.⁵⁰ Documentary evidence was extremely rare. Since a matrimonial cause was a contentious case, the respondent and the plaintiff could challenge each other's witnesses in open court.⁵¹ Advocates, who might also frame the articles or interrogatories, argued the legal merits of the case after all the proofs were in and before sentence was given. These "proofs", along with the interviewer's *ex officio* questions and *de fide* were most useful to the judge in rendering his decision which he declared publicly in open court while seated.

In small dioceses the offices of advocate and proctor were often undertaken in the same case by the same person, although the first duty of the advocate was to canonical and spiritual justice and not to the parties. A court official similar to the *defensor vinculi* did not exist at that time.⁵² Causes usually took between four and seven months to process and were conducted in French or English, while the *acta* were written in Latin. Few cases were appealed after a definitive sentence in first instance. Appeals from the inferior courts went to the bishop's court, and from the

⁵⁰ Witnesses appeared publicly in court to be admitted and sworn. They were questioned individually *in camera* by the judge's delegate, usually later that day.

⁵¹ At the time set for publication of the acts, the depositions were read aloud in open court. This was the first time the plaintiff and respondent heard the witnesses' evidence.

⁵² See J. DOLAN, *The Defensor Vinculi: His Rights and Duties*, Canon Law Studies, n. 85, Washington, D.C., The Catholic University of America, 1934, pp. 1-5.

episcopal court to the metropolitan court of Arches⁵³ in Canterbury or to the Chancery court in York, and, if required, to the Holy See.⁵⁴

From the records⁵⁵ it seems that a declining number of nullity suits made up a minor part of ecclesiastical litigation between 1250 and 1500.⁵⁶ Reasons to support the different views for this decline may be deduced.⁵⁷ A safe opinion is that persons in the Middle Ages considered marriage to be a private affair, as demonstrated by the Church's continual urging of marriage *in facie Ecclesiae*, at least for civil effects, while recognizing the validity of marriage *per verba de praesenti vel futuro*. If the forming of marriage was a private matter in the minds of the people, its termination

⁵³ From the time of Archbishop J. Pecham (1272-1279) the court sat in the Church of Sancta M. de Arcubus or St. Mary-le-Bow giving it the name by which it became generally known in the City of London. The Church with twelve other churches formed a peculiar of the archbishop and was therefore within his immediate jurisdiction and outside the control of the Bishop of London. The judge was known as the Dean of Arches. The provincial court also sat in the same building, and from the time of Archbishop W. Warham (1503-1532) the same person was appointed chief judge of both courts and retained the title of the lesser office. See The Ecclesiastical Courts, Principles of Reconstruction: Being the Report of the Commission on Ecclesiastical Courts set up by the Archbishops of Canterbury and York in 1951 at the request of the Convocations, London, S.P.C.K., 1954, p. 8 (hereafter cited as E.C.R. 1954).

⁵⁴ This required the monarch's permission in accordance with the A.D. 1164 Constitutions of Clarendon, n. 8; see J. JOYCE, The Civil Power in its Relation to the Church, London, Rivingtons, 1869, pp. 10-14, 17.

⁵⁵ See footnote 46.

⁵⁶ For example, in Canterbury, sixty-two suits were heard during the *sede vacante* (1292-94); thirty-nine in 1373, thirty-one in 1374, and forty-seven in 1397. Between 1415 and 1507 the number of suits never exceeded twenty per year, and frequently less than ten. See B. WOODCOCK, Medieval Ecclesiastical Courts in the Diocese of Canterbury, London, Oxford University Press, 1952, pp. 83-85.

⁵⁷ Litigation was not inexpensive. For examples of costs, see *ibid.*, pp. 160-161. Although such causes could be introduced *in forma pauperum* (see X, 1, 32, 1), instances are difficult to find. Perhaps those persons living outside the See city were unable to pursue a suit for various reasons, one of which might be linked with the decline in the archdeacons' jurisdiction to hear matrimonial causes.

might have been equally so.⁵⁸ Most nullity actions were for pre-contract -- prior bond due to marriage *de futuro* and often unconsummated,⁵⁹ while others were on grounds of consanguinity and affinity,⁶⁰ impotence,⁶¹ force and fear,⁶² crime, nonage⁶³ and, in three cases, error of condition. Causes on other grounds were not found.⁶⁴

b. Ecclesiastical marriage courts: 1533-1857

Some persons theorize that the ecclesiastical courts in England carried on without a break in continuity after the Reformation. While the courts did not close down, four momentous innovations affected both the application of ecclesiastical law and the exercise of jurisdiction. Firstly,

⁵⁸ Canon 59, passed by the synod of Winchester in 1224, stipulated that only an ecclesiastical jurisdiction where the couple had the right to marry could judge the validity of a *de facto* union and not the spouses themselves. See F. POWICKE and C. CHENEY, *op. cit.*, vol. I, p. 135. Such a statement resulted in the opinion that spouses believed themselves competent to handle such matters. See also X, 1, 36, 11.

⁵⁹ The promise to marry in the future (*sponsalia per verba de futuro*) gave rise to a natural law obligation (executory contract) to marry and the parties were therefore precluded from contracting any other marriage. This could be turned into the indissoluble bond of present marriage by consummation. Before consummation, however, the espousals *per verba de futuro* could be dissolved by mutual consent. See J. BAKER, *An Introduction to English Legal History*, 2nd. ed., London, Butterworths, 1981, pp. 391-393. No doubt the presence of an invalidating impediment in one party would also prevent the enforcement of the marriage by the ecclesiastical court.

⁶⁰ With the reduction of consanguinity from the seventh to the fourth degree, by c. 50 of Lateran IV (1215), the requirements for proving this impediment became stricter (see X. 4, 14, 8). Canon 52 allowed couples within prohibited degrees established by merely ecclesiastical law to remain together (see X, 2, 20, 47).

⁶¹ Pre-1450 records from Canterbury and York show that "a group of [seven] 'honest women' were deputized by the court to inspect not the woman, but the man." See R. HELMHOLZ, *op. cit.*, p. 89.

⁶² Modern day reverential fear was not a sufficient ground in the Middle Ages.

⁶³ A marriage contracted after seven years of age was not invalid; on reaching puberty, twelve for a girl and fourteen for a boy, the marriage contract was ratified or rejected by the parties alone.

⁶⁴ See R. HELMHOLZ, *op. cit.*, p. 100.

after 1533 third instance appeals went to the king in Chancery court where a Court of Delegates (clerics, lay or mixed) was established *ad hoc* to hear the case.⁶⁵ Secondly, *circa* 1535 the royal visitors of the Universities of Oxford and Cambridge suppressed the study of canon law⁶⁶ and substituted the study of (Roman) civil law.⁶⁷ Thirdly, a 1536 act declared that the king exercised all ecclesiastical jurisdiction, and that bishops and clerics had no ordinary governance by virtue of their office or by papal appointment, but only an authority secured by licence from the Crown, thereby transforming canonical mission into regal commission.⁶⁸ Fourthly, a 1545 act allowed married laymen, who were doctors only of the civil law, to exercise ecclesiastical jurisdiction.⁶⁹ They formed themselves into a group known as Doctors' Commons. These four edicts changed the basis for competence in ecclesiastical jurisdiction and, with the reception of the *ius civile*, expanded the criteria for investigations into matters matrimonial and other options, in particular, divorce. Not surprisingly, for a short time after and undoubtedly influenced by some radical theological ideas from within and outside of the realm, Parliament⁷⁰ and some ecclesiastics seemingly pronounced

⁶⁵ 25 Henry VIII, c. 19, § 4. See Statutes, vol. 2, p. 190.

⁶⁶ See E. KEMP, An Introduction to Canon Law in the Church of England, London, Hodder and Stoughton, 1957, p. 36.

⁶⁷ The master of English legal history, Frederick Maitland (1850-1906), disagreed that continuity had been preserved. He wrote: "The academic study of canon law was prohibited. No step that Henry took was more momentous. [...] The significance of this change is sometimes overlooked [...] for the Church became a department of the State." See F. MAITLAND, op. cit., pp. 92-94. The view (of the Swiss-German theologian Thomas Erastus, 1524-1583) that the State had supreme authority over the Church gave way in the post-Reformation era to a theory of regalism which postulates that the civil authority possessed authority in spiritual matters since society was a purely human institution. Thus, spiritual power belonged in the hands of the nation and was transferred to the spiritual hierarchy who were subject to judgement and deposition by the prince or the people.

⁶⁸ 28 Henry VIII, c. 16. See Statutes, vol. 2, pp. 259-260.

⁶⁹ 37 Henry VIII, c. 17. See ibid., p. 381. For a brief description of the establishment and work of Doctors' Commons, see E. KEMP, op. cit., pp. 36-38.

⁷⁰ Civil divorce *a vinculo* was granted to Sir Ralph Sadler in 1545 (private act, 37 Henry VIII, c. 7) and to William Parr, Marquis of Northampton (private act, 5 & 6 Edward VI, c. 4) in 1552 following Archbishop Cranmer's permission; see Statutes, vol. 2, list of private acts, n.p.

divorce *a vinculo matrimonii* in cases of valid marriage.⁷¹ Indeed, valid marriages were thereafter considered to be dissoluble in cases of adultery, albeit only with the aid of Parliament.⁷²

After England's break from Rome, the ecclesiastical courts continued to use the pre-existing procedure,⁷³ the common terms⁷⁴ *divortium a vinculo* (declaration of nullity) and *divortium a mensa et thoro* (separation in cases of adultery, heresy or cruelty)⁷⁵ as well as the traditional canonical grounds as bases for pleas of nullity in matrimonial causes, except where those grounds

⁷¹ Archbishop M. Parker permitted Sir John Stawell to marry after receiving a judicial separation *a mensa et thoro* from an ecclesiastical court following his wife's adultery. After the marriage, the archbishop apparently changed his opinion. In 1572 Sir John was cited to appear in the archbishop's court and accused with cohabitation. Perhaps the most famous case was that of Hercules Fulkjambe (or Foljambe), twice married and twice divorced. After his third marriage his then father-in-law questioned the validity of that marriage and in 1602, Archbishop J. Whitgift, sitting in the Star Chamber, held that a sentence of divorce in the ecclesiastical courts did not effect a dissolution *a vinculo*, only *a mensa et thoro*. See A. WINNETT, Divorce and Remarriage in Anglicanism, London, MacMillan, 1958, p. 47.

⁷² Towards the end of the seventeenth century a practice arose of procuring divorce *a vinculo* by private act of Parliament. A bill was introduced into the House of Lords after a judicial separation (divorce *a mensa et thoro*) from the ecclesiastical court and after an action at common law to recover damages from the adulterer for criminal conversation, see *Times* (London), June 14, 1854, p. 5. Before 1715 five such bills were known in the House of Lords. Between 1715 and 1775 there were sixty, increasing to seventy-four between 1775-1800, and later to ninety between 1800-1850. See W. HOLDSWORTH, op. cit., vol. I, p. 623. One writer puts the number at one hundred and eighty-four divorces between 1715-1852. See R. O'SULLIVAN, "The History of English Marriage Law", in The Clergy Review, 29(1948), p. 227, n. 3; another quotes a figure of three hundred and seventeen between 1697-1855. See G. DUNSTAN, "Development of the Theology of Marriage in the Churches of the Anglican Communion", in Concilium, vol. 6(1970), n. 5, p. 139.

⁷³ For example, concerning the citation, which in the Anglican courts was the first stage of the trial and took the place of the *libellus* -- the first stage of the trial in decretal law; see A. BEVILACQUA, Procedure in the Ecclesiastical Courts of the Church of England with its Historical Antecedents in Roman and Decretal Law, Romae, Pontificia Universitas Gregoriana, 1956, 100p. For the probatory stage of the trial in post-Reformation English ecclesiastical courts; see R. KEVANE, Matrimonial Procedure in the Law of the Church of England and in the Code of Canon Law: A Comparative Analysis, Rome, Pontifical Lateran Athenaeum, 1957, 80p.

⁷⁴ These terms were not always correctly understood and caused confusion later among some Anglicans who supported divorce, and saw its being permitted in the pre- and post-Reformation Church as a means to obtain ecclesiastical sanction for its reintroduction.

⁷⁵ See X, 4, 19, 4-7.

had been modified or abrogated by statute.⁷⁶ The list of prohibited degrees⁷⁷ was also subject to a rigorous curtailment.⁷⁸ Like their continental European counterparts, the ecclesiastical courts in the post-1533 era were occupied primarily with the punishment of sexual immorality⁷⁹ and only secondarily with the validation and enforcement of marriage.⁸⁰ Examples from the extant diocesan records of Winchester and Norwich between 1520 and 1570 showed that fourteen nullity decrees⁸¹

⁷⁶ Those grounds not continued after the Reformation were: error concerning a condition, clandestinity, legal relationship, spiritual relationship, crime, disparity of cult, holy orders, public honesty (except in matters of pre-contract until 1753), age (after 1929) and consent except in matters of error of person, duress (*vis et metus*) and insanity (*amentia*). See Report on Nullity, pp. 57-59.

⁷⁷ At first, the break with Rome brought no change in the law. However, dispensations to marry within the degrees specified in Lv. 18 (as interpreted by Henry VIII and his advisers) were utterly prohibited in 1533 (25 Henry VIII, c. 22, see Statutes, vol. 2. pp. 200-203). In 1536 (28 Henry VIII, c. 7) fornication, and adultery, as well as marriage created affinity, see *ibid.*, p. 254. Then in 1540 (32 Henry VIII, c. 38, see *ibid.*, p. 298), it was decided that *only* the prohibitions included in Lv. 18 were to be observed in future. Thus many impediments disappeared from English civil ecclesiastical law altogether.

⁷⁸ The impediments listed in Lv. 18 were affected by Archbishop M. Parker's 1563 table of prohibited degrees (c. 99 of the 1603 canons of the Church of England) which declared void all marriages within the newly specified degrees. The table of affinity and kindred followed John Calvin's interpretation of Lv. 18 that marriage is forbidden between any couple related as closely as mentioned in that chapter. This added some fifteen degrees to those found in Lv. 18 as opposed to the literal interpretation favoured by Henry VIII and Martin Luther, see F. CROSS and E. LIVINGSTONE (eds.), The Oxford Dictionary of the Christian Church, 2nd ed., [Oxford], Oxford University Press, 1983, p. 781.

⁷⁹ See F. EMMISON, Elizabethan Life: Morals and the Church Courts, Chelmsford, Essex Record Office, 1973, pp. 1-47.

⁸⁰ See B. WOODCOCK, *op. cit.*, pp. 79-82; see also R. MARCHANT, Church under the Law, Cambridge, University Press, 1969, p. 219.

⁸¹ There were seven decrees for pre-contract covering the two dioceses. In the diocese of Norwich seven decrees were granted: one in a case of abduction, two for nonage, four resulting from affinity (one on illicit *copula*, one arising from marriage and two from spiritual relationship). No decrees were granted in either diocese on the grounds of consanguinity. Of the seven nullity decrees granted during those years in the diocese of Winchester, not one concerned a marriage solemnized *in facie Ecclesiae*. See R. HOULBROOKE, Church Courts and the People during the English Reformation, 1520-1570, Oxford, Oxford University Press, 1979, pp. 71-75.

were granted by these dioceses and were based on one of three grounds: pre-contract,⁸² force (usually linked with nonage) and an impediment of affinity.⁸³

The tomes of the civil lawyers who belonged to Doctors' Commons are a primary source on the work of the ecclesiastical courts in post-Reformation England. They show an integrity with the pre-Reformation practice in suits of nullity of marriage (except where affected by statutory provision) laid before ecclesiastical judges in the sixteenth and seventeenth centuries.⁸⁴

⁸² The primary aim of these suits was not only to annul a marriage between two parties, but also to establish the validity of the prior marriage and to secure its enforcement. A 1540 statute, 32 Henry VIII, c. 38 (see *Statutes*, vol. 2, p. 298) complained that allegations of unconsummated pre-contracts had often led to the divorce [nullity] and separation of Church marriages with subsequent issue. The act provided that in future solemnized and consummated marriage should supersede unconsummated pre-contracts. It seems the act was to preserve Henry VIII's marriage with Katharine Howard. See H. KELLY, *The Matrimonial Trials of Henry VIII*, Stanford, Stanford University Press, 1976, pp. 262-264, 273-275. The act was repealed in 1549 by 2 & 3 Edward VI, c. 23 (see *Statutes*, vol. 2, p. 422). It was not until 1753 that suits for simple contract were made unenforceable at law in virtue of a 1753 act (26 George II, c. 33); see *ibid.*, vol. 7, pp. 525-528.

