

THE WORD *CONSORTIUM* OF CANON 1055, § 1 — A HISTORICAL INVESTIGATION OF ITS MEANING

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The sacrament of marriage today, as in the past, is confronted with numerous issues coming from various conditions within the Church, both universal and local. In the sphere of ecclesiastical law, the promulgation of the Code of Canon Law in 1983 is a concrete response to meet the contemporary issues regarding marriage. Nevertheless, despite the many advantages the new Code offers, there remain certain aspects which demand greater clarity — precisely because of the complexity of the matter they cover. One of the issues which needs further understanding is the term *consortium* which designates marriage in Canon 1055, § 1 of the new Code.¹ The purpose of the present article is to explore the historical meaning of this term *consortium* — from its origins in Roman Law up to the years before the Second Vatican Council.² This era provides the needed foundation in understanding the meaning of the term both in doctrine and jurisprudence as used in Canon 1055, § 1 of the 1983 Code of

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, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est." Note: Unless indicated otherwise, all Latin texts of the 1983 Code of Canon Law are taken from *Codex iuris canonici* (Libreria Editrice Vaticana, 1989); while all English versions are taken from *Code of Canon Law: Latin-English Edition* (Washington, D.C.: Canon Law Society of America, 1983).

2. The need to continue exploring the meaning of the term *consortium*, both in doctrine as well as in jurisprudence, has been expressed time and again by various canonists. Cf. C. Serrano 6 May 1987, in *SRRD LXXIX* (1992) 275 (§ 13); L. Örsy, S.J., *Marriage in Canon Law: Texts and Comments — Reflections and Questions* (Dublin: Dominican Publications, 1988) 265; and M. F. Pompedda, *Studi di diritto matrimoniale canonico* (Milano: Giuffrè Editore, 1993) 112-13.

Canon Law. It is the intention of this study not only to investigate the sense of the term found within the designated period in history as given by groups or individuals, but also to arrive at a common understanding of it. In this way, one can recognize with certain clarity the meaning of the term when used in reference to marriage in the present Code. Moreover, this work will not only study the development of the Christian understanding of the nature of marriage, but also its ends and other matters necessarily connected to such nature. Finally, the investigation will not focus merely on texts where the term *consortium* is directly used, but also on other expressions where its content is meant.³

1. ROMAN LAW

The prominent position of Roman Law in history is recognized in Christianity — especially because in her early period, the Church found herself in a situation where Roman law was in force. It was the Roman law on marriage which the early Church dealt with. This condition, far from being regretted, is instead regarded as a most propitious one.⁴

1.1 Concept of Marriage

The beginnings and initial developments of Christian marriage are found within the imperial epoch of ancient Rome, that is, from 31 BC to 235 AD.⁵ During this time, it was the *matrimonium liberum* which was the common arrangement of marriage.⁶ In

3. *Consortium* is rendered as *partnership* in official English translations of the 1983 Code of Canon Law — found in the versions of both the Canon Law Society of America, and the Canon Law Society of Great Britain and Ireland. Aside from Canon 1055, § 1, the term *consortium* is also found in Canons 1096, § 1, 1098 and 1135 of the same Code. And it is rendered too as *partnership* in all these canons by both mentioned Canon Law Societies — with the exception of Canon 1096, § 1 where the Canon Law Society of America opted to retain the word *consortium*. In the course of this work, the term has been often translated by the author himself as *sharing* or *union*.

4. F. Schulz, *Classical Roman Law* (Oxford: Clarendon, 1951) 103.

5. Cf. O. Robleda, S.J., *Introduzione allo studio del diritto privato romano* (Roma: Università Gregoriana Editrice, 1979) 54-55.

6. *Matrimonium liberum* became the common arrangement of marriage from

this arrangement, there was virtually a formless transaction, because marriage was considered a private affair, not a public one.⁷ At most, it was a family affair where fathers of the two families often made all the arrangements. The Roman tradition demanded nothing more to make marriage valid than the mutually exchanged consent of the partners, even if such was made in complete privacy. In particular, three causes could be delineated which were joined to arrange a marriage: *pubertas*, *connubium*, *maritalis affectio*.

1.1.1 "Pubertas"

The first cause, *pubertas*, could be considered as the *natural capacity* of a person to enter into marriage. This cause prohibited the following from marriage: a male below fourteen years old, a female below twelve years old, and a eunuch. All the above were considered not capable, by nature, to have the psychological and sexual capacity to get married.⁸

1.1.2 "Connubium"

The second cause, *connubium*, was regarded as the right to marry possessed by those who were free and who were citizens

the early stage of the empire after the disappearance of the ancient ceremony of *confarreatio* and the diminishing form of marriage by *coemptio* or *usus*. Cf. T. Mackin, S.J., *What is Marriage? — Marriage in the Catholic Church* (New York: Paulist, 1982) 71-72; O. Robleda, S.J., *El matrimonio en derecho romano — esencia, requisitos de validez, efectos, disolubilidad* (Roma: Università Gregoriana Editrice, 1970) 1-25; E. Schillebeeckx, *Marriage — Human Reality and Saving Mystery* (London: Sheed and Ward, 1965) 233 ff.

