

## THE JURIDICAL COMPETENCE OF THE CATHOLIC CHURCH IN ANNULING THE MARRIAGE OF THE UNBAPTIZED

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The Catholic Church accepts the validity of the marriage of the non-Catholics provided they are married according to the norms or customs of their own or of the place that do not go against the divine or natural law. The law applicable in marriage nullity procedure involving two unbaptized persons are given *Dignitas Connubii* which can be considered as a complimentary source of interpretation of the Oriental Canons. The marriage nullity cases of the unbaptized are considered only when there is a necessity to prove their free state before the Church.

### **Introduction**

Any human person enjoys an innate right to choose one's state of life (ref. CCEO c. 22; CIC c. 219). Marriage, as a state of life, is a fundamental natural right of every human being. This was an acceptable tradition in most cultures and civilizations long before the establishment of the Church. Universal Declaration of Human Rights says men and women have reached the marriageable age, without any

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limitations due to race, nationality or religion, have the right to marry and found a family.<sup>1</sup>

It is the certain belief of the Catholic Church that a valid marriage, as an institution, is “founded by the Creator.”<sup>2</sup> Although marriage gets socially established by the human act of the spouses through their reciprocal consent, it arises from the divine will. The vow of fidelity makes a marriage contract transcend from all other ordinary contracts and therefore it is known as a covenant. The notion of covenant is an ancient Roman civil term, by its application to marriage, Church shows that a secular reality in marriage has become a saving mystery for the baptized persons.<sup>3</sup> Thus marriage is a natural reality and when two validly baptized persons marry, is also a sacrament.<sup>4</sup> In a valid marriage, whether sacramental or non-sacramental, a man and a woman join together for the present and indissolubly for the rest of their lives, to live together, to help one another and to procreate.<sup>5</sup> What is required here is to articulate some of the essentials of the nature and dignity of the most fundamental and primary characteristics of a valid matrimonial union.

### 1. Marriage as Natural Bond

There is no difference between sacramental marriages and non-sacramental marriages concerning their basic nature. CCEO c. 776 §1 makes the criterion to measure all marriages. In this portion, we analyze natural marriage in the light of the definition of marriage.

By the marriage covenant, founded by the Creator and ordered by his laws, a man and a woman by irrevocable personal consent establish between themselves a partnership of the whole of life; this covenant is by its very nature ordered to the good of the spouses and the procreation and education of children.<sup>6</sup>

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<sup>1</sup> United Nations Organization, *Universal Declaration of Human Rights*, art. 16, 10 December, 1948, see, <http://www.claiminghumanrights.org/udhrarticle16.html>, accessed 2 December 2019.

<sup>2</sup> CCEO c. 776; CCC, 1602 and 1603.

<sup>3</sup> William E. Pinto, *Law of Marriage and Matrimonial Reliefs for Christians in India* (Bangalore: Theological Publications in India, 2000) 5.

<sup>4</sup> CCEO c. 776 §2.

<sup>5</sup> Jorge Mendina Esteves, *Male and Female He Created Them* (San Francisco: Ignatius Press, 2003) 134.

<sup>6</sup> CCEO c. 776 §1.

This explanation of marriage in CCEO gives a criterion according to which all marriages are to be measured, whether parties are baptized or not. It does not make any distinction between sacramental marriage and the natural law marriage. In short, natural bond marriage, marriages of the unbaptized also share the basic concepts of the Christian marriage.

### 1.1. God as the Founder of all Marriages

The position of the Church regarding the natural institution of marriage is that it has its origin in God. In Genesis, we read the creation of man and we find marriage is not a mere product of social evolution but is founded by God the Creator to realize in humanity his plan of love.<sup>7</sup> Leo XIII taught:

Marriage has God for its Author, and was from the very beginning a kind of foreshadowing of the Incarnation of His Son; and therefore, there abides in it a something holy and religious; not extraneous, but innate; not derived from men, but implanted by nature.<sup>8</sup>

