The Catholic Lawyer

Volume 25, Summer 1980, Number 3 Article 3

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THE CANONICAL CONCEPT OF MARITAL CONSENT: ROMAN LAW INFLUENCES

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Nuptias non concubitus sed consensus facit.[1]

Examining the institutions of ancient Roman life, one has to marvel at Roman marriage, *conubium.*[2] Roman law bears its own confusion with realities like manumission, prescription, and a host of different contracts. Marriage, however, was remarkably uncomplicated chiefly because *conubium* had extremely little social accountability. We cite this because marriage today in both civil and religious spheres is just the opposite—complicated, heavily accountable to the *communio* and weighed down with any number of legal prescriptions. Rome, on the other hand, enjoyed marriage. The institution for all its freedoms served the Republic (451-125 B.C.) and the Empire (125 B.C.-A.D. 180) well.[3] Family life enjoyed stability, perhaps greater stability than during recent times.

Unfortunately, we may be at a biased vantage point to analyze Roman marriage. Christianity is weighed down with a heavy baggage of tradition and its own problems regulating marriage in law. But we look at our legal patrimony for no other reason than that Rome alone was our teacher. Christian marriage became, in some ways, a reaction to the Roman mores, while at the same time, the institution was heavily influenced by common law trends, especially regarding the efficient cause of marriage, consent.

Christianity in the West lived and breathed Rome. Although Rome

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[1] DIGEST 30.1.17 (not copulation, but consent creates marriage).

[2] *Conubium* described marriages, or the civil right to marry, in Roman society. *See* P. CORBETT, THE ROMAN LAW OF MARRIAGE 24 (1930); B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 64-65 (1962).

[3] *Iustae nuptiae* described marriages of Roman citizens only, not those of foreigners (*peregrini*) or slaves (*servi*). *See* B. NICHOLAS, *supra* note 2, at 83.

attempted to drown Christianity in its own blood for the first three centuries of the infant faith's existence, Rome's profound influence on us cannot be underestimated. We adopted our ecclesial legal system patterning it after mother Rome. Prior to the fifth century barbaric invasions, Christians knew no other legal system. Call it skillful adaptation. We did with Rome what Thomas Aquinas (1225-1274) would do with Aristotle (384-348 B.C.)—squeeze holiness out of what was pagan! In the Golden Age, Rome believed herself eternal. She turned out mortal, but left an eternal mark on Western life. For all her virtues and vices, we cannot spurn her.

For all its lack of sanctions, *conubium* in the classical period was strikingly stable.[4] There was no ceremonial rite called for in law, no symbolic acts necessary, no officiant priest or magistrate and no public registration mandated. Augustus was fascinated with a needed census of people in his time, but marriage records served no useful purpose and none were kept. *Confarreatio* was an optional ritual for the patricians and those of the priestly class. This involved a solemn ceremony with a wheat cake, broken and eaten by the couple.[5]

Marriage was purely a social status, hardly a *contractus.* It was part of the *ius personae* (the law of persons). The best of Roman sentiments were a part of *conubium.* In classical times, it called for the purest exercise of free will. *Conubium* was purely humanistically free and freely dissoluble, yet socially understood for life. Roman marriage displayed the fundamental "stuff" of human nature—to want human affection to last forever. Marriage for life was a deeply human sentiment before Christianity made it an imperative. *Conubium* was monogamous. What surprises the student of history is that concubinage was socially acceptable even for the married, although understood as extra-legal and as without *affectio maritalis* when enjoyed with anyone other than freeborn and respectable women. Christianity established strict monogamy as a norm in lieu of Judaeic roots after the instruction of Christ.[6] Concubinage was forbidden by the time of Emperor Justinian (r. A.D. 527-565).

Rome had nothing to apologize for with her idea and practice of marriage. *Humanitas* emphasized the value and dignity of the human person that was uniquely and sometimes excessively individualistic. By the time of Augustus (18 B.C.) the birth rate of Romans was so low because of the freedom of marriage that favors and concessions were granted citizens to increase family size, *i.e., sanguis Romanus.*

Although human desires encouraged marriage for life, Romans un-

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[4] The last 150 years before Christ are considered the formative period of Roman law. *See* B. NICHOLAS, *supra* note 2, at 34.

