

The Nature of Christian Marriage

I. A HISTORICAL OVERVIEW

Christ did speak on marriage and stressed its unity and indissolubility. Yet, He never told us what makes a marriage to be a marriage or what makes it indissoluble. Obviously, however, He must have had in mind the Jewish type of marriage of His times, which by then had already assimilated some tinge of influence from Roman customs and pagan traditions.

In the Jewish tradition, the "espousals" were equivalent to actual marriage. Once the pre-nuptial agreement was arranged, it became binding on both parties, who right then and there were considered husband and wife in all religious and legal aspects with the lone exception of cohabitation.¹ A working example of this system is found in the New Testament. The evangelists say that Mary was "espoused" (*desponsata*) to Joseph who at the same time was called her "husband", while the angel talked of Mary as a "wife" (*coniugem tuam*), Matt., I, 18-20.

The nuptials, to follow later on after the espousals, were merely a celebration *ad honestandam mulierem* and reached its climax with the solemn escorting of the woman to the bedchamber of the man. It is interesting to note that the *consensus* given during the espousals was considered a full marital consent. Hence, a further expression of this *consensus maritalis* was no longer deemed necessary during the nuptials or marriage ceremony itself.²

¹ Neufeld, E., *Ancient Hebrew Marriage Laws*, N.Y., 1944, pp. 84, 124.

² Fus, E. A., *The Extraordinary Form of Marriage*, C.U.A., Washington, D.C., 1954, p. 9.

Similarly, when Christianity came into contact with the Roman world, it was already customary to have marriage preceded by a betrothal.³ The consent elicited during the betrothal was considered sufficient for a valid marriage, because the *maritalis affectio* was adjudged to be present.⁴ But once that affection died out, marriage also came to an end.⁵ Roman jurists laid down the general principle that *nuptias enim, non concubitus, sed consensus facit* (Ulpian, Justinian, etc.). It was, therefore, consent and not mere sexual intercourse which constituted marriage.⁶ This notwithstanding, the Roman marriage was not considered a contract in the sense that Christian marriage was. So, while the Roman marriage lasted as long as the *maritalis affectio* remained operative, the Church matrimony became a life-time affair. This was perhaps founded on Paul's teaching that baptism constitutes the basis of marital indissolubility.⁷

Early Christians, of Jewish stock in their majority, simply adapted themselves to the prevalent customs and traditions of the place or region of their residence. Pastoral care protected them from practices not acceptable to the Church.⁸

The early Fathers of the Church reflect in their writings that the Jewish-Roman theory of consensus played an important role in the formation of Christian marriage.⁹ It is only in this context that they could defend the existence of a true union between Joseph and Mary.

³ Buckland, W. W., *Textbook of Roman Law from Augustus to Justinian*, Cambridge, 1932, p. 112.

⁴ *Novellae*, 74.5.

⁵ *Digesta*, (24.1), 3; 32-13.

⁶ Corbett, P., *Roman Law of Marriage*, London, 1930, pp. 90-94.

⁷ Schillebeeckx, E., *Marriage—Secular Reality and Saving Mystery*, London, 1965, vol. II, pp. 19, 22.

⁸ Joyce, G., *Christian Marriage*, London, 1948, p. 40.

⁹ In reply to a series of questions submitted by the Bulgarian Christians, Pope Nicholas I delineated the customs observed at Rome in the celebration of marriage. He states that the customs had been accepted by the Church since ancient times and that it still held them. The marriage process followed according to the Pontiff four stages: there was first a *betrothal* what followed by the *desponsatio*, at which ceremony a ring was placed in the woman's finger. The celebration of the Mass came in third to be followed by the crowning of the couple as they were leaving the Church. MPL, CXIX, 979-980.

It is obvious that the Church had adopted the entire Roman process in the formulation of marriage. No mention is made of the *consensus* which had been elicited during the espousals. Hadrian II held that, inasmuch as a marriage was entered into with the consent of both parties, it must be considered a true marriage and was not to be dissolved. MPL, CXXII, 1318.

Pope Calixtus (217-222) was accused by Hoppolytus Romanus of violating Roman marriage laws by permitting the slaves to marry in Church. In the eyes of the law, they were not free persons and, therefore, were not qualified to exchange a true *consensus maritalis*. This conflict gave rise to the marriage of "conscience", for which the approval of the bishop was necessary.¹⁰

Through the centuries, the Church held to the Roman theory of consensus, as we can cull from the writings of Tertullian (160-230), John Chrysostome (354-407), Augustine (354-430), Nicholas I (858-867), Hadrian II (867-872), etc.¹¹ It was in the twelfth century, however, that the famous controversy regarding the essence of marriage was brought to the forum with the publication of the Decree of Gratian. Was it the Roman *consensus* what made the marriage or was it necessary to have the *copula carnalis*?¹²

Gratian and the School of Bologna advocated the *copula* theory: *matrimonium consensu initatur copula perficitur*.¹³ The *copula carnalis* was necessary for marriage, since only then, would the union of Christ with His Church be symbolized in the Sacrament. Peter Lombard (1100-1160) and the School of Paris championed the *consensus* theory.¹⁴ They held on to this position mainly to defend the reality of a true marriage between Joseph and Mary.

The dispute was definitely settled by Alexander III (1159-1181). While teaching at Bologna he favored the *copula* theory. But once Pope, recanted and proclaimed consent as the essential element in the formation of Christian marriage.¹⁵ However, the *copula* was what rendered marriage indissoluble. Thus, a non-consummated marriage, indissoluble too by its very nature, could be dissolved by the Pope in virtue of his ministerial powers, "the powers of the keys".¹⁶

By this time, the Church's teaching on the efficient cause of marriage was already firmly established. A series of great Popes

¹⁰ Schillebeeck, E., op. cit., pp. 217-222.

¹¹ Fus, E. A., op. cit., p. 13.

¹² Schillebeeck, E., op. cit., p. 206; Fus, E. A., op. cit., p. 17.

¹³ cc. 16-34, C. XXVII, q. 2; *Summa Paucapaleae*, c. XXVII, q. 2.

¹⁴ Lombardus, P., *Liber Sententiarum*, IV, dist. XXVII, c. 3; Aquinas, Th., *In Lib. Sententiarum*, lib. IV, dist. XXVII, a. 2.

¹⁵ c. 14, X, *De Sponsalibus et Matrimonio*, VI, 1.

¹⁶ Schillebeeck, E., op. cit., p. 206.