⁸³ What is surprising was the paucity of suits for annulment and the number of decrees granted during those fifty years in those two parts of England. This concurs with the pre-Reformation situation. See M. SHEEHAN, *loc. cit.*, pp. 258-259, 262. See also R. HELMHOLZ, *op. cit.*, pp. 25-26, 74-76. A similar study using the extant registers of the ecclesiastical courts in various dioceses in the west of England for the years 1570-1640 produced a comparable result, namely, that the incidence of causes was minimal, and then usually they were for pre-contract. For example, in the County of Wiltshire only eight nullity cases were recorded as being entered before ecclesiastical courts between 1601-1640, of which five were for pre-contract. See M. INGRAM, *Church Courts, Sex and Marriage in England, 1570-1640*, Cambridge, Cambridge University Press, 1987, pp. 172, 176. Apparently, in the late Middle Ages few persons in England sought annulments; ecclesiastical judges rarely annulled marriages. The Reformation did not seem to cause any immediate increase in the number of suits entered before the ecclesiastical courts. Between 1660 and 1849, two hundred and ninety suits for nullity were entered before the provincial Court of Arches. Of these, one hundred and sixty-seven were for pre-contract and the remainder were mostly post-1753 cases dealing with nonage. Between 1670 and 1857 the London Consistory Court dealt with two hundred and fifty-two nullity suits: forty-five for pre-contract, one hundred and nine for prior bond, twenty-three for consanguinity, seven for impotence and sixty-six for nonage. See L. STONE, *Road to Divorce: England 1530-1987*, Oxford, Oxford University Press, 1990, pp. 425, 428.

⁸⁴ They were doctors of civil law who, initially, worked as advocates, and were later chosen to be judges of the ecclesiastical courts. The best known post-Reformation writer on ecclesiastical law was Henry Swinburne (died 1624). His work dealt with the pre- and post-Reformation law of matrimony. See H. SWINBURNE, *Treatise on Spousals*, London, S. Roycroft, 1686, 240p. [Facsimile reprint by Garland Publishing, New York, 1985]. Earlier insightful manuals written by the ecclesiastical lawyers of this period included Richard Cosin's *Apologie* of 1591, which defended the

Some aspects of the changing parliamentary legislation "enabled" the lawyers of the common law to exhibit an increasing interest in the judicial competence of the courts of ecclesiastical law,⁸⁵ particularly in the occasional practice of the ecclesiastical courts to separate parties to an invalid marriage *pro salute animarum* after the death of a spouse. Common lawyers sometimes produced writs of prohibition which prevented the ecclesiastical courts from declaring null a marriage entered into with a diriment impediment, a union which was canonically void *ab initio* since an essential condition for its validity was either missing or not fulfilled.⁸⁶ Such writs brought with them a "civil *sanatio in radice*" which averted the declaration of any offspring's bastardy resulting from a nullity of marriage decree which, perhaps more often in earlier times, prevented the issue from inheriting.⁸⁷ This proviso allayed the anxiety of the common law lawyers. Since 1604

ecclesiastical courts against attack from the common lawyers, and Francis Clarke's 1596 detailed volume on the procedure of the ecclesiastical courts. Cosin's work circulated in manuscript form for many years. It was published in Dublin in 1666 as Praxis in curiis ecclesiasticis. Clarke's work was rearranged and translated into English and published in 1685 as The Practice of the Spiritual or Ecclesiastical Courts. As the years passed, other standard texts found favour in the ecclesiastical courts as changes in marriage law were accommodated in ecclesiastical jurisprudence. For examples, see E. GIBSON, Codex juris ecclesiastici Anglicani, vol. I, London, J. Baskett, 1713, pp. 494-537 (marriage and nullity); vol. II, pp. 1020-1086 (procedure). J. AYLIFFE, Parergon juris canonici Anglicani, London, J. Walthoe, 1726, pp. 225-230 (nullity). R. BURN (1709-1785), Ecclesiastical Law, London, Woodfall and Strahan, 1763, 2 vols.

⁸⁵ In 1604 bigamy became a crime in common law (I James 1, c. 11, see Statutes, vol. 3, p. 9). In 1742, marriages of those suffering from amentia even during a lucid interval, became void *ab initio* (15 George II, c. 30, see *ibid.*, vol. 6, p. 468) and again in 1811 (51 George III, c. 37, see Statutes U.K., vol. 4, p. 366). In 1753, statutory requirement of form and disavowal of pre-contract (26 George II, c. 33, see Statutes, vol. 7, pp. 527-528). In 1835 (5 & 6 William IV, c. 54, see Statutes U.K., vol. 13B, p. 239) marriages between persons related with the prohibited degrees of consanguinity and affinity which had been voidable were made void *ab initio*.

⁸⁶ For a brief history and development of this ploy, see R. RHODES, Lay Authority and Reformation in the English Church: Edward I to the Civil War, Notre Dame, Indiana, The University of Notre Dame Press, 1982, pp. 197-200.

⁸⁷ See X, 4, 17, 6. Alexander III declared that children born prior to the solemnization of marriage, where marriage followed, should be legitimate and have equal rights of inheritance as children born after the marriage. At the Council of Merton (1234-1236), the English nobles told the clergy that English law would not accept the papal ruling. See F. POWICKE and C. CHENEY, *op. cit.*, vol. I, pp. 198-201. This secular ruling received statutory force in 1235 (20 Henry III, c. 9), see Statutes, vol. 1, p. 19. Since the matter refers to a temporal effect of marriage, this refusal to bring English law into conformity with canon law could constitute a recognition by the Church of the

the secular law courts exercised a vigilance over cases of bigamy (*ligamen*), nonage and lack of consent as vitiating the contract of matrimony. These three ecclesiastical diriment impediments, of which the statute and common law took cognizance, became known as "civil disabilities".⁸⁸ While the ecclesiastical court could declare a marriage suffering from a "(canonico-)civil disability" null at any time, the same court could pronounce a declaration of nullity only during the lifetime of both parties to a marriage allegedly invalid because of one of the other canonical disabilities -- the former diriment impediments of the *ius commune* as modified by statute. Consequently, the validity of a marriage subject to a canonical impediment became incontrovertible once one party to it was dead and by subsequent development such marriages came to be regarded as valid until annulled.

The common law lawyers, however, considered marriages entered into with a civil disability void *ab initio*. On the other hand, those marriages subject to a canonical impediment were voidable only during the lifetime of the parties. This "interference" by the courts of common law into ecclesiastical matters gave rise to a distinction between a marriage which was void *ab initio*, and one that was voidable -- a distinction unused in pre-Reformation canon law where marriage was either void or valid.⁸⁹

The common law interest in the ecclesiastical courts did not wane. In 1830 King George IV (1820-1830) ordered an inquiry into their operations. Unfortunately, the king died the same year. His successor, William IV (1830-1837) issued Letters Patent in 1830 for the same commission. Two

State's right to legislate for civil effects.

⁸⁸ Lack of parental consent (required between 1753 and 1823) and lack of form (since 1753) were later added. See W. BLACKSTONE, Commentaries on the Laws of England, vol. I, Oxford, Clarendon Press, 1765, pp. 427-428.

⁸⁹ See J. COULTER, "The Common Law Term 'Voidable': Its Use in Canonical Jurisprudence", in Studia canonica, 13(1979), pp. 474-475.

reports appeared, one in 1831 dealing with the Court of Delegates,⁹⁰ and the second one in 1832 addressing the work and competence of the Church courts. The latter study outlined the procedure used in the ecclesiastical courts. It demonstrated a remarkable fidelity to and continuity with procedure used in the Church courts in England long before the Tudor monarchs appropriated ecclesiastical jurisdiction to the Crown.⁹¹ However, on the subject of nullity of marriage, as distinct from the procedure involved, this sixty-four page report (excluding over four hundred and fifty pages of appendices) devoted only two paragraphs to the matter.⁹² This may well indicate the importance placed by the commission on nullity of marriage and its use in the legal system. There can be little doubt that nullity of marriage was a minuscule part of the work of the ecclesiastical courts by 1830.⁹³ Testamentary work was their major concern. The 1832 report maintained that the ecclesiastical courts had jurisdiction over causes both civil and temporal in nature.⁹⁴ The report

⁹⁰ The report recommended transferring appellate jurisdiction in ecclesiastical causes from the Court of Delegates to the Privy Council, "since the whole number from both the Provinces to the Delegates, for the last thirty years have been ninety-five, which gives an average of little more than three in the year." See Ecclesiastical Courts Commission: Special Report (on the Jurisdiction of the Delegates) made to His Majesty by the Commissioners appointed to inquire into the practice of the Ecclesiastical Courts in England and Wales, London, H.M.S.O., 1832, p. 5. This third instance appellate jurisdiction passed to the Privy Council in 1832 (2 & 3 William IV, c. 92, see Statutes U.K., vol. 12, pp. 956-957), and in 1833 (3 & 4 William IV, c. 41, see *ibid.*, vol. 13A, pp. 336-345) to the Judicial Committee of the Privy Council.

⁹¹ For an outline of the procedure and the competent officials, see Ecclesiastical Courts Commission: General Report made to His Majesty by the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in England and Wales, London, H.M.S.O., 1832, pp. 16-23 (hereafter cited as 1832 Report).

⁹² See *ibid.*, p. 43.

⁹³ The report recalls that twenty-six nullity decrees were granted in the Province of Canterbury between the years 1787-1789, 1807-1809 and 1827-1830. One decree was granted in the Province of York between 1827-1830. The twenty-seven decrees were given on the following grounds: nonage (11), prior bond (7), banns not published (3), affinity (2), impotence (2), insanity (1) and ground not made public (1). See 1832 Report, (appendix C), pp. 379-427.

⁹⁴ The purely civil category included "matrimonial causes for separation and nullity of marriage, which are purely questions of civil right between individuals in their lay character, and are neither spiritual nor affecting the Church Establishment." See *ibid.*, p. 12. This opinion was a significant statement since six of the fifteen Commissioners were bishops of the Church of England, one being the Primate of All England. No reason for the statement was given in the report.

recommended that all future matrimonial causes be adjudged in first instance at provincial level should the York Chancery (the provincial court) continue to function and if not, then at Canterbury. Various reasons were given for this proposition: the scarcity of causes entered before the diocesan courts,⁹⁵ the small income realized by proctors and advocates, and the financial expenses involved for a plaintiff submitting a cause to an ecclesiastical court. Other contributing reasons were the questions of legitimacy (affecting inheritance) sometimes involved in declarations of nullity suits, and the availability at the provincial level of better qualified, more experienced personnel for this work. The possibility of a trial by jury in matrimonial causes and of having the witnesses give evidence *viva voce* was also suggested.⁹⁶ While addressing the subject of nullity causes, the commission mentioned the possible extension of the ordinary tribunals' competence so as to dissolve the bond of marriage, and allow the parties to marry again but remitted the matter of divorce *a vinculo* to the wisdom of the legislature.⁹⁷

c. The statute of 1857

Marriage, matrimonial cases and ecclesiastical courts, were the topics of an 1850 royal commission. Its report, published in 1853 focused on divorce *a vinculo* and not on nullity. The majority opinion of the commission was that the offence of adultery was an adequate cause and justification for divorce *a vinculo*. Unfortunately, the commission's understanding of the traditional

⁹⁵ Of seventeen hundred cases before the ecclesiastical courts of England between the years 1827-1830 only one hundred were matrimonial causes. See E.C.R. 1954, p. 22.

⁹⁶ See 1832 Report, pp. 43-44, 73. A change in procedure was made some years later when an 1854 act (17 & 18 Victoria, c. 47, see Statutes U.K., vol. 22, p. 397) stipulated that in future evidence would be given *viva voce* in ecclesiastical courts.

⁹⁷ See 1832 Report, p. 43.

theology and canon law of marriage was deficient.⁹⁸ In 1854 a bill (subsequently withdrawn and reintroduced in 1856) addressing some of the issues contained in the 1832 report on the ecclesiastical courts and the 1853 report was proposed in Parliament.⁹⁹ Members' concerns also focused on aspects of civil and ecclesiastical jurisdiction, the abolition of Church courts and the constitution of two new secular courts to handle matrimonial suits,¹⁰⁰ property rights and matters concerning inheritance.

In 1857 the Matrimonial Causes Act¹⁰¹ transferred competence in matrimonial causes to the secular courts anticipated in an earlier act of that same year,¹⁰² and not to the provincial courts as suggested in the 1832 report. The new court, known as the "Court of Divorce and Matrimonial Causes",¹⁰³ facilitated the consolidation of the administration of the matrimonial law.

⁹⁸ Parliamentary Papers, 1852-1853: Report of the Royal Commission on Divorce and Matrimonial Causes, London, H.M.S.O., 1853, vols. 40-42. The commission was chaired by Lord Campbell. Speaking in the House of Lords, Lord Lyndhurst observed that much praise and reliance had been placed upon the 1571 Reformatio legum ecclesiasticarum in this report. See Hansard's Parliamentary Debates: Third Series, vol. 142, London, Cornelius Buck, 1856, p. 416 (hereafter cited as Hansard).

⁹⁹ The Lord Chancellor reported the fact that one joint temporal and ecclesiastical court formerly existed in the realm and that there arose a distinction between them. "The Courts Ecclesiastical were created to deal with questions having reference to the interests of the Church; but in process of time it happened -- whether by abuse, by accident or by a mixture of both, I cannot say -- that those courts came to have jurisdiction over matters which cannot, except technically, be described as of an ecclesiastical character; and it is for the remedy of abuses connected with the jurisdiction thus acquired by these courts in matters [...] matrimonial that I propose to introduce a measure." See Hansard, 144(1857), p. 422.

¹⁰⁰ Speaking to the projected legislation, members of Parliament made only passing reference to annulment, while constantly addressing the issue of divorce a *vinculo*. See Hansard, 142(1856), pp. 401-428; 144 (1857), pp. 1685-1721.

¹⁰¹ 20 & 21 Victoria, c. 85 received royal assent August 28, 1857 with legal effect January 1, 1858. See Statutes U.K., vol. 23A, pp. 435-445.

¹⁰² 20 & 21 Victoria, c. 77. Court of Probate Act received royal assent August 25, 1857 with force of law on January 1, 1858. See ibid., pp. 357-379.

¹⁰³ Known as "Probate, Divorce and Admiralty Division of the High Court" since 1873 and as "Family Division of the High Court" since 1970.

The act bestowed on the court all jurisdiction in such matters (except for marriage licences which remained the competence of diocesan bishops) then exercised by any ecclesiastical court.¹⁰⁴ Furthermore, competence in matrimonial cases and causes was transferred to the judges and lawyers of the common law jurisdiction, which, since Henry VIII's time, had been executed by the civil law judges, advocates and proctors of Doctors' Commons in the ecclesiastical courts.¹⁰⁵ Although decrees of divorce *a vinculo* were scarce in the early years of the new court,¹⁰⁶ a few suits of nullity of marriage were processed along with some cases of separation, jactitation and restitution of conjugal rights. The act also prescribed that all matrimonial causes, except divorce *a vinculo*, be adjudicated by a panel of three judges of the common law¹⁰⁷ according to the principles and rules formerly used by the ecclesiastical courts in hearing marriage suits.¹⁰⁸

¹⁰⁴ The amendments, votes and royal assent to the act are found in Hansard, 145(1857), 146(1857) and 147(1857), *passim*.

¹⁰⁵ In a 1947 lecture, The Hon. Mr Justice (now Lord) Denning pointed out that marriage law had not been taught at the (common law) Inns of Court while Doctors' Commons was in existence. It was not taught after 1857 either. Teaching on this discipline seems to have begun in 1948. See R. O'SULLIVAN, *loc. cit.*, p. 297.

¹⁰⁶ For example, 24 divorces were granted in 1858, 117 in 1859 and 103 in 1860. The lowest number granted was 23 in 1868. In 1983 147,479 were granted. See Marriage and divorce statistics. Historical series of statistics on marriage and divorces in England and Wales, 1837-1983, London, H.M.S.O., 1990, p. 114. In 1989 approximately 347,000 marriages were solemnized and 151,000 divorces were granted. See Daily Telegraph (London), December 6, 1990, p. 6.

¹⁰⁷ The Judge of the Court of Probate was one of the judges appointed to sit in this new court and was to be called the Judge Ordinary. (At an earlier stage in the bill's passage through Parliament, it was proposed that an ecclesiastic, perhaps the Dean of the Court of Arches, should be that judge, hence the use of the ecclesiastical term "Ordinary". See Hansard, 144(1857), p. 1686.) Under the 1857 Matrimonial Causes Act (see Statutes U.K., vol. 23A, p. 443) he was empowered to sit as a single judge in all marriage cases except for the dissolving or annulling of marriage. In 1860 (23 & 24 Victoria, c. 144, see *ibid.*, vol. 24B, pp. 949-951) he alone was given power to hear and determine all marriage causes and cases. Both the 1857 and the 1860 acts allowed petitioner or respondent right of appeal from one judge to a three judge court or directly to the House of Lords.

¹⁰⁸ In virtue of § 22. This section was repealed by § 226 and Sixth Schedule of the Supreme Court of Judicature (Consolidation) Act of 1925, but was in substance enacted by section 32 of that same act. See 15 & 16 George V, c. 49 in P.G.A. 1925, vol. 2, pp. 1197-1334. See also Baxter v. Baxter, [1948] A. C. 274 at p. 285 per Lord Jowitt L.C.

d. The Church of England's deference to the civil court

Between 1717 and 1852 the Canterbury Convocation remained inactive. Although it opened with each new Parliament, the monarch's or archbishop's writ immediately and successively prorogued it until it was dissolved with Parliament.¹⁰⁹ During those years, the official clerical body of the Church of England had little or no influence on public life. In 1852, the Convocation was rejuvenated and focused its attention on matters of public importance.¹¹⁰

The bishops, however, had a platform from which they could influence the passage of the Matrimonial Causes Bill since most diocesan bishops sat as Lords Spiritual in the House of Lords. Parliamentary records of the day indicated that episcopal attendance for the readings of and debates on this bill was minimal. Only two bishops -- Oxford and Exeter -- were present for the second reading.¹¹¹ While the latter professed a belief in doing away with "a system [presumably, nullity] which had been inaugurated by the wisest but most corrupt of Churches", he also dismissed the content of the 1853 report on marriage. Moreover, the bishop censured the commission who "exhibited a marvellous unfitness for the inquiry, and it was evident, that they wanted someone to tell them what was the law of God, and how the law had been carried out, not in Rome, but in a

¹⁰⁹ See Chronicle of Convocation being a record of Proceedings of the Convocation of Canterbury from November 19 1847 to February 6 1857, London, Thompson and Rivingtons, 1859, pp. iii-xi.

