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**THE NATURE OF MARRIAGE
AS PROPOSED IN THE *CODEX IURIS CANONICI*
AND IN THE *CODEX CANONUM ECCLESIAARUM ORIENTALIU*M**

by
Patrick J. CONNOLLY

A dissertation submitted to the Faculty of Canon Law,
Saint Paul University, Ottawa, Canada, in partial
fulfillment of the requirements for the degree of
Doctor of Canon Law

Ottawa, Canada
Saint Paul University
1995



Patrick J. Connolly, Ottawa, Canada 1995



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ABSTRACT

Thesis title: "The Nature of Marriage as Proposed in the Codex iuris canonici
and in the Codex canonum Ecclesiarum orientalium"

Author: Patrick J. Connolly, University of Ottawa, Ph.D., 1995

* * * * *

When one quickly glances at the new 1990 Oriental Code, one gets the impression that the marriage legislation is substantially the same as that found in the 1983 Latin Code. This cannot be surprising since the canon law on Christian marriage concerns a sacrament of the Church and therefore one would expect that it should be much the same throughout the Catholic Church, in the Western and in the Eastern Churches. However, because of the diversity of traditions, there are differences in theological approach and matters of discipline in respect of marriage. One such difference concerns the description of the nature of marriage in each Code.

This comparative study addresses a number of questions regarding the nature of marriage as proposed in the two legislations. What are the common elements in both Codes' descriptions of marriage's nature? Do both legislations fully reflect the teaching of Vatican II's Gaudium et spes? What precisely are the differences between the two Codes? What is the origin and significance of these differences? Is the Oriental legislation faithful to the tradition of the Eastern Churches?

The dissertation begins by attempting a synthesis of the historical and theological background of the Church's thinking on marriage in East and West, which will help explain the different approaches found in the two Codes, and which will also assist in assessing to what extent the new Oriental Code is indeed faithful to authentic Eastern traditions. The thesis goes to thoroughly elucidate the contribution of the Second Vatican Council and to survey the post-conciliar magisterial documents and the jurisprudence of the Roman Rota. This is essential in order to evaluate the ways that the two new legislations reflect the teaching of the Council. There is then a detailed examination of the two Code Commissions' work in drafting the Church's new legislations on marriage, to try to ascertain the reasoning behind their choices of formulations. All of this enables the final part of the work to investigate the common and different approaches by the two Codes in describing marriage's nature; this involves an in-depth comparison and analysis of the relevant canons.

ABSTRACT

When one quickly glances at the new 1990 Oriental Code, one gets the impression that the marriage legislation is substantially the same as that found in the 1983 Latin Code. This cannot be surprising since the canon law on Christian marriage concerns a sacrament of the Church and therefore one would expect that it should be much the same throughout the Catholic Church, in the Western and in the Eastern Churches. However, because of the diversity of traditions, there are differences in theological approach and matters of discipline in respect of marriage. One such difference concerns the description of the nature of marriage in each Code.

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The dissertation begins by attempting a synthesis of the historical and theological background of the Church's thinking on marriage in East and West, which will help explain the different approaches found in the two Codes, and which will also assist in assessing to what extent the new Oriental Code is indeed faithful to authentic Eastern traditions. The thesis goes to thoroughly elucidate the contribution of the Second Vatican Council and to survey the post-conciliar magisterial documents and the jurisprudence of the Roman Rota. This is essential in order to evaluate the ways that the two new legislations reflect the teaching of the Council. There is then a detailed examination of the two Code Commissions' work in drafting the Church's new legislations on marriage, to try to ascertain the reasoning behind their choices of formulations. All of this enables the final part of the work to investigate the common and different approaches by the two Codes in describing marriage's nature; this involves an in-depth comparison and analysis of the relevant canons.

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I wish to thank the priests and people of Blessed Sacrament Church who provided me with a parish home during my time in Ottawa.

Finally, I dedicate this study to my mother and father, calling to mind the words of Scripture: "Remember that through your parents you were born, and what can you give back to them that equals their gift to you?" (Sirach 7:28).

ABBREVIATIONS

| | |
|------------------------|---|
| <i>AAS</i> | <i>Acta Apostolicae Sedis: commentarium officiale</i> |
| <i>c.</i> | <i>coram</i> |
| <i>c.</i> | <i>canon</i> |
| <i>cc.</i> | <i>canons</i> |
| <i>CC</i> | <i>Casti connubii</i> |
| <i>CCEO</i> | <i>Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus</i> |
| <i>CIC</i> | <i>Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus</i> |
| <i>Fontes</i> | <i>Codicis iuris canonici fontes</i> |
| <i>Fonti orientale</i> | <i>Codificazione canonica orientale: fonti</i> |
| <i>GS</i> | <i>Gaudium et spes</i> |
| <i>M.P.</i> | <i>Motu proprio</i> |
| <i>PCCICOR</i> | <i>Pontificia Commissio codici iuris canonici orientalis recognoscendo</i> |
| <i>PCCICR</i> | <i>Pontificia Commissio Codici iuris canonici recognoscendo</i> |
| <i>Periodica</i> | <i>Periodica de re morali canonica liturgica (1927-1989)</i> <i>Periodica de re canonica (1990-)</i> |
| <i>SRR Dec</i> | <i>Sacrae Romanae Rotae Decisiones seu sententiae ...</i> , vols. 1-40 <i>TRIBUNAL APOSTOLICUM SACRAE ROMANAE ROTAE, Decisiones seu sententiae ...</i> , vols. 41-66 <i>TRIBUNAL APOSTOLICUM ROTAE ROMANAE, Decisiones seu sententiae ...</i> , vols. 67-72 <i>APOSTOLICUM ROTAE ROMANAE TRIBUNAL, Decisiones seu sententiae ...</i> , vols. 73- |

GENERAL INTRODUCTION

Both in the revised Eastern and Western Codes more canons are devoted to marriage than to any other single subject. This concern for marriage reflects the importance of this sacrament in the life of the Church. Centuries of experience and study have resulted in the formulation of the canonical parameters of marriage. Of course, canon law is but one dimension of this complex social, human, and ecclesial reality. The teaching of the Second Vatican Council, especially in *Gaudium et spes*, has been a major source guiding the revision of both legislations' presentation of marriage. In addition, the post-conciliar magisterial documents, and the decisions of the Roman Rota interpreting the conciliar teaching in the canonical sphere, have also been influences on the revised Codes. When one quickly glances at the new 1990 *Codex canonum Ecclesiarum orientalium*, one gets the impression that the marriage legislation is substantially the same as that found in the 1983 *Codex iuris canonici*.¹ This cannot be surprising since the legislation on Christian marriage concerns a sacrament of the Church and therefore one would expect that it should be much the same throughout the Catholic Church, in the Western and in the Eastern Churches.

¹ *Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1990, xxxiv, 381 p. We shall adapt the English translation found in *Code of Canons of the Eastern Churches: Latin-English Edition*, translation prepared under the auspices of THE CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1992, xlvii, 785 p.

Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, in Civitate Vaticana, Libreria editrice Vaticana, 1983, xxx, 317 p. We shall modify the English translation of the canons found in *Code of Canon Law Annotated: Latin-English Edition of the Code of Canon Law, and English-language Translation of the 5th Spanish-language Edition of the Commentary Prepared under the Responsibility of the Instituto Martín de Azpilcueta*, edited by E. CAPARROS, M. THÉRIAULT, and J. THORN, Montréal, Wilson & Lafleur, 1993, 1631 p.

However, because of the diversity of traditions within the Eastern and Western Churches there are differences in theological approach and matters of discipline in respect of marriage. One such difference concerns the description of the nature of marriage in each Code. The 1917 *Codex iuris canonici* did not attempt to offer a definition or description of marriage, nor did the 1949 Oriental legislation on marriage, Pius XII's M.P. *Crebrae allatae*. Subsequent attempts by canonists and moralists at definitions never yielded a consensus. However the revised Eastern and Western legislations on marriage do advance descriptions of marriage, even if they are not comprehensive definitions. These canons attempt to give juridical expression to the teaching on the fundamental nature of marriage that is set out in Vatican II's Pastoral Constitution *Gaudium et spes*, which in turn draws on the rich biblical and theological traditions on the meaning of Christian marriage, beginning with the creation account of Genesis 2:24.

The initial canons in both Codes show significantly different approaches in describing the fundamental nature of marriage:²

² *CIC*: "c. 1055 § 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

c. 1056 Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio christiano ratione sacramenti peculiarem obtinent firmitatem."

CCEO: "c. 776 § 1. Matrimoniale foedus a Creatore conditum Eiusque legibus instructum, quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad filiorum generationem et educationem ordinatur.

§ 2. Ex Christi institutione matrimonium validum inter baptizatos eo ipso est sacramentum, quo coniuges ad imaginem indefectibilis unionis Christi cum Ecclesia a Deo uniuntur gratiaque sacramentali veluti consecrantur et roborantur.

CIC c. 1055 § 1. The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, [and] of its very nature ordered to the good of the spouses and to the generation and upbringing of offspring, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

§ 2. Consequently, a valid marriage contract cannot exist between baptised persons without its being by that very fact a sacrament.

CIC c. 1056 The essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a distinctive firmness by reason of the sacrament.

CCEO c. 776 § 1. The marriage covenant, established by the Creator and ordered by His laws, whereby a man and a woman through an irrevocable personal consent establish between themselves a partnership of their whole life, is of its very nature ordered to the good of the spouses and to the generation and upbringing of children.

§ 2. From the institution of Christ a valid marriage between baptised persons is by that very fact a sacrament, whereby the spouses are united by God in the image of the indefectible union of Christ with the Church, and are, as it were, consecrated and strengthened by sacramental grace.

§ 3. The essential properties of marriage are unity and indissolubility, which in marriage between baptised persons obtain a special firmness by reason of the sacrament.

Of course, these introductory descriptive canons are not the only ones which will tell us something about the nature of marriage according to each Code. The canons on simulation and the fundamental canons on consent are also especially useful in fleshing out marriage's nature according to each Code. Both legislations contain a more personalistic approach than did the canons of the preceding legislations, and have common elements. But there are major differences in expression. From a

§ 3. *Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio inter baptizatos specialem obtinent firmitatem ratione sacramenti.*"

quick glance at the initial canons, we see that the Latin text emphasises the legal and contractual reality which is automatically coupled with the sacrament when the human contract is solemnised; the Eastern canon has a more explicitly theological and sacramental approach.

Regarding previous work in the field, a relatively recent book by a recognized canonist is Joseph Prader's *Il matrimonio in Oriente e in Occidente*.³ His discussion of the initial canons deals mostly with common elements and just touches on the approach of the Eastern canon to the nature of marriage, without dwelling on the significance of the differences. An even more recent work is Dimitrios Salachas' *Il sacramento del matrimonio nel nuovo diritto canonico delle Chiese orientali*.⁴ In his first chapter, on the initial Eastern canons, Salachas' focus is on the theology of marriage found in the Oriental Code, and so quite naturally he doesn't concern himself too much with the Latin legislation; he does mention differences between the two Codes with regard to "contract" and to the role of the priest in the celebration of marriage. Perhaps one of the best known authors in this area is Victor J. Pospishil who has written the book *Eastern Catholic Marriage Law*.⁵ However, in his discussion of CCEO c. 776, he doesn't compare it with the Latin canons. Among survey articles,

³ J. PRADER, *Il matrimonio in Oriente e in Occidente*, Roma, Pontificio Istituto orientale, 1992, x, 260 p.

⁴ D. SALACHAS, *Il sacramento del matrimonio nel nuovo diritto canonico delle Chiese orientali*, Roma e Bologna, Edizioni Dehoniane, 1994, 300 p.

⁵ V.J. POSPISHIL, *Eastern Catholic Marriage Law*, Brooklyn, NY, Saint Maron Publications, 1991, 534 p.

two, one by Clarence Gallagher, the other by Joseph Vadakumcherry, briefly mention that there are differences between the Latin and Oriental canons regarding the nature of marriage, but don't engage in any in-depth analysis.⁶

There seem to be just two previous works which focus directly on our topic. The first is a licentiate thesis submitted by Michael P. Minehan in 1992 at The Catholic University of America, which studies our theme.⁷ Lacking a theological and historical background, it does however briefly outline the previous legislations and Vatican II teaching. Though the paper deals well with some of the work of the Code Commissions, the commentary on the current law is brief and cursory. Of course, when all of this is being said, it needs to be remembered that the work was bound by the constraints of a licentiate paper. Secondly, there is a survey article comparing the current legislations by the widely respected scholar Urbano Navarrete; this is undoubtedly the best piece on our issue.⁸ Although, because it is a wide-ranging article, its comments on the canons dealing with the nature of marriage are necessarily short, it nevertheless perceptively focusses on significant differences found between the two texts.

⁶ C. GALLAGHER, "Marriage in the Revised Canon Law for the Eastern Catholic Churches", in *Studia canonica*, 24 (1990), pp. 69-90; J. VADAKUMCHERRY, "Marriage Laws in the Code of Canon Law and the Code of Canons of the Eastern Churches", in *ibid.*, 26 (1992), pp. 437-460.

⁷ M.P. MINEHAN, *The Nature of the Sacrament of Marriage According to the Latin and Eastern Codes*, J.C.L. thesis, Washington, DC, The Catholic University of America, 1992, 74 p.

⁸ U. NAVARRETE, "Jus matrimoniale latinum et orientale: collatio codicem latinum inter et orientalem", in *Periodica*, 80 (1991), pp. 609-639.

This dissertation is a comparative study on one aspect of the two Codes, something earnestly requested by Pope John Paul II.⁹ Our study addresses a number of questions regarding the nature of marriage as proposed in the two legislations. What are the common elements in both Codes' descriptions of marriage's nature? Do both legislations fully reflect the teaching of *Gaudium et spes*? What precisely are the differences between the two Codes? What is the origin and significance of these differences? Is the Oriental legislation faithful to the tradition of the Eastern Churches?

The first chapter attempts a synthesis of the historical and theological background of the Church's thinking on marriage in East and West, which will help explain the different approaches found in the two Codes, and which will also assist us in assessing to what extent the new Oriental Code is indeed faithful to authentic Eastern traditions.

The second chapter shall thoroughly elucidate the contribution of the Second Vatican Council, then survey the post-conciliar magisterial documents and Rotal jurisprudence. This is essential in order to evaluate the ways that the two new legislations reflect the teaching of the Council.

These first two chapters set the stage for the post-conciliar revision of the Church's law. In chapter three, there shall be a detailed examination of the two

⁹ See JOHN PAUL II, Allocation at the Presentation of the *Codex canonum Ecclesiarum orientalium* to the Synod of Bishops, 25 October 1990, no. 8, in *AAS*, 83 (1991), p. 490.

Code Commissions' work in drafting the Church's new legislations on marriage, to try to ascertain the reasoning behind their choices of formulations.

All of this will enable the final chapter to investigate the common and different approaches by the two Codes in describing marriage's nature. This will involve an in-depth comparison and analysis of the relevant canons.

CHAPTER ONE

HISTORICAL, THEOLOGICAL, AND CANONICAL BACKGROUND

INTRODUCTION

The fundamental doctrinal notions underlying much of the current matrimonial legislation of the Catholic Church, both Latin and Oriental, are to be found in the teaching of the Second Vatican Council. However, this teaching was not something which emerged out of the blue but was the result of building on previous legislation and magisterial teaching. Moreover, to understand some of the differing emphases found in the Eastern and Western legislations, it is essential, besides knowing the conciliar teaching, to have also a knowledge of various historical developments. To comprehend the teaching of the Council and of the post-conciliar documents on the nature of marriage, a review of pre-conciliar official Catholic thought is essential because this will throw light on many of the nuances found in the conciliar doctrine.

In our sketch of the historical and theological background to the Council, we will adopt as a framework the previous legislations and the pre-conciliar magisterial teaching. Beginning with the Latin Church, we will see how the codification of its law in 1917 summed up Western canonical thinking on marriage at the turn of the century. Then, after studying some of the historical and doctrinal background of the Eastern Churches' thought on marriage, we will observe how the Oriental Catholic legislation of 1949 copied the 1917 Code in regard to marriage's nature, and

represented a certain type of Latinization of Oriental discipline, largely ignoring the sacred character inherent in the Eastern traditions. Finally, we will examine magisterial thinking on the nature of marriage in the forty years prior to the Council, as this will explain some of the issues debated at Vatican II.

A. THE WESTERN CHURCH

The 1917 Latin Code of Canon Law did not simply emerge from a vacuum. Its canons on marriage reflect the common Western canonical thinking at the turn of this century which itself was the result of centuries-old development. We will therefore first investigate this backdrop so as to comprehend the 1917 canons themselves.

1. BACKGROUND¹

We must first recognise that in canon law the term "marriage" itself has two meanings: the celebration of marriage (a wedding), a juridical act (*matrimonium in fieri*), and marriage as a state, a stable relationship between two people (*matrimonium in facto esse*). There is of course an intimate relationship between the two concepts: the married state is brought into being by the act of marriage. Coming from Western classical canon law, this distinction between "marriage coming into

¹ This section is not a comprehensive study of Western reflection on the nature of marriage, but rather is meant to outline some important points which are necessary to understand the thinking underlying the 1917 Latin canons concerning marriage's nature.

existence" and "marriage in existence" underlies much canonical reflection on the nature of marriage.²

Marriage as it has existed throughout history can be studied under different conceptual categories. The Latin Church's theological-ethical-juridical doctrine about marriage has been structured especially under three conceptual schemes:³

- St. Augustine's three goods or blessings of marriage (*bona matrimonii*): *prolis* (offspring, their generation and education); *fidei* (conjugal fidelity); *sacramenti* (indissolubility);⁴
- the essence of marriage, and its properties (unity and indissolubility);
- the ends of marriage, i.e. its intrinsic finality, or purposes.

All three schemas are interconnected and interdependent (e.g. the end of procreation and the *bonum prolis*). Of course this way of looking at marriage does not claim to be exhaustive, but it will serve as a framework to explain the Western canonical thinking about marriage's nature. Finally, we will need to say a word about the relationship between consent, contract, and sacrament.

² However, as L. Örsy correctly notes, the following point also needs to be remembered: "The distinction should not be pushed too far; the moment of birth cannot be separated from the life that follows it" (L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, Wilmington, DE, Glazier, 1986, p. 202).

³ This is pointed out by U. NAVARRETE in his excellent work *Structura juridica matrimonii secundum Concilium Vaticanum II: momentum juridicum amoris conjugalis* [= *Structura juridica matrimonii*], Romae, Pontificia Universitas Gregoriana, 1968, p. 17.

⁴ See ST. AUGUSTINE, *De genesi ad litteram*, liber 9, cap. 7, no. 12, in J. MIGNE (ed.), *Patrologia latina*, vol. 34, Paris, Migne, 1845, col. 397.

(a) The Augustinian Goods of Marriage

First, marriage can be considered in a rather "static" way. This was done by St. Augustine who synthesized his ideas about marriage according to the *tria bona* which were inseparably united because together they realise the total good of marriage. In Augustine's thought all the things which God gave us are good. But some are good *propter se* (in themselves), for example, wisdom. Others are good only *propter aliud bonum* (for the sake of, or on account of, another good). Sexual intercourse acquires its greater good in the preservation of the human race. So, in line with his thought Augustine believed that marriage was justified (i.e. was good) *propter tria bona*.⁵ The *bonum prolis* not only includes the natural sex act directed towards the procreation of children, but also the right and obligation to take care of the offspring until they can look after themselves in life. For Augustine, the *bonum fidei* refers to the Christian virtue of faith; it means not only rendering the "marriage debt" but also mutual fidelity for life involving a complete caring dedication between the spouses.⁶ The *bonum sacramenti* designated the indissolubility of marriage; even a natural marriage had a sacred character according to Augustine.

Prior to the Middle Ages there were few means to adjudicate the validity of a marriage. It was not until the 16th century (after Thomas Sanchez) that this began to happen on a more regular basis. The Augustinian scheme is not simply juridic, but

⁵ It is not our function here to discuss St. Augustine's negative view of the sexual impulse and his alleged "sexual pessimism" in general.

⁶ See T.P. DOYLE, "A New Look at the *bonum fidei*", in *Studia canonica*, 12 (1978), p. 9.

the *bona* were connected by the canonists with the validity of marriage.⁷ Although the *tria bona* pertain to the married state (*matrimonium in facto esse*), to marry validly, the spouses were bound to include the three goods of marriage in their marital consent. Dealing with the validity of marriage, the *bona* were considered not in so far as they constitute marriage, but as to which of their essential elements should be contained in the formal object of matrimonial consent. A marriage would remain valid even if the *bona* were disregarded after consent, but would be invalid if either or both of the parties had excluded any of the essential goods in their consent. So a distinction was made between the essential, the integrating, and the accidental elements of the *bona*. The essential good was understood as the minimum the parties must intend, at least implicitly, to create the consent necessary for marriage.⁸ More often than not, at the canonical level, minimalism led to things being reduced to sexual intercourse in so far as it is ordered to children in an exclusive and perpetual relationship.⁹ For example, the *bonum fidei* came to mean the obligations arising from the right to fidelity given in marital consent. As far as the essence of these obligations was concerned, this was understood as the perpetual

⁷ See C. MURTAGH, "The Jurisprudential Approach to the *consortium vitae*", in *Studia canonica*, 9 (1975), p. 310.

⁸ See NAVARRETE, *Structura juridica matrimonii*, p. 50.

⁹ See P. HUIZING, "Bonum proles ut elementum essenziale obiecti formalis consensus matrimonialis", in *Gregorianum*, 43 (1962), pp. 694-714.

and exclusive right and obligation to the conjugal act.¹⁰ Other elements of the *bonum fidei* were not regarded as belonging to its essence. Although the Augustinian *schema bonorum* has not figured explicitly as such in the actual legislation of the Church, it has been very important in canonical jurisprudence and in Church teaching, as seen for example in the Council of Florence.¹¹

Another conceptual *schema* under which the Church's doctrine on marriage has been studied is that of its essence and properties.¹² This metaphysical scheme is rooted in Aristotle and St. Thomas Aquinas and was used by Western medieval authors. The questions asked have been: "What is marriage?" and "What are the qualities proper to it?"

¹⁰ To make matters more complicated, Rotal jurisprudence distinguished between a right (the *ius radicale*) and the use of that right (the *exercitium iuris*). Many auditors held that it was not the exclusion of the exercise of the right to conjugal acts, but only the exclusion of the radical right itself that invalidated marriage. In 1963, a Rotal judge, A. De Jorio, disagreed with this distinction, regarding it as cerebral and of little practical usefulness. See Decision c. DE JORIO, 30 October 1963, nos. 4-5, in *SRR Dec*, vol. 55, pp. 718-719.

¹¹ See EUGENE IV, Bull, *Exultate Deo* ["*Bulla unionis Armenorum*"], 22 November 1439, in N.P. TANNER (ed.), *Decrees of the Ecumenical Councils* [= TANNER], vol. 1, London, Sheed & Ward; Washington, DC, Georgetown University Press, 1990, p. 550. The decisions taken at Florence were almost always issued in the form of papal bulls, since the pontiff was presiding in person; these decrees mention the Council's approval and contain the words "in a solemnly celebrated general session of the synod" (see *ibid.*, p. 453).

¹² The property of indissolubility coincides at the juridical level with the *bonum sacramenti* of the Augustinian scheme, but the property of unity is not coextensive with the *bonum fidei*. The "unicity" of the bond excludes polygamy while the "good of fidelity" also excludes adultery. See the excellent explanation by A. MENDONÇA, "The Theological and Juridical Aspects of Marriage", in *Studia canonica*, 22 (1988), pp. 292-294. Whereas this is an important distinction juridically, historically in jurisprudence "unity" and "fidelity" have been presented together. See L.G. WRENN, *Annulments*, 5th ed., Washington, DC, Canon Law Society of America, 1988, p. 102. Cf. G. CANDELIER, "L'exclusion du *bonum fidei*: une lecture des sentences de la Rote", in *Revue de droit canonique*, 44 (1994), pp. 47-81.

(b) The Essence of Marriage

Regarding the essence of marriage, there are two famous definitions of marriage in Roman law which historically have had considerable influence in the Church, because of their compatibility with Christian concepts.¹³ The first, attributed to Modestinus, is found in the *Digest*:

Marriage is a union of man and woman and a partnership of the whole of life, a participation in divine and human law.¹⁴

Another definition, considered to be that of Ulpianus, is located in the *Institutiones* of Justinian:

Marriage, or matrimony, is a union of man and woman, involving an undivided way of living.¹⁵

These formulations express more than the legal side of marriage, by seeing it also as a moral and social reality, a permanent, unique, complete type of community.¹⁶ However in the centuries immediately preceding the 1917 Code, the procreative aspect of marriage was increasingly emphasised, to the detriment of the notion of the personal union of the spouses. Historically the difficulty was that "the

¹³ Of course, to these definitions the Church added its own particular notion of indissolubility.

¹⁴ "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio" (*Digest* 23, 2, 1).

¹⁵ "Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens" (*Institutiones* 1, 9, 1).

¹⁶ These definitions seem to concern *matrimonium in facto esse*, but are not unequivocal. Canonists have used the definitions for both senses of the term "marriage".

Scholastic definition took over from Roman law the concept of a two-in-one way of life [...] but the possibilities of this were not developed."¹⁷

While the classical theologians acknowledged that "conjugal society" itself (i.e. *matrimonium in facto esse*) was the true object of marital consent, by the late nineteenth century, the Western canonical tendency to equate the right to sexual intercourse with the essence of marriage had become firmly established.¹⁸ Two exceptions to this reductionist trend had been the Tridentine Catechism (where the primary reason for marriage is the community of man and woman for the purpose of mutual help so that together they will more easily be able to bear the difficulties of life and especially those of old age), and Thomas Sanchez.¹⁹ However, generally speaking, canonists tried to define more precisely the community established by marriage; they wanted to have concrete verifiable parameters for marriage. This was exemplified in the writings of F. Wernz and P. Gasparri.²⁰ According to Wernz:

If marriage is considered *in fieri*, it can be defined: the lawful and undivided contract of man and wife for the generation and education of offspring. [...]

If on the other hand marriage is taken as the bond or permanent society, as in common speech and even that proper to

¹⁷ D. O'CALLAGHAN, "Marriage as Sacrament", in *Concilium*, 6 (1970), no. 5, p. 104.

¹⁸ See the excellent historical treatment of this reductionism by D. FELLHAUER, "The *consortium omnis vitae* as a Juridical Element of Marriage" [= "The *consortium omnis vitae*"], in *Studia canonica*, 13 (1979), pp. 35-79.

¹⁹ See T. MACKIN, *What is Marriage?*, New York, NY, Paulist Press, 1982, pp. 198-201.

²⁰ See F. WERNZ, *Ius decretalium*, t. 4, *Ius matrimoniale*, Prati, Giachetti, 1911, pars 1, pp. 23-24, 42; P. GASPARRI, *Tractatus canonicus de matrimonio*, Paris, L'Institut catholique, 1891, vol. 1, pp. 117-120; vol. 2, pp. 2-3, 120-121, 218.

theologians and canonists, it is defined: the lawful and undivided union of man and wife for the generation and education of offspring, or more briefly: the undivided conjugal or marital society of man and wife.²¹

Here we have a description of both *matrimonium in fieri* and *in facto esse*: from the contract there arises the bond or permanent conjugal society, both concepts being defined in terms of offspring.

The essence of the *matrimonium in facto esse* and the essential object of the *matrimonium in fieri* must of course coincide. When they discussed the object of matrimonial consent, the canonists distinguished between the material and formal object of consent. For example, before the turn of the century, P. Gasparri explained these concepts by referring to contracts of lease or sale for a house.²² The material object of the contracts would be the house; the formal object would be the title of lease, or as the case may be, the title of property, over the house. So the material object was the concrete thing with which the contract is concerned, whereas the formal object was the reason why that particular thing is of interest to the parties under the contract. Therefore, according to Gasparri, the material object of matrimonial consent was the persons themselves (*ipsae contrahentium personae*), while the formal object was the fellowship of life (*vitae consuetudo*), the latter idea being

²¹ "Si matrimonium *in fieri* spectetur, definiri potest: *Contractus* legitimus et individuus maris atque feminae ad generandam prolem. [...] Vicissim matrimonium, si usu communi et etiam theologis et canonistis proprio sumatur pro *vinculo* vel societate permanente, definitur: *Coniunctio* legitima et individua maris atque feminae ad generandam et educandam prolem, vel brevius: *Maris et feminae individua societas coniugalis sive maritalis*" (WERNZ, *Ius matrimoniale*, pars 1, pp. 23-24).

²² See GASPARRI, *Tractatus canonicus de matrimonio*, 1891, vol. 1, p. 119.

taken directly from the classical Roman law definition.²³ But this was split into two aspects: firstly, the mutual *ius in corpus pro generatione prolis*, which he called the bond; secondly, the *communio tori, mensae et habitationis*. Only the first was considered essential to marriage.²⁴ The thought of Gasparri, principal drafter of the 1917 Code, is summed up by D. Fellhauer thus:

The juridical object of matrimonial consent is the mutual *ius in corpus pro generatione*. The other dimensions of *consuetudo vitae*, namely the common life, union of wills, and mutual love of the spouses, are canonically non-essential.²⁵

Although the actual expressions used for the *obiectum formale* varied among the authors, the common teaching maintained that the essential formal object of the *matrimonium in fieri* was limited to the exchange of rights over the bodies of the spouses. As a result of historical evolution, Roman law terms such as *consortium omnis vitae, conjunctio maris et feminae*, and *individua consuetudo vitae*, while acknowledged, were not accorded any real definition-value.²⁶

²³ See *ibid.*

²⁴ See *ibid.* This view was also held by WERNZ, *Ius matrimoniale*, pars 1, p. 43: "Quae vitae consuetudo principaliter et essentialiter consistit in iure atque officio mutuo, aequali, exclusivo, perpetuo, in corpus alterius coniugis in ordine ad prolem generandam et educandam, non ad alios quoscunque scopos; at salva maneat necesse est subiectio uxoris, cuius caput est maritus. Deinde ut communio illa essentialis suam obtineat integritatem, accedat necesse est communio thori et cohabitationis, quae salva essentia matrimonii quandoque abesse potest."

²⁵ FELLHAUER, "The *consortium omnis vitae*", p. 78. On his own terms, Gasparri was completely logical, holding that a marriage is valid when in giving consent the person permanently excludes cohabitation, provided that the right to carnal copula is given and received. See GASPARRI, *Tractatus canonicus de matrimonio*, 1891, vol. 2, p. 79.

²⁶ See U. NAVARRETE, "De iure ad vitae communionem: observationes ad novum schema canonis 1086 § 2", in *Periodica*, 66 (1977), pp. 263-266; O. ROBLEDA, "Riflessi romanistici nella definizione canonica del matrimonio", in *Gregorianum*, 56 (1975), pp. 413-415.

Looking at marriage from the vantage-point of this metaphysical conceptual schema (i.e. that of its essence and properties), we have been examining marriage in regard to its essence, now we need to survey what are the attributes or qualities of marriage, called unity and indissolubility by the Western canonists in the epoch leading up to the promulgation of the 1917 Code.

(c) The Properties of Marriage

The first property of marriage was called unity, which forbade polygamy. There were scholarly disputes, which need not concern us here, about whether polygamy was forbidden by the natural law, and about how to explain the practices of the Old Testament patriarchs.²⁷ Nevertheless it was the constant teaching of the Church that Christ had ruled out polygamy and hence it was incompatible with Christian marriage.²⁸ The issue of the "unity" of marriage never seems to have been in dispute between East and West. In 1274, at the Second Council of Lyons which was concerned with reuniting East and West, there was read a profession of faith that Oriental Christians would have to make theirs if they were to be reunited with Rome,

²⁷ Most classical theologians agreed that polygamy was against the natural law. But they made all sorts of distinctions to explain Old Testament practices, for example claiming that polygamy was contrary to the secondary ends of marriage, not the primary one (i.e. saying it was opposed to mutual help and the remedy to concupiscence but was obviously not opposed to procreation), or claiming that, using Scholastic philosophical categories, polygamy was contrary to the secondary precepts of the natural law, not the primary ones, and hence could be dispensed by God for those times. Despite these distinctions, all the theologians acknowledged that with the coming of Jesus Christ the issue was settled because the Lord had revoked all prior concessions and restored the rule of monogamy in its fullness. See F.J. URRUTIA, "Praxis non admittendi polygamos ad baptismum: cur non mutatur", in *Periodica*, 70 (1981), pp. 503-506; see also G.H. JOYCE, *Christian Marriage*, London, Sheed and Ward, 1933, pp. 560-574.

²⁸ For a survey of Church teaching and legislation on polygamy, and various scholars' interpretation thereof, see A.J. MALONE, *The Canonical and Pastoral Implications of Canon 1148*, J.C.D. dissertation, Ottawa, Saint Paul University, 1992, pp. 59-139.

in which it was said that a man cannot have many wives, nor one woman many husbands.²⁹ Moreover, in a very clear statement, canon two, on the sacrament of marriage, of the 24th session of the Council of Trent taught:

If anyone says that Christians may have more than one wife at once and that it is forbidden by no divine law: let him be anathema.³⁰

Whatever about the debates concerning whether the Council here intended to proclaim a dogma *de fide*, there can be little doubt that the "unity" of marriage has been the constant teaching of the Catholic Church before and after Trent. Indeed, on a practical level, Trent took measures to stamp out bigamy, which was facilitated by clandestine marriages and vagrancy.³¹

The second property of marriage was called indissolubility. Whereas it was acknowledged that it was characteristic of marriage, there were disputes among the Scholastics as to whether indissolubility was mandated by the natural law.³²

²⁹ See the Profession of Faith of Emperor Michael VII Paleologus, in H. DENZINGER (ed.), *Enchiridion symbolorum definitionum et declarationum de rebus fidei et morum* [= DENZINGER], 37th ed. by P. HÜNERMANN (Latin text with German translation), Friburgi Brisgoviae-Basileae-Romae-Vindobonae, Herder, 1991, no. 860, p. 382. This profession of faith was not actually promulgated by the Council itself. It had been originally composed in 1267 by Pope Clement IV and the Eastern Emperor Michael VII Paleologus and seems to have been intended as a political instrument for unification. So it has been disputed whether it is actually a *conciliar* statement, although it was received by the Council without protest, and seemed to be accepted by it.

³⁰ "Si quis dixerit, licere christianis plures simul habere uxores, et hoc nulla lege divina esse prohibitum: a.s." (COUNCIL OF TRENT, Session 24, 11 November 1563, Canon 2 on the Sacrament of Marriage, in TANNER, vol. 2, p. 754).

³¹ See COUNCIL OF TRENT, Session 24, 11 November 1563, Canons on the Reform of Marriage, Chapters 1 and 7, in TANNER, vol. 2, pp. 755-757, 758.

³² For an explanation of Aquinas' view, and of the distinction made by him between the primary and secondary precepts of the natural law, see L. RYAN, "The Indissolubility of Marriage in Natural Law", in *The Irish Theological Quarterly*, 30 (1963), pp. 293-310; 31 (1964), pp. 62-77.

Concerning the divine positive law, the history of the notion of indissolubility in the Church is a complicated one and there are disputed issues among scholars, especially regarding the interpretation of the Scriptures and of the writings of some of the Church Fathers.³³ The question need not detain us here, as we are more interested in what actually emerged as the teaching of the Church and then was expressed in its law. In the West, from the fifth century onwards, as bishops consulted the papacy about difficult cases, the popes asserted the principle of the indissolubility of marriage and tried to contain abuses which sometimes seemed to be tolerated by local councils.³⁴ Papal resistance to the civil law being used as justification for divorce

³³ There have been debates about whether some of the Fathers allowed divorce and remarriage for Christians in some cases. For a discussion of this issue, see E. HAMEL, "The Indissolubility of Completed Marriage: Theological, Historical, and Pastoral Reflections", in J.R. CONNERY and R. MALONE (eds.), *Contemporary Perspectives on Christian Marriage: Propositions and Papers from the International Theological Commission [= Contemporary Perspectives]*, Chicago, IL, Loyola University Press, 1984, pp. 181-188. See also the insightful comments of the Jesuit patristic scholar H. Crouzel: "[...] il ne nous paraît pas concevable que l'Église puisse un jour autoriser quelqu'un, dont le mariage est certainement valide, sacramentel et consommé, à contracter de nouvelles noces du vivant de son conjoint. La quasi-unanimité des cinq premiers siècles concernant le refus d'un mariage après séparation constitue en effet, dans le désarroi complet des exégètes contemporains sur le sens des incises, la seule donnée solide: ainsi l'Église dès le début a-t-elle compris, dans l'interprétation vivante que donnent ses institutions, ces expressions difficiles. [...] autre chose est d'accepter qu'un chrétien contracte de nouvelles noces après divorce et même de bénir cette union, autre chose est de tolérer dans une certaine mesure, bien qu'elle soit adultère, une union conclue devant les instances civiles et qui ne peut être rompue par suite des responsabilités qui en découlent. [...] On pourrait donc reprocher aux théologiens et aux historiens qui, examinant les textes de façon imprécise et inexacte, voient dans les quelques témoignages d'indulgence trouvés chez les Pères l'acceptation d'un nouveau mariage, de céder à cette confusion et de rendre encore plus difficile à l'Église contemporaine la mise au point d'une solution" (H. CROUZEL, *L'Église primitive face au divorce: du premier au cinquième siècle*, Paris, Beauchesne, 1971, p. 382).

Ambrosiaster seems to be the only Father to have explicitly said that a divorced spouse may legitimately and in accordance with the Christian faith enter a new marriage while the other spouse lives.

³⁴ See HAMEL, "The Indissolubility of Completed Marriage", pp. 189-198. For a historical survey of the problem of indissolubility in the Western Church between the sixth century and Gratian, see JOYCE, *Christian Marriage*, pp. 328-358. Cf. J. GAUDEMET, *Le mariage en Occident: les mœurs et le droit*, Paris, Cerf, 1987, pp. 106-107, 119-132.

was illustrated by Pope Gregory the Great in 601 A.D. when he denied that the entry of a spouse into monastic life dissolves a marriage: civil law may allow this but divine law forbids it.³⁵ Yet the Western Church did not come to understand every marriage as absolutely indissoluble: the Pauline Privilege was recognised, and the praxis of the Church admitted the dissolution of unconsummated marriages.³⁶ History shows that a certain development took place regarding the Church's consciousness of its ability to dissolve certain types of marriages.³⁷ The well-known dispute in the twelfth century between the schools of Paris and Bologna regarding what exactly constitutes marriage, and reflecting two different lines of thought in the Church's tradition which needed to be reconciled, dealt also with the issue of indissolubility: whereas Pope Alexander III "canonized" the consensual theory of marriage, he also adopted Gratian's view that the marriage created by consent was not absolutely indissoluble until consummation had taken place. The perfect significance of the union between Christ and His Church occurs at the moment of the consummation of the marriage. In other words, once *consensus de praesenti* was

³⁵ In his *Novella 22*, the Emperor Justinian had ruled that if one spouse wanted to enter monastic life and did so even against the will of the other, the marriage was dissolved; the apparent principle was that one spouse's will could override the other's in this case. In a reverse interpretation of the law, some Christian husbands, wanting to divorce, forced their wives into monastic life to gain the dissolution. Attempting to combat this abuse, Pope Gregory I declared that the entry into monastic life doesn't dissolve marriage in the first place, despite what the civil law may say. See GREGORY THE GREAT, Letter to Theoctista (the sister of Emperor Mauritius), *Magnas omnipotenti*, February 601 A.D., in *Corpus christianorum*, series latina, vol. 140a, *S. Gregorii Magni Registrum epistularum*, ed. D. NORBERG, Turnholti, Brepols, 1982, pp. 902-913.

³⁶ Hincmar of Reims seems to have been the first to allow for dissolution of a marriage entered into but not consummated.

³⁷ For a sketch of this development, see U. NAVARRETE, "Indissolubilitas matrimonii rati et consummati: opiniones recentiores et observationes", in *Periodica*, 58 (1969), pp. 475-489.

given, the marriage was firm to the point that the spouses themselves could not dissolve it (what was later called "intrinsic indissolubility"); but when this marriage was consummated, it could not be dissolved at all, by any human power ("extrinsic indissolubility"). Hence the teaching in the West was that a sacramental consummated marriage could never be dissolved except by death. This doctrinal synthesis still remains today the teaching of the Catholic Church.³⁸

As is well known, a divergence emerged between East and West regarding the indissolubility of consummated Christian marriage. Yet, well after the schism of 1054, in 1274 at the Second Council of Lyons, a council aimed at reunion, the issue of indissolubility was almost ignored, although in the Profession of faith of the Eastern Emperor Michael Paleologus, read to the Council, there was a declaration that death frees the spouses from the conjugal bond, without mention of any other causes;³⁹ this is interpreted by some as an implicit affirmation of indissolubility, though it was more likely concerned with those Oriental Christians who found something wrong with a second marriage even after the death of one's spouse.

In 1341, Pope Benedict XII, in a letter to the Armenian Church, condemned (in proposition 102) as one of the errors imputed to the Armenians, that they allowed

³⁸ See COMMISSIO THEOLOGICA INTERNATIONALIS, *Propositiones de quibusdam quaestionibus doctrinalibus ad matrimonium christianum pertinentibus*, in *Gregorianum*, 59 (1978), pp. 461-463 (proposition no. 4: *De indissolubilitate matrimonii*).

³⁹ See the Profession of Faith of Emperor Michael VII Paleologus, in DENZINGER, 37th ed., no. 860, p. 382.

remarriage in cases other than the death of one of the spouses.⁴⁰ On the other hand, in 1439 at the Council of Florence, another "union" council, the question was not really debated with the representatives of the Byzantine Church and it did not figure in the conciliar decree of union with the Greeks.⁴¹ The issue of indissolubility was raised by Pope Eugene IV at the very last moment, but at that stage the decree of union had already been signed. The Greeks said that divorce was permitted only for a just cause (harking back to Origen), and the Latins let the question drop.⁴² However, later that year, when the Armenians signed an act of union, that decree laid down that

although separation of bed is lawful on account of fornication, it is not lawful to contract another marriage, since the bond of a legitimately contracted marriage is perpetual.⁴³

⁴⁰ "Item, quod apud Armenos, si post matrimonium contractum, etiam carnali copula subsecuta et prole suscepta, viro non placeat uxor; vel e converso, ille cui non placet alter coniux, vel ambo, si sibi mutuo non placent, vadit vel vadunt ad episcopum vel sacerdotem et data pecunia et secundum quod inter se conveniunt, episcopus seu sacerdos separat dictum matrimonium et dat licentiam alter nubendi, etiam cum altero coniuge invito; et hoc fit multoties apud Armenos" (BENEDICT XII, Letter to the Armenians, *Cum dudum*, 1 August 1341, in *Fonti orientales*, Series III, vol. 8, p. 151, proposition 102).

⁴¹ See EUGENE IV, Bull, *Laetentur caeli*, 6 July 1439, in TANNER, vol. 1, pp. 523-528.

⁴² See HAMEL, "The Indissolubility of Completed Marriage", p. 199. See also the commentary of Origen on Saint Matthew's Gospel: ORIGEN, *In Matt. 19: 2-11*, in J. MIGNE (ed.), *Patrologia graeca*, vol. 13, Paris, Migne, 1862, cols. 1245-1246.

⁴³ "Quamvis autem ex causa fornicationis liceat thori separationem facere, non tamen aliud matrimonium contrahere fas est, cum matrimonii vinculum legitime contracti perpetuum sit" (EUGENE IV, *Exultate Deo* [*Bulla unionis Armenorum*]), in TANNER, vol. 1, p. 550).

In 1442, this latter decree was imposed on the Syrian Jacobites reuniting with Rome.⁴⁴ Historically, it was to turn out that all these decrees of reunion had little practical effect in reuniting the Western and Eastern Churches.

A great influence in the Catholic Church was canon 7 on the sacrament of marriage, of the 24th session of the Council of Trent, which read as follows:

If anyone says that the Church erroneously taught and teaches, according to evangelical and apostolic doctrine, that the bond of matrimony cannot be dissolved by the adultery of one of the spouses; and that neither party, even the innocent one who gave no grounds for the adultery, can contract another marriage while their spouse is still living; and that the husband commits adultery who dismisses an adulteress wife and takes another woman, as does the wife dismissing an adulterous husband and marrying another man: let him be anathema.⁴⁵

This canon was carefully worded so as not to condemn Oriental practices which permitted divorce at least in cases of adultery, yet it did condemn Luther who was accusing the Catholic Church of having lapsed into error. The canon needs to be read in conjunction with canon 5 forbidding divorce on the grounds of heresy, irksome cohabitation, or the departure of one of the spouses, and with canon 8 defending the Church's right to allow separation in some cases.⁴⁶ Whereas Trent

⁴⁴ See EUGENE IV, Bull, *Cantate Domino* [*Bulla unionis Coptorum*], 4 February 1442, in TANNER, vol. 1, p. 581. Also, in contradistinction to some Oriental thinking, it was asserted that a fourth marriage may be entered into, after the death of the spouse. See *ibid.*

⁴⁵ "Si quis dixerit, Ecclesiam errare, cum docuit et docet, iuxta evangelicam et apostolicam doctrinam [c.f. praecipue Mt. 5,32, 19,9; Mr 10,11-12; Lc 16,18; 1 Cor 7,11], propter adulterium alterius coniugum matrimonii vinculum non posse dissolvi, et utrumque, vel etiam innocentem, qui causam adulterio non dedit, non posse, altero coniuge vivente, aliud matrimonium contrahere, moecharique eum, qui dimissa adultera aliam duxerit, et eam, quae dimissa adultero alii nupserit, a.s." (COUNCIL OF TRENT, Session 24, Canon 7 on the Sacrament of Marriage, in TANNER, vol. 2, pp. 754-755).

⁴⁶ For the text of canons 5 and 8, see *ibid.*, pp. 754, 755.

did not deny the existence of practices and beliefs, both past and present, that differed from its teaching, the Council saw divorce, on account of adultery or for the other reasons mentioned, as contrary to an authentic Catholic teaching which itself is consistent with the Scriptures. Yet the cautious formulation of the canon shows that the Council was aware of the doubts arising from some patristic texts and from some Catholic theologians, and also that it did not wish to condemn formally some positions and practices upheld by the Eastern Churches.⁴⁷ Nevertheless, the Holy See's long struggle against tolerating the remarriage of divorcees among the Oriental Christians reunited with Rome shows that indissolubility was not regarded solely as a disciplinary issue but as one intimately connected with the Catholic doctrine on the nature of marriage, as we shall see later.⁴⁸

⁴⁷ As Hamel comments: "As far as its content is concerned, canon 7 denied the possibility of dissolving the conjugal bond in case of adultery and the liceity and validity of remarriage. It makes no distinction between intrinsic and extrinsic indissolubility. The context favours the view that intrinsic indissolubility was meant, but this was not explicitly stated. Nor did canon 7 make a distinction between consummated and nonconsummated marriages. It did not decide the question of whether the Church has any power over sacramental and consummated marriage" (HAMEL, "The Indissolubility of Completed Marriage", p. 201).

⁴⁸ By the late 19th century, canon 7 was regarded by many Catholic theologians as a *dogma de fide*, that is, a truth directly revealed by God, as Vatican I had defined such after three centuries of theological reflection. The scholarship of P. Franzen of Leuven has been very influential in revising this assessment that canon 7 was meant to be a dogmatic definition. See P. FRANZEN "Divorce on the Grounds of Adultery — the Council of Trent (1563)", in *Concilium*, 6 (1970), no. 5, pp. 89-100, where he summarises his conclusions from previously published works. But he also maintains that canon 7 was much more than a disciplinary decree. See also L. BRESSAN, *Il canone Tridentino sul divorzio per adulterio e l'interpretazione degli autori*, Roma, Università Gregoriana, 1973, xxvii, 366 p.

Today, the general assertion that marriage is indissoluble is considered to be a Catholic doctrine: "It is not possible to speak of indissolubility as a dogma of faith in the strict sense of the phrase, but neither can it be denied that we are dealing here with Catholic doctrine endowed with all the solidity implied in that theological note" (P. DELHAYE, "Commentary on the Propositions on the Doctrine of Christian Marriage", in *Contemporary Perspectives*, p. 29).

The Church's evolving view of the indissolubility of non-sacramental marriages is illustrated in the way that the Pauline Privilege underwent a certain development; it was "extended" by Popes Paul III (1537), Pius V (1571), and Gregory XIII (1585).⁴⁹ This development later became known as the so-called "Petrine privilege": in certain cases, a marriage could be dissolved by pontifical dispensation, if at the time at which it was entered into one of the spouses was a Christian and the other was not.⁵⁰ However, there was no wavering from the principle that a consummated sacramental marriage could never be dissolved, except by death.

Having examined marriage from the view-point of its essence and properties, it is now time consider it under the aspect of its finality.

⁴⁹ In 1537 Paul III's Constitution *Altitudo* allowed the polygamist, converted to Christianity and baptized, to choose one of his wives if he could not remember which was his first wife. Pius V's *Romani pontifices* (1571) permitted the baptized polygamist convert to keep the wife baptized with him, even if she was not the first wife. Gregory XIII in *Populis ac nationibus* (1585) gave some missionaries the faculty to dispense baptized slaves or captives from the obligation of conducting the interpellation of their former spouse before entering a second marriage with another Christian, and said that this second sacramental marriage once consummated remained binding even if later it was discovered that the original valid marriage had been made sacramental by the baptism of both the spouses. See J.J. KOURY, *Three Sixteenth Century Constitutions on the Dissolution of Marriage: A Study in Lawmaking and the Uses of Law*, Canon Law Studies no. 517, Washington, DC, The Catholic University of America, 1985, pp. 28-202. Koury shows that these Constitutions were subsequently interpreted, in the following centuries, in two differing ways: the dominant school considered these pieces of legislation to belong to the discipline of the Pauline Privilege, whereas a second school saw in these Constitutions evidence of a papal or "Petrine" power to dissolve certain marriages. See *ibid.*, pp. 212-241. Koury himself argues that the three Constitutions don't fit into either the Pauline or "Petrine" framework, but should be understood as *ad hoc* papal concessions.

⁵⁰ Regarding these "Petrine privilege" cases, it has been disputed whether this name is accurate, that is whether it is actually papal power which dissolves the natural marriage. Even today the Church lacks scholarly consensus about the nature of the power which justifies its practice of dissolving these types of marriage. See the carefully worded statement of the International Theological Commission in 1977: "Ecclesia nullam sibi agnoscit auctoritatem ad dissolvendum matrimonium sacramentale ratum et consummatum. Cetera autem matrimonia, sub gravissimis conditionibus, in bonum fidei salutemque animarum, a competenti auctoritate Ecclesiae, dissolvi, aut - secundum aliam interpretationem - saltem declarari soluta, possunt" (COMMISSIO THEOLOGICA INTERNATIONALIS, *Propositiones de quibusdam quaestionibus doctrinalibus ad matrimonium christianum pertinentibus*, p. 462).

(d) The Ends of Marriage

All societies have a *finis* or purpose. Marriage as a society of two persons is a relationship ordered towards certain ends independent of the will of the parties. In other words, what is the end of marriage in its natural ordination? This "dynamic" schema was much used in the Middle Ages.

When one speaks of ends, it is necessary to call to mind the two Scholastic distinctions of *finis*: firstly, *fines operis* which are intrinsic to the nature of marriage and an objective reality, willed by God; secondly, *fines operantis* which are extrinsic to marriage itself and subjective, willed by the couple, and which vary from case to case since they depend on the particular personal motives of the parties to the marriage. Here in this context it is the "intrinsic" ends that we are speaking of, those objective institutional ends postulated by the very nature of marriage, rather than subjective ends determined by the will of the parties.⁵¹

Latin canonists around the turn of this century didn't give much attention to the issue of the "ends" of marriage as such, since these are not of its essence. The question of "ends" became more a question for the moralists. Nevertheless, procreation was stated by the canonists to be the primary end, while mutual assistance and the attenuation of concupiscence were called secondary.⁵² This was in line with their thinking on the essence of marriage and corresponded to their general emphasis on the procreative aspect of marriage.

⁵¹ See J.F. CASTAÑO, *Il sacramento del matrimonio*, vol. 1, Roma, Piada Gianfranco, 1991, p. 63.

⁵² See, for example, GASPARRI, *Tractatus canonicus de matrimonio*, 1891, vol. 1, p. 121.

Having reviewed the thinking of the Latin Church on the nature of marriage under three different conceptual categories, we shall conclude our discussion by briefly explaining the Church's thought on consent, contract and sacrament.

(e) Consent, Contract, and Sacrament

The Western Church's view on how marriage is created was and is basically consensual: the principle *consensus partium facit matrimonium* was an idea adopted from Roman Law, but with the difference that once consent was given, it could not be withdrawn, i.e. the marriage's enduring reality did not depend on marital consent persisting. In the ninth century, Pope Nicholas I told the Bulgars that consent alone creates marriage and that a sacred rite was not necessary, i.e. criticising the Greeks who had converted the Bulgars and who also placed great emphasis on the crowning and blessing by the priest.⁵³ In the fourteenth century, Benedict XII, in a letter to the Armenians, condemned (in proposition 100) as one of the errors imputed to them, that they had no form of words to express matrimonial consent.⁵⁴ Nevertheless, in 1439, the Council of Florence, in the Bull of Union with the

⁵³ See NICHOLAS I, Response to the Bulgars, *Ad consulta vestra*, 13 November 866, in DENZINGER, 37th ed., no. 643, p. 296.

⁵⁴ It must be acknowledged that this admonition seems more concerned with couples being married against their will, than with suggesting the idea that consent alone creates marriage: "Item, quod apud Armenos nulla est certa forma verborum exprimens consensum matrimonialem inter virum et uxorem; immo multi per parentes et amicos coguntur venire ad ecclesiam, ut matrimonium fiat inter eos; et quamvis unus vel ambo dicant, quod nolunt inter se matrimonialiter copulari, tamen matrimonium fit inter eos in facie ecclesiae" (BENEDICT XII, Letter to the Armenians, *Cum dudum*, 1 August 1341, in *Fonti orientales*, Series III, vol. 8, p. 151, proposition 100).

