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MARRIAGE, A COVENANT AND CONSORTIUM TOTIUS VITAE: SCRIPTURAL BASIS, CONCILIAR TEACHING AND THE REVISED CODE OF CANON LAW

by

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BIOGRAPHICAL NOTE

Rev. Brian Geoffrey O'Loughlin was born on January 4, 1949, in Fremantle, Western Australia. He was educated by the Presentation Sisters and the Christian Brothers. He completed his philosophical seminary studies at St. Charles' Seminary, Guildford, W.A., and his theological studies at St. Francis Xavier Seminary, Rostrevor, S.A., both under the care of the Vincentian Fathers. On August 31, 1974, he was ordained a priest for the Archdiocese of Perth, Western Australia by the Most Rev. Sir Launcelot John Goody, third Archbishop of Perth.

In 1979, at the invitation of Archbishop Goody he commenced studies in Canon Law at St. Paul University, Ottawa. In 1980 he received a Baccalaureate in Canon Law; in 1981 a Master's degree in Canon Law from the University of Ottawa, and a Licentiate in Canon Law from Saint Paul University. He is now working at the Metropolitan Matrimonial Tribunal in Perth, Western Australia.

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ABBREVIATIONS

A.A.S.	Acta Apostolicae Sedis
A.C.R.	Australasian Catholic Record
C.	Decretum Gratiani
c.	canon
c.	coram
C.I.C.	Codex Juris Canonici
C.L.D.	Canon Law Digest
C.L.S.A.	Canon Law Society of America
C.L.S.A.N.Z.	Canon Law Society of Australia and New Zealand
C.L.S. of G.B. and I.	Canon Law Society of Great Britain and Ireland
C.B.Q.	Catholic Biblical Quarterly
D.	The Digest of Justinian
DS	Denzinger, 35th edition
Deut	Deuteronomy
E.I.C.	Ephemerides iuris canonici
Eph	Ephesians
Ezek	Ezekiel
Gen	Genesis
H.P.R.	Homiletic and Pastoral Review
I.C.	Ius canonicum
I.D.E.	Il diritto ecclesiastico
Isa	Isaiah
JB	The Jerusalem Bible
J.B.C.	The Jerome Biblical Commentary
Jer	Jeremiah
LXX	Septuagint
Mal	Malachi
Matt	Matthew
M.E.	Monitor ecclesiasticus
NAB	The New American Bible
N.C.E.	New Catholic Encyclopedia
NEB	The New English Bible

PG	Patrologia graeca (Migne)
PL	Patrologia latina (Migne)
Periodica	Periodica de re morali canonica liturgica
PONT. COMM. C.I.C. REC.	PONTIFICIA COMMISSIO CODICI JURIS CANONICI RECOGNOSCENDO
RSV	Revised Standard Version
SAC. OECUM. CON. VAT. II	SACROSANCTUM OECUMENICUM CONCILIUM VATICANUM II
S.C.	SACRED CONGREGATION
S.C.	Studia Canonica
S.R. ROTA	SACRED ROMAN ROTA
S.R.R. Dec.	Sacra Romana Rota Decisiones seu Sententiae
X.	Decretales Gregorii Papae IX

INTRODUCTION

In the revised Code of Canon Law, c. 1055 #1 marriage is described as a covenant and partnership of the whole of life. Covenant has governed God's relationship with his people from its very beginning and was applied by the prophets specifically to marriage.

A covenant is a sacred bond or agreement entered into through the observance of the prescribed ritual form. The Second Vatican Council chose to speak of marriage as a covenant in the Pastoral Constitution on the Church in the Modern World, arts. 48-52. In so doing, the more legal term "contract" was avoided.

The Vatican Council also spoke of marriage as a "communion of life and love" thus expressing the personalist dimension of the marriage covenant. The Code Commission expressed this in law as the consortium totius vitae, thus ensuring that the revised Code had both personalist and procreationist elements in the definition of marriage.

The Council's teaching on marriage referred to a number of Scriptural texts. These we accepted as stated, considering that a comparison of them and an investigation of any omitted texts unwarranted, due to the fact that the first four chapters were based on the Scriptural texts referred to by the Council.

A dissertation in Canon Law containing as much Scriptural content as this does, would have been inappropriate under the Pio-Benedictine Code. The Revised Code of Canon Law, inspired as it is by the Vatican Council's teaching, is consequently Scriptural in the underlying principles, particularly the definition of marriage.

Pope John Paul II, in the Apostolic Constitution, Sacrae Disciplinae Leges of 25th January, 1983 amply focuses on the basis in Scripture for law in the Church, not a constraining, burdensome law, full of cumbersome prescriptions but a law based on divine adoption and the gift of grace, a vivifying law in the power of the Spirit. There can be no questioning of the appropriateness of this dissertation's Scriptural part - Sacrae Disciplinae Leges affirmed that from the books of the Old and New Testaments, the whole juridical legislation of the Church derives.

A study like this at this time of the implementation of the revised Code and of its prior stages, leads to a bird's eye view. The Doctoral researcher can make a contribution by placing the text of the canon in its wider context. This has been no mere academic presentation, but a personal study which I hope brings the law closer to its Scriptural base.

There is a dilemma to be faced: does the dissertation become so technical that it is discouraging at the initial

glance? - this certainly I have tried to avoid - or, does the dissertation become such a personal exercise and enquiry that it loses interest for others? In this regard, fidelity to the title and plan are the key, as well as explanations of the purpose and intent. Therefore it is necessary to state at the outset that the texts of Scripture referred to by the Council when speaking of marriage as a covenant, form the basis of the first four chapters. In examining these texts we have referred to the commentaries and historical background and based our conclusions on the contribution of some notable biblical scholars.

The opportunity to provide the Scriptural presentation and basis for the revised Code's definition of marriage has been challenging: it is an interdisciplinary work which I am convinced does justice both to Scripture and to law. Many points of Scriptural exegesis could have been covered but the extensive bibliography's Scriptural section gives the works that could be referred to for further study.

The analysis of the development of the Vatican Council's teaching on marriage in Chapter V is crucial to appreciate the various emerging stages of the Conciliar teaching to see what was specifically avoided and what emphasis was intended by the Council fathers. Such emphases would need to be respected in the revised Code which was to reflect in law the Council's teaching.

In Chapter VI we trace the continuation of the Council's thrust in Post Conciliar teaching especially Pope Paul VI's encyclical letter, Humanae Vitae and the 1980 Synod of Bishops on "The Role of the Christian Family in the Modern World". During the pontificate of Pope John Paul II a new phenomenon emerged; the Pope systematically teaching on a selected theme: the theology of the body. It seemed important to take note of this papal teaching as contemporary teaching based on selected Scriptural texts on marriage and human sexuality, and so they are examined in Chapters I-IV with the Scriptural texts that inspired them.

Chapter VII examines the drafts of the Code and the contribution from the consultative process, the most extensive in the Church's history. The revised Code is shown to be a chronicle of fidelity to the Council.

The Conciliar teaching on marriage posed a question to the judges of the Sacred Roman Rota which now seems straight forward to us: Did that teaching have juridical effect and could it be applied jurisprudentially? Gradually, affirmative answers to both those questions emerged and so there developed a rotal jurisprudence and consequent local jurisprudence which is examined in Chapter VIII.

On the positive side, c. 1055 introduced into law a fourth bona: the bonum coniugum, as a consequence of the

definition of marriage as a partnership. There is a sense that the revised Code is more significant for what it didn't state: the hierarchy of the ends of marriage, for this means that marriage is now ordered to the good of the spouses and the generation and upbringing of children. No longer, therefore, is the act of consent to be viewed juridically as primarily the exchange of the "ius in corpus". The marriage covenant is the exchange which brings into being the partnership of the whole of life. The rights exchanged, the essential duties and obligations, must be fully human and truly interpersonal. Accordingly, c. 1055 #1 defines the marriage covenant as a partnership for the whole of life. This designation of marriage as a covenant and a partnership, while introduced with the revised Code, has a very traditional basis.

A significant study by Rev. D.E. Fellhauer, "The consortium omnis vitae as a Juridical Element of Marriage", antecedes this work. Our starting point, however, is to examine the Scriptural sources and trace the development of the reception of the consortium into the revised Code and more recent rotal jurisprudence.

CHAPTER I

MARRIAGE IN THE BOOK OF GENESIS CREATION ACCOUNTS: THE PRIMORDIAL SACRAMENT AS A CONSORTIUM

Sacred Scripture has deeply imbued the teaching of the Vatican Council II. The Book of Genesis creation accounts' presentation of "marriage in the beginning" reflects two traditions. The Priestly tradition (Gen 1:26-28, 31) is procreationist in its view of marriage while the Yahwist tradition (Gen 2:18-24) is personalist. These dimensions are also evident in the Pastoral Constitution on the Church in the Modern World, arts. 48-52, and therefore they influenced the definition of marriage as a consortium totius vitae in the revised Code of Canon Law.

1. Consortium: Etymology, Legal and Doctrinal Sources

Sygklērōsis is the Greek root of the Latin word "consortium".[1] A similar Greek word "symbiosis" from which the Latin word "convivium" comes means "living with, companionship", especially of a wedded pair, as opposed to mere cohabitation." Consortium is a combination con + sors = sharing a common lot; it is a partnership, fellowship, participation or association.[2] Considering this etymology, we have opted for the translation of consortium as partnership, which in the context of marriage

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1 H.G. LIDDELL and R. SCOTT, A Greek-English Lexicon, Oxford, Clarendon Press, 1940, p. 1665.

2 Cf. C.T. LEWIS and C. SHORT, A Latin Dictionary, Oxford, Clarendon Press, 1969, p. 435.

emphasizes the inter-personal dimension of relations between husband and wife.

There have been many and varied influences on the Church's understanding and definition of marriage. The Scriptures, the Fathers of the Church, the Councils, Roman law, the Scholastics and, of course, canonists, throughout the Church's history have all made contributions. Among the important contributions from the Roman law period, was the fundamental principle that "marital affection, and not coition, constitutes marriage."[3] This text from Ulpianus focuses on marital affection, which was a basic element of intent to marry, to live as married couples do, in a relationship which was truly matrimonial and which excluded every other form of living arrangement, directed as it was to the forming of a life-long conjugal society. Of the celebrated definitions of marriage found in Roman law, that in the Institutes, is attributed to Ulpianus, that of Modestinus in the Digest, was later made use of by the Scholastic theologians and canonists:[4]

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3 "[...] non enim coitus matrimonium facit, sed maritalis affectio", in D. 24, 1, 32, 13. The translation is ours. For a discussion of the meaning of affectio maritalis in Roman law, see J.T. NOONAN, "Marital Affection in the Canonists", in Studia Gratiana, 12(1967), pp. 479-498.

4 ST. THOMAS, Suppl., q. 44, art. 3; ST. RAYMOND OF PENYAFORT, Summa de matrimonis, Decretales novae, Curantibus Xaverio Ochoa et Aloisio Diez, Romae, Commentarium pro

> Marriage is the union of a man and woman forming a partnership of the whole of life /.../.[5]

Modestinus' definition inspired the Code's description of marriage, C.I.C. (1983), c. 1055.[6]

The Fathers of the Church, especially St. Clement of Alexandria,[7] and also St. Irenaeus,[8] were defenders of the goodness of marriage against the Gnostic attacks which maintained that marriage was evil. Such a negative view, the Fathers saw, was disproved by the Genesis text which presented marriage as a gift from God "at the beginning" when "God looked at everything he had made, and found it very good" (Gen 1:31).

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4 (cont'd) religiosis, 1978, IV, t. 2, #1; PETER LOMBARD, Sentent, IV, in D. 27, c. 2.

5 "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae /.../", in D. 23. 2. 1.

6 PONT. COMM. C.I.C. REC., Relatio (1981), p. 244, "/.../ in definitione iuris romani substantialiter a traditione recepta /.../". The relator refers to the definition of Roman law substantially accepted by tradition and makes reference to Modestinus' definition in D. 23, 2, 1.

To distinguish between the Code of 1917 and the Code of 1983, we shall place the abbreviation of the Latin title, Codex Iuris Canonici before the year of promulgation, so C.I.C. (1917) or C.I.C. (1983).

7 De libris stromatum, PG 9, coll. 999-1436.

8 Contra haereses, PG 7, coll. 707-972.

Against Manicheeism, which condemned marriage, or at least procreation, as essentially evil, St. Augustine[9] defended marriage as a gift from God at creation; but, after the Fall with its consequences of sin and concupiscence, there were three goods which excused the use of marriage: offspring, fidelity and sacrament, which, even after the Fall, render marriage itself good and excuse concupiscence.

It seems that eight centuries passed before the next independent and integral treatise on marriage was written by Hugh of St. Victor between 1130 and 1143. The Scholastics,[10] in the main, simply adopted the teaching on marriage of the Fathers, especially St. Augustine. Hugh was thoroughly conversant with the writings of St. Augustine, so much so that he was known as the Alter Augustinus. However, instead of simply repeating Augustine, Hugh returned to the biblical sources

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9 ST. AUGUSTINE, Contra Faustum Manichaeum, PL 42, coll. 207-518. St. Augustine's other works on marriage are De bono coniugali (The Good of Marriage) written in 401, PL 40, coll. 373-396; De nuptiis et concupiscentia (On Marriage and Concupiscence) written between 418-420, PL 44, coll. 413-474; De adulterinis coniugiis (On Adulterous Marriages) written in 419, PL 40, coll. 451-486; De Genesi ad Litteram (Commentary on the Literal Meaning of Genesis) written intermittently between 401 and 414, PL 34, coll. 245-286.

10 St. Thomas speaks of marriage as "Naturae officium" which is similar to Hugh when he says "Matrimony /... / is not merely a sacrament but a function of nature as well", Summa Theologiae, Latin text, and English translation by D. BOURKE, (London), Blackfriars, 1975, Vol., 56 (IIIa. 60-5), pp. 142-143.

and focused his attention on marriage as a relationship of self-giving love, just as the Vatican Council has done in our day.

The institution of marriage "in the beginning", Hugh called a "duty". He posited that after the Fall, a second institution brought a remedy for sin.

> Although all the sacraments took their beginning after sin and on account of sin, we read that the sacrament of marriage alone was established even before sin, yet not as a remedy but as a "duty".[11]

Hugh and other Medieval monks had a surprisingly personalist understanding of marriage.[12] Their starting point for the consideration of marriage was often the biblical texts, especially those found in the first two chapters of the Book of Genesis.

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11 "Cum omnia sacramenta post peccatum et propter peccatum sumpserint exordium, solum conjugii sacramentum etiam ante peccatum legitur institutum; non tamen ad remedium sed ad officium." HUGH OF ST. VICTOR, De Sacramentis, Lib. II, pars XI, PL 176, 479-480; English translation in R.J. DEFERRARI, Hugh of St. Victor on the Sacraments of the Christian Faith, Cambridge, Mass., Medieval Academy of America, 1951, p. 324.

12 D.E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage", in S.C., 13(1979), pp. 35-70; HUGH OF ST. VICTOR, op.cit., coll. 479-520; J. LECLERCQ, Monks on Marriage: A Twelfth-Century View, New York, Seabury, 1982, viii-135p; T. MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 145-191; D. O'CALLAGHAN, "Love in Marriage: How New Was Vatican II", in The Irish Theological Quarterly, 46(1979), pp. 221-239.

The canonists, on the other hand, were more concerned with what actually constituted marriage and its consequent duties and obligations. Gratian,[13] St. Raymond of Penyafort,[14] Peter Lombard[15] and later Thomas Sanchez[16] were the most notable among them.[17]

2. Marriage "In the beginning" Raised to a Sacrament

The 1917 Code of Canon Law asserted an historical fact regarding the institution of the sacrament of marriage by our Lord Jesus Christ. But no attempt was made to determine just when marriage was raised to the dignity of a sacrament.

> Christ our Lord elevated the very contract of marriage between baptized persons to the dignity of a sacrament.[18]

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13 GRATIAN, Decretum, c. 1-8.

14 ST. RAYMOND OF PENYAFORT, op.cit., Vol. 1c, cxvi-cliii, 902-1439 pp.

15 PETER LOMBARD, op.cit.

16 T. SANCHEZ, De sancto matrimonii sacramento, lib. 1-2.

17 The contribution made by these notable canonists is examined by D.E. FELLHAUER, loc.cit., pp. 25-72, which thus contributes the survey of the doctrinal and historico-canonical background to complement our work.

18 "Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos." C.I.C. (1917), c. 1012 #1; English translation in T.L. BOUSCAREN -

The footnote for this canon gives, among others, reference to the Council of Trent's teaching on the sacraments in general. The revision of this canon as C.I.C. (1983) c. 1055 #1 is so major that we shall give the text to allow for a clear and full comparison.

> The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.[19]

What is initially important in this canon is the recognition of the obvious fact that marriage already existed

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18 (cont'd) A.C. ELLIS - F.N. KORTH, Canon Law, A Text and Commentary, Milwaukee, Bruce, 1963. 4th revised edition, 1966, p. 464.

19 "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." C.I.C. (1983), c. 1055 #1; The Code of Canon Law in English Translation, Collins - Canadian Conference of Catholic Bishops, 1983, p. 189.

The context clearly indicates a partnership of the persons themselves, a man and a woman. This canon shows the marked influence of the Vatican Council II, Pastoral Constitution on the Church in the Modern World (Gaudium et Spes), Arts. 48-50. Particularly evident is the designation of marriage as a covenant, ordered to two joint ends.

prior to the conferral of sacramental status. Among the seven sacraments[20] of the Catholic Church, this fact makes marriage unique. Christ the Lord has endowed the pre-existing reality of marriage with the dignity of a sacrament.

The Council of Trent, in an introductory doctrinal statement on the sacrament of matrimony takes from the Book of Genesis the words of the "First father of the human race" who said:

> This one, at last, is bone of my bones and flesh of my flesh: This one shall be called "woman" for out of "her man" this one has been taken.

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20 Cf. Lateran Council II (1139) DS, 718; Innocent III (1198-1216) DS 769, 793; Council of Florence, Decree for the Armenians, November 22, 1439, DS 1320; Council of Trent, 7th Session (1547), Sacraments in general, DS 1601, 24th Session (1563), Sacrament of Matrimony DS 1801; Leo XIII, Encyclical Letter, Arcanum Divinae Sapientiae, February 10, 1880, in Acta Leonis PP. XIII, Bruges, Desclée, 1887, pp. 117-137, English translation in Papal Teachings - Matrimony, Boston, St. Paul Editions, 1963, pp. 132-165; Pius XI, Encyclical Letter, Casti Connubii, December 31, 1930, in A.A.S., 22(1930), pp. 539-592; English translation in Papal Teachings - Matrimony, pp. 219-291; SAC. OECUM. CON. VAT. II, Constitutiones Decreta Declarationes, Cura et studio Secretariae Generalis Concilii Oecumenici Vaticani II, Lumen Gentium, pp. 93-206, (art. 35); English translation in A.P. FLANNERY (ed.), Documents of Vatican II, Grand Rapids, Mich., Eerdmans, 1975, pp. 350-423; John Paul II, Apostolic Exhortation, Familiaris Consortio, November 22, 1981, in A.A.S., 74(1982), pp. 81-191; English translation in A. FLANNERY (ed.), Vatican Council II: More Postconciliar Documents, Grand Rapids, Mich., 1982, Vol. II, pp. 815-898.

> That is why a man leaves his father and mother and clings to his wife, and the two of them become one body.[21]

In the Council of Trent's doctrinal statement, this text is seen as the starting point for the magisterium's determination of just when[22] Christ the Lord instituted the sacrament of marriage.

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21 Genesis 2: 23-24. The Council of Trent quotes only v. 23, CONCILIUM TRIDENTINUM, Canones et decreta Sacrosancti Oecumenici Concilii Tridentini /.../, Romae, Ex Typographia polyglotta, 1904, p. 169 or DS 1797. The Council of Trent, Session 4, approved the Vulgate as the standard Catholic text, DS 1506. The Vatican Council II, Dei Verbum, art. 22, states that the Church "honors /.../ the Latin translation, especially that which is called the Vulgate" and requests "that suitable and correct translations are made /.../ especially from the original texts of the sacred books" even in conjunction with other Christians, A.P. FLANNERY, op.cit., Vol. I., P. 763. An outstanding example of a response to this latter call by the Council is the La Traduction Oecuménique de la Bible resulting from the joint cooperation of Catholic, Orthodox and Protestant biblical scholars, Paris, Cerf, AT, 1980, NT, 1981.

We shall use the text from the New American Bible, a translation from the original languages with the critical use of all the ancient sources by members of the Catholic Biblical Association of America and sponsored by the U.S. Bishops' Committee of the Confraternity of Christian Doctrine. This text is notable as the first Catholic translation of the Bible direct from the ancient sources and original languages into English, though it is not more "Catholic" than other approved translations.

22 It should be noted, though, that most theologians would now maintain that Christ committed the sacraments to the Church which then, guided by the Spirit, determined their number and form; cf. L. ORSY, "Faith, Sacrament, Contract and Christian Marriage: Disputed Questions", in Theological Studies, 43(1982), p. 394;

> But that by this bond two only are united and joined together, Christ the Lord taught more plainly when referring to those last words as having been spoken by God, he said: "Therefore now they are not two, but one flesh" (Mt. 19:6) AND IMMEDIATELY RATIFIED the firmness of the bond so long ago proclaimed by Adam with these words: "What therefore God has joined together, let no man put asunder" (Mt. 19:6).[23]

The Council fathers at Trent saw the dialogue between Jesus and the Pharisees, which followed their question on divorce (Matt 19:3)[24] as the occasion of the institution of

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22 (cont'd) E. SCHILLEBEECKX, Christ the Sacrament, London, Sheed and Ward, 1980, pp. 47-132. Scripture scholars are generally in agreement on the authenticity of Jesus' sayings on marriage and divorce, cf. A. AMBROZIC, "Indissolubility of Marriage in the New Testament: Law or Ideal?", in S.C., 6(1982), pp. 269-288; A.-L. DESCAMPS, "Les textes évangéliques sur le mariage", in Revue théologique de Louvain, 11(1980), pp. 32-40; J.A. FITZMYER, "The Matthean Divorce Texts and Some New Palestinian Evidence", in Theological Studies, 37(1976), pp. 198-207.

23 "Hoc autem vinculo duos tantummodo copulari et coniungi, Christus Dominus apertius docuit, cum postrema illa verba, tamquam a Deo prolata, referens dixit: 'Itaque iam non sunt duo, sed una caro' (Mt. 19:6), statimque eiusdem nexus firmitatem, ab Adamo tanto ante pronuntiatam, his verbis confirmavit: 'Quod ergo Deus coniunxit, homo non separet' (Mt. 19:6, Mk. 10:9)." DS 1798; English translation from K. RAHNER, (ed.), The Teaching of the Catholic Church, Cork, Mercier, 1967, p. 356; emphasis added.

24 For the abbreviations of the names of the Biblical books we shall follow those now generally in use and published in Biblica, 63(1982), pp. 5-7.

the sacrament of marriage. Jesus' appeal to the Creator's original plan and his specific language, "I now say to you", were seen as the basis for this doctrinal assertion.

The grace conferred by the sacrament of marriage is then stated as being an addition to the natural love.

> But the grace which was to perfect the natural love and confirm that indissoluble union and sanctify the persons married, Christ himself, the instituter and perfecter of the venerable sacraments, merited for us by his Passion.
>
> Since therefore matrimony in the evangelical law surpasses in grace through Christ the ancient marriages, our Holy Fathers, the Councils and the tradition of the universal Church have with good reason always taught that it is to be numbered among the sacraments of the New Law.[25]

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25 "Gratiam vero, quae naturalem illum amorem perficeret, et indissolubilem unitatem confirmaret, coniugesque sanctificaret, ipse Christus, venerabilium sacramentorum institutor atque perfector, sua nobis passione promeruit.

"Cum igitur matrimonium in lege evangelica veteribus connubiis per Christum gratia praestet: merito inter Novae Legis sacramenta annumerandum sancti Patres nostri, Concilia et universalis Ecclesiae traditio semper docuerunt." DS 1799, 1800; English translation from K. RAHNER, op.cit., p. 356. Vatican Council II, Lumen Gentium, art. 35, echoes this text when it states "[...] the sacraments of the New Law, [...] nourish the life and the apostolate of the faithful [...]" A.P. FLANNERY, (ed.), op.cit., Vol., I, p. 392.

These texts from the Council of Trent clearly indicate the doctrine of the sacrament of marriage. But, they also speak of marriage prior to the conferral of the dignity of a sacrament. Firstly, the text speaks of grace "to perfect the natural love", thus recognizing the place of love in marriage, long before conjugal love was given a sacramental dimension, prefiguring Christ's undivided and never-ending love for his bride, the Church. Secondly, the Council of Trent in this clear statement on marriage as one of the seven sacraments states that "matrimony in the evangelical law surpasses in grace through Christ the ancient marriages."

Implicit in the sacrament of marriage is its reality as seen in the "ancient marriages", and as envisaged by God in the creation of man and woman as complementary individuals, destined by their very nature for union with each other. This union would consist in far more than sexual union. Man and woman complement each other in the whole gamut of human experience; to reduce this complementarity to its sexual expression would be to elevate copulation to pre-eminence, rather than seeing it as part of the totality of male-female complementarity.

> In fact, marriage seen on its own is already a sacramental sign of the love of two lives. Through it, the meeting and flowering in love of an I and a Thou are expressed on the

> personal and social levels. Human love, therefore, seen in its totality, possesses a transcendent need and dimension. In love, man experiences fulness, the generosity of living for another, and the encounter that makes two one. Nevertheless, he also knows that love can be threatened by infidelity, by separation and by death; he can also find that the other is not the full and exhaustive answer to the longings of his heart. Man sighs for a deep and lasting love. What he loves is not in fact just another person, but the mystery of personality, revealed and made flesh in the loved one, but also veiled and withdrawn.[26]

This view of marriage, seen through its psychological dynamics could, at first glance, seem out of place. But in considering marriage, we come face to face with a reality that is rooted in humanness. To appreciate its functioning, it seems only natural, and indeed it is to be expected, that the behavioural sciences would make a contribution, even if these express this reality in terms that canonists may be unaccustomed to using.

> In marriage, both husband and wife feel called to transcend themselves and to unite in the deeper reality that lies above them. Religions have seen God as the supreme and ineffable mystery that penetrates everything and encompasses everything, in which everything is revealed and kept. So the real Thou to whom man is radically open is not a human Thou but a divine Thou, and, ultimately, man is married by and to God. The other person

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26 L. BOFF, "The Sacrament of Marriage" in Concilium, 7(1973), n. 9, p. 26.

> is the sacrament for another when God is seen to be near because he is felt in the excellence of their love, and also felt to be distant, because he is veiled under the sacrament.[27]

This yearning of the I for the Thou is expressed in its own way in the Book of Genesis as another basic view of marriage. The covenant image is also contained in the Scriptures and consistently proposed as the model for marriage in Israel, especially by the prophets.

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27 Ibid, p. 26. A deficiency of this article is that Boff adopts a broad description of a sacrament as a "symbolic understanding of the world" (p. 25). Starting from Genesis 1:27, creation in God's image and likeness, he then concludes that "marriage as a human order possesses a sacramental character" (p. 27) and that Christ did not institute a sacramental sign proper to matrimony, but built on marriage as it existed, restoring its original human dimension (p. 29). Boff neglects to state that this restoration for each individual marriage rests on the baptism of the couple. Incorporated into Christ through baptism and then mirroring the relationship of Christ to his Church in their marriage, the sacrament has been committed to the Church, which has declared that the contract C.I.C. (1917), c. 1012 or matrimonial covenant C.I.C. (1983), c. 1055 has been raised by Christ to the dignity of a sacrament. We will discuss the implications of this canonical-theological issue when we consider marriage as a covenant (Chapter II) and sign of the union between Christ and the Church (Chapter III).

Scripture as interpreted by Tradition is the primary source of Christian teaching, and the Book of Genesis presents us with the value of marriage as intended by the Creator. This view is of marriage as a human institution ordained by God from "the beginning" as a natural reality which was subsequently raised by Christ the Lord to the dignity of a sacrament.

3. The Book of Genesis Creation Accounts

The classical theory for the composition of the Book of Genesis distinguishes three sources, known as traditions. They are the Yahwist, from its use of the name of God as Yahweh, the Elohist, because of the careful use of Elohim (Lord) and the Priestly, so known because of the obvious concern for liturgy and attributed to the priests of Jerusalem, together with the Deuteronomist. These four traditions are conveniently identified by the fourfold sigla: J (from the German form of Yahwist) E, P and D. The texts that are of interest to us are contained in Chapters 1-11 of the Book of Genesis, which contain only the J and P traditions.

The question of history in the Book of Genesis is one that should be addressed at the beginning.

> No scholar today would hold that Genesis presents history in the modern sense of that term. The sacred authors' conception of history as a linear movement of events determined by divine interventions and tending to a divinely conceived goal militates against such a presentation. They were interested in the "facts" of history only in as much as they illustrated the divine plan. This interest was the overriding factor in their choice of material.
>
> With regard to the patriarchal history, the basic "facts" included such items as the movements of the Patriarchs, their occupations, their relations with their neighbors, and their marriages and deaths. There is every reason for the modern scientific historian to accept this basic family history, which serves as the foundation for the author's religious history. The sciences of ancient Near Eastern history and especially of archaeology have shown that the underlying social, juridical, political, geographical, and religious conditions in Genesis are precisely those of the 2nd millennium (B.C.) and could not have been invented by an author living in a much later period.[28]

The celebration of marriage in the Book of Genesis clearly indicates an understanding of marriage as a private or family affair, rather than a religious or public concern, as

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28 E. H. MALY, "Genesis", in J.B.C., Vol., I, R. BROWN, (ed.), Englewood Cliffs, N.J., Prentice-Hall, 1968, p. 7. We also acknowledge the above outline of the composition of the Book of Genesis from the same author's introduction to the Pentateuch, pp. 1-4.

for example with Isaac and Rebekah in Genesis 24, or Jacob with Leah and Rachel in Genesis 27:46 - 29:30.[29]

The first two texts we will consider are from the Yahwist tradition. They are found in the Book of Genesis' second story of creation, which is actually the earlier of the two creation accounts. Genesis 2 contains the garden story of creation, which has been dated to the 10th century B.C.[30] Before considering this passage in detail, some preliminary observations on the characteristics of the Yahwist style are in order.

> J's style is clear and direct, but its simplicity is that of consummate art. An unobtrusive word or phrase may become the means for the unfolding of character, a single sentence can evoke a whole picture. The leading actors on J's stage are realized in

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29 From a canonical viewpoint, since this case instanced both error of person and polygamy, we note that Gratian used it as a starting point to devise the impediment of error of person, C.I.C. (1983) c. 1097; C.I.C. (1917), c. 1083 (C. 3, 51; C. XXVII, Q. 2; C. XXIX, q. 1; C. 1, X, De sponsa duorum, IV, 4) inspired by this incident.

30 E.H. MALY, "Introduction to the Pentateuch", in the Jerome Biblical Commentary, p. 3 "[...] more commonly dated about the 10th century (B.C.) in the southern kingdom. This date, however, represents only that period which seems to have had the most decisive influence on the selection, arrangement, and redaction of material; it precludes neither earlier nor later editorial work. The constants distinguishing the tradition include a characteristic vocabulary, a stylistic elegance reflected in its colourful presentation of scenes, especially the dialogues, a perceptive psychology, deep theological insights, and a bold use of anthropomorphisms."

> depth. It is their inner life that invariably attracts the author's attention; yet he manages to show it in action, not through description; and the reader is thus made a participant in the unfolding drama. J's world, moreover, in diametric contrast to P's, is emphatically earth-centered. And his earth is peopled with actors so natural and candid that even their relations with Yahweh are reduced to the human scale, so that God himself becomes anthropomorphic.[31]

Surely it is not this anthropomorphism alone that has given the Yahwist account such endearing and enduring value. Rather, as E. A. Speiser indicates, it is the characteristics of the Yahwist style which have done so.

> What is truly distinctive about this writer (J) is his incisive style, his economy and boldness of penetration, HIS INSIGHT INTO HUMAN NATURE, and the recognition that a higher order and purpose may lie behind seemingly incomprehensible human events.
>
> There is common agreement that we have in J - or alternatively, in those portions of Genesis that critical consensus attributes to J - not only the most gifted biblical writer, but one of the greatest figures in world literature. If so much in the Book of Genesis remains vivid and memorable to this day, the reason is not

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31 E.A. SPEISER, Genesis, The Anchor Bible, Vol. 1, New York, Doubleday, 1964, p. xxvii.

> merely the content of the tales but, in large measure as well, the matchless way in which J had told them.[32]

We now turn directly to the first two Yahwist texts in the Book of Genesis, to examine what they say about marriage. Although the Priestly account is the first in the literary ordering, the Yahwist's is the more ancient account, and therefore we shall examine the two Yahwist texts first.

a. Genesis 2: 18-22a

> The Lord God said: "It is not good for the man to be alone. I will make a suitable partner for him". So the Lord God formed out of the ground various wild animals and various birds of the air, and he brought them to the man to see what he would call them; whatever the man called each of them would be its name. The man gave names to all the cattle, all the birds of the air, and all the wild animals; but none proved to be the suitable partner for the man.
>
> So the Lord God cast a deep sleep on the man, and while he was asleep, he took out one of his ribs and closed up its place with flesh. The Lord God then built up into a woman the rib that had been taken from the man.[33]

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32 Ibid., p. xxii. We have added the emphasis to indicate the Yahwist insight into marriage, the yearning and desire for a partner and the lack of finding one, with a consequent void for the man, which we are about to examine in this Yawhist text.

33 Genesis 2: 18-22a; emphasis added. Commentaries and other works referred to in this and the following section

Implicit in this text is the radical difference between man and the animals; they are formed out of the ground just as the man was, but with man the Lord God "blew into his nostrils the breath of life." The animals are paraded before the man who is to give each its name;[34] the animals are under man's control, but they are not fit companions. Man desires and needs one like himself, not just other creatures over which he has dominion.

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33 (cont'd) are as follows: W. BRUEGGEMANN, "Of the Same Flesh and Bone", in C.B.Q., 32(1970), pp. 539-542; J. COTTIAUX, La sacralisation du mariage de la Genèse aux incises Matthéenes, Paris, Cerf, 1982, pp. 78-85; P.K. JEWETT, Man as Male and Female, Grand Rapids, Eerdmans, 1978, pp. 120-134; E.H. MALY, loc.cit., pp. 3, 10-12; M. DE MERODE, "Une aide qui lui corresponde", in Revue théologique de Louvain, 8(1977), pp. 329-352. E.A. SPEISER, op.cit., pp. xxii-xxix, 14-20; B. VAWTER, On Genesis, Garden City, N.Y., Doubleday, 1977, pp. 63-76; W. VOGELS, "It is not Good that the 'Mensch' Should Be Alone; I will Make Him/Her a Helper Fit for Him/Her", in Église et Théologie, 9(1978), pp. 9-35.

34 In the Scriptures, to name someone or to change their name, indicates the conferral of a role or the giving of a commission or even election to a new destiny. Thus the Lord changes Abram to Abraham to indicate the change effected in the Patriarch by the promise that he will be the father of a host of nations (Genesis 17: 1-8); Jesus commissions Peter in Matthew 16: 13-20, and changes his name.

The New American Bible and the New English Bible correctly and richly translate the Hebrew noun 'ezer kenegdo[35] as "suitable partner." E.A. Speiser translates it as "an aid fit for him" and observes that the traditional (King James Bible) "help meet for him" is adequate, but subject to confusion, as may be seen from our "helpmate" which is based on this very passage. The Hebrew complement means literally "alongside him", i.e., "corresponding to him "[36] or "equal and adequate to".[37]

Evidence of the confusion generated by the translation as "helpmate" is found in the English translation of The Jerusalem Bible from the French. The French has aide, which in English would be "help" (RSV) or "aid" (Speiser), but the English edition of JB has translated it as "helpmate".

> The "helpmate for him", found in so many English translations, conveys the meaning poorly, for the Hebrew noun means literally "someone alongside him", "someone suited to him". The being that the Lord God will

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35 The Hebrew word 'ezer is rarely used for a human being. Most often it refers to God. God is the helper of man. It implies that the man needs his "helper" he cannot live without her, cf. W. VOGELS, loc.cit., p. 20.

36 E.A. SPEISER, op.cit., p. 17.

37 P.K. JEWETT, op.cit., p. 124.

> provide for his loneliness will be the correlate to his need, not so much a helper as a partner.[38]

A partner is described in the Oxford Dictionary as: "One who has a share or part with another or others. A partaker, sharer."[39] We give our own description as a complementary being and, in an inter-personal sense, one with whom one's own personality enters into dialogue, exchange and interaction leading to the full development of one's own person. Further expression of how the Book of Genesis perceived partnership is to be found in the following verses.

b. Genesis 2: 22b - 24

> When he brought her to the man, the man said:
>
> "This one, at least, is bone of my bones and flesh of my flesh; This one shall be called 'woman' for out of 'her man' this one has been taken".
>
> That is why a man leaves his father and mother and clings to his wife, and the two of them become one body.[40]

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38 T. MACKIN, What is Marriage? Marriage in the Catholic Church, Ramsay, N.J., Paulist Press, 1982, p. 44.

39 J.A. MURRAY (Ed.), A New English Dictionary of Historical Principles, Oxford, Clarendon Press, 1909, Vol. 7, p. 512.

40 Note the emphasis on independence from one's own family as one joins one's partner in marriage that is part of the Genesis teaching on marriage.

In a very perceptive article, Walter Brueggemann examines this text and contributes greatly to the full understanding of its meaning. The Hebrew word bsr usually translated as "flesh", as in this text, has a double meaning as "weakness, empty of power and meaning."[41] It includes not only the physical notion of flesh but also the psychological notion of frailty. Thus, it embodies both the physical and the psychological. We have no single word in English for this combination, and so it might best be rendered as "flesh-weakness". The difficulty of expressing this in a non-semitic language is related by W. Brueggemann as follows:

> The problem in our language of finding words which express psychosomatic unity in a personal organism is well known. It is this difficulty which makes the understanding of our verse problematic. The terms are "wholistic" but we have learned to render them as if they connoted only the physical. This double focus is important for a fresh understanding of Genesis 2:23. Such an understanding of the term suggests that we are dealing with an assertion that is not

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41 W. BRUEGGEMANN, "Of the Same Flesh and Bone (Genesis 2, 23a)", in C.B.Q., 32 (1970), p. 533.

> concerned simply with physical relationship but includes also psychological dimensions of interaction.[42]

On the strength of this research, we can thus be more certain that this 10th century B.C. text is the earliest reference in the Sacred Scriptures to the interpersonal complementarity of husband and wife.[43]

"As "flesh" is shown to refer to the physical and psychological, so also does "bone" have a psychological dimension. "Bone" has a root meaning of "might" or "power" which encompasses psychic connotations. Thus it speaks of a person in his ability to function effectively and to work his will in his context; it combines the interpersonal with the physical. W. Brueggemann analyses the inter-relationship of these words as follows:

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42 Ibid. The expression "flesh and bone" also refers to brothers (p. 536) which is to be expected, given the unequal position of women in Eastern (Jewish) society, emphasized by the fact that a wife ranked among her husband's possessions (Exodus 20:17).

43 Peter Lombard quoted the Talmud "that the woman was created from the side of man to be his equal and close to his heart to be loved", in Sentent., I. II, Dist. XVIII. JOHN PAUL II, General Audience Address, September 8, 1982, described Gen 2:24 as "that which in the entire Bible can be considered the fundamental text on marriage", in L'Osservatore Romano, September 13, 1982, p. 1.

> Thus our two words which conventionally appear in English as physical properties of the body need to be rendered in ways that speak of the functioning of the whole organism. We shall render them "flesh-weakness" and "bone-power".
>
> The two terms /.. ./ are not to be regarded as referring to two simple states. The fact that they are a continuing pair in the traditions means that together they mean something different from what either might mean separately. Because they are antithetical, it is most likely that they mean to state two extreme possibilities and include everything between them, thus all physical-psychological dimensions of interaction from A-Z.[44]

Brueggemann substantiates his conclusions by making reference to other texts which have the phenomenon of two opposites including the range of intermediate possibilities. The fullness of the expression is clearly indicated not only in the scriptural usage but also in a contemporary formula.

> In our verse (Genesis 2:23), the poles of "flesh-frailty" and "bone-power" mean to express the entire range of intermediate possibilities from the extreme of frailty to power. Thus the relationship affirmed is one of which is affirmed for every possible contingency in the relationship, as we affirm in the marriage formula, "in sickness and in health, in plenty and in want". Here the text says, "in every circumstance from the extreme of frailty to the extreme of power". A relation is affirmed which is unaffected by changing circumstances.

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44 W. BRUEGGEMANN, loc.cit., p. 534.

> It is a formula of constancy, of abiding loyalty which in the first place has nothing to do with biological deviation, as it is so often interpreted.[45]

A detailed exegesis of Genesis 2: 22b - 24 is beyond our purpose here, but much is made, in the traditional interpretations of this passage, of the Hebrew word play between the use of 'iš for man and 'iššā for woman. There now seems to be general agreement among Scripture scholars that too much attention has been given to this word play.

> The assonance of Hebrew 'iš and 'iššā has no etymological basis. It is another instance of symbolic play on words, except that the phonetic similarity this time is closer than usual. By an interesting coincidence, English "woman" (derived from "wife of man") would offer a better linguistic foil than the Hebrew noun.[46]

Brueggemann even calls this word play "an intrusion in the text" and substantiates his assertion as follows:

> This is evident first in that it does not follow from our formula in the preceding line. It can be connected with it only if our formula is not understood as a covenantal formula, but as a statement of biological derivation which it is not. More clearly, nowhere prior to this

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45 Ibid., pp. 534 - 535.

46 E.A. SPEISER, op.cit., p. 18.

> is man called 'iš. He is consistently ha'adam. Thus the word-play is inappropriate and without connection to its context and cannot possibly provide a clue to the meaning of the text.[47]

Therefore, leaving aside interpretations that have given undue significance to the biological derivation of woman from man, we may then ask and conclude with Brueggemann:

> What remains when these misleading elements are placed in perspective are a) vv. 18-20, the need for a mate and a difficulty in finding one, b) v. 23a, the affirmation of finding a partner, and c) v. 24, the implication of this new partnership. One of these, it is clear, is concerned with biological derivation. Now the issue is the continuing relation with reference to their freedom and responsibility. Thus I shall insist, the main point is that the two, man and woman, are covenant partners and this partnership is decisive for understanding the life of either or both.[48]

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47 W. BRUEGGEMANN, loc.cit., p. 538.

48 Ibid, p. 539. Two other instances where "bone" and "flesh" refer to a wife are in JOB 2: 5-9 where Job's wife turns against him, she is considered the epitome of his already stricken physical body and Sirach 25:26 "A bad woman must be 'cut off from' her husband's flesh" (LXX text). M. BARTH, Ephesians 4-6, The Anchor Bible, Garden City, N.Y., Doubleday, 1974, Vol. 34A, p. 630.

The fundamental importance of covenants in the biblical relationships is then emphasized by W. Brueggemann as follows:

> We affirm that the formula of (v.) 23a is a covenant formula /... / to express /... / profound loyalty and solidarity of purpose /... /. They are bound by oath now to share in their common cause in every circumstance of weakness and every circumstance of strength. And that to which they have made common oaths is the care of the earth (cf. v. 15). For both of them the responsibility of 'adam is 'adamah, and the woman partner now shares that loyalty and that responsibility.[49]

There is another Hebrew word-play operative here, 'adam (man), who is taken or formed from 'adamah (soil or ground) and is now with his partner commissioned to care for 'adamah (the earth).

> This formula of solidarity in "weakness and strength" is underscored by the frustration of vv. 18-20 in which among all other creatures there is no suitable "helper", i.e., there is no other able to enter into this kind of covenant for every circumstance. Perhaps this is the most radical statement about human personhood made in Scripture, namely the capacity to make oaths and enter into covenants

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49 W. BRUEGGEMANN, loc.cit., p. 539.

> (...) that man is congenial for covenants only with humankind. It is important that the covenant mate is to "help" (vv. 18, 20).[50]

The woman is a partner for the man so that together they enter into a covenant to care for the earth. This covenant, like all covenants, implies obligations, but they are shared between the man and his partner, the woman.

> The covenant formula is further substantiated by the concluding statement of v. 24(...) (which) has the language of covenant relations, to abandon (N.A.B. leaves) 'azav and to cleave (N.A.B. clings to) davaq. The latter term, when used of interpersonal relations, as in any context, is clearly a covenant term (...). The two terms in Genesis 2: 24 also speak of terminating one loyalty and the embrace of a new one (...). Finally, in (Genesis) 2: 24b the term "one flesh" can of course be taken to refer to kinship and blood relations, but in the light of our understanding of v. 23, it can refer to all those who have a mutuality of concern and loyalty. Certainly it refers to a community bound in covenant as in mispah (Lv. 25: 4a) and cannot at all be understood in terms of biological derivation or sexual intercourse. "One flesh" refers to the soli darity of purpose about which we have already spoken.

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50 Ibid.

> We come to the conclusion then that Genesis 2: 18-24 in its comment on man and woman is an attempt to talk meaningfully about interpersonal relationships which has been often misunderstood in conventional exegesis. Among the implications of our conclusion are these:
>
> 1) The key phrase about the relationship in (Genesis) 2: 23a is a covenantal formula which does not speak about derivation in a biological sense but means to speak about commonality of concern, loyalty, and responsibility.
>
> 2) That exegetical tradition which understands the text to speak about biological derivation of woman from man is based on a lost pun (vv. 21-22) and an inappropriate word-play (v. 23b) which surely miss the main point of the text which speaks of the solidarity of man and woman in loyalty and responsibility.[51]

We have quoted at some length from this article by Walter Brueggemann because of his insights into this text of Genesis. In many ways he opens up a new understanding of this text, particularly when he emphasizes man and woman as partners, but we must beware of the danger of reading back into the text more than it contains. In this regard it is important to note that the mutuality of man and woman spoken of in the text is more in the line of the man and woman being oriented toward the world rather than to each other.

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51 Ibid., pp. 540-541.

> The solidarity of that relationship as presented in the narrative is of course for mutuality, but is also addressed to the larger meaning of humanness with reference to 'adamah. Any understanding of human interaction which ignores this counterpoint presents only a partial understanding of humanness. Indeed the mutuality of the pair is subordinated to the primary mutuality of 'adam ('iš - 'iššah) - 'adamah.52

This primary mutuality manifested in the shared responsibility for the world does not devalue the mutuality of the man and woman for each other, rather it gives them an object upon which to direct their attention. They are partners suited to each other by common origin and complementarity, but they also have a role beyond themselves, of caring for the world. While their care for the world is the ultimate expression of the responsibility imposed upon them by their mutuality, the quality and richness of its expression would depend on their mutual relationship to each other.

This mutuality and complementarity are expressed in the covenant which implies fidelity to promises, and which we shall discuss more fully in the next chapter. The similar content is contained in the secular notion of consortium, a partnership between man and woman living as husband and wife in marriage.

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52 Ibid., p. 541.

c. Genesis 1: 26-28, 31a

> Then God said: "Let us make man in our own image, after our likeness. Let them have dominion over the fish of the sea, the birds of the air, and the cattle, and over all the wild animals and all the creatures that crawl on the ground".
>
> God created man in his image; in the divine image he created him; male and female he created them.
>
> God blessed them saying: "Be fertile and multiply; fill the earth and subdue it. Have dominion over the fish of the sea, the birds of the air, and all the living things that move on the earth".
>
> God looked at everything he had made, and he found it very good.

This text forms part of the first story of creation in the Book of Genesis. But internal evidence indicates its origin is beyond the sixth century B.C. Priestly source to which it is generally ascribed.[53] Israel's cultural and literary links were with the peoples who dwelt in the Fertile Crescent. Biblical tradition shows ample familiarity with

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53 The main commentaries and other words referred to in this examination of the Priestly creation account are as follows: M. GILBERT, "Soyez féconds et multipliez", in Nouvelle revue théologique, 96(1974), pp. 729-742; P.K. JEWETT, op.cit., pp. 33-40; E.H. MALY, loc.cit., p. 10; J.M. MILLER, "In the 'Image' and 'Likeness' of God", in Journal of Biblical Literature, 91(1972), pp. 289-304; E. SCHILLEBEECKX, Marriage: Human Reality and Saving Mystery, London, Sheed and Ward, 1980, pp. 11-20; E.A. SPEISER, op.cit., pp. 8-10; B. VAWTER, op.cit., pp. 21-38; ID., loc.cit., p. 172.

Mesopotamian cultural norms.[54] There are remarkable similarities between the Priestly creation account and the Babylonian creation epic. So stark are these similarities that E.A. Speiser[55] has composed a table comparing these two creation stories, the "When on High" from the Ancient Near Eastern Texts Enuma eliš and the Priestly creation account.

The similarities of these two accounts are so obvious it is more instructive to consider their differences and specifically the enrichment given the Genesis text by the Priestly author.

> This story of the Priestly author, even though it has as one of its purposes to polemicize against the spirit and details of the Babylonian myths of creation, nevertheless has retained much of the ritual aspect of the re-enactment and reiteration which was the essence of such myths. As will be evident from the reading of this passage, it is less a story than it is a prose poem celebrating certain dominant Israelite convictions about the nature and consequences of creation: It is a recitation of dogma, in other words.[56]

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54 The Magna Carta of the Ancient Near East was the Code of Hammurabi, cf. The Oldest Code of Laws, Edinburgh, T. Clark, 1903, pp. 24-31.

55 E.A. SPEISER, op.cit., p. 10; B. VAWTER, op.cit., p. 38 gives an extract from the Babylonian creation hymn.

56 B. VAWTER, op.cit., p. 27.

The Priestly writer has purified the pagan myth so that it becomes a vehicle for the sacral. Yahweh's creating word is opposed and contrasted to the forces of change which rule in the myth, the provident God will provide for his people if they acknowledge his Lordship and respect him by imitating his observance of the sabbath rest, an injunction very dear to the Priestly author. This account's theology of the absolute Lord of the universe nullifies the primitive pagan connotations of the Babylonian myth, the impotence of which is contrasted with the vivifying power of God.[57] The Priestly author was also concerned with confronting the fertility cults of Canaan; according to these cults, sexuality and procreation were mysterious, belonging to the realm of the divine. Fertility gods were deities of the forces of nature in control of the fertility of man and nature. Canaanites believed that all fertility and the entire force of life depended on these gods who were both male and female, and their intercourse was the prototype of earthly fertility. The fertility cults led to orgies of prostitution in the temples in which the deities were worshipped. These cults exerted an attraction on the

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57 For a precise exegesis of Yahweh's blessing, cf. M. GILBERT, loc.cit., pp. 729-735.

people of Israel, (cf. Numbers 25: 3-8 and I Kings 14:24) and hence the Priestly author's concern.

On the other hand, The Priestly author sought to emphasize that the people of Israel were called by Yahweh, the sovereign God who had created man in his own image "male and female he created them." Marriage was seen as a gift from Yahweh and fertility a blessing, given freely by God and now won as a reward from fertility gods.

> The "secularisation" of pagan marriage was the result of Israel's demythologizing of God; but at the same time marriage was placed in a different religious sphere, that of creation by Yahweh's free and sovereign love.[58]

This insistence on the "secularisation" of marriage in Israel is the emphasis in E. Schillebeeckx's work, even if he does tend to propound his thesis ad infinitum. The human, secular reality of marriage is a fact that the texts from the Bock of Genesis do recognize. Man and woman are created in the image and likeness of God for each other, but they are also given a blessing,[59] they are to be fertile and work together to

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58 E. SCHILLEBEECKX, Marriage: Human Reality and Saving Mystery, London, Sheed and Ward, 1980, p. 14; for a comprehensive treatment of the development of Israel's understanding of marriage particularly its spiritualisation, cf., J. COTTIAUX, op.cit., pp. 87-430.

59 Cf., M. GILBERT, loc.cit., p. 730. "Cette domination sur le monde infra-humain, l'homme la reçoit comme

care for the earth as God's stewards, not constraining the divinity through orgiastic rites, but co-operators. Where there is a human reality, there is also a responsibility. Israel's profession of faith in Yahweh meant a corresponding enrichment of her institutions because "God looked at everything he had made and found it very good" (Gen 1: 21). Marriage and sexuality for Israel were not to be subject to the vagaries of pagan rites and fertility cults, but were part of God's good creation.

> Israel's faith in the free and sovereign God who was able to bestow fertility upon the barren was also to lead gradually to a totally different experience of marriage. It is here that the source of all Israel's demythologizing of marriage is to be found. This "secularisation", this removal of sexuality from the religious sphere of the fertility cults, which was in fact a transference of sexuality into the sphere of the worship of Yahweh, or a "Yahwehisation" of the theological themes of Canaan, can be regarded as the first-fruit of the revelation made to Israel in connection with marriage.[60]

By removing marriage and sexuality from the magic of the fertility cults, Israel was reminded that her growth as

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59 (cont'd) la conséquence de ce qu'il est: 'à l'image et à la ressemblance de Dieu', ce qui fait de l'homme une sorte de vice-roi au sein de la création."

60 E. SCHILLEBEECKX, op.cit., p. 14.

a people depended on obedience to the Lord (Deut. 6:3).[61] By consecrating marriage through Yahweh's blessing, the sacral nature of marriage and sexuality as gifts of the Creator were brought to the fore. Marriage in Israel was purified of its pagan connotations and enriched by being a good gift from Yahweh the God of Creation who had entered into a covenant with his people.

> What was called into existence by God's creation was sanctified by the fact of creation itself and subject to God's holy laws. It was not the sacred rites which surrounded marriage that made it a holy thing. The great rite which sanctified marriage was God's act of creation itself. The blessing promised to married couples in the oriental world was seen by Israel as Yahweh's blessing. It was Yahweh and none other who, as founder of marriage, blessed the union of man and wife. The blessing was the very blessing of God's act of creation. This divine blessing made the first marriage of history the prototype of all married life.[62]

Throughout this chapter, we have presented the texts on marriage in the Book of Genesis as normative. Internal evidence in the Scriptures affirms their normative character. In the Book of Tobit 8: 4, Tobiah calls his new wife Sarah to

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61 Cf. M. GILBERT, loc.cit., p. 536-541.

62 E. SCHILLEBEECKX, op.cit., p. 15.

prayer. In his prayer, Tobiah praises God, offers Adam and his wife Eve as models of partners in marriage and affirms that he does not take his wife because of lust but for a noble purpose and calls down God's blessing, vv. 6-7. The specific characteristic of the union of the first man and woman was that they would be suitable partners for each other as E. Schillebeeckx says:

> God made man and woman for each other. It is fundamentally a question of partnership at the human level; a man's wife is his alter ego.[63]

Marriage acquired its dignity from God at creation as the primordial sacrament. A gift from God, a partnership to remedy loneliness bringing complementarity with one who was alike rather than a creature that was different. A partner who answered the heartfelt need for companionship rather than the quest for dominion.

In the New Testament, Jesus appeals to God's plan "at the beginning" (Matt 19:4; Mark 10:6), as the prototype for marriage. Thus the original good gift of God at creation, which is portrayed in the Book of Genesis, was given a new,

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63 E. SCHILLEBEECKX, op.cit., p. 19.

richer dimension. Marriage in the New Law was constituted by Christ as a grace communicating reality of interpersonal union for those incorporated into Christ through baptism. The Fathers of the Church, the scholastics and canonists reflected on these Genesis' creation narratives, but did not dwell at length on the partnership of the first man and woman.[64]

4. The Primordial Sacrament of the Genesis Creation Accounts in the General Audience Addresses of Pope John Paul II

Pope John Paul II in his general audiences[65] commencing September 5, 1979, gave a series of reflections in preparation for the fifth general assembly of the Synod of Bishops which had as its theme: The Role of the Christian Family. These addresses on the Scriptural teaching concerning

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64 M. GILBERT, loc.cit., pp. 739-742; M.C. HOROWITZ, "The Image of God in Man - Is Woman Included?", in Harvard Theological Review, 72(1979), pp. 192-204.

65 JOHN PAUL II, General Audience Addresses on the Theology of the Body, September 5, 1979 - May 6, 1981 in L'Osservatore Romano, September 10, 1979 - May 11, 1981; cf. M. CLEMENT, L'Homme Nouveau, in The Canadian Catholic Review, 1(1983) - 2(1984), 15 articles on "A Theology of the Body".

marriage constitute a systematic treatment of a theme by the Pope as he fulfills his ordinary teaching office.[66]

Typical of his concern for human dignity, the Pope says of Genesis 2: 18-24:

> [...] the entire text, in formulating the truth about man, amazes us with its typical profoundity [...]. It could be said that Genesis 2 presents the creation of man especially in its subjective aspect. Comparing both accounts, we arrive at the conclusion that this subjectivity corresponds to the objective reality of man created "in the image of God".[67]

A basic element in the text of Genesis 2: 18-24 is man's solitude. This solitude belongs to him as human and not as male vis-à-vis female. The text is contrasting the human world to the animal world; it speaks of the man as 'adam and only after the creation of woman is he spoken of as male 'iš in contrast to his partner 'iššā, the woman.

> [...] the complete context of that solitude of which Genesis 2:18 speaks can convince us that it is a question here of the solitude of "man" (male and female) and not just of the

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66 Cf. SAC. OECUM. CON. VAT. II, Lumen Gentium, art. 25; A.P. FLANNERY, Vol., I, op.cit., p. 379; F.G. MORRISEY, The Canonical Significance of Papal and Curial Pronouncements, Hartford, Conn., C.L.S.A., 1974, p. 23.

67 JOHN PAUL II, General Audience address, September 19, 1979, in L'Osservatore Romano, September 24, 1979, p. 1.

> solitude of man the male, caused by the lack of woman. It seems, therefore, on the basis of the whole context, that this solitude has two meanings: one derived from man's very nature, that is, from his humanity (and that is evident in the account of Genesis 2) and the other derived from the male-female relationship, and that is evident, in a certain way, on the basis of the first meaning.[68]

These two meanings of man's original solitude are interrelated, but what is more important for our reference to them is their object. The over-coming of man's solitude is directed to his care for the earth in a covenant response to Yahweh.

> The affirmation of God-Yahweh, "it is not good that man should be alone", appears not only in the immediate context of the decision to create woman ("I will make him a helper fit for him"), but also in the wider context of reasons and circumstances, which explain more deeply the meaning of man's original solitude. The Yahwist text connects the creation of man first and foremost with the need to "till the ground" (Genesis 2: 5), and that would correspond, in the first account, with the vocation to subdue and have dominion over the earth (Cf. Genesis 1:28). Then, the second account of creation speaks of man being put in the "Garden of Eden", and in this way introduces us to the state of his original happiness. Up to this moment man is the object of the creative action of God-Yahweh who at the same

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68 JOHN PAUL II, General Audience address, October 10, 1979, in L'Osservatore Romano, October 15, 1979, p. 14.

> time, as legislator, establishes the conditions of the first covenant with man.[69]

As we have noted above, Walter Brueggemann emphasizes this same covenant theme when speaking of Genesis 2: 23, the key phrase of which concerns the solidarity of man and woman in caring for the earth.

> The help that is to be rendered apparently is in "tilling and keeping" the earth (v. 15). When the matters in vv. 21-22 (sleep, rib, built into a woman) are recognized as a device to comment on the appearance of woman, we can read directly from v. 20 to v. 23 to follow the main thread of the story. Seen this way the "help" is found when the covenant formula is spoken, for the solidarity is in doing man's work, namely caring for the earth. Thus the covenant formula implies obligations.[70]

A detailed treatment of covenants, particularly marriage as a covenant, will follow in the next Chapter. Before we complete this examination of the Yahwist text of the Book of Genesis, we should consider its implications for the consortium, the partnership, the interpersonal relationship of the first man and woman. Pope John Paul II, following the

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69 Ibid., p. 15.

70 W. BRUEGGEMANN, loc.cit., pp. 539-540.

Vatican Council II's vision, describes man's call from solitude to unity as a communio personarum. The Council says, "This partnership of man and woman constitutes the first form of communion between persons".[71]

This element of communion of persons and the mutual gift by which it is brought into being forms the basis for two reflections by Pope John Paul II in his general audience addresses.[72] As this communion of persons has many elements in common with the consortium, it is of particular interest to us here. The differentiating quality is that the consortium is specifically marital, whereas the communion of persons is applicable to families and other groups.

As important as this distinction is. unfortunately it is one that is not always made, even when Conciliar texts are quoted. An example of such may even be found in the Apostolic Exhortation, Familiaris Consortio, where it states that "The

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71 SAC. OECUM. CON. VAT. II, Gaudium et Spes, p. 697 Art. 12 "/... / quorum consociatio primam formam efficit communionis personarum " ; English translation from A.P. FLANNERY, Vol. I, op.cit., p. 913, Art. 12.

72 JOHN PAUL II, General Audience addresses, November 14, 1979, "By the Communion of Persons Man Becomes the Image of God", in L'Osservatore Romano, November 19, 1979, p. 1, and February 6, 1980, "Man and Woman: A Mutual Gift for Each Other", in L'Osservatore Romano, February 11, 1980, p. 1.

family [...] in God's plan [...] has been established as an 'intimate community of life and love'."[73] This is a fine and noble description of the family, but there is a difficulty that arises from the fact that these words were originally not spoken of the family but of marriage, as a cursory glance at their source in the Vatican Council documents clearly indicates.

> The intimate partnership of married life and love has been established by the Creator and qualified by His law, and is rooted in the conjugal covenant of irrevocable personal consent.[74]

The first part of Gaudium et Spes, Article 48, speaks specifically of marriage and only subsequently does the text speak of the family. To quote the words of the Vatican Council and to acknowledge them in the footnote while omitting the specific reference to marriage risks giving the words a

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73 ID, Apostolic Exhortation, Familiaris Consortio, November 22, 1981, art. 17, in A.A.S., 74(1982), pp. 99-100, "Familia quoniam ex Dei consilio constituitur tamquam 'intima communitas vitae et amoris'"; English translation published by the Canadian Conference of Catholic Bishops, Ottawa, p. 32.

74 "Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur", SAC. OECUM. CON. VAT. II, Gaudium et Spes, p. 754; English translation in The Sixteen Documents of Vatican II, Boston, St. Paul Editions, 1966, p. 561.

meaning different from that intended by the Council Fathers. In the Conciliar teaching, husband and wife are seen as a community of persons, a consortium, a partnership that is specifically marital. This consortium is brought into being by the mutual agreement of the spouses, the act of consent "whereby the spouses mutually bestow and accept each other."[75]

This mutual gift of self is expressed in Genesis 2: 24 in terms of a man's leaving father and mother and joining himself to his wife so that the two become one. Pope John Paul II speaks of this as a mutual gift and reciprocal acceptance.

> We can say that /... / the exchange of the gift consists in reciprocal "acceptance" of the other, such as to correspond to the very essence of the gift; in this way, mutual donation creates the communion of persons. It is a question, therefore of "receiving" the other human being and "accepting him", precisely because in this mutual relationship, of which Genesis 2: 23-25 speaks, the man and the woman become a gift for each other.[76]

This interpersonal emphasis, prepared for by the teaching contained in Gaudium et Spes and the rich Scriptural

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75 Ibid., art. 48; Cf. C.I.C. (1983), c. 1057 #2.

76 JOHN PAUL II, General Audience address, February 6, 1980, "Man and Woman: A Mutual Gift for Each Other", in L'Osservatore Romano, February 11, 1980, p. 1.

background that it summarizes, is well expressed in the definition of matrimonial consent given in the new Code of Canon Law.

5. Canonical Application of the Genesis Creation Accounts' Teaching on Marriage

Some might say that the Genesis creation accounts' teaching on marriage may be a useful inspiration for later scriptural insights and for the development of the theological understanding of marriage, but that they do not have consequences in the juridic order. Mgr. L. Anné an auditor of the Roman Rota discusses this attitude and makes an enlightening contribution by stressing that the elements of the Genesis teaching on marriage as the primordial sacrament, the union to which man and woman are called from the beginning, derive from the natural law.

> It may be objected that the teaching of Sacred Scripture is primarily religious and ethical. Since marriage is, however, a social institution of the natural law, those things which in the ethical order are considered to denote the very nature or essence of this institution must also be considered as such in the juridical order. In the order of positive law, therefore, we must admit as fundamental principles those things which are part of the natural law.[77]

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77 S.R. ROTA, c. Anné, December 4, 1975, in E.I.C., 33 (1977), p. 176, "Objicit forsan aliquis doctrinam S.S.

Another rotal auditor, Mgr. J.M. Serrano-Ruiz says that the People of God discover the nature of and the norms for the institution of marriage in two basic sources: the Word of God and the study of humankind.[78] Serrano says that the inspired Word's original idea and fundamental law on marriage is Gen 2: 18-24. This he links to the teaching on marriage in Gaudium et Spes when he says:

> The idea of 'community of life and love' then is repeatedly taught in the biblical account alluding to companionship as remedy for aloneness as much as the closeness of the couple which itself sustains marriage and which distinguishes marriage from any other less-exacting association.[79]

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77 (cont'd) Scripturarum esse imprimis religiosam et ethicam. At, cum matrimonium est institutum sociale juris naturalis, ea quae, in ordine ethicae, habentur uti ipsam huius instituti essentiam seu naturam significantia etiam uti talia habenda sunt in ordine juridico. Nam in ordine iuris positivi uti principia fundamentalia agnoscenda sunt ea quae sunt iuris naturae." English translation by members of the Matrimonial Tribunal of Sydney, Australia.

78 J.M. SERRANO-RUIZ, The Right to the Community of Life and Conjugal Love as Object of Matrimonial Consent: Juridical Aspects and the Evolution of the Jurisprudence of the Sacred Roman Rota, C.L.S.A., Eastern Regional Conference, 1976, p. 4.

79 Ibid., p. 5.

Serrano then notes that the Hebrew word bśr for "flesh":

> /...7 graphically expresses the singularity, the intimacy, the totality and exclusivity of the conjugal union /...7 perhaps a better interpretation of the biblical text in modern times would be to say that God destined man and woman for the constitution of an intimate community of life and love.[80]

Thus, Serrano forges a link between the Yahwist creation text and the description of marriage in Gaudium et Spes, art. 48. Such a link is canonically significant, because as we shall see in our later chapters the Council's description of marriage will influence profoundly the revised Code's definition of marriage in C.I.C. (1983), c. 1055 #1.

The Genesis creation accounts indicate the two poles which have influenced the Church's teaching on marriage and therefore Canon law and jurisprudence. The C.I.C. (1917) with its ius in corpus and the hierarchy of the ends of marriage, could, like the Priestly creation account, be described as "procreationist". The revised Code, inspired by the Vatican Council II's teaching on marriage, could, like

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80 Ibid.

the Yahwist creation account, be described as "personalist".[81] Just how decisive the Council's teaching would be in establishing this personalist emphasis we shall see in the following chapters.

CONCLUSION

The Genesis creation accounts while sharing some similarities with the myths of the surrounding peoples, are also profoundly different. God is presented as the Creator who makes man and woman in his "own image and likeness " Gen 1:26 and presents man with a partner, because"it is not good for the man to be alone" Gen 2:18. Thus, marriage is presented as the primordial sacrament, the original gift of God at creation.

Among the wonderful deeds of God's creation, we could mention that in the beginning He blessed man and woman who were given as partners to each other with responsibility for and stewardship over God's work of creation. This commission was expressed in covenant terms, the man and woman as partners were responsible before God to live by the terms of

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81 Cf. G. ROBINSON, "Unresolved Questions in the Theology of Marriage", in The Jurist 43(1983), p. 69.

the covenant in their relationship with each other and also with the rest of creation. Covenants are pacts or agreements which solemnly define rights and convey obligations. The fathers at the Vatican Council II chose to describe marriage in terms of the scriptural notion of covenant, as also does the new Code in canon 1055.

To appreciate this change let us now consider the origin of covenants, their place in Israel and the contribution of the prophets who in the Old Testament enriched marriage by paralleling the union of husband and wife in marriage with God's covenant with his people. Once having seen the importance of covenants as defining rights and obligations and the link with marriage, we shall then consider the change brought about by the Vatican Council II and the ramifications for the Code of Canon Law.

CHAPTER II

MARRIAGE AS A COVENANT: MODEL FOR THE SECOND VATICAN COUNCIL'S TEACHING ON MARRIAGE

The Scriptures enhance marriage by placing it in the context of a sacred agreement or covenant. The Second Vatican Council, in the Pastoral Constitution on the Church in the Modern World (Gaudium et Spes), sought to enrich the contemporary understanding of marriage by returning to the same concept and expression. When the Council spoke of marriage as a covenant, it referred to a number of Old Testament texts.[1] To understand what the Council meant by "covenant", this chapter will offer some general remarks on covenant and marriage in Israel which the prophets would eventually link to covenant, and then examine the texts used by the Council.

1. Covenants in General

For the good of society, promises and commitments, especially those of a more social nature, are held to be binding. Therefore, certain formalities are established

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1 SAC. OECUM. CON. VAT. II, Constitutiones, Decreta, Declarationes, Cura et studio Secretarie Generalis Concilii Oecumenici Vaticani II, Constitutio pastoralis de Ecclesia in mundo huius temporis, Gaudium et spes, art. 48, p. 755. "Sicut enim Deus olim foedere dilectionis et fidelitatis populo suo occurrit." Footnote 3 which accompanies this verse mentions: Hosea 2; Jeremiah 3, 6-13; Ezekiel 16 and 23; Isaiah 54. We will examine these texts in this chapter.

to determine how and when the promise was made; witnesses are also assigned to vouch for it. In the Ancient Near East, solemn forms of such pacts or treaties were called covenants. But the Hittite and Babylonian civilizations, from which Israel inherited so many of her institutions and customs, never had one single word to describe contract or covenant.

The word most often used for covenant in the Scriptures is berith, which occurs 286 times in the Old Testament. The meaning of the root for berith raises an etymological problem; perhaps it comes from the root "to eat", in which case berith was the meal or the act of eating. More likely are hypotheses which find a connexion with the Accadian word baru in the sense of "to bind" and the related biritu in the sense of "binding" or "bond".[2] The Septuagint translated "berith" as "diathéké" (testament) which was translated into Latin as "foedus" and into English as "covenant".[3]

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2 G. QUELL, "Diatheke" (testament), in G. KITTEL (ed.), Theological Dictionary of the New Testament, Grand Rapids, Mich., Eerdmans, 1964-1976, Vol., II, pp. 107-108; M. WEINFELD, "Berith", in G.J. BOTTERWECK and H. RINGGREN, (eds.), Theological Dictionary of the Old Testament, Vol., II, Grand Rapids, Mich., Eerdmans, 1974, pp. 253-279.

3 G. QUELL, loc.cit., p. 106; J.S. FREY, A Hebrew, Latin and English Dictionary, London, Gale and Fenner, 1815, Vol., II, p. 13. D.J. McCARTHY, "Ebla: Addenda to Treaty and Covenant", in Biblica, 60(1979), p. 249.

The Old Testament texts which use the word berith may be divided into two main groups. To one belong those in which the concept is understood as the firmly regulated form of a fellowship between God and man or man and God. To the other belong those in which the covenant is presented as the half-legal and half-sacral form of a fellowship between man and man.[4] Among examples of the first group are the covenants with Noah (Gen 9:1-17) and Abraham (Gen 22:15-18).

Human covenants in Israel manifested a great variety of forms and this second group arose in a variety of ways. An exchange of gifts, the shaking of hands, the eating of something together, an oath, and a host of other things could be used to form covenantal relationships.[5]

Among all the covenants in the Old Testament, three stand out as being of fundamental importance. Firstly, they are the covenant with Abraham in the Book of Genesis (Chapters 12-23): having entered into a covenant with Yahweh, Abram's name is changed to Abraham to signify his new status as the father of the people of Israel. Secondly, the granting

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4 G. QUELL, loc.cit., p. 109.