7. The Roman marriage at this time was concluded without any form of law. It was not subject to any essential mold of formality like the celebration before an authority or the drafting of a document. In some traditional circles though, it was supplemented by ancient religious customs which were considered mere accessories. Cf. J. Iglesias, *Derecho romano — instituciones de derecho privado* (Barcelona: Ediciones Ariel, 1958) 488; Schillebeeckx, 241.

8. There was an earlier disagreement between two schools, Sabinian and Proculian, regarding the natural age for a male to get married. While the former insisted that the physical development must be examined in each individual male, the latter set a fixed age limit of fourteen years. Justinian resolved this issue in favor of Proculian. Cf. F. M. Cappello, S.J., *Tractatus canonico-moralis de sacramentis*, Vol. 3: *De matrimonio* (Romae: Bibliopolam Marietti, 1933) 408, n. 3; Iglesias, 490, n. 15.

of the empire.⁹ This could be considered the *juridical capacity*. As the phrase *matrimonium liberum* implied, the status of marriage exclusively belonged to the free. And only those who possessed *connubium* could form a *matrimonium iustum*, that is, a valid and lawful marriage.

1.1.3 "Maritalis affectio"

The third cause, *maritalis affectio*, was the desire and the will of the parties to be married to one another. It was this cause that differentiated marriage from any other kind of relationship. There were three aspects which could be identified to describe *maritalis affectio*: objective element, subjective element, and the manifestation of mutual consent.¹⁰

a) Objective Element

First, the objective element involving the partners' joint conjugal life: Given the fact that for the Romans marriage was directed to the building up of a perpetual community, of a common and enduring life, it was not correct to subject it to a variety of conditions or limits.¹¹ In fact such conjugal life was not to be interpreted in the material but in the ethical sense. It was possible, for example, that the partners were not actually living together.¹² Indeed, the marriage continued to exist even if they did not live in the same house.¹³ Another example of the ethical sense was the fact that there could be a marriage in the

9. The union of those not free were not regarded as *matrimonium* but as *contubernium*. See G. H. Joyce, S.J., *Christian Marriage: An Historical and Doctrinal Study* (London: Sheed and Ward, 1933) 42-43; Iglesias, 490.

10. Robleda brought out an important discussion touching on these three elements — especially the objective and subjective elements — by analyzing some controverted ideas like those of another author named Manenti and his followers. Cf. Robleda, 74 ff.

11. Even if the Romans were not concerned about attributing to marriage any such juridical value or function, they were faithful in showing its essential characteristic (Iglesias, 489).

12. Although this not living together was reckoned as a possibility, it was considered to be hardly normal. Cf. D. E. Fellhauer, "The *Consortium omnis vitae* as a Juridical Element of Marriage," *Studia Canonica* 13 (1979) 14.

13. Cf. *Digesta* 24, 1, 32, 13.

absence of the male partner when the bride came to the residence of the former in the so-called *deductio in domum mariti*.¹⁴

b) Subjective Element

In addition to the objective element of joint marital life, there was the subjective element of intention or consent — that is, the desire and the will of two persons of different sex to become husband and wife.¹⁵ This was properly designated as *affectio maritalis*.¹⁶ It required that spouses essentially lived and accepted each other as common partners. It also implied the intention to form a lifelong partnership which was, in principle, stable and lasting.¹⁷ And this was confirmed by the fact that the possibility of divorce did not affect the nature of marriage based on such intention.¹⁸ This made Roman marriage

14. *Digesta* 23, 2, 5. Regarding *deductio in domum mariti*, Gasparri addressed the old question whether in Roman law marriage was formed solely by a manifested consent, or was the *deductio mulieris in domum viri* required besides it (P. Gasparri, *Tractatus canonicus de matrimonio*, ed. nova ad mentem codicis i. c. [Typis Polyglottis Vaticanis, 1932] 13). De Smet believed that such *deductio* was not necessary, only consent sufficed to establish marriage (A. de Smet, *De sponsalibus et matrimonio* [Brugis: Car. Beyaert Editor, 1920] 81). Moreover, the *deductio* was held as a proof of marriage, but was not considered as marriage itself (Joyce, 42).

15. Iglesias, 487. Cf. Fellhauer, 12-13 and A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1953) s.v. "*Affectio maritalis*."

16. H. Insadowski, "Quid momenti habuerit christianismus ad ius romanum matrimoniale evolvendum," *Acta congressus iuridici internationalis* 2 (1935) 44.

