

## SEMINAR PAPER

### THE SACRAMENT OF MARRIAGE— A DISCIPLINE IN SEARCH OF A THEOLOGY

The purpose of this seminar is to bring to the attention of the American Catholic theological community some of the theological inadequacies of the proposed revision of the canon law of marriage. The canons have been undergoing a systemic revision since the close of the Second Vatican Council, and recent word indicates that the reorganized discipline may be promulgated as soon as 1980. The present draft,<sup>1</sup> like the 1917 Code it is intended to replace, contains a theology of marriage which is seriously deficient, flawed and incoherent. Church authorities must assume responsibility for this unfortunate situation, but theologians share their embarrassment. The lack of a reasonable and consistent theology of marriage, which might afford a sound basis for a healthy sacramental discipline, is due at least partially to the complacency or neglect of theologians.

The issues are presented here as questions or problem areas which emerge from the canonical formulations, the roots of which run to deeper, unresolved theological concerns.

#### *Sacramentality*

Is every marriage between baptized persons a sacrament? The first canon on marriage states that "it is impossible for a valid contract of marriage between baptized persons to exist without being by that very fact a sacrament."<sup>2</sup> The International Theological Commission similarly affirmed in 1978, "Between two baptized persons, marriage as an institution willed by God the Creator, cannot be separated from marriage the sacrament. . . . Thus between baptized persons no other married state can exist really and truly which differs from that willed by Christ. . . ."<sup>3</sup>

These confident assertions take insufficient account of these common realities: (1) those baptized persons who enter marriage well disposed, but convinced that it is not a sacramental act or state and who, therefore, do not "intend what Christ and the Church desire"; (2) those baptized persons who do not have any trace of living faith, whose belief either never existed in any human sense or entirely ceased to be active or

<sup>1</sup> *Schema Documenti Pontificii Quo Disciplina Canonica De Sacramentis Recognoscitur* (Rome: Vatican Polyglot Press, 1975), cc. 242-361. In what follows, the canons of the 1917 *Codex Iuris Canonici* are cited by *C.I.C.*, this 1975 proposed draft is referred to as *Schema*, and the revisions made by the *coetus studiorum de iure matrimoniali (Communicationes* 9 [1977] 117-46, 345-78; P10 [1978] 86-127) since 1975 are mentioned as "Revision."

<sup>2</sup> *C.I.C.*, 1012; *Schema*, 242.

<sup>3</sup> "Propositions on the Doctrine of Christian Marriage," *Origins* (1978) 235-39; *Gregorianum* 59, 3 (1978) 453-64; paragraphs 3.2 and 3.3.

operative in their lives. How can the Church pretend that such persons cannot marry? To put the question more positively, what qualities of faith and intention are required for sacramental matrimony, and how can these be inserted realistically into church law?

### *Indissolubility*

What is the nature of that indissolubility which is an essential property of marriage?<sup>4</sup> Is it an unbreakable, ontological *vinculum* between the partners which cannot be sundered, or is it a moral imperative which demands that their union should never cease? What is the special firmness which we assert to be proper to a sacramental marriage? How can we treat "merely natural" marriages as dissoluble?<sup>5</sup> Does "consent make the marriage,"<sup>6</sup> and, if so, why do we treat a non-consummated union as somehow imperfect and dissoluble?<sup>7</sup> What added permanence does sexual intercourse add to a sacramental marriage?<sup>8</sup>

Would not the Church's witness to the stability of marriage be improved by simply affirming its permanence and eschewing all "dissolution" language? It is at least anomalous for a communion which so strongly asserts a lasting matrimonial commitment to be engaged in "dissolving" marriages. These "dissolutions" (in favor of the faith, by means of a Pauline privilege, or in a non-consummated union) are no more than legal fictions anyway. They are pastoral accommodations on behalf of those whose marriages have failed, usually for reasons entirely unrelated to these stated causes.<sup>9</sup> The theological explanations for the "dissolutions" are tortuous and tenuous. The Church's teaching and practice regarding marriage would be more credible and consistent without them.

### *Authority*

What is the basis and the extent of the Church's authority over marriage?<sup>10</sup> Is the Church involved because the institution of marriage itself is of divine origin, with spiritual and sacred aspects, or is it because of the sacramental nature of the union? Does the Church have the right to instruct and adjudge marriages of non-Catholics and non-baptized persons because of a magisterial responsibility for interpreting divine and natural law? Or is the Church's interest in marriage primarily related to the community's own life of prayer, a part of its sacramental liturgy?

Historically, the Church's encounter with the human reality of marriage took on moral, pastoral, liturgical and juridical dimensions.<sup>11</sup>

<sup>4</sup> C.I.C., 1014; *Schema*, 243.

<sup>5</sup> C.I.C., 1118-27; *Schema*, 337-46.

<sup>6</sup> C.I.C., 1081; *Schema*, 295.

<sup>7</sup> C.I.C., 1118-19; *Schema*, 337-38.

<sup>8</sup> C.I.C., 1015; *Schema*, 245.

<sup>9</sup> J. T. Noonan, *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia* (Cambridge: Belknap/Harvard, 1972), 341-404.

<sup>10</sup> C.I.C., 1x16; *Schema*, 246; Revision 5.