Armenians, was cautious in its teaching: "The efficient cause of matrimony is *usually* mutual consent expressed in words about the present."⁵⁵

We have seen that, concerning the essence of marriage, the term "contract" was used in describing the act of getting married. In fact, in the West, after the solution of the debate between the medieval schools of Paris and Bologna about what constitutes marriage with the adoption of the principle *consensus facit matrimonium* by Pope Alexander III, and especially beginning with Blessed Duns Scotus, marriage consent had been referred to more and more as a sacred *contractus*; in other words marriage was viewed as a contractual agreement.⁵⁶ The contractualist approach had already been seen in Gratian and Peter Lombard.⁵⁷ So during the last 600 years marriage has been described juridically almost entirely using the terminology of "contract". Whereas this term came into vogue in the 12th century, during the Scholastic period, prior to that time "covenant" had been a more important term in the vocabulary of marriage. Adopted by the Western medieval canonists to describe marriage more precisely, this contractual terminology was used by the Council of Trent, and by the present century the use of the term "contract" was so common that

⁵⁵ "Causa efficiens matrimonii regulariter est mutuus consensus per verba de presenti expressus" (EUGENE IV, *Exultate Deo* ["*Bulla unionis Armenorum*"], in TANNER, vol. 1, p. 550).

⁵⁶ See E. SCHILLEBEECKX, *Marriage: Human Reality and Saving Mystery*, London, Sheed & Ward, 1978, pp. 287-302.

⁵⁷ See A. GAUTHIER, *Introduction to Roman Law for Students in Canon Law*, Rome, St. Thomas University, 1994, pp. 54-56.

it could be said by a Latin canonist: "This needs no proof."⁵⁸ This is not to say that the use of the term *foedus* (for both *matrimonium in fieri* and *in facto esse*) was unknown, but that it was greatly overshadowed by *contractus* in describing the act of getting married. The effect of this contract, that is the *matrimonium in facto esse*, was usually described as the bond (*vinculum* or *ligamen*) of marriage, an ontological reality with juridical effects.⁵⁹ The term *coniunctio* was used to describe both the married state and the consensual act of getting married.

The sacramental dimension of the natural reality of matrimony was recognised slowly in the history of the Western Church. Although since Augustine the word *sacramentum* had been applied in a wide sense to marriage, it was only in the twelfth century that marriage began to be included in the canonical list of the sacraments. From the second half of the thirteenth century the position that marriage *in fieri* was a true sacrament and that it conferred grace was generally considered to be theologically certain. The Council of Florence, in the Bull of Union with the Armenians, taught the sacramentality of Christian marriage:

The seventh is the sacrament of matrimony, which is a sign of the union between Christ and the church according to the words of the

⁵⁸ J. PETROVITS, *The New Church Law on Matrimony*, Canon Law Studies no. 6, Philadelphia, PA, J.J. McVey, 1921, p. 2. Yet Cardinal Gasparri later admitted, in the 1932 edition of his tract on marriage, that the term "contract" was not used in Roman law in relation to marriage. See P. GASPARRI, *Tractatus canonicus de matrimonio*, revised ed. according to the 1917 Code, in Civitate Vaticana, Typis polyglottis Vaticanis, 1932, vol. 1, pp. 13-14.

⁵⁹ See, for example, GASPARRI, *Tractatus canonicus de matrimonio*, 1891, vol. 1, pp. 117-118: "Matrimonium in fieri est contractus legitimus inter marem et feminam individuam vitae consuetudinem afferens. Matrimonium in facto esse est inde resultans vitae consuetudo, et nominatim vinculum matrimoniale. Illud conjunctio [...]" ; p. 120: "Essentia autem matrimonii in facto esse consistit in vitae consuetudine, quae ex matrimonio in fieri resultat, praesertim in ligamine [...]"

apostle: *This sacrament is a great one, but I speak in Christ and in the Church.*⁶⁰

Trent confirmed this, in opposition to the Reformers:

If anyone says that marriage is not in a true and strict sense one of the seven sacraments of the gospel dispensation, instituted by Christ, but a human invention in the church, and that it does not confer grace: let him be anathema.⁶¹

As marriage became accepted as one of the sacraments, the question of the minister arose. The common Western position came to understand that the spouses were the ministers;⁶² this was the view held by Aquinas. Yet, in its Bull of Union with the Armenians, the Council of Florence had named the minister of each of the sacraments, except marriage. Trent too said nothing about the minister of the sacrament. A minority view in the West, exemplified by Melchior Cano (1509-1560), held that the priest was the minister.⁶³ In the 18th century, Prosper Lambertini (later Benedict XIV) thought Cano's view greatly probable.⁶⁴ However, by the 19th

⁶⁰ "Septimum est sacramentum matrimonii, quod est signum coniunctionis Christi et ecclesiae secundum apostolum dicentem: *Sacramentum hoc magnum est, ego autem dico, in Christo et in ecclesia [Eph 5,32]*" (EUGENE IV, *Exultate Deo* ["*Bulla unionis Armenorum*"], in TANNER, vol. 1, p. 550).

⁶¹ "Si quis dixerit, matrimonium non esse vere et proprie unum ex septem legis evangelicae sacramentis, a Christo domino institutum, sed ab hominibus in ecclesia inventum, neque gratiam conferre: a.s." (COUNCIL OF TRENT, Session 24, Canon 1 on the Sacrament of Marriage, in TANNER, vol. 2, p. 754). See also Session 7, 3 March 1547, Canon 1 on the Sacraments in General, in *ibid.*, p. 684, which lists marriage as one of the seven sacraments.

⁶² See F.R. McMANUS, "The Ministers of the Sacrament of Marriage in the Western Tradition", in *Studia canonica*, 20 (1986), pp. 85-104.

⁶³ See M. CANO, *De locorum theologorum*, book VIII, chapter V, in H. SERRY (ed.), *Melchioris Cani opera*, Bassani, ex typographia Remondini, 1746, pp. 240-241, 246.

⁶⁴ See P. LAMBERTINI, *De synodo diocesana*, book XIII, chapter XIII, no. IV, in *Benedicti XIV opera omnia*, vol. 11, Prati, Tipographia Aldina, 1844, p. 281.

century, the belief that the spouses themselves were the ministers of the sacrament was nearly universally accepted among Catholic theologians in the West; this was considered to be "theologically certain", although not a matter of Catholic faith. This stance was probably connected to the Church's resistance to the separation of contract and sacrament, a thesis which was helped by regarding the priest as the minister.

The precise relationship between the natural reality of marriage, in the West usually referred to as the contract, and the sacrament has been controversial historically, and indeed remains so today. Duns Scotus (1265-1308) had denied that for Christians the contract and the sacrament were identical in every case.⁶⁵ Later, around the time of the Council of Trent, Cajetan and Melchior Cano held the same view. Trent did not end the debate. St. Robert Bellarmine (1542-1621) was one of the most decisive influences on Church teaching in his contention that for Christians the contract and the sacrament were one and the same thing, and thus were inseparable.⁶⁶ He held that the matter, form, and minister of the sacrament are identical with those of the contract. Looking at inseparability theologically, Bellarmine spoke of this connection as an elevation (*elevation*), an idea which was to be taken up in the 1917 Code of Canon Law.

⁶⁵ Scotus denied that a marriage by proxy was sacramental, and likewise the marriages of mutes. For a précis of his ideas, see C. CAFFARA, "Marriage as a Reality in the Order of Creation and Marriage as a Sacrament", in *Contemporary Perspectives*, pp. 119-120.

⁶⁶ For a synopsis of Bellarmine's view, see *ibid.*, pp. 126-127.

In the 17th and 18th centuries, under the influence of Royalism and Josephinism, challenges were made by some European states to the Church's jurisdiction over the marriages of Christians, on the grounds that as a secular reality the contract of marriage was subject to secular jurisdiction. In practice, the state wanted to determine impediments, adjudicate on the validity of the contract, grant separation, etc. The Church's role would simply be reduced to the area of sacramentality, viewed as something additional to the contract.⁶⁷ This secularising trend was resisted by the magisterium of the Church, on the grounds that since, in Christian marriage, the sacrament and the contract are identical, the Church therefore has exclusive competence except for purely civil effects. Pius VI (1775-1799) was the first pope to identify the contract and the sacrament in an unqualified manner.⁶⁸ In the nineteenth century, this was reaffirmed by the popes in the context of a continuing struggle over marriage between Church and State.⁶⁹ The condemnation of the separability of the contract and the sacrament found its way into Pius IX's 1864 Syllabus of Errors, and inseparability was clearly taught by Leo XIII in his 1880 encyclical *Arcanum divinae sapientiae*.⁷⁰

⁶⁷ For a historical recapitulation, see *ibid.*, pp. 137-144.

⁶⁸ This is apparent from his letter to the archbishop of Trier, *Post factum tibi* (2 February 1787), his letter to the bishop of Mottala (Naples), *Deessemus nobis* (16 September 1787), and from the papal bull *Auctorem fidei* (28 August 1794). See *ibid.*, pp. 144-145.

⁶⁹ See *ibid.*, pp. 147-150, 154-156.

⁷⁰ See PIUS IX, *Syllabus errorum*, 8 December 1864, § VII, *Errores de matrimonio christiano*, propositions 66 and 73, in DENZINGER, 37th ed., nos. 2966 and 2975, pp. 807-808; LEO XIII, Encyclical, *Arcanum divinae sapientiae*, 10 February 1880, in *ibid.*, nos. 3145-3146, pp. 847-848.

By the late 19th century, inseparability was regarded as certain Catholic doctrine, defended by the theologians such as Scheeben and Palmieri;⁷¹ this was accepted by the canonists, exemplified by Gasparri and Wernz.⁷²

2. THE 1917 *Codex iuris canonici*

No attempt was made to offer a definition of marriage in the 1917 Code of Canon Law, promulgated for the Latin Church.⁷³ However some canons do come close to describing the juridical nature of marriage. The first two canons are especially important:

c. 1012 § 1. Christ the Lord has raised the marriage contract itself between baptized persons to the dignity of a sacrament.

§ 2. Hence, a valid marriage contract cannot exist between baptized persons without its being by that very fact a sacrament.⁷⁴

c. 1013 § 1. The primary end of marriage is the procreation and education of offspring; the secondary end is mutual help and the allaying of concupiscence.

⁷¹ For a summary of the views of M.J. Scheeben and D. Palmieri, see CAFARRA, "Marriage as a Reality in the Order of Creation and Marriage as a Sacrament", pp. 119-124.

⁷² See GASPARRI, *Tractatus canonicus de matrimonio*, 1891, vol. 1, pp. 130-132; WERNZ, *Ius matrimoniale*, pars 1, pp. 45-46.

⁷³ *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, in *AAS*, 9 (1917), pars 2, pp. 5-456. For an English-language translation of the 1917 canons we will be discussing, see T.L. BOUSCAREN, A.C. ELLIS, and F.N. KORTH, *Canon Law: A Text and Commentary*, 4th revised ed., Milwaukee, WI, Bruce, 1966, pp. 464, 466, 565, 573, 603. We use these translations, but with slight modifications.

⁷⁴ *AAS*, 9 (1917), pars 2, p. 202: "c. 1012 § 1. Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimoniale inter baptizatos.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum."

By using the word "elevated" in regard to the sacramentality of marriage between the baptized, c. 1012 § 1 indirectly acknowledged the origin of marriage in the natural human condition.

§ 2. The essential properties of marriage are unity and indissolubility which in Christian marriage acquire a distinctive firmness by reason of the sacrament.⁷⁵

From these two canons, one can deduce the understanding of marriage *in fieri* as being basically a contract between a man and a woman, which is itself a sacrament between the baptised. However, the Code says nothing about the ministers of the sacrament of marriage, unlike the other six sacraments where the minister is spoken of. All marriages are characterised by the essential properties of unity and indissolubility, but in sacramental marriage these properties gain a unique firmness.⁷⁶ The general principle that every marriage is indissoluble was further defined later on in the 1917 Code when it is stated that a valid consummated Christian marriage could never be dissolved except by death (c. 1118). Finally, the initial canons tell us that marriage is meant primarily for the procreation and education of children.

⁷⁵ Ibid: "c. 1013 § 1. Matrimonii finis primarius est procreatio atque educatio proles; secundarius mutuuum adiutorium et remedium concupiscentiae.

§ 2. Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti."

Navarrete shows, by examining the *fontes* of c. 1013 § 1, that this is the first magisterial document to order the "ends" hierarchically in this particular way, and in terms of "primary" and "secondary". See NAVARRETE, *Structura juridica matrimonii*, pp. 26-28.

⁷⁶ In this context, Mackin comments: "[Canon 1013 § 2] saves a place for the radical possibility of polygamous marriage and of dissolution by adding that monogamy and indissolubility gain a unique firmness in the marriages of Christians by reason of their sacramental character. In other merely natural marriages the monogamy is exceptionable and the indissolubility is dissoluble" (MACKIN, *What is Marriage?*, p. 210). On the other hand, we also need to remember that the 1917 Code said that if in their marital consent the parties actually reject either unity or indissolubility or both, then it is not a marriage (see c. 1086 § 2).

However, canons 1012 and 1013 are not the only canons which elucidate something about the nature of marriage. Canons 1081, 1086 § 2, and 1110 are also worth reviewing, because in some ways they flesh out the first two canons:

c. 1081 § 1. A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by human power.

§ 2. Matrimonial consent is an act of the will by which each party gives and accepts the exclusive and perpetual right over the body, for acts which of themselves are apt for the generation of offspring.⁷⁷

c. 1086 § 2. If, however, either or both of the parties should by a positive act of the will exclude marriage itself, or all right to the conjugal act, or any essential property, such party contracts invalidly.⁷⁸

c. 1110 From a valid marriage there arises between the spouses a bond which of its very nature is perpetual and exclusive; moreover Christian marriage confers grace upon the spouses if they place no obstacle in its way.⁷⁹

So a marriage is brought into existence by the properly expressed consent of a legally capable couple, a restatement and elucidation of the old Western canonical principle *matrimonium facit partium consensus*. The object of this consent is the perpetual and

⁷⁷ AAS, 9 (1917), pars 2, p. 213: "c. 1081 § 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus; qui nulla humana potestate suppleri valet.
§ 2. Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad proles generationem."

This last paragraph and c. 1082 § 1 together determine what essentially distinguishes marriage from other societies, as pointed out by NAVARRETE (*Structura juridica matrimonii*, pp. 28-29).

⁷⁸ AAS, 9 (1917), pars 2, p. 214: "c. 1086 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit."

⁷⁹ Ibid., p. 219: "c. 1110 Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; matrimonium praeterea christianum coniugibus non ponentibus obicem gratiam confert."

exclusive *ius in corpus pro generatione*.⁸⁰ Once consent is validly given, the *matrimonium in factum esse* which arises is described as the *vinculum*. In describing consent, a dominating theme is the right to carnal copula which is ordered to procreation.⁸¹ Concepts such as *communio vitae coniugalis* and *consortium vitae* were treated under the heading *De separatione tori, mensae et habitationis*.⁸²

Cardinal Gasparri had a decisive role in shaping the Code's concept of marriage. He ensured that there was in the Code an explicit mention of a hierarchy of ends and a definition of consent in terms of the *ius in corpus*; these were not found in the earlier schemata.⁸³ The Code narrowed the concept of marriage, reducing its essence from the "conjugal society" of classical theology to "the right to sexual intercourse for procreation".⁸⁴ This confirmed the thought of canonists immediately preceding the Code.

⁸⁰ See S.D. KOŽUL, *Evoluzione della dottrina circa l'essenza del matrimonio dal C.I.C. al Vaticano II*, Vicenza, Edizioni LIEF, 1980, pp. 167-169.

⁸¹ This is confirmed by canon 1082 § 1 (stating that for consent to be possible the parties must be "at least not ignorant that marriage is a permanent society between man and woman for the procreation of offspring") which is also useful in finding out what is the essence of marriage in the Code. See FELLHAUER, "The *consortium omnis vitae*", p. 80.

⁸² See canons 1128, 1129 § 1, 1130, and 1131 § 1.

⁸³ See L. BONNET, "L'influence du Cardinal Gasparri sur la conception du mariage du Code de droit canonique de 1917", in *L'Année canonique*, 35 (1992), pp. 181-197. In this context, it is interesting to note that the canonical historian Cardinal A. Stickler contends that Gasparri was more of a pragmatic jurist than a historian of canon law. See A.M. STICKLER, "La funzione della scienza storica di diritto canonico nella codificazione piobenedittina e per la riforma attuale dei diritti canonici", in *L'Année canonique*, 15 (1971), pp. 526-528.

⁸⁴ Yet, by an analysis of the sources of c. 1081 § 2, c. 1082 § 1, and c. 1086 § 2, Fellhauer could find no *fontes* presenting the essence of marriage as the *ius in corpus* or identifying the object of consent in like terms. See FELLHAUER, "The *consortium omnis vitae*", pp. 81-82.

The post-Code commentators followed this thinking on the nature of marriage.⁸⁵ Terms such as *consortium* or *communio* generally meant little more than cohabitation and were usually said to pertain to the "integrity" of the marriage contract rather than to its essence.⁸⁶ This understanding can be summed up in the definition of marriage given by Bouscaren, Ellis, and Korth:

Marriage is a lawful and exclusive contract by which a man and a woman mutually give and accept a right over their bodies for the purpose of acts which are in themselves suitable for the generation of children.⁸⁷

These authors acknowledge that the secondary end of marriage is very important and may even be predominant in the minds of the parties, but don't include it in their definition.

⁸⁵ For a very detailed survey of the definitions of marriage, both *in fieri* and *in facto esse*, advanced by canonists and theologians after the 1917 Code, see C.J. SCILUNA, *The Essential Definition of Marriage According to the 1917 and 1983 Codes of Canon Law: An Exegetical and Comparative Study*, J.C.D. dissertation *pro manuscripto*, Romae, Pontificia Universitas Gregoriana, 1991, pp. 90-122.

⁸⁶ See, for example, F.M. CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. 3, *De matrimonio*, 4th ed., Taurinorum, Augustae; Romae, Marietti, 1939, pars 1, p. 6. Cf. P. FEDELE, "La definizione del matrimonio in diritto canonico", in *Ephemerides iuris canonici*, 1 (1945), pp. 49-50: "[...] la *consuetudo totius vitae* [...] (identificandosi col fine del *mutuum adiutorium*) [...] non incide sul problema della validità del matrimonio; è un elemento non necessario *ad validitatem*, ma necessario *ad integritatem*, cioè affinché il matrimonio sortia un esito felice, e quindi non può trovar posto in una definizione giuridica del matrimonio." See also J.A. RENKEN, *The Contemporary Understanding of Marriage: An Historico-Critical Study of "Gaudium et spes" 47-52 and its Influence upon the Revision of the "Codex juris canonici"*, Rome, Pontifical University of St. Thomas, 1981, pp. 4-10.

⁸⁷ BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, p. 466. In this context, G. ROBINSON ("Unresolved Questions in the Theology of Marriage", in *The Jurist*, 40 [1983], p. 80) makes the excellent point that this type of thinking led to a dichotomy. A more personalistic theology was used in pre-marriage preparation — priests didn't tell couples that all they were consenting to was the *ius in corpus*, and that everything else was desirable but not essential; the other theology functioned when assessing the validity of a broken marriage in a tribunal.

B. THE EASTERN CHURCHES

Having examined the Western canonical thinking on the nature of marriage, it is now time to sketch some of the theological and historical background of the Oriental thinking on marriage, focussing especially on the different emphases found in the East. The words "East" and "West", relative terms in themselves, have obtained quite a precise meaning in ecclesiastical language, in which they are used with reference to the division of the Roman Empire, introduced by Diocletian at the end of the third century and which became definitive at the death of Theodosius.

1. BACKGROUND⁸⁸

A preliminary point which needs to be made is that, when speaking of the "Eastern Churches", it is difficult to make generalisations. In other words, we have to beware of treating these Churches as a totality without differentiating between them. Nonetheless, we can say that before and after the ecclesial schism with the West, a uniquely Eastern theology of marriage had developed which the Oriental Catholic Churches brought with them on their reunion with Rome, although having this theology recognised in canonical terms was to encounter difficulties. First we need to say a word of explanation about these Catholic Churches, before going on to examine some aspects of the Oriental theology of marriage.

⁸⁸ This section does not attempt to offer a comprehensive treatise on Oriental thinking on the nature of marriage, but rather is meant as a background sketch focussing on those areas where the East had different emphases from the West.

(a) The Eastern Catholic Churches

The most important cities of the Eastern Empire, Alexandria and Antioch from the beginning, and then Byzantium as capital of the Empire with the name Constantinople, became great centres of Eastern Christianity, quasi mother Churches of other Churches. We speak of five original traditions — three within the borders of the Empire: Antioch with Jerusalem (or West Syrian), Alexandria, and Constantinople; and two on the borders: the East Syrian (or Chaldean) tradition, and the Armenian. From these five Eastern traditions (Alexandrian, Antiochene, Armenian, Chaldean, and Byzantine), there have evolved fifteen "rites".⁸⁹ Except for the Armenian tradition, all the other traditions have given rise to more than one rite with varying differences. The Byzantine tradition has been the seedbed of seven rites: Bulgarian, Georgian, Greek, Melkite, Rumanian, Ruthenian, and Slav. The Antiochean tradition embraces the Malankaran, Maronite, and Syrian rites, while from the Chaldean tradition arose the Chaldean and Syro-Malabar rites. The Alexandrian tradition gave rise to the Coptic and Ethiopian rites.⁹⁰ Eastern canon law developed out of rites.

⁸⁹ The word "rite" has many meanings; here we are using "rite" in the second sense of the term noted by G. Nedungatt: "[t]he word 'rite' [...] came [...] to designate any or all of the following three things: 1) liturgical ceremony; 2) a complex of liturgical ceremonies, customs and practices including canonical discipline; 3) the communities of faithful with or without their own hierarchy who were received into direct communion with Rome but with their own 'rite' in senses 1 and 2. Thus 'rite' underwent a seachange or metamorphosis from its original thing-status to person-status and caused no little confusion" (G. NEDUNGATT, *The Spirit of the Eastern Code*, Rome, Centre for Indian and Inter-Religious Studies; Bangalore, Dharmaram Publications, 1993, p. 64).

⁹⁰ We must note that, historically, all rites have been influenced by more than one tradition: there is no "pure" rite as such. For instance, in the way the Alexandrian tradition developed in Ethiopia, it was not free from Antiochene influence.

As early as the fifth century, Christological disputes coupled with political rivalries rent the fabric of Eastern Christianity. Affected by schism in this early period were the Churches of Armenia and Persia, along with parts of the Churches of Antioch, Alexandria, and Jerusalem.⁹¹ The schism between the Eastern and Western Churches has been traditionally recorded as occurring in 1054 A.D. when the papal legates and the patriarch of Constantinople excommunicated each other, although Church unity had been seriously impaired even before this date; certainly the Crusades and the sacking of Constantinople in 1204 confirmed the division in the minds of many Oriental Christians.⁹² After the schism of 1054, various individuals, movements, and councils offered plans for a reunion of East and West; notable, for example, were the Second Council of Lyons in 1274, and the Council of Florence in 1439, which we have already mentioned. These attempts ultimately failed to heal the breach between Rome and the Eastern Churches.

In the sixteenth and seventeenth centuries various groups reunited with Rome, largely as a result of Latin missionary activity, while at the same time the concept of "rite" developed, according to which groups of Oriental Christians reuniting with the Roman See would be allowed to maintain their own liturgical tradition and canonical discipline. In 1595, the Ukrainian Catholic Church was formed as a result of the Union of Brest, and in 1646 at the Union of Uzhhorod the Ruthenians under

⁹¹ These schisms, after the Councils of Ephesus (431 A.D.) and Chalcedon (455 A.D.), led to the formation of the so-called Nestorian and Monophysite Churches. See D. ATTWATER, *The Christian Churches of the East*, vol. 1, Milwaukee, WI, Bruce, 1947, pp. 3-5.

⁹² See ATTWATER, *The Christian Churches of the East*, vol. 1, pp. 5-12.

Hungarian rule established communion with the Holy See. At other times, a number of other Oriental Catholic patriarchs were recognised by Rome such as the Chaldean Patriarch (1553), the Syrian Patriarch (1656), the Melkite Patriarch (1729), the Armenian Patriarch (1742), and the Coptic Patriarch (1899). Eventually sections of virtually all the Eastern Churches came into union with the Roman See. Since, however, until Vatican II, the overarching Catholic ecclesiology was that of "one Church", usage shied away of speaking of Oriental Catholic Churches: the term "rite" usually fulfilled that function. The concern of the Holy See to protect the Eastern "uniate" communities from absorption into the Latin Church resulted in a praxis and law that "personalised" rite; this was a post-Tridentine development. Pope Benedict XIV (1740-1758) issued the first papal legislation prohibiting the change of rite (from Latin to Oriental, and vice versa) without the permission of Rome.

Today, in Catholic thinking, the word "Church" is preferred when speaking about autonomous communities belonging to one rite. This is seen in the *Codex canonum Ecclesiarum orientalium* where a Church *sui iuris* is defined as "a group of Christian faithful united by a hierarchy according to the norm of law which the supreme authority of the Church expressly or tacitly recognises as *sui iuris*" (c. 27), whereas a rite is "the liturgical, theological, spiritual and disciplinary patrimony, distinct by virtue of the culture and historical circumstances of the people, by which its own manner of living the faith is manifested in each Church *sui iuris*" (c. 28 § 1). So today we speak of five traditions, fifteen rites, but twenty-one Oriental Catholic Churches recognised by the Holy See as *sui iuris*. These latter are grouped according

to the five Eastern traditions.⁹³ Belonging to the Alexandrian tradition are the Coptic and Ethiopian Catholic Churches, while the Syrian, Maronite, and Syro-Malankaran Catholic Churches come from the Antiochene tradition. The Armenian Catholic Church is the only one in the Armenian tradition; both the Chaldean and Malabar Catholic Churches share the Chaldean tradition. The Byzantine or Constantinopolitan tradition has the largest number of Catholic Churches *sui iuris*: Belorussian, Bulgarian, Greek, Hungarian, Italo-Albanian, Melkite, Rumanian, Ruthenian, Slovak, Ukrainian, Krizevci (Yugoslavian), Albanian, and Russian.

Nowadays one can divide the Oriental Churches into roughly four categories: Catholic, Orthodox, the Assyrian Church of the East ("Nestorian" in origin), and what are today called the Oriental Orthodox Churches (sometimes called "non-Chalcedonian" or "pre-Chalcedonian").⁹⁴ Today the Eastern rites include both Catholic and non-Catholic groups, with the exception of the Maronites and Byzantine Italians.⁹⁵

(b) Marriage as Sacrament or "Mystery"

The Eastern approach to the sacraments was and is different from that of the West. The Latin concentration on precision led to dividing the sacraments into

⁹³ See NEDUNGATT, *The Spirit of the Eastern Code*, p. 62; F.R. McMANUS, "The Code of Canons of the Eastern Churches", in *The Jurist*, 53 (1993), pp. 44-45.

⁹⁴ See R.G. ROBERSON, *The Eastern Christian Churches: A Brief Survey*, revised 3rd ed., Roma, Pont. Institutum studiorum orientarium, 1990, xi, 129 p.

⁹⁵ For a contemporary report on the Eastern Catholic Churches, see ROBERSON, *The Eastern Christian Churches*, pp. 82-118. This valuable book also has an up-to-date description of all the non-Catholic Eastern Churches. One group, the Maronites in Lebanon, claims never to have been out of communion with Rome.

essential and non-essential parts, while the Eastern Churches looked at the sacraments in their totality, insisting on the imperceptible facets of the "mysteries". The Pauline idea of the Church as the bride of Christ exerted a greater influence in the East than in the West. To a greater extent than in the Western Church, Oriental theology of marriage was inspired by the notion of *henosis* (the communion of Christ with his Church), in relation to the Letter to the Ephesians 5:22-32.

In the theology of marriage of the Eastern traditions the primary point of departure is not the natural properties of marriage, but the supernatural union that it images. As the Orthodox theologian A. Schmemmann puts it: "It is an icon of the Kingdom."⁹⁶ Marriage is above all a gift of God, redeemed by Christ, and lived out in the life of the Church.⁹⁷ The Oriental Churches, from early on, looked upon the mutual consent of the Christian couple as a spiritual act, rather than as a legal one. Later on, when the time arrived to list canonically the sacraments, the East had no difficulty in acknowledging marriage as one of the sacraments.⁹⁸ The Western view

⁹⁶ A. SCHMEMMANN, "The Indissolubility of Marriage: The Theological Tradition of the East", in W. W. BASSETT (ed.), *The Bond of Marriage*, Notre Dame, IN, University of Notre Dame Press, 1968, p. 111.

⁹⁷ For an understanding of some Eastern Christian thinking on the sacrament of marriage, see P. EVDOKIMOV, *The Sacrament of Love: The Nuptial Mystery in the Light of the Orthodox Tradition*, Crestwood, NY, St. Vladimir's Seminary Press, 1985, 192 p; J. MEYENDORFF, *Marriage: An Orthodox Perspective*, 2nd ed., Tuckaboe, NY, St. Vladimir's Seminary Press, 1975, 144 p; B.S. PERRICONE, *The Spiritual Theology of Marriage in the Eastern Tradition*, S.T.L. thesis, Washington, DC, The John Paul II Pontifical Institute for Studies on Marriage and the Family, 1992, iii, 103 p; T. STYLIANOPOULOS, "Toward a Theology of Marriage in the Orthodox Church", in *Greek Orthodox Theological Review*, 22 (1977), pp. 249-283.

⁹⁸ See J. ZHISHMAN, *Das Eherecht der orientalischen Kirche*, Wien, W. Braumüller, 1864, pp. 124-132. This monumental work by a nineteenth century Orthodox canonist remains an important resource for the study of marriage in the Byzantine Churches. We are grateful for the assistance of the Rev. Dr. Leslie Laszlo with the somewhat archaic German of this text.

of marriage as contract did not have much sway in the Churches of the East where more attention was paid to the mystical meaning of marriage. Certainly the idea of contract was known but it did not have great influence on ecclesial thinking regarding marriage.⁹⁹ However, after their reunion with Rome, later Catholic Oriental synods were heavily influenced by the Western *Ius decretalium* and the word "contract" crept into their legislation.¹⁰⁰

Three important ideas underlie the Eastern notion of marriage: God's creation and His blessing of man and woman (Genesis 1:27, 2:24; Matthew 19:4), the spouses' new life in Christ, and the couple's sharing in the life of the Church, the Body of Christ. Marriage is a mystery of the Kingdom of God, whereby husband and wife not only fulfil their own earthly needs, but also enter the realm of eternal life: according to St. John Chrysostom in the fourth century, when husband and wife cleave to one another in love, there is a remnant of Paradise, even after the Fall.¹⁰¹ Furthermore, according to Chrysostom, there are two reasons for which marriage was instituted,

⁹⁹ This is not to say that the contractual model of looking at marriage has been without influence on the older Oriental Christian tradition of tending to relate everything to the mystery and the Scriptures, since, as has been remarked by O. ROUSSEAU: "If the Eastern tradition (especially the Russian) has varied on this question over the course of recent centuries, the reason has been in part owing to the influence of Latin theology, which on this point has been abandoned nowadays by her theologians" ("Divorce and Remarriage: East and West", in *Concilium*, 4 [1967], no. 3, p. 61).

¹⁰⁰ For instance, see some of the marriage legislation of the 1736 Maronite Synod of Mount Lebanon (part II, chapter XI) in *Fonti orientales*, Series I, fac. XII, no. 877 (p. 739), nos. 880-884 (pp. 741-745), no. 886 (pp. 745-747), no. 889 (p. 749), no. 891 (pp. 749-751), no. 893 (p. 753); likewise, see the contractual terminology used by the 1720 Ruthenian Synod of Zamosč (title III, § 8), in *Synodus provincialis Ruthenorum habita in civitate Zamosciae anno 1720*, 2nd ed., Romae, Typis S.C. de Propaganda Fide, 1838, pp. 108-113.

¹⁰¹ See ST. JOHN CHRYSOSTOM, *De libello repudii*, in J. MIGNE (ed.), *Patrologia graeca*, vol. 51, Paris, Migne, col. 221.

that people may live chastely and that they may be parents, and of these two reasons, the first is the most significant.¹⁰² Many married persons cannot have children, and he says that is why in marriage the ordering of the sexual life takes precedence over procreation, especially now that the human race has filled the whole earth.¹⁰³

The Roman jurist Modestinus' definition of marriage as "a union of a man and a woman, and a partnership of the whole of life, a participation in divine and human law" was restated continuously in Eastern handbooks of theology and canon law down to this century.¹⁰⁴ This definition was accepted by Oriental Christian theologians and canonists, yet it was understood and unfolded in a thoroughly Christian way, especially in their teaching that marriage was much more than a legal bond, involving as it did a profound spiritual and moral reality.¹⁰⁵

(c) The Sacred Rite and the Sacred Minister

The special emphasis on the sacred and spiritual character of marriage in the Eastern Churches is shown in the significant difference which developed between East and West concerning the necessity of a sacred rite and in particular the role of the priest in the celebration of marriage. It is not immediately obvious that the actual celebration of marriage can tell us anything about the nature of marriage itself.

¹⁰² See ST. JOHN CHRYSOSTOM, *De verbiis illis Apostoli "propter fornicationes"*, in *ibid.*, col. 213.

¹⁰³ See *ibid.*

¹⁰⁴ According to the Orthodox theologian P. Evdokimov, the greater number of Orthodox texts refer to this definition without any mention of procreation. See EVDOKIMOV, *The Sacrament of Love*, p. 119, footnote 25.

¹⁰⁵ For an account of the influence of Modestinus' definition, see ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 93-99, 119-124.

Yet it is very difficult to gain an insight into Oriental Christian thought on marriage without first comprehending how the sacred rite is at the very heart of the Eastern understanding of marriage as something essentially sacred. Hence we need to elucidate this.

In contrast to the West, in the Orient the marriage liturgy was made obligatory very early on; this resulted in marriage obtaining a mystical and liturgical significance very early in the Eastern Churches.¹⁰⁶ The role of nuptial rites and the priest developed even earlier in the non-Byzantine Churches than in the Greek Church; to be married in a religious rite was a canonical obligation in Armenia in the fifth

¹⁰⁶ To generalise, the ecclesiastical marriage rite in the Christian East was composed of two parts: (i) the betrothal, and (ii) the "crowning" and blessing by the priest. The latter were intimately connected, and sometimes synonymous; their precise relationship need not concern us here. On the formation of the marriage bond, see J. DAUVILLIER and C. DE CLERCQ, *Le mariage en droit canonique oriental*, Paris, Recueil Sirey, 1936, pp. 32-48 (Byzantine Churches), pp. 48-61 (Chaldean Churches), pp. 61-65 (Syrian Churches), pp. 65-68 (Maronite Church), pp. 68-72 (Coptic Churches), pp. 72-76 (Armenian Churches), pp. 76-83 (Ethiopian Churches).

The history of betrothals is quite complex in both East and West. See JOYCE, *Christian Marriage*, pp. 83-101. In the East, the betrothal or engagement was at one time regarded as an incomplete marriage (equivalent to *matrimonium initiatum* in the West), starting an indissoluble marriage, though it did not confer the right for its consummation which was granted only through the subsequent coronation. The rite of engagement was and is a distinct ceremony in itself, although in some Churches it is now immediately followed by the actual wedding ceremony. In some Eastern Churches, the expression of consent was verbalised in the rite of betrothal, either by the couple or by their parents or guardians, but it was not part of the actual marriage ceremony, the rite of crowning. Their consent was implicit by their presence before the Christian community and God's altar to receive the blessing of the priest.

Therefore, it should be remembered that in the original tradition of the East the "blessing of the priest" was not the equivalent of the questioning by the priest and the presence of witnesses, but was a sacerdotal blessing in the strict sense in that it was unaccompanied by any exchange of consent either asked for or received by the priest. In the early marriage ceremonies of the Churches linked with Constantinople, the consent was not expressed vocally in church, since among the Byzantines the blessing and crowning ceremony gave external manifestation to the consent of the spouses. See J. DAUVILLIER, "La formation du mariage dans les Églises orientales: à propos d'une publication récente", in *Revue des sciences religieuses*, 15 (1935), pp. 386-387. Much later on, Byzantine liturgies did sometimes include an exchange of consent, largely under Western influence.

century.¹⁰⁷ Between the eighth and eleventh centuries in the Byzantine Empire the state virtually made the liturgical celebration an obligatory condition of validity. Of particular importance was *Novella 89* of Emperor Leo the Wise, issued around 893 A.D., requiring the sacerdotal blessing for marriage, under pain of nullity.¹⁰⁸ This gave legal sanction to the already widespread practice of receiving the *euchologia*.¹⁰⁹ Although this was a civil sanction, it was accepted as ecclesiastical law.¹¹⁰ Indeed there is evidence to show that even prior to the enactment of Leo the Philosopher, many Byzantine Christians considered nuptials celebrated without the blessing of a priest invalid.¹¹¹ This notion was also recognised by the non-Byzantine Churches.¹¹²

The common opinion prevailed among the Oriental Churches that the benediction of the couple by a priest, not necessarily the parish priest, was necessary for a valid marriage.¹¹³ This idea was maintained by Eastern Catholics on their reunion with Rome, on the basis of an appeal to the immemorial observance of this

¹⁰⁷ See K. RITZER, *Le mariage dans les Églises chrétiennes du I^{er} au XI^e siècle*, Paris, Cerf, 1970, pp. 144-145, 172; PRADER, *Il matrimonio in Oriente e in Occidente*, pp. 196-198.

¹⁰⁸ *Novella 89* did not apply to serfs; in 1095, Emperor Alexios I gave slaves the right of getting lawfully married, which meant that the sacerdotal blessing was henceforth required for all marriages.

¹⁰⁹ See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 158-159.

¹¹⁰ See P. TOCANEL, "De Novellae 89 Leonis Philosophi canonizatione", in *Apollinaris* 42 (1969), pp. 21-36. See also P. L'HUILLIER, "Novella 89 of Leo the Wise on Marriage: An Insight into its Theoretical and Practical Impact", in *Greek Orthodox Theological Review*, 32 (1987), pp. 153-162.

¹¹¹ See H. BENEDETTI, "Votum II", in *Acta Sanctae Sedis*, 41 (1908), p. 256.

¹¹² See *ibid.*, pp. 257-258. See also PRADER, *Il matrimonio in Oriente e in Occidente*, pp. 196-198.

¹¹³ See BENEDETTI, "Votum II", pp. 258-260.

Oriental law or custom, although having this accepted by the Roman Curia and Western canonists faced grave difficulties. As far as Rome was concerned, at least initially, no real binding law concerning a sacred liturgical rite existed among the Oriental Churches which returned to union with the Holy See. In 1785, in an Instruction to the Vicar Apostolic of Constantinople, Propaganda Fide held that the marriage of an Armenian before a Turkish judge was to be considered valid if the couple gave true marital consent yet erroneously believed that marriage without the blessing was invalid.¹¹⁴ This latter opinion was declared to be not constant, not even common throughout all the Armenian nation, not accepted by those ecclesiastics who had studied theology, not to correspond with any Armenian synodal canon, and finally, to be a view not approved by the Apostolic See and, moreover, deriving from the ignorance of the Armenians.¹¹⁵ In 1858, the same Congregation told the Byzantine Rumanian bishops that no document of the Eastern Churches demanded

¹¹⁴ "Il loro errore di non potersi contrarre validamente il matrimonio avanti il giudice turco, non può renderlo nullo; imperocchè non concerne, nè appartiene all sostanza del matrimonio, e non toglie la precedente volontà di chi volea celebrarlo, ma cade solamente nelle sua forma e solennità, e così non può renderlo invalido, giacchè sì nel matrimonio, come negli altri contratti, quando l'errore è concomitante, e non influisce sull'essenza della cosa che si vuole, ma sulle sue qualità accidentali, rimane il contratto valido. E neppure osta validità di tali matrimonii l'opinione invalsa presso la nazione armena, che non possa un matrimonio contrarsi avanti il ministro turco, ma faccia di mestieri di celebrarlo avanti la Chiesa, e con le benedizione sacerdotale" (S.C. DE PROPAGANDA FIDE, *Instr. ad Vic. Ap. Constantinop.*, 1 October 1785, in *Fontes*, vol. 7, no. 4607, pp. 162-163). However, this Instruction stated earlier that marriage before the Turkish judge would be invalid if the party only planned to take a concubine, or if the party did not intend to enter a true marriage.

¹¹⁵ "Questa opinione non è costante, non è nè tampoco comune presso tutta la nazione, e gli ecclesiastici che hanno studiata teologia, sanno pensare diversamente, come l'afferma lo stesso Vicario Missirli nella sua risposta. Inoltre non è questa opinione corredata da verun canone synodale armeno, non è approvata dalla Sede Apostolica, ma piuttosto deriva dall'ignoranza degli armeni, i quali non distinguono il matrimonio invalido dall' illecito. [...] Sarà pure opportuno, che a poco a poco vada V.S. disingannando gli armeni dal loro errore, che per la validità del matrimonio sia necessaria la presenza del sacerdote" (*ibid.*, p. 163).

expressly and clearly the blessing of a priest for the validity of a marriage.¹¹⁶ Thus the requirement for a sacerdotal blessing was considered a customary practice, after the late nineteenth century a very acceptable one, but not a binding requirement whose neglect would invalidate marriage.

The West had lost contact with the liturgical theology of the East, and operated with the Latin understanding that the sacrament came into existence through the consent of the two baptized parties; people married by the simple exchange of vows unless they were specifically bound by a canonical form, in which case the priest's role was merely that of a "qualified witness" to ensure the publicity of the consensual exchange. Thus the Roman authorities continued to recognise marriages among Oriental Christians conducted without a sacred rite on the basis that, unless in a particular case they were bound to a canonical form, the expression of consent alone sufficed for a valid marriage.¹¹⁷ By the turn of this century there

¹¹⁶ "Nunc vero ut ad ea veniamus, quae de orientalis Ecclesiae doctrina circa benedictionem sacerdotalem retulistis, notum profecto est eandem Ecclesiam non minus quam occidentalem, inde ab origine christiani nominis, in celebrandis fidelium nuptiis, utpote novae legis sacramento, sacros ritus sacerdotumque benedictiones adhibuisse, simulque omnibus severissime interdixisse, ne, illis praetermissis seu neglectis, coniugale foedus conciliare auderent. Quod autem matrimonia contra communem Ecclesiae usum inita non solum pro illicitis, sed etiam pro irritis habita fuerint, ex ecclesiasticis orientis documentis demonstrari nequit. Equidem nullum cognovimus antiquae eiusdem Ecclesiae Patris effatum, nullum Conciliorum canone, quo illud expressis ac indubiis verbis declaratum fuisse appareat. Porro orientalium et graecorum euchologia dum solemnitates ac ritus commemorant, quibus connubium celebratur, mutuum consensum quo sponsus et sponsa inter se copulantur supponunt, atque coniunctionem tamquam iam factam sanctificant, quin ullo verbo significetur, sacerdotem esse qui sponso in matrimonium coniungat aut sacramentum ipsum efficiat et conferat" (S.C. DE PROPAGANDA FIDE, Instruction to the Greek Rumanians, *Litterae quas nuper*, 1858, in *ibid.*, no. 4843, p. 362). The Instruction went on to say that *Novella 89* of Emperor Leo the Wise changed nothing in ecclesiastical law.

¹¹⁷ For a survey of the form of marriage among the Eastern Catholic Churches after their reunion with Rome, see D. MOTIUK, *The Sacred Rite in Eastern Matrimonial Canon Law*, J.C.L. seminar paper, Ottawa, Saint Paul University, 1990, pp. 26-39. Before 1949, each time a canonical form had

was a growing Roman recognition of the strength of the Eastern liturgical tradition and of the fact that all Oriental Christians considered themselves obliged to have their marriages blessed by a priest, but this was still clearly distinguished from what was essential for the celebration of the sacrament. Eastern theology's particular focus on the sacredness of marriage as expressed in the sacerdotal blessing and crowning was deprived of canonical significance, and was lost from view for some time.

Slowly, however, Western theologians and canonists began to accept that the Eastern theology of marriage had developed differently from the West, and was intimately connected with the liturgical rite in which the priestly blessing was

been imposed on an Oriental Catholic Church, it had been purely a Tridentine form — either that of the decree *Tametsi* itself or its modified version found in *Ne temere* (1908). Much scholarship centred on which Oriental Catholics were subject to the Tridentine form laid down by *Tametsi*. There is no indication that attempts by various Eastern Catholic Churches to establish explicitly a form of marriage requiring the benediction of a priest for validity ever gained the acceptance of the Holy See. Oriental Catholic synods and councils were repeatedly informed that they were incompetent to establish a form of marriage, and they were told that their actions had no invalidating force without the specific approval of Rome, which, for example, was granted to the Maronites after the Synod of Lebanon in 1736, and to some Ukrainian-Ruthenian eparchies at various times. See J.F. MARBACH, *Marriage Legislation for the Catholics of the Oriental Rites in the United States and Canada*, Canon Law Studies no. 243, Washington, DC, The Catholic University of America Press, 1946, pp. 76-203. Moreover they were obliged to employ a Tridentine form if they wished to receive approval of their request for a juridical form of marriage.

considered crucial.¹¹⁸ Yet, right up to the 1940s, the Roman Curia refused to acknowledge the blessing as being essential.¹¹⁹

This Roman reluctance to acknowledge the role of the sacred rite in the Eastern thinking on marriage probably arose from several factors. First, there was the historical difficulty that the blessing had not always been given to second marriages (e.g. the case of widows/widowers), begging the question whether the blessing was absolutely essential. Secondly, the Roman authorities were reluctant to do anything that lent any support to the widespread Oriental Christian view, which had fully developed by the nineteenth century, that the priest is the minister of the sacrament of marriage. Catholic scholars, by and large, remained skeptical of this view, regarding it as erroneous and, moreover, as a relatively recent development.¹²⁰

¹¹⁸ For example, in 1928 an American author would grudgingly admit: "It is true that the Church has never declared whether the sacerdotal blessing is necessary for a valid marriage of certain Orientals. Theoretically the latter conclusion [that it isn't] is sound, but in practice it seems the question must be solved by an appeal to the immemorial observance of the Oriental law or custom which considers the sacerdotal blessing an absolute formality for valid nuptials" (J.A. DUSKIE, *The Canonical Status of the Orientals in the United States*, Canon Law Studies no. 48, Washington, DC, The Catholic University of America, 1928, p. 155). There was considerable resistance to the argument that the obligation of the sacerdotal blessing existed among Orientals before the schism and therefore continued to have force. For instance, Æ. HERMAN ("De benedictione nuptiali quid statuerit ius Byzantium sive ecclesiasticum sive civile", in *Orientalia christiana periodica*, 4 [1938], pp. 189-234) maintained, in a historical study of the Byzantine rite, that the conviction that marriage must take place in a liturgical rite was not persistent through all times, and that the requirement did not apply to all classes, and was never the general practice in all places.

¹¹⁹ In 1945, in a reply to the Latin Archbishop of Montreal, the Sacred Congregation for the Oriental Church stated that a civil marriage between a Maronite and a Protestant was to be considered valid, on the grounds that it took place outside the territory of the patriarchate where *Tametsi* was in force. See *Leges Ecclesiae post Codicem iuris canonici editae*, collegit, digessit notisque ornavit X. OCHOA, vol. 2, *Leges annis 1942-1958 editae*, Roma, Commentarium pro religiosis, 1969, no. 1825, cols. 2276-2277.

¹²⁰ See, for example, M. JUGIE, *Theologia dogmatica christianorum orientalium ab Ecclesia catholica dissidentium*, vol. 3, *Theologiae dogmaticae graeco-russorum expositio de sacramentis*, Paris, Letouzey et Ané, 1930, pp. 447-459.

The Roman authorities seemed to know that many Oriental Catholics also shared this view of the priestly role, but regarded it as an mistaken idea which would eventually be overcome. Of course, Rome was aware that the Church had never defined who is the minister of the sacrament.¹²¹ But the Roman Curia was hostile to the idea of the priest being regarded as such, in light of the practice of the merely passive assistance of priests at valid mixed marriages, and more importantly, because such a view of the minister could lead to the danger of separating contract and sacrament.¹²² Many Oriental non-Catholics held that valid marriage and sacrament were separable, and that the priest was the minister of the sacrament.¹²³ Finally, in the Curial mind, the doctrine of the sacrament had to be exactly the same in East and West, and hence the priestly blessing was only a rule or custom in the East.¹²⁴

(d) Indissolubility in the Eastern Churches

As is well known, a difference arose between East and West on the indissolubility of consummated Christian marriage. In the Orient, the passage from Matthew's Gospel, "Have you not read that he who made them from the beginning

¹²¹ For example, one of Propaganda Fide's 1858 Instructions to the Byzantine Rumanians, *Litterae quas nuper*, recognised that Prosper Lambertini (later Pope Benedict XIV) had said, in his eighteenth century work *De synodo dioecessana*, that the opinion that the priest is the minister was "greatly probable". See *Fontes*, vol. 7, no. 4843, p. 361.

¹²² See *ibid.*, pp. 361-362.

¹²³ See, for instance, ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 160-162.

¹²⁴ See S.C. DE PROPAGANDA FIDE, Instruction to the Greek Rumanians, *Litterae quas nuper*, 1858, in *Fontes*, vol. 7, no. 4843, p. 364.

made them male and female [...]" (19:4), had a profound influence.¹²⁵ In an eschatological perspective, this was seen as promoting perfect and perpetual monogamy as the norm for marriage, so that in some sense true married love transcended even death. Remarriage for widowers and widows was held in low esteem by Eastern Christians, who regarded it as a concession to human weakness, not marriage as it had been established "from the beginning"; initially, at least, such marriages were not given the nuptial blessing. Moreover, this eschatological text of Matthew 19:4 was seen in the context of the exceptive clause in Matthew 19:8-9, "whoever divorces his wife, except for unchastity (*porneia*), and marries another, commits adultery."¹²⁶ The Orthodox canonist and historian J.H. Erickson claims:

For the East generally, the Matthean exceptive clause is understood not as a derogation from the prohibition to divorce but as its logical corollary. Adultery is the antithesis of marriage as it was established "from the beginning": the perpetual union in love of one man and one woman.¹²⁷

Historically, the Byzantine and other Oriental Churches admitted of remarriage after divorce by interpreting Matthew 19:9 and 5:32 in a broad sense. Sometimes, too, appeal is made to the principle of *oikonomia*, whereby the Church, as the dispenser of the graces of Christ in the sacraments, claims the power to admit

¹²⁵ See J.H. ERICKSON, *The Challenge of Our Past: Studies in Orthodox Canon Law and Church History*, Crestwood, NY, St Vladimir's Seminary Press, 1991, pp. 41-42.

¹²⁶ The interpretation of the "exceptive" clauses in Matthew 19:9 and 5:32 is much debated among biblical exegetes. See A.L. DESCHAMPS, "The New Testament Doctrine on Marriage", in *Contemporary Perspectives*, pp. 217-273.

¹²⁷ ERICKSON, *The Challenge of Our Past*, p. 43.

of exceptions in the law of indissolubility, out of solicitude for human frailty, while at the same time upholding the fundamental principle.¹²⁸

Adultery was not the only grounds for divorce eventually accepted by the Oriental Churches; other reasons were assimilated to adultery and considered equally grave. The general trend of the Oriental canonical tradition became clear: while remarriage after divorce was discouraged, just as any remarriage was, return to communion was possible for the remarried in certain circumstances, even for the guilty party after a severe penance. This situation was true for both the Byzantine and non-Byzantine Churches.¹²⁹

As an example, let us look at the Byzantine Churches. In allowing divorce for just causes other than adultery and toleration of remarriage in certain cases, Byzantine canonists later sought support in the texts of canon 87 of Trullo, the 48th Apostolic Canon, canon 8 of Neocaesarea, and the 9th canon of St. Basil. For instance, the famous twelfth century Byzantine canonists, Balsamon, Zonaras, and

¹²⁸ The concept of *oikonomia* is not unequivocal and is often understood in different senses by various Orthodox scholars. See F.J. THOMAS, "Economy: An Examination of the Various Theories of Economy Held within the Orthodox Church with Special Reference to the Economical Recognition of the Validity of Non-Orthodox Sacraments", in *Journal of Theological Studies*, 16 (1965), pp. 368-420. See also J.H. ERICKSON, "Sacramental 'Economy' in Recent Roman Catholic Thought", in *The Jurist*, 48 (1988), pp. 653-667; IDEM, *The Challenge of Our Past*, pp. 115-129; IDEM, "Oikonomia in Byzantine Canon Law", in K. PENNINGTON and R. SOMERVILLE (eds.), *Law, Church, and Society: Essays in Honor of Stephan Kuttner*, Philadelphia, PA, University of Pennsylvania Press, 1977, pp. 225-236.

¹²⁹ For a summary of the divorce legislation of the Oriental Churches, see DAUVILLIER and DE CLERCQ, *Le mariage en droit canonique oriental*, pp. 84-95 (Byzantine Churches), pp. 96-102 (Nestorian), pp. 102-104 (Syrian Jacobite), pp. 105-107 (Maronite), pp. 107-110 (Coptic Monophysite), pp. 110-116 (Armenian), pp. 116-122 (Ethiopian Monophysite). See also M. JUGIE, art. "Mariage dans l'Église gréco-russe", in *Dictionnaire de théologie catholique*, t. 9, part 2, Paris, Letouzey et Ané, 1927, cols. 2323-2328; IDEM, art. "Mariage dans l'Église nestorienne et les Églises monophysites", in *ibid.*, cols. 2331-2335.

