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PROPOSED CHANGES IN CANONICAL MATRIMONIAL LEGISLATION

FRANCIS G. MORRISEY, O.M.I.*

For the past few years, the Pontifical Commission for the Revision of the Code of Canon Law has been studying necessary and possible changes to be incorporated into the body of ecclesiastical legislation. The announcement of the revision of the Code of Canon Law was made by Pope John XXIII on that historic feast of the conversion of St. Paul, January 25, 1969, when he also announced that he intended to convoke an ecumenical council. A definitive commission was established by Pope Paul VI on March 28, 1963, under Cardinal P. Ciriaci. After the Cardinal's death in 1966, he was replaced in 1967 by the then Archbishop Pericles Felici, former Secretary of the Council, and presently chairman of this commission. The various sub-commissions began their work on May 6, 1965.

While it is not an easy task for those who are not members or consultants of the various sub-commissions to obtain copies of the texts of the proposed changes, we are able to gain considerable insight into the work of the commission by examining the periodical reports or *relationes* published in its official organ, *Communicationes*. The report of the sub-commission *De matrimonio* was published in 1971.¹ Since that time there have been numerous articles published giving additional partial insights into the changes that are proposed for the Church's legislation on marriage.

Underlying the entire document is the renewed theological presentation of marriage found in the Conciliar Constitution, *Gaudium et spes* and the papal Encyclical letter, *Humanae vitae*. Consequently, it will first be necessary to review this new teaching. In the second part of this paper, I will select certain proposed key changes for comment, and in the final section will mention some of the problems in matrimonial legislation which do not yet appear to have been resolved sufficiently by the sub-commission.

RECENT TEACHINGS ON THE NATURE OF CHRISTIAN MARRIAGE

Since Church law is not simply a static reality, but rather an ongoing

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¹ *Communicationes*, 3 (1971), p. 69-81.

living process, a canonist who wishes to apply ecclesiastical legislation must be able and willing to remain abreast of doctrinal and jurisprudential developments. In many instances, these changes are simply a matter of shift in emphasis, in an effort to shed greater light on the deposit of faith which was left by Christ to His Church. In other cases, they consist in more formal pronouncements of the Magisterium. In view of this, it is an easy matter to recognize that Canon Law is a subsidiary science, receiving its enlightenment from Revelation and Theology.

The Conciliar Teaching

When examining some problems of special urgency found in the Church of the early 1960's, the Council Fathers first turned their attention to means of fostering the nobility of marriage and the family. After a brief introduction, they began considering the sanctity of marriage and proposed a new working definition of the sacrament which was highly influential in the deliberations of the Code Commission, if we can judge from the *Relatio*.

Marriage is described as "an intimate partnership of life and love established by the Creator and qualified by His law, rooted in the conjugal covenant of irrevocable personal consent."² We can state immediately that the reality is no longer described in terms relating to ends taken from St. Augustine's teaching on the *bona matrimonii*, but rather in terms of an intrinsic finality of mutual love of the spouses. The Council goes on to speak about the lasting relationship which ensues and the mutual help and service that the couple render to each other through an intimate union of their persons and of their actions.³

A little further on, *Gaudium et spes* brings in an additional element which will influence the forthcoming legislation: marriage involved the good of the whole person, and conjugal love leads the spouses to a free and mutual gift of themselves.⁴ One final aspect added to the Council's teaching, and which is traditional in Church doctrine, is that conjugal love is ordained toward "the begetting and educating of children," considered as the "supreme gift of marriage."⁵

In summary, then, the Conciliar doctrine on marriage is quite significant. The passage is an outstanding compromise statement on the theology of marriage which provides a very important development in the understanding of the nature of Christian marriage. The term "contract" is never used, but rather the expression "covenant." There is no essential subordination of ends; in its place we find a remarkably strong emphasis placed

² Cf. *Gaudium et spes*, No. 48; Abbott edition, p. 250.

³ *Ibid.*

⁴ *Ibid.*, No. 49, p. 252-253.