5 D.J. McCARTHY, Old Testament Covenant, Richmond, Va., John Knox Press, 1972, p. 41; ID., "Three Covenants in Genesis", in C.B.Q., 26(1964), pp. 179-189; J. MUILENBURG, "The Form and Structure of the Covenantal Formulations", in Vetus Testamentum, 9(1959), pp. 347-365.

of the Decalogue to Moses in the Book of Exodus (Chapters 19-25) is the high point of Old Testament covenant theology. Finally, Joshua, after his entry into the promised land, renews the covenant in the Book of Joshua (Chapter 24). These principal covenants of the Old Testament were the inheritors of a long tradition.

In earlier covenants, oaths were made, a conditional self-cursing which was an appeal to the gods to punish the promisor for any default. A sacrifice may have been offered, the understanding being that the promisor be cut apart like the sacrifice for any default (Gen 15:1-12). This cutting of a sacrifice seems to link the etymology of covenant with the word "to cut" and so the expression "to cut a covenant". [6]

The great Mesopotamian cultures, particularly in the realm of international relations, enacted covenants upheld by oaths, as G.E. Mendenhall clearly shows:

> References to international (i.e. inter-city-state) covenants occur already in old Sumerian texts of the third millennium B.C.

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6 G.E. MENDENHALL, "Covenant", in The Interpreter's Dictionary of the Bible, Vol., 1, New York, Abingdon Press, 1962, pp. 715-716; G. QUELL, loc.cit., 116-117.

> and it would seem likely that covenants upheld by oath must go back many centuries if not millennia before. Consequently, it is not surprising that international covenants had developed a specialized form of their own in Babylonia and Assyria, which do not have any direct relationship to the forms known in ordinary business or private legal contracts. /... / we have adequate source material for studying international covenants only from the Hittite Empire, 1450-1200 B.C. This material is invaluable for our purposes, since it is contemporary with the beginnings of the people of Israel. [7]

The word used by the people of Israel for covenant, berith, was not univocal, but varied in meaning according to the obligations assumed as part of the covenant. As K. Baltzer shows:

> The berith then is that cultic act whereby obligations or agreements of whatever sort were solemnly made absolutely binding and inviolable. Its content and therefore its meaning derive solely from the nature of the obligations; depending on what these are, it can mean covenant, agreement, treaty, solemn assurance, obligation, oath. [8]

Since berith is so fundamental to an understanding of covenant in Israel, a definition is in order. The following

7 G.E. MENDENHALL, Law and Covenant in Israel and the Near East, Pittsburg, The Biblical Colloquium, 1955, pp. 26-27.

8 K. BALTZER, The Covenant Formulary in Old Testament, Jewish and Early Christian Writings, Philadelphia, Fortress Press, 1971, p. 3.

definition by G.E. Mendenhall highlights the essential elements of a covenant entered into by equal partners, in contrast to the suzerainty treaty form of covenant, when he defines covenant as:

> A solemn promise made binding by an oath, which may be either a verbal formula or a symbolic action. Such an action or formula is recognized by both parties as the formal act which binds the actor to fulfil his promise.[9]

Personal or equal partner covenants could be between families (e.g., Abraham and Lot) or between friends (e.g., Jonathan and David) and will also be applied by the prophets to marriage. We must beware of generalizing the use of the word "covenant" in the sense that "contract" is used in English to cover any exchange of rights or things.

> There is no word, either in Bible (sic) or in Mishnah, which like the Latin contractus or pactum, or the English "contract", covers all agreements from which a liability or change of rights may arise. Different kinds of contracts, whether executed or executory, are denoted by their own special names.[10]

The very highly developed Roman legal system did not have one single general term for contract, even though it had a number of well known forms of contract.[11]

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9 G.E. MENDENHALL, loc.cit., p. 714.

10 L.N. DEMBITZ "Contract", in The Jewish Encyclopedia, New York, Funk and Wagnalls, 1903, Vol., 4, p. 248.

11 Obligatio, according to Modestinus in D. 44, 7, 52; Stipulatio according to Ulpianus in D. 45. 1, 1, or Pactus in D. 2, 14, 1, 3.

"Testimony" and "oath" are other words used instead of covenant in the Scriptures. Also there was an early designation of the Decalogue as "the ten words". In the Septuagint, berith is rendered as "testament" 270 out of the 286 times it appears. The same Greek word "diathékē" is used to translate the Hebrew words for brotherhood, word, statute and law. Very rarely is "synthékē", the usual Greek word for "contract" used, but never as a translation of berith.[12] This fact is important, as it shows that in the translating of the Scriptures a clear distinction was seen between contract and covenant.

Some consideration of the etymology of "contract" and "covenant" is in order. The Latin "contractus" is derived from "contraho" and means "to be drawn together into a narrow space, i.e., compressed, shortened".[13] An analysis of the classical texts leads to the conclusion that "contractus" meant "contract" i.e., an agreement recognized

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12 G.E. MENDENHALL, loc.cit., p. 716; M. WEINFELD, "berith", in Theological Dictionary of the Old Testament, G.J. BOTTERWECK and H. RINGREN (eds.), Grand Rapids, Mich., Eerdmans, 1974, Vol., 2, p. 256.

13 C.T. LEWIS and C. SHORT, A Latin Dictionary, Oxford, Clarendon Press, 1969, pp. 457-458.

by the ius civile and made by the parties in order to create an obligation.[14] In English, "contract" means:

> A mutual agreement between two or more parties that something shall be done or forborne by one or both; a compact, covenant, /.../. In a legal sense, an agreement enforceable by law /.../. The act whereby two persons take each other in marriage.[15]

In Roman law, rights in personam are the province of obligatio which implies both rights and duties.

> Thus, etymologically it signifies a tying together - the bond which unites creditor and debtor. It is a bond by which one party is bound, and the other entitled to some act or forebearance, third parties being, in principle at least, unaffected.[16]

According to Justinian, obligations arise either from contract (ex contractu) or from delict (ex delicto) and "contract" is defined as:

> An enforceable agreement, a legal bond whereby we are constrained by the need to perform something according to the law. There are four species of obligatio: real, verbal, literal and consensual contracts.[17]

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14 F. SCHULZ, Classical Roman Law, Oxford, Clarendon Press, 1951, pp. 464-468.

15 J.A. MURRAY, "Contract", in A New Dictionary on Historical Principles, Oxford, Clarendon Press, 1893, Vol., 2, pp. 912-913.

16 B. NICHOLAS, An Introduction to Roman Law, Oxford, Clarendon Press, 1979, p. 158.

17 Institutes III, 13.

The fact that mention is made of enforcing the agreement is a reminder that "contract" has its origin in business and commerce. But there were also "consensual contracts" which were less formal, the parties being bound by a formless agreement. Modestinus, in his Rules lists, among others, two such types:

> Even simple consent will be sufficient to establish an obligation, although it may be expressed by words. Many obligations are contracted merely by signs of assent.[18]

Consensual contracts because of their reciprocity, and of their nature being freely entered into, manifested much in common with consent to marry, which was later determined by the Church to be a contract though not accepted as such in Roman law.

> It was in the consensual contracts that the idea of bona fides had its most fruitful application, and in them /... /, that most of the important transactions of commercial life could be expressed.[19]

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18 "Etiam nudus consensus sufficit obligationi, quamvis verbis hoc exprimi possit. Sed et nutu solo pleraque consistunt." MODESTINUS, Libro secundo regularum, in D.44,7,52

19 B. NICHOLAS, op.cit., p. 171

Bona fides colours every aspect of consensual contracts and the iudex was directed to determine whether the defendant was in law liable or not according to the requirements of good faith (ex fide bona).[20] While obligations were strictly personal, Nicholas notes that:

> In a bonae fidei contract [...], both dolus and metus came within the wide heading of bad faith so as to enable the iudex to hold that ex fide bona the innocent party should not be held to his contract. And it was bad faith not only if one party actively deceived the other on some material point, but even if he did no more than passively to acquiesce in the other's self-deception.[21]

It is easy to see how these consensual contracts with their bilateral aspect and particularly the emphasis on the necessary good faith lent themselves to the canonists describing marriage as a contract. Roman law viewed marriage as a pactum, an agreement through the consent of two or more persons to the same effect, or a conventio, which referred to everything to which persons who have transactions with one another give their consent for the purpose of making a contract.[22] "Covenant" is the English equivalent

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20 Ibid., p. 163.

21 Ibid., p. 176. This is especially applicable to the C.I.C. (1983), c. 1098 concerning deceit or fraud as also c. 1103 on fear.

22 ULPIANUS, Libro quarto ad edictum, in D. 2, 14, 1, 3.

of "conventio" and means: "A mutual agreement between two or more persons and especially has legal and theological application."[23] This theological meaning derived from the adaptation of the suzerainty treaty between a great king and his vassal to express the bond between the people and the divinity.

D.J. McCarthy examined the basic unity of the Ancient Near Eastern covenants, and concluded:

> Everywhere the basic elements are the same; the provisions are imposed under oath and placed under the sanction of the divine witnesses invoked. And this divine guardianship is invariably made more vivid through curses which represent (and effect) the dreadful fate of an eventual transgressor. Hence the essential elements of the form: stipulations, the god lists or invocations, and curse formulae which are invariably found in the treaties [...][24]

While there are similarities stemming from their common Near Eastern origin, Israel's covenants are also markedly different from those of the surrounding nations. Yahweh was not merely a guarantor of Israel's covenant, he was a party

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23 J.A. MURRAY, "Covenant" in loc.cit., pp. 1100-1101. J.A. MURRAY notes that "covenant" is the English equivalent of the Latin "conventio" as technically used from the Norman Conquest onwards.

24 D.J. McCARTHY, Treaty and Covenant, Rome, Biblical Institute Press, 1978, p. 122. See also D.R. HILLERS, Covenant: The History of a Biblical Idea, Baltimore, Johns Hopkins Press, 1969, pp. 28-45.

to it. Ethical and ritual prescriptions are contained because the covenant governed the relations of Yahweh's people with him and also among themselves.

It was the contribution of the prophets to explicate marriage as a covenant, thus placing it within the ambit of Israel's basic relationship with Yahweh. Let us now consider marriage as an institution in the life of the people of Israel, then we shall be able to appreciate the richness of the prophets' linking marriage to the covenant.

2. Marriage in Israel

The Yahwist text in the Book of Genesis 2: 24, "That is why a man leaves his father and mother and clings to his wife, and the two of them become one body," clearly indicates that for Israel the primordial marriage was monogamous. Since God has given the woman to the man as his partner, it was also obvious that this monogamy was by God's will and design. As if in confirmation of this, the Book of Genesis (4:19) notes that polygamy first enters in the reprobate line of Cain, who murdered his brother Abel.

References to polygamy among the Patriarchs are really to relative polygamy, for there is a lawful wife and one or more concubines. The Patriarchs seem to have been freer in

their conduct than the mores of Mesopotamia at that time. Jacob married both Leah and Rachel after Laban's deception (Gen 29: 15-30) and Esau had a number of wives (Gen 28: 6-9). The history of Israel under the Judges and the monarchy witnessed to further abuses. Gideon had many wives (Judges 8: 30-31); later the Talmud fixed the number of wives at four per subject and eighteen for a king. Despite these instances of laxity, the most common form of marriage in Israel was monogamous.[25]

In the typical Israelite marriage, the wife was under the authority of her husband. The Book of Exodus 20:17 lists under a man's possession, his wife along with his servant, his ox and his ass. The husband was called "master" of his wife. Custom also dictated that the fiancé was bound to pay a certain sum of money to the father of the intended spouse.

Such payment raises the question: was marriage in Israel marriage by purchase? The obligation to pay a sum

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25 M. BURROWS, An Outline of Biblical Theology, Philadelphia, Westminster Press, 1946, p. 295; R. DE VAUX, Ancient Israel, London, Darton, Longman and Todd, 1968, p. 25; P. GRELOT, "The Institution of Marriage: Its Evolution in the Old Testament", in Communio, 1 (1974) pp. 42-45; C. WIENER, "Marriage", in The Dictionary of Biblical Theology, L.X. DUFOUR (ed.), London, Geoffrey Chapman, 1967, p. 295.

of money or its equivalent certainly looks like a purchase. In place of the money the man could work for the father of the intended bride. This was the case with Jacob who worked for Laban to acquire both Leah and Rachel (Gen 29: 15-30). Or, he could also accomplish an appointed task, as when David acquired Michal from Saul (1 Samuel 18: 20-27). But the exchange was not so much the price paid or work done to acquire the woman, as a compensation to her family. The future husband acquired a right over the woman, but the woman herself was not bought and sold. This is certainly clear when we compare this exchange with another type of union which really was a purchase: a girl could be sold by her father as a concubine, in which case she was a slave, she could be re-sold, though not to a foreigner, (Exodus 21: 7-11).

It was the custom in Biblical times to marry very young. The Rabbis fixed the minimum age for marriage at twelve years for girls and thirteen for boys. In fact, in the Middle East to this day, marriages are entered into early.[26]

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26 R. DE VAUX, op.cit., p. 29. Canon 1083 #1, C.I.C. (1983) remains unchanged from Canon 1067 #1, C.I.C. (1917), "A male before he has completed his sixteenth

Israel's strong patriarchal family model and the young age at which marriage could be entered into meant that parents generally arranged the marriages of their children, often without consulting them (Gen 24: 2,29:23 and Tobit 6:13). On the other hand, the young man could make his preferences known (Gen 34:4 and Judges 14:3) or even make his own decision without consulting his parents (Gen 26:34) and in 1 Samuel 18:30 we even read of Michal falling in love with David.

The patriarchal family and the relics of tribal life meant that one chose a wife from one's own kith and kin. Abraham sent his servant to find a wife for Isaac from his own family (Gen 24:4). In the Book of Tobit 7:11 we read

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26 (cont'd) year of age and likewise a female before she has completed her fourteenth year of age, cannot validly enter matrimony." Canon 1083 #2 grants to the Conference of Bishops the power to establish a higher age for the licit celebration of marriage, while Canon 1067 #2 C.I.C. (1917), is retained as Canon 1072 C.I.C. (1983), which urges pastors of souls to deter from marrying before the age acceptable for that region. The Relatio records that the President of the Oriental Code Commission, Cardinal Parecattil, urged that because of developments in civil legislation and in view of the necessary psychic maturity of the spouses, that the age be uniform with the proposed Oriental Code: eighteen years for the male and sixteen years for the female. The relator noted that all the Consultative bodies were in favour of the canon, that it speaks of the minimum required by the natural law and that it is not expedient for the Code to establish a higher age because of the diversity of cultures. PONT.COMM. C.I.C. RECOGNOSCENDO, Relatio, p. 251.

that Sarah had been given in marriage to seven men, all of whom were kinsmen and all died on the very night they approached her. Tobiah is told Sarah is his "for no man is more entitled to marry my daughter Sarah than you, brother. Besides, not even I have the right to give her to anyone but you, because you are my closest relative " (Tobit 7:10). However, within the family, marriages with very close relatives were forbidden, because one does not unite with "the flesh of one's body" (Leviticus 18:6). Affinity was held to create the same bond as consanguinity (Leviticus 18: 17). These bans amount to the prohibition of incest.[27] Many Scriptures scholars now interpret the exceptive clauses of St. Matthew's Gospel (5:32 and 19:9) as referring to these forbidden degrees of marriage.[28]

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27 R. DE VAUX, op.cit., p. 31.

28 A.M. AMBROZIC, "Indissolubility of Marriage in the New Testament: Law or Ideal?", in S.C., 6 (1972), pp. 274-278; J.R. DONAHUE,"Divorce: New Testament Perspectives", in The Month, April (1981), pp. 113-116; J.A. FITZMYER, "The Mattean Divorce Texts and Some New Palestinian Evidence", in Theological Studies, 37 (1976), pp. 197-226. This is a scholarly work with conclusions based on recent archaeological discoveries, the work itself or the conclusions are referred to by most of the other authors; M. GELDARD,"Jesus' Teaching on Divorce: Thoughts on the Meaning of Porneia in Matthew 5:32 and 19:9", in The Churchman, 92 (1978), pp. 134-143; A. MAHONEY, "A New Look at the Divorce clauses in MT 5: 32 and 19:9", in C.B.Q., 30 (1968), pp. 29-28; W.J. O'SHEA, "Marriage and Divorce: the Biblical Evidence", in A.C.R., 47 (1970), pp. 92-109; Q. QUESNELL, "Made Themselves Eunuchs

Marriage in Israel was a purely civil contract,[29] not sanctioned by any religious rite.[30] Only in the Book of Tobit 7:13 is mention made of a written contract. The most outstanding example of the inequality of the sexes in Israel was that a husband could divorce his wife for the reasons given in Deuteronomy 24:1, that he "finds in her something indecent" and "writes out a bill of divorce and hands it to her." This reason for divorce is so vague that it was discussed at length in the Rabbinical age and even down to the time of Jesus.

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28 (cont'd) for the Kingdom of Heaven, (MT 19:12)", in C.B.Q., 30 (1968), pp. 335-358; L. SABOURIN, "The Divorce Clauses. MT 5:32, 19:9", in Biblical Theology Bulletin, 2 (1972), pp. 80-86; B. VAWTER, "Divorce and the New Testament", in C.B.Q., 39 (1977), pp. 528-542; ID, "The Divorce Clauses in MT 5:32 and in 19:9", in C.B.Q., 16 (1954), pp. 155-167.

29 "According to the Mishnah, a wife is to be acquired by money or by writ or by intercourse. Thus in some cases sexual intercourse alone was considered to constitute marriage ", A. ISAKSSON, Marriage & Ministry in the New Temple, Lund, C.W.K. Gleerup, 1965, p. 125.

30 For a thorough treatment of the development of the sacralisation of marriage in Israel, traced according to three phases, Codes and Monarchy, the Prophets and finally under the Rabbis, see J. COTTIAUX, La Sacralisation du mariage de la Genèse aux incises Matthéennes, Paris, Cerf, 1982, pp. 87 - 575; R. DE VAUX, op.cit., pp. 26-34, esp. p. 33; E. SCHILLEBEECKX, Marriage: Human Reality and Saving Mystery, London, Sheed and Ward, 1980, pp. 97-101.

The more orthodox school of Rabbi Shammai, admitted only adultery and misconduct as grounds for divorce. The liberal school of Rabbi Hillel accepted almost any reason for divorce, even poor cooking. The wife for her part could not divorce her husband, for he was her master. This was in sharp contrast to the place of women in surrounding cultures and also in Roman law, as R. De Vaux writes:

> In Egypt the wife was often the head of the family, with all the rights such a position entailed. In Babylon she could acquire property, take legal action, be a party to contracts, and she even had a certain share in her husband's inheritance.[31]

In Jewish colonies of the Roman empire, the wife often acquired certain civil rights. Perhaps due to the gentile influence in the communities for which it was primarily written, Mark's gospel manifests a libertarian spirit in that it states: "the woman who divorces her husband and marries another commits adultery" (Mark 10:12). There is here a statement of the equality of the sexes in that neither husband nor wife may divorce, thus removing the Deuteronomic

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31 R. DE VAUX, op.cit., p. 40. A. PHILLIPS, "Some Aspects of Family Law in Pre-Exilic Israel", in Vetus Testamentum, 9 (1959), pp. 347-365. Phillips treats of women in Israel enjoying no independent legal status (p. 351) and divorce (pp. 352-353.

discrimination against the wife and affirming the indissolubility of marriage.[32] This attitude was prepared by the prophets' linking marriage to the covenant, with its profound religious significance.

3. Covenant Marriage according to the Prophets

Yahweh, the God of the people of Israel was also the God of the covenant. In placing marriage in the context of the covenant, the prophets,[33] who were witnesses to the God who had joined himself to his people by a covenant, and in whose name they pronounced blessings on those who were faithful and curses on those who were unfaithful to the covenant, endowed marriage with the most sacred of connotations.

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32 "From Mark x. 2-12 it is clear that Jesus regarded marriage as an indissoluble union and that He placed husband and wife in a relationship of equality ", V. TAYLOR, Gospel According to St. Mark, London, Macmillan, 1953, p. 421.

33 "The canonical prophets are thus very much concerned with Israel as the covenant people of Yahweh, and consequently with the covenant by which Israel's life was governed. /... / Israel /... / became increasingly influenced, and ultimately circumscribed, by the tradition of the covenant and its law. For the prophets /... / the covenant tradition formed the heart of their religion /... / ", R.E. CLEMENTS, Prophecy and Covenant, London, SCM, 1965, pp. 17-18.

The image of the monogamous marriage of the first man and woman (Gen 2: 21-25) is before the eyes of those prophets who present the image of Israel as the one wife chosen by the one and only God to whom they are bound by a covenant. Three prophets, Hosea, Jeremiah and Isaiah, present this image most conclusively. Ezekiel develops the same metaphor into an allegory and the last book in the literary ordering of the Old Testament, the Book of Malachi, extols marriage as a covenant and repudiates divorce, which is an appropriate setting for Jesus' re-institution of the indissolubility of marriage.

a. Hosea, the Prophet of Marriage and the Covenant[34]

Hosea belonged to the northern kingdom and his prophetic activity extended from the prosperous reign of Jeroboam (786-746 B.C.) into the disastrous times that followed and saw the disappearance of Israel[35] from the political scene. The prophet Hosea is commanded in Chapter 1:2 to

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34 The Vatican Council II in Gaudium et Spes, art. 48, gives Hosea 2 as a reference in footnote 3 as follows: "God of old made Himself present to his people through a covenant of love and fidelity", cf. supra, our footnote 1.

35 We refer to the chosen people of the Old Testament as "Israel" and therefore the use of this term prescinds from the division of this people into the northern kingdom of Israel and the southern kingdom of Judah. "In the opinion of many the term Israel, as a name binding together the confede-

marry a harlot and to have children by her.[36] This command is consistent with symbolic actions in the other books of the prophets (Jeremiah 19; Isaiah 20: 2-6 and Ezekiel 5). Hosea's symbolic action of marrying a harlot is equated to Israel's infidelity.[37] Israel has proved unfaithful to

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35 (cont'd) ration of tribes and meaning "God rules", would also have had a predominantly sacral-religious and not political connotation", W. EICHRODT, Theology of the Old Testament, London, SCM, 1961, Vol. 1, p. 40. "/... / Judean editors, /... / had taken over the name Israel, applying it to the kingdom of Judah and later to the province of Judah and its people in the Persian period", W.F. STINESPRING, "A Problem of Theological Ethics in Hosea", in J.L. CRENSHAW and J.T. WILLIS, (eds.), Essays in Old Testament Ethics, New York, KTAV Publishing, 1974, p. 133.

36 Various interpretations of this exceptional command have been given. I.H. EYBERS, "The Matrimonial Life of Hosea", in Studies on the Book of Hosea, Die Ou Testamentiese Werkmeenskap in Suid-Afrika, Stellenbosch University, 1964, pp. 11-34, summarises these interpretations as allegorical, pp. 11-12; visionary, pp. 12-15; biographical, pp. 16-17 and literal, pp. 17-24. The meaning of the account is more poignant if taken literally and so we conclude with Eybers, p. 26: "Since there is no evidence which renders a realistic or literal interpretation of Hosea's matrimonial experiences impossible or even improbable, we accept the narrative in Hosea 1 and 3 as brief history of actual events. In this way the symbolism was, and still is, apparent to everyone, especially if only one woman, Gomer, was involved." For further discussion of interpretations of Hosea's marriage, see R. GORDIS, "Hosea's Marriage and Message: A New Approach", in the Hebrew Union College Annual, 25 (1954), pp. 9-24.

37 The charge of harlotry levelled against Gomer has been challenged by some commentators, see L.W. BAITEN, "Hosea's Message and Marriage", in the Journal of Biblical Literature, 48 (1929), pp. 257-273; F.S. NORTH, "Solution of Hosea's Marital Proolems by Critical Analysis", in the Journal of Near Eastern Studies, 16 (1957), pp. 128-130.

Yahweh and his covenant by consorting with the Baals. While this meant spiritual apostasy, the cult of the Baals also included the practice of the grossest sexual abuses which were part of the fertility cults; therefore, Israel's attitude and behaviour are characterised as prostitution. Israel has turned aside from the God of the covenant, Yahweh, her true king who gives salvation, and taken up the fertility cults of the gods of Canaan, the Baals. [38]

Hosea's symbolic action shows Israel that she is like a wife who abandons her husband. Chapter 3 has been interpreted as containing a second marriage by the prophet, but the account of Chapter 3 is not integrated with Chapter 1 and there are three well defined literary units, seeking to emphasize the theological meaning of the marriage symbol and not to tell a story, treating the same experience from a different viewpoint. Hosea presents a revolutionary view, for Israel was a society that punished adultery harshly[39] (Leviticus 20: 10, Deuteronomy 22: 20-28 and John 8: 1-11).

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38 G. OSTBORN, Yahweh and Baal, Lund, C.W.K. Gleerup, 1956, pp. 14-31, 74-82.

39 Although severe penalties were enacted for adultery, this is not to say they were carried out, thus they may be seen more as a deterrant than actual punishments, cf. H. McKEATING, "Sanctions against Adultery in Ancient Israelite Society, with some Reflections on Methodology in the Study of Old Testament Ethics", in Journal for the Study of the Old Testament, 11 (1979), pp. 57-72.

> The richness of Hosea's idea of the true character of covenanted union is best evident in the image peculiarly his own, i.e. the presentation of Yahweh and Israel as husband and wife (chs. 1-3). His own experience of the marriage union, characterized by a tender, understanding love and an unshakable fidelity despite a tragic mismatch, provides the insight through which he can understand and convey something of Yahweh's union with Israel. He knows beyond any doubt that Yahweh's love is unchanging no matter how the partner breaks faith.[40]

The breaking of faith is certainly the activity of Hosea's wife. Prior to the marriage she may have been a sacred prostitute at a Baal shrine or a devotee of Baal whose worship involved orgiastic rites. In which case Hosea's wife, Gomer, is an image of Israel which has joined in the idolatry of Baal worship.

> Gomer's misconduct is not just LIKE the sin of Israel that infuriates God and breaks his heart, it IS that sin. Her infidelity was not simply adultery committed against Hosea, and so an allegory of Israel's spiritual adultery against Yahweh. Her prostitution in the Baal cult was the very epitome of Israel's apostasy. YAHWEH's judgement of her as a sinner is indistinguishable from his condemnation of the whole nation's societal sin.[41]

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40 D.M. McCARTHY, "Hosea", in J.B.C., Vol., I, R.E. BROWN, (ed.), p. 255.

41 F.I. ANDERSON and D.N. FREEDMAN (joint authors), Hosea; The Anchor Bible, Vol. 24, Doubleday, Garden City, N.Y., 1980, p. 125.

These theological aspects have a very human, psychological follow-up. Anyone who has been involved with broken marriages knows the anger, hurt, resentment and frustration that marital difficulty and crisis generate. Hosea experiences these in his trial with Gomer, as F.I. Anderson and D.N. Freedman illustrate so well.

> Hosea insists that the marriage is no longer functional though there is no evidence of a formal divorce. After repeated violations of the prescribed code, she has gone off entirely (2:4a, 76, 10, 15b) /...7

> The passage expresses both an ardent will to reconciliation and an indignant determination to use coercive or punitive measures to correct or even to destroy her. Such a combination of contrary moods and motives is psychologically convincing. Catastrophic deprivation produces mingled rage and grief.[42]

Despite her infidelity to Hosea, Gomer proved to be a productive wife, in the best Israelite sense, and bore three children. Hosea gave them names pregnant with meaning, in the vein of the symbolic actions of the prophets. The first child, a son, is named Jezreel, which means "may God

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42 Ibid., p. 128. See also F.A. TATFORD, Prophet of a Broken Home, An Exposition of Hosea, Eastbourne, Sussex, Prophetic Witness Publishing House, 1974, pp. 18-28; L. WATERMAN, "Hosea, Chapters 1-3, in Retrospect and Prospect", in Journal of Near Eastern Studies, 14 (1955), pp. 107-108.

sow", and thus is an affirmation of Yahweh's beneficence, seen in the fruitfulness of plants, animals and persons. At the same time, it was also an attack on the fertility cults of Canaan and their Baals, who were regarded by the apostates as the harbingers of fruitfulness.

Gomer's infidelity, a symbol of the infidelity of Israel, is denounced by her children in language reminiscent of a covenant that has been violated. "Protest against your mother "(Hos 2:4); the children, who "represent" Israel, are to protest to the unfaithful Gomer their mother. The setting is one of confrontation and accusation within the covenant community, with more formal application to disputation in a court of law. The verb can mean to lay charges, denounce, bring evidence, argue a case, viz. the actions of the aggrieved party.[43]

Punishments are threatened, but they can be avoided if she (Gomer - Israel) removes her harlotry. Otherwise Yahweh will renounce her, saying "she is not my wife, and, I am not her husband" (Hos 2:4). Yahweh then lays the charge against Israel for attributing to the Baals, his gifts of

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43 F.I. ANDERSON and D.N. FREEDMAN, op.cit., p. 219.

grain, wine and oil.[44] Hosea has Israel confess her conversion: "I will go back to my husband" (Hos 2:9). Then, expressed in a typical prophetic oracle, verses 16-25, Israel "shall call me 'My husband', and never again 'My Baal' " (Hos 2:18).

Yahweh promises a covenant with creation that is reminiscent of the covenant, with Noah (Gen 9:8-11), and of that "at the beginning" in the Book of Genesis. This is not simply a covenant between Yahweh and Israel, but with the whole of creation.[45] Yahweh takes the initiative, he is the author and guarantor of the covenant, the imposer of its terms and conditions. Into this covenant setting, Hosea introduces his most startling contribution, linking marriage and the covenant, as G. Ostborn says so well:

> Israel's sin primarily consists of whoredom. On the other hand, Israel committed great sins against Yahweh's laws, and these offences are obviously a consequence of the people's

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44 Confirmation of the antiquity of these verses from Qumran is noted in J.M. ALLEGRO, "A Recently Discovered Fragment of a Commentary on Hosea from Qumran's Fourth Cave", in Journal of Biblical Literature, 78 (1959), p. 145.

45 M. DE ROCHE, "The Reversal of Creation in Hosea", in Vetus Testamentum, 31 (1981), pp. 400-407; W. VOGELS, God's Universal Covenant, A Biblical Study, Ottawa, University of Ottawa Press, 1979, pp. 29-31 enumerates the following elements of this covenant. It is natural, universal, fraternal, promises peace and is eternal.

> adultery (Hos 4:1, 10, 12). Thus we find how the covenant and the marriage between Him and Israel are both designations of the relationship between the two. Both the covenant and the marriage are regulated by Yahweh's laws.[46]

Having announced this covenant with creation, Yahweh continues,

> I will espouse you to me forever;
> I will espouse you in right and in justice,
> in love and in mercy;
> I will espouse you in fidelity, and you shall know the Lord. [47]

The personal relationship in the context applies to Yahweh and Israel,[48] but since the covenant is presented in the context of the marriage relationship, its use here has the effect of deepening the reality of marriage by linking it to a covenant, and covenants are not rightfully dissolved. This link is even more portentous when we consider that for

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46 G. OSTBORN, op.cit., p. 90.

47 Hosea 2:21-22. The Hebrew word translated by love is "hesed" which also occurs in 6:6 immediately preceding Hosea's mention of the violated covenant. "Hesed /... / can also be translated by covenant love. In Hosea it may have the special meaning of faithfulness to a marriage - contract, but we have to bear in mind that the concept of a marriage contract is used parallel in Hosea to the covenant-idea". F.C. FENSHAM, "The Covenant-Idea in the Book of Hosea", in Studies on the Book of Hosea, p. 37.

48 J.M. WARD, "The Message of the Prophet Hosea", in Interpretation, 23 (1969), pp. 387-391.

Israel, marriage was dissoluble on the grounds of indecency (Deuteronomy 24: 1-4).

Hosea presents marriage in the context of a covenant and covenants imply fidelity, hence they are not broken even though they are at times violated.[49] The analogy of husband-wife of Yahweh-Israel expresses the relationship of God with his people in familiar, endearing terms, as H. Wolff details.

> The prophet's language /... / strikes /... / the heart of his audience /... /. As far as we know, never before had anyone dared to speak to God in this fashion. Subordinating all consideration of pious tradition and aesthetic sensitivities, the prophet sought to bear witness to Yahweh's awesome, overpowering strength and present action. [50]

Such expressions also meant a corresponding increase in the appreciation of marriage. This is obvious when we consider the qualities and attributes mentioned in Hosea 2: 21-25: right, justice, love and mercy. These fundamental dispositions are well drawn out by F.I. Anderson and

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49 "Although some of the offences which are mentioned in Hosea, do not occur as part of covenant-stipulations in the Old Testament, his intention is clear, viz. that anything which clashes with the spirit of the covenant is wrong and helps to break the covenant. Keeping of the covenant is clearly not only a streching (sic) out to the Lord alone, but also respect and love for the neighbour ", F.C. FENSHAM, loc.cit., p. 41.

50 H.W. WOLFF, Hosea, Philadelphia, Fortress Press, 1974, p. xxv.

D.N. Freedman as follows:

> The middle clause has four objects, arranged in two pairs: "Righteous justice" and "compassionate loving kindness" /.../. The four interior qualities explicate the enclosing pair. Taken together, they constitute a profound theological statement describing the foundational components of the marriage relationship, which derive from the character of Yahweh himself.[51]

Thus Yahweh's own attributes are linked to marriage, they constitute what the partners promise to give and also what they expect to receive from the relationship. This could also be an indirect reference to God's original gift at creation: "in the divine image he created him; male and female he created them" (Gen 1:27).

> From the root word fidus and the verb fidere, which means to trust, to have faith in, to entrust oneself to another, a covenant is seen as a relationship of mutual trust and fidelity (fides). Hence to speak of a covenant of fidelity is redundant. Fidelity is of the essence of covenant.[52]

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51 F.I. ANDERSON and D.N. FREEDMAN, op.cit., p. 283; See also W. EICHRODT, op.cit., pp. 232-258.

52 P.F. PALMER, "Christian Marriage: Contract or Covenant?", in Theological Studies, 33(1972), p. 619; emphasis added. Any redundancy is only apparent, as the origin of the covenant lies in the overflow of Yahweh's hesed and 'emeth, hence love, faithfulness and other such qualities are implied.

Finally, as though to show that Yahweh's mercy and loving kindness is an example for marriage in Israel, the names of the children of Hosea and Gomer are changed.[53] The children of harlotry are adopted by Yahweh, just as he accepts faithless Israel. The earth will respond to Jezreel, "I will have pity on Lo-ruhama. I will say to Lo-ammi 'You are my people', and he shall say 'My God!'" (Hos 2:25). Implicit in Yahweh's forgiveness of the unfaithful Israel is a call for a husband to take back an unfaithful wife (or vice versa), as Hosea took Gomer back. Such a radical departure from the law of Deuteronomy 24 will come when Jesus will say to the Pharisees "Have you not read that at the beginning the Creator made them male and female" (Matt 18:4). Then, as if asserting that this new law is higher than the old Jesus will say "I now say to you" (Matt 19:9).

Hosea in making the parallel between the people's infidelity and Yahweh's covenant fidelity to that of Gomer's infidelity and his taking her after her covenant violation, is the clearest OT prophecy of the dignity to which Jesus will elevate marriage, a sign of the covenant between Himself and the Church, as we shall examine in the following chapters.

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53 Cf. M. DE ROCHE, loc.cit., p. 407; H.G. MAY, "An Interpretation of the Names of Hosea's Children", in Journal of Biblical Literature, 55(1936), pp. 285-291.

b. The Book of Jeremiah

The prophet Jeremiah calls the chosen people to take note and repent of their infidelity,[54] shown by their adopting the idolatrous practices of the surrounding peoples. Jeremiah issues an urgent call for repentance to avert Yahweh's punishment and chastisement for their adulterous behaviour with other gods.

For Israel, Yahweh was not simply the guarantor of the covenant, he was a party to it. This meant that Israel's covenant not only had a legal meaning - the conveying of rights and changing status or relationships - but also a theological meaning. Jeremiah is the earliest representative of the idea of a theological covenant.[55] In Jeremiah's time the bond between Yahweh and his people was sadly under stress, the result of sin and infidelity. Yahweh's messengers, the prophets, through the succession of Zephaniah, Habakkuk, Nahum, Ezekiel and above all, Jeremiah, appealed for a return to Yahweh and his ordinances as G. Couturier summarizes:

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54 M. DE ROCHE, "Jeremiah 2: 2-3 and Israel's Love for God during the Wilderness Wanderings", in C.B.Q., 45 (1983), pp. 370-372.

55 G. QUELL, loc.cit., p. 119, footnote 63.

> In their work of bringing forth the authentic tradition of Yahwism, these prophets were assisted by the pious men responsible for the deuteronomic reform and literature. But of all these inspired men, no one reached the stature of Jeremiah in his great sensitivity to Yahweh's love for his people and in his profound understanding of this very people's duty toward Yahweh through the covenant ties.[56]

Just how far the people had strayed from Yahwism is evident in the long reign of Manasseh (687-642 B.C.) which preceded Jeremiah's prophetic calling, but during which Jeremiah was born. 2 Kings 21:11-12 contains a severe condemnation:" Manasseh /... / has practiced abominations and has done greater evil than all that was done before him /... /". We may wonder, what prompted such castigation?

> /... / pagan practices of all sorts were given free rein, the fertility cult with its ritual of sacred prostitution being tolerated even within the temple itself /... /. Most sinister of all, the barbarous rite of human sacrifice, an abomination to all true Yahwists, began on occasion to be practiced in Jerusalem, the king himself apparently taking the lead (II Kings xxi 6).[57]

It fell to King Josiah (640 - 609 B.C.) to purge Yahwism of these pagan influences and it was in Josiah's

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56 G.P. COUTURIER, "Jeremiah", in J.B.C., Vol., I R.E. BROWN (ed.), p. 301.

57 J. BRIGHT, Jeremiah, The Anchor Bible, Vol., 21, Garden City, N.Y., Doubleday, 1965, p. XXXIII.

reign that the high priest reported: "I have found the book of the law in the temple of the Lord" (2 Kings 22:8).

> The lawbook found in the temple which so profoundly moved Josiah, and which furnished the basis for so many of his measures, was, as is generally agreed, some form of the Book of Deuteronomy. A number of Josiah's actions can be explained only on this assumption. For example, centralization of the cult, and the full integration of the rural clergy with the priests of the central shrine, are measures that are specifically called for, of all the biblical law codes, only in Deuteronomy.[58]

This fact, no doubt, explains Jeremiah's uncharacteristic prophetic emphasis on the covenant, a theme at the heart of Deuteronomy but conspicuous by lack of explicit mention in the majority of the prophets.

Reminiscent of Hosea, Jeremiah recalls that the covenant is basically a matter of love between Yahweh and Israel. He sees this love symbolised above all in the union of husband and wife in marriage, hence it is not surprising to find this theme mentioned immediately after his prophetic call. Elements of the formula drawing attention to a violated covenant, the "rib" or lawsuit[59] are clearly present

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58 ID., loc.cit., p. XL.

59 H.B. HUFFMON, "The Covenant Lawsuit in the Prophets", in Journal of Biblical Literature, 78 (1959), p. 288.

in Chapter 2 of Jeremiah, which is entitled "Infidelity of Israel", as R.P. Carroll notes:

> The influence of Hosea on Jeremiah's theology has long been recognized, and thus is seen especially in the early oracles with their emphasis on the decline of the nation in idolatry (cf. 2. 4-12). The fidelity and devotion of the bridal period has given way to involvement in the fertility cults of Baal, and Israel has changed its glory (Yahweh) for things which lack profit.[60]

The "word of the Lord" is addressed by Jeremiah "for Jerusalem to hear. I remember the devotion of your youth, you loved me as a bride" (Jer 2:2). But they went after "empty idols and became empty themselves (v. 5); the prophets prophesied by Baal" (v. 8). This is followed by the Lord's judgement on the people for the violation of the covenant: "Therefore will I accuse you, says the Lord" and as though to emphasize Yahweh's disgust at Israel's betrayal and apostasy," even your children's children I will accuse" (v. 9), R.P. Carroll captures this spirit when he says:

> The strong emotions behind the language are apparent, and the oracles share the same atmosphere of outrage, pain and jealousy as may be found in Hosea. The roots of the metaphoric language are probably to be found in the cult of the incomparable Yahweh, the

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60 R.P. CARROLL, From Chaos to Covenant; Uses of Prophecy in the Book of Jeremiah, London, SCM, 1981, p. 61.

> jealous God, who did not permit other gods to be associated with his worship (cf. Ex.20: 3; Deut. 5:7). As a man did not permit his wife to take lovers or go off after other men, so the deity did not permit the community to worship other gods.[61]

This latter image is the very one used by Jeremiah in Chapter 3. It was not a temporary or occasional infidelity, but a divorce in the strict sense according to the terms of Deuteronomy 24:1-4.

Jeremiah 3:6-10 forms an interpolation in a poem of conversion.[62] But there are sound reasons for its position here as the two parts contain a charge of apostasy which is characterised as adultery. The key Hebrew word "shub" can mean either "turn away" (apostatize) or "turn back" (repent) and it is played upon in a variety of ways.[63]

> If a man sends away his wife and, after leaving she marries another man, does the first husband come back to her? Would not the land be wholly defiled?
> But you have sinned with many lovers, and yet you would return to me: says the Lord.
> Even now you call me, 'my father, you who are the bridegroom of my youth?'[64]

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61 Ibid., p. 63.

62 D. JOBLING, "Jeremiah's Poem in III 1 - IV 2", in Vetus Testamentum, 28 (1979), pp. 45-54.

63 J. BRIGHT, op.cit., p. 25.

64 Jeremiah 3:1,4

The faithless Israel has prostituted herself with the fertility cults which, in the tradition of Hosea, is likened to adultery, a capital offence in Israel.

> The poem just described is unquestionably a sample of Jeremiah's preaching prior to 622. Similarities to Hosea, characteristic of the young Jeremiah, are striking. Not only is the dominant theme (the adulterous wife) borrowed from that great prophet of northern Israel; there are verbal similarities - perhaps even quotations - as well.[65]

The text of Jeremiah referred to by Gaudium et Spes,[66] i.e. 3:6-10. is addressed to Jeremiah by Yahweh. It describes the two divisions of Yahweh's people, Israel and Judah, as two adulterous (apostate) sisters. There is here an obvious connexion with Hosea's theme of the adulterous wife, as J. Bright clearly shows:

> The diction of 3:6-12 has qualities of its own /... 7. It is quite without the characteristic clichés of the Jeremiah prose, and exhibits one which is characteristic of Dtr. But it is emphatically not dependent on Ezekiel. On the contrary, its diction is closer to the Jeremiah poetry and to Hosea than anything else. This means that whatever kinship exists between these passages and Ezekiel is of the idea only

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65 Ibid., p. 26.

66 SAC. OECUM. CON. VAT. II, op.cit., art. 48, footnote 3 refers to Jeremiah 3:6-10; among other scriptural references, see supra, p.51, footnote 1.

> /... / and the germ of it (the adulterous wife) has been in Hebrew prophecy since Hosea.[67]

By posing Israel's adultery in the context of Deuteronomy 24: 1-4 - a man who divorces his wife cannot, after she has entered the house of another man, re-marry her - Jeremiah thus states that Israel's conversion is impossible.[68] While calling Yahweh "My father, you who are the bridegroom of my youth" (Jer 3:4), he adds, "Yet you do all the evil you can" (Jer 3:5). The text contains many allusions to the prostitution before the fidelity cults. Baal was called father or master, hence a play on words is evident.

> The idea has been demythologized and applied to Yahweh by Hosea (11: 1 ff.) to serve, along with marriage, as a second covenant image. Jeremiah, here and in v. 19, blends fatherly love and marital love as tangible expressions of this same covenant.[69]

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67 J. BRIGHT, "The Date of the Prose Sermons of Jeremiah", in Journal of Biblical Literature, 70 (1951), p. 21.

68 Israel's conversion will be possible with the inauguration of the new covenant prophesied by Jeremiah, (31: 31-34). "The most original and most important theme of this declaration is the promise of a renewal of the whole people in each one of its members. /... / But before this transformation of hearts there must come about a purification of the sinful people, a people guilty of having broken the covenant in many ways." P. BUIS, "La nouvelle Alliance", in Vetus Testamentum, 18 (1968), p. 4.

69 G.P. COUTURIER, loc. cit., p. 307.

Jeremiah calls for fidelity to the covenant in Chapter 11:3. "Thus says the Lord, the God of Israel: cursed be the man who does not observe the terms of this covenant." Implicit in covenants are blessings for those who fulfil the stipulations and conditions, but punishment arises from non-fulfilment; hence, the word curse adds to the picture of a violated covenant. Blessings and curses as part of the covenant framework have permitted the tracing of the origin of the covenant form.

> On the basis of this hypothesis about the form of Israel's covenant with Yahweh the most significant area where comparison is possible between material in political treaty documents and the Old Testament prophetic literature lies in the curses of the treaties and the threats enunciated by the prophets against Israel. /... 7. Since the pre-exilic prophets accuse Israel of having broken their obligations of loyalty to Yahweh, and of having failed to maintain the standards of law and justice which he has set them, this represents on Israel's part a breach of its covenant with Yahweh.[70]

After Jeremiah states for the Lord "Cursed be the man" who does not observe the terms of this covenant" (v. 3), he returns to the expression of "this covenant" in verses 6-8. Here he is given an injunction to preach "this covenant" in

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70 R.E. CLEMENTS, Prophecy and Tradition, Atlanta, John Knox Press, 1975. p. 15.

the cities of Judah and the streets of Jerusalem. Until the advent of modern biblical scholarship, most commentators[71] would have interpreted "this covenant" as the renewal of the covenant under King Josiah. Contemporary interpretations of the expression "this covenant" are summarized as follows:

> It is frequently used in Dt, in an identical or analogical form, for the Sinai covenant. Thus it would be rash to hold that Jeremiah must evoke here exclusively the Deuteronomic Code. Moreover, the context itself recalls Sinai, as does the rest of the prophetical tradition, and Josiah's covenant is basically nothing more than the renovation of the primitive one.[72]

The covenant theme is returned to in Chapter 14. Partly in poetry and partly in prose, it has the appearance of being a skilfully executed literary unit. The setting of the passage is a great drought; memory of the covenant is invoked in

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71 For a summary of early opinions and research, see J. SKINNER, Prophecy and Religion, London, Cambridge University, 1930, pp. 97-103.

72 G.P. COUTURIER, loc.cit., p. 312; On the relationship of Jeremiah to the Deuteronomists, see R.P. CARROLL, op.cit., pp. 96-106; J.P. HYATT, "Jeremiah and Deuteronomy", in Journal of Near Eastern Studies, 1 (1942), pp. 156-173; H. FREEDMAN, Jeremiah, Hebrew Text and English Translation, London, Soncino Press, 1961, p. 80; H.H. ROWLEY, "The Prophet Jeremiah and the Book of Deuteronomy", in Studies in Old Testament Prophecy, Edinburgh, T. Clark, 1950, pp. 157-174.

v. 21 in what one might call a liturgy of penitence and petition.[73]

> As with other great teachers, the theologian and the man are sometimes at war with each other, which is not surprising since emotions often triumph over strict logic. So Jeremiah insists that the covenant does not confer immunity, yet when the country is smitten with a drought of extraordinary severity, he eloquently appealed to God, as Israel's hope, to send relief /... / the covenant is here apparently regarded as binding upon God though Israel had been faithless to it.[74]

This infidelity of Israel contrasted to the faithfulness and loving kindness of Yahweh brings forth from Jeremiah the highpoint of his theology in chapter 31 on the new covenant.

> Jeremiah uttered the great oracle of the 'New Covenant' (31, 31-34) sometimes called "The Gospel before the Gospel". This passage contains his most sublime teaching and is a landmark in Old Testament theology.[75]

This text views the covenant at the exodus as the honeymoon

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73 J. BRIGHT, op.cit., p. 102.

74 H. FREEDMAN, op.cit., p. xviii.

75 New American Bible, Introduction to the Book of Jeremiah, p. 778. For a survey of opinions on actual Jeremian authorship or otherwise, cf. H.D. POTTER, "The New Covenant in Jeremiah XXXI 31-34", in Vetus Testamentum, 33 (1983), pp. 348-352.

between Yahweh and Israel. "It will not be like the covenant I made with their fathers the day I took them by the hand and lead them forth from the land of Egypt" (v. 32). The marriage of Yahweh and Israel, while not specifically mentioned is clearly alluded to.

> Of all Jeremiah's prophecies, perhaps the best known and most influential is that of the New Covenant (31.31 ff). In his introduction to this theme he uses again, as in 3:14, the word baal for husband (cf. Hos 2.16). Though God had been a husband to Israel, she had broken his covenant. In this statement the two ways of presenting Israel's relationship to God, marriage and covenant, are combined, despite the faithless marriage and the broken covenant, God will make reconciliation. There is no divorce nor repudiation of the sinful nation. The steadfast love (2.2, RSV 'devotion') Israel showed to God centuries before when she was his bride in the wilderness, he shows to her, but with the significant distinction. On his part it is everlasting love, and steadfast love (31.3, RSV faithfulness) that continues.[76]

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76 J.N. SCHOFIELD, Law, Prophets and Writings; The Religion of the Books of the Old Testament, London, S.P.C.K., 1969, p. 180, Emphasis is ours.
On the importance of these attributes of Yahweh, which form part of the disposition for a covenant and are also applicable to marriage, especially hesed, it can be said: "The word belongs to covenant making; it denotes the disposition which should characterize the true party to a contract. To us it has a legalistic sound, but hesed is no mere matter of courts and rescripts. It does not mean mere justice, quid pro quo. True hesed is a matter of the mind and heart, a true devotion to the covenant partner /... /. The true covenant partner has pity (rhm) for the other. /... / it means love, a personal devotion eager to help and protect,

Despite being the beneficiary of Yahweh's loving-kindness as a covenant partner, Israel failed to live up to the covenant obligations: "they broke my covenant" (v. 32). As P. Buis says:

> Jeremiah never condemned the first covenant, he states simply that it has been broken through the fault of Israel (ii 5, 13, 20, 32 etc.). It would serve no purpose to re-establish it because its failure comes from man's radical incapacity to remain faithful to his commitments to God.77

Therefore, the new covenant will have an internal aspect, "I will place my law within them, and write it on their hearts; I will be their God, and they shall be my people" (v. 33). This verse emphasizes the unilateral formula of the new covenant compared to the mutual commitment of the covenant partners in Deut 26: 16-19. The new covenant

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76 (cont'd) for ultimately it derives from the attitude of a mother to her child (rehem, "womb")." D.J. McCARTHY, "Hosea", in J.B.C., Vol. I, R.E. BROWN, (ed.), p. 254; A. PLOTKIN, op.cit., pp. 39-40.

77 "Jérémie n'a jamais condamné la première alliance. Il constate simplement qu'elle a été rompue par la faute d'Israël (ii 5, 13, 20, 32 etc.). Il ne servirait à rien de la rétablir, car l'échec vient de l'incapacité radicale de l'homme à rester fidèle à ses engagements envers Dieu." P. BUIS, loc.cit., p. 10.

evokes the formulae used for adoption or for contracts of marriage.[78]

The link between marriage and the covenant was made by Jeremiah and characterises the spirit of the new covenant.

> /... / love was the very foundation stone for the idea of the covenant. God alone was a divine Husband and Protector, and Israel was exclusively His. In the beginning, Israel was only with her God in the depth of her vows, the marriage vows of loyalty and love. This simile of the covenant was one in which the prophetic consciousness that experience of Israel being a bride was not a process but an event. It was an event that took place in Israel's history and the prophet recalls the event as a solemn reminder that memory and the marriage symbol are the most important factors in renewing the value of the covenant.[79]

This renewal was a two way process, for as the marriage symbol provided a basis for the renewal of the covenant so did the covenant, based as it was on Yahweh's faithful-love, lead to a deepening of the understanding of marriage, as a covenant which will be clearly stated in the Book of Ezekiel (16:8) and the Book of Malachi (2:14).[80] Let us now examine the covenant and marriage in the prophet Ezekiel who was contemporaneous with Jeremiah.

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78 Ibid., p. 12.

79 A. PLOTKIN, op.cit., p. 40

80 C.C. TORREY, Pseudo - Ezekiel and the Original Prophecy, New York, KTAV, 1970, pp. 11-23; M.A. FRIEDMAN,

c. The Book of Ezekiel

The Book of Ezekiel, especially Chapters 1:1-3 and 29:17, contains statements which enable us to place the prophet Ezekiel's activity between 594 and 571 B.C. His youth was during the reign of the reforming king Josiah (639-609 B.C.) and his book manifests the influence of the political and cultic reforms undertaken by Josiah in 621 B.C. Ezekiel, therefore, lived in the same period as Jeremiah. Certain themes are common to both prophets, as J.N. Schofield clearly shows, especially Israel, the faithless spouse of Yahweh, Ezekiel 16 and Jeremiah 2:2, likely inspired by Hosea 2:4-15.

> Though these two great prophets were contemporary, neither mentions the other. If Jeremiah came from a priestly family at Anathoth with little intimate relationship with the Jerusalem priesthood, and if Ezekiel was a member of the priestly family at Jerusalem about thirty years his junior, who went to Babylon as a young man, there is no reason why Jeremiah should have known him. There are considerable differences between them. Both were priests, but Ezekiel makes us much more aware of this background, with his emphasis on the need to maintain the distinction between the holy and the profane /... / and his intimate knowledge of Temple institutions and ritual. It is clear that

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80 (cont'd) "Israel's Response in Hosea 2:17b: "You are my husband" " in Journal of Biblical Literature, 99 (1980), p. 202.

> they live and move in the same atmosphere of sin, destruction and repentance. Both preach the new covenant and the gift of the spirit, regarding religion as primarily an individual relationship to God.[81]

In contrast to the Book of Jeremiah, much of the Book of Ezekiel consists of long, extended allegories that need and receive detailed explanation. There are also visions, whose imagery later becomes characteristic of the apocalyptic literature that succeeded the prophetic, reaching a highpoint in the Book of Daniel.

Allegories are characteristic of Ezekiel so that it is said of him, "Is not this the one who is forever spinning parables?" (Ezek 21:5). Where Hosea 11:1 and especially Jeremiah 2:2 depict a honeymoon period (the exodus and desert wandering) in the marriage of Yahweh and Israel, Ezekiel's allegories recognize no such new-found love and devotion, instead judgement is expected, as W. Zimmerli notes:

> What undoubtedly permeates all his preaching is above all a knowledge of the majesty of the God of Israel, who has been so humiliated by the actions of his people that his harsh judgement for the sake of

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81 J.N. SCHOFIELD, op.cit., pp. 195-196; See also W. ZIMMERLI, Ezekiel, Philadelphia, Fortress Press. 1979, pp. 45-46

> the holiness of his divine name becomes unavoidable.[82]

Such judgement is notable in Chapter 16 which is a marriage allegory on Jerusalem and in which marriage is presented as a covenant. Ezekiel mentions covenant more than 15 times, but verse 8 is the only one in which marriage is spoken of as a covenant.

The spreading of the cloak (v. 8) is not only to cover nakedness but also signifies the intention of marriage, which is then described. "'I swore an oath to you and entered into a covenant with you; you became mine', says the Lord God."[83] After reminding Jerusalem of all the gifts Yahweh had lavished upon her, verses 15-34 describe in lurid detail her harlotry and thus they form the accusation of covenant violation in the manner of legal processes at the city gate. Accusations against Jerusalem or Israel for playing the harlot, occur very frequently, about 20 times, in Ezekiel mostly in chapters 16 and 23, and also in Hosea and Jeremiah.[84]

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82 W. ZIMMERLI, op.cit., p. 57.

83 Ezekiel 16:8; cf. also the footnote for this verse in NAB, p. 857. See also the Book of Ruth 3:6.

84 J. BRIGHT, loc.cit., p. 35.

> She committed a double harlotry, being unfaithful to Yahweh and adopting the fertility cult that involved ritualistic prostitution (Hos: 4:13-14). Even human sacrifice was introduced under Judah's wicked kings [...]. Jerusalem squandered the gifts of her husband, Yahweh, to attract partners in illicit love affairs, thus more shameless than a prostitute, who engages in such conduct for pay.[85]

One is struck by the explicit and even coarse use of language that is characteristic of the prophets and in particular of Ezekiel, especially in Chapters 16 and 23, as R.P. Carroll expresses so well.

> [...] the use of bawdy language arises out of the involvement of the community in the fertility cults [...]. When condemning such involvement the prophets used the language appropriate to such a practice, so the terms employed are necessarily bawdy, though they may be intended as metaphors. The ambiguity of language arises here because it is the worship of false gods which is being condemned under the metaphors of adultery and whoremongering [...]. The difficulty of determining whether the language is descriptive or metaphoric should not distract attention from its essentially bawdiness.[86]

Indicative of such use of language is verse 22, "And through all your abominations and harlotries you remembered nothing

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85 A.J. TKACIK, "Ezekiel", in J.B.C., Vol., I, R.E. BROWN (ed.), p. 354.

86 R.P. CARROLL, op.cit., p. 61.

of when you were a girl, stark naked and weltering in your blood". Such ingratitude has been shown to Yahweh who had adopted Jerusalem - Israel, the abandoned child, and entered into a covenant of marriage with her when she matured.[87]

Chapter 16: 35-36 introduces the pronouncement of the sentence of judgement upon Israel and is followed by the re-claiming of the gifts previously given (vv. 10-14) as signs of Yahweh's love and affection. The concluding verses, 59-63, announce an eternal covenant as W. Eichrodt details:

> /... / it regards the old covenant as providing a basis for the new. In that God either establishes or upholds the eternal covenant /... /, he stresses the continuity of his regard for the covenant, which is so faithful to the first covenant with the chosen people as to give eternal validity to the relationship there set up, in spite of the injury done to it by human unfaithfulness. /... /. Ezekiel /... / did not give central place to the covenant under its institutional aspect. He preferred to subordinate it to God's personal actions in glorification of his name. He even takes this broken covenant, evidently no longer valid as the indestructible foundation of future salvation, and sets over against it the new covenant of peace, by

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87 W. ZIMMERLI, op.cit., pp. 339-340

> which an everlasting relationship of grace will be established between God and his people (34.25; 37-26).[88]

Linked with the new covenant of verses 59-63 is the fact that Yahweh will remember his covenant while Jerusalem-Israel will remember their offences that violated the covenant. The word "covenant" (berith) occurs five times in these few verses while "remember" (zakar) occurs three times and also earlier in vv. 22 and 43.[89]

Ezekiel places greater stress on the remembering, which he links with the covenant, especially in verses 59-63. Despite Jerusalem's violations, Yahweh "will remember the covenant /...7 and /...7 set up an everlasting

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88 W. EICHRODT, Ezekiel, London, SCM, 1970, pp. 216-217.

89 Curiously, the Vulgate translates berith as pactus not foedus in these verses and also in verse 8 where it specifically links marriage as a covenant. Nova Vulgata, Bibliorum Sacrorum Editio, Sacros. Oecum. Concilii Vaticani II ratione habita iussu Pauli PP. VI recognita auctoritate Ioannis Pauli PP. II promulgata, Libreria Editrice Vaticana, Typis Polyglottis Vaticanis, 1979, p. 1472. On the covenant in Ezekiel, W. Zimmerli says: "Within the framework of the marriage metaphor v 8 refers to the "covenant" which Yahweh entered with the young girl. The reference to the covenant which Israel used in its older tradition as a comprehensive expression for its relationship to God, appears in the book of Ezekiel as an independent part of the tradition /...7. Its content in the covenant formulation is unfolded at several important points. Even so the word itself does not belong to the specific theological vocabulary of Ezekiel." W. ZIMMERLI, op.cit., p. 352

covenant" verse 60. Where Jeremiah's new covenant would be internal (31:33), Ezekiel's would be everlasting and so these two aspects complement each other.

In another allegory, Ezekiel returns to the symbol of a marriage to express Israel's relationship to Yahweh in chapter 23: 1-27. The setting is a conversation between Yahweh and the prophet in which Jerusalem and Samaria are presented as two sisters playing the harlot. Typical of the difference between Hosea and Jeremiah on the one hand and Ezekiel on the other, the harlotry starts even in Egypt, where there is no honeymoon period of faithful love on the part of Yahweh's marriage partner.[90]

Ezekiel's most important contribution, in the context of our work, was to adopt the symbol of the marriage between Yahweh and Israel that had been presented by Hosea and Jeremiah, but to go further than either of them. Ezekiel in 16:8 depicts marriage as a covenant, whereas the other biblical prophets simply likened marriage to the covenant

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90 W. EICHRODT, op.cit., p. 206, asserts of Ezekiel 16:8 that it does speak of a springtime of love and that it is wrong to say Ezekiel does not know of any ideal period. However it is certainly not as pronounced in Ezekiel as in Hosea and Jeremiah.

between God and his people. For this reason, Ezekiel Chapters 16 and 23 are referred to by Gaudium et Spes[91] when it speaks of the covenant.

d. The Book of Isaiah

Isaiah,[92] following Hosea and Jeremiah, turns to the image of Yahweh as husband to Jerusalem, (Isa 49:14) and to the New Zion. "For he who has become your husband is your Maker; his name is the Lord of hosts" (Isa 54:5).

> Presentation of Israel as a wife is based on the rich covenant relationship that exists between Israel as a nation and God. At the institution of this covenant with the people on Mt. Horeb this marriage was contracted from God's side out of free love; Israel responded to it with shameful adultery.[93]

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91 Vatican Council II, Gaudium et Spes, art. 48, footnote 3. The original text is given in the first footnote of this Chapter, see also footnote 66.

92 It is now generally accepted that the Book of Isaiah is not the work of one biblical writer. There are three clearly discernible sections, Isaiah 1-39, Second (Deutero) Isaiah (40-55) and Third (Trito) Isaiah (56-66). There may be an indication, though not conclusive, of very early knowledge of such a division in Qumran Scroll A which has three ruled but empty lines at the foot of the column containing Chapter 33 and thus may indicate a change of author. It is sometimes argued that Second Isaiah begins at Chapter 34. cf. C.R. NORTH, The Second Isaiah, Introduction, Translation and Commentary to Chapters XL-LV, Oxford, Clarendon, 1964, p. 2.

93 H. BULTEMA, Commentary on Isaiah, Grand Rapids, Mich., Kregel, 1981, p. 535.

The covenant relationship is also universal,[94] as we are reminded by Isa 54:9-10: "This is for me like the days of Noah when I swore /-.. _7 my covenant of peace." This covenant was with Noah and every living creature (Gen 9:1-17).

The first verses of Chapter 54 allude to Sarah, Abraham's wife, whose barrenness was removed by the birth of Isaac (Gen 21). The following verse (4), "The shame of your youth", is obviously alluding to Israel's apostasy, likened to adultery. The warm expressions welcoming back the forsaken wife (faithless Israel) in vv. 7-8, words such as "tenderness", "love" and "pity" are reminiscent of Hosea 2: 21-22.[95] The intervening verse 6 has been described as the most difficult verse in the passage and the meaning in the standard English versions is obscure.[96] The NAB is as follows: "The Lord calls you back, like a wife forsaken and grieved in spirit, a wife married in youth and then cast off."

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94 W. VOGELS, God's Universal Covenant, A Biblical Study, Ottawa, University of Ottawa Press, 1979, pp. 29-31. Vogels also mentions the "covenant of peace" (Is. 54:9-10) and its universal aspect on p. 34. See also G.A. KNIGHT, Deutero-Isaiah, New York, Abingdon, 1965, p. 249; W. EICHRODT, Theology of the Old Testament, London, SCM, 1961, pp. 246-247, says this universal reference is the unique concept of the covenant characteristic of this prophet.

95 See also our footnote 51.

96 C.R. NORTH, op.cit., pp. 248-249.

> God takes the woman forsaken and grieved in spirit back again, and she once more has a husband. The state of forsakeness, loneliness and shame is past, and she who was solitary is given back the happiness and honour of the married state and status.[97]

The incredulity expressed in forsaking the wife of one's youth, could be compared with 62:5: "As a young man marries a virgin, your builder shall marry you; and as a bridegroom rejoices in his bride so shall your God rejoice in you."

This restoration of the forsaken bride, the return to the bride of one's youth, is contained in that part of Isaiah consisting of chapters 56-66 which is known as Third (Trito) Isaiah. Chapter 54 is referred to by the Vatican Council as "God making himself present through a covenant of love and fidelity."[98]

In chapter 57 Isaiah takes up the theme of Israel's infidelity and reminiscent of Hosea 4:13 and Jeremiah 2 likens Israel's apostasy to adultery. In an interesting play on words, JB (v.8) has "You have struck a pact"[99]

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97 C. WESTERMANN, Isaiah 40-66, A Commentary, London, SCM, 1969, p. 273.

98 SAC. OECUM. CON. VAT. II, op.cit. Footnote 1 of this Chapter quotes the original Concilar text. The other prophets cited by the Council are mentioned in our footnotes 34, 61 and 91.

99 JB notes that this verse is added in the Greek text, p. 1233. footnote g.

while another text says "you cut (covenant) with them."[100] The bawdy language and expliciteness is characteristic of Ezekiel's denunciations of harlotry in chapter 20. By her chasing after the local deities, Jerusalem-Israel has deserted her true spouse Yahweh, who has now forsaken her (Isa 49:14, 51:1). But in his mercy Yahweh "will never forget you (Zion)" (Isa 49:15).

Chapter 62 depicts the restoration of the Lord's forsaken bride and forms part of the corpus of chapters 60-62 which is regarded as the nucleus of Third Isaiah.

> This chapter is probably the clearest exemplification of the special features in the prophecy of Trito-Isaiah. But up to now neither its structure nor the purpose which it was designed to serve have ever been satisfactorily explained. The key is supplied, however, when we recognize that the three chapters 60-62, are based on the three component parts of a lament /.../. If in both sections we were to scrutinize the names which express

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100 J. GREEN (ed. and trans.), The Interlinear Hebrew-Greek-English Bible, LaFayette, Ind., A.P. and A., 1980, p. 573, conveys the sense accurately by including the implied reference to covenant in brackets. The NAB translates "of those whose embraces you love" while the RSV has "you have made a bargain" and NEB "you drove bargains with men" which lose the allusion to the covenant. On the expression "cut a covenant" see G.E. MENDENHALL, "Covenant", in The Interpreter's Dictionary of the Bible, Vol., I, pp. 715-716, and G. QUELL, loc.cit., pp. 116-117. Both texts are referred to in section 1, Covenants in general, of this Chapter.

> God's fresh turning towards Israel, we should find that the ones which come first, the Foresaken, the Desolate, and the city that did not remain Foresaken, are obviously reminiscences of the lament /.../. In Deutero-Isaiah, of whom there are echoes here almost sentence by sentence, the final promise is introduced by the summons to go forth (52.11.f.). The same thing is done here.[101]

The text opens with an announcement by the prophet[102] that Zion's cause is vindicated, that her exiled children have returned. That she was forsaken and desolate (both used as proper names), shall be called "My Delight", and the land "Espoused". Yahweh rejoices over Jerusalem as a bridegroom rejoices over his bride (Isa 62:5).

> The Yahweh-as-spouse theme is not just repeated here (49:14; 50:1), but sinful, adulterous Israel is restored to that joyful age of long ago when she was the virgin spouse of God.[103]

The new names clearly indicate this acceptance of Jerusalem as Yahweh's bride. There is a marked contrast between the old and the new names, the scene is similar to an adoption with the new names conferring a new dignity and consequences

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101 C. WESTERMANN, op.cit., pp. 372-373.

102 I.W. SLOTKI, Isaiah, London, Soncino Press, p. 301.

103 C. STUHLMUELLER, "Deutero-Isaiah" in J.B.C., Vol.,I, R.E. BROWN, (ed.), p. 383.

- the espoused of Yahweh is his delight - a very personal image of the relationship of Yahweh to his people expressed likewise in Hosea, Jeremiah and Ezekiel, as we have seen, and also by the prophet Malachi.

e. The Book of Malachi

Malachi's style is didactic. So distinctive is this style with its teaching techniques, that Malachi has been called "the Hebrew Socrates".[104] His doctrine has a kinship with the universalism of Second-Isaiah. Malachi clearly believes that Second-Isaiah's great prophecy (Isa 40-43 and 49-54) is to be fulfilled. But Malachi goes further in his universalism in chapter 1:10-11.

> In a way unparalleled in the remainder of the Old Testament, he declares that the gentile offering of incense and gifts is acceptable, and magnifies God's name more than the Jewish offerings in the Temple.[105]

More importantly for our consideration, Malachi seeks to restore the holiness of marriage. "The Israelites were living loveless marriages and divorcing the Israelitic wives.

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104 G.L. ROBINSON, The Twelve Minor Prophets, New York, G.H. Dorian, 1926, p. 161.

105 J.N. SCHOFIELD, op.cit., p. 255.

This is not Yahweh's relationship to Israel."[106] "Have we not all one Father? Has not the one God created us? Why then do we break faith with each other, violating the covenant (berith) of our father?" (Mal 2:10).

Inter-marriage of Israelites with foreigners was forbidden according to Deut 7:1-4. Foreign marriages are portrayed here as a violation of the covenant,[107] and Malachi thus is able to make his own unique contribution to the understanding of the covenant.

> The covenant is made prominent, and in some ways unique, throughout the book. First, there is a covenant with Levi which is said to have been corrupted (cf. 2:9). Second, the covenant of the fathers is profaned (cf. 2:10). Third, a covenant existed between husband and wife. The wife is said to be a covenant companion against whom the husband is accused of being faithless (cf. 2:14-15). Fourth, the messenger of the covenant is introduced as a coming one in whom the people are said to delight. /.../. Fifth, the whole worship system is associated with the covenant. /.../ the prophets view their history theologically in covenantal relationships. This was prominent in their preaching as they besought the nation to renew her covenant vows.[108]

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106 J.A. FISCHER, "Notes on the Literary Form and Message of Malachi", in C.B.Q. 34 (1972), p. 318.

107 New American Bible, footnote for Malachi 2:10-16, p. 961.

108 T.J. DELAUGHTER, Malachi, Messenger of Divine Love, New Orleans, Insight Press, 1976, p. 30. The second point, profanation of the covenant with the fathers is obviously referring to the prohibition of Deut 7:1-4; emphasis added.

Besides such a diverse enrichment of the covenant through considering its varied aspects, the outstanding contribution of the Book of Malachi is to identify marriage as a covenant in Chapter 2:14. The NAB translation does not convey this identification adequately, giving "betrothed" as the translation of berith. A more accurate translation in the RSV is "she is your companion and your wife by covenant," and NEB "she is your partner and your wife by solemn covenant."[109]

> Malachi's description of marriage to the wife of one's youth as companionship (2:14) bears incidental witness to a high view of family life, based on the lifelong partnership of one man with one woman. The wife is valued for the worth of her personality and not merely for her physical attraction. /.../. Thus family relationships illustrate love and loyalty, and make the divine covenant comprehensible to man, while divorce, by contrast, typifies broken faith and severed relationship.[110]

Castigation of divorce is contained in Chapter 2:16. "For I hate divorce, says the Lord, the God of Israel."[111]

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109 JB has "It is because Yahweh stands as witness between you and the wife of your youth, the wife with whom you have broken faith, even though she was your partner and your wife by covenant."

110 J.G. BALDWIN, Haggai, Zechariah, Malachi; An Introduction and Commentary, Downers Grove, Ill., Inter-Varsity Press, 1972, p. 217. Emphasis is ours.

111 "The text of these verses, especially verse 15,

We have here a clear departure from the possibility of divorce conceded in Deut 24:14. Commentators see in the rhetorical question of Chapter 2:10, "Has not the one God created us," a reference to the first marriage as presented in the Book of Genesis.

