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THE CANONICAL SIGNIFICANCE
OF MARITAL FIDELITY
AMONG THE BANTU OF SOUTH AFRICA

Rev. Marc de Muelenaere

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

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ABBREVIATIONS

iv

AAS	Acta Apostolicae Sedis
AC	L'Année canonique
AFER	African Ecclesiastical Review (1959-1978)
	African Ecclesial Review (1979-)
AG	Ad Gentes
AKK	Archiv fur Katholisches Kirchenrecht
ASS	Acta Sanctae Sedis
CIC(1917)	Codex Iuris Canonici, 1917
CIC(1983)	Codex Iuris Canonici, 1983
CLD	Canon Law Digest
CLSA Proc.	Canon Law Society of America Proceedings
CRF	Charter of the Rights of the Family
DDC	Dictionnaire de droit canonique
EIC	Ephemerides iuris canonici
FC	Familiaris Consortio
GS	Gaudium et Spes
IC	Ius Canonicum
IDE	Il diritto ecclesiastico
J	The Jurist
ME	Monitor ecclesiasticus
OAK	Osterreichisches Archiv fur Kirchenrecht
Periodica	Periodica de re morali canonica liturgica
PL	Patrologia latina (Migne)
PMVB	Pro Mundi Vita Bulletin
PMVD	Pro Mundi Vita Dossiers
RCA	Revue du clergé africain
RDC	Revue de droit canonique
SACR	The South African Clergy Review
SC	Studia Canonica
SRR Dec.	Sacrae Romanae Rotae Decisiones seu
	Sententiæ
TPS	The Pope Speaks

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Contemporary canonical practice places great emphasis on the need to judge marriages equitably by discovering not only what values any given individual pursues in matrimony, but also what values the society in which he lives holds to be inherent in marriage. This trend has been encouraged by modern Popes in their annual addresses to the Auditors of the Roman Rota.

Thus, Pope Pius XII advised judges to take into account the insights of the moral and juridical sciences when judging psychological capacity to marry.¹ Pope Paul VI carried this a step further when he declared that both psychology and the social sciences were essential for an equitable understanding of the marriage bond.² And Pope John Paul II recently stressed that a knowledge of the auxiliary sciences, especially the human sciences, is indispensable for a thorough understanding of both the facts

1. PIUS XII, Address to the Roman Rota, October 3, 1941, "The Right to Marriage and the Dissolution of the Bond", in CLD, 2, p. 455.

2. PAUL VI, Address to the Roman Rota, February 9, 1976; "The Marriage Bond", in TPS, 21(1976), pp. 151-152.

and the people in marriage cases.³

It follows that jurisprudence should follow an interdisciplinary approach, making use of the insights of anthropological and sociological research. Therefore, it would seem that there is an urgent need for the local Church and its tribunals to develop a deeper understanding of marriage as experienced within its particular culture, in order to reach equitable and just judgments in its canonical practice. Hence the purpose of this dissertation: to examine the cultural context of marriage among the Bantu of South Africa, with particular reference to marital fidelity.

To set the scene for our study, a few words about the people, their culture and their country are in order. The Bantu are that part of the black African population which is of mixed Hamitic and Negroid descent and is widely dispersed over sub-Saharan Africa. They are not a single, homogeneous people, but are made up of many regional or cultural-linguistic groups. The Bantu in South Africa are a section of the Southern Bantu, subdivided into four main cultural-linguistic groups, the Nguni, the Sotho, the Venda

3. JOHN PAUL II, Address to the Roman Rota, January 26, 1984, "The Task of the Church Tribunal", in Origins, 13(1983-1984), p. 585.

and the Tsonga, among whom nine separate ethnic groups are usually identified (see Appendix I).

The term Bantu is really a linguistic concept which occurs in various forms in the languages of these people. Thus, when speaking in the vernacular, they commonly refer to themselves as abantu (i.e. the people), or its linguistic equivalent. In English they prefer to use the term "Blacks" or "Africans", and although these terms are anthropologically less precise, they are used interchangeably with Bantu in this dissertation.

The Bantu make up about 70% of the South African population, and although some 75% of them claim allegiance to Christianity, only 10% are Catholic, 35% are Protestant, and 30% are members of some 3000 independent Churches. The latter broke away from the recognised Christian denominations and now strive to bring the gospel to their own people without abandoning established customs. This has resulted in a marked syncretism, a blend of Christian and traditional beliefs and cultural practices. Thus the Catholic community forms a small minority dispersed in a population, 55% of which either displays only some recognisable elements of Christianity or is overtly non-Christian.

Culturally, Bantu society is in a stage of transition, where no single model of behaviour can claim universal acceptance. The old homogeneous and integrated pattern of living has given way to a much more complex reality in which many cultures are struggling for supremacy, not only in society as a whole but also within each individual. There is the pull of tradition which nurtures security and a sense of belonging; there is the attraction of western culture with its promise of personal achievement based upon education, its escape from the disabling restrictions based on age and gender, and its glamour of consumerism and urban living; and there are the insights of Christianity striving to instill a new set of values often in conflict with those of tradition.

South Africa is the country in which all nine ethnic subdivisions of the Southern Bantu can be found. For the purposes of this dissertation, it consists of the Republic of South Africa as well as the adjacent territories recognised in South African law as independent but without international recognition: Transkei and Ciskei in the Eastern Cape Province, Bophutatswana in the Northern Cape Province and the Western Transvaal, and Venda in the Northern Transvaal. The neighbouring countries, Botswana, Lesotho and Swaziland are included to the extent that their population

represents one or more of the same ethnic subdivisions. However, they are not included in the statistical information contained in the dissertation.

The method of the dissertation is determined by its purpose. Thus, chapter one is a factual investigation into the cultural aspects of Bantu marriage. Relying almost exclusively on anthropological and ethnographical material relating to South Africa, it seeks an understanding of the importance of marriage in the life of the people, the expectations they bring to it, the values they hope to achieve by it, and the social influences that endanger it.

Pope Paul VI emphasised that law should follow theology,⁴ and chapter two thus looks at this cultural reality through the eyes of Catholic Bishops and theologians, in an effort to determine how they evaluate it in the light of the gospel. These theological reflections will reveal to what extent Catholics still share the cultural expectations of the Bantu community as a whole, how much they are influenced by them, and to what extent they have succeeded in purifying them in view of the demands of faith.

4. PAUL VI, Address to the International Congress of Canonists, "Canon Law Renewal in the Light of Vatican II", January 19, 1970, in TPS, 15(1970), p. 73.

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Relying on canonical studies and Rotal jurisprudence, chapter three then seeks to establish precisely what the canonical requirements are regarding marital fidelity. These demands have undergone some modifications and refinements through the years, especially regarding the significance of prevailing social attitudes and their influence on the individual's personal commitment. However, the present canonical understanding of fidelity requires from prospective spouses a willingness to enter into an exclusive relationship which will sustain and complete their marriage. Any intention to exclude, limit or restrict a spouse's right to such a relationship results in invalidity, and this is the principle against which the fidelity of Bantu marriage is to be measured.

Finally, chapter four investigates those elements which Rotal jurisprudence considers proof of the exclusion or limitation of fidelity. Among these, considerable importance is attached to the character of the spouses and the possible motives they may have to limit the exclusivity of their relationship. Since both these elements are significantly influenced by the culture and customs of any given society, those cultural factors which could be indicative of a limitation of exclusivity are explored. However, their

significance must be evaluated by the judge in each particular instance, for every case is to be judged on its own merits only. Therefore the chapter concludes with a list of those factors which should be closely examined by the judge in cases handled under the heading of intention against fidelity.

Papal insistence that law should be derived from theology as its first principle, together with the emphasis that the auxiliary sciences be used and local conditions be taken into account, have changed the way in which canon law is applied. It is our hope that this dissertation will make a modest contribution to a fuller understanding of those aspects of Bantu culture which are pertinent to marriage. By evaluating their significance in the life of the community and of the individual, ecclesiastical judges may find it easier to render just and equitable decisions in marriage nullity cases.

CHAPTER ONE

BANTU MARRIAGE IN SOUTH AFRICA

One of the outstanding features of the Bantu of South Africa is their strong group-consciousness which finds expression in every aspect of their lives.¹ From early childhood they are made aware that they belong to a larger society and that their individuality should not transcend its reality. Therefore, besides seeing themselves as individuals, they are also conscious of the fact that they represent their family, clan or tribe in all their dealings with others. They thus feel obliged to uphold the standards of the group they represent, for it will be judged according to their own behaviour.²

This also holds true for marriage, in which the spouses act as representatives of their respective kin. It follows that marriage lies at the heart of a set of relationships, rights, obligations and patterns of behaviour, which serve to strengthen the homogeneity of the family and of the clan.³ Thus, as P. Whooley points out, anyone

1. P. WHOOLEY, "Marriage in Africa: A Study in the Ciskei", in T.D. VERRYIN (ed.), Church and Marriage in Modern Africa, Groenkloof, Ecumenical Research Unit, 1975, p. 254. Hereafter cited as "Marriage in Africa".

2. Ibid., p. 364.

3. Ibid., pp. 248, 328.

contemplating marriage knows that

One is not dealing with one's own affairs; one is dealing with the most important business of one's clan, that is, its continuity and the quality of its members. It is simply unthinkable that any man should enter marriage without involving his lineage.⁴

Traditional African society considers marriage a very serious business, with religious, social and personal consequences: religious, because it is the means by which a man's lineage is continued, an assurance of immortality in the children born of lawful wedlock; social, because it increases the numerical strength of the clan and extends its system of alliances with other groups; and personal, because it is the culmination of the individual's development in which he achieves a new status which carries with it maturity and dignity. It follows that marriage affects the quality of life which depends more on one's social relationships than on material goods.⁵

These traditional values which ascribed to each person his place in society, defined roles and regulated the interaction between individuals, are no longer accepted

4. Ibid., p. 257.

5. E. PRESTON-WHYTE, "Kinship and Marriage", in W.D. HAMMOND-TOOKE (ed.), The Bantu-Speaking Peoples of Southern Africa, London, Routledge and K. Paul, 1974, p. 177.

by all. Due to an unsettled social situation, caused by rapid and irreversible urbanisation, the old certainties and group support no longer buttress the individual in his decisions. He is thus cut adrift and thrown back upon his own insights and resources, for the old values which seem to have lost some of their relevance in the heterogeneous urban situation, have not yet been replaced by new norms which serve to support the individual and to restore in him a sense of belonging.⁶

It is against this background that this part of the study will look at some of the preliminaries to marriage, matrimonial life itself, and some of the possible causes of marital breakdown in Bantu society.

A. PRELIMINARIES TO MARRIAGE

Marriage can be properly understood only in relation to the cultural concepts, values and expectations of the society in which it is embodied. We therefore consider the nature of marriage in Bantu society, its prerequisites, the motives that lead to it, the choice of partners, and the various forms of celebration of marriage.

6. V. VAN DER VLIET, "Growing Up in Traditional Society", in W.D. HAMMOND-TOOKE, op. cit., p. 212.

1. The Nature of Marriage

Since marriage is a weighty occurrence which involves whole families rather than just two individuals, it is the object of long drawn-out negotiations and discussions, usually spread out over several months or even years. Each step of the process needs some tangible expression but, according to E. Preston-Whyte, for all the Bantu in South Africa:

It is the passing of bridewealth in the form of cattle from the agnatic group of the man to that of the woman which is the essential act in legalizing a new marriage union. By this transfer certain vital rights over the woman, and consequently over any children she may bear, are transferred from her father or guardian, as representative of her family, to her husband and his family. The stress in marriage is upon the linking of two groups of kin rather than merely the union of a man and

7. For fuller details regarding the nature of marriage in the various ethnic communities of Bantu in South Africa, see E. PRESTON-WHYTE, *loc. cit.*, pp. 187-194; E.J. KRIGE, The Social System of the Zulu, Pietermaritzburg, Shuter and Shooter, 1965, pp. 120-123; *ID.*, "Individual Development", in I. SCHAPER (ed.), The Bantu-Speaking Tribes of South Africa: An Ethnographical Study, London, George Routledge and Sons, 1937, pp. 111-118; H. MONNIG, The Pedi, Pretoria, Van Schaik, 1967, pp. 129-137; H. ASHTON, The Basuto: A Social Study of Traditional and Modern Lesotho, London, Oxford University Press, 1967, pp. 62-87; H. STAYT, The Bavenda, London, F. Cass, 1968, pp. 142-152; D.H. READER, Zulu Tribe in Transition: The Makhanya of Southern Natal, Manchester, Manchester University Press, 1966, p. 174; A. REUTER, Native Marriages in South Africa According to Law and Custom, Münster, Aschendorff, 1963, pp. 207-269.

woman standing alone and independent of their kin.⁸

Such a transfer of bridewealth not only compensates the woman's group for the loss of a member, but in turn can be used to acquire a wife for one of her brothers.⁹ This restores the equilibrium within her group and establishes a special relationship between her and this cattle-linked brother who henceforth becomes her life-long confidant, friend and protector.¹⁰ In this way the bridewealth is

8. E. PRESTON-WHYTE, loc. cit., p. 187. According to I. SCHAPER, Married Life in an African Tribe, Harmondsworth, Penguin Books, 1971, pp. 80-81 (hereafter cited as Married Life), the influence of the kinship groups is so great that "[...] no marriage is ever considered a union merely between husband and wife. It remains the concern of their relatives as well, upon whose help they depend for carrying on their major tasks and for smoothing out their personal difficulties."

Bridewealth is exacted in all ethnic Bantu communities, but among the Nguni the bride's family determines the amount and there is room for bargaining while the Sotho often leave the amount to be determined by the groom's family.

Bridewealth has been variously described as being transferred in thanksgiving, gratitude and compensation for the willingness of the bride's family to part with a valuable member of their group. The involvement of various members of the groom's kinship group in contributing to the total number of cattle needed gives them a stake in the success of the marriage and thus contributes to its stability. For a full discussion on the meaning of bridewealth, see A. REUTER, op. cit., pp. 207-224; I. SCHAPER, Married Life, pp. 73-81; E.J. KRIGE, loc. cit., pp. 113-114.

9. E. PRESTON-WHYTE, loc. cit., pp. 180, 206.

10. A.D. SPIEGEL, "Christianity, Marriage and Migrant Labour in Lesotho", in T.D. VERRY, op. cit., p. 453.

used to extend marital ties collaterally, forging ever-widening social links and thus creating a social fabric which is based on affinal alliances and friendship.

Although not explicitly formulated as such, marriage is a negotiated contract between two groups of kin who surrender and claim certain rights.¹¹ For the husband's group, these include rights in uxorem, i.e. of sexual access and labour, as well as rights in genetricem, i.e. legal control over the children born of the marriage.¹² Consequently, his group has the right to children, and should the wife prove to be barren or die without issue, her group is still obliged to fulfill its part of the contract. This is done either through the sororate, in which she is replaced by her sister or another member of her group, or by returning the bridewealth to enable the husband to acquire another wife to bear him children.¹³ Conversely, should the husband be infertile or die without issue, the levirate calls for an approved relative to beget children for the deceased.¹⁴

11. D.H. READER, op. cit., p. 175; H. ASHTON, op. cit., p. 82; I. SCHAPERA, Married Life, pp. 300-301; E.J. KRIGE, loc. cit., p. 111.

12. E. PRESTON-WHYTE, loc. cit., p. 187.

13. Ibid., pp. 188-189.

14. Ibid., pp. 189-190. A widow who has already had

For the wife's group, the marriage contract ensures a good home for her, an assurance that she will be provided with the necessary physical environment in which to function as a wife and mother, and an affinal relationship on which the group as a whole will be able to depend in time of need.¹⁵

Arranged marriages used to be common, and although the mutual affection of the spouses could be taken into account, it remained possible for their personal satisfaction to be subordinated to the needs of their kin.¹⁶ Although these are now less prevalent, most people still regard group interests, their stability and alliances, and their numerical increase through procreation as the main purpose of marriage.¹⁷ This implies that Bantu marriage is in principle polygamous, for the interests of the kinship

children is not usually bound to accept a levir. The levirate exists in most Bantu societies but differs as to detail, e.g. exactly which male relative should beget the children. Among the Xhosa it should be a stranger.

Offspring is so important that provision is sometimes made for the situation in which a young man dies before marriage. His mother can contract a woman-to-woman marriage (sometimes known as a ghost marriage) by paying bridewealth for a girl, indicating whom she wishes to beget children for her late son. This also ensures her right to descendants who will take care of her in her old age, see *ibid.*, pp. 191-192; H. MÖNNIG, *op. cit.*, p. 206.

15. H. ASHTON, *op. cit.*, p. 82.

16. E.J. KRIGE, *loc. cit.*, p. 111.

17. E. PRESTON-WHYTE, *loc. cit.*, p. 179.

group are best served by fertile unions coupled with many and far-flung alliances.¹⁸ These interests are felt to outweigh considerations of a personal nature.

Close companionship between the spouses is thus neither sought nor achieved, for even in marriage they remain the representatives of their respective kin and display a certain tension.¹⁹ Among the Nguni who maintain strict exogamy where the groom must find a bride outside his own clan or tribe, the wife always belongs to another lineage and is never completely assimilated into her husband's group, thus remaining something of an outsider until her death.²⁰ However, among the Sotho who have a system of preferred cousin-marriages, the wife's incorporation into her

18. I. SCHAPER, Married Life, p. 299. In South Africa polygamy or plural marriage takes the form of polygyny, where one man takes unto himself several wives. The word polygamy is used throughout this dissertation to denote polygyny.

19. Ibid., p. 247. According to W.D. HAMMOND-TOOKE, "World-View II: A System of Action", in ID., op. cit., p. 361, the lack of intimacy between the spouses is due to the nature of Bantu marriage in which "the importance of lineage solidarity is reflected in the husband-wife relationship. It is somehow thought wrong for a man to be too closely involved with his wife, as this may conflict with his loyalty to his kinsmen." P. WHOLEY, "Marriage in Africa", p. 277, feels that it is due to the strict division of society according to gender: "A man must identify with his group. He loses dignity if he is too much in the presence of his wife or of the women of his homestead."

20. E. PRESTON-WHYTE, loc. cit., pp. 192-193, 203-209.

husband's lineage is both more rapid and more complete.²¹

In view of this, the really personal element in marriage is perceived to be the achievement of a new status, the transfer from the unmarried to the married, rather than the establishing of an intimate community of life together.²²

2. The Prerequisites to Marriage

Bantu society is founded upon the principles of seniority and male dominance, and a person's status is thus ascribed to him by birth rather than achieved through personal initiative.²³ Children are drawn into the life of the community from early childhood and, through daily social intercourse and example, they are imbued with the values of a community-oriented society. These include respect for elders, implicit obedience to their authority, generosity, hospitality and a sense of mutual responsibility.²⁴ In this way, personal interests are subordinated to those of the group from an early age and deviant behaviour is frowned

21. Ibid.; H. MÖNNIG, op. cit., pp. 198-202; I. SCHAPER, Married Life, pp. 34-36; E.J. KRIGE, loc. cit., pp. 111-112.

22. E. PRESTON-WHYTE, loc. cit., pp. 192-193; D.H. READER, op. cit., p. 174.

23. V. VAN DER VLIET, loc. cit., p. 211.

24. Ibid., p. 224.

upon by both adults and the children's peer-group itself.²⁵

As is common in most cultures, however, at the time of puberty, adolescents form a visible group with interests that are often in conflict with those of society.²⁶ They need to be guided through this transitory stage of revolt against the values of the community, and this is usually done by means of initiation ceremonies by which they are jointly separated from childhood to be aggregated into the adult world and turned into trusted, dignified and responsible members of the community.²⁷

25. Ibid., pp. 217-220.

26. Ibid., pp. 220-225.

27. For complete descriptions of initiation ceremonies and their significance in society, see V. VAN DER VLIET, loc. cit., pp. 227-241; M. HUNTER, Reaction to Conquest: Effects of Contacts with Europeans on the Pondo of South Africa, London, Humphrey Milford, 1936, pp. 165-174; H. STAYT, op. cit., pp. 101-141; H. ASHTON, op. cit., pp. 46-58; A. REUTER, op. cit., pp. 105-110; I. SCHAPERA, Married Life, pp. 229-234; B.A. PAUW, The Second Generation: A Study of the Family among Urbanized Bantu in East London, Cape Town, Oxford University Press, 1968, pp. 88-94; H. MONNIG, op. cit., pp. 107-128; M. WILSON and A. MAFEJE, Langa: A Study of Social Groups in an African Township, Cape Town, Oxford University Press, 1973, pp. 105-108; E.J. KRIGE, loc. cit., pp. 99-107; P. WHOOLEY, "Marriage in Africa", pp. 257-263.

According to V. VAN DER VLIET, loc. cit., p. 234, the exact value of initiates' new status is not easy to ascertain and therefore "many ethnographers carry interpretation only so far as to say that initiation confers adulthood or manhood on the initiate, without defining whether

The essential features of initiation schools include physical separation, ordeals and hardships, formal instruction, and sex education.²⁸ Since the latter is intended to regulate those sexual activities which directly influence marriage, it will be discussed briefly.

Sexual liaisons are deemed both normal and desirable, and are encouraged by the sex instruction given in the initiation school.²⁹ Nevertheless, it tries to exercise some control and to limit unwanted pregnancies by encouraging intra-crural (external) intercourse while placing a prohibition on full intercourse. Girls are told not to have many lovers, for this would be bad training for marriage; but since men are not expected to limit themselves to one sexual partner only, this prohibition does not

this means sexual, jural, social, religious, political or economical adulthood, or a combination of these statuses." She finally concludes, *ibid.*, p. 240, that initiation is "[...] an essential preliminary qualification, a *sine qua non* of later acceptance into complete adult status [...]. Where initiation entitles the initiate to marry, marriage and parenthood may confer the privilege of full adult status; in many tribes, full political, jural and religious status are often attained only after middle age."

28. V. VAN DER VLIET, *loc. cit.*, pp. 229-232; H. MÖNNIG, *op. cit.*, p. 118.

29. V. VAN DER VLIET, *loc. cit.*, p. 236; W.D. HAMMOND-TOOKE, *loc. cit.*, p. 361.

apply to the boys.³⁰

Some Bantu societies have abolished initiation schools, but they still demand visible incorporation into the adult world as an essential prerequisite to marriage.³¹ Once this has taken place a limited form of sexual activity is permitted. Thus, among the Zulu, there is the practice of ukugoma in which a girl accepts a lover with whom to have intercourse.³² According to D.H. Reader, this

[...] confers status on both the main parties concerned. By recognizing and accepting him, the girl has made a man, a person, out of her sweetheart. [...] For her part, a boy's successful suit shows that she is an eligible, nubile girl, a person of consequence, and suitable in every way for marriage.³³

Since the girl is not expected to marry her first lover, ukugoma can only be said to be a preparation for marriage in that it publicly acknowledges that she is ready for it.³⁴

30. For the sexual aspect of the initiation schools, see V. VAN DER VLIET, loc. cit., pp. 236-237. For the purpose of girls' initiation schools, see ibid., pp. 232-234.

31. Various chiefs abolished initiation schools in the face of extraordinary circumstances, but they have been replaced by an equivalent public act of entrance into adulthood, e.g. being enrolled into an age-regiment or finding work in the city, see M. HUNTER, op. cit., p. 165; E.J. KRIGE, op. cit., pp. 116-117; V. VAN DER VLIET, loc. cit., p. 228.

32. D.H. READER, op. cit., p. 175.

33. Ibid., p. 178.

34. Ibid.

It must be admitted, however, that initiation has lost much of its effectiveness, for the traditional controls operative in society have ceased to be efficacious.³⁵ Although it was meant to bridle the excessive sexuality of youth by inculcating a sense of responsibility and dignity, there is a general feeling that it no longer achieves this result, since the initiates' change in behaviour is temporary at best.³⁶ It is not uncommon for sexual activity to start before puberty,³⁷ and most of the young people have been involved in a sexual liaison by the time they are fifteen.³⁸ But, whereas formerly adolescents were willing to accept traditional limitations, they now regard full intercourse as something normal. Personal satisfaction has come to be

35. P. WHOOLEY, "Marriage in Africa", p. 258;
M. WILSON and A. MAFEJE, op. cit., p. 108.

36. W.D. HAMMOND-TOOKE, loc. cit., p. 360.

37. According to E.J. KRIGE, loc. cit., p. 109, "Bantu children, even before puberty, indulge in play at sexual intercourse, but this is either connived at or looked upon with amusement and toleration by adults because it can have no social consequences." See also D.H. READER, op. cit., p. 175.

Regarding pre-marital intercourse, see B.A. PAUW, op. cit., pp. 108-123; M. HUNTER, op. cit., pp. 180-184; E.J. KRIGE, op. cit., pp. 105-106; ID., loc. cit., pp. 107-110; I. SCHAPER, Married Life, pp. 37-47. According to B.A. PAUW, op. cit., pp. 118-120 and P. WHOOLEY, "Marriage in Africa", pp. 349-352, the breakdown of traditional sanctions has resulted in an illegitimacy of approximately 60% of first births and 35% of all births in some areas.

38. B.A. PAUW, op. cit., p. 112.

demanding as a right and most young people ridicule a lover who shows himself unwilling to practice full intercourse.³⁹

Many youths maintain multiple sexual relationships simultaneously, being inhibited only by the possibility of trouble arising from jealousy or paternity suits.⁴⁰ Such liaisons may last for several years and result in illegitimate children,⁴¹ but they are perceived as temporary and are entered into only to obtain sexual gratification.⁴² Some

39. According to B.A. PAUW, op. cit., p. 122 and P. WHOOLEY, "Equality in Marriage", in T.D. VERRYIN, op. cit., p. 179, boys often threaten girls with violence should they resist their advances since they believe that they have a right to demand intercourse.

According to B.A. PAUW, op. cit., pp. 118-123, P. MAYER, Townsmen or Tribesmen: Conservatism and the Process of Urbanization in a South African City, Cape Town, Oxford University Press, 1971, pp. 253-256, A.A. DUBB, "The Impact of the City", in W.D. HAMMOND-TOOKE, op. cit., p. 459 and I. SCHAPERLA, Married Life, p. 41, there is a general conviction that intercourse as such is not wrong, but only the pregnancy that might result from it.

40. I. SCHAPERLA, Married Life, p. 45; B.A. PAUW, op. cit., pp. 116-117.

41. According to P. MAYER, op. cit., p. 276, illegitimacy does not have the same disabling consequences it has in western society: "The truly 'illegitimate' child, within the traditional system, is the one whose genitor defaults or deserts, failing to pay the seduction fee or otherwise honour the obligations of his position." Such a child remains incorporated in the lineage of his mother but suffers no other disabilities, see ibid., pp. 275-282; V. VAN DER VLIET, loc. cit., p. 210; I. SCHAPERLA, Married Life, p. 79.

42. B.A. PAUW, op. cit., pp. 111, 118.

of them do result in marriage but mostly they break up due to a new liaison or insurmountable tensions arising from divergent expectations. In this way the average individual would have experienced several sexual relationships long before thinking of marriage.⁴³

It does not seem as if these attitudes are very different among young Christians who maintain an ambivalent position in this regard. This has led B.A. Pauw to conclude:

Although actual behaviour suggests that the traditional ideal of restriction to external intercourse is outmoded and the Christian ideal of complete chastity is regarded as untenable, there are not many people who openly advocate the complete sexual freedom which is practiced. [...] the attitudes expressed are obviously patterned much more according to traditional moral values than Christian sex teaching, but there is a distinct tendency to avoid an explicit choice between the two.⁴⁴

3. The Motives for Marriage

Since sexual satisfaction is easily obtained outside marriage, it follows that marriage is often pursued for motives other than the establishment of an intimate sexual relationship. Marriage is very desirable because it allows

⁴³. I. SCHAPER, Married Life, pp. 38-41, 161.

⁴⁴. B.A. PAUW, op. cit., p. 123.

a person to advance on the ladder of personal development, helps achieve partial emancipation from parental tutelage and brings him closer to social maturity.⁴⁵

The married status brings with it dignity and respectability, guarantees status and a wider acceptance in society through its affinal alliances, and is an assurance of security and help in old age through its offspring. Children are the ratification of the bridewealth contract between the two families and are considered society's highest good.⁴⁶ Paternity enables a man to ensure the continuity of his father's lineage and his own immortality, while maternity allows the woman to achieve full adult status.⁴⁷

Sometimes, however, marriages of convenience take place to qualify for government-provided sub-economic housing in the cities, or to obtain a higher wage.⁴⁸ These and other

45. E. PRESTON-WHYTE, loc. cit., p. 193; H. ASHTON, op. cit., p. 66.

46. V. VAN DER VLIET, loc. cit., p. 212.

47. Ibid.; I. SCHAPERA, Married Life, p. 191; H. MÖNNIG, op. cit., pp. 98, 128.

48. C.W. MANONA, "Marriage, Family Life and Migrancy in a Ciskei Village", in P. MAYOR (ed.), Black Villagers in an Industrial Society: Anthropological Perspectives on Labour Migration in South Africa, Cape Town, Oxford University Press, 1980, p. 194; M. WILSON and A. MAFEJE, op. cit., pp. 72-73.

personal reasons can lead the couple to spurn social values and to seek marriage to fulfill their individual goals. Such individualism is increasingly evident in urban areas.

4. The Choice of Partners

The groom's descent group takes the initiative in marriage and does all in its power to ensure that the bride will measure up to the qualities expected from a prospective member of the group.⁴⁹ Her background and parentage are investigated to avoid unsuitable alliances, and her personal abilities are scrutinised to see whether she will be an asset to the group. Physical beauty is not always appreciated for fear that it would lead to infidelity,⁵⁰ but she should have a strong and fertile body together with a quiet, docile and respectful disposition by which she will more easily adapt to her new environment and accept its values.⁵¹ There is a preference for a spouse less educated than the

49. Regarding the choice of partners, see A. REUTER, op. cit., pp. 127-132; I. SCHAPER, Married Life, pp. 32-55; M. HUNTER, op. cit., pp. 222-226; B.A. PAUW, op. cit., pp. 125-126; A.A. DUBB, loc. cit., p. 460; D.H. READER, op. cit., p. 178; H. ASHTON, op. cit., p. 62.

50. I. SCHAPER, Married Life, p. 41; B.A. PAUW, op. cit., p. 126.

51. According to A.A. DUBB, loc. cit., p. 460, even city youths consider these qualifications as basic.

husband, and marrying a childhood sweetheart is spurned too, for fear that male dominance might be impossible to maintain.⁵²

Cousin-marriages are preferred among the Sotho because they are felt to be most likely to succeed.⁵³ Not only would the spouses be known to one another, but they would be more tolerant of one another, display greater co-operation, try harder to achieve personal harmony and bind the two families even closer together. Besides all this, the bridewealth would not be lost to the family group.

However, among all ethnic groups there is a general weakening of the role of the lineage in the choice of partner, in favour of the individual. This is not without its negative effects for, the more the lineage is circumvented in the choice of partner, the less it is willing to be called upon to help solve domestic problems.⁵⁴ This is particularly evident in urban areas.

5. The Celebration of Marriage

While the marriage can be initiated in many different ways, it can be validated only by the passing of

52. P. WHOOLEY, "Equality in Marriage", pp. 186-187.

53. I. SCHAPER, Married Life, pp. 34-37.

54. P. WHOOLEY, "Marriage in Africa", p. 367.

bridewealth.⁵⁵ In the normal course of events the boy's family will initiate proceedings, but occasionally the girl's family does this. However, although originally little regard was given to the wishes of the couple or their possible change of mind, traditional society did foresee the possibility that either the boy or the girl would try to avoid an arranged marriage.⁵⁶ Four distinct ways of initiating marriage have thus evolved:⁵⁷

1. Ukucela (to request), in which the boy, having indicated his choice of partner, requests his relatives to ask the girl's family for her hand. Should she meet with their approval, a go-between is appointed who will be their spokesman in all negotiations. These take several months or even years to complete and are marked by a continuous exchange of gifts. Ukucela is the normal process for initiating marriage and is designed to establish friendship between affinal relatives, culminating in the exchange of the

55. For a full description regarding the various marriage ceremonies, see A. REUTER, op. cit., pp. 133-151; I. SCHAPERA, Married Life, pp. 56-81; E.J. KRIGE, op. cit., pp. 120-158; Id., loc. cit., pp. 111-118; B.A. PAUW, op. cit., pp. 94-102, 126-130; D.H. READER, op. cit., pp. 178-226; M. HUNTER, op. cit., pp. 190-103, 212-213; P. WHOOLEY, "Marriage in Africa", pp. 286-301.

56. D.H. READER, op. cit., p. 184.

57. Ibid., pp. 178-189; E.J. KRIGE, op. cit., pp. 124-131.

bridewealth cattle.

2. Ukuganisela (to make a match), in which the girl's family takes the initiative, having a particularly desirable alliance in mind. This rare procedure would happen only where her family is of high standing. The boy's group would find such a proposal very flattering and would appoint the go-between to proceed in the usual way.

3. Ukubaleka (to run away, to elope), in which the girl, wishing to avoid a planned match which she feels repugnant, runs away to the sweetheart of her choice and spends the night at his home. His family can either accept her, in which case a mediator is sent to her home to explain her absence and begin marriage negotiations, or they can reject her, in which case she is escorted home and faces disgrace.⁵⁸

4. Ukuthwala (to bear off, to abduct), in which the boy carries off his beloved with or against her will. If she

58. According to A.D. SPIEGEL, loc. cit., pp. 467-469, C.W. MANONA, loc. cit., pp. 189-196, and H. ASHTON, op. cit., pp. 65-66, elopement has increasingly become a means by which the couple try to short-circuit the lengthy family negotiations. Its dramatic increase is ascribed to the migratory labour system, greater individualism and a desire to circumvent an expensive Church wedding. According to E. LAPOINTE, "Understanding Christian Marriage in a Culturally Changing Lesotho", in SC, 15(1981), pp. 249-262, the custom has become endemic and sometimes resembles abduction. D.H. READER, op. cit., disagrees that individualism has caused an increase in elopements since it has led to a diminished incidence of arranged marriages and precludes the need to assert personal desires against parental authority.

does not make her escape within three days, she will submit herself and consent to be married. Then the go-between is appointed to proceed in the normal fashion.⁵⁹

The actual marriage ceremonies have undergone some modifications and show a flexibility and resilience in the face of changed circumstances.⁶⁰ The details are too variable and cannot here be described minutely. However, the traditional social values persist and can be summarised briefly as follows:

1. Bridewealth is calculated in terms of "heads of cattle", but is now usually transferred in the form of a cash payment. However, whereas the groom used to rely on his kin to contribute some of the cattle, he is now consi-

⁵⁹. According to P. WHOOLEY, "Marriage in Africa", pp. 296-300, 315-318, 341-345, and D.H. READER, op. cit., pp. 188-189, 216, abductions have decreased due to a greater respect for the law, the rights of the individual and the woman's expectations of the husband-wife relationship.

C.W. MANONA, loc. cit., pp. 191-193, uses the word ukuthwala in the sense of ukubaleka and claims that there is a dramatic increase in such elopements which constitute 56% of all marriages in the Ciskei since 1950. Yet it has not become the accepted form of marriage and the offender is fined. He cites as causes: a high bridewealth rate, financial independence of young men, decline of parental authority, rise of individualism, need for instant marriages due to migratory labour, avoiding the damages payable for pre-marital pregnancies. These unions resemble concubinage.

⁶⁰. D.H. READER, op. cit., pp. 214-226; E.J. KRIGE, op. cit., p. 146.

dered personally responsible for the cash payment. Bride-wealth has thus become indicative of the value he places on his intended partner and of his own worth as a prospective husband.⁶¹

2. The marriage is widely advertised in order publicly to ratify the new status of the couple themselves and their new relationships within the community. This partly replaces the presence of the larger kinship group which is now geographically dispersed and is often unable to attend. There is thus an open invitation for all to come.⁶²

3. At the wedding feast, usually celebrated in turn at the homes of the bride and groom,⁶³ the fathers of both spouses make a public declaration of some of the details of the marriage contract, referring specifically to the transfer of bridewealth and any balance which may remain.⁶⁴ Having handed over his daughter, the bride's father asks that she be treated with kindness and understanding, while the groom's father stresses the new and mutual affinal

61. B.A. PAUW, op. cit., p. 129.

62. Ibid., pp. 100-101, 130.

63. Ibid., pp. 106-107.

64. D.H. READER, op. cit., pp. 200-203;
I. SCHAPER, Married Life, p. 62.

obligations that bind the families together.⁶⁵

4. The traditional religious integration of the bride with the ancestors of her new descent group is now transferred to the Church ceremony among Christians.⁶⁶

5. Other gifts are still transferred between the two groups, symbolising the new ties and mutual obligations which link them together. These are given to the spouses and various specified kin.⁶⁷

Besides the recognised ways of getting married, mention must be made of the elopement which ends in concubinage rather than marriage. This is quite common in urban areas and is institutionalised among some groups.⁶⁸ Thus one finds a certain class of people, unmarried mothers or

65. D.H. READER, op. cit., pp. 200-203; E.J. KRIGE, op. cit., pp. 142-143.

66. D.H. READER, op. cit., p. 224.

67. Ibid., p. 226. The whole process can be schematised as follows: contract initiation (bridewealth in exchange for child-bearing and labour); contract development (goodwill gifts, thanking for the bridewealth); contract ratification (the face-to-face conclusion of the contract in public); contract sanctification (the religious integration of the bride into her new group, through pagan or Christian rites); contract securing (goodwill gifts to future relatives); and contract celebration (the satisfaction of hospitality obligations during the feast and afterwards).

68. B.A. PAUW, op. cit., p. 135; P. WHOOLEY, "Marriage in Africa", pp. 346-348; A.D. SPIEGEL, loc. cit., pp. 479-480.

widows, with whom semi-permanent relationships can be established with impunity.⁶⁹ However, these relationships do not initiate marriage and should not be confused with it. Only the agreement of the kinship groups to exchange bridewealth could allow concubinage to evolve into marriage.⁷⁰

In the same way a Church wedding would be considered little better than concubinage in the eyes of the community if unaccompanied by the traditional ceremonies.⁷¹ Notwithstanding early missionaries' strenuous efforts to the contrary, the Bantu cannot conceive of marriage without at least some of the traditional rites, foremost of which is the transfer of bridewealth.⁷² It is the one essential element which turns a union between a man and a woman into marriage.

69. According to P. WHOOLEY, "Marriage in Africa", p. 346, "[...] to an outsider, the line that divides concubinage from the kind of unions the Xhosa have tolerated for young widows, wives that have run away, and unmarried mothers who will not now get married, may seem very unreal."

70. P. MAYER, op. cit., p. 265; P. WHOOLEY, "Marriage in Africa", p. 348.

71. P. WHOOLEY, "Marriage in Africa", pp. 361-363.

72. P. WHOOLEY, ibid., p. 305, asserts that "[...] Christians have had very little success in changing traditional thinking regarding marriage." However, according to P. MAYER, op. cit., p. 264, there is a small shift in thinking regarding the transfer of bridewealth, since "[...] no payment need precede the actual transfer of the bride. An understanding that the bridewealth 'will be' paid is enough," especially in ukuthwala marriages.

The significance of the transfer of bridewealth which seals the marriage cannot be overestimated, not only in legal terms but also in emotional and psychological terms. This has led P. Whooley to conclude that, far from being only a juridical obligation reluctantly fulfilled, bridewealth instead

[...] gives a sense of security to the bride, it gives her a sense of dignity and of being wanted. It establishes her family's interest in her. It gives her security from her husband's anger or from others' abuse; she can go home in the knowledge that her husband is certain to seek her out [...]. But it also gives the husband the knowledge that the children are his, no matter what happens. It establishes him in control of his house and homestead and gives him final say in many important decisions regarding the children: their initiation, their marriage, ceremonies, etc. But more than all else, [bridewealth] and the ritual that accompanies it is the only language that can bring about the emotional changes that new relationships demand [...]⁷³

B. MATRIMONIAL LIFE

Following the principles of male dominance and the strict division of society according to gender, the Bantu attach more importance to the social, legal and economic aspects of marriage than they do to the personal relation-

73. P. WHOOLEY, "Marriage in Africa", pp. 312-313.

ship of the spouses.⁷⁴ However, although their respective kin are involved in establishing its juridical reality, it is the spouses who live the day-to-day togetherness in marriage. Thus, this part of the study will look at their commitment values, the social conditions which influence their relationship and the causes of marital breakdown.

1. Commitment values in Marriage

Even in marriage the spouses continue to be committed to their respective lineages. In their personal relationship they are conscious that they remain the representatives of their kin, which prevents them from establishing a close marital intimacy. In this section we will look at the nature of the husband-wife relationship, their understanding of marital fidelity and their parental obligations.

a. The Husband-Wife Relationship

True to the principles of male dominance and gender division, the spouses are not considered equal but complementary.⁷⁵ Men are expected to spend most of their time

74. E.J. KRIGE, loc. cit., p. 111.

75. P. WHOOLEY, "Equality in Marriage", pp. 165, 172-173; ID., "Marriage in Africa", pp. 280-282; H. KUPER, The Swazi: A South African Kingdom, New York, Holt, Rinehart and Winston, 1963, p. 26; I. SCHAPER, Married Life, pp. 247-258.

in one another's company and thus opportunities for real intimacy between the spouses are limited. This separation makes personal communication and understanding difficult and leads to a lack of companionship and even tension.⁷⁶

The man enters into the world of women more through contact with his mother and sisters than through his wife, and his relations with them are more intimate and warm than with her.⁷⁷ Similarly, the wife has a much closer relationship with her own cattle-linked brother and other kin and considers his place of residence as her home, rather than her marital abode.⁷⁸ This consciousness does little to encourage the development of a common purpose in marriage.

