

## SOME SPECIAL MARRIAGE PROCEDURES: LEGISLATION AND PRAXIS

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“Matrimonial consent is ... an irrevocable covenant” (CIC c. 1057 §2; CCEO c. 817 §1). Thus one of the essential properties of marriage is “indissolubility, which in Christian marriage obtains a special firmness by reason of the sacrament” (CIC c. 1056; CCEO c. 776 §3). Other than a *ratum et consummatum* marriage (CIC c. 1141; CCEO c. 853), any marriage, either sacramental or non-sacramental, can be dissolved in various ways, fulfilling all the conditions indicated by the ecclesiastical legislation. In this contribution, the author presents some marriage “dissolution” procedures especially Pauline Privilege, the Dissolution *in favorem fidei* and the Dispensation of the Non-consummated Marriages, with a focus on their History and Legislation, along with the Procedure and Praxis.

### Introduction

Marriage has been clearly defined by the Code of Canon Law of 1983, keeping in mind the Church’s teaching down the centuries: “The matrimonial covenant, by which *a man and a woman* establish between themselves *a partnership of the whole of life* and which is

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ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament *between the baptized*" (CIC c. 1055 §1; CCEO c. 776 §1). "For this reason, a valid matrimonial contract cannot exist *between the baptized* without it being by that fact a sacrament" (CIC c. 1055 §2; CCEO c. 776 §2).<sup>1</sup> One cannot forget that "the essential properties of marriage are *unity and indissolubility*, which in Christian marriage obtain a special firmness by reason of the sacrament" (CIC c. 1056; CCEO c. 776 §3).

A marriage becomes a reality only with the consent of the parties, as has always been considered in the canonical tradition: "The *consent of the parties*, legitimately manifested between persons qualified by law, *makes marriage*; no human power is able to supply this consent" (CIC c. 1057 §1; CCEO c. 817 §2). The object of the matrimonial consent is also indicated in the canonical legislation: "Matrimonial consent is *an act of the will* by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage" (CIC c. 1057 §2; CCEO c. 817 §1).

A marriage, either sacramental or non-sacramental, can be dissolved in various ways, fulfilling all the conditions indicated by the ecclesiastical legislation. In this paper on some special marriage procedures, a focus on the history, legislation, along with the procedure and praxis of the Pauline Privilege, Dissolution *in favorem fidei* and the Dispensation of the non-consummated marriages are discussed.<sup>2</sup>

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<sup>1</sup>The texts of the canons of the Code of Canon Law quoted in this paper are taken from [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 31 January 2013). The texts of the Canons of the Code of Oriental Churches are taken from <http://www.intratext.com/X/ENG1199.HTM> (consulted on 31 January 2013). All such canons are indicated with CCEO. All the English versions of ecclesial documents are taken from [http://www.vatican.va/phome\\_en.htm](http://www.vatican.va/phome_en.htm) (consulted on 31 January 2013).

<sup>2</sup>The following books could be consulted for a detailed presentation of these special marriage procedures. Cf. Wojciech kowal - William H. Woestman, *Special Marriage Cases and Procedures*, Fourth Revised and Updated Edition, with Appendices, Ottawa 2008. Cf. Piero Amenta, *Administrative Procedures in Canonical Marriage Cases: History, Legislation and Praxis*, (Translated by Marcus Francis Christopher Hancock), Wilson &

## 1. Pauline Privilege

To understand the Pauline Privilege, it should first of all be clear the type of marriage for which such a provision can be applied: *Pauline Privilege is applied only for marriages between two non-baptised persons* (CIC c. 1143 §1; CCEO c. 854 §1). Therefore, it *cannot be applied* to marriages celebrated with dispensation of *Disparity of Cult* (*one party is a non-baptised person*: CIC cc. 1086 §1,<sup>3</sup> 1129; CCEO c. 803 §1) or to *mixed marriages* (*one party is a non-catholic baptised person*: CIC c. 1124; CCEO 813).<sup>4</sup>

### 1.1. Biblical Basis

The Pauline Privilege is based on the indications given by St. Paul in his first letter to Corinthians (1Cor 7, 10-15):

To the married I give this ruling, and *this is not mine but the Lord's*: a wife *must not be separated* from her husband - or if she has already left him, she must remain unmarried or else be reconciled to her husband - and a husband *must not divorce*

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Lafleur, Canada 2011. Cf. Luigi Sabbarese - Frank Elias, *Scioglimento in favorem fidei del matrimonio non sacramentale*, Città del Vaticano 2010. Cf. Aa.Vv., *I procedimenti speciali nel diritto canonico*, Città del Vaticano 1992. Cf. Roberto Rubiyatmoko, *Competenza della Chiesa nello scioglimento del vincolo del matrimonio non sacramentale. Una ricerca sostanziale sullo scioglimento del vincolo matrimoniale*, Roma 1998. Cf. Benedetto Marchetta, *Scioglimento del matrimonio canonico per inconsumazione e clausole proibitive di nuove nozze* (Dottrina-Procedura-Giurisprudenza), Padova 1981.

<sup>3</sup>Can. 1086 §1. A marriage between two persons, *one of whom was baptized in the Catholic Church or received into it, and the other of whom is not baptized, is invalid*". Benedict XVI, Apostolic Letter "motu proprio" *Omnium in mentem*, on several amendments to the code of canon law, 26 October 2009, in AAS 102 (2010) 8-10. It would "take force only after three months have elapsed from the date of that issue of the Acta" (can. 8 §1).

<sup>4</sup>Can. 1124. Marriage between *two baptized persons, one of whom was baptized in the Catholic Church or received into it after baptism, and the other a member of a Church or ecclesial community not in full communion with the Catholic Church, cannot be celebrated without the express permission of the competent authority*". Benedict XVI, Apostolic Letter "motu proprio" *Omnium in mentem*, on several amendments to the code of canon law, 26 October 2009, in AAS 102 (2010) 8-10. It would "take force only after three months have elapsed from the date of that issue of the Acta" (can. 8 §1).

his wife. For other cases these instructions are my own, not the Lord's. If one of the brothers has a wife who *is not a believer*, and she is *willing to stay with him*, he *should not divorce her*; and if a woman has a husband who is not a believer and he is willing to stay with her, she should not divorce her husband. You see, the unbelieving husband is sanctified through his wife and the unbelieving wife is sanctified through the brother. If this were not so, your children would be unclean, whereas in fact they are holy. But *if the unbeliever chooses to leave*, then *let the separation take place*: in these circumstances, the brother or sister *is no longer tied*. But God has called you to live in peace.

The following parts can clearly be found in the above biblical passage: first of all, there is a *command of Jesus on indissolubility of Marriage* (vv.10-11); while St. Paul based on *his own authority speaks of an eventual dissolution of marriage* (v.12), which is actually a case of *Disparity of Cult* (CIC c. 1086; CCEO c. 803); it is clear that if the *non-baptised person consents to stay married* with the baptised person, the latter should not leave the marriage, since the other is sanctified through the faith of the baptised person (vv.12-14); but if the *unbeliever chooses to leave*, then a separation takes place with the *eventual dissolution of matrimonial bond* (v.15).

The Biblical scholars have debated and proposed *various interpretations* to this biblical passage. Edward Schillebeeckx has proposed the following:<sup>5</sup> the *marriage of the baptised reflects union of Christ and Church*, according to the words of St. Paul to Ephesians: "This mystery has great significance, but I am applying it to Christ and the Church" (*Eph* 5, 32) and thus the marriage *is indissoluble*. The *marriage with a non-baptised* who wishes to leave, however, could end in the auto-dissolution of this natural marriage, since the non-baptised person does not wish to live in "peace", which would mean living in the communion and the community of faith.

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<sup>5</sup>Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, Sheed and Ward, New York 1965, 141, 394, 457.

## 1.2. Historical Notes

The Pauline Privilege is a juridical institute which has developed through some significant historical moments.<sup>6</sup> As seen above, the *Pauline Privilege* is based on 1Cor 7, 10-15, where it was clear that the “freedom in Christ” is more important than the indissolubility of natural marriage.<sup>7</sup> In the fourth Century, “Ambrosiaster”<sup>8</sup> held that the *marriage not honoured in God is not indissoluble*. Actually the contempt of the Creator (*contumelia Creatoris*) dissolves the obligations of marriage for the one who is dismissed. St. Augustine,<sup>9</sup> in the fifth Century, spoke only of the right to separation but not of right to new marriage. Taking into account the ecclesial pastoral praxis of his

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<sup>6</sup>Cf. Gianfranco Girotti, *La procedura per lo scioglimento del matrimonio nella fattispecie del “privilegio paolino”*, in Aa.Vv., *I procedimenti speciali nel diritto canonico*, Città del Vaticano 1992, 159-161. Cf. Matteo Visioli, *Il privilegio paolino: una deroga al principio di indissolubilità?*, in *Quaderni di diritto ecclesiale* 20 (2007) 378-394. Cf. Markus Graulich, *Agli altri dico io - non il Signore. Dal privilegio paolino allo scioglimento del matrimonio in favorem fidei*, in Jesu Pudumai Doss (Ed.), *Parola di Dio e legislazione ecclesiastica*, Roma 2008, 111-125. Cf. Antonio Silvestrelli, *Scioglimento di matrimonio in favorem fidei*, in Aa.Vv., *I procedimenti speciali nel diritto canonico*, Città del Vaticano 1992, 179-182.

<sup>7</sup>“Nella situazione in cui il bene della fede, quale valore superiore e più strettamente connesso alla *salus animarum*, pare in contrasto con l’indissolubilità, si privilegia il primo e si considera il secondo funzionale al primo. Il problema non riguarda il contrasto di due valori, come qualcuno ha scritto, ma del supremo valore della libertà in Cristo, cui ogni altro valore va subordinato. L’indissolubilità non è un valore assoluto. È la maturazione in Cristo, il fulcro della fede cristiana. Qualora diventi oggettivamente d’intralcio a tale compimento di libertà, come nell’ipotesi prevista dal Privilegio Paolino, il valore dell’indissolubilità cede dinanzi alla esigenza della fede e della sua pubblica professione.” Girotti, *La procedura*, 159.

<sup>8</sup>Cf. Ambrosiaster, *Commentarius in epistulas paulinas*. Pars Secunda. *In epistulas ad corinthos*, in H.I. Vogels (Ed.), *Corpus Scriptorum Ecclesiasticorum Latinorum*, Vol. 81, 76-77.