(Innocent III, Gregory IX, etc.) and the pronouncements of the Council of Trent set finally the basis of today's concept of marriage, to wit: "a community of persons entered into by mutual consent and consummated by sexual intercourse". This was precisely the Jewish-Roman type of marriage Christ had in mind and elevated to the dignity of a sacrament.¹⁷ Thus, any genuine study on christian marriage should not overlook this historical reality. As Haring writes, "to try to elaborate a theory of marriage on the basis of pure philosophy without reference to the tradition and the teaching of the Magisterium is not only unreliable, but a way of rejecting the Holy Spirit".¹⁸

II. DEVELOPMENTS AT VATICAN II

A number of significant developments in the understanding of christian marriage took place in the pre-conciliar years. The need for updating the marriage institution reached the Council's halls formalized more or less in the following propositions:

— The treatise on marriage had become a juridical study on the matter, lacking the dogmatic approach demanded by the totality of matrimony as a sacrament and as a contract. As a result, the theology of marriage had turned into subsidiary of canon law and was hardly aiding the pastoral needs of married couples.¹⁹

— Marriage was regarded more like a juridical abstraction than a personal reality. The juridical formalization of marriage extrapolated from its richer existential totality was less prompted by an anthropological view than by the idea of assigning to matrimony the exclusive task of procreation.²⁰

— The role conjugal love was called to play in the marital institution had not been duly emphasized. It was argued that married love had been relegated to a secondary position. Even during the Council's discussions, some Fathers were reluctant to consider conjugal love as a departing point for a serious study of matrimony. It was contended that what is being glorified today

¹⁷ *Ibidem.*

¹⁸ Haring, B., *Love is the Answer*, N.J., 1970, pp. 7-8.

¹⁹ Schillebeeckx, E., *op. cit.*, p. 211.

²⁰ Haring, B., *op. cit.*, p. 21; Schillebeeckx, E., *ib.*, p. 209.

by the movies and the mass communication media is nothing but superficial sentimentalism. To emphasize unduly the concept of love will open the door to a serious attack of the sanctity of the sacrament itself.²¹

Obviously, the traditional vision of marriage gave way in the face of this strong opposition to a more personalist-existentialist approach as reflected in the conciliar teachings:

— *Gaudium et Spes* (nn. 48-50) evades as far as possible the real juridical issues. The text deals exclusively with marriage as a community — *matrimonium in facto esse*. In contrast with old laws, very little is said of the matrimonial contract — *matrimonium in fieri* that effects the very institution of marriage, and this is said rather incidentally. The conciliar description of marriage is heavily colored with pastoral, theological overtones (GS. 48).

— Vatican II takes pains in emphasizing the personal, anthropological view of marriage. Juridical terminology is substituted by more personalized, humanized concepts. The text often refers to marriage as a 'community of love', 'married life and love', 'intimate partnership', . . . by its very nature ordered to the well-being of the spouses and offspring.

— Great emphasis is laid on the *amor coniugal*is which is consistently identified as the 'animating soul of the marital union':

"Such love, merging the human with the divine, leads the spouses to a mutual and free gift of themselves . . . such love pervades the whole of their lives" (GS. 49).

— As to the primacy of conjugal love, the Council opted for a realistic position by presenting clearly and unmistakably the true characteristics of married love. Today, more than ever, people need to know how to tell pure love from mere sentimentalism or sex. A new concept of christian love had to be elaborated to give married life in a materialistic world a wider significance and an evangelizcal dimension.

For Vatican II, love is first of all truly human:

"This love is an eminently human one since it is directed from one person to another through an affection of the will; it involves the good of the whole person and, there-

²¹ Haring, E., *ib.*, p. 19.

fore, can enrich the expressions of body and mind with unique dignity" (GS, 49).

"The understanding of love shown by Vatican II, writes Haring, no longer admits of the opinion that love is a subjective motive or a subjective purpose. The difficulties of such viewpoint are obvious, for love, as a subjective motive, can be neither measured nor described. The Council presents conjugal love as an intrinsic and structural principle of marriage. If the husband or wife exclude the element of love, then, there can be no true consent to marriage. If a man finds out later on that he no longer loves his wife, then, he must learn to love again. In no case may he turn against the marriage itself".²²

Post conciliar commentators and jurists are by no means unanimous as to the juridical significance of the key-concepts from *Gaudium et Spes* about the nature of marriage. The document, it is said, is pastoral in nature and should not be read as though it were giving juridical definitions. In a pastoral text, which is intended to establish a dialogue with the world, juridical elements are not needed.²³

Whatever the thinking on the matter, it should be obvious by this time that the impact of Vatican II on the theological and juridical aspects of marriage is such that can no longer be ignored. The task of the jurist is to delve into the theological basis of the pastoral document and draw the pertinent juridical conclusions.

III. MARRIAGE: CONTRACT OR COVENANT?

Theology views marriage from two different perspectives, *in fieri* and *in facto esse*.

Marriage *in fieri* is the act by which the conjugal society is brought into being, i.e. the marriage contract. Marriage *in facto esse* is the matrimonial institution itself resulting from the contract, i.e. the marital bond. The bond that emerges from the contract binds the spouses to a lifelong community of life.

²² Haring, E., *ib.*, pp. 24-25.

²³ Mackin, Theodore, S.J., *What is Marriage?* Paulist Press, N.Y., 1982, pp. 300-311.

As explained elsewhere in this article, the contractual nature of christian marriage is rooted in roman law and tradition. G. H. Joyce admits that "though marriage is not termed a contract in roman law, ... its contractual aspect is extremely prominent in the treatment accorded to it". "Just as with contracts, marriage is constituted by the consent of those concerned".²⁴

The roman marriage, however, was not considered a contract in the sense the Church did. While the roman union could be easily dissolved by either or both parties without a need to specify the reasons for it, christian marriage became a lifetime affair.

By the eleventh century the contract theory is already accepted as a part of the church's teaching on marriage, which doctrine will remain uncontested till Vatican II.²⁵ The 1917 CIC simply assumes that marriage is a contract and proceeds to specify its components and characteristics (cc. 1081, 1082). It was during the decade of the nineteen fifties that the contractual theory was subjected to severe criticism as a "restrictive" and even "dangerous" doctrine.

The term "contract" is presently viewed as a legal concept with emphasis on the law and not on the theological and personalistic dimension of marriage. On the other hand, it became difficult to defend the indissolubility of a contract based on the free election of the spouses in accordance with the valid and classical assumptions that "quod consensu contrahitur, consensu dissolvitur", and "omnis res per quascumque causas nascitur, per easdem dissolvitur".

