

# Indissoluble and Valid Marriage in the Roman Catholic Church and Anglican Church of Southern Africa: A Canonical Review

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## Abstract

This article is based on a master's research undertaken at St Augustine College of South Africa, Johannesburg from 2017 to 2019. The study sought to compare and contrast the concept of marriage indissolubility in the Roman Catholic Church and Anglican Church of Southern Africa (ACSA). Canon law is well established as a field of study in the Roman Catholic Church and is documented in the 1983 Code of Canon Law of the Latin Church (*Codex Iuris Canonici-CIC/83*). However, there has been limited study of canon law in the Anglican Church. The study of canon law in the Anglican Church has developed over the years since it was banned at the English Reformation in the 16th century. The article seeks to demonstrate similarities and differences in the nature of marriage indissolubility and validity in the Roman Catholic Church and the ACSA. It will focus on the jurisprudence of the 1983 Code of Canon Law of the Latin Church and canon 34 of the ACSA.

**Keywords:** canon 34; Anglican Church of Southern Africa (ACSA); 1983 *Code of Canon Law*; Latin (Roman Catholic) Church; marriage; indissolubility; validity

## Introduction

Law is a system of rules that are enforced through social institutions to govern behaviour (Robertson 2006, 90). Marriage is an institution that is regulated both by canon law and secular law in many countries. The church is a repository of the doctrinal teaching on marriage as sacred and indissoluble, and not only a legal contract. As the church in southern Africa wrestles with a number of marriage pastoral situations, it is important



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to give guidance to the clergy of the Roman Catholic Church<sup>1</sup> and the Anglican Church of Southern Africa (ACSA)<sup>2</sup> with tools to deal with these issues, since canon law is a broad topic to which seminary students of both churches have limited exposure. Furthermore, there is limited academic literature that is available in the context of the ACSA's teaching and practices in canon law for marriage, except for the writings of Norman Doe and some of the work of the Anglican Canon Law Council of Southern Africa. On the other hand, the magisterial teaching of the Roman Catholic Church on marriage spans more than two millennia to the current papacy of Francis, whose major contribution to the Roman Catholic Church's teaching on marriage is premised on mercy, as reflected in his Apostolic Exhortation *Amoris Laetitia* (Francis 2016, 51). A comparison of marriage law in both traditions is broad and complex because the Anglican Communion as a whole, unlike the Roman Catholic Church, does not have a centralised canon law of its own. However, the clergy and laity of both churches need to have some knowledge of canon law on marriage, since interdenominational marriages are common between these traditions in southern Africa.

In the last decade, the teachings of the Roman Catholic Church on marriage were highlighted in the media during the 2014 and 2015 "Synods of Bishops on Marriage and the Family" held in Rome, and also during the 2015 Irish referendum on same-sex marriage. On the other hand, the royal wedding of Prince Harry and Meghan Markle at St George's Chapel, Windsor, in May 2018, drew attention to the position of the Church of England and by extension ACSA on the doctrine of the indissolubility of marriage. This article is an attempt to compare and contrast the canonical position of the Roman Catholic Church and ACSA on marriage indissolubility and validity. There are two broad issues that will be discussed in this article. Firstly, the article will examine the

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- 1 The Roman Catholic Church is a member of the Catholic Church, a communion of churches (*communio Ecclesiarum*) comprising of 24 churches, one Latin and 23 Eastern i.e., the Latin (Western) rite that is *sui iuris* (of its own right) in accordance with the norm of the law as well as 23 Eastern Churches *sui iuris* that include six patriarchal churches (canons 55–150 of *CCEO/1990 Code of Canons of the Eastern Churches*), four major archiepiscopal churches (Canons 151–154 of *CCEO*), four metropolitan churches (canons 155–173 of *CCEO*), nine other churches that have acquired autonomy (canons 174–176 of *CCEO*), and three Eastern communities without hierarchies (Burke 2014, 300).
  - 2 The Anglican Church of Southern Africa (ACSA) is an autonomous and separate province of the Anglican Communion that was promulgated as the Church of the Province of South Africa in 1870, with only five dioceses in South Africa, but has to date expanded to 26 dioceses in southern Africa, comprised of eSwatini, Lesotho, Namibia and South Africa, together with the South Atlantic Island of St. Helena. On 24 September 2021, two Portuguese-speaking countries namely, Angola and Mozambique that were part of ACSA created a new province called *IAMA (Igreja Anglicana de Moçambique e Angola* or the Anglican Church of Mozambique and Angola). ACSA is in full communion with, but in no way subordinate to, the Church of England, and in 2006 it changed its name to the Anglican Church of Southern Africa (Davenport 1997, 51–67). It is headed by the Primate or Metropolitan of the See of Cape Town (currently Archbishop Thabo Cecil Makgoba). It is part of an 80-million-strong association of 52 regional and national churches in 163 countries consisting of 42 provinces, four united churches and six other churches of the Anglican Communion (<http://anglicancommunion.org>. Accessed December 13, 2021).

