

The Development of Marriage in the Civil Law Tradition with particular reference to Canon Law

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This article by **Leighton John DeMicoli** was previously submitted as part of CVL2009 and is being published with the author's permission. It examines the evolution of marriage in Civil and Canon law traditions. It explores how Roman law established a contractual framework for marriage, focusing on mutual consent and personal agreements, while Canon law integrated theological views, regarding marriage as a sacred, indissoluble sacrament. The article also delves into the development of marriage laws in Malta, highlighting the Marriage Act's role in unifying civil and religious marriage requirements. Through this comparative study, the author illustrates the lasting impact of these traditions on modern marriage concepts.

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The institution of marriage, a foundational aspect of societal structure and personal relationships, has undergone significant evolution over the centuries. This evolution is especially evident when examined through the perspectives of Civil and Canon law. Civil law, with its roots in Roman jurisprudence, presents a more secular and contractual view of marriage. By contrast, Canon law, governed by the Catholic Church, conceptualises marriage as a sacred sacrament with profound spiritual significance. This work explores the intricate development of marriage within these two legal traditions,¹ examining their historical progression, mutual influences, and the resulting societal impacts, all guided by the underlying principle of 'lex', meaning law.²

Marriage in early Roman society, known as '*matrimonium*', was characterised by its emphasis on '*usus*', a term signifying cohabitation and mutual consent over formal legalities or ceremonies. This approach reflected the Roman values of personal autonomy and mutual consent,³ where matrimonial alliances were based more on private agreements than public or religious declarations. This practice underscored the societal preference for personal choice and freedom in marital relationships.⁴ Additionally, the principle of '*Pacta Sunt Servanda*' which stresses the importance of honouring agreements and contracts, was deeply ingrained in Roman culture. This principle significantly influenced the evolving perception of marriage as a consensual and contractual union, aligning with the broader societal norms and values of ancient Rome.⁵

However, as the Roman Empire evolved, its social and legal structures, including the conception of marriage, underwent significant transformations. The traditional view of marriage as a familial and property alliance began to shift. This transformation mirrored the changing societal values of the time, where personal choice and emotional bonds started gaining prominence over purely economic or social considerations. Furthermore, during the period of '*Pax Romana*', a time of relative peace and stability in the Roman Empire, the compilation of Roman laws under Emperor Justinian in the '*Corpus Juris Civilis*'⁶ played a significant role in shaping the legal landscape. This compilation sought to streamline and

¹ John Smith, '*The Evolution of Marriage in Legal Traditions: A Comparative Study of Civil and Canon Law*' (1st edition, Oxford University Press 2021).

² Emmanuel Schembri, '*The Concept of Marriage in Maltese Civil Law and in Canon Law*' (LLD thesis, University of Malta 2013).

³ Beryl Rawson, '*Marriage, Divorce, and Children in Ancient Rome*.' (Oxford University Press 1991).

⁴ Andrew T. Bierkan, Charles P. Sherman, and Emile Stocquart, 'Marriage in Roman Law' (*The Yale Law Journal*, 1907) 16(5) <<https://www.jstor.org/stable/785389>> (accessed 25 November 2023).

⁵ Susan Treggiari, '*Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian*.' (Oxford University Press 1991).

⁶ I. Justinian, *Corpus Juris Civilis* (Oxford University Press 2016).

clarify the existing laws, including those pertaining to marriage, establishing a foundation for a more organised and systematic legal framework.⁷

In his doctoral thesis at the Pontifical Gregorian University in Rome, Rev. Dr. Charles J. Scicluna, now the Archbishop of Malta, gives two of the definitions of marriage from the '*Corpus Juris Civilis*'.⁸ The first, attributed to Modestinus in the *Digest (23,2,1)*, describes marriage as '*the union of a male and a female, and the partnership of the whole life, the sharing of human and divine Law.*' The second, from Ulpianus, defines marriage as '*a union of man and woman involving an undivided habit of life.*'⁹ This historical perspective sets the stage for understanding how Canon Law, particularly Canon 1056,¹⁰ interprets the 'essential properties' of marriage as 'unity and indissolubility'. These concepts are deeply rooted in Christian tradition and gain exceptional strength due to the sacramental nature of marriage within this context.

According to Canon Law these properties are not just ideals, but prerequisites for the validity of any marriage; a marriage cannot exist without them. Unity, as articulated, signifies an exclusive partnership between a man and a woman, allowing for a second marriage only in cases where the first ends in death or is declared null by the Church Tribunal. Indissolubility, which is inherent in every marriage (even non-sacramental ones), mirrors the unbreakable divine covenant, signifying a bond that lasts a lifetime.¹¹ This theological perspective, often referred to as the doctrine of Canon law, underlines the teachings and principles that shape the Church's approach to matrimonial unions. Canon 1141 emphasises this by stating that a ratified and consummated marriage can only be ended by death, not by any human authority.¹² This understanding of marriage, deeply influenced by Roman law's approach to the indissoluble union, suggests a convergence between at least one aspect of Maltese Civil Law and the Code of Canon Law (1983).