⁵ *Ibid.*, No. 50, p. 253-254.

upon conjugal love. The intimate union which is a consequence of conjugal love demands permanence and exclusivity, a sharing of actions and the creation of a common conscience. The sacramentality of marriage is explained in terms of a transforming effect firstly upon the parties and then extended to the family.⁶

The four principle elements which the Council brings out when describing marriage, and which will reappear in the *Relatio* are: (1) the intimate community of life and love, (2) the intrinsic finality of mutual love, (3) the involvement of the whole person, and (4) the begetting and educating of children.

The Encyclical Letter

A similar teaching some three years later is found in the Encyclical letter, *Humanae vitae* of Pope Paul VI. In addition to repeating the doctrine on the "reciprocal personal gift of self by which husband and wife tend toward the communion of their beings,"⁷ Pope Paul also outlines conditions for a true Christian marriage: it must be human, total and moral.⁸

Rotal jurisprudence

It is impossible to determine accurately the immediate contribution of the Conciliar teaching to the ordinary jurisprudence of the Rota because the collection of sentences is not published until ten years later. We are, however, at least able to glean from those decisions published in canonical periodicals some indication of the influence this new doctrinal approach had in determining the outcome of certain marriage cases. There does not seem to be any reference to the new teaching until 1968. At this time, we find at least six Rotal judges referring explicitly to *Gaudium et spes*.⁹

While for many years the aptitude to perform a connatural conjugal

⁶ Cf. Bernard HARDING, "Fostering the Nobility of Marriage and the Family", in H. VORGRIMLER, ed., *Commentary on the Documents of Vatican II*, Montreal, Palm Publishers, 1969, Vol. V, p. 225-245. Ph. DELHAYE, "Dignité du mariage et de la famille," in Y. CONGAR and M. PEUCHMAURD, ed., *L'Eglise dans le monde de ce temps*, Paris, Cerf, 1967, p. 387-453 (Collection "Unam Sanctam," No. 65b). The ideas proposed in this section are also found in G. LESAGE, O.M.I., "Evolution recente de la jurisprudence matrimoniale," to be published in *Le Divorce*, Montreal, Fides, 1973, (Collection "Héritage et Project," No. 6).

⁷ Pope PAUL VI, Encyclical letter, "Humanae vitae," No. 8.

⁸ *Ibid.*, Nos. 8-10. Cf. G. LESAGE, O.M.I., "The Consortium Vitae Conjugalis: Nature and Applications," in *Studia Canonica*, 6(1972), p. 102-103.

⁹ *S.R.R. Dec.*, c. FIORE, November 30, 1968, in *Ephemerides Iuris canonici*, 26(1970), p. 198-199; c. FAGIOLO, July 2, 1968, *Ibid.*, 24(1968), p. 175-176; c. BEJAN, March 30, 1968, in *Monitor Ecclesiasticus*, 93(1968), p. 485; c. EWERS, May 11, 1968, *Ibid.*, 94(1969), p. 397; c. ANNE, July 16, 1968, *Ibid.*, 94(1969), p. 408; c. PARISELLA, December 20, 1968, in *Ephemerides Iuris canonici*, 25(1969), p. 352.

act was considered in Canon Law as the sign and proof of a valid marriage, the time had come for a different approach to be adopted by judges. The former approach was based on the premise that law must be grounded in facts or realities which can be perceived and demonstrated. In former days, love, which is something intimate and changing, did not seem to provide a reliable and stable criterion of life in common. However, with the development of the psychological sciences and the perfecting of testing techniques, specialists are now able to know better some of the secrets of personality with its characteristic traits, with its weaknesses and impulses. In view of this, conjugal love can enter into the canonical sphere as an "aptitude for the community of conjugal life."