issue of acceptance of marriage indissolubility in each church tradition. Thereafter, it will analyse what each church teaches about what constitutes a valid marriage.

## Indissolubility of Marriage Recognised in the Roman Catholic Church and Anglican Church of Southern Africa

### **Roman Catholic Church**

The 16th century Council of Trent was convened by Pope Paul III on 22 May 1542 to address the issue of Protestantism (Lossky 1991, 1019). One of the issues that were discussed in this council was the sacrament of marriage. The 24th session of the council resolved to uphold the traditional doctrine of the indissolubility of marriage (Peschke 1997, 482). It promulgated two canons on marriage indissolubility (canon 5 and canon 7). It was here that the term “indissolubility” was first used in the context of the seven sacraments in official teaching when the doctrine and canons on the sacrament of marriage were discussed (Council of Trent 1563, 2.753–755). The council declared that Adam pronounced marriage to be an indissoluble and a perpetual bond (*nexum*) according to Genesis 2:23–24. It further reaffirmed the biblical teaching that a spouse could not break the bond of marriage and that it could only be dissolved on the grounds of infidelity by one of the spouses (Olsen 1971, 24). Although marriage as a symbol of Christ and the church can be traced back to the Scriptures, absolute indissolubility as one of the elements of marriage has been in place only since the 12th century (Alesandro 2015, 23). Thus, from the beginning, the church has decreed the indissolubility of marriage as a direct requirement of God and the obvious principle of natural law (Twomey 1982, 36).

Ordinarily, a marriage is dissolved by the death of one of the spouses and extraordinarily when dissolution is recognised as such by a competent ecclesiastical authority while both spouses are still alive. The Roman Catholic Church has comprehensive norms on marriage. Before the 12th century, the Roman Catholic Church considered the indissolubility of marriage as the moral demand associated with disciplinary laws. Since the 12th century, Catholic theologians have described marriage as a sacrament (López-Trujillo 2006, 297). St Pope John Paul II (1981, 13) stressed in the Apostolic Exhortation *Familiaris Consortio* the sacramental nature of marriage when he said, “spouses are bound to one another in the most profoundly indissoluble manner.” Sheehy (1995, 574) notes that although the baptism of both partners is a prerequisite for the capacity to contract a sacramental marriage, the 1983 Code of Canon Law of the Latin Church makes reference to different types of marriages, namely a natural law (bond) marriage; a sacramental marriage (canon 842 § 1 and canon 1055 of *CIC/83*); and a ratified and consummated marriage (canon 1061 § 1 of *CIC/83*). However, all three types of marriages are considered intrinsically indissoluble. The intrinsic indissolubility of marriage has its origin in the Augustinian doctrine of the *bonum sacramenti* (Grochowski 1973, 38).

According to canon 1056 of *CIC/83*, indissolubility is an essential property of marriage and is considered as good for the spouses, for children, for the church and for the whole of humanity (*cf.* canon 1056 of *CIC/83*). The 1983 Code of Canon Law of the Latin Church (see Beal et al. 2000) repeats the statement made in canon 1013 § 2 of the 1917 Code of Canon Law of the Latin Church regarding the properties of marriage that had been defined by the Council of Trent (Schröder 1941, 180). Miralles (1996, 87) strongly believes that in order to achieve the good of the children, indissolubility in the conjugal bond is necessary. Marriage before becoming what it is in life and in love should be understood as a juridical bond, and it is also a unity of natures (Hervada 2000, 272). Canon 1134 of the *CIC/83* states: “From a valid marriage there arises between the spouses a bond which by its nature is perpetual and exclusive.” This canon refers to all marriages, whether between Christians and non-Christians.

