

MARITAL CONSUMMATION
ACCORDING TO ECCLESIASTICAL LEGISLATION

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CURRICULUM VITAE

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ABBREVIATIONS

<u>A.A.S.</u>	Acta Apostolicae Sedis
<u>A.C.</u>	Année canonique
<u>A.C.R.</u>	Australasian Catholic Record
<u>A.E.R.</u>	American Ecclesiastical Review
<u>C.L.D.</u>	Canon Law Digest
<u>Comm.</u>	Communicationes
<u>D.C.</u>	Documentation catholique
<u>E.I.C.</u>	Ephemerides iuris canonici
<u>E.T.L.</u>	Ephemerides theologicae Lovanienses
<u>I.C.</u>	Jus canonicum
<u>I.D.E.</u>	Il diritto ecclesiastico
<u>M.E.</u>	Monitor ecclesiasticus
<u>N.R.T.</u>	Nouvelle revue théologique
<u>Per.</u>	Periodica
<u>R.D.C.</u>	Revue de droit canonique
<u>R.E.D.C.</u>	Revista Espanola de Derecho canonico
<u>R.Sc.R.</u>	Revue des sciences religieuses
<u>S.C.</u>	Studia Canonica
<u>S.T.</u>	Sal terrae

TABLE OF CONTENTS

Chapter	page
INTRODUCTION.....	viii
I.- THE JURIDICAL SIGNIFICANCE: THE PROBLEM UP TO THE TWELFTH CENTURY.....	1
A. The Development of the Consensual Theory: The School of Paris	3
1. The Influence of Roman Law	3
2. St. Ambrose	8
3. St. Augustine	11
4. Pope Nicholas I	14
5. St. Peter Damian	16
6. Hugh of St. Victor	18
7. Peter Lombard	22
B. The Development of the Copula Theory: The School of Bologna	25
1. Hincmar of Rheims	28
2. Ivo of Chartres	34
3. Gratian	38
C. Reconciliation of the Two Theories: Alexander III	45
1. The Doctrine of Rolando Bandinelli prior to His Election to the Papacy	45
2. The Response of Alexander III to the Archbishop of Salerno	49
3. The Response of Alexander III to the Bishop of Brescia	51
II.- ECCLESIASTICAL LEGISLATION FROM THE TWELFTH TO THE TWENTIETH CENTURY.....	57
A. Pre-Code Documents on Problems Related to the Consummation of Marriage	60
1. The Brief "Cum frequenter", Sixtus V, June 27, 1587	60
2. Documents on Procedural Law	75
B. The Teaching of the Code of Canon Law on the Consummation of Marriage	88
1. Canon 1015, §1 and §2	89
2. The Notion of Conjugal Copula Consummative of Marriage: Its Elements and Its Effects	91

TABLE OF CONTENTS

vi

Chapter	page
C. Post-Code Documents on the Consummation of Marriage and Related Problems	98
1. Decree "Catholica Doctrina", and Norms "Regulae servandae in processibus super matrimonio rato et non consummato", S.C. Sacr., May 7, 1923	99
2. Norms "Ad praecavendam dolosam personarum substitutionem", S.C. Sacr., March 27, 1929	106
3. Instruction "Quo facilius", S.C. Eccl. Orient., June 10, 1935	108
4. Instruction "Provida Mater", S.C. Sacr., August 15, 1936	109
5. Letter "In plenariis", S.C. Sacr., January 5, 1937	110
6. Reply "De copula perfecta et de consummatione matrimonii", S.C. S. Off., March 1, 1941	111
7. Decree "De quibusdam cautelis adhibendis in causis matrimonialibus impotentiae et inconsummationis", S.C. S. Off., June 12, 1942	113
8. Reply "De consummatione matrimonii", S.C. S. Off., February 3, 1949	115
9. Motu proprio "Crebrae allatae", Pius XII, February 22, 1949	118
10. Motu proprio "Sollicitudinem nostram", Pius XII, January 6, 1950	119
11. Instruction "Instructionem quo facilius", S.C. Eccl. Orient., July 13, 1953	119
12. Motu proprio "Cleri sanctitati", Pius XII, July 11, 1957	120
13. Apostolic Constitution "Regimini Ecclesiae Universae", Paul VI, August 15, 1967	121
14. Instruction "Dispensationis matrimonii rati", S.C. Sacr., March 7, 1972	122

TABLE OF CONTENTS

vii

Chapter	page
III.- A BIOLOGICAL PERSPECTIVE.....	136
A. The Physical Contribution of Husband and Wife to Consummation	137
1. Requirements for Consummation on the part of the Husband	137
2. Requirements for Consummation on the part of the Wife	140
B. Impotence as a Defect Impeding Biological Consummation	143
1. The Impediment of Impotence in Early Ecclesiastical Sources	144
2. The Notion and Division of the Impediment of Impotence in the Code of Canon Law	156
C. The Problem of the Verum Semen	171
1. The Problem in its Historical Context and its Subsequent Influence on Rotal Jurisprudence	172
2. The Practice of the Sacred Congregation of the Holy Office regarding the Marriage of the Bilaterally Vasectomized	194
IV.- THE PROPOSED NEW LAW.....	210
A. The Proposed Revision of Canon 1015 of the Code of Canon Law	214
1. The Text of Canon 245 of the Proposed Law and Canon 1015 of the Code of Canon Law	215
2. A Comparative Study and Evaluation of Canon 245 of the Proposed Law	217
B. The Proposed Revision of Canon 1068 of the Code of Canon Law	251
1. The Text of Canon 283 of the Proposed Law and Canon 1068 of the Code of Canon Law	253
2. A Comparative Study and Evaluation of Canon 283 of the Proposed Law	254
SUMMARY AND CONCLUSIONS.....	292
BIBLIOGRAPHY.....	304

INTRODUCTION

In the past decade or so, due no doubt to the influence of the Second Vatican Council, there has been a revival of interest in the importance of the sacramental life of the Church. The sacrament of marriage, in particular, has received the special attention of ecclesiastical writers. These have strived to renew, to re-express the traditional theology of marriage in terms of the conciliar teaching, as found especially in Gaudium et spes, Part II, Chapter I, Marriage and the Family in the Modern World. There is a marked tendency today to speak of marriage as a covenant, as "an intimate community of life and love" rather than as a mere contract. Likewise, the advances in anthropology, psychology and sociology have occasioned a re-examination of the entire marital relationship.

It is not surprising, therefore, that the traditional notion of marital consummation as the first act of sexual intercourse following the exchange of consent, is criticized as inadequate within the context of the renewal of the theology on marriage. Many see this notion of consummation as too biological, as a rather automatic type of concept, which fails to involve the whole human person over an extended period of time.

A number of serious studies have already been done in the area of the consummation of marriage and other related topics. In 1969, for example, Guy St-Hilaire prepared a doctoral dissertation on the subject of azoospermia in Rotal jurisprudence (L'azoospermie dans la jurisprudence rotale), which treats incidentally and at some length of copula satiativa or copula whereby ordinary semination, irrespective of testicular content, is required and is sufficient to consummate marriage. In 1971, John A. Alesandro presented a dissertation, also at the Gregorian University in Rome, on Gratian's Notion of Marital Consummation, treating in some detail of Gratian's view of consent and consummation.

Such studies as the above are a valuable contribution to the literature on marital consummation. They clarify problem areas while acting as an incentive to further research along the same lines. However, they do tend to concentrate (as we expect from their titles) on one particular aspect. Consequently, an overall synthesis of the notion of consummation seems still to be lacking. It is with a view to supplying for this deficiency in legal circles that this present work is undertaken.

We shall, accordingly, begin our study by examining some of the texts of the Fathers of the Church during the first millennium or so of Christianity. Such an investigation will enable us to situate the "consensual" and "copula theories" on marriage within their proper context. According to the "consensual theory", marriage was essentially constituted by the consent of the contracting parties and was perfect even without consummation. The adherents of this theory made up what was styled "the School of Paris", with Peter Lombard as one of its most illustrious representatives. The adherents of the "copula theory" on marriage admitted with the consensualists that consent was central to marriage, but held, moreover, that sexual intercourse was also an essential element of the marital contract. Gratian was one of the foremost proponents of the "copula theory", representing the so-called "School of Bologna".

By the middle of the twelfth century, the question of consummation was being discussed, not so much on its own merits, but as related to the indissolubility of marriage. Alexander III (1159-1181) resolved the tension between the two schools of thought by stating that consent constituted two people in marriage, but that, if marriage had not been consummated, it could be dissolved. We shall see what effect this particular teaching has had on the notion of marital

consummation, which afterward was translated into ecclesiastical law.

Following the pontificate of Alexander III, his successors upheld his teaching on marital consummation and the indissolubility of marriage. Since between the twelfth and the twentieth centuries there were very few documents which treated of consummation explicitly, we shall examine in detail the Brief Cum frequenter, 1587, on impotence, and the many procedural documents which, prior to and following the Code of Canon Law, dealt with the directives for the study of cases of nonconsummation of marriage. We shall discuss the physical and psychological elements of consummation on the part of husband and wife in our commentary on the notion of consummation found in canon 1015 of the Code. Two replies of the Holy Office, dated 1941 and 1949, dealing explicitly with copula consummative of marriage, will supplement our study of this particular canon.

With reference to the physical contribution of the spouses to consummation, we shall find it useful to add some basic notions on the impediment of impotence as a defect impeding biological consummation, with special emphasis on Canon 1068 of the Code of Canon Law. While this study will not deal primarily with impotence, yet marital consummation

and impotence are so closely related that the notion of one necessarily implies the notion of the other.

Relative to male impotence, we shall be obliged to add some precisions on the problem of the verum semen, namely the bearing of the content of the seminal fluid on the consummation of marriage, and, consequently, on the nullity of marriage or its dissolution on either the grounds of impotence or nonconsummation. We shall be interested as well in exploring the jurisprudence of the Sacred Roman Rota and of certain Roman Congregations, notably the Congregation of the Holy Office (now the Congregation for the Doctrine of the Faith), in dealing with such marriage cases. The topic has special relevance at present because of its link with the marriage of the bilaterally vasectomized, which will be discussed in its turn.

Lastly, our investigation of the notion of marital consummation in the Schema of the proposed new law on marriage (canon 245) will lead us to inquire whether a revised notion of consummation is emerging. While introducing the study of consummation from the perspective of the proposed new law, we shall have occasion to speak briefly of the hypothesis of the "existential and in faith" consummation of marriage.

The correlative question of the impediment of impotence (canon 283 of the proposed law) will be treated in relation to its origin (whether of natural or ecclesiastical law) and again in connection with the verum semen controversy. In our study of the notions of consummation and of impotence in the proposed law, the methodology will be the following: a statement of the texts of the proposed new canons, followed by a comparison of canons 1015 and 1068 of the Code with canons 245 and 283 of the Schema respectively. We shall rely on the reports of the Pontifical Commission for the Revision of the Code of Canon Law in evaluating the two canons in question.

Briefly, then, the aim of this dissertation may be restated: to prepare a comprehensive summary of the notion of marital consummation according to ecclesiastical legislation, and so to show what relevance the notion has had in the canon law of marriage from the early centuries of the Church to the present. Such a synthesis will not pretend to solve all problems in the area of consummation. It will attempt to restate the past and current legislation on the subject in terms as clear as possible, and to reflect on

this legislation in the light of recent canonical and theological writings and the communications of the Commission for the Revision of the Code.

CHAPTER I

THE JURIDICAL SIGNIFICANCE OF THE CONSUMMATION OF MARRIAGE: THE PROBLEM UP TO THE TWELFTH CENTURY

Throughout its history, the Church has always paid close attention to questions pertaining to marriage. There were frequent discussions and controversies which, for the most part, ended by a greater precision in the Church's teaching on the subject, a firmer affirmation of what it considered to be its rights, and the establishment of a stronger legislation.¹ In order to appreciate the relevance of the notion of the consummation of marriage in present-day Canon Law studies, the problem must be placed in its proper historical context. Since this presupposes approximately twenty centuries of ecclesiastical legislation which becomes more and more detailed with the passage of time, we shall limit ourselves in this first chapter to a survey of the problem up to the 12th century.

The nature of the marriage contract was one of the major questions to preoccupy the Church in the Middle Ages. It was an issue which would be reflected upon for many centuries by theologians and canonists, and would eventually require the intervention of the papacy. Some early

¹ Cf. V. Boulanger, "Le mariage à travers l'histoire", in S.C., 8(1974), p. 109.

ecclesiastical writers, the adherents of the "consensual theory", taught that marriage was essentially constituted by the consent of the contracting parties and was perfect even without consummation. Other writers advocated the "copula theory", according to which consent remained central but with sexual intercourse also as a part of the constitution of marriage.²

By the middle of the twelfth century, moreover, the question of the consummation of marriage was being discussed, not so much on its own merits, but as related to the indissolubility of the sacrament. Alexander III (1159-1181) resolved the tension between the two schools of thought by stating that consent constituted two people in marriage, but that if marriage had not been consummated it could be dissolved. This addition of copula to consent as a criterion for the indissolubility of marriage identified the words of Genesis 2:24 "and they shall be two in one flesh" with the first act of conjugal intercourse.³

2 Cf. ibid., p. 111. Cf. E. Schillebeeckx, Marriage: Secular Reality and Saving Mystery, v. II, p. 74-75. Cf. T. Finnegan, "When is Marriage Indissoluble? Reflections on a Contemporary Understanding of a Ratified and Consummated Marriage", in The Jurist, 28(1968), p. 313-319.

3 Cf. J.T. Finnegan, loc. cit., p. 317-318.

To give a brief exposition of the thought of the early ecclesiastical writers on the consummation of marriage along with the solution proposed by Alexander III, this chapter will consider: A) the development of the "consensual theory": the School of Paris; B) the development of the "copula theory": the School of Bologna; and C) the reconciliation of the two theories: Alexander III (1159-1181).

A. The Development of the "Consensual Theory":
the School of Paris.

Our study of the development of the "consensual theory" will include first of all a consideration of the influence of Roman Law in this area. We shall then briefly summarize the thought of St. Ambrose, St. Augustine and others, who taught that the essence of marriage was to be found in the consent of the contracting parties.

1. The Influence of Roman Law on
the Development of the
"Consensual Theory".

In the area of marriage, as in many other areas, ecclesiastical legislation was influenced by Roman Law. Prior to the Church's legislation on marriage, Roman Law set the standards. In Roman Law the consensus was the essential

constitutive element of a marriage. The agreement of wills brought about a consortium, a common and conjugal life. Marriage, then, was not a contract but the realization of a common life through the agreement of wills regulated by law. Ceremonies were not demanded for the validity of a marriage, but most often they were performed. In these ceremonies, the paramount element was the deductio in domum. This deductio, or the establishment of the woman under the care of her new husband, ensured her legitimacy as a wife and that of her children. The Church readily accepted this theory of the consensus.⁴

G.H. Joyce in his classic work, Christian Marriage: An Historical and Doctrinal Study, readily concedes the influence of Roman Law on the Church's teaching regarding the formation of marriage, but points out that the Church remained very selective in admitting such influence:

⁴ A. McNevin, "The Indissolubility of Marriage as Effected by Consummation", in Resonance, 2(1967), No. 4, p. 17.

There has been considerable discussion about the sources of the Church's doctrine on this subject. Some have maintained that, having at first no theory of her own, she took over the principle that the sole essential element in marriage is the consent of the parties from Roman jurisprudence. Others have held that the Apostles handed down to the Church the teaching which prevailed among the Jews. Others again consider that the principles of canon law have their source in early German custom. It may safely be said that all these theories are beside the mark. /.../ There was much in the Roman system which she could accept: and she admitted likewise certain elements drawn from Germanic custom. But she did not hesitate to reject whatever in them she found at variance with Christian principles.⁵

Whatever the attitude of the early Church towards the incorporation of some tenets of Roman Law into Canon Law, the Roman jurists did hold that marriage was essentially constituted by the consent of the parties. Two brief quotes from the Corpus Juris Civilis illustrate their position: "Consent, not copulation, makes marriage,"⁶ and, "Marriage

⁵ G.H. Joyce, Christian Marriage: An Historical and Doctrinal Study, p. 40. Cf. also B. Nicholas, An Introduction to Roman Law, Oxford, Clarendon Press, 1962, p. 86. "Consent was indeed the foundation of Christian as of Roman marriage, but for the Christian the effect of consent was exhausted in the creation of the marriage, leaving no room for the Roman idea that what had been created by agreement could be dissolved by contrary agreement or by disagreement."

⁶ Dig. Lib. XXXV, tit. I, lex 15. "Ulpianus / libro XXXV. ad Sabinum. / - /.../ nuptias enim concubitus, sed consensus facit" (unless otherwise indicated, translations are by the writer).

cannot be effected except by the consent of all, that is, those to be united in marriage and who hold authority over the couple."⁷

Joyce further comments on the above texts:

The Roman jurists had laid it down as a principle that the essential element in marriage was the consent of the parties. The consent of the persons under whose potestas they were, should there be such, was also necessary. Though marriage is not termed a contract in Roman Law, its contractual aspect is extremely prominent in the treatment accorded to it. Just as with contracts, it is constituted by the consent of those who are concerned. If the consent had been duly given, the marriage was legally complete even though the customary ceremonies were omitted. The most important of these ceremonies was the home-coming of the bride - the deductio in domum. Yet even this was only essential in the exceptional case of a marriage celebrated in the absence of the bridegroom. If the latter signified his consent in writing, or through a messenger, and the bride was taken to his house, the marriage held good: and even though he should die before seeing her, she possessed the legal status of a wife. /.../ the Church could readily accept the rule which declared that marriage was effected by consent, and that consummation was not essentially requisite. This was not merely in accordance with reason, but harmonized with Christian teaching. The Church had always held that, though the union between the Blessed Virgin Mary and St. Joseph was one of perpetual continence, it was nevertheless a true marriage.⁸

⁷ Dig. Lib. XXIII, tit. II, lex 2. "Paulus libro XXXV. ad Edictum. - Nuptiae consistere non possunt, nisi consentiant omnes, id est, qui coeunt, quorumque in potestate sunt."

⁸ G.H. Joyce, op. cit., p. 42.

It follows, therefore, that the Church adopted the prescriptions of Roman Law on marriage to the extent that those prescriptions were reasonable and did not conflict with her divinely revealed fundamental principles. If in the early classical days of the Empire, marriage was more a type of agreement toward a communion of life between a man and a woman, in the time of Justinian the marriage agreement was elevated to the level of a contract. As such, marriage was entered upon and considered valid only by the consent of the parties. Hence, our canonical theory of the formation of marriage seems to be similar to, if not identical with, Roman Law, where consent was the primary principle - an absolute necessity - of a valid marriage.⁹

To sum up, Roman Law played an important, if not decisive, role in the development of the consensual theory on marriage.¹⁰ In the Empire, Christian marriage was governed in its essentials by Roman Law, since Sacred Scripture did not define the act by which the matrimonial bond is effected, and the canonical legislators of the fourth and fifth centuries did not elaborate on this point. The

9 Cf. W.M. Lawson, "Roman Law: A Source of Canonical Marriage Legislation", in Resonance, 2(1967), No. 4, p. 8-9.

10 Cf. G. Fransen, "La formation du lien matrimonial au moyen âge", in R.D.C., 21(1971), p. 106.

Christian writings of this period proposed reflections on conjugal morality rather than a juridical definition of the matrimonial bond. If the question of the formation of the bond was dealt with in these works, it was most often to explain the marriage of the Virgin and St. Joseph. The natural consequence was a convergence towards consensualism, which was in keeping with the Roman mentality concerning marriage, and which furthermore permitted the nuptials of Mary to be viewed as a true marriage.¹¹

2. St. Ambrose (340-397).

Two main sources of influence can be detected in the writings of St. Ambrose, including those on marriage: the Holy Scriptures where he found his doctrine and inspiration, and Roman Law and traditions. St. Ambrose was perfectly in accord with the Roman tradition on marriage when he taught that it was not the union of bodies but the union of wills that constituted a marriage. It was significant that the occasion for the elucidation of this teaching was a reference to the union of Mary and Joseph, who were considered to be truly married despite the absence of carnal intercourse.

¹¹ Cf. J. Gaudemet, "Le lien matrimonial: les incertitudes du haut moyen-âge", in R.D.C., 21(1971), p. 81.

St. Ambrose showed the juridical value of consent in such a union, underlining the fact that marriage consisted in a contract.¹²

In his De institutione virginis, Ambrose spoke of marriage in the context of virginity:

For when the marital union is begun, then the title of marriage is applied; for it is not the loss of virginity but the conjugal pact that makes marriage. Finally, the marriage comes into being when the girl is united to the man, not when she has intercourse with him.¹³

It seems that for St. Ambrose marriage received its value in relation to the continence of Mary's conjugal life. This approach would profoundly influence canonists and theologians for generations, causing them to view marriage as an idealized institution, while minimizing its biblical, existentialist, and personalist values. It would, in a word, tend to the consideration of marriage in itself apart from the very human persons who would undertake it.¹⁴

¹² Cf. W.J. Dooley, Marriage According to St. Ambrose, p. 1-2.

¹³ Ambrose, De institutione virginis, 6, 41, in A.B. Caillau, Collectio selecta SS. Ecclesiae Patrum, v. 60, p. 572. "Cum enim iniatur coniugium, tunc coniugii nomen asciscitur; non enim defloratio virginitatis facit coniugium, sed pactio coniugalitatis. Denique cum iungitur puella, coniugium est, non cum virili admixtione cognoscitur." (It has not been possible to locate a critical edition of this particular work of St. Ambrose).

¹⁴ Cf. J.T. Finnegan, loc. cit., p. 314.

Moreover, St. Ambrose's view of marriage would influence later Christian writers in their failure to see the marital union as a secular reality with its own proper worth. The consensual aspect of marriage overshadowed the importance of the carnal relationship of the spouses, so that married life was considered perfect even without sexual intercourse. As late as the twelfth century, in fact, Hugh of St. Victor wrote that marriage was perfect precisely because of the continence of the spouses.¹⁵

Whatever the interpretation given to his teaching by later writers, St. Ambrose rightly merited a place among the chief proponents of the best thought in both the Roman and Christian traditions. According to him, marriage was a contract effected by the consent of the parties, but a contract partaking of both the sacred and the secular. By pointing out that consummation was not necessary to constitute marriage, he implied that marriage was more than a mere physical union: in marriage, minds and hearts are united by a spiritual bond. So, to the notion of contract, Ambrose added the definite element of sacredness which brought husband and wife together in lifelong companionship, involving not only

¹⁵ Cf. A. McNevin, loc. cit., p. 18.

a sharing in things human but also a partnership in things divine.¹⁶

3. St. Augustine (354-430).

Among the Fathers of the Church, St. Ambrose was not alone when he taught that consent constituted marriage. His illustrious disciple, St. Augustine, also emphasized this fact when he spoke of the unconsummated marriage of Our Lady and St. Joseph.¹⁷ In his treatise De nuptiis et concupiscentia, Augustine wrote:

It would be intolerable to say that the bond of marriage is dissolved, because husband and wife agree to abstain altogether from the use of carnal concupiscence. /.../ Nor did the Angel speak falsely to Joseph when he said: Do not be afraid to take Mary home as your wife (Matt. 1,20). She was termed spouse from the first faith of the espousals, whom he had neither known nor would know carnally: nor did the title of spouse cease or remain untrue, where there neither was nor would be any carnal intercourse.¹⁸

¹⁶ Cf. W.J. Dooley, op. cit., p. 3-4.

¹⁷ Cf. ibid., p. 3.

¹⁸ St. Augustine, De nuptiis et concupiscentia, lib. I, c. 12, in A.B. Caillau, op. cit., v. 141, p. 202-203. "Quibus vero placuerit ex consensu, ab usu carnalis concupiscentiae in perpetuum continere, absit ut inter illos vinculum conjugale rumpatur. /.../ Neque enim fallaciter ab Angelo dictum est ad Joseph: Noli timere accipere Mariam conjugem tuam (Mt. 1,20). Conjux vocatur ex prima fide desponsationis, quam concubitu nec cognoverat, nec fuerat cogniturus: nec perierat, nec mendax manserat conjugis appellatio, ubi nec fuerat, nec futura erat carnis ulla commixtio."

This text indicates that Augustine upheld the consensual theory on marriage and looked upon the marriage of Mary and Joseph as the model for all marriages. For Augustine the spiritual union of wills was far superior to the "voluptuous" union of bodies.¹⁹ Although the teaching of Augustine on marriage has recently been criticized in some quarters, it has hitherto been an almost uncontradicted authority in the theology of the West. Apart from the fact that he was undoubtedly influenced by his predecessors such as Ambrose, we must also keep in mind that Augustine wrote in a highly controversial fashion.²⁰

On the one hand, Manichaeism condemned marriage and procreation because the begetting of a new human being implicated a continuation of the captivity of spirit within matter. On the other hand, Pelagianism denied original sin and the necessity of infant baptism.²¹ This, then, was the climate in which Augustine was writing. Over and over again

19 *Ibid.* "I...7 vinculum conjugale ... imo firmitus erit, quo magis ea pacta secum inierint, quae charius concordiusque servanda sunt, non voluptariis nexibus corporum, sed voluntariis affectibus animorum." Cf. J.T. Finnegan, *loc. cit.*, p. 314-315.

20 Cf. W.H.M. Van der Marck, "Toward a Renewal of the Theology of Marriage", in *The Thomist*, 30(1966), p. 309.

21 Cf. *ibid.*

he emphasized that marriage was good, and while he denied that sexual relations were of the essence of marriage, he upheld the honesty of sex.²²

In the thought of St. Augustine, a purely spiritual conjugal charity was the soul of Christian marriage, a conjugal charity which rested on the union of hearts and not of bodies. As previously pointed out, it was precisely this charity, which united Mary and Joseph in a true marriage. Mary was the wife of Joseph and he her husband in a holy union, which should remind Christians that there can be a real marriage without sexual relationship, and that in the conjugal society the spouses are most closely related to Christ in the degree that they become capable of imitating this perfect model. Called upon to signify the union between Christ and His Church, the marriage of Christians is an "alliance of souls", (animorum confoederationem), an alliance in conjugal love in which the bond is indissoluble (manente in se vinculo foederis coniugalis).²³

22 Cf. Augustine, Contra Faustum Manichaeum, 29, 4, in Migne, Patrologiae Cursus Completus, Series Latina, 42, 490 (henceforth abbreviated as Migne, PL, etc.). Cf. W.H.M. Van der Marck, loc. cit., p. 309.

23 Cf. Augustine, De coniugiis adulterinis, 1, 1, in Migne, PL, 42, 471. Cf. L. Janssens, Mariage et fécondité; de "Casti connubii" à "Gaudium et spes", p. 38-39.

It is quite obvious that one by no means does justice to Augustine's whole theology on marriage by simply stating that he was among the adherents of the "consensual theory". However, let it be kept in mind that, quite apart from that simple fact, the writings of the Doctor of Grace contain some of the most eloquent passages on the beauty of Christian marriage.

4. Pope Nicholas I (858-867).

There is a special importance attached to a declaration made by Pope Nicholas I in 866 in a reply to certain questions on marriage proposed by some Bulgarians. The essence of the reply was that neither cohabitation, sexual intercourse, nor the ceremonies surrounding marriage constituted the marital union but rather that the essential element in any marriage was the consent of the parties. It seems that some Greek priests had assured the Bulgarians that the sacerdotal benediction was necessary for the validity of marriage, so the Pope emphasized rather the consent of the couple.²⁴

²⁴ Cf. G.H. Joyce, op. cit., p. 44-45. Cf. J.T. Finnegan, loc. cit., p. 315-316.

Nicholas I wrote:

/.../ let there suffice the simple consent of those being married, as the /civil/ laws prescribe. If this consent be lacking in a marriage, all other celebrations, even should the union be consummated, are rendered void, as the great doctor, St. John Chrysostom, bears testimony when he says: "it is not coition that effects marriage, but the will."²⁵

This papal letter shows that the Holy See adhered to the Roman conception of marriage, namely that consent was its sole effective factor. While the Pope was above all concerned with the erroneous teaching of the Greek priests, it can be reasonably presumed that he also had in mind the traditio and other formalities observed in the Western Church on the occasion of a wedding. Hence, he signified that such ceremonies did not pertain to the essence of marriage. It must be borne in mind that although a certain importance was given to the Responsa ad Bulgaros, it was not accepted as a final decision on a point of doctrine excluding all further discussion. Almost at the same time as Pope Nicholas gave his response to the Bulgarians, the Frankish prelate, Hincmar

²⁵ Nicholas I, Responsa ad consulta Bulgarorum, III, in Migne, PL, 119, 180. "/.../ ac per hoc sufficiat secundum leges solus eorum consensus, de quorum conjunctionibus agitur. Qui consensus si solus in nuptiis forte defuerit, cetera omnia etiam cum ipso coitu celebrata frustrantur, Joanne Chrysostomo magno doctore testante, qui ait: Matrimonium non facit coitus sed voluntas."

of Rheims (+882) was composing a treatise in which his conclusions differed widely from the Pope's teaching.²⁶ A closer examination of Hincmar's doctrine will be undertaken when we study the development of the "copula theory" on marriage later in this chapter.

5. St. Peter Damian (1007-1072).

St. Peter Damian, a forerunner of Hugh of St. Victor, who would support him in the next century, concluded that sexual intercourse was not essential to the establishment of the marriage bond. In his opusculum regarding the time for contracting marriage, he spoke in some detail of the formation of the bond, while at the same time he attacked what seemed to be theories perceiving a marriage bond formed by sexual intercourse. Similarly to his predecessors, he placed marriage in the perspective of the virginal marriage of Mary and Joseph. He also relied upon Pope St. Leo's distinction between a concubine and a wife as a popular support for his work.²⁷

26 Cf. G.H. Joyce, op. cit., p. 52-53.

27 Cf. J.T. Finnegan, loc. cit., p. 316. Cf. A. McNevin, loc. cit., p. 20-21. Cf. footnotes 56 and 57 below where the reference to St. Leo is given.

The following short text is illustrative of his thinking on the essence of marriage. It is taken from Chapter II of his De tempore celebrandi nuptias:

When it is quite clear that the blessed Mother of God did not marry; and nevertheless according to Scripture her nuptials were undoubtedly celebrated; how is it said that, where carnal intercourse has not taken place, there can be no marriage? On the contrary we freely profess that there both can be intercourse without marriage and marriage properly so called without intercourse. For there are at times celibate marriages which are worthy to be called virginal.²⁸

Peter Damian made little positive contribution to the notion of sex in marriage. While he maintained that the purpose of marriage was the procreation of children, the means of procreation could only be tolerated. In this line of reasoning, he was simply being faithful to the Augustinian perspective, among others, which excluded sexual intercourse as a constitutive element of marriage.²⁹

28 St. Peter Damian, De tempore celebrandi nuptias, cap. II, in Migne, PL, 145, 662. "Cum ergo luce clarius constat, quia beata Dei Genitrix virgo non nupsit; et tamen juxta Scripturae sententiam, absque dubio nuptias celebravit; quomodo dicitur, ubi concubitus defuit, nuptias dici non posse? Nos autem e diverso libere profiteamur, et concubitum posse sine nuptiis fieri, et sine concubitu recte nuptias appellari. Sunt enim aliquando nuptiae caelibes, sunt quae dignae dicantur nuptiae virginales."

29 Cf. A. McNevin, loc. cit., p. 21.

6. Hugh of St. Victor (1096-1141).

Hugh has been described as an Augustinian who pushed Augustine to extremes. His conception of marriage was in terms of a common life, a societas formed by the consent of the parties and putting each in debt to the other.³⁰ In a treatise on the virginity of the Blessed Virgin Mary, wherein he wished to show that Mary did not alter her intention of remaining a virgin when she consented to marriage, he wrote:

Let us see, therefore, whether the mother of the Lord could be a true spouse and remain a true virgin. Let us discuss /.../ what marriage is; and from its definition let us consider if there could coexist in the virgin mother both the conjugal consent and the intention of virginity. For what is marriage but the legitimate society between a man and a woman; in which society by an equal consent each owes himself to the other? /.../ It is therefore the spontaneous consent legitimately given between a man and a woman, by which each freely becomes the debtor of the other, that constitutes marriage. And marriage is that very society effected by such consent whereby one party is not freed of his obligations during the life of the other.³¹

30 Cf. ibid.

31 Hugh of St. Victor, De Beatae Mariae Virginitate libellus epistolaris, cap. I, in Migne, PL, 176, 859. "Videamus igitur nunc utrum mater Domini et vera conjux potuit, et vera virgo permanere. Discutiamus (ut postulas) quid sit conjugium; et ex ejus diffinitione proposita consideremus si simul esse potuerunt in virgine matre et consensus conjugalís, et propositum virginitatis. Quid enim est conjugium nisi legitima societas inter virum et feminam; in qua videlicet societate ex pari consensu uterque semetipsum debet alteri? /.../ Spontaneus ergo consensus inter virum ac feminam legitime factus, quod uterque alteri debitorem sui se spondet; iste est qui conjugium facit. Et conjugium est ipsa societas tali consensu foederatu quae altero vivente alterum a debito non absolvit."

He went on to describe another type of consent in addition to the first and essential one that constitutes the societas. The second consent was purely accidental and involved the right to sexual intercourse which was not considered an essential ingredient to marriage but an "additive" to that essential consent. It was an alius consensus, belonging to the office of marriage but not constituting the bond of marriage.³²

In Hugh of St. Victor's own words:

There is also another consent, namely to the mutual rendering and requiring of carnal intercourse, constituting a similar agreement between the man and the woman: it is neither the cause nor the bond of marriage but its companion and office /.../.³³

With this twelfth century theologian, the marital society did not require the union of bodies. This last element did not, therefore, enter into the object of consent, but was rather a corollary to it, a consequence which was unessential. It is manifest that Hugh wished to safeguard the sacramental and matrimonial character of the union of

32 Cf. A. McNevin, loc. cit., p. 21.

33 Hugh of St. Victor, op. cit., 176, 859. "Est adhuc alius consensus, scilicet carnalis commercii ad invicem exigendi atque reddendi, similem inter virum et mulierem pactionem constituens: comes et non effector conjugii, officium et non vinculum /.../."

the Blessed Virgin and St. Joseph. In this, he was simply being consistent with the consensualist tradition that had preceded him. But on the other hand, he was sensitive to a very human reality, - the community of life, which future writers will sometimes neglect because of their insistence on the biological aspects of marriage. And he further made a valuable contribution to the theology of marriage in that he did not isolate consent to consider it in itself, as will happen later on, but clearly indicated that consent had for object a society based on a covenant of love.³⁴

His treatment of the sacrament of marriage in De Sacramentis Christianae Fidei well summarizes what has already been said of his teaching on the formation of the matrimonial bond. Of the definition of marriage, he wrote:

One wishing to define marriage may say: "Marriage is the legitimate consent, that is, legitimately made between legitimate persons, between a man and a woman to observe a singular way of life."³⁵

34 Cf. G. Fransen, loc. cit., p. 114.

35 Hugh of St. Victor, De Sacramentis Christianae Fidei, Pars XI, De Sacramento Conjugii, cap. IV, in Migne, PL, 176, 485. "Qui ergo diffinire voluerit conjugium, dicere potest: 'Conjugium esse consensum legitimum, hoc est inter legitimas personas et legitime factum masculi et feminae ad individualement vitae consuetudinem observandam'."

Speaking of the point at which married life began, he added:

If someone asks when marriage begins, we say that as soon as such consent as we have defined above has been made between a man and a woman, marriage immediately comes into being; and even if carnal copulation follows that consent, it adds nothing to the marital union with respect to the binding force of the sacrament.³⁶

The natural consequence of the doctrine of the two consents alluded to earlier was a distinction, within the sacrament, of a sacramentum conjugii and a sacramentum conjugalis officii. The former was a union of spiritual love and reflected the union between God and the soul; the latter was a union for the procreation of children and reflected the great union of Christ and the Church.³⁷ Even before consummation, however, and even in its definitive absence, marriage was already a sacrament from the fact that it was a unique society based on a conjugal covenant.³⁸ The

³⁶ Ibid., cap. V. "Si quis autem quaerat quando coniugium esse incipiat, dicimus quod ex quo talis consensus qualem supra diffinivimus inter masculum et feminam factus fuerit, ex eo statim coniugium est, quem etsi postea copula carnis sequitur, nihil tamen conjugio amplius ad virtutem sacramenti confertur."

³⁷ Cf. A. McNevin, loc. cit., p. 21-22.

³⁸ Cf. G. Fransen, loc. cit., p. 114.

phraseology of this twelfth century theologian is reminiscent of our own century.

7. Peter Lombard (1100-1160/4).

In his Sentences, Peter Lombard, Archbishop of Paris, brought the consensualist tradition to full bloom when he placed the formal and essential element of marriage in the consensus de praesenti. His conclusion was that consent made marriage, and therefore it was essentially perfect without consummation, and absolutely indissoluble on this basis alone.³⁹

Of the constitution of marriage, he wrote:

The efficient cause of matrimony is consent, not just any kind of consent, but expressed in words, not bearing on the future but on the present.⁴⁰

He then went on to cite the Church Fathers who had taught that consent alone made marriage:

³⁹ Cf. E. Schillebeeckx, op. cit., p. 82. Cf. J.T. Finnegan, loc. cit., p. 316.

⁴⁰ Peter Lombard, Sententiarum Libri Quatuor, Lib. IV, D. XXVII, c. 3, in Migne, PL, 192, 910. "Efficiens autem causa Matrimonii est consensus, non quilibet, sed per verba expressus, nec de futuro, sed de praesenti."

That consent alone makes marriage is proven by the testimony of the following. For Isidore says: consent makes marriage. Likewise Pope Nicholas: let there suffice the simple consent of those being married, as the /civil/ laws prescribe. If this consent be lacking in a marriage, all other celebrations are rendered void, even should the union be consummated. /.../ Also Ambrose, in his second exposition on Matthew: It is not the loss of virginity but the conjugal pact that makes marriage. It appears from these texts that consent, that is, the conjugal pact makes marriage; and consequently, marriage exists even if carnal copula has not preceded or followed it.⁴¹

In Distinction XXVIII of Book IV, he reiterated his teaching that carnal copulation did not belong to the essence of marriage:

Let us state therefore that consent to cohabitation or carnal intercourse does not make marriage; but consent to conjugal society expressed in words in the present tense /.../.⁴²

The rationale underlying Lombard's treatment of marriage would seem to be the following: marriage is a society, and since entry into a society is effected by an act

⁴¹ *Ibid.*, c. 4, col. 911. "Quod autem consensus Matrimonium faciat, subditis probatur testimoniis. Ait enim Isidorus: Consensus facit Matrimonium. Item Nicolaus papa: Sufficiat solus secundum leges eorum consensus, de quorum conjunctionibus agitur; qui solus si forte in nuptiis defuerit, caetera etiam cum ipso coitu celebrata frustrantur. /.../ Item Ambrosius, in 2 expositione in Matth: Non defloratio virginitatis facit Conjugium, sed pactio conjugalis. Ex his apparet quod consensus id est, pactio conjugalis, Matrimonium faciat; et ex tunc Conjugium est, etiam si non praecessit vel secuta est copula carnalis."

⁴² *Ibid.*, D. XXVIII, c. 3, col. 915. "Dicamus ergo quod consensus cohabitationis vel carnalis copulae non facit conjugium; sed consensus conjugalis societatis, verbis secundum praesens tempus expressus /.../."

of the will, the essential and sufficient element for the formation of the marriage bond is consent expressed by words or signs bearing on the present. He maintained in this the basic position of Hugh of St. Victor, while his synthesis in some respects represented a further development of the "consensual theory". Lombard's teaching would impose itself little by little on canonists beginning with Etienne de Tournai (1128-1203), thanks in part to Alexander III and Innocent III.⁴³

Lombard, who had covered the greater part of theological thinking in his Sentences, stood at the end of a long tradition, supported at its base by Augustine, which had conceived marriage to be a sacrament from the moment the spouses had exchanged their consent. Consent had been emphasized more and more to the gradual exclusion of sexual intercourse. The historical climax of this process was seen primarily in the writings of Hugh of St. Victor but was faithfully reiterated in those of Peter Lombard. Considering the lack of emphasis on sex in the Scholastic period and the significance of such an attitude, a process of this type was not at all inconceivable and perhaps even unavoidable.⁴⁴

⁴³ Cf. V. Boulanger, loc. cit., p. 112. Cf. G. Fransen, loc. cit., p. 118-119.

⁴⁴ Cf. A. McNevin, loc. cit., p. 22.

We have followed the unfolding of the "consensual theory" on marriage from Ambrose through Peter Lombard. The writers quoted in this abbreviated study were chosen as representative of the theory, not because they are the only ones who supported it, but because they seem best to exemplify this hypothesis. We must now become aware that early in Church history there were also other writers, who were convinced that the "consensual theory" was inadequate as an explanation for the formation of the bond of Christian marriage. In fact, during the very century that a definitive position had been achieved regarding marital consent by the response of Nicholas I in 866 to the Bulgarians, a great shift of emphasis occurred which, with Alexander III in the twelfth century, was to become part of the Church's official doctrine and would influence legislation to our own time. We refer to the development of the "copula theory" on marriage, attributed generally to the School of Bologna and specifically to Hincmar of Rheims, Ivo of Chartres, and Gratian.

B. The Development of the "Copula Theory":
the School of Bologna.

From the fifth century onwards, the Roman tradition of marriage that was concluded in an instant by the exchange of mutual consent found itself compromised by the introduction

of Germanic customs. Unfortunately, the forms of Germanic marriage observed before the movement of the Germans into the Empire are little known due to lack of sources. However, it does seem that they distinguished two stages in the formation of the matrimonial bond, that of the "engagement" concluded by the fathers or the future spouses, and that of the handing over of the wife to the husband for consummation of the union. Consequently, the Germanic conception of marriage differed profoundly from the Roman notion.⁴⁵

Nor did the Jewish marriage correspond to the classical Roman schema already mentioned. As described in the Bible, marriage comprised an ensemble of acts of which some derived more from social usages than from a strictly juridical obligation. There were agreements between the fathers and the future spouses (or at least the future husbands), the exchange of gifts, the dowry brought by the woman, diverse ceremonies, the blessing and, finally, the delivery of the wife to the husband. There was, in short, a number of stages separated in time and progressively marking the establishment of the bond until its completion in the conjugal union. It remains difficult, nevertheless,

⁴⁵ Cf. J. Gaudemet, loc. cit., p. 82.

in the presence of non-juridical texts to say exactly what was juridically necessary for the formation of the matrimonial bond.⁴⁶

Thus, in the high middle ages there were three traditions concerning the formation of the marriage bond: namely, Roman consensualism, Germanic dualism, and the Judeo-patristic current used by the Fathers in speaking of the marriage of Mary. This last was occasioned by the difficulty of applying the purely Roman concept of marriage to a union such as Mary's which had been concluded in a Semitic milieu. So the word desponsatio was used in place of the Roman term sponsalia. At this point in time, the terminology regarding marriage was complex and imprecise.⁴⁷

It is not to be wondered that the Church had difficulty in making itself heard in this epoch. Councils were most often regional or local; the papacy, excepting perhaps the interventions of Gregory the Great (590-604) and Nicholas I (858-867), tended to be weak and ineffectual. Canonical legislation did not pretend, besides, to legislate on or

46 Cf. ibid., p. 84.

47 Cf. ibid., p. 85-86.

fix the elements constituting the marriage bond, although the papal doctrine was consensualist.⁴⁸ It is within this climate of inadequate legislation on marriage, complicated by divergent customs in the Occidental Church, in the second half of the ninth century, that we must situate the inception of the "copula theory" on marriage, the foremost proponent of which seems to have been Hincmar of Rheims.

1. Hincmar of Rheims (806-882).

It is with this well-known Frankish prelate that the very ancient and particularly Jewish view of procreation as the primary purpose of marriage entered the mainstream of the Church's reflection. The result was that sexual intercourse gradually became part of the constitution of marriage, while the consensus remained essential to marriage as well. Hincmar was one of the first to reflect this duality in his writings.⁴⁹

His treatise on marriage entitled De nuptiis Stephani et filiae Regimundi comitis differed widely in its conclusions from the reply of Nicholas I in 866 to the Bulgarians. It

⁴⁸ Cf. footnote 25. Cf. J. Gaudemet, loc. cit., p. 86-87.

⁴⁹ Cf. A. McNevin, loc. cit., p. 22-23.

was prompted by a celebrated marriage case which had necessitated the closer attention of the Frankish bishops. Briefly, the background of the epistolary study was as follows: Stephen, an Aquitanian noble, had married the daughter of Regimund, another peer. But after the marriage had been celebrated, he declared that he could not in conscience consummate the union, since the marriage was invalid by reason of affinity. Stephen claimed he had previously had illicit relations with a close kinswoman of his bride.⁵⁰

The case was further complicated by the fact that Stephen refused to divulge the name of the woman relative concerned. Proof was impossible and Count Regimund lodged a formal complaint with the assembled bishops meeting in the Synod of Touzy in 860. Hincmar was requested by his brother bishops to supply them with a theological treatment of the question at issue. The consequence was the De nuptiis Stephani.... The main contentions of the work were that consummation is essential to marriage and that without it the union of the partners could not rightly be called marriage.⁵¹

50 Cf. G.H. Joyce, op. cit., p. 53-54.

51 Cf. ibid., p. 54.

In one passage he wrote:

And we can show that not all marriages effect the conjugal bond, those namely which are not followed by the union of the sexes: much as a man is not always the son and heir of him whose heir he is known to be. Nor does marriage contain in itself the sacrament of Christ and the Church, as St. Augustine says, if it does not involve the use of marriage, that is if sexual intercourse does not follow it.⁵²

And again, a little further on in the same work:

And let anyone know /.../ that the betrothal, dowry, and wedding, such as they were, did not make it a marriage, since the union of the sexes was lacking, along with both the hope of offspring and the sacrament of faith /.../.⁵³

Consideration of the preceding quotes would lead one to ask what value Hincmar attributed to the marriage ceremony. It would seem that he held that it created a normally inseparable bond. As a result of this bond, each partner had conjugal obligations to the other, of which they could not divest themselves. In reference to the union of Mary and

⁵² Hincmar of Rheims, *De nuptiis Stephani*, in Migne, PL, 126, 137. "Et nos /.../ etiam ostendere possumus, quia non omnes nuptiae conjugalem copulam faciunt, quas non sequitur commistio sexuum: sicut nec semper illius est filius omnis et heres, cujus esse noscitur haeres. Nec habent nuptiae in se Christi et Ecclesiae sacramentum, sicut beatus Augustinus dicit, si se nuptialiter non utuntur, id est, si eas non subsequitur commistio sexuum."

