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# THE STATUS OF THE CANONICAL FORM OF MARRIAGE IN PAPUA NEW GUINEA: A COMPARATIVE STUDY OF CUSTOMARY, STATUTORY AND CANONICAL CELEBRATION OF MARRIAGE

by
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# ABSTRACT

The people in Papua New Guinea contract marriage according to their traditional, customary law, normally in every case prior to any Christian rite of marriage. From the time of their customary marriage, even Catholics, consider themselves properly married. Nevertheless, they are aware that they cannot receive the Eucharist as long as they remain unmarried in the eyes of the Church. If it takes place at all, the Church marriage is often celebrated years after the customary marriage and this rite loses its meaning for the couple and many Catholics think that a Church marriage contributes, if anything, little to the married state. At best it regularizes a couple's position before the priest and this provides access to the Eucharist. This attitude and the low percentage of Catholics who celebrate their marriage in the canonical form has been a matter of increasing concern to the Church in Papua New Guinea.

As a solution to this serious pastoral problem some adaptation of the norms governing the canonical form of marriage could be introduced by combining the essential aspects of the customary and canonical forms of celebration. We think that such an adaptation is essential to dissolve the dichotomy, which now exists between customary and Church marriages of Catholics. It is obvious that the genuine values of Papua New Guinean cultures have to be integrated into the canonical ceremony of marriage if we wish to make Christian marriage incarnate in Papua New Guinean cultures. In this respect we have to take cognizance of the fact that the concept of marriage formulated out of a single contractual expression of consent has no place in the traditional understanding of marriage. Customary marriage differs from the Western form of marriage in two respects: a) it comes into being in the course of protracted negotiations between the families of the bridegroom and the bride. Various stages in the negotiations are marked by various ceremonies: b) while free choice and consent of the parties is in no way precluded, the inter-familial relationship is an inseparable characteristic of the marriage according to Papua New Guinean customs.

It was with an intention of identifying and proposing an equitable solution the pastoral problems related to marriage and family life in Papua New Guinea that we undertook our study regarding the status of the canonical form of marriage in Papua New Guinea. The *status quaestionis* of study was: How might the customary laws expressed in the traditional celebration of marriage be safeguarded and yet contextualized within the Church's legislation on the canonical form of marriage? This *status quaestionis* is answered in four inter-related chapters.

The principal conclusion of our study suggests that the most serious feature of a low marriage rate in the church is the separation in time of the customary and sacramental marriage, which leads to a widespread view that sacramental marriage is largely irrelevant. For this reason, we discuss at length in the fourth chapter the compatibility between the notions of a natural contract (*contractum naturale*) and the sacramental marriage. The integration of the customary celebration, that is, natural marriage, and the canonical celebration is possible only when marriage is actually celebrated within a cultural context that conforms to the customary legal traditions of people. Because of this compatibility between the two forms of marriage, any adaptation of the canonical form of marriage to customary celebration must take into consideration the different roles the lay people, that is, the leaders of the communities or elders of families as well as the priest have to play.

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## ABBREVIATIONS

| | |
|---|---|
| *AA* | Decree on the apostolate of the laity, *Apostolicam actuositatem* |
| *AKK* | *Archive für Katholisches Kirchenrecht* |
| *AAS* | *Acta Apostolicae Sedis* |
| *AD* | Decree on the Church's missionary activity, *Ad gentes* |
| *AFER* | *African Ecclesial Review* |
| *AS* | Motu proprio, *Apostolos suos* |
| *ASS* | *Acta Sanctae Sedis* |
| *CD* | Decree on the pastoral office of bishops in the Church, *Christus Dominus* |
| *CIC '17* | *Codex iuris canonici, 1917* |
| *CIC '83* | *Codex iuris canonici, 1983* |
| *CLD* | *Canon Law Digest* |
| CLSA | Canon Law Society of America |
| *CL* | Apostolic exhortation, *Christifideles laici* |
| *CM* | Decree, *Crescens matrimoniorum* |
| *CT* | Apostolic exhortation, *Catechesi tradendae* |
| Decision c. | Decisions of a court in which the named judge was *ponens*<br>(decisions cited in our studies are of the Roman Rota unless indicated otherwise) |
| *DH* | Declaration on religious liberty, *Dignitatis humanae* |
| *EB* | Motu proprio, *Ecclesiae bonum* |
| *EIC* | *Ephemerides iuris canonici* |
| *EN* | Apostolic exhortation, *Evangelii nuntiandi* |
| *FC* | Apostolic exhortation, *Familiaris consortio* |

| | |
|---|---|
| FLANNERY I | Austin P. FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Postconciliar Documents*, vol. 1, New revised ed., Northport, NY, Costello Publishing Company; Dublin, Dominican Publications, 1996. |
| FLANNERY II | A.P. FLANNERY (gen. ed.), *Vatican Council II: More Postconciliar Documents*, vol. 2, New revised ed., Northport, NY, Costello Publishing Company; Dublin, Dominican Publications, 1998. |
| *Fontes* | *Codicis iuris canonici fontes* |
| *GS* | Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* |
| *HV* | Encyclical letter on the regulation of births, *Humanae vitae* |
| JCD diss. | Doctoral dissertation in Canon Law |
| *LG* | Dogmatic Constitution on the Church, *Lumen gentium* |
| *ME* | *Monitor ecclesiasticus* |
| *OE* | Decree on the Eastern Churches, *Orientalium Ecclesiarum* |
| *PG* | Apostolic exhortation, *Pastores gregis* |
| *RH* | Encyclical letter, *Redemptoris hominis* |
| *RM* | Encyclical letter, *Redemptoris missio* |
| *SA* | Encyclical letter, *Slavorum apostoli* |
| *SC* | Constitution on the sacred liturgy, *Sacrosanctum concilium* |
| *RRT Dec.* | *Sacrae Romanae Rotae Decisiones seu sententiae*, Apostolicum Rotae Romanae Tribunal [Romanae Rotae Tribunal] |
| *StC* | *Studia canonica* |

## GENERAL INTRODUCTION

The Second Vatican Council re-affirmed that the Church is not dependent upon the worldviews or the laws, customs and practices of any particular culture. Rather the Council Fathers emphatically stated that

> [...] the Church is faithful to its traditions and is at the same time conscious of its universal mission; it can, then, enter into communion with different forms of culture, thereby enriching both itself and the cultures themselves.[1]

However, the Council also recognized that missionary adaptation is always a difficult task. Thus, the Fathers declared:

> Although the Church has contributed largely to the progress of culture, it is a fact of experience that there have been difficulties in the way of harmonizing culture with Christian thought, arising out of contingent factors.[2]

The missionary and pastoral problem of harmonizing the essential aspects of the customary marriage in Papua New Guinea with the essential aspects of the canonical form of marriage is a specific example of this basic problem of cultural adaptation. For centuries church law has required that all Catholics observe the canonical form for the valid celebration of marriage. Such a requirement has pastoral ramifications in societies in which people, prior to any Christian rite of marriage, contract marriage according to their traditional and customary law. Moreover, customary marriage in the mind of Papua New Guineans, including Catholics, is the "real marriage." Consequently, most Catholics do

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[1] SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* (= *GS*) 58, 7 December 1965, in *Acta Apostolicae Sedis* (= *AAS*), 58 (1966), pp. 1025-1120; English trans. in Austin P. FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Postconciliar Documents* (= FLANNERY I), vol. 1, New revised ed., Northport, NY, Costello Publishing Company; Dublin, Dominican Publications, 1996, pp. 903-1001, here at p. 234

[2] *GS* 62; FLANNERY I, p. 238.

not feel the need of, and often are in no hurry for, a church marriage even though they are aware that they cannot receive the Eucharist as long as they remain unmarried in the eyes of the Church. If it takes place at all, the Church marriage is often celebrated years after the customary marriage and this rite loses its meaning for the couple, and many Catholics think that a Church marriage contributes little, if anything, in itself to the married state. At best, it regularizes a couple's position before the priest and provides them access to the Eucharist.

Due to these realities, the percentage of Catholics who celebrate their marriage according to canonical form is considerably low. This is a source of great concern to many bishops of Papua New Guinea. Even in areas where Christianity is well established, the percentage of canonical celebrations of marriage is quite low.

As a solution to this serious pastoral problem, some adaptation of the norms governing the canonical form of marriage might desirably be introduced by combining the essential aspects of both the customary and canonical forms of celebration. We think that such an adaptation is possible and even necessary to reduce the effects of the dichotomy that now exists between customary and church marriages of Catholics. Therefore, if we wish to make Christian marriage truly incarnate in Papua New Guinea, the genuine values of its native cultures have to be integrated into the canonical ceremony of marriage.

The customary form of marriage differs from the western approach to marriage in two respects. First, customary marriage comes into being over the course of protracted negotiations between the families of the prospective groom and bride. Various stages in the negotiations are marked by different ceremonies. Second, while free choice and consent of the parties is in no way precluded, the inter-family relationship is an

inseparable characteristic of marriage according to the Papua New Guinean customs. Family and community are continually involved, and this assists in lending a certain stability to the marriage. Moreover, some of the traditional values of a Papua New Guinean marriage are quite close to those of the Christian celebration. Some essential elements of the Papua New Guinean cultures with respect to the nature and celebration of marriage are perfectly compatible with the Christian understanding of marriage. It is extremely important, therefore, that these common values are carefully identified and studied in depth before making any attempt to integrate the two forms of marriage celebration.

Although much has been written concerning the different aspects of the customary and Christian marriage in Papua New Guinea, our research indicates that to date there has not been any major canonical study on the possibility of integrating the essential aspects of the Papua New Guinean customary marriage into the canonical forms of marriage celebration or vice versa. In his doctoral thesis, defended in 1992 at Saint Paul University, Ottawa,[3] A.J. Malone studied the problems associated with the pastoral care of those in polygamous marriages in Papua New Guinea. But his study did not consider the conflict between the customary and canonical forms of marriage and the pastoral problems associated with it.

There is a major study published in three volumes which is the result of a research project on Marriage and Family Life (MFL) in Melanesia. Each volume examines the

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[3] See A.J. MALONE, *The canonical and pastoral implications of canon 1148*, JCD diss., Ottawa, Saint Paul University, 1992.

Melanesian marriage from the theological,[4] sociological[5] and anthropological[6] perspectives. Each of these volumes will prove extremely valuable to our study although not from a canonical point of view.

This present study will attempt to analyze thoroughly the status of the canonical form of marriage and its adaptability to the Papua New Guinean context. Our own experience, as well as that of many pastors working in Papua New Guinea, suggests that there is an urgent need to resolve the impasse described above. Hence, the main question we propose to pursue in this study is: How can we respect and transform the customary laws that govern the traditional celebration of marriage in light of the Church's teachings without disregarding the fundamental values the canonical form of marriage is intended to promote? Our answer to this question will be organized under the following scheme.

First, the main question necessitates an inquiry into the relationship between culture and law in general. Culture rules people's life and behaviour. It constitutes their norm of daily life in their interpersonal relations. In the first chapter, therefore, we will study the important insights provided by cultural anthropologists and sociologists into the concept of culture and its influence on the behaviour of a particular ethnic group or people. This will provide us with a sufficient understanding of the real life situation of the people to enable us to contextualize the main issue of the adaptability of the canonical form of marriage within the Papua New Guinean cultures. This constitutes the subject matter of chapter one.

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[4] See E. MANTOVANI et al. (eds), *Marriage in Melanesia: A theological perspective*, Point Series No. 11, The Melanesian Institute, Papua New Guinea, Goroka, 1987.

[5] See J. CONWAY, E. MANTOVANI, *Marriage in Melanesia: A sociological perspective*, Point Series No. 15, The Melanesian Institute, Papua New Guinea, Goroka, 1990.

[6] See E. MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, Point Series No. 17, The Melanesian Institute, Papua New Guinea, Indore, M.P, Satprachar Press, 1992.

Second, because the daily life, including marriage, of Papua New Guineans is governed by two sets of laws, namely the customary and statutory laws prior to encountering canon law, it is necessary to analyze them in order to determine the possibility of finding a common basis for legitimate adaptation of the ecclesiastical norms on the canonical form of marriage to their native cultures. Therefore, the second chapter will focus on the values the Papua New Guinean societies consider vital to their existence and survival, particularly those values embedded in the customary celebration of marriage. Since the aim of our investigation is to bridge the customary form of marriage and the canonical form, our attention will be directed more towards an analysis of the essential aspects of customary marriage than toward the statutory marriage defined by civil laws for Papua New Guineans. We believe that a correct understanding of the Papua New Guinean customary marriage could lead to the identification of the common foundation for a legitimate fusion of the customary and canonical forms of marriage.

Third, an integration of two systems of law cannot be achieved without a proper understanding of the principal values each system is intended to promote and safeguard. Therefore, it is important to establish the Christian notion of marriage and the legislation promulgated by the legitimate church authority in the 1983 Code of Canon Law. The third chapter will contain an analysis of certain canonical provisions of the Catholic Church in respect to marriage, particularly the juridical act of contracting marriage and the essential elements of the canonical form of marriage.

Fourth, in order to integrate a particular legal requirement related to the celebration of marriage into the Papua New Guinean way of life, there should be proper catechesis of the people about the issues that will invariably affect their life. They should

understand and appreciate the meaning of what they are offered or asked to do. Any adaptation of a particular aspect of life demands such a catechesis. The main objective of chapter four, therefore, will be to identify clearly the compatible values found in both legal systems and the pastoral implications of integrating the canonical form of marriage into the customary celebration of marriage in Papua New Guinea. We attempt such an integration in the hope that it will enrich the daily spiritual life of Papua New Guinean Catholics by enabling them to participate legitimately in the sacramental life of the Church of which many of them are now deprived due to the difficulties hindering them from marrying according to the canonical form.

A final note concerns the parameters of the scope of our study. Papua New Guinean Catholics are predominantly Roman Catholics of the Latin *sui iuris* Church. Therefore, our study will be restricted to an analysis of the laws on the canonical form of marriage as found in the Code of Canon Law promulgated in 1983 for Latin Catholics. It is beyond the scope of our inquiry to embark on a comparative analysis of the respective canons on the canonical form of marriage according to the *CIC' 83* and *CCEO*. The adaptability of the *CCEO* norms governing the canonical form of marriage to other cultures warrants its own separate investigation.

# CHAPTER ONE

# INTERACTION BETWEEN CULTURE AND EVANGELIZATION: IMPLICATIONS FOR THE APPLICATION OF ECCLESIAL LAW

## Introduction

The cultural heritage of each person is the prism through which the whole of human experience is seen. This "treasure" gives them their identity. Therefore, it has to be respected and jealously safeguarded not only by the people of a given culture but also by other cultures and even by the Church. Consequently, Christianity must begin with the people's culture, beliefs and worldviews if the evangelization is to have lasting effect.[1] Otherwise, Christianity remains superficial.

In the past, most of the first missionaries, coming to mission countries mainly from Europe and America, thought that the "natives"—regarded by Christian countries as "primitive" both spiritually and technologically—had no knowledge of God and were seen to be in dire need of saving grace. Therefore, they paid little attention, if at all, to the people's culture and effected their first evangelization on the model of the western concept and understanding of mission.[2]

Gradually the Church took note of the importance of cultures with greater sensitivity. Realizing that the Christian message—the Gospel—must apply equally to

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[1] See JOHN PAUL II, Address to the participants in "Meeting for friendship among peoples," in *Osservatore romano* (English edition), 13 September 1982, pp. 6-7; L. STANISLAUS, "Gospel and culture: Encounter in the life of people," in *Sedos Bulletin*, 34 (2002), p. 272.

[2] See E. MANTOVANI et al. (eds), *An introduction to Melanesian religions*, Point Series No. 6, The Melanesian Institute, Papua New Guinea, Indore, M.P, Satprachar Press, 1995, p. 2; P. GIBBS, "Missionaries and culture," in *Verbum SVD*, 41 (2000), p. 92; G.A. ARBUCKLE, "Inculturation not adaptation: Time to change terminology," in *Worship*, 60 (1986), pp. 513-514; M.V. ANGROSIMO, "The culture concept and the mission of the Roman Catholic Church," in *American Anthropologist*, 96 (1994), p. 824; M. ÜFFING, "Introduction of new missionaries: General considerations," in *Verbum SVD*, 43 (2002), p. 11.

every culture[3] and be open therefore to a variety of different cultures, the Church has slowly begun to change its way and understanding of evangelization and to talk about "acculturation," "adaptation," "accommodation," "indigenization," "inculturation," etc.[4] Recent popes emphasized this need for the interaction of the Christian message with different cultures but stressed the one-sided effect of its power to change cultures.[5] To some extent they realized that the evangelization of human individuals and communities should inevitably imply evangelization of culture.[6] Otherwise, evangelization, strictly speaking, would be a purely superficial process.

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[3] One of the most significant aspects in mission, which we must never overlook, is history. It is important to keep in mind the fact that within the wider context of God's plan of salvation for all nations, all have their own history of salvation – as individual persons but above all as community(ies), modelled out of their own particular context(s). On this point, see JOHN PAUL II, Allocution to the Roman Rota, 28 January 1991, in *AAS*, 83 (1991), pp. 947-953; English trans. in W.H. WOESTMAN (ed.), *Papal allocutions to the Roman Rota, 1939-2002*, Ottawa, ON, Saint Paul University, Faculty of Canon Law, 1994, pp. 215-216; ANGROSIMO, "The culture concept and the mission of the Roman Catholic Church," p. 824. Therefore, each people needs to be approached with "a deep humility, by which we remember that God has not left himself without a witness in any nation at any time. When we approach the people of another faith than our own it will be in a spirit of expectancy to find how God has been speaking to them and what new understanding of the grace and love of God we may ourselves discover in this encounter. Our first task in approaching another people, another culture, another religion, is to take off our shoes, for the place we are approaching is holy. Else we may find ourselves treading on people's dreams. More serious still, we may forget that God was here before our arrival" (M.A.C. WARREN, Introduction to J.V. TAYLOR, *The primal vision: Christian presence amid African religion*, London, SCM Press, 1963, p. 10).

[4] See A. SHORTER, *Toward a theology of inculturation*, Maryknoll, NY, Orbis Books, 1988, pp. 3-16; D.J. HESSELGRAVE, *Communicating Christ cross-culturally*, Grand Rapids, Zondervan Publishing House, 1980, p. 82; T. AERTS, *Christianity in Melanesia*, Port Moresby, University of Papua New Guinea Press, 1998, p. 3; ARBUCKLE, "Inculturation not adaptation," p. 515; ANGROSIMO, "The culture concept and the mission of the Roman Catholic Church," pp. 824-826.

[5] See PIUS XII, *Allocutiones*, 4 November 1953, in *AAS*, 45 (1953), p. 794; JOHN XXIII, Encyclical letter, *Princeps pastorum*, 10 December 1959, in *AAS*, 51 (1959), p. 844; PAUL VI, Apostolic exhortation, *Evangelii nuntiandi* (= *EN*), 8 December 1975, in *AAS*, 68 (1976), pp. 5-76; English trans. in A.P. FLANNERY (gen. ed.), *Vatican Council II*, vol. 2, *More Postconciliar Documents* (= FLANNERY II), New revised ed., Northport, NY, Costello Publishing Company; Dublin, Dominican Publications, 1998, pp. 711-761, here at pp. 718-719; JOHN PAUL II, Encyclical letter, *Redemptoris missio* (= *RM*) 54, 7 December 1990, in *AAS*, 83 (1991), pp. 249-340; English trans. in *Origins*, 20 (1991), p. 557.

[6] In his apostolic exhortation, *Pastores gregis*, John Paul II writes: "The evangelization of culture and the inculturation of the Gospel are an integral part of the new evangelization and thus a specific concern of the Episcopal office. [...] This is, in fact, a task which is ancient yet ever new, a task which has its origin in the mystery of the incarnation itself and its motivation in the innate ability of the Gospel to take root in every culture, shaping and developing it, purifying it and opening it to the fullness of truth and life

Notwithstanding the good intention and sincere effort of the popes to promote the interaction of the Christian message with different cultures, the language of the papal texts referred to is perhaps in some places rather too embellished and unctuous. In fact, an examination of the actual worldwide praxis of the Church reveals little of the inculturation demanded. The liturgy is to a great extent still Roman-European. So also are canon law, theology, governance structures, etc. There is wide divergence between claim and reality, theory and praxis. In order to achieve the symbiotic and harmonious merger of faith and culture, a process of interaction and change must be reciprocal. Thus the final result of inculturation may be a synthesis in which faith becomes culture or, in other words, the "end-product" may be a "Christian culture."

The aim of this first chapter is to outline the more important insights proposed by both cultural anthropologists and sociologists on the concept of culture and its influence on and even direction of people's daily life-activities. This hopefully will provide a background for avoiding the difficulty of ethnocentrism, when later in this study certain canonical and pastoral provisions of the Catholic Church on marriage, particularly its canonical form, are analyzed.

The chapter is divided into three parts. The first part will look at the concept of culture and its impact on the individual as well as on the community. The second part will describe the problem of communicating the Christian message across cultures as one of the most critical problems faced by the Church. The third part of the chapter will present an overview of Papua New Guinea peoples and their cultures.

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which is realized in Jesus Christ" (JOHN PAUL II, Apostolic exhortation, *Pastores gregis* (= *PG*) 30, 16 October 2003, in *Origins*, 33 [2003], p. 369).

### 1.1. Importance of Culture to Canon Law

With the promulgation of the revised Code of Canon Law in 1983, discussions regarding the issue of canonical interpretation entered into a new and vital stage.[7] Unfortunately, most tackled this issue without a specifically intercultural focus, although the ways of applying canon law in non-western societies have been more problematic and ambiguous.[8] Ladislas Örsy, the leading thinker in today's canonical hermeneutics, has stated that "the most significant hermeneutical issue in canonical science is in the understanding of the same law in many different cultural contexts."[9] This intercultural hermeneutical problem of canon law has, in some degree, always existed and therefore it is not restricted only to areas in which the Church is beginning to grow. It is a continual

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[7] See L. ÖRSY, *Theology and canon law: New horizons for legislation and interpretation*, Collegeville, MN, Liturgical Press, 1992; "The interpreter and his art," in *The Jurist*, 40 (1980), pp. 27-56; "The interpretation of laws: New variations on an old theme," in *StC*, 17 (1983), pp. 95-133; J.A. CORIDEN, "Rules for interpreters," in *The Jurist*, 42 (1982), pp. 287; R.G. CUNNINGHAM, "Invitation, interpretation and inspiration: The canonist's response to the Code," in *CLSA Proceedings*, 47 (1985), pp. 16-34; R.A. HILL, "Reflections on the interpretation of the revised Code," in *The Jurist*, 42 (1982), pp. 311-319; E. KNEAL, "Interpreting the revised Code," in *The art of interpetation: Selected studies on the interpretation of canon law*, Washington, DC, Canon Law Society of America (= CLSA), 1982, pp. 29-35.

[8] One of the reasons why there are only a few books and articles regarding the canonical interpretation with the intercultural focus may be the fact that the Latin Code does use the term "culture" in intercultural perception only once. See *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus*, Vatican City, Typis polyglottis Vaticanis, 1983; English trans. *Code of Canon Law* (= *CIC '83*), Latin-English ed., New English trans., prepared under the auspices of the Canon Law Society of America, Washington, DC, CLSA, 1999, c. 787 §1: "Missionari, vita ac verbi testimonio, dialogum sincerum cum non credentibus in Christum instituant, ut ipsis, ratione eorundem ingenio et culturæ aptata, aperiantur viæ quibus ad evangelicum nuntium cognoscendum adduci valeant." Only a few canonists consider in their studies the importance of interpreting the Code in relation to non-western cultures. See B. CONSTANTINE, *The problem of consent in the arranged marriages of Tamils of Jaffna*, JCD diss., Rome, Pontificia Universitas Urbaniana, 1977; A. MENDONÇA, "*Bonum coniugium* from a socio-cultural perspective," in *Many cultures, many faces. Monsignor W. Onclin Chair 2002*, Leuven, Peeters, 2002, pp. 57-108; "The importance of considering cultural contexts in adjudicating marriage nullity cases, with special reference to South East Asian countries," in *Philippiniana sacra*, 92 (1996), pp. 189-268; "Recent Rotal Jurisprudence from socio-cultural perspective," in *StC*, 29 (1995), pp. 331-335; M. DE MUELENAERE, "Cultural adaptation and the Code of Canon Law," in *StC*, 19 (1985), pp. 31-59; S. BWANA, "The impact of the new Code in Africa," in *Concilium*, 185 (1986), pp. 103-109; J. HUELS, "Interpreting canon law in diverse cultures," in *The Jurist*, 47, (1987), pp. 249-293.

[9] ÖRSY, "The interpretation of laws: New variations on an old theme," p. 122.

question faced by every local church no matter how young or old, no matter in what culture it exists. Today this problem of canonical interpretation has flared up with some regularity not only because Vatican II restored the theology of local church but also because such human sciences as anthropology and sociology have contributed to a greater respect and sensitivity for cultural differences even in the Church. Therefore, today even more than ever, there is the need to interpret canonical principles in light of cultural forces which are likely to shape the daily life of a given society particularly its constitutive elements that are the marriage and family.

### 1.1.1. Definition of culture[10]

The question, "What is culture?" has occupied the minds of anthropologists and sociologists ever since E.B. Tylor (1832-1917), the father of modern anthropology, suggested one of the earliest definitions of culture. He defined it as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[11] Since Tylor's time, definitions of culture have proliferated. In the middle of the last century, Kroeber and Kluckhohn reviewed over 160 definitions of culture in order to bring order into the confused usage of

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[10] The use of the term "culture" is universal in the sense that all people have one. However, they do not all have the same one. What culture amounts to varies widely with place and time. The fact of culture is common to all; the particular pattern of culture differs among all. Even the Second Vatican Council acknowledges this reality when it says that "culture necessarily has historical and social overtones, and the word 'culture' often carries with it sociological and ethnological connotations; in this sense one can speak about a plurality of cultures." See *GS* 53; FLANNERY I, p. 229. Therefore, in this work the term "culture"—allowing for similarities in its application—may sometimes be used in the singular, sometimes in the plural.

[11] E.B. TYLOR, *Primitive culture: Researches into the development of mythology, philosophy, religion, language, art and custom*, 4th ed., vol. 1, London, John Murray & Co., 1903, p. 1; *The origins of culture*, with an introduction by P. RADIN, Gloucester, MA, Peter Smith, 1970, p. 1.

the term.[12] One meaning of the term "culture" as defined by Augustine Mendonça seemed particularly helpful to our study.[13] For him, "culture" is the soul of the community, and all human behavior within it is the result of a dynamic interaction between different physio-psychic forces in its members. Therefore, "culture" may be defined as "*the vital force of a given community which, informing the minds and molding the hearts of the people, directs their behavioral actions and operations and gives them their meaning.*"[14] In other words, culture is a learning "process by which people shape their lives, helping them to know how to feel, think and behave."[15]

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[12] F.J. EILERS, *Communicating between cultures: An introduction to intercultural communication*, Roma, Editrice Pontificia Università Gregoriana, 1987, p. 15.

[13] See MENDONÇA, "Bonum coniugium from a socio-cultural perspective," pp. 59-61; "The importance of considering cultural contexts," pp. 191-193 and also A. MENDONÇA, P.S. MORRIS, "Pathological gambling and marital consent," in *StC*, 36 (2002), p. 66.

[14] We should be fully aware that just as the soul of the human body is an abstraction so is "culture." The way of behaving and acting is simply the outcome of a given culture. We see forms or manifestations of it in particular actions (what people do or say) and objects (things made and used by people), but culture as such cannot be seen. Therefore, culture for us is a vital force. It is an idea of how to behave or do things in a particular situation. That idea originates in the mind of individuals which, in the course of time becomes accepted and shared by the community. Behind the idea there must be some reason which, influenced by different factors, determines and justifies the given idea. Consequently, the idea gives meaning to both individual and community action and behavior. Hence, we might say that culture is a system of ideas or a system of meanings that are expressed in the way people live. Aylward Shorter corroborates our theory when stating that "culture is a mental world, a web of meanings clothed in images and behavioral norms" (A. SHORTER, *Christianity and the African imagination: After the African Synod resources for inculturation*, Nairobi, Pauline Publications, 1996, p. 16). If culture were a mere collection of rules, it would not be difficult for a person coming from another culture to adapt to it. But since culture is a system of meanings with one's own system considerably different from the system of another, it is not surprising that there are difficulties in those facing a new culture. See ARBUCKLE, "Inculturation not adaptation," p. 511. They usually project their own system of meanings to the actions and behaviors of people from the new culture which actually might not be familiar with and supported by their system. Such discrepancy might result in a "culture shock." On this point, see E.A. SCHULTZ, R.H. LAVENDA, *Cultural anthropology: A perspective on the human conditions*, 2nd ed., St. Paul, MN, West Publishing Company, 1990, p. 47; W.A. SMALLEY, "Culture shock, language shock, and the shock of self-discovery," in *Readings in missionary anthropology*, W.A. SMALLEY (ed.), Tarrytown, NY, Practical Anthropology, Inc., 1967, pp. 693-700.

[15] GIBBS, "Missionaries and culture," p. 93. It is very important to realize that culture is not biologically inherited from our parents. Instead, it is a learning process whereby the ideas are passed on from one generation to another. On this point, see W.A. HAVILAND, *Cultural anthropology*, 7th ed., Fort Worth, Harcourt Brace Jovanovich College, 1993, p. 34. B.J. NICHOLLS, *Contextualization: A theology of Gospel and culture*, Downers Grove, Inter Varsity Press, 1979, p. 11.

### 1.1.2. Culture is a system

The social, economic and political aspects of cultures do not exist in isolation. They are mutually interrelated, thus creating systems. Although today there are differences of opinions among anthropologists in specifying the way and degree to which the various aspects of a culture are interrelated, the fact that they are integrally related and thus form a more or less integrated whole is beyond question.[16] The insistence on the interrelation of the aspects of a culture is also a consequence of viewing culture as a principle of social order. If a culture is to integrate or hold a society together, it must itself be integrated or held together. Cultures, therefore, tend to be consistent and harmonious, and, generally speaking, one aspect of culture does not contradict or make impossible other aspects but tends to be supportive of the whole. Because of this interrelatedness between the different aspects it obviously follows that a change in one aspect of a culture will usually affect other aspects, sometimes even in very dramatic ways. However, it does not mean that harmony eliminates change. Since culture is a living system in structure as well as in its dynamic character, we must recognize that a degree of change is necessary in any properly functioning culture.[17] Otherwise, the culture could fall victim to a museum mentality.

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[16] See D.L. WHITEMAN, "What is culture?" in *An introduction to Melanesian culture*, D.L. WHITEMAN et al. (eds), Point Series No. 5, The Melanesian Institute, Papua New Guinea, Indore, M.P, Satprachar Press, 1995, p. 9. The interrelation of economic, political and social aspects of a culture can be illustrated by the Jiwaka people of Western Highlands Province in Papua New Guinea. Their economy relies on plant cultivation along with pig breeding. Although plant cultivation provides most of the people's food, it is through pig breeding that men achieve political power and positions of legal authority. However, pig breeding is a complex business. Raising lots of pigs requires lots of food to feed them. Consequently, production of food implies the gardening. Since the gardening activities are mostly performed by women, thus, to raise lots of pigs, a man has to have lots of women in the household. The way he gets them is by marrying them. For each wife, however, a man must pay a bride price. From this short account the interrelatedness of the various aspects of a culture can be clearly seen.

[17] As Melanesians have adopted Christian values it has affected their social relationships. It has, among other things, expanded the traditional definition of "Who is my brother?" Brothers are no longer limited to fellow kinsmen, but now may include even those who were considered traditional enemies. For

### 1.1.2.1. The analysis of culture

The ways in which culture may be analyzed are various. Here we will analyze it from the viewpoint of how individuals participate within their culture. The insights for this approach are taken from the anthropologist Ralph Linton.[18] He suggests that the content of every culture can be divided into categories. We would define category as a particular combination of attributes which makes one social group distinct from all others.

1. The first category Linton calls *universals*. Included in this category are those elements common to all members of a particular group distinguishing it from others.[19] Thus, the boundaries of a particular culture become the boundaries of a particular group.

2. The second category is that of *specialties*. Within this group are those elements actually shared by the members of certain socially recognized categories of individuals but which are not shared by the total population.[20] However, specialties are not thought to conflict with the homogeneity of the wider-group culture.

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deeper study about the cultural dynamics, see L.J. LUZBETAK, *The Church and cultures: New perspectives in missiological anthropology*, rev. ed., Maryknoll, NY, Orbis Books, 1998, pp. 292-373.

[18] See R. LINTON, *The study of man: Introduction*, New York, D. Appleton-Century Company, Inc., 1936, pp. 271-287.

[19] See ibid., p. 272. This category comprises such elements as the use of a particular language, patterns of dress and housing, ideal patterns for social relationship, values, beliefs and those elements of a culture that are often unconscious assumptions.

[20] See ibid. Men and women are two distinct socially recognized categories, and there are areas of the culture in which certain things are done by or known to men but not women and vice-versa. This categorization is particularly true in some tribal societies where male and female roles and spheres of influence are usually quite different from one another. However, this difference of roles or division of labor, although many times criticized by the western world, makes neither of social categories superior and inferior. On the contrary, this division of labor may allow them to create an interdependence among community members and give them an opportunity to actually strengthen the community ties binding members together. In western societies where there is the emancipation of work, individualism is very strong, while in tribal societies where there is still the division of work the sense of community prevails. See G. FUGMANN, "The role of the Church in society," in *An introduction to ministry in Melanesia*, B. SCHWARZ (ed.), Point Series No. 7, The Melanesian Institute, Papua New Guinea, Goroka, 1985, p. 7; M.E. MARTY, *Friendship*, Allen, Argus Communications, 1980, pp. 60-61.

3. The third category, which Linton calls *alternatives*, comprises a considerable number of traits which in every culture are shared by certain individuals but which are not common to all members of the particular group, or even to all members of a socially recognized category. They represent different reactions to the same situations or different techniques for achieving the same ends.[21]

In analyzing a society we can divide it into two parts: the *core culture*—which consists of universals and specialties—and the *fluid zone*—which consists of alternatives. The core culture is the most resistant to change; the fluid zone is more open. Moreover, changes in the fluid zone do not necessarily imply changes in the core culture.[22]

### 1.1.2.2. The impact of culture on the individual

Culture and society mold the world in which we live, but how do individuals fit into the picture? Are we the unquestioning products of our biological and cultural environment or do we share in some way in its creation?

The relation between culture and the individual person must be viewed from two perspectives. On the one hand, we must look at the ways culture influences and molds the person.[23] On the other hand, we need to see the world from the vantage point of the individual and consider the strategies a person uses to chart a course of action in his or

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[21] See ibid., p. 273. In Papua New Guinea there are two alternatives to traditional marriage, i.e., polygamous and monogamous. Although polygamous marriages create domestic situations behaviorally and mentally very different from those created by monogamous marriages, the aim of either is always to provide offspring and thus to guarantee the continuity and survival of the community.

[22] See S. FUCHS, *Anthropology for the missions*, Allahabad, St. Paul Publications, 1979, p. 23.

[23] See MENDONÇA, "Bonum coniugium from a socio-cultural perspective," pp. 59-60; A.L. KROEBER, *Anthropology: Culture patterns & processes*, New York, Harcourt, Brace & World, Inc., 1963, pp. 96-98.

her unique life situation.[24] Viewing the relation between culture and the individual from these two perspectives, we can say that while categories composing culture may have a distinct cultural influence, they do not totally determine the behavior of the individuals of a given community. Within each culture there is rather some room for individual expression which creates a variation in the real behavior of subjects or even subgroups of the same culture. Despite the possibility of such individual expressions in each culture, people continue to learn, to store and use a limited number of conventional rules enabling them to act appropriately, to judge their own behavior and that of others as being either acceptable or unacceptable.

### 1.1.3. Some concepts of culture change

Although stability is a notable characteristic of many cultures,[25] none is changeless.[26] Cultures are dynamic systems which must have the flexibility to cope with variability and change within their environment. Without the ability to conceive new ideas and to change existing behavior patterns, no culture and, therefore, no human society could survive. Today it is clear that all cultures are constantly changing because the individuals of the society are constantly developing their ways for more successful living. Those changes often consist not so much of new objects as of new ways of looking at prior events. Therefore, to understand how cultures change we will review

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[24] See E.A. NIDA, *Custom, culture and Christianity*, London, Tyndale Press, 1963, pp. 227-229.

[25] HAVILAND in *Cultural anthropology*, Chapter 6, pp.149-150 portrays the culture of the native inhabitants of north-western New England and southern Quebec which remained relatively stable over thousands of years. This is not to say that change was entirely absent because, as he says, "stable does not mean static."

[26] See LUZBETAK, *The Church and cultures*, p. 292; HAVILAND, *Cultural anthropology*, pp. 403-404; D.L. WHITEMAN, "How cultures change," in *An introduction to Melanesian culture*, p. 29.

several concepts of culture change. The insights for these concepts are taken from the anthropologist Darrell L. Whiteman.

The first concept of culture change, briefly treated in the previous section on culture as a system, is that of *functional integration*.[27] A culture consists of the various elements which function as an interrelated whole in perfect harmony. This does not mean that all elements in the culture are of equal importance, but it does mean that they influence and are influenced by each other.[28] Therefore, a change in one element of a culture usually will affect other elements as well, and so we can talk about the chain effect of culture change. Sometimes in closely integrated cultures—as we find in Papua New Guinea—this change can occur in a rather drastic way.[29]

The second important concept that is related to culture change is the idea of *cultural conservatism*.[30] Although all cultures are living and dynamic systems that change over

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[27] See WHITEMAN, "How cultures change," p. 30.

[28] A very good example of what has been said about influence and dependence among various elements of culture is Saint Paul's paradigm of Church which he depicts as the body of Christ. He says: "For just as the body is one and has many members, and all the members of the body, though many, are one body, so it is with Christ. [...] For the body does not consist of one member but of many. If the foot should say, 'Because I am not a hand, I do not belong to the body', that would not make it any less a part of the body. And if the ear should say, 'Because I am not an eye, I do not belong to the body', that would not make it any less a part of the body. If the whole body were an eye, where would be the hearing? If the whole body were an ear, where would be the sense of smell? But as it is, God arranged the organs in the body, each one of them, as he chose. If all were a single organ, where would the body be? As it is, there are many parts, yet one body. The eye cannot say to the hand, 'I have no need of you', nor again the head to the feet, 'I have no need of you'. On the contrary, the parts of the body which seem to be weaker are indispensable, and those parts of the body which we think less honorable we invest with the greater honor, and our unpresentable parts are treated with greater modesty, which our more presentable parts do not require. But God has so composed the body, giving the greater honor to the inferior part, that there may be no discord in the body, but that the members may have the same care for one another. If one member suffers, all suffer together; if one member is honored, all rejoice together" (1 Cor 12, 12-26).

[29] The elimination of polygamy and its possible effects and ramifications on a culture may be an example. Such a change would affect economic, social, sexual, political and personal spheres of a given society. See A.J. MALONE, *The canonical and pastoral implications of canon 1148*, JCD diss., Ottawa, Saint Paul University, 1992, pp. 18-22; R. CLIGNET, *Many wives, many powers: Authority and power in polygynous families*, Evanston, Northwestern University Press, 1970, p. 20.

[30] See WHITEMAN, "How cultures change," p. 33.

time, each of them has a tendency to persist. We might say that cultural conservatism is the "immunity system" of culture which battles for its equilibrium, particularly in the case of forced or rapid and chaotic change.[31] The general characteristic of culture is what may be called its receptivity or its openness. The unlimited receptivity and assimilativeness of culture make its totality a continuum. Therefore, the culture of today is always largely received from yesterday. That is actually what tradition or transmission means. It is a passing or handing on from one generation to another.[32] These continuity and stability of culture provide personal security for individuals in the society who can assume that what has worked in the past will work in the future.[33] Consequently, it is understandable that members of a given society tend to see their culture as the best of all possible worlds and seek to perpetuate as many of its ways as possible. This phenomenon, known as *ethnocentrism*, can be a hindrance to an effective intercultural ministry.[34] In summary, we can deduce the following three generalizations regarding the people's resistance to proposed change. They resist it if the change: (1) is forced upon the people and/or is rapid and chaotic, (2) threatens their basic security, (3) is not understood by them.

The third concept, which is the ultimate source of all change, is that of *cultural innovations*.[35] An innovation is an idea, practice or object perceived as new by an individual. Such innovations involving the chance discovery of some new principle and

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[31] See J.A. PONSIOEN, *The analysis of social change reconsidered: A social study*, rev. and enl. ed., The Hague, Mouton, 1969, pp. 66-67; G. ZALTMAN, R. DUNCAN, *Strategies for planned change*, New York, NY, John Wiley & Sons, 1977, pp. 62-63; LUZBETAK, *The Church and cultures*, pp. 315-316.

[32] See M. HARRIS, *Cultural anthropology*, 2nd ed., New York, NY, Harper & Row, 1987, p. 7; LUZBETAK, *The Church and cultures*, pp. 170-171 and 181-192.

[33] See PONSIOEN, *The analysis of social change reconsidered*, pp. 61-64.

[34] See SCHULTZ, LAVENDA, *Cultural anthropology*, pp. 32-33; ZALTMAN, DUNCAN, *Strategies for planned change*, pp. 69-70; MALONE, *The canonical and pastoral implications of canon 1148*, p. 9.

[35] See WHITEMAN, "How cultures change," p. 37.

knowledge are *primary innovations*; those resulting from the deliberate applications of known principles and existing knowledge are *secondary innovations*. Besides changes effected by either of these innovations, there are also changes brought about by borrowing cultural elements from other cultures.

### 1.1.3.1. Categories of culture change

One of the ways of viewing culture change is to focus on the source of change. Culture change may be triggered from within or from without the society. It is triggered from within when members of a given society with no external influence create and develop a new idea which then is spread in the society. Such change is called *immanent change* and occurs through primary innovation—discovery—or secondary innovation—invention. Change that emerges from without occurs when sources external to the society introduce a new idea. Such change is called *contact change*. It may be either *selective* or *directed*. In *selective contact change*, members of the society are exposed to external influences and adopt or reject a new idea from that source on the basis of their need.[36] *Directed contact change*, or planned change, is caused by outsiders who intentionally seek to introduce new ideas in order to achieve goals they have defined.[37]

### 1.1.3.2. Where does culture change occur?

We need to be aware that many changes happen only on the surface and not in the core culture. We have seen that the core culture and the fluid zone are two different parts of

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[36] See ZALTMAN, DUNCAN, *Strategies for planned change*, p. 10.

[37] See ibid.

a cultural system. The core culture consists of universals and specialties.[38] The fluid zone comprises alternatives and individual peculiarities.[39] Those cultures whose technology is "simpler" or less developed have a large core culture and a small fluid zone whereas cultures with high and developed technology have a larger fluid zone and a smaller core culture. The fluid zone is more open to change while the core culture is more resistant. Moreover, changes in the fluid zone do not necessarily imply changes in the core zone.

In addition to the distinction between changes that happen in the core culture and the fluid zone, we may also distinguish changes that occur at (1) the observable or formal level which includes people's behavior, the use of new tools, etc., and (2) the conceptual or meaning level which includes ideas, values, attitudes, etc. Seldom do these two levels change at the same time or at the same rate. Frequently, the observable level changes more quickly than the meaning. The same thing can happen when people change their religion.[40]

In sum, it is very important for expatriate missionaries to keep these distinctions in mind. They may advocate change, but it will not occur unless the new ideas or principles become a part of the core culture. It means the recipient has to interpret those

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[38] J.H., STEWARD, *Theory of culture change: The methodology of multilinear evolution*. Urbana, University of Illinois Press, 1958, pp. 37 and 89.

[39] Individual peculiarities, unlike universals, specialties and alternatives, are not elements of culture. Instead, they refer to personal habits, ideas and conditioned emotional responses. In many cases, these are the results of childhood experiences.

[40] If Christian ideas are accepted, their integration into the culture will be a matter of degree. Some ideas will be accepted but might be only partially integrated into the new cultural context. Therefore, the change brought about by Christian ideas remains in some cases only on the surface, only at the observable level of culture. For example, people in Papua New Guinea will normally contract marriage in almost every case according to their customary law and prior to any Christian rite of marriage. From the time of their customary marriage, even Catholics consider themselves to be properly married. Nevertheless, they are aware that they cannot receive the Eucharist as long as they remain unmarried in the eyes of the Church. If it takes place at all, the Christian marriage is often celebrated years after the customary marriage, and this rite loses its meaning for the couple. Many Catholics reckon that a Christian marriage contributes little, if anything, to the married state. Often the couple marries in church only to regularize their status before the priest and have access to the Eucharist.

new concepts and principles in terms of his/her pre-existing configuration of ideas and principles and create an innovation.[41]

### 1.1.3.3. How is change introduced into a culture?

Directed culture change as mentioned above is a deliberate process that begins with an idea on the part of a change agent and ends with its adoption or rejection by potential recipients. From the viewpoint of the change agent, there is a plan to create a modification in the structure of the recipient group in order to assist in its life style and economic improvement. Throughout this modification process, there are basically two forces acting on the integration plan: the techniques used by the change agent in an effort to convince the local group to accept the new idea, and the behavior of the recipients toward the proposed new idea. These two forces can be characterized as the action and the reaction.

There are three possible outcomes to the plan being introduced by the change agent: (1) it may be accepted and integrated into the culture; (2) it may be modified by the recipients before it is accepted and integrated into the culture; or (3) it may be rejected outright. What would the crucial factors be to make these three possible outcomes happen?

#### 1.1.3.3.1. Characteristics relating to the change agent

1. The method of communication used by the change agent in proposing a new idea is a critical characteristic. The effective communication of a proposed idea depends not so much on the persuasive skills of the change agent as on the perception of the new idea by recipients.[42]

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[41] J.P. SPRADLEY, D.W. MCCURDY, *Anthropology: The cultural perspective*, New York, NY, John Wiley & Sons, 1975, p. 574.

[42] See A.H. NIEHOFF et al. (eds), *A casebook of social change*, Chicago, Aldine Publishing Company, 1966, pp. 15-18; C.H. KRAFT, *Christianity in culture: A study in dynamic biblical theologizing in cross-cultural*

2. The other characteristic proven effective in the change process is the openness of the change agent to the recipients' participation. If a new idea is to be fully accepted, there must be an active and full participation by recipients. Their participation lessens feelings of alienation with the new idea and provides a greater assurance of its continuity.[43]

3. Another characteristic that also plays a very important role in the recipients' acceptance of change is the consistency with the past of any idea proposed by the change agent as well as respect for existing customs, beliefs and values. An idea that is not consistent with the prevalent customs, beliefs and values will not be accepted as rapidly as an idea that is consistent.[44]

### 1.1.3.3.2. Characteristics relating to the recipient

1. One of the basic requirements for an acceptance of any proposed change is the recipients' actual need for it. Therefore, the first task performed by the change agent is to establish a link between a perceived need of the recipients and a possible means of satisfying that need. If there is no need for what has been advocated, then it is less likely that people will accept it.[45]

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*perspective*, Maryknoll, NY, Orbis Books, 1979, p. 147; ZALTMAN, DUNCAN, *Strategies for planned change*, pp. 226-229.

[43] See NIEHOFF et al. (eds), *A casebook of social change*, pp. 18-20; J.M. HICKMAN, "Linguistic and sociocultural barriers to communication," in *Readings in missionary anthropology*, p. 646.

[44] See NIEHOFF et al. (eds), *A casebook of social change*, p. 21; E.M. ROGERS, F.F. SHOEMAKER, *Communication of innovations: A cross-cultural approach*, 2nd ed., New York, NY, The Free Press, 1971, p. 22; ANGROSIMO, "The culture concept and the mission of the Roman Catholic Church," p. 825; R.L. SCHWENK, "Some uses of the past: Traditions and social change," in *Readings in missionary anthropology*, pp. 495-509.

[45] See NIEHOFF et al. (eds), *A casebook of social change*, p. 25; D.W. KIETZMAN, W.A. SMALLEY, "The missionary's role in culture change," in *Readings in missionary anthropology*, p. 526; KRAFT, *Christianity in culture*, pp. 149-150. E.M. ROGERS and F.F. SHOEMAKER call this characteristic "relative advantage." See ROGERS, SHOEMAKER, *Communication of innovations*, p. 22.

2. Another characteristic determining the possible acceptance or rejection of change is the degree to which recipients will receive any practical benefits and/or profits resulting from what is being proposed.[46]

3. Undoubtedly, a crucial characteristic in the final acceptance of a proposed idea is the degree to which the existing authority structures are involved in the implementation of the change. Therefore, what the change agent must take into consideration is to work through traditional leaders and gain the support of individuals who can influence others.[47]

## 1.2. Intercultural Communication[48]

We are vividly aware of the tremendous diversity of cultures throughout the world.[49] Every culture has a distinctive flavor of its own not shared by other cultures. Because of this diversity, the problem of intercultural communication is one of the biggest problems we face in the Church.[50] As we already noted above in treating some concepts of culture change, ethnocentric thinking is probably the greatest roadblock in

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[46] See NIEHOFF et al. (eds), *A casebook of social change*, pp. 26-28.

[47] See NIEHOFF et al. (eds), *A casebook of social change*,pp. 31-33; ZALTMAN, DUNCAN, *Strategies for planned change*, pp. 75-76 and 193.

[48] Some anthropologists make a distinction between the terms *cross-cultural* and *intercultural communication*. For them cross-cultural communication is confined to mass media while person-to-person communication is intercultural. Therefore, we might say that cross-cultural communication is an official, one-way communication in which the change agent or communicator communicates the prepared message in order to achieve the individual purpose. Contrary to this, intercultural communication is an unofficial, interactive communication in which the message is developed in the course of a joint venture between communicator and recipient; its purpose is mutual satisfaction. See L.S. HARMS, *Intercultural communication*, New York, Harper and Row Publishers, 1973, p. 41; "Special assembly for Oceania of the Synod of bishops: Second General Congregation: Effective communication is vital to Church's mission, Archbishop Francis P. Carroll, Camberra, Australia," in *L'Osservatore romano* (English edition), 2 December 1998, p. 16; W.S. HOWELL, "Can intercultural communication be taught in a classroom?" in *Syllabi in intercultural communication*, M.H. PROSSER (ed.), Charlottesville, University of Virginia, p. 2. For the above-mentioned reasons we will use in our dissertation the term *intercultural communication*.

[49] See ÜFFING, "Introduction of new missionaries," p. 15.

[50] See AERTS, *Christianity in Melanesia*, pp. 3-4.

the process of communicating across different cultures. M.J. Herskovits, a leading American anthropologist, says:

> We are not the most ethnocentrically oriented society the world has known, but we certainly possess one of the most powerful ethnocentrisms in the experience of mankind. [...] Even today, it is difficult for us not to do what I term "thinking colonially" by applying to peoples whose ways of life differ from our own the dreary vocabulary of inferiority. [...] We must recognize that the pluralistic nature of the value systems of the world's cultures [...] cannot be judged on the basis of a single system. [...] Unless we realize that perhaps we do not have the only answers to questions of common concern, and that our biases, though they seem natural enough to us, cannot be universally accepted, we will be in for some very difficult times.[51]

Therefore, intercultural communication can be defined as the process in which people of two or more different cultures coming into significant contact exchange their thoughts and meanings. The outcome of such an encounter should be a convergence that does not replace either of the cultures but enriches them.

### 1.2.1. The problem of different worldviews

The way people perceive reality can be called their *worldview*.[52] People in different cultures have different worldviews, and from this diversity of culturally based worldviews arises the difficulty of communication. Although mastering the language of someone else is the first step to personal communication, nevertheless its knowledge does not guarantee a fruitful intercultural communication. The reason for this is the fact that communication is

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[51] M.J. HERSKOVITS, *Cultural relativism: Perspectives in cultural pluralism*, New York, NY, Random House, 1972, p. 97.

[52] See HESSELGRAVE, *Communicating Christ cross-culturally*, pp. 123-129; KRAFT, *Christianity in culture*, pp. 53-60; LUZBETAK, *The Church and cultures*, pp. 252-255; W.D. REYBURN, "The missionary and cultural diffusion," in *Readings in missionary anthropology*, pp. 510-511.

more than simply verbal exchange.[53] It is the perspective provided by people's own worldview that generally circumscribes any communication. Therefore, to be able to communicate successfully with people from another culture we must be aware of their unspoken codes, i.e., their worldviews. Only when we acknowledge, learn and understand their worldviews can we get beyond the superficial meanings of their culture and thus avoid misunderstandings in our intercultural communication.[54] David J. Hesselgrave presents this aspect in the process of communication very clearly when he says:

> Missionaries have to adopt temporarily the worldview of their non-Christian respondents. Then, by reexamining their message in the light of the respondent worldview, they can adapt the message, encoding it in such a way that it will become meaningful to the respondent. This approach is not easy, but it is both possible and practical.[55]

Both the communicator and the recipient are important to every communication: both are determined by their cultural and social worldviews. Because of their different cultural worldviews, both of them try, whether consciously or unconsciously, to send a message to each other. As a consequence, the principal communicator in any intercultural communication is not only the communicator but, to some extent, also the recipient. Likewise, the principal recipient is not just a passive recipient but, to some extent, also the communicator. Such a process of interaction between the principal communicator and the

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[53] Anthropologist E.A. Nida corroborates our statement when he says that "linguistic training is of great help but it is not a substitute for cultural submersion" (E.A. NIDA, *Custom, culture and Christianity*, p. 223). W.D. Reyburn is also in agreement with us when he writes: "The greatest deficiency in any language learning program is the assumption that one can merely learn a language and thereby communicate with the speakers of that language. [...] Real communication takes place between two people when each understands the assumptions which lie behind the other's words and phrases. This is an ideal situation but it can only be approached through an intimate acquaintance with the feeling and thought patterns of the people" (W.D. REYBURN, "Don't learn that language," in *Readings in missionary anthropology*, p. 343). See also J.M. HICKMAN, "Linguistic and sociocultural barriers to communication," in *Readings in missionary anthropology*, p. 639.

[54] See *RM* 53, p. 556.

[55] HESSELGRAVE, *Communicating Christ cross-culturally*, p. 131.

principal recipient can make communication informal and also help the principal communicator develop a message that fits properly into the socio-cultural perspectives of the principal recipient. Therefore, any effective intercultural communication must take into account all these factors. If the message sent by the principal communicator only modifies or changes a person or a community's observable behavior without producing an equivalent change in the fundamental worldview of the principal recipient, the level of communication will remain superficial and ineffective.

### 1.2.2. The problem of confusing cultural forms with intended meanings

As already stated, intercultural communication is the exchange of thoughts and meanings through cultural forms.[56] However, the relationship between cultural forms and the meanings they convey has occasioned a great deal of difficulty in intercultural communication.[57] A fundamental reason for this difficulty is the fact that cultural forms do not convey any universal meaning but are related to a specific meaning that is determined by the cultural context in which the forms are used.[58] Therefore, if a cultural form is taken from one culture and introduced into another, it seldom, if ever, carries exactly the same meaning across cultural boundaries. Normally, the people who adopt an introduced form will assign a

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[56] In defining culture, we said that forms or manifestations of culture are seen in particular actions (what people do or say) and objects (things made and used by people). Therefore, we can say that the cultural forms are the observable parts of which culture is made up. Marriage customs, family structures, singing, dancing, speaking are concepts of nonmaterial cultural forms. Houses, clothing, axes, hoes, weapons are concepts represented by material cultural forms.

[57] See HESSELGRAVE, *Communicating Christ cross-culturally*, pp. 38-50; D.W. KEETZMAN, W.A. SMALLEY, "The missionary's role in culture change," in *Readings in missionary anthropology*, p. 525.