Men and women who are not Christians are joined together through the natural covenant of a lawful marriage. This covenant is provided with good and authentic values that assure its soundness. But it is necessary to keep in mind that, values come from God the Creator and are inscribed in a rudimentary form within the spousal love.<sup>9</sup> *Casti connubii* says:

Even by the light of reason alone and particularly if the ancient records of history are investigated if the unwavering popular conscience is interrogated and the manners and institutions of all races examined, it is sufficiently obvious that a certain sacredness and religious character is attaching even to the purely natural union of man and woman, "not something added by chance but innate, not imposed by men but involved like things," since it has "God for its author and has been even from the beginning a foreshadowing of the Incarnation of the Word of God." This sacredness of marriage which is intimately connected with religion and all that is holy arises from the divine origin...<sup>10</sup>

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<sup>7</sup> Prader, "Marriage," G. Nedungatt, ed., *A Guide to the Eastern Code*, Kanonika 10, Roma, Pontificio Istituto Orientale, 2002, 541.

<sup>8</sup> Leo XIII, *Arcanum Divinae*, 1880, 19.

<sup>9</sup> Esteves, *Male and Female He Created Them*, 110.

<sup>10</sup> CC, 80.

The Study of cultural anthropology reveals the historical fact that practically all people have attached an inherent sacred and religious character to marriage which they have expressed by special and symbolic rites of a public and solemn kind. These rites became part of their traditions, customs and laws, which recognized that marriage is not a humanly devised institution but of divine origin.

### 1.2. Marriage is Governed by Divine Natural Law

The position of the Church regarding the natural institution of marriage is that it has its origin in God and from the beginning, it was governed by divine natural law.<sup>11</sup> Natural law in the strict sense is not a "Law of the Letter," but an unformulated law resting directly in nature and therefore not submitted to the imperfections of human language.<sup>12</sup> By his reason, man can read this law written in his heart unless he is not blind by passion or sin, in that sense reason itself is called natural law.<sup>13</sup>

### 1.3. The Binding Nature of Natural Law

The early Church rarely used the term natural Law. It was only in the middle of the last century that references to the natural law became frequent.<sup>14</sup> Augustine Emphasized especially God's eternal law as the source of the natural law in humans. For him eternal law means the divine reason or will of God, commanding that the natural order be preserved.<sup>15</sup> It is that aspect of eternal law which directs the actions of humans.<sup>16</sup> Leo XIII, in the Encyclical *Casti connubii* referred repeatedly to the institution of marriage, its values and moral orientations as having their foundations in the natural law.<sup>17</sup>

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<sup>11</sup> CCEO c. 776.

<sup>12</sup> C. Henry Peschke, *Christian Ethics* vol. I, *General Moral Theology in the Light of Vatican II* (Bangalore: Theological Publications in India, 1979) 111.

<sup>13</sup> Josef Fuchs, *Natural Law: A Theological Investigation*, tran. Helmut Reckter and John A. Dowling (Dublin: Gill and Son, 1965) 7.

<sup>14</sup> Fuchs, *Natural Law: A Theological Investigation*, 4.

<sup>15</sup> Brian Tirney, "Natural Law and Natural Rights" in *Christianity and Law*, eds., John Witte and Frank S. Alexander (Cambridge: University Press, 2008) 91.

<sup>16</sup> Thomas Aquinas, "Treatise on Law Summa Theologica Questions 90-97," *Summa Theologia: Treatises on Law Q. 91*, <https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbpdjvu.txt>, accessed 15 January 2020

<sup>17</sup> Fuchs, *Natural Law: A Theological Investigation*. 5.

The natural moral law binds every human at all times and in all places, for its basis is the very nature of human beings. The content of the natural law is not given in a fully developed form to the human from the beginning, but must be evolved as he progresses in other knowledge. No law is binding as long as it is not known. But whoever has the use of reason cannot remain ignorant of the natural law, at least not of its basic principles.<sup>18</sup> Thus natural law has got a universal nature and cannot be hooped by any reasonable person.