⁵³ Ibid., c. 145. "Sciat /.../ propter talem desponsationem, dotationem, atque pro talibus nuptiis, sicut istae fuerunt, non esse conjugium, quibus defuit conjunctio sexuum, ac cum prolis spe fidei sacramentum /.../."

Joseph, he referred to the marriage ceremony as the occasion when the Blessed Virgin "began to be a wife".⁵⁴ His terminology, albeit well intentioned, was ill-chosen, since it implied that the marriage ceremony constituted merely a matrimonium initiatum, the phrase afterwards in vogue among canonists.⁵⁵

The source of the error of the Archbishop of Rheims would seem to be twofold. He based his view on the authority of two Church Fathers: St. Augustine and St. Leo. With respect to the words he cited as St. Augustine's, they do not seem to be found in any of that illustrious doctor's existing works. Furthermore he misinterpreted the passage from St. Leo, which concerned a case submitted to the Pope by Bishop Rusticus of Narbonne. The bishop was inquiring whether the union of a man living in quasi-conjugal relations with a woman of servile condition should be reckoned as a marriage, and should be an obstacle to any other marital alliance as long as the woman lived. In his reply, Pope Leo first pointed out that a matrimonial alliance was agreeable to civil law

⁵⁴ Ibid., c. 148. "Nuptiae /.../ quando ea quae prius desponsata fuerat, conjux esse incēpit."

⁵⁵ Cf. G.H. Joyce, op. cit., p. 54-55.

when the partners were freeborn and of equal standing, but that this rule was established by God Himself long before Roman Law (Gal. 4,30 quoting Gen. 21,10: Cast out the bondswoman and her son...). The crucial words seemingly misunderstood by Hincmar were the following:⁵⁶

Wherefore, since marriage was so instituted from the beginning, that besides the union of sexes it would symbolize the sacrament of Christ and the Church, there is no doubt that that woman is not married, of whom we are informed that the nuptial mystery has never been hers.⁵⁷

St. Leo's words: "that woman /̄...̄ of whom it is taught that the nuptial mystery has never been hers" (mulierem /̄...̄ in qua docetur nuptiale non fuisse mysterium), considering their context, were not to be understood as referring to the consummation of marriage. Hincmar interpreted Leo's use of mysterium as sexual union, whereas the Pope was really referring to the union between Christ and the Church, not to the commistio sexuum. Where a freeman, the Pope contended, was united to a woman of servile condition,

56 Cf. ibid., p. 56. Cf. A. McNevin, loc. cit., p. 25.

57 St. Leo, Ep. 167, ad Rusticum, in Migne, PL, 54, 1204. "Unde cum societas nuptiarum ita ab initio constituta sit, ut praeter sexuum conjunctionem haberet in se Christi et Ecclesiae sacramentum, dubium non est eam mulierem non pertinere ad matrimonium in qua docetur nuptiale non fuisse mysterium" (English translation from G.H. Joyce, op. cit., p. 56).

the symbolism of Christ and the Church was not realized: "for the spouse of Christ is not the bondswoman but the free" (Gal. 4,31). Was Hincmar's view of marriage that of the Germanic Church in general? Not necessarily so. Although German law seems to have required the establishment of conjugal life as a natural consequence of marriage, this was normally effected by the traditio of the bride into her husband's hands. When the traditio had taken place, the marriage was considered legally valid and there is no proof that consummation was requisite. So Hincmar probably viewed the question theologically as a churchman, mistakenly thinking he was following Leo and Augustine.⁵⁸

In reality, it is not easy to determine to what extent Hincmar was influenced by German civil law and customs on marriage, when he composed the treatise which became a milestone in medieval ecclesiastical literature. After the long emphasis on the need of consensus as exemplified in the Roman tradition, he had made a significant break with the past. His meaning was plain enough: without sexual intercourse there was no marriage. For Hincmar, the consensus

58 Cf. G.H. Joyce, op. cit., p. 57.

would constitute an entry into marriage, a beginning of married life.

Hincmar's significance lies in the fact that he seems to have been the first to incorporate sexual intercourse into the very constitution of marriage. Accordingly, he has profoundly set the stage for later medieval developments.⁵⁹

2. Ivo of Chartres (1040-1116).

Bishop Ivo of Chartres was without doubt one of the most eminent members of the French or Parisian School of thought on marriage, and his thinking also represented a progress in the clarification of certain ideas. As such, he served as a transitional figure between Hincmar of Rheims and Gratian. It is true that, unlike Hincmar, he did not concede to sexual intercourse the decisive role in the formation of the matrimonial bond. Nevertheless, as will be pointed out shortly, a certain phraseology in his letters seemed to anticipate the matrimonium initiatum found in Gratian.

Basically, Ivo relied upon the Ambrosian-Augustinian traditions for his definition of marriage.⁶⁰ He wrote:

59 A. McNevin, loc. cit., p. 23-24.

60 Cf. A. McNevin, loc. cit., p. 24-25. Cf. G. Fransen, loc. cit., p. 110.

"Marriage is the union of a man and a woman bringing with it a singular way of life."⁶¹

Speaking of the point at which marriage began, he cited St. Ambrose (De institutione virginis):

/.../ it is not the loss of virginity but the conjugal pact that makes marriage. Finally, the marriage comes into being when the girl is united to the man, not when she has intercourse with him.⁶²

In chapter 17 of the Decretum, Ivo quoted the response of Nicholas I to the Bulgarians (866) to which we have previously referred.⁶³ This would seem to indicate that he reaffirmed the consensualist theory that consent alone was sufficient to constitute a marriage. Yet, at the same time he exhibited a very realistic attitude towards procreation and the place of sex in marriage. He pointed to the bearing of children as the sole reason for marrying and to the shamefulness of a woman who is barren. Again he quoted St. Ambrose (super Luc. I, 1, c. 1): "It is a reproach for a woman not to have children, since this is the only cause for marriage."⁶⁴

61 Ivo of Chartres, Panormia, Lib. VI, cap. I, in Migne, PL, 161, 1244. "Nuptiae sive matrimonium est viri mulierisque conjunctio, individuum consuetudinem vitae continens."

62 Ivo of Chartres, Decretum, Pars VIII, cap. II, ibid., PL, col. 585. Cf. footnote 13 for Latin text.

63 Ibid., cap. XVII, col. 588. Cf. also footnote 25.

64 Ivo of Chartres, Panormia, Lib. VI, cap. XXIV, ibid., col. 1248.

Moreover, he was also conscious of the obligation on the part of husband and wife to render the debitum conjugale. It is problematical to see his use of the term as an indication that legal terminology and a legal attitude towards marriage were beginning to assert themselves. One of the texts where the expression is found reads as follows:

The obligation of sexual intercourse is incumbent upon the spouses not only for the purpose of begetting children /.../ but also as a mutual service to their weakness for the purpose of avoiding illicit relations, in such manner that one may not resolve to observe perpetual continence without the consent of the other. Likewise, the rendering of the conjugal debt is in no way sinful; to demand it for purposes other than procreation is a venial failing.⁶⁵

One would prefer to hear, in this text, the voice of the bishop-pastor fully aware of human frailty, rather than the echo of the pure legalist.

Some of the letters of Ivo of Chartres are noteworthy in that the expression pactum conjugale EX MAIORI PARTE sacramentum implet returned very frequently.⁶⁶

Although the implication was that a marriage concluded by

65 Ibid., cap. XXVI. "Debent ergo sibi conjugati non solum ipsius sexus sui commiscendi fidem, liberorum procreandorum causa /.../ verum etiam infirmitatis invicem accipiendae ad illicitos concubitus evitandos, mutuam quodammodo servitutem, ut, si alteri eorum continentia perpetua placent, nisi alterius consensu non possit. Item: Reddere vero debitum conjugale, nullius est criminis; exigere autem ultra generandi necessitatem, culpa venialis."

66 Cf. Ivo of Chartres, Epp. 99, 148, 161, 167, 246, op. cit., v. 162, col. 118-119, 153-154, 165-166, 170, 253-254 respectively.

the consent of the spouses was of itself indissoluble even before consummation, he did make exceptions. In one case, he allowed a girl to marry the person whom she wished to marry despite the fact she had already been given by her parents to her fiancé, and then forced to marry and consummate a union with a second man. Once duress had been proven with respect to the second marriage, she was given a writ of freedom rather than simply being returned to the first man. In a second case, a marriage contracted in violation of a previous engagement was not explicitly declared null but the spouses were forced to separate. The principle invoked in the solution of these cases seems to have been the dictum of Pope John VIII (872-882) to Emperor Louis II: "What is done in defiance of the law may rightly be set aside by the law."⁶⁷

Ivo of Chartres may with profit be compared to his illustrious contemporary, Hugh of St. Victor. But whereas in Hugh of St. Victor we have found the notion of the two consents in marriage, with Ivo of Chartres there was at least the inception of a joint emphasis on consent and copula. If

67 Cf. G. Fransen, loc. cit., p. 111-112.

Ivo did not assign copula the primordial role that Hincmar of Rheims did, yet it is not difficult to foresee Gratian's matrimonium initiatum in Ivo's ex maiori parte sacramentum implet.⁶⁸

3. Gratian (12th Century).

Little is known of Gratian other than that he was a Bolognese monk, who lived in the twelfth century. His Concordantia discordantium canonum (c. 1140) usually called the Decretum Gratiani, represented an attempt to collect and put into order all the mass of ecclesiastical legislation that had appeared up to his time. It soon became a recognized source book. In Cause XXVII, Question II of his Decree, Gratian has gathered texts pertaining to the bond of marriage and other related matters. It is his treatment of the consummation of marriage in Cause XXVII that is of special interest to us here.

A careful analysis of Cause XXVII, Question II reveals a theory of marriage which is both simple and subtle. The distinction between conjugium initiatum and conjugium ratum

⁶⁸ Cf. ibid., p. 112. Cf. J.T. Finnegan, loc. cit., p. 317.

seems to provide a theory of marriage giving equal emphasis to consent and to consummation. The two elements of consent and consummation appear to mark off two stages "within" matrimony - its beginning in consent and its perfection in consummation. Further study of Cause XXVII, however, leads to the discovery that Gratian means something other by his distinction than what the words first indicate.⁶⁹

In Question II, Gratian offers the reader the following plan. Part I groups many texts showing that espoused persons (sponsi) are truly married (conjuges) even before sexual intercourse (copula carnalis) has taken place. Part II presents seven textual arguments revealing that sponsi are in no way conjuges. Part III provides a reconciliation by Gratian of the two affirmations, showing that sponsi previous to consummation are involved in a matrimonium initiatum and can therefore be called conjuges. Sexual intercourse transforms their union into a matrimonium perfectum (ratum). Although Question II pretends to offer a dialectic of judgment, in fact the dialectical structure never surpasses the level of vocabulary.⁷⁰

⁶⁹ J.A. Alesandro, Gratian's Notion of Marital Consummation, p. 69.

⁷⁰ Ibid., p. 81.

The following familiar texts (from Isidore and Augustine respectively) are chosen from Part I as exemplifying the consensualist view of the formation of the marriage bond which Gratian contradicted:

They are truly called spouses from the first commitment of the espousals, although conjugal intercourse has not yet taken place between them.⁷¹

She was termed spouse from the first commitment of the espousals, whom /Joseph/ had not known or would know carnally, nor did the title of spouse remain false, where there neither was nor would be any carnal intercourse.⁷²

After citing authorities in Part I, such as the texts just quoted, to show that espoused persons (sponsi) were truly married (conjuges) even before sexual intercourse had taken place, Gratian still concluded that mutual consent only effected a matrimonium initiatum: consummation was needed for matrimonium ratum, i.e., a marriage rendered indissoluble by the sacramental symbolism. However, of the

⁷¹ Gratian, Decreti Secunda Pars, c. 6, C. 27, q. 2, in A. Friedberg, ed., Corpus Iuris Canonici, v. I, col. 1064. Item Ysidorus Ethimologiarum, lib. IX, C. 7. "Conjuges verius appellantur a prima desponsationis fide, quamvis adhuc inter eos ignoretur conjugalis concubitus."

⁷² Ibid., c. 9. Item Augustinus de bono conjugali, /lib. I, c. II/. "Conjux vocatur a prima desponsationis fide, quam concubitu non agnoverat, nec fuerat cogniturus, nec perierat, nec mendax manserat conjugis appellatio, ubi nec fuerat, nec futura erat carnis ulla commixtio."

texts that he had chosen in Part II of his argument to support his view, and to refute the consensus texts he had offered so liberally in Part I, only two spoke clearly in that sense, and these were the same which had misled Hincmar of Rheims: namely the words erroneously attributed to St. Augustine and the misunderstood citation from St. Leo's letter to Rusticus, the latter being given in the altered form.⁷³

The words cited by Gratian as St. Augustine's and not in fact found in his extant writings were:

It is manifest that that woman is not married, with whom we are informed that carnal intercourse did not take place.⁷⁴

It can be surmised that the above text was an abbreviated form of the altered passage of St. Leo given in the following canon:⁷⁵

73 Cf. G.H. Joyce, op. cit., p. 58.

74 Gratian, loc. cit., c. 16, in A. Friedberg, op. cit., col. 1066. "Non dubium est, illam mulierem non pertinere ad matrimonium, cum qua docetur non fuisse commixtio sexus."

75 Cf. G.H. Joyce, op. cit., p. 56, footnote 1.

Since marriage was instituted from the beginning in such wise that except for the union of the sexes it would not have in itself the sacrament of the union of Christ and the Church, there is no doubt that that woman is not married with whom we are informed there was no nuptial mystery.⁷⁶

When the passage of St. Leo was thus altered, it clearly asserted the need for consummation for a perfected marriage bond. The original text, by way of comparison to Gratian's version, read:

Wherefore since marriage was from the beginning instituted in such wise that over and above the union of the sexes it should present the symbol of Christ and the Church, it is manifest that that woman is not married, of whom we are informed that the nuptial mystery has never been hers.⁷⁷

In Part III of Cause XXVII, Question II, Gratian proceeded to reconcile the following contradiction: How can the texts of Part I call "sponsi" "conjuges", when Part II

⁷⁶ Gratian, loc. cit., c. 17. Item Leo Papa. "Cum societas nuptiarum ita a principio sit instituta, ut preter commixtionem sexuum non habeant in se nuptiae Christi et ecclesiae sacramentum, non dubium est, illam mulierem non pertinere ad matrimonium, in qua docetur non fuisse nuptiale mysterium" (emphasis added to show the important alteration from the original text of St. Leo given in note 77).

⁷⁷ St. Leo, Ep. 167, ad Rusticum, in Migne, PL, 54, 1294. "Unde cum societas nuptiarum ita ab initio constituta sit, ut praeter sexuum conjunctionem haberet in se Christi et Ecclesiae sacramentum, dubium non est eam mulierem non pertinere ad matrimonium, in qua docetur nuptiale non fuisse mysterium." Cf. G.H. Joyce, op. cit., p. 56.

has conclusively proven that true conjugium begins only with copula carnalis? The dictum post c. 45 gives us Gratian's reply in his consideration of the marriage of Mary:

From all these authorities it appears that the espoused are called wives by reason of the hope of future things and not present realities. How then are they called spouses from the first faith of the espousals, if she, who is asserted to be an espoused, is denied to be a wife? But from the first commitment of the espousals one is said to be called a spouse, not because he/she became such in the espousals themselves, but because, by reason of the faith which they owe one another from the espousals, they are afterwards made spouses /...7.78

Desponsatio (prior to sexual intercourse) could be called conjugium because it was the beginning of the process which produced true conjugium - i.e., when the process was completed (consummatum) by copula carnalis. Sponsi were therefore called conjuges not because they were actually conjuges, but because they were slated to "become conjuges". The appellation was anticipatory.⁷⁹

78 Gratian, loc. cit., dictum post c. 45, in A. Friedberg, op. cit., col. 1076. "Ex his omnibus apparet, sponsas conjuges appellari spe futurorum, non re presentium. Quomodo ergo coniuges a prima fide desponsationis appellantur, si ista, que sponsa asseritur, coniunx esse negatur? Sed a prima fide desponsationis coniunx dicitur appellari, non quod in ipsa desponsatione fiat coniunx, sed quia ex fide, quam ex desponsatione sibi invicem debent, postea efficiuntur coniuges /...7."

79 Cf. J.A. Alesandro, op. cit., p. 82.

In Gratian's dialectic, both consent and consummation were essential to the formation of the marriage bond; no marriage began to exist in reality until both elements were present. Without sexual intercourse the matrimonial process remained incomplete. The desponsatio (or espousals) was identified with the matrimonium initiatum, which was not a "kind" of marriage but the beginning of the process of formation and hence was entitled matrimonium. Juridically speaking, persons remained sponsi until they physically consummated their union. Only then did they become conjuges in reality. Consequently, Gratian did not envisage the matrimonium ratum sed nonconsummatum, - the ratified, sacramental, but unconsummated union. With him a marriage was perfectum, ratum and consummatum only after physical consummation. In the Decretum, a "sacramental and non-consummated" marriage would be a contradiction in terms.⁸⁰

It appears that the urgency to incorporate the necessity of a consummated marriage into the Church's theological and ultimately juridical reflection originated within the narrow tradition of apocryphal texts, which were first utilized by Hincmar of Rheims. The School of Bologna

80 Cf. ibid., p. 82-84.

finally adopted the "copula theory" on the formation of the marriage bond. The papal marriage courts in turn made use of the theory and soon found their jurisprudence at odds with the French ecclesiastical courts in their solutions of marriage cases.⁸¹ This disparity in the Church's practice called for a solution, which would eventually come with Alexander III to whom we now turn our attention.

C. Reconciliation of the Two Theories:
Alexander III (1159-1181).

In order to appreciate more fully how Alexander III was able to effect the reconciliation between the "consensual" and the "copula" theories, it will be necessary to expose briefly his teaching prior to becoming Pope. His replies to the Archbishop of Salerno and the Bishop of Brescia respectively will then be treated separately, and will be seen to follow logically from his earlier tenets.

1. The Doctrine of Rolando Bandinelli
prior to His Election to the Papacy.

Before becoming Pope Alexander III in 1159, Rolando Bandinelli had been a distinguished professor of theology and canon law at Bologna where he was a disciple of Gratian.

⁸¹ Cf. A. McNevin, loc. cit., p. 29.

His Summa was written as an abridgment of the second part of Gratian's Decree some time before 1148. In this work he upheld Gratian's doctrine on initiated and consummated or perfected matrimony (matrimonium initiatum, matrimonium consummatum, perfectum). Bandinelli held to the two elements of consent and copula as essential to the formation of the marriage bond, to the exclusion of any others.⁸²

Commenting in his Summa on Cause XXVII, Question II of Gratian, Bandinelli wrote:

We have said above that there is an initiated and a consummated or perfected marriage. If indeed marriage is initiated by the espousals, by consent and the conjugal pact, it is in truth consummated by sexual intercourse legitimately performed by the couple.⁸³

And further on in his commentary on Cause XXXV, he stated even more emphatically:

82 Cf. E. Portalié, "Alexandre III canoniste et théologien", in Dictionnaire de théologie catholique, I-1, c. 711-714. Cf. J.A. Coriden, The Indissolubility added to Christian Marriage by Consummation, p. 7-8.

83 In C. XXVII, q. 2, c. 33-34, in F. Thaner, ed., Summa magistri Rolandi, p. 131. "Diximus superius, quod conjugium aliud est initiatum, aliud consummatum atque perfectum. Initiatum siquidem est desponsatione, consensu et conjugali pactione; consummatum vero utriusque legitime facta carnali commixtione."

/.../ With respect to the constitution of marriage, it is of no relevance whether the espoused are blessed by the priest or the espoused girl is handed over and given a dowry by her parents, provided the marriage has taken place between suitable persons by way of consent, with the conjugal pact sealed by carnal intercourse.⁸⁴

Bandinelli's major theological work, the Sententiae, was written a few years after his Summa, probably between 1150 and 1153, and indicated that he had somewhat changed his position on the formation of the marriage bond. He still spoke of a twofold union, spiritual and corporal, and required both for a perfect and consummated marriage, but he had taken a step toward the "consent school". He had not abandoned his former tenets entirely, but a compromise or synthetic position between the two schools was already present seminally in his thought. Copula was still required for a perfect marriage, but the consent of the will was also underlined.⁸⁵ As is said in the Sententiae:

⁸⁴ In C. XXXV, q. 2 et 3, c. 19, ibid., p. 213.
"Nihil enim interest, quod ad effectum matrimonii pertinet, utrum sponsus et sponsa a sacerdotibus benedicantur vel sponsa a parentibus tradatur atque dotetur, dummodo inter idoneas personas consensus cum pactione coniugale carnali commixtione confirmatus intercesserit."

⁸⁵ Cf. J.A. Coriden, op. cit., p. 9-11.

Marriage is the union of a man and a woman comprising a singular way of life. But note that the union is twofold. There is a spiritual and corporal union: the carnal union is perfected by sexual intercourse, but the spiritual is strengthened by the union of the wills of the man and the woman. Consequently, in order that matrimony be consummated and perfect, it is necessary that each union take place.⁸⁶

After his election to the papacy, Alexander proceeded to apply this doctrine with considerable consistency. There are three facts which make it difficult to interpret his decisions. Firstly, very few of them contain a general date, and the great majority bear no date at all. Secondly, some of the documents contain very little information. And thirdly, his terminology, not always uniform, tends to ambiguity.⁸⁷ Having made these observations, we shall study briefly two of these decisions: his response to the Archbishop of Salerno, and his response to the Bishop of Brescia, both of which Mansi dates 1179.

⁸⁶ A. Gietl, ed., Sentenzen Rolands nachmals Papstes Alexander III, p. 270. "Est autem matrimonium viri et mulieris conjunctio individuum vitae consuetudinem retinens. Sed notandum est, duplicem esse conjunctionem. Est enim spiritualis, alia corporalis: carnalis perficitur carnali commixtione, spiritualis vero roboratur viri et uxoris voluntatum unione. Ad hoc ergo, ut sit matrimonium consummatum atque perfectum, necesse est, ut utraque conjunctio interveniat."

⁸⁷ Cf. J.A. Coriden, op. cit., p. 11-12.

2. The Response of Alexander III
to the Archbishop of Salerno.

From the context and trend of his previous writings, we would expect Alexander to hold a position on the formation of the marriage bond, which would take into account the difference between a marriage entered into by the mutual consent of the parties and not yet completed by sexual intercourse, and one which has been effected by both consent and copula. The following response to the Archbishop of Salerno was a case in point and concerned the possibility of married persons entering religious life even when one of the partners was unwilling. The original text was as follows:

After having legitimately contracted marriage, one of the spouses may still, even against the will of the other, enter a monastery, as certain saints followed this vocation immediately after their marriage: provided that sexual intercourse has not taken place between them. As to the other party remaining in the world, if, after admonition, he is unwilling to observe chastity, it seems he may contract a second marriage. Because, since the spouses did not become one flesh together, one of them can very well give himself to the Lord and the other remain in the world.⁸⁸

⁸⁸ Alexander III, De conjugatis et sponsis, cap. I, in Mansi, Sacrorum conciliorum nova et amplissima collectio, 22, 283. "Verum post consensum illum legitimum de praesenti, licitum est alteri, altero etiam repudiante, monasterium eligere, sicut quidam sancti de nuptiis vocati fuerunt: dummodo inter eos carnis commixtio non intervenerit. Et alteri remanenti, si commonitus servare noluerit continentiam, licitum esse videtur, ut ad secunda vota transire possit. Quia cum non fuissent una caro effecti, potest unus ad Dominum transire, et alter in saeculo remanere."

The above decision is the oldest known legal text that treats of the dissolution of marriage legitimately contracted by the fact of the religious profession of one of the parties. The essential condition laid down by the Pope for the dissolution was the nonconsummation of the marriage. Alexander pointed out that he was not introducing a novelty in the practice of the Church since a number of saints had previously renounced married life for the religious life. Neither was he derogating from the indissolubility of marriage, since absolutely indissolubility belongs only to the consummated marriage.⁸⁹

In sum, Alexander III declared that solemn profession had the force to dissolve the bond of a nonconsummated marriage. Confirming an already established custom, the Pope authorized either spouse to enter a monastery even against the will of the other party, provided consummation of the marriage had not taken place. The spouse who remained in the world was in turn permitted to contract a new marriage.⁹⁰

⁸⁹ Cf. H. Moureau, "Décrets d'Alexandre III", in D.T.C., I-1, c. 718.

⁹⁰ Cf. R. Charland, "Le pouvoir de l'Eglise sur les liens du mariage", in R.D.C., 16(1966), p. 50.

Since the partner remaining in the world was free to remarry, the Pope obviously considered the nonconsummated bond completely severed. This was evidently Alexander's final position since it was supported by other clear and strongly worded decrees, such as his response to the Bishop of Brescia given below. However, it represented an evolution in his thought because, in an earlier response to the Archbishop of Sienna, he had denied that the man whose wife entered religion might marry again.⁹¹

3. The Response of Alexander III
to the Bishop of Brescia.⁹²

The Response Ex publico addressed to the Bishop of Brescia again concerned a spouse who wished to enter religious life. The tenor of this reply, as was the case in the one cited above was: marriage contracted by mutual consent

⁹¹ Cf. Mansi, op. cit., 22, 291. Cf. J.A. Coriden, op. cit., p. 19.

⁹² The see of Brescia (the Latin form is Brixia, Brixienensis) dates back to at least the 12th Century. It seems to have been a suffragan diocese of the Archdiocese of Milan. (Cf. C. Eubel, ed., Hierarchia Catholica Medii Aevi, Patavii, Typis librariae "Il Messaggero di S. Antonio", 1913-, v. I, p. 147).

alone is indissoluble in principle, while a marriage contracted by mutual consent and perfected by carnal copula is indissoluble in fact.⁹³ The Pope wrote as follows:

By way of a public document /.../ it has been brought to our attention that, when our venerable brother the Bishop of Verona /.../ had undertaken the study of the marriage case between M. and A., /.../ he upheld the validity of the marriage, and ordered the same woman to return to her husband and fulfill her duties as a wife. When she refused to comply, /.../ she was excommunicated. Besides, /however/ because the aforesaid woman /.../ has not known her husband carnally, /.../ we command, inasmuch as /.../ the same woman /.../ wishes to enter religion, /.../ that, once she has given sufficient guarantees, she either enter religious life or return to her husband within the space of two months /.../: and the man is free to contract a new marriage once his former wife has assumed the religious habit. Certainly, Our Lord's words that it is not lawful for a man to put away his wife save for the cause of fornication, are to be understood /.../ of those whose marriage has been consummated by carnal copula, without which marriage cannot be consummated /.../.⁹⁴

93 Cf. A. McNevin, loc. cit., p. 31.

94 Alexander III, De conjugatis et sponsis, cap. VIII, in Mansi, op. cit., 22, 284. "Ex publico instrumento /.../ nobis innotuit, quod cum venerabilis frater Veronensis episcopus /.../ causam matrimonii, quae inter M. virum et A. mulierem vertebatur, suscepisset /.../ iudiciali sententia matrimonium approbavit, et eidem mulieri praecepit, ut ad virum suum rediret, et exhiberet coniugalem affectum. Verum cum eadem mulier /.../ /regredi/ nollet, /.../ fuit vinculis excommunicationis adstricta. Ceterum, quia praefata mulier, /.../ adhuc tamen /.../ a viro est incognita: /.../ mandamus, quatenus /.../ eadem mulier /.../ ad religionem transire voluerit, recepta ab ea sufficienti cautione, quod vel ad religionem transire, vel ad virum suum redire infra duorum mensium spatium debeat /.../: et vir ipse, ea religionis habitum assumente, ad alia vota licentiam habeat transeundi. Sane quod Dominus in evangelio dicit: Non licet viro uxorem suam, nisi causa fornicationis, dimittere: intelligendum est /.../ de his, quorum matrimonium est carnali copula consummatum, sine qua matrimonium consummari non potest /.../."

The substance of the response to the Bishop of Brescia was basically that of the one to the Archbishop of Salerno. However, there were four important precisions made: 1) the spouse wishing to enter religious life was given a two month period in which to make up her mind either to take the veil or return to her husband; 2) the husband had to wait till the wife assumed the religious habit before he might remarry; 3) Alexander interpreted Our Lord's words in Matt. 5,32 as applying only to consummated marriage; and 4) marriage could be consummated only by carnal intercourse. It would seem that the reason the Pope attributed greater stability to the consummated union is to be found in the third and fourth precisions. Moreover, it was his teaching that the words of Genesis, "A man shall leave his father and mother, and shall cleave to his wife; and they shall be two in one flesh" also referred to marital intercourse: "The man and woman are not one flesh until they have consummated their union."⁹⁵

Alexander III contributed especially to the solution of the problem posed by the divergent positions of the schools on the formation and the indissolubility of the marriage bond.

⁹⁵ Alexander III, De sponsalibus secundo, cap. V, in Mansi, op. cit., 22, 410. "Non sunt una caro vir et mulier, nisi carnali copula coheserint: /.../." Cf. J.A. Coriden, op. cit., p. 21.

His reconciliation of the radical differences between the "consent" and "copula" theories was effected by way of a pragmatic compromise. He rejected neither view entirely, but rather combined the salient features of each into a relatively happy and workable system. In the view of Alexander, marital consummation was neither all-important as Gratian had claimed, nor was it inconsequential as Lombard had taught. It enjoyed a perfective or complementary function, which rendered marriage indissoluble.⁹⁶ His reason for taking this stand seems to have been his understanding of the scriptural passages on indissolubility bolstered by stories from the lives of the saints.⁹⁷

CONCLUSION

This chapter has been devoted to showing how the Magisterium of the Church came to recognize the juridical significance of the consummation of marriage. Due to the writings of Hincmar of Rheims in the ninth century and of those who followed him, the Church slowly became aware of

96 Cf. J.A. Coriden, p. 26.

97 Cf. footnote 94, where Alexander refers to Matt. 5,32; also, footnote 88, where reference is made to the example of certain saints who entered religion immediately after their marriage.

the inadequacy of judging a marriage as indissoluble on the merits of consent alone. As the importance of marital consent had been over-emphasized formerly, so too the role of sexual intercourse was exaggerated with Gratian. It remained for Alexander III to reconcile the two schools of thought on the subject of the formation of the marriage bond. This he did by teaching that two essential elements are necessary to constitute an absolutely indissoluble marriage: the mutual consent of the parties and sexual intercourse.⁹⁸

The available evidence does not indicate that the successors of Alexander III deviated substantially from his teaching on the consummation of marriage.⁹⁹ Theologians and canonists might continue to discuss the decision of Alexander III, but his teaching on the subject has never been formally changed by later Popes or Ecumenical Councils. It was accepted that the essence of marriage lay in the contract and not in consummation, but that a non-consummated marriage lacked the absolute indissolubility characterizing consummated marriages, which more fully symbolized the union of Christ with the Church.

98 Cf. A. McNevin, loc. cit., p. 32.

99 Cf. J.A. Coriden, op. cit., p. 26.

Alexander III stated that a ratified marriage (i.e., one where both parties are baptized), even if nonconsummated, is truly sacramental, but it can be dissolved. We have already seen that it was the accepted practice of the Church for a nonconsummated marriage to be dissolved by solemn religious profession. It was also recognized that such a marriage could be dissolved by papal dispensation. Some authors stated that Alexander III granted some dispensations, but proofs are not conclusive. However, it is certain that Martin V (+1431) granted dispensations of this kind, and the practice became stabilized under Clement VIII (+1605).¹⁰⁰

It is beyond the purpose of this paper to discuss the origin or nature of the papal power to dispense from a nonconsummated marriage. Rather, in the following chapter, we wish to examine ecclesiastical legislation from the twelfth to the twentieth century, which continues to underline the juridical significance of the consummation of marriage as recognized by Pope Alexander III and his successors in the See of Peter.

¹⁰⁰ Cf. J. Casoria, De matrimonio rato et nonconsummato, p. 25-26.

CHAPTER II

THE CONSUMMATION OF MARRIAGE IN ECCLESIASTICAL LEGISLATION: TWELFTH TO THE TWENTIETH CENTURIES

Diverse reasons of the theologico-moral order had led the ecclesiastical writers of the first centuries to treat of the notion of sexual union or copula. First of all, there was a moral judgment to be made concerning the liceity of sexual relations; then too, the impediments of affinity and impotency, and the marriages of those who had not yet reached the age of puberty, demanded that the Church clarify its teaching on the concept of sexual intercourse consummative of marriage. The Fathers of the Church had justified marriage and its use by showing its ordination to the propagation of the human race.¹ It was not surprising therefore that the Church's notion of consummation in the high Middle Ages would be influenced by their writings on the subject.

The biblical concept of the two marriage partners becoming "two in one flesh" was also to predispose the Church to view marital consummation in a specific way. The question asked was: how does conjugal copula achieve the carnal union

¹ Cf. G. St-Hilaire, L'azoospermie dans la jurisprudence rotale, p. 9-10 (unpublished doctoral dissertation).

destined for the procreation of children? According to the physiological notions in vogue in the thirteenth century, the generative process of copula was attributed to the union of the male and female seed, this latter being what is now known to be the vaginal secretions of the glands of Bartholin, which emit a lubricant at the vaginal orifice.² Hence, theological and canonical writers, such as St. Thomas Aquinas, would teach that "husband and wife become one flesh in carnal copula through the commingling of the two seeds."³

The canonical doctrine of the thirteenth century was, therefore, demanding the commixture of the male and female seed at the moment of intercourse in order that a marriage be consummated. If the spouses denied that the female seed (or the vaginal secretions) had been present during first copulation, the marriage would have been considered as nonconsummated. However, as physicians discovered that the so-called semen feminae had no direct effect on generation,

2 Cf. ibid., p. 12-13.

3 St. Thomas, In IV lib. sentent., d. 41, q. 1, a. 1, ad 4, in Thomas Aquinas, Opera omnia, Parmae, Typis P. Fiaccadori, 1852-1873, v. VII-II, p. 1040. "Efficiuntur in carnali copula una caro per commixtionem seminum."

its requirement for marital consummation was dropped. Instead it began to be taught that marriage was consummated and the union in one flesh achieved by male semination in the vagina during sexual intercourse.⁴

It is quite important to keep those few observations in mind as we turn our attention to the subject of this chapter, namely the consummation of marriage as found in ecclesiastical legislation from the twelfth to the twentieth century. Admittedly, following the reign of Alexander III (+1181), there were no official statements from the Holy See treating directly of the consummation of marriage as such until the Code of 1917 (canon 1015). However, there were a number of documents both in the pre-Code and post-Code periods, which presupposed the notion of consummation outlined above and particularly as it was related to the indissolubility of marriage.

This chapter will deal with: A) pre-Code documents on problems related to the consummation of marriage; B) the teaching of the Code of Canon Law on the consummation of marriage; and, C) post-Code documents on the consummation of marriage and related problems.

⁴ Cf. G. St-Hilaire, op. cit., p. 15.

A. Pre-Code Documents on Problems
Related to the Consummation of
Marriage.

Even though the pre-Code legislative documents could be divided into three categories: doctrinal, doctrinal and procedural, and procedural texts, it is preferable to study them as a whole. However, because of the importance of the Brief Cum frequenter of 1587, it will be considered separately.

1. Brief "Cum frequenter", Sixtus V,
June 27, 1587.⁵

At the beginning of the fifteenth century, and therefore before the pontificate of Sixtus V, couples were considered potent and capable of consummating marriage, if they could realize the union in one flesh by the deposit and reception of the male semen within the vagina. Sterility did not either render a spouse impotent or the marriage null or unconsummated. But male semination was required for consummation, and, given the Augustinian influence which justified sexual activity in view of its relationship to

⁵ Cf. Sixtus V, Brief Cum frequenter, June 27, 1587, in Magnum Bullarium Romanum, IV, part 4, p. 319.

procreation, it was understood that the male seed must be at least apt for generation and not deliberately rendered infertile.⁶ The whole issue of potency and marital consummation was thus more complex: due to the lack of medical knowledge (e.g., the absence of refined microscopy) there was no clear distinction between sterility and impotence, and yet the requirement of male semen apt for generation existed. The simple material capacity of physical union with a woman did not render a man potent.

In the first quarter of the sixteenth century a delicate problem arose regarding the sexual union of eunuchs, who were of necessity sterile. These were men who possessed a male copulatory organ but lacked both testicles either due to a congenital defect or castration. There were three opinions on the ability of eunuchs to marry: the first required only the capacity of bodily union and of satisfying the spouses, even without semination, and was upheld by such writers as Sylvester Prieras (1510) and Andreas Alciatus (1540); the second opinion required that the male at least be able to emit a secretion, even if only a watery distillate, and was accepted by such as Torquemada (1455); the third

6 Cf. G. St-Hilaire, op. cit., p. 16-17.

opinion, on the contrary, accepted by the more important theologians and canonists as St. Raymond of Penafort (1220), St. Albert (1230), St. Thomas (1250), and Dominicus Soto (1550) recognized that a man deprived of both testicles was incapable of marriage.⁷ St. Albert, for example, wrote:

/.../ if there be an accidental impediment, namely due to the excision of the male copulatory member or the sectioning of the testicles, /.../ then, according to what we have said above, the whole matter falls under the heading of perpetual impotence for coition (impotentia coeundi perpetua), and this falls under frigidity: /.../ the law does not speak of frigidity inasmuch as it is frigidity, but inasmuch as it causes impotence for coition: and, therefore, the law classifies as frigidity all that causes impotence for coition naturally and perpetually.⁸

In view of the divergent opinions on the marriages of eunuchs, it became necessary to have some type of official statement from Church authorities. In 1587, Pope Sixtus V

⁷ Cf. ibid., p. 18-19.

⁸ St. Albert, In IV lib. sentent., d. 34, B, a. 4, in Albertus Magnus, Opera omnia, Paris, L. Vivès, 1890-1899, v. 30, p. 332. "/.../ si enim esset accidentale impedimentum, scilicet abscissione veretri, vel sectione testiculorum, /.../ tunc secundum versus supra positos totum sub illo membro continetur, quod est impotentia coeundi perpetua, et hic continetur sub frigiditate: /.../ jus non loquitur de frigiditate in quantum frigiditas, sed in quantum causat impotentiam coeundi: et ideo omnia quae idem causant naturaliter et perpetue, vocat frigiditatem" (emphasis in original). Cf. also, St. Thomas, Summa theologiae, Suppl., q. 58, a. 1, sc 2, in Thomas Aquinas, op. cit., v. IV, p. 550, where St. Thomas treats of impotentia coeundi from both natural and accidental causes.

addressed a brief, Cum frequenter, to the Nuncio to the Spanish Court. The Nuncio had previously written to the Pope concerning the marriages of men, who, though they lacked both testicles, were nevertheless capable of accomplishing the appearances of the sexual act. These men insisted they were capable of contracting a true marriage.⁹

The response of Sixtus V was categorical. Its general tenor was that the Nuncio was to declare the men in question inapt for marriage. Moreover, the marriages already contracted by such men were to be declared null and void, and the "pseudo-spouses" were to separate unless they chose to live together as brother and sister.¹⁰

Because of the far-reaching effects which Cum frequenter has had in the past and even in our own century, especially with regard to the definition of verum semen and, consequently, male impotence, we shall analyze it in some detail. The introductory paragraph reads:

9 Cf. R. Charland, "La dispense du mariage non-consommé", in Revue de Droit canonique, 18(1968), p. 46. Cf. G. Oesterle, "Impuissance", in Dictionnaire de droit canonique, v. V, c. 1262-1292.

10 Cf. R. Charland, loc. cit., p. 46.

Since frequently in those regions there are eunuchs and spaded men (eunuchi et spadones), who lack both testicles, and are therefore certainly and manifestly incapable of emitting true semen (verum semen), and who for reasons of impure lecherousness and with unclean embraces have relations with women, and emit a liquid perhaps somewhat similar to semen, although by no means apt for generation or marriage, and yet are presuming to contract marriage especially with women aware of their defect, and obstinately insist that they are acting licitly, - and because trials and controversies concerning this matter are being brought before your and other ecclesiastical courts, Your Fraternity has asked us what rules are to be laid down concerning marriages of this kind.¹¹

Who precisely were the eunuchi et spadones to whom the Nuncio and Pope were referring? Previously, the eunuchs were mentioned, but here there must be further precisions given. It seems that the words castrati, eunuchi and spadones may not have always been differentiated in the terminology of the sixteenth century. However, the word castratus seems to have been used of those who had their

¹¹ Sixtus V, op. cit., p. 319. "Cum frequenter in istis regionibus Eunuchi quidam, et Spadones, qui utroque teste carent, et ideo certum ac manifestum est, eos verum semen emittere non posse quia impura carnis tentigine, atque immundis complexibus cum mulieribus se commiscent, et humorem forsitan quemdam similem semini, licet ad generationem, et ad matrimonii causam minime aptum effundunt, matrimonia cum mulieribus, praesertim hunc ipsum eorum defectum scientibus contrahere praesumant, idque sibi licere pertinaciter contendunt, et super hoc diversae lites, et controversiae, ad tuum, et Ecclesiasticum forum deducantur, requisivit a Nobis Fraternitas tua, quid de huiusmodi connubiis sit statuendum."

testicles removed surgically, while the word eunuchus was used of those who had their testicles crushed. The word spado seems to have had a more generic sense and was often used alone as a substitute for both the words castratus and eunuchus to signify the lack of even one testicle.¹² But the Pope is obviously referring only to those eunuchs and spaded men, who lack both testicles (utroque teste carent).

One may also ask why the Pope found it necessary to single out marriages of eunuchs in Spain, quite apart from the fact that the Apostolic Nuncio had written to him about the problem in that country. The question was also a historical one. The Mohammedans had occupied parts of Spain until about a century before Cum frequenter was issued, when they had been driven out by the armies of Isabella the Catholic and Ferdinand. It was the Mohammedans who had introduced the custom of castrating young boys before puberty or even afterwards, so that they might safely be used as servants for the Mohammedan women even when they were mature men. However, after the expulsion of the Mohammedans from Spain, the practice was not completely eradicated, for

¹² Cf. G. St-Hilaire, op. cit., p. 18. Cf. G. Oesterle, loc. cit., c. 1262.

whatever purposes it was employed.¹³ The opening words of the Pope's letter, Cum frequenter, imply that such men were quite numerous at the time.

In Spain, moreover, towards the middle of the sixteenth century, the eunuchi et spadones formed matrimonial alliances specifically sought for by Spanish women. Such unions were coveted because therein lay the possibility of satisfying their sensual desires without the hardships incidental on pregnancy and childbirth. The spread of such marriages was an ever growing scandal for the faithful and had drawn the attention of the Spanish bishops. The Pope had therefore intervened in the question upon the formal query proposed by the Bishop of Navarre, Nuncio to the Spanish Court.¹⁴

In the second or dispositive part of Cum frequenter, which is to be attributed to the Pontiff alone (as compared with the narrative first paragraph where the Pontiff was recapitulating the inquiry of the Nuncio), Sixtus prohibits such marriages, but does not expressly invoke the reason

¹³ Cf. L. Azzolini, De impedimento impotentiae in viro; disceptatio de Ep. "Cum frequenter", Sixtus V, p. 319.

¹⁴ Cf. P.L. Frattin, The Matrimonial Impediment of Impotence: Occlusion of the Spermatic Ducts and Vaginismus, p. 24.