¹¹⁰ Records show that the lower house requested the bishops (the upper house) to consider the matter of matrimonial causes. See handwritten unpublished minutes of the meetings of the Lower House of Canterbury Convocation, Lower House of Convocation Reports 1856-1861, Church of England Records Centre Conv/LH/M, pp. 103-104. The bishops did not respond to the motion.

¹¹¹ See Hansard, 144(1857), p. 1710. However, the archbishop of Canterbury and nine other bishops were present for the actual vote (and voted) in favour of the second reading of the bill. See H. WILKINS, The History of Divorce and Remarriage for English Churchmen: Compiled from Holy Scriptures, Church Councils and Authoritative Writers, London, Longmans Green, 1910, p. 160.

purser state of the Church."¹¹² As the bill progressed through the House of Lords, the subject of nullity was hardly mentioned during the debates.¹¹³

Did the Anglican bishops give a mandate to the church courts to transfer nullity cases to the jurisdiction of the secular courts? Officially, it seemed not. As members of the upper house of Parliament and as the upper house of Convocation,¹¹⁴ the bishops had not opposed the passage of the Matrimonial Causes Act of 1857.¹¹⁵ Seemingly, nullity of marriage was not a matter of great importance since such suits were a minor part of the work load of the ecclesiastical courts, and the act included the provision that the new secular court would continue to process these causes in

¹¹² Hansard, 144(1857), pp. 1699-1700.

¹¹³ The bill finally passed the House of Lords on June 23, 1857. At the final vote, forty-six members which included the bishops of London, Bangor, Ripon, St. Asaph and Worcester were in favour of the bill. The bishops of Chichester, Durham, Exeter, Oxford, Llandaff, Rochester and Salisbury were among the twenty-four Lords who voted against it. See H. WILKINS, op. cit., p. 160.

¹¹⁴ After the Matrimonial Causes Act achieved force of law, the lower house of Convocation again addressed the topic. A discussion on divorce *a vinculo* took place on June 22, 1859. Nullity received a mention when a cleric spoke of "annulling of marriages by private statute since the Reformation", when he really meant civil divorce *a vinculo*. See Chronicle of Convocation being a record of Proceedings of the Convocation of Canterbury from June 1859 to July 1861, London, Thompson and Rivingtons, 1861, pp. 39-43. The members of the lower house expressed three concerns. Firstly, that the bishops had ignored their wish that the act be opposed. Secondly, now that the act had been passed the clergy wanted the bishops to press for a change or a repeal of the act which had impaired the sanctity of marriage by introducing divorce *a vinculo*, a practice contrary to divine law. Thirdly, the lower house wanted the bishops to compel Parliament not to act on matters of doctrine without advice from Convocation. See *ibid.*, p. 39. Also on June 7, 1860, a clergy request that the same *articulus cleri* be sent to the upper house. See *ibid.*, pp. 269-271. On June 8, 1860 the house refused this. See *ibid.*, p. 314. On February 26, 1861 it was presented by Rev. J. Joyce for transmission to the upper house as a personal *gravamen*. See *ibid.*, p. 364. Again, the bishops did not issue a formal response. In fact, official episcopal reaction following the passage of the act was negligible. Civil dissolution of marriage was not mentioned at the first (1867) or second (1878) Lambeth Conferences, the pan-Anglian convention. However, divorce was mentioned at the third conference (1888) but it had nothing to do with nullity.

¹¹⁵ A. Horstman hypothesizes the restoration of the Catholic hierarchy in England (1850) and the Anglican "high" Church movement towards Rome contributed to an anti-Catholic swell in the Houses of Parliament. A rejection of divorce *a vinculo* would be tantamount to a rejection of statute law in favour of Catholic law. See A. HORSTMAN, Victorian Divorce, New York, St. Martin's Press, 1985, pp. 46-65.

accordance with traditional (canonical and) civil law principles. Presumably no change had taken place. Both common law and civil law courts derived their competence from the sovereign and from Parliament, and in that way there was an apparent continuity between the former and the reformed practices.

3. THE CANON LAW OF MARRIAGE

a. Pre-Reformation

In addition to the "universal" law, the English Church's pre-Conquest legislation on marriage is scant. After 1070, matrimonial prescriptions were found in the canons promulgated by national and provincial councils. Diocesan synods, common during the thirteenth century, promulgated the universal ecclesiastical laws on marriage as well as the statutes of the local Church.¹¹⁶ These *dicta* were also a means of instructing the parochial clergy in the theology underlying the canon law of marriage. From the early fourteenth century until the Reformation, throughout England and in the Church generally there was no "original legislation touching marriage, but the councils of the period were to return again and again"¹¹⁷ to earlier decrees.

There was no general English ecclesiastical law on marriage distinct from that of the Roman Church.¹¹⁸ Beyond doubt marriage was accepted to be a sacrament¹¹⁹ and the matrimonial

¹¹⁶ See C. CHENEY, English Synodalia of the Thirteenth Century, [London], Oxford University Press, 1941, x-164p.

¹¹⁷ M. SHEEHAN, "Marriage Theory and Practice in the Conciliar Legislation and Diocesan Statutes of Medieval England", in Medieval Studies, 40(1978), p. 459.

¹¹⁸ See *ibid.*, pp. 417-421 (impediments); p. 422 (consent); pp. 422-425 (formalities); pp. 425-431 (betrothal); pp. 432-440 (banns) and pp. 440-451 (times, place and form of consent *per verba de presenti*).

impediments were those of the Roman Church. There were minor differences in matters associated with banns and decrees of *sub pena nubendi*.¹²⁰ The teaching on consent was not extensively developed in the synodal regulations, yet there were abundant signs to indicate its importance was presumed. An indissoluble union could be created solely by (mere) consent *per verba de praesenti*, without witnesses, without benefit of clergy and without public celebration. Binding marriage "contracts" could be made in advance of the church wedding by an exchange of consent *per verba de futuro*.

These teachings can be found in the works of the late medieval English canonists, the foremost being John Ayton (d. 1349) and William Lyndwood (d. 1446).¹²¹ The latter completed his gloss on the provincial constitutions of the archbishops' of Canterbury in 1430. Lyndwood regarded the constitutions as a supplement to the law founded upon papal decretals. Writing on marriage, its name, institution, the contract, the *bona* and the impediments, he observed in his Provinciale that these matters had been treated by Pope Innocent III and more fully by Johannes Andrea.¹²² Therefore, "to ascertain what is the English law of marriage, one is referred to the works of two Roman canonists, of whom one was *laicus et uxoratus* and the other [...] was Pope."¹²³

¹¹⁹ See c. 13, First Council of Salisbury (1215), in MANSI, XXII, col. 1110 and c. 9, Council of Lambeth (1281), in *ibid.*, XXIV, col. 409.

¹²⁰ See footnote 43.

¹²¹ Lyndwood is still one of the principal English authorities on canon law, and is recognised as such by eminent jurists of the common law even today. See Halsbury, vol. 14, p. 139, para. 304.

¹²² See W. LYNDWOOD, op. cit., p. 271.

¹²³ R. O'SULLIVAN, loc. cit., p. 220.

b. Post-Reformation

Responding to the Tudor monarchs' demands for a revision of the ecclesiastical law, Archbishop Thomas Cranmer with the aid of two continental Protestant divines, Peter Martyr and Martin Bucer, drew up a suggested Code of canons for the emerging national Church between 1551-1553.¹²⁴ Matthew Parker, Archbishop of Canterbury, and John Foxe published the Reformatio legum ecclesiasticarum in 1571 with slight textual changes.¹²⁵ A "new" understanding on marriage is proffered in the section *De matrimonio* where marriage was said to be a simple rescindable contract.¹²⁶ In addition, a new concept approximating divorce a *vinculo*¹²⁷ permitted the innocent spouse to remarry after the partner's adultery¹²⁸ and in some other situations.¹²⁹ The number of impediments was reduced to conform with contemporary statutory changes. The proposed Code also allowed for nullity of marriage which would be processed without significant alteration from the pre-Reformation procedure.

The weight of evidence counteracts the view that the proposed Code ever governed the

¹²⁴ See footnote 17. A thirty-two member commission was appointed by act of the Privy Council on October 6, 1551. See L. DIBDIN and C. CHADWYCK HEALEY, op. cit., pp. 10-11.

¹²⁵ See E. CARDWELL, The Reformation of the Ecclesiastical Laws as attempted in the Reigns of King Henry VIII, King Edward VI, and Queen Elizabeth, Oxford, University Press, 1850, lviii-344p. Being a copy of Reformatio legum ecclesiasticarum.

¹²⁶ See *ibid.*, p. 39, *De matrimonio*, cap. 1.

¹²⁷ See *ibid.*, p. 58, *De adulteriis et divortiis*, cap. 19.

¹²⁸ See *ibid.*, p. 51, *De adulteriis et divortiis*, cap. 5.

¹²⁹ A number of possibilities were listed in the section *De adulteriis et divortiis*: desertion, enmity, long absence of one spouse and ill-treatment of one spouse by the other. See *ibid.*, pp. 49-58.

practice of the Church of England in the latter half of the sixteenth century.¹³⁰ It did not receive statutory or ecclesiastical sanction or promulgation. Queen Elizabeth I rejected the work for its Calvinistic content. She also found some of its contemplated legislation contrary to the teaching and practice of the nascent Church of England. However, during Elizabeth's lifetime various canonical enactments -- not affecting marriage -- were submitted to the queen by Convocation. She either confirmed or rejected them, giving them force of law only for the duration of her life. At her death, Anglican Church legislation was in a state of confusion. In an attempt to restore order, the bishops collected in one book all those ecclesiastical laws that had been promulgated since the period of the Reformation.¹³¹ These were refined and enhanced by ecclesiastics who then presented a collection of one hundred and forty-one canons to King James I on his accession to the throne in 1603.

This collection, known as The Constitutions and Canons Ecclesiastical of 1603 -- the canon law of the Church of England -- was the product of the theological thought of three Protestant reigns and, in some aspects, dimly reflected the spirit of the Reformatio legum ecclesiasticarum. It also restated some laws of the *ius commune*. While the canons were not of themselves standards of Anglican Church teaching, they did express the mind of the Church of England on certain matters. With rare exceptions, they were mainly disciplinary or merely ecclesiastical laws designed to enforce the observance of other injunctions -- some ecclesiastical and some civil -- which existed independently of the canons. Although Convocation had already approved this new body of canon

¹³⁰ Sir Lewis Dibdin examined eight hundred and fifty parish registers and episcopal visitation records dated between 1547-1603 and concluded that remarriage during the lifetime of a former spouse was not allowed by Anglican Church authorities. See L. DIBDIN and C. CHADWYCK HEALEY, op. cit., p. 45. A similar study came to a corresponding conclusion, see A. WINNETT, op. cit., p. 39.

¹³¹ For the various enactments made until 1603, see E. CARDWELL, Synodalia: A Collection of Articles of Religion, Canons, and Proceedings of Convocations in the Province of Canterbury from the year 1547 to the year 1717, vol. I, Oxford, University Press, 1842, pp. 1-163.

law,¹³² its legal authority rested only on the monarch's approval. King James I approved the canons for himself and his successors.¹³³ Although Parliament did not confirm them, King and Church assented to them and authorized their use.

What did the new legislation have to say about marriage and nullity of marriage? Of the one hundred and forty-one original canons, eight concerned marriage directly¹³⁴ and four addressed the matter of nullity.¹³⁵ These norms had little theological significance with one exception, namely, that a valid marriage was indissoluble. Moreover, they did not specifically address the question of what constituted marriage. On the whole, the marriage canons dealt with general matters: banns or licence, age, prohibited degrees of consanguinity and affinity, and ecclesiastical registration of marriage. As for nullity, the Church of England Code specified the qualifications for judges and proctors¹³⁶ but not the grounds of nullity or the form of appeals. Some answers were found by

¹³² On June 25, 1604. See C.L.R., p. xiii. They were approved by the York Convocation in 1605-1606. See *ibid.*, p. 73.

¹³³ On September 6, 1604. See J. KENYON (ed.), The Stuart Constitution 1603-1688: Documents and Commentary, Cambridge, University Press, 1969, p. 127. The Latin form had force of law. See Halsbury, vol. 14, p. 308, n. 1.

¹³⁴ Canons 62 and 63 concerned banns of marriage. Canon 99 forbade marriage within the prohibited degrees laid down in the 1563 table of Archbishop Parker. Canon 100 required parental consent for parties under 21 years of age. Canon 101 designated those ecclesiastics who could grant dispensations. Canon 102 -- a general canon -- included the norms of cc. 62, 63, 99 and 100 and a prohibition of a marriage for one who had a matrimonial cause before the ecclesiastical court. To prevent collusion and fraud, c. 103 stipulated that before the licence to marry and a dispensation from banns were granted, the applicants must appear before the bishop's judge to prove their intentions. Canon 104 provided an exception to c. 103 for those in widowhood entering marriage.

¹³⁵ Canon 105 stated that nullity could not be given on the sole confession of the parties (thereby preventing collusion). Canon 106 ruled that a sentence for nullity was to be given only in open court after consent of the bishop (or his delegate) and only to those dwelling under that bishop's jurisdiction. Canon 107 noted in separation cases (divorce *a mensa et thoro*) that a subsequent marriage was prohibited and this stipulation was written into the decree and accepted by the petitioner before the separation was granted by court. Canon 108 concerned invalidity of sentences given by judges who disregard (Anglican) ecclesiastical laws.

¹³⁶ See canons 127-128.

having recourse to statute law.

c. The current state

Since the canons of 1603 had not been approved by Parliament, questions arose concerning their binding force. The decision handed down by Lord Chief Justice Hardwicke in a 1736 common law case resolved the dilemma.¹³⁷ In his opinion, the canons, did not *proprio vigore* bind the laity since they had not been confirmed by Parliament. However, those of ancient usage (presumably the *ius commune* prior to 1533) did bind the laity due to an antecedent obligation not arising from the canons. Furthermore, the canon law of 1603 bound the clergy since it was approved by Convocation.

Although the Hardwicke judgement was not well received, his opinion was upheld by the ecclesiastical Court of Arches in a 1753 case (Lloyd v. Owen) and by the House of Lords in 1868 (bishop of Exeter v. Marshall). Consequently, the parts of the Corpus iuris canonici not "amended" by statute law and the Constitutions and Canons Ecclesiastical of 1603 in so far as they reproduced the pre-1533 canon law as modified by particular law, indult or custom prior to the Reformation still had authoritative value and binding force for the Church of England and its members.¹³⁸

Then, in 1866 a committee appointed by the Canterbury Convocation attempted to revise

¹³⁷ Middleton v. Crofts. 2 Atkins 650, at p. 653. Quoted in C.L.R., pp. 76-77.

¹³⁸ The canons of 1603 remained intact until 1865. No alterations were made to accommodate the Matrimonial Causes Act 1857. Modifications were made to conform with changes in other statutes: in 1865 minor alterations to cc. 36-38 and 40 (ordination), in 1888 to cc. 62 and 102 (times of marriage), in 1892 addition of canon 142 which gave canonical effect to the Clergy Discipline Act of that year, in 1921 a new c. 143 (clerical representation in the lower houses of the Convocations), in 1936 to cc. 62 and 102 (times of marriage), in 1946 to c. 99 (prohibited degrees) and in 1948 a new c. 144 (new provincial court).

the 1603 canons. In 1873 it produced a report along with a series of revised canons which laid dormant until 1939 when an archiepiscopal commission was appointed to investigate canon law in the Church of England. The commission's report, The Canon Law of the Church of England, was published in 1947. There was a reluctance to answer the difficult question about the status of canons promulgated before and after the Reformation.¹³⁹ Accordingly, in an attempt to respond to those questions the members had been unwilling to answer, the planned Code contained a draft canon 8.¹⁴⁰ The draft Code reworked and updated the 1603 canons and their amendments. Each proposed canon was annotated to show its juridical and canonical pre-1533 root as far as it was possible. The Convocations of Canterbury and York continued the work of revision and published amended schemes in 1954¹⁴¹ and 1959.¹⁴² Unfortunately c. 8 did not appear in the 1959 draft or in the promulgated text, The Canons of the Church of England.¹⁴³

While the canonical revision was taking place, there were other developments. An ecclesiastical commission, established in 1949 at the request of the Convocations to study nullity

¹³⁹ See C.L.R., p. 79.

¹⁴⁰ "The Canon Law of the Church of England consists not only of this Code, meaning thereby these present Canons as added to or varied from time to time, but also of the General Canon Law, meaning thereby such provisions of the Canon Law in force in England at the passing of the Act 25 Henry VIII, c. 19 as are not expressly or by implication superseded by this Code and are by virtue of that Act still in force, so that, in the case of any divergence between this Code and the General Canon Law, the provisions of this Code shall prevail, and (until further order be taken) any dispute or question as to the content or effect of the General Canon Law may be referred to and shall, be conclusively determined by the Archbishops of Canterbury and York, after taking such advice as they may deem proper." See *ibid*, p. 108.

