

THE IMPORTANCE OF THE TEACHING OF *GAUDIUM ET SPES* FOR THE INTRODUCTION OF *DOLUS* AS A GROUND FOR MARRIAGE NULLITY IN THE 1983 CODE OF CANON LAW

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Abstract: The present essay is aimed to highlight the impact of the teaching of Vatican II, through the pastoral constitution *Gaudium et spes*, on the introduction of a new ground for marriage nullity, namely, *dolus*. In order to reach this aim, the essay provides a short presentation of the teaching of the 1917 Code of Canon Law. The essay emphasizes that in this code was stressed more the procreative end of matrimonial consent and less the importance of matrimonial love in giving consent. The 1917 Code of Canon Law had the advantage of offering juridic clarity on marriage, yet the disadvantage was that the legislation was very much removed from experience of most married members of the Church. To this disadvantage the personalist view of some theologians and canonists was to give equal importance to procreative end of marriage and to matrimonial love. The personalist proposal was accepted and included in the teaching of the Council of Vatican II, more precisely, in the pastoral constitution *Gaudium et spes*. The council eliminates the hierarchical ordering on the ends of marriage and it teaches that both ends are equally important for a valid marriage. The council stresses the importance of the love between the man and the woman for a valid matrimonial consent. The teaching of the council led to the introduction of a new ground for marriage nullity in the 1983 Code of Canon Law. In fact, according to the teaching of the council, the consent consists in the mutual giving and accepting of the spouses. When one of them is deprived of knowledge of an important quality of the other party by *dolus*, the mutual giving and accepting in consent is incomplete or truncated. Also, the partnership of life and love about which the council teaches is seriously disturbed in such a case. As a consequence, it was necessary to be introduced this new ground for marriage nullity in the 1983 Code of Canon Law.

Key words: *dolus*, deceit, council, canon, code, marriage, consent, matrimonial, nullity, ground, constitution.

Introduction

In one of his books Walter Kasper says that “there is no area of human life on which most people are so dependent for personal happiness and fulfillment as that of love between man and woman, a love that is made

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lasting in marriage and family life”¹. The importance of love between man and woman in marriage is highlighted by the Second Vatican Council² as well. However, it is important to say that the traditional teaching of the Church on marriage has not always considered love as being so important for marriage. Thus, for instance, even the 1917 Code of Canon Law said that “the primary end of marriage is procreation and education of children; the secondary is mutual support and a remedy for concupiscence”³. It is the merit of Vatican II and more exactly of the pastoral constitution *Gaudium et spes* of stressing the importance of love for marriage. As a matter of fact, the teaching of *Gaudium et spes* “marked a watershed in the Church’s understanding of marriage”⁴.

In the light of what was said above, the aim of the present paper is make a short analysis of marriage as it used to be before the Council, then, what the Council says about marriage, and finally, to present a practical consequence of the Council’s teaching on marriage, i.e., the introduction of *dolus* as a ground for marriage nullity in the new legislation of the Church. The way in which the paper will tackle the topic is as follows: in its first part the paper will analyze the teaching on marriage in 1917 Code and it will also present briefly the personalist view that preceded the Council, then, in the second part, the paper will present the preparatory work of the council fathers on marriage and the actual teaching of the Second Vatican Council on marriage, and in its third part the paper will present one of the consequences of the teaching of Vatican II on marriage; namely, the introduction of a new ground for marriage nullity in the 1983 Code⁵. The paper will offer a few conclusions at the end.

¹ Walter KASPER, *Theology of Marriage*, (New York: Abington, 1980) 1.

² See VATICAN II, *Gaudium et spes* 48-52, December 7, 1965: AAS 58 (1966) 1025-1115. Hence forth called *GS*. Unless mentioned otherwise, all English translations used in the paper will be taken from *Vatican II: The Conciliar and Post Conciliar Documents*, ed. Austin FLANNERY, 2nd ed. (Northport, NY: Costello Publishing, 1996) 903-1001.

³ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (Rome: Typis Polyglottis Vaticanis, 1917), canon 1013, § 1: “Matrimonii finis primarius est procreatio atque educatione prolis: secundarius mutuuum adiutorium et remedium concupiscentiae.” Henceforth called the 1917 Code. All subsequent citations of the 1917 Code will be from this source.

⁴ John P. BEAL, “Title VII: Marriage [cc. 1055-1165],” in *New Commentary on the Code of Canon Law*, ed. John P. BEAL et al., (Mahwah, NJ: Paulist Press, 2000) 1239.

⁵ See *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983), canon 1098. Henceforth called the 1983 Code. All subsequent citations of the 1983 Code will be from *Code of Canon Law, Latin-English Edition: New English Translation* (Washington, DC: CLSA, 1998). Canons cited by number are from this code unless specifically noted otherwise.

Part I: The Teaching of the 1917 Code of Canon Law on Marriage

Even though the 1917 Code offered no definition of marriage, nevertheless, it incorporated in its legislation a number of principles of the Church's theology and discipline on marriage that developed in the post-Tridentine era⁶.

Accordingly, the 1917 Code stressed first of all the importance of the matrimonial contract that was created by the reciprocal consent of the man and woman entering into it. The contract could be created only by the two parties entering into marriage, no third party could replace it⁷. Moreover, there was not possible to have a valid matrimonial consent among the baptized "without its also being a sacrament"⁸. Christ raised the matrimonial consent to the dignity of a sacrament⁹.