"because these men are unable to emit true semen".¹⁵ The text in question reads:

§1. We, therefore, mindful that, according to canonical legislation and natural reason, those who are frigid and the impotent, are by no means considered capable of contracting marriage, and that the aforesaid eunuchs, or castrated men, are unwilling to have as sisters those whom they cannot have as wives, - because experience teaches that both they, as long as they consider themselves capable of intercourse, and the women who marry them, under the pretext and the form of marriage, strive after wicked unions of this kind, not that they may live chastely, but that they be carnally united to each other with a depraved and libidinous intention; since such unions give rise to the occasion of sin and scandal, and tend to the loss of souls, they are to be extirpated entirely from the Church of God. And above all considering that no usefulness arises from the marriages of eunuchs and spaded men of this kind, but rather a source of temptations and an incentive to illicit pleasure, we entrust the matter to Your Fraternity by the presents and enjoin you: to prohibit the contracting of marriage by the aforesaid and any other eunuchs or spaded men, lacking both testes, with any women whether aware or unaware of the aforesaid defect, - and to declare them, by our authority, incapable of in any way contracting marriage, - and to forbid

15 Cf. L. Azzolini, op. cit., p. 314.

local Ordinaries to allow unions of this kind,
- and to see to it that those who have
contracted unions of this kind are separated,
- and to declare such marriages already
contracted as null, void, and invalid.¹⁶

A careful perusal of the text just cited will indicate
that Sixtus V did not wish, as it were, to make a new law
concerning the marriage of the men in question. On the

¹⁶ Sixtus V, *op. cit.*, p. 319. "§1. Nos igitur attendentes, quod secundum Canonicas sanctiones, et naturae rationem, qui frigidae naturae sunt, et impotentes, iidem minime apti ad contrahenda matrimonia reputantur, quodque praedicti Eunuchi, aut Spadones, quas tamquam uxores habere non possunt, easdem habere ut sorores nolunt, quia experientia docet, tam ipsos, dum se potentes ad coeundum iactitant, quam mulieres, quae eis nubunt, non ut caste vivant, sed ut carnaliter invicem coniugantur prava et libidinosa intentione, sub praetextu, et in figura matrimonii turpes huiusmodi commixtiones affectare quae cum peccati, et scandali occasionem praebeant, et in animarum damnationem tendant, sunt ab Ecclesiae Dei prorsus exterminandae. Et insuper considerantes, quod ex Spadonum huiusmodi, et Eunuchorum coniugiis nulla utilitas provenit, sed potius tentationum illecebrae, et incentiva libidinis oriuntur, eidem Fraternitati tuae per praesentes committimus et mandamus, ut coniugia per dictos, et alios quoscumque Eunuchos, et Spadones, utroque teste carentes cum quibusvis mulieribus, defectum praedictum sive ignorantibus, sive etiam scientibus, contrahi prohibeas, eosque ad matrimonia quomodocumque contrahenda inhabiles auctoritate nostra declares, et tam locorum Ordinariis, ne huiusmodi coniunctiones de cetero fieri quomodocumque permittant, interdicas, quam eos etiam, qui sic de facto matrimonium contraxerint, separari cures, et matrimonia ipsa sic de facto contracta, nulla, irrita, et invalida esse decernas."

contrary, the Pontiff felt induced to issue this solemn legislative precept in view of the fundamental motivating principles underlying the true concept of marriage. He also saw the need of forestalling scandal. Apart from this moral aspect, the pontifical letter not only did not introduce a ius novum but limited itself to giving a legislative sanction to what, according to accepted doctrine, was the solution to the case presented by the Nuncio. The fundamental principles traditionally fixed with respect to conjugal intercourse and the consummation of marriage rested solidly on the postulate of the parties' intrinsic capacity for responding to the aim and purpose of marriage, i.e., the procreation and education of children.¹⁷

In prohibiting the marriages of these men, the Pope prefers to reason along traditional lines based on the ends of marriage. He implies that the eunuchs and castrated men in question are to be assimilated to the impotent and frigid, who are considered inapt for marriage both from natural and canon law (because unable to beget children). However, Sixtus delves more deeply into the motivation behind the marriages of the eunuchi and spadones. Again, the implication is

17 Cf. P.L. Frattin, op. cit., p. 24-25.

that both these men and the women they marry are well aware of their condition and are contracting these illicit (and as the Pope says later) invalid unions for purely sensual reasons. What is more, their fellow-citizens seem to have become aware of what is happening. These "pseudo-couples" are therefore, not only an occasion of sin to themselves, but a source of bad example to others.¹⁸

The Nuncio, in Sixtus V's name, is to declare the eunuchi et spadones, who lack both testes, unfit (inhabiles) for marriage; he is to see that any such marriages already contracted are declared null and void, and that the parties involved separate. The Pope observes that such unions not only lack all utility but contribute to the damnation of the souls of the persons involved.¹⁹

Consequently, Cum frequenter can be considered one of the most important documents in the historical evolution of the impediment and notion of impotence. As P. Harrington puts it:

18 Cf. L. Azzolini, op. cit., p. 313-316 (passim).

19 Cf. footnote 16.

It was the first authoritative papal pronouncement in modern times that directly and unequivocally asserted that impotency constituted an invalidating impediment which prohibited marriages to be contracted and nullified marriages already contracted.²⁰

Turning our attention now to the third paragraph of the document, we find that it reiterates the necessity of having the couples in question separate, were they unwilling to live as brother and sister:

§2. You are to see to it that those, who have already contracted such unions, are to be separated altogether, if it appears they have contracted not that they live chastely, but to perform carnal and wanton acts, or it is proven that the men sleep in one and the same bed with the women.²¹

Previous to the papal pronouncement and afterwards some authors such as Pontus (1569-1629) had envisaged the possibility of an impotent man marrying validly, provided he and the woman involved were content to live chastely. Even these authors conceded, however, that since the man was incapable of copulation apt for generation, the marriage would be invalid if he married with the intention of having

20 Cf. P. Harrington, "The Impediment of Impotency and the Notion of Male Impotency", Part II, in The Jurist, 19(1959), p. 188.

21 Sixtus V, op. cit., p. 319. "§2. Eos etiam qui sic iam contraxerunt, si appareat illos non ut caste simul vivant, contraxisse, sed actibus carnalibus, et libidinis operam dare, simulve in uno, et eodem lecto cum praedictis mulieribus dormire convincantur, omnino similiter separari cures."

intercourse. Following the lead of Pope Sixtus V, the majority of outstanding canonists and theologians of the succeeding decades and centuries held that impotence of itself, apart from knowledge or ignorance of the condition, and independently of the possible acceptance of the condition by the potent party, invalidated marriage and constituted an impediment to marriage.²²

Paragraph 3 of the original document lays down the rule to be followed in the judging of such cases by ecclesiastical tribunals:

We decree that such cases must be judged and defined according to the foregoing rules and not otherwise, by all judges and commissioners of whatever authority and dignity, who hereby lose the faculty of judging and interpreting otherwise in any case; and if a judgment in contravention to these rules has already knowingly or unknowingly been attempted anywhere by any authority, or will be attempted in future, we hereby declare it null and void.²³

22 Cf. P. Harrington, loc. cit., p. 188.

23 Cf. Sixtus V, op. cit., p. 319. "§3. Nos enim ita in praemissis, et non aliter, per quoscumque Iudices, et Commissarios, quacumque auctoritate, et dignitate fungentes, sublata eis, et eorum cuilibet, quavis aliter iudicandi, et interpretandi facultate in quacumque causa, et instantia iudicari, et definiri debere, et si secus super his quoquam quavis auctoritate, scienter vel ignoranter attentatum forsan est hactenus, vel attentari in posterum contigerit, irritum et inane decernimus."

By way of conclusion to our study of Cum frequenter, the following observations are offered:

- Authors disagree on the exact nature of the document. It is variously referred to as a letter (L. Azzolini), a letter in the form of a brief (G. St-Hilaire), a constitution (P.L. Frattin), or a bull (P. Harrington). For the purposes of this paper, we shall assume that it is a letter in the form of a brief, addressed to the Bishop of Navarre.

- It seems to be an established fact, however, that, although the document was issued specifically for Spain, it was considered binding on the whole Church.²⁴

- As we have already said, the dispositive part of the papal pronouncement does not formally give as the reason for the impotence of eunuchs "the fact that these men are unable to emit true semen" (verum semen emittere non possunt). As such, Cum frequenter merely declares the canonical and natural impotence of eunuchs and the Church's attitude towards their marriages. Nevertheless, in the narrative or preambulatory paragraph of his response, Sixtus seems to assume as certain and manifest the prevalent opinion that it

²⁴ Cf. P.L. Frattin, op. cit., p. 24.

is impossible for eunuchs to produce true semen, even if they emit a secretion similar to semen but inapt for generation.²⁵

- The term verum semen in the response of Sixtus V was not defined with the scientific precision of modern physiology, but Rotal jurisprudence appears to have taken the term in the sense of testicular semen (in testiculis elaboratum). Such an acceptance of the term by the Rota has given rise to inconsistencies in the practice of different Roman Congregations. For example, the Holy Office has permitted the doubly vasectomized to marry; but surely such men are unable to produce verum semen in the Rotal sense. In fact, the Congregation of the Sacraments has considered marriage as nonconsummated in the absence of testicular semen.²⁶

- Considerable time has been spent on the study of Cum frequenter, because it is believed that its analysis is most relevant to the juridical notion of the consummation of marriage. Henceforth, from the end of the sixteenth century onwards, there would be another concept of copula. The

²⁵ Cf. footnotes 15 and 16 above. Cf. G. St-Hilaire, op. cit., p. 25-26.

²⁶ Cf. U. Navarrete, "Mutationes ... in iure matrimoniali", in Prawo kanoniczne, 15(1972), p. 11.

common doctrine would teach not only that a eunuch was impotent, but it would require the emission of true semen by the husband for the realization of carnal union or intercourse. Authors would define copula consummative of marriage as that which is naturally apt or ordained to generation. If this new formulation of the concept of conjugal copula does not expressly mention the semen, this last is still required as an essential element. Also, under the influence of Sixtus V, future canonical doctrine would specify that it was semination in the vagina which constituted simple carnal union as copula consummative of marriage, or copula intrinsically apt for generation.²⁷ It is this concept of copula which will later inspire canon 1015, §1, of the Code of Canon Law.

2. Documents on Procedural Law.

While the main doubts regarding impotence and the notion of copula consummative of marriage were clarified at least in jure by Cum frequenter, yet the procedural rules to be followed in cases of impotence and/or nonconsummation needed a more definite specification. Almost two hundred

27 Cf. G. St-Hilaire, op. cit., p. 26-29 (passim).

years later, Pope Benedict XIV finally began to fill this lacuna in the ecclesiastical legislation by means of his constitution, Dei miseratione, of 1741.²⁸

The documents on procedure for nonconsummation cases are a natural consequence of the paramount principle laid down by Alexander III that only a ratified and consummated marriage is absolutely indissoluble,²⁹ and the correlative practice of papal dispensation from a ratified but non-consummated marriage from at least the time of Martin V (+1431).³⁰ With the passage of time, such documents become more and more detailed, as the Church becomes ever more conscious of her role as guardian of the indissolubility of marriage, while yet more imbued with a pastoral sense of the needs of the faithful.

The four documents to be studied in this section are not only interesting from the perspective of the juridical significance of the consummation of marriage. They also form an important unit in the heritage of procedural law in the

28 Cf. P.L. Frattin, op. cit., p. 26.

29 Cf. A. McNevin, "The Indissolubility of Marriage as Effected by Consummation", in Resonance, 2(1967), No. 4, p. 32.

30 Cf. J. Casoria, De matrimonio rato et nonconsummato, p. 25-26.

Church. Moreover, they are essential if we are to understand the ecclesiastical procedural documents of the twentieth century. Hence, an overall view of each document will be given with special emphasis on paragraphs relating to impotence and the nonconsummation of marriage.

a) Constitution "Dei miseratione", Benedict XIV, November 3, 1741.³¹

The Constitution Dei miseratione sets down the rules to be followed in the judging of all marriage cases.³² In the proemium or preface, Benedict XIV takes note that certain abuses have arisen in this area.³³ Paragraph 1 reiterates the indissolubility of marriage from natural and divine law,³⁴ quoting the "one flesh" text from Genesis.

The holy bond of matrimony /.../, which was foretold by the first parent of the human race as perpetual and indissoluble: /.../ wherefore, a man will leave his father and mother, and cleave to his wife and the two will become one flesh.³⁵

31 Cf. Benedict XIV, Constitution Dei miseratione, November 3, 1741, in Magnum Bullarium Romanum, Benedict XIV, I/II, p. 81-86.

32 Cf. ibid., p. 81.

33 Cf. ibid., (Proemium).

34 Ibid., par. 1.

35 Ibid. "Sanctum Matrimonii nexum /.../, quem perpetuum, atque indissolubilem primus humani generis Parens praemonuit: /.../ Quamobrem relinquet homo patrem suum, et matrem, et adhaerebit uxori suae, et erunt duo in carne una."

Benedict thus elucidates the two essential elements of the indissoluble marriage, consent and copula.

Paragraphs 2 and 3 remind bishops of the necessity of exercising vigilance over their tribunals in dealing with cases of nullity of marriage or of dissolution of non-consummated marriage.³⁶ The remainder of the document lays down precise directives for the hearing of nullity cases in local tribunals³⁷ and in the tribunals of the Roman Curia;³⁸ likewise it determines the procedure to be followed in cases of dissolution of ratified and nonconsummated marriage. The special status accorded by the Pontiff to ratum cases is indicated by the fact that he reserves the final decision to himself.³⁹ Moreover, suitable sanctions are to be applied for the nonobservance of the constitution.⁴⁰

The directives for judicial procedure as fixed by Benedict XIV in Dei miseratione were to be later revised by the Instruction Cum moneat, of the Sacred Congregation of

36 Cf. Benedict XIV, loc. cit., §§2, 3, p. 81-82.

37 Cf. ibid., §§4-12, p. 82-85.

38 Cf. ibid., §§13, 14, p. 85.

39 Cf. ibid., §15, p. 85-86. Cf. P.L. Frattin, op. cit., p. 26-27.

40 Cf. Benedict XIV, loc. cit., §§16-18, p. 86.

the Council, August 22, 1840, and the Instructions of the Holy Office in 1858 and 1889. Further modifications were also effected by the Code, by the Instruction of the Sacred Congregation of the Sacraments on May 7, 1923, and afterwards by other canonical documents, as we shall see shortly.

b) Instruction "Cum moneat Glossa", Sacred Congregation of the Council, August 22, 1840.⁴¹

The Instruction Cum moneat Glossa seems to be a complement of the Constitution Dei miseratione, which preceded it by nearly a century. The first part of the instruction, for example paragraphs 1, 2, and 3, bears many similarities to the document of Benedict XIV. Rules are given regarding the duties and functions of judges and "defenders of marriage". The motivation behind the instruction is also given: rules are necessary because, firstly, marriage cases deal not only with the rights of the parties, but also with the sacred bond of matrimony itself, and, secondly, such cases pose special difficulties for tribunal personnel.⁴²

Paragraph 3 underlines that the "defender of marriage" must be cited for every judicial act under pain of nullity

⁴¹ S.C. Conc., Instr. Cum moneat Glossa, August 22, 1840, in Pietro Gasparri, C.I.C. Fontes, VI, n. 4069, p. 345-350 (the paragraphs of the original instruction are not numbered, but we shall assign each paragraph a number for more convenient reference).

⁴² Cf. ibid., p. 345-346.

of the acts.⁴³ Dei miseratione legislated that the defender must be present when either or both of the principals in the case were heard, and should be cited in all other cases.⁴⁴

Paragraph 5 speaks of the duties of the chancellor-notary at the judicial sessions.⁴⁵ Paragraphs 5 to 10 outline the rules for the examination of the parties to the marriage.⁴⁶

Paragraph 11 introduces another element not found in Dei miseratione: the septimae manus witnesses. Both parties were to submit the names of seven blood relatives or in-laws, or at least close neighbours, who could testify individually and under oath to the credibility of the parties in question.⁴⁷

⁴³ Cf. ibid., par. 3, "hic defensor matrimonii citandus erit ad quaelibet acta, ne vitio nullitatis ipsa tabescant."

⁴⁴ Cf. Benedict XIV, loc. cit., §7, p. 83. "Et demum Defensoris huiusmodi persona, tanquam pars necessaria, ad iudicii validitatem, et integritatem censeatur, semperque adsit in iudicio sive unus ex coniugibus, qui pro nullitate matrimonii agit, sive ambo, quorum alter pro nullitate, alter vero pro validitate in iudicium veniant. /.../ quaecumque vero, eo non legitime citato aut intimato, in iudicio peracta fuerint, nulla, irrita, cassa declaramus." (emphasis added).

⁴⁵ Cf. S.C. Conc., Instr. Cum moneat Glossa, loc. cit., p. 346.

⁴⁶ Cf. ibid., p. 346-347.

⁴⁷ Cf. ibid., p. 347.

The institution of the septimae manus witnesses will become a hallmark of subsequent legislation on the hearing of non-consummation cases.

Paragraph 12 envisages the possibility of rogatorial commissions for the hearing of witnesses, who live at a distance from the seat of the tribunal.⁴⁸ Dei miseratione had issued no special rules for that eventuality.

Paragraph 14 is even more pertinent to our study since it deals with the questioning of witnesses with respect to the consummation of the marriage. It reads:

All the witnesses /.../ must be asked /.../ whether it was known that the parties tried to consummate the marriage; whether the marriage was considered as consummated; about causes impeding consummation /.../.⁴⁹

The remaining paragraphs give detailed instructions for the choosing of physician-experts, for the physical examination of the parties to be carried out by these experts, and for the judicial examination of the experts on their findings: all of which is to be carried out scrupulously

⁴⁸ Cf. ibid., p. 348.

⁴⁹ Ibid., "Omnes testes /.../ rogandi erunt /.../ utrum innotuerit eos consummationi operam dedisse; an inde matrimonium consummatum censeretur; de causis consummationem impeditivis /.../."

in cases of suspected impotence or non-consummation of marriage.⁵⁰

Cum moneat Glossa closes with a reminder that two conform affirmative sentences are still necessary in cases of nullity of marriage, before the parties are allowed to remarry, and that even then the case can always be reopened should new evidence come to light.⁵¹

Our cursory examination of the instruction of 1840 has shown that while it resembles the Constitution Dei miseratione in many respects, it is considerably more detailed, particularly in the directives given for the processing of cases of impotence and/or non-consummation. This would seem to indicate an increasing importance accorded to the juridical significance of the fact of the consummation of marriage (or the lack of it) in the procedural rules laid down by the Church for its tribunals.

c) Instruction "Judex ad hoc deputatus", Sacred Congregation of the Holy Office, 1858.⁵²

The Instruction Judex ad hoc deputatus was to be applied in cases of male impotence and resulting non-

50 Cf. ibid., p. 348-349.

51 Cf. ibid., p. 350.

52 Cf. S.C. S. Off., Instr. Judex ad hoc deputatus, 1858, in Pietro Gasparri, C.I.C. Fontes, IV, n. 946, p. 220-222. The Instruction is dated only 1858.

consummation of marriage where a pontifical dispensation was being sought by the accurate observance of the prescriptions of the Constitution Dei miseratione of 1741.⁵³ It presupposes the faithful observance of the Constitution where it is applicable.

The introductory paragraphs (1,2) refer to the procedure to be followed in cases of this nature.⁵⁴ The format of the interrogations of the parties is left to the discretion of the judge, but some questions are for convenience suggested by the instruction in paragraph 3. The following are examples.

How long did the parties know one another before the marriage; /.../ on the wedding night, did they sleep in the same house, in the same room, in the same bed, and did they freely try to fulfill their conjugal duties; did they consummate the marriage; does the person being questioned know or suspect the reasons why they were unable to consummate the union, /.../.⁵⁵

53 Ibid. The preface preceding the Instruction reads: "Pro conficiendo processu super viri impotentia, et non secuta matrimonii consummatione, accedente Pontificis dispensatione ab accurata observantia praescriptionum Bullae Benedict XIV 'Dei miseratione'."

54 Cf. ibid., p. 220.

55 Ibid. "A quanto tempore sese cognoverint sponsi ante matrimonium; /.../ an in sequenti nocte in eadem domo, eodemque cubiculo, et toro cubaverint, officiisque conjugalibus ultro libenterque operam dederint; an matrimonium consummaverint; an ipse examinatus cognoscat, vel suspicetur causas propter quas consummare nequiverint /.../."

The questions become even more explicit later in the paragraph, delving into the most intimate details of male and female anatomy, which could possibly explain the non-consummation of the marriage.⁵⁶ The same type of questions are to be put to both spouses to see if a consensus can be reached on the facts of the case.

The following three paragraphs (4-6) of the instruction give details for the questioning of the witnesses, for the physical examination of the husband by at least two physicians (Cum moneat Glossa specified five physicians),⁵⁷ and for the gynecological examination of the wife by two specialists, respectively.⁵⁸ The instructions for the physical examination are quite detailed.

The closing paragraph notes that once all the information has been gathered, the Bishop shall forward the acts to the Sacred Congregation of the Holy Office for decretory judgment (decretorio eius iudicio).⁵⁹

⁵⁶ Cf. ibid., p. 221.

⁵⁷ Cf. Instr. Cum moneat Glossa, loc. cit., par. 18, p. 348.

⁵⁸ Cf. Instr. Judex ad hoc deputatus, loc. cit., p. 221.

⁵⁹ Cf. ibid., p. 222.

If we were to ask what the Instruction of 1858 adds to Dei miseratione of 1741 or to Cum moneat Glossa of 1840, we would have to reply that it is an application to a specific case of the more general principles found in the two preceding documents. All three have in common an emphasis on determining whether or not the marriage has been consummated by physical, carnal intercourse, as is especially evident from the directives given for the interrogation of the parties and witnesses in the two instructions of 1840 and 1858.

d) Instruction to the Bishops of the Oriental Rites, "Quemadmodum matrimonii foedus", Sacred Congregation of the Holy Office, June 25, 1883.⁶⁰

The Instruction Quemadmodum matrimonii foedus summarizes the procedural law for matrimonial cases; it is similar in content to Dei miseratione and to the instructions of the Holy Office that we have already referred to. Article 5 of Quemadmodum matrimonii foedus is entitled De impedimento impotentiae.⁶¹ The directives given there for the interrogation of the parties and witnesses, and for the physical examination of the parties are practically identical with

⁶⁰ Cf. S.C. S. Off., Instr. ad Ep. Rit. Orient. Quemadmodum matrimonii foedus, June 25, 1883, in Pietro Gasparri, C.I.C. Fontes, IV, n. 1076.

⁶¹ Cf. ibid., Art. 5, p. 408-410.

the prescriptions laid down in the 1858 instruction, Judex ad hoc deputatus.⁶²

However, the Instruction of 1883 does elucidate the notion of the impediment of impotence. In the first paragraph of Article 5, we read:

Only the spouses are admitted to impugn the marriage under the heading of impotence, because this fact can be known to them alone. /.../ In order that impotence invalidate the matrimonial contract, it is necessary that it be antecedent and perpetual, and that it cannot be cured by natural and licit means. If the impotence is absolute, or such that it renders conjugal copula impossible altogether, it always invalidates marriage contracted with any person; but if the impotence is relative only, it invalidates marriage only with that person with whom the impotence exists.⁶³

It is this notion of impotence that will be incorporated into canon 1068 of the Code of Canon Law of 1917.

⁶² Cf. Instr. Judex ad hoc deputatus, loc. cit., p. 220-222.

⁶³ Cf. Instr. Quemadmodum matrimonii foedus, loc. cit., p. 408. "Ad impugnandum ex capite impotentiae matrimonium solummodo coniuges admittuntur, quia ipsis solummodo hoc factum cognitum esse potest. /.../ Ut autem impotentia matrimonium contractum irritet, necesse est, ut sit antecedens atque perpetua, quae scilicet naturalibus atque licitis remediis tolli non possit. Ista impotentia si fuerit absoluta, seu talis ut omnino impossibilem reddat coniugalem copulam, matrimonium dirimit semper, et cum quaelibet persona contractum; si vero relativa tantum, matrimonium dirimit solummodo cum illa, ad quam impotentia ipsa refertur."

The Instruction also specifies that the physical examination of the woman may be omitted if she is a widow, or it is known she had had relations with another man after separating from her present spouse.⁶⁴ No such exceptions to the need for the physical examination of the woman had been mentioned in earlier documents.

The final paragraph of Article 5 indicates that, if it is impossible to prove the impediment of impotence, but there is proof of the nonconsummation of the marriage in question, the entire file is to be forwarded to the Holy See for decision.⁶⁵

These few observations on the Instruction Quemadmodum matrimonii foedus conclude our study of pre-Code documents of the Holy See, which treat of procedural rules for marriages cases, including cases of impotence and/or non-consummation of marriage. It will have been noticed that these rules have become gradually more precise, more detailed, and bear a closer resemblance to the post-Code documents on the same subject such as the instruction of the

⁶⁴ Cf. ibid., p. 410.

⁶⁵ Cf. ibid.

Sacred Congregation of the Sacraments in 1923. Moreover, all of these pre-Code documents following the pontificate of Alexander III faithfully reflect the inalterable principle of the absolute indissolubility of Christian marriage where consent is sealed by sexual union.

B. The Teaching of the Code of Canon
Law on the Consummation of Marriage.

The promulgation of the Code of Canon Law in 1917 did not radically change the notion of marital consummation, which had been implicit in the teaching of the Church for at least the last five centuries. Following the Brief Cum frequenter of Sixtus V, the common doctrine would define copula consummative of marriage as that which is naturally apt or ordained to generation. It is true that this notion of conjugal copula does not expressly mention the verum semen, but it still presupposes it without determining its specific nature.⁶⁶ While the Code did not further define copula or add substantially to the notion just mentioned, it did enshrine and encapsulate it in the official law of the Church.

⁶⁶ Cf. footnote 27.

In many respects, then, this short study of the consummation of marriage as found in the Code will serve to recapitulate what has already been said thus far, and it will also anticipate to a certain extent Chapter III, which will view consummation from a biological perspective. This section will consider: 1) paragraphs 1 and 2 of Canon 1015, and, 2) the notion of conjugal copula consummative of marriage: its elements and its effects.

1. Canon 1015, §1 and §2.⁶⁷

The first and second paragraphs of Canon 1015 read:

§1. Matrimonium baptizatorum
validum dicitur ratum, si non-
dum consummatione completum
est;

ratum et consummatum, si inter
coniuges locum habuerit coniu-
galis actus, ad quem natura
sua ordinatur contractus
matrimonialis et quo coniuges
fiunt una caro.

§1. A valid marriage of
baptized persons is called
ratified if it is not yet
completed by consummation;

ratified and consummated if
there has taken place be-
tween the parties the conjugal
act to which the matrimonial
contract is by its nature
ordained and by which the
spouses become one flesh.

67 Cf. Codex Juris Canonici, c. 1015, §§1, 2 (emphasis added). Cf. Commentaries: H.A. Ayrinhac, Marriage Legislation in the New Code of Canon Law (1917), p. 8-10. G. Casoria, op. cit., p. 43-58. P. Cerato, Matrimonium a codice I.C. integre desumptum; pontificiae Com. et SS. Congregationum responsis et decretis huiusque datis adnotationibus et factorum speciebus locupletatur, p. 5-7. P. Gasparri, Tractatus canonicus de matrimonio cura et studio Petri Card. Gasparri concinnatus, v. I, p. 37-42. I. Gordon, De processu super rato, v. I, p. 5-7. E.J. Regatillo, Interpretatio et iurisprudencia C.I.C., p. 402-403.

§2. Celebrato matrimonio, si coniuges simul cohabitaverint, praesumitur consummatio, donec contrarium probetur.

§2. Once marriage has been celebrated, if the parties have cohabited, the consummation of marriage is presumed, until the contrary is proven.

The terms "ratified" and "ratified and consummated" require a brief explanation. A ratified marriage (matrimonium ratum) is a marriage between baptized persons, which is both valid and sacramental, but which has not been followed by the normal sexual act suitable in itself for generation.⁶⁸ A ratified and consummated marriage (matrimonium ratum et consummatum) is the valid, sacramental marriage of baptized persons, who have sealed the marriage contract with an act of normal conjugal intercourse in itself suitable for generation. The common understanding of the consummation of marriage requires copula perfecta or normal sexual intercourse accompanied by semination in the vagina. It excludes onanism, imperfect acts, and artificial fecundation. The consummation of marriage does not require conception.⁶⁹

The second paragraph of canon 1015 simply states that if the married couple live together after the ceremony, the law presumes that they have consummated their union, until

68 Cf. I. Gordon, op. cit., p. 5-6.

69 Cf. H.A. Ayrinhac, op. cit., p. 9.

the contrary is proven. This is an example of a legal presumption, which will yield to contrary proof. An example of such contrary proof would be a medical document attesting that the wife remains a virgin in the physical sense despite cohabitation and even attempts at intercourse.⁷⁰ Nor, as Regatillo points out, does the birth of a child necessarily prove the marriage has been consummated in the canonical sense. A woman afflicted with vaginism may be able to conceive and bear children and yet be incapable of copula consummative of marriage.⁷¹

2. The Notion of Conjugal Copula
Consummative of Marriage: its
Elements and its Effects.

The notion of conjugal copula consummative of marriage is taken up here to clarify further canon 1015, §1, of the Code, and to integrate the physical aspects of consummation with its psychological elements. A short exposition of the effects of marital consummation will also be given by way of completing the juridical notion.

70 Cf. ibid.

71 Cf. E.F. Regatillo, op. cit., p. 402-403.

Traditionally, conjugal copula consummative of marriage has been defined: "the introduction in the ordinary way of the male copulatory member into the vagina of the woman with the deposition therein of the male semen".⁷² And commentators usually elaborate on the following:

a) The Physical Elements of Copula.⁷³ - On the part of the husband, these are: the erection of the male copulatory organ, its penetration into the vagina, that is through the hymen and into the vaginal canal at least partially; semination within the vagina (ordinary semination is required, prescinding from the origin and nature of the ejaculate, since it is not certain that testicular semen is required).⁷⁴

On the part of the wife, the physical elements are the receiving of the male organ in the vagina itself as a result of posthymeneal penetration and the consequent

72 L. Azzolini, op. cit., p. 329.

73 Cf. I. Gordon, op. cit., p. 93-97. Cf. U. Navarrete, "De notione et effectibus consummationis matrimonii", in Per., 59(1970), p. 623-635.

74 Cf. I. Gordon, op. cit., p. 93-95 (quotes Navarrete extensively). Cf. U. Navarrete, loc. cit., p. 628-634.

reception of the ejaculate in the vagina. It is not necessary for the consummation of the marriage that the wife experience orgasm.⁷⁵

b) Psychological Elements of Copula.⁷⁶ - In speaking of the psychological elements required in order that copula be consummative of marriage, one must avoid extolling or exaggerating them to the extent of ignoring the anatomical elements almost completely as do certain modern writers. On the other hand, some writers denied the relevance of the psychological elements entirely, as did Cappello, when he wrote:

75 Cf. U. Navarrete, loc. cit., p. 634-635.

76 Cf. I. Gordon, op. cit., p. 98-102. Cf. U. Navarrete, loc. cit., p. 636-645. Additional references: Cf. A.E. Del Corpo, "Actus hominis et actus humanus in consummatione matrimonii", in M.E., 83(1958), p. 303-313. Del Corpo, in a reply to the article by Marccone which is indicated below, holds that the act of consummation is not a juridical act, but a juridical event or fact, and so as long as the physical elements of conjugal copula are present, marriage can be consummated even without a deliberate act of the will and consciousness. In his words: "recta opinio quae ad matrimonii consummationem requirit ut tantummodo essentialia copulae elementa ponantur, etiamsi absque conscientia et voluntate," p. 313. Cf. J. Marccone, "An matrimonium consummetur actione tantum hominis", in M.E., 82(1957), p. 631-656. Marccone proposes the thesis that since the act of consummation is a juridical act, it must necessarily be a deliberate human act. As he says: "non quaevis commixtio corporum inter coniuges habita consummet matrimonium, sed ea sola quam comitatur voluntas, saltem sciens, viri et uxoris inter se rem habentium," p. 634.

The consummation of marriage postulates only the external fact of perfect natural copula, whether this takes place by a human act or other means, whether it is posited freely and knowingly or under duress and inadvertently, whether justly or unjustly. Wherefore a spouse can consummate the marriage while in a state of drunkenness.⁷⁷

Assuming the presence of the physical elements, the following psychological elements seem to be sufficient for copula consummative of marriage:

- the copula must be a human act: since the consummation of marriage produces serious theological and juridical effects, it must be placed by a human person acting as such, namely with the advertence of the reason and freedom of the will at the time consummation is taking place. The act must be placed with an actual intention or at least a virtual intention (intention placed in the past and exercising an influence on a present act), so that such an act could not be placed by a sleeping or drunken person.⁷⁸

- it must be placed without physical violence: if a party is coerced by physical force to submit to sexual relations, such an act would not consummate a marriage because

⁷⁷ Cf. F. Cappello, De Matrimonio, p. 356-357. Also quoted in U. Navarrete, loc. cit., p. 636.

⁷⁸ Cf. U. Navarrete, loc. cit., p. 637-638.

it lacks the freedom of the will necessary for a truly human act.⁷⁹ With respect to copula which takes place as a result of moral coercion or fear, it is questionable whether the person so influenced is acting with the liberty required for marital consummation as a human act. According to canon 103, §2, "Acts placed out of grave and unjust fear or from fraud are valid, unless the law expressly provides otherwise /.../."⁸⁰ The law has in fact provided that grave and unjust fear inspired from without can invalidate marriage (canon 1087), noviceship (canon 542), religious profession (canon 572), and so forth. It seems logical that when there is a question of marital consummation, which has the serious effect of rendering marriage absolutely indissoluble (canon 1118), the persons involved should be free from either physical force or moral coercion due to fear or other causes.

- it must be intended as a conjugal act ("debet 'animo maritali' poni"): the copula must be intended as conjugal and not as an act of fornication. Thus, if someone

79 Cf. ibid., p. 638.

80 C.I.C. 103, §2. "Actus positi ex metu gravi et iniuste incusso vel ex dolo, valent, nisi aliud iure caveatur /.../."

has relations with his wife and at the same time thinks she is someone else (e.g., his wife's twin sister), he would not consummate his marriage. The reason is that that sexual act, although a human act with respect to carnal copulation, is not a human act with respect to conjugal copulation, which in the case mentioned is neither adverted to nor intended by the free will.⁸¹

c) The Effects of the Consummation of Marriage.⁸²

- If the physical and psychological elements necessary to copula consummative of marriage are present, then it may be asked what are precisely the effects of such consummation. There are two principal effects, of which one is theological and one juridical. Of the theological effect, Navarrete writes:

Consummation, therefore, confers on Christian marriage the power of 'fully and perfectly' signifying the marriage of charity between Christ and the Church. This effect can be rightly considered as the first effect of consummation and is of the theological order.⁸³

81 Cf. U. Navarrete, loc. cit., p. 643.

82 Cf. ibid., p. 657-660. Cf. I. Gordon, op. cit., p. 108-109.

83 U. Navarrete, loc. cit., p. 656-657.

Theologians and canonists as well as the Magisterium of the Church itself unanimously teach that the perfect representation of the mystical marriage between Christ and the Church is found only in the ratified marriage perfected by consummation.⁸⁴

And taking up the subject of the effect of consummation in the juridical order, Navarrete expresses this opinion on the subject:

In the juridical order, consummation confers on the ratified marriage the seal of absolute indissolubility. Therefore, the ratified and consummated marriage cannot be dissolved by any human power other than death, not even by the vicarious or ministerial power of the Roman Pontiff (cf. c. 1118). This indissolubility is not a norm of the positive law of the Church from which in fact the Church has never digressed - as some have recently begun to affirm -, but it is a norm of divine law from which the Church may not deviate.⁸⁵

It will be noted that both the theological and juridical effects of consummation find their rationale or foundation in the fact that, by consummating their marriage, the spouses become "one flesh" (Gen. 2,24; Mt. 19,6; Mk., 10,8). In fact this becoming "one flesh" could be looked

84 Cf. ibid.

85 U. Navarrete, loc. cit., p. 658. Cf. Idem, "Indissolubilitas matrimonii rati et consummati: Opiniones recentiores et observationes", in Per., 58(1969), p. 415-489.

upon as the primordial effect of consummation, which in turn includes several dimensions among which is the theological effect of the perfect symbolization of the marriage between Christ and the Church, and the juridical effect of the absolute irrescindibility of the conjugal covenant.⁸⁶

C. Post-Code Documents on the Consummation
of Marriage and Related Problems.

The documents following the Code represent a further development (1923-1972) in the procedural law for cases of impotence and nonconsummation. It should be remarked that the Code of Canon Law entrusted the competency over cases of nonconsummation of marriage to the Sacred Congregation for the Discipline of the Sacraments (canon 249, §3).⁸⁷ As will be recalled, the Sacred Congregation of the Council and the Sacred Congregation of the Holy Office had previously issued instructions on the hearing of such cases in 1840 and 1858 respectively. However, the Holy Office was to intervene again on June 12, 1942, when it issued the Decree

86 Cf. U. Navarrete, "De notione et effectibus consummationis matrimonii", in Per., 59(1970), p. 659-660.

87 C.I.C. 249, §3. "Ipsa /S.C. Sacr.7 cognoscit quoque et exclusive de facto inconsummationis matrimonii et de existentia causarum ad dispensationem concedendam, nec non de iis omnibus quae cum his sunt connexa."

De quibusdam cautelis, concerning precautions to be taken in cases of impotence and nonconsummation. This same Sacred Congregation would also issue responses concerning consummation on March 1, 1941, and on February 3, 1949.

1. Decree "Catholica doctrina", and Norms "Regulae servandae in processibus super matrimonio rato et non consummato", Sacred Congregation of the Discipline of the Sacraments, May 7, 1923.⁸⁸

The study of the Decree Catholica doctrina (Catholic doctrine) will serve as a basis for a survey of the norms found in the Regulae servandae.

The Decree

The decree begins by restating the Catholic teaching found in Canon 1119 of the Code of Canon Law, namely:

⁸⁸ Cf. A.A.S., 15(1923), p. 389-413. Cf. S.C. Sacr., Instructio de quibusdam emendationibus circa normas in processu super matrimonio rato et non consummato servandis cum adnexis peculiaribus documentis ad rem attinentibus, Rome, Typis Polyglottis Vaticanis, 1972, p. 32-52.

A nonconsummated marriage between two baptized persons or between a baptized person and a non-baptized person, is dissolved both by the law itself through solemn religious profession, and by a dispensation from the Apostolic See granted for a just cause at the request of both parties or at the request of one party even against the will of the other.⁸⁹

The decree goes on to enumerate the necessary conditions for the granting of such a dispensation: a marriage which in reality has not been consummated, and a just cause for the concession of the dispensation.⁹⁰

Although the Roman Pontiff alone is competent to grant the dispensation, the Holy See customarily confides the instruction of the process to Ordinaries of places, who will see to the investigation and the proof of the non-consummation of the marriage and the existence of a legitimate cause for the dispensation. The form of procedure is administrative rather than contentious or judicial, that is, there is question of the Holy See's granting a favour on the

89 C.I.C. 1119. "Matrimonium non consummatum inter baptizatos vel inter partem baptizatam et partem non baptizatam, dissolvitur tum ipso iure per sollemnem professionem religiosam, tum per dispensationem a Sede Apostolica ex iusta causa concessam, utraque parte rogante vel alterutra, etsi altera sit invita." S.C. Sacr., Instructio..., p. 32.

90 Cf. S.C. Sacr., op. cit., p. 32.

presentation of a petition by one or both parties to the marriage rather than question of the settlement of a conflict of rights. Nonetheless, the search for the objective truth is to be carried out as assiduously as in the judicial cases. Moreover, the judge is to remind the parties and everyone taking part in the process, that a dispensation obtained as a result of fraud or a failure to uncover the true facts of the case (for example, if the marriage has really been consummated) is invalid, and any subsequent marriage attempted by the parties would likewise be invalid.⁹¹

The decree closes by referring to the appended rules, the purpose of which is to enable Ordinaries of places to conduct the process more securely and expeditiously.⁹²

The Appendix to the Decree

The appendix re-emphasizes that there are two requirements for the validity of the pontifical dispensation: namely, that the marriage really be nonconsummated, and that there be a just cause for granting the dispensation. The following rules are therefore to be considered as an aid in

91 Cf. ibid., p. 32-33.

92 Cf. ibid., p. 33.

making sure the two requirements are present. With respect to the just cause exacted for the concession of the favour, it is to be understood as a just cause, which takes into account the particular factual circumstances of persons in a determinate case. Consequently, one and the same cause may be worthy of consideration in one case, but in another case, because of different circumstances, be not just or proportionately serious (non iusta seu proportionaliter non gravis). So the cause required here (as in c. 1119) is a just cause in the concrete or a proportionately grave cause.⁹³

The appendix also mentions that in dispensing from a ratified and nonconsummated marriage the Roman Pontiff makes use of his ministerial or extraordinary power (extraordinaria seu ministeriali, uti aiunt, utitur potestate). This presupposes that the salvation of souls cannot be usefully and efficaciously worked out otherwise than by granting the dispensation. Wherefore the judge must make every effort to effect a reconciliation of the parties before the case begins or even at any stage before it is concluded.⁹⁴

93 Cf. ibid.

94 Cf. ibid., p. 34.

The Norms - "Regulae Servandae"⁹⁵

The norms comprise fifteen short chapters which lay down very detailed rules for the instruction of the case. They resemble the stipulations of the pre-Code documents Judex ad hoc deputatus, 1858, and Quemadmodum matrimonii foedus, 1883. However, the Regulae servandae of 1923 are noteworthy in that they represent a further refinement of procedural law meant to facilitate the work of the diocesan curiae.

The first chapter of the Regulae servandae deals with the competent forum for ratum cases,⁹⁶ restating the exclusive competency of the Congregation of the Sacraments in such cases as per canon 249, §3, and canon 1962.⁹⁷ Only the spouses have the right to petition for a dispensation from a ratified and nonconsummated marriage. The petition is addressed to the Holy Father.⁹⁸ The Congregation of the

95 Cf. ibid., p. 34-52.

96 Cf. ibid., p. 34.

97 Cf. footnote 87; also, S.C. Sacr., op. cit., p. 34, l.

98 Cf. ibid., p. 34-35.

Sacraments authorizes the instructional phase of the case in the diocesan curia, and a tribunal is set up, consisting of a judge, a defender of the bond, and a notary.⁹⁹ The duties of these officers of the tribunal are set down in minute detail.¹⁰⁰

Rules are then given for the citation of the parties and the witnesses,¹⁰¹ and their interrogation,¹⁰² with a special chapter on the verbal examination of the spouses.¹⁰³ Again, emphasis is placed on the calling of the septimae manus witnesses, who are to testify to the probity and veracity of the spouses,¹⁰⁴ similarly to what was laid down in the Instruction, Cum moneat Glossa, August 22, 1840.¹⁰⁵ The interrogation of the septimae manus witnesses is dealt with at length,¹⁰⁶ as is also the questioning of other witnesses cited in consideration of their knowledge of the circumstances of the case.¹⁰⁷

99 Cf. ibid., p. 36-37.

100 Cf. ibid., p. 37-39.

101 Cf. ibid., p. 40-41.

102 Cf. ibid., p. 41-43.

103 Cf. ibid., p. 43-44.

104 Cf. ibid., p. 44-45.

105 Cf. S.C. Conc., Instr. Cum moneat Glossa, August 22, 1840, in Pietro Gasparri, Fontes C.I.C., VI, p. 347.

106 Cf. S.C. Sacr., op. cit., p. 45-46.

107 Cf. ibid., p. 46.

The physical examination of the wife, to be carried out by specialists, is required in nonconsummation cases, unless it is obvious that the examination would be useless, for example, in the case of a widow. The husband must also be examined medically, when nonconsummation of marriage is attributed to his impotency.¹⁰⁸ Once the instructional phase of the case is completed on the local level, the acts, along with the votum of the bishop, are to be forwarded to the Congregation of the Sacraments, which will study the file and then refer it to the Holy Father for a final decision.¹⁰⁹ The dispensation from a ratified and nonconsummated marriage is directly conceded by the Pope, and the rescript is forwarded by the Congregation of the Sacraments to the party or parties requesting the favour.¹¹⁰

The instruction and norms of 1923 will remain in effect until 1972, a space of nearly one half century. As such, they will serve as a most useful guide for the preparation of cases of nonconsummation of marriage.

108 Cf. ibid., p. 48-50.

109 Cf. ibid., p. 50-51.

110 Cf. ibid., p. 51-52.

2. Norms "Ad praecavendam dolosam personarum substitutionem", Sacred Congregation of the Discipline of the Sacraments, March 27, 1929.¹¹¹

As the title implies, the Norms Ad praecavendam are meant to prevent the fraudulent substitution of one person for another in cases dealing with the nonconsummation of marriage. The implication in the opening paragraph is that such substitution has already been attempted in larger cities.¹¹² In future, the judge in such cases is to forestall substitution by asking for ecclesiastical or civil documents, photographs, and the like for the purposes of identifying parties, witnesses, experts, and others involved in the case, who are not personally known to him.¹¹³ Physicians are to make sure they are examining the parties to the case and not substitutes.¹¹⁴

The document also outlines the manner of proceeding against those who succeed in the fraudulent substitution.

¹¹¹ Cf. A.A.S., 21(1929), p. 490-493. Cf. S.C. Sacr., Instructio de quibusdam emendationibus... cum adnexis peculiaribus documentis ad rem attinentibus, p. 53-55.

¹¹² Cf. S.C. Sacr., op. cit., p. 53.

¹¹³ Cf. ibid.

¹¹⁴ Cf. ibid., p. 54.

If the fraud is detected during the process, then a number of options are open to the judge: e.g., if both petitioner and respondent have consented to the fraudulent substitution, then the judge may decree the process at an end; if only one of the parties has consented to the fraud, the judge may decide to continue the process after hearing the defender of the bond and the other party.¹¹⁵

If the fraudulent substitution is discovered only after the conclusion of the case but before the acts have been forwarded to the Holy See, the Ordinary shall decide, after hearing the judge and defender of the bond, whether the whole process has lost its effect, or a part of it, and so forth. In the event that the acts are later forwarded to the Holy See, the fraudulent substitution must be mentioned.¹¹⁶

When the fraud is discovered only after the acts have been transmitted to the Sacred Congregation, the Ordinary, having heard the judge and the defender of the bond, must inform the Congregation at once.¹¹⁷

115 Cf. ibid.

116 Cf. ibid., p. 54-55.

117 Cf. ibid., p. 55.

3. Instruction "Quo facilius", Sacred
Congregation for the Oriental Church,
June 10, 1935.¹¹⁸

The Instruction Quo facilius, originating with the Sacred Congregation for the Oriental Church, is addressed to the Ordinaries of the Oriental Rites. Its purpose is to facilitate the processing of cases of ratified and non-consummated marriages. It is comparable to the decree and norms issued on May 7, 1923, for the same purpose by the Sacred Congregation of the Sacraments.¹¹⁹

The norms are divided into six sections only and contain in an abbreviated form the directives contained in the norms of 1923. The petition is forwarded to the Congregation for the Oriental Church,¹²⁰ which presumably authorizes the local inquiry. The document mentions only that the Apostolic See gives authorization to process the case.¹²¹

Despite the similarity between the norms of 1923 and those of 1935, there are three interesting distinctions: - the norms of 1935 make no mention of septimae manus witnesses,

¹¹⁸ Cf. A.A.S., 27(1935), p. 333-340. Cf. S.C. Sacr., op. cit., in footnote 111, p. 58-63.