<sup>9</sup>Cf. Augustinus, *De Conjugiis Adulterinis*, in J.P. Migne, *Patrologia Latina*, Vol. 40, col. 459. Cf. Augustinus, *De Sermone Domini in monte*, in J.P. Migne, *Patrologia Latina*, Vol. 44, col. 1252.

times, in the XI Century Gratian<sup>10</sup> cautioned against applying the Pauline Privilege and the eventual dissolution of the natural marriage in case of apostasy. It was in XII Century, that Pope Innocent III<sup>11</sup> officially held that the newly baptised party was *free to remarry*, if the cohabitation was rendered morally impossible.

During these centuries, the Catholic Church furnished the Pauline Privilege with some positive norms:<sup>12</sup> first of all she gave a *definition* of the term “*depart*”; it was held that the “*departure*” be established in the ecclesiastical forum through “*interpellations*”; it also established that the *marriage is not dissolved until another marriage* is contracted by the baptised party. Thus in the XIII century, the Pauline Privilege became a fully defined theological-canonical institute. Beginning in the XVI century, the scope of the Pauline Privilege was broadened<sup>13</sup> to include the cases of the polygamists and those separated by persecution or captivity. The whole legislation on the Pauline Privilege was later included in the Code of Canon Law of 1917 (cf. CIC cc. 1120-1127), which is quite similar to the one found in the Code of Canon Law of 1983 (cf. CIC cc. 1143-1150; CEO cc. 854-

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<sup>10</sup>Cf. c.XXVIII, q.2, c.2., in *Corpus Iuris Canonici*, Editio lipsiensis secunda post Aemilii Ludouici Richteri curas ad librorum manu scriptorum et editionis romanae fidem recognouit et adnotatione critica instruxit Aemilius Friedberg, Pars prior, *Decretum Magistri Gratiani*, Lipsiae 1879 (ristampa: Graz 1959), col. 1090.

<sup>11</sup>Cf. X. IV, t.19, c. 7., in *Corpus Iuris Canonici*, Editio lipsiensis secunda post Aemilii Ludouici Richteri curas ad librorum manu scriptorum et editionis romanae fidem recognouit et adnotatione critica instruxit Aemilius Friedberg, Pars secunda, *Decretalium Collectiones*, Lipsiae 1879 (ristampa: Graz 1959), col. 722-723.

<sup>12</sup>Cf. Preface, Congregatio pro Doctrina Fidei, Normae *Potestas Ecclesia*, de conficiendo processu pro solutione vinculi matrimonialis in favorem fidei, 30 aprilis 2001, in *Enchiridion Vaticanum* 20 (2001) 402-423; English Version in: [http://www.doctrinafidei.va/documents/rc\\_con\\_cfaith\\_doc\\_20010430\\_fav-or-fidei\\_en.html](http://www.doctrinafidei.va/documents/rc_con_cfaith_doc_20010430_fav-or-fidei_en.html) (consulted on 24 May 2013).

<sup>13</sup>Cf. Paul III, *Altitudo*, 1 June 1537, in *Denz-H* 1497; Pius V, *Romani Pontifices*, 2 August 1571, in *Denz-H* 1983; Gregory XIII, *Populis*, 25 January 1585 in *Denz-H* 1988; later inserted in the Code of Canon Law of 1917 (can. 1125) and of 1983 (CIC cc. 1148-1149), and in the Oriental Code of 1990 (CIC cc. 859-860).

861), highlighting that in the application of the Pauline Privilege and its extension, *all those marriages would be dissolved by the law itself*.

### 1.3. Some Juridical Aspects: Authority, Conditions & Effects

Based on the actual legislations on the Pauline Privilege (CIC cc. 1143-1150; CCEO c. 854-861), some juridical aspects<sup>14</sup> of the Pauline Privilege are discussed below.

**a)** The **competent authority** to enable the proper procedure of the Pauline Privilege is the *Local Ordinary* of the converted party (CIC cc. 1145 §1, 1147; CCEO cc. 856 §1, 858).

**b)** The following are the **four conditions** *that should be fulfilled concurrently* for the Pauline Privilege:

- The marriage for which the Pauline Privilege is applied should be a *natural marriage celebrated validly between two non-baptised persons* (CIC c. 1143 §1; CCEO c. 854 §1). Thus, it cannot be applied, if both have received baptism or if none of the parties wishes to receive baptism.
- There should be a *successive valid baptism of one of the partners* (CIC c. 1143 §1; CCEO c. 854 §1). Thus only a *valid sacramental baptism* is needed,<sup>15</sup> while the baptism in the Catholic Church is not requested for the application of the Privilege.
- The “*departure*” of the non-baptised party<sup>16</sup> (CIC c. 1143 §2; CCEO c. 854 §2) should be *ascertained through interrogation* on the party’s refusal of cohabitation or at least the refusal of

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<sup>14</sup>Cf. Kowal - Woestman, *Special Marriage Cases and Procedures*, 55-71. Cf. Sabbarese - Elias, *Scioglimento in favorem fidei*, 17-20. Cf. Gianni Trevisan, *Il privilegio paolino. Delineazione fondamentale del privilegio*, in *Quaderni di diritto ecclesiale* 20 (2007) 343-349.

<sup>15</sup>It is in contrast with what had been indicated in c. 1121 of CIC 1917, which required not only valid baptism but also that such baptism, and eventual conversion, should be into the Catholic Church. Thus this new openness in the Code throws light on the ecumenical spirit of the CIC 1983. Cf. Girotti, *La procedura*, 163.

<sup>16</sup>Cf. Alessandro Girauda, *La volontà della parte non battezzata: oggetto, modalità e conseguenze delle interpellazioni nel privilegio paolino*, in *Quaderni di diritto ecclesiale* 20 (2007) 350-362.

peaceful cohabitation *sine contumelia Creatoris*.<sup>17</sup> In fact, such a refusal could be presumed in the following cases: the *eventual* violation of peaceful cohabitation *sine contumelia Creatoris* and departure without just cause (CIC c. 1146, 1°; CCEO c. 857, 1°); or silence or no response from the non-baptised party (CIC c. 1145 §1; CCEO c. 856 §1).<sup>18</sup>

- The *interrogation of the non-baptised party* to ascertain the refusal (CIC c. 1144 §1; CCEO c. 855 §1) is an *ad validitatem* condition. Such an interrogation should be done (CIC c. 1144 §2; CCEO c. 855 §2) usually *after baptism* of the converted party. It could be done *even before baptism* or be *dispensed with* by the Local Ordinary,<sup>19</sup> if “it is evident at least by a *summary and extrajudicial process that it cannot be done or would be useless*.”<sup>20</sup> The interrogation should be done *ordinarily* by the

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<sup>17</sup>To act *sine contumelia Creatoris* would mean that one’s actions does not offend God and thus not undermine the spiritual and moral obligations of the converted party, especially in practicing personally the Catholic faith and in educating the children in it. Cf. Girotti, *La procedura*, 162, 164. Cf. Giraudo, *La volontà della parte non battezzata*, 351-352. “Questa precisazione è importante, perchè la finalità dello scioglimento del precedente matrimonio è di permettere al coniuge convertito di vivere in pienezza le esigenze della fede”. Trevisan, *Il privilegio paolino*, 346.

<sup>18</sup>The *duration for a response of the non-baptised party* should be a convenient “period of time” (CIC c. 1145 §1; CCEO c. 856 §1). Thus, after such duration, if the non-baptised party is silent, then it should be taken as a negative response from him/her.

<sup>19</sup>“Essendo, però, la volontà della parte non battezzata l’elemento centrale della fattispecie prevista per il privilegio paolino, risulta altrettanto importante sia l’intervento dell’ordinario del luogo, a cui spetta di raccogliere tale volontà e di regolarne le modalità di acquisizione, sia la prova in foro esterno delle avvenute interpellazioni o della loro dispensa per impossibilità, inutilità, ed anche dannosità in ragione della concreta situazione in cui le parti vengono a trovarsi”. Giraudo, *La volontà della parte non battezzata*, 362. According to a Declaration of the Holy Office of 1884, neither the divorce nor the second civil marriage is sufficient to dispense from the duty of interrogation of the non-baptised party. Cf. Trevisan, *Il privilegio paolino*, 348.

<sup>20</sup>The impossibility to respond might be due to: non-traceability of the non-converted party, some serious incapacitating sickness, or time of war, etc. The uselessness of response could be due to the non-converted



Local Ordinary of converted party, perhaps with the help of an *Instructor* (CIC c. 1145 §1, §3; CCEO c. 856 §1, §3). If that cannot be done, even the *private interrogation* by the Converted Party would suffice, if the fact and the outcome of that interrogation “be established legitimately in the external forum” (CIC c. 1145 §§2-3; CCEO c. 856 §§2-3).

c) The following are the **effects of Pauline Privilege**: the *previous natural Marriage* becomes dissoluble and the dissolution takes place *only with a new canonically valid marriage* (CIC c. 1143 §1; CCEO c. 854 §1) and the *baptised party* acquires a *right to contract a new marriage* with a Catholic party (CIC c. 1146; CCEO c. 857).

#### 1.4. Extension of Pauline Privilege

The Pauline Privilege, through the centuries, got extended<sup>21</sup> (known also as *Petrine privilege*)<sup>22</sup> to include a variety of other special situations that are contemplated in the Code of Canon Law of 1983.

##### a) Marriage with a non-Catholic party (CIC c. 1147; CCEO c. 858)

In fact, CIC c. 1147<sup>23</sup> (CCEO c. 858) contemplates that, for a grave cause,<sup>24</sup> the Local Ordinary *can* permit the converted party to marry

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party's open dissent towards Catholic faith, etc. Cf. Girotti, *La procedura*, 165-166.

<sup>21</sup>Cf. Andrea Migliavacca, *Privilegio paolino: alcuni casi particolari* (cf. *cann.* 1147-1149), in *Quaderni di diritto ecclesiale* 20 (2007) 363-377. Cf. Sabbarese - Elias, *Scioglimento in favorem fidei*, 20-23.

<sup>22</sup>These extensions are called *Petrine privilege* since the natural marriage is dissolved applying the fullness of the apostolic power of the Roman Pontiff. Cf. Luigi Chiappetta, *Il Codice di diritto canonico. Commento giuridico-pastorale*, Terza Edizione (a cura di F. Catozzella, A. Catta, C. Izzi, L. Sabbarese), Bologna 2011, vol. 2, 426.