When confronted on such issue the patrons of the contractual theory held on the "uniqueness" of marriage as a contract "sui generis" which can neither limp nor be rescinded at will by the parties since everything is fixed by nature itself.²⁶

At Vatican II the "personalists" prevailed over the "contractualists" and as a result the term "contract" does not appear in the conciliar document GS and only once the text uses the word

²⁴ Joyce, George, H., *Christian Marriage: A Historical and Doctrinal Study*, London, 1933, p. 42.

²⁵ Mackin, T., op. cit., pp. 186-188.

²⁶ Aznar, Federico Gil, *El Nuevo Derecho Matrimonial Canonico*, Salamanca, 1985, pp. 75-78.

"consent". New and more sophisticated terms are used to convey practically the same message, to wit, foedus, pact, partnership, matrimonial enterprise, covenant...

The issue, seemingly unresolved at Vatican II despite the majority rule, would still drag during the codification process. Though the text "foedus" — in English, covenant or pact — is frequently used in the conciliar texts, the Commission in charge of drafting the new law refuses to substitute the term "contract" by "covenant" because "in hoc canone agitur de matrimonio ut instituto naturae quod evehitur ad dignitatem sacramenti; iam vero, matrimonium ut institutum naturae est contractus".²⁷

A new proposal to directly describe marriage as a covenant was likewise rejected by the Commission. The proposed draft began by saying: "matrimonium... est foedus quo...", a definitive statement. This was changed and the final text read: "matrimoniale foedus quo..."²⁸ Thus the word "foedus" or covenant became descriptive rather than definitive. It is limited to the consent that creates the marriage. But marriage as a relationship is not called a 'covenant'.²⁹

The terms "covenant" and "contract" are not entirely opposed. A covenant must at least contain all the components of a contract, otherwise it will never be a covenant. The issue is: does the term covenant add anything to the term contract, and if so, what is it?

To the first question the Commission answered: "locutiones *contractus* et *foedus* uno eodemque sensu adhibitae sunt, consulto quidem, ut liquidius pateat foedus matrimoniale de quo in GS nullo alio modo constitui posse pro baptizatis quam per contractum, etsi "sui generis".³⁰

Clearly there is a change of terms but not of doctrine. Both terms, covenant and contract, are used here in one and the same sense to express that marriage is a natural, secular reality.³¹ Though no one term adequately expresses the richness of the mystery of marriage, covenant is admittedly richer than contract on account

²⁷ *Communicationes*, 1979, pp. 122-131.

²⁸ *Communicationes*, 1978, pp. 125-126.

²⁹ Mackin, T., op. cit., p. 287 ff.

³⁰ *Communicationes*, 1983, p. 222.

³¹ cc. 1055; 1057, 2; Aznar F., op. cit., p. 79.

of its deep biblical tradition.³² It fittingly symbolizes the union of Yahweh and Israel: "I shall be your God and you shall be my people"; the union between Christ and his bride, the Church: "just as the old God encountered his people with a covenant of love and fidelity, so our Saviour, the spouse of the Church, now encounters christian spouses through the sacrament of Marriage" (GS. 48).

IV. THE NATURE OF CHRISTIAN MARRIAGE

A formal definition of marriage does not properly fit into the realm of law. In law a definition can be positively dangerous for it is to be interpreted according to the exact meaning of the word. On the other hand, matrimony being the oldest natural institution does not need a juridical definition properly speaking.

Accordingly, *Gaudium et Spes* contains no formal definition of marriage and attempts none. All the conciliar text offers is a fresh, relevant description:

"The intimate partnership of life and love... is rooted in the conjugal covenant of irrevocable personal consent" (GS. 48).

Likewise, the concept of marriage included in the new Code is a descriptive statement of its nature and all the necessary components that constitute the matrimonial pact — *matrimonium in fieri*:³³

"The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament" (c. 1055, 1).

The essential elements which constitute the matrimonial covenant, therefore, are the following:

- 1) the subjects or persons: specifically a man and a woman;
- 2) the object or essence: the intimate 'consortium' or partnership

³² Palmer, Paul F., *Christian Marriage; Contract or Covenant? Theological Studies*, 1972, pp. 617-665; Navarrete, U., *Foedus Coniugale*, Romae, 1970, pp. 645-673. *Acta Conventus Internationalis Canonistarum*.

³³ *Communicationes*, 1978, p. 125.

of the whole life: 3) the purposes or ends: the good of the spouses and the procreation and education of the offspring.

The essential properties are 'unity' and 'indissolubility', which in christian marriage obtain greater firmness by reason of the sacrament (c. 1056).

Lastly, the matrimonial partnership is effected by the mutual consent of the parties, externally manifested, to enter conjugal life (c. 1057, 1). The consent must be freely elicited and with adequate knowledge. Existing laws require that the partners know, at least, that matrimony is a permanent union between a man and a woman which is ordered toward the offspring by means of some sexual cooperation (c. 1096). A full understanding of the nature of marriage and exact knowledge of the various techniques of sexual intercourse are not necessary for validity.

We shall now undertake a study of the nature of christian marriage through the analysis of its essential components.

1. *Marriage — An Heterosexual Partnership.*

Matrimony is basically rooted in the duality of sex. Each sex has been biologically and psychologically gifted by nature with different inclinations, skills, abilities, . . . So, no sex can claim to be perfect by itself. It needs the complement found only in the opposite sex. "The man and woman, who are no longer two but one, help and serve each other by their marriage partnership" (GS. 48)

On the other hand, only the union of the sexes makes it possible for man to perpetuate the human race on earth: "God himself has endowed marriage with various benefits and with various ends in view: all of these have a very important bearing on the continuation of the human race (GS. 48).

As a result of such complementary tendencies, spouses can find in married life "the personal development and eternal destiny of every member of the family . . ., dignity, stability, peace and prosperity of the family and of the whole human race" (GS. 48).

Thus, every man and woman, and only one of each sex, not prohibited by law, and as long as they are capable of lawfully

expressing consent, may be the subjects of the marriage covenant (c. 1057). This implies that the person has attained the necessary knowledge and discretion required for consent and remains free from any impediment which may arise from natural — vgr. impotency, divine — vgr. existing bond, or human laws, — vgr. age, sacred orders, solemn vows...

The right to marry is a natural, basic right of man. He is free to exercise such right but with due regard for the rule of law, social and moral commitments as demanded by the dimensional nature of marriage as a natural, social and religious institution. Matrimony is not just an individual pact or agreement binding the partners to a life together, but a social and religious institution as well, and as such must be governed and controlled by civil and moral norms and regulations. Thus, natural constraints as well as statutory, moral norms enacted by human authorities may curtail the private right of the individual to take a partner in marriage, or even to restrict the exercise of such right in other ways.