Alesandro (2015, 17) states that the current teaching of the Roman Catholic Church on marriage breakdown is that marriage cannot be dissolved by the single will of either party (partner) or by their combined wills (mutual consent), since it is a sacrament (intrinsic indissolubility, canon 1057 of *CIC/83*).<sup>3</sup> Furthermore, no human power or external agent can dissolve marriage other than the Roman Pontiff in his exercise of vicarious power in certain cases (extrinsic indissolubility, canon 1056 of *CIC/83*). The Roman Catholic Church emphasises the point that the initial union is indissoluble. Canon 1141 of *CIC/83* states that “a marriage that is *ratum* (valid and sacramental) *et consummatum* (the validly married spouses have engaged in a conjugal act suitable for procreation according to canon 1061 of *CIC/83*) can be dissolved by no human power and by no cause, except death.” The individual who wishes to keep communion with the Roman Catholic Church must seek its consent for remarriage according to certain conditions through the process of annulment.

An annulment is the Roman Catholic Church’s colloquial term for the declaration of a “decree of nullity,” a determination that a sacramental marriage did not take place on the wedding day of the couple in question because of an impediment that prevented one or both parties from giving full consent to the marriage. The official church teaching is that an annulment is not necessarily the so-called “Roman Catholic divorce” or that the marriage in question failed, but that the marriage never existed in a sacramental sense. Any Roman Catholic member granted an annulment can be remarried in the church and any Roman Catholic member who does not receive one, cannot. The annulment of marriage is fraught with challenges, firstly, from the consequences of the church’s refusal to accept the jurisdiction of civil courts regarding decrees of divorces by canon 1141 of *CIC/83*, and secondly, from the fact that many divorced couples are

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3 Reason occupies a very important place in the Roman Catholic tradition. It is evident in Jesus’ teaching on marriage indissolubility in the Gospels (Mark 10:11–12, Matthew 5:31–32, and Luke 16:18) that he was intent on protecting the sacred relationship of marriage from sabotage by any third party. Jesus was also determined to protect the relationship from any whimsical and sinful destruction of the marriage bond by either one of the partners, thus protecting the innocent party from the consequence of such a sin.

unable to bring themselves to request the church for an annulment; and therefore, they are excluded from concluding a valid Roman Catholic remarriage (Stuart 1994, 16). The Roman Catholic Church's present teaching on divorce and remarriage is that if a couple divorces and subsequently one of them marries a new partner without having been granted an annulment, that person is considered to have broken the sacred bond of marriage, which is unbreakable and indissoluble. In order to obtain a declaration of nullity, one or both parties must approach a Roman Catholic marriage tribunal. This consent becomes critically important if a partner, after obtaining a divorce decree from a secular court, wishes to contract another marriage within the Roman Catholic Church. Although all valid marriages are intrinsically indissoluble, not all of them have absolute extrinsic indissolubility (Kowal and Woestman 2008, 9).

### **The Anglican Church of Southern Africa**

There are many valid theological understandings of marriage in the Anglican Church as sacrament (Anglo-Catholic), ordinance, and covenant or as a form of biblical contract. Canon B 30(1) of the Church of England regards marriage as a sacrament and upholds its sacredness in the order of grace (*Canons of the Church of England* 2021, 51). However, Article 25 of the *Thirty-Nine Articles of Religion* (1562) states that marriage (and other five sacraments, except Baptism and Eucharist) "are not to be counted for Sacraments of the Gospel ... for that they have not any visible sign or ceremony ordained of God" (*Constitution and Canons of ACSA* 2017, 145). There seems to be a contradiction between canon B 30(1) of the Church of England and the *Thirty Nine Articles of Religion* with regard to marriage being a sacrament. Canon B 30(1) defines marriage as a "union permanent and life-long ... till death them do part ... to the exclusion of all others on either side" (*Canons of the Church of England* 2021, 51). This definition was reiterated by the 1998 Lambeth Conference through Resolution I.10. Traditionally, Anglicans consider marriage to be monogamous, heterosexual, exclusive and lifelong. The 1662 *Book of Common Prayer* describes marriage as an "honourable estate, instituted by God in the time of man's conscience, signifying unto us the mystical union between Christ and his Church" (Doe 1998, 284; *Book of Common Prayer* 1662, 183). The Anglican Church of Southern Africa considers marriage as one of the seven canonical sacraments mentioned in the Middle Ages (Schillebeeckx 1965, 128). However, the *Anglican Prayer Book* (1989, 457) states that Baptism and Eucharist are the "two great sacraments," while marriage is regarded as a "sacramental rite" in a confusing attempt to chart a middle road. For the purposes of the article, the view of marriage as sacrament will be adopted for ACSA.