Aristenos, deduced from these texts that there were other grounds for divorce besides adultery.¹³⁰ However a problem was that these canonists appealed to the civil law of the Emperors to clear up doubts about the meaning of the conciliar canons.¹³¹

Although the Oriental ecclesial mindset disliked all remarriage, even that of widows/widowers, a difficulty arose in the Byzantine Empire when in the ninth century the *Novella 89* of Emperor Leo the Wise gave the Greek Church in effect a monopoly in marriage matters. The distinction between marriages living up to the Church's norm and those tolerated as a concession to human weakness became blurred, since the Church had to bless the second and third marriages of the widowed and divorced who previously would have undergone a civil ceremony. The Church ended up blessing marriages which in theory involved a period of excommunication for the spouses. There was created a distinct liturgy for second marriages, penitential in character, yet in practice the difference between the two types of marriage was forgotten.¹³²

However, the Byzantine Church upheld indissolubility as the norm and was very opposed to the Roman law concept of divorce by simple mutual consent, as can

¹³⁰ See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 107-110. The interpretation of these canons has been disputed for a long time. For the 19th century Roman Curia's view of the 48th Apostolic canon and canon 9 of St. Basil, see S.C. DE PROPAGANDA FIDE, Instruction to the Greek Rumanians, *Difficile actu*, 1858, in *Fontes*, vol. 7, no. 4842, pp. 352-353. On the explanation of some controversial ancient canons, see also J. PAPP - SZILÁGYI, *Enchiridion juris Ecclesiae orientalis catholicae*, M.-Varadini, Typis A. Tichy, 1862, pp. 487-498; he was a Byzantine Rumanian Catholic canonist, though of a certain Latin outlook.

¹³¹ See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 110-111.

¹³² See ERICKSON, *The Challenge of Our Past*, p. 47; MEYENDORFF, *Marriage: An Orthodox Perspective*, pp. 27-34.

be seen in the teaching of Basil the Great, Gregory of Nazianzen, and John Chrysostom. For the Church, divorce was unacceptable without a valid reason; in this matter appeal was made to the Council of Trullo and to St. Basil. Despite this ecclesiastical opposition, divorce by mutual consent lingered for a long time in the Byzantine Empire.¹³³

It is disputed whether the Byzantine Church admitted of divorce for certain causes in order to adapt itself to imperial laws, as has been alleged by some Western scholars, or whether we are dealing with a custom dating from well before the Christian Emperors and reaching back to Origen, St. John Chrysostom and St. Basil, as is claimed by many Orthodox Christians.¹³⁴ As has already been mentioned, the

¹³³ See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 101-107.

¹³⁴ Among those who hold that divorce entered the Greek Church through the civil law are Dauvillier and De Clercq: "L'Église byzantine est, des Églises orientales, celle qui a admis rapidement les causes les plus nombreuses. En effet, jamais l'Église byzantine n'a considéré le texte de Saint Mathieu comme contenant la cause exclusive du divorce; elle y a vu l'application à titre d'exemple des causes qu'admettait le droit civil. Car c'est par le droit civil que le divorce est entré dans l'Église byzantine. Cela s'explique par le dépendance que l'évêque de Constantinople, qui doit l'importance de son siège au voisinage du Basileus, manifeste vis-à-vis du pouvoir séculier. Et des empereurs émane une législation très abondante à l'égard du divorce, dans laquelle se manifestent des tendances contradictoires" (DAUVILLIER and DE CLERCQ, *Le mariage en droit canonique oriental*, p. 85). See also JOYCE, *Christian Marriage*, pp. 359-376; P. ADNÈS, *Le mariage*, Tournai, Desclée, 1963, p. 64; JUGIE, art. "Mariage dans l'Église gréco-russe", cols. 2323-2328.

For a quite different perspective on this historical question, see the Orthodox canonist P. L'HUILLIER, "The Indissolubility of Marriage in Orthodox Law and Practice", in *St. Vladimir's Theological Quarterly*, 32 (1988), pp. 208-210. Interestingly, even some Orthodox feel that the Byzantine Church was forced by the historical circumstances of its connection with the Empire to accommodate itself overly to the demands of society in the matter of divorce, and should nowadays bar the remarriage in church of "guilty parties". See A.N. SMIRENSKY, "The Evolution of the Present Rite of Matrimony and Parallel Canonical Developments", in *St. Vladimir's Seminary Quarterly*, 8 (1964), pp. 42-47. Others feel that the Orthodox Church needs to abandon the practice of formally granting "ecclesiastical divorces", while showing tolerance to factual unions, and moreover giving the liturgical blessing in the case of "innocent parties". See E. MELIA, "Le lien matrimonial à la lumière de la théologie sacramentaire et de la théologie morale de l'Église orthodoxe", in R. METZ and J. SCHLICK (eds.), *Le lien matrimonial*, Strasbourg, CERDIC, 1970, pp. 190-197.

interpretation of some Church Fathers and local councils is a controversial issue upon which much scholarly ink has been spilled.

Leaving aside the hotly contested question of the relationship between civil law and the development of some Oriental thinking on indissolubility, we know that the grounds for divorce specified in Byzantine civil law were often clearer than those in canon law.¹³⁵ The "valid reasons" in civil law were eventually reduced to two categories which could be acceptable to the Church: those which could be assimilated to death, implying no culpability (e.g. a spouse disappeared and presumed dead, lasting madness, entry into monastic life, elevation to the episcopate, etc.), and those which could be compared to adultery and are deserving of punishment (e.g. putting the spouse's life in danger, abortion, making the spouse work as a prostitute, etc.).¹³⁶ Because of the civil restrictions placed on divorce from Christian influence, the divorce rate was lower during the Byzantine Middle Ages than during late Antiquity.¹³⁷

Therefore well before the time of the schism of 1054 A.D., Oriental practices on remarriage were different from those of the Western Church. This also applied

Erickson points out that the Byzantines had an ideal of a "symphony" between *imperium* and *sacerdotium*. See ERICKSON, *The Challenge of Our Past*, pp. 46-47. The Byzantine Church always tried to resist "divorce by mutual consent", and attempted to reduce the phenomenon of divorce by trying to "Christianise" lax civil legislation.

¹³⁵ The Patriarchs sometimes contradicted each other. See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, pp. 117-118.

¹³⁶ See *ibid.*, pp. 118-119.

¹³⁷ See L'HUILLIER, "The Indissolubility of Marriage in Orthodox Law and Practice", p. 212.

to Eastern Churches not located in the sphere of Byzantine ecclesiastical influence.¹³⁸ The Latin Church was aware of the Oriental practices, yet it was not a bone of contention. We have already discussed how indissolubility did not figure greatly at the reunion councils of Lyons and Florence, and how Trent did not wish to condemn directly the Eastern practice. Nonetheless, later, Rome engaged in a long struggle against tolerating the remarriage of divorced persons in the Oriental Catholic Churches when they reunited with the Holy See, a struggle lasting right up to the nineteenth century.¹³⁹

We must bear in mind that divorce was not a frequent or urgent pastoral problem and that communication with Rome was not always easy. Nevertheless, the papal attitude was fairly clear. For example, in 1595, in an Instruction to the Byzantine Italians, Pope Clement VIII declared that the remarriage of divorced persons could in no way be permitted and that such marriages were null and void.¹⁴⁰ This statement was repeated in the eighteenth century by Benedict XIV.¹⁴¹

¹³⁸ For an account of the practices of the non-Byzantine Churches, see DAUVILLIER and DE CLERCQ, *Le mariage en droit canonique oriental*, pp. 96-122.

¹³⁹ For an excellent historical account of the relationship between Rome and the Oriental Catholics concerning indissolubility, see L. BRESSAN, *Il divorzio nelle Chiese orientali: ricerca storica sull'atteggiamento cattolico*, Bologna, Edizioni Dehoniane, 1976, pp. 123-218.

¹⁴⁰ "Matrimonia inter coniuges Graecos dirimi, seu divortia quoad vinculum fieri nullo modo permittant, aut patiantur, et si qua de facto processerunt, nulla, et irrita declarent" (CLEMENT VIII, Instruction to the Byzantine Italians, *Sancitissimus*, § 5, 31 August 1595, in *Fontes*, vol. 1, no. 179, p. 345).

¹⁴¹ See BENEDICT XIV, Constitution, *Etsi pastoralis*, § 8:2, 26 May 1742, in *Fontes*, vol. 1, no. 328, p. 749.

Remarriage after divorce was considered to be contrary to Catholic doctrine, and not just opposed to a disciplinary law of the Church.¹⁴² This is indicated in the way that indissolubility came to be explicitly included in the Professions of faith prescribed for Oriental Christians coming into communion with the Roman See, although this explicit statement was not always insisted upon in every case of reunion.¹⁴³ The article in the *Professio orthodoxae fidei ab Orientalibus facienda* issued by Pope Urban VIII in the seventeenth century became widely used, though not exclusively, for reunions with Eastern Christians:

[I hold] also that the bond of the sacrament of marriage is indissoluble, and that although the spouses can separate from bed and

¹⁴² See Bressan's conclusion about the Roman Congregations' long struggle against remarriage among Oriental Catholics: "La Santa Sede cioè è sempre stata unanimemente contraria all'ammissione del divorzio fra cristiani, ed ha raccomandato agli stessi prelati di rito orientale ed ai missionari inviati in quelle regioni di abolirne l'uso dove esisteva. Questo atteggiamento era motivato dalla convinzione che la prassi cattolica si basava sul vangelo ed era quindi immutabile e valida per tutte le chiese. I testi considerati non sono infatti favorevoli all'ipotesi secondo cui la Santa Sede non avrebbe ammesso il divorzio in oriente unicamente perché non riconosceva l'autorità di quei vescovi di dispensare dal vincolo coniugale. Il problema non era infatti discusso a Roma sotto l'aspetto giuridico di competenze, ma è stato considerato sotto l'aspetto teologica-morale dell'indissolubilità in sé e della relativa dottrina evangelica" (BRESSAN, *Il divorzio nelle Chiese orientali*, p. 220).

¹⁴³ For an analysis of how indissolubility was treated in the various Professions of faith laid down by Rome for Oriental Christians, see *ibid.*, pp. 123-157. On the fact that indissolubility was not mentioned explicitly in every Profession, Bressan makes the perceptive comment: "[...] la chiesa romana non sempre ha chiesto la ammissione esplicita dell'assoluta indissolubilità del matrimonio cristiano come una delle verità da accogliere necessariamente per essere in unione con la chiesa. Assai spesso però questa dichiarazione è stata domandata negli ultimi secoli, e quando il problema è emerso in trattative d'unione, come nel caso citato dei nestoriani, la risposta della santa sede è stata decisamente contrario al divorzio. Le omissioni quindi nelle Professioni di fede di un articolo sull'indissolubilità del matrimonio non sembrano indicare che si ritenesse come liberamente discutibile la dottrina relativa, vanno collocate nelle circostanze storiche, ed indicano un metodo con cui si è fatta l'unione" (*ibid.*, pp. 155-156).

board on account of adultery, heresy and other causes, another marriage may not however be contracted by them.¹⁴⁴

This declaration was later included, for example, in the eighteenth century Profession of faith prescribed for the Maronites by Benedict XIV.¹⁴⁵ In the mid-nineteenth century, there was an ongoing dialogue between Rome and the Catholic Byzantine bishops in Transylvania concerning remarriage practices among the Byzantine Rumanian Catholics; the bishops appealed for their discipline to be left alone, arguing that Trent had not settled the matter.¹⁴⁶ Propaganda Fide issued a detailed instruction, explaining that this was impossible, since indeed it was not a matter of Oriental discipline but Catholic doctrine.¹⁴⁷ The next year, Pius IX explicitly told the bishops that the indissolubility of consummated Christian marriage did not have its origin in ecclesiastical discipline; the pope even went so far as to say that it

¹⁴⁴ URBAN VIII, *Professio orthodoxae fidei ab Orientalibus facienda*, circa 1644, no. 22, in *Iuris Pontificii de Propaganda Fide*, cura ac studio R. DE MARTINIS, vol. 1, Romae, ex typographia polyglotta S.C. de Propaganda Fide, 1888, p. 231: "[Pariter veneror, et suscipio Tridentinam Synodum, et profiteor, quae in ea definita et declarata sunt, et praesertim ...] Item sacramenti matrimonii vinculum indissolubile esse, et quamvis propter adulterium, haeresim, aut alias causas possit inter coniuges thori et cohabitationis separatio fieri, non tamen illis aliud matrimonium contrahere fas esse." Note that this is a general assertion of the indissolubility of Christian marriage; it does not distinguish between consummated sacramental marriages and unconsummated sacramental marriages, and says nothing about purely natural marriages. It seems to refer to what we now call intrinsic indissolubility. See BRESSAN, *Il divorzio nelle Chiese orientali*, p. 145.

¹⁴⁵ See BENEDICT XIV, Letter to the Maronites, *Nuper ad Nos*, § 5:2, 16 March 1743, in *Fontes*, vol. 1, no. 335, p. 786.

¹⁴⁶ For an account of this drawn out dispute (1856-1872), see BRESSAN, *Il divorzio nelle Chiese orientali*, pp. 197-218.

¹⁴⁷ See S.C. DE PROPAGANDA FIDE, Instruction to the Greek Rumanian Bishops, *Difficile actu*, 1858, in *Fontes*, vol. 7, no. 4842, pp. 350-358.

concerned a question of divinely revealed truth.¹⁴⁸ Furthermore, in 1883, the Holy Office, in an wide-ranging instruction on matrimonial law to all the Eastern Catholic bishops, reminded them that it was Catholic doctrine that the valid consummated marriage of the baptized cannot be dissolved, except through the death of one of the spouses.¹⁴⁹ So, after the Council of Trent, the popes kept insisting that the Catholic teaching on indissolubility be obeyed among the Oriental Catholics, until the law against remarriage was observed throughout the Catholic Church in both East and West.

2. THE 1949 ORIENTAL LEGISLATION: M.P. *Crebrae allatae*¹⁵⁰

Often in this century there had been confusion regarding the canonical validity of marriages celebrated by Eastern Catholics after they had emigrated beyond the traditional territory of their Churches.¹⁵¹ Pius XII wished to clear these problems up, and so he promulgated *motu proprio*, *Crebrae allatae*, on 22 February 1949, a common marriage law for all the Oriental Catholic Churches.

¹⁴⁸ See PIUS IX, Letter to the Bishops of the Provinces of Fogaras and Alba-Iulia, *Verbis exprimere*, 15 August 1859, in *Fontes*, vol. 2, no. 526, pp. 928-931; an English translation can be found in *Papal Teachings: Matrimony*, selected and arranged by the Benedictine monks of Solesmes, translated by M.J. BYRNES, Boston, MA, St. Paul Editions, 1963, pp. 111-112.

¹⁴⁹ See S. C. S. OFFICII, *Instr. ad Ep. Rituum Orient.*, 1883, pars II, art. 4, no. 42, in *Fontes*, vol. 4, no. 1076, p. 405. See also the concern of Propaganda Fide that "Nestorians" reuniting with Rome should be instructed in this Catholic doctrine: S. C. DE PROPAGANDA FIDE, Instruction, § 1 (f), 31 July 1902, in *Fontes*, vol. 7, no. 4940, p. 545.

¹⁵⁰ PIUS XII, M.P. *Crebrae allatae*, 22 February 1949, in *AAS*, 41 (1949), pp. 89-119.

¹⁵¹ See S.C. GULOVICH, "Matrimonial Laws of the Catholic Eastern Churches", in *The Jurist*, 4 (1944), pp. 200-245.

Crebrae allatae had begun its gestation under the auspices of Cardinal P. Gasparri, the guiding spirit of the 1917 Latin codification; the first secretary of the commission for the codification of Oriental canon law was another famous Latin canonist, Cardinal A. Cicognani.¹⁵² Moreover, at their first meeting, on 7 March 1930, the official representatives of the Eastern Catholic Churches all agreed to follow the pattern of the Latin Code, but modifying it so as to make it truly Oriental.¹⁵³ Thus the basis of the Eastern codification was to be the 1917 Code, not ancient Oriental legislation. This was despite Pius XI's instruction to produce legislation without a sign of "Latinization".¹⁵⁴ This latter term connotes "the modification of Eastern liturgies, customs, and modes of thought by indiscriminating adoption of foreign practices and submission to foreign influences [that] mostly come from the West."¹⁵⁵ Latinization is partly rooted in the belief that the Western Church is better than the Eastern Churches.¹⁵⁶

¹⁵² See V.J. POSPISHIL, *Code of Oriental Canon Law — The Law on Marriage: Interracial Marriage Law Problems*, Chicago, IL, Universe Editions, 1962, p. 17.

¹⁵³ See D. FALTIN, "La codificazione del diritto canonico orientale", in *La Sacra Congregazione per le Chiese Orientali nel cinquantésimo della fondazione (1917-1967)*, Roma, Sacra Congregazione per le Chiese Orientali, 1969, pp. 129-130.

¹⁵⁴ See *ibid.*, p. 128.

¹⁵⁵ ATTWATER, *The Christian Churches of the East*, vol. 1, p. 27.

¹⁵⁶ On the phenomenon of "Latinization" or "hybridization" in the Eastern Catholic Churches, see the perspicacious comments of N. Edelby: "La latinisation de la discipline orientale a été le fait des Orientaux eux-mêmes autant que de Rome. Elle paraissait normale, presque obligatoire, si elle n'était pas recherchée comme le signe d'une adhésion plus profonde au catholicisme. L'opposition à ce courant latinisant n'a jamais été tout-à-fait absente, mais c'est seulement dans les dernières décades qu'elle s'est concrétisée, dans la mesure où ces communautés unies prenaient conscience de leur appartenance indéfectible à l'Orient, en même temps que du sens authentique et des limites de leur union avec Rome. Leur retour à l'authentique tradition orientale en matière disciplinaire est

In the light of the above, it is not too surprising that, when Pius XII promulgated the Eastern marriage law, no originality was shown by the Oriental canons which dealt directly with the nature of marriage.¹⁵⁷ Perhaps the significant appreciation of the especially Oriental Christian thinking on the sacred character of marriage was in the area of the canonical form, where at long last the vital role of the sacerdotal blessing in the formation of the marriage bond was recognised.¹⁵⁸ Although the canonical form certainly does not treat directly of the nature of marriage, the significant difference from the Latin Church implicitly pointed to a notable dissimilarity in emphasis regarding marriage's nature.

Canons 1 and 2 of *Crebrae allatae* are absolutely identical to canons 1012 and 1013 of the 1917 *Codex iuris canonici*: marriage is a contract, characterised by unity and indissolubility;¹⁵⁹ the contract itself is a sacrament for the baptized; marriage's

désormais synchronisée avec la découverte progressive de la nature et des exigences de leur communion avec Rome" (N. EDELBY, "L'authentique tradition orientale et le décret de Vatican II sur les Églises catholiques", in *Kanon*, 1 [1973], p. 61).

¹⁵⁷ For areas of marriage law where there are differences between the two legislations, see R.P. ROBERTS, *A Comparative Study: Matrimonial Legislation in Latin and Oriental Canon Law*, Westminster, MD, Newman Press, 1961, viii, 110 p. See also J.D. CONWAY, "A Comparative Glance at the Latin and the Oriental Marriage Discipline", in *The Jurist*, 9 (1949), pp. 316-324; F. GALTIER, *Le mariage: discipline orientale et discipline occidentale, la réforme du 2 mai 1949*, Beyrouth, Université St. Joseph de Beyrouth, Faculté de théologie, 1950, xxiii, 456 p.

¹⁵⁸ On the negative side, a major problem was that the canonical form was also imposed on mixed marriages between Oriental Catholics and Eastern non-Catholics, resulting in invalidity in the case of a Catholic woman and an Orthodox man, if, as customary in the Middle East, the marriage was blessed in the church of the groom by a non-Catholic priest. See M. THOMAS, *The Sacred Rite of Marriage in the Eastern Churches*, J.C.O.D. dissertation, Rome, Pontifical Oriental Institute, 1992, pp. 118-123.

¹⁵⁹ The teaching that a valid consummated Christian marriage can never be dissolved except by death is found in c. 107 of *Crebrae allatae*, an exact repetition of c. 1118 of the 1917 Code except for a comma.

primary purpose is the generation and education of children. Canon 72 on consent of the Eastern legislation is the same as canon 1081 of 1917 except for one minor stylistic change in the text: marriage is brought into existence by consent; the object of this consent is the perpetual and exclusive *ius in corpus pro generatione*.¹⁶⁰ Similarly, canons 73 § 1, 77 § 2, and 99 of *Crebrae allatae* repeat word for word the formulations of canons 1082 § 1, 1086 § 2, and 1110 in the 1917 Latin Code. Terms like *communio vitae coniugalis* (c. 117 *Crebrae allatae*), or *communio vitae* (c. 73 § 1) had the same sense of cohabitation that they had in the 1917 Code. Like that Code, *Crebrae allatae* says nothing about who is the minister of the sacrament of marriage.

The *fontes* cited for canons 1 and 2 of *Crebrae allatae* did not include any ancient Oriental legislation; yet ironically there is no reference to the 1917 Latin Code itself. The councils of Lyons, Florence, and Trent received mention along with papal teaching, Professions of faith prescribed for Oriental Christians, and various instructions of the Roman Curia, all of which we have already mentioned. Regarding the less important canons which tell us something about the nature of marriage, there is for c. 72 on consent, besides the non-Eastern *fontes*, an Oriental ecclesiastical source indicated, not an ancient one, but the Ruthenian Catholic Synod of Zamošć in 1720 with a corresponding reference to the Byzantine civil law of the *Digest*.¹⁶¹

¹⁶⁰ The 1917 canon 1081 § 2 stated that matrimonial consent is an act of the will by which each party gives and accepts the exclusive and perpetual right over the body *in ordine* for acts of themselves apt for the generation of children, whereas canon 72 of *Crebrae allatae* used the phrase *quod attinet*.

¹⁶¹ This *fontes* ("Syn. Zamosten. Ruthenorum, a. 1720, tit. III § 8 — D. 23, 2, 2") seems to be concerned with ensuring the parties are free from impediments, and that they truly consent, unfettered by pressure from parents or others. See *Synodus provincialis Ruthenorum habita in civitate Zamosciae anno 1720*, pp. 108-113, and D. 23, 2, 2 ("Nuptiae consistere non possunt nisi consentiant omnes, id

Canon 73 § 2 has no sources indicated whatsoever, while c. 77 § 2 has only a reference to the 1785 Instruction of Propaganda Fide to the Vicar Apostolic of Constantinople. Although canon 99 of *Crebrae allatae* was itself an exact replica of the 1917 Latin canon 1110 (on the perpetual and exclusive bond arising from a valid marriage), its *fontes* did include mention of ancient Oriental texts concerned with combatting adultery, desertion, and remarriage.¹⁶² So, except for c. 99, the *fontes* of the canons dealing with the nature of marriage did not include ancient Eastern legislation. However, this may have been more correct than what obtained with canon 99: while it was basically Latin in inspiration, Oriental sources were actually cited in support of it.¹⁶³

So those Eastern canons touching directly on the nature of marriage were simply copied from the Western law. Throughout the Oriental legislation, the notions

est qui coeunt quorumque in potestate sunt").

One general difficulty with citing later Oriental Catholic synods as sources is the charge of Latinization, for as the noted Oriental Catholic canonist I. Žužek has remarked: "[...] it is well known that the synods of the Oriental Catholic Churches of the last three centuries were so strongly influenced by the Latin *Jus decretalium* that many of them can hardly be called 'Oriental'" (I. ŽUŽEK, "The Ancient Sources of Canon Law and the Modern Legislation for Oriental Catholics", in *Kanon*, 1 [1973], p. 155).

¹⁶² "[...] — Syn. Gangren., a. 340-376, can. 14; Syn. Carthagen., a. 419, can. 105; Syn. Trullan., a. 691, can. 87, 93; S. Basilius M., can. 9, 46, 48, 77; Timotheus Alexandrin., interrog. 15." See *Fonti orientale*, Series I, fac. IX, pp. 399-409. The interpretation of some of these texts, imposing penalties for remarriage, has been controversial with regard to indissolubility.

¹⁶³ Another general difficulty was that in *Crebrae allatae* nearly all the *fontes* quoted were Byzantine; this over-emphasis was a problem with all four *motu proprio*s promulgated for the Eastern Catholic Churches prior to Vatican II. See ŽUŽEK, "The Ancient Sources of Canon Law and the Modern Legislation for Oriental Catholics", pp. 149-150. An added misfortune was that the ancient canons were not referred to in the same order that is traditional in the Christian East. See *ibid.*, pp. 153-155.

of "contract" and "contractants" (largely alien to the genuine Oriental tradition) predominate, showing a very significant Latinisation of Eastern marriage law, and reflecting what had already been happening in the legislation of Oriental Catholic synods. Many of the commentators on *Crebrae allatae* made no note of this.¹⁶⁴ Others simply took the idea of contract as a given, as did Æ. Herman, for example:

Canonists used to dispute among themselves whether or not marriage should be considered a contract. Nowadays this is something obvious.¹⁶⁵

So the commonly accepted Western canonical idea of marriage's nature had been absorbed largely undiluted into Oriental Catholic law. On the other hand, in the requirement that there must always be a blessing when an Oriental priest officiates at the marriage celebrated between a Oriental Catholic and another person (either Catholic or non-Catholic), there was some recognition of the genuine Eastern traditions regarding the sacred and mystical nature of marriage (see c. 85), although this was counterbalanced by c. 72 § 1 repeating the Latin notion that marriage was created simply by the consent of legally capable parties.¹⁶⁶

¹⁶⁴ See, for example, POSPISHIL, *Code of Oriental Canon Law — The Law on Marriage*, p. 39. Cf. ROBERTS, *A Comparative Study*, pp. 3-4; GALTIER, *Le mariage*, pp. 17-21.

¹⁶⁵ Æ. HERMAN, *De disciplina sacramenti matrimonii pro Ecclesia orientali*, Romae, Pontificium Institutum orientalium studiorum, 1958, p. 10: "Disputaverunt inter se canonistae utrum matrimonium habendum sit contractus an secus. Hodie res evidens est." This author goes on to say that it is a special type of contract and pertains to the supernatural order. However he never mentions any problem in the Oriental Christian mindset with considering marriage primarily as a contract.

¹⁶⁶ A later interpretation of the Pontifical Commission for the Redaction of the Oriental Code of Canon Law on 8 January 1953 declared that a Latin priest lawfully called upon to officiate at the marriage of an Oriental Catholic and a non-Catholic (baptized or non-baptized) must follow the prescription of the 1917 Latin canon 1102 § 2 which forbade any sacred rites in marriages conducted with non-Catholics. See *AAS*, 45 (1953), p. 104. In other words, the priest was always to follow his own rite, regardless of that of the parties; this seemed to be derived from the legal maxim *locus regit*

C. MAGISTERIAL THOUGHT PRIOR TO THE SECOND VATICAN COUNCIL

Papal and magisterial teaching confirmed and expanded what was expressed in the legislation of the Church. A scrutiny of pre-conciliar official Catholic thought is crucial because this will throw light on many of the subtleties in the conciliar doctrine. That the pre-conciliar documents have a continuing relevance is shown by the fact that they are listed among the official sources of the Latin canons on the nature of marriage, as probably will also happen when the Oriental *fontes* are published.

1. PIUS XI'S ENCYCLICAL *Casti connubii* (1930)¹⁶⁷

The encyclical *Casti connubii* was primarily about moral teaching, but it did touch on some canonical questions. Speaking in the context of the Augustinian *bona*, around which the encyclical was constructed, the Pope left no doubt that he regarded procreation as primary in marriage, and he went on to quote canon 1013 of the 1917 Code.¹⁶⁸ Pius XI used the word *pactio* for marriage *in fieri*, but *contractus* was the preferred term; *consortium*, *consuetudo*, and *conjunctio* were employed largely in the

actum. However this meant that a Latin priest officiating at the mixed or disparity of cult marriage of an Oriental Catholic had usually to omit the liturgical rite and blessing. It seems obvious that the requirement of the blessing was being interpreted in a formalistic and minimalistic way, rather than being seen as something intrinsically connected with Eastern thinking on marriage. This type of minimalism is also seen in a further interpretation of the Commission issued on 3 May 1953 which construed the word "blessing" in canon 85 § 2 of *Crebrae allatae* as a simple blessing rather than as a certain liturgical rite. See *AAS*, 45 (1953), p. 313.

¹⁶⁷ PIUS XI, *Casti connubii* [= CC, followed by page numbers], in *AAS*, 22 (1930), pp. 539-592; English translation in C. CARLEN (ed.), *The Papal Encyclicals: 1903-1939*, Wilmington, NC, McGrath, 1981, vol. 3, pp. 391-414.

¹⁶⁸ See CC 543-546.

sense which they had attained in that Code. However, in the encyclical, he also spoke consistently of marriage *in facto esse* as a *foedus* (covenant).¹⁶⁹ While Pius XI wrote of the secondary ends as being subordinate to the primary end, he did mention mutual love as one of these secondary ends.¹⁷⁰

Moreover, he also used the Roman Catechism's understanding of marriage, by giving the interpersonal relationship in marriage a primacy of honour, a primacy in the wide sense:

This mutual moulding of husband and wife, this determined effort to perfect each other, can in a very real sense, as the Roman Catechism teaches, be said to be the chief reason and purpose of matrimony, provided matrimony be looked at not in the restricted sense as instituted for the proper conception and education of the child, but more widely as the complete blending of life as a whole and the mutual interchange and sharing thereof.¹⁷¹

This stands in contrast to the standard canonical commentaries and theological handbooks. Likewise, in addressing the notion of the *bonum fidei*, the Pope does not restrict it to conjugal acts, but includes in its content the elements of "charity", "honourable noble obedience", and "chastity":

¹⁶⁹ See, for instance, CC 552.

¹⁷⁰ See CC 561: "Habentur enim tam in ipso matrimonio quam in coniugalis iuris usu etiam secundarii fines, ut sunt mutuus adiutorium mutuusque fovendus amor et concupiscentiae sedatio, quos intendere coniuges minime vetantur, dummodo salva semper sit intrinseca illius actus natura ideoque eius ad primarium finem debita ordinatio."

¹⁷¹ "Haec mutua coniugum interior conformatio, hoc assiduum sese invicem perficiendi studium, verissima quadam ratione, ut docet Catechismus Romanus, etiam primaria matrimonii causa et ratio dici potest, si tamen matrimonium non pressius ut institutum ad prolem rite procreandam educandamque, sed latius ut totius vitae communio, consuetudo, societas accipiatur" (CC 548-549; *The Papal Encyclicals: 1903-1939*, p. 395).

These, then, are the elements which compose the blessing of conjugal faith: unity, chastity, charity, honourable noble obedience, which are at the same time an enumeration of the benefits which are bestowed on husband and wife in their married state, benefits by which the peace, the dignity, and happiness of matrimony are securely preserved and fostered.¹⁷²

Pius XI's encyclical emphasised the divine institution of marriage, by repeating the teaching of Leo XIII in the encyclical *Arcanum*, that it was an immutable and inviolable fundamental doctrine that "matrimony was not instituted or restored by man but by God."¹⁷³

It is within this context of "institution" that Pius XI speaks of marital consent:

Yet although matrimony is of its very nature of divine institution, the human will, too, enters into it and performs a most noble part. For each individual marriage, inasmuch as it is a conjugal union of a particular man and woman, arises only from the free consent of each of the spouses; and this free act of the will, by which each party hands over and accepts those rights proper to the state of marriage, is so necessary to constitute true marriage that it cannot be supplied by any human power.¹⁷⁴

¹⁷² "Haec sunt igitur, quae bono fidei comprehenduntur: unitas, castitas, caritas, honesta nobilisque oboedientia; quae, quot sunt nomina, tot sunt coniugum atque coniugii emolumenta, quibus pax, dignitas, felicitas matrimonii in tuto collocentur atque promoveantur" (CC 550; *The Papal Encyclicals: 1903-1939*, p. 395).

¹⁷³ "[...] Matrimonium non humanitus institutum neque instauratum esse, sed divinitus" (CC 541; *The Papal Encyclicals: 1903-1939*, p. 392).

¹⁷⁴ "At, quamquam matrimonium suapte natura divinitus est institutum, tamen humana quoque voluntas suas in eo partes habet easque nobilissimas; nam singulare quodque matrimonium, prout est coniugalis coniunctio inter hunc virum et hanc mulierem, non oritur nisi ex libero utriusque sponsi consensu; qui quidem liber voluntatis actus, quo utraque pars tradit et acceptat ius coniugii proprium, ad verum matrimonium constituendum tam necessarius est ut nulla humana potestate suppleri valeat" (CC 541; *The Papal Encyclicals: 1903-1939*, p. 392).

Two footnotes in this text refer to canons 1081 § 2 and 1081 § 1 of the 1917 Code.

Here we see a reiteration of the 1917 Code's terminology in describing consent and its value, although it is to be noted that the Code's phrase *ius in corpus* becomes *ius coniugii proprium* in the encyclical, a much broader and less restrictive term. The Pope sums up by saying:

Therefore the sacred partnership of true marriage is constituted both by the will of God and the will of man. From God comes the very institution of marriage, the ends for which it was instituted, the laws that govern it, the blessings that flow from it; while man, through generous surrender of his own person made to another for the whole span of life, becomes, with the help and cooperation of God, the author of each particular marriage, with the duties and blessings annexed thereto from divine institution.¹⁷⁵

Again the Code's phraseology of giving and receiving the *ius in corpus* is replaced by a different formulation: *[transmissio] propriae personae*, a terminology which was later taken up by Vatican II.

We might note that Pius XI also used the term *institutum* to express more clearly the fact that marriage is a social-juridical reality which was not always conveyed by the word *contractus*, a term open to misunderstanding due to the rise of individualistic and liberal theories of law which regarded marriage as a *rescindable* contract.¹⁷⁶ From this point on, the term *institutum* (or *institutio*) began to be referred to more often in Church teaching.

¹⁷⁵ "Itaque germani connubii sacrum consortium divina simul et humana voluntate constituitur: ex Deo sunt ipsa matrimonii institutio, fines, leges, bona; Deo autem dante atque adiuvante, ex hominibus est, per generosam quidem propriae personae pro toto vitae tempore factam alteri traditionem, particulare quodlibet matrimonium cum officiis ac bonis a Deo statutis coniunctum" (CC 542-543; *The Papal Encyclicals: 1903-1939*, p. 392).

¹⁷⁶ See W. KASPER, *Theology of Christian Marriage*, translated by D. Smith, New York, NY, Crossroad, 1980, pp. 40-41.

When speaking of sacramentality, *Casti connubii* does not mention who are the ministers of the sacrament, but teaches Christian couples that "by such a sacrament they will be strengthened, sanctified and in a manner consecrated."¹⁷⁷

Later on in the encyclical, Pius XI reminded such married couples:

Let them be constantly mindful that they have been as it were consecrated and strengthened for the duties and dignity of their state by a special sacrament, whose efficacious power, though it does not impress a character, remains nevertheless in perpetuity.¹⁷⁸

Here we have two mentions of a "consecration" involved in Christian marriage, although it is only a consecration by analogy, because the sacrament of marriage is sometimes repeatable.¹⁷⁹ In the tradition of the Western Church since the Middle Ages some sacraments (baptism, confirmation, holy orders) are said to imprint a permanent "character", because they are unrepeatable on the same subject. For example, in the case of holy orders, the act of ordination (i.e. the imposition of hands and the prayer) is formally the sacrament. The effect of that "sign" is a consecration which results in a permanent state, that is the priestly character. In *Casti connubii*, Pius XI drew on St. Robert Bellarmine's analogy between the Eucharist and Christian

¹⁷⁷ "[...] eruntque tanto Sacramento roborati et sanctificati et quasi consecrati" (CC 555; *The Papal Encyclicals: 1903-1939*, p. 398). Here it is clear that while Christian marriage sanctifies and strengthens the couple, it only gives a *quasi* consecration.

¹⁷⁸ "Meminerint assidue, se ad sui status officia et dignitatem peculiari veluti consecratos et roboratos esse Sacramento, cuius efficax virtus, quamquam characterem non imprimit, perpetuo tamen perseverat" (CC 583; our own translation).

¹⁷⁹ This qualification is shown by the use of the particles *veluti* and *quasi*, in reference to consecration, in the two quotations above.

marriage.¹⁸⁰ The sacrament of marriage can be regarded in two ways: first, in the making, and then in its permanent state. So by analogy, the "consecratory act" takes place at the moment of the celebration of the sacrament, but the sacrament (in the wider sense of being a sign and symbol of the union of Christ with the Church) remains in their married state.¹⁸¹ This idea was later taken up by Vatican II, by the 1983 Latin Code, and by the 1990 *Codex canonum Ecclesiarum orientalium*.

2. DECREE OF THE HOLY OFFICE ON THE ENDS OF MARRIAGE (1944)

In reaction to a number of European theologians, the most famous being H. Doms,¹⁸² who proposed that the *bonum coniugum* deserved more importance in the structure of marriage's finality, the Holy Office stated on 1 April 1944:

Question: Whether the opinion of certain modern writers can be admitted, who either deny that the primary end of marriage is the generation and education of children, or teach that the secondary ends are not essentially subordinate to the primary end, but are equally principal and independent.

Reply: In the negative.¹⁸³

¹⁸⁰ See CC 583. Pius XI had also, earlier in the encyclical, drawn an analogy between the conjugal state and the state of the baptised (see CC 555).

¹⁸¹ Marriage *in facto esse* is not a sacrament in the strict Scholastic sense of the word in that it does not produce grace *ex opere operato*.

¹⁸² See H. DOMS, *The Meaning of Marriage*, London, Sheed and Ward, 1939, xxiv, 229 p. For a summary of Dom's position, and that of another "personalist", D. von Hildebrand, see MACKIN, *What is Marriage?*, pp. 225-235.

¹⁸³ "[...] proposito sibi dubio: 'An admitti possit quorundam recentiorum sententia, qui vel negant finem primum matrimonii esse proles generationem et educationem, vel docent fines secundarios fini primario non esse essentialiter subordinatos, sed esse aequae principales et independentes'; respondendum decreverunt: Negative" (AAS, 36 [1944], p. 103; English translation in *Canon Law Digest*, vol. 3 [covering period 1942-1953], ed. T.L. BOUSCAREN, Milwaukee, WI, Bruce, 1954, pp. 401-402).

The decree does not explain how, or in what manner, the secondary ends are essentially subordinate to, and dependent on, the primary end. However it goes beyond canon 1013 § 1 in specifying the nature of the relationship between the primary and the secondary ends.

This thinking is illustrated by a 1944 Rotal decision *coram* A. Wynen published in the *Acta Apostolicae Sedis*, which was a sign of official approval.¹⁸⁴ The Rotal judge recalled the distinction between the *finis operis* and the *finis operantis*; he held that there must be a *finis operis* which is the *finis principalis* and which determines the specific nature of marriage; all the other ends are ordained to and subordinate to this principal end. The secondary end has its origin in the primary end; in other words, the secondary end exists only for the generation and education of children. Wynen argued that a *consortium totius vitae* could exist even between brother and sister, so therefore what distinguishes a matrimonial communion of life is the *ius in corpus pro generatione*. He acknowledged a "right to mutual help" in marriage, but this was a secondary right whose denial by itself would not invalidate marriage. Commenting on the definition of Modestinus, the Rotal auditor said this was more of a description and had to be interpreted cautiously when speaking of the essence and ends of marriage.¹⁸⁵

¹⁸⁴ See Decision c. WYNEN, 22 January 1944, in *AAS*, 36 (1944), pp. 179-200. For a critical analysis of this judgement, see FELLHAUER, "The *consortium omnis vitae*", pp. 88-93.

¹⁸⁵ See *AAS*, 36 (1944), p. 191. The hypothetical case posed by the Italian jurist A.C. Jemolo in 1941 showed the great problems with this understanding of marriage. Jemolo questioned contemporary jurisprudence, claiming that there was something drastically wrong with the then current canonical understanding of marriage. He posed a hypothetical scenario in which a man marries a woman chiefly to carry out a vendetta, intending to be cruel to his wife so as to get revenge on her

3. PIUS XII'S TEACHING ON MARRIAGE

Although Pope Pius XII spoke highly and frequently of the goodness and importance of the secondary ends of marriage, he clearly taught that the procreative aspect of marriage was primordial. Before the Holy Office Decree of 1944, in his Address to the Roman Rota of 3 October 1941, the Pope used the language of "essential subordination" when speaking of the secondary ends, denying a place of "equal principality" to the non-procreative aspect of matrimony.¹⁸⁶ He went on to say:

Two extremes, in other words, if truth stands in the middle, are to be avoided: on the one side to deny practically or to esteem too little the secondary ends of matrimony and the generative act; on the other, to set free and separate immoderately the conjugal act from the primary end to which in all its intrinsic structure it is primarily and principally ordained.¹⁸⁷

This theme is found continuously in Pius XII's teachings on marriage. In an Allocution of 29 October 1951, he explained that marriage is of its nature primarily

family. However the man does exchange the right to the conjugal act, excludes neither unity or indissolubility, and moreover consents to the *tria bona* in the minimal sense (intending to have children, not reserving himself the right to adultery, and planning to stay with his wife until death). Despite his hate-filled vendetta, he marries validly! See A.C. JEMOLO, *Il matrimonio in diritto canonico*, Milano, Francesco Vallardi, 1941, p. 76; see also L.G. WRENN, "Refining the Essence of Marriage", in *The Jurist*, 46 (1986), pp. 532-533.

¹⁸⁶ See PIUS XII, Allocution to the Roman Rota, 3 October 1941, in *AAS*, 33 (1941), p. 423; English translation in *Papal Teachings: Matrimony*, p. 334.

¹⁸⁷ "Due estremi, in altre parole, se il vero sta nel mezzo, sono da fuggirsi: da una parte, il negare praticamente o il dipremere eccessivamente il fine secondario del matrimonio e dell'atto generazione; dall'altra, lo sciogliere o il separare oltre misura l'atto coniugale dal fine primario, al quale secondo tutta la sua intrinseca struttura è primieramente e in modo principale ordinato" (*AAS*, 33 [1941], p. 423; *Papal Teachings: Matrimony*, p. 334).

and principally for the procreation and upbringing of children; everything else of value in marriage exists only for that purpose:

Now, the truth is that matrimony, as an institution of nature, in virtue of the Creator's will, has not as a primary end the intimate and personal perfection of the married couple but the procreation and upbringing of a new life. The other ends, inasmuch as they are intended by nature, are not equally primary, much less superior to the primary end, but are essentially subordinated to it. This is true of every marriage, even if no offspring result from it; just as of every eye it can be said that it is destined and formed to see, even if, in abnormal cases arising from special internal or external conditions, it will never be possible to achieve visual perception.¹⁸⁸

Yet the Pope did not wish to deny or diminish the personal values resulting from marriage,

because the Creator has designed that for the procreation of a new life human beings made of flesh and blood, gifted with soul and heart, shall be called upon as men and not as animals deprived of reason to be the authors of their posterity. It is for this end that the Lord desires the union of husband and wife.¹⁸⁹

¹⁸⁸ "Ora la verità è che il matrimonio, come istituzione naturale, in virtù della volontà del Creatore non ha come fine primario e intimo il perfezionamento personale degli sposi, ma la procreazione e la educazione della nuova vita. Gli altri fini, per quanto anch'essi intesi dalla natura, non si trovano nello stesso grado del primo, e ancor meno gli sono superiori, ma sono ad esso essenzialmente subordinati. Ciò vale per ogni matrimonio, anche se infecondo; come di ogni occhio si può dire che è destinato e formato per vedere, anche in casi anormali, per speciali condizioni interne ed esterne, non sarà mai in grado di condurre alla percezione visiva" (PIUS XII, Allocution to the Italian Catholic Union of Midwives, 29 October 1951, in *AAS*, 43 [1951], pp. 848-849; *Papal Teachings: Matrimony*, p. 424).

¹⁸⁹ "[...] poichè alla procreazione della nuova vita il Creatore ha destinato nel matrimonio esseri umani fatti di carne e di sangue, dotati di spirito e di cuore, ed essi sono chiamati in quanti uomini, e non come animali irragionevoli, ad essere gli autori della loro discendenza. A questo fine il Signore vuole l'unione degli sposi" (*AAS*, 43 [1951], p. 849; *Papal Teachings: Matrimony*, p. 426).

While stating that God had placed personal values, both physical and spiritual, not in the first, but in the second degree of the scale of values, the pontiff acknowledged that

the perfect married life, of its very nature, also signifies the total devotion of parents to the well-being of their children, and married love is itself a condition of the sincerest care of the offspring and the guarantee of its realisation.¹⁹⁰

Finally, in line with his predecessors, Pius XII spoke frequently of the indissolubility and unity of the marriage bond, and repeated the common Western teaching that, in the case of Christian couples, the parties themselves are the ministers of the sacrament.¹⁹¹

CONCLUSION

The history of the Church's thinking on the nature of marriage is complex in both East and West. Nevertheless, we can say that in the West marriage was viewed

¹⁹⁰ "Per sua natura, la vita coniugale perfetta significa anche la dedizione totale dei genitori a beneficio dei figli, e l'amore coniugale nella sua forza e nella sua garanzia della attuazione" (*AAS*, 43 [1951], p. 850; *Papal Teachings: Matrimony*, p. 427).

¹⁹¹ Regarding the indissolubility and unity of the bond in the teaching of Pius XII, see, for instance, the following: the final part of his Allocation to the Rota, 3 October 1941, in *AAS*, 33 (1941), pp. 424-426 (*Papal Teachings: Matrimony*, pp. 336-338), where the Pope distinguished between intrinsic and extrinsic indissolubility. See also the Allocation to Newly-weds, 22 April 1942, in *Discorsi e radiomessaggi di Sua Santità Pio XII*, vol. 4, Città del Vaticano, Tipografia poliglotta Vaticana, 1955-1959, pp. 43-49 (*Papal Teachings: Matrimony*, pp. 340-346); Allocation to Newly-weds, 29 April 1942, in *Discorsi e radiomessaggi di Sua Santità Pio XII*, vol. 4, pp. 53-57 (*Papal Teachings: Matrimony*, pp. 346-352).

On the issue of the ministers of the sacrament, see, for example, the Allocation to Newly-weds, 5 March 1941, in *Discorsi e radiomessaggi di Sua Santità Pio XII*, vol. 3, pp. 5-9 (*Papal Teachings: Matrimony*, pp. 319-325).

first as a natural human reality, which led to a legal approach, whereas in the Oriental traditions the primary point of departure was not the natural character of marriage, but the supernatural union that it imaged. The especial emphasis on the sacred and spiritual character of marriage in the Eastern Churches was illustrated in the significant difference which developed between East and West concerning the necessity of a sacred rite in the celebration of marriage.

In this century, up to the Second Vatican Council, a few notions had come to control the Catholic Church's view of marriage's nature, and were expressed in magisterial teaching and in its legislation, both Latin and Oriental. First, marriage *in fieri* was regarded as a contract between a man and a woman, which is itself a sacrament between the baptised, the spouses being the ministers. Throughout the Catholic Church, in both East and West, the concept of contract had come to overshadow completely other ways of looking at marriage's nature. The sacrosanct and religious nature of marriage in the thinking of the Eastern Churches was ignored in those canons of *Crebrae allatae* (1949) which dealt directly with the nature of marriage, as they were reproduced straight from the 1917 Western law. This is especially evident in the use of "contract" and "contractants", concepts alien to the genuine Oriental tradition, and represented a very profound Latinisation of Eastern marriage law.

Secondly, the formal object of the marriage contract was seen as the permanent exclusive right of the spouses to each other's bodies for sexual intercourse for procreation. So the procreative aspect of marriage was emphasised, to the

detriment of the notion of the personal union of the spouses. While Western classical theology acknowledged that the "conjugal society" itself was the true object of marital consent, and although in both East and West the Church took over from Roman law the concept of marriage as a two-in-one way of life, by this century the tendency of Catholic canonists to equate the right to sexual intercourse with the essence of marriage had become firmly established. This epitomised a kind of reductionism which was the result of historical evolution, a development which led to the unitive aspect of marriage being deprived of real canonical significance. Terms such as *consortium omnis vitae*, *conjunctio maris et feminae*, and *individua consuetudo vitae*, while acknowledged, were not accorded a definition-value in Church teaching or in legislation (both Oriental and Latin). Likewise, procreation was regarded as the primary purpose of marriage and the other ends were essentially subordinate to and dependent on it.

Finally, the Church insisted that all marriages are identified by the essential properties of unity and indissolubility, but in sacramental marriage these properties gain a singular steadfastness. The long struggle by the Roman authorities against remarriage practices among the Oriental Catholics showed that indissolubility was regarded as matter of Catholic doctrine rather than of ecclesiastical law.

Now that we have sketched the historical, theological and canonical background of the Church's understanding of marriage in East and West, we are in a position to examine the contribution of the Second Vatican Council.

CHAPTER TWO

THE NATURE OF MARRIAGE IN THE CONCILIAR AND POST-CONCILIAR DOCUMENTS

INTRODUCTION

The Second Vatican Council represents a significant shift and development from previous Church teaching on the nature of marriage, extending even to its use of terminology. It sought to restore some of the balance between the procreative and unitive aspects of marriage. Thus a thorough examination of the conciliar teaching is in order. Then we will peruse the important post-conciliar Church documents regarding the nature of marriage, to observe how they reaffirmed and complemented the conciliar doctrine. After scrutinising these documents, we will have a brief look at how the reasoning of some Rotal decisions was affected.

A. THE SECOND VATICAN COUNCIL

The Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, forms the basic source of renewal in marriage law because the Constitution elucidates key points of the Church's doctrine on the nature of marriage. While this remains the primary text to be examined, we must also review some other conciliar documents relevant to the Church's revision of its law concerning the nature of matrimony; these are sections in the Dogmatic Constitution on the Church (*Lumen gentium*) and in the Decree on the Apostolate of the Laity (*Apostolicam actuositatem*).

I. THE PASTORAL CONSTITUTION *Gaudium et spes* (1965)

Part II, Chapter I of Vatican II's Pastoral Constitution on the Church in the Modern World of 7 December 1965 is entitled "Fostering the Dignity of Marriage and the Family".¹ A study of this chapter in so far as it speaks about marriage is required.² We will do so by examining the Constitution's teaching under various headings: the essence of marriage, its properties, its ends, its goods, and finally, the sacramentality of marriage.³

¹ SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* [= GS, followed by article and paragraph number], 7 December 1965, nos. 47-52, in CONCILIUM VATICANUM II, *Constitutiones, decreta, declarationes*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1966, pp. 753-766.

The translations of the conciliar documents are our own, but we made use of the following: A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post-Conciliar Documents* [= FLANNERY, vol. 1], Dublin, Dominican Publications, 1981, xxiv, 1062 p; P.-A. MARTIN (ed.), *Vatican II: les seize documents conciliaires* [= MARTIN], Montréal & Paris, Fides, 1966, 671 p; W. ABBOTT and J. GALLAGHER (eds.), *The Documents of Vatican II* [= ABBOTT], New York, NY, America Press, 1966, xxi, 793 p; TANNER, vol. 2, pp. 817-1342.

For a comparison of the English translations by ABBOTT and FLANNERY, see J.A. SELLING, "Re-reading *Gaudium et spes* on Marriage and the Family", in *Louvain Studies*, 8 (1980), pp. 82-94.

² There were other proposed treatments of marriage, emanating originally from the Holy Office and from the Congregation for the Discipline of the Sacraments, which never resulted in a conciliar document. They need not concern us here. One, the work of the Commission for the Discipline of the Sacraments, which in its final form dealt mostly with impediments, mixed marriages, canonical form, and pastoral preparation, was referred by the bishops in November 1964 to the Pope for consideration by those responsible for the future revision of canon law. See B. O'LOUGHLIN, *Marriage — A Covenant and "consortium totius vitae": Scriptural Basis, Conciliar Teaching and the Revised Code of Canon Law*, J.C.D. dissertation, Ottawa, Saint Paul University, 1985, pp. 234-240.

³ The headings under which the conciliar constitution's teaching on marriage may be examined vary, depending on the purpose of the study. The method adopted here is not the only possible one; it was found convenient for the analysis of the text, though it reflects to a certain extent Western canonical schemas.

In our analysis of the paragraphs on marriage we will not give a detailed history of the draft documents, except in so far as this illustrates the meaning of the promulgated conciliar text. For a detailed history of all the conciliar texts on the nature of marriage, see O'LOUGHLIN, *Marriage —*

(a) The Essence of Marriage

The conciliar Constitution differs from the earlier canonical treatment of the essence of marriage in this century in two significant ways: its use of the term "covenant" and its description of the object of matrimonial consent.

(i) The notion of covenant

Article 48 begins by looking at marriage as a natural human reality, that is, in the order of creation:

The intimate community of life and married love, established [founded] by the Creator and endowed by him with its own laws, is formed [constituted] by the covenant of matrimony or irrevocable personal consent.⁴

Here, Vatican II, in continuity with canonical tradition, seems to distinguish between the dynamic moment of the juridic formation of marriage (*matrimonium in fieri*), and the result of this event which is the juridical state of marriage (*matrimonium in facto esse*). This latter is called the "intimate community of married life and love", while the marital "covenant", a word full of biblical allusions, refers here to marriage *in fieri*.⁵ Covenant essentially involves a personal commitment which cannot be

A Covenant and "consortium totius vitae", pp. 212-260. Cf. P. DELHAYE, "Dignité du mariage et de la famille (I: Préhistorie et histoire du texte)", in Y. CONGAR and M. PEUCHMARD (eds.), *L'Église dans le monde de ce temps*, Paris, Cerf, 1967, pp. 387-420. For a general history of *Gaudium et spes*, see C. MOELLER, "History of the Constitution (*Gaudium et spes*)", in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, vol. 5, Montréal, Palm, 1969, pp. 1-76.

⁴ "Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur" (GS 48 § 1).

⁵ Some translators of *Gaudium et spes* presumably want to indicate that this expression "intima communitas vitae et amoris coniugalis" here refers to *matrimonium in facto esse*. However this laudable aim is sometimes frustrated by a poor choice of phrase. For example, see FLANNERY, vol. 1, p. 950: "The intimate *partnership* of life and love which *constitutes* the married state has been

revoked.⁶ As a kind of explanation of what this "covenant" is in this context, the Constitution uses the words "irrevocable personal consent". So here "covenant of marriage" and "irrevocable personal consent" are equivalent terms; one is the same as the other. This is seen in the text by the use of *seu*. However, as J. Huber has pointed out, in *Gaudium et spes*, the term *foedus* does not have one univocal meaning throughout the text; it does not refer to *matrimonium in fieri* all the time.⁷ Later in this paragraph, it is said that man and woman are no longer two but one flesh by their marriage covenant; here *foedus* denotes the married state (*matrimonium in facto esse*). Later again, in the second paragraph of article 48, reference is made to the "covenant of love and fidelity" between God and His people in the Old Testament; in this context, *foedus* seems to be an acknowledgment of a factual matter. So there seems to be a three-fold meaning to "covenant" in the conciliar Constitution.