¹⁴¹ The Revised Canons of the Church of England Further Considered, London, S.P.C.K., 1954, 189p.

¹⁴² Canon Law Revision 1959, London, S.P.C.K., 1960, xiv-262p.

¹⁴³ The canons received royal assent in two sets: one group in 1964 and the other in 1969. They were not submitted to Parliament.

of marriage, published its report in 1955.¹⁴⁴ That commission studied the advisability of creating a process by which the Church of England might review decisions of divorce *a vinculo* made in the secular courts to see whether they could be accepted in the exercise of ecclesiastical discipline. In essence, could a decree of nullity be granted by the Church of England to a person who had previously received a civil dissolution of marriage? Two possible courses of action were outlined in the report. Firstly, that the Church of England establish an ecclesiastical court to review the evidence already presented in the secular court, to examine witnesses and if possible, to grant a decree of nullity. Secondly, to remit the review to the diocesan bishop who would decide, informally or formally with his chancellor, whether a subsequent marriage in the Church was permitted to a divorced person.

Both options were rejected by the commission. It reasoned that the first proposition required the Church to have coercive powers compelling attendance in the ecclesiastical court which the State would be unlikely to give. There would be problems with establishing, staffing and financing such a court and knowing how many plaintiffs would enter a suit. The second proposition was not supported because it would involve a subjective decision on the part of the bishop in informal situations, and the quasi-establishment of forty-three diocesan nullity courts acting on an unvarying standard of judgement based upon a detailed Code of principles in formal cases. The commission concluded that the most satisfactory solution was to impress on the Bar and on the Law Society that a decree of divorce *a vinculo* debarred the parties concerned from a future marriage in church.¹⁴⁵ It behoved lawyers and barristers to advise their clients to apply for a civil nullity decree where possible, since a party to an annulled marriage may have a church wedding after receiving

¹⁴⁴ See footnote 44.

¹⁴⁵ However, since civil marriage was introduced into England in 1836 the ecclesiastical obstacle to remarriage was effectively removed.

a declaration of nullity.¹⁴⁶

The present canon law of the Church of England is found in the canons of 1964 and 1969 with subsequent amendments.¹⁴⁷ The revised canons presuppose both the common and statute laws of England "and the general pre-Reformation Canon Law of the Western Church, except where that Canon Law has been affected by contrary statute or custom in England."¹⁴⁸ The canons, like those of 1603, are binding on the clergy in ecclesiastical matters while not obligating the laity,¹⁴⁹ except perhaps those lay persons holding office in the Church.¹⁵⁰ The seven marriage canons (B30-B36), were promulgated in 1969.¹⁵¹ They contain no provision for nullity of marriage. Canon

¹⁴⁶ See Nullity Report, pp. 41-48. Nullity in the Church of England was touched upon again in a 1971 report, Marriage, Divorce and the Church and in a 1978 report, Marriage and the Church's Task. A more extensive treatment is found in a 1983 report (see Marriage and the Standing Committee's Task: The Standing Committee's response to the motion, carried by the General Synod in July, 1981, requesting a report setting out a range of procedures for cases where it is appropriate for a divorced person to marry in church during the lifetime of a former partner, London, C.I.O. Publishing, 1983, pp. 11-24) which repeats the two options mentioned in the 1955 report and adds five other possible procedures, none of which would mirror the Roman Catholic process reported as being perhaps one of the least attractive aspects of that Church's discipline; see *ibid.*, p. 23. The matter of nullity and nullity courts remains unresolved in the Church of England.

¹⁴⁷ The Canons of the Church of England: Canons Ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969 and by the General Synod of the Church of England from 1970, London, Church House Publishing, Fourth edition, 1986, 154p.

¹⁴⁸ In the introduction to the 1969 text the metropolitans stated: "This collection of canons is not a complete statement of the laws of the Church of England. It is, in fact, a revision of the Code of Canons issued in 1603 and covers roughly the same areas of Church life, but like that Code it presupposes both the Common and statute law of England and the general pre-Reformation Canon law of the Western Church, except where that Canon Law has been affected by contrary statute or custom in England. In this it differs to some extent from the much more comprehensive Code of the Roman Catholic Church, and it follows the English secular legal tradition in its dislike of complete codification." See The Canons of the Church of England, London, S.P.C.K., 1969, p. xi.

¹⁴⁹ The original reason for this is that the laity were not represented in Convocation. For legal arguments on this subject, see Halsbury, vol. 14, p. 142, para. 308, n. 10.

¹⁵⁰ See *ibid.*, nn. 8-9.

¹⁵¹ For an exposition of and commentary on the marriage canons, see M. SAUNDERS, The Marriage Laws as found in the Canons of the Church of England, M.A. diss., Ottawa, Saint Paul University, Faculty of Canon Law, 1986, pp. 100-224.

B30:1 describes marriage as a permanent exclusive union between one man and one woman for the procreation and education of children and for mutual help and comfort. This is considered the official canonical teaching of the Church of England.¹⁵² The other matrimonial regulations in the 1969 Code refer to the capacities and incapacities for those entering marriage. These canons exhibit a fundamental dependence on and a union with the statutory enactments of the state.¹⁵³ Yet, even in these statutes, some vestige of the ancient canon law of the pre-Reformation Church can still be detected.

Conclusion

From 1533 until 1857, the canonical and civil ecclesiastical laws of marriage in England were identical because canon law mirrored successive statutory laws or, at least, deferred to those laws. However, in 1857 a clear distinction and disharmony arose between Church and State when the latter began granting divorce *a vinculo*. Since that time, the State has been reluctant to apply the marriage laws of the Church of England which in theory are its own. This could be because the general outlook of the English people on marriage is not in accord with the theory and doctrine of the established Church. On the other hand, if some would expect the State to uphold the Church

¹⁵² Another aspect warrants consideration. In 1857 Parliament legislated for divorce *a vinculo* with the right to a second marriage. The clergy were released from any obligation to perform second marriages, but were obliged to allow their churches to be used if a minister from elsewhere was prepared to witness a second marriage after divorce. The bishops responded to the 1857 act by issuing regulations in 1888 that forbade such marriages, with the proviso that the diocesan bishop could decide in the case of an innocent party. The obligation incumbent upon ministers to allow their churches to be used for second marriages was removed by statute law in 1937. In 1938 the Convocation again forbade second marriages in church and repeated the prohibition in 1957. What is apparent is a conflict of laws. On the one hand, the statute law bestows on a cleric the right to witness the marriage of divorced persons in his church; and on the other, the act of Convocation prohibits such marriages, but an act of Convocation has no force of law in the secular forum. Therefore, while the Church of England holds to the idea of indissolubility, its observance depends upon the beliefs of the individual minister.

¹⁵³ Since receiving royal assent in 1969, canon B32 has been modified to accommodate the lowering of the statutory age of majority to eighteen.

of England's teaching on marriage, it must be remembered that the Church is a product of statute law and is therefore subject to the wish of the legislator. In reality, the legislator exemplifies the will of the people expressed in the normal political mode and executed by act of Parliament in matters of doctrine and canon, but not now in worship.¹⁵⁴

From a Catholic point of view marriages between members of the Church of England are sacramental, *ex opere operato* and valid, providing no invalidating impediment or obstacle intervenes.¹⁵⁵ Do Anglicans consider marriage a sacrament? This question has been debated many times in successive theological and sociological enquiries undertaken by the Church of England. Its most recent report¹⁵⁶ on the subject states: "there is something profoundly sacramental about marriage [and it is] a means of grace."¹⁵⁷ For some persons, its sacramental character can be deduced from the liturgical marriage rites of 1662 and 1980.¹⁵⁸ Other persons may hold to the declarative content of article 25 of the Thirty-Nine Articles of Religion (1571) which asserted that matrimony is not a sacrament (of the Gospel).¹⁵⁹

Despite what some reformers claimed and many modern historians have assumed,

¹⁵⁴ See footnote 32.

¹⁵⁵ See Chapter One, footnotes 77, 78, 91 and 93. The matter was reiterated by the Holy Office in an instruction of January 24, 1877; see *Fontes*, n. 1050. As to the merely ecclesiastical requirements, c. 11 of the 1983 Codex iuris canonici applies.

¹⁵⁶ An Honourable Estate: The doctrine of marriage according to English Law and the obligation of the Church to marry all parishioners who are not divorced. The Report of a Working Party established by the Standing Committee of the General Synod of the Church of England, London, Church House Publishing, 1988, viii-100p.

¹⁵⁷ *Ibid.*, p. 12.

¹⁵⁸ See E. MOORE and T. BRIDEN, Moore's Introduction to English Canon Law, 2nd. ed., London, Mowbray, 1985, p. 86.

¹⁵⁹ See E. CARDWELL, Synodalia, vol. I, p. 99.

annulments in England were a rare occurrence in actual practice both before and after the Reformation. Since nullity suits between 1533 and 1857 exhibit a fidelity with the pre-Reformation canon law, a study of the contemporary Catholic and civil grounds can be valuable. Accordingly, the practice of the English law courts in nullity causes will be addressed in the next chapter.

CHAPTER FIVE

THE CIVIL DECLARATION OF NULLITY OF MARRIAGE IN ENGLAND AND ITS CANONICAL RECOGNITION

Since marriage is usually a public act circumscribed by civil and ecclesiastical norms, the procedures used to investigate its validity must not only have some public recognizable form, but must also be conducted by the same authority who legislates for marriage or some superior legislator. The Church of England's canon law faithfully mirrors the statutory civil provisions required to establish marriage, except in the matter of affinity which was changed in 1986.¹ Since the Church of England presently has no mechanism for investigating matrimonial validity, it accepts the competence of the civil judiciary to pronounce on the matter in cases involving its members.²

This chapter will investigate the grounds of nullity presently enshrined in English statute law. They will then be compared with Catholic canon law as outlined in the 1983 Code to help us see whether decrees of nullity granted by the secular courts to members of the Church of England might eventually be recognized and accepted by the Roman Catholic Church.

1. GROUNDS OF NULLITY: ENGLISH LAW

Between 1857 and 1971, the law and practice in nullity cases were governed by the

¹ See footnote 18.

² The Church of England accepts a civil decree of nullity as *ipso facto* enabling a second marriage to be conducted in church. An Anglican cleric is not free to exercise a discretion to bar a marriage from taking place when an annulment has been granted, whether the prior marriage was void or voidable. See Marriage and the Standing Committee's Task, p. 19.

ecclesiastical courts' legislation, procedure and customs, by statute³ and by rules of the civil court. Initially, the grounds on which annulments could be sought were partly both statutory and ecclesiastical in origin; but when the Nullity of Marriage Act took force on August 1, 1971, questions concerning matters of nullity became entirely governed by statutory provision.⁴ Although they were previously known and used, the concepts of "void" and "voidable" marriages were formally incorporated into statutory law by the 1971 act. In a 1948 case, Lord Greene, Master of the Rolls, explained the distinction now recognized in English law as classic. He said:

A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place, and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid and subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.⁵

Beginning with the 1971 act and subsequent amendments,⁶ the grounds upon which

³ The Matrimonial Causes Act 1857 (20 & 21 Victoria, c. 85, see Statutes U.K., vol. 23A, pp. 435-445); the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 George V, c. 49, see P.G.A., 1925, pp. 1197-1334); the Matrimonial Causes Act 1937 (1 George VI, c. 57, see ibid., 1937, pp. 729-738), which introduced several new grounds of nullity hitherto unknown to the law: pregnancy *inter alium*, wilful refusal to consummate, unsound mind/mentally defective or subject to fits of insanity or epilepsy, and having a communicable venereal disease; the Marriages Act 1949 (12 & 13 George VI, c. 76, see ibid., 1949, pp. 1621-1683); the Matrimonial Causes Act 1958 (6 & 7 Elizabeth II, c. 35, see ibid., 1958, pp. 239-249) and the Matrimonial Causes Act 1965 (13 & 14 Elizabeth II, c. 72, see ibid., 1965, pp. 1581-1614).

⁴ The Nullity of Marriage Act 1971, c. 44. See ibid., 1971, pp. 859-862.

⁵ See B. PASSINGHAM and C. HARMER, Law and Practice in Matrimonial Causes., 4th ed., Butterworths, London, 1985 p. 45 (hereafter cited as L.A.P.).

⁶ The Matrimonial Proceedings Act 1972, c. 38 added polygamous marriage to the list of those recognized to be void *ab initio*; see The Law Reports: Statutes, 1972, p. 555 (hereafter cited as L.R.S.). The Matrimonial Causes Act 1973, c. 18, sections 11-14 concern nullity; see ibid., 1973, pp. 172-174. The Matrimonial and Family Proceedings Act 1984, c. 42, section 2; see P.G.A., 1984, pp. 1428-1429. The Marriage (Prohibited Degrees of Relationship) Act 1986, c. 16. See ibid., 1986, pp. 253-262.

petitions for nullity of marriage celebrated after August 1, 1971⁷ might be presented are as follows:

A. Void Marriages

- i. parties within the prohibited degrees;
- ii. nonage -- either party under sixteen;
- iii. lack of civil preliminaries or form;
- iv. bigamy;
- v. parties of the same sex;
- vi. polygamous union.

B. Voidable Marriages

- i. incapacity to consummate;
- ii. wilful refusal to consummate;
- iii. lack of valid consent resulting from duress, mistake, unsoundness of mind or otherwise;
- iv. unsoundness of mind or a mental disorder in either party at the time of the marriage;
- v. a communicable venereal disease present in the respondent at time of the marriage;
- vi. pregnancy of the respondent at the time of marriage by some person other than the plaintiff.

Before 1971 a decree of nullity arising from a voidable marriage purportedly placed the parties in the position of never having been married, although the decree did not affect the legal transactions that took place during the subsisting marriage.⁸ Since 1971, however, voidable marriages are now deemed to be null only from the granting of the decree absolute, and not from

⁷ The 1971 act made fundamental changes in the grounds for nullity, namely, the transfer of lack of consent from the void to the voidable category and the cessation of epilepsy as a ground.

⁸ See General Register Office, London, circular 10A/1971.

the time of solemnization or the granting of the decree *nisi*.⁹ A voidable marriage remains a marriage until one of the spouses seeks to break the legal bond. A void marriage is one recognized to be void *ab initio* and does not require a decree of nullity since the law declares that no marriage has taken place. However, the suit places the facts on record while the decree -- a judgement *in rem* -- has a declaratory value.

The civil notion of voidability is not totally alien to canonical jurisprudence. Canon lawyers may see a parallel between it and a putative marriage. Voidability as understood in English law implies dissolubility and a possible healing of the nullity at both one and the same time. While civil law¹⁰ decrees that a voidable marriage is a valid subsisting marriage until the day a decree absolute declares it null, Catholic jurisprudence sees a putative marriage as enjoying the favour of the law until proven otherwise. Only then will the Catholic Church declare the marriage to be null *ab initio* unless it is sanated, the impediment dispensed or consent renewed.

While the twelve grounds under which a nullity suit might be introduced are now based on a statutory enactment, their ecclesiastical origins cannot be overlooked. Although some of the civil grounds can be said to mirror those used in the Catholic ecclesiastical tribunals, a question arises for the canonist concerning the practical interpretation of those parallel grounds in the English law courts.

⁹ The Nullity of Marriage Act 1971 states that the marriage remains valid until the granting of the decree absolute. Statute law created this principle to protect the civil and merely civil effects of marriage and the rights of the parties to an equitable settlement of money and property and to uphold the legitimacy of any issue.

¹⁰ Although the expression 'civil law' is a traditional one for canonists, for common law lawyers it has a variety of meanings and clarity becomes possible in a certain context. In this paper it means the non-criminal body of law within the English legal system. Adapted from D. GALES, "The Civil Law", in The Jurist, 49(1989), p. 241.

2. ECCLESIASTICAL PARALLELS

a. Void marriages

i. Prohibited degrees

The statutory list of prohibited degrees has its basis in the Reformation controversy. A 1540 statute prohibited marriage within the Levitical degrees.¹¹ Unhappy with the minimalistic content of the statute, Archbishop Matthew Parker of Canterbury produced a "Table of Kindred and Affinity" in 1563, listing the sixty relationships he believed were contrary to divine law and therefore diriment impediments to marriage. Parker listed sixteen degrees of consanguinity and forty-four degrees of affinity. This "table" found Anglican canonical acceptance¹² and implicit civil recognition in 1662;¹³ it generated much controversy, however, between practitioners of the common and ecclesiastical laws. In 1835 Parker's list found explicit statutory acceptance.¹⁴

¹¹ 32 Henry VIII, c. 38 (the Roman method of calculating degrees of relationship was adopted in England); see Statutes, vol. 2, p. 298. The Levitical laws did not directly prohibit marriage but rather sexual intercourse, since this led to motherhood which was seen to be the prime purpose of marriage.

¹² A provincial constitution at Canterbury in 1571 confirmed the "table" with a rider that marriages within the relationships explicitly mentioned in Leviticus, chapter eighteen, plus marriage with a wife's sister were to be declared unlawful and dissolved by episcopal decree. In other cases, marriages were voidable. See E. CARDWELL (ed.), Synodalia, vol. 1, p. 130. Although the list was mentioned in c. 99 of the canons of 1603 (see *ibid.*, p. 304), the 1571 distinction was not, and all marriages within the decrees listed were said to be void *ab initio*.