Additionally, the 1917 Code defined the object of matrimonial consent as "an act of will by which each party gives and accepts perpetual and exclusive rights to the body, for those actions that are of themselves suitable for the generation of children"¹⁰. Thus, the 1917 Code attributed to the matrimonial communion only one essential element, i.e., the so-called *ius in corpus* – the right to those acts which were apt for conception¹¹. Besides, "even the *societas permanens* (permanent society)¹², which was the object of minimal knowledge, was described as having the exclusive aim of procreation"¹³.

Moreover, the 1917 Code made a hierarchical ordering of the ends of marriage according to the teaching of Saint Augustine on marriage¹⁴. Consequently, the primary end of marriage was procreation and education of children, and the secondary end of marriage was mutual assistance and remedy of concupiscence¹⁵. The secondary end of marriage was so subordinate to the primary end that it "could be explicitly excluded from consent without invalidating the marriage, since it was not a *sine qua non* for the achievement of the primary end"¹⁶.

⁶ BEAL, "Title VII: Marriage [cc. 1055-1165]," 1240.

⁷ Cf. 1917 *CIC*, canon 1012, § 1.

⁸ 1917 *CIC*, canon 1012, § 2: "quin sit eo ipso sacramentum."

⁹ Cf. 1917 *CIC*, canon 1012, § 1.

¹⁰ 1917 *CIC*, canon 1081, § 2: "actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad proles generationem."

¹¹ Cf. Antoni STANKIEWICZ, "The Canonical Significance of Matrimonial Communion," In *Vatican II Assessment and Perspectives: Twenty-five Years After (1962-1987)*, ed. René Latourelle, Vol. 2, (Mahwah, NJ: Paulist Press, 1989) 204.

¹² Cf. 1917 *CIC*, canon 1082, § 1.

¹³ Antoni STANKIEWICZ, "The Canonical Significance of Matrimonial Communion," 204.

¹⁴ Theodore MACKIN, *Divorce and Remarriage*, (New York: Paulist Press, 1984) 456.

¹⁵ Cf. 1917 *CIC*, canon 1013, § 1.

¹⁶ BEAL, "Title VII: Marriage [cc. 1055-1165]," 1238.

In short, from what was said so far, it can be easily noted that the 1917 Code stressed more the procreative end of matrimonial consent and less the importance of matrimonial love in giving consent¹⁷. The legislation of the 1917 Code had the advantage of offering juridic clarity on marriage, yet the disadvantage was that the legislation was “far removed from the lived experience of most married members of the faithful”¹⁸. The following example is eloquent in this regard.

It was about a sacramental marriage of two Catholics that the Congregation of the Sacraments ruled in its decision of August 2, 1958. The issue was whether the marriage had ever been consummated, and therefore whether it were dissoluble by papal action. In every instance of intercourse the wife had had to drug herself so heavily to endure what she regarded as a vile experience that she was senseless when the act took place. The Congregation’s decision was that the marriage – the sacramental marriage – had indeed been consummated. The criterion appropriate to a contract and its completion had been met. Her husband’s penis had penetrated her vagina sufficiently and had deposited semen there. Neither had taken contraceptive measure to block this¹⁹.

The Personalist Proposal

Given the fact that cases like the one abovementioned were not isolated and that the legislation of the 1917 Code was far removed from the lived experience of most married faithful, some theologians came up with a proposal. These theologians acknowledged the hierarchical ordering of the ends of marriage, but they argued that more emphasis should be given to the secondary end of marriage and its personal dimensions²⁰. Because of their insistence on the personal values of marriage, they were called personalists. According to this view,

If one would describe realistically what men and women do in marrying, one must say that they get married in order to be married. Even if they have a goal in view that lies in their future as they marry, this goal is not a product or a state outside their relationship. It lies within the relationship; it is the completing of themselves in their sexual nature as man and woman – a completing that is possible precisely because they are reciprocally masculine and feminine. At the same time it is the completing of their two-in-oneness as a man and a woman. [...] Even if one insists on thinking of goals of either in marrying, there is no need to distinguish two separate goals of either marriage itself or of marital intercourse. Intercourse’s first meaning – or goal – is to effect and complete

¹⁷ Cf. Antoni STANKIEWICZ, “The Canonical Significance of Matrimonial Communion,” 206.

¹⁸ BEAL, “Title VII: Marriage [cc. 1055-1165],” 1238.

¹⁹ Theodore MACKIN, *What is Marriage?* (New York: Paulist Press, 1982) 241.

²⁰ BEAL, “Title VII: Marriage [cc. 1055-1165],” 1238.

the spouses' union. It is the most thorough way in which they can give and accept one another's entire persons. This is, again, marital intercourse's first meaning, its first value.

The bringing of this union to reality is in turn oriented to two further goals, the fulfilling of the husband and wife as persons, and the conceiving of a child²¹.

This proposal of the personalist theologians was rejected by the Holy Office in 1944 when it was asked "whether the opinion of certain modern writers can be admitted, who ... teach that the secondary ends are not essentially subordinate to the primary end, but are equally principal and independent?"²² Also, Pope Pius XII insisted that the subordination of the secondary end of marriage to the primary end is a principle that "the very internal structure of the natural order reveals, which the heritage of the Christian tradition embodies, which the Supreme Pontiffs have repeatedly taught, and which finally is crystallized into legal form by the Code of Canon Law"²³.

Nevertheless, the personalist view was taken into account at Vatican II and this will be presented in the next part of the paper.