The Council resolutely refused to replace the term "covenant" by "contract", despite there being *modi* asking for this. The Commission in its *relatio* explained that the text (the first line of article 48) spoke in clearer terms of "irrevocable personal

established by the creator and endowed by him with its own proper laws: it is rooted in the *contract* of its partners, that is, in their irrevocable personal consent." This does not make for clarity; it could even give the impression that the intimate community gives rise to the married state, whereas the conciliar Constitution is saying here that the covenant (i.e. irrevocable personal consent) establishes the married state of intimate community. A better phrase might be "which is the married state", thereby showing that in *Gaudium et spes* the married state and the "intimate community of life and married love" are one and the same thing. Also, "partnership" isn't a good translation of *communitas*, and, of course, the translation of *foedus* by "contract" is simply wrong. A similar problem might arise in MARTIN, p. 221: "La communauté profonde [...] que forme le couple [...]."

⁶ We will not explore here the biblical background of the term "covenant". For a detailed analysis of this, see O'LOUGHLIN, *Marriage — A Covenant and "consortium totius vitae"*, pp. 51-118, 161-202.

⁷ See J. HUBER, "Coniunctio, communio, consortium: observationes ad terminologiam notionis matrimonii", in *Periodica*, 75 (1986), p. 395, note 10.

consent" and that the biblical term was added "out of consideration for the Orientals for whom 'contract' presents some difficulties."⁸ During the Council, Cardinal Meouchi, Maronite Patriarch of Antioch, in a written intervention, had stated that it was good to speak of irrevocable personal consent and not of contract, so as to emphasise fully the personal dimension and to respect the Eastern tradition.⁹ Indeed the term *contractus* is conspicuously absent from the whole text of *Gaudium et spes* (and even from earlier drafts). This concern to respect the broader Eastern tradition represents a sensitivity not apparent in the Eastern canons on marriage we looked at earlier. While the only reason given *explicitly* in the conciliar documentation for this is that of acknowledging Oriental thought, there is much truth in the claim of B. Häring, one of the chief architects of the Constitution,¹⁰ that another reason is that the relationship between Christ and His Church is a covenant, not a contract:

[...] the "marriage contract" was often something bargained for by the two families and frequently obscured the genuine nature of the marriage covenant which is a community of love. People nowadays think of a contract as an agreement whose content can be determined by the contracting parties themselves and which can later be revoked by mutual consent. A contract concerns things, services and rights which in one way or another can be separated from the person [...]. The idea of a "covenant" [...] corresponds to an understanding of

⁸ "Mentio non fit de 'contractu matrimoniali', sed verbis clarioribus sermo est de 'irrevocabili consensu personali' secundum vota Patrum [...]. Additur terminus biblicus intuitu etiam Orientalium, pro quibus 'contractus' quasdam difficultates facit" (CONCILIUM VATICANUM II, *Acta synodalia Sacrosancti Concilii Oecumenici Vaticani II: cura et studio archivi Concilii Oecumenici Vaticani II* [= *Acta synodalia*], in Civitate Vaticana, Typis polyglottis Vaticanis, 1976, vol. 4, periodus 4, pars 1, p. 536).

⁹ See *Acta synodalia*, 1977, vol. 4, periodus 4, pars 3, p. 150.

¹⁰ See J. RATZINGER, *Theological Highlights of Vatican II*, New York, NY, Paulist Press, 1966, p. 149.

marital intercourse as mutual self-giving [...] it is not the single act but the whole community of life and love which is viewed as mutual self-giving.¹¹

Not all scholars have agreed that the Council's omission of "contract" is significant. U. Navarrete claims that, in its answer, the conciliar Commission presupposed that marriage is truly a contractual act, by referring to irrevocable personal consent; hence the omission was only for the sake of Oriental Christians, and, according to the Commission, the term *contractus* didn't pose difficulties for the Latins.¹² He goes on to say that the essential elements of the contract in traditional canonical doctrine (the consent of the parties that causes the contract, its object, and obligations flowing from the consent) are all clearly expounded in *Gaudium et spes*. Hence, regarding the contractual nature of marriage *in fieri*, the conciliar Constitution, being pastoral and avoiding technical terms, didn't propose doctrine any different from that found in so many Church documents.¹³ So Navarrete sees the Council's omission of "contract" as of minimal importance. However there are several problems with this view. The very fact that "contract" was mentioned in so many past ecclesiastical statements, and in so much theological-canonical writing, puts the spotlight on the Constitution's failure to mention the word even *once*. Moreover,

¹¹ B. HÄRING, "Fostering the Nobility of Marriage and the Family", in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, vol. 5, pp. 232-233. Cf. P.F. PALMER, "Christian Marriage: Contract or Covenant?", in *Theological Studies*, 33 (1972), p. 618, who claims that covenant is the "preferred word to express the reality of marriage."

¹² See NAVARRETE, *Structura juridica matrimonii*, pp. 78-79. Cf. O. ROBLEDA, "Causa efficiens matrimonii iuxta Const. *Gaudium et spes* Conc. Vaticani II", in *Periodica*, 55 (1966), pp. 378-380.

¹³ See NAVARRETE, *Structura juridica matrimonii*, p. 79.

the Council was not afraid to call marriage an "institution" and an "institute", while sedulously avoiding the term *contractus*. In *Gaudium et spes* 47-48, we find the terms "covenant", "community" and "institution" applied to marriage already celebrated and the terms "covenant" and "consent" applied to marriage being celebrated.

Perhaps the most balanced explanation is given by L. Örsy: that Vatican II wanted to break away from a rigid contractual conception of marriage by placing it in a sacred context, but did not completely exclude the presence of contractual elements in the marriage vows. These elements must be seen and included in that context. Hence he says that

contractual elements can be still recognised in the exchange of the promises, but that exchange can no longer, not even in canon law, be adequately defined as a contract. This new relationship between contract and covenant is best understood if the move from contract to covenant is considered as a move to a higher viewpoint. Nothing is lost, everything is enriched; contract is contained in the covenant but does not exhaust it.¹⁴

Finally, by affirming that matrimony is founded by the Creator and endowed with its own intrinsic laws, article 48 § 1 of the Constitution is stating that marriage is not a purely human reality. The vocation to marriage is inscribed in the very nature of humanity, so that the purposes and nature of marriage are not subject to humankind's arbitrary discretion. Here, in this context, as Häring notes, the word

¹⁴ ÖRSY, *Marriage in Canon Law*, p. 50.

"laws" refers to marriage's essential structure, rather than moral laws added or imposed.¹⁵

Having seen the significance of Vatican II's *Gaudium et spes* in its usage of the term "covenant", it is time to investigate how it also differs from the earlier canonical treatment of the essence of marriage in this century in another pivotal way, its description of the object of matrimonial consent.

(ii) The object of matrimonial consent

Article 48 § 1 of the conciliar constitution says that "from the human act whereby spouses mutually bestow and accept each other, there arises by the divine will a lasting institution."¹⁶ Here the "human act" refers to marriage *in fieri*, while the "institution" is marriage *in facto esse*.

This formulation ("the human act whereby spouses mutually bestow and accept each other") did not go unchallenged at the Council. Thirty-four Fathers wanted the (formal) object of matrimonial consent to be identified as "specific rights and duties", not the spouses themselves, but the Commission replied that rights have objects

¹⁵ See HÄRING, "Fostering the Nobility of Marriage and the Family", p. 232. Selling is very critical, sometimes rightly so, of the FLANNERY translation of GS 47-52. See SELLING, "Re-reading *Gaudium et spes* on Marriage and the Family", pp. 82-94. However his disapproval (p. 85) of FLANNERY'S rendering (GS 48 § 1, line 1) of *suis legibus* by "its own proper laws" is dubious, since *suis* does indeed refer to *legibus*, not to the Creator directly. Selling prefers the ABBOTT version — "His laws", but the Latin text doesn't read *Eius legibus*. There is an important difference of meaning between *suis* and *eius*; accordingly, ABBOTT here loses a certain nuance. Furthermore FLANNERY'S rendition makes sense in the light of the above comment by Häring that in this case we are talking about the "laws of essence" or "structure" of marriage. Also, Selling's reproach of FLANNERY for adding "by him" to "endowed" seems unfair when one looks at the original Latin clause: "a Creatore condita suisque legibus instructa".

¹⁶ "Ita actu humano, quo coniuges sese mutuo tradunt atque accipiunt, institutum ordinatione divina firmum oritur [...]" (GS 48 § 1).

which in marriage involve the spouses themselves; in addition, the phrase *traditio personae* was used in *Casti connubii*.¹⁷

Another 190 Fathers wished to insert the formulation of the 1917 Code, making the *ius in corpus* the object of the spouses' consent. This type of juridical specification was not required in a pastoral text intended to engage in discussion with the world, said the Commission.¹⁸ This answer by the Commission is somewhat evasive because ultimately, using a pastoral pretext, it is refusing to restate the common pre-conciliar thinking, while not rejecting it outright.

The conciliar description bypasses the well-known canonical distinction between the formal and material object of consent. Even if the conciliar formulation of the object of marital consent is vague and almost poetic ("spouses mutually giving and accepting one another"), nonetheless it certainly denotes a divergence from the 1917 Code and the M.P. *Crebrae allatae* (1949). Finally, it needs to be noted that *Gaudium et spes* never named love as part of the object of consent, although throughout the conciliar Constitution married love is spoken of in glowing terms.

(b) The Properties of Marriage

Given the pastoral scope of the conciliar text, it is not too surprising to note that the essential properties of marriage, unity and indissolubility, are not treated in a technical way. Indeed the general Catholic understanding of them is almost assumed. Yet, in the autumn of 1964, an Oriental Catholic prelate, E. Zoghby,

¹⁷ See *Acta synodalia*, 1978, vol. 4, periodus 4, pars 7, pp. 476-477. See also CC 542-543.

¹⁸ See *ibid.*, p. 477.

Melchite Patriarchial Vicar for Egypt and Sudan, had created quite a stir in the Council by suggesting that the Catholic Church could adopt the non-Catholic Oriental practice of allowing the remarriage of the innocent partner in the case of adultery.¹⁹ However, Zoghby's views on indissolubility were not accepted for discussion because they were considered to be opposed to Catholic doctrine on Christian marriage and were officially declared by the Patriarch, Maximos IV, to be private opinions that did not reflect the mind of the Melchite Church. The controversy had no impact whatsoever on the text of *Gaudium et spes*. Although the conciliar exposition of the properties of marriage is neither detailed nor technical, the prevailing doctrine was clearly taken for granted by the Council and underlies the conciliar text.

In *Gaudium et spes* 47, unity and indissolubility are alluded to when the Council speaks of the dignity of marriage being marred by polygamy, divorce and so-called free love. Indissolubility is more clearly referred to in the next paragraph:

[...] from the human act whereby spouses mutually bestow and accept each other, there arises by the divine will an institution which is lasting, even in the eyes of society; for the good of the spouses, of the children, and of society, this sacred bond does not depend on human decision [for its continued existence]. For God himself is the author of marriage [...].²⁰

¹⁹ The "Zoghby affair" created a controversy, and provoked a scholarly debate on Oriental remarriage practices. For an good account of Zoghby's two speeches, along with subsequent reactions and views, see A. WENGER, *Vatican II: chronique de la quatrième session*, Paris, Éditions du Centurion, 1966, pp. 200-246.

²⁰ "[...] actu humano, quo coniuges sese mutuo tradunt atque accipiunt, institutum ordinatione divina firmum oritur, etiam coram societate; hoc vinculum sacrum intuitu boni, tum coniugum et prolis tum societatis, non ex humano arbitrio pendet. Ipse vero Deus est auctor matrimonii [...]" (GS 48 § 1).

Speaking here of marriage as a natural reality, the conciliar Constitution clearly teaches that the bond of marriage is not subject to the arbitrary discretion of either or both of the partners — they have no power to dissolve it. The text does not delve into the varying grades of firmness possessed by different kinds of marital bonds, i.e. it prescind from the question of the exceptions to the principle of indissolubility represented by the Pauline and so-called Petrine privileges. The distinction between intrinsic and extrinsic indissolubility is not mentioned. The disputed issue of whether every marriage is intrinsically indissoluble by the natural law (leaving aside divine positive law) is left untouched.²¹ Apart from stating that marriage is indissoluble by divine institution, the Council does not discuss the nature of this indissolubility or its ultimate foundation. Proposing a complete doctrine of indissolubility was not on the conciliar agenda.

However *Gaudium et spes* did relate the essential properties of marriage to its wider reality when it linked indissolubility with the good of the spouses, of the children and of society.²² At the end of the same paragraph, both properties are mentioned when it is said that

the intimate union of marriage, as a mutual giving of two persons, and the good of the children, demand total fidelity from the spouses and require an indissoluble unity between them.²³

²¹ For a synopsis of the two Catholic views on this question, see NAVARRETE, *Structura juridica matrimonii*, pp. 101-103.

²² The Constitution doesn't deal with the question of how ignorance or error regarding the properties of marriage might ever affect consent.

²³ "Quae intima unio, utpote mutua duarum personarum donatio, sicut et bonum liberorum, plenam coniugum fidem exigunt atque indissolubilem eorum unitatem urgent" (GS 48 § 1).

So there are two roots to the requirement that marriage be an unbreakable unity: the conjugal covenant and the good of the children. Later, in article 49, it is explicitly stated the unity of marriage has been confirmed by the Lord.²⁴ By way of contrast, there is no mention in the conciliar text of divine positive law in regard to indissolubility.

The Council noted the importance of conjugal love for fidelity in marriage and for upholding the indissolubility of the bond, when it said that married love excludes adultery and divorce.²⁵ Indissolubility is further affirmed in article 50 when it is said that

marriage to be sure is not instituted solely for procreation; rather its very nature as an indissoluble covenant between persons, and the good of the children, also demand that the mutual love of the spouses be shown properly, that it grow and mature. Therefore even where there are no children despite the often intense desire of the spouses, marriage, as a communion and sharing of all of life, persists and maintains its value and indissolubility.²⁶

We note here that indissolubility is not a requirement of or founded in married love; rather unbreakability is a characteristic of the covenant itself. It is this compact (precisely because it is indissoluble) as well as the good of the children which require

²⁴ See *GS* 49 § 2.

²⁵ See *GS* 49 § 2.

²⁶ "Matrimonium vero, non est tantum ad procreationem institutum; sed ipsa indoles foederis inter personas indissolubilis atque bonum prolis exigunt, ut mutuus etiam coniugum amor recto ordine exhibeatur, proficiat et maturescat. Ideo etsi proles, saepius optata, deficit, matrimonium ut totius vitae consuetudo et communio perseverat, suumque valorem atque indissolubilitatem servat" (*GS* 50 § 3).

that the couple nourish conjugal love. Because indissolubility is an attribute of the conjugal covenant itself, marriage remains unbreakable in the absence of offspring.

(c) Marriage's Finality

The issue of the ends of marriage was one of the most hotly debated questions at Vatican II.²⁷ We can examine what article 48, paragraph one, of *Gaudium et spes* says of this:

For God himself is the author of marriage, endowed as it is with its various goods and ends. [...] By their very nature, the institution of marriage itself and conjugal love are ordered to the procreation and education of children and find in them their ultimate crown.²⁸

The same 190 conciliar Fathers, mentioned before, who wished to name the *ius in corpus* as the object of marital consent, also wanted the various goods and ends of marriage to be specified as "hierarchically connected". Again the reasons advanced by the Commission in the *Expensio modorum* for rejecting this proposal are evasive and ambiguous.²⁹ The passage, said the Commission, is about marriage in its natural state, and so here it is not appropriate to enumerate the Christian goods of the

²⁷ Cardinal M. Browne, in particular, insisted that the primacy of the procreative end of marriage was certain Catholic doctrine and not just a juridical teaching. See CONCILIUM VATICANUM II, *Acta et documenta Concilio Oecumenco Vaticano II apparando*, in Civitate Vaticana, Typis polyglottis Vaticanis, *Series II: Praeparatoria*, 1978, vol. 2, pars 3, pp. 965-967. For a detailed history of the various drafts of the Constitution on the ends of marriage, see J.S. MORENO, "*Fines matrimonii*" as Found in Canon 1055 § 1 in the 1983 C.I.C.: A Critical Study, Romae, Pontificia studiorum Universitas a S. Thomas Aq. in Urbe, 1991, pp. 40-76.

²⁸ "[...] hoc vinculum sacrum intuitu boni, tum coniugum et prolis tum societatis, non ex humano arbitrio pendet. Ipse vero Deus est auctor matrimonii, variis bonis ac finibus praediti [...]. Indole autem sua naturali, ipsum institutum matrimonii amorque coniugalis ad procreationem et educationem prolis ordinantur iisque veluti suo fastigio coronantur" (GS 48 § 1).

²⁹ See *Acta synodalia*, vol. 4, periodus 4, pars 7, pp. 477-478.

sacrament of marriage. Secondly, a footnote would indicate the traditional doctrine. Thirdly, the hierarchy of goods could be looked at from different viewpoints, cryptically replied the Commission, which in its answer gave a reference to *Casti connubii*.³⁰ Fourthly, the phrase "hierarchically connected" was too technical. Lastly, the Commission maintained that the primordial importance of the procreative aspect of marriage was expounded at least ten times in the text.

From the whole of this reply, one might get the impression that the primacy of the procreative end was being reaffirmed, albeit implicitly. Yet the reference to *Casti connubii* and the Commission's thinking that a hierarchy of goods can be seen from different aspects would seem to indicate otherwise. Besides, the footnote referred to by the Commission mentioned texts concerned with the *bona matrimonii*, not the *finis*. There has been some confusion regarding a reference in this footnote (number 1) to *Casti connubii*.³¹ In the Commission's reply the reference is to only two pages of the encyclical, which have no mention of the *finis* of marriage or their relative ranking.³² This is the same in the text of *Gaudium et spes* actually promulgated by the Council, except to confuse matters an accompanying Denzinger reference is to all of part one of the encyclical, resulting in the citation of two non-

³⁰ The actual reference was to *AAS*, 22 (1930), p. 547.

³¹ For a detailed but overly suspicious account of all of this, see J.A. SELLING, "A Closer Look at the Text of *Gaudium et spes* on Marriage and the Family", *Bijdragen*, 43 (1982), pp. 30-48.

³² See *Acta synodalia*, vol. 4, periodus 4, pars 7, p. 478: the reference is "*AAS* 22 (1930), pp. 547-548".

parallel references.³³ However in the official text of the conciliar Constitution published in the *Acta Apostolicae Sedis* in 1966, the complete reference in the footnote is to part one of the encyclical.³⁴ Obviously the original reference of the Commission to two pages of *Casti connubii* got "corrected", rather than the added Denzinger reference. The only real significance of the content of this footnote regarding *Casti connubii* is this: if the truly correct reference is to two pages of the encyclical extolling conjugal love and giving a primacy of honour to the mutual formation of husband and wife, then the case of those claiming that Vatican II reaffirmed the traditional doctrine on the ends of marriage is weakened. However, even if footnote number 1 refers to part I of *Casti connubii*, the so-called "traditionalist" view is not helped either, since all of part one is concerned with the

³³ That is "AAS 22 (1930), pp. 547-548; Denz.-Schön. 3703-3714". This is the reference in footnote number 1 in the translations by ABBOTT and MARTIN who presumably relied on the text circulated for promulgation.

³⁴ See AAS, 58 (1966), p. 1068, where the footnote mentions "AAS 22 (1930), pp. 543-555; Denz. 2227-2238 (3703-3714)".

bona matrimonii, not the *finis*.³⁵ The vital point is that nowhere in *Gaudium et spes* is an actual hierarchy of ends asserted.

Certainly the great importance of the procreative purpose of marriage is clearly stated in *Gaudium et spes*, while there is a clear unwillingness to enter into the question of whether the other ends are subordinate to it. This is obvious in article 50 which states that marriage and conjugal love are of their nature ordained to the generation and education of children, and then goes on to say:

Children are really the supreme gift of marriage and contribute greatly to the good of the parents themselves. [...] Hence, *while not making the other ends of marriage of less account*, the true cultivation of married love and the whole structure of family life arising from it is directed to disposing the spouses to cooperate courageously with the love of the Creator and Saviour, who through them will increase and enrich His family day by day. [...] Marriage to be sure is not instituted solely for procreation.³⁶

³⁵ Thus FELLHAUER ("The *consortium omnis vitae*", p. 111, footnote 21), while using the probably incorrect "official" text of the footnote, can nevertheless sagely note: "[...] the only text which unequivocally states that the *bonum prolis* is the primary good is *Casti connubii* which does so while developing the notions of the *bonum fidei* and conjugal love. In short, none of the texts cited speak of a hierarchy of ends. Notably absent is any reference to Pope Pius XII or to the Decree of the Holy Office, April 1, 1944."

Therefore SELLING ("A Closer Look at the Text of *Gaudium et spes* on Marriage and the Family", pp. 45-47), while seemingly accurate on the true composition of the footnote, probably exaggerates the significance of the footnote change in helping the "traditionalist" interpretation of the conciliar Constitution. Indeed he seems at one point (p. 34) to fail to understand that part one of *Casti connubii* is about the "goods" of marriage, not the "ends". He begins by saying that "*Casti connubii* consists of three parts: I. on the traditional teaching on the ends of marriage [...]", yet he goes on to speak of the *bona*.

³⁶ "Filii sane sunt praestantissimum matrimonii donum et ad ipsorum parentum bonum maxime conferunt. [...] Unde verus amoris coniugalis cultus totaque vita familiaris ratio inde oriens, non posthabitis ceteris matrimonii finibus, eo tendunt ut coniuges forti animo dispositi sint ad cooperandum cum amore Creatoris atque Salvatoris, qui per eos Suam familiam in dies dilatat et ditat. [...] Matrimonium vero, non est tantum ad procreationem institutum" (GS 50 § 3).

The preceding draft of the document did not have the ablative absolute phrase *non posthabitis ceteris matrimonii finibus*, but included the particle *etiam* after *oriens*. It was meant to show that procreation was not the only end of marriage. Some objected, however, that as it stood it lessened the importance of procreation. Two Council Fathers requested its deletion; 117 others suggested that the word *praecipue* replace it, while one proposed *praesertim*.³⁷ The Commission said that if the word *etiam* was eliminated, it would seem that the other ends of marriage need not be considered. Consequently, *etiam* was dropped from the text, but the phrase "while not making the other ends of marriage of less account" was added.³⁸ So again the Commission refused to enunciate explicitly the primacy of the procreative finality of matrimony.

Outside the purpose of the generation and education of children, the Council does not explicitly indicate the "other ends" of marriage. In article 48, paragraph one, it does speak of the "mutual help and service" of the spouses, but does not refer to it formally as a purpose of marriage.³⁹ Although the Constitution greatly extolls married love in article 49, and in article 50 exhorts spouses to protect and cultivate their conjugal love, it never actually spoke of love itself as an "end" of marriage.⁴⁰

³⁷ See *Acta synodalia*, vol. 4, periodus 4, pars 7, p. 493.

³⁸ *Ibid.*, pp. 493-494.

³⁹ "Vir itaque et mulier, qui foedere coniugali iam non sunt duo, sed uno cara' (Matth. 19,6), intima personarum atque operum coniunctione mutuam sibi adiutorium et servitium praestant [...]" (GS 48 § 1).

⁴⁰ See the analysis of the conciliar text regarding love by NAVARRETE, *Structura juridica matrimonii*, pp. 108-151.

Moreover, it does not expressly mention *remedium concupiscentiae* as an "end" of marriage, although in article 49 the Council speaks highly of the sexual acts expressing married love.⁴¹ Hence the Constitution fails to identify or name the "other" institutional ends of matrimony.⁴²

In the light of all of the above, it is not surprising that scholars have drawn different conclusions about Vatican II's teaching on the ends of marriage.⁴³ It is fair to say, as G. Robinson observes, that the Council avoided the issue.⁴⁴ Ultimately the text of *Gaudium et spes*, while asserting the very great importance of both the procreative and other personal purposes of marriage, is silent on the issue of a ranking of the *finis matrimonii*.⁴⁵ This silence, or refusal to restate the magisterial

⁴¹ Not very convincingly, Navarrete claims that the *remedium concupiscentiae* could be said to be implicit in GS 51. See *ibid.*, p. 42.

⁴² Not all authors recognise this clearly. For instance, R. PUTHOTA (*The Evolution of the Concept of Marriage from Vatican II to the New Code of Canon Law*, S.T.D. dissertation, Rome, Pontifical Lateran University, 1986, p. 39) states that, after giving the general principle that marriage has been endowed by God with various benefits and purposes, Vatican II "enumerates some of the various benefits and purposes: continuation of the human race, personal development and the eternal destiny of the individual members of the family and of society." This is incorrect as a careful reading of *Gaudium et spes* demonstrates. What Vatican II actually says (GS 48 § 1) is that all of the *bona ac fines* have a very important bearing on the continuation of the human race, etc. The Council itself did not specify what the ends were, besides the procreation and education of children.

⁴³ For example, NAVARRETE (*Structura juridica matrimonii*, pp. 42-43) concludes that Vatican II, while avoiding technical language, decided nothing new. See also M. ZALBA, "Num Concilium Vaticanum II hierarchiam finium matrimonii ignoraverit, immo et transmutaverit", in *Periodica*, 68 (1979), pp. 613-635. On the other hand, HÄRING ("Fostering the Nobility of Marriage and the Family", pp. 233-234) thinks that the Council's teaching was a transformation.

⁴⁴ See ROBINSON, "Unresolved Questions in the Theology of Marriage", p. 82.

⁴⁵ Therefore it is not quite accurate to say that Vatican II rejected the pre-conciliar thinking on the hierarchy of ends, as is claimed by T. MACKIN, "Conjugal Love and the Magisterium", in *The Jurist*, 36 (1976), p. 27.

thinking directly preceding the Council, has led to varying deductions which usually depend on the reader's starting-point. However Vatican II clearly wanted to say that the personal unitive side of marriage is of great consequence, and cannot be ignored or pushed aside in discussing the purposes of marriage.⁴⁶

(d) The Goods of Marriage

Unlike *Casti connubii*, Vatican II's *Gaudium et spes* is not constructed around the scheme of the Augustinian *bona*. Mention of the goods/benefits of marriage is dispersed throughout the conciliar text. Besides the Augustinian *bonum prolis* and *bonum fidei* (51 § 1), there is also mention of other goods such as the *bonum coniugum* (48 § 1) and the *bonum societatis* (48 § 1, 50 § 2).

Especially important is article 48 which states that God has endowed marriage with various goods. Citing the context, the testimony of the Commission and the authorities in the footnote, Navarrete claims that here Vatican II essentially presupposed Augustine's *tria bona* and relinquished to the theological sciences the study of the doctrine of the three goods, whereas Häring thinks that this mention of

⁴⁶ In all of this, it is good to remember the general point made by L. Örsy: "A conventional method to explain the 'mind of the council' is from the discussions which have taken place in the drafting committees, from the developments of the successive drafts of a document and from the official *Relatio* which introduced it to the assembly. Such a historical approach (indispensable as it is) can certainly account, perhaps to a high degree, for the 'mind of the committee', or the 'mind of the relator', but in itself it is incomplete because it does not account for what went on in the mind of the vast majority who ultimately approved of the document. It is precisely in this general act of approval that the *sensus fidei* of the episcopate could have played a decisive role beyond and above the reasoning of the drafting committee and the persuasive speech of the relator. [...] ... the final formulation is due not only to the rational planning of a committee but also the faith vision of all the participants" (L. ÖRSY, *The Church: Learning and Teaching*, Wilmington, DE, Glazier, 1987, pp. 83-84 [footnote 2]).

goods has nothing to do with the Augustinian doctrine of the benefits of marriage.⁴⁷ Notwithstanding the pastoral intent of the conciliar Constitution, Navarrete also argues that article 48 in particular was composed under the influence of the traditional doctrine, and that the concept of the *bona* is found throughout the text in a non-technical sense.⁴⁸

Certainly the terms *bonum prolis* and *bonum fidei* are found explicitly in *Gaudium et spes*.⁴⁹ Moreover, fidelity is linked to the intimate union of the spouses and not just restricted to exclusivity regarding conjugal acts.⁵⁰ Likewise, although never explicitly called *bonum sacramenti*, indissolubility is related to the good of the children and the married couple's union.⁵¹ One might accept that in other places the goods are implicit in the conciliar document.⁵² Whether the framework of the *bona* of Augustine is to be found within the structure of the Constitution's chapter on marriage, as is claimed by F. Gil Hellin, is quite another matter.⁵³ Anyway, all of this matters little since Vatican II clearly did not give any attention to what constitutes the essential elements of the Augustinian *tria bona*.

⁴⁷ See NAVARRETE, *Structura juridica matrimonii*, pp. 54-58; HÄRING, "Fostering the Nobility of Marriage and the Family", p. 235. Navarrete seems to have the stronger argument.

⁴⁸ See NAVARRETE, *Structura juridica matrimonii*, p. 67.

⁴⁹ See GS 50 § 3 and 51 § 1.

⁵⁰ See GS 48 § 1.

⁵¹ See GS 50 § 3.

⁵² See GS 48 § 1.

⁵³ See F. GIL HELLIN, "Los *bona matrimonii* en la constitucion pastoral *Gaudium et spes* del concilio Vaticano II", in *Scripta theologica*, 11 (1979), pp. 127-178.

(e) **The Sacramentality of Marriage**

In article 48, paragraph 2, the Council clearly stated that the Lord has blessed married love which comes from the spring of divine love and is modelled on Christ's union with the Church. Christian spouses encounter the Lord through the sacrament of marriage, just as God in the past made Himself present to His people through a covenant of love and fidelity. Authentic conjugal love is caught up into divine love and is ordered and enriched by Christ's redemptive power and the salvific action of the Church, leading married couples to God and helping them in their role as parents.

Therefore, as the Constitution goes on to say, "Christian spouses are strengthened and, as it were, consecrated by a special sacrament for the duties and dignity of their state."⁵⁴ This idea is taken from Pius XI's encyclical *Casti connubii*. We note here that, while the Council clearly and simply states that the couple is fortified by the sacrament of marriage, when it speaks of "consecration" the terminology is more nuanced. The word *veluti* qualifies the verb *consecrantur*. So the sacrament of marriage gives "a kind of consecration". Vatican II seems to be saying that, by analogy, in the consensual act of the celebration of marriage (the sacramental "sign"), the couple is consecrated and this endures as a state in the Church. Of

⁵⁴ "[...] coniuges christiani ad sui status officia et dignitatem peculiari roborantur et veluti consecrantur" (*GS* 48 § 2).

In this text there is a footnote to *Casti connubii*, that is *CC* 583; interestingly whereas here in this conciliar formulation it is clear that *veluti* applies only to *consecrantur* and not to *roborantur*, it is not so obvious in *CC* 583, and may indeed apply there to both words.

course, in line with Pius XI, the Council did not say that marriage impresses a character because the sacrament of marriage is of course repeatable for an individual in the case of dissolution of the prior bond either by the death of the other spouse or by the Church in specific cases (non-consummated sacramental marriages). At the same time, Vatican II wanted to draw an analogy between marriage and these other sacraments which give one a state in the Church. Finally, we note that the Council said nothing about the minister(s) of the sacrament of marriage.

2. OTHER CONCILIAR DOCUMENTS

While *Gaudium et spes* undoubtedly was the Council's most important text on marriage, we must record how marriage is briefly described in two other documents, *Lumen gentium* (1964) and *Apostolicam actuositatem* (1965).⁵⁵ In these, marriage is not being dealt with in detail, but in passing; nevertheless, they are not insignificant for the conciliar understanding of the nature of marriage.

Vatican II's Dogmatic Constitution on the Church, *Lumen gentium*, in article 11, states that

Christian spouses, in virtue of the sacrament of marriage by which they signify and share in the mystery of the unity and fecund love between Christ and the Church (c.f. Eph 5:32), help one another to attain holiness in their married life and in the acceptance and education of

⁵⁵ SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church, *Lumen gentium* [= LG, followed by article and paragraph number], 21 November 1964, nos. 11, 41, in CONCILIUM VATICANUM II, *Constitutiones, decreta, declarationes*, pp. 111-113, 167-170; IDEM, Decree on the Apostolate of the Laity, *Apostolicam actuositatem* [= AA, followed by article and paragraph number], 18 November 1965, no. 11, in *ibid.*, pp. 478-480.

children, and so in their state and way of life they have their own gift among the people of God.⁵⁶

Moreover, article 41 says that Christian couples are to support each other in grace with faithful love, accept children lovingly from God, and train them in the faith. Thus they offer an example of untiring and faithful love, build up the brotherhood of charity, and they bear witness to and cooperate in the fruitfulness of the Church. In this way, they are a sign of, and they share in, that love with which Christ loved His Bride and gave Himself up for her.⁵⁷

The Decree on the Apostolate of the Laity, *Apostolicam actuositatem*, devotes its article 11 to the apostolate of married people and the family. It begins by saying that

the Creator of all things established the matrimonial partnership as the beginning and foundation of human society, and by His grace, has made it a great sacrament in Christ and in the Church [...].⁵⁸

Here we have mention first of marriage in its natural reality, in the order of creation, followed by a reference to how God's grace has also made it a sacrament. Later in the article, Christian couples are called upon to manifest and prove by their own lives the indissolubility and sanctity of the bond of marriage.⁵⁹

⁵⁶ "Tandem coniuges christiani, virtute matrimonii sacramenti, quo mysterium unitatis et fecundi amoris inter Christum et ecclesiam significant atque participant (c.f. Eph 5,32), se invicem in vita coniugali necnon prolis susceptione et educatione ad sanctitatem adiuvant, adeoque in suo vitae statu et ordine proprium suum in populo Dei donum habent" (LG 11 § 2).

⁵⁷ See LG 41 § 4.

⁵⁸ "[Cum] conditor omnium constituerit coniugale consortium exordium et fundamentum societatis humanae, idque gratia sua reddiderit sacramentum magnum in Christo et in ecclesia [...]" (AA 11 § 1).

⁵⁹ See AA 11 § 3.

In conclusion, we need to note two other conciliar documents, which, while not saying anything about the nature of marriage, are indirectly relevant to our topic. First, in its Decree on the Eastern Catholic Churches, *Orientalium Ecclesiarum* (1964), the Council spoke of its esteem for the spiritual and ecclesiastical heritage of these Churches, a heritage which it said belonged to the whole Church; it was explicitly demanded that Oriental Catholics, wherever they have improperly abandoned their genuine ancient traditions, should strive to return to them.⁶⁰ This was to form part of the background for the revision of the Oriental legislation on marriage. The second relevant document is the Constitution on the Liturgy, *Sacrosanctum concilium* (1963).⁶¹ In article 59, it taught that the sacraments are acts of faith; as well as nourishing and expressing it, they also presuppose faith.⁶² This was to create the setting for the post-conciliar debate about the necessity of faith in the celebration of the sacrament of marriage. Significantly, this Constitution also laid down, in article 78, that henceforth the nuptial blessing was always to be given at

⁶⁰ See SECOND VATICAN COUNCIL, Decree on the Eastern Catholic Churches, *Orientalium Ecclesiarum*, 21 November 1964, nos. 5-6, in CONCILIUM VATICANUM II, *Constitutiones, decreta, declarationes*, pp. 226-228.

This decree, while saying nothing about the nature of marriage, did declare in article 18 (see *ibid.*, pp. 233) that it sufficed for the validity of a mixed marriage between an Oriental Catholic and a non-Catholic Oriental Christian that there be present a sacred minister (either Catholic or non-Catholic), thus abrogating the requirement of *Crebrae allatae* that such marriages, for validity, had to be blessed by the Catholic pastor or his delegate. This latter ruling had led to the invalidity of many marriages in the Near East, where it was the custom for the marriage always to take place in the church of the man.

⁶¹ SECOND VATICAN COUNCIL, Constitution on the Sacred Liturgy, *Sacrosanctum concilium* [= SC, followed by article and paragraph number], 4 December 1963, nos. 59, 78, in CONCILIUM VATICANUM II, *Constitutiones, decreta, declarationes*, pp. 33, 38.

⁶² See SC 59 § 1.

weddings, thereby changing the existing Latin legislation which prescribed that mixed marriages were to be conducted without any sacred rites.⁶³

B. IMPORTANT POST-CONCILIAR DOCUMENTS

In the wake of Vatican II, Papal teaching and magisterial documents have been characterised by attempts to reaffirm and complement conciliar doctrine. There is no exception in the area of marriage. We shall now examine the more important documents.

1. THE PONTIFICATE OF PAUL VI

Regarding the nature of marriage, the most significant text of Paul VI's pontificate was *Humanae vitae*. We need to examine it first before looking at some other magisterial documents.

(a) The Encyclical *Humanae vitae* (1968)⁶⁴

The encyclical *Humanae vitae* basically addresses the moral problem of birth control; unfortunately, in the popular mind, it was understood only as the "no Pill" encyclical, and Pope Paul's beautiful theology of conjugal love was effectively ignored. Its chief concern is the nature of conjugal sexuality, rather than the nature of marriage, and its key conclusion is that every conjugal act must remain open to the

⁶³ See SC 78 § 2.

⁶⁴ PAUL VI, Encyclical on the Regulation of Births, *Humanae vitae*, 25 July 1968, in AAS, 60 (1968), pp. 481-503; English translation in C. CARLEN (ed.), *The Papal Encyclicals: 1958-1981*, vol. 3, Wilmington, NC, McGrath, 1981, pp. 223-232.

procreation of human life.⁶⁵ So we will just briefly examine what the encyclical has to say about marriage itself.⁶⁶

Of direct concern to us is the fact that the encyclical uses language similar to that of *Gaudium et spes*. Paul VI does not use the term "ends" at all. In his treatment of contraception he based his argument on the premise that conjugal love demands openness to new life and on the God-given inseparable connection between the unitive and the procreative meanings (*significationes*) of the conjugal act. His predecessors, Pius XI and Pius XII, had begun their condemnation of artificial birth control from the axiom that it was a contradiction of the *finis primarius* of marriage. As D. Fellhauer points out, a ready-made argument against contraception for Paul VI could easily have been that the primary purpose of marriage is procreation and so every marital act must therefore retain its orientation towards this primary end.⁶⁷ Yet the Pope doesn't argue this way in the encyclical, nor indeed ever is his 15 year pontificate. He was silent on the issue of a possible hierarchial ranking of the *fines matrimonii*, while insisting on the inseparable link between the unitive and procreative aspects of marriage.

Paul VI never directly alludes to the Augustinian goods of marriage, as did Pius XI in *Casti connubii*. We note too that the terms *contractus* and *ius in corpus*

⁶⁵ See *AAS*, 60 (1968), p. 488.

⁶⁶ There is an enormous theological literature about *Humanae vitae*, a lot of it either disputing or defending the soundness of the Papal reasoning about contraception. This need not detain us here.

⁶⁷ See FELLHAUER, "The *consortium omnis vitae*", p. 116.

never appear in *Humanae vitae*, whereas the terms *vinculum* and *coniunctio* are mentioned.⁶⁸ However, the more disciplinary documents of Paul VI's reign continued to use the verb *contrahere* and its derivatives.⁶⁹ In the encyclical, the term *communio* is used twice to denote marriage, in articles 8 and 9, and it is spoken of in terms of a reciprocal personal gift of self.⁷⁰

In article 8, marriage is described as arising from God's loving design; marriage is the wise and provident institution of God the Creator, and for the baptized, this is invested with the dignity of a sacramental sign of grace, for it represents the union of Christ and His Church.⁷¹ Article 25 elucidates this, repeating the idea found in *Casti connubii* and *Gaudium et spes*, saying that through this sacrament the Christian spouses "are strengthened and, one might almost say, consecrated to the faithful fulfilment of their duties."⁷²

(b) Other Documents of Paul VI's Pontificate

Although *Humanae vitae* was, in the context of marriage, the most important text of Paul VI's reign, because it had the status of an encyclical, it was by no means

⁶⁸ See *AAS*, 60 (1968), pp. 486, 488.

⁶⁹ See, for example, PAUL VI, M.P. *Matrimonia mixta*, 31 March 1970, in *AAS*, 62 (1970), pp. 257-263.

⁷⁰ See *ibid.*, pp. 485-487.

⁷¹ See *ibid.*, pp. 485-486.

⁷² "Eodem namque ipsi roborantur et veluti consecrantur, ut fideliter munia sua exsequantur [...]" (*ibid.*, p. 499; *The Papal Encyclicals: 1958-1981*, p. 230).

A footnote to this text cites *GS* 48; *LG* 35 is also cited, obviously with reference to the witness shown by Christian couples to the world, which is the theme of the rest of the sentence (not quoted above).

the only papal or magisterial document which mentioned something about the nature of marriage. Instead of examining every text of the pontificate, which would lead to a great deal of repetition, we shall just briefly look at two documents which are listed among the *fontes* for canons concerning marriage's nature in the 1983 Code of Canon Law. These documents largely restate the teaching of Vatican II and *Humanae vitae*, but have some particular features worth noting.

(i) *The Ordo celebrandi matrimonium (1969)*⁷³

The Latin liturgical rite for celebrating marriage was revised according to the norms of the Constitution on the Liturgy, and was published by the Sacred Congregation for Rites on 19 March 1969.⁷⁴ Although this is a liturgical document, its introduction offers to the Latin Church a recapitulation of Vatican II's doctrine on marriage.

Unlike *Gaudium et spes*, and most likely because it concerns liturgy, article 1 of the *Ordo* begins with marriage as a sacrament, rather than in its natural reality:

⁷³ S.C. RITUUM, *Ordo celebrandi matrimonium (Rituale Romanum: ex decreto Sacrosancti Oecumenici Concilii Vaticani instauratum, auctoritate Pauli PP. VI promulgatum)* [= *Ordo*, followed by article number], editio typica, 19 March 1969, in Civitate Vaticana, Typis polyglottis Vaticanis, 1969, 40 p; English translation in INTERNATIONAL COMMISSION ON ENGLISH IN THE LITURGY, *The Rites of the Catholic Church* [= *Rites*], vol. 1, New York, NY, Pueblo Publishing Co., 1990, pp. 719-758.

⁷⁴ In 1991, the Congregation for Divine Worship and the Sacraments issued a revised *Ordo celebrandi matrimonium*. See CONGREGATIO DE CULTU DIVINO ET DISCIPLINA SACRAMENTORUM, *Ordo celebrandi matrimonium (Rituale Romanum: ex decreto Sacrosancti Oecumenici Concilii Vaticani renovatum, auctoritate Pauli PP. VI editum, Ioannis Pauli PP. II cura recognitum)*, editio typica altera, 19 March 1990, in Civitate Vaticana, Typis polyglottis Vaticanis, 1991, 109 p. The *praenotanda* of this edition show significant differences with the 1969 text, if only because the more recent edition has been extensively revised and augmented, plus the fact that the various elements of the 1969 ritual are arranged differently in the new text. However, we do not here examine the 1991 ritual, since it appeared after the 1983 Latin Code and was not a *fontes* for that legislation. Indeed the new ritual itself shows the influence of the 1983 Code.

In virtue of the sacrament of marriage, married Christians signify and share in the mystery of the unity and fruitful love that exists between Christ and his Church;⁷⁵

The *Ordo* then basically repeats what *Lumen gentium* 11 said about the married state.

It is in article 2 that there is a summary of some of the teaching of *Gaudium et spes* 48, starting with marriage in the order of creation:

A marriage is established by the marriage covenant, the irrevocable consent that the spouses freely give to and receive from each other. This unique union of a man and woman and the good of the children impose total fidelity on each of them and the unbreakable unity of their bond. To make the indissoluble marriage covenant a clearer sign of this full meaning and a surer help in its fulfillment, Christ the Lord raised it to the dignity of a sacrament, modelled on his own nuptial covenant with the Church.⁷⁶

Here, the "covenant" is the *matrimonium in fieri*.

Article 3 says that Christian couples are to strive to strengthen and develop their marriage by undivided affection. Love is seen as something to be nourished and worked at. In article 4 of the *Ordo*, there is repetition of *Gaudium et spes*' teaching that of their very nature, the institution of marriage and conjugal love are ordained to the procreation and education of children, while the other purposes of marriage are not to be considered to be of less account. Lastly, article 7 explicitly asserts that

⁷⁵ "Matrimonii Sacramento mysterium unitatis et fecundi amoris inter Christum et Ecclesiam coniuges christiani significant atque participant" (*Ordo* 1; *Rites*, vol. 1, p. 720).

⁷⁶ "Coniugii foedere, seu irrevocabili utriusque consensu, quo coniuges libere sese mutuo tradunt excipiuntque, Matrimonium instauratur. Plenam autem coniugum fidem necnon indissolubilem vinculi unitatem tum ipsa singularis viri mulierisque exigit unio, tum bonum exoptulat liberorum. Quod ut Christus Dominus et clarius significaret et facilius redderet, indissolubilem coniugii pactionem, ad exemplar sui nuptialis cum Ecclesia foederis, ad Sacramenti dignitatem evexit" (*Oratio* 1; *Rites*, vol. 1., p. 720).

We have translated *foedus* in terms of "covenant", rather than using "bond" as found in *Rites*.

the sacrament of marriage presupposes and demands faith. Conspicuously, for a liturgical document aimed at the Latin Church, there is no mention of who are ministers of the sacrament. The term *contractus* is not used in the *Ordo's* introduction describing marriage, but later there is reference to the "contracting parties".⁷⁷

(ii) The General Catechetical Directory (1971)

The *Directorium catechisticum generale* was published on 11 April 1971 by the Sacred Congregation for the Clergy.⁷⁸ Requested by the Second Vatican Council, it was meant to present fundamental theological-pastoral principles, taken from the Church's magisterium and especially Vatican II, for the guidance and better coordination of the ministry of the Word. The Directory prescribes that the sacraments must be presented as sacraments of faith:

Of themselves they certainly express the effective will of Christ the Saviour; for their part, men and women must manifest a sincere willingness to respond to God's love and mercy.⁷⁹

A short section (number 59) is devoted to the sacrament of matrimony.

Marriage is called the foundation of family life. Unity and indissolubility are spoken of as a "divine law". Interestingly, when the document speaks of love, it refers

⁷⁷ See *Ordo* 17.

⁷⁸ SACRED CONGREGATION FOR THE CLERGY, *Directorium catechisticum generale*, 11 April 1971, in *AAS*, 64 (1972), pp. 97-176; English translation in A. FLANNERY (ed.), *Vatican Collection*, vol. 2, *Vatican Council II: More Post-Conciliar Documents* [= FLANNERY, vol. 2], Dublin, Dominican Publications, 1982, pp. 529-605.

⁷⁹ "Ipsa certe efficacem Christi Salvatoris voluntatem ex sese exprimunt; homines vero, pro sua parte, sinceram voluntatem respondendi Dei amori et misericordiae manifestare debent" (*AAS*, 64 [1972], p. 130; FLANNERY, vol. 2, p. 560).

to it as an obligation which flows from marriage. This love, in its turn, is ordered to the procreation and education of children. After saying that Christ raised marriage to the dignity of a sacrament, the Directory states:

The spouses administer the sacrament to each other when they exchange personal and irrevocable consent. Living in the grace of Christ, they imitate and in a sense represent the love of Christ himself for his Church. Christian couples are given strength by this special sacrament to fulfill the duties of their state and to uphold its dignity and, as it were, they are consecrated.⁸⁰

Here we have the common Western view that the couple are the ministers of the sacrament, an idea never mentioned in the documents of Vatican II or in *Humanae vitae*. Since the General Catechetical Directory was addressed to the entire Church, this inclusion of a Latin notion, which is not shared by Oriental Catholics, seems unfortunate. Moreover, the statement that the spouses are the ministers is not nuanced in any way, whereas the representation by the married couple of the love between Christ and the Church is qualified by the phrase "in a sense". Lastly, there is mention of the strength received from the sacrament, and following *Casti connubii* and *Gaudium et spes*, of the quasi-consecration that it effects. There is no mention of the term "contract".

⁸⁰ "[...] coniuges, sacramenti administri in personali et irrevocabili consensu eliciendo, in gratia Christi viventes imitantur et quodammodo repraesentant amorem Ipsiis Christi erga suam Ecclesiam. Coniuges christiani ad sui status officia obeunda et dignitatem servandam hoc peculiari sacramento roborantur et veluti consecrantur" (*AAS*, 64 [1972]; pp. 132-133; FLANNERY, vol. 2, p. 562).

Two footnotes cite *Eph* 5:25 and *GS* 48.

2. JOHN PAUL II'S APOSTOLIC EXHORTATION *Familiaris consortio* (1981)

The institution of marriage and its problems have been a great concern of Pope John Paul II in his ministry. Instead of examining every papal text which mentions something about the nature of marriage, which would result in repetition, we shall confine our analysis to *Familiaris consortio*, because it is undoubtedly in that document, published before the new Codes, that we can find the key points of his teaching.

The 1980 Synod of Bishops devoted its attention to the role of the Christian family in the modern world.⁸¹ After its discussions it presented Pope John Paul II with a list of propositions and asked him to publish at his convenience a document for the Church. Hence, in 1981 the Pope issued the Apostolic Exhortation, *Familiaris consortio*.⁸² The focus of this long papal document is the family, and its aim is not to settle disputed questions about marriage as such, but rather to demonstrate the Church's lively care for family life. So marriage is not considered in itself and for itself but in so far as it is the foundation and origin of the family. We are not going

⁸¹ For a history of the Synod, see J. GROOTAERS and J.A. SELLING, *The 1980 Synod of Bishops "On the Role of the Family": An Exposition of the Event and an Analysis of its Texts*, Leuven, Leuven University Press, 1983, 375 p.

⁸² JOHN PAUL II, Apostolic Exhortation on the Christian Family in the Modern World, *Familiaris consortio*, 22 November 1981, in *AAS*, 74 (1982), pp. 81-191. We have used but modified the English translation found in FLANNERY, vol. 2, pp. 815-898.

to give a commentary on the Exhortation, but simply note the important things it says about the nature of marriage itself.⁸³

Among the expressions used for marriage are *coniugale institutum* (article 11), *coniugale pactum* (article 12), and *vinculum amoris* (article 12). The conciliar phrase "intimate community of life and married love" is also used in articles 11 and 13. However Pope John Paul II's favourite term for marriage *in facto esse* seems to be *communio* which appears 21 times in *Familiaris consortio*.⁸⁴ Marriage is spoken of in personalistic terms: *in fieri*, it is referred to as a *foedus coniugalis* and a *foedus coniugalis amoris* (articles 11, 67). In 1980, at Kinshasa, John Paul II had called marriage an audacious and marvelous contract,⁸⁵ but in the Exhortation, the term "contract" is not employed in describing marriage, although verbal derivatives like *contrahere* are used in passing.⁸⁶ Rather, the pope speaks of the marriage covenant being given the dignity of a sacrament (article 67).⁸⁷ In line with *Humanae vitae* and

⁸³ Likewise, it is not germane to the purpose of this study to attempt to assess the theological cogency of the argumentation and standpoints adopted by the Pope in *Familiaris consortio*. This has been undertaken by many authors, some positive in their assessment, others negative. See, for instance, the extremely critical and very unsympathetic view of GROOTAERS and SELLING, *The 1980 Synod of Bishops*, pp. 303-331. For a different perspective, see D. TETTAMANZI, *L'esortazione sulla famiglia "Familiaris consortio"*, Milano, Massimo, 1982, 254 p; M.J. WRENN (ed.), *Pope John Paul II and the Family*, Chicago, IL, Franciscan Herald Press, 1983, xxxi, 286+93 p.

⁸⁴ See E. KACZYNSKI, "Le mariage et la famille: la communion de personnes", in *Divinitas*, 26 (1982), p. 318.

⁸⁵ See JOHN PAUL II, Address to the Christian Spouses of Kinshasa, 3 May 1980, in *AAS*, 72 (1980), p. 426: "C'est le contrat le plus audacieux qui soit, le plus merveilleux également!"

⁸⁶ See *AAS*, 74 (1982), pp. 180, 183, 186.

⁸⁷ See *ibid.*, p. 162.

Gaudium et spes, the Augustinian *bona* are not explicitly outlined, and there is no hierarchical listing of the ends of marriage.

Articles 11 and 12 deal with God's plan for marriage as a natural reality. It is probably in article 11 of the Exhortation that we come closest to John Paul II's concept of marriage.⁸⁸ Sexuality, says the Pope, is not purely biological but concerns the innermost being of man and woman. The total physical self-giving in sexual intercourse should be a sign and a fruit of total personal self-giving; otherwise it would be a lie. The only place where such an understanding of sexuality can be realised is in marriage, which is

the covenant of conjugal love or the free and conscious decision, by which man and woman accept the intimate community of life and love willed by God Himself [...].⁸⁹

Marriage comes into being by the couple's mutual decision, that is their covenant, which has the objective of entering an intimate community of love and life. Here we have the distinction between marriage *in fieri* (their covenant or choice) and their married state (the intimate community), but expressed much more beautifully than in the traditional canonical language of a mutual exchange of rights (*contractus*) over the bodies of the spouses.

Next, the pontiff elucidates the concept of marriage as an institution:

The conjugal institution is not an undue interference by society or authority, nor the extrinsic imposition of a form, but rather is the

⁸⁸ See *ibid.*, pp. 91-93.

⁸⁹ "[...] amoris conjugalis foedus vel conscia ac libera electio, qua vir ac mulier in se recipiunt vitae amorisque communitatem intimam [...]" (*ibid.*, pp. 92-93).

interior requirement of the covenant of conjugal love which is publicly affirmed as unique and exclusive, in order to live in complete fidelity to the plan of God the Creator.⁹⁰

So in John Paul II's thought the institution of marriage is already existing outside the spouses in its own right as a pre-given reality with a definitive form laid down by God; as such it must be recognized by society.⁹¹ Thus when spouses enter marriage they accept this divine reality through their covenant of conjugal love, i.e. marriage is both personal and institutional.⁹²

Article 13 of *Familiaris consortio* repeats the Tridentine doctrine that the marriage of the baptized is one of the seven sacraments, and goes on to say that because by baptism the Christian couple have been inserted into the spousal covenant of Christ with the Church,

⁹⁰ "Coniugale institutum non est illegitimus quidam interventus societatis vel auctoritatis neque exterior formae impositio, verum interior necessitas ipsius foederis amoris coniugalis, qui palam affirmatur tamquam unicus et peculiaris omnino ut ex fidelitate erga Dei conditoris concilium vivatur" (ibid., p. 93).