17. This point, however, is disputed. While some believe that such an intention or will should be *continuous*, others propose that the *initial* manifestation was enough. This latter view has the advantage in that it upholds the original view of the Romans regarding the role of *consent* as the fundamental factor in marriage instead of *conjugal love* — that is, of *affectio maritalis* instead of *amor conjugalis*. Another advantage is that such initial manifestation of consent would create a juridical reality in marriage which no longer depends on the will of those who created it — making *consent* as truly the essential and constitutive element of marriage. These latter convictions naturally presuppose that the Roman expression *affectio maritalis* did not mean *conjugal love*, but the *will* to be married. Eventually, canon law followed the idea of *initial consent* as sufficient in creating marriage. Cf. U. Navarrete, S.J., "Consensus matrimonialis in matrimonio romano eratne initialis tantum an continuus? (Nota bibliographica)," *Periodica* 59 (1970) 505-8; Robleda, *El matrimonio*, 111-44; Iglesias, 488.

18. Divorce was understood to be the loss of the *affectio maritalis* in one

monogamous.¹⁹ And without the *affectio maritalis* no marriage at all was possible, at least, in principle.²⁰

c) Manifestation of Mutual Consent

Finally, there was the third aspect whereby *affectio* must be manifested in some mutual consent that could be verified. This necessarily required the partners to keep their mutual obligations. An example would be the husband's duty to respect the social dignity of the wife, that is, the *honor matrimonii* which was a manifestation of their mutual *affectio*.²¹ Nevertheless, inasmuch as Roman marriage was not in the first place a juridical relationship but a social datum, *affectio maritalis* was to be manifested in reciprocal actions of the partners. And it was to be measured through the standard of social norms, and not juridical ones.²²

Therefore, for the Romans, marriage was consensual in nature. The manifested consent had as its immediate object the establishment of *consortium omnis vitae* which will be at the heart of an early Roman definition of the nature of marriage.²³ The importance of this definition rests on the fact that its language was expressly the same as that being used in the current understanding of marriage as *consortium*. This was the definition of Modestinus which was contained in the Roman law of the imperial epoch.

1.2 Definition of Modestinus

The definition of Modestinus is found in the *Digesta* of the

of the partners or in both (Iglesias, 488 and 497). Cf. O. Robleda, S.J., "Divortium: lus romanum et theoria generalis," *Periodica* 58 (1969) 351-414; Robleda, *El matrimonio*, 115.

19. For example, bigamy carries with it the fitting consequence of disgrace (*Digesta* 3, 2, 1).

20. Fellhauer, 12. Cf. *Digesta* 23, 1, 11.

21. Fellhauer, 11. Cf. Iglesias, 487; Insadowski, 45; O. Robleda, S.J., "Reflessi romanistici nella definizione canonica del matrimonio," *Gregorianum* 56 (1975) 416.

22. K. Ritzer, "Diritto civile e concezione ecclesiastica del matrimonio in occidente," *Concilium* 5/6 (1970) 95.

23. Cf. Insadowski, 44-45; Mackin, 78-79.

sixth-century Christian Emperor Justinian. It is associated with the jurist Herrennius Modestinus whose death in 237 AD marked the end of Roman law's period of classical jurisprudence.²⁴

Marriage is a union between man and woman, and a partnership of the whole of life, a sharing of human and divine right.²⁵

Modestinus aimed at defining what the relationship of marriage was, that is, as based on its long-established existence and its being indigenous to his culture. It was, therefore, a descriptive definition.²⁶

1.2.1 Generic Term: "Coniunctio"

The key generic term of the definition was *coniunctio* which indicated that marriage was first of all a *union*. It was the term to describe the life in common of the spouses which should be taken more in its naturalistic and physical sense, rather than the spiritual — such as the union of wills or souls, or of hearts and minds. Moreover, this union involved one man and one woman. This clearly excludes polygamous or homosexual marriages. It implied that union was important in the marital relationship.²⁷

24. Cf. V. Palathingal, "*Consortium totius vitae*": *Essence and Form of Marital Relationship in the Malabar Church* (Alwaye: Saint Thomas Academy for Research, 1992) 8; Joyce, 40.

25. *Digesta* 23, 2, 1: "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio." There were some challenges to the authenticity of Modestinus' definition either as a whole or in part. Some, for example, claimed that the phrase *consortium omnis vitae* was inserted by the Christians in order to give support to the idea of permanence in marriage. This accusation has been losing weight as studies showed ever more clearly that permanence has been part of Roman consciousness even before Christianity. Moreover, a majority of recent scholars attest to the genuineness of the definition. See Felthauer, 14; Mackin, 74; Robleda, *El matrimonio*, 66 ff. Note: The translation into English of any non-English text is made by the author of this article, unless stated otherwise.

26. Descriptive definition is distinguished from *prescriptive* which is *a priori*. Mackin further elaborates this in the following: "In descriptive defining the definer and his definition come after the thing to be defined. The definer comes upon this thing; it is already there constituted in its nature and existing in that nature. In defining it he seeks to say what its nature is, both inclusively and exclusively. His definition is accurate if he describes this nature accurately." See Mackin, 328-29.

