

## EXCEPTIONS TO THE CANONICAL FORM AND MARITAL NULLITY

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### Introduction

I was invited to speak about defection from the Catholic Church by a formal act in light of the 2006 circular letter issued by the Pontifical Council for Legislative Texts on this subject. Earlier this year, however, a study I authored on that topic was published in *Studia canonica*. Since I do not just want to repeat here what I have already written there, I have broadened the topic to include other exceptions to the canonical form. This will give my presentation greater practical value since, as will be seen, cases of a valid formal act of defection are exceedingly rare due to the fact that, for validity, the act must be placed before the competent ecclesiastical authority, and those defecting from the Church are typically not interested in observing this requirement.

The law on the canonical form in c. 1108, §1 enumerates five allowable exceptions to its observance: those of cc. 144 (the supply of the faculty); 1112, §1 (a lay person as the qualified witness); 1116 (the extraordinary form); 1127, §§ 1 and 2 (dispensations from form in mixed marriages). In addition, there are several dispensations from canonical form that can be granted besides those of c. 1127; and c. 1117 contains the exception with respect to a Catholic who has defected from the Church by a formal act. I will sketch the requirements for validity in the use or application of these exceptions. If any such requirement is not observed, the marriage itself is invalid. After briefly stating the requirements for validity in the law on the ordinary form of marriage, I will then consider what is necessary for validity in dispensations from the form, the delegation to a lay person of the faculty to assist at marriage, the extraordinary form, and the formal act of defection. I will devote greater attention to recent questions and disputed points than to matters that are settled in canonical doctrine and jurisprudence. In a final section, I want to raise some objections to a new theory on the applicability of the law concerning the supply of the faculty to assist at marriage in common error.<sup>1</sup>

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<sup>1</sup> On the differences in the laws on the canonical form between the *CIC* and *CCEO*, see U. NAVARRETE, “Questioni sulla forma canonica ordinaria nei codici latino e orientale,” in *Periodica*, 85 (1996), pp. 489-514; G. KUMINETZ, “La forma de la celebración del matrimonio desde la comparación entre ordenamientos,” in *Ius canonicum*, 45 (2005), pp. 89-142; J. PRADER, commentary in G. NEDUNGATT (ed.), *A Guide to the Eastern Code*, Rome, Pontificio Instituto Orientale, 2002, pp. 569-575; and J. Abbass, *Two Codes in Comparison*, 2<sup>nd</sup> ed., Rome, Pontificio Instituto Orientale, 2007, pp. 117-119; 128-130.

## 1. Requirements for the Validity of the Ordinary Form

*The parties.* - By the natural law, the couple must at least implicitly manifest their marital consent to one another, with or without witnesses. Canon 1057, §1 says that the consent of parties *legitimately manifested* makes the marriage. This legitimate manifestation is specified in the laws on the canonical form and the liturgical laws of the marriage rite: the couple must mutually manifest their consent before the qualified witness and two witnesses by words or signs (cf. c. 1101, §1). For liceity, a formula of an approved marriage rite must be observed.<sup>2</sup>

*Qualified witness.* - The one who assists at marriage must have the faculty to do so, whether by law or delegation. Those who have the faculty by law are the local ordinary, the pastor (*parochus*), and those holding offices equivalent in law to that of pastor.<sup>3</sup> The faculty is validly used only within the officeholder's territory (c. 1109) or, in the case of a personal jurisdiction, only for marriages in which at least one of the parties is his subject (c. 1110). The faculty may validly be used only when at least one of the parties is of the Latin Church *sui iuris* or is an Eastern Catholic subject to the Latin Church for pastoral care; it may not validly be used by one under the imposed or declared censure of excommunication, interdict, or suspension (c. 1109).

As long as they validly function in office, the local ordinary or pastor may grant to priests and deacons general or special delegation to assist at marriage within the territory (c. 1111, §1). The grant of a faculty is an act of the power of governance, namely, a singular administrative act.<sup>4</sup> A faculty may not be delegated validly by a person under censure of excommunication or suspension when the penalty has been imposed or declared (cc. 1331, §2, 2°; 1333, §1, 2°). For validity, the faculty must be given expressly to determined persons; the local ordinary could not validly grant the faculty to all parochial vicars, for example, by means of a general decree. The grant must be *express*, which may be implicit but not tacit or interpretative. For validity, general delegation must be granted in writing, although this point is disputed by authors.<sup>5</sup> Special delegation must be given

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<sup>2</sup> *Ordo celebrandi Matrimonium, editio typica altera*, Typis Polyglottis Vaticanis, 1991. With the permission of the pastor, the extraordinary form of the Roman Rite may also be used. See BENEDICT XVI, apostolic letter motu proprio *Summorum Pontificum*, 7 July 2007, art. 9, §1, AAS 99 (2007) 781.

<sup>3</sup> See cc. 516, §1; 517, §§ 1,2; 539-540; 541; 549; JOHN PAUL II, apostolic constitution *Spirituali militum curae*, 21 April 1986, no. VII, in AAS, 78 (1986), pp. 481-486; and PONTIFICAL COUNCIL FOR THE PASTORAL CARE OF MIGRANTS AND TRAVELLERS, instruction *Erga migrantes caritas Christi*, 3 May 2004, art. 7, § 2, in AAS 96, (2004), pp. 762-822. The faculty is delegated by law in virtue of c. 144, as treated below.

<sup>4</sup> Delegation of a faculty usually has the nature of a decree that makes a provision (c. 48), but it may also be a rescript when it is a favour granted in response to a request, especially in the case of a special delegation.