[58] See M.K MAYERS, *Christianity confronts culture: A strategy for crosscultural evangelism*, rev. and enl. ed., Grand Rapids, Academie Books, 1987, pp. 203-210; KRAFT, *Christianity in culture*, p. 65; D.J. HESSELGRAVE, "Dimensions of cross-cultural communication," in *Readings in missionary anthropology*, p. 623; HUELS, "Interpreting canon law in diverse cultures," pp. 255-257.

meaning to it that is different from the meaning assigned to it in the original culture.[59] This is so because the cultural forms are relatively neutral in and of themselves.[60] What they mean and how they function depend upon the way active human agents employ and use them. However, the fact that cultural forms may be used in different ways is often forgotten in missionary activities. Most missionaries expect to find in another culture exactly what they have in their own. They expect it to look the same and to have the same meanings. They assume that if the form is the same, the meaning must also be the same; and if the form is different, the meaning is different also. When the missionaries, therefore, see other people using different forms to communicate similar meanings it strikes them as strange or perhaps even sinful. They suddenly begin to insist on using their own cultural forms because they have certain meanings for them. Because of their own cultural conditioning, the forms seem natural and right to them. This is the reason why much missionary communication has been monological, official and therefore ineffective.

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[59] An example of this problem comes from Jiwaka people in Waghi Valley, in Papua New Guinea. In their language there is no word equivalent to "thank you." No gift is accepted with any sincere expression of joy. The one who gives is the one who should be thankful because he/she is either paying a debt or creating a debt. The recipient is getting his/her due or being put into the giver's debt. In other words, if someone from the Jiwaka people gives something as a present to somebody else it means that he/she is either accepting friendship that was offered to him/her by another giver or he himself/she herself is offering a friendship to another person. This cultural form, if not known by a Westerner for whom the cultural form of accepting and giving presents does not have such a deep meaning, could jeopardize communication and, therefore, the building of any good relationship with the Jiwaka people. This is only one example. There are many more that illustrate how the recipient has applied a particular meaning to a form used by a missionary communicator that was very different from what the missionary had intended to communicate. The canonical form of marriage in Papua New Guinean culture is structured in such a way as to be very susceptible to this problem of applying a meaning to the form that is different from what the communicator intended when he introduced it. See footnote 40, p. 20. See also CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Instruction, *Varietates legitimae*, 25 January 1994, in *AAS*, 87 (1995), nn. 9 and 15-17, pp. 292 and 294-295.

[60] See LUZBETAK, *The Church and cultures*, p. 75; KRAFT, *Christianity in culture*, p. 64.

### 1.2.3. A universal Christianity – a diversity of people

Christianity is a dynamic process born in a change setting, and since it introduces change in the life of individuals and society,[61] it resists being bound by narrow ethnocentrism. The mission and ministry of Christianity is to proclaim a unique message of a new fact authoritatively given—namely that in the ministry, death and resurrection of Jesus Christ God has acted decisively to reveal and effect his purpose of redemption for the whole world. Therefore, the Christian message is universal and is addressed to all people. "Go into all the world and preach the good news to all creation" (Mk 16, 15). If it is so universal one may object: Why are there so many different understandings of the same message? This plurality starts, as mentioned above, when we attempt to communicate our understanding of the universal message of Christianity through cultural forms that are determined by the time and space in which they have been used.[62] Consequently, the non-relative and universal meaning of the Christian message must not be understood in a static sense. Since Christianity is a dynamic process, the discovery of the meaning of the Christian message must be a dynamic process as well. The truth of the message in this

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[61] When we are talking about the change that Christianity introduces into the life of individuals and society, we do not mean the change of such aspects of culture as language, music, art, dress and customs which are compatible with Christian morals and values. See *La culture au risqué de l'Evangile: le rapport de Willowbank*, Traduction de J.C. LOSEY, J. BLANDENIER, M. GARDIOL, Lausanne, Presses bibliques universitaires, 1979, p. 28. But certainly Christianity does not want to leave unchallenged those elements of culture which are contrary to Gospel values, i.e., cannibalism, violation of women's rights, the death penalty for petty offences or the Papua New Guinean custom of *sanguma*—blaming somebody of possessing a special power and without any evidence making alleged sorcerer accountable for misfortune or death of a person and followed by the killing of alleged sorcerer. John Huels in his article "Interpreting canon law in diverse cultures" poses a few challenging questions related to the approach of the Church when introducing Christianity into the life of people with a different cultural background. What changes should or should not Christianity require? See HUELS, "Interpreting canon law in diverse cultures," pp. 263-266.

[62] See G. RENCK, *Contextualization of Christianity and christianization of language: A case study from the highlands of Papua New Guinea*, Erlangen, Verlag der Ev.-Luth. Mission, 1990, p. 2; E. MANTOVANI et al. (eds), *Marriage in Melanesia: A theological perspective*, Point Series No. 11, The Melanesian Institute, Papua New Guinea, Goroka, 1987, pp. 9 and 77; NICHOLLS, *Contextualization: A theology of Gospel and culture*, pp. 7-10; E. MANTOVANI, "Missionary societies of the 80's and 90's," in *Verbum SVD*, 27 (1986), p. 112.

process will not change, but our discovery of the meaning of this truth will certainly be influenced by different cultural heritage, linguistic backgrounds and personal experiences.[63]

### 1.2.3.1. Communicating the universal message of Christianity

What process should be followed in communicating the universal message of Christianity to people of different cultures? There are three steps: 1) *discovering the original meaning of the Christian message*; 2) *distinguishing original meanings of the Christian message from our contemporary cultural forms*; 3) *communicating original meanings of the Christian message, not transferring cultural forms*.

*Step I. Discovering the original meaning of the Christian message*

We may safely contend that in some way God is responsible for the presence of culture because he created human beings in such a way that they are culture-producing beings.[64] Since culture is the end product of human beings who are not perfect, neither is culture perfect. Despite its imperfection, God uses human culture as a vehicle to approach human beings and deliver them his eternal, supracultural message.[65] In fact, culture is the mutually intelligible language of Creator and creature. It is the normal medium through

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[63] To illustrate one such difference in perception, Charles Kraft uses Dr. J.A. Loewen's field experience with a group of people made up of Africans and expatriate missionaries. The people were asked to tell him the main point of the story of Joseph in the Old Testament. The European missionaries all pointed to Joseph as a man who remained faithful to God regardless of what happened to him. The Africans, on the other hand, saw Joseph as a man who, no matter how far he traveled, never forgot his family. Kraft goes on and says: "Both of these meanings are legitimate understandings of the passage. But differing cultural backgrounds led one group to one interpretation and the other group to the other interpretation. Evidently, God speaks to the different groups through the same passage in ways that are appropriate to the different focuses of their culture." C.H. KRAFT, *Christianity in culture*, p. 9. On this point see also D.A. MCGAVRAN (ed.), *Crucial issues in mission tomorrow*, Chicago, Moody Press, 1972, pp. 169-170.

[64] See J.A. KIRK, *What is mission?: Theological explorations*, Minneapolis, Fortress Press, 2000, p. 77; MANTOVANI et al. (eds), *Marriage in Melanesia: A theological perspective*, p. 14; NICHOLLS, *Contextualization: A theology of Gospel and culture*, p. 17; MANTOVANI , "Missionary societies of the 80's and 90's," p. 113; L. ÖRSY, "Quo vadis Ecclesia: The future of canon law," in *StC*, 36 (2002), p. 11.

[65] See MANTOVANI et al. (eds), *An introduction to Melanesian religions*, p. 16.

which human beings can know, love, and serve God and their fellow. God is desirous of reaching all people. As a means of communicating his plan of salvation, he uses not just a cultural system of a particular nation and of a particular time but cultural systems of all peoples of all times.[66] Therefore, people in every culture are redeemable.

When God speaks he chooses to employ the cultural and linguistic context of reference in which those to whom he speaks are immersed. He could have done things otherwise. He might have developed some sort of heavenly language and culture and demanded that we learn it in order to make contact with him, but he did not. Instead, he chooses to make contact with people in their language and culture. He uses their human figures and imageries to convey exactly eternal, supracultural truth. In this way God makes his revelation meaningful to those to whom it is addressed. He chose the culture of the Hebrews to convey certain meanings about himself, using cultural forms that were understandable to the Hebrews. God started from where people were, embedded in their own culture, and he used the cultural forms people could understand to communicate something about himself.

God's becoming human at a particular moment of history in a specific geographical location—the Incarnation—is one of the most tangible signs of God's usability of culture. Jesus was born a Jew, not a kind of universal man. He functioned within a specific cultural and linguistic context and conveyed meanings about himself, using forms that were understandable to people living in Roman-occupied Palestine more than 2,000 years ago.[67]

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[66] See C.H. KRAFT, "Christian conversion or cultural conversion," in *Readings in missionary anthropology II*, enl. ed., W.A. SMALLEY (ed.), South Pasadena, William Carey Library, 1978, p. 486.

[67] See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 10, p. 292; K.A. DICKSON, *Uncompleted mission: Christianity and exclusivism*, Maryknoll, NY, Orbis Books, 1991, pp. 30-31; E. HILLMAN, *Polygamy reconsidered: African plural marriage and the Christian churches*, Maryknoll, Orbis Books, 1975, pp. 68-69; KIRK, *What is mission?*, p. 76; LUZBETAK, *The Church and cultures*, p. 9; P.C. PHAN, "Crossing the borders: A spirituality for mission in our times from an Asian

The tension between cultural forms and following the message of Jesus was an important issue already in early years of the emerging Church.[68] Some argued strongly for the necessity of observance by Gentile converts to Christianity of certain cultural forms of the Jews (Acts 15). However, Saint Paul, who was a champion of the Gospel for the Gentiles, was not above insisting that the Gentiles adopt the cultural forms that were part of his Jewish cultural background. He was able to make distinction between an acceptable modus vivendi compatible with the message of Jesus and the cultural forms which for Judaizers were part and parcel of being Christians.[69]

Unfortunately, the Church has had to relearn this lesson in every period of its history. It has been always easier to insist on new Christians accepting the western cultural forms of Christianity than let ourselves be challenged by mutual discovery and celebration of Christ in one another's cultural traditions. Therefore, our first task as Christian communicators is to properly decode the original meanings of the Christian message. In order to accomplish it we must make sure that we do not confuse the forms which are tied to specific cultures with the original, eternal meaning they are intended to convey.

*Step II. Distinguishing original meanings of the Christian message from our contemporary cultural forms*

The unconscious reprocessing of information according to one's own cultural presuppositions and personal experiences and biases happens to a greater or lesser extent in all

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perspective," in *Sedos Bulletin*, 35 (2003), pp. 16-17; A. QUACK, "Inculturation: An anthropologist's perspective," in *Verbum SVD*, 34 (1993), p. 4.

[68] See KRAFT, "Christian conversion or cultural conversion," pp. 487-489.

[69] See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 14, pp. 293-294; J.A. RICH, "Religious acculturation in the Philippines," in *Readings in missionary anthropology II*, enl. ed., W.A. SMALLEY (ed.), South Pasadena, William Carey Library, 1978, pp. 551-552; DICKSON, *Uncompleted mission: Christianity and exclusivism*, pp. 43-48.

human communication.[70] Communicators of the Christian message cannot avoid this difficulty either.[71] Therefore, we now come to an even more arduous but very important task, i.e., the task of distinguishing the original meanings of the Christian message from the contemporary cultural forms we use to express those meanings in our society, in our own denomination and in church tradition.[72] In reality, we are constantly tempted to project the meanings of our own cultural forms into the Christian exegetical process with the result that the original meanings are missed or perverted. Very often the cultural forms are for us as sacred as the Christian meanings they are intended to convey. However, there is nothing sacred about the forms we use. They are simply cultural vehicles conveying sacred meanings. This confusion between Christianity and western cultural forms could cause us to present the Christian message in such a way that it would meet needs defined by our own culture but not the needs of the people to whom the message is presented.[73] Such a presentation then may result in gross

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[70] See HUELS, "Interpreting canon law in diverse cultures," p. 271.

[71] See L. NEWBIGIN, *The Gospel in a pluralistic society*, Grand Rapids, William B. Eerdmans Publishing Company, 1989, pp. 142-147; "Special assembly for Oceania of the Synod of bishops: Address of archbishops Hickey and Calvet: The 'Relatio ante disceptationem,'" in *L'Osservatore romano* (English edition), 2 December 1998, p. 11.

[72] See See JOHN PAUL II, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, 22 November 2001, in *Origins*, 31 (2001-2002), pp. 577-578.

[73] One of the examples could be a canonical form of marriage. The western Church always taught that the constitutive element of marriage is not the blessing of the priest but the mutual consent of the parties, and that this suffices to form a marriage though no priest was present. However, little by little the Church came to require the public religious celebration of marriage with increasing stringency and under pain of ecclesiastical penalties. But even then when her requirements were ignored, she never questioned the validity of the marriage. We may say that the medieval canon law of marriage was a watershed in the history of western law. It set out many of the basic concepts and rules of marriage and family life that have persisted to this day. Particularly, the great decree *Tametsi*, issued by the Council of Trent in 1563, codified and refined this medieval law of marriage, making mandatory its celebration before the proper pastor of at least one of the parties or another priest delegated by him. The presence of at least two witnesses was also necessary. Thus the Council made the validity of marriage dependent on a legal form. See Concilium Tridentinum, sess. XXIV, *de reformatione matrimonii*, c. 1, English trans. in N.P. TANNER, *Decrees of the Ecumenical Councils*, vol. 2, London, Sheed & Ward, Washington, DC, Georgetown University Press, 1990, pp. 755-757. However, the above-mentioned legal form became a stumbling block for the Catholics of Papua New Guinea who mostly contract marriage according to their customary law. From the time of their customary marriage they consider themselves to be properly married, though in the eyes of the Church they remain

misunderstanding, ineffective intercultural communication, and at last frustrating endeavors. If we believe in the sacredness of the Christian message, which is addressed to all people, we should not allow ourselves or others to believe that the cultural forms that we have generated concerning our better understanding and easier implementation of that message are similarly sacred or inspired and so binding for all people. Moreover, we should not easily denounce as sinful the forms rooted in cultures of other people solely because they are different from and not conformable with ours. What a European or an American may label as sinful may not correspond to what is perceived as sinful by a Papua New Guinean or a Melanesian. Therefore, to be effective communicators of the Christian message, we have to distinguish the original meanings of that message from the past and contemporary forms used to help us understand and implement it in our own cultural or sub-cultural context.[74] This now leads us to the third step in the process of communicating the universal message of Christianity.

*Step III. Communicating original meanings of the Christian message, not transferring cultural forms*

In our communication of the Christian message across language and cultural boundaries, we usually start with a certain basic understanding of what we believe to be the original meaning of following Christ. The sources, which shape this understanding,

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unmarried because they do not follow the legal form of marriage which was the historical and cultural evolvement of the Church in the West.

[74] This is no new insight. The 1659 instruction of the Propaganda to the first vicars apostolic of the Paris Mission Seminary for East Asia called for avoiding this mistake. See CONGREGATIO DE PROPAGANDA FIDE, *Collectanea constitutionum, decretorum, indultorum ac instructionum Sanctae Sedis ad usum operariorum apostolicorum Societatis Missionum ad Exteros selecta et ordine digesta cura moderatorum Seminarii Parisiensis ejusdem societatis*, ed. altera, documenta complectens ad annum usque 1905, Hongkong, Typis Societatis Missionum ad Exteros, 1905, N° 235, p. 108. See also "Special assembly for Oceania of the Synod of bishops: Second General Congregation: In Samoa, catechist system is 'lifeblood' of Church, Cardinal Pio Taofinu'u, S.M., Archbishop of Samoa-Apia, Samoa," in *L'Osservatore romano* (English edition), 2 December 1998, p. 15.

are the guidance of the Holy Spirit, the Scriptures, the church tradition of which we are members and the culture in which we grew up. However, these two last sources mostly give shape and form to original meanings. The Christian message, after going through the denominational and cultural filters and worldviews, will always have alterations, additions and subtractions. Therefore, the final model of the Christian message will undoubtedly include not only Christian but also cultural forms.

When we dealt with the problem of confusing cultural forms with intended meanings, we said that cultural forms do not convey any universal meaning. They are important for what they mean to people, not in and of themselves. The people who use them on the basis of their employment within a specific cultural experience assign them their meanings. Though this substantial distinction between cultural forms and meanings is well known, it is not uncommon for some people to regard cultural forms as the essence of culture. Consequently, when they communicate the Christian message, they try to transfer along with it also their cultural forms which are for them as sacred as the original meanings of the Christian message itself.

Such communication, however, will often result in missing its primary goal, i.e., to communicate the original meanings of the Christian message. To transmit and at the same time to preserve original meanings of the Christian message, surface cultural forms need to be changed. The way to preserve the original meanings of the communicated message is to discover and employ forms in the new culture or new generation which are interpreted by the new group as expressing meanings equivalent to the original meanings.[75] Therefore, the gauge

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[75] See JOHN PAUL II, *Africa: Apostolic pilgrimage*, compiled and indexed by the Daughters of St. Paul, Boston, St. Paul Editions, 1980, pp. 294-296; D.L. WHITEMAN, "Communicating across cultures," in *An introduction to Melanesian culture*, p. 73.

of success in any communication will depend on whether the meanings understood by the principal recipient will be similar to the meanings intended by the principal communicator. If they have been truly Christian, the principal recipient will see Jesus and understand his message, and not just the principal communicator with his/her requirements and cultural forms. He will then come to see Christianity not as alien and foreign but as a living, viable factor truly belonging to the social structure of his/her own culture.

### 1.2.4. Christian conversion[76] or cultural conversion

It is clear that some conversion has historically always resulted from communication of the Christian message and any widespread acceptance of Christ. But what should that conversion be? In order to become a Christian, should people renounce their own culture with its traditional beliefs and accept the culture and beliefs of a Christian communicator? Should customary marriage be dropped and substituted with the

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[76] Some authors talk about religious conversion. See V.B. GILLESPIE, *Religious conversion and personal identity: How and why people change*, Birmingham, Religious Education Press, 1979; WHITEMAN, "Communicating across cultures," pp. 74-79. However, if our above-mentioned statement that God has not left himself without a witness in any culture at any time is true, then we must conclude that religion is a part of every culture. In fact, anthropological and sociological studies to date have proven that there is no nation or society on earth without some traditional beliefs in supranatural powers and spirits in its culture. Regarding this point, see A. MATIABE, "General perspective: A call for black humanity to be better understood," in *The Gospel is not western: Black theologies from the southwest Pacific*, G.W. TROMPF (ed.), Maryknoll, NY, Orbis Books, 1986, pp. 17-18; "Special assembly for Oceania of the Synod of bishops: Address of archbishops Hickey and Calvet: The 'Relatio ante disceptationem,'" p. 11; J. GAQUARAL, "Indigenisation as Incarnation: The concept of Melanesian Christ," in *Christ in Melanesia: Exploring theological issues*, J. KNIGHT (ed.), Point 1977, The Melanesian Institute, Papua New Guinea, Goroka, 1977, pp. 146-147. Consequently, people of every culture—regardless of the way and manner of their religious practices—are to some extent religious and therefore not needing religious conversion. Jesus Christ in his teaching and preaching did not advocate religious conversion of Jews either. "Think not that I have come to abolish the law and the prophets; I have come not to abolish them but to fulfill them." (Mt 5, 17). What Jesus had called for above all was a change of heart, a reorientation of life goals. For him the convert is the one who apprehends differently, values differently, relates differently because he/she has become different. The new apprehension is not so much a new set of statements, but rather new meanings that attach to almost any statement. It is not so much a new set of values as a transvaluation of values. For this reason we would rather prefer to talk about Christian conversion than religious conversion. John Paul II in his Encyclical letter, *Redemptoris missio*, when talking about conversion and baptism also says: "The proclamation of the word of God has Christian conversion as its aim" (*RM* 46, p. 554).

canonical form of marriage? Should the bride price be left behind? Should romantic love be substituted for family alliances as a basis for marriage?

If we read church history critically, we have to admit that the first missionary activities frequently led to advocating a cultural conversion to a western worldview and way of life, not simply to Christianity within the cultural context of a given society.[77] However, advocating such a conversion seems theologically indefensible as well as culturally threatening in that it gives an entirely distorted picture of the original meanings of the Christian message and therefore of the Church.

The term "conversion" implies a free decision; there must be no noticeable pressure toward one alternative over another. The decision to change must come from inside the individual and group, and it must come as a result of a process of testing and trial. Therefore, the communicator of the Christian message cannot legitimately force or enforce conversion. Nevertheless, the communicator does have an extremely important function. It is to present and advocate tactfully, thoughtfully and seriously the Christian conversion, meaning first of all turning to Jesus in a radical way, in a personal and absolute commitment to him.[78] Secondly, it also means taking over and continuing his mission in a given cultural context. The same freedom, which was allowed to our Roman and Greek forebears to develop a non-Jewish type of Christianity, must be allowed to non-western converts to develop their own particular type of cultural Christianity.[79] Therefore, in order

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[77] See KRAFT, "Christian conversion or cultural conversion," pp. 489-491.

[78] See *RM* 46, p. 554; P.C. PHAN, "Conversion and discipleship as goals of the Church's mission," in *Sedos Bulletin*, 34 (2002), pp. 20-21.

[79] See: "Special assembly for Oceania of the Synod of bishops: Address of archbishops Hickey and Calvet: The 'Relatio ante disceptationem'," p. 12. L. MAGESA, "Against compromising the locality of the local church," in *Sedos Bulletin*, 32 (2002), pp. 61-63; E. MANTOVANI, "The Pacific: Transforming role of the Church: Past and future from the perspective of the present," in *Sedos Bulletin*, 27 (1995), p. 197; M. MCCABE,

to see an authentic Christian conversion resulting from a communication of the Christian message, inculturation must be an inseparable aspect of evangelization.

### 1.2.5. Inculturation

Although the term "inculturation" is a relatively new concept, its goals and implications are not. They have been a part of the Christian Church from its inception. Throughout Church history there have been attempts at dialogue between the Christian faith and the various cultures with which it has come into contact. Unfortunately, most of those attempts ended up with cultural domination thereby jeopardizing the initial commitment to dialogue with other cultures.[80] Today, however, this ongoing dialogue between faith and culture is particularly urgent, because as Pope John Paul II once said: "A faith which does not become culture is not a faith which is fully accepted, integrated and faithfully translated into life."[81] Consequently, the terminology and concept of inculturation have become parts of the Church teaching.

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"Towards a new vision: Mission as exploration and transformation," in *Sedos Bulletin*, 30 (1998), p. 334. As regards some kind of canonical independence, Karl Rahner makes a very interesting remark. He says: "Will the new Code of Canon Law [...] avoid the danger of being once again a western code that is imposed on the world Church in Latin America, Asia and Africa? [...] It is self-evident that a significant pluralism with respect to canon law must be developed in the great local churches." K. RAHNER, "Towards a fundamental theological interpretation of Vatican II," in *Theological Studies*, 40 (1979), pp. 717 and 725.

[80] See R.J. SCHREITER, *Constructing local theologies*, Maryknoll, NY, Orbis Books, 1985, p. 145; E. MANTOVANI, "Key issues of a dialogue between Christianity and culture in Melanesia," in *Sedos Bulletin*, 31 (1999), pp. 35-41; L. MAGESA, "Against compromising the locality of the local church," in *Sedos Bulletin*, 32 (2002), p. 61.

[81] "Una fede che non diventa cultura è una fede non pienamente accolta, non interamente pensata, non fedelmente vissuta," (JOHN PAUL II, Discorso ai partecipanti al Congresso Nazionale del movimento ecclesiale di impegno culturale, "Fede e cultura elevano il lavoro a valore di salvezza cristiana," in *Insegnamenti di Giovanni Paolo II*, V. 1 [1982], p. 131). See also *PG* 30, p. 369; *RM* 52, p. 556.

### 1.2.5.1. Evolution of the term[82]

The term "inculturation" was first used by the Belgian missiologist Pierre Charles in 1953[83] and has displaced such terms as "accommodation," "assimilation," "adaptation," "acculturation," or "indigenization." In 1962, shortly before the opening of Vatican II, Joseph Masson was the next to call for an opening of the Church towards all cultures, i.e., for an "inculturated Catholicism."[84] The term "inculturation" first appeared in Roman Catholic circles in item 12 of the Final Statement of the First Plenary Assembly of the Federation of Asian Bishop's Conferences (Taipei, 22-27 April 1974), where the Asian bishops noted: "The local church is a church incarnate in a people, a church indigenous and inculturated."[85] The Thirty-Second General Congregation of the Society of Jesus, which took place from December 1974 to March 1975, used the actual word "inculturation" fairly frequently in its text and included a decree on inculturation.[86] Finally, in 1979 Pope John Paul II in his apostolic exhortation "Catechesi tradendae" was the first who introduced the

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[82] For the history and deeper study of the term of inculturation, see SHORTER, *Toward a theology of inculturation*; S. NIOBONG UDIODEM, *Pope John Paul II on inculturation: Theory and practice*, Lanham, University Press of America, Inc., 1996; F.E. GEORGE, *Inculturation and communion: An essay in the theology of local church according to the teaching of Pope John Paul II*, Rome, Pontificia Universitas Urbaniana, 1987; *Inculturation and ecclesial communion: Culture and Church in the teaching of Pope John Paul II*, Rome, Urbaniana University Press, 1990; G.A. ARBUCKLE, "Inculturation not adaptation," in *Worship*, 60 (1986), p. 511-520; A.A.R. CROLLIUS, "What is so new about inculturation?" in *Gregorianum*, 59 (1978), pp. 721-737; J.G. PIEPKE, "Inculturation and beyond," in *Verbum SVD*, 40 (1999), pp. 43-53; QUACK, "Inculturation: An anthropologist's perspective," pp. 3-17.

[83] See P. CHARLES, "Missiologie et acculturation," in *Nouvelle revue théologique*, 75 (1953), pp. 19-21.

[84] "[...] catholicisme inculturé" (J. MASSON, "L'Eglise ouverte sur le monde," in *Nouvelle revue théologique*, 84 [1962], p. 1038).

[85] *Evangelization in modern day Asia: The First Plenary Assembly of the Federation of Asian Bishop's Conferences*, statement and recommendations of the Assembly, Taipei, Taiwan, Republic of China, 22-27 April 1974, rev., enl., 3rd ed., Manila, Office of the Secretary-General, FABC, 1981, pp. 7 and 20-21.

[86] See *Documents of the 31st and 32nd General Congregations of the Society of Jesus. An English translation of the official Latin texts of the General Congregations and of the accompanying papal documents*, Saints Louis, Institute of Jesuit Sources, 1977, pp. 367-368 and 439-440.

concept of inculturation into official Roman Catholic terminology at the level of the universal Church.[87]

### 1.2.5.2. The concept

Inculturation can be defined as a dynamic and life-giving encounter between the Christian message and a particular culture. It is an ongoing process of reciprocal and critical interaction in which both elements, the Christian message and a particular culture, begin to change in order to achieve, at the very least, a symbiotic and harmonious synthesis.[88] The goal of inculturation, therefore, is a single cultural identity that is at once a culture transformed by faith and a faith that is culturally re-expressed.[89] Pope John Paul II, speaking to a gathering of Australia's indigenous nations, said:

> The Gospel now invites you to become, through and through, aboriginal Christians. It meets your deepest desires. You do not have to be people divided into two parts, as though an aboriginal had to borrow the faith and life of Christianity, like a hat or a pair of shoes, from someone else who owns them. Jesus calls you to accept his words and his values into your own culture. To develop in this way will make you more than ever truly aboriginal.[90]

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[87] See JOHN PAUL II, Apostolic exhortation, *Catechesi tradendae* (= *CT*) 53, 16 October, 1979, in *AAS*, 71 (1979), pp. 1277-1340; FLANNERY II, pp. 762-814, here at p. 794.

[88] John Paul II in his encyclical letter, *Slavorum apostoli*, gives an example of how the kind of synthesis had already and successfully been achieved by SS. Cyril and Methodius in their evangelisation of Eastern Europe. See JOHN PAUL II, *Slavorum apostoli* (= *SA*) 21, 2 June 1985, in *AAS*, 77 (1985), pp. 779-813; English trans. in *Origins*, 15 (1985), pp. 113, 115-125, here at pp. 121-122; for more insight into the reciprocal interaction and harmonious synthesis of the Christian message and a particular culture, see also *RM* 52, pp. 556-557; JOHN PAUL II, Discorso alla plenaria del Pontificio Consiglio per la Cultura, "Fate maturare negli spiriti l'urgenza dell'incontro del vangelo con le culture vive," in *Insegnamenti di Giovanni Paolo II*, X, 1 (1987), p. 125; CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, nn. 4-6, pp. 289-291; CROLLIUS, "What is so new about inculturation?" p. 735; PIEPKE, "Inculturation and beyond," pp. 43-44; QUACK, "Inculturation: An anthropologist's perspective," pp. 4-5.

[89] See also LUZBETAK, *The Church and cultures*, pp. 72-73 and 82.

[90] JOHN PAUL II, Address to the Aborigines of Australia, "A defense of the rights of Aborigines," in *Origins*, 16 (1986), p. 476.

Hence we might say that in a true and authentic inculturation there are no winners or losers. Inculturation implies that both elements, the Christian message and a particular culture, will undergo a process of change, yet neither of them will lose its identity. The result of inculturation will be the reinterpretation and the enrichment of both, without being unfaithful to either.[91] Anything else would be a syncretism rather than a synthesis.[92]

Two questions are key: Where does inculturation start? Who is the primary agent of inculturation? The auxiliary bishop Gilles Côté of Daru-Kiunga, Papua New Guinea, although referring only to the Melanesian situation, may provide us with a useful direction in order to find proper answers to our proposed questions. At the Synod for Oceania he emphasized that the only way to build the Church in Melanesian society is to build it from within the community with the participation of all, making sure that the key values of the culture become somehow the key values of the process of evangelization. "All the baptized members are gifted by the Holy Spirit and all need to contribute to the life and the growth of the Church body." Therefore, it is obvious—although it might not always seem so—that

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[91] See *GS* 58; FLANNERY I, p. 234.

[92] A. Quack in his article states that inculturation is realized in syncretistic processes. He defines syncretism essentially as a blending of cultural and religious elements of diverse origin into a functioning synthesis. See QUACK, "Inculturation: An anthropologist's perspective," p. 10. However, we find his definition faulty because those two terms—syncretism and synthesis—are basically contradicting each other. What is the contradiction between these two terms? According to the Chambers dictionary, *syncretism* is a fusion or blending of religions; an *illogical compromise* in religion. See *The Chambers dictionary*, C. SCHWARZ (ed.), Edinburgh, Chambers Harrap Publishers Ltd., 1993, p. 1749. And *Meriam-Webster's deluxe dictionary* explains the meaning of verb *syncretize* as an attempt to unite and harmonize especially *without critical examination* or *logical unity*. See *Meriam-Webster's deluxe dictionary*, 10th collegiate ed., Pleasantville, NY, The Reader's Digest Association, Inc., 1998, p. 1873. Contrary to syncretism, *synthesis* is defined as the combining of often diverse conceptions into a *coherent whole*; the *dialectic combination* of thesis and antithesis into a higher stage of truth. See *Meriam-Webster's deluxe dictionary*, p. 1874. Italicized words in these definitions thus clarify the primary contradiction between these two terms and also underlie reasons why we would prefer to talk about inculturation only as a synthesis rather than mixing two terms together and thus shedding negative light on the process of inculturation. See also CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 47, p. 306; B. SCHWARZ, "Contextualization and the Church in Melanesia," in *An introduction to ministry in Melanesia*, pp. 111-113.

"we need to find a way to utilize the power that is within each person and community." This begins with personal conversion and involvement by the laity in the decision-making process. "Such a process can easily become a very concrete exercise of inculturation."[93]

Bishop Côté's insights assist in answering the questions we posed. The starting point of inculturation is the community, and the point of entry is the way of life of the community. To evangelize a community in depth requires us to assess carefully and objectively where the community is and what its actual need is.[94] After the assessment, the community is offered the Christian message and invited to make its own the way of life revealed in Jesus Christ. Because of that offer and invitation, the living community becomes the primary agent of inculturation.[95] Free acceptance of that invitation will lead to a transformation in people's values, attitudes and actions.[96] The resultant inculturated Christian living then will find its expression in inculturated worship. On the contrary, any attempt to impose the Christian message from outside or from the top will most likely only modify or change a person or a community's observable behavior without producing an

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[93] Quotations taken from "Special assembly for Oceania of the Synod of bishops: Second General Congregation: Build diocesan Church by encouraging participation, Bishop Gilles Côté, S.M.M. Titular Bishop of Cissa, Auxiliary of Daru-Kiunga, Papua New Guinea," in *L'Osservatore romano* (English edition), 2 December 1998, p. 16.

[94] See LUZBETAK, *The Church and cultures*, p. 44.

[95] Sections dealing with characteristics relating to the change agent (1.1.3.3.1.) and the recipient (1.1.3.3.2.) could shed more light on this point. See also LUZBETAK, *The Church and cultures*, pp. 70-72 and 82-83.

[96] There is no room in evangelization for any type of manipulation that deprives the individual of free choice. Vatican II could not have been more emphatic than it was when it insisted that the "human person has a right to religious freedom. Freedom of this kind means that everyone should be immune from coercion by individuals, social groups and every human power so that, within due limits, no men or women are forced to act against their convictions nor are any person to be restrained from acting in accordance with their convictions in religious matters in private or in public, alone or in association with others. The Council further declares that the right to religious freedom is based on the very dignity of the human person as known through the revealed word of God and by reason itself" (SECOND VATICAN COUNCIL, Declaration on religious liberty, *Dignitatis humanae* (= *DH*) 2, 7 December 1965, in *AAS*, 58 (1966), pp. 929-941; FLANNERY I, pp. 551-568, here at pp. 552-553). See also *DH* 11, pp. 560-562.

equivalent change in the fundamental worldview. Then, their Christian living and worship will result in superficial forms of cultural expression which do not come from the heart.

### 1.2.5.3. Inculturation and universality

Despite the fact that inculturation is promoted by the Church, some people are afraid that the process of inculturation could give rise to nationalistic divisions, destroying the very character of the universality of the Church.[97] For them, to be loyal to the Christian message suggests accepting it with its cultural forms without any modification. According to this view, unity means that everything is the same in all spheres of the life of the Church; uniformity is acceptable and plurality is condemnable. However, people with this kind of mentality have failed to perceive that "universality can only be realized through particularities, unity only through variety and authenticity through originality,"[98] that universality and unity are more than uniformity in performing and practicing the same Church's rituals and cultural forms.[99] In reality, "they are realized by the One Spirit, by the same faith and by communion in the values of the same Christian message."[100] There is no contradiction between the Church universal and the many local expressions of being church. The Church was universal on the day of Pentecost[101] and will always be so until the last day. In this regard *Lumen gentium* says:

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[97] See QUACK, "Inculturation: An anthropologist's perspective," pp. 9-10.

[98] D. AMALORPAVADASS, "Evangelization and culture," in *Concilium*, 114-116 (1978), p. 62. See also *SA* 13, 16,17,18, 19 and 20, pp. 119-121.

[99] See "Special assembly for Oceania of the Synod of bishops: Second General Congregation: In Samoa, catechist system is 'lifeblood' of Church, Cardinal Pio Taofinu'u, S.M., Archbishop of Samoa-Apia, Samoa," p. 15; QUACK, "Inculturation: An anthropologist's perspective," p. 5.

[100] D. AMALORPAVADASS, "Evangelization and culture," p. 63.

[101] SECOND VATICAN COUNCIL, Decree on Church's missionary activity, *Ad gentes* (= *AD*) 4, 7 December 1965, in *AAS*, 58 (1966), pp. 947-990; FLANNERY I, pp. 443-497, here at pp. 446-447.

> All women and men are called to belong to the new people of God. This people therefore, whilst remaining one and unique, is to be spread throughout the whole world and to all ages in order that the design of God's will may be fulfilled: he made human nature one in the beginning and has decreed that all his children who were scattered should be finally gathered together as one. [...] This universality which adorns the people of God is a gift from the Lord himself whereby the Catholic Church ceaselessly and effectively strives to recapitulate the whole of humanity and all its riches under Christ the Head in the unity of his Spirit.[102]

However, in our opinion, the Catholic Church, despite its universality, is still, in many respects, very much the western Church. In the name of Christ, the Papua New Guineans and the people of many other mission countries are asked, along with the Christian message, to accept cultural forms introduced by western civilization. Is there not another way to let the Christian message be lived and expressed in other than western cultural forms? Only if Christ is experienced in each given society, only if people in their own ways live out this experience,[103] can we talk about the universality of the Church as something authentic. Therefore, in order to achieve its authentic universality and unity, the Church has to be localized and inculturated.

### 1.3. Papua New Guinea: Its People and Cultures

Papua New Guinea is a fascinating and unique country pertaining to one of the most isolated areas in the world.[104] This characteristic perhaps more than any other must be taken into account for an understanding of its past and present circumstances. Papua

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[102] *LG* 13; FLANNERY I, pp. 17-19.

[103] See ÖRSY, "Quo vadis Ecclesia: The future of canon law," p. 11.

[104] See F. ZOCCA, "Papua New Guinea: Land of unexpected," in *SVD Word in the world, 1995-1996: The Society of the Divine Word (SVD) reports on its world-wide missionary activities*, R.E. PUNG, J. AHRENS (eds), Netteteal, Steyler Verlag, 1995, p. 33.

New Guinea's isolation is the product of a number of distinct conditions,[105] all working in the direction of separating the life of the country from the main streams of development in the larger world as well as dividing life within the country into a multitude of separated human societies, all relatively isolated from one another.[106] We can say very convincingly that there is no place on earth where so many cultures and languages are met at the same time in such a small geographical area. This is, therefore, one of the reasons why many archeologists and anthropologists, particularly since the Second World War, have been so interested in studying Papua New Guinea. It is also a reason why there were so many challenges in establishing Christianity in this area.

Knowledge of the history in Papua New Guinea is somewhat limited by its human memory of only a few generations. However, recent results in archeology, anthropology, comparative linguistics and oral history enable us to reach much farther into the past than was possible before.

### 1.3.1. New Guinea geography

New Guinea is generally a long and narrow island. It is approximately 2,400 km (1,490 mi) in length and about 690 km (430 mi) in width at its widest point. With its circa 885,780 sq km (342,000 sq mi) it is, after Greenland, the second largest island in the world. It lies immediately north of the northeastern extremity of Australia, extending from the equator to about 12° southern latitude and from 130° 50' to 156° eastern

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[105] See J.B. WATSON, "Anthropology in the New Guinea highlands," in *New Guinea: The central highlands*, J.B. WATSON (ed.), Menaska, American Anthropological Association, 1964, pp. 2 and 11-12.

[106] See R.D. MACKAY et al. (eds), *New Guinea: The world's wild places*, with photographs by E. LINDGREN, Amsterdam, Time-Life International (Nederland) B.V., 1978, p. 25.

longitude. Politically, it is divided into two sections: the Indonesian province of Irian Jaya in the west and the independent country of Papua New Guinea in the east.

### 1.3.1.1. Papua New Guinea geography

Situated in the South Pacific, Papua New Guinea lies on the eastern half of the island of New Guinea. It comprises both the mainland and some 600 offshore islands, principally the Bismarck Archipelago, which largely includes New Britain, New Ireland and Manus, and the North Solomon Islands of which Bougainville and Buka are the largest.[107] It extends from the equator to Cape Baganowa in the Louisiade Archipelago at latitude 12° south and from the border with Irian Jaya to longitude 156° east, thus comprising about 453,000 sq km (174,900 sq mi) in total land area. It is bordered on the north by the Bismarck Sea, on the east by the Solomon Sea, on the south by the Coral Sea, the Gulf of Papua, and the Torres Strait, and on the west by the Indonesian province of Irian Jaya. Other neighbors are the Solomon Islands to the east and Australia to the south. Papua New Guinea has coastlines extending for a total of 5,152 km.

The country is a land rich in geographic diversity. Most of the coastline of mainland Papua New Guinea is at low elevations. The interior is partly a low-lying, swampy plain formed by alluvial deposition and also has a series of rugged mountains, including the Bismarck and Owen Stanley ranges. The highest point is Mount Wilhelm, at 4,509 m (14,800 feet). Some of the country's other islands, such as New Britain and Bougainville, are mountainous, and many of the small islands are low-lying coral atolls. The country is endowed with substantial mineral wealth and has good agricultural

[107] See ibid., p. 21.

potential with fertile soil and abundant rainfall. There are large expanses of tropical forest and good fishery stocks.

### 1.3.2. New Guinea prehistory and history

It is commonly believed that the prehistoric period in Papua New Guinea was very much static. However, the opposite is true. The prehistoric period was a dynamic one. It was a period of movement, development and innovation long before outside European contact was ever made. After the European contact this dynamism was even accelerated, though leaving very negative repercussions on the traditional culture.

#### 1.3.2.1. New Guinea prehistory

The diversity of cultures and languages and also the variety of physical types of people in New Guinea suggest its prehistory to be complicated and complex, and it is very much so. The island of New Guinea is assumed to be the first part of Melanesia to be inhabited by humans. Current archaeological and anthropological opinion indicates that people first came to this island about 50,000 years ago, probably by sea from southeast Asia during an Ice Age period when the sea was lower and distances between islands shorter.[108] The first inhabitants were joined some 5,000 years ago by more recent arrivals who settled in the islands and the areas along the coast. It is understood that merchants from Java, Sumatra and probably India were trading with the local Papuans for products such as spices, coral or pearls some 2,000 years ago.

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[108] See P. SWADLING, *Papua New Guinea prehistory: An introduction*, Port Moresby, National Museum and Art Gallery, 1981, p. 2; D.L. WHITEMAN, *Melanesians and missionaries: An ethnohistorical study of social and religious changes in the southwest Pacific*, Pasadena, William Carey Library, 1983, p. 43; "Melanesia: Its people and cultures," in *An introduction to Melanesian culture*, p. 90; ZOCCA, "Papua New Guinea: Land of unexpected," p. 33.

Although the first arrivals were hunters and gatherers, early evidence shows that people managed the forest environment to provide food. The ecosystem on the island was sufficiently rich and diversified to support hunting and gathering populations. Nevertheless, around 9,000 years ago, when agriculture was developing in Mesopotamia and Egypt, the transition from a hunting and gathering economy to one based on horticulture took place also in the New Guinea highlands.[109] At present it is unknown whether the introduction of horticulture into a New Guinean economy occurred independently or was introduced from outside by a people migrating into the area. However, this date places New Guineans among the earliest gardeners in the world. The evidence of pig bones from around 6,000 years ago indicates that there were also domesticated pigs in the highlands. Pigs, in fact, are not indigenous to New Guinea, so they must have been brought to the island by people. A major horticultural revolution occurred in New Guinea with the introduction of the sweet potato. This highly adaptable plant arrived in the island between 300 and 400 years ago from eastern Indonesia, having been taken around the world from South America by Spanish and Portuguese seafarers.[110] Its high yield and tolerance for poor and cold soils led to its cultivation at higher and higher altitudes, and promoting greater population expansion, especially in the highlands.

This short portrayal of Papua New Guinea prehistory does not give a complete picture of the country and of the people who live in it. It is a difficult and enormous task

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[109] See *Encyclopedia of world cultures: Oceania*, vol. 2, T.E. HAYS, volume editor, Boston, G.K. Hall & Co., 1991, p. 201; G.W. TROMPH, "Geographical, historical, and intellectual perspective," in *The Gospel is not western: Black theologies from the southwest Pacific*, G.W. TROMPF (ed.), Maryknoll, NY, Orbis Books, 1986, p. 5; ZOCCA, "Papua New Guinea: Land of unexpected," p. 33.

[110] See WHITEMAN, "Melanesia: Its people and cultures," p. 91; H.C. BROOKFIELD, "The ecology of highland settlement: Some suggestions," in *New Guinea: The central highlands*, J.B. WATSON (ed.), Menaska, American Anthropological Association, 1964, pp. 20-30.

that will still require the work of anthropologists, archeologists and linguists for many years to come. What we tried to demonstrate was the long historical dimension to the present cultural diversity in Papua New Guinea.

### 1.3.2.2. New Guinea history

*Early Europeans.* Although adventurers from Indonesia and Asia had long traded with the Papuans, the first contact by a European was credited to the Portuguese navigator, Antonio d'Abreu.[111] It is said that in 1511 he spotted the Aru islands on the south coast of what is now West Papua. However, an examination of d'Abreu's report shows that he might have only reached the eastern coast of Further India—Cambodia, making thus his discovery very dubious.[112] The first recorded European landing was in 1526 when Jorge de Meneses, another Portuguese, accidentally came upon the northwest coast of the island—again in West Papua. He was so taken by the appearance of the Papuans that he named the island "Ilhas dos Papuas," after the Malay word "Papuwah," meaning "people with curly hair."[113] The term "New Guinea" was applied to the island in 1545 by a Spaniard, Inigo Ortiz de Retes, because

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[111] See J.W. LINDT, *Picturesque New Guinea: With an historical introduction and supplementary chapters on the manners and customs of the Papuans; accompanied with fifty full-page autotype illustrations from negatives of portraits from life and groups and landscapes from nature*, London, Longmans, Green, and Co., 1887, pp. 1-2; *Gran Enciclopedia Rialp*, vol. 24, Madrid, Ediciones Rialp, 1979, p. 89; *The encyclopedia Americana: Canadian edition; complete in thirty volumes*, vol. 20, Montreal, Americana Corporation of Canada Limited, 1950, p. 123.

[112] See *The Catholic encyclopedia*, vol. 10, New York, The Encyclopedia Press, Inc., 1913, p. 783; *Enciclopedia italiana di scienze, lettere ed arti*, vol. 25, Roma, Istituto della Enciclopedia Italiana, 1949, p. 56; J.W. LINDT, *Picturesque New Guinea*, p. 2.

[113] See LINDT, *Picturesque New Guinea*, p. 2; R.F. MAHER, *New man of Papua: A study in culture change*, Madison, The University of Wisconsin Press, 1961, p. 3; *Enciclopedia universal ilustrada Europeo-Americana: etimologias sanscrito, hebreo, griego, latin, arabe, lenguas indigenas americanas, etc.; versions de la mayoria de las voces en frances, italiano, ingles, aleman, portugues, catalan, esperanto*, vol. 41, Madrid, Espasa-Calpe, 1958, p. 1091; *Gran Enciclopedia Rialp*, p. 89; *Enciclopedia italiana di scienze, lettere ed arti*, p. 56; *Le Million, l'encyclopédie de tous les pays du monde*, vol. 15 – Océanie, Paris, Éditions Atlas S.A., 1982, p. 129; *The encyclopedia Americana*, p. 123; ZOCCA, "Papua New Guinea: Land of unexpected," p. 33.

of a fancied resemblance between the islands' inhabitants and those found on the African Guinea coast.[114] Although European navigators visited the islands and explored their coastlines for the next decades, little was known of the inhabitants until the late 19th century. During the next two centuries, the island was visited by Europeans from many nations.

*Colonialist takeover*. In 1828 the Dutch formally annexed the western half of the island to protect their interests in the region—in particular the Spice Islands west of West Papua, today the Maluku Islands.[115] Germany followed in 1884, taking possession of the northeastern part of the territory and the islands off its shore. In the same year the British proclaimed a protectorate over the southeastern coast and the adjacent islands under the name of British New Guinea.[116]

*German empire*. Powers of administration in the German colony were chartered in 1885 to the German New Guinea Company.[117] Administrative and financial problems, however, forced the German Government to revoke those sovereign powers in 1899 and assume direct control of the colony, which, thereafter, was known as German New Guinea.[118] During World War I, Australian forces occupied the German-controlled region

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[114] See LINDT, *Picturesque New Guinea*, p. 2; J.C. THIESSEN, *A survey of world missions*, rev. 3rd ed., Chicago, Moody Press, 1970, p. 318; *Gran Enciclopedia Rialp*, p. 89; *Enciclopedia italiana di scienze, lettere ed arti*, p. 56; *Le Million, l'encyclopédie de tous les pays du monde*, p. 129; *The encyclopedia Americana*, p. 123; *The Catholic encyclopedia*, p. 783; M. MEIER, "We are the Church: Yumi Sias," in *SVD Word in the world*, p. 49.

[115] See *Gran Enciclopedia Rialp*, p. 90; *Enciclopedia italiana di scienze, lettere ed arti*, p. 62; *Le Million, l'encyclopédie de tous les pays du monde*, p. 129; *The encyclopedia Americana*, p. 123; ZOCCA, "Papua New Guinea: Land of unexpected," p. 34.

[116] See LINDT, *Picturesque New Guinea*, pp. 5-9; *Gran Enciclopedia Rialp*, p. 90; *Enciclopedia italiana di scienze, lettere ed arti*, p. 62; *Le Million, l'encyclopédie de tous les pays du monde*, p. 129; *The encyclopedia Americana*, p. 123; ZOCCA, "Papua New Guinea: Land of unexpected," p. 34.

[117] See *Enciclopedia italiana di scienze, lettere ed arti*, p. 62; *Le Million, l'encyclopédie de tous les pays du monde*, p. 129; *The encyclopedia Americana*, p. 123; LINDT, *Picturesque New Guinea*, pp. 191-194.

[118] See *Enciclopedia italiana di scienze, lettere ed arti*, p. 62; *Le Million, l'encyclopédie de tous les pays du monde*, p. 129.

in the northeast, which was mandated to Australia by the League of Nations in 1920 as the Territory of New Guinea.[119] It was administered under this mandate until the Japanese invasion in 1942 brought about the suspension of Australian civil administration.

*British empire*. The British protectorate over the southeastern coast of New Guinea and the adjacent islands was proclaimed in 1884. However, it was only in 1888 that Britain annexed its protectorate outright, establishing an administration which it shared with its colony in Queensland, Australia.[120] The territory remained under British sovereignty until 1901. Then the separate British colonies in Australia federated and the new Commonwealth government took responsibility for Britain's Papua colony. However, it was not until September 1906 that Australia formally took over the colony and renamed it the Territory of Papua under the terms of the Papua Act 1905.[121] Papua was administered under that Act until 1942 when the Japanese invaded the territory and suspended Australian civil administration.

During the Second World War the island was the scene of bitter fighting between Japanese and Allied forces. In January 1942 Japan invaded the northern islands, and most of the northern coast fell to the Japanese. From there they advanced southward where they were stalled by Allied forces. It took until 1945 to regain all the mainland from the Japanese. However, the islands—New Ireland, New Britain, Bougainville—were not liberated until the final surrender.[122]

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[119] See *Enciclopedia italiana di scienze, lettere ed arti*, pp. 62-63; *Le Million, l'encyclopédie de tous les pays du monde*, p. 130; *The encyclopedia Americana*, p. 123.

[120] See *Enciclopedia italiana di scienze, lettere ed arti*, p.62; *The encyclopedia Americana*, p. 123.

[121] See *Enciclopedia italiana di scienze, lettere ed arti*, p.62; *The encyclopedia Americana*, p. 123.

[122] See *Le Million, l'encyclopédie de tous les pays du monde*, p. 130; R.E. PUNG, "Divine Word Missionaries in Papua New Guinea," in *SVD Word in the world*, p. 13.

Australian involvement with Papuans and New Guineans during the war led to new thinking about labor questions and social welfare. The United Nations accepted the terms Australia proposed for a trusteeship agreement, and New Guinea came under the international trusteeship system. The Papua and New Guinea Provisional Administration Act came into force in 1945. It restored civil administration to Papua as well as to New Guinea and combined the two territories under one administration, though constitutionally they remained distinct. This joint administration was formalized in 1949 with the passage through the Australian Parliament of the Papua New Guinea Act.[123] The Act formally approved the placing of New Guinea under the United Nations Trusteeship system. It also confirmed the administrative union of Papua and New Guinea under the title of "The Territory of Papua and New Guinea." The administration of the Territory, under the supervision of the United Nations, was returned to Australia. In 1963, Dutch New Guinea was transferred to Indonesian administration. In 1971 the name "The Territory of Papua and New Guinea" was changed to "Papua New Guinea." The election in 1972 resulted in the formation of a ministry headed by Chief Minister Michael Somare, who pledged to lead the country to self-government and then to independence. Papua New Guinea became self-governing in December 1973 and achieved independence on 16 September 1975.[124]

From this short account we can see that Papua New Guinea had been subjected to colonialism. This historical reality did much to shape the present nation.

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[123] See *Gran Enciclopedia Rialp*, p. 90; *Le Million, l'encyclopédie de tous les pays du monde*, p. 130; *The encyclopedia Americana*, p. 124.

[124] See WHITEMAN, "Melanesia: Its people and cultures," p. 86; ZOCCA, "Papua New Guinea: Land of unexpected," p. 34; *Gran Enciclopedia Rialp*, p. 90.

### 1.3.3. People and languages of Papua New Guinea

With an estimated 5,290,000 people, Papua New Guinea has by far the largest population in the Pacific. The inhabitants as a whole are considered part of the Melanesian race although there is a tremendous diversity of physical appearance among them. In the highland regions the people are short and thickset whereas along the coast they tend to be taller. Skin color varies from the rich black found among the inhabitants of Bougainville and Buka to the light skin of the Trobriand Islanders. There is really no consistent pattern of physical appearance among Papua New Guineans.

Politically and culturally the country is divided into four groups: Papuans, who live in the southern Gulf of Papua region; Highlanders, who inhabit the central mountainous region; New Guineans, located in the northern Sepik and Ramu river valleys; and Islanders, who live on outlying northern islands. Some authorities divide the people into Papuans (predominantly descended from the original arrivals) and Melanesians (more closely related to the peoples of the southwest Pacific), though some people, particularly those in outlying islands, are closer to being pure Polynesian or Micronesian. The dividing lines between these definitions are very hazy.

Since the highlands are malaria-free and endowed with good agricultural potential, approximately a third of the total population lives there.[125] About 50% live along the coasts and in the vast plains of the north and the south. The remaining 15% live on the minor islands.

Papua New Guinea is one of the most linguistically diverse areas of the world. It is jokingly said that the Tower of Babel must have been built somewhere in these parts. In

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[125] See *Gran Enciclopedia Rialp*, p. 89; MACKAY et al. (eds), *New Guinea: The world's wild places*, p. 25.

fact, there are thousands of clans on the island speaking over 850 languages representing approximately one-third of the world's indigenous languages. Papua New Guinea speech communities are very small, comprising only a few hundred to a few thousand speakers for each language. The question that immediately comes to mind is why are there so many different languages in such a small geographic area? One of a few possible explanations might be the already mentioned characteristic of the country, i.e., its isolation—not only from the outside world but also within the country itself. Broken mountain ranges, torrential rivers and thick forests divided the centers of population one from another resulting thus in the evolution of hundreds of languages. The high degree of social and political fragmentation may be another reason for the multiplication of languages. Reinforced culturally by leadership patterns, tribal fighting and the general ethos whereby those outside their clan have been perceived as potential enemies, the social and political groups of Papua New Guinea are very small and fragmented. Therefore, in addition to the isolation factor, social and political fragmentation has also played an influential role in the multiplication of languages spoken in Papua New Guinea.

These many languages fall into two large categories. Languages along the coast and on the minor islands belong to a category known as Austronesian or Malayo-Polynesian, whereas languages in the central part of the island with some languages in the Solomon Islands are grouped into different phyla called Papuan or non-Austronesian.