¹³ Act of Uniformity 1662 (13 & 14 Charles II, c. 4). See Statutes, vol. 3, pp. 224-230.

¹⁴ All marriages within the degrees mentioned in Parker's list were henceforth void *ab initio* according to the act (5 & 6 William IV, c. 54). See Statutes U. K., vol. 13B, p. 239.

Since 1907, various statutory provisions¹⁵ seemingly reduced the number of relationships said to be matrimonial impediments arising from affinity in the collateral line. In reality, marriage was permitted in certain cases to persons within the prohibited degrees of affinity only after the death of the common relation. However, the 1949 Marriage Act altered the list of affine relationships given in the 1835 statute and enumerated twenty-four affines between whom marriage was prohibited.¹⁶ In 1960 the last prohibition in the collateral line was removed¹⁷ and in 1986 affinity in the direct line ceased to be an absolute impediment,¹⁸ thus permitting marriage under explicit conditions to affines in that line.¹⁹

Affinity in the direct line is recognized by most Catholic canonists as being a matrimonial

¹⁵ Affinity rules were changed by statutory provision in 1907, 1921 and 1931. In 1907, marriage was permitted between a man and his deceased wife's sister (7 Edward VII, c. 47, see P.G.A., 1907, pp. 216-217). In 1921, a man and his deceased brother's widow could marry (11 & 12 George V, c. 24, see *ibid.*, 1921, pp. 78-79). A 1931 act permitted marriage between persons and their deceased spouse's nephew, niece, uncle or aunt and between persons and their deceased nephew's, niece's, uncle's or aunt's widow or widower (21 & 22 George V, c. 31, see *ibid.*, 1930-1931, pp. 182-183).

¹⁶ The impediments applied to those of the whole blood or the half blood. The offspring of illegitimate relationships were likewise bound. See P. BROMLEY, Family Law, London, Butterworths, 1981, pp. 34, 357. The same rules applied in canon law, see J. HUELS, The Pastoral Companion, Chicago, Franciscan Herald Press, 1986, p. 192.

¹⁷ Marriage Enabling Act 1960 (8 & 9 Elizabeth II, c. 29, see P.G.A., 1960, pp. 342-343) permitted marriage with a sister-in-law, brother-in-law, aunt, uncle, niece or nephew after a divorce.

¹⁸ Marriage (Prohibited Degrees of Relationship) Act 1986, c. 16. (see *ibid.*, 1986, pp. 253-262). Under the act, a man may marry his grandmother-in-law, mother-in-law, his daughter-in-law, his step-grandmother, step-mother or step-daughter. A woman may marry a man of corresponding relationship.

¹⁹ Two conditions apply, viz., that the younger person is over twenty-one years of age and has not at any time lived as a child of the other person before reaching the age of eighteen and only for marriages between in-laws, their former spouses are no longer living. A divorce is not sufficient. The act will not permit these marriages to take place in the Church of England. (In cases where the former spouse is still alive, a private act of Parliament may be enacted to permit in-laws to marry, see *Daily Telegraph* (London), November 1, 1986, p. 5.)

impediment arising from merely ecclesiastical law.²⁰ Canon 1092 states that marriages between persons related in any degree of that line are invalid.²¹

In the matter of consanguinity, statute law retains the prohibitions listed in Parker's tabulation. Marriage between persons related in the direct line and in the second and third degrees in the collateral line (Roman computation) remain invalid. Subsequent legislation addressing the status of adopted children in this matter has been enacted.²² Both English law and canon law acknowledge the natural law prohibition of marriages between blood relatives in the direct line and in the second degree (Roman computation) of the collateral line. English statute law, however, is stricter than the 1983 Code of Canon Law since the former invalidates marriage between consanguines related in the third degree (Roman computation) of the collateral line. On the other hand, canon law recognizes the possibility of a dispensation from the third degree (Roman computation) collateral line prohibition since it is a merely ecclesiastical law established by the

²⁰ According to P. Gasparri, the *dubium* whether affinity is a merely ecclesiastical law or not received an affirmative answer in a September 4, 1743, Holy Office response approved by Benedict XIV. See P. GASPARRI, De Matrimonio, vol. I, pp. 441-443, n. 722. See also F. WAHL, The Matrimonial Impediments of Consanguinity and Affinity: An Historical Synopsis and Commentary, Canon Law Studies, n. 90, Washington, D.C., The Catholic University of America, 1934, pp. 88-89. However, some canonists see a difficulty when affinity in the first degree of the direct line is designated as being a merely ecclesiastical law, particularly if Leviticus 18: 7 and I Cor. 5: 1-3, 5 are examined.

²¹ English law recognizes that affinity can be created only by a valid marriage and not by illicit sexual union. See R. BARBER, "'Affinitas ex copula illicita' in English Law", in Studia canonica, 12(1978), pp. 73-80. Unlike the Church's pre-1917 ruling, c. 97 of the former Code and c. 109 of the Code of Canon Law agree with the civil prescription.

²² The Children Act 1975, c. 72 (see P.G.A., 1975, pp. 2313-2432) and The Adoption Act 1976, c. 36, section 39 (see L.R.S., 1976, p. 684) state that an adopted child is legally treated as a natural child of his adoptive parents and therefore, may not marry an adoptive or former adoptive parent. The child may marry an adoptive sibling. Catholic canon law contains similar norms concerning the adoptive parents, but not an adoptive sibling; see Codex, cc. 110 and 1094.

Catholic Church in the distant past.²³

ii. Nonage

Until 1929, common law accepted the customary Church of England law that boys aged fourteen and girls aged twelve were able to exchange valid matrimonial consent. The lack of parental assent did not vitiate such unions, except between 1753 and 1823 as a consequence of statute law,²⁴ but not according to the Church of England's canon law. In 1929 a significant change occurred in the civil law on this very point. According to the evolving social mores of the time, informed individuals considered it socially and morally wrong for immature persons to bear the stresses of married life, sexual freedom and the physical strains of childbirth. The marriage of young persons was deemed detrimental to society, to the participants, and to the very institution of marriage. In light of these considerations, a statute made two changes in the law.²⁵ Firstly, a valid marriage could not be contracted unless both parties had reached the age of sixteen; secondly, any marriage where either party was under age was void, and not voidable as it had been prior to the passing of this act. Accordingly, nonage (below sixteen years of age) has been a civil diriment impediment to marriage in England since 1929.²⁶

²³ Except in a case of necessity, the grant of a dispensation for English and Welsh Catholics in this matter would seem to be precluded, since statute law would prohibit such a marriage. See *ibid.*; c. 1071, § 1, 2°.

²⁴ In 1753 (26 George II, c. 33, see Statutes, vol. 7, pp. 525-528) a legal minimum age was instituted making marriage between parties under twenty-one years of age void unless parental consent had been given. An 1823 act (4 George IV, c. 76, see Statutes, U. K., vol. 9, pp. 400-404) held that marriages of minors were valid.

²⁵ 19 & 20 George V, c. 36, see P.G.A., 1928-1929, pp. 776-777. Re-enacted in the Marriage Act 1949 and the Matrimonial Causes Act 1973.

²⁶ This civil impediment found expression as canon B31:1 in the Church of England's canon law. The canon, promulgated in 1969, made nonage an explicit canonical diriment impediment to marriage.

In this matter English law is stricter than the 1983 Codex iuris canonici which restated the 1917 canon that for a valid marriage the man and woman must have completed their sixteenth and fourteenth year respectively.²⁷ This impediment, although based on natural law, is recognized in the Catholic Church as being a merely ecclesiastical law once the parties have reached the age of puberty.²⁸

iii. Lack of civil preliminaries or of form

Statute law provides that marriages solemnized after July 31, 1971, shall be void if a couple disregard certain requirements regarding the formation of marriage mandated under various matrimonial acts²⁹ in effect since 1949.³⁰ Members of the Church of England may marry according to the rites of their Church or in a Register Office.³¹ Both State and Church recognize the validity of either form. However, the non-observance of certain formal requirements will invalidate the marriage, but only if both parties knowingly and willingly marry in breach of one or more of

²⁷ See Codex, c. 1083 § 1.

²⁸ The natural law requires for the validity of marriage, not physiological puberty, but sufficient understanding to enable the contracting parties to give true consent. Prior to the 1917 Code both conditions were required in order to establish a valid marriage and not incur the canonical impediment of nonage. Under the 1917 Code juridical puberty alone was required; see J. ABBO, The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church, by John A. Abbo and Jerome D. Hannan, rev. ed., vol. II, St. Louis, Herder, [1957], pp. 253-254. See also Decisiones, vol. 67(1975), pp. 424-430, *coram* De Jorio. A married couple must have the physical maturity to undertake acts *per se* for the generation of offspring.

²⁹ The Matrimonial Causes Act 1973, c. 18, section 11.

³⁰ The Marriage Act 1949 (sections 24 and 48) lists some formal defects which do not invalidate a marriage. These concern residency requirements, lack of parental consent for those under eighteen, and items concerning the building where the marriage is to take place.

³¹ The marriage may be solemnized according to ecclesiastical form in an authorized place or according to civil form in a Register Office either after the triple publication of banns, the ecclesiastical grant of a special or common licence, or on the authority of a superintendent registrar's licence or certificate.

them.³² These formal defects are applied differently according to the place where the marriage is celebrated. In the case of marriage in the Church of England -- other than by special licence -- the only formal defects with an ecclesiastical significance concern a failure to publish banns and the solemnization of a marriage by a person not in holy orders. Both defects render a marriage void.

From a Catholic perspective both requirements are aspects of merely ecclesiastical law. Banns are now a subject of particular law and non-publication would not invalidate a marriage. In the equally unlikely event that a marriage was "officially witnessed" by a non-authorized cleric or lay person, the putative marriage could be sanated. In a rare case, common error might apply.

iv. Bigamy

A married man or woman has no capacity to marry. Statute law renders a marriage void where one of the parties is, at the time of the marriage, already lawfully married.³³ Since 1857, however, English law permits a divorced person to enter a second marriage. For Anglicans in this situation, the marriage may take place in the Church of England³⁴ or alternatively in a Register Office or other registered building. However, these civil -- and ecclesiastical -- permissions run

³² Formal defects are: (a) that the marriage was celebrated in a place other than a church or chapel in which banns may be published; (b) that a bishop's licence or a registrar's certificate has not been duly obtained or received; (c) that in the case of a marriage of a minor by banns, a person entitled to do so has publicly dissented from the marriage at the time of publication; (d) that more than three months have elapsed since the grant of the licence or certificate. See P. BROMLEY, op. cit., pp. 78-80. A similar list concerns Register Office marriages and marriages conducted in other registered buildings. See F. HOPKINS, Formation and Annulment of Marriage, London, Oyez Publishing, 1976, p. 39.

³³ The Matrimonial Causes Act 1973, c. 18, section 11(6).

³⁴ In virtue of the Matrimonial Causes Act 1965, c. 72, section 8. See also Halsbury, vol. 14, pp. 532-533, para. 1005.

contrary to divine positive law as understood by the Catholic Church.³⁵

v. Gender

Before 1971 a marriage in which both parties were of the same sex could be annulled as a void marriage.³⁶ In that year, this situation became substantive law without including the statutory definition of male and female.³⁷ A judgement handed down in the same year assigned a test for the determination of legal sex.³⁸ Although this ordinance has no antecedent in ecclesiastical law, such a "marriage" is considered contrary to natural and divine positive law; furthermore it might be preferable to say that such a union is incongruent with the accepted understanding of marriage.

vi. Polygamy

In the specific context of civil nullity, a polygamous marriage celebrated outside England and Wales is void where either party was domiciled at the time in either of the two countries. Whereas, a potentially polygamous marriage abroad will become monogamous by the acquisition of an English domicile of choice and a prosecution for bigamy will lie in respect of a subsequent

³⁵ Notwithstanding the fact that non-sacramental marriages may be dissolved in virtue of the Pauline privilege or by papal authority *in favorem fidei vel super rato*.

³⁶ Judgement was first given in a 1967 case (*Talbot v. Talbot*) involving two women. See L.A.P., p. 48.

³⁷ Nullity Act 1971.

³⁸ A case (*Corbett v. Corbett*) involving two men, one of whom had undergone a "change of sex", produced a judgement which established the principle that a person's sex is determined at birth (biological criteria, in particular chromosomal, gonadal and genital factors) and cannot be legally changed. See F. HOPKINS, op. cit., pp. 66-67. The second recorded case in English legal history of two men having "their marriage" annulled occurred on November 8, 1990. See *Daily Telegraph* (London), November 9, 1990, p. 3.

marriage in England.³⁹ Similarly, the comments on bigamy would apply to the Catholic Church's position regarding preexisting bond and intention against the exclusivity or unity of marriage.

b. Voidable marriages

i. Incapacity to consummate

Since there is no statutory definition of what constitutes marital consummation, case law and precedents⁴⁰ have to be consulted.⁴¹ These judgements permit the formulation of a question at issue in such cases, namely, whether the spouse is capable of sexual intercourse or whether the incapacity is remedial even though at present the person is incapable of consummating the marriage.⁴² The law⁴³ recognizes that a person who is *incapax copulandi* is impotent regardless of any consideration of whether he or she is *incapax procreandi*. Sexual intercourse in the ordinary

³⁹ See L.A.P., p. 58.

⁴⁰ A judicial judgement or legal decision serving as an authoritative rule in future similar cases.

⁴¹ For a list of cases and judgements, see J. JACKSON (ed.), Rayden's Law and Practice in Divorce and Family Matters, 14th ed., vol. 1, London, Butterworths, 1983, pp. 170-172 (hereafter cited as Rayden).

⁴² There is a legal presumption in favour of the validity of a marriage. The court must be satisfied beyond reasonable doubt that a spouse whose impotence is alleged at the exchange of consent and during the common life was incapable of consummating it. Verification is not required as a matter of law, but the court usually requires it unless its absence can be satisfactorily ascertained. A medical inspection may be ordered by the court. See *ibid.*, pp. 178-179, nn. 71, 74.

⁴³ For example, sterility in either party is not a ground for nullity (see *ibid.*, p.179, n. 73), nor contraceptive consummation or the use of contraceptives during the common life (see *ibid.*, p. 173, n. 64), artificial insemination by the husband (see L.A.P., p. 49) or *fecundatio ab extra* (see J. JACKSON, The Formation and Annulment of Marriage, 2nd ed., London, Butterworths, 1969, p. 312 [hereafter cited as F.A.M.]). For an overview of Catholic thinking on this and associated matters, see Communications, 6(1974), pp. 176-198.

meaning of the term is full and complete penetration (*vera copula, i.e., erectio et intromissio*);⁴⁴ ejaculation is not required.⁴⁵ In summary, the conditions required under this heading are: a pre-existing condition rendering a party incapable of effecting or permitting consummation by reason of some structural defect in the organs of generation,⁴⁶ which especially if this is incurable, renders complete sexual intercourse impractical; or because of some incurable mental, moral or other disability resulting in absolute or relative inability to consummate.⁴⁷

This civil impediment arises from the canonical ground of impotence and even in some aspects from natural law. Indeed, there are many parallels between the civil law and the canon law understanding of impotence. Although there is a consensus regarding many of the subsidiary matters relating to this impediment, there is a difference regarding the major and primary factor when the impotent party is a male. English law requires a two-fold condition for consummation; canon law has a three-fold qualification: erection, penetration and ejaculation -- even though *verum semen* is no longer required.⁴⁸

⁴⁴ This does not mean partial and imperfect intercourse. A 1967 court judgement states: "the husband was able to penetrate the wife for a short time, but that soon after he got inside her, his erection collapsed and he came out. [...] penetration maintained for so short a time, resulting in no emission [...] cannot [...] be described as ordinary and complete." A decree of nullity was granted. See SWEET and MAXWELL'S, Family Law Manual: Nullity of Marriage, London, Sweet and Maxwell, 1985, p. 97 (hereafter cited as F.L.M.).

⁴⁵ See footnote 52.

⁴⁶ An artificially created female organ will not fulfil the requirements of ordinary and complete intercourse; whereas an artificially extended vagina may facilitate consummation. See F. HOPKINS, op. cit., p. 62. However, since the judgement in the former case was given in a "marriage involving two men", a different judgement might be given if the recipient was biologically female.

⁴⁷ The impotence is regarded as incurable if the condition can be corrected only by an operation attended by considerable risk, if the person refuses to submit to an operation or if a cure is not morally certain. When the defect arises from other than physical causes, it is regarded as incurable if the person refuses to submit to treatment. Other incurable causes are obesity and multiple sclerosis. See Rayden, p. 172, nn. 4, 7, and 8.

⁴⁸ S.C.D.F., Decree, May 13, 1977. See A.A.S., 69(1977), p. 426.

ii. Refusal to consummate

The ground of refusal to consummate was introduced in 1937.⁴⁹ While the reasons for the refusal can be diverse, delay or neglect to comply with a request to consummate is not tantamount to wilful refusal.⁵⁰ Furthermore, a continuing volitional act not to consummate the marriage must be clearly manifested. Moreover, pre-marital intercourse between the petitioner and the respondent has no juridical significance.⁵¹

A 1945 case precipitated an interpretation of the ground in civil law.⁵² Following the first instance judgement, an appeal court overruled the trial judge and held that a marriage cannot be said to have been consummated when the act of sexual intercourse was deliberately discontinued before its natural termination or when that termination was artificially prevented, thereby frustrating one, if not the principal, end of the union. This second instance decision⁵³ was in conformity with the praxis of the defunct ecclesiastical courts and of canonists and canonical text-books of the post-

⁴⁹ See footnote 3.