> Malachi refers to creation and by this allusion shows that the unique wonder of marriage, set up by God himself, must not be torn apart by man! Creation also reminds us of the moment when God made woman from man and established marriage in such a way that each were "bone of bone, flesh of flesh" (cf. Gn. 2:21-25; Mt. 19:3-9).[112]

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111 (cont'd) is obviously corrupt and very difficult to translate. However, the very bad state of the text bears its own witness to the probability that it did originally condemn divorce outright. If so, this passage is unique in the Old Testament and it would be small wonder if it suffered from scribal efforts to soften it", R. MASON, The Books of Haggai, Zechariah and Malachi, Cambridge, Cambridge University Press, 1977, p. 150. "English Versions agree that this is the prophet's meaning, even though the Hebrew in fact reads 'if he hates send (her) away', a sense found also in the ancient Version. Evidently the text suffered early at the hands of some who wanted to bring Malachi's teaching into line with that of Deuteronomy 24:1, which permitted divorce. Such a reading undermines all the prophet is seeking to convey. /... 7. He sees divorce to be like covering one's garment with violence, a figurative expression for all kinds of gross injustice which, like the blood of a murdered victim, leave their mark for all to see. /... 7. It is in the best interests of the individual as well as of the community that families should not be broken by divorce. Malachi's plea prepares the way for the teaching of Jesus (Mt. 5:31, 32; 10:4-9)", J.G. BALDWIN, op.cit., p. 241.

112 C. STUHMUELLER, loc.cit., p. 400.

In the context of our first chapter, it is interesting to note that the last book in the literary ordering of the Old Testament should return to the image of the monogamous marriage of the first man and first woman, given to each other as covenant partners to care for the earth.[113] From the prototype of the first couple in Genesis, through the succession of prophets who likened God's relationship with his people to a marriage, we come to Malachi who presents marriage itself as a covenant: "she is your partner and your wife by solemn covenant."[114] A covenant must have witnesses and a guarantor.[115] Malachi presents Yahweh himself as the witness par excellence of marriage: "/... 7 the Lord is witness between you and the wife of your youth, with whom you have broken faith" (Mal 2:14).

> /... 7 moral wrong was hindering access to God: marriage vows had been broken. The Law of Hammurabi decreed that marriage was a legal contract to be drawn up with the appropriate documents, but the Israelite saw it as a covenant to which the Lord was witness (Gn. 31:50; Pr. 2:17) and for that

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113 W. BRUEGGEMAN, "Of the Same Flesh and Bone (Genesis 2:23a)", in C.B.Q., 32 (1970), p. 539.

114 NEB, Mal 2:14.

115 G.E. MENDENHALL, loc.cit., p. 720.

> reason the more binding. This spiritual dimension should have contributed to the stability of home life. The loyalty of each partner to the covenant God was a uniting bond which created a lasting companionship between the partners. The word companion, which is often used in the masculine of a close friend, with whom interests, good or bad are shared /.../ is used only here of a wife.[116]

Perhaps the prime example of two companions united is that of David and Jonathan in 1 Samuel 18:3. It seems characteristic of Malachi, that in a society which saw the place of a woman unequal[117] to that of a man, that he employs the word to signify the close bond between male partners or companions as the descriptive for husband and wife united in marriage, as J.G. Baldwin says:

> Malachi is a quiet witness to a mutually satisfying marriage relationship which, though begun in youth, does not become jaded with the passing of time. Though it is true that to insist on the binding nature of the legal ceremony and to deny the opportunity for divorce cannot create such a companionship, yet there is a close connection between loyalty and faithfulness as a character trait and the building up of the mutual trust essential to a stable marriage. It was this trust which Malachi was accusing his contemporaries of betraying.[118]

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116 J.G. BALDWIN, op.cit., pp. 239-240.

117 Exodus 20:17 lists a man's wife among his possessions.

118 J.G. BALDWIN, op.cit., p. 240.

No doubt, due to the novelty of Malachi's view of marriage as a covenant, some interpretors have seen his teaching in a metaphorical sense only. But similar views of marriage as a covenant between husband and wife with God as witness are found in Gen 31:50 and Proverbs 2:16-17. These interpretations are summarized by R. Mason as follows:

> Some have understood the reference to faithlessness to the covenant with the wife of your youth in a metaphorical sense as faithlessness to the covenant religion of Yahweh. They can appeal to the use of the marriage metaphor to describe the covenant relationship between Yahweh and his people in Hosea and Jeremiah (e.g. Jer. 3:20). In such cases, however, Yahweh is always portrayed as the husband.[119]

Therefore it is correct to interpret this passage of Malachi literally, applying to husband and wife in marriage and not, or at least only secondarily, as metaphoric, applying to Yahweh and his people. The literal interpretation is more consistent with Malachi's insights and constitutes an advance on the other prophets' use of the marriage symbol.[120]

Hosea 7:4: "Protest against your mother, protest! for she is not my wife and I am not her husband", and Ezekiel

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119 R. MASON, op.cit., pp. 150-151.

120 Marriage was not the only symbol used to express the intimate relationship between Yahweh and his people. The Father-son theme expressed the same relationship, especially tender and eloquent in Hosea 11:1-4.

16:35: "Therefore, harlot, hear the word of the Lord:", both depict the scene of a violated covenant and a court-like scene in which Israel is the accused. Israel's crime is violation of the covenant through infidelity to her spouse, Yahweh, who now accuses her.

> Malachi declares that the marital infidelity was sin which was known to Yahweh, because he was the witness to the covenant between "you and the wife of your youth, to whom you have been faithless, and she is your companion and the wife of your covenant". This is a court scene in which Yahweh is the plaintiff, the witness, and the judge. The witness comes to the stand and accuses the one who is arraigned of marital infidelity. The marriage which was dissolved was consummated in the tender, youthful years of the contracting parties in the formal ceremony of a solemn covenant before God who had ordained the rite of marriage.[121]

Malachi built on the foundation laid by Hosea and the major prophets. For them marriage was a symbol of the relationship between Yahweh and his people. This relationship was solemnly enacted and made binding by a covenant. For Malachi 2:14 it is marriage itself which is a covenant and Yahweh is its witness and guarantor.

From our standpoint now, Malachi's prophetic call can lose some of its revolutionary character, but in its context

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121 T.J. DELAUGHTER, op.cit., p. 99.

in the Old Testament, it represents a profound call for the indissolubility of marriage and respect for the richness of marriage as an inter-personal sharing between husband and wife.

> This prophetic diatribe entails a demand for affection and fidelity, which even goes as far as indissolubility of the matrimonial berith and far beyond the tolerance of the Torah. To support this demand, the prophet seems to appeal /... / to the creation of the couple: man and woman constitute one being (Gen 2:24) /... /. It is then to this primitive ideal that the couple is to return. There is however, no doubt that the fidelity of Yahweh towards Israel, whom he has joined with himself in a berith, is implicitly put forward as a model for husband and wife.[122]

Malachi was a prophet before his time, as the attempts to water down his condemnation of divorce testify. But his teaching, with its transcendent implications for marriage, paves the way for the re-institution of the indissolubility of marriage, once "the day of the Lord comes" (Mal 3:24).

Curiously, Gaudium et Spes,[123] which speaks of God making himself present through a "covenant of love and

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122 P. GRELOT, Man and Wife in Scripture. London, Burns and Oates, 1974, pp. 69-70.

123 SAC. OECUM. CON. VAT. II, op.cit. Footnote 1 of this Chapter quotes the original Conciliar text. The other prophets cited by the Council are mentioned in our footnotes 34, 61, 91 and 98.

fidelity", refers among others to Ezekiel 16:8: "I swore an oath to you and entered into a covenant with you", but does not mention the two other texts in the Old Testament where marriage is specifically identified as a covenant. One of these, Malachi 2:14, describes the wife as the "life companion" the ideas of companionship of life and in law are intermingled here.[124] Thus Malachi presents the clearest statement in the Old Testament of the context of the consortium as an expression of marriage that is both interpersonal and legal. The third text where marriage is referred to as a covenant is in the Wisdom literature. The prophets used the marriage symbol to express Yahweh's union with his people through the covenant. Ezekiel and Malachi identified marriage as a covenant; but the Wisdom literature is less idealistic and more pragmatic. The prophetic teaching presents an uplifting view, that although marriage in Israel could be based on love, unity, fidelity and perhaps even equality, still its concrete expression manifested polygamy, divorce and a lack of respect for the wife as a person, far less an equal partner.

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124 F. HAUCK, "Companion" in G. KITTEL (ed.), Theological Dictionary of the New Testament, Grand Rapids, Mich., Eerdmans, 1965, Vol., III, p. 801. Reference is made to diatheke (berith), see G. QUELL, loc.cit., pp. 106-124.

> Hence the importance of the wisdom literature, which deals more specifically with marriage on the social and human level than on the more transcendent and cultic level.
>
> The husband had to be educated to appreciate in the wife those personal qualities and values which are essential to covenant marriage on the human level. He had to see his wife as a companion, a support and a confidant, to whom he can entrust his heart (Prv 31:11).[125]

A detailed examination of marriage as presented in the books which compose the Wisdom Literature[126] is beyond our scope here. However, mention must be made of Sirach,[127] especially 7:19; 25: 12-25 and 41:23. The Song of Songs sets forth the delights of marriage and very beautifully describes deeply satisfying personal relations.[128] The

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125 P.F. PALMER, "Christian Marriage: Contract or covenant?", in Theological Studies, 33 (1972), p. 621.

126 R.E. MURPHY, "Introduction to Wisdom Literature", in J.B.C., Vol., I, R.E. BROWN (ed.), pp. 487-494; ID, Seven Books of Wisdom, Milwaukee, Bruce, 1960, x - 163p.

127 B. VAWTER, The Book of Sirach, New York, Paulist Press, 1962, Pamphlet Bible Series, Vol., 40, 96p; Vol., 41, 96p.; T.H. WEBER, "Sirach", in J.B.C. Vol., I, R.E. BROWN (ed.), pp. 541-555.

128 G.L. ARCHER, Encyclopedia of Bible Difficulties, Grand Rapids, Zondervan, 1982, pp. 261-262; R.E. MURPHY, "Canticle of Canticles", in J.B.C., Vol., I, R.E. BROWN (ed.), pp. 506-510; ID., "Towards a Commentary on the Song of Songs" in C.B.Q., 39 (1977), pp. 482-496; ID., "The Unity of the Song of Songs" in Vetus Testamentum, 29 (1979), pp. 436-443; M.H. POPE, Song of Songs, The Anchor Bible, Vol., 7c, Garden City, N.Y., Doubleday, 1977, xxi - 743p.

Book of Proverbs[129] is of particular interest as it contains a text very similar to Malachi 2:14, identifying marriage as a covenant in almost the same words. The NAB translation has rendered the text poorly, using "adulteress" for "stranger" or "foreigner" and "pact" for "covenant" (berith).[130] The Jerusalem Bible translation conveys the sense Proverbs 2:17 accurately: "She has left the partner of her younger days, she has forgotten the covenant of God." Once again, companion or partner is similar to the consortium or partnership, though consortium does not possess the rich religious and cultic significance that is of the essence of covenant, particularly as it is presented by the prophets, especially, Hosea, Jeremiah and Ezekiel.

Conclusion

Covenants were either treaty forms between a great king and his vassals or personal agreements or pacts between equal partners. The parties were unequal and yet promises were sworn between them. Israel's relationship with Yahweh her God was expressed in terms of the covenant. The prophets

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129 J.T. FORESTELL, "Proverbs", in J.B.C., Vol., I, R.E. BROWN (ed.), pp. 495-505; R.B. SCOTT, Proverbs, The Anchor Bible, Vol., 18, Garden City, N.Y., Doubleday, 1965, Liii-255p.

130 R.B. SCOTT, op.cit., p. 43.

applied the marriage metaphor to the relationship of the chosen people to their God. Ezekiel 16:8, Malachi 2:14 and Proverbs 2:17 enrich marriage by identifying it as a covenant. Malachi and Proverbs both emphasize that the covenant of marriage is for companionship; this is also implied in the secular, legal notion of the consortium.

The prophet's use of the imagery of marriage means that, for him, the language of law is largely displaced by a living fellowship of love, which demands the total allegiance of man as the object of that love, and can never be satisfied with the formal fulfilment of obligations.[131]

The marriage metaphor used to describe the covenant between God and his people brought out the utterly personal, intimate nature of the covenant relationship. An emphasis was placed on love and the relationship, rather than on the form and the obligations assumed. So also does the Conciliar use of covenant for the marriage relationship emphasize the implied fidelity and life-companionship, rather than simply external acts, an emphasis on the spirit rather than the letter of the law and legal forms. How characteristic of the main thrust of Jesus' teaching is that emphasis!

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131 W. EICHRODT, Theology of the Old Testament, London, SCM, 1961, pp. 251-252.

CHAPTER III

MARRIAGE IN THE NEW TESTAMENT:[1] THE GOSPELS' TEACHING ON UNITY AND INDISSOLUBILITY AS THE BASIS FOR THE CONSORTIUM TOTIUS VITAE

Considering the importance of the covenant in the Old Testament it is surprising that diathēkē, the Greek word for berit (covenant) occurs comparatively rarely in the New Testament, in fact only 35 times, of which 17 are in the Letter to the Hebrews.[2] However, it is contained in the two-fold division of the Bible into the Old and New Testaments and so diathēkē has given its name to both. More importantly the fulfilment of Jeremiah's and Isaiah's prophecy of the new covenant is reached when Jesus offers "the new covenant in my blood, which will be shed for you", Luke 22:20. Matthew 26:28 and Mark 14:24 speak of the "blood of the covenant, to

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1 SAC. OECUM. CON. VAT. II, Constitutiones, decreta, declarationes, cura et studio Secretariae Generalis Con. Oecum. Vat. II, Gaudium et spes, pp. 755-756: "Sicut enim Deus olim foedere dilectionis et fidelitatis populo suo occurrit, ita nunc hominum Salvator Ecclesiasque Sponsus, [4] per sacramentum matrimonii christifidelibus coniugibus obviam venit." Footnote 4 supplements the Council's reference to marriage as a covenant as noted in our Chapter two. The Scriptural references referred to by the Council in this text are as follows: Matt 9:15; Mark 2: 19-20; Luke 5: 34-35; John 3:29; 2 Cor 11:2; Eph 5:27; Rev 19: 7-8; 21, 2 and 9.

2 H. CAZELLES, "Covenant", in Sacramentum Mundi, An Encyclopedia of Theology, K. RAHNER (ed.), London, Burns and Oates, 1968, Vol., 2, p. 22. J.J. Hughes finds "diathēkē" only 33 in the NT corpus as a whole." J.J. HUGHES, "Hebrews IX 15ff. and Galatians III 15ff. A Study in Covenant Practice and Procedure", in Novum Testamentum, 21(1979), p. 28.

be poured out on behalf of many" in a formula which recalls the sacrifice of Exodus 24:8 for the ratification of the Sinai covenant.

The New Testament teaching on marriage[3] contains two essential aspects. Firstly, the marriage metaphor is applied anew to the covenant relationship existing between Christ and the Church. This covenant relationship of the New Testament transforms marriage from a social and civil reality, even with sacred connotations, which was governed solely by civil or family laws, to a spiritual reality governed also by the law of God. Secondly, marriage in the New Testament is constituted as an indissoluble union between husband and wife which pre-figured the fulness of covenant union between Christ and his bride, the Church. Since Christian husband and wife are incorporated into Christ through their baptism, they share in Christ's graced covenant union with the Church, a never ending union; hence, their own marriage bond is indissoluble.

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3 L. ORSY, "Christian Marriage: Doctrine and Law Glossae on Canons 1012-1015", in The Jurist, 40(1980), p. 315, gives a list of 24 NT texts on marriage. This Chapter will examine the Gospel texts on divorce to show how Jesus restored the original covenant meaning to marriage.

1. The Gospel According to Matthew

a. Matthew 5:31-32

The essentially Jewish nature of Matthew's Gospel is striking throughout and especially obvious in Chapter 5 where Jesus is portrayed as the new Moses who goes up the mount and gives to the new Israel a new revelation from God. This is the context for Jesus' first saying on divorce in the Gospel.

> The isolated dominical saying about divorce in "Q" has become part of the Sermon on the Mount in the Matthean Gospel, functioning as one of the six antitheses in 5:21-48, where Jesus is depicted reacting to the righteousness of the scribes.[4]

Jesus seems to be presented as the new Moses when he repudiates the norm contained in Deut 24:1. Matt 5:31 quotes Deut 24:1 when it says: "It was also said, 'Whenever a man divorces his wife, he must give her a decree of divorce'." But then Matthew has Jesus say, "What I say to you is: everyone who divorces his wife - lewd conduct is a separate case - forces her to commit adultery." These exceptive clauses for porneia which NAB translates as "lewd conduct", RSV as "on

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4 J.A. FITZMYER, "The Matthean Divorce Texts and Some New Palestinian Evidence", in Theological Studies, 37(1976), p. 202.

the ground of unchastity" and JB as "the case of fornication", are peculiar to Matt 5:31 and 19:3.[5]

Also peculiar to Matthew is that he portrays divorce itself and not divorce and subsequent remarriage as the cause of adultery. This is, no doubt, due to Matthew's context, for in v.27 Jesus' antithesis equates even the lustful look with adultery "in his thoughts", whereas Luke 16:18 lacks such a setting.[6] The prohibition is cast from the Old Testament or Jewish point of view with its bias favouring the husband who may divorce his wife (Deut 24:1-4), with no such allowance made for the woman.

Matthew 5:32 is similar to Luke 16:18 and both derive from the same source as A. Isaksson summarizes:

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5 Matt 5:32 parektos logou porneias and 19:9 mē epi porneia. Attempts to avoid reading the phrases as exceptive clauses are really subterfuges to avoid the obvious. Such attempts have been well summarized in B. VAWTER, "The Divorce Clauses in Mt 5, 32 and 19, 9", in C.B.Q., 16(1954), pp. 156-165.

6 It is generally agreed among Scripture scholars that Matt 5:32 and Luke 16:18 derive from the same isolated "Q" logion, with suitable modifications on both sides; see B. VAWTER, "Divorce and the New Testament", in C.B.Q., 39(1977), pp. 528-542. "Q" from the German Quelle "source" was first mentioned by F. Schleiermacher in 1832 and is now a generally accepted hypothesis; cf. F. GAST, "Synoptic Problem" in J.B.C., Vol. II, J.A. FITZMYER et alii, (eds.), p. 5.

> The version in Q (Lk. 16.18 and Mt. 5.32), according to which the husband is forbidden to divorce his wife and to marry a divorced woman, is the original one. /.../. In 5.32 Matthew has made a change in Q, for the statement that the husband's guilt in a divorce case consists in the fact that, by divorcing his wife, he causes her to commit adultery by remarrying is obviously an artificial formulation. The original wording is that the husband is guilty if he divorces his wife in order to marry another woman.[7]

This original wording is radical. In contrast to the concession permitted by Moses, Jesus asserts a repudiation of divorce.

Jesus goes beyond what the Law permitted the husband to do, i.e. divorce, and focuses his attention on marriage as revealed in the plan of the Creator "at the beginning". Whereas the Rabbis argued over the grounds for divorce, Jesus designates as adultery all divorce. He declared illegitimate an action which in Jewish Law was legitimate (Deut 24:1-4), although nowhere in the Old Testament[8] are the legal causes for divorce spelt out.

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7 A. ISAKSSON, Marriage and Ministry in the New Temple, Lunk, C.W.K. Gleerup, 1965, p. 70.

8 Cf. W.J. O'SHEA, "Marriage and Divorce: The Biblical Evidence", in A.C.R., 47(1970), p. 92.

> His provocative statement would have made two things clear to his listeners: (i) marriage unites man and wife in a way that cannot be dissolved by the Law; (ii) a man can be answerable to his own wife as an adulterer (Luke 16:18a) - the obligations of a woman to her husband, formerly one-sided, are now mutual. Man and wife are shown to be equal partners with equal rights. /...7 Jesus /...7 does indeed use the language of the Law, but he does so in a way that alienates it from its customary legal use and breaks through the plane of law into that of reality. He reveals the reality of a human relationship in which God lays direct claim to man's response. And he frees this relationship from the strait-jacket of the Law.[9]

However, Jesus' criticism in this case was more directed at the lax interpretation of the Law rather than at the Law itself. An example of such lax interpretation comes from the school of Hillel which allowed divorce for trivial reasons, "Even if she has let his food get burnt."[10] These interpretations were of the Mosaic concession in Deut 24:1, which Jesus says, in answer to the pharisees, was given "because of your stubbornness" (Matt 19:8). Of the references

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9 P. HOFFMANN, "Jesus' Saying about Divorce and its Interpretation in the New Testament Tradition", in Concilium, 6(1970), p. 53.

10 Cf. F. HAUCK and S. SCHULZ, "Porneia" (fornication) in Theological Dictionary of the New Testament, G. FRIEDRICH (ed.), Grand Rapids, Mich., Eerdmans, 1968, Vol. VI, p. 591. See also H.L. STRACK and P. BILLERBECK, Kommentar zum Neuen Testament aus Talmud und Midrash; Das Evangelium Nach Matthäus, München, C.H. Beck, 1971, Vol., 1, p. 313.

to divorce in the Gospels, Matthew alone has the exceptive clauses and also two sayings of Jesus on divorce.

The content of these two sayings is similar, so we shall consider them simultaneously. But, of the differences between the two Matthean texts on divorce, A. Isaksson says:

> We must assume that for Mt. 5:31-32 Matthew had another source at his disposal than Mt. 19:3-9. There are three reasons for this assumption. (1) In Mt. 5:31 he uses a different expression for the bill of divorce from that in Mt. 19 and in the LXX. (2) The logion itself has a different form from that in Mt. 19 and this form has been devised to give expression to the Church's interpretation of the prohibition of divorce as a prohibition which applied even though the husband did not intend to remarry after divorce and thus commit an act of adultery, to which the husband was an accessory, in that he divorced her. (3) The clause on unchastity has a different wording in Mt. 5:32 than in Mt. 19:9. It would seem that none of these differences can be explained as an attempt on Matthew's part to vary his expression and to amend what he found in Mark's Gospel.[11]

The second difference is not only a difference between Matt 5:32 and Matt 19:3-9, but is singularly characteristic of Matt 5:32 among all the Gospel divorce passages, as A. Isaksson says:

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11 A. ISAKSSON, op.cit., pp. 123-124.

> Mt. 5:32 differs from all the other formulations in that it is not concerned with the situation which arises when a husband re-marries after divorce. It says instead that, if a divorced woman re-marries, she and her second husband are guilty of adultery and the first husband is morally responsible for this state of affairs.[12]

We shall examine the content of Matt 5:31-32 and Matt 19:3-9 after we have considered the setting of this second Matthean divorce text.

b. Matthew 19:3-9

The setting for the second saying of Jesus on divorce in Matthew 19:3-9 refers to the dispute between the schools of Shammai (strict) and Hillel (lax) regarding the grounds for divorce. This setting is important, for while Luke 16:18 is generally regarded as the most primitive[13] form of the sayings of Jesus about divorce in the New Testament, the Matthean text is profoundly Palestinian in origin. J.A. Fitzmyer ably indicates this origin when he says:

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12 Ibid., p. 69.

13 Cf. A. AMBROZIC, "Indissolubility of Marriage in the New Testament: Law or Ideal", in S.C., 6(1972), pp. 269-270; J.A. FITZMYER, loc.cit., p. 200; B. VAWTER argues for the fidelity of the Matthean text to the Q logion and therefore its originality, B. VAWTER, "Divorce and the New Testament", in C.B.Q., 39(1977), pp. 530-531.

> Moreover, the question posed in Mt 19, "Is it lawful to divorce one's wife for any reason?" is regarded as more primitive, because it seems to reflect a dispute between the schools of Hillel and Shammai and would thus have a more plausible matrix in a well-known Palestinian Jewish setting.[14]

Matthew's episode is regarded as derived from its counterpart in Mark 10 which Matthew has adopted, with the addition of the exceptive phrase, for the sake of Christians living in the mixed community for which he was principally writing.[15]

> The fact that the logion has been preserved in so many different versions testifies to the widespread use made of it in the primitive Church. It is clear from 1 Cor. 7:10-11 that this logion was part of the Jesus tradition which Paul had at his disposal and used to impart to his churches. Thus the Corinth church was acquainted with the content of the logion as early as about 55 A.D. The church to which Matthew belonged must have known about it a good deal earlier.[16]

This is obvious from the fact that the questions on the Sabbath, the position of the Gentiles and also divorce would have been important, especially among Jewish Christians; as B.H. Streeter says:

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14 J.A. FITZMYER, loc.cit., p. 207.

15 Cf. J.R. DONAHUE, "Divorce: New Testament Perspectives", in The Month, April 1981, p. 114; J.A. Fitzmyer, loc.cit., p. 207.

16 A. ISAKSSON, op.cit., p. 71.

> Hence we should expect that sayings or stories which could be quoted as defining Christ's attitude to them would be current at a very early time in nearly every Church - and most certainly in the Church of Jerusalem.[17]

There is one further parallel between Matt 19:3-9 and I Corinthians 6-7 and it is that all the themes found in Matt 19:3-12, i.e., questions on sex and marriage, are also found in Paul's letter to the Corinthians. From what Paul says in 1 Corinthians 6 - 7, it is clear that he assumes, as an already recognized and authorized Christian tradition, the content of this particular pericope in Matthew.[18]

An important element of exegesis is the Sitz im Leben, and Matthew 19:3-9 certainly brings us at once into the situation in Palestine in Jesus' time, as is witnessed by the question posed to Jesus by the Pharisees in order to test him. The question constitutes the horns of a dilemma. On the one hand the answer would put Jesus in opposition to the Mosaic concession in Deut 24:1; or, on the other, Jesus' teaching would be unacceptable to the people if he completely

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17 B.H. STREETER, The Four Gospels, London, Macmillan, 1927, p. 260.

18 Cf. A. ISAKSSON, op.cit., pp. 106-112.

forbade divorce, an attitude the disciples seem to voice in verse 10.

J.A. Fitzmyer distinguishes three aspects of the problem regarding these exceptive phrases. Firstly, are the exceptive phrases part of an authentic logion? Few critical commentators would say so and J.A. Fitzmyer gives the reasons.

> The greater difficulty in explaining how the more absolute forms of the prohibition in Paul, Mark and Luke would then have arisen /... / (and) the tendency otherwise attested in Matthew of adding things to the sayings of Jesus (e.g., two extra petitions in the Our Father) ... . The two considerations make it almost certain that the exceptive phrases stem from the pen of the Evangelist faced with a problem to resolve in the community for which he was writing.[19]

Secondly, we may ask, what is meant by "porneia"? The comparison of the three English translations given above already indicates that a variety of answers may be given. Use of the word elsewhere in Matthew's Gospel occurs in Chapter 15:9, where it is listed among the evil machinations of the human mind, "murder, adultery, fornication" (RSV),

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19 J.A. FITZMYER, loc.cit., p. 208.

lined up side-by-side with moicheia "adultery" and obviously distinct from it.[20]

Clearly then, if Matthew meant adultery, he would have used moicheia a word he otherwise knows and uses, and not porneia. The clue to the reason why Matthew used porneia must be found then either in its etymology or other uses in the New Testament.

> Etymologically, (porneia) means "prostitution, harlotry, whoredom" being an abstract noun related to pornē 'harlot', and to the verb porneuein, 'to act as a harlot'. Generally speaking, it means 'fornication', but /... / it is actually used 'of every kind of unlawful sexual intercourse'. Though it is differentiated from moicheia in Mt 15:9, Mk 7:21-22, 1 Cor 6:9, Heb 13:4, it is used of a variety of sexual activity: (incest), 6:13 (prostitution) /... /. In Acts 15:20, 29 porneia is used, however, in a specific sense, since it is lined up with several dietary tabus, which early Gentile Christians /... / were being asked to avoid.[21]

The use of porneia in Acts, understood as illicit marital unions within the degrees of kinship proscribed by Leviticus 18:6-18, is the meaning of porneia as shown by new

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20 M. GELDARD, "Jesus' Teaching on Divorce: Thoughts on the Meaning of porneia in Matthew 5:32 and 19:9", in The Churchman, 92(1978), p. 134.

21 J.A. FITZMYER, loc.cit., pp. 208-209.

evidence that has come to light from the Qumran Scrolls. The Temple Scroll from Qumran contains statutes for the king that begin with a direct quotation from Deuteronomy 17: 14-18 and which includes, "He shall not multiply wives for himself" (RSV v.17). These statutes contain a prohibition both of polygamy and divorce as J.A. Fitzmyer translates:

> And he shall not take in addition to her another wife, for she alone shall be with him all the days of her life; and if she dies, he shall take for himself another (wife).[22]

It is interesting to note that God is depicted in the Scroll as speaking in the first person singular and issuing decrees, as if to show that the author of the text apparently wanted his readers to consider it virtually as Torah[23] which gives it a universally binding character. Also, similarities are noticeable between that statute from the Temple Scroll and Malachi 2:14 and Proverbs 2:17, the two Old Testament texts which speak of marriage as a covenant and which enjoin enduring fidelity to the partner or companion of one's youth.

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22 Ibid., pp. 215-216.

23 Ibid., pp. 215.

Of the clear denial of both polygamy and divorce in the Temple Scroll, J.A. Fitzmyer says:

> The first regulation clearly precludes polygamy (probably echoing Dt 17:17), but the reason that is further added makes it clear that the king is not to divorce his wife: "for she alone (lebaddah) shall be with him all the days of her life". Thus the Temple Scroll goes beyond Dt. 17:17, which forbids polygamy, and proscribes divorce as well /.../.
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> Here, then, we find a clear prohibition of divorce in a first-century Palestinian Jewish text. True, it may reflect the ideas of the sectarian Jews who formed the Qumran community, normally regarded as Essenes. It may also be a view that was in open opposition to what is usually regarded as the Pharisaic understanding of the matter.[24]

Hence Matthew 19:3-9 and Mark 10:2-12 with the setting of the Pharisees test question, takes on new relevance as a very contemporary Palestinian issue in Jesus' time with the marked difference in teaching between the Pharisees and the Qumran community.

Other sources[25] also help to shed light on these Gospel passages. The Hebrew word used in the Damascus Document is

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24 Ibid., p. 216.

25 Notably the Damascus Document, see J. MURPHY-O'CONNOR, "The Essenes and Their History", in Revue biblique, 81(1974), pp. 215-244, especially "The Community of the New Covenant",

zenut which is translated as "unchastity", of which two examples are given and which are illustrated by reference to Old Testament passages. The taking of two wives in their lifetime is seen to contravene Genesis 1:27 and Deuteronomy 17:17; while in the case of taking as wives "the daughter of his brother, and the daughter of his sister", such incest is seen to be in contravention of Leviticus 18:13.[26]

The reason why these source documents are important is that the use of zenut is parallel in other Old Testament texts and that it is translated into the Septuagint as porneia. J.A. Fitzmyer details the importance of this as follows:

> In the OT zenut is used both of harlotry (e.g., Jer 3:2, 9; Ez 23:27) and of idolatrous infidelity (Nm 14:33). In the LXX it is translated by porneia (e.g., Jer 3:2-9). Whatever one might want to say about the nuances of the word zenut in the OT, it is clear that among the Jews who produced the Damascus Document the word had taken on further specific nuances, so that

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25 (cont'd) pp. 219-229; On the document itself, see ID., "An Essene Missionary Document? CD II, 14-VI, 1", in Revue biblique, 77(1970), pp. 201-229, especially p. 220. However on J. Murphy-O'Connor's view that the document proscribes any second marriage, J.A. Fitzmyer quotes from the Temple Scroll, "if she dies, he shall take for himself another (wife)", and thus concludes that the prohibition of a second marriage should not be read into CD 4:21: J.A. FITZMYER, loc.cit., p. 220.

26 J.A. FITZMYER, loc.cit., p. 219.

> polygamy, divorce and marriage within forbidden degrees of kinship could be referred to as zenut. Thus /... / we have missing-link evidence for a specific understanding of zenut as a term for marriage within forbidden degrees of kinship or incestuous marriage.[27]

This interpretation of porneia is not new,[28] what is new is that it is now confirmed as coming from sources roughly contemporary with Jesus. That the same interpretation is supported by later rabbinic literature simply confirms that the interpretation was not confined to the Qumran community. In the contemporary scene, this interpretation has great relevance for canon law.

The exceptive clauses in the light of these recently discovered source documents are to be interpreted as applying to an illicit union, a marital situation that should not have been entered into to begin with, one which violated the acceptable degrees of relationship. It is interesting that M. Geldard, an Anglican, should note that:

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27 J.A. FITZMYER, loc.cit., p. 221.

28 J. BONSIRVEN, Le divorce dans le Nouveau Testament, Tournai, Desclée, 1948, pp. 50-60, proves that Lev 18:7-18 held some marriages to be invalid due to zenut or porneia. For a summary of the interpretations, see L. SABOURIN, "The Divorce Clauses (Mt 5:32, 19:9)", in Biblical Theology Bulletin, 2(1972), pp. 80-86; B. VAWTER, "The Divorce Clauses in Mt. 5.32 and 19.9", in C.B.Q., 16(1954), pp. 155-167.

> It allows not the dissolution of a "proper' on-going marriage but the abrogation of what, by Jewish law, standards and thought, was an improper and invalid marriage. Since the wedding contract (ideal) has not been honoured and fulfilled, no real marriage had taken place. It refers to what we would term an annulment rather than a divorce; the annulment of what for a Jew was a deeply offensive marriage by deception - a marriage in which one partner had no right to the marriage at all.[29]

Just as it was appropriate and necessary for the Matthean Church to apply the exceptive phrases to some marriages of Gentile Christians which were offensive to Jewish Christians because of conflict with the Law, so has the Church, down through the ages, determined grounds for annulment. These have been established either because they conflict with the natural law, e.g., C.I.C. (1983), c. 1083 (the minimum age required for marriage) or divine law, e.g., C.I.C. (1983), c. 1056 (the essential properties of unity and indissolubility).

This interpretation of the exception clause is a vindication of the Church's right to provide matrimonial tribunals and the right of the faithful to have a marriage they now consider invalid, adjudicated on the grounds of

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29 M. GELDARD, loc.cit., p. 140.

nullity that the Church recognizes. The Church has also interpreted the Scriptures she has received: what of these Gospel texts in Matthew 19:3-9, Mark 10:2-12 and Luke 16:18? Do they convey ipsissima verba Christi and his teaching on divorce? As if answering these fundamental questions, J.A. Fitzmyer draws the following conclusions:

> On the basis of form criticism and redaction criticism it is possible to isolate two sayings about divorce that may plausibly be regarded as traceable to Jesus himself: "What therefore God has joined together, let not man put asunder" (the pronouncement, Mk 10:9, Mt 19:6) and "Everyone who divorces his wife and marries another commits adultery" (the dominical saying best preserved in Lk 16:18 a-b).[30]

As to the other aspects of these texts, especially the Matthean texts, it is now generally agreed that they do in fact contain exception clauses.[31] Two main interpretations seem to be accepted. J.A. Fitzmyer has ably presented the first, that the meaning of porneia refers to illicit marriages between relatives (Leviticus 18) which is the meaning given it in Acts 15:20, 29, as P. Hoffmann concludes:

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30 J.A. FITZMYER, loc.cit., p. 223.

31 R. SCHNACKENBURG, The Moral Teaching of the New Testament, London, Burns and Oates, 1975, pp. 137-143.

> So its not a question of an exceptional case in which the divorce of a valid marriage would be allowed, but of the separation commanded by the Law of people who were married illegitimately.[32]

Secondly, other interpretations of porneia are that it refers to fornication in the sense of pre-marital sexual intercourse[33] or adultery, unbridled, perhaps perverse sensuality,[34] but these interpretations have not been established by the same critical analysis and comparative study with which J.A. Fitzmyer has supported his interpretations of the Matthean exception clauses.[35]

Matthew 19:3-9 occurs in a very Palestinian setting. The opening test question, "May a man divorce his wife for

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32 P. HOFFMANN, loc.cit., p. 58.

33 M. GELDARD, loc.cit., p. 140.

34 P. HOFFMANN, loc.cit., p. 58-59.

35 B. VAWTER has reservations about J.A. Fitzmyer's conclusions. This is because the Temple Scroll was then unpublished and so he says it is precarious to draw large conclusions at this stage. However, J.A. Fitzmyer bases his conclusions on parts of the Temple Scroll that have become available. B. Vawter seems to attach too little importance to the fact that there is evidence of teaching opposed to Deut 24:1 and that the Essenes lived by that teaching which has now come to light in the Qumran scrolls. B. VAWTER, "Divorce and the New Testament", C.B.Q., 39(1977), pp. 533-534.

any reason whatever?"[36], is an effort to have Jesus pronounce on the dispute between the rabbinical schools of Hillel and Shammai.

> Jesus' answer is given in good rabbinical style by quoting the arguments for a permanent state of unity created by marriage /.../. Since this union is a work of creation and formally stated in the Law, it is the work of God, with which man may not tamper. This is an appeal to the primitive institution of marriage; Jesus goes behind the Law to creation, an argument that would not please the questioners but one they could hardly contest.[37]

We have examined the texts from the Book of Genesis creation accounts in Chapter 1. The Priestly text (Gen 1:27b) Jesus quotes first: "at the beginning the Creator made them male and female". Thus it is emphasized that the sexual differentiation was part of God's original purpose in creation. This directedness to each other we called the complementarity of husband and wife in Chapter 1.

The Yahwist text (Gen 2:24) is also quoted by Jesus to prove that the purpose of distinguishing the sexes was to join

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36 Matthew 19:3; emphasis added.

37 J.L. McKENZIE, "The Gospel According to Matthew", in The Jerome Biblical Commentary, Vol., II, J.A. FITZMYER (ed.), p. 96.

them together in marriage.[38] Thus both texts in their own way indicate that the complementarity of husband and wife in marriage is by God's design.

Typical of Matthew's Gospel, Jesus expounds on the Law. even interpreting it, as P. Hoffmann says:

> Jesus gives /... / a lesson on the Law. His new, authoritative exposition ('And I say to you...') stands in opposition to the Jewish one, and can appeal for its justification to God's creative will itself. So in Matthew the dispute (19:4-18) has a theological and hermeneutic function: the original created order is shown to be the criterion for interpreting the Law, and Jesus's interpretation with the directive it contains is thus shown to be the better exposition of God's will.[39]

Jesus overcomes the trap set by the Pharisees by appealing beyond Moses to God's will at creation. In this way he avoids conflict with the Law and highlights the prototype marriage at the dawn of creation. P.F. Palmer in his excellent book length article links together the themes contained in Jesus' pronouncement when he says:

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38 H. MONTEFIORE, "Jesus on Divorce and Remarriage", in Marriage, Divorce and the Church; The Report of a Commission appointed by the Archbishop of Canterbury to prepare a statement on the Christian Doctrine of Marriage, London, SPCK, 1972, p. 81.

39 P. HOFFMANN, loc.cit., p. 57.

> His own commentary on the significanace of the two-in-one-flesh relationship of the first human couple is unqualified: "What therefore God has joined together, let no man put asunder" (Mt 19:6). God is not only the witness or guarantor of marriage, he is its ultimate author. Jesus does not use the term "covenant" of marriage, but in ruling out all divorce and remarriage he makes obligatory, at least for his followers, the archetypal ideal of Yahweh's covenant with Israel in which Yahweh is faithful to his covenant even when Israel is faithless.[40]

The faithful love of Yahweh for his people, established in the covenant, was taken up by the prophets of Israel and expressed as Yahweh wedded to his people. Likewise the failure of the people to keep to the terms of the covenant was denounced by the prophets as infidelity. Jesus seems to follow a similar style in answering the Pharisees' test question on divorce.

The Pharisees were wanting Jesus to pronounce on which rabbinic school he agreed with or give such a strict interpretation of Deuteronomy's concession that the people would turn away from following him. The Matthean text expresses Jesus' reply in a confrontational tone - "Have you not read that at the beginning the Creator made them male and female"

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40 P.F. PALMER, "Christian Marriage: Contract or Covenant", in Theological Studies, 33(1972), p. 623.

(Matt 19:4). This reply was a public rebuke to the Pharisees. Their lives were spent studying the Law and its interpretations and this attempt to discredit Jesus backfires. Jesus' reply could almost be paraphrased: "If you really knew the Law you would know that the Creator made them male and female." Instead of giving a teaching that reflects the rabbinic discussions of the Deuteronomic concession, Jesus pronounces that God's will "at the beginning" is normative, that the Creator is the originator of this union in marriage.

Anxious to save face before the people, the Pharisees appeal to the authority of Moses, no doubt thinking that Jesus would surely not contradict Moses. But Jesus' reply has the Pharisees on the horns of the dilemma, the very position where they had hoped to have Jesus. Not only is divorce against God's purpose for man and woman as expressed in the Yahwist creation narrative (Gen 2:18-24), but Jesus also declares that Moses permitted divorce "Because of your stubbornness, but at the beginning it was not that way" (Matt 19:8). The unwillingness to abide by the Creator's design brought about the concession but it was a departure which needed to be rectified. Jesus, therefore, declares, "I now say to you" (Matt 19:9) and there follows the logion which occurs, with some variations, in the two Matthean texts, as well as in Mark 10:11-2, Luke 16:18 and I Corinthians 7:10-11.

In the context of Matthew 5:31-32, Jesus' criticism of the Torah is due to the fact that he has just enunciated a more perfect law in the Beatitudes. Matthew also expresses a relationship between Jesus' teaching on marriage and his call for voluntary celibacy. Matthew seems to be suggesting that if the Master shows himself to be so demanding concerning marriage, it is because he proposes an ideal,[41] "Not everyone can accept this teaching, only those to whom it is given to do so" (Matt 19:11).

Matthew's verson of the Q logion, occurring as it does as part of the antithesis of the Sermon on the Mount, obviously needs to be interpreted in that context. Ambrozic has done so admirably and concludes that it is

> an early Christian catechism containing many, though by no means all, of the commands of Jesus obliging all Christians; they are conditions of entry into the future Kingdom of heaven. The conclusion of the Sermon indicates quite clearly that Matthew insists on doing what Jesus commands /.../ there is no doubt in his mind about the obligatory character of these very concrete and explicit demands, nor does he wonder about his readers' ability to fulfil them. The commands are given to be fulfilled; their non-fulfilment

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41 A.-L. DESCAMPS, "Les textes évangéliques sur le mariage", in Revue théologique de Louvain, 11 (1980), p. 46. The late Archbishop Descamps was Secretary of the Pontifical Biblical Commission.

> is sinful precisely because, as the eschatological and salvific will of God, they can and must be obeyed.[42]

Jesus presents himself here more as a moralist than as one who is to establish the kingdom, for it would seem that for Jesus, the perfect will of the Creator is imposed on all the righteous and not only on those of great faith who are awaiting the coming of the kingdom and who are ready to sacrifice everything for it.[43]

That this call of Jesus was a radical one is confirmed in two ways. Firstly, in Matt 19:10 there is recorded the reaction of the disciples themselves "if that is the case between man and wife, it is better not to marry." This observation then begets Jesus' remark on the paramount importance of the demands of the kingdom.[44] Secondly, the test question of the Pharisees (Mark 10:2, Matt 19:3) is an indication,

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42 A. AMBROZIC, loc.cit., pp. 281-282.

43 Cf. A.-L. DESCAMPS, loc.cit., p. 46.

44 J. DUPONT, Mariage et divorce dans l'évangile, Bruges, Desclée, 1959, pp. 161-222 made a thorough analysis of these verses, but unfortunately his research was, in the main, overlooked. However, Q. QUESNELL, " Made Themselves Eunuchs for the Kingdom of Heaven' (MT 19,12)", in C.B.Q., 30(1968), pp. 335-358. built on the foundation Dupont had so scholarly prepared.

> /... / they know that the Master had already clearly criticized elsewhere and motu proprio the Jewish practice of repudiation. We can therefore believe that Jesus was not content with putting the Pharisees at a loss for an answer but that he wished to declare clearly the principle of no-remarriage and even no separation and that he applies the principle in an address to the disciples by way of a few sayings.[45]

We must beware of concluding that the Jewish society of Jesus' day was decadent with regard to marriage, especially monogamous marriage. Archbishop A.-L. Descamps elaborates on the monumental research of R. de Vaux[46] and concludes:

> The Jewish milieu at the time of Jesus thought highly of monogamous marriage, there was general conformity in the practice and this contrasted, in the view of historians of his day, with the lax attitude of Greco-Roman mores. In expressing his ideas on marriage, Jesus was not led, at least there are no indications of it, by a desire to root out serious abuses.[47]

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45 /... / "qu'ils savent que le Maître avait bel et bien critiqué ailleurs et motu proprio la pratique juive de la répudiation. On peut donc comprendre que Jésus ne se soit pas contenté de mettre les pharisiens à quia, mais qu'il ait prononcé clairement le principe du non-remariage et même de la non-séparation, et qu'il en ait fait l'application à l'adresse des disciples par quelques sentences." A.-L. DESCAMPS, loc.cit., p. 39.

46 R. DE VAUX, Les Institutions de l'Ancien Testament, English translation, Ancient Israel, London, Darton, Longman and Todd, 1968, p. 25.

47 "Le milieu juif qui fut celui de Jésus avait une haute idée du mariage monogame; la pratique y était largement conforme, et elle contraste, aux yeux de l'historien

That Jesus' teaching on marriage and divorce was contested by the Pharisees is revealing.

> The Pharisees, with whom Jesus was in opposition, were among the Jews and other religious groups, rather severe in matters of conjugal morality. Because Jesus had a head-on-collision with them, it is a confirming sign of his own radicalism.[48]

In this confrontation with the Pharisees, Jesus' starting point is not the law but the Genesis texts.

> For Jesus himself, indissoluble marriage is a response to the perfect will of God, promulgated since the beginning, before any work of salvation was begun, and is therefore addressed to the disciples and to all men. In other words: the obligation in matters of marriage is not of the same sort as the call to voluntary celibacy or to the selling of one's goods: on the one hand there is a voluntary choice in the context of the kingdom, and on the other there is a pure and simple submission to the absolute will of God.[49]

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47 (cont'd) d'aujourd'hui, avec le laxisme de moeurs gréco-romaines. En s'exprimant sur le mariage comme il le fit, Jésus ne fut donc pas conduit, du moins rien ne l'indique, par un désir d'extirper de graves abus." A.-L. DESCAMPS, loc.cit., p. 39.

48 "Les pharisiens auxquels s'oppose ici Jésus étaient, parmi les Juifs et face à d'autres groupes religieux, plutôt sévères en matière de morale conjugale. Puisque Jésus les a néanmoins heurtés de front c'est un confirmatur assez frappant de son radicalisme", Ibid.

49 "Pour Jésus lui'-même, le mariage indissoluble répond plutôt à la volonté parfaite de Dieu, promulguée dès les origines, antérieurement à toute économie du salut

The Genesis creation account (Gen 2:23ff) is also the starting point for the Council of Trent's[50] teaching on the sacrament of marriage.[51] The canons[52] which follow it, are referred to as sources of C.I.C. (1917), c. 1013 #2 or C.I.C. (1983), c. 1056 on the unity and indissolubility of marriage. The conciliar fathers intended to condemn[53] only the Reformers, not the Greeks or Ambrosiaster (understood by some of the Council fathers as St. Ambrose). The prudent formulations of the Council were comprised of a general respect for the New Testament texts and a statement of the Church's right to make an interpretation. What

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49 (cont'd) proprement dite, et donc à l'adresse des disciples et de tous les hommes. En d'autres termes: l'exigence en matière de mariage n'est pas de même nature que l'appel au célibat volontaire ou à la vente des biens; d'un côté il y a choix volontaire et attitude d'exception en vue du royaume, de l'autre il y a soumission pure et simple à l'absolue volonté de Dieu", Ibid., p. 40; emphasis added.

50 Concilium Tridentinum, Sessio XXIV, November 11, 1563, De Matrimonio.

51 DS 1797-1800; English translation in K. RAHNER (ed.), The Teaching of the Church, Cork, Mercier, 1967, pp. 356-357.

52 Canon 2, DS 1802; English translation, ibid., p. 357; cf. P. McENIERY, "Divorce at the Council of Trent", in A.C.R., 47(1970), pp. 188-201.

53 Cf. Ibid., p. 195.

comes to the fore is "non confirmation" of the clause understood as the right to remarriage.[54] The clause in question is the exception clause in Matthew 5:32 and 19:9.

In Matt 19:3-9 and Mark 10:2-12 the setting for a declaratory legal statement reminiscent of Old Testament casuistic law is provided by the Pharisees' test question. Thus Jesus' words, "I now say to you" (Matt 19:9), assume their full legal import in both rescinding the Mosaic permission to divorce and re-establishing the Creator's intention and thus giving the normative value to the Genesis creation accounts treatment of marriage.[55] "They are no longer two but one flesh" (Matt 19:6; Mark 10:8; cf. Gen 2:24) the unity of marriage is immediately followed by Jesus' re-instituting the indissolubility of marriage; [56] "Therefore, let no man

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54 Cf. A.-L. DESCAMPS, loc.cit., p. 48.

55 This legal aspect is not universally accepted, although the other interpretations are circuitous, thus "Jesus is not absolutely prohibiting divorce by way of a binding legal enactment, but is absolutely elevating marriage (as an indissoluble union) by way of leading men to understand it, not as a remote ideal, but as a gift of God's creation, to be received gladly and celebrated naturally and spontaneously. What is essentially a gift of God can never of course be forced on men by law, but only responded to in gratitude." H. ANDERSON, The Gospel of Mark, London, Oliphants, 1976. p. 243.

56 Cf. C.I.C. (1983), c. 1056 and also C.I.C. (1917), c. 1013 #2.

separate what God has joined" (Matt 19:6; Mark 10:9). Having mentioned the similarities between the Matthean and Marcan texts, let us now examine the distinctive qualities of Mark 10:2-12.

2. The Gospel According to Mark (10:2-12)

Whereas the Matthean texts concerning divorce (5:31 and 19:3-9) are distinctive because of the exceptive clause they each contain, the Marcan text (10:2-12) has a number of distinguishing qualities which indicate a non-Jewish background. The language manifests this as the quotation from Genesis 2:24 in Mark 10:8 follows the Septuagint word for word. Where Mark (from LXX) has "and the two shall become as one" (v.8), the Hebrew texts read "they shall become one flesh." Since the Greek reading is a constitutive element of Jesus' reply, it is highly probable that the dispute, together with Jesus' answer, only took on the form it has in Mark when it was received into the Greek-speaking Judeo-Christian community.[57]

Mark alone, of all the New Testament divorce texts, makes mention of "a woman who divorces her husband and marries another commits adultery". An indication of how revolutionary this Marcan text is, comes from the Jewish

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57 Cf. P. HOFFMANN, loc.cit., p. 55.

historian Josephus, who says that Salome, sister of Herod the Great, sent her husband, Costobarus, a bill of divorce.

> Though this was not in accordance with Jewish laws; for with us it is lawful for a husband to do so; but a wife, if she departs from her husband, cannot of herself be married to another, unless her former husband put her away.[58]

Since divorce was permitted by Roman law,[59] some commentators[60] see Mark 10:12 as an accommodation of the Lord's teaching by the evangelist to a Roman or gentile setting. However the Marcan setting for Jesus' teaching on divorce has a character all its own. In 10:1 the scene

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58 FLAVIUS JOSEPHUS, Antiquities of the Jews, XV, VII, 10, in The Works of Flavius Josephus, translated by W. WHISTON, London, Nelson, 1847, p. 420.

59 "The commonest termination of a marriage was the voluntary divorce of the parties themselves through the withdrawal of affectio maritalis; and since it required two to make a marriage, not only divorce by mutual consent but even simple repudiation (repudium) sufficed to end a union. /.../ In the later Republic, the full logical consequences of freedom of divorce were accepted /.../ The empire, however, brought attempts to check the instability of marriage." J.A. THOMAS, Textbook of Roman Law, (Amsterdam) North-Holland Pub. Co., 1976, pp. 425-426. See also B. NICHOLAS, An Introduction to Roman Law, Oxford, Clarendon Press, 1979, pp. 85-87.

60 Cf. D.E. HIEBERT, Mark, A Portrait of a Servant, Chicago, Moody Press, 1974, p. 241; J. SCHMID, The Regensburg New Testament: The Gospel According to Mark, Staten Is., N.Y., Alba House, 1968, p. 187; H. WANSBROUGH "St. Mark", in A New Catholic Commentary on Holy Scripture, R.C. FULLER (ed.), London, Nelson, 1969, p. 970.

occurs "across the Jordan" i.e., within the territory of Herod Antipas, who had married his niece, wife of his half-brother Philip. John the Baptist had incurred the ire of Herodias through his condemnation of this adulterous union (Mark 6:14-29). It is, therefore, not without significance that Jesus utters v.10 to his disciples, within the territory of the infamous Herod Antipas and the blood-thirsty Herodias, great-niece of Palestine's most notable divorcee, Salome. Therefore, F.C. Burkitt declares that Mark 10:12 "far from being a secondary addition (as the other commentators referred to above maintain) is one of the really primitive features of the Gospel of Mark."[61]

This opinion of F.C. Burkitt has received substantiation in more recent times from historical sources that have become available and known as the Temple Scroll from Qumran Cave XI and the Damascus Document. J.A. Fitzmyer translates the relevant section as follows:

> They [...] have been caught in unchastity in two ways: by taking two wives in their lifetime, whereas the principle of creation is "Male and female he created them"; and those who entered (Noah's) ark, "two (by) two went into the ark." And concerning the prince (it is) written: "He shall not multiply wives for himself."[62]

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61 F.D. BURKITT, The Gospel History and its Transmission, Edinburgh, T. and T. Clark, 1906, p. 100.

62 J.A. FITZMYER, loc.cit., p. 218.

The word "unchastity" is the translation of the Hebrew word "zenut" and is used for contravention of Genesis 1:27.[63] Thus we have a text from the Qumran community, dated to the first centuries B.C. and A.D.,[64] and thus contemporaneous with Jesus, in which the Priestly creation account is quoted as normative, just as in Mark 10:2-12 and Matthew (19:3-9), Jesus quotes the same texts of Genesis and also from the Yahwist creation account (Gen 2:24). In Mark 10:9 Jesus concludes his public teaching with this injunction "Therefore let no man separate what God has joined." Matthew 19:9 has a more legal expression following the same verse, "I now say to you." The stringency of Jesus' teaching is not lost on the disciples, who respond "If that is the case between man and wife, it is better not to marry" (19:10).

The Qumran text gives the Marcan account a more authentic setting. The prohibition of divorce by the Qumran community shows that there were at least some Jews in first-century Palestine who did proscribe divorce. Thus the originality of the Marcan form of the Pharisees test question "whether it was

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63 "Zenut" is translated in the LXX as porneia; its use here is controverted, but J.A. Fitzmyer says the majority opinion is that it proscribes both polygamy and marriage after divorce; ibid., pp. 219-220.

64 Cf. Ibid., p. 221.

permissible for a husband to divorce his wife?" is not as unlikely as many had previously contended.[65]

The impact of the Qumran scrolls is well detailed by J.A. Fitzmyer when he says:

> But now, in the light of the statute for the king in the Temple Scroll, which directly forbids polygamy and ... at least implies the prohibition of divorce, the question put by some Pharisees to Jesus in Mk 10:2 /.../ is not as 'inconceivable' in a Palestinian milieu as might be supposed. Knowing about the Essene prohibition of divorce, a Pharisee could easily have posed the question to see where Jesus stood in the matter: Do you side with the Essenes or with the Pharisees?[66]

Commentators[67] favoured the Matthean text as it indicated a more Palestinian setting, especially in interpreting "May a man divorce his wife for any reason whatever?" as referring to the discussions by the two main rabbinic schools. In his reply

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65 "Yet neither the story as Mark tells it (a question over the licitness of divorce in principle) nor the logion as he has formulated it (envisaging the possibility of a woman's divorcing her husband) fits into the Palestinian scene presupposed in the life of Jesus." B. VAWTER, "The Biblical Theology of Divorce", in Proceedings of the Catholic Theological Society of America, 22(1967), p. 233.

66 J.A. FITZMYER, loc.cit., pp. 222-223. See also H. ANDERSON, op.cit., p. 240; A. ISAKSSON, op.cit., pp. 70-74, 100-104.

67 D.E. HIEBERT, op.cit., p. 237; E.J. MALLY, "The Gospel According to Mark, in J.B.C., J.A. FITZMYER (ed.), Vol., II, p. 44; D.W. SHANER, A Christian View of Divorce According to the Teachings of the New Testament, Leiden, E.J. Brill, 1969, p. 38.

to the Pharisees' question (Mark 10:2 and Matt 19:3), Jesus' starting point is marriage "at the beginning" as B. Vawter says:

> The Synoptic Gospels testify to a logion of Jesus by which the ancient Israelite marriage ideal was declared as a positive norm for Christian life and by which the recourse to divorce was not merely inhibited but rejected in principle.[68]

Jesus disallows the Mosaic concession because it conflicts with the Creator's will 'at the beginning' manifested in Gen 1:27. H. Anderson says:

> In creating two sexes God declared his intention that one man is for one woman. In Gen 2:24 the phrase 'for this reason' refers back to the Creation of the woman out of Adam's rib, but here it is applied to the statement of Gen 1:27 which is thus interpreted as a sign that the union between one man and one woman in marriage was ordained by God to transcend all other human ties and relationship. /... / Jesus' argument is that in accordance with God's will marriage is the closest conceivable bond.[69]

Such closeness, recounted in the Yahwist creation account as "bone of my bones and flesh of my flesh" (Gen 2:23) explains a man's urge to form a unity with his wife stronger than his affinity to his closest blood relatives (cf. Gen 2:24). Jesus took the two creation texts from Genesis and high-lighted the unity aspect of marriage, re-inforcing it by declaring it part of the Creator's purpose "at the beginning."[70]

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68 B. VAWTER, loc.cit., p. 231.

69 H. ANDERSON, op.cit., p. 242

70 "Mark X.6 /... / introduced the words, 'From the beginning of creation', which certainly resembles the principle

> Thus Jesus wills that the order of God established in creation be again established. His authoritative decision is significant from a double point of view: on the one hand, it counters the debasement of woman that was inherent in the exclusive right of the husband to divorce, which is not insignificant, even if divorce in Judaism was not very common in practice. Jesus was the first to raise the status of woman to that of a moral personality, with inalienable rights equal to those of man. In the second place by rejecting divorce he nullified the force of an ordinance - rather, a concession - which was incorporated into O.T. law. By virtue of his messianic authority he pronounces a stipulation of the O.T. to be out of keeping with the original moral will of God.[71]

This equality of treatment of both woman and man is a hallmark of the Marcan text.[72] Let us now consider the much briefer Lucan text which may well best preserve the original words of Jesus.

3. The Gospel According to Luke (16:18)

Just as the Marcan divorce text (10:2-10) was taken up by Matthew (19:3-12) so also does the shorter Matthean text

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70 (cont'd) of creation phrase of the Damascus Document. In both cases, then, we have the description of the creation of man in the image of God (male and female he created them) cited in support of a notion which actually goes beyond the immediate intention of the verse in Genesis." J.A. FITZMYER, "The Use of Explicit Old Testament Quotations in Qumran Literature and in the New Testament", in New Testament Studies, 7(1960), pp. 297-333.

71 J. SCHMID, op.cit., pp. 186-187.

72 Cf. V. TAYLOR, op.cit., p. 421.

(5:32) have a parallel in Luke (16:18). If we accept the two source theory[73] as a workable hypothesis to solve the synoptic problem,[74] then Matt 5:32 is not only paralleled in Luke 16:18 but is derived from the same source. This source is generally known as "Q" and of these sayings P. Hoffmann says:

> In both the Q source of sayings (Lk, 16.18 parallel Mt. 5.32) and in the Gospel of Mark (Mk. 10.11), a saying is handed down in which Jesus designates the divorce of one's wife as adultery. Literary-critical comparison of the various traditions leads to the conclusion that the Lucan version of the Q source renders faithfully the original wording of the saying.[75]

Speaking specifically of Luke 16:18, J.A. Fitzmyer is even more emphatic:

> A slightly modified form of it stands the best chance of being regarded as the most primitive form of the sayings about divorce in the NT [...]:

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73 "The two-source theory is, of course, still a theory, and will likely remain such. But it is the best, and almost universally accepted, solution of the synoptic problem." A. AMBROZIC, loc.cit., p. 269, footnote 1; cf. J.A. FITZMYER, "The Matthean Divorce Texts and some New Palestinian Evidence", in Theological Studies, 37(1976), pp. 206-207; B. VAWTER, "Divorce and the New Testament", in C.B.Q., 39(1977), p. 528.

74 This term denotes the appearance of similar and dissimilar material in the first three (synoptic) Gospels, cf. W.R. FARMER, The Synoptic Problem, New York, Macmillan, 1964, xi-308p.

75 P. HOFFMANN, loc.cit., pp. 51-52.

> This form of the dominical saying is a declaratory legal statement which is reminiscent of OT casuistic law.[76]

Speaking of the literary style of the Lucan text, A. Ambrozic says:

> The saying is cast in a literary form which we meet in the Wisdom books of the Old Testament where it serves the purpose of teaching, enlightening and exhorting in that it explains the true character of a given action. Lk. 16:18 states divorce and remarriage fall under the prohibition of the sixth commandment: an action that was not considered adultery is now declared to be such.[77]

Thus it is not, like the disputes of the Pharisees, an argument about the relevant importance of the minutiae, but a clear determination by Jesus of the content of the Decalogue.

Another aspect of the text is the equality that is introduced as opposed to Deuteronomy 24:1 granting the possibility of divorce only to the man.

> The very fact that the man who has divorced her and married another is characterized as an adulterer indicates that the wife is no mere object but a subject of marriage; their marriage is not only his but hers also, for it continues even after the divorce. In this, Jesus differs from the Jewish ideas of marriage according to which the man could not commit adultery against his wife, but only against the husband of the

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76 J.A. FITZMYER, loc.cit., p. 200.

77 A. AMBROZIC, loc.cit., p. 270.

> woman with whom he had sexual intercourse. /.../ Jesus, moreover, implicitly criticizes the Torah, the divine instruction given to the Jews.[78]

Compared to the other Gospels, the isolated Q logion in Luke 16:18 occurs in a very different setting. As B. Vawter says:

> In Luke it appears almost out of the blue, one of a series of aphorisms tacked on the Parable of the Shrewed Steward (16:1-8), immediately introduced by the derisory reaction of the Pharisees to the parable (v (4), a reaction which invites a contrast between their doctrine and that of Jesus (vv 15-181).[79]

As for the content of this single Lucan divorce text it can be summarized as follows: "If man 1 repudiates woman 1 and marries woman 2, he commits adultery; if man 2 marries woman 1, he commits adultery."[80] Unlike Matt 19:3 and Mark 10:2-9 Luke's logion on divorce is not contained in the context of the Pharisees' test question. However it is similar to Matt 5:32 (minus the exceptive clause), as Descamps says:

> For Luke, let us remember that he did not report upon the controversy, perhaps because it may have seemed to him to be too rooted in a Pharisaical framework which was not relevant

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78 Ibid.

79 B. VAWTER, "Divorce and the New Testament", in C.B.Q., 39(1977), p. 529.

80 Cf. A.-L. DESCAMPS, loc.cit., p. 31.

> to his time. As far as his version of the saying goes (Luke 16:18) it is as traditional as possible and does not reveal any effort to interpret it personally.[81]

This Lucan context is important especially if we compare Luke 16:18 with the Matthean version of the Q logion in Matt 5:31-32 where it forms part of the antitheses of Sermon on the Mount and as P. Hoffmann notes concerning Matthew:

> For his Old Testament premise he chooses the classic divorce text of Deuteronomy 24.1, but he omits the condition included in this text: 'because he has found some indecency in her'. In this way he arrives at a formulation which allows divorce without any limit being set (as also in 19.3). In opposition to this 'commandment' he sets Jesus' reading of the Law. He formulates v. 32a (which diverges from Lk.16.18a) in accordance with Deuteronomy 24.1 and with Jewish practice, both of which presume remarriage on the part of the wife.[82]

Matthew's expression, "forces her to commit adultery" (v.32b), has a peculiar Jewish twist to it compared to the Lucan form. Luke 16:18 says: "Everyone who divorces his

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81 "En ce qui concerne Lc, rappelons qu'il n'a pas rapporté la controverse, peut-être parce qu'elle lui a paru trop ancrée dans un cadre pharisien qui n'est plus celui de son temps. Quant à sa version des sentences (Lc 16,18), elle est, avons-nous dit, aussi traditionnelle que possible et ne révèle donc aucune volonté d'interprétation personnelle." A.-L. DESCAMPS, loc.cit., pp. 45-46.

82 P. HOFFMANN, loc.cit., p. 60.

wife and marries another commits adultery." Thus the man himself is the adulterer in Luke whereas in Matthew, the man by his act of divorcing his wife "forces her to commit adultery" (Matt 5:32b). Thus the legitimacy of polygamy is not questioned in Matthew.[83]

Speaking of the Lucan form of Jesus' teaching, Ambrozic says,

> In this Jesus differs from the Jewish ideas of marriage according to which the man could not commit adultery against his wife, but only against the husband of the woman with whom he had sexual intercourse. Jesus' statement must have been hard for Jewish ears, for they were proud of their law on divorce. They looked upon the letter of dismissal handed to the wife as protection for her: with that letter, she could find another man to marry her and protect her. Jesus, moreover, implicitly criticizes the Torah, the divine instruction given to the Jews.[84]

Conclusion

The Gospel texts on marriage and divorce are closely related, falling as they do into two distinct groups. To one belong Matt 5:31-32 and Luke 16:18 which both repeat the "Q" logion. To the other belong Matt 19:3-9 and Mark 10:2-12

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83 A. AMBROZIC, loc.cit., p. 271.

84 Ibid., p. 270.

which occur in the setting of the Pharisees' test question on divorce. At least part of these latter texts are now agreed by Scripture scholars to be ipissima verba Christi. Luke 16:18 best preserves the Lord's prohibition of divorce which is likened to adultery.

In their own way, the Gospel sayings on marriage and divorce interpret the Genesis creation accounts as expressing God's creative will "at the beginning" to which Jesus appeals when enunciating his answer to the Pharisees' test question. Thus the complementarity or partnership aspect of the creation account's view of marriage is linked to the permanency of marriage and is declared by Jesus to have been the Creator's will "at the beginning" which he declares to be re-established despite the Mosaic concession.

With the removal of that concession's unequal treatment of the wife compared to the husband, the way was open for marriage itself to be appreciated as a covenant between equal partners and thus it can be said that the Gospels implicitly contain the partnership notion of marriage which in Roman law was called "consortium". Explicitly, the Gospels maintain that such a partnership is indissoluble and is, therefore, of the whole of life.

CHAPTER IV

MARRIAGE IN THE NEW TESTAMENT LETTERS: AN EMPHASIS ON LOVE AND SIGN OF THE COVENANT BETWEEN CHRIST AND THE CHURCH

We now consider the texts in the New Testament Letters which speak of marriage,[1] and also in some cases, divorce. Paul speaks of marriage by way of an example to elucidate freedom from the law in Rom 7:1-6. The two most important Pauline texts for our consideration are 1 Cor 7:10-16 and Eph 5:22-33.

In 1 Cor 7:10-11, Paul repeats the "Q" logion. This is the New Testament's earliest extant text of a saying of Jesus on marriage and divorce. 1 Cor 7:12-16, containing Paul's own teaching as distinct from the Lord's (vv. 10-11), is reminiscent of the Matthean exceptive clauses. Paul, like Matthew, applies the Lord's teaching to a specific situation that arose in the local Church for which he was writing.

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1 Cf. L. ORSY, "Christian Marriage: Doctrine and Law Glossae on Canons 1012-1015", in The Jurist, 40(1980), p. 315. Orsy lists fifteen texts on marriage in the New Testament Letters and notes five leading ideas that emerge from the NT texts on marriage: they perceived a marked contrast between the law of Moses and the law of Jesus; they believed that God was present and active wherever a marriage came into being; they were aware that marriage had a sacred dimension; for Paul, there was a mysterious sanctifying force in a marriage; and finally; the author of the Epistle to the Ephesians was already in possession of a highly developed theology of marriage - with considerable breadth and depth; ibid., p. 316.

I Cor 12:31-13:8 leads to a reflective consideration on the importance of love. This may be applied, as the liturgy does, to love in marriage.

Ephesians 5:22-33 is perhaps the highpoint of the New Testament teaching on marriage. It draws in brilliant strokes the dynamics of Christian marriage, especially as an image of Christ's love for his body, the Church.

1. I Corinthians 7:10-11, 12-16.

> I give this command (though it is not mine; it is the Lord's): a wife must not separate from her husband. If she does separate, she must either remain single or become reconciled to him again. Similarly, a husband must not divorce his wife.[2]

The spouses dealt with in vv. 10-11 are both Christians as the case of a Christian and non-Christian spouse is treated in vv. 12-16. To the Christian spouses, Paul says the teaching "is the Lord's" (v.10), i.e. in conformity with the teaching of the earthly Jesus, a teaching which Paul had received in the Church as coming from Jesus. The Apostle clearly distinguishes these precepts coming from the Lord from the rules which he establishes himself (1 Cor 7:12-16), or from the simple counsels which Paul

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2 1 Cor 7:10b-11.

gives (1 Cor 7:25-40).[3] In affirming that this teaching "is the Lord's" (v.10) Paul is giving the earliest attestation to a saying of Jesus on divorce, dated as it is to around 56 A.D.[4]

It is significant that Paul addresses the woman first. This is in sharp contrast to the Gospel divorce sayings which are addressed to men in an almost exclusive fashion, the only exception being Mark 10:12. The Apostle seems to be taking into account that in the Greco-Roman world, contrary to Jewish custom, the wife may initiate divorce proceedings.[5] Paul seems to indicate a distinction between the wife who "must not be separated" (choristhénai v.10) and the husband who "must not divorce" (aphienai v.11).[6] However, in v. 13 he states that if the unbelieving

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3 Cf. A.-L. DESCAMPS, "Les textes évangéliques sur le mariage", in Revue théologique de Louvain, 11(1980), pp. 34-35.

4 Cf. J.A. FITZMYER, "The Matthean Divorce Texts and some New Palestinian Evidence", in Theological Studies, 37(1976), pp. 198.

5 However, it should be noted that if choristhénai (which is the aorist passive infinitive) is properly translated, v.10 would read 'the wife should not be separated (or divorced) from her husband'. With such an understanding of the verse, the charge would reflect the Palestinian Jewish situation, in which only the husband was normally permitted to institute divorce, ibid., pp. 199-200.

6 J.K. ELLIOTT argues that Paul uses the two words to maintain a distinction and that thus Paul is closer to the Matthean divorce sayings. (However, for the Greco-Roman

husband "is willing to live with her, she must not divorce (aphienai) him" so that a Greco-Roman setting is envisaged.

In "ordering" or "commanding" that the "wife must not separate from her husband" (v.10), Paul surely means to condemn the simple fact of separating as with Mark 10:2-12 where Jesus condemned the act of repudiation and not just remarriage.[7] Archbishop Descamps analyses the words, "If she does separate" (v.11), as follows:

> Even though the verb is in the subjunctive we should understand here a direct prohibition, because the prohibition of remarriage was absolute in the message of Jesus; it is a point on which almost all exegetes agree, even though some hesitate concerning simple separation.[8]

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6 (cont'd) setting of the Corinthian Church, Paul uses aphienai of both husband and wife in vv. 12-13), J.K. ELLIOTT, "Paul's Teaching on Marriage in I Corinthians: Some Problems Considered", in New Testament Studies, 19 (1972), p. 224. In contrast to J.K. Elliott's view, D.M. STANLEY, "Pauline Allusions to the Sayings of Jesus", in C.B.Q., 23(1961), p. 27. For an analysis of the Greek words for divorce noting that the verb chorizein (1 Cor 7:10) should be translated "be divorced" as also should aphienai, but that Mark 10:11-12, Luke 16:18, Matt 5:32 and 19:9 always use apolyein, for which there is Qumran use, in the sense of divorce and remarriage, dated to 124 A.D., cf. J.A. FITZMYER, loc.cit., pp. 211-213.

7 Cf. A.-L. DESCAMPS, loc.cit., p.35 who says that "to give an order is the strong nuance of the Greek verb paraggellein".