Part II: The Teaching of Vatican II on Marriage

a. The Preparatory Work of Vatican II on Marriage

At the outset of the preparation for the council, the bishops of the world were asked to send *vota*²⁴ to Rome with regard to what they were hoping from the forthcoming council. The *vota* were arranged by the preparatory commissions and secretariats of the council in seventy draft decrees also called *schemata*. Among the issues treated in the draft decrees, there were four issues that were eventually going to be treated in *Gaudium et spes*; namely, *De Ordine Morali*; *De Castitate, Matrimonio, Familia, Virginitate*; *De Ordine Sociali*; *De Communitate Gentium*²⁵. As it can be easily noted, marriage was one of them.

During the first period of the council, which lasted from October 11 to December 8, 1962, there were discussions about the draft decrees to be

²¹ Theodore MACKIN, *Divorce and Remarriage*, 457.

²² SACRED CONGREGATION OF THE HOLY OFFICE, decretals, April 1, 1944, AAS 36 (1944) 103, in *Canon Law Digest*, ed. T. BOUSCAREN – J. O'CONNOR, vol. 3, (Milwaukee-New York: Bruce, 1939) 401-402.

²³ PIUS XII, allocution, October 29, 1951, AAS 43 (1951) 849, in *Canon Law Digest*, vol. 3, 403.

²⁴ *Votum* was the word used at the council for the answers given by all the bishops of the world as well as other individuals and institutions to the invitation to sent to Rome their views on what they expected from the council.

²⁵ Norman TANNER, *Rediscovering Vatican II: The Church and the World; Gaudium et Spes, Inter Mirifica*, (Mahwah, NY: Paulis Press, 2005) 4-5.

included in the document that was going to be called *Gaudium et spes*. The seventy draft decrees were reduced by the Council Fathers to twenty by the end of the first period of the Council. Eventually, after the end of the first period of the council, the twenty-draft decrees were reduced to seventeen, and hence known for a while as *Schema XVII*, being entitled “The Presence of the Church in the Modern World.”

The title was again changed during the second period of the council, which lasted from September 19 to December 4, 1963. The title was changed first to “The Active Participation of the Church in the Building of the World”, and then to its final version, “The Church in the World of Today”. Also, the working title, known until then as *Schema XVII*, was changed to *Schema XIII* as a result of the reordering of the proposed decrees. During this period there was taken the decision to include the discussion of the *schema* on the agenda of the next session²⁶.

During the third period which lasted from September 14 to November 21, 1964, *Schema XIII*, which eventually became *Gaudium et spes*, became the main work of the council. The *Schema* was structured as follows: Introduction; Chapter 1: Integral Vocation of the Human Person; Chapter 2: The Church in the Service of God and Humanity; Chapter 3: Conduct of Christian in the World; Chapter 4: Chief Responsibilities of Christian Today; Conclusion²⁷. In chapter four, article twenty-one of the *schema* there were treated two important topics, i.e., marriage and family²⁸.

Archbishop Dearden (Detroit, USA) was the one who introduced the debate on article twenty-one, entitled “The Dignity of Marriage and Family”²⁹. He pointed out from the beginning that the article was not meant to be “a full treatment of the doctrine of marriage”³⁰, but “a synthesis of teaching to help Christians today to understand more deeply the nature and dignity of married and domestic life and to live their calling to holiness more efficaciously”³¹.

Additionally, Archbishop Dearden made clear at the beginning of his speech that Pope Paul VI decided to reserve to himself the issue of birth-control pill and, therefore, this issue would be treated neither in the *schema* nor in the appendices³². The archbishop also said in this regard:

²⁶ Ibidem, 6-9.

²⁷ Ibidem, 10-12.

²⁸ Ibidem, 19.

²⁹ Norman TANNER, “The Church in the World (*Ecclesia ad Extra*),” in *History of Vatican II*, ed. Giuseppe ALBERIGO – Joseph KOMONCHAK, vol. 4, (Maryknoll: Orbis and Leuven: Peeters, 2002) 306.

³⁰ Ibidem, 306.

³¹ Ibidem, 306.

³² TANNER, *Rediscovering Vatican II*, 21.

The synod speaks in a pastoral way to Christian married couples about their dignity and problems and at the same time it exhorts theologians and all experts in the anthropological, psychological, medical, and sociological science, as well as the spouses themselves who taught by experience and virtue, to undertake by a common effort the necessary studies to solve such urgent problems³³.

Nevertheless, even though the issue of birth control was reserved to the pope, the speeches of the council fathers on the Church's teaching on marriage were concentrated on two main issues, i.e., the ends or purposes of marriage and birth control. These two issues created a sharp division among the council fathers. On the one hand there was a group of the council fathers also called conservatives who considered that the teaching of the Church on marriage was clear enough and it needed no changes. On the other hand, there was another group of the council fathers also called progressives who stressed the necessity to update the teaching of the Church on marriage³⁴.

Among the conservatives there were Cardinals like Ottaviani, Ruffini and Browne. Actually, Cardinal Ruffini was the first speaker in the debate and he highlighted "the sublime nature of marriage as a sacrament instituted by Christ and an efficacious sign of the most sacred marriage between Christ and the Church"³⁵. Ruffini also thought that the *schema* "gave too much weight to the consciences of spouses in deciding the number of children"³⁶. Because of that, he suggested that the *schema* be rewritten according to the teaching of Pope Pius XI in encyclical *Casti connubii* and Pius XII's address to obstetricians in October 1951³⁷.

Agreeing with Ruffini, Cardinal Ottaviani pointed out in his speech that he came from a numerous family and he praised his parents for trusting firmly in divine providence. He also suggested that the article on marriage be rewritten in a way that "expressed a similar trust and openness toward God, in place of the present exaggerated emphasis upon the choice of the spouses in deciding the number of children, which, he said, contradicted the church's traditional teaching"³⁸.