2. *Marriage — A consortium or Community of Life.*

2.1. *The Object of Marriage Consent:*

The 'ius in corpus' in the traditional teaching presented a fairly clear picture of the object of matrimonial consent. It was the inability to give the right, not the incapacity to exercise it, which rendered the contract null and void (1917 CIC, c. 1081, 2). In the new law, however, this same object has been expressed in a broadened perspective as to include both the right to the copula and the conjugal society which arises from the matrimonial commitment:

"Matrimonial consent is an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish marriage" (c. 1057, 2).

It is obvious that the object of matrimonial consent is marriage itself, the conjugal society, the right to the copula being just an integral part of it.

But what is the nature of matrimony? We are told that marriage is a *consortium totius vitae*, a community of the whole life . . . This is a radical, transcendental change introduced in canonical doctrine and legislation which has its source in the teachings of Vatican II:

"The intimate partnership of life and love which constitutes the married state has been established by the Creator . . . and is rooted in the covenant of its partners, that is in their irrevocable personal consent" (GS. 48).

Drawing from this conciliar description of marriage, the Code sets forth the fundamental nature of matrimony as follows:

"The matrimonial pact, by which a man and a woman establish between themselves a *partnership of the whole life*, is by its very nature ordered toward the good of the spouses and the procreation and education of offspring" (c. 1055, 1).

The spouses enter the covenant specifically to create a *consortium*, a *communion* or *community of the whole life*. The use new. They have been consistently used in roman law, canonical of such terms to express the object of matrimonial consent is not and theological writings from the middle ages to the present.

The roman law definitions of marriage by Ulpianus³⁴ and Modestinus³⁵ "indicated explicitly the permanency of married life and evidenced an understanding of marriage as a unique conjugal community — *consortium omnis vitae, individua consuetudo vitae*."³⁶

In the middle ages, too, the conjugal society was generally to be the object of marital consent. Peter Lombard wrote:

"... When a man and a woman agree to say 'I take you for my wife and I take you for my husband', in these words or in others signifying the same thing, there is expressed consent not to carnal copula, not to bodily cohabitation, but to a conjugal society".³⁷

³⁴ *Institutes*, 1, 9, 1: "Marriage or matrimony is a union of a man and a woman, involving and undivided way of living" — *individuum consuetudinem vitae*.

³⁵ *Digest*, 23, 2, 1: "Marriage is a union of a man and a woman and a community of the whole life, a participation in divine and human law."

³⁶ Fellhauer, David E., "The consortium omnis vitae as a Juridical Element of Marriage." *Studia Canonica*, 1979, pp. 17-18.

³⁷ *IV Lib. Sent.*, dist. 28, cc. 3-4.

For Thomas Aquinas, matrimony... "is not essentially the carnal copula itself, but a certain association of man and wife in view of the carnal copula and the other consequences of being man and wife... And this association is called the conjugal union".³⁸

The community of the whole life as the object of marital consent, however, was given little juridical value. Since the personal elements of the conjugal society, such as love, living together, sharing..., could not be spelled out with juridical precision, were of little use in solving practical cases involving marital consent. As a consequence, they were left out — not withstanding their relevance for the doctrinal understanding of marriage — in favor of the *ius in corpus*, which for all practical purposes became the sole object of marital consent.³⁹

The 1917 Code, too, adopted the traditional stand and emphasized the *ius in corpus* as the sole object of consent to the exclusion of the various emotional, spiritual elements of the conjugal society. In short, while in theory the object of consent was the "*consortium totius vitae*, in practice it was only the *ius in corpus*.

2.2 Contents and Minimum Requirements for the '*Consortium Vitae*':

The Code has clearly embraced the theology of Vatican II on the object or essence of matrimony: it is the *consortium totius vitae* or, as the Council puts it, the *intimate partnership of married life and love*, and not the *ius in corpus*, the right to the copula.

While an old problem is now laid to rest, new problems have emerged which demand a prompt solution:

Which are the integral elements of the *consortium vitae*? Which are the minimum requirements for a marriage below which a union could not be considered a true marriage?

Admittedly, the phrase *consortium totius vitae* is too vague to adequately answer these questions. In the practical field, its application would likely create confusion and could even be a danger to the stability of married life.⁴⁰

³⁸ *Supplementum*, q. 48, art. 1, in corp.

³⁹ Fellhauer, D., op. cit., pp. 71-72, 78.

⁴⁰ *Communicationes*, 1977, pp. 79-80; 211-212.

The Code does not determine the essential elements of the 'consortium' nor it is the appropriate place to do so. It does state, however, that "if either or both of the parties should by a positive act of the will exclude marriage itself or any essential element of marriage, or any essential property, such party contracts invalidly (c. 1101, 2). The things essential to married life are to be determined by doctrine and jurisprudence.

Canonists are not yet in accord as to the nature and applications of this new dimension of marriage as a 'community of life'.⁴¹ In general it can be said that the 'consortium' should include the various physical, emotional and spiritual aspects of the conjugal society. It should involve the union of the spouses on all levels of human activity. But what should specifically be the content of this consortium or communion of life remains a debatable issue.

G. Lasage, OMI, of the Montreal tribunal, has made several attempts to list the requirements which, in his opinion, are essential to the 'consortium' and, therefore, when missing to a vital degree, would prevent the party to enter into a valid marriage. The following are, in his judgment, the requirements for a true 'consortium'.⁴²

- 1) *Balance and maturing required for a truly human form of conduct.*
 - a. Maturity of personal conduct in the relationship of married life;
 - b. Self-mastery, which is indispensable for any reasonable and human form of conduct;
 - c. Stability of conduct and ability to adapt oneself to circumstances.
- 2) *The relationship of interpersonal and heterosexual friendship.*
 - d. Oblative love, which is seeking not only for egotistical satisfaction, but the good and happiness of the partner;
 - e. Respect for the personality or sensitivity of the partner; both in the affective and sexual orders;

⁴¹ Thomas, M., "The Consortium Vitae Coniugalit". *The Jurist*, 1978, pp. 171-179; Fellhauer, D., op. cit., pp. 116-123.

⁴² Lasage, Germain, OMI., "The Consortium Vitae Coniugalit: Nature and Applications. *Studia Canonica*, 1972, pp. 103-104; "Le Divorce", *Montreal. Fides*, 1973, pp. 47-48.