[5] *See id.* at 82.

[6] *Matthew* 19:3-6.

derstood that circumstances in the human situation could change. Thus, the marriage could end as freely as it was made either by mutual agreement or announcement by one of the parties.[7] No suits, sanctions, or obligations to the spouses, children, or society were envisioned. Romans appear to have been concerned more with how marriage came into existence rather than with the strength of a marital relationship or any such reality which mandated permanence. Indissolubility simply spoke to no particular value in Roman life, nor to the spirit of *humanitas.*

For most of their observable history, Romans focused on consent as the constitutional element of marriage. In the Republic, marriage was patriarchal. The *uxor* (wife) was in *manu mariti* (in the hand/power of the husband).[8] The spirit of *humanitas,* however, later freed marriage, and therefore women, by the end of the second century B.C. Marriage remained free thereafter.[9] Gaius (2d cent. A.D.) in his *Institutiones,* stated the following about valid marriages: *legitimae sunt nuptiae, si Romanus Romanam nuptiis intervenientibus vel consensu ducat uxorem.*[10] About a century later, the Roman jurist Modestinus (d. A.D. 237), spoke of marriage being much more than a status differentiated from concubinage by a unique type of consent. Marriage for him embraced the civil and religious aspects of the couple's lives—the totality of the human relationship. Christians could sympathize with his conception: *nuptiae sunt coniunctio maris et feminae, et consortium omnis vitae, divini et humani iuris communicatio.*[11]

Consent is a profound human act. It defies conclusive description. Consent was an intricate part of the Roman law on persons; it included family, guardianship, property, contracts, wills, and adoption. Without human consent, most of these legal institutions simply had no life. Thus, at the most fundamental level, consent created the status of Roman marriage, found either in the consent given by the *pater potestas,* the *epitholomia* (the *uxor's* homage now to the husband's household goods), or the *deductio uxoris ad domum mariti* (the going down to the husband's house). With these acts, Romans were looking for external evidence demonstrating the existence of a marriage as opposed to merely an agreement to cohabit.[12] This external evidence was seen as fundamental to the clarity of the social status. Citing evidence in law was simply a

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[7] B. NICHOLAS, *supra* note 2, at 85-86.

[8] L. CURZON, ROMAN LAW 42 (1966).

[9] F. SCHULZ, CLASSICAL ROMAN LAW 104 (1951).

[10] INSTITUTES (GAIUS) 1.4 (lawful marriages are those which involve consent, if they are between Roman citizens).

[11] DIGEST 23.2.1 (a union between a man and woman, an association for the whole of life in which the two have the same civil and religious rights).

[12] *See* B. NICHOLAS, *supra* note 2, at 81.

matter of good reasoning and common sense, and the Romans were unmistakably reasonable and sensible people.

Conubium's only legal effect was the legitimate status of children and inheritance rights.[13] Law exists for order in the community. Law is consistent in this sense in that it demands the cold, hard facts of evidence. Hence, to demonstrate that in this instance we have marriage, and in this instance we do not have marriage, there must be some external sign in the human order of the internal consent.

It is important to note here that there is a difference between the methodology of the lawyer and that of the theologian. Most early Christian thinkers on marriage were theologians. Church law on marriage was refined much later, beginning in the Middle Ages. When the theologian today asks what marriage is, he is likely to describe it as a sacred relationship, a union, or a sign of God's fidelity. In other words, the theologian attempts to explain the mystery of Christian marriage, whereas law is not capable of dealing with mystery. The law of marriage must define by clear signs when we have anything akin to the mystery of the sacrament of marriage. Traditionally, the contractual agreement has provided the necessary external evidence. Ecclesial law is rooted in Christian mysteries, but law and theology are not identical.