Furthermore, Cardinal Browne insisted upon the necessity of the *schema* to make clear the distinction between the primary end of the sexual act, which is the procreation and education of children, and the secondary end of marriage, which is the mutual help of the spouses and a remedy for

³³ TANNER, "The Church in the World (*Ecclesia ad Extra*)," 307.

³⁴ *Ibidem*, 308.

³⁵ *Ibidem*, 308.

³⁶ TANNER, *Rediscovering Vatican II*, 22.

³⁷ TANNER, "The Church in the World (*Ecclesia ad Extra*)," 308.

³⁸ TANNER, *Rediscovering Vatican II*, 22.

concupiscence. Additionally, since the article on marriage emphasized the importance of conjugal love, Cardinal Browne insisted upon the distinction that the article should make between “love of friendship,” which is particularly necessary in marriage, and “love of concupiscence.” He also said in his speech that the teaching of Pius XI and Pius XII should be taken into account in this regard³⁹.

In addition, there were some other conservatives who insisted in their speeches on some important issues. Thus Beitia Aldazábal (Santander, Spain) pointed out that the article on marriage should praise parents with large families and make clear the contractual nature of marriage⁴⁰. Fiordelli (Prato, Italy) pointed to the fact that there were some serious omissions in the article on marriage, such as, education of children, engagement, abortion, illegitimate children and their rights, etc.⁴¹ Also, Hervás y Benet (Ciudad Real, Spain) said that the way in which the article approached the issue of birth control was too materialistic and he suggested that “a more positive vision, which included praising large families, was needed. The text did not sufficiently emphasize supernatural faith, confidence in divine providence, love and acceptance of cross”⁴².

Nonetheless, the progressive group had their complaints with regard to the article on marriage as well. The first speaker of this group in the debate was Léger, who, in a way, set the tone:

Anxieties and doubts about marriage are expressed in many regions and by people of all conditions. The faithful – including the more fervent – are pressured daily with difficulties; they seek solutions that are consonant with their faith but the answers given hitherto do not satisfy their conscience. Pastors, especially confessors, have become doubtful and uncertain; in many cases they do not know how they can and ought to respond to the faithful. Many theologians increasingly see the need to investigate anew and more deeply the fundamental principles of teaching about marriage⁴³.

Moreover, Léger insisted upon the fact that the article should present conjugal love as an end or purpose of marriage and as “a love involving soul and body.” Additionally, he wanted conjugal love to be presented as “the intimate union of the spouses”⁴⁴. In the same regard, Cardinal Döpfner (Munich-Freising, Germany) said:

³⁹ TANNER, “The Church in the World (*Ecclesia ad Extra*),” 308-309.

⁴⁰ *Ibidem*, 309.

⁴¹ *Ibidem*, 309.

⁴² *Ibidem*, 309.

⁴³ *Ibidem*, 310.

⁴⁴ *Ibidem*, 310.

The bishops of the Church surely cannot be ignorant of how many damaging mistakes have been made in our pastoral practice under the inspiration of those textbooks treating this matter in an exclusively negative and juridically analytic way rather than in a spirit of charity and concern. We need not be surprised that so many of the faithful have been scandalized by the practice of confessors (so many of whom disagree with one another) interpreting sexual intercourse in a way looking only to the animal nature of men and women, while either ignoring the aspect of personal union in it or relegating it to a secondary status⁴⁵.

Another important council father from the progressive group was Suenens. He highlighted how important there were the questions of marriage and birth control for the Church and the world. Because of that, he insisted in his speech upon the fact that moralist, scientists, university faculties, laymen and women, and married Christians should be consulted on the issue of birth control⁴⁶.

Staverman (Sukarnapura, Indonesia) pointed out that the council could not just repeat the traditional teaching on marriage because by doing that the teaching “loses its pastoral effectiveness”⁴⁷. His suggestion was that the council should involve more lay experts to work for the article on marriage because they “represent married people better than bishops and priests can”⁴⁸ and because they know better “both the development of our understanding of marriage, conjugal love, fruitfulness, etc., and the evolution of marriage as an historical reality”⁴⁹.

With regard to the ends of marriage, Alfrink (Utrecht, Netherlands) said:

Difficulties in married life often occur because there is an anxious conflict between the two values of marriage, namely the value of procreation and that of human and Christian education. The conflict can be avoided only if there is present between the parents conjugal love, which is normally nourished and increased through carnal intercourse. It is not a conflict between two separate values, for without the love and fidelity of the spouses, recreated through the ‘cult of love’ (as our schema rightly says), the motive of procreation is in moral danger⁵⁰.

⁴⁵ *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II*, vol. 3 (Vatican City: Typis Polyglottis Vaticanis, 1976) 939. Henceforth called AS. Translation taken from Theodore, Mackin, *Divorce and Remarriage*, 465.

⁴⁶ TANNER, “The Church in the World (*Ecclesia ad Extra*),” 310.

⁴⁷ TANNER, *Rediscovering Vatican II*, 22.

⁴⁸ *Ibidem*, 22.

⁴⁹ *Ibidem*, 22.

⁵⁰ AS II, vol. 3, 83-84. Translation taken from Tanner, “The Church in the World (*Ecclesia ad Extra*),” 311.

Additionally, Cardinal Alfrink referring to the teaching of the Sacred Scripture on marriage, said:

Sacred Scripture sees this bond of marital love not as the end of marriage – as neither its primary nor its secondary end. It sees it rather as a constitutive element of marriage itself, not in the sense that without it the marriage would be invalid, but in the sense that it would be in some sense defective, imperfect, incomplete. Marital love belongs to marriage itself, at least if marriage be considered not merely as a juridical contract. And the primary end of this bond of marital love remains in the objective sense the offspring conceived of this love, even though in the conjugal act the spouses do not have the child as their primary end.