- f. Kindness and gentleness of character and manners in mutual relationships.
- 3) *The aptitude to cooperate sufficiently for conjugal assistance.*
- g. The respect for christian morality and for the partner's conscience in sexual and conjugal relationships;
 - h. Respective responsibility of husband and wife in conjugal friendship;
 - i. Mastery of passions, impulses or irrational instincts which would place mutual understanding and or life in peril.
- 4) *Mental balance and the sense of responsibility required for the material welfare of the family.*
- j. Respective responsibility of both husband and wife in providing for the material well-being of the home, stability in employment, budgetary foresight, etc.;
 - k. Mutual sharing and consultation on important points of conjugal and family life;
 - l. Objectivity and realism in the evaluation of happenings and events of family or conjugal life;
 - m. Lucidity in the choice and determination of the ends and the means to attain them.
- 5) *Psychic capacity to participate, each in his own way, in promoting the welfare of the children.*
- n. Moral and psychological responsibility in the generation of children;
 - o. Parental responsibility in the care for, love and education of children.

Canonists have shown both interest and great concern on this list of essential requirements for the matrimonial covenant. Many cannot agree with some of the points.⁴³ Others have even denied the possibility of identifying the components universally necessary for the essence of matrimony. Rotal judge Raad, for instance, argued that each case must be studied in itself, each person judged in his unique situation, and concluded that if his or her personality is basically healthy the capacity to exchange marital

⁴³ La Due, William, "Conjugal Love and the Juridical Structure of Marriage". *The Jurist*, 1974, p. 25; Mostaza, A., "La Simulacion en el CIC y en el Proyecto del NuevoCodigo". *Rev. Esp. de Der. Canonico*, 1982, p. 474.

rights is there. He demands a serious psychic defect as evidence of inability to give and receive the right to the 'community of life'.⁴⁴

Indeed, a cursory reading of the proposed list of essentials evidences that, were the above elements *in toto or in parte* integral conditions for the validity of marriage, few existing matrimonies in this wide, vast world could stand such a test of validity, and that a great majority of people will not qualify to embrace a state of life to which mankind is destined. Marriage would then be reserved for a few privileged ones.

The application of said criteria will also lead to the conclusion that every broken marriage should be a null and void marriage, what is totally incorrect. Neither the break-up of a common life or any serious problems or failures in inter-personal relationship between the partners are sufficient to prove nullity of the union, since the rupture could have been caused by a number of factors, some or even all of which are extrinsic to the partner; or by a psychic incapacity which is not sufficiently serious to threaten the marital bond and life.⁴⁵

Judge Anné, in his decision of 25 Feb. 1969, acknowledges the difficulty in listing the traits or elements which are essential to the 'consortium vitae' and to the marriage itself. He suggests that the essentials of the 'consortium' be established by examining marriage, a) as a natural institution designed by the Creator for the perpetuation of the race; b) as it exists in a specific culture: c) as an individual unit between the parties involved.⁴⁶

It is obvious that the search for a suitable formula to determine the contents and minimum requirements for the community of life, which is marriage, is still in its initial stage. Behavioural sciences and canonical doctrine and jurisprudence have yet to establish clearly the ability required of a partner to share a living with the other. While this situation of irresolution persists and in order to give juridical value to the 'consortium' doctrine, it may be wise to consider existing jurisprudence on the matter.

⁴⁴Mackin, T., *op. cit.*, pp. 307-308.

⁴⁵C. Serrano, 5 apr., 1973. *Studia Canonica*, 1975, p. 27.

⁴⁶Ephemerides *Iuris Canonici*, 1970, pp. 419-442.

Some of the most relevant decisions heretofore released are the following:

— The essentials of the conjugal community should have been established as existent before or during the marriage ceremony by a thorough examination of either spouse from several aspects, namely, as an individual, as a social being, as an about-to-be husband or wife, and finally as a prospective father or mother. If the person is wanting in the fundamental elements of natural maturity to the extent of affecting his or her ability to give primary emphasis on the shared aspect of living with another human being, then that person, as an individual, cannot be regarded as capable of assuming the basic commitments of matrimony.⁴⁷

— This same principle applies to a person who proves to be unfit in a serious degree to establish interpersonal relationship with other people, including those of his or her own sex.⁴⁸

— The spouse must be capable of that oblation love which seeks primarily the good and happiness of the partner. In the final analysis conjugal love must be directed toward procreation, which constitutes the ultimate expression of human heterosexual love. This includes the ability of caring for, loving and educating one's own children.⁴⁹

— A person seriously lacking intrapersonal and interpersonal integration... must be considered incapable of judging and reasoning correctly concerning the perpetual communion of life to be initiated with another person.⁵⁰

— In marriage cases most attention should be given to that area of psychic life wherein an interpersonal relationship is established and developed. I refer to that interpersonal relationship, which in every respect is concrete and totally unique, endowed with that individuality which contemporary writers are inclined to describe as 'incapable of repetition.'⁵¹

⁴⁷ c. Lefevre, 8 jul., 1967. *Monitor Ecclesiasticus*, 1968, pp. 54 ff.

⁴⁸ c. Serrano, 5 apr., 1973. *Revista Española de Derecho Canonico*, 1974, p. 108.

⁴⁹ c. Di Felici, 13 May, 1969. *Monitor Ecclesiasticus*, 1969, pp. 469 ff.

⁵⁰ c. Anne, 22 Jul., 1969, n. 4. *Ius Canonicum*, 1975, p. 287.

⁵¹ c. Serrano, 5 Apr., 1973. *Studia Canonica*, 1975, p. 22.

Other rotal decisions could be consulted profitably.⁵² So far, however, cases affecting the 'consortium vitae' are commonly tried under the ground of the incapacity to assume and fulfill the essential obligations of marriage.

3. *The Ends of Marriage.*

Dealing with his subject one must consider the motivations of the persons seeking marriage as well as the objectives of the matrimonial institution itself. The intention of the parties constitutes the so called *extrinsic ends of matrimony*. The objectives to which marriage tends by its very nature are known as the *intrinsic ends*.

Whatever the motivations of the partners are for entering marriage, they must be good in themselves and not exclusive of the intrinsic ends. Intentions immoral in themselves render the act of matrimony sinful. Those contrary to the intrinsic ends vitiate the very nature of the marital union.