In order to overcome the tremendous linguistic barriers and facilitate communication across linguistic boundaries, a compromise language called *Tok Pisin* has been developed.[126]

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[126] Tok Pisin is the official Papua New Guinean name for its dialect of Pidgin English. By definition a pidgin language is, in fact, a simplified language derived from two or more languages. It is a contact language developed and used by people who do not share a common language in a given

When the Independent State of Papua New Guinea was born in 1975, Tok Pisin was recognized in the constitution as one of the national languages of the new country. Other official languages are English and Hiri Motu. The latter is considered as the local second language of the Port Moresby coastal area. English is mostly used for government business. Tok Pisin today is, however, far and away the largest language used in Papua New Guinea.

### 1.3.4. Organization of Papua New Guinea societies

As already mentioned, one of the most characteristic features of the way Papua New Guinea societies are organized is the small size of socio-political units that in the highlands are commonly called *clans* and on the coast *villages*.[127] They could be defined as a complex web of cooperation and reciprocal obligations based mostly on ethnic identity within a group in which warfare should not take place. A clan and/or a village recognizes itself as an independent, autonomous social unit with its own legal order. It exists by its own history, tradition and territory. Such a unit is autochthonous and self-executing in that it does not depend on the state or any other higher authority. Its size varies normally from only a few hundred to several thousand people.

Each socio-political unit has its own leader or "bikman," as he is called in Tok Pisin. The position of leader is not inherited but usually acquired through his prowess in war, in giving feasts, public debates, or by virtue of age and wisdom. Leaders in the

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geographical area. It is used in a limited way and the grammatical structure is very simplistic. Since pidgin languages serve a single simplistic purpose, they usually die out. However, if the pidgin is used long enough, it begins to evolve into a richer language with a more complex structure and richer vocabulary. Once the pidgin has evolved and has acquired native speakers (the children learn the pidgin as their first language), it is then called a Creole. An example of this is Tok Pisin, which has become a National language. For a theory about where and how Tok Pisin originated, see F. MIHALIC, "The medium of the message," in *SVD Word in the world*, pp. 43-44.

[127] See M. MACDONALD, "Melanesian communities: Past and present," in *An introduction to Melanesian culture*, p. 213.

community do not make or give law. They give wise counsel of what should be done or avoided. Through the institution of the meeting house, knowledge of what is right and what is wrong is transmitted.

Individuals become attached to the unit according to shared criteria for membership including their socialization and acculturation. By virtue of one's membership, a person is endowed by the community not only with rights but also with obligations owed to it. Therefore, the member of the unit is bound by certain norms, values and acceptable or prohibited modes of behavior. Obedience to internal orderings is a necessary requirement for the recognition of one among all. This recognition is vital to the creation and continuity of a Papua New Guinea socio-political unit. A person could forfeit membership by settling down by himself, by joining another unit or by being expelled. Termination of membership results in withdrawal of co-operation and possible heightening of conflict between a separated person and other members of the unit.

## Conclusion

Having read the forgoing and aware that this is a canon law dissertation, one might ask how this first chapter with its emphasis so much on anthropology might relate to canon law? The answer is quite simple.

Evangelization presupposes the primacy of the Holy Spirit and requires a religious commitment on the part of those engaged in it. However, a deep appreciation of the contribution of other scientific disciplines can, at the same time, help toward fostering more effective policies and practices of evangelization. Albert Einstein once said that

"science without religion is lame; religion without science is blind." Religion and science need each other. They go hand in hand; both are necessary and mutually enriching.

Evangelization in the Catholic Church is primarily regulated by the provisions of the Code of Canon Law. This fact, actually, makes canon law an integral part of the evangelization process, and both should be open to the challenges of human knowledge. In fact, an increased human knowledge can help any evangelist move into a higher viewpoint, take a fresh look at familiar things, have a base on which to raise new questions, and thus make evangelization more effective and fruitful. Being an integral part of evangelization, canon law too is subject to the challenges of human knowledge. Therefore, if canon law really is to be a helpful instrument of effective and fruitful evangelization, it must be open to those challenges. The contribution of human knowledge to canon law is even more needed when we realize that the Code reflects only a given moment in the life and history of the Church as well as a certain vision of the Church. It does not pretend to be the final word on the matters it contains. The law builds on the life and tradition of the Church; it must follow life, not create it. Therefore, law must be promulgated to further an understanding of life and of the varied traditions of people. It must also be a means whereby the observance of the supreme law, which is the salvation of souls, is promoted. In order to accomplish the mentioned goals, canon law must be open as much as possible to pertinent insights and data of other scientific disciplines and especially of anthropology, the object of which is the study of our humanity. L.J. Luzbetak defines anthropology as a science which "inquires into the basic questions about who human beings are, how they came to be what they are, how they

behave, and why they behave as they do."[128] He also makes a statement which is actually the answer to our foregoing question: How might this first chapter with its emphasis so much on anthropology be related to canon law? Again Luzbetak says: "Because the mission of the Church is to human beings, and because anthropology is the systematic study of such beings, a basic knowledge of this science is a *must* for anyone engaged in mission."[129]

Paraphrasing this in terms of its application to canon law, we might conclude that since canon law represents an effort to regulate humanity in the context of Catholic Christianity, and since anthropology is in fact the systematic study of that humanity, a basic knowledge of this science is a *must* for anyone engaged in applying canon law to people of different cultures and varying traditions.

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[128] LUZBETAK, *The Church and cultures*, p. 23.

[129] Ibid.

# CHAPTER TWO

# CUSTOMARY AND STATUTORY MARRIAGE IN PAPUA NEW GUINEA

## Introduction

Biblical tradition from its outset reveals that God has endowed each person with a yearning to surrender oneself to another in marriage, thereby establishing this union as the natural means to effect human procreation. Pope Leo XIII pointed out that, even among those who have not been baptized, marriage of its very nature is sacred and necessarily governed by law. He says:

> Marriage has God for its author, and was from the very beginning a kind of foreshadowing of the Incarnation of His Son; and, therefore, there abides in it something holy and religious; not extraneous but innate; not derived from men but implanted by nature. Therefore, Innocent III and Honorius III, our predecessors, affirmed not falsely nor rashly that a *certain sacredness of marriage rites existed ever among the faithful and unbelievers*. [...] Since marriage is holy by its own power, in its own nature and of itself, it should not be regulated and administered by the will of civil rulers but by the divine authority of the Church, which alone in sacred matters professes the office of teaching.[1]

Hence, we may confidently assume that every human society has always had some form of marriage with its own regulating laws, despite the fact that such laws might be unwritten. Certainly it has not been otherwise with those societies which have existed in Papua New Guinea for the past 50,000 years. A rich variety of Papua New Guinean

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[1] "Etenim cum matrimonium habeat Deum auctorem, fueritque vel a principio quaedam Incarnationis Verbi Dei adumbratio, idcirco inest in eo sacrum et religiosum quiddam, non adventitium, sed ingenitum, non ab hominibus acceptum, sed natura insitum. Quocirca Innocentius III et Honorius III decessores Nostri, non iniuria nec temere affirmare potuerunt, *apud fideles et infideles existere Sacramentum coniugii*. [...] Igitur cum matrimonium sit sua vi, sua natura, sua sponte sacrum, consentaneum est, ut regatur ac temperetur non principum imperio, sed divina auctoritate Ecclesiae, quae rerum sacrarum sola habet magisterium" (LEO XIII, Encyclical letter, *Arcanum divinae sapientiae*, 10 February 1880, in *Acta Sanctae Sedis* [= *ASS*], XII [1894], pp. 385-402, here at p. 392).

marriage customs and values produced over these thousands of years support the truth of our assumption.[2]

We are aware that the form of marriage is not a single, fixed form across the whole world. Since societies differ in their worldviews as well as in their perception and ranking of cultural values, it is not surprising that we come across many different cultural forms of marriage.[3] Marriage, in fact, is an open, natural phenomenon that absorbs form and meaning from the particular culture within which it is lived. It can be properly understood only in relation to the cultural concepts, values and expectations in which it is embodied.[4]

Marriage and family have always occupied a central place in Papua New Guinean tradition. In Papua New Guinea the single state is looked upon as something abnormal and even a little sinister, whereas marriage is regarded as right and proper for all adults.

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[2] An example of a rich variety of Papua New Guinean marriage customs, particularly from the New Guinea highlands, is brought out to us in short but clearly focused and comparable accounts presented by Glasse and Meggitt. See R.M. GLASSE, M. J. MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, Englewood Cliffs, NJ, Prentice Hall, 1969.

[3] We dealt with different worldviews and cultural forms at length in the first chapter. We said that different cultural forms rarely, if ever, carry exactly the same meaning across cultural boundaries because they are related to a specific meaning which is determined by the cultural context in which the forms are used. Nevertheless, there are some exceptions. An example could be drawn from the different cultural forms of the same institution of marriage. For instance, although the cultural form of traditional marriage of Papua New Guinea (or in any other country) and the canonical form of Christian marriage might differ considerably and not be understood across cultural boundaries, the aim of each is the same, i.e. to establish a matrimonial contract or covenant. In the strict sense, or at least in accordance with our western understanding, the aim of the canonical form is to establish a valid matrimonial contract between a man and a woman. In the broad sense, or according to Papua New Guinean understanding, the aim of the cultural form is a valid matrimonial contract not only between two individuals but also between two families or clans. Moreover, whether it is a Christian marriage or a customary marriage, both are ordered towards the same ends, i.e., the good of the spouses (in Papua New Guinea towards the families and clans as well) as well as the procreation and education of children. This reality may be at the crux of our study as we reflect on their final implications canonically and pastorally.

[4] In a western social sense one can say that a family is created whenever a man and a woman share a common household or where one or both parents are sharing such a household with their children. In Papua New Guinean legal sense the family, however, is a much more restricted concept. Customary family is effected by a ritual process, lasting weeks, months and even years. It takes the form of a series of rites, negotiations, feasts and gifts exchanges.

Therefore, the goal of all Papua New Guineans is to get married and have a family. Today in Papua New Guinea two types of marriage are recognized by law as prerequisites to instituting the legal family: a *customary marriage* which is formed in accordance with custom and a *statutory marriage* which satisfies the statutory requirements of the "Marriage Act 1963" (now Ch 280 of the Revised Laws). The legal status of marriage, whether it is customary or statutory, is, in fact, designed to support and strengthen essential family functions. Formal customary ceremonial marriage is for Papua New Guineans the most common and usual way of instituting the above-mentioned legal family.[5] Formal statutory ceremonial marriage is very rarely effected, particularly among people in rural areas.

The focus of this second chapter is to present the cardinal values of Papua New Guinean societies and the important role they play in the institution of customary marriage. We will also give an overall description of the two legal types of marriage: customary and statutory. Since the goal of our dissertation is actually to find some way to combine the canonical form of marriage with the essential aspects of customary marriage, our attention will focus more on what is less generally understood of the customary rather than of the statutory marriage. A correct understanding of customary marriage may hopefully, then in a later section of the study, provide a solid basis on which to adjust the norms governing the canonical form of marriage to the essential norms of customary marriage.

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[5] See O. JESSEP, J. LULUAKI, *Principles of family law in Papua New Guinea*, 2nd ed., Waigani, University of Papua New Guinea Press, 1994, p. 1.

The chapter is divided into three parts. The first part will look at the traditional value system in Papua New Guinea and its importance for and impact on the individual and the community as well as on the institution of marriage. The second part will describe the nature of customary marriage in Papua New Guinea, its prerequisites and ceremony as well as the motives that lead to it. The third part of the chapter will present the historical background of statutory marriage and its implementation in the Papua New Guinea constitution. It will also deal with the requirements that have to be met in order that the celebration of statutory marriage may be valid.

## 2.1. Traditional Value System in Papua New Guinea

The study of people's values, the ideas and emotions which form their outlook on life and motivate their behavior, is of fundamental importance to our understanding of them. Nothing is more basic to evangelization than insight into a people's value system. However, the process of uncovering values is not easy because these implicit and unanalyzed assumptions, which form and guide people, can only be inferred from language and other behavior, but never directly observed.

What do we mean by the terms "value" and/or "value system"? When we talk about those terms we refer to any conception of the good or desirable reality which forms, motivates and influences the thinking or action of people and thus gives quality to their life.[6] Such conception may be characteristic either of an individual or of a group. In

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[6] See E. MANTOVANI, "Traditional values and ethics," in *An introduction to Melanesian culture*, p. 197; V.F. AYOUB, "The study of values," in *Introduction to cultural anthropology: Essays in the scope and methods of the science of man*, J.A. CLIFTON (ed.), Boston, Houghton Mifflin Company, 1968, p. 264; ÖRSY, "Quo vadis Ecclesia: The future of canon law," p. 7; P.K. BOCK, *Modern cultural anthropology: An introduction*, 2nd ed., New York, Alfred A. Knopf, 1974, p. 347.

our study we will be concerned primarily with values held by Papua New Guinea people as members of their society and culture. Many of their traditional values, in fact, provide the fertile soil for the Word of God to grow and flourish. Therefore, they are not only helpful and useful but are indispensable for the proper communication and incarnation of the Christian message in Papua New Guinea today. Their comprehension and appreciation will certainly, in the process of this dissertation, gently modify our own Christian value concepts and what they imply and especially modify what is implied by the concept of the canonical form of marriage as it relates to Papua New Guinea culture.

The fact that every human experience and activity involves a value concept has become a very important aspect not only for contemporary existential philosophy, sociology and psychology but also for anthropology. Anthropologists have recognized that values held by people determine their motives for action and, therefore, constitute much of the dynamic for their society. Nevertheless, it is important to keep in mind that these values are not innate. They are acquired in two ways: through culture and experience.[7] First, the value system of a person depends in large part upon those culturally based worldviews and ideas that one has learned from contemporaries in his/her society. Second, it also depends upon an everyday experience gained by a person living and participating as a member of his/her society. This daily experience should undergird the value system of a given culture in the life of individuals. However, a rapidly changing culture in many countries today brings about the divergence between their experience and the underlying values of society and leads, therefore, to the undermining of the whole system of traditional values. A person

[7] See T.H. ERIKSEN, *Small places, large issues: An introduction to social and cultural anthropology*, 2nd ed., London, Pluto Press, 2001, p. 40; AYOUB, "The study of values," pp. 246-250; MANTOVANI, "Traditional values and ethics," p. 199.

in such a situation is often torn between experience and values. Pope John Paul II, speaking to a gathering of Australia's indigenous nations, pointed it out when he said:

> The culture [...] was not prepared for the sudden meeting with another people, with different customs and traditions, who came to your country nearly 200 years ago. They were different from aboriginal people. Their traditions, the organization of their lives and their attitudes to the land were quite strange to you. These people had knowledge, money and power: and they brought with them some patterns of behavior from which the aboriginal people were unable to protect themselves.[8]

In the preceding paragraph of the same message, which might very well be addressed and applied to any of the thousands of distinct peoples or nations inhabiting the continents and islands of our planet, the Pope also emphasized the importance of maintaining cultural values. He said:

> Your culture, which shows the lasting genius and dignity of your race, must not be allowed to disappear. *Do not think that your gifts are worth so little that you should no longer bother to maintain them.* Share them with each other and teach them to your children. Your songs, your stories, your paintings, your dances, your languages, must never be lost. Do you perhaps remember those words that Paul VI spoke to the aboriginal people during his visit to them in 1970? On that occasion he said: "[...] *For us, you and the values you represent are precious.* We deeply respect your dignity and reiterate our deep affection for you" (Sydney, Dec. 2, 1970).[9]

However, the effort of maintaining the cultural values should not be only the people's duty. In this regard the Church has also its own role to play. According to John Paul II, every bishop, in the proclamation of the Gospel, must strive to ensure that the positive cultural values of people are safeguarded and maintained. In his Apostolic exhortation, *Pastores gregis*, he says:

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[8] JOHN PAUL II, Address to the Aborigines of Australia, p. 475.

[9] Ibid. (Emphasis added). On this point, see also JOHN PAUL II, *Africa: Apostolic pilgrimage*, pp. 263 and 315.

> Every bishop, taking into consideration the cultural values present in the territory of his particular church, should strive to ensure that the Gospel is proclaimed in its integrity, so as to shape the hearts of men and women and the customs of the people. In this work of evangelization a valuable contribution can be made by theologians and those expert in drawing upon the cultural, artistic and historical patrimony of the diocese: This is true for both first evangelization and the new evangelization, and represents an effective pastoral tool.[10]

Why do the two mentioned popes so strongly recommend the preservation of cultural values? They certainly realized that the system of values represents unwritten laws which guide the conduct of a people in a manner they accept as credible and relevant to them.[11] Moreover, the popes also understood the teaching of Vatican II whereby the true measure of the universal Church is expressed when the values of each culture actually contribute to the whole body. In *Lumen gentium* we read:

> [...] All the faithful scattered throughout the world are in communion with each other in the Holy Spirit so that he who dwells in Rome knows the Indians to be his members. [...] In virtue of this catholicity, each part contributes its own gifts to other parts and to the entire church, so that the whole and each of the parts are strengthened by the common sharing of all things and by the common effort to achieve fullness in unity. [...] Therefore, whatever good is found sown in people's hearts and minds, or in the rites and customs of peoples, it is not only saved from destruction, but it is purified, raised up, and perfected for the glory of God.[12]

It is interesting to note that some languages native to Papua New Guinean societies do not have a word for *law* in their vocabulary.[13] Law, actually, is not considered to be an essential tool for their survival. However, this does not mean they are anarchic societies without social order, discipline or control. They have their own ways

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[10] *PG* 30, p. 370.

[11] See ERIKSEN, *Small places, large issues*, pp. 59-60.

[12] *LG* 13 and 17; FLANNERY I, pp. 18-19 and 23.

[13] See B. NARAKOBI, *Law and custom in Melanesia*, Point Series No. 12, The Melanesian Institute, Papua New Guinea, Indore, M.P, Satprachar Press, 1996, p. 4.

and methods in order to achieve what is achieved by law in western societies. What the law seeks to accomplish is accomplished through the way people live and do things, i.e., through their customs: *pasin bilong ol.*[14] Today, however, one of the struggles which many Papua New Guinean societies must endure is the struggle between western law written with a pen (to which provisions of the Code of Canon Law, to some extent, also belong) and the unwritten law or people's values that are engraved in their hearts. Many times such a struggle makes people confused and leads to a very severe threat to the traditional value system in the life of people.[15]

### 2.1.1. Life

Papua New Guinean philosophy can be defined as a *philosophy of quest for life and for its possession in abundance in all possible forms.* "Life," therefore, seems to be the cardinal value of Papua New Guinean societies.[16]

For Papua New Guineans the essential aspect of being alive is the ability to transmit biological life to another human person. Therefore, one is not fully alive if one does not, or cannot, bear children. The transmission of biological life is a sign of the ancestors' blessing as well as an assurance that one's memory will be cherished after death. For this reason, biological life is valued as the supreme gift which has to be

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[14] See ibid.

[15] For deeper analysis of this problem, see G.W. TROMPH, "Competing value-orientations in Papua New Guinea," in *Ethics and development in Papua New Guinea*, G. FUGMAN et al. (eds), Point Series No. 9, The Melanesian Institute, Papua New Guinea, Goroka, 1986, pp. 17-34; W. EDONI, "The confrontation of traditional and Christian norms and values in Papua New Guinea," in *Ethics and development in Papua New Guinea*, pp. 35-42.

[16] See SYNOD OF BISHOPS - SPECIAL ASSEMBLY FOR OCEANIA, *Jesus Christ and the people of Oceania: Walking his way, telling his truth, living his life*, lineamenta, Vatican City, Libreria editrice Vaticana, 1997, pp. 47-48; D.L. WHITEMAN, "Melanesian religions: An overview," in *An introduction to Melanesian religions*, E. MANTOVANI et al. (eds), Point Series No. 6, The Melanesian Institute, Papua New Guinea, Indore, M.P., Satprachar Press, 1995, pp. 91-94; MANTOVANI, "Traditional values and ethics," pp. 200-202.

preserved. Because human life, in classical Papua New Guinea, is recognized as a social reality, preservation of biological existence, in the understanding of Papua New Guineans, means more than only a strict preservation of biological life of an individual. This preservation is also seen in the context of the preservation of some social elements, such as social balance, community survival, its power, prosperity, honor and respect. However, Papua New Guineans do not limit life only to biological life with its social aspects. They go further. For them, life embodies the whole of life, the whole universe as well as the renewal of life within an integrated universe. Therefore, life in this context means everything positive the human heart desires: health, wealth, prestige, well-being, good relationships, peace and security.

It is important to note that the pursuit of this cardinal Papua New Guinean value of life is maintained primarily in two interrelated ways: (1) through right relationships with both the humans and the spirits,[17] and (2) through the accumulation of indigenous wealth in the form of pigs, shells, etc.[18]

The concept of "life," like the concept of "law," seems not to have a term in the vocabulary of some Papua New Guinean traditional languages. Yet, the actions of the people point to this deeply-felt value that we call "life." In Pidgin English, the term *gutpela sindaun* comes close to the concept.

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[17] See R.A. RAPPAPORT, *Pigs for the ancestors: Ritual in the ecology of a New Guinea people*, 2nd ed., Prospect Heights, IL, Waveland Press, Inc., 2000, pp. 38-41; T. AERTS, *Traditional religion in Melanesia*, Port Moresby, University of Papua New Guinea Press, 1998, pp. 51-58; M. OTUNGA, "African family values," in *AFER*, 23 (1981), p. 34.

[18] See P. BROWN, *Highland peoples of New Guinea*, Cambridge, Cambridge University Press, 1978, pp. 87-94; L.J. LUZBETAK, "The Middle Waghi culture: A study of first contacts and initial selectivity," in *Anthropos*, 53 (1958), pp. 67-71.

### 2.1.2. Community and relationship

Human life is community life. Part of our primal heritage is sociability and gregariousness. A human infant brought into the world, in order to survive, depends on other, older human individuals. Even when childhood is over, human persons need other people. In fact, they would perish without culture and human companions to sustain them. Thence, we might say that the community is necessary not only for biological survival but also for emotional support and meaning.

Papua New Guineans are very familiar with this kind of philosophy.[19] Thousands of years of experience have taught them that the only feasible way to achieve the above-mentioned cardinal value, which is life, was and is through the community. For them, the human person is not an isolated island, with no constitutive links with other persons or institutions. On the contrary, each person is closely linked to other people. These links create a chain binding each person horizontally to other members of the community and vertically to deceased ancestors.[20]

How could, then, the traditional community be defined? It is a natural environment in which the human person is born and acts and in which he/she finds the necessary protection and security. It is a small intimate group of people knowing and relating to each other with mutual acceptance and understanding. They live and relate in solidarity and fraternity to those with a sense of their common ancestry. This fundamental relationship is so much part of each person that it is automatically recalled whenever the person identifies him or herself. In fact, people in Papua New Guinea are defined and

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[19] See JOHN PAUL II, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, p. 577.

[20] See NARAKOBI, *Law and custom in Melanesia*, pp. 9-11; MANTOVANI, "Traditional values and ethics," pp. 199-200; WHITEMAN, "Melanesian religions: An overview," p. 93.

identified by membership to a community, i.e., to a clan, lineage, or extended family.[21] Within the traditional community, the above-mentioned relationship is maintained between members through reciprocity, i.e., by giving and receiving, by helping and being helped. Because of this reciprocal relationship, there is, in the community, a shared rhythm of life providing individual members with social and economic security.[22] On a day-to-day basis they co-operate with and derive support from their own household or small community.[23] Each individual member has a significant place within the community and, therefore, contributes, to some extent, to its up-building. For this reason, each person insofar as he/she is a community member and is respected as such—far from being lost in the community and from being absorbed by it—becomes the very basis of community and is of the essence of what makes community possible.

The feeling of equality is deeply ingrained in traditional communities. One person may be admired more than another for his/her natural qualities or supernatural powers, but even this individual is no better than any of his/her clansmen. Regardless of the very strong sense of equality, authentic leadership provides the basis for the survival and continuity of the Papua New Guinean community. Therefore, there are some members who assume leadership in particular spheres of community life such as ritual, warfare or hunting. Mostly, these are not hereditary leaders, but men whose competence and ability

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[21] See MACDONALD, "Melanesian communities: Past and present," p. 214.

[22] See B. KISEMBO, L. MAGESA, A. SHORTER, *African Christian marriage*, London, Geoffrey Chapman, 1977, p. 183.

[23] See D.F. ABERLE, *The peyote religion among the Navaho. With field assistance by Harvey C. Moore and with an appendix on Navaho population and education by Denis F. Johnston*, Chicago, Aldine Publishing, 1966, p. 44.

gave them influence and respect.[24] In local parlance they are called "big men." However, the fact that they enjoy leadership does not give them any special privileges over the rest of their clansmen.

Members of traditional Papua New Guinean communities are very often related by kinship ties. An understanding of kinship ties is really the key unlocking the door to a greater understanding of how Papua New Guinean communities function. It is a way to a better understanding and appreciation of their values and ethics, economics and politics, marriage and family life. What then does kinship mean? Essentially, it is a biological and social system which organizes people into different kinds of groups, situates people within the groups and positions the people and groups in relation to one another, both in space and in time.[25] There are two descent systems for the transmission of kin group membership and other resources from parents to children in Papua New Guinea: *cognatic* and *unilineal*. The main feature of a cognatic descent system is to give due recognition to biological relationships and thus to define the degrees of primary kinship within which marriage is forbidden. A unilineal descent system is operative where children are identified as members of the descent group of only one of their parents. There are two unilineal descent systems that are the most usual in Papua New Guinea: *patrilineal* and *matrilineal*.[26] In the patrilineal system the transmission of membership and other

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[24] See H. MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, Port Moresby, University of Papua New Guinea, 1978, p. 17

[25] For deeper study, see SCHULTZ, LAVENDA, *Cultural anthropology*, pp. 258-291; R.M. KEESING, *Cultural anthropology: A contemporary perspective*, New York, Holt, Rinehart and Winston, 1976, pp. 229-272; HAVILAND, *Cultural anthropology*, pp. 259-283; HARRIS, *Cultural anthropology*, pp. 159-178.

[26] See K. MCELHANON, D.L. WHITEMAN, "Kinship: Who is related to whom," in *An introduction to Melanesian culture*, pp. 110-116; SCHULTZ, LAVENDA, *Cultural anthropology*, pp. 269-273; HARRIS, *Cultural anthropology*, pp. 163-164.

resources takes place unilineally through male sex links, i.e., through the father's lineage. In the matrilineal system the transmission of membership and other resources takes place unilineally through female sex links, i.e., through the mother's lineage.

### 2.1.3. Bridewealth[27]

In many Papua New Guinean societies as well as in many African countries, *bridewealth* (sometimes spoken of as *bride-price*) has traditionally been a very important and common institution.[28] It has played an indispensable role in customary marriage. Bridewealth is a human institution in which the groom's kin is obliged to transfer material goods to the bride's family as a compensation for the loss of a daughter who leaves home when she marries.[29] Nevertheless, bridewealth is not a simple transaction of material goods to the bride's family in return for a wife. It is a long, involved and intricately organized system of fulfilling and creating rights and obligations.[30] The payment of bridewealth establishes the rights of the man to the woman's labor and to her reproductive powers as well as to the legal control over children born of the marriage.[31] It also establishes the rights of the woman in guaranteeing her good and proper treatment in her new home. In case of mistreatment she can ordinarily return to her parents with the result that her husband would forfeit his financial

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[27] For deeper study of the institution of bridewealth, see MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, pp. 80-97; A. SHORTER, *African culture and the Christian Church: An introduction to social and pastoral anthropology*, Maryknoll, NY, Orbis Books, 1974, pp. 167-172; R. WAGNER, "A theology of bride-price," in *Marriage in Melanesia: A theological perspective*, E. MANTOVANI et al. (eds), Point Series No. 11, The Melanesian Institute, Papua New Guinea, Goroka, 1987, pp. 153-171.

[28] See KISEMBO, MAGESA, SHORTER, *African Christian marriage*, p. 184.

[29] See SCHULTZ, LAVENDA, *Cultural anthropology*, p. 305.

[30] See E.H. ASHTON, *The Basuto: A social study of traditional and modern Lesotho*, 2nd ed., London, Oxford University Press, 1967, p. 82; M. DE MÜELENAERE, *The canonical significance of marital fidelity among the Bantu of South Africa*, JCD diss., Ottawa, Saint Paul University, 1985, p. 6; SCHULTZ, LAVENDA, *Cultural anthropology*, p. 305.

[31] See GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 189.

investment in her. If the bridewealth is not paid, the marriage might be regarded as void, and the offspring born out of that relationship belongs to the mother and her clan.

Payment of bridewealth also creates several kinds of moral bonds between people.[32] First, it establishes a contractual tie between clans, thus becoming a sign of mutual trust. Second, the system of bridewealth strengthens solidarity within the paying groups. Frequently, several relatives must contribute to the payment of the bridewealth and often the groom must borrow material goods from his relatives.[33] Such loans may create long-term debts and profound obligations on the part of the groom towards his clan relatives.[34]

Beyond what has been already mentioned, bridewealth coerces the parents to discern very seriously the chances of a happy marriage for the young couple. It leads them to evaluate the good and bad aspects of their characters, their aspirations, and their ability to build up a united and stable marriage.

Formerly the bridewealth system, as we can see from the above description, was a healthy and useful practice.[35] It had several social functions both economic and noneconomic. Among the most common were the function of compensating the bride's family; of legalizing, proving and stabilizing the marriage; of legitimizing the children of

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[32] See BROWN, *Highland peoples of New Guinea*, p. 11.

[33] See GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, pp. 25, 40.

[34] See MALONE, *The canonical and pastoral implications of canon 1148*, p. 33.

[35] During the Ecumenical Bishops Seminar on Marriage and Family Life in Melanesia, organized and conducted by The Melanesian Institute, Goroka, from 31st July to 5th August, 1987, bishops from the Roman Catholic, Anglican and United Churches in Papua New Guinea expressed their opinion regarding the practice of bridewealth. They described bridewealth "as an honorable tradition that was being exploited and degraded to a level of a business transaction" (MANTOVANI et al. [eds], *Marriage in Melanesia: A theological perspective*, p. 208).

the union; and giving cohesion to the extended family.[36] However, due to the spirit of the modern consumer society, bridewealth, in many Papua New Guinean and African societies, has become degraded into a mere business venture.[37] Too often, parents offer their daughter for marriage to the man who is able to give the biggest bridewealth rather than to the one who can make her happy. The excessive demands created an adverse effect upon the institution of bridewealth and thus upon the whole system of culture. With these new pressures there must be some modifications if the ancient heritage and social fabric is to survive and support the social cohesion for which the bridewealth system was born.

## 2.2. Customary Marriage

Trying to deal with the subject of customary marriage in Papua New Guinea might inevitably lead some to many doubts and objections. This seems evident from the efforts in our study to deal with the people and cultures of Papua New Guinea where, as we have already seen, life within the country is actually divided into a multitude of separated human societies, all relatively isolated from one another. Also in that section of our thesis regarding the people and languages of Papua New Guinea, we have said that there are thousands of clans in the country speaking over 850 languages. This reality gives rise to a variety of cultures with many different practices in respect to customary

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[36] See E. MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, Point Series No. 17, The Melanesian Institute, Papua New Guinea, Indore, M.P, Satprachar Press, 1992, pp. 50-52; R.F. GRAY, "Sonjo bride-price and the question of African 'wife purchase'," in *American Anthropologist*, 62 (1960), pp. 45-53.

[37] J. Osom, in his doctoral dissertation about the traditional marriage in Annang tribe in Nigeria, pointed out very clearly a considerable shift in the traditional understanding of the meaning of bridewealth. He also gave an excellent overview of the moral problems caused by the present business-like meaning of bridewealth. See J. OSOM, *The necessity for marriage preparation and the moral implication of high bride-price in Annang tribe in Nigeria*, Rome, Academia Alfonsiana, 1989, pp. 44-117. See also SHORTER, *African culture and the Christian Church: An introduction to social and pastoral anthropology*, pp. 171-172; KNIGHT, "Sacramentality and Melanesian cultural traditions," p. 126; WAGNER, "A theology of bride-price," p. 160.

marriage:[38] hence, the subject becomes vast and very complex. Despite the considerable variety of details in customary marriage, there are some features, such as bridewealth payment and a kinship system, that are common to all Papua New Guinean societies. Such common features are able to provide for us a general framework for an examination of the various forms of marriage existing in the country.

Undoubtedly, there are some ethnic and ethical practices connected with Papua New Guinean marriages and family life which go far beyond our usual western terminology and standards. However, it cannot be disputed that the Papua New Guineans have a clear and distinctive notion of "marriage." Basically, they regard it as a regular and socially prominent relationship between a man and a woman not unlike western marital unions, except—of course—for the very strong involvement of community, the custom of bridewealth payment and the practice of polygamy.

### 2.2.1. Definition and nature of customary marriage

The matrimonial laws in traditional societies are embodied in the customs and practices of clan life. It is, therefore, these customs and practices which, for the most part, constitute the native matrimonial law of traditional societies, and marriages contracted according to these customs and practices are conveniently called *customary marriages*.

Customary marriage is a weighty occurrence which involves whole families and clans rather than just two individuals. For this reason, customary marriage is not a single contractual expression of consent but rather the process of long drawn-out negotiations and discussions, usually spread out over several months or even years. Aware of these

[38] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, p. 8.

facts, customary marriage could be defined, therefore, as a negotiated union not only between two individuals but also between two families and/or clans. Such a union would be entered into following the traditional form recognized by the people of a given cultural area.[39] In this negotiated union certain rights are surrendered and may be claimed by either side.

Traditional Papua New Guinean societies have regarded marriage as a very important affair with religious, social and personal consequences. Religious consequences lie in the fact that marriage is a means whereby the children born of a lawful union assure the continuity of a man's line and thus the continuing veneration of ancestors.[40] Social consequences occur insofar as marriage is then regarded as an instrument whereby the maintenance and increase of the demographic strength of the clan as well as the extension and cementing of alliances and good neighbor treaties with other clans are brought about.[41] Personal consequences also occur in the fact that marriage becomes the culmination of the individual's development in which one achieves a new status.[42] This, in turn, guarantees a

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[39] As for customary marriage, the primary statutory provision in Marriage Act (Ch 280), section 3 reads as follows: "3. (1) Notwithstanding the provisions of this Act or of any other law, a native, other than a native who is a party to a subsisting marriage under Part V [a civil marriage] may enter, and shall be deemed always to have been capable of entering, into a customary marriage in accordance with the custom prevailing in the tribe or group to which the parties to the marriage or either of them belong or belongs. (2) Subject to this Act, a customary marriage is valid and effectual for all purposes" (Marriage Act [Ch 280], section 3 in *Selected legislation on family law in Papua New Guinea*, Port Moresby, University Printery, 1994, p. 8). See also J. ANSHAW, *Biblical theology of marriage*, 3rd ed., Goroka, Liturgical Catechetical Institute, 1984, p. 5.

[40] See L.J. LUZBETAK, "Worship of the dead in the Middle Waghi (New Guinea)," in *Anthropos*, 51 (1956), pp. 81-96; J. KNIGHT, "Sacramentality and Melanesian cultural traditions," in *Marriage in Melanesia: A theological perspective*, p. 126; DE MUELENAERE, *The canonical significance of marital fidelity among the Bantu of South Africa*, p. 2; KISEMBO, MAGESA, SHORTER, *African Christian marriage*, p. 73.

[41] See KNIGHT, "Sacramentality and Melanesian cultural traditions," p. 126.

[42] See W. BEBEN, "An anthropological view of sexuality," in *Human sexuality in Melanesian cultures*, J.F. INGLEBRITSON et al. (eds), Point Series No. 14, The Melanesian Institute, Papua New Guinea, Goroka, 1990, p. 52; MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 21; GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 95.

wider acceptance in society through its affinal alliances, brings with it respectability and dignity and is an assurance of security and help in one's old age through offspring.

In referring to the traditional value system in Papua New Guinea we have mentioned that one of the outstanding features of Papua New Guinean societies is their strong community-consciousness. Community-consciousness means simply that community prosperity and community prestige have precedence over personal and family rights and advantages.[43] No personal rights and advantages are to be sought at the expense of the community. They must be subservient to those of the community. Because of this Papua New Guinean communitarian philosophy of life, customary marriage is also very much seen as related to the community. For Papua New Guineans, a good marriage is one which serves the well-being and solidarity of the community. An ethically honest Papua New Guinean would enter into marriage primarily to serve the community and try to find happiness and fulfillment essentially in this service.

In Papua New Guinea there are two types of customary marriage, i.e., polygamous and monogamous.[44] Although polygamous marriages create domestic situations behaviorally and intellectually very different from those created by monogamous marriages, the aim of either is always to provide offspring and thus to guarantee the continuity and survival of the community.

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[43] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 12.

[44] We will deal with the positive and negative aspects of polygamous marriages more extensively in section 2.2.5.

### 2.2.2. Preparation for customary marriage

Preparation for customary marriage is a process with some informal as well as formal moments in it. Hence, under the present title, we shall consider some customs that are characteristic of the Papua New Guinean mentality and of its tradition regarding the natural development and the state of maturity required in view of future marriages of Papua New Guinean boys and girls.

The first and remote informal marriage preparation is the proper education and instruction given by parents. From early childhood parents have the duty to instill in their children the values of a community-oriented society, i.e., that each individual is not an end in him/herself but only finds a meaningful basis for his/her existence in service to the community. Respect for elders, obedience to authority, a sense of mutual responsibility for the well-being and solidarity of the community, generosity and hospitability are also part of that service. All the above-mentioned values are brought to the attention of boys and girls, especially when they are in proximate preparation for marriage. Another aspect to this informal preparation is observation by the young person of the behavior of the adults: how adults act within marriage, what they are supposed to do, what society demands, allows or condemns.

Besides the experiential learning process, there are two occasions when the learning process takes on a formal aspect. One occasion is the initiation, and the other one is part of the ceremony of the marriage celebration itself.

### 2.2.2.1. Initiation

It is common in most cultures that at the time of puberty the interests of adolescents are often in conflict with those of the society. Adolescents need to be guided through this transitory stage, and in traditional Papua New Guinean societies this guidance, particularly for boys, was usually provided by means of initiation ceremonies. In a general way, initiation was particularly seen to be the completion of the boys' education as well as a preparation for adult status.[45] In some societies boys could not actually take part in various social activities and tribal affairs, nor marry, until they were initiated.[46] In fact, initiation was one of the key formal moments of preparation for marriage.

Although initiation ceremonies were practiced by almost all Papua New Guinean societies, there were many different forms and combinations of them. These varied from place to place. However, the fundamental characteristics of initiation comprised physical seclusion, ordeals and hardships, learning of history, traditions and taboos of the clan as well as sex education.[47] Boys were taught to be warriors and trained in such virtues as bravery, obedience and honesty. Sex was usually not an important aspect and, in this regard, initiation functioned not as an immediate introduction and stimulus to an erotic experience, but, first and foremost, as an essential and indirect prelude to marriage. Taboos linked with menstruation as well as taboos linked with sexual intercourse after childbirth were very important topics of sexual and marital instruction.[48] Initiation also

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[45] See BROWN, *Highland peoples of New Guinea*, p. 38.

[46] See SCHULTZ, LAVENDA, *Cultural anthropology*, p. 341.

[47] See BROWN, *Highland peoples of New Guinea*, pp. 38-39 and 154.

[48] For reasons explaining the menstruation and after-birth taboos, see MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 122-126.

provided social bonds linking the initiates together. Moreover, through social entertainment, which was included in the initiation rite, many elements of one's culture—as for instance dances and songs—were thereby kept alive. To sum up, we might say that through seclusion and initiation rituals adolescents achieved physical, moral and sexual maturity.

Girls in most Papua New Guinean societies did not go through group initiation ceremonies. Nevertheless, there were some ways to provide guidance and instruction also for girls going through the stage of puberty. In highland societies, girls went through an individual form of initiation at their first menstruation.[49] A girl was secluded for a few weeks and instructions relating to sexuality and the role of women were given her. Sometimes new clothes, special foods, songs as well as a small feast were prepared for her.

A few decades ago, initiation was probably the most important event in the lives of Papua New Guinea adolescents, particularly in the highland regions. However, today it is rapidly breaking down. Its decline is due mainly to missionary influence and to the inevitable change in ideas of Papua New Guineans brought about by contact with Europeans.

### 2.2.2.2. Instruction of the bride and groom before marriage

Another formal marriage preparation is instruction of the bride and groom given before their final handing over.[50] In highland societies, on the eve of the marriage the bride is taken to the rear of a house, and vegetable oil and pig grease are applied to her whole body to cleanse her and make her skin glow beautifully. The older women talk about married life and

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[49] See ibid., p. 29.

[50] See ibid., p. 57.

sing as this is done. Men, mostly of her father's men's house-group, lecture her about the responsibilities of a wife. Hard work, gardening, pig raising, cooking and sharing food are the main themes. She is told to remain faithful and obedient to her husband and his group, not to go visit her parents too often, or to be lazy and loiter at markets. These instructions and discussions may last most of the night as a farewell to the bride.[51]

Men, mostly of the groom's subclan, give the same instruction to the groom. They remind him of the fundamental marital rules and taboos about which he had been instructed during initiation. In fact, it was during that time that rules for male-female relationships were inculcated. During the instruction given before marriage, the groom is reminded to treat his wife well. The proper and good treatment of his future wife involves building a house for her, providing gardens and raising fences around them, allocating pigs to her, felling trees and fetching firewood for her.

### 2.2.3. The rise of new marriage: Concern of the whole community

Besides what has already been suggested about the deeper messages contained in the definition and nature of customary marriage (viz., the individual's obligation to care for community prosperity and prestige), it should be noted that community-consciousness also means that brotherly cooperation of all community members is expected in all important phases of life.[52] This also holds true for marriage. Contrary to the usual way of doing things in the western world where responsibility for marriage is the affair of the couple alone, in Papua New Guinea marriage is understood as a complex social and

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[51] See GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 85; MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 59.

[52] See BROWN, *Highland peoples of New Guinea*, p. 12; KISEMBO, MAGESA, SHORTER, *African Christian marriage*, p. 183.

cultural relationship.[53] It lies at the heart of a set of relationships, rights, obligations and patterns of behavior which serve to strengthen the homogeneity of the family and of the clan. Because of that, Papua New Guinean tradition lays great emphasis on the need for the whole community to be actively involved in raising and supporting new marriage.

As already mentioned in the section on bridewealth, marriage is a formal transaction which includes the transfer of valuable goods. Once agreement over the valuable goods between the parties of the bride and groom has been reached, the work of collecting the goods has to start. A substantial burden of this work is primarily carried out by the family of the groom. However, since marriage payments are large—more than any individual or family could provide unaided—the assistance of other members of the clan is needed to a great extent. Therefore, the family of the groom is often assisted by a wide range of clansmen, kin and affines. They assist the family in the local area by providing a portion of the food production, shells, pigs and money.

In Papua New Guinea, marriage needs more than the consent of the two partners. The consent of their respective clans is so significant that the success and fruitfulness of the marriage is directly tied to it.[54] Because of this strong community involvement in the raising of a new family, it is easy to get the impression that young people in Papua New Guinea are generally compelled to enter into a marriage they really do not want. They may seem to be compelled by parents and relatives to marry partners they may never have seen before; or compelled to marry someone in a certain category (cross or parallel cousins, or mother's brother's daughter, for example). They may seem to be without any

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[53] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 81; WAGNER, "A theology of bride-price," p. 154.

[54] See JOHN PAUL II, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, p. 577.

right to express their consent in choosing and marrying their partner and, therefore, appear to be unhappy in their marital unions. However, this impression might be very deceptive. Although the fixed customary marriage rules with their strict limitations provide fewer opportunities for the fullest expression of individual interests or endowments, they nevertheless result in a relatively high percentage of satisfied individuals. Why is this so? In a previous section we have already noted that an ethically honest Papua New Guinean would enter into marriage primarily to serve the community and try to find happiness and fulfillment essentially in this service. Therefore, a young Papua New Guinean couple when entering into marriage gives their consent first and foremost to the community values as well as to the social, economic and political network that is established by marriage. Anytime the couple freely gives its consent to the community values as well as to the above-mentioned network of community ties, there is created a very stable and supportive environment for the growth of an interpersonal relationship between husband and wife as well as between the families and/or clans of the couple.

To summarize this section, we might say that there can be no doubt at all that the stability of the marriage institution in Papua New Guinea depends on the interest and support of the community and on the control which the community exercises over its members.

### 2.2.3.1. Choice of partner

Customary marriage in Papua New Guinea can be understood only within the context of a highly segmented society in which each group needs the support of other groups to survive and to attain its well-being. In fact, marriage is one of the key

institutions for bringing different groups together and creating vital links between them. Because of the complexity and importance of the social and cultural relationships involved in it, marriage is too difficult an affair to let young, inexperienced boys and girls choose their own partners.[55] Therefore, the involvement of the community in this process is inevitable. In fact, to freely choose one's own partner would incur towards the individuals involved the displeasure of the community. Although young people have actually little to say in choosing their partner, the community choice does not necessarily mean that the community does not know the preferences of young people and/or disregard them.[56]

The manner by which the community becomes involved varies from place to place.[57] One way of community involvement is through the betrothal of young children whereby two communities decide to enter into a relationship by pledging the future marriage of the two children.[58] Close to such betrothal is the situation of the so-called sister-exchange.[59] A young man in order to marry must give his own sister as a wife to the brother of his chosen one. If no real sister is available, another female relative would take her place. The other form of the community involvement is seen in the case of an

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[55] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 33-35; KNIGHT, "Sacramentality and Melanesian cultural traditions," p. 126.

[56] See GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 24; BROWN, *Highland peoples of New Guinea*, pp. 161, 171.

[57] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 54-56; MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 36.

[58] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 13.

[59] See GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 127; BROWN, *Highland peoples of New Guinea*, p. 162.

elopement.[60] In this case a girl, wishing to avoid a planned match hostile to her, runs away to the mother of the boy she already admires and wants to marry. Because of the rules of hospitability she cannot be turned away, and if she perseveres she forces the two communities to take a stand. However, there is no guarantee that the decision would be in her favor. The abduction of the bride is another way in which the community is forced to regularize a marriage.[61] In this case the boy carries off his beloved with her consent or against her will. If she does not make her escape within a few days, it means she submits herself and consents to be married. Then a go-between is appointed to proceed in the normal fashion. Yet another form of community involvement arises in those societies which have a formal courtship.[62] During courtship, boys and girls come to know and like each other. Once they become serious, either the boy or the girl or both would ask their fathers or uncles to arrange the marriage. From that moment the community would completely take over the negotiations to effect the decision of the couple.

#### 2.2.3.1.1. Qualities of partners

The qualities of partners are very important in any establishment of a good and properly functioning relationship. This is even truer when it comes to the establishment of a partnership for the whole of life, i.e., marriage. However, the qualities that are sought in candidates for marriage may vary from country to country, from culture to culture. Hence, the qualities which are very important for and sought in the marriage candidates

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[60] See GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, pp. 45, 102-103, 180.

[61] See ibid., pp. 129-130, 179.

[62] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 147-156; GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, pp. 101-102, 162-163; BROWN, *Highland peoples of New Guinea*, pp. 156-160.

of one culture might be irrelevant, even insignificant, for the candidates of another culture. For instance, attributes such as physical appeal and beauty are very important for the marriage candidates of the western culture, whereas they are quite irrelevant for marriage candidates in traditional Papua New Guinean or African societies.[63] Experience has taught them that physical appeal and beauty are very precarious and will be overshadowed and destroyed by old age. Therefore, character and the personality of candidates are stressed more than physical appeal and beauty.

In customary marriage, the groom's descent group takes the initiative and does all in its power to ensure that the bride measures up to the qualities expected from a prospective new member of the clan.[64] The top quality of the Papua New Guinean woman in marriage is to bring forth offspring. In fact, the woman in Papua New Guinea does not exist in her own right or for her own sake. She exists first of all as the mother of her husband's children. Another very important quality of the Papua New Guinean woman is her ability to take care of children and of domestic work,[65] particularly to look after the garden and pigs. The marriage to which the woman is called is one in which hard work has to be done. It is the life of the subsistence farmer where the gardens are usually the domain of the woman. Therefore, any family, in choosing a wife for the son, is very much influenced by the above-mentioned girl's aptitude for hard work.[66] Additionally, the girl

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[63] See ibid., p. 22.

[64] See E.H. ASHTON, *The Basuto: A social study of traditional and modern Lesotho*, 2nd ed., London, Oxford University Press, 1967, p. 62; A. REUTER, *Native marriages in South Africa according to law and custom*, Münster, Aschendorff, 1963, p. 128.

[65] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 16.

[66] See ibid., p. 36; GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 145; W.A. HAVILAND, *Cultural anthropology*, New York, Holt, Rinehart and Winston, 1975, p. 174.

must be hospitable,[67] obedient, good tempered, modest, respectable and chaste. In other words, she has to be the sort of person who will make a steady wife and a good mother.

Similarly, as in the case of the future wife, the paramount quality sought in her future husband is the ability to work hard. Other expected qualities of the husband are physical strength, good character, obedience to the elders, consideration of parents and in-laws, ability to look after the family and respect for traditions.

One might wonder: why are the qualities of partners contracting customary marriage so much emphasized? Why are they so particularly stressed by the community and not by the partners themselves? Should not more importance be given to conjugal love?

In the beginning of this section we have already noted that the qualities of partners are very important for any good and properly functioning relationship. Moreover, in the section on the definition and nature of customary marriage we have mentioned that customary marriage establishes a relationship not only between a man and a woman but also between various families and/or clans. Therefore, the qualities of partners should help establish not only a good and lasting marriage but also an inter-clan relationship. Breakup of a matrimonial relationship might result as well in the breakup of an inter-clan relationship. That is why the qualities of partners entering customary marriage are so much emphasized. Since community prosperity and community prestige have precedence over personal and family rights and advantages, those qualities are more emphasized by the community than by the partners themselves.

An answer to the question regarding conjugal love might be provided for us by Hadrianus Djajasepoetra, Archbishop of Djakarta, a participant in Vatican II. In one of

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[67] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 36.

the conciliar discussions he spoke of the cultural values pertaining to marriage, particularly the importance of considering cultural influences on the nature of marriage. He said:

> Outside the western culture, marriage is generally not contracted through the mutual love of the parties, who often hardly know each other, but through the will of their parents or clans. The covenant, therefore, is not the result of love. Rather, mutual love is considered as the fruit of marriage which gradually matures.[68]

In a later intervention, the same archbishop again returned to the theme saying:

> I pleaded for your consideration in regard to the forms of marriage, which are found in regions of non-western culture. [...] In our regions and in some others, there still prevails the form of marriage in which it is not the personal love between the husband and wife but the intention to establish a family in society that impels them to marry. The very first thing intended in marriage is the establishment of a family so that the family lineage (clan) may be perpetuated. And it is precisely this intention which results in true love or at least in mutual and stable trust between the husband and the wife.[69]

It can be rightly said that in such societies partners get married in order to experience love. For them, marriage is the cradle of love, and as such, true love only begins from within marriage and not outside of it. Therefore, despite the absence of romantic love in the beginning of customary marriage, strong bonds of affection, built up over the years out of respect for one another's labor and skills, shared experience and common endeavors, could develop between husband and wife.

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[68] *Acta synodalia Sacrosancti Concilii Oecumenici Vaticani II*, cura et studio archivi Concilii Oecumenici Vaticani II, [In Civitate Vaticana], Typis polyglottis Vaticanis, 1970-2001, 6 vols., 35 parts, here in vol. 3, part 8, p. 669. For the deeper study regarding the crucial question whether conjugal love is so important to marriage that a marital union cannot come into existence without it, see MENDONÇA, "Bonum coniugium from a socio-cultural perspective," pp. 72-85.

[69] *Acta synodalia Sacrosancti Concilii Oecumenici Vaticani II*, vol. 4, part 3, p. 69.

### 2.2.4. Marriage and its celebration

The western world sees marriage as a human and social reality, which entails an agreement between two individuals who are mature and free enough to enter into such an agreement. This agreement is expressed publicly in an act that can be clearly documented. For all practical purposes, this act is considered to take place at a given moment when that person, who before the act is unmarried, becomes, after it, a married person with all its legal consequences.

In the customary law of Papua New Guinean societies, there is not usually any prescribed set of ceremonies which could be easily identified as one corresponding to the solemnization or celebration of marriage under western law. Customary marriage is usually not tied to a specific moment in time or to a single ceremony or to a single contractual expression of consent. On the contrary, it is effected by a ritual process, lasting weeks, months and even years. It takes the form of a series of rites, negotiations, feasts and gift exchanges. This fact, however, may often cause some doubts: (1) doubts as to the exact moment of the process at which the parties become husband and wife,[70] and (2) doubts as to which of the accompanying ceremonies and observances are strictly essential to the legal existence of a marriage.[71] As for the exact moment and the essential ceremony finalizing marriage, there is some discrepancy in opinion even between Papua New Guineans themselves. Some say that there is a moment or an essential ceremony in customary marriage which might be considered its finalization. The finalizing moment or ceremony is variously said to be the completion of bridewealth payment or the pregnancy or birth of a child or cohabitation or the traditional marriage ceremonies or

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[70] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 8-9.

[71] See ibid., p. 8.

their eating together.[72] On the other hand, there are some Papua New Guineans who say that there is no marital ceremony in which customary marriage can be considered finalized. They see marriage finalized only when the two get along well or take over responsibilities.[73]

### 2.2.4.1. Marriage as the bonding of families and clans

In the section regarding the raising of a new family as a concern of the whole community we have already mentioned that marriage in Papua New Guinean societies is not only the affair of the couple alone, but is a social affair and as such is the concern of the all extended families and/or clans of the couple. Because of this social aspect, customary marriage among the Papua New Guineans is not seen simply as the bonding of a man and a woman in love with each other. It is not only a "love affair" of two partners but rather the bonding of two families and/or clans through those partners.[74] As a personal and communitarian act, customary marriage is precisely a covenant and a pact concluded between two persons and their respective families and/or clans, which are all concerned to give new opportunities to life, to love, to harmony, to peace and to security beyond their common frontiers of blood and ancestry. Such a bonding provides, stabilizes and cements the various units which form the framework of society. The bonding creates the network which is needed for social, political and economic well-being.

When a girl marries into another clan, she extends her clan into the one into which she marries. In this sense, we could say that marriage is a silent, peaceful invasion of one

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[72] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 39-42.

[73] See ibid., p. 39 and also pp. 41-42.

[74] See KISEMBO, MAGESA, SHORTER, *African Christian marriage*, p. 182; MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 16; F.X. URRUTIA, "The challenges on canonical doctrine on marriage arising from Africa," in *StC*, 23 (1989), pp. 6-7.

clan into another. Each marriage, in fact, initiates new personal and exchange relations, not only for the marrying couple, but also for their clansmen, kin and affines.[75] They become exchange partners, donors and recipients of valuables. They are the lenders and helpers, the audience and witnesses, both publicly and privately, in all successive stages of marriage. In this context the couple is, more than before, bound to the whole clan in a special way.

### 2.2.4.2. The formation of the marriage bond – a series of successive stages[76]

In the western context, entering marriage is largely reduced to one sole event, i.e., to the ceremony of mutual exchange of consent by the couple before witnesses. However, marriage in the Papua New Guinean understanding goes far beyond that. We have already mentioned that the fundamental principle underlying marriage in Papua New Guinean societies is that marriage is not just a couple's affair but is rather a community affair. Because of its community aspect, of the complex family relationships and of a different philosophy and view of the human person, marriage is seen as a series of successive stages. It is a process and not a moment which can be legally defined in terms of time and place. Within this process there are important moments, often marked by celebrations, which indicate a strengthening of the bond so that it becomes more difficult

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[75] See KNIGHT, "Sacramentality and Melanesian cultural traditions," p. 126.