8 "Bien que le verbe soit au subjonctif, il y a sans doute lieu de lire ici une interdiction pure et simple,

Separation is permitted by Paul: "If she does separate, she must either remain single or become reconciled" (v.11). The first option is what Catholic tradition calls separatio tori et mensae.[9]

Archbishop Descamps highlights this call for reconciliation when he says:

> The woman should either reconcile herself or else abstain from remarriage while remaining separated. Reconciliation is without any doubt the ideal and in mentioning it, Paul expresses in a new way something of the message of Jesus, which is centred on the indissoluble union of the spouses.[10]

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8 (cont'd) car l'interdiction du remariage était absolue dans le message de Jésus: c'est un point sur lequel quasi tous les exégètes s'accordent, même si certains hésitent au sujet de la simple séparation," ibid., pp. 35-36.

9 While separation from "bed and board" was taught by St. Augustine, De nuptiis et concupiscentiis I, 10 in PL., 44, coll. 419-420, it does not seem to have originated with the Bishop of Hippo but is attributed to St. Jerome, In Matthaeum III, in PL., 26 col, 135. For an excellent survey of Patristic teaching, see A. BEVILACQUA, "The History of the Indissolubility of Marriage", in The Catholic Theological Society of America Proceedings, 22 (1967), pp. 253-280; on p. 262 he notes that Ambrosiaster "is the only Latin writer who clearly permits a husband to remarry after divorce." The same conclusion is arrived at in the classic work on the Fathers and the indissolubility of marriage, H. CROUZEL, L'Eglise primitive face au divorce, du premier au cinquième siècle, Paris, Beauchesne, 1971, 410p.

10 "La femme doit ou bien se réconcilier ou bien s'abstenir du remariage tout en restant séparée. La réconciliation est sans doute l'idéal et, en l'évoquant,

Paul also orders that "a husband must not divorce his wife" (v.11), and, as Archbishop Descamps notes,

> This is obviously an imperative precept of the Lord. In fact 1 Cor 7:11b is partially linked with an essential formula of the Gospels, /...which.../ finds its source in Jesus: "the spouse who sends away his wife and marries another commits adultery." We say "partially" because Paul speaks of sending away without speaking of remarriage (as also does Matt 5,32a). Paul uses here the mode of expression (to send away) which conforms with the Jewish language, while not excluding Greco-Roman mores, which also know of, ad sensum, the case of the man sending away his wife.[11]

Paul is conscious of handing on a command of the Lord, based on the will of the Creator which had been spelled out in Genesis. In the kingdom of God which Jesus proclaimed, and of which Paul has been chosen an Apostle, divorce was

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10 (cont'd) Paul exprime d'une nouvelle façon quelque chose du message de Jésus, axé sur l'union indissoluble des époux ", A.-L. DESCAMPS, loc.cit., p.36.

11 "Il s'agit donc clairement d'un précepte impératif du Seigneur. Effectivement, 1 Co 7, 11b rejoint partiellement une formule essentielle des évangiles, /...qui.../ remontait à Jésus: 'l'époux qui renvoie sa femme et en épouse une autre commet l'adultère '. Nous disons 'partiellement', car Paul parle de renvoi sans parler de remariage (comme fait aussi Mt 5, 32a). Paul retrouve ici le mode d'expression (renvoyer) qui correspond au langage juif, sans cesser pour autant de songer aux moeurs gréco-romaines, lesquelles connaissaient aussi, ad sensum, le cas de l'homme renvoyant son épouse," ibid.

not allowed. Paul calls for, as P. Benoit says; "full and unreserved adherence to the command received from the Lord, which for him is law."[12]

This law, however, is not absolute.[13] In the face of such clear teaching from the Lord, Paul does not fail to address particular difficulties which arose in the Church of Corinth, difficulties which were communicated to him as questions. Therefore, in contra-distinction to the teaching of the Lord (vv. 10-11), Paul proceeds to elaborate a teaching peculiarly his own, though somewhat parallel to the Matthean exceptive clauses.

In replying to the questions directed to him, Paul says:

> As for the other matters, although I know of nothing the Lord has said, I say: If any brother has a wife who is an unbeliever but is willing to live with him, he must not divorce her. And if any woman has a husband who is an unbeliever but is willing to live with her, she must not divorce him. The unbelieving husband is consecrated by his believing wife; the unbelieving wife is consecrated by her believing husband.

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12 P. BENOIT, "Christian Marriage according to Saint Paul", in The Clergy Review, 65(1980), p. 314.

13 Cf. P. HOFFMANN, "Jesus' Saying about Divorce and its Interpretation in the New Testament Tradition", in Concilium, 6(1970), p. 62.

> If it were otherwise, your children should be unclean; but as it is, they are holy.
>
> If the unbeliever wishes to separate, however, let him do so. The believing husband or wife is not bound in such cases. God has called you to live in peace. Wife, how do you know that you will not save your husband; or you, husband, that you will not save your wife?[14]

Paul is here addressing a Christian married to a Jew or a pagan, prior to the Christian's conversion. If the partner is willing to live with her/him, she/he must not divorce (vv. 12-13). In stating that there is to be no divorce if the unbeliever is willing to live (as before the conversion) Paul affirms that marriage is first and foremost a natural institution, or as Descamps says:

> Paul's idea is in a direct line from the teaching of Jesus on marriage as an element in the charter of creation, even before any idea of the Chosen People.[15]

The Corinthians seem to have had a fear of being rendered unholy by sexual intercourse with their pagan

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14 1 Cor 7:12-16, emphasis is ours. Mention should also be made of Paul's other statement on entering such mixed marriages: "Do not yoke yourselves in a mismatch with unbelievers", 2 Cor 6:14.

15 "[...] l'idée de Paul est dans le droit fil de l'enseignement de Jésus sur le mariage comme élément de la charte du monde créé, antérieurement à toute idée de peuple élu", A.-L. DESCAMPS, loc.cit., p. 44.

marriage partners. Paul's answer that the pagan partner is consecrated by the believer, that Christ has brought freedom from the powers of this world is thus "instructive for the relationship between law and freedom".[16] For while insisting on the Lord's teaching on the indissolubility of marriage (vv. 10-11), Paul does not fail to modify that teaching.[17] He applies it to situations that did not arise in the Lord's day, but about which Paul was asked by someone in the Corinthian Church or by it.

J. Murphy-O'Connor has reconstructed the circumstances which he considers gave rise to the question put to Paul. He sees 1 Cor 7:1-9 as indicating the situation which had developed at Corinth, that some were advocating that married couples should not have sexual intercourse.

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16 P. HOFFMANN, loc.cit., p. 62.

17 Some have argued from this that the Church can and should do the same today. B. BYRON "1 Cor 7:10-15: A Basis for Future Catholic Discipline on Marriage and Divorce?", in Theological Studies, 34(1973), pp 429-445; ID., General Theology of Marriage in the New Testament and 1 Cor. 7:15", in A.C.R., 49(1972), pp. 1-10; "The Brother or Sister Is Not Bound, Another look at the New Testament Teaching on the Indissolubility of Marriage", in New Blackfriars 52(1971), pp. 514-521; and W. HARRINGTON, "The New Testament and Divorce" in The Irish Theological Quarterly, 39(1972), pp 178-187.

> Paul first mentions the wife who may have been dismissed. /... / Paul's desire is, and hers should be, that the misguided husband should undergo a change of heart. Should this occur, true charity demands that the marriage be reestablished. Hence it is imperative that the wife should remain 'unmarried' because only this state permits full 'reconciliation'. She should not accept the divorce, and to drive this home Paul has to insist that she should not contract a new marriage because a legal divorce automatically conferred the right of remarriage.[18]

Paul arrived at a different solution in 7:15. But vv. 10-11 have a parallel in the later, though still early, Christian source, The Shepherd of Hermas dated to 140-154 A.D. Here the question is posed of a man's wife who has fallen into adultery:

> "Let him divorce her" he said, "and remain single. But, if he divorces her and marries another woman, he himself commits adultery." "But, if, sir" I said "after the divorce the wife repents and wishes to return to her husband, will he refuse to receive her?" "No, indeed", he said. "If the husband does not receive her he sins. He incurs a great sin. The sinner who has repented must be received."[19]

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18 J. MURPHY-O'CONNOR, "The Divorced Woman in 1 Cor 7:10-11", in Journal of Biblical Literature, 100(1981), p. 604.

19 The "Shepherd of Hermas", Mandates 4:6-8, in The Fathers of the Church, The Apostolic Fathers, New York, CIMA, 1947, p. 262.

The Shepherd, clearly does not permit the husband to remarry after having separated from the adulterous wife in order that the way may be open for a possible reconciliation.

Paul in 1 Cor 7:15 is not as categoric, saying "The believing husband or wife is not bound in such cases. God has called you to live in peace." Does Paul permit remarriage?

> In exegesis, two opposite answers are possible. If the answer is no /.../ the marriage between pagans (or between Jews) is already so "sacred" that it is absolutely indissoluble. If the answer is yes, one does not ascribe to the Apostle a vague idea of natural (or Jewish) marriage; but we admit that Paul while renouncing the principle of the 'validity' of such marriages really creates here an exception, in the interests of the faith, which are of sovereign importance. One will speak, therefore, very exactly of a privilege given by Paul to the Christian party and it is thus that the Church understands 1 Cor 7:15, at least since the Middle-Ages.[20]

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20 "En exégèse, deux réponses opposées sont possibles. Si l'on répond non /.../ le mariage qui avait été conclu entre paiens (ou entre Juifs) est déjà tellement 'sacré' qu'il est absolument indissoluble. Si l'on répond oui, on ne prête pas pour autant, à l'Apôtre, une idée vague du mariage naturel (ou juif); mais on admet alors que Paul, sans renoncer au principe de la 'validité' de tels mariages, crée ici une véritable exception, eu égard aux intérêts de la foi, lesquels sont souverains. On parlera donc, très exactement, d'un privilège accordé par Paul à la partie chrétienne, et c'est ainsi que l'Eglise comprend 1 Co 7, 15, du moins depuis le moyen âge", A.-L. DESCAMPS. loc.cit. p. 44.

The first opinion is similar to that of Sanchez who held that even the legitimate marriage of infidels was intrinsically indissoluble.[21] The latter is enshrined in the Pauline privilege which is specifically mentioned in C.I.C. (1983), c.1143:

> In virtue of the Pauline privilege, a marriage entered into by two unbaptised persons is dissolved in favour of the faith of the party who received baptism, by the very fact that a new marriage is contracted by that same party, provided the unbaptised party departs.
>
> The unbaptised party is considered to depart if he or she is unwilling to live with the baptised party, or to live peacefully without offence to the Creator, unless the baptised party has, after the reception of baptism, given the other just cause to depart.[22]

A detailed analysis of the Pauline privilege, particularly its application from the time of Pope Gregory VII,

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21 Cf. T. SANCHEZ, De matrimonio, lib.II, disp. XIII, n.7.

22 "Matrimonium initum a duobus non baptizatis solvitur ex privilegio paulino in favorem fidei partis quae baptismum recepit, ipso facto quo novum matrimonium ab eadem parte contrahitur, dummodo pars non baptizata discedat.
"Discedere consetur pars non baptizata, si nolit cum parte baptizata cohabitare vel cohabitare pacifice sine contumelia Creatoris, nisi haec post baptismum receptum iustam illi dederit discedendi causam." C.I.C. (1983), c. 1143 #1, #2; English translation from The Code of Canon Law, London, Collins, 1983, p. 202.

and its more recent variant, the Petrine privilege, is beyond our scope here.[23] However, we cannot fail to note that 1 Cor 7:15 is the Scriptural basis for this canonical application.[24]

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23 For a detailed treatment of the privilege of the faith, see A. ABATE, Lo scioglimento del vincolo coniugale nella giurisprudenza ecclesiastica, Napoli, M. d'Auria, 1972, 4TH ed., 248p; L. BEAUDOIN, La dissolution du lien matrimonial, Ottawa, Editions de l'Université d'Ottawa, 1948, x-479p; other relevant texts are: F.J. BURTON, A Commentary on Canon 1125, Washington, D.C., Catholic University of America Press, (1940), (Canon Law Studies, 121,) x - 212p ; J.G. GERHARTZ,"L'indissolubilité du mariage et la dissolution du mariage dans la problématique actuelle" in Revue de Droit canonique, 21(1971), pp. 198-234; H. GRENIER, "Can we still Speak of the Petrine Privilege", in The Jurist, 38(1978), pp. 158-162; J.M. KUNTZ, "The Petrine Privilege: A Study of some Recent Cases", in The Jurist, 28 (1968), pp. 486-496; U. NAVARRETE, "Potestas vicaria Ecclesiae, Evolutio historica conceptus atque observationes attenta doctrina Concilii Vaticani II",in Periodica, 60(1971), pp. 415-486; J.T. NOONAN, Power to Dissolve; Lawyers and Marriages in the Courts of the Roman Curia, Cambridge, Mass., Belknap Press, 1972, xix-489p; B.G. O'LOUGHLIN, Dissolution of the Natural Bond of Marriage in Favour of the Faith, Unpublished research paper, Ottawa, St. Paul University, 1980, 86p ; L. ORSY, "An Evaluation of 'New Applications' of Canon 1127",in The Jurist, 38(1978) pp. 163-170; SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction on the Dissolution of Marriage in Favour of the Faith, December 6, 1973, P/N 2717/68. This text does not seem to have been published in the A.A.S.; English translation is in C.L.D. VIII, pp. 1177-1184; R. TREMBLAY, The Privilege of the Faith, Tabora, Tanzania, T.M.P. Printing, 1959, 123p.

24 Even if the canonical discipline does not square with every detail of its Scriptural basis, cf. B. BYRON, "1 Cor 7:10-15: A Basis for Future Catholic Discipline on Marriage and Divorce?", in Theological Studies, 34(1973), pp. 429-435.

Finally, it is interesting to note that Paul infers the (Yahwist) Genesis creation account teaching on marriage as presented by the Lord in Matt 19:3-12 and Mark 10:2-12. Speaking of 1 Corinthians 7:10-11 A. Isaksson says that:

> What Paul writes on sex and marriage in this letter, namely, that all the themes found in Mt. 19.3-12 are also to be found here. The Corinth church already knows about Jesus' prohibition of divorce. In 1 Cor. 6.16-17 Paul points out in connection with the passage in Gen. 2.24 about becoming one flesh that intercourse with a prostitute is not a matter of little importance but is so radically important that it affects a man's relationship with Christ. /... 7 To be sure, the words in Gen. 2:24 are interpreted, even in rabbinical exegesis, as referring to sexual union, but this interpretation was not the only possible one /... 7. Must we not assume that Paul had previously given this church instruction on the meaning of Gen 2:24 and that this instruction was connected with that on the Christian view of marriage? The interpretation he gives of Gen. 2:24 in 1 Cor. 6.16-17 is in full agreement with the interpretation given of these words in the divorce pericope in Mt. and Mk.[25]

There seems to be a certain unity between 1 Cor chapters 6 & 7 somewhat reminiscent of the patterns of material gathered for catechetical purposes and assembled as Haustafeln or 'house - regulations' addressed to different groups in the Church, wives, husbands, etc.[26]

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25 A. ISAKSSON, Marriage and Ministry in the New Temple, A Study with Special Reference to Mt. 19. 13-12 (sic) and 1 Cor. 11. 3-16, Lund, C.W.K. Gleerup, 1965, p. 106.

26 Cf. H. ANDERSON, The Gospel of Mark, London, Oliphants, 1976, p. 239.

In this case, it is presented by Paul as advice to the unmarried, to virgins or the engaged,[27] similar to Ephesians 5:22 - 6:9, where Paul's theology of marriage reaches its highpoint.

The tradition of the church witnesses to similar, though post-Pauline, adaptations of this clear command of the Lord regarding divorce. Origen reported that women whose husbands had committed adultery and who were therefore divorced, were in some cases, permitted to remarry during the lifetime of their first husbands. Origen justifies this concession to prevent greater abuses.[28]

St. Basil, while also aware that admitting to the Eucharist after a long period of penance, a man who had been divorced because of his wife's adultery and remarried, was against Scripture, yet he appealed to the Church's custom. We note that in both these instances from the writings of these Fathers, that special consideration is given to the innocent party.[29]

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27 Cf. J.K. ELLIOTT, loc.cit., pp. 219-223.

28 ORIGEN, Comment. in Matthaeum, in PG, 13, coll. 1243-1252.

29 ST. BASIL, Ep. 188, c. 9, in PG, 32, coll. 677-680. Ep. 217, c. 77, in PG, 32 coll. 803-806.

This consideration for the innocent party and the consequent mitigation of the law is known in the Eastern Churches as oeconomia and was referred to in the 1980 Synod of Bishops as follows:

> This synod calls for a new and extensive study to increase the effectiveness of pastoral care. This study should take into account the practices of the eastern churches.[30]

Pope John Paul II's Apostolic Exhortation, Familiaris Consortio, does not mention the Synod's call but states that a "careful discernment of situations" is called for.[31]

Before considering Ephesians 5:22-33, let us note that 1 Cor 12:31-13:8 speaks about love though not specifically about conjugal love. Love, especially Christ's love for the Church, is given as the model for Christian husbands towards their wives in the New Testament's clearest affirmation of the sacrament of marriage. Reflecting the prophets'

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30 "The Synod Propositions", in The Tablet Jan. 31, 1981, p. 118, proposition 16. The voting (Yes: 179; No: 20; Abstain: 7.) was the highest negative vote on any of the published propositions, perhaps indicating that in the minds of some bishops present at the Synod, any re-thinking of the Latin Church's position would mean a corresponding lessening of emphasis on the indissolubility of marriage.

31 JOHN PAUL II, Apostolic Exhortation, Familiaris Consortio, November 22, 1981, in A.A.S., 74(1982), pp. 184 - 186; English translation, Canadian Conference of Catholic Bishops, Ottawa, pp. 158 - 161.

description of the covenant between Yahweh and his people as a nuptial bond, likewise, does the Letter to the Ephesians develop the figure of Christ's relationship to his body, the Church, as a model for Christian husbands and wives.

2. Ephesians 5:22-33

Compared to the Gospel texts on marriage and divorce, the text in Ephesians is distinctive. It contributes a specifically Christian, New Testament dimension to marriage as a covenant. The first extant documentary use of bridal imagery in the New Testament is 2 Cor 11:2-3 where Paul speaks of having given the Corinthians "in marriage to one husband, presenting you as a chaste virgin to Christ."

A theme similar to that mentioned in our Chapter two, "Marriage as a Covenant", section three, "Covenant Marriage in the Prophets", seems to be present in this passage, as R.A. Batey observes:

> Just as Hosea, Jeremiah, and Ezekiel called Israel from consorting with strange gods, so Paul warns against a misalliance which would forfeit the church's sanctification. Compromising loyalty to Christ would violate the Corinthians' status as a pure Bride.[32]

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32 R.A. BATEY, New Testament Nuptial Imagery, Leiden, E.J. Brill, 1971, p. 13.

An identical theme is contained in Ephesians 5:25-27:

> Christ loved the church. He gave himself up for her to make her holy, purifying her in the bath of water by the power of the word, to present to himself a glorious church, holy and immaculate.[33]

a. The Authorship of Ephesians and the Sitz im Leben

Perhaps we would do well to note that the Pauline authorship of the Letter to the Ephesians is disputed[34] and recognition of this has even been made by Pope John Paul II.[35] However, it is well attested that Paul relied on an amanuensis for the actual writing of many of the Pauline letters (cf. Rom 16:22; 1 Cor 16:21; Gal 6:11; 2 Thess 3:17 and Col 4:18). Likely, it was such a disciple-editor who, after having received the broad outline from Paul himself, wrote the Letter to the Ephesians.

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33 The Fathers of the Church saw in these words a reference to baptism. "By the word, he says, What word? In the name of the Father, and of the Son and of the Holy Spirit." ST. JOHN CHRYSOSTOM, Homily 20, On the Letter to the Ephesians, Ch. 5., in PG, 62, col, 137.

34 M. BARTH, Ephesians 1-3, The Anchor Bible, Garden City, N.Y., Doubleday, 1974, Vol. 34, pp. 36-41, surveys the four main groups of opinions on Pauline or other authorship.

35 JOHN PAUL II, General audience address, Sept. 8, 1982, in L'Osservatore Romano, Sept., 13, 1982, p. 1.

P. Benoit, who maintains authorship by one of Paul's disciples, gives his opinion of the Letter's origin as follows:

> Paul [...] wanting to communicate by a sort of encyclical - that is exactly what our epistle 'to the Ephesians' is - entrusted to a disciple the task of drawing up the document, indicating to him the ideas to develop, no doubt dictating the more important passages. [...] the passage on marriage seems (to me) important enough and brilliant enough to have been dictated by Paul himself.[36]

The Pauline authorship of the letter is not the only original element that is discussed. Contemporary scholarship has also focused on the similarities between the letter and themes contained in the classics. Was Paul aware of these? M. Barth states a strong case for an affirmative answer:

> Just as philosophers spiced their diatribes on marriage with quotes from classical writers, and poets referred to the example of great lovers rather than make use of abstract definitions, so Paul inserted quotes into his arguments. Christ's love, acclaimed in a Christ hymn, takes the place of the love affairs of Zeus, Paris and so on; the

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36 P. BENOIT, loc.cit., p. 316. Therefore, we shall refer to Paul as the author of Ephesians.

> obedient church replaces Hera, the guardian of morals and Aphrodite, the protector of free love. Instead of Isis and Osiris, the divine pair, there is Christ and the church, a pair composed of a divine and a human partner. The book of Genesis is substituted for Homer's Iliad and Odyssey and similar epical accounts.[37]

b. A Christian Consortium[38]

As we noted previously, the instructions to Christian wives and husbands are given in a Haustafel, a Table of

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37 M. BARTH, Ephesians 4-6, The Anchor Bible, Garden City, N.Y., Doubleday, 1974, Vol., 34A, p. 659.

38 We have taken a Roman law term and find similarities between the consortium and Paul's view of the marriage partnership in the Lord. Commentaries and other texts referred to as a basis for this section are as follows: M. BARTH, op.cit., pp. 608-753; R.A. BATEY, op.cit., pp. 20-37; P. BENDIT, loc.cit., pp. 317-321; ID., "Traditions in Ephesians", in New Testament Studies, 30(1984), pp. 3-25; P.A. BONNET, "Amor coniugalis matrimoniumque in fieri prout Vetus et Novum Testamentum significant", in Periodica, 65(1976), pp. 587-611; C.H. GIBLIN, "Pauline Sexual Morality" in Scripture in Church, 53(1984), pp. 106-119; T. MACKIN, What is Marriage, Ramsey, N.J., Paulist Press, 1982, pp. 61-65; L. ORSY, "Christian Marriage: Doctrine and Law Glossae on Canons 1012-1015", in The Jurist, 40(1980), pp. 316-317; P. REMY, "Le mariage, signe de l'union du Christ et de l'Eglise", in Revue des Sciences philosophiques et théologiques, 66(1982), pp. 397-415; E. SCHILLEBEECKX, Marriage: Human Reality and Saving Mystery, London, Sheed and Ward, 1980, pp. 110-132; ST. THOMAS AQUINAS, Commentary on Saint Paul's Epistle to the Ephesians, translated by M.L. LAMB, Albany, N.Y., Magi Books, 1966, pp. 216-226.

Household Duties. There are other Haustafeln in the New Testament[39] but only the Ephesian version opens with a call to mutual subordination. Before exhorting wives and husbands in turn, the letter to the Ephesians gives an injunction that sets the tone for what follows when it says: "Defer to one another out of reverence for Christ." However, M. Barth says this rendering and others[40] do not accurately translate the original, which is more accurately stated: "Because you fear Christ subordinate yourselves."

The preceding verses lay down the Christian basis for what follows. It is important to note that v.18 has a call for Spirit-filled behaviour.

> In v. 21 Paul says that one of the ways we can be spirit filled is to be subject to one another in fear of Christ /.../ this mutual

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39 Col 3:18-4:1; 1 Tim 2:8-15, 6:12; Titus 2:1-10; 1 Pet 2:13-3:7. Our previous reference to the Haustafel was in footnote 26.

40 NAB, RSV, and NEB translate by "reverence", JB has "obedience". M. Barth notes that if "reverence" was meant then timeo "to honour" should have been used. M. BARTH, op.cit., p. 608. Barth also notes "that the substitution of words softer than "fear" e.g. "reverence" contradicts philological evidence and must be rejected in favor of the literal translation", ibid., p. 662.

> submission is attitudinal in nature and should influence all interpersonal dealings in which the Christian participates.[41]

What is meant by this "fear of Christ" and are there other parallels? We ask these questions because v.21 calling for mutual subordination for "fear of Christ" sets the tone for the specific injunctions to wives and husbands (vv. 22-30).

> Whenever the Old Testament and New Testament, as well as intertestamental and later Jewish writings, speak of the 'fear of God' or the 'Lord', more is meant than are reverence and respect. /.../ In Deuteronomy, fear of the Lord, the learning of his commandments, and love are used as synonyms. Here it is impossible to set the 'love' of Yahweh against 'fear', for neither is just an emotional attitude. Both mean to adhere to Yahweh faithfully, that is, to do his will according to his covenant and law. /.../ In Ephesians Paul speaks extensively of the love of God and Christ, and of brotherly love, before he mentions 'fear' in 5:21, 33. Even in 5:25-33 love is dominant over fear, the covenant reality over sheer dependence. 'Fear' may be called a 'cultic' concept - if by cult is meant the total attitude of a covenant member to God and his neighbor, not just a form of lip service such as the classic prophets denounce.[42]

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41 J.R. BECK, "Mutuality in Marriage", in Journal of Psychology and Theology, 6(1978), p. 145.

42 M. BARTH, op.cit., pp. 663-664.

These words "fear Christ" are not used in any inter-testamental writings, in heretical groups or by the early Church; they cannot be called "a traditional formula" and so cannot be considered as irrevelant to the context. When Ephesians speaks of "fear", that is what is meant, the relative scarcity of the use of the word gives it more weight where it is found.[43]

Another important aspect of the term "fear of Christ" and the corresponding conduct of husband and wife in expectation of it, is its eschatological connotation. As M. Barth says:

> It puts all ethical commands of the Haustafel under the sign of the eschatological promise and hope, and calls for a conduct that heeds the crisis of the present, the last judgement and the ultimate triumph of Christ.[44]

It is because husband and wife are filled with the Spirit and are awaiting the return of the Bridegroom that Paul announces their expected marital conduct in Ephesians 5:22-33. There is a basic continuity and inter-relationship between vv. 22-24 (on wives) and vv. 25-28 (on husbands) and v.21 (the call to mutual subordination) that is

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43 Ibid., p. 665.

44 Ibid., pp. 666-667.

often overlooked. For grammatical reasons 5:21 belongs to the preceding verses, but the context of this sentence forms an essential element of the section of Ephesians which follows.[45] We can thus conclude that the call to wives to be "subordinate" or "submissive" to their husbands is really a further specification of what both husband and wife are already called to do in "fear of Christ".

In thus appreciating what Ephesians has to say about husbands and wives in that fuller context, we avoid the misogynist overtones that are often commonly and mistakenly perceived to be at the basis of Paul's treatment of women. A true appreciation of what Paul had to say concerning woman, necessitates taking into account the place of women, and especially wives, in Paul's day.

Contemporary Western pre-occupation with the equal rights of women and minorities is just that, a contemporary phenomenon. To take Paul's words and contrast them with the United Nations Universal Declaration of Human Rights, Art.2, or the now floundering U.S. Equal Rights Amendment[46] is a

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45 Cf. Ibid., p. 608.

46 Cf. A. BEVILACQUA, The ERA in Debate: What Can it Mean for Church Law?, Toledo, Ohio. C.L.S.A., 1978, 83p.; SYNOD OF BISHOPS, loc.cit., p. 118.

disservice both to Paul and to a rational statement of an otherwise justified contemporary movement.

Paul wrote at a time when the following was an accepted statement of fact as to the role of wives and others in society.

> "We have courtesans (hetairai) for our pleasure, prostitutes (i.e. young female slaves) for our daily physical use, wives to bring up legitimate children and to be faithful stewards in household matters." Such a proud, possessive or cynical statement may give frank expression to a classical Greek and Hellenistic male's feeling toward woman and marriage.[47]

Aristotle, however, finds the basis for conjugal affection in friendship as a natural instinct, since man is by nature a pairing creature and that the procreation of offspring is a more general characteristic of the animal creation; whereas human beings cohabit to provide the needs of life. Man and woman have different functions. They supply each other's wants. Hence the friendship of man and wife seems to be one of utility and pleasure combined.[48]

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47 M. BARTH, op.cit., p. 655, quoting PSEUDO-DEMOSTHENES, adv. Neaeram, 122(1386); cf. D. DAUBE, The Duty of Procreation, Edinburgh University Press, 1977, pp. 16-17.

48 ARISTOTLE, The Nicomachean Ethics, VIII,12,7, London, Heinemann, 1962, p. 503.

Aristotle does not envisage equality of woman and man as is shown when he says, "Again as between the sexes, the male is by nature superior and the female inferior, the male ruler and the female subject."[49]

Is this the conception that Paul has of the role of a wife vis-à-vis her husband? At first glance, v.22, "Wives should be submissive to their husbands as if to the Lord", would certainly seem to indicate an affirmative answer. However, in the Haustafel in Ephesians Chapters 5-6, the word "obey" (hupakouo) is applied to the conduct expected from children and slaves not to that of the wife, whereas for Aristotle to be "subject" or "obedient" is precisely what is expected of a woman.

> Paul cannot have followed "the Jewish tradition" for this tradition is neither uniform nor free from contradictions. Also, there is no single Jewish (Aramaic) equivalent for the Pauline 'subordinate'. Finally in most Jewish sources a direct relationship between the order of marriage and the Messiah is not established or expounded. Though there are clear traces of some Jewish traditional elements in Paul's marriage counsels, the substance of Eph 5:21-33 must be traced to another source.[50]

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49 ID., The Politics, I. 2,12, London, Heinmann, 1932, p. 21.

50 M. BARTH, op.cit., p. 660.

Paul states in vv. 23-24 exactly where he sees the origin for the injunction he gives to wives who are to "be submissive to their husbands as if to the Lord" (v.22).

> Because the husband is head of his wife just as Christ is head of his body the church, as well as its savior, as the church submits to Christ, so wives should submit to their husbands in everything.[51]

It is clear, then, that the theme of Christ the head of the body which is the Church underlies Paul's pericope concerning marriage. Later verses will draw from a Christological hymn, the Book of Genesis and possibly even proverbial sayings of Jewish or pagan origin.

What purpose does Paul have in drawing from these various sources? As M. Barth clearly states:

> Paul intends to establish a connection between his counsel and his readers' faith in Christ, the Scripture, and daily experience. All are drawn upon to support the apostle's ethical advice. All have an evangelical ring and add to the knowledge of Christ and the praise of God's glory: how great is the Messiah's love for the church, how close his unity with her! Each of the three elements might be considered sufficient for the point Paul wants to make, that is the immediate relevance and indispensability of the Christ-church relationship for marriage.[52]

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51 Eph 5:23-24.

52 M. BARTH, op.cit., p. 653. M. Barth notes that St. Thomas distinguished three separate arguments with a

It is important to note that what is said in Eph 5:22-24 is said to wives and not to women in general. The liberated prophetesses in the church of Corinth are addressed in 1 Cor 14:33-35, Paul having already spoken of female decorum in 1 Cor 11:3-16.[53] Against the excesses of these liberated women and in order to re-establish order in the assembly, Paul appeals to a mixture of social custom and various Scriptural images. P. Benoit details Paul's plight well when he says:

> Paul prescribes that women wear veils, we find him likewise bound by custom and a little embarrassed to justify it. He calls attention to the angels /.../. Was a woman with her head uncovered supposed to shock them? Or even to tempt them? Then he calls upon nature to affirm that men must wear

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52 (cont'd) common purpose: (a) the example of Christ (vv. 25-27); (b) the nature of the husband or voice of reason (vv. 28-30) and (c) the divine command or testimony of Scripture. More recent commentators have expressed surprise at the appeal to self-love and Paul's interpretation of Genesis and that most interpreters discern basically only two arguments as the foundation of Paul's marriage ethics: (a) grace and (b) nature; ibid.

53 A. ISAKSSON, op.cit., pp. 153-196 is a masterly analysis of these verses. M. Barth comments "Despite all Paul says about the creation of woman out of man, and about her role in the fall (I Cor 11:3,7-9; II Cor 11:3; cf. I Tim 2:14, his letters surprise the reader by an overwhelming number of passages which treat man and woman on an egalitarian basis. See especially I Cor 7:2-5, 8-16, 28, 32-34; Gal 3:28; Eph 5:21 and the gratitude expressed to women in the greeting list, Rom. 16:1-15." M. BARTH, op.cit., p. 611, footnote 12.

> their hair short and women long. That is by no means obvious, and a shrewd opponent might reply that it is exactly long hair that takes the place of a veil. /... / Poor Paul is getting confused. He is searching everywhere for arguments.[54]

Paul seems to have wandered from his fundamental principle expressed in 1 Cor 11:3 (and similarly in Eph 5:23-24). "I want you to know that the head of every man is Christ; the head of a woman is her husband; and the head of Christ is the Father." Paul here establishes a hierarchy, not based on custom but on nature and grace, that God has created differences between man and woman that are not of dignity but of function. In the church there is a hierarchy and order that does not depreciate anyone but which puts each one in his or her right place, a hierarchy modelled on the Father and his Christ in whom there is neither "male nor female. All are one in Christ Jesus" (Gal 3:28).

Markus Barth points out that the Greek text speaks not of females and males but only of "wives" (gynē) and "husbands" (anēr) and concludes:

> Eph 5:22 does not affirm that females (women) are inferior to males (men) and must

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54 P. BENOIT, op.cit., p. 317.

> on all societal and professional occasions take and retain the second rank. Paul discusses only the special relationship between husband and wife. Though the very use of the term 'subordinate' reflects the esteem in which women in general were held, actually Paul announces a drastic restriction of women's subordination: it is due only to her husband, just as the husband 'owes' marital love only to his wife. This corresponds to his subordination to her (vs. 21) which consists of a love measured after Christ's self-giving love for the church. Unlike 1 Peter 3:5-7 and other Greek texts, Paul does not use the verbs 'obey' and 'serve' as synonyms for the 'subordination' expected of wives. He does not stipulate a legislative, juridical, and executive power of the male. Neither does he call women 'weaker' than men.[55]

Paul's stipulation that wives are to be "subordinate" or "submissive"[56] is marked by three qualifications. There is no absolute decree that women are bound to an inferior place. Firstly, there is the equally obliging call to mutual subordination (v. 21). Secondly, the address is to wives who are to be subordinate to their husbands and not a general call for women to be subordinate to men. Finally the wife's subordination is in terms of the church's servant

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55 M. BARTH, op.cit., pp. 610-611.

56 M. Barth notes that hypotassō in the NT is more correctly translated as "subordinate" than "submissive", ibid., p. 714.

role: "As the church submits to Christ, so wives should submit to their husbands in everything" (v. 24).

Paul certainly preaches subordination of Christian wives to their husbands, but it is a subordination to love. Verses 25-28, addressed to husbands, clearly state the quality of love that is expected of husbands, modelled as it is on nothing less than Christ's self-giving love for the church. M. Barth notes the uniqueness of Paul's injunction when he says:

> For the first time in Ephesians the term 'love' (agapaō) includes the erotic relationship and sexual union by which a man and a woman become 'one flesh'. In the great majority of its occurences in the Bible, agapaō means the attitude and acts of unselfish giving. According to Paul the other directed, creative, and self-sacrificing character of love does not prevent a husband from loving his wife 'as his own body' and therefore 'as himself' (vss. 28-29, 33). Paul will not state this, however, until after he describes the love shown by Christ which is the source and standard of the husband's love.[57]

It seems valid to say, then, that what Paul says of the interrelationship of husband and wife will only be fully appreciated by those who are incorporated into Christ by the Spirit. Herein lies the uniqueness of Eph 5:22-33 as E. Stauffer states so well:

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57 Ibid., p. 621.

> For the self-giving of the wife acquires a new dedication, and the impulse of the husband a new content and standard, in agapē. The wife is no longer surrendered to the husband; she is entrusted to him. He does not have rights of lordship over her; he takes responsibility for her. Sometimes the execution of this thought has been as artificial as its exegetical basis. But the enterprise is magnificent and bold. It is the only attempt of early Christianity to set marital duty definitely under the sign of the fact of Jesus.[58]

The injunction given to husbands, "love your wives, as Christ loved the church" (v.25), is the complement of that to the wives "be submissive to (your) husbands" (v.22). That this is not a call to a mystical ideal is reinforced by the fact that Christ's love for the church was manifested in his suffering and death (cf. Eph 2:15-16). Thus, his was a love that was concrete, historic and pragmatic. It is this love which is presented as a model to husbands, not an ethereal love.

As we examine Paul's call for husbands to love their wives we should note that Paul's doctrine of marriage may best be described by the terms "partnership" or "covenant".[59]

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58 E. STAUFFER, "Marriage", in G. KITTEL (ed), Theological Dictionary of the New Testament, Grand Rapids, Mich., Eerdmans, 1964, Vol. I, p. 656.

59 Cf. M. BARTH, op.cit., p. 701. We note that this

Paul's use of the covenant image means that any tendency to see a hieros gamos image is avoided, for as M. Barth notes:

> The existence of Old Testament parallels to 5:25-27 and the similarity of the argument used by both make it unlikely that a 'mystical relationship to the deity' is envisaged in Eph 5. The strictly historical, intra-personal and legal character of the Old Testament covenant between Yahweh and his people is not converted by Paul into an impersonal experience /.../[60]

The Old Testament covenant was often presented by the Rabbis as a marriage between Yahweh and Israel: "The Torah is the marriage contract, Moses is the friend of the bridegroom and Yahweh comes to Israel as a bridegroom to his bride."[61] Ephesians contains a broadening of the covenant as M. Barth notes: "The Old Testament speaks of the 'Yahweh-Israel' covenant; Eph 5 describes the 'Messiah's' covenant with a people composed of 'Jews and Gentiles.'"[62] Christ

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59 (cont'd) emphasis on partnership, also expressed in the Roman law consortium, is even present when Paul calls for wives to subordinate themselves "to their husbands as if to the Lord" (v.22). This call is not intended to lessen the wife as a partner but to establish a household order (Haustafel) voluntarily accepted in mutual subordination to the Lord.

60 M. BARTH, op.cit., p. 670.

61 E. STAUFFER, loc.cit., p. 654.

62 M. BARTH, op.cit., p. 670.

"gave himself up" (v.25) for the church. Betrothal was effected by the giving and receiving of a valuable gift, here it is Christ himself who is the gift (cf. 1 Peter 1:18-19; 1 Cor 7:23). The betrothal was invalid unless the presentation of the gift was accompanied by the declaration of specific intent.[63] Eph 5:26 states Christ the bridegroom's intent regarding the church, his bride, "to make her holy". The future is spoken of, an obvious reference to the parousia when the bridegroom will reveal himself resplendent in glory and take his bride, the church, to himself.

Why does Paul refer to the bridegroom-bride image between Christ and the church and not to Christ as husband and the church as his wife, as with the Old Testament covenant where Yahweh presented himself as husband to Israel? M. Barth answers this question well.

> Most likely his interest is centred in the creative, futurist character of the bridegroom's love. At any rate, the love of the betrothed pair, Christ and the church, is described as the standard for the married life of a man and a woman. This love is so full of hope that it forgets what lies behind: it is telic, not static; imaginative, not pedantic; self-giving, not devouring; creative, not analytical; passionate - in the sense of uplifting - rather than condescending.[64]

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63 Cf. R.A. BATEY, op.cit., p.28.

64 M. BARTH, op.cit., pp. 626-627.

Paul's counsel to husbands is that they are to love their wives. In fact, Paul insists on this three times (vv. 25, 28 and 33), emphasizing in v.25b that the model for husbands is Christ's love for the church presented in vv. 26-28 as a Christological hymn. Five essential elements[65] are seen by M. Barth to be constitutive for the substance of love between a man and a woman:

> An act of election by which one person binds himself exclusively to one other person, and invites the other to do likewise in a firm covenant of faithfulness;[66]
>
> A word of promise which makes explicit that the lover voluntarily surrenders himself and his possessions for the benefit and joy of the beloved;[67]
>
> A resolution and vision that within the bond created by election and promise the elect partner above all shall profit and come to perfection;[68]
>
> The full concentration upon the beloved person alone and the corresponding abstention from using the beloved for an

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65 Each of these elements has a parallel in either the canons on marriage or in the Rite for the Celebration of Marriage, we shall note this after each of the following elements as presented by M. Barth.

66 Cf. C.I.C. (1983), c. 1055#1.

67 Cf. ibid., c. 1057#2.

68 Cf. ibid., c. 1057#1.

> ulterior purpose; the readiness to forget what lies behind and be oriented only to the future, as is the case between a loving bride and bridegroom;[69]
>
> The joy in being able to do good, to spend oneself, to effect changes from which not only the chosen partner but also a wider public can profit. Such love will be good not only for the beloved but also for the lover.[70]

In stating that the love of a Christian husband is to be modelled on the love of Christ for the church we see to what heights Paul raises the conjugal union. Jesus not only spoke of God's love but demonstrated it personally, and it is this love flowing from Jesus' own example that Paul presents as the model whom Christian husbands are to imitate.

The example of the love of Christ is not merely a disposition of the heart, mind and will but a love which has both structural and institutional elements, as M. Barth states:

> Marital love based upon and informed by the Messiah's love creates or upholds a monogamous marriage. Total love can be given only to one woman. Greatest intimacy

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69 Cf. ibid., c. 1056.

70 M. BARTH, op.cit., p. 702 (Barth's five elements constitutive of love).

> requires the exclusion of any third person, not to speak of a harem of any size.
>
> In 1 Cor 7:10-15, Paul prohibits, by reference to a command of the Lord, both the separation of a believing wife from her husband, and the dismissal of a wife by a believing husband; only if the unbelieving partner insists shall the believer give his consent to a divorce. Eph 5 contains no exception to the 'equal rights and duties' attributed to husbands and wives in 1 Cor 7. Equal, also, is the right of - and the warning about - remarriage (1 Cor 7:8-9). However, Paul's distinct admonitions to husbands and wives show that he cannot be made a champion of indiscriminate 'egalitarianism'.
>
> Finally, the love of Christ described by Paul as the ground and model of marital love excludes the assumption that only the will to beget a child or the unlimited procreation of children, or any other motive beyond the wholehearted concern for the wife's welfare, constitutes true marriage and the pre-requisite of meaningful physical intercourse.[71]

This lack of emphasis on procreation[72] in Paul's view of marriage is in great contrast to C.I.C.(1917), c.1013#1. The over-emphasis on procreation as the primary end of marriage was first corrected by Gaudium et Spes, art. 50 jointly stressing conjugal love and the purposes

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71 Ibid., pp. 703-704.

72 Ibid., p. 629.

of marriage.[73] Now the Code of Canon Law speaks of the matrimonial covenant which is ordered to the good of the spouses and the generation and education of children.[74]

Of the Gen 2:24 text quoted in Eph 5:31, M. Barth says:

> The phrase 'joined to his wife' is even more emphatically understood in a sexual sense than the term 'become one flesh!' According to some rabbis these phrases specify a natural mode of intercourse rather than unnatural practices; the exclusion of homosexual intercourse and of adultery.[75]

Where the Genesis texts see procreation as a blessing flowing from the sexual union of the man and the woman, Paul does not insist on procreation and even chooses to ignore it in all of the Eph 5 references to marriage. M. Barth says that in Paul's view:

> Marriage is no longer explained as a 'creation order', but as an expression of renewal of all things through Jesus Christ. Indeed, according to Paul, the supreme love and the first work and effect of Christ were announced, promised and guaranteed as early as the creation story. But creation itself, viz. the creaturely existence which

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73 L. ORSY, "Christian Marriage: Doctrine and Law Glossae on Canons 1012-1015", in The Jurist, 40(1980), p. 300.

74 C.I.C. (1983), c. 1055 #1.

75 M. BARTH, op.cit., p. 727.

> God gave to man in the beginning, was only an imitation of marriage, not its ontological and ethical ground. Only Jesus Christ's coming, his love, his death, his dominion are the final, solid basis and model.[76]

This dominion of Christ and application to husband and wife has given rise to Eph 5 being interpreted as the New Testament's clearest reference to the fact that marriage between baptised persons has been raised by Christ the Lord to the dignity of a sacrament.[77]

The critical text occurs in v. 32: "This mystery is a profound one" (NEB). The Greek word "mysterion" was translated into Latin as "sacramentum".[78] P. Benoit says of Paul's use of mysterion:

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76 Ibid., p. 731. As will have been noticed we have relied much on M. Barth's splendid commentary on Ephesians. However, one would hardly expect the son of Karl Barth to be endorsing the Catholic and Orthodox understanding of marriage as a sacrament. Saying that such a view "continues the pagan doctrine and practice of Eros", Barth argues for marriage as a covenant. Most of what he says in that regard would apply equally well to the Church's understanding of marriage as a sacrament; cf. ibid., pp. 738-753.

77 Cf. C.I.C.(1983), c. 1055#1.

78 With St. Augustine we could say "Felix culpa", for it would seem that this supposedly clear reference by St. Paul to marriage as a sacrament was there when the Scholastics (cf. ST. THOMAS AQUINAS, Summa Theologiae, IIIa, 9.65, art.1; Summa Contra Gentiles, IV, ch. 58) determined

> In Paul's language, which is derived from Jewish apocalyptic, this term refers to a 'secret' of the divine plan that was formerly concealed but is now revealed. Paul means that he now understands, in the light of Christ, the profound meaning of the institution of human marriage: if God willed that man and woman be united to one another, body and soul, in love, it was to symbolize and to bring about together, by one another and with one another, that union of supreme love which is the ultimate vocation of everyone, the love of Christ.[79]

Eph 5:32 is referred to in two dogmatic definitions[80] of the church regarding the sacrament of marriage. The sacramentality of marriage is rooted in the new order which Christ himself inaugurated. The mystery of the Incarnation has meant a corresponding enrichment of

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78 (cont'd) the number of the sacraments and when their seven were defined by the church in the Council of Florence, Decree for the Armenians (1439), DS 1320; the Council of Trent, 7th session (1547), Sacraments in general, DS 1601; 24th session (1563), canon 1, DS 1801.

79 P. BENOIT, loc.cit., p. 319.

80 The Council of Florence, Decree for the Armenians (1439), DS 1327, which also solemnly teaches the tria bona; cf. ST. AUGUSTINE, De bono conjugiis, PL., 40, coll. 373-396, the third good being the indissolubility of marriage "because it represents the indissoluble union of Christ and the Church." The Council of Trent, 24th session (1563), DS 1799.

humanity, especially that institution willed by God "in the beginning" (Gen 1:1), disfigured by sin in the Fall and now restored by Christ who has taken the church as his bride.

How is the church as a whole and each and every member made ready for this union? This inter-relationship between the individual's baptism and nuptial imagery used in Eph 5:26-28 is well expressed by R.A. Batey:

> Christ's initial preparation of the church is the cleansing bath of baptism. As a bride was bathed in preparation for the wedding, so the church has submitted to the purification of her Lord provided by baptism. Numerous individual baptisms are viewed as a single cleansing act for the whole church, just as a straight line may become a point by perspective.[81]

Having been incorporated into Christ through baptism, christian wives and husbands mirror the love that exists between Christ and the church.[82]

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81 R.A. BATEY, op.cit., p. 28.

82 P. RÉMY, loc.cit., pp. 400-402 examines the application of the terms "mirror", "reflection" and "image" to compare the relationship of Christ and the Church to that of husband and wife. He warns of the dangers of what psychoanalysts call the "alienating identification" of early childhood that such terms could refer to.

The sacrament of marriage is however an efficacious sign, bringing the love and grace of Christ to the couple. W. Kasper reflects on this well when he says:

> Marriage, then, is in its own way a form by means of which God's eternal love and faithfulness, revealed in Jesus Christ, are made historically present. The love and faithfulness existing between Christ and his Church is therefore not simply an image or example of marriage, nor is the self-giving of man and wife in marriage an image and likeness of Christ's giving of himself to the Church. The love that exists between man and wife is rather a sign that makes the reality present, in other words, an epiphany of the love and faithfulness of God that was given once and for all time in Jesus Christ and is made present in the Church.[83]

It is, then, the definitive event of the Incarnation that makes possible the sacramentality of marriage, which is not based on a few isolated Scriptural texts but on the Christ event. The Incarnation has meant an enrichment and ennobling of human nature and its institutions. The primary institution renewed by grace was marriage. Its unity and indissolubility, that were by God's design "at the beginning", were restored by Christ.

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83 W. KASPER, Theology of Christian Marriage, New York, Crossroad, 1981, p. 30.

3. Ephesians 5 in the General Audience Addresses of Pope John Paul II

The starting point for Pope John Paul II's addresses on Ephesians is whether Eph 5:32 can be understood as referring to a sacrament.[84] The Pope also asks whether the author of Eph so understood it?

> If he is not speaking of it directly, in the strict sense - here one must be in agreement with the sufficiently widespread opinion of Biblical scholars and theologians - however it seems that in this text he is speaking of the bases of the sacramentality of the whole of Christian life and in particular of the bases of the sacramentality of marriage.[85]

Sacramentality is here understood in a broad sense.[86] Are "sacrament" and "mystery" synonymous? According to Pope John Paul II:

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84 Eph 5:32 in the Vulgate is "Sacramentum hoc magnum est". "Sacramentum" is the Latin translation of the Greek word "mysterion". JB translates literally into English as "mystery" and NEB has "great truth", NAB renders this poorly as "great foreshadowing" while the best translation in the English texts is RSV "This mystery is a profound one" which captures the element of mystery and alludes to the Pauline application to Christ and the Church by emphasizing the depth of meaning within the mystery.

85 JOHN PAUL II, General Audience Address, September 8, 1982, "Christ's Redemptive Love has Spousal Nature", in L'Osservatore Romano, September 13, 1982, p. 1.

86 Cf. SAC. OECUM. CON. VAT. II, Lumen Gentium, art. 1, says that "The Church is in Christ in the nature of a sacrament

> The sacrament presupposes the revelation of the mystery and presupposes also its acceptance by means of faith on the part of man. At the same time, however, it is something more than the proclamation of the mystery and its acceptance by faith. The sacrament consists in the "manifesting" of that mystery in a sign which serves not only to proclaim the mystery but also to accomplish it in man.[87]

Thus the efficacy and the sign value, according to the scholastic definition of a sacrament are respected.[88] The elements giving rise to a sacrament are discerned to be present in Eph 5:21-33 on the basis of a number of suppositions. H. Volk describes these as follows:

> [...] that the total self-giving of the person that takes place in marriage implies a relationship with God as the ground and the aim of this self-giving; that Christ included marriage in the Christian order; that the relationship involved in marriage is different from other relationships between human beings; that wherever fundamental signs that are intimately connected with the life of Christians and the Church exist and these point to the

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86 (cont'd) - a sign and instrument, that is, of communion with God and of unity among all men".

87 JOHN PAUL II, loc.cit., p.2, art. 5.

88 "Cum tamen ex multis Sanctorum auctoritatibus habeatur quod sacramenta novae legis non solum significant, sed causant gratiam." ST. THOMAS AQUINAS, Summa Theologiae, 3a. 62, 1; the scholastic definition is "signum efficax gratiae" (efficacious sign of grace).

> reality of grace, such signs cannot, within the new covenant, be empty and meaningless; that every community of Christians in Christ includes a making present of Christ /... /. Christ instituted the sacrament by establishing the new covenant as an eternal sign of God's grace and by giving that sign a sacramental reality. This sacramental sign represents and expresses the unity of Christ and the Church.[89]

Eph 5:21-33 combines and develops the two Old Testament basic principles regarding marriage. Firstly the partnership and unity of the couple (Gen 2:24) are emphasized. Secondly, the covenant as a marriage between Yahweh and his people as presented by the prophets is applied anew to the union of Christ and the Church. Pope John Paul II says in this regard:

> The relationship of Christ to the Church, which is defined in the Letter to the Ephesians, as 'a great mystery', constitutes the fulfilment and the concretization of the visibility of the mystery itself. Moreover the fact that the author of the Letter to the Ephesians compares the indissoluble relationship of Christ to the Church to the relationship between husband and wife, that is, to marriage - referring at the same time to the words of Genesis (2:24), which by God's

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89 H. VOLK, "Ehe", in Lexikon für Theologie und Kirche, Freiburg, Herder, 1959, Vol., 3, col., 681, English translation in W. KASPER, op.cit., p. 31. Note the similarity between the first of these suppositions and the definition of matrimonial consent in C.I.C. (1983), c.1057 #2.

> creative act originally instituted marriage - turns our attention to /.../ the very "origin" of the theological history of man.[90]

Obviously, there is in Eph 5:21-33 far more than a simple recalling of the Creator's intention "in the beginning" (Gen 1:1). The Christ event to which the author of Eph 5:32 applies the analogy, consequently enriches marriage itself. This relationship Pope John Paul II states as follows:

> It can be said that the visible sign of marriage "in the beginning" inasmuch as it is linked to the visible sign of Christ and of the Church, to the summit of the salvific economy of God, transfers the eternal plan of love into the "historical" dimension and makes it the foundation of the whole sacramental order.[91]

To appreciate the sacramentality of marriage, Pope John Paul II encourages a bird's eye view, looking at the grand sweep of salvation in the context of Christ's redemptive act and in his role as the "new Adam" to whom is given the church as his bride. This analogy of Adam-Eve to Christ and the church, Pope John Paul II describes as follows:

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90 JOHN PAUL II, General audience address, September 29, 1982, "Analogy of Spousal Love Indicates the Radical Character of Grace, in L'Osservatore Romano, October 4, 1982, p. 12.

91 Ibid.

> To the marriage of the first husband and wife, as a sign of the supernatural gracing of man in the sacrament of creation, there corresponds the marriage, or rather the analogy of the marriage of Christ with the Church as the fundamental "great" sign of the supernatural gracing of man in the sacrament of redemption - of the gracing in which there is renewed in a definitive way the covenant of the grace of election, which was broken in the beginning by sin.[92]

The new supernatural gracing of man in the "sacrament of redemption" is also a new actuation of the mystery hidden in God from all eternity - new in relation to the sacrament of creation.[93]

> The sacrament of redemption - the fruit of Christ's redemptive love - becomes, on the basis of his spousal love for the Church, a permanent dimension of the life of the Church herself, a fundamental and life-giving dimension. It is the mysterium magnum /.../ that is continually actuated in the Church, because Christ 'loved the Church' (Eph 5:25), uniting himself with her in an indissoluble love, just as spouses, husband and wife unite themselves in marriage. In this way the Church lives on the sacrament of redemption, and in her turn completes this sacrament as the wife, in virtue of her spousal love, completes her

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92 ID., General audience address, October 13, 1982, "Loss of Original Sacrament Restored with Redemption in Marriage-Sacrament", in loc.cit., October 18, 1982, p. 10, art., 2.

93 Ibid., art., 3.

> husband, which in a certain way had already been pointed out 'in the beginning' /... / the Church united to Christ, as the wife to her husband, draws from the sacrament of redemption all her fruitfulness and spiritual motherhood.[94]

Similar teaching is contained in Lumen Gentium when it says "the Church is in Christ like a sacrament."[95] Allusions to baptism (v.26), the Eucharist (v.29) and marriage (v.32) have been discerned in Eph 5. However, there is not present here a well developed sacramental theology, but rather reference to the broader basis of all the sacraments in Christ's work of Redemption.

Concerning the sacrament of marriage specifically, Pope John Paul II says:

> Even though the Letter to the Ephesians does not speak directly and immediately of marriage as one of the sacraments of the Church, nevertheless the sacramentality of marriage is particularly confirmed and closely examined in it. In "the great sacrament" of Christ and of the Church

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94 Ibid., p. 11, art., 4.

95 "Cum autem Ecclesia sit in Christo veluti sacramentum", SAC. OECUM. CON. VAT. II, op.cit., p. 93.

> Christian spouses are called upon to model their life and their vocation on the sacramental foundation.[96]

Eph 5:21-33 describes the spousal relationship of Christ to the church. Pope John Paul II says this relationship is:

> /... / the new sign of the Covenant and of grace, which draws its roots from the depths of the Sacrament of Redemption, just as from the depths of the sacrament of creation there has emerged marriage, a primordial sign of the Covenant and of grace. The /... / primordial sacrament is realized in a new way in the "sacrament" of Christ and of the Church. For this reason also the Apostle /... / urges the spouses to /... / model their conjugal life by basing it on the sacrament instituted at the "beginning" by the Creator: a sacrament which found its definitive greatness and holiness in the spousal covenant of grace between Christ and the Church.[97]

Thus Eph 5:21-33 constitutes a clear reflection on the ramifications of the primordial sacrament for Christian husband and wife. It is this continuity between marriage as the primordial sacrament in God's plan "at the beginning" and its fulfilment in the covenant established by Christ that is the definitive contribution of the text on marriage in the Letter to the Ephesians.

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96 JOHN PAUL II, General audience address, October 27, 1982, "The Indissolubility of the Sacrament of Marriage in the Mystery of the 'Redemption of the Body'", loc.cit., p. 3, art., 3.

97 Ibid., art., 2.

Conclusion

There are two outstanding texts on marriage in the New Testament Letters. Firstly, 1 Cor 7:10-11, which is the earliest written reference quoting Jesus' logion on divorce which refers back to the will of the Creator as expressed in the Genesis creation accounts. Secondly, Eph 5:21-33 is addressed to Christian wives and husbands, v.21 calling upon them to subordinate themselves to Christ. Many commentaries have seen in these words a call for the wife to be submissive and obedient to her husband as though conjugal life was established by Eph 5:21-33 as a hierarchy that would be opposed to partnership. But, unlike 1 Pet 3:5-7, Eph 5:21-33 does not call for obedience, but rather subordination in love, modelled on Christ's self-giving love.

Christ's love was also sacrificial and this was not without parallel in the classical sources with which Eph 5:21-33 showed familiarity. In the military, the officer led his troops into battle, thus there was the very real prospect that he would be the first victim in any possible defeat. In the Book of Revelation (19:7-9; 21:9), Christ the paschal Lamb is the one who was immolated and yet because of his self sacrifice he enjoys the throne of God. He will recover his original

gentleness only when the nuptials will be celebrated with the heavenly Jerusalem, which symbolizes the Church.

The full union of Christ with the Church is eschatological. Therefore, as it is applied to the union of husband and wife in the here and now it is analogical. The marital union of the here and now is just that, transitory in the sense of being broken by death, whereas the union of Christ and the Church will come to full fruition in the world to come. The union of husband and wife exists in situations marred by sin, whereas Christ's union with the Church will be complete when perfection is attained.

The "natural" institution of marriage is for partnership and procreation, the sacramental reality brings to that "natural" order, unity and indissolubility which are strengthened with particular firmness by union with Christ through baptism. From a canonical point of view, the consortium of Roman law becomes the consortium totius vitae through the irrevocable act of consent. Such was the expression employed by the Vatican Council II which concerning marriage admirably combined a Scriptural and personalist emphasis, the latter being conveyed in terms of the communion of life which will subsequently be expressed juridically as consortium totius vitae.

CHAPTER V

CONCILIAR TEACHING ON MARRIAGE AS A COVENANT AND COMMUNION OF LIFE AND LOVE

1. Preparatory Texts

Pope John XXIII announced his intention to call an Ecumenical Council on January 25, 1959 at the Basilica of St. Paul outside the Walls of Rome. By an Apostolic Letter of June 5. 1960 the Preparatory Commissions were established.[1] Firstly, the Theological Commission of which Cardinal Alfredo Ottaviani was appointed president on June 6, 1960. Secondly, the Commission for the Discipline of the Sacraments, of which Cardinal Benedetto Aloisi Masella was president.[2]

Two of these commissions produced documents that would have a bearing on the Conciliar teaching on marriage. A schema prepared by the Theological Commission was discussed by the Central Preparatory Commission for the Council on May 7, 1962. The praenotandum notes that, as desired by the Central Commission, the chapter "On Chastity and Christian Modesty" was separated from the Constitution "On the Moral

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1. A.A.S., 52(1960), pp. 333-337.

2. Both these appointments were announced on June 6, 1960 as reported in A.A.S., 52(1960), p. 495.

Order" and joined to the draft Constitution "On Matrimony and the Family" as one schema.[3]

This union, while helping to reduce the number of schemata, produced a text treating of chastity and virginity in part 1, and of marriage and the family in part 2. As this latter is more directly our concern, an outline of the article headings will serve as a guide to its contents. Chapter I of part II was entitled "On the Divinely Established Order of Marriage."[4] The articles making up Chapter 1 were as follows: art. 9, Introductory notes; art. 10, The origin, nature and dignity of marriage; art. 11, Marriage and consecrated virginity; art. 12, The properties of matrimony; art. 13, The ends of matrimony; art. 14, The power of the Church; art. 15, The competence of civil authority; art. 16, Errors condemned. Three other chapters completed part 2. Chapter 2 was entitled "On the Rights, Obligations and Virtues Proper to Marriage"; Chapter 3, "On the Divinely

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3. Acta et documenta Concilio Oecumenico Vaticano II apparando, 2,3,1, p. 90. An identical text of the schema occurs in ibid., 2,2,3, pp. 893-937. Hereafter cited as Acta /.../ apparando.

4 Ibid., 2,2,3, pp. 907-918; 2,3,1, pp. 104-115. A scholarly text supported by 8 pp. of references, the majority of which were to previous Councils and Papal encyclicals, notably LEO XIII, Encyclical Letter, Arcanum divinae sapientiae, February 10, 1880, in Acta Leonis PP. XIII, 1878-1887, Bruges, Desclée, 1887, pp. 117-137; PIUS XI, Encyclical Letter, Casti connubii, December 31, 1930 in A.A.S., 22(1930), pp. 539-592.

Established Order of the Christian Family"; Chapter 4, "On the Rights, Obligations and Duties Proper to the Christian Family." In its style the proposed constitution was similar to that of former Councils as is clearly manifested by art. 16, "The condemnation of errors":

> /The Synod/ disapproves severely those errors and theories which deny that there is an immutable divine order regarding the properties and ends of marriage. And it rejects as a supreme calumny the assertion that the indissolubility of marriage does not come from God /.../. What is more, it disapproves those theories which subvert the right order of values and make the primary end of marriage inferior to the biological and personal values of the spouses, and proclaim that conjugal love, in the objective order, is itself the primary end.[5]

In the accompanying relatio, Cardinal Ottaviani, noted that the constitution was to be "/.../ pastoral, but

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5 " /S. Synodus../ Severe improbat errores et theorias, quibus dicitur non adesse ordinem divinum immutabilem circa proprietates et fines matrimonii. Atque nominatim ut summam calumniam refellit assertum, matrimonii indissolubilitatem non procedere a Deo /.../. Improbat insuper theorias, quibus recto ordine valorum subverso, finis primarius matrimonii postponitur valoribus biologicis et personalibus coniugum[50] et amor coniugalis, in ipso ordine obiectivo, proclamatur tamquam finis primarius." Acta /.../ apparando, 2,2,3, p. 910; 2,3,1, p. 107. Footnote 50 notes the erroneous positions of H. DOMS, Vom Sinn und Zweck der Ehe, and especially of E. MICHEL, Ehe, Eine Anthropologie der Geschlechtsgemeinschaft, which book was placed on the Index of Forbidden Books, cf. A.A.S., 44(1952), p. 879.

pastoral and doctrinal, not pastoral and disciplinary."[6]

While the animadversiones[7] reveal many favourable votes[8] a considerable number of these are qualified, with references to recommendations previously proposed by Cardinals Alfrink, Döpfner, Léger and Suenens.[9] Cardinal Döpfner's comments ran for twelve pages of the Acta[10] and contradicting the qualities which Cardinal Ottaviani identified with the spirit in which the proposed constitution was drafted, he wrote:

> The bishops surely cannot be ignorant of how many damaging mistakes have been made in our pastoral practice under the inspiration of those textbooks treating this matter in an exclusively prohibitive and analytic way /...7.
>
> Our faithful /...7 seek from the council above all a synthesis that is truly constructive and attractive, in which marital love consecrated by the sacrament occupies its visible place.

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6 "/...7 pastoralem, sed pastoralem dogmaticam et doctrinalem, non vero pastoralem disciplinarem", Acta /...7 apparando, 2,2,3, p. 937.

7 Ibid., 2,2,3, pp. 939-971.

8 Ibid., pp. 971-985. Only 9 outright placet votes are recorded, while the overwhelming number were placet iuxta modum.

9 29 out of the 65 votes cast wanted the recommendations of these Fathers included in the text.

10 Ibid., 2,2,3, pp. 947-959.

> /... / in the entire chapter, "The Divinely Established Order of Marriage," absolutely nothing else is said about married love than the condemnation, at the end of the chapter, of the opinion of 'those who claim that marital love is the primary end in the objective order.'
>
> /... / But does not marital love, in the objective order itself and according to God's intent, somehow constitute the very form and soul of marriage, in such a way that without true marital love the ends themselves of marriage can neither be conceived of nor be rightly attained?[11]

While Cardinal Döpfner was calling for a more pastoral text, Cardinal Alfrink outlined the proposed constitution's lack of Scriptural teaching, especially about the place and function of marital love in marriage. Cardinal Alfrink drew his inspiration from the image of marriage in the Book

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11 "Episcopos latere non potest, quot errores funesti in praxi pastorali evenerint sub inspiratione illorum manualium, quae hanc materiam nonnisi modo prohibitivo et analytico, proposuerunt. /... /

"Fideles nostri, /... / desiderant a Concilio praeprimis synthesim vere constructivam et attractivam, in qua amor coniugalis sacramento consecratus suum locum visibiliter habeat.

"/... / in toto capite de 'ordine matrimonii christiani divinitus constituto' omnino nihil de amore coniugali invenitur quam damnatio - in fine capitis - sententiae eorum, 'qui amorem coniugalem, in ipso ordine obiectivo, proclamant tamquam finem primarium.'

"/... / Nonne amor coniugalis in ipso ordine obiectivo secundum ipsius Dei intentionem constituit quodammodo formam et animam matrimonii, ita ut sine vero amore coniugali ipsi fines matrimonii nec concipi nec recte attingi possint? /... /." Ibid., 2,2,3, pp. 947-948.

of Genesis, 2:18-24, noting the various forms of union: physical, bodily, sexual but also psychological. We have already examined these aspects in Chapter 1. Cardinal Alfrink attacked a merely juridical view of marriage prevalent in the proposed constitution, which was opposed to the modern Catholic's way of thinking. This was more psychological and more human as well as theological - biblical in its scope.[12]

Cardinal Suenens was the most forthright in his rejection of the proposed constitution, stating that, while he agreed with much in particular, he found the general "perspectives" unacceptable:

> The schema, as proposed, is based only on biological considerations of sex and sexuality, so that only the 'genital' aspect is highlighted. The specifically human aspects are only touched on indirectly and mediately.
>
> The perspective is such that the fruits of more recent enquiry in this field cannot evidently be assumed. On the contrary, they seem to contradict traditional affirmations of Catholic doctrine and so can only be relegated among condemned errors.[13]

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12 Cardinal Alfrink's intervention as recorded in the Acta [...] apparando, 2,2,3, pp. 959-962.

13 "Schema propositum fere unice fundatur in consideratione biologica sexus et sexualitatis, ac proinde tantummodo aspectum 'genitalem' ante oculos habet. Exinde aspectus specifice humani tantummodo indirecte ac mediate

In place of this biological emphasis, Cardinal Suenens recommended that new light could be shed upon these matters by other sciences treating of sexuality as specifically human.

> Today it seems necessary to present Catholic doctrine in reference to the data of authentic anthropology concerning sex and sexuality, which, by assuming biological considerations proper to man, shed light upon it. Only in this perspective can whatever is of value in more recent enquiries be understood and assumed into traditional doctrine.[14]

It was Cardinal Suenens who introduced into his recommendations the terms that would eventually have a crucial bearing on the Conciliar teaching on the subject of marriage and later be received into the revised Code's definition of marriage, c. 1055 #1.

> The conjugal union between man and woman in Sacred Scripture, especially in the prophets, is the principal symbol of the covenant and love between God and his people. In the New Testament

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13 (cont'd) attinguntur.
In tali perspectiva fructus recentioris indagationis in hoc campo evidenter nullo modo assumi possunt. E contrario videntur contradicere traditionales catholicae doctrinae affirmationes. Tantummodo inter damnatos errores relegari possunt", ibid., p. 962.

14 "Hodie videtur necessarium praesentare doctrinam catholicam sese referendo ad authenticam anthropologiam circa sexum et sexualitatem, quae assumendo considerationes biologicas propriam humanam significationem sexualitatis in lucem ponit. In hac tantum perspectiva quidquid valoris est in recentiorum indagationibus, intelligi potest ac in traditionali doctrina assumi potest", ibid.

> it was raised to the dignity of a sacrament of the new covenant as a symbol of the union and love between Christ and the Church.[15]

Cardinal Suenens then noted that it would be useful if the traditional doctrine of the primary and secondary ends of marriage were formulated so as to be more acceptable to the contemporary mind.[16]

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15 "Unio coniugalis inter virum et mulierem in Sacra Scriptura, praesertim apud Prophetas, praecipuum symbolum est foederis et amoris Deum inter et populum suum. In Novo Testamento elevata est ad dignitatem sacramenti novi foederis, ut symbolum unionis et amoris Christum inter et Ecclesiam. "ibid., emphasis added. Cardinal Alfrink spoke in similar terms but without using foedus when he said, "Praecise propter hunc amorem coniugalem in universa Sacra Scriptura Veteris et Novi Testamenti matrimonium est symbolum relationis inter Jaweh et populum Dei, Israel." Ibid., p. 961, emphasis added.

16 Ibid., p. 963. This re-formulation in terms less stringent than C.I.C.(1917), c. 1013 #1 will be the subject of heated debate in the Council and behind the scenes manoeuvre; cf. D.E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage", in S.C., 13(1979), pp. 104-114; T. MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 257-274; H. VORGRIMLER (ed.), Commentary on the Documents of Vatican II, Freiburg, Herder, Vol., 5, pp. 42-44, 226-245. The Council's text on the ends of marriage is found in Gaudium et Spes, art. 50, "Without intending to underestimate the other ends of marriage, it must be said that true married love and the whole structure of family life which results from it is directed to disposing the spouses to cooperate valiantly with the love of the Creator and Saviour, who through them will increase and enrich his family from day to day." A.P. FLANNERY (ed.), Documents of Vatican II, Grand Rapids, Eerdmans, 1980, p. 953. If the formulation of C.I.C. (1917), c. 1013 #1 was preserved, despite the Council's refraining from speaking in such terms, the logical place for

It is to Cardinal Suenens that we are indebted at this preparatory stage of the Council for the suggestion to include the Roman law conception of marital society in the Conciliar teaching. He made this suggestion by referring to the expression used by Pope Pius XI in his encyclical letter, Casti Connubii.

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16 (cont'd) it to be resurrected was in Pope Paul VI's Encyclical Letter, Humanae Vitae. However, Pope Paul spoke in terms of marriage's characteristics, not of its ends, art. 9, and of the unitive and procreative meanings of the conjugal act, art. 12. During the 1980 Synod of Bishops on the Family, Cardinal Palazzini said, "Regarding the ends of marriage, although the Second Vatican Council did not use the terms, the principal and secondary ends, nevertheless the hierarchy of ends (Gaudium et Spes 48,50,52) is at least implicitly preserved." SYNOD OF BISHOPS, 15th General Congregation, October 13, 1980, in L'Osservatore Romano, October 27, 1980, p. 15. However, Gaudium et Spes speaks not of a hierarchy of ends but of "variis bonis ac finibus" (art. 48), "non posthabitis ceteris matrimonii finibus" (art. 50) (which is specifically opposed to Cardinal Palazzini's claim to a retention of a hierarchy of ends), and "Ad quem finem obtinendum sensus christianus fidelium /... 7" (art. 52), which refers not to the ends of marriage but to the promotion of the values of marriage and the family. Finally, Cardinal Siri requested the 1981 Plenarium of the Code Commission to retain the hierarchy of ends in C.I.C. 1917), c. 1013, PONT. COMM. C.I.C. REC., Relatio (1981) p. 243. The relator states, "The definition or description of marriage should not be suppressed altogether, for concerning this there is already an affirmation of the Plenary Congregation of this Commission on 24 May, 1977. Equally, neither can it be suppressed; for this reason, mention is made of the personal aspect of marriage. The term 'bonum coniugum' should remain. For the ordering of marriage to the good of the spouses is truly an essential element of the matrimonial covenant, in a minimum way the truly subjective end of the person marrying. On the other hand, the schema does not

> At the same time it would be fitting as in Casti Connubii, to highlight the understanding of marriage as a communion of the whole of life which is ordered to the sanctification of the members. This indeed is considered to be the cause and primary reason for marriage as Casti Connubii affirmed.
>
> Less appropriately the words of Casti Connubii are relegated amongst errors: footnote 51![17]

For some inexplicable reason the text of Casti Connubii

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16 (cont'd) want to establish a hierarchy of ends. Vatican Council II itself in the Constitution Gaudium et Spes, beside the good of offspring, proposed other goods and ends, without calling them primary and secondary: 'Ipse vere Deus est auctor matrimonii, variis bonis ac finibus praediti' (G et S 48)," Relatio (1981), p. 244.