Doe (1998, 272) states that marriage is one area of canon law that has undergone transformative changes in recent years, but there is no uniformity within the Anglican Communion. Each of the autonomous member churches, like ACSA, however, does have a canonical system. The Church of England has highly developed canon law. The Anglican Church of Southern Africa, like the Roman Catholic Church, also accepts both the absolute and relative indissolubility of marriage according to canon 34 of the *Constitution and Canons of ACSA*. Thabede (2012, 29) describes marriage as "the union

of a man and a woman as husband and wife according to the standard set out by God.” It is an exclusive bond, “no human being then must separate what God has joined together” (Mark 10:9). Thabede (2012, 29) further notes that the Preface of canon 34 of the *Constitution and Canons of ACSA* states that the church affirms that marriage, by divine institution, is a lifelong and exclusive union and partnership between one man and one woman. In other words, God’s divine intent was that marriage was to be lifelong, but God, being a realist, then gave grounds on which divorce could happen (God prescribed how a marriage could be dissolved). The Anglican Church teaches that a marriage can be dissolved through a divorce. Thereafter, following a clearly defined process of discernment that may involve several ecclesial figures, a marriage after divorce may be granted. There is a special service in the *Anglican Prayer Book* (1989:484-486) for a marriage after a divorce.

The earliest Anglican conversations and debates on marriage indissolubility and the issue of giving permission for the remarriage of divorced persons began because of pastoral concern for the status of the “innocent party” in a divorce (Nicholls 2010, 16). The doctrine of the indissolubility of marriage is problematic if one of the spouses finds themselves in an abusive relationship. They may not be able to leave the marriage because of its theological implication of permanence that is upheld by some in the Anglican Church. On the other hand, the “innocent party” may sustain permanent emotional or physical scars that would take long to heal. The doctrine of marriage indissolubility and the sacramental nature of marriage that is advocated by the Anglo-Catholic strand of Anglicanism then becomes problematic in these situations. In 1808, the Episcopal Church in the United States of America gave permission for the “innocent party” in a divorce to remarry. This was followed by the Anglican Church of Canada in 1967. In 1888, the Lambeth Conference maintained the indissolubility of marriage, though recognising the exceptive clause in St Matthew, and affirmed the prohibition of the remarriage of persons divorced for any other reason during the lifetime of the other party. However, there was a softening of this stance for the “innocent spouse,” though this was disputed, as an increasing emphasis on the indissolubility of the marriage covenant was reinforced within Anglicanism. The Lambeth Conference of 1920 reiterated the doctrine of the indissolubility of marriage.

## Validity of Marriage in terms of the Canon Law: Roman Catholic Church and ACSA

### **Roman Catholic Church**

The Roman Catholic Church recognises as valid the heterosexual civil unions between the unbaptised, and mixed marriages between the unbaptised and the baptised. It sees the unions between unbaptised as contractual, non-sacramental “natural” marriages. Moreover, if the couple has been baptised in a Christian tradition other than the Roman Catholic or Orthodox traditions, their marriage is also considered by the Roman Catholic Church to be a sacrament and so indissoluble by any civil authority once it has been consummated. The recognition by the Roman Catholic Church of non-Roman

Catholic baptisms was once regarded as a positive sign for ecumenism, but it had some strings attached. It means that marriages contracted between baptised non-Roman Catholic members are regarded as sacramental, in the full sense of the word, unless it can be proved otherwise, i.e., until the death of the other party and regardless of the circumstances of the marriage breakdown. The Roman Catholic Church has proceeded on the assumption that all marriages between baptised individuals are automatically sacramental, even if they belong to another Christian denomination such as the Anglican Church.