Christianity adopted this legal notion of consent readily, but succeeded in stripping the social status of marriage of the freedom it enjoyed under Roman common law. For a long time, the marriages of Christians were regulated by local custom and law. Eventually, the church became a legal community and began developing her own law, prohibiting marriage within certain degrees of blood relationship as the Romans did,[14] and discouraging secret and clandestine marriages forbidden by the Montanist and Tertullian (2d cent. A.D.), who labelled such attempts at marriage as adultery and fornication.[15] Ignatius of Antioch (2d cent. A.D.) and Jerome (A.D. 345-419), and Ambrose (A.D. 339-397) all cautioned the faithful against mixed marriages with the heathens or pagans.[16] From the Ro-

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[13] Legitimization of offspring from concubinage was not possible until shortly before the reign of Emperor Justinian (A.D. 527). *Id.* at 85. *Iustae nuptiae* automatically conferred rights of inheritance. *See id.* at 83.

[14] *Iustae nuptiae* was forbidden in the direct line of descendents and in the collateral line (kinship) up to and including the sixth degree. Under the Roman method of computation there are as many degrees as there are generations (*tot gradus sunt quot generationes*). *See* P. CORBETT, *supra* note 2, at 47-51.

[15] *de Pudicitia*, c.4, *et de monogamia*, n.15,—*occultae coniugationes id est non prius apud Ecclesiam professae iuxta moechiam et fornicationem periclitantur* (secret unions, those which have not been professed before the church are in danger of amounting to adultery and fornication).

[16] Ignatius of Antioch, *epistula ad Polycarpum* (A.D. 107); Ambrose, de Abr., 1, 9, and *epistula ad episcoppis;* Jerome, Adv., 10 v. "great numbers of christian women despise the

man prescription of marriage as a natural, social institution, Christianity transferred marriage into an *acta religionis,* exhorting Christians to appreciate the religious character of marriage and its source of grace and blessing.

The church began to see more than a marital affection differentiating the marriage relationship from concubinage or any other relationship akin to it. For Christians, marriage emerged with communitarian effects and transcendent ends for the baptized. The Roman institution was purely human, individualistic and free, without social accountability. For the Christian, its indissoluble character aids the spiritual life of man here and in the future kingdom. We need not emphasize the obvious disparity between the Roman and Christian conceptions, based on two entirely different world views. The Christian experience affords a drastic change in the human experience of marriage, at least insofar as Christianity affected the entire Western world.

The early church fathers and theologians entertained the idea of marriage's causality further. Ambrose suggested a real marriage came to be *pacto coniugáli, i.e.,* at the time of betrothal, *desponsatio.*[17] Augustine (A.D. 354-430) spoke of marriage as sacred and indissoluble, calling the singular marriage of Mary and Joseph a true marriage, although it is believed to have existed without consummation.[18]

The Emperor Justinian (r. A.D. 527-565) adopted and Christianized decadent Roman law for the purpose of the Byzantine Empire. He saw marriage as a union between man and woman enjoying a divine privilege which could not take place without consent. The Emperor could not escape true Roman roots. Even through the *pater potestas,* consent was still believed valid when a woman was in her father's household in Byzantine Christianity. Justinian enumerated at length the degrees of blood relationship between whom marriage was prohibited, adding to what Roman common law had already provided,[19] and clarified what was a previous attempt by the Emperor Theodosius (A.D. 438) to compile ancient and contemporary law useful for the Empire.[20]

Pope Gregory II (r. 715-731) carried on the theological reflection, titling mere espousal *coniuges* (marital union). Whereas the Romans had searched for an identifiable and external reality that demonstrated the coming-to-be of *conubium,* Christians were now wrestling with the question of what constituted marriage before God. In fact, the church still wrestles with this question.

Apostles command and marry heathens!"

[17] de Abr., 1, 9.

[18] Augustine, *de nuptiis et concupiscentia,* bib., 1, c.11, *et de bono coniugali.*

[19] *See* DIGEST 23.2; note 12 *infra.*

[20] CODE THEOD. 16.3.7.1.

The discussion came to a dramatic point in the twelfth century, illustrated by the debate between two French universities, Bologna and Paris. Gratian the monk led the Bologna school, stating that the act of consummation completed the act of consent given in marriage and that consummation was necessary for marriage's sacramentality.[21] Gratian was searching for an external sign in the Christian order. His belief was based on a fourth century theory advanced by one archbishop, Hincmar of Rheims. The sacramental theologian, Peter Lombard (1164) disagreed, stating consent alone was efficient cause for the sacramentality of marriage. The canonist, Pope Alexander III, concurred with Lombard, essentially placing an end to the discussion. From this point on, it became a matter of church doctrine that, at the most fundamental level, consent alone creates Christian marriage *in iure*. Thereupon, Christianity would exercise a dominant influence on Western life and marriage.