Unless I am mistaken, this is the modern Catholic's way of thinking, a way of thinking that is more psychological, more human, as well as more theological-biblical⁵¹.

However, Bishop Djajasepoetra of Djakarta emphasized in his speech the fact that there was “a risk in the unqualified acceptance of certain teaching of modern psychology, and protested against a possible confusion between marital love and passion with all its affective consequences”⁵². Also, he complained that the article “demonstrated a completely western tone and does not take into account the manner in which marriage is seen in various cultures of Asia”⁵³. He insisted upon the fact that the main stress with regard to marriage should not be laid on the contract, but “on the permanent association for the whole life of the husband and wife, which is of a sacred character. It is not necessary to lay stress on the reason of love, because ... love is often born after marriage”⁵⁴.

Furthermore, Bishop Reuss (auxiliary of Mainz, Germany) highlighted in his speech that he agreed with the article's way of presenting conjugal love, in as much as “the uniqueness of human sexuality and the primary responsibility of parents to decide the number of their children were stated more clearly”⁵⁵. He also said with regard to the human sexuality: “Sexuality cannot and must not be viewed only from the biological point of view: it is different from any sort of non-human sexuality, and has repercussions on the whole human person”⁵⁶.

⁵¹ Ibidem, 978. Translation taken from Mackin, *Divorce and Remarriage*, 467-468.

⁵² Bernard DE LANVERSIN, “Vatican II and Marriage: The Sacred Foundation of the Order of Creation in Natural Marriage,” in *Vatican II Assessment and Perspectives: Twenty-five Years After (1962-1987)*, ed. René LATOURELLE, 177-200. Vol. 2, (Mahwah, NJ: Paulist Press, 1989) 190.

⁵³ Ibidem, 190.

⁵⁴ Ibidem, 190.

⁵⁵ TANNER, “The Church in the World (*Ecclesia ad Extra*),” 311.

⁵⁶ LANVERSIN, “Vatican II and Marriage: The Sacred Foundation of the Order of Creation in Natural Marriage,” 184.

Two bishops from Africa pointed out in their speeches two other important issues that the article on marriage should include, namely, the importance of free consent when couples marry and the evil of polygamy which “gravely damages the dignity of women”⁵⁷.

Also, Bishop Rusch (Innsbruck-Feldkirch, Austria) insisted upon the fact that the article should give more attention to youth, to the “problems encountered by young people in industrialized nations who live and work away from their families, and the opportunity as well as the dangers of the large amount of free time and recreation available to many of them today”⁵⁸.

As a summary to the whole debate, Cardinal Bea said that: “The text ought to be less juridical – more positive and constructive. Let it use Sacred Scripture more fully and let its language be less technical”⁵⁹.

In short, these were the main ideas that served as a guide at the shaping of the final text of *Gaudium et spes* on marriage. In fact, on the penultimate day of the council, December 7, 1965, “in the solemn and definitive approval of the constitution, the voting was 2,309 in favor, 75 against, and 7 null votes. Immediately after the voting, Pope Paul confirmed the approval and promulgated *Gaudium et spes*”⁶⁰.

b. The Teaching of Gaudium et spes on Marriage

The pastoral constitution on the Church in the modern world, *Gaudium et spes* teaches about marriage in chapter one of its second part. The main points that the constitutions stresses on the chapter on marriage help us to understand the nature of marriage.

First of all, being aware of the fact that human society and the life of the individual person are closely bound up with the well being of the family, which is called by the council “community of love”⁶¹, the constitution remarks that there are many place in the world where marriage is held in great esteem, while there are also places in the world where it is threatened⁶². The threats that the council is referring to are: polygamy, divorce, the so-called free love, and similar blemishes⁶³. They “are aberrations which

⁵⁷ TANNER, *Rediscovering Vatican II*, 23.

⁵⁸ TANNER, “The Church in the World (*Ecclesia ad Extra*),” 312.

⁵⁹ *AS II*, vol. 3, 798. Translation taken from Theodore, Mackin, *Divorce and Remarriage*, 469.

⁶⁰ TANNER, *Rediscovering Vatican II*, 37.

⁶¹ *GS 47*: “communitate amoris.”

⁶² Cf. *GS 47*. See also, Christopher BUTLER, *The Theology of Vatican II*, (London: Darton, Longman and Todd, 1981) 192.

⁶³ Cf. *GS 47*.

falsify the very institution of marriage”⁶⁴. Given this situation, the constitution’s aim is to “clarify certain points in the Christian doctrine concerning marriage”⁶⁵, and to “foster the dignity and supremely sacred value of the married state”⁶⁶.

Then, the council teaches that the root of the marriage partnership is “in the contract of its partners, that is, in their irrevocable personal consent”⁶⁷. Flannery, whose English translation of the constitution is used in the present paper, translates the Latin word *foedus* with “contract.” Yet, Butler indicates that the English word for *foedus* is “covenant”⁶⁸, and this is very important for the understanding of the teaching of the council with regard to marriage. While the civil and ecclesiastical laws have preferred to use the word contract in order to speak about marriage and this is understandable because marriage is a matter of public concern, the council used the word covenant being aware that the “concentration on the contractual aspect of marriage can be unfortunate”⁶⁹. Butler explains why it can be unfortunate as follows: “Just as Bellarmine can ‘define’ the Church in such a way that the holiness of its members becomes apparently irrelevant to its nature, so a marriage, viewed purely as a contract, can appear to be totally without heart and without spiritual value”⁷⁰. Also, Häring points out in his commentary on *GS* that “the relationship between Christ and the Church is not a contract but a covenant”⁷¹.