[76] In their articles, J. Njenga and J. Perrot describe marriage as a process of successive stages. The process they describe, though referring to customary marriage in Africa, is very similar to the marriage process followed in Papua New Guinea. See J. NJENGA, "Marriage in successive stages," in *AFER*, 28 (1986), pp. 198-207, and J. PERROT, "Marriage: A series of successive stages in community," in *AFER*, 23 (1981), pp. 43-47. See also A. KASEBA, "The marriage bond as the result of a process," in *AFER*, 23 (1981), pp. 40-41; B. BATANTU, "Progressive marriage and admission to sacraments," in *AFER*, 23 (1981), pp. 41-43.

to reverse the process. However, there is no one moment which is universally accepted as a sign that the process is finalized.

The process whereby the marriage bond is effected takes different forms in different clans. In fact, each ethnic group has its own traditions and its own symbolism. However, many beliefs, values and practices concerning marriage are remarkably widespread, and the same or similar themes recur in many different places.[77] Therefore, four stages may be recognized, in general, in any process effecting Papua New Guinean customary marriage. They can be summarized briefly as follows. The first stage may be called *betrothal*. Its distinctive characteristic is the formal meeting of the two families. This meeting might be determined by the closeness between two sets of families, a previous marriage connection or a desire to link wealthy or hostile families. *Engagement* is the second stage. The formal marriage negotiations between the two families precede it. Some rituals and informal exchanges accompany the marriage negotiations, and, in some cases the prospective marriage partners are scarcely involved in the arrangements. They meet face to face only at a comparatively late stage of the negotiation process. The marriage negotiations end with the conclusion of an "affinition agreement."[78] thus establishing a legal condition which may be regarded as a formal engagement between the young man and the girl. The engagement that is duly supported by the down payment ceremony is

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[77] H. McRae and E. Mantovani give a brief account of marriage procedures and celebrations from different parts of Papua New Guinea. See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, pp. 37-49; MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 58-60.

[78] "Affinition agreement" is used here as a technical expression and it means consensus of two families to establish relations by marriage between them. It should be clearly distinguished from the marriage contract, which is the actual conclusion of the marriage, the creation of a marital or conjugal union between husband and wife in consequence of the affinition agreement. "Affinition" is interpreted as "formation or recognition of affinity."

rarely broken. In that ceremony the boy's relatives hand over their collection of a pig or two, pearlshells and garden food to the girl's relatives who make a comparatively much smaller contribution in return. The third stage is the *marriage celebration* and *ratification*. It is the face-to-face endorsement of the marriage in public. It consists mainly of those acts which are seen as the fundamental stages of the marriage process: the marriage ceremony itself, the payment of bridewealth and the handing over of the bride. At the marriage ceremony, usually celebrated at the home of the bride, the uncles of both spouses make a public declaration of some of the details of the marriage contract, referring specifically to the transfer of bridewealth and any balance which may remain. The bride's uncle asks that his niece be treated with kindness and understanding, while the groom's uncle stresses the new and mutual affinal obligations that bind the families and clans together. Then the bridewealth is paid. In fact, the bridewealth is the most significant and widely-practiced ceremony in relation to customary marriage. Its payment effectively "defines" and "ratifies" the marriage. It also symbolizes the new ties and mutual obligations linking the two groups. The marriage celebration is concluded with the handing over of the bride to the groom. Following this, the newlyweds go to live with the groom's parents. The fourth stage, which may be called *accommodation*, includes the gradual process of assimilation and emancipation of the young wife into her husband's family.

The local communities of the couple participate at every stage of the marriage process. Not only do they share in the feasts and dances, but they also give public testimony to what is going on. By their participation they give their assent to the marriage and express their expectations concerning it.

### 2.2.4.3. Bridewealth as the symbolic finalization of marriage

The issue addressed in this section is the symbolism of bridewealth in the marriage finalization. We have already noted that Papua New Guineans do not think of marriage in terms of a specific legal moment but of a whole process. Therefore, there is no universally accepted point at which their customary marriage can be said to be finalized. The basic cultural assumption of Papua New Guineans is that words do not suffice to express an attitude. It is not enough to speak of entering a relationship and of accepting and reciprocating that relationship. It has to be shown by actions and deeds. The bridewealth ceremony is actually one of those actions which expresses an attitude of entering, accepting and reciprocating a new relationship. Therefore, under customary law bridewealth may be essential to the marriage contract. Its payment is recognized as a seal of the marriage relationship[79] and a means to linking the two participating families and clans together. Likewise, the return of the bridewealth may, under customary law, constitute a "legal" dissolution of the marriage. Nevertheless, we cannot allow ourselves to be misled by the idea that bridewealth fulfils a uniform function and is of equal value in the matrimonial ceremonies of all Papua New Guinean societies.

In an Instruction of 22 August 1860, the Holy Office said: "A stable and valid marriage exists whenever gestures or ceremonies, performed in the presence of the witnesses according to the common estimation of the region, sufficiently express the

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[79] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, pp. 39, 46.

mutual consent of both spouses."[80] In the text the word *vel* has been used. This word makes clear that the mutual consent can consist in one or other gesture or in the ceremonies. The principal point is that consent has been given and expressed externally either by gesture or by the customary ceremonies. Supported by the above instruction we might say that the bridewealth ceremony in customary marriage, to some extent, may be considered as the external expression of the mutual consent of the parties.

### 2.2.4.4. Child as the symbolic finalization of marriage

One of the fundamental ends of marriage is to have children, and this end is universal. However, the role of the child within marriage is not the same everywhere. The child's role in the marital complex varies in different socio-economic situations. Children have a different value in a subsistence gardening economy than in a post-industrial computer society. In Papua New Guinean societies the child holds the principal position.[81]

In the Papua New Guinean traditional value system, the necessity to transmit one's biological life to another human person is regarded as an essential aspect of being alive. One is not fully alive if one does not, or cannot, bear children. In fact, children for Papua New Guineans are signs of the ancestors' blessing[82] as well as an assurance that one's memory will be cherished after death. The death of a childless person is final and, therefore, feared.[83] Whereas, the death of men and women with many children is less feared because

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[80] "Matrimonium firmum ac validum consistere quoties nutus vel ceremoniae coram testibus praestitae, juxta communem regionis existimationem, mutuum sponsorum de praesenti consensum sufficienter exprimunt" (CONGREGATIO DE PROPAGANDA FIDE, *Collectanea*, N° 1413, p. 560).

[81] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 42.

[82] See KNIGHT, "Sacramentality and Melanesian cultural traditions," p. 126.

[83] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 14.

they will perpetuate themselves among their children even after their physical death. Besides the aspect of perpetuation of one's biological life and memory, the child has also another aspect having to do with personal identity and success, with personal ethical standards. Because of the traditional value assigned to society, service to society is felt as an ethical duty. The good person is the one who fulfills this duty. In fact, the child is the greatest service one can offer society. It helps it to survive, perpetuate and be a security for the older generation. Hence, by contributing the child to the community, individuals feel that they are fulfilling their duty, thus achieving their identity. Consequently, having children is the principal and determining factor effecting a Papua New Guinean marriage.[84] In fact, children are the foundation-stone of any marital union. Therefore, the general and diffuse motive behind every customary marriage in Papua New Guinea is the need to bear and rear children. In this regard, the intention to have children is part and parcel of the marital consent, whereas the actual birth of the child is a clear confirmation of this intention.

It is through the children that the husband and wife as well as the two families, by having descendants in common, become united and bonded in a favorable relationship.[85] The birth of the first child is usually—even though not always—a most important stage in the development of the marriage. Until a child is born, the marital union or partnership between husband and wife has little significance for Papua New Guineans. Only after the birth of the child does marriage gain value and become a symbol of the future existence

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[84] See ibid.; GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 51.

[85] See KNIGHT, "Sacramentality and Melanesian cultural traditions," p. 126; GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 64.

and prosperity of the clan. Therefore, the child indirectly establishes and especially ensures the existence of a marriage.

Childlessness, on the other hand, places a very heavy—if not an intolerable—strain upon marriage. It may be a very disruptive element in the marital union and in the husband-wife relationship[86]—as it may often be in the relationships within and between their families as well. Childlessness also acts as a motive for a man to enter into other marital unions. Moreover, childlessness may lead the husband to return his wife to her family and to demand the return of bridewealth. For Papua New Guineans, a marriage without children is not a true marriage. Inability to bear male children may be another motive causing some difficulties in marriage and leading the man to other marital unions. In the Papua New Guinean understanding, the ability of the man to transmit life is paramount. Therefore, having male children is a major concern in marriage.[87] It is the child who will continue to propagate the life of his father, the family and/or the clan. Daughters are important mainly because they are the future mothers of children to be born of other men in other clans.

Children belong not only to the nuclear household but also to the extended family community as a whole. Therefore, the education of children becomes the collective responsibility of the whole community with much cooperation in the upbringing of children by both near and distant relatives.

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[86] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 14.

[87] See ibid. A male child is more prestigious not only in Papua New Guinea but in many African cultures. See M.C. CHIKWE, *The concept of marriage in Igbo traditional society*, Roma, Pontificia Universitas Lateranensis, 1997, pp. 87-88; A. WEINRICH, *African marriage in Zimbabwe and the impact of Christianity*, Nyanda, Mambo Press, 1982, p. 105.

### 2.2.5. Polygamy

In western cultures, a monogamous union, the marriage of one male to one female, forms the basis of the family system. However, in Papua New Guinean societies there are other types of marital arrangements that allow for plural spouses and a polygamous family system. Strictly speaking, polygamy is a generic term that, in fact, refers to two forms of marital arrangements, known as polygyny and polyandry. Polygyny is a marital arrangement that can be described as "a culturally determined, socially accepted and legally recognized form of permanent marriage in which a husband has more than one wife at the same time."[88] Polyandry is different in that one wife is married simultaneously to two or more husbands. However, polyandry is rare: anthropologists have recorded only a small percentage of the world's societies practicing this type of marital arrangement.[89]

In order to understand its significance, polygamy has to be seen in the context of the place and functions of this institution within its own socio-economic and cultural milieu. In fact, the marital structure of polygamy fits well into the thinking of the people, thus embodying values or ideals of the particular society and serving many useful purposes within it. It is unfortunate that Vatican II equated polygamy with "the plague of divorce" and "so-called free love."[90] The institution of polygamy in traditional Papua New Guinea was certainly not practiced to give expression to lust. Rather polygamy had

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[88] HILLMAN, *Polygamy reconsidered*, p. 11.

[89] See G.P. MURDOCK, "World ethnographic sample," in *American Anthropologist*, 59 (1957), p. 686.

[90] *GS* 47; FLANNERY I, p. 218.

a number of useful social functions and economic dimensions.[91] It certainly has helped to stabilize the institution of marriage and to integrate the family within society. It had nothing to do with free love. Nor did it always or necessarily imply divorce and remarriage. In fact, very often it was a remedy for divorce.

In all Papua New Guinean traditional societies, the desire to have as many children as was physically possible was the ideal, and polygamy was a means which might help fulfill that desire. The more wives a man had, the more children could be engendered. Children represented the assurance of man's immortality. Men with many children were, in fact, destined to live forever. They perpetuated themselves among their children even after their physical death.

Furthermore, the number of wives and children also plays a very important role in a man's social status.[92] The man with many wives and children earns a great respect in his respective community because it is a sign of his ability to propagate. Such a man becomes not only the ideal family man, but also a person who can be a good leader in the community. However, not all men can afford to have several wives. Only older men, who have already lived long enough and have acquired capital, are considered able to have multiple wives. The younger men must content themselves with a single spouse.

### 2.3. Statutory Marriage

Colonial governments very rarely legalized the existing tribal customs of countries they had colonized. As a rule, they would issue new laws for colonies based on

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[91] See T.B. EBED, "Re-converting the converted: Challenges for mission in Africa," in *Mission*, 9 (2002), 1, pp. 67-68.

[92] See ibid., p. 68.

western ways of life with no regard for people's existing customs.[93] However, in a few cases colonial governments issued new laws out of respect and as an option for existing tribal customs. One of the examples of this kind of legislative action was the Papua New Guinean dual system of marriage initiated in 1963. But even in this case we have some doubts about the real intention of the colonial government in initiating the dual system of marriage.[94] On the surface, the introduction of such a system made it appear that the intention of the colonial government was to enable the indigenous population to contract marriage under a system of law different from their original tribal law. Nevertheless, we believe that the real goal of government, with its major focus on statutory marriages, was, in fact, to include customary marriage as part of the statutory system and to reduce the traditional practices of customary marriage that still allowed for polygamy and bridewealth.

### 2.3.1. Definition and nature of statutory marriage

We shall use the term *statutory marriage* for marriages contracted under the statutory requirements, involving binding legal obligations of monogamy as well as other legal consequences concerning the mode and conditions of celebration that usually conform substantially to the general pattern of western marriage law. Statutory marriage is based on the idea of contract. This requires four elements: (i) that the contract take

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[93] See NARAKOBI, *Law and custom in Melanesia*, p. 144-145.

[94] Narakobi's description of the introduction of English Common Law to Melanesians seems to corroborate our concern about the veracity of intentions of colonial governments in issuing new laws for the indigenous people. Narakobi says: "Colonial jurists and scholars would write about 'reception' as if the Melanesians had a choice. Even the choice of expressions such as 'reception' in preference to 'imposition' was designed to colonize the minds of the indigenous races and make them believe the process was peaceful or that there were other systems they could have chosen but did not choose" (NARAKOBI, *Law and custom in Melanesia*, p. 144).

place at a specific moment in time; (ii) that it involve a formal ceremony; (iii) that it be concerned with the effect of validity; and (iv) that it assume certain Christian conditions, notably the free consent of the partners and monogamy.

Statutory marriage, contrary to customary marriage, emphasizes the role of two individual participants. It is a contract between two persons, not necessarily two families, however much the families might be interested in a particular marriage for social, economic or other reasons. It is the man and the woman themselves who through the celebration of statutory marriage enter into the relationship and, from that point on, the parents vanish from legal significance. As for the children born of the marriage, it is the couple, not the grandparents, uncles, aunts nor other relatives, who have a legal interest in them.

### 2.3.2. Historical background of statutory marriage in Papua New Guinea

Colonizers in Papua New Guinea were rulers in a foreign land. Their technology and cultural conditioning enabled them to enforce laws and adopt practices that reflected the prevailing English-Australian thinking. In 1912, the Australian government, which administered the Papua territory, introduced the "Marriage Ordinance" which contained provisions regulating statutory marriage in accordance with the principles of English Law. According to the Marriage Ordinance, statutory marriages, though legally open to everyone, were the sole marriages recognized and accepted as valid by the government. On the other hand, customary marriages as such were not recognized or accepted as legally valid in Papua.[95]

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[95] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, p. 7.

In the New Guinea territory, the legal situation was significantly different. Under the "Marriage Ordinance 1935-36," statutes were, to some extent, modified by the insertion of the New Guinea Native Administration Regulations 1924 which enabled New Guineans to enter customary marriage, thus recognizing and accepting it as legally valid. On the other hand, the Marriage Ordinance 1935-36 in the New Guinea territory, contrary to the Marriage Ordinance 1912 in the Papua territory, did not allow "natives" to enter into statutory marriages.[96]

A uniform marriage law was first applied to both Papua and New Guinea by the "Marriage Act 1963." This was, to some extent, a combination of the two earlier-mentioned colonial legislations. According to the Marriage Act 1963, the possibility of having a statutory marriage was legally open to everyone. Likewise, marriages entered into in accordance with custom were recognized and accepted as legally valid.

When in 1975 Papua New Guinea became independent and the government first enacted laws for marriage, it followed the English Law which the Australian government had been using during its colonial period.[97] So the statutory law regulating marriage in Papua New Guinea has become very similar to that of Australia. Nonetheless, it has never been suitable as a means of regulating Papua New Guinean marriage relationships. The Law Reform Commission of Papua New Guinea is now trying to have people follow the old marriage customs of the country.

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[96] See ibid.

[97] See ibid., p. 2.

### 2.3.3. Marriage procedures

Parties wishing to enter into a statutory marriage must comply with one of two procedures: a "church" or a "civil" procedure. As regards the former, these are referred to as "church marriages" since a minister of religion is the one authorized to solemnize marriages performed in church. Alternatively, the parties may choose to marry by following a civil proceeding with their marriage solemnized at the Registrar General's Office or at any of its branches in the provinces.[98] Both procedures must, however, conform to the requirements for statutory marriages in Papua New Guinea which are set out in the Marriage Act (Ch 280).

### 2.3.4. The prerequisites to statutory marriage

Before a union can be recognized as a validly contracted statutory marriage, the law requires that parties to a proposed marriage meet certain requirements. Some of these requirements relate to capacity while others to formalities. In general, failure to comply with criteria relating to capacity will render the marriage void, whereas failure to meet relevant formalities of marriage may, though not necessarily, invalidate the marriage.[99]

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[98] These procedures are set out in Part V of the Marriage Act (Ch 280) under sections 40(1) and (2), and 41.

[99] That the concepts of *voidability* and *invalidity* are different legal entities is partly borne out by the terms of the Marriage Act (Ch 280) itself where voidability of marriage is provided separately under section 17 from invalidity of marriage which is provided under section 43 of the same Act. A void marriage is void from the beginning and forever, and can never be made good, regardless of whether the parties continue to live together and whether or not legal proceedings are instituted for a decree of nullity. An invalid marriage can be made valid by simply correcting the initial errors in complying with relevant procedural requirements. For the deeper explanation of the term "voidable", see J.A. COULTER, "The Common Law term 'Voidable': Its use in canonical jurisprudence," in *StC*, 13 (1979), pp. 465-485.

### 2.3.4.1. Capacity to marry

Factors relating to capacity are marital status, prohibited degrees of relationship, consent and age. These are expressly stated under section 17(1) of the Marriage Act (Ch 280) as: (a) an existing prior marriage; (b) prohibited degrees of consanguinity or affinity; (c) failure to comply with the legal form of celebration of the country; (d) lack of consent; and (e) lack of marriageable age. A marriage that takes place in contravention of any of these rules becomes void *ab initio*. No conduct on the part of the contracting parties or of any other person will validate what is otherwise a void transaction.

***(a) An existing prior marriage.***[100] Since marriage under the Act is monogamous, i.e., the union of one man and one woman, a marriage in contravention of this requirement would be void.[101] Since the law recognizes both forms of marriage, it is irrelevant whether the existing prior marriage is statutory or customary.

***(b) Prohibited degrees of consanguinity and affinity.***[102] It is a general rule that persons whom the law says are within the prohibited degrees of relationship either because they are related by blood or through marriage can never contract a valid marriage. The same prohibition applies to all persons who fall within the prohibited relationship as specified in the Act regarding adoption.[103] Any purported marriage between persons so related is void.[104] There might be some exceptions if the parties

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[100] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 25-26.

[101] See Marriage Act (Ch 280), section 17(1)(a).

[102] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 26-27.

[103] See Marriage Act (Ch 280), section 19.

[104] See ibid., section 17(1)(b).

come within the prohibited degrees of affinity. However, no exceptions exist under the law if the parties fall within the prohibited relationship of consanguinity.

(c) ***Failure to comply with the legal form of celebration of the country.***[105] Because marriage is not a private affair but an external and social event, civil authority has the power to regulate it, determine the rights and duties that flow from it and prescribe the formalities or form of the marriage ceremony. The form of marriage is actually the complex of external formalities required by law for its proper celebration. According to section 17(1)(c) of the Marriage Act (Ch 280), "a marriage is void if the marriage is not valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of the place with respect to the form of solemnization of marriage."[106]

(d) ***Lack of consent.***[107] The marital covenant begins with the exchange of consent between the spouses. Since marriage is a specific way of life demanding a total gift of self, the mutual exchange of consent must be a free act of the will on the part of each party. Otherwise, the marriage contract will be void. According to section 17(1)(d) of the Marriage Act (Ch 280), "the consent is not a real consent if (i) it was obtained by duress or fraud; or (ii) the party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or (iii) the party is mentally incapable of understanding the nature of the marriage contract."[108]

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[105] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 27-29.

[106] Marriage Act (Ch 280), section 17(1)(c).

[107] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 29-31.

[108] Marriage Act (Ch 280), section 17(1)(d).

While the requirement of real consent is simply a reflection of the idea that marriage should be entered into voluntarily, the difficulties of determining a person's actual mental state are obvious. It is the party's state of mind at the time of the ceremony which is crucial, although what happens before or afterwards will be relevant only to the extent that it throws light on the person's mental condition at that time.

***(e) Lack of marriageable age:***[109] Under section 17(1)(e), a purported marriage is void if "either of the parties is not of marriageable age."[110] Section 7(1) defines the marriageable age for males and females. It says that "(a) a male person is of marriageable age if he has attained the age of 18 years: and (b) a female person is of marriageable age if she has attained the age of 16 years."[111] However, if special circumstances exist, a court may, on application, grant permission to a person under marriageable age to marry so long as (i) the person below marriageable age is not more than two years below the minimum requirement applicable to him or her, and (ii) only one party is below marriageable age.[112] In either case, the person below the marriageable age is the one who is required to make the application for the special court permission, not the person who has attained the minimum age. A marriage in which both parties are below the marriageable age is void.

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[109] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 31-34.

[110] Marriage Act (Ch 280), section 17(1)(e).

[111] Ibid., section 7(1).

[112] See ibid., section 7(2) and (3).

### 2.3.4.2. Formal marriage requirements

Marriage is not a purely private affair but a relationship which affects civil society. Nearly every society has surrounded marriage with norms and regulations. Both custom and law have decreed that there be some formalities involved in one's entrance into marriage.

**(a) Form of ceremony.** Section 40 of the Marriage Act (Ch 280) says:

> (1) Where a marriage is solemnized by or in the presence of an authorized celebrant who is a minister of religion, it may be done so according to any form and ceremony recognized as sufficient for the purpose by the religious body or organization of which he is a minister.
>
> (2) Where a marriage is solemnized by or in the presence of an authorized celebrant who is not a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorized celebrant and the witnesses, the words "I call on the persons present here to witness that I, A.B., take you, C.D., to be my lawful wedded wife (*or* husband)," or words to that effect.
>
> (3) Subject to subsection (4), where a marriage has been solemnized by or in the presence of an authorized celebrant a certificate of marriage prepared and signed in accordance with section 45 is conclusive evidence that the marriage was solemnized in accordance with this section.
>
> (4) subsection (3) does not make a certificate conclusive (a) where the fact that the marriage ceremony took place is at issue—as to that fact, or (b) where the identity of a party to the marriage is at issue—as to the identity of the party.[113]

**(b) Official witness:** In this regard, section 1(2) of the Marriage Act (Ch 280) states that "where (a) a marriage is solemnized in the presence of a person in whose presence a marriage may, in accordance with this Act, be lawfully solemnized; and (b) he consents to the marriage being solemnized in his presence, he shall be

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[113] Ibid., section 40.

deemed, for the purposes of this Act, to solemnize the marriage."[114] Section 36 of the same Act states that "a marriage shall be solemnized by or in the presence of an authorized celebrant who is authorized to solemnize marriages at the place where the marriage takes place."[115]

(c) **Two witnesses:** Section 39 of the Marriage Act (Ch 280) says that "a marriage shall not be solemnized unless at least two persons who are, or appear to the person solemnizing the marriage to be over the age of 16 years, are present as witnesses."[116]

(d) **Time and place:** Section 38 of the Marriage Act (Ch 280) states that "a marriage may be solemnized on any day, at any time and at any place."

### 2.3.5. Legal consequences of statutory marriage

When two people in Papua New Guinea get married under statutory law, they become subject to a wide range of laws which apply only to married persons or which treat married people differently from unmarried people. Some of these laws prescribe the rights and obligations owed by the spouses to each other, while others concern the position of one or both spouses in relation to third parties and the State. However, it does not mean that people who have been married under statutory law are thereby withdrawn from the observance of customary law and placed for all purposes only under the authority of statutory law. In fact, they may contract marriage under statutory law without the necessity of renouncing native law *in toto*.[117] Nevertheless, statutory law will always,

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[114] Ibid., section 1(2).

[115] Ibid., section 36.

[116] Ibid., section 39.

[117] Although some Papua New Guineans have married under statutory law, they are still considered, and consider themselves, subject to the clan customs and laws which are compatible with

of necessity, involve the overriding or displacement of native law at certain essential points. Under schedule 2.1 of the Constitution, custom will not be applied and enforced if it is inconsistent with the Constitution, a statute, or is "repugnant to the general principles of humanity."[118] Thus, it is, for instance, an invariable consequence of statutory marriage that the parties will always be bound by the obligation of monogamy and that exclusively non-customary law will govern the possibility of divorce.

With regard to the widow of a statutory marriage, it can be accepted as a general principle that she is relieved of any customary obligations which are incompatible with the ordinary standards of statutory law. Therefore, the customs of levirate[119] by compulsion would nowhere be officially upheld as applying to statutory marriages.

With regard to children, section 5(f) of the Custom Recognition Act (Ch 19) states that custom may be taken into account in relation to the right to custody or guardianship of infants in a case concerning customary marriage. Section 6 of the same Act is,

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statutory laws. Payment of bridewealth is one of the examples. Even though statutory law does not prescribe bridewealth payment for the validity of marriage, most men would, nonetheless, feel the obligation to pay it. The reason for doing so would be their traditional understanding of marriage, i.e., marriage seen as an alliance between various families and clans.

[118] On the 3rd of May, 1996, the Post Courier newspaper published an article entitled "Girl sold in death compensation." The article reported that Miriam Willingal from Tangilka clan was given to the Konumbuka clan as part of a compensation payment including money and pigs in settlement of a dispute arising out of the death of a Konumbuka man. She was being placed in a position where she would be forced into a customary marriage with a Konumbuka man against her will. The article prompted the Individual and Community Rights Advocacy Forum Inc (ICRAF) to take up the case and bring it in the National Court in Mount Hagen. Judge Injia ruled that Miriam could not be married off as part of a compensation payment. He said that giving a woman as "head pay" was repugnant to the principles of humanity, particularly to the principle forbidding men or women to be dealt with as part of compensation payment under any circumstances. For full details of the case, see www.vanuatu.usp.ac.fj/Paclawmat/PNG_cases/Re_Willingal.html

[119] The word "levirate" comes from the Latin word *levir* which means brother-in law. A levirate marriage was one entered into by a widow and the brother of her dead husband. This practice may have been aimed at preventing a widow from alienating any of the family's property by marrying outside the family. It also guaranteed offspring to the deceased man.

however, broader and would not necessarily exclude customary rules from consideration in custody cases arising also from a statutory marriage. It says:

> Notwithstanding anything in any other law, custom shall be taken into account in deciding questions relating to guardianship and custody of infants and adoption.[120]

Hence, the general effect of section 6 of the Custom Recognition Act is that all courts hearing custody cases, whether arising from customary marriage, from statutory marriage or otherwise, should take any pertinent custom into account.[121]

In most colonial territories, there does not seem to be any specific provision regarding the property rights of native spouses *inter se*. Prudence would suggest that in these matters one should follow the laws and customs of the clan or clans to which the parties belong respectively.

## Conclusion

From our description of customary and statutory marriage, it is clear that there are some notable differences between the Papua New Guinean and the western understanding of marriage. The cardinal difference is in that customary marriage, contrary to the western model of marriage, is usually not tied to a specific moment in time, a single ceremony, or a single contractual expression of consent. Rather, it is a process with some important moments in it. In fact, there are many aspects to the consent in a Papua New Guinean

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[120] Custom Recognition Act (Ch 19), section 6.

[121] Some years ago, McRae criticized a number of pre-Independence decisions pronounced by expatriate judges. In her view, those judges were insufficiently sympathetic to the content of Papua New custom concerning custody of children. She says that "the court's negative attitude to custom has resulted in failure to develop techniques for ascertaining and applying custom or to assess the importance of custody in the various circumstances which arise" (H. MCRAE, "Reform of family law in Papua New Guinea," in *Law and social change in Papua New Guinea*, D. WEISBROT et al. [eds], Butterworths, Lexis Publishing, 1982, p. 136).

marriage. Only when people are satisfied that all of those aspects have been accomplished, will they regard the relationship as a true marriage. Another substantial difference is a very strong and active involvement of the whole community in arranging marriage and choosing partners. While in the western world the responsibility for marriage is the affair of the couple alone, in Papua New Guinea marriage is understood as a community affair. Bridewealth and polygamy are further aspects of customary marriage that make it different from western marriage. Despite such differences, customary marriage in Papua New Guinea today is, nonetheless, moving away from the unwritten clan legislation embodied in the customs and practices of clan life and is adapting to western legislation. It is moving from a community-centered and community-serving structure to a nuclear family-centered reality that serves the immediate kin rather than the clan. Marriage is not seen as a key element in the provision of those relationships vital to the building of a strong community. It is seen primarily as a way to build the family relationships where the feelings and opinions of the partners in marriage are as important as the wisdom of the community. However, the loss of authority by the traditional community leaves a vacuum. In spite of the many shortcomings of the past, the experience and wisdom of the community has served to prevent some bad choices by the young. While the community is losing its authority, the young do not seem to have gained any special insights in their choice of marriage partners. The one solution which seems to gain ground among them is simply for them to live together with a partner and see how it works out.

We might say that this new shift is not only because of inadequate preparation but also because of a breakdown of every type of formal preparation for marriage. Initiation, as we have already seen, was once one of the ways through which formal preparation

took place. Despite the significant role that initiation played in formal marriage preparation, it should not be idealized. However, there is no doubt that initiation was a very important time when adolescents, among other things, formally learned the rules of behavior in the sexual and marital field. Today the old rules do not apply anymore and, therefore, it is natural that traditional initiation is beginning to disappear. Because no new cultural substitute has been found to replace it, the community does not provide the formal preparation it once did. Therefore, many young people intending to enter into marriage face only confusion, with former customs disregarded and authority ignored.

Because of the shift in the understanding of marriage, informal preparation for marriage suffers as well. In the section regarding the preparation for customary marriage we saw that informal preparation comes from actually living in a community and observing the accepted roles being played. Because of the changes in understanding, there are unfortunately no new clear roles, no clear message coming from life experience. One experiences more the tensions than acceptable solutions for them.

Within this situation of change, one element seems to have changed very little, if at all. This is the attitude of Papua New Guineans to children who still rank very high on the priority list for marriage.

No system is perfect. Nor is the Papua New Guinean understanding of marriage perfect. Nevertheless, it is a reflection of the people's culture. Therefore, we must acknowledge the cultural elements in it, neither pretending they do not exist, nor, if they do, that somehow they are intrinsically wrong. They may simply be different from what is familiar to the western world. An acknowledgment of these cultural realities in marriage does not necessarily mean approval. Nor does it imply their superiority and

higher ethical standard. It means simply recognizing a slightly different way of understanding and of the practice of the institution of marriage. This acknowledgement must be, surely, the starting point for any relevant social action. Social care should not aim to make Papua New Guineans think and feel in a western way but to help those who suffer in the tension created by the system. One should help without imposing a ready-made solution, without dismantling the whole cultural system.

# CHAPTER THREE

# CANONICAL CELEBRATION OF MARRIAGE

## Introduction

The purpose of all law is the common good. "*Ordinatio rationis ad bonum commune...*" is the wording of the time–honored definition.[1] Excepting the divine positive and natural law, all law is mutable, reflecting the evolving nature of each community from and for which it is crafted. As a product of history, the law is subject to continual change and adaptation; by its very nature human law is flexible, adaptable and changeable. The constant development of a society and emergence of new needs within it necessitate either creation of new or revision of old law(s). This necessarily implies that positive law must always be an expression of the evolving cultural life of the community which it is meant to serve.

This also applies to the law of the Church, which is both a visible society and a spiritual communion, a unique and complex reality composed of human and divine elements. Canon law is a product of its own historical development. It has evolved in response to legitimate needs felt in societies at different times, in different cultures, and in different places.[2] The ultimate purpose of the Church's law is "the salvation of souls which is always the supreme law of the Church."[3] This supreme law, however, can be

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[1] T. AQUINAS, *STh* I-II, q. 90, a. 4. See also J.C. BARRY, "Law in the post-conciliar Church," in *StC*, 5 (1971), p. 270.

[2] See E. CORECCO, "Ecclesiological bases of the Code," in *Concilium*, 185 (1986), p. 3; L. ÖRSY, "The life of the Church and the renewal of canon law," in *The Jurist*, 25 (1965), p. 53; BWANA, "The impact of the new Code in Africa," p. 103.

[3] *CIC '83*, c. 1752. See also J.A. CORIDEN, "Law in the service to the people of God," in *The Jurist*, 41 (1981), pp. 5-14; M. WIJLENS, "*Salus animarum suprema lex*: Mercy as a legal principle in the application of canon law," in *The Jurist*, 54 (1994), pp. 560-590.

achieved only if the principles of justice and equity are used in the application of the Church's law.[4]

The canon law of the Catholic Church has its roots in the distant past, having been formulated into a system with its own terminology by Gratian about the year 1140.[5] Since then it has undergone progressive change. The one thing that we can be certain about is that change, sometimes radical, will be part of the future history.[6] What is the basis of such a statement? The purpose of canon law is to help and guide a unique living community. Since human beings are subject to constant change, canon law must necessarily be open to such change. Canon law is a living system animated and guided by faith rather than, as some may think, a rigid and intractable order.[7]

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[4] In his eloquent discourse of 8 February 1973 on "equity," Pope Paul VI described it as "one of man's loftiest aspirations. If societal life requires the determinations of human law, nevertheless the norms of this law, inevitably general and abstract, cannot foresee the concrete circumstances in which laws will later be applied. Faced with this problem, jurisprudence has sought to amend, to rectify, to correct the 'rigour of the law'. This is done through the operation of equity, which somehow embodies man's aspiration for a better kind of justice" (PAUL VI, Allocution to the Roman Rota, 8 February 1973, in *AAS*, 65 [1973], p. 99; English trans. in WOESTMAN, *Papal allocutions*, p. 118). See also M. AMENS, "Canonical equity before the law," in *The Jurist*, 33 (1973), pp. 1-23; A. MENDONÇA, "The application of the principle of equity in marriage nullity cases," in *The Jurist*, 55 (1995), pp. 664-697; IDEM, "Recent trends in Rotal Jurisprudence," in *StC*, 28 (1994), pp. 177-182.

[5] See T. MACKIN, *What is marriage?*, New York, Paulist Press, 1982, p. 192; G.H. JOYCE, *Christian marriage: An historical and doctrinal study*, 2nd ed., London, Sheed and Ward, 1948, p. 39; J. BERNHARD, "Evolution du sens de la forme de célébration du mariage dans l'Eglise d'Occident," in *Revue de droit canonique*, 30 (1980), p. 194.

[6] See F.G. MORRISEY, "Applying the 1983 Code of Canon Law: The task of canonists in the years ahead," in in *The new Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, vol. 2, M. THERIAULT, J. THORN (eds), Ottawa, Imprimerie Laprairie Inc., 1986, p. 1143; IDEM, "Is the new Code an improvement for the law of the Catholic church?" in *Concilium*, 185 (1986), p. 40; ÖRSY, "The life of the Church and the renewal of canon law," pp. 62-65.

[7] F. Morrisey notes that no one would pretend for a moment that the 1983 Code of Canon Law is the final word in the Church on matters that touch its life and mission as a society. Indeed, were it the final word, we would have a dead Church; but because the Church is truly "alive and well," it is only natural that we expect it to continue to guide us along the path that leads to salvation. New situations, difficulties and developments will call for changes in structures. See MORRISEY, "Applying the 1983 Code of Canon Law, p. 1143.

Marriage is an external and social event; in it the welfare of the individual persons blends with the welfare of the community. Canon law, therefore, must take cognizance of the act of marrying, regulate it, and determine the rights and duties that flow from it. More canons in the Code of Canon Law are devoted to marriage than to any other single subject. This unique concern for marriage reflects the importance of this sacrament in the life of the Church. The formulation of the canonical norms governing this intitution of marriage is the result of centuries of study and experience.

According to the Latin Church *sui iuris*, the sacrament of marriage is unique in that the minister of the sacrament is not a priest or bishop but the contracting parties themselves, who administer the sacrament to each other.[8] It was the desire to preserve this doctrine that prevented the Latin Church for fifteen hundred years from enacting a law which would require the presence of a priest for the validity of marriage. However, the decree of the Council of Trent, *Tametsi*, is a landmark in the history of marriage. For the first time the Church declared null and void any marriage contracted without the presence of the parish priest or his lawful delegate and two or three witnesses. For the first time a positive, ecclesiastical law would establish the actual invalidity of a marriage in cases where there is either a lack or defect in the form of celebration.

The aim of this third chapter is to analyze certain canonical provisions of the Catholic Church in respect to marriage, particularly the juridical act of one's entering into the bond of marriage. The chapter is divided into two parts. Since marriage consent is a juridical act, the first part will focus on the nature and elements of a juridical act. Its

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[8] See F.R. MCMANUS, "The ministers of the sacrament of marriage in the western tradition," in *StC*, 20 (1986), pp. 85-104.

reference point will be the content of c. 124 which establishes the general principles governing juridical acts. The chapter will begin with the notion of a juridical act followed by an analysis of its elements. The aim of this analysis is to identify the essential conditions and constitutive elements as well as extrinsic formalities and requisites of a juridical act in general and to determine how those conditions, elements, extrinsic formalities and requisites may affect its existence or validity. The second part of the chapter will present the historical antecedents of the canonical form and its implementation in the Code of Canon Law. It will also deal with the requirements that must be met for the validity of the canonical celebration of marriage.

### 3.1. Marriage Consent as a Juridical Act

Though Vatican II did not produce a separate document on Christian marriage, what it did say is extremely significant for the development of our canonical and theological understanding of marriage as a human reality and as a sacrament. The most striking development in conciliar teaching is a shift in emphasis from a matrimonial contract to a conjugal covenant between the husband and wife which constitutes an intimate partnership of life and love, from the biological to the spiritual, from the exchange of physical rights to the exchange of "ius ad consortium vitae matrimonialis."[9] W.J. LaDue, commenting on paragraphs 47-52 of the Pastoral Constitution on the Church

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[9] See J.P. BEAL, "Marriage," in *New commentary on the Code of Canon Law*, commissioned by CLSA, J.P. BEAL, J.A. CORIDEN, T.J. GREEN (eds), New York/Mahwah, Paulist Press, 2000, pp. 1241-1243; J. MCARTAVEY, *The canon law of marriage and the family*, Portland, OR, Four Courts Press, 1999, p. 21; L. ÖRSY, *Marriage in canon law: Texts and comments, reflections and questions*, Wilmington, Delaware, M. Glazier, 1986, pp. 50-51; CONSTANTINE, *The problem of consent in the arranged marriages of Tamils of Jaffna*, p. 140; A. MENDONÇA, "Exclusion of the essential elements of marriage," in *Simulation of marriage consent*, W.H. WOESTMAN (ed.), Ottawa, ON, Saint Paul University, Faculty of Canon Law, 2000, pp. 42-88.

in the Modern World, *Gaudium et spes*, notes that "it is nothing short of astounding that the word 'contract' is never used in the entire chapter. Rather, the term, *foedus* is consistently preferred."[10] L. Örsy speculates on the reason for this shift as follows:

> Covenant was not used by the Council to exclude altogether the presence of contractual elements in the marital promises (the more can contain the less), but the Council wanted the strictly legal elements to be incorporated into a sacred context. Accordingly, contractual elements can be still recognized in the exchange of the promises, but that exchange can no longer, not even in canon law, be adequately defined as contract. This new relationship between contract and covenant is best understood if the move from contract to covenant is considered as a move to a higher viewpoint. Nothing is lost, everything is enriched: contract is contained in the covenant but does not exhaust it.[11]

The explanation of the meaning of the terms 'contract' and 'covenant' presented by P.F. Palmer can help us understand Örsy's reasoning as well as the nature of Christian marriage as a covenant. Palmer writes:

> Contracts deal with things, covenants with people. Contracts engage the services of people; covenants engage persons. Contracts are made for a stipulated period of time; covenants are forever. Contracts can be broken, with material loss to the contracting parties; covenants cannot be broken, but if violated, they result in personal loss and broken hearts. Contracts are secular affairs and belong to the market place; covenants are sacral affairs and belong to the hearth, the temple, or the Church. Contracts are best understood by lawyers, civil and ecclesiastical; covenants are appreciated better by poets and theologians. Contracts are witnessed by people with the state as guarantor; covenants are witnessed by God with God as guarantor. Contracts can be made by children who know the value of a penny; covenants can be made only by adults who are mentally, emotionally and spiritually mature. If Christian marriage is to be defined in terms of contract, the present Code of Canon Law would have us say that Christian marriage is a valid contract between two baptized people, in which the formal object of their consent is the permanent and exclusive right to the other's body and to those acts which serve the race. If Christian marriage is to be defined in terms of covenant, Scripture, early

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[10] W.J. LADUE, "Conjugal love and the juridical structure of Christian marriage," in *The Jurist*, 34 (1974), pp. 37-38.

[11] ÖRSY, *Marriage in canon law*, p. 50.

> Christian terminology, the liturgy of the Church and the conciliar statements of Trent and Vatican II would have us say that Christian marriage is a graced covenant of love and fidelity between two baptized believers which, when ratified or sealed in the flesh, has God as author, witness, and guarantor of the indissoluble bond. Both definitions tell us what is unique in Christian marriage, its indissoluble character, but only the second tells why Christian marriage is unique and distinguished from other marriages.[12]

Despite the preference for the term "covenant" over the term "contract" in reference to marriage in the conciliar documents, the legislation of the *CIC '83* is more familiar with contractual than with covenant language.[13] This accentuation is, in part, a result of the fact that canon law builds on the experience and theory of the Roman law in which marriage was understood as a consensual contract.[14] According to the Roman law, particularly Ulpian, obligations in a consensual contract arose not from the exchange of a verbal formula or from handing over of the object of the contract but from the agreement of the wills of the consenting contractants.[15]

The linchpin of the canon law governing marriage is the principle, derived from Roman law and reinforced by the decretals of twelfth century popes, that *nuptias enim*

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[12] P.F. PALMER, "Christian marriage: Contract or covenant?" in *Theological Studies*, 33 (1972), pp. 639-640.

[13] In the *CIC '83* there are only three canons (1055 §1; 1057 §2 and 1063, 4°) which refer to marriage as a "covenant" and more than forty instances in which marriage is presented as a "contract." However, as already noted, "covenant" is probably a more accurate theological description of marriage because it reflects the totally faithful and unending relationship of Christ to his Church.

[14] For a study of the influence of Roman law on canon law, see A. GAUTHIER, *Roman law and its contribution to the development of canon law*, 2nd ed., Ottawa, Faculty of Canon Law, Saint Paul University, 1996. See also BEAL, "Marriage," p. 1241.

[15] See D. II, 14, 1, p. 62 (*The Digest of Justinian*, Latin text edited by Theodor MOMMSEN with the aid of Paul KRUEGER; English trans. edited by Alan WATSON, Philadelphia, PA, University of Pennsylvania Press, 1985, 4 vols). See also GAUTHIER, *Roman law and its contribution to the development of canon law*, pp. 64-67.

*non concubitus sed consensus facit*,[16] i.e., that consent and not cohabitation makes a marriage. According to c. 1057 §1, consent is not only an indispensable element of marriage but also the efficient cause that brings marriage into being. The second paragraph of c. 1057 describes matrimonial consent as an act of the will. It is, as the Rotal judge Lucien Anné defines,

> [...] an act of the will by which a man and a woman constitute between themselves by means of a mutual covenant, that is, by an irrevocable consent,

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[16] D. L. 17, 30, p. 958; see also D.R. ESPEN, *The canonical form of marriage*, Canon Law Studies, No. 462, Ann Arbor, UMI, 1988, p. 4; P. MONETA, *Il matrimonio nel nuovo diritto canonico*, 3rd ed., Genova, ECIG, 1996, p. 181; JOYCE, *Christian marriage*, pp. 42 and 67; MACKIN, *What is marriage?*, p. 170; ÖRSY, *Marriage in canon law*, pp. 24-26; BEAL, "Marriage," p. 1250; P. GISMONDI, "La celebrazione del matrimonio secondo la dottrina e la legislazione canonica sino al concilio Tridentino," in *Ephemerides iuris canonici* (= *EIC*), 5 (1949), p. 307; G.C. GALLEN, "Proposal for a modification in the juridical form of marriage," in *Australasian Catholic Record*, 38 (1961), pp. 314-315; L. ÖRSY, "The canons on ecclesiastical law revisted," in *The Jurist*, 37 (1977), p. 122; C. VOGEL, "The role of the liturgical celebrant in the formation of the marriage bond," in *Marriage studies: Reflections in canon law and theology*, vol. 2, T.P. DOYLE (ed.), Washington, DC, CLSA, 1980, p. 69. In reference to this principle G. Roche writes: "[...] any attempt to inculturated church teaching on marriage must not exclude the principle 'consent makes marriage'. However, this principle has a long history in the church, and there are various aspects of mutual consent that have been given emphasis at different times. While the principle must be safeguarded, this does not automatically mean that other cultures must emphasize the same aspects concentrated on by current western jurisprudence." Then he emphasizes the importance of seeing marriage as a *pact*, rather than as a *contract* or *covenant*. Roche notes: "It may be easier to 'inculturate' the principle of consent if more attention is paid to consent as 'pact'. However, it may be important to note that it is not the 'capacity for pact' that is being discussed here, but the actual pact that is essential to make the marriage. [...] It can be also helpful to distinguish between the **formation** of the pact and the **sealing** of the pact. The conjugal pact is indeed sealed in a single ceremony, and from that 'moment' it has juridical recognition. Some emphasis has no doubt been put on the 'moment' of 'exchange of consent', the sealing of the pact, in order to exclude the possibility of consent being interpreted as being a 'persevering consent'. This is both necessary and important. At the same time from a Melanesian cultural viewpoint it is unthinkable to have a pact created without first having dialogue and preparation between the parties concerned. It is possible to give more explicit recognition to the formation of the pact, and at the same time retain the insistence that from the 'moment' the pact is sealed, from the 'moment' that the consensus is manifested, the bond of marriage is created and endures even though the partnership itself may not always persevere as a harmonious relationship. [...] In the Melanesian world when dealing with a marriage case there may be little or no evidence pointing to 'lack of capacity', but, from the life history of the engaged couple there may be ample evidence pointing to 'lack of actual pact between the two persons'. It would help very much with the inculturation of 'consent' if jurisprudence paid more attention to this 'encounter' or 'confluence'—not only to the capacity within the individual for such encounter—but to the reality and actuality of such encounter. [...] Jurisprudence tends to describe consent in terms of 'decision', and there is thorough investigation of the act of individual-decision-making. From a Melanesian viewpoint it is also important to thoroughly investigate the partnership-decision-making that is essentially required to form the pact. Partnership-decision-making is not deciding what I will do, but what we will do. **As conspiring is different from aspiring, so partnership-decision-making is different from individual-decision-making.** [...] The actual decision on where, how, and when to get married is normally a partnership-decision, a 'we decision'" (G. ROCHE, "Canon law, psychology and culture," in *Mi-cha-el CSMA*, 3 (1997), pp. 136-138).

> a perpetual and exclusive partnership of conjugal life, ordained by its very nature to the generation and education of children. Thereby, the formal substantial object of this consent is not only the perpetual and exclusive right to the body ordered to acts *per se* apt for the generation of offspring to the exclusion of all other formal essential elements, but it comprises also the right to the partnership of life, namely, community of life which, properly speaking, is matrimonial, and which gives rise to the correlative obligations, that is to say, the right to '*an intimate joining of persons and works*' by which 'they complete each other so as to cooperate with God in the procreation and education of new lives' (Enc. *Humanae vitae*).[17]

From what we have discussed above, we can conclude that matrimonial consent of the spouses is a juridical act of a contractual or covenantal nature. Therefore, the provisions of the Code governing juridical acts are applicable to matrimonial consent. In the following sections we will present a brief analysis of c. 124 because of its importance to the subject matter of our study.

### 3.1.1. Notion of a juridical act

Law usually does not define concepts. This task is left to doctrine and jurisprudence. For this reason, a creative and evolutionary process of interpretation and application of law to concrete situations is allowed. The notion of a juridical act used in canon law went through such a process as well. It was developed by jurists of the civil law tradition of continental Europe and was introduced into the canonical system by writers conversant with that tradition. According to them, the primary factor necessary for a juridical act is the will or intention of the acting person.[18]

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[17] See decision *c.* ANNÉ, 25 February 1969, in *Sacrae Romanae Rotae Decisiones seu sententiae* (= *RRT Dec.*), 61 (1969), pp. 183-184. For comments on this definition, see LADUL, "Conjugal love and the juridical structure of Christian marriage," pp. 48-51.

[18] See M. HUGHES, "A new title in the Code: Juridical acts," in *StC*, 14 (1980), pp. 396-401; O. ROBLEDA, "De conceptu actus iuridici," in *Periodica*, 51 (1962), p. 417; M. WIJLENS, "Juridic acts," in *New commentary on the Code of Canon Law*, p. 177.

The *CIC '83* itself does not provide a definition of a juridical act. However, it seems that a simple definition offered by O. Robleda has assumed prominence in canonical literature. Robleda defines a juridical act as "an externally manifested act of the will by which a certain juridical effect is intended."[19] For Robleda, the core element of the juridical act is a deliberate action of an agent directed to a specific object for the purpose of producing juridical effects. This is so because the person has a subjective right to act relative to his or her proper and legitimate purpose along with the means whereby that purpose can be realized. In the objective order, the law must serve to regulate the exercise of individual rights within the context of the common good and, therefore, is able to impose conditions and/or formalities for the legitimate placement of a juridical act.[20]

Another classical author, G. Michiels, defines a juridical act, in the strict sense, as "a social human act legitimately issued to which the law recognizes specific juridical effects, inasmuch as these effects are intended by the agent."[21]

F. Aznar, in a Spanish commentary on the Code, defines it almost identically. He says that "a juridical act, in the strict sense, is a social human act, issued legitimately, to which the law recognizes specific juridical effects that are intended and willed by the

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[19] "[...] voluntatis actum externe manifestatum quo certus effectus iuridicus intenditur" (ROBLEDA, "De conceptu actus iuridici," p. 419). See also J.M. KUZIONA, *The nature and application of juridical acts according to canon 124 of the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1998, p. 14; G. SHELBY et al. (eds), *The Code of Canon Law, Letter & Spirit: A practical guide to the Code of Canon Law*, prepared by The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, Dublin, Veritas, 1995, p. 72; WIJLENS, "Juridic acts," p. 177; HUGHES, "A new title in the Code: Juridical acts," p. 392.

[20] See ROBLEDA, "De conceptu actus iuridici," pp. 419-446.

[21] "Sensu stricto autem actus iuridicus est actus humanus socialis legitime positus et declaratus, cui a lege ideo et eatenus effectus iuridicus determinatus agnoscitur, quia et quatenus effectus ille ab agente intenditur" (G. MICHIELS, *Principia generalia de personis in Ecclesia: commentarius libri II Codicis iuris canonici, canones praeliminares 87-106*, Tornaci, Desclée, 1955, p. 572).

agent. Juridical acts are voluntary or human acts and produce juridical effects inasmuch as they are truly human or voluntary."[22]

From the foregoing definitions of different authors we may conclude that the juridical act is an externally manifested act of the will. The will of the agent is the primary factor involved in the placing of a juridical act. Because of the involvement of the will, the juridical act is truly a human act and since the law attaches juridical effects to it which are to be intended by the agent, the juridical act is of legal character.

### 3.1.2. Essential conditions of a juridical act (c. 124)

Canon 124 §1 states: "For the validity of a juridical act it is required that it be placed by a person capable (*habilis*) of placing it, and that it include those elements which essentially constitute it as well as the formalities and requisites imposed by law for the validity of the act." This canon avoids defining the inner nature of a juridical act. Rather, it is concerned with factors which must be present for such an act to be valid. According to the canon, the validity of a juridical act depends on three *essential conditions*: (1) the effective capacity of the subject placing the act itself; (2) the concurrence of all constitutive essential elements of the act itself; and (3) the observance of extrinsic formalities and requisites required by law for the validity of the act.[23]

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[22] "Un *acto jurídico*, en sentido estricto, es un acto humano social, legítimamente puesto y declarado, al que la ley le reconoce unos efectos jurídicos determinados, que son pretendidos y buscados por el agente. Se encuadran dentro de la categoría de los actos jurídicos voluntarios; es decir, los que proceden de la persona humana en cuanto tal y que, a tenor de las leyes, producen efectos jurídicos sólo en cuanto que sean verdaderamente humanos o voluntarios" (F. AZNAR, "Commentary on cc. 124-128," in *Código de derecho canónico*, L. DE ECHEVERRIA [ed.], 2da ed. bilingüe comentada por los profesores de la Facultad de Derecho Canónico de la Universidad Pontificia de Salamanca, Madrid, La editorial católica, 1993, p. 100).

[23] See L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, 2da ed. accresciuta e aggiornata, vol. 1, Roma, Edizioni Dehoniane, 1996, n. 862, pp. 187-188; F. D'OSTILIO, *Prontuario del Codice di diritto canonico*, 2da ed. rivedutta e aggiornata, Città del Vaticano, Libreria

### 3.1.2.1. Capacity of subject

The first essential condition governing a juridical act has to do with the actual capacity of the subject to place such an act. The canon states that the agent of a juridical act must be *habilis*, i.e., he/she must have the *capacity* to act. Canon law distinguishes two types of capacity: *natural* and *juridical*. A human being is "ex iure naturae" rational, and, therefore, should be endowed with *the capacity to intend* and *to will*.[24] A juridical act is a "human act" (*actus humanus*) and to be such it must be a free, conscious and responsible act.[25] On the basis of these premises, we can define the *natural capacity* as the capacity of the acting subject to place a human act.[26] In this regard it must be noted that the simple use of reason, which even infants may enjoy, is not sufficient.[27] According to canonical doctrine, "discretion of judgement" is always needed in order to

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editrice Vaticana, 1996, p. 101; KUZIONA, *The nature and application of juridical acts*, pp. 117 and 125; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 72; M. THÉRIAULT, "De actibus iuridicis," in *Comentario exegético al Código de derecho canónico*, obra coordinada y dirigida por A. MARZOA, J. MIRAS y R. RODRÍGUEZ-OCAÑA, 2da ed., vol. 1, Pamplona, EUNSA, 1996, p. 823; ID., "The nullity of some processual acts in light of canon 124," in *Forum*, 5 (1994), pp. 31-32; WIJLENS, "Juridic acts," p. 178.

[24] See H. PREE, "On juridic acts and liability in canon law I," in *The Jurist*, 58 (1998), p. 51; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 863, p. 188; D'OSTILIO, *Prontuario del Codice di diritto canonico*, p. 101.

[25] See KUZIONA, *The nature and application of juridical acts*, p. 134; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 72; THÉRIAULT, "De actibus iuridicis," pp. 820 and 823; ID., "The nullity of some processual acts in light of canon 124," pp. 30-31. For an explanation of a human act and its principles, see A. MENDONÇA, "The nature of matrimonial consent," in *StC*, 16 (1982), pp. 88-99; J.A. OESTERLE, J.A. O'DONOHOE, "Human act," in *New Catholic encyclopedia*, vol. 7, Detroit: Thomson/Gale, Washington, DC: Catholic University of America, 2003, pp. 169-174.

[26] See THÉRIAULT, "De actibus iuridicis," p. 823; ID., "The nullity of some processual acts in light of canon 124," p. 31.