76. H. MONNIG, *op. cit.*, p. 217; H. ASHTON, *op. cit.*, p. 78. According to I. SCHAPER, *Married Life*, pp. 249-250, the husband-wife relationship can be described thus: "At best they usually like and humour each other, but as often as not they lack mutual sympathy and understanding [...] there is little intimate contact in everyday life [...] there is little real companionship between them." According to P. WHOOLEY, "Equality in Marriage", pp. 184-191, marriage among the Xhosa was initiated as a state of deliberate tension. The husband, having been trained and made ready for marriage by initiation, takes a nubile girl who will have to be trained during the first year of marriage. If he shows her too much affection, he will "spoil" her and forfeit the authority he should have in marriage. Thus love-marriages are frowned upon, for it is difficult to maintain the necessary severity towards a woman with whom one is too emotionally involved.

77. P. WHOOLEY, "Equality in Marriage", p. 176.

78. *Ibid.*, ID, "Marriage in Africa", p. 328.

The spouses follow their own pursuits virtually independent of one another and, while mutual consultation is desirable in theory, it is seldom practiced.⁷⁹

The husband is the active partner in the relationship and dominates decision-making.⁸⁰ It is his duty to act as legal and social guardian for his wife, to provide her with all the necessities with which to fulfill her domestic obligations and to enable her to have children. He must also treat her well, care for her, consult her on important matters, be responsible for her debts, and support her in private quarrels.⁸¹

The wife is the more passive partner in the relationship. She must respect her husband and co-operate with him, fulfill her domestic duties, have intercourse only with her husband and bear his children, give her opinion when asked, and support his decisions.⁸² She is expected to adapt

79. I. SCHAPER, Married Life, p. 250.

80. Ibid., pp. 86-87; D.H. READER, op. cit., pp. 160-161; B.A. PAUW, op. cit., pp. 155-165; A. REUTER, op. cit., pp. 151-166.

81. P. WHOOLEY, "Equality in Marriage", pp. 175, 182-183.

82. D.H. READER, op. cit., pp. 161-162. While the wife is expected to be faithful to her husband and have intercourse with him only, the same requirement is not asked from the husband. See also I. SCHAPER, Married Life, p. 94.

quickly to the customs of her new home and to be an asset to her husband and his family. To help her do this, she is frequently made to spend the first year of her marital life under the close and often harsh supervision of her mother-in-law.⁸³

The submissiveness and adaptability she is expected to display is vividly illustrated in the virtues extolled in a young wife: respect for her husband and all other members of his family; knowing her place before her in-laws in obedience, humility and meekness; diligence in work; dignity through self-control; and pride in her new home and family.⁸⁴ Yet she is not an abject creature and can claim rights both as a person and as a wife.⁸⁵ The rigorous training to which she is submitted is meant to build up her character and to ensure that she becomes a worthy member of the group.⁸⁶

83. According to P. WHOOLEY, "Marriage in Africa", pp. 262-270, the real problem for many young women is not so much that they have to work hard, but that they feel insecure and anxious lest they unwittingly transgress an unknown custom.

84. *Ibid.*, pp. 264-277. According to D.H. READER, *op. cit.*, p. 210, the hlonipha (respect) custom "[...] shows her respect for seniority and tradition and is a condition of her acceptance [...] it is] a continual reminder to a married woman that she is merely a graft upon her husband's descent group [...]"

85. M. HUNTER and A. MAFEJE, *op. cit.*, p. 81, cite the proverb "umzi ngumzi kamfazi", i.e. a home is a home by virtue of the wife.

86. P. WHOOLEY, "Equality in Marriage", p. 185.

Should the husband treat her with undue severity, his senior male relatives would come to her defence in an effort to preserve the security and well-being of the group.⁸⁷

b. Mutual Fidelity

Sexual morality in marriage reflects basic social values, which means that in a male-dominated and traditionally polygamous society, exclusivity is demanded from the wife but not from the husband. B.A. Pauw describes prevailing attitudes towards sexuality as follows:

Both traditional and modern Bantu attitudes tend to view sexual gratification as something not necessarily associated with the conjugal bond. Traditionally a large degree of sexual gratification could be sought before marriage (ukumetsha, external intercourse), not necessarily with a prospective marriage partner. Married men, mature unmarried women and women who had lost their husbands were also allowed opportunities of sexual gratification outside marriage. The serious transgressions were the impregnation of a nubile girl and adultery which involved a married woman. What were guarded were not the exclusive rights of present or future spouses to sexual favours, but the rights to the procreative powers of nubile girls and married women [...]⁸⁸

87. H. KUPER, op. cit., p. 26.

88. B.A. PAUW, op. cit., p. 163. For descriptions of attitudes towards sexuality, see ibid., pp. 130-135, 163-165; E. PRESTON-WHYTE, loc. cit., pp. 187-188; W.D. HAMMOND-TOOKE, loc. cit., p. 361; A.A. DUBB, loc. cit., p. 459; E.J. KRIGE, loc. cit., pp. 109-111; H. MÖNNIG, op. cit., pp. 196-197;

Present attitudes towards extra-marital sex reflect this basic principle. Although polygamy is no longer possible for socio-economic or religious reasons, men retain a polygamous mentality and consider that they enjoy the same sexual freedom after marriage as they did before.⁸⁹ They do not see marriage as an exclusive relationship for them, and would deny that an extra-marital experience is adultery, unless it involves a married woman.⁹⁰ Women generally acquiesce in this situation and take offence only when their own rights are infringed upon, e.g. if a man were to establish a permanent relationship with another woman or cease to support his wife and family.⁹¹ Adultery is thus very common, even among Christians,⁹² and P. Mayer concludes that although

There are some [...] who refrain from adultery on christian principle, just as there are some who genuinely abstain from drink, this does not seem to be the general norm. Many [...] said that a man's extra-marital affairs should not be regarded as "adultery"

I. SCHAPER, Married Life, pp. 181-190; M. HUNTER, op. cit., pp. 203-210.

89. P. WHOOLEY, "Marriage in Africa", p. 329; P. MAYER, op. cit., p. 214; M. HUNTER, op. cit., pp. 205-206.

90. B.A. PAUW, op. cit., p. 163.

91. I. SCHAPER, Married Life, p. 184; P. WHOOLEY, "Marriage in Africa", p. 329.

92. B.A. PAUW, op. cit., pp. 130-131; I. SCHAPER, Married Life, p. 183; H. MÖNNIG, op. cit., p. 197; A.A. DUBB, loc. cit., p. 471.

at all unless the woman involved is a married one.⁹³

By contrast, women do not enjoy the same freedom, and the woman who commits adultery grievously offends both her husband and his lineage. This does not necessarily mean that adultery among women is rare, but rather that it is subject to more severe sanction. Ethnographers agree that it is prevalent and even seems to have increased, ironically due to the Christian insistence on the equality of the spouses, which some women interpret as the right to enjoy an equal measure of sexual freedom.⁹⁴

In a male-dominated society where men claim the right to commit adultery, a variety of ways have evolved which enable them to do so without undermining the fabric of society.⁹⁵ H.O. Monnig claims that among the Pedi, for

93. P. MAYER, op. cit., p. 214. M. HUNTER, op. cit., p. 222, describes adultery as a "lesser sin" for men, and E.J. KRIGE, loc. cit., claims that, although disapproved in theory, "[...] in practice and in private it is looked upon as something desirable" (p. 110). See also P. WHOOLEY, "Marriage in Africa", p. 316; D.H. READER, op. cit., p. 214.

94. P. MAYER, op. cit., p. 214; B.A. PAUW, op. cit., p. 163. According to M. HUNTER, op. cit., p. 103, and E.J. KRIGE, loc. cit., p. 110, adultery is common both among Christians and non-Christians, although they know that it is legally punishable.

95. E.J. KRIGE, loc. cit., p. 110

example,

[...] extra-marital intercourse is possible and even socially accepted and culturally provided for. It is only expected that the parties be circumspect in their relations and maintain the proper demeanour.⁹⁶

He maintains that the Pedi regard extra-marital intercourse as "normal and natural", and ensure the "orderly conduct" of such affairs by warning the husband never to go home without having first notified his wife, or at least to whistle as he approaches, thus giving a potential "visitor" the opportunity to make good his escape.⁹⁷ Husbands sometimes point out suitable lovers to their wives,⁹⁸ but prefer them to establish long-standing affairs with the same person.⁹⁹

The Xhosa have institutionalised adultery in the class of women called amankazana.¹⁰⁰ These are women, usually

96. H. MÖNNIG, op. cit., p. 196.

97. Ibid., p. 197.

98. E.J. KRIGE, loc. cit., p. 110.

99. H. MÖNNIG, op. cit., p. 197.

100. P. MAYER, op. cit., p. 235, cautions against a too hasty translation of this term and says: "[amankazana is] often translated by some English word with a strong sexual referent, such as 'concubine', but another of its meanings, equally basic, is that of a woman who, being ineligible for marriage, will not bear children out of her parental home. She and her children (if any) will always belong there, will never be transferred to another homestead or lineage."

unmarried mothers, who, having spoiled their chances for a good marriage, are supposed to associate sexually only with mature men, preferably married.¹⁰¹ They form a large group and are frequented even by polygamous husbands.¹⁰²

Widows are also considered useful in providing sexual gratification to married men, for to expect a widow to abstain from sexual intercourse is considered unduly harsh.¹⁰³ She is not prevented from publicly forming sexual attachments, and is sometimes called "the wife of everybody".¹⁰⁴ The Xhosa, Christian and non-Christian alike, expect a widow to have regular and authorised lovers who will support her

M. HUNTER, op. cit., pp. 205-206, speaks of amadikazi, and defines a member of this group as "[...] a woman who has been married, or has borne a child, living at her father's or brother's umzi [home]." These include divorced women and those who have absconded to their father's home, even temporarily. They are free to enter sexual liaisons, but the man who impregnates such a woman is liable to a fine.

101. P. MAYER, op. cit., p. 236; M. HUNTER, op. cit., p. 205.

102. According to M. HUNTER, op. cit., pp. 205, 484, practically every married man in the rural areas of Pondoland has his special friends among them, while many urban dwellers, both Christian and non-Christian, have amadikazi besides their legal wives whom they visit regularly and whom they may partly support.

103. H. MÖNNIG, op. cit., p. 197; P. MAYER, op. cit., p. 242; M. HUNTER, op. cit., p. 221.

104. H. MÖNNIG, op. cit., p. 205; I. SCHAPER, Married Life, p. 183; P. MAYER, op. cit., p. 242.

and enable her to bear children.¹⁰⁵

Many individuals, men and women, look forward to becoming migratory labourers in order to enjoy greater sexual freedom in town.¹⁰⁶ There they enter into semi-permanent relationships which the Xhosa call ukushweshwa (concubinage) or, more euphemistically, ukuhlalisana (staying together).¹⁰⁷ Both married and unmarried people are involved in such relationships which involve widows, divorced women, wives who have absconded, and unmarried mothers who have given up on marriage.¹⁰⁸ Christians try to be discreet and fear detection either by the Church or by their wives, but like the non-Christians who openly practice such relationships, they do not feel that their behaviour is necessarily immoral.¹⁰⁹

105. P. WHOOLEY, "Marriage in Africa", p. 331.

106. Ibid., p. 322; ID., "Equality in Marriage", p. 189; P. MAYER, op. cit., pp. 214-215.

107. According to P. MAYER, op. cit., pp. 256-257, "the term ukushweshwa is applied to all the town unions in which the woman comes to stay with her man without being married to him, and they live in his room as one domestic unit." In this lies the difference between amankazana (visiting lovers) and amashweshwe (cohabiting lovers).

108. Ibid., pp. 259-260; P. WHOOLEY, "Marriage in Africa", p. 331. Traditional society knew very few divorces, and tried to avoid them as much as possible. Their incidence has increased due to external influences, of which more later.

109. P. MAYER, op. cit., p. 257.

Concubinage is an offshoot of the polygamous mentality and is a part of Bantu culture; but in the urban situation it has become more prevalent due to the existence of migratory labour.¹¹⁰ P. Mayer claims that both Christians and non-Christians regard sexual satisfaction as a normal activity for all adults, not necessarily linked to marriage, and that their only preoccupation is to avoid infringing existing rights.¹¹¹ Thus it would become immoral only if the traditional conventions and rules of fair play in extra-marital affairs were to be jettisoned,¹¹² but a person who simultaneously maintains several lovers is doing only what comes naturally.¹¹³ This attitude is based on

[...] the customary Xhosa liberty to conduct relationships with other women as long as the wife's rights are not directly affected. [...] Morality demands that [a concubine] must move out without protest when the wife comes to town on a visit to her husband; that she must recognize the husband's primary duty to support his family; that she must therefore strive to earn her own money and to demand as little financial help as possible from the man; and especially that she must accept the essentially temporary basis of the relationship.¹¹⁴

110. I. SCHAPERA, Married Life, p. 251.

111. P. MAYER, op. cit., 252.

112. Ibid., p. 253.

113. Ibid., p. 266.

114. Ibid., p. 260.

Mayer's study into the social value of concubinage has found that it should not be confused with polygamous secondary marriage,¹¹⁵ for although it partly replaces the latter, modern wives are not prepared to concede to their husbands the right to concubinage as they did before.¹¹⁶ Therefore, he points out,

The institution is complementary to marriage and not parallel to it, catering especially for men who already have wives and women who will never have husbands. It is characterized by an almost complete lack of formal obligations.¹¹⁷

Christians are aware that the Churches condemn such extra-marital activities, but at the same time the overwhelming evidence suggests that in this regard they remain closer to traditional attitudes than to Christian teaching.¹¹⁸

This has led B.A. Pauw to argue that

[...] the impact of Christian teaching on attitudes and norms pertaining to sex still appears to be very restricted. [...] true

115. Ibid.

116. M. WILSON and A. MAFEJE, op. cit., pp. 79-80; A.D. SPIEGEL, loc. cit., p. 436; I. SCHAPERA, Married Life, p. 299.

117. P. MAYER, op. cit., p. 265.

118. Ibid., pp. 265-266. A concession to Christian morality seems to be the fact that, rather than establishing a common domicile, the Christian prefers to become a semi-permanent visitor. This approaches ukushweshwa.

moral norms transcend any particular social structure, and have an absolute validity. These norms may be accepted in spite of structural conditions which militate against them, and their acceptance may eventually change the whole structure of a particular society: [... The Church's] task is not only to proclaim those absolute moral norms relating to sex and family, but more important still, to proclaim a gospel of salvation from the powers, including the forces exerted by a particular structural situation, which militate against conforming to these values. Perhaps the reason why Christian teaching seems to have had so little impact on the sex life of the Bantu is that too much stress has been laid on norms, and too little on salvation and redemption.¹¹⁹

c. Parental Obligations

The lack of close relationship between the spouses themselves is reflected in their relationship to their children. The great love and affection which both parents have for children does not necessarily bring them closer together. The wider community into which children are integrated from early childhood claims a right to be involved in their upbringing,¹²⁰ and the division of society into gender and age groups militates against intimacy between parents and children.¹²¹

119. B.A. PAUW, op. cit., pp. 164-165.

120. V. VAN DER VLIET, loc. cit., p. 218.

121. P. WHOOLEY, "Equality in Marriage", pp. 180-187.

The father is expected to look after the children's material needs, to discipline them, be their guide, protector and guardian, and be answerable for their conduct.¹²² He is not closely involved in their day-to-day upbringing, but demands total obedience to his authority.¹²³ Should he neglect his duties, his kin would intervene and public opinion would condemn him.¹²⁴

The intimacy which is lacking between father and son is found in the grandfather-grandson relationship instead. Whereas there is a conflict of interests between the former, since the son is both essential as an affirmation of the father's manhood and yet presents a potential threat to his position, the latter have nothing to fear from one another.¹²⁵ So the actual rearing of children is often left to the grandparents who are deemed better able to impart both discipline and respect for traditional values.¹²⁶

122. D.H. READER, op. cit., pp. 132-133; I. SCHAPERA, Married Life, pp. 219-220.

123. S.B. NGCOBO, "The Bantu Peoples", in G.H. CALPIN (ed.), The South African Way of Life: Values and Ideals of a Multi-Racial Society, London, William Heinemann, 1953, p. 65.

124. I. SCHAPERA, Married Life, p. 218.

125. H. KUPER, op. cit., pp. 26-28.

126. P. MAYER, op. cit., pp. 274-275.

The mother is mainly responsible for looking after the children while they are young. She should exercise material and health care, teach them social behaviour, educate them, protect them, show them a sympathetic understanding and be interested in them until her death.¹²⁷

The education given the children is not only a private responsibility of the parents, but devolves also on the community. This education is geared towards making them useful members of the family and of society, by encouraging them to conform to public values. Thus neither originality nor the development of a child's personality is consciously pursued.¹²⁸

Since so many people are involved in this process, quarrels frequently arise due to different expectations. Thus the father may find his wife's treatment of his son too harsh, or the mother her husband's treatment of the daughter, or the parents may object to what they consider societal interference, etc.¹²⁹ The lack of intimate communication between the spouses makes the resolution of such conflicts more difficult.

127. D.H. READER, op. cit., pp. 137-138; I. SCHAPERA, Married Life, pp. 218-219.

128. V. VAN DER VLIET, loc. cit., pp. 211-212; I. SCHAPERA, Married Life, p. 328.

129. I. SCHAPERA, Married Life, pp. 225-228.

Like bridewealth, children may be used to cement wider kinship ties. For instance, a childless couple might be given a child engendered specially for them by a collateral relative.¹³⁰ Physical paternity is thus not necessarily essential to paternal relationships, but can be replaced by fostering.¹³¹ Such a child gives the foster-parents the sense of fulfillment and security of which they feel such need.¹³² Fostering may also be used to find a niche for the children of unmarried mothers, or to provide grandparents with a young pair of hands to serve them.¹³³

Due to the high incidence of concubinage and the concomitant high illegitimacy rate, a word should be said about the obligations of parents towards their natural children.¹³⁴ According to P. Mayer, the genitor acquires neither rights nor obligations towards them, for

The natural children "must not" seriously rival the legitimate ones, just as the ishwe-shwe [concubine] "must not" rival the real wife. It would be a grave wrong, not only against the legitimate wife and children

130. Ibid., pp. 220-221. -

131. P. WHOOLEY, "Marriage in Africa", pp. 331-332.

132. P. MAYER, op. cit., pp. 273-275.

133. Ibid., pp. 275-277.

134. Ibid., pp. 277-281.

themselves, but against all the kin and ancestors who sanctioned the lawful marriage.¹³⁵

While the genitor may thus decide to give support to his natural children or to gratify their needs, he is not under obligation to do so. His legitimate children have a birth-right while the others can only look for favours. Moreover, the mother frequently prefers not to be too dependent on the genitor for the children's support, for this could seriously jeopardise her own claim to their future earnings. Thus she is often prepared to accept a short-term liability for the sake of long-term security in her old age.¹³⁶

2. The Social Context of Marriage

18 Social structures are inherently flexible and are able to adapt themselves to altered circumstances, assimilating even those foreign institutions which initially appeared incompatible to them.¹³⁷ The integration of such influences into a culture changes it from a single, homogeneous system into a complex and multi-layered reality. This makes it possible for an individual to engage in a

135. Ibid., p. 277.

136. Having been declared "unmarriageable", a concubine's only hope of security lies in the support that her children may grant her some day. So she is forced to assess her situation carefully, balancing present comfort with future needs.

137. D.H. READER, op. cit., pp. 327-329.

process of selective adaptation in which he chooses to act according to those cultural norms which best serve his immediate interests.¹³⁸ He then behaves in a seemingly incoherent manner, constantly changing his terms of reference as he moves from one level to another, according to the needs of the moment.¹³⁹

Such selective adaptation also takes place in marriage, for at present it is subject to influences from several normative systems: Bantu culture, Western culture and Christian morality. The spouses thus have several frames of reference as they establish a dynamic of married life. In the words of M. Peskin, this means that

[...] the behaviour of the spouses, and their responses to one another can often be understood in terms of the operation - sometimes in harmony, sometimes in conflict - of different normative systems and their perceived relevance to particular situations.¹⁴⁰

This part of the study will thus deal with those social influences which add to the complexity of Bantu

138. For an account of case histories illustrating this process, see M. PESKIN, "Christianity and Marriage in Soweto", in T.D. VERRYIN, op. cit., pp. 379-434.

139. A.A. DUBB, loc. cit., p. 449.

140. M. PESKIN, loc. cit., p. 405.

marriage in South Africa. Taken historically, these are Christianity, which profoundly affected the kinship system; westernisation, which led to the dispersion of the kinship group; and migratory labour, which divides the family for lengthy periods of time.

a. Christianity

By definition, the act of conversion means to leave behind a way of life which is now deemed incompatible with the demands of faith. It distinguishes the individual from those of his family who do not share his convictions, and thus undermines the solidarity which previously characterised them.¹⁴¹ It is also an intensely personal act which highlights individual responsibility and personal salvation, and thus further weakens group conformity and cohesion. It follows that evangelisation led to the loosening of tribal ties and the upsurge of personal freedom of decision.¹⁴²

Early Christian influence in South Africa was Protestant, for Catholics were forbidden to practise their faith.

141. A.A. DUBB, loc. cit., p. 456.

142. For more detail regarding the impact of Christianity on Bantu culture in South Africa, see B.A. PAUW, "The Influence of Christianity", W.D. HAMMOND-TOOKE, op. cit., pp. 415-440; R.E. PHILLIPS, The Bantu in the City: A Study of Cultural Adjustment on the Witwatersrand, Lovedale, Lovedale Press, 1938, pp. 248-290; M. HUNTER, op. cit., pp. 349-355.

After many difficulties, the Church finally was allowed its first resident bishop in 1838, and the main thrust of its missionary activity dates only from the latter part of the nineteenth century.¹⁴³ Nevertheless, the Church experienced rapid growth among the Bantu, especially since the establishment of the Hierarchy in South Africa by Pope Pius XII in 1951. National statistics show that in the decade between 1970 and 1980 Catholics increased by 60% among the Bantu.¹⁴⁴ It follows that many Catholics today are still first or second generation converts, subject to strong non-Catholic or non-Christian influences.

¹⁴³. For a detailed account of the establishment of the Catholic Church on South African soil, see W.E. BROWN, The Catholic Church in South Africa: From Its Origins to the Present Day, London, Burns and Oates, 1960, xiv-384 p.

¹⁴⁴. These statistics were obtained by comparing the figures given in South Africa's Official Yearbooks of 1974 and 1984, making allowances for the fact that the latter excludes statistics for Bophutatswana, Transkei and Venda. According to the statistics, Catholics made up 8,8% of the Bantu population in 1970, whereas this had risen to 10% by 1980. The actual figures show that in 1970 there were 1 329 980 Black Catholics who increased by 818 990 for a total of 2 148 970 in 1980. See DEPARTMENT OF FOREIGN AFFAIRS AND INFORMATION, South Africa 1974: Official Yearbook of the Republic of South Africa, Johannesburg, Perskor, 1974, pp. 838, 843-845, and ID., South Africa 1984: Official Yearbook of the Republic of South Africa, Johannesburg, Chris van Rensburg Publications, 1984, pp. 786-787, 792.

We consider both the fact that the Church finds itself in a minority position and the fact that many of today's Catholics are recent converts of special significance to this dissertation.

Ethnographers indicate that Christianity exercised a profound influence on Bantu culture, directly by consciously striving to replace one system of morality with another, and indirectly by altering family relationships and kinship groups.¹⁴⁵ Church allegiance to some extent replaced kinship allegiance, for the Church fulfilled some of the functions of the kinship group.¹⁴⁶ Christianity also introduced a system of education which emphasised human dignity, equality between men and women, and individual initiative.¹⁴⁷

M. Peskin describes the effect of Christianity on the marital behaviour of urban Blacks as follows:

[...] Christian marriage must be understood in terms of the Christian component or influence. On the one hand Christianity provides a set of customs, usages, values, prescriptions of behaviour, which exerts some pressure on the professing Christian. This may reinforce similar pressures exerted by tradition or westernism, it may come into conflict with them or there may be no coincidence at all. On the other hand, Christianity together with tradition and westernism provide the individual with a number of choices in terms of which any situation may be defined or any problem resolved. [...] while in the global sense all three modes have equal force and importance for any particular individual, Christianity or

145. I. SCHAPER, Married Life, pp. 27-31.

146. B.A. PAUW, loc. cit., p. 426.

147. I. SCHAPER, Married Life, pp. 237-242.

tradition or westernism may have the greatest significance.¹⁴⁸

Basing himself on several case histories in Soweto, South Africa's largest Black urban complex, Peskin comes to the conclusion that

[...] Christianity is seen as a dynamic of married life rather than as an ideal against which any marriage might be measured.¹⁴⁹

In a complex and confusing situation where not only the aspirations of the individual but also those of his kinship group have to be met, the normative value of Christianity can thus be overlooked in favour of a selective adaptation of other normative systems. One of these is "westernism".

b. Westernisation

Education is the key to westernisation, and in this sense the process can be said to have been initiated by the early missionaries.¹⁵⁰ Nevertheless, D.H. Reader rightly points out that

It is sometimes forgotten, in the somewhat mechanistic view of "culture contact" which

148. M. PESKIN, loc. cit., p. 423.

149. Ibid., p. 424.

150. For greater details about the process of westernisation and urbanisation, see A.A. DUBB, loc. cit., pp. 441-472; R.E. PHILLIPS, op. cit., pp. 89-107; M. HUNTER, op. cit., pp. 434-504; E.P. HELLMANN, "The Native in the Towns", in I. SCHAPERA, The Bantu-Speaking Tribes of South Africa, pp. 405-434.

occasionally still persists, that one of the main westernizing influences or media for the African is the African himself: his view of what he thinks white civilization means for him.¹⁵¹

Urbanisation provides a focus for westernisation and powerfully strengthens the process.¹⁵² The city is seen as the depository of western values, as illustrated by the motives which bring people to flock to it: they wish to sell their labour and to enjoy western artifacts, to gain personal independence and social prestige, to satisfy their curiosity and spirit of adventure, or they wish to escape from unwanted obligations back home.¹⁵³

However, rural social structures based on the kinship system and the mutual interdependence of its members, are inadequate to deal with the complexities of urban living. Strict social divisions based on gender or seniority cannot be maintained where the nuclear family has become the basic social unit.¹⁵⁴ Moreover, the criteria for social interaction change as close-knit relationships are replaced by

151. D.H. READER, op. cit., p. 340.

152. B.A. PAUW, op. cit., p. 195.

153. A.A. DUBB, loc. cit., pp. 444-445; P. MAYER, op. cit., p. 234; I. SCHAPER, Married Life, pp. 128-129, 242.

154. A.A. DUBB, loc. cit., pp. 446-447.

voluntary and open networks based on personal compatibility, shared interests, Church membership, employment, or occupation.¹⁵⁵ According to E.P. Hellmann, this means that in the city

[...] the family is on its own, no longer embedded in the web of kinship which was the basis of the traditional system ... Parents are called on to accept responsibilities and functions - educational, economic and emotional - that were formerly carried out by a group of kin. In a number of families, new patterns of behaviour between husband and wife and between parents and children have developed, which meet the demands of these new conditions. In such households, there is close co-operation between husband and wife, consultation about money matters, the children's education and other concerns ... It seems to me that this pattern is regarded as the ideal to be aimed at by professional and middle class women, although by no means all men of the same status share this aspiration and its attainment is very infrequent ... It is far more common to find families under strain because of the unresolved conflict between the husband's patriarchal conduct and the wife's new role as wage-earner, manager of the household budget and educator of the children. Men, including educated men, seem to resist the emancipation of women which modern conditions promote.¹⁵⁶

155. Ibid., pp. 450-453.

156. E.P. HELLMANN, "The African Family Today", paper delivered to a Conference on African Family Life, organised by the Southern Transvaal Region, South African Institute of Race Relations and the Witwatersrand Christian Council, 1967, cited by A.A. DUBB, loc. cit., p. 458.

Westernisation and urbanisation have therefore led to a large degree of emancipation for women, and the blurring of the gender gap. However, the divergent expectations which spouses now have of marriage have increased the difficulties of communication between them. In this there is a link between the influence of Christianity and that of westernisation. M. Peskin puts it succinctly:

While the church provides much of the rationale for the aspirations and increased self-respect and status of women, life in town allows these to materialize by providing the necessary opportunities often denied women in traditional life. The church alone acting as a base for aspirant women, would be comparatively ineffectual if not for the independence and mobility allowed by town facilities and condoned by "Western norms".¹⁵⁷

c. Migratory Labour

Strangely, the migratory labour situation has had a somewhat similar emancipating effect on rural women.¹⁵⁸ The rural areas are bereft of most able-bodied men for the greater part of the year, which means that women enjoy

157. M. PESKIN, loc. cit., pp. 413-414.

158. The Catholic Church's opposition to the system of migratory labour is well documented, but for a discussion of the effect of the system on African society, see F. WILSON, Migrant Labour in South Africa: Report to the South African Council of Churches, Johannesburg, Spro-Cas, 1972, especially chapter 9: Weighing the Evidence, pp. 169-202.

unwonted autonomy of movement, bear sole responsibility for the upbringing of the children, and find their position of inferiority reversed to that of decision making. However, they are also unable to establish an interpersonal relationship with their spouses and are tempted into extra-marital relationships.¹⁵⁹

There are well over one and a half million migratory workers in South Africa, together with three quarters of a million daily commuters who spend long hours travelling to and from work.¹⁶⁰ The urban areas thus have to accommodate a large influx of people who make up about 27% of the total African urban population.¹⁶¹ F. Wilson points out that, although urbanisation is usually accompanied by such social evils as illegitimacy and prostitution,

[...] the existence of huge single-sex hostels, and the large excess of men over women in some urban areas are powerful factors exacerbating the problems inherent in urbanisation.¹⁶²

159. A.D. SPIEGEL, loc. cit., pp. 475-483.

160. According to the DEPARTMENT OF FOREIGN AFFAIRS AND INFORMATION, South Africa 1984, pp. 218, 248, there were some 1,3 million migratory workers among South African Blacks, as well as some 282 272 from neighbouring countries.

161. According to statistics, there are approximately five million Africans living in urban areas in "white" South Africa, which figure is augmented annually by the 1,5 million migratory labourers, see ibid., p. 215.

162. F. WILSON, op. cit., p. 191.

There is also the loss of a sense of responsibility towards those left behind, an increase in concubinage, bigamy, and homosexuality in a situation in which protracted separation of husband and wife is endemic.¹⁶³

3. Marital Breakdown

Although the dissolution of marriage was possible, traditional society disliked divorce and did everything in its power to prevent it.¹⁶⁴ Family and kinsmen on both sides exerted pressure on the spouses to be reconciled and thus to preserve affinal alliances.¹⁶⁵ In theory the kinship groups could proceed alone in dissolving marriage, but since contentious issues were involved, such as the return of the bridewealth cattle or the custody of the children, the matter was usually referred to a tribal court.¹⁶⁶

163. According to P. WHOOLEY, "Equality in Marriage", p. 189; ID., "Marriage in Africa", p. 322, and A.D. SPIEGEL, loc. cit., pp. 471-472, some Africans welcome migratory labour and use it for their own ends. According to A.D. SPIEGEL, ibid., pp. 436-437, "[...] the migrant labour system, in being only one aspect of the general process of 'modernization' is not solely responsible for some of the less 'moral' phenomena which are attributed to it."

164. For traditional attitudes to the dissolution of marriage, see H. ASHTON, op. cit., pp. 82-87; I. SCHAPER, Married Life, pp. 247-272; M. HUNTER, op. cit., pp. 210-213; A. REUTER, op. cit., pp. 172-206.

165. I. SCHAPER, Married Life, p. 263.

166. H. ASHTON, op. cit., p. 87.

Acceptable grounds for divorce were serious and protracted misconduct, and the uncondoned impotence or sterility of a spouse.¹⁶⁷

This commitment to the preservation of the marriage bond has seen a radical change. The introduction of Christian and civil rites of marriage have put the institution under a different legal system, and the divergent expectations of the spouses caused by socio-economic changes have led to a widespread incidence of marital breakdown. Spouses may now sue for divorce in a civil court on a variety of grounds which include adultery, refusal to render conjugal rights, desertion, continuous gross misconduct or ill-treatment, impotence or barrenness, and imprisonment for a criminal offence.¹⁶⁸ Divorce has become common, even in rural areas where migratory labour is an important contributory factor. Thus a recent study in the Ciskei found that 22% of all marriages ended in divorce, due to the husband's prolonged absence or his failure to support his wife financially which led her to claim greater independence from her mother-in-law, or to commit adultery resulting in pregnancy

167. V. VAN DER VLIET, loc. cit., p. 208.

168. The Natal Code, Section 163, 1891, as cited in E.J. KRIGE, op. cit., p. 157.

or elopement.

African marriage has been severely taxed by these pressures, all of which should be taken into account when evaluating any given marriage.

CANONICAL OBSERVATIONS

Concluding this survey of marriage among the Bantu of South Africa, it is most important to remember that African culture is in transition and is no longer a homogeneous system of values, expectations and beliefs. As an element of cultural expression, marriage shares in this process and thus includes elements from the indigenous culture, western culture and Christian morality.

Any canonical evaluation of Bantu marriage must take into account that these elements co-exist in society and in each individual without necessarily having equal force or significance. In assessing each individual case, it will be necessary to see how strong an influence the following indigenous customs exerted on the spouses' attitudes towards marital fidelity:

1. The principles of male dominance and gender division which preclude equality between the spouses.
2. The polygamous tradition which allows men almost

complete sexual freedom after marriage, and institutionalises adultery for them but demands that women enter an exclusive relationship.

3. The spouses' strong attachment to their descent group, which results in a lack of intimacy and companionship between them.

4. Early sex education, which encourages sexual liaisons for boys and seeks only to limit girlish promiscuity and extra-marital pregnancies.

5. The strong emphasis from early childhood on conformity to community values and adherence to male demands.

Similarly, the influence of the following social conditions are equally relevant in the assessment of an individual's commitment to marital fidelity:

1. The coexistence of different cultural elements in the life of each individual, which encourages him to engage in a process of selective adaptation according to his own perceived needs and the demands of his closest kin, his most intimate friends, or his most important associates.

2. The extent to which westernisation or migratory labour have led to the emancipation of women, and have encouraged the spouses to have different expectations in marriage while simultaneously making their fulfillment more problematical.

3. The extent of the individual's adherence to Christian beliefs, and the extent to which these coincide with Catholic teaching on marriage.

CHAPTER TWO

THEOLOGICAL REFLECTIONS ON BANTU MARRIAGE

Chapter one was devoted to a factual investigation into the cultural aspects of Bantu marriage in South Africa and the influence which modern social conditions exert over it. One of these is Christianity which, although claiming the adherence of 75% of the African population, is predominantly non-Catholic. Ethnographical references to the influence of Christianity on African marriage thus generally do not envisage Catholicism but refer to Protestantism or the independent Churches.

However, following Pope Paul's insistence that law should follow theology,¹ an investigation into the canonical significance of African marriage customs and attitudes should endeavour to determine how African Catholic theologians evaluate them in the light of the gospel.² Fortunately, the

1. PAUL VI, Address to the International Congress of Canonists, "Canon Law Renewal in the Light of Vatican II", January 19, 1970, in TPS, 15(1970), pp. 70-74; ID., Address to the Second International Congress of Canonists, "Church Law and the Spiritual Order", September 17, 1973, in ibid., 18(1973), pp. 275-283.

2. Catholic theological writing on African marriage developed slowly. According to W. BUHLMAN, "Questions à propos du mariage et de la famille en Afrique", in Téléma, 9,2 (1983), pp. 63-64, prior to the 1950s most missionaries were influenced so much by their moral and canonical training that they were unable to raise more than peripheral questions regarding African marriage. Some of the writings in the 1950s

Second Vatican Council's reformulation of the nature of marriage in its Pastoral Constitution on the Church in the Modern World,³ together with its call to the young Churches to adapt the Christian life to the mentality and character of each culture,⁴ caused an increased interest in African marriage and theological reflection on it.⁵ Research projects and theological study weeks in various parts of the African continent stimulated reflection on the socio-religious and pastoral level.⁶ This culminated in the African episcopate's

and 1960s concerned themselves with the validity of customary unions and the advantages or disadvantages of the extended family, see R. KAMPUNGU, "Are Customary Marriages to be Considered Invalid a priori?", in SACR, 1963, pp. 145-155; C. VIJVERBERG, "The Validity of Customary Union in South Africa", in Euntes docete, 6(1953), pp. 231-240; A. REUTER, Native Marriages in South Africa According to Law and Custom, Münster, Aschendorff, 1963, xx-376 p.; J.M. ROBINSON, The Family Apostolate and Africa, Dublin, Helicon, 1964, xvi-278 p.

3. CONCILIUM VATICANUM II, Constitutio Pastoralis de Ecclesia in mundo huius temporis (Gaudium et Spes), December 7, 1965, in AAS, 58(1966), nn. 47-52, pp. 1067-1074.

4. ID., Decretum de activitate missionali Ecclesiae (Ad Gentes), December 7, 1965, in ibid., nn. 19-22, pp. 969-974.

5. Pope Paul VI showed great personal interest in the African continent and stimulated theological research by his message Africae Terrarum, in which he identified and praised some traditional values, see PAUL VI, "Development in Africa: The Message Africae Terrarum", in TPS, 13(1968), pp. 5-22. He also visited Africa personally in 1969 during which time he charged the African episcopate to become "missionaries to yourselves" and to adapt the gospel and the Church itself to African culture, see ID., "The African Church Today", in ibid., 14(1969), pp. 214-220.

6. Several initiatives are noteworthy: In July, 1970,

contribution to the discussions of the 1980 Synod of Bishops on the role of the Christian family in the modern world.⁷

During his visit to the African continent in 1980, Pope John Paul II encouraged such theological reflection and emphasised its practical value when he declared:

the Faculty of Theology of Lovanium University, Kinshasa, Zaire, dedicated its Fifth Theological Week to the theme: Christian Marriage in Africa, and published the papers in a special issue of the RCA, 26(1971), pp. 3-201.

In 1971, the bishops of the Association of Member Episcopal Conferences of Eastern Africa (AMECEA) launched a research project which covered English-speaking Eastern and Southern Africa. Two books and numerous articles were published during the course of the project, see B. KISEMBO, L. MAGESA, A. SHORTER, African Christian Marriage, London, Geoffrey Chapman, 1977, xxvi-242 p.; T.D. VERRYIN (ed.), Church and Marriage in Modern Africa, Groenkloof, The Ecumenical Research Unit, 1975, 497 p.; as well as the articles on marriage published by AFER in the years 1972-1976.

In July, 1978, the Symposium of Episcopal Conferences of Africa and Madagascar (SECAM) held its Fifth Plenary Assembly in Nairobi, Kenya, under the general theme of problems of the family in Africa and Madagascar, and had its recommendations published in AFER, 20(1978), pp. 380-383. For a detailed commentary and critique, see F.J. URRUTIA, "La pastorale du mariage en Afrique Noire: la cinquième assemblée du SCEAM, Nairobi, 24-30 Juillet, 1978", in AC, 24(1980), pp. 169-213. Hereafter cited as "La pastorale du mariage".

7. The integral text of the interventions of the African episcopate at the Synod was published in a special double issue of AFER, 23(1981), pp. 15-128.

Following the Synod, SECAM dedicated its Sixth Plenary Assembly again to: Marriage and Christian Family Life in Africa Today, and had its recommendations and conclusions published in AFER, 23(1981), pp. 370-376. For a commentary, see F.J. URRUTIA, "Pastoralis matrimonialis et familiaris in Africa: VI consessus generalis SECAM, Yaoundé (Cameroun), 29 Iunii ad 5 Iulii anni 1981", in Periodica, 71(1982), pp. 255-317.

African traditions, judiciously utilized, may have their place in the construction of Christian homes in Africa. I am thinking in particular of all the positive values of the family feeling [...]: the seriousness of the matrimonial commitment at the end of a long process, priority given to the transmission of life and therefore the importance attached to the mother and children, the law of solidarity among families related by marriage, which is exercised especially in favour of old persons, widows and orphans, a kind of co-responsibility in taking charge and bringing up the children, which is capable of relieving many psychological tensions [...]⁸

The Pontiff's encouragement has been taken to heart, but it should be noted that most of the theological reflection on Bantu marriage has taken place outside South Africa.⁹ However, the whole of sub-Saharan Bantu Africa shows a remarkable similarity in marital values and customs. This makes it possible for us to make use of the theological conclusions reached regarding Bantu marriage in other parts of Africa.

This chapter will therefore concern itself with a synopsis of present Catholic theological reflection on those aspects which are considered constitutive of Bantu marriage in order to see to what extent Catholics apply them and

8. JOHN PAUL II, Africa: Apostolic Pilgrimage, Boston, St Paul Editions, 1980, pp. 50-51.

9. The two most innovative and prolific centres of study are the Lovanium University, Kinshasa, Zaire, for Francophone Africa, and the Gaba Pastoral Institute, Eldoret, Kenya, for Anglophone Africa.

to what extent they have been able to purify them according to the demands of faith. Special attention will be given to those elements which emerged from the factual investigation of chapter one: the inherent value of the extended family; marriage as a pact between families, constituted by progressive steps and the exchange of bridewealth; and the establishment of a husband-wife relationship which is strongly influenced by prevailing attitudes towards polygamy, fertility and sexuality.