This is a common source of complications for a Christian (or Anglican) who was previously divorced and then remarried, and who subsequently wishes to become a Roman Catholic member or who wants to marry a Roman Catholic member. Because their non-Roman Catholic marriage is deemed still valid, any later marriage after divorce, including the one still on-going, is regarded as adultery. Moreover, someone living in a state of sin, which is implied here, cannot be received into full communion in the Roman Catholic Church. It does not matter that the party or couple acted in good faith. Not having been a Roman Catholic member at the time of their previous marriage, it probably never occurred to them that the Roman Catholic Church assumes jurisdiction over all marriages between individuals who have been baptised, regardless of where it was celebrated. Apart from divorcing their present partner, the only solution the Roman Catholic Church has is an annulment after conducting an official inquiry into the validity of the previous marriage to determine whether a church tribunal could conclude, after considering all the evidence, that the marriage was so flawed from the beginning as to be regarded null and void.

There are four instances where a valid marriage can be dissolved by the Roman Pontiff, namely unconsummated marriage; marriage of a new convert by the Pauline privilege; marriage in favour of the faith by the Petrine privilege; and the dissolution that the law offers to a polygamist at his conversion when he is unable to take on the first wife and may choose one from the others (canon 1148 § 1 of *CIC/83*). The Pauline privilege refers to the Roman Catholic Church's teaching and practice of recognising the dissolution of certain marriages contracted by two non-baptised persons, after the conversion of one of the parties, with the right to marry again (Woestman 2005, 33; also see canon 1143 § 1 of *CIC/83*). The Petrine privilege came into force as an extension of the Pauline privilege to address the situation where a Roman Catholic member intends to marry a person who was married before, but whose previous marriage was non-sacramental since only one party was baptised. Dissolution of marriage by virtue of the Petrine privilege is only granted by the pope, with or without the use of experts to authenticate documents (Kowal and Woestman 2008:92-128). This canonical situation is not covered in the 1983 Code of Canon Law of the Latin Church.

As a result of canon 1061 § 1 of *CIC/83*, this means that in the Roman Catholic Church, the principle of absolute marriage indissolubility is connected to three indispensable provisions: the baptism of both partners, the valid celebration of the marriage, and

finally, its consummation. If one of the three provisions is lacking, the indissolubility is no longer absolute and the marriage can be dissolved (Flatten 1987, 477–490). An individual who is bound by such a marital bond cannot validly marry another during the lifetime of their spouse (canon 1085 § 1 of *CIC/83*). Prior to the dissolution of marriages by the pope as the Vicar of Christ, the *ipso iure* (the law itself) dissolution of non-consummated marriages by the unilateral decision of one party to enter religious life was a reality in ancient times (canon 1142 of *CIC/83*). To civil or traditional unions between the unbaptised and mixed marriages, and between the unbaptised with the baptised (natural bond marriages), the church confers the characteristic of relative indissolubility (canon 1143 of *CIC/83*). The Roman Catholic Church recognises that these marriages are from the Creator and bear the imprint of permanence. The fact is that such marriages celebrated in secular settings are just as sacramental and so indissoluble in the eyes of God and the church. Therefore, the Roman Catholic Church, in its canonical tradition, recognises both absolute and relative indissolubility of marriage.

To be married validly in the Roman Catholic Church, a couple must meet certain conditions prescribed by the ecclesiastical law and must have undergone premarital counselling and preparation on the nature and obligations of marriage. The concept of invalidity *ab initio* refers to marriage annulments in the Roman Catholic Church: a marriage's validity or invalidity is considered to occur from the beginning. A common misunderstanding is that if the Roman Catholic Church declares a marriage to be null, the inference can be made that the marriage never took place. In actual fact, the church only recognises that the marriage that did take place was not valid from the beginning (Zwack 1983, 5–7). This idea can be ascribed to various causes: some actions result in invalidity, and some people may be incapable of contracting a valid marriage. The latter may be inherently incapable or they may enter marriage without the proper disposition. Although all marriages are initially presumed valid, the 1983 Code of Canon Law of the Latin Church recognises that some of them are not true marriages as understood by the church. Because of the presumption of validity of marriage, there is a process to declare a marriage invalid (canon 1060 of *CIC/83*). Canon 1058 of *CIC/83* enshrines the principle of freedom to marry, which everyone has unless prohibited by law. However, the natural right to marry can be limited by an impediment (canons 1083–1094 of *CIC/83*), defects of canonical form (canon 1108 of *CIC/83*) or invalid consent (canons 1095–1103 of *CIC/83*). Consent is an act of the will (canon 1057 § 2 of *CIC/83*); it involves the intellect and the will. For the consent to be a true act of the will, rational faculties need to be functional, free, and informed. A marriage is invalid on a specific ground (for a specific reason) and the defects of consent constitute the various ways that the intellect and the will may be defective.