#### 1.4. Marriage is a Natural Institution

The institution of marriage is primarily a natural entity. The conjugal bond is not a legal phenomenon but a natural reality.<sup>19</sup> It is the oldest institution of mankind. It came before governments and laws and long before other social structures. Marriage is such, a natural law contractual agreement between a man and a woman to have sex lawfully to bear children, since without procreation and rearing up of children human race would become extinct. All men realize that there must be some fixed, definite arrangements that will enable man and woman not only to procreate but also to protect the offspring until they are capable of looking after themselves. It is self-evident that the marriage defers from the mating of animals to the extent that will and reason are distinguishable from instinct. Marriage upholds the dignity of the human being.<sup>20</sup>

#### 1.5. Monogamous and Heterosexual Union

The canon says marriage is established between a man and a woman by irrevocable personal consent.<sup>21</sup> The essence of marriage as an exchange of mutual and personal gifts between a man and a woman, who are sexually different beings, shows in itself that the marriage should be a monogamous and heterosexual union. Marriage is also a psychological assurance for satisfying the need of man and woman for

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<sup>18</sup> Peschke, *Christian Ethics vol. I General Moral Theology in the Light of Vatican II*, 107.

<sup>19</sup> Mario Grech, "The Harmonization of the Religious and Civil Dimensions of Canonical Marriages in Malta," *Forum: A Review of Canon Law and Jurisprudence*, vol. 11, no. 1 (2000) 27.

<sup>20</sup> Pius XII, *Address to the Society of Italian Catholic Union of Midwives*, 29 October 1951, Brendan F. Brown, "The Natural Law, the Marriage Bond, and Divorce" *Fordham Law Review*, vol. 24, Issue 1 (1955) 84-85, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1453&context=flr.>, accessed 27 December 2019.

<sup>21</sup> CCEO c. 776 §1.

lifelong support and the monogamous heterosexual association is the only capable institution in meeting this goal. Pope John Paul II in *FC* states:

The conjugal communion sinks its roots in the natural complementarity that exists between man and woman, and is nurtured through the personal willingness of the spouses to share their entire life-project, what they have and what they are: for this reason such communion is the fruit and the sign of a profoundly human need. ... Such a communion is radically contradicted by polygamy: this, in fact, directly negates the plan of God which was revealed from the beginning, because it is contrary to the equal personal dignity of men and women who in matrimony give themselves with a love that is total and therefore unique and exclusive.<sup>22</sup>

The mutual and irrevocable self-giving creates a psychological relationship between spouses which by its internal structure is different from a transitory relationship.<sup>23</sup>

### 1.6. Established through Personal Consent

Another important element in the definition of marriage given in CCEO is “the irrevocable personal consent established between themselves.”<sup>24</sup> The word consent is derived from the word “consensus” which means conformity of the will of at least two persons on the same object. The word can also be traced to the Latin word *consentire*, which stems from the words *con* - together and *sentire* to feel. Thus *consentire* means feeling together.<sup>25</sup>

Mutual exchange of consent in the marriage is a juridic act. A juridic act is a human act of the will externally be manifested by a legally qualified person, to have the juridic effect or juridic consequences.<sup>26</sup> Since marriage is a specific way of life that demands a total gift of self-giving, the mutual exchange of consent must be a free act of the will on

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<sup>22</sup> *FC*, 19.

<sup>23</sup> Varghese Palathingal, *Consortium Totius Vitae: Essence and Form of Marital Relationship in the Malabar Church* (Alwaye: Saint Thomas Academy for Research, 1992) 62.

<sup>24</sup> CCEO c. 776 §1.

<sup>25</sup> Ernest Obodo, “The Importance of Consent and the Consequences of the Exclusion of Fidelity in Marriage,” [https://www.uibk.ac.at/th/eol/leseraum/pdf/obodo\\_final.pdf](https://www.uibk.ac.at/th/eol/leseraum/pdf/obodo_final.pdf), accessed on 20 January 2020.