<sup>23</sup>Cf. Migliavacca, *Privilegio paolino*, 363-365.

<sup>24</sup>The grave causes could be few Catholics living in that region, a new relationship already started, a civil marriage a pregnancy or a child born out of wedlock, or such situations. Cf. Migliavacca, *Privilegio paolino*, 365. Cf. Girotti, *La procedura*, 165-166. “Il battesimo non è la sola ragione, né il solo ‘grave motivo’ per cui viene accordato lo scioglimento del vincolo precedente. La ragione e il motivo grave sono compendiabili nell’obiettivo che si intende favorire e cioè un *bene spirituale* collegato alle nuove nozze”. *Ibid.*, 169.

a non-catholic person,<sup>25</sup> either validly baptised in another ecclesial community or even a non-baptised person. This could be seen as an application of CIC c. 1078 (CCEO c. 795 §§1-2), which requires the permission of Local Ordinary for entering a marriage with the dispensation of either the disparity of cult (CIC c. 1086 §1; CCEO c. 803 §1) or the mixed marriages (CIC c. 1124; CCEO c. 813).

**b) Case of polygamist or polyandrist who converts (CIC c. 1148; CCEO c. 859)**

The second case,<sup>26</sup> already contemplated in the XVI Century, is of a polygamist or a polyandrist who converts, i.e., *a non-baptised man/woman, who has several non-baptised wives/husbands "at the same time"*,<sup>27</sup> who receives baptism in the Catholic Church. Such a convert can *retain one of the wives/husbands*, especially "if it is hard for him/her to remain with the first one" with whom he/she got married. The other wives/husbands are to be dismissed,<sup>28</sup> without forgetting to provide for their needs, "according to justice, Christian charity and natural equity", which would rightly depend on moral, social and economic conditions of places and persons. *After the baptism has been received, the marriage must be contracted in legitimate form*,<sup>29</sup> with the chosen wife/husband, applying if need be the prescripts about mixed marriages or disparity of cult.

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<sup>25</sup>Such was not contemplated in the Code of Canon Law of 1917, which specifies that the converted party has a right to new marriage only with a catholic party (can. 1124).

<sup>26</sup>Cf. Migliavacca, *Privilegio paolino*, 365-369.

<sup>27</sup>The indication of having "contemporarily" many wives/husbands should mean that the person did not marry them one after the other when each precedent marriage ended *already* in separation and divorce. Cf. *Ibid.*, 367.

<sup>28</sup>According to the praxis, he/she could maintain in the same house the other ex-spouses, especially if they are sick or old, but should not live with them *more uxorio* and should avoid the danger of scandal or sin. Cf. *Ibid.*

<sup>29</sup>The renewal of consent, even though not necessary, makes certain with a formal act the choice of the non-baptised spouse. Cf. Girotti, *La procedura*, 173. Cf. *Communicationes* 10 (1978) 114-115.

**c) Case of convert who cannot restore cohabitation (CIC c. 1149; CCEO c. 860)**

In the case of a non-baptised person, who *after receiving baptism* in the Catholic Church, cannot restore cohabitation due to *captivity or persecution, the previous marriage is dissolved*.<sup>30</sup> Therefore, this converted party can contract another marriage, even if the *other party has received baptism* in the meantime. If the previous marriage, after the baptism of both the parties, has been consummated, then it cannot be dissolved (CIC c. 1141; CCEO c. 853).

**d) Case of doubt**

CIC c. 1150 (CCEO c. 861) speaks about the case of doubt for various reasons.<sup>31</sup> In such cases of doubt, “privilege of faith possesses the favor of the law”.

**1.5. Some Cases in which Pauline Privilege cannot be applied**

The extension of the Pauline Privilege cannot be applied indiscriminately in cases not contemplated by the actual canonical legislations. The following are some examples where the *Pauline Privilege cannot be applied*:

- Dissolution of a natural marriage celebrated validly between two non-baptised persons (CIC c. 1143 §1; CCEO c. 854 §1); *no one wishes to be baptised*; one of them wishes to marry a catholic.
- Dissolution of a natural marriage celebrated validly between two non-baptised persons (CIC c. 1143 §1; CCEO c. 854 §1), if the *other party wishes to live peacefully* after the baptism of one of them.
- Dissolution of a natural marriage celebrated validly between two non-baptised persons (CIC c. 1143 §1; CCEO c. 854 §1), if the *other party “separated” before* the baptism of one of them and for motives other than religious-baptism of the party.

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<sup>30</sup>Cf. Migliavacca, *Privilegio paolino*, 369-371.

<sup>31</sup>If in case the baptism of one party or both the parties are not sure enough or the validity of the baptism in question is not clear, it would be better to refer the case to the Apostolic See, especially the Congregation for the Doctrine of Faith. Cf. *Ibid.*, 372-374.

- Dissolution of the natural marriage of a polygamist/polyandrist (CIC c. 1148; CCEO c. 859) who receives Catholic baptism and *wishes to marry another woman/man who has not been one of his/her spouses*.
- Dissolution of the natural marriage of a polygamist /polyandrist (CIC c. 1148; CCEO c. 859) who receives Catholic baptism and *wishes to “renew marital vows” with a non-baptised spouse, while there is a baptised one among their spouses*.
- Dissolution of a natural marriage celebrated validly between two non-baptised persons (CIC c. 1143 §1; CCEO c. 854 §1), *after the baptism of both, but before consummation of the marriage*.
- Dissolution of a natural marriage celebrated validly between a non-baptised person and a baptised person *with dispensation of DC; after baptism of the non-baptised party and before the consummation of the marriage*.

### 1.6. Procedure and Documents Needed<sup>32</sup>

The Procedure that should be followed in cases of applying the Pauline Privilege, along with the documents needed to complete the procedure, is as follows:

- First of all, a *Petition of the “Converted”/Baptised party* (in which one should present the previous natural marriage, the conversion/baptism of the petitioner, the refusal of the other party to live “peacefully”, the new marriage that the petitioner wishes to contract, the third -catholic- party in question) should be submitted, *along with these Documents: (Birth Certificate /Personal ID of all involved, esp. Baptism Certificate of the Petitioner and the Third Party, Marriage Certificate, Separation/Divorce Certificate)*.
- The *Decree of Constitution of “Tribunal” or Officers (Instructor and Notary)* signed by the Bishop should be added to the Acts.

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<sup>32</sup>For the Model Formats, cf. Kowal - Woestman, *Special Marriage Cases and Procedures*, 274-285. Cf. Andrea Migliavacca, *Modelli e formulari per l'applicazione del privilegio paolino*, in *Quaderni di diritto ecclesiale* 20 (2007) 395-401.

- The *Examination of the parties*, at least of “converted”/baptised party is to be done (the examination should include the Personal Identification, Pre-nuptial Relationship, On Marriage & his/her Intentions on Marriage, Separation/Divorce & the Reasons, Responsibility towards Ex-Spouse & Children, Possibility of Reconciliation or Peaceful Cohabitation, Proposed Marriage and the New Third Party, Baptism or desire to be baptised along with the parish priest who is helping the party for the same).
- The *Interrogation of the non-baptised party* (at least in Summary Form: whether s/he wishes to be baptised; whether s/he would live “peacefully” with the petitioner) is one of the conditions to be fulfilled. This can be done privately (even by the converted party) or be dispensed with by the Local Ordinary, if “it is evident at least by a *summary and extrajudicial process* that *it cannot be done or would be useless*”. If so, do attach the summary process and the authorisation of the Local Ordinary to the Acts.
- The *Authorisation of Local Ordinary to contract new marriage*, especially if the Third Party is a baptised non-catholic or non-baptised.
- The *New marriage of the converted party with the third party*, which dissolves the previous marriage bond.

## 2. Dissolution of Marriage *in favorem fidei*

The dissolution of a natural marriage in favour of the faith evolved naturally from the Pauline Privilege, especially in the last Century. One should not forget the *basic difference* between applying the Pauline Privilege or dissolution *in favorem fidei*, which depends more on the marriage for which such a dispensation is sought. The **Pauline Privilege** is applied to non-sacramental marriage between *two non-baptised persons* (CIC c. 1143 §1; CCEO c. 854 §1) and is *dissolved by law* itself. The **Dissolution in favorem fidei** is applied to non-sacramental marriage, where *at least one of whom is not baptised* (CIC c. 1086 §1; CCEO c. 803 §1) and is *dissolved only by the Roman Pontiff* in favour of the faith (with the assistance of the Congregation for the Doctrine of Faith).

## 2.1. Historical Notes

The Dissolution *in favorem fidei* is an off-shoot of the Pauline Privilege and has become a reality as its extension.<sup>33</sup> In the XIX Century,<sup>34</sup> the jurisdictional power of the Roman Pontiffs to dissolve marriages not only of the *ratum et consummatum* marriages, but also of the *non-ratum* but *consummatum* marriages was recognised. The Code of Canon Law of 1917 has been the starting point for some important developments. The *abrogation of impediment of disparity of cult* with respect to *baptised non-catholics* has been a big change. Thus the *marriages* between a baptised non-catholic and a non-baptised *were considered valid*. After the CIC 1917, the changes in Europe saw a multiplication of *mixed marriages* (marriages between a catholic and a baptised non-catholic). There was also a considerable increase of *marriages between catholics and non-baptised parties* (with dispensation of *disparity of cult*).

In 1920,<sup>35</sup> Pope Pius X dissolved the marriage of a neophyte, who was married to a baptised, so that the neophyte could marry a baptised. In 1924<sup>36</sup> it was Pope Pius XI, who was the first to dissolve a marriage between a non-catholic and non-baptised, so that the *non-catholic who became a catholic* might marry a catholic third party. Due to the proliferation of these sorts of cases, the Congregation of the

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<sup>33</sup>Cf. Silvestrelli, *Scioglimento di matrimonio*, 179-204. Cf. Graulich, *Agli altri dico io*, 125-134. Cf. Elena Lucia Bolchi, *Lo scioglimento del matrimonio non sacramentale in favorem fidei. Una presentazione sintetica delle norme procedurali vigenti*, in *Quaderni di diritto ecclesiale* 20 (2007) 299-305. Cf. Sabbarese - Elias, *Scioglimento in favorem fidei*, 29-38.