27. *Ibid.* 74.

1.2.2 Specific Difference: "Consortium omnis vitae"

The differentiating phrase of Modestinus' definition which specified *coniunctio* was *consortium omnis vitae*. This expression *partnership of the whole of life* was meant to convey a sense of sharing, and of the inclusiveness and stability of such sharing. Since this study wishes precisely to investigate the meaning of the term *consortium*, a deeper inquiry will be made into its early Roman roots and usage.

a) Etymology of "Consortium"

In explaining the etymology of *consortium*, two approaches are possible: first, in its compound neuter form of *consortium*; and second, in its separated simple forms of *con* and *sors*. To the first, the following meanings are listed in English: community of goods, fellowship, participation, society.²⁸ To the second, dividing *consortium* into its simple forms reveals further specific meaning. On the one hand, the preposition *con*, or its later form *cum*, is translated in English as: with, together, together with, in connection or company with, along with.²⁹ On the other hand, the noun *sors* is given as: lot, share, the duty assigned by lot, fate, destiny, chance, fortune, condition, share, part.³⁰ Combining the two words into *consortium*, it can be translated as *partnership or common destiny, project or fate*.³¹

Consequently, from the two approaches, the etymological meaning of *consortium* may be described as a close partnership

28. *Harpers' Latin Dictionary*, revised by C. T. Lewis and C. Short (New York: American Book Company, 1907) s.v. "*Consortium*." Under the feminine word *consortio* in the same dictionary, the following meanings are listed: fellowship, community, partnership, association, sympathy and sympathetic connection. It is precisely the term *partnership* which the official English translations of Canon 1055, § 1 adopted. Incidentally, under the word *consortium*, Forcellini mentions the following Latin expressions: *communio bonorum, societas, communicatio, collatio* (*Totius latinitatis lexicon*, ed. A. Forcellini [Prati: Typis Aldinianis, 1861] s.v. "*Consortium*").

29. *Harpers'*, s.v. "*cum*."

30. *Ibid.*, s.v. "*sors*."

31. This is, at least, what is implied by the Navarra version of the 1983 Code (P. Lombardia and J. I. Arrieta, eds., *Codice di diritto canonico*, Vol. 2: *Libri IV, V, VI* [Roma: Edizioni Logos, 1986], commentary on Canon 1096, § 1).

of persons sharing the same fortune and fate, and participating in a common design and destiny.³²

b) Usage of the Term "Consortium"

In the context of marriage, the term *consortium* generally referred to *communio omnia*, that is, a sharing of everything between husband and wife.³³ It was a sharing which went beyond the physical or sexual.³⁴ It referred not so much to a juridical as to a social and cultural sharing. The term *consortium* also evoked the old Roman familial community which maintained an extremely close and united bond.

In particular, there were four aspects of the sharing:³⁵ First, it was a *societas bonorum*, that is, a sharing of all possessions or goods.³⁶ Second, it was a *societas vitae*, that is, a sharing of life or of the way of living. Third, it was a *societas fortunae*, that is, a sharing in any kind of fortune — be it in prosperity or in poverty, be it good or bad.³⁷ Finally, it was a *societas in perpetuum servanda*, that is, a sharing with the idea of perpetuity or for all time.³⁸

Hence, marriage was called *consortium* because the spouses became partners of the same lot and condition, and of rights

32. Cf. Örsy, 51; Fellhauer, 15.

33. Cicero, *De officiis*, 1, 17, 54. Wernz mentioned *consortium* as one of the names for marriage from the "communione eiusdem sortis et conditionis, honorum et iurium et bonorum inter coniuges" (F. X. Wernz, S.J., *Ius Decretalium*, Vol. 4: *Ius matrimoniale eccles. catholicae* [Prati: Ex Officina Libraria Giachetti, Filii et Soc., 1911] 23, n. 4). Similarly, Cappello stated that marriage was also called *consortium* because "coniuges participes fiunt eiusdem sortis et conditionis, iurium et bonorum ex intima coniunctione quae inter eos adesse debet" (Cappello, 2). Note: The source of all the classical authors cited in this section are taken from: J. Huber, "Coniunctio, Communio, Consortium. Observationes ad terminologiam notionis matrimonii," *Periodica* 75 (1986) 404-5.

34. Robleda, "Reflessi romanistici," 413.

35. Cf. Huber, 403-6.

36. Cf. Livius, *Ab urbe condita* 1, 9, 14 and Columella, *De re rustica* 12, *praefatio*. *Societas* or *communio bonorum* was the original sense of the expression *consortium*. Cf. *Digesta* 17, 2, 52, 8; *Totius latinitatis*, s.v. "Consors" and "*Consortium*"; Iglesias, 269, 383, 472, 533.