<sup>11</sup> E. Schillebeeckx, *Marriage: Human Reality and Saving Mystery* (New York: Sheed & Ward, 1965), 231-343.

In the Middle Ages the Church was thrust into the role of public and official moderator of the institution of marriage, e.g., certifying the freedom of the parties, keeping the official records, guarding against clandestinity, establishing legal impediments minimally related to religious or sacramental values. Times have changed and with them the Church's role. There is now a need to restate the precise interest in marriage which grounds the Church's legislation.

Another question related to the authority of the Church is the extent of the human right to marry. For what reasons and by whom may this fundamental right be limited?<sup>12</sup> May the Church impair or circumscribe the right to marry for reasons of purely ecclesiastical law (i.e., not of divine or natural law), for example: the requirements of canonical form<sup>13</sup> or the diriment impediments of sacred orders<sup>14</sup> or public property?<sup>15</sup>

### Validity

Does the simple dichotomy between valid and invalid provide adequate categories to describe the subtle variety of human marital experience, even for the purposes of the Church's discipline?<sup>16</sup> Must we continue to distinguish so starkly in Church law between a valid marriage in full possession and one which never existed, i.e., which was null and void from the beginning? The terms fail completely to reflect the nuance and dynamic of the human condition, and they therefore impose harsh and unrealistic choices upon our processes of potential discernment. Should we describe as simply "valid" a canonically perfect marriage between two young people which is inchoate and which appears to be far from adjustment or stability? Or should we pronounce "invalid" a long-lasting or successful union which was flawed by lack of canonical form or the presence of a diriment impediment? Our exclusive focus on whether or not the marriage was valid or invalid at the moment consent was exchanged has led us into a very artificial pastoral stance. Our marriage courts are compelled to ask the wrong question, namely, *constat aut non constat de nullitate matrimonii*.

Would we not be far more realistic, honest, and pastorally effective to desist from the valid/invalid judgment and turn our attention to the Christian community's willingness to acknowledge a second marriage when a first has failed?

### Other Questions

If the concept of "consummation" is intended to imply a certain full and final establishment of the marriage relationship, should it not encompass more than physical intercourse?<sup>17</sup>

<sup>12</sup> C.I.C., 1035; *Schema*, 259.

<sup>13</sup> C.I.C., 1094-99; *Schema*, 311-19. The extent of the Church's power over marriage was the subject of considerable discussion at the Council of Trent debate on the imposition of canonical form. Cf., Schillebeeckx, *op. cit.*, 363-64.

<sup>14</sup> C.I.C., 1072; *Schema*, 287.

<sup>15</sup> C.I.C., 1078; *Schema*, 293.

<sup>16</sup> C.I.C., 1015, 1036, 1094 *et passim*; *Schema*, 245, 260, 311 *et passim*.

<sup>17</sup> C.I.C., 1015, 1118-19; *Schema*, 245, 337-38.

Under what conditions should "mixed marriages" be acknowledged by the Church? What signs or assurances should be asked and given to offset the danger of religious indifference and to highlight the ecumenical opportunity?<sup>18</sup>

Is "contractual" terminology appropriate to describe the marriage relationship, or should church legislation avoid it as carefully as *Gaudium et spes* did?<sup>19</sup>

Should canonical form be retained as a requirement for the valid marriage of baptized Catholics who have not formally left the Church, or is the law now both anachronistic, ineffective and pastorally detrimental?<sup>20</sup>

Is sexual potency essential for marriage *ex natura matrimonii*? Even though we routinely approve the marriages of elderly, injured or ill persons whose abilities to engage in sexual intercourse are doubtful, we state that potency is essential for marriage.<sup>21</sup>

These questions are posed in order to stimulate theological research, reflection and writing; they are not an indictment of the theological community, but they should be a challenge to it.<sup>22</sup> More urgently, the questions indicate that the promulgation of this proposed legislation, as contorted, theologically impoverished and pastorally counterproductive as it is, would be a tragic disservice to the Church.

JAMES A. CORIDEN

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<sup>18</sup> *C.I.C.*, 1060-64, 1070; *Schema*, 276-80, 285; Revision, 70-76.

<sup>19</sup> *C.I.C.*, 1012, 1035, *et passim*; *Schema*, 242, 259, *et passim*.

<sup>20</sup> *C.I.C.*, 1094-99; *Schema*, 311-19.

<sup>21</sup> *C.I.C.*, 1068; *Schema*, 283.

<sup>22</sup> For further development of these ideas, see the following: W. Bassett, "The Marriage of Christians: Valid Contract, Valid Sacrament?" in W. Bassett, ed., *The Bond of Marriage* (Notre Dame: Notre Dame University Press, 1968), pp. 117-79.; L. Boff, "The Sacrament of Marriage," *Concilium* 87 (1973), 22-33; C. Curran, "Divorce: From the Perspective of Moral Theology," *Canon Law Society of America Proceedings* 6 (1974), 1-24; E. Kilmartin, "When Is Marriage a Sacrament?" *Theological Studies* 34 (1973), 275-86; W. Ladue, "The Sacramentality of Marriage," *Canon Law Society of America Proceedings* 6 (1974) 25-35; P. Palmer, "Christian Marriage: Contract or Covenant?" *Theological Studies* 33 (1972), 617-65; K. Rahner, "Marriage as a Sacrament," *Theological Investigations* X (1973), 199-221.