¹¹⁹ Cf. footnote 88.

¹²⁰ Cf. S.C. Sacr., op. cit., p. 58, section I.

¹²¹ Cf. ibid., p. 59.

but speak simply of at least three testes credibilitatis (witnesses of credibility);¹²² they specify that, when the spouses are being questioned, they should be asked if they used means to inhibit the completion of copula or to prevent children;¹²³ and, they even envisage the possibility of a lay notary if no suitable priest is available.¹²⁴ However, the substance of the 1935 instruction as a whole is an abbreviated version of the norms of 1923.

4. Instruction "Provida Mater Ecclesia",
Sacred Congregation of the Sacraments,
August 15, 1936.¹²⁵

The purpose of Provida Mater is to facilitate the processing of marriage nullity cases by diocesan tribunals.¹²⁶ Article 206 of the instruction is of interest to the present study in that it stipulates what is to be done in the three following instances: - if a case is being tried on the grounds of impotence, and there emerges proof rather of the

122 Cf. ibid., section II.

123 Cf. ibid., p. 60.

124 Cf. ibid., p. 63, section V.

125 Cf. A.A.S., 28(1936), p. 312-370.

126 Cf. ibid.

nonconsummation of the marriage, then at the request of one or both spouses, the entire file, along with the votum of the tribunal, is to be forwarded to the Congregation of the Sacraments; - if the proofs of nonconsummation are as yet inconclusive in the above case, they are to be completed locally according to the norms of 1923, and the file on the case, along with the votum of the Bishop and the remarks of the defender of the bond, are to be forwarded to the Sacred Congregation; - if the case is being tried on grounds other than impotence and there emerges a very probable doubt of nonconsummation, the procedure is as in the second instance described above.¹²⁷

5. Letter "In plenariis", Sacred Congregation of the Discipline of the Sacraments, January 5, 1937.¹²⁸

The Letter In plenariis has as its purpose to remind defenders of the bond in nonconsummation cases that it is their duty to write remarks in favour of the consummation of the marriage rather than to write simply in favour of the

¹²⁷ Cf. ibid., p. 353-354.

¹²⁸ Cf. S.C. Sacr., Instructio de quibusdam emendationibus... cum adnexis peculiaribus documentis ad rem attinentibus, p. 65 (this letter was not published in A.A.S.).

objective truth in the case (pro rei veritate). The letter states that Bishops alone enjoy the privilege of writing a votum "pro rei veritate".¹²⁹

6. Reply "De copula perfecta et de consummatione matrimonii", Sacred Congregation of the Holy Office, March 1, 1941.

The reply of March 1, 1941, concerns the requirements for complete copula and the consummation of marriage. It adds further precisions to what was deduced from canon 1015 concerning the physical elements of consummation,¹³⁰ and is worded as follows:

D. Utrum ad copulam perfectam et ad consummationem matrimonii requiratur et sufficiat, ut vir aliquo saltem modo, etsi imperfecte, vaginam penetret atque immediate in ea seminationem saltem partialem, naturali modo, peragat an tanta vaginae penetratio requiratur, ut glans tota intra vaginam versetur.

Doubt. Whether for complete copula and for the consummation of marriage it is required and sufficient, that the husband in some way, even imperfectly, penetrate the vagina and immediately effect, in a natural way, at least partial semination therein, or whether penetration of the vagina is required in such manner that the entire glans is introduced into the vagina.

R. Affirmative ad primam partem; negative ad secundam.¹³¹

Response. In the affirmative to the first part; in the negative to the second part.

¹²⁹ Cf. ibid., second paragraph.

¹³⁰ Cf. footnotes 73 to 75 above.

¹³¹ Cf. S.C. Sacr., op. cit., p. 70 (this reply does not appear in A.A.S.).

The response, therefore, makes it clear that, on the part of the husband, imperfect penetration of the vagina (commonly understood as posthymeneal penetration), and at least partial ejaculation of the semen in a natural way within the vagina itself, are required and sufficient for marital consummation.¹³²

Since the response mentions "semination...in a natural way" (seminationem...naturali modo), it seems to rule out consummation by way of artificial insemination.¹³³ Nor would intercourse where the husband uses a condom seem to suffice to consummate the marriage, since there is no ejaculation immediately into the vagina but into the condomic sheath.

The second part of the response implies that the introduction of the entire glans penis into the vagina is not necessary. It is commonly held that there must be at least some penetration beyond the hymen, so that ejaculation

¹³² Cf. L. Azzolini, op. cit., p. 329. Cf. R. Bidagor, "Quelques remarques sur les causes matrimoniales", in A.C., 6(1958), p. 96-97. Cf. C. Holböck, Tractatus de jurisprudentia Sacrae Romanae Rotae, p. 55.

¹³³ Cf. G. Casoria, op. cit., p. 194-195. Cf. J. Creusen, "Techniques médicales et loi morale. Un discours de S.S. Pie XII aux membres du 4^{me} Congrès international des médecins catholiques", in Gregorianum, 30(1949), p. 261.

takes place within the vagina and not simply against the hymen at the vaginal orifice.¹³⁴

7. Decree "De quibusdam cautelis adhibendis in causis matrimonialibus impotentiae et inconsummationis", Sacred Congregation of the Holy Office, June 12, 1942.¹³⁵

The Decree De quibusdam cautelis outlines precautions to be taken in cases of impotence and nonconsummation of marriage. The opening paragraphs of the decree recall the necessity of juridical proof in such cases but always with the understanding that Christian modesty be safeguarded.¹³⁶ The document is made up of seven numbered paragraphs.

Paragraph (1) resumes article 86 of the Norms of 1923, which specified that the physical examination of the spouses especially of the women, could be omitted, if there had been neither time, nor place, nor means to consummate the marriage, or if there was proof that the woman was no longer a virgin.¹³⁷ The present decree then mentions that the

134 Cf. G. Casoria, op. cit., p. 195.

135 Cf. A.A.S., 34(1942), p. 200-202. Cf. S.C. Sacr., op. cit., p. 68-69.

136 Cf. S.C. Sacr., op. cit., p. 68.

137 Cf. footnote 108.

physical examination of both spouses may be omitted if, in consideration of the moral excellence of the parties and witnesses and other circumstances of the case, the Ordinary judges there is full proof of impotence or nonconsummation; the physical examination of the wife may be omitted if the prior examination of the husband has shown his incapacity to consummate the marriage.¹³⁸

The substance of paragraphs 2-6 is that, where possible, the physical examination of the woman should be confided to woman-doctors, or at least to women trained or experienced in obstetrics. In the defect of women to conduct the examination, the examining physicians may be men but only with the permission of the woman to be examined. If she refuses the examination altogether, or at least refuses the examination by men, she should be advised of the juridical consequences of her refusal, the probable impossibility of proof, and so forth.¹³⁹

The final paragraph of the decree cautions against excessive and minute descriptions in the drafting of sentences for these cases.¹⁴⁰

138 Cf. S.C. Sacr., op. cit., p. 68-69, par. 1.

139 Cf. ibid., p. 69, par. 2-6.

140 Cf. ibid., par. 7.

8. Reply "De consummatione matrimonii",
Sacred Congregation of the Holy Office,
February 3, 1949.

The Reply De consummatione matrimonii of February 3, 1949, deals with the psychological elements of marital consummation. The substance of the reply is that, if the physical elements of copula are present, then marriage is to be considered consummated even if aphrodisiacs are used which take away the use of reason. The text of the reply is as follows:

D. An matrimonium haberi debeat
inconsummatum si essentialia
copulae elementa posita sint a
coniuge qui ad unionem sexualem
non pervenit nisi adhibitis
mediis aphrodisiacis, rationis
usum actu intercipientibus.

Doubt. Whether a marriage
is to be considered as un-
consummated if the essential
elements of copula were
placed by a spouse, who
achieved sexual union only
by the use of aphrodisiacs
depriving him of the use
of reason.

R. Negative.¹⁴¹

Response. In the negative.

The reply has an interesting origin. The case of a man, who was able to have sexual relations with his wife on one occasion only after taking an exaggerated dosage of the aphrodisiacal drug Yohimbina, was tried by the Sacred Roman Rota on the grounds of impotence. A sentence c. Pecorari,

¹⁴¹ Cf. S.C. Sacr., op. cit., p. 70 (this reply does not appear in A.A.S.).

October 15, 1947,¹⁴² was negative but recommended to the Holy Father that the dispensation for a ratified and nonconsummated marriage be given, the argument being that the sole act of copula in question was neither natural nor human. Pius XII, however, preferred to confide the case to the Holy Office, which subsequently issued the reply given above and ordered that the sentence c. Pecorari never be published.¹⁴³ Furthermore, on May 9, 1951, the same Sacred Congregation stated that the case could not again be tried on the grounds of the impotence of the husband.¹⁴⁴

¹⁴² Unpublished sentence, reported only as Causa Veronen 61/47 in G. St-Hilaire, op. cit., p. 231. Although extracts from the sentence appear in R. Szenwic, "L'impotenza nella recente giurisprudenza rotale", in I.D.E., 65(1954)II, p. 43, 59, and 133, they do not touch upon the facts of the case. Cf., also, D. Lazzarato, "De copula artificiosa semel tantum peracta", in E.I.C., 4(1948), p. 470.

¹⁴³ Cf. G. St-Hilaire, op. cit., p. 231. Cf., also, the following commentaries on the reply of February 3, 1949: F. Hurth, "Dubium circa consummationem matrimonii", in Per., 38(1949), p. 220-227; D. Lazzarato, loc. cit., in E.I.C., 41(1948), p. 470-472; F. Lodos, "De matrimonio in ebrietate aphrodisiaca consummato", in S.T., 38(1950), p. 92-94. Cf. S.R.R.Dec., 47(1955), c. Pasquazi, June 7, 1955, p. 488-495, esp. p. 490; S.R.R.Dec., 49(1957), c. Felici, March 26, 1957, p. 235-245, esp. p. 241.

¹⁴⁴ Cf. S.R.R. Dec., 49(1957), c. Felici, March 26, 1957, p. 241.

It seems that the decision of the Holy Office leads only to the conclusion that actual advertence at the moment of first copula is not required for marital consummation. This does not preclude the inference that a human act, which is at least voluntary in its cause, is required. The act of intercourse in question seems to have been at least virtually voluntary in that the husband had voluntarily placed its cause, in a previous human act, with full advertence to its intended effect. In short, he had taken the aphrodisiac for the specific purpose of effecting consummation.¹⁴⁵

It must also be recalled that the full facts of the case, which was the occasion for the response, are not generally known. The majority of commentaries on the response give very few details, leading us to believe that authors are unable or unwilling to supply further information. It would be most interesting, for example, to have a medical and psychiatric evaluation of the precise effects of the aphrodisiac used. Only then would we be in a position to estimate to what extent the husband actually lacked the use

¹⁴⁵ Cf. D. Lazzarato, loc. cit., p. 471; F. Lodos, loc. cit., p. 93; L.L. McReavy, "Consummation of Marriage - 'Actus humanus' Required?", in The Clergy Review, 44(1959), p. 37-40.

of reason at the time of consummation. In one summary of the case, for example, the wife states that, immediately after intercourse, her husband said he would not use the drug again.¹⁴⁶ This would seem to imply that he had not been completely deprived of the use of reason even during copula. In any event, the reply of 1949 is to be considered as an important adjunct to what was said earlier regarding the psychological elements of copula.¹⁴⁷

9. Motu Proprio "Crebrae allatae", Pius XII, February 22, 1949.

The Motu proprio Crebrae allatae deals with marriage law for the Oriental Churches. Canon 108 of this legislation, which is substantially the same as canon 1119 of the Code of Canon Law, states that a nonconsummated marriage between baptized persons, or between a baptized and a non-baptized person, is dissolved by the law itself through major or solemn religious profession, or by a dispensation from the Roman Pontiff conceded for a just cause at the request of both

¹⁴⁶ Cf. D. Lazzarato, loc. cit., p. 470.

¹⁴⁷ Cf. footnote 76 above.

parties or one party, even if the other party be unwilling.¹⁴⁸

10. Motu Proprio "Sollicitudinem nostram",
Pius XII, January 6, 1950.

The Motu proprio Sollicitudinem nostram concerns procedural law for Oriental Churches. Canons 470, 471, 474-477, 480, 482-488, and 492 codify the directives for dealing with cases of nonconsummation of marriage.¹⁴⁹ On the whole, these canons repeat what was laid down by the Instruction Quo facilius, June 10, 1935,¹⁵⁰ and, almost word for word, canons 1962-1969, 1973, 1975-1978, and 1985 of the Code of Canon Law. The motu proprio really adds nothing new to what we have already seen pertinent to the processing of cases of impotence or nonconsummation of marriage.

11. Instruction "Instructionem quo facilius",
Sacred Congregation for the Oriental
Church, July 13, 1953.¹⁵¹

The Instruction Instructionem quo facilius updates the rules for drawing up the process for a dispensation from

¹⁴⁸ Cf. A.A.S., 31(1949), p. 112-113. Cf. S.C. Sacr., op. cit., p. 25. Cf. C.I.C., 1119, footnote 89.

¹⁴⁹ Cf. A.A.S., 22(1950), p. 100-105.

¹⁵⁰ Cf. footnote 118.

¹⁵¹ Cf. S.C. Sacr., op. cit., p. 71-77 (the document was not published in A.A.S.).

a ratified and nonconsummated marriage.¹⁵² The introduction states that the Sacred Congregation felt it necessary to adapt the directives of the Instruction Quo facilius, issued by it in 1935 and dealing with the procedure for non-consummation cases, to the prescriptions of the canons of the Motu proprio Sollicitudinem nostram, January 6, 1950, which treat of the same subject matter.¹⁵³

The document is divided into six sections under the same headings as Quo facilius. It includes frequent quotes from the canons of Sollicitudinem nostram. The result is a synthesis of the two earlier documents, which would certainly facilitate consultation by those concerned, but which by no means breaks any new ground as far as procedural law is concerned.

12. Motu Proprio "Cleri sanctitati", Pius XII, July 11, 1957.

The Motu proprio Cleri sanctitati is addressed to the hierarchy of the Oriental Churches and comprises the canonical legislation on "persons in the Oriental Churches"

152 Cf. ibid., p. 71.

153 Cf. ibid.

(De personis pro Ecclesiis Orientalibus). Canon 196, §3, is of interest to us and reads:

It (the Congregation of the Sacraments), and it exclusively, also concerns itself with the fact of the nonconsummation of marriage, with the existence of causes for granting a dispensation /.../.¹⁵⁴

Previous documents, such as the Instruction Quo facilius, June 13, 1953, confided such cases to the Sacred Congregation for the Oriental Church.¹⁵⁵

13. Apostolic Constitution "Regimini Ecclesiae Universae", Paul VI, August 15, 1967.

Chapter IV, number 56, of Regimini Ecclesiae Universae reiterates the exclusive competency of the Sacred Congregation of the Sacraments with respect to all cases dealing with the nonconsummation of marriage. The field of competency includes nonconsummated marriages between two baptized Catholics, between a Catholic and a baptized non-Catholic, and also between two baptized non-Catholics, regardless of whether they belong to the Latin or Oriental rites.¹⁵⁶

¹⁵⁴ A.A.S., 39(1957), p. 491. Canon 196, §3. "Ipsa /Congregatio de disciplina Sacramentorum/ quoque et exclusive de facto inconsummationis matrimonii, de existentia causarum ad dispensationem concedendam /.../."¹⁵⁴

¹⁵⁵ Cf. footnotes 118 and 151.

¹⁵⁶ Cf. Paul VI, Apost. Const. Regimini Ecclesiae Universae, August 15, 1967, in A.A.S., 59(1967), p. 903-904. Caput IV, 56, §1. "Ipsa cognoscit quoque et sola de facto inconsummationis matrimonii, etiam inter partem catholicam et acatholicam baptizatam necnon inter partes baptizatas acatholicas, sive pertineant ad ritum latinum sive ad ritum orientalem /.../."¹⁵⁶

On July 14, 1973, Pope Paul VI extended the competency of the same Sacred Congregation to cases of non-consummation of marriage where one of the parties was unbaptized.¹⁵⁷

14. Instruction "Dispensationis matrimonii rati", Sacred Congregation for the Discipline of the Sacraments, March 7, 1972.¹⁵⁸

The Instruction Dispensationis matrimonii rati is subtitled "Certain Emendations in the Norms for the Process concerning Ratified and Nonconsummated Marriage", and does in fact intend to effect some changes to facilitate the processing of cases of nonconsummation of marriage. The emendations are motivated by the present increase in petitions received by the Apostolic See for the dissolution of a ratum but nonconsummated marriage, as also by the desire to foster the good of souls through a more careful examination and definition of these processes.¹⁵⁹

¹⁵⁷ Cf. A.A.S., 65(1973), p. 602. Cf. C. Lefebvre, "Actes récents du Saint-Siège: chronique générale (1973-1974)", in A.C., 19(1975), p. 167-168.

¹⁵⁸ Cf. S.C. Sacr., Instr., Dispensationis matrimonii rati, March 7, 1972, in A.A.S., 64(1972), p. 244-252. Cf. S.C. Sacr., De quibusdam emendationibus...cum adnexis peculiaribus documentis ad rem attinentibus, p. 11-18. Cf. M. Bonnet, "La nouvelle instruction 'super matrimonio rato et non consummato'", in E.I.C., 31(1976), p. 93-115. Cf. M. Desdouts, "La dispense du mariage non consommé", in L'ami du clergé, 82(1972), p. 617-620.

¹⁵⁹ Cf. S.C. Sacr., op. cit., p. 11.

The document, after a short introduction, is divided into three main sections: I) the General Faculty of Conducting the Process Super Rato et Non Consummato; II) the Instruction of the Case and the Preparation of the Acts; and, III) Clauses attached to the Rescript of Dispensation.

For the last several years, the Holy See has published a number of documents modifying or simplifying the canonical legislation so as better to adapt it to the needs of the members of the Church. Generally, these documents have a provisory character and are promulgated ad experimentum. For the most part they will probably be corrected, if necessary, and inserted in the future code. It is in this spirit that the Sacred Congregation of the Sacraments has prepared the present instruction.¹⁶⁰

The first question that may come to mind is: to whom is the document addressed? The answer is given in the last paragraph of the instruction: it is to be observed properly and rightly by all bishops of the Latin and Oriental rites and others concerned.¹⁶¹ This is a result of the enlarged

160 Cf. M. Bonnet, loc. cit., p. 93.

161 Cf. Instr., in fine, in A.A.S., 64(1972), p. 252.

competency of the Sacred Congregation of the Sacraments, following the constitution Regimini Ecclesiae Universae, August 15, 1967, and a subsequent papal decision, July 14, 1973.¹⁶²

The instruction modifies or completes the existing legislation for the processing of ratum cases on several points. Consequently, laws and decrees antedating this instruction will be valid if and inasmuch as they coincide with the prescriptions of the present instruction. The document became effective June 30, 1972.¹⁶³

Changes Introduced by the Instruction of 1972. - On the one hand, these concern: a) the conditions in which ratum cases can be introduced, and, on the other, b) certain norms established for the instruction of such cases.

a) The Introduction of "Ratum" Cases: Bishops are given the general faculty, for their own territory, of conducting the instructional phase of the process. They will enjoy such faculty from the day the instruction becomes effective until the promulgation of the revised Code of Canon Law.¹⁶⁴ Previously, they had to seek the prior

¹⁶² Cf. footnote 157. Cf. C.L.D., Suppl. 1973, can. 249.

¹⁶³ Cf. M. Bonnet, loc. cit., p. 94-95.

¹⁶⁴ Cf. Instr., I (preamble), in A.A.S., 64(1972), p. 245.

permission of the Holy See before beginning to instruct the case.¹⁶⁵

If a certain diocese lacks the trained personnel for the proper instruction of a ratum case, the Bishop may confide the task to the officers of the regional, provincial, interdiocesan, or interritual tribunal or of the tribunal of a nearby diocese or eparchy, which is capable of undertaking the process.¹⁶⁶

The document. places only one restriction on the general faculty given the diocesan Bishop to begin the instruction of the case on his own initiative: namely, the Bishop is to refer to the Sacred Congregation complicated cases or those with special difficulties of the juridical or moral order. The Congregation will carefully weigh all the circumstances and will communicate to the Bishop the steps to be taken.¹⁶⁷ Possible difficulties could be: a conflict of competency between two Bishops equally competent, or a lack of witnesses, and, consequently, of proofs, etc.¹⁶⁸

165 Cf. footnote 96.

166 Cf. Instr., II, a) and f) in A.A.S., 64(1972), p. 248, 250.

167 Cf. ibid., I, d, p. 246.

168 Cf. M. Bonnet, loc. cit., p. 103.

If, from the examination of the petition, there arises a prudent doubt concerning the validity of the marriage, then it is up to the Bishop either to counsel the petitioner to follow the judicial order for a declaration of nullity, or to permit the process Super rato et non consummato to be conducted (provided in this last case that the petition is based on a solid and juridical foundation).¹⁶⁹ Formerly, the Sacred Congregation most often requested that the case first be tried as a nullity case while recalling that, if the nullity failed to be proven, it was possible to process the case according to the directives for ratum cases.¹⁷⁰

b) Changes in the Instruction of "Ratum" Cases: -

Although the rule that the assistance of advocates and procurators cannot be sought in ratum cases, remains in force, the parties may nevertheless use the services of counselors or experts (especially ecclesiastics). These may serve in the drawing up of petitions, in the conduct of the case, or in completing the acts of the process. Their designation whether chosen ex officio or at the request of the

169 Cf. Instr., I, e, loc. cit., p. 246-247.

170 Cf. M. Bonnet, loc. cit., p. 104.

parties, pertains to the Bishop in consultation with the defender of the bond.¹⁷¹ The function of these counselors resembles that of an advocate, but differs in many respects. In particular, these counselors have no defence or plea to present at the end of the instruction of the case.¹⁷²

The instruction makes no mention of the septimae manus witnesses as such nor does it require that the witnesses of credibility be seven in number for each side. It states simply that in nonconsummation cases both spouses must present witnesses, who can testify to their probity and especially to their truthfulness with respect to the asserted nonconsummation.¹⁷³ In this aspect, the instruction is similar to the legislation for the Oriental Churches prior to 1950. Before the new Oriental Code of 1950, their procedural law for ratum cases asked only that each spouse present at least three suitable witnesses of credibility above all exception.¹⁷⁴ However, the present instruction

171 Cf. Instr., II, e, loc. cit., p. 249.

172 Cf. M. Bonnet, loc. cit., p. 106.

173 Cf. Instr., II, b, loc. cit., p. 248.

174 Cf. Instr. Quo facilius, n. 11, in S.C. Sacr., op. cit., p. 60. Cf. M. Bonnet, loc. cit., p. 107.

does not even mention any minimum number of witnesses required, but seems to attribute more value to the quality of the witnesses rather than to their number. It states that even a few witnesses can suffice, provided their concordant testimony leads to valid proof and moral certitude.¹⁷⁵

The physical examination is to take place if necessary for juridical proof of the fact of nonconsummation. If the Bishop judges there is full proof without it, he need not insist. If the woman refuses to submit to the examination, it need not be insisted upon. Finally, patriarchal synods and episcopal conferences have the faculty to establish additional norms with regard to this inspection, taking into account local and other circumstances.¹⁷⁶

When a case is being tried on the grounds of impotence or other grounds (i.e., in view of a declaration of nullity) and there emerges proof of nonconsummation or at least a very probable doubt thereof, the acts are to be transmitted to the Sacred Congregation together with the

¹⁷⁵ Cf. Instr. Dispensationis matrimonii rati, II, b, loc. cit., p. 248. Cf. M. Bonnet, loc. cit., p. 107.

¹⁷⁶ Cf. Instr., II, c, loc. cit., p. 249.

votum of the tribunal, the votum of the Bishop, and the remarks of the defender of the bond. The vota and remarks are required in all cases of this kind.¹⁷⁷ Formerly, the votum of the Bishop and the remarks of the defender of the bond were not required when a case had been tried on the grounds of impotence and there emerged proof of nonconsummation.¹⁷⁸

In writing the votum pro rei veritate, Bishops should weigh the nature and qualities of the case in a concrete and practical manner, that is, by considering the special circumstances of the persons, the fact of the nonconsummation, and the opportuneness of the concession.¹⁷⁹

And finally, there are three other changes which are of very practical importance: the use of the tape-recorder is permitted in recording the acts;¹⁸⁰ all the procedural acts and other documents may be drawn up in the more widely used vernacular languages;¹⁸¹ the procedural acts and

177 Cf. ibid., I, e, p. 247.

178 Cf. Instr. Provida Mater, August 15, 1936, Art. 206, in A.A.S., 28(1936), p. 353-354.

179 Cf. Instr. Dispensationis matrimonii rati, II, f, loc. cit., p. 250.

180 Cf. ibid., II, d, p. 249.

181 Cf. ibid., II, g, p. 250.

documents, which are to be sent to the Congregation in three copies, may be photostatic copies with certificates of authenticity.¹⁸²

Recapitulation of Prescriptions in the Instruction of 1972, Which Were Also in Earlier Documents. These are, briefly:

- Before instructing the case, the Bishop should attempt to reconcile the parties.¹⁸³

- Only the spouses (both, or one of them even against the will of the other), may petition for the dissolution of a ratified but nonconsummated marriage. The petition is addressed to the Pope and normally should be presented to the Bishop so he may forward it to the Holy See.¹⁸⁴

- The conditions for the validity of the dispensation are the same as formerly: the actual nonconsummation of the marriage, and a just or proportionately serious cause.¹⁸⁵

- It is to be kept in mind that the moral argument carries great weight in attaining moral certitude concerning

182 Cf. ibid., II, g, p. 250-251.

183 Cf. ibid., I, c, p. 246.

184 Cf. ibid., I, b, p. 246.

185 Cf. ibid., I, f, p. 247-248.

nonconsummation. This moral certitude accrues from the concordant testimony of the parties and witnesses.¹⁸⁶

- The process is administrative, not judicial.¹⁸⁷

- Finally, according to the previous Decree of the Holy Office of June 12, 1942,¹⁸⁸ the physical examination can be omitted if, in the Bishop's judgment, proof has been sufficiently established by the moral argument alone.¹⁸⁹

The third part of the instruction deals with the diverse clauses, which may affect the rescript of a dispensation from a ratified and nonconsummated marriage.¹⁹⁰ These clauses are not new and have been used for a long time in the praxis of Congregations. However, it is the first time they have been published and accorded an official commentary.¹⁹¹

The prohibition of the remarriage of the spouses may be expressed in two ways: by the clause ad mentem (which prohibition can be removed by the Bishop after he has

186 Cf. ibid., II, b, p. 248.

187 Cf. ibid., I, a, p. 245-246.

188 Cf. footnote 138.

189 Cf. Instr. Dispensationis matrimonii rati, II, c, loc. cit., p. 249.

190 Cf. ibid., III, p. 251.

191 Cf. M. Bonnet, loc. cit., p. 114.

assured himself that the prescribed conditions in the clause have been fulfilled); by the clause vetitum (which prohibition can be removed only by recourse to the Congregation, which will give the necessary directions in each case). The vetitum is attached to the rescript only when the reason for nonconsummation is a physical or a psychic defect of major significance and seriousness. The removal of the vetitum would probably be dependent on the party's (or parties') submitting to a medical or psychological examination before being allowed to remarry. In any case, the vetitum does not constitute a diriment impediment, unless the rescript so states. Consequently, a marriage contracted before its removal would be presumed valid.¹⁹²

In analyzing the instruction of March 7, 1972, an attempt has been made to present its positive aspects, along with a commentary on the points of difference from or similarity to earlier documents. A judicious use of the instruction should facilitate the work of diocesan curiae and tribunals in their processing of ratum cases.

192 Cf. ibid.

CONCLUSION

This chapter has been devoted to the survey of ecclesiastical legislation concerning the consummation of marriage and related problems from the twelfth to the twentieth centuries. It is readily admitted that during this period there are very few documents which treat explicitly of the notion of marital consummation or its elements. In the pre-Code period, Cum frequenter of Sixtus V, issued in 1587, elucidates the notion of male organic impotence, and leads to the deduction that certain men are not permitted to marry because they cannot fulfill the physical requirements for copula consummative of marriage. The Constitution Dei miseratione, 1741, of Benedict XIV, treats briefly of consummation as related to the indissolubility of marriage. The other pre-Code documents studied deal with consummation in a negative sense in that they lay down detailed rules for the processing of nonconsummation cases.

It is true that canon 1015, §1, of the Code of Canon Law does not define marital consummation, but it implies that it is effected by the "conjugal act to which the matrimonial contract is by its nature ordained and by which husband and wife are made one flesh." The commentators on the Code do not completely agree on either the physical or psychological

elements of consummation. They differ especially on the nature of the semen required among the physical elements, and the nature of the human act among the psychological requirements.

The post-Code legislation is noteworthy first of all for two replies of the Holy Office on March 1, 1941, and February 3, 1949, which deal respectively with the degree of penetration required for consummation and the effect of aphrodisiacs on the psychological component of consummation. These replies do not appear in the Acta Apostolicae Sedis and therefore seem to have the nature of only private replies. However, they are widely quoted by commentators and have certainly had an effect on the practical interpretation of canon 1015 and post-Code documents.

In the remaining post-Code period, the procedural law for the processing of ratum cases has been revised, refined, and updated principally by the instructions of the Congregation of the Sacraments on May 7, 1923, and March 7, 1972, respectively. In the interim, other documents were issued by the same Congregation (March 27, 1929; August 15, 1936), by the Holy Office (June 12, 1942), by the Congregation for the Oriental Church (June 10, 1935; June 13, 1953), and by the Pope himself, (January 6, 1950; July 11, 1957; August 15, 1967). These documents were motivated partially or in

whole by the desire to expedite the instruction of ratum cases, while protecting the indissolubility of Christian marriage and fostering the good of souls.

Some may question the study of procedural law in order to arrive at a clearer notion of copula consummative of marriage, since, as we have said, such documents deal with the subject only in a negative sense. However, a careful reading of the ecclesiastical legislation treating of the procedure for nonconsummation cases leaves a very definite overall impression. That impression is the following: the notion of the consummation of marriage as reflected in such legislation is definitely a biological one.

CHAPTER III

THE CONSUMMATION OF MARRIAGE FROM A BIOLOGICAL PERSPECTIVE

The conclusion from the previous chapter was that the Church has tended to view consummation from a biological perspective. Following the Brief Cum frequenter, 1587, authors would define copula consummative of marriage as that which is naturally ordained to generation, but with the added dimension that it was the emission of verum semen by the husband that rendered copula apt for generation. Officially, the Church has not seen fit to define what constitutes verum semen, and its nature is still being discussed at present. The purpose of the present chapter is to elaborate further on the physical contribution of husband and wife to consummation, to study briefly defects impeding biological consummation (i.e., impotence), and to synthesize the essential elements of the controversy regarding the verum semen.

This chapter will be divided as follows: A) the physical contributions of husband and wife to consummation; B) impotence as a defect impeding biological consummation; and, C) the problem regarding the verum semen.

A. The Physical Contributions of
Husband and Wife to Consummation

Some basic concepts of male and female anatomy will be given as the means to a clearer understanding of the physical requirements for consummation on the part of the spouses. We shall deal in turn with the requirements for consummation, 1) on the part of the husband, and, 2) on the part of the wife.

1. Requirements for Consummation on
the part of the Husband.¹

The reproductive system of the male consists of paired testes, paired accessory glands, and the duct system, including the penis or copulatory organ. Each testis consists of a large number of infinitely small convoluted seminiferous tubules in which the spermatozoa or sperms are produced. The spermatozoa are the generative elements of

¹ Cf. The following: J. Dreyfus-Moreau, L'impuissance sexuelle, p. 13-17. I. Gordon, De processu super rato, v. I, p. 79-84. R.J. Last, Anatomy - Regional and Applied, p. 490-492. C. Marshall, An Introduction to Human Anatomy, p. 203-211. A.V. Nalbandov, Reproductive Physiology; Comparative Reproductive Physiology of Domestic Animals, Laboratory Animals and Man, p. 39-51. P. Thorek, Anatomy in Surgery, p. 597-614. Willy, Vander, and Fisher, The Illustrated Encyclopedia of Sex, p. 36-55.

the semen, which are produced at such a high rate that a single emission of normal semen contains from 400 to 500 million spermatozoa.²

The seminal duct is a single passage but its parts are variously named according to their anatomical location. The semen, emerging from the testis, flows into the epididymis, a long convoluted tubule behind the testis. The epididymis continues into the vas deferens, a duct of about eighteen inches long, which runs upward from the testis, pierces the abdominal wall and penetrates the prostate gland at the neck of the urinary bladder. At the posterior base of the bladder are the two seminal vesicles, whose ducts unite with the vas deferens from each testicle to form the ejaculatory duct. This last penetrates the urethra which pierces the penis longitudinally and serves to expel the semen during copulation.³

The prostate gland, the seminal vesicles, and the paired Cowper's glands (near the origin of the urethra) all add their secretions to the original seminal fluid considerably increasing its volume by the time it is ejaculated through

2 Cf. Willy, Vander, and Fisher, op. cit., p. 36.

3 Cf. ibid., p. 43-44.

the penis. The urethra, passing through the penis to the outside, is surrounded by spongy erectile tissue, above which are two longitudinal cavernous bodies. Both the spongy and cavernous tissues are rich in blood vessels.⁴ The erection of the penis occurs when it is enlarged and made firm by the accumulation of blood within the erectile tissue and cavernous spaces. The arteries actively dilate during sexual excitement bringing more blood to the male copulatory organ, while the return of the blood through the veins is slowed down.⁵

While keeping this rather brief sketch of the male urogenital system in mind, we can summarize what was said previously regarding the physical elements of copula consummative of marriage on the part of the husband. Complete copula requires that the husband introduce the erect male member or penis into the female vagina to a point beyond the hymen at the vaginal orifice and effect at least partial semination therein.⁶ A response of the Holy Office on March 1, 1941, confirmed that imperfect penetration and incomplete

⁴ Cf. ibid., p. 46, 50. Cf. A.V. Nalbandov, op. cit., p. 48-49.

⁵ Cf. C. Marshall, op. cit., p. 211.

⁶ Cf. C. Holböck, Tractatus de jurisprudentia S.R.R., p. 55.

semination were sufficient for the purposes of marital consummation.⁷ However, penetration alone, or penetration with ejaculation against the hymen rather than beyond it would not effect consummation. In neither of these cases can we speak of truly conjugal copula in the traditional sense since it would not be apt for generation.⁸

2. Requirements for Consummation on the part of the Wife.⁹

The female reproductive system consists of a pair of ovaries which produce ova and hormones, a system of tubes, the uterine tubes, the uterus, the vagina leading to the outside, and a group of external structures surrounding the opening of the vagina.¹⁰

The most superficial of the female external genitalia (vulva) are the mons pubis and the labia majora, the former being a rounded eminence in front of the symphysis pubis and the latter two large folds meeting in the midline of the

7 Cf. S.C.S. Off., Reply De copula perfecta et de consummatione matrimonii, March 1, 1941, in S.C. Sacr., Instructio de quibusdam emendationibus circa normas... cum adnexis peculiaribus documentis ad rem attinentibus, p. 70.

8 Cf. Holböck, op. cit., p. 78.

9 Cf. I. Gordon, op. cit., p. 85-90. Cf. C. Marshall, op. cit., p. 213-222. Cf. A.V. Nalbandov, op. cit., p. 13-24. Cf. Willy, Vander, and Fisher, op. cit., p. 56-74.

10 Cf. C. Marshall, op. cit., p. 213.

body below the pubic arch. The labia minora are two smaller folds internal to and covered by the folds of the labia majora. Anteriorly, these smaller folds meet and enclose a small organ, the clitoris, the homologue of the penis in the male. Behind the clitoris and between the labia minora are two orifices: anteriorly, the small opening of the urethra leading to the bladder, and posteriorly, the larger entrance to the vagina. The vaginal orifice is partially closed in the virgin by a thin membrane, the hymen. Between the vaginal orifice and the labia minora are the openings of the two "greater vestibular glands", formerly termed the glands of Bartholin and corresponding to the bulbourethral glands in the male.¹¹

Generally, canonical authors merely list the vagina as the correlative requirement for consummation on the part of the female. One comes across such phrases as "On the part of the woman there is required a vagina" ("Ex parte mulieris requiritur vagina").¹² It has been disputed among authors whether the vagina has to be open both at the vulva and to the uterus, or whether it suffices that it be open

11 Cf. ibid., p. 214.

12 Cf. C. Holbøck, op. cit., p. 55.

only at its vulval entrance. According to one opinion, it seems that a woman with a vagina closed at the entrance to the uterus would be sterile but not impotent, since she is still able to perform normal conjugal copula consummative of marriage albeit accidentally inapt for generation.¹³

There has been a traditional insistence in canonical literature on the preponderant role of the husband in effecting consummation. One might trace the origin of such an attitude to the fifteenth century (approximately), when it was first taught that male semination alone into the vagina was sufficient to consummate marriage.¹⁴

However, the fact that women have been traditionally assigned a passive role in sexual relations, whether consummative of marriage or throughout married life, must more probably be traced to the very early history of the human race. Men have always assumed they were the active element in sexual intercourse since they become aroused and carry out penetration. Moreover, the study of cultural similarities and differences between oriental and occidental civilizations,

¹³ Cf. ibid., p. 75-76. Cf. I. Gordon, op. cit., p. 121. Certain authors disagree with this opinion: see footnote 72 and 73 below.

¹⁴ Cf. G. St-Hilaire, L'azoospermie dans la jurisprudence rotale, p. 9-10. Cf. Willy, Vander, and Fisher, op. cit., p. 74.

early and late, prior to the establishment of Christianity and afterwards, will indicate generally an inferior role assigned to women in all spheres including the sexual.¹⁵

It is not our aim to theorize at length on the reasons, therefore, why in ecclesiastical writings likewise the husband has been regarded as the active principle of copula and generation. This was taken for granted. Explanations tend to be woefully inadequate. Perhaps the most evident explanation is found in the biological difference of men and women, at the level of human anatomy. Undoubtedly, there remains much to be done to create a mentality whereby it will be shown that both husband and wife have complementary roles in the entire process of consummation.

B. Impotence as a Defect Impeding
Biological Consummation.

The impotence which concerns us here is impotence as understood in the canonical literature, that is, a defect which impedes normal conjugal relations from the very outset of marriage. Considering the Church's view that marriage is

¹⁵ Cf. Vern L. Bullough, The Subordinate Sex - A History of Attitudes Toward Women, p. 11, 49, 76, 96, 120 and passim (truly an excellent, well-researched book).

ordained to the propagation of the human race, and the biblical theology of the spouses becoming one flesh, it is not surprising that the question of impotence was dealt with fairly early in ecclesiastical writings. It was natural that the Church legislate on what she considered to be an obstacle to the fulfillment of the primary purpose of the marital union.

The study of impotence will be subdivided as follows:

1) the impediment of impotence in early ecclesiastical sources; and, 2) the notion and division of the impediment of impotence in the Code of Canon Law.

1. The Impediment of Impotence in
Early Ecclesiastical Sources.¹⁶

The word "impediment" (impedimentum) does not seem to have occurred in early ecclesiastical writings, but the

¹⁶ Cf. the following: J. Bank, Connubia canonica, p. 126-131. P.L. Frattin, The Matrimonial Impediment of Impotence: Occlusion of Spermatid Ducts and Vaginismus, p. 1-28. P. Harrington, "The Impediment of Impotency and the Notion of Male Impotency", in The Jurist, 19(1959), Part I, p. 29-66; Part II, p. 187-211; Part III, p. 309-351. G.H. Joyce, Christian Marriage: An Historical and Doctrinal Study, p. 337-339. G. Lesage, "Psychic Impotence, A Defect of Consent", in S.C., 4(1970), p. 61-78. J. McCarthy, "The Traditional Concept of the Impediment of Impotence", in The Irish Theological Quarterly, 19(1952), p. 223-233.

prohibition was expressed in equivalent words. Moreover, there was a lack of precise terminology, and it is not known whether there was a question of diriment (i.e., invalidating) or impedient (prohibiting) impediments to marriage. This distinction became clearer only when the Church acquired fuller jurisdiction over marriage than she had had in the first thousand years of her existence.¹⁷

a) The impediment of impotence is, briefly, the incapacity of a man or a woman to perform conjugal intercourse suited for the procreation of children. Some authors hold it derives from the natural law itself.¹⁸ In the beginning, the Church seems to have kept to the Roman legislation, thus allowing that the impotence of husband or wife might continue to be brought forward as a motive for the dissolution of the marriage bond. Simple sterility (incapacity to beget children), however, was excluded as a cause for dissolution and so was clearly distinguished from impotence. The first hint regarding the impediment of impotence in the ecclesiastical

17 Cf. J. Bank, op. cit., p. 126-127.

18 Cf. F. Cappello, Tractatus Canonico - Moralis de Sacramentis, V, De Matrimonio, n. 388, p. 387. This is disputed at present as we shall see later. Cf. Communicationes, 7(1975), p. 54.

legislation seems to be found in a seventh century Penitential (Poenitentiale) attributed to Theodore of Tarsus (+690), Archbishop of Canterbury.¹⁹ The pertinent text is as follows:

Si vir et mulier coniunxerint se in matrimonio et postea dixerit mulier de viro non posse nubere cum ea, si quis poterit probare quod verum sit, accipiat alium. ²⁰	If a man and woman are united in marriage, and the woman says afterward of the man that he is unable to have relations with her, if someone can prove that this is true, let her remarry.
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Admittedly, the text is obscure, but this fundamental rule passed undisputed into the canonical praxis of the following centuries and was reaffirmed both in several later poenitentialia and in the conciliar canons of the Carolingian Monarchy (e.g., Concilium Verberienense, 756, can. 17; Concilium Salisburgense, 799, can. 15)²¹ as well as in the declarations of the major canonists of the 9th century.²²

19 Cf. P.L. Frattin, op. cit., p. 2. Cf. G.H. Joyce, op. cit., p. 339. Cf. J. McCarthy, op. cit., p. 225.

20 Theodori Cantuariensis, Poenitentiale, lib. II, cap. XII, n. 33 in P.W. Finststerwalder, Die Canones Theodori Cantuariensis und ihre Uberlieferungsformen, Weimar, H. Bohlaus, 1929, p. 330.

21 Cf. P.L. Frattin, op. cit., p. 2.

22 Cf. ibid.

b) A letter of Pope Gregory II to St. Boniface in 708,²³ according to which the Pontiff allowed a man to separate from his wife and remarry if she was impotent, is still an object of controversial interpretation. Gratian, for example, as indicated in the Dictum ad c. 18, C. 32, q. 7,²⁴ was of the opinion that the response of Gregory II wrongly interpreted the condition of female impotence, and that accordingly his judgment ran counter to the sacred canons and both the evangelical and apostolic doctrine.²⁵ However, the concept and notion of impotence found in the Penitential of Theodore of Canterbury were accepted in the French Councils of the 8th century where, as already in Germany, they recognized the custom of separation and

23 Gregorii II ad Bonifacium Ep., Epistola XIII, in G.D. Mansi, Sacrorum conciliorum nova et amplissima collectio, XII, 245. ".../ si mulier infirmitate correpta non valuerit debitum viro reddere, quid ejus faciat iugalis? Bonum esset si sic permaneret ut abstinentiae vacaret. Sed quia hic magnorum est, ille qui se non poterit continere nubat magis .../."

24 Gratian, Decreti Secunda Pars, c. 18, C. 32, q. 7, in A. Friedberg, Corpus Iuris Canonici, v. I, c. 1145.

25 Cf. M. Coronata, De Sacramentis Tractatus Canonici, III, De Matrimonio et de Sacramentalibus, Taurini-Romae, Marietti, 1947, p. 372, note 10. Cf. G. Oesterle, "Impuissance", in Dictionnaire de droit canonique, v. V, c. 1263.

permission to remarry (separandi et permittendi transitum ad alias nuptias) if the impediment to conjugal copulation arose from relative impotence.²⁶

c) Earlier in his Decree, Gratian treated of the problem of impotence under a twofold aspect: impotence properly so called, that is, in a strict sense, referring either to man or woman, and impotence resulting from witchcraft or sorcery (ex maleficio).²⁷ Natural impotence was viewed as a cause for separation and remarriage:

If the impossibility of having sexual relations is discovered in someone after carnal copulation, it does not dissolve the marriage. If however, the /condition/ comes to light before carnal copulation, the woman is free to remarry. Wherefore it appears that they were not spouses; otherwise, they would not be permitted to separate except for the cause of fornication; and in that case they would have to remain unmarried /.../.²⁸

26 Cf. P.L. Frattin, op. cit., p. 3.

27 Cf. ibid.

28 Gratian, loc. cit., dictum ad c. 29, C. 27, q. 2, in A. Friedberg, op. cit., c. 1071. "Ecce, impossibilitas coeundi, si post carnalem copulam inventa fuerit in aliquo, non solvit coniugium. Si vero ante carnalem copulam deprehensa fuerit, liberum facit mulieri alium virum accipere. Unde apparet, illos non fuisse coniuges; alioquin non liceret eis ab invicem discedere, excepta causa fornicationis; et sic discedentes oportet manere innuptos /.../."