Moreover, the term covenant has biblical roots and from a chronological point of view it is prior to the law. An example of covenant is the one between God and Abraham in the Old Testament. “A covenant is a personal agreement and is founded not on law but on mutual trust”⁷². The law’s duty is to give more precision to this mutual trust and to state sanctions in order to protect it. Yet, what is far more important than the enactment of the law in this regard is “the personal commitment of partner to partner, and this is almost hypocritical if it is not itself an expression of mutual love”⁷³. By using the word covenant, the council wants to highlight the fact that genuine

⁶⁴ Bernhard HÄRING, “Fostering the Nobility of Marriage and the Family,” in *Commentary on the Documents of Vatican II*, ed. Herbert Vorgrimler, vol. 5, (New York: Herder & Herder, 1969) 231.

⁶⁵ Christopher BUTLER, *The Theology of Vatican II*, 192.

⁶⁶ *GS* 47: “qui nativam status matrimonialis dignitatem eiusque eximium valorem sacrum tueri et promovere conantur.”

⁶⁷ *GS* 48: “foedere coniugii seu irrevocabili consensu personali instauratur.”

⁶⁸ Cf. Christopher BUTLER, *The Theology of Vatican II*, 192.

⁶⁹ *Ibid.*, 192.

⁷⁰ *Ibid.*, 192-193.

⁷¹ HÄRING, “Fostering the Nobility of Marriage and the Family,” 232.

⁷² See Christopher BUTLER, *The Theology of Vatican II*, 193.

⁷³ *Ibidem*, 193.

love is at the heart of marriage⁷⁴. A contract is a juridical act and consequently it is an act of will, which does not presuppose necessarily love. Love is not necessary to enter into a contract. This is the reason why contract is not a very good word to use for marriage.

Additionally, another important word used by the constitution with regard to marriage is “personal”⁷⁵. The constitution defines marriage as a personal community in which the partners give and accept each other. By defining marriage in this way, the council subordinates the objective and institutional aspects of marriage to the personal view⁷⁶.

Besides, according to Butler, the Church has become familiar with the distinction between nature and person since the Council of Chalcedon. This council taught that in Jesus Christ there are two natures and one person⁷⁷. Also, Butler says that “when we ask ‘who’ someone is we are asking for information about a person; when we ask what he is we are asking information about his nature as that nature exists in the flux of history”⁷⁸. Given that, Butler continues:

Man operates within the framework provided by his nature and its context; but his operations, when they are most genuinely his own, are expressions of him as a person. I can love someone’s physical charm, intellectual brilliance, powers of imagination, generosity, courage. But if my love stops short at this point, it will disappear if he loses the qualities which I have found amiable. But if I love someone as himself, then my love can survive the disappearance of the qualities and attributes which first attracted me to him. The ideal of married love is a love of persons for each other, a love which is capable of grows and developing maturity, but not strictly of dying⁷⁹.

In the light of Butler’s explanation, it can be easily understood how important is the word “personal” used by the council. In addition, Cardinal Kasper points out in this regard: “If we are successful in developing such a view of marriage, it will be possible to testify to the reality of the fundamental principle stated by the Second Vatican Council”⁸⁰: namely, “insofar as man by his very nature stands completely in need of life in society, he is and he ought to be the beginning, the subject and the object of every social organization”⁸¹. It is also noteworthy that the personalist view,

⁷⁴ Ibidem, 193.

⁷⁵ Cf. *GS* 48.

⁷⁶ KASPER, *Theology of Marriage*, 13.

⁷⁷ BUTLER, *The Theology of Vatican II*, 193-194.

⁷⁸ Ibidem, 194.

⁷⁹ Ibidem, 194.

⁸⁰ KASPER, *Theology of Marriage*, 14.

⁸¹ *GS* 25: “Etenim principum, subiectum et finis omnium institutorum socialium est et esse debet humana persona, quippe quae, suapte natura, vita sociali omnino indigeat.”

mentioned earlier in the paper, influenced very much the thinking of the council in this regard.

Furthermore, the influence of the personalist view on the constitution can also be seen in the fact that it does not use anymore a hierarchal ordering of the ends of marriage like the 1917 Code did⁸². In fact, Tanner points out in his commentary on the constitution that in it the ends of marriage “are mentioned in a discreet way without entering into thorny issue of the priority of one over the other”⁸³.

The council teaches also that marriage has been raised by Christ to the dignity of a sacrament and that it is an expression of the redemptive love that was incarnated in Jesus Christ. Additionally, the council teaches that the love that unites the spouses is modeled “on Christ’s own union with the Church”⁸⁴. With regard to this image, Cardinal Kasper highlights:

The love and faithfulness existing between Christ and his Church is not simply an image or example of marriage, nor is the self-giving of man and wife in marriage an image and likeness of Christ’s giving of himself to the Church. The love that exists between man and wife is rather a sign that makes the reality present, in other words, an epiphany of the love and faithfulness of God that was given once and for all time in Jesus Christ and is made present in the Church⁸⁵.

Moreover, the Council did not present conjugal love as a purely spiritual reality, but it teaches:

Married love is uniquely expressed and perfected by the exercise of the acts proper to marriage. Hence the acts in marriage by which the intimate and chaste union of the spouses takes place are noble and honorable; the truly human performance of these acts fosters the self-giving they signify and enriches the spouses in joy and gratitude⁸⁶.