<sup>5</sup> Canon 1111, §2 has three phrases, each of which pertains to validity. To be consistent, those who argue that the third phrase on delegation in writing does not pertain to validity should say that the second phrase, on special delegation for a determined marriage, likewise does not pertain to validity, but it clearly does.

for a determined marriage or marriages. Delegation takes effect the moment it is granted; neither acceptance by, nor notification to, the delegate is necessary for valid assistance at marriage.<sup>6</sup>

In addition to having the faculty, the priest or deacon must be present, ask for the manifestation of consent of the contracting parties, and receive it in the name of the Church; each of these requirements is for validity, as indicated implicitly by the word *tantum* in c. 1108, §2.<sup>7</sup> The qualified witness must assist knowingly and willingly (*sciens et volens*). If he is forced against his will,<sup>8</sup> or if he lacks sufficient use of reason,<sup>9</sup> the form is not observed. For liceity, he must use a formula of the request for and reception of the consent as given in the liturgical rite, which may be adapted by the conference of bishops.<sup>10</sup> For validity, some form of asking for and receiving the manifestation of consent is necessary, which need not be explicit but must be express (by words, sign language, writing, gesture, posture),<sup>11</sup> done “in such a way that he be present at the moment when the parties express matrimonial consent so that he can render authentic witness before the Church of the marriage celebrated in his qualified presence.”<sup>12</sup>

*The witnesses.* - Besides the official witness, there must be, for validity, at least two witnesses with the physical ability, use of reason, and sufficient discretion to perceive, understand, and testify to the exchange of consent. The presence of the witnesses must be simultaneous, physical, and moral (with recognition of what is happening). Unlike the official witness, with respect to the two common witnesses, the canonical form is valid even if their presence is unanticipated or involuntary.

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<sup>6</sup> This has not been recognized by all. See my study, “The Efficacy of Delegation without Notification or Acceptance,” in V. D’SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça*, Bangalore, Centre of Canon Law Studies, St. Peter’s Pontifical Institute, 2008, pp. 69-108.

<sup>7</sup> A 28 November 1978 reply of the S.C. for the Doctrine of the Faith stated: “... this S. Congregation has decreed that for the valid form of a wedding celebration it is required that the ordinary or the pastor or their delegate should have an active role, that is, that he truly receive the consent of the spouses and, indeed, of each one of the contracting parties and that, otherwise, the wedding celebration must be considered invalid.” In *Canon Law Digest*, VIII, p. 821.

<sup>8</sup> See c. 125, §1; and *Communicationes*, 8 (1976), p. 37.

<sup>9</sup> For an interesting case, see TRIBUNAL OF THE ARCHDIOCESE OF MÉRIDA-BADAJOS, *c. GONZÁLEZ MARTÍN*, 2 March 2002, in *Revista española de derecho canónico*, 63 (2006), pp. 909-925.

<sup>10</sup> *Ordo celebrandi Matrimonium*, nn. 41, 61, 64.

<sup>11</sup> Cf. TRIBUNAL OF THE ROMAN ROTA, *c. STANKIEWICZ*, 26 March 1990, in *ARRT Decisiones seu sententiae*, 82 (1990), pp. 232-233.

<sup>12</sup> U. NAVARRETE, “Sensus verborum exquirat et recipit manifestationem consensus matrimonialis (c. 1108, §2),” in *Periodica*, 83 (1994), p. 632.

## 2. Dispensations from Canonical Form

In mixed marriages, the local ordinary of the Catholic party, after consulting the ordinary of the place in which the marriage is to be celebrated, has the right to dispense from the canonical form when grave difficulties hinder its observance; for validity, there must be some public form of marriage (c. 1127, §2). Is the restriction of the dispensation to the local ordinary of the Catholic party for validity or only for liceity? Firstly, it should be noted that the law does not say that only the local ordinary of the Catholic party is *habilis* (cf. c. 124, §1) to grant the dispensation but that he has the right (*ius*) to grant it. This wording does not indicate a reservation of the dispensation solely to the local ordinary of the Catholic party or to higher authority and therefore does not restrict the valid use of the dispensing power of the *diocesan bishop of the place of marriage* (cc. 87, §1; 136). The same cannot be said, however, of the vicar general or episcopal vicar of same who lack the dispensing power of c. 87, §1. Thus, the diocesan bishop of the place of marriage may validly grant the dispensation but not the vicar general or episcopal vicar (unless the place of marriage is also the diocese of the Catholic party).

Is the *consultation* of the ordinary of the place of marriage required for validity or liceity? According to c. 127, §2, 1<sup>o</sup>, the act of a superior is invalid when the consent or consultation required by law is omitted. The meaning of “superior” in c. 127 is that of an official who has governance authority in the external forum.<sup>13</sup> The local ordinary of one diocese, however, does not have governance authority over the ordinary of another diocese. One ordinary is not the superior of the other; they are equals in law. Thus, c. 127, §2, 1<sup>o</sup> is not applicable here; the consultation required by c. 1127, §2 is necessary only for liceity.<sup>14</sup>

The dispensation may be granted “if grave difficulties hinder the observance of the canonical form.” This requirement of grave difficulties (in the plural) is evidently greater than the usual requirement of a “just and reasonable cause” for a valid dispensation (c. 90, §1). Is the presence of grave difficulties a condition for validity or only for liceity? On the one hand, it is not an express requirement for validity.<sup>15</sup> On the other hand, c. 90, §1 requires, for the validity of a dispensation, that the authority “take into account” (*habita ratione*) the *gravity* of the law. In taking into account the gravity of this law, one cannot escape the fact that the principal condition for granting the dispensation is the presence of grave difficulties that hinder the observance of the form. For *validity*, however, c. 90, §1

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<sup>13</sup> H. PREE, commentary in *Munsterischer Kommentar zum Codex Iuris Canonici*, Essen, Ludgerus, 1998, p. 4.