<sup>26</sup> CCEO c. 931.

the part of each party.<sup>27</sup> This unique friendship between a man and a woman acquires an all-encompassing character only within the conjugal union. The mutual gift between the spouses must be sincere, total in the aspects regarding the conjugal union.<sup>28</sup> Consent given in the marriage is the right of the other party to have sexual intimacy with the partner. It is precisely the conjugal act in *humano modo*, which expresses and perfects their mutual love and is ordered to the procreation of children.

### 1.7. Marriage Covenant as a Partnership of the Whole Life

The irrevocable personal consent as a partnership of the whole life<sup>29</sup> may seem an impossible situation for many, but that is exactly what marriage is all about according to the Catholic teachings. It is like gluing two objects together. After setting the glue for some time and trying to separate them; both objects will be destroyed in trying to separate them.

### 1.8. The Essential Ends of the Marriage

The ends of marriage commonly speaking, in every society are to have a lawful sexual relationship to keep the morality of the society intact and to have offspring to keep the remembrance of their forefathers on earth after their death. To say that "marriage is by its nature, ordered to the good of the spouses and the procreation and education of offspring" means as a natural institution, marriage has certain ends that are embodied like the institution itself. It applies to all marriages whether baptized or unbaptized.

### 1.9. The Essential Properties of Marriage

Marriage is the only place where one plus one equals one. The commitments of marriage are the promises made in the marriage. Two of the commitments that have been seen to be at the core of every marriage are sexual exclusivity and permanence. The terms used in common language, sexual exclusivity and permanence are the same as the canonical terms unity and indissolubility.<sup>30</sup> Therefore, any genuine

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<sup>27</sup> Thomas P. Doyle, "Marriage" in *The Code of Canon Law: A Text and Commentary*, eds., James A. Coriden, Thomas J. Green and Donald E. Heintschel (London: Geoffrey Cappman, 1985) 742.

<sup>28</sup> Pablo Gefaell, "Marriage," in *A Practical Commentary to the Code of Canons of the Eastern Churches*, eds., John D. Faris and Jobe Abbass (Canada: Wilson and Lafleur, 2019) 1396.

<sup>29</sup> CCEO c. 776 §1.

<sup>30</sup> CCEO c. 776 §3.

marriage is constituted of these properties which characterize the essential nature, without which marriage cannot exist. But some of the societies have made polygamous marriages legitimate and we know it is not in the Divine plan as we consider the creation of humans as the prototype of all marriages.

The indissolubility of marriage is demanded not only by Christianity but by human nature itself. Only indissolubility guarantees the true equality and dignity of the man and the woman. It obliges one to take the marital commitment seriously; it paves a foundation for the stability of marriage; it demands the radical commitment to give oneself to the other spouse; it curbs the inconstancy and creates a favourable climate for bringing up the children. Indissolubility sustains the nobility of conjugal love against the temptation to use the other.<sup>31</sup> Regarding divorce, Christ's statement, "it was not so from the beginning," about the permission given by Moses to the Israelites,<sup>32</sup> shows that the marriages between Jews which were not sacramental also was characterized by indissolubility. Thus, unity and indissolubility are not properties of sacramental marriage alone but all marriages.

## **2. Nullity of the Marriage of the Unbaptized**

A valid marriage does not depend on human will alone but on the divine constitution. For, "the vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator."<sup>33</sup> Any valid marriage is predetermined by not only the divine law but also the natural law. By the very fact that a valid marriage is founded on both divine and natural law, it binds universally all humans irrespective of their "different cultures, social structures, and spiritual attitudes."<sup>34</sup> Any valid marriage, which is an icon of God's unconditional faithfulness to his creation, gets the firmness of indissolubility both intrinsically and extrinsically. Thus, we are to be aware of the legitimacy of non-sacramental marriages celebrated between unbaptized persons and the competence of the tribunal of the Church to annul the marriage of the unbaptized.

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<sup>31</sup> Esteves, *Male and Female He Created Them*, 138.

<sup>32</sup> Riga, "Marriage and Indissolubility: A Historical Note," 48-49.

<sup>33</sup> CCC, 1603.

<sup>34</sup> CCC, 1603.