[27] Canon 97 §2 states: "Before the completion of the seventh year a minor is called an infant and is held to be incompetent (*non sui compos*); with the completion of the seventh year one is presumed to have the use of reason." And c. 99 says: "Whoever habitually lacks the use of reason is held to be incompetent (*non sui compos*) and is equated with infants." Because a juridical act is an act of the will, anyone who is *non sui compos* cannot place a juridical act.

place a juridical act as a human act.[28] Canonical jurisprudence has identified three components in the "discretion of judgement." These components are: (a) *knowledge* ("*cognitio*") of the formal object of the act: (b) *discernment* ("*aestimatio*"), i.e., critical evaluation of the formal object of the act: and (c) *choice* ("*selectio*") of the formal object of the act made with internal freedom of a person, i.e., freedom from both external and internal limitations. In the absence of any or all of these three components, a juridical act cannot be regarded as a human act.[29]

The *juridical capacity* can be defined as one's subjectivity to rights and ability to exercise legal rights and obligations.[30] In canonical language it means that the acting subject has a status of a "person"—whether physical or juridical—in the Church. Such juridical capacity is called the *ecclesiastical juridical capacity* and it means the subjectivity of rights and obligations in the Church.[31] With respect to a physical person, this capacity implies that an individual is a subject of rights and obligations proper to Christians within the ecclesial community. According to the norm of c. 96, this capacity is acquired by baptism. Baptism is a juridical act whereby an individual is incorporated into the Church and is constituted a person with rights and obligations in it. Because of

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[28] The *coetus* dealing with the norms governing juridical acts stated that "ad actus privatos ponendos persona, discretione iudicii gaudens, capax dicenda est, nisi lege incapax facta sit" (*Communicationes*, 6 [1974], p. 102). For an example, see c. 1095, 2°.

[29] Regarding the three components of "discretion of judgement," see decisions *c.* COLAGIOVANNI, 11 December 1985, in *RRT Dec.*, 77 (1985), pp. 569-583; *c.* FIORE, 30 May 1987, in ibid., 79 (1987), pp. 335-343; *c.* BRUNO, 16 December 1988, in ibid., 80 (1988), pp. 746-749; *c.* FALTIN, 26 May 1989, in ibid., 81 (1989), pp. 380-384. See also MICHIELS, *Principia generalia*, pp. 586-588; CONSTANTINE, *The problem of consent in the arranged marriages of Tamils of Jaffna*, pp. 145-146; A. MENDONÇA, "Recent Rotal Jurisprudence from sociocultural perspective," in *StC*, 29 (1995), pp. 45, 50 and 55-57; L.A. ROBITAILLE, "Simulation, error determining the will, or lack of due discretion? A case study," in *StC*, 29 (1995), pp. 420-422.

[30] See PREE, "On juridic acts and liability in canon law I," p. 51.

[31] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, n. 864, p. 188; D'OSTILIO, *Prontuario del Codice di diritto canonico*, p. 101; KUZIONA, *The nature and application of juridical acts*, p. 134.

this principle, even those persons who are validly baptized in other Christian Churches and ecclesial communities not in full communion with the Catholic Church possess this juridical capacity according to the norms of law. Non-baptized persons are not persons in the Church in a strict sense, and, therefore, they cannot be subjects of rights and obligations in the Church.[32] This is so because they lack baptism, the very foundation of juridical personality in the Church. Ecclesiastical juridical capacity is also applicable to juridical persons. Canon 113 §2 states that "in the Church, besides physical persons, there are also juridical persons, i.e., subjects in canon law of rights and obligations which correspond to their nature." It is obvious, that a juridical person cannot place juridical acts by itself. It can only act through the agency of a physical person. However, the acts placed by a physical person on behalf of a juridical person are considered to have been performed by the juridical person and are, therefore, imputed to it in this way.[33]

The person placing the juridical act must possess *subjective juridical capacity* as such and *capacity to act*.[34] Subjective juridical capacity means that a person has the possession of rights. However, in order to use those rights the person must also be

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[32] See *Communicationes*, 17 (1985), pp. 166-167. The Church recognizes the natural rights of all people, but she cannot recognize their canonical rights. Canon 3 of the schema "Legis Ecclesiae fundamentalis" notes: "Ecclesia omnibus et singulis hominibus, utpote ad imaginem Dei creatis, dignitatem humanae personae propriam recognoscit et profitetur, itemque officia et iura quae ex eadem profluunt agnoscit atque, omnium hominum vocationis ad salutem ratione, etiam tuetur." See *Communicationes*, 12 (1980), p. 57. In spite of this, the fact that the new Code has several canons, which concern directly or indirectly the non-baptized persons as subjects of rights and obligations, cannot be denied. For example, in the case of a mixed marriage, when the non-baptized person is obliged to assume certain obligations towards another party and towards children born of the union, that person is or becomes a subject of the right which is taken into consideration. Such manifestation of will whereby a canonical commitment is assumed presupposes a juridical subjectivity. See c. 1061 §1, 2° of *CIC '17* and c. 1125 of *CIC '83*.

[33] See THERIAULT, "De actibus iuridicis," p. 824.

[34] For example, a minor has juridical capacity because invested with rights, but does not have the capacity to act. In such and similar cases, the Code has provided for others to act on their behalf. See cc. 98 §2; 1478 §1.

endowed with the capacity to act which means, that he/she has the capacity to exercise his/her rights or, in other words, he/she has the capacity to place a juridical act.

### 3.1.2.2. Essential elements of a juridical act

The second essential condition governing a juridical act concerns the essential elements of a juridical act. In general, they are those elements required by law—whether divine or merely ecclesiastical—which constitute the essence of the act.[35] A juridical act cannot come into being without those elements. Without them a juridical act is unable to produce the intended juridical effects and the result will be a purely material act.[36] Thus, for example, F. Roberti notes that "the essential elements are those without which the act changes its nature or is made inefficient for the end to which it is ordained."[37] P. Gomez and G. Michiels describe the essential elements of an act in similar words.[38]

According to L. Chiappetta, the first of all the essential elements, and a generic and constitutive one that must be present in all juridical acts, is the *will* properly

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[35] As for the act itself, canon law has maintained a distinction between those elements which essentially constitute the act and those which are required by the law for its validity. Whenever any of the essentially constitutive elements of the act is lacking, the act itself is not merely invalid, but is simply non-existent. On the other hand, when a non-constitutive element of the act required by the law for its validity is missing, the act itself is invalid, but not non-existent. See *Communicationes*, 6 (1974), pp. 101-102. This distinction is important for the following reasons. In the case of a non-existent act, there is no possibility of a convalidation from the beginning (*sanatio in radice*). There is no possibility of dispensation, suppletion or ratification. Prescription cannot be applied to the rights or duties of a non-existent juridical act. See O. ROBLEDA, *La nulidad del acto jurídico*, 2da ed., Roma, Libreria editrice Università Gregoriana, 1969, pp. 211-214; A. BRESSAN, "De inexsistentia et nullitate actus iuridici in C.I.C.," in *Periodica*, 59 (1970), pp. 479-482. A marriage contracted without the canonical form illustrates the distinction between the essentially constitutive elements and the non-constitutive elements required by the law for the validity of a juridical act. In this case, although the act of consent of the parties physically exists, it is invalid or inefficacious for lack of the form prescribed by the law for its validity.

[36] See PREE, "On juridic acts and liability in canon law I," p. 49; WIJLENS, "Juridic acts," p. 178.

[37] "[...] dicendi sunt essentialia elementa illa sine quibus actus suam naturam mutat, vel ineptus efficitur ad finem cui ordinatur" (F. ROBERTI, *De processibus*, 4ª ed., In Civitate Vaticana, Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1956, p. 620).

[38] See S. GOMEZ, *De actionibus et exceptionibus (canones 1667-1705)*, Romae, Copisteria Coscia, 1951, pp. 71-72; MICHIELS, *Principia generalia*, p. 583.

manifested.[39] Other elements are determined by the very nature of the act. He also notes that the essential elements are to be distinguished from the *accidental* or *integrative elements* whose defects may not have any consequence on the validity of the act.[40]

M. Hughes avoids too great a separation between intellect and will in placing a human act. For him the essential element is the *decision* in which all the rational faculties are engaged. Consequently, he defines the juridical act not as an act of the will but as an act of decision. The juridical acts seen as the acts of decision differ from other kinds of decisions in that they intend to bring about certain juridical effects. What all juridical acts have in common is that the juridical effects that follow upon them are *in some way* related to their having been *intended by someone*.[41]

H. Pree analyzes the juridical intention of the acting subject and says that ultimately it is in this analysis that we find the "essential elements" of a juridical act. He

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[39] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 868, p. 188. For more information on the will as a generic constitutive element, see also J. OTADUY, "Normas y actos juridicos," in *Manual de derecho canónico*, obra a cargo del Instituto Martin de Azpilcueta, Pamplona, Ediciones Universidad de Navarra, S.A., 1988, p. 287; AZNAR, "Commentary on cc. 124-128," p. 100; SHEEHY et al. (eds), *The Code of Canon Law: Letter & Spirit*, p. 72; THÉRIAULT, "The nullity of some processual acts in light of canon 124," p. 31.

[40] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 868, p. 188. See also AZNAR, "Commentary on cc. 124-128," p. 100.

[41] See HUGHES, "A new title in the Code: Juridical acts," p. 392-396. Hughes points out three problems in the juridical act: 1) Most fundamental of all problems concerns the relationship between the actor's intention and the juridical efficacity of the act. Therefore, the question can be posed: Does the intention produce the juridical effect, or is the effect produced by a personal juridical authority? 2) The second problem concerns the relationship between the actor's intention and the formal object. Hence, the question is: What precisely has to be intended for there to be a juridical act? Is it necessarily a juridical effect that is endorsed by the legal system? If we take the example of marriage, the question is: for the juridical act that makes marriage, is it necessary to intend a valid marriage, or is it enough to intend the union that is marriage? 3) The third problem concerns the relationship between the actor's intention and the declaration of the intention. The question is: Is it truly the intention that is important, or is it the declaration of the intention, whether or not this corresponds to an inner intention? If we take marriage as the paradigm of canonical juridical acts, we can readily discern the responses given to these questions in canon law. To the first question, c. 1057 §1, responds that it is the personal intention, and nothing else, that produces the juridical effect of marriage. To the second question, c. 1100, responds that it is not necessary to intend a valid marriage but rather a true marriage, i.e., union with the full effects intended by the Church. And to the third question, c. 1101 responds that it is the inner intention, not its declaration that is crucial. Simulation destroys the juridical act. See HUGHES, "A new title in the Code: Juridical acts," p. 402.

identifies three of them: (a) *cognition* (there is nothing in the will which was not first in the intellect); (b) *intention itself*; and (c) *external manifestation* or *declaration of the intention* according to the form the law establishes.[42] According to him, cognition requires at least the knowledge of the essence of the juridical act, the persons involved, and the essential content of the legal act. Regarding the intention, it must be either actual or virtual. Habitual, presumptive, or interpretative intentions do not suffice.[43] As for the external manifestation or declaration of the intention required by the law, it can be either explicit or implicit.

Those essential elements which have been described up to this point concern, in fact, the subject placing the juridical act and, therefore, they could be called *subjective elements*. Besides them, there are also *objective elements*. Every human act must necessarily have an object.[44]

Something can become an object of a juridical act only if it exists *in reality*. Besides that, the object must also be *possible*.[45] It is also important to note that elements composing the object may be *substantial* or *accidental*. Elements determined either by the nature of the act itself or by the competent authority as substantial constitute the substantial elements of an actual object. When the substantial elements are either totally or partially wanting in the object, there cannot be the particular object. Moreover, the subject placing the act must intend the substantial elements of the object. If these

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[42] See PREE, "On juridic acts and liability in canon law I," p. 53.

[43] See MICHIELS, *Principia generalia*, p. 588.

[44] See above, p. 125, for the components necessary to produce "discretion of judgement." All of them are related to the formal object.

[45] See KUZIONA, *The nature and application of juridical acts*, p. 36. There cannot exist a contract of sale of a house if the presumed seller is not the owner of the house and has no legitimate authority to sell it. See THERIAULT, "De actibus iuridicis," p. 823.

elements are intentionally excluded, the act itself will be juridically inefficacious for lack of its object.[46] Objects of juridical acts are corporeal or spiritual things, actions, facts, or persons. However, they become objects of juridical acts only when they are recognized or determined as such by the law.[47]

Subjective and objective elements constitute the essence of the juridical act. Since marriage consent is a juridical act, these elements must also be comprised in it. In regard to customary marriage, a question may be raised: Are these elements present at the moment when a Papua New Guinean couple contracts customary marriage? Customary marriage usually appears to the western world as a marriage that lacks the subjective elements. This impression is caused by the great emphasis placed on the need for the whole community to be actively involved in raising and supporting the new marriage.[48] Because of this strong involvement of the community, those not familiar with Papua New Guinean culture may think that young people in Papua New Guinea are generally compelled to enter into marriage they really do not want and, as a consequence of this compulsion, that their subjective rights, such as the right to make a personal decision or to express freely the consent in choosing and marrying their partner, are denied. Such a mistaken perception may lead one to conclude that in Papua New Guinean culture individuals who marry have no subjective rights and, therefore, those subjective rights are missing in the expression of their marital consent. Is this really true? Do Papua New Guineans have the ability to exercise their legal rights and obligations, especially those

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[46] See MICHIELS, *Principia generalia*, p. 579; KUZIONA, *The nature and application of juridical acts*, pp. 37-38.

[47] See MICHIELS, *Principia generalia*, p. 578; KUZIONA, *The nature and application of juridical acts*, p. 36.

[48] See above, pp. 81-85.

related to marriage? Do they have the capacity to place a juridical act when contracting customary marriage? Are the subjective elements of marital consent really missing in customary marriage?

Besides the subjective elements, the marital consent must include also the objective elements. In every contract, there is a transfer of some right(s), and the right(s) thus transferred is called the object of the contract. Canon 1057 §2 defines such an object for marriage consent: "Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage." A careful analysis of this canon reveals that marriage consent has a twofold object: the first is the material object, namely the very persons of the spouses (*sese mutuo tradunt et accipiunt*);[49] and the second is the formal object, that is, "for the purpose of establishing a marriage."[50] It is impossible and contrary to the dignity of the spouses to give themselves physically in the exchange of consent; therefore their mutual exchange takes place in the aspects of rights and duties regarded as essential to marriage, which is the formal object of consent. This formal object is, in turn, identified in c. 1055 §1 in terms of "a partnership of their whole life,"[51] which consists of the complex or totality of the rights and obligations related to the good of the spouses and of offspring, as well as to the essential properties of the "partnership," that is to say, its unity, exclusivity, perpetuity (indissolubility), and sacramentality (if the partnership is between two baptized persons). A valid marriage contract cannot exist without the mutual

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[49] See BEAL, "Marriage," p. 1252.

[50] See ibid., pp. 1250 and 1252.

[51] This canon reiterates in substance the conciliar teaching on marriage contained in the first paragraph of n. 48 of *Gaudium et spes*; see FLANNERY I, pp. 219-220.

transfer of these rights and correlative obligations. In other words, the right/obligation of each party to the essential elements and properties of the marital partnership constitutes the content of the formal object of marital consent. If one or both parties to a marriage contract are either incapable of intending or assuming any one or all of these essential rights and obligations, or exclude them by a positive act of the will, the marriage is invalid. Because these essential elements and properties of marriage are of divine law, no culture can substitute or interfere with them in the exchange of marital consent. Nevertheless, we believe that if a particular culture has other elements and characteristics which are not contrary to the divine law on this matter, it is possible to integrate them into the partnership defined by that culture.

What are the ends of customary marriage in Papua New Guinea? Are these in any way contrary to the essential ends and properties of marriage as determined by the Church? Is it possible for a Papua New Guinean couple to incorporate the essential elements and properties of marriage described above when they enter upon customary marriage? We will attempt to answer all the questions raised in this section in the following fourth chapter.

### 3.1.2.3. Extrinsic formalities and requisites required by law

In order for a juridical act to have its effects, the law usually establishes certain extrinsic formalities and requisites. Although they are not of the essence of the juridical act as such, they may be prescribed by law for its validity. Stipulation of formalities and

requisities extrinsic to the juridical act is meant to ensure its juridical certainty and to safeguard the rights of individuals and the common good.[52]

*Legal formalities* constitute the external form in which a juridical act must be placed.[53] According to c. 124 §1, this means that when the law expressly requires observance of certain formalities for validity of a juridical act, a person to act validly must comply with them. Formalities may be *simple* or *complex*. Simple formalities comprise just one component, whereas complex ones are composed of several components. In any case, the compliance with the stipulated formalities must be complete. Should there be a lack or absence of even one of its components, the juridical act will be invalid.[54]

*Requisites* are prescribed requirements by law demanding the existence of the elements extrinsic to the act itself as well as to the manner of placing it.[55] These elements

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[52] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 869, p. 189; KUZIONA, *The nature and application of juridical acts*, p. 134; R.A. HILL, "Juridic acts," in *The Code of Canon Law: A text and commentary*, commissioned by CLSA, J.A. CORIDEN, T.J. GREEN, D.E. HEINTSCHEL (eds), New York/Mahwah, Paulist Press, 1985, p. 89; AZNAR, "Commentary on cc. 124-128," p. 100; OTADUY, "Normas y actos juridicos," p. 287; PREE, "On juridic acts and liability in canon law I," p. 54; THERIAULT, "De actibus iuridicis," p. 824; ID., "The nullity of some processual acts in light of canon 124," p. 32; WIJLENS, "Juridic acts," p. 178.

[53] See KUZIONA, *The nature and application of juridical acts*, p. 144; E. MOLANO, "Juridical acts," in *Code of Canon Law annotated*, prepared under the responsibility of the Instituto Martín de Azpilcueta, E. CAPARROS, M. THERIAULT (†), J. THORN (†) (eds), 2nd ed. revised and updated of the 6th Spanish language ed., E. CAPARROS, H. AUBÉ (eds), assisted by J.I. ARRIETA, M.A. HACK, J.L. JUNG, D. MOTTUK, Montréal, Wilson & Lafleur Limitée, 2004, pp. 107-108; PREE, "On juridic acts and liability in canon law I," p. 54.

[54] An example of a simple formality is the form in which a decisory decree must be issued. Canon 51 stipulates that such a decree must be issued in writing. The canonical form of marriage could be considered as an example of a complex formality. Apart from the exceptions made in the Code, to be valid, a marriage between two Roman Catholics, or between a Roman Catholic and a non-Catholic, the canonical form of marriage consisting of a qualified witness and two other witnesses, must be observed; cfr. c. 1108 §1 with cc. 1117 and 1127 §1. If the marital consent were exchanged only in the presence of a qualified witness and one additional witness, or only before two witnesses without a qualified witness, the marriage would be invalid because of the defect in the canonical form required by law. A marriage case judged at the Rota *coram* Palestro illustrates this situation; see decision *c.* PALESTRO, 19 February 1986, in *RRT Dec.*, 78 (1986), pp. 100-113. For more examples related to formalities, see cc. 189 §1; 474; 1281 §1; 1622, 3°.

[55] See KUZIONA, *The nature and application of juridical acts*, p. 146; MOLANO, "Juridical acts," pp. 107-108; PREE, "On juridic acts and liability in canon law I," p. 54.

must be placed prior to the act itself.[56] The lack of a requisite which is required by law for validity results in an invalid act, although not a non-existent one.

### 3.2. Canonical Form of Marriage

The ministers of the sacrament of marriage are the two baptized parties. Their consent is sufficient to establish a marriage according to the natural law. However, for Catholics, positive ecclesiastical law prescribes certain external formalities which are to be observed for the validity of marriage.[57] These formalities are the result of the Church's struggle to address the late medieval problem of clandestine marriages. But what did the term "clandestine marriage" really mean? In its simplest signification the term referred to a marriage whose existence could not be proved before the law. Because of the principle that consent makes the marriage, the consent of parties sufficed to form a marriage though no priest was present. The marriage simply came into existence with the consent of the parties, but no third party could verify it. Moreover, such marriages often had harmful spiritual and social repercussions. Therefore, the Church took action against clandestine marriages by introducing the canonical form of marriage. The canonical form retains its importance today since a clandestine marriage would still have some of the

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[56] Canon 127 could be one of the examples. According to this canon, for the validity of certain acts of authority, law requires the obtaining of the prior consent or advice of other persons. If it is the consent of a group of persons forming a college that is sought, they should be lawfully convened and the consent must be given by the absolute majority of those present, that is, more than half. If there is question of obtaining the consent of individual persons, consent must be given by each of them. To act without obtaining the required consent, either because it was not requested or it was not given, renders the act invalid. If there is question of obtaining advice, for the validity of the act it is required that the authority concerned ask for it, but particular law can provide for a method of consultation without convocation in determined cases; and if there are serious reasons, the authority is not bound to adhere to the advice received and may set aside the advice given. For more examples, see cc. 170; 172 §1, 1° and 2°; 312 §2; 684 §3; 1292 §§1 and 2. Examples include also juridical acts which are not to be subjected to a condition or a time limit; see cc. 149 §3 and 1102 §1.

[57] See F. BERSINI, *Il diritto canonico matrimoniale: commento giuridico, teologico, pastorale*, 4ª ed. aggiornata e ampliata, Leumann (Torino), Elle Di Ci, 1994, p. 144.

same religious, social and familial problems as it did in the past. However, there is no doubt that if the Church were to abolish the canonical form, then statutory marriages, and in many cases even the customary marriages, would for the baptized be both valid and sacramental. This would be so, not simply because a civil and customary law was being observed, but rather because there was nothing missing from what was necessary or required in ecclesiastical legislation for the validity of such a marriage.

During the International Symposium held at the University of the Holy Spirit, Kaslik, Lebanon, 24-29 April 1995, Navarrete pointed out that the Latin Church sees the *sacredness* of the celebration of the sacrament of marriage in the fact that each celebration of a valid marriage between the baptized is a sacrament. For him, the celebration of a valid marriage between the baptized is an ecclesiastical fact placed in the act by the *ministeriality* of two baptized faithful who act within the context of the ethical requirements of the institution of marriage and in conformity with the positive law of the Church which regulates the capacity of the persons and the validity of the celebrating act of marriage-sacrament. Therefore, such an act, even if celebrated in secret and without witnesses, as might have happened before the Council of Trent, is an act radically ecclesial and sacred in which the sacramental ministeriality of the Church is carried out through the two baptized spouses.[58]

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[58] "[...] che la Chiesa latina vede la *sacralità* della celebrazione del sacramento del matrimonio proprio nel fatto che ogni celebrazione di matrimonio valido fra battezzati è sacramento, quindi un fatto ecclesiale posto in atto dalla *ministerialità* dei due fedeli battezzati, che agiscono nel quadro delle esigenze etiche dell'istituto del matrimonio e nell'osservanza della legislazione positiva della Chiesa che regola l'abilità delle persone e la validità dell'atto celebrativo del matrimonio-sacramento. Perciò tale atto, anche se celebrato in segreto e senza testimoni, come poteva accadere prima di Trento, è un atto radicalmente ecclesiale e sacro, nel quale si attua la ministerialità sacramentale della Chiesa attraverso i due sposi battezzati. [...] 1) approfondimento del fondamento teologico del principio dell'inseparabilità fra patto coniugale e sacramento nel matrimonio cristiano, sotto la prospettiva dell'inserimento per mezzo del battesimo nella Nuova Alleanza e dell'assunzione dell'amore coniugale dei battezzati nell'amore sponsale

### 3.2.1. Historical synopsis

Roman Law regarded marriage as a relatively private matter. There was no special formula, no registration and no requirement of intervention by any public official. The law regulated the relationship between husband and wife once it was established, but the actual formation of the marriage bond did not require any action by a public official.

In the early days of the Church Christians lived and moved within the traditional religious and secular horizons in their understanding of marriage and in their acceptance of binding norms for it; they married as everybody else did. They did not introduce any specifically Christian pattern for marrying but simply followed the customs of the place where they lived or of the ethnic group to which they belonged. There were no general laws regulating the celebration of marriage. However, the Church, already in ancient times, held that it was consent rather then cohabitation that makes a marriage, and it urged that the matrimonial contract be performed *in facie Ecclesiae*.[59] Among the earliest Church writings referring to the assistance of the priest at Christian marriage is perhaps the letter of St. Ignatius to Polycarp. He notes:

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di Cristo con la Chiesa; 2) approfondimento della dottrina del sacerdozio comune dei fedeli, alla cui luce si rafforza la dottrina secondo cui il sacramento del matrimonio sorge in forza proprio della condizione di persona radicalmente consacrata alla Trinità, che acquista ogni uomo e ogni donna con la recezione del battesimo; 3) sviluppo della dottrina sul ruolo del laicato nella Chiesa e della pluralità di carismi e di servizi, fra questi il 'ministero' proprio dei coniugi cristiani, nella costituzione della 'chiesa domestica' che è la famiglia, prima cellula della Chiesa e della società" (U. NAVARRETE, "Quaestioni sulla forma canonica ordinaria nei Codici latino e orientale," in *Periodica*, 85 [1996], pp. 498-499).

[59] See B.A. SIEGEL, *Marriage today: A commentary of the Code of Canon Law in the light of Vatican II and the ecumenical age*, 2nd ed., Staten Island, NY, Alba House, 1973, p. 197; JOYCE, *Christian marriage*, pp. 109-110; MONETA, *Il matrimonio nel nuovo diritto canonico*, p. 182; BERNHARD, "Evolution du sens de la forme de célébration du mariage," p. 195; GISMONDI, "La celebrazione del matrimonio secondo la dottrina e la legislazione canonica," p. 310.

> It is proper that bridegroom and bride would enter into marriage with the approval of the bishop, that the marriage should be according to the Lord and not according to the desires of the flesh.[60]

Tertullian is even more explicit in his reference to the priestly blessing. He asks how one could adequately express the happiness of marriage which has been blessed by the priest. He writes:

> Whence are we to find adequate words to tell fully of the happiness of that marriage which the Church unites and the oblation confirms, benediction seals and the angels announce, the Father holds for ratified?[61]

In his *De pudicitia*, Tertulian states that secret marriages, i.e., those not previously professed before the Church, are in danger of being considered adultery and fornication:

> For us secret marriages, i.e., such which are not publicly professed before the Church, are in danger of being considered as adultery and fornication.[62]

Pope Siricius also makes a reference to the priestly blessing when he notes that:

> [...] if the blessing which the priest gives to the woman who is about to enter on conjugal life be violated by a breach, the faithful regard her act as a sacrilege.[63]

Pope Innocent I seems also to confirm the importance of the priestly blessing. He writes:

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[60] "Decet vero, ut sponsi et sponsae de sententia episcopi conjugium faciant, ut nuptiae secundum Dominum sint, non secundum cupiditatem" (ST. IGNATIUS, *Epistola ad Polycarpum*, c. 5, in J. MIGNE, *Patrologiae cursus completus*, Series graeca, vol. 5, Parisiis, Excudabat Migne, 1857-1866, p. 723).

[61] "Unde sufficiamus ad enarrandam felicitatem ejus matrimonii, quod Ecclesia conciliat, et confirmat oblatio, et obsignat benedictio, angeli renuntiant, Pater rato habet?" (TERTULLIAN, *Ad uxorem*, II, c. 9, in J. MIGNE, *Patrologiae cursus completus*, Series latina, vol. 1, Parisiis, Excudabat Migne, 1844-1864, p. 1302).

[62] "Ideo penes nos occultae quoque conjuctiones, id est non prius apud Ecclesiam professae juxta moechiam et fornicationem judicari periclitantur" (TERTULLIAN, *De pudicitia*, c. 4, in MIGNE, *Patrologiae cursus completus*, Series latina, vol. 2, p. 987).

[63] "[...] quia illa benedictio, quam nupturae sacerdos imponit, apud fideles cujusdam sacrilegii instar est, si ulla transgressione violetur" (SIRICIUS, *Epistolae et decreta, Ad Himerium*, c. 4, in MIGNE, *Patrologiae cursus completus*, Series latina, vol. 13, pp. 1136-1137).

> [...] it is taught that the blessing which is conferred on the bridal pair by the priest [...] is an observance of a law instituted long since by God.[64]

However, in the light of the testimony of the early centuries and in the unanimous opinion of various scholars, the assistance of the priest at a Christian marriage was not required for validity.[65] Therefore, many marriages were entered into not "*in facie ecclesiae*" but privately, i.e., without any blessing or solemnities. Such marriages were called "clandestine marriages."[66]

Clandestine marriages, though forbidden, have existed for centuries. Until the Council of Trent, the Church accepted them as valid and did not declare them void. Gratian bears testimony to this practice when he says:

> Marriages which are contracted secretly are not denied to be marriages, nor is a dissolution of the union ordered, provided such can be established by the confession of both parties. But they are forbidden, for should one of the parties repent of the marriage, the judge cannot accept the confession of the other person as proof of the marriage.[67]

As Gratian noted, the Church, despite any doubt regarding the validity of clandestine marriages, had to face many difficulties. The problem of clandestine marriages became

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[64] "[...] cum benedictio, quae per sacerdotem super nubentes imponitur, [...] formam tenuisse legis a Deo antiquitus institutae doceatur" (INNOCENTIUS I, *Epistolae et decreta, Ad Victricium*, c. 6, in MIGNE, *Patrologiae cursus completus*, Series latina, vol. 20, p. 475).

[65] See J.A. ABBO, "A change in the form of marriage," in *Priest*, 19 (1963), p. 670; J.C. BARRY, "The Tridentine form of marriage: Is the law unreasonable?" in *The Jurist*, 20 (1960), pp. 160-161; J.G. CHATMAN, "Evolution of the juridical form of marriage in the Latin rite," in *The Jurist*, 16 (1956), p. 298.

[66] See CARBERRY, *The juridical form of marriage*, pp. 3-4.

[67] "Coniugia, quae clam contrahuntur, non negantur esse coniugia, nec iubentur dissolui, si utriusque confessione probari poterunt: uerumtamen prohibentur, quia mutata alterius eorum uoluntate, alterius confessione fides iudici fieri non potest" (*Corpus iuris canonici*; vol. 1, Editio lipsiensis secunda post Aemilii Ludouici Richteri curas ad librorum manu scriptorum et editionis romanae fidem recognouit et adnotatione critica instruxit Aemilius Friedberg, Lipsiae, Ex Officina Bernhardi Tauchnitz, 1879, C. XXX, q. 5, c. 9).

acute during the Middle Ages, resulting in serious harm to Christian communities.[68] Therefore, the Church, in order to eliminate such harm, began to enact strict legislation against clandestine marriages. Alexander III forbade secret celebration of marriages. Likewise, he decreed the penalty of suspension of three years for any priest who would secretly bless such a marriage.[69] The Lateran Council IV in 1215 required publication of banns for those entering marriage in the entire Latin Church.[70] The requirement of publishing banns was entrusted to local bishops and pastors, thereby demonstrating that it was they who would henceforth be responsible for approving marriages within their dioceses and parishes. The Council, with its sanction of suspension against any priest celebrating a marriage not properly conducted, sought not only to oblige pastors to publish banns, but also to prevent the faithful from having their marriages celebrated without due publication and approval. These requirements were of a great importance for the verification of marriages in the external forum, particularly with regard to proof of the exchange of consent.

### 3.2.1.1. Council of Trent

As already noted, clandestine marriages had harmful spiritual and social repercussions. In order to solve once and for all the perennial problem of clandestine marriages, the Council of Trent, on 11 November 1563, during the twenty-fourth session,

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[68] See BEAL, "Marriage," p. 1326; BERSINI, *Il diritto canonico matrimoniale*, p. 145; JOYCE, *Christian marriage*, p. 107; MCAREAVEY, *The canon law of marriage and the family*, p. 136;

[69] See Compilatio II, *De clandestina desponsatione*, IV, 3, c. 3.

[70] See CONCILIUM LATERANENSE IV, *de poena contrahentium clandestine matrimonia*, c. 51. English trans. in TANNER, *Decrees of the Ecumenical Councils*, vol. 2, p. 258. See also CARBERRY, *The juridical form of marriage*, pp. 18-19; ESPEN, *The canonical form of marriage*, pp. 17-19; JOYCE, *Christian marriage*, p. 111; BARRY, "The Tridentine form of marriage," p. 162.

issued the *Tametsi* decree which prohibited clandestine marriages.[71] The *Tametsi* decree first recognized the sufficiency of consent for a valid marriage.

> There is no doubt that secret marriages, entered by free consent of the parties, are true and valid marriages as long as the church has not made them null. Hence those are worthy of condemnation, and the holy Council condemns them under anathema, who deny that they are true and valid, and falsely assert that marriages contracted by children still at home without the consent of their parents are null, and that the parents can make them either valid or invalid. Nevertheless, the holy Church of God has always detested and prohibited such marriages for the best of reasons.[72]

Then the Council explained why it made the validity of marriage dependent on a legal form:

> Now, the Council recognizes that such prohibitions have been ineffective owing to human disobedience, and weighs up the serious sins that arise from these secret marriages, especially on the part of those who persist in a state of damnation in that they have deserted a first wife married in secrecy and have publicly contracted marriage with another woman and live with her in a permanent state of adultery. The Church, in that it does not judge about what is not public, is unable to treat this evil unless it uses a more effective remedy [...][73]

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[71] See J.F. CASTAÑO, *Il sacramento del matrimonio*, 2[da] ed., Roma, Tipolitografia P. Gianfranco, 1992, p. 408; A.C. JEMOLO, *Il matrimonio nel diritto canonico: dal concilio di Trento al Codice del 1917*, Bologna, Il Mulino, 1993, p. 48; E.A. FUS, *The extraordinary form of marriage according to canon 1098: A historical synopsis and a commentary*, Canon Law Studies, No. 348, Washington, DC, Catholic University of America, 1954, p. 24; JOYCE, *Christian marriage*, p. 123; MACKIN, *What is marriage?*, p. 196; CARBERRY, *The juridical form of marriage*, pp. ix, 23; CHATMAN, "Evolution of the juridical form of marriage in the Latin rite," p. 298.

[72] "Tametsi dubitandum non est, clandestine matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu ecclesia ea irrita non fecit, et proinde iure damnandi sint illi, ut eos sancta synodus anathemate damnat, qui ea vera ac rata esse negant quique falso affirmant, matrimonia, a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse: nihilominus sancta Dei ecclesia ex iustissimis causis illa semper detestata est atque prohibuit" (CONCILIUM TRIDENTINUM, sess. XXIV, *de reformatione matrimonii*, c. 1; English trans. in TANNER, *Decrees of the Ecumenical Councils*, vol. 2, p. 755).

[73] "Verum cum sancta synodus animadvertat, prohibitiones illas propter hominum inobedientiam iam non prodesse, et gravia peccata perpendat, quae ex eisdem clandestinis coniugiis ortum habent, praesertim vero eorum, qui in statu damnationis permanent, dum, priore uxore, cum qua clam contraxerant, relicta, cum alia palam contrahunt et cum ea in perpetuo adulterio vivunt; cui malo cum ab ecclesia, quae de occultis non iudicat, succurri non posit, nisi efficacius aliquod remedium adhibeatur [...]" (ibid.).

In order to correct these evils, the Council, therefore, laid down the provision that a canonical form of marriage was to be required for validity:

> The holy synod now renders incapable of marriage any who may attempt to contract marriage otherwise than in the presence of the parish priest or another priest, with the permission of the parish priest or the Ordinary, and two or three witnesses: and it decrees that such contracts are null and invalid, and renders them so by this decree.[74]

Despite the cogency of its reasoning, the same Council in practice did not make the canonical form absolutely binding. In fact, the decree was not to have force except in those places in which it had been promulgated.[75] It had to be published by the bishop of the diocese and could not be published by a pastor without the approval of the bishop. Even then its effect was to be limited by the insertion of a clause which declared that the decree would become binding only after thirty days following its promulgation.[76] This avoided the invalidation of all Christian marriages, Protestant or Catholic, which would have resulted from universal promulgation. As a result, the decree was never promulgated

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[74] "Qui aliter, quam praesente parocho vel alio sacerdote, de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt: eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et huiusmodi contractus irritos et nullos esse decernit, prout eos praesenti decreto irritos facit et annulat" (ibid., p. 756).

[75] For a list of the places where *Tametsi* was duly promulgated and where it was somewhat derogated from, see Z. ZITELLI, *Apparatus iuris ecclesiastici iuxta recentissima SS. Urbis Congregationum resolutiones in usum episcoporum et sacerdotum praesertim apostolico munere fulgentium auctore Zephyrino Zitelli*, ed. tertia, Romae, Fridericus Pustet, 1903, pp. 428-434.

[76] See C.J. CRONIN, *The new matrimonial legislation: A commentary on the decree of the Sacred Congregation of the Council, Ne temere, published on the 2nd of August 1907*, London, Washbourne, 1908, p. 27; L. BENDER, *Forma iuridica celebrationis matrimonii: commentarius in canones 1094-1099*, Roma, Desclée & C - Editori Pontifici, 1960, pp. 23-24; CARBERRY, *The juridical form of marriage*, p. 25; ESPEN, *The canonical form of marriage*, pp. 23-24; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, pp. 622-623; J.I. O'CONNOR, "Should the present canonical form be retained for the validity of marriage?" in *The Jurist*, 25 (1965), p. 67; BARRY, "The Tridentine form of marriage," p. 163; CHATMAN, "Evolution of the juridical form of marriage in the Latin rite," p. 301.

in Protestant dominated areas and, therefore, they continued to be subject to the perplexities of the former law.[77]

### 3.2.1.2. Period from the decree *Tametsi* up to the decree *Ne temere*

The decree *Tametsi* did not make any evident distinction between baptized Catholics and non-Catholics. In consequence, it seemed that even baptized non-Catholics were subject to the external form of marriage as determined by the decree. This omission of any expressed distinction certainly appeared to imply that marriages of baptized non-Catholics, which were not contracted in accordance with the external form established in the *Tametsi*, were invalid. Two hundred years later, on 4 November 1741, Pope Benedict XIV issued a document which became known as the Benedictine Declaration.[78] It relaxed the Tridentine law by exempting non-Catholics from the canonical form when they married among themselves or married Catholics. This was first issued for countries now known as Belgium and Holland, but it was later extended to other places.[79] Later, there

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[77] See SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 623; E. DUNDERDALE, "The canonical form of marriage: anachronism or pastoral necessity?" in *StC*, 12 (1978), p. 41; BEAL, "Marriage," p. 1326; O'CONNOR, "Should the present canonical form be retained for the validity of marriage?" p. 67; BARRY, "The Tridentine form of marriage," p. 163; GALLEN, "Proposal for a modification in the juridical form of marriage," p. 315.

[78] For the full text of the letter, see *Codicis iuris canonici fonts, cura Emi Petri Card. Gasparri editi* (= *Fontes*), vol. II, Romae, Typis polyglottis Vaticanis, 1926-1939, n. 394 (BENEDICTUS XIV, ep. *Singulari*, 9 febr. 1749). See also BENDER, *Forma iuridica celebrationis matrimonii*, pp. 24-25; CARBERRY, *The juridical form of marriage*, p. 33; ESPEN, *The canonical form of marriage*, p. 27; JEMOLO, *Il matrimonio nel diritto canonico*, p. 86; JOYCE, *Christian marriage*, pp. 134-135; BARRY, "The Tridentine form of marriage," p. 163; CHATMAN, "Evolution of the juridical form of marriage in the Latin rite," p. 301.

[79] For a list of the places to which the Benedictine Declaration was extended, see ZITELLI, *Apparatus iuris ecclesiastici*, pp. 435-436; see also CARBERRY, *The juridical form of marriage*, pp. 31-37; ESPEN, *The canonical form of marriage*, pp. 26-30; JEMOLO, *Il matrimonio nel diritto canonico*, pp. 86-87.

were other concessions granted to various places, especially in exempting mixed marriages from the necessity of the canonical form of *Tametsi* for validity.[80]

### 3.2.1.2. Decree "*Ne temere*"[81]

Despite the developments related to the stipulations of *Tametsi* after the Council of Trent, there was still great need and much room for reform in church law on the form of marriage. Clandestine marriages, which the Church had condemned for centuries and which it tried to abolish, were still being contracted, both culpably or inculpably. Therefore, it was not surprising that the Holy See was asked by many bishops of the world to modify the *Tametsi* decree. Heeding this request, the Holy See referred the matter to the Congregation of the Council for its opinion and pertinent suggestions. On 20 May 1905, the Congregation assigned two canonists to revise the *Tametsi* decree and to present statements from which a new decree could be drawn up.[82] This new decree was to be framed with the following four principles kept in mind: a) that the parish priest should assist voluntarily at the marriage by request in order to preclude being surprised by parties exchanging their consent before an unwilling parish priest; b) that no parish priest should assist at the marriage of those who are not his parishioners, nor even of his own parishioners who have resided outside the parish long enough to contract an impediment, unless the freedom of the contracting parties is proved *ad tramitem iuris*; c)

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[80] See ZITELLI, *Apparatus iuris ecclesiastici*, pp. 437-438.

[81] For the full text of the decree, see SACRED CONGREGATION OF THE COUNCIL, Decree, *Ne temere*, 2 August 1907, in *ASS*, 40 (1907), pp. 525-530, and also *Fontes*, vol. VI, n. 4340 (S.C.C., decr. *Ne temere*, 2 aug. 1907).

[82] See CONGREGATION OF THE COUNCIL, *Relatio actorum quae praecesserunt decretum de sponsalibus et matrimonio*, in *ASS*, 40 (1907), p. 531; CARBERRY, *The juridical form of marriage*, p. 38; CRONIN, *The new matrimonial legislation*, pp. 19, 22; ESPEN, *The canonical form of marriage*, p. 31.

under these two conditions, that anyone may marry in the presence of the Ordinary or the parish priest plus two or three witnesses; d) that the new law should be universal, i.e., it should affect all Catholics throughout the world.[83] In fact, it was only on 2 August 1907 that the statements of the experts were finally revised, formulated into law and promulgated by Pope Pius X in a decree which, from its opening words, came to be known as the *Ne temere*.[84] This decree became effective on the following Easter Sunday, 19 April 1908.[85] This decree had the same significance for marriage legislation as the *Tametsi* decree of the Tridentine Council.[86]

The decree *Ne temere* reorganized *quasi ex novo* the legislation which regulated the celebration of marriage: a) it extended the law on the form of marriage to the entire Latin Church; b) it made the ordinary canonical form necessary for the validity of marriages for all those baptized in or received into the Catholic Church; c) it simplified the rule for valid assistance at marriage with its basis changed from personal to territorial jurisdiction designating thus as *testis qualificatus* the pastor or Ordinary of the place where marriage was to take place rather than the pastor of the parties; d) it abolished all preceding dispensations and extensions of the Benedictine Declaration, with the

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[83] See *Relatio actorum*, pp. 531-532; CARBERRY, *The juridical form of marriage*, p. 39; CRONIN, *The new matrimonial legislation*, p. 23; ESPEN, *The canonical form of marriage*, p. 31; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 623; BEAL, "Marriage," pp. 1326-1327.

[84] See J.B. WU, *De forma canonica extraordinaria celebrationis matrimonii (Can. 1098, CIC)*, Romae, Pontificia Universitas Urbaniana, de Propaganda Fide, 1956, pp. 25-26; CARBERRY, *The juridical form of marriage*, p. 39; CASTAÑO, *Il sacramento del matrimonio*, p. 411; CRONIN, *The new matrimonial legislation*, p. 25; JEMOLO, *Il matrimonio nel diritto canonico*, p. 91.

[85] See BENDER, *Forma iuridica celebrationis matrimonii*, p. 27; CARBERRY, *The juridical form of marriage*, p. 39; CRONIN, *The new matrimonial legislation*, p. 43; ESPEN, *The canonical form of marriage*, p. 31; FUS, *The extraordinary form of marriage according to canon 1098*, p. 43; WU, *De forma canonica extraordinaria*, p. 26.

[86] For a detailed explanation of its impact on marriage legislation, see J. CREAGH, *A commentary on the decree Ne temere*, Baltimore, Furst, 1908; CRONIN, *The new matrimonial legislation*.

exception of the Motu proprio, *Provida*,[87] which was addressed to Germany by Pope Pius X and later extended to Hungary.[88] The exception concerned mixed marriages. In these countries mixed marriages were valid even if the decree *Ne temere* had been neglected, for the old principle of exemption was admitted. Thus the Catholic party was released from observing the canonical form. Two interpretations were given concerning the Motu proprio, *Provida*, which limited its application. The first, issued on 30 March 1908, stated that only those born in Germany, and contracted marriage there, enjoyed the exemption.[89] The second, given on 18 June 1909, declared that both parties had to be born in Germany or in Hungary.[90] In case of marriage between a person born in Germany and one born in Hungary, the form had to be observed. If neglected, the marriage was invalid. This exemption for Germany and Hungary remained in force until the 1917 Code became effective. The Code abrogated the principle of exemption in its entirety. It admitted no exceptions.

### 3.2.1.3. The 1917 Code of Canon Law[91]

Decades after the close of Vatican I, Pius X set out to accomplish the unfinished task of unifying ecclesiastical legislation. On 19 March 1904, he announced the establishment of a commission of cardinals to gather into one authoritative collection all

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[87] PIUS X, Motu proprio, *Provida*, 18 January 1906, in *ASS*, 39 (1906), pp. 81-84.

[88] See ZITELLI, *Apparatus iuris ecclesiastici*, p. 437; CRONIN, *The new matrimonial legislation*, p. 31.

[89] See SACRED CONGREGATION OF THE COUNCIL, [Response], *Responsa ad proposita dubia circa decretum de sponsalibus et matrimonio*, 28 March 1908, in in *ASS*, 41 (1908), pp. 288-289.

[90] See SACRED CONGREGATION FOR THE SACRAMENTS, [Response], *Responsa ad proposita dubia circa decretum de sponsalibus et matrimonio*, 18 June 1909, in *AAS*, 1 (1909), pp. 516-517.

[91] See F. AZNAR, "La nueva regulación de la forma canonica del matrimonio," in *Curso de derecho matrimonial y procesal para professionales del foro*, AA. VV., Salamanca, Universidad Pontificia de Salamanca, 1984, pp. 197-201.

of the laws of the Latin Church. It took thirteen years of the most painstaking work to accomplish the completion of this task. On Pentecost Sunday, 27 May 1917, Benedict XV promulgated by the Constitution, *Providentissima Mater*, the *Code of Canon Law* which came into effect on the following Pentecost Sunday, 19 May 1918. It codified, with many modifications, the then existing matrimonial law. Its provisions regarding the form of marriage was essentially a repetition of the legislation of the decree *Ne temere*. It set forth two forms for the contracting of marriage: the ordinary form, as indicated in cc. 1094-1097, and the extraordinary form, as delineated in c. 1098. The latter form was used when the ordinary form was impossible to observe. Both forms were substantial, juridical forms, each legally valid. The extraordinary form was not to be considered as a mere exception to the ordinary form. It was also a juridical form as valid as the ordinary form. Canon 1099 §2 of the Code modified some provisions of the decree *Ne temere* with regard to the ordinary form. The canon provided an exception to the obligation to follow the canonical form in the case of those born of non-Catholics, even if baptized in the Church, but who from infancy grew up in heresy or schism or infidelity or without any religion.[92]

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[92] "Firmo autem praescripto §1, n. 1, acatholici sive baptizati sive non baptizati, si inter se contrahant, nullibi tenentur ad catholicam matrimonii formam servandam; item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint" (c. 1099 §2 of *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, praefatione, fontium annotatione et indice analytico-alphabetico ab Emo Petro Card. Gasparri auctus* [= *CIC '17*] Romae, Typis polyglottis Vaticanis, 1933).

### 3.2.1.4. Period from the 1917 Code up to the 1983 Code

The legislation of the 1917 Code remained in effect until 1 August 1948, when Pius XII, with his Motu proprio, *Decretum ne temere*, abrogated the exception of c. 1099 §2[93] and decreed that henceforth, all those who were baptized in the Catholic Church were bound to the form of marriage for validity.[94] This decree became effective on 1 January 1949.

By another Motu proprio, *Ecclesiae bonum*, dated 25 December 1953, Pius XII corrected c. 2319 §1, 1°, which prescribed that those Catholics who would enter marriage in the presence of a non-Catholic minister against the prescript of c. 1063 §1 would fall under automatic excommunication reserved to the Ordinary.[95] He ordered that the words "contra praescriptum canonis 1063 §1" be deleted.[96] With the abolition of those words, it should have become clear that the excommunication prescribed in c. 2319 §1, 1° applied to any Catholic marrying "before a non-Catholic minister acting as a minister of religion."

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[93] Canon 1099 specified who was and who was not bound to the juridical form of marriage. But the application of that canon to particular cases, especially of its second paragraph, caused many problems. In each individual case, recourse to the Holy See was necessary. For problems related to the exemption from the canonical form of marriage, see E.J., MAHONEY, "Ab acatholicis nati (canon 1099)," in *Clergy Review*, 16 (1939), pp. 511-520; ID., "Questions and answers: Exemption from canonical form of marriage," in *Clergy Review*, 25 (1945), pp. 35-36; ID., "Questions and answers: Canonical form of marriage," in *Clergy Review*, 25 (1945), pp. 122-123; ID., "Questions and answers: Form of marriage under 'Ne temere'," in *Clergy Review*, 27 (1947), pp. 52-53; ID., "Correspondence *memoriale rituum* in oratories: Form of marriage under 'Ne temere'," in *Clergy Review*, 27 (1947), pp. 215-216. As for the abolition of the exception exempting from the canonical form, see BARRY, "The Tridentine form of marriage," pp. 166-167; CHATMAN, "Evolution of the juridical form of marriage in the Latin rite," pp. 308-309; O'CONNOR, "Should the present canonical form be retained for the validity of marriage?" p. 68.

[94] PIUS XII, Motu proprio, *Decretum Ne temere*, 1 August 1948, in *AAS*, 40 (1948), pp. 305-306; English trans. in *Canon Law Digest* (= *CLD*), 3 (1942-1953), pp. 463-464, here at p. 464.

[95] "Subsunt excommunicationi latae sententiae Ordinario reservatae catholici: 1° qui matrimonium ineunt coram ministro acatholico contra praescriptum c. 1063 §1" (c. 2319 §1, 1° of *CIC* '17).

[96] PIUS XII, Motu proprio, *Ecclesiae bonum* (= *EB*), 25 December 1953, in *AAS*, 46 (1954), p. 88; English trans. in *CLD*, 4 (1953-1957), pp. 424-425, here at p. 425.

Further changes in the legislation on the canonical form were introduced by the Second Vatican Council.[97] The Dogmatic Constitution on the Church, *Lumen gentium*, n. 29, opened up the possibility of deacons being authorized to assist at marriages.[98] The Decree on the Eastern Churches, *Orientalium Ecclesiarum*, in n. 18, prescribed that "when Eastern Catholics marry baptized Eastern non-Catholics the canonical form of celebration for these marriages is of obligation only for liceity. For their validity, the presence of a sacred minister is sufficient, provided that the other prescripts of canon law are observed."[99]

The Decree, *Crescens matrimoniorum*, extended the above conciliar provision of *Orientalium Ecclesiarum* to Latin Catholics when they marry non-Catholics of the Oriental rites, stating that "the canonical form of celebration is of obligation only for liceity; for validity, the presence of a sacred minister is sufficient."[100]

The Instruction, *Matrimonii sacramentum*, envisaged the possibility of dispensation from canonical form in the case of mixed marriages, but its concession was reserved to the Holy See. This instruction also abolished the penalty of excommunication

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[97] See F. AZNAR, "La revision de la forma canonica del matrimonio en el Concilio Vaticano II," in *Revista española de derecho canonico*, 38 (1982), pp. 507-534; ID., "La nueva regulación de la forma canonica del matrimonio," pp. 201-203.

[98] *LG* 29; FLANNERY I, p. 42.

[99] SECOND VATICAN COUNCIL, Decree on the Eastern Churches, *Orientalium Ecclesiarum* (= *OE*), 21 November 1964, in *AAS*, 57 (1965), pp. 76-85; English trans. in FLANNERY I, pp. 525-538, here at p. 531.

[100] SACRED CONGREGATION FOR THE ORIENTAL CHURCHES, Decree, *Crescens matrimoniorum*, 22 February 1967, in *AAS*, 59 (1967), pp. 165-166; English trans. in *CLD*, 6 (1963-1967), pp. 605-606, here at p. 606.

*latae sententiae* (c. 2319 §1, 1°) incurred by those who celebrated marriage before a non-Catholic minister.[101]

Pope Paul VI, by his Motu proprio, *Episcoporum muneribus*, in accordance with the prescript of the Decree, *Christus Dominus*, n. 8b, reserved to himself the authority to dispense "from the form prescribed by law for validly contracting marriage."[102] However, in his Motu proprio, *Matrimonia mixta*, Paul VI granted to local Ordinaries the faculty of dispensing from the obligation of the canonical form in the case of mixed marriages "if serious difficulties stand in the way of the observance of the canonical form."[103] A later authentic interpretation determined that the local Ordinary could dispense from the canonical form also in case of a marriage between a Catholic and a party who was baptized Catholic but later left the Church and adhered to another religion.[104]

After the promulgation of the new Code, the Commission for Interpretation has decreed that apart from urgent danger of death, the diocesan bishop cannot, in virtue of c. 87 §1, dispense from the observance of the canonical form when the marriage involves two Catholics.[105] However, this does not affect the local Ordinary's competence to

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[101] SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction, *Matrimonii sacramentum*, 18 March 1966, in *AAS*, 58 (1966), pp. 235-239; English trans. in *CLD*, 6 (1963-1967), pp. 592-596, here at pp. 595, 596.

[102] PAUL VI, Motu proprio, *De episcoporum muneribus*, 15 June 1966, in *AAS*, 58 (1966), pp. 467-472; English trans. in *CLD*, 6 (1963-1967), pp. 394-400, here at p. 399.

[103] PAUL VI, Motu proprio, *Matrimonia mixta*, 31 March 1970, in *AAS*, 62 (1970), pp. 257-263, here at p. 261; English trans. in *CLD*, 7 (1968-1972), pp. 712-718, here at p. 716.

[104] See THE PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF THE SECOND VATICAN COUNCIL, [Response], *Responsa ad proposita dubia de dispensatione a forma canonica celebrationis matrimonii mixti*, 11 February 1972, in *AAS*, 64 (1972), p. 397; English trans. in *CLD*, 7 (1968-1972), p. 750.

[105] See THE PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, *De dispensatione a forma canonica matrimonii*, 5 July 1985, in *AAS*, 77 (1985), p. 771.

dispense the canonical form if one of the Catholic parties now adheres to another religion.

In his Motu proprio, *Sacrum diaconatus ordinem*, among the other functions assigned to them, Paul VI authorized deacons "to assist at and bless marriages in the name of the Church when there is no priest present, with delegation from the bishop or the pastor, so long as everything else commanded in the Code of Canon Law [1917] is observed (cf. cc. 1095 §2 and 1096), and with no infringement on c. 1098, in which case what is said of a priest is to be understood of a deacon as well."[106]

The Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council made some clarification regarding the above provision and stated that the prescript applied not only to permanent deacons but also to those who were preparing for the priesthood.[107] It also made clear that the clause "when there is no priest present" was only for liceity and not for validity.[108] Likewise, the Commission stated that permanent deacons or deacons assigned to a certain parish could receive general delegation to assist at marriages in the parish to which they are assigned, according to c. 1096 §1 of the *CIC '17*.[109] In 1979, the Commission was asked whether a deacon, just as a priest, who, in virtue of delegation, officiates at a marriage in the name of the Church,

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[106] PAUL VI, Motu proprio, *Sacrum diaconatus ordinem*, 18 June 1967, in *AAS*, 59 (1967), pp. 697-704; English trans. in *CLD*, 6 (1963-1967), pp. 577-584, here at p. 582.

[107] See THE PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF THE SECOND VATICAN COUNCIL, [Response], *Responsum ad propositum dubium*, 26 March 1968, in *AAS*, 60 (1968), p. 363; English trans. in *CLD*, 7 (1968-1972), p. 133.