<sup>14</sup> M. BRUNNBAUER, after reviewing the differing opinions of the authors, reaches much the same conclusion: “Beim jetzigen Stand der Dinge aber ist die moralische Gewissheit dafür, dass eine Ehe allein wegen der Unterlassung der Konsultation gemäß c. 1127 § 2 für nichtig erklärt werden kann, sicher nicht zu erreichen.” See “Ist die Anfrage an den Ordinarius des Eheschließungsortes zur Gültigkeit der Dispens gemäß c. 1127 § 2 CIC erforderlich?” in U. KAISER, R. RAITH, and P. STOCKMANN (eds.), *Salus animarum suprema lex: Festschrift für Offizial Max Hopfner zum 70. Geburtstag*, Adnotationes in Ius canonicum 38, Frankfurt am Main, Peter Lang, 2006, p. 115.

<sup>15</sup> Contra certain authors, c. 39 does not apply to conditions expressed in laws.

expressly requires only that the local ordinary not grant the dispensation before taking into account this gravity. The competent authority has wide discretionary power to grant or refuse the dispensation, provided he has taken into account the gravity of the law. After the local ordinary takes into account the gravity of c. 1127, §1 and its requirement of grave difficulties, a dispensation would be valid, even without grave difficulties, provided there is a just and reasonable cause.

In the case of two Catholics, the dispensation from form is reserved to the Apostolic See.<sup>16</sup> Exceptionally, a 1972 authentic interpretation permits the local ordinary to grant this dispensation also in the case of a marriage of two Catholics when one had defected from the Catholic faith and converted to “another non-Catholic confession.”<sup>17</sup> Does this apply also in the case of an atheist or other who defects from the Catholic Church without joining another confession? Arguably, this is a lacuna, and the 1972 interpretation is a *lex lata in similibus* (c. 19); if so, the local ordinary could dispense. On the other hand, the 1972 interpretation is an exception to the law, which must be interpreted strictly (c. 18). Therefore, it seems likelier that the local ordinary cannot dispense from form in the case of two Catholics, one of whom had defected from the Church, unless the defecting person had converted to a non-Catholic confession.

The canonical form needs to be observed for liceity when a Catholic marries an Eastern non-Catholic (c. 1127, §1). Thus, the Catholic party needs a dispensation for such a marriage to take place before an Eastern non-Catholic minister. This is not the dispensation of canon 1127, § 2, which is required for validity and is only given when grave difficulties pose an obstacle to the observance of the canonical form. Rather, this dispensation may be given for any just and reasonable cause (c. 90, §1). The original law on which c. 1127, §1 is based says the local ordinary is competent to grant the dispensation,<sup>18</sup> but this is not repeated in the code. Does this mean that the diocesan bishop is competent to grant the dispensation (c. 87, §1; cf. c. 6, §1, 2° or 4°) to the exclusion of the vicar general and episcopal vicar? The answer must be negative in virtue of the standard rule of law: the one who can do the greater can do the lesser.<sup>19</sup> Since the vicar general and episcopal vicar can dispense from the form in mixed marriages when there are “grave difficulties,” all the more may they dispense in these cases for other just and reasonable causes.

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<sup>16</sup> PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE CODE OF CANON LAW, 14 May 1985, in AAS, 77 (1985), p. 771.

<sup>17</sup> P.C. FOR THE INTERPRETATION OF VATICAN II, reply, 11 February 1972, in AAS, 64 (1972), p. 397. This authentic interpretation is still in effect. See J. HUELS, opinion in J. KOURY and S. VERBEEK (eds.), *Roman Replies and CLSA Advisory Opinions 2008*, Washington, Canon Law Society of America, 2008, pp. 108-111.

<sup>18</sup> S.C. FOR EASTERN CHURCHES, decree *Crescens matrimoniorum*, 22 February 1967, in AAS, 59 (1967), p. 166.

<sup>19</sup> *RJ* 53 in 6°.

For the validity of the marriage with this dispensation, the presence of a sacred minister is required, that is, a validly ordained minister. Does this include deacons as well? Although the term “sacred minister” encompasses deacons as well as priests, a deacon may not validly assist at such a marriage insofar as it would not be recognized as valid in the Eastern non-Catholic law.<sup>20</sup>

In addition to the dispensation from form in a mixed marriage, the law provides for the dispensation in danger of death or by means of the *sanatio in radice* (cc. 1079, §§ 1, 2; 1161, §1). A dispensation from form by the ordinary is possible also in doubt of fact or when recourse to the Holy See is difficult and there is grave harm in delay (cc. 14; 87, §2).

A dispensation (cc. 85-94) is a juridical act (cc. 124-126), an act of executive power of governance (cc. 136-144), a singular administrative act (cc. 35-47), and is granted by rescript (cc. 59-75). When questions arise regarding the validity of a dispensation from form, it may be necessary to consider whether any of the general norms on these institutes may enter into play. For example, if after consulting the dispensing authority (c. 67, §3), it appears that the motivating cause for granting a dispensation was false or the truth was concealed, the rules on obreption and subreption may be applicable (c. 63).

### 3. Delegation of the Faculty to a Lay Assistant

Canon 1112, §1 states: “Where priests and deacons are lacking, the diocesan bishop, with the previous favourable vote of the conference of bishops and having obtained the permission of the Holy See, may delegate lay persons to assist at marriage.” The question arises: what is necessary for validity in this law? Most certainly, delegation of the faculty by the diocesan bishop is necessary for the validity of the marriage. No other authority within the diocese, including the vicar general, is legally capable of this delegation. Some authors maintain, additionally, that the permission (*licentia*) of the Holy See is a virtual (non-express) requirement for validity, that the bishop lacks the power validly to delegate a lay person without this *licentia*.<sup>21</sup> A *licentia* in canon law, however, is hardly ever needed for the validity of an act—not at all in the Eastern code and, in the Latin Code, only in ten canons; but only in four of these canons is the *licentia* a virtual requirement for validity. These canons have to do with the permission of the Apostolic See necessary to change one’s church *sui iuris* (c. 112, §1, 1°) and the permission for various transfers of members of institutes of consecrated life and societies of apostolic life (cc. 684, §5; 730; 744, §§ 1, 2). The latter are not comparable to c. 1112, however,

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<sup>20</sup> PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, instruction *Dignitas connubii*, 25 January 2005, art. 2, §2, 1°. Cf. also *CCEO* c. 834, § 2 which says *sacerdos* instead of *minister sacer*.