⁵⁰ An example would be a 1960 case concerning two Catholics who married in a Register Office. Before the civil ceremony, the husband had promised the wife that a Church service would ensue. Following the civil formalities he refused to arrange the ecclesiastical rite. Consequently, the wife refused to have intercourse. A cross petition was entered. The nullity was granted to the wife and the husband's plea was rejected. The Judge (J. Hewson) reasoned that as Catholics the parties understood that the marriage should only be consummated after a Church service. The wife had a just cause for refusing the husband's demands until he fulfilled the condition. By his refusal to arrange for the ecclesiastical service, he also implicitly refused to allow consummation. See F.L.M., p. 102.

⁵¹ See F. HOPKINS, op. cit., p. 64.

⁵² *Cowan v. Cowan*. The judge held that the husband who refused to have intercourse with his wife save with the use of contraceptives or the practice of *coitus interruptus* had not wilfully refused to consummate the marriage.

⁵³ See R. O'SULLIVAN, loc. cit., pp. 302-303.

Reformation era. However, in 1947 the House of Lords overruled⁵⁴ the decision of the appeal court.⁵⁵

Refusal to consummate has no explicit canonical antecedent but it can give rise to a case for non-consummation. In certain instances the refusal to consummate might indicate simulation or non-inclusion with particular reference to the unitive and procreative aspects of marriage as understood by the Catholic Church. On the other hand, since a non-consummated marriage is voidable, the civil law ground may be compared with the papal dissolution of a ratified but non-consummated marriage in so far as such marriages are deemed dissolved from the date of the decree of nullity.⁵⁶ However, a dispensation *super rato* arises from a theological foundation and is essentially different from the basis for the secular law practice, even though the ultimate consequences may be similar.

iii. Lack of consent

In English common law, marriage is an agreement made between a man and a woman

⁵⁴ A 1947 House of Lords judgement ended the position espoused by the post-Reformation (Anglican) canonists that the primary reason for marriage was offspring -- which gave way to the need for power of conception, expressed as ejaculation. It was stated: "In any view of Christian marriage the essence [...] is the creation of a situation whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage is the solace and satisfaction of man." See F.A.M., p. 308.

⁵⁵ Nullity cases could then be introduced at any time after the marriage, whereas three years had to pass before a petition for divorce might be entered, and notions and practices concerning birth control were becoming freely available, collusion between the parties -- a defence not open to rebuttal -- was possible. This seemed to be the underlying reason for the House of Lords' concern and the basis of its decision.

⁵⁶ SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, Instruction, May 7, 1923, art 103. See A.A.S., 15(1923), p. 413. The rescript is issued *in forma gratiosa*. The matter is not mentioned in subsequent Roman instructions.

when they consent and contract to cohabit exclusively with each other.⁵⁷ For civil purposes, the essential part of the ceremony is held to be the reciprocal agreement of the parties to take each other for husband and wife until death.⁵⁸ The classic English law definition of marriage, however, was given in 1866: marriage, as understood in Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others.⁵⁹ Four elements can be deduced from the definition: free choice and consent of both parties, for life, a monogamous character and heterosexuality. Although this view has an air of ecclesiastical purity and theological soundness, the fact is that under English law such is not really the case. The legal interpretation since the divorce act of 1857, is that marriage may be for life in the sense that it is capable of lasting indefinitely regardless of the intentions of the partners at the time of the exchange of consent. However, the courts now hold that it may later be dissolved by the mutual consent of the parties or by a unilateral decision.

Following the demise of the Church of England's marriage courts in 1857, the newly constituted civil marriage courts retained and followed the classic ecclesiastical maxim that consent makes marriage. Lack of consent was recognized until 1971 as nullifying a marriage *ab initio*; at that time the present understanding of voidable marriage was statutorily enacted. Since 1971, however, marriages are voidable for lack of valid consent resulting from unsoundness of mind, duress, mistake or otherwise. It seems that the classic doctrine is no longer a tenet of English law.⁶⁰

⁵⁷ See Halsbury, vol. 14, p. 529, para. 1002.

⁵⁸ See *ibid.*, p. 548, para. 1033, note 3.

⁵⁹ In *Hyde v. Hyde*. LR 1 PD 130, 131. See A. SCOTT, Private International Law (Conflict of Laws), 2nd ed., Plymouth, Macdonald and Evans, 1979, pp. 130-132.

⁶⁰ In a judgement (Roberts deceased) Mr. Justice Walton ruled that since 1971 marriages entered into on the ground of lack of consent were voidable and not void. Roberts married in October 1974 and died in March 1975. It was alleged that he contracted marriage in a state of senile dementia and was unable to understand the ceremony or its effects, and consequently could not have consented to the marriage. Counsel submitted that the traditional doctrine of no consent, no

Furthermore, court judgements since that time have circumscribed the notion of consent which is presumed to have been given once it has been exchanged. Marriage is a contract which does not require a high degree of intelligence to comprehend; mental reservations made prior to the union concerning the marriage do not affect its validity.⁶¹ Moreover, civil jurisprudence accepts that consent remains as long as a party to a voidable marriage wishes it to perdure, and has not entered a suit to the contrary within a statutory time limit.

Case law and precedent determined that the "legal requirement is that each party to the marriage must possess a capacity to understand the nature of the contract and the duties and responsibilities which it creates."⁶² This was refined by a later judgement which declared that a person must be "mentally capable of appreciating that it [marriage] involves the responsibilities normally attaching [*sic*] to marriage."⁶³ The ground seems to refer to those situations where undue influence was exercised over a weak-willed person who would not have entered the marriage of his or her own volition. Since 1965 there is no statutory or binding legal definition of "unsoundness of mind".⁶⁴ Suits in this category are more expeditiously adjudicated under the heading of mental disorder.

marriage should prevail. The judge stated that only the parties could proceed against the marriage since it was voidable. Since neither spouse challenged the union, the marriage remained [civilly] valid. This judgement was upheld by the Court of Appeal in 1978. See J. COULTER, *loc. cit.*, pp. 477-481.

⁶¹ See *Rayden*, pp. 182-183, nn. 4, 5, 11.

⁶² Sir James Hannen in *Durham v. Durham* (1885) 10 PD 80.

⁶³ Mr Justice Singleton in the 1954 case: "In the Estate of Park." See F. HOPKINS, *op. cit.*, p. 68.

⁶⁴ Although the Mental Health Act 1959 (7 and 8 Elizabeth II, c. 72, section 4(1), see P.G.A., 1959, p. 1270) introduced the phrase "mentally disordered persons" to replace the earlier statutory expression "persons of unsound mind", the Matrimonial Causes Act 1965 and the Nullity Act 1971 retained the latter designation, thus giving rise to a confusion.

A developing jurisprudence by the Law Lords and the Privy Council during the past decade has established certain important factors concerning duress. Lord Scarman summed up this advancement by stating that "duress, whatever form it takes, is a coercion of the will so as to vitiate consent" and in a nullity suit "there must be present some factor which could in law be regarded as a coercion of [...] will so as to vitiate [...] consent."⁶⁵ The law requires that this fear be external. Consequently, the crucial question in any duress case before the secular court is whether the threats, pressures or other factors are strong enough to vitiate free consent. Accordingly, duress cases depend on the single fact that the will of one party was overborne.

Causes entered under the ground of "mistake" usually refer to an error regarding the person or to an error regarding the nature of the ceremony. Fraud or deceit may or may not contribute to the mistake. Judicial judgements, however, have established that the absence of consent to the marriage must be verified and not simply the presence of fraud.⁶⁶ A mistake or error regarding the person permits a nullity decree only when the identity of the person is in question. A miscalculation as to the quality or attributes of the person is not a sufficient basis for a suit. This applies even when deceit, misrepresentation or concealment by one party is involved.⁶⁷ As to a mistake regarding the nature of the ceremony, this may arise if one party believes the ceremony to be one of engagement and later discovers it was one of marriage. In this situation, the court usually declares the marriage invalid. A "mistake" held by a spouse concerning the legal consequences of marriage, for example that a wife is obliged to cohabit with her husband after marriage, does not admit of nullity.

⁶⁵ See F.L.M., p. 105.

⁶⁶ See F. HOPKINS, op. cit., p. 70.

⁶⁷ This is not unlike the Roman law understanding of *dolus* or deceit, at least until the time of Cicero. In the Middle Ages, Gratian, Gregory IX and Raymond of Peñafort supported a theory held for many centuries, namely, that an individual brought into a spiritual good or a better state of life such as marriage as a result of *dolus* had contracted validly. See K. VANN, "*Dolus*: Canon 1098 of the Revised Code of Canon Law", in The Jurist, 47(1987), pp. 372-373.

In addition to the preceding categories in the statute there are those which might be judged under the heading of "otherwise". Such a case would occur when one or both parties were incapable of giving a valid consent because of the influence of alcohol or drugs.⁶⁸ Hypnotism, amnesia and undue influence are suggested as other possible grounds.⁶⁹

The statutory category of duress is similar to the natural law *caput* of force or fear. However, the canonical ground, unlike the civil one, recognizes internal fear.⁷⁰ The civil ground of "mistake concerning the person" has its parallel in the Code of Canon Law which also has a close counterpart in error concerning a quality.⁷¹ Unlike the civil provisions, simulation (civilly known as prior mental reservations) may according to canonical jurisprudence, invalidate a marriage.⁷² Like the civil interpretation, the canonical ground of *dolus*⁷³ will not have a direct bearing in this

⁶⁸ See Rayden, p. 186.

⁶⁹ See P. PACE, Family Law, 3rd ed., London, Pitman, 1987, p. 43.

⁷⁰ Canonists traditionally postulated the nullity of marriage contracted as a result of physical force or extrinsic grave fear unjustly inflicted as vitiating consent under the natural law. However, no other grave fear -- even if it was the cause of the contract -- was a sufficient cause of nullity. A declarative reply by the Pontifical Commission For the Authentic Interpretation of the Code of Canon Law has established that force and fear "can be applied" as a ground of nullity for non-Catholics (baptized and non-baptized). Although not stated in the response, this interpretation seems to confirm a long-standing, probable opinion that any marriage entered into under the duress of moral violence or fear is now recognized as being invalid in natural law. See PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO, "Resposiones ad proposita dubia, n. I (November 25, 1986)", in A.A.S., 79(1987), p. 1132. For some reservations on the application of this ground, see U. NAVARRETE, "Responsa Pontificiae Commissionis Codici Iuris Canonici Authentice Interpretando", in Periodica, 77(1988), pp. 497-510.

⁷¹ See Codex, c. 1097.

⁷² See ibid, cc. 1098 and 1101.

⁷³ K. Vann prefers the translation of *dolus* as deceit rather than fraud. Fraud can be understood as being directed against a given law and not a person, while deceit is directed towards tricking or trapping a person into marital consent. This is a personalist approach to the word which is demanded by the understanding of marriage as a free communion of life of two persons. See K. VANN, loc. cit., pp. 380-381. Prior to the promulgation of the 1983 Code some judges gave decisions which respond to the allegations of *dolus*. See *coram* Sheehy, August 28, 1979, Dublin Regional Marriage Tribunal, in Canon Law Society of Great Britain and Ireland Newsletter, 45(March,

matter.⁷⁴ As to the civil category of "otherwise", cases may or may not have a canonical counterpart depending upon the basis for the case in the civil court.

iv. Mental disorder

Since 1857 case law and precedent have used various statutory provisions to interpret mental disorder as a ground of nullity. Prior to 1960,⁷⁵ a person who was found "lunatic" by inquisition or whose estate was entrusted to a trustee was deemed incapable of contracting marriage. Such a marriage, if contracted, was considered void even if the union took place during a lucid interval.⁷⁶ On the other hand, a mentally disordered person not diagnosed as a "lunatic" could validly marry during a lucid interval.

In virtue of the Mental Health Act 1959⁷⁷ (which superseded the 1938⁷⁸ enactment

1980), pp. 51-70; *coram* Dunderdale, March 29, 1973, Westminster Metropolitan Tribunal, in Studia canonica, 7(1973), pp. 129-132; *coram* Di Felice, March 26, 1977, in Ephemerides iuris canonici, 24(1978), pp. 160-164; *coram* Serrano, May 28, 1982, in Decisiones, 74(1982), pp. 308-325.

⁷⁴ During the revision of the Code, *dolus* was established as a ground of nullity in its own right and distinct from error. "The only reason we are given by the consultors for their acceptance of *dolus* as a ground for nullity is [...] there is no joining of the wills in an act of consent, while in the case of simple error there is such a joining"; see P. SUMNER, "Dolus as a Ground for Nullity of Marriage", in Studia canonica, 14(1980), p. 177. In a private reply Cardinal R. Castillo Lara is reported to have made the point that *dolus* is presently understood to be of merely ecclesiastical law; see K. VANN, loc. cit., p. 392. Consequently, *dolus* is not retroactive, and does not apply to marriages before November 27, 1983 nor to non-Catholics in virtue of canon 11. However, the Roman Rota does not seem to hold the same position; see J. JOHNSON, "On the Retroactive Force of Canon 1098", in Studia canonica, 23(1989), pp. 61-83.

⁷⁵ The Mental Health Act 1959 took legal effect November 1, 1960.

⁷⁶ By virtue of the 1811 Marriage of Lunatics Act (51 George III, c. 37). See Statutes U.K., vol. 4, p. 366.

⁷⁷ 7 & 8 Elizabeth, c. 72, 7th schedule. See *ibid.*, 1959, p. 1408.

⁷⁸ 1 & 2 George VI, c. 43. The Mental Deficiency Act. See *ibid.*, 1938, pp. 378-379.

mentioned in the Matrimonial Causes Act 1950⁷⁹) statutory changes were made in the 1950 law. They were later incorporated into the Matrimonial Causes Act 1965, section nine, which stated that a marriage is voidable if either party, though capable of giving valid consent, suffered continuously or intermittently from a mental disorder within the meaning of the Mental Health Act 1959 so "as to be unfit for marriage and the procreation of children". Judgements given under this heading took the words "marriage" and "children" as being conjunctive and not disjunctive, and gave a strict interpretation to the term "mental disorder".⁸⁰ The 1971 Nullity Act and ensuing acts⁸¹ retained the phrase "as to be unfit for marriage", while discarding the words "and children". Not surprisingly this deletion affected subsequent court judgements. The phrase "within the meaning of the 1959 act" contained in the 1971 Nullity Act has given way to "within the meaning of the 1983 act".⁸² This latter ordinance lists four categories: mental disorder,⁸³ mental impairment,⁸⁴ severe mental impairment⁸⁵ and psychopathic disorder.⁸⁶ To establish the presence of a mental disorder, the

⁷⁹ 14 George VI, c. 25. See P.G.A., 1950, pp. 386-404.

⁸⁰ See F.L.M., pp. 108-110.

⁸¹ See footnote 6.

⁸² The Mental Health Act 1983, c. 20, sections 1 and 2. See P.G.A., 1983, pp. 343-344.

⁸³ "Mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind and 'mentally disordered' shall be construed accordingly." See *ibid.*, p. 343.

⁸⁴ "Mental impairment means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and 'mentally impaired' shall be construed accordingly." See *ibid.*, p. 344.

⁸⁵ "Severe mental impairment means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and 'severely mentally impaired' shall be construed accordingly." See *ibid.*, p. 343.

⁸⁶ "Psychopathic disorder means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned." See *ibid.*, p. 344.

courts use the testimonies of experts as a foundation for a judicial decision.

There are natural law aspects underlying some facets of this civil ground of nullity, in particular the lack of the use of reason or the inability to perform a human act. The statute nevertheless prevents civil action, and therefore a nullity suit, under any one of the four headings against a person said to have a mental disorder whose deviant behaviour results from promiscuity, immoral conduct, sexual deviancy, alcohol or drug dependency. Given a developing psycho-canonical jurisprudence concerning defective judgement and the incapacity to assume the essential obligations of marriage, some canonists might see the civil ground as presently interpreted to be somewhat limited in its application.

v. Venereal disease

A venereal communicable disease⁸⁷ in the respondent became a ground of nullity in 1937. All that was required for a petitioner to institute a suit was the existence of the disease in the respondent at the time of the wedding. The term "communicable" as established by case law means easily transmitted to any person. Jurisprudentially, if the disease is passed on to a child of the marriage, irrespective of whether the other spouse has or has not been infected, the petitioner is entitled to a nullity decree.⁸⁸ These precedents apply even though the respondent might have innocently contracted a form of the disease which is not a defence in law.⁸⁹ Causes under this heading, however, are uncommon.

⁸⁷ That is syphilis, gonorrhoea or soft chancre according to the 1917 Venereal Disease Act (7 and 8 George V, c. 21, section 4). See *ibid.*, 1917, p. 36.

⁸⁸ See Rayden, p. 190.

⁸⁹ Judgement in a 1917 case. See *ibid.*, p. 189, para. 88, n. 1.