## 2.1. Juridical Status of the Unbaptized

A valid baptism is received by washing with the natural water and with the invocation of the Holy Trinity.<sup>35</sup> Baptism is the fundamental ontological and juridical event separating Christians from non-Christians. An unbaptized is thus one who has not yet received the valid sacrament of baptism. Unbaptized thus include a wide category of people professing non-Christian religions, members of those ecclesial communities whose baptism is not valid according to the Catholic teaching and the people who do not profess any religion at all.<sup>36</sup>

Marriage is a natural right of every human being, which surpasses all dividing principles of society like religion, state, colour, race etc. In the contemporary global village, marriages between Catholics and unbaptized are growing in numbers. Canon law prohibits marriages of Catholics with unbaptized under the invalidating impediment of disparity of cult. The disparity of cult is different from a mixed marriage. A marriage between a Catholic and a baptized person who is not in full communion with Catholic Church is known as a mixed marriage.<sup>37</sup> A marriage between a Catholic and a non-baptized person is known as a disparity of cult marriage.<sup>38</sup> Only with the dispensation received from the competent ecclesiastical authority disparity of cult marriages can be celebrated validly. In marriages with disparity of cult the Catholic spouse has a particular task as exhorted by St Paul: "for the unbelieving husband is made holy through his wife and the unbelieving wife is made holy through her husband."<sup>39</sup>

In addition to the dispensation, the canon requires the pre-matrimonial investigation to ensure a valid and licit celebration of marriage. For this, the parties should prove the free state before the Church.<sup>40</sup> If one of the parties has a previous marriage bond and the other spouse is still alive, a marriage cannot be validly celebrated until the first marriage is dissolved or declared null.

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<sup>35</sup> CCEO c. 675.

<sup>36</sup> Sajan George Thengumpally, "Marriages of Unbaptized Person: Misapprehensions and the Right Approach of the Church," *Eastern Legal Thought*, vol. 9 & 10 (2010-2011) 47.

<sup>37</sup> CCEO c. 813; CIC c. 1124.

<sup>38</sup> CCEO c. 803 §1; CIC c. 1086.

<sup>39</sup> 1Cor 7:14.

<sup>40</sup> CCEO c. 784.

A further motivating reason behind this search for marriage nullity cases of the unbaptized is the numerous petitions coming before the ecclesiastical tribunals. Now there remains a lack of clarity: some of the ecclesiastical tribunals do the nullity process and some proceed without and the parties after getting the permission from the local hierarch basing the civil divorce decree conduct the second marriage in the Church. The problem is that Church never recognized the competence of any tribunal to grant a divorce for any valid marriage. Therefore, in my opinion, a civil divorce decree is not sufficient to prove the free state of an unbaptized who wishes to marry a Catholic.

## **2.2. Juridical Status of the Marriage of the Unbaptized**

The present Codes of Canon Law do not give any direct definition or description of a non-Christian marriage. The only reference to such marriages can be found in CCEO cc. 854-860 and CIC cc. 1142-1149 which speak of the dissolution of marriage in virtue of favour of faith. The juridical statuses of the marriages of the unbaptized remain outside the direct scope of canonical marriage law. However, the Church regards those marriages as valid marriages of natural bond in as much as they respect Divine Law and their proper civil, religious or customary law.<sup>41</sup> A natural bond is an expression used to indicate a non-sacramental marriage by which a man and a woman become spouses before society and acquire rights and obligations proper to joint life.

## **2.3. Potential Sacramental Marriage of the Unbaptized**

According to Pauline theology, every marriage including those of non-Christians, is a "great mystery,"<sup>42</sup> because it is the sign of the indissoluble union of covenantal love between God and his people, between Christ and Church, but in the marriage of Christians, this natural sign is fully made explicit and becomes a sacrament. If the unbaptized parties later receive baptism, it becomes a sacramental marriage, and if subsequently it is consummated, no human power can dissolve it for any reason.<sup>43</sup>

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<sup>41</sup> Thengumpally, "Marriages of Unbaptized Person: Misapprehensions and the Right Approach of the Church," 48.

<sup>42</sup> Eph 5: 32.

