

## Marriage Validity and the Rejection of Indissolubility

By Dorothea Ludwig-Wang, 15 February 2023

The indissolubility of marriage has been under attack for some time now around the world, including in formerly Christian societies. The vast majority of people in the Western world believe that if their marriage ends up being unhappy—often complaining that they simply fell out of love—, they can always divorce and remarry. Given the high number of even Catholic marriages that end in divorce, along with the ease of obtaining a declaration of nullity from a modern tribunal, one wonders whether a significant percentage of these marriages were in fact invalid due to the prevalence of theological errors regarding indissolubility. However, this is not necessarily the case, and simplistic conclusions must be avoided to protect the principle that the validity of marriage is presumed until the contrary is proven.

Canon 1099 of the 1983 Code of Canon Law states: “Error concerning the unity or indissolubility or sacramental dignity of marriage does not vitiate matrimonial consent provided that it does not determine the will.” Looking at canonical tradition, one finds that error that “does not determine the will” was referred to as “simple error” by canon 1084 of the 1917 Code, and it refers to error that “proceeds merely from intellectual apprehension, and has no formal condition or stipulation attached to it, nor a formal act of the will excluding a substantial feature of the marriage.”<sup>1</sup> Even if this error is the cause of the contract—which means that “the parties had the intention of contracting a union not in conformity with the notion of Christian marriage”<sup>2</sup>—this still does not necessarily indicate that the marriage is invalid.

For example, a man might believe that marriage is dissoluble in the event of adultery, which means that he commits an intellectual error. Perhaps he was hesitant to make the commitment to get married, but the thought of a potential divorce if adultery occurs renders him more willing to give his consent, comforted by the fact that he has a potential escape plan should things go wrong. In this case, the possibility of divorce becomes the cause for the contract, and yet the Church still requires that the marriage be given the favor of the law. As Bachofen explains, commenting on canon 1084 of the 1917 Code: “The mere opinion that marriage was dissoluble, even if combined with the intention to obtain a divorce in case of adultery or for other reasons, would not render a marriage thus contracted invalid.”<sup>3</sup>

However, if the man in the scenario above married *on the condition* that his marriage be dissoluble, and that he be able to obtain a divorce should his wife commit adultery, then he explicitly intends to contract a *dissoluble* union by a positive act of the will. If he had this intention, then his marriage is null, because his intellect provided his will with a defective formal object which he deliberately chose. If the existence of this intention prior to the wedding can be proven beyond a reasonable doubt before a tribunal, then a declaration of nullity may be given; however, due to the difficulty of proving this, it is quite possible that many marriages which are invalid in the internal forum cannot be definitively regarded as such in the external forum.

---

1 C. A. Bachofen, *A Commentary on the New Code of Canon Law, Volume V* (St. Louis, MO and London: B. Herder, 1921), 235.

2 *Ibid.*

3 *Ibid.*, 236-237.

The same principles apply with regard to the unity (exclusivity) and sacramental dignity of marriage, which canon 1099 also addresses. Marriages are exclusive by definition, because they are contracted by exchanging the *exclusive* and perpetual right over the body as regards the act suitable for the generation of offspring. A person may not believe that marriages are exclusive, and he may even be more willing to marry if the possibility of having other partners after marriage is entertained. But unless he explicitly wills a non-exclusive union and refuses to give consent unless the union be non-exclusive, his consent remains valid. The same is true for sacramental dignity: two baptized persons may not believe that marriage is a sacrament, but any marriage between two baptized persons is necessarily a sacrament. However, unless at least one party positively wills a non-sacramental marriage and refuses to give consent unless the marriage be non-sacramental, the marriage is valid, assuming that there were no other invalidating factors.

Not all those who deny the unity, indissolubility, or sacramental dignity of marriage contract marriage invalidly; nevertheless, the prevalence of theological error in modern times remains a problem, and such errors need to be corrected. It is to be lamented that Catholic tribunals today are too eager to grant declarations of nullity, often without strictly following proper procedures or properly considering the nuances and complexities of the law. Under such conditions, the Church must once again assert herself as a “sign of contradiction” (Lk. 2:34) against the world and its hedonistic and consumerist culture which fears commitment and seeks to treat indissoluble marriages as disposable commodities to be discarded whenever an individual desires to seek out newer and more novel pleasures.