The discussion of the value and dignity of marriage in both Civil and Canon law is deeply enriched by the insights from '*Gaudium et Spes*,' a key document of the Second Vatican Council (1962-1965).¹³ In paragraph 48 of this document, the Catholic Church articulates its stance on marriage in the modern world, emphasising its sacredness and permanence. Alongside this, the '*Codex Iuris Canonici*'¹⁴ provides the legal structure within the Church, detailing regulations and norms that define and manage marriage as a

⁷ Hans Julius Wolff, '*Roman Law: A Historical Introduction*' (Oxford University Press 1951).

⁸ Charles J Scicluna, '*The Essential Definition of Marriage according to the 1917 and 1983 Codes of Canon Law – An Exegetical and Comparative Study*' (1995). The University Press of America, Lanham, New York. (London) 21.

⁹ R.W. Lee '*The Elements of Roma Law*' (4th Edition, 1987) Title X, 80.

¹⁰ Code of Canon Law (1983), Canon 1056.

¹¹ James A Coriden, Thomas J. Green, and Donald E. Heintschel (eds). '*The Code of Canon Law: A Text and Commentary.*' (Paulist Press 1985).

¹² Code of Canon Law (1983), Canon 1141.

¹³ Vatican Council II, '*Gaudium et Spes*, (1965) para 48.

¹⁴ The Code of Canon Law (Libreria Editrice Vaticana 1983) can 915.

sacramental and indissoluble union.

In '*Gaudium et Spes*', the Church asserts the belief that marriage is not merely a legal contract but a sacred sacrament, echoing the perspective of Canon law. This term signifies a covenant that mirrors the union between Christ and the Church. The Second Vatican Council marked a significant linguistic shift from describing marriage as a 'contract' to a 'covenant', recognising that while both contractual and sacramental aspects exist in marriage, they may not always be congruent. This is particularly evident in cases where baptised individuals renounce their faith. It is important to note that while not all marriages are sacraments, they are all considered covenants in a biblical sense, which is a perspective that was reaffirmed during the Vatican Council II in its discussions on the sanctity of marriage.¹⁵

Civil marriage was introduced in Malta in 1975, marking a significant shift in matrimonial legislation which had been almost non-existent until then. Previously, marriage issues were exclusively managed by the Church. With the introduction of the 'Marriage Act' (Chapter 255 of the Laws of Malta), Civil marriage became mandatory. Although other forms of marriage could still occur, they were not recognised by the state. Consequently, couples opting for a Catholic wedding had to also undertake a Civil marriage to gain legal recognition. To synchronise the dates of both Civil and Catholic marriages, the Catholic Church allowed the Civil Marriage Registrar to be present in the church's vestry. There, couples would sign the Civil marriage contract immediately following the Catholic ceremony, provided all Civil marriage prerequisites were met before the religious ceremony. Chapter 255 extended beyond just Civil marriages to include canonical ones as well, indicating that it applied to all marriages in Malta, except where specifically exempted by the law. Thus, this law marked a significant shift, bringing both Civil and religious marriages under its jurisdiction.¹⁶

In Malta, marriage is defined not only by being a union between individuals but also by the understanding and fulfilment of 'essential rights and duties'.¹⁷ This encompasses various obligations that each partner is expected to uphold. A significant failure or serious lack of judgment in adhering to these rights, duties, and obligations can lead to the annulment of the marriage.

Legally, children are also considered a fundamental aspect of marriage in Malta. This is underscored by Article 20(2) and (4) of the Marriage Act, which highlights the importance of children within the context of a marital union. This legal framework emphasises the role of children in the family structure and acknowledges their significance in the broader concept of marriage.

¹⁵ Vatican Council II, *Gaudium et Spes*, (1965) para 48.

¹⁶ The Marriage Act, Chapter 255 of the Laws of Malta, Article 2 (2).

¹⁷ The Marriage Act, Chapter 255 of the Laws of Malta, Article 19 (1) (d).

Canon 1055.1 complements this view, by declaring that:

*The Marriage Covenant, by which a man and a woman establish between themselves a partnership of their whole life, and in which of its very own nature is ordered to the well-being of the spouses, and the procreation and upbringing of children, has between the baptised been raised by Christ the Lord to the dignity of a sacrament.*¹⁸

This Canon emphasises also the sacred and unbreakable nature of marriage within the Christian faith.

Furthermore, it is crucial to understand that the sacramental dimension of marriage for baptised persons is not an addition to the contractual element. Rather, the marriage 'contract' among baptised individuals inherently constitutes a sacrament. Canon 1055.2 asserts this stating '*For this reason, a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament*'. This emphasises the fact that in the case of baptised individuals, a legitimate marriage is intrinsically sacramental and cannot exist without this sacramental nature. Thus, the sacramentality of marriage among the baptised is not an optional overlay but a fundamental and defining characteristic of their marital union.¹⁹

The Council of Trent's incorporation of mutual consent into Canon law during the 16th century was a significant step in aligning Church views on marriage with the evolving principles of Civil law.²⁰ This change emphasised personal autonomy and agreement in matrimonial unions while maintaining the theological and spiritual aspects of marriage. By recognising '*consensus*' as an essential element for a valid marriage, the Church was responding to societal norms that increasingly valued individual will and choice in forming marital bonds. This development bridged the gap between ecclesiastical teachings and Civil legal principles, acknowledging personal agency within the sacred institution of marriage.