3.1. *Historical Overview.*

St. Isidore of Seville, (c. 636) offers these reasons — *causae* — to take a wife. The first is for offspring, as it is read in Genesis: "and He blessed them saying: increase and multiply" (Gen. 1:28); the second reason is assistance, as it is likewise said in Genesis: "it is no good for a man to be alone; let us make him a helpmate similar to himself" (Gen. 2:18); the third reason is incontinence: whence the Apostle says "that he who does not remain continent should marry".⁵³

In the mind of Isidore, matrimony was primarily for procreation. So it was all through the middle ages to the 1917 Code. Commentators would discuss at length the other ends of marriage, but will not give them much juridical relevance.⁵⁴

3.2 *The 1917 Code of Canon Law.*

Seemingly, the hierarchy of ends is first established in the 1917 Code of Canon Law (c. 1013, 1). The terminology *primary*

⁵² Aznar F., op. cit., pp. 70-71; Mackin T., op. cit., pp. 300-318.

⁵³ *Etimologias*, lib. 9, cap. 7, De Coniugiis, 27; PL. 82, p. 367.

⁵⁴ Aznar, F., op. cit., p. 101.

and *secondary* with an essential subordination of the secondary end to the primary, is something new in the 1917 Code.⁵⁵ The magisterium frequently supported such teaching:

"The secondary ends of marriage cannot be considered independent and equally important with the primary".⁵⁶

"The other ends, though also intended by nature, are not in the same level with the first, and much less are superior to it, but essentially subordinate to it".⁵⁷

Thus, the primary end — the procreation and education of offspring — to which matrimony is principally and directly ordered by its very nature, must be intended or at least not positively excluded under pain of nullity. If it is lacking no other purpose suffices for marital consent. On the contrary, it is sufficient in itself to have a true marriage, though not adequately.

The secondary ends — mutual help and comfort and the allaying of concupiscence — are those to which matrimony can tend by its very nature but only secondarily and dependently upon the primary. The fact that the primary end is not positively excluded, implicitly includes the secondary ends.

The exaltation of personal values — personal perfection, mutual love etc. — above the procreation and education of offspring is condemned. This does not mean, however, that personal, positive values are denied or debased, but simply, that they have been placed by ordinance of nature at the service of the progeny.⁵⁸

3.3. *The Second Vatican Council.*

The code doctrine went at least officially unchallenged until Vatican II when the issue of the procreative and personalist elements of marriage was hotly debated.⁵⁹

Was the Code theology entirely changed by the Council? Some say, yes.⁶⁰ Others maintained that the Council changed nothing.⁶¹

⁵⁵ Navarrete, U., "Structura Iuridica Matrimonii secundum Conc. Vat. II." *Periodica*, 1967, pp. 368-369.

⁵⁶ AAS, 36, p. 103.

⁵⁷ AAS, 43, p. 835.

⁵⁸ AAS, 43, p. 835.

⁵⁹ Mackin, T., op. cit., pp. 26-29.

⁶⁰ Haring, B., "Fostering the Nobility of Marriage and the Family" *Commentary on the Documents of Vat. II.* London, 1969, vol. 5, p. 225 ff.

⁶¹ Navarrete, U., op. cit., pp. 131-167; 169-216.

Perhaps it would be safer to say that the issue was avoided. Fagiolo, a rotal judge, views GS "as a vain attempt to reconcile the old with the new". Fedele, another judge, says that the document "gives something with one hand and then with the other hand takes away what it has given". A more balanced judgment seems to be that of Föllhauer:

"Still, there is a sense in which it is accurate to say that the conciliar document is more significant in what it did *not* state than in what it did assert. It maintained a deliberate and conspicuous silence — despite numerous attempts of some Council members to effect the contrary — on the problem of the relative importance and hierarchy of the *finis matrimonii*. It can not be said that *Gaudium et Spes* overturned the primary-secondary scheme of ends. But neither it can be asserted that it upheld and affirmed such formulation. The document staunchly maintained that both the procreative and the personal dimensions of marriage were essential to its meaning, and that an exaggeration of either aspect to the detriment of the other was contrary to catholic teaching."⁶²

The doctrine of Vatican II on the ends of marriage may be summarized as follows:

— The traditional terminology of primary and secondary purposes is totally eliminated.

— Marriage was not instituted merely for procreation purposes. The welfare of the parents and of children should be given due relevance (GS. 50).

— Among the various objectives flowing naturally from the matrimonial institution, the procreation and the education of the children take a place of distinction and prominence (GS. 4).

— Though no end should be of less account than the other, still matrimony finds its ultimate crown in the children, the supreme gift of marriage (GS. 50).

— Marriage persists as a whole manner and communion of life... even when despite the often intense desire of the couple, offsprings are lacking (GS. 50).

⁶² Fellhauer, op. cit., p. 114.

— The union between the spouses and the welfare of the children demand that mutual love be properly shown between the married couple, that it should progress and mature (GS. 50).

3.4. *The 1983 Code: Present Legislation.*

The impact of Vatican II teaching is obvious in the Code: "The matrimonial pact... is by its very nature ordered toward the good of the spouses and the procreation and education of the offspring... (c. 1055, 1).

The law does no longer set a hierarchy of ends. By natural and divine determination marriage is ordered to the good of the spouses and of the children. They are intimately related, equally important and there is no subordination among them.⁶³ Both are essential elements of the marriage covenant and cannot be positively excluded.⁶⁴

An openness to the procreation and perfection of the spouses must always exist for validity of the union. The good of the spouses "is rooted in the will and embraces the good of the whole person (GS. 49). This includes the double dimension of the old secondary purpose of marriage, namely, mutual help and comfort and the allaying of concupiscence.

Spouses cannot only achieve personal growth in married life but also find in the union a more tolerable forebearance of the burdens, difficulties and anxieties arising from the community of life and love.

V. *THE ESSENTIAL PROPERTIES OF MARRIAGE*

The traditional doctrine on the essential properties of marriage remains unchanged. They are: *unity* and *indissolubility* which in christian marriage obtain a special firmness in virtue of the sacrament (c. 1056). Thus, in christian marriage, its essential properties must be understood in the context of the sacramental marriage.

⁶³ *Communicationes*, 1977, p. 123.

⁶⁴ *Communicationes*, 1983, p. 221.

The essential property is rooted in the essence of marriage itself. Therefore, if either or both partners, by a positive act of the will, exclude an essential property, that person contracts marriage invalidly (c. 1101, 2). A simple error concerning the unity or indissolubility of marriage is not sufficient to vitiate matrimonial consent (c. 1099). Simple error is one which remains in the mind of the person and has no influence on the will or consent. When the error affects the will and causes the person to reject one of the essential properties, then it is no longer a case of error but one of simulation. He who excludes marriage itself, the community of life, is said to simulate *totally*, whereas one who denies one of the properties or goods of marriage is said to simulate *partially*.

1. *Unity*.