37. Cf. Tacitus, *Annales* 3, 34 and 12, 5.

38. Cf. Quintilian, *Declamationes* 277. In fact, as an ethical and social reality, marriage was always considered to be permanent. Cf. Fellhauer, 15; Robleda, *El matrimonio*, 66-69.

and goods from the intimate sharing which should be on hand among themselves. In other words, the man and woman united in a marital *consortium* became sharers in life's experience.

c) "Omnis vitae"

In the phrase *of the whole of life*, there were two possible significations which were not mutually exclusive. It could point to duration of marriage or to total sharing of the various aspects of life. In any case, the meaning of *consortium omnis vitae* was clear enough to the Romans.³⁹

1.2.3 Final Element: "Divini et humani iuris communicatio"

The last phrase of the definition gave the content of marital *consortium* a further specification. The partners in marriage are required to maintain a *sharing of human and divine right*. This sharing embraced not only civil effects, but also moral and religious ones.⁴⁰

The study will now proceed to examine the different periods in history which held or alluded to the elements of the term *consortium* as understood from the definition of Modestinus.

2. EARLY CHRISTIAN MARRIAGE

At the beginning, since the Church simply accepted the Roman legislation, Christian marriage was the same as that of the Roman pagans. Marriage remained a secular reality. It persisted as a private affair, realized by the partners through a verifiable mani-

39. Fellhauer, 15.

40. Joyce, 40-41. In a similar way, Paucapalea (ca. 1148) explained this phrase, *divini et humani iuris communicatio*, as to mean that the partners share "one church, one 'chorus', one home, and the like" (Fellhauer, 39). Note: During the time of Modestinus, there was another descriptive definition of marriage which was associated with Domitius Ulpianus: "Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens." Although the term *individuum consuetudinem* is used, this definition conveys essentially the idea of *consortium* in Modestinus. Cf. *Institutiones* 1, 9, 1; Robleda, *El matrimonio*, 59-71; Fellhauer, 37-42.

festation of consent.⁴¹ A clerical intervention was considered superfluous. Even the basic Roman attitude towards marriage endured, viewing it more as a social than as a legal reality.

Despite the sameness, however, Christians observed one limiting principle, namely, that the pagan practices concurred with reason and revelation.⁴² It was this same principle that would begin to shape the Christians' own view of marriage around the original notion of the term *consortium* described by Modestinus. The most significant result was the crucial role given to *equality* in order to realize a genuine sharing between husband and wife.⁴³ Equality would also be required in the partners' mutual obligation to live a moral life — such as the observance of fidelity.⁴⁴

The next period to be considered will be that of the Fathers whose chief representative was St. Augustine.⁴⁵

3. ST. AUGUSTINE (354-430)

During the time of the Fathers, there was a move from the traditional focus on marriage as a social reality into something formal — that is, to look at marital *consortium* as an institution.⁴⁶

41. E.g., see Nicholas I, *Ad Bulgaros* (H. Denzinger and A. Schönmetzer, S.J., eds., *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum* [36th ed.; Barcinone: Herder, 1976], no. 643).

42. Joyce, 40. An example of such limitation was the disregard for the imperial law denying *connubium* to slaves and foreigners. Cf. Hippolytus of Rome, *Philosophoumena*, 9, 12 (PG 16, 3385).

43. Joyce, 40. Among the Romans, such equality existed only in principle. In reality, however, there were still advantages which were enjoyed solely by the husband. See Fellhauer, 11.

44. Mackin, 77. This strengthened the early Church's resolve to uphold indissolubility. See Joyce, 308.

45. The expression Church *Fathers* refers to certain ecclesiastical writers of Christian antiquity, roughly from 96 to 636 AD. Cf. *New Catholic Encyclopedia*, s.v. "Fathers of the Church," by W. J. Burghardt.

46. The term *institution* refers to the form and order of marriage, or to its systematization and constitution (*The Shorter Oxford English Dictionary*, C. T. Onions, ed. [3d ed.; Oxford: Clarendon, 1973] s.v. "Institution"). Hence, when looking at marriage as an *institution*, this would imply a certain organism established for some permanent good which is above the individual good of the members. The term is differentiated from the phrase *social institution*. The latter implies the particular set of values, norms and relationships associated with achieving happiness and fulfillment in marriage (J. L. Thomas, S.J., *Looking Toward Marriage* [Notre Dame: Fides Publishers, 1964] 76 and 87).