17 "Insimul conveniens esset, uti in Casti Connubii, in lucem ponere sensum matrimonii ut est communitas totius vitae, quae ordinatur ad sanctificationem membrorum. Haec revera considerari potest ut 'causa et prima ratio' matrimonii uti in Casti Connubii affirmatur.

"Minus feliciter verba Casti Connubii in hac re inter 'errores' releguntur: nota 51, /p. 918/:"

The erroneous propositions regarding the ends of marriage are in the Acta, 2,2,3, pp. 917-918, footnote 50 and include the works of H. DOMS and E. MICHEL as mentioned in our footnote 5, supra p. 214. Footnote 51 referred to by Cardinal Suenens states that those who place conjugal love alongside the primary end were expressly rebuked by Pope Pius XII in his address of October 29, 1951, in A.A.S. 43(1951), p. 849, and that Pope Pius XI quoting the Roman Catechism says "indebite superextollunt amorem coniugalem ut finem primarium ipsius matrimonii." Unlike Cardinal Suenens' use of the Roman law concept for marital society as used in Casti Connubii, Cardinal Döpfner speaks of the "/.../ communionem personalem", in Acta /.../ apparando, 2,2,3, p. 951.

referred to above was omitted from some English translations.[18] In concluding his recommendations, Cardinal Suenens proposed a new text in which, while generation and education of children were presented as the essential end of marriage, they were to be viewed in the context of a communion of life and love between a man and woman, understood according to Casti Connubii.[19]

Cardinal Ottaviani showed little willingness to change the text substantially. Twice, the Cardinal Secretary of the Holy Office stated that what the foregoing Cardinals had said, supported by so many others in the Congregation, was to "be taken with a grain of salt."

> As to the question of marital love, about which so many and endless things have been said - things that tell of the environment in which Cardinals Döpfner, Alfrink and others live - it seems to me that it must be taken with a grain of salt. Surely what Cardinals Döpfner, Alfrink and Suenens have said will be taken into account, but we must accept it carefully and on secure ground. For today the aspect of

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18 PIUS XI, Encyclical Letter, Casti Connubii, December 31, 1930, in A.A.S., 22(1930), pp. 539-592, English translation in Papal Teachings: Matrimony, Boston, St. Paul Editions, 1963, pp. 219-291, this text contains on pp. 231-232 the text missing from p. 14 of St. Paul Editions pamphlet translations of the text.

19 Acta [...] apparando, 2,2,3, p. 964. The text from Casti Connubii, in A.A.S., 22(1930), pp. 548-549.

> marital love is exaggerated /... / rather than being of the nature of marriage, this love is one of its duties.[20]

That there was strong reluctance to make the substantial changes called for by so many (35 of the 60 members agreed with the criticisms levelled by Cardinals Döpfner, Alfrink and Suenens) is again in evidence, when only a slightly modified version of the schema appears in the acts of the Council.[21] However, this text was never debated in the Council aula.[22]

The Co-ordinating Commission of the Council first met in January 1963 and arranged the schemata around the central

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20 "Quod attinet ad amorem coniugalem, circa quem multa et multa dicta sunt, quae ostendunt etiam atmosphaeram in qua vivunt Em.mi Patres Döpfner, Alfrink, etc., mihi videtur cum mica salis esse procedendum. Utique, habebitur ratio eorum quae dicta sunt ab Em.mis Döpfner, Alfrink et Suenens, sed debemus cum moderamine inculpatae tutelae haec accipere. Nam hodie ita exaggeratur aspectus amoris coniugalis /... / ceterum est plus quam natura ipsius matrimonii, officium." Acta /... / apparando, 2,2,3, p. 977.

21 Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, 1,1,4, pp. 718-771. A change in the title placing virginitate after matrimonio, familia is the only notable change; there is no mention of conjugal love among the secondary ends as in Casti Connubii. In art. 14, errors are disapproved rather than condemned (art. 16, Acta /... / apparando 2,2,3, p. 910).

22 Acta Synodalia, 1,1,4, p. 653.

axis: Ecclesia Christi, lumen gentium, to preserve two essential aspects of conciliar texts as a whole, the Church ad intra and the Church ad extra. Thus Gaudium et Spes as a pastoral constitution was clearly linked with the Dogmatic Constitution on the Church.[23] This distinction between the Church ad intra and ad extra had been made by Pope John XXIII.[24] The concept seemed to originate from Dom Helder Camara. The then Cardinal Montini was also in agreement.[25]

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23 Cf. H. VORGRIMLER (ed.), op.cit., p. 12.

24 JOHN XXIII, Radio Message, Universis catholici orbis christifidelibus, September 11, 1962 in Acta /... 7 apparando, II (Praeparatoria), vol. I, (Acta Summi Pontificis Ioannis XXIII), p. 350. Mgr. Moeller notes that this radio message largely drew its inspiration from a memorandum prepared for Pope John by Cardinal Suenens on what positive factors he saw in the "organization and aims of the Council's work. /... 7 This makes clear the line which leads from the allocution of 11 September to Cardinal Suenens' intervention of 4 December. It is no longer an unfounded hypothesis to affirm that the speech of 4 December was not made in the Council aula without the Pope's prior knowledge, despite the serious state of his health at that time. These precise details are extremely important because they show, as in any case might be surmised, that the very idea of the Pastoral Constitution goes back to John XXIII's fundamental intentions for the Council. At the opening of the Council on 11 October, 1962, the Pope took up the idea again. This is all the more important because we know that John XXIII wrote the entire opening address to the Council himself." H. VORGRIMLER (ed.), op.cit., p. 8.

25 Ibid., pp. 10 - 11.

Of the 70 schemata from the Conciliar preparatory commissions, only the one from the Theological Commission was devoted to the social order. Two commissions, however, were concerned with the social order. The Preparatory Commission for the Apostolate of the Laity was preparing a text on social action. On the effect of this bilateral approach, Canon Charles Moeller observes:

> The tension that arose from the fact that the same theme was being approached from various sides is very obvious /... /. In the end a text was successfully produced which while not too exclusively theological or lacking in direct reference to contemporary problems, was not excessively sociological and theologically pointless.[26]

Pope John XXIII died on June 3, 1963 and Cardinal Montini was elected his successor as Paul VI on June 21, 1963; he announced that the Council would reconvene on September 29, 1963.[27] When the Co-ordinating Commission of the Council met on July 4, the relator, Cardinal Suenens, drew attention to Pope Paul VI's homily at his enthronement in which he had spoken of dialogue between the Church and the modern world.[28] It was in this context that the schemata treating of marriage were presented to the Council fathers.

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26 Ibid., p. 3

27 A.A.S., 55(1963), p. 581

28 Ibid., pp. 618-625.

2. Schemata of the Pastoral Constitution on the Church in the Modern World

It is somewhat ironic that Cardinal Suenens, who was so critical of the draft presented by the Theological Commission, was the one who presented the latest draft, known as Schema 17, to the Co-ordinating Commission. Schema 17 was entitled: De praesentia efficaci Ecclesiae in mundo hodierno. Chapter 3 bore the title: De matrimonio et familia. Cardinal Suenens' reservations with the text soon showed:

> He emphasized the lack of synthesis between the natural law elements and the message of the gospel. Moreover, he noted the insufficient distinction drawn between general statements of faith and concrete applications which could not be the object of conciliar pronouncements. He also stressed that delicate questions such as the "fertility of marriage" [...] had not been thought out deeply enough.[29]

Schema 17 was certainly an advance on the treatment of marriage presented in the earlier drafts; it went beyond the terminology of primary and secondary ends and placed emphasis on the generous fecundity of love.[30] From 6-8 September, 1963, Cardinal Suenens assembled at Malines, a team of theologians,

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29 H. VORGRIMLER, op.cit., p. 19.

30 Cf. ibid., p. 18.

including, among others, Mgr. L. Cerfaux, Canon Moeller and Frs. Congar, Rahner and Tucci to prepare a text on the purely dogmatic part of the schema. This revision was suggested by the Co-ordinating Commission and Cardinal Suenens was asked to supervise the work.[31]

At a meeting of the Mixed Commission on November 29, 1963, the Malines text, while regarded as a good contribution was criticized for its purely theological perspective and lack of specific treatment of concrete issues.[32] The Central Commission met in Zurich from February 1-3, 1964. The first words of its text were to remain through all subsequent drafts and so give rise to the Latin name of the conciliar text. Canon Moeller's remarks on this Zurich meeting are revealing:

> The spirit of the Zurich meeting left its mark on all who took part. Here they acquired the unshakable conviction that a Schema 17 was necessary, that it was the most difficult but also one of the most important of the conciliar schemata. Whatever the setbacks, they maintained their determination to complete the text.[34]

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31 Cf. ibid., p. 21.

32 Cf. ibid., pp. 25-26.

33 Cf. ibid., p. 27.

34 Ibid., p. 33.

Fr. Bernhard Häring, secretary of the subcommission on marriage,[35] completed a translation from French into Latin of the emended Zurich text and this was presented to the Mixed Commission in March, 1964. A vote was taken to see if the text could form the basis for discussion and it was accepted by 35 - 6 votes. The doctrinal content was discussed. One member urged that greater prominence be given to the texts of Genesis and that the relationship between creation and redemption be expressed more clearly.[36]

> At the end of this series of meetings, Cardinal Cento, who with Cardinal Ottaviani was co-president of the Mixed Commission, asked whether they approved the text in its present form and whether it could therefore be submitted to the Co-ordinating Commission after a few suitable emendations. If so, the text plus the appendix chapters might be printed at once and sent to the bishops, for submission to the Council. A vote showed almost complete unanimity in its favour.[37]

On July 3, 1964, Pope Paul VI authorized that the text,

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35 The subcommission on marriage was composed of three members from the Theological Commission - Bishops Ancel, McGrath and Schröffer and three members from the Commission for the Apostolate of the Laity - Bishops Guano, Hengsbach and Ménager with Frs. Glorieux, Häring, Sigmond and Tucci as experts. Cf. Acta Synodalia, 3, 3, 5, p. 143.

36 H. VORGRIMLER, op.cit., pp. 34-35.

37 Ibid., p. 37

consisting of 25 articles and a conclusion, be sent to the fathers.[38] A new ordering meant it was now schema 13 and bore the somewhat cumbersome title De ecclesia in mundo huius temporis. Thus it became popularly known as schema 13.[39] To accompany the schema, but not distributed with it, were 5 adnexa.[40]

Schema 13 was a far cry from the guarded text originally proposed by the Theological Commission on May 7, 1962,[41] which was never discussed in the Council aula. The schema emphasized the fundamental importance of the family. But far from seeing marriage as hierarchically yoked to a primary end to which all the other benefits of marriage were to be subordinated, the text affirmed an

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38 Acta Synodalia, 3,3,5, pp. 116-142. Chapter 4, "The Special Tasks to be Accomplished by Christians in the Modern World," contains art. 21 which is titled "The Dignity of Marriage and the Family", pp. 131-133.

39 Canon Moeller notes that "Italians like to think that 13 is a lucky number, whereas in northern countries it is considered unlucky." H. VORGRIMLER, op.cit., p. 12.

40 The adnexa were distributed to the fathers on September 30, 1964. They were not to be discussed in the Council aula but animadversiones were to be sent to the Mixed Commission which would emend the text accordingly. Acta Synodalia, 3,3,5. pp. 147-200. Adnexum 2 "On Marriage and the Family," is on pp. 158-168.

41 Acta [...] apparando, 2,2,3, pp. 893-937.

openness on the question of the ends when it stated:

> For God, in the wisdom of his love, designed marriage not only for the procreation and upbringing of children and for the husband's and wife's mutual assistance /... / but also for the mutual sanctification and shared glorifying of God.[42]

Schema 13 showed that, while not unaware of exaggerations, marital love animates consent. When love is acknowledged as part of the "bonum coniugum" it is because a couple love each other that they give themselves to each other in marriage.

> Since in our time so many exalt the love of husband and wife, it is the duty of Christian spouses to show the world the true nature of this marital love /... /. True marital love is a mutual and free gift of self made by each spouse to the other in one spirit and one flesh. It is a mutual interior conformation of one to the other, proved by tender affection; it far exceeds mere passing infatuation.[43]

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42 "Deus enim caritatis suae consilio voluit coniugium non solum ad prolis procreationem et educationem ac mutuum viri et mulieris adiutorium /... / sed etiam ad mutuam sanctificationem et communem Dei glorificationem /... /", Acta Synodalia, 3,3,5, p. 131, emphasis added.

43 "Cum homines nostrae aetatis libenter exaltent amorem inter virum et mulierem, coniugum christianorum est mundum illuminare de vera natura amoris coniugalis /... /. Verus amor coniugalis, mutuum et liberum sui ipsius donum in uno spiritu et in una carne mutuaque interior conformatio, tener affectu et opere probatus, plane exsuperat labilem inclinationem mere affectivam /... /", Acta Synodalia, 3, 3, 5, p. 132.

Schema 13 was the first Conciliar text presented to all the fathers which spoke of marriage as foedus. This first reference was directly inspired by Ephesians 5:32 and it read as follows: "The Christian family is an image of and participation in the covenant of love between Christ and the Church."[44] A further reference to the covenant spoke directly of marriage as an indissoluble covenant in which conjugal love and procreation are inter-related.

> Marriage is no mere instrument of procreation. Rather, the very nature of the indissoluble covenant between the persons, and most especially the good of the children, demand that the spouses truly love one another. And even if the marriage has no children, it is in no way deprived of its fundamental value or its indissolubility. But such is the character of marital love that marriage is of its nature ordered to the procreation and upbringing of children. It must be said that true married love and the whole structure of family life which results from it may be brought forth, so that the spouses be nobly disposed to cooperate with the love of the Creator and Saviour, who through them will increase and enrich his family.[45]

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44 "Sed cum familia christiana sit imago et participato foederis amoris Christi et Ecclesiae (cf. Eph. 5,32)." Ibid.

45 "Matrimonium non est merum procreationis instrumentum, sed ipsa natura foederis indissolubilis inter personas, et maxime bonum prolis exigit, ut coniuges se vere ament; et si proles deficit, matrimonium suo fundamentali valore suaque indissolubilitate non privatur. Attamen talis est amoris coniugalis indoles, ut matrimonium natura sua ordinetur ad prolis procreationem et educationem. Unde

Adnexum 2, "On Marriage and the Family", art. 2, "A Brief Description of the Vocation of Marriage", admirably incorporated the fundamental Scriptural references[46] and spoke of "a covenant of love":

> God, seeing that it was not good for the man to be alone (cf. Gen 2:18; Matt 19:4), from the beginning created them male and female. He joined them in a covenant of love, and blessed them, saying: "Be fertile and multiply; fill the earth" (Gen 1:18 /...sic read 28/). By blessing them he called them to be "one flesh" (cf. Gen 2:24; Eph 5:31), that is joined in an undivided and indissoluble partnership, that they might co-work with him and glorify him in propagating the human race.[47]

Article 4 of the adnexum carried the title "De amore et caritate in matrimonio", and linked marital love and the act of consent.

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45 (cont'd) verus amoris coniugalis cultus totaque vitae familiaris ratio inde oriens eo proditur, ut coniuges generose dispositi sint ad cooperandum amori Creatoris atque Salvatoris, qui per eos Suam familiam dilatat et ditat." Ibid.

46 Cf. H. VORGRIMLER, op.cit., p. 47.

47 "Videns Deus non esse bonum homini, si sit solus (cf. Gen. 2,18; Mt. 19,4), ab initio masculum et feminam creavit eos, amoris foedere coniunxit eos benedixitque eis: 'Crescite et multiplicamini et replete terram' (cf. Gen.I, 18 /sic read 28/). Qua benedictione vocavit eos, ut 'in una carne' (cf. Gen. 2,24; Eph. 5,31), id est consortio indiviso et indissolubili iuncti Ipsiusque in propagando genere humano cooperatores, Eum glorificent." Acta Synodalia, 3,3,5, p. 159.

> Married love, by which the spouses freely and mutually give themselves to each other and are conformed interiorly, confirmed by tender affection and by deed, is related by its nature, to the begetting and cherishing of children according to the dictates of Christian prudence. Moreover, marital consent of its essence intends the unity of this covenant, its indissolubility and the love that is devoted to the service of life. The stronger and purer marital love, the more strongly and perseveringly will the spouses accept and realize marriage's specific traits and its essential goods. However, the validity of the consent and therefore of the marriage itself is not dependent on a particular degree or perfection of this love as long as the consent is free and provided that unity, indissolubility and fruitfulness are not positively excluded.[48]

The schema and the adnexa introduced to the Council the designation of marriage as a covenant. No hierarchy of the ends of marriage was presented and marital love was stressed. Meanwhile, others were also working to have marriage treated by the Council. In particular members of another Conciliar commission were involved in the preparation of an alternative to schema 13.

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48 "Amor coniugalis, quo coniuges libere ac mutuo se ipsos dono dant et mutuo interne conformantur, tener affectu et opere comprobatus, natura sua promptus est ad prolem recipiendam et fovendam secundum christianae prudentiae dictamen. Consensus autem matrimonialis sua essentia intendit huius foederis unitatem, indissolubilitatem et amorem vitae servitio destinatum. Quo purior et firmior est amor coniugalis, eo fortius et constantius coniuges notas specificas coniugii eiusque bona essentialia affirmabunt et exequentur. Validitas vero consensus indeque ipsius matrimonii non dependet a particulari gradu perfectionis istius amoris, dummodo consensus sit liber nec positive excludatur unitas, indissolubilitas vel fecunditas." Ibid., p. 161.

3. The Work of the Commission for the Discipline of the Sacraments

The Commission for the Discipline of the Sacraments prepared 10 texts which ranged from the sacraments to mixed marriages, the form for the celebration of marriage, matrimonial procedures and even a text of 10 pages on "Lapsed Priests." The sixth text was entitled "De consensu matrimoniali" and was approved in March 1962.[49]

This schema, which appears twice in the preparatory acts of the Council, was discussed by the Central Preparatory Commission of the Council on May 10-11, 1962.[50] Chapter 6 "On Matrimonial Consent", paragraph 1, was a virtual summary of C.I.C. (1917), c. 1008. It spoke of the necessity of consent for marriage which it referred to as a "contract." In this regard the only source quoted is Leo XIII's encyclical letter "Arcanum."[51] This is unfortunate, as a more recent papal text on marriage,

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49 Acta [...] apparando, 2, 3, 1, p. 530.

50 Ibid., pp. 528-530 and ibid., 2, 2, 3, pp. 1221-1224.

51 LEO XIII, Encyclical Letter, "Arcanum Divinae Sapientiae", February 10, 1880, in Acta Leonis PP. XIII, Bruges, Desclée, 1887, pp. 117-137.

Pius XI's "Casti Connubii"[52] studiously avoided speaking of marriage as a "contract" and consistently instead spoke of marriage as a "covenant."[53]

"Casti Connubii" is, however, spoken of in the third paragraph, but only in terms of "tradit et acceptat ius coniugii proprium."[54] Paragraph 4 mentions the Church's concern to safeguard the freedom of consent and the sanctity of marriage. This paragraph is concluded by quoting the Letter to the Hebrews 13:4 "Let marriage be honoured in every way" as the "permanent conjugal partnership."[55]

In addition, dissatisfaction with the Theological Commission's initial schema De castititate, virginitate, matrimonio, familia, written as it was in the style of the text books and manuals, meant that various persons and

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52 PIUS XI, Encyclical Letter, "Casti Connubii", December 31, 1930, in A.A.S., 22(1930), pp. 539-592.

53 U. NAVARRETE, "Foedus coniugale, amor, sacramentum, attenta doctrina Concilii Vaticani II", in Quaedam problemata actualia de matrimonio, Romae, Libreria Editrice della Pontificia Universita Lateranense, 1979, pp. 58-61.

54 Acta /.../ apparando, 2, 3, 1, p. 528.

55 " /.../ consortium coniugale permanere", ibid.

groups would propose alternatives. In January 1963, the Central Preparatory Commission requested that these proposals be gathered into a single text and this task was given to the Commission for the Discipline of the Sacraments.

Six drafts[56] of proposed texts were presented to the Commission which compiled the Decretum de Matrimonii Sacramento; this was sent to the bishops by the Central Preparatory Commission in July 1963.[57] As was to be expected, the text was disciplinary in tone. It did not speak of marriage as a covenant, nor of conjugal love; nor was there any mention of the hierarchy of the ends of marriage. The fifth chapter contained a "Pastoral Instruction" which spoke of the married state as an undivided and indissoluble communion of life modelled on the perpetual covenant between "God and the Church".[58]

Written observations of the Council fathers on the text were received by the Commission up to October 1, 1963.[59]

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56 Cf. T. MACKIN, op.cit., p. 258.

57 Acta Synodalia, 3,3,8, pp. 1068-1083.

58 Ibid., p. 1080.

59 Ibid., pp. 1083-1144.

The Central Preparatory Commission asked the Commission for the Discipline of the Sacraments to reduce the proposed decree to a simple votum[60] which was sent to the bishops in April 1964. This votum of five articles spoke of marriage as a covenant of love, but the bishops considered it too brief; therefore an emended text was proposed and distributed to the Council fathers at the 119th general congregation on November 10, 1964.[61]

Bishop F. Von Streng of Basel in his written comments on the votum, highlighted the description of marriage as a "sacred covenant of love" by which "it is expressed that love is indeed an essential quality of marriage."[62] He also noted in the same contribution, the Scriptural basis in 1 Cor 13 and Eph 5:21-32 for the importance of love in marriage.

In the Council aula, Archbishop Djajasepoetra of Djakarta commended the votum. He showed particular interest

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60 Ibid., pp. 1145-1147. The relatio of the Commission for the Discipline of the Sacraments, p. 1149.

61 Ibid., pp. 467-475, the two vota arranged synoptically.

62 Ibid., p. 767. Bishop Von Streng was one of the sixteen elected members of the Commission for the Discipline of the Sacraments.

in what he called its "description or definition of marriage."[63] The text's definition remained unchanged from that of April 27, 1964 and was as follows:

> Marriage, which from the beginning of the human race, as the sacred covenant of love instituted by God for the worthy propagation of humankind and the safeguarding of the sacred law of life, was raised by Christ the Lord to the dignity of a sacrament so that in a marvelous way through sanctity and firmness it would share in his new and eternal covenant with the Church (cf. Eph. 5:32).[64]

Archbishop Djajasepoetra proposed an alternative to the substantive part of this "definition", he stated that marriage is:

> The sacred and human partnership of life between a man and a woman instituted by God for constituting a family.[65]

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63 Ibid., p. 669.

64 "/Sacramentum matrimonii dignitas/. Matrimonium iam inde ab humani generis exordio ut sacrum amoris foedus ad dignam hominum propagationem sacramque vitae legem tuendam a Deo institutum, Christus Dominus ad sacramenti dignitatem ita evexit ut mirabili modo particeps fieret sanctitatis et firmitatis sui Novi et Aeterni Foederis cum Ecclesia (cf. Eph. 5,32)", ibid., p. 467. Both texts, that of April 27 1964 (Acta Synodalia, 3,3.8. p. 1145) and the revised text of November 10, 1964 are arranged here synoptically. There is a marked difference between these texts and the originally proposed Decree on the Sacrament of Marriage, where the personalist dimension is not in evidence and marriage is not defined in covenant terms, even though the same text from Ephesians is referred to; ibid., p. 1068.

65 "Sacrum ac humanum vitae consortium inter virum et mulierem ad constituendam familiam a Deo institutum", ibid., p. 669.

The reasons for proposing this change, Archbishop Djajase-poetra stated, were the following:

> The principal accent is not placed on the act of contracting marriage ('contract', 'covenant') but on the permanent association of the whole of life ('partnership of life'). However this partnership is - sacred, in as much as the spouses are conscious of uniting themselves in an inviolable and somehow other-worldly or divine bond ('instituted by God'); - human i.e. fully human in as much as it includes the union of the whole of life and of the whole person, namely of souls, affect, solicitude and bodies.
>
> The love between the spouses is not to be placed first, because outside of Western culture marriage is often not contracted out of mutual love /... 7. The covenant, therefore, often does not arise out of love, but rather mutual love, as the fruit of the marriage gradually matures.[66]

The Council fathers decided on November 20, 1964 to send the votum to Pope Paul VI to be passed on to those who

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66 "Accentus principalis non est ponendus in actu matrimonii contrahendi ('contractus', 'foedus'), sed in permanente associatione totius vitae ('vitae consortium'). Hoc autem consortium est - sacrum, inquantum coniuges conscii sunt se uniri vinculo inviolabili et quodammodo sopramundano seu divino ('a Deo institutum'); - humanum i.e. plene humanum, inquantum includit unionem totius vitae et totius personae, scil, animarum, affectuum, sollicitudinum et corporum.

"Non primo loco ponendus est amor inter coniuges, quia extra culturam occidentalem matrimonium plerumque non contrahitur ex mutuo amore /... 7 Foedus ergo saepe non ex amore. Sed potius amor mutuus tamquam fructus matrimonii paulatim maturescens habetur", ibid.

would revise the Code's De matrimonio.[67] Schema 13 which was eventually to become the Pastoral Constitution on the Church in the Modern World, was the cause of heated debate during the fourth session of the Council.

4. Conciliar Texts and Debates Leading to a Personalist Emphasis and Covenant Terminology

The schema of the Pastoral Constitution de Ecclesia in mundo huius temporis was approved for distribution to the Conciliar fathers by Pope Paul VI on May 28, 1965. Debate in the Council aula during the 132nd General Congregation commenced on September 21, 1965.[68]

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67 Cf. T. MACKIN, op.cit., p. 259. T. Mackin says "Nothing more was heard of the document - the second on marriage to be worked up, discussed, revised, discussed again, and finally abandoned." Such was not the oblivion of this votum, however, as it re-appears as an Instruction of the S.C. for the Doctrine of the Faith, Matrimonii Sacramentum, March 18, 1966, in A.A.S., 58(1966), pp. 235-239. English translation in C.L.D., VI, pp. 592-596. The reactions of the bishops to this excessively cautious document were manifested during the 1967 Synod of Bishops which as well as approving the guiding principles for the revision of the Code, also among other topics, considered mixed marriages, cf. F.X. MURPHY and G. MacEOIN, Synod '67, Milwaukee, Bruce, 1968, pp. 48-49, 122-126. Less than three years later it was necessary to issue what the animadversiones of the bishops at both the Synod and the Council were calling for. This more definitive response came in Pope Paul VI's Apostolic Letter, Matrimonia Mixta, March 31, 1970, in A.A.S., 62(1970), pp. 257-263. English translation in C.L.D., VII, pp. 711-717.

68 Acta Synodalia, 4,4,1, pp. 419-597. Canon Moeller notes that "The French text, which to some extent (Part I

The title "Pastoral Constitution" originally suggested by Mgr. Guano in May 1963 was accepted by the Council's Co-ordinating Commission on May 11, 1965. It chose "Pastoral" because the schema was not directly doctrinal but was to be applied to the conditions of our times. It could not be called a "Decree" since it did not contain prescriptions. It is called a "Pastoral Constitution" as it complements the "Dogmatic Constitution" on the Church.[69]

The schema at this stage is noticeably the forerunner in format and content of Gaudium et Spes: a preface of 3 articles, an introduction, Part I "The Church and Man's Vocation" consisting of 4 chapters; Part II "On Some More Urgent Problems", chapter 1 "Fostering the Dignity of Marriage and the Family", in the schema consists of articles 60-64, whereas in Gaudium et Spes it runs from arts. 47 to 52.[70] The remainder consists of four additional chapters and a conclusion.

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68 (cont'd) and Introductory Statement) was the original, was issued in May and June with the explanatory note that reference might be made to it", H. VORGRIMLER, op.cit., p. 58. The Secretary General of the Council, Archbishop Felici, announced that other modern language versions in English, German, Spanish and Italian were in preparation but that the Latin text remained the only official one. Acta Synodalia, 4,4,1, p. 421.

69 Ibid., 4,4,1, p. 521

70 Gaudium et Spes, Article 47 and the schema Article 60 bear the same title "Marriage and the Family in the Modern

Unlike the text proposed to the Council's third session, the revised schema did not contain the adnexa as these had been incorporated into the body of the text and not only into its second part.[71] This fact is important as it contradicts any later attempt to regard the second part of Gaudium et Spes as of less doctrinal importance than the first part.[72]

The Relatio de particularibus is of fundamental importance as it explains the reasons why certain changes

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70 (cont'd) World"; Gaudium et Spes, Article 48 "The Holiness of Marriage and the Family" varies slightly from the schema, Article 61 "On the Sacred Ordering of Marriage and the Family"; Gaudium et Spes, Article 49, "On Married Love" is identical with the title of the schema, Article 62, as also is Gaudium et Spes, Article 50 "The Fruitfulness of Marriage" with the title of the schema, Article 63. The remaining titles vary substantially, Gaudium et Spes, Article 51 bears the title "Married Love and Respect for Human Life" whereas the schema Article 64 bears the title "God, Lord of Life". Gaudium et Spes, Article 52 "On Fostering Marriage and the Family as a Duty for All" was added to the schema.

71 An addendum notes the determinate elements in the reworking of the text and also how the former adnexa were incorporated. Acta Synodalia, 4,4,1, pp. 525-528.

72 Canon Moeller notes: "A certain number of bishops had declared that on a variety of points the appendix chapters contained more precise and better digested materials than the text of the 'Conciliar Constitution'. This argument was quickly to lead to the incorporation of these chapters in the amended text /... 7. If the appendices had remained separate from the text, they would never have attained the authority which they henceforward enjoyed. /... 7 The agreement of numerous bishops permitted the Central Subcommission to incorporate the appendices once more with the rest."
H. VORGRIMLER, op.cit., pp. 43-44.

were made in the text. We find, therefore, the reason why marriage is spoken of as a "covenant" rather than as a "contract" expressed as follows:

> Mention is not made of 'the contract of marriage' but in clearer terms the text speaks of 'irrevocable personal consent', following the recommendations of the fathers (cf. 196, /etc./. The biblical term 'covenant' is added to the text out of consideration for the Orientals for whom 'contract' presents some difficulties.[73]

The clearest indication of the attitude of the Oriental fathers[74] occurs in the written intervention of the Maronite

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73 "Mentio non fit de 'contractu matrimoniali', sed verbis clarioribus sermo est de 'irrevocabili consensu personali', secundum vota Patrum (cf. 196,217,336,337,359). Additur terminus biblicus 'foedus', intuitu etiam Orientalium, pro quibus 'contractus' quasdam difficultates facit", Acta Synodalia, 4,4,1, p. 536.

74 The best compilation of the Oriental contribution to the Vatican Council II is L'Eglise grecque melkite au Concile, Discours et notes du Patriarche Maximos IV et des Prélats de son Eglise au Concile oecuménique Vatican II, Beyrouth, Dar Al-Kalima, 1967, XV-533p. The conclusion we may, therefore, draw is that the Council fathers preferred to speak not of "contract" but of "irrevocable personal consent" and that the Scriptural term "covenant" is used because the Oriental fathers preferred this biblical term. The text remained unchanged through subsequent Conciliar debates and revision and came into the promulgated text of Gaudium et Spes, Article 48 as "foedere coniugii seu irrevocabili consensu personali instauratur." A.P. Flannery's translation as "contract of its partners, that is, in their irrevocable personal consent" is poor as it renders "contract" for "covenant" thus using the very legal term the text was studiously framed to avoid! A.P. FLANNERY, op.cit., p. 950.

Patriarch of Antioch, Cardinal P. Meouchi as follows:

> This chapter which places relatively new perspectives before us (Doms and Von Hildebrand had already launched similar ideas) and which contains some repetitions, perhaps necessary ones, allows me to make the following remarks:
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> /...7 It is good to speak of irrevocable personal consent and not of a contract so as to emphasize fully the personal dimension and to respect the Oriental tradition.75

Cardinal P. Meouchi interestingly combines the contemporary inter-personal emphasis with the biblical concept of covenant: The schema drew heavily from personalist philosophy and so was a departure from Stoic ethics that had so strongly influenced the Church's moral teaching.[76] One particular guiding principle in the schema was "to unite the two

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75 "Ce chapitre qui nous met dans des perspectives relativement neuves (Doms et Von Hildebrand avaient déjà lancé des idées semblables), et qui contient dans la suite de l'analyse des redites, peut-être nécessaires, me permet de faire les remarques suivantes:

> /...7 On a bien fait de parler de consentement personnel irrévocable et non plus de contrat: et pour se mettre tout à fait dans un ordre de personnes et pour respecter la tradition orientale." Acta Synodalia, 4,4,3, p. 150.

76 Cf. J. RATZINGER, Theological Highlights of Vatican II, New York, Paulist Press, 1966, pp. 166-167.

principal goods of marriage, procreation and love."[77] Another motif was the exposition of the Old Testament covenant between God and the chosen people which pre-figured Christ the Spouse of the Church, the foundation of the sacramental nature of marriage.[78]

The Relatio also explains the prominence given in the text to love in marriage, when it says:

> By the words: 'However marriage must be animated by conjugal love that is ... completed and crowned', as many fathers requested, by both marriage and love. The importance of conjugal love is also underlined and directed towards the very procreation and education of offspring /... 7.[79]

However, this text is preceded by a caution against making love and marriage co-terminous, so that if love were no longer present, neither would the marriage itself exist.

> The notion of the institution of marriage is strengthened by the following phrase /irrevocable personal consent 7,

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77 Acta Synodalia, 4,4,1, p. 536 (B).

78 Ibid., (D).

79 "Per verba: 'Amore autem coniugali ... animetur oportet matrimonium, quod ... completur et coronatur' mentio fit, uti multi Patres petierunt, de matrimonio simul et amore. Momentum amoris coniugalis etiam ad ipsam prolem procreandam educandamque sublineatur: 197, /etc. 7." Ibid., (C).

> so that no one could think that he could dissolve it later by his own will; or that in the absence of the required love his marriage would become null.[80]

Schema 13 had to be re-worked according to the vota of the Council fathers. Subcommissions were established to do this work. Subcommission VI[81] had as its title De matrimonio, and of this subcommission and its work, C. Moeller notes:

> The Subcommission for Marriage was the largest. Under the chairmanship of Mgr. Dearden and with the collaboration of numerous experts, several of them from Belgium, it composed what, in comparison with the old appendix II of the May 1963 text, was practically a new draft.[82]

Cardinal Dearden's contribution during the schema's development was noted by V.A. Yzermans as follows:

> Archbishop Dearden, according to many American experts, emerged as the great American leader during the fourth session because of his crucial role as chairman of

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80 "Notio instituti matrimonii sequenti phrasi firmatur, ne ullus censeat sese illud arbitrio suo postea dissolvere posse; aut, deficiente amore etiam requisito, matrimonium suum nullum fieri." Ibid., (A).

81 Canon Moeller lists the members of Subcommission VI as follows: "Mgrs. C. Colombo, Dearden, Heuschem, Morris, Petit, Van Dodewaard, Géraud, Lambruschini, Prignon, Canons Delhaye, Heylen, Frs. Schillebeeckx, Van Leeuwen and the laymen Miloli, Adjakpley and Work." The members of the other Subcommissions are also listed, in H. VORGRIMLER, op.cit., p. 63.

82 Ibid., p. 52.

> the subcommission charged with handling the chapter on marriage and the family. His courage and prudence caused him to be considered as a giant among his peers during the difficult closing days of the final session.[83]

Certainly, long before the final session of the Council, it was obvious that there were three main attitudes to the schema prevalent among the fathers. J.A. Renken notes of these three groups:

> Some prelates sought an explicit statement about the procreative finality and hierarchy of ends of marriage. Others sought a greater emphasis to be placed upon the personalist dimension of married life by stressing the important role of love in marriage. Still others were adhering to contentions located somewhere between these two extremes: while lauding the important role of the personalist aspects of marriage, these prelates did not wish the Council to deny the procreative dimension of the married state.[84]

This division of opinion between the first and second of these groups, came to a head in the latter stages of the Council. Representative of the first group was Cardinal

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83 V.A. YZERMANS, American Participation in the Second Vatican Council, New York, Sheed and Ward, 1967, p. 194.

84 J.A. RENKEN, The Contemporary Understanding of Marriage, Rome, Pontificia Studiorum Universitas a S. Thoma Aquinas in Urbe, 1981, p. 237.

Ruffini who maintained that the schema would introduce confusion regarding the ends of marriage and so the distinction between primary and secondary ends according to the C.I.C. (1917), c. 1013 #1 should be re-stated. Cardinal Ruffini also stated that this was accepted Catholic doctrine taught by the Supreme Pontiffs and other recent acts of the Holy See.[85] However, recent research has shown that the sources quoted for this canon do not support such an hierarchical ordering of the ends of marriage.[86]

Cardinal P.-E. Léger made an intervention which manifests the attitude of the second group of the Council Fathers.

> The faithful will rejoice to find praise of conjugal love in some of the texts. /.../ But they will regard the formula as inadequate and ambiguous when it simply affirms that 'the purpose of marriage is the procreation and education of children.' /.../ This formula expresses the end of marriage as far as the human species is concerned. /.../ But because marriage joins persons, it must have an object for them as individuals /.../. We should declare that marriage is not merely a means of procreation but also a community of life and love. /.../ We should explain the deep signification of procreation for conjugal love, seeing in this the peak of that

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85 Acta Synodalia, 4,4,3, p. 17.

86 U. NAVARRETE, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), pp. 366-368.

> love. /...7 Love is to be regarded not as a strictly personal thing but as something which gives the spouses a part in God's creative providence.[87]

A very important contribution to the Conciliar debate on marriage was made by Cardinal L. Shehan, Archbishop of Baltimore who noted that a clearer understanding of marriage would be gained by considering the following points: (1) marriage as an institution; (2) the nature of the marriage union; (3) the bona of marriage; (4) conjugal love; (5) the relation between conjugal love and the sexual act.[88]

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87 "Procul dubio fideles gaudebunt in hoc quod schema, quibusdam in locis, amorem coniugalem extollit. /...7 Sic considerabitur v.g. illa formula qua matrimonium definitur ut 'institutum ad procreationem et educationem prolis ordinatum.' Meo iudicio, haec formula incompleta et ambigua est; /...7.

"Sane, haec formula sensum matrimonii pro specie humana, exprimere posset. /...7 Sed cum matrimonium personas iungit, oportet ut praesertim sensus eius sicuti valet pro persona describatur /...7 matrimonium non est tantum institutum quoddam ad procreationem ordinatum sed est etiam - immo est praesertim - communitas amoris et vitae. /...7

"Lucide exponatur profunda significatio quam generatio prolis habet pro amore et vita coniugali. Sic coniuges intelligent prolem esse summum fastigium ipsius amoris qua se ad invicem diligunt. /...7. Sic coniuges intelligent amorem suum non ad seipsos simpliciter ordinari sed partem esse ipsius propositi Providentiae creatricis Dei." Acta Synodalia, 4,4,3, pp. 21-22.

88 Cardinal Shehan's intervention on these points is printed in English and offers a clear exposition of these aspects. Acta Synodalia, 4,4,3, pp. 151-158.

It was the task of the Mixed Commission to supervise the incorporation of the recommendations into the revised text. Between November 15 and 17, 1965, there were 33 votes in the aula on the schema and here, as Canon Moeller notes, a procedural point became important.

> The most important result was that the placet juxta modum never amounted to more than one third of the votes. This made it possible to take into account at the expensio modorum only those which made the accepted text clearer, deeper or more complete, and to exclude all those which contradicted the substance of the text.[89]

The subcommissions finished by October 17 what must surely be regarded as one of the feats of the Council, the handling of the expensio modorum, for there were about 20,000 of them.[90] The result was that Part II was distributed to the fathers on November 12, 1965.[91]

In this revised schema, Part II, Chapter 1, "Fostering Dignity of Marriage and the Family", runs from articles 51-56.[92]

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89 H. VORGRIMLER, op.cit., p. 66.

90 Ibid., p. 67.

91 Acta Synodalia, 4,4,6, pp. 421-563. This also includes the relatio for each chapter. Part II, Chapter 1 (Marriage and the Family) pp. 474-480 while the relevant relatio is pp. 481-491.

92 Acta Synodalia, 4,4,1, pp. 477-482 contains the

The relatio for each number is very instructive in noting the reasons for changes made to the text. Article 51 has a bearing on the definition of marriage when it is noted in the relatio:

> The words "well-being ... of human and Christian society", are added because of the auspicious state of marriage and the family for the very life of the Church; because the schema refers indeed to marriage and the family, there is now, however, mention of the "favourable state of the conjugal community and the family".
>
> The schema also intends to speak to non-Christians and so there is added, according to votum E/5659, "Christians, in union with all who highly esteem the same (conjugal and family) community".93

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92 (cont'd) previous text which consisted of articles 60-64. The promulgated text in Gaudium et Spes is articles 47-52.

93 "Additur: 'salus ... societatis humanae et christiana ob momentum faustae condicionis matrimonii et familiae pro ipsa vita Ecclesiae (E/5821); quia vero in schemate agitur de matrimonio et familia, nunc sermo fit de 'fausta condicione communitatis coniugalis et familiaris'.

"Quia schema etiam non christianos alloqui intendit, additum est, iuxta votum E/5659: 'christiani, una cum omnibus qui eandem communitatem (matrimonialem ac familiarem) magni aestimant;'", Acta Synodalia, 4,4,6, p. 482. The emphasis (in the original) notes the additions and alterations between this and the previous schema.

Even more important for its influence on the Council's (and eventually the revised Code's) definition of marriage is the text's referring to marriage as a community. This emphasis was introduced because the fathers specifically requested it, as the Relatio says:

> Many fathers right from the beginning intended not only to underline the institution but but also the communion of life in the institution (whence an addition to the text is proposed): "Intimate communion of life and love".94

No doubt in reply to those fathers who requested that "contract" be spoken of, reference is made to the former text:

> In the relatio of the previous text /Acta Synodalia 4,4,1, p. 536 / the commission stated that the word "contract" was omitted and this change was approved by many of the fathers. It is hardly possible to treat here in more detail of irrevocable consent.95

The schema in article 52 (Gaudium et Spes, art. 48) incorporates a clear reference to the interpersonal aspect

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94 "Multi Patres inde ab initio non tantum institutum sed communionem vitae in instituto sublineare intendunt: quare additio in textu proponitur: 'Intima communitas vitae et amoris' ". Ibid., p. 483.

95 "In relatione ad textum priorem /Acta Synodalia, 4,4,1, p. 536/ explicatur cur commissio verbum 'contractus' hic omisit, quem agendi modum ceteroquin plures Patres laudant. Fusius de possibilitate proferendi consensum irrevocabilem hic vix agi posset". Ibid., p. 484.

of marriage which is the basis of the consortium. The reference is specifically added to the revised text.[96] The Relatio gives the following reasons for this change:

> We propose in place of: "from the nature itself of marital love", to say: "as a mutual giving of the two persons", to which words must also be added, so that the idea may be fully expounded, "and also for the sake of children" [...] for the properties of marriage seemed to be confirmed by these two elements of married life rather than by the nature of love.[97]

Similar additions to create a more personalist emphasis were made to article 53.[98] Article 54, which speaks of marriage as a 'covenant' and contains the addition of the Roman law consuetudo in paragraph 2, is transposed in Gaudium et Spes, art. 50 as the last paragraph. The Relatio says of this addition:

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96 The previous text is in ibid., 4,4,1, p. 478.

97 "Proponitur ut loco: 'ex ipsa coniugalis amoris natura', dicatur: 'utpote mutua duorum personarum donatio', quibus verbis etiam adiungi debent, ut idea modo completo exponatur: 'atque etiam intuitu liberorum' [...] etenim proprietates matrimonii illis duobus elementis vitae coniugalis magis quam natura amoris confirmari videntur." Ibid., 4,4,6, p. 484.

98 "Cum a persona in personam voluntatis affectu dirigatur" et totius personae bonum intendere ('totius personae bonum complectitur' [...]." Ibid., 4,4,6, p. 486.

> To express the value of marriage in more positive terms, in which offspring, even though desired, are lacking, we propose the following words be added: 'that (marriage) may remain a partnership and communion of the whole of life', according to the words of Casti Connubii.[99]

Thus these changes to the schema which was assuming its final form highlighted the personalist emphasis of the text. However, there was one very exciting intervention among the more routine vota of the fathers and the work of the commissions. This situation is well summarized by T. Mackin when he says:

> This brought on the final round of the document's history, a round witnessing a manipulation of the council's rules of procedure that was both delicate and exciting. For one of these rules held that once approval of a document had been voted by the full council, no substantial changes could be made in it. But still within the purview of this rule the bishops were told that the deadline for submitting their modi in written form for any part of Schema 13 was extended beyond the deadline set by the rules, to midnight of that Wednesday, November 17, the last day of the voting in full conciliar session.[100]

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99 "Ut magis positive exprimatur valor matrimonii, in quo proles, quamvis optata, deficit, proponitur ut addatur: '(matrimonium) ut totius vitae consuetudo et communio perseverat' /.../ cum verbis 'Casti Connubbi' /.../. "Ibid., 4,4,6, p. 488.

100 T. MACKIN, op.cit., p. 263.

Into the rush and excitement of these closing days of the Council, a week beyond that deadline, came a letter to the Mixed Commission from the Cardinal Secretary of State "in the name of higher authority". Canon Moeller says of this intervention:

> As regards marriage, there was the penultimate conciliar controversy because of the modi sent in by the Holy Father. Some of the more moderate members of the Mixed Commission (some of them were members of the Theological Commission) did not hesitate to say that this was the most serious crisis of the Council.[101]

Archbishop Dearden, chairman of the subcommission on marriage actually questioned the authenticity of the letter.[102] The letter called for the insertion of explicit reference to Pope Pius XI's condemnation of contraceptive intercourse in Casti Connubii and to Pope Pius XII's condemnation of it in his 1951 discourse.[103] Reference to these texts had not been included, no doubt, because Pope Paul VI had withdrawn the question of population problems from the Council for study by a commission appointed by him.

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101 H. VORGRIMLER, op.cit., pp. 67-68.

102 X. RYNNE, The Fourth Session: The Debates and Decrees of Vatican II, New York, Farrar, Straus and Giroux, 1966, p. 213.

103 Acta Synodalia, 4,4,7, p. 509

Attached to the letter were four modi, the second of which, if accepted, would profoundly alter what the Council was teaching on the essence of marriage. Certain members of the commission maintained that the commission had to accept them "in holy obedience" and without discussion. As for the other members of the commission, Fr. B. Häring says:

> The majority in the commission acted with a wisdom and dignity worthy of the admiration of posterity. They first of all ensured their essential freedom by inquiring whether it was a question of giving consideration to the modi in accordance with conciliar procedure, or of an order from the Pope.[104]

Cardinal Léger went to Pope Paul VI the following day to get a personal clarification of his will. On November 26, Pope Paul replied through a letter from the Secretary of State which made the following four points:

> (1) Pope Paul considered the modi attached to the first letter to be of great importance; (2) the method of formulation was not obligatory; (3) certain things could be added to the modi provided the latter's meaning were retained; (4) the Pope himself would decide subsequently whether the Commission's decision was acceptable.[105]

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104 H. VORGRIMLER, op.cit., p. 228.

105 P. MACKIN, op.cit., p. 264.

The commission considered that this clarification respected their freedom and task and that the third point meant that the modi were to be treated according to the rules of the Council. Fr. B. Häring notes that:

> Pastoral safeguards against misunderstanding were introduced, while at the same time the line adopted in the text by the majority was faithfully maintained. The clearest proof that those who claimed that the modi were an order from the Pope were wrong, was the fact that Paul VI approved the commission's answer on the very same day.[106]

Reference to the Papal teaching, called for in the letter,[107] was attained by adding a footnote which referred to Casti Connubii and Pope Pius XII's Address to Midwives. Canon Moeller notes:

> The note ended with a famous sentence in which the absence of a comma after one word made a very definite difference to the meaning: "Sic stante doctrina magisterii" ("With the doctrine of the magisterium in this state") and not "Sic, stante doctrina magisterii" (Thus, the doctrine of the magisterium remaining as it is ...)." This footnote is celebrated because it is unique among all the conciliar texts; all other

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106 H. VORGRIMLER, op.cit., p. 228.

107 The text of the modi may be found in X. RYNNE, op.cit., p. 212.

notes simply contain references to biblical, patristic, scholastic or papal texts.[108]

The other change called for by the Papal modus meant the deletion of the one word "etiam". But because the deletion would have occasioned a marked change of meaning, something that the rules of the Council would not permit at this late stage, the members of the Mixed Commission proposed the addition of a phrase which would clarify the meaning in the absence of the "etiam".

Added to the text was "non posthabitis ceteris matrimonii finibus" which was intended to underline that procreation was not the only end of marriage.[109] This addition was also open to the interpretation that "procreatio et educatio prolis" was equal to the other ends of marriage (the sense of the text before the removal of "etiam") or that the question of the hierarchy of the ends of marriage was not closed, that other ends could be equal. Which of

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108 H. VORGRIMLER, op.cit., p. 68. The footnote referred to by Canon Moeller originated at the suggestion of Canon Heylen, cf. X. RYNNE, op.cit., p. 214. A.P. FLANNERY, op.cit., p. 955 follows the second, inaccurate translation mentioned by Fr. B. Häring. The Sixteen Documents of Vatican II, St. Paul Editions, p. 620, has the more accurate translation.

109 Acta Synodalia, 4,4,7, p. 494.

these interpretations is correct will be borne out after the Council as we shall examine in our next chapter.

The voting on December 6, 1965 on Gaudium et Spes, Part II, Chapter 1 "On Fostering the Dignity of Marriage and the Family" was as follows: 2,047 placet, 155 non placet, 1 placet iuxta modum and 6 null votes.[110] The final text of Gaudium et Spes[111] was voted on December 7, 1965, as follows: 2,391 possible votes, 2,309 placet, 65 non placet and 7 null,[112] thus the text met with overwhelming approval and was promulgated.

The text of Gaudium et Spes manifests a strong personalist emphasis. Having seen the development of the texts through the various schemata and the suggestions of the fathers we now know that this emphasis was deliberate. Despite numerous calls to speak of marriage as a "contract", the chapter on marriage studiously avoids doing so. Never does "contractus" nor the verb "contrahere" appear. In their place the Biblical term "foedus" with its emphasis on mutual

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110 Ibid., p. 631.

111 Ibid., pp. 733-804.

112 Ibid., p. 860.

agreement and therefore faith as well as personal aspects are revived.

5. Key Elements of the Teaching on Marriage in Gaudium et Spes

Gaudium et Spes, art. 47, commences by calling attention to the positive aspects of marriage and family life.

> The well-being of the individual person and of both human and Christian society is closely bound up with the healthy state of conjugal and family life.[113]

The text is not only addressed to Christians "ad intra" but it also addresses human society generally, and so is addressed "ad extra", which is characteristic of Gaudium et Spes as a pastoral text.

Secondly, the text points out that the favourable picture of the dignity of these partnerships is not reflected everywhere and therefore some abuses are mentioned. Yet despite these blemishes, the Pastoral Constitution is written in an optimistic spirit: "the strength and vigour of the

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113 "Salus personae et societatis humanae ac christianae arcte cum fausta condicione communitatis coniugalis et familiaris connectitur." SAC. OECUM. CON. VAT. II, Constitutiones, Decreta, Declarationes, Const. Past. de Ecclesia in mundo huius temporis, Romae, Typis Polyglottis Vaticanis, 1966, p. 753. English translation in A.P. FLANNERY, op.cit., p. 949.

institution of marriage and the family shines forth again and again".[114]

In Gaudium et Spes, art. 48, however, the consideration is of Christian marriage as such, as the title, "The Holiness of Marriage and the Family",[115] manifests. Not only is marriage as an institution treated here but also the partnership of life and love.

> The intimate community of conjugal life and love, founded by the creator and endowed with his laws, is established by the covenant of marriage or irrevocable personal consent.[116]

The interpersonal aspect is deliberately brought into focus when the words "intima personarum atque operum" were added, the word "personarum" replacing the impersonal

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114 Verumtamen matrimonialis familiarisque instituti vis et robur ex eo quoque apparent /.../. Ibid., p. 754.

115 "De sanctitate matrimonii et familiae." The earlier text was "De sacra matrimonii et familiae indole." Acta Synodalia, 4,4,1, p. 478.

116 "Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur." SAC. OECUM. CON. VAT. II, op.cit., p. 754. A.P. FLANNERY, op.cit., p. 950, speaks of "rooted in the contract of its partners" a much stronger expression than "instauratur" which seems to suggest the raising of marriage by Christ to the dignity of a sacrament. "Contractus" was deliberately avoided in the text.

"animorum, corporum".[117] In the following sentence, in addition to the good of children, mention is made of the mutual giving of persons: "for the properties of marriage seem to be confirmed by those two essential elements more than by the nature of love."[118] Thus Gaudium et Spes, instead of speaking of "the nature of married love itself,"[119] combines the two elements and says:

> The intimate union of marriage, as a mutual giving of two persons, and the good of the children demands total fidelity from the spouses and requires an unbreakable unity between them.[120]

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117 Acta Synodalia, 4,4,6, p. 484. The words "intima" and "vitae et amoris" were added to the "communitas" because: "Multi Patres inde ab initio non tantum institutum sed communionem vitae in instituto sublineare intendunt." Ibid., p. 483.

118 "[...] etenim proprietates matrimonii illis duobus elementis vitae coniugalis magis quam natura amoris confirmari videntur." Ibid. p. 484.

119 "[...] ipsa coniugalis amoris natura." Ibid.

120 "Quae intima unio, utpote mutua duarum personarum donatio, sicut et bonum liberorum, plenam coniugum fidem exigunt atque indissolubilem eorum unitatem urgent". SAC. OECUM. CON. VAT. II, op.cit., p. 755; emphasis added. The "mutua duarum personarum donatio" refers to the whole community of married life and love which is to be lived as a mutual self-giving, one aspect of which is their sexual union. In a later chapter we will examine the profound contribution that this and similar phrases of Gaudium et Spes had on the revised Code's definitions of marriage (c. 1055 #1) and consent (c. 1057 #2).

Speaking of the specifically Christian element of marriage, the second paragraph of article 48 says that the conjugal covenant of love has its source in the spring of divine love. The sacrament of marriage is then spoken of as a covenant, modeled on Christ's own union with the Church, a clear reference to Ephesians 5. The Old Testament references to marriage as a covenant are presented as prefiguring the union of Christ and the Church:

> Just as of old God encountered his people with a covenant of love and fidelity, so our Saviour, the spouse of the Church, now encounters Christian spouses through the sacrament of marriage.[121]

In addition to comparing the covenant of old with the New Testament relationship between Christ and the Church, indissoluble per se, the text is decidedly personalist in tone, as B. Häring says:

> The sacramental nature of marriage is here described in very personalist terms, as a meeting with Christ. He abides with

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121 "Sicut enim Deus olim foedere dilectionis et fidelitatis populo suo occurrit, ita nunc hominum Salvator Ecclesiaeque Sponsus, per sacramentum matrimonii christifidelibus coniugibus obviam venit." SAC. OECUM. CON. VAT. II, op.cit., pp. 755-756. The covenant of love and fidelity entered into by God with his people in the Old Testament was the basis for the designation of marriage as a covenant in the OT texts referred to here, as we examined in Chapter 2.

> the couple who in his name have become an indissoluble unity. The purpose of his abiding presence, which is understood dynamically, is to make their love increasingly resemble his own love for the Church, so that it will truly become mutual dedication in absolutely faithful love.[122]

This concept of self donation of the spouses, their mutual giving, donatio - acceptatio, recurs again in Gaudium et Spes, art. 49, which speaks of married love in very positive terms:

> Married love is an eminently human love because it is an affection between two persons rooted in the will and it embraces the good of the whole person; it can enrich the sentiments of the spirit and their physical expression with a unique dignity and ennoble them as the special elements and signs of the friendship proper to marriage. The Lord, wishing to bestow special gifts of grace and divine love on it, has restored, perfected and elevated it. A love like that, bringing together the human and the divine, leads the partners to a free and mutual gift of self, experienced in tenderness and action, and permeates their whole lives.[123]

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122 H. VORGRIMLER, op.cit., p. 235.

123 "Ille autem amor, utpote eminenter humanus, cum a persona in personam voluntatis affectu dirigatur, totius personae bonum complectitur ideoque corporis animique expressiones peculiari dignitate ditare easque tamquam elementa ac signa specialia coniugalis amicitiae nobilitare valet. Hunc amorem Dominus, speciali gratiae et caritatis dono, sanare, perficere et elevare dignatus est. Talis amor, humana simul et divina consocians, coniuges ad liberum et mutuum sui ipsius donum, tenero affectu et opere probatum,

Gaudium et Spes, of course, speaks of this love not as an end in itself: "Marriage and married love are by nature ordered to the procreation and education of children."[124] But there is also a counterbalance, lest this be interpreted as continuing the hierarchy of ends established by the C.I.C. (1917), c. 1013 #1. The Conciliar teaching, while giving due emphasis to procreation, also lays equal stress on the good of the spouses.

The Pastoral Constitution makes this emphasis when it states:

> But marriage is not instituted merely for the procreation of children: but its nature as an indissoluble covenant between the persons, and the good of the children demand that the mutual love of the partners be properly shown. /... / marriage retains its character as a partnership and communion of the whole of life and preserves its value and indissolubility.[125]

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123 (cont'd) conducit totamque vitam eorum pervadit." SAC. OECUM. CON. VAT. II, op.cit., pp. 757-758. English translation from A.P. FLANNERY, op.cit., p. 952; emphasis added.

124 "Matrimonium et amor coniugalis indole sua ad prolem procreandam et educandam ordinatur." Ibid., art. 50, p. 759.

125 "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, /... / matrimonium ut totius vitae consuetudo et communio perseverat. suumque

In speaking of marriage as foedus and consuetudo, the Council deliberately chose these biblical and personalist terms. But Gaudium et Spes was not the first document of the Magisterium to phrase the teaching in such terms. Many of the fathers consistently called for the Council to draw upon the richness of these expressions as contained in the encyclical letter of Pope Pius XI, "Casti Connubii".[126]

Conclusion

The text of Gaudium et Spes, arts. 47-52 with its teaching on the personalist dimension of marriage, and the designation of marriage as a covenant and as a partnership or community is a far cry from the initial draft prepared for the Council. But this teaching was contained in a Pastoral Constitution which was intended to have the Church address the world of today and some of its more pressing problems.

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125 (cont'd) valorem atque indissolubilitatem servat", Ibid., art. 50, p. 761; emphasis added.

126 PIUS XI, Encyclical letter, "Casti Connubii" December 31, 1930. in A.A.S., 22(1930), p. 552. 560; U. NAVARRETE, "Foedus coniugale, amor, sacramentum, attenta doctrina Concilii Vaticani II", in Quaedam problemata actualia de matrimonio, Romae, Libreria Editrice della Pontificia Università Lateranense, 1979, pp. 58-65.

There were constant calls to have the text speak in terms of the "contract" of marriage rather than of the "covenant" and to re-assert the hierarchy of the ends of marriage. The text left aside the former terms. But was this abandoning of the former technical vocabulary and the preference for more pastoral terms, of little or no juridical consequence? Such was maintained by some. The crucial answer would not come in any once and for all response, but in a multiplicity of post-Conciliar documents and addresses.

This post-Conciliar teaching, then, is the necessary complement and interpreter of matters the Council did not speak of directly. Let us now consider this legislative and teaching activity of the Popes and Synods to see its impact on the definition and essential constituents of marriage according to the Conciliar teaching.

CHAPTER VI

POST-CONCILIAR PAPAL AND SYNODAL TEACHING ON MARRIAGE AS A COVENANT AND CONSORTIUM

1. The Teaching of Pope Paul VI on Marriage as a Consortium

The Vatican Council II came to a close on December 8, 1965. But the Commission for Population Problems, which had been formed by Pope John XXIII in March 1963,[1] had not by then submitted its report to the Pope. Pope Paul VI addressed the commission at its fourth plenary session on March 27, 1965, pointing out the levels of their study: the physiological, psychological and medical data. Pope Paul said that above these were "the data of Faith and the traditional teaching of the Church".[2] Perhaps this statement constitutes a foreshadowing of the teaching of "Humanae Vitae".

Pope Paul VI spoke of marriage in an address, two months after the closing of the Council, as follows:

> God has made use of marriage and the family to wisely unite two of the greatest elements in

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1 PAUL VI, Encyclical Letter, "Humanae Vitae", July 25, 1968, in A.A.S., 60(1968), p. 484. There is no mention of this Commission in A.A.S., 55(1963).

2 "/...le plan de la lumière supérieure que projettent sur ces faits / les données de la Foi et de l'Eglise". ID., Address to the Special Papal Commission Examining the Problems of Population Growth, Family Planning and Birth Regulation, March 27, 1965, in A.A.S., 57(1965), p. 388; English translation in C... LIBARD (ed.), Official Catholic Teachings: Love and Sexuality, Wilmington, N.C., McGrath, 1978, p. 269.

> human existence: the mission of transmitting life and the legitimate mutual love of man and woman, by which they are called to complete each other in a reciprocal giving of themselves that is not just physical but above all spiritual. Or to put it better, God wanted to make married people share in this love - the personal love that he has for each of them, by means of which He calls them to help each other and to give themselves to each other to achieve the fulness of their personal lives /...7.[3]

Pope Paul VI here takes up the donatio - acceptatio of Gaudium et Spes, art. 48, in what seems to be his first address on marriage since the conclusion of the Council. The Papal Commission on Birth Control also turned to the Council's personalist emphasis. It spoke of the couple as a "community of persons" and "conjugal love, without which marriage would not be a true union of persons."[4] Also quoted was Pius XI's encyclical "Casti Connubii" which referred to the Roman Catechism's definition of marriage "in the wider sense as a complete and intimate life-partnership and association."[5]

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3 PAUL VI, Address to the Participants in the 13th National Congress of the Italian Women's Center, February 12, 1966, in Ibid., p. 291.

4 COMMISSION FOR THE STUDY OF PROBLEMS OF POPULATION, FAMILY AND BIRTH, "Theological Report", June 26, 1966 in C.M. LIEBARD (ed.), op.cit., pp. 298-299.

5 "/...7 latius ut totius vitae communio, consuetudo, societas accipiatur." PIUS XI, Encyclical Letter, "Casti Connubii", December 31, 1930, in A.A.S., 22(1930), p. 549.

While the papal addresses are an exercise of the **ordinary** teaching office, the more fundamental canonical ramifications in the post-Conciliar era would come through the exercise of that teaching office in the encyclical "Humanae Vitae". This encyclical, treating of a subject intimately related to marriage, marks a turning point. Either the Conciliar teaching would be confirmed in the papal teaching or the earlier formulations would be returned to.

a. The **Encyclical Letter** "Humanae Vitae".

Pope Paul VI had confirmed and enlarged the Study Commission which Pope John XXIII had instituted, the scope of which was the gathering of opinions on new questions regarding conjugal life and the regulation of births, so that the magisterium could give an adequate reply.[6]

In comparison with other encyclicals, "Humanae Vitae" is commendably brief,[7] and is divided into 3 parts. Firstly, an overview of questions regarding marriage and the transmission of life. This is followed by an affirmation that

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6 PAUL VI, Encyclical Letter, "Humanae Vitae" July 25, 1968 in A.A.S., 60(1968), art. 5, p. 484.

7 "Humanae Vitae" runs for 22 p. of the A.A.S., whereas "Casti Connubii" is more than double this length at 53 p.

"the Church is competent to interpret even the natural moral law."[8] Secondly, doctrinal principles are proclaimed, art. 11 stating the core pronouncement "that each and every marriage act must remain open to the transmission of life."[9] Thirdly, there are a series of pastoral directives to the members of the Church, an appeal to public authorities, to scientists, to Christian husbands and wives. to doctors and medical personnel, to priests and finally to bishops, thus reversing the order in which such appeals were customarily made.

For most outside the Church and, unfortunately, even for many within, the teaching contained in "Humanae Vitae" degenerated into two catch words, "No Pill". This did, at the time of the encyclical's release, and regrettably still does, obscure the profound teaching of Pope Paul on marriage and family life. Regarding the view of marriage, particularly as enriched by the Council, with the emphasis on the personal and inter-personal dimensions of marriage, the encyclical is

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8 "Ecclesiae Magisterium interpretationem legis moralis naturalis spectare", "Humanae Vitae", art. 4, in A.A.S., 60(1968), p. 483.

9 "[...] ut qualibet matrimonii usus ad vitam humanam procreandam per se destinatus permaneat", ibid., art. 11, p. 488.

noteworthy for what it did not say.

If the emphasis of Vatican Council II in "Gaudium et Spes" art. 48-50 was simply to be a statement of the Church's view of marriage before the world, but not to have an influence on theology and the juridical effects of marriage within the Church, as some have claimed, in wanting to deny juridical relevance to the Conciliar view of marriage, then "Humanae Vitae" becomes the touchstone. For "Humanae Vitae" presents the opportunity either to continue the Vatican Council II's thrust in giving proper emphasis to the personal-communal aspects of marriage or to return to the terminology of "contract" and the primary and secondary ends of marriage, which had become the standard expressions of the juridic reality since the Pio-Benedictine Code.

That Pope Paul VI was determined to continue the Conciliar teaching is clear not only from the content of "Humanae Vitae" and all other acts of his pontificate, but also from the fact that arguments based on the primary end of marriage would have provided a ready-made basis for the teaching of "Humanae Vitae". In choosing not to use such arguments and terms, but in contrast, remaining faithful to the recently proclaimed teaching on marriage in "Gaudium et Spes", Pope Paul VI builds on the teaching of Vatican

Council II, which was given "in a highly authoritative form."[10]

In the doctrinal principles of the encyclical, Pope Paul VI starts from a consideration of a total view of man, a view not limited to any partial perspective, whether biological, psychological or sociological. It is a view which considers the human person and problems regarding human life, in the light of an integral vision of man. Pope Paul VI gives in art. 8 what could well be regarded as a definition of marriage.

> Marriage is not, then, the effect of chance or the product of evolution of unconscious natural forces; it is the wise institution of the Creator to realize in mankind His design of love. By means of the reciprocal personal gift of self, proper and exclusive to them, husband and wife tend towards the communion of their beings in view of mutual personal perfection, to collaborate with God in the generation and education of new lives.[11]

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10 "/...7 summa auctoritate exposuit." Ibid., art. 7, p. 485.

11 "Tantum igitur abest, ut matrimonium e casu quodam vel e caeco naturalium virium cursu nascatur, ut reapse illud sapienter providenterque Creator Deus ea mente instituerit, ut in hominibus suum amoris consilium efficeret. Quocirca per mutuum sui donationem, quae ipsorum propria est et exclusoria, coniuges illam persequuntur personarum communionem, qua se invicem perficiant, ut ad novorum viventium procreationem et educationem cum Deo operam socient." Ibid., art. 8, pp. 485-486. English translation, Of Human Life, Boston, St. Paul Editions, art. 8, p. 7.

Pope Paul continues by specifying the characteristics of conjugal love, which is brought about by this "reciprocal personal gift of self" directed as it is to a "communion of their beings." Firstly, this love is "fully human"; it is of the senses and of the spirit, an act of the free will, intended to endure so that husband and wife become one heart and soul. Secondly, this love is "total" a very special form of personal friendship in which husband and wife generously share. Love of one's marriage partner is not for what one receives, but for who, the partner's self, rejoicing that the partner can be enriched by the gift of self. Finally, Pope Paul says of conjugal love that it is faithful and exclusive, giving as examples the couple who freely and in full awareness assume the marriage bond and also "so many married persons down through the centuries."[12]

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12 "Posita enim volventibus saeculis a tot coniugibus [...]." Ibid., art. 9, p. 486. Pope Paul does not list any such examples. It is also noteworthy that the Church's calendar of saints includes very few husband and wife saints. This is in contrast to the Old Testament, where husband and wife are often extolled, beginning with Adam and Eve who rejoice in each other, the helpmate being fashioned from man's very self, whereas the animals are simply paraded before the man. Abraham and Sarah are a model of love and affection, and God looked kindly upon them, relieving them of their sterile affliction. Tobias and Sarah initially are united in mind and heart rather than sexually, and God blesses them. At the dawn of the New Testament, Zachary and Elizabeth are

Article 4 states that:

> Conformably to this mission of hers, the Church has always provided - and even more amply in recent times - a coherent teaching concerning both the nature of marriage and the correct use of conjugal rights and the duties of husband and wife.[13]

This teaching was given "in a highly authoritative form by the Second Vatican Council in its pastoral constitution Gaudium et Spes."[14] Thus did Pope Paul VI himself express

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12 (cont'd) models in placing their trust in God, while Christian tradition celebrates Joachim and Anne, and in the New Testament the marriage of Joseph and Mary. There is, however, a regrettable lack in the number of married holy men and women who are recommended for emulation in the Church's calendar of Saints.

13 "Hoc autem mandatum Ecclesia persecuta, omni tempore, sed recentiore aetate copiosius, sive de matrimonii natura, sive de recto coniugum iurium usu, sive de ipsorum officiis congrua dedit documenta", ibid., art. 4, p. 483. The footnote enumerating these documents extends from The Roman Catechism of the Council of Trent, Leo XIII "Arcanum", Pius XI "Casti Connubii" and the addresses of Pius XII to "Gaudium et Spes", arts. 47-52. There is an intriguing mention of C.I.C. (1917), c. 1067 (marriageable age); c. 1068 (impotence); and c. 1076(consanguinity) but no mention of c. 1013 (ends of Marriage) nor of c. 1081 #2 (consent). Canon 1013 would have constituted the clearest traditional statement of the hierarchy of ends and yet Pope Paul VI did not refer to it, choosing rather to speak of unitive and procreative meanings of the conjugal act. "Humanae Vitae" art. 12, in A.A.S., 60(1968), p. 488.

14 "Concilium Vaticanum II, Constitutione pastorali edita a verbis Gaudium et Spes incipiente, summa auctoritate exposuit", ibid., art. 7, p. 485. P. HUIZING (ed.), Concilium, 167(1983), was devoted to "The Ecumenical Council: Its Significance in the Constitution of the Church."

his estimation of the Conciliar teaching on marriage. Implicit here was a statement that Gaudium et Spes presented far more than a statement by the Church to the world on marriage. Even more so, the Pope seems to be asserting that it constituted an authoritative pronouncement on the nature of marriage, particularly the inter-personal dimension that had, in the main, been neglected since the Middle Ages.[15]

b. Address to the Roman Rota, "The Bond of Marriage", February 9, 1976.

Certainly from the pontificate of Pius XII onwards the

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14 (cont'd) The following articles are relevant: G. ALBERIGO, "The Papacy in the Ecumenical Council", pp. 69-75; M. COLAIANNI, "Criticism of the Second Vatican Council in Current Literature", pp. 106-110; J. KOMONCHAK, "The Ecumenical Council in the New Code of Canon Law", pp. 100-105; R. METZ, "The Influence of Vatican I on the Legal Status of an Ecumenical Council in the Code of Canon Law of 1917", pp. 95-99; P. RICCA, "Should the Ecumenical Council be an Expression of the Collegiality of Bishops, of the Communio Ecclesiarum or even a Representation of the Whole Community of the Faithful?", pp. 85-91; F. WOLFINGER, "Ecumenical Councils and the Reception of their Decisions", pp. 79-84.