⁹¹ Grootaers and Selling claim that here there is a difference between *Familiaris consortio* and Vatican II, in the perspectives on the notion of institution: "[...] in conciliar thought marriage as a relationship has its own dynamic that is lived out according to cultural customs and values. On account of its importance, society 'institutionalises' marriage. However, the thought exhibited in *FC* considers marriage as an institution in itself which is then recognised by society. This presupposed a definitive form, specifically willed by God and knowable through an exegesis of Scripture" (GROOTAERS and SELLING, *The 1980 Synod of Bishops*, p. 307).

⁹² There are resonances here of *Casti connubii*'s teaching on how marriage is constituted by both the divine and human wills, the institution of marriage coming from God and humans being the author of each individual marriage (see *CC* 542-543).

the intimate community of conjugal life and love, founded by the Creator, is raised and assumed into the spousal charity of Christ, sustained and enriched by his redeeming power.⁹³

Although it is the *matrimonium in facto esse* (the intimate community) that is being spoken of here, the Exhortation seems to be saying that the natural reality of the married state has a sacramental quality, in the case of the baptized. There are echoes here, first, of the teaching of *Casti connubii* and *Gaudium et spes* that the married state involves a sort of sacramental consecration, and, second, of the longstanding teaching that for the baptized, marriage and its sacramentality are inseparably linked. Later in article 13, it is explained that marriage is a real symbol of the event of salvation, like the other sacraments, but in its own way:

The first and immediate effect of marriage (*res et sacramentum*) is not supernatural grace itself, but the Christian conjugal bond, a typically Christian communion of two persons because it represents the mystery of Christ's incarnation and the mystery of his covenant.⁹⁴

Nothing is said about the minister(s) of the sacrament.⁹⁵

The properties of marriage, unity and indissolubility, are treated in the context of sacramentality (in article 13), and also in the framework of *Familiaris consortio*'s

⁹³ "[... ob hanc indelebilem insertionem extollitur] intima vitae amorisque coniugalis communitas condita a Creatore assumiturque in sponsalem Christi caritatem, firmatam ac ditatam redemptrice ipsius virtute" (AAS, 74 [1982], p. 95).

⁹⁴ "[... adeo ut] primus proximusque matrimonii effectus (*res et sacramentum*) non ipsa sit gratia supernaturalis, sed coniugale vinculum christianum, communio duorum proprie christiana, quandoquidem mysterium refert Incarnationis Christi eiusque mysterium Foederis" (ibid., pp. 95-96).

⁹⁵ However, in an address at an 1983 general audience, the Pope did speak of the spouses as the ministers of the sacrament. See JOHN PAUL II, General Audience Address, 19 January 1983, "The Sacramental Covenant in the Dimension of Sign", in *L'Osservatore romano*, English edition, 24 January 1983, p. 9.

favourite expression for marriage, *communio* (in articles 19 and 20). Sacramentality means the Christian couple are bound to each other indissolubly, because their belonging to one another is the real representation, through the sacramental sign, of the union between Christ and the Church.⁹⁶ The unity of Christian marriage is also connected with this mystery.⁹⁷ Besides, polygamy is a radical contradiction of the conjugal communion, negating the plan of God and being contrary to the equal dignity of men and women (article 19).⁹⁸ The conjugal communion is also characterised by indissolubility, says the Pope in article 20, quoting *Gaudium et spes* 48. This indissolubility has three bases: the good of the children, the total personal self-giving of the couple, and most importantly, because it is a fruit, a sign, and a requirement of the totally faithful love that binds Christ to the Church. So the most fundamental reason for indissolubility of Christian marriage is its sacramental dignity.⁹⁹

In article 68, the Exhortation teaches that the sacrament of marriage has one specific element that distinguishes it from all the other sacraments: "it is the very conjugal covenant instituted by the Creator 'in the beginning'."¹⁰⁰ Marriage is the sacrament of something that was part of the economy of creation itself. So the

⁹⁶ See *AAS*, 74 (1982), p. 95.

⁹⁷ See *ibid.*, p. 96.

⁹⁸ See *ibid.*, p. 102. Here, Pope John Paul II also quotes *GS* 49.

⁹⁹ See *ibid.*, pp. 102-104.

¹⁰⁰ "[prae ceteris sacramentis haec sunt eiusdem matrimonii sacramenti peculiaris et propria: ...], est idem foedus coniugale a Creatore institutum in principio" (*ibid.*, p. 163).

Church admits to marriage those couples imperfectly disposed, because their decision to marry in accordance with the divine plan involves, even if not in a completely conscious way, an attitude of obedience to the divine will, a stance that cannot exist without grace. Already sharers in Christ's covenant with the Church by their baptism, the Christian couple through their right intention accept God's plan for marriage, and so they give at least implicit consent to what the Church intends to do in the celebration of marriage. Unless they explicitly and formally reject this, the couple can be allowed to celebrate marriage in the Church. The Pope is skeptical about setting up any other criterion for baptized persons requesting a sacramental marriage, such as a certain level of faith, because of the risk of unfounded judgements by pastors and of casting doubt on the validity of already existing marriages, both among Catholics and among other Christians.¹⁰¹ Thus, in response to the post-conciliar debate about the role of faith in the celebration of the sacrament of marriage, a discussion which received attention at the 1980 Synod, *Familiaris consortio*, while not denying the necessity of personal faith, places the emphasis on the couple's right intention, an intention which is presumed unless the parties formally and explicitly reject what the Church intends.

¹⁰¹ See *ibid.*, pp. 164-165.

**C. THE JURIDICAL RELEVANCE OF THE CONCILIAR AND POST-
CONCILIAR DOCUMENTS: ROTAL DECISIONS**

Vatican II had clearly adopted a more personalistic approach to marriage than pre-conciliar canonical thought. It had refused to call the *ius in corpus* the object of matrimonial consent, and had spoken of marriage *in facto esse* as the intimate community of married life and love. So the question arose whether *Gaudium et spes'* teaching on the nature of marriage was to have any juridical consequences. A note attached to the title of the document stated that the Constitution was to be interpreted according to the general norms of theological interpretation. This did not seem to rule out the derivation of legal principles from the text, since these have to be theological in their foundation. Hence some Rotal judges could see a canonical application for the theological principles expressed in *Gaudium et spes'* chapter on marriage and the family. However, other auditors held that since the conciliar Constitution was not a juridical text and was pastoral in intent, no juridical conclusions could be deduced from it;¹⁰² the Council did not intend to change anything in the juridical structure of marriage as it was traditionally understood by

¹⁰² For examples, see Decision c. PALAZZINI, 2 June 1971, no. 11, in *SRR Dec*, vol. 63, p. 471; c. EGAN, 7 February 1974, no. 6, in *ibid.*, vol. 66, p. 58. A 1972 decision by the *Sectio prima* of the Apostolic Signatura also proposed this view. See SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, First Section, 5 December 1972, in *Periodica*, 62 (1973), p. 575. See also c. PINTO, 15 July 1977, no. 4, in *SRR Dec*, vol. 69, p. 401. It should be noted that this latter Rotal auditor, J.M. Pinto Gomez, changed his thinking later on. See, for instance, c. PINTO, 12 February 1982, nos. 3-6, in *ibid.*, vol. 74, pp. 64-66; c. PINTO, 9 November 1984, nos. 10-11, in *Monitor ecclesiasticus*, 110 (1985), pp. 320-321.

canonists.¹⁰³ We will now have a brief look at how Vatican II did affect the thinking of two Rotal auditors regarding the nature of marriage, realizing that their position was not always shared by other Rotal judges, before going on to make some general comments, and then concluding by treating of the jurisprudential assessment of the role of love in marriage.

In his famous decision of 25 February 1969 the Rotal judge L. Anné (a member of the *coetus* which prepared the 1975 Latin marriage schema) brought the conciliar teaching to the level of law by stating that the person marrying had the right and obligation to an intimate community of life which has as its most specific element the intimate union of persons whereby a man and woman become one flesh.¹⁰⁴ He defined the *matrimonium in fieri*, marital consent, as

an act of the will whereby a man and a woman through a covenant between themselves, or their irrevocable consent, establish a matrimonial *consortium vitae* which is perpetual, exclusive, and of its nature ordered to the generation and education of offspring.¹⁰⁵

The formal object of consent is not only the *ius in corpus*, but also includes the right to a matrimonial communion or community of life.¹⁰⁶ The *matrimonium in facto esse*, or the bond, is made up of a number of legal, ethical and social relationships,

¹⁰³ For illustrations of this thinking, see c. EWERS, 30 July 1966, no. 4, in *SRR Dec.*, vol. 58, p. 674; c. PINTO, 28 November 1976, no. 7, in *ibid.*, vol. 68, p. 388; c. DE JORIO, 17 December 1981, no. 3, in *ibid.*, vol. 73, p. 633.

¹⁰⁴ See c. ANNÉ, 25 February 1969, in *ibid.*, vol. 61, pp. 174-192.

¹⁰⁵ "[...] actus voluntatis quo vir et mulier foedere inter se seu irrevocabili consensu constituunt consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad prolem generandam et educandam ordinatum" (*ibid.*, no. 16, p. 183).

¹⁰⁶ See *ibid.*, no. 16, pp. 183-184.

some of which are essential, others not. Anné acknowledged that it is difficult to list exhaustively all the essential elements of the *consortium omnis vitae*, yet nevertheless argued that for consent to be valid the right to a community of life could not be withheld.¹⁰⁷

Another Rotal auditor who emphasised the notion of *consortium omnis vitae* was J.M. Serrano Ruiz; in particular he stressed the capacity of entering into an interpersonal pact of marriage. In a decision of 5 April 1973 he dwelt on the interpersonal character of marriage, seeing this element as its most distinctive trait.¹⁰⁸ A spouse must be able both to give and to receive marriage rights. Because marriage is such a personal relationship, rights and obligations cannot be disembodied from the persons themselves.¹⁰⁹ While admitting that "inter-personal relationship" can be at different levels in different marriages, Serrano said that some kind of relationship cannot simply be seen as something desirable but not essential. If this relationship is totally excluded by the person's incapacity to establish it, then the marriage is non-existent.¹¹⁰ Of course Serrano was aware of the danger of simply equating broken marriages with invalid ones, so he required that the defect in the person be truly psychologically incapacitating.¹¹¹ In a later 1976 decision he

¹⁰⁷ See *ibid.*, no. 17, p. 184.

¹⁰⁸ See *c. SERRANO*, 5 April 1973, in *SRR Dec*, vol. 65, pp. 322-343.

¹⁰⁹ See *ibid.*, nos. 3-4, pp. 323-324.

¹¹⁰ See *ibid.*, no. 8, pp. 326-328.

¹¹¹ See *ibid.*, nos. 11-12, pp. 330-332.

more explicitly made the right to a *communitas vitae* equivalent to the right to some kind of inter-personal relationship.¹¹² For Serrano, Vatican II's personalistic teaching on marriage has clear consequences; the older notion of marriage as a contract exchanging the right/obligation to acts apt for the procreation of children needed to be developed in the light of the teaching of *Gaudium et spes*.

There was considerable resistance to these evaluations of Vatican II's teaching on marriage.¹¹³ Some Rotal judges continued to hold that "communion of life" belonged to the "integrity" of matrimony, rather than its essence, and continued to quote the traditional *ius in corpus pro generatione* formulation for the object of matrimonial consent.¹¹⁴ Although the ends of marriage are not of its essence, and so do not figure prominently in jurisprudence, there was still found in some Rotal jurisprudence the contention that procreation was primary and that the Council's silence on marriage's finality did not change the 1917 Code's hierarchial listing of the ends.¹¹⁵ Other auditors thought that, in regard to the object of consent, the phrase *ius in corpus* had to be understood in more than a biological sense, after the

¹¹² See c. SERRANO, 9 July 1976, nos. 5-6, 11, in *SRR Dec*, vol. 68, pp. 311-312, 315-317.

¹¹³ Even after the promulgation of the new 1983 Latin Code, E.M. Egan still held that *Gaudium et spes* was a pastoral document devoid of canonical effects. See c. EGAN, 28 July 1983, no. 4, in *ibid.*, vol. 75, p. 487.

¹¹⁴ As late as 1982, Egan was still maintaining that the Council saw the personalist value of marriage as ordered only to procreation; see c. EGAN, 9 December 1982, nos. 4-7, in *ibid.*, vol. 74, pp. 614-618, where he stated that it is the exchange of the right to acts apt for the generation of children that constitutes marriage.

¹¹⁵ For example, see c. PALAZZINI, 22 June 1967, nos. 5-6, in *ibid.*, vol. 59, p. 484.

Council.¹¹⁶ The conciliar reference to a handing over of "self" obviously had an influence. Judges like Anné clearly were of the opinion that the essential object of consent included a right to *communio vitae* along with and distinct from the traditional *ius in corpus*.¹¹⁷ Of course, a real problem was how to determine what is the essence of the *communio vitae*. Other auditors, however, preferred to see the aspect of marital communion as a necessary corollary of, rather than something distinct from, the mutual exchange of the exclusive and perpetual right to sexual acts apt for procreation.¹¹⁸ In this view, the *ius in corpus* was regarded as the truly specifying factor in the conjugal bond, and so what is essential to marriage as a communion is considered in that light.¹¹⁹

Vatican II's *Gaudium et spes* had obviously held married love in great esteem, and in the post-conciliar years there were debates about the precise juridical value that should be given to love, both in the formation of marriage and in its continuing existence. In a 1970 judgement, V. Fagiolo argued for a concept of conjugal love as self-giving, which would permeate matrimonial consent to such an extent that its

¹¹⁶ See c. BEJAN, 30 March 1968, no. 6, in *ibid.*, vol. 60, p. 279; c. ANNÉ, 25 February 1969, no. 12, in *ibid.*, vol. 61, p. 182; c. RAAD, 14 April 1975, no. 7, in *ibid.*, vol. 67, p. 241.

¹¹⁷ See c. RAAD, 14 April 1975, no. 11, in *ibid.*, vol. 67, p. 243; c. POMPEDDA, 19 February 1982, no. 5, in *ibid.*, vol. 74, p. 87.

In 1972 the Apostolic Signatura was skeptical about the existence of a *ius ad communionem vitae* distinct from the rights contained in the essential elements of the Augustinian *tria bona* understanding of marriage. See SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, First Section, 5 December 1972, in *Periodica*, 62 (1973), p. 579.

¹¹⁸ See c. DI FELICE, 8 March 1975, no. 2, in *SRR Dec.*, vol. 67, pp. 86-87; c. BRUNO, 30 March 1979, no. 4, in *ibid.*, vol. 71, p. 120; c. STANKIEWICZ, 31 May 1979, no. 3, in *ibid.*, p. 307.

¹¹⁹ See c. MASALA, 30 March 1977, no. 2, in *ibid.*, vol. 69, p. 158.

absence would vitiate consent.¹²⁰ Pope Paul's address to the Roman Rota about the nature of the marriage bond, on 9 February 1976, was a response to some of these issues.¹²¹ He was clearly worried about some currents of thought which seemed to hold that the continued existence of a marriage was dependant on love, and which talked about a couple's love creating a marriage.

The Pope acknowledges the great importance of the personalist approach of the Council in its respect for conjugal love and the mutual perfection of the spouses.¹²² But some people, he says, have laid undue emphasis on these aspects, even going so far as to neglect or eliminate the *bonum prolis*:

They consider conjugal love to be so important, even in law, as to make the validity of the marriage depend on it. [...] In their view, once love — or more accurately, the original feeling of love — ceases, with it goes the validity of the irrevocable conjugal covenant brought into existence by free and full consent of love.¹²³

Paul VI recognizes that Vatican II set a high importance on married love in that the Council spoke of it as representing the perfection of marriage and the goal to which the couple is to direct their common life. However, no concept of conjugal

¹²⁰ See c. FAGIOLO, 30 October 1970, nos. 3-9, in *ibid.*, vol. 62, pp. 979-986. This decision was appealed, and in the subsequent sentence P. Palazzini held that love has no essential juridical significance, while admitting its value as an integrating factor in the *bonum fidei*. See c. PALAZZINI, 2 June 1971, nos. 3-17, in *ibid.*, vol. 63, pp. 468-474.

¹²¹ PAUL VI, Allocation to the Sacred Roman Rota, 9 February 1976, in *AAS*, 68 (1976), pp. 204-208; English translation in W.H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-1994*, Ottawa, Saint Paul University, Faculty of Canon Law, 1994, pp. 133-137.

¹²² See *AAS*, 68 (1976), p. 205.

¹²³ "[...] amorem vero coniugalem iidem elementum habeant tanti momenti etiam in iure, ut ei subiciant ipsam vinculi matrimonialis validitatem, [...] deficiente amore (vel potius primigenia amoris cupiditate), ipsa deficiat validitas irrevocabilis foederis coniugalis, quod ex libero atque amoris pleno consensu ortum est" (*ibid.*, p. 206; *Papal Allocutions to the Roman Rota 1939-1994*, pp. 134-135).

love can be admitted which would take away from the principle *matrimonium facit partium consensus*:

This principle is of paramount importance in the whole canonical and theological teaching received from tradition and has frequently been restated by the Church's magisterium as one of the chief bases on which both the natural law of the institution of marriage and the evangelical precept are founded.¹²⁴

A marriage exists once the spouses give legally valid consent. So it is the consent of the parties that creates the marriage, not their love. However, the Pontiff never says that love is not necessary, at least in some minimal sense, for the emission of this consent. Possibly because in some parts of the world the couple does not know each other before the wedding, Paul VI does not enter into the question whether some rudiment of love is necessary for a person to give matrimonial consent.¹²⁵

Consent is "an *act of the will* by nature a *pact* (or a *conjugal covenant*, to use the word preferred today to *contract*)."¹²⁶ Here the Pope clearly acknowledges the conciliar preference for *foedus* over *contractus* to describe the *matrimonium in fieri*. Earlier in the text he mentions that marriage has the nature of a *consortium*.¹²⁷

¹²⁴ "Quod quidem principium summum momentum habet in universa doctrina canonica ac theologica a traditione recepta, idemque saepe propositum est ab Ecclesiae magisterio ut unum ex praecipuis capitibus, in quibus ius naturale de matrimoniali instituto nec non praeceptum evangelicum innituntur" (AAS, 68 [1976], p. 206; *Papal Allocutions to the Roman Rota 1939-1994*, p. 135).

¹²⁵ See U. NAVARRETE, "Amor coniugalis et consensus matrimonialis", in *Periodica*, 64 (1976), pp. 631.

¹²⁶ "[Talis consensus] est *actus voluntatis* indolis *pacticiae* (vel *foedus coniugii*, ut dictione utamur, quae hodie potius habetur quam vox *contractus*) [...]" (AAS, 68 [1976], p. 206; *Papal Allocutions to the Roman Rota 1939-1994*, p. 135).

¹²⁷ See AAS, 68 (1976), p. 205.

Consent produces a juridical effect, the married state; once consent is given, it cannot be taken back, because there arises a juridical reality which cannot be destroyed. The Pope says that *Gaudium et spes* 48 § 1 teaches this doctrine, despite the pastoral character of the conciliar Constitution.¹²⁸

Once the *matrimonium in facto esse* comes into being, this reality does not depend on subjective elements such as love. The juridical reality of marriage continues even if love totally disappears. Paul VI offers a rationale why this is so:

For, when the spouses give their free consent they are entering into and making themselves part of an objective order or *institution* that transcends them and does not in the slightest depend on them as far as its nature and special laws are concerned. The institution of marriage does not originate in the free will of humans but in God who willed it to have its own laws.¹²⁹

Here we have the conciliar idea from *Gaudium et spes* 48 § 1 that marriage, as instituted by God, is endowed and provided with its own inherent laws.¹³⁰ These laws are not so much external rules imposed from outside, but rather are something belonging to the very structure of the institution itself. Thus the Pope says that spouses have to accept these laws for their own good and that of their children and

¹²⁸ See *ibid.*, pp. 206-207.

¹²⁹ "Coniuges, enim, cum liberum praestant consensum, non aliud faciunt, quam ingrediuntur atque inseruntur in ordinem obiectivum, seu 'institutum' quod eos superat ex eis minime pendet nec quoad naturam suam, nec quoad leges sibi proprias. Matrimonium non a libera hominum voluntate suam repetit originem, sed institutum est a Deo, qui illud voluit suis legibus praeditum atque instructum" (*AAS*, 68 [1976], p. 207; *Papal Allocutions to the Roman Rota 1939-1994*, p. 136).

¹³⁰ This is apparent by examining how Paul VI puts it: "Matrimonium [...] institutum est a Deo, qui illud voluit suis legibus praeditum atque instructum" (*AAS*, 68 [1976], p. 207).

of society.¹³¹ So, in this context, love is no longer an instinctive emotion, but a binding obligation.¹³²

Paul VI does not want to lessen the importance of married love, but he says that it does not enter into the realm of law. Rather, he describes it as a force of the psychological order, which, if absent, means that the couple lacks the impetus for carrying out their conjugal duties with sincerity. On the other hand, if married love is strong, a marriage can reach full perfection. The Pope sees love as something which helps achieve the ends of marriage.¹³³

While Vatican II had given much attention to married love, Rotal jurisprudence was wary of its place in a juridical context. Fagiolo's view never gained much headway at the Rota, which, while acknowledging that the presence or absence of love could be useful evidence especially in cases of simulation or fear, generally held that cases involving lack of conjugal love should be studied under the heading of simulation, or defect in the giving and acceptance of the right to the *consortium vitae*, or defect in the giving and acceptance of the essential rights in marriage. It was judged inopportune to use the concept of love because of the ambiguities involved.¹³⁴

¹³¹ See *ibid.*

¹³² See *ibid.*

¹³³ See *ibid.*

¹³⁴ See *c. ANNÉ*, 4 December 1975, nos. 8-10, in *SRR Dec*, vol. 67, pp. 694-699.

In summary, we can say that post-conciliar Rotal decisions reflect differing views on the juridical consequences of Vatican II's teaching on the nature of marriage. There was a difference of opinion regarding the significance of terminology, that is, whether or not terms like *consortium* or *communio* should be understood in a different sense from that found in the 1917 Code. The proper way of translating conciliar teachings into legal maxims was an issue leading to much debate.

CONCLUSION

We have shown that Vatican II unquestionably embraced a more personalistic approach to marriage than pre-conciliar canonical reflection, especially in its employment of the term "covenant". This was an area in which the Oriental Catholics had a significant influence on the Council. Vatican II was also novel in its delineation of the object of matrimonial consent, declining to call it the *ius in corpus*, while speaking of marriage *in facto esse* as the intimate community of married life and love. Yet the essential properties of marriage, unity and indissolubility, are clearly taught by the Council. However, unlike pre-conciliar papal and magisterial teaching, Vatican II said nothing about a hierarchical ranking of the *finis matrimonii*. Besides the procreation and education of children, *Gaudium et spes* did not name the other institutional ends of marriage. Married love was greatly exalted, although it was never called an end of marriage or part of the object of marital consent. The

conciliar Constitution spoke of the various goods of marriage, significantly including the *bonum coniugum*. Thus there has been a refocussing in the Church's understanding of the nature of marriage, with much more attention being given to the unitive side of marriage, whereas the pre-conciliar focus had been completely on procreation. So the unitive aspect, the biblical two-in-one dimension, now has been identified as very important, and has been propelled toward the same status previously accorded to the *bonum prolis*, although the question of the juridical value of both aspects was not addressed explicitly.

When it came to sacramentality, the Council taught that the sacraments are acts of faith. Christian spouses, in virtue of the sacrament of marriage, signify and share in the mystery of the unity and fruitful love between Christ and the Church. Vatican II also spoke of a quasi-consecration involved in the sacrament of marriage, emphasising its sacredness, a theme very much in line with Eastern traditions, yet said nothing about the minister.

In the post-conciliar magisterial documents, the Augustinian *bona* are not an explicit concern, while the properties of marriage are firmly asserted. Vocabulary analogous to that of *Gaudium et spes* is utilized. These post-conciliar documents contain no hierarchical ranking of the ends of marriage, yet maintain the inseparable connection between the unitive and procreative aspects of marriage. The terms *contractus* and *ius in corpus* did not resurface in *Humanae vitae*, beginning a trend. Although contractual language has not completely disappeared in all Church documents, *foedus* and other expressions are used when describing the nature of

marriage itself. The personalistic focus of Vatican II has been affirmed.

Nonetheless, while praising married love greatly, the post-conciliar magisterium was very resistant to any idea that the continued existence of a marriage was dependant on love, or which talked about a couple's love creating a marriage. Moreover, post-conciliar Rotal decisions indicate diverging opinions on the juridical consequences of Vatican II's teaching on the nature of marriage. The stage has now been set for the drafting of the Church's post-conciliar law, the topic of our next chapter.

CHAPTER THREE

TOWARDS A DESCRIPTION OF MARRIAGE IN CANON LAW

INTRODUCTION

Translating the Conciliar doctrine and post-Conciliar teaching on marriage into canonical categories was never going to be an easy task, since the Council itself had avoided speaking in juridical terms. The task was further complicated by the fact that canonists did not always agree among themselves about the precise meaning and significance of Vatican II's teachings. The difficulties and tensions inherent in translating the theological concepts of *Gaudium et spes* into proper juridical terminology can be seen very clearly in the work of reforming the marriage law. Before we can compare the concepts of marriage in the current Latin and Oriental Codes it is necessary to understand the terminology used in the two texts to describe marriage's nature. This in turn requires an investigation into how the two Code Commissions decided, in the light of Vatican II, on the formulation of the important canons describing the nature of marriage.

A. LATIN LEGISLATION: THE 1983 *CODEX IURIS CANONICI*

The work of creating a post-conciliar Code for the Latin Church began as the Second Vatican Council was ending. On 20 November 1965, Pope Paul VI inaugurated the task of the Pontifical Commission for the Revision of the Code of Canon Law, a commission originally set up by John XXIII but whose work had been

postponed for the duration of the Council.¹ Paul VI stated clearly that the revised law was to incorporate the doctrinal content of the Council, i.e. the Commission's task was not simply a matter of reorganising the existing 1917 law.² For this reason, the Commission started by establishing principles to guide the revision; these were approved by the 1967 Synod of Bishops and by Paul VI. Study groups of consultors were then established to rework sections of the Code under the supervision of the Commission and its Secretariat.³ The *coetus* on marriage, consisting of 15 members, met from October 1966 until January 1973 to draft a schema which in 1975 was joined to the schemata on the other sacraments;⁴ this document was then circulated

¹ For a general account of the revision of the Code, see J.A. ALESANDRO, "The Revision of the Code of Canon Law: A Background Study", in *Studia canonica*, 24 (1990), pp. 91-146. Useful articles on the revision of the marriage canons are: T.J. GREEN, "The Revision of Marriage Law: An Exposition and Critique", in *ibid.*, 10 (1976), pp. 363-410; IDEM, "The Revised Schema *De matrimonio*: Texts and Reflections", in *The Jurist*, 40 (1980), pp. 57-127.

² See PAUL VI, Allocution to the Cardinal Fathers and Consultors of the Pontifical Council for the Revision of the Code of Canon Law, 20 November 1965, in *AAS*, 57 (1965), p. 988. According to the mind of Paul VI as shown in his allocutions, the new Code was to be closely related to theology, follow carefully the teachings of Vatican II as set forth especially in *Lumen gentium* and *Gaudium et spes*, and be pastoral in character. See F.G. MORRISSEY, "The Spirit of Canon Law: The Teaching of Pope Paul VI", in *Origins*, 8 (1978-1979), pp. 34-40.

³ For a chronology of the meetings of the *coetus* on marriage, including a list of the topics discussed and references to the information on these meetings found in *Communicationes*, see G. CORBELLINI and J. FOX, "Synthesis generalis laboris Pontificiae Commissionis Codici iuris canonici recognoscendo", in *Communicationes*, 19 (1987), pp. 289-292.

⁴ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO [= PCCICR], *Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur* [= 1975 Latin schema], in Civitate Vaticana, Typis polyglottis Vaticanis, 1975, 96 p.

The early drafts of the proposed *Lex Ecclesiae fundamentalis* also had a canon on the sacrament of marriage. For the first redaction, the comments of the *LEF coetus* on it, the amended text and the group's discussion of it, see PCCICR, *Schema legis Ecclesiae fundamentalis: textus emendatus cum relatione de ipso schemate deque emendationibus receptis*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1971, pp. 44, 106-107, 151. These texts do not seem to have influenced the work of the Latin and Oriental marriage study groups; there is no reference to the *LEF* in their deliberations. The later 1980 schema of the *LEF* had no canon on marriage.

for comment to the episcopate, the Roman Curia, religious superiors, and ecclesiastical faculties.⁵ After reviewing the observations received from these groups, the schema was further developed by the study groups; between February 1977 and February 1978 a small group from the previous *coetus* on marriage met to rework the canons on matrimony. In 1980 a draft of the entire code was sent for observations to an expanded Code Commission, rather than being the object of a second world-wide consultation.⁶ After receiving further comments, the Secretariat and consultors examined them and presented their response to the Commission in the summer of 1981 in the form of a *Relatio* which gave specific answers to each comment, sometimes altering the text of the 1980 schema, sometimes rejecting the suggested amendments.⁷

In October 1981 the Code Commission met in plenary session to discuss and approve a draft of the whole code. In April 1982 a *Schema novissimum* was presented to the Pope for his consideration.⁸ This text was reviewed and further

⁵ There were 172 responses to the section on marriage, not exactly a great demonstration of interest; see *Communicationes* 9 (1977), p. 117. For possible reasons for this lack-lustre reaction, see F.G. MORRISEY, "The Revision of the Code of Canon Law", in *Studia canonica*, 12 (1978), pp. 181-183.

⁶ PCCICR, *Codex iuris canonici: schema Patribus Commissionis reservatum* [= 1980 Latin schema], in Civitate Vaticana, Libreria editrice Vaticana, 1980, xxiii, 382 p.

⁷ PCCICR, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum schema Codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis* [= 1981 Relatio], in Civitate Vaticana, Typis polyglottis Vaticanis, 1981, 358 p.

⁸ PCCICR, *Codex iuris canonici: schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1982, xvii, 308 p.

refined by the pontiff with the help of a small group of advisors, and the new Code was promulgated on 25 January 1983, becoming effective on 27 November 1983.

We note that marriage, like the other sacraments, is now treated in Book IV, dedicated to the Church's Sanctifying Office, and not, as was the case in the 1917 legislation, in Book III dedicated to "things", the same book that also treated benefices and the temporal goods of the Church. This placement is one indication of the strong personalist influence of Vatican II on the new Code. While they offer no definition of marriage *per se*, the first two canons of the section *De matrimonio* (describing marriage and its characteristics) are the fundamental texts which provide an insight into how the Latin *Codex* understands the nature of marriage. We shall now trace the development of these preliminary canons. While these remain the basic texts to be scrutinised, the introductory norm on consent, as well as the canon on simulation also help in elucidating the Code's notion of the essence of matrimony.⁹ A final canon to be examined describes the effects of marriage, since this involves a description of the state arising from matrimonial consent.

1. CANON 1055

The first canon on marriage of the 1983 Code reads as follows:

c. 1055 § 1. The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life,

⁹ In choosing which canons need to be examined in elucidating the nature of marriage in the Code, we have been influenced by the views of M.F. POMPEDDA, "Incapacity to Assume the Essential Obligations of Marriage", in R.M. SABLE (ed.), *Incapacity for Marriage: Jurisprudence and Interpretation (Acts of the III Gregorian Colloquium)*, Rome, Pontificia Universitas Gregoriana, 1987, pp. 179-190. In addition to the canons mentioned there, we are also looking at the canon describing *matrimonium in facto esse*.

[and] of its very nature ordered to the good of the spouses and to the generation and upbringing of offspring, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

§ 2. Consequently, a valid marriage contract cannot exist between baptised persons without its being by that very fact a sacrament.¹⁰

This opening canon did not appear out of nowhere but was the result of a long drafting process begun in 1966 and first made public in 1975. In the *Praenotanda* to the 1975 schema there are some remarks which refer to the principles which the study groups followed in their work of revising the sacramental law. One in particular concerns us: theological definitions were to be generally avoided, since norms are meant to clarify discipline and not expound doctrine, although of course doctrine underlies the law.¹¹

(a) The 1975 schema

Canon 1055, as it now stands, retraces its origins to c. 1012 of the 1917 Code.

The 1975 draft retained the same text as in the previous legislation:

c. 242 § 1. Christ the Lord has raised the marriage contract itself between baptized persons to the dignity of a sacrament.

§ 2. Consequently, a valid marriage contract cannot exist between baptized persons without its being by that very fact a sacrament.¹²

¹⁰ *CIC*: "c. 1055 § 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum."

¹¹ See *Communicationes*, 7 (1975), p. 28.

¹² *1975 Latin schema*: " c. 242 § 1. Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum."

In the report of the study group meeting in October 1966 we find the comment that this opening canon "should remain intact".¹³ The term *contractus* was used in its substantive and other forms throughout the draft text. In reaction to this, some observed that the proposed law did not include the post-conciliar understanding of marriage. One of the universities criticised the 1975 schema as being pervaded with a contractualistic mentality and lacking an ecclesial dimension; moreover a frequent objection to this canon was its failure to use the term "covenant" instead of "contract".¹⁴ When discussing these reactions to the schema, the consultors at the *parvus coetus* of 21 February 1977 had divergent views on the meaning of the word "covenant" (*foedus*). One felt that *contractus* referred to marriage *in fieri* whereas *foedus* denoted *matrimonium in facto esse*. Another consultor was of the opinion that in *Gaudium et spes* the word "covenant" indicated marriage consent; while a third member of the study group said that *foedus* was mostly used in reference to the married state, nevertheless admitting that there were times when "covenant" was used for *matrimonium in fieri*. While noting that *Gaudium et spes* had indeed used the term *foedus*, all the consultors nevertheless agreed that the term "contract" should not be completely dropped, since the canon referred to marriage as a natural institution

¹³ See *Communicationes*, 3 (1971), p. 70 : "Canon 1012 § 1, qua edicitur sacramentalis dignitas contractus matrimonialis duorum baptizatorum, necnon § 2, qua affirmat realem identitatem huius contractus valide initi et sacramenti, intactae remanserunt."

¹⁴ For these reactions, see the report of the 21 February 1977 meeting of the marriage *parvus coetus*, in *ibid.*, 9 (1977), pp. 117, 120. P. Huizing maintained that the notion of marriage in the 1975 schema is a compromise between the contractualist understanding of it in the 1917 Code and the personalist concept of it in *Gaudium et spes*. See P. HUIZING, "La conception du mariage dans le Code, le Concile et le *Schema de sacramentis*", in *Revue de droit canonique*, 27 (1977), pp. 141-142.

elevated to the dignity of a sacrament. The *coetus* held that, as a natural institution, marriage is truly a contract.¹⁵

It then discussed a wording suggested by one Conference of bishops:

Christ raised the matrimonial contract itself, whereby the marriage covenant is constituted, between the baptized [...].¹⁶

This was simply declared tautologous, and given that canon 295 on marital consent (in which the term "covenant" was used) was being transferred to the preliminary canons, the consultors did not feel the need to introduce the term *foedus* into this first canon. However the *relator* wanted the consultors to consider a formula proposed by one bishop:

From the institution of Christ, the matrimonial union between the baptized is a sign of the union of Christ and the Church.¹⁷

This received a mixed response. When the *parvus coetus* resumed the next day, 22 February 1977, two other formulae were examined:

From the institution of Christ, the marriage contract itself between the baptized is raised to the dignity of a sacrament, constituting the marriage covenant whereby they signify and participate in the mystery of the unity and fecund love between Christ and the Church and are strengthened by the spirit of Christ, so that they may be mutually helped in their own perfection and sanctification as well as in accepting and bringing up offspring.

¹⁵ See *Communicationes*, 9 (1977), pp. 120-121.

¹⁶ *Ibid.*, p. 121: "Christus ... evexit ipsum contractum matrimoniale inter baptizatos quo *foedus coniugale* instauratur."

¹⁷ *Ibid.*: "Ex Christi institutione unio matrimonialis inter baptizatos signum est unionis Christi et Ecclesiae."

From the institution of Christ, the marriage contract itself between the baptized, by which the marriage covenant is constituted, is raised to the dignity of a sacrament and of a sign of the union of Christ and the Church.¹⁸

It was decided that each text resulted in difficulty, and so the study group failed to find an acceptable formula; the original text of the schema was initially let stand.¹⁹ However, later that day, after having revised canon 295 on marriage consent (now transferred to the preliminary canons) and in the process having deleted any reference to "covenant", the consultants voted to bring back the formula proposed by the Conference of bishops, that is:

Christ the Lord raised the matrimonial contract itself between the baptized, whereby the marriage covenant is constituted, to the dignity of a sacrament.²⁰

This became the amended text of canon 242 § 1. Here "covenant" clearly denotes *matrimonium in facto esse*.

The assertion that marriage between the baptized has been "raised" by Christ to the dignity of a sacrament was not publicly challenged during the entire revision process; however objections were raised against the second paragraph of canon 242 which asserted the absolute identity of every valid marriage contract between baptized

¹⁸ Ibid.: "Ex institutione Christi ad sacramenti dignitatem evehitur ipse contractus matrimonialis inter baptizatos, foedus coniugale instaurans quo mysterium unitatis et foecundi amoris Christum inter et Ecclesiam significant et participant et spiritu Christi roborantur, ita ut sibi invicem in propria perfectione et sanctificatione atque in prolis susceptione et educatione adiutorio sint", and "Ex Christi institutione ad dignitatem sacramenti et signi unionis Christi et Ecclesiae evehitur ipse contractus matrimonialis inter baptizatos, quo foedus coniugale instauratur."

¹⁹ See *ibid.*, p. 120.

²⁰ *Ibid.*, p. 125: "Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos quo foedus coniugale instauratur."

people with the sacrament of marriage. The general objection was that such an automatic sacramentality should not be canonised in light of post-conciliar theological thinking, especially on the role of personal faith in the celebration and reception of the sacraments. In February 1977, the *parvus coetus* considered various suggestions:

That the question be profoundly investigated, or that the canon be completed by the clause "with due regard for those things which are required for the valid reception of the sacraments", or that "between Christ's faithful" be said instead of "between the baptized", or that the canon be entirely deleted.²¹

The study group did not deny the theological controversies surrounding this paragraph, but decided unanimously that it was not in their competence to settle this issue since law must be based on commonly accepted theological presuppositions. Another suggestion by one consultor to drop the word "hence" (*quare*) from the canon was also deemed unacceptable. Thus canon 242 § 2 was let stand as it was.²²

However this opening canon was not the only one which eventually was to be integrated into the final formulation of c. 1055, because the first paragraph of canon 243 of the 1975 schema contained a definition of marriage *in facto esse*:

Marriage, which comes into being by mutual consent according to cc. 295ff., is an (intimate) union of the whole of life between a man and a woman, which of its very nature is ordered to the procreation and upbringing of offspring.²³

²¹ Ibid., p. 122: "[...] votum fecerunt vel ut quaestio profundius investigetur, vel ut canon compleatur per clausulam 'servatis iis quae ad validam sacramentorum receptionem requiruntur', vel ut dicatur 'inter christifideles' loco 'inter baptizatos', vel ut canon penitus deleatur."

²² See *ibid.*

²³ 1975 *Latin schema*: "c. 243 § 1. Matrimonium, quod fit mutuo consensu de quo in cann. 295 ss., est (intima) totius vitae coniunctio inter virum et mulierem, quae, indole sua naturali, ad prolis procreationem et educationem ordinantur."

This was an attempt to incorporate the conciliar teaching into canon law; unlike canon 242, it was a substantial modification of canon 1013 of the 1917 Code. In 1966 the majority of the marriage study group, following the description of marriage in *Gaudium et spes*, had agreed to revise canon 1013 § 1,

to affirm the nature of marriage as an intimate union of the whole of life between a man and a woman which of its very nature is ordered to the procreation and upbringing of offspring.²⁴

Hence came the text of a new paragraph. Although a few of those consulted were opposed to this canon on the grounds that all definitions in law are dangerous, most were in favour of such a canon even if they had reservations about its actual redaction.²⁵ In February 1977, the study group meeting decided to suppress the reference to consent since canon 295 was being transferred to the preliminary canons. A footnote in the schema had invited opinions as to whether the word "intimate" should be retained in subsequent drafts. The consultors noted that most responses favoured keeping the word and so they did, even though they thought that "this word adds nothing to the canon in the conceptual and technical sense."²⁶ A suggestion from three respondents that the word "whole" (*totius*) be removed from the canon did not meet with the approval of the *parvus coetus*. Attempts to replace the word "union" (*coniunctio*) by "communion" (*communio*) or "partnership" (*consortium*), or

²⁴ *Communicationes*, 3 (1971), p. 70: "[... major pars coetus tandem convenit] in affirmandam naturam matrimonii ut intimam totius vitae coniunctionem inter virum et mulierem, quae, indole sua naturali, ad proles procreationem et educationem ordinatur."

²⁵ See *ibid.*, 9 (1977), p. 122.

²⁶ *Ibid.*, p. 123: "[...] etsi verbum hoc nihil addat canonis in sensu conceptuali et tecnico [...]".

to qualify *coniunctio* with the adjectives *permanens* or *arcissima*, also failed at this meeting.²⁷

Canon 243 § 1 only mentioned the procreative end of marriage even though at its first meeting in 1966 the *coetus* had agreed that, following *Gaudium et spes*, the new law would refer to the personal relationship of the spouses as well as to the ordering of marriage to procreation, and that the hierarchy of ends found in the 1917 Code should not be employed in the new legislation.²⁸ Many observers had remarked therefore that canon 243 § 1 had indirectly reaffirmed the 1917 understanding; they wanted this problem redressed by an explicit recognition of the other ends of marriage in the new canons. At the February 1977 meeting of the *parvus coetus*, one consultor replied that the canon was being wrongly interpreted if it was thought the primacy of the procreative end was being asserted here, directly or indirectly. There was a suggestion to say that marriage is ordained "also" (*etiam*) to procreation. Finally, in order to meet these concerns, and to help clarify the issue, the *parvus coetus* included the phrase "the good of the spouses" with "the procreation and upbringing of offspring" as ends of marriage; this was done to make mention of

²⁷ See *ibid.* One consultor rejected the replacement of *coniunctio* on the grounds that it was marriage *in fieri* that was being spoken of here in this canon, notwithstanding the fact that the text of the canon makes it fairly plain that it is a description or definition of the married state. This is confirmed by the consultors' reference to their transfer of the canon on consent to the preliminary canons.

²⁸ See *ibid.*, 3 (1971), p. 70.

the personal ends of marriage.²⁹ As a result the final redaction of canon 243 § 1 read as follows:

Marriage is an intimate union of the whole of life between a man and a woman, which of its very nature is ordered to the good of the spouses and to the procreation and upbringing of offspring.³⁰

After having received and discussed reactions to the 1975 schema, the study group asked the Commission of Cardinals directing the revision of the complete Latin Code to decide the following questions which remained unresolved:

- (a) should there be provided in the Code a concept of marriage? If so:
- (b) should that definition include the element of the "union of life" (communion, partnership) as an expression of the personal aspect of marriage (*Gaudium et spes* 48)? If so:
- (c) what meaning should this element have for the validity of marriage?³¹

At the Synod of Bishops later that year it was announced that the *plenarium* of Cardinals, in May 1977, had decided that there should indeed be a definition of marriage *in fieri* in the Code, but expressed in a descriptive form and *in obliquo*, indicating only its essential elements, yet including the element of "union of life" (expressed thus or in other words such as "communion" or "partnership"), provided that expressions leading to false interpretations in jurisprudence were avoided. This

²⁹ See *ibid.*, 9 (1977), p. 123.

³⁰ *Ibid.*: "Matrimonium est viri et mulieris intima totius vitae coniunctio quae indole sua naturali ad bonum coniugum atque ad proles procreationem et educationem ordinatur."

³¹ *Ibid.*, pp. 79-80: "(a) Utrum in Codice praebenda sit notio matrimonii. Quatenus positive: (b) Utrum in hac definitione includere oporteat elementum 'coniunctionis vitae' (communio, consortium) tamquam expressionem ad spectus personalis matrimonii (*Gaudium et spes*, n. 48). Quatenus positive: (c) Quatenam sit vis huius elementi in ordine ad validitatem matrimonii."

element was to have juridic weight regarding the validity of consent (*matrimonium in fieri*), but was to have no bearing on the validity of *matrimonium in facto esse*.³² Inherent in these questions and answers seems to be an understanding that the terms *coniunctio*, *communio*, and *consortium* are equivalent and that they refer to the personal dimension of marriage emphasised by Vatican II, rather than to the essence of marriage itself.³³ In other words, these words were being used to describe the personal element of marriage, rather than as descriptions of the totality of essential rights and duties in marriage.

Following the opinion of the Cardinals, the marriage *coetus*, in February 1978, reduced two canons of the 1977 schema (c. 242 and c. 243 § 1) into one, thereby

³² See *ibid.*, p. 212.

³³ Nevertheless J.S. Moreno claims that, because the Cardinals wanted an oblique description of *matrimonium in fieri* in its essential elements, "the word *coniunctio* was kept, instead of using the word *communitas*, as proposed by the *coetus*" (MORENO, "*Fines matrimonii*" as Found in Canon 1055 § 1 in the 1983 C.I.C.: A Critical Study, p. 128). This appears to be incorrect; the *coetus*, when posing their questions to the Cardinals, used the term *coniunctio*, with *communio* and *consortium* in brackets. Certainly some canonical authors did make distinctions when commenting on the 1975 schema. For example O. Giacci held that only *coniunctio* (c. 243 § 1) and *consortium* (c. 295 § 2) are equivalent. See O. GIACCHI, "La definizione del matrimonio nella riforma del diritto matrimoniale canonico", in *Ephemerides iuris canonici*, 33 (1977), p. 223. So did U. Navarrete and O. Robleda. See U. NAVARRETE, "Influsso del diritto Romano sul diritto matrimoniale canonico", in *Apollinaris*, 51 (1978), pp. 657-658; O. ROBLEDA, "Intorno alla nozione di matrimonio nel diritto Romano e nel diritto canonico", in *Apollinaris*, 50 (1977), pp. 178-182. But O. Fumagalli-Carulli considered *communio vitae* (c. 303 § 2) and *consortium vitae coniugalis* (cc. 295 § 2 and 331) as equivalent phrases but expressing something less than the idea of *intima totius vitae coniunctio* in c. 243 § 1. See O. FUMAGALLI - CARULLI, "Osservazioni su la definizione del matrimonio nello Schema *iuris recogniti de sacramentis*", in *Ephemerides iuris canonici*, 33 (1977), pp. 230-231. However the questions recorded in *Communicationes* do not provide any evidence that, at this stage of revision, there are any distinctions being made among the phrases *coniunctio vitae*, *communio vitae*, and *consortium vitae*. The reply of the Cardinals also shows this: "Placuit etiam Patribus (placet 16, placet iuxta modum 5, non placet 6) ut elementum 'coniunctionis vitae' in hac definitione includatur his vel aliis verbis (ex. gr. 'consortium vitae', 'communio vitae'), dummodo vitentur expressiones quae ansam praebere possint falsis interpretationibus in iurisprudencia" (*Communicationes*, 9 [1977], p. 212).

linking the description of marriage with the notion of its sacramentality. Initially a consultor came up with the following formula:

§ 1. Marriage, which is a covenant whereby a man and a woman establish between themselves an intimate communion of the whole of life, [and] of its very nature ordered to the good of the spouses and to the generation and upbringing of offspring, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

§ 2. Consequently, a valid marriage contract cannot exist between baptised persons without its being by that very fact a sacrament.³⁴

Another consultor thought that the phrase "the marriage contract *itself*", as found in c. 1012 of the 1917 Code, had value because it avoided any implication that sacramentality was something added to natural marriage; the other consultors didn't find this a cogent argument, since the 1917 formula mentioned the marriage *contract*, whereas the formula being discussed simply spoke of *marriage*. The Cardinal President pointed out that the formula proposed was not an *indirect* definition, because it said "marriage [...] is a covenant whereby [...]". Therefore the committee unanimously agreed on the following altered text for the first paragraph of the canon, as suggested by the same consultor who had made the initial proposal:

The marriage covenant whereby a man and a woman establish between themselves an intimate communion of the whole of life, [and] of its very nature ordered to the good of the spouses and to the

³⁴ *Communicationes*, 10 (1978), p. 125-126: "§ 1. Matrimonium, quod est foedus quo vir et mulier intimam inter se constituunt totius vitae communionem, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum."

generation and upbringing of offspring, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.³⁵

This "covenant" is a description of marriage *in fieri*. There is no reason given in the report of the committee as to why *communio* has replaced *coniunctio* in the description; little can be inferred from the change, since at this stage of the revision, the terms seem to be understood as synonymous, as pointed out already. There is also a small stylistic change: "generation" replaces "procreation"

(b) The 1980 schema

Canon 1008 of the 1980 schema reproduces the above formulation. We can note that although the notion of "covenant" is used to describe *matrimonium in fieri*, the word "contract" has not been dropped. Indeed the 1981 *Relatio* makes it apparent that the Secretariat believed that the words have one and the same meaning. One member of the Pontifical Commission requested that the equivalent relationship between *foedus* and *contractus* be more clearly expressed, while another thought these two terms referred to different realities and so wanted the conjunction *quare* in the second paragraph dropped. The reply of the Secretariat stated:

The expressions "contract" and "covenant" are used deliberately in one and the same sense, to show clearly that the marriage covenant spoken of in *Gaudium et spes* can be instituted in no other way for the

³⁵ Ibid., p. 126: "Matrimoniale foedus quo vir et mulier intimam inter se constituunt totius vitae communionem, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est."

baptised than by a contract, even if it is a contract of a special kind. Thus the word "therefore" remains.³⁶

This response made it clear that the symmetrical use of the two terms was intended to dispel any doubts regarding the meaning of "covenant" as used in *Gaudium et spes*: for the baptised, contracting marriage is the same thing as celebrating the matrimonial covenant.

Moreover there was a repeated call from members of the Commission for the recognition in the second paragraph of this canon of the role of faith, as proposed at the 1980 Synod of Bishops. Cardinal Hume wished to have the term *baptizatos* qualified by the phrase *minima praesupposita requisita intentione credendi cum Ecclesia*, while Cardinal Willebrands and Archbishop Coffy proposed that the words *etsi infructuosum si deficit dispositio requisita* be added after the word *sacramentum*.³⁷ The Secretariat's view was that the canon as it stood (endorsing automatic sacramentality) embodies a Catholic doctrine which is theologically certain. This response is much stronger than that of the 1977 meeting of the study group mentioned above. However the Secretariat did acknowledge that the canon only intended to assert the inseparability of the contract and the sacrament for the baptized, without saying anything about the conditions required by theological doctrine for reception of the sacrament of marriage. According to the Secretariat,

³⁶ *Communicationes*, 15 (1983), p. 222: "Locutiones 'contractus' et 'foedus' uno adhibitae sunt, consulto quidem, ut liquidius pateat foedus matrimoniale de quo in *Gaudium et spes* nullo alio modo constitui posse pro baptizatis quam per contractum, etsi sui generis. Maneat ergo verbum 'quare'."

³⁷ See *ibid.*, p. 221; see also *1981 Relatio*, p. 244.

many comments did not sufficiently advert to the distinction between *sacramentum formatum* and *sacramentum informe*, a distinction which pertains more to theology than canon law.³⁸

Paragraph one's description of marriage also came in for some criticism from Cardinal Palazzini, a member of the Commission, on the grounds that it broke with theological and canonical tradition. Noting that the 1917 Code lacked a definition of marriage and that Vatican II offered only a pastoral description of marriage, he wished the new Code to avoid any definition of marriage. His argument stated that it was philosophically absurd to have more than one essential and principal end; the *bonum coniugum* is a *finis operantis*, not a *finis operis*. He proposed excluding the *bonum coniugum* as an *ordinatio*, while being prepared to mention it in the phrase referring to the essence of marriage, in the clause about the communion of life:

The marriage covenant, whereby a man and a woman establish between themselves an intimate communion of the whole of life and procure their mutual good, of its very nature is ordered to the [...] of children.³⁹

This Cardinal also desired the suppression of the adjective *totius* (qualifying *vitae communi*) because it might exclude marriages of conscience or mixed marriages; he obviously thought that the adjective referred to marriage as a complete whole and

³⁸ See *Communicationes*, 15 (1983), p. 222; see also *1981 Relatio*, p. 245.

³⁹ *Communicationes*, 15 (1983), p. 220: "Proponitur ergo ut verba 'ad bonum coniugum' supprimantur. Si quis tamen illa servare velit, ea coniungere poterit cum altera clausula 'communio vitae', hoc modo: 'Matrimoniale foedus quo vir et mulier inter se constituunt vitae communionem bonumque sibi mutuo procurant, indole sua naturali ad prolis ...'" See also *1981 Relatio*, pp. 242-243.

not just to its essential elements.⁴⁰ A second member of the Commission asked for a restatement of the hierarchy of ends found in the 1917 Code, while a third stated that the meaning of the word *communio* was not clear or univocal.⁴¹

In its response to these suggestions the Secretariat said that a description or sort of definition of marriage could not be suppressed, because of the decision of the Plenary Congregation of Cardinals in May 1977; moreover it declared that the *ordinatio ad bonum coniugum* is an essential element of the matrimonial covenant and, citing *Gaudium et spes*, that the Secretariat did not intend to refer to any hierarchy of ends in the schema.⁴² So there was a deliberate rejection of the reintroduction of the hierarchy of ends of the 1917 Code. Regarding the adjective *totius*, the Secretariat held that this was equivalent to *omnis* in the Roman Law definition of marriage attributed to Modestinus and received by canonical tradition (*consortium omnis vitae*). However the Secretariat did acknowledge the problems associated with the term *communio* (which meant different things in different places in the schema) and replaced it with *consortium* on the grounds that "it expresses better the matrimonial living together and finds greater support in juridical tradition."⁴³ The adjective *intima* was dropped as therefore being no longer

⁴⁰ See *ibid.*

⁴¹ See *Communicationes*, 15 (1983), p. 221.