<sup>34</sup> Congregation for the Doctrine of the Faith, Norms *Potestas Ecclesiae* to instruct the process for the dissolution of marriage bond "*in favorem fidei*," 30 April 2001, preface, in *Enchiridion Vaticanum* 20 (2001) 402-404. Cf. Sacra Congregatio Concilii, *Florentina*, 27 iulii 1726 & 29 martii 1727, in *Codicis Iuris Canonici Fontes*, Vol. V, 766, 769.

<sup>35</sup>Cf. Silvestrelli, *Scioglimento di matrimonio*, 183.

<sup>36</sup>Cf. Sacra Congregatio Sancti Officii, *Solutio De privilegio fidei*, 2 aprilis 1924, in *Periodica* 21 (1932) 170-171. Cf. Sacra Congregatio Sancti Officii, *Decretum Dissolutio vinculi naturalis in favorem fidei*, 5 novembris 1924, in *Periodica* 14 (1925) 19-21. Cf. Rubiyatmoko, *Competenza della Chiesa*, 239-240.

Holy Office brought out an Instruction in 1934,<sup>37</sup> on the process to be followed in cases of the dissolution of the marriage bond in favour of the faith by the supreme authority of the Roman Pontiff.<sup>38</sup> Pope Pius XII<sup>39</sup> went further by dissolving a *marriage between a catholic and non-baptised* (which was celebrated with the dispensation from the Disparity of Cult), so that the *non-baptised who became a catholic* could marry a catholic third party. Pope John XXIII<sup>40</sup> extended further the scope of dispensation by applying it to a *marriage between a catholic and non-baptised* (which was celebrated with the dispensation from the Disparity of Cult), so that the *non-baptised who does not convert* could marry a catholic third party.

The Instruction of 1934 was then updated with another Instruction of the Congregation for the Doctrine of the Faith in 1973.<sup>41</sup> It elaborated

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<sup>37</sup>Cf. Sacra Congregatio Sancti Officii, *Instructio Connubia inita, Normae pro conficiendo processu in casibus solutionis vinculi matrimonialis in favorem fidei per supremam Summi Pontificis auctoritatem*, 1 maii 1934, in X. Ochoa, *Leges Ecclesiae post Codicem iuris canonici editae*, Roma 1969, Vol. II, coll. 3354-3355.

<sup>38</sup>This instruction upheld the *authority of the Supreme Pontiff to dissolve marriages* in which at least one is non-baptised (art. 1). It spoke of the *exclusive competence* of the Congregation of the Holy Office (art. 2). The *requirements for the concession of the favour* were indicated as follows (art. 3): *One of the parties should be non-baptised before and during the marriage and marriage should have to be non-consummated (after the baptism, if received esp. by both the parties). There should be a real impossibility of reconciliation between the parties. There should be no cause of scandal among the faithful, if a new marriage would be allowed after the dissolution in favorem fidei.* The instruction also gave in detail *procedural norms for the preparation of the process* in the diocese (artt. 4-18).

<sup>39</sup>Cf. Rubiyatmoko, *Competenza della Chiesa*, 241-243. Cf. Pio PP. XII, *Discorso agli sposi novelli*, 22 aprile 1942, in *Discorsi e Radiomessaggi di Sua Santità Pio XII*, Vol. IV, Vaticano 1960, 47.

<sup>40</sup>Cf. Rubiyatmoko, *Competenza della Chiesa*, 244.

<sup>41</sup>Cf. Sacra Congregatio Sancti Officii, I. *Instructio Ut notum est, pro solutione matrimonii in favorem fidei*; II. *Normae procedurales Processum concessioni, pro conficiendo processu dissolutionis vinculi matrimonialis in favorem fidei*, 6 decembris 1973, in X. Ochoa, *Leges Ecclesiae post Codicem iuris canonici editae*, Vol. V, coll. 6702-6705.

the *Substantive law* (artt. 1-6)<sup>42</sup> and the *Procedural norms* (artt. 7-22) for the dispensation *in favorem fidei*. During the Revision of *Code of Canon Law* (1983), there was a proposal of a set of canons on *substantive law* and *procedural norms* for the dissolution of the marriage bond in favour of the faith.<sup>43</sup> It was, however, decided to assign them to Particular Norms which would eventually be promulgated by the Supreme Pontiff.<sup>44</sup> Thus, the actual legislations on the Dissolution *in favorem fidei* are to be found in the Norms of the Congregation for the Doctrine of the Faith of 2001.<sup>45</sup>

## 2.2. Some Juridical Aspects

Based on the actual legislations on the Dissolution *in favorem fidei*, some juridical aspects of the same are discussed below.

### a) Competent Authorities

The competent authorities for various aspects or stages of the dissolution *in favorem fidei* of a natural marriage are as follows:

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<sup>42</sup>The conditions for granting the dissolution *in favorem fidei* are the following: *at least one party had not been baptised* before and during marriage; *the interrogation of the other party*; *provision for needs of the other party* by the petitioner; *the impossibility of reconciliation* (petitioner is not the prevalent cause of separation and the third party is not the cause of separation); *the religious practice of petitioner and the third party* (if either is a catechumen, an *imminent baptism*); *Cautiones to be signed* especially by the non-baptised party *to allow the Catholic party the freedom to profess one's own religion* and to *baptise and educate their children as Catholics*; and *absence of scandal* due to new marriage.

<sup>43</sup>Cf. *Communicationes* 3 (1971) 70-73, 5 (1973) 86. Cf. *Schema de sacramenti* of 1975, can. 346. Cf. *Schema CIC* of 1980, can. 1104. Cf. *Schema novissimum CIC*, can. 1150. Cf. Sabbarese - Elias, *Scioglimento in favorem fidei*, 36-37.

<sup>44</sup>Cf. Sabbarese - Elias, *Scioglimento in favorem fidei*, 37-38. Cf. *Communicationes* 15 (1983) 241.

<sup>45</sup>Cf. Congregatio pro Doctrina Fidei, *Normae Potestas Ecclesia*, de conficiendo processu pro solutione vinculi matrimonialis in favorem fidei, 30 aprilis 2001, in *Enchiridion Vaticanum* 20 (2001) 402-423; English Version in:

[http://www.doctrinafidei.va/documents/rc\\_con\\_cfaith\\_doc\\_20010430\\_fav-or-fidei\\_en.html](http://www.doctrinafidei.va/documents/rc_con_cfaith_doc_20010430_fav-or-fidei_en.html) (consulted on 24 May 2013).



**i)** The *only* competent authority to grant dissolution *in favorem fidei* of a natural marriage is the Roman Pontiff (Art. 1).

**ii)** The *competent authority* to examine and to adjudicate *in favorem fidei* cases and to submit them to the Roman Pontiff is the Congregation for the Doctrine of the Faith (Art. 2).

**iii)** The *competent authority to accept petition and to instruct the process* is the *diocesan or eparchial Bishop of domicile or quasi-domicile* of the petitioner (Art. 3).

**b) Conditions to be fulfilled for the dissolution of marriage *in favorem fidei***

The conditions that are to be fulfilled for the dissolution of marriage *in favorem fidei*, which thus become the object of the Process, are the following:

**i)** The **marriage for which the dissolution is sought** should be a *non-sacramental marriage* entered into by parties, of whom **at least one is not baptised**, both before and during the marriage (Art. 1).

- The *absence of the baptism of at least one of the spouses* should be *demonstrated beyond any doubt* (Art. 16).
- The marriage should *not have been consummated*, especially *after* both parties have received baptism (Art. 1, 17).
- The *dissolution in favour of the faith* of this prior marriage *cannot be sought* if this marriage had *already* received a papal dissolution *in favorem fidei*, since no two (successive) dissolution *in favorem fidei* can be given (Art. 6).

**ii)** The *petitioner was not exclusive or predominant culpable cause* of separation of the prior marriage (Art. 4).

**iii)** The *third party did not provoke the separation* of the spouses (Art. 4).

**iv)** There is *no possibility of reconciliation* between the parties (Art. 4).

**v)** *At least one of the parties* of the **new marriage** (petitioner and third party) *should be a catholic* or at least be a catechumen wishing to receive baptism in the Catholic Church.

**vi)** The *petitioner* and the *third party* should be *free to marry*.

- In *case of a non-catholic party*, the written *Cautiones* should be signed (Art. 5), indicating that the Catholic party would *remove dangers of defecting from the faith* and the non-Catholic party would *allow the Catholic party the freedom to profess his or her own religion and baptise and educate their children as Catholics*.
- In *case of* dissolution of the *prior marriage celebrated with the dispensation of the Disparity of Cult* (Art. 7), the *new marriage should be a sacramental one*, i.e., the Catholic party can enter a *new marriage only with a baptised person* or the non-baptised party should *intend to receive baptism before the new marriage with a baptised party*. Therefore, the petition should not be presented, if *prudent doubt on the sincerity of conversion*.
- In *case of* one of the parties is still a *catechumen*, the *wedding should be delayed until after the baptism* (Art. 8).

**vii)** There should be *no scandal or surprise* among the faithful, if the dispensation is granted (Art. 9).

### **2.3. Procedure for dissolution of marriage *in favorem fidei***

The procedures at various stages of the diocesan level to obtain the papal dissolution of a marriage *in favorem fidei* are discussed below.

#### **a) Introduction of the Process**

The process is to begin at the diocese level for any dissolution *in favorem fidei* case. The various steps to taken are as follows:

**i)** The **Petition** to obtain the papal dissolution of a marriage *in favorem fidei* consists of a formal request by one of the spouses of a non-sacramental marriage, in which at least one spouse has never been baptised (Art. 1, 16). The petition should also mention if there is a *positive doubt on the validity of the marriage* (Art. 10). If any such petition is rejected, then a *recourse* against the rejection can be made to the Apostolic See (cf. CIC c. 1699 §3).

**ii)** On receiving the petition, the **Competent Bishop** has some **duties** even before initiating the process. They could be summed up as follows:

- If the case is one of the *difficult cases* of the juridical or moral order, especially one of those indicated in the Norms (such as *difficulties of petitioner* to fulfil obligations toward former spouse and children or *fear of scandal* from the concession of the favour), then the bishop should *consult the Congregation for the Doctrine of Faith* and should follow its instructions (Art. 9).
- The bishop then *appoints a Commission or Officers* to act on the petition and complete the process. Such an appointment, specifying the Instructor, Notary, Defender of Bond should be given in writing and could be done on permanent basis or could be done case by case (Art. 11).