The champion of the whole movement was Augustine. The shift was occasioned by the need to defend Christian ideals against errors which challenged the moral value of marriage.⁴⁷ These varied from uncompromising rigorism to insolent laxism.⁴⁸

3.1 *Bona matrimonii*

Augustine centered his defense of the moral value of marriage in his doctrine on the three goods: offspring faithfulness, and sacrament.⁴⁹

Faithfulness means that one refrains from sexual contact outside the bond of marriage; offspring, that the child is lovingly received, tenderly nurtured, religiously brought up; sacrament, that a marriage is not to be broken apart.⁵⁰

The original and most fundamental meaning attributed by Augustine to the *bona* are those that made them the *excusing causes* of marriage and the sexual intercourse within it.⁵¹ Sexual activity, as an expression of man's fragile state under the domination of sin, was always evil. But one could transform it into good through rational use. The goods of marriage could outweigh the evil of marital sex and so make it excusable.⁵² This

47. Gnosticism and Manichaeism, whose tendencies mostly contradicted basic Christian beliefs, were most notable. Cf. Fellhauer, 19.

48. P. Delhaye, "Fissazione dogmatica della teologia medioevale. Sacramento, vincolo, rato e consumato," *Concilium* 5/6 (1970) 107.

49. These were commonly referred to in Latin as *bona matrimonii*. Augustine enumerated them as: *proles, fides, sacramentum*. Cf. Augustine, *De bono coniugali*, 1, 29, 32 (PL 40, 394); *De nuptiis et concupiscentia*, 1, 17, 19 (PL 44, 424).

50. Augustine, *De Genesi ad litteram*, 9, 7, 12 (PL 34, 397): "In fide attenditur ne praeter vinculum conjugale, cum altera vel altero concumbatur : in prole, ut amanter suscipiatur, benigne nutriatur, religiose educetur : in sacramento autem, ut conjugium non separetur." Note: The three goods were not identical with marriage itself, nor with its properties, nor with its finality. Nevertheless, they were closely connected with them and, in fact, could almost coincide with some of them. Cf. U. Navarrete, S.J., *Structura iuridica matrimonii secundum Concilium Vaticanum II — momentum iuridicum amoris coniugalis* (Roma: Pontificia Università Gregoriana, 1968) 44-45; E. Doronzo, *Tractatus dogmaticus de matrimonio*, Vol. 1: *De institutione, essentia, fine* (Milwaukee: Bruce, 1964) 822.

51. Fellhauer, 21. Cf. Augustine, *De gratia Christi et de peccato originali*, 2, 34, 39 (PL 44, 404).

52. Cf. Delhaye, 111; J. T. Noonan Jr., *Contraception — A History of Its Treat-*

process of demonstrating a positive element from something that was rather negative created some obscurity which led to a lack of precision about the exact nature of the *bona*. Both the pessimistic stance on sex and the unclear process by which it was justified in marriage, made it difficult to see how the original notion of marriage as *consortium* of Modestinus could be recognized in Augustine. Nevertheless, there were instances in his writings where it could be shown that he was not indifferent to the possibility of a certain marital *consortium* between husband and wife which went beyond the principal end of *proles*.⁵³ These were found among those considered to be the lesser ends, like *fides* and *sacramentum*, which were however internal to the marital partnership itself. The following works precisely contained elements of *consortium*.

3.2 *De bono conjugali*

To begin with, in *De bono conjugali*, Augustine established the relationship between husband and wife as the first *natural bond* in human society. He then placed marriage in the setting of *friendship* since this was a natural effect of the social nature among human beings.⁵⁴ He also described the married partners as those *who walk together*. Moreover, Augustine seemed to have tempered here the preeminence of procreation when discussing the marital bond between older couples. The element of marital love endured despite the absence of offspring because the *natural bond* was an internal good of marriage and was founded in the order of natural affection. Finally, Augustine saw

ment by the Catholic Theologians and Canonists (Cambridge: Harvard University Press, 1986) 107 ff.; Örsy, 21-22; K. Rahner and H. Vorgrimler, *Theological Dictionary*, English version, ed. C. Ernst, O.P. and trans. R. Strachan (New York: Herder and Herder, 1965), s.v. "Manichaeism"; G. Robinson, "Unresolved Questions in the Theology of Marriage," *Catholic Tribunals — Marriage, Annulment and Dissolution*, ed. H. F. Doogan (Newtown: Dwyer, 1990) 27.

53. Augustine did not have precise thoughts regarding the ends of marriage. Nevertheless, he was sure that procreation was first among them, and all others were secondary. Cf. Augustine, *Contra Faustum manichaeum*, 19, 26 (PL 42, 365); C. Schahl, *La doctrine des fins du mariage dans la théologie scolastique* (Paris: Éditions Franciscaines, 1948) 26.

54. Augustine, *De bono conjugali*, 1, 1, 1 (PL 40, 373).

marriage as a means for *mutual support*, that is, as a mutual service for sustaining each other's weaknesses.

3.3 *De moribus Ecclesiae Catholicae*

From *De moribus Ecclesiae Catholicae*, something similar to mutual help was given. Augustine described it as *domestic companionship*. And it was meant to create together a home according to the laws of *genuine love*.⁵⁵ This should bring about the bond of mutual love between the partners which must eventually be the guiding force of every relationship in the family.