[108] See THE PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF THE SECOND VATICAN COUNCIL, [Response], *Responsum ad propositum dubium*, 4 April 1969, in *AAS*, 61 (1969), p. 348; English trans. in *CLD*, 7 (1968-1972), p. 134.

[109] See THE PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF THE SECOND VATICAN COUNCIL, [Response], *Responsum ad propositum dubium de delegatione generali diacono conferenda pro assistendo matrimonio*, 19 July 1970, in *AAS*, 62 (1970), p. 571; English trans. in *CLD*, 7 (1968-1972), p. 752.

could dispense from matrimonial impediments in the circumstances mentioned in c. 1044 of the *CIC '17*; the response was affirmative.[110]

### 3.2.1.5. The 1983 Code of Canon Law[111]

The new Code has retained the strongly institutional orientation of the *CIC '17*, but the insights of Vatican II concerning the dignity and rights of individual persons have made substantial inroads into the old structures. The result is a somewhat uneasy coexistence of two diverging trends: one upholding the primacy of the institution, the other the importance of human persons. Also the understanding of marriage now appears in a broad religious context through the doctrine of covenant, although the highly juridical language of the contract is still present in many traditionally formulated canons.

Regarding the canonical form of marriage, the new Code essentially reproduces the legislation of the *CIC '17*. However, it does not neglect to include some important innovations. The *CIC '83* devotes sixteen canons to the form of marriage. These canons deal with the constitutive elements of canonical form (c. 1108); the requisites for valid assistance at marriage (cc. 1109-1112); the requisites for licit assistance at marriage (cc. 1113-1115); the extraordinary form of marriage (c. 1116); the subjects bound by the canonical form of marriage (c. 1117); the place of marriage celebration (c. 1118); the liturgical form of marriage (cc. 1119-1120); and the recording of marriages (cc. 1121-1123).

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[110] See THE PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF THE SECOND VATICAN COUNCIL, [Response], *Responsa ad proposita dubia de potestate diaconi dispensandi in assistendo matrimonio*, 21 December 1979, in *AAS*, 72 (1980), p. 105; English trans. in *CLD*, 9 (1978-1981), pp. 622-623.

[111] See E. BAJET, "La forma del matrimonio en el proyecto de revisión del 'Codex iuris canonici'," in *Ius canonicum*, 17 (1977), pp. 173-211; AZNAR, "La nueva regulación de la forma canonica del matrimonio," pp. 204-236.

### 3.2.2. Terms explained

The *form* of marriage in general means the formalities which are required for the expression of consent. The *canonical form* of marriage, as prescribed in cc. 1108-1123 of the new Code, is presented as an entity which is extrinsic to marriage itself and purely legal in nature. What, in fact, is the canonical form of marriage? It is the complex of external rituals and ceremonies which, in virtue of positive ecclesiastical law, must be part of the exchange of consent.[112] According to c. 1108 §1,[113] the canonical form is required for the valid and lawful contracting of marriage. It means that when a Catholic marries another Catholic or when a Catholic marries a non-Catholic, whether baptized or not, such a marriage must be contracted in the presence of an authorized minister of the Church (the local Ordinary or the local parish priest or a priest or a deacon delegated by either of them), with the assistance of two witnesses.

The *sacramental form*, according to the most common opinion, is constituted by the consent of two baptized parties, which, as a reciprocal offering and donation of oneself, is actually the *matter* of the sacrament while the acceptance of that offering is its *form*.[114] The *non-sacramental form* is based on the consent of two parties of which one is baptized and

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[112] See J. CARBERRY, *The juridical form of marriage*, p. 5; CASTAÑO, *Il sacramento del matrimonio*, p. 407.

[113] "Only those marriages are valid which are contracted in the presence of the local Ordinary or the pastor or a priest or deacon delegated by either of them, who assist, and in the presence of two witnesses, according to the rules expressed in the following canons, with due regard for the exceptions mentioned in cc. 144, 1112 §1, 1116 and 1127 §§2 and 3" (c. 1108 §1 of *CIC '83*).

[114] See J.M. HUELS, *The pastoral companion: A Canon Law handbook for Catholic ministry*, 3rd ed., revised and updated, Quincy, IL, Franciscan Press, 2002, p. 181.

another is not or of two non-baptized parties by which they express their acceptance of one another as husband and wife.[115]

The *liturgical form* (cc. 1119-1120) consists of the rites and ceremonies which accompany Christian marriage, expressing thus its ecclesial and sacramental character. These ceremonies which are contained in *Ordo celebrandi matrimonium*[116] are not "ad validitatem" but only "ad liceitatem." The Bishops' Conferences have the faculty to draw up their own ceremonial rites of matrimony in accordance with the Christian spirit and the traditional customs and practices of a particular people insofar as such are reviewed and approved by the Holy See. There is also a provision that the person assisting at a marriage must ask and receive the manifest consent of the contracting parties.[117]

The *assistant* is the person who is deputed by the Church to request the parties to declare their consent and to receive it in the name of the Church. The term *assistant* is used in a technical sense throughout the canons on marriage. It refers to the so-called *testis qualificatus* (qualified witness). In a strict sense of the term, no other persons present, not even the two required witnesses, should be called assistants.

### 3.2.3. Forms of marriage

From the terms explained in the foregoing section it is clear that the canonical form of marriage must be distinguished from the sacramental, non-sacramental and

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[115] See idid.

[116] See THE CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Rituale Romanum, ex decreto Sacrosancti Oecumenici Concilii Vaticani II renovatum, auctoritate Pauli PP. VI editum, Ioannis Pauli PP. II cura recognitum: Ordo celebrandi matrimonium*, ed. typica altera, Città del Vaticano, Typis polyglottis Vaticanis, 1991.

[117] For a very good article regarding the problems raised by changing theological and legal views on the liturgical celebration of marriage, see K. RICHTER, "The liturgical celebration of marriage. The problems raised by changing theological and legal views of marriage," in *Concilium*, 9-2 (1973), pp. 72-87.

liturgical forms. The sacramental form consists of that part of the sacramental sign by which a baptized man and a baptized woman express their acceptance of one another as husband and wife. The non-sacramental form embodies the exchange of consent by which a baptized person and a non-baptized person or two non-baptized persons accept one another as husband as wife. The liturgical form comprises the rites and ceremonies which accompany the exchange of consent. The canonical form consists of those legal formalities which, if not fulfilled, render marriage invalid even when there might have been sufficient natural consent. It is possible to observe the sacramental or liturgical form without observing the canonical form.

We can say that the fundamental structure of the canonical form of the *CIC '17* was brought unchanged into the *CIC '83*. Both Codes contain the two forms of celebration of marriage – *ordinary* and *extraordinary*.

### 3.2.3.1. Ordinary form of marriage

According to c. 1108, the constitutive elements of the ordinary form of marriage are: a) the manifestation of consent; b) the presence of the *testis qualificatus*—qualified witness—at marriage; c) the presence of the two additional witnesses.

#### 3.2.3.1.1. Manifestation of consent

Consent is the essential constitutive element of marriage (c. 1057 §1).[118] It presupposes the intrinsic requisites relative to the natural and juridical capacity of the

[118] See PAUL VI, Allocution to the Roman Rota, 9 February 1976, in *AAS*, 68 (1976), pp. 204-208; English trans. in WOESTMAN, *Papal allocutions*, pp. 133-137, here at p. 135; A.M. ABATE, "Il consenso matrimoniale nel nuovo Codice di diritto canonico," in *Apollinaris*, 59 (1986), pp. 453-454.

contracting parties (c. 1095),[119] and the absence of negative influences which render consent defective (cc. 1096, 1097, 1098, 1099, 1101, 1102 and 1103).[120] However, we must also address the extrinsic factors affecting the external manifestation of consent itself. Internal consent alone is not sufficient. Canon 1104 §1 prescribes that consent must be manifested through words or signs which unequivocally express the will to enter into matrimony. Such manifestation is absolutely necessary for the validity of the matrimonial act. The liturgical books provide formulas ordinarily used in the exchange of consent. The use of these formulas is not binding for validity, thus allowing for formulas which may be more fitting or expressive of particular cultures. The conference of bishops has the authority to make such an adaptation, which may be promulgated following the *recognitio* of the Holy See.[121] Sometimes the parties compose their own consent formula. However, such a personalized formula must clearly express, without reservation, the object of consent, namely, the nature of the marriage covenant and the properties of unity and indissolubility.

### 3.2.3.1.2. The presence of the *testis qualificatus* at marriage[122]

As a general principle, we can state that for validity, marriage must take place *in facie Ecclesie*, that is:

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[119] See ABATE, "Il consenso matrimoniale," pp. 454-460.

[120] See ibid., pp. 460-462 and also 485-491.

[121] See THE CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Ordo celebrandi matrimonium*, n. 41, pp. 9-10.

[122] See A.M. ABATE, "La forma della celebrazione del matrimonio nel nuovo Codice di diritto canonico," in *Apollinaris*, 59 (1986), pp. 134-142.

a) with the assistance of a duly authorized ecclesial witness, i.e., the local Ordinary or the pastor of the place by virtue of their office, or a priest or deacon delegated by either of them;

b) and simultaneously in the presence of two witnesses.

Besides the Roman Pontiff who, by virtue of the primacy conferred by Christ to Peter and his successors, "enjoys supreme, full, immediate and universal ordinary power" (c. 331), there are the Ordinaries of the place who also enjoy the faculty to assist at the celebration of marriage. According to c. 134 §2, the local Ordinaries are:

- the diocesan bishop (c. 381) and those who, according to c. 368, are equivalent in law to a diocesan bishop: the territorial prelate and abbot (cc. 381 §2, 368, 370), the apostolic vicar and prefect (cc. 368, 371, 381 §2), the apostolic administrator of an apostolic administration (cc. 381 §2, 368, 371 §2), and the diocesan administrator (427 §1);
- the coadjutor bishop and the auxiliary bishop equipped with special faculties (cc. 405 §2, 406 §1);
- the vicar general (cc. 475, 479, 134 §1) and the episcopal vicars for their particular part of the territory or other area of competence (cc. 476, 479 §2, 134);
- those who replace the diocesan bishop or his equivalent during the vacancy of the episcopal see (cc. 426, 134 §1) or when the incumbent is impeded in the sense of cc. 412-413. [123]

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[123] See L. CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria: manuale giuridico-pastorale*, Roma, Edizioni Dehoniane, 1990, pp. 270-271.

Parish priests also have the faculty by law itself to assist at marriages (c. 530, 4°). The parish priest is the proper pastor of the parish community entrusted to him by the diocesan bishop (c. 519). Equivalent to a parish priest are:

- the personal parish priest, i.e., a priest who is appointed as pastor of a personal parish (c. 1110);[124]
- the quasi parish priest, i.e., a priest who is entrusted with the pastoral care of a quasi-parish (c. 516 §1);
- the parochial administrator, i.e., a priest who is given pastoral charge of a vacant or impeded parish (cc. 540 §1, 539);
- the parochial vicar who assumes the pastoral care of a parish during the temporary absence of the parish priest or the priest who is responsible for the pastoral care of a parish (cc. 541 §1, 533 §3, 549);[125]
- the priests entrusted *in solidum* with a parish or parishes (cc. 543 §1, 517 §1).

The faculty of the local Ordinary and of the parish priest to assist validly at marriage is contingent upon several conditions:

- they must have been duly appointed and be actually in office (c. 147);
- they must not be excommunicated, suspended or under interdict (c. 1109);
- they must act within the area of their competence; for instance, a territorial pastor within his territory; a personal pastor only in relation to his subject(s) (cc. 1109, 1110);

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[124] See G.S. SARTORI, "La parrocchia personale nell'attuale disciplina della Chiesa," in *Quaderni di diritto canonico*, 2 (1989), pp. 165-173.

[125] See M. RIVELLA, "Il vicario parrocchiale quando il parroco non c'è," in *Quaderni di diritto canonico*, 5 (1992), pp. 35-38; G. TREVISAN, "Il vicario parrocchiale e l'assistenza ai matrimoni," in *Quaderni di diritto canonico*, 5 (1992), pp. 39-46.

- they must still validly hold office (c. 184).

Neither cardinals (c. 357) nor papal legates (c. 366, 1°) enjoy the faculty to assist at marriages. Likewise, the metropolitan bishops have no faculty to assist at marriages in suffragan dioceses (c. 436). They always need delegation from a competent authority.[126]

Although the faculty to act as an official witness at a marriage is normally reserved to priests and deacons, it is not confined solely to those in sacred orders. In cases of a real lack of priests and deacons, the faculty to assist at marriages as a qualified witness can be delegated also to lay persons.[127]

The *testis qualificatus* of a marriage must not only be physically present but also be an active and willing participant in the event. This active presence consists of asking for and receiving, in the name of the Church, the manifestation of consent from the contracting parties.[128] Thus, if a priest (or another duly authorized person) simply stood before the couple while they were manifesting their consent and refrained from either asking for it or in fact receiving it, he would not be "assisting canonically" at the marriage and, therefore, such a marriage would be invalid. However, this function does not constitute an act of jurisdiction but simply an act of witnessing in the name of the Church the celebration of marriage in which the contracting parties are the ministers.[129]

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[126] See CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 271; A. TANASINI, "Forma del matrimonio," in *Matrimonio e disciplina ecclesiastica: XXI incontro studio, Passo della Mendola – Trento, 4 luglio – 8 luglio 1994*, a cura di Gruppo italiano docenti di diritto canonico, Milano, Glossa, 1996, p. 118.

[127] See THE CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Ordo celebrandi matrimonium*, n. 25, p. 6.

[128] See *Ne temere*, pp. 527-528; MONETA, *Il matrimonio nel nuovo diritto canonico*, p. 191; R.N. VALLS, "The form of the celebration of marriage," in *Code of Canon Law annotated*, p. 864; ABATE, "La forma della celebrazione del matrimonio," p. 134; BEAL, "Marriage," p. 1328; TANASINI, "Forma del matrimonio," pp. 117-118.

[129] See VALLS, "The form of the celebration of marriage," p. 864.

### 3.2.3.1.2.1. Delegation of the faculty to assist at marriages

The legislation regarding the delegation of the faculty to assist at marriages has undergone notable changes. According to c. 1096 §1 of the *CIC '17*, the general delegation could be granted only to parochial vicars for the parish to which they were assigned and it concerned the validity of marriage. This norm was later extended and applied to a deacon "who was stably and lawfully assigned to a certain parish."[130] In the new Code, the possibility of general delegation has been extended considerably. The local Ordinary and the pastor, as long as they validly hold office, "can delegate to priests and deacons the faculty, even a general one, to assist at marriages within the confines of their territory" (c. 1111 §1). Canon 1111 §2 prescribes the requirements for the concession of delegation: (a) it must be given expressly to specific persons;[131] (b) in a case of a special delegation, it is to be given for a specific marriage;[132] (c) and in case of general delegation it is to be given in writing.[133] These three requirements are necessary for validity. However, the canon does not speak of

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[130] See THE PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE DECREES OF THE SECOND VATICAN COUNCIL, [Response], *Responsum ad propositum dubium*, 19 July 1970, in *AAS*, 62 (1970), p. 571; English trans. in *CLD*, 7 (1968-1972), p. 752.

[131] See J.M. HUELS, *Empowerment for ministry: A complete manual on diocesan faculties for priests, deacons, and lay ministers*, New York/Mahwah, NJ, Paulist Press, 2003, pp. 92-94; BERSINI, *Il diritto canonico matrimoniale*, pp. 154-155; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 284; MCAREAVEY, *The canon law of marriage and the family*, p. 143; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 625; G. CHIERICHETTI, "La 'forma canonica' del matrimonio: legalismo o attenzione pastorale?" in *Quaderni di diritto canonico*, 3 (1990), p. 142; ABATE, "La forma della celebrazione del matrimonio," p. 143; BEAL, "Marriage," p. 1331.

[132] See BERSINI, *Il diritto canonico matrimoniale*, p. 155; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 284; HUELS, *Empowerment for ministry*, p. 91; MCAREAVEY, *The canon law of marriage and the family*, p. 143; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 625; ABATE, "La forma della celebrazione del matrimonio," pp. 143-144; T.P. DOYLE, "Marriage: The form of celebration of marriage," in *The Code of Canon Law*, p. 795; CHIERICHETTI, "La 'forma canonica' del matrimonio," pp. 142-143

[133] See BERSINI, *Il diritto canonico matrimoniale*, pp. 155-156; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 284; HUELS, *Empowerment for ministry*, p. 90; MCAREAVEY, *The canon law of marriage and the family*, p. 143; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 625; ABATE, "La forma della celebrazione del matrimonio," p. 143; CHIERICHETTI, "La 'forma canonica' del matrimonio," p. 143.

the necessity of acceptance of the delegation by the delegate. According to the opinion of authors and the more recent jurisprudence, not only the granting of delegation is necessary for the validity of a marriage, but also its acceptance, at least implicit, by the delegate.[134] Nevertheless, the acceptance of a faculty does not apply to faculties granted by law or faculties delegated by a superior to a subject.[135]

Canon 1112 §1 introduces the possibility of delegating a lay person to assist at a marriage under certain conditions.[136] The *CIC '17* did not envisage this possibility. It has roots in post-conciliar pastoral experiences. After Vatican II, several bishops petitioned the Holy See asking whether, in the absence of a priest or deacon, a lay person could be designated as a qualified witness at a marriage. The Holy See had some hesitation to allow this possibility and, therefore, called for further study and reflection on the issue. In 1971, the Congregation for the Sacraments encouraged the Ordinaries to provide for the training of lay persons by means of suitable catechetical courses established for this purpose.[137] In 1974, the same Congregation issued an Instruction, *Sacramentalem indolem*, whereby the Congregations competent in this matter were "granted the power to permit local Ordinaries who have obtained a favorable vote of their episcopal conference and who have presented a request to accord to a Catholic who has been personally

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[134] See BERSINI, *Il diritto canonico matrimoniale*, p. 156; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 952, p. 210; MONETA, *Il matrimonio nel nuovo diritto canonico*, pp. 193-194; HUELS, *Empowerment for ministry*, p. 94; C.J. HETTINGER, "Collegiality and the form of marriage," in *The Jurist*, 24 (1964), pp. 342-345; VALLS, "The form of the celebration of marriage," p. 867.

[135] See HUELS, *Empowerment for ministry*, p. 95.

[136] *CIC '83*, c. 1112 §1: "With the prior favorable opinion of the conference of bishops and after the permission of the Holy See has been obtained, the diocesan bishop can delegate lay person to assist at marriages where priests or deacons are lacking."

[137] See SACRED CONGREGATION FOR THE SACRAMENTS, Instruction, *Marriage before witnesses only*, 7 December 1971, in *Archiv für Katholisches Kirchenrecht* (= *AKK*), 141 (1972), pp. 510-512; English trans. in *C.L.D.*, 7 (1968-1972), pp. 753-756.

selected the function of official witness at the canonical celebration of marriage."[138] Since these provisions reflected the mind of Vatican II which accorded greater participation of the laity in the mission of the Church, they have been also introduced into the new Code but with some well-defined restrictions:[139]

(1) The faculty to delegate a lay person must be requested by the diocesan bishop from the Holy See.

(2) The favorable vote of the episcopal conference must be requested by the diocesan bishop. The favorable vote of the conference of bishops may be a matter of general policy, or it may be restricted to certain specified dioceses where clergy are lacking. In either case, the diocesan bishop still needs the permission of the Holy See to grant the faculty.[140] Moreover, even if the conference of bishops does not take a vote, or votes negatively, nothing prevents a bishop from petitioning the Holy See for this favour.

(3) If the faculty is granted, only the diocesan bishop, and not any other local Ordinary (c. 134 §3), can delegate the faculty to assist at marriages. It would seem that this faculty is *ad liceitatem* of the bishop's act, that is to say, without it the diocesan bishop cannot delegate licitly a lay person to assist at marriages.

(4) It is to be used only for a territory where priests or deacons are lacking. Restrictions on the activities of sacred ministers due to political persecution by a regime are also a sufficient reason for delegating this faculty.

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[138] See SACRED CONGREGATION FOR THE SACRAMENTS, Instruction, *Sacramentalem indolem*, 15 May 1974, in *La documentation catholique*, 72 (1975), p. 610; English trans. in *CLD*, 8 (1973-1977), pp. 815-818, here at p. 816. See also SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 625; TANASINI, "Forma del matrimonio," p. 127.

[139] On this point, see NAVARRETE, "Quaestioni sulla forma canonica ordinaria," p. 507; ABATE, "La forma della celebrazione del matrimonio," pp. 145-150.

[140] See BEAL, "Marriage," pp. 1331-1332.

(5) The delegation is to be given to a suitable lay person, man or woman. Such a person must be capable of instructing those getting married and be able to conduct the marriage liturgy properly.

Can a lay person given general delegation to assist at marriage by the diocesan bishop subdelegate another lay person who might be available to assist but has not delegation to do so? It would seem that an authorized lay person, even if given the general delegation, cannot subdelegate the faculty he/she has received to another lay person who is not already authorized according to the present canon. The faculty to assist at marriage(s) is not technically an act of the power of governance. However, the act of delegating or subdelegating this faculty is an act of power of governance and thus comes under the controversy regarding the possibility of granting such power to lay persons.[141] The faculty to assist at marriage(s) given to a lay person is strictly personal. Canon 1112 §1 and the *Ordo celebrandi matrimonium*, n. 25 explicitly state that the faculty is only given to a lay person by the diocesan bishop. Unless the bishop himself would delegate his power to grant the faculty, it could not validly be granted by any other person within the diocese, not even by his vicar (cf. c. 479 §1 on matters requiring a special mandate). Therefore, for validity, the faculty must be delegated to a lay person by the diocesan bishop or by someone to whom he has delegated the power to grant the faculty.[142]

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[141] The delegation or subdelegation of the faculty to assist at marriage is an act of executive power of governance, and the rules on executive power are applicable to it (cc. 136-142).

[142] See HUELS, *Empowerment for ministry*, p. 183.

### 3.2.3.1.3. The presence of the two additional witnesses

Besides the *qualified witness*, there must also be two witnesses present at the manifestation of consent. The presence of these two witnesses is also required for the validity of the marriage. No specific norms are laid down regarding the witnesses. All that is required of them is the capacity to witness, that is to say, to have the use of reason and the use of the senses necessary to perceive the manifestation of consent. They can be men or women, Catholics or non-Catholics, baptized or non-baptized.[143] Any two witnesses suffice; it is not necessary that they be specifically selected as such. Hence, any two persons among those present in the Church, provided they saw and heard the exchange of consent between the contracting parties, could be witnesses.[144] For example, if the best man were intoxicated, the marriage would be valid if two other persons with the use of reason were present and could understand the manifestation of consent. Obviously those who lack sufficient use of reason, such as those who are insane or those who are so intoxicated that they cannot testify to what is going on, are not competent witnesses.[145]

If the witnesses do not know the language used by the parties in giving their consent, there should be someone to interpret for them. Otherwise, it may be difficult, if not impossible for them to testify to having assisted at the marriage. Commentators on the *CIC '17* had excluded the deaf from the position of witnessing at marriage. The reason for the

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[143] See BERSINI, *Il diritto canonico matrimoniale*, p. 148; MONETA, *Il matrimonio nel nuovo diritto canonico*, p. 191; ABATE, "La forma della celebrazione del matrimonio," p. 154; TANASINI, "Forma del matrimonio," p. 131.

[144] See BERSINI, *Il diritto canonico matrimoniale*, p. 148; TANASINI, "Forma del matrimonio," p. 131.

[145] See BERSINI, *Il diritto canonico matrimoniale*, p. 148; BEAL, "Marriage," p. 1328.

exclusion was the fact that the deaf were equated with those habitually lacking the use of reason. However, the current research has proved that idea erroneous. The deaf are now included in the list of potentially legitimate witnesses at marriage. Though they may not be able to hear the consent of the parties, they could witness to it in other ways, e.g., by sign language, lip reading, visual indications such as a nod of the head, or other gestures.

### 3.2.3.2. Extraordinary form of marriage

As stated earlier, the canonical legislation provides, besides the ordinary form, also an *extraordinary* form defined in c. 1116.[146] This canon reiterates the norms on the *extraordinary form* contained in c. 1098 of the *CIC '17*, albeit with some innovations. In order to use the extraordinary form, the legislator requires not only objective conditions—i.e., the absence of or the impossibility of having access to a qualified witness and the prudent foresight that such circumstances will continue for a month, but also subjective conditions—i.e., the real intention of the contracting parties to enter into a true marriage.[147] The extraordinary form may be used only in those circumstances in which there is no qualified witness to receive matrimonial consent in the name of the Church. However, the parties must comply with the other requirements of the canonical form, namely a) the

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[146] *CIC '83*, c. 1116 §1 - If the presence of or access to a person who is competent to assist at marriage in accord with the norm of law is impossible without serious inconvenience, persons intending to enter a true marriage can validly and licitly contract it before witnesses alone:

1° in danger of death;

2° outside the danger of death, as long as it is prudently foreseen that such circumstances will continue for a month.

§2 - In either case and with due regard for the validity of a marriage celebrated before witnesses alone, if another priest or deacon who can be present is readily available, he must be present at the celebration of the marriage, along with the witnesses.

[147] See BERSINI, *Il diritto canonico matrimoniale*, p. 167; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 289; VALLS, "The form of the celebration of marriage," p. 871.

manifestation of consent;[148] and b) the presence of two witnesses.[149] For the valid use of the extraordinary form the following must be verified:

1) *The contracting parties must intend a true marriage*. Such an intention is absolutely necessary for the validity of a marriage. Therefore, the extraordinary form may be used only by those who intend to enter a true marriage, i.e., who intend that the union which they enter in the presence of witnesses alone will have the full effects intended by the Church.[150] If all the conditions required by c. 1116 are verified, even a civil form of marriage would suffice.[151] However, this canon does not apply to the situation of two Catholics who—unaware of the possibility of using the extraordinary form—contract a merely civil marriage in either of the circumstances envisaged in the canon and who intend properly to celebrate marriage later before the Church because they think that their civil marriage does not have the full effects of a marriage intended by the Church.

2) *Unavailability of a qualified witness without grave inconvenience*. When the law speaks of a *grave incommodum* it means a real *grave inconvenience* and not an imagined

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[148] See J. HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," in *Periodica*, 84 (1995), pp. 687-709; Italian trans. in *Quaderni di diritto canonico*, 9 (1996), pp. 239-256, here at pp. 249-250.

[149] See ibid., pp. 247-249.

[150] See footnote 41, p. 128 as well as ABATE, "La forma della celebrazione del matrimonio," pp. 158-159.

[151] See COETUS STUDIORUM DE IURE MATRIMONIALI, "De forma celebrationis matrimonii," in *Communicationes*, 10 (1978), p. 95, c. 318. See also G. GHIRLANDA, *Il diritto nella Chiesa, mistero di communione: compendio di diritto ecclesiale*, Milano, Edizioni Paoline, 1990, p. 362; BERSINI, *Il diritto canonico matrimoniale*, p. 165; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, pp. 289 and 291; MCAREAVEY, *The canon law of marriage and the family*, p. 145; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 628; ABATE, "La forma della celebrazione del matrimonio," p. 158; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," pp. 239-241 and 253. A relevant question may be raised concerning this issue when a customary marriage is involved: "If all the conditions required by c. 1116 were verified, would a customary marriage suffice to produce the full effects of a validly celebrated marriage according to an extraordinary form?" In our opinion, if the parties were free to marry, willing to enter marriage as understood by the Church as well as capable of sustaining it, and not otherwise bound by a diriment impediment, even if they were unaware of the possibility of using the extraordinary form of celebration, the answer would be affirmative.

one.[152] The grave inconvenience may be on the part of either the contracting parties who are unable to have access to a qualified witness or the qualified witness who cannot be available to the contracting parties.[153] This unavailability of a qualified witness may be due to physical circumstances (e.g. sickness, too great a distance to get in touch with a qualified witness, inadequate means of communication or lack of transportation), or moral circumstances (e.g. unjust civil laws, persecution, war, etc.).[154] There is, however, no list of circumstances that might constitute grave inconvenience justifying the use of the extraordinary form. Grave inconvenience, however, cannot be claimed against an express prohibition, i.e., the prohibition to contract a new marriage before obtaining a declaration of nullity or a decree of dissolution of a previous bond (c. 1085 §2).[155]

3) The use of extraordinary form is valid and licit only when: (1°) *there is danger of death*, or (2°) *it is prudently foreseen that the inaccessibility of a qualified witness will last for a month.*

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[152] In 1954, Julius and Margaret, Catholic Hungarians, fearful of communists, went through a civil marriage. Their marriage, however, failed. In 1960, Julius married in the Catholic Church an Irish woman by the name Bernarda. This marriage also ended in divorce, and Bernarda petitioned for a declaration of nullity on the ground of the diriment impediment of prior bond, because, according to c. 1098 of *CIC '17*, the civil marriage which Julius had contracted with Margaret was valid. The Rota, however, decided that the fear experienced by the petitioner at the time of the first marriage was insufficient to justify the use of the extraordinary form. The marriage was null and void because of the defect of the canonical form. The Rota declared that Bernarda's marriage to Julius was valid, because Julius was free to marry; see decision *c* PINTO, 8 October 1975, in *RRT Dec.*, 67 (1975), pp. 550-554.

[153] See CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, pp. 289 and 291; GHIRLANDA, *Il diritto nella Chiesa, mistero di communione*, p. 361; ABATE, "La forma della celebrazione del matrimonio," pp. 155-156; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," p. 243.

[154] See THE PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, [Response], *Responsa ad proposita dubia de celebratione matrimonii*, 25 July 1931, in *AAS*, 23 (1931), p. 388; English trans. in *CLD*, 1 (1917-1933), p. 542; A. VERMEERSCH, "Annotationes," in *Periodica*, 21 (1932), pp. 42-46; BERSINI, *Il diritto canonico matrimoniale*, p. 166; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," pp. 243-247.

[155] See BERSINI, *Il diritto canonico matrimoniale*, p. 166; TANASINI, "Forma del matrimonio," p. 132; VALLS, "The form of the celebration of marriage," p. 872.

(1°) *Danger of death* could stem from any cause and could concern either one or both of the contracting parties. It is not necessary that death be imminent or certain. It is sufficient that there is reasonable certainty that death would occur from external or internal causes. Therefore, situations such as war, illness or pending serious surgery, etc. are justifiable reasons for one to believe that there is in fact a danger of death.[156] The marriage contracted in a situation involving probable danger of death while, in fact, it is not, is valid and licit.[157]

(2°) *Inaccessibility of a qualified witness prudently foreseen to last for a month* must be founded. The simple absence of the pastor or of another qualified witness or a grave impediment on their part, however, does not justify the use of the extraordinary form.[158] It is necessary that the contracting parties have moral certainty,[159] i.e., a prudent and founded foresight, concerning the month-long absence or impediment. However, if the parties err in this respect and a qualified witness is accessible before the one-month period, the marriage contracted under such circumstancies, objectively estimated, would be valid.[160]

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[156] See HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," pp. 250-251.

[157] See BERSINI, *Il diritto canonico matrimoniale*, p. 166; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 290; BEAL, "Marriage," p. 1334; DOYLE, "Marriage: The form of celebration of marriage," pp. 796-797; TANASINI, "Forma del matrimonio," p. 133.

[158] See ABATE, "La forma della celebrazione del matrimonio," p. 157; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," p. 251.

[159] See THE PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, [Response], *Responsa ad proposita dubia de forma celebrationis matrimonii*, 10 November 1925, in *AAS*, 17 (1925), p. 583; English trans. in *CLD*, 1 (1917-1933), p. 542; ABATE, "La forma della celebrazione del matrimonio," p. 157; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," pp. 251-252.

[160] See BERSINI, *Il diritto canonico matrimoniale*, p. 166; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, pp. 290-291; BEAL, "Marriage," p. 1334; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," p. 252; TANASINI, "Forma del matrimonio," p. 133; VALLS, "The form of the celebration of marriage," p. 871.

If all of the above-mentioned conditions for the use of the extraordinary form are verified, a marriage celebrated in the presence of only two witnesses capable of witnessing the actual exchange of consent is valid. The second paragraph of c. 1116, however, prescribes that if a priest or deacon who can be present is available, even if he has no faculty to assist at the marriage, must be called and be present at the celebration of the marriage. This requirement of calling a priest or deacon to perform the liturgical function is necessary only for liceity, not for validity. If a priest or deacon is available and is not called in or at least does not assist, the marriage would be valid if celebrated only before two witnesses.[161] The presence of either of them might ensure the correct celebration of marriage and offer the possibility of dispensing from any dispensable impediments of ecclesiastical law (cc. 1079-1080) as well as guarantee the proper registration of the marriage (c. 1121 §2).[162]

The law does not give any directions concerning the rite for the celebration of marriage according to the extraordinary form.[163] As already noted, it is sufficient that the contracting parties intend to enter marriage as understood by the Church and manifest their consent in the presence of at least two witnesses. This may be done within the liturgy of the Word. According to Chiappetta, the witnesses in the extraordinary form of

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[161] See BERSINI, *Il diritto canonico matrimoniale*, p. 167; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordatoria*, p. 291; ABATE, "La forma della celebrazione del matrimonio," p. 159; BEAL, "Marriage," p. 1335; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," pp. 242 and 253.

[162] See BERSINI, *Il diritto canonico matrimoniale*, p. 167; CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordatoria*, pp. 291-292; SHEEHY et al. (eds), *The Code of Canon Law: Letter & Spirit*, p. 628; ABATE, "La forma della celebrazione del matrimonio," p. 159; BEAL, "Marriage," p. 1335; HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," p. 254.

[163] See HENDRIKS, "Matrimonii forma extraordinaria (canon 1116)," p. 254.

marriage are to refrain from saying or doing anything that is reserved to a priest or deacon in the ordinary form of marriage.[164]

### 3.2.4. Subjects of the canonical form

Canon 1117 states: "The form prescribed above is to be observed if at least one of the parties contracting marriage was baptized in the Catholic Church or received into it and has not by a formal act defected from it, without prejudice to the provisions of c. 1127 §2." This canon, to a certain extent, reaffirms the norm of c. 1099 §1 of the CIC '17 including the changes introduced by the Motu proprio, *Decretum Ne temere*.[165] The norm is clear in itself. By it, all Catholics are bound either by the ordinary or extraordinary canonical form of marriage. The form binds always if one of the contracting parties is a Catholic.

According to what we have mentioned above, the law governing the canonical form binds those who:

a) were baptized in the Catholic Church;

b) were baptized in another Church or ecclesial comunity but were later received into the Catholic Church;

c) have not defected from the Catholic Church by a formal act.[166] Since the canon does not precisely define the nature and elements of a formal act of defection, several criteria may be used to verify it—registration as a member of another Church or ecclesial community not in full communion with the Catholic Church, formal notification to the

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[164] See CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordataria*, p. 292.

[165] See above, pp. 146-147.

[166] The term "defection from the Church by the formal act" is very well explained V. DE PAOLIS, "Alcune annotazioni circa la formula 'Actu formali ab Ecclesia catholica deficere'," in *Periodica*, 84 (1995), pp. 579-608.

diocesan or parochial authorities, formal profession of atheism, etc. Mere non-practice of Catholic religion, even if extended over a long period, is not to be considered as a formal act of defection from the Catholic Church.[167] The formal act must be an externally manifested, deliberate act of the will.

### 3.2.4.1. Exemptions from canonical form

Canon 11 of the *CIC '83* states that "merely ecclesiastical law binds those baptized in the Catholic Church or received into it [...]." And c. 1059, which regulates marriages of Catholics, reads: "Even if only one party is baptized, the marriage of Catholics is regulated not only by divine law but also by canon law [...]." On the other hand, the norm of c. 1117 implicitly states that the law on the canonical form of marriage does not bind when both contracting parties are non-Catholics, whether baptized or not. Based on these three canons, it can be stated with certainty that other Christians and those who are not baptized are not bound by the merely ecclesiastical law, particularly by the matrimonial legislation. When non-Catholics marry among themselves, they are exempt from the observance of the canonical form. Therefore, those exempt from the canonical form are:[168]

a) non-baptized persons marrying among themselves. They would be bound to observe the civil or customary form of marriage prescribed for them. In the absence or defect of this form the marriage might be invalid.

b) baptized non-Catholics marrying among themselves. They are to observe the form prescribed for them either by their own Church or by the law binding them at the

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[167] See CASTAÑO, *Il sacramento del matrimonio*, p. 451.

[168] See U. NAVARRETE, "Diritto fondamentale al matrimonio e al sacramento," in *Quaderni di diritto canonico*, 1 (1988), pp. 77-78.

time of marriage. The Catholic Church has, in fact, recognized the competence of Orthodox Churches to determine the elements of the form of marriage for valid celebration.[169] The practical difficulty, however, is to determine what precisely are the requirements for validity existing in other legal systems.

c) Catholics who have formally defected from the Catholic Church and who are marrying non-baptized or baptized non-Catholics. There is no specific form prescribed for the celebration of their marriage. Therefore, any legitimate form in which they exchange their mutual matrimonial consent would suffice for the valid celebration of their marriage.

### 3.2.4.2. Exceptional cases of canonical form

Canon 1108 §1 makes explicit reference to four canons which foresee possible exceptions to the universal observance of the canonical form for the validity of a marriage. These include the case of common error or positive and probable doubt about the existence of the faculty to assist at marriage (c. 144);[170] the case in which a lay person is delegated to witness marriages in the name of the Church (c. 1112 §1);[171] the case of a

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[169] For instance, if the Orthodox Church would not recognize the validity of the marriage involving an Orthodox without the proper blessing of the priest, the Catholic Church would not recognize it either. On this point, see APOSTOLIC SIGNATURA, "Nullitas matrimonii inter Orthodoxos absque ritu sacro initi," and "De nullitate matrimonii absque ritu sacro initi," in *Apollinaris*, 44 (1971), pp. 24-25 and 578-580, as well as "De nullitate matrimonii absque ritu sacro initi," in *Apollinaris*, 45 (1972), pp. 383-385.

[170] *CIC '83*, c. 144 §1 - In common error about fact or about law, and also in positive and probable doubt about law or about fact, the Church supplies executive power of governance both for the external and for the internal forum.

§2 - This same norm applies to the faculties mentioned in cc. 883, 966 and 1111 §1.

[171] See above, pp. 160-162.

marriage contracted before witnesses alone in certain foreseen circumstances (c. 1116);[172] the case of a dispensation from form (c. 1127).[173]

Legal competency to assist at marriage, whether ordinary or delegated, is required for the integrity of the form and consequently, for the validity of marriage. In order to avoid invalid marriages, however, the legislator explicitly states in c. 1108 that the traditional principle of *Ecclesia supplet* applies to the faculty to assist at marriage in instances mentioned in c. 144.

*Common error*, mentioned in c. 144, is a mistaken judgement by the community.[174] It is not simply ignorance. It exists when even persons who know the law are induced to believe by a certain *public fact* that a priest or deacon is legally competent to assist at marriage, when in truth he is not. For common error to exist, there has to be a *public fact* affecting the community because otherwise the error would not be common but private. The principle does not concern the error on the part of the qualified witness but only on the part of the contracting parties and others at the celebration.[175] The

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[172] See above, pp. 164-168.

[173] *CIC '83*, c. 1127 §1 - The prescripts of can. 1108 are to be observed for the form to be used in a mixed marriage. Nevertheless, if a Catholic party contracts marriage with a non-Catholic party of an Eastern rite, the canonical form of the celebration must be observed for liceity only; for validity, however, the presence of a sacred minister is required and the other requirements of law are to be observed.

§2 - If grave difficulties hinder the observance of canonical form, the local Ordinary of the Catholic party has the right of dispensing from the form in individual cases, after having consulted the Ordinary of the place in which the marriage is celebrated and with some public form of celebration for validity. It is for the conference of bishops to establish norms by which the aforementioned dispensation is to be granted in a uniform manner.

§3 - It is forbidden to have another religious celebration of the same marriage to give or renew matrimonial consent before or after the canonical celebration according to the norm of §1. Likewise, there is not to be a religious celebration in which the Catholic who is assisting and a non-Catholic minister together, using their own rites, ask for the consent of the parties.

[174] See ÖRSY, "The canons on ecclesiastical law revisted," p. 141.

[175] See MONETA, *Il matrimonio nel nuovo diritto canonico*, p. 195; CHIERICHETTI, "La 'forma canonica' del matrimonio," pp. 144.

qualified witness attempting to represent the Church without due competency would possibly commit a punishable crime,[176] but for the sake of the common good, the Church would supply for the deficiency.

*Common error of fact* means that the entire or most of the community actually thinks that the priest or deacon possesses the faculty to assist at marriage when, in fact, he does not.[177] *Common error of law* is a fiction of law which means that, because of certain circumstances of a public nature, the community might be led into error causing it to judge that the priest or deacon has in fact the faculty, not assuming otherwise.[178]

The law also supplies the faculty in cases of *positive and probable doubt of law* or *positive and probable doubt of fact*. While the error concerns the community, positive and probable doubt refers exclusively to the qualified witness at marriage who, after a careful study of his faculties, may still have good reason to doubt his competency.[179] A doubt is *positive* when there is a good reason for thinking that one has the faculty, but

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[176] See *CIC '83*, c. 1389.

[177] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 1019, p. 228; HUELS, *Empowerment for ministry*, p. 57; MCAREAVEY, *The canon law of marriage and the family*, p. 138; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 85; ABATE, "La forma della celebrazione del matrimonio," p. 152. An example of this would be a priest appointed as the parish priest of a certain parish, but his appointment was invalid because of a particular circumstance (cfr. cc. 149 §3; 153 §1). He takes possession of the parish according to prescribed formalities. He is *de facto* parish priest and in virtue of c. 144 §1 he has the faculty to assist validly at marriages as long as people believe that he is the real parish priest.

[178] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 1019, p. 228; HUELS, *Empowerment for ministry*, p. 57; MCAREAVEY, *The canon law of marriage and the family*, p. 138; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, pp. 85-86; ABATE, "La forma della celebrazione del matrimonio," p. 152. An example of this would be a priest who is a university professor and who resides in a parish rectory. He regularly celebrates Mass and hears confessions in the parish, but he does not have the faculty to assist at marriage. One weekend the pastor is out of town and the resident priest is celebrating all the Masses. On Saturday afternoon, a wedding party shows up unexpectedly at the church doors. It seems the secretary had mistakenly written the date of the marriage for the following week. The priest professor steps in and celebrates the marriage. The marriage is valid because *Ecclesia supplet facultatem*. The public fact of his ministry in the parish, even though in an auxiliary capacity, can lead the community into believing that the person concerned had the necessary faculty.

[179] See MONETA, *Il matrimonio nel nuovo diritto canonico*, p. 195; ABATE, "La forma della celebrazione del matrimonio," pp. 152-153; CHIERICHETTI, "La 'forma canonica' del matrimonio," pp. 144.

there is also a reason for thinking that one does not have it. A doubt is *negative* when there is no reason at all or there is only a slight reason for thinking one has the faculty. A negative doubt is tantamount to ignorance. A doubt is considered *probable* insofar as the reasons for such doubt have certain serious aspect to them allowing any reasonable person to conclude that the faculty could well exist, even if the opposing reasons are equally serious. A doubt, like error, presumes someone knows the law. *Positive and probable doubt of law* (*dubium iuris*) occurs when the person is not certain of having the faculty to assist at a marriage because of differing interpretations of the law in question.[180] *Positive and probable doubt of fact* (*dubium facti*) arises when a person is not certain whether, in the concrete case, the fact of a particular circumstance on which the valid exercise of the faculty to assist depends is verified.[181]

The Church, however, does not supply competency if the error is due to negligence or ignorance since positive and probable doubt implies diligence used in

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[180] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 1023, p. 228; HUELS, *Empowerment for ministry*, p. 64; MCAREAVEY, *The canon law of marriage and the family*, p. 139; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 86; ABATE, "La forma della celebrazione del matrimonio," p. 153. For example, the diocesan bishop has given the privilege to a shrine stating that the clergy assigned to the shrine have the habitual faculty of assisting at the marriage of any member of the diocese who would wish to be married there. However, the question is: What does the expression "clergy assigned to the shrine" really mean? Does this expression also include a temporary deacon who is there only for the summer? The term "a member of the diocese" may raise another question. Is it only those who have a domicile, or a quasi-domicile in the diocese? Or, does the phrase embrace also those who have only a month-long residence? In such a case, because of doubt concerning the law, *Ecclesia supplet facultatem*.

[181] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, n. 1023, p. 228; HUELS, *Empowerment for ministry*, p. 64; MCAREAVEY, *The canon law of marriage and the family*, p. 139; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 86; ABATE, "La forma della celebrazione del matrimonio," p. 153. For example, pastors have the faculty by law to assist at marriage within the parish territory. The bishop asks a newly assigned pastor to move into the parish a week earlier than his appointment officially begins, because the other pastor has had to leave earlier than anticipated. Upon moving in, the new pastor discovers that there is a wedding scheduled for the next day. Under the circumstances he doubts whether he in fact has the power of a pastor to assist at the marriage (*dubium facti*), since his assignment has not yet officially begun. On the other hand, he thinks that he might have the powers of a pastor because the bishop directly told him to come early and begin functioning. He reasons that he must have at least implicit special delegation. Therefore, if he assists, the marriage would be valid because in such a case, *Ecclesia supplet facultatem*.

knowing the law and the facts that determine competency. Therefore, the qualified witness at marriage who raises doubt about his faculty without making any effort to resolve the doubt is not to assist at marriage, and if he were to assist without having first ascertained the status of his faculties, he could be liable to a penalty prescribed by law.

Canon 1127 §1 repeats the law of *Crescens matrimoniorum* which recognized the validity of a marriage celebrated between a Catholic and a non-Catholic of an Eastern Church without observing the canonical form. For the validity of such a marriage, besides observing the other requirements of law, there should be present a validly ordained priest who should bless the marriage. The other requirements of law include the exchange of consent and also other elements recognized by eastern disciplines governing the validity of marriage.

The second paragraph of c. 1127 provides for the dispensation from the canonical form. It allows the Ordinary of the Catholic party, in consultation with the Ordinary of the place where the marriage is to be celebrated, to dispense from the canonical form in a marriage between a Catholic and a non-Catholic (other than Eastern non-Catholics). This dispensation is to be granted only when serious difficulties pose an obstacle to the observance of the canonical form. However, for validity some public form of celebration must be observed. The episcopal conference is to issue norms to be followed while granting such a dispensation.[182]

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[182] See ABATE, "La forma della celebrazione del matrimonio," p.p 160-165.

### 3.2.4.3. Lack/defect of canonical form

Based on what has been discussed above, we might say that a marriage is invalid due to a defect of form in the following circumstances:

- when a marriage involving at least one Catholic—who has not defected from the Church by a formal act—takes place without a dispensation before a non-Catholic minister or in a Registry Office;
- when a marriage involving at least one Catholic—who has not defected from the Church by a formal act—takes place in the Catholic Church before a priest or deacon lacking delegation to assist and the delegation was not supplied by the Church;[183]
- when the official witness did not ask for or receive the couple's consent;
- when the exchange of consent was omitted altogether;
- when the official witness lacked the use of reason at the time of assistance;
- when the official witness was not in full communion with the Catholic Church, or had been suspended or excommunicated and the penalty was imposed or declared;
- when there were no witnesses or there was only one witness;
- when either of two witnesses lacked the use of reason, or was incapable of seeing, hearing or understanding the manifestation of the exchange of consent;
- when the dispensation from canonical form was defective.[184]

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[183] For some examples regarding the defect of canonical form due to the lack of the faculty and/or delegation of the official witness, see HUELS, *The pastoral companion*, p. 261.

[184] For some examples of defective dispensation, see ibid.

### 3.2.4.4. Dispensation from canonical form[185]

As already mentioned, the canonical form of marriage, whether ordinary or extraordinary, must be observed in marriages contracted between two persons of whom at least one is Catholic at the time of the wedding celebration. But this obligation is of merely ecclesiastical law and therefore dispensable. Who can dispense from the canonical form? The Pope and those to whom the faculty has been granted—whether by ordinary power or by special concession—can dispense from this obligation. However, in order to determine precisely who can dispense from the canonical form of marriage and in what circumstances, it is necessary to know if the dispensation is sought on behalf of those "*outside danger of death*" or "*in danger of death.*" It is also necessary to determine whether it involves a marriage between two Catholics or between a Catholic and a non-Catholic or an unbaptized person.[186]

The dispensation from the canonical form of two Catholics is reserved to the Holy See by the 1985 authentic interpretation of the Code Commission.[187] This interpretation created a new reservation not found in the Code, although it had been in the law before the *CIC '83*.[188] The Holy See grants the dispensation only in extraordinary situations. The

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[185] See D.J. ANDRÉS, "De dispensatione a forma canonica matrimonii," in *Apollinaris*, 58 (1985), pp. 443-449; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, nn. 4099-4100, pp. 372-372; ABATE, "La forma della celebrazione del matrimonio," pp. 169-172; AZNAR, "La nueva regulación de la forma canonica del matrimonio," pp. 234-235.

[186] See ABATE, "La forma della celebrazione del matrimonio," p. 169.

[187] See PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, *De dispensatione a forma canonica matrimonii*, 5 July 1985, in *AAS*, 77 (1985), p. 771; English trans. in *CLD*, 11 (1983-1985), p. 14. See also T.I.J. URRESTI, F. AZNAR, "Respuestas de la Comisión de intérpretes de 5 de julio de 1985, III. Can. 87 §1: De la dispensa de la forma canonica del matrimonio," in *Revista española de derecho canonico*, 41 (1985), pp. 501-510.

[188] See SACRED CONGREGATION OF THE HOLY OFFICE, Decree, *De matrimoniis eorum qui a genitoribus acatholicis vel infidelibus nati, sed in Ecclesia Catholica baptizati, ab infantili aetate in haeresi vel infidelitate aut sine ulla religione adoleverunt*, 31 March 1911, in *AAS*, 3 (1911), pp. 163-164. On 31 March

local Ordinary does not have the power to dispense from the canonical form when two Catholics marry, except for the case mentioned in c. 1079, i.e., in imminent danger of death. However, in cases mentioned in c. 1127 §2 (mixed marriages), c. 1129 (marriages with a dispensation from the impediment of disparity of worship), cc. 1161 §1 and 1165 (radical sanation), the local Ordinary can grant the dispensation from canonical form of marriage even outside the danger of death.

In imminent danger of death and only for cases in which the local Ordinary cannot be reached (c. 1079 §2), the faculty to dispense from the canonical form is granted by law also to the pastor, the properly delegated sacred minister and the priest or deacon who assists at marriage in accord with the norm of c. 1116 §2.

### 3.2.5. Place and time of marriage

Christian marriage is not merely a public attestation of a private exchange of consent between two persons but a sacramental and ecclesial celebration.[189] Therefore, the marriage must be celebrated in a suitable place, in the presence of the local Christian community and according to those rites which are found in the liturgical books approved by the competent ecclesiastical authority (cc. 1118 and 1119).

Because of the special relationship between Christian marriage and the ecclesial community, c. 1118 §1 establishes that the proper and ordinary place for the celebration

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1911 the Holy Office affirmed that those persons who, from a period prior to the attainment of the age of seven years, were reared in heresy, and also those Catholics who were educated by heretics and those who in childhood had fallen under the influence of a heretical sect and had affiliated with it, could, even after the *Ne temere* decree, have recourse to the Holy Office in each individual case. It would have included marriages in which *ab acatholicis nati* had wished to marry persons from their own class, or persons who were not bound by the law of canonical form.

[189] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, n. 4101, p. 373; ABATE, "La forma della celebrazione del matrimonio," p. 172; BEAL, "Marriage," p. 1337.

of marriage between Catholics or between a Catholic party and a baptized non-Catholic is the parish church. However, if the marriage is to be celebrated outside the parish church of one of the parties, i.e., in another church, oratory or other suitable place, then—according to §§1 and 2 of the same canon—two types of authorization are envisaged:

- if a marriage is to be celebrated in another church or oratory, then the local Ordinary or the pastor may authorize such a place for celebration:[190]
- if a marriage is not to be celebrated in a sacred place, then only the local Ordinary can give authorization for the use of such a place.[191]

In the case of a non-sacramental marriage, i.e., of a marriage between a Catholic and an unbaptized person, a church remains the preferred place for the celebration. However, provided that a dispensation from disparity of worship has been obtained, the parties are free to choose another suitable place for the marriage (c. 1118 §3).[192]

If a place other than the parish church is used, the prescripts of c. 1115 should be kept in mind. The qualified witness at a marriage, whether the pastor or someone else with proper delegation, should be mindful that the exercise of his faculty is valid only within the realm of his competence (territorial or personal), and he should avoid

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[190] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, n. 4101, p. 373; MCAREAVEY, *The canon law of marriage and the family*, p. 147; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 629; BEAL, "Marriage," p. 1337; TANASINI, "Forma del matrimonio," p. 136.

[191] See BERSINI, *Il diritto canonico matrimoniale*, p. 171; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, n. 4101, pp. 373-374; MCAREAVEY, *The canon law of marriage and the family*, p. 147; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 629; BEAL, "Marriage," p. 1338; TANASINI, "Forma del matrimonio," pp. 136-137.

[192] See BERSINI, *Il diritto canonico matrimoniale*, p. 171; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, n. 4103, p. 374; MCAREAVEY, *The canon law of marriage and the family*, p. 147; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, pp. 629-630; BEAL, "Marriage," p. 1338; TANASINI, "Forma del matrimonio," p. 137.

everything that would lead to unnecessary complications concerning the validity of the marriage celebrated.[193]

There are no norms in the new Code governing the time of the celebration of marriage. The *CIC '17* had prescribed that a marriage could be celebrated at any time of the year except the period from the first Sunday in Advent till Christmas, and from Ash Wednesday till Easter Sunday (c. 1108 §§1, 2). This norm has not been retained in the new Code. The *Ordo celebrandi matrimonium* states that the celebration of marriage is "altogether forbidden" (*omnino vitetur*) on Good Friday and Holy Saturday.[194] The celebration of marriage on Sundays and on holidays is generally discouraged. However, particular law may regulate this matter.

## Conclusion

Several important conclusions flow from the foregoing analysis of matrimonial consent as a juridical act. First, as c. 1057 §1 states, consent makes marriage. This ancient principle is deeply entrenched in the Latin Church's theology and canonical doctrine on marriage. The act of matrimonial consent is fundamentally a human act, an act which proceeds from a deliberate will, in which interact all aspects of the human person of those who marry. It is a juridical act because the conditions of its efficacy and legitimate manifestation are determined by law.

Second, every juridical act placed within the canonical order, to be valid, must meet all the pre-conditions specified in c. 124. This canon, new in the 1983 Code,

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[193] See BERSINI, *Il diritto canonico matrimoniale*, p. 171; SHEEHY et al. (eds), *The Code of Canon Law, Letter & Spirit*, p. 630; BEAL, "Marriage," p. 1338;

[194] See THE CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Ordo celebrandi matrimonium*, n. 32, p. 7.

provides the foundation for the proper understanding of the nature and elements of a juridical act. It states that a person must possess the *habilitas*—a term difficult to translate accurately into English language—in order to place a juridical act validly. In canonical language, it signifies natural (psychological) and juridical (legal) capacity to place a juridical act. In the absence of either of these capacities (*habilitates*), a human act placed within the juridical order is non-existent. The canon also stipulates that, besides this natural and legal *habilitas*, the act must include "those elements which essentially constitute the act itself." This last phrase implies that there are certain elements, determined either by natural or positive ecclesiastical law, which are so intrinsic to the act itself that, in the absence of any one of them, the act cannot come into being. In other words, the lack of any one of the constitutive elements of a juridical act impedes its very origin. For this reason, laws which determine the essentially constitutive elements of an institute or act are not subject to dispensation (c. 86). The same canon also implies that the external manifestation of a juridical act is necessary for social recognition, and that positive law may prescribe certain external formalities as well as requisites either for the act's validity or its liceity. However, c. 124 makes it very clear that if the extrinsic formalities and requisites are to be necessary for the validity of a juridical act, the legislator must state so expressly (explicitly or implicitly) in the law itself (cfr. c. 10). A lack of any one of these extrinsic elements would not affect the *existence* of the juridical act, but it would certainly impede its efficacy. Because these extrinsic elements are usually determined by positive law, the legislator can dispense from, suppress, change, substitute, complement or supplement them without radically changing the nature of the act itself.