<sup>43</sup> CCEO c. 853; CIC c. 1141.

### 3. Difference between Non-Christian Marriage and the Sacramental Marriage

Two expressions are generally used in canonical language to denote marriages celebrated between unbaptized persons: natural bond and legitimate marriage.<sup>44</sup> The term "legitimate" means a juridical act<sup>45</sup> accomplished according to norms of law. Concerning validity, legitimacy, ends, and properties of marriage, there is no substantial difference between sacramental marriages and non-sacramental marriages.<sup>46</sup>

CCEO c. 776 §§1 and 3 make the distinction between natural marriage and sacramental marriage. The sacrament elevates the marriage so that it becomes a sign of grace, but the sacrament rests on the natural institution of marriage. For those who are married in the Church, this becomes one more reason, in addition to the natural indissolubility. If the Scripture took marriage as the model of the love God has for His people or Christ has for the Church, is because the human love was already indissoluble.<sup>47</sup> The only difference between a sacramental marriage and the non-sacramental marriage is the sacramental grace and firmness the couple receives in the sacramental marriage. Therefore, a valid marriage bond has arisen in a natural bond marriage and it reaches its firmness in sacramental marriage. Thus, natural marriages have indissolubility but the absolute indissolubility can be attributed only to sacramental marriages. The sacramental bond of marriage, once the marriage has been consummated, cannot be dissolved by any human power or by any cause other than death.<sup>48</sup>

The question is whether indissolubility belongs to marriage by nature or by sacrament? Canon Law is very clear that the essential properties of marriage are unity and indissolubility. Canon says that the sacrament gives a special firmness to indissolubility.

It is the natural dimension of the union and, more concretely, the nature of man created by God himself that provides the indispensable key for interpreting the essential properties of marriage. The further reinforcement of that the properties obtain in

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<sup>44</sup> Thengumpally, "Marriages of Unbaptized Person: Misapprehensions and the Right Approach of the Church," 59.

<sup>45</sup> We have discussed about the juridic act in the second chapter.

<sup>46</sup> Thengumpally, "Marriages of Unbaptized Person: Misapprehensions and the Right Approach of the Church," 60.

<sup>47</sup> Esteves, *Male and Female He Created Them*, 141.

<sup>48</sup> CCEO c. 853; CIC c. 1141.

Christian marriage under the sacrament is based on a foundation of natural law that, if removed, would make incomprehensible the very work of salvation and elevation of the conjugal reality that Christ effected once and for all.<sup>49</sup>

That is to say, both natural and sacramental marriages are essentially indissoluble through the sacramental marriage differs in degree. In a certain sense, there is no natural marriage; marriage is always a divine institution. But the non-sacramental marriages entered by non-baptized persons can be dissolved by the Roman pontiff with his special vicarious power. These provisions are known as privileges, used by the Roman Pontiff as the vicar of God and Christ and as the successor of Peter, the first head of the Catholic Church and as the custodian of the natural law. Absolute indissolubility remains with the *ratum et consumatum* marriages.

#### 4. The Competence of the Unbaptized to Act in a Trial

Anyone, either baptized or non-baptized, can bring an action. However, a party who is legitimately summoned must respond.<sup>50</sup>

The canon says that the ecclesiastical tribunal is not limited to the baptized alone. A party in canon law is a physical person or a juridic person, one recognized in the law. The fact that the tribunal is ecclesiastical does not mean that the one introducing the case be Catholic. In marriage cases, if in the case of mixed marriage or the petitioner hoped to have a marriage with a Catholic party only their marriage annulment cases come to the ecclesiastical tribunal from the non-Catholics. However, they could be called as a respondent since the Catholic party needed to exercise their right in the tribunal. This context is changed by the promulgation of this canon.<sup>51</sup> In the decree of ecumenism, *Unitatis redintegratio*,<sup>52</sup> (21 November 1964), described baptized non-Catholics as separated brethren and in 1973, it was

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<sup>49</sup> John Paul II, "Allocution to the Roman Rota, One Cannot Give in to the Divorce Mentality" 28 January 2002, AAS 94 (2002) 340-346, in *Papal Allocutions to the Roman Rota, 1939- 2002*, ed. W.H. Woestman, 268.