On February 25, 1969, a decision given by the Rota, *coram* Msgr. Lucien Anné, brings the conciliar teaching to the level of law and marks an important breakthrough in juridical practice. He writes:

The statement of the second Vatican Council has juridical significance. Indeed, it is not concerned with the establishment of the community of life, but rather with the right and obligation of this intimate community of life, which has as its most specific element the intimate union of persons by which a man and a woman become one flesh, and to which, as a summit, this community of life tends.¹⁰

Anné then proceeds to define matrimonial consent as:

An act of the will by which a man and a woman constitute between themselves a mutual covenant, or by an irrevocable consent, a perpetual and exclusive community of conjugal life, ordained by its very nature to the generation and education of children. Thereby, the formal substantial object of this consent is found not only in the perpetual and exclusive *ius in corpus*, but it also includes the right to a communion of life, or a community of life which, properly speaking, is matrimonial, and gives rise to correlative obligations or the right to "an intimate conjunction of persons and works" by which they complete each other and associate their action to God in the procreation and education of new lives.¹¹

While Anné had broken the ice in this matter, the sailing was still not clear. Indeed, for a short period of time, it seemed that other Rotal judges did not care to admit this new interpretation of law. We find a strong stand taken against conjugal love in a decision by Pinto, July 30, 1969,¹² and in another by Palazzini as late as June 2, 1971.¹³ Nevertheless, there now appears to be greater uniformity with conjugal love accepted as a capacity to commit oneself to a life-long union and a capacity to share a significant degree of one's life with a marriage partner.¹⁴

¹⁰ *S.R.R. Dec.*, c. ANNE, February 25, 1969, in *Ephemerides Iuris canonici*, 26(1970), p. 429.

¹¹ *Ibid.*, p. 430-431.

¹² *S.R.R. Dec.*, c. PINTO, July 30, 1969, in *Monitor Ecclesiasticus*, 96(1971), p. 510-512.

¹³ Unpublished sentence.

¹⁴ See, for instance, *S.R.R. Dec.*, c. FAGIOLO, October 30, 1970.

The Schema De Matrimonio

The various elements found in the Rotal decisions, especially in Anné, seem to be taken directly from the *schema, De Matrimonio*, prepared by the Commission for the Revision of the Code. Indeed, at times, the wording corresponds line for line to that given by Huizing in his *Relatio*. With this background, let us now examine some of the points raised in this *Relatio* to see how they apply the Conciliar teaching and how they will affect the Church's legislation on marriage.

THE PROPOSED CHANGES IN MATRIMONIAL LEGISLATION

Since many of the proposed legislative modifications are of minor importance, I will limit myself in this section to a study of five of the principal points: the ends of marriage, physical and moral impotence, the notion of matrimonial consent, and the existence of fraud.

*The ends of marriage*¹⁵

We have already referred in passing to the elimination of a hierarchy of ends in marriage. However, this matter requires further investigation. It must be asked whether conjugal love and the intimate community of life are now to be considered as ends of marriage, and, if so, are they of the same importance as the generation and education of children? It can be noted that the Conciliar Constitution, *Gaudium et spes*, does not propose conjugal love as an end of marriage in itself, but rather as something ordained to the same ends as the institution of matrimony. With Navarrete,¹⁶ it seems that we can say that both conjugal love and the institution of marriage are placed in the same line of finality.

The conciliar teaching in respect to the ends of marriage could be summarized as follows: God ordained an element of the psychological order which we call conjugal love, like the very institution of marriage, to the generation of children and the happiness and perfection of the couple. Love appears, then, to be an element that cannot be substituted. It must be present if the marriage is to attain its ends, because without love, the common life of the couple would become almost impossible. Indeed, their spiritual, affective and psychological development would be severely hindered.

While the Code Commission did not seem to want to consider love as an end of matrimony, even though, as mentioned above, it could now enter the canonical sphere under the heading of "aptitude for the community of conjugal life," it agreed upon the following definition of the sacrament:

¹⁵ Cf. U. NAVARRETE, "Mutationes et praevisae innovationes in iure matrimoniali," in *Prawo Kanoniczne*, 15(1972), p. 4-6.