⁴² See *ibid.*

⁴³ *Ibid.*: "[... consortium] quod melius exprimit matrimoniale convictum et maius suffragium invenit in traditione juridica." However, Fellhauer points out that, historically speaking, canonists didn't give much juridical value to the idea of *consortium omnis vitae*: "It was commonly seen and accepted to be part of the fundamental make-up of marriage, but was, for the most part not recognised as having

necessary.⁴⁴ Thus when the Secretariat had finished revising canon 1008 of the 1980 schema, the text read as follows:

§ 1. The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, [and] of its very nature ordered to the good of the spouses and to the generation and upbringing of offspring, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

§ 2. Consequently, a valid marriage contract cannot exist between baptised persons without its being by that very fact a sacrament.⁴⁵

This was promulgated as canon 1055 of the 1983 Code.

2. CANON 1056

In the 1983 Code, the second canon describing marriage, c. 1056, refers to its characteristics:

The essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a distinctive firmness by reason of the sacrament.⁴⁶

This statement basically repeats canon 1013 § 2 of the 1917 Code. In that Code it was linked to the affirmation of the primary and secondary ends of marriage, while the 1975 schema included this statement as the second paragraph of canon 243 whose first paragraph was a description of marriage and its ends, as discussed above. These

great canonical significance" (FELLHAUER, "The *consortium omnis vitae*", pp. 70-71). In the 1917 Code, it referred only to marital cohabitation (cc. 1130 and 1688 § 3). The term does not appear in *Gaudium et spes*. At the February 1977 meeting of the *coetus*, only one member favoured the use of the term.

⁴⁴ See *Communicationes*, 15 (1983), p. 221.

⁴⁵ See footnote 10 above.

⁴⁶ *CIC*: "c. 1056. *Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio christiano ratione sacramenti peculiarem obtinent firmitatem.*"

properties of unity and indissolubility did not receive much attention in the revision process. In the responses to the 1975 schema, there was one proposal to distinguish between intrinsic indissolubility (referring to the inability of spouses themselves to dissolve their marriage) and extrinsic dissolubility (the dissolution of a marriage by an outside third party, in this case, the Church). In February 1977, the study group decided to leave the canon intact, as this touched on doctrinal issues.⁴⁷ The consultants were of course well aware that the Church sometimes did in fact dissolve certain types of marriages (e.g. non-consummated sacramental marriages, privilege of the faith cases), so the indissolubility spoken of in the canon is not absolute.⁴⁸

3. OTHER APPLICABLE CANONS

Having looked at the development of the fundamental canons describing marriage's nature, we shall now review the drafting of the introductory canon on consent in the 1983 Code, as well as of the canon on simulation, because they also help in fleshing out the Code's notion of matrimony. A final canon to be examined notes the effects of marriage, since this describes the state arising from matrimonial consent.

(a) Canon 1057

In the 1983 Code, the third introductory canon on marriage, c. 1057, concerns consent and its object:

⁴⁷ See *Communicationes*, 9 (1977), p. 124.

⁴⁸ However, L. Örsy makes the excellent point that indissolubility does not admit of degrees, so the canon is somewhat confusing. See ÖRSY, *Marriage in Canon Law*, p. 59.

§ 1. A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power.

§ 2. Matrimonial consent is an act of the will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage.⁴⁹

The first paragraph is the same as the 1917 Code's canon 1081 § 2, except that the last part (*qui nulla potestate suppleri valet*) is now separated by a comma instead of a semi-colon. Indeed this paragraph remained basically unchanged throughout the revision process. However since the second paragraph's description of the object of consent represents a considerable departure from the former Code's affirmation of the *ius in corpus* and reflects the influence of Vatican II, we shall need to examine its development.

(i) The 1975 schema

Early in its work, in October 1966, the study group had recognised that Vatican II's emphasis on the personal dimension of marriage would entail changes in the description of the object of consent. According to the 1971 *Synthesis laboris* of the marriage *coetus*, signed by P. Huizing, the commission held that changes were required both in the formulation of the object of consent and in the list of essential

⁴⁹ CIC: "c. 1057 § 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet.

§ 2. Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium."

elements whose exclusion would cause a defect of consent.⁵⁰ For these reasons the paragraph defining matrimonial consent read as follows in the 1975 schema:

c. 295 § 2. Matrimonial consent is an act of the will by which a man and a woman establish, by a covenant between themselves, a perpetual and exclusive partnership of conjugal life which of its very nature is ordered to the generation and upbringing of offspring.⁵¹

The new version presented the *consortium vitae coniugalis* as the object of consent but did not indicate the essential elements thereof.⁵²

In February 1977 the *parvus coetus* decided to move this definition of consent to the preliminary canons so as to give it a prominent place immediately following the definition of marriage itself in canon 243 § 1, and dropped the description of the object of consent as being superfluous in that context.⁵³ The present wording, "in order to establish marriage", was adopted and the canon's description of the act of consent expanded to read "irrevocable covenant".⁵⁴ The *parvus coetus* finally settled for the text of what was to become canon 1010 § 2 of the 1980 schema:

⁵⁰ See *Communicationes*, 3 (1971), p. 75.

⁵¹ 1975 *Latin schema*: "c. 295 § 2. Consensus matrimonialis est actus voluntatis quo vir et mulier foedere inter se constituunt consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad prolem generandam et educandam ordinatum."

This definition looks remarkably like that found in the famous Decision c. ANNÉ, 25 February 1969, no. 16, in *SRR Dec*, vol. 61, p. 183.

⁵² See GIACCHI, "La definizione del matrimonio nella riforma del diritto matrimoniale canonico", pp. 218-226; U. NAVARRETE, "Schema iuris recogniti *De matrimonio*: textus et observationes", in *Periodica*, 63 (1974), pp. 636-637.

⁵³ See *Communicationes*, 9 (1977), pp. 119-120, 125.

⁵⁴ See *ibid.*, p. 125.

Matrimonial consent is an act of the will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage.⁵⁵

The study group wished to state simply that the object of matrimonial consent is marriage itself. One consultor opined that this new formulation added nothing new to the age-old principle stated in the first paragraph (*consensus facit nuptias*), but the consultor who had proposed the new formulation rebutted this objection by stating that it indicated the object of consent and added a new element to the first paragraph by the phrase *sese mutuo tradunt et accipiunt*.⁵⁶ An attempt to substitute "marriage covenant" instead of "marriage" at the end of the paragraph failed. Thus the text of the canon as accepted by the *parvus coetus* clearly uses *foedus* in reference to *matrimonium in fieri*.

(ii) The 1980 schema

The above formulation appeared as canon 1010 § 2 of the 1980 schema which was submitted to the scrutiny of the members of the entire Commission who were invited to give their comments in time for the Plenary Congregation which was to be held in October 1981. The 1981 *Relatio* reveals three comments on canon 1010. The first commends the new formulation of the definition of consent as better and richer than that of the 1917 Code.⁵⁷ The other two wish to improve the terse redaction

⁵⁵ Ibid.: "Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium."

⁵⁶ See *ibid.*

⁵⁷ See *ibid.*, 15 (1983), p. 222: "Definitio consensus melior et ditior est quam in can. 1081 § 1 C.I.C. (Unus Pater)." There seems to be a printing error here; the reference should be to canon 1081 § 2 of the 1917 Code, since of course the first paragraph of the 1917 canon is the same as the first

of the paragraph. For instance, one member wanted to add to the text the purposes for which the spouses mutually give and accept each other; according to him, consent is an act of the will

by which a man and a woman through an irrevocable and exclusive covenant between themselves give and accept one another for the purpose of completing their mutual love and for the procreation and upbringing of offspring.⁵⁸

Finally, one member of the Commission advocated a return to the formulation of canon 295 § 2 of the 1975 schema which he claimed was clearer.⁵⁹

The Secretariat responded that the simple reference to marriage would be retained in the definition of consent, as the nearby canon 1008 § 1 of the schema sufficiently declares what marriage is; the Secretariat wished to avoid repetition of the same content.⁶⁰ Thus the paragraph was left unchanged; this canon on consent was eventually promulgated in the 1983 Code as c. 1057:

§ 1. A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by human power.

paragraph of canon 1010 of the 1980 schema, except for a semi-colon being replaced by a comma.

⁵⁸ Ibid.: "[...] quo vir et mulier foedere irrevocabili et exclusivo sese invicem tradunt et accipiunt in ordine ad mutuam amorem complendum et prolem procreandam et educandam."

⁵⁹ See *ibid.*, pp. 222-223.

⁶⁰ See *ibid.*, p. 223.

§ 2. Matrimonial consent is an act of the will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage.⁶¹

(b) Canon 1101 § 2

As D. Fellhauer notes, c. 1086 § 2 of the 1917 Code on simulation (specifying that a positive act of the will excluding marriage itself, or all right to the conjugal act, or any essential property, renders marriage invalid) was also useful in finding out what was the essence of marriage in the old Code; it is a kind of window on the whole question to see what elements are regarded as so essential to marriage that their exclusion by a positive act of the will would invalidate consent.⁶² Likewise the new Code's c. 1101 § 2 on simulation gives us an insight into its teaching on the essence of marriage:

If, however, either or both of the parties should by a positive act of the will exclude marriage itself, or any essential element of marriage, or any essential property, such party contracts invalidly.⁶³

This paragraph differs significantly from the previous canon and underwent a few drafts before arriving at its final state.

⁶¹ *CIC*: "c. 1057 § 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus; qui nulla humana potestate suppleri valet.
§ 2. Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium."

⁶² See FELLHAUER, "The *consortium omnis-vitae*", p. 80.

⁶³ *CIC*: "c. 1101 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut matrimonii essenziale aliquod elementum vel essentialem proprietatem, invalide contrahit."

(i) The 1975 schema

According to the 1971 *Synthesis laboris*, the Commission recognised that Vatican II's teaching on marriage required a revision of the 1917 canon on simulation.⁶⁴ So the paragraph about simulation read as follows in the 1975 schema:

c. 303 § 2. If however either or both of the parties should by a positive act of the will exclude marriage itself, or the right to communion of life, or the right to the conjugal act, or any essential property of marriage, such party contracts invalidly.⁶⁵

The *Synthesis laboris* makes it clear that the canon refers to the "right" to a communion of life, and not to the actual communion of life; this communion of life is not to be confused with cohabitation, and affects matrimonial consent to the extent that it forms part of or pertains to the essence of marriage.⁶⁶

The phrase *ius ad vitae communionem* provoked a diverse reaction, being welcomed by some, while others were worried by its ambiguity.⁶⁷ To complicate matters further the term *communio vitae* was used in varying senses in different parts of the schema: it was also used in the canons on separation where it primarily meant

⁶⁴ See *Communicationes*, 3 (1971), p. 76.

⁶⁵ 1975 Latin schema: "c. 303 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut ius ad vitae communionem, aut ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit."

⁶⁶ See *Communicationes*, 3 (1971), p. 76.

⁶⁷ For example, Navarrete questioned whether the phrase elucidates anything conceptually different from that group of rights which has been understood traditionally as essential to the *consortium vitae*. He also pointed out that the term *communio vitae* was not used in a consistent sense throughout the schema; the term was also used among the impediments (c. 276) and in the norms on separation in cc. 347 and 348. See NAVARRETE, "Schema iuris recogniti *De matrimonio*", p. 639; IDEM, "De iure ad vitae communionem", p. 262.

cohabitation. In May 1977 the *parvus coetus* discussed the response to the consultation. Some bodies wished to have the phrase eliminated because they considered it dangerous to the stability of marriage; others wanted an explanation of what came under this concept; yet another group requested its suppression, because, since it referred to the essence of marriage, it had the same meaning as the preceding phrase "marriage itself".⁶⁸ The *coetus* declared that *ius ad vitae communionem* indicated

those rights which pertain to the essential interpersonal relations between the spouses and which in today's context are considered as a complex of rights distinct from the other rights commonly listed in tradition.⁶⁹

However there was no clarification of what is entailed in this distinction. One consultor held that the phrase referred to the element of love in marriage; while acknowledging that love is the most fundamental of all marital interpersonal relationships, he said one cannot speak of a right to love. Instead he spoke of a right to those actions which generally are required by love; this element was traditionally included in the *bonum fidei*.⁷⁰ Another consultor favoured a reformulation of the paragraph so as to include the *tria bona*, leaving the interpretation of the essential

⁶⁸ See *Communicationes*, 9 (1977), p. 375.

⁶⁹ Ibid.: "Consultores dicunt sub verbis 'ius ad vitae communionem' hic venire iura quae attinent ad essentielles relationes interpersonales coniugum, quaeque in hodierno contextu habentur ut complexus iurium distinctus ab aliis iuribus quae communiter in traditione numerabantur."

⁷⁰ See *ibid.*

elements thereof to jurisprudence. This suggestion was rejected on a vote.⁷¹ Finally, one consultor proposed that the phrase *ius ad vitae communionem* be replaced with *ius ad ea quae vitae communionem essentialiter constituunt*. This was accepted by the *parvus coetus*.⁷²

(ii) **The 1980 schema**

Thus in the 1980 schema the revised canon on simulation became canon 1055 § 2 and read as follows:

If however either or both of the parties should by a positive act of the will exclude marriage itself, or the right to those things which essentially constitute the communion of life, or the right to the conjugal act, or any essential property of marriage, such party contracts invalidly.⁷³

From the 1981 *Relatio*, we can see that there were three main reactions from the members of the Commission. Two asked for the suppression of the phrase *ius ad ea quae vitae communionem essentialiter constituunt*. The first member stated that it was dangerous for the stability of the bond of marriage. Referring to marriages of conscience, this member went on to say that *communio thori et mensae* does not

⁷¹ See *ibid.* Urbano Navarrete had been sceptical whether the phrase *ius ad vitae communionem* added anything to the classical *tria bona* model of understanding marriage's essence, and he favoured avoiding listing the essential elements of the object of consent, while adopting the "three goods" model of describing marriage. For example, see NAVARRETE, "De iure ad vitae communionem", pp. 268-270.

⁷² See *Communicationes*, 9 (1977), p. 375.

⁷³ 1980 *Latin schema*: "c. 1055 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut ius ad ea quae vitae communionem essentialiter constituunt, aut ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit."

belong to the essence of marriage;⁷⁴ he was obviously interpreting *communio vitae* as cohabitation, a view that, in this context, the Commission had already excluded in the 1971 *Synthesis laboris*.⁷⁵ The second comment simply requested dropping the controversial phrase on the grounds that its meaning was not clear.⁷⁶ A third member wanted an explicit mention of the sacramental nature of Christian marriage (a characteristic traditionally treated by jurisprudence under the heading of total simulation), by the addition to the canon of the phrase *aut matrimonium in quantum Sacramentum Ecclesiae*.⁷⁷

In response to these comments the Commission Secretariat decided to redraft canon 1055 § 2 by introducing a new phrase: *aut matrimonii essentielle aliquod elementum*, instead of: *aut ius ad ea quae vitae communionem essentialiter constituunt, aut ius ad coniugalem actum*. The question of exactly what elements are to be considered essential to marriage was left to doctrine and jurisprudence; this interpretation of essential elements was to take into account the definition of marriage as well as the totality of legislation and doctrine.⁷⁸

⁷⁴ See *Communicationes*, 15 (1983), p. 233.

⁷⁵ One advantage of the revised 1980 schema was that, unlike the 1977 draft, it avoided using the term *communio* in the chapter on separation where, instead of *communio*, the expression *convictus coniugalis* was introduced to refer to marital cohabitation.

⁷⁶ See *Communicationes*, 15 (1983), p. 233.

⁷⁷ See *ibid.*

⁷⁸ See *ibid.*, pp. 233-234.

The Secretariat also introduced an explicit reference to the sacramental dignity of marriage. Thus the revised text of the canon now read as follows:

If however either or both of the parties should by a positive act of the will exclude marriage itself, or any essential element of marriage, or any essential property of marriage, or its sacramental dignity, such party contracts invalidly.⁷⁹

During the Plenary Congregation of October 1981, Cardinal Joseph Ratzinger proposed for ecumenical reasons the deletion of the phrase *vel sacramentalem dignitatem*, on the grounds that this idea was already implicit in another canon of the schema (c. 1053: provided that it does not determine the will, error concerning the unity, indissolubility or sacramental dignity of marriage does not vitiate marital consent) and so it was better to avoid drawing direct attention to a point in which we differ from many other non-Catholic Christians.⁸⁰ This suggestion was accepted by the *plenarium* and the new text was eventually promulgated as canon 1101 § 2 of the 1983 Code of Canon Law:

If, however, either or both of the parties should by a positive act of the will exclude marriage itself, or any essential element of marriage, or any essential property, such party contracts invalidly.⁸¹

⁷⁹ Ibid., p. 233: "At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut matrimonii essenziale aliquod elementum vel essentialem proprietatem vel sacramentalem dignitatem, invalide contrahit."

⁸⁰ See PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria diebus 20-29 octobris 1981 habita (Acta et documenta Pontificiae Commissionis Codici iuris canonici recognoscendo)*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1991, pp. 458-459.

⁸¹ CIC: "c. 1101 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut matrimonii essenziale aliquod elementum vel essentialem proprietatem, invalide contrahit."

(c) Canon 1134

In the 1983 Code, the initial canon on the effects of marriage replaces canon 1110 of the 1917 Code, and is quite different in the formulation of its second part:

c. 1134 From a valid marriage there arises between the spouses a bond which of its very nature is perpetual and exclusive; moreover, in Christian marriage the spouses are by a special sacrament strengthened and, as it were, consecrated for the duties and the dignity of their state.⁸²

This canon concerns a description of *matrimonium in facto esse*; it underwent some changes in the drafting process.

(i) The 1975 schema

The marriage study group discussed canon 1110 of the 1917 Code in January 1971 and decided that it should be substantially retained, even though it was observed that the first part was already incorporated in many earlier canons and was tautologous, and that the second part by its explicit mention of grace makes an exception to what is found elsewhere in sacramental law in the Code.⁸³ On the other hand, the reasoning for retaining the norm was that marriage, unlike the other sacraments, is a natural institution and it would be appropriate to declare what is its effect; in other words, it would be opportune here to say explicitly what is implicitly understood in other canons. This canon not only has theological and pastoral importance; it also has a juridical effect. Indeed the *coetus* judged it appropriate for

⁸² CIC: "c. 1134 Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; in matrimonio praeterea christiano coniuges ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur."

⁸³ See *Communicationes*, 5 (1973), p. 75.

the second part of the canon to explain in detail the conciliar doctrine on marriage.⁸⁴ Thus the study group agreed to the following text which subsequently appeared in the 1975 schema:

c. 330 From a valid marriage there arises between the spouses a bond which of its very nature is perpetual and exclusive; moreover, Christian marriage confers sacramental grace by which the spouses are strengthened and, as it were, consecrated for the duties and the dignity of their state.⁸⁵

After the comments of the consulting bodies were received, the *coetus* reviewed this canon on 17 October 1977.⁸⁶ Some critics had requested its suppression since it was exclusively doctrinal and its material was found in other canons. However all the consultors agreed that it should be maintained since it states that the *vinculum* is the chief effect of marriage, and therefore this norm makes sense of the canons which follow in the chapter.⁸⁷

As to the first part of the canon, a proposition to insert *pacto* between *valido* and *matrimonio*, so as to make it clear that here *matrimonio* refers to marriage *in fieri*, was rejected by the study group on a vote. There was another suggestion to drop the words "of its very nature" because of the uncertainty whether indissolubility is postulated by the natural law. This failed to gain support as the consultors did not

⁸⁴ See *ibid.*

⁸⁵ 1975 Latin schema: "c. 330 Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; matrimonium christianum confert praeterea sacramentalem gratiam qua coniuges ad sui status officia et dignitatem roborantur et veluti consecrantur."

⁸⁶ See *Communicationes*, 10 (1978), pp. 104-105.

⁸⁷ See *ibid.*, p. 104.

wish the new Code to prejudice in any way the resolution of this disputed theological question.⁸⁸

As to the other part of the canon referring to sacramental grace, some thought it a superfluous doctrinal expression, while others held that it should be completed by the addition of the phrase from the 1917 canon, *non ponentibus obicem*. Finally another group wanted the canon redacted in a different way because one part of the text spoke of marriage in general, while the other concerned Christian marriage. The study group responded to these various proposals by taking words from *Gaudium et spes* 48 and reworking the second part of the canon to read: *in matrimonio praeterea christiano coniuges ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur*.⁸⁹

(ii) The 1980 schema

When the second schema appeared, the text of the proposed canon was as follows:

c. 1090 From a valid marriage there arises between the spouses a bond which of its very nature is perpetual and exclusive; moreover, in Christian marriage the spouses are by a special sacrament strengthened and, as it were, consecrated for the duties and the dignity of their state.⁹⁰

⁸⁸ See *ibid.*, p. 105.

⁸⁹ See *ibid.*

⁹⁰ 1980 Latin schema: "c. 1090 Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; in matrimonio praeterea christiano coniuges ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur."

The reference to sacramental grace has disappeared and the formulation of the second part is completely faithful to *Gaudium et spes*. This redaction remained unchanged during the final stages of the Latin Code revision process and was promulgated as c. 1134 of the 1983 Code.

Having examined the history of the Latin canons concerning the nature of marriage, it is now time to explore the development of the relevant canons in the new Oriental legislation.

B. ORIENTAL LEGISLATION: THE 1990 *CODEX CANONUM ECCLESiarUM* *ORIENTALIUM*

On 10 June 1972 the Pontifical Commission for the Revision of the Code of Eastern Canon Law was set up by Pope Paul VI.⁹¹ At the first plenary session of the Commission in March 1974 the Pope asked it to revise the law "according to the mind of the Fathers of the Second Vatican Council and also in the genuine Oriental tradition."⁹² Guidelines for revision of the Eastern law, drawn up by the Faculty of Oriental Canon Law of the Pontifical Oriental Institute in Rome, were accepted by

⁹¹ See *Nuntia*, no. 3 (1976), p. 11. The journal of the Commission, *Nuntia*, first appeared in 1973, that lone issue being entitled no. 1. However, when in 1975 the periodical began to appear more regularly, the series started again with no. 1. *Nuntia* was not published in the usual manner, that is in volumes corresponding with particular years, but appeared in issues numbered consecutively. We shall identify *Nuntia* by the number of the issue, and in brackets, there will be indicated the year in which that particular number appeared.

⁹² PAUL VI, Allocution to the Members of the Pontifical Commission for the Revision of the Code of Oriental Canon Law, 18 March 1974, in *ibid.*, no. 1 (1975), pp. 6-7: "[recognoscerentur] secundem mentem Patrum Concilii Vaticani atque germanam orientalem traditionem."

this plenary session.⁹³ One of these mandates is of particular interest to us: that the new law was to be Oriental in character. This meant that the work of revision was to be guided by the conciliar teaching, especially the Vatican II decree *Orientalium Ecclesiarum*, article 5, and so

the Oriental Code should draw its inspiration from, as well as express, the common discipline, such as it is contained: a) in the Apostolic tradition; b) in the Oriental canonical collections and in the customary norms common to the Oriental Churches and not fallen into desuetude.⁹⁴

Although not stated in *Nuntia*, from this idea it would follow that, among other things, the Latin Code should not be the basis of the task of revising the Eastern law, as happened with the previous process of codification of Oriental legislation; the new law should to be inspired by and represent the established discipline of the Oriental Churches.

Study groups worked on particular areas; the canons on marriage were assigned to one group.⁹⁵ In June 1980 a proposed schema on the sacraments, including marriage, was sent for comment to the Eastern hierarchs, the Roman Curia, Oriental religious superiors, and Eastern ecclesiastical faculties.⁹⁶ After the study group assessed the replies of these bodies, a new schema of the entire code, including

⁹³ See *Nuntia*, no. 1 (1973), p. 12. See the guidelines in *ibid.*, no. 3 (1976), pp. 18-24.

⁹⁴ *Ibid.*, no. 3 (1976), p. 19.

⁹⁵ For a list of the original members of the *coetus de matrimonio*, see *ibid.*, no. 1 (1973), p. 18. The relator was J. Prader.

⁹⁶ PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO [= PCCICOR], *Schema canonum de cultu divino et praesertim de sacramentis* [= 1980 Oriental schema], Romae, Tipografica Pompei, 1980, 64 p.

the revised section on marriage, was sent by the Secretariat in 1981 to the membership of the Code Commission for comment.⁹⁷ Their responses helped to form the third draft which was discussed and approved by the Commission in plenary session in November 1988.⁹⁸ This final draft was sent to the Pope for his consideration in January 1989. After papal review, the new Oriental Code was promulgated on 18 October 1990 and became effective on 1 October 1991.

Like with the Latin Code, there is no direct definition of marriage in the Eastern legislation. Nevertheless the initial canon of the chapter *De matrimonio* offers a description of marriage and its characteristics which gives us a major insight into how the Oriental *Codex* understands marriage. In addition, later on in the Code, in the article on matrimonial consent, the first canon describing consent and the norm on simulation are also helpful in discerning the Oriental Code's notion of matrimony and its essence. We now need to investigate the development of these canons so as to be able to understand their significance.

1. CANON 776

The first canon of the 1990 Eastern Code's chapter on marriage reads as follows:

⁹⁷ PCCICOR, *Schema Codicis iuris canonici orientalis* [= 1986 Oriental schema], in *Nuntia*, nos. 24-25 (1987), pp. 1-278. English translation: *Code of Eastern Canon Law: 1986 Draft*, Brooklyn, NY, U.S. Eastern Catholic Bishops Consultation, 1987, 305 p.

⁹⁸ See "Le osservazioni dei membri della Commissione allo *Schema Codicis iuris canonici orientalis* e le risposte del *Coetus de expensione observationum*", in *Nuntia*, no. 28 (1989), pp. 3-128. At this stage it was still planned to call the codification *Codex iuris canonici orientalis*. This response of the Secretariat to the Commission members' comments corresponds to the 1981 Latin *Relatio*. In addition, see "Resoconto dei lavori dell' Assemblea Plenaria dei membri della Commissione del 3-14 novembre 1988", in *ibid.*, no. 29 (1989), pp. 20-77.

c. 776 § 1. The matrimonial covenant, established by the Creator and ordered by His laws, whereby a man and a woman through an irrevocable personal consent establish between themselves a partnership of their whole life, is of its very nature ordered to the good of the spouses and to the generation and upbringing of children.

§ 2. From the institution of Christ a valid marriage between baptised persons is by that very fact a sacrament, whereby the spouses are united by God in the image of the indefectible union of Christ with the Church, and are, as it were, consecrated and strengthened by sacramental grace.

§ 3. The essential properties of marriage are unity and indissolubility, which in marriage between baptised persons obtain a special firmness by reason of the sacrament.⁹⁹

This canon is considerably different from c. 1055 of the 1983 *CIC* in its description of marriage. Although a canon offering a description or definition of marriage was included in the proposed Oriental law from the very beginning of the revision process, several significant changes took place in its redaction; we need to examine these now.

(a) The 1980 schema

In the *Praenotanda* to the 1980 schema, the Eastern Code Commission, citing *Gaudium et spes*, stated clearly that the expressions "contract marriage" and "assist at marriage" (used in the previous Oriental law *Crebrae allatae* of 1949) were avoided in the schema; rather, the terms "covenant", "celebrate", "enter", "bless" were used,

⁹⁹ *CCEO*: "c. 776 § 1. Matrimoniale foedus a Creatore conditum Eiusque legibus instructum, quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad filiorum generationem et educationem ordinatur.

§ 2. Ex Christi institutione matrimonium validum inter baptizatos eo ipso est sacramentum, quo coniuges ad imaginem indefectibilis unionis Christi cum Ecclesia a Deo uniuntur gratiaque sacramentali veluti consecrantur et roborantur.

§ 3. Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio inter baptizatos specialem obtinent firmitatem ratione sacramenti."

because they correspond better to the conceptions of marriage in the Eastern Churches.¹⁰⁰ The first proposed text, replacing canons 1 and 2 of *Crebrae allatae*, read as follows:

c. 115 § 1. Marriage as an intimate community of life and love between a man and a woman, established by the Creator and endowed by Him with its own laws, is formed [constituted] through the covenant of matrimony or irrevocable personal consent, and is of its very nature ordered to the good of the spouses and to the procreation and upbringing of offspring.

§ 2. From the institution of Christ a valid marriage between baptised persons is by that very fact a sacrament, whereby the spouses are strengthened and, as it were, consecrated so that they may live their proper communion of love in such a way that they will be a faithful image of the indefectible union of Christ with the Church.

§ 3. The essential properties of marriage are unity and indissolubility, which in marriage between baptised persons obtain a distinctive firmness by reason of the sacrament.¹⁰¹

In the early meetings of the marriage study group, in February 1976 and March 1977, the *relator* of the *coetus* had proposed that natural marriage be treated in the first paragraph of the canon, while marriage as a sacrament be considered in the second; this was accepted by the consultants. They also noted that the oblique definition of marriage in the first paragraph as an *intima communitas vitae et amoris*

¹⁰⁰ See *Nuntia*, no. 10 (1980), p. 12.

¹⁰¹ 1980 *Oriental schema*: "c. 115 § 1. Matrimonium uti intima communitas vitae et amoris inter virum et mulierem a Creatore condita suisque legibus instructa foedere coniugii seu irrevocabili consensu personali instauratur atque indole sua naturali ad bonum coniugum ac ad prolis procreationem et educationem ordinatur.

§ 2. Ex Christi institutione matrimonium validum inter baptizatos est eo ipso sacramentum, quo coniuges roborantur et veluti consecrantur ut propriam communionem amoris ita vivant ut sint fidelis imago indefectibilis unionis Christi cum Ecclesia.

§ 3. Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio inter baptizatos peculiarem obtinent firmitatem ratione sacramenti."

inter virum et mulierem a Creatore condita suisque legibus instructa was redacted by drawing on the teaching of *Gaudium et spes* 48.¹⁰² Moreover, according to the study group, the notion of marriage as a *communio vitae coniugalis* (c. 117 *Crebrae allatae*), or a *communio vitae* (c. 73 § 1), or a *societas permanens inter virum et mulierem* (c. 73 § 1) was well known in current law and canonical doctrine, as were the two formulae attributed to Modestinus and Ulpianus taken from Roman law.¹⁰³

The *coetus* believed that the text of the first paragraph affirmed that the cause of marriage is two-fold:

(a) God, in so far as the conjugal community is "established by the Creator and endowed by Him with its own laws"; (b) the spouses, in so far as their marriage "is constituted by the covenant of matrimony or irrevocable personal consent."¹⁰⁴

While noting that the word *foedus* was used instead of *contractus* in *Gaudium et spes* especially in view of Oriental concerns, the consultors recalled that this is equivalent to the irrevocable personal consent through which marriage is entered; once manifested, the act of consent cannot be revoked; the *vinculum matrimoniale* does not cease to exist even if the will of the spouses to live in the *communitas intima vitae coniugalis* has disappeared. The *coetus* noted that the words *ad bonum coniugum*

¹⁰² See *Nuntia*, no. 8 (1979), p. 4.

¹⁰³ See *ibid.* Actually, here the account of the meeting is slightly mistaken: the expression *communio vitae* does not occur in c. 73 § 1 of *Crebrae allatae*. The report in *Nuntia* probably meant to refer to c. 118.

¹⁰⁴ *Ibid.*: "Textus relatus in § 1 affirmat duplicem esse causam matrimonii: (a) Deum, quatenus *communitas coniugalis* est 'a Creatore condita suisque legibus instructa'; (b) coniuges, quatenus *matrimonium eorum* 'foedere coniugii seu irrevocabili consensu personali instauratur'."

were lifted from the conciliar Constitution, article 48, and were inserted to express adequately the personal end of marriage.

The consultors also agreed that the formulation of canon 1 of *Crebrae allatae*, "Christ the Lord has raised the marriage contract itself between baptized persons to the dignity of a sacrament", be replaced with the following text taken from the second paragraph: "From the institution of Christ a valid marriage between baptised persons is by that very fact a sacrament ..." However the study group accepted that the words *eo ipso* of the previous canon should remain because

according to Catholic doctrine, the validity of the sacrament of marriage does not depend on the degree of intensity of the spouses' faith but on baptism.¹⁰⁵

Referring to the Letter to the Ephesians 5:32 and Vatican II's *Lumen gentium* 11 § 2, the *coetus* judged it appropriate to describe marriage in this paragraph as being founded in the mystery of the unity and fruitful love between Christ and the Church, which the spouses signify and in which they participate, by virtue of the sacrament.¹⁰⁶

As to the third paragraph on the properties of marriage, there was a proposal that the last words ("which in marriage between baptised persons obtain a distinctive firmness by reason of the sacrament") be deleted since marriage is not absolutely

¹⁰⁵ Ibid.: "Verba 'eo ipso' canonis 1 *CA* retenta sunt, quia, attenta doctrina catholica, validitas sacramenti matrimonii non dependet a gradu intensitatis fidei coniugum sed a baptismo."

¹⁰⁶ See *ibid.*

indissoluble except in the case of a sacramental consummated marriage.¹⁰⁷ Noting, however, that the canon itself did not affirm an absolute indissolubility of marriage, but spoke rather of "a distinctive firmness" in sacramental marriage, the study group decided to retain the traditional wording. So ended the consultors' consideration of the complete text.

In examining the text of the proposed canon, we notice immediately that the first two paragraphs have references to love. The first paragraph, describing natural marriage, clearly distinguishes between *matrimonium in fieri* ("the covenant of matrimony or irrevocable personal consent") and *matrimonium in facto esse* (the "intimate community of life and love between a man and a woman"). The phrase describing the married state, "intimate community of life and love", is taken almost directly from *Gaudium et spes*, except that in the conciliar document the word "love" is qualified by the adjective "married" which in the context of the canon was unnecessary as it was clearly speaking of marriage. The description of marriage as being "established by the Creator and endowed by Him with its own laws" and the statement that the married state "is constituted by the covenant of matrimony or irrevocable personal consent" were taken verbatim from Vatican II. Here *foedus* clearly referred to *matrimonium in fieri* and was equivalent to the act of consent. Thus the first half of this paragraph describing marriage *in fieri* and *in facto esse* was completely faithful to the actual text of the Conciliar Constitution, while the second half regarding the *ordinationes* of marriage ("the good of the spouses and the

¹⁰⁷ See *ibid.*, p. 5.

procreation and upbringing of offspring") was an repetition of the 1980 Latin schema, except for a stylistic difference ("procreation" instead of "generation")

The second paragraph, describing sacramental marriage, also repeats *Gaudium et spes*' teaching that the spouses are "strengthened and, as it were, consecrated" by the sacrament of marriage. There is express mention of sacramental marriage's participation in and signification of the fecund love between Christ and the Church. Moreover the married state is called a "communion of love".

The third paragraph on the essential properties repeats the content of canon 2 § 2 of *Crebrae allatae*, while making a technical change in expression, replacing *matrimonio christiano* with *matrimonio inter baptizatos*. However this does not amount to any real change, as in this particular context these are equivalent expressions.

After the distribution of the 1980 schema, there was an opportunity for those consulted to give their views. Five made critical comments on this canon which led the study group eventually to reformulate considerably the first two paragraphs. Three observations in particular influenced the *coetus*.¹⁰⁸ First, there was the criticism that, in the two paragraphs, there was an unclear distinction made between *matrimonium in fieri* and *matrimonium in facto esse*. In regard to the first paragraph, this opinion is somewhat baffling since the text reproduces *Gaudium et spes*' distinction between the two concepts. Secondly, there was the criticism that the first paragraph offered a definition of marriage which "does not seem juridically precise

¹⁰⁸ See *ibid.*, no. 15 (1982), pp. 56-57.

in so far as marriage is a *communitas vitae et amoris coniugalis*.¹⁰⁹ Lastly, there was a comment that mention of "love" should be omitted in a juridical definition of marriage, because of the danger of the multiplication of nullity cases. However one body responding to the consultation held that it was necessary to say, in some way, that marriage is a "permanent society of love", in the light of the conciliar teaching; another response praised the canon precisely for including the complete phrase of *Gaudium et spes* 48, *intima communitas vitae et amoris*.¹¹⁰

In January 1982, the study group met and discussed the above three proposals, and came up with the following revised texts for the first two paragraphs, the last paragraph remaining unchanged:

§ 1. The matrimonial covenant, established by the Creator and endowed by Him with its own laws, whereby a man and a woman through an irrevocable personal consent establish between themselves a partnership of their whole life, is of its very nature ordered to the good of the spouses and to the generation and upbringing of offspring.

§ 2. From the institution of Christ a valid marriage between baptised persons is by that very fact a sacrament, whereby the spouses are united by God in the image of the indefectible union of Christ with the Church, and are, as it were, consecrated and strengthened by sacramental grace.

¹⁰⁹ Ibid., p. 56: "Nel § 1 viene offerta una definizione del matrimonio che non sembra giuridicamente esatta, in quanto il matrimonio è 'communio vitae et amoris coniugalis'."

Actually this criticism was slightly inaccurate in its wording since the proposed paragraph had spoken of a "community of life and love", rather than a "community of married life and love".

¹¹⁰ See *ibid.*, p. 57.

§ 3. The essential properties of marriage are unity and indissolubility, which in marriage between baptised persons obtain a distinctive firmness by reason of the sacrament.¹¹¹

Except for the reference to the three observations of the consulting bodies, there is no explanation given in *Nuntia* as to why or how the *coetus* came to this particular formulation.

All mention of "love" has been removed from the proposed canon; the concept of *consortium totius vitae* is taken from the revised version of the 1980 Latin schema, replacing "community" and "communion". Moreover, in the revised text, *foedus* is no longer simply made the equivalent of irrevocable personal consent, unlike in the previous formulation and in the first line of *Gaudium et spes* 48. Likewise, the previous formulation's and Vatican II's statement that Christian spouses are "strengthened and, as it were, consecrated" by the sacrament of marriage is changed to the declaration that the spouses are "as it were, consecrated and strengthened by sacramental grace." The modifier *veluti* is now applied to both *consecrantur* and *roborantur*, and the reference is to the grace of the sacrament rather than to the sacrament itself. In addition, we note that mention is made of the divine action in uniting the couple (*a Deo uniuntur*), and of the symbolism of their union (*ad*

¹¹¹ Ibid.: "§ 1. Matrimoniale foedus, a Creatore conditum suisque legibus instructum, quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad proles generationem et educationem ordinatur.

§ 2. Ex Christi institutione matrimonium validum inter baptizatos eo ipso est sacramentum, quo coniuges, ad imaginem indefectibilis unionis Christi cum Ecclesia, a Deo uniuntur gratiaque sacramentali veluti consecrantur et roborantur.

§ 3. Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio inter baptizatos peculiarem obtinent firmitatem ratione sacramenti."

imaginem indefectibilis unionis Christi cum Ecclesia). Finally, there is a slight stylistic change: in the new redaction of the study group, "generation" replaces "procreation".

(b) The 1986 schema

A complete schema of the proposed Eastern Code was circulated in October 1986 to the members of the Commission, in which the initial canon describing marriage appeared as follows:

c. 771 § 1. The matrimonial covenant, established by the Creator and ordered by His laws, whereby a man and a woman through an irrevocable personal consent establish between themselves a partnership of their whole life, is of its very nature ordered to the good of the spouses and to the generation and upbringing of children.

§ 2. From the institution of Christ a valid marriage between baptised persons is by that very fact a sacrament, whereby the spouses are united by God in the image of the indefectible union of Christ with the Church, and are, as it were, consecrated and strengthened by sacramental grace.

§ 3. The essential properties of marriage are unity and indissolubility, which in marriage between baptised persons obtain a special firmness by reason of the sacrament.¹¹²

There are slight differences between this draft canon and the previous text revised by the study group. First, the phrase taken directly from *Gaudium et spes* describing

¹¹² 1986 *Oriental schema*: "c. 771 § 1. Matrimoniale foedus a Creatore conditum Eiusque legibus instructum, quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad filiorum generationem et educationem ordinatur.

§ 2. Ex Christi institutione matrimonium validum inter baptizatos eo ipso est sacramentum, quo coniuges ad imaginem indefectibilis unionis Christi cum Ecclesia a Deo uniuntur gratiaque sacramentali veluti consecrantur et roborantur.

§ 3. Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio inter baptizatos specialem obtinent firmitatem ratione sacramenti."

A comma after *matrimoniale foedus* was deleted subsequent to the actual publication of the schema. See "Emmendamenti redazionali allo Schema *CICO* del 1986", in *Nuntia*, no. 27 (1988), p. 58.

the matrimonial covenant (*a Creatore conditum suisque legibus instructum*) has been slightly altered to another formulation: *a Creatore conditum Eiusque legibus instructum*. This represents a different nuance in that the new formulation speaks of marriage being "ordered by His laws", whereas the previous text thought of marriage as being endowed by the Creator with its own proper laws. Second, there are two stylistic changes in the redaction of the canon: in the first paragraph, *ad filiorum* replaces *ad proles*; in the third paragraph, with reference to the firmness possessed by sacramental marriage, the adjective "special" (*specialem*) replaces "distinctive" (*peculiarem*). No explanation is given in *Nuntia* for these changes.

Among the observations received by the Commission was a proposal from one member that, in the phrase *quo coniuges ad imaginem indefectibilis unionis Christi cum Ecclesia a Deo uniuntur*, the words "by God" should be omitted, on the grounds that it is not God who unites the spouses.¹¹³ The Secretariat strongly rejected this suggestion, arguing that the words correspond with the Oriental liturgical books and also with the Gospel (*quod Deus coniunxit*).¹¹⁴

At the *plenarium* of the Oriental Pontifical Commission in November 1988 there was a motion regarding both this proposed canon and c. 812 (on consent).¹¹⁵ This motion maintained that, in Eastern thought, it is not consent alone which

¹¹³ See *Nuntia*, no. 28 (1989), p. 103.

¹¹⁴ See *ibid.*

¹¹⁵ See *ibid.*, no. 29 (1989), p. 71.

constitutes marriage, and thus a fourth paragraph should be added to c. 771. This paragraph would read as follows:

The essential acts which constitute marriage are: matrimonial consent and the blessing of the Church.¹¹⁶

However this motion, along with several others, was rejected on procedural grounds, while it was noted at the same time that these issues had been the subject of diligent study during the long years of the elaboration of the schema.¹¹⁷ Nonetheless, *Nuntia* has no report of any discussions on this very interesting issue. So the text of c. 771 of the 1986 schema remained unaltered, and eventually was promulgated as canon 776 of the 1990 *Codex canonum Ecclesiarum orientalium*.

2. OTHER APPLICABLE CANONS

Having seen the evolution of the initial Oriental canon describing marriage and its qualities, it is worthwhile investigating the development of two other canons, as they are helpful in discerning the Oriental Code's concept of marriage and its essence: the first canon describing consent and the norm on simulation.

(a) Canon 817

No mention of consent appears in the introductory canons of the Eastern Code. The Oriental canon defining consent and its object is found in article V on consent. It reads as follows:

¹¹⁶ Ibid.: "Essentiales actus, qui matrimonium constituunt sunt: consensus matrimonialis et benedictio Ecclesiae."

¹¹⁷ See *ibid.*

c. 817 § 1. Matrimonial consent is an act of the will by which a man and a woman through an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage.

§ 2. Matrimonial consent cannot be supplied by any human power.¹¹⁸

A significant difference between this canon and c. 1057 of the Latin Code is that the Oriental Code entirely omits the first paragraph of c. 1057 which contains the age-old Western canonical principle *consensus facit matrimonium*; this means also that the explicit limitation of matrimonial consent to a "legitimate manifestation between persons who are legally capable" is not found in the Oriental canon. Furthermore, this omission represents a considerable difference from canon 72 of *Crebrae allatae* (1949) which had reproduced the complete corresponding 1917 canon 1081, except for a slight stylistic change. No explanation is given in *Nuntia* for this development. Oriental canon 817 is the same as c. 1057 § 2 of the *CIC*, except that the latter paragraph is split into two further paragraphs. We will now briefly trace the history of c. 817.

(i) The 1980 schema

In the discussions of the study group in 1976 and 1977, the *relator* initially suggested this text:

§ 1. Matrimonial consent is a lawfully manifested act of the will, by which a man and a woman who are legally capable establish between themselves a perpetual and exclusive conjugal community of life, which is of its very nature ordered to the good of the spouses and to the generation and upbringing of offspring.

¹¹⁸ *CCEO*: "c. 817 § 1. Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium.
§ 2. Consensus matrimonialis nulla humana potestate suppleri valet."

§ 2. Consent cannot be supplied by any human power.¹¹⁹

The consultors were agreed on introducing the words *ad bonum coniugum* into the canon, because "the essential end of marriage and therefore the essential object of marriage is not only the procreation and upbringing of children, but also the personal good of the couple."¹²⁰ One consultor observed that the text repeated what had been already said about the object of consent in the first canon.¹²¹ Accordingly, it would be sufficient to say in this canon that

matrimonial consent, as in canon 1, is a lawfully manifested act of the will, by which a man and a woman who are legally capable establish between themselves a conjugal community of life.¹²²

This formulation was accepted by the *coetus*.

However when the first Oriental schema appeared in 1980, a different redaction was actually circulated; it read as follows:

¹¹⁹ *Nuntia*, no. 8 (1979), p. 16: "§ 1. Consensus matrimonialis est actus voluntatis legitime manifestatus quo vir et mulier, iure habiles, inter se constituunt communitatem vitae coniugalis perpetuam et exclusivam, indole sua naturali ad bonum coniugum et prolem generandam et educandam ordinatam.

§ 2. Consensus nulla humana potestate suppleri valet."

¹²⁰ *Ibid.*: " [...] finis essentialis matrimonii et ideo objectum essenziale matrimonii non est tantummodo procreatio et educatio prolis, sed etiam bonum personale coniugum."

Here, by using "therefore" (*ideo*), the consultors appeared to be confusing the ends and the essence of marriage: one cannot simply deduce that because something is an *ordinatio*, on that account it is part of the essential object of consent. Even so, it is clear that the consultors considered the good of the couple to be part of the essential object, and not just a *finis*.

¹²¹ Actually, neither the first canon, nor the canon being discussed, said explicitly that the *bonum coniugum* belonged to the object of consent: in both it is listed as an *ordinatio*.

¹²² *Nuntia*, no. 8 (1979), p. 17: "Consensus matrimonialis, de quo in can. 1, est actus voluntatis legitime manifestatus, quo vir et mulier, iure habiles, inter se constituunt communitatem vitae coniugalis."

c. 153 § 1. Matrimonial consent is an act of the will by which a man and a woman mutually give and accept one another for the purpose of establishing a marriage.

§ 2. Matrimonial consent cannot be supplied by any human power.¹²³

We have no information as to why the text was amended to simplify the description of the object of consent ("to establish marriage") but the influence of the Latin Code revision process is fairly obvious.

There were many observations from the consulting bodies when the study group reviewed responses to the 1980 schema. Three responses called for the new first paragraph of the schema to be replaced by the *ius in corpus* formulation of canon 72 § 2 of *Crebrae allatae* (1949).¹²⁴ According to one of these bodies, the formula proposed in the canon, *sese mutuo tradunt*, could lead one to think that a reciprocal personal subjugation is being approved that would not safeguard the dignity of the spouses nor the institution of marriage. The third responding body found the formula adopted in the canon unacceptable on the grounds that the object of the giving and accepting in marriage is never the person, but the *ius in corpus*.

All the other consultative bodies were pleased with the proposed canon, although two made minor comments regarding the appropriateness of a mention of

¹²³ 1980 *Oriental schema*: "c. 153 § 1. Consensus matrimonialis est actus voluntatis quo vir et mulier sese mutuo tradunt et accipiunt ad constituendum matrimonium.
§ 2. Consensus matrimonialis nulla humana potestate suppleri valet."

¹²⁴ See *Nuntia*, no. 15 (1982), p. 76.

"covenant".¹²⁵ These were taken into account when the *coetus* decided to leave the canon unchanged except for the addition to the first paragraph of the phrase "through an irrevocable covenant", so as not to create any difference between it and canon 1010 § 2 of the 1980 Latin schema regarding the definition of matrimonial consent. The study group recalled that *Gaudium et spes* 48 taught that marriage has its origin in a "human act" in which "the spouses mutually give and accept one another"; the *coetus* judged that with the words "to establish marriage" there is specified the complete essential object of this "act" as it is described in the introductory canon on marriage.¹²⁶

(ii) The 1986 schema

When the schema of the whole Eastern Code appeared in 1986, the text of the proposed canon read as follows:

c. 812 § 1. Matrimonial consent is an act of the will by which a man and a woman through an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage.

§ 2. Matrimonial consent cannot be supplied by any human power.¹²⁷

This canon received no further attention in the revision process, except in connection with the first canon on marriage, when, at the November 1988 *plenarium*, a motion

¹²⁵ See *ibid*: "Altri due Organi di consultazione fanno osservazioni al canone, ma di minore rilievo, che pure vengono prese *ex novo* in considerazione: (1 - si definisca già nel can. 115 § 1 cosa è *consensus matrimonialis* insistendo sul *foedus coniugale*; 2 - si adotti *ad verbum* il can. 1010 dello schema del CIC latino), mentre a tutti gli altri Organi di consultazione il canone sembra sia piaciuto."

¹²⁶ See *ibid*.

¹²⁷ 1986 *Oriental schema*: "c. 812 § 1. *Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium.*
§ 2. *Consensus matrimonialis nulla humana potestate suppleri valet.*"

that it be stated that marriage is brought into being by consent and the blessing of the Church was rejected, as we have already seen. Thus the proposed canon 812 was promulgated unchanged as c. 817 of the *CCEO*.

(b) Canon 824 § 2

The Eastern canon on simulation is found in the article on consent and it repeats the 1983 Latin formulation, except for avoiding contractual language and having slight stylistic changes:

c. 824 § 2. But if either or both of the parties by a positive act of the will excludes marriage itself, or any essential element of marriage, or any essential property, marriage is invalidly celebrated.¹²⁸

Like its Latin counterpart, this paragraph underwent some drafting before arriving at its final formulation.

(i) The 1980 schema

In the early meetings of the marriage study group, there was some discussion regarding the revision of canon 77 of *Crebrae allatae* which had specified that a positive act of the will excluding marriage itself, or all right to the conjugal act, or any

¹²⁸ *CCEO*: "c. 824 § 2. Sed si alterutra vel utraque pars positivo voluntatis actu excludit matrimonium ipsum, aut matrimonii essentiale aliquod elementum vel essentialem proprietatem, invalide matrimonium celebrat."

There are stylistic changes in that *CIC* c. 1101 § 2 begins with *sed* and uses a different tense for the verb "exclude". Regarding the canons in article five on consent, it is worth noting that the English translation by the Canon Law Society of America, *Code of Canons of the Eastern Churches: Latin-English Edition*, constantly uses contractual language not present in the Latin text.

essential property, renders marriage invalid.¹²⁹ The consultors eventually came up with the following text:

§ 2. If however either or both of the parties should by a positive act of the will exclude marriage itself or any essential property of marriage, or should absolutely exclude the conjugal act or offspring or the communion of married life, such party contracts invalidly.¹³⁰

Two innovations on *Crebrae allatae* are obvious, and these were discussed by the *coetus*.

First, what was now required for invalidity is the absolute exclusion of the conjugal act or of children, rather than the previous law's demand for the exclusion of all *right* to the marriage act. The study group did not want to employ the traditional canonical term *exclusio iuris* because they felt that this was an abstract contractual concept of little utility, since it depended on a subtle distinction between the exclusion of the right and the exclusion of the *exercise* of the right. In the view of the *coetus*, this distinction even if really logically possible, scarcely ever had significance, practically and psychologically, for those getting married:

If the use of the right is absolutely and perpetually excluded, the giving over of the same right is reduced to nothing, [and] in practice that right is negated.¹³¹

¹²⁹ See *Nuntia*, no. 8 (1979), pp. 19-20.

¹³⁰ *Ibid.*, p. 19: "§ 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut essentialem aliquam matrimonii proprietatem vel absolute excludat actum coniugalem aut prolem aut communionem vitae coniugalis, invalide contrahit."

¹³¹ *Ibid.*: "Si usus iuris absolute et perpetue excluditur, traditio ipsius iuris ad nihil reducitur, practice ipsum negatur."

Citing *Gaudium et spes* 50-51 and *Humanae vitae* 10, the consultors noted that the exercise of the right can be excluded for a time, but this doesn't exclude all right to conjugal relations.¹³² Investigating whether exclusion had been made of the right or only of the use of that right was not really helpful. Furthermore, it could often happen that the right to the marriage act suitable for producing children was conceded, but from the beginning children were excluded by some means (e.g. removal of semen, sterilisation, abortion). In this case also the marriage is invalid even if the right to natural intercourse was carried through. Therefore the exclusion of children cannot be restricted to the exclusion of the right to the conjugal act; rather it was the latter which is contained in the general category of the exclusion of children. Wherefore one consultor held that it would be sufficient to say "or should absolutely exclude children", omitting the words "conjugal act".¹³³ Some thought that the word "absolute" was superfluous, but the *relator* and one of the other members held that the words "absolutely" or "absolutely and in perpetuity" were necessary, because one cannot deduce the invalidity of marriage solely from the exclusion of the marital act for a determinate or indeterminate time.¹³⁴

The second innovation on *Crebrae allatae* discussed by the study group was the proposed canon's use of the term "communion of married life". Another reason for keeping the word *absolute* was that it referred also to this clause *aut communionem*

¹³² See *ibid.*

¹³³ See *ibid.*, p. 20.

¹³⁴ See *ibid.*

vitae coniugalis. One consultor held that the phrases "marriage itself" and "communion of married life" meant the same thing, while the *relator* maintained it opportune for this paragraph to state

if however either or both of the parties should by a positive act of the will exclude marriage itself, or an essential property or end of marriage, such party contracts invalidly.¹³⁵

These two comments did not seem to influence the *coetus* which decided to accept the wording indicated above.