15 L.E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage", in S.C., 13(1979), pp. 35-70; HUGH OF ST. VICTOR, De Sacramentis, lib. II, pars XI, in PL, 176, 479-520; J. LECLERCQ, Monks on Marriage: A Twelfth-Century View, New York, Seabury, 1982, viii-135p; F. MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 145-191. D. O'CALLAGHAN, "Love in Marriage: How New Was Vatican II", in The Irish Theological Quarterly, 46(1979), pp. 221-239.

annual papal address to the members of the Rota[16] provides an authoritative commentary on the canonical aspects of marriage and tribunal procedures. Pope Pius XII, unlike his predecessor Pius XI who wrote "Casti Connubii", did not write an encyclical on marriage. Yet his Rotal addresses, and those to various other groups have proven to be influential.[17] Popes John XXIII and Paul VI followed the lead of Pope Pius XII in addressing the Rota at the commencement of the judicial year.

In the address on February 9, 1976, Pope Paul VI interpreted what Gaudium et Spes said on the importance of love in marriage and particularly of the relationship between conjugal love and the bond of marriage. Pope Paul commended the Rota[18] for applying what the Vatican Council II had said

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16 Addresses of Popes Pius XII to John Paul II to the Roman Rota, compiled by students of the Faculty of Canon Law, St. Paul University, Ottawa, 1984, 141 p.

17 PIUS XII, Address to the Roman Rota, "The Roman Rota and Marriage Cases", in A.A.S., 33(1941), pp. 421-426. English translation in C.L.D. II, pp. 454-458; Apart from "Casti Connubii", the other source quoted by Pope Paul VI in the core statement of "Humanae Vitae" (art. 11), was PIUS XII, Address to Obstetricians, October 29, 1951, in A.A.S., 43(1951), p. 843.

18 S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), pp. 174-192; c. Anné, July 22, 1969, ibid., pp. 863-872; c. Fagiolo, October 30, 1970, ibid., 62(1970), pp. 978-990; c. Serrano, April 5, 1973, ibid., 65(1973), pp. 322-343.

of the spiritual side of marriage. In this regard, the Pope said:

> This tribunal has become more aware of its serious obligations and has come to understand the full importance of the personalist approach which the Council emphasizes in its teaching and which consists in rightly esteeming conjugal love and the mutual perfection of the spouses.[19]

Pope Paul also stated that the experience of the Rota would provide "very useful, and indeed, unparalleled material for the new canonical legislation."[20] Like Pius XII,[21] Paul VI commended the Rota's "taking into account such findings of jurisprudence, biology, psychology, and the social sciences as contribute to a better knowledge and appreciation of marriage."[22] Unlike Pius XII, Paul VI

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19 "[...] serium officium istius Tribunalis excitavit idque induxit ut plenam perciperet significationem rationis magis personalis quam magisterium Concilii proposuit quaeque in aequa aestimatione amoris coniugalis et in mutua perfectione coniugum nititur ", PAUL VI, Address to the Roman Rota, February 9, 1976, in A.A.S., 68(1976), p. 205. English translation in The Pope Speaks, 21(1976-1977), p. 151.

20 "[...] materiam perutilem et praestantissimam afferendi novae legislationi canonicae ", ibid.

21 PIUS XII, Address to the Roman Rota, October 3, 1941, in A.A.S., 33(1941), pp. 421-426.

22 "[...] in colendis disciplinis iuridicis, biologicis, psychologicis et socialibus habiti sunt - per quas matrimonium melius cognitum est et perspectum [...] ", PAUL VI, Address to the Roman Rota, February 9, 1976, in A.A.S., 68(1976), p. 205.

insisted on the partnership aspect of marriage when he stated that these findings of the contemporary sciences would help the understanding "of the true nature of marriage as a community of love."[23] This statement of the importance of love leads Pope Paul to assert that love is not juridically necessary for marriage, quoting the Roman law principle that "consent makes a marriage":

> In virtue of this well-known principle, a marriage exists at the moment when the spouses express a juridically valid matrimonial consent. This consent is a will-act which establishes a contract (or a conjugal covenant, to use the phrase preferred today). In an indivisible moment of time it produces a juridical effect, namely an existing marriage as a state of life. Once the moment is past, the wills of the consenting partners have no power to affect the juridical reality they have brought into being. Consequently, once the consent has produced its juridical effect, it automatically becomes irrevocable and lacks power to destroy what it created.[24]

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23 "[...] matrimonium [...] secundum veram suam naturam ut communitas amoris [...]", ibid. The final part of this paragraph is in a similar vein when it says, "quo perfectus in dies et modo magis congruenti indolem suam consortionis coniugalis et sacramenti ostenderet", ibid.

24 "Vi huius principii, omnibus probe cogniti, matrimonium exsistit eo ipso temporis momento, quo coniuges matrimonialem consensum praestant iuridice validum. Talis consensus est actus voluntatis indolis practiciae (vel foedus coniugii, ut dictione utamur, quae hodie potior habetur quam vox contractus), qui quidem puncto temporis indivisibili gignit iuridicum effectum, seu matrimonium 'in facto esse', uti aiunt, vel vitalem statum, neque postea ullam vim habet

Pope Paul VI saw that this doctrine was taught in Gaudium et Spes, art. 48. Some, it seems, were invoking the other Roman law notion of the "affectio maritalis" to say that if conjugal affection, the will to remain as husband and wife was no longer present, then neither was there any marriage. To this opinion, which, it seems, was even being applied in some ecclesiastical marriage courts, Pope Paul stated clearly and unequivocally:

> We must, therefore, reject without qualification the idea that if a subjective element (conjugal love especially) is lacking in a marriage, the marriage ceases to exist as a juridical reality which originated in a consent once and for all efficacious. No, the juridical reality continues to exist in complete independence of love; it remains even though love may have totally disappeared.[25]

Of course, Pope Paul does not say that love is of no importance in marriage, on the contrary, he says "it is a

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24 (cont'd) ad 'realitatem iuridicam', quam creavit. Quod fit ut, cum semel effectum iuridicum creaverit seu vinculum matrimoniale, huiusmodi consensus irrevocabilis evadat ac virtute careat id, quod peperit, destruendi", ibid., p. 206. English translation, ibid., p. 152.

25 "Prorsus igitur negandum est, deficiente quovis elemento subiectivo, cuiusmodi est in primis amor coniugalis, matrimonium non amplius exsistere ut 'iuridicam realitatem', quae ortum duxit a consensu semel atque in omne tempus iuridice efficaci. Haec 'realitas', ad ius quod spectat, esse pergit ex amore minime pendens, eademque permanet, etiamsi amoris affectus plane evanuerit", ibid., p. 207. English translation, ibid., p. 153.

force of the psychological order and God has set as its goals the ends of marriage itself."[26] This identity of goals may lead to confusion, but Pope Paul emphatically states that "conjugal love does not enter the purview of law."[27]

Gaudium et Spes, art. 48, spoke of the conjugal covenant of irrevocable personal consent creating a stable institution and sacred bond. It spoke of marriage as a "covenant" and we have already noted that Pope Paul VI said this is the preferred word today. During the 146th general congregation of the Council, when 190 fathers made a final effort to have explicit mention of the hierarchy of

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26 "Est vis quaedam ordinis psychologici, cui Deus ipsos matrimonii fines praestituit", ibid.

27 "Amor coniugalis, etiamsi in iuris provincia non assumatur /... /", ibid. Emphasis added. SACROSANCTUM OECUMENICUM CONCILIUM VATICANUM II, Constitutiones, Decreta, Declarationes, Const. Past. de Ecclesia in mundo huius temporis, Romae, Typis Polyglottis Vaticanis, 1966, p. 754. The terms "institutum ordinatione" and "vinculum sacrum" are used in the text to speak of the unbreakable bond that arises from the partners' irrevocable personal consent. T. MACKIN, What is Marriage?, New York, Paulist Press, 1982, p. 322 says that here Pope Paul makes a "departure from the teaching of Gaudium et Spes, which placed the unfailingness of marriage not in the indissoluble juridical bond, alias the non-voidable contract, but in the spouses' irrevocable personal consent". We fail to see how this could be a departure when Gaudium et Spes itself speaks of the "bond" and "institution" arising from the consent.

the ends of marriage incorporated into Gaudium et Spes, art. 52, the relatio notes that the text is pastoral and that juridical precision is not required.[28]

Pope Paul VI was guided by the Vatican Council II as he admirably implemented the Concilar teaching. Canonically, one of his lasting legacies is the process he instituted for the revision of the Code of Canon Law. Compared to the somewhat single handed preparation by Cardinal Gasparri of the 1917 Code, the long term, broad consultation for the revised Code is a lasting monument to the crucial pontificate of Pope Paul VI.

The all too brief pontificate of Pope John Paul I was insufficient for any major statement or document on marriage as a partnership. However, in an address to bishops from the U.S.A., Pope John Paul I spoke of making the teaching of Pope Paul VI his own and referred to Vatican Council II Lumen Gentium, art. 11 on the family as the "domestic Church".

> Let us never grow tired of proclaiming the family as a community of love: conjugal love unites the couple and is procreative of

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28 Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, 4,4,7, p. 477.

> new life; it mirrors the divine love, is communicated, and, in the words of Gaudium et Spes, is actually a sharing in the covenant of love of Christ and His Church.[29]

Addresses of the Popes may be regarded as an exercise of the ordinary papal magisterium. The successor of Pope John Paul I has already made a unique contribution. Firstly, no other Pope in the history of the Church has taken his message personally to so many in various lands and situations. Secondly, Pope John Paul II has made the general audience address a means of imparting consistently a theme which is then developed successively week by week. However, the addresses with a more direct canonical application have been those given to the Roman Rota at the commencement of the judicial year.

2. Teaching of Pope John Paul II on Marriage as a Covenant and Consortium.

a. Addresses to the Roman Rota 1979 - 1984.

The first address of Pope John Paul II to the Rota chiefly concerned human rights and contained the following admirable testimony:

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29 JOHN PAUL I, Address to the Bishops of Pastoral Region XII of the U.S.A., September 21, 1978 in A.A.S., 70(1978), p. 766. English translation in The Family, Center of Love and Life, Boston, St. Paul Editions, 1981, p. 80.

> In the history of the 20th century the Church will perhaps go down as the chief defender of the human person throughout the whole of his or her life beginning with conception.[30]

The role of Canon law is to foster order in the communal dimension of one's membership in the Church, thus ensuring that rights are to be exercised within the communion of the Church.

The second address is a useful summary of the role of the tribunal personnel and a clarification of the moral certainty required of the judge. In this regard Pope John Paul II, highlighting the contribution of Pope Pius XII, said:

> Taking advantage of the doctrine and jurisprudence that has developed particularly in more recent times, Pius XII declared in an authentic way the canonical concept of moral certainty in the allocution addressed to your court on 1 October, 1942 (A.A.S., 34 /1941/, pp. 339-343).[31]

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30 "Forse il XX secolo qualificherà la Chiesa come il principale baluardo a sostegno della persona umana in tutto l'arco della sua vita terrena fin dal suo concepimento." JOHN PAUL II, Address to the Roman Rota, February 17, 1979, in A.A.S., 71(1979), p. 422. English translation in The Pope Speaks, 24(1979), p. 218.

31 "Facendo tesoro della dottrina e della giurisprudenza sviluppatosi sopratutto in tempi più recenti, Pio XII dichiarò in modo autentico il concetto canonico di certezza morale nell'allocuzione rivolta al vostro tribunale il 1 ottobre 1942 /A.A.S., 34(1941 sic, read 1942), 339-343/." in A.A.S., 72(1980), p. 176. English translation in L'Osservatore Romano, March 3, 1980, p. 6. Emphasis added.

In this address Pope John Paul II commended the Rota for applying the Vatican Council II's teaching on marriage and that of the behavioural sciences in the Rota's judging of marriage cases, while avoiding any excesses. In this regard the Pope said:

> /... / the values of married life, rightly highlighted by the Second Vatican Council, and the progress of the human sciences, especially psychology and psychiatry, have brought to your Court new cases and new approaches to matrimonial trials, which are not always correct. It has been your merit after a serious and delicate study of the doctrine of the Council and of the above-mentioned sciences to think out "questions of law" /... /.[32]

Pope John Paul approved the Rota's introduction of the new ground of lack of consent and said this was in accord with Paul VI's address to the Rota of February 9, 1976, which we have already considered. The addresses to the Rota from 1981 - 1982 specifically treat of marriage, especially in the terms used by the Council.

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32 "/... / quando i valori della vita matrimoniale giustamente messi in particolare luce dal Concilio Vaticano II, ed il progresso delle scienze umane, in specie della psicologia e della psichiatria, hanno fatto confluire al vostro Tribunale nuove fattispecie e nuove impostazione delle cause matrimoniale, non sempre corrette. 'E stato merito vostro, dopo un serio e delicato approfondimento della dottrina conciliare e delle suddette scienze, elaborare delle 'quaestiones iuris' /... /." Ibid., p. 177.

After stating that the Second Vatican Ecumenical Council had set the tone by examining man in the light of Christ, the rotal address spoke of marriage today as follows:

> Among the problems that most affect man's heart today and consequently the human environment, both family and social, in which he lives and works, the pre-eminent and indispensible one is that of conjugal love which binds two human beings of different sex, making them a community of life and love, that is, uniting them in marriage.[33]

This text is obviously inspired by Gaudium et Spes, art. 48.[34] This faithful following of the Council's lead is the consistent characteristic of Pope John Paul II's statements on the nature of marriage as the following year's address to the Rota manifests even more clearly.

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33 "Tra quelli che oggi piu travagliano il cuore dell' uomo, e di conseguenza l'ambiente umano, sia familiare sia sociale, nel quale egli vive ed opera, va annoverato come preeminente ed inderogabile quello dell'amore coniugale, che lega due esseri umani distinti per sesso, facendone una communità di vita e di amore, unendoli cioè in matrimonio." JOHN PAUL II, Address to the Roman Rota, January 24, 1981, in A.A.S., 73(1981), p. 229; English translation in L'Osservatore Romano, February 2, 1981, p. 10.

34 SAC. OECUM. CON. VAT. II, op.cit., p. 754, "Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur."

In an explicit reference[35] to the text of Gaudium et Spes, art. 48 noted above, Pope John Paul says:

> The Council saw marriage as a covenant of love. This covenant "supposes a conscious and free choice whereby the man and the woman accept the intimate community of life and love willed by God himself". (Familiaris Consortio, n. 11).[36]

Pope John Paul II spoke of love as a gift, that is more than an erotic sensation, when he said the Council saw the act of love as:

> /...7 an act of giving which is one, decisive, irrevocable because it is a total giving which wants to be and to remain mutual and fruitful.[37]

This giving, lovingly and sexually, follows the act of consent, which is, of course, what is juridically essential.

Pope John Paul II reflected on the importance of consent when he said:

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35 JOHN PAUL II, Address to the Roman Rota, January 28, 1982, in A.A.S., 74(1982), p. 450, footnote 4.

36 "Il Concilio ha visto il matrimonio come patto di amore. Questo patto 'suppone la scelta cosciente e libera, con la quale l'uomo e la donna accolgono l'intima comunità di vita e d'amore, voluta da Dio Stesso' ", ibid. English translation in L'Osservatore Romano, February 8, 1982, p. 6.

37 "/...7 un atto di donazione, unico e decisivo, irrevocabile come lo è un dono totale, che vuole essere e restare mutuo e fecondo ", ibid.

> To understand fully the exact meaning of marriage consent we must allow ourselves to be enlightened by divine revelation. The marriage consent is an act of the will which signifies and involves a mutual giving which unites the spouses /...7.
>
> Seen in this light marriage consent is a commitment in a bond of love where in the same gift there is expressed the agreement of wills and hearts to realize all that marriage is and signifies for the world and the Church.[38]

The Conciliar thrust of addressing the world "ad extra" is here placed first, no doubt in recognition of marriage as a natural institution. Only secondly is the dimension "ad intra" mentioned, of marriage as an ecclesial act constituting a sacramental reality, the natural institution raised to the dignity of a sacrament (cf. c.1055 #1).

The other aspect, in addition to marriage as a covenant of love, emphasized by the Council in Gaudium et Spes was "giving", the gift of one's self to one's partner in

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38 "Per comprendere pienamente il senso esatto del consenso matrimoniale, dobbiamo lasciarci illuminare dalla rivelazione divina. Il consenso nuziale è un atto di volontà che significa e comporta un dono mutuo, che unisce gli sposi /...7.

Visto così il consenso matrimoniale è un impegno in un vincolo di amore dove, nello stesso dono, si esprime l'accordo delle volontà e dei cuori per realizzare tutto quello che è e significa il matrimonio per il mondo e per la Chiesa." Ibid., pp. 450-451.

the act of consent. The full dimension of this gift of self was described by Pope John Paul as follows:

> If one wishes the gift to be total, it must be irrevocable and without reserve. Therefore in the act in which the giving is expressed we must accept the symbolic value of the duties that are undertaken.[39]

Thus the gift of self entails the duties and obligations consequent on its being lived out, the transition from *in fieri* to *in facto esse*. The valid act of consent brings about the beginning of the matrimonial life. It is in the living out of these duties that the personal elements, so highlighted in the Conciliar teaching, especially the place of love in marriage, meet and are synchronized.

Pope John Paul II explained the meeting of the juridical and the Conciliar aspects as follows:

> If from the juridical point of view these obligations are more easily defined, they are expressed more as a right which one gives than as an obligation which one assumes, it is also true that the giving

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39 "Un dono, se vuole essere totale, deve essere senza ritorno e senza riserve. Perciò, nell'atto, col quale la donazione si esprime, noi dobbiamo accettare il valore simbolico degli impegni assunti." *Ibid.*, p. 451.

> is only symbolized by the obligations arising from a contract, which expresses on the human level the obligations inherent in every marriage consent that is true and sincere. It is in this way that one is able to understand the teaching of the Council and also to rediscover the traditional teaching by seeing it in a deeper and at the same time more Christian light.[40]

The revised Code of Canon Law would have that task of combining the traditional elements in a law enlightened by the Conciliar teaching. Just how successful it was we will see in the following chapter. The address of Pope John Paul II on February 26, 1983, which was given only a month after the promulgation of the revised Code of Canon Law, outlined the rights of the faithful. Concerning marriage, however, it mentioned twice that the faithful are ministers of the sacrament and also spoke of the conjugal and family communion of persons.[41]

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40 "Se sotto il profilo giuridico questi obblighi sono più facilmente definiti, se vengono espressi più come un diritto che si cede che come un obbligo che si assume, è pur vero che il dono non è che simbolizzato dagli impegni di un contratto, il quale esprime sul piano umano gli impegni inerenti ad ogni consenso nuziale vero e sincero. E così che si giunge a comprendere la dottrina conciliare, così da consentirle di recuperare la dottrina tradizionale per collocarla in una prospettiva più profonda ed insieme più cristiana." Ibid., pp. 451-452.

41 JOHN PAUL II, Address to the Roman Rota, February 26, 1983, in A.A.S., 75(1983), p. 559; English translation in Origins, 12(1983), p. 632.

In his first address to the Rota since the new Code of Canon Law took effect, Pope John Paul II said of the new Code:

> It is the fruit of long, patient, careful work enriched by various consultations with the episcopate, which impressed a particular mark of collegiality upon it. It represents an authoritative guide for applying Vatican Council II. Indeed, as I said elsewhere, it might be considered as the last council document.[42]

The Pope stated that the Rota could make a valid contribution in applying the canons on matrimonial law that are formulated in a generic way and specifically mentioned the matrimonial obligations of c. 1095. Speaking of the importance of the Rota as the court of the Apostolic See and therefore a guide for courts of local churches, the Pope said:

> These important determinations will have to give orientation and guidance to all tribunals of particular churches. They must be the fruit of mature and profound study, of serene and impartial discernment in the light of the perennial principles of Catholic theology, but also the principles of the new canonical legislation inspired by Vatican Council II.[43]

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42 ID., Address to the Roman Rota, January 26, 1984, in Origins, 13(1984), p. 583. The Pope quoted from his "Discourse to Participants of the Course on the New Code of Canon Law," in L'Osservatore Romano, November 21-22, 1983.

43 ID., Address to the Roman Rota, January 26, 1984, in Origins, 13(1984), p. 585.

Pope John Paul II clearly stated the Church's task regarding marriage when he said:

> All know with what ardor and tenacity the church sustains, defends and promotes the holiness, dignity and indissolubility of matrimony /.../ transcendental values, deeply rooted in human nature, which form the fundamental texture of the institution of matrimony.[44]

Certainly, Pope John Paul II has repeatedly stressed this essential content of the church's teaching on marriage as will be clearly seen in the following section.

In a previous address,[45] like his predecessors,[46] the Pope commended the Rota's application of the findings of the sciences. Pope John Paul returns to this theme when he says that safeguarding the dignity and indissolubility of marriage cannot preclude taking into account "the real and undeniable progress made by the biological, psychological, psychiatric and social sciences." Pope John Paul exhorted ecclesiastical

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44 Ibid., p. 585.

45 ID., Address to the Roman Rota, February 4, 1980, in A.A.S., 72(1980), p. 177.

46 PAUL VI, Address to the Roman Rota, February 9, 1976, in A.A.S., 68(1976), p. 205 and PIUS XII, Address to the Roman Rota, October 3, 1941, in A.A.S., 33(1941), pp. 421-426.

judges to study these sciences so as to have a "deeper knowledge of the facts and above all of persons." [47]

These addresses to the Rota have clear application in the juridic order. In the post-Conciliar era they formed the first official confirmation of the juridical importance of the teaching in Gaudium et Spes on marriage.[48] Subsequently, they are authoritative statements by the legislator offering clear guidelines for the interpretation of the law.

Although the papal general audience addresses do not usually speak of juridic realities, there are instances in the series of addresses given by Pope John Paul II when matrimonial consent and the interpersonal (consortium) aspect of marriage are considered. These addresses also gain added importance from the fact that a theme is developed systematically by the Pope rather than as isolated statements by the ordinary magisterium.

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47 JOHN PAUL II, Address to the Roman Rota, January 26, 1984, in Origins, 13(1984), p. 585.

48 PAUL VI, Address to the Roman Rota, February 9, 1976, in A.A.S., 68(1976), p. 205.

b. General Audience Addresses.

Between September 5, 1979, and February 9, 1983,[49] Pope John Paul II at the weekly general audience spoke on the theology of the body. However, there was an interruption due to the attempted assassination and the consequent convalescence. At least in modern times, this series of addresses on a single theme, constitutes a unique contribution by Pope John Paul. The recent annals of the papacy contain addresses by the popes to many and varied groups, but none show a Pope as moralist and philosopher carefully lecturing and instructing the faithful as he develops the pre-determined theme in successive audiences.

Pope John Paul II propounded the Christian - personalist view of the body, sex and marriage as inspired by the biblical texts in Gen 1:26-31, 2:18-24; Hosea, Jeremiah and Ezekiel, as well as Matt 5, Mark 10, Luke 16:18 and Ephesians 5:22-33. Chapters one to four of our work considered these Scriptural texts and mention was made of the Pope's contribution to the interpretation and understanding of them as he developed his theme of the theology of the body.

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49 The introduction to the address of February 16, 1983 notes that the "catechetical series on the theology of the body" has been interrupted in view of the "Jubilee Year of the Redemption", in L'Osservatore Romano, February 21, 1983, p. 3.

The Vatican Council II had previously taken the biblical accounts of the creation of man and woman as the inspiration for the principle of the dignity of the human person. In Gaudium et Spes, this is expressed as follows:

> But God did not create man a solitary being. From the beginning 'male and female he created them' (Gen. 1:27). This partnership of man and woman constitutes the first form of communion between persons.[50]

Thus we are face to face with the biblical basis for the consortium: the union of the first man and woman as partners for each other which the Council calls the "communio personarum".[51] Pope John Paul II says of the words to express this reality:

> The term 'community' could also be used here, if it were not generic and did not

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50 "At Deus non creavit hominem solum: nam inde a primordiis 'masculum et feminam creavit eos' (Gen. 1:27), quorum consociatio primam formam efficit communionis personarum." SAC. OECUM. CON. VAT. II, op.cit., p. 697. English translation in A.P. FLANNERY (ed.), op.cit., p. 913.

51 "In affirming that by this communion the man and the woman are also in the image of God, the Holy Father makes clear allusion to the union of the persons of the Trinity, which Jesus came to reveal to us." M. CLEMENT, L'Homme nouveau, translated by Anna Rist in The Canadian Catholic Review, 1(1983), p. 150. Thus the primordial sacrament, the union of the first man and woman according to Gen 1:27 and also 2:18, foreshadows marriage being "raised by Christ the Lord to the dignity of a sacrament" (cf. C.I.C. (1983), c. 1055 #1).

> have so many meanings. 'Communio' expresses more and with greater precision, since it indicates precisely that 'help' which is derived, in a sense, from the very fact of existing as a person 'beside' a person.52

The interpersonal dimension of the communio (consortium) is brought to the fore by Pope John Paul II when he speaks of the overcoming of the solitude which Genesis 2:18-22 states the man finds himself in, i.e. without a suitable partner. The existence of the person for the person, man for woman is expressed by the Pope as follows:

> Furthermore, the communion of persons could be formed only on the basis of a 'double solitude' of man and of woman, that is, as their meeting in their 'distinction' from the world of living beings (animalia), which gave them both the possibility of being and existing in a special reciprocity. The concept of 'help' also expresses this reciprocity in existence, which no other living being could have ensured.53

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52 JOHN PAUL II, General audience address, November 14, 1979, in L'Osservatore Romano, November 19, 1979, p. 1.

It is interesting to note that Archbishop Castillo Lara gave a similar reason for the revised Code speaking of marriage as a "consortium" rather than "communitas" which is the descriptive word used in Gaudium et Spes, art. 48. At the Canadian Canon Law Society's 18th annual general meeting as in S.C., 16(1983), p. 339, Archbishop Castillo Lara said that use of "communio vitae" as the descriptive term for marriage was changed to consortium so that communio would be used in the same sense throughout the Code. On February 1, 1984, Pope John Paul II appointed Archbishop Castillo Lara Pro-President of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law which had been established on January 2, 1984, cf. L'Osservatore Romano, February 6, 1984, pp. 11-12.

53 JOHN PAUL II, General audience address, November 14, 1979, in L'Osservatore Romano, November 19, 1979, p. 1.

This reciprocity may also be spoken of as complementarity, that the partners together are able to provide what each individually is lacking: a relationship that draws the partner forth while one gives of oneself, a consortium or partnership. Pope John Paul II speaks of the multifaceted nature of the unity spoken of in Gen 2:24 when he says:

> This unity through the body ('and the two will be one flesh') possesses a multiform dimension: an ethical dimension, as is confirmed by Christ's answer to the Pharisees in Mt 19 (Mk 10), and also a sacramental dimension, a strictly theological one, as is proved by St. Paul's words to the Ephesians (3 sic read as 5:22-32) which refer also to the tradition of the prophets (Hosea, Isaiah, Ezekiel). And this is so because that unity which is realized through the body indicates right from the beginning, not only the 'body', but also the 'incarnate' communion of persons - communio personarum - and calls for this communion right from the beginning.[54]

Chapters 1 - 3 of this work traced the origins of the covenant in the Ancient Near Eastern suzerainty treaties, the adoption of the same model to express the bonding of Yahweh and his people, the application by the prophets, particularly

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54 Ibid., p. 16.

Hosea, to marriage. This was possible because covenants not only regulated relationships of the superior to an inferior, but there were also covenants between equals. The application to marriage, Yahweh wedded to his people as a model for husband and wife is taken up by the later prophets. Finally, in the NT Jesus often referred to himself as the bridegroom and St. Paul gives the basis for the sacramentality of marriage in the relationship of Christ to the Church (Eph. 5:22-32).

It may be asked: How does the communio personarum show itself? Since it is human it must be a communion based on human faculties, specifically the intellect and the will. As M. Clément put it so well:

> /... / if man and woman are in all the relations of married life each for the other, from this must result the norm of their reciprocal activity in relation to one another. In short 'the fact that one person exists for the other' leads to benevolence, to 'good will' and on to mutual love of each other, and finally to communion of wills.[55]

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55 M. CLEMENT loc.cit., p. 152.
M. Clément also notes that "communion of persons is achieved in the first place through /... / reciprocity of consciousness. There are two points of departure for the communion of persons as such: the knowledge which the subject who knows has of the other /... /; and the relationship of reciprocal discovery of the capacity for being known as oneself knows." Pope

Pope John Paul II, in his address of the following week turned his attention to the unity of which Gen 2:24 speaks ("they become one flesh"), the Pope saw this unity "expressed and realized in the conjugal act".[56] However, in union with some contemporary biblical scholarship,[57] he saw the context of this sexual union as not exhausting this expression. The fuller ramifications the Pope expressed as follows:

> However, the whole context of the lapidary formulation does not permit us to stop at the surface of human sexuality, does not allow us to deal with the body and sex outside the full dimension of man and of the "communion of persons", but obliges us right from the beginning to see the fullness and depth characteristic of this unity, which man and woman must constitute in the light of the revelation of the body.[58]

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55 (cont'd) John Paul observes that "helper" seems to suggest the concept of "complementarity" and even more precisely of "exact correspondence". Ibid., p. 151.

56 JOHN PAUL II, General audience address, November 21, 1979, in L'Osservatore Romano, November 26, 1979, p. 1.

57 Cf. W. BRUEGGEMANN, "Of the Same Flesh and Bone (Genesis 2:23a)" in The Catholic Biblical Quarterly, 32(1970), p. 540. W. Brueggemann interprets this as "mutuality of concern and loyalty /... / a community bound in a covenant" and goes beyond other scripture scholars when he says it "cannot at all be understood in terms of biological derivation or sexual intercourse".

58 JOHN PAUL II, General audience address, November 21, 1979, in L'Osservatore Romano, November 26, 1979, p. 1.

The gift of self to one's partner, which according to C.I.C. (1983), c. 1057 #1 constitutes the act of consent, is spoken of by Pope John Paul II as "reciprocal acceptance":

> [...] the exchange of the gift consists in reciprocal 'acceptance' of the other, such as to correspond to the very essence of the gift; in this way, mutual donation creates the communion of persons. It is a question, therefore, of 'receiving' the other human being and 'accepting him', precisely because in this mutual relationship, of which Genesis 2:23-25 speaks, the man and the woman become a gift for each other [...].[59]

Speaking of the original human couple, especially the creation of the woman as the remedy for the loneliness of the man, M. Clément says:

> That they are ordained to communion is evident on a still deeper level: the gift that is made possible is one of two selves, two egos, two subjects who are persons. By the intermediary of the body, they commune with each other in the same intimate reality, namely a mutual giving and receiving of each other, in a spiritual sense.[60]

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59 ID., General audience address, February 6, 1980, in L'Osservatore Romano, February 11, 1980, p. 1.

60 M. CLEMENT, loc.cit., p. 186.

During the following months, Pope John Paul II spoke on lust as the fruit of the breach of the covenant. Then he spoke on the relevance of the Sermon on the Mount for today and the teaching of St. Paul on respect for the body.

In later addresses Pope John Paul II takes up again the indispensible role of the couple as ministers of the sacrament (in the Latin rite). In his address on January 19, 1983, the Pope says this role is expressed in the couple's act of consent.

> /... / as ministers of the sacrament of marriage, institute the visible sign by the words of matrimonial consent /... /. This 'prophetic' proclamation has a complex character. The matrimonial consent is at the same time the announcement and cause of the fact that, from now on, both will be before the Church and society, husband and wife.[61]

The importance and indeed indispensable nature of consent is one of the strongest determining principles of marriage that has come down from Roman law where the dictum was "Consensus facit nuptias".[62] C.I.C. (1983), c. 1057 #1 identical with C.I.C. (1917), c. 1081 #1 states that:

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61 JOHN PAUL II, General audience address, "The Sacramental Covenant in the Dimension of Sign", January 19, 1983, in L'Osservatore Romano, January 24, 1983, p. 9.

62 Ulpianus in D. 35,1,15, gave rise to the canonical principle "Matrimonium facit partium consensus".

> 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.[63]

"The Rite for the Celebration of Marriage" contains the lawful form whereby the celebrant asks for and receives the consent of the spouses as follows:

> I, /... /, take you, /... /, to be my wife/husband. I promise to be true to you in good times and in bad, in sickness and in health. I will love you and honor you all the days of my life.[64]

These or similar words constitute the exchange of consent, which occupies the central position, the indispensable element of the marriage ceremony in the Latin rite.

Pope John Paul II draws attention to the spouses, as ministers of the sacrament, exercising a prophetic role[65] in their act of consent when he says:

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63 "Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet". English translation in The Code of Canon Law in English Translation, London, Collins - Canadian Conference of Catholic Bishops, 1983, p. 189.

64 CONGREGATION OF RITES, Ordo celebrandi matrimonium, March 19, 1969; English translation, Marriage: Ritual and Pastoral Notes, Ottawa, Canadian Conference of Catholic Bishops, 1979, p. 53.

65 Cf. SAC. OECUM. CON. VAT. II, "Lumen Gentium", art. 12.
In the context of the tria munera Christi the spouses as ministers of the sacrament also exercise in a profound way their priestly role or office. Cf. JOHN PAUL II, Address to the convention on "The Family and Love", May 3, 1981, in L'Osservatore Romano, May 11, 1981.

> If the matrimonial consent has a prophetic character, if it is the proclamation of the truth coming from God and in a certain sense the statement of this truth in God's name, this is brought about especially in the dimension of the interpersonal communion, and only indirectly 'before' others and 'for' others.[66]

This prophetic characteristic is part of a continuum originating with the first man and woman as expressed in the Book of Genesis, linked to the covenant of old by the prophets and made an image of the covenant between Christ and the Church in the Letter to the Ephesians. The OT covenant was fulfilled in the NT and both are presented in the Scriptures as unbreakable. Even though the prophets had to denounce continual violations, in essence the covenant of old, because initiated by Yahweh, endured despite these repeated violations.

The unbreakable bond of marriage mirrors the covenant. Marriage, too, is not broken by failure to observe its terms, rather its promise and covenant are violated. Speaking of this lasting nature of marriage, Pope John Paul says:

> The sign which they constitute by the words of matrimonial consent is not a mere immediate

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66 JOHN PAUL II, General audience address, January 19, 1983, in L'Osservatore Romano, January 24, 1983, p. 9.

> and passing sign, but a sign looking to the future which produces a lasting effect, namely the marriage bond, one and indissoluble ('all the days of my life', that is, until death). In this perspective they should fulfil that sign of multiple content offered by the conjugal and family communion of persons /...7.[67]

Failure to live up to the pledge that is given in the consent that forms the matrimonial bond is said by Pope John Paul II to be the sign of the "man of concupiscence". For "the sacramental sign of marriage - the sign of the conjugal covenant "expresses" the requirement proper to marriage as a pact and a sacrament".[68] Any going back on one's promise is a violation of the covenant.

The "man of concupiscence" was seen by the Pope as the one denounced by the prophets when he said:

> The prophets of the Old Testament have certainly before their eyes this man when, making use of an analogy, they condemn the 'adultery of Israel and Juda'. The analysis of the words spoken by Christ in the Sermon on the Mount lead us to understand more deeply 'adultery' itself. And at the same time it leads us to the conviction that the human 'heart' is not so much 'accused and

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67 Ibid.

68 ID., General audience address, "Man called to overcome concupiscence", February 9, 1983, in L'Osservatore Romano, February 14, 1983, p. 11.

> condemned' by Christ because of concupiscence (concupiscentia carnalis), as first of all 'called'.[69]

This is a call to live by the power of the redemption according to the "new man" rather than as the "old man" of fleshly desires. Strengthened by the sacrament, the "new man" promises to be true to his partner in the consortium totius vitae as a communion of persons.

Following the Conciliar texts and debates, the most comprehensive treatment on the partnership and other aspects of marriage took place during the 1980 Synod of Bishops. Occurring fifteen years after the close of the Council, the Synod's texts and debates, and the Papal exhortation which resulted, form the final stage before the promulgation of the new Code.

3. The Synod of Bishops.

a. The 1980 Synod of Bishops on Marriage and the Family.

Since the close of the Vatican Council II, six Synods of Bishops have been held,[70] so that Synods have become an important part of the post-Conciliar Church. But the Synod of Bishops is a recent institution, the existence of which was foreshadowed only at the opening of the fourth session of the

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69 Ibid.

70 The first general Synod of Bishops commenced on September 29, 1967 and considered: dangers to the faith, the reform of Canon Law, Seminaries, Mixed marriages and lastly Liturgical reform. This Synod was crucial for the revision

Council on September 14, 1965. One day later, Pope Paul VI issued the motu proprio which established the Synod of Bishops.[71]

In 1979 a text bearing the title "The Role of the Christian Family in the Modern World" was distributed to Episcopal conferences.[72] The purpose of this text was to enable the members of the respective conferences to prepare

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70 (cont'd) of the Code of Canon Law as it near unanimously approved the ten guiding principles for the revision of the Code. Codex iuris canonici, Auctoritate Ioannis Pauli PP. II promulgatus, Typis Polyglottis Vaticanis, 1983, pp. xxi-xxiii; The second Synod in 1971 had the themes "The Ministerial Priesthood and Justice in the World"; This Synod issued documents on these themes under its own name, the first in A.A.S., 63(1971), pp. 898-942, the second in Enchiridion Vaticanum, Bologna, Edizioni Dehoniane, 1980, Vol. 4, pp. 800-838. A rescript from the Council for the Public Affairs of the Church notes that the Holy Father approved these two documents, in A.A.S., 63(1971), p. 897; The third Synod met in 1974 and its conclusions were passed to Pope Paul VI who issued the Apostolic Exhortation, "Evangelii nuntiandi", December 8, 1975 in A.A.S., 68(1976), pp. 1-96. The fourth (1977) Synod's conclusions on catechetics had to wait, due to the deaths of Popes Paul VI and John Paul I, until Pope John Paul II issued the Apostolic Exhortation "Catechesi tradendae", October 16, 1979, in A.A.S., 71(1979), pp. 1277-1340. The fifth general Synod of Bishops held in Rome from September 26 to October 25, 1980 on "The Christian Family" is our specific concern here. The propositions of the Synod fathers were forwarded to Pope John Paul II who issued the Apostolic Exhortation "Familiaris consortio", November 22, 1981, in A.A.S., 74(1982), pp. 81-191. The sixth general Synod of Bishops met in Rome from September 29 to October 29, 1983 on the theme "Reconciliation and Penance in the Mission of the Church". 63 propositions to form the basis of an Exhortation were presented to the Pope, cf. Origins, 13(1984), pp. 371-373.

71 PAUL VI, Motu proprio, "Apostolica Sollicitudo", September 15, 1965, in A.A.S., 57(1965), pp. 775-780.

72 SYNOD OF BISHOPS, The Role of the Christian Family in the Modern World, Vatican City., 1979, 25 p.

for the Synod, to help the conference's delegates in preparation for the Synod and also to enable consultation with married couples.

Part 1 of the text describes the contemporary scene and its influence on marriage and the family. It is noted that in some areas "one in three marriages leads to divorce" which has now taken the form of successive polygamy. Of the attitudes of couples themselves it is noted:

> Many married people consider impossible the permanent continuance of the bond and therefore declare that the promise of such continuance demanded in marriage is without effect; others are psychologically incapable of undertaking a permanent commitment.[73]

The findings of psychology and the behavioural sciences have certainly contributed to a better understanding of the psychological causes of the incapacity for marriage. Recent popes have commended the application of this knowledge in Church courts as we noted above.

Part 2 of the study text examined questions of doctrine. Chapter 1 stated the fundamental principles of the conjugal and family partnership, drawing especially on the teaching of Gaudium et Spes when it says: "The bond of marriage is based on love and 'an affection of the will'" and "the loving

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73 Ibid., p. 8.

covenant between Christ and the Church".[74]

Reflecting on the importance of interpersonal relationships, the text states:

> Modern men and women are more and more aware that the life they are living is intimately characterized by manifold reciprocal relationships with other men and women.[75]

The lack of this interpersonal communication is the cause of loneliness and frustration, whereas such communication is helped by the practise of the human and Christian virtues, which are the expression of the consortium.

a. Interventions and Reports in the General Congregations of the Synod

The fifth general Synod of Bishops was held in Rome from September 26 to October 25, 1980 on the theme "The Role of the Christian Family in the Modern World". There were 205 bishop participants, some representatives of Institutes of consecrated life and also 40 lay men and women. Some of these laypersons, married couples among them, spoke in two sessions devoted completely to them.[76] Some fathers at the Synod, while unequivocally expressing their acceptance of the teaching of Humanae Vitae, pointed out that:

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74 Ibid., p. 13 quoting Gaudium et Spes, arts. 48 and 49.

75 SYNOD OF BISHOPS, op.cit., p. 15.

76 Cf. ARCHBISHOP J. QUINN, "Report on the Synod: Collegiality and Faith", in Origins, 10(1980-1981), p. 355.

> Concentration on this controversial issue has hindered that development of the teaching on marriage which would bring out the riches already contained in the Church's teaching, notably in the council document "On the Church in the Modern World" and in the encyclical Humanae Vitae itself.[77]

Speaking directly of marriage as a partnership but under the aspect of intimacy, the then Archbishop Bernardin said that this marital intimacy involves the qualities of sensitivity, warmth, openness and mutual respect and that these are coloured by our sexual nature. Accordingly there are two important aspects to this intimacy and these he described as:

> First, a willingness to disclose oneself to others, to become somewhat vulnerable by being honest about oneself with them; second, a willingness to let others become a part of and an influence on one's life.[78]

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77 Synod of Bishops, Address by Cardinal G.B. Hume, September 29, 1980, in Origins, 10(1980-1981), p. 276.

In a similar vein, the then Archbishop J. Bernardin called for "a more holistic approach to sexuality and conjugal love" in an address on September 29, 1980, in Ibid., pp. 260-262, while Archbishop J. Quinn called for the "removal of the impasse on this moral issue which is so harmful to the Church", in Ibid., pp. 263-267, emphasis added.

78 Synod of Bishops, Address of Archbishop J. Bernardin, "Toward a Spirituality of Marital Intimacy", in Origins, 10(1980-1981), p. 286. Archbishop Bernardin defined intimacy as "a certain psychological and physical nearness which includes a loving sharing of one's being with another and an openness to a similar sharing by the other", Ibid.

Obviously intimacy here is referring to the interpersonal basis of the consortium. The consortium is the recognizable and juridically provable existing marriage whereas marital intimacy is what motivates the couple to love and affection within their partnership, or at least should do so.

Bishop J.F. Stafford called upon the Synod to consider that not only the wedding but also the whole marriage is a sacrament. In this regard he quoted St. Robert Bellarmine who taught that:

> The sacrament of matrimony can be regarded in two ways: first, in the making, and then in its permanent state.
>
> For it is a sacrament like that of the eucharist which not only when it is being conferred but also while it remains, is a sacrament. For as long as the married parties are alive, so long is their union a sacrament of Christ and the church.[79]

This is, of course, the basis for the canonical distinction between matrimonium in fieri the exchange of consent and matrimonium in facto esse the lived relationship.

The richness of Christian marriage is highlighted by Bishop Stafford as:

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79 Synod of Bishops, Written intervention by Bishop J.F. Stafford, "The Marriage Covenant", in Origins, 10(1980-1981), p. 317.

> /...7 the reciprocal illumination between the natural and supernatural, between the world of creation and the world of redemption, between the secular and sacred. The good gift of the creator becomes also a personal gift of the savior.[80]

As well as interventions by the Synod fathers the Synod procedures call for division into various language groups. In his report from the Spanish language group, the then Archbishop A. Lopez Trujillo stated that the "Christian family should be a relation of persons in the manner of the Trinity" and that "it is necessary to consider faith as a condition for the validity of the sacrament."[81]

Cardinal J. Knox on the other hand, reporting as Prefect of the Sacred Congregation for the Sacraments and Divine Worship, spoke of marriage as a contract and made no allowance for the necessity of faith for the sacrament when he said:

> All the baptized who validly enter marriage receive the sacrament of matrimony whether they intend to or not. If they exclude the sacrament as a condition,

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80 Ibid.

81 Synod of Bishops, Fifteenth general congregation, Report of Archbishop A. Lopez Trujillo from the Spanish language group B, in L'Osservatore Romano, October 27, 1980. p. 14.

the marriage is invalid.[82]

Cardinal P. Palazzini, stated a series of what he called fundamental points among which was:

> The Sacrament of Matrimony essentially consists in the very covenant of marriage, or irrevocable personal consent.

However, Cardinal Palazzini then stated that "although the Second Vatican Council did not use the terms, the principal and secondary ends, nevertheless the hierarchy of ends is at least implicitly preserved."[83]

Cardinal Palazzini's contention marks one of the final appeals for the re-assertion of the hierarchy of the ends of marriage which were so stated by C.I.C. (1917), c. 1013 #1. The new Code, like Gaudium et Spes, to which it is admirably faithful on this issue relegates the hierarchical ordering of the ends of marriage to history and

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82 Synod of Bishops, Eighteenth general congregation, Report of Cardinal J.R. Knox, October 16, 1980, in L'Osservatore Romano, November 3, 1980, p. 14.

83 Synod of Bishops, Fifteenth general congregation, October 13, 1980. Report of the Latin language group, in L'Osservatore Romano, October 27, 1980, p. 15. This contention by Cardinal Palazzini quoting Gaudium et Spes arts. 48, 50 and 52 to which he refers do not substantiate his claim as art. 48 speaks of "variis bonis ac finibus praediti" while art. 50 explicitly states "non posthabitis ceteris matrimonii finibus", SAC. OECUM. CON. VAT. II, op.cit., p. 754 and p. 760 respectively.

speaks of two joint ends or meanings, the good of the spouses and the generation and upbringing of children, C.I.C. (1983), c. 1055 #1.

The message of the Synod fathers at the conclusion of the fifth general Synod, having noted the place of marriage in God's plan says:

> This divine plan shows us why the church believes and teaches that the covenant of love and self-giving between two people joined in sacramental marriage must be both permanent and indissoluble. It is a covenant of love and life.[84]

c. Propositions of the Synod on "The Role of the Christian Family in the Modern World"

Only the second general Synod of Bishops issued a document in its own name. Recent Synods have presented a list of propositions to the Pope and addressed a message to the Church at the conclusion of the Synod. Some controversy surrounds the propositions of the 1980 Synod:

> Forty three propositions out of 50 drawn up - and we know nothing of the missing seven - were passed over to the Pope to be accepted, rejected or modified.[85]

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84 SYNOD OF BISHOPS, "Message to Christian Families" October 25, 1980, in Origins, 10(1980-1981), p. 323.

85 "Synod propositions", in The Tablet, January 31, 1981, p. 104.

The first propositions concern the sensus fidei and also injustice and the need for conversion. Those propositions which treat of marriage directly have a scriptural starting point. Proposition 9 notes the following three elements:

> (i) the spouses' physical and psychological differences that make their union possible (Gen 2,18-25); (ii) the dialogue and indispensable exchange these persons different but fully equal must establish; (iii) their interpersonal communion and fruitfulness (Gen 1,26-28).[86]

The covenant was the means by which God chose to enter into a relationship with his people. The OT prophets, who called the people back to faithful observance of the covenant, drew upon the image of marital infidelity to illustrate the violation of the covenant. This OT conception is expressed as follows:

> So great is conjugal love that God willed it to be an expression of his covenant love, a mirror that reflects him. Through the prophets he continually denounced his chosen people's waywardness in matters of love and sexuality. Through those same prophets, he used the metaphor of marriage to reveal how deep and holy was the conjugal love with which he loved his people (Hos 2,18-21; Ez 16,8; Is 54,5).[87]

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86 Ibid., February 7, 1981, p. 141.

87 Ibid.

The definitive covenant between God and his people was inaugurated in the very person of Jesus, Son of God and Son of man. Christ's self-giving love for his bride, the Church, was expressed cogently in his passion and death. Marriage became, in the expression of the Letter to the Ephesians, an image of and participator in the "great sacrament" between Christ and the Church. However, the proposition reminds us that each and every marriage will not reach this ideal expression, but such failure does not vitiate the ideal. Thus the proposition states:

> Marriage may not fully mirror the riches of the mystery of Christ, but its original truth and full meaning flow from that mystery.[88]

The text of the Letter to the Ephesians is seen as the sacramental basis for love and the interpersonal aspect of

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88 Ibid. Archbishop Henri Légaré posed the following questions to the Synod fathers which seem to be answered by this part of proposition 10.

"How does one speak of marriage as a privileged sign of the covenant between God and man? How express the difference between the relationship of Christ to the church and the relationship of the church to Christ? If the faithfulness of Christ to his church is absolute, we know very well that the reality of the church's relationship to Christ is different. We know very well that this relationship is marked by human frailty. Can one then purely and simply equate Christ's relationship to the church and the church's relationship to Christ?", Synod of Bishops, Address of Archbishop H. Légaré, September 30, 1980, in Origins, 10(1980-1981), p. 281.

marriage is highlighted in the proposition when it states:

> Married love between baptised persons is a living sign of the interpersonal fruitfulness made possible by Christ's death and resurrection, the foundation and model of love and mutual giving (cf. Eph 5,5). The sacramental grace of marriage allows a couple to become the source of sanctification for each other through their mutual love and interpersonal relationship.[89]

We have here the spiritual basis and dimension of the consortium. It is a partnership of persons - with spiritual and physical aspects. Proposition 36 notes that family spirituality is inspired by the following elements: creation, covenant, cross, resurrection and sign.[90]

The members of the Synod presented the 43 propositions to the Pope and asked him to publish at his convenience a document for the Church on "The Role of the Christian Family" similar to the Apostolic Exhortation, Catechesi Tradendae, issued in response to the 1977 Synod. Thus Pope John Paul II on November 22, 1981, issued the Apostolic Exhortation, Familiaris Consortio in response to the propositions which flowed from the 1980 Synod of Bishops.

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89 "Synod propositions", loc.cit., p. 141.

90 Ibid., February 14, 1981, p. 165.

4. Pope John Paul II, Apostolic Exhortation, Familiaris Consortio, November 22, 1981.

Pope John Paul II's Apostolic Exhortation, "Familiaris Consortio"[91] and Pope Paul VI's Encyclical Letter,"Humanae Vitae are the two examples in which the papal teaching office, exercised in its more solemn ordinary form, confirmed the Conciliar teaching on the interpersonal aspect of marriage. This is particularly evident when it is noted that of fifty nine footnote references to the Vatican Council's teaching twenty six are from Gaudium et Spes and nineteen of these are from articles 47-52. The only source quoted more than the Council is the Scriptures.

"Humanae Vitae" marked official papal confirmation of the personalist dimension of marriage so clearly taught by "Gaudium et Spes" in the immediate post-Conciliar era. "Familiaris Consortio" placed great stress on this personalist dimension as the revision of the Code of Canon Law was

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91 JOHN PAUL II, Apostolic Exhortation, "Familiaris Consortio", November 22, 1981, in A.A.S., 74(1982), pp. 81-191; hereafter cited as "Familiaris Consortio"; English translation by the Vatican Press Office in A. FLANNERY (ed.), Vatican II: More Postconciliar Documents, Vol. II, Grand Rapids, Mich., Eerdmans, 1982, pp. 815-898.

reaching a climax. Part two "The plan of God for marriage and the family"[92] emphasizes that God created man in his own image, calling him into existence through love and for love. In the words of the text, Pope John Paul II says:

> God inscribed in the humanity of man and woman the vocation, and thus the capacity and responsibility, of love and communion. Love is therefore the fundamental and innate vocation of every human being.[93]

An expression of this love in marriage is the sexual exchange of the spouses. The Pope emphasizes this link when he says:

> Consequently, sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such. It is realized in a truly human way only if it is an integral part of the love by which a man and a woman

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92 This heading is not in the original Latin text but in the English translation in A. FLANNERY, op.cit., Vol. II, p. 822 or as published by the Canadian Conference of Catholic Bishops, p. 19.

93 "Deus indidit ei vocationem ac propterea potestatem et officium, cum conscientia coniunctum, amoris atque communionis. Quocirca amor est princeps et naturalis cuiusque hominis vocatio", "Familiaris consortio", pp. 91-92; English translation in A. FLANNERY, op.cit., Vol. II, p. 822.

> commit themselves totally to one another until death.[94]

In this way the Pope links truly human sexuality to the mutual gift of themselves which the partners make in the act of consent. This gift of self, according to the Pope, must be total, with personal as well as physical aspects:

> The total physical self-giving would be a lie if it were not the sign and fruit of a total personal self-giving, in which the whole person, including the temporal dimension, is present: if the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally.[95]

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94 "Sexualitas ideo, per quam vir ac femina se dedunt vicissim actibus coniugum propriis sibi ac peculiaribus, minime quiddam est dumtaxat biologicum, sed tangit personae humanae ut talis veluti nucleum intimum. Sexualitas modo vere humano expletur tantummodo, si est pars complens amoris quo vir et femina sese totos mutuo usque ad mortem obstringunt", ibid., p. 92; English translation in A. FLANNERY, op.cit., Vol. II, p. 822.

95 "Tota physica corporum donatio mendacium esset, nisi signum fructusque esset totius donationis personalis, in qua universa persona, etiam secundum temporalem rationem, praesens adest: si enim aliquid homo sibi retineret vel facultatem aliud postea statuendi, iam idcirco se non totum donaret", ibid.; English translation in A. FLANNERY, op.cit., Vol. II, p. 822. In such cases we would be faced with nullity of marriage on the grounds of simulation (cc. 1096, 1101) or conditional consent (c.1102).

Pope John Paul II then states that this self-giving is only possible in marriage and he links the covenant to the partnership-communion aspect when he says:

> The only 'place' in which this self-giving in its whole truth is made possible is marriage, the covenant of conjugal love freely and consciously chosen, whereby man and woman accept the intimate community of life and love willed by God himself, which only in this light manifests its true meaning.[96]

This gift of self which the partners make in their marriage covenant was pre-figured in the communion God sought by establishing a covenant with his people. Pope John Paul II says of this communion:

> The communion of love between God and /his/ people, a fundamental part of the Revelation and faith experience of Israel, finds a meaningful expression in the marriage covenant which is established between a man and a woman.[97]

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96 "Unicus autem 'locus', ubi haec donatio accidere potest ex omni sua veritate, matrimonium est sive amoris coniugalis foedus vel conscia ac libera electio, qua vir ac mulier in se recipiunt vitae amorisque communitatem intimam, a Deo ipso praestitutam, quae hac tantum ratione germanam suam ostendit significationem", ibid., pp. 92-93. Emphasis added. English translation in A. FLANNERY, op.cit., Vol. II, p. 823.

97 "Amoris inter Deum hominesque communio, quae principaliter invenitur in Revelatione atque fidei Israelis experientia, significanter exprimitur coniugali pacto, quod inter virum initur ac feminam", ibid., p. 93; English translation in A. FLANNERY, op.cit., Vol. II, p. 823.

The contribution of the prophets was to apply the parallel of God and his people joined by covenant to man-woman united in the marriage covenant. Pope John Paul highlights this when he says:

> For this reason the central word of Revelation, 'God loves his people', is likewise proclaimed through the living and concrete word whereby a man and a woman express their conjugal love. Their bond of love becomes the image and the symbol of the covenant which unites God and his people.[98]

This covenant reached its definitive fulfilment when Christ, the Bridegroom, offered himself on the cross for the Church, his bride. As if paraphrasing the Letter to the Ephesians, Pope John Paul says:

> In this sacrifice there is entirely revealed that plan which God has imprinted on the humanity of man and woman since their creation; the marriage of baptized persons thus becomes a real symbol of that new and eternal covenant sanctioned in the blood of Christ. The Spirit which the Lord pours forth gives a new heart, and renders man and woman capable of loving one another

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98 "Quapropter primarium Revelationis verbum 'Deus suum populum amat' enuntiatur etiam verbis vivis et concretis, quibus vir et mulier inter se coniugalem permutant amorem. Vinculum eorum amoris imago fit et signum foederis, quod Deus eiusque populum coniugit", ibid.; English translation in A. FLANNERY, op.cit., Vol. II, p. 823. Footnote 24 of the text refers to the prophets, Hosea (2:21), Jeremiah (3:6-12) and Isaiah (54).

> as Christ loved us. Conjugal love reaches that fulness to which it is interiorly ordained /...7[99]

The final section of the second part of the Exhortation lays stress on marriage and the family as a communion of persons, a complex of interpersonal relationships.[100] Archbishop Dermot Ryan of Dublin said of this call to form a communion of persons:

> /... 7 the Synod Fathers found it necessary to recall and to emphasize that the communion of husband and wife, by which the family is bonded together, is indissoluble. /...7
>
> The basis of communion within the family is the "conjugal communion" between husband and wife, between mother and father. It is, therefore, essential that the elements of unselfish love, mutual respect, warm friendship and unfailing fidelity should be clearly manifested in them.[101]

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99 "Eo in sacrificio plane reseratur consilium illud, quod Deus humana impressit in viri ac mulieris natura iam inde ab eorum creatione; baptizatorum itaque matrimonium efficitur solidum signum novi aeternique Foederis, Christi sanguine firmati. Spiritus autem, quem Dominus effundit, cor novum largitur aptosque facit virum ac mulierem ad se amandos, quemadmodum nos Christi amavit. Coniugalis amor illam attingit plenitudinem, ad quam intrinsecus ordinatur /... 7", ibid., p. 94; English translation in A. FLANNERY, op.cit., Vol. II, p. 824.

100 Cf. ibid., p. 97.

101 ARCHBISHOP D. RYAN, "Forming a Community of Persons: Apostolic Exhortation "Familiaris consortio", Sections 18-27", in L'Osservatore Romano, April 5, 1982, p. 14.

These elements are the realization of the consortium, without them no true partnership of life that is truly marital, would endure. It is important to note that Familiaris Consortio moves from speaking of conjugal communion to that communion which is familial.[102] However, the basic text is that of Gaudium et Spes:

> The intimate partnership of life and the love which constitutes the married state has been 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.[103]

The difficulty is that this text is clearly speaking of marriage, not the family, established by the creator as an "intimate community of conjugal life and love". The second part of Gaudium et Spes, article 48 speaks specifically of the family:

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102 JOHN PAUL II, Apostolic Exhortation, "Familiaris Consortio", November 22, 1981, in A.A.S., 74(1982), pp. 99-104.

103 "Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur", in SAC. OECUM. CON. VAT. II, op.cit., p. 754. English translation in A.P. FLANNERY (ed.), Documents of Vatican II, Grand Rapids, Mich., Eerdmans, 1980, p. 950. This translation freely renders "communitas" as "partnership" but seriously departs from the Conciliar fathers' emphasis in rendering "foedus" as "contract".

> The Christian family springs from marriage, which is an image and a sharing in the partnership of love between Christ and the Church.[104]

This would surely have been a better Conciliar text to quote, rather than one which refers specifically to marriage itself and not to the family, or at least, only very indirectly.[105]

Part three of the Apostolic Exhortation "Familiaris Consortio" highlights the importance of love in this communion. "The love between husband and wife /in marriage.../ is given life and sustenance by an unceasing inner dynamism leading the family to ever deeper and more intense communion, which is the foundation and soul of the community of marriage and the family."[106] Pope John Paul II, quoting

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104 "Proinde familia christiana, cum e matrimonio, quod est imago et participatio foederis dilectionis Christi et Ecclesiae, exoriatur", ibid., p. 757.

105 The text of Familiaris Consortio reads "Familia tunc /.../ ex Dei consilio constituitur tamquam 'intima communitas vitae et amoris' /.../", in A.A.S., 75(1982), pp. 89-100. Footnote 44 gives the reference to Gaudium et Spes, art. 48.

106 "Amor inter virum et mulierem in matrimonio /.../ animatur atque impellitur intimo perennique vigore dynamico, qui familiam perducit ad communionem in dies arctiorem impensioremque, quae est fundamentum et vis communitatis coniugalis et familiaris", JOHN PAUL II, Apostolic Exhortation,

from his first encyclical, emphasizes that love is the principle and power of this communion: "Man cannot live without love".[107] Concerning love in marriage, from the juridic viewpoint, we recall what was said in the address of Pope Paul VI to the Roman Rota:

> We must, therefore, reject without qualification the idea that if a subjective element (conjugal love especially) is lacking in a marriage the marriage ceases to exist as a juridical reality which originated in a consent once and for all efficacious.[108]

Pope Paul VI went on to say that conjugal love was of the psychological not the juridical order and that God has set as the goals of conjugal love the very ends of marriage.

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106 (cont'd) "Familiaris Consortio", in A.A.S., 74 (1982), p. 101. The English translation is from A. FLANNERY (ed.), Vatican II: More Postconciliar Documents, Grand Rapids, Mich., Eerdmans, 1982, pp. 828-829. However, this translation, by the Vatican Press Office, omitted "in matrimonio" and italicized "community" unlike the original.

107 "Homo sine amore vivere nequit", I.D., Encyclical Letter "Redemptor Hominis", March 4, 1979, in A.A.S., 71 (1979), p. 274.

108 "Prorsus igitur negandum est, deficiente quovis elemento subiectivo, cuiusmodi est in primis amor coniugalis, matrimonium non amplius exsistere ut 'iuridicam realitatem', quae ortum duxit a consensu semel atque in omne tempus iuridice efficaci", PAUL VI, Address to the Roman Rota, February 9, 1976, in A.A.S., 68(1976), p. 207. English translation in The Pope Speaks, 21(1976-1977), p. 153.

In an article that notes the important place given to love in marriage by Familiaris Consortio , Vidal Guitarte Izquiero, relying on a decision of the Apostolic Signatura,[109] states: "Love can never be the efficient cause nor an essential condition in itself".[110] He also notes that when Gaudium et Spes speaks of the "Institution of marriage and married love" (art. 48) that these two are not identical, this being indicated by the copulative conjunction "and", but they are similar realities.[111]

Pope John Paul II speaks of marriage as the first communion which originates in the marital covenant of consent:

> The first communion is the one which is established and which develops between husband and wife: by virtue of the covenant of married life, the man and woman "are no longer two but one flesh"

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109 SIGNATURA APOSTOLICA, c. Staffa, November 29, 1975, in Periodica, 66(1977), pp. 297-325.

110 "Nunca el amor puede ser causa eficiente ni condición esencial del mismo", in V. GUITARTE IZQUIERO, "Amor y matrimonio en la Exhortación 'Familiaris Consortio' de Juan Pablo II", in Revista Española de Derecho canónico, 38(1982), p. 110.

111 Ibid., p. 109.

> and they are called to grow continually in their communion through day-to-day fidelity to their marriage promise of total mutual self-giving.[112]

This communion, the quest for ever-deeper union, will only be possible in the light of the total and lasting mutual self-giving. As Pope John Paul II says:

> This conjugal communion sinks its roots in the natural complementarity that exists between man and woman, and is nurtured through the personal willingness of the spouses to share their entire life-project, what they have and what they are: for this reason such communion is the fruit and sign of a profoundly human need.[113]

This sharing of the spouses entire life-project will be expressed in the revised Code c. 1055 #1 as totius vitae

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112 "Prima communio ea est quae inter coniuges instituitur atque progressione quadam fovetur: vi foederis coniugalis amoris, vir et mulier 'iam non sunt duo sed una caro' et adiguntur ad crescendum continenter in communione sua per cotidianam fidelitatem erga matrimoniale promissum mutuae plenaeque donationis", JOHN PAUL II, Apostolic Exhortation, "Familiaris Consortio", November 22, 1981, in A.A.S., 74(1982), p. 101. English translation in A. FLANNERY, Vatican II: More Postconciliar Documents, p. 829.

113 "Haec coniugalis communio in completiva ratione naturali radicitus insidet, quae inter virum et mulierem viget atque ipsorum coniugum alitur proposito totum participandi de vita consilium, id videlicet quod habent et quod sunt: haec igitur communio fructus est et signum postulationis penitus humanae", ibid.

consortium, the marriage partnership of life and for life.

"Familiaris Consortio" art. 46 contains a list of family rights. The Synod proposition 42 called for the Holy See to develop "A Bill of Rights for the Family" to be presented to the United Nations.[114] This proposition was inspired by Ukrainian-Rite Archbishop M. Hermaniuk's intervention during the Synod general assembly, which was favourably received by the Synod fathers.[115]

The "Charter of the Rights of the Family" was presented by the Holy See on October 22, 1983.[116] The Charter marks the first time that a document addressed by the Holy See to "all persons, institutions and authorities concerned with the mission of the family in today's world"[117] cites the revised Code of Canon Law.

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114 "The Synod propositions" in The Tablet, February 14, 1981, pp. 166-167.

115 SYNOD OF BISHOPS, Intervention of Archbishop M. Hermaniuk, "Developing a Charter of Family Rights", in Origins, 10(1980), p. 305 and 307.

116 Charter of the Rights of the Family, October 22, 1983, in L'Osservatore Romano, November 28, 1983, pp. 3-4. hereafter cited as Charter.

117 Ibid., p. 3 (sub-title).

The document consists of three sections. Firstly, an introduction explaining the origins and purposes. Secondly, a preamble stating the fundamental principles of marriage and the family. Finally, the Charter itself which consisted of twelve articles.

The preamble, part B. is of interest as it stresses the interpersonal dimension of marriage, when it says:

> /T/he family is based on marriage, that intimate union of life in complementarity between a man and a woman which is constituted in the freely contracted and publicly expressed indissoluble bond of matrimony, and is open to the transmission of life.[118]

The Charter, in article 2c also stresses the interpersonal complementarity between a husband and wife when it states:

> The spouses, in the natural complementarity which exists between man and woman, enjoy the same dignity and equal rights regarding the marriage.[119]

The Charter, addressed as it is to public authorities, is in this respect an outgrowth of Pope John XXIII's, Encyc-

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118 Ibid. The sources quoted are Pacem in Terris, part 1; Gaudium et Spes. arts 48 and 50; Familiaris Consortio, art. 19 and Codex Iuris Canonici /1983/, c. 1055 which is incorrectly given as c. 1056.

119 Charter, art. 2.

lical Letter, Pacem in Terris and more especially Vatican Council II's, Pastoral Constitution on the Church in the Modern World.

Conclusion

Two post-Conciliar pontifical documents are influential in confirming the ramifications of the Conciliar teaching on marriage contained in Gaudium et Spes, arts. 48-52. Pope Paul VI's, Encyclical Letter, Humanae Vitae, confirms the Conciliar emphasis on the interpersonal basis of marriage and refrains from speaking of the hierarchy of ends. Pope John Paul II's Familiaris Consortio greatly elaborates this interpersonal emphasis and gives the fullest positive elaboration on conjugal love in any pontifical document.

Pope John Paul II's contribution must also be seen in the light of his general audience addresses in which the scriptural basis for the interpersonal complementarity and covenantal nature of marriage are progressively set forth. The addresses to the Roman Rota welcomed the application of the Conciliar teaching on marriage in the Rota and its jurisprudence as we shall now detail.

CHAPTER VII

THE RECEPTION INTO LAW OF THE CONSORTIUM TOTIUS VITAE

There are two approaches one may take in evaluating the juridical ramifications of the Conciliar and post-Conciliar teaching on marriage. One could say that the teaching is fine theology but that it has little or no application in the field of law. Ten years after the Council, it was reported that Cardinal Staffa insisted that the Council had changed nothing regarding the contractual nature of marriage.[1] Cardinal Staffa's contention may have been motivated by a concern to avoid excessive change and possible abuses. However, from our position of hindsight we know how much the appreciation of the object of consent has been enriched by the Conciliar teaching.

On the other hand, one could say that much was changed by the Conciliar emphasis on the interpersonal aspect of marriage. It was, then, the task of the authentic teachers and interpreters and accordingly of those charged with the application of the law to develop the ramifications of Conciliar teaching in the field of law. Influential in this

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1 Cf. R.G. CUNNINGHAM, "Recent Rotal Decisions and Today's Marriage Theology: Nothing Has Changed - or Has It?", in C.L.S.A., Proceedings, 1976, p. 24.

development would be the work of the Pontifical Commission for the Revision of the Code of Canon Law[2] which was assisted by thirteen committees, one of which was entitled "De Matrimonio".

1. Stages in the Development of the Definition of Marriage

a. The Work of the Committee "De Matrimonio"

The committee "De Matrimonio" held its first session from October 24 - 29, 1966. The committee was to prepare texts to be presented to the Cardinals of the Commission.[3] Decisions taken by this committee were summarized by the relator, P. Huizing. As to how the Conciliar teaching in Gaudium et Spes, would affect the revisions of the introductory canons on marriage, the relator said:

> /... / The majority of the committee members finally agreed 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 education of children. Following the Constitution, the committee decided that in this

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2 On March 28, 1963 the Commission for the Revision of the Code of Canon Law was constituted with a committee (coetus) "De Matrimonio"; cf. Communicationes, 1(1969), pp. 32-37. Pope John Paul II, established by "Motu Proprio" on January 2, 1984, the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law by which the Commissions for the Revision of the Code and also for the Interpretation of the Decrees of Vatican Council II were disbanded; cf. L'Osservatore Romano, February 6, 1984, pp. 11-12.

3 Cf. ibid., 3(1971), p. 69.

> paragraph /C.I.C. (1917), c. 1013#1/ the idea of the primary end, that is the procreation and education of children, and the secondary end, namely mutual help and the remedy for concupiscence, should no longer be so expressed.[4]

Apart from the introductory canons, the other canons that would be most affected by the Conciliar teaching were those in the chapter on matrimonial consent. Since the Council placed such emphasis on the interpersonal aspect of marriage, the committee members were faced with deciding the validity of any attempt to define consent which would exclude an element which the Council saw as part of the object of consent. The committee decided on incorporating the interpersonal dimension as an element essential to the object of consent.

The reasons for this change were given by P. Huizing speaking as relator:

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4 "/... / maior pars coetus tandem convenit in affirmandum naturam matrimonii ut intimam totius vitae coniunctionem inter virum et mulierem, quae indole sua naturali, ad prolis procreationem et educationem ordinatur. Eandem constitutionem secutus, coetus in hac paragrapho notionem finis primarii, procreationis scilicet atque educationis prolis, et finis secundarii, nimirum mutui adiutorii et remedii concupiscentiae, iam adhibendam non esse censuit", ibid., p. 70. Emphasis added.

> As in canon 1013, the teaching of the Vatican Council II on marriage and on matrimonial consent requires that in this chapter too several changes in the canons regarding marriage consent be introduced, namely with respect to the object of consent and to the defect of consent by reason of the exclusion of an essential element of that object.5

In view of this, the committee proposed a new definition of consent, one that would reflect the Council's teaching. The substantial change was the reference to the consortium as follows:

> By a majority vote the committee proposed: consent is an act of the will whereby a man and a woman by mutual covenant constitute a perpetual and exclusive partnership of conjugal life /... /.6

This draft also adds to the exclusions vitiating the object of consent and of this change the committee notes as follows:

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5 "Ut in canone 1013, doctrina Concilii Vaticani II de matrimonio et de consensu matrimoniali etiam in hoc capite plures mutationes in canonibus de consensu matrimoniali introducendas requirit; cum quod ad consensus obiectum attinet, tum quod spectat ad defectum consensus ratione exclusionis elementi essentialis eiusdem obiecti", ibid., p. 75.

6 "Ex voto maioris partis coetus, consensus proponitur ut actus voluntatis, quo vir et mulier foedere inter se constitutuunt consortium vitae coniugalis, perpetuum et exclusivum /... /", ibid., emphasis added.