Although there is no canonical parallel for this ground, it might be analogous to an intention *contra bonum prolis* or *contra bonum coniugum*. Indeed, *dolus* might also be envisioned as a ground of nullity if the disease was concealed and was serious enough to disrupt the conjugal life.

vi. Pregnancy inter alium

The ground of "pregnancy *inter alium*" was also introduced in 1937 for cases in which a wife (respondent) was pregnant at the time of the wedding by a man other than the plaintiff. Verification is usually proven by the evidence of blood groups. Although there is no equivalent canonical ground, it could be addressed under a heading concerning consent (for example, fraud, error, etc.) or on the nature of marriage as understood by the Catholic Church.

3. PROCEDURE: ENGLISH LAW

The secular courts claim jurisdiction over nullity proceedings when at least one party to an impugned marriage resides in England or Wales on the date a petition is lodged, or has habitually resided for one year ending with the date on which the proceedings were initiated.⁹⁰ The law of the place of celebration and the antenuptial domicile govern the formal validity of the marriage under investigation.⁹¹ However, since precedence is given to the law of the place where proceedings are enacted, marriages valid under foreign laws are judged (and often annulled) in accordance with

⁹⁰ A case may be heard if a plaintiff domiciled in England or Wales or with a year's residence, died after the petition had been made. See Halsbury, vol. 8, p. 361, para. 498.

⁹¹ Since 1974 a wife may have a domicile of choice independent of her husband's domicile. In the absence of a domicile of choice, her domicile of origin revives. See A. SCOTT, op. cit., pp. 27-28, 31.

English domestic law.⁹² Marriages might be impugned under any of twelve grounds, which belong to one of two categories: (1) marriages recognized in civil law as being void *ab inito*, and (2) marriages that are said to be civilly voidable.

Marriages that are said to be void *ipso iure* may be impugned at any time. Ordinarily, the parties to the marriage may petition during their lifetime, as may any other person with an interest in establishing the nullity of a specific marriage.⁹³ The marriage may also be impugned by one party after the death of the other, or even by any person following the death of the couple.⁹⁴ In the case of marriages said to be voidable, only the parties to the union in question may petition for a judgement of nullity, and then only during their common lifetime. If the parties to a marriage are content,⁹⁵ the civil law does not admit the right of a third person to denounce the marriage. Three other restrictions prevent a matrimonial cause from being considered by a court, thus limiting the introduction of a suit on any or all of the six voidable grounds. Firstly, if the plaintiff had pre-knowledge of the situation. Secondly, if the plaintiff was able to avoid the marriage, but gave the impression to the respondent that he/she would not seek to do so. Thirdly, if it would be manifestly unjust to the respondent should the court grant a decree of nullity.

⁹² Most foreign decrees of nullity are recognized by the English courts. However, the ground of nullity is irrelevant to the court; it is also immaterial whether the marriage was celebrated in England or elsewhere. The common law presumptions are now recognized under statutory provision by virtue of the Family Law Act 1986. See P. PACE, op. cit., pp. 50-51, 3-5 of update. There is one exception to this general presumption, namely, in cases said to be contrary to natural or substantive justice. Case law cites as an example of this exception certain Maltese decrees annulling civil marriages celebrated in England. The decrees are granted to Maltese nationals on the ground that a marriage was not solemnized in the presence of a Roman Catholic priest. See Halsbury., vol. 8, pp. 363-364, para. 502.

⁹³ Usually by persons having a financial interest in the matter. See Halsbury, p. 260, para. 533.

⁹⁴ Such an action is possible in canon law; see Codex, c. 1675.

⁹⁵ In the case of a pre-marriage agreement that marriage would be one only of companionship. See Rayden, p. 175, n. 3.

For voidable marriages celebrated after July 31, 1971, time bars (under a statute of limitations) also govern the introduction of a petition.⁹⁶ For suits entered under the grounds of lack of consent,⁹⁷ mental disorder, pregnancy *inter alium* and venereal disease, the limitation is three years from the date of the wedding. Between 1971 and 1984, the time limit was strictly observed by the courts, but now some flexibility in this matter is possible.⁹⁸ Moreover, suits entered under the headings of pregnancy *inter alium* and venereal disease may not be pursued by a plaintiff unless the judge is satisfied that at the time of the marriage the plaintiff was ignorant of the facts alleged.⁹⁹ In cases on incapacity to consummate the marriage or wilful refusal to do so, the time limit is somewhat adaptable and is subject to a judge's discretion since the unwilling or incapable party may try to overcome the difficulty within a period longer than three years.

Since 1967¹⁰⁰ a nullity suit must commence with a "petition" made in a divorce court.¹⁰¹

⁹⁶ See Matrimonial Causes Act 1973, section 13.

⁹⁷ The Nullity Act 1971 transferred lack of consent from the void to the voidable category. Proceedings may be instituted at any time under this ground for marriages celebrated before August 1, 1971.

⁹⁸ Fraud on the part of the respondent would not overturn this statutory requirement. The 1984 Matrimonial and Family Proceedings Act, c. 42, section 2, mitigated this bar, but only at a judge's discretion. See P. PACE, op. cit., p. 48.

⁹⁹ See generally, Matrimonial Causes Act 1973, s. 13 and Matrimonial and Family Proceedings Act 1984, s. 2.

¹⁰⁰ Before 1967 the high court had sole jurisdiction over nullity causes. See Rayden, p. 113.

¹⁰¹ A *pro-forma* divorce petition is completed and the term nullity is written in over the word divorce, along with general information such as names, addresses, place and date of marriage, domicile and residences during the common life, children, agreement or arrangements concerning natural obligations. The plaintiff may omit certain information at a court registrar's leave. However, in voidable cases on the grounds of pregnancy *inter alium* and venereal disease, the plaintiff's ignorance of the facts at the time of the marriage must also be stated. See F. HOPKINS, op. cit., pp. 83-86, 98-100.

A copy of the petition¹⁰² must be served personally or by post to the respondent¹⁰³ and an acknowledgment of receipt must be filed at the court of issue within eight days. A respondent who wishes to rebut the cause must send to the court a statement of intention to do so within twenty-nine days after receiving the petition. This is done in the respondent's written reply to the reasons alleging nullity of marriage contained in the petition; it is known as an "answer". The plaintiff may then produce a "pleading" to the answer within the following fourteen days. The pleading may refute, agree with or enhance the respondent's declaration. The court may then require documents from the parties. It will also accept their prepared interrogatories.¹⁰⁴

Nullity causes may either be defended or undefended suits. Defended suits are normally heard in the divorce court of petition,¹⁰⁵ while undefended causes are transferred to the high court. Both types of cases are conducted by counsel, although undefended causes normally concern the establishing of a fact, in which case counsel for the defence is not required. Defended causes are instructed in the manner of a divorce case. (A detailed study of the minutiae of this civil procedure is not necessary or appropriate here.) There is no specific court procedure laid down by statute for use in undefended nullity causes, although a judicial hearing is always necessary. Testimonial evidence and cases based solely on the question of sexual capacity are normally heard

¹⁰² This also includes provisions concerning temporal issues involved in the breakdown of the marriage, namely, child support and property settlements. The petition may contain a plea for divorce *a vinculo*, should the nullity plea not be accepted by the court.

¹⁰³ In certain circumstances the court registrar may dispense with serving the petition, for example, if the respondent is mentally ill.

¹⁰⁴ Interrogatories are concerned with admissions of fact from an opposite party or from witnesses. They are usually made in the form of an affidavit, rather than by oral evidence.

¹⁰⁵ At the registrar's discretion, proceedings may be held at any other court more convenient to the parties and witnesses.

in camera,¹⁰⁶ while a defended nullity is held in open court. A statutory provision limits the publications of the acts.¹⁰⁷ Whether the case is a defended or undefended one, a guardian *ad litem*¹⁰⁸ is appointed for a party to the marriage who may be of unsound mind or who suffers from a mental disorder.¹⁰⁹ In a defended cause concerning non-consummation, a medical examination¹¹⁰ is normally required; however, it is not always demanded in an undefended cause.¹¹¹

In a proven cause for nullity, the judge grants a decree *nisi* which is normally made absolute six weeks later. Very few cases are ever appealed, although an appeal is possible. Those that are must be sent to the court of first instance (where the case was judged) or to the House of Lords. Only a party to the marriage may lodge an appeal. If the queen's proctor (a legal official somewhat similar to the canonical promoter of justice) or any other person wishes to show cause why a decree *nisi* should not be made absolute, that person must first advise the court where the

¹⁰⁶ As a protection of a basic human right. The Catholic Church also closes its courts to the public. "The publicity attending many cases in civil law does untold harm to the good name and justifiable feelings of the parties whose faults are laid bare at public examinations." See H. MOTRY, "The Judicial Power of the Church", in The Jurist, 16(1956), p. 244.

¹⁰⁷ In virtue of the Judicial Proceedings (Regulations of Reports) Act 1926 (16 & 17 George V, c. 61, see P.G.A., 1926, pp. 524-525), it is illegal to publish any indecent matter or any matter calculated to injure public morals. In nullity causes the following may be published: (1) names, addresses and occupations of parties and witnesses, (2) a concise statement of the ground of nullity, the defence and rebuttal in support of which evidence has been given, (3) submissions on points of law, (4) the judge's findings and opinions. See L.A.P., p. 222.

¹⁰⁸ Usually a relation or friend of the sick person.

¹⁰⁹ The 1977 Matrimonial Causes Rules, r. 144 requires the permission of a registrar before a case on this ground might proceed. It is the registrar's responsibility to see that a proper guardian is appointed. See F.L.M., p. 118.

¹¹⁰ Experts rarely appear in nullity cases. Their written reports are usually sufficient for the court's needs.

¹¹¹ "If the husband is the petitioner; or if the wife is the petitioner and it appears that she has been previously married or has borne a child, or a statement by her that she is not a virgin has been filed, unless, in either case, the petitioner is alleging his or her own incapacity." See L.A.P., p. 219.

case was judged. Should an intervention be made, the case is automatically transferred to the high court in London where just cause for the intercession must be shown. If this is adequately demonstrated, the case is then dealt with accordingly. The high court may declare absolute the decree *nisi*, rescind the lower court's decree, or prescribe that further enquiries be undertaken before rendering its judgement.

4. POSSIBLE CANONICAL PRACTICE

a. The possible canonical recognition of the civil decree

There may be two possible reasons why a member of the Church of England in possession of a civil decree of nullity might approach an ecclesiastical tribunal of the Roman Catholic Church: the person might wish to marry either another baptized non-Catholic¹¹² or a Catholic. In the first case, applying for an ecclesiastical review would be only for conscience's sake. Some members of the Church of England do accept that a valid matrimonial contract between two baptized persons is necessarily sacramental by divine positive law. The request, therefore, originates from a moral sense rather than from a judicial one. Nevertheless, this concept of law, traditionally understood, is a problematic one for some in and for many outside the Catholic Church.¹¹³

The Catholic Church's present teaching is that marriages between baptized non-Catholic persons are normally sacramental and valid provided no impediment or obstacle arising from divine

¹¹² Special diligence is required if the prior marriage was with a member of the Orthodox Church. See C.L.D., 8(1973-1977), pp. 3-29.

¹¹³ See A. DULLES, "*Ius Divinum* as an Ecumenical Problem", in Theological Studies, 38(1977), pp. 681-708.

positive or natural law intervenes.¹¹⁴ Consequently, a request made by a baptized non-Catholic solely on the heading of conscience should be addressed by the tribunal because the validity of a sacrament could be involved. The second reason relates to a baptized person with a civil decree of nullity who now wishes to marry a Catholic. Initially, the possessor of the decree might prefer that the civil decree be accepted as *prima facie* evidence of nullity, or at least form the basis of an extra-judicial process. On the other hand, the tribunal might prefer to have a formal case, since its members may not be acquainted with the civil process.

The secular court may grant a nullity on one of twelve headings. Six of these can be said to have been inherited, but not unscathed from the ecclesiastical courts: prohibited degrees concerning affinity and consanguinity, nonage, non-compliance with certain formalities, bigamy (*ligamen*), impotence and lack of valid consent. The six other grounds arise solely from statutory law. Two questions present themselves for consideration. Firstly, has the civil comprehension of these grounds which developed in isolation from their canonical understanding and from Catholic jurisprudence since the Reformation and the closure of the Church of England's marriage courts in 1857, made them unacceptable to the Catholic Church as grounds of nullity? Secondly, do the other six grounds have any legal antecedent outside of their English statutory enactment which could make them acceptable to the Catholic Church as grounds of nullity?

English civil decrees of nullity might be acceptable to a Catholic ecclesiastical tribunal if the cause for the decree totally corresponds with the Church's recognition and understanding of the ground. Hence, civil decrees would have to be based in or coincide with: **(a) natural law, (b) divine positive law, or (c) merely ecclesiastical law.** Correspondingly, there would be grounds **(d) not acceptable** to the Catholic Church. In schematic form the six void and six voidable grounds may

¹¹⁴ See Fontes, nn. 387, 394, 399, 477 and 1050.

be divided thus showing the category under which each civil decree has an acceptable canonical basis:

a. Natural Law (against the nature of marriage)

- i. Consanguinity – direct line and second degree of the collateral line (Roman computation)
- ii. Lack of consent -- duress (force and fear)
- iii. Lack of consent – mistake (error regarding the person)
- iv. Mental disorder⁶
- v. Gender
- vi. Impotence -- erection, penetration and ejaculation

b. Divine Positive Law

- i. Polygamy
- ii. Bigamy (*ligamen*)

c. Merely Ecclesiastical Law (before November 27, 1983)

- i. Consanguinity in the third degree of the collateral line (Germanic computation⁷)
- ii. Affinity -- in the direct line and in the second degree of the collateral line (Germanic computation⁸)

⁶ A decree of nullity arising from "mental disorder" might be granted to a person suffering from insanity or from true mental illness who is devoid of the use of reason at the time of marriage. Such a person is incapacitated from establishing a marital union by the natural law itself. However, the decree might also be given to a person with deficiencies the Catholic Church's jurisprudence would not accept as invalidating the marriage.

⁷ Previous legislation (see C.I.C., c. 96), prohibited marriage between persons related closer than full second cousins.

⁸ This impediment is recognized by ecclesiastics as being of its nature perpetual, so that it does not cease by the death of the spouse; see F. WERNZ, Ius canonicum, vol. 5, Romae, 1946, p. 447, n. 369. See also Fontes, n. 866; W. GOLDSMITH, "Of the Competence of the Church and State over Marriage: Disputed Points", in The Jurist, 6(1946), p. 489. English law, however, proclaims that the impediment does not bind after death. This fact should not be overlooked when attending to these cases.

iii. Nonage¹¹⁸d. Not Acceptable

- i. Lack of civil preliminaries or form
- ii. Pregnancy *inter alium*
- iii. Suffering from venereal disease
- iv. Lack of consent – unsoundness of mind
- v. Lack of consent – otherwise¹¹⁹
- vi. Wilful refusal to consummate¹²⁰
- vii. Impotence – erection and penetration

Since the Church accepts civil public documents as authentic if issued according to the laws of the respective country,¹²¹ an ecclesiastical tribunal might accept documents that establish the presence or absence of a fact. Accordingly, the following cases mentioned in categories (a) i and v (for whatever reason); (b) i and ii and (c) i, ii and iii might be accorded a documentary process -- formerly known as a summary judicial procedure -- as outlined in cc. 1686-1688 of the Code of Canon Law. The remaining causes under (a) should be submitted to a formal process because a tribunal would not be expected to know the diagnostic criteria used by the civil judiciary in arriving at a decision. Even if the tribunal should be in possession of civil documentary evidence submitted by psychologists or psychiatrists cases arising under (a) iv should be submitted to a full

¹¹⁸ Statute law states the age of both parties must be 16, while canon law legislates 16 for the boy and 14 for the girl. Although the marriage is civilly invalid if both parties are under 16, it is canonically valid if they are over 16 and 14 respectively. The age at marriage would determine a canonical acceptance of the decree.

¹¹⁹ Being affected by drugs or being in a state of severe drunkenness when either condition takes away all use of reason, might make marriage invalid. Reason that is said to be incomplete or partial does not necessarily render marriage canonically invalid.

¹²⁰ This ground arises only after the marriage.

¹²¹ See Codex, c. 1540, § 2.

process.¹²²

For various reasons civil decrees granted under (d) would presently be unacceptable to an ecclesiastical tribunal as constituting a ground or a proof of nullity. The reasons supporting the decree in the case of (d) i are contrary to canonical custom, to theology and to former positive ecclesiastical laws,¹²³ while those presented under (d) ii, iii, iv and v, of their nature would require a contentious case to establish a defect in consent or an incapacity to establish marriage.

In certain circumstances, cases presented under (d) vi might be processed and remitted to the Holy See for a dissolution. A full process would be required in order to establish nullity under some acceptable category. Lastly, decrees granted under (d) vii would not be acceptable as such since one of the three acts required to establish impotence in a canonical sense is not required to validate the incapacity in civil law. Expert medical evidence, however, might establish in particular cases the presence of impotence that meets the canonical criteria, thereby facilitating a documentary procedure for cases presented under (a) vi.