This text, with the contractual language omitted in accordance with the *Praenotanda* of the 1980 schema, appeared in the first Oriental schema on marriage:

c. 159 § 2. If however either or both of the parties should by a positive act of the will exclude marriage itself or any essential property of marriage, or should absolutely exclude the conjugal act or offspring or the communion of married life, such party enters marriage invalidly.¹³⁶

This paragraph came in for extensive criticism from the bodies consulted after the distribution of the 1980 schema. Their comments were grouped under the following headings:

- 1) the list of exclusions that invalidate marriage is not complete;
- 2) the formulation is imperfect and ambiguous (e.g. *exclusio prolis*);
- 3) the need to specify that the exclusion of the conjugal act is not being discussed, but the exclusion of the *ius ad actum*;

¹³⁵ Ibid.: "At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut proprietatem vel finem essentialem matrimonii, invalide contrahit."

¹³⁶ 1980 *Oriental schema*: "c. 159 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut essentialiam aliquam matrimonii proprietatem vel absolute excludat actum coniugalem aut prolem aut communionem vitae coniugalis, invalide matrimonium init."

- 4) the need to specify that what is being dealt with is not the exclusion of the *communio vitae*, but the exclusion of the *ius ad communionem vitae*;
- 5) the words *communio vitae coniugalis* don't have a clear juridical significance;
- 6) the word *absolute* does not have a well-determined meaning;
- 7) the jurisprudence of East and West must have the same clear norm in this material which pertains to the natural law.¹³⁷

Without any discussion being reported in *Nuntia*, the study group reviewing the responses to the 1980 schema simply accepted these observations as substantially correct and adjusted the text to read:

If however either or both of the parties should by a positive act of the will exclude marriage itself, or any essential element of marriage, or any essential property of marriage, or its sacramental dignity, such party enters marriage invalidly.¹³⁸

The *coetus* stated that what is to be regarded as essential is to be determined in the light of the first canon describing marriage and of Catholic doctrine and legitimate jurisprudence.

The influence of the Latin Code revision process is clear; the Oriental text is identical to the corresponding canon as revised by the Secretariat in the Latin 1981 *Relatio*, except for the omission of contractual language.

¹³⁷ *Nuntia*, no. 15 (1982), pp. 78-79: "I motivi adottati sono i seguenti: 1) l'elenco delle esclusioni che invalidano il matrimonio non è completo; 2) la formulazione è imperfetta ed ambigua (p.es. *exclusio prolis*); 3) bisogna specificare che non si tratta dell'esclusione dell'atto coniugale, ma dello *ius ad actum*; 4) bisogna specificare che non si tratta dell'esclusione della *communio vitae*, ma dello *ius ad communionem vitae*; 5) le parole *communio vitae coniugalis* non hanno un chiaro significato giuridico; 6) la parola *absolute* non ha un senso bene determinato; 7) la giurisprudenza nell'Oriente ed Occidente deve avere la stessa chiara norma in questa materia che appartiene al diritto naturale."

¹³⁸ *Ibid.*, p. 79: "§ 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut matrimonii essenziale aliquod elementum vel essentialem proprietatem vel sacramentalem dignitatem, invalide matrimonium init."

(ii) The 1986 schema

When the schema of the whole Eastern Code appeared, the text of the proposed paragraph ran as follows:

c. 819 § 2. But if either or both of the parties by a positive act of the will excludes marriage itself, or any essential element of marriage, or any essential property, marriage is invalidly celebrated.¹³⁹

Again this shows the influence of the 1983 *Codex iuris canonici* in that the phrase *vel sacramentalem dignitatem* has been deleted, as also happened in the last phase of the Latin revision process. There was no further discussion of this 1986 text; it remained unchanged during the final stages of the Eastern revision process and was promulgated as c. 824 § 2 of the *CCEO*.

CONCLUSION

The development of the Latin and Oriental canons shows clearly the influence of the Second Vatican Council as the two Commissions grappled to transfer theological categories into appropriate canonical terminology which would also reflect the traditions of West and East. The Commissions tried to draft oblique definitions of marriage which would faithfully reflect the substance of the description of marriage provided by *Gaudium et spes*. We have seen how the terminology used in the two

¹³⁹ 1986 *Oriental schema*: "c. 819 § 2. Sed si alterutra vel utraque pars positivo voluntatis actu excludit matrimonium ipsum aut matrimonii essenziale aliquod elementum vel essentialem aliquam proprietatem, invalide matrimonium celebrat."

Codes to describe marriage's nature was formulated. Sometimes they use identical terms because during the process of revision decisions were made to harmonise the Eastern law with the 1983 Latin Code, as happened for instance in the canon on simulation. Other times significant differences remain which reflect different theological viewpoints.

In describing the nature of marriage, both Codes contain a much more personalist approach than did the canons of the preceding legislations. The unitive dimension of marriage has been given equal status with the procreative aspect, but there is no mention of love. In the process of development of the new canons, some elements, such as the notions of "covenant", *consortium omnis vitae*, and *bonum coniugum* have been identified in describing marriage. These are common to both Codes. But there are major differences between the two legislations. The Latin Code retains the notion of "contract" to describe matrimony, and emphasises that for the baptized this legal reality is automatically coupled with the sacrament. The Eastern Code has a more explicitly theological and sacramental approach. Reflecting Oriental tradition, there is no mention of contract, while it is more expressive of the role of the Creator. It goes beyond the simple statement of the Latin legislation that marriage between the baptised is a sacrament, by describing how it is such.

The history of the development of these canons will be extremely valuable when we attempt to compare and understand the two concepts of marriage by analysing the two Codes' common and distinct elements, which is the object of our next chapter.

CHAPTER FOUR

COMPARISON OF THE TWO APPROACHES

INTRODUCTION

Both new Codes shy away from defining the essence of marriage, yet unlike the previous legislations, they attempt indirect definitions or descriptions of marriage. These are not simply interchangeable, because each carries within it a vision which reflects a certain view of marriage with particular emphases. This chapter shall identify the Codes' common and different approaches in describing the nature of marriage and analyse the relevant canons of both legislations. In common, both view marriage as a "covenant" and a *consortium totius vitae*, expressions which require investigation. We shall elucidate how the ends and properties of marriage are depicted in the same way, as is the object of matrimonial consent. Furthermore, the canons on simulation essentially coincide. After analysing those common features, we shall observe how the characterization of the "covenant" is different in the Eastern Code from that in the Latin Code, which also utilizes a very distinctive method by employing the term "contract". The diverse approaches apparent in the two portrayals of the sacramentality of Christian marriage will also be examined. Finally, we shall show how the legislations diverge in delineating what exactly creates a marriage: the Latin Code is explicit, while the Oriental Code remains silent on this issue.

A. COMMON APPROACHES

From an initial glance at the new Latin Code, it is noticeable that marriage is now dealt with in Book IV on the sanctifying office, unlike under Book III (*De rebus*) of the 1917 Code. The new arrangement enables the sacraments, including marriage, to be seen more clearly as means of sanctifying the faithful. Thus the placement of the Latin marriage canons under the sanctifying office of the Church further underlines the religious character of marriage, a theme very much in harmony with Oriental concerns. For Eastern Christians, marriage is primarily a *quid sacrum*.

1. THE NOTION OF COVENANT

In line with Vatican II and the post-conciliar documents, both Codes use the term "covenant" in describing the fundamental nature of marriage. It is a covenant with definite goals, ordained to the good of the spouses and the procreation and education of children:

CIC c. 1055 § 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos euectum est.

CCEO c. 776 § 1. Matrimoniale foedus a Creatore conditum Eiusque legibus instructum, quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad filiorum generationem et educationem ordinatur.

In these "defining canons", "covenant" is applied in the first instance to marriage as a natural institute, as can be seen from the actual text of the canons and from the history of their formulation. The "covenant" idea catches well the concept that love and fidelity are pledged by the spouses to each other, and emphasises that

marriage is a sacred reality. In addition, it is a personalistic notion, dwelling on the relational and interpersonal aspect of marriage. Of course, the covenant of marriage is only a reflection of the covenant between God and His people. As F.G. Morrissey has noted,

the term "covenant" adds a faith dimension to the celebration of matrimony, a dimension that was previously either taken for granted or ignored. The marriage is not only a legal agreement; it takes into account the fact that it is founded "in the Lord" and thus calls for fidelity and trust [...].¹

Moreover, W. Kasper has pointed out that *foedus* illustrates well the balance between the public and the personal character of marriage, by expressing better than "contract" or "institution" the personal character of consent, while at the same time keeping intact the public aspect of marriage inherent in these two terms:

A covenant is both private and public. The covenant of marriage is not simply a personal bond or covenant of love — it is also a public or legal matter concerning the whole community of believers.²

By adopting the term "covenant", the Codes affirm the personalistic view of marriage taught by *Gaudium et spes* and the post-conciliar documents, while giving jurisprudence and canonical doctrine an opportunity to investigate the personalistic, social, cultural, and religious aspects of marriage. Nevertheless, even in their employment of "covenant", the Codes show distinctive approaches, a topic which we shall examine later.

¹ F.G. MORRISEY, "The 1978 Proposal: Revising Church Legislation on Marriage", in *Origins*, 9 (1979-1980), p. 211.

² KASPER, *Theology of Christian Marriage*, p. 41.

2. MARRIAGE AS A *Consortium totius vitae*

In both initial canons, the descriptions of marriage have aspects in common: an expression showing the communal dimension of marriage (*consortium totius vitae*), and specific mention of the two *ordinationes* of marriage. The communal aspect is thus linked to the institutional ends of marriage. In *Gaudium et spes* 48, *matrimonium in facto esse* was called the *intima communitas vitae et amoris coniugal*, whereas in both new introductory canons the expression *consortium totius vitae* is utilized to describe that reality, that is, the marital community.³ The expression *consortium totius vitae* is not found in the conciliar Constitution.⁴

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| <p>CIC c. 1055 § 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, [...].</p> | <p>CCEO c. 776 § 1. Matrimoniale foedus [...], quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, [...].</p> |
|--|--|

First, we note that the marital *consortium* is formed between two sexually distinct persons, that is, a man and a woman. This axiom is also repeated in *CIC c.*

³ Despite the antiquity of its origin, is *consortium totius vitae* an adequate formulation of the conciliar teaching that marriage is "an intimate community of conjugal life and love"? Not everybody is convinced that it is. We might remember that the Vatican II phrase for the married state was used in the 1980 Oriental schema. In the Oriental revision process, "community" and "communion" were replaced by *consortium totius vitae*. The terms "communion" and "community" have sacred and liturgical overtones, and so J.M. Serrano for one would prefer to call marriage the "communion and partnership of the whole of life". See J.M. SERRANO RUIZ, "L'ispirazione conciliare nei principi generali del matrimonio canonico", in *Matrimonio canonico fra tradizione e rinnovamento*, 2nd ed., Bologna, Dehoniane, 1991, p. 36.

⁴ With reference to marriage, the term *consortium* is used in four canons of the Latin Code (cc. 1055 § 1, 1096 § 1, 1098, 1135), and in eleven canons of the Oriental Code (cc. 776 § 1, 777, 816, 819, 821, 849 § 2, 863 §§ 1-3, 864 § 3, 866, 1362, 1381). See X. OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, 2nd ed., Roma, Commentarium pro religiosiis, 1984, p. 106; I. ŽUŽEK, *Index analyticus Codicis canonum Ecclesiarum orientalium*, Roma, Pontificium Institutum orientalium studiorum, 1992, p. 74.

1057 § 2 and *CCEO* c. 817 § 1. In line with biblical and Church teaching, the Codes are declaring that the partnership of marriage can only be constituted between a man and a woman. This also presupposes that a heterosexual union is central to the partnership of marriage, and without the possibility of this sexual union there can be no real marriage. In this context it is also worth noting *CIC* c. 1135 and *CCEO* c. 777 which state that each spouse has an equal obligation and right to whatever pertains to the partnership of conjugal life.

From the text and context of the two new initial canons, it can be established that the term *consortium totius vitae* expresses the totality of the marital community; it is the juridic expression for marriage itself, the entire *matrimonium in facto esse*. Unquestionably, in this context, *consortium* can hardly be perceived in the way it used to be in canonical writings.⁵ Thus it can include essential, integral, and accessory elements. The essential elements form an indispensable part of every matrimonial *consortium*, irrespective of ethnic background, culture etc., and cannot be omitted

⁵ The phrase *consortium totius vitae* has been traditionally used to describe the effects of marriage rather than its essence, which more often than not was referred to as the *coniunctio* (see AQUINAS, *Suppl.*, q. 44, art. 3). The famous definition of Modestinus had used *consortium*, but had begun with the key concept *coniunctio*. This term was used throughout canonical tradition, and appeared in the 1975 Latin schema, before being altered to *communio* after the consultation, and then finally was changed to *consortium* by the Secretariat. Although in 1977 the three terms are equivalent for the Latin Commission, this is not really in line with canonical tradition. In 1944, the Rotal judge A. Wynen had been sceptical about using the expression *consortium omnis vitae*. See c. WYNEN, 22 January 1944, no. 27, in *AAS*, 36 (1944), p. 191; *supra*, pp. 81-82. Rotal jurisprudence often used *consortium* to refer to cohabitation.

Unfortunately, the Eastern Code, in cc. 863, 864 § 3, 866 of Article VIII, 2° (on the separation of the spouses), still seems to employ the term *consortium* principally in the narrow sense of the matrimonial living together, which would be inconsistent with the use of the word in cc. 776 § 1, 777, 819, 821, 849 § 2. The Latin Code is more clearly consistent in its use of the expression *consortium* (see cc. 1055 § 1, 1096 § 1, 1098, 1135).

from the content of marriage consent because they are vital to the very structure of marriage as instituted by God. The difficulty lies in concretely determining which are the essential elements of marriage, and then in assessing the practical extent of this essential *consortium* in the light of a particular cultural and social situation. Integral ("connatural" or "concomitant") elements flow from the essential elements of marriage; while not absolutely required themselves, the connatural elements cannot be simply described as accessory; an example of an integral element of marriage might be the question of whether the couple will live together under the same roof or not. Accessory elements are wholly ancillary to the nature of marriage itself and often spring from social, cultural, psychological and other factors; while they may form part of the total content of the couple's consent, they are completely supplementary to the fundamental nature of marriage (e.g. whether the woman takes the man's name upon marriage or not).

So the phrase *consortium totius vitae* has not been defined by canon law, as indeed it had not been by Roman law, since there is a certain wisdom in not giving a precise definition of a legal term, so that a concept's meaning is not completely fixed, something which would prevent any unfolding of the idea. By leaving the notion of *consortium* undelineated, its essential elements can then be ascertained by canonical doctrine and jurisprudence.

During the revision processes it was not always clear that distinctions were being made between the terms *coniunctio*, *communio*, and *consortium*, which sometimes led to confusion. According to J. Huber, the word *coniunctio* means a

physical and mental union, i.e. *matrimonium consummatum*. *Communio vitae* involves the communion of minds and the common life, that is the rights and duties arising from these, but excluding physical relations.⁶ It would now best be seen as not depicting the totality of all marital rights and duties (although sometimes the word had indeed been used in this sense).⁷

Accordingly, the *consortium totius vitae* would involve, first, the physical sexual relationship and its associated rights and duties, what was traditionally called the *ius in corpus pro generatione*, and secondly, the *communio vitae*, the right to mutual help, the intimate two-in-one relationship understood in the biblical sense.⁸ Thus the *communio* would be an essential right and obligation, part of the sum total of rights and obligations that is the *consortium*.

⁶ See HUBER, "Coniunctio, communio, consortium", pp. 401-408.

In his Letter to Families (1994), Pope John Paul II speaks of *communio* and *communitas* as two closely related yet not completely identical concepts: *communio* has to do with the personal relationship between the "I" and the "Thou", while *communitas* transcends this personal relationship and moves towards a "society", a "we". A community of persons arises from the conjugal covenant of marriage which opens the spouses to a lasting communion of love and life, and it is brought to completion in a full and specific way with the procreation of children: the "communion" of the spouses gives rise to the "community" of the family. See JOHN PAUL II, *Litterae familiis datae ipso volvente sacro familiae anno MCMXCIV*, 2 February 1994, no. 7, in *AAS*, 86 (1994), p. 875.

⁷ One difficulty is that *communio vitae* has also been used historically to describe the complete *matrimonium in facto esse*. See P. FEDELE, "Quarta lucubratio in tema di *ius in corpus e debitum coniugale*", in *Ephemerides iuris canonici*, 45 (1989), pp. 441-443.

⁸ If marriage is described as a *consortium totius vitae*, are the implications of this taken into account in some of the other canons? *CIC* c. 1103 and *CCEO* c. 825, on force and grave fear, limit invalidity to pressure exerted from an extrinsic force, ignoring the fact that some serious intrinsic pressures could also vitiate the formation of the marital *consortium*. *CCEO* c. 821 and *CIC* c. 1098 require a specific type of fraud for the nullity of marriage where there is error concerning a quality that can be gravely disruptive of the partnership of conjugal life: if marriage is truly a *consortium totius vitae*, then the real issue would seem to be error regardless of whether the party is fraudulently misled or not. See C. GALLAGHER, "Marriage and the Family in the Revised Code", in *Studia canonica*, 17 (1983), pp. 153-154.

Hence the right to "communion of life" forms an essential element of the *consortium*, yet is not equivalent to it. The work of the Latin Code Commission on what was to be canon 1101 § 2 shows us that it saw the *ius ad communionem vitae* as essential to marriage, indicating those rights which pertain to the essential interpersonal relations between the spouses, distinct from the other rights commonly listed in canonical tradition.⁹ The draft versions of the corresponding Oriental canon (c. 824 § 2) also appear to show that the "communion of married life" was envisaged as something distinct from the procreative dimension of marriage, and moreover not simply equivalent to marriage itself.¹⁰ This "communion of life" requires some sort of interpersonal relationship, to which the spouses have a right. The difficulty of course is to determine what this means in practice, which is the task of jurisprudence.

A. Mendonça states:

An 'interpersonal relationship' implies a true and a special relationship between two persons, a true friendship based on mutual trust and self-giving. Two persons should, before anything else, be able and willing to be friends, to love, to respect, to trust, to relate to and communicate with each other [...].¹¹

Consequently, we must ask the question whether conjugal love can be regarded as an essential element of the *consortium omnis vitae*. We have seen that

⁹ See supra, p. 163; NAVARRETE, "De iure ad vitae communionem", pp. 258-270; G. SHEEHY, "Animadversiones quaedam in *matrimonii essentiale aliquod elementum*", in *Periodica*, 75 (1986), pp. 124-126.

¹⁰ See supra, pp. 188-191.

¹¹ A. MENDONÇA, "Recent Trends in Rotal Jurisprudence", in *Studia canonica*, 28 (1994), p. 189. For a discussion of the "right to interpersonal relationship" in Rotal jurisprudence, see *ibid.*, pp. 189-193.

Pius XI gave love in marriage a primacy of honour, while calling the cultivation of mutual love a secondary end, and the Second Vatican Council esteemed it greatly, perceiving it as an expression of total mutual self-giving. The post-conciliar magisterium has continued this exaltation of married love, but has been resistant to describing it as an essential element of marriage. Unlike *Gaudium et spes*, the two new Codes have no mention of conjugal love and, as we can see from the revision processes, this was no accident. Indeed, the Vatican II phrase for the married state (*intima communitas vitae et amoris*) was used in the 1980 Oriental schema, where marriage was also called a "communion of love", yet later all references to love were removed.¹² There was probably a fear that its inclusion would have unpredictable effects on jurisprudence.

We cannot claim that love is always something without which a marriage cannot begin, since in many parts of the world the couple don't know each other before the wedding.¹³ Juridically speaking, it is an elusive concept to pin down, because it is difficult objectively to judge and assess its presence or absence. Hence, Navarrete, for instance, thinks that it is something beyond the field of law, belonging

¹² See *supra*, pp. 174-180.

¹³ See the comment of J. Prader: "L'elemento dell'amore non ha un ruolo giuridico essenziale nell'atto costitutivo del matrimonio; se così fosse, un gran numero di matrimoni sarebbero invalidi in quei paesi africani e del vicino e medio Oriente, ove tutt'oggi frequentemente gli sposi prima del matrimonio non hanno neppure la possibilità di conoscersi" (PRADER, *Il matrimonio in Oriente e in Occidente*, p. 9).

to the psychological order, lacking essential juridical value, and thus is to be regarded only as an integrating factor in marriage.¹⁴

Of course, the whole difficulty revolves around what one means precisely by the term "love". Some canonists say that if it is considered in the sense of rational human love (*amor benevolentiae*), something under the control of the will, as distinct from an affective or erotic love, then the spouses have a right to it and it cannot be excluded from their consent.¹⁵

In addition, L.G. Wrenn, calling love an affective dialogical tendency towards another person involving union with him/her, claims that the essence of the *bonum coniugum* lies in the right to love: the mutual giving and receiving of each other (c. 1057 § 2) is precisely what love is. It is that love which is ordered to the good of the spouses and of children which matters juridically, not just love in the sense of a genital or affective attraction. Within the context of the *bonum coniugum*, this type of conjugal love should be treated juridically as an essential element.¹⁶ Wrenn notes that the liturgical books speak of the couple pledging their love at the time of

¹⁴ See NAVARRETE, *Structura iuridica matrimonii*, p. 154.

¹⁵ See Z. GROCHOLEWSKI, "De 'communione vitae' in novo schemate *De matrimonio* et de momento iuridico amoris coniugalis", in *Periodica*, 68 (1979), pp. 479-480. Cf. G. VERSALDI, "Via et ratio introducendi integram notionem christianam sexualitatis humanae in categorias canonicas: gressus a 'ius in corpus' (can. 1081 § 2 Codicis 1917) ad 'sese mutuo tradunt et accipiunt' (can. 1057 § 2 novi Codicis)", in *ibid.*, 75 (1986), pp. 412-413.

¹⁶ See WRENN, "Refining the Essence of Marriage", pp. 543-547. Cf. M.F. POMPEDDA, "L'amore coniugale e il consenso matrimoniale", in *Quaderni studio Rotale*, vol. 7, Roma, Libreria Leoniana, 1995, pp. 53-55. For a criticism of Wrenn's view, see E. MONTAGNA, "Considerazioni in tema di *bonum coniugum* nel diritto matrimoniale canonico", in *Il Diritto ecclesiastico*, 114 (1993), pp. 682-684.

consent: *lex orandi lex credendi*. The spouses have a right to a love which is directed to the good of the spouses and of children, and so this right is an essential element of marriage, and must be included in consent. The precise content and meaning of this love may, however, vary in different cultural contexts. Of course, this love may later disappear, but the marriage remains valid. However, in contrast to Wrenn's view, the work of the Latin Commission shows that there seemed to be a grave reluctance to speak about a *ius ad amorem*: rather, one consultor spoke of a right to those actions which generally are required by love.¹⁷ One real difficulty about using the term "love" is the inevitable confusion which arises because the word is used in so many senses: for instance, love can refer to a force that generates the will for mutual self-giving (matrimonial consent), but also to something which needs to be cultivated in *matrimonium in facto esse*.

Lastly, it is worth noting that traditionally the *ius in corpus pro generatione* has been classified as "exclusive and perpetual". Now that the essential formal object of marital consent is no longer confined to this one particular right/duty, the qualities of perpetuity and exclusivity are also being applied to all the essential rights and duties associated with the *consortium totius vitae*.¹⁸ Furthermore, the phrase "whole of life" corresponds to the perpetuity and unity of the partnership which, in *CIC* c. 1056 and *CCEO* c. 776 § 3, have been named as the essential properties of marriage.

¹⁷ See *supra*, p. 163.

¹⁸ See J.M. PINTO GOMEZ, "Incapacitas assumendi matrimonii onera in novo *CIC*", in Z. GROCHOLEWSKI and V. CARCEL ORTI (eds.), *Dilexit iustitiam: studia in honorem Aurelii card. Sabattani*, Città del Vaticano, Libreria editrice Vaticana, 1984, pp. 24-26.

3. THE ENDS OF MARRIAGE

Legislation continues to give great attention to the ends of marriage, whereas jurisprudence has not been overly concerned with these, since they do not enter into the juridical essence of marriage. It is fairly obvious from the entire Latin revision process that the Commission did not intend for there to be any hierarchy of ends in the new legislation. The new Codes seem to have definitively ended the age-old question of a hierarchy of ends, in that the equality of the ends of marriage, which is implicit if not wholly clear in *Gaudium et spes*, is explicit in the new legislations.¹⁹

CIC c. 1055 § 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum [...].

CCEO c. 776 § 1. Matrimoniale foedus [...], quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad filiorum generationem et educationem ordinatur.

The "natural" character of marriage, both in its reality and in its orientation, is underlined by the canons' use of the phrase *indole sua naturali*. The fact that the good of the spouses is mentioned first, before the generation and education of children, should not necessarily be seen as implying that the *bonum coniugum* has a

¹⁹ See SERRANO RUIZ, "L'ispirazione conciliare nei principi generali del matrimonio canonico", pp. 55-56. However, the Rotal auditor C. Burke maintains that the generation and education of children could be considered primary in a "specifying sense" for marriage. See c. BURKE, 11 April 1988, nos. 5-6, in *SRR Dec*, vol. 80, pp. 213-214. Although the hierarchy of ends, in the formal sense of the notion, apparently has been abandoned by the magisterium, Pope John Paul II, in a cryptic comment at a 1984 general audience address on some aspects of *Humanae vitae*, hinted that some sort of hierarchy between the ends exists. After mentioning that encyclical and *Gaudium et spes*, the pope said: "In this renewed formulation the traditional teaching on the purposes of marriage (and their hierarchy) is reaffirmed and at the same time deepened from the viewpoint of the interior life of the spouses, that is, of conjugal and family spirituality" (JOHN PAUL II, General Audience Address, 10 October 1984, "The Power of Love is Given to Man and Woman as a Share in God's Love", in *L'Osservatore romano*, English edition, 15 October 1984, p. 8).

privileged position: it would simply underscore the way in which the couple comport themselves in their mutual self-donation which reaches its culmination in children.

(a) The Procreation and Education of Children

The conciliar and post-conciliar documents make it clear that the Church continues to see the procreative aspect as having a central place in marriage. In the previous legislations, the procreation and education of children was called the primary end, but the object of consent was defined as the exclusive and perpetual right to acts ordered to the generation of children, the component of "upbringing" being omitted. The new Codes state that marriage is ordered to the "procreation and education of children", while the formal object of consent is the "constitution of marriage" (*CIC* c. 1057 § 2; *CCEO* c. 817 § 1), which means that we are referred back to the introductory descriptions of marriage.

Although the generation and education of children is an end of marriage, one cannot strictly speak of a right to this end. Actual procreation does not lie fully within the power of the spouses; ultimately it remains a gift of God. Openness to procreation, and hence to those acts suitable for it, can never be excluded from valid matrimonial consent, though no children may in fact be produced by a particular marriage, since every marriage does not necessarily achieve its ends. So, strictly speaking, it is the *bonum prolis* which has been seen as essential to marriage consent, although this term is never mentioned in the Codes.²⁰

²⁰ Using the term *bonum* in the generic non-technical sense of canon 1055, Rotal jurisprudence has listed *bonum prolis* as an essential element of marriage. For instance, see c. POMPEDDA, 29 January 1985, no. 8, in *SRR Dec*, vol. 57, pp. 55-56; c. COLAGIOVANNI, 26 June 1984, no. 5,

While there is no doubt that the *bonum proles* is an essential element of the formal object of consent, what precisely is the content of this *bonum*? After Vatican II, it definitely cannot now be restricted simply to procreative acts, but must also include the upbringing of children.²¹ This in turn involves, in the first place, guarding their physical well-being (e.g. if a spouse positively intended that there be an abortion in the case of a pregnancy, this would invalidate the marriage). The study group revising the Oriental law was certainly aware of this.²² Secondly, the good of children involves providing for their education. Regarding the latter, it can be said in principle that if the right to the education of children is denied, then this would imply the denial of the *bonum proles*. However, the essential components of this right to education have not yet been completely settled in jurisprudence.²³

in *ibid.*, vol. 76, p. 421.

²¹ See one of the conclusions of the study by K.W. Schmidt: "During the last fifty years the Rota demonstrates a tendency to extend the understanding of the *bonum proles* beyond the right to the conjugal act itself so as to include its natural consequences. To summarize, the Rotal jurisprudence with respect to the *bonum proles* now includes aspects of **procreation**, namely sexual intercourse or the conjugal act, performed properly and in a human manner; openness to the natural effects of the conjugal act, i.e., openness to conception, and no behaviour intended to lead to conception outside of natural sexual intercourse; and aspects of **education** i.e., the safeguarding of the offspring after the moment of conception, during gestation, at birth and into life thereafter" (K.W. SCHMIDT, "*Educatio proles*" as an Essential Element of Marriage, J.C.D. dissertation, Ottawa, Saint Paul University, 1993, p. 191).

²² See *supra*, pp. 188-190.

²³ Schmidt summarizes the current jurisprudence: "*Educatio proles* consists of physical, moral, religious (spiritual), civil, social, and cultural dimensions, according to the two canonical codes and Rotal jurisprudence. The jurisprudence strongly supports the consideration of components of physical education as essential elements of marriage; it almost unanimously rejects spiritual (religious) and moral education as essential; and it virtually omits any consideration of civil education (c. 1113), or social and cultural education (c. 1136)" (SCHMIDT, "*Educatio proles*" as an Essential Element of Marriage, p. 192).

(b) The Good of the Spouses

As we have seen, prior to the Council, the unitive dimension did not receive juridical recognition as essential to marriage, even if Pius XI and Pius XII praised this aspect of marriage. The conciliar and post-conciliar documents no longer display a hierarchy of ends in their teaching on marriage; they give great attention to the good of the spouses, yet do not identify its specific elements. The new legislations have recognized this explicitly by stating that the marriage partnership is by its very nature ordered to the *bonum coniugum*; indeed in the two canons this *bonum* is listed as an *ordinatio* before the generation and education of children.

According to the Scholastic principle, *societates definiuntur finibus* — societies are defined by their ends, yet we must note that the ends as such do not pertain to the essence of the society in the way properties do. The direction or finality is always something that is extrinsic, so finality does not constitute part of the essence. Thus since the *bonum coniugum* is clearly listed in the Codes as an "end" of marriage, does it in fact pertain to the canonical essence of marriage?

In the previous legislations, the formal essential object of consent was clearly defined as the permanent and exclusive *ius in corpus pro generatione*. So it was obvious that the first part of the primary end (i.e. the procreation of children) was considered essential to the object of consent, while the second part of the primary end (i.e. the upbringing of children) and the secondary ends (i.e. mutual assistance and a remedy for concupiscence) were not. However, the new Codes do not have a clear delineation of the formal object of consent (*CIC* c. 1057 § 2; *CCEO* c. 817 §

1), it being simply called the "constitution of marriage". The *consortium totius vitae* is the object of consent, and by its very nature is ordered to the *bonum coniugum*. Some argue that in this sense this *bonum* pertains to the object of consent. Indeed, recent Rotal jurisprudence seems to accept this thinking and regards the "good of spouses" as an essential element of marriage, not just an extrinsic end.²⁴ Moreover, this view seems to receive support from *CIC* c. 1101 § 2 and *CCEO* c. 824 § 2 which speak of essential elements. While these latter remain unspecified in the Codes, the Secretariat of the Latin Code Commission did hold that the *ordinatio ad bonum coniugum* is indeed an essential element of the matrimonial covenant.²⁵ Likewise, the consultors of the Oriental *coetus* when discussing what was to become *CCEO* c. 817 maintained that the essential object of marriage included not just the procreation and education of children, but also the personal good of the couple.²⁶

Nevertheless, the Rotal auditor C. Burke holds that the *bonum coniugum*, which he describes as the maturing of the spouses for the ultimate purpose of life, is only an end of marriage, and not part of its essence.²⁷ Therefore, there is no such thing, strictly speaking, as a right to the good of the spouses. What the spouses have

²⁴ See MENDONÇA, "Recent Trends in Rotal Jurisprudence", pp. 194-198. Pompedda argues that the *bonum coniugum* should be considered as part of marriage's essence on the grounds that we are proceeding according to the rules of canon law, not according to the principles of science. See POMPEDDA, "Incapacity to Assume the Essential Obligations of Marriage", pp. 186-188.

²⁵ See *supra*, p. 154.

²⁶ See *supra*, p. 185.

²⁷ See C. BURKE, "The *bonum conjugum* and the *bonum prolis*: Ends or Properties of Marriage", in *The Jurist*, 49 (1989), p. 708.

a right to is that the ordering of marriage to the *bonum coniugum* not be excluded from marital consent; this exclusion happens rarely, in his view. If the *ordinatio ad bonum coniugum* is to be admitted as an essential element of marriage, the rights and obligations flowing from this are the same as those derived from the Augustinian *bona*.²⁸ Therefore, for Burke, the *bonum coniugum* does not constitute a fourth good. Some recent Rotal decisions, however, add the *bonum coniugum* as a fourth *bonum* to the traditional *tria bona* (*prolis, fidei, and sacramenti*).²⁹ Burke is clearly operating within the Augustinian schema, and seems unwilling to go beyond it in his assessment of marriage's essence. Nonetheless, given the background of the conciliar and post-conciliar documents, the thinking of the Latin Commission Secretariat and of the Eastern *coetus*, and on account of much recent Rotal jurisprudence, we can safely hold now that it is indeed an essential element.³⁰

²⁸ See C. BURKE, "Essential Obligations of Matrimony", in *Studia canonica*, 26 (1992), p. 398.

²⁹ See, for instance, c. PINTO, 12 February 1982, no. 3, in *SRR Dec*, vol. 74, p. 64; c. DI FELICE, 19 June 1984, no. 5, in *ibid.*, vol. 76, p. 350. See also L. DE LUCA, "L'esclusione del *bonum coniugum*", in P.A. BONNET (ed.), *La simulazione del consenso matrimoniale canonico*, Città del Vaticano, Libreria editrice Vaticana, 1990, p. 132.

There arises a terminological problem in that the idea of *bonum* in the *bonum coniugum* of *CIC* c. 1055 § 1 and *CCEO* c. 776 § 1 is not the same concept as that of the *tria bona*. See U. NAVARRETE, "I beni del matrimonio: elementi e proprietà essenziali", in *La nuova legislazione matrimoniale canonica*, Studi giuridici, vol. 10, Città del Vaticano, Libreria editrice Vaticana, 1986, pp. 97-98.

³⁰ Employing the term "good" in the generic non-technical sense of c. 1055, the *bonum coniugum* has been considered an essential element of marriage by Rotal jurisprudence: see c. DI FELICE, 19 January 1984, no. 6, in *SRR Dec*, vol. 76, p. 350; c. PINTO, 31 May 1985, no. 5, in *ibid.*, vol. 77, p. 281. See also A. MENDONÇA, "Consensual Incapacity for Marriage", art. *pro manuscripto*, pp. 72-76, 79-82.

The interpretation of the term *bonum coniugum* is one of the problems left by the promulgation of the new Codes. In the broad sense, the good of the spouses would seem to consist of their mutual help and service, the sharing of all their spiritual and material possessions, and the intimate communion of their whole life. This "good" is a rich but ultimately somewhat elusive concept, because the notion of the spouses' right to their total well-being is hard to assess juridically. Although the overall juridical significance of the *bonum coniugum* is quite clear, its precise content remains undefined.³¹ We can of course say that the parties have the right to those essential acts which are ordered to their well-being and mutual help, but not to the actual fulfilment of this well-being. The essence of marriage involves the ordering of the spouses' consent to the ends of marriage, but not the actual fulfilment of such ends.

However, it can be safely stated that the expression *bonum coniugum* applies to the good of both partners; in other words, it is a common good, and thus each spouse must intend to foster the good of the other.³² Moreover, there are aspects of this good which are essential and to which the parties must commit themselves, and aspects which are non-essential and don't matter juridically (e.g. happiness). The essential good of the spouses implies that there be corresponding rights and

³¹ One difficulty with the general canonical importance of the *bonum coniugum* is that in *CIC* c. 1096 § 1 and *CCEO* c. 819, which both concern the minimum subjective knowledge required in the parties (stating that marriage is a permanent *consortium* ordained to the procreation of children through some means of sexual cooperation), there is no mention of a minimum requirement concerning the good of the spouses. See L. ÖRSY, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107", in *The Jurist*, 43 (1983), p. 44.

³² See POMPEDDA, "Incapacity to Assume the Essential Obligations of Marriage", p. 192.

duties which are essential to marriage, and to which the parties must consent at least implicitly. For instance, if a person is able but unwilling to foster the essential good of the other spouse, and excludes it in his/her consent, then the marriage would be invalid (*CIC* c. 1101 § 2; *CCEO* c. 824 § 2).

What aspects of the *bonum coniugum* are essential and what are the corresponding essential rights and duties? To this question there is as yet no clear answer, as jurisprudence will have to determine the essence of this *bonum*. Different scholars and judges have advanced elements they regard as essential to the *bonum coniugum*. Some refer to these essential aspects under the heading of *ius ad communionem vitae*.³³ L.G. Wrenn identifies six elements as forming this essence: partnership, companionship, friendship, benevolence, caring, and love.³⁴ A. Mendonça, on the other hand, thinks that these are essential to attain the *bonum coniugum*, but are themselves not the essence of the good itself.³⁵ L. De Luca sees this *bonum* as essentially the spiritual good of the couple, since the legislator sees marriage as "an act brought into existence by two human beings for their material

³³ While being aware of possible ambiguities, M.F. Pompedda discusses using the term *ius ad communionem vitae* as a way of capturing juridically the meaning of the *ordinatio ad bonum coniugum*. See c. POMPEDDA, 11 April 1988, nos. 3-5, 9, in *SRR Dec*, vol. 80, pp. 199-202. For U. Navarrete, the good of the spouses is equivalent to the right-duty concerning the communion of conjugal life. See NAVARRETE, "I beni del matrimonio", pp. 86, 89-100. To cover "the good of the spouses", J.M. Serrano Ruiz has suggested the phrase *ius ad relationem interpersonalem*, but this ran up against the objection that the concept of *relatio personalis* had also been used to refer to marriage as a whole. See c. SERRANO, 22 February 1985, nos. 5-10, in *SRR Dec*, vol. 77, pp. 124-128. Cf. c. STANKIEWICZ, 24 October 1985, nos. 4-9, in *ibid.*, pp. 446-451, for a different perspective.

³⁴ See WRENN, "Refining the Essence of Marriage", pp. 537-547.

³⁵ See MENDONÇA, "Recent Trends in Rotal Jurisprudence", p. 196, footnote 76.

and spiritual welfare."³⁶ Mendonça also holds that we must appraise the physical, emotional, mental, sexual, and spiritual well-being of both spouses, since both Scripture and magisterial teaching focus on the perfection and fulfilment of the whole person of the spouses: "In the married state both spouses have the right/obligation to a reasonable degree of fulfilment of their being."³⁷ J.M. Pinto lists the remedy for concupiscence and psychosexual reciprocity as elements of the *bonum coniugum*.³⁸ Di Felice says that he is uncertain of all the elements of this good, yet states that the *mutuum adiutorium et remedium concupiscentiae* of the 1917 Code do belong to this *bonum*, as do the mutual efforts of the spouses to establish the *consortium totius vitae*.³⁹ Precisely which components of the *bonum coniugum* are essential and which are not, no Rotal judge has attempted to answer. Rotal jurisprudence has not proposed a list of essential elements, perhaps because a general "list" would not be that helpful, since the specific good of the spouses must also be assessed in the light of a specific culture and country.

³⁶ L. DE LUCA, "The New Law on Marriage", in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, Organized by Saint Paul University and Held at the University of Ottawa, August 19-25, 1984*, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, vol. 2, p. 831.

³⁷ MENDONÇA, "The Theological and Juridical Aspects of Marriage", p. 287.

³⁸ See PINTO GOMEZ, "Incapacitas assumendi matrimonii onera in novo CIC", p. 192.

³⁹ See c. DI FELICE, 19 June 1984, no. 6, in *SRR Dec*, vol. 76, p. 350. F. Bersini also observes that the former secondary ends of marriage (*remedium concupiscentiae* and *mutuum adiutorium*) are now included in the "good of the spouses". See F. BERSINI, *Il nuovo diritto canonico matrimoniale: commento giuridico - teologico - pastorale*, 3rd ed., Torino, Elle di Ci, 1985, p. 18.

4. THE PROPERTIES OF MARRIAGE

In the teaching of *Gaudium et spes*, the properties of marriage are peaceably accepted and underlie the conciliar text, while post-conciliar magisterial teaching asserted these more forcibly: marriage is one and indissoluble not only because of its sacramentality (in the case of Christian marriage), but also in virtue of the conjugal covenant itself, and on account the good of the spouses, of the children and of society. The properties of marriage received hardly any attention during the revision processes, and so the new Codes basically repeat the statements of the previous legislations, except for a slight stylistic difference between the two canons:

CIC c. 1056 *Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio christiano ratione sacramenti peculiarem obtinent firmitatem.*

CCEO c. 776 § 3. *Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio inter baptizatos specialem obtinent firmitatem ratione sacramenti.*

The properties of unity and indissolubility characterize the natural bond of marriage; they are preexisting to sacramentality and are not a consequence of the sacrament from which they obtain only a greater firmness.

(a) Unity

The new Latin and Oriental Codes clearly reiterate the former statements that unity is an essential property of marriage, and that its exclusion by a positive act of the will, invalidates marriage. As an essential obligation of matrimony, failure to assume it, through some consensual incapacity of one of the parties, also invalidates marriage (*CCEO c. 818, 3°; CIC c. 1095, 3°*).

The prohibition on polygamy has never really been an issue between East and West. In the West, the unity of the bond of marriage has traditionally been associated jurisprudentially with the Augustinian *bonum fidei*, conjugal fidelity. However they are not coextensive concepts, as we have noted earlier. The unity of marriage is contradicted by polygamy, while adultery is contrary to the *bonum fidei*. L.G. Wrenn states that in past jurisprudence, fidelity was reduced to mean "unity", while in recent jurisprudence "unity" is extended to mean fidelity.⁴⁰ We saw that, historically speaking, the essential content of the *bonum fidei*, that is the essential right to fidelity exchanged in marriage, came to be seen as the perpetual, exclusive, mutual *ius in corpus pro generatione*.⁴¹ However, Vatican II linked conjugal fidelity with the intimate union of marriage (as a mutual giving of two persons) and with the good of the children, thus no longer restricting it to the exclusivity of conjugal acts, without saying explicitly, however, that this intimate union was an essential component of the *bonum fidei*.

Although the unity of marriage is clearly declared, neither of the new Codes speak explicitly of the broader concept of the *bonum fidei*; yet we know that since it has been regarded as essential to marriage, it continues to be so in the new Codes. Its precise essential elements need now to be interpreted in the light of the conciliar and post-conciliar documents.⁴² T.P. Doyle claims that

⁴⁰ See WRENN, *Annulments*, 5th ed., p. 102.

⁴¹ See *supra*, pp. 19-20.

⁴² See MENDONÇA, "The Theological and Juridical Aspects of Marriage", p. 294.

past jurisprudence in such cases no longer seems *ad rem* since the 'one flesh' does not depend on sexual union alone but on the presence of conjugal love. A division of the one flesh can be accomplished by a deep and consuming interpersonal relationship with a member of the same or opposite sex if it results in total physical, emotional and spiritual alienation from one's spouse.⁴³

However, besides the perpetual and exclusive right to conjugal acts performed in a natural and normal human manner, it is not as yet clear or agreed what other components might be included in the essence of the *bonum fidei*.

(b) Indissolubility

Indissolubility has been an area of disagreement between East and West, and we have examined the long struggle waged by the popes to ensure that remarriage after divorce was forbidden among the Oriental Catholics after their reunion with Rome. This issue was and continues to be regarded as a matter of Catholic doctrine, not merely of ecclesiastical law. Therefore it is no surprise that the new Codes repeat the previous legislations' statements that indissolubility is an essential property of marriage, that its positive exclusion invalidates marriage, and that a sacramental consummated marriage cannot be dissolved by any human power or any cause except death (*CCEO* c. 853; *CIC* c. 1141).⁴⁴ As an essential obligation of matrimony, failure to assume indissolubility, through some consensual incapacity of one of the

⁴³ T.P. DOYLE, "A New Look at the *bonum fidei*", p. 38.

⁴⁴ Thus F.R. McManus notes that even if the general councils of the West, considered ecumenical by Catholicism, have carefully avoided an explicit rejection of those Eastern doctrines or practices permitting a second marriage after divorce, "[...] it seems wrong to encourage the Eastern Churches, including the Eastern Catholic Churches, to hope for the removal of this obstacle [...]" (F.R. McMANUS, "Marriage in the Canons of the Eastern Catholic Churches", in *The Jurist*, 54 [1994], p. 79).

parties, invalidates marriage (*CCEO* c. 818 § 3; *CIC* c. 1095 § 3). Also worth noting is that although the *CCEO* has no section on the "effects of marriage", both Codes do employ the term "bond" (*vinculum*) to describe the juridical state arising from a valid marriage (see, for instance, *CCEO* cc. 802 § 1, 853; *CIC* cc. 1085 § 1, 1134).

Canonically speaking, the property of indissolubility corresponds completely with the Augustinian *bonum sacramenti*: the essence of the latter has been understood by jurisprudence as the indissolubility of the marriage bond.⁴⁵ In Christian marriage, is sacramentality included in the *bonum sacramenti*, or is the latter concerned only with indissolubility? Some canonists claim that both indissolubility and sacramentality are included in this *bonum*, while others hold that indissolubility is the only component of the *bonum sacramenti*, so that sacramentality is a separate and independent *bonum* for Christian marriage.⁴⁶ In other words, the *bonum sacramenti* can be regarded as the *bonum vinculi*. This latter view has held sway in jurisprudence.⁴⁷ Deeming sacramentality a separate good for Christian marriage seems to receive backing from Vatican II, when *Gaudium et spes* 48 linked indissolubility with the good of the spouses, of the children and of society.

⁴⁵ For an explanation of the new understanding of the relationship between the exclusion of the *bonum sacramenti* and error (*CIC* c. 1099; *CCEO* c. 822), see MENDONÇA, "The Theological and Juridical Aspects of Marriage", pp. 297-298.

⁴⁶ See Z. GROCHOLEWSKI, *De exclusione indissolubilitatis ex consensu matrimoniali eiusque probatione*, Neapoli, M. D'Auria, 1973, p. 41.

⁴⁷ See MENDONÇA, "The Theological and Juridical Aspects of Marriage", p. 296.

5. THE OBJECT OF MATRIMONIAL CONSENT

Vatican II's description of marriage avoided the canonical distinction between the formal and material object of consent. The conciliar formulation of the object of marital consent was ultimately obscure and could be labelled poetic, yet it heavily influenced the new Codes. In the new canons, mention is made of the giving and acceptance of self by the spouses, the terminology being taken from *Gaudium et spes* 48 (the phrase *foedere irrevocabili* also echoes the conciliar Constitution):

CIC c. 1057 § 2. Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium.

CCEO c. 817 § 1. Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium.

By linking consent to the biblical term "covenant", the canons emphasise the spiritual aspects of marriage consent such as its sacred character. Moreover, in these paragraphs the two aspects of marriage (*in fieri* and *in facto esse*) are once again brought together: the act of the will precedes the marital partnership.⁴⁸

There is no doubt that the conciliar phrase *sese mutuo tradunt et accipiunt* is rich in meaning, yet the simple transfer of its wording into the Codes, without any further elucidation of its meaning in juridical terms, is not very enlightening.⁴⁹ If the

⁴⁸ The new canons understand consent as it was understood in the previous legislations: an act of the will. *Gaudium et spes* 48 § 1 spoke of consent as a human act, whereas the canons mention the will only. See ÖRSY, "Matrimonial Consent in the New Code", p. 38.

⁴⁹ For criticism of the phrase, see c. EGAN, 10 November 1983, no. 9, in *SRR Dec*, vol. 75, p. 607. For a more favourable view of the expression, see c. POMPEDDA, 14 May 1984, no. 4, in *ibid.*, vol. 76, p. 274.

phrase were to be taken literally, it might lead one to envision marriage as the mutual subjugation of the spouses, a complete transferral of one's psyche.

So the new Codes tell us that marriage consent involves a "mutual handing over and acceptance" between a man and a woman. The notion of *acceptatio-traditio* indicates that the new Codes did not abolish the concept that marital consent implies an exchange of rights and duties some of which are essential. It certainly indicates the bilateral and oblativ nature of marriage, but does not spell out what are the individual rights and duties if marriage is considered to be such an exchange. Whereas the old canons had clearly identified the essential formal object of marital consent, these canons are less incisive and lead one back to the notions of marriage found in *CIC* c. 1055 § 1 and in *CCEO* c. 766 §§ 1-2.

The new canons are tautologous to the extent that they define marital consent as the consent by which the parties enter marriage.⁵⁰ So *sese* is probably best seen as denoting the material object of consent (two sexually distinct persons), signifying that the "whole person" is involved in the act of total self-giving. In other words, it emphasises the interpersonal nature of the consensual act, implying that each partner has a personal knowledge of the other sufficient to make a conscious and deliberate decision.⁵¹ So the formal object of consent indicated by the canons is "the

⁵⁰ It could be claimed that what is being expressed, in *CIC* c. 1057 § 2, is the principle that *matrimonium in facto esse* arises from *matrimonium in fieri*, but this is already proposed in the first paragraph of that canon.

⁵¹ J.M. Serrano Ruiz argues that the *sese* formulation implies that it is the *relative* incapacity between two specific persons for the essential obligations of marriage that must be assessed under *CIC* c. 1095, 3°. See c. SERRANO, 22 November 1985, no. 5, in *SRR Dec*, vol. 77, pp. 517-518.

constitution of marriage". This means that the paragraphs defining marital consent must be read in the light of the earlier canons' descriptions of marriage.⁵²

6. THOSE THINGS WHICH INVALIDATE MARRIAGE BY THEIR POSITIVE EXCLUSION

The revised Codes do not specify directly the essence of marriage. Furthermore, the Oriental canon on simulation is basically the same as the Latin one, because during the Eastern revision process, a decision was made to have the same norm, probably on account of the fear that two different redactions might allow a difference in interpretation to arise and hence lead to some divergence in jurisprudence.

CIC c. 1101 § 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut matrimonii essenziale aliquod elementum vel essentialem proprietatem, invalide contrahit.

CCEO c. 824 § 2. Sed si alterutra vel utraque pars positivo voluntatis actu excludit matrimonium ipsum, aut matrimonii essenziale aliquod elementum vel essentialem proprietatem, invalide matrimonium celebrat.

These paragraphs on simulation mention essential elements whose exclusion invalidates marriage, but does not specify what they are. The old canons (*CIC* c. 1086 § 2; *Crebrae allatae* c. 77 § 2) had held that the exclusion of all right to the conjugal act would invalidate marriage. In the new legislations, it is left to doctrine and jurisprudence to determine what precisely are these essential elements. In continuity with the previous legislations, the new canons retain the statement that the

⁵² This is supported by the Latin Secretariat's contention that the canon on the notion of consent was to be understood in conjunction with c. 1055 § 1. See *supra*, p. 160.

exclusion of the essential properties also invalidates marriage. The legislator explicitly lists unity and indissolubility as essential properties (*CIC* c. 1056; *CCEO* c. 776 § 3). Thus the essence of marriage is not limited to the properties, yet the essential elements remain undetermined in the Codes, at least explicitly.

Nonetheless, we can say from our study so far that the two properties of marriage are unity (embracing also exclusivity) and indissolubility, while the *bonum coniugum* and the *bonum prolis* are essential elements of the formal object of consent. To these aspects we must add sacramentality, which we will explore in the second half of this chapter.⁵³ Finally we might note that although *Gaudium et spes* 48 had spoken of the *bonum societatis* in the context of marriage, so far this concept has not received any juridical recognition in the legislations or in jurisprudence, probably because of its vagueness.⁵⁴

B. DIFFERENT APPROACHES

In both Codes, there are introductory canons which say much about the nature of marriage, and which precede the other canons. These introductory norms have no rubric: they are fundamental or "constitutional", and are more numerous than the corresponding ones found with other sacraments.⁵⁵ In the 1917 Code, c. 1081 on

⁵³ In reference to the essential obligations of marriage, current doctrine and jurisprudence refer to the essential *bona* (*coniugum* and *prolis*), to the properties of unity (including unicity and fidelity) and indissolubility, and to the sacramental dignity of Christian marriage.

⁵⁴ See MENDONÇA, "The Theological and Juridical Aspects of Marriage", pp. 301-302.

⁵⁵ On the "constitutional" nature of the introductory canons in the *CIC*, see SERRANO RUIZ, "L'ispirazione conciliare nei principi generali del matrimonio canonico", pp. 24-30.

consent was not listed among these canons, unlike c. 1057 in the new Latin Code. Most noteworthy is the fact that the Oriental canon defining consent is not in the introductory canons. Likewise, c. 1134 on the sacramental consecration involved in Christian marriage is not found in the "constitutional" canons of the Latin Code. So a certain difference of approach is obvious even from a simple look at the arrangement of the canons in the respective Codes.

1. THE CHARACTERIZATION OF THE COVENANT

Although both Codes use "covenant" to describe marriage, the term does not play quite the same role in each of the introductory canons describing marriage's nature; in addition, the Oriental canon is expressive of the role of the Creator:

CIC c. 1055 § 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.

CCEO c. 776 § 1. Matrimoniale foedus a Creatore conditum Eiusque legibus instructum, quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt, indole sua naturali ad bonum coniugum ac ad filiorum generationem et educationem ordinatur.