3.4 *Sermo 51*

In *Sermo 51* Augustine taught that inasmuch as conjugal affection constituted the marriage bond, the partners could persevere in marital life through *union of hearts* — even without fleshly intercourse. He based this assertion on the example of Mary and Joseph.⁵⁶

3.5 *De civitate Dei*

Finally, from *De civitate Dei*, alluding to the intimate union between Adam and Eve, Augustine himself acknowledged the presence of a *cherished union* between marital partners: The fact that the woman was formed for Adam from his own side shows clearly enough how dear ought to be the union of husband and wife.⁵⁷ Such union seemed to be overwhelming since one had little resistance to partaking of the sin of the other, leading to a common expulsion from paradise into a life of pains.

Therefore, although at the time of the Fathers the chief concern was marriage as an institution — particularly on the moral value of procreation and nurture of children — the traditional regard for marriage as a human relationship whereby a *consortium*

55. Idem, *De moribus Ecclesiae Catholicae*, 1, 30, 63 (PL 32, 1336).

56. Idem, *Sermo*, 51, 13, 21 (PL 38, 344-45).

57. Idem, *De civitate Dei*, 12, 27, 1 (PL 41, 376): "Quod vero femina illi ex ejus latere facta est, etiam hinc satis significatum est quam chara mariti et uxoris debeat esse conjunctio." (English version: Mackin, 143.)

between a husband and wife could be realized, was not ignored. This was shown by the most revered of them, Augustine.⁵⁸ The same thing happened in the succeeding period of the Middle Ages.⁵⁹ This time, however, the attention given to the institutional aspect of marriage will be reinforced. But just as before, the mutual sharing of married partners — which supported the Roman idea of marital *consortium* — was not overlooked. The next section will deal precisely with the person who did not bypass, but rather stressed the significance of marriage as *consortium*. His name was Hugh of St. Victor.

4. HUGH OF ST. VICTOR (1097-1141)

The importance of Hugh could be underscored by the fact that unlike his contemporaries, he did more than just repeat Augustine. In fact, Hugh was the first Western theologian since Augustine to write a treatise on marriage.⁶⁰ He remained a prominent figure in the development of marriage doctrine just like the great Church Fathers.⁶¹

First of all, basing himself on the two biblical foundations of Christian marriage, Genesis 1 and 2,⁶² Hugh came up with the

58. Augustine's *bona matrimonii* have made a tremendous impact on the Church then and now. Moreover, through the centuries, the *bona* developed from being the excusing causes for marriage to being its essential ingredients. Thus, his ideas evolved even to a point where they were taken to mean more than what he himself had envisaged. Cf. K. Matthews, "Essential Elements and Essential Properties of Marriage," *Catholic Tribunals — Marriage, Annulment and Dissolution*, ed. Doogan, 115; and Robinson, 28.

59. This period appropriately pertained to western European history between the collapse of Roman civilization in the 5th century AD and the revival of civilized life and learning. Roughly it was between 400 and 1500. Cf. I. W. Frank, *Historia de la iglesia medieval*, trans. V. Bazterrica (Barcelona: Editorial Herder, 1988) 12 and 222.

60. See Hugh of St. Victor, *De sacramento conjugii* (PL 176, 479-520); *De Beatae Mariae virginitate* (PL 176, 857-76).

61. Cf. P. J. Elliott, *What God Has Joined — The Sacramentality of Marriage* (New York: Alba House, 1990) 87; Fellhauer, 43.

62. The first is the Priestly tradition (Gn 2) when God created both male and female, who were given the task of continuing the work of creation. The second is the Yahwist tradition (Gn 1) when God took one of the ribs of the man which He then made into a woman, whom He then brought to the man; thereby forming two distinct yet complementary persons who shared a unity — that is, the flesh of one became the flesh of the other.

following definition of marriage:

What is marriage but a lawful society between a man and a woman, a society in which each person by mutual consent owes himself to the other? This owing can be looked at in two ways, namely that one keep himself for the other and not deny himself to the other. He keeps himself in that he does not pass over to another society after giving that consent. He does not deny himself in that he does not separate from that mutual common society.⁶³

This definition revealed not only a formal effort to define the nature of marriage, but also an originality in almost all its parts. It reached back to Modestinus; yet it moved forward by ascribing mutual self-giving to the quality of marriage partnership. It was, therefore, a definition that implied the original Roman *consortium* — that is, a sharing of personal lives. And it was precisely in the shared lives where partners became one in a communion of heart and spirit.