Voidable marriages declared null may not in fact be null marriages as understood in canon law. Some civil decrees of nullity may be simply decrees nullifying what the Church would consider to be valid marriages. Hence, such marriages would be civilly void but canonically valid. This could

¹²² The canonical rights of the respondent must not be infringed or overlooked. For a list of these rights, see R. McGUCKIN, "The Respondent's Rights in a Matrimonial Nullity Case", in *Studia canonica*, 18(1984), pp. 457-481. For a documentary case, however, cc. 1686 and 1544 would apply.

¹²³ The decree *Ne Temere* (see *Fontes*, n. 4340) expressly exempted baptized non-Catholics from the observance of any form. This was respected in the 1917 *Code of Canon Law* (see c. 1099, § 2). Neither are baptized non-Catholics required to observe the formalities prescribed by civil law, even those required for validity because the civil authority has no power to legislate for the marriages of the baptized (except as regards the merely civil effects), or to judge such cases unless these effects are the principal object of litigation of marriage. According to Western tradition, the parties themselves are the ministers of the sacrament.

be the case if underage people contracted a union, or if a couple married without fulfilling some preliminaries, or without the benefit of a qualified minister to officiate at their marriage.

b. The possible canonical recognition of the civil tribunal

A decree of civil nullity became available in 1858. In that year and in the two years following, only two cases were filed per year. By 1929, however, one hundred cases had been submitted in that year to the high court.¹²⁴ In recent years, though, there has been a steady increase in the number of nullity causes handled by the divorce courts in England and Wales. Between 1937-1947 on average a little over six hundred cases were processed each year.¹²⁵ In the succeeding years this number increased notably.¹²⁶ On average, nearly one thousand nullity suits were entered for judgement annually between 1978 and 1987, the last years for which official figures are available.¹²⁷ Perhaps the number of decrees of nullity seems insignificant when compared with the number of divorces granted by the secular courts.¹²⁸ Nonetheless, some members of the Church of England, for whatever reasons, follow the route of civil nullity in preference to that of divorce.

Baptized parties who enter a marriage are considered to have contracted it as God

¹²⁴ See F.A.M., p. 5.

¹²⁵ The number of cases for 1937 was 153, 1938: 263, 1939: 186, 1940: 171, 1941: 226, 1942: 390, 1943: 498, 1944: 579, 1945: 854, 1946: 1459, 1947: 1460. See Annual Abstract of Statistics, vol. 85, London, H.M.S.O., 1948, p. 55.

¹²⁶ A median of 854 cases were processed between 1957 and 1967. In 1957, 648, 1958: 655, 1959: 638, 1960: 672, 1961: 781, 1962: 887, 1963: 919, 1964: 847, 1965: 911, 1966: 999, 1967: 987. See *ibid.*, vol. 105, 1968, p. 80.

¹²⁷ The number of cases for 1977 was 1095, 1978: 1117, 1979: 994, 1980: 1110, 1981: 1050, 1982: 921, 1983: 887, 1984: 1036, 1985: 574, 1986: 554, 1987: 542. See *ibid.*, vol. 125, 1989, p. 27.

¹²⁸ See Chapter Four, footnote 106.

instituted it and as the Catholic Church understands Christian marriage to be. The Church does not admit any State's claim to dissolve Christian marriages or to annul those validly solemnized between baptized persons. Sacramental marriage is a spiritual matter. Accordingly, the Church has constantly claimed exclusive jurisdiction over the nullity of a sacramental marriage.¹²⁹ While the Church retains its claim to enjoy a proper and exclusive right to judge spiritual matters, it no longer lays claim to the exclusive right that an ecclesiastical judge adjudicate those cases and causes. Not all marriage cases, however, are nullity cases and some cases are dealt with more fittingly by civil courts. An insistence by the Church on exclusive competence would be largely anachronistic. For pragmatic and equitable reasons, the Church has on occasion allowed ecclesiastical tribunals to make use of civil decrees of divorce and nullity to expedite matrimonial causes. For instance, in 1794, Pope Pius VI granted an indult, (then "faculties") to the bishop of Eger permitting him to use the findings of a civil tribunal as extra-judicial proofs in nullity cases.¹³⁰ Although the sentences of the civil authority carried no weight in the eyes of the Church, the ecclesiastical court was allowed to make an investigation of each civil nullity (or divorce) in summary form. This permission was extended by the Holy See to many European dioceses.¹³¹

For well-known historical and theological reasons, the religious situation in England differs somewhat from that of many other countries. Could the Catholic Church recognise the English civil marriage tribunal? Although the civil nullity process does not incorporate all the Catholic requirements, there are some fundamental points of agreement between them and as well as points of wide divergence. A major concern focuses on undefended cases that have no respondent's counsel, while a lesser one involves a single lay judge, who may or may not have been baptized,

¹²⁹ See Codex, c. 1401, 1°. The Church could delegate civil courts to study its cases; see Relatio, pp. 308-309.

¹³⁰ See A. ROSKOVANY, op. cit., vol. I, pp. 609-634.

¹³¹ See Chapter Three, footnotes 65-67.

deciding a case where there is usually no appeal. Furthermore, there is considerable doubt whether an ecclesiastical tribunal would be permitted to study the acts of the civil case, thereby frustrating the ecclesiastical judge's knowledge of the nature and reliability of the evidence presented.¹³² There is no equivalent of a defender of the bond, and perhaps the bond is not even recognized since divorce is universally available. Presently, therefore, the answer to the question must be a negative because the relationship between the established Church, the State and the Monarchy precludes any such recognition which would necessarily involve a political settlement. Apparently, the time is not yet right for this.

Conclusion

Christianity has been a major influence in the evolution of English legal concepts, institutions and enactments before and since the Reformation. Pre- and post-sixteenth century ecclesiastics and canon law have made a significant contribution to those developments, one of which concerns equity -- the prudent moderation of the rigour of law on the principles of natural justice and fairness. It can truly be said that equity is a common characteristic of both the canonical order and English common law. Perhaps, in this common spirit of equity the Holy See might permit the English or Welsh ecclesiastical tribunals to recognize those civil decrees of nullity that establish facts not subject to rebuttal and which are in harmony with canonical principles. This would permit the issuing of an ecclesiastical decree declaring the nullity of a marriage and accord approbation to a civil process inherited from the Catholic Church by way of the Church in England and upheld in the ecclesiastical marriage courts of the national Church.

¹³² P. Harrington points out some of the difficulties involving witnesses and undefended cases in civil law. See P. HARRINGTON, Analytic Comparison of Trials under Canon Law and Civil Law with Specific Reference to the Examination of Witnesses, Washington, D.C., The Catholic University of America, 1954, 77p.

GENERAL CONCLUSION

A venerable British canonist, writing after the promulgation of the revised Code of Canon Law, parenthetically stated of c. 11, "This is the most revolutionary ecumenical canon of all."¹ He may be right. There is little doubt that the Code contains canons seen by many persons as actual and recognizable evidence of an ecumenical evolution set in motion by the Second Vatican Council. This recognition is most clearly evident when those ecumenical signs are enunciated or promoted juridically in the Catholic Church. One such change heralded by many persons both within and outside of the Catholic Church concerns c. 11 which reads as follows: "Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy the sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age."² This appears to be a straightforward statement of intent by the Church. As a consequence of the promulgation of the Codex iuris canonici in 1983, only Latin rite Catholics are bound by the internal laws of the Catholic Church. What happens when this canon is applied to baptized non-Catholics, in particular to persons who are members of the Church of England, in matters concerning nullity of marriage? The following points emerge from this study and present themselves for consideration.

First, based on the natural law axiom that existence precedes essence, the Catholic Church proclaims that human dignity is anterior to any other consideration. From a theological and canonical standpoint, the baptized person has a sacramental dignity that defers only to human dignity. Those same disciplines also recognize marriage as an inherent right of natural law intimately bound up with human dignity. Consequently, as an application of natural law, spouses possess a

¹ J. BUCKLEY, "The Ecumenical Aspects of Marriage Legislation in the New Code", in The Clergy Review, 1986(70), p. 165.

² See Chapter Two, footnote 73.

right to question whether their marital union is a valid marriage. They also have a corresponding right to a declarative judgement on the question. The Catholic Church has bound itself to respect this right and favour its use.

Second, the Catholic Church has claimed that all baptized persons, while not always subjects of the Church, are members of the Church. The expression and the application of this teaching have differed at various times. In the context of this study, however, two aspects of that teaching are of paramount importance. Today, the Catholic Church distinguishes between the *Ecclesia Christi* and itself. It asserts that persons are baptized into the Church of Christ, but that only some of those persons are members of the Catholic Church. Since the Church which Christ founded subsists in and maintains its fullest expression in the Roman Catholic Church, the latter by its nature is obliged continually to manifest the grace, truth and equity which are part of the essence of the *Ecclesia Christi*. Through baptism, persons become members and subjects of the Church of Christ and of its juridical power. Accordingly, as members and subjects of the Church of Christ, baptized non-Catholics have the prerogative to expect the Catholic Church to acknowledge them as persons within the Church of Christ, and to maintain a vigilance over both their rights and their obligations.

Third, as a result of the theological distinction between the Church of Christ and the Roman Catholic Church, the Second Vatican Council asserted in *Dignitatis humanae* (n. 4), that non-Catholic ecclesiastical bodies have the right to govern themselves by their own norms. This conciliar statement is not included in the revised Code which is addressed to the Latin Church. Understandably, there was a reluctance by the Code commission when preparing the revised Code, to legislate formally for non-Catholics. The silence of the Catholic Church on the laws of other Christian communities is not tantamount to giving its consent to those laws, their contents or the applicability. Rather, that reticence and reluctance to codify norms concerning the discipline of

Churches and ecclesiastical bodies linked, however tenuously, with the Latin Church was painstakingly maintained and achieved during the revision of the Latin Code. This stance, however, seems in some extent to have given way recently when the Holy See promulgated positive legislation concerning non-Catholic Christians linked with the Eastern Churches.³

Fourth, although it implicitly contains aspects of divine positive law and natural law, c. 11 by written composition is a merely ecclesiastical law. However, it reflects the ecclesiology of the Second Vatican Council and may well be a constitutive law not subject to dispensation. In its positively stated form, it binds Catholics. It does not say that baptized non-Catholics are not bound by merely ecclesiastical laws. Had a negative form been used, the injunction itself, a merely ecclesiastical law, would have bound non-Catholics.

Fifth, throughout its history, the Church has issued certain laws for the baptized concerning marriage; those laws declared and defined more explicitly the requirements of the natural law and of the divine positive law; they added merely ecclesiastical laws to safeguard more adequately the integrity of the marital union. While divine law, in its natural and positive elements, continues to bind all the baptized, there appears to be a *lacuna* arising from the eventual application of c. 11. Since marriages are sacred, as the Church has constantly claimed, and therefore subject to its oversight, who now legislates the conditions required for establishing a valid union between baptized non-Catholics? The new Codex canonum ecclesiarum Orientalium, in c. 781, has no such hesitation in providing an answer to that question for those bound by its prescriptions. The canon provides that the Catholic Church recognizes any form of marriage prescribed or admitted by the law to which the parties were subject at the time of their marriage. Could the Latin Church see this merely ecclesiastical law as being a parallel passage that might be safely used in the Western Church? If

³ See cc. 780-781 in the new Codex canonum ecclesiarum Orientalium, in A.A.S., 82(1990), p. 1218.

so, in England, could the canon law of the Church of England, which substantially defers to the civil law and recognizes both civil and ecclesiastical marriage, fulfil this function? Could the Catholic Church recognize the competence of the civil authority to legislate for marriages between baptized non-Catholics, to determine what does and what does not constitute marriage?

Sixth, since baptized non-Catholics marrying after November 27, 1983, would not be considered bound by merely ecclesiastical laws, the matrimonial impediments not arising from the nature of marriage or from divine positive law would not affect those persons. Consequently, baptized non-Catholics cannot impugn a marriage solemnized after that date on any *caput* arising from a diriment impediment of merely ecclesiastical law. Similarly, a marriage entered into by baptized non-Catholics after the promulgation of the revised Code may not be judged by an ecclesiastical tribunal on a ground having its formulation only in positive ecclesiastical law as understood in contemporary jurisprudence.

Seventh, those baptized non-Catholics whose marriages were celebrated before November 27, 1983, retain the right to enter a petition alleging nullity on the headings open to them under the former Code of Canon Law. These marriages, however, may not be judged on any ground of nullity introduced by the revised Code, unless it amounts to a declaration of natural or divine positive law. *Dolus* is now listed in the Code as a specific ground of nullity. Some canonists⁴ hold that a marriage effected by *dolus* is contrary to the nature of marriage, thereby rendering such a union invalid *ab initio*. Nevertheless, until the supreme authority in the Church declares authentically about the nature of *dolus* in this regard, there remains a *dubium*. An interpretation declaring that the ground of *dolus* (determining consent) could be invoked in cases regarding baptized non-Catholics or other persons as was the case with force and fear, would enable non-Catholics to impugn their

⁴ See Chapter Five, footnote 73.

marriage on this ground. Otherwise, there remains a doubt, and different solutions might be envisaged in different courts.

Eighth, for some persons the positive formulation of c. 11 appears to have been a beneficial ecumenical step. The writer holds a contrary view. The application of this canon circumvents the right of some baptized non-Catholics to impugn a marriage before an ecclesiastical tribunal previously -- albeit briefly -- and equally shared with Catholics. Since Roman Catholics are bound to observe the Church's merely ecclesiastical laws, it may be construed that they now seem to have more opportunities under which the validity of their marriages might be investigated, while baptized non-Catholics who married after a given date have fewer possibilities. By way of example, abduction, *crimen*, consanguinity in the third and fourth degrees of the collateral line, affinity in the direct line, legal relationship in the direct line and second degree of the collateral line and notorious or public concubinage remain what they are, whether a spouse is a Catholic or a baptized non-Catholic. A Catholic may impugn a marriage on any of those grounds; a baptized non-Catholic who married after November 27, 1983, cannot. Canon 11 seems to have created a dual system for judging the validity of marriages between Christians, depending solely on ecclesiastical ascription.

Ninth, through a declaration from the Commission for the Interpretation of the Decrees of Vatican II (later amplified by the Apostolic Signatura) and in its positive law (c. 1476) the Church has acknowledged that anyone may be a plaintiff in a trial. Persons have a concordant right to receive a judgement in trials concerning the validity of an impugned marriage. Since the Church appears to recognize that some baptized non-Catholics must marry according to the law to which they are subject (point four, above), could the Church also acknowledge that those same authorities possess an inseparable obligation to declare when those conditions have not been met? In this way the right to attack a marriage before some competent arena would be preserved intact. Conceivably, could the Church look at the grounds of English civil nullity and procedure and perhaps accept civil

decrees as binding in the Catholic ecclesiastical forum? Perhaps, the present discipline of the State could be viewed sympathetically by the Roman Catholic Church (abstracting from the theological principles of papal primacy and the Church of England's lack of full communion with the Holy See) if it is true that the principles which determine the validity or invalidity of a marriage are those known by the Roman Catholic Church. In England, at least five of the six categories of marriage held by the State to be void *ab initio* are in harmony with the Catholic Church's canon law.

Tenth, since some English civil decrees of nullity establish facts, those that are canonically acceptable to the local Church could form the basis of a documentary process or at least be sanctioned as documentary proof. If a clerical judge (collegiate tribunal or episcopal delegate) were to review the grounds for the decree, endorse and confirm it, the Church's difficulty of accepting a decision made by a secular, and probably non-Catholic, judge on a sacramental matter would be resolved. Naturally, in examining an English decree of nullity granted to a non-Catholic under any heading, a Catholic tribunal would have to take cognizance of the date of the union and apply canon law accordingly. Perhaps, in cases where two Catholics have obtained a civil decree of nullity, similar procedural norms might be invoked.

Finally, it is axiomatic that new principles in law bring new applications. Canon 11 is no exception. Some of these new principles are amply illustrated when c. 11 is invoked in matters pertaining to baptized non-Catholics on topics concerning marriage and the nullity of marriage. However, some of the ramifications of c. 11 in these matters might be an antithesis to what the revisers of the Codex iuris canonici had anticipated and what ecumenists envisioned as a development of law not a regression, once all the baptized were recognized as being full members of the *Ecclesia Christi*. Canon 11 may indeed have a just cause to be dubbed "the most revolutionary ecumenical canon of all."

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BIOGRAPHICAL NOTES

Michael Patrick Saunders was born on February 1, 1951, in Birmingham, England, where he received his primary and secondary education. He entered All Hallows College, Dublin, Ireland, in 1973 and completed his philosophical and theological studies in 1979.

On June 16, 1979, he was ordained a priest for the diocese of Clifton, England, by the Right Reverend Mervyn Alexander. After five years' pastoral and tribunal experience he undertook studies in canon law at Saint Paul University, Ottawa, Canada, in 1984.

He received a national award for philosophical studies in 1976 (Dublin, N.C.E.A.); a Baccalaureate in Sacred Theology (Saint Patrick's University, Maynooth, Ireland) in 1978; a Baccalaureate in Canon Law (Saint Paul and Ottawa Universities) in 1985; a Licence in Canon Law (Saint Paul University) in 1986; he prepared and defended a dissertation for the Master of Arts degree in Canon Law and received this degree from the University of Ottawa in 1986 (title: The Marriage Laws as found in the Canons of the Church of England).

In 1986 he was appointed private secretary to the bishop of Clifton, promoter of justice, defender of the bond, vocations director and chancellor of the diocese. He returned to Saint Paul University in 1989 to pursue doctoral studies in canon law.