by or against clergy were generally heard by the consistory court of the bishop, presided over by the bishop himself or by his principal official. These courts operated with sophisticated rules of procedure, evidence, and equity; they had a battery of sharp spiritual weapons on hand to enforce their judgments and to put down their secular rivals. Cases could be appealed up the hierarchy of church courts, ultimately to the papal rota. Cases raising novel questions could be referred to distinguished canonists or law faculties called assessors, whose learned opinions (*consilia*) on the questions were often taken by the church courts as edifying if not binding.[65]

The church's canon law of marriage was the supreme law of marriage in much of the West from 1200 to 1500. Temporal laws of marriage—whether issued by imperial, royal, customary, urban, feudal, or manorial authorities—were considered supplemental and subordinate. In the event of conflict, civil courts and councils were to relinquish their jurisdiction over marriage to church courts and councils. The church could not always make good on its claim to exclusive jurisdiction and peremptory power over marriage. In polities governed by strong kings or dukes and weak bishops, civil authorities often enjoyed concurrent jurisdiction over marriage—doubly so when the papacy and church leadership came to be wracked with scandal in the fourteenth and fifteenth centuries. But as a sacrament, marriage was at the heart of the church's jurisdiction, and the canon law of marriage was pervasive and powerful.

Engagements and Marriages

The medieval canon law included complex and comprehensive rules to govern the formation and dissolution of a marriage. The canonists distinguished two types of contracts: contracts of engagement and contracts of marriage—betrothals (*sponsalia de futuro*) and espousals (*sponsalia de praesenti*), as these two contracts were historically called. An engagement contract or betrothal was a promise to be married in the future: "I, John, *promise to take you*, Mary, to be my wife." A marriage contract or espousal was a promise to marry here and now: "I, John, *now take you*, Mary, to be my lawfully wedded wife."

Neither the engagement nor the marital contract required much formality to be valid and enforceable at medieval canon law. Parties were required simply to exchange these or similar formulaic words—or where parties were mute, deaf, or incapable of de facto exchange, some symbolic equivalent thereof. Parties could add much more to either contract. They could attach conditions. They could seek their parents' consent. They could draw on witnesses. They could have a wedding in church or at home, and a public celebration thereafter. They could seek the counsel and blessing of a priest. But none of this was required at medieval canon

65. See, e.g., John T. Noonan Jr., *The Power to Dissolve: Lawyers and Marriage in the Courts of the Roman Curia* (Cambridge, MA: Harvard University Press, 1972); Rudolf Weigand, "Zum mittelalterlichen kirchlichen Ehegerichtsbarkeit: Rechtsvergleichende Untersuchung," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 67 (1981): 218–47.

law. As both the theologians and canonists of the day had made clear, a private voluntary exchange of promises between a fit man and fit woman of the age of consent was a valid and enforceable marriage at medieval canon law—and this was doubly true if the parties had consummated their vows and the woman was now pregnant. Clandestine or secret marriages, contracted without the involvement of any third parties, were perennially frowned upon and could be occasionally prohibited by unusually firm and severe church courts.[66] But they were generally considered to be valid marriages, with the marital promises implied and imputed to the parties. Concubinage was a more problematic category for canonists. While immoral and illegal, it was such a widespread practice that most canonists before the fifteenth century tended to view a man's long-standing cohabitation with a concubine, featuring "marital affection," as a form of clandestine marriage that could be later ratified through a formal marriage ceremony. Here, too, marital contracts were imputed to the couple, and marital rights and duties attached.[67]

Impediments to Engagement

Not all parties were free and fit to make such engagement and marital promises, however, and not all such promises had to be enforced or could be enforced. The parties needed to have the freedom, fitness, and capacity to marry each other—*ius conubium*, "the right to marry," as the classical Roman lawyers had put it. Certain relationships or experiences could disqualify the parties from engagement and marriage, altogether or at least with each other. Certain actions or conditions discovered after the exchange of promises could, and sometimes had to, lead to the dissolution of these promises.

These disqualifying and disabling factors were called impediments. Impediments provided the two parties, and sometimes third parties as well, with grounds to seek annulment of the engagement or marriage contract. An annulment was an order by a church court or a qualified religious official that declared the engagement or marital contract to be null and void and the relationship between the parties dissolved. A declaration of annulment meant that the engagement or marriage never formally existed at law; it was never a legally binding union, however contrary to fact that might appear. In cases involving serious impediments, even fully consummated long-standing marriages that had yielded children could be annulled.