<sup>21</sup> *Virtual nullity*, or inexistence, is when an act is null not because of the absence of an express requirement for validity but due to the lack of an essential element, whether of the divine or the ecclesiastical law. If an essential element of an act is missing, there is no need for the law to say the act is invalid, because effectively there is no act in the legal sense. The supposed “act” is juridically in-existent (e.g., cc. 137, §4; 607, §2; 1057, §1).

because they have to do with lay faithful and members of institutes and societies who do not have the power of the diocesan bishop. They are unable to effect these transfers on their own authority without the permission of competent authority. The diocesan bishop, in contrast, “has all ordinary, proper, and immediate power that is required for the exercise of his pastoral office except for cases which by law or decree are reserved to the Supreme Pontiff or to some other authority” (c. 381, §1). Canon 1116 does not reserve to the Holy See the bishop’s power to grant the faculty. In virtue of his divinely constituted office, it must be presumed that he has this power, but he needs the permission of the Holy See *licitly* to use it. Indeed, this is the most common way that *licentia* is used in canon law: to permit the licit use of a power, faculty, or right that one already possesses.<sup>22</sup>

Another source of universal law also regulates this matter. The 1997 interdicasterial Instruction, *Ecclesiae de mysterio*, which was approved by the pope *in forma specifica*, states that three conditions must be fulfilled to delegate this faculty: only if (*tantummodo si*) (1) priests or deacons are lacking, (2) the conference of bishops has voted favourably, and (3) the necessary permission of the Holy See is granted.<sup>23</sup> The word *tantummodo* (*tantum, solus*) in a law may indicate an implicit requirement for validity. If that is true here, then all three conditions are required for validity, given the grammatical structure of this law. Yet, the first two conditions certainly are not for validity. The first involves a judgement concerning the lack of priests and deacons, a judgement that may sometimes be imprecise and somewhat subjective, which hardly can be a requirement for the validity of the grant of a faculty affecting the validity of marriages. The second condition also cannot be for validity: certainly the Holy See has the power to permit the bishop to grant this faculty without the favourable vote of the conference of bishops. This context, therefore, implies that the Holy See’s *licentia* is not required for the validity of the bishop’s dispensation. Thus, the 1997 Instruction does not add anything substantially new to canon 1112.

#### 4. The Extraordinary Form of Canon 1116

The requirement of the canonical form is a merely ecclesiastical law that must give way to the natural right to marry when its observance is impossible. If it is impossible to observe the canonical form due to the absence of a qualified witness, a couple has the natural right to marry even without the two common witnesses. The law on the extraordinary form, however, treats not just absolute impossibility but also moral impossibility when the qualified witness is unable to be present or approached “without grave inconvenience” (*sine gravi incommodo*). Canon 1116, §1 states: “If the one competent according to the norm of law to assist at marriage is unable without grave inconvenience to be present or approached, the parties who intend to enter a true marriage may validly and licitly contract it solely before witnesses: (1) in danger of death; (2) apart

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<sup>22</sup> See my study, “Permissions, Authorizations and Faculties in Canon Law,” in *Studia canonica*, 36 (2002), pp. 25-58. A *licentia* may also grant a favour.

<sup>23</sup> CONGREGATION FOR THE CLERGY ET AL., 15 August 1997, art. 10, §1, in AAS, 89 (1997), p. 873.

from danger of death, provided it may be prudently foreseen that this situation will last for a month.” The conditions of the law required for validity are: that the qualified witness be unable to be present or approached without grave inconvenience, whether this inconvenience be absolutely or relatively grave; that there be at least two witnesses; that the parties intend a true marriage; and that there be the danger of death of either party or it be prudently foreseen that the qualified witness cannot be present or approached without grave inconvenience for one month.

For the most part, c. 1116 is identical to c. 1098 of the 1917 Code, which had been the subject of repeated authentic interpretations and discussion by the authors such that, today, its meaning and application are peacefully accepted. However, the legislator for the 1983 Code added a phrase to c. 1116 not found in the prior Code, namely, that the parties must “intend to enter a true marriage” (*intendunt verum matrimonium inire*). The meaning of this phrase has yet to find complete agreement. There are basically two views, one that the parties must expressly intend a canonically valid marriage, the other being that natural consent to marry suffices. Jan Hendriks is a proponent of the latter position, as seen in a 1995 article.

It is not necessary for the parties to know that the extraordinary form of marriage exists in the Church. Those who express a naturally sufficient consent, in fulfilling the conditions of the canons of the Code, contract validly by the extraordinary form. The validity of a marriage must be upheld (c. 1060) which is celebrated, e.g., before a civil magistrate, if the parties meet the applicable conditions of c. 1116, even if they do not know that this marriage is recognized by the Church. One who judges the validity of

such marriages must examine the will of the contracting parties. If there were no impediments, if witnesses were present, the marriage is valid if they gave true marital consent.... Indeed, a false opinion maintaining the nullity of the marriage does not impede the validity of the contract.<sup>24</sup>

This position is rooted in the fundamental rule that “the knowledge or opinion of the nullity of marriage does not necessarily exclude marital consent” (c. 1100). A couple may think they are marrying invalidly due to the lack of the ordinary form, but as long as they consent to marry and the conditions for the extraordinary form are met, the marriage is valid. In this view, there is an exact equation of the *intention to enter a true marriage* of c. 1116 with the *natural consent* to marry. Accordingly, the extraordinary form operates automatically, *ex iure*, when the conditions of c. 1116 are met, whether or not the parties know of it. The addition of the new phrase in the 1983 Code, then, effectively adds nothing to the traditional interpretation of the law. In fact, the authorities Hendriks cites for his position are commentaries and Rotal sentences based on the 1917 Code.