By the Middle Ages, the Church had succeeded in bringing marriage under control by a system of impediments, that is, circumstances and conditions, both divine and natural, which would preclude valid marital consent. The first listings of these impediments appeared at the end of the twelfth century. There were no exhaustive lists. Peter Lombard had one such list. Gratian listed sixteen, though his was not definitive.[22] Catholicism later would emphasize the necessity of the freedom of consent with what vitiates it, e.g., force, fear, fraud, conditional consent. The Council of Trent (1545-1563) would later add abduction and clandestiny to the list. Consanguinity-affinity prohibitions were already formulating by the time of the fourth and sixth century councils.

Not to be underestimated is scholastic philosophy's contribution to the discussion. Thomas Aquinas (1225-1274) proposed that marriage was a *communio vitae* (communion of life).[23] One first sees now a train of thought developing with the causality inherent in the institution. The Romans did not reflect that much on marriage. They lived and enjoyed marriage. Unknown to the pagan ancients, they began the significant discussion. *Affectio maritalis* distinguished *iustae nuptiae* from concubinage in Roman common law of the classical period. For Catholicism, love was not essential to their notion of the marriage contract. In fact, we still are not

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[21] *Corpus Iuris Canonici*, Gratian, causam xxviii, q.2.

[22] *Corpus Iuris Canonici*, Gratian, causam xxvii, q.1. *viduae religioso habito abiecto; viduis et virginbus religionis proposito; clericus deponatur; laicus excommunicetur; bigamos; monachus et virgo; professam continentiam*, etc. The Old Catholic Encyclopedia also lists medieval impediments as: *votum, conditio, violentia, spirituali, proximitas, error, dissimilisque fides, culpa, dies vetitus, honor, ordo ligatio, sanguis, quae sit affinis, quique coire nequibit, additur his aetas, habitum coniunge furoris. His interdictum subditur ecclesiae. Haec si canonico vis consentire rigore te de iure vetant subire tori.* 7 OLD CATHOLIC ENCYCLOPEDIA 696 (Herbermann ed. 1913); *cf.* CODE OF CANON LAW (1917).

[23] *See de objecto consensu matrimonis* in SUMMA THEOLOGIAE q.1, art. 1 (Supp.).

comfortable with where this essential human emotion fits into the contract, as we have defined it over the centuries. Love is not an essential component of contracts of any kind, at least as we have inherited contracts from the Romans. And with ecclesial (canon) law, one could conceivably have a true marriage without love or at least without its imperfect expression. We are still working on this.

Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos.[24] This is an article of belief incorporated into the body of law by the legislator. From this canonical statement, all ecclesial law on marriage proceeds.

The medieval canonists had already chosen the notion of contract to define marriage because it facilitated measuring the exigencies of consent and suited scholastic philosophical categories as well as facilitated litigation in the church courts. There was no such reality as litigation with Roman *conubium.* In comparison, Roman marriage appeared to be a superformalized kind of friendship between the opposite sex, freely begun and freely ended by means of consent. Romans had no notion whatsoever of marriage being a contract between parties. Marriage contract within Catholicism, however, freely consented to, now involved duties and obligations never imagined by the Romans.

The church's control over the marriages of her faithful came drastically as an issue at the Council of Trent (1545-1563). After the painful experience with the reformers, there existed intense concern for renewed order and pristine uniformity. With the decree *Tametsi,* Catholicism pronounced its vicarious power over the Christian marriage bond.[25] The issue was not without long debate by the bishops. The question: If consent is all that is needed for true and valid marriage, why require a public form? Some bishops feared the loss of a doctrine supported heavily by tradition. The church now required consent to be enacted in *forma publica, i.e.,* before a bishop or priest and two witnesses, for no other reason than to check secret marriages and the resulting problems of legitimacy, inheritance rights, and moral chaos, to say nothing of the rights of the parties themselves and the protection of the sacrament. The requirement of "form" remains today indispensable for validity.

Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus; qui nulla humana potestate suppleri valet.[26] The Romans would have no difficulty with this statement as it stands. But the

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[24] CODE OF CANON LAW Canon 1012 (1917) (Christ the Lord has raised to the dignity of a sacrament, the marriage contract itself, between the baptized).

[25] *Concilio Tridentini, sessio* 24, Nov. 11, 1563, *de reformatio matrimonis,* tit. xvii.

[26] CODE OF CANON LAW Canon 1081 (1) (1917) (Marriage is effected by the consent of the parties lawfully expressed between persons who are capable according to law, and this consent no human power can supply).

church believes marital consent when contracted between the baptized is always a sacrament. The sacrament of marriage is said today to be a sign in the existential order of Christ's love and fidelity to His Church. The church has always felt a need to reflect this fidelity of Christ in the human experience.[27] Christian marriage therefore becomes an experience of pure faith, an extraordinary lifestyle. With this understanding of the mysteries, christians cannot conceive of marriage as anything but indissoluble, because God has been constant with His people.

The discussion developed still further at Vatican Council II (1962-1965). The bishops titled marriage "*communio vitae.*"[28] Was this not, in effect, Modestinus and Aquinas revisited? The council described for the first time the importance of conjugal love and the ingredients of consent. The contractual agreement is understood now not just as a cerebral, verbally communicated intention, but as a disposition that involves the spiritual, the psychological, and the physical. It is a much broader consent, complimenting a growth in understanding, but now more difficult to measure. Some are able to qualify for this kind of marriage, others not. It is more than the *ius ad corpus.*[29] Rather, it is, fundamentally the capacity to form a communion of life with another, and to supply a mutual help that gives true meaning and purpose to the conjugal act.

We have yet to work with this developed understanding of consent in marriage. The ramifications are immense. *Foedus* (covenant) is now suggested to replace *contractus* because of its fuller biblical sense. The covenant of marriage necessarily highlights the faith dimension of marriage. Some will argue that "contract" is clearer for sake of legal language and methodology. The term, however, certainly does not adequately describe the mystery of Christian marriage. The word has been useful because law has needed the concrete image to assess whether a given marriage represents the sacrament. The church could have chosen some other model to determine clear consent. Nevertheless, it would appear inconceivable that the civil or church society would dispense with the need to ascertain the external sign of consent in marriage, precisely because of the institution's great accountability to the community.

> #1 *Matrimoniale foedus quo vir et mulier intimam inter se constituunt totius vitae communionem, indole sua naturali ad bonum coniugum atque ad prolis procreationem et educationem ordinatam, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.*
> #2 *Quare inter baptizatos nequit matrimonialis contractus validus consis-*

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[27] *See Ephesians* 5:25-33.
[28] *Gaudiam et Spes* (The Church in the Modern World) II, 1, 48.
[29] CODE OF CANON LAW Canon 1081(2) (1917) (the right over the body . . . for those acts apt for generation).

tere, quin sit eo ipso sacramentum.[30]

In effect, the church took a Roman concept, consent in marriage, and developed it through history, casting it in the legal frame of the Roman contract of the consensual type, to clarify what now has emerged as the institution's social and religious accountability. If the Romans could see us today!

There are some unresolved difficulties as yet with "marriage consent." The 1975 schema of the new code of law on marriage, commissioned out of the Second Vatican Council, reflects in part the present-day growth in our understanding of the mystery. The important thing is that the church is still reflecting on marriage and today, more than ever, admits to new growth in her understanding.

One of our weaknesses is that those who have lived Christian marriages have hardly written about them, especially the happy marriages. Most of our literature concerns itself with marital breakdown and needed adjustment. Those who have often written about marriage are celibates who obviously have not lived the mystery!

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[30] Proposed schema, *de matrimonis*, 1975, norm 242. Compare with CODE OF CANON LAW Canon 1012 (1917). (#1 The matrimonial covenant between baptized persons, by which a man and a woman constitute together a communion of the whole of life, is ordered by its natural character to the good of the spouses and to the procreation and education of children, has been raised by Christ the Lord to the dignity of a sacrament. #2 Therefore, it is impossible for a valid contract of marriage between baptized persons to exist without being by that very fact a sacrament.).