## b) The Evolution of the Process

i) The **instructor** appointed by the bishop should start the **process of gathering valid and relevant information to achieve a moral certitude** (Art. 12) on the constitutive conditions and essential elements for the dissolution *in favorem fidei* (Artt. 1, 4).

The *Examination of the parties and the witnesses* should be carried out by the instructor with the help of the notary and the defender of the bond should also be cited (Art. 14). During the interrogation, an *oath should be administered*<sup>46</sup> to the parties and witnesses and should follow a prepared questionnaire. At the end the *responses should be written and signed* by the party or witness, along with the instructor and notary.<sup>47</sup>

If the *other party or a witness refuses or is unable to appear* before the instructor, then their *declarations may be obtained* before a notary or in any other lawful manner (Art. 15 §1). If the other party is unwilling to participate in the process or has not replied to the summons, then the *absence of the party should be declared and be included* in the Acts (Art. 15 §2).

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<sup>46</sup>If the party or witness should refuse to take the oath, s/he should be heard unsworn (Art. 14 §2).

<sup>47</sup>The parties may be heard in another place or through an auditor, but depositions by letter or through telephone should be avoided as much as possible. If *written responses* are given, they should be *signed in front of a Notary Public*.

Also the *documentary proofs* could be gathered by the instructor. They should be submitted *in original form or in authentic copy* and be verified by the notary (Art. 13 §1). The complete documentation should then be sent along with the acts to the Congregation for the Doctrine of Faith after been authenticated by the notary (Art. 13 §2).

- The *documentary evidence* especially on the state of life should be gathered, through the copy of *divorce decree* or *civil nullity sentence* and/or canonical nullity sentence for any attempted marriages by either of the intended parties (Art. 19).
- The *baptismal registers* of the places related to the non-baptised party, especially during his/her infancy, schooling and before and during marriage, should be examined and the outcome should be included in the Acts (Art. 16 §4).
- If the *non-sacramental marriage* was *celebrated with the dispensation of the Disparity of Cult*, then the copies of the prenuptial inquiry and the dispensation obtained should be included in the Acts (Art. 16 §5).
- The certificates of baptism of the parties involved or any profession of faith of a baptised non-catholic party should be included in the Acts (Art. 22).

ii) During the **interrogation/examination of the parties and the witnesses**, the instructor should gather the following information on the non-sacramental marriage in question and of the intended spouse (the third party).

First of all, the *absence of the baptism of at least one of the spouses* should be *demonstrated beyond any doubt* (Art. 16). Thus, the non-baptised party and the witnesses, who could be the parents or relatives of the non-baptised party and those who knew this person as an infant, should be *interrogated about absence of baptism* and also the *circumstances and other reasons* for the absence of baptism (Art. 16 §§1-3).

The *non-consummation after baptism* of the non-baptised should be established through enquiries (Art. 17) of the parties on *relationship* and especially if they engaged between them in *any conjugal act after their separation* and of all witnesses *on any cohabitation between parties* after the baptism.

There is *other information* that is to be gathered by the instructor (Art. 18) on the *state of life*, especially if there has been any attempted marriage, of the other party and on the *cause of the separation or divorce*, especially on *who was at fault* for the breakdown of the marriage. The instructor should also find out about the obligations of the petitioner *toward the former spouse and offspring, if any* (Art. 20).

The instructor should *question the petitioner and the intended spouse* (Art. 21) on the time and intentions on receiving baptism of the non-baptised party and should *enquire the parish priest* about the reasons for the baptism and the integrity of the parties.

Lastly, during the interrogation the instructor should *find out explicitly about the religious practice of the petitioner and the intended spouse* (Art. 22).

### c) Conclusion of the process

The formal conclusion of the process at the diocesan level takes place, *without any publication of the acts* (Art. 23).

The **Instructor** should present a **Report**, which is a *summary of the whole process* (Art. 23). The **Observations** of the **Defender of Bond** should present all *possible arguments against the dissolution of the marriage* (Art. 23). The *votum* of the **Bishop** should contain these essential elements (Art. 24): Are *all conditions* for the concession of the favour *fulfilled* (non-baptism of at least one of the parties; petitioner is not predominant cause of separation; third party is not the cause of separation; no possibility of reconciliation; no scandal due to new marriage)? Is there any doubt about validity of the marriage? Are there any difficulties in fulfilling the obligations from former marriage? What is the present “conjugal” condition of the other party? What are the *reasons to recommend the concession* of the favour? Have *Cautiones* by the intended parties (*as given by the CDF*) been signed? Is there any doubt about sincerity of conversion of any of the intended parties? Has the petitioner *attempted a new marriage or living in concubinage* with the intended spouse (i.e., the third party)?, along with his opinions of the case.

The *Bishop* should finally transmit three typewritten sets to the *Congregation for the Doctrine of Faith* all the Acts, along with the Report of the Instructor, Observations of the defender of the bond and the *votum* of the bishop (Art. 25 §1). If there has been a *translation of the acts* into one of the recognised language of Roman Curia, then a

sworn declaration of the translator should be included in the Acts (Art. 25 §2).

#### 2.4. Cases in which Dissolution *in favorem fidei* can be invoked<sup>48</sup>

The Table below presents all the possible cases in which dissolution *in favorem fidei* **can be invoked** and in the last few rows, it also shows when one **cannot invoke** the dissolution!

|   |                     |   |
|---|---------------------|---|
| <b>Spouses of the natural marriage seeking dissolution</b>                  |                     |   |
| <b>Petitioner</b>   | <b>Other Party</b>  |   |
| <i>Eventual conversion of one of the parties</i>                            |                     | <b>(New) Third Party</b><br>to marry or already married |
|   |                     |   |
| <b>Non-baptised</b>   | <b>Non-baptised</b> |   |
| <i>no conversion of any party</i>   |                     | Catholic  |
| <i>One of the Non-baptised becomes catechumen or Catholic</i> <sup>49</sup> |                     | Catholic  |

<sup>48</sup> Cf. Sabbarese - Frank, *Scioglimento in favorem fidei*, 87-88. Cf. Bolchi, *Lo scioglimento del matrimonio*, 305-307.

<sup>49</sup> It is clear that the *conversion took place after the separation and divorce*. Here the *timing of the conversion* is important, which implies the *cause of separation* that could not be the conversion of the petitioner, as requested by CIC c. 1143 §2 (CCEO c. 854 §2). Thus one becomes a catechumen or a baptised (catholic) only after the separation/divorce had *already* been taken place. According to the praxis of the Congregation for the Doctrine of Faith, such cases are dissolved *in favorem fidei*. Therefore, according to me, if the separation took place *only* due to the conversion or baptism of the petitioner then it would be a Pauline privilege case, as one can easily see in the biblical passage of Paul's words to Corinthians that is the basis of Pauline privilege (1Cor 7, 10-15). Kowal & Woestman apply Pauline privilege also in these cases: "On the other hand, if he baptized person prior to baptism unjustly caused the departure of the other person,

|  |  |              |
|--|--|--------------|
| <i>One of the Non-baptised becomes catechumen or Catholic*</i> |  | Non-Catholic |
|  |  |              |
| <b>Non-Catholic</b>  | <b>Non-baptised</b>                      |              |
| <i>NC does not convert</i>                                     |  | Catholic     |
| <i>NC becomes catechumen or Catholic</i>                       |  | Catholic     |
| <i>NC becomes catechumen or Catholic</i>                       |  | Non-Catholic |
| <i>NC becomes catechumen or Catholic</i>                       |  | Non-baptised |
|  | <i>NB does not convert</i>               | Catholic     |
|  | <i>NB becomes Non-Catholic</i>           | Catholic     |
|  | <i>NB becomes catechumen or Catholic</i> | Catholic     |
|  | <i>NB becomes catechumen or Catholic</i> | Non-Catholic |
|  | <i>NB becomes catechumen or Catholic</i> | Non-baptised |
|  |  |              |

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the Pauline privilege can be invoked, because all sins and their punishment are remitted by baptism". Kowal - Woestman, *Special Marriage Cases and Procedures*, 63. Sabbarese & Frank instead consider that if the non-baptised is only catechumen then *in favorem fidei* should be applied (in 12<sup>th</sup> case or 1). Cf. Sabbarese - Frank, *Scioglimento in favorem fidei*, 88. Later specify that if the non-baptised *catechumen* should receive baptism, then the Pauline privilege should be applied. Cf. *Ibid.* 134, footnotes 3, 6. (\*same to be applied in this case too)!

| <b>Catholic</b>  | <b>Non-baptised</b>                      |                     |
|--|--|---------------------|
| <i>Married with the dispensation of Disparity of Cult</i>  |  |                     |
| <i>Catholic</i>  |  | Catholic            |
| <i>Catholic</i>  |  | Non-Catholic        |
|  | <i>NB becomes Non-Catholic</i>           | Catholic            |
|  | <i>NB becomes catechumen or Catholic</i> | Catholic            |
|  | <i>NB becomes catechumen or Catholic</i> | Non-Catholic        |
| <b><i>C + NB with dispensation of Disparity of Cult</i></b>  |  |                     |
| <b>In following cases <u>cannot seek the dissolution</u> (Art. 7)</b><br>since new <b>marriage cannot be celebrated again</b> with Disparity of Cult |  |                     |
| <i>Catholic</i>  |  | <i>Non-baptised</i> |
|  | <i>NB does not convert</i>               | <i>Catholic</i>     |

## 2.5. Documents Needed<sup>50</sup>

After having seen the procedure that should be followed in cases of dissolution of a non-sacramental marriage *in favorem fidei*, the documents needed to complete the procedure are listed below:

- First of all, the Acts should contain the “*Summary page*”, using strictly the format given by the CDF.

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<sup>50</sup>For the Model Formats, cf. Kowal - Woestman, *Special Marriage Cases and Procedures*, 286-348.