A. TOWARDS A THEOLOGY OF BANTU MARRIAGE

According to J.A. Grootaers, the interventions of the African episcopate at the 1980 Synod showed that in their own mind

[...] no true renewal in the pastoral care of the family was even thinkable without both a general Africanization of the Church as a whole and a rethinking of the entire theology of marriage. [...] They] were very much in favour of an inductive method for approaching the entire question: the Synod must begin with the given situation rather than with principles.¹⁰

For this reason the African bishops insisted that Christian marriage is a mystery of salvation which cannot be fully

10. J.A. GROOTAERS and J.A. SELLING, The 1980 Synod of Bishops "On the Role of the Family": An Exposition of the Event and an Analysis of Its Texts, Leuven, Leuven University Press, 1983, p. 88 (emphasis added).

understood, expressed or lived. Since no culture can exhaust its meaning, a careful distinction must be made between the doctrinally essential elements of marriage - its unity, indissolubility and sacramentality - and its cultural expressions which should respect local values.¹¹

The bishops emphasised that the local Churches in Africa are entrusted with the mission to ensure that marriage and the family be truly Christian and truly African. They have both the right and the duty to strike a balance between revealed truth and cultural realities,¹² for, as Bishop J.C. Bouchard said, marriage

[...] cannot be reduced to a purely Christian order, still less to an ecclesiastical order. It belongs to secular life, to the order of "earthly values", [...] and as such it has a certain autonomy.¹³

We are sure that the sacrament of marriage is no other reality than human marriage prepared and lived in a constant conversion to Christ.¹⁴

It follows that theological reflection on African marriage

11. Bishop M.P. LAURENT, "The Properties of Christian Marriage", in AFER, 23(1981), pp. 15-17.

12. Cardinal L. RUGAMBWA, "The Responsibility of the Local Churches", in ibid., pp. 28-30.

13. Bishop J.C. BOUCHARD, "Culture and Collegiality", in ibid., p. 30.

14. Ibid., p. 32.

must begin with the extended family (the kinship group) from which marriage springs and in which it finds its support and meaning.

1. The Extended Family

Late nineteenth century missionaries brought with them the vision of a monogamous nuclear family as it had evolved in the post-industrial West, in which the husband, wife and children form the basic family unit, live apart from their descent group and form autonomous if interconnected cells within society.¹⁵ On the other hand, the African extended family which they encountered consisted of a large number of people related by descent from a single ancestor; it extended in time and space and was thought to last indefinitely. The individual households which existed within the group were not autonomous as are the nuclear families, but they acted corporately and acknowledged a co-responsibility towards the group and its interests as a whole.¹⁶

15. A. SHORTER, African Culture and the Christian Church: An Introduction to Social and Pastoral Anthropology, London, Geoffrey Chapman, 1973, p. 163. Chapter 5: Christianizing African Marriage and Family Life, pp. 156-195, gives an excellent overview of the challenges of Christian inculturation in this field.

16. Ibid., pp. 163-164. For a schematic comparison of the main differences between Western and African marriage, see pp. 181-182.

Faced with the need to present African society with a truly Christian vision of the family, the missionaries had to determine whether the advantages of group solidarity outweighed its disadvantages. They acknowledged the positive social values of the extended family: its strong community spirit, its solidarity and its respect for family authority which safeguarded traditional morality. They also admitted that it brought socio-economic stability and group security in the common desire for children who were cared for on a basis of shared responsibility. But in a society where Christians were by far in the minority, the pressures to which neophytes were subject in this extended family were deemed inimical to the establishment of a Christian lifestyle for the believing couple.¹⁷ According to J.M. Robinson,

17. One of the ways in which early missionaries sought to minimise the influence of the non-Christian extended family was to create Christian villages in which neophytes lived apart from the pagan influence of their family and friends. For a non-Catholic example in South Africa, see D.H. READER, Zulu Tribe in Transition: The Makhanya of Southern Natal, Manchester, Manchester University Press, 1966, pp. 234-237. According to M. LEGRAIN, "Les africains peuvent-ils espérer une autre législation matrimoniale?", in AC, 22(1978), pp. 110-114, such Catholic villages in Zaïre disappeared only towards the middle of the twentieth century, due to the greater local cultural and political autonomy and the decline of religious authority. On p. 113 he evaluates them thus: "[...] la création d'îlots chrétiens n'a favorisé ni la diffusion de l'évangélisation ni l'africanisation du christianisme. Mais, en dehors des cas où la ségrégation et la tutelle ont provoqué le pourrissement, on a vu d'excellentes familles chrétiennes prendre leur essor [...]"

the position could be described thus:

The incompatibility between the family group organization in its traditional form and family life according to the Christian ideal may be reduced fundamentally to the matter of the responsibility for the domestic affairs (spiritual, social, educational, and, to a big extent, economical) of the family strictly so called. [... For] if the Christian mode of domestic life is to be developed, the elementary family must be able to direct its domestic affairs and for that must be recognized as internally autonomous to a large extent.¹⁸

By and large, missionaries agreed that the disintegration of the extended family group was neither necessary nor desirable, indicating that the negative aspects were not insurmountable. In fact, confronted with excessive individualism in western societies, African community values could not help becoming more appreciated.¹⁹ Thus, in a more recent evaluation of the extended family, A. Shorter points out its affinity with Christian teaching when he says:

[...] the extended family embodies an ideal of co-operation and mutual service which goes beyond the limits of the nuclear family and involves a relatively large community of kinsfolk. This is a step in the direction of Christ's teaching that the Christian's love must transcend his family circle and be all-embracing.²⁰

18. J.M. ROBINSON, op. cit., p. 124.

19. Ibid., p. 128.

20. A. SHORTER, op. cit., p. 178.

The solution would have to be found in a harmonious fusion of the two cultures in which both feeling and intelligence would play a part.²¹ According to J.M. Robinson, the Church should help bring about a situation which would allow the extended family to evolve into

[...] a community of blood relatives living together on land held in common, acknowledging the authority of the senior member, as at present, in everything concerning the group as such, helping each other whenever possible, especially with their work, and sharing a common social life, solicitous about the good name of the group and accepting to be answerable to it for moral conduct. Within this unit the elementary family would be autonomous in its domestic affairs, in particular, wives would be subject primarily to their husbands, and the education, and choice of career and marriage of children would be primarily the business of their parents.²²

While this vision seems to be primarily rural in character, presupposing as it does the continued physical togetherness of the extended family, it tries to balance the selfishness of extreme individualism and the constraints of an authoritarian collectivism. With this balance in mind, the African bishops at the Synod could emphasise that the Christian family is not to be considered a separate

21. J.M. ROBINSON, op. cit., p. 129.

22. Ibid., p. 135.

or isolated entity, but that it should assume and fulfill the role assigned to the traditional family.²³ Bishop A. Setele pleaded that, rather than fear the influence of the extended family, efforts should be made to christianise the community of the clan without uprooting its members.²⁴

In their turn, Archbishops B. Yago and J. Zoa praised the positive values of the extended family which are found in a joyful sense of communal life, genuine moral, religious and human support, mutuality, and a strong community spirit. However, they also warned that, like all human realities, the extended family is subject to abuse and must be purified continually from what is evil: undue pressure and interference, manipulation by others, parasitism and exploitation, materialism and corruption, and the unwillingness to assume personal responsibility.²⁵

23. Bishop P.P. DERY, "Christian and Customary Marriage in Ghana", in AFER, 23(1981), pp. 37-39.

24. Bishop A. SETELE, "Catechesis for Marriage and Family Life", in ibid., pp. 54-56.

25. Archbishop B. YAGO, "Marriage and Family in the Modern World", in ibid., pp. 17-19, and Archbishop J.B. ZOA, "The Role of the Extended Family", in ibid., pp. 80-82. Some bishops from Tropical Africa blame modern economic conditions for undermining this family solidarity, see "Les fonctions de la famille chrétienne dans le monde d'aujourd'hui: rapport final de la réunion des évêques du Congo, Centrafrique et du Tchad", in Téléma, 7,2(1981), pp. 71-72.

The extended family, in other words, is not only an integral part of the African life experience, but must be challenged constantly to transcend its own limitations. It is a chosen instrument of personalisation for the individual who develops his personality in community relationships. It follows that it can become the vehicle of grace and evangelisation only to the extent that it proclaims the values of Christian living within the family context. However, as long as Christians remain in a minority, or in as much as they do not live according to the demands of the gospel, the influence of the extended family will remain an ambiguous blessing. It needs a considerable faith-commitment if it is to be, in the words of Bishop A. Setele,

[...] a community open to other families,
[...] strengthening its unity, its stability,

However, M. SINGLETON, "La vie familiale et le christianisme en Afrique", in PMVB, January 1980, p. 30, cautions against a facile romanticism regarding the extended family: "Il suffit de lire les récits des explorateurs de l'Afrique orientale au XIXe siècle pour se rendre compte que la famille ouverte, en supposant qu'elle ait jamais existé, était alors éclatée puisque les parents vendaient leurs enfants et les réduisaient ainsi à l'esclavage, les hommes réclamaient des dédommagements pour le tort causé à leur propriété féminine et les femmes erraient là et là sans but précis." According to him, ibid., "Même si la paix et le progrès introduits par le colonialisme ont pu être jugés ambigus, ils ont eu les meilleurs effets sur la famille ouverte. Les pires excès de l'autoritarisme patriarcal ont été supprimés et certaines des pressions socio-économiques responsables de la conception purement utilitariste de la famille, ont disparu."

and its manner of fulfilling its specific functions. [...] it would not be very difficult to pass from the traditional conception of the family to a Christian one, "to leave father and mother to cleave to one's wife", if conversion was seen as a passage from the tribal clan, preserving its values, to the Christian community.²⁶

2. Marriage as a Pact between Families

The communitarian nature of marriage lies first and foremost within the reality of the extended family because, according to Bishop M.T. Hata, in Africa

[...] the human person is not an isolated, wandering atom, with no constitutive links with other persons or institutions. [...] He lives and is related in solidarity and fraternity to those who are conscious of the same ancestry. [...] Far from being dissolved in the community and from being

²⁶. Bishop A. SETELE, loc. cit., p. 55. In this regard M. SINGLETON, loc. cit., p. 33, argues that the gradual disappearance of the extended family is a well-documented fact and says: "Avant de regretter la transition de la famille ouverte à la famille nucléaire comme si elle signifiait la disparition d'un passé africain authentique, ou bien de l'approuver comme si elle signifiait un progrès vers un avenir chrétien dans lequel le couple sera un élément plus important, il vaudrait peut-être mieux penser qu'elle a été commandée par l'efficacité du modèle nucléaire et par l'inutilité du modèle ouvert, par rapport à certains buts." However, it seems to him that the urban African nuclear family of the future will not be the same as its western predecessor for Africans are "[...] à la recherche d'un autre type de mariage - 'une union affective à partir de laquelle chacun des époux tente de mener une vie complémentaire mais autonome'" which will result in greater equality for women. See also A. SHORTER, op. cit., pp. 178-179.

absorbed by it, the human person, precisely as a member and respected as such, is the basis of community and the element which makes community possible.²⁷

Marriage has pride of place among the values of African society and within it the spouses find self-fulfillment and assume a co-responsibility with regard to the fundamental task of providing for the survival of the group. Since this benefits the whole extended family, its members, both living and dead, have a stake in marriage and are responsible for it. Marriage thus needs more than just the spouses' consent to come into being: since the spouses act as representatives of their respective families, the latter's consent is equally necessary to ensure the success and fruitfulness of their union. It follows that these kinsmen have to become personally involved and that their advice and co-operation is essential to the establishment of marriage.²⁸

27. Bishop M.T. HATA, "African Marriage: Personal and Communitarian", in *AFER*, 23(1981), p. 35. The words of Bishop J. PERROT, "Marriage: A Series of Successive Stages in Community", in *ibid.*, pp. 44-45, are equally pertinent: "While western philosophy is inclined to think of humanity as made up of individuals who are called beyond self to create community, the African approach seems to be the other way round. [...] The tension that exists here is on the part of the individual who has to struggle to go beyond a mere impersonal absorption in the community, to reach his or her own truly personal stature. In the context of marriage, [...] to go beyond the merely communitarian reality towards a truly personal growth, and an interpersonal growth."

28. Bishop M.T. HATA, *loc. cit.*, pp. 36-37.

Because African customary marriage was never seen as a private matter between two individuals, but as an alliance between two families,

[...] the family community was the fundamental element of the African, his basic sphere of action, through which he became integrated with the larger, human community. Without necessarily adopting a familistic attitude, he acted always from within the sphere of the family. In marrying his wife, he accepted responsibility towards another family, and she likewise.²⁹

The communitarian nature of marriage thus emphasises a reciprocal responsibility. The spouses assume obligations, not only towards one another, but also with regard to the extended family, while the latter becomes obliged to be supportive of them. In this way the community is continually built up and strengthened.

Such an attitude towards marriage provides an opportunity for grace, and the Symposium of Episcopal Conferences of Africa and Madagascar (SECAM) has therefore deemed it advisable to highlight both the human and the Christian values of the community dimensions of marriage. These values prevent marriage from becoming too individualistic, highlight the social nature of marriage, protect the couple's stability and help them during the difficult early years

29. B. KISEMBO et al., op. cit., p. 182.

of marriage.³⁰ However, because the gospel also demands a personal facet in marriage, SECAM insists that a delicate balance must be maintained between the spouses' free personal consent and the involvement of their families, between their personal autonomy and family solidarity.³¹

Both the individual and the community need to transcend the ever-present temptation to be so self-seeking as to harm the other. The individual is called to a love that goes beyond self and should not be hemmed in by lineage demands, and yet in his individuality he is fragile and needs the support of the family group. The basic criterion is therefore Christ's call to love and service. This can be very effective in a well balanced family solidarity which respects the personal autonomy of the couple and yet calls forth a reciprocal sense of spiritual, moral and material

30. SECAM, "Recommendations and Conclusions on Christian Family Life and Marriage in Africa Today", in AFER, 23 (1981), p. 371. What follows is a synopsis of SECAM's recommendations regarding the resolution of the tension between the personal and communitarian aspects of Bantu marriage.

31. In this regard, B. KISEMBO et al., op. cit., pp. 28-31, argue that the Church should take the place of the extended family in the urban situation where nuclear families proliferate, whereas Bishop H. KARLEN, "Canonical Form and Traditional Marriage", in AFER, 23(1981), p. 59, suggested at the Synod that basic Christian communities or the parishes should fulfill the role of a spiritual extended family, particularly in the preparation for marriage and the supportiveness called for in times of crisis.

support.³²

3. The Progressive Nature of Marriage

The involvement of the extended family in African marriage accounts for the fact that marriage is progressive.

As A. Shorter explains:

[...] the beginning of marriage is a growing process [...] which may be interrupted if the partners prove incompatible, or if essential conditions, such as fertility, appear not to be present. This interruption is not regarded as divorce or dissolution, but simply as the recognition that a marriage has been attempted but has not come into existence.³³

This does not mean that marriage is undertaken lightly, for not only the families concerned but also the whole local village community share in every stage of the marriage process. People participate actively by giving their approval and advice, by voicing their expectations of the union, and by ensuring that all is done according to the accepted norms. This accompaniment outlasts the wedding and is an important

32. SECAM, loc. cit., pp. 371-372.

33. A. SHORTER, op. cit., p. 183. In an editorial comment in Téléma, 9,2(1983), p. 79, L. BOKA DI MPASŏ points out: "Le mariage est un contrat qui lie deux familles et engage deux individus comme époux: cette conception est universelle en Afrique; mais l'élaboration du mariage par étapes impliquant cohabitation et naissance n'est valable que par endroits."

element in the formation of a stable marital relationship.³⁴

Thus the African bishops at the Synod pleaded for an understanding of this important aspect of their people's experience of marriage: all stages of the process fulfill a specific function and are together constitutive of the gradual establishment of the marriage bond. It is the process as a whole which makes marriage. This allows for the discovery and the removal of possible impediments and culminates in indissolubility. In this way, later questions of validity or invalidity do not arise.³⁵ The process gives the spouses and their families the chance to express publicly and on several occasions the seriousness of their commitment. With the help of the community they can learn

34. B. KISEMBO et al., op. cit., p. 187.

35. Bishop A. KASEBA, "The Marriage Bond as the Result of a Process", in AFER, 23(1981), pp. 40-41.

According to PMVD, "Vie de famille et mariage des chrétiens en Afrique subsaharienne", June 1976, p. 29, the various stages of marriage and their accompanying ceremonies "[...] ont un triple but: rendre le mariage de notoriété publique, l'insérer dans la zone du sacré, insister psychologiquement auprès des nouveaux époux sur certaines nécessités, attitudes ou comportements qui découlent du mariage."

Regarding the indissolubility of traditional marriage, L. BOKA DI MPASI, "Pour une pastorale familiale africaine", in Téléma, 7,2(1981), p. 46, makes the following distinction: "Le mariage coutumier s'accomplit sur deux plans: le lien familial (indissoluble) et le lien conjugal (dissoluble). [...] Il serait donc étranger et abusif de prétendre que l'indissolubilité soit une importation étrangère."

to trust one another and to develop an ever-deepening personal relationship which will enable them to achieve mutual fidelity.³⁶

Nevertheless, this gradual process is no longer the only way in which people get married and thus Bishop C. Obamba told the Synod that he deplored the societal changes which have brought in

[...] various kinds of anarchic individualism and thus sometimes pervert customary marriage into "trial marriage" or free unions without any serious commitment on the part of the two people or of their families.³⁷

The greater independence of the young generation with regard to marriage has contributed to the breakdown of traditional structures and, according to Bishop S. Khoarai, in some places elopement accounts for a very large proportion of all marriages.³⁸

It is interesting to note that an unwillingness to abide by customary structures is equated with a lack of commitment to marriage as such. This has led theologians

36. Bishop J. PERROT, loc. cit., p. 46; Bishop C. OBAMBA, "Marriage in Stages Lived 'in the Lord'", in AFER, 23(1981), pp. 47-49.

37. Bishop C. OBAMBA, loc. cit., p. 48.

38. Bishop S. KHOARAI, "Elopement and Other Problems", in AFER, 23(1981), pp. 93-95.

to conclude that

[...] a fundamental change has taken place in the nature of African customary marriage. [...] in the past the processual aspect of customary marriage applied mainly to proximate marriage preparation, and [...] the whole series of events led up to a clear stage at which these preparations culminated in a definite contract which could not be dissolved. Today, as a result of self-contracted or elopement marriages the preparation is curtailed, if it exists at all, and it is the contract or central moment of the marriage which is drawn out or indefinitely postponed. This development has had the effect of obscuring the true nature and central moment of customary marriage.³⁹

It follows that the importance of the progressive nature of traditional marriage lies in the fact that it not only emphasises personal and communal commitment, but serves also as a preparation for marriage in which mutual love and fidelity mature under the supervision of the community to which constant reference is made.⁴⁰

Once again the social nature of the marriage commitment and the role of the extended family become explicit, which is why the African bishops at the Synod pleaded that

39. B. KISEMBO et al., op. cit., p. 191 (emphasis added). It should be noted that this distortion of the processual nature of marriage has also had the effect of discrediting the traditional system in the eyes of the young generation.

40. Bishop J. PERROT, loc. cit., p. 45.

marriage be not reduced to one sole event. However, the changed perceptions of the younger generation regarding marriage may have made the survival of progressive marriage problematical.

The progressive nature of African marriage has not gone unchallenged on another front. F.J. Urrutia in particular has pointed out that even where successive stages exist, there has to be a point at which people are now recognised as married. He agrees that it is normal that such an important step as marriage should be preceded by a long and even complicated preparation, and

[...] the mutual covenant to be established or already established must certainly progress and grow more and more to the end of the spouses' days. But, if one wishes to be technical, one cannot say that it is the marriage which progresses and grows through so many stages. At the most one can speak of the flourishing of marriage as a state of life resulting from marriage in fieri. But not of this marriage in fieri, of the cause of this state of life, which is the consent of these two people who commit themselves irreversibly and irrevocably for the specific ends of complementarity and mutual perfection in all spheres of their personality.⁴¹

41. F.J. URRUTIA, "La pastorale du mariage", p. 191: "[...] l'alliance mutuelle à établir, ou déjà établie, doit, certes, progresser et grandir de plus en plus jusqu'à la fin des jours du conjoints. Mais, si l'on veut être technique, on ne peut pas dire que c'est le mariage qui progresse et

Therefore, he deplores the fact that the African concept of progressive marriage should have been opposed to the canonical punctual concept, for that is to forget that the latter is a technical and juridical term, distilled after centuries of philosophical, theological and canonical reflection.

This leads him to argue that the African popular concept of progressive marriage does not differ essentially from those popular concepts of other countries, all of which celebrate marriage in a series of successive stages which have a personal, cultural, sociological, legal, or religious function, the totality of which makes up marriage.⁴²

It was perhaps with the resolution of this conflict in mind that SECAM, in its recommendations regarding the

grandit à travers tant d'étapes. Tout au plus on peut parler de croissance du mariage comme état de vie résultant du mariage in fieri. Mais non pas de ce mariage in fieri, de la cause de cet état de vie qui est le consentement de ces deux personnes qui s'engagent irrévocablement et irrévocablement pour des fins spécifiques de complémentarité et de perfectionnement mutuel dans toutes les sphères de leur personnalité [...]"

Commenting on CIC(1983), c. 1057 § 1, L. ORSY, "Matrimonial Consent in the New Code: Glossae on Canons 1057, 1095-1103, 1107", in J, 43(1983), p. 32, states: "[...] when replaced into its historical context, this paragraph makes one precise point: the sacrament of marriage does not come into being through stages, its 'last efficient cause' is not sexual union (copula). It is brought into existence through mutual agreement (consensus). It does not follow that other causes play no part in creating the bond; they do."

42. F.J. URRUTIA, "La pastorale du mariage", pp. 189-190.

progressive nature of marriage, specified that pastors should not be concerned only about the "minimal canonical requirements" for marriage. They should take into account "the actual human step" taken by the spouses and their families, and work out their marriage preparation programmes accordingly so that the different stages should "highlight and protect the seriousness of marriage".⁴³

On the other hand, SECAM recommends that the various Episcopal Conferences should evaluate the dynamic process in the light of the gospel, strive for its celebration in a Christian way, and "find at what exact moment the canonical form should be inserted, in such a way as to eliminate the present dichotomy between the liturgical and the traditional forms" - making use of the different stages in order to work out a programme for marriage preparation.⁴⁴

Regarding such preparation for marriage which SECAM wishes to have adapted and aligned with the reality of progressive marriage, A. Shorter points out that

While courtship in Africa is perfectly adequate in a situation where the first years of marriage constitute a trial, it is not at all adequate for a marriage that is ex-

43. SECAM, loc. cit., pp. 372-373.

44. Ibid., p. 373.

pected to be absolute and indissoluble from the beginning.⁴⁵

[...] Therefore] it is clear that a much more thorough preparation must be given to young people before marriage. Above all, there must be an opportunity for them to understand each other's psychology and get to know one another well. Attention must be diverted from the wedding and focused on Christian married life itself. As far as possible, preparation for marriage should involve not only the couple but also other members of the extended family.⁴⁶

The African bishops at the Synod thus pleaded for parents and elders to be given an important part in such a preparation for marriage. They also argued that lay married couples and the whole Christian community should be involved.⁴⁷ In addition to this, SECAM reaffirmed that the family is the proper sphere for marriage preparation and that nobody can replace the parents' involvement. SECAM also urged that Christian formation should concentrate on the essentials of marriage rather than its secondary aspects.⁴⁸

45. A. SHORTER, op. cit., p. 191.

46. Ibid., p. 193.

47. Archbishop J. CHIONA, "Pre-Marriage and Marriage Catechesis", in AFER, 23(1981), pp. 49-51; Bishop S. NAIDOO, "The Need for an Obligatory, Graded Preparation for Marriage", in ibid., pp. 51-54; Bishop A. SETELE, loc. cit., pp. 54-56.

48. SECAM, loc. cit., pp. 374-375.

4. Bridewealth as the Symbolic Conclusion of Marriage

The progressive nature of marriage comes to its conclusion in the exchange of bridewealth which publicly symbolises and juridically establishes an irrevocable link between two families.⁴⁹ Acceptance of bridewealth, together with the handing over of the bride, signifies the parents' final consent and also serves as proof that a marriage was concluded.⁵⁰ Since marital obligations can never be fully discharged, just as gratitude can never be exhausted, bridewealth can also be seen as a promise of future reciprocal assistance and support.⁵¹

There is a considerable shift in the traditional understanding of the meaning of bridewealth. A. Shorter points out that, like all human institutions subject to rapid social change,

Bridewealth at the present time is certainly subject to abuse, and the cause of many evils. Its original character was a process of real or symbolic gift exchange, legalizing a marriage, legitimizing the children of the union,

49. V. MULAGO, "Le mariage traditionnel Bantu", in RCA, 26(1971), pp. 57-60.

50. A.B.T. BYARUHANGA-AKIIKI, "Aspects of Bantu Marriage", in AFER, 20(1978), p. 265.

51. M. LEGRAIN, loc. cit., pp. 129-131.

indemnifying the bride's family, stabilizing the marriage to a limited extent, and propitiating the lineage spirits. Above all, it had the function of giving cohesion to the extended family. Today the abuse of bride-wealth actually operates against the extended family, disrupting it, and serving the profit of individuals within the family at the expense of others.⁵²

That this is the present situation was reaffirmed at the Synod where Bishop J.B. Gahamanyi claimed that, due to the introduction of a money economy, bridewealth has become a mere business transaction, undermining a person's right to choose a marriage partner freely.⁵³ The wife is put into an inferior position to her husband because, although bride-wealth is not a price paid for her, the husband nevertheless feels that he owns her.⁵⁴ The Bishop was convinced that the Church's unwillingness to bless marriages which had

52. A. SHORTER, op. cit., pp. 171-172.

53. Bishop J.B. GAHAMANYI, "Two problems: Bridewealth and Polygamy", in AFER, 23(1981), pp. 104-105. What follows is the gist of his argument. Two decades ago, J.B. ZOA (now Archbishop), "The Problem of the Bride Price", in AFER, 4 (1962), pp. 173-181, found this already to be the most fundamental objection to the custom.

54. Although often disclaimed as exaggerated or untrue, such a claim almost invariably arises during a serious argument between the spouses. There is a feeling that by paying bridewealth the husband acquires full control over his wife and need brook no opposition of any kind: his spouse is bound to him, but since she did not transfer bridewealth to the husband's family, he remains as free as before.

not yet been concluded according to custom has created the impression that there is a connection between bridewealth and the sacrament of marriage. The Church should therefore speedily correct this unfortunate notion in the minds of the people.

Bishop Gahamanyi's request to separate bridewealth and the sacrament of marriage touches upon a sensitive issue. In many African countries both Church and government have tried unsuccessfully to reduce or abolish the bridewealth custom. However, since the people see bridewealth as an essential element for a valid marriage, the best approach now would seem to be to initiate a re-education programme in the value and meaning of the custom, although human cupidity may prove too strong for it to be successful.⁵⁵ SECAM thus recommends that Episcopal Conferences study both the values which bridewealth was meant to protect and signify, as well

55. The deciding factor for the amount of bridewealth is not the ability of the young man to pay but the education, beauty, virginity and other attributes of the bride. At the present time, the going rate in the urban areas of South Africa can be anything from R 1000 to R 2000, although the young man might be earning in the region of R 300 to R 400 per month. In the words of L. BOKA DI MPASI, *loc. cit.*, p. 42: "De plus en plus la dot devient tantôt la cause véritable, tantôt le prétexte pour retarder indéfiniment ou même bouter la conclusion du mariage sans pour autant différer la venue des enfants ni dédaigner une forme quelconque de co-habitation."

as the abuses which now mar the custom.⁵⁶

5. The Husband-Wife Relationship

As indicated in chapter one, the husband-wife relationship cannot be dissociated from a host of other relationships, for although the wife is incorporated into her husband's family group, she maintains strong and intimate relationships with her father and brothers.⁵⁷ Prevailing cultural values also influence the husband-wife relationship, for in a male-dominated society where there are established sex-roles and where men are seen as sources of wisdom and control, there can be no question of equality in marriage.⁵⁸

A. Duteil describes the wife's position as follows:

56. SECAM, loc. cit., p. 375.

57. B. KISEMBO et al., op. cit., p. 99.

58. L. BOKA DI MPASI, loc. cit., p. 45, highlights the traumatic nature of the change needed in husband-wife relationships as follows: "La coutume, développée en milieu villageois intégrée, répartit les activités et rôles sociaux selon le sexe et les classes d'âges. Dans cette structure, le mari est époux plutôt que compagnon de la femme, pas plus que les parents ne sont compagnons de leurs enfants. [...] On mesure ainsi l'importance de la révolution introduite par la forme du couple où mari et femme deviennent compagnons, avec des activités communes. Selon la coutume, les contacts époux-épouses ont plus valeur de rite que d'exhibition affective. La communion et les échanges touchent au sacré. Le couple en voie d'émancipation est forcément condamné à se 'déréaliser' ou, en quelque sorte, se séculariser."

• It has been said [...] that the wife was treated as an inferior. I prefer to be more nuanced: what seems true to me is that she was put in second place. But one can walk behind someone while remaining his equal [...] by protecting the wife like a child, she has come to be considered as such.⁵⁹

Although they remain essentially representatives of their own families, both husband and wife gradually assume a greater autonomy over their own affairs within the husband's family. It is in parenthood that they achieve their full social status as adults and therefore marriage is seen primarily as a source of life.⁶⁰ This understanding of the purpose of marriage has given rise to various attitudes towards polygamy, fertility and sexuality, all of which have an important bearing on the husband-wife relationship

59. A. DUTEIL, "Quelle parole pour quelle famille?", in *Spiritus*, 20(1979), pp. 396-397: "On a dit [...] que la femme était traitée en inférieure. Je serais plus nuancé: ce qui me semble vrai, c'est qu'elle était mise en seconde position. Mais on peut marcher derrière quelqu'un en lui étant cependant égal. [...] à force de protéger la femme comme une enfant, on en est venu à la considérer comme telle."

It may thus be true to say that the inequality between the spouses pertains more to their public roles and their acts which have social repercussions. B. KISEMBO et al., *op. cit.*, p. 101, put it as follows: "Out of doors under public scrutiny the wife may be like an adult child. Indoors, however, she is mistress over her household. To her husband she is an indispensable partner and supporter. She has a say at every stage of the affairs of the family. She can moderate or even overrule the husband's decisions."

60. V. MULAGO, *loc. cit.*, p. 55.

and have to be scrutinised in the light of the gospel.

a. Attitudes towards Polygamy

Polygamy in traditional Africa had a social function, helping to stabilise marriage as an institution and to achieve its integration within society.⁶¹ It provided for the sexual needs of married men while controlling promiscuity, allowed for many children without overburdening individual women, made it possible to rectify childlessness in marriage without recourse to divorce, increased the prosperity and security of the extended family and the individuals belonging to it, created multiple alliances and thus strengthened the bonds of society.⁶² It stood at the service of the extended family and provided status and a secure haven for women whose main function was perceived as being to provide children for their husband's lineage.⁶³ Since

61. E. HILLMAN, Polygamy Reconsidered: African Plural Marriage and the Christian Churches, New York, Orbis, 1975, x-242 p., presents a very complete treatment of polygamy, and seems to be supported by M. LEGRAIN, loc. cit., pp. 136-144. However, B. KISEMBO et al., op. cit., pp. 63-80; A. SHORTER, op. cit., pp. 172-177; F.J. URRUTIA, "La pastorale du mariage", pp. 200-213; and P. ZOUNGRANA, "A propos de la polygamie en Afrique", in Téléma, 9,2(1983), pp. 33-46, would disagree that polygamy could under certain circumstances be an acceptable form of marriage for Christians.

62. B. KISEMBO et al., op. cit., pp. 63-64.

63. A. SHORTER, op. cit., p. 173.

women could not fill independent positions in a male-dominated society, they themselves also appreciated its socio-economic benefits.⁶⁴

Although in actual fact fewer than 25% of all men practiced polygamy, most of the unions were at least potentially polygamous.⁶⁵ The fear of childlessness encouraged the institution of the sororate, while the levirate also provided for the security and procreative needs of widows.⁶⁶

However, the modern manifestations of polygamy have a different function.⁶⁷ They tend to be the result of social instability and the relaxation of family support structures due to rapid urbanisation, coupled with motives of sexual exploitation, pride, the will to dominate, or the desire to exhibit wealth.⁶⁸ It can take the form of successive polygamy, which entails the effective desertion of the first

64. B. KISEMBO et al., op. cit., p. 72.

65. According to A.B.T. BYARUHANGA-ÁKIIKI, loc. cit., pp. 364-366, polygamy was traditionally associated with those who possessed a special status based on age, wealth, or leadership, and was even taken for proof of good administrative ability.

66. B. KISEMBO et al., op. cit., pp. 78-80. ?

67. Ibid., pp. 74-78.

68. P. ZOUNGRANA, loc. cit., p. 35.

wife without going through divorce proceedings; mono-polygamy, in which the husband openly forces his wife to accept a co-wife; or clandestine polygamy, where the man of means maintains a second establishment unknown to his wife.⁶⁹ But whereas traditional polygamy was a means to avoid divorce, its modern manifestations encourage it.⁷⁰

Such mutations in the causes and forms of polygamy, which increasingly seem to be based upon male selfishness, are the reason that

On all sides there are complaints about the double moral standard, according to which married African men demand sexual freedom, while denying it to their wives. Male dominance demands that the sexual activity of women be strictly controlled and regulated by men [...]. The polygamous mentality demands that a wife be absolutely faithful to her husband, but it allows the husband to court an unlimited number of other women with a view to marriage. The husband's extra-marital interests can always be justified in this way. The fact, however, is that the polygamous mentality is out of place when simultaneous polygamy is not feasible and when women are demanding a greater degree of married companionship. An outmoded polygamous mentality is one of the causes of successive and clandestine polygamy.⁷¹

69. B. KISEMBO et al., op. cit., pp. 74-76.

70. Ibid., p. 76.

71. Ibid., p. 77 (emphasis added).

There is some evidence that suggests that Christian men remain open to polygamy and prefer it to divorce, while women show a greater repugnance to it.⁷² For this reason the African bishops at the Synod were at pains to condemn strongly all forms of sexual exploitation and infidelity, especially in the form of successive or clandestine polygamy.⁷³ Particularly Archbishop F.A. Arinze of Nigeria asked for an end to the ambivalent discussion of theologians which obscures clarity of doctrine, and for a clear condemnation of polygamy as opposed to the Christian ideal of marriage.⁷⁴ Archbishop R. Sarah of Guinea argued that even where it serves the function of overcoming childlessness, polygamy represents a worldly rather than a Christian solution to the problem, reduces the woman to the status of an instrument for reproduction, and deprives her of personal dignity. He thus concludes that the Church must energetically push back polygamy and return to the ancient African ideal of monogamy.⁷⁵

72. Ibid., pp. 77-78.

73. Bishop M.K. FRANCIS, "Marriage Problems and the Local Churches", in AFER, 23(1981), pp. 96-97.

74. Archbishop F.A. ARINZE, "Polygamy and Childlessness", in ibid., pp. 97-99.

75. Archbishop R. SARAH, "Polygamy", in ibid., pp. 99-102. Some recent comments on polygamy in Africa suggest that it is not truly in character with Bantu marriage as it

On the other hand, Bishop P. Itēka of Tanzania pleads for a more nuanced approach to polygamy, on the grounds that it does not necessarily destroy all family values. He feels that a distinction should be made between traditional polygamy and that of baptised Christians who use it as a solution to personal problems. For this reason it would be better to allow each region to find the appropriate evangelical solutions, formulated within the context of the community in which the problem is found.⁷⁶

was "in the beginning", and that a "genuine" African tradition rejects polygamy. This is partially based on a study of ancient proverbs which are uniformly negative in their criticism of polygamy. According to L. BOKA DI MPASI, *loc. cit.*, p. 46, "[...] le mariage traditionnel est fondamentalement monogamique. Comme dans la Bible, il ne devient polygamique que par tolérance, pour compenser des failles apparues dans l'union initialement monogamique. D'ou, en certains cas, un couple monogamique stérile qui se veut indissoluble recourra à la polygamie pour se procurer des enfants. Mais ce n'est là qu'une sorte de suppléance, souvent consentie par la première épouse elle-même, qui garde une position privilégiée au sein de l'équipe de femmes du polygame."

In an editorial comment in *Téléma*, 9,2(1983), p. 79, the same author says categorically: "La polygamie est admise partout comme exception et non comme règle ni obligation" and again in *ibid.*, p. 66, he claims even more strongly: "[...] le mariage monogamique n'est pas une invention chrétienne. En Afrique, la monogamie est la règle, la polygamie l'exception. C'est de là qu'il faut partir pour aboutir à des conclusions pastorales vraies, saines, et justes."

⁷⁶. Bishop P. ITEKA, "Polygamy and the Local Church", in *AFER*, 23(1981), pp. 106-108. This statement was not made at the Synod, but *AFER* included it in the same issue.

While supporting the need for such a nuanced approach, Bishop J. Njenga of Kenya is nevertheless opposed to pastoral compromises. Speaking to the Congregation for the Evangelisation of Peoples, he states categorically:

The Gospel is for those who are monogamous, not for the polygamists who would not respect minutely the conditions we have just enumerated. The Church must continue to defend monogamous marriage, notwithstanding the pastoral problems which its practice entails.⁷⁷

In much the same vein SECAM stressed that extreme care must be exercised to avoid the impression that the Church accepts either polygamy or divorce, even though it may not abandon those who find themselves in that position.⁷⁸

The most complete episcopal statement on the matter comes from Cardinal P. Zoungana of Upper Volta (now Bourkina Faso) in an intervention before the Congregation for the Evangelisation of Peoples. In his talk he deplores some

77. Bishop J. NJENGA, "Autour du mariage traditionnel ou coutumier", in *Téléma*, 9,2(1983), p. 32: "L'Evangile est pour les monogames, non pour les polygames qui ne respecteraient pas à la lettre les conditions que nous venons d'énumérer. L'Eglise doit continuer à défendre le mariage monogamique, en dépit des problèmes pastoraux qu'il soulève dans la pratique." This intervention was made in October, 1981, as a contribution to Propaganda's study session on the role of the family in the missionary context.

78. SECAM, *loc. cit.*, p. 375.

recent writings on polygamy, and insists that any pastoral approach must clearly reflect that monogamy is not merely one alternative form of marriage but a divine command and a Christian ideal.⁷⁹ He makes the important observation that monogamy is fundamentally an attitude of mind and presupposes a conversion of the heart, leading to a restoration of the primitive institution of marriage as found in the book of Genesis. Therefore he finds it regrettable that

After several generations of Christianity, too many men, even having only one spouse, seem to have what may be called a mentality, a polygamous heart, in the sense that the wife appears to them more like a possession and a means rather than a person. Therefore our pastoral care should above all engender an appreciation of and a desire for a true monogamy, that is to say the desire for a reciprocal interpersonal love based on mutual respect, a desire for a "helpmeet like unto him" (adiutorium simile sibi). Without this profound desire, the law of monogamy can only appear as a "prohibition", a very difficult restriction.⁸⁰

79. P. ZOUNGRANA, loc. cit., p. 42. This intervention was made at the same study week as that of Bishop J. Njenga.

80. Ibid., p. 43: "Après plusieurs générations de christianisme, trop d'hommes, même n'ayant qu'une épouse, n'ont-ils pas ce que l'on pourrait appeler une mentalité, un coeur polygamique, en ce sens que la femme leur apparaît plus comme 'un avoir' et un moyen que comme une personne. Aussi bien, notre pastorale doit-elle avant tout susciter l'estime et le désir d'une vraie monogamie, c'est-à-dire le désir d'un amour interpersonnel réciproque dans le respect mutuel, le désir d'une aide assortie (adjutorium simile sibi). Sans ce désir profond, la loi de la monogamie ne peut apparaître que comme un 'interdit', une restriction très lourde à porter" (emphasis added).

The Cardinal pleads that extreme care should be taken when teaching the ends of marriage. Since African Christians see marriage primarily as an instrument for the transmission of life, their overwhelming desire for children has led to the very institution of polygamy. Therefore, he concludes, what must be emphasised are

[...] the other two essential ends sought in Christian marriage: community of life and the sacrament of the union of Christ and the Church; ends, the first of which St. Thomas already knew to be difficult to reconcile with polygamy, while the second is completely incompatible with it.⁸¹

b. Attitudes towards Fertility and Sexuality

Although African marriage may not be exclusively fertility-oriented, it is readily admitted that this is its fundamental value.⁸² For this reason the wife's value is determined primarily in terms of her procreative ability, and she finds recognition above all as the mother of her husband's children.⁸³ Her closeness with her own male

81. Ibid.: "Il faut insister sur les deux autres fins essentielles poursuivies par le mariage chrétien, communauté de vie et sacrement de l'union du Christ et de l'Eglise, fins dont S. Thomas faisait déjà remarquer qu'elles sont: difficilement compatible avec la polygamie, pour la première, et totalement impossible, pour la seconde."

82. V. MULAGO, loc. cit., p. 55.

83. In the words of L. BOKA DI MPASI, loc. cit., p. 41: "[...] au coeur des angoisses de l'existence, l'enfant

relatives rather than her husband emphasises that she is "on loan", as it were, and has come to serve her husband's group. Thus there is little room for such values as confidence and love, loyalty and sharing, in the relationship with her husband.⁸⁴

However, as seen in chapter one, the desire to participate in the transmission of life has to some extent become detached from marriage. Whereas sexuality, as distinct from childbearing, was allowed outside marriage, nowadays the two usually go together. And in a society where social welfare services are still embryonic, there is a felt need for old-age security. The intense desire for children answers to this need, for they are a guarantee that one will be looked after in one's declining years, mourned at death, assured a proper funeral, and remembered after death.⁸⁵

Thus, in the midst of social change and the disintegration

reste un trésor incomparable, un droit inaliénable, un devoir pressant, une sécurité suprême. Dans une structure familiale intégrée, la relation père-enfants, mère-enfants est tenue pour prioritaire. Elle paraît même éclipser la relation époux-épouse." In South Africa, the husband often ceases to refer to his wife by name after the birth of the first child. She becomes "mma-N", or "mother of N".