The other view, that the parties must intend a canonically valid marriage, is succinctly stated by Rafael Navarro Valls:

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<sup>24</sup> “*Matrimonii forma extraordinaria* (canon 1116),” in *Periodica*, 84 (1995), p. 705.

... for the extraordinary form to be used, not only objective conditions, but also subjective ones, are required; that is, there must be a real intention to contract a *true* marriage. Thus is avoided the danger that Catholics, being in the objective circumstances of c. 1116, will celebrate civil marriage without the intention to contract a true marriage, and find themselves joined in a canonical marriage. In mixing questions of consent and form, the Code breaks with the system on this point; however, the addition is justified since it prevents paradoxical situations from arising.<sup>25</sup>

In this view, the intention to contract a true marriage is not identical to natural marital consent. It is something additional: the intention to have a marriage that is recognized as valid in canon law. Indeed, if the intention to contract a true marriage was simply equal to natural consent to marry, there would be no need to mention it as a condition for the use of the extraordinary form, as there can be no marriage without natural consent (c. 1057, §1).

The consultors of the *Coetus studiorum de iure matrimoniale* who drafted the revision of c. 1098 of the 1917 Code clearly had in mind that the “true marriage” that must be intended is a canonical marriage. Four out of five consultors voted in favour of inserting the new phrase, and it is evident from the report that, for them, the parties must intend to contract a valid *canonical* marriage, “even if this restricts the ambit of the application of the extraordinary form,” as one consultor noted.<sup>26</sup> In reaching this decision, the consultors considered the situation of a couple who contract civil marriage, believe it to be invalid canonically, later divorce, and now one wishes to enter a valid marriage but is told he cannot because the conditions of the law for applying the extraordinary form may have existed and thus that marriage, which he thought to be invalid for lack of form, must now be presumed valid until proven otherwise. If the party then wants to marry, he must prove in the judicial forum that these conditions did not all exist, or that there was some other ground of nullity. The *coetus* sought to add the new wording to the canon to prevent this grave state of affairs (*ad hanc gravem rerum condicionem vitandam*).<sup>27</sup>

Although it is clear what the consultors had intended, the law must be interpreted principally not on what they had in mind but on the proper meaning of the words considered in the text and context (c. 17). The canon does not say that the parties must intend “canonical marriage” but “true marriage.” Thus, the view expressed by Hendriks cannot be discounted. A more nuanced and detailed presentation of this idea is found in a study by Javier Martínez-Torrón. He too believes that the intention to enter a true marriage of c. 1116 is simply the natural consent to marry. Indeed, he argues that the positive law is *unable* to require any intention beyond this naturally sufficient consent. He says that the new phrase does not add a subjective element in the context of a law establishing formal

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<sup>25</sup> In E. CAPARROS ET AL. (eds.), *Code of Canon Law Annotated*, prepared under the responsibility of the INSTITUTO MARTÍN DE AZPILCUETA, Montréal, Wilson & Lafleur, 2004, p. 871. See also NAVARRO VALLS, “*La forma jurídica del matrimonio en el nuevo Código de Derecho Canónico*,” in *Revista española de derecho canónico*, 39 (1983), pp. 503-504.

<sup>26</sup> *Communicationes*, 10 (1978), p. 95.

<sup>27</sup> Meeting of 18 October 1977, in *Communicationes*, 10 (1978), pp. 94-95.

conditions, one that requires the parties explicitly to intend a valid canonical marriage. Nevertheless, he says the phrase does add something new to the law. It introduces a more restrictive interpretation of what is required for a valid recourse to the extraordinary form, namely, that the intention to enter a canonical marriage must in some way be externalized; if there is no evidence that the parties wanted a marriage that is canonically valid, the presumption of the law is that they did not intend to enter a true marriage.<sup>28</sup> This is the opposite of the usual presumption that the correct intention is presumed until the contrary is proven (c. 1101).

Martínez-Torrón argues against the position that the couple must subjectively intend a canonical marriage. Nonetheless, he comes to a reasonable and sound conclusion that upholds the value and purpose of this change in law: that a couple, who gave no indication that they wanted a marriage valid in canon law, may be presumed not to have wanted a true marriage when they consented apart from the canonical form, and therefore they do not fulfill a necessary condition for the valid use of the extraordinary form. He does not say what such indications are, but they would have to be judged according to the facts of the case. For example, if the parties had attended the parish Sunday celebration without a priest each week, this would be a likely indicator that they would have wanted a marriage according to the canonical form. Or, even if they had not, if they had made inquiries about a priest assisting at their marriage, this too would be such an indication.

These viewpoints are not difficult to reconcile in practice. In judging whether c. 1116 was applicable to a given marriage, the *ratio* of the law must be kept uppermost in mind. The extraordinary form is not intended for nominal Catholics who, at the time of entering a civil or natural marriage, did not practice their faith, did not care whether or not the Church considered their union to be valid, and gave no indication that they had wanted a marriage valid in canon law. Even if no qualified witness were available for a month, they cannot be said to marry validly by means of an automatic application of the extraordinary form. On the other hand, if the conditions of c. 1116 were present and the parties had given some external indication that they had wanted a canonical marriage, it should be presumed that the marriage is valid, even if they had thought it to be invalid.