Besides, it is worthy of note that the council teaches about the fruitfulness of marriage in a special paragraph. The text reads as follows:

Marriage and married love are by nature ordered to the procreation and education of children. Indeed children are the supreme gift of marriage and greatly contribute to the good of the parents themselves. [...] Without intending to underestimate the other ends of marriage, it must be said that true married love and the whole structure of family life which results from it is directed to

⁸² Cf. *GS* 48.

⁸³ TANNER, *Rediscovering Vatican II*, 51.

⁸⁴ *GS* 48.

⁸⁵ KASPER, *Theology of Marriage*, 14.

⁸⁶ *GS* 49: “Haec dilectio proprio matrimonii opere singulariter exprimitur et perficitur. Actus proinde, quibus coniuges intime et caste inter se uniuntur, honesti ac digni sunt et, modo vere humano exerciti, donationem mutuum significant et foveant, qua sese invicem laeto gratoque animo locupletant.”

disposing the spouses to cooperate valiantly with the love of the Creator and Savior, who through them will increase and enrich his family from day to day⁸⁷.

Nevertheless, it is important to say that the council does not advocate “irresponsible multiplication of children,”⁸⁸ but it teaches that the spouses have their own responsibility in this regard. Instead of using the modern term “family planning,” the constitution uses the expression responsible parenthood⁸⁹. The constitution teaches in this regard:

Married people should realize that in their behavior they may not simply follow their own fancy but must be ruled by conscience – and conscience ought to be conformed to the law of God in the light of the teaching of authority of the Church, which is the authentic interpreter of divine law⁹⁰.

In addition, the council teaches that a total abstinence from marital acts as a method of avoiding having children can have serious consequences for marriage itself. Yet, the council does not say anything about birth-control methods leaving thus a problem unsolved⁹¹. The constitution condemns abortion and infanticide as methods to avoid having children and recommends married people to practice the virtue of married chastity⁹².

Finally, the constitution highlights the importance of the nuclear family: father, mother, and children. The council highlights the importance of the presence of the father for children’s upbringing and the legitimate progress of women⁹³. Also, the council defines family as “a school for human enrichment”⁹⁴. This definition reminds us about another definition given to the family in the dogmatic constitution on the Church, *Lumen gentium*; namely, “domestic Church”⁹⁵. Cardinal Kasper explains the way

⁸⁷ GS 50: “Matrimonium et amor coniugalıs indole sua ad prolem procreandam et educandam ordinantur. Filii sane sunt praestantissimum matrimonii donum et ad ipsorum parentum bonum maxime conferunt. [...] Unde verus amoris coniugalıs cultus totaque vitae familiaris ratio inde oriens, non posthabitis ceteris matrimonii finibus, eo tendunt ut coniuges forti animo dispositi sint ad cooperandum cum amore creatoris atque salvatoris, qui per eos suam familiam in dies dilatat et ditat.”

⁸⁸ BUTLER, *The Theology of Vatican II*, 195.

⁸⁹ Ibidem, 195. See also GS 87.

⁹⁰ GS 50: “Hoc iudicium ipsi ultimatim coniuges coram Deo ferre debent. In sua vero agendi ratione coniuges christiani conscii sint se non ad arbitrium suum procedere posse, sed semper regi debere conscientia ipsi legi divinae conformanda, dociles erga ecclesiae magisterium, quod illam sub luce evangelii authentice interpretatur.”

⁹¹ BUTLER, *The Theology of Vatican II*, 195. See also Norman TANNER, *Rediscovering Vatican II*, 52.

⁹² Cf. GS 51.

⁹³ See also HÄRING, “Fostering the Nobility of Marriage and the Family,” 244-245.

⁹⁴ GS 52: “schola quaedam uberioris humanitatis est.”

⁹⁵ VATICAN II, *Lumen gentium* 11, November 21, 1964: AAS 57 (1965) 5-67: “ecclesia domestica.”

in which the definition domestic Church has to be understood. He says: “in its function, married and family life are not, however, simply a development of the essential being of the Church. They in fact make an active contribution to the building up of the Church”⁹⁶. Since the married people and their families contribute to the building up of the Church and society, the council teaches that they have to be helped by doctors, psychologists, priests and various organizations⁹⁷.

In summary, these are the main points that the council touches upon with regard to marriage and family. As it can be easily noted, the council develops a theology of marriage that is “scriptural, sacramental and deeply human”⁹⁸. In the last part of the present paper it will be presented the influence of the council on the 1983 Code of Canon Law.

Part III: The Legislation of the 1983 Code of Canon Law on Marriage

The Second Vatican Council influenced very much the legislation of the 1983 Code of Canon Law on marriage, yet, in keeping with the purpose of the paper, there will be emphasized only three canons in order to make the point.

First of all, with regard to the matrimonial consent, canon 1057, § 2 states: “Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage”⁹⁹. The canon reproduces, even though not word for word, a key phrase from *Gaudium et spes*, which says: “The intimate partnership of life and love which constitute the married state ... is rooted in the contract of its partners, that is, in their irrevocable personal consent”¹⁰⁰. Additionally, the 1983 Code distances itself from the legislation of the 1917 Code of Canon Law with regard to the formal object of matrimonial consent. In canon 1081, § 2, the 1917 Code stated that the formal object of marriage was “the perpetual and exclusive right to the body ordered to acts per se apt for the generation of offspring.” Yet, the new Code incorporated the teaching of the council in this regard, namely,

⁹⁶ Walter KASPER, *Theology of Marriage*, 38.

⁹⁷ Cf. GS 52. See also HÄRING, “Fostering the Nobility of Marriage and the Family,” 245.