Applying his theory (as we have seen earlier) that marriage is initiated by consent and perfected by copula, Gratian distinguished between antecedent and subsequent impotence with reference to physical consummation rather than with respect to the time that consent is exchanged, as does the Code of Canon Law.²⁹

In his examination of impotence resulting from external causes such as magic, witchcraft and charms, Gratian pointed out that, if the incapacity of performing the conjugal act persisted for the married couple even after the repentance of their sins, fasts, and so forth, they could separate.³⁰ But whether he was studying natural impotence or impotence deriving from some external cause, Gratian regarded it merely as an obstacle to coition and as a basis for the dissolution of a nonconsummated marriage. Only later will impotence be regarded as a diriment matrimonial impediment, invalidating marriage from the beginning.³¹

29 Cf. P.L. Frattin, op. cit., p. 4.

30 Gratian, loc. cit., c. 4, C. 33, q. 1, in A. Friedberg, op. cit., c. 1150.

31 Cf. P.L. Frattin, op. cit., p. 9.

d) The diriment impediment of impotence was established around the twelfth century as the result of evolving juridical trends, doctrinal positions, and jurisprudential considerations. Influenced by classical Roman Law, the Church customarily tried to have a husband continue to live with an impotent wife, whereas the Frankish Church, influenced by German Law, favoured a declaration of nullity and permission for the husband to remarry in such cases. It was inevitable that there be conflicts of practice. A document of Alexander III (1159-1181) is a case in point, since it favours the Roman opinion but still tolerates the Frankish practice.³²

Although the Roman Church is not accustomed in cases of frigidity or in those where spells have been cast, to separate spouses who have been legitimately united, however, if a general custom of the Gallican Church admits that these marriages are dissolved, we will tolerate without protesting that you grant this woman the permission to marry, in the Lord, whomsoever she pleases.³³

32 Cf. G. Lesage, loc. cit., p. 62-63.

33 C. 2, X, IV, 15 in A. Friedberg, op. cit., v. II, c. 705. "Verum licet Romana ecclesia non consueverit propter naturalem frigiditatem aut propter alia maleficia legitime coniunctos dividere, si tamen consuetudo generalis Gallicanae ecclesiae habet, ut huiusmodi matrimonia dissolvantur nos patienter tolerabimus, si secundum illam consuetudinem eidem mulieri cui voluerit nubendi in Domino concesseris facultatem " (English text from G. Lesage, loc. cit., p. 63).

Meanwhile, canonists and theologians such as Bernard of Pavia studied the nature of impotence more deeply from the doctrinal point of view, declaring that it voided any matrimonial consent since it deprived it of its proper object (the right over the body in relation to acts apt for procreation). But it is finally through the Decretals of Gregory IX, promulgated in 1234, that the diriment impediment of impotence became the common law of the Latin Church. In the collection of texts of the Decretals entitled De frigidis et maleficiatis (the frigid and those under spells), impotence appears to have become a diriment impediment based on the notion of juridical incapacity. Henceforth, the impediment, to be invalidating, must exist at the moment consent is given. This differs from the doctrine of Gratian already mentioned, which held that impotence could invalidate the marriage if it occurred after the contract but before consummation.³⁴

e) In the writings of St. Thomas Aquinas (1225-1274), there is evidence that perpetual impotence was considered a diriment impediment to marriage:

³⁴ Cf. G. Lesage, loc. cit., p. 65-66.

/.../ the bond of other contracts is unfitting if a person bind himself to what he cannot give or do; so the marriage contract is unfitting, if it is made by one who cannot pay the marital debt. This impediment is called by the general name of impotence as regards coition. /.../ If it be due to a natural cause, this may happen in two ways. For either it is temporary and can be remedied by medicine, or by the course of time, and then it does not void a marriage: or it is perpetual and then it voids marriage, so that the party labouring under this impediment remains forever without hope of marriage, while the other party may marry whomever he desires.³⁵

Teaching on impotence similar to that of the Angelic Doctor will be found in substance in the works of writers such as St. Bonaventure (1221-1274), Durandus a S. Porciana

³⁵ St. Thomas, Summa Theologica, Suppl., q. 58, a. 1, sc 2, in Thomas Aquinas, Opera omnia, Parmae, Typis P. Fiaccadori, 1852-1873, v. IV, p. 550. "/.../ non est conveniens obligatio /in aliis contractibus/ si aliquis se obliget ad hoc quod non potest dare vel facere, ita non est conveniens matrimonio contractus, si fiat ab aliquo qui debitum carnale solvere non possit. Et hoc impedimentum vocatur impotentia coeundi, nomine generali. /.../ Si autem sit ex causa naturali, hoc potest esse dupliciter. Quia vel est temporalis, cui potest subveniri beneficio medicinae vel processu aetatis, et tunc non solvit matrimonium. Vel est perpetua. Et tunc solvit matrimonium, ita quod ille ex parte cuius allegatur impedimentum, perpetuo maneat absque spe coniugii, alius nubat cui vult in Domino " (English translation from Thomas Aquinas, The Summa Theologica, literally translated by the Fathers of the English Dominican Province, v. 19, 3rd part (Suppl.), p. 254-255).

(ca. 1275-1334), Silvester Prierias (1456-1523), Dominicus Soto (1494-1560) and Thomas Sanchez (1551-1610). These held that the impotent party, if permanently incapable of performing the sexual act, could not cede to the other the power for the conjugal act. The impotent were considered altogether incapacitated for marriage, for they were indeed forbidden to bind themselves to the performance of something which their impotent condition did not allow them to fulfill.³⁶

f) While the Council of Trent did not legislate on the validity or nullity of marriage where one of the parties was impotent, a short time afterwards, in 1587, Sixtus V issued the Brief Cum frequenter on the subject.³⁷ In substance, Cum frequenter implied that eunuchs and spaded men (lacking both testicles) were unfit (inhabiles) for marriage and were to be assimilated to the impotent and the frigid. Marriages already contracted by the men in question were to be declared null and void, and the "pseudo-spouses" were to separate unless they chose to live as brother and sister.³⁸

³⁶ Cf. T. Sanchez, Compendium totius tractatus de S. Matrimonii Sacramento, De impedimentis Matrimonii, cap. XVIII, De impotentia, in Migne, Theologiae cursus completus, 25, c. 648-649.

³⁷ Cf. Sixtus V, Brief Cum frequenter, June 27, 1587, in Magnum Bullarium Romanum, IV, part 4, p. 319.

³⁸ Cf. ibid., §1.

As such, Cum frequenter was the first authoritative papal pronouncement of modern times that directly and unequivocally asserted that organic impotence (e.g., lack of both testes) constituted a diriment impediment prohibiting marriages to be contracted and invalidating marriages already contracted.³⁹ Although the document was issued specifically for Spain and concerned itself with a particular situation, it was soon considered binding on the whole Church.⁴⁰

g) Following Cum frequenter, the procedural documents, Dei miseratione,⁴¹ Cum moneat Glossa,⁴² Judex ad hoc deputatus,⁴³ and Quemadmodum matrimonii foedus⁴⁴ set down

39 Cf. P. Harrington, loc. cit., p. 188.

40 Cf. P.L. Frattin, op. cit., p. 24.

41 Cf. Benedict XIV, Constitution Dei miseratione, November 3, 1741, in Magnum Bullarium Romanum, Benedict XIV, I/II, p. 81-86.

42 Cf. S.C. Conc., Instr. Cum Moneat Glossa, August 22, 1840, in Pietro Gasparri, C.I.C. Fontes, VI, n. 4069, p. 345-350.

43 Cf. S.C.S. Off., Instr. Judex ad hoc deputatus, 1858, ibid., IV, n. 946, p. 220-222.

44 Cf. S.C.S. Off., Instr. ad Ep. Rit. Orient. Quemadmodum matrimonii foedus, June 25, 1883, ibid., IV, n. 1076, p. 395-411.

detailed rules for dealing with marriage cases including cases of impotence. Article 5 of this last document is of special interest to us here:

In order that impotence invalidate the matrimonial contract, it is necessary that it be antecedent and perpetual, and cannot be cured by natural and licit remedies. If the impotence is absolute, or such that it renders conjugal copula impossible altogether, it always invalidates marriage contracted with any person; but if the impotence is relative only, it invalidates marriage only with that person with reference to whom the impotence exists /.../.⁴⁵

It is the above notion of impotence, that will be incorporated into canon 1068 of the Code of Canon Law.

⁴⁵ Cf. *ibid.*, p. 408. "Ut autem impotentia matrimonium contractum irritet, necesse est, ut sit antecedens atque perpetua, quae scilicet naturalibus atque licitis remediis tolli non possit. Ista impotentia si fuerit absoluta, seu talis ut omnino impossibilem reddat coniugalem copulam, matrimonium dirimit semper, et cum qualibet persona contractum; si vero relativa tantum, matrimonium dirimit solummodo cum illa, ad quam impotentia ipsa refertur."

2. The Notion and Division of the
Impediment of Impotence in the
Code of Canon Law.⁴⁶

Canon 1068 of the Code reads:

§1. Impotentia antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive alteri cognita sive non, sive absoluta sive relativa, matrimonium ipso naturae jure dirimit.

§2. Si impedimentum impotentiae dubium sit, sive dubio juris sive dubio facti, matrimonium non est impedendum.

§3. Sterilitas matrimonium nec dirimit nec impedit.⁴⁷

§1. Antecedent and perpetual impotence, whether on the part of the man or of the woman, whether known to the other party or not, whether absolute or relative, invalidates marriage by the law of nature itself.

§2. If the impediment of impotence is doubtful, whether by a doubt of law or of fact, the marriage is not to be hindered.

§3. Sterility renders marriage neither invalid or illicit.

It is obvious that Canon 1068 does not define impotence, but it does give an accurate explanation of the essential requisites for the impediment. Impotence is sometimes taken in a broad sense as the incapacity to beget

⁴⁶ Cf. Pius XII, Allocution to the Twenty-Sixth Congress of Urologists, October 8, 1953, in A.A.S., 45(1953), p. 676-678 (original text in French). Centre d'Etudes Laënnec, "Impuissance et mariage", in Cahiers Laënnec, 16(1956), Dec. 1956, p. 1-67. P. Cerato, Matrimonium a codice I.C. integre desumptum..., p. 94-97. P. Gasparri, Tractatus canonicus de matrimonio, ed. nova ad mentem C.I.C., v. I, p. 299-338. E.F. Regatillo, Interpretatio et iurisprudentia C.I.C., p. 429-432.

⁴⁷ C.I.C., c. 1068.

children, implying that the spouses are able to have sexual intercourse in a perfectly natural manner, but for some reason, e.g., the pathological condition of the postvaginal organs of the woman, are unable to procreate. Impotence in the sense of the inability to procreate (impotentia ad solam generationem) is more properly called sterility,⁴⁸ and as Canon 1068, §3, says, it neither renders the marriage invalid or illicit. On the other hand, if coition itself is not possible and, consequently, neither is generation, then there is question of impotence in the strict sense, i.e., the inability to have normal sexual intercourse, (impotentia coeundi seu ad copulam).⁴⁹ It is with this last that Canon 1068 is concerned, and of which P.L. Frattin writes:

48 Cf. P. Gasparri, op. cit., p. 306.

49 Cf. ibid.

Impotence, therefore, in the theological-juridical-canonical meaning, may be defined as the sexual incapacity of man or woman, in consequence of defects either organic or functional, which prevent the sexual act, as a human act, not only from being physiologically perfect, but also from being intrinsically suited (actus per se aptus) for generation. Thus, impotent shall be considered that party whose copulative sexual organs appear to be defective either in their nature or in their function, such namely, as not to make the sexual embrace an actus de se aptus ad prolem generandam.⁵⁰

It must be understood from the outset, therefore, that only the incapacity for normal sexual intercourse (impotentia coeundi) and not the incapacity to procreate (impotentia generandi) or sterility can constitute, in the canonical legislation, a diriment impediment to marriage. This assertion is supported by a Rotal sentence, February 25, 1930, which states the following:⁵¹

Ad effectum matrimonii irritandi, sola coeundi impotentia in nostro foro attenditur; nam impotentia generandi, ex quocumque defectu proveniat, validitati nuptiarum non nocet, siquidem obiectum immediatum contractus matrimonialis non est ius ad actionem naturae a qua pendet fecundatio et con-

Our court considers only the incapacity for coition as effecting the invalidity of marriage; for the incapacity of begetting children, from whatever defect it arises, does not touch the validity of marriage, since in fact the

50 Cf. P.L. Frattin, op. cit., p. 41. Cf. P. D'Avack, Cause di Nullità e di Divorzio, Firenze, Casa Editrice C. Aya, 1952, p. 546-547.

51 Cf. P.L. Frattin, op. cit., p. 40.

ceptio, cum non sit in coniugum potestate illud tradere atque promittere, sed est ius ponendi coniugalem actionem, seu copulam carnalem in ordine ad prolis generationem, quod ius dumtaxat in contractu matrimoniali promittere coniuges valent.⁵²

immediate object of the matrimonial contract is not the right to the action of nature on which fecundation and conception depends, given that it is not within the power of the spouses to hand over and promise that right, but it is the right of positing the conjugal action, or carnal copula in relation to the generation of children, which right precisely the spouses can promise in the matrimonial contract.

Subsequent Rotal sentences continue to distinguish between the impotentia coeundi and the impotentia generandi but not always in so direct a manner as the sentence just quoted. Generally, they discuss briefly the notion of impotence and attack immediately the problem at hand, namely impotence arising from a specific cause.⁵³

We shall now review briefly the requisites of canon 1068, §1 and §2, in order for impotence to invalidate marriage.

Canon 1068, §1, specifically prescribes that impotence invalidating marriage must be:

⁵² S.R.R. Dec., 22(1930), c. Quattrocolo, February 25, 1930, p. 106.

⁵³ Cf. e.g., S.R.R. Dec., 54(1962), c. Lefebvre, February 3, 1962, p. 27; S.R.R. Dec., c. Lefebvre, July 26, 1966, in E.I.C., 24(1968), p. 190; S.R.R. Dec., c. Parisella, July 13, 1968, in M.E., 95(1970), p. 404; S.R.R. Dec., c. Lefebvre, December 16, 1972, in E.I.C., 29(1973), p. 103.

Antecedent: that is, it must have existed prior to the celebration of marriage, and perdure right up to the time of marriage. If a doubt arises as to the antecedent or subsequent nature of impotence, it must be settled by applying the appropriate presumption. If the complaint is entered very shortly after marriage has been contracted, the impotence is presumed antecedent; if the allegation is made only after a long interval has elapsed, the condition is presumed subsequent.⁵⁴

Perpetual: that is, it must be permanent in the sense that there is no known remedy for it, or in the sense that it cannot be removed by natural human means, which are licit and which do not involve any danger to the life of the individual. On the other hand, impotence is thought to be temporary when it can be cured by means that are purely natural and licit.⁵⁵

The canon also specifies that in order for antecedent, perpetual impotence to be invalidating, it matters not whether the impediment is on the part of the wife or husband, whether

⁵⁴ Cf. P.L. Frattin, op. cit., p. 41-42. Cf. P. Harrington, loc. cit., p. 201.

⁵⁵ Cf. P.L. Frattin, op. cit., p. 43-45. Cf. P. Harrington, loc. cit., p. 201-202.

it is known to the partner or not, or whether it exists with respect to all possible marriage partners (absolute) or only one or a few persons (relative).⁵⁶ In practice, however, absolute impotence invalidates marriage with all persons, while relative impotence invalidates marriages with one or several persons only.

To the requisites of antecedence and perpetuity, Canon 1068, §2 implies that impotence must also be certain: that is, it must be an undoubted fact. This does not imply that a judge pronouncing a sentence of nullity on the grounds of impotence must have a truly objective certainty of the impotence, emerging positively and directly from the factual data of the case; nor is there required a form of evident impotence perceptible to our senses. Rather, as in other marriage cases, the simple moral certitude of the tribunal regarding the actual existence of the impediment is sufficient to declare a marriage null.⁵⁷ With respect to the contracting of marriage, Canon 1068, §2 specifies that if there is a doubt regarding the existence of the impediment, whether the

⁵⁶ Cf. C.I.C., 1068, §1. Cf. P. Gasparri, op. cit., p. 333-334.

⁵⁷ Cf. Pius XII, Allocution to the Sacred Roman Rota, October 1, 1942, (on the question of moral certitude), in A.A.S., 34(1942), p. 338-343.

doubt is of law or of fact (i.e., a doubt about the extension of the law to a particular case or about the existence of the impotence itself), the marriage is not to be hindered from taking place.⁵⁸

The division of the impediment of impotence will give us in summary form the information already compiled in this study, along with some new facets of the question. Accordingly, impotence in the strict sense, i.e., the incapacity of the true sexual act of coition (impotentia coeundi) may be divided as follows:

a) By reason of knowledge of the impediment, it is certain or dubious, according to the more or less reliable proofs of its existence.⁵⁹ It could also be considered, besides, as known or unknown to one of the parties.⁶⁰

b) By reason of its beginning, it is antecedent or subsequent, that is existing before the marriage or arising only afterwards.⁶¹

58 Cf. C.I.C., 1068, §2. Cf. P.L. Frattin, op. cit., p. 45.

59 Cf. T. Sanchez, op. cit., in Migne, Theologiae cursus completus, 25, c. 648.

60 C.I.C., 1068, §1.

61 Cf. Gasparri, op. cit., n. 540, p. 329.

c) By reason of its duration, impotence is temporary or perpetual, inasmuch as it is curable by the lapse of time or by licit means, or not.⁶²

d) By reason of its origin or cause, it is natural when due to a congenital defect and intrinsic to the body; accidental, if it has its origin in an external cause such as an operation.⁶³

e) By reason of persons, impotence may be absolute or relative, according as the inability to have sexual relations exists with reference to all persons, or in respect to one particular person or several only.⁶⁴

f) By reason of the way in which it is manifested, impotence is organic (or anatomical) when it derives either from the lack of, or the injury to some genital organ indispensable for copulation; it is functional when the incapacity for coition is a consequence of psychological and nervous causes.⁶⁵ Some authors speak of impotence from

62 Cf. ibid., n. 543, p. 332.

63 Cf. P.L. Frattin, op. cit., p. 48.

64 Cf. F. Cappello, Tractatus canonico - moralis de Sacramentis, III, De Matrimonio, n. 346, p. 446.

65 Cf. Wernz-Vidal, Jus canonicum ad codicis normam exactum, V, Jus Matrimoniale, n. 221, p. 265.

psychogenic causes as a class by itself. Among the causes would be "those related to psychological inhibitions, whether temporary or deeply rooted in the person's psychic composure."⁶⁶

Among the more common causes of male organic impotence (provided it is antecedent and perpetual) may be mentioned the following: the lack of both testicles, atrophy of both testicles, the lack of a penis or the presence of an insufficiently developed penis, a penis with the opening of the urethra on its dorsal side (epispadia) or on its ventral side (hypospadia) rather than at its extremity where it is normally found. With respect to the occlusion or the cutting of the spermatic ducts and the consequent absence of true semen elaborated in the testicles (verum semen in testiculis elaboratum), there is nowadays a doubt as to whether a man is impotent in the canonical sense in those cases.⁶⁷

Male functional impotence concerns mainly the sexual dysfunctions of anerection (the inability to produce or sustain an erection of the penis), anejaculation (inability

66 Cf. G. Lesage, loc. cit., p. 61.

67 Cf. I. Gordon, op. cit., p. 114-115.

to ejaculate), and premature ejaculation.⁶⁸ The cause of these disorders may be physical or psychological inasmuch as physiological factors (e.g., circulatory problems) or mental or nervous disorders are interfering with the normal functioning of the organs concerned.

Since, on the part of the woman, the canonical requirement for the consummation of marriage or coition is the presence of a vagina capable of acting as a receptacle for the erect male organ and the effusion of the semen, female impotence is reduced to organic anomalies of the vagina (e.g., the lack, the occlusion of the outermost portion of the vagina, and so forth) or to obstacles which impede the receptive functioning of the normally formed vagina (e.g., functional impotence resulting from vaginism).⁶⁹

Concerning the woman lacking postvaginal organs (e.g., uterus, one or both ovaries) and commonly termed mulier excisa, the common teaching at the present time seems to oscillate between two alternatives, which are by no means contradictory. Those alternatives are: the mulier excisa is either certainly potent or at least she is not certainly

68 Cf. ibid., p. 115-119.

69 Cf. ibid., p. 120-123.

impotent for marriage in the strictly canonical sense.

In sum there is a doubt of law concerning her impotence and her marriage is not to be impeded (c. 1068, §2). As Navarrete says:

/.../ Both science and jurisprudence almost unanimously support the opinion according to which the mulier excisa, that is, one who lacks postvaginal organs but has an intact vagina - is not impotent, or at least is not certainly impotent with respect to marriage. In practice, for at least the last forty years, the following opinion has been applied without hesitation: the mulier excisa is admitted to marriage without any difficulty or special formality; cases of nullity on the grounds of the lack or the defect of postvaginal organs are not to be admitted to ecclesiastical tribunals, since their negative outcome is certain and therefore they are destitute of any foundation or fumus boni iuris.⁷⁰

70 U. Navarrete, "De muliere excisa. Animadversiones in opus recens editum", in Per., 64(1975), p. 335. The article was written by Navarrete in response to a study by A. Gutierrez (Il Matrimonio. Essenza-Fine-Amore coniugale. Con particolare riferimento alla donna recisa, 2a ed., Napoli, A. Vallini, 1974, 207 p.). According to Navarrete (loc. cit., p. 336), Gutierrez tries extremely hard to prove the mulier excisa impotent, but in fact does not, in Navarrete's opinion, succeed. Gutierrez, in turn, replied to Navarrete in an article entitled "In 'De muliere excisa. Animadversiones in opus recens editum' contra-animadversiones" (Per., 64(1975), p. 661-667). Soon afterwards Navarrete issued a counter-reply, in which he maintained his former stance that there is a doubt of law concerning the mulier excisa (Per., 64(1975), p. 678-681).

Earlier studies have also favoured an opinion and practice similar to that advocated by Navarrete.⁷¹ The fact alone that the matter has provoked such lively discussion is indicative that there is indeed a doubt of law (dubium iuris) concerning the marital capacity of the mulier excisa, and consequently, canon 1068, §2 is applicable. This discussion presupposes (as Navarrete points out) that the woman has a natural intact vagina suitable for copulation. On the other hand, modern plastic surgery has made it possible to construct a vagina in a woman who lacks one. But even when human tissue (from the patient herself) is used in the coloplasty, the surgery raises a number of canonical

71 Cf. F. Bersini, "De muliere excisa et de vagina occlusa in ordine ad validitatem matrimonii", in M.E., 99(1974), p. 232-254 (especially the conclusion, p. 252). Cf. J. McCarthy, The Matrimonial Impediment of Impotence with Special Reference to the Physical Capacity for Marriage of an "Excised Woman" and of a "Doubly Vasectomized Man", p. 59-83, especially p. 82-83. Cf. S.R.R. Dec., 53(1961), c. Ewers, October 28, 1961, p. 456. "Si id /conceptionis defectus/ evenit ob vitia in organis post-vaginalibus, sive quia agitur de vagina aequivalenter occlusa, sive quia mulier excisa fuit, defectus haud inducit dirimens impotentiae impedimentum. Altero enim in casu, adest saltem iuris dubium /.../."

problems,⁷² concerning which, Sabattani, a former Rotal judge, has written with insight and clarity:

By way of conclusion, the following principles are laid down: a) an artificial vagina cannot be said juridically inept from the mere fact that it is artificial or factitious; b) an artificial vagina must be said apt for copula, so that it does not allow a declaration of nullity of marriage, if it responds to these two conditions, namely: - it acts as a canal penetrable by the male member and is open to

72 Cf. M. Thériault, "Néo-vagin et impuissance", in *S.C.*, 2(1968), p. 27-76. A study from the point of view of both physiological medicine and canon law, the article concludes that, if the neo-vagina is constructed of human tissue and in contact with the uterus, it responds to the notion of a natural vagina and the woman in question is potent and can validly contract marriage. Otherwise, she is impotent and her marriage is invalid. The foundation for this conclusion is Thériault's contention that the definition (canonical and medical) of the vagina is: the copulatory organ of the woman situated between the vulva and the uterus (organum copulatorium mulieris in vulva aperto qui ducit ad uterum et ejus collo terminatur), (p. 73). A neo-vagina, constructed of non-human tissue and/or not in communication with the uterus, regardless of its functional efficacy as a copulatory organ, is, in Thériault's opinion, simply not a vagina (p. 75).

the uterus, or it corresponds to the definition of a vagina; - it was constructed /of natural tissue⁷ before the celebration of marriage.⁷³

It must be conceded, nevertheless, that the above problem, as well as many others relating to male and female impotence, affords the opportunity of a specialized study, since authors are not unanimous. In the present work we have been dealing with impotence in general as a defect impeding biological consummation, and felt it necessary to broach specific causes of male or female impotence by way of completing the overall picture of the impediment. To recapitulate: if either spouse suffers from an organic or functional defect, which is both antecedent and perpetual and prevents the realization of one or more of the elements

⁷³ S.R.R. Dec., 55(1963), c. Sabattani, February 22, 1963, p. 142. "Proinde, conclusionis instar, haec principia tradi possunt: a) vagina artificialis dici nequit iuridice inepta eo tantum quod est artificialis seu facticia; b) vagina artificialis apta dici debet ad copulam, ita ut non sinat declarationem nullitatis matrimonii, si respondeat his duabus conditionibus, nempe: - praestet canalem a membro viri penetrabilem et pervium usque ad uterum, seu respondeat definitioni vaginae; - confecta sit ante celebratas nuptias" (Certain authors disagree with Sabattani about the necessity of vagina open to uterus, see footnote 13 above). Cf. also: S.R.R. Dec., c. De Jorio, October 11, 1967, in E.I.C., 24(1968), p. 178-184 (Female Impotence: Artificial Vagina); S.R.R. Dec., c. Pinna, January 28, 1969, in M.E., 95(1970), p. 75-86 (Congenital Lack of Vagina); S.R.R. Dec., c. Lefebvre, December 16, 1972, in E.I.C., 29(1973), p. 103-109 (Occluded Vagina).

of conjugal copula, he/she is considered impotent.⁷⁴ This being established, we direct our attention to a problem relevant to male impotence, i.e., the controversy regarding the verum semen.

⁷⁴ Cf. Pius XII, Allocution to the Twenty-Sixth Congress of Urologists, October 8, 1953, loc. cit., p. 676, where the Pope speaks of the elements of the potentia coeundi in a positive manner. "Les conditions requises pour 'potentia coeundi' sont déterminées par la nature et se déduisent du mécanisme de l'acte. En cela l'action des conjoints, au point de vue biologique, est au service de la matière séminale qu'elle transmet et reçoit. A quoi peut-on voir que la 'potentia coeundi' existe réellement et que par conséquent l'acte des époux comporte tous ses éléments essentiels? Un critère pratique bien qu'il ne vaille pas sans exception dans tous les cas, en est la capacité d'accomplir de façon normale l'acte externe. /.../ ce 'signum manifestativum' doit suffire en pratique dans la vie, car celle-ci demande que, pour une institution aussi ample que le mariage, les hommes possèdent, dans les cas normaux, un moyen sur et facilement reconnaissable de constater leur aptitude à se marier /.../."

C. The Problem of the Verum Semen.⁷⁵

Our study will consist of the following: 1) the problem in its historical context and its subsequent influence on Rotal jurisprudence; and, 2) the practice of the Sacred Congregation of the Holy Office regarding the marriage of the bilaterally vasectomized.

⁷⁵ The following references are particularly useful. Pius XII, Allocution to the Twenty-Sixth Congress of Urologists, October 8, 1953, loc. cit., p. 673-679 (clear distinction between potentia coeundi and potentia generandi). P.U.G. Cursus renovationis canonicae pro iudicibus, iuris principia circa impotentia deprompta e quibusdam decisionibus S.R. Rotae, Rome, 1972, 45 p. (contains some unpublished material). G. St-Hilaire, op. cit., xli-567 p. (unpublished doctoral dissertation, the most comprehensive study of the verum semen question to date, complete analysis of Rotal jurisprudence on the subject from 1909-1968). Centre d'Etudes Laënnec, "Malformations de l'appareil génital masculin et azoospermies", in Cahiers Laënnec, 16(1956), Dec. 1956, p. 3-11 (medical notion of azoospermia). -----, "Les stérilités masculines", in Cahiers Laënnec, 31(1971), Dec. 1971, p. 16-27 (sterility from the medical point of view). P. Harrington, loc. cit., p. 309-349 (well-researched study of the verum semen question). B. de Lanversin, "Evolution de la chirurgie moderne et ses répercussions sur les cas d'impuissance masculine d'origine excrétoire", in A.C., 13(1969), p. 93-122 (surgery to restore the permeability of the deferent canal in case of obstruction). C. Lefebvre, "L'impuissance: science médicale et jurisprudence rotale", in A.C., 15(1971), p. 415-427 (solutions given by Rotal jurisprudence to problems of impotence vis-à-vis the criticisms of medical science).

1. The Problem in its Historical Context
and its Subsequent Influence on Rotal
Jurisprudence.

In the Brief Cum frequenter,⁷⁶ the lack of a precise notion (not to say definition) of the verum semen has led canonists and theologians during the following centuries to discuss the nature of such semen. It was natural to assume the verum semen was a testicular product since the brief dealt with the marriages of men lacking both testicles.

However, the term verum semen was used by theologians and jurists even prior to Cum frequenter. It was commonly taught that a true semen was required for potency, the word meaning the relatively copious and viscous ejaculate of the normal man as compared to the watery distillation of the eunuch.⁷⁷

Nevertheless, the papal brief did lead to the conclusion that, in order for a man to be considered apt for marriage, he must be able to secrete a semen, in the emission of which the testicles have played some role. It apparently

⁷⁶ Cf. Sixtus V, Brief Cum frequenter, June 27, 1587, in Magnum Bullarium Romanum, IV, Part 4, p. 319.

⁷⁷ Cf. T. Sanchez, De sancto Matrimonio sacramento (3 vols), Norimbergae, J.C. Lochner, 1706, lib. 7, d. 92, n. 17, v. II, p. 336-337. Cf. P. Harrington, loc. cit., p. 311-312. Cf. E.H. Nowlan, "Double Vasectomy and Marital Impotence", in Theological Studies, 6(1945), p. 401.

did not matter whether it had been elaborated there, or had been produced elsewhere and had simply passed through the testicles.⁷⁸ Neither did it matter whether the semen was fertile or sterile as in the case of older men.⁷⁹

Henceforth, the concept of copula was formulated differently, and the potent person was one who was capable of copula intrinsically apt for generation. According to this theory, the true male semen was that which comes from the testicles, since that is the only kind which is apt for fecundation.⁸⁰ The biological discoveries, between the seventeenth and nineteenth centuries, added a new dimension to this view. There was first of all the discovery of the spermatozoon by Hamm in 1677, the discovery of the ovum by Ernst von Baer in 1827, and the detailed observations of Oscar Hertwig in 1875 concerning the process of fecundation. Since biology had shown that the only masculine fertile

⁷⁸ Cf. S.R.R. Dec., 57(1965), c. De Jorio, October 13, 1965, p. 641. According to this sentence, in Cum frequenter, Sixtus V "asseruit eunuchos non posse emittere verum semen, quia carent testiculis, seu didymis et epididymis, in quibus illud elaboratur vel saltem transeundo perficitur, uti veteres theologi docebant." Cf. G. St-Hilaire, op. cit., p. 38.

⁷⁹ Cf. G. St-Hilaire, ibid.

⁸⁰ Cf. G. St-Hilaire, op. cit., p. 55.

element in the semen is the spermatozoa, canonists began to ask themselves if a man incapable of emitting fertile semen was capable of contracting a valid marriage. Authors at the end of the nineteenth and the beginning of the twentieth century discussed the question at some length.⁸¹ The different opinions resulting from the discussion have influenced the jurisprudence of the Sacred Roman Rota up to the present time.

Among the writings at the turn of this century, which have had a special impact with respect to Rotal jurisprudence on the verum semen, those of Gasparri and Antonelli are perhaps most often mentioned. A short summary of the theories of these two authors is therefore necessary for a proper understanding of the practice of the Rota in dealing with cases of male impotence or nonconsummation of marriage.

In speaking of the verum semen, Gasparri stated that it originated in the testicles, without being concerned whether or not it contained spermatozoa. A man was to be classified as impotent if he lacked both testicles or if his spermatid ducts were occluded or ruptured. His supposition

81 Cf. ibid., p. 56.

would seem to be that the more important part of the ejaculate came from the testicles, and consequently the castrated or vasectomized man would be impotent, whereas the older man and a sterile man were not, although their verum semen was accidentally without fertile elements. For Gasparri, azoospermia (the absence of active spermatozoa in the ejaculate) was a sign of sterility and not of impotence.⁸²

In his own words:

Although the semen of the old men or youths is generally not fertile either because spermatozoa are lacking or are not sufficiently vigorous, nevertheless it is of the same constitution as true fertile semen, since it is elaborated in its natural organs, namely the testicles. /.../ Male semen is, as we have said, produced in the testicles. Hence castrates and eunuchs, who lack both testicles, are clearly and certainly incapable of emitting true semen, as Sixtus V clearly teaches.⁸³

⁸² Cf. G. St-Hilaire, op. cit., p. 80-81. Cf. P. Harrington, loc. cit., p. 328-329.

⁸³ P. Gasparri, Tractatus canonicus de Matrimonio, ed. nova ad mentem C.I.C., v. I, n. 504, 506, p. 301-302. "Licet autem senile vel juvenile semen saepius non sit prolificum, quia spermatozoïda in eodem aut desunt aut languescunt, tamen est eiusdem rationis seu naturae cum vero semine fecundo, utpote in suis organibus naturalibus, nempe testiculis elaboratum. /.../ Virile semen ut dictum est conficitur in testiculis. Unde spadones et eunuchos, utroque testiculis carentes, certum et manifestum est verum semen emittere non posse, ut expresse docet Sixtus V."

Gasparri also upheld the distinction between the actio humana (the human action) and the actio naturae (the action of nature) in the process of fecundation. He postulated only the capacity for the actio humana in copula apt for generation, abstraction being made from the subsequent role of nature in the generative act.⁸⁴ He considered a man potent, who was able, during normal intercourse, to introduce into the vagina semen of testicular origin. On the other hand, he considered as impotent the man whose semen did not derive from the testicles.⁸⁵

Antonelli's view of impotence differed considerably from the one we have just seen. For him, impotence was the absolute incapacity to beget children because of the lack or atrophy of the organs essential for generation, or because of other defects rendering intercourse impossible or necessarily infertile. Sterility was understood as some disposition affecting a person capable of procreating, in such a way that his carnal relations were accidentally infertile.⁸⁶

⁸⁴ Cf. P. Gasparri, Tractatus canonicus de Matrimonio, Paris, Secretariat de l'Institut catholique, 1891, v. I, n. 511, p. 343.

⁸⁵ Cf. ibid., n. 512, p. 343-344, 355.

⁸⁶ Cf. J. Antonelli, Medicina pastoralis, v. II, n. 510, p. 320. Cf. -----, De conceptu impotentiae et sterilitatis relate ad matrimonium, p. 13-16, 58, 60-62, 64-65, 68. Cf. P. Harrington, loc. cit., p. 316-318. Cf. G. St-Hilaire, op. cit., p. 81-84.

For Antonelli, a person certainly incapable of begetting children was impotent for marriage. A woman, lacking ovaries or post-vaginal organs, or a man, known as perpetually incapable of ejaculating spermatozoa, was certainly in this class.⁸⁷

Of the eunuchs, Antonelli wrote that they were incapable of carnal copulation:

/.../ because in copula it is certain and manifest that they are unable to emit true semen apt for generation and for the end of marriage, since they lack testicles, which elaborate the semen, as theologians have always rightly taught.⁸⁸

Speaking of the constitution of the verum semen, he went on to say: "Physiologically, the verum semen /.../ is made up essentially of spermatozoa, which effect generation, and only of spermatozoa."⁸⁹ It appears that he built his entire system on the premise that the purpose of marriage was the

87 Cf. J. Antonelli, De conceptu impotentiae et sterilitatis relate ad matrimonium, p. 68-69.

88 Ibid., p. 68. "/.../ quia in copula certum ac manifestum est eos non posse effundere verum semen ad generationem et ad matrimonii causam aptum, deficientibus testibus, qui semen elaborant, ut semper recte docuere theologi."

89 J. Antonelli, Medicina pastoralis, v. II, n. 678, p. 460. "Physiologice enim verum semen /.../ conficitur essentialiter nemaspermatis, quae operantur generationem, et tantum nemaspermatis."

propagation of the human species, and that any other end of marriage was accessory only to this primary objective.⁹⁰

While being aware of the danger of oversimplification in a complex matter, we may summarize as follows: the opinion of Gasparri (as well as F. Cappello, A. Eschbach, C. Galdi, E. Génicot, B. Merkelbach, and F.X. Wernz) required a verum semen of testicular origin for potency regardless of whether it was fertile or not; whereas, Antonelli (S. Aichmer, I. Alberti, M. De Luca, F. Santi) required not only that the verum semen originate in the testicles but also that it be fertile, capable of effecting generation.⁹¹ It was only natural that these two trends, supported by the respective arguments of their proponents, would have an influence on the jurisprudence of ecclesiastical tribunals in dealing with cases of impotence or of nonconsummation of marriage. We must now survey the effect of that influence on Rotal jurisprudence in particular.

On June 29, 1908, in his Constitution Sapienti consilio⁹² on the reorganization of the Roman Curia, Pope Pius X decreed the re-establishment of the Sacred Roman

90 Cf. J. Antonelli, De conceptu impotentiae et sterilitatis relate ad matrimonium, p. 60.

91 Cf. G. St-Hilaire, op. cit., p. 95.

92 Cf. Pius X, Apostolic Constitution Sapienti consilio, June 29, 1908, in A.A.S., 1(1909), p. 7-19, especially p. 15.

Rota.⁹³ Following the restoration of the Rota, the first sentence to treat explicitly of the elements of the verum semen was a sentence c. Cattani.⁹⁴ While this particular sentence favoured the fertile semen theory of Antonelli, all the subsequent sentences up to 1929, except one c. Solieri, August 10, 1922,⁹⁵ (favouring the satiative copula theory whereby ordinary semination is sufficient for perfect copula without reference to its testicular content) applied Gasparri's theory on testicular semen, paying little heed to whether it was fecund or not and considering azoospermia as an index of sterility rather than impotence.⁹⁶

A sentence c. Chimenti on June 28, 1924,⁹⁷ seems to have terminated the controversy regarding the fertile semen theory of Antonelli and the testicular semen theory of Gasparri, by espousing the latter theory and stating that a semen of testicular origin is required for potency but it need not

93 Cf. G. St-Hilaire, op. cit., p. 148. (Our study of Rotal jurisprudence will summarize St-Hilaire's conclusions, giving at the same time the necessary references to important sentences of the Rota and cross-references to St-Hilaire's work).

94 Cf. S.R.R. Dec., 5(1931), c. Cattani, January 8, 1913, p. 23-38. Cf. G. St-Hilaire, op. cit., p. 154-156.

95 Cf. S.R.R. Dec., 14(1922), c. Solieri, August 10, 1922, p. 272-289. Cf. G. St-Hilaire, op. cit., p. 179-183.

96 Cf. G. St-Hilaire, op. cit., p. 563.

97 Cf. S.R.R. Dec., 16(1924), c. Chimenti, June 28, 1924, p. 257-264. Cf. G. St-Hilaire, op. cit., p. 187-191.

be fertile. In the period between 1909 and 1929 it is noteworthy that, of the six sentences dealing with seminal analysis chosen for our study, none took issue with the morality of the methods used to obtain samples of semen. On the other hand, the judges did not take azoospermia into account when declaring marriage null on the grounds of impotence.⁹⁸

After 1929, Rotal jurisprudence gave evidence of a certain evolution in its understanding of the elements of the male ejaculate. More and more, there was a tendency to admit that a major part of the seminal liquid was not of testicular origin but rather derived from the adjoining glands. A sentence c. Mannucci⁹⁹ on May 17, 1932 appeared to base itself on the opinion of Vermeersch¹⁰⁰ that the testicles produce almost exclusively only spermatozoa to which is added a very small amount of liquid. This sentence was also the first to recognize that azoospermia had a certain value as indicating a lack of semen; such an indication must be completed by the proof of lesions in

98 Cf. G. St-Hilaire, op. cit., p. 563.

99 Cf. S.R.R. Dec., 23(1932), c. Mannucci, May 17, 1932, p. 190-199. Cf. G. St-Hilaire, op. cit., p. 239-242.

100 Cf. A. Vermeersch, De castitate et vitiis contrariis, n. 7.1, p. 5-6.

either the organs that produce or those that transport the semen.¹⁰¹ However, subsequent sentences by both Grazioli¹⁰² and Heard¹⁰³ emphasized that azoospermia of itself, in the absence of organic lesions, proved nothing.¹⁰⁴

The sentence c. Wynen of April 25, 1941¹⁰⁵ marked a turning point in the jurisprudence on the subject of the true semen and azoospermia. With this sentence began the controversy between those who held that the spermatozoa are the unique secretion of the testicles and those who held the contrary. Wynen held that it was by no means certain that the testicles produce only spermatozoa. He also insisted that

101 Cf. G. St-Hilaire, op. cit., p. 564.

102 Cf. S.R.R. Dec., 27(1935), c. Grazioli, March 29, 1935, p. 180-189; 29(1937), April 5, 1937, p. 248-262; 29(1937), April 30, 1937, p. 319-328; 31(1939), March 20, 1939, p. 166-177; 35(1943), November 30, 1943, p. 857-871. Cf. G. St-Hilaire, op. cit., p. 258-264, 265-270.

103 Cf. S.R.R. Dec., 30(1938), c. Heard, March 16, 1938, p. 173-178; 30(1938), November 12, 1938, p. 577-584; 36(1944), June 3, 1944, p. 371-378; 38(1946), March 11, 1946, p. 142-150; 38(1946), November 30, 1946, p. 559-570; 41(1949), March 16, 1949, p. 94-100; 42(1950), January 14, 1950, p. 23-26; 42(1950), July 13, 1950, p. 470-474; 45(1953), April 30, 1953, p. 299-305. (Also, 2 unpublished sentences: April 21, 1949 and December 29, 1953). Cf. G. St-Hilaire, op. cit., p. 280-297.

104 Cf. G. St-Hilaire, op. cit., p. 564.

105 Cf. S.R.R. Dec., 33(1941), c. Wynen, April 25, 1941, p. 284-308. Cf. G. St-Hilaire, op. cit., p. 308-315.

the testicles were constituted not only by the didymis but also the epididymis. His conclusion was that the liquid of the epididymis in the ejaculate would truly be considered as semen elaboratum in testiculis. According to the decision, potency requires that a man bring to the sexual act the generative organs with which nature has endowed him. The consequence is that if the testicles cannot or do not function in the act of sexual intercourse, it is impossible for the man to fulfill the act imposed on him by nature in order that the relationship be apt for new life.¹⁰⁶

The final summation from this sentence by Wynen is as follows: a man is potent, and the act of sexual intercourse is apt for the generation of offspring, if it is placed by a man with at least one testicle with unobstructed spermatic ducts, with a male organ capable of being erected, of penetrating the vagina, and of depositing semen within the vagina. The sentence, moreover, underlined that azoospermia might be only a temporary condition due to contingent causes and for this reason at least did not prove

¹⁰⁶ Cf. S.R.R. Dec., 33(1941), c. Wynen, April 25, 1941, p. 288-291. Cf. P. Harrington, loc. cit., p. 330-332. Cf. G. St-Hilaire, op. cit., p. 564.

impotence.¹⁰⁷ The sentences c. Heard, March 16, 1949,¹⁰⁸ July 13, 1950¹⁰⁹ and February 25, 1954,¹¹⁰ also asked that the azoospermia be verified more than once and at intervals before it was considered as an indication of impotence.¹¹¹

Sentences posterior to 1941, in speaking of the elements secreted by the testicle, tended to agree with Wynen that it was at least doubtful that the testicle produced only spermatozoa.¹¹² With Doheny's sentence of May 22, 1950,¹¹³ however, began another series of sentences which, contrary to Wynen, affirmed that the didymis alone came under the name of testicle. It was only with Lefebvre on February 18, 1960, that the Rota affirmed that the spermatozoa are the sole element secreted by the testicle.¹¹⁴

107 Cf. S.R.R. Dec., 33(1941), c. Wynen, April 25, 1941, p. 289, 292-293. Cf. P. Harrington, loc. cit., p. 334.

108 Cf. S.R.R. Dec., 41(1949), c. Heard, March 16, 1949, p. 94-100. Cf. G. St-Hilaire, op. cit., p. 287-289.

109 Cf. S.R.R. Dec., 42(1950), c. Heard, July 13, 1950, p. 470-474. Cf. G. St-Hilaire, op. cit., p. 291-292.

110 Cf. S.R.R. Dec., 46(1954), c. Heard, February 25, 1954, p. 165-170. Cf. G. St-Hilaire, op. cit., p. 422-423.

111 Cf. G. St-Hilaire, op. cit., p. 565.

112 Cf. G. St-Hilaire, op. cit., p. 565.

113 Cf. S.R.R. Dec., 42(1950), c. Doheny, May 22, 1950, p. 303-310. Cf. G. St-Hilaire, op. cit., p. 365-366.

114 Cf. S.R.R. Dec., 52(1960), c. Lefebvre, February 18, 1960, p. 84. Cf. G. St-Hilaire, op. cit., p. 490-494.

The allocution of Pius XII to the Twenty-Sixth Congress of Urologists on October 8, 1953,¹¹⁵ has exercised a certain influence on Rotal jurisprudence concerning azoospermia and the verum semen. In the words of the Pope:

Moreover, the potentia coeundi comprises on the part of the husband the capacity to transmit in a natural way the liquid of the seminal glands; there is no question of each of the specific and complementary elements constituting this liquid. The lack of active sperm is not ordinarily a proof that the husband cannot exercise the function of transmission. Also, azoospermia, oligospermia, asthenospermia, necrospermia in themselves have nothing to do with the impotentia coeundi, because they concern the constituent elements of the seminal liquid itself, and not the faculty of transmitting it. /.../ The examination of the sperm by itself can scarcely lead to sufficient proof /of impotence/.¹¹⁶

¹¹⁵ Cf. Pius XII, Allocution to the 26th Congress of Urologists, October 8, 1953, loc. cit., p. 673-679.