Another new question is whether the extraordinary form is applicable when a qualified priest or deacon is not available but the lay minister of c. 1112 is. On the one hand, c. 1116, §2, which is only for liceity, says that if another priest or deacon [lacking the faculty to assist] is available, he must be called upon, but no mention is made of a lay assistant; and c. 1108, §1 identifies a marriage before a lay assistant to be an exception to the canonical form, comparable in this sense to the extraordinary form. On the other hand, c. 1116, §1, which establishes the conditions for the valid use of the extraordinary form, speaks of an *assistens ad normam iuris competens*, not excluding a lay assistant. To exclude the lay assistant from the meaning of the law would be a restrictive interpretation, which can only be done by the legislator or his delegate (c. 16, §2). Therefore, the extraordinary form may not be validly used if a competent lay assistant is available.

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<sup>28</sup> “La valoración del consentimiento en la forma extraordinaria del matrimonio canónico,” in *Revista española de derecho canónico*, 40 (1984), pp. 450-454.

## 5. Defection by a Formal Act

Another exception to the canonical form, not mentioned in c. 1108, §1, is that of c. 1117 regarding a person who was baptized or received into the Catholic Church and afterward defected from it by a formal act (*actu formali ab ea defecerit*). The same phrase is used in cc. 1086, §1 and 1124 to exempt such persons from the impediment of disparity of cult and the requirements for a mixed marriage, namely, a just cause, the fulfillment of the conditions of c. 1125, and the local ordinary's permission. The meaning and precise implications of this formal act, which has no parallel in the Eastern Code, had been the subject of considerable discussion among the authors ever since this novel provision was introduced in the 1983 Code. This exception to the canonical form also gave rise to doubts in pastoral and tribunal practice concerning whether a person had truly defected by a formal act and was thereby exempt from the canonical form, or whether he had not actually defected by a formal act and therefore married invalidly. Due to this confused state of affairs, the Pontifical Council for Legislative Texts (PCLT) undertook a study of the question beginning in 1995<sup>29</sup> which resulted in 1999 with the unanimous vote of its members to request the suppression of the three exemptions.<sup>30</sup> This suppression has not occurred thus far (although it would still be welcome by many). Instead, the PCLT issued a circular letter on 13 March 2006 to clarify the essential elements, requirements, and formalities necessary for a valid and licit formal act of defection.<sup>31</sup> This document, however, has occasioned new debate among authors with little agreement up to now on basic questions such as its juridical nature, binding force, and retroactivity. I myself have argued that the circular letter is an act of executive power, that the essential elements identified in it for the validity of the act are retroactive, and that the other requirements and formalities have the nature of general executory decrees that bind only for liceity and are not retroactive.<sup>32</sup> Given the focus of this article on marital validity, I shall only summarize here the arguments pertaining to matters of validity and retroactivity.

Following three introductory paragraphs on the purpose of the document, the first numbered paragraph of the circular letter identifies the essential elements of a formal act of defection: “For the abandonment of the Catholic Church to be validly configured as a true *actus formalis defectionis ab Ecclesia* so that the exceptions foreseen in the previously mentioned canons would apply, it is necessary that there concretely be: (a) the internal decision to leave the Catholic Church; (b) the realization and external manifestation of that decision; and (c) the reception of that decision by the competent authority.” There are two reasons why these requirements for validity are retroactive and applicable to every formal act of defection since the 1983 Code took effect. The first has to do with the juridical nature of the document as an act of executive power and the second with the nature of

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<sup>29</sup> See *Communicationes*, 27 (1995), p. 31.

<sup>30</sup> Plenary Session of the PCLT, 4 June 1999, in *Canon Law Society Newsletter*, no. 127 (2001), pp. 5-6.

<sup>31</sup> PCLT, circular letter *Da tempo*, in *Communicationes*, 38 (2006), pp. 170-172. The Italian text is followed by versions in English, German, French, Spanish, and Portuguese.

<sup>32</sup> See my study, “Defection from the Catholic Church by a Formal Act and the Circular Letter of 13 March 2006,” in *Studia canonica*, 41 (2007), pp. 514-549.

these three conditions, which are not mere requirements or formalities of positive legislation but are elements essential to a formal act of defection without which the act is not just invalid but inexistent.

*Nature of the document.* - The circular letter is not legislative. Although the PCLT has legislative power to make authentic interpretations of law (c. 16, §2), this document is not an authentic interpretation either in form or substance. There is no indication of papal delegation of legislative power (c. 30), approval *in forma specifica*, or approval *ex audientia Sanctissimi*. The text has only the usual formula of approval *in forma communi*. New legislation would be introduced by an Apostolic Letter *motu proprio* or a General Decree of legislative power (c. 29), not by a circular letter. A circular letter is not a means to promulgate new ecclesiastical legislation but is a juridical text commonly used by the dicasteries of the Roman curia to establish general norms of executive power—the general executory decrees of cc. 31-33—as well as to communicate related information.<sup>33</sup> The normal means of promulgation is sending the letter to the presidents of the conferences of bishops, who in turn forward it to the members of the conference. The 13 March 2006 circular letter is standard in all these respects.

A document of executive power is unable to create new ecclesiastical laws (c. 7), nor can general executory decrees establish new requirements for the validity of an act (*leges irritantes*) or laws establishing those things that are essentially constitutive of an act. Such fundamental matters of the canonical system are only established in law (*in lege*). It follows that the three elements that the circular letter identifies as necessary for the validity of a formal act of defection are not newly created requirements of the PCLT: they are intrinsic to the very nature of the act, without which there would be no act.