Third, as stipulated in c. 124, matrimonial consent, for its very existence or validity, must be elicited by a person *iure habilis* (naturally and legally capable); must include those elements (subjective and objective) which essentially constitute it, and must be manifested externally in accord with the form defined in law and meet all the requisites identified in law for its validity. The subjective elements of the act of matrimonial consent are the psychological components which are involved in producing it. These are: the use of sufficient reason, the discretion of judgment, and the capacity in the very act of consent to assume the essential obligations of marriage. The objective elements are those which constitute the very essence of marriage as a *consortium totius vitae*, i.e., the essential elements, ends and essential properties of marriage. The elements which are essentially constitutive of the matrimonial consent are not dispensable, while the formalities and requisites demanded by law for its validity are, if necessary, dispensable, changeable, and adaptable without causing any harm to the essence of the act of consent and of the emerging reality of marriage.

Fourth, as illustrated in this chapter, the canonical form of marriage through which matrimonial consent is manifested, has its origin in positive ecclesiastical law. It was devised by the council of Trent to abolish the practice of clandestine marriages. At present, it consists in the presence of the local Ordinary, or the pastor, or a priest or deacon delegated by either of them (c. 1108), and in special circumstances even a legitimately delegated lay person (cfr. c. 1112), and of two witnesses. As is clear from the foregoing analysis, the canonical form is not an element intrinsic to or constitutive of the act of matrimonial consent. According to the present law, it can be dispensed from and even assume an extraordinary form. Because of its origin in positive law, the legislator can

certainly abolish it, change it or permit its adaptation to the cultural mores of a particular community of Christian faithful. It is our hypothesis that when properly inculturated, the canonical form will not lose its relevance but will assume a richer and more meaningful value not only within the cultural context but also in the faith life of the people.

In the following chapter we will examine the possibility and wisdom of adapting to or inculturating the canonical form of marriage into the multifaceted Papua New Guinean culture. We believe that a meaningful incorporation of the canonical form into the different forms of customary celebrations of marriages in Papua New Guinea will prove more beneficial to the faith or spiritual life of the faithful of the nation.

# CHAPTER FOUR

# CONTEMPORARY CANONICAL AND PASTORAL IMPLICATIONS OF CUSTOMARY MARRIAGE

## Introduction

Vatican II devoted a significant section of its Pastoral Constitution on the Church in the Modern World to a discussion of culture. Postconciliar documents as well as subsequent papal pronouncements have also shown a greater sensitivity to the traditions of local cultures in their articulation of Christian life. There is a new awareness of local expressions of faith but with discriminating attention given to what is consonant with genuine Christian values. K. Rahner wrote that Vatican II marked the moment when the Catholic Church actually began to be a world Church, in practice as well as in theory.[1] However, the Church's catholicity or universality must not be seen as simple uniformity nor as valid only when subject to one, two or even three so-called "superior" cultures.[2] There is a general feeling that most cultures possess a variety of traditions of which it is difficult to say whether they are good or bad. Most of them, however, are meaningful.[3] In

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[1] See K. RAHNER, "Towards a fundamental theological interpretation of Vatican II," in *AFER*, 22 (1980), pp. 323-334.

[2] See B. HEARNE, "Christology and inculturation," in *AFER*, 22 (1980), p. 340; HILLMAN, *Polygamy reconsidered*, pp. 66-67. See also *GS* 42 and 58; FLANNERY I, pp. 210 and 234; *EN* 20; FLANNERY II, p. 719.

[3] JOHN PAUL II, Address to representatives of universities, royal academies and research institutes in Madrid, "Conditions for true development of culture are liberty, cooperation, universality and service of man," in *L'Osservatore romano* (English edition), 14 March 1983, pp. 6-7; IDEM, Discours à l'université de Coimbra, "Le role de la culture dans le monde d'aujourd'hui," in *La documentation catholique*, 79 (1982), pp. 547-550; IDEM, Discours à l'UNESCO, in ibid., 77 (1980), pp. 603-609; R. BAMRUNGTRAKUL, "Inculturation and mission," in *Omnis terra* (English edition), 17 (1983), pp. 319-323; S. BEVANS, "Center, means and aim: Contemporary church documents on inculturation," in *Verbum SVD*, 37 (1996), pp. 413-429; N. BUSTAMANTE, "Approccio alla nozione di cultura nel magistero di Giovanni Paolo II," in *Doctor communis*, 35 (1982), pp. 317-326; T. GROOME, "Inculturation: How to proceed in a pastoral context," in *Concilium*, 2 (1994), pp. 120-133;

fact, all cultures find their home in Christ, the person in whom all creation comes together. For this reason, the Church cannot align itself exclusively to any particular customs, cultures or nations, but must enter into communion with different forms of culture if it wishes to be an effective leaven in human society. In its openness to everything that is human, the Church must integrate all human values within itself. K. Rahner notes that, either the Church sees and recognizes the essential differences with other cultures if it is truly to become a world Church, or it remains simply a western Church, thereby, in the final analysis, betraying the meaning of Vatican II.[4]

Culture is the primary vehicle for human self-expression and self-realization. There is, in fact, a plurality of cultures within which the Church must act as a leaven while still leaving such cultures substantially intact in all things that are not inimical to faith. Therefore, canonical structures must be created to incorporate local customs and institutions: also a flexible liturgical law is needed to allow for cultural self-expression in the celebration of the liturgy.[5]

Not only Papua New Guinean but also many African and Asian bishops have brought to our attention the need for the Church to incorporate the values of traditional family life, and particularly of customary marriages, into its pastoral and liturgical activity. They have pointed out again and again that there is a serious gap between the traditional celebration of marriage and the church celebration, with its heavy dependence on a different cultural framework and on a different code of law. How can Papua New Guinean

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PIEPKE, "Inculturation and beyond," pp. 43-53; QUACK, "Inculturation: An anthropologist's perspective," pp. 3-17; M. ZAGO, "Inculturation in the addresses of John Paul II in Asia," in *Omnis terra* (English edition), 15 (1981), pp. 375-389.

[4] RAHNER, "Towards a fundamental theological interpretation of Vatican II," p. 331.

[5] See above, p. 9.

marriage be adapted to become a truly sacramental celebration? How can the symbiosis between the Papua New Guinean conjugal "yes" and the Christian conjugal "yes" be acknowledged and strengthened since the objective of both is the same, i.e., to create the great family of the children of God? These are the questions that we shall try to address in this chapter. In the process of answering these questions we must, however, try to avoid two extremes. On the one hand, casting completely aside traditional doctrines simply to fit the fashion of different cultures would lead to the destruction of marriage and family rather than to their protection. On the other hand, too much rigidity in discipline and canon law is likely to give more credence to the various cultural situations than to the Gospel.

### 4.1. Incarnation of the Church in Various Cultures

It has been stated many times that evangelization leads to the incarnation of Christianity in various cultures.[6] As already noted by K. Rahner, inculturation is not the implanting of a foreign church of the western type in non-western cultures. Rather, it is born out of respect for both the Gospel and the culture in which the Christian message is proclaimed and welcomed. On the one hand, inculturation is the process of transformation and purification of certain cultural values not conformable with Christian values. On the other hand, inculturation is also the process of fostering positive cultural values through which culture becomes a new language into which the Word of God is translated.[7] This principle has been restated many times during and after Vatican II as well as during the

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[6] See JOHN PAUL II, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, p. 581.

[7] See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 4, p. 289. See also above, pp. 40-41.

subsequent Synods of Bishops.[8] Recognition of this principle entails the legitimacy of a certain pluriformity within the one Catholic Church. Therefore, "if the Church is to be in a position to offer all men and women the mystery of salvation and the life brought by God, then it must implant itself among all groups in the same way that Christ by his incarnation committed himself to the particular social and cultural circumstances of the men and women among whom he had lived."[9] The incarnation of the Church means taking cultures seriously, including the differences and similarities among cultures.

Since Papua New Guinea is now independent and is rightly proud of its cultural heritage, the problem of the incarnation of Christianity in Papua New Guinean culture has become very urgent. Yet this process has hardly begun. The reproach is made that the Church and canon law have lost their internal force and flexibility. Today, for practical reasons, the law scarcely develops except by acts made by a supreme authority. One can still admit that there is room in the system for customs with the force of law. However, the conditions that must be fulfilled in order to obtain legal recognition of a custom are so strict that it is quite rare that a usage has the force of law. According to a principle of dogmatic theology, the creation of church legislation is beyond the jurisdiction of the local community. All power has been given to Peter and to the apostles, as well as to their successors. Usages and customs cannot have any legal force except insofar as they are approved by the legislator (c. 23), whether this be the universal or a particular legislator. This means that everything must come from the center and flow from canonical prescripts which have been carefully established.

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[8] See *GS* 58; FLANNERY I, pp. 234-235; *EN* 20; FLANNERY II, p. 719; SYNOD OF BISHOPS - SPECIAL ASSEMBLY FOR OCEANIA, *Jesus Christ and the people of Oceania: Walking his way, telling his truth, living his life*, p. 16; JOHN PAUL II, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, p. 581.

[9] See *AG* 10; FLANNERY I, p. 458. See also above, p. 31.

However, this does not mean that the People of God cannot co-operate in the work of the legislator by giving rise to and developing usages and customs. Many institutions, even the best, owe their origin to the devotion of certain Christian communities. In the degree that they harmonize with the *sensus Ecclesiae*, usages and customs can contribute greatly to the enrichment of the Christian life and canonical legislation.[10] There is no greater temptation for the Church than wanting to clarify and define everything, but that would be fatal to the vitality of the Church.

### 4.1.1. The one Catholic Church and the local churches[11]

One of the consequences of the deliberations of Vatican II intimately connected with the recognition of pluriformity is the understanding of the Church as a *communio communionum*. In fact, the whole Church is not just the communion of particular churches. It has been and is also the communion of communions of churches, i.e., the communion of local churches.[12] Because of such an understanding of the *communio communionum* there is the reappearence of "local churches" belonging to a particular cultural area and the appearance of national Episcopal conferences.

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[10] See F.R. MCMANUS, "The Second Vatican Council and canon law," in *The Jurist*, 22 (1962), p. 275.

[11] A "local church" that we refer to in our study is a grouping of particular churches of a given country or territory linked on the basis of common culture, tradition and history as well as the interconnection of social relations amnong people of the same country or territory.

[12] This distinction is actually linked with the concept of collegiality and the application of the principle of subsidiarity in the Church. The apostolic letter, *Apostolos suos*, says that individual bishops "have no competency to act over the whole church except collegially" (JOHN PAUL II, Motu proprio, *Apostolos suos*, 21 May 1998, in *AAS*, 90 [1998], pp. 641-658; English trans. in *Origins*, 28 [1998-1999], pp. 152-158, here at p. 154). The subjects of authority over the whole Church are the pope and the whole body of bishops. However, the first expressions of a sense of collegiality were regional, not universal, and these persist not only in the Eastern churches and their synods but also in such structures as particular councils. Therefore, the greater consideration and significance should be given to the development of such regional, national and cultural forms of ecclesial and episcopal communion.

Today more than ever, the need is felt for the organization of the Church to reflect unity in diversity. It is, in fact, these two notes which, considered in their relationship, express best the universality of the Church. John Paul II pointed to it when he notes:

> The Church universality implies, on the one hand, a solid unity, and on the other, a *plurality* and a *multiformity*, that is to say, a *diversity*, which are not an obstacle to unity, but rather give it the character of "communion."[13]

The unity of the Church is signified through the multiform manifestations of the same faith in the diverse cultures of the tribes and peoples and nations who constitute the whole of humanity in the extension of different historical times and places. Hence, it presupposes and implies a multiplicity of local churches;[14] each one, on condition that the substantial unity of the universal Church would be preserved, with its own special "look," and, to some extent, even with its own ecclesiastical order and liturgy.

Only in the mutual recognition of each local church as a legitimate representation of the one Church of Christ is the full meaning of the Church guaranteed. The Church needs particular cultures in order to carry out her divine mission. The Church needs the culture of the time and place, and must actually use it, not merely tolerate it. There must always be an inculturated liturgy and theology, such as Melanesian, Asian or African liturgies and theologies.[15] Without in any way ceasing to be what Christ had intended, the Church must nevertheless always be a changing Church: (1) it must be ever ancient and

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[13] JOHN PAUL II, Address at the general audience, in *L'Osservatore romano* (English edition), 2 October 1989, p. 5. See also CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Litterae ad Catholicae Ecclesiae episcopos de aliquibus aspectibus Ecclesiae prout est communio*, 28 May 1992, in *AAS*, 85 (1993), pp. 847-848.

[14] See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 26, p. 298.

[15] See JOHN PAUL II, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, p. 590; CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, nn. 18-19, p. 295.

ever new, and (2) it must be at home everywhere, never a stranger, always native to the land.

The Catholic Church is not as monolithic as some people imagine. It is a *communio communionum*, a communion of communions in which legitimate varieties and plurality find their place. In his address during the 1980 Synod of Bishops, Cardinal Hume portrayed some models of the Church. He pointed to some tensions between those who want to hold on to a strongly centralized Church, with all the decisions coming from the center, and those who dream of a Church that is a communion of communions, with each local church expressing the one Catholic faith in terms of its own values and cultures.[16] Theoretically, no reason exists for not having a local church with a "Papua New Guinean look" based on the amalgamation of Papua New Guinean experiences, cultures, values, theology and discipline, which nonetheless embraces the larger tradition by remaining in communion with the universal Church.[17] Papua New Guineans long to have a Papua New Guinean Church, not, of course, a schismatic and isolated Church, but a truly Catholic and truly Papua New Guinean church in full communion with the Vicar of Christ.

The search for Papua New Guinean identity and communion in the *communio communionum* is not only legitimate but also mandatory. The purpose of the process of evangelization is the implantation of a church that draws life from its own soil, its own resources. A church founded by missionary enterprise will continue to be tied to the apron

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[16] See G.B. HUME, "Models of the Church and Christian family life," in *AFER*, 23 (1981), pp. 26-27.

[17] One of the points that should be kept in mind in the process of inculturation is the substantial unity of the Roman rite. The work of inculturation does not foresee the creation of new families of rites; inculturation responds to the needs of a particular culture and leads to adaptations which still remain part of the Roman rite, see CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 36, p. 302.

strings of the mother-Church and, as such, will remain not only an infant but also foreign until it affirms itself, poses its own questions, gives answers to its own questions and regulates its life in keeping with its mores and values. Then, to a certain extent, it will be a church in its own right, a self-affirming, self-supporting, self-propagating and self-governing church. The church in Papua New Guinea is still Latin in thought, Latin in theology, Latin in liturgy, Latin in governance, Latin in canon law and indeed, Latin in culture.

### 4.1.2. The responsibility of the local churches

Canon 381 §1 states that the bishops, each one in his own diocese, are real pastors of their churches, endowed with the fullness of the priesthood and fully responsible for their churches.[18] However, bishops are frequently unable to fulfill their office suitably and fruitfully unless they work more harmoniously and closely every day.[19] In fact, "from the earliest ages of the Church, bishops in charge of particular churches, inspired by a spirit of fraternal charity and by zeal for the universal mission entrusted to the apostles, have pooled their resources and their aspirations in order to promote both the common good and the good of individual churches."[20] It was in line with this tradition that the Council Fathers felt the need to promote the establishment and/or revival of episcopal conferences. They judged that it would be in the highest degree helpful if in all parts of the world the bishops of each country or region would meet regularly, so that by sharing their wisdom and experience and

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[18] See also *LG* 23 and 24; FLANNERY I, pp. 31-35; *CD* 11-16; ibid., pp. 288-294; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Litterae ad Catholicae Ecclesiae episcopos de aliquibus aspectibus Ecclesiae prout est communio*, p. 846; CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Directives for mutual relations between bishops and religious in the Church, *Mutuae relationes*, in FLANNERY II, pp. 214-216.

[19] See *CD* 37; FLANNERY I, p. 311.

[20] *CD* 36; FLANNERY I, p. 310.

exchanging views they may jointly promote the good of the faithful of the same country or region. With a revival of episcopal conferences greater autonomy has been opened for particular regional legislation so that the special characteristics of the individual churches become clearly apparent.[21] The objective of this particular legislation is not to compromise the Gospel so as to shape Christianity to fit the different cultures of local churches. No, the Gospel challenges all cultures and calls them all to conversion. The objective of the particular legislation, in fact, is rather to aid in incarnating the Gospel within diverse cultures of local churches.[22] This incarnation, however, is possible only when the teachings of Jesus Christ are planted in the local cultures without smothering them. The Church must understand and appreciate first what is good in local cultures before imposing any of its teaching. On the pastoral level the local churches must be allowed to find solutions to problems arising from the interaction between the local cultures and church law and teaching. Such solutions may be found by discovering the importance of local mores and customs that rule the conduct of local people and by granting them juridical sanction through particular regional legislation promulgated on the authority of episcopal conferences.[23] Even though, on the one hand, we strongly support the idea of particular legislation, on the other hand, we certainly affirm the need to have a unified legal system that articulates the basic principles governing the

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[21] See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, nn. 27 and 37, pp. 299 and 302.

[22] See DE MÜELENAERE, "Cultural adaptation and the Code of Canon Law," pp. 44-45.

[23] Canon 447 offers a lengthy, densely packed definition of the institution of the bishops' conference. It states that "a conference of bishops, a permanent institution, is a group of bishops of some nation or certain territory who jointly exercise certain pastoral functions for the Christian faithful of their territory in order to promote the greater good which the Church offers to humanity, especially through forms and programs of the apostolate fittingly adapted to the circumstances of time and place, according to the norm of law." See also F.G. MORRISEY, "Decisions of episcopal conferences in implementing the new law," in *StC*, 20 (1986), pp. 105-121; D.B. MURRAY, "The legislative authority of the episcopal conference," in *StC*, 20 (1986), pp. 33-48; DE MÜELENAERE, "Cultural adaptation and the Code of Canon Law," pp. 46-49.

fundamental institutions of the Church, the means necessary for the Church to achieve her supernatural end, and her legislative authority. In all this, Episcopal conferences must strive to maintain proper balance.[24]

It follows from what has been said above that some of the Church's legislation on marriage may have to be substantially revised. This should certainly include the law on the canonical form of marriage. We believe that it is possible to have considerable decentralization on this matter. The right to marriage is one of the most fundamental human rights which every person, and therefore, every Christian, has. This right to marry and to have a family is exercised within the particular culture of one's people—always, of course, safeguarding the Gospel values and the Christian ideal of marriage. Therefore, in response to the wishes of Vatican II, especially those expressed in the Constitutions *Gaudium et spes*,[25] *Sacrosanctum concilium*[26] and the Decree *Ad gentes*,[27] the local churches should be encouraged in their search for an expression of Christian marriage that is more in conformity with different cultures. To formulate a culturally appropriate expression of Christian marriage, the local churches, in virtue of the call to "incarnate" the Gospel, must appeal to the cultural values of their peoples. In fact, this role of the people and their culture in the expression of the Christian message is indispensable to a proper understanding of the mystery of Christ. Evidently, it is the local church's responsibility, in a spirit of collegiality

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[24] See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, nn. 31-32, pp. 300-301.

[25] See *GS* 44; FLANNERY I, pp. 214-215.

[26] See SECOND VATICAN COUNCIL, Constitution on the sacred liturgy, *Sacrosanctum concilium* (= *SC*) 77 and 78, 4 December 1963, in *AAS*, 56 (1964), pp. 97-138; FLANNERY I, pp. 117-161, here at pp. 142-143.

[27] See *AG* 15 and 22; FLANNERY I, pp. 463-465 and 476-477.

and communion and in fidelity to revealed truth, to formulate an expression which would reflect marriage that is authentically Christian and authentically Papua New Guinean.

The *Ordo celebrandi matrimonium* provides considerable room for the conference of bishops to adapt Christian marriage to different cultures. In n. 39, the *Ordo* explicitly states that the conferences of bishops have the right to adapt the Roman ritual to the customs and needs of the particular regions for use in their region, once the Apostolic See has reviewed the *acta*. Moreover, n. 43 of the *Ordo* allows each conference of bishops, in keeping with the provisions of the Constitution on the Liturgy (art. 63b), to draw up its own marriage rite suited to the usages of the place and the people and approved by the Holy See. The instruction regarding the Roman liturgy and inculturation goes in the same direction. It points out that "in many place it is actually the marriage rite that calls for the greatest degree of adaptation so as not to be foreign to social customs. To adapt it to the customs of different regions and peoples, each episcopal conference has the faculty to prepare its own proper marriage rite."[28] A necessary condition, however, is that in the rite the assisting minister must ask for and receive the consent of the contracting parties,[29] and the nuptial blessing should always be given.[30] In the drawing up of adaptations the points listed in n. 41 of *Ordo* should be kept in mind.[31]

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[28] CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 57, p. 310.

[29] See SC 77; FLANNERY I, p. 142.

[30] See SC 78; FLANNERY I, pp. 142-143.

[31] The points are:

1. The formularies of the Roman ritual may be adapted and, as circumstances suggest, even supplemented (this includes the question before the consent and the words of the consent itself).

2. Whenever the Roman ritual gives several alternative texts, other texts of the same kind may be added.

### 4.1.3. Responsibility of each family and all Christian members concerning marriage

In our times of rapid change, the Church has to be readier than ever to listen to the experiences of married people of different cultures so as to be able to read "the signs of the time." Sincere dialogue is the most effective way to appreciate, understand and take into account the different cultural and social values of the people in order to help them to live their marriage properly. Through the process of open dialogue we can get to the heart of many problems and difficulties, joys and sorrows, hopes and fears of many families. In fact, it is only through such dialogue that families will be enabled to understand better their vocation and take responsibility for marriage in the world of today. So this is an area that calls for special sensitivity and openness on the part of the local churches.

The family is not merely the object but is also the subject of evangelization. Through the sacrament of marriage, the family is called to become "the salt of the earth," to transform society. The family, seen theologically as a "domestic church," must be a part of the mission of the Church as a whole.[32] It must act responsibly, although never in

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3. Provided the structure of the sacramental rite is maintained, adaptation of the order of its parts is permitted. If this seems more suitable, even the questions before the consent may be omitted, as long as the minister asks for and receives the consent of the contracting parties.

4. Should pastoral need so demand, the conference of bishops may rule that the consent of the contracting parties always be asked for by questioning.

5. Depending on local customs, after the exchange of rings, the crowning of the bride or the veiling of bride and groom may be added.

6. Whenever the joining of hands or the blessing and exchange of rings are imcompatible with the culture of a people, the conference of bishops may decide on the omission of these rites or their replacement by other rites.

7. The conference of bishops shoul weigh carefully and prudently what elements from the traditions and cultures of individual people may be appropriately received into the rite.

[32] See THE PONTIFICAL COUNCIL FOR FAMILY, *Preparation for the sacrament of marriage*, 13 May 1996, in *Origins*, 26 (1996-1997), pp. 97, 99-109, here nn. 4 and 28, pp. 100 and 104. See also SECOND VATICAN COUNCIL, Decree on the apostolate of the laity, *Apostolicam actuositatem* (= *AA*) 11, 18 November 1965, in *AAS*, 58 (1966), pp. 837-864; English trans. in FLANNERY I, pp. 418-419; *LG* 11, FLANNERY I, p. 16;

isolation, since it is precisely as a domestic church that it finds life in communion with others. The fact that families are the agents of their own history and destiny has far-reaching consequences. In fact, it is they who must make the decisions about their own life—always in dialogue with other families, with their pastors and with the magisterium of the Church.

All baptized Christians share in Christ's prophetic office and are called to witness to him in their daily lives. Therefore, all Christians have the duty to uphold the value of Christian marriage. Such a duty is not incumbent on the "official Church" only but on every member of the community, on those who are married and on those who are not. Moreover, this is not an obligation to be fulfilled by words only; deeds matter just as much or more. Whatever Christians do about marriage, officially or otherwise, conveys a message to those who are preparing for marriage.

### 4.2. Canonical Form and Customary Marriage

The preaching of the Christian message calls every culture to conversion[33] but without overthrowing or destroying the human patrimony of a social grouping or its setting for communication and development.[34] Marriage and family are basic sociological

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JOHN PAUL II, Apostolic exhortation, *Familiaris consortio* (= *FC*) 59-61, 22 November 1981, in *AAS*, 74 (1982), pp. 81-199; English trans. in FLANNERY II, pp. 864-866; IDEM, Apostolic exhortation, *Christifideles laici* (= *CL*), 30 December 1988, in *AAS*, 81 (1989), pp. 393-521; English trans. in *Origins*, 18 (1988-1989), p. 591; IDEM, Letter to families, 2 February 1994, in *AAS*, (1994), pp. 249-340; English trans. in *Origins*, 23 (1993-1994), p. 654; IDEM, Post-synodal apostolic exhortation, *Ecclesia in Oceania*, p. 591; IDEM, Opening address at the Puebla Conference, 28 January 1979, in *Puebla and beyond*, J. EAGLESON, P. SCHARPER (eds), Maryknoll, NY, Orbis Books, 1979, p. 70; IDEM, Address to married couples and their families, "True human love reflects the divine," in *L'Osservatore romano* (English edition), 6 October 1993, p. 6.

[33] See *GS* 58; FLANNERY I, pp. 234-235.

[34] See JOHN PAUL II, Encyclical letter, *Redemptoris hominis* (= *RH*) 12, 4 March 1979, in *AAS*, 71 (1979), pp. 257-324; English trans. in *Origins*, 8 (1978-1979), pp. 625, 627-644, here at pp. 632-633; *EN* 19-20; FLANNERY II, p. 719; *CT* 53; FLANNERY II, pp. 794-795.

realities. Married life takes on many forms, all of which need the light of the Christian message and the pastoral care of the Church. In theory, the Christian sacrament of marriage operates in and through the ordinary human institution of marriage in whatever form society celebrates and lives it.[35] In a sense, marriage is the most cultural of all the sacraments, as we see from its progressive historical development, assimilating customs and signs used by people. In practice, church law represents the human traditions of ancient Rome and Germany and joins forces with the legal forms of the western world which derive from the same traditions. Church marriage in Papua New Guinea has not made use of the existing Papua New Guinean traditions and institution of marriage and, therefore, the two forms of marriage continue to exist alongside each other. This inevitably leads to a dichotomy in marriage celebrations and reduces the church celebration to a mere and often formalistic blessing.[36] To solve this dichotomy successfully, the Bishop's Conference of Papua New Guinea and Solomon Islands must try to bridge the gap between the church rite and customary rites. It is obvious that the genuine values of Papua New Guinean culture should be integrated into the marriage ceremony if we wish to have a truly incarnated church marriage. No church marriage in Papua New Guinea would be stable without first becoming validated in accordance with tribal norms.

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[35] See above, p. 135.

[36] Many churches in Africa face the same problem. See H. KARLEN, "Canonical form and traditional marriage," in *AFER*, 23 (1981), p. 59; G.Z. WAKO, "The marriage rite in Africa," in *AFER*, 23 (1981), p. 57; BATANTU, "Progressive marriage and admission to sacraments," p. 42.

### 4.2.1. The low rate of marriage by Catholics according to the canonical form

Though Christ has raised marriage to the dignity of a sacrament, the Church in Papua New Guinea has not yet succeeded in its efforts to transform Papua New Guinean traditional marriage into ecclesiastical or sacramental marriage. At best, the reality of what actually takes place can be described as a customary marriage to which a subsequent church marriage or blessing is added as a trimming for the purpose of solemnity. Consequently, most Catholics do not feel the need of and are often in no hurry for a church marriage.[37] Customary marriage in the mind of Papua New Guineans, including Catholics, is the "real marriage." Therefore, after a century of Christianity in Papua New Guinea, there are many baptized adult Catholics who, even though married traditionally, are not married according to church law. The number of Catholics marrying according to the canonical form of marriage is somewhat low.[38] At the end of the eighties and into the early nineties, the Melanesian Institute carried out a research project on marriage and family life in Papua New Guinea. Statistics show that only one out of three Catholics actually observes the canonical form of marriage.[39] Only a small percentage, 8.2 percent of all respondents reviewed in this project, would choose to turn their customary marriage into a church marriage with dual customary and church

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[37] In the first chapter it was noted that one of the basic requirements for an acceptance of any proposed change is the recipients' actual need for it. If there is no need for what has been advocated, then it is less likely that people will accept it. See above, p. 23 and also p. 42. Therefore, the first task performed by the Church in regard to the canonical form of marriage is to establish a link between a perceived need of people and an advocated need of the Church.

[38] See J. CONWAY, E. MANTOVANI, *Marriage in Melanesia: A sociological perspective*, Point Series No. 15, The Melanesian Institute, Papua New Guinea, Goroka, 1990, pp. 76-78 and 146-148.

[39] See ibid., pp. 77 and 159.

ceremonies.[40] Facts seem to show that the teaching on Christian marriage has failed to become the lived experience of most married couples who see no vital link between the Papua New Guinean traditional marriage and the Christian marriage proposed to them. It seems that there is a failure really to understand the meaning of Christian marriage as well as a lack of adequate motivation for its celebration. Even the sanctions, which prohibit Catholics living in an irregular matrimonial situation from sharing in the sacramental life of the Church, seem not very effective. What are the main reasons behind the hesitation of many Papua New Guineans to marry in church?

1) The Church recognizes natural marriage as valid. Therefore, they ask: Why should the Church not recognize also the customary marriage as valid? Moreover, if it is contracted between two Catholics, why should that marriage not be sacramental as well?[41]

2) Children are essential to Papua New Guinean customary marriage. Catholics are, therefore, afraid to enter into this new type of indissoluble sacramental marriage, which neither guarantees them children nor permits subsequent marriage that would ensure the presence of children in marriage.

In response to these difficulties:

1) The Church should recognize and christianize monogamous customary marriage and thereby allow for customary and Christian marriage to be synchronized. The consent in customary marriage could be given before the parish priest, his representative, or some community elders.

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[40] See ibid., p. 77.

[41] See BATANTU, "Progressive marriage and admission to sacraments," p. 42.

2) The Church should have a more patient and sympathetic understanding for Christians who, under the force of social and ingrained customs, may not live up to the full ideal of Christian marriage. It should not condemn but educate them.

3) Papua New Guinean theologians should undertake an in-depth study into the true nature of customary marriage with the aim of refining some theologically sound solutions, particularly in regard to the Papua New Guinean notion of children as essential to the marriage.[42]

### 4.2.2. Non-observance of canonical form as an obstacle to the reception of the Eucharist

Married life takes on many forms, all of which need the light of the Gospel and the pastoral care of the Church. However, it might well be asked whether or not the Church's pastoral policy on marriage might not in itself become an obstacle to many Catholics in their search for God's love. Listening to the young Papua New Guinean churches, we get the impression that the present practice of the Church in this regard obstructs the process of evangelization. The canonical form of marriage actually has been frequently blamed for the painful and altogether unacceptable situation whereby the majority of Catholic couples—considered as "public sinners"—are excluded from sacramental sharing, especially from the Eucharist, because of their "irregular

[42] In this regard the instruction concerning the Roman liturgy and inculturation notes that in order "to prepare an inculturation of the liturgy, episcopal conferences should call upon people who are competent both in the liturgical tradition of the Roman rite and in the appreciation of local culture values. Preliminary studies of a historical, anthropological, exegetical and theological character are necessary. But these need to be examined in the light of the pastoral experience of the local clergy, especially those born in the country" (CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, *Varietates legitimae*, n. 30, p. 300).

matrimonial situation."[43] However, Catholic Papua New Guineans, who fulfill all the formalities of marriage required by custom or tradition would not think that they are just living in a state of concubinage.

Canon 915 stipulates that those who have been excommunicated or interdicted after the imposition or declaration of the penalty as well as others obstinately persevering in manifest grave sin are not to be admitted to the Eucharist. There is a serious difficulty in applying this canon to the cases in which public excommunication or interdict do not come into play. In fact, the application of this canon can cause some injustice to the faithful. Therefore, it is necessary in cases, apart from those of public excommunication or interdict, that there be some urgent need pertaining to the common good, in particular, the need to preclude grave scandal on the part of the community that would arise from the public sinner's reception of the Eucharist. The fact of actual scandal is, however, culturally relative. What causes scandal in one part of the world may not cause scandal

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[43] See P.P. DERY, "Christian and customary marriage in Ghana," in *AFER*, 23 (1981), pp. 37-38; J. HARDY, "Missionary expectations concerning the synod," in *AFER*, 23 (1981), p. 24; BARRY, "The Tridentine form of marriage," pp. 174 and 177; KARLEN, "Canonical form and traditional marriage," p. 59. F. Urrutia, however, argues, on the one hand, that the canonical form is nothing more than a form, not helping by itself to deepen the Christian understanding of marriage. However, on the other hand, he radically opposes the opinion that the canonical form should be blamed for the abnormal situation of those Catholic couples who went only through the traditional customary celebration of marriage and are now deprived of the sacraments. According to him, it is not so much the canonical form itself, but rather the heavy significance of the religious ceremony that prevents the Catholic couples from contracting Christian marriage. The idea that Christian marriage is monogamous and indissoluble has very likely sunk deep into the couples' minds and that is what frightens them. One of the fundamental ends of customary marriage is to have children. If the couple, for any reason, fails to achieve this end, the custom allows the man to enter into a subsequent marriage in order to ensure the presence of children in marriage. However, if the couple went through Christian marriage and no child were born, the couple would not have the same possibility. For this reason, Catholic couples married customarily are afraid to enter into a new type of monogamous and indissoluble sacramental marriage, which neither guarantees them children nor permits subsequent marriage. Hence, there is the frequent practice of ascertaining fertility of their marriage.

Urrutia also notes that the suppression of the canonical form and the acceptance of the customary marriage celebration without deeper catechetical formation and greater pastoral care would in no way solve the problems of the numerous couples living away from the sacraments. From his point of view, simple suppression of the canonical form of marriage may even increase those problems. See F.X. URRUTIA, "The challenges on canonical doctrine on marriage arising from Africa," in *StC*, 23 (1989), pp. 18-20.

elsewhere. In Papua New Guinea the faithful are often more scandalized by the Church's denial of the Eucharist than by the Christians living in the progressive stages of customary marriage. Moreover, these Christians, for the most part, are not lacking in good will. They are regular in attending worship, and they are often engaged in church activities or in the apostolic movements with every bit as much zeal as those who are in a regular marriage situation. If such couples manifest real faith and show serious signs of trying to live a Christian life, and if their desire to come to a definite commitment can be verified, could it be equitable to suggest that the Church recognize their journey along the way as legitimate, and, under certain conditions, allow them to receive the sacraments during their movement towards the marriage sacrament, celebrated according to the regular canonical form?[44]

### 4.2.3. Canonical analysis of customary marriage

If customary marriage between two Catholics is going to be qualified as a valid "sacramental marriage" by the standards of canon law, it must comprise certain juridical constituents, i.e., subjective and objective elements. Manifestation of consent and the right to conjugal love pertain to the subjective elements while the ends of marriage (*bonum coniugum*, *bonum prolis* and even *bonum societatis*) constitute objective elements.

All these elements can be thought of as essential building blocks that add up to valid "sacramental marriage." If any one of these elements were missing, there would be

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[44] See PERROT, "Marriage: A series of successive stages in community," pp. 43-44. In this regard, Urrutia brings out a very interesting point. He says that the couples who would be married according to the traditional customs, would not have any reason, on that account, to be deprived of the sacraments. However, he poses a few questions: Would those couples understand their marriage to be a Christian marriage? Would they truly try to live according to its demands? Would the fact that they receive the sacraments mean a spiritual help for their Christian family life, or would it have only a ritualistic character?

something radically wrong with the resulting marriage. It may be a perfectly legal civil marriage, but it would not constitute "Christian marriage."

#### 4.2.3.1. Subjective elements of marital consent in customary marriage

In the third chapter, we explained that marriage consent is a human act, a juridical act, which is the efficient cause that brings into being the reality of marriage. As a human act, marital consent proceeds from a deliberate will, in which interact the various psychological faculties of the human person. Canonical doctrine and jurisprudence identify the following psychological capacities in the act of exchanging mutual consent to marry: the reason, the discretion of judgment, internal freedom, and the ability to assume and fulfill the essential rights and obligations of marriage. These constitute the subjective elements of the act of matrimonial consent. Those who contract marriage should be endowed with these capacities in proportion to the object, that is to say, in proportion to the essential rights and obligations of marriage. In the absence of sufficient use of reason, or sufficient discretion of judgment or internal freedom, or the ability to assume the essential marital obligations, the consent will be invalid (c. 1095). The crucial question we ask here is: Are these subjective elements involved in eliciting marital consent present in those who enter into a customary marriage?

As noted in our analysis of customary marriage, the strong community involvement in its arrangement may lead one to think that the parties in a Papua New Guinean customary marriage do not enjoy the subjective right to make a personal decision or to freely choose their partner. Therefore, the subjective elements which constitute the act of marital consent are presumably missing in a case of customary

marriage. Such a marriage, therefore, would be invalid from a canonical point of view. Is this conclusion really true? Do Papua New Guineans enjoy the ability to exercise their personal subjective right to choose marriage and their life partner? Are subjective elements which constitute marital consent really missing in a customary marriage?

The freedom that people preparing to enter into a customary marriage enjoy is the freedom of persons who belong to one another and to one clan.[45] They are people who are about to perform in a certain way in the name of all, and with the participation of all, a sacred act, a ministry at the service of life and of the future of the clan. In this way, marriage, the source of new family life, is an act that is at the same time eminently personal and communitarian; for, the most legitimate personal aspirations of the parties find fulfillment in it, and the social structure of the clan becomes wider and richer with the establishment of a new alliance, the source of new life. Although the customary marriage rules place stringent restrictions on opportunities for the fullest expression of personal interests of those who are going to marry, they, nevertheless, do not deny the young people their right to express their consent in choosing and marrying their partner.[46] As already pointed out, an ethically honest Papua New Guinean person would enter into marriage primarily to serve the community and to find personal happiness and fulfillment in such a service. Therefore, the young Papua New Guinean couple entering marriage give their consent primarily to the community values and to the social, economic and political network that is established by marriage. Anytime a couple freely express their consent to the community values and to the network of community ties, a stable and

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[45] See SYNOD OF BISHOPS - SPECIAL ASSEMBLY FOR OCEANIA, *Jesus Christ and the people of Oceania: Walking his way, telling his truth, living his life*, p. 48.

[46] See NARAKOBI, *Law and custom in Melanesia*, p. 77.

supportive environment conducive to the development of a healthy and enriching interpersonal relationship between husband and wife and between the families and/or clans of the couple is created.

#### 4.2.3.1.1. Manifestation of consent in customary marriage

Manifestation of consent as prescribed in c. 1104 §2 must be made with words or signs which unequivocally express the intention of the will to enter into marriage. Such manifestation is absolutely necessary for the validity of the matrimonial act. Internal consent alone does not suffice.

The role of the clans and their community elders in the celebration of customary marriage is of primary importance. Besides the arrangement and preparation of marriage, they play a very significant role also in the manifestation of consent. Even though the groom and bride may be capable of manifesting their consent verbally, in the context of Papua New Guinean customary marriage it is the two community elders, i.e., their uncles who by words and signs manifest the consent on their behalf. They are actually seen as the official witnesses of marriage. They do not ask for and receive consent but rather "preside" over the marriage and actually "proclaim and announce it."[47] At the time of celebration the groom's uncle comes forth and addresses the whole assembly and the prospective partners in words such as: "X and Y, we all are here today to witness your marriage. From now on both of you will be living together as a couple in a legal customary marriage. The vast contribution of the bridewealth by the whole community is a sign of the joy and happiness we share with both of you." The bride's uncle responds by

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[47] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, pp. 14-15.

thanking the groom's uncle and also the close family and their kinsmen, clans, and the whole community. In his parting words he may say to the bride: "Y, up to now you have been our daughter. We looked after you as our own. But at this moment, we offer you to X and his clan as one of them. We hope they will treat you as their own." At this point both sides sing a parting song. Then the bride's uncle presents the bride to the groom with his uncle. In return the groom's side hands over the bridewealth to the bride's clan. Traditionally, this is the moment when the celebration reaches its climax. Then the parties partake of a single piece of cooked pork obtained from one of the pigs that were given as a part of the bridewealth.[48]

In such a form of marriage celebration, as noted above, the parties do not say a word to manifest consent. Their relatives do that on their behalf. However, the canon requires that the parties themselves must manifest consent by words or signs. Otherwise, the validity of such marriage may be seriously questioned. Hence, the problem that arises here is: Must Papua New Guineans, in order to be married sacramentally, have to forgo their own traditional manner of communicating and, at the moment of celebration, be required to follow and accept only the western way of communication? Could not the actions (signs) performed by the parties and strengthened with words by the relatives on their behalf be regarded as a legal and sufficient manifestation of their consent?[49]

The basic cultural assumption of Papua New Guineans is that words do not suffice to express an attitude. It is not enough to speak of entering a relationship and of accepting and reciprocating that relationship. The relationship has to be shown by actions

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[48] See ibid., p. 45.

[49] See MANTOVANI, "The Pacific: Transforming role of the Church," p. 200. See also above, pp. 94-95.

and deeds. Therefore, Papua New Guineans do not create and express their relationship with one another through words but rather through actions.[50] This philosophy is actually the basis for the fundamental difference between the western and Papua New Guinean manifestation of consent. In order to manifest consent, westerners use words whereas Papua New Guineans use deeds. It is unfortunate that once again the validity of the sacrament is endangered because of differing cultural perceptions and misunderstanding of what is actually implied in the manifestation of consent. A question might be raised: Is everyone obliged to subscribe to a western way of communication in order to celebrate a valid marriage? A canonical compromise could possibly be reached whereby the Papua New Guinean celebration of marriage might first be performed for example in the local village, followed by the exercise of the marriage ritual as a canonical requirement in the western church. However, this compromise may be also taken as a cultural insult to the thinking of the people, to their understanding and traditional ways of acting. It might even imply that the Papua New Guinean way of communicating is not acceptable to God, that it is not good enough for the sacramental celebration of marriage. Is this not repeating by our actions the lack of insight of the first missionaries who saw Papua New Guineans as primitive and inferior to be molded into the image which reflected the western standards?[51] Why cannot a Papua New Guinean couple manifest their consent, i.e., express their "yes" through their own native expressions? One might be tempted to say that the insistence on a western style in the celebration of marriage reveals a distrust

[50] See ibid.

[51] See above, p. 7.

toward and a lack of understanding of the Papua New Guinean life and culture. A Church that wants to be Papua New Guinean cannot ignore and overlook this problem.

Based on what is suggested above, a question can be posed: What kind of action do the parties perform in manifesting their consent? The arrival of the groom at the girl's family place is a sign of his intention to get married. The acceptance of the bridewealth by the girl's family and partial return of it to the groom's family is the sign the girl's willingness to marry. At the same time, it is a sign of a sealed pact between the parties and their own clans. Finally, the eating the same piece of cooked pork is actually an expression or sign of the parties' "yes."

#### 4.2.3.1.2. Western and Papua New Guinean concept of marital love

In the western culture, two persons marry because they are in love. Marriage is, in fact, seen as the culmination of the love they have for each other. This is expressed in the exchange of their marital consent. This, however, is not the situation in Papua New Guinea. The marriage is brought about through the will of the couple's parents or clans. Implicit in this will is the will of the parties. It is not the mutual love of the couple but their intention to serve the community by establishing a new family that impels them to marry. It is precisely this intention that leads to true love or mutual trust between the husband and the wife. True marital love develops only if the service to the community is given the priority in their marriage. True love in married life may be affected or rendered impossible if this communitarian service were excluded. In brief, we can say that

customary marriage in Papua New Guinea is not the result of love. Rather, it is a "school of love" in which mutual love gradually matures.[52]

The description of the Papua New Guinean customary marriage may lead one to think that in such an arrangement marital love falls short of the Christian ideal and creates only a "working relationship" for the mutual benefit of the partners and their respective clans. Therefore, it may seem that an important subjective element, i.e., love, is missing in a customary marriage. That is not at all true! Even in such marriages some degree of love, personal affection and compatibility are expected in the couple so that they will be able to cooperate and work together; this is an important requisite for marriage in all Papua New Guinean cultures.[53] Therefore, we can say that marital love is present also in customary marriages even though the way in which it is expressed and the meaning which it carries are strongly influenced by the culture.

In western cultures the display of affection between men and women in public is not uncommon; but in Papua New Guinea such expression of affection does not take place. Expression of affection between men and men, women and women, old and young

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[52] See W. FEY, "Melanesian married love," in *Human sexuality in Melanesian cultures*, J.F. INGEBRITSON et al. (eds), Point Series No. 14, The Melanesian Institute, Papua New Guinea, Goroka, 1990, pp. 216-232; B.H. OKONKWOR, *The role of matrimonial consent in Igbo traditional marriage in the light of the new canonical legislation: A comparative study*, JCD diss., Rome, Pontificia Universitas Urbaniana, 1985, pp. 24-27; MANTOVANI et al. (eds), *Marriage in Melanesia: A theological perspective*, pp. 3-4; MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, pp. 13-14; MENDONÇA, "Bonum coniugum from a socio-cultural perspective," pp. 63-64.

[53] Ongka, a leader from Mt. Hagen area, described his relationship with his first wife in affectionate terms. He recalled how his father had arranged for him the marriage with a hard working and obedient girl and how he had objected: "There are girls around here I have made friends with by singing to them and playing at mug-games with them. I like them and may want to marry one of them." However, he accepted his father's choice of a girl by the name Pau. Later when Pau died, Ongka said: "I was fond of her and I am upset that she is dead." Pau's own love for Ongka is reflected in her last words as he remembered them: "You have cooked so many pigs for me while I am still alive and you have suffered a lot. [...] I am your wife, but now I am leaving you with so much work, so many gardens and houses, and our little girl too. Who will look after her?" See FEY, "Melanesian married love," pp. 222-223.

is not uncommon in Papua New Guinea, but it does not take place between men and women. It is an indication of something "sacred" in the man-woman relationship. Papua New Guineans do not easily talk about the meaning of their cultural behaviors because, if the meaning were made public, the cultural behavior would lose all vigor of sacredness and power. Perhaps the lack of public expression of marital love can, in part, be explained in similar terms: What is "sacred" is kept "secret."

There is no doubt that in any marriage, whether customary, statutory, or Christian, love has a central place. However, the crucial question is: Is love so important that a marriage fails to come into existence without it? Can customary marriages contracted in Papua New Guinea be regarded as invalid merely because there was no love at the beginning?

It seems that in the history of Rotal jurisprudence there has been only one sentence which had declared a marriage null on the ground of lack or absence of love at the time of the exchange of marital consent. In that lone case, V. Fagiolo, in his affirmative sentence of 30 October 1970, identified marital love with marital consent itself.[54] According to him, marital love is identical to marital self-giving and is the same as consent; therefore, love is not only the efficient cause of marriage but also its very essence. For this reason, in a marriage, in which marital love is lacking, consent is either not free, or not internal, or excludes or limits the object that must be integral to have a valid marriage.

P. Palmer questioned the appropriateness of the wording of Fagiolo's decision. He noted:

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[54] Decision *c.* FAGIOLO, 30 October 1970, in *RRT Dec.*, 62 (1970), pp. 978-990. On page 982 Fagiolo states: "Videretur, ex iis quae diximus, amorem coniugalem esse matrimonii causam efficientem, sicut consensus. Imo, cum matrimonium sit proprie coniunctio maritalis, quae donationem mutuam postulat et intimam communitatem vitae gignit, videretur dici debere rectius amorem coniugalem cui proprium est donationem facere causam esse coniugii eumque matrimonium facere et esse."

> My quarrel is only with the wording of the decision which speaks of the "lack of conjugal love" instead of the more precise "refusal to love." There have been and there will be many cultures in which engaged couples meet for the first time on the day of the marriage. This does not prevent them from pledging their love and undivided affection, even though love might be lacking at the time the covenant is entered.[55]

J. Prader raised a similar objection to Fagiolo's argument by pointing out the cultural variance with regard to the relevance of love to marital consent. He wrote:

> The element of love does not have any essential juridic role in the constitutive act of marriage; if it were so, then a large number of marriages would be invalid in those countries of Africa and of Near and Middle East, where even today frequently the spouses do not even have the possibility of knowing each other before marriage.[56]

Prader also emphasized that Rotal jurisprudence has been constant in considering conjugal love as an element extrinsic to the juridical notion of marital consent. According to him, lack of love may be an indication or proof of simulation of consent. However, merely its lack in the beginning of marriage or its cessation during the marriage is *per se* not a justifiable motive for the invalidity of a marriage.

In his allocution to the Roman Rota of 9 February 1976, Paul VI reaffirmed the constitutive role of marital consent in effecting marriage. He said:

> The Christian teaching on the family cannot admit any concept of conjugal love which will lead to the abandonment or lessening of the force and meaning of the well-known principle "marriage is brought into being by the consent of the parties" (*matrimonium facit partium consensus*).[57]

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[55] P.F. PALMER, "Needed: A theology of marriage," in *Communio*, 1 (1974), p. 258.

[56] J. PRADER, *Il matrimonio in Oriente e Occidente*, Kanonika 1, Roma, Pontificium Institutum Orientalium, 1992, p. 9.

[57] PAUL VI, Allocution to the Roman Rota, 9 February 1976, in *AAS*, 68 (1976), p. 206; English trans. in WOLSTMAN, *Papal allocutions*, p. 135.

The pope also pointed out that conjugal love pertains to the psychological order and, therefore, it is not under the control of the will. For this reason, its lack does not affect the existence of marriage as a *juridical reality*. He stated:

> We must, therefore, reject without qualification the idea that if a subjective element—among these especially conjugal love—is lacking in a marriage, the marriage ceases to exist as a *juridical reality*, which originated in a consent for once and forever efficacious. No, this *reality*, which is juridical, continues to exist and does not depend on love: it remains even though love may have totally disappeared.[58]

The pope's allocution on the relevance of conjugal love to the validity of marriage was timely because tribunals in several countries were trying to read into Fagiolo's sentence more than what he had probably intended to incorporate into it. However, the pope's intervention did not succeed in eliminating the discussion on this matter. Even after the papal allocution, several authors have tried to attribute juridical value to conjugal love in marriage.[59] Some of them identify conjugal love with marital consent and, therefore, consider it as an essential element of marriage.[60] Others regard conjugal love as necessary for the realization of the essential aspects of marriage but without any juridical significance to the validity of marriage.[61] Among the different opinions on this issue, Stankiewicz's reflections found in his sentence of 16 December 1982 are in conformity

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[58] Ibid.

[59] A Mendonça cites Z. Grocholewski, G. Versaldi, L. Wrenn, L. Chiappetta, M.F. Pompedda. See MENDONÇA, "Exclusion of the essential elements of marriage," pp. 49-54.

[60] See Z. GROCHOLEWSKI, "De 'communione vitae' in novo schemate 'De matrimonio' et de momento iuridico amoris coniugalis," in *Periodica*, 68 (1979), p. 479; M.F. POMPEDDA, "L'amore coniugale e il consenso matrimoniale," in *Quaderni dello studio rotale*, 7 (1994), p. 29; G. VERSALDI, "Elementa psychologica matrimonialis consensus," in *Periodica*, 71 (1982), pp. 252-253; IDEM, "Via et ratio introducendi integram notionem christianam sexualitatis humanae in categorias canonicas," in *Periodica*, 75 (1986), pp. 412-413; L.G. WRENN, "Refining the essence of marriage," in *The Jurist*, 46 (1986), p. 211.

[61] See decisions *c.* PINTO, 12 February 1982, in *RRT Dec.*, 74 (1982), p. 65; *c.* EGAN, 22 April 1982, in ibid., 74 (1982), pp. 202-215; *c.* BRUNO, 19 July 1991, in ibid., 83 (1991), pp. 466; *c.* STANKIEWICZ, 16 December 1982, in *EIC*, 39 (1983), pp. 255-265.

with our own view. He considers conjugal love as the intrinsic force which enables spouses to realize the essential aspects of their covenantal relationship. However, he does not call conjugal love an essential element of marriage.[62] In one of his later articles, Stankiewicz reiterates this view on conjugal love. He states:

> Therefore, although the very validity of the matrimonial bond is not subject to the element of love, nevertheless conjugal love cannot be overlooked while assessing either the conjugal duties, [...], or conjugal communion itself, which is properly speaking the communion of conjugal love.[63]

In sum, we can say that love itself is not the essential constitutive element of marriage and it does not have to be present at the time when two persons exchange their consent. In fact, this is exactly what happens in Papua New Guinean customary marriage. However, what should not be lacking in the exchange of consent is the right to conjugal love. This right must be exchanged and conjugal love pledged either explicitly or implicitly in the act of consent. This means that at the time of expressing consent both parties must be capable of loving and have the intention to love one another. If this essential right were substantially restricted at the time of the exchange of consent, the marriage could be declared invalid.

#### 4.2.3.2. Objective elements of marital consent in customary marriage

Besides the subjective elements, marital consent must include also the objective elements. As noted in our analysis of c. 1057 §2, the very persons of those getting married are the material object of consent. Is the material object of consent the same also

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[62] See decision c. STANKIEWICZ, 16 December 1982, in *EIC*, 39 (1983), p. 258.

[63] A. STANKIEWICZ, "De iurisprudentia rotali recentiore circa simulationem totalem et partialem (cc. 1101 §2 CIC; 824 §2 CCEO)," in *Monitor ecclesiasticus* (= *ME*), 122 (1997), p. 218.

in customary marriage? There is no doubt about it even though this may seem contrary to what was mentioned in the second chapter. We stated there that the young Papua New Guinean couple when entering marriage gives their consent first and foremost to the service of the community and its values. Consequently, one could get the impression that the material object of marital consent in customary marriage may not be the very persons but the community, but this is not true. The service and values of the community would not be met if the material object, i.e., the very persons of the spouses, were not included in the marital consent of the couple entering customary marriage.

It was also mentioned that the material object finds its formality in the establishment of a marriage which is identified in c. 1055 §1 with the *consortium totius vitae*. This right, i.e., the right to a partnership of the whole life, is the formal object of the marriage contract by the law of nature and the divine positive law. Since the marriage is a natural, human reality, the meaning and elements of *consortium* must be understood and interpreted according to the culture and customs of the people. The crucial question we ask here is: How do Papua New Guineans understand *consortium totius vitae*? Is this formal object included in the marital consent of customary marriage? Traditionally, the supreme value of marriage in Papua New Guinean societies was its ability to give continuity to the clan in space and time. Because marriage possessed this ability, Papua New Guinean societies took care to support and protect the marriage partnership and its stability. Most Papua New Guineans have viewed divorce and remarriage as something unacceptable.[64] In fact, divorce was contrary to their idea of marriage and only in extreme cases was it reluctantly allowed. The factors which could lead to divorce were: unceasing

[64] See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, pp. 209-213.

cruelty on the part of a husband toward his wife, incurable laziness on the part of the wife and repeated refusal of the wife to have conjugal relations with her husband. What was behind this stability of customary marriages? As a broad generalization, it is assumed that marriages tended to be stable in societies where they were the focus of economically significant exchanges of material goods or where the reciprocity of woman exchange was explicit and strict. In such circumstances marriage involved the economic or social interests of many people besides the couple themselves. These people had, as it were, an investment in the union and, therefore, they supported and protected the marriage partnership and its stability.