¹⁶ *Ibid.*

Matrimonium est intima totius vitae conjunctio inter virum et mulierem, quae, indole sua naturali, ad proles procreationem et educationem ordinatur.¹⁷

There is no sign here of the present terminology of the Code: primary and secondary ends. This is indeed fitting, because neither the terminology nor the division of ends seem apt to express the Catholic teaching on marriage at the present time. Those ends which are said to be secondary appear to be less important than the primary ones. In the new schema, those ends which in the present Code are considered secondary are included in the expression "*intima totius vitae conjunctio inter virum et mulierem,*" and the former primary end is expressed in the words "*quae indole sua naturali ordinatur ad procreationem et educationem proles.*"

It would appear by the wording that the intimate community of life is proposed as an immediate end of marriage, ordained to a more distant goal: the generation and education of children. This corresponds closely to the teaching of the Encyclical *Humanae vitae*.¹⁸ While this change of emphasis is of significant importance to canonists, it will not have any great import on the intentions of those wishing to enter matrimony, for, in practice, this is what most young couples have in mind when entering into the married state. It is proposed to leave unchanged the second paragraph of canon 1013 where the properties of marriage, unity and indissolubility, are mentioned.

*The impediment of impotence*¹⁹

One of the more difficult points of law concerning the matrimonial impediments has long been the interpretation of canon 1068, where the diriment impediment of impotence is described. Most canonists are aware of the fact that there appears to be divergent approaches to this question, even within the various sectors of the Roman Curia. While Rotal jurisprudence generally calls for "*semen in testiculis elaboratum,*" certain Congregations seem to apply a more moderate approach allowing the celebration of a marriage when the impotence was only doubtfully perpetual. However, there will be a slight change in the orientation of the Rota if the sentence of June 25, 1971, *c. Fagiolo* is followed by other judges.²⁰

Indeed, it has been possible to obtain a dispensation from a ratified, non-consummated marriage when it could be shown that the semen did not come from the testicles. It seems as though we might have to change our notion of consummation and disregard the element of *verum semen*, perhaps replacing it by the notion of *copula satiativa* which has been

¹⁷ *Loc. cit.*, p. 70.

¹⁸ Pope PAUL VI, Encyclical letter, "*Humanae vitae*," No. 8.

¹⁹ Cf. U. NAVARRETE, *loc. cit.*, p. 10-11.

²⁰ Cf. G. LESAGE-F. MORRISEY, *Documentation on Marriage Nullity Cases*, Ottawa, Saint Paul University, 1973, p. 11-12.

battered around in canonical circles since the beginning of the century.

Are we about to see a new definition and an extension of the concept of *verum semen*? It is indeed possible. The arguments proposed on both sides are serious, but they demonstrate only too clearly the fragile and even contradictory nature of the position adopted before the second Vatican Council, at least if they are compared with the teaching of the Fathers and the orientations of the Code Commission. Moreover, the question of vasectomies necessitates a strong, clear, unambiguous and uncontradictory position on the part of the Church in this delicate matter.²¹

For the time being, the Commission proposed modifying the second paragraph of canon 1068, where it is stated that in doubtful cases the marriage is not to be prevented. Henceforth, ecclesiastical tribunals would not be able to declare null a marriage celebrated when a doubtful impediment of impotency occurred. It does indeed seem strange that a marriage that the Church does not impede because of the existence of a doubtful impediment can be declared null after its celebration.

Nevertheless, this decision is not an easy one to accept. If the marriage is indeed void due to the presence of a diriment impediment, then it seems that the couple would have a right to receive a declaration of nullity. It will be very interesting to watch the evolution of doctrine and practice on this very touchy matter.