<sup>50</sup> CCEO c. 1134; CIC c. 1476.

<sup>51</sup> William L. Daniel, "The Petitioner and the Respondent," in *A Practical Commentary to the Code of Canons of the Eastern Churches*, eds., John D. Faris and Jobe Abbass (Canada: Wilson and Lafleur, 2019) 2116.

<sup>52</sup> Vatican Council II, Decree on Ecumenism, *Unitatis Redintegratio*, 21 November 1964, AAS 57 (1965) 90-107.

authoritatively established that non-Catholics had the right to accuse their marriage of nullity before the ecclesiastical tribunal.<sup>53</sup>

Canon 1360 gives the competent persons to approach the tribunal challenging the marriage celebrated. According to the plain wording of the canon, the husband and wife have the absolute right to challenge the marriage. The promoter of justice also has the right to challenge a marriage, even without the consent of one or both parties; however, his right is not absolute, but conditional. The conditions are: first, the nullity of marriage should be made public and second, the convalidation of marriage is either not possible or not expedient.

### **5. The Competence of the Ecclesiastical Tribunal to Declare the Annulment of the Marriages of the Unbaptized.**

Even though the common law does not make any provision for adjudicating the marriage nullity case of the unbaptized, *Dignitas Connubii* gives special reference to cases involving unbaptized. The explicit reference about the unbaptized can be seen in 3 articles of DC: Arts. 3 §2; 4 §2 and 92, 1°. All these articles commonly speak of the non-Catholics which are also applied to both baptized and unbaptized; however, Art. 4 §2 deals exclusively with the unbaptized.<sup>54</sup> According to the principle of the Church, those who received baptism only necessarily come under the direct juridic authority of the Church.

Art. 3 §2: However, an ecclesiastical judge hears only those cases of the nullity of marriage of non-Catholics, whether baptized or unbaptized, in which it is necessary to establish the free state of at least one party before the Catholic Church, without prejudice to art. 114.

The competence of the ecclesiastical tribunal is not limited to marriages in which one or both of the partners are Catholic. Tribunals may also examine the validity of marriage entered into between two non-Catholics, but only if a legitimate reason for doing so exists: specifically, the need for one of the partners to the marriage seeks the intervention of the ecclesiastical tribunal to have the states of the

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<sup>53</sup> Pontifical Commission for Interpreting the Decrees of the Second Vatican Council, "*Responsum ad Propositum Dubium de Iure Accusandi Matrimonium*," 8 January 1973, AAS 65 (1973) 59.

<sup>54</sup> Sajan George Thengumpally, "*Ecclesiastical Judgment of Marriages between Unbaptized Persons: A Study Based on the Norms of the Instruction Dignitas Connubii and the Context of the Syro-Malabar Church*," PhD diss. excerpta., Pontificium Institutum Orientale, Rome, 2012, 31.

marriage clarified. As Church is also the authentic interpreter of natural law, she can declare the nullity of marriages if the impediment is one of natural law. This means that the unbaptized, though not directly subject to the Church's jurisdiction like the baptized, can benefit from the Church's juridical ministry indirectly.<sup>55</sup>

DC art. 4 §2 expressly deals with the cases of the unbaptized.

Art. 4 §2: Whenever an ecclesiastical judge must decide about the nullity of a marriage contracted by two unbaptized persons:

1° the cause of nullity is heard according to canonical procedural law;

2° however, the question of the nullity of the marriage is decided, without prejudice to divine law, according to the law by which the parties were bound at the time of the marriage.