¹¹⁶ Ibid., p. 676-678. "En outre la 'potentia coeundi' comporte de la part de l'époux la capacité de transmettre de façon naturelle le liquide des glandes séminales; il n'est pas question de chacun des éléments spécifiques et complémentaires constituants de ce liquide. Le manque de sperme actif n'est pas d'habitude une preuve que l'époux ne peut exercer la fonction de transmission. Aussi l'azoospermie, l'oligospermie, l'asthenospermie, la nécrospermie n'ont rien à faire en soi avec l'impotentia coeundi', parce qu'elles concernent les éléments constitutifs du liquide séminal lui-même, et non la faculté de le transmettre /.../ L'examen du sperme par lui seul peut difficilement procurer une sécurité suffisante " (azoospermia: absence of spermatozoa; oligospermia: reduced number of spermatozoa; asthenospermia: spermatozoa lacking in vigour; necrospermia: dead spermatozoa).

The fact that the Pontiff left the possibility open of examining the sperm when it was obtained by licit means (and even possibly of accepting the results of an examination of a sample obtained illicitly),¹¹⁷ permitted the Rotal judges to give medical evidence serious consideration. While the first sentence after the papal discourse, that of Pasquazi on February 2, 1954,¹¹⁸ was rather opposed to azoospermia as an argument, it nevertheless clearly indicated that the judges could also take into account the results of an analysis of semen obtained in an illicit manner. Subsequently, with the exception of a sentence c. Canestri on February 1, 1955¹¹⁹ and one c. Pinna on March 27, 1958,¹²⁰ the results of seminal analysis were no longer rejected for reasons of the moral order.¹²¹

117 Cf. ibid., p. 678.

118 Cf. S.R.R. Dec., 46(1954), c. Pasquazi, February 2, 1954, p. 86-95. Cf. G. St-Hilaire, op. cit., p. 414-418.

119 Cf. S.R.R. Dec., 47(1955), c. Canestri, February 1, 1955, p. 116-122. Cf. G. St-Hilaire, op. cit., p. 428-429.

120 Cf. S.R.R. Dec., 50(1958), c. Pinna, March 27, 1958, p. 198-209. Cf. G. St-Hilaire, op. cit., p. 479-480.

121 Cf. G. St-Hilaire, op. cit., p. 566.

With the passage of time, the Rota accorded even more importance to azoospermia as one of the indications of male impotence. An analysis of the prostatic fluid or that from the seminal vesicles, as well as a testicular biopsy was added to the examination of the ejaculate to prove the lack of verum semen. Besides, the sentence c. Felici of March 22, 1955,¹²² explicitly pointed out that, under the influence of Pius XII, the Rota admitted (albeit only recently) azoospermia as an index of proof.¹²³

The general change of attitude of the Rota with respect to the evidence of impotence from azoospermia, seems to have been due in part to the fact that doctors almost unanimously hold that the spermatozoa are the sole secretion of the testicle to be transported outside that organ. Lefebvre explicitly accepted this scientific fact in his sentence of February 18, 1960.¹²⁴ The affirmation regarding spermatozoa as the sole testicular secretion ad extra seemed also to be admitted by the Rotal sentences from 1965-1968.¹²⁵

122 Cf. S.R.R. Dec., 47(1955), c. Felici, March 22, 1955, p. 235-240. Cf. G. St-Hilaire, op. cit., p. 438-439.

123 Cf. G. St-Hilaire, op. cit., p. 566.

124 Cf. footnote 114.

125 Cf. G. St-Hilaire, op. cit., p. 567.

A further sentence of Lefebvre on April 27, 1968,¹²⁶ took note of the fact that the testicles also produce spermatogonia, spermatids (spermatozoa in developmental stages), and other products of the seminal line; these constitute verum semen as well, since they are elaborated in the testicles, but they are infertile. Thus, the distinction between impotence and sterility is preserved.¹²⁷

While azoospermia can be explained otherwise than by testicular atrophy or occlusion of the spermatic ducts, it has been fairly well accepted at the Rota since about 1953 as a confirmation or corroboration of the proof of impotence. The sentences c. Mattioli,¹²⁸ c. Lefebvre,¹²⁹ and above all c. Palazzini¹³⁰ bear this out, not to mention those c.

126 Cf. G. St-Hilaire, op. cit., p. 502-504. This particular sentence (Sen. 84/68 - Tourinen. N. 9127) is unpublished.

127 Cf. G. St-Hilaire, op. cit., p. 567.

128 Cf. e.g., S.R.R. Dec., 46(1954), c. Mattioli, February 26, 1954, p. 170-173. Cf. G. St-Hilaire, op. cit., p. 443-445.

129 Cf. S.R.R. Dec., 52(1960), c. Lefebvre, February 18, 1960, p. 83-89. Cf. G. St-Hilaire, op. cit., p. 490-494.

130 Cf. e.g., Sent., 81/67 - Mediolanen. N. 8651, c. Palazzini, May 18, 1967, reported in G. St-Hilaire, op. cit., p. 524-526.

Felici,¹³¹ and c. Filipiak.¹³² Consequently, when azoospermia is detected several times at spaced intervals, and there are also other symptoms of testicular atrophy or occlusion of the spermatic ducts, it is considered to give a very serious indication of male impotence due to lack of verum semen.¹³³

The decisions of the Rota on male impotence during the first few years of the present decade gave no indication that the Tribunal was modifying its stance on the question of the verum semen. Consider the following quote from a sentence /c. Lefebvre/ on December 20, 1970:

On account of our /jurisprudence/ on the verum semen or semen elaborated in the testicles, there is required above all the possibility of that elaboration, namely the activity of the didymis /.../.¹³⁴

131 Cf. e.g., S.R.R. Dec., 46(1954), c. Felici, March 16, 1954, p. 239-244. Cf. G. St-Hilaire, op. cit., p. 434-436.

132 Cf. e.g., S.R.R. Dec., 49(1957), c. Filipiak, January 18, 1957, p. 17-20. Cf. G. St-Hilaire, op. cit., p. 467-468.

133 Cf. G. St-Hilaire, op. cit., p. 567.

134 P.U.G., Cursus renovationis canonicae pro judicibus..., p. 22. The quote is from a sentence /c. Lefebvre/ apparently not published elsewhere. "Propter istam /jurisprudentiam Nostram/ veri seminis seu seminis a testiculis elaborati ante omnia requiritur possibilitas istius elaborationis, sc. activitas didymorum /.../."

An article by Lefebvre in 1971¹³⁵ on the approach of medical science and Rotal Jurisprudence to the problem of impotence reinforced the impression:

According to Rotal jurisprudence, physical impotence consists in the impossibility to realize copula perfecta, that is, the introduction of the male organ into the female organs with the emission of the verum semen. /.../ Traditionally, the verum semen is to be understood as in testiculis elaboratum. It follows that, according to the continuous jurisprudence of the Rota, any secretion of testicular origin followed by emission is necessary and sufficient for the consummation of marriage; reciprocally, that marriage is to be held as null if the impossibility of this production of testicular origin or of its emission can be proven. This is the case in total and complete atrophy of the testicles, for example in certain particularly serious cases of double cryptorchidia. The same can be said of certain infections - more commonly blennorrhoea, mumps, tuberculosis in some cases - where there is complete occlusion of the epididymi or of the deferent ducts: the product of the testicles cannot be ejaculated.¹³⁶

Parisella adopted the same line of reasoning in his sentence of May 13, 1971:

135 Cf. C. Lefebvre, "L'impuissance: science médicale et jurisprudence rotale", in A.C., 15(1971), p. 415-427.

136 Ibid., p. 417, 418-419. (Double cryptorchidia is a condition where the testes have not descended into the scrotum. Blennorrhoea is a venereal disease accompanied by purulent discharge from the urethra, Larousse Médical, p. 112, 278).

/.../ according to the constant jurisprudence of the Rota a man is impotent when he is unable to penetrate with the erect male organ, in a natural way, the vagina of his wife and deposit therein the verum semen. /.../ Verum semen is that /.../ which is elaborated in the testicles, "which is of itself apt for procreation, even if the man be sterile" (cf. alloc. Pius XII, Oct. 8, 1953). /.../ "if there is proof of azoospermia not only once, but several times, over a long period of time, then there is a very serious indication of impotence, since other causes of this defect are of their nature transitory (Cf. S.R.R. Dec., 41(1949), c. Heard, December 18, 1949, n. 2, p. 95)".¹³⁷

In a sentence at the end of 1972, Lefebvre spoke of the causes of organic or instrumental impotence in the following terms:

¹³⁷ S.R.R. Dec., c. Parisella, May 13, 1971, in E.I.C., 27(1971), p. 407-409. "/.../ secundum constantem iurisprudentiam Rotalem, tunc /impotentia viri/ habetur, cum is per virgam erectam, naturalem in modum, uxoris vaginam penetrare, ibique verum semen deponere non valet. /.../ Est autem verum semen quod /.../ in testiculis elaboratur, 'quod de se aptum sit ad procreationem, etsi sterilitate laborare possit vir' (cf. allocutionem Pii XII die 8 oct. 1953). /.../ 'et, si non semel, sed pluries, per longum tempus de azoospermia constet, iam gravissimum haberi indicium impotentiae, cum ceterae causae defectus natura sua transitoriae sint' (Cf. S.R.R. Dec., 41(1949), c. Heard, Dec. 18, 1949, n. 2, p. 95)" (emphasis in the original).

/.../ and so among other defects, when the testicles, are so atrophied that verum semen is unable to be produced, as is deduced from the celebrated brief of Sixtus V Quum frequenter, June 27, 1587.¹³⁸

Since the Rotal sentences are not published as a whole until ten years after the decisions were actually given, it is impossible at present to make a global judgment on the attitude of the Rota in the first five years of this decade with respect to the problem of the verum semen. However, the few sentences published in the canonical reviews are not indicative that the Rotal judges are about to change their view on the relation of the absence of verum semen to male impotence.

After the reorganization of the Rota in 1908, its jurisprudence has tended to favour the theory of Cardinal Gasparri, which demanded that there be a testicular component in the male ejaculate irrespective of its fertility.¹³⁹ To sum up then: in the mind of the Rota, a man is potent when he has a normally constructed and developed male organ, which is capable of being erected and of being sustained in erection long enough to penetrate the female vagina and to

¹³⁸ S.R.R. Dec., c. Lefebvre, December 16, 1972, in E.I.C., 29(1973), p. 105. "/.../ Ita inter alia quando testiculi sunt atrophici adeo ut verum semen non produci queat, uti deducitur e celebri brevi Sixti /V/ 'Quum frequenter' diei 27 junii a. 1587."

¹³⁹ Cf. footnotes 82 and 83.

seminate within it; proper semination requires one healthy testicle, which elaborates the verum semen, which should pass through an uninterrupted passage from the testicle through the vas deferens and seminal vesicles to the urethral os and ultimately be deposited within the vagina of the woman at the moment of ejaculation.¹⁴⁰

Conversely, a man is impotent if he lacks a male organ, or the male organ lacks sufficient erectibility for penetration or is otherwise defective; if he lacks at least one healthy testicle and unoccluded spermatic duct. Therefore, complete absence of testicles (or their complete atrophy), or complete occlusion of the spermatic ducts would, according to Rotal practice, constitute a diriment impediment to marriage.

For approximately the last twenty years, the Rota has tended to give more importance to azoospermia (the absence of spermatozoa in the semen) as an index of impotence by reason of the absence of verum semen, but only inasmuch as the condition is verified on several occasions over a long period of time. Even then it is seen as simply corroborative

140 Cf. P. Harrington, loc. cit., p. 496.

of other evidence of the impotence. The value of the test for azoospermia derives from the fact that when the presence of the sperm cannot be demonstrated in the ejaculate, the presence of a testicular component (the verum semen) cannot be proved.¹⁴¹ Finally, sterility is still distinguished from impotence, in as much as in that case the verum semen would still be present but infertile for some reason, e.g., the spermatozoa are too few in number (oligospermia), are debile (asthenospermia), or are dead (necrospermia).

According to the jurisprudence of the Rota, a man who has undergone bilateral vasectomy, for example in prostatic surgery or for purposes of sterilization, would be impotent, since the continuity of the vasa deferentia has been interrupted. The male ejaculate would as a consequence contain no testicular component, no verum semen. Nevertheless, the Sacred Congregation of the Holy Office has on a number of occasions permitted doubly vasectomized men to contract marriage. We shall look briefly at the practice of the Holy Office in such cases.

¹⁴¹ Cf. ibid., p. 472.

2. The Practice of the Sacred Congregation
of the Holy Office regarding the Marriage
of the Bilaterally Vasectomized.¹⁴²

The term "vasectomy" may be taken in the sense of the interruption of the continuity of the vasa deferentia by ligation, division or segmental resection. Urologists commonly use the procedure in prostatic surgery to prevent the spread of infection from the prostatic bed to the epididymis.¹⁴³ But in recent years, vasectomy is often performed, in the absence of any pathological condition, purely for the purpose of sterilization. Apart from the moral question of the liceity of unnecessary mutilation, the problem has repercussions in the area of pastoral practice. In other words, are bilaterally vasectomized men to be debarred from marriage on the basis of the diriment impediment of impotence? Or, if they are permitted to marry, can their marriage be annulled on the grounds of impotence?

¹⁴² Cf. S.C.S. Off., Private Reply to the Bishop of Aix-la-Chapelle (Aachen), February 16, 1935, original Latin text in J.R. Cavanagh, Fundamental Marriage Counselling, Cork, Mercer Press, 1959, p. 181; in G. St-Hilaire, op. cit. p. 228; and in A. Silvestrelli, "Circa l'impotenza e l'inconsummazione nella giurisprudenza canonica anche del S. Ufficio", in M.E., 98(1973), p. 115. The reply is not in the A.A.S. Cf. S.C.S. Off., Private Replies to the Tribunal of the Diocese of Worcester, Mass., January 28 and March 25, 1964, in C.L.D., 6, p. 616-618; in The Jurist, 25(1965), p. 301-303.

¹⁴³ Cf. P. Harrington, loc. cit., p. 491.

We are fully aware that a few private replies of the Sacred Congregation cannot be said to constitute jurisprudence in the same sense as do the decisions of the Rota over sixty years. However, we offer two samples of the replies of the Holy Office separated by almost thirty years in time. The first reply on February 16, 1935, concerns the permission for certain doubly vasectomized men to marry; the second, January 28, 1964, states that the marriage of a doubly vasectomized man is not to be declared null on the grounds of impotence.

a) The Reply of the Sacred Congregation of the Holy Office to the Bishop of Aix-la-Chapelle, February 16, 1935.

The query of the Bishop of Aix-la-Chapelle concerns the possible marriages of men, who have been sterilized for eugenic purposes.¹⁴⁴ The text of the reply of the Holy Office, February 16, 1935 is as follows:

D. An vir qui subiit vasectomiam bilateralem, totalem et irreparabilem, vel aliam operationem ejusdem effectus, qua scilicet omnis communicatio cum testiculis irreparabiliter ita intercluditur ut nulla spermata ex iis traduci et transferri naturali via possint,

D. Whether a man who has undergone a bilateral vasectomy, total and irreparable, or any other surgical operation having the same effect, namely, that all communication with the testicles is irreparably cut off so that

¹⁴⁴ Cf. P.L. Frattin, op. cit., p. 69.

nihilominus ad matrimonium ineundum admitti tuto possit, iuxta normam can. 1068, 2 statutam?

no sperm can be carried through and transferred in the natural way; can be nevertheless safely permitted to enter marriage according to the norm established in C. 1068, par. 2.

R. In casu sic dictae sterilizationis iniqua lege impositae, matrimonium, ad mentem p. 2, Can. 1068, non esse impediendum.¹⁴⁵

R. In the case of the aforementioned sterilization imposed by an immoral law, marriage is not to be prohibited, according to the mind of can. 1068, par. 2.¹⁴⁶

To appreciate this response we must realize that the question arose in the first place, because a number of men had been subjected to a vasectomy as a result of a law promulgated under the Nazi government of Germany. The purpose of the law was to prevent a rising generation afflicted with hereditary weaknesses. Only if the men submitted to the operation would they be permitted to enter a civil marriage, which by law had to precede the ecclesiastical ceremony. Without the operation there could be no marriage, for thereby the marriage before the Church was also prohibited.¹⁴⁷

The Bishop of Aix-la-Chapelle was authorized to bring the response to the knowledge of the whole German episcopate.¹⁴⁸

¹⁴⁵ Cf. A. Silvestrelli, loc. cit., p. 115.

¹⁴⁶ Cf. J.R. Cavanagh, op. cit., p. 181.

¹⁴⁷ Cf. ibid., p. 180.

¹⁴⁸ Cf. E. Regatillo, Interpretatio et iurisprudencia C.J.C., p. 431.

A document in the Holy Office attests to the fact that Pius XI himself had approved the decision in question on February 6, 1935. He also authorized the Sacred Congregation in July 1935 to communicate the response to the interested Dicasteries.¹⁴⁹

The Sacred Roman Rota recognized the validity of the reply but interpreted it as expressing a doubt of fact - that the Holy Office doubted the fact of the permanency of the vasectomy. However, it is recalled that the original inquiry of the Bishop of Aix-la-Chapelle stated quite clearly that the condition was permanent and irreversible. Nevertheless, the jurisprudence of the Rota has not changed as a result of the reply, and hence that Sacred Tribunal refuses to admit a doubt of law in the case of those unable to deposit a semen elaboratum in testiculis.¹⁵⁰

In a sentence of December 20, 1970, Lefebvre seems to attempt to reconcile the Rotal jurisprudence with the practice of the Holy Office:

¹⁴⁹ Cf. A. Silvestelli, loc. cit., p. 115.

¹⁵⁰ Cf. P. Harrington, loc. cit., p. 345.

Let not the objection be raised that in the case of double vasectomy the Sacred Congregation of the Holy Office has replied that "the marriage is not to be impeded" (February 16, 1935 and September 28, 1957¹⁵¹), for the motive is added, namely, canon 1068, §2, which refers to either a doubt of law or of fact. Hence the reply can be reconciled with our jurisprudence.¹⁵²

In any event, the practice of the Rota has remained constant despite the attitude of the Holy Office. Since the Rota, following Gasparri's opinion, requires the presence of the verum semen in testiculis elaboratum for potency, and doubly vasectomy precludes this possibility, a man who undergoes such a surgical procedure is impotent in the Rotal sense.¹⁵³

151 Cf. A.C., 5(1957), p. 240-241. The reply was to certain Ordinaries concerning those sterilized by double vasectomy. "In casu vasectomiae bilateralis matrimonium, ad mentem c. 1068, §2, non esse impediendum."

152 P.U.G., Cursus renovationis canonicae pro iudicibus..., p. 21-22. This sentence does not seem to be published elsewhere. "Nec obiciatur in casu duplicis vasectomiae S.C.S. Off. respondisse 'matrimonium non esse impediendum' (dd. 16 februarii 1935 et 28 septembris 1957), etenim motivum additur, sc. ipse canon 1068, §2, quo refertur dubium sive iuris, sive facti. Proinde facile potest concordari cum iurisprudencia nostra."

153 Cf. P. Gasparri, Tractatus canonicus de matrimonio..., v. I, p. 470.

It is important to note that the Holy Office did not take a definite stand in the controversy. The most that can be concluded from the 1935 reply is that double vasectomy gives rise to a doubtful impediment, which may not impede the natural right to marry. Neither is it clear whether the Holy Office considers that there exists a doubt of law or a doubt of fact, although the Rota seems to assume the latter.¹⁵⁴ For those (e.g., Vermeersch, Arend, Iorio, McCarthy), who hold the copula satiativa theory, which does not require a testicular component in the seminal fluid,¹⁵⁵ the reply of the Holy Office seems to confirm that semination can be effected by the liquid from the seminal vesicles, prostate gland, and the bulbo-urethral glands. In at least one decision, the Rota referred to the opinion of Vermeersch and others for the purpose of saying that it could not consider

¹⁵⁴ Cf. J.P. King, "Procedure to be followed in Obtaining Permission for Marriage by the Doubly Vasectomized", in The Jurist, 23(1963), p. 447. Cf. P. Harrington, loc. cit., p. 345.

¹⁵⁵ Cf. P. Harrington, loc. cit., p. 346. Cf. Vermeersch, op. cit., p. 72, 75. Cf. G. Arend, "De Genuina ratione impedimenti impotentiae", in E.T.L., 9(1932), p. 28-69, 442-450. Cf. T. Iorio, Theologia moralis, v. III, n. 1054, p. 595. Cf. J. McCarthy, "The Impediment of Impotence in Present Day Canon Law", in E.I.C., 4(1948), p. 98-130.

this new doctrine as probable and so it has not applied it in its decisions.¹⁵⁶

Those, who favour the copula satiativa theory, feel that Sixtus V forbade eunuchs to marry precisely because they could emit only a small amount of thin, watery fluid, which differed both in quantity and quality from the ejaculate of a normal man. With reference to the bilaterally vasectomized man, they argue that he can emit a normal, viscous ejaculate, and so should not be equated with the castrate and should not be considered impotent. They further claim that one cannot draw a cogent argument from Cum frequenter to favour the Rotal theory that verum semen must be elaborated in the testicles. They say this doctrine should be certain and conclusive if it is to establish an invalidating impediment. Since there is no observable difference between the ejaculate of a doubly vasectomized man and of a normal man, with the exception of the absence of spermatozoa, the existence of the invalidating impediment can be discovered only by a minute microscopic examination.¹⁵⁷

¹⁵⁶ Cf. S.R.R. Dec., 33(1941), c. Wynen, April 25, 1941, p. 286.

¹⁵⁷ Cf. P. Harrington, loc. cit., p. 338, 340. Cf. footnote 155 above. (The Congregation of the Sacraments likewise follows the Rotal opinion regarding the verum semen, considering marriage as nonconsummated in the absence of a testicular component in the semen. Cf. U. Navarrete, "Mutationes in iure matrimoniali", in Prawo Kanoniczne, 15(1972), p. 11).

With respect to the Rotal opinion, the reply of the Holy Office of 1935 does not make it clear that the marriages in question were not to be impeded because the Congregation doubted about the perpetuity of the impediment. The Bishop's letter had indicated that the operation was irreversible, which it could well have been at that time. At the present time, the success of anastomosis surgery to restore the continuity of the vasa deferentia after bilateral vasectomy is more hopeful. In any case, considering the delicacy of the technique, the surgery cannot be considered an ordinary means to which the vasectomized person should submit to remedy his impotent condition.¹⁵⁸

Two further replies of the Holy Office, in 1965, provide an interesting parallel to the case just studied. In a reply dated June 11, 1965, a marriage involving a man lacking both testicles as a result of surgery (double orchiectomy) was declared capable of simple convalidation.¹⁵⁹ A month later, on July 11, 1965, the same Sacred Congregation stated that marriage was not to be impeded in the case of a

¹⁵⁸ Cf. P. Harrington, loc. cit., p. 493-494. Cf. B. de Lanversin, loc. cit., p. 93-122, especially p. 116-119.

¹⁵⁹ Cf. C.L.D., 6, p. 618-619.

man with congenital defect of both testicles.¹⁶⁰ Obviously, the condition of both the men would rule out the verum semen in testiculis elaboratum, which the Rota and the Congregation of the Sacraments hold necessary for marital consummation. Of these two replies, the Holy Office invoked canon 1068, §2, in the July 11, 1965 response only, involving the congenital defect of testicles.¹⁶¹

We shall now consider the attitude of the Holy Office with respect to declaring the marriage of a doubly vasectomized man null on the grounds of impotence.

b) The Replies of the Sacred Congregation of the Holy Office to the Tribunal of the Diocese of Worcester, U.S.A., January 28, 1964, and March 25, 1964.

Because of the manner in which the Holy Office chose to reply, the full text of the original inquiry sent by the Officialis of Worcester to the Sacred Congregation is given:

The following case is presented to the consideration of the Congregation of the Holy Office for an interpretation on the law and for decision.

The Tribunal of Worcester accepted the case since it was competent by virtue of contract and domicile. When the evidence was completely taken, the Tribunal became aware of the fact that there was probably a dubium iuris et facti present and that, if there is a dubium iuris, it would be

160 Cf. ibid., p. 619-620.

161 Cf. ibid., p. 620.

beyond its competency to make a decision on the nullity of the marriage.

The Congregation of the Holy Office, in a ruling dated September 28, 1957, stated "in casu vasectomiae bilateralis matrimonium ad normam (c. 1068, §2) non esse impediendum." In view of this ruling, the Tribunal could not decide how canon 1068, §1 and §2, was to be interpreted and applied in this case of S.-H.

In this case, the defendant, prior to the marriage and by virtue of a pact, subjected himself to an operation of bilateral vasectomy. The evidence submitted indicates with moral certitude that the operation did take place by mutual agreement in order that no children would be born of the union, since the principals were led to believe that the insanity in the defendant's family would be inherited by any children he might father. But the following questions then arise:

1. Is or is not the defendant impotent since the bilateral vasectomy performed renders it impossible perpetually and prior to the marriage for the defendant to effuse verum semen in vaginam?
2. Is the marriage invalid since a bilateral vasectomy was performed deliberately prior to marriage to prevent the attainment of the primary end of marriage?
3. If this marriage is invalid, is it because of impotency arising from the bilateral vasectomy and/or because there was a defective intention contra bonum prolis?
4. Does the ruling of the Congregation cited above refer only to cases of bilateral vasectomy which, when performed, had at that time no reference to marriage?

5. Is the ruling of the Congregation cited above to be applied in all cases of bilateral vasectomized men desiring to marry or was the ruling applicable only to the individual case about which the Congregation was consulted?
6. Does the ruling of the Congregation indicate that the capability of ejaculation of verum semen can be considered doubtful as a rule in a bilaterally vasectomized man?
7. Would the ruling be applicable in cases in which medical evidence indicates that a given operation of bilateral vasectomy before a marriage will certainly, irreversibly and perpetually prevent the passage of semen?¹⁶²

A first response from the Holy Office was dated

January 28, 1964:

Actis maturo examini subiectis, expletisque omnibus in casu explendis, Em.mi. ac Rev.mi Patres huius Supremae S.C. in Coetu plenario diei 22 ianuarii 1964 decreverunt: "matrimonium non potest declarari nullum ex capite impotentiae; hac decisione non excluditur possibilitas instruendi processum ex alio capite (v.g., ob exclusionem boni prolis)."163

After having subjected the acts /of the case/ to mature examination and fulfilled all the legal requirements of the case, the Most Eminent and Reverend Fathers of this Supreme Sacred Congregation, in the plenary session of 22 January, 1964, decreed: "The marriage cannot be declared null on the basis of impotency. This declaration does not exclude the possibility of drawing up a process under another heading (e.g., exclusion of children)."164

162 S.C.S. Off., Reply, January 28, 1964, "Double Vasectomy", in The Jurist, 25(1965), p. 301-302.

163 Ibid., p. 302-303.

164 C.L.D., 6, p. 617-618.

After receipt of the above reply, the Tribunal of Worcester again wrote on February 6, 1964, to inquire why the above marriage could not be declared null on the basis of impotence. The second reply of the Sacred Congregation March 25, 1964, was worded as follows:

Ad rem notum facio E.T. Rev.mae hanc Supremam S.C. tulisse tale decretum innixam super decisione anni 1935 ab eadem S.C. editam, scilicet; matrimonium non esse impediendum quando agitur de vasectomia bilateralis.

Quoad alia ab E.T. proposita, haec S.C. non opportunum duxit aliquid decernere cum de his adhuc inter moralistas et iuris peritos non una sit sententia.¹⁶⁵

On this matter /i.e., why the marriage cannot be declared null by reason of impotence⁷, I inform Your Excellency that this Supreme Sacred Congregation passed such a decree following the decision given by the same Sacred Congregation in 1935, sc., marriage must not be impeded when there is a question of bilateral vasectomy.

As for the other points proposed by Your Excellency, this Sacred Congregation does not think it opportune to make any decisions, since on these matters unanimity of opinion does not exist between moralists and canonists.¹⁶⁶

The replies of 1964 are noteworthy in that they are consistent with the previous ruling of the Holy Office to the effect that, in the case of bilateral vasectomy, marriage must not be impeded. The practice of the Holy Office does

¹⁶⁵ The Jurist, 25(1965), p. 303.

¹⁶⁶ C.L.D., 6, p. 618.

not recognize bilateral vasectomy as giving rise to a diriment impediment of impotence with respect to a marriage to be contracted, nor does it admit that a marriage once contracted by such a man can later be declared null on the grounds of impotence. By the same token, the constant jurisprudence of the Rota would hold such a marriage invalid from the beginning because of the inability of the man to ejaculate semen containing a testicular component.¹⁶⁷

As previously, the Holy Office does not in 1964 address the issue directly by answering the questions asked in the original inquiry from Worcester. It simply states that "on these matters unanimity of opinion does not exist between moralists and canonists."¹⁶⁸ The Sacred Congregation

¹⁶⁷ P. Harrington, loc. cit., p. 333. "From 1914 through 1943, the Sacred Roman Rota judged 38 cases in which inability to emit or deposit semen elaborated in the testicles was the main issue. In all cases, the above interpretation /the necessity of a testicular component in the semen/ was invoked and, in all but six cases, the marriage was declared invalid. In the remaining cases, the condition of impotency was established but the impediment of impotency could not be proved because there was question of the antecedent or permanent nature of the condition; in each instance the Holy Father dissolved the marriage on the basis that it was never properly consummated by marital relations."

¹⁶⁸ Cf. footnote 166.

might have added that neither is there unanimity of opinion on such matters in the highest échelons of ecclesiastical government, namely in the Roman Curia.

The purpose of this comparative study of the practice of the Sacred Roman Rota and the Congregation of the Holy Office (now the Congregation for the Doctrine of the Faith) on the question of the verum semen was not to defend or attack either position, but to take cognizance of the fact that there is discordance on the subject. The Rota seems to base its position on its interpretation of the words verum semen as found in Cum frequenter of Sixtus V, and ultimately on the view that the primary purpose of marriage is the procreation of children, so that copula has to be at least apt for generation. This position necessarily entails that the semen contain a testicular element since only the spermatozoa produced in the testicles have a generative effect. The Holy Office has not seen fit to justify its position other than by invoking canon 1068, §2. It would be pointless to surmise other motivation for its way of proceeding in such cases.

Harrington suggests a practical mode of action for dealing with the problem:

It would appear to the present writer that with two probable opinions, dealing with the semination required in copula, a doubt of law exists and in regard to a marriage to be contracted, canon 1068, §2, should be invoked: "If the impediment of impotency is doubtful, whether the doubt be one of law or of fact, the marriage is not to be prohibited." In regard to a marriage already contracted, canon 1014 should be invoked: "Marriage enjoys the favour of the law; therefore, in doubt, the validity of marriage should be sustained, until the contrary is proved."¹⁶⁹

CONCLUSION

In this chapter we have studied the consummation of marriage as it is viewed traditionally, from a biological perspective. Some basic anatomical and physiological notions were given as an aid in understanding this view. Impotence was seen as a defect impeding biological consummation, and our sources have indicated that, as early as the seventh century, Theodore of Canterbury intimated that it was an impediment to marriage. In subsequent centuries, ecclesiastical legislation became more explicit as to the nature and effects of the impediment, the Decretals of Gregory IX (1234) and Cum frequenter of Sixtus V (1587) representing important developments in the enactments on the subject.

¹⁶⁹ P. Harrington, loc. cit., p. 348.

The Code of Canon Law does not define impotence but specifies in canon 1068 under what conditions it constitutes a diriment impediment. However, the canonical notion of male impotence poses at present an almost insurmountable problem because of the practice of the Rota and the Holy Office in regard to what constitutes semination during copula. The former requires the presence of the so-called verum semen in the ejaculate, while the Holy Office does not. Consequently, in enumerating the physical elements required on the part of the male for the consummation of marriage, the discordance regarding the presence or absence of the verum semen must be kept in mind.

CHAPTER IV

THE CONSUMMATION OF MARRIAGE FROM THE PERSPECTIVE OF THE PROPOSED NEW LAW

Following the Second Vatican Council, the Holy See has made numerous efforts to put the conciliar decision into practice. The many documents issuing from the Holy Father and various Roman Congregations since the Council are an ample testimony to that fact. The same can be said of the work of the Pontifical Commission for the Revision of the Code of Canon Law.¹ The labours of the Pontifical Commission, accomplished with great attention to detail and often under working conditions somewhat less than ideal, have as yet to be fully appreciated. The Schema...de Sacramentis² represents an attempt to revise the first part of Book III of the Code.³ Of special interest to us are the revised canons on the

1 Cf. e.g., Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur, 95 p. (henceforth abbreviated as S.D.S. (Schema ... de Sacramentis); this document is marked reservatum, but the text of the marriage canons has been published in U. Navarrete, "Schema Iuris recogniti 'De matrimonio' textus et observationes", in Per., 63(1974), p. 611-658).

2 Cf. ibid.

3 Cf. C.I.C., Liber III, De Rebus, Pars I, De Sacramentis, cc. 731-1141.

Sacrament of Marriage,⁴ and in particular those canons dealing with the consummation of marriage and the diriment impediment of impotence.⁵

The Commission for the Revision of the Code is made up of fourteen coetus studiorum or study groups. It is presided over by a Cardinal Praeses, who also directly oversees the work of two of the coetus, the Coetus de ordinatione systematica Codicis and the Coetus de lege fundamentali. The twelve remaining groups have each their own moderator, who is either the Secretary of the Commission or one of his assistants.⁶ For the revision of the canons on the sacraments, two separate coetus were established: one for the revision of the marriage canons, and another for the revision of the canons on the other six sacraments. The coetus on marriage law, which met to discuss the reformation of canon 1015 on marital consummation and canon 1068 on the diriment impediment of impotence from February 16-21, and from May 14-15, 1970, was composed of sixteen consultants along with the Cardinal Praeses and Secretary. Three specialists in medicine

4 Cf. S.D.S., Titulus VII - De Matrimonio, can. 242-361, p. 72-94.

5 Cf. ibid., can. 245 and can. 283 respectively, p. 72 and 80.

6 Cf. Comm., 1(1969), p. 29-34.

and psychiatry were also present for the February deliberations, which dealt mainly with copula consummative of marriage and organic impotence.⁷

We have seen that ecclesiastical legislation has, on the whole, tended to stress the biological aspects of the consummation of marriage. More recently, however, some writers, notably J. Bernhard of the University of Strasbourg, have begun to speak of the "existential and in faith" consummation of marriage, seeing this amplification of the notion of consummation as more in keeping with the theology of Vatican II.⁸

7 Cf. Comm., 6(1974), p. 177-198.

8 J. Bernhard, "A propos de l'hypothèse concernant la notion de 'consommation existentielle' du mariage", in R.D.C., 20(1970), p. 184-192; "A propos de l'indissolubilité du mariage chrétien", in R.Sc.R., 44(1970), p. 49-62; "Où en est la dissolubilité du mariage chrétien dans l'Eglise d'aujourd'hui? état de la question", in A.C., 15(1971), p. 59-82; "Réinterprétation (existentielle et dans la foi) de la législation canonique concernant l'indissolubilité du mariage chrétien", in R.D.C., 21(1971), p. 243-278; "Perspectives renouvelées sur l'hypothèse de la 'consommation existentielle et dans la foi' du mariage chrétien", in R.D.C., 24(1974), p. 334-349; "Réflexion critique sur l'incapacité morale, incapacité ou non-consommation existentielle du mariage?", in R.D.C., 25(1975), p. 274-286.

According to Bernhard's hypothesis, a Christian marriage would not be consummated merely by the first act of conjugal intercourse following the exchange of consent. Consummation would also depend on the spouses having established "an intimate community of life and love", on their having elevated their conjugal love to a certain level of human and Christian fulfillment. Moreover, the term "ratified marriage" would be replaced by the term mariage instauré (marriage initiated by the pledged word of the parties, by the exchange of consent); likewise, a "ratified and consummated marriage" would be termed a mariage consacré (marriage not only physically consummated but also consecrated by the common life). Only the mariage consacré would be absolutely indissoluble, i.e., not dissolvable either by the will of the parties or by ecclesiastical authority.⁹ A detailed analysis of the hypothesis will not be undertaken here, but it is necessary at least to note that certain writers are speaking of marital consummation in a much broader context than is traditional in canon law.

At the same time, the diriment impediment of impotence still involves a special difficulty with regard to the notion

9 Cf. e.g., J. Bernhard, "A propos de l'hypothèse concernant la notion de 'consommation existentielle' du mariage", in R.D.C., 20(1970), p. 184-192.

of verum semen, a difficulty which has perhaps provoked even more discussion than the notion of the consummation of marriage. Consequently, in this chapter we shall study the notions of marital consummation and the impediment of impotence as found in the canons of the proposed new law. With the help of the available commentaries we shall try to determine whether the proposed canons on our subject offer a solution to current difficulties.

Our study will comprise the following: the proposed revision of Canon 1015 of the Code of Canon Law, and the proposed revision of Canon 1068 of the Code of Canon Law.

A. The Proposed Revision of Canon 1015
of the Code of Canon Law.

In order to evaluate the text of canon 245 of the proposed new law, which corresponds to canon 1015 of the Code, we shall first of all state the text of both canons. The order of paragraphs of Canon 1015 has been altered for purposes of comparison.

We shall then present a brief comparative and evaluative study of Canon 245 of the proposed new law (Schema, 245).

1. The Text of Canon 245 of the Proposed
Law and Canon 1015 of the Code of
Canon Law.

Schema, 245

§1. Matrimonium QUODLIBET
VALIDUM dicitur legitimum.

§2. Matrimonium baptizato-
rum validum dicitur ratum,
si nondum consummatione
completum est;

ratum et consummatum SI
CONIUGES INTER SE (HUMANO
MODO) POSUERUNT CONIUGALEM
ACTUM PER SE APTUM AD PROLIS
GENERATIONEM, ad quem na-
tura sua ordinatur
MATRIMONIUM et quo coniuges
fiunt una caro.

§3. Celebrato matrimonio,
si coniuges simul cohabi-
taverint, praesumitur
consummatio, donec contra-
rium probetur.

§4. Matrimonium QUODVIS
invalidum dicitur putativum,
si in bona fide ab una
saltem parte celebratum
fuerit, donec utraque pars
de eiusdem nullitate certa
evadat.¹⁰

C.I.C. 1015

§3. Matrimonium inter non
baptizatos valide celebratum,
dicitur legitimum.

§1. Matrimonium baptizatorum
validum dicitur ratum, si non-
dum consummatione completum est;

ratum et consummatum si inter
coniuges locum habuerit coniuga-
lis actus, ad quem natura sua
ordinatur contractus matrimo-
nialis et quo coniuges fiunt
una caro.

§2. Celebrato matrimonio, si
coniuges simul cohabitaverint,
praesumitur consummatio, donec
contrarium probetur.

§4. Matrimonium invalidum
dicitur putativum, si in bona
fide ab una saltem parte
celebratum fuerit, donec utraque
pars de eiusdem nullitate certa
evadat.¹¹

10 S.D.S., can. 245, p. 72-73 (emphasis added).

11 C.I.C. 1015.

Schema, 245

§1. ANY valid marriage is called legitimate.

§2. A valid marriage of baptized persons is called ratified if it has not yet been completed by consummation;

ratified and consummated IF THE SPOUSES HAVE POSITED (IN A HUMAN FASHION) THE CONJUGAL ACT APT OF ITSELF FOR THE GENERATION OF CHILDREN, to which MARRIAGE is of its nature ordained and by which husband and wife become one flesh.

§3. Once marriage has been celebrated, if the spouses have lived together, consummation is presumed, until the contrary is proven.

§4. ANY invalid marriage is called putative, if it was celebrated in good faith by at least one of the parties, until both parties become certainly aware of its nullity.

C.I.C. 1015

§3. A validly celebrated marriage between non-baptized persons is called legitimate.

§1. A valid marriage of baptized persons is called ratified if it has not yet been completed by consummation.

ratified and consummated, if there has taken place between the parties the conjugal act, to which the matrimonial contract is by its nature ordained and by which the spouses become one flesh.

§2. Once marriage has been celebrated, if the spouses have lived together, consummation is presumed, until the contrary is proven.

§4. An invalid marriage is called putative, if it was celebrated in good faith by at least one of the parties, until both parties become certainly aware of its nullity.

2. A Comparative Study and Evaluation
of Canon 245 of the Proposed Law.¹²

In evaluating the proposed text of canon 245 of the Schema...de sacramentis, we shall first of all point out the obvious similarities and differences between canon 245 and canon 1015 of the Code. After which we shall summarize the

¹² Cf. the following commentaries: G. Alberigo et al., "La riforma del matrimonio dopo il Concilio (Dibattito sui canoni 242-361 dello 'Schema canonum de Sacramentis')", in E.I.C., 30(1974), p. 226-269 (a general reference on the application of conciliar (Vat. II) theology in law; no special treatment of can. 245). Canadian Catholic Conference, Report of the Canadian Catholic Conference to the Pontifical Commission for the Revision of the Code of Canon Law on the Proposed Schema "Sacramentorum Celebratio", p. 15 (abbreviated as C.C.C., Report, etc.). Canon Law Society of America, Report of a Special Committee of the Task Force of the C.L.S.A. on the Marriage Canons of the Proposed "Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur", p. 3, d, p. 7, d (abbreviated as C.L.S.A., Report, etc.). Canon Law Society of Great Britain and Ireland, Report on the "Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur", p. 48, 76, and 81 (abbreviated as C.L.S. of Great Britain and Ireland, Report, etc.). P.A. D'Avack, "Per una riforma giuridica del matrimonio canonico", in E.I.C., 30(1974), p. 9-26 (an article of a general nature on the orientation of the new code, no special treatment of can. 245). T.G. Green, "The Revision of Marriage Law: An Exposition and Critique", in S.C., 10(1976), p. 381-382. F.G. Morrissey, "Proposed Changes in Canonical Matrimonial Legislation", in The Catholic Lawyer, 20(1974), p. 30-43 (cf. p. 35-37). U. Navarrete, "Mutationes et praevisae innovationes 'in iure matrimoniali'", in Prawo Kanoniczne, 15(1972), p. 3-17 (cf. p. 5-8, 15-16); -----, "Schema iuris recogniti 'De Matrimonio' textus et observationes", in Per., 63(1974), p. 611-658 (cf. p. 612, 614-615).

comments of the consultors, who prepared the text of the proposed new canon, and add our own personal comments or recommendations.

The texts we have cited indicate in fact quite a number of similarities between canon 245 of the proposed law and canon 1015 of the Code. We are primarily interested in paragraph 2 of canon 245, so the following remarks are simply offered in passing concerning paragraphs 1, 3, and 4. Canon 245, §1, corresponds to canon 1015, §3, and extends the use of the term 'legitimate' to any valid marriage, whether between baptized persons or non-baptized. Canon 245, §3, is identical to canon 1015, §2, and retains the presumption of consummation once the spouses have cohabited. Canon 245, §4, corresponds to canon 1015, §4, and is practically identical, except that the word "quodlibet" or "any" is added; the addition does not appear to alter substantially the meaning of the paragraph.¹³

Paragraph 2 of canon 245 of the proposed law corresponds to paragraph 1 of canon 1015. The notion of a ratified

¹³ Cf. the following for additional comments on the terminology used in par. 1, 3, and 4: T.G. Green, loc.cit., p. 381-382. U. Navarrete, "Schema iuris recogniti...", p. 614.

(sacramental) marriage remains the same, i.e., a valid unconsummated marriage between baptized persons. However, we may question whether the mere fact of baptism implies entrance to a ratum marriage. Will the future code still leave us with a concept of the sacramentality of marriage that has been described as "automatic"?¹⁴ A discussion of this subject is beyond the scope of this paper, but it must at least be noted.

The notion of ratified and consummated marriage is altered somewhat in canon 245, §2:

A valid marriage of baptized persons is called /.../ ratified and consummated IF THE SPOUSES HAVE POSITED (IN A HUMAN FASHION) (HUMANO MODO) THE CONJUGAL ACT APT OF ITSELF FOR THE GENERATION OF CHILDREN, to which MARRIAGE is of its nature ordained and by which husband and wife become one flesh.¹⁵

In discussing the alterations introduced by canon 245, §2, we must first give some precisions regarding the notion of conjugal copula, and then speak of the implication of the words "modo naturali et humano" as applied to conjugal copula.

¹⁴ Cf. T.G. Green, loc. cit., p. 379. Cf. C.L.S.A., Report on the Marriage Canons, p. 7, d.

¹⁵ S.D.S., can. 245, §2, p. 72. The words "HUMANO MODO" were bracketed in the original text, and a footnote, n. 1, stated that the use of brackets implied that the Code Commission wished the Bishops and others, to whom the text was sent, to express their opinion on the retaining of the words in the final text.

a) Precisions regarding the notion of conjugal copula.