*Essential elements.* - The three conditions for the validity of the formal act are not mere formalities or requirements; they are elements which essentially constitute the act (c. 124, §1). Without the three elements, an attempted act of defection would not be just invalid; it would be inexistent. Unlike invalidating (*irritantes*) or incapacitating (*inhabilitantes*) requirements, which must be expressly stated in the law, the essential elements of an act need not be expressly stated. This has already been illustrated above regarding the *licentiae* needed to transfer to another church *sui iuris* and the other transfers pertaining to members of institutes of consecrated life and societies of apostolic life. The law does not expressly state, not even implicitly, that the permission of the competent authority is needed for the validity of the transfer. That is not necessary, since the *licentia* is the essential act that brings about the transfer. The transfer is accomplished by the act of the competent authority, not by the act of the petitioning subject who is powerless to accomplish this by merely declaring it on his or her own (unless so authorized by law as in c. 112, §1, 2°, 3°). The same is true of the three essential elements of the formal act of defection. The first, the internal decision to leave the Catholic Church, pertains to the necessary intention to bring about a specific juridical effect or effects, which intention is the essence of every juridical act. The second, the realization and external manifestation of

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<sup>33</sup> Canon 33, §1 says general executory decrees may be issued “in directories or in documents of another name.” The circular letter is one such document of another name.

that decision, is also essential to a formal act. If the decision to leave the Catholic Church is not realized and externally manifested, there is no act, much less a formal act. Thirdly, this decision must be received by competent ecclesiastical authority; a formal act of defection cannot be accomplished without this reception.

This third essential element was surprising to some canonists, as it was not widely recognized in doctrine before the publication of the circular letter. Many had thought a formal act would be demonstrated, for example, merely by a person's joining a non-Catholic confession with the intention of leaving the Catholic Church, with no necessary intervention by the competent Catholic authority. A formal act of this kind, however, cannot be placed before another authority, whether civil or religious, or done entirely on one's own. This requires an act of the competent ecclesiastical authority who, according to no. 5 of the circular letter, "is uniquely qualified to make the judgment concerning the existence or non-existence of the act of the will," namely, that described in no. 2 of the document: "The substance of the act of the will must be the rupture of those bonds of communion, faith, sacraments, and pastoral governance that permit the faithful to receive the life of grace within the Church." No one but the competent ecclesiastical authority is capable of making such a judgement. The "reception" of the decision by the ecclesiastical authority is not the mere acknowledgement and recording of the act of the defecting person; it is a distinct act placed by the competent authority. He must act knowingly, that is, he must judge whether the person truly intends to defect from the Church; whether the defecting Catholic has committed or is about to commit an act of apostasy, heresy, or schism; and whether this person understands the consequences of the defection. The act of reception is an act of verification, akin to a notary who authenticates a document. It is verification that a true act of defection has taken place.

By its very nature, a formal act of defection may only be accomplished when it is received by the competent Catholic authority, for it is an act that affects one's juridical status in the Catholic Church and determines whether one is exempt from three marriage laws, two of which affect the validity of one's marriage. This act of reception is no favour for the defecting Catholic but pertains to the good order of the Church itself, especially given that the recognition of the validity of one's marriage may depend upon it.

The introduction to the circular letter mentions that it is based on a "decision of the Congregation for the Doctrine of the Faith concerning the theological and doctrinal elements." Something similar was done in a circular letter of the CDF in 1995 that communicated doctrinal decisions of the CDF pertaining to the validity of the matter of the Eucharist—that bread without gluten is invalid matter and that low gluten hosts are valid provided that there is sufficient gluten to obtain the confection of bread, that there is no addition of foreign materials, and that the procedure for making such hosts is not such as to alter the nature of the substance of bread.<sup>34</sup> This was not the creation of new law but the communication of a doctrinal decision by means of a circular letter (a document of

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<sup>34</sup> CDF, circular letter *Questo dicastero*, 19 June 1995, in *Notitiae*, 31 (1995), pp. 608-610. This circular letter also contains disciplinary norms which have the nature of general executory decrees; they cannot be *leges* since the document was not an act of legislative power.

executive power), together with accompanying general executory decrees to implement that decision. The general executory decrees are not retroactive, in keeping with the standard rule of c. 9 concerning merely ecclesiastical laws, but the doctrinal decision is retroactive since it is matter of the divine law pertaining to the essence of a sacrament. Any Mass prior to this decision was invalid at which bread without gluten had been used to attempt to confect the Eucharist. The same is true of the decision of the CDF concerning the essential elements of a formal act of defection as enumerated in the 2006 circular letter of PCLT. All three of these essential elements must have existed in every formal act of defection since the 1983 Code took effect. Otherwise, there was no formal act, and a marriage contracted without a dispensation from canonical form or from the impediment of disparity of cult is null.

## 6. The Supply of the Faculty in Common Error

In recent years, a few authors have espoused a new proposal or argument that the conditions for common error are verifiable whenever a vested priest or deacon, who is in the full communion of the Church, publicly presides at a wedding in a church.<sup>35</sup> They say that the community is inevitably led by this fact into the error of thinking that the priest has the faculty. In other words, the *public fact* that induces common error need not have anything to do with the cleric's status in the parish or anything else pertaining to the existence of the faculty; it suffices simply that the priest or deacon preside at the wedding in this fashion.<sup>36</sup>

This opinion, which is contrary to the common and constant opinion of authors and Rotal jurisprudence, appears to conflate error with ignorance. That the faithful are unaware that the priest or deacon lacks the faculty, or that he even needs one at all, is not error but ignorance. Error must be based on some public fact regarding the existence of the faculty such that even knowledgeable and prudent persons would judge that the priest or deacon has the faculty. In error of law, the community that errs is not the guests at the wedding, many or most of whom are not from the parish and would not know the difference between the presiding priest and the pastor or anyone else. Rather, the community that errs *in iure* are the parishioners who know their pastor, parish deacon, and the priest who comes to hear confessions and celebrate Masses on weekends. Typically, the public fact that provokes common error is the status of the priest or deacon in the

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<sup>35</sup> A nearly identical proposal was formally considered and rejected in the Code revision process. See *Communicationes* 10 (1978) 90.