> Whence it follows that among the essential elements of the object of consent, the exclusion of which renders the consent invalid, there should be listed the right to the communion of life.[7]

As is evident the text emphasized the right to the communion of life. The relator noted this as follows:

> As will be evident to those acquainted with the subject, the expression the 'right' to a communion of life was deliberately used, so that consent would be invalid only if in the very act of contracting marriage the communion of life in so far as it belongs to the essence of marriage, should be excluded; that is, when 'marriage' would be intended in such a way that the right would not be given by one of the parties. Furthermore, the communion of life which is proper to marriage is not to be confused with cohabitation.[8]

This last proviso is important as C.I.C. (1917), cc. 1128-1129 on separation do refer to the communio, but in the context of cohabitation and C.I.C. (1917), c. 1130 speaks of consortium vitae similarly. These references to cohabitation refer

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7 "Unde sequitur, inter elementa essentialia obiecti consensus, quorum exclusio consensum reddit invalidum, recensendum esse ius ad vitae communionem", ibid.

8 "Ut peritis ultro patebit, consulto dictum est 'ius' ad vitae communionem, ita ut tunc tantum consensus sit invalidus, si in ipso contractu matrimoniali vitae communio, quatenus ad essentiam coniugii pertinet, excludatur, seu 'matrimonium' ita intendatur, ut comparti ius illud non habeat. Porro communio vitae, coniugii propria, non confundenda est cum cohabitatione", ibid., p. 76.

to the perfection of marriage which is markedly different from the understanding the Council and the proposed canons of the Schema (1975) had of marriage itself.

b. The Schema (1975) and Subsequent Revisions

On February 2, 1975, the Pontifical Commission for the Revision of the Code of Canon Law sent a schema to the Bishops, Episcopal Conferences and other consultative organs.[9] This schema of the revised canons on the sacraments had been drawn up in accordance with the principles for the revision of the Code that had been approved at the 1967 Synod of Bishops.[10]

Title seven of the schema was "De Matrimonio" which consisted of ninety nine canons. C.I.C. (1917), c. 1012 was identical with the draft c. 242. The first substantial change came with the revision of C.I.C. (1917), c. 1013 which became c. 243 #1. The hierarchy of ends was no

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9 PONT. COMM. C.I.C. REC., Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur, Typis Polyglottis Vaticanis, 1975, 96 p; hereafter cited as schema (1975); in the text we shall also use the English "draft" as a translation of schema.

10 Communicationes, 1(1969), pp. 77-85; C.I.C. (1983), pp. xxi-xxiii.

longer spoken of, instead a description of matrimonium in facto esse was given.[11] Thus marriage was described in terms of the personal dimension, the relationship of the spouses, as well as of its ordination to procreation as follows:

> Marriage, which is formed by mutual consent according to cc. 295 and following, is an (intimate) union of the whole of life, between a man and a woman, which by its very nature is ordered to the procreation and education of children.[12]

C.I.C. (1917), c. 1081 #2, the definition of consent is substantially revised to include the description of marriage as a covenant and consortium in the draft c. 295 as follows:

> Matrimonial consent is an act of the will by which a man and a woman, through a mutual covenant establish between themselves a perpetual and exclusive conjugal partnership of life which by its very nature is ordered to the procreation and education of children.[13]

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11 Schema (1975), p. 13.

12 "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 ordinatur", ibid., c. 243, p. 72; emphasis added. The word "intima" is in parenthesis so that the Bishops and others to whose judgement the text was submitted, were asked to respond whether it should be retained, cf. ibid., footnote 1.

13 Consensus matrimonialis est actus voluntatis quo vir et mulier foedere inter se constituunt consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad

The consortium is here described as part of the essential object of consent. That this is so is clearly borne out by the draft c. 303 #2 which replaced C.I.C. (1917), c. 1086 #2 on invalidating exclusions as follows:

> But if either party or both parties by a positive act of the will exclude marriage itself or the right to the communion of life or the right to the conjugal act, or any essential property, the marriage is invalidly contracted.[14]

The introduction notes that the emphasis is on the exchange of the right to the communion of life which is essential to marriage itself and that this is not to be confused with cohabitation.[15] This clarification is important as it is the second time it is stated that communion of life as in C.I.C. (1917), cc. 1128-1129, which referred to cohabitation, is not what was intended but rather marriage in its very essence.

In a report on the results of this consultation which drew 172 responses, Cardinal Felici noted that in general

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13 (cont'd) prolem generandam et educandam ordinatum", ibid., p. 82. Emphasis added.

14 "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", ibid., p. 83. Emphasis added.

15 Cf. ibid., p. 14. When the consultors discussed the draft c. 347, C.I.C. (1917), c. 1128, they wished to dis-

all were in favour of the schema.[16] A new study committee "On Matrimonial Law" was constituted with Archbishop Castillo Lara as secretary and P. Huizing S.J. as relator.[17]

The reply from one Episcopal Conference drew attention to the draft's "lack of mention of the love of Christ the Redeemer and the union of Christ and the Church to which marriage is ordered as a sign".[18] It could be noted that, at this stage only draft c. 295 spoke of "foedus" in the definition of consent. Obviously this Episcopal Conference wanted marriage itself defined as a covenant.

In their assessment of the draft, members of one university "thought the schema was pervaded with the logic of contract, and that the ecclesial dimension was lacking".[19] Since the Council, in Gaudium et Spes, purposefully avoided

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15 (cont'd) tinguish between the "communio vitae" of the definition of marriage and the "communionem vitae coniugalis" of this canon: therefore they decided that the latter would be changed to "convictum coniugalem" to avoid confusion; cf. Communicationes, 10 (1978), p. 118; cf. C.I.C. (1983), c. 1151.

16 Ibid., 9(1977), p. 117.

17 Ibid.

18 "[...] sine mentione amoris Christi Redemptoris et unionis Christi et Ecclesiae, cui matrimonium uti signum ordinatur", ibid.

19 "[...] censet schema pervasum esse logica contractus, et dimensione ecclesiali matrimonii carere", ibid.

speaking of marriage as a contract, the normative character of the conciliar terms was bound to be of importance. This question was answered in the relatio as follows:

> /... / concerning the not strictly juridical sense of certain words and expressions taken from the Vatican Council II, these it should be noted were spoken of in a pastoral sense which is not easily transferred into a juridical text, where they assume a new value which has consequences regarding the very validity of marriage.[20]

The interpersonal dimension of marriage was not included among these "pastoral" expressions not having juridical consequences because the interpersonal aspect was already spoken of as part of the object of consent in c. 295 #2. The committee (parvus coetus) decided that the definition of consent would be more logically placed among the introductory canons.[21] Since the preceding canon already contained the description of the object of consent as

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20 "/... / de sensu non stricte iuridico quorundam verborum vel locutionum quae mutuatae sunt ex testibus Concilii Vaticani II; animadvertunt scilicet plura in Concilio dicta fuisse sensu pastorali quae non possunt transferri simpliciter in textum iuridicum, ubi valorem novum assumunt qui consequentias habet in ordine ad ipsam validitatem matrimonii", ibid., p. 118.

21 Cf. ibid., p. 119.

"intima totius vitae coniunctio" (c. 243 /C.I.C.(1917), c. 1013_7) it was no longer necessary for this to be repeated in the draft c. 295 now revised as follows:

> Matrimonial consent is an act of the will by which a man and a woman, through an irrevocable covenant, give themselves to each other and accept each other in order to constitute matrimony.[22]

The committee also introduced into c. 243, which contained the notion or definition of marriage, a more personal dimension as follows:

> Marriage is for a man and a woman an intimate union of the whole of life which is ordered by its natural character to the good of the spouses and to the procreation and education of children.[23]

This is the first time that the emphasis in Gaudium et

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22 "Consensus matrimonialis est actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium", in ibid., p. 125. The consultors arrived at this formulation which departs from the rules for a definition in that it mentions what is being defined - "matrimonial consent is consent to matrimony" - because the object of consent was defined in the previous canon on the notion of marriage. In opting for this definition the consultors were in good company. Peter Lombard described matrimonial consent similarly.

23 "Matrimonium est viri et mulieris intima totius vitae coniunctio quae indole sua naturali ad bonum coniugum atque ad prolis procreationem et educationem ordinatur", in ibid., p. 123; emphasis added.

Spes art. 48, on the personal dimension of marriage was received into a draft. The text was also inspired by the Council's treatment of the ends of marriage: "God himself as the author of marriage, has endowed it with various goods and ends."[24] "Coniunctio" was decided on in preference over "communio" and "consortium" and it was noted as referring to "matrimonium in fieri".[25]

In response to those who called for the text to speak of "covenant" rather than "contract", the relator noted a difference of opinion among the consultors as to whether Gaudium et Spes, when speaking of "foedus" meant matrimonium in fieri or matrimonium in facto esse. Gaudium et Spes, art. 48, does seem to be speaking of matrimonium in facto esse. However, mention of "covenant" is made in such a way that "covenant" is equivalent to "consent", which is, of course, matrimonium in fieri.

> The intimate community of conjugal life and love, founded by the Creator and endowed

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24 "Ipse vero Deus est auctor matrimonii, variis bonis ac finibus praediti", SAC. OECUM. CON. VAT. II, Constitutiones, Decreta, Declarationes; Cura et studio Secretariae Generalis Concilii Oecumenici Vaticani II, Const. past. de Ecclesia in mundo huius temporis, Romae, Typis Polyglottis Vaticanis, 1966, p. 754.

25 Communicationes, 9(1977), p. 123.

> with his laws, is established by the covenant of marriage or irrevocable personal consent.[26]

In chapter five, we saw that the Conciliar fathers specifically avoided referring to marriage as a "contract" and substituted the biblical term "covenant"; yet the draft c. 242, unchanged from C.I.C. (1917), c. 1012, spoke of marriage as a "contract". The reaction to the schema in this regard, was therefore predictable: many requested that "covenant" be substituted for "contract".[27] The relator noted that opinion among the consultors in this matter, fundamental for fidelity to the Conciliar teaching, was divided three ways:

> One consultor expressed the opinion that this proposal not be admitted because the word "contract" referred to "marriage's coming into existence" whereas the word "covenant" referred to "marriage's being lived out". Another consultor observed that the word "covenant" in the Constitution Gaudium et Spes is applied to indicate "marriage's coming into existence". A third consultor maintained that the word "covenant" sometimes applied to "marriage's coming into

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26 "Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur", SAC. OECUM. CON. VAT. II, op.cit., p. 754; emphasis added.

27 Communicationes, 9(1977), p. 120; C.L.S.A., "Report of a Special Committee on the Marriage Canons of the Proposed Schema", in Task Force Critiques, C.L.S.A., 1978. p. 206.

existence" but most times it is applied to "marriage as it is being lived out".[28]

While the consultors were prepared to introduce the word "covenant", they were unwilling to abandon the term "contract" altogether.[29] The reason given, however, would indicate that in the understanding of the consultors "covenant" and "sacrament" were synonomous.[30] But "covenant", as we showed in chapter two, was applied by the prophets to marriage long before the institution of the sacrament. In this sense, because marriage itself was instituted by God "in the beginning" (Matt 19:4) as the primordial sacrament,

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28 "Aliquis consultor censet propositionem hanc admitti non posse, quia verbum 'contractus' indicat matrimonium in fieri, dum verbum 'foedus' indicat matrimonium in facto esse. Alius Consultor autem animadvertit verbum 'foedus' in Constitutione Gaudium et Spes adhibitum esse ad indicandum matrimonium in fieri. Tertius Consultor admittit verbum 'foedus' aliquando adhibitum esse pro matrimonio in fieri, sed plerumque adhibitum esse pro matrimonio in facto esse", Communicationes, 9(1977), p. 120.

29 Ibid., pp. 120-121.

30 "[...] quia in hoc canone agitur de matrimonio ut instituto naturae quod evehitur ad dignitatem sacramenti; iam vero matrimonium ut institutum naturae est contractus", ibid., p. 121.

all marriages share that sacred dimension.[31] In the "New Law",[32] the natural institution has been elevated to the dignity of a sacrament to mirror the relationship of Christ to his Church (Eph. 5:32).

It is curious that there would be disagreement among the consultors as to whether "foedus" referred to matrimonium in fieri or matrimonium in facto esse, because the only canon where the consultors had decided to incorporate the term used by the Council was the former draft c. 295 on the definition of consent.[33] This canon was re-positioned among

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31 T. SANCHEZ, De matrimonio, lib. II, disp. XIII, n.7, held that the legitimate marriage of infidels was intrinsically indissoluble. ARCHBISHOP A.-L. DESCAMPS, "Les textes évangéliques sur le mariage", in Revue théologique de Louvain, 11(1980), p. 44. examined the text of 1 Cor 7:15 and says two answers are possible to the question "whether Paul permits re-marriage?" If the answer is no, Archbishop Descamps says this is because "marriage between pagans (or between Jews) is already so 'sacred' that it is absolutely indissoluble. If the answer is yes, one does not ascribe to the Apostle a vague idea of natural (or Jewish) marriage /but/ a privilege"; emphasis added; cf. C.I.C. (1983), c. 1143.

32 CONCILIUM TRIDENTINUM, sess. XXIV, De matrimonio, in DS 1800. C.I.C. (1917), c. 1012 #1 has this reference and that of sess. VII, De sacramentis in genere, canon 1 as its first sources. C.I.C. (1983), c. 1055 though very substantially revised as the definition of marriage contains the substance of the former canon.

33 Communicationes, 3(1971), p. 75.

the introductory canons as c. 244, but without the word "foedus".[34] Therefore mention of "foedus" had been removed from the draft canons. The consultors decided to mention "foedus" in the draft c. 242 as was proposed by an Episcopal Conference. The revised draft of c. 242 #1 was approved by five consultors, with one against and one abstaining, as follows:

> Christ the Lord raised the very contract of marriage between the baptized to the dignity of a sacrament by which he restored the marriage covenant.[35]

However, the consultors then directed their attention again to the new draft c. 244 and decided to incorporate "by an irrevocable covenant" into the revised definition of consent.[36] This meant that "foedus" was now mentioned twice, but in two different senses: the first, the revised draft c. 242 #1 referring to matrimonium in facto esse; the second, the original use, now restored to the revised draft c. 244 #2.

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34 Cf. ibid. 9(1977), pp. 119-120.

35 "Christus dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos quo foedus coniugale instauratur", ibid. p. 125.

36 "[...] foedere irrevocabili [...]", ibid.

Since the question of the definition of marriage was so important, the study committee decided to refer it to the plenary Congregation of the Cardinals of the Pontifical Commission for the Revision of the Code held in Rome May 24 - 27, 1977. The question was posed in three parts as follows:

> Concerning the notion of marriage:
> a. Whether the notion of marriage is to be presented in the Code? If yes:
> b. Whether in this definition it would be opportune to include the elements "conjoining of life" (communion, partnership) as expressions of the personal aspect of marriage (Gaudium et spes, n. 48)? If yes:
> c. What is the effect of this element on the validity of marriage?[37]

Cardinal P. Felici, in a report to the Synod of Bishops on October 20, 1977 made known the response of the Commission of Cardinals to these questions. Firstly, they were in favour of the Code's containing a:

> /... / descriptive definition referring to matrimonium in fieri and to the essential

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37 "De notione matrimonii:
a. Utrum in Codice praebenda sit notio matrimonii. Quatenus positive:
b. Utrum in hac definitione includere oporteat elementum 'coniunctionis vitae' (communio, consortium) tanquam expressionem adspectus personalis matrimonii (Gaudium et spes, n. 48). Quatenus positive:
c. Quaenam sit vis huius elementi in ordine ad validitatem matrimonii", ibid., pp. 79-80.
The reason for this first question is the maxim "Definitions are odious in law".

> elements. /Secondly.../ the words "consortium vitae" or "communio vitae" should be included in the definition but in such a way that they are not wrongly interpreted in jurisprudence. /Thirdly.../ Regarding the effect of these elements, it pleased the majority of the fathers /.../ that they have juridical effect regarding the validity of consent, certainly not for the validity of marriage considered 'in facto esse".[38]

These decisions of the plenary Congregation of the Commission were considered by the marriage law committee on February 2, 1978. Since the Cardinals had decided that the revised Code would contain a definition of marriage, this called for a substantial change to c. 243. The committee noted the following:

> Concerning the first question: the Fathers agreed that in c. 243 the notion of marriage be presented. However, this must be descriptive or indirect and must refer to marriage "in fieri", only in its essential elements. They also agreed that

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38 "/.../ notionem matrimonii praebendam esse in Codice sed potius forma descriptiva et in obliquo et respicere debere matrimonium 'in fieri', quoad eiusdem sola elementa essentialia. /.../ in hac definitione includatur his vel aliis verbis 'consortium vitae', 'communio vitae', dummodo vitentur expressiones quae ansam praebere possint falsis interpretationibus in iurisprudentia. /.../ ut illud habeat vim iuridicam quoad validitatem consensus, minime quoad validitatem matrimonii 'in facto esse'", ibid., p. 212.

> these essential elements are to be rendered as "conjoining of life" (or "partnership of life" or "communion of life") provided that expressions which may give rise to false interpretations in jurisprudence are avoided.39

When the committee examined c. 243 on the definition of marriage they decided that it should be combined with c. 242 on the sacramentality of marriage, and so the following formula was eventually agreed upon:

> The matrimonial covenant between baptized persons, by which a man and a woman constitute together a communion of the whole of life, ordered by its natural character to the good of the spouses and to the procreation and education of children, has been raised by Christ the Lord to the dignity of a sacrament.40

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39 "Circa primam quaestionem Patribus placuit ut in can. 243 praebeatur notio matrimonii, quae tamen notio debet esse descriptiva seu in obliquo et respicere debet matrimonium 'in fieri', quoad eiusdem tantum elementa essentialia. Inter haec elementa essentialia placet ut recenseatur 'coniunctio vitae' (vel consortium vitae vel communio vitae), dummodo vitentur expressiones quae ansam praebere possint falsis interpretationibus in iurisprudentia", ibid., 10(1978), p. 125.

40 "Matrimoniale foedus, quo vir et mulier intimam inter se constituunt totius vitae communionem, indole sua naturali ad bonum coniugum atque ad prolis procreationem et educationem ordinatam, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est", ibid., pp. 125-126.

It is important to note that mention of the "covenant" considered under the aspect of marriage "in fieri" had, with this latest revision of the draft, now been placed both in the first of the marriage canons, that of the definition of marriage, as well as in the revised c. 244 #2. Combined with the mention of the "good of the spouses", it thus highlighted the interpersonal dimension of the union. It seems, though, that little can be inferred from the change from "coniunctio" to "communio" because, along with "consortium", these terms had consistently been proposed as being synonomous.[41]

These equivalent terms define what marriage essentially is, thus describing the essential formal object of consent. That this is so, is borne out by the fact that c. 243 revised as the definition of marriage, corresponds to C.I.C. (1917), c. 1013.[42] One of the consultors drew attention to the fact that the new formulation was a replacement and not an alternative re-statement of the hierarchy of the ends of marriage:

> The ends of marriage are included in this definition, because a conjoining

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41 Cf. ibid., 9(1977), p. 123, and 10(1978), p. 125.

42 Incorrectly listed as C.I.C. (1917), c. 1113 in ibid., 9(1977), p. 122.

> ordered to offspring entails procreation, mutual assistance, and the remedy for concupiscence, etc., without anything being said in the canon about a hierarchy of ends, either directly or indirectly.[43]

The work of both the Commission and the committee "De iure matrimoniali" reached a definitive stage by June 29, 1980. A schema of the entire revised Code, with consecutive ordering of the canons, was subsequently sent to all the members of the Commission for comments.

c. The Schema (1980) of the Code of Canon Law[44]

The introduction to the schema (1980) mentions that Book IV, "The Sanctifying Office of the Church", is only exceeded by Book II "The People of God" in the number of consultors and study committee sessions, etc., whose work produced the schema.

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43 [...] fines autem matrimonii includatur in hac definitione, quia coniunctio ordinata ad prolem importat sive procreationem sive mutuum adiutorium, sive remedium concupiscentiae etc., quin in canone directe vel indirecte aliquid dicatur de hierarchia finium", in ibid., p. 123.

44 PONT. COMM. C.I.C. REC., Schema Codicis Iuris Canonici, Libreria Editrice Vaticana, 1980, 382p. Hereafter cited as Schema(1980).

Title VII "Marriage" began with c. 1008, the definition of marriage, which remained substantially as the committee had revised it.

> The matrimonial covenant whereby a man and a woman establish between themselves an intimate communion of the whole of life, ordered by its natural character to the good of the spouses and to the procreation and education of children, when celebrated by baptized persons has been raised by Christ the Lord to the dignity of a sacrament.[45]

This was the definition of marriage proposed at the final consultative stage in the revision of the Code. A further detailed consultation with the Episcopal Conferences was decided against. Instead, Pope John Paul II asked for general comments only from each Conference and expanded the Plenary session by inviting the various regions to propose members; he also added some papal appointees.[46] The result was that eighteen additional Cardinals and an equal number of bishops were appointed to complement the members of the Commission for the plenary session held in October 1981.

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45 "Matrimoniale foedus, quo vir et mulier intimam inter se constituunt totius vitae communionem, indole sua naturali ad bonum coniugum atque ad prolis procreationem et educationem ordinatam, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est", Schema, 1980, c. 1008#1.

46 PONT. COMM. C.I.C. REC., Relatio, 1981, pp. 5-8. hereafter cited as 1981 Relatio.

Besides giving the full Commission a final opportunity for input, the plenary session marked an important step in confirming the development of the law through the various drafts and revisions. The Relatio, which was composed by the secretariate, was in the main, ratified by the Commission and thus provides us with authoritative insights as to why this definition was decided upon and what was being avoided.

In preparation for the plenarium, Cardinal Palazzini remarked that:

> The definition of the draft departs exceedingly from the whole of theological and canonical tradition. No value is to be given to such a definition as was the case with the current Code and also the Vatican Council II which presented only a pastoral description.[47]

In reply, the relator maintained that the definition of marriage could not be suppressed because of the decision of the plenary Congregation of Cardinals.[48]

Cardinal Palazzini also objected to the use of the word "totius", saying that it conflicted with the Code's provision

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47 "[...] definitio Schematis nimis a tota traditione theologica et canonica discedit. Nulla danda est in casu definitio sicut fecit Codex vigens et etiam Concilium Vat. II, quod quidem descriptionem pastoralem tantum praebuit", ibid., p. 242.

48 The Plenary Congregation of the Cardinals of the Code Commission's decision, that the Code should contain a definition of marriage, was made known by Cardinal Felici in a report to the 1977 Synod of Bishops; cf. Communicationes 9(1977), pp. 79-80 and p. 212. Also see supra footnotes 37 and 38.

for marriages of conscience (C.I.C. (1917), c. 1104 ff.) and for mixed marriages.[49] But his most fundamental attack was against the definition's reference to the bonum coniugum and all that this expression implied:

> The expression "for the good of the spouses" cannot be allowed. Indeed, (a) the end of a created thing is always outside its essence. Now truly the good of the spouses is not outside of marriage, but pertains to its essence as the mutual complement ("between them": personal aspect) principally on the sexual, physical and psychic levels. Therefore it cannot be presented as an end of marriage.[50]

The relator, on the other hand, affirmed that the expression could not be changed. Cardinal P. Felici spoke of its basis in the Conciliar teaching on marriage as a covenant for justifying the use of this term with its richly interpersonal connotations.

> The expression "for the good of the spouses" must remain. The ordering of marriage to the good of the spouses is

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49 Relatio (1981), pp. 242-243.

50 "Clausula 'ad bonum coniugum' admitti nequit. Etenim:
a) finis rei creatae est semper extra essentiam rei. Nunc vero bonum coniugum non est res extra matrimonium, sed pertinet ad eius essentiam tanquam mutuum complementum ('inter se': adspectus personalisticus) principaliter in plano sexuali physico et psychico. Praesentari ergo nequit uti finis matrimonii", ibid., p. 243.

> indeed the essential element of the matrimonial covenant and certainly not the subjective end of those marrying.[51]

As is obvious, the Schema (1980) and all the drafts for the revision of the Code did not speak of the hierarchy of ends as in C.I.C. (1917), c. 1013 #1. Yet, even as late as the period of preparation for the 1981 Plenarium, Cardinal G. Siri asked that it be retained. In response, the relator indicated that this was a matter of fidelity to the Conciliar teaching on marriage:

> [...] the Schema did not wish to establish a hierarchy of ends. Vatican Council II itself in the Constitution, Gaudium et spes, in addition to the good of children, proposed other goods and ends, without calling them primary or secondary: "God himself is the author of marriage and has endowed it with various goods and ends in view" (GS 48).[52]

The relator also stated that the word "totius" must remain as it was equivalent to "omnis" in the classical definition.[53] A change was then made in the vocabulary by

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51 "Locutio 'ad bonum coniugum' manere debet. Ordinatio enim matrimonii ad bonum coniugum est revera elementum essentiale foederis matrimonialis, minime vero finis subiectivus nupturientis", ibid., p. 244.

52 "Schema nullam vult statuere hierarchiam finium. Ipsum Concilium Vaticanum II in Const. Gaudium et spes, praeter bonum prolis, alia bona et fines proponit, quin tamen nullum vocet primarium aut secundarium: 'Ipse vere Deus est auctor matrimonii, variis bonis ac finibus praediti' (GS 48)", ibid.

53 "Verbum 'totius' manere etiam debet; aequivalet verbo

substituting "consortium" for "communio". The reason for this change was explained as follows:

> However, to avoid any ambiguity that could arise from the word "communion" which is not always used in the same sense in the Schema, it seems that the word "partnership" is to be preferred, since it expresses better the matrimonial living together and finds greater reception in juridical tradition.[54]

The only other change made to the definition of marriage found in the Schema (1980) was the deletion of the word "intimate" which was no longer appropriate, because it would be repetitious.[55] This meant that the definition of marriage had now almost acquired the form in which it was promulgated as C.I.C. (1983), c. 1055 #1:

> The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of

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53 (cont'd) 'omnis' in definitione iuris romani substantialiter a traditione recepta; 'consortium omnis vitae' (Dig. 23, 2, 1)", ibid.

54 "Ut vitetur tamen ambiguitas, quae forte oriri potest ex verbo 'communio' in Schemate non semper uno sensu adhibito, praeferendum videtur verbum 'consortium', quod melius exprimit matrimoniale convictum et maius suffragium invenit in traditione juridica", ibid., pp. 244-245.

55 "[...] dempto verbo intima, quod non amplius convenit [...]", ibid., p. 245.

> children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.[56]

Considering the concerted effort of the Council to avoid speaking of marriage as a "contract" and the calls for the use of the conciliar term "covenant" in the observations presented on the draft canons, it is at first surprising to note that C.I.C. (1983), c. 1055 #2 speaks of "contract" in such a way that it is identified with the matrimonial "covenant" referred to in #1. For the Plenarium, Cardinal Satowaki thought that this formulation might lead to errors and so he proposed speaking of "'covenant which is a contract' or something similar."[57] In reply the relator stated:

> The terms "contract" and "covenant" are used in one and the same sense and this deliberately, to show that the matrimonial covenant of which Gaudium et Spes clearly speaks can be instituted in no other way for the baptised than

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56 "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 Christi Domino ad sacramenti dignitatem inter baptizatos evectum est." English translation in The Code of Canon Law, London, Collins - Canadian Conference of Catholic Bishops, 1983, p. 189; cf. Relatio (1981), p. 245.

57 "'Foedus quod est contractus' [...] vel aliquid simile", in Relatio (1981), p. 244.

> through a contract, even though it is a contract of a special kind. The word 'therefore remains.[58]

Having considered these authoritative replies to questions about the schema,[59] we are now in a position to examine the revised Code of Canon Law to see what we can understand and infer about marriage as a covenant and consortium.

2. The Revised Code of Canon Law (1983)[60]

Canon 1055 speaks of marriage as a "covenant" in #1 and as a "contract" in #2.[61] In English, "covenant has personal and faith dimensions or connotations that are lacking in "contract". The Latin "pactus", the Italian "patto", and the French "alliance" are so similar that Cardinal Felici could equate the two terms in the relatio. Little wonder, then that

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58 "Locutiones "contractus" et "foedus" uno eodemque sensu adhibitae sunt, consulto quidem, ut liquidius pateat foedus matrimoniale de quo in Gaudium et Spes nullo alio modo constituti posse pro baptizatis quam per contractum, etsi sui generis. Maneat ergo verbum 'quare' ", ibid., p. 245.

59 The draft of the Code presented to Pope John Paul II by the Commission has canon 1055 which is unchanged upon promulgation; cf. PONT. COMM. C.I.C. REC., Codex Iuris Canonici, Schema Novissimum /... / Summo Pontifici praesentatum, E Civitate Vaticana, March 25, 1982, p. 189.

60 Codex Iuris Canonici, Auctoritate Ioannis Pauli PP. II promulgatus, Libreria Editrice Vaticana, 1983, XXX - 317 p.

61 Since in this section the revised Code of Canon Law is being considered, we shall dispense with the year of promulgation unless we refer to the Pio-Benedictine Code which we shall continue to speak of as C.I.C. (1917).

many authors writing in English applauded the change from "contract" to "covenant".[62]

If canon 1055 indicates that no major change can be inferred from the use of "covenant", since "contract" is also used, the same cannot be said of the object of that contract. With the passing into canonical history[63] of C.I.C. (1917), c. 1013 #1 and the "right to the body" of C.I.C. (1917), c. 1081 #2, the Code's understanding of the object of consent has undergone a profound enrichment. For here we come face to face with the decisive contribution of the revised Code regarding marriage. The change in terminology from "contract" to "covenant" seems to be more apparent than real because both terms continue in use. But,

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62 P.F. PALMER, "Christian Marriage: Contract or Covenant?", in Theological Studies, 33(1972), p. 618, even goes as far as to say: "/... / the word 'covenant' is not only biblical; it is also the preferred word to express the reality of marriage in those societies where marriage is monogamous, where the union of husband and wife is exclusive and stable", emphasis added; F.G. MORRISEY, "Revising Church Legislation on Marriage", in Origins, 9(1979-1980), p. 211, says: "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."

63 G. ROBINSON, "Unresolved Questions in the Theology of Marriage", in The Jurist, 43(1983), p. 86: Since the

what is covenanted or contracted is no longer the "right to the body", but marriage itself through a mutual gift of self (c. 1057 #2). This gift (consent) has two joint objects: "the good of the spouses and the procreation and upbringing of children" (c. 1055 #1). It is, then, the object of the covenant (contract) which has been enriched by the Conciliar teaching and subsequently influenced the drafting of the Code.

In English, "covenant" certainly expresses the constitutive element of marriage more personally. In law, however, both terms are used interchangeably, L. Orsy summarises this well:

> It follows that, as long as we are moving in the world of law, it matters little if the exchange of promises is called contract or covenant, provided it is understood that the word refers to the external sign through which the mystery is identified.[64]

We are obviously faced with something more than contract in the ordinary sense of the word. "Covenant" expresses this

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63 (cont'd) Council the ius in corpus as the object of consent has not once been mentioned in any document of the Magisterium."

64 L. ORSY, "Christian Marriage: Doctrine and Law Glossae on Canons 1012 - 1015", in The Jurist, 40(1980), p. 292.

element of mystery better than "contract" does. [65]

The Conciliar and post-Conciliar teaching on marriage, examined in our chapters five and six, placed increasing emphasis on the importance of love in marriage. The importance of conjugal love was clearly emphasized by the Second Vatican Council[66] and subsequently taken up in a Rotal decision[67] and by a number of notable authors.[68] Pope Paul VI spoke of

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65 Cf. J. JOYCE, "Love and Marriage go together like a Horse and Carriage - or do they?", in Clergy Review, 68(1983), pp. 367-369; T. MACKIN, What is Marriage?, Ramsey, N.J., Paulist Press, 1982, pp. 15-26, 286-288; F.G. MORRISEY, "Revising Church Legislation on Marriage", in Origins, 9(1979-1980), p. 211; U. NAVARRETE, "Foedus coniugale, amor, sacramentum, attenta doctrina Concilii Vaticani II", in Quaedam problemata actualia de Matrimonio, Romae, Libreria Editrice della Pontificia Università Lateranense, 1979, pp. 55-56; P.F. PALMER, "Christian Marriage: Contract or Covenant", in Theological Studies, 33(1972), pp. 617-619.

66 SAC. OECUM. CON. VAT. II, Constitutiones, Decreta, Declarationes; Cura et studio Secretariae Generalis Concilii Oecumenici Vatican II, Const. past. Gaudium et Spes, Arts., 48-49, Libreria Editrice Vaticana, 1966, pp. 754-759.

67 S.R. ROTA, c. Fagiolo, October 30, 1970, in S.R.R.Dec., 62(1970), pp. 978-990.

68 Z. GROCHOLEWSKI, "De 'communione vitae' in novo schemate 'De matrimonio' et de momento juridico amoris coniugalis", in Periodica, 68(1979), pp. 439-480; U. NAVARRETE, "Amor coniugalis et consensus matrimonialis", in Periodica, 65(1976), pp. 619-632. See also J.C. FORD and G. KELLY, Contemporary Moral Theology, Vol., II, Marriage Questions, Westminster, Md., Newman, 1959, pp. 103-126; W.J. LaDUE "Conjugal Love and the Juridical Structure of Christian Marriage", in The Jurist, 34(1974), pp. 36-37; D.F. O'CALLAGHAN, "Love in Marriage: How New was Vatican II?, in The Irish Theological Quarterly, 46(1979), pp. 221-239.

marriage as a "communion of beings".[69] In a decision on a case originally from Utrecht, the Apostolic Signatura stated that:

> Love has importance in law provided that it is understood as an act of the free will which is manifested according to law and by which marriage is entered into: at that moment, however, love, or the act of love whereby the marrying parties mutually give themselves, is the same thing as matrimonial consent. If /... / love is accepted as the act of the will whereby the spouses mutually 'give and accept themselves' and are constituted husband and wife, love is the same thing as matrimonial consent. /... / Unless this act of the will, which is essentially self-donative - and, hence an act of love - is elicited, marriage is not entered into. In this sense and only in this sense, love pertains to the efficient, intrinsic and essential cause of the marriage contract, and matrimonial consent /... / produces its specific effect, namely, marriage as an accomplished fact, not insofar as it is an act of love, but insofar as it is an act of the will, having the nature of a pact, by which each one of the parties intends to establish a conjugal society with the rights and obligations which are proper to marriage.[70]

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69 PAUL VI, Encyclical Letter, Humanae Vitae, July 25, 1968, in A.A.S., 60(1968), p. 481. English translation, Of Human Life, Boston, St. Paul Editions, Art. 8.

70 "Amor momentum habet in iure dummodo intelligatur ut actus liberae voluntatis (Encycl. Humanae vitae, n.9 - AAS., 60(1968), p. 486) legitime manifestatus quo matrimonium initur: tunc autem amor, seu actus amoris quo

But love is the cause of consent, not the act; Spouses consent to marriage in Western cultures because they love each other and want to commit themselves to love each other for the rest of their lives. The act of consent is, therefore, the product or act of love rather than identical with it.[71] Archbishop Fagiolo says this so well when he states that:

> Conjugal love is the efficient cause of marriage, just as consent is. In fact, because marriage is properly speaking a marital conjunction, which requires a mutual giving

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70 (cont'd) nupturientes sese mutuo donant, idem est ac matrimonialis consensus, Si /.../ amor accipiatur ut actus voluntatis quo sponsi mutuo 'sese tradunt atque accipiunt' ac constituuntur maritus et uxor, amor idem est ac consensus matrimonialis. /.../ Nisi eliciatur hic actus voluntatis, qui essentialiter est traditivus suipsius - ac proinde actus amoris - matrimonium non initur. Hoc sensu et tantum hoc sensu, amor pertinet ad causam efficientem intrinsecam et essentialem, contractus matrimonialis et consensus matrimonialis /.../ producere effectum proprium, scilicet matrimonium in facto esse, non quatenus est actus amoris, sed quatenus est actus voluntatis indolis practicae, quo nimirum utraque pars constituere intendit societatem coniugalem cum iuribus et officiis, quae propria sunt matrimonii." Sig. Apost., c. Staffa, November 29, 1975, in Periodica, 66(1977), pp. 314-315.

71 Cf. U. NAVARRETE, "Structura iuridica matrimonii secundem Concilium Vaticanum II", in Periodica, 57(1968), p. 208. It should be noted, however, that U. Navarrete states that "love does not have any juridical relevance for the validity of marriage", cf. ibid., p. 210.

> and is the origin of the intimate communion of life, it should be clear that it must be more correct to say that conjugal love is the cause of marriage and makes marriage and is marriage, since because of conjugal love the giving is made.[72]

Pope Paul VI cautioned against making love and marriage co-terminous, so that if love is lacking the marriage no longer exists, distinguishing as he did between the subjective element (conjugal love) and the juridical reality (the marriage bond) in stating that:

> This "reality" insofar as law is concerned, continues in existence without any dependency on love and remains the same even though the feelings of love may have completely vanished. For, when the spouses express their free consent, they do nothing more than enter into and weave themselves into an objective order, that is "institution", which is superior to them and which in no wise depends upon them, either as regards its nature or as regards the laws which are proper to it.[73]

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72 "[...] amorem coniugalem esse matrimonii causam efficientem, sicut consensus. Imo, cum matrimonium sit proprie coniunctio maritalis, quae donationem mutuam postulat et intimam communitatem vitae gignit, videretur dici debere rectius amorem coniugalem - cui proprium est donationem facere - causam esse coniugii eumque matrimonium facere et esse", S.R. ROTA, c. Fagiolo, October 30, 1970, in S.R.R. Dec., 62(1970), p. 982.

73 "Haec 'realitas', ad ius quod spectat, esse pergit ex amore minime pendens, eademque permanet, etiamsi amoris affectus plane evanuerit. Coniuges, enim, cum liberum praestant consensum non aliud faciunt, quam ingrediuntur atque inseruntur in ordinem obiectivum, seu 'institutum' quod eos superat ex eisque minime pendet nec quoad naturam suam, nec quoad leges sibi proprias ", PAUL VI, Address to the S.R. Rota, February 9, 1976, in A.A.S., 68(1976), p. 207; English translation in C.L.D., VIII, p. 794.

Pope Paul VI is obviously concerned here with safeguarding the indissolubility of marriage, and thus, while the spouses as a result of their love for each other bring about their marriage through their act of consent, the continuation or the quality (or lack) of love does not affect the validity of the consent of the marriage thus brought into existence.

Bishop Z. Grocholewski distinguishes between affection (the attraction and desire of possessing) which is the physical and emotional stage of love on the one hand, and amor benevolentiae on the other. This latter is the nucleus of every true love and is an attitude manifested in acts; but he says: "Ordinarily these two aspects are deeply connected in conjugal love and strengthen each other."[74] Regarding the juridical importance of conjugal love (understood as amor benevolentiae), he says it should be given "juridical relevance in relation to the validity of marriage in the same way that juridical relevance is recognized in the three essential goods."[75]

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74 Z. GROCHOLEWSKI, loc.cit., p. 459: "[...] ordinarie hi duo aspectus stricte in amore coniugali connectuntur et invicem sese roborant."

75 Ibid., p. 465: "[...] momentum iuridicum, relate ad matrimonii validitatem eodem modo quo agnoscitur momentum iuridicum tribus bonis essentialibus."

Finally, it should be noted that the juridical relevance of conjugal love is arrived at negatively, not by ascertaining what degree of love would need to be present (a task fraught with social and cultural factors), but by teaching that marriage should be considered null if the essential element of love is excluded by a positive act of the will.[76] But an objection may be raised, since conjugal love is nowhere mentioned in the Code. Nowhere mentioned explicitly we would hasten to add, for it seems to us, that conjugal love is an element of the bonum coniugum. According to c. 1055 #1, along with the generationem et educationem prolis, the bonum coniugum is part of the object of consent, which strictly speaking, is marriage itself.

Canon 1055 #1 presents the consortium totius vitae as equivalent to marriage itself, the summation of its rights and obligations.[77] These rights and obligations, which are essential to marriage, are for the good of the spouses and the generation and education of children. This formulation

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76 Cf. ibid.

77 Cf. U. NAVARRETE, "De iure ad vitae communionem: observationes ad novum Schema canonis 1086 #2", in ID., Quaedam problemata actualia de matrimonio, Romae, Pontificia Universitas Gregoriana, 1979, p. 207.

differentiates between the traditional bonum prolis (and the other two traditional bona) and the bonum coniugum, for if the bonum prolis was contained in the bonum coniugum, there would be no need for it to be mentioned separately or vice versa. Since elements of the other two traditional bona are listed as the essential properties of marriage in c. 1056, it seems that we should now speak of four goods of marriage: the bona coniugum, prolis, fidei and sacramenti.[78]

The linkage of the bonum coniugum with the bonum prolis as joint elements of consent, is a welcoming into law of the personalist emphasis of the Council found in Gaudium et Spes, art. 48 and elsewhere. It is, therefore, in the context of the bonum coniugum that the Council's emphasis on conjugal love acquires expression in law. The bonum coniugum and the bonum prolis are essential elements of the marriage partnership (consortium). From the perspective of the law, therefore, it is not any love, but love which is specifically ordered to the bonum coniugum and bonum prolis as an expression of the

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78 A. CUSCHIERI, "Bonum coniugum (c. 1055, 1) and Incapacitas contrahendi (c. 1095, 2-3) in the New Code of Canon Law", in M.E., 108(1983), p. 344, takes a different view and says: "Being the matrimonial convenant (sic) itself, the bonum coniugum incorporates in itself the two essential properties of unity and indissolubility."

consortium, that is considered. This gives conjugal love an institutional character, taking it out of the sphere of affectivity alone and giving it stability as an element of the bonum coniugum.

W. Kasper, in his brief but excellent work, pointed out the deficiency of equating love and marriage when he said:

> Marriage /... / should not be seen purely as a love relationship. It must also be seen within the framework of the actual social and economic conditions of human freedom.[79]

The question of the juridical relevance of conjugal love centres on whether love can be willed. Authors maintain that love is beyond the will and express it as "a-juridical" or "metajuridical".[80] We maintain that conjugal love is an element of the bonum coniugum, but the elements of the bonum coniugum vary from one culture or society to another.

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79 W. KASPER, Theology of Christian Marriage, New York Crossroad, 1981, p. 17.

80 J.A. RENKEN, The Contemporary Understanding of Marriage, Rome, Pontifical University of St. Thomas, 1981, pp. 406-444. Among authors who maintained that conjugal love was the same as marriage, Renken noted D.F. O'CALLAGHAN, "Marriage as a Sacrament", in Concilium, 55(1970), p. 104; Others maintained that conjugal love was the object of matrimonial consent: I. KELLY, "The Church's Understanding of Marriage", in S.C., 9(1975), p. 278; C. MURTAGH, "The Juridical Importance of Amor coniugalis", in S.C., 7(1973), pp. 52-53.

Besides c. 1055 #1, the other canon which clearly speaks of the consortium is c. 1098. The dolus[81] is such that it would seriously disturb the "partnership of conjugal life". This canon is new with the Code of 1983. Roman law did not have anything similar regarding marriage, no doubt because marriage lasted as long as the affectio maritalis endured. Under Roman law, a slave was incapable of marriage rights and so could not enter a matrimonium legitimum. Not even a slave's master could permit marriage.

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80 (cont'd) Opposed to the juridical relevance of conjugal love was U. NAVARRETE, "Amor coniugalis et consensus matrimonialis", in Periodica, 65(1976), pp. 619-632, who maintained that conjugal love was an "elementum psicologico-affectivum". Similarly, F.G. MORRISEY, "Preparing Ourselves for the New Marriage Legislation", in The Jurist, 33(1973), pp. 347-348, maintained conjugal love was an element of the psychological order.

81 C.T. LEWIS and C. SHORT, A Latin Dictionary, Oxford, Clarendon Press, 1969, p. 607 note that dolus is derived from the Sanscrit dal-bhas for "deceit". Firstly in older, especially juridic language, dolus malus was the standing expression for "guile, fraud and deceit". Secondly, without malus it means "guile, deceit or deception". The Code of Canon Law in English Translation renders dolus as "deceit" whereas the C.L.S.A. translation renders it as "fraud". Once again, the peculiarities of English come to the fore. As "covenant" emphasizes the personal aspect with fidelity implied, so "deceit" emphasizes deception of one person by another. Fraud, on the other hand, like "contract" is more applicable to things, especially business misdealings. J.A. MURRAY (ed.), A New English Dictionary of Historical Principles, Oxford, Clarendon Press, 1901, Vol. 3, p. 88 defines deceit as the "action or practice of deceiving, concealment of truth in order to mislead."

Hugh of St. Victor considered the case of a free person marrying a slave, but deceived by fraud as to that person's true status. Hugh maintained that "the trickery of the other is not permitted to stand for the harm of the innocent one in that which he seized by fraud."[82] In canonical history, only error of person or error of quality that amounted to an error of person invalidated. C.I.C. (1917), c. 1083 #2 only mentioned slavery as an invalidating quality of error of person. It would seem that the reason for servile state as an invalidating condition was that there could be no consortium between unequal persons. J. Freisen maintained that "deceit was not given any invalidating force because no one could find a precedent for it."[83] Also, deceit would seldom seriously have affected marriage when its object was the "ius in corpus".

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82 "/...7 alterius dolus ad laesionem innocentis in eo quod fraude usurpavit, stare non permittatus", J. MIGNE, PL, 176, col. 520. English translation in R.J. DEFERRARI, Hugh of St. Victor on the Sacraments of the Christian Faith, Cambridge, Mass., Medieval Academy of America, 1951, p. 369.

83 J. FREISEN, Geschichte des Canonischen Eherechts bis zum Verfall der Glossenlitteratur, Paderborn, (1893), Sect. III, ch. I, n. 4, p. 301 in G. ROBINSON, Background to the Question of the Invalidating Effect of Deceit on Marriage, (unpublished manuscript), p. 4. Bishop Robinson's text traces the history thoroughly and then examines how revolutionary C.I.C. (1983), c. 1098 is, as he says "it goes against a thousand years of history /or/ really a non-history, that the power of precedent

During the preparation for the 1981 Plenarium this lack of precedent in canonical history and the fear of possible abuses led some to call for the abolition of c. 1052 of the Schema (1980) or C.I.C. (1983), c. 1098. Bishop T. Stewart of Chun Cheon, Korea, for instance, called for the deletion of the proposed canon on deceit. Fr. U. Navarrete responded on behalf of the Commission, and made an enlightening contribution in replying to Bishop Stewart's propositions. Referring to the basis for the canon on deceit, even though it did not arise directly from the natural law, Navarrete wrote:

> /... / it seems obvious to all that in view of the nature of the conjugal partnership, it is very much in keeping with natural equity that the innocent party be effectively protected against the deceitful machinations of the other party with regard to those qualities which, of their very nature, would seriously disturb the partnership of conjugal life in the same way that it is protected against force and grave fear (C.I.C. /1917/, c. 1087).[84]

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83 (cont'd) was so strong that few authors gave the question any consideration", ibid., p. 15. P. SUMNER "Dolus as a Ground for Nullity of Marriage", in S.C., 14(1980), p. 176, observed that even in the Coetus there was confusion between error and dolus.

84 "/... / nemo non videt quod attenta natura consortii coniugalis, quam maxime congruit cum aequitate naturali ut pars innocens efficaciter protegatur contra machinationes dolosas alterius partis circa qualitates quae natura sua natae sunt ad consortium vitae coniugalis graviter perturbandum, simili modo ac protegitur contra vim et metum gravem (can. 1087 CIC)." PONT. COMM. C.I.C. REC. Response by Rev. U. Navarrete to Bishop T. Stewart, Pn. 81/81, p. 2.

Rather than being pre-occupied by the lack of a precedent, Navarrete drew a parallel with the existing canon on force and fear, now c. 1103.

Finally, as if to underscore the basis of the new c. 1098 on deceit, Navarrete concludes:

> This canon was formulated after much discussion and it lays down a norm which derives either directly from the natural law or at least corresponds to a great extent to natural equity.[85]

It seems that Cardinal Florit and others were not convinced, however, for during the consultation, they voiced the fear that the formula of the canon would leave the way open for innumerable declarations of nullity. The relator, however, stated that:

> The formula of the canon appears to be sufficient to avoid lax interpretations. It requires a quality (or defect) which is objectively grave, i.e., of great importance, which of its nature can seriously disturb the partnership of life. Furthermore it is required that the person enter marriage 'inveigled by deceit perpetrated to obtain consent'.

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85 "Canon redactus est post plurimas discussiones et statuit normam quae vel est directe ex iure naturali vel saltem maxime congruit cum aequitate naturali." Ibid., p. 4.

> For the rest, doctrine and jurisprudence will more exactly determine the extent and limits of the canon and, if necessary, draw up a list of the qualities to which the canon refers.[86]

Apart from c. 1098 on deceit, the other canon treating of marriage as a partnership is c. 1101. In the Schema (1980), c. 1055 #2 read as follows:

> But if either party or both parties by a positive act of the will exclude marriage itself or the right to that which essentially constitutes the communion of life, or the right to the conjugal act, or any essential property of marriage, the contract is invalid.[87]

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86 "Formula canonis videtur sufficiens ad laxas interpretationes praecavendas. Exigitur enim qualitas (vel defectus) obiective gravis, scil, magni momenti, quae ex natura sua consortium vitae graviter perturbari possit. Requiritur praeterea quod matrimonium quis contrahat 'dolo deceptus ad obtinendum consensum patrato'.

"Ceterum doctrina et iurisprudentia pressius determinabunt extensionem et ambitum canonis et, si opus fuerit, elenchum qualitatum de quibus in canone conficient." Relatio (1981), pp. 256-257.

87 "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." Schema (1980), c. 1055 #2; emphasis added.

This text which initially included a reference to the exclusion of the sacramental dignity[88] and finally assumed the more generic form of c. 1101 #2.

> 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.[89]

The relator explained this change as follows:

> Thus, the difficulties regarding the words "or the right to those things which essentially constitute the communion of life" are removed, and, although in a generic way, a necessary relation is expressed towards those things which are essential to marriage and which are to be determined by doctrine and jurisprudence, taking into account the definition of c. 1008 #1 as well as the whole of the legislation and the juridical and theological doctrine.[90]

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88 In order to respect the view of those Christians who do not maintain the sacramentality of marriage for ecumenical reasons this reference was abandoned during the Plenary session (1981).

89 "At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum vel matrimonii essentiale aliquid elementum, vel essentialem aliquam proprietatem, invalide contrahit." C.I.C. (1983), c. 1101 #2.

90 "Ita auferuntur difficultates circa clausulam 'aut ius ad ea quae vitae communionem essentialiter constituunt' et, etsi generico modo, relatio exprimitur necessaria ad ea quae essentialia matrimonio sunt, quae quidem a doctrina et iurisprudentia determinanda sunt, habita ratione definitionis

Pope John Paul II in his address to the Roman Rota on January 26, 1984, seems to echo this explanation of the Relatio when he says:

> Not a few explanations of natural law have been codified in the material of matrimonial consent. But there are still canons having noteworthy importance in matrimonial law which were necessarily formulated in a generic way and await further determination, to which expert rotal jurisprudence could above all make a valid contribution.[91]

The Pope, in drawing attention to canons which are based on the natural law, is encouraging local courts to move ahead immediately and apply the law to such cases. On the other hand, however, those canons which are of more generic formulation, will need the specific contribution of courts like the Rota for the development of jurisprudence.

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90 (cont'd) can. 1008 #1 necnon totius legislationis et doctrinae, sive iuridicae sive theologicae." Relatio (1981), pp. 257-258.

Among the 'difficulties' mentioned by Cardinal P. Palazzini were dangers to the stability of the bond of marriage, attention to marriages of conscience and the fact that communion of bed and board referred to the integrity and not to the essence of marriage. This shows that Cardinal Palazzini was giving an interpretation to the Conciliar term (or equivalent to describe marriage itself) according to C.I.C. (1917), cc. 1128-1129, which was not the intended meaning of successive drafts of the revised Code; cf. ibid., p. 257.

91 JOHN PAUL II, Address to the Roman Rota, "The Task of the Church Tribunal", in Origins, 13(1983-1984), p. 585. The original text, unavailable at the time of writing, is in A.A.S. 76(1984), p. 648.

Among the canons Pope John Paul II specifically mentions by way of example, is c. 1098. But c. 1101 #2 is similar, in that mention of an "essential element" of marriage being positively excluded as a reason for the invalidity of consent is new to the revised Code, therefore the guidance of the Rota will be necessary for its application. The Pope highlights the guidance the Rota will give other courts in this regard when he says:

> These important determinations will have to give orientation and guidance to all tribunals of particular churches. They must be the fruit of mature and profound study, of serene and impartial discernment in the light of the perennial principles of Catholic theology, but also the principles of the new canonical legislation inspired by Vatican Council II.[92]

Fortunately, members of the Church did not have to wait the more than seventeen years between the promulgation of Gaudium et Spes' teaching on marriage and the revised Code of Canon Law for some of the juridical consequences of the Conciliar teaching to take effect. Distinguished rotal auditors applied the Council's teaching in their jurisprudence and thus stimulated a renewed understanding of marriage as a

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92 Ibid.

partnership of life and love (or equivalent terms) and the change of emphasis from seeing marriage only as an exchange of "rights over the body".

Conclusion

The Vatican Council II in Gaudium et Spes, arts. 48-52 had a profound impact on the drafting of the revised Code. From very tentative beginnings, the coetus through successive schemata gradually gave juridic expression to the Conciliar teaching.

Marriage was designated as a covenant, thus a more personal and thoroughly biblical term now described marriage "in fieri". This personalist emphasis, introduced by the Council, was received into law with the definition of marriage as a consortium totius vitae. A further manifestation of the personalist emphasis was that the covenant which brought about the partnership was no longer ordered primarily to the exchange of the "rights over the body" but equally to the good of the spouses. Thus, the hierarchy of ends was no longer spoken of, the end of an era that began with the Pio-Benedictine Code.

The revised Code gives equal prominence to the bonum prolis and the bonum coniugum, thus openness to children in a

marriage and their full human development are linked to the intrapersonal and interpersonal capability of the spouses. The Commission left to legislation and jurisprudence the delineation of the essential elements of the consortium.

Some of these changes were applicable before the promulgation of the revised Code, either because they were based on the natural law[93] or constituted authoritative declarations by the legislator. Some rotal auditors realized these were open to immediate application in law and so applied them. Therefore, even before the promulgation of the revised Code it was possible for a jurisprudence to emerge and these developments will now be examined in our final chapter.

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93 Cf. J.M. SERRANO-RUIZ, "Le droit à la communauté de vie et d'amour conjugal comme objet du consentement matrimonial: aspects juridiques et évolution de la jurisprudence de la Sacrée Rote Romaine", in S.C., 10(1976), p. 274.

CHAPTER VIII

JURISPRUDENCE ON THE CONSORTIUM TOTIUS VITAE

Unlike Common law courts, where previous decisions become precedents and so have a decisive role to play in deciding cases before a court, the Civil or Roman law traditions see such decisions merely as interpretations of law in a particular case. In Canon Law, authentic interpretation is reserved to the legislator or an appointee, according to the principle enunciated by Pope Innocent III: "Let interpretation of the law come from where the law came."[1] Rotal jurisprudence is not law but rather the application of the law or its interpretation for the parties in the particular case, c.16.

Since the Vatican Council II, during the period of the revision of the Code, rotal jurisprudence acquired a certain authoritative, pace-setting character in applying the Conciliar teaching and supplementing the Code's definition of the object of consent (c. 1081 #2). This has meant that from the time of the Council through to the implementation of the revised Code, there were marked developments in jurisprudence.

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1 "Unde ius prodiit, interpretatio quoque procedat", in X,V,39,31.

a. Jurisprudence of the Roman Rota.

The first rotal decision to apply directly the Conciliar teaching in Gaudium et Spes and give it juridical import was the landmark decision c. Anné:

> This formulation of the Vatican Council II has juridical value. For it looks, not to the mere fact of establishing a community of life, but to the right and obligation to this intimate community of life, which has as its most specific element a most intimate union of persons /.../. This points out that marriage is a most personal relationship /.../.[2]

Anné also notes that the teaching of Gaudium et Spes, art. 48, originating in the natural law, is prior to any positive law, whether canonical or civil.[3] Therefore it is open to immediate application in jurisprudence.

Inspired by the Conciliar teaching on the interpersonal dimension of marriage, Anné stated that the formal object of consent was more than the right to the body, (C.I.C. /1917/, c. 1081 #2) but that it also included the right to the partnership of life. This decision was so

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2 "Propositio haec Concilii Vaticani II sensum iuridicum habet. Non respicit, enim, merum factum instaurationis communitatis vitae, sed ius et obligationem in hanc intimam communitatem vitae, quae uti elementum maxime specificum habet intimissimam personarum coniunctionem /.../. Id denotat matrimonium esse relationem maxime personalem /.../", in S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), p. 182.

3 Cf. ibid., p. 184.

crucial that, although it is by now well known, we shall quote the substantive part as follows:

> The formal substantial object of this consent is not only the right over the body /... / but it also embraces the right to the partnership or community of life which is properly called matrimonial, and to the correlated obligations, that is, the right to the intimate union of persons and actions by which the partners 'perfect themselves so that they are able to collaborate with God in the procreation and education of new lives' (Enc. Humanae Vitae /art. 8/).[4]

Furthermore, Mgr. Anné admits the difficulty of exhaustively listing the essential juridical elements of the consortium totius vitae. Three aspects of marriage have to be kept in mind: the natural law element, the cultural aspect, and the personal dimension as this exists for the spouses themselves.[5] One canonist faced this difficulty head on and enumerated what he considered were fifteen "concrete elements which are essential to the consortium vitae coniugalis and to which the marriage partner has a right."[6] Fr. G. Lesage deserves credit

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4 "Obiectum, exinde, formale substantiale istius consensus est non tantum ius in corpus, /... / sed complectitur etiam ius ad vitae consortium seu communitatem vitae quae proprie dicitur matrimonialis, necnon correlativas obligationes, seu ius ad intimam personarum atque operum coniunctionem, qua 'se invicem perficiunt ut ad novorum viventium, procreationem et educationem cum Deo operam sociant' (Enc. Humanae Vitae)." Ibid., pp. 183-184.

5 Ibid., p. 184.

6 G. LESAGE, "The Consortium vitae conjugalis: Nature and Applications", in S.C., 6(1972), p. 103.

as he is the first to provide a taxative list of concrete elements necessary for the partnership aspect of married life.[7] He was also correct in focusing on the right to these elements, rather than their realisation in any given marriage. This attempt at listing the elements of the consortium did not go without criticism.[8] Perhaps, this was to be expected because it was the first such attempt. An example of reservations expressed about the elements listed by Lesage is the following by W.J. Ladue:

> Lesage's list of essential elements seems very broad, overlapping, and somewhat nebulous. It would in all likelihood be extremely difficult to apply these criteria in practice.[9]

Lesage's approach was controversial in that he listed what would be necessary for the consortium. But it

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7 Ibid., pp. 103-104.

8 SIGNATURA APOSTOLICA, c. Staffa, November 29, 1975 in Periodica, 66(1977), pp. 312-313, quotes. U. Navarrete, that concerning the communion of life, its sum total is "indefinite and indefinable, comprising attitudes, behaviour and affectivity - variable in concrete expressions according to the diversity of culture - without which the formation and consolidation of that communion of life and love /.../ in a truly human way, is impossible" and then concludes: "All these are required, according to G. Lesage, for the expression of the partnership of life and therefore for the essence of the matrimonial contract, this truly cannot be admitted".

9 W.J. LADUE, "Conjugal Love and the Juridical Structure of Christian Marriage", in The Jurist, 34(1974), p. 52. Bishop G. Robinson noted that canonists have studied Lesage's "list with interest, but most would insist that it cannot be used as a simple checklist. Each must be studied in itself." G. ROBINSON, "Unresolved Questions in the Theology of Marriage", in The Jurist, 43(1983), p. 89. Among the canonists referred

does seem to be valid in that he did not maintain that each and every element must be present in every marriage to a subjectively desired degree. Rather, he stated that: "The absence of these to a vital degree would deprive the partner of an essential right of marriage."[10] Thus, the way to be followed in each case will be the via negativa: to show that a person unable to live the conjugal partnership is also unable to exchange the right to that consortium and therefore unable to enter a valid marriage which consists in the exchange of the rights to the consortium totius vitae and the other rights of marriage.

Fr. Lesage later refined the list of fifteen elements of the consortium into five categories: (1) the balance and maturity required for a genuinely human conduct; (2) the relationship of interpersonal and heterosexual friendship; (3) the aptitude for adequate collaboration with respect to conjugal assistance; (4) the mental equilibrium and sense of responsibility required for the material well-being of the family; and (5) the psychological capacity of each partner

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9 (cont'd) to by Robinson would be the following: O. FUMAGALLI-CARULLI, "Amour conjugal et indissolubilité dans le consentement au mariage canonique", in S.C., 16(1982), pp. 219-240; C. MURTAGH, "The Jurisprudential Approach to the Consortium Vitae", in S.C., 9(1975), pp. 309-322; M. THOMAS, "The Consortium Vitae Coniugalis", in The Jurist, 38(1978), pp. 171-179.

10 G. LESAGE, loc.cit., p. 103.

in his or her own normal way to see to the well-being of children.[11]

Once Anné had consistently attributed juridical significance to the description of marriage in Gaudium et Spes, [12] and especially to the broadening of the object of consent that this teaching entailed, the way was open for other rotal auditors. Mgr. J.M. Serrano Ruiz provided an impetus for a deeper understanding of the consortium in his decision of April 5, 1973 in which he highlighted the interpersonality of the marriage covenant.[13]

Like Anné, Serrano's starting point is the interpersonal sharing emphasized in Gaudium et Spes, art. 48, of which he says:

> These magisterial statements necessitate the acceptance of the minimal conclusion that marital consent is exchanged by the persons as each is inadequately distinguished from the rights each surrenders and accepts and from the obligations each takes on.[14]

Thus, the interpersonal exchange is the very act of consent.

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11 ID., "Evolution récente de la jurisprudence matrimoniale", in Société Canadienne de Théologie, Le Divorce, Montreal, Fides, 1973, pp. 47-48.

12 S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), pp. 175, 182-183; Anné, July 22, 1969, ibid., p. 864.

13 ID., c. Serrano, April 5, 1973, in S.R.R. Dec., 75(1973), p. 323.

14 "Ex allatis citationibus saltem tenendum ipsasmet personas prout inadequate distinguuntur a iuribus et officiis, quorum fit traditio et acceptatio, consensum matrimonialem ingredi." Ibid., p. 324; English translation in C.L.D., VIII, pp. 694-695 (revised translation by W.B. Cogan, S.J. and J.A. Persich, S.J., is privately circulated).

Serrano is also concerned with the distinction between marriage and other relationships; he says:

> Further study of that interpersonal relationship which is said to, and truly does, individuate marriage leads to the discovery of what may be termed the two-fold formality which constitutes marriage. For sometimes it seems /... / that attention is focused on the object of the marriage consent, which is rightly considered to be the very relationship considered under the aspect of its exclusivity, perpetuity and orientation toward children. Yet, according to traditional teaching, this means that the spouses mutually give and accept each other. Hence, one necessarily considers the persons of the spouses at the time they give their consent /... / the interpersonal relationship, i.e., the sharing of life.[15]

Serrano hastens to add that this interpersonality belongs to the very nature of marriage when he says:

> Though it can be granted that an interpersonal relationship can reach greater or lesser perfection in different couples, yet in no way can it be said that this relationship belongs only to the more perfect or

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15 "Si autem ulteriori subiciatur examini relatio interpersonalis illa, quae propriissima matrimonio dicitur et est, haud difficulter quasi duplex invenietur formalitas eamdem constituens. Aliquando enim potius videtur /... / attendi ad obiectum consensus coniugalis, quod iure habetur illa ipsissima relatio sub ratione utique exclusivitatis, perpetuitatis et ad prolem ordinationis; at cum - iuxta doctrinam traditam - hoc sibi velit coniuges sese mutuo tradere atque acceptare, inde est quod necessario sequatur, imo magis implicetur subiectorum persona, uti consensum praestans /... /: Relatio interpersonalis - sive communitas vitae /... /." Ibid. p. 325; English translation, ibid., p. 696.

> desirable ideal marriage since, in fact, according to what has been said, it constitutes an essential property of any marriage consent.[16]

In this lengthy and expertly written sentence, Serrano then proceeds to draw on the findings of the behavioural sciences and also of the phenomenologist Merleau-Ponty. His sentence paved the way for an understanding of marriage considered as an interpersonal consortium in the jurisprudence of the Rota.

The revised Code of Canon Law has incorporated this interpersonal element into law, not only because of magisterial teaching but also due to confirmation from other disciplines, as Serrano says:

> That the nature of the pact which gives rise to marriage is an interpersonal and intra-personal one is today a commonly admitted fact. It is admitted in the documents of the Magisterium as well as in the jurisprudence. It is likewise confirmed from psychological and anthropological viewpoints through authoritative studies.[17]

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16 "Cum ultro concedatur relationem interpersonalem maiorem vel minorem posse apud diversos nupturientes perfectionem attingere, nequaquam tamen licebit asserere eam ad perfectius vel optabile matrimonium ideale totam pertinere, cum proprietatem essentialem cuiuscumque matrimonii in fieri." Ibid., p. 327; English translation in ibid., p. 700.

17 J.M. SERRANO RUIZ, The Right to the Community of Life and Conjugal Love as an Object of Matrimonial Consent: Juridical Aspects and the Evolution of the Jurisprudence of the Sacred Roman Rota, C.L.S.A., Eastern Regional Conference, 1976, pp. 2-3. The text as available to us does not detail

In a reference that anticipated the call by Pope John Paul II for the Rota "to give orientation and guidance to all tribunals of particular churches",[18] Serrano directed his attention to what is now c. 1101 as follows:

> Although there still do not exist precise precedents in this matter, I believe that in dealing with marriage as a juridic affair - which it essentially is - as equal a force must be directed towards recognizing the deliberate exclusion of the "right to life and conjugal love" as is presently directed to the incapacity to assume and give that right.[19]

Speaking more specifically of a lack of the consortium and therefore of the bonum coniugum, Serrano says:

> And for my part, a most recent Decree of Ratification rejects the idea that an authentic covenant has been celebrated by

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17 (cont'd) which documents of the Magisterium are referred to. Obviously Gaudium et Spes. arts. 48-52 and PAUL VI, Enc. 'Humanae Vitae', in A.A.S., 60(1968), pp. 481-503 would have been mentioned. More recently, JOHN PAUL II, Apostolic Exhortation,"Familiaris consortio", November 22, 1981, in A.A.S., 74(1982), pp. 81-191 would now need to be included. Examples of the jurisprudence would be as follows: S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), pp. 174-192; c. Anné, July 22, 1969, ibid., pp. 863-872; c. Fagiolo, October 30, 1970, ibid., 62(1970), pp. 978-990; c. Serrano, April 5, 1973, ibid., 65(1973), pp. 322-343.

18 JOHN PAUL II, Address to the Roman Rota, January 26, 1984, in Origins, 13(1983-1984), p. 585.

19 J.M. SERRANO-RUIZ, op.cit., p. 24. A more exact translation of the substantive part would be "right to conjugal life and love."

> a husband who has endeavoured to exercise a despotic dominion over his wife. Such is incompatible with the model of a ius societatis - to use words more specifically conjugal, it is incompatible with a ius ad communitatem vitae et amoris coniugalis as regards his companion.[20]

Obviously, in such a case, there would be no respect for the partner as a partner. There would be no mutuality flowing from the giving and receiving that is the conjugal covenant. Instead, the partner would be seen as an object to be used, much like a house or a car.

Returning to Serrano's landmark rotal decision it was only to be expected that it would generate interest and further research.[21] Rev. W.A. Schumacher of the Chicago Matrimonial Tribunal evaluated Serrano's sentence as a landmark in the jurisprudence of the Rota in that:

> Probably his most significant insight is that this interpersonal relationship must be present essentially, radically, at least potentially, that a mutual act of consent may correctly be deemed conjugal, that is, constitutive of marriage as such.[22]

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20 Ibid., p. 25.

21 C.J. CORREA, Intrapersonal and Interpersonal Integration in Marital Consent, Romae, Pontificia Universitas S. Thomae, 1978, xiv-276p.

22 W.A. SCHUMACHER, "Interpersonal Communication in Marriage", in S.C., 9(1975), p. 34. In a later article he says, "In Serrano's decision, the fundamental insight is this: marital consent is of its nature a true giving-and-accepting of a unique interpersonal relationship with one single,

In a subsequent decision, Serrano spoke even more specifically of the interpersonal nature of the act of consent when he said:

> The genuine structure of conjugal consent, more fully, more clearly and more accurately understood, necessarily presupposes in the spouses some true conception of one's self and of one another and also of the will, intended by the reason, which may then arrive at the true giving of one's self and the acceptance of the other.[23]

Serrano also foresaw the importance the revised Code c. 1680 would place on the need for a psychological expert's report when he said:

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22 (cont'd) determined individual - if it be not this, it is not conjugal consent, and no marriage can take its origin from it. /... / marital consent /... / is causative of a unique relationship of interpersonal communication with this specific individual, accepted precisely as 'other'." ID., "The Importance of Interpersonal Relations in Marriage", in S.C., 10(1976), p. 79; J.V. DOLCIAMORE, "Interpersonal Relationships and their Effect on the Validity of Marriages" in C.L.S.A. Proceedings, 1973, pp. 84-100; cf. D.E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage", in S.C., 13(1979), p. 135-136; M. LAVIN, "The Rotal Decision before Serrano, April 5, 1973: Some Observations concerning Jurisprudence, Procedure, and Risk", in The Jurist, 36(1976), pp. 302-316; G. ROBINSON, "Capacity for Interpersonal Relations", in S.C., 11(1977), pp. 415-419.

23 "Inde plenius, clarius atque accuratius apprehenditur consensus coniugalis germana structura, quae necessario praesupponit in sponsis quamdam uniuscuiusque de seipso veram imaginem necnon de altero; et ordinatam quoque voluntatis intendendi rationem, quae ad veram suiipsius traditionem et alterius acceptationem pervenire possit", S.R. ROTA, c. Serrano, May 9, 1980, in S.C., 15(1981), p. 288.

> /... / in requiring the help of experts, as well as in a definitive decision to be pronounced by a judge, a clear distinction should be made from the very beginning: namely, whether there is question of an invalid covenant on account of an incapacity to give consent or because of the incapacity to offer a sustained and singular 'object' of consent.[24]

Like Anné, Serrano asserts the juridic implications of the Conciliar teaching on marriage in Gaudium et Spes, art. 48 as follows:

> /... / The Vatican Council II when speaking of conjugal consent, extols highly the personal character of consent, by speaking of the fact that 'the spouses give themselves to each other and accept each other' (cf. Gaudium et Spes, art. 48), this will help to show how the aforementioned personality disorders can disturb the self-image or that of the partner, and how the will, also disturbed, may be wanting in a firm determination regarding the pact to be entered into.[25]

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24 "/... / in auxilio peritorum requirendo, tum in definitiva decisione a Iudice pronuntianda, clara habeatur ab initio rerum dispositio iuxta unamquamque speciem: utrum scilicet agatur de irrito foedere propter incapacitatem emittendi consensum; an propter incapacitatem praestandi diuturnum et singulare 'obiectum' consensus coniugalis." Ibid., p. 296.

25 "/... / quam circa consensum coniugalem praestitit S. Concilium Vaticanum II, extollens characterem eiusdem maxime personalem, siquidem 'coniuges sese mutuo tradunt atque accipiunt' (cfr. Const. Gaudium et spes, n. 48), iuvabit ostendere quomodo praedictae personalitatis deordinationes possint exturbare imaginem, quam subiectum de se et de

This mutual giving and receiving, in which matrimonium in fieri consists and which, as lived out day by day, constitutes matrimonium in facto esse, is rightly highlighted by Serrano as the juridical basis for the interpersonality of marriage. Thus Anné and Serrano and the now Archbishop V. Fagiolo are the rotal auditors who welcomed the Conciliar teaching into jurisprudence. But in highlighting their contribution we may have created the impression that all the judges of the Rota concurred in seeing the juridical relevance and application of Gaudium et Spes.