In brief, we may conclude that each party in the celebration of customary marriage gave and accepted the right to a partnership of the whole life. Without the mutual transfer of this right, i.e., without the formal object, it would have been impossible to establish or preserve the community of life and love required for achieving the essential ends of marriage which are the good of the spouses, of the children and also of society.

#### 4.2.3.2.1. Ends of marriage

The pastoral constitution *Gaudium et spes* explicitly mentioned three goods (ends) of marriage: "[...] for the good of the partners, of the children, and of society this bond no longer depends on human decision alone."[65] This means that marriage, as God's creation, is endowed by its divine founder with various values and ends. All of them have a very important bearing on the personal enrichment of the spouses, on the dignity, stability, peace and prosperity of the family, and on the continuation of the human race.

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[65] *GS* 48; FLANNERY I, p. 219. See also THE PONTIFICAL COUNCIL FOR FAMILY, *Preparation for the sacrament of marriage*, n. 7, p. 100.

#### 4.2.3.2.1.1. *Bonum coniugum* in customary marriage

God is love and, therefore, he created human beings out of love. In fact, human beings are both the object of God's love and the revelation of his love to one another. Every human life is a revelation of God's nature, i.e., of his love and care. This nature is reflected more acutely in a marital relationship. In God's plan, the marital relationship was meant not only to populate the earth but also to enable those involved in such a relationship to share his love with each other. Christianity actually teaches how this interpersonal relationship should be. A marriage which is devoid of a relationship of genuine love for each other is destined to fail in its human and divine purpose. Therefore, a Christian marriage is fundamentally an act of *giving*, and an act of *love*. The emphasis is on the word "*giving*" because marriage is not a search solely for the personal experience of love, but an act of self-giving. In other words, the essential end of marriage is the good of both spouses.

As stated in *Gaudium et spes*, n. 48, the institution of marriage is ordered to the good of the spouses (*bonum coniugum*). This means that the spouses through the intimate union of their persons and tasks offer each other mutual assistance and service, and experience and deepen the sense of their unity daily.[66] Marital union involves the whole person of each spouse and for this reason, *bonum coniugum* must be an all-embracing expression implying the physical, emotional, intellectual, sexual, moral-ethical and spiritual well-being of both spouses.[67]

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[66] See *GS* 48; FLANNERY I, p. 219.

[67] See ÖRSY, *Marriage in canon law*, p. 53.

In his allocution to the Roman Rota of 21 January 1999, Pope John Paul II pointed out that a better knowledge of the human person contributes to a deeper understanding of the essential content of marriage. He said:

> Everyone knows the contribution which the jurisprudence of your Tribunal has made to our knowledge of the institution of marriage by offering a very good doctrinal reference-point for other ecclesiastical tribunals. This has made it possible to bring into an ever better focus the essential content of marriage on the basis of a more adequate knowledge of the human person.[68]

The Holy Father teaches here that a more adequate knowledge of the human person is indispensable to a deeper understanding of the nature and content of marriage. On the basis of this teaching, we consider it reasonable to argue that the determination of the nature and content of the *bonum coniugum* would depend, to a large extent, on the objective knowledge we have of the human person incarnate in a specific and concrete culture. The life of people, whether as individuals or as groups, is invariably influenced by the concrete cultural worldviews,[69] which cannot be dismissed as irrelevant to defining the nature and elements of the *bonum coniugum*. In fact, the concrete elements of the *bonum coniugum*, and the possibility of their realization in the actual life of the couple, depend largely on the worldviews of the people in each culture. Therefore, the true good of the human person would depend primarily on the understanding a specific culture has of that good.[70] What a European or an American may label as good may not be perceived as good by a Papua New Guinean or a Melanesian. For this reason, one is

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[68] JOHN PAUL II, Allocution to the Roman Rota, 21 January 1999, in *AAS*, 91 (1999), pp. 622-627; English trans. in WOESTMAN, *Papal allocutions*, pp. 249-253, here at p. 249.

[69] Regarding this point, see above, pp. 25-26.

[70] See J.L. MACDONALD, "On missioning to systems," in *Bulletin*, 148 (1985), p. 1.

not to consider certain a concept (e.g., *bonum coniugum*) as universal and, consequently, applicable to all people. Similarly, one is not to label quickly certain behaviour of a particular cultural or ethnic group as abnormal or inappropriate merely because it does not correspond to the behaviour of his/her cultural or ethnic group.

The above reasoning is valid also in respect to the influences of cultural worldviews on the notion of the *bonum coniugum*, i.e., the husband-wife relationship. We can substantiate this from how the *bonum coniugum* is understood in the Papua New Guinean culture(s). In Papua New Guinea, the principle of male dominance and gender division determines the husband-wife relationship. Because of this principle, one might be inclined to think that the spouses in customary marriage are not equal and, consequently, there is no scope for true *bonum coniugum* in marital relationship. This is not at all true. Although, as in any society, there certainly are abuses, the spouses are considered very much equal, complementary and truly interdependent in everything they do.[71] The husband is the active partner in the relationship and dominates decision-making. It is his duty to act as the legal and social guardian for his wife, to provide her with all the necessities with which to fulfill her domestic obligations and to enable her to have children. He must also treat her well, care for her, consult her on important matters, be responsible for her debts and support her in private quarrels. The wife is more a passive partner in the relationship. She must respect her husband and cooperate with him, fulfill her domestic duties, have intercourse only with her husband and bear his children, express her opinion when asked and support her husband's decisions. She is expected to adapt quickly to the customs of her new home and

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[71] The interdependent and complementary roles of the spouses in Papua New Guinean customary marriage were already mentioned in footnote 20, p.14. See also O. FOUNTAIN, "A biblical theology of marriage," in *Marriage in Melanesia: A theological perspective*, p. 34.

to be an asset to her husband and his family.[72] A. Duteil describes the wife's position in African culture as follows:

> Its has been said [...] that the wife was treated as an inferior. I prefer to be more nuanced: what seems true to me is that she was put in second place. But one can walk behind someone while remaining his equal [...] by protecting the wife like a child, she has come to be considered as such.[73]

It may thus be true to say that the inequality between the spouses pertains more to their public roles and their acts which have social repercussions. Outdoors, under public scrutiny, the wife may be like an adult child. Indoors, however, she is mistress over her household. She is an indispensable partner and supporter to her husband. She has a say at every stage of the affairs of the family. She can moderate or even overrule the husband's decisions.

In the western culture, the *bonum coniugum* is being interpreted as a reasonable fulfillment of all personal needs, such as the need for love, acceptance, emotional security. In the Papua New Guinean understanding, however, the *bonum coniugum* is more than that. As noted in a previous section, an honest Papua New Guinean person would enter into marriage not only to fulfill his/her personal needs but, first and foremost, the needs of the community. It is essentially in their service to the community that the

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[72] Nowadays, there is a strong trend towards change of roles. Inquiring what the spouses do now that in former times they did not do, the men reply that they are now inclined to domestic jobs such as cooking, housework, child care and minding the pigs. The women, in this regard, point to heavy work which used to be done by men such as building the house, clearing the bush, fixing the fence of the garden. Because of this change of roles we might say that this new type of work performed by the women does not sound like a gain in equal rights but rather like the situation of a wife whose husband is not at hand and does not have other males to help her in the heavy duties of the subsistence economy. See MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 96.

[73] A. DUTEIL, "Quelle parole pour quelle famille?" in *Spiritus*, 20 (1979), pp. 396-397.

spouses try to find personal happiness and fulfillment.[74] Anytime the couple fulfills this expected service to the community, particularly in bringing forth new offspring, there is created a very stable and supportive environment for the *bonum coniugum*, for the growth of an interpersonal relationship between husband and wife as well as between their families and/or clans.[75]

#### 4.2.3.2.1.2. *Bonum prolis* in customary marriage

The other essential end of marriage is the *bonum prolis*. In *Gaudium et spes*, n. 48, the Council expresses it very clearly in the following words:

> By its very nature, the institution of marriage and married love are ordered to the procreation and education of the offspring and it is in them that it finds its crowning glory.[76]

The same document adds:

> Marriage and married love are by nature ordered to the procreation and education of children. Indeed, children are the supreme gift of marriage and greatly contribute to the well-being of the parents themselves.[77]

This means that in their consent the spouses give to and receive from each other the right to acts which are apt by their very nature for the procreation of children. This right is, in fact, one of the essential rights to be given and accepted in matrimonial consent. A grave incapacity to reciprocate this right in married life or its absolute refusal would constitute an exclusion of the *bonum prolis*.

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[74] See MANTOVANI et al. (eds), *Marriage in Melanesia: A theological perspective*, pp. 3-4; MANTOVANI, "The challenge of Christ to traditional marriage," in *An introduction to ministry in Melanesia*, p. 132.

[75] See MANTOVANI, "The challenge of Christ to traditional marriage," in *An introduction to ministry in Melanesia*, p. 131.

[76] *GS* 48; FLANNERY I, p. 219.

[77] *GS* 50; FLANNERY I, p. 223.

The fundamental end of customary marriage in Papua New Guinea is to have children.[78] The child, in fact, is the greatest gift one can offer to the community. This gift of life assures the community's survival. It also perpetuates and provides security for the older generation. By bringing forth a child in and for the community, both spouses feel that they are fulfilling their duty, achieving thus their own identity. A person dying without a child is considered as one having failed to fulfill his/her lifetime duty, i.e., service to the community.[79] As a consequence of this failure, his/her memory to be cherished after death in the clan is jeopardized. Therefore, having children is the principal and determining factor effecting a Papua New Guinean marriage.[80] The children are, in fact, the foundation-stone of any marital union. The need to bear and rear children is the principal motive behind every customary marriage in Papua New Guinea. The intention to have children, therefore, might be seen as an expression of marital consent, whereas the actual birth of the child as the action spelling out marital consent in a clear and loud voice.

For Papua New Guineans, marriage must be fertile before it is socially recognized.[81] For this reason, a marriage without children is not a true marriage. This means that the majority of the people enter marriage with such conviction. Then a question must be raised: Is a marriage entered with at least an implicit condition valid? According to c. 1102 §1, marriage cannot be validly contracted subject to a condition concerning the

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[78] See CONWAY, MANTOVANI, *Marriage in Melanesia: A sociological perspective*, pp. 64-65. See also above, pp. 95-97.

[79] See MANTOVANI et al. (eds), *Marriage in Melanesia: A theological perspective*, p. 3; MANTOVANI, "The challenge of Christ to traditional marriage," in *An introduction to ministry in Melanesia*, pp. 127-128.

[80] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, p. 14; GLASSE, MEGGITT, *Pigs, pearlshells and women: Marriage in New Guinea highlands*, p. 51.

[81] See SYNOD OF BISHOPS - SPECIAL ASSEMBLY FOR OCEANIA, *Jesus Christ and the people of Oceania: Walking his way, telling his truth, living his life*, lineamenta, p. 52.

future. The Church regards as invalid a marriage entered with a condition which can be fulfilled only after the marital consent was exchanged. Therefore, if no child is born of a customary marriage and the marriage is terminated precisely for that reason, it is possible to challenge the validity of such a marriage on the ground of conditional consent.

#### 4.2.3.2.1.3. *Bonum societatis* in customary marriage

Canon 1055 §1 reiterates, for the most part word for word, the teaching on the subject of marital ends as contained in *Gaudium et spes*, n. 48. As indicated above, in this document the good of society, i.e., its dignity, stability, peace and prosperity, is also named as one of the ends of marriage. This particular end has not been mentioned in c. 1055 §1. However, in Papua New Guinea this end is a precondition of marriage. It is one of the fundamental ends of customary marriage. Marriage is, in fact, seen as one of the most important means to achieve the good of the community. Therefore, for a Papua New Guinean couple entering into marriage, prosperity and prestige of their community have precedence over personal rights and well-being. No personal rights and advantages are to be sought at the expense of the community. Service to the community through marriage in order to achieve its prosperity and prestige is regarded by the Papua New Guinean couple as an ethical duty. Thus, a good marriage is one that actually fulfills this duty. The stability and success of a customary marriage, in fact, depends very much on the realization of this duty. If a Papua New Guinean boy and a girl wished to be bound to each other, yet did not want to include the communitarian aspect involved in their union but simply to be united only for the sake of each other and not for the community, then they would not be serving the community and, as a matter of fact, they would be losing its vital support.

In sum, the communitarian nature of customary marriage stresses the reciprocal responsibility of the spouses. In such a marriage, the spouses assume obligations not only towards one another but also toward their communities or clans, while their communities or clans are obliged to support them. This results in a continual building and strengthening of the community. The communitarian dimension of customary marriage also prevents marriage from becoming too individualistic, supports and strengthens the couple's stability, and helps them during the difficult early years of their marriage. However, because the canon law also demands the personal good of the spouses, it is important to strike a balance between the spouses' free personal consent and the involvement of their families and clans, between their personal autonomy and their community solidarity.

### 4.2.4. The need of bridging the gap between the Church and customary rites

It is clear that many aspects of life and culture in Papua New Guinea are not the same as in Europe or America, particularly regarding marriage and the family. However, in Catholic marriages it is advisable and permissible to tolerate those marriage ceremonies and customs which in the eyes of the people are of great value and not contrary to good morals. An instruction of the Sacred Congregation Propaganda Fide of 1659 says: "*Take great care not to make them change their rites, customs and manners as long as these are clearly not contrary to religion or to good morals.*"[82]

[82] "Nullum studium ponite, nullaque ratione suadete illis populis ut ritus suos, consuetudines et mores mutent, modo non sint apertissime Religioni et bonis moribus contraria" (CONGREGATIO DE PROPAGANDA FIDE, *Collectanea*, N° 235, p. 108).

It is regrettable that in Papua New Guinea we find the reality of two marriages side by side. On the one side is the human reality, which is the true marriage; on the other is the church celebration, with its heavy dependence on a different cultural framework and a different code of law. This situation has created a serious gap between these two marriages. However, we are convinced that the sacrament of marriage is no other reality than human marriage prepared and lived by baptized parties in a constant conversion to Christ, following a certain progression and certain aspects that can be defined by the episcopal conferences.

In order to bridge this gap the Papua New Guinean Church has some evangelical ideals to propose, but the cultural context in which these ideals have to take root and blossom is radically different. The family model, the family values, the human and Christian communities of which the family forms a part, the whole process itself of marriage, are all different. However, these differences certainly can give people in so-called advanced civilization food for thought. Chief among these considerations are the strong communitarian aspect of marriage; the seriousness of the matrimonial commitment at the end of a long process; priority given to the transmission of life and, therefore, the importance attached to children; a kind of co-responsibility in taking charge of and bringing up the children; and the law of solidarity among families related by marriage. If these differences are not taken into account, then the possibility of defining the reality of marriage and the role of the Christian family in today's world will be very difficult. In fact, it would be a pity if the Church in the process of evangelization, which should be aiming at liberation, should contribute to the destruction of authentic human values which are good in themselves, even if they need to be enlightened by the Gospel. In this respect,

the Church should work out ways by which the traditional values can be incorporated in its process of evangelization. It is true that we live in a rapidly changing society, especially in urban areas such as Port Moresby, Madang, Lae, and young people must be helped to live in Papua New Guinea today. Still, basic values remain as permanently valid. The careful process of preparation for marriage is one of them, and involvement of the whole community is another.

#### 4.2.4.1. Marriage bond as the result of a process

The importance attached to the marriage contract by the lineage community explains the great care taken in the development and formation of the matrimonial bond. Customary marriage is not simply a ceremony concluded at just one moment of time. It is a very gradual development, a living process which unfolds stage by stage, each one following upon the preceding one, until the bride actually arrives at the house of the bridegroom. This process is spread out in time and even in space. Certain stages are celebrated at certain times in the house of the future bride, at other times in the bridegroom's house. Each of these stages has its own specific function and is a constitutive part of the gradual elaboration of the marriage bond. In fact, all stages taken as a whole make customary marriage a reality. The actual number of stages may vary from clan to clan. However, no matter how many stages in the formation of the marriage bond there may be, their aim is the same: the gradual ripening and establishing of a more solid and lasting union.

From what has been noted thus far we deduce that it is wrong to use words like "prenuptial" or "trial" to describe stages that are integral parts of the ritual process

through which the marriage bond matures.[83] Furthermore, in this understanding of a gradual growing together of partners and families, the question of validity and invalidity is not raised at the end of the process.[84] The careful examination of every aspect of the process may help identify and remove possible obstacles and impediments causing the invalidity of marriage.

In this context, the notion of marriage understood as a momentary act, occurring in a certain moment of time, does not take sufficiently into account the Papua New Guinean experience of great and painstaking care given to the progressive formation of the marriage pact in a community framework. This concept of the marriage process should encourage the Church to introduce two pastoral initiatives.

a) First, church authorities should put into action a pastoral policy of marriage catechesis and preparation that is spread over a long period of time. Preparation for church marriage is practically limited to its proximate preparation for its celebration in church. Serious respect for the Papua New Guinean concept of progressive marriage could become a welcome opportunity for gradual catechesis accompanying each stage of customary marriage;[85]

b) Second, in keeping with its competence, the conference of bishops should adapt a ritual for the sacrament of marriage which gives an important place to the appointed members of the community.

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[83] See BATANTU, "Progressive marriage and admission to sacraments," p. 42.

[84] See ROCHE, "Canon law, psychology and culture," pp. 137-138.

[85] See KISEMBO, MAGESA, SHORTER, *African Christian marriage*, pp. 25-28.

#### 4.2.4.2. Marriage as an integral part of the community's life

The Papua New Guinean family is not a reality closed in on itself. Neither is the marriage relationship just a private affair of the couple but rather an affair of the whole community. In fact, that is what marriage is all about. Marriage is not only a private commitment between two individuals. As a sacrament, it is a commitment before God and the church community, and it involves the good of the community. Hence marriage should be highly esteemed and cared for by the community.

In the section regarding the preparation for customary marriage we have mentioned that education for marriage begins in childhood, is intensified during the initiation rite, reaches its culmination in the immediate preparation for and in the celebration of marriage, and continues into the early part of the couple's married life.[86] The community, in particular the extended family, assumes the task of this education and integrates it into the life of the community. In this way, marriage becomes an integral part of the community's life. The church rite could be easily adapted to and incorporated into this chain, making thus the traditional education for marriage an integral part of the Christian formation of the faithful. Likewise, greater emphasis should be placed on the role of the community both in the formation and the celebration of marriage, and finally in helping the couple after marriage.[87] In fact, such an approach would enable the

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[86] The stages of preparation for customary marriage are, in fact, very similar to the stages of preparation for Christian marriage; see c. 1063 and also THE PONTIFICAL COUNCIL FOR FAMILY, *Preparation for the sacrament of marriage*, nn. 21-59, pp. 103-107.

[87] In the first chapter it was noted that one of the characteristics proven effective in the change process is the openness of the change agent for the recipients' participation. If a new idea is to be fully accepted, there must be an active and full participation by recipients. Their participation lessens feelings of alienation with the new idea and provides a greater assurance of its continuity. See above, p. 22. Therefore, if the Church wants Papua New Guineans to accept the canonical form of marriage as a part of their lives, it

community to fulfill its role as educator of the new generations and, therefore, as educator for marriage. The community must possess these resources in itself, as it once did in the past, in order to be truly mature. Dependency on outside "specialists" is not meaningful nor culturally advisable.

Regarding this point, it is not our intention to overstate the role of the community and extended family in the institution of marriage. We are aware that their role brings, in some cases, certain abuses—excessive interference, pressure, manipulation—that we must be honest enough to reject. This is, in fact, an area where the church in Papua New Guinea has to reflect seriously on its tradition, in the light of the Gospel, and where it has something to learn from the Church in other regions. On the other hand, the role of family and community is important and valuable. Many young couples in Papua New Guinea would have been able to overcome their crisis if they had not been cut off from their family community, which has often shown itself capable of real support, deeply human as well as moral and spiritual, in times of difficulty. To give back to this family community a place more in line with new conditions of life is a pastoral necessity. Therefore, the Church should open the way to integrating the community into the preparation for and celebration of marriage. The simplest and most natural way of involving the community is, it seems to us, to recognize customary marriage between two Catholics as a sacrament. This involves, however, an effort to develop an inculturated "canonical form" while preserving the essential elements of Christian marriage, i.e., unity and indissolubility.

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certainly must be more open for an active and full participation of the community both in formation and the celebration of marriage. See KARLEN, "Canonical form and traditional marriage," p. 59.

#### 4.2.4.2.1. The role of an appointed member of the community

In the first chapter, we discussed the fact that a crucial characteristic in any final acceptance of an idea proposed by a change agent operating in a culture different from his/her own is the degree to which the existing authority structures in that culture are involved in the actual implementation of change. What the change agent, in our case the local church, must take into consideration in implementing a new idea is to work through traditional leaders and gain the support of individuals who can influence others.[88] Underestimation of the importance of the involvement of the leaders of the community in the church ceremonies can have negative consequences, among them the continuation of the low number of Papua New Guinean Catholics marrying according to the canonical celebration of marriage.

For this reason, the Church should take the initiative to adapt the canonical celebration of marriage in conformity with the concrete life of the people. It should recognize the role of the leaders and/or elders of the community in the customary/canonical celebration of marriages. The active participation of the priest in the celebration of marriage could be shared with the community elders. One possibility is to authorize community leaders or legitimate representatives of the two families as the Church's official witnesses. These elders know which act in the customary marriage ceremony determines its validity. In customary marriage celebrations they are the actual "ministers" who ratify and "bless" marriages, and they still do it before the church celebration. Their judgement before the community also affects marriages contracted in the Church. The priest could still be present and take part in the customary celebration as the Church's official presence. Such a low-keyed presence of the priest would not detract

[88] See above, p. 23.

from the religious or canonical aspect of the marriage celebration. Rather it could add beauty to the communitarian celebration of such a significant event even of a Christian community. Another possibility is to actually bring the liturgical (canonical) celebration into the customary marriage with the priest acting as an official witness of the marriage. In other words, it is still possible for the priest to be present and assist actively in the culminating stages of the customary celebration while the community elders fulfill their roles defined by the customary marriage. The conference of bishops should assume the task of formulating a ritual that will integrate both aspects of a Catholic marriage, namely the customary and canonical.

From a practical point of view, the community must provide structures of service and ministries for its own upbuilding. That means the local community should be able to designate suitable persons for the services within the community. Furthermore, the whole community, under the direction of the Church, should recognize such people as its true representatives and give them the mandate. The pastor should make sure that the community representatives properly fulfill their responsibilities. By sharing his ministry with the elders or representatives of the community, the pastor would be making them responsible for the celebration of the sacrament of marriage.

This pastoral approach, in our opinion, would enable the duly authorized representatives of the people to play an important role in the customary and well as the canonical celebration of marriage. In this way, the marriage celebration would become a part of the Catholic community, the Catholic clan, the Catholic extended family.

#### 4.2.4.2.2. The communities as additional witness to the sacrament of marriage

Negotiations between the families of the future couple begin very early. As the years go by, the young couple confirms the choice of the partner suggested by the family. Even if there is no direct contact between the two, they observe and come to know one another, and, when the time for marriage draws near, they express a kind of mutual acceptance through their friends. The whole community is aware of what is going on and tests everything by the taboos and customs that will ensure the stability of the proposed union. It is the public nature of the procedure that brings the young couple the guarantee that they can learn to trust one another and to develop their relationship gradually to a truly personal love. In this way, the community takes on the sponsorship of the young couple and continues to offer them support in their married life, with its joys and sorrows, in their childbearing and the upbringing of their children.

In light of this, it would surely be possible to revise the law concerning the witnesses who are part of the canonical form. In the Latin rite, besides the assisting priest, who is a qualified witness, two additional witnesses are necessary to constitute the canonical form. This juridical form has little meaning for Papua New Guineans. The presence of the two clans, i.e., the clan of the bridegroom and the clan of the bride, acting as witnesses of the commitment of two of their members has much greater value in the eyes of Papua New Guinean communities.

Canon 1116 provides for instances when there is danger of death or when a person competent to assist is not available. In essence, this canon states that, in case of danger of death and in the absence of a duly competent ecclesiastical witness, which is prudently foreseen to last for a month, a marriage celebrated before only two witnesses is

valid. In other words, a valid celebration of marriage can take place even in the absence of an official canonical witness.

Applying the provision of c. 1116 to the Papua New Guinean situation does not seem helpful to Catholics there. In fact, there are many marriages of Catholics, particularly in remote areas, which are celebrated in the absence of a duly competent ecclesiastical witness and in the presence of witnesses only because the parties are unable to approach the official witness without grave inconvenience. Those marriages are actually customary marriages contracted in the presence of two clans. Even though most of them, in our opinion, meet all the requirements of the canon, they are not considered as marriages validly and lawfully contracted before the Church. This is so because Catholics in Papua New Guinea are universally unaware of the existence of this canon. Therefore, when contracting customary marriage, they do not have the intention required by law to enter the union which is to have the full effects intended by the Church.

### 4.3. Canonical Form and Statutory Marriage

The civil law in Papua New Guinea recognizes two types of marriage: a *customary marriage* which is celebrated in accordance with custom and a *statutory marriage* which is contracted as per the statutory requirements of the "Marriage Act 1963" (now Ch 280 of the Revised Laws). Canonical marriage is, however, not officially recognized by the State. It is simply seen as a kind of sanction or "blessing" of what is otherwise a customary marriage. A couple that first enters the customary and later the canonical celebration of marriage may consider themselves as married "in church." However, marriage for legal purposes remains a customary marriage. This is not the case

in regard to statutory marriage. It is possible for a couple to marry first according to custom and then to decide to make a statutory marriage with each other, provided that the requirements of Part V of the Marriage Act (Ch 280) are observed. In this case all legal consequences of a statutory marriage will be attached to their relationship from the time of the statutory ceremony. This being noted, some questions may be raised: Why should the same legal consequences not apply when the conditions, formalities, impediments and marriage ceremony are, in fact, the same in both the canonical and statutory form of marriage? Should not the State see canonical marriage as equivalent to statutory marriage and recognize it as a marriage system with its own legal value and consequences, and cease looking at it only as a kind of sanction or "blessing" of customary marriage?

### 4.3.1. The low rate of statutory marriages

In Papua New Guinea people have been forming and carrying out their marriage arrangements by reference to customary law, i.e., to their traditional standards and expectations. Regardless of this law, the Australian colonial administration introduced a new, western body of matrimonial law along with the statutory marriage.[89] Statutory marriage is one which is contracted in accordance with statute law. However, this form of marriage had not always been available to all Papua New Guineans. Until the passing of the Marriage Act 1963, native couples in New Guinea could not enter the statutory marriage, though couples in Papua could do so. Since 1963, a uniform marriage law applied for the first time to

[89] See above, pp. 101-102.

everyone.[90] Thus Papua New Guineans today have the choice between entering customary or statutory marriage. Both forms have equal validity before the law.

Entry into statutory marriage is much simpler than entry into a customary marriage. Nevertheless, the number of Papua New Guineans who enter into statutory marriage as compared with the number of those who contract customary marriage is very low.[91] The vast majority of Papua New Guineans still prefers to follow the customary way of marrying. This is because of its importance as a means of cementing and creating relationships between the two clans of the parties.

Another reason why so many Papua New Guineans still opt for the customary form of marriage is that, in some respects, there is a difference in the legal consequences of a customary and/or statutory marriage. For example, in the case of marital breakdown it is much easier to obtain a customary than a statutory dissolution of marriage. Customary marriage can be dissolved in accordance with native custom under which it was celebrated whereas statutory marriage may only be dissolved by a decree granted by the National Court according to strictly defined grounds in the Matrimonial Causes Act.[92] Moreover, the process of statutory dissolution is very costly and inconvenient and many Papua New Guineans could not afford it.[93] Consequently, if a person still bound by the statutory marriage purports to enter a second marriage, whether statutory or customary,

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[90] See above, p. 102.

[91] See CONWAY, MANTOVANI, *Marriage in Melanesia: A sociological perspective*, pp. 77-78; MANTOVANI, *Marriage in Melanesia: An anthropological perspective*, p. 248.

[92] See Matrimonial Causes Act (Ch 282), section 17. See also H. MCRAE, *Cases and materials on family law in Papua New Guinea: Dissolution of marriage*, Port Moresby, University of Papua New Guinea, 1984, pp. 212-215 and 253; JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, pp. 25 and 56-62.

[93] See MCRAE, *Cases and materials on family law in Papua New Guinea: Dissolution of marriage*, p. 253; JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, p. 25.

such a marriage would be legally invalid because the Marriage Act (Ch 280) expressly excludes either of the parties who is statutorily married to another person from contracting a valid marriage.[94] Furthermore, a person entering a second marriage, while still bound by the statutory marriage, may sometimes also be guilty of the crime of bigamy. Such a crime is punishable by a term of up to five years imprisonment.[95]

Finally, many Papua New Guineans do not see any need for the statutory form of marriage. Experience shows that such form has been needed only in a few cases of employment to obtain housing, to determine salaries, allowances, leave fares. Due to all these reasons, the statutory marriage in Papua New Guinea is not and has never been considered as a suitable means of entering into a marital relationship.[96]

### 4.3.2. Comparison of the canonical form with the statutory form of marriage

Throughout history, the Church has accepted the human laws of various nations, especially those of imperial Rome, and has enacted its own laws to regulate the marriages of its own members. Later on, the ecclesiastical teachings, doctrines and prescripts relating to marriage have strongly influenced the terms of many statutory laws regarding marriage and divorce.

The statutory form of marriage was introduced into Papua New Guinea by the Australian colonial government, in the form of the Marriage Act 1963 and the

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[94] In accordance with section 3 of the Marriage Act (Ch 280) it has been generally assumed that a polygamous marriage is legally valid so long as it is in accord with the appropriate custom of the parties, and neither spouse is simultaneously bound by a prior statutory marriage. See Marriage Act (Ch 280), section 3 as well as section 17(1)(a).

[95] See Marriage Act (Ch 280), section 57.

[96] See MCRAE, *Cases and materials on family law in Papua New Guinea: Entry into marriage*, pp. 20 and 54; JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, p. 2.

Matrimonial Causes Act 1963. These Acts have largely been a reflection of the Australian federal statutes dealing with marriage and divorce which, in turn, had their origins in the English ecclesiastical marital law. Therefore, terminology, concepts and doctrines contained in Papua New Guinean statutory legislation regarding marriage and divorce in many instances can only be completely understood by reference to ecclesiastical law.[97] Furthermore, almost the same essential elements and formalities are required whether for the canonical or statutory institution of marriage.

#### 4.3.2.1. Common nature

The nature and context of legal coexistence between statutory marriage, on the one hand, and canonical marriage, on the other, has often been described as one of duality. This categorization is wrong. The nature of either marriage is the same. For example, the statutory legislation defines marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.[98] Canon law describes marriage as a covenant by which a man and a woman voluntarily establish between themselves a partnership of the whole of life.[99] Both statutory marriage as well as canonical marriage, whether by definition or nature, involve the same conditions, i.e., a heterosexual relationship (a man and a woman), freedom of choice (the relationship must be voluntary),[100] exclusiveness (only one spouse)[101] and permanence and/or

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[97] See JESSEP, LULUAKI, *Principles of family law in Papua New Guinea*, p. 22.

[98] See Marriage Act (Ch 280), section 41.

[99] See *CIC '83*, c. 1055 §1.

[100] See *CIC '83*, c. 1057 §§1 and 2.

[101] See *CIC '83*, c. 1056.

indissolubility (partnership for life).[102] However, the condition of permanence in the statutory marriage might be misleading because, as we know, civil courts are able to dissolve them. For this reason, it would be more appropriate to interpret the expression "permanence" (indissolubility) in respect to statutory marriage as a prohibition of other marriages while the prior bond exists. Thus, a marriage properly entered into would continue to exist until legally dissolved, either by a court decree or by the death of one of the spouses. A final qualification relates to the term "union." If this term merely implied "relationship," then it would include also some informal or de facto relationships. However, this is not the case. What is required is a proper *ceremonial* union, which in Papua New Guinea would mean a ceremony complying with the requirements of the Marriage Act (Ch 280). The "union" concept of statutory marriage is sometimes described as a "contract." This term is also confusing. It might seem that it hints at the fact that marriage shares many legal features with other contracts of a commercial nature. This was actually the reason why the revised code following Vatican II made a shift in emphasis from a matrimonial contract to a conjugal covenant between the husband and wife which constitutes an intimate partnership of life and love.[103] For this reason, it would be better to refer to legal coexistence in these jurisdictions as one of legal plurality rather than duality.

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[102] See ibid.

[103] See above, pp. 117-119.

#### 4.3.2.2. Common formalities

With reference to statutory marriage celebrated in Papua New Guinea, certain formalities are set out in Part V of the Marriage Act.[104] Part V requires the celebrant, religious and/or civil, to be officially authorized (sections 26-34);[105] in most cases, written notice of an intended marriage must be given not earlier than three months before the date of the marriage and not later than the seventh day before the date of the marriage (section 37);[106] the parties must declare their age and eligibility to marry (section 37);[107] and the ceremony must be attended by two witnesses and followed by the preparation of a marriage certificate (sections 39-42, 45).[108]

#### 4.3.2.3. Common form of ceremony

A minimum content for a civil marriage ceremony is prescribed in section 40 of the Marriage Act. According to this section, it is required that the parties entering into marriage should declare to each other their intention to become spouses in the presence of an authorized celebrant and the witnesses. This requirement is for validity.[109] However,

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[104] See Marriage Act (Ch 280), Part V.

[105] Canon 1108 §1 requires of the minister of the rite of marriage to have the faculty whether by law or delegation in order to validly assist at the celebration.

[106] The Code of Canon Law does not set any norm in this regard. However, it belongs to the diocesan bishop, taking into account any norms or pastoral guidelines issued by the Bishops' Conference, to lay down norms concerning the time within which the notice of an intended marriage must be given. The reason for this norm is that sufficient time for an adequate marriage preparation would be provided. Engaged couples should be made aware of this ahead of time.

[107] Canon 1066 prescribes that before a marriage is celebrated, it must be evident that nothing prevents its valid or licit celebration. According to c. 1114, the one who assists at marriage acts illicitly unless he has established, according to the norm of law, the free status of the parties.

[108] According to c. 1108 §1, the presence of at least two additional witnesses is as essential for the valid celebration of a marriage as the presence of an authorized minister.

[109] The Code of Canon Law lays down the same norm. Canon 1108 §1 stipulates that only those marriages are valid which are contracted before the local Ordinary, pastor, or a priest or deacon delegated

in the case in which the celebrant is not authorized by the Act to perform the ceremony, the marriage is considered valid as long as one of the parties thought at the time of celebration that the celebrant was properly authorized.[110] Only if both parties knew that the celebrant was unauthorized would the marriage be invalid. Nevertheless, a person who makes a false statetement in a declaration prior to the wedding, or performs a ceremony without authority to do so, is liable to be punished by a heavy fine or imprisonment.[111] Legally, the marriage is complete once the parties have exchanged their promises during the ceremony.

#### 4.3.2.4. Common impediments

In statutory law as well as in canon law access to the celebration of marriage is, in a certain sense, limited. In fact, in the interest of the common good, both the civil and the ecclesiastical authority have the power to restrict the freedom of the parties to marry by determining matrimonial impediments. These impediments are justified. Experience shows that certain marital relationships are injurious to both civil and ecclesiastical society as well as to the institution of marriage. Furthermore, they often result in harm to

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by either of them, who assist, and before two witnesses according to the rules expressed in the canons 1108 §2-1123 and without prejudice to the exceptions mentioned in cc. 144, 1112 §1, 1116, and 1127 §§1-2.

[110] This has some similarity to the situation spelled out in c. 144. According to this canon, in common error, whether of fact or of law, and in positive and probable doubt, whether of law or of fact, the Church supplies executive power of governance for both the external and the internal forum. The use of c. 144 to invoke common error in case of marriage celebration seems to have limited application, e.g., (1) when a pastor was invalidly appointed, but the community believes him to be their pastor; (2) when the parochial vicar or parish deacon, who should normally have the faculty by general delegation for assisting at marriages in the parish, was not granted it or it was granted invalidly; (3) when the community errs concerning the status of the priest or deacon, thinking him to have general delegation.

[111] See Marriage Act (Ch 280), sections 59 and 62-64. According to canonical prescript, the official witness at a marriage who raises doubt about his faculty without making any effort to resolve the doubt is not to assist at the marriage. However, if he were to assist without having first ascertained the status of his faculties, he could be punished with a just penalty; see c. 1389 §§1-2.

the parties themselves and their children. But what is a matrimonial impediment? A matrimonial impediment is some fact or condition that bars a person from marrying. Canonical tradition makes the distinction between those matrimonial impediments that are considered to be founded in divine law, whether natural or positive, and those determined by positive ecclesiastical law alone. Divine law impediments bind all persons, whether baptized or not, and cannot be dispensed. Ecclesiastical impediments bind only Catholics and, in principle, they are subject to dispensation. Besides the above-mentioned distinction, canon law distinguished prior to *CIC '83* also between *impedient* and *diriment* matrimonial impediment. An *impedient* impedimemt is a condition which makes the celebration of marriage unlawful, whereas a diriment impediment is a circumstance attached to a person which renders him/her incapable of contracting any marriage in general or a particular marriage validly.

Although minor variations in marriage formalities exist, the substantive requirements regarding capacity, consent, age, marital status and prohibited degrees do not remain an option whether in statutory or in canonical jurisdiction. Section 17 of the Marriage Act sets out the impediments upon which the parties in Papua New Guinea are unqualified to enter into a valid statutory marriage. Those impediments are: 1) a prior existing marriage;[112] 2) a marriage within prohibited degrees of consanguinity or affinity;[113] 3) failure to comply with the legal form of celebration prescribed in the

[112] The impediment of a prior bond is found also in canon law. Canon 1085 §1 notes that a person bound by a prior marriage, even if it was not consummated, is prevented from contracting a second valid marriage as long as his or her original spouse is alive.

[113] These impediments are mentioned in cc. 1091 §1 and 1092. Canon 1091 §1 states that any marriage entered into between all ancestors and descendants, both legitimate and natural, in the direct line is invalid. In fact, all societies, whether ancient or modern, have attempted to prevent marriage between

country;[114] 4) lack and/or defect of consent;[115] 5) lack of marriageable age.[116] Matrimonial consent can be defective[117] because a) it was obtained by duress or fraud;[118] b) the party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed;[119] and c) the party is mentally incapable of understanding the nature of the marriage contract.[120]

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close blood relatives. Canon 1092 covers the impediment of affinity. According to this canon, the impediment of affinity invalidates marriage in all degrees of the direct line.

[114] Canon 1108 corresponds to the statutory impediment regarding failure to comply with the legal form of celebration. This canon prescribes external rituals and ceremonies, i.e., canonical form, which must be observed at the time of the exchange of consent. The Church ordinarily recognizes as valid only those marriages which are celebrated in conformity with the canonical form of marriage.

[115] Canon law has always regarded consent of the contracting parties not only as an indispensable element of marriage but also as an efficient cause of marriage. Canon 1057 §1 notes that marriage comes about by consent legitimately manifested between persons who are legally capable. No human power can substitute for this consent. Consequently, canon law does not recognize the validity of a marriage if there is lack and/or defect of consent.

[116] Canon 1083 §1 sets down the minimum age for marriage. It is sixteen for men and fourteen for women. Regardless of the level of physical and psychological maturity of the parties at the time of marriage, a marriage entered into before minimum age required by law is invalid.

[117] In cc. 1095-1103, canon law makes a formal distinction between several defects of consent. Even though each defect of consent is formally distinct from the other, they all are interrelated. In fact, all juridical defects of consent are rooted in the structure and dynamics of human personality.

[118] See Marriage Act (Ch 280), section 17(1)(d). Defective consent caused by fraud or duress is spelled out in cc. 1098 and 1103. Canon 1098 notes that a person who enters into a marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner, which by its very nature can gravely disturb the partnership of conjugal life, contracts invalidly. According to c. 1103, a marriage entered into by reason of force or of a grave fear imposed from without, even if unintentionally, from which a person has no escape other than by choosing marriage, is invalid.

[119] See Marriage Act (Ch 280), section 17(1)(d). Canon 1097 §1 notes that if a person other than the one agreed upon is substituted at the wedding, the marriage is invalid due to error of person.

[120] See Marriage Act (Ch 280), section 17(1)(d). Canon 1095 corresponds to the statutory impediment regarding the incapacity to contract marriage because of some mental illness and/or psychological disturbances. According to this canon the following are incapable of contracting marriage: 1° those who lack sufficient use of reason; 2° those who suffer from a grave lack of discretion of judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted; 3° those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage.

## Conclusion

Humanity was created male and female, and one of the lessons of the first chapters of Genesis is that the companionship of man and woman creates the primary form of interpersonal communion, the fundamental community of love. Marriage, and the family that it becomes, is a communion of life and love. It brings the community into being, not only through the procreation of members and through building up alliances within and between human groups, but also through its own life and witness to the paschal mystery of Christ. The family, as we mentioned in this chapter, is the "domestic church." The Christians' first experience of community as well as their first opportunity to contribute to community are found in the family.

Marriage is primarily a secular reality and is the property of the natural, human community. Therefore, just as the Church should not seek to create an artificial "parallel" community but should try to identify itself with what it conceives to be in the best interests of the natural community, so it must not seek to create a Christian marriage that is an artificial institution of its own. Marriage is first of all human. It becomes Christian through a deepening of its human reality in reference to the mystery of Jesus Christ. An obvious conclusion to be drawn from this chapter is that church marriage and customary marriage in Papua New Guinea should not exclude one another, still less be opposed to one another. The task of the Church is to strengthen and develop the institution of marriage as it is found in contemporary Papua New Guinean society. Does that mean that Christians can simply extend church recognition to customary marriage? Provisions of many local churches in Papua New Guinea and Africa are more and more moving towards this recognition. However, before according such recognition, certain tests

should be applied to safeguard the quality of the marriage covenant and to ensure social approval. We must admit that, in view of the threat which modern social changes hold for the institution of customary marriage, it would be unwise for Christians to just canonize them without a very thorough study and without the explicit assurance that the parties have a genuine understanding and commitment to the ideal of marriage held by Christians.

Some Christian writers on customary marriage have assumed far too readily that Christian marriage is incompatible with the communitarian approach to the marriage that was traditional in many countries. The assumption was that Christian marriage was identifiable with the western, social model of the autonomous, nuclear family. It was also frequently assumed that the older members of the family community who made the decisions about the choice of marriage partners infringed the rights of Christian spouses. However, such an assumption seems very deceptive. Although the customary marriage rules placed stringent restrictions on opportunities for the fullest expression of personal interests of those who were going to marry, they, nevertheless, did not deny the young people their right to express their consent in choosing and marrying their partner.

That being said, the principle of bringing customary and church marriage together must be accepted. Elements from the customary ceremony should be incorporated in the Christian service to such extent that people would recognize the rituals as their own. However, it must not stop there. We would not achieve much if we took only the rite of marriage as the object of revision. A meaningful adaptation should be based on an organized pastoral action and formation, centered on the family and strengthened by a caring community of faith. The Christian community must act as an animator of the natural

community. It must help in fulfilling those functions with regard to marriage and the family which are slipping from its grasp. It must promote community care and support for the marriages which take place in its midst. It must not be content with a celebration only.

While comparing the conditions, formalities, impediments and marriage ceremony between the canonical and statutory form of marriage, we came to the conclusion that there are many common aspects in these two forms. Despite their similarities, the State, however, recognizes as official only the statutory form of marriage. The State with such a system, i.e., the system accepting only statutory marriage, fails to recognize the jurisdiction of the Church; because of this it does not recognize a primary juridical system, i.e., the canonical system. Why is this so when Papua New Guinea professes itself as a Christian country? Failure to recognize the canonical system is not a necessary result of the religious confessionality or non-confessionality of the State. Rather, it is a consequence of the secular orientation of the colonial governments of the past in Papua New Guinea. Now the Papua New Guinean government should revise its matrimonial legislation. It should acknowledge the fact of religion with all its consequences including—in the case of the Catholic Church—the existence of the canonical system that actually entails acceptance of a social reality, endowed with its own juridical identity. In other words, the State should recognize canonical marriage as an expression of a marriage system with its own legal and religious values, and not purely as a method of contracting.

## GENERAL CONCLUSION

In the introduction to the third chapter we have noted that the purpose of all law is the common good. Excepting the divine positive and natural law, human law by its very nature is flexible, adaptable and changeable. It actually reflects the evolving nature of each community from and for which it is crafted. Therefore, the constant development of a society and emergence of new needs within it necessitate either the creation of new or the revision of old law(s). This necessarily implies that positive law must always be an expression of the evolving cultural life of the community which it is meant to serve.

This also applies to the law of the Church which has evolved in response to legitimate needs felt in societies at different times, in different cultures, and in different places. The principal task of the Church is to work for the salvation of souls which stands in close connection with the common good. This is also the task of the law of the Church, i.e., of canon law. If the salvation of souls constitutes the theologically grounded goal and the purpose of ecclesial praxis, then it must be a central juridical factor of canon law as well. This implies that the salvation of souls should be part of canonical praxis, especially in issuing and applying the norms. That being said, it follows then that the primary concern of the legislator should be to enact only such law(s) that serve the salvation of souls. This means that every legislator[1] should ask the question if the law(s) he intends to promulgate is really to serve the good of the faithful. In brief, any legal action of the Church should take place in light of this principle.

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[1] Speaking of "legislator" we should not think of the legislator of the universal Church only: bishops (c. 381 §1) and in some cases Episcopal conferences are also legislators (c. 455 §1).

From what has been said above, we can draw some practical implications pertinent to our study. Firstly, it is evident that canon law, the ordering of the relationships and activities of the faithful, must be subordinate to the salvation of souls. In other words, the life of the faithful is more important than the law which regulates it. Secondly, regulation in some sense necessarily implies a restriction of the freedom of people. Therefore, regulation can be justified only if there is a good reason for it, and the only adequate reason for such restriction is that the life of the faithful is rendered impracticable without it. The law, in fact, exists to safeguard maximum liberty of individuals within the context of common good. Thirdly, law has a subordinate function in the life of the faithful. It exists to safeguard their rights, freedoms, and peaceful activity, so that they may attain their salvation.

One of the basic criticisms of the new matrimonial legislation of the Church is that it essentially reaffirms the one western or Latin model according to which all Catholics should mold or shape their Christian life style. However, in reality there is not just one but several models of marriage. As already noted in our study, models of marriage are essentially cultural and historical phenomena, shaped and molded by the life of each society. Customary and church marriages are such models. Nevertheless, despite their different cultural and historical evolution, both of them have, for the most part, the same constitutive elements and ends because marriage is ultimately a natural reality common to all human beings. For this reason, we believe that there is a distinct possibility to harmonize these two models into one. Such harmonization is desirable and even necessary in order to reduce the effects of the dichotomy that now exists between customary and church marriages of Catholics in Papua New Guinea. In this regard, the

*Ordo celebrandi matrimonium*, n. 43 explicitly states: "As for the marriage custom of peoples that are now receiving the gospel for the first time, whatever is good and is not indissolubly bound up with superstition and error should be sympathetically considered and, if possible, preserved intact. Such things may, in fact, be absorbed into the liturgy itself as long as they harmonize with its true and authentic spirit."

Unfortunately, as already noted earlier in this study, canon law has tended to define the personal consent of the spouses given at a moment in time as the sole efficient cause of marriage. This determination is not very easily harmonized with the marriage customs of Papua New Guinea. Within the Papua New Guinean customs, marriage consent is considered not just as a momentary contractual expression but rather as a process of long drawn-out negotiations and discussions, usually protracted over several months or even years. The efficient cause of marriage in Papua New Guinea involves more than the consent of the parties. The consent of their respective parents and other family members also plays a significant role in the constitution of marriage, and it so happens that the success and fruitfulness of the marriage is directly linked to it. Therefore, the Church's insistence on the sole principle of the parties' consent manifested in a specific moment of time or in a single ceremony is often viewed as cultural imperialism that denigrates traditional customs. Uncritical accommodation of canonical principles and institutes to traditional customs, on the other hand, can compromise the freedom of the parties themselves as well as lead to uncertainty about the status of couples who are in the process leading to marriage. Nevertheless, it seems unlikely that a genuine inculturation of the Church's law on marriage in Papua New Guinea can be achieved without some willingness on the Church's part to reassess the exclusive role of

the personal consent of the parties in effecting marriage.[2] In saying this, we do not want to deny the principle that "consent makes marriage."

We are well aware that marriage, whether customary, Christian or statutory, is at the same time eminently personal and communitarian: for the most legitimate personal aspirations of the parties find fulfillment in it, and the social structure of the society becomes wider and richer with the establishment of a new family.[3] However, in our modern society, too much emphasis put on the personal aspect of marriage has almost caused the loss of its communitarian dimension. The parties are free in choosing their own partners, but, in our opinion, many of them, particularly the young, are unable to deliberate critically about their choice in the concrete. They do not often see themselves objectively because of infatuation or superficial romantic love oriented predominantly toward sexual gratification. In such cases, the "consent," or, better, the advice of their parents, relatives or friends could help them evaluate themselves more critically and avoid negative consequences of their uncritical choices to themselves or to their community, and possible rupture of marriage in the future. Therefore, the involvement of the parents and other family members in the choice of the future spouse in customary marriage could help the parties in establishing a solid and permanent marital relationship. In such a marriage, the spouses assume obligations not only towards one another but also toward their communities or clans, while their communities or clans are obliged to support them. In this process there is a continual building up and strengthening of the

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[2] See BEAL, "Marriage," p. 1251.

[3] See See THE PONTIFICAL COUNCIL FOR FAMILY, *Preparation for the sacrament of marriage*, n. 9, p. 100; L.A. ROBITAILLE, "Pastoral care and those things which must precede the celebration of marriage," in *New commentary on the Code of Canon Law*, p. 1262; M. TSINDA HATA, "African marriage: Personal and communitarian," in *AFER*, 23 (1981), pp. 35-37.

community. The communitarian dimension of customary marriage also prevents marriage from becoming too individualistic, supports and strengthens the couple's stability, and helps them during the difficult early years of their marriage.

Another important aspect of the church and customary marriage closely linked to what we have said above, and one that needs to be harmonized, is the form of its celebration. The search for possible ways to harmonize the two forms of marriage celebration might prove easier than to synthesize the concept of consent in church and customary marriage. As seen in our historical synopsis, the canonical form of marriage was not required for its validity until the decree, *Tametsi*, of the Council of Trent. For the first time the positive ecclesiastical law established the necessity, for validity, of the presence of the parish priest, or his lawful delegate, and two or three witnesses at the manifestation of matrimonial consent. In other words, in the absence of the form or in the presence of a defective form, the celebration was invalid. Since its promulgation by the Council of Trent, the legislation on the canonical form of marriage has undergone some changes down through the years, with most of them occurring in the last century. From 1900 to 1908, the canonical form of marriage was not universally required for validity. Between 1908 and 1918, the form was required for validity for all baptized Catholics. From 1918 to 1949, the form continued in force for validity except for certain well-known exemptions. From 1949 to 1967, even those exempted by the Code became bound to the form. In 1967 another change in the canonical form was introduced, this one referring to a marriage between a Catholic and an Orthodox. From this outline one gets the clear impression that the institute of the canonical form of marriage is not so tightly

bound to tradition that another change is not beyond consideration perhaps on the regional or national levels.

There is an interest on the part of an increasing number of Melanesian, Asian and African bishops in enacting new legislation that would leave the ultimate determination of the institute of the canonical form of marriage to the various regional or national legislative bodies. The idea of particular legislation, it seems, will have merit especially in those areas where national customs and experience can so alter the impact of certain universal legislation that the reaction to a law in one country may be almost diametrically opposed to the results effected in another country. In short, local situations are so decidedly different that particular legislation would seem desirable.

Therefore, the local church in Papua New Guinea—whose customs and experiences are so different from customs of the western world—should, in our view, be encouraged to have particular legislation in regard to certain aspects of marriage, particularly its canonical form. In Papua New Guinea there is widespread interest to have particular legislation which would harmonize the canonical and customary forms of celebrating marriage. This harmonization could be achieved in two ways. The first would consist in the Church's recognition of the role of the traditional leaders and/or elders of the community in the customary/canonical celebration of marriages. This would allow active participation of the priest in the celebration of marriage together with the community elders or community traditional leaders. These leaders or legitimate representatives of the two families involved could be authorized as the Church's official witnesses. The priest could still be present as the Church's official presence and take part in the customary celebration even by offering prayers for and imparting blessing on the

newlyweds. Such a presence of the priest would not detract anything from the religious or canonical aspect of the marriage celebration. Rather it could add beauty to the communal celebration of an event so significant to the Christian community. The second possibility would be to incorporate the liturgical (canonical) celebration directly into the customary marriage with the priest acting as an official witness of the marriage. With this adaptation, it would be possible for the priest to be present and take active part in the culminating stages of the customary celebration and for the community elders to fulfil their roles defined by their customs. Should these possibilities be considered seriously, the conference of bishops would have to assume the task of revising some aspects of the canonical form and of formulating a ritual that would integrate both aspects of a Catholic marriage, namely the customary and canonical.

Such a change, of course, will necessitate a serious assessment of the merits and demerits of the present system as opposed to any new proposal. The final determination of any choice in this matter should be made in favour of a system that will contribute to the spiritual growth of the local church.

Retaining the present form has, needless to say, many advantages.[4] *First* of all, it assures us that all marriages of Catholics will receive the proper preparation and investigation. *Secondly*, it ensures that Catholics receive the sacrament of marriage in the Church, where obviously the sacraments should be received. *Thirdly*, it avoids the problem of an improper recording of marriage in the marriage registry.

On the other hand, retaining the present form involves some disadvantages as well. *First* of all, it multiplies the invalidity of many customary marriages entered into in

[4] See J.A. ABBO, "The form of marriage," in *Priest*, 20 (1964), pp. 64-66.

good faith. *Secondly*, the existing law regarding the form is often used as a device for a trial marriage by Catholics, whether they marry among themselves or with others. It can and does encourage some Catholics who are less committed to the faith to enter a customary or civil marriage lightly since they know that it is dissoluble before the Church. This obviously causes injustice to the other party, particularly to the one who is not a Catholic who intends to enter into an absolutely permanent union. Hence, in practice, the present law often tends to reward evil and punish the good. *Thirdly*, it is a source of scandal for many people to see Catholics, who have perhaps been involved in multiple customary or civil marriages, leave their partners with children irresponsibly scattered in the wake of their marriage breakdown. Furthermore, despite their history of irresponsibility, they are viewed as being finally settled into a "so-called real marriage," and warmly received back into the Church, even as others—often far more deserving—are refused the sacraments for apparently far less justifiable reasons. *Fourthly*, all of this tends to aid and abet the sabotaging of the sanctity and permanence of marriage, an effort, surely, in which the Church does not seem eager to cooperate.

One should not be surprised if one day we were told that the 1983 Code of Canon Law is one of the last universal Codes that was possible to promulgate. The development of the churches in the Pacific, Asia and Africa shows that the Church's legal constructs and institutions are not fully relevant in areas where the future of the Church most likely lies. The development of nationalism—in both the good and the bad sense of the term—would mean that people will simply not accept the things that are not compatible with their cultures and cannot be harmonized with the values determined by them. The Church

will be walking a tightrope in this area if it continues to envisage things exclusively in the perspective of the western world.[5]

[5] See E. CORECCO, "Theological justifications of the codification of the Latin canon law," in *The new Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, vol. 1, M. THÉRIAULT, J. THORN (eds), Ottawa, Imprimerie Laprairie Inc., 1986, pp. 70-72.

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