<sup>36</sup> R. NAVARRO-VALLS, commentary in Á. MAZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen. ed. of the English edition), *Exegetical Commentary on the Code of Canon Law*, Montréal, Wilson & Lafleur, 2004, p. 1463; M.A. ORTÍZ, "La forma canonica quale garanzia della verità de matrimonio," in *Ius Ecclesiae* 15 (2003) 401; A. NITA, "La suplencia de la facultad de asistir al matrimonio en caso de error común, a la luz de la jurisprudencia de la Rota Romana," in *Ius canonicum*, 39 (1999), pp. 704-708. I am aware of only one Rotal sentence that has adopted this view: c. MONIER, 23 November 2000, in *Studies in Church Law*, 1 (2005), pp. 447-461. I agree with the judges that the marriage in this case must be presumed valid due to the unresolved doubt that the faculty had at least been implicitly delegated, but I see no basis for common error.

parish: he functions actively in the parish on a regular basis. However, it cannot be admitted that a visiting priest, whose identity is unknown to the pastor and not even implicitly delegated, may provoke common error by the mere fact of presiding publicly at the marriage rite, duly vested, in an open church.

This is not to say that common error may never exist in cases when special delegation is lacking. For example, if the visiting priest begins the celebration by thanking the absent pastor for allowing him to preside at this wedding, common error would exist. A prudent person, knowledgeable of the law, would judge on the basis of this statement that the priest had at least implicit delegation from the pastor (although he had not). Thus, it cannot be excluded that common error may exist in cases where special delegation is lacking, but such cases are very rare due to the lack of a public fact that can objectively induce error.

The motivation behind the new proposal to allow ignorance to suffice for common error is evidently pastoral: to avoid invalid marriages on a technicality, namely, the lack of a faculty that should have been given but was not. This proposed solution, however, could undermine parochial jurisdiction over the preparation, celebration, and recording of marriage and result in the very difficulties that the Church's marriage laws seek to prevent. It undermines the very law of c. 1108, §1 which requires, for the validity of the marriage, that it be celebrated by the local ordinary or the pastor or by someone who has been delegated by either of them.<sup>37</sup> Moreover, the legislator already has a sure solution to the problem of a marriage invalidly celebrated due to the lack of the faculty to assist, namely, the *sanatio in radice* (c. 1163, §1). In any case, the number of marriages with a *lack of form* is much, much greater than marriages that are invalid due to defect of form. Altering the traditional understanding and application of the law on the supply of a faculty in common error will do nothing to resolve this larger issue, which is a pastoral problem for the whole Church.

Although c. 144 is included in c. 1108, §1 as an exception to the canonical form, it really is not a true exception. When the law delegates the faculty in a particular case of common error of fact or of law or in positive and probable doubt of law or of fact,<sup>38</sup> all the elements of the canonical form are then in place. The priest or deacon who had lacked the faculty to assist at this marriage now has it, and the marriage proceeds before him and two witnesses exactly as at all marriages celebrated according to the canonical form.

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<sup>37</sup> See L. WOLF, "Die Suppletion der fehlenden Traubefugnis gemäß c. 144 i. V. m. c. 1111—Quelle der Rechts(un-)sicherheit?" in U. KAISER, R. RAITH, and P. STOCKMANN (eds.), *Salus animarum suprema lex* (nt. 14), p. 453.

<sup>38</sup> Cf. TRIBUNAL OF THE ROMAN ROTA, c. STANKIEWICZ, 15 December 1992, in *ARRT Decisiones seu sententiae* 84 (1992), p. 670, no. 13.

## Conclusion

Over the years, many canonists, theologians, and pastors have expressed the wish that the requirement of the canonical form for the validity of marriage be abolished, not the least because of the very numerous marriages that are null due to its non-observance by indifferent Catholics.<sup>39</sup> Still, these concerns may continue to be outweighed by the pastoral and juridical advantages of the preparation for marriage and its liturgical celebration that result from the requirement of the form. If the legislator in the future wishes to maintain the present law, some slight adjustments to it would be recommended on the basis of this study.

1. In c. 1108, § 1, the phrase should be dropped mentioning the exceptions to the form (*et salvis exceptionibus de quibus in cc. 144, 1112, §1, 1116 et 1127, §§ 1-2*). The exceptions are already in the law; the reminder of them in c. 1108, §1 is unnecessary. Moreover, as this study has shown, this is not a taxative listing of the exceptions, and one of them (c. 144) is not really an exception since the canonical form is indeed observed when the faculty to assist is supplied by law.

2. It would be better to define the canonical form in c. 1108, §1 as marriages that are contracted before *a qualified witness* and two other witnesses, in place of “the local ordinary or pastor or a priest or deacon delegated by either of them.” The qualified witnesses are then identified in subsequent canons (1109-1112). This change would make it clear that the canonical form is in fact observed even when a lay person lawfully assists at the marriage and asks for and receives the manifestation of the parties’ consent in the name of the Church. The lay person serves exceptionally as a qualified witness (akin to an extraordinary ministry), but he or she performs the same function as the clerical qualified witnesses, so there is no reason for the law to consider this as an exception to the form.

3. Finally, one might well question whether, in light of the principle of subsidiarity and the divine law powers of the diocesan bishop, that the requirements (for liceity) of c. 1116 are truly still necessary, namely, that the bishop may not delegate a lay person to assist at marriage without the previous favourable vote of the conference of bishops and the permission of the Apostolic See. It would suffice for the legislator to say that delegation of a lay assistant is lawful only when it is physically or morally impossible for a priest or deacon to assist. This would show greater respect for the bishop’s pastoral judgement and discretionary authority as well as allow him greater flexibility for unforeseen cases that may arise from time to time.

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<sup>39</sup> One recent proposal is to give conferences of bishops the authority to determine the appropriate canonical form in their society and culture. See R. JACQUES, “The Canonical Form of Marriage Revisited: Did the Decree *Ne temere* Outlast Its Usefulness?” in V. D’SOUZA (ed.), *In the Service of Truth* (cf. note 6), pp. 347-364.