- The *Petition of the spouse*, who desires to seek the dissolution of his/her non-sacramental marriage *in favorem fidei*, should be submitted (in which the following details should be found: addressed to the Holy Father; who married whom, when, where; which party was not baptised before and during marriage; pre-nuptial events, post-nuptial events, reasons for separation, responsibility towards children if any, third party and any involvement in separation; any attempted marriage; date and place; sign of the petitioner; addresses of the other party, of the witnesses and of the third party), *along with these Documents* (Baptism Certificate/Birth Certificate /Personal ID of the baptised party and of the third party and of children, if any; Marriage Certificate; Divorce Certificate, if any; Dispensation of the disparity of cult -along with pre-nuptial process/documents-, if any; certificate of death, if any; Full sentence of the canonical Nullity of marriage, if any; Declaration of the Nullity due to lack of form or ligament, if any).
- The *Decree of Constitution of "Commission" or Officers* (Instructor, Notary and Defender of Bond) signed by the Bishop (*not vicar general or episcopal vicar "except by special mandate"*) -on permanent basis or case by case- should be added to the Acts. The oath of the Officers might be added, especially if they are not part of the diocesan tribunal.
- The *Examination of the parties/spouses* should take place *under oath* (the examination should include the Personal Identification; what is his/her religion? What is parent's religion; was s/he baptised?, If not, why?; Anyone in the family is baptised? If so, why?; Where did s/he live during infancy, growth and marriage?; what is the other party's religion? What is the other party's parent's religion; was the other party baptised?, If not, why?; Anyone in the family of the other party is baptised? If so, why?; Where did the other party live during infancy, growth and marriage?; Pre-nuptial Relationship; his/her Intentions on Marriage; Celebration of the Marriage; Post-nuptial events; Separation/Divorce & Reasons; who is the cause of separation?; Possibility of Reconciliation; Responsibility towards Ex-Spouse & Children; third party and any involvement in separation; any attempted marriage or any cohabitation; wish to become

catholic?; Absence of scandal or surprise of the faithful, if the favour is granted) The *responses should be written and signed by Instructor, Notary and the Petitioner/Other Party*. The parties may be heard in another place or through an auditor, but depositions by letter or through telephone should be avoided. If *written responses* are given, they should be *signed in front of a Notary Public*.

- The Acts should contain the *Decree of declaration of absence of the other party (respondent)* from the process, if “*the cited respondent has neither appeared nor given a suitable excuse for being absent or has not responded according to the norm of can. 1507 §1” (CIC c. 1592 §1, Art. 15 §2)*.
- Also the *Examination of the witnesses* should take place *under oath* (the examination should include the Personal Identification; relationship with the parties; obligations of petitioner regarding former marriage; causes of breakdown; responsibility of the separation: petitioner or third party?; religious practice of petitioner and third party; *Questions as for the spouses*).
- The *Examination of the Third Party* (intended spouse) should also take place *under oath* (Personal Identification; relationship with the parties; obligations of petitioner regarding former marriage; causes of breakdown; responsibility of the separation: petitioner or third party?; religious practice of petitioner and the third party; *Questions as for the spouses*).
- The Acts should contain also the eventual requests for searches and replies from these churches or parishes after examination of their baptismal records on the possible baptism of the non-baptised petitioner or the other party.
- The *Cautiones*, signed by the petitioner and third party –if at least one is a non-catholic–, should be added to the Acts. One should follow strictly the format given by the CDF.
- The attestation of *religiosity and sincerity of conversion of the petitioner and the third party* should be obtained and should be added to the Acts.
- The Acts could contain *other documents* to sustain the physical and/or moral arguments and should contain a *Declaration of*

*the Conclusion of the Process and a Declaration of Authenticity of the Acts.*

- The Acts should be completed with the *Report of the Instructor*, the *Observations of the Defender of the Bond* and the *Votum of the Bishop*, along with the *Index of the Acts* (Table of Contents with page numbers).

### 3. Non-consummated Marriages

To understand the non-consummated marriages, it should first of all be clear which marriage and when it would be considered a *Ratum et consummatum marriage*. CIC c. 1061 §1 defines the *Ratum marriage* and the *Ratum et consummatum marriage*: “A valid marriage between the baptized is called *ratum tantum* if it has not been consummated; it is called *ratum et consummatum* if the spouses have performed between themselves in a human fashion a conjugal act which is suitable in itself for the procreation of offspring, to which marriage is ordered by its nature and by which the spouses become one flesh” (CIC c. 1061 §1).<sup>51</sup> Therefore, if the spouses (both baptised) have NOT performed between themselves in a human fashion a conjugal act (CIC c. 1061 §2), then they are considered *Ratum et non consummatum marriage*.

#### 3.1. Some Basic Concepts

Some juridical aspects regarding the consummation of marriage as established by CIC c. 1061 §1 are discussed below.

##### a) Conjugal act (*physical part*)

The conjugal act or intercourse takes place when there is, on the part of man, the *erectio, penetratio atque eiaculatio cuiuscumque generis seminis in vagina*<sup>52</sup> and on the part of the woman, the ability to receive the penetration in her vagina and to hold the seminal liquid.

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<sup>51</sup> CCEO does not define the *Ratum marriage* and the *Ratum et consummatum marriage* and so does not have a corresponding canon to can. 1061.

<sup>52</sup> Cf. Sacra Congregatio pro Doctrina Fidei, *Decretum Sacrae Congregatio circa impotentiam quae matrimonium dirimit*, 13 maii 1977, in AAS 69 (1977) 426. Cf. Amenta, *Administrative Procedures in Canonical Marriage Cases*, 126-130. Cf. Mario Francesco Pompedda, *La nozione di matrimonio “rato e consumato” secondo il can. 1061,1 del CIC e alcune questioni*

### **b) “In a human fashion” (moral part)**

This is based on the Vatican II Constitution *Gaudium et Spes* n. 49: “The (conjugal) actions within marriage by which the couple are united intimately and chastely are noble and worthy ones. *Expressed in a manner which is truly human*, these actions promote that *mutual self-giving by which spouses enrich each other with a joyful and a ready will*”. Thus *to be a human act*, it should spring from reciprocal love as a *conscious, willing and free union* between the spouses: “For a marriage to be consummated it is necessary that *there be a human act on the part of both spouses; it is sufficient for it to be virtually voluntary*, provided that *it was not extorted through violence*. No weight is given to other psychological elements which render the act easier or more loving”.<sup>53</sup> Hence, the conjugal act should be suitable for the procreation of offspring and to express the spouses’ loving interpersonal communion by becoming one flesh, “*una caro*”. Only thus, the *consummation of marriage would become the image of and help the spouses participate in the fullness of the connubial union of Christ with his Church*.<sup>54</sup>

### **c) Presumption of consummation**

Due to the dignity and the intimacy of the conjugal act, the Code of Canon Law provides a *presumptio iuris* of consummation on the basis of something easily and truly verifiable: the cohabitation (CIC c. 1061

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*processuali di prova in merito*, in *Monitor Ecclesiasticus* 110 (1985) 340-342, 345-348.

<sup>53</sup>Congregatio pro sacramentis, Litterae circulares *Congregatio pro sacramentis de processu super matrimonium rato et non consummato*, 20 decembris 1986, in *Enchiridion Vaticanum*, Vol.10, 756; *English Version*: Kowal - Woestman, *Special Marriage Cases and Procedures*, 200. “Actus humanus est actus qui ponitur ab homine modo sibi specificè proprio, scilicet cum rationis advertentia et voluntatis libertate. Unde si vel rationis advertentia vel voluntatis libertas seu immunitas a coactione intrinseca deest, actus non est specificè humanus etsi ab homine ponatur”. Urbano Navarrete, *De notione ed effectibus consummationis matrimonii*, in *Periodica* 59 (1970) 637.

<sup>54</sup>*Breve relazione sullo humano modo*, in *Congregazione per il Culto divino e la disciplina dei Sacramenti, XXXIX Corso di prassi canonico-amministrativa 2008-2009 (Subsidia pro auditoribus)*, Pars IIa, Roma 2008-2009. Cf. Amenta, *Administrative Procedures in Canonical Marriage Cases*, 130-141. Cf. Pompedda, *La nozione di matrimonio “rato e consumato”*, 342-343, 348-355, 360-364.

§2). Thus, if there has been cohabitation between the spouses, then the consummation of marriage should be presumed *ipso iure*.

#### **d) Indissolubility of consummated marriage**

Only a *ratum et non consummatum marriage can be dissolved*, that too only by the Roman Pontiff (CIC c. 1142; CCEO c. 862), since “a marriage that is *ratum et consummatum* can be dissolved by no human power and by no cause, except death” (CIC c. 1141; CCEO c. 853).

### **3.2. Historical Notes**

The juridical institute of the dissolution of the *Ratum et non consummatum* marriage has a long history.<sup>55</sup> One can find, as in cases of St. Tecla, St. Alessio, etc., that the Church in praxis held that the *non-consummated marriages be dissolved for solemn religious profession* with some special permissions.<sup>56</sup> Later, in the XII-XIII Centuries, popes Alexander III<sup>57</sup> and Innocent III<sup>58</sup> explicitly noted the power of the Roman Pontiff to dissolve such marriages. The Medieval theologians, however, differed in interpreting the foundation of this institute: while some held that such is part of the natural law or the divine positive law, others tended to consider it as an ecclesiastical law based on the ministerial power of Pope. Hugh of St. Victor<sup>59</sup> distinguished *two sacramental signs* in the marriage: the first one, being a *sacramentum maius* (which is the *consensus animorum*), can still be dissolved and the second one, being a *sacramentum magnum* (which is the *coniunctio corporum*) cannot be dissolved. St. Thomas

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<sup>55</sup>Cf. Kowal - Woestman, *Special Marriage Cases and Procedures*, 29-30. Cf. Dante Spiazzi, *La dispensa pontificia dal matrimonio rato e non consumato*, Verona 1971, 41-89. Cf. Amenta, *Administrative Procedures in Canonical Marriage Cases*, 117-122. Cf. Raymond Leo Burke, *Il processo di dispensa dal matrimonio rato e non consumato: La grazia pontificia e la sua natura*, in Aa.Vv., *I procedimenti speciali nel diritto canonico*, Città del Vaticano 1992, 135-144.

<sup>56</sup>Cf. Sabino Ardito, *Solubilità estrinseca del matrimonio rato e non consumato*, Dispensa-Corso Procedure Amministrative, FDC-UPS, Roma 2010, 14.

<sup>57</sup>Cf. *Denz-H* 755.

<sup>58</sup>Cf. *Denz-H* 786.

<sup>59</sup>Cf. Ardito, *Solubilità estrinseca del matrimonio rato e non consumato*, 15.

Aquinas in his *Summa*<sup>60</sup> held that the *non-consummated marriage can be dissolved* to enter the religious life, since the religious profession is a *sort of spiritual death*, in which the religious dies to the world to live for God.