If the marriage of two unbaptized persons is brought before the ecclesiastical tribunal, provided a legal justification exists for doing so as indicated in DC art. 3 §2 the canonical procedural law is used to adjudicate the status of the marriage. In the case of the marriage between the unbaptized, the question of nullity of marriage is to be decided based on divine law or natural law to which the partners were bound at the time of the marriage. In most cases, they follow the civil law in force. However, it might also involve religious law or customary law depending on the person's religious and social membership.<sup>56</sup>

Declaration of the nullity of marriage denotes a competent tribunal's judicial pronouncement of the invalidity of marriage from the beginning. For a human relationship to be correctly classified as marriage, certain components must be fulfilled. If a marriage entered by two baptized or unbaptized is against the divine law that marriage cannot be considered as a valid marriage. Canon 795 §3 says "a dispensation is never given from the impediment of consanguinity in the direct line or the second degree of the collateral line." Canon 802 §1 says "A person who is held by the bond of prior marriage invalidly attempts marriage." Thus these three impediments are having the force of divine law. If anyone approaches the ecclesiastical tribunal for annulling his or her marriage the Church can declare that marriage as null and void *ab initio* on the above-mentioned grounds. For the

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<sup>55</sup> Grech, "The Harmonization of the Religious and Civil Dimensions of Canonical Marriages in Malta," 44.

<sup>56</sup> Ludicke and Jenkins, *Dignitas Connubii: Norms and Commentary*, 21.

annulment of the marriages between the unbaptized, also same as the canonical marriages can use the ordinary process, the briefer process by the eparchial bishop and the documentary process.

The principle established by *DC* in examining the validity of marriages of the unbaptized is relatively easy to apply if both spouses belong to the same law system. But if they belong to two different systems of law, which law would govern their marriage? Whether the proper laws of one of the spouses are to be used or the proper laws of both parties? For example, in the case of a marriage between a Hindu boy and a Muslim girl whose proper law should be applied in the annulment process? A critical comment on art. 4 §2, 2° is that it imposes an extra burden on the judges of the ecclesiastical tribunals.<sup>57</sup>

According to the principle of the Catholic Church, full communion with the Catholic Church is necessary for someone to be directly under the juridic authority of the Church. Ordinarily, the Church has no juridic authority over the marriages entered into between two unbaptized persons.<sup>58</sup> There are special circumstances when Church gets this power. When the scope of the ecclesiastical court extends to the other religions they may oppose being present in our court for deposition on our summons. As they belong to a different faith they can go even for a civil case for burdening them and defamation of their status in society.

### **Conclusion**

As we have discussed, although there are no canons in CCEO that address the validity or invalidity of the marriage of two unbaptized, the Code accepts the validity of the marriage of the non-Catholics provided they are married according to the norms or customs of their own or the place. Any custom or norm that goes against the divine or natural law would render a marriage whether Catholic or not, invalid. However, the procedural law and the substantive laws applicable in marriage nullity procedure involving two unbaptized persons are not specified either in both Codes or in any other legislative text applicable to the Catholic Church in general. Only *DC* gives the norms on it. But the first article of *DC* restricts its scope only to the Latin Church. But since the procedural laws in both Codes are quite similar, and since many of the new points are taken from established jurisprudence, the

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<sup>57</sup> Thengumpally, "Ecclesiastical Judgment of Marriages between Unbaptized Persons: A Study Based on the Norms of the Instruction *Dignitas Connubii* and the Context of the Syro-Malabar Church," 67-71.

<sup>58</sup> CCEO c. 1490; CIC c. 11.

document can be helpful when dealing with Oriental tribunals also. And it can also serve as a complementary source of interpretation of the Oriental Canons.

The ecclesiastical tribunal does not enjoy by its right, an ordinary jurisdiction on the annulment process of two unbaptized. They can admit such cases only when there is a necessity to prove the free state of the unbaptized before the Church. When we analyze it is clear that there is a difference between the process of marriage nullity cases of baptized non-Catholics and the unbaptized. The marriage nullity cases of the baptized non-Catholics, because of its sacramentality, belong to the ecclesiastical judge by the law itself.<sup>59</sup> But it is administered only when they require proving their free state. Whereas the marriage nullity cases of the unbaptized do not belong to the ecclesiastical judge by the law itself. But the judge may handle such cases only when there is a necessity to prove the free state of the unbaptized before the Church.

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<sup>59</sup> CCEO c. 781.