Unity means *exclusiveness* on both sides; that is, matrimony must be between one man and one woman to the exclusion of all other persons. It is also called *monogamy* as opposed to polygamy, i.e. the union existing between one person and several persons of the opposite sex.

Unity is a characteristic essential to all matrimonies, both sacramental and natural, for marriage by its very nature tends toward unity:

"Conjugal faith or honour demands in the first place complete unity of matrimony which the Creator himself laid down in the beginning when He wished it to be not otherwise than between one man and one woman".⁶⁵

"The intimate union of marriage, as a mutual giving of two persons and the good of the children demand total fidelity from the spouses and require an unbreakable unity among them" (GS. 48).

When c. 1134 speaks of marriage creating a "bond which is, by its nature, exclusive", implies the obligation of unity, too.

Unity excludes:

— *Simultaneous polyandry*: The union of a woman with several husbands. Polyandry is opposed to natural law and frustrates the main objective of the marital union. The woman tends

⁶⁵ Pius XI, Litt. Encycl., *Casti Connubii*. AAS, 1930, p. 546-547.

to become infertile; the uncertainty of the father renders the education of the progeny difficult, if not impossible; love and companionship between the partners cannot be easily attained.

— *Simultaneous polygny*: The union existing between a man and several wives, is the type of matrimony that prevailed in society among jews and gentiles and the one Christ restored to its original unity. He considered adulterous the man who sends away his lawful wife and gets a second woman. This type of matrimony, though not totally opposed to the precepts of natural law, renders married life difficult and cumbersome.

Unity does not exclude successive polygamy.

Marital fidelity is something different from unity, though it is not possible without unity, that is, one partner with whom to share one's life. It means more than merely refraining from extra-marital sexual activity. It involves the whole person since the 'one flesh' relationship created by the mutual consent is not limited to sexual intercourse alone.

2. *Indissolubility.*

Indissolubility is a property whereby, due to an intrinsic inviolable firmness, the conjugal bond cannot be dissolved by mutual consent of the parties but only through death of one of them.

The indissolubility of matrimony both as a sacrament and as 'officium naturae' is based in the very partnership of married life and the positive will of the creator:

"This inviolable stability... belongs to every true marriage, for the word of the Lord: 'what God has joined together let no man put asunder', must of necessity include all true marriages without exception, since it was spoken of the marriage of our first parents, the prototype of every future marriage".

Hence, "marriage even in the state of nature and certainly long before it was raised to the dignity of a sacrament, was divinely instituted in such a way that it should carry with it a perpetual and indissoluble bond which cannot therefore be solved by any civil law."⁶⁶

⁶⁶ Pius XI, *Casti Connubii*. AAS., 1930, pp. 348-350.

Early christians already believed and accepted marital indissolubility in opposition to the roman marriage which was intrinsically dissoluble at the will of either or both parties. For them an indissoluble marriage was not just an ideal but a way of life imposed by the gospel teaching.

Is marriage still an indissoluble union?

"The intimate partnership of married life and love has been established by the Creator and qualified by his laws and is rooted in the conjugal covenant of *irrevocable* personal consent. Hence by that human act whereby spouses mutually bestow and accept each other, a relationship arises which by divine will and in the eyes of society too is a *lasting* one" (GS. 48).

No doubt, the indissolubility of matrimony is still a central point in catholic teaching. It is the basis of the sacrament of marriage as an image of the faithful love between Christ and His Church, and of God's covenant with his people. Yahweh does not covenant with Israel until He finds a people more faithful and worthy. Even if Israel is not faithful, Yahweh always remains faithful.

VI. CHRISTIAN MARRIAGE: THE SACRAMENT

The sacred, religious character of matrimony as a natural institution has been emphasized in many ways and at various times.

"The light of reason alone... is enough to establish that there is in marriage itself a sacred and religious character."⁶⁷

To emphasize still further that the sacred character of matrimony is inherent in its very nature Pius XII reminds us that:

"even among those who are not baptized, a legitimately contracted marriage is, in the natural order, a sacred thing"⁶⁸

However, for christians, marriage is not just a natural institution, a contract, no matter how religious and sacred, but is above

⁶⁷ *Casti Connubii*, ib.

⁶⁸ Allocution to the SRR., 6 Oct., 1946.

all, a sacrament, a covenant which confers sacramental grace on the partners.

From apostolic times, the life of the christian has been structured through the sacraments: one becomes a member of the church through baptism, receives full initiation through confirmation, is nourished through the eucharist, is reconciled in the sacrament of penance, committed in vocation by matrimony or orders, and finally, aided in illness or prepared for death by the anointing of the sick. The law that governs the life of a christian, therefore, must always reflect that special orientation toward the sacramental life of the church.

The present legislation of matrimony as a sacrament is based in the following principles:

— the natural matrimonial contract between the baptized has been raised by Christ to the dignity of a sacrament (c. 1055, 1);

— as a consequence, a matrimonial contract cannot validly exist between christians unless it is also a sacrament (c. 1055, 2).

The type of marriage Christ raised to the dignity of a sacrament is by its very nature a contract effected by the consent of the parties. In raising the natural contract to the supernatural order endowing it with the power of conferring sacramental grace, Christ did not change the nature of the contract. He merely lifted it from the natural level to the supernatural order. It is only on this account that christian marriage is superior to the old marriage and those of non-christians.

“Spouses... are fortified and, as it were, consecrated for the duties and dignity of their state by a special sacrament.”

“Just as old God encountered his people with a covenant of love and fidelity, so our Saviour, the spouse of the Church, now encounters christian spouses through the sacrament of marriages” (GS. 48).

As a result of this doctrine:

1. A valid matrimonial contract between two christians is by that very fact a sacrament, and as such becomes a source of grace. Affiliation to a religious sect will have not much bearing in this regard as long as the person is validly baptized.

2. It is not possible for baptized persons to enter a valid marriage contract which is not at the same time a sacrament. Should the parties attempt to positively exclude the sacrament, the exclusion of the contract becomes automatic. This exclusion is not presumed if the parties just fail to advert the fact of the reception of the sacrament. The faithful, therefore, cannot start with a valid civil union to be 'reinforced' later with the sacrament.

3. A marriage between a baptized and a non-baptized person is a valid contract, not a sacrament. The marriage bond is supposed to bind equally the partners. It gives the parties equal rights and obligations (c. 1135).

4. The marriage of two pagans becomes a sacrament the moment both parties receive baptism. There is no need to renew the consent since the original 'consensus' is supposed to remain operative unless positively revoked.