84. A.I. BERGLUND, "The Biblical Concepts of Man-Woman relations", in T.D. VERRYIN, op. cit., pp. 2-8.

85. L. BOKA DI MPASI, loc. cit., pp. 37-41.

of the extended family, unmarried women today feel totally justified in making use of their God-given fertility while they can, and thus to provide for their future needs.⁸⁶

Although there are biblical references indicating a cultural bias towards a fertility-oriented marital relationship, such an understanding is not exhaustive of the teaching of scripture.⁸⁷ Within the Old Testament, progeny was important, not only to ensure the survival of the Chosen

86. *Ibid.*, pp. 39-40. The author describes two incidents involving unmarried mothers actively involved in parish activities. Neither could accept that having several children, each from a different father, could be considered morally wrong. In the words of the second, *ibid.*, p. 40: "[...] comment pourrai-je dans mon existence concrète justifier le refus de transmettre la vie et mon propre suicide social qu'entraîne le rejet de la progéniture?"

According to M. SINGLETON, "L'objectif sexuel en Afrique", in *Spiritus*, 19(1978), pp. 341-353, sexuality in Africa is neither an obsession nor something to be shunned at all costs. Rather, it is one of the more pleasurable natural functions which every normal person is expected to exercise throughout his life, but not necessarily within marriage. He concludes on p. 352: "[...] les sociétés africaines que j'ai fréquentées ne m'ont pas paru en premier lieu approcher de près ou de loin, une sexualité supposée objective, absolue et universelle, mais tout simplement pour suivre des pratiques sexuelles qui leur convenaient, plus ou moins, de par le poids de leurs passés et de leur visées présentes."

This pragmatic approach was vividly illustrated in a personal interview during the course of my pastoral work, in which I was told: "Father, we Africans marry for children but we have our pleasure outside."

87. A.I. BERGLUND, *loc. cit.*, pp. 1-24; H. PRETORIUS, "Childlessness", in T.D. VERRYIN, *op. cit.*, pp. 108-128.

People, but also to make it possible for the promised Messiah to be born. Therefore barrenness was seen as an affliction, a punishment from God, and posterity was assured through the institutions of polygamy and the levirate.⁸⁸

However, even the creation narratives stress the equality of man and woman, and place the emphasis on their relationship. It is the marriage itself which is blessed and commanded to be fruitful, while the exclusiveness of the spouses' union requires mutual belonging and total commitment.⁸⁹

The New Testament perspective is different since the all-important birth has taken place and survival is no longer purely to be seen on the physical level. This makes the interpersonal relationship in marriage still more important, for regeneration in Christ now takes precedence over physical generation. Parenthood now becomes a gift from God rather than a physical and social duty, while generation itself embraces both a spiritual and a social parenthood.⁹⁰

88. H. PRETORIUS, loc. cit., pp. 111-115; T. MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 38-39.

89. Genesis 1:27-28, 2:23-25; see also the commentary of A.I. BERGLUND, loc. cit., pp. 13-23.

90. H. PRETORIUS, loc. cit., pp. 120-128.

While St. Paul seems to insist on the subjection of the wife, and in this sense corresponds to the African male-dominated vision of marriage, his insight is based on the necessity for the man to love in a self-giving and self-sacrificing way.⁹¹ The husband's obligation is to reflect Christ's saving love, and to precede his wife and family on the way of salvation. Only by loving in this salvific way does he earn his wife's respect and co-operation.⁹² His role is therefore one of constant service and self-denial, a leadership based on trust rather than a domination based on fear. Thus a truly biblical view of marriage should accentuate the fact that

The woman is first and foremost a partner in marriage. The biblical ideal of the relationships of husband and wife is not so much equality, however, as mutuality, sharing at every level of life. The quality of input may differ, and does indeed differ, but what is essential is that each is given the opportunity to be himself or herself.⁹³

Each of the partners in marriage has value as a human person. Like the man, the woman has value and importance in her own right and not necessarily in her children. Neither the man nor the woman is an instrument for an end, be it genitor or childbearer. The

91. Ephesians 5:21-33.

92. Ibid., vv. 23-24.

93. B. KISEMBO et al., op. cit., p. 107.

value of man and woman in marriage cannot be subordinated to any other purpose.⁹⁴

The African bishops at the Synod asked that married people be helped with a "solid and evangelical doctrine" by which to learn better what their role is in the proclamation of the gospel.⁹⁵ But the emphasis fell almost exclusively on the position of husband and wife within the extended family and its influence upon them, rather than focusing on the fundamental relationship which should exist between them. Similarly, SECAM made only oblique references to the spouses' mutual relationship while speaking of fecundity. Thus, according to SECAM, the couple's vocation is to love one another beyond the demands of lineage or the need to continue the family line,⁹⁶ while the gospel reveals the value of a spiritual fecundity which lies in the total gift of self and is expressed in mutual help, support, and the couple's enrichment.⁹⁷ Where physical sterility is experienced, the couple is reminded that physical generation cannot be

94. Ibid., p. 108; for the elements which form part of a truly biblical view of the husband-wife relationship, see A.I. BERGLUND, loc. cit., p. 23.

95. Archbishop B. YAGO, loc. cit., p. 19.

96. SECAM, loc. cit., p. 371.

97. Ibid., pp. 373-374.



considered an absolute any more. The Christian should accept such a disappointment, see it as an opportunity to share in the sufferings of Christ, and replace the joys of physical parenthood with social and spiritual commitments.⁹⁸

Concluding this survey of present Catholic theological thinking regarding the essential characteristics of Bantu marriage, it should be noted that it has opted for an inductive approach. This was clearly demonstrated at the Synod on the role of the Christian family, where the African bishops preferred to start with the anthropological situation.⁹⁹ Their approach wished to avoid static formulations, leaving room for the development of doctrine. Instead, making their teaching historical and experiential, they looked at reality from the perspective of the people, allowing pastoral concerns to guide their doctrinal exposition.

B. THE PERSPECTIVES OF THE MAGISTERIUM

The inductive approach to a theology of Bantu marriage leads to some ambiguities, for the human values exhibited

98. *Ibid.*, p. 374.

99. J.A. GROOTAERS and J.A. SELLING, *op. cit.*, pp. 88-89. Cardinal J. Ratzinger summarised the interventions of all the bishops in his *Relatio Altera* of October 6, 1980, in which he describes the inductive and deductive methodological approaches which divided the Synod Fathers. For a commentary, see *ibid.*, pp. 106-110.

in it as a secular reality are not necessarily in harmony with the gospel and might not easily yield to it. On the other hand, the deductive method of theology emphasises the revealed word of God and the Church's prophetic role in the world.¹⁰⁰ It stresses that human structures can be transformed only to the extent that the individual Christian uses his insights and commitments to penetrate his own culture.

In his apostolic exhortation, Familiaris Consortio, Pope John Paul II opts for the deductive approach to theology, and he addresses the concerns of the African bishops basing his arguments on God's plan for the family.¹⁰¹ This document is amplified by the Charter of the Rights of the Family, which strives to formulate the fundamental rights of the natural institution of the family.¹⁰² These two

100. Ibid., pp. 106-107.

101. JOHN PAUL II, Apostolic Exhortation, De familiae christianae muneribus in mundo huius temporis (Familiaris Consortio), November 22, 1981, in AAS, 74(1982), pp. 81-191. References to this document will appear in the text as FC, followed by the paragraph number.

102. Charter of the Rights of the Family, Presented by the Holy See to all Persons, Institutions and Authorities Concerned with the Mission of the Family in Today's World, Vatican City, Vatican Polyglot Press, October 22, 1983, 17 p.

This Charter was requested by the 1980 Synod of Bishops, see "The Synod Propositions", in The Tablet, 235 (1981), proposition 42, pp. 166-167, and promised by Pope

recent documents reveal the position of the Magisterium on the essential characteristics of Bantu marriage.

1. The Extended Family

Familiaris Consortio does not explicitly mention the extended family, although it contains allusions to a wider family community. It acknowledges that marriage sets up a complex of interpersonal relationships through which each person is introduced to the human community (FC, 15). The conjugal community is the foundation of the family community which consists of parents and children, brothers and sisters, relatives and other members of the household (FC, 21). While some cultures grant the elderly an important role in the family, they have to respect the new family's autonomy (FC, 27). At the same time, although the couple form the first community in their mutual self-giving (FC, 19), they are helped by a mutual exchange of presence and help on the part of other Christian families (FC, 69).

The Charter of the Rights of the Family makes the point that the family's primary meaning lies in the fact

John Paul II in FC, 46. References to the Charter will appear in the text as CRF, followed either by a letter, denoting a clause in the Preamble, or a number, indicating an Article of the Charter itself.

that it is a community of love and solidarity, whose primary function is to transmit and foster cultural, ethical, social, spiritual, and religious values (CRF, E). It is a place where different generations come together to help one another grow in wisdom and social responsibility (CRF, F). The extended family system is valuable and should be assisted to fulfill its function of mutual assistance and solidarity, but in its turn it should respect the rights of the nuclear family and the personal dignity of its members (CRF, 6c).

The Magisterium's perspective on the extended family is thus similar to that of the African bishops and theologians: as a secular reality, the extended family contains much that is good but it is subject to abuse. The tension that exists between family collectivism and personal responsibility needs to be resolved in the light of faith. How this can be done is not explained, but the extended family need not necessarily be undermined. The difficulties will clearly be increased in a situation where Catholics find themselves in a minority.

2. Marriage as a Pact between Families

Familiaris Consortio makes no mention of marriage as anything else but a mutual self-giving, a personal covenant between the spouses. The aims and interests of the two

families, as well as the view that marriage is a pact between two families, are seemingly left aside. However, since the family is a realisation of the ecclesial community (FC, 21), it is also by nature and vocation open to other families (FC, 42) and cannot be concerned only with itself or be satisfied with a purely individualistic ethic (FC, 44). It has a mission which embraces not only its own members but others as well (FC, 49-54) and should be moved by a sense of justice and concern for society (FC, 64).

The Charter of the Rights of the Family downplays the juridical, social and economic functions of the family, for it considers these functions to be secondary (CRF, E). Families which guide their children's decisions regarding the choice of partner in marriage should therefore refrain from exerting such pressures as would be prejudicial to the children's freedom of choice (CRF, 2a).

The Magisterium's perspective on marriage as an alliance between two families is less favourable than it is regarding the extended family. Where such alliances are sought for juridical, social, or economic advantage, they degrade the value of marriage and the family. The primary purpose of marriage is not to be part of a master plan for the benefit of some, but to create a community of love and

solidarity. People are thus not to be exploited for material or social gain.

3. The Progressive Nature of Marriage

Familiaris Consortio allows for the inclusion into the liturgical celebration, of elements specific to each culture which express the human and religious significance of the marriage contract (FC, 67).¹⁰³ However, it is only after the preparation for marriage, which is highlighted by the engagement and the liturgical celebration, that the couple progressively begins to actualise the values of marriage (FC, 65), because the gift of Christ accompanies them for the duration of their married life (FC, 56).

Rapid social change necessitates the involvement of the Church in marriage preparation, which means that the families concerned, other Christian families, and the whole ecclesial community should participate actively in such a marriage "catechumenate" (FC, 66). All couples need this preparation which, if successful, should help overcome such

103. This permission was subsequently incorporated into the 1983 Code of Canon Law, see CIC(1983), c. 1120: "Episcoporum conferentia exarare potest ritum proprium matrimonii, a Sancta Sede recognoscendum, congruentem locorum et populorum usibus ad spiritum christianum aptatis, firma tamen lege ut assistens matrimonio praesens requirat manifestationem consensus contrahentium eamque recipiat."

aberrations as trial marriages and free unions, both of which distort the meaning of marriage as a total, exclusive and unlimited gift of self (FC, 80-81).

The Magisterium thus maintains the punctual view of marriage, in the sense that intercourse or cohabitation before the liturgical exchange of marital consent is prohibited. It considers a proper marriage preparation, in which the whole Christian community participates, as the best means by which to further the Christian understanding of marriage. Only the total gift of self in a mutual and exclusive relationship can be reconciled with the Christian view of marriage.

4. The Husband-Wife Relationship

According to Familiaris Consortio, the community between husband and wife is so dependent upon the equal dignity and responsibility of the spouses, that the moral criterion for the authenticity of their relationship is the measure in which they can achieve their personal fulfillment in genuine self-giving (FC, 22). Therefore, an attitude which considers human beings as things, as objects for pleasure or instruments for the promotion of self-interest, is fundamentally unchristian (FC, 24). Such an attitude can lead to discrimination against childless

wives, or widows (FC, 24), and is responsible for the institution of polygamy, an institution which is directly contrary to God's plan in that it is contrary to the equal personal dignity of men and women (FC, 19).

The unity which exists in the conjugal community is characterised by mutual fidelity. Fidelity is both an ideal for the future and a present demand, and is made possible through the power of Christ (FC, 20). The husband's role is one of leadership, based upon the recognition of and respect for his wife's equal dignity. His love for her is primarily modelled on Christ's self-giving love for the Church. It creates a genuine friendship and true partnership between them, shunning all mistaken ideas of male superiority or prerogatives which are humiliating to women and detrimental to the development of healthy family relationships (FC, 25).

Although the fundamental task of the family is to serve life, and children are the fruit and sign of the full mutual self-giving of the spouses, procreation does not exhaust the fruitfulness of conjugal love (FC, 28). The spouses' communion of life is valuable, even when procreation is not possible, for physical sterility opens up the way for a different kind of dedication to the life of the

human person (FC, 14). Adoption or fostering are ways in which a barren couple remain fully engaged in the service of God's family (FC, 41).

Human sexuality can become personalised only where it expresses a genuine self-giving (FC, 37), for the conjugal act has a unitive and a procreative meaning, both of which together express total self-giving (FC, 32). The virtue of chastity thus remains an indispensable element of conjugal love, for it defends it against the dangers of selfishness and aggressiveness (FC, 33).

The Magisterium's perspective on the conjugal relationship is thus firmly rooted in the equality of the spouses, both of whom share an equal personal value and dignity. Since they are equally bound to an exclusive relationship which demands total commitment and mutual self-giving, neither is to be exploited by the other as a means to an end. The sexuality of the spouses is thus to be a conscious expression of their love for each other, not only in its procreative dimension for the generation of offspring, but also in its unitive dimension characterised by mutual fidelity.

Familiaris Consortio finally envisages the need for the development of doctrine regarding marriage and the family. This is to take place in the mutual dialogue

between Christian families, their pastors, theologians, experts in family matters, and the Magisterium. Together they are to contribute to the correct understanding of the faith and the promotion of a legitimate pluralism within it (FC, 73).

CANONICAL OBSERVATIONS

Both African theologians and the Magisterium find much that is of value in Bantu marriage, but they approach it differently. The former presume that African marriage is the normal and acceptable way for a Christian to enter matrimony, and that he should observe those essential characteristics which tradition demands. These must be judged in the light of the gospel, and the Christian should be made aware that some of them present ambiguous values when measured against the demands of faith.

Thus, for instance, the extended family can become despotic; family involvement in the forging of marriage alliances can destroy freedom of choice; circumventing the progressive nature of marriage can disguise a refusal to commit oneself; bridewealth can be turned into a business transaction, or turn the wife into a chattel; and male dominance can become a double standard, masking a selfish desire to exploit and control.

The basic approach of the African episcopate and its theologians thus reflects a willingness to accept the risks of ambiguity and uncertainty that inculturation entails. On the other hand, the Magisterium presents the demands of the gospel as paramount. Since it is the individual who accepts conversion, he is challenged to a personal response and in a way becomes the agent of cultural change. His commitment is expected to transform and purify the social and cultural structures of his environment. This pits him against the traditional views of the majority of his relatives and contemporaries. The basic virtue of this approach lies in the fact that it presents the faith as a clear challenge, and at the same time guides the individual in his response to it.

In the light of these theological reflections on Bantu marriage, we could state that the following elements are canonically significant, since they have the potential to affect the individual's marital commitment adversely:

1. The African episcopate presupposes that Catholics will enter marriage according to the customs and traditions of their people. They have thus opted for an inductive approach to theology, emphasising what is acceptable and purifying what is incompatible with the faith.

2. This can lead to confusion, for the values in Bantu marriage are ambiguous in themselves and have to be clarified by Christian catechesis. Where theological teaching lacks unanimity, or where an individual's catechetical training is deficient, a proper understanding of the essentials of Christian marriage cannot be presumed.

3. Particularly spouses who are first or second generation Catholics or who live in a predominantly non-Catholic or non-Christian society are more likely to be influenced adversely by the cultural aspirations of those around them.

4. Those cultural factors which seem to be incompatible with the gospel are those which offend against the essential and doctrinal elements of marriage: its unity, indissolubility and sacramentality. Among these would be the polygamous mentality which undermines marital self-giving and fidelity; the absolutising of fertility which reinforces the polygamous mentality; the idea of a growing indissolubility only after a lengthy process; and the use of bridewealth as an instrument of control, leaving the husband free while binding his spouse.

5. Where traditional ceremonies are short-circuited, there is a general presumption of a lack of commitment, since it results in a cohabitation which is considered

either a trial marriage or concubinage.

6. The complementarity of the spouses does not take away the fact that they enjoy the same dignity and equal rights regarding the marriage. Therefore, anyone with ideas of male superiority or prerogatives which consider women as objects of pleasure or instruments for the promotion of self-interest cannot be said to enter Christian marriage.

CHAPTER THREE

FIDELITY AS AN ESSENTIAL ELEMENT OF MARRIAGE

The previous chapters were devoted to an examination of the cultural aspects of Bantu marriage in South Africa and the extent to which Catholics adhere to them; in order to see how this affects their commitment to marital fidelity. However, an enquiry into the canonical significance of fidelity must even go beyond the moral imperatives of the gospel, for fidelity is also required as an essential element of marriage on the juridical level.

Historically, the understanding of the juridical value of fidelity has undergone some modifications and refinements. The most important of these concerns the shift away from fidelity seen as an obligation of the married state to the requirement that the spouses must be willing to enter an exclusive relationship at the time of the wedding. Whether or not the spouse remains faithful in marriage is juridically less important than are his intentions at the exchange of the wedding vows. Thus, at the present time, a firm intention to exclude, limit or restrict a spouse's right to an exclusive relationship is considered sufficient to result in the canonical invalidity of the marriage.

Similarly, recent canonical studies and decisions have concluded that prevailing social attitudes exert a

significant influence on an individual's personal commitment. Should such attitudes be contrary to the canonical requirements and be so rooted in the individual that they affect his will, they could also cause the marriage to be canonically invalid.

The purpose of this chapter is thus to establish precisely what are the canonical requirements regarding marital fidelity. We will begin by recalling the doctrine of the tria bona in general and of the bonum fidei in particular, follow with its legal formulation in the 1917 Code of Canon Law and the various jurisprudential distinctions made in its application, touch upon recent developments in Rotal jurisprudence, and conclude with an analysis of the present canonical legislation.

A. THE DOCTRINE OF THE TRIA BONA

Historically, the Church's ethical, theological and juridical doctrine of marriage evolved mainly within the framework of three conceptual and partially coinciding structures: the three goods (tria bona) of marriage, its inner structure (the essential properties of unity and indissolubility), and its finality (the two hierarchically ordered ends of procreation and mutual support).¹

According to U. Navarrete, considering marriage within the framework of the tria bona is best suited for the development of a pastoral doctrine of marriage, for it enables one to reflect upon those marital values which touch mankind in its daily existence. On the other hand, the notions of the inner structure of marriage or of its finality are more theoretical and fall outside mankind's daily concerns.²

This led the early Church Fathers to emphasise the fact that the real value of marriage and of sexuality lay in service to the good of offspring, family, and society, rather than in the husband-wife relationship accentuated by some of the Gnostics.³ In his turn, St. Augustine defended the legitimacy of marriage against the Manicheans and Pelagians, and became the first to speak of its three intrinsic goods: the bonum prolis, the bonum fidei, and the bonum sacramenti.⁴ Thus he writes:

1. U. NAVARRETE, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), p. 357. Hereafter cited as "Structura iuridica".

2. Ibid., pp. 359-360.

3. D.E. FELLHAUER, "The consortium omnis vitae as a Juridical Element of Marriage", in SC, 13(1979), pp. 18-19. Hereafter cited as "The consortium vitae". For a historical overview of this period, see T. MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 80-122.

4. U. NAVARRETE, "Structura iuridica", pp. 554-556.

These are all goods, on account of which marriage is good: offspring, fidelity, Sacrament.⁵

This is threefold: fidelity, offspring, sacrament. Fidelity means that one refrains from sexual contact outside the marriage bond; offspring, that [the child] is lovingly received, tenderly nurtured, religiously brought up; the sacrament, that the marriage is not broken and the abandoned spouse marry another, not even for the sake of having children. This can be considered the rule of marriage, by which natural fecundity is adorned and the baseness of sexual disorder is restrained.⁶

Although St. Augustine's theology of marriage rests on his synthesis of the tria bona which are intrinsic to marriage because of its very nature and God's design,⁷ he acknowledges the presence of other values in marriage.⁸

For an evaluation of St Augustine's thought, see D.E. FELLHAUER, "The consortium vitae", pp. 20-25, and for a historical overview, see T. MACKIN, op. cit., pp. 127-144.

5. St. AUGUSTINE, De bono conjugali, c. 24, n. 32, in PL, 40, 394: "Haec omnia bona sunt, propter quae nuptiae bonae sunt; proles, fides, Sacramentum." Translation as in D.E. FELLHAUER, "The consortium vitae", p. 20.

6. ID., De Genesi ad litteram, lib. 9, c. 7, n. 12, in PL, 34, 397: "Hoc autem tripartitum est: fides, proles, sacramentum. In fide attenditur ne praeter vinculum conjugale, cum altera vel altero concubatur: in prole, ut amanter suscipiatur, benigne nutriatur, religiose educetur: in sacramento autem, ut conjugum non separetur, et dimissus aut dimissa nec causa prolis alteri conjugatur. Haec est tanquam regula nuptiarum, qua vel naturae decoratur fecunditas, vel incontinentiae regitur pravitas." Translation as in D.E. FELLHAUER, "The consortium vitae", p. 20.

7. U. NAVARRETE, "Structura iuridica", pp. 554-555.

These include conjugal companionship, conjugal friendship, mutual help, and a remedy for weakness, and are to some extent subsumed into the tria bona.⁹ Thus, while not discussing the structure and finality of marriage as such, he includes them implicitly in his treatment of the bona.¹⁰

Medieval authors followed St. Augustine's lead in viewing the tria bona as the excusing causes for marriage and the benefits which render it virtuous.¹¹ However, the canonists gradually changed the character of the bona, seeing their presence or absence as a measure of the validity of marriage.¹² Any condition placed against the substance of marriage as exemplified in any of the tria bona, was considered to render the union invalid.¹³ In this way,

8. For a discussion of these supplementary values, see T. MACKIN, op. cit., pp. 139-142.

9. For a list of these values with bibliographical references and citations from St. Augustine, see D.E. FELLHAUER, "The consortium vitae", pp. 23-24.

10. U. NAVARRETE, "Structura iuridica", pp. 554-555.

11. St. THOMAS AQUINAS, Summa theologiae, supplementum, q. 49, a. 1: "[...] haec sunt bona quae matrimonium excusant, et honestum reddunt."

12. GRATIAN, Decretum, c. 6, C. 32, q. 2.

13. GREGORY IX, c. 7, X, De conditionibus, IV, 5.

the bona became identified with the essence of marriage quoad obligationes,¹⁴ and in order to enter marriage validly, the spouses were juridically obliged to include them in their marital consent.¹⁵

Canonists thus slowly narrowed down the juridical content of marriage, in an effort to establish what was essential to it. Jurisprudence developed the distinctions between the essential, the integrating, and the accidental elements of the bona, and came to the conclusion that

The essential good is understood as that minimum which the contracting parties must intend, even implicitly, to elicit matrimonial consent sufficient for the establishment of marriage.¹⁶

14. T. SANCHEZ, De sancto matrimonii sacramento disputationum tomi tres, lib. 5, disp. 9, n. 2: "Praetermittendum est, quamvis tria bona matrimonii non sint de eius essentia, quoad executionem; esse tamen de essentia quoad obligationem; est enim de essentia, ut coniuges obligentur ad vitam perpetuam et individuum, et ad fidem sibi servandam; reddendo debitum, negandoque corpus alii; prolemque non impediendam, sed educandam, si Deus eam dederit."

15. Ibid.; n. 3: "Unde conditiones, et pacta, per quae coniuges ad aliquid his contrarium obligantur, tollunt matrimonii substantiam, et debitum consensum."

16. U. NAVARRETE, "Structura iuridica", p. 560: "Bonum essenziale intelligitur id minimum quod contrahentes intendere debent, saltem implicite, ut consensum matrimonium naturaliter sufficientem ad causandum matrimonium, eliciant."

However, this trend of juridical limitation has coincided with a theological movement which, drawing upon Christian reflection and the social sciences, has led to an enriching of the understanding of the tria bona and the development of a fuller theology of marriage.¹⁷ Specially worthy of mention is the encyclical Casti Connubii of Pope Pius XI which presents a vision of the bona as constitutive of marriage as a community of life, rather than as an institution ordained solely for the procreation and nurturing of children.¹⁸ Vatican II's Gaudium et Spes continued the process of deepening the understanding of the bona, particularly the bonum fidei and the bonum sacramenti, without determining the essence of each.¹⁹ This has led to the subsequent recognition of a fourth bonum, the bonum coniugum.²⁰

17. Ibid., p. 562.

18. PIUS XI, Encyclical Letter, Casti Connubii, December 31, 1930, in AAS, 20(1930), pp. 548-549. Hereafter cited as Casti Connubii.

19. CONCILIUM VATICANUM II, Constitutio Pastoralis de Ecclesia in mundo huius temporis (Gaudium et Spes), December 7, 1965, in AAS, 58(1966), n. 48, pp. 1067-1069. Hereafter cited as Gaudium et Spes. For a discussion of this matter, see U. NAVARRETE, "Structura iuridica", pp. 564-578.

20. The expression bonum coniugum finally became part of the Church's marriage legislation when it was incorporated into the 1983 Code of Canon Law, see CIC(1983), c. 1055 § 1: "Matrimoniale foedus [...] indole sua naturali ad bonum coniugum [...] ordinatum [...]"

Both Casti Connubii and Gaudium et Spes had canonical implications, but whereas the time was not yet ripe for the juridical acceptance of Casti Connubii's treatment of the bona,²¹ Gaudium et Spes' description of marriage as a covenant has had a much greater effect on the development of jurisprudence. This has led to the expansion of the scope of the bona, and subsequently to significant juridical consequences.²²

B. THE BONUM FIDEI

The early Church Fathers energetically opposed the mores of society which granted the husband greater sexual

21. D.E. FELLHAUER, "The consortium vitae", p. 31.

22. According to R.J. SANSON, "Jurisprudence for Marriage: Based on Doctrine", in SC, 10(1976), p. 13, "The emphasis [of jurisprudence based on the tria bona] was on minimal consent to narrowly defined duties. In contrast, covenant implies a broader concept of capacity for these responsibilities, if less clearly determinate juridically. It gives a more complete and accurate description of the relationship, from which law can extract minimal consent and capacity. [...] With this definition [of GS, 48-50], the three goods of St. Augustine can be expanded: 1. children: the right to the intimate sexual union with an openness to fecundity. The capacity to be responsible parents [...]. 2. fidelity: the right to a marital love special to this exclusive and lifelong union. The possibility of loving and being loved as the 'only one'. 3. sacrament: that Christian love which signifies and partakes of that unity and fruitful love which exists between Christ and his Bride, the Church. The capacity, for life, of all the essentials of marriage."

freedom in marriage.²³ They were conscious of the fact that fidelity in marriage is a demand which was given a new significance in Christianity.²⁴ building on the insights of the Old Testament which taught that God had made marriage both one and indissoluble,²⁵ the New Testament proclaims the absolute equality of the spouses in marriage, both of whom are equally bound to a reciprocal obligation of loyalty and sexual exclusivity.²⁶ As a sign of Christ's union with the Church, marital fidelity is at the same time law and ideal, and demands an equal commitment from both spouses.²⁷

St. Augustine was the first to call marital fidelity

23. For a selection of texts from the early Church Fathers, see T.P. DOYLE, The Understanding of the Concept "bonum fidei" in the Church's Canonical Tradition, Canon Law Studies, no. 496, Washington, D.C., Catholic University of America, 1978, pp. 178-346; E. MAGNIN, "Adultère", in DDC, vol. 1, coll. 221-250.

24. E. MAGNIN, loc. cit., p. 225.

25. For an exegesis of Old Testament texts, see T.P. DOYLE, op. cit., pp. 95-140; T. MACKIN, op. cit., pp. 38-52; J. HARVEY, "Situation de la fidélité dans l'Ancien Testament", in SOCIÉTÉ CANADIENNE DE THÉOLOGIE, Le divorce, Montréal, Fides, pp. 129-137.

26. For an exegesis of New Testament texts, see T.P. DOYLE, op. cit., pp. 141-175; T. MACKIN, op. cit., pp. 52-66.

27. A.M. AMBROZIC, "Indissolubility of Marriage in the New Testament: Law or Ideal?", in SC, 6(1972), pp. 281-287.

the bonum fidei,²⁸ and this has subsequently become part of the juridical vocabulary of canonists. For him, the bonum fidei is rooted in faith in Christ,²⁹ and is closely related to the other two bona, for together they realise the total good of marriage.³⁰ It is not static, merely excluding sexual relations with another, but dynamic: besides entailing the obligation to render the conjugal debt to one's spouse, it also preserves friendship between them and is manifested in a constant and generous mutual concern.³¹ Thus, more than just preserving sexual rights and obligations, it denotes total mutual dedication: it is the sustaining element of marriage, and the means by which marriage comes to completion.³²

Both St. Augustine and St. Thomas Aquinas hold that

28. For a list of texts from St. Augustine, see R. RODRIGO, "Considerationes quaedam de interpretatione exclusionis 'boni fidei'", in ME, 103(1978), p. 449.

29. For an analysis of the meaning of the bonum fidei in the thought of St. Augustine, see T.P. DOYLE, op. cit., pp. 229-273; E. JOMBART, "Biens du mariage", in DDC, vol. 2, coll. 842-848.

30. T.P. DOYLE, op. cit., p. 269.

31. Ibid., p. 268.

32. ID., "A New Look at the bonum fidei", in SC, 12(1978), p. 9.

unity is implied in the bonum fidei, but the two notions are not co-extensive.³³ the unity of marriage is violated by a plurality of spouses, while the bonum fidei is violated by adultery.³⁴ However, they do not consider unity a separate good in itself, although there is some overlapping between it and the bonum fidei.³⁵

For St. Thomas, the tria bona are not of equal juridical importance: the bonum sacramenti, considered in itself, denotes the substance of the sacrament of marriage and is therefore essential to it; the bonum prolis and the bonum fidei, considered in themselves, pertain to the use of marriage and are therefore non-essential, but, considered in their principle as the intention of having children or as the obligation to fidelity, they are essential to marriage.³⁶

33. St. AUGUSTINE, De nuptiis et concupiscentia, lib. 1, c. 9, n. 10, in PL, 44, 419. St. Thomas treats of the bonum fidei in the Supplementum, q. 49, whereas he discusses the unity of marriage in q. 65.

34. St. AUGUSTINE, De bono conjugali, c. 4, n. 4, in PL, 40, 376; St. THOMAS, Supplementum, q. 49, a. 2 (as contrasted with q. 65, a. 1).

35. U. NAVARRETE, "Structura iuridica", pp. 555-559.

36. St. THOMAS, Supplementum, q. 43, a. 3: "[...] indivisibilitas, quam sacramentum importat, pertinet ad ipsum matrimonium secundum se, quia ex hoc ipso quod per pactiorem conjugalem sui potestatem sibi invicem in perpetuum conjuges tradunt, sequitur quod separari non possunt: et inde est quod matrimonium nunquam invenitur sine inseparabilitate;

The understanding of fidelity as a juridical element of marriage thus developed in two stages: initially it was seen as an obligation of the married state (matrimonium in facto esse), but theologians and canonists gradually refined it to denote the obligations arising from the right to fidelity exchanged in marital consent (matrimonium in fieri).³⁷ In this way, the perpetual and exclusive right and corresponding duty to those acts proper to conjugal life became designated as the only essential juridical content of the bonum fidei, whereas the exclusion of other elements covered by the term neither vitiated consent nor rendered the marriage null.³⁸

invenitur autem sine fide et prole, quia esse rei non dependet ab usu suo. [...] Alio modo possunt considerari fides et proles secundum quod sunt in suis principiis, ut pro prole accipiatur intentio prolis, et pro fide debitum servandi fidem, sine quibus etiam matrimonium esse non potest, quia haec in matrimonio ex ipsa pactione conjugali causantur; ita quod si aliquid contrarium his exprimeretur in consensu, qui matrimonium facit, non esset verum matrimonium."

This understanding of the relative importance of the bona was carried through to this century, as seen in F.M. CAPPELLO, Tractatus canonico-moralis de sacramentis, vol. 3: De matrimonio, 4th ed., Taurini, 1939, n. 16, p. 15: "[...] bonum sacramenti est semper de essentia matrimonii; bonum prolis et fidei, contra, est de essentia in suis principiis, videlicet quoad existentiam et obligationem in se consideratum, non autem quoad executionem."

37. T.P. DOYLE, loc. cit., p. 10.

38. U. NAVARRETE, "Structura iuridica", p. 561. In a subsequent article, "De iure ad vitae communionem: observationes ad novum schema canonis 1086 § 2", in Periodica,

Nevertheless, Casti Connubii did amplify the content of the bonum fidei, and linked it to marital love.³⁹ It considered the mutual perfection of the spouses essential to Christian marriage, and centred it upon the bonum fidei. Thus we read:

This mutual inward moulding of husband and wife, this determined effort to perfect each other, can in a very real sense, as the Roman Catechism teaches, be said to be the chief reason and purpose of matrimony, provided matrimony be looked at not in the restricted sense as instituted for the proper conception and education of the child, but more widely as the blending of life as a whole and the mutual interchange and sharing thereof.⁴⁰

66(1977), p. 256, the author further refines the concept as follows: "Bonum fidei essenziale includit, praeter unitatem vinculi, ius et relativam obligationem: a) ad debitum coniugalem exigendum et praestandum; et b) ad mutuam fidelitatem seu ad exclusivitatem quod attinet ad actus proprios vitae coniugalis. Primum ius et relativa obligatio includitur etiam in bono essentiali prolis; at dum in bono prolis ius ad actus conjugales consideratur uti ius ad actum naturaliter necessarium ad prolem generandam, in bono fidei idem ius ad actus conjugales consideratur potius uti ius ad sexualitatem modo humano et exclusivo exercendam." Hereafter cited as "De iure".

39. PIUS XI, Casti Connubii, pp. 547-550.

40. Ibid., pp. 548-549: "Haec mutua coniugum interior conformatio, hoc assiduum sese invicem perficiendi studium, verissima quadam ratione, ut docet Catechismus Romanus, etiam primaria matrimonii causa et ratio dici potest, si tamen matrimonium non pressius ut institutum ad prolem rite procreandam educandamque, sed latius ut totius vitae communio, consuetudo, societas accipiatur." Translation as in Five Great Encyclicals, New York, Paulist Press, 1957, p. 84.

These, then, are the elements which compose the blessing of conjugal faith: unity, chastity, charity, honorable noble obedience, which are at the same time an enumeration of the benefits which are bestowed on husband and wife in their married state, benefits by which the peace, the dignity and the happiness of matrimony are securely preserved and fostered.⁴¹

Gaudium et Spes also centres the bonum fidei in the communion of life established by marriage, and thus expands the narrow juridical content of the concept.⁴² The communion of life is directly related to the bodily and spiritual union of the spouses, and brings the bonum fidei to perfection.⁴³ There is nothing in the text of the Constitution as such which indicates that this intimate union of persons in mutual help and service constitutes an essential element of the bonum fidei.⁴⁴ However, jurisprudence has in fact broadened the scope of the juridical content of

41. Ibid., p. 550: "Haec sunt igitur, quae bono fidei comprehenduntur: unitas, castitas, caritas, honesta nobilisque oboedientia; quae, quot sunt nomina, tot sunt coniugum atque coniugii emolumenta, quibus pax, dignitas, felicitas matrimonii in tuto collocentur atque promoveantur." Translation as in Five Great Encyclicals, p. 85.

42. CONCILIIUM VATICANUM II, Gaudium et Spes, n. 48, pp. 1067-1069. For a discussion on this question, see U. NAVARRETE, "Structura iuridica", pp. 569-572.

43. U. NAVARRETE, "De iure", p. 269.

44. ID., "Structura iuridica", p. 572.

the bonum fidei by relying on the insights of Gaudium et Spes and the contribution of the human sciences.⁴⁵

1. Pre-Conciliar Jurisprudence on the bonum fidei

The 1917 Code of Canon Law did not express its marriage legislation in terms of the tria bona, deeming the conceptual structures of the ends and of the properties of marriage more suited to a scientific analysis of its moral and juridical demands.⁴⁶ However, although the legislator presented the law in an abstract and general fashion, the judges had to apply it in a concrete manner to existential, real-life situations.⁴⁷ Jurisprudence thus fell back on

45. ID., "De iure", p. 270: "Hodie 'ius ad vitae communionem' (vel 'ius ad mutuum adiutorium' sense biblico) aestimatur uti essenziale. Ideoque posset matrimonium nullum declarare ob exclusum bonum fidei si hoc ius excluderetur actu positivo voluntatis, haud secus ac nullum declaratur ob hoc caput, si exclusa est unitas matrimonii, aut ius-obligatio ad reddendum debitum vel servandam fidelitatem coniugalem."

46. ID., "Structura iuridica", p. 360. However, according to O. DI JORIO, "Causae nullitatis matrimonii secundum novissimam iurisprudentiam rotalem", in V. FAGIOLO (ed.), Annali di dottrina e giurisprudenza canonica, vol. 2: Il dolo nel consenso matrimoniale, Città del Vaticano, Libreria Editrice Vaticana, 1972, p. 235, "[...] sancti doctoris praevalens studium fuisse sine dubio theologicum et ethicum, quamobrem non sine magna cautela deductiones iuridicas trahendas esse; tripartitum bonum denique, quamvis littera non recenseatur, Codicis formulationibus subesse."

47. P. HAYOIT, "La présomption du canon 1086", in Etudes de droit et d'histoire: mélanges Mgr H. Wagnon, Leuven, Bibliothèque Centrale de l'U.C.L., 1976, pp. 566, 570.

the tria bona in determining the content of marital consent, and the grounds upon which to base marriage nullity judgments.⁴⁸ A person's marriage could thus be declared null because of defective consent if he had intentionally excluded any of the bona from it.

Compared to the other two bona, however, Rotal jurisprudence has dealt with far fewer bonum fidei cases, and has issued even less affirmative decisions of nullity under this heading.⁴⁹ This situation has arisen due to several factors which we will now consider: the blurring of the distinction between the unity of marriage and the bonum fidei; the hardening of the distinction between ius and usus iuris; the insistence on a prevailing intention to marry according to the mind of the Church; and the requirement of a positive act of the will for the exclusion of the bona.

48. U. NAVARRETE, "Structura iuridica", p. 361.

49. Up to the end of 1973, the 65 published volumes of Rotal decisions showed that the Rota had processed 6969 matrimonial cases, of which only 263 were dealt with under the heading of exclusion of the bonum fidei, either as sole heading or in conjunction with other alleged grounds. Taking the decade of 1964-1973 as a sample of recent jurisprudence, the statistics show that of the 2302 cases processed, only 130 were dealt with under this heading. Of these 130 cases, 62 received affirmative judgments, 32 of which under the sole bonum fidei heading. For a full list of cases, 1962-1973, see Appendix II.

a. The Identification of Unity and the bonum fidei

St. Thomas was careful to maintain the distinction between the unity of marriage and the bonum fidei, and the 1917 Code indicated this same separation by dealing with the two concepts in different canons.⁵⁰ However, Cardinal P. Gasparri seems to have been the first canonist to identify the two notions, and his position influenced Rotal jurisprudence subsequent to the Code.⁵¹

Thus the second decision based on the exclusion of the bonum fidei, coram Jullien on November 13, 1925, expressly identifies unity and fidelity.⁵² This was followed by

50. Unity is dealt with in those canons which mention the essential properties of marriage, see CIC(1917), c. 1013 § 2: "Essentiales matrimonii proprietates sunt unitas ac indissolubilitas [...]", and c. 1086 § 2: "At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit", while the bonum fidei is implied in c. 1081 § 2: "Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem."

51. P. GASPARRI, Tractatus canonicus de matrimonio, 1892, p. 122: "Unitatem dicunt bonum fidei seu fidelitatis, quod importat precipue, ut pars, matrimonio legitime prius non soluto, non praesumat contrahere novum matrimonium, neque cum alia persona rem habeat, sed suis officiis conjugilibus fideliter satisfaciat."

52. SRR Dec., 17(1925), c. JULLIEN, November 13, 1925, p. 173: "Quae distinctiones [...] applicantur matrimonii fini primario, seu bono prolis, et unitati, seu bono fidei [...]."

several other similar decisions,⁵³ and led to the conclusion that the bonum fidei is excluded only where either the unity of marriage is excluded, or where the contractant gives the right to the body simultaneously to the spouse and to others.⁵⁴

However, most Rotal decisions were reluctant to accept that a person could be so depraved as to grant both a spouse and a third party equal rights over the body.⁵⁵ It was considered so unlikely, that in practice jurisprudence concluded that it could happen only in very exceptional circumstances or in cases of polygamy. Thus the identification of the bonum fidei with the unity of marriage sharply narrowed the scope of this heading, and affirmative

Unitas (nempe ut sit una unius) seu fides, est fidelitas
'per quam homo ad suam accedit et non ad aliam.'