One of the underlying principles of the revision of the canons on the sacraments was that, generally, theological definitions and considerations were not to be given. As was said plainly in the praenotanda of the Schema of 1975:

Theological definitions and considerations are, for the most part, lacking in the revised canons, since it is not the function of the canons of the Code to expose doctrine, but to present the ecclesiastical discipline. Although theological teaching is the foundation of canonical legislation, it should not be expounded in the legislation itself, except in as much as it seems opportune so that the meaning of the norms be better understood and their importance be underlined in a special way.¹⁶

The above statement must be qualified, however, for rather involved theological notions (if not definitions in the strict sense) were given of all the sacraments except marriage,¹⁷ which was simply described as "an (intimate)

16 S.D.S., praenotanda, p. 5. "Theologicae definitiones atque considerationes plerumque in canonibus recognitis desunt, cum Codicis canonum non sit doctrinam exponere, sed disciplinam ecclesiasticam referre. Doctrina theologica, licet fundamentum sit legislationis canonicae, in ipsa hac legislatione praeberi non debet, nisi quatenus opportunum videatur ut significatio normarum aptius intellegatur earumve momentum peculiari modo sublineetur."

17 Cf. S.D.S., can. 9, 40, 61, 130, 181, 190.

partnership of the whole of life between a man and a woman, which is ordered, by its very nature, to the procreation and education of children."¹⁸ As we have already mentioned, there was a separate coetus studiorum, which worked on the revision of the marriage canons according to its own way of proceeding, and chose to describe marriage in the terms mentioned.

From the outset, then, it was clear that canon 245 of the proposed law would not define conjugal copula or marital consummation. Up to the present time, however, jurisprudence and doctrine have deduced the essential elements of perfect copula (consummative of marriage) from canons 1015, §1, and 1081, §2, which state, respectively:

A valid marriage of baptized persons is called /.../ ratified and consummated, if there has taken place between the parties the conjugal act to which the matrimonial contract is by its nature ordained and by which husband and wife become one flesh.¹⁹

Matrimonial consent is an act of the will by which each party gives and accepts the perpetual and exclusive right over the body in relation to acts apt of themselves for the generation of children.²⁰

¹⁸ S.D.S., can. 243, p. 72. "(intima) totius vitae coniunctio inter virum et mulierem, quae, indole sua naturali, ad prolis procreationem et educationem ordinatur." Cf. also, Gaudium et spes, n. 48.

¹⁹ C.I.C. 1015, §1.

²⁰ Ibid., 1081, §2. Cf. P. Huizing (Relator), "De matrimonio, 6. De separatione coniugum", in Comm., 5(1973), p. 78 (henceforth abbreviated as Comm., 5(1973), etc.).

Accordingly, it did seem opportune to the consultors of the coetus on marriage to give certain precisions concerning the nature of perfect copula (dare determinationem naturae copulae perfectae).²¹

There was considerable discussion among the consultors regarding the elements required for perfect copula.²² While all agreed that neither a definition nor a description of perfect copula should be given, yet, they thought that its elements should at least be implied:

No definition nor description of perfect copula is to be given. It is sufficient that, in the norms concerning either consummation or the impediment of impotence, at least indirectly those elements be apparent which are necessary for copula, upon which consent must bear and without which a person must be said to be impotent.²³

Some consultors did not like the phrase "perfect copula", because they held the word "perfect" implied the concept of perfection, and would have preferred either the

21 Cf. Comm., 5(1973), p. 79.

22 Cf. F. Voto (Actuarius), "De Matrimonio. De impotentia matrimonium dirimenti", in Comm., 6(1974), p. 178-196 (henceforth abbreviated as Comm., 6(1974), etc.).

23 Ibid., p. 184. "Nulla definitio neque descriptio copulae perfectae facienda est. Sufficit ut in normis quae attinent sive ad consummationem sive ad impedimentum impotentiae, saltem oblique illa elementa appareant quae sint necessaria ad copulam, super quae versari debeat consensus et sine quibus aliquis impotens dici debeat."

phrase "natural copula" or "'conjugal' copula". However, another consultor pointed out that, in the canonical literature, the word "perfect" implied simply the idea of the integrity of an act or its completeness. Yet other consultors requested that a distinction be made between the elements constituting copula and those affecting the consummation of marriage.²⁴ It is difficult to see how such a distinction could be made as long as a strictly biological notion of copula consummative of marriage is retained. The elements of coition seem to be the same whether there is question of the first act of intercourse following the exchange of consent or of conjugal copula during the remainder of married life.

When it came to the actual enumeration of the elements of true copula consummative of marriage, there was a general consensus that, on the part of the husband, there was required the erection of the copulatory member, its penetration into the vagina, and semination (presumably, posthymeneal) within the vagina. On the part of the wife, the consultors stated that copula required simply a vagina capable of receiving the penetration of the male copulatory member.²⁵

24 Cf. ibid., p. 185.

25 Cf. Comm., 6(1974), p. 180.

Of the requirements on the part of the husband, erection and penetration provoked little comment. However, the nature of the semen to be deposited by the husband in the vagina of his wife gave rise to a lengthy discussion on whether verum semen in testiculis elaboratum was required for perfect copula. Some consultors favoured the Rotal opinion that verum semen containing a testicular component was necessary in order to consummate marriage. Others spoke of the need to return to the notion of copula satiativa as understood by the ancients, that is copula which includes erection, penetration, and insemination on the part of the husband without being concerned about the nature of the semen.²⁶ We shall synthesize briefly the comments of the consultors on the question of the verum semen and the copula satiativa.

One of the consultors pointed out that in the ancient canonical tradition there was no question of the nature of the semen, since, given the fact of intercourse, the pre-requisites of generation were assumed to be present.

²⁶ Cf. ibid., generally, p. 178-181, 183-184, 186-191.

Moreover, the inability to beget children did not invalidate marriage.²⁷ Accordingly, he said, a broad interpretation was to be given the Brief Cum frequenter, of Sixtus V:

From the Constitution of Sixtus V it is not deduced with certainty that that man is impotent, who is unable to emit semen elaborated in the testicles. The document only asserts that eunuchs and spaded men may not contract marriage since they are incapable of ordinary semination or of semination satiative of concupiscence, and therefore they are unable to attain any end /of marriage/, not even a secondary end, namely a remedy for concupiscence.²⁸

The consultor went on to say that the doctrine and jurisprudence, which asserted the necessity of semen elaborated in the testicles and of copula apt of itself for the generation of children, have so exaggerated the notion of impotence (impotentia coeundi) that the distinction between the inability to perform sexual intercourse (impotentia coeundi) and the inability to procreate (impotentia generandi) has become confused.²⁹ Such confusion would seem to have

27 Cf. ibid., p. 179.

28 Ibid. "At ex Constitutione Sixti V non certe deducitur illum esse virum impotentem qui semen in testiculis elaboratum emittere nequeat. Sed tantum ibi asseritur eunuchos et spadones matrimonium inire non posse cum sint incapaces seminationis ordinariae seu concupiscentiae satiativae et ideo nullum finem assequi valent, ne quidem illum qui secundarius habebatur, nempe remedium concupiscentiae."

29 Cf. ibid.

been inevitable. A doctrine which asserts the necessity of semen elaborated in the testicles for conjugal copula consummative of marriage and for male potency, is thereby requiring an element in the semen which has to do with fertility and procreation. As medical science has shown, to speak of the proper secretion of the testicles, is to speak of the spermatozoa, the sole component in the seminal fluid capable of fertilization of the female ovum.³⁰

From this exaggeration has arisen, also, the very serious discrepancy in certain decisions of the Holy See: a man, who has undergone bilateral vasectomy, is not forbidden to marry, while at the same time, another man's marriage is declared null by a tribunal of the Holy See on the grounds of impotence, because he is unable to emit semen elaborated in the testicles.³¹ The consultor concluded that it was expedient to return to the doctrine of copula satiativa, according to which copula was considered perfect in as much as it satiated sensual desires without concern for the nature

30 Cf. Willy, Vander, and Fisher, The Illustrated Encyclopedia of Sex, p. 36.

31 Cf. footnotes 137, 138 and 142 of Chapter III.

of the verum semen. This teaching, he held, would be more in keeping with teaching of Vatican II, which extolled the personal ends of marriage.³²

The opinion of the above consultor was not held unanimously by all the consultors, since at least two of them stated that perfect copula required verum semen in testiculis elaboratum.³³ However, in the final vote, sixteen consultors voted that true semen elaborated in the testicles (as understood in Rotal jurisprudence) was not required for perfect copula, but ordinary semination as understood in the ancient tradition, without special attention being given to the nature of the seminal liquid itself.³⁴

Fairly frequent references were made by one or another consultor to copula satiativa or satiative copula. While no precise definitions were given of copula satiativa, the following notion was offered:

With respect to copula satiativa, it seems that copula must be said to be such when the two spouses seek to obtain the satisfaction of their sensual desires, even if the allaying of concupiscence is not effected.³⁵

32 Cf. Comm., 6(1974), p. 179.

33 Cf. ibid., p. 180.

34 Cf. ibid., p. 188.

35 Ibid., p. 183. "De copula autem satiativa videtur dicendum illam esse talem in qua duo coniuges satisfactionem libidinis assequuntur, etiamsi sedatio concupiscentiae non habeatur."

In the final analysis, the consultors admitted that copula was of its nature ordained to the satisfaction of sensual desire, that is, it should be apt to satisfy such desire, but they denied that, in the concrete, this element of copula had juridical consequences. Namely, if it were to happen in a particular case that copula was not satiative in the sense mentioned, there would be no question of the impediment of impotence, provided the usual elements of copula were present.³⁶ However, while viewing copula in this strictly juridical manner, it must always be kept in mind that satiatio refers not only to sensual desire, but is the first effect of the conjugal act, which expresses the mutual donation of conjugal love.

It seems, then, that the consultors considered perfect copula as copula satiativa, without reference to whether the semen is fertile or not, and deemed that such copula is of a nature to satisfy the sensual desire of the spouses. Satiative copula would be consummative of marriage.³⁷ By favouring this view of copula, the consultors were in accord with earlier authors on the subject:

36 Cf. ibid., p. 188-191.

37 Cf. ibid., p. 179, 188-191.

/.../ early authors, while requiring copula apt for generation, believed that such copula was realized by the mere ejaculation of the seed emitted, since they were unable, except microscopically, to examine it scientifically. For them, such intercourse was that which was apt for procreation and allayed concupiscence. And since sterile persons may marry with a view to allaying concupiscence, the mere capacity to realize copula satiativa is sufficient, according to certain authors, for contracting marriage, irrespective of the capacity to procreate /.../. Also, the man who, though sterile because of vasectomy, can accomplish this fully satiative copula which, taking into account only the actio humana, is apt for procreation, may, according to these authors, contract marriage.³⁸

Vermeersch seems to have been one of the first to elaborate on the theory of the copula satiativa, presenting it, however, rather as a personal opinion which he would be the first to uphold:

/.../ spouses are potent, with respect to bodily prerequisites, in so far as they are able to realize natural carnal union. /.../ If, due to the maintaining of the internal secretions, the regular venereal appetite with the faculty of copulation persists in a vasectomized man, it seems that we should declare him, as do the physicians, sterile rather than impotent.³⁹

³⁸ G. St-Hilaire, L'azoospermie dans la jurisprudence rotale, p. 131-132 (emphasis added).

³⁹ A. Vermeersch, De castitate et de vitiis contrariis, p. 72 and 75. "Capaces sunt coniugii ex parte corporis, quotquot naturalem coniunctionem carnalem vere peragere possunt. /.../ Si, propter servatam secretionem internam, regularis appetitus venereus cum facultate copulationis permansurus videtur virum istum (vasectomiatum), cum medicis, sterilem potiusquam impotentem dixerimus."

Following Vermeersch, others such as Arend, Iorio, and McCarthy held a similar view of conjugal copula.⁴⁰ Some more recent rotal sentences have likewise shown themselves "sympathetic" to the theory:

Gasparri would have argued rightly and reasonably, if he had contended that that man was also potent, who was able to accomplish copula satiativa of concupiscence or at least fulfill the secondary end of marriage.⁴¹

It is encouraging to note that, while discussing the appropriateness of a return to the notion of perfect copula as copula satiativa with the consequent denial of the necessity of the verum semen in testiculis elaborum, one of the arguments advanced by the consultors was the following:

40 Cf. G. Arend, "De genuina ratione impedimenti impotentiae", in E.T.L., 9(1932), p. 28-69, 442-450. Cf. T. Iorio, Theologia Moralis, 3rd rev. ed., v. III, n. 1054, p. 595. Cf. J. McCarthy, "The Impediment of Impotence in Present Day Canon Law", in E.I.C., 4(1948), p. 98-130.

41 S.R.R. Dec., c. De Jorio, October 11, 1967, (n. 157/67 - Kottoyamen. N. 8639), n. 8, unpublished Rotal decision, cited in G. St-Hilaire, op. cit., p. 138. "Recte ac ratione (logicamente) argumentatus esset Em.mus Gasparri, si contendisset quoque esse potentem virum, qui copulam concupiscentiae satiativam perficere seu saltem finem secundarium matrimonii assequi, valeat." Cf. also, S.R.R. Dec., c. De Jorio, October 13, 1965, in I.D.E., 77(1966), II, p. 6-7.

The evolution of the doctrine of the Church on marriage in the direction of a greater acknowledgment of the value of conjugal love and the community of life (cf. the Constitution, Gaudium et spes and the Encyclical, Humanae vitae), seems to require that too great an importance not be attributed to a biological element, namely semen elaborated in the testicles, to determine the capacity of a person for marriage. Given the capacity for unitive copula, it seems that there must be acknowledged the capacity for the establishment of that "intimate community of life and conjugal love," which is proper to marriage and to which all men have the right unless the contrary be proven by altogether authoritative arguments.⁴²

One apparent lack in the discussion of copula satiativa was that very little importance was accorded to the role of the wife in intercourse.⁴³ In the statement of principles to be considered in determining the elements of

⁴² Comm., 6(1974), p. 187. "Evolutio doctrinae Ecclesiae de matrimonio versus maiorem in dies agnitionem valoris amoris coniugalis ac communionis vitae (Cf. Const. Gaudium et spes et Enc. Humanae vitae), exigere videtur ut momentum non adeo peremptorium tribuatur illi elemento biologico, semini scilicet in testiculis elaborato, ad determinandam capacitatem personae ad matrimonium. Posita capacitate ad copulam unitivam, videtur capacitas agnoscenda esse ad illam 'intimam communitatem vitae et amoris coniugalis' constituendam, quae est propria matrimonii et ad quam omnes homines ius habent donec certo argumentis omnino peremptoriis contrarium probetur."

⁴³ Cf. ibid., generally, p. 178-191.

perfect copula, one of the principles laid down was: "In the new law the principle of the equality of the sexes must shine forth, while safeguarding that specific character bestowed on each by nature itself."⁴⁴ But in the following paragraph the only requirement on the part of the wife for copula was stated to be: "a vagina apt to receive the male member."⁴⁵ Furthermore, when there was a question of voting on whether it was required that copula be satiative of sensual desire, one of the proposed modi was: "The satisfaction of sensual desire is required in the husband; in the wife, some sort of general satisfaction suffices."⁴⁶ In all fairness, however, it has to be added that this particular modus was not submitted to a vote.

At this point, it may be asked whether the consultors could have assigned a more prominent role to the wife in speaking of copula satiativa. On the one hand they wished that too great an importance be not attributed to a biological

⁴⁴ Ibid., p. 180, d. "in novo iure fulgere debet principium aequalitatis utriusque sexus, salvo quidem caractere specifico a natura ipsa ditato."

⁴⁵ Ibid. "In muliere vaginam aptam ad receptionem membri."

⁴⁶ Ibid., p. 190. "In viro requiritur satiatio libidinis; in muliere sufficit aliqua satiatio generali modo habita."

element (semen elaborated in the testicles) when speaking of the capacity of a man for marriage. Rather, the capacity for unitive copula was to be stressed.⁴⁷ Yet, on the other hand, their view of unitive copula, with respect to the wife, seems to have evolved little or not at all. Moreover, very little space was allotted to the discussion of the problem of female impotence. The presence or absence of a vagina capable of receiving the male copulatory member remained the crucial factor in determining a woman's organic potency or lack of it.⁴⁸

In fact, however, the re-statement of the requirements for potency and copula, on the part of the wife, in terms of the presence of a functional vagina was not only consistent with the language used in the traditional canonical literature but with sound biological principles as well. Although the clitoris is the most excitable of the female genitalia, the vagina is also admirably suited for its role as copulatory organ. Both the musculature and the blood supply of the vagina make it possible for it to become erect

47 Cf. footnote 42 above.

48 Cf. Comm., 6(1974), p. 196-197.

during sexual intercourse and to act as the perfect receptacle and complement for the erect male member.⁴⁹ To speak only of the presence of the vagina with reference to the capacity of the wife for copula satiativa is not the oversimplification which it first appears to be. While it is true that female sexuality is a biological, endocrinal, and psychological complex as compared to male sexuality which tends to be more genital, yet the vagina is not only an essential organ for copulation but also one of the most important centers of sensual gratification.

Nevertheless, the discussion of the role of the wife in conjugal copula was one area where the contribution of a woman canonist or specialist in gynecology might have resulted in a more delicate, more suitable phraseology. It was necessary to state that the vagina was the correlative requirement on the part of the wife for copula, but a woman may have been more sensitive as to how this requirement should be phrased. But again, the coetus studiorum on marriage was not working under ideal conditions. In the early 1970's, women canonists were not numerous, although it may have been possible to have at least one perita in medical science

⁴⁹ Cf. Willy, Vander, and Fisher, The Illustrated Encyclopedia of Sex, p. 66, 70.

present at the deliberations on the nature of copula and of female impotence.

If we now recall the discussion of the consultors on the notion of conjugal copula consummative of marriage⁵⁰ that we have resumed in the preceding pages, it seems we may understand the phrase "IF THE SPOUSES HAVE POSITED THE CONJUGAL ACT APT OF ITSELF FOR THE GENERATION OF CHILDREN,..." in paragraph 2 of canon 245 of the Schema, to mean: perfect conjugal copula, including erection of the male copulatory organ, penetration of the vagina, and semination therein of semen in the ordinary sense, without being concerned about its testicular component, which may even be absent. That is, we may assume that a marriage has been consummated if the external elements of copula have been posited, irrespective of the presence of the verum semen in testiculis elaboratum.

The apparent acceptance by the consultors of the Code Commission of copula in the sense of copula satiativa, may signal the beginning of the end of the controversy regarding the verum semen. Only the passage of time, however, will indicate whether such an orientation will become a

50 Cf. Comm., 6(1974), p. 178-196.

generally accepted and applied principle of jurisprudence. The attitude of the Sacred Roman Rota in dealing with cases of male impotence, based on the inability of the man to emit testicular semen, will have to be considered in this respect. If the Rota continues to require a testicular component in the seminal fluid, then the discrepancy in tribunal practice (e.g., between the Rota and the Congregation for the Doctrine of the Faith), which the consultors hoped to preclude, will continue to be perpetuated.

The notion of copula as satiative (rather than strictly procreative) does seem to be more in keeping with the theology of marriage found in the documents of Vatican II,⁵¹ which chose not to insist on the ends of marriage as primary and secondary. At the same time, certain authors have already been holding for some years that ordinary semination, prescinding from the nature and origin of the ejaculate, was required and sufficient for conjugal copula consummative of marriage.⁵² In addition, it does not seem reasonable to continue to require an element for the

51 Cf. footnote 18 above.

52 Cf. I. Gordon, De processu super rato, p. 93-95. Cf. U. Navarrete, "De notione et effectibus consummationis matrimonii", in Per., 59(1970), p. 628 and 634.

consummation of marriage which is verifiable only by fairly refined microscopic techniques. On the other hand, we still consider satiative copula as a question which requires further study before being accepted as a common teaching. Some four centuries of canonical tradition dating from Cum frequenter, 1587, regarding the necessity of the verum semen for consummation, will not be easily set aside.

We have dealt thus far with the precisions, which the consultors of the coetus on marriage law saw fit to bring to the notion of copula. We have also seen the interpretation, which, consequently, seems to be warranted of paragraph 2 of canon 245 of the Schema dealing with the ratified and consummated marriage. We must now speak briefly of the addition of the words "humano modo" to the notion of copula consummative of marriage in the same paragraph of canon 245. As well, we shall deal briefly with copula where contraceptives are used.

b) The implication of the words "modo naturali et humano" as applied to conjugal copula. The Cardinal Praeses pointed out that the Rota has always required that copula be carried out in a natural and human way. But because of the difficulty of delineating the positive meaning of copula which is carried out in such a way, he proposed that the

consultors consider three cases, which seem to exclude the carrying out of intercourse in a modus naturalis et humanus.⁵³

The three dubia proposed were:

1) Whether true copula takes place (in a natural and human fashion) when the husband forcibly (violenter) has intercourse with his unwilling spouse.

The consultors voted as follows: 13 negative: 2 affirmative: 2 abstentions. In short, the overwhelming majority considered that no true copula took place under conditions where violence was used on an unwilling wife. In such a case, freedom, a prerequisite to a human act, was considered to be lacking. Consequently, marriage would not be consummated by such an act of intercourse.⁵⁴

11) Whether true copula takes place (in a natural and human fashion) when aphrodisiacs are used to facilitate copulation.

Fourteen out of seventeen consultors voted affirmatively to this proposition, particularly since one of the experts had pointed out that aphrodisiacs did not augment the potentia coeundi but rather heightened the sensibility to the pleasure of the act.⁵⁵ As we have seen earlier, the Holy

53 Cf. Comm., 6(1974), p. 191.

54 Cf. ibid., p. 191-192.

55 Cf. ibid., p. 192.

Office declared that a marriage is to be considered consummated even if the essential elements of copula were placed by a spouse, who achieved sexual union only by the use of aphrodisiacs depriving him of the use of reason.⁵⁶

iii) Whether true copula takes place (in a natural and human fashion) when the wife suffers intolerable pain.

There was no consensus among the consultors regarding this proposition, although some of them thought such an act of intercourse would be considered true copula provided the wife consented to it. No vote seems to have been taken.⁵⁷

The presence of such pain on the part of the wife during copula could be due to vaginism or constriction of the vagina, to mention only two possible causes, and so there might be reason to suspect female impotence.

In brief, then, the addition of the words "humano modo" to the notion of consummation seem to imply that both partners must freely consent to the act of intercourse, particularly the wife, who must not be submitting to her husband as a result of duress or violence.⁵⁸ The use of

⁵⁶ Cf. S.C.S. Off., Resp. "De consummatione matrimonii", February 3, 1949, in Per., 38(1949), p. 220.

⁵⁷ Cf. Comm., 6(1974), p. 192-193.

⁵⁸ Cf. ibid., p. 191-193.

aphrodisiacs to facilitate copula or heighten the pleasure concomitant to the act was not excluded by the consultors.⁵⁹ It must also be pointed out that, in an earlier discussion concerning the addition of the words "humano modo" to the notion of consummation, allusion was made to the following text from Gaudium et spes, n. 49:

The actions within marriage by which the couple are united intimately and chastely are noble and worthy ones. Expressed in a manner which is truly human, these actions signify and promote mutual self-giving /.../.⁶⁰

In the context of the passage just cited, the reference to marital chastity has special significance. It seems that this virtue must be understood not only as excluding infidelity, divorce and remarriage, as well as certain abuses of the sexual act within marriage, but also as an eminently positive attribute of the sexual relationship of the couple.

59 Cf. ibid., 192.

60 Pastoral Constitution, Vatican II, December 7, 1965, Gaudium et spes, pars II, caput I, De dignitate matrimonii et familiae fovenda, n. 49, in A.A.S., 58(1966), p. 1070. "Actus proinde, quibus coniuges intime et caste inter se uniuntur, honesti et digni sunt et, modo vere humano exerciti, donationem mutuam significant et foveant /.../" (English translation from W.M. Abbott, ed., The Documents of Vatican II, New York, Guild Press, 1966, p. 253). Cf., also, Comm., 5(1973), p. 79.

The intimate and chaste union of husband and wife evokes the image of the spouse, who responds to the beloved partner in willing self-giving. The consequence is that the marital act is morally good in itself. It expresses and perfects a fully human, personal and total conjugal love.⁶¹

In the discussions on the Schema of Chapter I, part II, of Gaudium et spes a minority of the Fathers had supported the Augustinian view that marital intercourse needs a motive (e.g., explicit intention of procreation, the rendering of the debitum coniugale requested by the other partner) to give it a moral goodness. The stand taken by the Council seems to have rather reverted to the teaching of St. Alphonsus (Theol. moralis lib., VI, tr. VI, n. 927) according to which conjugal intercourse has a moral goodness of its own (honestus ex natura sua, ibid.), and remains good even if the couple have good reasons for not wishing a pregnancy to ensue. The Council has chosen not to speak of the ends of marriage

61 Cf. H. Vorgrimeler, ed., Commentary on the Documents of Vatican II, Friedberg, Herder and Herder, /1967-1969/, v. V, p. 237-239 (commentary on Gaudium et spes, Part II, Chapter I, prepared by B. Haring). Cf., also, W. Bertrams and J. Beyer, edd., De matrimonio coniunctanea, p. 837-842 (commentary on De dignitate matrimonii et familiae fovenda prepared by M. Zalba).

as primary and secondary, while at the same time making it plain that marriage and conjugal love are "by their nature ordained toward the begetting and educating of children [...] the supreme gift of marriage" (Gaudium et spes, n. 50).⁶²

To speak of conjugal chastity in the perspective just mentioned is to add a further dimension to the words "humano modo" in canon 245 of the Schema...de sacramentis. It seems, then, that the words should be taken to signify more than the mere absence of violence or duress. In the mind of at least some of the consultors, and in our own opinion, they should be understood to imply the free, the willing, the spontaneous chaste and loving gift, which the spouses make to each other of themselves at the time of the consummation of marriage and during married life.

A minority of the consultors had questioned whether the words "humano modo" should be inserted at all in the canon in question. They objected that the essential note of some fact in law (consummation in this case) should be capable of easy proof, and that it could scarcely be proven that consummation had not been carried out in a human fashion.

⁶² Cf. H. Vorgrimeler, ed., op. cit., p. 237-238. Cf. W. Bertrams and J. Beyer, edd., op. cit., p. 842.

A compromise was effected when all the consultors agreed that the words "humano modo" should be bracketed (humano modo) in the draft of canon 245, §2. This was done, therefore, to indicate there was a doubt concerning the matter.⁶³ Later deliberations of the coetus led to the proposal of the dubia and the conclusions we have just seen.⁶⁴

Commentators seem to have welcomed the addition of the words "humano modo" to the canon, and believe they should be retained in the final draft.⁶⁵ This does not imply, however, that everyone is completely satisfied with the text of canon 245, §2:

Does consummation mean a single act of physical intercourse? Contemporary discussion focuses on the transphysical dimensions of the union of Christ and the Church. The commission's proposing of humano modo as a possible option in defining consummation reflects its awareness of the above discussion. In any event a developed notion of consummation should be placed in the section on dissolution/dispensation from the bond.⁶⁶

63 Cf. Comm., 5(1973), p. 79.

64 Cf. Comm., 6(1974), p. 191-193.

65 Cf. C.C.C., Report ... the Proposed Schema, p. 15. C.L.S.A., Report ... on the Marriage Canons, p. 7, d. Cf. C.L.S. of Great Britain and Ireland, Report on the Schema..., p. 76. Cf. T.G. Green, loc. cit., p. 382.

66 C.L.S.A., op. cit., p. 7, d.

The una caro imagery in canon 245, §2, is also criticized:

Canon 245, 2 uses the biblical una caro imagery as did the Code to refer to the physical act of consummation. This is a misuse of Scripture, where the expression refers to a full personal union or partnership of man and woman. This misuse of Scripture should not be perpetuated in the new law, as indeed it was not perpetuated in Gaudium et spes.⁶⁷

We do not insist on this criticism, since it is a matter that, hopefully, scriptural scholars will further elucidate in the near future.

c) The use of contraceptives as affecting copula consummative of marriage. There was some discussion among the consultors regarding the use of contraceptives in consummating marriage, but their conclusions may be summarized as follows: when the anti-conceptional devices affect the physical act itself of intercourse, true copula and consummation do not exist; when such devices do not affect the physical act, true copula and consummation do exist; and, finally, some doubts remain regarding whether condomatic copula is consummative of marriage.⁶⁸

⁶⁷ Ibid., p. 3, d.

⁶⁸ Cf. Comm., 6(1974), p. 194-196.

It seems from the above that the use of a contraceptive pill by either the husband or the wife does not affect the consummation of marriage, while the use of a mechanical device, which interferes with the physical act of intercourse, does exclude perfect copula and consummation. Nevertheless, we are inclined to question whether a husband or wife who, with or without the knowledge of the other party, uses a contraceptive pill, has really the intention of giving himself or herself completely to the spouse. This is apart from the fact that there may be an intention against children involved, which, if it existed prior to the wedding ceremony, would render the marriage null.

It seems to us that, if the words "humano modo" are to become a part of the text of canon 245, §2, then the use of contraceptives of any kind should be re-evaluated in the light of the implication of the words. There appears to us to be some contradiction in the "total gift of self" to the other spouse (at the time of marital consummation) and the use of an anticonceptual device, which deprives the marriage act of its possible natural outcome, the conception of a child. The contradiction may be more apparent than real, but it is a question requiring further research by canonists and theologians alike.

By way of recapitulation of our study of the draft of canon 245 we offer the following point summary:

1) Canon 245 must be understood in the light of the discussions of the Code Commission to which we have made reference. Otherwise the alterations in the canon (from canon 1015 of the Code) will not be fully appreciated.

2) The notion of copula consummative of marriage remains essentially biological, yet it seems that it should be understood in the sense of copula satiativa.⁶⁹

3) By no longer requiring the presence of a testicular component in semination during copula, the consultors hoped to eliminate in future the conflict between the practice of the Congregation for the Doctrine of the Faith (formerly, the Holy Office) on the one hand and the jurisprudence of the Rota and the Congregation of the Sacraments on the other.⁷⁰

4) The possible addition of the words "humano modo" to the notion of marital consummation seems to imply that a greater importance is being conceded to the psychological elements of copula: advertence of the reason, freedom of

69 Cf. ibid., p. 186-188.

70 Cf. U. Navarrete, "Mutationes et praevisae innovationes in iure matrimoniali", p. 11.

the will, and so forth. It seems also that the words may be understood in the sense of the complete gift of self that the spouses make to each other,⁷¹ first of all, at the exchange of consent, and seal at the time of the consummation of their marriage. The words "humano modo" are bracketed to indicate that the consultors were not unanimous on the insertion of the words in the canon, and wish to be informed of the opinion of the Bishops and others consulted on the matter.⁷²

5) Canon 245, §2, does not incorporate an "existential and in faith" notion of consummation into the proposed new law. While it is a matter of speculation only, we offer these reflections on why the Code Commission chose to retain instead a biological notion of consummation. First of all the hypothesis of the "existential and in faith" consummation of marriage is relatively new. It was really only between 1970 and 1975 that Professor Bernhard's hypothesis became known as a possible alternative to our present notion of marital consummation. Even yet, his essays are not well known

71 Cf. footnote 60 above.

72 Cf. Comm., 5(1973), p. 79. Cf. Schema, p. 72.

in many parts of the world. He has chosen to publish them mainly in French language periodicals, which have a limited circulation.⁷³ Consequently, the hypothesis has not been subjected to a really universal criticism by scholars of the ecclesiastical sciences. In sum Bernhard is speaking of consummation in a moral or a psychological sense, the result of which is a notion of marital consummation which is difficult to express in juridical terms. A great deal more of research in the area of "existential" consummation would be needed before the hypothesis could be considered as a serious alternative to the present concept of marital consummation.

6) Admittedly, the draft of canon 245 as it presently reads can be improved upon. We have just explained why we feel the Code Commission chose to retain a biological notion of consummation in this canon. Given that fact, we are, in general, satisfied with the way the canon is formulated in the present Schema, but we feel the following alterations would further add to its acceptability. We are mainly

⁷³ Cf., e.g., R.D.C., 20(1970), p. 184-192; 21(1971), p. 243-277; 24(1974), p. 334-349; 25(1975), p. 274-286. Cf. R.Sc.R., 44(1970), p. 49-62. Cf. A.C., 15(1971), p. 59-82.

concerned with paragraph 2 of the canon. The words "humano modo" should be inserted permanently in this canon to indicate that the proposed new law is placing a renewed emphasis on the psychological elements of marital consummation. On the other hand, the "one flesh" imagery should be omitted because of the disagreement among scriptural scholars regarding its use in this sense.⁷⁴ We suggest the substitution instead of a phrase from Vatican II, Gaudium et spes, n. 49: "by which the couple are united intimately and chastely, and which promotes mutual self-giving."⁷⁵ Thus, once the alterations suggested have been made, canon 245, §2, would read:

Matrimonium baptizatorum	A valid marriage of baptized
validum dicitur /.../ ratum	persons is called /.../ ratified
et consummatum si coniuges	and consummated if the spouses
inter se humano modo posuer-	have posited in a human fashion
unt conjugalem actum per se	the conjugal act apt of itself,
aptum ad proles generationem,	for the generation of children,
ad quem natura sua ordinatur	to which marriage is of its
matrimonium, quo coniuges	nature ordained, which unites the
intime et caste inter se	couple intimately and chastely,
uniuntur et donatio mutua	while signifying and promoting
significatur et fovetur. ⁷⁶	mutual self-giving.

The use of the phraseology we have suggested in canon 245, §2, would not only be a further elucidation of the

74 Cf. footnote 67 above.

75 Cf. footnote 60 above.

76 Cf. ibid. Cf. Schema, can. 245, §2, p. 72.

expression "humano modo" within the canon itself, but would be a fitting sequel to, and more in keeping with, canon 243, §1, of the proposed law, which is inspired by a text from Gaudium et spes, n. 48, and which reads:

Matrimonium quod fit mutuo consensu [...], est (intima) totius vitae coniunctio inter virum et mulierem, quae indole sua naturali, ad prolis procreationem et educationem ordinatur.⁷⁷

Marriage, which comes into being by mutual consent [...], is an (intimate) partnership of the whole of life between a man and a woman, which of its very nature is ordained to the procreation and education of children.⁷⁸

The other paragraphs of canon 245 have to do with the legitimate marriage (§1), the ratified or sacramental marriage prior to consummation (§2, first part), the presumption of consummation from the fact of cohabitation (§3), and the putative marriage (§4). These are special problems in themselves and should be the object of separate research projects. We do not wish to elaborate on them at this time.

By way of corollary, we add the following remark to our study. In keeping with the retention of the biological notion of copula consummative of marriage, the proposed canons on the procedure for cases of nonconsummation in the Schema

77 S.D.S., can. 243, §1, p. 72. Cf. Gaudium et spes, n. 48.

78 Cf. W.M. Abbott, op. cit., p. 250.

de processibus,⁷⁹ reiterate substantially the directives laid down for such cases in the instruction of 1972.⁸⁰ The Code Commission seems to be remaining consistent in its acceptance of consummation in a physical sense, albeit the consultants have revised the notion somewhat as already explained.

The study of the revision of canon 1015 of the Code of Canon Law would be incomplete without also an examination of the revision of canon 1068 on the diriment impediment of impotence. Our notion of marital consummation is closely allied to our understanding of the impediment of impotence, which is considered a defect impeding consummation. We now turn our attention to the proposed new canon 283, corresponding to canon 1068 of the Code.

B. The Proposed Revision of Canon 1068
of the Code of Canon Law.

Our study of the revision of canon 1068 will be somewhat abbreviated, since much of the material presented concerning the revision of canon 1015 is also applicable here.

79 Cf. Pontificia Commissio Codicis Iuris Canonici Recognoscendo, Schema de Processibus, can. 362-372, p. 83-84 (reservatum).

80 Cf. S.C. Sacr., Instr. Dispensationis matrimonii rati, March 7, 1972, in A.A.S., 64(1972), p. 244-252.

We assume, for example, that for male potency ordinary semination is required and sufficient without reference to a testicular content, since the consultors of the Code Commission denied that verum semen in testiculis elaboratum was required.⁸¹ Neither is bilateral vasectomy, consequently, to be retained as giving rise to a diriment impediment to marriage.⁸² Likewise, there appears to be a doubt as regards the perpetuity of vasectomy,⁸³ particularly with the advances in microscopic surgery. In the opinion of the consultors, the requirement for female potency was simply the presence of a vagina capable of receiving the erect male member and semination.⁸⁴

In order to evaluate the text of canon 283 of the proposed new law, which corresponds to canon 1068 of the Code, the text of both canons will first be given. Then a brief comparative and evaluative study of canon 283 (Schema, 283) will be presented.

⁸¹ Cf. Comm., 6(1974), p. 178-193, 194-195 (especially, p. 186-188).

⁸² Cf. ibid., p. 196.

⁸³ Cf. ibid.

⁸⁴ Cf. ibid., p. 180.

1. The Text of Canon 283 of the Proposed
Law and Canon 1068 of the Code of Canon
Law.

Alterations or additions from canon 1068 in canon
283 are capitalized.

Schema, 283

§1. Impotentia COEUNDI
antecedens et perpetua sive
ex parte viri sive ex parte
mulieris, sive absoluta sive
relativa, matrimonium ipso
iure naturae (EX IPSA
NATURA MATRIMONII) dirimit.

§2. Si impedimentum impo-
tentiae dubium sit, sive
dubio iuris, sive dubio
facti, matrimonium non est
impediendum, NEC, STANTE
DUBIO, NULLUM DECLARANDUM.

§3. Sterilitas matrimonium
nec PROHIBET nec dirimit,
FIRMO PRAESCRIPTO CAN.
300.⁸⁵

§1. Impotence FOR COITION,
antecedent and perpetual,
whether on the part of the
man or the part of the
woman, whether absolute or
relative, invalidates mar-
riage by the law of nature
itself (FROM THE VERY
NATURE OF MARRIAGE).

C.I.C. 1068

§1. Impotentia antecedens et
perpetua sive ex parte viri,
sive ex parte mulieris, SIVE
ALTERI COGNITA SIVE NON, sive
absoluta sive relativa,
matrimonium ipso naturae iure
dirimit.

§2. Si impedimentum impotentiae
dubium sit, sive dubio iuris,
sive dubio facti, matrimonium
non est impediendum.

§3. Sterilitas matrimonium nec
dirimit nec impedit.⁸⁶

§1. Impotence, antecedent and
perpetual, whether on the part
of the man or the part of the
woman, WHETHER KNOWN TO THE
OTHER PARTY OR NOT, whether ab-
solute or relative, invalidates
marriage by the law of nature
itself.

85 S.D.S. can. 283, p. 80.

86 C.I.C. 1068.

§2. If the impediment of impotence is doubtful, whether by a doubt of law or of fact, the marriage is not to be hindered, NOR IS IT TO BE DECLARED NULL AS LONG AS THE DOUBT REMAINS.

§2. If the impediment of impotence is doubtful, whether by a doubt of law or a doubt of fact, the marriage is not to be hindered.

§3. Sterility neither renders marriage illicit nor invalidates it, WITHOUT PREJUDICE TO THE PRESCRIPTION OF CANON 300.

§3. Sterility neither invalidates marriage nor renders it illicit.

2. A Comparative Study and Evaluation
of Canon 283 of the Proposed Law.⁸⁷

As can be noted from a comparison of the text of canon 283 of the proposed law to the parallel text of canon 1068 of the Code, there are alterations in all three paragraphs. We shall deal with each paragraph in turn.

In paragraph 1 of canon 283, the word "coeundi" has been added to indicate clearly that there is question here of the inability to perform the marital act (impotence, therefore, in the strict canonical sense) rather than the

⁸⁷ Cf. the following: C.C.C., Report ... on the Proposed Schema, p. 17. C.L.S. of Great Britain and Ireland, Report on the Schema..., p. 59, 77, and 83. T.G. Green, loc. cit., p. 388-389. F.G. Morrissey, loc. cit., p. 35-37. U. Navarrete, "Mutationes et praevisae innovationes in iure matrimoniali", p. 10-13; -----, "Schema iuris recogniti 'De Matrimonio' textus et observationes", p. 629-633.

inability to procreate (sterility). The word was understood in canon 1068 of the Code, so this addition does not alter the meaning of the canon.

A more noteworthy addition to this paragraph is the phrase "ex ipsa natura matrimonii". The discussions of the consultors of the coetus relative to this phrase and other alterations in paragraph 1 of canon 1068 are best summarized under several separate headings.

a) Whether the Invalidating Effect of Impotence is from the Law of Nature (ipso iure naturae) or the Nature of Marriage (ex ipse natura matrimonii). While it seems impotence will remain an invalidating impediment in the new law, yet the consultors reached no agreement on whether it invalidates marriage by the law of nature or in virtue of the nature of marriage.⁸⁸ Although none of the arguments proposed in favour of retaining or omitting the expression "ipso iure naturae" seemed conclusive, the following were typical.

One consultor argued that it could not be doubted that impotency was an impediment of natural law:

⁸⁸ Cf. T.G. Green, loc. cit., p. 370 and 388.

Marriage is an institution of nature, naturally ordained to the procreation and education of children. But procreation ordinarily takes place through the sexual union of a man and a woman. Therefore, those who are incapable of acts "apt of themselves for the generation of children" are forbidden by the law of nature to contract marriage.⁸⁹

Another consultor seconded this opinion: "the potency for coition (potentia coeundi) is required from the law of nature because sexual union specifies matrimonial society."⁹⁰ Five others added that the impotent cannot contract marriage by reason of the law of nature, because marriage is ordained to procreation.⁹¹

On the other hand, another consultor pointed out that, if impotence were really an impediment of natural law, it should be universally admitted as such by all men, since the natural law is supposedly "written in our hearts." Yet,

89 F. Voto (Actuarius), "De Matrimonio, Canons 1068, 1081", in Comm., 7(1975), p. 54 (henceforth abbreviated as Comm., 7(1975), etc.). "Matrimonium est institutum naturae, indole sua naturali ad prolis generationem et educationem ordinatum. Generatio autem fit ordinario modo per unionem sexualem viri et mulieris. Ergo qui impotentes sunt ad actus 'per se aptos ad prolis generationem' ipso iure naturae vetantur quominus matrimonium contrahant."

90 Ibid. "Potentiam coeundi requiri iure naturae quia unio sexualis specificat societatem matrimonialem."

91 Cf. ibid.

he continued, many do not consider impotence as invalidating marriage (he then made reference to certain civil laws).⁹²

The results of the voting on the retention of the words "ipso iure naturae" in canon 1068, §1, were: 4 affirmative, 3 negative, 5 affirmative with reservations (iuxta modum). The words "ex ipsa natura matrimonii" were proposed as one of the alternatives to ipso iure naturae but the vote on this modus was evenly divided.⁹³ As we have seen in the proposed canon 283, §1, both expressions are included, the words "ex ipsa natura matrimonii" being in brackets,⁹⁴ to indicate that those commenting on the Schema should express their preference for one or other expression. In sum, it seems that the consultants were not certain whether impotence is an impediment of the natural law or an impediment arising from the very nature of marriage.

It appears, also, that commentators on paragraph 1 of canon 283 of the Schema, have not wished to study the matter at any length. Green, for example, has expressed the following opinion:

92 Cf. ibid., p. 55.

93 Cf. ibid., p. 55 and 56.

94 Cf. Schema, can. 283, §1, p. 80.

Physical relations should be seen within the broader context of the couple's total relationship. Perhaps the impotent should not always be excluded from marriage if they desire communio to the extent that it is possible and perhaps are willing to adopt /children/ to realize the procreative orientation of marriage.⁹⁵

The British and Canadian Reports on the Schema have suggested that it might be better to delete both expressions, "ex ipsa natura matrimonii" and "ipso iure naturae" from the final draft of the canon. The positive law would in this way avoid a disputed point by not giving the underlying reason for the impediment. Thus, the canon would not preclude a discussion on what is potentially an unresolved problem.⁹⁶

In some respects, the foregoing observations seem to be beside the point in that they fail to mention explicitly that impotence can also be related to the capacity for consent, and therefore to the object of matrimonial consent itself. In discussing the notion of impotence as distinct from the impediment, some medieval authors held that marriage was a contract by reason of which each spouse was bound to

95 Cf. T.G. Green, loc. cit., p. 388.

96 Cf. C.C.C., Report ... on the Proposed Schema, p. 17. Cf. C.L.S. of Great Britain and Ireland, Report on the Schema..., p. 59, 77.

render the marital debt to the other and transfer to the other rights over his body for the purpose of sexual intercourse.⁹⁷

Bernard of Pavia wrote:

/.../ marriage is entered into in order to beget children and to avoid incontinence, and since the impossibility of fulfilling the conjugal act destroys these two motives, it follows that when this impossibility exists, marriage is excluded.⁹⁸

St. Thomas Aquinas held a similar view:

In marriage, a contract exists by which one binds himself to render the marital debt; thus, as in other contracts where there exists no obligation if someone binds himself to give or to do that which he is unable to do, so too, there is no marriage contract in the true sense, if it is entered into by someone who is unable to render the marital debt.⁹⁹

97 Cf. P. Harrington, "The Impediment of Impotency and the Notion of Male Impotency", in The Jurist, 19(1959), p. 63. Cf. G. Lesage, "Psychic Impotence, A Defect of Consent", in S.C., 4(1970), p. 65.

98 Bernardus Papiensis, Summa Decretalium, lib. IV, tit. 16, /edit. Laspeyres/, Graz, Akademische Druck-U. Verlagsanstalt, 1956, p. 175. "/.../ cum enim matrimonium aut causa suscipiendae prolis aut causa incontinentiae fiat, impossibilitas vero coeundi utramque removet causam, restat, ut, ubi haec intervenerit, matrimonium excludatur" (English translation from G. Lesage, loc. cit., p. 64).