*Psychological or moral impotence*²²

The incapacity to assume the obligations of matrimony, sometimes called lack of due discretion, other times referred to as psychic impotence, is of more recent vintage in canonical circles. Some authors prefer to consider it as a defect of consent;²³ the Rota itself seems to refuse to recognize it as a diriment impediment.²⁴ In some writings, moral impotence is considered as the equivalent of a person's constitutional incapacity to assume the obligations and to fulfill the proper duties of the matrimonial state, no matter from which grounds this incapacity arises. The progress of jurisprudence on this score is reflected in the *Schema* published by Huizing in *Communicationes*. After mentioning that even though the principle of giving valid matrimonial consent is implicitly mentioned in the present Code, the *Relatio* states that the new text will refer to it explicitly, distinguishing three headings of incapacity: a) the total incapacity to elicit consent due to a *mental illness* or disturbance which impedes the use of reason; b) an incapacity arising from a serious lack of *due discretion* of

²¹ Cf. *Ibid.*, p. 12, quoting *Quebec Provincial Tribunal*, case 7/64.

²² Cf. U. NAVARRETE, "Incapacitas assumendi onera uti caput autonomum nullitatis matrimonii," in *Periodica*, 61(1972), p. 67-80.

²³ Cf. G. LESAGE, "Psychic Impotence, A Defect of Consent," in *Studia Canonica*, 4(1970), p. 61-78.

²⁴ Cf. *S.R.R. Dec.*, c. PINNA, 51(1959), July 5, 1959, p. 352.

judgment concerning the rights and duties to be given and received in marriage; c) an incapacity arising from a serious *psycho-sexual anomaly*.

Various habitual illnesses, such as those arising from alcoholism or drug abuse could be placed under the first heading; cases of psychological or moral immaturity would be classified in the second category. The problem arises with the third category: it would not seem to include anomalies arising outside the sexual sphere, or sexual anomalies which are not serious in nature. Thus, while the Commission seems willing to admit incapacities arising from various mental illnesses, from immaturity and serious psycho-sexual anomalies, some categories which are now accepted in jurisprudence might not be readily included in the proposed canon. The difficulties would be easily overcome if the third category were simply to read: "the incapacity to assume the essential obligations of matrimony," without adding any restrictive clause. We should provide in law henceforth for those cases where a person is unable to assume the obligations of the community of life (*consortium vitae*).

Be that as it may, it is certainly an immense step forward to have a new canon inserted covering most of the grounds which are now commonly accepted. At the present time they are all reduced, not without difficulty, to the canon concerning consent. Indeed, it might even be preferable to envisage the possibility of introducing three headings: the incapacity of human responsibility, the incapacity to perform the contractual act, and the incapacity to fulfill the obligations arising from the contract. This leads us, though, to one of the most important changes proposed by the commission: the revision of the notion of matrimonial consent.

*The object of matrimonial consent*²⁵

When referring to recent teachings on the nature of Christian marriage, we mentioned some of the elements that are now considered essential to any sacramental marriage. If these are to be incorporated into the revised Canon Law, then canons 1081 and 1086 must be substantially revised to include the new understanding of the marriage covenant.

The definition of canon 1081, section 2, gave as a specific element of matrimonial consent the granting of the *ius in corpus*. It is readily stated today that this approach is too biological and does not take the total object of consent into consideration, hence the necessity for a new formulation of the canon.

The question of the *consortium vitae* immediately arises. The Code Commission stated that the community of life is to be considered an essential element of consent:

Consensus est actus voluntatis, quo vir et mulier foedere inter se constituunt

²⁵ Cf. U. NAVARRETE, "Mutationes. . .," *loc. cit.*, p. 6-8.

consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad prolem generandam et educandam ordinatum.

It could be mentioned in passing that it was not conjugal love, but the community of life which was inserted in the proposed new text of the canon because the members felt that this community consists in a series of actions and manifestations that fall directly under the will and can become the object of rights and obligations.

Nothing is mentioned in the new text about the *ius in corpus*, or the exercise of sexuality, but this is implicitly found in indicating the purpose of the community. The canonists will fall heir to the problem of determining when the community will be said to have "conjugal life" and be ordained to the generation of children. Some attempts have already been made in this respect, but we are probably still a long way off from a set of working criteria to be applied in the majority of cases.²⁶

The new formulation presents an outlook that is less material and biological than the present *ius in corpus*. On the other hand, it makes for a more complex object of consent, no longer indicating simply an element that will always remain specific to the conjugal state, but rather opens the door to the entire complex of rights and duties in marriage. The *consortium vitae*, in the general sense of the term is, consequently, no longer an accessory element, but rather the very object of the matrimonial consent.