53. Ibid., 22(1930), c. QUATTROCOLO, May 20, 1930, p. 284; ibid., 33(1941), c. CANESTRI, July 15, 1941, p. 622; ibid., 39(1947), c. WYNEN, December 18, 1947, p. 589; ibid., 51(1959), c. BONET, May 11, 1959, p. 252.

54. For an example of this view, see ibid., 39(1947), c. WYNEN, December 18, 1947, p. 589: "Sane quoad bonum fidei tunc tantum matrimonium dirimitur si quis, positivo voluntatis actu in contrahendo, unitatem matrimonii excludit [...]. Id accedit si quis alicui tertiae personae in celebrando matrimonium copiam sui corporis facere, intendit, respectivum ius ei tradendo."

55. Ibid., 31(1939), c. ID., April 29, 1939, p. 255: "Distinctio inter legitimam unionem conjugalem et pravum commercium cum tertia persona tam firmiter in mentibus hominum christianorum, utcumque morum perditorum, residet, ut confusio conceptuum quoad ipsum ius conjugale admitti nequeat."

decisions tended to be limited to those cases where the spouse had entered marriage with a polygamous intent.⁵⁶

Nevertheless, there is no lack of Rotal decisions in which the exclusion of the bonum fidei is perceived as the reservation of the right to commit adultery.⁵⁷ Some

56. Ibid., 31(1939), c. GRAZIOLI, February 23, 1939, p. 117; ibid., 43(1951), c. FELICI, January 24, 1951, p. 51; ibid., 57(1965), c. ROGERS, December 20, 1965, p. 967. The decision c. Rogers is representative of this line of reasoning when it says: "[...] ius enim tunc tantum nota exclusivatis privatur, cum nupturiens intendit ius in suum corpus ad actus conjugales cum pluribus ex aequo disperituri. Quod quam rarissime contingit, ut nemo non videt, eo quod per ipsum actum contrahendi quis sibi selegit compartem ab omnibus aliis distinctam, nisi agatur de casu prorsus extraordinario, vel matrimonium contrahatur in locis ubi vi et institutum polygamiae vel polyandriae."

It should be noted, however, that according to A.M. ABATE, Il matrimonio nell'attuale legislazione canonica, 2nd ed. rev., 1981, p. 63, "Pertanto le nozze sono permesse anche fra una cattolica e un pagano il quale pensa di poter essere 'futuro poligamo', senza però una positiva intenzione di volerlo essere. Né in questo caso, 'il missionario è tenuto a interrogare l'uomo sulla sua volontà in merito a una futura poligamia.' L'elemento che crea il matrimonio è la volontà positiva, concepita ed esistente di fatto nella celebrazione del matrimonio, non quella futura, ipotetica, eventuale." He bases his remarks on a document not available to us, but cited in ibid., footnote 19: "S.C.S. Of., 6 febbraio 1952, Prot. 1068/1950, al Vicario Apostolico di Lawangwa, il quale domandava: 'a) Se il matrimonio di una cattolica con un pagano, futuro poligamo, possa permettersi; b) se lo sposo debba essere interrogato esplicitamente circa i suoi propositi poligamici.' R. 'Attentis adiunctis non tenetur missionarius interrogare virum de voluntate eius relate ad futuram polygamiam.'"

57. Ibid., 31(1939), c. GRAZIOLI, February 23, 1939, p. 113; ibid., 42(1950), c. STAFFA, January 13, 1950, p. 13; ibid., 43(1951), c. FIDECICCHI, May 22, 1951, p. 412;

decisions also investigate whether the contractant gave another the right to the body and thus retained a lover uti uxorem, but they are all generally preoccupied with the distinction between ius and usus iuris, without dealing with the various aspects of the bonum fidei as such.⁵⁸

The decision coram Mattioli on October 30, 1953, is one of the earliest decisions to study the bonum fidei in depth.⁵⁹ Without expressly discussing the distinction between unity and the bonum fidei, he enumerated the various ways in which the bonum fidei can be excluded:

[...] the exclusive right is undoubtedly damaged, that is to say, excluded when:

- a. some limitation contrary to the obligation of fidelity is imposed on the consent;
- b. the intention is made of not entering marriage except under a certain condition, namely that one not be restricted from having sex with others;
- c. a positive obligation is contracted with a third party;
- d. the right of not observing fidelity is reserved.

ibid., 46(1954), c. BRENNAN, January 13, 1954, p. 26; ibid., c. FIDECICCHI, March 9, 1954, p. 203; ibid., c. BRENNAN, June 28, 1954, p. 521; ibid., 52(1960), c. FILIPIAK, May 1, 1960, p. 196.

58. Ibid., 42(1950), c. WYNEN, June 17, 1950, p. 383; ibid., 45(1953), c. FIDECICCHI, November 24, 1953, pp. 695-697.

59. Ibid., 45(1953), c. MATTIOLI, October 30, 1953, pp. 640-653.

For the exclusion of the bonum fidei it is not necessary that one harbours the intention to marry one's accomplice at a favourable time, but it is sufficient to decide by a positive act to continue having intercourse with the spouse and a third party.⁶⁰

In other words, the bonum fidei can be excluded directly, if it is restricted in any way by limitation or condition in view of an extra-marital relationship with one or more specific persons, or by the refusal to assume the obligation of fidelity in view of a relationship with persons still unknown. It can also be excluded indirectly by denying the unity of marriage.

The point received further clarification in a decision coram De Jorio on October 30, 1963, where he argued that it is possible for a person to exclude the unity of marriage and yet pledge fidelity to two or more women. Therefore, the distinction between the two notions maintained

60. Ibid., p. 642: "[...] hoc exclusivum ius indubitanter laeditur seu excluditur, quando: a) aliqua limitatio apponitur consensui, quae sit contraria debito fidei servandae; b) intentio proditur se non aliter obligandi in contrahendo, nisi cum restrictione: i.e. excluso onere se aliis non commiscendi; c) positiva obligatio contrahitur cum tertio rem habendi; d) facultas reservatur non observandi fidem. Nec, ut bonum fidei exclusum habeatur, necesse est ut quis intentionem foveat ducendi, tempore propitio, fornicationis socium; sed satis est ut, una simul cum coniuge, et tertium, ad concumbendum, retinere positivo actu decernat." Translation as in L.G. WRENN, Decisions, 2nd ed. rev., Washington, D.C., CLSA, 1983, p. 155, except for the last paragraph.

in the Code should be respected: the exclusion of the bonum fidei harms the exclusivity of the marital relationship (c. 1081 § 2), and not necessarily the unity of marriage (c. 1086 § 2).⁶¹

b. The Distinction between ius and usus iuris

The scholastic view that the bonum fidei is essential to marriage only as a right and obligation given at the time of the matrimonium in fieri, rather than its execution for the duration of the marriage, lies at the heart of one of the most difficult and disputed distinctions made in Rotal jurisprudence regarding the right to fidelity in marriage.⁶² The object of this right is determined in c. 1081 § 2, as the "exclusive and perpetual right over the body, for acts which are of themselves suitable for the generation of

61. Ibid., 55(1963), c. DE JORIO, October 30, 1963, p. 717: "[...] potest excludere unitatem, et insimul sese obligare ad servandam fidem, utique duabus seu tribus, seu aliquibus determinatis feminis. Itaque censem nullitatem ob exclusum bonum fidei cogendam esse, non ex praescripto can. 1086 § 2, conl. cum can. 1013 § 2, sed canonis 1081 § 2 [...]"

62. For a representative selection of sentences based on this distinction, see ibid., 39(1947), c. FIDE-CICCHI, January 14, 1947, p. 22; ibid., 40(1948), c. WYNEN, November 25, 1948, p. 420; ibid., 41(1949), c. CAIAZZO, April 25, 1949, p. 186; ibid., 42(1950), c. STAFFA, January 13, 1950, p. 13; ibid., 43(1951), c. PASQUAZI, January 16, 1951, p. 38; ibid., 44(1952), c. FILIPIAK, March 21, 1952, p. 173.

children."⁶³ Its exclusivity is both positive and negative, in that one gives this right to the spouse and denies it to all others.⁶⁴ But consent is given to the right to acts and not necessarily to the acts themselves, since marriage can exist even when the right to sexual activity is not used.⁶⁵ This makes it possible for a person to grant this right to the spouse while yet proposing to violate it, or conversely, to assume the obligation of fidelity while yet intending not to fulfill it.⁶⁶

The distinction between the will to assume the obligation and the will not to fulfill the obligation assumed has led to the presumption in Rotal jurisprudence that not fidelity but only its exercise is excluded in bonum fidei.

63. For the Latin text, see footnote 50.

64. SRR unpublished decision, case 66/62, c. EWERS, June 27, 1962: "[...] fidei bonum [...] in mutua fidelitate consistit quam utraque pars servare tenetur sive positive, quatenus sui corporis usum coniugii tribuere debet, sive negative, quatenus eundem usum nulli alii potest concedere [...]", as cited by W.J. TOBIN, "The bonum fidei in Recent Rotal Jurisprudence", in J, 25(1965), p. 409.

"SRR unpublished decision" is used throughout to denote those Rotal decisions which have not (yet) been published in extenso in the official collection but have been cited or have appeared in canonical reviews, or are available from other sources.

65. St. THOMAS, Supplementum, q. 49, a. 3.

66. SRR Dec., 55(1963), c. EWERS, June 8, 1963, p. 460: "Inde, non sufficit contrahentem sibi proponere compartis ius laedere et fovere in vita coniugali pravas cum tertia persona consuetudines: violare enim legitimi coniugis ius, idem non est compartem hoc iure privare."

cases.⁶⁷ Thus the will to commit adultery does not invalidate marriage,⁶⁸ unless adultery is expressly reserved as a right,⁶⁹ or unless there is a refusal to concede the exclusive right to fidelity or to assume the obligation of exclusivity.⁷⁰ The desire to retain a lover does not invalidate,⁷¹ unless this third party is granted a right over the body.⁷²

However, this distinction has not gone unchallenged, both in the Rota and by other canonists.⁷³ Thus, in his

67. A.M. ARENA, "Consenso matrimoniale e giurisprudenza evolutiva nel tribunale della Sacra Romana Rota", in ME, 105(1980), p. 498. Hereafter cited as "Consensus matrimoniale".

68. SRR Dec., 22(1930), c. QUATTROCOLO, May 20, 1930, p. 284.

69. Ibid., 41(1949), c. STAFFA, August 5, 1949, p. 461: "Actus positivus voluntatis, quo contrahens sibi reservat libertatem adulterandi, seipsum reicit obligationem ipsam ad fidem coniugalem, sive ad tempus sive in perpetuum eliciatur, matrimonium irritat, quia consensum limitat seu ipsum excludit"; ibid., 39(1947), c. FIDECICCHI, June 10, 1947, p. 358.

70. Ibid., 36(1944), c. WYNEN, July 31, 1944, p. 570.

71. Ibid., 24(1932), c. MASSIMI, January 27, 1932, p. 36; ibid., 31(1939), c. WYNEN, April 29, 1939, p. 254; ibid., 32(1940), c. ID., November 23, 1940, p. 838.

72. Ibid., 45(1953), c. MATTIOLI, October 30, 1953, p. 641.

73. H. FLATTEN, "Gilt bei c. 1086 § 2 heute noch die Unterscheidung von Nichtverpflichtungswillen und Nichterfullungswillen?", in OAK, 13(1962), pp. 257-280; G. OESTERLE, "Animadversiones in sententiam SRR, diei 23 februarii, 1951, coram Staffa", in IDE, 62(1951), pp. 730-750.

decision of October 30, 1963, De Jorio maintains that the distinction does not reflect the mind of St. Thomas, who only wished to differentiate between act and intention. Furthermore, the distinction is not useful to discover the truth in bonum fidei cases, since even the contractants do not know whether they excluded the obligation of fidelity or only its fulfillment.⁷⁴ Some years later, De Jorio remarked that the distinction is psychologically improbable, even if it may be logical and comprehensible in law. Therefore, based on ordinary human experience, he concludes that the general presumption should be that whosoever does not wish to fulfill an obligation is not normally inclined to bind himself to it.⁷⁵

74. SRR Deç., 55(1963), c. DE JORIO, October 30, 1963, p. 718: "[...] censemus distinctionem inter intentionem non sese obligandi et non implendi fuisse alienam a mente S. Thomae, qui intentionem a facto tantummodo discret. Ceterum distinctio inter voluntatem sese non obligandi et non implendi susceptam obligationem haud est utilis ad definiendam quaestionem de validitate alicuius matrimonii ob exclusum bonum fidei. Nam in casu concreto est fere impossibile decernere utrum contrahentes fidem excluserint in suis principiis vel in seipsa. Et contrahentes, si verum dicerent, ordinarie fateri deberent se ignorare utrum excluserint obligationem servandi fidem an eiusdem adimplementum."

75. Ibid., 63(1971), c. ID., October 27, 1971, p. 803. See also J.M. SERRANO-RUIZ, "Le droit à la communauté de vie et d'amour conjugal comme objet de consentement matrimonial: aspects juridiques et évolution de la jurisprudence de la Sacrée Rote Romaine", in SC, 10(1976), p. 280: "Il faudra traiter avec une attention croissante la distinction

c. The Prevailing Will to Marry According to the
Mind of the Church

The 1917 Code decreed that simple error regarding the essential properties of marriage did not vitiate consent, even though it was the cause of the contract.⁷⁶ This was a consequence of the presumption that a prevailing intention to marry according to the will of God and the requirements of the Church absorbed any such deficiencies.⁷⁷ As long as the spouses intended marriage, even if they did not explicitly intend all of its juridical consequences or grasp its full implications, their marriage was deemed valid.⁷⁸

Moreover, since marriage enjoys the favour of the law,⁷⁹ error was presumed to be simple, i.e. confined to

parfois employée très naturellement entre le droit et l'exercice ou l'abus du droit; car en fonction du pluralisme [...] la volonté atteint un tel pouvoir d'autonomie que seule une éthique chrétienne bien caractérisée pourra servir de critère clair à la différenciation."

76. CIC(1917), c. 1084: "Simplex error circa matrimonii unitatem vel indissolubilitatem aut sacramentalem dignitatem, etsi det causam contractui, non vitiat consensum matrimonialem."

77. SRR Dec., 28(1936), c. WYNEN, July 11, 1936, pp. 480-481.

78. For a discussion on this, see O. FUMAGALLI-CARULLI, "Amour conjugal et indissolubilité dans le consentement du mariage canonique", in SC, 16(1982), pp. 220-224.

79. CIC(1917), c. 1014: "Matrimonium gaudet favore

the intellect, and without influence on the will. Thus, even those whose marriage was motivated by their mistaken notions regarding its unity or exclusivity were considered to contract validly. Only a positive act of the will, excluding one of the essential elements, and elicited at the time of the wedding, could vitiate consent.⁸⁰

d. The Need for a Positive Act of the Will

Marriage consent is an act of the will which embraces a threefold intention: to contract marriage, to bind oneself to its obligations, and to fulfill those obligations. Consent can therefore be vitiated if a person deliberately excludes marriage itself (the animus non contrahendi), refuses to be bound by its obligations (the animus se non obligandi), or to fulfill them (the animus non implendi).⁸¹

The 1917 Code prescribed that such an invalidating exclusion was not to be presumed.⁸² Although its immediate

iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur [...]"

80. Ibid., c. 1086 § 2; for the Latin text, see footnote 50.

81. W.J. DOHENY, Canonical Procedure in Matrimonial Cases, vol. 1: Formal Judicial Procedure, 2nd ed., Milwaukee, Bruce, 1948, p. 858.

82. CIC(1917), c. 1086 § 1: "Internus animi consensus semper praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis."

source is the will itself, an act of the will is considered, to be positive if it is based on reflection, informed by a determined and concrete object, and actually invoked or perduring at the time of consent.⁸³ It should thus not be confused with a mere inclination arising from error, uncertainty, habit, or some vague desire.⁸⁴

This requirement for a positive act of the will led jurisprudence to propose that, in order to cause nullity, the exclusion of an essential element of marriage should have the same force as a condition sine qua non, i.e. one would rather remain unmarried than to marry without the exclusion.⁸⁵ The courts also distinguished between an explicit exclusion, made at the time of the wedding, and an implicit exclusion, made before the wedding and never

83. Z. GROCHOLEWSKI, De exclusione indissolubilitatis ex consensu matrimoniali eiusque probatione: considerationes super recentiores sententias rotales, Neapoli, M. D'Auria, 1973, p. 189. According to L. ORSY, "Matrimonial Consent in the New Code: Glossae on Canons 1057, 1095-1103, 1107", in J, 43(1983), p. 56, "The positive here is not opposed to anything negative: it simply means that the 'act of the will' is 'informed' by an object. [...] it signifies that the object effectively moves the will and the will actively pursues the object."

84. Z. GROCHOLEWSKI, op. cit., p. 190.

85. SRR Dec., 41(1949), c. FELICI, October 15, 1949, pp. 480-481.

revoked.⁸⁶

Whereas an explicit exclusion is always invalidating, an implicit exclusion might not result in nullity if it is so weak as to lose its express character. Similarly, if it were to be reduced to a general, habitual, or interpretative intention, or general ideas regarding the essential properties of marriage, it would not vitiate consent.⁸⁷ Some Rotal decisions thus held that a person accustomed to a dissolute lifestyle would not think of excluding fidelity, since he had no regard for marital obligations.⁸⁸

However, the decade immediately preceding the Second Vatican Council saw a less rigid application of these principles. While some sentences held that an intention to pursue an existing affair some time after marriage was not per se a solid argument for the exclusion of fidelity,⁸⁹

86. Ibid., c. STAFFA, December 22, 1949, pp. 562-563; ibid., 47(1955), c. HEARD, July 28, 1955, pp. 664-666.

87. Ibid., 51(1959), c. SABATTANI, May 29, 1959, pp. 300-301.

88. Ibid., 41(1949), c. STAFFA, December 22, 1949, pp. 562-564; ibid., 49(1957), c. HEARD, October 26, 1957, p. 633.

89. Ibid., 48(1957), c. PASQUAZI, April 24, 1956, pp. 398-399.

others began claiming that an uninterrupted liaison could be a sufficient indication thereof.⁹⁰ Likewise, reserving to oneself the right to commit adultery was subsequently considered equivalent to placing a condition against fidelity,⁹¹ whereas the person who claimed unfettered freedom after marriage certainly excluded the obligation of fidelity.⁹² Similarly, some judges began to accept the fact that a dissolute lifestyle provided at least a vehement presumption of the exclusion of fidelity,⁹³ especially if the prevalent will was to marry with such a limitation.⁹⁴

This pre-conciliar trend towards more flexibility in the application of jurisprudential principles in cases of the exclusion of fidelity was to continue in the post-conciliar era.

90. Ibid., 55(1963), c. DE JORIO, October 30, 1963, p. 720.

91. Ibid., 52(1960), c. PINNA, October 29, 1960, p. 458.

92. Ibid., 49(1957), c. ID., April 13, 1957, pp. 347-348.

93. Ibid., c. FELICI, January 29, 1957, pp. 49-50.

94. Ibid., 54(1962), c. PINNA, April 14, 1962, p. 151.

2. Post-Conciliar Jurisprudence on the bonum fidei

Conciliar teaching on marriage as a communion of life and love, and its emphasis on the dignity of the individual, greatly influenced post-conciliar jurisprudence. The tria bona were still considered fundamental in marriage and had to be mutually given and received, but more attention was given to the quality of these gifts. Bonum fidei cases were thus less often seen in isolation and were closely linked with other jurisprudential concepts. The following will now be considered: fidelity as an obligation distinct from unity; fidelity and personal capacity; fidelity and prevailing social attitudes; and fidelity within the context of the marital communion of life.

a. Distinguishing the bonum fidei from Unity

After De Jorio's decision of October 30, 1963, Rotal jurisprudence progressively recognised that the bonum fidei is not usually denied by giving the right to the body to a third party, but rather by reserving to oneself the right to commit adultery, thus limiting the spouse's right to an exclusive relationship.⁹⁵ Whoever rejects the bonum fidei

95. SRR unpublished decision, case 44/77, c. EWERS, April 6, 1977: "Aliquid detrahatur ob obiecto substantiali consensus, non quatenus aliis ius reservatur quod uni

does not so much intend to bind himself to several people but to free himself from any obligations at all.⁹⁶ The spouse's right to fidelity is perpetual and exclusive, however, and may not suffer any restrictions.⁹⁷

Jurisprudence thus gradually rejected the older identification of fidelity with the unity of marriage, and this was confirmed by U. Navarrete in 1977:

It has been said that the right to fidelity is included in the property of unity. But it should be noted that this property pertains only to the unicity of the bond. Therefore, only the one who reserves to himself the right to have more than one wife (or husband) in the strictly polygamous sense, contracts invalidly due to the exclusion of the property of unity even though not all the wives would enjoy those marital rights in the same degree. The one who actually

coniugi competit, sed quatenus eidem coniugi non traditur ius exclusivum. Quapropter exclusio boni fidei tunc tantum dirimit matrimonium cum alteruter vel uterque contrahens positivo voluntatis actu detrectat comparti tradere exclusivum potestatem sui corporis in ordine ad actus coniugales", as cited by A.M. ARENA, "The Jurisprudence of the Sacred Roman Rota: Its Development and Direction after the Second Vatican Council", in SC, 12(1978), p. 268. Hereafter cited as "Jurisprudence". See also his comments on case 39/76, c. AUGUSTONI, March 17, 1976, and case 117/76, c. LEFEBVRE, October 3, 1976, in ibid., pp. 269-270.

96. SRR Dec., 63(1971), c. DE JORIO, October 27, 1971, p. 803.

97. Ibid., 60(1968), c. BEJAN, January 17, 1968, pp. 13-14; SRR unpublished decision, case 53/76, c. PARISELLA, April 29, 1976, as cited by A.M. ARENA, "Jurisprudence", p. 271.

intends to marry only one wife and yet reserves to himself the right to commit adultery or excludes the obligation of conjugal fidelity also contracts invalidly, but not because of the exclusion of the property of unity since he truly does not exclude it.⁹⁸

Fidelity is thus excluded when the spouse's right to an exclusive relationship is in any way restricted or denied. It can no longer be held that one would have to be a de facto polygamist in order to exclude the bonum fidei, nor can it be presumed that the bonum fidei is rarely harmed.

98. U. NAVARRETE, "De iure", p. 250: "Dixeris forte ius ad fidelitatem includi in proprietate unitatis. At notandum est hanc proprietatem dicere tantummodo unicitatem vinculi. Ideoque ob exclusam proprietatem unitatis contrahit invalide tantummodo qui sibi reservat ius habendi plus quam unam uxorem (vel maritum), sensu stricto polygamico, etiamsi uxores non omnes iisdem iuribus eodemque gradu honoris matrimonii gaudeant. Qui vero intendit unam tantum habere uxorem, at sibi reservat ius adulterandi vel excludit obligationem fidelitatis coniugalis, invalide quidem contrahit, at non ob exclusam proprietatem unitatis, quia reapse hanc non excludit."

O. DI JORIO, loc. cit., p. 231, sums up the position as follows: "Quoad exclusum bonum fidei, ad nullitatem provocandam, prospicitur satis esse, in praestando consensu, firmam voluntatem rem habendi cum tertia persona, quin necessarium quoque sit ut tertia persona voluntate habeatur quasi coniunx et iurium coniugalium destinataria una cum coniuge vel etiam magis quam coniux. Haec novitas autem, dum ex una parte faciliorem reddit declarationem nullitatis, ex altera melius collustrat et relevare facit sanctitatem coniugii christiani et intentionis puritatem in eodem coniugio contrahendo. Opportune tamen subiungitur voluntatem foedandi matrimonium non esse confundendam cum praevisioe relapsus ex humana fragilitate, eademque voluntatem non esse credibilem cum multo post matrimonium fuerit executioni mandata" (emphasis added).

b. The bonum fidei and Capacity

Recent Rotal jurisprudence has given close attention to the personality and the disposition of the contractants in bonum fidei cases, to see whether they were physically or psychologically capable of assuming the obligation of fidelity.⁹⁹ A.M. Arena sums up the Court's position as follows:

This [incapacity] can arise, not only from some psychic or psychological anomaly capable of inducing a grave mental dysfunction, but even from a mere moral incapacity "arising from and firmly embedded in daily habitual action or a vehement instinct intolerant of any restraint" (c. Ewers, April 2, 1977), through which one of the parties eventually encounters great difficulty to observe that fidelity which he believes freely to have accepted. Of course, in such cases one must proceed with great caution to avoid falling into the quagmire of determinism.¹⁰⁰

99. A.M. ARENA, "Consensus matrimoniale", p. 497. According to J.M. PINTO GOMEZ, "Incapacitas assumendi matrimonii onera in novo CIC", in Z. GROCHOLEWSKI and V. CARCEL ORTI (eds.), Dilexit iustitiam: studia in honorem Aurelii Card. Sabattani, Città del Vaticano, Libreria Editrice Vaticana, 1984, p. 28, "Psychica incapacitas assumendi bonum fidei habetur ex parte nupturientis qui, propter suam hypersexualitatem, obligationem fidelitatis servandae adimplere non valet, quippe quod ad coeundum cum aliis personis alterius sexus invincibiliter rapiatur."

100. A.M. ARENA, "Consensus matrimoniale", p. 497: "Ciò non solo può derivare da una certa anomalia psichica o psicologica che induca una grave disfunzione mentale, ma anche da mera incapacità morale 'erumpente' atque in cute firmata ex diuturnis vitae agendi habitibus aut vehementi instintu

The incapacity to assume the obligation of fidelity thus resides within the individual's personality, but need not necessarily be caused by psychic anomalies. A habitual way of life, which could be culturally conditioned, can be so deeply rooted that a person becomes unable to assume that obligation to an exclusive relationship which the bonum fidei demands. This leads Arena to conclude:

Thus in some way the problem posed by the doctrine of the need of a positive act of the will or a "conditio mente retenta" has been solved or rather overcome by going into the area of the personality of the person concerned, which is then seen, by its constitution, education and habits of behaviour that have become second nature, to be essentially unable to assume the obligation of fidelity.¹⁰¹

c. The bonum fidei and Social Attitudes

Besides rendering a person unable to assume the obligation of fidelity, his habitual way of life can also be so mistaken regarding the essential obligations of Christian marriage that it moves him to exclude them from his consent. Recent Rotal jurisprudence regards such deep-rooted and

cuiusvis cohibitionis intolerante' (sent. 2 aprile 1977, c. Ewers) per la enorme difficoltà eventualmente incontrata da una delle parti ad osservare quella fedeltà che liberamente prevedeva di avere accettato. Naturalmente in questi casi si deve procedere con estrema cautela ad evitare che si possa cadere nei lacci del determinismo."

101. ID., "Jurisprudence", p. 276.

erroneous views of marriage as "mentalities" which influence marital consent if the individual makes them his own.

R.A. Kenyon identifies four such attitudes which the Rota has acknowledged to be prevalent in modern society:¹⁰² a divorce mentality, in which knowledge of the indissolubility of marriage is lacking and thus implicitly excluded;¹⁰³ a quid-pro-quo mentality, in which knowledge of the mutuality of self-giving is absent;¹⁰⁴ an infidelity mentality, in which knowledge of the exclusivity of marriage is lacking and thus implicitly limited or excluded;¹⁰⁵ and a contraceptive mentality, in which the procreative nature of marriage is misunderstood.¹⁰⁶

102. R.A. KENYON, "The Nature and Nullity of Matrimonial Consent: Arguments Based upon Primary Sources", in SC, 14(1980), pp. 128-129.

103. SRR Dec., 60(1968), c. EWERS, May 18, 1968, pp. 346-347.

104. Ibid., 61(1969), c. ANNE, February 25, 1969, pp. 175-185.

105. According to R.A. KENYON, loc. cit., such a mentality exists, although he could find no explicit mention of it in Rotal sentences. It is mentioned by T.P. DOYLE, loc. cit., pp. 24-31; R.A. STRIGL, "Überlegungen zur Unitas matrimonii und exclusio boni fidei", in AKK, 106(1963), pp. 132-141. In the Bantu context with which we are concerned, one would call this the "infidelity mentality" when speaking of women, whereas it would be the equivalent of the "polygamous mentality" where men are concerned.

106. SRR Dec., 56(1964), c. BRENNAN, March 5, 1964, pp. 163-164; ibid., 55(1963), c. SABBATANI, March 22, 1963, pp. 197-211.

Discussing the infidelity mentality, Kenyon explains:

An "infidelity mentality" is to be distinguished from simulation contra bonum fidei in that the latter includes the double concept of first knowing and externally manifesting consent to the exclusive right, yet internally withholding the same. In the case of "infidelity mentality" this basic knowledge is wanting or perverted by an ignorance or error.¹⁰⁷

A "mentality" thus embraces the non-assumption of obligations, caused by erroneous opinions which influence the will of the individual.

i. Exclusion and Non-Assumption

The person who is influenced by an infidelity mentality is considered to refrain from assuming the obligation of fidelity, rather than from rejecting it explicitly. This is not identical to the traditional concept of exclusion by a positive act of the will. A.M. Arena clearly links it to prevailing social attitudes and the individual's personal capacity when he says:

107. R.A. KENYON, loc. cit., pp. 128-129. See also J. BERNHARD, "Réflexion sur la 'dynamique' de l'engagement matrimonial en droit canonique", in RDC, 27(1977), p. 297: "L'exclusion positive requiert la connaissance explicite des qualités essentielles du mariage refusées [...] or, une telle connaissance explicite risque actuellement de faire défaut, sans que pour autant le consentement considéré dans son contenu positif corresponde au minimum d'engagement requis."

To the non-giving of the right there corresponds the non-assuming of the obligation of fidelity, but jurisprudence more often favours the latter formulation because it is psychologically clearer and/or because socially we live in a society that tends less and less to want to assume binding obligations and/or because in many cases there is also an evident inability to bind oneself.¹⁰⁸

R. Brown argues that the exclusion of the bonum fidei should be demonstrated by reference to canon 1086 § 2, whereas the non-assumption of the obligation is better referred to canon 1081 § 2.¹⁰⁹ He contends that both are examples of simulation, one ob exclusionem and the other ob non-inclusionem and concludes:

[...] the case under the heading of non-inclusion would be properly described as an allegation of nullity on the grounds of a substantial defect in the object of consent.¹¹⁰

108. A.M. ARENA, "Jurisprudence", p. 270.

109. R. BROWN, "Simulation versus Lack of Commitment", in SC, 14(1980), pp. 335-345; ID., "Non-Inclusion: A Form of Simulation?", in CLSA Proc., 41(1979), pp. 1-11.

110. R. BROWN, "Simulation versus Lack of Commitment", p. 345. See also J. BERNHARD, loc. cit., p. 297: "Ce qui fait la nullité, cela peut être également - en dehors d'une exclusion positive d'un bien essentiel - la défectuosité du consentement matrimonial, considéré dans son contenu positif. Le mariage est alors valide ou non, selon que ce contenu correspond ou non au minimum d'engagement requis pour qu'il y ait objectivement un vrai mariage au regard de l'Eglise."

The question is therefore not to discover what the person excluded from consent, but rather what was included in it: was it or was it not directed towards marriage as defined by law? In this regard P. Hayoit considers that, due to the fact that people's ideas are so different; it is not sufficient to call an agreement "marriage" for it to be truly a Christian marriage.¹¹¹ Since people who give limited or fictitious consent to marriage really intend a pseudo-marriage, one should seek to determine what they positively intend rather than what they exclude from their consent.¹¹² In other words, the will to marry is not something negative but positive, unless a particular circumstance causes a limitation or restriction.¹¹³ J. Bernhard thus argues that, since people marry according to their own conception of marriage,

Reference must be made to sociological realities and the ideas prevalent in various places, or even more to the concrete circumstances of each case, rather than to a presumption. Indeed, in judging the validity of a marriage the problem is not just to know what the person has excluded from consent, but one should consider what was positively included in it. Marital consent is normally and essentially an adhesion and assent,

111. P. HAYOIT, loc. cit., p. 564

112. Ibid., pp. 568-570.

113. Ibid., p. 571.

rather than a denial or exclusion.¹¹⁴

In this light, several Rotal sentences have judged that a person's inability to see fidelity as the Church sees it, or a feeling of intolerance towards such a restriction, can lead to its positive exclusion.¹¹⁵ On the other hand, the foreknowledge that one might commit adultery due to human frailty does not invalidate consent.¹¹⁶

ii. The Influence of Error

Rotal jurisprudence regarding the influence of error on the will of the contractant has evolved to the point that some commentators now feel that simple error which does not influence the will is no longer to be presumed.¹¹⁷ Instead,

114. J. BERNHARD, *loc. cit.*, p. 296: "Plutôt qu'à une présomption, c'est au réalités sociologiques et aux idées reçues dans tel lieu ou dans tel milieu, mieux encore aux circonstances concrètes de chaque cas qu'on doit se référer. Bien plus, lorsqu'il s'agit d'évaluer la valeur d'un mariage, le problème n'est pas uniquement de savoir ce que le sujet a exclu de son consentement, la question principale est d'examiner ce qu'il y a positivement inclus. Le consentement matrimonial est essentiellement et normalement une adhésion, un assentiment, et non pas un refus, une exclusion." See also P. HAYOIT, *loc. cit.*, pp. 571-574.

115. *SRR Dec.*, 64(1972), c. POMPEDDA, January 21, 1972, pp. 25-26.

116. For references to the most recent Rotal sentences in this regard, see A.M. ARENA, "Consenso matrimoniale", p. 499.

117. D.E. FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence", in *SC*, 9(1975),

the unity of man's cognitive and volitional faculties pre-suppose the opposite.¹¹⁸

Some Rotal sentences acknowledge that error can be so much a part of the person's personality that he cannot act otherwise, and therefore his vitiated will is the cause of the nullity.¹¹⁹ Deep convictions become like a second nature and can constitute at least an implicit intention

pp. 105-133 (Hereafter cited as "The Exclusion"); L.G. WRENN, "A New Condition Limiting Marriage", in J, 34(1974), pp. 292-315; Z. GROCHOLEWSKI, "Der positive Willensakt als Ursache der Ehenichtigkeit nach can. 1101 § 2 des neuen Kodex", in RDC, 34(1984), pp. 118-139.

118. Having studied in detail the relationship of intellect and will in Thomistic philosophy and in empirical psychology (pp. 108-118), D.E. FELLHAUER, "The Exclusion", p. 117, observes: "The act of consenting is internal, unobservable, and often impossible to pinpoint. Philosophically, consent is an 'act', caused 'effectively' by man's faculty of will, and caused 'finally' by the intellect. Psychologically, consent is a 'process', involving, besides volition itself, beliefs, judgments, feelings, and a variety of other factors."

According to L. ORSY, loc. cit., p. 52, "[...] there is an on-going interplay between ideas and actions, between the knowledge stored in the mind and the movements of the will [...] which] is so intense that our attitudes and actions are continuously (some would say infallibly) influenced by the knowledge stored in our memory whether we are conscious or not of such interplay. That subconscious motivation is the real driving force of many of our actions is not a theory any more; it is a proven fact."

119. SRR Dec., 46(1954), c. FELICI, July 13, 1954, p. 616; ibid., 49(1957), c. ID., December 17, 1957, p. 844.

against one of the bona of marriage,¹²⁰ and therefore a person's attitudes, opinions and habits must be closely scrutinised.¹²¹ Where the error itself is not invalidating, even a slight occasion can lead to the placing of a positive intention, for a habitual intention can easily become an actual or virtual intention, and a partial presumption exists that such error did in fact influence the will.¹²² Deeply held erroneous convictions overturn the presumption that people wish to enter marriage as God intends it,¹²³ especially in non-Catholic cultures.¹²⁴ Moreover, it should not be presumed that people do not wish to apply their erroneous convictions to their own marriage.¹²⁵

Commenting on the development of the understanding

120. Ibid., 48(1956), c. FILIPIAK, March 23, 1956, pp. 256-257.

121. Ibid., 53(1961), c. FIORE, July 14, 1961, pp. 94-96.

122. Ibid., 56(1964), c. SABATTANI, December 11, 1964, pp. 926-932.

123. Ibid., 60(1968), c. EWERS, May 18, 1968, pp. 444-451.

124. SRR unpublished decision, c. FAGIOLO, June 8, 1968, in IDE, 79,2 (1968), pp. 278-280.

125. SRR Dec., 63(1971), c. POMPEDDA, January 23, 1971, pp. 53-54.

of the influence of error upon the will, R. Brown observes:

[...] jurisprudence has been extremely ingenious in progressing from the older concept of non-invalidating "simple error" to a twofold concept of error which (assuming the necessary proof) does invalidate; to the doctrine and nature of an implicit exclusion which was seen later as equivalent to an explicit exclusion; and the masterful explanation of the implicit act of exclusion being contained as the indirect object of an explicit act of the will.¹²⁶

iii. The Positive Act of the Will

Basing his conclusions upon a study of Rotal jurisprudence on the exclusion of the bonum sacramenti in the 1960s, Z. Grocholewski argues that the Rota has come to distinguish many different kinds of positive acts of the will, any one of which can cause the nullity of marriage. The act of the will can thus be actual (elicited at the time of the wedding) or virtual (pre-existing but not revoked at the time of the wedding). It can also be explicit (directly intending its object) or implicit (directly intending something in which its object is contained). Even its manifestation can be either explicit or implicit.¹²⁷

126. R. BROWN, "Non-Inclusion: A Form of Simulation?", p. 6.

127. Z. GROCHÓLEWSKI, op. cit., pp. 190-191.

The positive act of the will which aims at a specific purpose can therefore be extremely elusive. It can arise from long-established views, constantly and deeply felt, and need not be elicited in a single moment of time, nor does it have to manifest itself directly and explicitly.¹²⁸ According to D.E. Fellhauer, it would thus seem reasonable to infer for practical purposes

[...] that a person's actions in important affairs, when consistent with his ideas, background and past behaviour, usually arise from an actual, even if elusive and less than fully conscious, volitional process. To look upon such a process as less than a "positive act of the will" would appear to be unrealistic [...]¹²⁹

He then identifies three ways in which such a positive act of the will can manifest itself: a known obligation may be rejected and the opposite intended; or, while ignorant of the obligation, the opposite may be explicitly intended; or, one can simply consent to marry according to one's own erroneous understanding of marriage.¹³⁰

Applying these principles to fidelity, T.P. Doyle notes that conjugal fidelity is being questioned, qualified

128. SRR Dec., 63(1971), c. POMPEDDA, January 23, 1971, pp. 53-54.

129. D.E. FELLHAUER, "The Exclusion", p. 128.

130. Ibid.

or even rejected by many in their search for personal freedom and self-fulfillment.¹³¹ He feels that the contemporary high incidence of marital infidelity is a hedonistic and immature means to reinforce a self-questioned masculine or feminine identity. This is based upon the fundamental error that marital behaviour and the marital relationship depend totally upon the will of the spouses themselves. He then concludes that

[...] it is less a question of invincible ignorance based on non-substantial error and more one of a wide-spread ignorance or error as to the nature of marital fidelity.¹³²

Jurisprudential development in this direction must take cognisance of the possibility that a person may enter marriage on the condition that he or she has the right to extra-marital relationships accompanied by varying degrees of emotional involvement, as long as the relationship promotes growth and does not harm anyone.¹³³

d. The bonum fidei and the consortium vitae

There is an intimate connection between conjugal love, the bonum fidei, and the communion of life.¹³⁴

131. T.P. DOYLE, loc. cit., pp. 24-31.

132. Ibid., p. 29.

133. Ibid., p. 31.

134. ID., op. cit., pp. 558-587.

According to U. Navarrete, the communion of life stands for marriage itself with all its rights and obligations, and includes both the communion of bodies and the communion of souls.¹³⁵ The former embraces the exclusive and permanent right over the body for generative acts, while the latter can be better described as the right to the mutuum adiutorium which embraces the needs of the spouses at all levels of their existence.¹³⁶

Conjugal love, seen primarily as an act of the will, should be human, total, exclusive, oblationary, and unifying, and is constitutive of the marital covenant.¹³⁷ It is the fidelity demanded in Christian marriage which sustains this marital community.¹³⁸ However, while conjugal acts are a part of the communion of life, they do not exhaust its meaning. The right to the communion of life thus cannot be reduced to the right to sexual activity or sexual exclusivity only, just as the bonum fidei has always implied

135. U. NAVARRETE, "De iure", p. 269. This has subsequently been incorporated into the 1983 Code, see CIC(1983), c. 1055 § 1: "Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt [...]"