For the first time, Pope Martin V,<sup>61</sup> in the XV Century, applied the dissolution of non-consummated marriages to reasons “other” than religious life. In the Church, till Council of Trent, the theologians opposed such an extension, but Canonists welcomed the extension of dissolution for other reasons too. At last, in the XVI Century the Council of Trent *defined the extrinsic dissolution of non-consummated marriage* in view of the successive religious solemn profession.<sup>62</sup>

From XVII Century,<sup>63</sup> even though there was *no doubt on validity of such papal acts*, there were still differences on its basis. In the Code of Canon Law of 1917 were included the legislation and the procedure to be followed in the case of dissolution of a non-consummated marriage (cf. CIC cc. 1015 §§1-2, 1118-1119, 1962-1963, 1966, 1973, 1975-1981, 1985). Later the Congregation for Sacraments,<sup>64</sup> through a Decree of 1923, presented the doctrine and the procedural law *super matrimonio rato et non consummato*.

The actual legislations on *Ratum et non consummatum* marriages are found in “Book VII. - Part III. Certain Special Processes” exactly in the “Title I. Marriage Processes - Chapter III. Process for the Dispensation of a Marriage *Ratum et non consummatum* (CIC cc. 1697-

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<sup>60</sup> Cf. *Suppl. Q.61, a.2.*, in Thomas Aquinas, *Summa Theologica*, Translated by The Fathers of the English Dominican Province, 1947, in <http://www.sacred-texts.com/chr/aquinas/summa/sum606.htm> (consulted 31 January 2013).

<sup>61</sup> Cf. Amenta, *Administrative Procedures in Canonical Marriage Cases*, 118.

<sup>62</sup> “Si quis dixerit, matrimonium ratum, non consummatum, per solemnem religionis professionem alterius coniugum non dirimi: anathema sit”. *Denz-H 1806*.

<sup>63</sup> Cf. Amenta, *Administrative Procedures in Canonical Marriage Cases*, 121-122.

<sup>64</sup> Congregatio pro Sacramentis, *Decretum Catholica doctrina et Regulae servandae in processibus super matrimonio rato et non consummato*, 7 maii 1923, in *AAS 15 (1923) 389-413*.

1706)",<sup>65</sup> with a few more canons that help in understanding the definition and competent authority: CIC cc. 1061 §§1-2 (*definition*), CIC cc. 1141-1142 (*authority*; CCEO c. 853, 862). Apart from these canonical indications, the special procedural norms are found in the Circular Letter of 1986 from the Congregation for the Sacraments.<sup>66</sup>

### 3.3. Some Juridical Aspects

Based on the actual legislations on the Dispensation from non-consummated marriage, some juridical aspects of the same are discussed below.

#### a) Competent Authorities

The competent authorities for various aspects or stages of the dissolution of a non-consummated marriage are as follows:

i) The *only* competent authority to grant dispensation from non-consummated marriages is the Roman Pontiff (CIC cc. 1142, 1698 §2; CCEO c. 862).

ii) The *competent authority to adjudicate* non-consummated marriages is the Apostolic See (CIC c. 1698 §1). Till recently the competent dicastery was the Congregation for the Sacraments (*Pastor Bonus* 67-68), but from 1<sup>st</sup> October 2011, the Special Office at the Tribunal of Roman Rota became the competent authority for such marriage cases.<sup>67</sup>

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<sup>65</sup> Such a procedure for Dispensation of the *Ratum et non consummatum* Marriage is not found in CCEO, as the Special Procedure for the same was already published by the Congregation for Sacraments in 1986.

<sup>66</sup> Congregatio pro Sacramentis, *Litterae Congregatio pro sacramentis, de processu super matrimonio rato et non consummato*, prot.n. 1400/86, 20 December 1986, in *Communicationes* 20 (1988) 78-84; in *Enchiridion Vaticanum* 10 (1986-87) 754-769; *English Version*: Kowal - Woestman, *Special Marriage Cases and Procedures*, 199-207.

<sup>67</sup> Cf. Benedict XVI, Apostolic Letter in the form of Motu proprio *Quaerit Semper*, on transferring to the new Office set up at the Tribunal of the Roman Rota the processes of the dispensation from ratified and non-consummated marriage and for the cases concerning the nullity of sacred ordination, 30<sup>th</sup> August 2011, in [http://www.vatican.va/holy\\_father/benedict\\_xvi/motu\\_proprio/docume](http://www.vatican.va/holy_father/benedict_xvi/motu_proprio/docume)

**iii)** The competent *authority to accept petition and to begin the procedure* is either the *diocesan Bishop of domicile or quasi-domicile* of petitioner (can. 1699) or the *diocesan Bishop of the place where majority of proofs are to be gathered* with consent of the his/her bishop and of the Roman Rota (cf. *Circular Letter*, n.1).

**b) Object of the Process for the dissolution of a non-consummated marriage**

The object of the process for the dissolution of a non-consummated marriage (can. 1698 §1) is first of all the *fact of the non-consummation* of the marriage in question, along with the finding of the *existence of a just cause* in favour of the papal dispensation.

**c) Three ways to determine the fact of the non-consummation**

The non-consummation of the marriage can be proved in three ways: «Triplex est via ad inconsummationem probandam, scilicet, per coarctata tempore, per argumentum physicum, per argumentum morale» (c. Lefebvre, 04.11.1967).

**i)** The first way to prove a non-consummation of the marriage is *per coarctata tempore* (c. Di Felice, 05.07.1972). It is *based on the presumption* of can. 1061 §2: “After a marriage has been celebrated, if the spouses have lived together consummation is presumed until the contrary is proven”. The non-consummation *per coarctata tempore* is proved only if the *lack of time, place and mode for consummating the marriage* is quite certain. If in the *case of the couple after marriage, who lived together*, but having neither the opportune time nor the occasion to perform the conjugal act, the *canonical presumption of consummation is applied*. Still the non-consummation can be proved only when *every possibility of consummation had been excluded*.

**ii)** The second way to prove a non-consummation of the marriage is through the *moral argument* (c. Di Felice, 08.04.1981). A moral certainty is *achieved on the basis of the confession of both the parties* or either one of them, *sustained by the arguments of credible witnesses*. Thus, the proof of non-consummation, which *depends on the truthfulness of the parties and of the witnesses*, is called the moral argument. Therefore, the *credibility and honesty of the parties and*



witnesses should be ascertained from the pastors or through other documents (cf. *Circular Letter*, n.8).

iii) The last way to prove a non-consummation of the marriage is through the *physical argument*. One should also remember that “if the instructor judges that *there is already complete proof of non-consummation through the moral argument, the physical examination may be omitted*” (*Circular Letter*, n.18). Therefore, “*only if it is necessary to obtain juridical proof of the fact of non-consummation, physical inspection of the parties is to be carried out*” (*Circular Letter*, n. 18). The *physical evidence* of non-consummation would consist in *ascertaining the hymenal integrity of the woman or the impossibility of consummation for impotentia coeundi*.<sup>68</sup> One or more experts can be consulted to ascertain the *physical evidence* (*Circular Letter*, n. 15). If there are discrepancies between the experts’ results, a super-expert could be used too (*Circular Letter*, n. 20).

#### d) The “just cause” to grant dispensation from non-consummated marriages

The “just cause” to grant dispensation from non-consummated marriages could be found among others in the following ones (cf. c. Stankiewicz, 21.12.1989; c. Teodori, 21.04.1942):

- Separation without hope of future reconciliation
- Doubtful or probable impotence of either spouse with the danger of incontinence
- Probable nullity of the marriage due to a lack of true consent in the marriage
- Estrangement and hatred between the spouses from the beginning of conjugal life
- Civil divorce already obtained by the parties
- Civil marriage already contracted by one or both spouses
- Probable fear of greater future scandals

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<sup>68</sup>The *impotentia coeundi* would also be a diriment impediment for a valid marriage, according to CIC c. 1084 §1 (CCEO c. 801 §1): “Antecedent and perpetual impotence to have intercourse, whether on the part of the man or the woman, whether absolute or relative, nullifies marriage by its very nature”.

- Discords and quarrels between the family members, esp. those related by blood
- Contagious disease already infecting one of the parties

#### e) **Difficult cases**

The difficult cases that are to be referred to the Apostolic See by the Bishop, before beginning the process at the diocese level are as follows (*Circular Letter*, n. 2):

- Contraceptive intercourse (use of Condom)
- Acknowledged penetration without ejaculation (Onanistic use of marriage)
- Child born by “conception through absorption of semen” (*without penetration*)
- Artificial insemination or other procedures of contemporary medical science
- Intercourse performed non voluntarily (*humano modo*)
- Danger of scandal or financial harm relating to the granting of favour

### 3.4. Procedure for *Ratum et non Consummatum* Marriage cases

The procedures at various stages of the diocesan level<sup>69</sup> to obtain the papal dispensation for a *Ratum et non Consummatum* Marriage case are discussed below.

#### a) **Introduction of the Process**

The process is to begin at the diocese level for any non-consummation case. The various steps to taken are as follows:

**i) The **Petition**** to obtain the dispensation for non-consummation marriage consists of a formal request by either both the spouses or one of them, *even if the other is unwilling* (CIC c. 1697). If any such petition is rejected, then a *recourse* against the rejection can be made to the Apostolic See (CIC c. 1699 §3).

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<sup>69</sup>Cf. Oscar Buttinelli, *Il procedimento di dispensa dal matrimonio rato e non consumato: La fase davanti al vescovo diocesano*, in Aa.Vv., *I procedimenti speciali nel diritto canonico*, Città del Vaticano 1992, 110-124.

ii) On receiving the petition, the **Competent Bishop** has some **duties** even before initiating the process. They can be summed up as follows:

- If the case is one of the *difficult cases* of the juridical or moral order, especially one of those indicated in the Circular Letter, then the bishop should refer the case *to the Apostolic See* and should follow the instructions of the Special Office of the Roman Rota (cf. CIC c. 1699 §2; *Circular Letter*, n. 2).
- if a prudent doubt exists on **possible nullity of marriage**,<sup>70</sup> the bishop should advise the parties and, having their preference, decide on the process to follow (cf. *Circular Letter*, n. 3).
- Normally on receiving the petition, the Bishop should *inform the other party* of the petition and *try a reconciliation* between the parties (*Circular Letter*, n. 4) before proceeding with the diocesan level process.
- The bishop then *appoints a Tribunal or Officers* to act on the petition and complete the process. Such an appointment could be done on permanent basis or could be done case by case (CIC c. 1700 §§1-2; *Circular Letter*, n. 5). The tribunal in question could be the *Diocesan Tribunal or any other Ecclesiastical Tribunal, especially if they serve as regional tribunals or could be the Tribunal which has received a petition of nullity of the same marriage*. In each case, the Instructor, Notary, Defender of Bond should be specified (cf. CIC c. 1701 §1). Even a *suitable priest* could be appointed to complete the process.