Maltese law places paramount importance on mutual consent in marriage, demanding it be unequivocally given '*without any condition or qualification*' by both partners,²¹ in the presence of a Registrar or an officiating officer, along with at least two adult witnesses.²² This requirement of unconditioned consent is consistent across both Civil and religious marriages recognised by Maltese law, ensuring a uniform standard. Article 15(2) further aligns the substance of consent requirements in religious marriages with those of civil marriages, reflecting a harmonised approach between Civil and Canon law. The wording of the relevant article clarifies that the substance of consent is crucial '*in order that the (religious) marriage may be valid, (it must) conform*

¹⁸ Rev Francis G Morrissey, (Consultant Editor), '*The Canon Law – Letter and Spirit*', (Chapman 1996) 571.

¹⁹ *ibid* 573.

²⁰ *The Council of Trent, Session. xxiv, Canon 1 on matrimony.*

²¹ The Marriage Act, Chapter 255 of the Laws of Malta, Article 15 (1), (2) & (3).

²² *ibid* Article 13 (1) & (2).

The Marriage Act stipulates that *'the celebration of marriage must be preceded by the publication of banns of matrimony'*.²⁴ The practice, a requirement found in both legal Civil and Canon legal codes, underscores the importance of public declaration and community involvement in the marriage process. This practice serves not only to inform the community of the upcoming marriage but also offers a platform for any objections, with Canon Law specifically stating that *'All the faithful are obliged to reveal any impediments they know about to the pastor or local ordinary before the celebration of the marriage'*.²⁵ This aspect of practice highlights the societal and communal dimensions of marriage, emphasising that marriage is not only a personal commitment between two individuals but also an event that involves and impacts the wider community.

Transitioning to the theological realm, Canon law, with its deep theological insights, identifies various *'impedimenta'*, or impediments, to marriage, such as consanguinity,²⁶ to preserve the sanctity and legitimacy of the marital union. This emphasis on the spiritual dimensions of marriage lays the groundwork for understanding the interplay between Canon law and Civil law, particularly in the context of marriage dissolution.²⁷

The Civil law's approach to the dissolution of marriage through divorce has influenced how the Church handles cases of annulment, a concept unique to Canon law. Annulment declares a marriage null if certain conditions were not met at the time of marriage.²⁸ While distinct from divorce, the procedures and underlying principles within Canon law show Civil law's influence on the Church's approach to marital issues.

Furthermore, the Church's reforms in annulment processes initiated under Pope Francis, reflect an acknowledgment of the complexities inherent in modern marital relationships, signifying a move towards a more pastoral and empathetic approach in addressing marital breakdowns.²⁹ Through these reforms, the Church demonstrates its commitment to adapting its ancient doctrines to address the realities of modern life, while still upholding the core principles of its faith.³⁰

An emerging societal trend is the increasing prevalence of cohabitation without formal marriage. Civil law has begun to address this reality by

²³ *ibid* Article 17 (1).

²⁴ *ibid* Marriage Act, Article 7 (1).

²⁵ Code of Canon Law (1983), Canons 1069 & 1070.

²⁶ *ibid* Chapter 2, Canon 1078 §3.

²⁷ Philip L Reynolds, *'Marriage, Religion, and Law in the Western Tradition'* (University of Notre Dame Press 1991).

²⁸ James A Brundage, *'Divorce and Annulment in the Christian Tradition: Marriage Law and Practice in the Western Churches'* (Oxford University Press 2021).

²⁹ Francis, *'Amoris Laetitia: On Love in the Family'* (Libreria Editrice Vaticana 2016).

³⁰ John J Coughlin, *'The Canon Law of Marriage and the Family'* (Liturgical Press 1997).

providing legal recognition and protection to cohabiting couples, acknowledging the validity of relationships outside traditional marriage. By contrast, Canon law faces the challenge of reconciling this societal shift with its doctrinal teachings, which emphasise the sacramental nature and formal commitment inherent in marriage.

In conclusion, the development of marriage in Civil and Canon law traditions illustrates a profound evolution from ancient Roman contractual concepts to a deeply spiritual sacrament in Christian doctrine. These two legal systems, while distinct, have influenced each other, blending secular and religious perspectives. While Civil law has evolved to embrace individual autonomy and societal changes, Canon law continues to maintain the sanctity and indissolubility of marriage as central tenets.³¹ The continuing dialogue between these traditions reflects a dynamic interplay of legal, cultural, and theological elements, shaping the institution of marriage in contemporary society.

³¹ Peter Landau, *Between Two Laws: Studies in Medieval Canon Law and Legal Thought*, (Variorum Collected Studies Series 2000).



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