136. U. NAVARRETE, "De iure", pp. 266-269.

137. PAUL VI, Encyclical Letter, Humanae Vitae, July 6, 1968, in AAS, 60(1968), n. 9, pp. 486-487.

138. CONCILIIUM VATICANUM II, Gaudium et Spes, n. 48, pp. 1067-1069.

obligations which go beyond the merely sexual.¹³⁹ Nevertheless, intended violations of the obligation of fidelity by regular or occasional acts of adultery diminish the spouse's right to the mutuum adiutorium, and as such are a denial of the right to the communion of life.¹⁴⁰

Accordingly, there is a new emphasis on the content of the bonum fidei and, in the view of C. Murtagh, the recent insistence on the consortium vitae is valuable, for it

[...] calls attention to certain values of marriage not adequately expressed in the traditional, restricted view of the three bona [...]. The transmission of the bona of marriage is still seen as basically necessary to a true marriage, but attention is drawn to the quality of the giving, and to the quality of the gift [...]. The bona are seen as necessary to the establishment of the consortium vitae [...]. Treating the three bona in a minimal sense led jurisprudence up a blind alley from which Vatican II has extracted it and led it back to a fuller view of marriage.¹⁴¹

Once again the emphasis falls on the positive content of the mutual donation of the spouses, rather than on an examination of what they sought to exclude from it. Does their self-giving contain all the necessary elements which make it

139. Ibid.; PIUS XI, Casti Connubii, pp. 547-548.

140. T.P. DOYLE, loc. cit., pp. 32-39.

141. C. MURTAGH, "The Jurisprudential Approach to the consortium vitae" in SC, 9(1975), p. 323.

constitutive of Christian marriage? In this regard, J.M. Serrano-Ruiz has said:

[...] from the perspective of consent as gift and acceptance of self, and the analysis of the interpersonal relationship which lies at the foundation of this consent, the sincerity of the marriage is destined to play an important role in nullity cases dealt with under the heading of simulation.¹⁴²

It is thus in the area of the consortium vitae that canonists see much promise of future developments regarding the bonum fidei. However, while the sincerity of the marital commitment is basic to an equitable assessment of a possible exclusion of one of the bona, A.M. Arena has pointed out that the bonum fidei remains linked to the sexual dimension of marriage, for

[...] until now, Rotal jurisprudence has stopped short of considering a break in communication between couples as constituting a serious indication of the exclusion of the "bonum fidei". Such a conclusion would be clear if greater value were placed on communication or rather the external communion of actually living together under the same roof.¹⁴³

142. J.M. SERRANO-RUIZ, loc. cit., p. 294: "[...] à partir des perspectives du consentement comme don et acceptation de soi, et de l'analyse de la relation interpersonnelle qui est à la base de ce même consentement, la sincérité du mariage est appelée à jouer un rôle important dans les cas de nullité de mariage sous le chef de simulation."

143. A.M. ARENA, "Jurisprudence", p. 278.

3. The 1983 Code of Canon Law

The new Code of Canon Law has confirmed much of the development which took place in matrimonial jurisprudence during the post-conciliar years. However, the following points will probably continue to influence jurisprudential advances regarding the bonum fidei: the object of consent, its content, and the object of exclusion.

a. The Object of Consent

The 1917 Code saw marriage as a contract in which the mutual bestowal by the spouses of the ius in corpus¹⁴⁴ was primarily geared to the procreation of children and secondarily to the good of the spouses themselves.¹⁴⁵ The 1983 Code considers marriage as a covenant by which the spouses constitute a partnership of the whole of life, ordered to their own good and the generation and nurturing of children¹⁴⁶ which requires the mutual giving and

144. CIC(1917), c. 1081 § 2, see note 50.

145. Ibid., c. 1013 § 1: "Matrimonii finis primarius est procreatio atque educatio prolis; secundarius mutuum adiutorium et remedium concupiscentiae."

146. CIC(1983), c. 1055 § 1: "Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum [...]"

accepting of themselves.¹⁴⁷

According to U. Navarrete, this means that whereas the old law saw the object of consent as the right to the body which implied the spouses themselves, the new law has reversed the order and regards the spouses themselves as the formal object of consent, while the conjugal acts in which they engage are included by implication.¹⁴⁸ Navarrete is convinced that the dignity of the spouses means that they cannot be reduced to mere objects to be exchanged, however, and that they thus mutually bestow and accept one another in those acts which are most expressive of their self-giving. These are not limited to sexual acts alone, but include all the elements which together make up the partnership of the whole of life.¹⁴⁹

However, whereas the old law spoke of the perpetual and exclusive right over the body upon which the jurisprudence on the bonum fidei was based,¹⁵⁰ the new law does not

147. Ibid., c. 1057 § 2: "Consensus matrimonialis est actus voluntatis, quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium."

148. U. NAVARRETE, "De iure", p. 138.

149. Ibid., pp. 138-139

150. CIC(1917), c. 1081 § 2; see note 50.

make explicit reference to the exclusive nature of the giving in its canon on consent.¹⁵¹ It is only in the canons on the effects of marriage that the 1983 Code mentions explicitly that a valid marriage results in a bond "which by its very nature is perpetual and exclusive,"¹⁵² and which binds both spouses equally "in those things which pertain to the partnership of conjugal life."¹⁵³ Exclusivity is therefore essential to Christian marriage, and the spouses must be willing to enter into such a relationship for their marriage to be valid.

Moreover, the new Code describes as the essential elements of marriage whatever is included in the consortium vitae which by its nature is ordered to the good of the spouses and of their offspring.¹⁵⁴ Precisely what is included in the consortium vitae is not specified, but Pope John Paul II has referred to the need for jurisprudence to elaborate on this generic formulation and to determine

151. CIC(1983), c. 1057 § 2, see note 147.

152. *Ibid.*, c. 1134: "Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum [...]"

153. *Ibid.*, c. 1135: "Utrique coniugi aequum officium et ius est ad ea quae pertinent ad consortium vitae coniugalitatis."

154. *Ibid.*, c. 1055 § 1, see note 146.

more closely what these elements might be.¹⁵⁵ What is certain is that the mutual self-giving of the spouses must be total and exclusive, otherwise the partnership could not embrace the whole of life. Canon 1055 will thus be pertinent in bonum fidei cases, especially where the non-assumption of exclusivity is alleged.

b. The Content of Consent

The consent by which marriage comes into being refers both to the internal will of each spouse and to the mutual agreement between them to establish marriage.¹⁵⁶ Since Christian marriage is described as a partnership of the whole of life, however, the spouses must consent to marriage as it is in itself, rather than to any personal image they may have of it. Otherwise, they marry invalidly.¹⁵⁷

Their consent can thus be defective in one of two ways: due to the non-inclusion of an essential element, if their understanding of marriage does not embrace any one

155. JOHN PAUL II, Address to the Roman Rota, January 26, 1984, "The Task of the Church Tribunal", in Origins, 13(1983-1984), p. 585.

156. CIC(1983), c. 1057 § 2, see note 147.

157. R. BROWN, "Simulation versus Lack of Commitment", pp. 341-345.

of the essential properties or elements required by law; or due to the exclusion of an essential element, if they intentionally exclude it.¹⁵⁸ It should be noted, however, that only those who have been properly instructed as to the nature of Christian marriage seem likely to make such a conscious exclusion. Those whose instruction was defective or non-existent could in fact fail to include the necessary element.¹⁵⁹

Therefore, the level of personal knowledge of the nature of Christian marriage, and preparation for matrimony, will become increasingly important in marriage jurisprudence, especially in mission territories. In a pluralistic

158. CIC(1983), c. 1055 § 1, see note 146; c. 1056: "Essentiales matrimonii proprietates sunt unitas et indissolubilitas [...]; c. 1057 § 2, see note 147; c. 1101 § 2: "At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum vel matrimonii essentialia aliquod elementum, vel essentialiam aliquam proprietatem, invalide contrahit."

159. H. LUDICKE, Eherecht, CIC, canones 1055-1165, Essen, Lüdgers, 1983, p. 101: "Nur dann kommt eine Ehe zustande, wenn sie gewollt wird. Dazu reicht es aus, die Ehe pauschal so zu wollen, wie die Kirche sie lehrt. [...] Der Inhalt des Ehevertrages ist durch die Schöpfungsordnung und die Weisung Gottes vorgegeben und unabdingbar. Jede wesentliche Abweichung des Ehewillens von diesem Inhalt ist deswegen gleichbedeutend mit dem Erstreben von etwas anderem, das nicht Ehe ist. Es liegt daher kein Wille zu der Ehe vor, wie sie ist. In diesem Sinne kann man auch in Fällen der Partialsimulation sowohl von mangelhaftem als auch von mangelndem Ehewillen sprechen."

society, only a well-defined and personalised Christian ethic will enable spouses to embrace all the necessary obligations of Christian marriage as required by law.¹⁶⁰

c. The Object of Exclusion

The 1917 Code spoke of the exclusion of the right to sexual acts, and the draft versions of the new law maintained this terminology regarding the exclusion of the right to the elements constitutive of the communion of life.¹⁶¹ However, in its promulgated form, the 1983 Code omits any reference to the word ius.¹⁶² According to the Code Commission, this was done to remove the ambiguities of the phrase "the right to those things which essentially constitute the communion of life," because these essential elements cannot in any case be determined in detail in a Code of law. Thus the Commission specified that the matter

160. J.M. SERRANO-RUIZ, loc. cit., p. 280; P. HAYOIT, loc. cit., pp. 557-575.

161. CIC(1917), c. 1086 § 2, see note 50; Communiones, 3(1971), pp. 75-76; ibid., 9(1977), pp. 374-375; Relatio, p. 257.

162. CIC(1983), c. 1101 § 2, see note 158. For a discussion of this question, see G. ROBINSON, "Unresolved Questions in the Theology of Marriage", in J, 43(1983), pp. 90-92.

163. Relatio, pp. 257-258.

should be left in the hands of doctrine and jurisprudence for further clarification.¹⁶³

However, since the Commission was sensitive to the implications of the distinction between ius and usus iuris regarding the consortium vitae, it is only logical that the same should hold true for the bonum fidei, which is clearly an important element of the marital communion of life. One can thus expect that the rigid application of the distinction between ius and usus iuris will fall into desuetude for the bonum fidei as well.¹⁶⁴ As has been noted, jurisprudence has already shown a willingness to see uninterrupted or frequent transgressions of the bonum fidei as indicative of a limitation of a spouse's right to an exclusive relationship.

164. M. LOPEZ ALARCON, "La exclusión del bonum fidei a la luz de la jurisprudencia y del Concilio Vaticano II", in IC, 12(1972), p. 409, commenting upon a sentence contra bonum fidei, coram Ewers, February 28, 1970, observes: "[...] no podrá defenderse que no consta la nulidad porque el cónyuge solamente tenga el propósito de adulterar, o porque solamente se pruebe el comportamiento adulterino antes y después del matrimonio. Tampoco se contará con apoyo para sostener la distinción entre el derecho y su ejercicio, pues la infidelidad amorosa es más grave e insidiosa en el segundo caso" (emphasis added).

CANONICAL APPLICATIONS

Concluding this investigation into the necessity of fidelity in Christian marriage, it would seem that the following should be kept in mind when assessing the validity of any marriage under the heading of the bonum fidei:

1. The bonum fidei is one of the juridically essential elements of Christian marriage, without which marriage cannot be celebrated validly.

2. The bonum fidei pertains to the exclusivity of the marital relationship, and by implication also to the unity of Christian marriage.

3. The bonum fidei is closely linked to marriage itself, to the consortium totius vitae, and to the bonum coniugum, for it is one of their sustaining elements.

4. As an obligation, the bonum fidei is equally binding on both spouses, and as a corresponding right it does not permit of any limitation of time or persons.

5. Prevailing social or cultural attitudes could so influence an individual that he refrains from including the bonum fidei in his marital consent. In such a case, his strongly-held but erroneous opinion of the nature of Christian marriage could lead to the non-assumption of the obligation of fidelity and the concomitant non-granting of the spouse's right to exclusivity. This would have to be

verified in each instance.

6. The bonum fidei can also be limited by the conscious exclusion of the obligation of fidelity, or of the spouse's right to an exclusive relationship, either at the time of consent or by an earlier and unrevoked intention.

7. Frequent infringements of the bonum fidei during marriage, while not per se indicative of an exclusion, may create a vehement presumption thereof. In some cases, however, they could be indicative of an incapacity of assuming the obligation of fidelity.

8. In positive terms, the bonum fidei thus refers to the free acceptance by both spouses of a sexually exclusive relationship which demands a total and unconditional surrender of self, in order to constitute Christian marriage.

CHAPTER FOUR

PROCESSING BONUM FIDEI CASES

There is widespread unanimity among canonists that it is very difficult to prove the exclusion of the bonum fidei, so much so that it is reputedly "the last grounds an advocate would ever choose."¹ Even the Auditors at the Rota, while maintaining that proof is possible, generally refer to the difficult nature of such proof in the in iure section of their sentences. The fact that most bonum fidei cases are judged under multiple heads similarly indicates a sense of uncertainty, a seeming lack of confidence in alleging an intention against fidelity as the sole basis for nullity.

W.A. Schumacher expresses this unease succinctly when he asks:

How often is a plea for a finding of nullity entered on an allegation of the exclusion of marital fidelity? Is this rarity because people do not, in fact, so vitiate their marital consent by thus contracting, or is it because our own understanding of the matter has not been pursued to the point where we feel comfortable and adequate in pursuing such an investigation and reaching moral certitude regarding such an allegation?²

The crux of the matter is precisely the necessity of reaching moral certainty regarding the exclusion of fidelity.

1. G. ROBINSON, "Unresolved Questions in the Theology of Marriage", in J, 43(1983), p. 90.

2. W. SCHUMACHER, "The Importance of Interpersonal Relations in Marriage", in SC, 10(1976), p. 105.

Most negative decisions on this ground arise from the judges' inability to establish such certainty regarding the fact of exclusion, in the face of the respondent's assertions to the contrary.³ However, there seems to be no real reason why the exclusion of fidelity should be more difficult to prove than the exclusion of the other bona of marriage. The act of exclusion is an internal act of the will in all cases, the existence of which needs to be established with moral certainty by the application of acceptable juridical principles of proof.

The jurisprudence of the Roman Rota is considered more authoritative than that of local tribunals. Because of its pre-eminence and normative character, this chapter will limit itself to an examination of what Rotal jurisprudence considers constitutive of proof, rather than examining the jurisprudence of local tribunals. Thus, having established what the Rota sees as the purpose of the investigation, we will proceed with a discussion of the necessity of proof, its various elements and their respective value, and the difficulties that must be overcome. Based upon this official foundation, the second part of the chapter will then seek to apply these principles to bonum fidei

3. T.P. DOYLE, "A New Look at the bonum fidei", in SC, 12(1978), p. 18.

cases in the African context as set out in chapters one and two.

A. ELEMENTS OF PROOF IN ROTAL JURISPRUDENCE

For a proper evaluation of the various elements which constitute proof in Rotal jurisprudence, it is necessary to establish clearly what the Rota considers as the purpose of a matrimonial investigation. An appreciation of this purpose makes it possible to assign each element its proper function in the process.

1. The Purpose of the Enquiry

The true purpose of any judicial enquiry into marriage is to establish the truth regarding the marriage bond: did it come into being or not?⁴ Rotal jurisprudence thus cautions that a truly objective approach is necessary: judges should be neither for nor against the marriage;⁵ they should carefully consider all the facts, words and

4. Z. GROCHOLEWSKI, De exclusione indissolubilitatis ex consensu matrimoniali eiusque probatione: considerationes super recentiores sententias rotales, Neapoli, M. D'Auria, 1973, pp. 147-148.

5. SRR Dec., 61(1969), c. ABBO, July 3, 1969, p. 705: "[...] iudicis investigationis finis non est pro vinculo aut contra vinculum agere, sed rei veritatem dumtaxat inquirere, sive pro vinculo sive contra vinculum haec sit."

actions of the case, and not only those which might favour nullity;⁶ they should consider only what actually did happen, and not speculate on what could or should have happened.⁷

Similarly, a sentence of nullity should not be regarded as a means to reward the virtuous or to punish the guilty.⁸

a. The Objective of the Investigation

Besides its general purpose, the principal objective of each individual matrimonial investigation is to reach a verdict on the possible invalidity of a given marriage, based on the alleged grounds.⁹ Thus, in bonum fidei cases, the exclusion of the spouse's right to fidelity or the exclusion of the individual's obligation to exclusivity must be proven.¹⁰ This involves proving the existence of

6. Ibid.

7. Ibid., 58(1966), c. BRENNAN, July 1, 1966, p. 489: "Nec iudicis est definire quid potuerit accidere aut quid agere voluerit contrahens, verum tantummodo, quid de facto evenerit aut contrahere voluerit."

8. Ibid., 61(1969), c. ABBO, July 3, 1969, p. 705: "[...] sententia matrimonii nullitatem edicens numquam consideranda est quasi meritum praemium bonis persolvendum, magis denegandum."

9. Z. GRÓCHOLEWSKI, op. cit., p. 148.

10. SRR Dec., 64(1972), c. POMPEDDA, February 16, 1972, p. 101: "Fidei bonum excluditur ubi alteruter vel uterque contrahens positive respuit obligationem ad fidelitatem servandam, seu non assumit eiusmodi obligationem; nec necesse

a positive act of the will, firmly placed and applied to one's own marriage.¹¹ As explained in chapter three, there are four kinds of positive acts that can lead to invalidity: actual (elicited at the time of the wedding), virtual (pre-dating the wedding but not revoked), explicit (a directly willed exclusion), and implicit (an indirectly willed exclusion, by non-inclusion or non-assumption).

All other objectives in matrimonial investigations, such as ~~establishing~~ the credibility of witnesses, examining the arguments for invalidity, or evaluating the circumstances surrounding the wedding, are subsidiary to this principal objective and should help in its achievement.¹²

est ut contrahens ius in suum corpus tertiae personae tradere statuatur, cum sufficiat ut ipse eiusmodi ius detrectet exclusivum trahi alteri contrahenti, seu facultatem sibimet servet adulterandi."

See also ibid., 65(1973), c. ID., October 16, 1973, p. 649: "Insimul insuper cum agitur de bono fidei attendendum est potissimum et essentialiter ad contrahendi rationem nubentis erga alterum coniugem; aliquid scilicet detrahatur ab obiecto substantiali consensus, per se, non quia aliis ius reservatur quod unice coniugi competit, sed quia eidem coniugi ius exclusivum non tribuitur. Ideo, saltem in abstracto, bonum fidei ab uno contrahente excludi potest etiam quin ipse positive cogitet de adulterio patrando seu de habenda concubina instar coniugis; sufficit, e contra, positiva voluntas non tradendi alteri parti ius exclusivum in proprium corpus."

11. Z. GROCHOLEWSKI, op. cit., p. 149.

12. Ibid., pp. 149-150.

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u Anne has pointed out that each investigation differs from all others. He thus calls for an existential approach to the examination of each individual's intentions, to evaluate the strength of his erroneous opinions, his personality, as well as all circumstances surrounding the marriage; these always reveal something which distinguishes one case from another.¹³

According to Abbo, recourse should not be had to hypotheses or general opinions which hardly touch the truth of the case, nor should principles or lofty arguments be used which are not directly applicable due to people's cultural and religious diversity or deficient instruction. He feels that unnecessary exceptions, distinctions, or explanations could be unhelpful to the case in question, and should therefore not be used.¹⁴

13. SRR Dec., 61(1969), c. ANNE, May 6, 1969, p. 440: "Consideretur oportet contrahentis intentio in sua existentia, pro unoquoque casu, singulari. Nam ipsa vis erronea opinionis, ipsa contrahentis, ut dicitur, personalitas, omnia, demum, matrimonii contrahendi adiuncta, sive antecedentia, sive concomitantia, semper demonstrant aliquid singulare, quo casus sub iudicio ab omni alio casu in nonnullis distinguitur."

14. Ibid., c. ABBO, July 3, 1969, p. 705: "[...] cavendum est ne [...] recursus fiat ad omnia genera opiniabilium seu hypotheticarum explanationum, quae tamen rei veritatem minime tangunt aut etiam ad principia, vel summe rationabilia, quae, sive ob religionis vel culturae diversitatem sive ob personarum minus rectam institutionem, cum casu particulari de quo forte agitur nullum nexum habent."

7

Citing unpublished decisions of Anné and Rogers, Z. Grocholewski adds that care should be taken to see that judicial argumentation not be divorced from reality, or that the investigation not be merely a mechanical application of procedural rules.¹⁵ Indeed, according to Pope Pius XII, such rules are not ends in themselves, but only means to an end, i.e. obtaining moral certainty in a given case.¹⁶

b. The Procedure of the Investigation

The investigation pursues its objective by gathering proofs. These are obtained by the examination of the declarations of the person who is alleged to have excluded the bonum fidei, the depositions of the other party and witnesses, documents relative to the case, and the testimony of experts (where necessary).

According to Z. Grocholewski, the declarations and depositions themselves reveal the existence of an exclusion, whereas the judge comes to this knowledge by examining these statements. He concludes therefore that the enquiry is itself an indirect element of proof, since it enables the

15. Z. GROCHOLEWSKI, op. cit., p. 151.

16. PIUS XII, Address to the Roman Rota, October 1, 1942, "Moral Certitude Especially in Marriage Cases", in CLD, 3, p. 609.

judge to reach moral certainty.¹⁷

2. The Necessity of Proof

The 1983 Code specifies in canon 1526 § 1, that the person who alleges the nullity of marriage should substantiate his claims.¹⁸ However, Canon Law acknowledges that positive proof cannot always be secured, and thus calls upon the help of presumptions in its quest for truth. It is therefore necessary to discuss the nature of presumptions and their juridical consequences.

a. Presumptions

The Code deals with presumptions in its section regarding proof, and thus considers them as constituting proof, or at least as capable of leading to proof. According to canon 1584, a presumption is "a probable conjecture about an uncertain matter."¹⁹ By definition then, it is

17. Z. GROCHOLEWSKI, op. cit., p. 164: "[...] schema elementorum probantium distinguitur a schemate peragendi inquisitionem iudiciale eo quod in primo indicantur ea quae exclusionem probant, in altero autem simpliciter media quibus pervenitur ad cognitionem illorum. Haec media - si de tota constructione probationis exclusae [...] e consensu cogitemus - etiam sub categoria 'probandium' collocanda sunt: ea enim serviunt ad probanda elementa quae sua ex parte ipsam probant exclusionem."

18. CIC(1983), c. 1526 § 1: "Onus probandi incumbit ei qui asserit."

19. Ibid., c. 1584: "Praesumptio est rei incertae."

not absolute certainty, but a probability which could be overturned by contrary proof. The same canon specifies that some presumptions are established by law and are called praesumptiones iuris, while others are formulated by the judge and are called praesumptiones hominis.

i. Presumptions of Law

The Code contains two presumptions of law which must be kept in mind in marriage nullity cases due to defective consent: canon 1060 specifies that a marriage is presumed valid until proof of the contrary is established, and canon 1101 § 1 presumes that internal consent conforms to its external manifestation.²⁰ Besides these presumptions of law, Rotal judges also call upon a very general presumption, variously described as a presumption of natural law, of law, or of jurisprudence, according to which all people are considered to intend entering marriage as a natural institution established by God and endowed with his laws.²¹

probabilis coniectura; eaque alia est iuris; quae ab ipsa lege statuitur; alia hominis, quae a iudice conicitur."

20. Ibid., c. 1060: "Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur." C. 1101 § 1: "Internus animi consensus praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis."

21. Z. GROCHOLEWSKI, op. cit., pp. 144-145: "Praeterea - cum de defectu consensus ex iure naturali, sicut nostro in

While there seems to be a tendency to move away from the latter presumption,²² any investigation into the possible nullity of marriage must not only remember the above presumptions, but needs to establish convincing arguments with which to overturn them. This is necessary, since canon 1526 § 2 prescribes that a presumption of law does not need proof, while canon 1585 absolves the person who has a favourable legal presumption on his side from the burden of proof.²³

casu, agatur - valet praesumptio magis generalis a iurisprudencia rotali adhibita, iuxta quam homines existimantur matrimonium contrahere velle prout est institutum iuris naturalis seu prout est a Deo Creatore conditum suisque legibus instructum, ideoque unum et indissolubile; matrimonium enim natura sua omnibus hominibus destinatur, ac proinde naturae iure non facile vitatur matrimonialis consensus."

According to the author, Rotal judges have described this presumption as "praesumptio iurisprudentialiae" (Anné, June 27, 1970), "praesumptio communis" (Anné, April 29, 1969), "praesumptio iuris" (Ewers, July 22, 1968; Rogers, October 31, 1966; Bonet, April 8, 1963; Filipiak, January 27, 1961), or "praesumptio de iure naturali" (Rogers, October 31, 1966).

22. Ibid., p. 145: "Animadvertitur tamen hanc praesumptionem generalem non semper aequali vi invocari posse, ideoque prudenter applicetur oportet." See also SRR Dec., 61(1969), c. ANNE, May 6, 1969, p. 440: "In multis regionibus [...] sparsa est doctrina erronea de matrimonii rescindibilitate. At vero, in hisce casibus invocari potest, debitis tamen cum cautelis, praesumptio intentionis contrahendi matrimonium prout est institutio ipsius naturae, seu cum essentialibus suis proprietatibus."

23. CIC(1983), c. 1526 § 2: "Non indigent probatione: 1. quae ab ipsa lege praesumuntur [...]"

C. 1585: "Qui habet pro se iuris praesumptionem, liberatur ab onere probandi, quod recidit in partem adversam."

It should be remembered, however, that according to Pope Pius XII, presumptions of law serve to remind the judge that he must keep an open mind and maintain a prudent doubt regarding any allegations of nullity.²⁴ The Pope thus teaches that presumptions are not intended to be prejudicial to the truth.²⁵ Legal presumptions should therefore not be given absolute value, for they cede to more weighty praesumptiones hominis.

ii. Human Presumptions

Presumptions formulated by a judge are called human presumptions. According to canon 1586, the judge should not formulate human presumptions unless they are based upon certain and determined facts directly related to the controversy.²⁶ Therefore, uncertain or equivocal facts regarding the possible exclusion of fidelity are insufficient to overturn the presumptions of law.²⁷ The question thus arises whether it is possible for a human presumption to result in

24. PIUS XII, loc. cit., p. 609.

25. Ibid., p. 607.

26. CIC(1983), c. 1586: "Praesumptiones, quae non statuuntur a iure, iudex ne coniciat, nisi ex facto certo et determinato, quod cum eo, de quo controversia est, directe cohaereat."

27. Z. GROCHOLEWSKI, op. cit., p. 157.

sufficient certitude to reverse the presumptions of law, especially in cases where an internal act of the will is concerned.

According to L.G. Wrenn, human presumptions are of three kinds: vehement presumptions, which constitute full proof and result in certainty - they are thus closer to jurisprudential interpretations and are more than probable conjecture (e.g. finding a man and a woman naked in bed leads to a vehement presumption of intercourse); grave presumptions, which are regarded as semifull proof and result in probability - they are thus closest to the canonical definition of a probable conjecture regarding an uncertainty (e.g. leaving a house of ill repute in the early morning hours leads to a grave presumption of intercourse); and light presumptions, which are regarded as indications only and do not constitute proof at all - they could be described as circumstantial evidence regarding important but minor incidents capable of clarifying the case (e.g. an encounter between a man and a woman in a public place only indicates that they met one another).²⁸

28. L.G. WRENN, Annulments, 4th ed, rev., Washington, D.C., CLSA, 1983, p. 123.

In an earlier work, R. Naz points out that the closer the connection between the unknown fact and the indication, the stronger the human presumption becomes, especially if experience shows that the one often follows the other. He thus holds for grave, a presumption based upon an indication quite closely connected with the unknown fact, while he considers a presumption vehement, if the indication and the unknown fact are very closely connected.²⁹

While there is general agreement among canonists regarding the tripartite division of human presumption, the same cannot be said regarding the value of each kind of presumption. Wrenn considers that grave presumptions are sufficient to constitute proof, since they are closest to the Code's definition of presumptions and are therefore

29. R. NAZ (ed.), Traité de droit canonique, 2nd ed. rev., Paris, Letouzey et Ané, 1954, vol. 4, p. 293: "L'indice grave a un rapport assez étroit avec le fait inconnu, ou on le rencontre fréquemment dans des faits de même nature [...]. L'indice grave crée plus qu'un soupçon, il produit une présomption forte, violenta, vehemens. L'indice très grave a un rapport très étroit avec le fait inconnu, on le rencontre habituellement dans des faits de même nature [...] un tel indice incline presque irrésistiblement l'esprit à conclure, il crée une présomption très forte, très grave, gravissima, violentissima. La présomption légère n'a pas de valeur probante parce qu'elle est fondée sur des indices insuffisants. La présomption grave fournit un commencement de preuve et si d'autres présomptions, d'autres indices, la déposition d'un témoin, le serment supplétoire, la fortifient, elle peut faire preuve entière [...]. La présomption très grave fait preuve entière dans les affaires contentieuses, si rien ne la renverse [...]"

classified as proofs themselves.³⁰ Grocholewski holds a different opinion, however, and argues that vehement presumptions are necessary for full proof, since only such presumptions can provide the moral certainty which is exclusive of positive doubt and is therefore able to overturn the presumptions of law favouring the marriage.³¹

To some extent it is a problem of semantics, and for this reason Naz warns that one cannot categorise human presumptions all that easily, for what to one judge seems grave may well seem vehement to another.³² What seems important to us, is that the legislator accords both legal and human presumptions the same status: they are both probable conjectures about an uncertain matter. The only juridical difference between them is that presumptions of law do not have to be demonstrated, whereas human presumptions do. Judges must therefore beware from according presumptions of law a more absolute value than that envisaged by the

30. L.G. WRENN, op. cit., pp. 124-127.

31. Z. GROCHOLEWSKI, op. cit., pp. 180-181.

32. R. NAZ, op. cit., p. 293: "[...] la réalité ne se laisse pas aisément compartimenter; tel juge estimera simplement grave un indice qui produira chez un autre une présomption très forte; il y a cependant plus qu'une nuance entre l'indice léger et l'indice très grave, entre la présomption légère et la présomption très forte. Ces distinctions ont donc leur utilité à titre d'indication."

legislator himself.

iii. Presumptions of Jurisprudence

Although the Code acknowledges only two kinds of presumptions, it should be noted that jurisprudence seems to have created a new kind of presumption that touches upon both these categories. This is sometimes referred to as a jurisprudential principle, but is better described as a presumption of jurisprudence.

Rotal jurisprudence shows many examples in which the judge formulates a general human presumption founded upon the legal presumption that marriage enjoys the favour of the law. Thus in bonum fidei cases, jurisprudence has formulated presumptions to the effect that, unless the contrary is proven, an adulterer does not wish to grant a third party a right over his body;³³ or that he does not exclude the right to fidelity but only its use;³⁴ or that his error remained in the mind and did not influence his will;³⁵ or that those who marry in Church do so as all Christians do.³⁶

33. SRR Dec., 57(1965), c. ROGERS, December 20, 1965, p. 967.

34. SRR unpublished decision, c. PINTO, March 19, 1978, in EIC, 35(1978), pp. 249-252.

35. Ibid.

36. Ibid.

Because these general presumptions favoured the validity of marriage, they have been treated as presumptions of law which did not need proof, even though they were formulated by the judge himself. The onus fell on the plaintiff in a marriage case to disprove them, which meant that he not only had to overturn the presumed validity of the marriage itself but the presumed non-existence of his chosen grounds of nullity as well. It could be argued that this situation contributed to the scarcity of affirmative decisions in bonum fidei cases.

Presumptions of jurisprudence could thus be described as general presumptions favouring the marriage, but formulated according to a historically conditioned insight into the common human experience. However, this experience is itself historical and can change, especially where the Church has come to embrace a multiplicity of societies and cultures. Thus Rotal judges have recently begun to reverse this process, and now sometimes speak in a general sense of the existence of a "partial" presumption against these traditional presumptions of jurisprudence, e.g. in non-Catholic cultures there is a partial presumption that people do not wish to marry according to the mind of the Church;³⁷ the

³⁷ SRR unpublished decision, c. FAGIOLLO, June 8, 1968, in IDE, 79,2(1968), pp. 278-280.

deeper the error, the stronger the presumption favouring invalidity;³⁸ the person who knows the truth and yet perseveres in disregarding it cannot be presumed to marry as Christians do;³⁹ or, the person who offends against the bonum fidei cannot be presumed to want to increase his obligations towards a third party.⁴⁰

L. de Luca describes the process as follows:

[...] it came to be realized that the unlimited application of the presumption of the general intention of doing what the Church does by everybody who celebrates canonical marriage, is simply not sustainable, particularly regarding people who live in certain cultural, spiritual and social contexts. [...] It is anticipated that jurisprudence will now give more and more attention to what is really going on in the souls of the spouses and to a softening of the dichotomy between the intellect and the will.⁴¹

The general nature of these jurisprudential presumptions must thus be acknowledged, and they should be applied with

38. SRR Dec., 63(1971), c. POMPEDDA, January 23, 1971, pp. 53-54.

39. Ibid., 64(1972), c. PINTO, November 6, 1972, pp. 673-675.

40. Ibid., 63(1971), c. DE JORIO, October 27, 1971, p. 803..

41. L. DE LUCA, "The New Law on Marriage", in CON-SOCIATIO INTERNATIONALIS STUDIO IURIS CANONICI PROMOVENDO, The New Code of Canon Law: Papers Presented to the Fifth International Congress, August 19-26, 1984, Ottawa, Saint Paul University, 1984, pp. 288-289.

great caution, for like all presumptions they allow proof to the contrary.

b. Moral Certainty

According to Z. Grocholweski, some Rotal expressions regarding the kind of proof necessary for an affirmative decision in matrimonial cases seem to demand absolute certainty. They speak of "conclusive arguments", "certain and exclusive of all doubt", "unequivocal", "unanswerable", "allowing of no ambiguity", "exclusive of positive doubt".⁴²

He is convinced that they err by excess, for Pope Pius XII clearly indicated that the moral certainty necessary and sufficient for the rendering of a judgment should be exclusive of "well-founded or reasonable doubt" and yet allow for the "absolute possibility of the contrary".⁴³ The Pontiff found it unreasonable to demand absolute certainty which is sometimes humanly unattainable but, on the other hand, he warns that mere probability is unacceptable as a basis for judgment.⁴⁴

Pius XII explained that moral certainty must be based

⁴². For references to Rotal sentences, see Z. GROCHOLEWSKI, op. cit., pp. 157-158.

⁴³. PIUS XII, loc. cit., p. 607.

⁴⁴. Ibid.

on objective reasons: the sum-total of proofs and indications must point to an objective fact which is the source from which they spring.⁴⁵ The judge must therefore exercise great care in evaluating the elements of proof contained in the depositions placed before him.

3. The Elements of Proof

Rotal judges consider it difficult to find direct proof of an internal act of the will, such as the exclusion of the bonum fidei. However, they seem to be generally in agreement that it can be obtained.⁴⁶ Sabattani thus considers that direct proof can be found in those things which directly indicate the existence of an internal act of the will, while indirect proof arises from the manifestation of something else which indicates the existence of such an act.⁴⁷ For

45. Ibid., p. 608.

46. For a dissenting opinion, see SRR Dec., 58(1966), c. FIORE, May 16, 1966, p. 309: "[...] probatio illius actus ex natura rei numquam fieri potest directe: itaque fieri oportet indirecte, critice, iudiciarie, seu per examen aliarum entitatum - verborum, actionem, morum, institutionis et ingenii nupturientis - quae actum elicited fuisse revelant et suadent."

47. Ibid., c. SABATTANI, July 9, 1966, p. 550: "Actus positivus, quo bonum [...] exclusum fuerit expresse, probatur directe: [...] omnibus mediis quae de voluntate nupturientis directe fidem faciant; indirecte [...] omnibus elementis ex quibus eadem voluntas conicitur."

Pompedda, the judicial or extra-judicial confession of the person who excluded is direct proof, as are the depositions of the spouse and witnesses, as well as available documents. He considers that indirect proof arises from the circumstances surrounding the marriage, i.e. antecedent, concomitant, and subsequent to the wedding.⁴⁸ To this, Palazzini adds the character of the person who excludes, as well as the motive for the exclusion.⁴⁹

In his decision of January 18, 1968, Abbo examined the distinction between direct and indirect proof at some length, and cited R. Decottignies as follows:

48. Ibid., 64(1972), c. POMPEDDA, January 21, 1972, p. 26: "[...] simulatio invicte probanda est, sive ex confessione partium, ex testium depositionibus, ex documentis forte existentibus. Quae omnia probationem directam, quam dicimus, constituunt, sive indirecte ex confluentia adiutorum quae matrimonio antecesserunt vel illud comitata et subsecuta sunt."

49. Ibid., 62(1970), c. PALAZZINI, October 28, 1970, p. 971.

Z. GROCHOLEWSKI, op. cit., pp. 169-170, offers a more nuanced approach to the division between direct and indirect proof when he says: "[...] nos consideramus confessionem partis excludentis; tum iudiciale tum extraiudiciale, uti elementa directe exclusionem probantia; exclusionis vero causam et alias matrimonii circumstantias uti elementa, quae exclusionem indirecte probant. Depositiones autem partium et testium ac documenta necnon peritias habemus uti media quibus ad cognitionem elementorum exclusionem, sive directe sive indirecte, probantium - prout casus ferat - pervenitur."

While this position seems more logical to us, we retain the Rotal view of the distinction in this chapter, since their practice is to some extent normative.

The difference between direct and indirect proof appears if one examines the basis of their probative force. The probative force of direct proof arises solely from its veracity. Anglo-Saxons call it testimonial evidence. The judge must evaluate the assertion, but once it is found to be true no further intellectual work remains to be done. Proof is had ex re ipsa. On the other hand, indirect proof is achieved through indications. On the other side of the Channel they call it circumstantial evidence. These indications are not proofs in themselves since they are not intended to be such. It is the reasoning, the presumption of the Magistrate which gives them a certain probative value. Proof is thus to some extent the work of the judge. This is illustrated by saying that the proof is made by human presumption.⁵⁰

Abbo therefore concludes that the distinction does not imply a hierarchy of probative value, as if direct proof were always better than indirect proof. The distinction basically

50. R. DECOTTIGNIES, Les présomptions en droit privé, Paris, Librairie Générale de Droit et de Jurisprudence, 1950, p. 19: "La différence entre preuve directe et preuve indirecte apparaît [...] si l'on examine le fondement de leur force probante. Celle de la preuve directe tient uniquement à la véracité de l'assertion qu'elle contient. C'est une testimonial evidence, disent les auteurs anglo-saxons. Le juge peut apprécier cette assertion; mais une fois qu'elle est reconnue exacte, il n'a plus aucune opération intellectuelle à effectuer. La preuve est faite ex re ipsa. - La preuve indirecte au contraire se fait par indices. C'est une circumstantial evidence, dit-on outre-Manche. Ces indices ne font nullement preuve par eux-mêmes, puisqu'ils n'ont pas été constitués à cette fin. C'est le raisonnement, la présomption du magistrat, qui leur confère une certaine valeur probante. La preuve est alors dans une certaine mesure l'oeuvre du juge. Pour marquer cette idée, on dit que la preuve est faite 'par présomptions du fait de l'homme', as cited in SRR Dec., 60(1968), c. ABBO, January 18, 1968, pp. 24-25.

indicated the way in which moral certainty is reached.⁵¹ He also argues that the certainty obtained from direct proof is not necessarily considered safer than that obtained through indirect proof, and that it does not indicate the difference between objective and subjective proof.⁵²

Rotal jurisprudence thus considers the declarations of the spouses and the depositions of the witnesses as elements of direct proof. The elements of indirect proof are the circumstances surrounding the marriage, the character of the person who excluded, and the cause or motive for the exclusion. These will now be considered individually.

a. Direct Proof

i. The Declarations of the Spouses

The most important element of direct proof is the judicial confession or the extra-judicial declaration of the

51. SRR Dec., 61(1969), c. ABBO, February 6, 1969, p. 139: "[...] probationes distinguentes in directas et indirectas, minime intendimus hierarchiam valoris inter eas constabilire, quasi priores semper firmiorem, alterae vero semper minorem in iudice certitudinem gignant. Distinctio haec essentialiter modum seu rationum tantum respicit qua pervenitur ad certitudinem assequendam."

52. Ibid.: "Quin etiam neque semper neque necessario certitudo per probationem directam inducta tutior censenda est quam certitudo probatione indirecta hausta. [...] Nec distinctio illa [...] tendit ad discernendas probationes; quasi aliae obiectivae, aliae subiectivae sint."

person who excluded.⁵³ It is judicial or extra-judicial, depending on whether it was made before an ecclesiastical judge or not.⁵⁴ While most Rotal judges consider the judicial confession as highly desirable,⁵⁵ others prefer an extra-judicial declaration made tempore non suspecto.⁵⁶

The confession is considered the basis of all proof since the person who excluded is generally the only one who knows of his internal act.⁵⁷ However, due to the fact that marriage cases concern the public good,⁵⁸ the law specifies that a confession is not sufficient to constitute full proof and must be corroborated by witnesses and the circumstances

53. Ibid., c. BEJAN, April 23, 1969, p. 397: "Ad probationem quod attinet, in qualibet specie simulationis consensus, inquirendum imprimis venit confessio simulantis, attenta nihilominus eius veracitatis nota."

54. CIC(1983), c. 1535: "Assertio de aliquo facto, scripto vel ore, coram iudice competenti, ab aliqua parte circa ipsam iudicii materiam, sive sponte sive iudice interrogante, contra se peracta, est confessio iudicialis."

55. SRR Dec., 64(1972), c. EWERS, April 19, 1972, p. 180; ibid., c. POZZI, May 13, 1972, p. 286; SRR unpublished decision, c. PARISELLA, October 15, 1981, in ME, 109(1984), p. 223.

56. SRR Dec., 62(1970), c. POMPEDDA, December 19, 1970, p. 1190; ibid., 65(1973), c. PINTO, April 9, 1973, p. 360.

57. Ibid., 61(1969), c. DE JORIO, February 26, 1969, p. 206.

58. Ibid., 64(1972), c. EWERS, April 19, 1972, p. 180.

of the case.⁵⁹ A confession should therefore not just be taken at face value, but must be assessed to see what the tone, images and words mean, how they fit the facts of the case, and how they reveal the thoughts and inclinations of their author.⁶⁰ The words must be scrutinised for passion, truth, exaggeration, contradiction, and credibility to see whether they can lead to full proof.⁶¹ What the person who excluded omits or dares not say may be even more important than his affirmations or denials.⁶²

If the judicial confession or an extra-judicial declaration is lacking, its absence can be overcome if the facts and circumstances reveal the intention to exclude.⁶³

59. CIC(1983), c. 1536 § 2: "In causis autem quae respiciunt bonum publicum, confessio iudicialis et partium declarationes, quae non sint confessiones, vim probandi habere possunt, a iudice aestimanda una cum ceteris causae adiunctis, at vis plenae probationis ipsis tribui nequi, nisi alia accedant elementa quae eas omnino corroborarent."