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<sup>70</sup>In a similar way, if *during a nullity case a probable doubt of non-consummation arises* (cf. *Circular Letter*, n.7), then the *Tribunal should communicate this to the parties* and suspends the nullity process, with the consent of the parties. After a formal petition of a party or parties, the Tribunal should complete the non-consummation process and transmit the acts to the Roman Rota, along with the petition, the observations of the Defender of Bond, the *votum* of Tribunal and of the Bishop, who could just sign the *votum* of the Tribunal.

- The bishop, if needed, could *appoint a legal expert*,<sup>71</sup> who should not be a legal representative (CIC c. 1701 §2) to help the parties especially with the technicalities of the process, like introducing the case, collecting proofs or proposing a recourse against the negative decision of the Special Office of the Roman Rota (cf. *Circular Letter*, n.6).

## **b) The Evolution of the Process**

The bishop or the instructor appointed by him should start the process of gathering valid and relevant information on the non-consummation of the marriage in question.

**i) Both the Moral Argument and the *Per coarctata tempore* proofs** are to be established in the following manner. First of all, the instructor should seek evidence of the *credibility and honesty of the parties and witnesses*, especially from Pastors or through documents (*Circular Letter*, n. 8). He should then *collect evidence* (*Circular Letter*, n. 9), which could be done through a *hearing by the Judge-Instructor* or by a cleric/lay person appointed by the Judge. The party or parties and their witnesses could well *make a declaration* before a Notary Public or through a “genuine and authentic” letter. One should *observe the canons on the collection of proofs* in the ordinary contentious trial and in cases of the nullity of marriage (cf. CIC c. 1702). The *interrogation of each spouse* (CIC c. 1702) forms a vital part of the process. During the *interrogation of the woman*, the *presence of a physician* appointed *ex officio* is a must (*Circular Letter*, n. 12). If one of the parties / spouses is unwilling to participate in the process or has not replied to the summons, then the *absence of the party* should be *declared and be noted in the Acts* (cf. *Circular Letter*, n. 10). In all the Interrogations, *the party or the witness* should take an *oath* to tell the truth and the *questions prepared* by Instructor or Defender of Bond should be used (*Circular Letter*, n. 11). During the interrogation of the witnesses, the instructor should *question also on the credibility of the parties* (*Circular Letter*, n. 13).

**ii) The Physical Argument** is to be established in the following manner: The Instructor-Judge should *consult one or more experts to ascertain the physical evidence* (*Circular Letter*, n. 15). The *Experts* should

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<sup>71</sup>Cf. Settimio Carmignani Caridi, *I diritti della difesa nel processo “super matrimonio rato et non consummato”*, in Aa.Vv., *I procedimenti speciali nel diritto canonico*, Città del Vaticano 1992, 145-156.

*be appointed by the instructor and, on appointment, must take oath (Circular Letter, n. 16; CIC c. 1454, 1577 §2; CCEO cc. 1112, 1258 §2). The Instructor may request a more extensive explanation from the experts (Circular Letter, n. 17). If it is expedient, reports of private examinations (i.e., not ex officio) may be included in the acts by the Instructor (Circular Letter, n. 19). If experts disagree, the Instructor can seek opinion of an additional expert or even a qualified expert "peritissimus" (Circular Letter, n. 20).*

### c) Conclusion of the process

The formal conclusion of the process takes place, *without any publication of the Acts* (can. 1703 §§1-2). The Instructor-Judge, however, might inform the interested party on the *proofs that hinder the request* and can *show a document or a testimony*, if requested by a party.

The **Instructor** should present a **Report**, which is a *summary of the whole process* (can. 1704 §1; Circular Letter, n. 21). The **Observations of the Defender of Bond**<sup>72</sup> should present all *possible arguments against granting of dispensation* (Circular Letter, n. 22). The **Votum of the Bishop**<sup>73</sup> (Circular Letter, n. 23a), which could well be the *Votum of a delegate made his own* by the bishop (Circular Letter, n. 23b), should contain these essential elements (CIC c. 1704 §1; Circular Letter, n. 23c): the fact of non-consummation; the just cause for the dispensation; the suitability of the favour; the absence of scandal or surprise of the faithful or of any harm; and the consequences to the good of souls and on restoration of peace of conscience. The *Bishop should finally transmit to the Apostolic See, i.e. to the Special Office at the Tribunal of Roman Rota, all the acts, along with the Report of the Instructor, observations of the defender of the bond and the votum of the bishop* (CIC c. 1705 §1).

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<sup>72</sup>If the case began as a nullity case in a Tribunal and was later converted to non-consummation case, then the Observations should be of *that particular Tribunal* (CIC c. 1704 §2).

<sup>73</sup>The Bishop in question should be the Bishop of Petitioner. However, *if from a nullity case it had become a non-consummation case*, then the authority is the bishop of the Tribunal, who should ask the bishop of petitioner on the suitability of granting the dispensation before giving his *votum*.

#### **d) Positive or Negative Response or Deferred Decision by Roman Rota**

After the process within the Special Office of the Roman Rota,<sup>74</sup> there could be diverse decisions on the non-consummation case submitted. If the “*Ratum et non consummatum is proved*” (CIC c. 1706), then the Apostolic See (Roman Rota) transmits the papal rescript of the dispensation to the bishop concerned. The Bishop then notifies the parties and the pastor of the parish of baptism and of marriage. Sometimes the decision could be a *Compleantur acta*, i.e, additional proofs or documents are needed (CIC c. 1705 §2; *Circular Letter*, n. 26). In such a case, the bishop would be informed of documents and/or proofs that are to be obtained and submitted to the Roman Rota for further examination. The Roman Rota could also decide that the “*Ratum et non consummatum marriage is not proved*” (CIC c. 1705 §3; *Circular Letter*, n. 27). In these cases, the parties with the help of legal expert could seek other elements to re-submit the petition and thus restart the process.

#### **e) Removal of clause attached in the Rescript of Dispensation**

When a papal dispensation is granted, it is usually accompanied by some clause reserved to the Bishop or the Roman Rota in view of the new marriage. If such a clause is *reserved to Roman Rota* (*Circular Letter*, n. 24), the Bishop should refer it to Roman Rota and follows its instructions. If, instead, it was *reserved to the Bishop* (*Circular Letter*, n. 25), then the Bishop should follow the instructions found in the Rescript of Dispensation and should not allow a new marriage without assurance from the interested party on the fulfilment of the marital duties.

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<sup>74</sup>The process that takes place at the Congregation once the file arrives at the Roman Curia, very similar to that which takes place at the Special office at Roman Rota (which now receives these cases), is described well in the following article. Cf. Raffaele Melli, *Il processo di dispensa dal matrimonio rato e non consumato: La fase davanti alla congregazione*, in Aa.Vv., *I procedimenti speciali nel diritto canonico*, Libreria Editrice Vaticana, Città del Vaticano 1992, 125-134.

### 3.5. Documents Needed<sup>75</sup>

After having seen the Procedure that should be followed in cases of dispensation from a non-consummated marriage, the documents needed to complete the procedure are listed below:

- First of all, a *Petition of the spouses or at least of one of them* should be submitted (in which the following details should be found: addressed to the Holy Father; who married whom, when, where: parish & diocese; pre-nuptial events, post-nuptial events, reasons for non-consummation, reasons in favour of dispensation –just cause–; date and place; sign of the petitioner/s; addresses of the spouses and of the witnesses with indication of their parishes), *along with these Documents* (Baptism Certificate or Birth Certificate or Personal ID of the spouses and of the children, if any; Marriage Certificate; Divorce Certificate, if any).
- The *Decree of Constitution of “Tribunal” or Officers* (Instructor, Notary and Defender of Bond) signed by the Bishop should be added to the Acts. The oath of the Officers might be added, especially if they are not part of the diocesan tribunal.
- The *Examination of the parties/spouses* should take place *under oath* (the examination should include the personal identification; Pre-nuptial relationship; his/her intentions on marriage; Celebration of the marriage; Post-nuptial events, especially the “first night”; Consummation of marriage –*if there was at least an attempt to consummate*–; if not, reasons for non-consummation; if separation and divorce have taken place, the reasons for the same –*just cause for and suitability of the dispensation*–; Possibility of reconciliation; Responsibility towards ex-spouse and children; Absence of scandal or surprise of the faithful, if the favour is granted; credibility of the other party and of the witnesses). The *responses should be written and signed* by the interrogated party, along with the instructor and notary.
- The acts should contain the *Decree of declaration of absence of the other party (respondent)* from the process, if “the cited

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<sup>75</sup>For the Model Formats, cf. Kowal - Woestman, *Special Marriage Cases and Procedures*, 245-273.

*respondent has neither appeared nor given a suitable excuse for being absent or has not responded according to the norm of can. 1507 §1" (CIC c. 1592 §1; CCEO c. 1272 §1).*

- Also the *Examination of the witnesses* should take place *under oath* (the examination should include the Personal Identification; What relationship with the parties; *Questions as indicated for the spouses*; knowledge of non-consummation *in tempore non suspecto*; Credibility of parties).
- The Acts should also contain the eventual *appointment of the Expert/s, his/her Oath, the results of the examination* (which is a detailed *medical certificate* on the genital organs, on virginity, on capacity or incapacity of consummation of marriage)
- The attestation of *credibility of the Spouses and the Witnesses* from their *parish priests* or other priests or religious should be obtained and should be added to the Acts.
- The Acts could contain *other documents* to sustain the physical and/or moral arguments and should contain a *Declaration of the conclusion* of the process and a *Declaration of authenticity* of the Acts.
- The Acts should be completed with the *Report of the Instructor, the Observations of the Defender of the Bond* and the *Votum* of the Bishop, along with the *Index of the Acts* (Table of Contents *with page numbers*).