Where Anné and Serrano constituted the vanguard, other rotal auditors were unwilling to concede, far less to apply, any juridical relevance to the Conciliar teaching.[26] Even as late as 1979, when the revised Code was taking definitive form and successive drafts showed that the Council's teaching would have a profound impact on the canons on marriage, there was an attack on those who attributed juridical value to the

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25 (cont'd) altero assecutus sit atque quomodo ipsius voluntas, etiam a talibus imaginibus commota, deficiat in liberam circa firmandum pactum determinationem." Ibid., p. 301.

26 Cf. D.E. FELLHAUER, loc.cit., pp. 134-135, 143-149.

Conciliar teaching. One rotal auditor, Mgr. G. Agustoni in vituperative tones said:

> We do not know whether, in treating of the marriage partnership, the Conciliar Constitution Gaudium et Spes fanned into flame these novelties lurking beneath the ashes, or whether it was rather the schema for the projected New Code of Canon Law which provided occasion for some to fabricate a model of Christian marriage which is more to be dreaded than sought after, because of the burdens with which it is oppressed.[27]

Agustoni then quoted two decisions of the Apostolic Signatura, which stated that the Conciliar teaching dealt with the "existential" rather than the "juridical" aspects of marriage.[28] This rotal auditor probably thought that the Signatura clinched his argument when it stated:

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27 "Nescimus utrum Constitutio conciliaris Gaudium et spes super societatem coniugalem disserens, cubantes sub cinere flammas novitatum aluerit, an potius schema de edendo novo Codice iuris canonici ansam praebuerit quibusdam fingendi christiani coniugii figuram horendam potius quam appetendam ob onera quibus opprimitur", in M.E., 104(1979), p. 305; English translation in C.L.S. of G.B. and I. Newsletter, 44, 1980, p. 42.

28 SIGNATURA APOSTOLICA, c. Staffa, November 29, 1975, in Periodica, 66(1977), p. 305.

> So from the fact that the Constitution does not determine more accurately the formal object of consent, one ought not argue that the teaching concerning the essential elements of this object has been changed. For the Constitution, on account of its pastoral character, omits this question. Nor from the fact that marriage is presented in the Constitution as an 'intimate community of conjugal life and love', is it allowed to conclude that all the rights and duties which constitute this intimate communion of life and love, or which are necessary so that this communion should be fully perfected during the spouses' life, therefore pertain to the essential object of consent /... /.[29]

It should be noted that Anné spoke of the right to the consortium[30] (as did the 1975[31] and particularly the 1980 Schemata[32]) not the attaining of it to a subjectively

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29 "Ex eo autem quod Constitutio non determinet accuratius obiectum formale consensus argui non debet doctrinam circa elementa essentialia huius obiecti mutatam esse. Constitutio enim, ob eius indolem pastoralem, hanc quaestionem omittit. Neque ex eo quod in Constitutione matrimonium exhibeatur uti 'intima communitas vitae et amoris coniugalis' erui licet omnia iura et officia quae hanc intimam communionem vitae et amoris constituunt vel necessaria sunt ut haec plene durante vita coniugum perficiatur, ad obiectum essentiale consensus pertinere /... /." ID., December 5, 1972, in Periodica, 62(1973), p. 576; emphasis added.

30 S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), p. 183.

31 PONT. COMM. C.I.C. REC., Schema (1975), p. 14.

32 ID., Schema (1980), c. 1055 #2.

desired degree as notable authors have also emphasized.[33]

Agustoni then attends to those who have applied the Conciliar teaching in sentences of the Rota:

> It would seem, therefore, that these learned men are proceeding rather on their own authority when they propose novelties, since they cannot truly claim the authority of the Conciliar Constitution. For the Council Fathers themselves wanted this to be pastoral, not juridical, and thus they constantly interpreted it. Those who intrude a wider sense onto the words of the aforementioned Constitution undoubtedly do violence to the text.[34]

This auditor seems to be oblivious to the fact that in applying a very restricted interpretation to the Council's pastoral emphasis, he thereby creates the illusion that pastoral is a category on its own with seemingly no consequences for

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33 Z. GROCHOLEWSKI, "De 'Communione vitae' in novo schemate 'De matrimonio' et de momento iuridico amoris coniugalis", in Periodica, 68(1979), pp. 439-455; U. NAVARETTE, "De iura ad vitae communionem: observationes ad novum schema canonis 1086 #2", in Periodica, 66(1977), pp. 258-270.

34 "Videntur ergo potius proprio marte procedere docti viri nova proponentes, cum nequeant veraciter provocare ad auctoritatem Constitutionis conciliaris. Hanc enim Patres ipsi voluerunt pastoralem, non iuridicam, itaque illam constanter interpretati sunt. Latiorem sensum verbis praefatae Constitutionis supponentes absque dubio vim textui inferunt." S.R. ROTA, c. Agustoni, February 20, 1979, in M.E. 104(1979), p. 306; English translation in C.L.S. of G.B. and I. Newsletter, 44, 1980, p. 44.

doctrine and, in his opinion, absolutely no ramifications in the spheres of law and jurisprudence. From our examination of the Conciliar and post-Conciliar teaching in the previous chapters, we know the contrary is true. Even though the Council did not speak in juridical terms, the Conciliar teaching had those consequences that the revised Code has now brought definitively into law.

Another rotal auditor who showed unwillingness to admit the juridical relevance of the Conciliar teaching on marriage, even as late as the end of 1979, was Mgr. J.M. Pinto who stated:

> Marriage is incorrectly impugned on the grounds of 'incapacity to assume conjugal obligations, i.e., establishing an intimate community of life and love' both because it is not a specific but a generic formula and also because it lacks a juridical element.[35]

Pinto justified this contention by maintaining the Council was speaking of marriage "in facto esse". He also equated the right to the communion of life with conjugal love. But

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35 "Haud recte accusatur matrimonium ex capite 'incapacitatis assumendi onera coniugalia, i.e. instaurandi intimam vitae et amoris', sive quia non est formula specifica sed generica, sive quia elementum non iuridicum continet." S.R. ROTA, c. Pinto, November 23, 1979, in M.E., 105(1980), p. 392.

conjugal love is an element of that right and not its sum total. He then quoted F. Wernz:

> The union of two hearts and minds through the mutual love of the spouses, though it be a condition for a happy marriage, is not, however, the object of the marriage contract.[36]

Wernz wrote even before the Pio-Benedictine Code which established the hierarchy of the ends of marriage.[37] Just as his commentary on the ends of marriage would need to be modified according to C.I.C. (1917) c.1013 #1, so also did Anné see the Council's teaching as bringing a new depth of understanding to the formal substantial object of consent so that from Gaudium et Spes onwards the right to the partnership of life was contained in the formal object of consent.[38]

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36 "Unio animorum per mutuum amorem sponsorum, quamvis sit conditio ad felicem exitum matrimonii, tamen obiectum contractus matrimonialis non est", F. WERNZ, Ius decretalium, IV/1, 1911, n.36.

37 "The Code is the first document of the Magisterium to name and hierarchically order the fines matrimonii as in /1917/ c. 1013 #1, and also the first to use the terminology 'primary-secondary'." Cf. U. NAVARRETE, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), pp. 366-368.

38 S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), pp. 183-184.

Pinto noted that the right to the community of life, which Vatican II extolled, was explained by the Coetus as follows:

> /.../ rights are involved, rights which touch the essential and interpersonal relationships of the spouses and which, in the present day context, are looked upon as a complex of rights distinct from those which are commonly enumerated in traditional Canon Law.[39]

He then noted, however, that the Commission for the Revision of the Code decided that the consortium (or its equivalent) has juridical force regarding the act of consent. Pinto seems to indicate that this right to the consortium would take its place alongside the tria bona.[40]

Having shown his familiarity with the decisions that had given juridical relevance to the consortium, Pinto then proceeds to examine the characteristics of homosexuality as these affect marriage. Here he fails to apply Gaudium et Spes as broadening the formal object of consent, even though Anné did so in a

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39 "/.../ iura quae attinent ad essentiales relationes interpersonales coniugum, quaeque in hodierno contextu habentur ut complexus iurium distinctus ab aliis iuribus quae communiter in traditione numerabantur." S.R. ROTA, c. Pinto, November 23, 1979, in M.E., 105(1980), p. 393, quoting from Communicationes, 9(1977), p. 375.

40 S.R. ROTA, c. Pinto, November 23, 1979, in M.E., 105 (1980), p. 393.

sentence which was by then ten years previous.[41] On the contrary Pinto maintained that:

> From the juridical point of view, however, because on the one hand, the ordering toward the aforesaid end does not demand a perfect union of spouses and on the other hand, because, where heterosexuality permits the giving of the right to the body perpetually and exclusively, /... / as long as the union of persons remains morally possible, it does not seem the incapacity of taking up the obligation of a community of life is proved.[42]

A detailed treatment of homosexuality as a cause of the invalidity of marriage is beyond our scope here; suffice it to note its development in the Rota,[43] and to note that cc. 1095 #3 and 1101 #2 will standardize this area. These canons

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41 S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), p. 183.

42 "Sub adspectu iuridico tamen, quia ex una parte ordinatio ad praefatum finem non exigit perfectam unionem coniugum, et ex alia parte, quia ubi heterosexualitas sinit tradere ius in corpus perpetuum et exclusivum, /... / quamdiu personarum unio maneat moraliter possibilis, de incapacitate assumendi onus quoad vitae communionem constare non videtur." S.R. ROTA, c. Pinto, November 23, 1979, in M.E., 105(1980), p. 394

43 A. STANKIEWICZ, "Homoseksualizm jako przyczyna nieważności małżeństwa według najnowszej jurysprudencji rotalnej (1956-1976), in Prawo Kanoniczne, 22(1979), pp. 179-198. Stankiewicz notes that the first Rotal decision in this regard was c. Lamas, March 15, 1956, in S.R.R. Dec., 48(1956) pp. 237-251 in which the auditors examined homosexuality

will be understood according to c. 1055 #1 which defines marriage as a covenant between a man and a woman which is ordered jointly to their good as spouses and to the generation and upbringing of children. This interpersonal aspect with physical, emotional and behavioural elements between spouses who are complementary as persons, now has juridic value. Pinto's decision, however, was given according to C.I.C. (1917), cc. 1013 #1 and

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43 (cont'd) on the following grounds: exclusion of children, exclusion of fidelity, functional impotence and lack of due discretion. In a later sentence, c. Sabattani, December 20, 1963, in S.R.R. Dec., 55(1963), pp. 959-970, homosexuality was examined under mental illness (amentia). C. Lefebvre argued that homosexuality was opposed to conjugal life since there was an inability to engage in normal sexual relations; cf., c. Lefebvre, October 20, 1966, in S.R.R. Dec., 58(1966), pp. 717-722. The same auditor introduced homosexuality as a cause of nullity in a case the following year; c. Lefebvre, December 2, 1967, in S.R.R. Dec., 59(1967), p. 803. and stated that the deviation causes aversion to the marriage partner and therefore incapacity to give and receive mutually the rights of marriage" and then he quoted the rule of law: "No one is obliged to the impossible." Anné accepted Lefebvre's argumentation and advanced upon it when he stated that "deep seated homosexuality of itself is a cause of nullity because of a defect of consent and because it disqualifies from giving the mutual conjugal rights that are part of the very nature of marriage", c. Anné February 25, 1969, in S.R.R. Dec., 61(1969), pp. 177-185. Anné also noted a dissertation: W.J. TOBIN, Homosexuality and Marriage, Rome, Catholic Book Agency, 1964, 378p; L.G. Wrenn in summarizing homosexuality as a cause of lack of due competence for marriage notes that four areas must be investigated: severity, antecedence, perpetuity and relativity. L.G. WRENN, Annulments, Washington, D.C., C.L.S.A., 1983, pp. 73-74. In a recent excellent sentence c. Colagiovanni, March 15, 1983, it is stated that homosexuality as a "qualification" for nullity of marriage has evolved in the Rota following the teaching of the Church as proposed in the Vatican Council II; in M.E., 108(1983), p. 247.

1081 #2 whereby the exchange of the right over the body was primary. The relationship was inconsequential juridically, therefore Pinto concluded:

> Hence, the incapacity of the respondent to assume the obligations of communion of life does not seem to be proved.[44]

A later rotal sentence c. Pinto[45] was in stark contrast to this decision and showed the obvious influence of the by then ready to be promulgated revised Code. Early in the sentence, Pinto stated unequivocally:

> Marriage essentially consists in this partnership or society (which is distinguished from cohabitation) so that one who is incapable of forming that partnership cannot give and receive the rights - duties which are the essential formal object of the marriage covenant while the good of children or fidelity or the sacrament or the spouses are lacking (cfr. Gen 2:24 compared to Matt 19:6; Institutes 1, 9,1; Digest 23,2,1. C.27, q.2, I part and c. 29, q.1; cc. 1013 #1, 1081, 1082 and 1086 #2; Communicationes, 9/1977/, pp. 79-80, 212 and 375). We are not dealing here with rights and duties rejected by society.[46]

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44 "De incapacitate igitur conventi assumendi onus communionis vitae constare non videtur", S.R. ROTA, c. Pinto, November 23, 1979, in M.E., 105(1980), p. 399.

45 ID., February 12, 1982, in I.D.E., 93(1982), pp. 521-558.

46 "In consortio enim hoc seu societate (quae a cohabitatione distinguitur) matrimonium essentialiter consistit; unde qui incapax est illud consortium constituendi, non valet tradere et acceptare iura - officia quae sunt

In his commentary on the sentence c. Pinto, February 12, 1982, P.A. Bonnet says that the words of this part:

> /.../ liken substantially the 'communion of life' to the essence itself of marriage 'in facto esse', evidenced also by the use of the term 'partnership' which traditionally has always constituted the key word to individualise the identity of the state of married life.[47]

But, in case this would lead to the conclusion that the consortium only referred to marriage 'in facto esse', Bonnet hastened to add that it is connected with the constitutive moment of marriage either as the efficient cause of marriage "in fieri" or the material cause of marriage "in facto esse".[48] Bonnet described the object of consent as "sexuality" rather than the "right to the body"; he explained it as "functional

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46 (cont'd) obiectum formale essentiale matrimonialis foederis, deficientibus bonis vel prolis vel fidei vel sacramenti vel coniugum (cfr. Gen. 2,24 coll cum Mt. 19,6; Inst. 1,9,1; Dig. 23,2,1; C. 27, q.2, I Pars et c. 29, q.1; cann. 1013 #1, 1081, 1082 et 1086 #2; Communicationes, 1977, pp. 79-80, 123, 212 et 375). Non agitur de iuribus - officiis a societate avulsis." Ibid., pp. 525-526.

47 "/.../ configurare sostanzialmente la 'communio vitae' attraverso l'essenza stessa del'matrimonium in facto esse', evidenziata anche dall'uso del termine 'consortium' che tradizionalmente ha sempre costituito la parola chiave per individuare l'identità dello stato di vita matrimoniale", P.A. BONNET, "Comunione di vita, 'ordinatio ad bonum coniugum' e 'honor matrimonii' ", in I.D.E., 93(1982), p. 524.

48 Ibid.

reciprocity of man and woman in their entirety"[49] which would seem to be another way of saying the "persons themselves in partnership" (cf. c. 1057 #2) rather than the "ius in corpus" (cf. C.I.C. /1917/, c. 1081 #2).

Pinto rightly placed the interpersonal aspect of marriage in the context of the good of the spouses, and emphasized the essence of this good when he said: "That this good is the essential element of marriage 'in fieri' is generally accepted."[50] Furthermore, Pinto noted Pope Paul VI's address to the Rota which commended what the Council said: "rightly esteeming conjugal love and the mutual perfection of the spouses."[51] He also referred to the Conciliar teaching as the inspiration for the reception into law of the bonum coniugum when he said:

> However the mutual perfection of the spouses exists when by 'the intimate joining of persons and actions their

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49 "/.../ reciprocità funzionale dell'uomo e della donna nella sua integralità /.../." Ibid., p. 525.

50 "Bonum hoc esse elementum essentiale matrimonii 'in fieri' passim admittitur." S.R. ROTA, c. Pinto, February 12, 1982, ibid., p. 526.

51 "/.../ aequa aestimatione amoris coniugalis et in mutua perfectione coniugum /.../." PAUL VI, Address to the Roman Rota, February 9, 1976, in A.A.S., 68(1976), p. 205; English translation in The Pope Speaks, 21(1976-1977), p. 151.

mutual help and service comes to the fore and they experience their unity more deeply from day to day'.[52]

Then speaking specifically of the consortium, Pinto noted the opinions of those learned in the behavioural sciences:

> The experts who in their works study the difficulties and breakdowns of marriage are of the opinion that the marriage partnership for the whole of life which is ordered to mutual perfection and the procreation and education of offspring, cannot exist unless the following conditions are verified:
>
> a) That both the spouses must have acquired such a degree of affective maturity by which they are rendered capable, having left their own family and joined with a partner, of founding a new family. /.../.
>
> b) That both the spouses are to be capable of mutually giving and receiving each other. /.../.
>
> c) That both spouses must consider themselves worthy of esteem and love, and have the capacity of loving others.[53]

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52 "Coniugum vero mutua perfectio obtinetur quatenus 'intima personarum atque operum coniunctione mutuum sibi adiutorium et servitium praestant, sensumque suae unitatis experiuntur et plenius in dies adipiscuntur' /Gaudium et spes, n. 48/." S.R. ROTA, c. Pinto, February 12, 1982, in I.D.E., 93(1982), p. 530.

53 "Periti qui matrimonii difficultibus atque naufragio studio operam dant, censent coniugale consortium totius vitae mutuae perfectioni prolisque aptae procreationi et educationi ordinatum exstare non valere nisi haec verificentur:

The psychiatrist whose work Pinto quoted in the sentence is the eminent British writer Dr. Jack Dominian whose conclusion is quoted in the sentence: "These are essential for any close relationship without which marriage is not possible."[54]

Pinto's sentence then noted that it is not merely the fact of a defect in the conjugal partnership, but the incapacity to give and receive the right to that partnership that creates invalidity. Jurisprudentially, it then becomes imperative to establish criteria whereby this exchange of the right to the marriage partnership is proven or not. This Pinto does by linking the right to the consortium to the right to the bona:

> For the psychic incapacity of assuming the obligation of the right to the partnership of life to be verified, whether in the generic sense (with regard to all the

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53 (cont'd) a) Ut utrique nupturientes talem affectivae maturitatis gradum adepti fuerint quo capaces reddantur, propria familia semel relicta et comparti adhaerentes, novam condendi familiam. /.../.

b) Ut nupturientes ambo mutuo se donandi ac recipiendi capaces sint.

c) Ut unusquisque nupturiens se ipsum habeat tamquam aestimationis amorisque dignum aliosque capacem amandi." Ibid., pp. 532-535.

54 Ibid., p. 536, cf. J. DOMINIAN, Marital Breakdown, Harmondsworth, Penguin Books, 1971, p. 40; also of note is Dominian's later work, Marriage, Faith and Love, London, Darton, Longman and Todd, 1981, pp. 34-89.

goods) or in the specific sense (regarding the good of the spouses, consisting in the mutual essential psycho-sexual integration) the following are required:

1) Pathological abnormality in one or other of the spouses by virtue of which the faculty for freely placing the formal essential object of matrimonial consent is excluded totally or partially. /.../.

2) The aforesaid abnormality must be so serious that it renders the partnership of the whole of life intolerable /.../ if this condition arises after the wedding, it excuses from the communion of life /.../. C.I.C. (1917), c. 1131 #1 /.../. But if it already existed at the time of the marriage /.../ the spouse is incapable of assuming the partnership of the whole of life.

3) The same abnormality must be antecedent to the celebration of the marriage, because otherwise we would not be dealing with nullity but with divorce. Such may be found in personality disorders. /.../

4) The incurability of the abnormality.[55]

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55 "Ut psychica incapacitas assumendi onus iuris ad vitae consortium, vel sensu generico (quoad cuncta bona), vel sensu specifico (quoad bonum coniugis, in mutua essentiali integratione psycho-sexuali consistens) verificetur haec requiruntur:

1) Pathologica abnormitas unius vel utriusque nupturientis vi cuius facultate libere disponendi de formali essentiali matrimonialis consensus obiecto totaliter vel partialiter privetur. /.../

2) Ut praefata abnormitas tam gravis sit ut comparti vel sibimet totius vitae consortium intolerabile reddat /.../ enim conditio post matrimonium orta a vitae communione excusat /.../. At si, momento matrimonii praefata conditio iam exsistebat /.../ nupturiens ille incapax est se obligandi ad totius vitae consortium.

The incurability of the psychic disorder was originally maintained in jurisprudence because of the parallel with impotency. In fact the early designation of this caput was "moral impotency". Incurability was assumed by virtue of C.I.C. (1917), c. 20's reference to analogy as a source of interpretation in lacuna situations. Lefebvre, however, distinguished between incapacity for exclusiveness, in which case, he did not require incurability,[56] and incapacity for the communion of life in which case, he said, incurability was required.[57] Pinto was at first adamant in demanding incurability but later he required that the psychic disorder causing the juridical "incapacity to assume the essential obligations of marriage be true and antecedent" to the act of consent, noting that incurability is not required by the draft of the new Code.[58]

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55 (cont'd) 3) Ut eadem abnormitas matrimonii celebrationem antecedat, quia aliter, non de nullitate sed de divortio ageretur. Hoc verificatur in perturbationibus personalitatis. /... 7.
4) Praefatae abnormitatis insanabilitas, S.R. ROTA, c. Pinto, February 12, 1982, in I.D.E., 93(1982), pp. 536-541.

56 S.R. ROTA, c. Lefebvre, January 15, 1972, in S.R.R. Dec., 64(1972), p. .

57 ID., January 31, 1976, in E.I.C., 32(1976), p. 287.

58 "Incapacitas assumendi onera ut patet, debet esse vera atque antecedens. /... 7 Non exigitur in schemate ut sit perpetua." S.R. ROTA, c. Pinto, April 20, 1979, in M.E., 104 (1979), p. 387; emphasis added.

Throughout this part of the sentence, Pinto refers to the manuals[59] and other American, French and German contemporary psychological texts.[60] One of the very striking aspects of this sentence is the reference to recent fundamental works and articles. This is even more obvious when Pinto concluded his analysis of psychic incapacity as follows:

> When these pre-requisites are verified, there is no doubt that there is a natural impossibility: objective, antecedent and perpetual, giving occasion to the application of the principle: 'No one is obliged to the impossible'.[61]

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59 AMERICAN PSYCHIATRIC ASSOCIATION, Diagnostic and Statistical Manual of Mental Disorders, Washington, D.C., American Psychiatric Association, 1980, x - 494p; hereafter cited as DSM III.

60 H. EY, "La psychiatrie devant la morale", in Colpe e colpevolezza, Atti dell'VIII Congresso catolico internazionale di psicoterapia e psicologia clinica, 1962, p. 50; H.I. KAPLAN - B.J. SADOCK, Modern Synopsis of Comprehensive Textbook of Psychiatry, Baltimore, Williams and Wilkins, 1981, pp. 474-477, 1005-1006; K. LÜDICKE, "Die Rechtswirkungen der heilbaren Impotenz", in Archiv für Katholisches Kirchenrecht, 1977, pp. 74-128.

61 "Cum requisita haec verificantur non est dubium quin locum habeat impossibilitas naturalis, obiectiva, antecedens et perpetua ansam dans applicando principio: 'Impossibilium nulla obligatio est'", S.R. ROTA, c. Pinto, February 12, 1982, ibid., p. 542. Pinto cites the excellent article by his fellow rotal auditor A. STANKIEWICZ, "De accomodatione regulae 'Impossibilium nulla obligatio est' ad incapacitatem adimplendi matrimonii obligationes", in Periodica, 68(1979), pp. 649-672, in which he traces the origin of this sixth rule of law to the

C.I.C. (1983), c. 1095, 3 has brought this principle into law: "They are incapable of contracting marriage: who are not capable of assuming the essential obligations of matrimony due to causes of a psychic nature."[62] It is now generally accepted that the essential obligations of marriage are those specifically designated in c. 1055 as the elements of the matrimonial covenant: the good of the spouses and the generation and education of children. The psychic incapacity prevents the assuming of obligations which flow from the giving of the right to the essential elements or goods of marriage or the fulfilling of those obligations.

In his commentary on the sentence c. Pinto, February 12, 1982, P.A. Bonnet emphasises the right to the communion of life as an essential element of marriage ordered to the good of the spouses when he says:

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61 (cont'd) Roman jurist Celsus. The same rule of law is also contained in the Digest (D. 50,17,185) and provides the juridic basis for nullity of marriage due to the incapacity to fulfil the essential obligations of marriage which has been received into rotal jurisprudence - S.R. ROTA, c. Lefebvre, December 2, 1967, in S.R.R. Dec., 59(1967), pp. 802-804; c. Pinto, April 14, 1975, in M.E., 102(1977), pp. 39-48; ID., October 28, 1976, in E.I.C., 33(1977), pp. 331-336.

62 "Sunt incapaces matrimonii contrahendi: qui ob causas naturae psychicae obligationes matrimonii essentiales assumere non valent." C.I.C. (1983), c. 1095, 3; English translation by the C.L.S.A., Washington, D.C., 1983, p. 399.

> /... / that which is essential and can never be lacking is 'the ordering to the good of the spouses' which is something different from the fact of 'the good of the spouses', and also something different from the fact of an effective communion of life. By this essential component we mean the attaining of 'conjugal relations' which constitutes /... / the essence of matrimonial life in such a way that it can bring about the mutual psychological and spiritual perfection of the spouses, however this may in fact later be actualized and even if its realization in a certain case, licitly or illicitly, may not be put into practice.63

Finally, in his commentary, Bonnet inter-relates the ordering of marriage to the good of the spouses and to the generation and education of children with elements of the other two traditional properties of marriage when he says:

> This 'ordering to the good of the spouses' is such as to specify the state of married life but not diversely from: 'the ordering to the good of children', to exclusivity and to indissolubility.64

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63 "/... / ciò che è essenziale e non può mai mancare è l''ordinatio ad bonum coniugum', che è altro dal fatto del 'bonum coniugum', ed altro anche dal fatto di una effettiva communione di vita. Con questa componente essenziale intendiamo l'atteggiarsi della 'relatio coniugalis' che costituisce /... / l'essenza dello stato di vita matrimoniale, in modo da poter realizzare un mutuo perfezionamento psicofisico e spirituale dei coniugi, comunque questo possa poi realmente attuarsi ed anche se la sua concretizzazione in certe ipotesi, lecitamente o illecitamente, non venga mandata ad effetto." P.A. BONNET, loc.cit., p. 551.

64 "Questa 'ordinatio ad bonum coniugum' è tale da specificare, non diversamente del resto dall' 'ordinatio ad

Thus Bonnet sees the good of the spouses, and the good of children as essential elements of marriage, to which are related the two essential properties of unity and indissolubility, cf. c. 1056. In our opinion the good of the spouses along with the good of children as the formal end of marriage is an essential element of marriage, as expressed in the invalidating exclusions of c. 1101 #2.[65]

The exclusion of the reciprocal giving that brings about the partnership of life, Bonnet says, comes from what "the Roman juridical wisdom has always called 'the dignity of marriage' which so clearly distinguishes marriage from every other 'relationship' even heterosexual ones."[66]

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64 (cont'd) prolem', dall'esclusività e dall'indissolubilità, lo stato di vita matrimoniale." Ibid., pp. 551-552,

65 The Schema (1980), c. 1055 #2 indicates this, as the right to the communion of life and the right to the conjugal act were both mentioned as invalidating exclusions. However, during the Plenary session of the Code Commission in 1981 these references were removed and replaced by the more generic expression of as in C.I.C. (1983), c. 1101 #2 "matrimonii essentiale aliquod elementum". The Relatio (1981) noted that this revised form would be interpreted in the light of the definition of marriage, C.I.C. (1983), c. 1055#1 and the whole of legislation and doctrine whether juridical or theological.

66 "[...] la saggezza giuridica di Roma ha chiamato con l'espressione 'honor matrimonii' cosi chiaramente qualificativa di quella matrimoniale in rapporto ad ogni altra 'relazione', anche eterosessuale." P.A. BONNET, loc.cit., p. 554.

> If a man and a woman exclude an essential component we cannot be speaking of marriage since these effectively constitute a union which by the fact itself of this limitation cannot be in some way unequal and oppressive of one partner or the other. In other words, the 'relationship' born of a will which has eliminated the dignity of marriage is such that it determines the /.../ egotistic ends of the other, whether it be their realization as something perceived as totally necessary or simply as a luxury and superfluous for the psycho-physical or even the economic well-being of the person.[67]

Interpersonality as essential to marriage has been consistently maintained in recent jurisprudence.[68] Bonnet relates this interpersonal aspect to a Roman law basis.

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67 "Se un uomo ed una donna escludono una tale componente essenziale non si può parlare di matrimonio, volendo questi effettivamente costituire un'unione che, per il fatto stesso di questa delimitazione, non può non essere in qualche modo 'disequale' e 'sopraffattoria' dell'uno sull' altro; in altre parole la 'relatio' nata da una volontà che ha eliminato l'honor matrimonii è tale da determinare /.../ fini egoistici dell'altro, sia che la realizzazione di questi si percepisca come del tutto necessaria o invece quale un di piu di lusso e superfluo per una sopravvivenza tanto psicofisica che semplicemente economica." Ibid.

68 S.R. ROTA, c. Anné, February 25, 1969, in S.R.R. Dec., 61(1969), p. 182; ID., July 22, 1969, ibid., p. 865; c. Fagiolo, October 30, 1970, ibid., 62(1970), pp. 984-985; c. Anné, February 6, 1973, ibid., 65(1973)., pp. 64-67; c. Serrano, April 5, 1973, ibid., pp. 696-700; ID., April 30, 1974, in E.I.C., 31(1975), pp. 191-202, c. Anné, December 4, 1975, ibid., 33(1977), p. 1976; c. Di Felice, January 17, 1976, ibid., 32(1976), pp. 284-285; c. Serrano, July 9, 1976, in M.E., 102(1977), pp. 363-381; c. Ewers, January 15, 1977, in E.I.C., 33(1977), pp. 354-256; c. Clementi, March 26, 1977, (unpublished sentence) P.N. 11.095, n.5; c. Di Felice, October 25, 1978, in M.E.,

Having stated that the communion of life is the concrete expression of the "ordering to the good of the spouses" Bonnet rightly focuses his attention on actually identifying its configuration in "matrimonium in fieri" when he says:

> In our opinion such 'ordering' is present in the state of conjugal life, if the spouses in the act of consent have not excluded (and being capable of) willing to the other a proper 'sharing together' as a participant in their /life/ journey, not only side by side but in 'effective togetherness'.[69]

In a sentence c. Stankiewicz July 23, 1982,[70] the principles for discerning the total simulation of marriage

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68 (cont'd) 104(1979), pp. 162-164; c. Pinto, April 20, 1979, ibid., p. 386; c. Colagiovanni, December 15, 1979, ibid., 105 (1980), pp. 55-58; c. Pinto, December 18, 1979, ibid., p. 376; c. Serrano, May 9, 1980, in S.C., 15(1981), pp. 288-301; c. Stankiewicz, January 29, 1981, in E.I.C., 38(1982), pp. 330-333; c. Ewers, April 4, 1981, in M.E., 106(1981), pp. 296-297; c. Di Felice, May 26, 1981, ibid., 107(1982), pp. 11-13; c. Serrano, October 23, 1981, in E.I.C., 39(1983), pp. 141-150; c. Pinto, February 12, 1982, in I.D.E., 93(1982), pp. 525-543; c. Colagiovanni, March 15, 1983, in M.E., 108(1983), pp. 245-253.

69 "A nostro parere una sifatta 'ordinatio' sarà presente nello stato di vita coniugale se i nubenti, all'atto del consenso, non avranno escluso - e saranno capaci - di volere l'altro quale proprio 'con-sorte', partecipe di un cammino non soltanto da percorrere insieme, ma 'effettivamente commune'." P.A. BONNET loc.cit., pp. 552-553.

70 S.R. ROTA, c. Stankiewicz, July 23, 1982, in Periodica, 72(1983), pp. 129-140. The sentence is replete with references to and quotations of many contemporary sociological and psychological works.

were applied to one who had belonged to the "hippy" sub-culture. This will no doubt prove to be a pace setting decision, as more and more marriages of the "flower power generation" flounder and are then accused of nullity in matrimonial courts.

Stankiewicz commences his in iure by defining marriage. The substance of his definition is drawn directly from Gaudium et Spes, art. 48:

> Since marriage is instituted through an irrevocable personal consent, the spouses, by a human act whereby they give themselves to each other and accept each other, should enhance this intimate communion of life and conjugal love, established by the Creator with its own proper laws, and whose structure does not depend on their opinion.[71]

Not content with rightfully seeing such juridical relevance in the Council's teaching and so receiving it into jurisprudence, Stankiewicz applies it as follows:

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71 "Cum matrimonium irrevocabili consensu personali instauretur, nupturientes actu humano, quo sese mutuo tradunt atque accipiunt, integre amplecti debent hanc intimam communionem vitae et amoris coniugalis a Creatore conditam suisque legibus instructam, cuius structura ab eorum arbitrio non pendet." Ibid., pp. 129-130.

> Marriage is known either as a communion of the whole of life ordered by its nature to the good of the spouses and to the procreation and education of children, or as a permanent partnership between a man and a woman ordered to children /.../.[72]

Stankiewicz, therefore, applies in jurisprudence the revision that the Council necessitated and the deliberations that shaped the revised Code. But such has not been the case with all rotal auditors as the following two sentences will attest.

In a rotal decision c. Egan of December 9, 1982 on the grounds of the incapacity to assume and fulfil the obligations of marriage,[73] Egan takes exception to the judges in first instance who stated the following:

> It is now firmly enshrined in canonical jurisprudence that marriage is a life-long and loving interpersonal relationship between a man and a woman. But even though the parties may understand that the union they are entering is to be a relationship of this kind /.../ it is always possible that they

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72 "Matrimonium autem ipsum quod dicitur sive totius vitae communio, indole sua naturali ad bonum coniugum atque ad prolis procreationem et educationem ordinata, sive consortium permanens inter virum et mulierem ordinatum ad prolem /.../." Ibid., p. 131, quoting from Communicationes 9(1977), p. 123 and p. 372.

73 S.R. ROTA, c. Egan, December 9, 1982, in M.E., 108 (1983), pp. 233-244. There is a recent critique of this rotal decision by C. GALLAGHER, "What is Marriage? Reflections on a recent Rotal Decision", in C.L.S. of G.B. and I. Newsletter, No. 61, 1984, pp. 10 - 18.

> will be unable ever in fact to establish such a relationship.
>
> Such inability would normally be the result of a substantial character or personality deficiency in one of the parties, or even in both of the parties, which would obstruct the formation of even a minimal loving interpersonal relationship [...].[74]

He is rather disturbed at their citing a local judge and not rotal jurisprudence. While it might have rounded their decision better to have cited rotal sentences, the fact concerning the place of the "interpersonal relationship" in marriage which the first instance judges stated, is incontrovertible as has been clearly taught in and since the Council. The right to interpersonal relationships has been consistently maintained in jurisprudence.[75] Therefore the first instance

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74 c. Cousins (Birmingham), September 4, 1978, in Matrimonial Decisions of England and Wales, London, C.L.S. G.B. and I., 14(1978), p. 57; hereafter cited as MDEW, quoted by Egan from the Italian of the acta of third instance, S.R. ROTA, c. Egan, loc.cit., pp. 233-234.

75 The most forthright and consistent proponent for the interpersonality and intrapersonality of marriage in rotal jurisprudence has been Mgr. J.M. Serrano Ruiz, cf. c. Serrano April 5, 1973, in S.R.R. Dec., 65(1973), pp. 322-343; April 30, 1974, in E.I.C., 31(1975), pp. 191-202; July 9, 1976, in M.E., 102(1977), pp. 363-381; May 9, 1980, in S.C., 15(1981), pp. 288-301, though as we indicated in our footnote 68, see supra pp. 413-414. Serrano's lead was quickly and consistently followed by other rotal auditors. Perhaps the clearest indication of this

judges, contrary to what Egan appears to maintain, were in accord with the "jurisprudence and practice of the Roman Curia",[76] even though this was not cited directly and explicitly.

The difficulty in this sentence c. Egan is that he conceives of the interpersonal relationship only in terms of C.I.C. (1917), c. 1013 #1. This ignores the Conciliar emphasis on the good of the spouses which c. 1055 now firmly establishes in law. Thus, marriage is now jointly ordered to the good of the spouses and to the generation and upbringing of children. Egan says the Council fathers in Gaudium et Spes, arts. 47-52 insisted on conjugal love as an "ultra-juridical" matter and that "the valid constitution of marriage they took for granted in the mutual giving and

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75 (cont'd) was in an unpublished sentence c. Clementi, March 26, 1977, P.N. 11. 095, n.5: "Insuper ad validas nuptias contrahendas oportet nupturiens ex sua ipsius indole constitutionali capax reapse sit instaurandi atque fovendi modo humano normali illam relationem interpersonalem et intrapersonalem, quae est nota peculiaris cujusque veri ac validi foederis matrimonialis quod suapte natura primo ac potissimum interpersonale est." This dimension is now implied in law, c. 1055 #1 as the ordering to the good of the spouses following Gaudium et Spes which expressed it in doctrine. Egan, however, restricts interpersonality to the exercise of the ius in corpus; cf. c. Egan, December 9, 1982, in M.E., 108(1983), pp. 233-234.

76 "[...] iurisprudentia et praxi Curiae Romanae [...]." C.I.C. (1983), c. 19; cf. C.I.C. (1917), c.20.

receiving of the perpetual and exclusive right ordained to procreative acts."[77] Such a reading of the Conciliar teaching on marriage ignores the fact that the Council deliberately sought a personalist emphasis, never spoke of marriage in contractual terms, and studiously avoided the question of the hierarchy of ends while jointly speaking of the personalist (unitive) and procreative meanings of marriage. Egan would have us understand that the Council saw the personalist value as ordered only to procreation.

This same case in second instance c. Daley[78] is clearer in getting to the basis of what is held to be lacking and therefore, rendering the marriage null, when it cites another sentence as follows:

> The couple is said to be essentially incompatible when their personalities clash, relative to one another, to such an extent they are unable to establish or carry through the conventional consent articulated in the wedding ceremony. This defect in donatio impairs the communio vitae and neutralizes

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77 "[...] disceptabant, de re nempe cuius validam constitutionem per mutuam traditionem et acceptationem iuris, perpetui et exclusivi, in ordine ad actus [...]." S.R. ROTA, c. Egan, loc.cit., p. 238.

78 January 4, 1979, c. Daley, (Liverpool), in MDEW, 15(1979), pp. 81-82.

> the effective construction of a consortium vitae coniugalis which both Gaudium et Spes and the new Code require for validity.79

Another sentence c. Egan, six months after the promulgation of the revised Code, makes no mention of that Code, but does refer to the Pio-Benedictine Code. While we would not expect to find the revised Code implemented during the vacatio, it certainly would constitute a means of interpreting the C.I.C. (1917) as Stankiewicz and other rotal auditors consistently did in applying the Council's teaching on marriage and the principles of the revision process. There are also instances where either juridical principles and grounds for nullity which had already been applied in jurisprudence, were codified, as is the case with the lack of

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79 c. Tierney (Paterson, New Jersey), March 19, 1975, in S.C., 9(1975), p. 181. The judge in this sentence does exceed the law and sound jurisprudence when he states: "The right to such a consortium and the right to be fulfilled as a person within the context of marriage form two of the objects of the matrimonial consent," ibid. The second instance court says of this claim "we do not accept that there is an additional right to be fulfilled as a person. It seems to us that this is an unjustifiable attempt to extend a partner's rights and expectations of marriage", c. Daley, loc.cit., p. 82. The second instance tribunal hones in on the salient argument in this case and it is interesting that where Egan states the law (or lack of it) was already so stated in second instance: incompatibility is too uncertain to be a basis for nullity; the law requires a fundamental and substantial defect which makes impossible the establishment of an interpersonal relationship; cf. ibid. Tierney's sentence also referred to the drafts as the new Code, which was premature and not a basis for sound jurisprudence.

discretionary judgement in c. 1095 #2. In other cases a principle of the natural law was received into the revised Code, cf. c. 1095 #3 (the incapacity of assuming the essential obligations of marriage) and possibly c. 1098 (deceit). In these instances the jurisprudential judicial development in the Rota preceded the codification of the revised Code and so the principles were applicable prior to promulgation and the expiration of the vacatio.[80]

With the revised Code already promulgated and the vacatio running its course, it is more than a little surprising to find that Egan argues that because the Council in Gaudium et Spes spoke "pastorally" that this had no juridical relevance.[81] Unlike the Church's doctrine which, as Bishop G. Robinson noted,[82] has not spoken of "the right over the body" since the Council, Egan claims that the giving and receiving of the right over the body is the essence of

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80 Cf. S.R. ROTA, c. Pinto, April 20, 1979, in M.E., 104(1979), p. 387.

81 Cf. S.R. ROTA, c. Egan, July 28, 1983, in S.C., 17(1983), p. 262. The contrary had been maintained as recently as July 19, 1983, c. Giannecchini in M.E. 109(1984), pp. 234 - 243.

82 G. ROBINSON, "Unresolved Questions in the Theology of Marriage", in The Jurist, 43(1983), p. 86.

marriage as an interpersonal relationship when he says:

> /... / by the giving and receiving of a perpetual and exclusive right over the body for acts which are apt for the generation of children, there also arises a relationship (a being or an ordering of one thing to another) which canonists and moralists usually call "marriage as it is lived out."[83]

Egan then proceeds to reduce marriage as a "consortium totius vitae" to "matrimonium in facto esse"[84] when he says that C.I.C. (1917), c. 1082 #1 and c.1110 refer to it as "society" or "bond" and that:

> /... / many contemporary authors in their pastoral - religious - spiritual writings now may call it 'an intimate community of life and love' or 'partnership of the whole of life' /... / also in the line of the pagan legal expert /... /.[85]

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83 "/... / iure in corpus perpetuo et exclusivo in ordine ad actus per se aptos ad prolis generationem tradito et accepto, protinus, invicte ac sponte sua exoritur relatio ('esse vel ordo' unius rei ad alteram) quae a canonistis et moralistis nuncupari solet 'matrimonium in facto esse'", ibid., pp. 262-263.

84 Such a reduction is directly contrary to the decision of the Cardinals of the Code Commission; cf. Communicationes, 9(1977), pp. 79-80, 212.

85 "/... / multis auctoribus hodiernis in scriptis pastoralibus - religiosis - spiritualibus vocatur nunc 'intima communitas vitae et amoris' nunc 'consortium totius vitae'. /... / etiam ad mentem iurisperiti illius pagani /... /. S.R. ROTA, c. Egan, loc.cit., p. 263.

One wonders whether St. Thomas, St. Raymond and Peter Lombard who all referred to the great Roman jurist Modestinus' definition of marriage, ever spoke of him in like manner.[86] The Code Commission embraced this definition of marriage whole heartedly.[87] Future rotal decisions will show how decisive the incorporation of this classical definition of marriage in c. 1055 #1 will be and will apply its consequences in jurisprudence for those who exclude this essential element of marriage, c. 1101 #2.

b. Jurisprudence of the Local Courts

Fortunately, collections of decisions from some local and regional marriage courts are available.[88] Canonists have also compiled collections of decisions.[89] Speaking specifically

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86 ST. THOMAS AQUINAS, Suppl., q. 44, art. 3; ST. RAYMOND OF PENYAFORT, Summa, IV t.2 #1; PETER LOMBARD, Sentent. IV in D. 27, c.2.

87 "[...] definitione iuris romani substantialiter a traditione recepta, 'consortium omnis vitae' (Dig. 23,2,1)." PONT. COMM. C.I.C. REC., Relatio (1981), p. 244.

88 Matrimonial Jurisprudence, United States, 1968-1976, (5 vols.), C.L.S.A.; MDEW, 1(1967)-16(1980), C.L.S. of G.B. and I; Tribunal matrimonial d'appel, Archidiocèse de Montréal, 1965-1977, Tribunal Marianopolitanum Sententiae, 1965- ; and also A.J. MAIDA, (ed.), The Tribunal Reporter, (C.L.S.A.), Huntington, Ind., Our Sunday Visitor, 1970. 564p.

89 G. LESAGE and F.G. MORRISEY, Documentation on Marriage Nullity Cases, Ottawa, St. Paul University, 1973,

to Canadian canonists, but no doubt applicable to many others. Cardinal A. Sabattani said some years ago:

> Not only at the Commission of Vigilance for Ecclesiastical Tribunals of the Holy See, but also in reviews, including your own, I have had the occasion to read sentences for marriage nullity cases containing an excellent study in iure and a profound examination in facto: they are so well structured, and written with such quality, that they could appear in a collection of rotal sentences.90

A survey of local jurisprudence would be, in itself, the subject of a dissertation and therefore beyond our scope here.[91] Fortunately, through the initiative of four

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89 (cont'd) vi-312p; J.E. HUDSON compiled two supplementary volumes: Selected Texts from Documentation on Marriage Nullity Cases, Ottawa, St. Paul University, 1976, vii - 195p; Documentation II on Marriage Nullity Cases, Ottawa, St. Paul University, 1979, xvi - 503p; L.G. WRENN, Decisions, Washington, D.C., C.L.S.A., 1983, vi-200p.

90 "Non seulement à la Commission de Vigilance sur les Tribunaux ecclésiastiques près le Saint-Siège, mais dans des revues et aussi dans la vôtre, m'a-t-il été donné de lire des sentences de causes matrimoniales contenant une excellente étude in iure et un examen approfondi in facto: elles sont si bien charpentées et rédigées avec une qualité telle qu'elles pourraient figurer dans un recueil de sentences rotales", A. SABATTANI, "L'évolution de la jurisprudence dans les causes de nullité de mariage pour incapacité psychique", in S.C., 1(1967), p. 143.

91 Cf. B. FRANCK, "Le manque de discernement suffisant et l'incapacité à assumer les obligations du mariage, d'après la jurisprudence récente des officialités Britanniques", in L'Année canonique, 24(1980), pp. 129-167; B. McCUMISKEY, The Development of "Inability" as a Ground of Marriage Nullity in Anglo-Irish Jurisprudence, Ottawa, St. Paul University,

Canon Law Societies presented in Chicago, U.S.A., a comparison of jurisprudence dealing with an actual case on psychological grounds is possible. Each of the four judges who participated in the seminar received the acts of an actual case and wrote a sentence, the in iure of which was published.[92]

The Judicial Vicar of the Hartford Tribunal, Rev. L.G. Wrenn, represented the C.L.S.A. In his sentence he draws on the Schema (1980) which he says "reflects contemporary jurisprudence" and that "the right to those things which essentially constitute the communion of life refer in fact to the 'right to the essential interpersonal relationship' (Communicationes, 9/1977/, p. 375)."[93] Wrenn specifies three necessary elements:

> /.../ that this right consists in the right to the three acts of self-revelation, understanding, and caring:

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91 (cont'd) 1980, vi-155p; partly published as ID., "'Inability' and Its Development in Rotal and British-Irish Jurisprudential Law", in S.C., 16(1982), pp. 241-281.

92 "Joint Seminar: Approaches to Jurisprudence", in C.L.S.A. Proceedings, 1981, Washington, D.C., C.L.S.A. 1982, pp. 62-83; hereafter cited as C.L.S. Joint Seminar.

93 Ibid., pp. 62-63.

> Self-revelation means that a person must first of all enjoy a basic ego identity, i.e., he must see himself as one fairly consistent person, have a reasonable degree of respect for that person and convey a knowledge of himself to his spouse.
>
> Understanding means that he must see his spouse as a separate person, and appreciate her way of feeling and thinking, without distorting it excessively by his own attitudes, needs or insecurities.
>
> Caring means that a person must, with reasonable maturity, pledge himself to a lifelong communion with his spouse, not because he wishes to possess her, but because of the special reverence and affection he has for her, and because he wishes to share his life with her.[94]

Wrenn sees those three elements as constituting the right to the consortium, but he also rightly relates the proof to the presence of a personality disorder as a psychological cause of nullity following the principle that "no one is obliged to the impossible." If a person is incapable of perceiving or fulfilling the object of marriage, then that person is incapable of assuming the object. Wrenn quotes, at some length, from a rotal decision c. Colagiovanni[95] which

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94 Ibid., p. 63.

95 S.R. ROTA, c. Colagiovanni, December 15, 1979, in M.E., 105(1980), pp. 53-63; English translation in T. DOYLE (ed.), Marriage Studies II, Washingon, D.C., C.L.S.A., 1982, pp. 193-199.

analyses and defines personality according to contemporary authors, Allport among them, and relates this to the "critical faculty" as understood in jurisprudence. Colagiovanni also considers the North American effort to standardize classification (DSM I-III) and the same regarding European terminology. He also rightly asserts that proof of such psychic disorder will be provided by experts, but that the judge will consider how this psychological cause rendered the person incapable of marrying validly.[96]

A sentence on behalf of the C.L.S.A.N.Z. was written by Rev. F. Harman who started by indicating the ferment in jurisprudence, even though it was now agreed that for a truly conjugal consent:

> /... / the Natural Law requires that over and above the capacity to posit a human act a party must:
> a. intrapersonally enjoy due canonical discretion about the rights and duties of marriage (Schema /1980/, c. 1048 #2; C.I.C. /1983/, c. 1095, 2), i.e. not be so grossly lacking in the evaluation of those rights and duties and/or in freedom as to be unable to posit that particular human act which is binding of oneself maritally; and
> b. interpersonally not be the subject of any grave psychic anomaly such as would render him incapable of assuming the essential obligations of marriage (Schema

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96 Ibid., p. 58.

> /1980/, c. 1049; C.I.C. /1983/, c. 1095, 3) and so be a grossly inept object of the partner's consent to a union which is of its nature permanent, exclusive.97

Although these grounds have now been definitely admitted into law, there are still disagreements, even within the Rota, as to their exact juridical meaning and effect as the above cited decisions c. Agustoni and c. Egan have indicated.

Harman then discusses five areas where he says:

> /... / a real polemic is being waged within the Rota, viz:
> - the relationship between Incapacity and Lack of Due Discretion
> - the value of modern psychology in assessing Incapacity
> - the consortium omnis vitae as an object of capacity
> - the relational element in Incapacity
> - Incapacity and curability.98

The first two areas have been given clear juridical standing by the revised Code[99] and recent jurisprudence.[100]

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97 C.L.S. Joint Seminar, p. 70. Reference to C.I.C. (1983) is added.

98 Ibid., pp. 70-71.

99 C.I.C. (1983), cc. 1095 and 1680.

100 S.R. ROTA, c. Lefebvre, January 31, 1976, in M.E., 102(1977), p. 319; c. Colagiovanni, December 15, 1979, ibid., 105(1980), pp. 55-58; c. Raad, March 20, 1980, ibid., p. 178.

On the right to the consortium vitae as one of the essential objects of marriage consent, Harman traces the clash between those Conciliar fathers who wanted a contractualist presentation of marriage and those who sought a personalist one. He described the sentence c. Anné, February 25, 1969 as "monumental" and noted that the "relational aspect of Incapacity has been particularly developed by Serrano in whose judgements it forms the central theme."[101] As for the elements that would give rise to the incapacity for marriage as a consortium totius vitae, Harman rightly argues that the manner of determination will be the via negativa when he states:

> Ultimately the ecclesiastical Judge does not act in abstracto, but is forced back on his own existential assessment of the subject's personality in determining the cut-off point below which not even minimal capacity can be predicated. He must work via negativa, that is, by studying the areas of conduct (pre-marital and marital) which indicate a shortfall in the capacity to donate and to accept the right to community of life, and deciding whether that shortfall was gross at the time of the marriage.[102]

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101 C.L.S. Joint Seminar, pp. 74-75.

102 Ibid.

Harman adds a wise note of caution that must be borne in mind when considering the interpersonal aspect of marriage and personality disorders when he states:

> When considering this relational aspect, we need to steer a clear course between the Scylla of totalling up the contrasting elements as though one minor personality defect + one minor personality defect = nullity; and the Charybdis of seeing incapacity where partners simply fail to live up to the subjective ideal and expectations held for them during courtship and marriage.[103]

Harman's sentence, written as the representative of the C.L.S.A.N.Z., presents a balanced and well reasoned effort at the local level to apply rotal jurisprudence, in so far as it has been able to, as Harman says, "percolate through to the Antipodes".[104]

The Canadian Canon Law Society, which co-sponsored the seminar on jurisprudence with the C.L.S.A., had Rev. C. Lahaise present a sentence, the first parts of which present consent and the contract of marriage according to Scholastic philosophy. This is supplemented by reference to Gaudium et Spes, art. 48,

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103 Ibid., p. 76.

104 Ibid., p. 71.

and recent rotal jurisprudence, especially c. Anné and c. Serrano and so Lahaise says of consent:

> Marriage consent does not involve only rights to sexual life but also rights to communal life. Sexual life usually leads to procreation of children. To fulfil this end, it is first of all necessary for the spouses to create together a community of life suited to receive a child and give it the kind of education which is necessary for its human and supernatural development. One can easily see that sexual life requires a community of life and this idea has been developed and high-lighted in recent years.[105]

Echoing Serrano, Lahaise examines the interpersonal differences which are the matrix of the consortium when he states:

> Inevitably, marriage brings together two persons who are different not only sexually but especially with regard to their education, their schooling, their upbringing, their professions, their way of thinking and their outlook on life. These persons must therefore have the ability to complete each other, to help each other develop and to establish authentic interpersonal relations.[106]

Serrano noted previously that a certain 'relativity' enters in when considering the interpersonality of marriage:

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105 Ibid., p. 80.

106 Ibid.

> As a consequence, the ground of nullity has a qualified "relativity" that could possibly be pronounced in this case. The incapacity is predicated of only one marriage, regardless of the capacities of the parties in other activities and habits of psychic life; it refers only to a particular marriage, a concrete "dyad" which exists in a given marriage.[107]

Lahaise incorporates this and develops its application when he states:

> We must, in fact, weigh the psychological capacity of the spouses precisely in connection with their matrimonial life. Thus, if we discover serious deficiencies in this regard, we must conclude to the nullity of the marriage, even though a person gives evidence of having an acceptable personality on other respects. To study the value of a marriage we must give greater attention to the capacity of a subject to become a true life companion for the other than to his ability to achieve sexual union: thus the wife must be considered primarily as a companion and then as a mother, and the husband first as a companion and then as a procreator. The inability to share in matrimonial common life because of a serious

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107 "Consequens sit qualificata 'relativitas' capitis nullitatis, quod in casu forte pronuntiandum erit. Inhabilitas enim et de uno negotio coniugali praedicaretur, quidquid erit de capacitate partium in aliis vitae psychicae operationibus et habitibus; et unum matrimonium respiceret in concreta 'diade', quae singulare coniugium init." S.R. ROTA, c. Serrano, July 9, 1976, in M.E., 102(1977), p. 371.

> personality defect must be judged in the same way as impotence with regard to sexual acts.[108]

Lahaise brings together the Scriptural and Conciliar teaching which with the natural law element is the essential basis in law for the interpersonality of marriage from which procreation flows. It is obvious from the context and his starting reference to Gaudium et Spes art. 48, that by "matrimonial common life" Lahaise means consortium or its Conciliar equivalent which is of the essence of marriage. As to the comparison with impotence, early writings actually called this incapacity "moral impotence".[109]

The final contribution in the seminar was a sentence c. Cousins which is very similar to the one referred to above, to which Egan took such exception in third instance.[110] Unlike Wrenn, Harman and Lahaise, Cousins cites no rotal jurisprudence,

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108 C.L.S. Joint Seminar, p. 81.

109 P. HUIZING, "Some Proposals for the Formation of Matrimonial Law: Impediments, Consent, Form", in Heythrop Journal, 7(1966), pp. 161-181; J.R. KEATING, The Bearing of Mental Impairment on the Validity of Marriage, Rome, Gregorian University Press, 1964, vi - 221p.

110 c. Cousins, MDEW, 14(1978), pp. 57-59; S.R. ROTA, c. Egan, December 9, 1982, in M.E., 108(1983), pp. 233-244.

but only a local sentence c. Chidgey. More seriously he states without giving any reference to sentences, that:

> It is now firmly enshrined in canonical jurisprudence that marriage is a lifelong and loving interpersonal relationship between a man and a woman. But even though the parties may understand that the union they are entering is to be a relationship of this kind /... / it is always possible that they will be unable ever in fact to establish such a relationship.[111]

The juridical basis for marriage as an interpersonal relationship has natural law and doctrinal elements, but jurisprudence has not attributed the same to conjugal love.[112]

Cousins draws the parallel, as Lahaise did, between inability and physical impotence, C.I.C. (1983), c. 1084 #1 but once again he links love to the essential interpersonal relationship when he says:

> Common sense, as well as justice, would dictate that in the area of the loving interpersonal relationship inability in a relative sense must be

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111 C.L.S. Joint Seminar, p. 82.

112 The only exception we are aware of is S.R. Rota, c. Fagiolo, October 30, 1970, in S.R.R. Dec., 62(1970), pp. 978-990; on appeal c. Palazzini, June 2, 1971, ibid., 63(1971), pp. 467-479 rejected the juridical relevance that Fagiolo attributed to the lack of conjugal love; cf. C. MURTAGH, "The Juridical Importance of Amor Conjugalis", in S.C., 7(1973), pp. 49-57.

> accepted as well as inability in an absolute sense, since one marries a particular person, and if it is impossible because of a clash of personalities to establish at any time a minimal loving relationship with the person one actually marries, then it is entirely irrelevant whether or not the person is able to establish such a relationship with every other person of the opposite sex.113

Some overall assessment of this commendable initiative taken by the respective Canon Law Societies can be done. Wrenn argues from psychological grounds and profusely quotes psychiatric experts and texts while basing the in iure on the Schema (1980) and rotal jurisprudence; Harman presented a very scholarly sentence based on the certainties that have emerged from rotal jurisprudence; Lahaise stated Scholastic principles and supplemented this by detailed quotes from recent rotal jurisprudence; Cousins argued for the jurisprudential relevance of conjugal love and cited only a local sentence.

The contribution of the American matrimonial courts during the last fifteen years has their use of

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113 C.L.S. Joint Seminar, p. 83, emphasis added; for the "relativity" of the interpersonality of marriage considered without Cousins' linking of it to love in the above decision, cf. S.R. Rota, c. Serrano, July 9, 1976, loc.cit., p. 371.

psychiatric experts and the application of the behavioural sciences to evaluate an ever increasing number of applications for nullity of marriage.[114] The best early efforts to apply the consortium in jurisprudence were made by Rev. G. Lesage and Mgr. C. Murtagh. The revised Code c. 1055 #1 which has the recognition of the consortium in law, raises two questions that Murtagh has already formulated: how do we determine its presence or absence in the intentions of the parties? Does the breakdown of a marriage indicate that the consortium vitae was never present?[115] It is here that the role of the psychiatric expert[116] will come to the fore as Murtagh envisaged:

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114 Cf. M.J. REINHARDT, "The Emphasis in American Tribunals", in E.I.C., 34(1978), pp. 64-75.

115 C. MURTAGH, "The Jurisprudential Approach to the Consortium Vitae", in S.C., 9(1975), p. 317.

116 Cf. L. BROWN and B. O'CONNOR, "The Assessment and Management of 'Personality Disorders' in Matrimonial Tribunal Procedure", in S.C., 11(1977), pp. 167-190; J.R. KEATING, "The Province of Law and the Province of Forensic Psychiatry in Marriage Nullity Trials", in S.C., 4(1970), pp. 6-23; J.G. PROCTOR, "Expert Proof of Psychic Incapacity in Marriage Cases under Canon Law", in The Catholic Lawyer, 25(1980), pp. 263-272; G.W. RUSSON, "Assessment of Personality Disorder in Marriage", in S.C., 9(1975), pp. 57-61; G. VENNES. "De la capacité et de l'incapacité relative dans les causes de mariage", in S.C., 11(1977), pp. 142-152.

> In the collecting of evidence he can be of great assistance in directing the questioning so as to elicit the relevant data. If a party is an active homosexual, lesbian, alcoholic, hysteric, schizophrenic, etc., it is very useful to be able to establish this. When the evidence has been collected, the psychiatrist can then offer an opinion on two matters: a diagnosis of the malady, and an assessment of the person's capacity for inter-personal relationships. However, since we are concerned with the genus of anomaly and not the species, his diagnosis is not as vital as his assessment of capacity for inter-personal relationship.[117]

The psychiatric expert will be able to classify the personality disorder by which one or both spouses is afflicted. The judge will draw out the juridical consequences of such diagnosis. Tables relating the psychic causes to the grounds of nullity will help the judge in this regard.[118]

A very useful procedure for the analysis of the constituents of the partnership of conjugal life (consortium) is to consider the person from broader to narrower perspectives and relate these to the "good of the spouses" and the "generation and upbringing of children", as was done in a Quebec sentence c. Morrisey.[119] Here the person was considered under five

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117 C. MURTAGH, loc.cit., p. 318.

118 J.E. HUDSON, Handbook II for Marriage Nullity Cases, Ottawa, St. Paul University, 1980, pp. 270-275.

119 c. Morrisey (Quebec), June 11, 1975, in S.C. 9(1975), pp. 184-187.

aspects: intra-personal, interpersonal, intra-psychic integration, and also capacity for conjugal love and parenthood. These aspects may help to determine a person's capacity for fulfilling the obligations of the consortium.

> The person considered as an individual. If we do not find in a person, to a sufficient degree, the fundamental elements of rational maturity in the relationships of daily life, self-mastery in conduct, stability of conduct and the capacity to adapt to circumstances, this person as an individual is not considered capable of fulfilling the fundamental obligations of the matrimonial state (cf. S.R. ROTA, c. Lefebvre, July 8, 1967, S.R.R. Dec., 59 /1967/, pp. 562-570).[120]

> The person considered as a social being. The same teaching applies to a person who is incapable, to a serious degree, of establishing interpersonal relations with other people, even persons of the same sex. A person must, likewise, be capable of oblative love which consists in seeking not for personal satisfaction, but for the good and happiness of his partner (cf. S.R. ROTA, c. Serrano, April 5, 1973, in S.R.R. Dec., 65 /1973/, pp. 322-343).[121]

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120 Ibid., p. 184. We have added here and following the original S.R.R. Dec. reference. Psychic causes which would vitiate the person's capacity to fulfil the obligations of marriage as an individual (they may affect capacity in other areas as well) would be as follows: alcoholism; anorexia nervosa; anxiety neurosis; asthenic personality; epilepsy; manic depressive psychosis; inadequate personality; mental depression; mental retardation; passive-aggressive-dependent personality; personality disorders; psychopathy; schizophrenia.

121 Ibid. Psychic causes affecting the person's capacity as a social being would be as follows: anti-social personality,

The person considered as being capable of heterosexual love. A person must show respect for the personality and sensitivity of his partner, both in the affective and sexual orders. Consequently, he must be able to respect the diversity and complementarity of the sexes (cf. Le Tribunal d'Appel de Montréal, c. Lesage, AM59/71, in Sentences, 1971, pp. 523-524).122

The person considered as being capable of conjugal love. Conjugal love, in the context of sacramental marriage, implies more than heterosexual love because it must also include respect for Christian morality and for the partner's conscience in matters of conjugal morality. Because conjugal love implies a sharing of all aspects of one's life, we must be able to find in its manifestations elements of mutual communication, as well as a sense of responsibility in material

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121 (cont'd) cf. A. MENDONCA, "Antisocial Personality and Nullity of Marriage", in S.C., 16(1982), pp. 1-213; cyclothymic personality, epilepsy, hysterical personality, immature personality, cf. J. ZUSY, Psychic Immaturity and Marriage Nullity, Ottawa, St. Paul University, 1980, xv-307p; partly published as ID., "Matrimonial Consent and Immaturity", in S.C., 15(1981), pp. 199-239; narcissistic personality, cf. E.J. KOMORA, "Narcissism: Its Relation to Personality Disorders and to Church Marriage Annulments", in E.I.C., 35(1979), pp. 173-196; nudism; obsessive-compulsive personality; schizoid personality.

122 Ibid., pp. 184-185. Psychic causes affecting the person's capacity for heterosexual relationships would be as follows: homosexuality or lesbianism, cf. J.R. SCHMIDT, "Homosexuality and the Validity of Matrimony: A Study in Homopsychosexual Inversion", in The Jurist 32(1972), pp. 381-399; transvestitism;trans-sexualism, J.J. GRAHAM, "Trans-sexualism and the Capacity to Enter Marriage", in The Jurist, 41(1981), pp. 117-154; C.J. RITTY, "The Transexual and Marriage", in S.C., 15(1981), pp. 441-459; fetishism; sadism.

> matters. Conjugal love must lead to a meaningful conjugal act which is the ultimate expression of human heterosexual love (cf. Le Tribunal Régional d'Ottawa, c. Charland, April 2, 1975, in S.C., 9/1975/, p. 167; Le Tribunal d'Appel de Montréal, c. Lesage, AQ 130/69 in Sentences, 1970, pp. 48-53).[123]
>
> The person considered as being capable of becoming a parent. In addition to being able to show conjugal love, a person must be capable of bringing this love to its ultimate fulfillment: the generation of children. This requires in addition to moral and psychological responsibility, the psychic possibility of caring for, loving and educating one's children (cf. S.R. Rota, c. Di Felice, May 13, 1969, in S.R.R. Dec., 61/1969/, pp. 481-487).[124]

Such an approach to determining the incapacity for the consortium totius vitae would be through a via negativa. Many rotal decisions are giving greater prominence to psychic disorders and this trend will continue following the encouragements of the Popes in their addresses to the Rota. Sound local jurisprudence has developed following the lead of the majority of rotal auditors. Local courts will need to keep one eye on their own application of the law and the other on consistent rotal jurisprudence.

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123 An incapacitating psychic cause of nullity would be hyperaesthesia.

124 Incapacitating psychic causes of nullity would be: psychic impotency, revulsion towards children.

The Pio-Benedictine Code was the first official Church document to order hierarchically the ends of marriage, but the sources quoted for doing so did not bear out such a conclusion. The hierarchy of ends according to C.I.C. (1917), c. 1013 #1, was never spoken of in that way in Gaudium et Spes and so is now abandoned.

The Vatican Council II in Gaudium et Spes, arts. 48-52 never spoke of marriage as a contract but consistently opted for the more biblical and decidedly personalist term "covenant". The revised Code of Canon Law, to distinguish between marriage as a natural institution speaks of "contract" and when speaking of a sacrament, the term "covenant" is employed.

Marriage, described as a "covenant" emphasizes love, fidelity, indissolubility and faith dimensions. The object of consent, according to c. 1057 #2, is marriage itself, which is defined by c. 1055 #1 as a partnership of the whole of life. This partnership is ordered to two joint ends: the good of the spouses and the generation and upbringing of children.

In seeking inspiration for the Church's teaching on marriage from the Scriptures, the Council chose the fundamental descriptive term "covenant" which throughout salvation history

regulated God's relationship with his people and this relationship was also applied specifically to marriage. The Genesis texts present man and woman created with dignity in God's image and likeness and vividly portray them as called "from the beginning" to partnership. Created in complementarity, husband and wife are called to realize the full interpersonal capacity of each other.

In particular, the prophets applied the marriage metaphor to the relationship between the chosen people and their God. But they also identified marriage itself as a covenant and hence love and fidelity came to the fore. Jesus, who in his parables often referred to himself as the bridegroom, asserts the normative character of the Genesis texts and refers to these in re-establishing fidelity and rejecting divorce. St. Paul presents marriage as a partnership in the Lord and calls upon husbands and wives to regulate their married lives motivated by that conviction.

Gaudium et Spes referred to these Scriptural sources when it spoke of marriage as a covenant. It also referred to the essentially interpersonal nature of marriage when it described marriage as a communion of persons and an intimate partnership of life and love. Despite repeated attempts to have the Council speak anew in the technical and legal terms

that governed marriage up until that time, the Conciliar texts deliberately and studiously avoided the use of such terms.

The post-Conciliar documents and statements were influential in confirming that the Council's texts taught doctrine that would have a bearing on law and in fact guide the process for the revision of the Code. Pope Paul VI's Encyclical Letter, Humanae Vitae confirmed the Conciliar emphasis on the essential interpersonal basis of marriage. He also confirmed the juridical relevance of this teaching when he commended rotal auditors such as Anné, Lefebvre and Serrano for applying the Council's teaching in jurisprudence. Almost on the eve of the promulgation of the revised Code, Pope John Paul II's Apostolic Exhortation, Familiaris Consortio greatly elaborated on this interpersonal emphasis and gave the fullest positive treatment to conjugal love found in any pontifical document.

The first draft from the Pontifical Commission for the Revision of the Code of Canon Law manifested very tentative steps in receiving the Conciliar teaching into law. This is clearly indicated by the fact that marriage was spoken of only as a contract and little of the Council's personalist emphasis was evident. Many Episcopal Conferences and other consultative bodies showed their dissatisfaction with certain parts of the

first draft. The committee rectified this after special consultation with the Cardinals who decided that the revised Code would contain a descriptive definition of marriage "in fieri" and that "consortium" or a similar term would be employed.

The Plenary meeting of the Code Commission discussed anew the definition of marriage; it was decided that it would speak of marriage as a "covenant" and that it was the consortium totius vitae which was covenanted. Jurisprudence has increasingly recognized this fact and following the monumental decisions of Anné and Lefebvre which applied the Conciliar teaching, other rotal auditors, such as Pinto who at first understood the communio as "cohabitation", now attribute the full juridical ramifications to this Roman law term which receives into law the interpersonal emphasis which the Council in Gaudium et Spes, arts. 48-52 had already firmly established in doctrine.

A number of consequences flow from these changes and so it would be beneficial to note the following:

1. Marriage defined as a "covenant" rather than as a "contract" introduced into law a rich biblical term which is both personalist and religious. In the Old Testament, the

covenant governed the relationship between God and his people. The prophets applied the covenant parallel to marriage and thus highlighted the dimensions of love and fidelity.

2. Jesus in his reply to the Pharisees' question on divorce, appealed to the presentation of marriage in the Genesis creation accounts. He thus opposed any laxity regarding divorce and restored the Creator's design "from the beginning". He emphasized the partnership that is established by husband and wife when they leave father and mother and are joined to each other in marriage.

3. The reception into law of the Vatican Council's personalist emphasis has meant that the relationship aspect of marriage is now recognized in law. The partnership of the whole of life which is marriage has two joint ends according to c. 1055: the partnership is ordered to the good of the spouses and to the generation and upbringing of children.

4. At the time of entering marriage the partners must not be ignorant that marriage is a permanent partnership ordered to the generation of children through some form of sexual cooperation, c. 1096. They are incapable of contracting marriage, who do not have sufficient use of reason, c. 1095 #1; who suffer from a grave lack of discretionary judgement concerning the essential matrimonial rights and obligations to be

mutually given and accepted. This is a defect of the critical faculty whereby they are unable to evaluate their act of consent or what marriage is, so that their evaluation is not proportionate to the life-long partnership of marriage, c. 1095 #1; who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage, c. 1095 #3.

5. The essential obligations of marriage derive from two joint ends of marriage as defined or described in c. 1055 #1. These obligations flow from marriage as ordered to the good of the spouses or to the generation and upbringing of children or to both of these aspects. To achieve the good of the spouses the partners must have acquired sufficient intra-personal integration as well as being capable of an inter-personal relationship with their partner. Psychic causes of nullity can be present in one or both of these areas. The diagnosis and description of mental illness that would cause incapacity for the essential obligations of marriage is the province of the behavioural sciences. The judge, guided by such expert diagnosis, ordinarily to be available according to c. 1680, applies the juridical consequences.

6. The essential elements of marriage as a partnership of the whole of life will be enunciated by doctrine and

jurisprudence on the intra-personal and interpersonal aspects of marriage. This permits immediate application in local jurisprudence.

7. Rotal jurisprudence will continue to delineate which psychic causes prevent the establishing of the partnership of the whole of life. This will likely be by the *via negativa*. For law is concerned with the exchange of the right to the conjugal partnership, whereas the behavioural sciences, especially those of the wholistic approach, will elaborate the positive aspects for the realization in the couple of marriage as a partnership of their whole life.

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