Once the *object* of matrimonial consent was changed, then canon 1086, section 2 also had to be revised. This canon deals with the exclusion of any essential property of marriage. Nothing is found in the present canon concerning the *consortium vitae*, simply the exclusion of properties, or of marriage itself. Thus the revised text of canon 1086, section 2, would read as follows:

At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut ius ad vitae communionem, aut ius ad coniugalem actum, vel essentialem matrimonii proprietatem, invalide contrahit.²⁷

It was also proposed to incorporate the right to cohabit into the canon, but the expression was not accepted because it is too vague and gives rise to numerous difficulties in interpretation. Moreover, it is rather difficult to state that cohabitation under the same roof is of the essence of marriage.²⁸

An important question that still remains to be solved is whether the Church has the power to add to the elements of natural law affecting the community of life other elements which could be determined more precisely, thus adding a greater scope of invalidity than that required by

²⁶ Cf. G. LESAGE, "The Consortium Vitae Coniugalis: Nature and Applications," in *Studia Canonica*, 6(1972), p. 99-113; Canon Law Society of Great Britain, *Newsletter*, No. 17, June 1973, Appendix V.

²⁷ Cf. P. HUIZING, *loc. cit.*, p. 75-76.

²⁸ Cf. U. NAVARRETE, "Mutationes. . .," *loc. cit.*, p. 9.

natural law. The Church has already done so in the case of fear, determining which type of fear invalidates a marriage in her eyes.

It would perhaps be advisable for some of the essential elements of consent to be spelled out in more detail, while at the same time leaving the door open for greater progress. Among these we could list: (1) the balance and maturity required for a truly human form of conduct; (2) the relationship of interpersonal and heterosexual friendship; (3) the aptitude to cooperate sufficiently for conjugal assistance; (4) the mental balance and sense of responsibility required for the material welfare of the family; and, (5) the psychic capacity of husband and wife to participate, each in their own way, in promoting the welfare of the children.²⁹ In this context, we could refer to the important letter issued by the Apostolic Signatura on December 30, 1971.³⁰ In this letter, we find limits assigned to the application of the notion of *consortium vitae* as an integral element of consent. Eight doctrinal aspects are given which must always be taken into account if the sanctity of the marriage bond is to be preserved and protected.

Whether the right to the community of life is an element required by natural law or by positive law of the Church, we can at least see that it will definitely be required for the validity of marriage in the future. It could even be argued that it is not necessary to await the publication of the new Code to apply this teaching since it is simply a logical consequence of the Council's doctrine. Indeed, many courts are now using the criteria provided under this heading.

*Fraud as grounds for nullity*³¹

The present law does not generally consider fraud as a cause of invalidity of marriage. Yet, most canonists have been faced with cases of deceit which must be settled on other grounds. It has been often asked that fraud be included among the grounds for nullity in the revised law. Some canonists even hold that in cases of grave fraud, marriage should be declared null by natural law itself; this seems a bit difficult to prove. Indeed, the juridical tradition has moved in the opposite direction. Fraud has never, it seems, been considered as an invalidating cause of marriage, even when it concerned things of the greatest importance for matrimonial life.

We have witnessed lately a certain broadening of the grounds of "error in the person" to cover fraudulently concealed defects or deficiencies. It will be interesting to watch the development of jurisprudence in this line because of the very practical implications.³² In spite of this turn of events,

²⁹ Cf. G. LESAGE, "Evolution recente de la jurisprudence matrimoniale," *loc. cit.*

³⁰ French text in *La Documentation catholique*, 69(1972), p. 618-620.

³¹ Cf. U. NAVARRETE, "Mutationes. . .," *loc. cit.*, p. 10.