The divine impediments include absolute, antecedent and perpetual sexual impotence (canon 1084 of *CIC/83*), the presence of a prior bond of marriage (*ligamen*) according to canon 1085 of *CIC/83*, and marriage between individuals related by blood in the direct line or to the second degree in the collateral line (consanguinity) according to



canon 1091 of *CIC/83*.<sup>4</sup> Impediments are categorised into two groups: divine impediments, and impediments of ecclesiastical law. All impediments under the 1983 Code of Canon Law of the Latin Church are invalidating. Some divine impediments cannot be dispensed, e.g., a previous bond, impotence or consanguinity in the direct line or in the second degree of the collateral line. Some ecclesiastical impediments can be dispensed by the supreme authority in the church, e.g., the impediment arising from sacred orders or from a public perpetual vow of chastity in a religious institute of pontifical rite; others can be dispensed by the diocesan bishop, e.g., non-age, disparity of cult, or consanguinity in the third or fourth degree. An impediment that can be proven in the external forum is public; if not, it is occult (see McKenna 2000, 67).

The ecclesiastical impediments include the following: under-age for marriage (canon 1083 of *CIC/83*); disparity of cult or difference of worship (canon 1086 of *CIC/83*); ordination to sacred orders (canon 1087 of *CIC/83*); public perpetual vows of celibacy in a religious institute (canon 1088 of *CIC/83*); the abduction of a woman with the intention of marriage (canon 1089 of *CIC/83*); the murder of a spouse with the intention to make a new marriage (canon 1090 of *CIC/83*); blood relations beyond the second degree in the collateral line (canon 1091 of *CIC/83*); affinity (in-law relationship in the direct line (canon 1092 of *CIC/83*); public propriety (canon 1093 of *CIC/83*); and a legal relationship (canon 1094 of *CIC/83*). Some African traditions neglect the fundamental issue of love as central to marriage, and this is evidenced by the custom of *ukuthwala* (wife abduction), which is prevalent in some parts of the Eastern Cape and KZN provinces in South Africa. This ancient African custom, particularly common among the Nguni, involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling a girl or young woman's family to endorse marriage negotiation and that she, in turn, will learn to love her husband in marriage.

Canon 1095 of *CIC/83* describes three significant groups of people who are incapable of marriage, namely: those who lack sufficient use of reason; those who lack due discretion of judgement regarding the essential obligations of marriage; and those who suffer serious psychological or psychiatric disorders resulting in their inability to assume the essential obligations of marriage. Moreover, the 1983 Code of Canon Law of the Latin Church recognises that a number of other individuals do not enter marriage validly, namely: those who are ignorant (canon 1096 of *CIC/83*); those who are in error (canon 1097 of *CIC/83*); those who commit fraud (canon 1098 of *CIC/83*); those who simulate their consent (canon 1101 of *CIC/83*); those who place conditions on their marriage (canon 1102 of *CIC/83*); those who enter marriage through force and fear (canon 1103 of *CIC/83*); those with an invalid proxy (canon 1105 of *CIC/83*); and the lack of the requisite age (canon 1083 of *CIC/83*). The minimum age for contracting a valid marriage is 14 years for girls and 16 years for boys (canon 1083 of *CIC/83*). However, for a licit marriage, only boys with a minimum age of 18 years and girls with

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4 An impediment is a canonical "obstacle" to a valid and licit celebration of a sacrament, which renders a person incapable of validly contracting a marriage (canon 1073 of *CIC/83*).

a minimum age of 15 are permitted to marry through the church. This is similar to the requirements of the current civil marriage law in South Africa (section 22 (1) of the Marriages Act 25 of 1961), which requires boys to be 18 years old and girls 15 for them to enter a valid marriage.