The late medieval canon law recognized a variety of impediments to the engagement contract. Although canonists differed widely in emphasis and in nomenclature, most cited fourteen impediments to engagement: (1) infancy, where one or both parties were below the age of consent at the time they exchanged promises; (2) precontract or polygamy, where either party was already betrothed

66. See Joyce, *Christian Marriage*, 103–46.

67. See Brundage, *Law, Sex, and Christian Society*, 206–7, 225–26, 297–300, 341–33, 369–70, 441–47.

clerical celibacy was confirmed. The spiritual superiority of celibacy and virginity to marriage was underscored. Medieval canon law impediments to betrothal and marriage, and traditional prohibitions against marriage in certain seasons were confirmed. The church's power to grant dispensations from impediments was confirmed. Divorce meant only separation from bed and board, with no right of remarriage. Ecclesiastical judges were to enjoy exclusive marital jurisdiction.[80]

In the same decree *Tametsi*, the Council of Trent also instituted several reforms to put down abuses that "experience teaches" have crept into the church. In an effort to curb the "evil" of clandestine marriages, the church sought to apply a "more efficacious remedy," based on earlier conciliar and patristic teachings. Minor children—who were above the age of consent, but below the age of majority—were to procure the consent of their parents to marry. Local parish priests were to announce the banns of marriage of a prospective couple on three successive festival days, forgoing such announcements only if "there should be a probable suspicion that a marriage might be maliciously hindered." Betrothed parties were to postpone cohabitation until after their wedding. Three days before consummation of their marriage, they were to make full and "careful" confession in the sacrament of penance and to "approach most devoutly the most holy sacrament of the Eucharist." Weddings were to be contracted in the church before a priest and "in the presence of two or three witnesses"—save during the seasons of Lent and Advent, when marriage was forbidden. Failure to comply with these requirements was a great sin, which "shall at the discretion of the ordinary [priest] be severely punished." And if the marriage contract was not consecrated by a priest, it was deemed automatically "invalid and null," and the parties subject to spiritual and temporal sanctions. If the marriage was contracted properly, the priest was to record the names of the couple and their witnesses in the local parish register.[81]

To remedy some of the abuses of marital impediments and of dispensations from the same, the council also instituted a number of changes. Baptized parties were to have only one godfather or godmother, with whom marriage was prohibited and whose name was to be recorded in the local parish register. The impediment of public honesty (which could preclude marriage to and of a nonvirgin) was removed. The impediment of affinity (which precluded marriage to the relatives of a person with whom one had intercourse) was limited to relatives only in the second degree. Dispensations from impediments could be granted retroactively (allowing consummated marriages to stand) only if the parties had innocently violated these impediments. Persons who consummated their marriages in knowing violation of an impediment were subject to severe punishment and foreclosed from any dispensation.[82]

80. Canons 1–12, in ibid., 181–82. See also "Decree concerning Reform" (November 11, 1563), chap. 20, in ibid., 211, on matrimonial jurisdiction.

81. Chaps.1, 10, in ibid., 183–85, 189–90.

82. Chaps. 2–5, in ibid., 185–87.

marriage—whether religious, social, or contractual—does not capture the full nuance of this institution. A single forum—whether the church, state, or the household itself—is not fully competent to govern all marital questions. Marriage demands multiple forums and multiple laws to be governed adequately. American religious communities must think more seriously about restoring and reforming their own bodies of religious law on marriage, divorce, and sexuality instead of simply acquiescing in state laws. American states must think more seriously about granting greater deference to the marital laws and customs of legitimate religious and cultural groups that cannot accept a marriage law of the common denominator or denomination.[1]

Second, the Western tradition has learned to distinguish between betrothals and espousals, engagements and weddings. Betrothals were defined as a future promise to marry, to be announced publicly in the local community and to be fulfilled after a suitable waiting period. Espousals were defined as the present promise to marry, to be celebrated in a public ceremony before civil and/or religious officials. The point of a public betrothal and waiting period was to allow couples to weigh the depth and durability of their mutual love. It was also to invite others to weigh in on the maturity and compatibility of the couple, to offer them counsel and commodities, and to prepare for the celebration of their union and their life together thereafter. Too long an engagement would encourage the couple to fornication. But too short an engagement would discourage them from introspection. Too secret and private a marriage would deprive couples of the essential counsel and gifts of their families and friends. But too public and routinized a marriage would deprive couples of the indispensable privacy and intimacy needed to tailor their nuptials to their own preferences. Hence the traditional balance of engagement and wedding, of publicity and privacy, of waiting and consummating.

The modern lesson in this is that we must resist collapsing the steps of engagement and marriage, and restore reasonable waiting periods between them, especially for younger couples. Today in most states, marriage requires only the acquisition of a license from the state registry, followed by solemnization before a licensed official—without banns, with little waiting, with no public celebration, without notification of others. So sublime and serious a step in life seems to demand a good deal more prudent regulation than this. It may well not be apt in every case to invite parents and peers, ministers and magistrates to evaluate the maturity and compatibility of the couple. Our modern doctrines of privacy and disestablishment of religion militate against this. But especially in the absence of such third parties, the state should require marital parties themselves to spend some time weighing their present maturity and prospective commitment. A presumptive waiting period of at least ninety days between formal engagement and

1. Joel A. Nichols, ed., *Marriage and Divorce in a Multi-Cultural Society: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge: Cambridge University Press, 2012); Rex Ahdar and Nicholas Aroney, eds., *Shari'a in the West* (Oxford: Oxford University Press, 2010).