60. SRR Dec., 64(1972), c. POZZI, May 13, 1972, p. 286.

61. Ibid., c. EWERS, April 19, 1972, pp. 180-181.

62. Ibid., 58(1966), c. PALAZZINI, July 26, 1966, p. 664: "[...] immo praecipue, ex iis quae tacuit callide, omisit, vel impugnare non ausus est, horum quidem momentum non advertens. Quae omnia si debita attentione comparentur cum certis actibus indubiae significationis, intentio, in abditis cordis occultata, vel ipso auctore nolente, non difficulter prodibit."

63. Ibid., 57(1965), c. EWERS, May 22, 1965, p. 432: "[...] deficiente confessione iudicali, nulla extraiudicali declaratione extante voluntatis simulantis, nemini licet

Should the respondent deny the allegations, proof is still possible but becomes more difficult,⁶⁴ and if he subsequently admits to the exclusion, the judge should treat his change of heart with circumspection.⁶⁵

According to Ewers, the spouse's testimony is the queen of all proofs if it is supported by the testimony of all the witnesses.⁶⁶

matrimonii nullitatem declarare ex aequivocis factis vel verbis praenuptialibus aut ex agendi ratione contrahentis post initas nuptias. Indicia etenim et praesumptiones istis in causis corroborare possunt alias probationes, dummodo tamen neque leves neque dubiae significationis sint."

See also ibid., 64(1972), c. ID., October 14, 1972, p. 540: "Reapse difficultas adest probandi animum simulandi, ubi desunt declarationes explicitae sive iudicialis sive extraiudiciales. Attamen, potiusquam ad verba, ad facta univoca et certe probata iudex in eiusmodi causis oportet attendat. Ceterum, potissimum ad evincendam simulationem admittuntur indicia, coniecturae et praesumptiones: immo deficiente directa probatione, cumque agatur de actu interno, asserta simulatio probari valet nonnisi praesumptionibus."

64. Ibid., 63(1971), c. ID., February 13, 1971, p. 122: "Nec simulantis denegatio peremptoriam difficultatem constituit"; SRR unpublished decision, c. PARISELLA, October 15, 1981, in ME, 109(1984), p. 223.

65. SRR Dec., 45(1953), c. MATTIOLI, October 30, 1953, p. 644.

66. Ibid., 64(1972), c. EWERS, October 14, 1972, p. 180: "[...] si coniugum depositioni suffragatur conformis depositio omnium testium, tunc habetur regina probationum."

ii. The Depositions of the Witnesses

The law specifies that witnesses are not only essential for the establishment of full proof, but that generally a single witness does not suffice.⁶⁷ Nevertheless, the number of witnesses is less important than the inherent value of their testimony.⁶⁸ Their trustworthiness and reliability as witnesses, as well as the source, value and credibility of their testimony, need to be assessed carefully before being given probative force.⁶⁹ Nevertheless,

67. CIC(1983), c. 1573: "Unius testis depositio plenam fidem facere non potest, nisi agatur de teste qualificato qui deponat de rebus ex officio gestis, aut rerum et personarum adiuncta aliud suadeant."

68. SRR Dec., 64(1972), c. EWERS, April 19, 1972, p. 180: "[...] attestaciones non sunt a iudice veluti ratione mathematica acceptandae aut reiciendae, sed [...] aestimandae sunt modo morali, adiunctis cunctis perpensis. Etenim, in cuiuslibet causae examine res sub cortice sunt introspectiendae. Ideo sistendum non est in externa argumentorum ratione expendenda, veluti si robur causae coartaretur numero sive parvo sive magno deponentium. Sed potius ac praesertim immorandum est in critica interna: nempe, sedulo inspiciantur ingenium et passiones loquentium, verisimilia et inverisimilia perpendantur, in contradictionibus denique aestimetur quid accidentale prosit credibilitati quid substantiale obsit."

69. CIC(1983), c. 1572: "In aestimandis testimoniis iudex, requisitis, si opus sit, testimonialibus litteris, consideret: 1. quae condicio sit personae, quaeve honestas; 2. utrum de scientia propria, praesertim de visu et auditu proprio testificetur, an de sua opinione, de fama, aut de auditu ab aliis; 3. utrum testis constans sit et firmiter sibi cohaereat, an varius, incertus vel vacillans; 4. utrum testimonii contestes habeat, aliisve probationis elementis confirmetur necne."

their testimony can overcome the respondent's denial of the exclusion, if it is supported by other sources of proof and confirms facts that are certain.⁷⁰

b. Indirect Proof

i. The Circumstances Surrounding the Marriage

The facts and circumstances surrounding the marriage must be proven and may not be presumed,⁷¹ but once ascertained, they are considered more eloquent than words,⁷² especially if they are many, certain and unequivocal.⁷³ Facts can be variously interpreted, however, and are therefore considered to be indications which bring the judge to formulate human presumptions. It is thus possible for judges to differ in their interpretation of the facts and the extent to which they demonstrate an exclusion.

70. SRR Dec., 57(1965), c. EWERS, May 22, 1965, p. 432, cited above, note 63; ibid., 64(1972), c. ID., October 14, 1972, p. 539, cited above, note 63.

71. Ibid., 64(1972), c. PINTO, November 6, 1972, p. 674.

72. SRR unpublished decision, c. PARISELLA, October 15, 1981, in ME, 109(1984), p. 223: "[...] rerum adiunctis seu factis, quae eloquentiora verbis sunt habenda [...]"

73. SRR Dec., 62(1970), c. ID., June 11, 1970, p. 650: "[...] ad rectum iudicium ferendum ratio potissimum habenda est factorum in suo complexu [...] quae facta aliquando verbis eloquentiora sunt, dummodo tamen sint plena, sint certa, sint univoca."

This has contributed to the shift in jurisprudential thinking regarding the meaning of adultery after marriage. While adultery as such is considered ambiguous, it leads some judges more firmly than others into moral certainty regarding the exclusion of the bonum fidei. De Jorio finds that a person's intention not to dismiss a lover is sufficient evidence of the exclusion of fidelity;⁷⁴ Ewers holds that a permanent relationship, especially with one person, leads to a vehement presumption of exclusion;⁷⁵ and Bejan considers frequent adultery with different people indicative of an inability to assume the obligation of fidelity rather than indicative of its exclusion.⁷⁶ Pompedda specifies

74. Ibid., 56(1964), c. DE JORIO, June 12, 1964, p. 496: "Sat evidens contra est argumentum exclusi boni fidei in ratione agenda viri, qui consuetudinem stupri ante nuptias habuerit cum muliere, quam tempore matrimonii non deseruerat, quamque uti concubinam postea nutriat atque foveat."

75. Ibid., 64(1972), c. EWERS, October 14, 1972, p. 539: "Ubi constat alterutri contrahentem, sive ante sive post nuptias, consuetudinem sexualem fovisse cum aliis feminis praeter sponsam vel uxorem, ac potissimum si probatur eandem rationem cum eadem femina instauratam et continuatam fuisse, vehemens praesumptio oritur de exclusione boni fidei. [...] Perpendi autem debent, in adstruenda probatione, sive circumstantiae sive indoles contrahentis sive agendi ratio simulantis nedum erga alias feminas sed praesertim coram et erga alteram partem."

76. Ibid., 65(1973), c. BEJAN, November 21, 1973, p. 777: "Difficilius ad comperiendum est utrum excluserit bonum fidei vir, qui modo uni, modo alii adhaeserit mulieri ante nuptias, et post matrimonium non concubinatum adulteri-

that adultery after marriage can prove an intention against fidelity only if it is corroborated by the respondent's confession and the depositions of the witnesses,⁷⁷ although the intention to continue a sexual relationship with a third party can be a strong indication of the non-assumption of the obligation of fidelity.⁷⁸

ii. The Character of the Excluding Party

According to De Jorio, it is outdated to think that error and mentality do not have an influence on the will,⁷⁹ and the influence and example of family, relatives and

num instauraverit, sed adulteria patraverit cum pluribus mulieribus [...] Omnia casus adiuncta considerate perpendenda sunt, ut dignoscatur utrum tam improba vitae agenda ratio sementiet varietatem ('instabilità dei sentimentì') an detractionem cuiuslibet obligationis."

77. Ibid., 61(1969), c. POMPEDDA, December 2, 1969, p. 1099: "[...] ex facto adulterii ad probationem exclusae fidelitate pervenire Iudex non potest, nisi apprime constet de confessione simulantis, potissimum extra iudicium facta, ac per testes idoneos confirmata, de non tradendo illo iure exclusivo, quidem per actum positivum voluntatis ante nuptias elicitum."

78. Ibid., 64(1972), c. ID., February 16, 1972, p. 101: "[...] non sufficit voluntas, in alterutro saltem contrahente, pergendi in sexuali commercio etiam post initas nuptias cum tertia persona cum qua et ante matrimonium idipsum fovebatur. Sed insimul cavendum est ne eiusmodi vehemens indicium levi ratione praetermittatur, cum saepe saepius signum certe esse possit non assumptae obligationis fidelitatis."

79. Ibid., 65(1973), c. DE JORIO, June 13, 1973, p. 503.

friends can induce the will to exclude.⁸⁰ Since error and positive will cannot be entirely separated in the human act, the person's character and customs are subsidiary arguments for the exclusion of fidelity. This is true especially if such a person resolutely and obstinately pursues his error regarding the essential properties and obligations of marriage.⁸¹

The circumstances surrounding the marriage and related facts will highlight whether the person's impatience with restrictions,⁸² or his instability, desire for liberty

80. *Ibid.*: "[...] si consanguinei vel affines aut amici, qui perspectam habent propinqui vel amici ingentem infidelitatem, eum moneant et quidem crebris et expressis verbis de obligatione, quam est suscepturus, is, si perstet in proposito violandi fidem seu explendi libidines suas non modo in corpore uxoris sed etiam aliarum mulierum, elicit positivum voluntatis actum, qui excludit bonum fidei."

81. *Ibid.*, 63(1971), c. ID., October 27, 1971, p. 786: "Quoad ingenium et institutionem simulantem, animadvertendum censemus adesse viros tam dissolutos et tam obstinato animo persequentes errores de proprietatibus essentialibus matrimonii et de obligationibus quae ex eo contrahuntur, ut honori sibi ducant eas respuere. Neque ad simulationem excludendum sufficit distinctionem inter errorem mentis et positivum voluntatis actum interserere, quia 'ex professione eiusmodi errorum praesumi potest voluntas contraria matrimonio, eoque gravior est praesumptio, quo tenacius error insidet in mente eius qui, non ignorans veram doctrinam de matrimonio, sed incredulus moribusque depravatus, eam pertinaciter irridet atque respuit' (SRRD, 39(1947), pp. 220-221)."

82. *Ibid.*, 64(1972), c. EWERS, October 14, 1972, p. 540: "Pressius vero pro exclusionem bono fidei praesumptio conicitur ex indole contrahentis qui sit effrenatae libidinis atque nullius legis iugi patiens."

or dissolute lifestyle led to a positive exclusion.⁸³ The person's moral and religious constitution, or his behaviour before, during and after the marriage, can point to an efficacious decision made before the marriage and tenaciously pursued thereafter,⁸⁴ especially if they allow for no other explanation.⁸⁵

It is clear that such erroneous convictions must be profound if the mentality is truly to influence the will.⁸⁶

83. Ibid., c. LEFEBVRE, July 22, 1972, p. 496: "Nec dubium est positivum voluntatis actum contra bonum fidei posse deduci ex instabili contrahentis ingenio, ex eius diffusis moribus et desiderio effrenatae libertatis, namque si verum non esset, eiusmodi exclusio vix unquam evicta haberi posset, cum simulans plerumque verecundetur tantam foeditatem fateri [...]"

84. Ibid., 63(1971), c. MASALA, October 20, 1971, p. 753: "[...] investigandum sedulo est quaenam fuerit indoles, institutio moralis et religiosa illius qui dicitur bonum fidei respuisse, quaenam eius ratio vitae ante et post nuptias, quibus in adiunctis ante nuptias idem versatus est, et ita porro."

85. SRR unpublished decision, c. PARISELLA, October 15, 1981, in ME, 109(1984), p. 223: "[...] inspicienda eiusdem mens, pensitanda praenuptialis proposita efficacia, attendendum ad executionem illius post matrimonium pervicaciter peractam [...]"

86. SRR Dec., 61(1969), c. POMPEDDA, July 1, 1969, pp. 691-692: "[...] inquirendum apprime erit quam tum error pervaserit in ingressus fuerit animum ac personam contrahentis ac ideo desierit esse 'simplex'. Ita distingui debet levis opinio a persuasione diu, constanter et alte concepta: illa etenim non necessario nec vehementer impellit voluntatem, dum ista vix non invincibiliter cogit ad obiectum iuxta eiusmodi conscientiam appetandum per volitionem positivam,

Nevertheless, paraphrasing observations made by Pompedda in a decision of January 21, 1972, and by Fiore on April 30, 1973, A.M. Arena comments that

[...] it is not necessary for people to be convinced of a general doctrine on marriage and even less is it necessary for there to be a clear opposition between the Church's teaching and a person's own convictions; all that is needed is that a contracting party follow his own feelings (or make-up), education, deep-seated practice to have many sexual relationships: this is enough to establish the exclusion of the "bonum fidei". Such dissolute morals or habits are held to be very pertinent in proving the non-assumption of the obligation of fidelity even when there is no self-confession by the guilty party.⁸⁷

Discussing the probative force of a "divorce mentality",

D.E. Fellhauer in his turn makes the following observations which, mutatis mutandis, can be applied equally well to bonum fidei cases:

[...] this type of error itself creates a strong presumption of invalidity, and when accompanied by reasons or occasions for defective consent [...] a conclusion in favour of marriage invalidity may be practically necessitated. [...] What one definitely "takes for

praesertim cum ex circumstantiis sive subiectivis sive obiectivis contrahentis mens ad id peculiariter se vertat. Nec tandem actus ille positivus voluntatis inspicere et inveniri potest veluti in instanti tempore, cum potius adstrui et excipi debeat in constanti hominis et diu protracta tendentia ad aliquid definite ac circumscripte consequendum."

87. A.M. ARENA, "The Jurisprudence of the Sacred Roman Rota: Its Development and Direction after the Second Vatican Council", in SC, 12(1978), pp. 273-274.

granted" in making a decision ought to be considered as being part and parcel (at least implicitly) of that decision.⁸⁸

There is undoubtedly such a thing as a "divorce mentality" in many regions, and people do marry with this divorce attitude in mind, though obviously many do not. In each case the individual circumstances would seem to be quite important, such as: family background; religious upbringing; personal ideas and attitudes; education; friends; events prior to marriage, like doubts, arguments, pressure; [...]⁸⁹

iii. The Motives for the Exclusion

The cause or the motive for the exclusion needs to be discovered for establishing proof, and jurisprudence considers that in the judgment of the respondent it must have been sufficiently grave and proportionate to induce him to enter marriage with this reservation in mind.⁹⁰ This is described as the prevalent intention, which should be to

88. D.E. FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence", in SC, 9(1975), pp. 129-130.

89. Ibid., p. 133.

90. SRR Dec., 64(1972), c. POMPEDDA, January 21, 1972, p. 26: "[...] maxime exploranda est causa simulandi, id est ratio illa peculiaris propter quam simulator consensum exinanire constituerit; haec vero gravis sit oportet, saltem in aestimatione simulantis, atque, omnibus perpensis, exclusum matrimonii bonum respiciens eidemque pro portione congruens"; SRR unpublished decision, c. PINTO, March 19, 1978, in EIC, 35(1979), p. 251.

choose a pseudo-marriage in which fidelity is excluded, rather than to marry according to the mind of the Church.⁹¹ Among the many motives which can induce such an exclusion, one finds a vehement love for a third party, or the desire to improve oneself socially or financially.⁹² Especially person's character and habitual way of life can reveal a grave cause for exclusion,⁹³ as can his dissolute nature or his stubborn and deep-rooted feelings about marriage.⁹⁴

91. SRR unpublished decision, c. PINTO, March 19, 1978, in EIC, 35(1979), p. 251: "Voluntas autem 'praevalens' recte intelligenda est. Praealentia enim praedicatur, non de uno voluntatis actu supra alium, sed de uno obiecto electo inter plura. Consensus unico voluntatis actu constat, nempe 'velle', quin praealentia quoad actum praecedentem vel sequentem dari queat. Praealentia verificatur relate ad obiectum ubi voluntas eligere debebat inter 'verum' matrimonium, ex una parte, et matrimonium 'elemento essentiali orbatum' ex alia."

92. SRR Dec., 65(1973), c. MASALA, October 10, 1973, p. 627: "Ob plura namque motiva fieri potest, et fit reapse, ut quis, propriis placitis ac propositis pravis repositis, aliorum usum et consuetudinem sequatur. Inter haec motiva non raro inveniuntur amorem vehementem in compartem, necnon studium bonam stabilemque condicionem oeconomicam et sociale sibi comparandi, ac in nova vita instauranda propositum delendi prorsus praeteritorum scelerum vestigia."

93. Ibid., 62(1970), c. POMPEDDA, December 19, 1970, p. 1190: "Indoles autem contrahentis eiusque agendi habitus sunt apprime perpendenda, cum exinde haud raro et simulando causa gravis scateat."

94. Ibid., 64(1972), c. POZZI, May 13, 1972, p. 286: "Causa simulati consensus gravis ac proportionata comprobanda est; eam vero in depravata simulantis natura atque insanis pervicacibusque de matrimonio commentis posse contineri passim iurisprudencia docet"; ibid., 63(1971), c. DI FELICE,

The motive for the exclusion can be deduced from the respondent's judicial confession or extra-judicial declarations and the circumstances surrounding the marriage.⁹⁵

However, malice need not necessarily be present, especially in the case of a non-inclusion or non-assumption of fidelity. It would be sufficient to show that the obligation was not considered an essential component of the consent.⁹⁶ As in similar cases, it is not sufficient to show that the person had the capacity to exclude fidelity, but that he actually did so by a positive act.⁹⁷

November 11, 1971, p. 840: "Circumstantiae vero, quae potiorum vim in denegandum bonum fidei quam in matrimonium recte contrahendum ostendere possunt, aliae causam simulandi respuunt, aliae modum sese gerendi ex parte simulantis."

95. Ibid., 62(1970), c. PARISELLA, June 11, 1970, p. 650; ibid., c. POMPEDDA, December 19, 1970, p. 1190.

96. Ibid., 63(1971), c. DI FELICE, November 11, 1971, p. 839: "Si nullam obligationem exclusivi iuris compartis suscipere voluerit, bonum fidei eodem positivo voluntatis actu respuit et invalide contrahit. Qui etenim obligationem non accipit, neque ius consequens alteri parti tradit. Cum igitur in matrimonio contrahendo quis vindicare sibi praeumat ius alii personae, praeterquam comparti, suum corpus tradendi, ut matrimonium contrahere alio modo non intendat, ab officiis coniugalibus abstulit traditionem exclusivitatatis iuris et bonum fidei denegat."

97. Ibid., 64(1972), c. EWERS, April 19, 1972, p. 181: "Causa simulationis autem est ratio qua quis matrimonium contrahere positive volens aut non ita seu essentialibus qualitatibus non praeditum, tamen inductus fuerit ad proferendum ore quod corde non teneret. Verum, haud sufficit quod contrahens, attenta eius indole et perpensis ipsius moribus, ostendatur capax frustrandi sacrum foedus, sed insuper necesse est ut factum simulati consensus certo eluscat."

Rotal insistence on distinguishing the motive for the exclusion from the motive for the marriage is intended to discern the respondent's prevalent intention. Should the motive for the exclusion be peripheral, it would not invalidate the marriage, whereas an exclusion principally intended would result in nullity.⁹⁸ Hence, earlier Rotal demands that the exclusion should have the force of a condition.⁹⁹

4. The Value of Proof

The person who excluded is the only one who can testify directly to his will, and therefore his confession needs particular consideration. However, the various other elements of proof also reveal the respondent's intentions more or less strongly. Their probative force thus lies mainly in the fact that they lead to human presumptions. As such, these elements are admissible as evidence only if they are founded upon circumstances that are certain,

98. Ibid., p. 182.

99. Ibid., 41(1949), c. FELICI, October 15, 1949, pp. 480-481; ibid., 51(1959), c. SABATTANI, November 13, 1959, pp. 501-503; ibid., 64(1972), c. POMPEDDA, January 21, 1972, p. 25: "Qui vero positivo voluntatis actu matrimonium ipsum impetit vel aliquam eius essentialem proprietatem iure merito veram consensui supponere condicionem censetur, sive id expresse praestiterit, sive mente retinuerit; quae quidem condicio, sive expressa sive tacita, tanti roboris existimanda est ut contrahenti praevaleat voluntati, nihil secus contra consensus firmitatem integritatemque effectura."

determined, and directly related to the nullity of the marriage.¹⁰⁰

The Rota considers that indirect proof can lead to full proof, even in marriage cases. Thus the human presumptions which are formulated from indirect indications could be sufficient in themselves to enable the judge to reach an affirmative decision in bonum fidei cases.¹⁰¹ However, indirect proof more often serves to complement direct proof,¹⁰² in which case the character of the person who excluded is the link between direct and indirect proof.¹⁰³ The personality of the one excluding is thus the key to an equitable interpretation of the facts of the

100. Z. GROCHOLEWSKI, op. cit., p. 177; CIC(1983), c. 1586.

101. Z. GROCHOLEWSKI, op. cit., pp. 179-180: "[...] fortiter in sententiis rotalibus sustinetur plenam probationem etiam in causis matrimonialibus solis elementis indirecte probantibus possibilem esse. Pro hac assertione sequentes exponuntur argumenta: a. 'CIC hoc medium nec reprehendit nec reprobatur'; b. 'documenta ecclesiastica extant ubi expresse de praesumptionibus, ab iudice quidem in nostra re stantibus, mentio fit'; c. iurisprudencia rotalis ita docet; d. 'qui id negare praesumpserit (i.e. quod iudex ex circumstantiis deducere valeat gravem, immo vehementem praesumptionem hominis, quae pariat in eo moralem certitudinem), eo ipso negat possibilitatem cuiuscumque fere probationis in iudicio, nam absque efformatione praesumptionum, praecipue vehementium, iudex non amplius valet ius dicere.'"

102. Ibid., pp. 178-179.

103. Ibid., pp. 182-183.

case, and the judge needs to assess it carefully in order to reach moral certainty.

Moral certainty is found in the convergence of several presumptions and arguments, even if each one individually would be insufficient for a verdict to be reached.¹⁰⁴

Z. Grocholewski summarises the position as follows:

The arguments of proof are therefore to be considered both singly and together. Singly, that it may appear whether they are certain, determined and univocal, and whether they are truly probative or favour proof. Together, to evaluate whether all these arguments, taken together, are able to lead to moral certainty.

To reach moral certainty, however, it is clear that not only the accumulation of arguments is to be considered, but especially their right evaluation made by the judge. For single arguments do not have the same force. Therefore, although many, they sometimes do not suffice to create moral certainty, while at other times, very few elements can constitute sufficient proof if certain and univocal.

Therefore, since there is question of concurring arguments to demonstrate the exclusion, the presence of all the arguments we mentioned above is not required by strict necessity, although these are very useful. It is sufficient that the arguments brought forward,

¹⁰⁴. SRR Dec., 61(1969), c. ANNE, July 1, 1969, p. 684: "Haec omnia argumenta - scilicet confessio viri conventi extraiudicialis [...] sermones [...] inveterata eiusdem opinio [...] cultus infinitae proprie libertatis, horror suscipiendae cuiuscumque praestationis, maxima morum levitas - si complexive sumuntur, ita coalescent ut gignant certitudinem moralem de viri intentione saltem virtuali in-eundi matrimonium non-nisi rescindibile."

taken together, are able to create moral certainty.

Among the elements which are to be weighed to reach moral certainty and to render a correct verdict, all those which are an obstacle to proof should also not be forgotten. The judge must see whether these elements really impede the morally certain proclamation of marriage nullity or, on the contrary, whether they are easily explained and are to be set aside in favour of the stronger positive arguments for nullity.¹⁰⁵

5. The Difficulties to be Overcome

The greatest difficulty in judging cases of exclusion stems from the fact that a positive internal act, not

105. Z. GROCHOLEWSKI, op. cit., p. 186: "Argumenta probantia itaque perpendenda sunt tum singillatim tum simul. Singillatim, ut appareat utrum sint certa, determinata et univoca ac utrum revera aliquid probent vel probationi favellant. Simul, ad aestimandum utrum omnia haec argumenta, complexive sumpta, apta sint ad certitudinem moralem efformandam.

Ad certitudinem moralem acquirendam tamen - uti par est - non tantum argumentorum cumulatio est consideranda quam praesertim eorum recta aestimatio a iudice facta. Singula enim argumenta non eandem vim habent. Inde aliquando, etsi plura, non sufficiunt ad certitudinem moralem creandam, dum, alio in casu, pauca omnino elementa sed certa et univoca sufficientem probationum constituere possunt.

Itaque, cum de argumentis concurrentibus ad exclusionem evincendam agatur, haud requiritur stricta necessitate praesentia omnium illorum quae supra enumeravimus, etsi haec sint maxime utilia. Sufficit ut argumenta allata, simul sumpta, certitudinem moralem creare valeant.

Inter elementa quae perpendenda sunt ad certitudinem moralem efformandam, et ideo ad rectam sententiam ferendam, non sunt obliviscenda etiam ea omnia quae probationi obstant. Iudex videre debet utrum haec elementa revera impediant ut morali cum certitudine nullitas matrimonii proclamari possit, an, e contra, facile explicentur et coram positivis argumentis pro nullitate, pugnantibus praetermittenda sint."

directly perceptible, must be shown to exist.¹⁰⁶ It is thus not only a question of proving the existence of certain facts and circumstances, but rather of assessing them correctly.¹⁰⁷ Although judges generally follow the interpretation made in previous jurisprudence, the particularity of each case makes the positing of general principles difficult.¹⁰⁸ Thus the ecclesiastical judge must be so familiar with the people and their culture as to be able to evaluate the circumstances correctly.¹⁰⁹ He must reach the required

106. SRR Dec., 60(1968), c. ABBO, January 25, 1968, p. 42: "Probatio iudicialis [...] difficultate haud caret, cum agatur de inquirendo interiore homine, seu de facto interno perscrutando, externae quidem et liberae expressioni contrario [...]"

107. SRR unpublished decision, c. ANNE, June 28, 1969, "Cum agatur de unaquaque causa matrimoniali in sua singularitate definienda, arduum iudicum munus est - depositiones partium et testium necnon praesumptiones tum iuris, tum facti quae ex communiter contingentibus colliguntur aequa luce existimando seu nec nimis nec minustribuendo - definire utrum contrahens, re vera, inire voluerit matrimonium nonnisi rescindibile", as cited by Z. GROCHOLEWSKI, op. cit., p. 152.

108. SRR Dec., 61(1969), c. ANNE, May 6, 1969, p. 440, cited above, note 13; ibid., c. ROGERS, May 27, 1969, pp. 540-541: "[...] in unaquaque causa nullitatis matrimonii ob defectum consensus mota, iudices [...] considerent consensum a contrahente praestatum in existentia sua singulari, i.e. prout elicitus erat a tali persona talibusque in adiunctis."

109. Z. GROCHOLEWSKI, op. cit., p. 153: "Semper enim res prout in casu singulo et concrete habentur, sunt pensandae et ponderandae atque gradatim eas iudex cribrare debet", quod exigit non tantum magnam capacitatem aestimandi, sed et psychologiae hominum cognitionem ac experientiam, necnon laborem aliquando maximum."

degree of certainty with which to overturn the presumptions of law and of jurisprudence.¹¹⁰

Besides these general difficulties, each individual case must be closely studied to see whether the mode of behaviour was due to error or inclination, to a positive act of the will or to a habitual way of life, to a denial of an essential obligation of marriage or a personal incapacity to live accordingly. Z. Grocholewski indicates some other practical difficulties often encountered in cases of this nature: the long time lapse between the marriage and the introduction of the case is an obstacle to its proper instruction; the person who allegedly excluded is often unavailable as are some witnesses; the extra-judicial declaration may be lacking or the depositions may be ambiguous.¹¹¹ In view of these problems, it is important to note the advice of the Rotal judge Abbo:

{ [...] the difficulties of this kind of proof should not be exaggerated beyond measure. Otherwise we would be dealing with a man-made law applied in a human manner which could bring about an injustice to an innocent person.¹¹²

110. According to Z. GROCHOLEWSKI, ibid., Rotal judges err in claiming that the presumptions of law constitute an added difficulty in cases of exclusion, since they cede to contrary proof established with moral certainty.

111. Ibid., pp. 155-156.

112. SRR Dec., 61(1969), c. ABBO, July 3, 1969, p. 704:

Concluding this section, it is to be noted that of all elements of proof, the Rota attaches most importance to the cause or motive of the exclusion of fidelity, which is often to be found in the character of the respondent.¹¹³ This is an element of indirect proof, and is therefore in the nature of circumstantial evidence which acquires probative force to the extent that it leads the judge to formulate a human presumption. In order to do this, the judge interprets the facts in the light of the respondent's character and of the situation in which he finds himself in terms of family upbringing, social environment, and cultural influences. Moral certainty of the exclusion of fidelity is possible if the arguments that point to it are convincing, both in themselves and in conjunction with others.

It now remains to apply these juridical principles to Bantu marriage. In so doing, we shall endeavour to interpret the cultural aspects of Bantu marriage in order to formulate general human presumptions for the guidance of ecclesiastical judges in South Africa.

"[...], difficultas eiusmodi probationis haud est praeter modum amplificanda. Secus autem esset de iure hominibus humano modo applicando; quin etiam, talibus in adiunctis, ius immerenti offeret iniuriam."

113. A.M. ARENA, loc. cit., p. 271.

B. PROVING EXCLUSION IN BANTU MARRIAGE

While direct proof is possible, most cases judged on the grounds of the exclusion of the bonum fidei depend on elements of indirect proof through which the judge obtains moral certainty. However; in order to formulate equitable human presumptions from the circumstances of the case and the culturally-conditioned character of the respondent, the judge needs to familiarise himself with the people and their culture.

This section will therefore recall briefly those cultural values which are operative in forming the character of the person who allegedly excluded fidelity, as well as those elements which provide him with motives for marriage and those which could induce him to exclude the bonum fidei. These clearly affect men more than women, and thus our arguments will be formulated with particular reference to men. The situation regarding women's attitudes is dissimilar and would require a different approach.

1. The Character of the Excluding Party

Rotal sentences acknowledge clearly that social realities, prevalent ideas, and the concrete circumstances of the individual's upbringing strongly influence the

character of the person who excludes. In the African situation we may highlight the recognition of male prerogatives and the strong influence of family and friends.

a. Male Prerogatives

Chapters one and two indicated that Bantu society is male dominated and allows women only a narrowly circumscribed role in marriage. The wife is expected to be respectful, obedient, submissive, and fully committed to her husband's kinship group. Her labour and sexuality are at their service, and to some extent she remains a stranger with loyalties separate from those of her husband.

At the same time, Bantu society remains open to polygamy and does not expect the husband to be sexually faithful to his wife.¹¹⁴ Extra-marital relationships can often be explained as a quest for an additional wife. This attitude is instilled into him from puberty, especially in the context of the initiation school, and is illustrated for him in the life-patterns of his elders.¹¹⁵ The same

114. Like most African countries, South Africa accepts the legality of polygamous unions as long as they are entered into according to traditional rites only. The moment a person marries according to Christian or civil rites, any subsequent union without previous divorce is considered bigamy and therefore punishable in law.

115. Although the Christian Churches have consistently tried to discourage attendance at initiation schools,

does not apply to women, who are expected to be faithful to their husband.

Even though de facto most men do not enter polygamous unions, they feel that they continue to enjoy the sexual freedom associated with it, and society as a whole seems to concede it to them. The only limitation placed is that they should not become involved with married women, for this would compromise another man's marriage and could thus not be explained away as a quest for a secondary wife.

Many men still claim this ancient prerogative, and do not accept the Church's doctrine on the exclusivity of marriage.¹¹⁶ The Church's overall influence on male sexuality has thus been minimal, and in practice many of those

many young people still attend them. Some attend willingly, others go against their will, while others still are abducted for this purpose. Recent years have seen a more nuanced approach to the initiation school on the part of many missionaries who would like to harness the custom's formative potential. The situation is thus ambiguous and many Catholics are uncertain as to the official position of the Church on this question.

116. As mentioned earlier, only 10% of South African Bantu are Catholic, a further 35% are mainline Protestant, 30% belong to the independent Churches, and 25% are non-Christian. Since the Catholic Church has shown a remarkable numerical growth in the last 30 years, many Catholics are first or second generation converts and therefore subject to strong non-Catholic or non-Christian influences from their relatives and friends.

who continue to behave in this fashion make a concession to Christian teaching only in as much as they are more discreet regarding their extra-marital liaisons.

However, many women have gladly accepted Christian teaching on sexual matters and no longer concede to their spouses the right to commit adultery. This is the source of considerable discord in Christian families. Other women claim the same prerogatives as the men and demand sexual equality, which they interpret as the same freedom to engage in extra-marital affairs.

Therefore, it is quite possible that the spouse who frequently commits adultery in marriage does so because he reserves it to himself as a right, notwithstanding his knowledge of the Church's teaching to the contrary. This could help the judge to overturn the presumption that he married according to the will of the Creator or the mind of the Church, for it is clearly held by the Rota that whosoever deliberately limits the spouse's right to an exclusive relationship enters marriage invalidly.¹¹⁷ This kind of

¹¹⁷. SRR Dec., 64(1972), c. PINTO, February 14, 1972, p. 87: "Animadvertendum tamen est illum qui cum voluntate praevalenti fidem non servandi matrimonium celebrat necessario consensum limitare 'Qua propter nequit a consensu ipso excludi voluntas adimplendi obligationem quin consensus ipse limitetur, ideoque obligatio excludatur.'"

approach would be revealed in phrases like: "I paid bride-wealth for you and therefore you are bound, but you did not pay bridewealth for me and therefore I remain free," or: "I am a man, therefore I choose with whom to associate, but I will tell you with whom you may associate."

b. The Influence of Family and Friends

The extended family provides both a pattern for behaviour and a strong motive for emulation. Especially the maternal uncle has traditionally had a great influence on the behaviour of the individual. Where society is overwhelmingly non-Catholic and possibly non-Christian, his influence and advice will prove to be formative both before and after the marriage.

Strong family ties make it extremely difficult for an individual to act against the values held by the kinship group as a whole. Even should he be convinced of the Christian position on the exclusivity of marriage, his kin have the power to counteract his convictions and to make him conform. Their influence becomes particularly noticeable in childless marriages, when they often make unbearably strong

See also ibid., 63(1971), c. MASALA, October 20, 1971, p. 753: "[...] in praxi, saepe voluntas perseverandi in consuetudine foeda, additis aliis concludentibus circumstantiis indicium est ius ipsum ad fidem detrectatum esse."

demands that the husband either abandon his wife or take a secondary wife to ensure the continuation of his lineage.

Age-grouping also exerts an inordinate influence upon the individual, to the extent that the wishes of the peer group often prevail over his own. This pressure finds its origin in the initiation school whose participants maintain a life-long intimacy greater than that which exists between the spouses.¹¹⁸ The peer group's insights and advice will frequently prevail in the individual's assessment of a given situation, for to be the odd man out is so disloyal as to be unthinkable. Security lies in conforming to the common values of the group.

Since the social values of the kinship or peer group do not include exclusivity in marriage, the presumption that the respondent excluded ~~only~~ the fulfillment of an obligation previously assumed cannot prevail. On the contrary, the presumption favours the limitation of the spouse's right to an exclusive relationship. It should also be remembered that in a predominantly non-Catholic society,

¹¹⁸ It is not possible to obtain accurate statistics regarding the attendance of Catholic youths in initiation schools. A large number undoubtedly avoid it by having themselves circumcised in a hospital. However, the almost mystical feeling of solidarity is perpetuated in age-groups based on the school or the neighbourhood.

most marriages are either mixed marriages or celebrated with a dispensation from disparity of cult. Such marriages should be preceded by some instruction and preparation, but this is often inadequate in the missionary situation.¹¹⁹ Nevertheless, where the respondent had been given a full course of pre-marital instruction, a verdict of positive exclusion would still be possible; whereas marriage not preceded by a thorough preparation would more easily lead to the implicit exclusion of fidelity due to the non-assumption of the obligation.

2. The Motives for the Exclusion

Rotal jurisprudence asks that a clear distinction be made between the motives for marriage and the motives for the exclusion, and that the latter should be prevalent before a sentence of nullity could be warranted. While the motives for marriage could easily be distinguished in traditional society, it has been indicated in chapter one that Bantu society is in a state of transition in which various value-systems operate simultaneously. The individual subconsciously

119. In South Africa, problems of communication such as language differences, transport difficulties in rural areas, the absence of one of the parties due to migratory labour, or inadequately trained catechists, often result in unsatisfactory marriage preparation. An adequate knowledge of the nature of Christian marriage cannot reasonably be presumed but will have to be demonstrated in each case.

moves from one system to another, depending upon which system is most favourable to his immediate goal. Since this selective adaptation takes place almost instinctively, he may not be aware himself that his terms of reference have changed. The ecclesiastical judge should take note of this when probing the individual's motives for marriage or his motives for exclusion of fidelity.

a. The Motives for Marriage

As indicated in chapters one and two, African motives for marriage are predominantly communal, but can also be personal. Thus, in a society which confers full adult status only on the married person, there is an unseen pressure brought to bear on the individual to enter marriage. Similarly, the extended family, particularly in the person of the maternal uncle, exerts pressure on the individual to marry for the sake of extending social alliances and for the socio-economic advantages which they bring. The desire for children is also a very strong motive for marriage, especially since a child born out of wedlock is not recognised as that of the progenitor and remains fully incorporated in the woman's kinship group.

The social motives for marriage could be described as the individual's contribution to, or service of, the survival

of the kinship group, and as such his individual preferences are not always allowed free scope. This applies not so much to his choice of partner, but rather to the fact that he is expected to marry in order to fulfill the expectations of the kinship group. Where polygamy is practiced de facto, personal preferences are fully realised in the secondary unions.

b. The Motives for Excluding

The motives for excluding fidelity originate mainly in the individual's character, shaped by family upbringing, social realities and cultural influences. These are many and varied, depending on the background of each particular individual.

Where the Rota speaks about a person's deep-rooted feelings regarding marriage, obstinately held and tenaciously pursued, the African situation would point to the polygamous mentality. The person who has such a polygamous "heart", in which he sees institutionalised adultery or concubinage not only as possible but his by right, has a very strong motive to exclude fidelity. It does not matter whether his polygamous mentality is cultural in origin in which secondary marriage is actually possible, or whether it is based upon modern conditions of social instability or the desire for

sexual exploitation. In almost every instance it represents a willfull limitation of the spouse's right to exclusivity.

The South African migratory labour situation, in which the husband and wife are separated for much of their married life, and know at the time of marriage that this is inevitable, strengthens this tendency. If a migratory labourer looks forward to such lengthy periods of absence in order to enjoy greater sexual freedom in town, there is once again a possible indication that his commitment at the time of marriage did not include the necessary element of exclusivity.

Rotal references to an impatience with restrictions or an inordinate desire for liberty could well be equated with African ideas of masculine prerogatives. Marriage is not seen as a restriction on the husband's sexual activity, but only places his wife out of bounds for others. Where a man does not see sexual activity necessarily linked to marriage, but claims freedom to indulge in such activity with persons other than his spouse, exclusivity is clearly lacking. The proviso that the rights of others should not be infringed upon is related to other husbands or fathers, and does not include the spouse. Her rights are considered infringed only if there is alienation, resulting in a

permanent relationship with a third party or the loss of material support.

Similarly, references to the instability or dissolute lifestyle of the individual can be related to the African feeling that pre-marital sex is normal and desirable. The individual may have been encouraged at puberty to indulge in sexual liaisons or have been ridiculed for not doing so. Alternatively, he may have been involved in several such affairs before marriage as a matter of course. In cases like these, his willingness or ability to accept the obligation of marital exclusivity rather than its mere fulfillment may have been severely compromised.

Rotal acceptance of a vehement love for a third party as motive for the exclusion of fidelity could exist in the African situation, either because parental or family pressure was brought to bear on the choice of partners, or where multiple liaisons during puberty sowed the germ of affection between otherwise socially unsuitable partners. However, experience shows that it is more likely to take the form of several liaisons rather than a semi-permanent relationship with one person only, even where concubinage exists.

The moral and religious constitution of the individual could point to a motive for the exclusion of the bonum fidei, either if he had received solid instruction in the faith and yet deliberately rejects the Church's teaching on exclusivity, or if he was not sufficiently instructed and therefore does not include the Christian demand for marital exclusivity in his consent. There is also a wide-spread custom which requires that, whereas the celebration of marriage takes place in the wife's parish, she is under obligation to follow the religious persuasion of the husband afterwards. Thus a non-Catholic or non-Christian husband will readily assent to the Catholic explanation of marital obligations during the pre-nuptial instructions, only because he considers that he must undergo this "formality" as a necessary prelude to marriage, without necessarily feeling bound to them afterwards.

At the risk of oversimplification, it could be argued that the above motives for marriage can be distinguished from the motives for the exclusion of fidelity in that the former are based upon the service of the kinship group, whereas the latter are intended to serve the personal interests of the individual. However, it will readily be seen that all these situations analogous to those described by the Rota are subject to the same difficulties regarding their

probative value. The presumptions to which they give rise will have value only in so far as the judge interprets them correctly within the circumstances of the particular case which he is called upon to decide.