### **The Anglican Church of Southern Africa**

Canon 34 (4) (c) of the *Constitution and Canons of ACSA* (2017, 74) prescribes the following regarding a valid church marriage: that the parties have a right under secular law to contract a marriage; that both parties freely and knowingly consent to the marriage, without fraud, coercion, or mistake as to the identity of a partner or the mental condition of the other party; that the parties do not fall within the prohibited degrees of relationship; that the parties have attained the legal age of marriage; and where required in the case of minors, that their parents or guardians have consented to it. It is the view from the *Anglican Prayer Book's* liturgical text on the doctrine of the indissolubility of marriage that the Anglican clergy presents premarital counselling to the applicants so that they may clearly understand the church's position on marriage (*Anglican Prayer Book* 1989, 457). In case of remarriage, canon 34 (5) (a) of the *Constitution and Canons of ACSA* (2017, 76) states that the "bishop may issue Letters of Closure if satisfied that the applicant understands the church's teaching concerning marriage" and that "there is no prospect of re-establishing a true marriage relationship between the parties of the former marriage, and that a certificate of divorce, valid both in the country where it was issued and, in the diocese, has been produced by the applicant" (*Anglican Prayer Book* 1989, 76). In determining the matter, the bishop consults with a practising civil attorney or advocate and sometimes he or she refers it to the diocesan church tribunal.<sup>5</sup>

There are different teachings on divorce in the Anglican Communion. The Church of England has no provision in its legislation to declare the nullity of marriage but accepts civil law declarations of nullity. However, some provinces of the Anglican Communion, such as ACSA, operate a system for the formal ecclesiastical recognition of the civil annulment of marriage and in these cases, remarriage is permitted by the relevant authority or the bishop (Jones 2000, 93). The Anglican Church of Southern Africa teaches that civil divorce is accepted by church authorities on the basis of a written judgement from the bishop regarding the dissolution of marriage.

The Anglican Church of Southern Africa has elaborate canonical measures regarding the necessary ingredients of valid marriages and the recognition of marriages being invalid *ab initio*. Canon 34 (4) of ACSA provides for three exclusive grounds upon which a marriage may be declared invalid: forbidden degrees of kindred and affinity ((c)(i)(1)); an existing bond at the time of solemnisation of the new marriage ((c)(i)(2));

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5 The Anglican Church of Southern Africa has a system of church courts or tribunals for the enforcement of discipline and the formal and judicial resolution of ecclesiastical disputes at diocesan and provincial (Southern Africa) levels. These courts are established by the competent authority (the bishop or archbishop), administered by qualified staff, and exercise such authority over church members as conferred on them by law (see Doe 2012, 164–171).

and error of person ((c)(i)(3)). In addition, the invalidity of marriage may be upheld when it is established that any of the following existed at the time of the marriage: the absence of the formalities required by the civil authority ((c)(ii)(1)); either spouse is under-age ((c)(ii)(2)); lack of consent due to force or duress, insanity, mental illness, mental deficiency, alcoholic intoxication, drug influence, or ignorance ((c)(ii)(3)); undisclosed permanent impotence or permanent sterility by either party ((c)(ii)(4)); the existence of a concurrent valid contract ((c)(ii)(5)); undeclared pregnancy by the female party ((c)(ii)(6)); marriage contracted for unnatural reasons ((c)(ii)(7)); evidence that either party entered marriage while rejecting marriage as an exclusive and indissoluble union ((c)(ii)(8)); refusal to consummate the marriage or exclusion of the procreation of children ((c)(ii)(9)); and either of the unbaptised spouses (not being a catechumen) at the time of marriage is unwilling to regard marriage as binding in the Christian sense ((c)(ii)(10)).

## Points of Difference and Commonality between the Roman Catholic Church and ACSA

A comparison of impediments in both Roman Catholic and ACSA's canon law shows that some impediments are substantially identical; others, while found in both codes, have significant variations; and there are a few impediments that are unique to the 1983 Code of Canon Law of the Latin Church. It is the duty of the clergy in the Roman Catholic Church (canon 1066 of *CIC/83* and canon 1574 of *CIC/83*) and ACSA to show discretion as to the use of experts to prove the existence of some impediments of marriage such as impotence where medical experts are used.