5. It belongs to the church to teach and judge anything pertaining to the essence of christian marriage (c. 1059). Only the civil effects can be legislated upon by the civil authority.

6. The study of christian marriage as a contract cannot be 'extrapolated' from its sacramental reality.

The identification of the marriage contract with the sacrament, the relationship between faith and the sacrament of marriage, was one of the most debated issues during the Code revision process.⁶⁹

How can a person who has no faith receive the sacrament? What criteria should be used to determine whether a person lacks the necessary faith to receive the sacrament of matrimony?

The Code Commission replied to the first question as follows:

"The law only intends to affirm the inseparability between contract and sacrament for the baptized, without saying or prejudging anything concerning the conditions which, according to theological teaching, are required for the sacrament of matrimony... On the other hand, it

⁶⁹ Orsy, L., S.J., "Faith, Sacrament, Contract and Christian Marriage" *Theological Studies*, 1982, pp. 379-398; Aznar, F., op. cit., pp. 87-97.

does not seem necessary to express this in the Code, because it is a theological rather than juridical matter".⁷⁰

The papal document issued as a result of the 1980 Synod of Bishops has this to say in reference to the second question:

"As for wishing to lay down further criteria for the admission to the ecclesial celebration of marriage, criteria that would concern the level of faith of those to be married, this would above all involve great risks. In the first place, the risk of making unfounded and discriminatory judgments; secondly, the risk of causing doubts about marriages already celebrated, with great harm to christian communities, and new and unjustified anxieties to the consciences of married couples; one would also fall into the danger of calling into question the sacramental nature of many marriages of brethren separated from full communion with the catholic church, thus contradicting ecclesial tradition".⁷¹

The Synod also distinguishes between validity of the sacrament, for which it is required the intention not necessarily the faith of the partners, and fruitfulness for which faith is a must. The church must ask for faith before performing a marriage, and, where it is not present, insist on catechesis.⁷²

VII. VARIOUS TYPES OF MARRIAGE.

A. *By reason of validity:*

1. *Valid.* A union not vitiated by failure to observe, a) the required form, b) by a diriment impediment, c) by defective consent. A valid marriage produces all juridical effects arising from the contract (cc 1061, 1).

a. *Among the baptized:*

i. *Ratum.* A valid union not yet completed by consummation (c. 1061, 1).

ii. *Ratum et Consummatum.* A valid union in which the parties have consummated the conjugal act in a manner apt to generate children. The consummation must

⁷⁰ *Communicationes*, 1977, p. 190.

⁷¹ John Paul II, *Familiaris Consortio*, Nov. 22, 1981.

⁷² Synodus Episcoporum, *De Muneribus Familiae Christianae* ... n. 34, pp. 32-33.

take place after the celebration of marriage. Once the parties have cohabited consummation is presumed until the contrary is proven (c. 1061, 2).

b. *Among the unbaptized:*

- i. *Legitimum*. A marriage validly celebrated between unbaptized persons. The spouses are bound by natural laws and just civil laws.
- ii. *Naturale*. A marriage between a baptized and unbaptized person. This cannot be considered as a sacramental marriage because the sacrament cannot exist in both parties.

2. *Invalid* (nullum). A union vitiated either by lack of form, the existence of a diriment impediment or the lack of a true and valid consent. This union does not produce any juridical effects (c. 1061, 3).

- i. *Good faith* (Putativum). A marriage contracted in good faith by at least one of the parties. It is considered to be putative until such a time as both partners become aware of the nullity. Children born out of this union are considered legitimate (c. 1061, 3).
- ii. *Bad faith*. A marriage considered in bad faith if one or both of the parties have knowledge of the nullity and have gone through the external form of a matrimonial contract.

B. *By reason of the celebration:*

1. *Public*; a marriage celebrated in accordance with the canonical form which is accepted by the Church as public (c. 1108).

2. *Secret*; a marriage contracted before the pastor and two witnesses in a secret manner for some very grave reasons. A special permission is needed to perform such marriages. No records are kept in the ordinary matrimonial register. Instead all documents are sent to the secret archives of the Chancery. It is also called "Marriage of Conscience" (c. 1130).

3. *Clandestine*; A marriage contracted without the presence of the pastor and witnesses.

VIII. MARRIAGE ENJOYS THE FAVOR OF THE LAW.

Before pronouncing sentence a judge must be sincerely convinced and possess moral certitude concerning the case to be settled by his final verdict. Moral certitude requires sufficient proofs to persuade the judge of the righteousness of the cause, and precludes the probability of error, not its possibility. It may not be sought outside the acts and allegations of the trial. The judge arrives at the state of certitude weighing the evidence according to his conscience and applying the fixed criteria set by law in the evaluation of evidence (c. 1608).

Occasions may arise when it is impossible for the judge to arrive at the moral conviction required by law. He has reached a state of positive doubt. In this case the judge must decide in favor of the defendant and dismiss him. In cases affecting the marriage bond, however, the presumption favors the validity of marriage and not the freedom of the person (c. 1060). This exception to the general rule is based on the fact that by favoring the person in case of doubt, one may run the risk of violating natural and divine positive laws. The favor, therefore, derives from natural law and applies to all marriages, even those which are not sacraments.

This presumption favoring the bond has been fiercely attacked in recent times. The most common objections run this way:

1. *The presumption should be favorable to the person.* It is contended that there must be something wrong with a legal system that favors the validity of a sacrament over and above the personal rights of the individual: "*sacramenta propter homines*". So, the presumption should be reversed.⁷³

Tradition holds that it is more tolerable to forego the happiness of a person in the second marriage than to run the risk of violating God's laws and of making a mockery of a possibly valid marriage. And so adopting a law of priorities, God comes ahead of man.

Assuming, for the sake of argument, that the presumption is reversed as to favor the person, what will happen next? All a

⁷³ Siegle, Benard A., "*Marriage Today*". 3rd ed. Alba House, New York, 1979, p. 37.

petitioner for annulment had to do is to introduce the case, and refrain from giving sufficient evidence forcing with his lack of cooperation a positive doubt in the mind of the judge who, in turn, will be compelled to decide in favor of the person for lack of sufficient evidence to reach moral certitude. If this is the case, silence will be the order of the day in ecclesiastical tribunals. The marriage bond will remain totally unprotected.

2. *The doubt should be settled in accordance with the so called "preponderance of evidence".* It is possible that the judge may not acquire the moral conviction required by law. However, the proofs may not be equally strong on both sides. Let the presumption, then, favor the side with heavier evidence, either the person or the vinculum. However, preponderance of evidence does not exclude the probability of error, and therefore, the risk of violating God's laws remains.

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