The judge thus needs a thorough understanding of the value-systems and the thought-patterns of the people and their culture. Neither the possibility nor the probability of exclusion is sufficient to establish moral certainty. This can be obtained only from the convergence of the various circumstances, elements of proof, and arguments, which will enable the judge to overturn the presumptions of law and of jurisprudence.

CANONICAL APPLICATIONS

The dearth of bonum fidei cases in matrimonial tribunals is due, not so much to the fact that the exclusion of fidelity does not take place, but rather to the fact that it is difficult to establish its existence with moral certainty. The following points can assist the judge in reaching such moral certitude:

1. The purpose of a matrimonial investigation is to establish the truth regarding the existence of the marriage bond, and is to be conducted only in terms of the specific

grounds of nullity alleged.

2. Each particular case is unique and should be dealt with according to its individuating circumstances. Only those general jurisprudential principles and distinctions which are directly applicable to it should thus be used.

3. Exclusion as an internal act of the will can be disclosed either directly, by the declaration of the excluding party corroborated by trustworthy witnesses, or indirectly, in the circumstances of the case and the character of the person who excludes.

4. Indirect proof can have the same probative value as direct proof. Both give rise to human presumptions which, in the opinion of the judge, can lead to moral certitude and are thus able to overturn the presumptions of law and of jurisprudence. However, only grave or vehement presumptions lead to moral certainty.

5. For the Rota, some of the most important elements of proof are to be found in the character and convictions of the excluding party which provide him with the motive for the exclusion, and in his behaviour before, during and after the marriage.

6. A person's character and convictions are influenced by the social and cultural values to which he is exposed. Each case should thus be judged within the context of the

culture which sustains the individual.

7. The factors in Bantu culture which could lead an individual to exclude fidelity are the encouragement of pre-marital sexual liaisons, the masculine prerogatives of sexual freedom, the polygamous mentality, the importance of the extended family and peer groups in the life of the individual, and the migratory labour situation.

8. Where the individual was given adequate instruction in the Christian faith, any exclusion could be explicitly willed as such, but where this was lacking, it could take the form of an implicit non-assumption of the obligation of fidelity.

The South African Bantu have a strong feeling of group solidarity which makes them aware that the actions of the individual have repercussions on the community as a whole. This is particularly evident in their approach to marriage, in which two groups of kin form alliances with one another through the persons of the prospective spouses. These alliances are manifested and strengthened in all the ceremonies surrounding the wedding, the most important of which is the exchange of bridewealth.

The significance of marriage thus lies mainly in the fact that it builds up the fabric of society and leads to a numerical increase of the kinship group into which the bride is married. The bride contributes her physical labour and fertility, but remains to some extent an outsider with loyalties outside the group. She thus maintains a close relationship with her own descent group, which makes it difficult for husband and wife to establish an intimate personal relationship.

Bantu society is based upon the principles of male dominance and gender division. The husband is the active

partner in the marital relationship and is responsible for family initiatives and public liabilities. Since polygamy was an option in traditional Bantu society and still is possible among non-Christians, sexual exclusivity in marriage is demanded from the wife but not from the husband who enjoys the same sexual freedom as do the unmarried. Men are thus not considered to commit adultery unless they involve a married woman in their affairs.

This has led to the institutionalisation of various forms of adultery by which extra-marital affairs are regulated. This often involves widows, divorcees, absconded wives, or unmarried mothers, leaving existing marriages largely intact. The existence of an extensive system of migratory labour has exacerbated the problem and has resulted in an increase of concubinage.

Christianity and westernisation have had the effect of emphasising the moral responsibility of the individual, as well as the equal dignity of the spouses. However, in a population where mainline Christians form a minority and Catholics are mostly first or second generation converts, the traditional attitudes regarding sexuality and marriage still largely prevail at the present time. Indeed, the co-existence of several value systems has actually enabled

individuals to engage in a process of selective adaptation, thus reducing the normative value of Christianity to one dynamic among many of married life.

The notion of equal dignity between the spouses is thus not yet generally accepted, which has contributed to increased tensions between husband and wife who have different expectations from marriage. It is for this reason that our dissertation has focused primarily upon masculine attitudes and behaviour.

Post-Vatican II missionary approaches have tended to follow an inductive approach to Bantu marriage. They take it for granted that Catholics will normally enter marriage according to traditional Bantu customs and seek only to purify these customs in the light of the gospel. Bishops and theologians have thus considered various aspects of Bantu marriage to see whether and to what extent they need adaptation. This has led to the accentuation of both the strengths and the weaknesses of traditional Bantu marriage.

Theologians have singled out some aspects of Bantu marriage which need greater understanding and could be made acceptable to Catholics. The extended family is judged compatible with Christianity, on condition that its group

solidarity and co-operation not become despotic and undermine personal responsibility and autonomy. The communitarian nature of Bantu marriage is considered a blessing, as long as it does not negate the individual's freedom of choice in marriage. The progressive nature of marriage which emphasises personal and communal commitment is beneficial as a form of preparation for marriage, whereas its circumvention could be indicative of a lack of commitment. Bridewealth can be symbolic of the earnestness of marital commitment and of the bond that links two families together, but has become dangerously close to being a business transaction which wounds the personal dignity of the woman and places her in a subservient position in relation to her husband. The principle of male dominance is considered the least defensible of all the traditional values, since it leads to the establishment of a double standard and the selfish exploitation of women, symbolised in the polygamous mentality.

The African bishops have opted for an inductive approach to Bantu marriage. Since the values of Bantu marriage are ambiguous in themselves, however, this approach carries with it the danger of causing confusion and uncertainty in the minds of the faithful. It therefore needs a clear, consistent and uncompromising catechesis and marriage prepara-

tion to ensure a proper understanding of the nature of Christian marriage. On the other hand, the documents of the Magisterium prefer a deductive approach and present the plan of God as the blueprint to which all human realities should conform. The individual is called upon to make a personal commitment to God's call, even if it should place him in confrontation with the cultural values of his environment. This, too, calls for an effective catechesis.

The social attitudes of male dominance and the polygamous mentality do not encourage an understanding of marriage as an exclusive relationship, and they thus make it difficult for a man to make a personal commitment to marital fidelity. However, sexual fidelity is an essential element of Christian marriage and its absence results in the invalidity of the union. Jurisprudence understands this to mean that fidelity must be included in the marital commitment made at the exchange of the wedding vows. Both spouses are equally bound to grant to one another the right to an exclusive relationship and to accept freely the concomitant obligation of fidelity. This demands a total and unconditional surrender of self to constitute Christian marriage, and any attempt to restrict, limit or exclude the bonum fidei on the part of one of the spouses results in the invalidity of the marriage.

Jurisprudence distinguishes various ways in which the bonum fidei can be denied. Should the individual know about the obligation and yet consciously reject it for his own marriage, he would exclude fidelity explicitly. Should he be unaware of the Church's teaching on fidelity and consciously intend the opposite in his marital commitment, he would again exclude fidelity explicitly. But should he simply live according to the prevalent attitudes of male prerogatives and consider himself equally free before and after marriage, he would exclude fidelity implicitly in that he would neither assume the obligation nor concede to his spouse the right to an exclusive relationship. The prevalent erroneous opinions regarding the exclusive nature of Christian marriage can thus influence the individual's consent so adversely that he contracts marriage invalidly.

However, there is another way in which these attitudes can invalidate an individual's marital consent. Should the person have become so accustomed to the prevailing male prerogatives and the polygamous mentality that they have become almost second nature to him, he could possibly have become unable to assume the obligations of an exclusive relationship. His marriage would then be invalid due to this incapacity to assume the obligation of fidelity.

Any investigation into the possible invalidity of marriage must start with the presumptions of law that both the marriage and the consent that gave rise to it are valid. These presumptions are not absolute and can be overturned by contrary proof. However, an intention against fidelity is an internal act of the will whose existence is not usually directly discernible, and jurisprudence considers it difficult of proof. The difficulty is aggravated by the jurisprudential application of the Thomistic distinction between the right to fidelity and the use of that right in marriage, or the obligation to fidelity and its fulfillment by the spouses. Up to the present, Rotal judges start their investigation with the presumption that infringements of fidelity by acts of adultery concern only the fulfillment of the obligation and are not proof of the rejection of the obligation itself. Adultery is thus considered ambiguous in itself: it serves only as an indication from which proof can be obtained but is not per se probative.

Since marriage cases concern the public good, the law requires that direct proof should be corroborated before moral certainty is obtained. Such corroboration is usually acquired from indirect proofs, particularly the character of the person who allegedly excluded and the circumstances

of the case. These indirect proofs enable the judge to formulate human presumptions regarding the exclusion of fidelity. Such human presumptions can be so grave as to give the judge moral certainty regarding the nullity of the marriage, and to overturn the presumptions of law which uphold validity.

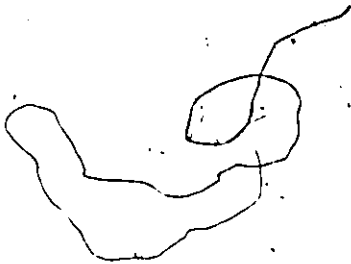
The human presumptions which are formulated from the indirect proofs of the case are thus inferences made by the judge's reasoning. In order to make equitable inferences, however, the judge needs to understand both the person who allegedly excluded as well as the social and cultural milieu which gave him birth. An insight into the prevailing attitudes towards marriage is thus indispensable for equitable verdicts in marriage nullity cases.

It is our contention, based upon this study, that the prevailing attitudes towards marriage and sexuality in Bantu culture do not favour the jurisprudential presumption that only the fulfillment and not the obligation of fidelity itself is usually excluded in bonum fidei cases. The evidence suggests that the man who offends against fidelity does so because he considers it to be his prerogative, his right. This implies that he did not assume the obligation of fidelity and did not grant his spouse the right to an exclusive

relationship. The same does not apply as readily in the case of a woman because of different cultural expectations..

While each particular case must be dealt with in its individuating circumstances, the prevailing social attitudes must be taken into account for their correct interpretation. This is true especially where Catholics form a small minority of the population or where they lack solid grounding in Catholic doctrine on the exclusive nature of Christian marriage. The presumptions formulated by jurisprudence must thus be applied with circumspection.

As a corollary, there is an urgent need for the Church in South Africa to give the faithful a better understanding of the exclusive nature of the marital relationship. Only a clear and unambiguous catechesis provided for all age groups, together with a thorough marriage "catechumenate" as called for in Familiaris Consortio, no. 66, can lead to both an understanding and an acceptance of this Christian imperative by which the spouses imitate Christ in his unconditional giving of self.



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II. ANTHROPOLOGICAL, ETHNOGRAPHICAL, AND LEGAL TEXTS

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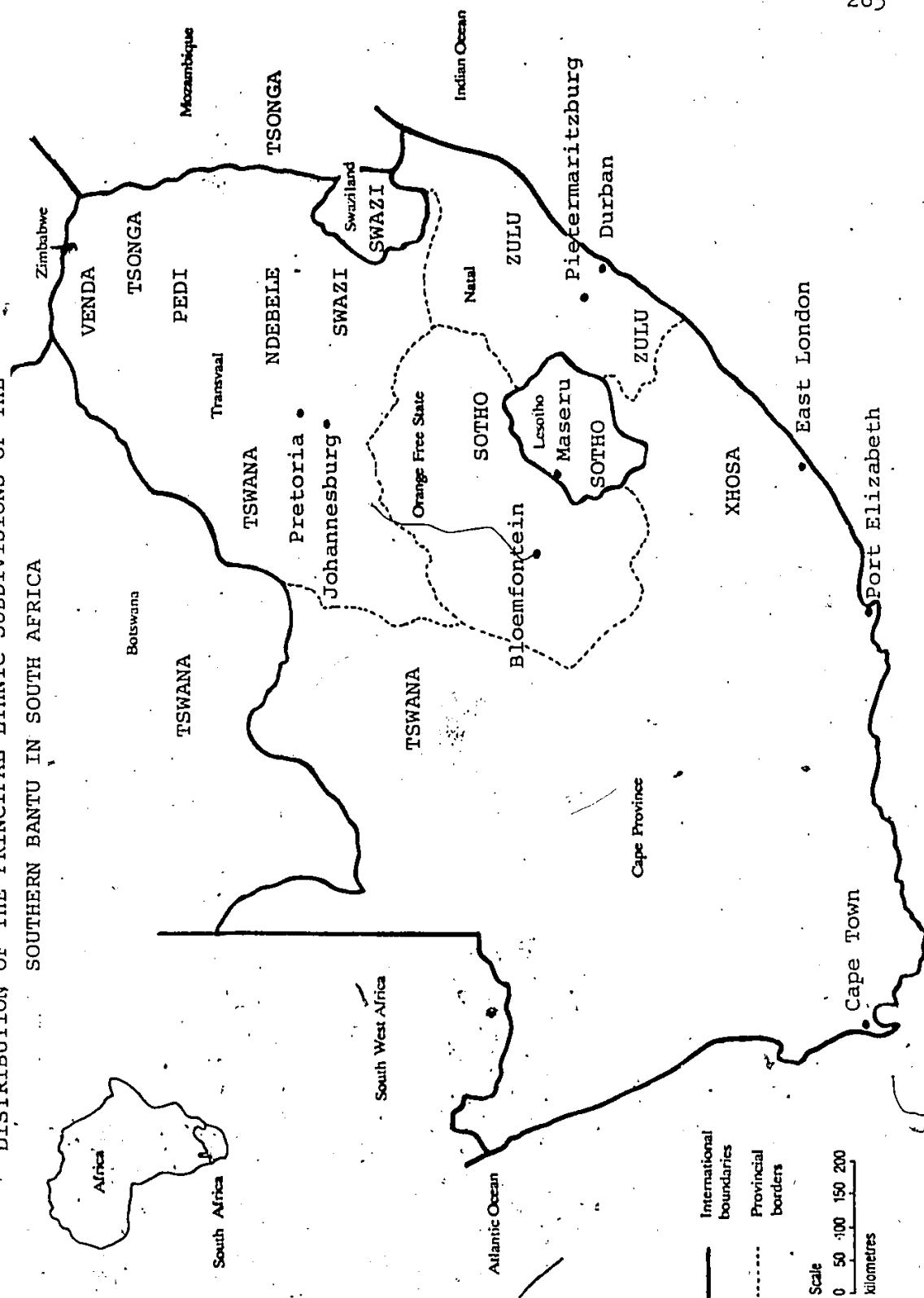
DISTRIBUTION OF THE PRINCIPAL ETHNIC SUBDIVISIONS OF THE SOUTHERN BANTU IN SOUTH AFRICA

The Southern Bantu in South Africa are subdivided into four main cultural-linguistic groups, the Nguni, the Sotho, the Venda, and the Tsonga. Nine separate ethnic groups are usually identified among them which show cultural differences in respect of language, customs, social organisation, etc. Each ethnic group consists of a large number of clans who differ dialectically but nevertheless give allegiance to the larger group. In the following chart, column I shows the cultural-linguistic group; column II the ethnic sub-group; column III some of the better known clans; and column IV the geographical area where they originate.

I	II	III	IV
NGUNI:	XHOSA	- Xhosa, Bhaca, Mpondomise Mpondo, Mfengu, Thembu	: Transkei and : Eastern Cape
	ZULU	- Zulu, Mngomezulu, Nkosi Buthelezi, Mkhize, Thembu Dlamini, Nxumalo, Makhanya	: Kwazulu and : Natal
	SWAZI	- Dlamini, Nkosi, Magagula Mkhatshwa, Zwane, Maseko	: Swaziland and : Eastern Transvaal
	NDEBELE	- Manala, Ndzuondza, Langa Hwaduba, Maune, Sebitiela	: Central and : Eastern Transvaal
SOTHO:	SOTHO	- Fokeng, Phuthing, Tlokwa Taung, Kweni, Kgolokwe	: Lesotho and : Orange Free State
	TSWANA	- Tlhaping, Tlharo, Rolong Hurutse, Ngwaketse, Kweni Fokeng, Taung, Kgatla	: Botswana, : Bophutatswana and : Western Transvaal
	PEDI	- Mphatlhele, Tshwene, Tlokwa Matlala, Letswalo, Dikgale	: Northern and : Central Transvaal
TSONGA:	TSONGA	- Maputa, Tembe, Mpfumo Khosha, Nkuna, Mavunda	: North-Eastern : Transvaal
VENDA:	VENDA	- Tshivhula, Ndou, Laudzi Tavhatsindi, Mbedzi, Lemba	: Northern : Transvaal

Besides the geographical distribution indicated above and on the accompanying map (p. 265), about 50% of South African Bantu are urbanised. The largest concentrations are based around the major industrial centres in each province (the cities indicated on the map). These urban conglomerations are very heterogeneous, representing most ethnic groups, with a concomitant blurring of cultural differences between them. Ethnic intermarriage is hastening this process.

DISTRIBUTION OF THE PRINCIPAL ETHNIC SUBDIVISIONS OF THE SOUTHERN BANTU IN SOUTH AFRICA



ROTAL CASES INVOLVING THE BONUM FIDEI, 1962-1981

To our knowledge, the only readily available list of Rotal cases involving the bonum fidei was published by H. SERAFINI, "Index iurisprudentiae rotalis super bonum fidei (ex voluminibus S.R. Rotae tribunalis editis)", in V. FAGIOLO (ed.), Annali di dottrina e giurisprudenza canonica, Vol. 2: Il dolo nel consenso matrimoniale, Città del Vaticano, Libreria Editrice Vaticana, 1972, pp. 236-261.

Serafini's list covers the years 1909-1961 and seems to include some early cases in which the bonum fidei is not mentioned explicitly. It does not refer to those cases listed in the table of contents of the SRR Decisions, but unpublished in the body of the text.

The following list is intended to bring Serafini's work up to date. It should be noted that it includes all Rotal cases involving the bonum fidei, whether published or unpublished, or whether introduced under the sole heading or in conjunction with others. Cases introduced under the heading of exclusion of the tria bona are also listed, for their in iure sections usually deal explicitly with the bonum fidei as well. The cases marked with an asterisk seem to have had a greater influence on the development of jurisprudence under the heading bonum fidei.

Since the last published volume of SRR Decisions covers the year 1973, our list is complete up to the end of 1973. Those few bonum fidei decisions which have been reported in canonical journals are included in as far as we are aware of them. It may be of interest to note that, whereas bonum fidei cases made up approximately 4% of Rotal cases in the early 1960s, in 1972 and 1973 bonum fidei cases had increased to approximately 9% of Rotal cases.

The following symbols are employed in this appendix:

a = amentia	l = ligamen
b = tria bona	m = metus
c = conditio	p = prolis
d = disparitas cultis	s = sacramenti
i = incapacitas assumendi	t = simulatio totalis
f = fidei	

APPENDIX II

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Vol	Year	Date	Ponens	Caput	Dec	Caput	Pages
54(1962)		April 4	Pinna	f	neg		150-155
		May 30	Mattioli	fp			unpubl.
		June 27	Ewers	f	neg		"
		July 13	Filipiak	f	neg		401-403
		Dec. 20	Bejan	f	neg		695-705
55(1963)		Feb. 22	Filipiak	b	neg	p	124-125
		April 4	Pinna	af	neg		256-271
		June 8	Ewers	fp	neg		454-461
		June 28	Doheny	fs	neg		526-532
		Oct. 30	*De Jorio	f	neg		716-725
		Dec. 20	Sabattani	fp	aff	p	959-970
56(1964)		March 18	Canals	f	aff		210-219
		April 23	Mattioli	f	neg		unpubl.
		June 17	*De Jorio	b t	aff	f	491-502
		June 27	Ewers	b t	neg		unpubl.
		Oct. 23	Sabattani	fs	neg		755-763
		Dec. 9	Anné	f	neg		911-918
57(1965)		Feb. 16	Anné	fs	aff	s	unpubl.
		March 20	Lefebvre	f	aff		"
		May 22	Ewers	fs	neg		431-435
		June 1	Anné	fm	neg		unpubl.
		Oct. 16	Lefebvre	ft	aff	t	"
		Nov. 15	Bonet	fp	neg		"
		Nov. 29	Pinna	b	aff	s	"
		Nov. 29	Pinna	b	aff	sp	"
		Dec. 20	Rogers	fs	neg		965-975
		58(1966)		July 18	Lefebvre	fp	aff
July 26	Palazzini			f	aff		662-672
59(1967)		Jan. 26	Lefebvre	f	aff		unpubl.
		Feb. 9	Abbo	dfs	neg		78-92
		March 18	Lefebvre	b	neg		unpubl.
		April 15	Lefebvre	dflpt	aff	l	181-187
		April 15	Lefebvre	fst	aff	s	unpubl.
		June 21	Canals	fs	neg		"
		Oct. 30	Filipiak	fs	neg		737-740
		Nov. 4	Czapla	fs	neg		unpubl.
60(1968)		Jan. 17	*Bejan	ft	aff	f	12-21
		Jan. 25	Abbo	fs	neg		41-46
		Jan. 30	Anné	b	aff		unpubl.

APPENDIX II

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Vol	Year	Date	Ponens	Caput	Dec	Caput	Pages
		Feb. 6	Anné	fm	neg		unpubl.
		May 18	Fagiolo	fs	aff	s	"
		May 22	Palazzini	fs	aff	s	"
		May 25	Filipiak	f	neg		365-369
		July 13	*De Jorio	fs	neg		551-562
		July 22	Ewers	cfs	neg		unpubl.
		Oct. 16	Palazzini	fs	aff		"
		Oct. 21	Czapla	f	neg		"
		Nov. 9	*Ewers	fs	neg		723-729
		Dec. 13	Ferraro	fmst	neg		862-870
		Dec. 21	Ewers	fs	neg		unpubl.
61(1969)		Jan. 20	Bonet	fpt	neg		55-62
		Feb. 12	Palazzini	fp	aff		155-163
		Feb. 26	*De Jorio	fs	aff	f	202-210
		March 26	Anné	fpst	neg		unpubl.
		April 23	Bejan	f	aff		394-402
		April 23	Bejan	f	aff		unpubl.
		May 28	Pucci	fs	neg		"
		June 27	Mundy	fs	neg		"
		Oct. 11	Ewers	fs	neg		934-946
		Oct. 30	Abbo	fs	neg		unpubl.
		Nov. 6	Abbo	fs	neg		977-983
		Nov. 15	Lefebvre	f	aff		1003-1007
		Nov. 27	Parisella	fpst	aff		unpubl.
		Dec. 2	Pompedda	fm	aff	m	1097-1105
		Dec. 19	Anné	f	aff		1172-1179
62(1970)		Jan. 27	Fiore	f	aff		86-90
		Feb. 28	Ewers	f	aff		223-234
		April 15	Palazzi	fmst	aff	m	unpubl.
		April 21	Canals	f	aff		370-375
		May 2	Ewers	fps	aff	f	417-424
		May 2	Lefebvre	fms	aff	fs	unpubl.
		May 6	Abbo	f	aff		488-496
		June 11	Parisella	fps	aff	f	647-654
		June 12	Fagiolo	f	neg		661-666
		June 26	Fagiolo	f	aff		unpubl.
		July 18	Lefebvre	f	neg		"
		July 23	Pinto	fps	aff	s	839-843
		Oct. 17	Ewers	fm	aff	f	892-901
		Oct. 21	Masala	fs	aff		922-931
		Oct. 28	Palazzini	af	neg		965-978
		Nov. 25	Pucci	afst	aff	a	1063-1072
		Dec. 16	Canals	f	aff		unpubl.
		Dec. 19	Pompedda	fs	aff	f	1189-1194

Vol	Year	Date	Ponents	Caput	Dec	Caput	Pages
63(1971)	Jan.	29	Fagiolo	fs	aff		unpubl.
	Feb.	13	*Ewers	f	aff		119-130
	March	18	*Pinto	i	neg		186-196
	March	31	Mundy	fps	neg		unpubl.
	April	30	Fiore	f	aff		361-365
	May	26	Pompedda	f	aff		unpubl.
	July	10	Lefebvre	fs	aff	s	673-678
	July	15	Pinto	fs	neg		687-696
	Oct.	20	Masala	f	aff		750-761
	Oct.	27	De Jorio	fs	aff	f	781-790
	Oct.	27	De Jorio	fms	neg		796-812
	Nov.	3	*Di Felice	fpt	aff	f	837-845
	Nov.	9	Rogers	fst	neg		unpubl.
64(1972)	Jan.	21	Pompedda	fs	aff	f	24-32
	Feb.	14	Pinto	f	aff		83-91
	Feb.	16	Pompedda	f	aff		100-105
	Feb.	26	Pozzi	fp	neg		unpubl.
	April	11	Fiore	fs	neg		unpubl.
	April	19	Ewers	fs	neg		179-188
	May	5	Bruno	f	aff		unpubl.
	May	13	Di Felice	afst	neg		276-283
	May	13	Pozzi	fs	aff		284-293
	May	17	De Jorio	fps	aff	p	310-319
	June	28	Huot	fpst	neg		unpubl.
	July	7	Serrano	fst			unpubl.
	July	22	Lefebvre	fmi	aff	f	494-500
	July	29	Lefebvre	f			unpubl.
	Oct.	11	Masala	fps	aff		"
	Oct.	14	Ewers	fs	aff	f	534-542
	Oct.	18	Palazzini	f			unpubl.
	Oct.	25	Bejan	f	aff		"
	Oct.	31	Fiore	f	neg		"
	Nov.	6	Pinto	fs	neg		672-680
	Nov.	15	Masala	f	neg		unpubl.
	Nov.	16	Fiore	fst	neg		"
	Nov.	22	Huot	fs	aff		"
	Nov.	29	Masala	fpst	neg		"
	Dec.	12	Huot	fs	aff		"
	Dec.	15	Bruno	f	aff		762-774
	Dec.	16	Mercieca	fmst	neg		783-790
65(1973)	Jan.	10	De Jorio	fps	aff	p	8-18
	Jan.	20	Pozzi	f			unpubl.
	Jan.	31	Davino	fps			49-53

Vol	Year	Date	Ponens	Caput	Dec	Caput	Pages
		Feb. 28	Agustoni	f	neg		180-188
		March 3	*Ewers	fs	aff	f	199-207
		March 9	Bruno	ft			unpubl.
		March 14	Palazzini	fs			"
		March 16	Pozzi	afst	neg		273-278
		March 26	Serrano	afp	neg		287-291
		April 9	Pinto	f	neg		359-366
		June 13	*De Jorio	fs	aff	f	500-506
		June 28	Lefebvre	fps			unpubl.
		June 28	Bruno	fm	aff	f	526-537
		Oct. 10	Masala	f	neg		626-633
		Oct. 16	Pompedda	ft	neg		647-652
		Oct. 20	Raad	f			unpubl.
		Nov. 5	Pompedda	fm			"
		Nov. 21	Bejan	fst	neg		774-783
		Dec. 22	Bejan	f	aff		849-856

* * * * *

Besides these bonum fidei cases published in SRR Decisions, some more recent Rotal bonum fidei decisions also appeared in whole or in part in the canonical reviews:

January 9, 1975, c. Parisella, in Periodica, 64(1975), pp. 683-688.

January 15, 1977, c. Ewers, in EIC, 33(1977), pp. 354-356.

March 19, 1978, c. Pinto, in EIC, 35(1979), pp. 249-252.

April 20, 1979, c. Pinto, in ME, 104(1979), pp. 384-390.

April 25, 1979, c. Davino, in ME, 105(1980), pp. 184-189.

May 7, 1979, c. Parisella, in ME, 104(1979), pp. 285-293.

July 25, 1980, c. Serrano, in EIC, 38(1982), pp. 274-277.

SAMPLE IN IURE SECTIONS UNDER THE HEADING OF INTENTION AGAINST FIDELITY

1. The Non-Assumption of Fidelity

Christian marriage is a covenant which comes about when the spouses mutually give and receive one another (c. 1057 § 2) in order to establish a partnership of the whole of life (c. 1055 § 1). Of its very nature this covenant is both perpetual and exclusive (c. 1134), and both spouses enjoy equally the same rights and obligations with regard to all the things which pertain to the partnership of conjugal life (c. 1135). Thus the self-giving of both husband and wife should be fully human, total, exclusive, oblativ, and unifying (Humanae Vitae, no. 9) if it is to be constitutive of Christian marriage.

The intention to establish an exclusive marital relationship is so essential to Christian marriage that where it is lacking a marriage does not come about (St. THOMAS AQUINAS, Supplementum, q. 49, a. 3). This exclusivity is called the bonum fidei, and any limitation placed upon it results in the invalidity of marriage (SRR Dec., 45(1953), c. MATTIOLI, October 30, 1953, pp. 641-642).

The unity of marriage and its exclusivity are not identical, and thus the limitation of exclusivity does not necessarily involve giving a third person the right to conjugal acts (ibid., 55(1963), c. DE JORIO, October 30, 1963, p. 717). Nevertheless, the invalidating limitation placed upon the bonum fidei should result from a positive act of the will (c. 1101 § 2), i.e. the limitation should be specifically sought by the will. However, jurisprudence acknowledges that this limitation may be implicit, i.e. the will can directly pursue the kind of marriage from which exclusivity is either excluded or restricted in some way.

Thus the person who intends to establish an open marriage in which exclusivity is lacking by mutual consent (ibid., c. ID., October 27, 1971, p. 787), or a marriage where one spouse enjoys sexual liberty while the other is bound to exclusivity (ibid., c. DI FELICE, November 3, 1971, p. 839), does not enter a Christian marriage. An indirect exclusion of the bonum fidei is therefore considered to have taken place if the spouse's right to an exclusive relationship is not acknowledged at the time of consent, or if the obligation

to sexual fidelity is not assumed (ibid., 64(1972), c. POMPEDDA, February 16, 1972, p. 101; ibid., 65(1973), c. ID., October 16, 1973, p. 649).

Such an implicit exclusion could be caused by the person's defective knowledge regarding the nature of Christian marriage. If this ignorance or error is so deep-rooted that it assumes the character of a mentality, rendering the individual unable to see fidelity as the Church sees it, or making him intolerant towards the restrictions imposed by marital exclusivity, the marriage is invalid (ibid., 64(1972), c. ID., January 21, 1972, pp. 25-26), for it vitiates the will (ibid., 46(1954), c. FELICI, July 13, 1954, p. 616; ibid., 49(1957), c. ID., December 17, 1957, p. 844; ibid., 48(1956), c. FILIPIAK, March 23, 1956, pp. 256-257).

A deep-rooted mentality of this nature can be reinforced by the influence and example of family, relatives, and friends, and thus induce the will further to exclude fidelity implicitly (ibid., 65(1973), c. DE JORIO, June 13, 1973, p. 503). It is sufficient for the invalidity of marriage that such a person follow his own feelings, education, or deep-seated practice of multiple sexual relationships (ibid., 64(1972), c. POMPEDDA, January 21, 1972, pp. 25-26), or that the obligation of fidelity was demonstrably not a part of his marital consent (ibid., 63(1971), c. DI FELICE, November 11, 1971, p. 839).

According to ethnographers, both traditional and modern Bantu attitudes consider sexual gratification as something not necessarily linked to marriage, allowing adults opportunities of sexual activity outside marriage on condition that there is no impregnation of a nubile girl or an involvement with a married woman (B.A. PAUW, The Second Generation, Cape Town, O.U.P., 1968, p. 163). This feeling is shared by many Christians who consider adultery to mean only those extra-marital relationships which involve married women (P. MAYER, Townsmen or Tribesmen, Cape Town, O.U.P., 1971, p. 214). Thus adultery is frowned upon only if it prejudices the security of the spouse and family, or the stability of another man's marriage (ibid., p. 252). In the changing socio-cultural scene, Christianity thus tends to be seen as just one of several possible dynamics of married life, rather than as a normative ideal (M. PESKIN, "Christianity and Marriage in Soweto", in T.D. VERRYIN (ed.), Church and Marriage in Modern Africa, Groenkloof, The Ecumenical Research Unit, 1975, p. 424).

Bishops and theologians have confirmed that these attitudes are shared by Catholics. According to them, too many

monogamous Christian men still have a polygamous mentality in which the wife is considered as a possession or a means to an end (Card. P. ZOUNGRANA, "A propos de la polygamie en Afrique", in Téléma, 9,2(1983), p. 43), and this polygamous mentality causes African men to live according to a double standard in which they demand sexual freedom for themselves while denying it to their spouses (B. KISEMBO, L. MAGESA, A. SHORTER, African Christian Marriage, London, Chapman, 1977, p. 77). This led the African bishops at the 1980 Synod on the family to condemn all forms of sexual exploitation, especially in the form of successive or clandestine polygamy (AFER, 23(1981), pp. 96-102).

Proof of the implicit exclusion of fidelity can be arrived at directly, from the declarations of the spouses, the testimony of witnesses, or available documents; or indirectly, from the circumstances surrounding the marriage, the character of the respondent, and the motive for the exclusion (SRR Dec., 64(1972), c. POMPEDDA, January 21, 1972, p. 26; ibid., 62(1970), c. PALAZZINI, October 28, 1970, p. 971).

The circumstances of the case which are particularly relevant to proving the implicit exclusion of fidelity are the extent to which the respondent displayed the polygamous mentality, subscribed to the prevalent cultural view of masculine prerogatives, or expressed a deep desire for many sexual relationships. Thus his personal character and way of life could be very important indications of the non-assumption of fidelity (ibid., 63(1971), c. DE JORIO, October 27, 1971, p. 786; ibid., 62(1970), c. POMPEDDA, December 19, 1970, p. 1190). If his prevalent will was to choose a pseudo-marriage from which fidelity was excluded, rather than to marry according to the mind of the Church, his consent would have been inadequate for the establishing of a valid marriage (SRR decision c. PINTO, March 19, 1978, in EIC, 35(1979), p. 251).

The presumptions of law which favour marriage (cc. 1060, 1101 § 1) can be overturned by proof to the contrary. Such proof arises from the human presumptions formulated by the judge from the circumstances of the case (c. 1586) and his knowledge of the psychology and cultural customs of the spouses (Z. GROCHOLEWSKI, De exclusione indissolubilitatis ex consensu matrimonialis eiusque probatione, Neapoli, M. D'Auria, 1973, p. 153). Particularly in mission countries where the Church has come to embrace a multiplicity of societies and cultures, the general formulations of jurisprudence must be applied with great caution (SRR decision c. FAGIOLLO, June 8, 1968, in IDE, 79,2(1968), pp. 278-280), for the

deeper the error regarding the nature of Christian marriage, the stronger the presumption favouring invalidity (SRR Dec., 63(1971), c. POMPEDDA, January 23, 1971, pp. 53-54).

2. The Exclusion of Fidelity

Christian marriage, which is a covenantal partnership of the whole of life (c. 1055 § 1), comes about through the consent of the spouses by which they mutually give and accept one another for the purpose of establishing marriage (c. 1057 § 2). This consent is presumed to be sincere (c. 1101 § 1), but it could be vitiated if either or both parties should exclude an essential element of marriage by a positive act of the will (c. 1101 § 2).

Exclusivity is one of these essential elements of Christian marriage (c. 1134), and both spouses are equally bound to it as one of the rights and obligations of marriage (c. 1135). Thus their self-giving must be fully human, total, exclusive, oblativ, and unifying (Humanæ Vitæ, no. 9) if it is to result in a valid Christian marriage.

The intention to establish an exclusive marital relationship is so essential to Christian marriage that where it is lacking, a marriage does not come about (St. THOMAS AQUINAS, Supplementum, q. 49, a. 3). This exclusivity is called the bonum fidei which St. Thomas understood to be essential to marriage in its principle as a right and obligation, but not necessarily in its use.

Traditional jurisprudence thus distinguished the right to fidelity from the use of this right, and formulated the presumption that not fidelity itself, but only its exercise is excluded in bonum fidei cases. This presumption made it very difficult to conclude to the invalidity of marriage on this ground. Only the reservation of the right to commit adultery (SRR Dec., 41(1949), c. STAFFA, August 5, 1949, p. 461); or the refusal to concede the spouse the right to an exclusive relationship or to assume oneself the obligation of fidelity (ibid., 36(1944), c. WYNEN, July 31, 1944, p. 570) was thus considered to harm the bonum fidei.

Some more recent decisions have held that St. Thomas' distinction concerns only the difference between act and intention, and is not concerned with different kinds of intentions (ibid., 55(1963), c. DE JORIO, October 30, 1963, p.

718), and that most people do not make such distinctions when excluding fidelity from their marriage (*ibid.*). Although the distinction is logical and comprehensible in law, it is psychologically improbable, and ordinary human experience leads to the presumption that whosoever does not wish to fulfill an obligation also does not wish to assume it (*ibid.*, 63(1971), c. ID., October 27, 1971, p. 803).

To provoke invalidity, the act of exclusion must be made by a positive act of the will which can be actual or virtual, explicit or implicit (Z. GROCHOLEWSKI, De exclusione indissolubilitatis ex consensu matrimonialis eiusque probatione, Neapoli, M. D'Auria, 1973, pp. 190-191). The bonum fidei is explicitly excluded when a person entering marriage directly intends the opposite, whether he was aware of the obligation or not. It is implicitly excluded if his understanding of marriage is defective and he simply intends to marry according to his erroneous views (D.E. FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence", in SC, 9(1975), p. 128).

According to ethnographers, Bantu marriage is open to polygamy which is conceived as the best means of serving the interests of the extended family (E. PRESTON-WHITE, "Kinship and Marriage", in W.D. HAMMOND-TOOKE (ed.), The Bantu-Speaking Peoples of Southern Africa, London, Routledge and K. Paul, 1974, p. 179). It is seen as part of a male-dominated culture in which masculine prerogatives include sexual freedom in marriage. Thus youths are encouraged to indulge in sexual relationships (V. VAN DER VLIET, "Growing Up in Traditional Society", in W.D. HAMMOND-TOOKE, *op. cit.*, pp. 236-237), and boys are so convinced that they have a right to demand intercourse from girls that many threaten them with violence should they resist their advances (B.A. PAUW, The Second Generation, Cape Town, O.U.P., 1968, p. 122; P. WHOOLEY, "Equality in Marriage", in T.D. VERRYIN (ed.), Church and Marriage in Modern Africa, Groenkloof, The Ecumenical Research Unit, 1975, p. 179).

Both traditional and modern attitudes towards sexuality are influenced by this polygamous mentality in which men do not see marriage as an exclusive relationship for themselves, but claim the same sexual freedom after marriage which they enjoyed before (B.A. PAUW, *op. cit.*, p. 163). They thus reserve to themselves the right to commit adultery, using the time-honoured ways institutionalised in Bantu culture and designed to leave existing marriages intact (E.J. KRIGE, "Individual Development", in I. SCHAPERA, The Bantu-Speaking

Tribes of South Africa, London, G. Routledge, 1937, p. 110). Ethnographers claim that many Christians tend to follow this attitude, although they are more discreet and try to avoid detection (P. MAYER, Townsmen or Tribesmen, Cape Town, O.U.P., 1971, pp. 252-266).

The exclusion of fidelity by a positive act of the will can be proven directly from the declarations of the spouses, the testimony of the witnesses, or available documents (SRR Dec., 64(1972), c. POMPEDDA, January 21, 1972, p. 26). Where the respondent does not admit to the exclusion, recourse must be had to indirect proof such as the circumstances surrounding the marriage, the character of the respondent, and his motives for the exclusion (*ibid.*, 62(1970), c. PALAZZINI, October 28, 1970, p. 971).

The respondent is generally the only one who knows his internal act, and his declaration is thus the basis for all proof (*ibid.*, 61(1969), c. DE JORIO, February 26, 1969, p. 206). However, it needs to be carefully evaluated, and what is omitted from it may be equally relevant (*ibid.*, 58(1966), c. PALAZZINI, July 26, 1966, p. 664), for actions speak louder than words if they are many, certain, and unequivocal (*ibid.*, 62(1970), c. PARISELLA, June 11, 1970, p. 650).

Facts can be variously interpreted, but the key to their meaning lies in the character of the respondent which is already formed by the time he enters marriage. Where this includes a resolute claim to the traditional male prerogatives of sexual freedom in marriage, it necessarily indicates a prevalent intention to reject the obligation of observing fidelity or to grant the spouse the right to an exclusive relationship, and thus results in invalidity (*ibid.*, 64(1972), c. PINTO, February 14, 1972, p. 87).

The person's moral and religious constitution, or his pattern of behaviour at the time surrounding the marriage, can thus point to an efficacious decision made before the wedding and tenaciously pursued thereafter (*ibid.*, 63(1971), c. MASALA, October 20, 1971, p. 753; SRR decision c. PARISELLA, October 15, 1981, in ME, 109(1984), p. 223). His character and habitual way of life can also reveal the motive for the exclusion (SRR Dec., 62(1970), c. POMPEDDA, December 19, 1970, p. 1190), which should be prevalent in the sense that marriage is not desired other than without the bonum fidei as understood by the Church (SRR decision c. PINTO, March 19, 1978, in EIC, 35(1979), p. 251).

It is not necessary that there be a clear opposition between the person's convictions and the Church's teachings (SRR Dec., 64(1972), c. POMPEDDA, January 21, 1972, p. 26), but where an individual knows the truth regarding the obligations of Christian marriage and yet perseveres in disregarding it, he cannot be presumed to marry as Christians do (ibid., c. PINTO, November 6, 1972, pp. 673-675).

The human presumptions formulated by the judge from the circumstances of the case (c. 1586) are capable of overturning the presumptions of law favouring the marriage (cc. 1060, 1101 § 1). An insight into the cultural values of the respondent leads to the presumption that where he has excluded fidelity from his marriage, he did so because he considers it his right and prerogative. He thus rejected the obligation of fidelity itself, and not only its fulfillment, he deprived his spouse of the right to an exclusive relationship, and thus entered an invalid union.