³² The celebrated Moulins-Sens case comes to mind here; cf. also, a decision of the Westminster Metropolitan Tribunal, March 29, 1973, c. DUNDERDALE, to be published in *Studia Canonica*, 7(1973).

it is still necessary to protect personal liberty to contract marriage freely with a given person, without any fraud on matters of great importance. This arises from the Conciliar doctrine on the dignity of the human person and a better understanding of the personalistic values of matrimony. On the other hand, it is evident that not any type of fraud can render a marriage null, since it is often connected with accidental matters.

The Commission had two possibilities concerning the formulation of the canon on fraud. One was to propose a general wording, similar to that used for fear, leaving to jurisprudence and doctrine the work of determining in practice which species of fraud are to be considered. Just as judges throughout the years determined what was meant by "*metus . . . extrinsece et iniuste incussus*," so too could they determine what is meant by fraud. The other possibility was to list a number of specific cases in the canon, and have this considered as a *taxative* listing. In this case, instances of fraud concerning parentship, religious affiliation, etc., could be listed. However, it is not difficult to see that numerous and grave difficulties would arise if this alternative were followed. An even more powerful jurisprudence would be required.

The consultors agreed, according to Huizing, to admit a defect of consent arising from fraud. However, they laid down stringent conditions. The fraud must be perpetrated to obtain the matrimonial consent; it must concern the quality of the partner, and a specific quality in particular, the absence of which would destroy the possibility of a community of life. It does not matter whether the fraud was perpetrated by one of the spouses or by a third party.³³ It was also discussed whether the motive for the nullity of marriage would lie in the injustice committed, or in the defect of freedom to consent resulting from the act of fraud.

Other changes to be incorporated into the canons

To complete this rapid analysis of the *Relatio*, we could mention many other items of interest found in the project. However, all the changes are not of the same practical importance as those concerning the community of life and the object of consent.

Matters relating to the preliminaries of marriage will be left to particular law. This applies especially to the prenuptial inquiry, publication of banns, marriages in doubtful cases. No change is proposed at the present time in the canon concerning the marriages of minors. Episcopal conferences will be authorized to propose new diriment and impedient impediments. We will probably see the impediment of non-age revised in our regions as a result of this new legislation, once it comes into effect. Those impediments reserved to the Holy See by the *Motu proprio, De Episcoporum muneribus* will remain reserved.³⁴ All minor impediments are to be

³³ *Loc. cit.*, p. 76-77.

³⁴ These include the impediment of non-age for more than one year, the impediment arising

abrogated.³⁵

No decision was taken for the time being on the matter of the Ordinary's power to dispense in virtue of canon 1043 from the impediment of priesthood in cases of danger of death. Only public vows will constitute a canonical impediment; any public perpetual vow of perfect chastity will constitute a diriment impediment. It is possible that a canon might be added concerning legal custody or tutorship to supplement the present rules on legal adoption.

The role of the qualified witness to marriages will be spelled out in detail: to ask for a manifestation of consent from the parties, and to receive it. It will be easier to give general delegations to assist at marriages in the name of the Church: priests and deacons who are not curates may receive this delegation. A *sanatio in radice* would be given automatically in those cases where the qualified witness lacked the proper jurisdiction, provided the marriage took place in a church or oratory, that the qualified witness was not prohibited from acting as such by ecclesiastical authorities, and that the parties were in good faith.

Canon 1098 on the extraordinary form of marriage would remain unchanged. Considerable time was given to a discussion of possible abuses of this canon. The case that seems to be the most common in our regions today is that of a couple who are unable to be married according to the regular form because at least one of them has been previously married and that marriage has not been annulled or dissolved according to the norms of law. Where the first marriage is considered to be objectively void, but cannot be proven so either for lack of witnesses or because the diocese or region does not have a working tribunal, some canonists hold that a couple would be authorized to use the extraordinary form. For them, the validity of the second marriage would depend on the objective non-validity of the first.