In *CIC* c. 1055 § 1, the term *foedus* clearly refers to marriage *in fieri*, as indeed it does in c. 1057 § 2 on consent where it is used in the ablative case, and is qualified by the adjective "irrevocable". So in these "defining canons" of the *CIC*, the expression "covenant" denotes *matrimonium in fieri*.⁵⁶ Likewise, from reading the

⁵⁶ However, later on in *CIC* c. 1063, 4°, concerning the obligations of pastors, *foedus* is used once more, this time to refer to marriage *in facto esse*. We have noted earlier that although the initial meaning of *foedus* in *Gaudium et spes* 48 denotes marriage *in fieri*, the term also was applied to the married state. See *supra*, pp. 89-90.

entire initial Oriental canon, *foedus* therein appears to refer to marriage *in fieri*, yet "covenant" is also qualified by the phrase "established by the Creator and ordered by His laws", words inspired by *Gaudium et spes* 48 where they certainly referred to *matrimonium in facto esse*.⁵⁷ It is difficult to perceive how this phrase could be applied to marriage *in fieri*.⁵⁸ In addition, the Eastern text does not make it obvious that the "covenant" is the equivalent of irrevocable personal consent, unlike the first line of *Gaudium et spes* 48, and indeed a previous redaction of the canon.

Unlike the Latin canon, *CCEO* c. 776 § 1 includes a characterisation of the covenant: in continuity with *Gaudium et spes* 48, the role of the Creator is outlined. However, the phrase from the conciliar Constitution describing the matrimonial covenant (*a Creatore conditum suisque legibus instructum*) has been slightly changed in the Oriental canon to another redaction (*a Creatore conditum Eiusque legibus instructum*). This provides a different nuance: the canon speaks of marriage being "ordered by His laws", whereas the conciliar text (and indeed the 1980 Oriental schema) envisaged marriage as being endowed by the Creator with its own proper laws. It could be said that this modification represents a mild impoverishment, in that the conciliar text expressed well the idea that the laws which govern marriage arise from and are part of its divinely-given essential structure and nature (a notion found throughout the post-conciliar magisterium), whereas *CCEO* c. 776 § 1 might

⁵⁷ Indeed, in *CCEO* c. 783 § 3 (an exhortation to pastors), "covenant" does clearly denote marriage *in facto esse*.

⁵⁸ See NAVARRETE, "Jus matrimoniale latinum et orientale", p. 614.

give the impression that somehow they are moral laws added or imposed from outside. The formulation of *Gaudium et spes* 48 and of the earlier Oriental schemas seems richer and theologically more subtle.

In contrast to the previous Latin legislation, c. 1055 § 1 has combined the understanding of marriage in its two aspects, *in fieri* and *in facto esse*: the *foedus* leads to the *consortium*.⁵⁹ On the other hand, this clear relationship is obscured in *CCEO* c. 776 § 1. Nonetheless, the *consortium totius vitae* clearly denotes the married state in both canons.

2. THE CONCEPT OF CONTRACT

Comparing the two Codes, one of most obvious differences of approach to the nature of marriage is the Latin Code's retaining the word "contract" to describe marriage:

CIC c. 1055 § 1. Matrimoniale foedus, [...], a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

It is not just in the initial Latin canon concerning the nature of marriage that *contractus* plays an important role. Besides being employed as a substantive in cc. 1055 § 2 and 1097 § 2, contractual language is used throughout the Latin Code (see cc. 1086 § 3, 1121 § 3, 1122 § 1), in contrast to the Oriental Code where it nowhere appears, in harmony with Eastern traditions.

⁵⁹ See SERRANO RUIZ, "L'ispirazione conciliare nei principi generali del matrimonio canonico", p. 44.

The question arises as to whether the *CIC* should have retained "contract" to denote marriage, since Vatican II had dropped it.⁶⁰ In 1976, Paul VI acknowledged that *foedus* is the preferred word for marriage, and undoubtedly the post-conciliar documents avoid the word "contract" when addressing the nature of marriage itself.⁶¹ Of course, many well-known Latin canonists, before and after the Council, held and hold that marriage is a contract.⁶² The majority of current canonical opinion seems to continue to regard marriage as a juridical agreement with a contractual nature: marriage is a bilateral consensual legitimate contract, even if it is of a special kind. In *matrimonium in fieri*, it is claimed that one finds the complete set of elements pertaining to a contract: the marital consent is a mutual and bilateral declaration of the will, between two persons of opposite sex, capable of celebrating marriage, and as a result there are produced several juridical effects willed by the parties.⁶³

The starting point of this idea of "contract" is the famous Roman definition: *duorum pluriumve in idem placitum consensus*. There are four essential elements to this notion:

⁶⁰ Navarrete claims that as a sign of reverence towards the Latin canonical tradition and the magisterium, the *CIC* wished to conserve the term "contract", among others, to designate the act by which a particular marriage is formed. See NAVARRETE, "Jus matrimoniale latinum et orientale", p. 635. On the other hand, Serrano thinks that a great opportunity to drop forever the term *contractus* as applied to marriage was missed. See SERRANO RUIZ, "L'ispirazione conciliare nei principi generali del matrimonio canonico", pp. 51-52.

⁶¹ See *supra*, pp. 112-113, 115-116, 117, 119, 131.

⁶² For a long list of scholars upholding the marriage-contract idea, see J.F. CASTAÑO, "Il matrimonio è contratto?", in *Periodica*, 82 (1993), pp. 433-435. For scholars opposed to the idea, see *ibid.*, p. 436.

⁶³ See, for instance, F. AZNAR GIL, *El nuevo derecho matrimonial canónico*, 2nd ed., Salamanca, Universidad Pontificia de Salamanca, 1985, pp. 75-76.

- the capacity of the contractants, both legal, and natural (implying an *actus humanus*);
- the object of the contract which must be univocal;
- the consent of the parties (genuine, free, mutual, deliberate, and manifested) which is the formal and efficient cause of the contract;
- the obligations of the contractants.⁶⁴

It is fairly obvious that the idea of marriage as a contract is very much connected with the Latin canonical principle *matrimonium facit consensus partium iure habiles* (c. 1057 § 1). Besides the vital element of consent, the parties marrying must have the natural *capacitas* and be legally capable, while the univocal object is the *consortium totius vitae* (c. 1055 § 1) or marriage itself (c. 1057 § 2); finally, marriage creates obligations binding on both parties. Consequently, it is asserted that there is present in marriage the minimum elements absolutely necessary to speak of a true contract.

A number of objections have been raised against the description of marriage as a "contract". The common complaint that it is a notion foreign to Oriental thought hardly carries much weight in the context of a Code designed for the Latin Church. It could be claimed that the use of "contract" is continuing a tradition proper to the West. Likewise, the charge of "juridicism" with regard to the use of "contract" undoubtedly has little influence in a canonical context. The juridical aspect is only one of the numerous aspects that make up the reality of marriage in its totality.

⁶⁴ See CASTAÑO, "Il matrimonio è contratto?", pp. 453-458.

Several other objections have also been advanced which appear more weighty. In Roman law, and in private "civil law", a contract is regarded as a "private" affair and tends to be associated with business or finance. Contracts are generally concerned with business or employment relationships, whereas marriage consists of an interpersonal relationship. Moreover, if marriage were to be seen as a contract in the usual sense, the contractants could attach clauses contrary to the ends and properties of marriage, but this cannot be allowed in marriage. Contracts can normally be rescinded, unlike marriage. However, these objections presume a simple univocal idea of "contract", whereas marriage is a contract *sui generis*; in other words, while marriage has the necessary essential prerequisites to be called a contract, it also has special traits which distinguish it from other contracts. One cannot say that marriage is a contract *sic et simpliciter*, but it is only so by analogy.⁶⁵ What is involved is an exchange of rights and duties specific to marriage, that is a contract of a very special kind, as was recognised by the Latin Code Commission, when in 1977 the *coetus* revising the marriage canons maintained that, as a natural reality, marriage is truly a contract.⁶⁶

Accordingly, it is only in a certain sense and with reservations that one can declare that marriage is a contract. As well, we must of course distinguish between marriage *in fieri* and *in facto esse*. The term "contract" cannot really be applied to

⁶⁵ On the analogy involved in seeing marriage as a contract, see CASTAÑO, "Il matrimonio è contratto?", pp. 460-466. See also IDEM, "Natura del *foedus* matrimoniale alla luce dell'attuale legislazione", in *Studia universitatis S. Thomae in Urbe: questioni canoniche*, 22 (1984), pp. 222-224.

⁶⁶ See *supra*, pp. 142-143.

matrimonium in facto esse, which can be described as an *institutio*.⁶⁷ So treating marriage in its natural reality as a "contract" refers only to marriage *in fieri*.⁶⁸ Of course, all of the above begs the question of just how useful the word "contract" is, if so many reservations have to be made. If marriage contains so many exceptions to the generic notion of contract that it is a contract *sui generis*, why bother trying to fit it into the concept of contract? It all sounds a little artificial.

Canon 1055 uses the terms *foedus* (§ 1) and *contractus* (§ 2) to refer to the same reality, marriage *in fieri*; the match between the two terms is demonstrated by the second paragraph's retention of the conjunction *quare*. While not doubting the biblical nuances of "covenant", and remembering its initial meaning in *Gaudium et spes* 48 § 1 as another expression for consent, does the Latin legislation have any real difference in meaning between the two words? It seems not.⁶⁹ For the Latin Code Commission, contracting marriage was the equivalent of celebrating the matrimonial covenant, for the baptized.⁷⁰

⁶⁷ Castaño defines an "institution" as "una realtà squisitamente giuridica, costituita da un blocco di norme che contengono un insieme di diritti e doveri, e, per di più, è un *quid iuridicum permanens*" (CASTAÑO, "Il matrimonio è contratto?", p. 472, footnote 33).

⁶⁸ Castaño maintains that marriage *in fieri* is a contract as an institute of nature, not as a sacrament; he says one cannot term the marriage-sacrament a contract ("Il matrimonio è contratto?", pp. 448, 470, 472-473). The difficulty with this claim lies in harmonizing it with the principle that it is the very contract of marriage which is the sacrament for the baptized; for them sacramentality is not something accessory or additional to the natural reality of marriage, the contract.

⁶⁹ See c. POMPEDDA, 22 July 1985, no. 6, in *SRR Dec*, vol. 77, pp. 397-398. Both terms can be used interchangeably, according to Castaño ("Natura del *foedus* matrimoniale alla luce dell'attuale legislazione", p. 239).

⁷⁰ See *supra*, pp. 151-152.

Yet *foedus* appears to be a richer expression to depict the reality of marriage, both natural and sacramental.⁷¹ The expression *foedus* adds something to the term *contractus* because while "contract" connotes the possibility of revocation and usually involves "things", the term "covenant" presupposes a personal yet public commitment that cannot be revoked.⁷² Unlike "contract", "covenant" seems suitable to describe both moments of marriage: *in fieri* and *in facto esse*.⁷³ Of course, both the expressions *foedus* and *contractus* have to be understood in a *sui generis* sense. The covenant of marriage is a likeness of and shares in the covenant between God and His people: they are not simply identical. *Foedus* was a juridical reality known to the neighbours of the Chosen People (and originally was also used to describe private pacts), yet was adapted by the Scriptures to describe the relations between Yahweh and Israel, and between Christ and the Church. Given the full biblical understanding

⁷¹ See the perceptive comment of Castaño: "Nonostante tutto, resta il fatto che il Concilio ha valorizzato le relazioni tra i coniugi, qualificandole come *foedus* = alleanza, per indicare il suo contenuto biblico. Non si deve dimenticare che nella Bibbia l'alleanza è carica di contenuto soprannaturale. Nell'Antico Testamento si trattava dell'alleanza tra Jahvè e Israele, mentre nell'Apostolo Paolo la 'figura' si converte in 'realtà' e alleanza significa l'unione tra Christo e la Chiesa. Per tutto ciò, l'ammissione nel Codice di Diritto Canonico del concetto del *foedus*, insieme, ma con una preferenza non indifferente al concetto di *contractus*, significa una evoluzione molto positiva ed un arricchimento più che notevole. Tutti i matrimoni, dunque, sono *foedus*. Con il vocabolo 'tutti' ci referiamo al matrimonio sacramento e al matrimonio naturale, benché quest'ultimo non partecipi con la stessa pienezza del significato di alleanza, che invece ha il matrimonio sacramento" (CASTAÑO, *Il sacramento del matrimonio*, p. 40).

⁷² See ROBINSON, "Unresolved Questions in the Theology of Marriage", pp. 95-96.

⁷³ "Covenant" is used for marriage in both senses in the new *Catechism of the Catholic Church* (Ottawa, Canadian Conference of Catholic Bishops, 1994): *in fieri* (e.g., no. 1660), and *in facto esse* (e.g., no. 1662). In the section on the sacrament of matrimony in the Catechism marriage is not termed a "contract", yet contractual language persists, although it is almost used in passing (see nos. 1628, 1629, 1631, 1649, 1650, 1662). But marriage is referred to as a "contract" in the section of the Catechism on offenses against the dignity of marriage (nos. 2381, 2384), where contractual language also is employed (nos. 2364, 2384).

of it, *foedus* seems the better term to portray marriage, certainly in a catechetical sense, since the notion of "covenant" can include contractual elements, while also intimating an interpersonal and sacred bond which has an institutional character.

3. SACRAMENTALITY

In their treatment of the sacramentality of Christian marriage, the two Codes show great divergence, both in the depiction of sacramentality itself and in the description of the relationship between the natural reality of marriage and the sacrament:

CIC c. 1055 § 1. Matrimoniale foedus, [...], a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

CIC c. 1134 Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; in matrimonio praeterea christiano coniuges ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur.

CCEO c. 776 § 2. Ex Christi institutione matrimonium validum inter baptizatos eo ipso est sacramentum, quo coniuges ad imaginem indefectibilis unionis Christi cum Ecclesia a Deo uniuntur gratiaque sacramentali veluti consecrantur et roborantur.

(a) The Description of Sacramentality

In *CCEO* c. 776, natural marriage (§ 1) is distinguished clearly from sacramental marriage (§ 2). In other words, marriage in general is treated separately from the sacrament. So the Eastern text keeps the order of creation in a paragraph separate from the order of redemption, unlike the Latin canon 1055 § 1 which mixes

both by declaring that the natural covenant has been raised to the dignity of a sacrament.

In the Oriental Code, the bond of sacramental marriage is portrayed as an image of the union between Christ and the Church. Unlike the Latin Code, the symbolism of the spouses' union (*ad imaginem indefectibilis unionis Christi cum Ecclesia*) receives explicit mention. In February 1977, the Latin *parvus coetus* did not accept texts that made reference to the marriage of the baptized being a sign of the union between Christ and the Church; no explanation was given for the study group's difficulties with such redactions.⁷⁴ Canon 776 § 2 uses the term *sacramentum* in two senses: first, in the biblical and patristic sense of an insertion into the paschal *mysterion* of the union of Christ and the Church (reflecting the thinking of Eastern theology); then, in the second sense, as an efficacious sign of Christ's grace.

Reflecting the thinking of the Eastern Churches the canon is saying that the sacrament arises not only from the will of the parties, but also from the will of Christ.⁷⁵ The creation of a concrete marriage depends on two peoples' consent, but the essence of sacramental marriage is God-given. God works through and unites the pair (*a Deo uniuntur*). Nonetheless, in this Oriental canon specifically concerned with the sacrament of Christian marriage, there is no mention of the action of the Holy Spirit, which one might have expected. In this regard, the Eastern theology found in

⁷⁴ See *supra*, pp. 143-144.

⁷⁵ See J. PRADER, "Die Ehebegriff im Orientalischen Kodex: Unterschiedliche Bestimmungen zwischen dem CCEO und CIC", in *Archiv für katholisches Kirchenrecht*, 160 (1991), pp. 409-410.

the Oriental Code's canons on the nature of marriage tends to be subtle rather than explicit. As we have shown, the Oriental Churches have seen the action of the Holy Spirit as taking place through the intervention of the priest. The notion of the divine action uniting the couple is not found in the Latin Code.⁷⁶

When it comes to the notion of "consecration" in the Oriental Code, *Gaudium et spes'* statement that Christian spouses are "strengthened and, as it were, consecrated" by the sacrament of marriage has been changed in canon 776 § 2 to the declaration that the spouses are "as it were, consecrated and strengthened by sacramental grace." The word *veluti* is applied to both *consecrantur* and *roborantur*, and the reference is to the grace of the sacrament rather than to the sacrament itself. There appears to be no reason why the modifier "as it were" needs to be applied to the "strengthening" received through the celebration of the sacrament. We have already seen how a previous formulation of the canon was clearer and more faithful to the conciliar Constitution.⁷⁷ Indeed, although the Latin Code does not include the concept of consecration in its initial description of marriage, canon 1134 in Chapter IX ("The Effects of Marriage") is completely faithful to the text of *Gaudium*

⁷⁶ The following comment by Navarrete demonstrates how he explains this phrase in a very Latin way: "Reapse verba Domini non possunt sumi sensu causalitatis efficientis ac si Deus ageret causaliter modo diverso ac agit quoad alias causas secundas. Scimus utique in Sacramentis omnibus Deum actuare opus sanctificationis modo peculiari, per Christum summum et aeternum sacerdotem, qui semper est 'sacerdos princeps' in omni actione sacramentali. At non apparet ratio ulla theologica ad hoc ut in sacramento matrimonii tribuatur Deo activitas efficiens indolis diversae ac in aliis sacramentis. Ideo illa locutio 'a Deo uniuntur' tali modo intelligenda est ut nihil minuat causalitati efficienti illius 'Matrimonialis foedus' seu 'irrevocabilis consensus personalis', quo vir et mulier constituuntur maritus et uxor, atque, si sunt baptizati, perficiunt foedus quod est eo ipso sacramentum" (NAVARRETE, "Jus matrimoniale latinum et orientale", pp. 615-616).

⁷⁷ See supra, p. 180.

et spes in this regard. This canon, unlike c. 1055 § 1, addresses the orders of creation and redemption separately: it speaks first of marriage in general (the perpetual and exclusive bond), while the last part, divided by a semi-colon, deals with the strength and *quasi*-consecration given by the Christian sacrament. With reference to the idea of "consecration", there is little doubt that the Latin Code has the better formulation.

(b) The Relationship between the Natural Reality of Marriage and the Sacrament

We recall that Vatican II and the post-conciliar documents taught that the sacraments are acts of faith, and that they presuppose faith. However the Council did not discuss the precise relationship between marriage as a natural reality and its sacramentality for the marriages of the baptized.

It is not the purpose of our study to investigate the disputed issue of the relationship between valid marriage and the marriage-sacrament, but to compare the ways in which the two Codes approach the matter.⁷⁸ The identification of the natural reality of marriage with the sacrament, for the baptized, is more in accord with the Western rather than the Eastern tradition on marriage, yet both current legislations uphold the idea, even if they do so in different ways. Although, as we have seen, the principle of inseparability arose in a largely Western context, and is not readily appreciated in the Oriental theological and canonical tradition (many Oriental non-Catholic Christians saw no great difficulty in separating civil marriage

⁷⁸ For a *status quaestionis* concerning the identity of the marriage-contract with the marriage-sacrament, see AZNAR GIL, *El nuovo derecho matrimonial canónico*, pp. 87-97.

from the sacrament), we should not be too surprised to see the principle reasserted in the new Eastern Catholic legislation.⁷⁹ In the course of its deliberations, the Latin Commission's stance on this issue hardened considerably, and so once the 1983 Latin Code had adopted this position, it was nearly inevitable that the 1990 Oriental Code would follow suit, as its omission there would have led to a great deal of speculation about the principle's precise status. On such a question so closely connected with the Catholic doctrine on Christian marriage, and which has provoked so much debate, the legislations were bound to coincide substantially.

In the *CIC*, the principle of inseparability is enunciated strongly, but in a negative construct, whereas the *CCEO* asserts this tenet in a more straight-forwardly positive way. Oriental canon 776 § 2 simply says that a valid marriage between baptized persons is *eo ipso* a sacrament, *ex Christi institutione*. Interestingly, neither "contract" nor "covenant" appear in this paragraph which has no explicit link with the first paragraph concerning marriage as a natural reality.⁸⁰ The Latin Code, having

⁷⁹ The fact that the inseparability principle came to be asserted in a particular Western historical context of conflict between Church and State does not of course rule out the possibility that the principle contains a theological truth of relevance for the whole Church today. See M.J. HIMES, "The Intrinsic Sacramentality of Marriage: The Theological Ground for the Inseparability of Validity and Sacramentality in Marriage", in *The Jurist*, 50 (1990), pp. 198-220.

⁸⁰ D. Faltin, speaking of the 1986 schema which in this regard remains unchanged in the promulgated canon, complains that the "separatist" school prevails in the Oriental text, on account of the following reasons: *quare* is not found in the Oriental canon; the first paragraph does not mention that the marriage-contract becomes of its very nature a sacrament; finally, the first part of the second paragraph gives "the idea that the sacrament is not an essential element of the matrimonial contract between the baptized, but only something accessory to the matrimonial pact which is already valid, a thesis which is theologically erroneous" (D. FALTIN, "The Exclusion of the Sacramentality of Marriage with Particular Reference to the Marriage of Baptised Non-believers", in J.A. ALESANDRO [ed.], *Marriage Studies*, vol. 4, Washington, DC, Canon Law Society of America, 1990, p. 87). However, neither the text of the canon (which uses the phrase *eo ipso*) nor the work of the Oriental Commission as recorded in *Nuntia* (see *supra*, p. 176) provide support for this view.

first declared that Christ raised the covenant of marriage to the dignity of a sacrament, then attests that consequently there cannot be a valid marriage contract between the baptized without its being a sacrament by that very fact. The notion of *evectio* is absent in the Oriental canon which nevertheless attributes the principle of inseparability to the institution of Christ, an idea not obvious in the Latin canon. Nonetheless, the latter in its negative construction appears to convey a very "automatic" view of marriage's sacramentality, something bound to the simple fact of baptism. The Oriental statement seems more theologically nuanced.

When dealing with marriage as a sacrament, it is necessary to remember that it is unlike the other sacraments, and so comparisons are not always enlightening. The Lord did not institute *ex novo* the sacrament of matrimony, as he did for instance in the case of the Eucharist, but rather took an already existing *institutum naturale* (whose institution is narrated in Genesis 1:26-28, 2:18-24) and gave it a sacramental quality. Marriage is itself an ordinary reality that *ex se* and *in radice* was converted into a sacrament.

The Council of Trent had taught that the ministers of the sacraments must have at least the *intentio faciendi id quod facit Ecclesia*.⁸¹ Since the couple are considered the ministers of the sacrament in the Latin tradition, this minimum intention, usually called a virtual implicit intention, would be necessary on their part for the valid conferral of the sacrament of matrimony, yet this intention was assumed

⁸¹ See COUNCIL OF TRENT, Session 7, 3 March 1547, Canon 11 on the Sacraments in General, in TANNER, vol. 2, p. 685.

to be present when the couple intended to enter marriage in the usual way. For the valid reception of the sacrament on the part of the subjects, an habitual intention (either implicit or explicit) of receiving the sacrament would be required. In the past, a rigid automatism dominated thinking in this area: the simple fact that the two spouses were baptized, automatically made their marriage a sacrament. Reflecting the Latin canonical tradition, it was maintained that the parties, ministers of a sacrament that they reciprocally confer and receive, could without faith receive the sacrament of matrimony, provided they had the will to enter marriage, since the faith of the minister is not required for the valid conferral of sacraments; the sole condition was that there be no defect of will.

However, after the Second Vatican Council, the Church became very conscious of the role of faith in the celebration of the sacraments. Marriage is not a sacrament of Christian initiation: it requires a certain level of positive conscient participation, for its reception. If the sacrament of matrimony is regarded in the biblical and patristic sense as an insertion into the paschal *mysterion* of the union between Christ and the Church and also as an efficacious sign of Christ's grace, it is perplexing to comprehend how a person who lacks Christian faith can celebrate the sacrament.⁸² In 1977, the International Theological Commission seemed to affirm

⁸² See the discerning comment of R. Finn: "In reference to the sacrament of matrimony its sacramental definition cannot be realized divorced from an intimate association with the Church. To intend what the Church does is an empty phrase without a real reference to the understanding of the community of faith. A sacramental marriage is specified as the work of the Church, a sanctifying action which demands the free embrace of the parties" (R.C. FINN, "Faith and the Sacrament of Marriage: General Conclusions from an Historical Study", in T.P. DOYLE [ed.], *Marriage Studies*, vol. 3, Washington, DC, Canon Law Society of America, 1985, pp. 103-104).

indirectly that at least a trace of faith (in the sense of belief, being disposed to believe) is necessary for the valid celebration of the sacrament.⁸³ It is difficult for the total non-believer to form a right intention, that is the intention of entering a true marriage with at least the implicit intention of doing what the Church does. In other words, to have the right and prevailing intention of accepting the conjugal covenant as instituted by the Creator requires some vestige of faith: total refutation of faith means that the presumption the spouses wish to "marry in the Lord" is overcome. The difficulty of course lies in assessing what is meant by a "non-believer".⁸⁴ The validity of the sacrament of marriage cannot be made to depend on the degree of intensity of the spouses' faith.⁸⁵ So while some faith is needed, it seems that a living

⁸³ In Proposition 2.3, the Commission stated: "Intentio requisita, nempe faciendi quod facit Christus et Ecclesiae, est conditio minima, ut consensus fiat sub aspectu sacramenti verus 'actus humanus'. Etiam si quaestio circa intentionem et problema circa fidem personalem contrahentium non misceri debeant, tamen non totaliter separari possunt. Intentio vera ultimatum fide viva nascitur et nutritur. Ubi ergo nullum vestigium fidei qua talis (in sensu vocis 'Gläubigkeit', 'croyance', = paratum esse ad fidem) et nullum desiderium gratiae et salutis invenitur, dubium facti oritur, utrum supradicta intentio generalis et vere sacramentalis reapse adsit, et matrimonium contractum validum sit an non. Fides personalis contrahentium per se, ut ostensum est, non constituit sacramentalitatem matrimonii, sed sine ulla fide personali validitas sacramenti infirmaretur" (COMMISIO THEOLOGICA INTERNATIONALIS, *Propositiones de quibusdam quaestionibus doctrinalibus ad matrimonium christianum pertinentibus*, p. 458)

⁸⁴ See the sagacious observation of M.F. Pompèdda: "[...] behind the expression 'baptized non-believer' there are situations that run the gamut from the ignorant baptized person to the non-practicing baptized person; from the baptized person who has lost the faith but who holds onto a certain basic religiosity, to the baptized person who has lost the faith altogether; from the baptized person who does not accept the Christian plan of marriage in some of its aspects to the baptized person who contests the sacramentality, and any religious institutionalization, of marriage" (M.F. POMPEDDA, "Faith and the Sacramentality of Marriage: Lack of Faith and Matrimonial Consent — Juridical Aspects", in J.A. ALESANDRO [ed.], *Marriage Studies*, vol. 4, Washington, DC, Canon Law Society of America, 1990, p. 56).

⁸⁵ The Oriental Commission was aware of this; see *supra*, p. 176.

and explicit faith is not required for the validity of the sacrament; a specific intention or will to accept marriage as a sacrament is not needed.⁸⁶

In response to the 1980 Synod's treatment of the post-conciliar debate, Pope John Paul II in *Familiaris consortio* (1981) did not exclude the necessity of personal faith for the celebration of Christian marriage, yet stated that a Christian couple through their right intention (which is to be presumed) accept the divine plan for marriage, and thus give, at a minimum, implicit consent to what the Church intends to do.⁸⁷ Faith, like love, is not something amenable to juridical measurement, and the Pope is clearly averse to setting up a faith criterion, on account of the hazard of throwing doubt on already existing Christian marriages and of the risk of faulty rulings by pastors. So the emphasis is placed on the couple's correct intention. However, *Familiaris consortio* did not decide whether a marriage ought to be regarded as sacramental when two baptized spouses lack faith, or whether the principle that a valid marriage between the baptized is always a sacrament, applies to the case of spouses who have lost the faith. As well, neither the new Latin nor the Oriental canons say anything about the conditions required by theological doctrine for reception of the marital sacrament.

⁸⁶ The current Dean of the Rota proposes that lack of faith should be treated on the canonical level as an *error personam pervadens*. See POMPEDDA, "Faith and the Sacramentality of Marriage", pp. 51-62.

⁸⁷ See *supra*, pp. 123-124.

Although both Codes describe sacramentality differently, neither explicitly calls it an essential element or property of marriage.⁸⁸ Both *CIC* c. 1099 and *CCEO* c. 822 (on error of law) speak about unity, indissolubility and sacramental dignity in the one breath, implying that sacramentality has a value equivalent to unity and indissolubility. We recall that during the Latin revision process, the term "sacramental dignity" was dropped from *CIC* c. 1101 § 2 for ecumenical reasons, a line subsequently also followed by the Oriental Code Commission.⁸⁹ So the exact juridical nature of sacramentality remains undefined in the Codes, its being called neither a property nor an element. Yet given our examination of the initial Latin and

⁸⁸ Older jurisprudence holds that the positive exclusion of sacramentality is equivalent to total simulation, on the grounds that since valid marriage and sacrament are inseparable, the exclusion of the second is the same as excluding the first. Marriage is valid if the party truly wishes to marry but simply excludes sacramentality in his/her consent; the intention to exclude sacramentality must override the intention to marry itself, for the marriage to be invalidated. In other words, the will contrary to the sacrament must "prevail" over the will to enter marriage. For the marriage to be invalid, it would not be sufficient for the party to posit: "I wish to marry, but don't accept the sacrament"; rather, the attitude would have to be: "I want the marriage but not the sacrament; if I must have the sacrament, then I don't wish to marry." The problem with this jurisprudence is well summed up by J. Prader: "Infatti, è una contraddizione, affermare che non può esservi matrimonio valido tra battezzati che non sia in virtù di ciò sacramento, e contemporaneamente affermare che la semplice positiva esclusione del sacramento non rende invalido il matrimonio, salvo che la volontà esclusiva non sia così forte da escludere lo stesso matrimonio. È incongruente considerare l'esclusione del sacramento come simulazione totale e considerare l'esclusione dell'unità, dell'indissolubilità, della fedeltà e della prole come simulazione parziale. [...] Non occorre affatto vedere se nella celebrazione del matrimonio fosse prevalente o meno l'intenzione di escludere il matrimonio stesso. L'esclusione del sacramento è da considerarsi un motivo a se stante di nullità" (PRADER, *Il matrimonio in Oriente e in Occidente*, p. 172). See also the criticism of this jurisprudence by the Rotal judges M.F. Pompedda (POMPEDDA, "Faith and the Sacramentality of Marriage", pp. 42-44, 63) and D. Faltin (FALTIN, "The Exclusion of the Sacramentality of Marriage with Particular Reference to the Marriage of Baptised Non-believers", pp. 93, 95-96, 101-102).

A newer approach favours treating sacramental dignity as an essential element or property, so that in the case of simulation, it would be partial, unless in excluding sacramentality the party intended to reject marriage itself. See, for instance, c. BRUNO, 26 February 1988, no. 3, in *SRR Dec*, vol. 80, pp. 167-168; English translation in *Law Sections*, selected and translated by L.G. WRENN, Washington, DC, Canon Law Society of America, 1994, pp. 68-69.

⁸⁹ See *supra*, pp. 166, 193.

Oriental canons there can be little doubt that sacramental dignity should now be treated as equivalent to either an essential property or to an essential element of Christian marriage.⁹⁰

4. WHAT CREATES A MARRIAGE

In the Eastern Code, an effort has been made to respect the Oriental understanding of marriage's formation: first, by demanding the sacerdotal blessing for validity (barring exceptions), and secondly, in a negative sense, by not introducing the Western theology of the spouses as ministers of the sacrament, although indeed the Latin Code itself never explicitly says anything about the minister.

No matter which way one looks at marriage theologically, it is agreed that consent is essential. This act of the will must be a free and conscious human decision, the clear choice of the person concerned, taken after sufficient deliberation. The principle that marital consent cannot be supplied by anybody but the spouses is an idea accepted in both East and West:

CIC c. 1057 § 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet.

CCEO c. 817 § 2. Consensus matrimonialis nulla humana potestate suppleri valet.

⁹⁰ Navarrete holds that sacramental dignity is similar to a property, and has the same juridic weight, even if it is not declared to be a property (NAVARRETE, "I beni del matrimonio", p. 94). D. Faltin thinks that sacramental dignity is an essential element, implicit in c. 1055 § 1 (FALTIN, "The Exclusion of the Sacramentality of Marriage with Particular Reference to the Marriage of Baptised Non-believers", p. 88). Accordingly, it appears that cases regarding sacramentality could be studied under the following headings: the positive exclusion of an essential element or property; error determining the will concerning an essential element or property. Faltin also holds that it is possible to deal with such cases as an exclusion of the *tria bona*, and as an inability to assume the essential obligations of marriage (see *ibid.*, p. 88).

The first paragraph of *CIC* c. 1057 basically reproduces the traditional Latin canonical principle *consensus facit nuptias*. Its omission in explicit terms by the new Oriental Code, unlike the previous legislation, *Crebrae allatae* (1949), received no explanation in *Nuntia*, yet the deletion is quite understandable given the great importance in Eastern thought of the priestly blessing in the formation of marriage. There can be little doubt that the exclusion of this axiom is intentional, as it does not illustrate well Oriental doctrine concerning marriage. It could of course be claimed that the principle is implicit in *CCEO* c. 776 § 1 ([...] *quo vir et mulier irrevocabili consensu personali totius vitae consortium inter se constituunt* [...]), i.e. the spouses *themselves* constitute the marital partnership by their irrevocable personal consent.⁹¹ Nonetheless, this idea is certainly not explicit in the canon.

In the West, in both canon and civil law, it is a common principle that the consent of the partners is the "efficient cause" of marriage.⁹² The Latin canon moreover states that for the consent to be efficacious, that is for it truly to produce or formally cause the marriage, the parties must be free from impediments and

⁹¹ See NAVARRETE, "Jus matrimoniale latinum et orientale", p. 633. He also maintains (p. 636) that the principle *matrimonium facit consensus partium* is implicit in the *CCEO* because the layout of the article on marriage presupposes this premise. This is a legitimate method of interpretation (see cc. 2, 1499). On the other hand, connected with this is another fundamental question: whether the layout itself reflects a "Latinized" schema. Nonetheless, Navarrete's view receives some support from the early discussion by the marriage study group of the first draft of c. 776 § 1, when the *coetus* thought that the draft paragraph said the cause of marriage is two-fold: God, in so far as the conjugal community is "established by the Creator and endowed by Him with its own laws"; the spouses, in so far as their marriage "is constituted by the covenant of matrimony or irrevocable personal consent". See *supra*, p. 175. Of course, this draft paragraph got altered later on in the revision process.

⁹² The efficient cause is understood as the *principium cuius operatione aliquid transit de non esse ad esse*. See NAVARRETE, "Jus matrimoniale latinum et orientale", p. 634.

incapacities; in addition, consent must be manifested according to the solemnities prescribed for validity (canonical form). In the *CCEO*, there is no explicit connection between the canon on consent and canonical form. The act of consent is the central point around which the Western canonical doctrine on a marriage's coming into being is constructed. The East, while fully accepting that consent is essential for the creation of a marriage, is much more conscious of the role of the Church in the formation of the marriage union.⁹³

In *CCEO* c. 776 § 2, the text speaks of the divine action uniting the couple (*a Deo uniuntur*); this idea is very important in Eastern thought. The implication is that, although the couple give their consent to the marriage, it is God who receives this consent and unites the pair. In the revision process, the Oriental Secretariat strongly rejected the suggestion that it is not God who unites the spouses, by appealing to the Eastern liturgical books and also to the Gospel. They were probably thinking of

⁹³ M. Thériault contends that it does not matter that the Eastern Catholic view on the form of marriage and on marriage consent is not the same as the Latin one. After stating that in Orthodox theology the mutual consent of the couple is regarded as the indispensable precondition for receiving the sacrament, which is celebrated through the blessing of the priest, he says that this is perfectly acceptable Oriental Catholic theology also. See M. THÉRIAULT, "Canonical Questions Brought About by the Presence of Eastern Catholics in Latin Areas in the Light of the *Codex canonum Ecclesiarum orientalium*", in *Ius Ecclesiae*, 3 (1991), p. 226.

On the other hand, M.P. Minehan, noting the explicit inclusion of the notion *matrimonium facit consensus partium* in c. 72 § 1 of *Crebrae allatae*, claims that this is an area where Eastern Catholic and Eastern Orthodox canonists disagree. Moreover, he doesn't attribute any significance to, or even discuss, the omission of this paragraph in the new Oriental Code. See M.P. MINEHAN, *The Nature of the Sacrament of Marriage According to the Latin and Eastern Codes*, J.C.L. thesis, Washington, DC, The Catholic University of America, 1992, pp. 10, 54.

Matthew 19:6 and Mark 10:9.⁹⁴ At the final stage of the Oriental revision process in 1988, there was a motion maintaining that in Eastern thought it is not consent alone which creates marriage. This motion certainly seems in consonance with the Oriental traditions. Yet, the proposal that both matrimonial consent and the blessing of the Church are essential to the constitution of marriage failed to get discussed because of procedural difficulties.⁹⁵ It was however stated that this had already been studied, but unfortunately we have no record of any discussion of this fundamental question in the Commission, an issue which lies at the very heart of much Eastern thought on marriage. One gets the impression that there is something of a compromise in this area: while this proposal was unsuccessful, the Code also never explicitly states that "consent creates marriage". There seemed to be a reluctance on the part of the Oriental Code Commission to name the act(s) that constitute a marriage.⁹⁶ Ultimately the new Oriental legislation is silent on this profound matter. So the precise relationship between the canonical principle *matrimonium facit consensus partium*, repeated by Paul VI in his 1976 Rotal address,

⁹⁴ For an example of a Byzantine liturgical text speaking of the divine intervention, a priestly prayer, see A. RAES, *Le mariage: sa célébration et sa spiritualité dans les Églises d'Orient*, Chevetogne, Ed. de Chevetogne, 1958, p. 62.

⁹⁵ See *supra*, pp. 182-183.

⁹⁶ This reluctance to delve into the question of what acts constitute marriage may have been connected with such issues as the fact that at one stage in the Alexandrian Church the reception of Holy Communion was required along with the priestly blessing for the valid celebration of marriage, according to the thirteenth-century *Nomocanon* of Ibn-al-Assal. Today, Communion is not part of the essential nuptial service of the Coptic Orthodox Church, but in the Ethiopian Orthodox Church a marriage celebrated without Communion is not considered sacramental or indissoluble (see PRADER, *Il matrimonio in Oriente e in Occidente*, pp. 196-197).

and the Eastern doctrine on marriage's formation remains obscure in the Eastern Code, which nevertheless has a tri-dimensional view of marriage as a "threefold pact".

The failure to mention the blessing of the Church in the Oriental Code's "defining canons" on marriage probably stems from the difficulty that would arise in explaining the case of "emergency marriages" and from fears that somehow it might throw doubt on other marriages (Catholic and non-Catholic) legitimately celebrated without the priestly blessing.⁹⁷ Perhaps this omission shows a failure to follow through on an authentic Eastern tradition. The priestly blessing is given full recognition in the Oriental Code's section on canonical form, but the underlying theological issue of what exactly constitutes marriage in the Eastern Churches is left

⁹⁷ If, in Oriental thought, the priest is regarded as the minister, Navarrete asks how can one explain marriage celebrated solely before witnesses (*CCEO* c. 832), the possibility of dispensation from the canonical form (*CCEO* c. 835), or convalidation through the simple renewal of consent by one of the parties (*CCEO* cc. 845-846) or through a *sanatio in radice* (*CCEO* cc. 848-852)? See NAVARRETE, "Jus matrimoniale latinum et orientale", pp. 638-639). So he claims the priest is not, or at least not always, the minister of the sacrament.

However, the question arises whether these canonical institutes are really "Latinizations". Oriental Christians cannot empathize with a Christian marriage celebrated without the active cooperation of the Church. In many ways the figure of the "emergency marriage" (*CCEO* c. 832) is a Latinization, somewhat foreign to the Oriental mindset, although an exception to the requirement for the priestly blessing was found in the fifth century canons of the Chaldean Church (see *Fonti orientales*, Series II, fac. XV, pp. 183-184). The insistence (*CCEO* c. 832 § 3), without a parallel in the Latin Code, that the couple in such a case should later seek the priestly blessing is an evident effort to respect the Eastern tradition. Nevertheless, in this context, one cannot but agree with Thériault who wonders if it would not have been better for the new Eastern Code to ignore the extraordinary form of marriage without witnesses, present in general Oriental Catholic canon law merely since 1949. See THÉRIAULT, "Canonical Questions Brought About by the Presence of Eastern Catholics in Latin Areas in the Light of the *Codex canonum Ecclesiarum orientalium*", pp. 227-228.

Finally, in response to Navarrete, it needs to be said that legal dispensation from the sacerdotal blessing seems strange to the eyes of Oriental Christians.

unexplained.⁹⁸ This problem is of course directly related to the minister of the sacrament.⁹⁹

Article 1623 of the new *Catechism of the Catholic Church* sheds some light on this issue:

In the Latin Church, it is ordinarily understood that the spouses, as ministers of Christ's grace, mutually confer upon each other the sacrament of Matrimony by expressing their consent before the Church. In the Eastern liturgies the minister of this sacrament (which is called "Crowning") is the priest or bishop who, after receiving the mutual consent of the spouses, successively crowns the bridegroom and the bride as a sign of the marriage covenant.¹⁰⁰

Note the idea that the spouses are the ministers of the sacrament in the Latin Church is qualified by "ordinarily understood"; in other words, the Catechism does not attempt to make a clear assertion. In addition, when it comes to the East, it is not said that the priest/bishop is the minister in the Eastern Churches, but rather that he is the minister when the marriage is celebrated during the Oriental liturgy. One thing is reasonably clear: it has been accepted by the Church that the priest is sometimes

⁹⁸ In its section on canonical form, the new Oriental Code is faithful to Eastern tradition in that it does not provide for deacons or laypeople to officiate at weddings, in contrast to the Latin Code. In addition, the Eastern legislation differs from the Latin Code in the refusal to recognise the validity of any type of conditional marriage.

⁹⁹ Navarrete defines the minister of the sacrament in the strict sense: "[...] de illa persona humana, quae, nomine Christi, perficit signum sensibile significans et efficiens gratiam, in quo consistit sacramentum" (NAVARRETE, "Jus matrimoniale latinum et orientale", pp. 636-637).

¹⁰⁰ *Catechism of the Catholic Church*, no. 1623, p. 345. Yet, later, it is said in no. 1626 that the Church holds the exchange of consent between the spouses to be the indispensable element that "makes the marriage", quoting *CIC* c. 1057 § 1 (*ibid.*, p. 346). One difficulty is that in the section on marriage, unlike other parts of the Catechism, there is no reference whatsoever to the Oriental Code, while the Latin Code is quoted, and referred to in the footnotes.

the minister of the sacrament. The Catechism seems to be the first document in which the magisterium has explicitly acknowledged this Eastern concept. In these cases where the priest is the minister, it is not clear how the principle *consensus facit nuptias* holds in the strict sense.

CONCLUSION

In line with the personalistic vision of the Second Vatican Council, both Codes call marriage a "covenant". From our analysis, this seems a better term than "contract" to describe marriage: perhaps in this area the Latin Church could have learned from the East, and have dropped "contract" completely. In common, the "defining" canons of the two legislations characterise marriage as a *consortium totius vitae*; we have shown that a "communion of life" is an essential component of this perpetual and exclusive partnership. By simply adopting the conciliar expression *sese mutuo tradunt et accipiunt*, the Codes do not spell out any further the rights and obligations exchanged in marriage consent; in other words, the formal object of consent is not delineated beyond the statement that it is the *consortium totius vitae*. Nevertheless, from the canons we have been able to identify the *bonum prolis* and the *bonum coniugum* as essential elements of the formal object, while the essential properties of marriage are indissolubility and unity (in the broad sense of exclusivity).

For Christian marriage, sacramentality is considered akin to an essential element or property.

What has not been settled in jurisprudence is the meaning of the *educatio prolis* within the *bonum prolis*, and the essence of the *bonum coniugum*. Likewise, outside of the perpetual and exclusive right to conjugal acts performed in a natural human manner, the extent of the essential *bonum fidei* has not yet been agreed upon. Moreover, the precise role of love in marriage remains an area of debate in canonical doctrine.

The Eastern Code's more theological approach is shown in the way canon 776 clearly distinguishes natural marriage from sacramental marriage, and then in its description of the symbolism of the Christian couple's union. Both legislations employ the notion of "consecration", but the Oriental Code does so in its "constitutional" canons. We have shown that the Eastern Code has a "three-fold" view of marriage's nature: the divine role is clearly enunciated, whereas the Latin Code's vista is more clearly legal and focusses on the couple's consent. Even the inseparability principle is more theologically nuanced and expressed in terms which don't convey quite the same rigid automatism apparent in the Latin legislation.

However, the Eastern Code has no mention of the Holy Spirit in its canons on marriage's nature. Furthermore, while the Oriental canon 776 is certainly expressive of the role of the Creator, it is not completely faithful to *Gaudium et spes* 48 in several ways, thus losing some of its richness, especially the idea — communicated so clearly in the conciliar text — that the laws which govern marriage

emanate from and are part of its divinely-given essential structure and nature (a concept also found throughout the post-conciliar magisterium). In addition, the Eastern Code fails to be true to Oriental tradition by not including the notion of the Church's blessing in the "defining" canons. A point which needs to be developed in doctrine is how the axiom *matrimonium facit consensus partium*, of Western canonical origin but also taught by Popes, fits (or indeed doesn't fit) into the Eastern doctrine concerning marriage's formation.

GENERAL CONCLUSION

In this dissertation, we have explored the different and common ways that the *CIC* and the *CCEO* portray the nature of marriage, and have tried to explain these ways by situating our study against an historical and theological background of the Church's thinking on marriage. However, a number of difficulties have encumbered us. One is that *Nuntia* and *Communicationes* do not always explain fully the reasoning behind the adoption of a particular formulation: *Nuntia* is especially cryptic about some decisions. Another problem is that the Oriental *fontes* have not yet been published. Finally, there is always the danger of interpreting Eastern theological ideas with a Western canonical mindset. Nonetheless, at the end of our work, we are in a position to make some general comments.

One point apparent from our study is that the Eastern approach to the sacrament of marriage was and is different from that of the West. The theology of marriage in the Eastern traditions does not begin with the natural human character of marriage, but with the supernatural union of Christ and the Church that marriage images. For Eastern Christians, marriage is fundamentally a *quid sacrum*. So the new Oriental Code is faithful to Eastern tradition when the symbolism of the spouses' union (*ad imaginem indefectibilis unionis Christi cum Ecclesia*) receives explicit mention, unlike the Latin Code. Moreover, natural marriage is distinguished clearly from sacramental marriage. This too seems in accord with Eastern tradition. However, while the *CCEO* is to be applauded, in contradistinction to the *CIC*'s initial

canons, for keeping the orders of creation and redemption in separate paragraphs, and furthermore for spelling out the role of the Creator in a clause (*a Creatore conditum Eiusque legibus instructum*), we have observed how this Oriental text loses something of the nuance found in *Gaudium et spes* 48.

In the East, from early on, the mutual consent of the Christian couple was regarded more as a spiritual act than a legal one. The mystical meaning associated with marriage meant that the idea of "contract" did not have the same influence as in the West. The new Oriental Code is certainly loyal to Eastern tradition by not employing the term "contract", and in this regard is a great improvement on the previous legislation *Crebrae allatae* (1949).

The Eastern Code views marriage as a "threefold pact": God works through the couple and unites them. The notion of the divine action uniting the couple has not been stressed in the Western canonical tradition and is not found in the present Latin Code. Nonetheless, in the Oriental canons specifically concerned with the sacrament of Christian marriage, there is no mention of the action of the Holy Spirit, nor of the Church's blessing. This is a weakness. In addition, how the canonical principle *consensus facit nuptias*, an axiom never explicitly stated in the *CCEO*, fits in with the tri-dimensional Oriental view of marriage's formation remains a point to be investigated in canonical doctrine, especially in those cases where the priest is considered to be the minister. In the West, the concept of canonical form was very much a legal imposition, whereas in the way the Oriental traditions developed, the sacred rite was something intimately connected with the sacrament itself.

There is no doubt that both Code Commissions have made efforts to reflect fully the teaching of *Gaudium et spes*. The inclusion of the notion of "consecration" in the formulation of the canons is one such very welcome effort. It is unfortunate that the Latin Code does not include it in the "defining" canons, and while the Oriental Code is to be commended for placing the notion there, it can be faulted for straying from the formulation of the conciliar Constitution: there appears to be no reason why the modifier *veluti* needs to be applied to the "strengthening" received through the celebration of the sacrament.

There are two areas of theological controversy, indissolubility and the principle of inseparability between valid marriage and sacrament, where it is unrealistic to have expected the legislations to have adopted stances different from each other. The Codes cannot be expected to solve theological debates. First, the general assertion of indissolubility is held to be part of certain Catholic doctrine, and moreover, the refusal to dissolve a consummated Christian marriage is not regarded simply as a matter of discipline. Accordingly, the Oriental Code must hold to these positions, whatever about some Eastern traditions, although it needs to be said that the general avowal of indissolubility poses few problems for these traditions; rather it is with the second part of the above statement that these traditions conflict. Secondly, the identification of the natural reality of marriage with the sacrament, for the baptized, is more in agreement with the Latin rather than the Oriental legacy on marriage, yet both current Codes sustain the principle, even if they do so in different ways; the Eastern Code is to be praised for its straight-forward more theologically aware

formulation. Here also, where there is a theological tenet involved (although it is not at all clear that this has the same Catholic theological status as the preceding issue of indissolubility), one which has provoked so much debate, the legislations were destined basically to agree. In disputed questions, Church law tends to preserve the *status quo*. Again, we need to recall that neither the new Latin nor Oriental Codes say anything about the circumstances required by theological teaching for reception of the marital sacrament.

One of the most manifest dissimilarities of approach to the nature of marriage is the Latin Code's retaining the word "contract" to depict marriage. It is only in a particular sense and with reserve that one can claim that marriage is a contract, which begs the question just how meaningful is the word "contract". At Vatican II, the Oriental Catholics had an influence on *Gaudium et spes*' dropping of "contract", but the Latin Code Commission was clearly reluctant to follow this model. There is bound to be an interchange of ideas between the Eastern Catholic Churches and the Latin Church, a healthy phenomenon, provided that it doesn't constantly lead to "Latinization". It is a disappointment that the Latin Code was not "Orientalized" in this regard. The expression that the Codes use in common (*foedus*) is a richer idea than the term *contractus*: "covenant" intimates a personal, yet public sacred commitment, that cannot be revoked; it is appropriate for depicting the two aspects of marriage (*in fieri* and *in facto esse*), and for delineating marriage both in its natural and sacramental reality. Of course, no matter what expression is chosen to describe marriage, it must be grasped in a *sui generis* sense: the covenant of marriage is a

resemblance of and participates in the covenant between God and His people; these covenants are not simply interchangeable, especially because the marriage covenant is between two equals.

The expression used in both introductory canons for the totality of the marital community is *consortium totius vitae*. This is an example in the Eastern Code of the influence of the Latin drafting process: like on several other points, there was a great anxiety not to have major differences with the Latin Code. This anxiety was one of the major influences on the work of the Oriental Commission. Obviously the fear was of divergent interpretations in jurisprudence if different expressions were employed to describe similar aspects of marriage such as the object of consent. Anyway, the term *consortium totius vitae* was known to Oriental tradition, so its insertion into the Eastern law can hardly be criticised. Although the phrase *communio vitae* doesn't appear explicitly in the Codes, this mutual help, the close two-in-one relationship perceived in the biblical sense, can be understood as forming part of the *consortium*, along with the physical sexual relationship.

The new Codes give an equal standing to the procreative and interpersonal sides of marriage, and so largely settle a post-conciliar debate whether Vatican II meant to develop further the pre-conciliar magisterial thinking. It needs to be remembered that there were hints of this unfolding in Pius XI's *Casti connubii*, which gave the interpersonal relationship in marriage a primacy of honour, a primacy in the wide sense, and which also used the terminology of *translatio propriae personae*. The equality of the ends of marriage, which is implied if not completely plain in *Gaudium*

et spes, is explicit in the new legislations. In this matter, the Codes clarify the teaching of the Council.

The unitive dimension has now received juridical recognition in the expression "the good of the spouses". The *bonum coniugum*, a term from *Gaudium et spes*, appears in both Codes as an end of marriage, yet we have shown that it also pertains to the formal object of consent as an essential element, along with the *bonum prolis*. The essential contents of these *bona* have not yet been settled in jurisprudence. These join the essential properties of marriage, indissolubility and unity (in the broad sense of the *bonum fidei*), as essential obligations which the parties must at least implicitly assume in the celebration of matrimony. Although the two Codes portray sacramentality differently, and neither calls it a property or an element, both do insinuate that sacramentality has a significance commensurate with unity and indissolubility. In jurisprudence, sacramental dignity is now being treated as equivalent to either an essential property or to an essential element of Christian marriage.

Finally, it needs to be said that it is very difficult to express the complete nature of marriage in legal terms. Marriage is a complex social, human, and ecclesial reality, not always easy to describe within the parameters of canon law. For instance, some theological concepts like "faith" and "love" are not amenable to juridical delineation, and the evaluation of their presence or absence is a hazardous task, so the Codes avoid them. Faithful to the old adage, "in law definitions are dangerous", the new legislations refrain from giving definitions of marriage, yet they nonetheless

are to be acclaimed for attempting oblique descriptions of marriage, which give us some insights into a great mystery.

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BIOGRAPHICAL NOTE

Patrick John Connolly was born on 14 January 1962 in Drogheda, County Louth, Ireland. He received his primary school education there and in Laytown, County Meath. After attending the Patrician High School, Carrickmacross, County Monaghan, he entered St. Patrick's College, Maynooth. In 1983 he obtained the B.Sc. from the National University of Ireland, and in 1986 the B.D. from the Pontifical University at Maynooth. After being ordained priest for Clogher diocese in 1987, he returned to Maynooth College to complete graduate studies in moral theology, receiving the S.T.L. He then served two years as a curate in St. Michael's Parish, Enniskillen, County Fermanagh. In 1990, he was sent to the Gregorian University in Rome to study canon law, and he obtained the J.C.L. in 1992. In the autumn of that year he began doctoral studies in canon law at Saint Paul University, Ottawa, Canada.