The canons on marriage in the 1983 Code of Canon Law of the Latin Church and canon 34 of ACSA are based on natural law. As in the 1983 Code of Canon Law of the Latin Church, the list of grounds for invalidity in canon 34 of ACSA is exhaustive and exclusive. Comparison of the grounds for invalidity of marriage in both traditions points out areas of commonality and difference. For example, ordination and difference of religion are not impediments to concluding a valid marriage in ACSA, but homosexuality is. However, in the Roman Catholic Church homosexuality as an orientation is not *ipso facto* (by the fact itself) an impediment, but could result in invalidity if it were to become an overt way of life.<sup>6</sup>

The Roman Catholic doctrine forbids divorced and remarried people from receiving the Eucharist, because it can give rise to scandal, since the impression would be created that the church no longer upholds the indissolubility of marriage, and the faithful would be

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6 According to canon 1055 of *CIC/83*, marriage is "between a man and a woman"; it is, therefore, both heterosexual and monogamous. However, a non-practising homosexual could conceivably marry; should the orientation be hidden, the marriage could be declared null on the grounds of deceit; should it become an overt way of life, the marriage could be declared null on the ground of the person's inability to assume the essential obligations of marriage. It should be noted here that the Anglican Archbishop of Cape Town's Commission on Human Sexuality is looking at a possibility of giving ministers discretion to bless same-sex couples through the amendment of canon 34 of ACSA.

led into error and confusion.<sup>7</sup> On the other hand, ACSA grants the possibility of divorce and remarriage out of concern that the church might be compromised by failure to extend the ministry of reconciliation and healing to the faithful who desperately need it, as stated above.

## Conclusion

The Roman Catholic Church's doctrine of the indissolubility of marriage emanated from the Council of Trent, which resolved that the marriage bond cannot be broken either by the withdrawal of consent of the married spouses or by civil authorities. The Roman Catholic Church's magisterium and the 1983 Code of Canon Law of the Latin Church confirm the teaching of Trent. It also sees marriage as a sacrament that is a symbol of the mutually faithful covenant relationship between Christ and the church. The Anglican Church has no common understanding on the sacramental nature of marriage, but it teaches that marriage is a permanent and lifelong union between two parties. In general, the Roman Catholic Church is stricter than ACSA on divorce and remarriage. Furthermore, there is neither a Pauline nor a Petrine privilege in ACSA. A central point of agreement between the Roman Catholic Church and ACSA is that there is scriptural evidence that marriage is permanent, but both traditions have a different understanding of the dissolution of the bond. Both traditions also acknowledge the following characteristics of marriage: unity, monogamy and heterosexuality. In the Anglican Church, the question of marriage indissolubility depends on whether one is looking at the low-church or high-church (Anglo-Catholic) orientation of Anglicanism.

The main focus of comparison in this article was the understanding of what each church teaches about the indissolubility and validity of marriage. The Roman Catholic Church teaches that indissolubility is one of the two essential properties of marriage. Canon 34 of ACSA does not imply that marriage is an indissoluble bond. The understanding of marriage indissolubility in the Anglican Church does not simply mean a marriage can never be broken by any means due to human frailty. Both churches accept the absolute and relative indissolubility of marriage. Both traditions teach that although everyone has a right to marry, some people or certain groups of people are incapable of marriage or cannot contract a valid marriage for different canonical reasons. The canons of marriage in the 1983 Code of Canon Law of the Latin Church and canon 34 of ACSA discuss a list of these people who enter marriage invalidly. In some cases, the list of each church is similar and oftentimes it states different juridical impediments for marriage.

The Roman Catholic Church regards divorce as an essentially civil matter with no ecclesiastical effects. Furthermore, the annulment of marriage is possible because under certain conditions the church can dissolve natural, non-sacramental marriages. There are different teachings on divorce in the Anglican Communion. ACSA embraces the teaching that divorce is permissible on certain grounds and remarriage may be granted

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7 See John Paul II (1981, 11).

during the lifetime of the former spouse. There is a provision in both traditions for the divorce of spouses but the process of discernment is different. Remarriage in the Roman Catholic Church is possible after a declaration of nullity in a Roman Catholic tribunal. In ACSA, remarriage can be approved after a clearly defined consultative process that may involve various ecclesial figures, including a diocesan bishop.

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