Whatever may be the merits or failing of this proposed canonical *combinazione*, it is certain that it gives rise to many additional problems, not the least of which is whether the Church has the right to impose outward conditions rendering a second marriage necessarily invalid if the first one was not declared null *ad tramitem iuris*. Without explicitly stating that any such second marriage would be invalid, Pope Benedict XIV, in his Constitution *Dei miseratione*, November 3, 1741, laid down numerous sanctions against those who proceeded otherwise.³⁶ This Constitution is the source of the present canon 1987.

from reception of the diaconate and the priesthood, crime when carried out *cum machinatione*, consanguinity in the direct line and in the collateral line to the second degree touching the first, affinity in the direct line.

³⁵ These include consanguinity in the third degree of the collateral line, affinity in the second degree of the collateral line, public propriety in the second degree, spiritual relationship, crime: adultery with promise of marriage or attempted civil marriage; (canon 1042, § 1).

³⁶ Cf. *Fontes CIC*, I, p. 698.

These two questions on the use of the extraordinary form and the observance of outward formalities might seem to be simply the results of canonists' fantasies. Yet, the consequences are of importance for the life of the Church and must be considered carefully before a definitive decision is taken. At least, no change is proposed in the text of the canon for the time being.

One major modification is being proposed for canon 1099, section 1, concerning those bound by the canonical form. A person who formally renounced the Catholic faith would no longer be bound by the form for marriage.

This covers most of the principal changes announced to date for the present law on marriage. There are still a number of points that have not been clarified; we could refer briefly to them in the third part of this paper.

SOME PROBLEMS IN MATRIMONIAL LEGISLATION THAT HAVE NOT BEEN RESOLVED

As we have already seen, there are numerous significant changes proposed for the Church's legislation on marriage. However, a certain number of points still need clarification, at least in the opinion of this writer. One such point, doctrinal in nature, is whether it is not possible to have a marriage between two baptized persons which is not sacramental in nature. The Commission proposes no change in canon 1012 where this teaching is given. However, many theologians and psychologists seem to be tending in another direction, and it might be advisable to give the matter further study.³⁷

A second question is what is necessary for the consummation of a ratified marriage? More investigation will have to be made into the notion of the *copula satiativa*.

A third and important problem area is the presumption of canon 1014: "*standum est pro valore matrimonii*." It seems as though this matter is not entirely closed yet.

A fourth area is the determination of the notion and extension of the impediment of *ligamen*. To what previous marriages does this impediment apply?

A fifth area is the question of simulation, especially in relation to the question of the existence of a "divorce mentality" in certain categories of people, with the subsequent presumption that they are unable to contract validly unless the contrary is proven.

A sixth area concerns mixed or inter-faith marriages. To what extent does the refusal to educate the children in the Catholic faith have an influence on the validity of marriage, since education of children is a logi-

³⁷ Cf. D.H. SALMAN, "L'engagement psychologique et social du mariage," in *Studia Canonica*, 3(1969), p. 259-268.

cal consequence of the teaching on the obligations of marriage?

A seventh area of concern is that of conditional marriages. To what extent must a condition be explicit to affect the validity of a marriage?

An eighth area which is not entirely clear at the present time and is of vital concern to all of us, is the question of the use of the privilege of the faith in cases where there is no conversion to the Catholic Church. We will probably have an answer on this difficult matter sometime in the not too distant future.

A ninth and final area that could be mentioned here is the necessity of taking into account the psychological and sociological context of marriage when preparing couples for the sacrament, or when dealing with broken-down marriages.

CONCLUSIONS

A summary of this nature is necessarily based upon a number of probabilities. Once the drafts of the new marriage legislation are distributed to the bishops for comments, we will be in a better position to see the modifications envisaged by the legislators. However, using those sources available at the present time, we are able to paint a rather optimistic picture concerning the new legislation.

The revised notion of matrimonial consent and the recognition of the necessity for a community of conjugal life are of the greatest importance. Even if these were the only changes introduced as a result of the Council's teaching, we would still be much farther ahead than we are now if we base ourselves simply upon the current legislative texts without referring to jurisprudential developments.