Then, while disregarding Augustine's opinion which did not properly integrate sexual union with married love, he developed Paul's insistence on mutual *agape*.⁶⁴ The essence of marriage, therefore, could be expanded as the conjugal partnership whose quality depended primarily on the spouses' mutual self-giving grounded on Christ's own example. This point was reaffirmed in another definition of marriage:

Marriage is that society which is consecrated by the covenant of mutual espousal when each by free promise makes the self debtor to the other, so that from that time neither may pass into another's companionship while the other still lives, nor may either separate from that companionship which they have with one another.⁶⁵

63. "Quid enim est conjugium nisi legitima societas inter virum et feminam; in qua videlicet societate ex pari concensu uterque semetipsum debet alteri? Debitum autem hoc duobus modis consideratur, ut scilicet et se illi conservet, et se illi non neget. Conservet videlicet ne post talem consensum ad alienam societatem transeat. Non neget ut ab ea quae ad invicem est communi societate se non disjungat" (Hugh of St. Victor, *De Beatae*, 1 [PL 176, 859]). (English version: Fellhauer, 43.)

64. See Eph 5, 25.

65. "Haec ergo societatis conjugium est, quae foedere sponsionis mutuae consecratur, quando uterque voluntaria promissione debitorem se facit alteri, ut

Finally, for Hugh, the nature of marriage was very much intertwined with its primary end.⁶⁶ In fact, it was on this point that his basic perspectives on marriage became more emphatic. Therefore, while it was widely agreed during the Middle Ages that the first and principal end of marriage was *procreatio*, Hugh taught that this was instead *consortium* — that is, the conjugal partnership.⁶⁷ This involved a *mutual caring* for each other's needs, and a *life together* in communion of heart and mind but not in sexual intercourse.⁶⁸ Hence, for Hugh the primary and essential task of marriage was *interpersonal relationship* which included the material cares of daily life.⁶⁹ Moreover, the only factor necessary to make a perfect marriage was this *marital society* where the partners lived in the same communion of hearts and minds.⁷⁰

deinceps neque ad alienam altero vivente societatem transeat, neque se ab illa quae ad invicem constat societate disjungat" (Hugh of St. Victor, *De sacramento*, 4 [PL 176, 485]). (English version: Mackin, 158.)

66. The *ends* of marriage are thought to have been proposed for the first time by St. Isidore of Seville (ca. 560-636). He listed three of them: offspring; assistance; avoiding incontinence (Isidore of Seville, *Etymologiarum*, 9, 7, 27 [PL 82, 367]). Cf. Robinson, 31.

67. Hugh of St. Victor, *De Beatae*, 1 (PL 176, 863-64). There are some who think that Hugh of St. Victor actually gave to procreation the primacy. Yet consistency with his entire theory of marriage would not make this thinking tenable. Cf. Fellhauer, 49-50.

68. Hugh found the *meaning* of marriage as well as its sacredness in the marital *consortium* of the partners (Hugh of St. Victor, *De Beatae*, 1 [PL 176, 860-61]). Procreation was a *task* given to the union, and therefore, not necessary for a perfect marriage. The marriage of Mary and Joseph vouched for this. Cf. *ibid.* 4 (PL 176, 874), and Schillebeeckx, 321-22.

69. Schillebeeckx, 321. The emphasis on conjugal partnership and interpersonal relationship was thought to be too far removed from the sexual dimension of marriage, giving the impression that Hugh's teachings were too *disincarnate* (P. Adnès, S.J., *Le mariage* [Tournai: Desclée, 1963] 85).

70. This is so since *sexual intercourse* is neither necessary nor even desirable for a perfect marriage (Hugh of St. Victor, *De Beatae*, 1 [PL 176, 860-61] and 4 [PL 176, 874]; cf. Schillebeeckx, 320-22). Nevertheless, later canonists found it hard to ignore *sexual intercourse* as a prerequisite to establish a perfect marriage. The most prominent of these was Gratian (c. 1140). He distinguished two moments in marriage: first, the *matrimonium initiatum* where the exchange of consent occurred; second, the *matrimonium perfectum* where marriage was wholly established through sexual intercourse. While the *matrimonium initiatum* could be dissolved, the *matrimonium perfectum* was indissoluble for it symbolized the union of Christ with His Church. Consequently, for Gratian and his followers, procreation was the primary end of marriage (cf. Gratian, *Decretum*, Part II, C. 27, q. 2, cc. 34-39). More than a century after Gratian, another dis-

The next important thinker to be considered will still be part of the Middle Ages. He belonged to a movement referred to as medieval scholasticism. This person who could be the most notable representative of this movement was the Italian Dominican friar, Thomas Aquinas.⁷¹

tinguished teacher, John Duns Scotus (ca. 1265-1308), would be thinking along the same lines (cf. J. D. Scotus, *Summa Theologica*, Vol. 6 [Roma: Ex Typographia Sallustiana, 1903] 462 and 471).

71. Medieval scholasticism was an intellectual movement that began gradually in the twelfth century. Its development spring from its use of Aristotle's dialectics in theology, philosophy and canon law. Cf. *New Catholic Encyclopedia*, s.v. "Scholasticism," by I. C. Brady.

(The second part of this article will appear in the next issue.)