99 St. Thomas Aquinas, Commentum in Quatuor Libros Sententiarum Petri Lombardi, IV, d. 34, q. 1, a. 2, in Thomas Aquinas, Opera omnia, Parmae, Typis Fiaccadori, 1856, v. VII-II, p. 984. "In matrimonio est contractus quidam, quo unus alteri obligatur ad debitum carnale solvendum; unde sicut in aliis contractibus non est conveniens obligatio, si aliquis se obliget ad hoc quod non potest dare vel facere; ita non est conveniens matrimonii contractus, si fiat ab aliquo qui debitum carnale solvere non possit" (English translation from G. Lesage, loc. cit., p. 64).

In brief, it can be said that impotence vitiates any matrimonial consent by depriving the contract of its proper object. It follows that a person, who is unable to render the marital debt, enters into a substantially defective matrimonial contract. The union is invalid because of a defect of consent, regardless of any canonical impediment.¹⁰⁰

Both canon 1068 of the Code of Canon Law and canon 283 of the proposed new law state that in order to invalidate marriage, impotence must be perpetual (permanent, not curable by natural and licit means). If, however, we view impotence as vitiating matrimonial consent by depriving the contract of its proper object, it would seem that even a temporary condition of impotence would be invalidating. The object of matrimonial consent, determined by Canon 1086, §2, is omne ius ad conjugalem actum. In a Rotal decision of November 11, 1953, c. Doheny, it was made plain that conjugal consent implies the perpetual surrender to the other partner of one's body (traditio corporis), "each time it is requested according to reasonable circumstances and moral principles."¹⁰¹

100 Cf. G. Lesage, loc. cit., p. 64-65.

101 Cf. S.R.R. Dec., 45(1953), c. Doheny, November 11, 1953, p. 659. Also quoted in G. Lesage, loc. cit., p. 77. Although Lesage is dealing specifically with psychic impotence as a defect of consent, it seems that much of what is said of the object of marriage could be applied to any form of impotence.

Doheny is referring to the debitum coniugale. Since the right to truly conjugal acts is perpetual, it cannot be limited timewise, be interrupted, or be determined by conditions outside of which the right would no longer exist.¹⁰²

Consequently, when one of the parties, for example, due to a temporary condition of impotence, does not /or cannot/ consent to the omne jus ad actum coniugalem, the marriage is invalid, because, contrary to law, its object is limited.¹⁰³ In other words, if one of the parties were in such a state that he would necessarily have to refuse the marital debt for a certain period of time, the omne ius is non-existent and the spouse is committing himself to what he cannot fulfill. There is as a result no true commitment and the contract is null, "because its essential object is unduly altered."¹⁰⁴

We may ask whether, in the light of the above remarks, it is even opportune to retain the diriment impediment of impotence as such. It seems that the whole question of

102 Cf. S.R.R. Dec., c. Doheny, loc. cit., p. 659.
Cf. G. Lesage, loc. cit., p. 77.

103 Cf. G. Lesage, loc. cit., p. 77.

104 Cf. ibid., p. 77-78.

impotence (organic, functional, and psychic) could be better treated under the heading of defect of consent rather than that of diriment impediment, since all forms of impotence, even those which are temporary, seem to invalidate matrimonial consent by depriving the contract of its object.

In fact, on the last day of the discussions concerning the revision of canon 1068 (i.e., on May 15, 1970), a suggestion was made by a consultor concerning the advisability of transferring canon 1068 to the heading of matrimonial consent. The reason given in favour of the transfer was the following:

Impotence is not an impediment in the proper sense of the word, that is a law disqualifying a person who is in himself capable of entering into marriage, but it is the incapacity of fulfilling the object of matrimonial consent. Therefore, the canon concerning impotence could be rightly inserted immediately after canon 1081, where the object of consent is defined.¹⁰⁵

Several consultors pointed out that impotence is something objective, existing in reality, and so it would be better to treat the matter with the other impediments rather

105 Comm., 7(1975), p. 61. "Impotentia enim non est impedimentum proprie tale, id est lex inhabilitans personam de se capacem matrimonii ineundi, sed est incapacitas praestandi obiectum consensus matrimonialis. Ideo canon de impotentia recte posset inseri statim post can. 1081, ubi obiectum consensus definitur."

than with the canons on consent. Yet another consultor drew attention to the fact that the whole matter depends on the criteria of systematization. If the nature of consent itself is considered, it must be said that it is an act of the spiritual faculties, that is of the intellect and the will. In this perspective, only those things directly pertaining to the exercise of those faculties (e.g., canons concerning fear, fraud, error, etc.) should be placed under the heading of consent. Impotence, however, does not refer directly to the exercise of the spiritual faculties. It is a personal deficiency of the physical order, which does not exercise a direct influence on the operation of the faculties mentioned. Again a preference was expressed for leaving canon 1068 where it is at present, and the final vote of the consultors was unanimous in support of that choice.¹⁰⁶

While granting that impotence is an objective condition (and this is especially evident in the case of organic impotence), consisting in the incapacity to perform the natural marriage act, it seems to be primarily linked to a defect of consent arising from the absence of the essential

106 Cf. ibid.

object of the matrimonial contract. For this reason it would seem more logical to treat of impotence under the heading of defect of consent, and thus make clear why it invalidates marriage in the first place. This would also have the effect of removing from the proposed new law what seems to be too great an emphasis on the physical aspects of marriage. Earlier on, in the discussion concerning the deletion of the words "ipso iure naturae" from canon 1068, one of the consultants, favouring the deletion, made a remark which also seems appropriate in connection with the treating of impotence as giving rise to a defect of consent:

The time seems to have come when more consideration should be given to the personal aspect of marriage and the necessary consequence of this aspect. We have already revised canon 1081 in that perspective; it is necessary to admit other consequences as well.¹⁰⁷

The emphasis on the personalist theology of marriage found in Vatican II, the recognition of the importance of copula as unitive rather than strictly procreative, and the denial of the necessity of verum semen in testiculis elaboratum for conjugal copula consummative of marriage, -

107 Cf. ibid., p. 182.

all these favour the relating of impotence in its various forms to matrimonial consent. The result would be a notion of impotence, which takes the whole human person into account rather than a physiological, neurological, or psychological phenomenon, that, in the past, has tended to involve the Church in disputes that would have been better left to physicians. Impotence treated in relation to a defect of consent could also be more easily allied to the incapacity to assume the obligations of the community of life in marriage rather than simply to the incapacity for coition. "The essential object of Christian marriage appears to entail a 'jus ad omnem communitatem vitae' as well as a 'jus ad omnem actum conjugalem'.¹⁰⁸ Impotence, therefore, is also an obstacle to the right to the community of life as well as the right to the conjugal act, effectively rendering impossible the physical union of the spouses, which signifies and promotes their mutual gift of self.

Notwithstanding the arguments in support of placing the canon on impotence in the section of the proposed new law dealing with the defect of consent, it appears unlikely that

108 Cf. G. Lesage, "The consortium vitae conjugalis: nature and applications", in S.C., 6(1972), p. 99, quoting S.R.R. Dec., c. Anné, February 25, 1969, in E.I.C., 26(1970), p. 430.

this will be done. Not only did the consultors vote unanimously to leave canon 1068 among the diriment impediments,¹⁰⁹ but, as already seen, considerable time was spent on debating whether the diriment impediment derived its invalidating force from the natural law (ipso iure naturae) or from the nature of marriage (ex ipsa natura matrimonii). The following observations are accordingly offered under the assumption that canon 283 of the proposed law will remain among the canons on the diriment impediments to marriage.

It seems that the question of whether the impediment originates from the natural law or from the nature of marriage could be principally one of semantics or terminology. To say that impotence invalidates marriage from the nature of marriage itself seems, in the final analysis, to be equivalent to saying that it does so from the natural law. It is true that marriage is by its nature ordered to the procreation and education of children, to the allaying of concupiscence, to the mutual help of the spouses, and so forth, but where do we find the nature of marriage defined if not ultimately in natural law? Nevertheless, if one or the other expression

109 Cf. Comm., 7(1975), p. 61.

"ipso iure naturae" or "ex ipsa natura matrimonii" is to be retained in canon 283, the insertion of the phrase "ex ipsa natura matrimonii" seems more appropriate for a number of reasons.

First of all, the words "ipso iure naturae" seem theoretical and not to have any more juridical consequences than would "ex ipsa natura matrimonii" if, in fact as we have said, the expressions have an equivalent meaning. Secondly, the expression "ex ipsa natura matrimonii" seems to be more in keeping with the phraseology used in the following canons of the proposed new law:

Canon 243, §1. "Marriage /.../ which by its very nature is ordered to the procreation and education of children."¹¹⁰

Canon 245, §2. ".../ the conjugal act which is apt for the generation of children, to which marriage is by its nature ordained /.../."¹¹¹

Canon 295, §2. Matrimonial consent is that act of the will whereby a man and a woman by means of a mutual covenant constitute with one another a communion of conjugal life, which is perpetual and exclusive and which by its very nature is ordered to the procreation and education of children.¹¹²

110 S.D.S., can. 243, §1, p. 72.

111 Ibid., can. 245, §2.

112 Ibid., can. 295, §2, p. 82.

Canons 243, §1, and 295, §2, use the expression "indole sua naturali", while canon 245 §2, uses "natura sua" to indicate that marriage is by its nature ordered to the procreation and education of offspring. It seems to us that canon 283, §1, would be more consistent with these canons with which it is closely allied, if it also uses a similar terminology, namely, "ex ipsa natura matrimonii," to express the origin of the invalidating effect of the inability for coition. This being said, without further elaboration on the question, seemingly one of terminology rather than of canon law in the strict sense, we shall continue our survey of the discussions of the consultors on the revision of canon 1068.

b) The expression "sive alteri cognita sive non" pertaining to the knowledge (or lack of knowledge) of the impediment by the other party was voted by the consultors to be deleted from canon 1068, §1. Apparently, the question of the deletion provoked very little if any discussion, on the part of the consultors,¹¹³ or the commentators. The presence

113 Cf. Comm., 7(1975), p. 56.

or omission of these words seems of little practical consequence, since it seems that impotence is invalidating irrespective of the knowledge or ignorance of the condition on the part of the future spouse.

The inclusion of the words in canon 1068, §1, was reminiscent of the possibility envisaged (prior to the Brief Cum frequenter, Sixtus V, 1587) by some authors as Pontus (1569-1629) of allowing an impotent man to marry validly, provided he and his wife were content to live a life of perfect continence. Even such authors admitted, however, that the marriage would be invalid if the man married with the intention of attempting intercourse, since he was incapable of copula. Following the lead of Sixtus V, canonists and theologians of succeeding centuries have taught that impotence is objectively invalidating, independently of the knowledge and acceptance of the condition by the potent party.¹¹⁴

c) Female Organic Impotence. In the light of what we have seen regarding the requirement on the part of the wife for perfect copula, i.e., a vagina capable of receiving

¹¹⁴ Cf. P. Harrington, "The Impediment of Impotency and the Notion of Male Impotency", in The Jurist, 19(1959), p. 188.

the erect male member, nearly all the consultors reached the following conclusions concerning female organic impotence: a woman who has an artificial vagina (made of natural tissue) inserted before marriage is to be considered potent;¹¹⁵ a woman who has a closed or an equivalently closed vagina is not to be considered impotent;¹¹⁶ and, an excised woman (mulier excisa) is to be considered potent.¹¹⁷

We have already alluded to the passive role assigned the wife in the consummation of marriage and to the fact that female potency is usually expressed in terms of a woman's having a vagina capable of receiving the male copulatory member. The conclusions, which the consultors reached with respect to female organic impotency, were also quite consistent with their views on copula satiativa. Namely, if perfect copula does not require a testicular component in the semen on the part of the man, then neither does it require post-vaginal organs (i.e., the ovaries, source of female fertility, or the uterus) on the part of the woman.

115 Cf. Comm., 6(1974), p. 196.

116 Cf. ibid., p. 197.

117 Cf. ibid.

In fact, certain authors have already been holding views similar to the conclusions reached by the consultors concerning the woman with an occluded vagina (mulier occlusa), or who lacks postvaginal organs (mulier excisa). Navarrete, for example, writes:

Both science and jurisprudence almost unanimously support the opinion according to which the mulier excisa that is, one who lacks post-vaginal organs but has an intact vagina - is not impotent, or at least is not certainly impotent with respect to marriage. In practice, for at least the last forty years, the following opinion has been applied without hesitation: The mulier excisa is admitted to marriage without any difficulty or special formality /.../.¹¹⁸

In a study of the question of the artificial vagina, in 1968, it was concluded that a woman with a vagina surgically constructed from natural tissue would be potent, provided the vagina was open to the uterus.¹¹⁹ Sabattani,

¹¹⁸ U. Navarrete, "De muliere excisa. Animadversiones in opus recens editum", in Per., 64(1975), p. 335. Cf., also, F. Bersini, "De muliere excisa et de vagina occlusa in ordine ad validitatem matrimonii", in M.E., 99(1974), p. 232-254, esp. p. 252. J.M. McCarthy, The Matrimonial Impediment of Impotence with Special Reference to the Physical Capacity for Marriage of an "Excised Woman" and of a "Doubly Vasectomized Man", p. 83 (this excellent study was published in 1948).

¹¹⁹ Cf. M. Thériault, "Néo-vagin et impuissance", in S.C., 2(1968), p. 27-76, esp. p. 73.

writing on the same subject, also held that the artificial vagina must be open to the uterus in order that a woman be considered potent.¹²⁰

If we consider the first two conclusions reached by nearly all the consultors (fere omnes consultores), namely, a woman who has an artificial vagina inserted before marriage is to be considered potent,¹²¹ and a woman who has a closed or an equivalently closed vagina is not to be considered impotent,¹²² it seems we may infer that an artificial vagina does not have to be open to the uterus as Thériault and Sabbattani were contending.¹²³ It is true that the consultors said only that a woman with a closed or an equivalently closed vagina was not to be considered impotent. While they do not say positively that she is to be considered potent as they did for the mulier excisa, their stand seems equivalent to saying there is at least a doubt of law concerning the impotence of the woman with occluded

¹²⁰ Cf. S.R.R. Dec., c. Sabbattani, February 22, 1963, in E.I.C., 20(1964), p. 338.

¹²¹ Cf. footnote 115 above.

¹²² Cf. footnote 116 above.

¹²³ Cf. footnotes 119 and 120 above.

vagina. Consequently, according to these orientations, it seems she could contract a valid marriage.

The above orientations concerning female impotence seem to be quite consistent with those concerning the vasectomized man. Again, it may be asked if a notion of female potency, which hinges on the presence of a vagina as a receptacle for the male copulatory organ is adequate. It seems that an affirmative answer to this question must be given, in view of what was said earlier regarding the structure of the vagina which is perfectly adapted to its role in copulation.¹²⁴ The vagina along with the clitoris provides a seat of sexual satisfaction for the wife during intercourse, enabling her and her husband to be united in the most intimate embrace possible. It was not the intention of the consultors deliberately to separate the vagina from the complex of female sexuality, but they were speaking in juridical terms. Nevertheless, the whole question of female impotence would profit from further study by specialists in gynecology and in canon law. Again, we feel this is an area where the expertise of women would be extremely important.

124 Cf. footnotes 48 and 49 above.

d) Functional Impotence. Impotence is functional when the incapacity for coition derives from nervous or psychological causes (psychic impotency).¹²⁵ The consultants unanimously agreed that the judgment concerning this form of impotence (its perpetuity, etc.) pertained to medical specialists.¹²⁶ In sum, they did not decide whether functional impotence constitutes a diriment impediment of impotence.¹²⁷

Moral Impotence. The concept of moral impotence seems a rather nebulous one as yet. It has also been referred to as psychological impotence,¹²⁸ or psychic impotence.¹²⁹

In some writings, moral impotence is considered as the equivalent of a person's constitutional incapacity to assume the obligations and to fulfill the proper duties of the matrimonial state, no matter from which grounds this incapacity arises.¹³⁰

125 Cf. Wernz-Vidal, Jus canonicum ad codicis normam exactum, V, Jus Matrimoniale, n. 221, p. 265.

126 Cf. Comm., 6(1974), p. 197-198.

127 Cf. ibid., p. 198.

128 Cf. F.G. Morrissey, loc. cit., p. 36-37.

129 Cf. G. Lesage, "Psychic Impotence: A Defect of Consent", in S.C., 4(1970), p. 61-78.

130 F.G. Morrissey, loc. cit., p. 36.

The Rota seems to have refused to recognize functional impotence, and a fortiori psychic impotence (a form of functional impotence) as a diriment impediment because of its doubtful perpetuity.¹³¹

Of moral impotence, the Relator (P. Huizing) summarized as follows:

/.../ this question, which is proposed by certain authors under the name of moral impotence, must be intimately connected with the question of matrimonial consent rather than with the question of impotence. For matrimonial consent concerns not only "acts apt of themselves for the generation of children," but the whole object of marriage (unity, indissolubility, mutual help, etc.). We must ask whether those who suffer from psychic illnesses are capable of eliciting a true consent with respect to all the essential obligations of marriage, namely a consent not vitiated by a constitutional incapacity of observing the essential obligations of the matrimonial contract.¹³²

¹³¹ Cf. S.R.R. Dec., 51(1959), c. Pinna, July 4, 1959, p. 352. "/.../ constans iurisprudentia Ordinis Nostri vix, immo ne vix quidem, habuit impotentiam functionalem tamquam impedimentum dirimens matrimonium, utpote dubiae perpetuitatis."

¹³² Comm., 6(1974), p. 193. "/.../ hanc quaestionem, quae a quibusdam sub nomine 'impotentiae moralis' proponitur, intime coneccti debere cum quaestione de consensu matrimoniali, potius quam cum quaestione de impotentia. Consensus matrimonialis enim non respicit tantum 'actus per se aptos ad prolis generationem' sed totum obiectum matrimonii (unitas, indissolubilitas, mutuum adiutorium etc.). Quaerendum nobis est an illi qui morbis psychicis laborant capaces sint eliciendi verum consensum circa omnia onera essentialia matrimonii, consensum nempe qui non sit vitiatum a constitutionali incapacitate observandi essentialia obligationes contractus matrimonialis."

The question was slated for further study by the experts.¹³³ What was said previously regarding the vitiation of marital consent by impotence, in that it deprives the contract of its proper object (omne jus ad actum conjugale / ad communitatem vitae),¹³⁴ is, therefore, applicable to the discussion of functional impotence. The coetus seems to have concluded that at least moral impotence should be studied as giving rise to a defect of consent rather than as a diriment impediment. Moral impotence could perhaps be better termed "psychic impotence", since the term "moral" is ambiguous, and since this form of impotence finds its origin in psychic or psychological causes.¹³⁵

With respect to paragraph 2 of canon 1068, dealing with cases where the impediment of impotence is doubtful, one of the consultors proposed that the paragraph be suppressed completely in the new law. However, the others voted to retain the paragraph in question, but with the

133 Cf. ibid., p. 194.

134 Cf. footnotes 97-100 above.

135 Concerning the whole question of psychic impotence, see G. Lesage, "Psychic Impotence: A Defect of Consent", in S.C., 4(1970), p. 61-78.

addition, "as long as the doubt regarding the impediment remains, the marriage is not to be declared null" (nec, stante dubio, nullum declarandum).¹³⁶ The reason for this addition was expressed in these terms:

/.../ what is considered before marriage as a doubtful impediment of impotence and therefore is reckoned as not impeding marriage, the same is to be reckoned as a doubtful impediment even after marriage is contracted, and, therefore, either a nullity case /on the grounds of impotence/ is not to be admitted before ecclesiastical tribunals, or, if it is admitted, the decision should be in favour of the marriage.¹³⁷

In short, in the case where the impediment of impotence is doubtful, a marriage is not to be hindered from taking place, nor may it later be declared null on the grounds of impotence as long as the impediment remains doubtful. The addition "nec, stante dubio, nullum declarandum" should have the effect of forestalling conflicting jurisprudence on the part of certain dicasteries of the Holy See,¹³⁸ namely

¹³⁶ Cf. Comm., 7(1975), p. 57.

¹³⁷ Ibid. "/.../ id quod ante matrimonium uti impedimentum dubium impotentiae consideratur ideoque uti non impediens matrimonium habeatur, idem post coniugium initum uti dubium impedimentum habeatur ideoque vel causa nullitatis non admittatur apud Tribunalia ecclesiastica, vel, si admittatur, fiat definitio in favorem matrimonii."

¹³⁸ Cf. T.G. Green, loc. cit., p. 388. Cf. U. Navarrete, "Schema iuris recogniti 'De matrimonio' textus et observationes", loc. cit., p. 631.

the Sacred Roman Rota and the Congregation of the Sacraments on the one hand and the Congregation for the Doctrine of the Faith (the former Holy Office) on the other.

It seems to us that this is a valid reason for the addition, since it is difficult to explain why the Congregation for the Doctrine of the Faith would permit a bilaterally vasectomized man to marry, and later the Rota would declare the marriage null on the grounds of impotence arising from the vasectomy. The explanation, of course, lies in the approach the two dicasteries take to the problem: the Congregation for the Doctrine of the Faith considers the man doubtfully impotent (perhaps because the impediment may not be perpetual) and upholds his right to marry. The Rota considers him as certainly impotent because he is incapable of semination containing a testicular component, which, according to the Rotal opinion, is a requisite for male potency. Although both dicasteries have been consistent in the application of their respective jurisprudence based on the premises mentioned, it does seem time that the highest ecclesiastical tribunals in the Church begin to act in consort when dealing with such cases.

Nevertheless, the addition in question has been met with mixed reactions. One writer, for example, expressed reservations:

Henceforth, ecclesiastical tribunals would not be able to declare null a marriage celebrated when a doubtful impediment of impotency occurred. /.../ Nevertheless, this decision is not an easy one to accept. If the marriage is indeed void due to the presence of a diriment impediment, then it seems that the couple would have a right to receive a declaration of nullity.¹³⁹

Yet, a decision of the Holy Office, January 28, 1964, which we have already studied in detail, seems to have anticipated this addition to the text of canon 1068, §2. The Sacred Congregation decreed that the marriage of a man, who had been vasectomized prior to marriage (and was considered doubtfully impotent), could not be declared null on the grounds of impotence, but that this did not preclude the case's being heard on other grounds, e.g., the exclusion of children.¹⁴⁰

Concerning the right of the couple to receive a declaration of nullity, the only direct solution to the difficulty proposed would seem to be to prove that the

¹³⁹ F.G. Morrissey, loc. cit., p. 36.

¹⁴⁰ Cf. C.L.D., 6, p. 616-618.

impediment is no longer doubtful but certain, by, for example, presenting irrefutable medical evidence of the impotence. If this is not feasible, then a declaration of nullity on other grounds would have to be sought as suggested by the Holy Office. Or, yet again, perhaps the marriage could be dissolved on the grounds of nonconsummation. In all fairness to the rights of the parties and those who uphold those rights, if the impediment of impotence remains doubtful then the moral certitude would seem to be lacking, which is necessary to grant a declaration of nullity on those grounds. This does not mean, however, that moral certitude would be lacking with respect to other grounds, such as an intention against children. Thus, a declaration of nullity would still be possible.

Finally, paragraph 3 of canon 283 of the Schema presents another interesting variation from canon 1068, §3, in the addition of the words "firmiter praescripto canon 300". That is, sterility is neither an impedient nor diriment impediment without prejudice to the prescription of canon 300. Canon 300 of the Schema ... de Sacramentis reads:

Qui matrimonium init
deceptus dolo, ad obtinendum
consensum patrato, circa
aliquam alterius partis
qualitatem, quae nata est ad
consortium vitae conjugalis
graviter perturbandum,
invalidè contrahit.¹⁴¹

The person who enters mar-
riage deceived by fraud,
perpetrated to obtain consent,
concerning some quality of the
other party, which could
seriously disrupt the community
of conjugal life, contracts
invalidly.

This is a new canon, which seems to be a logical
extension of canon 1083, §2, 1^o, of the Code of Canon Law,
which deals with an error on the quality of a person, which
becomes the equivalent of an error concerning the person
and so invalidates marriage.¹⁴²

Sterility is the simple inability to beget children
(impotentia generandi) as opposed to the inability for
coition (impotentia coeundi). In the proposed law (as in
the Code of Canon Law and prior to the Code) sterility does
not normally render marriage either illicit or invalid. As
such, sterility does not deprive marital consent of its
proper object, the right to acts apt for procreation
(although the acts are accidentally infertile) and the right
to the community of life. It is not an obstacle to the carnal

¹⁴¹ S.D.S., can. 300, p. 82.

¹⁴² C.I.C., 1083, §2, 1^o. "Error circa qualitatem
personae /.../ matrimonium irritat tantum: 1^o Si error
qualitatis redundet in errorem personae."

union of the spouses, to their mutual help, to the allaying of concupiscence, and to those other elements making up the community of life.

The consultors agreed, therefore, that the revised canon 1068, §3, should state that sterility neither invalidates marriage nor renders it illicit, but with the addition, "without prejudice to the prescription of canon 300" (firmiter praescripto can. 300). This addition implies that if the sterility is fraudulently (cum dolo) or deceitfully concealed from the other party in order to obtain his/her consent to the marriage, there would be sufficient grounds to investigate the possible nullity of the marriage. "Sterility is certainly a quality which 'is apt to disrupt seriously the community of conjugal life' and, therefore, deceit concerning sterility renders marriage null."¹⁴³

The word "quality" as used here in reference to sterility does not mean a positive attribute which is present in the person deceiving. It means rather the negation of the capacity to beget children, which is the attribute

¹⁴³ Comm., 7(1975), p. 59. "Sterilitas enim certo certius est qualitas quae 'nata est ad consortium vitae coniugalis graviter perturbandum' et ideo dolus de sterilitate nullum facit matrimonium." Cf., also, S.D.S., can. 300, p. 82.

that the deceived partner thought was present in the other but which in fact is not. There is no doubt that fertility is both an objectively serious quality and also greatly esteemed subjectively by one who marries for the specific reason of having a family. Although sterility of itself does not necessarily disrupt the community of life, it is certainly apt to do so in cases where, for example, one of the purposes of a marriage was to beget an heir.

Furthermore, the reference to sterility in paragraph 3 of canon 283 is in keeping with the stand taken earlier by the consultors to the effect that testicular semen was not required for potency or for the consummation of marriage. In many cases azoospermia and sterility in the male are, for all practical purposes, equivalent. A man, who is permanently unable to secrete a testicular element, is thereby unable to secrete spermatozoa, and is therefore sterile. According to Rotal jurisprudence, if the azoospermia is accompanied by atrophy of the testicles or occlusion of the spermatic ducts, the condition of male impotence would also be considered to exist.¹⁴⁴ Canon 283, §3, serves then, to re-emphasize the

¹⁴⁴ Cf. G. St-Hilaire, op. cit., p. 567.

distinction between impotence for coition and sterility and should help to avert future misunderstandings on this question.

Finally, the word "prohibet" is used in canon 283, §3, in place of the word "impedit" of canon 1068, §3, in pointing out that sterility does not hinder marriage with due regard for the exception just noted. The two words are of similar meaning, and the substitution of prohibet for impedit was suggested by one of the consultors in keeping with the terminology used in the proposed canon 260, §1, where the term "impedimentum prohibens" (prohibitive impediment), was used¹⁴⁵ rather than the term "impedimentum impediens" (impedient impediment), of canon 1036, §1.¹⁴⁶

If, as for canon 245 of the Schema, it may be permitted to suggest an alternate text for the final draft of canon 283 of the proposed new law, the following changes from the present draft are recommended: in paragraph 1, the phrase "ex ipsa natura matrimonii" would be removed from

¹⁴⁵ Cf. Comm., 7(1975), p. 59. Cf. S.D.S., can. 260, §1, p. 75.

¹⁴⁶ Cf. C.I.C., 1036, §1.

its brackets and substituted in place of the phrase "ipso iure naturae". Moreover, the phrase "quia privat contractum obiecto eius essentiali" would be added to the end of the paragraph to indicate precisely why impotence is invalidating. Paragraph 2 would be retained unaltered because it both safeguards the natural right to marry in the case of doubtful impotence and protects the bond of marriage once contracted, while precluding conflicting jurisprudential practices on the part of ecclesiastical tribunals. Paragraph 3 would also be retained unaltered since it complements the first two paragraphs by underlining the distinction between the impotence for coition and the impotence for generation, the former being invalidating while the latter is not, except where it is fraudulently concealed from the future spouse.

The final text of Canon 283 would then read.

§1. Impotentia coeundi antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive absoluta sive relativa, matrimonium ex ipsa natura matrimonii dirimit, quia privat contractum obiecto eius essentiali.

§2. Si impedimentum impotentiae dubium sit, sive dubio iuris, sive dubio facti, matrimonium non est impediendum, nec, stante dubio, nullum declarandum.

§1. Impotence for coition, antecedent and perpetual, whether on the part of the man or the part of the woman, whether absolute or relative, invalidates marriage from the very nature of marriage, because it deprives the contract of its essential object.

§2. If the impediment of impotence is doubtful, whether by a doubt of law or of fact, the marriage is not to be hindered, nor is it to be declared null as long as the doubt remains.

§3. Sterilitas matrimonium
nec prohibet nec dirimit,
firmo praescripto can. 300.

§3. Sterility neither renders
marriage illicit nor invalidates
it, without prejudice to the
prescription of canon 300.

In terminating our study of impotence from the perspective of the new law, we note that in the new Schema on procedural law, canon 351 foresees a summary procedure (as per canon 1990 of the Code of Canon Law) in marriage cases, where there is documentary proof of the existence of a diriment impediment.¹⁴⁷ No exceptions are made, so documentary proof of the existence of impotence is also acceptable in summary trials. This is in keeping with the *Motu proprio* Causas matrimoniales, X, March 28, 1971.¹⁴⁸

CONCLUSION

We have already pointed out most of the positive aspects along with certain criticisms of the proposed new canons 245 and 283 on marital consummation and the diriment impediment of impotence respectively. There remains, by way of conclusion, to recapitulate briefly the general impressions of our study, and that in a spirit of optimism.

¹⁴⁷ Cf. Schema de Processibus, can. 351, 1), p. 81.

¹⁴⁸ Cf. Paul VI, M.P. Causas matrimoniales, March 28, 1971, in A.A.S., 63(1971), X, p. 445.

Canon 245 rearticulates a biological notion of consummation, yet with a difference: the verum semen in the Rotal sense no longer seems to be an essential element. On the contrary, the orientations of the Code Commission give us to understand that copula consummative of marriage is to be taken in the sense of copula satiativa where ordinary semination suffices even if a testicular constituent is absent.

The possible insertion of the phrase "humano modo" in the same proposed canon reminds us that consummation involves not only physical bodies, but the whole person of the marriage partners, who act in a human fashion with knowledge and love. In this sense, consummation can be viewed not as a purely biological function, but as the ultimate expression of love between the newlywed spouses, who make a complete gift of self to each other.

We have suggested, however, that the "one flesh" imagery be removed from canon 245, §2. Firstly, scriptural scholars have disputed the meaning of Gen. 2,24, and secondly, a text from Gaudium et spes, n. 49, would be more in keeping with the gift of self implied in the phrase "humano modo" and the terminology used in other canons of the Schema, which are closely related to canon 245.

There is no mention of the "existential and in faith" consummation of marriage in canon 245. This is not to be wondered at, given the fact that Bernhard's hypothesis on this subject dates from, in fact postdates, the deliberations of the Code Commission on marital consummation. The theory has not yet been sufficiently studied by scholars from all over the world.

The discussions of the coetus on the subject of the requirement of the wife in marital consummation have been notably traditional in their tenor. The wife seems to be assigned her usual role. If she has a vagina capable of receiving the male copulatory member, she is considered potent and capable of consummating marriage. Nevertheless, the physical requirements for consummation on the part of the wife, as stated in the reports of the work of the coetus, do coincide with biological data on the same subject. The phraseology used could perhaps be improved upon with the help of women specialists in Canon Law and medicine.

The proposed canon 283, §1, attempts to explore the origin of the invalidating effect of the impediment of impotence. Those commenting on the canon in an official capacity, i.e., episcopal conferences, universities, and so forth, were invited to express their opinion on whether the

impediment is invalidating from the nature of marriage (ex ipsa natura matrimonii) or from the natural law (ipso iure naturae). The consultors reached no agreement on this question, which seems largely to be one of terminology. The nature of marriage is ultimately derived from the natural law, but the use of the phrase "ex ipsa natura matrimonii" in canon 283, §1, seems preferable because it is, first of all, more readily understood. This option seems also more acceptable because it would parallel the phraseology used in other canons of the Schema, notably canons 243, 245, and 295, which are related by subject matter to canon 283.

More basic to the problem of impotence than a discussion of terminology is the fact that it invalidates marriage by depriving the contract of its proper object and is, therefore, fundamentally related to a defect of marital consent. The consultors briefly discussed the possibility of transferring canon 283 to the canons on consent, but they eventually voted to leave impotence among the diriment impediments to marriage. It has been suggested, by way of compromise, that the phrase, "because it deprives the matrimonial contract of its essential object," might at least be added to the end of paragraph 1 of canon 283 to underline the relationship between impotence and defective consent.

The second paragraph of canon 283, by the addition of the phrase "nec, stante dubio, /matrimonium/ nullum declarandum", should obviate conflicting jurisprudential practices among certain tribunals of the Holy See in the matter of doubtful impotence. The addition may seem superfluous to some in view of canon 1014 of the Code and canon 244 of the proposed new law (stating that, in case of doubt, marriage enjoys the favour of law until the contrary is proven). However, given the embarrassment of the divergent jurisprudence alluded to above, it is well worth retaining the phrase even at the risk of redundancy.

We have suggested that canon 283, §3 (concerning sterility) be retained, because it seems a natural complement to paragraph 1 of the same canon which speaks of the impotentia coeundi. Thus, the distinction between impotentia coeundi and impotentia generandi is further elucidated by a special paragraph on sterility.

Finally, we believe the proposed canons can be evaluated intelligently only when they are studied in the light of the protracted discussions of the members of the coetus which prepared them. Otherwise, they probably will not be fully understood, and certainly will not be appreciated for the real juridical progress they represent.

The Church, it has been said, makes haste slowly. This is especially true in matters of canonical discipline, but the work presently being done by the Code Commission and its consultants throughout the world seems a sufficient reason for optimism.

SUMMARY AND CONCLUSIONS

It has been shown that the Magisterium of the Church only gradually came to recognize the juridical significance of the consummation of marriage. Due to the writings of Hincmar of Rheims in the ninth century and those who followed him, the Church slowly became aware of the inadequacy of judging marriage as indissoluble on the merits of consent alone, as had those who upheld the "consensual theory". After the long emphasis on the need of consensus to effect marriage as exemplified in the Roman tradition, Hincmar's De nuptiis Stephani made a significant break with the past. Its meaning was plain enough: without sexual intercourse there was no marriage. For Hincmar, consent constituted an entry into marriage, a beginning of married life, but sexual intercourse also entered into the very constitution of the marriage bond.

As the importance of marital consent had been over-emphasized formerly, so too, following Hincmar, the role of sexual intercourse was exaggerated with writers such as Gratian (twelfth century) who endorsed the "copula theory". In Gratian's dialectic, both consent and consummation were essential to the formation of the marriage bond; no marriage began to exist in reality until both elements were present. According to this view, the matrimonial process was incomplete without sexual intercourse.

Alexander III (1159-1181) reconciled the two schools of thought on the formation of the marriage bond by teaching that there were two essential elements necessary to constitute an absolutely indissoluble marriage: the mutual consent of the parties and sexual intercourse. The essence of marriage lay in the contract and not in consummation, but a non-consummated marriage lacked the supreme indissolubility characterizing those marriages (consummated), which more fully symbolized the union of Christ with the Church. According to this teaching, a ratified marriage (i.e., where both parties were baptized), even if nonconsummated, was truly sacramental, but it could be dissolved by solemn religious profession or by papal dispensation, this latter practice becoming stabilized under Clement VIII (1605).

Alexander's addition of copula to consent as a criterion for the indissolubility of marriage seems to have identified the words of Genesis 2:24 "and they shall be two in one flesh" with the first act of conjugal intercourse following the exchange of consent. Keeping this in mind, it is not surprising that ecclesiastical legislation since the pontificate of Alexander III has traditionally viewed the consummation of marriage from a biological standpoint.

From the twelfth to the twentieth centuries, very few documents treated explicitly of marital consummation or its elements. The Brief Cum frequenter, Sixtus V, 1587, treated of male organic potency, rather than directly of consummation. In Cum frequenter, Sixtus V forbade the marriage of eunuchs and spayed men lacking both testicles, seemingly because they were unable to fulfill the physical requirements for copula consummative of marriage or accomplish the ends of marriage. The use by Sixtus V of the expression, "it is certain that these men are unable to emit verum semen", in the narrative part of the brief, was interpreted by some authors to mean that eunuchs and spayed men were considered impotent due to their inability to emit semen containing a testicular component. Following Cum frequenter, other documents (e.g., Dei miseratione, 1741, and Cum moneat Glossa, 1840) did not further elaborate on the verum semen question, but laid down detailed rules for processing cases of impotence and/or nonconsummation of marriage.

At the turn of the twentieth century, however, Giuseppe Cardinal Antonelli and Pietro Cardinal Gasparri again taught that semen containing a testicular component was necessary for male potency and marital consummation. Antonelli, moreover, required that such semen be fertile, while Gasparri insisted only on the fact that the semen contain a testicular

element irrespective of its fertility or infertility. After its reorganization in 1908, the Sacred Roman Rota chose gradually to apply the Gasparri opinion in dealing with cases of male impotence, declaring marriage null if a man was unable to emit testicular semen. The Congregation of the Sacraments likewise followed suit in its jurisprudence on cases of nonconsummation. On the contrary, the Congregation of the Holy Office (later the Congregation for the Doctrine of the Faith) has consistently declared that marriage is not to be hindered in the case of bilaterally vasectomized men, who obviously are unable to emit semen elaborated in the testicles. Neither has the Holy Office later permitted such marriages to be declared null on the grounds of impotence.

Canon 1015 of the Code of Canon Law has made it possible to deduce the physical elements of consummation on the part of the husband (i.e., erection of the male copulatory organ, penetration, and ordinary semination) as well as the physical elements on the part of the wife (the reception of male copulatory organ in the vagina as the result of post-hymeneal penetration and subsequent ejaculation). Commentators have generally agreed that the following psychological elements are also required for consummation: it must be a human act (i.e., with deliberation of the intellect and

freedom of the will), it must be free from physical violence, and be posited as an act of intercourse between husband and wife. Replies of the Holy Office, dated March 1, 1941, and February 13, 1949, have further clarified the physical and psychological requirements for consummation respectively.

The correlative notion of impotence as a defect impeding biological consummation has occasioned a more detailed study of canon 1068 of the Code. According to this canon, impotence invalidates marriage when it is both antecedent and perpetual. Yet, authors have remained divided with respect to the capacity for coition of both the man unable to secrete testicular semen, and the woman, who lacks postvaginal organs (mulier excisa) or whose vagina is not open to the uterus (vagina occlusa). The question of the artificial vagina has also posed similar difficulties.

In the post-Code period, the procedural law for the processing of ratum cases was revised and updated principally by the Decree Catholica doctrina, and Norms Regulae servandae, both of Congregation of the Sacraments, May 7, 1923, and the Instruction Dispensationis matrimonii rati, of the same congregation, March 7, 1972. As was the case with the pre-Code documents the procedural documents of the last half century have continued to outline the rules for the investigation of the biological consummation of marriage.

The reports on the work of the Pontifical Commission for the Revision of the Code of Canon Law do not indicate that the present notion of marital consummation will be substantially altered in canon 245 of the proposed new law. Nevertheless, there is a difference. Verum semen in the Rotal sense no longer seems to be an essential element for copula consummative of marriage. The discussions of the Code Commission imply that copula satiativa is sufficient to consummate marriage; that is, ordinary semination is required without reference to whether there is any testicular component present. The acceptance of conjugal copula in this sense has consequences for the marriage of the bilaterally vasectomized, who, though they cannot emit testicular semen, yet are capable of ordinary semination. Also, the possible insertion of the words "humano modo" in canon 245 gives new impetus to the psychological elements of consummation as a human act, and connotes the total gift that the spouses make of themselves.

The proposed new canon 283 on impotence attempts to explore the origin of the invalidating effect of the impediment. It is asked whether the first paragraph of the canon should state that impotence is invalidating from the law of nature (ipso iure naturae) or from the nature of marriage (ex ipsa natura matrimonii). This seems to be

mainly a question of terminology since the two phrases are closely related in meaning. Moreover, the fundamental reason for the invalidating force of the impediment is that it deprives the matrimonial contract of its essential object, jus ad actum conjugale or jus ad communitatem vitae.

Although it might seem preferable, therefore, to treat of impotence under defect of consent, the consultors voted to leave canon 283 with the diriment impediments to marriage.

In discussing the question of female impotence, the consultors agreed that a woman with an occluded vagina (vagina occlusa) was not to be considered impotent, although the vagina was not open to the uterus. Likewise, the woman, who lacked postvaginal organs (mulier excisa), or who had a vagina surgically constructed of natural tissue prior to marriage, was to be considered potent. The orientations of the Code Commission thus continue to consider the vagina as the essential female copulatory organ. In doing so they were not only following canonical tradition, but were also in accord with sound biology.

The second paragraph of canon 283 reiterates that, in the case of doubtful impotence, marriage is not to be impeded, but with the proviso that, while the doubt remains, the marriage cannot be declared null on the grounds of the

impediment. The purpose of the addition was to obviate the conflicting jurisprudential practices among certain tribunals of the Holy See, particularly with respect to the marriage of the doubly vasectomized. The final paragraph of canon 283 declares that sterility neither invalidates marriage nor renders it illicit, provided that the sterility is not fraudulently concealed for the purpose of obtaining marital consent. In that case, there would be reason to investigate the nullity of the marriage, since sterility is a "quality" which could seriously disrupt the community of conjugal life.

The present dissertation has endeavoured to trace the notion of marital consummation in ecclesiastical sources from the writings of the early Church Fathers to the Schema ... de Sacramentis. It is not meant to be the last word on the subject. Rather, it must now be asked whether the notion of marital consummation will evolve in the future. Will consummation, for example, eventually be understood in an "existential" or "psychological" manner?

It is not considered prudent nowadays in canonical circles to project too far into the future, or to predict that the final draft of the new Code of Canon Law will or will not include certain elements not foreseen in the former law. However, neither the Schema ... de Sacramentis nor the

available commentaries on the Schema seem to give much credence to the belief that we shall be dealing with a radically changed notion of consummation in the near future. While it is true that the Second Vatican Council did not insist on a distinction between the ends of marriage, yet it did say that marriage was ordained to the procreation of children, which are its crown. Moreover, there are passages from conciliar documents which speak of the carnal union of husband and wife, although such texts go beyond the realm of mere biology to speak of "the actions by which the couple are united intimately and chastely ... and which signify and promote mutual self-giving".

The law does undeniably presuppose the physical requirements for consummation, but encourages us to see beyond this visible physical sign to the invisible but not less real union of charity between Christ and His Church symbolized in a more excellent way by this sign. As material elements are used as symbols of a greater spiritual reality in other sacraments, it is not to be wondered that the ultimate expression of love between a newlywed couple should be a more perfect sign of the mutual love between Christ and His Mystical Bride. Admittedly, the bond of marriage is effected by the exchange of consent, but since the time of Alexander III the Church has taught that physical consummation seals

this bond for life, and forges, so to speak, a link between the couple which only death can loose.

The biological consummation of marriage has the advantage of being more easily verified in law than "existential" consummation, which requires not only that the spouses have physically consummated their marriage but also have succeeded in raising their love to a certain level of human and Christian fulfillment. As yet, the criteria to determine when a marriage becomes existentially consummated are not well defined. Consequently, the absolute indissolubility of marriage is left in suspense for an indefinite period of time and made to depend on variables, which can be more easily evaluated by psychology and sociology than by Canon Law. From a juridical standpoint, then, the Church seems to prefer a notion of consummation that can be more precisely expressed in legal terms, and with good reason, because of the relationship between marital consummation and indissolubility. Any revision of the notion of marital consummation necessarily implies a revision of the Church's teaching on indissolubility.

The foregoing observations are not meant to imply that the present notion of consummation is fixed and rigid or that it cannot or will not be altered in the future. Ecclesiastical authorities are certainly aware of the research

being done in the area of "existential" consummation. But, in all fairness, it must be admitted that such research is of recent date and has not yet been subject to universal criticism. When such writings have stood the test of time and have been translated into canonical language, they may be given more serious consideration on the part of those who interpret and revise ecclesiastical legislation.

For the present, and at least the immediate future, the notion of biological consummation can be greatly enhanced by more insistence on its theological and juridical effects, as also on the psychological elements, which are required to accompany consummation as a human act. The projected new law has taken this into account by the introduction of the words "humano modo" in canon 245. This then is one area where canonists and theologians can make a contribution, which is acceptable to the Magisterium of the Church. In preparing couples for marriage, emphasis must be placed more on the significance of physical consummation than biological data which are available in any standard textbook of human anatomy. Because of the serious theological and juridical consequences of first conjugal intercourse, couples must be made aware that especially in the area of sexual communication they are first of all acting as knowing, loving and consenting human beings.

The final word is one of encouragement to serious thinkers and writers in the ecclesiastical sciences and in these disciplines dealing with the physiological, psychological and sociological aspects of marriage. There is need first of all to explore the many facets of the present notion of consummation with all of its implications for the whole human person as understood in Gaudium et spes, rather than concentrating too much on a new concept of consummation, that is considered by many to be somewhat equivocal. Loyalty to the Magisterium of the Church is the requisite for research that will eventually influence the making of laws. Such a postulate does not stifle originality in canonical and theological thought, whose role is not to make new doctrine, but to elucidate the existing doctrine in a language adopted to the age in which the Church finds itself.

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