⁹⁸ Enda McDONAGH, “The Church in the Modern World (*Gaudium et Spes*),” in *Modern Catholicism: Vatican II and After*, ed. Adrian HASTINGS, (London: SPCK and New York: Oxford University Press, 1991) 104.

⁹⁹ 1983 CIC, canon 1075, § 2: “Consensus matrimonialis est actus voluntatis, quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium.”

¹⁰⁰ GS 48: “Intima communitas vitae et amoris coniugalibus ... foedere coniugii seu irrevocabili consensu personali instauratur.”

that the object of matrimonial consent is “the human act whereby spouses mutually bestow and accept each other”¹⁰¹. However, both, the teaching of the council with regard to object of matrimonial consent as well as the canonical legislation in this regard are criticized by canonists as being too pastoral and insufficiently juridical in nature¹⁰². Anyway, the teaching of the council in this regard is very important in order to understand why *dolus* was introduced as a ground for marriage nullity in the new cod.

Then, the 1983 Code of Canon Law does not make a hierarchical ordering of the ends of marriage as it was in the former code. Instead, the code states:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole life and which is ordered by its very nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between baptized¹⁰³.

Thus, the code states what the council teaches in this regard that both ends of marriage are equally important and inseparable in marriage.

Finally, canon 1098 of the 1983 Code of Canon Law states: “A person contracts invalidly who enters into a marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner which by its very nature can gravely disturb the partnership of conjugal life”¹⁰⁴.

This is a new ground for marriage nullity and it can be understood only in the light of the teaching of the council on marriage consent. According to the teaching of the council, the consent consists in the mutual giving and accepting of the spouses¹⁰⁵. When one of them is deprived of knowledge of an important quality of the other party by deceit, the mutual giving and accepting in consent is incomplete or truncated¹⁰⁶. Also, the partnership of life and love about which the council teaches is seriously disturbed in such a case. Moreover, “deception perpetrated in order to extort the consent of

¹⁰¹ *Ibid.*, 48: “sese mutuo tradunt atque accipiunt.”

¹⁰² See for instance Urbano NAVARRETE, “Structura iuridica matrimonii secundum Concilium Vaticanum II,” in *Periodica* 57 (1968) 137-142. See also Charles J. SCICLUNA, *The Essential Definition of Marriage according to the 1917 and 1983 Codes of Canon Law*, (Lanham, Md.: University Press of America, 1995) 292-295.

¹⁰³ 1983 *CIC*, canon 1055, § 1: “Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem dignitatem inter baptizatos evectum est.”

¹⁰⁴ 1983 *CIC*, canon 1098: “Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius parties qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit.”

¹⁰⁵ Cf. *GS* 48.

¹⁰⁶ See BEAL, “Title VII: Marriage [cc. 1055-1165],” 1307.

the other party – that is, to obtain the covenant of marital love – psychologically speaking produces a total lack of commitment to the obligation to maintain the communion of marital love”¹⁰⁷. Additionally, the partnership of life and love is merely apparent as long as the error caused by deceit remains, “because the covenant of marital love is invalid and the spouses cannot validly accept the intimate partnership of life and love willed by God”¹⁰⁸.

Furthermore, the new ground was introduced in the new code as a consequence of the fact that the council eliminated the hierarchical ordering on the ends of marriage as well. It is hard to speak about the good of the spouses as long as one of the parties enters into marriage as a result of deceit.

Conclusion

From what was said so far in this paper it is clear that the teaching of Second Vatican Council on marriage and family has a great impact on the life of the Church and on the 1983 Code of Canon Law, which regulates the life of the Church. Thus, for instance, because of its teaching, it was possible to have a new ground for marriage nullity in the new code, which protects people from being deceived when they marry. The council influenced the 1983 Code of Canon Law in many regards, yet the paper used only one example in order to make its point. As a matter of fact, there are many commentators on the 1983 Code of Canon Law who say that the legislation of the 1983 Code of Canon Law on marriage is heavily influenced by the Second Vatican Council¹⁰⁹.

Bibliography

Primary Sources

Code of Canon Law: Latin-English Edition: New English Translation. Washington, DC:

Canon Law Society of America, 1999.

Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus. Vatican City: Libreria Editrice Vaticana, 1983.

Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus. Rome: Typis Polyglottis Vaticanis, 1917.

VATICAN II, dogmatic constitution *Lumen Gentium*, November 21, 1964: AAS 57 (1965) 5-67.

VATICAN II, pastoral constitution *Gaudium et spes*, December 7, 1965: AAS 58 (1966) 1025-1115.

¹⁰⁷ Antoni STANKIEWICZ, “The Canonical Significance of Matrimonial Communion,” 212.

¹⁰⁸ *Ibidem*, 212.

¹⁰⁹ See for instance, *Il Codice del Vaticano II: Matrimonio Canonico*. ed. LONGHITANO A. Bologna: Edizioni Dehoniane, 1985.

Secondary Sources

- ALBERICO Giuseppe – KOMONCHAK Joseph A, eds., *History of Vatican II*. Vol. 4. Maryknoll: Orbis and Leuven: Peeters, 2003.
- BEAL John P., “Title VII: Marriage [cc. 1055-1165].” In *New Commentary on the Code of Canon Law*, ed. John P. BEAL et al., 1234-1355. Mahwah, NJ: Paulist Press, 2000.
- BUTLER Christopher, *The Theology of Vatican II*. London: Darton, Longman & Todd, 1981.
- DE LANVERSIN Bernard, “Vatican II and Marriage: The Sacred Foundation of the Order of Creation in Natural Marriage.” In *Vatican II Assessment and Perspectives: Twenty-five Years After (1962-1987)*, ed. René LATOURELLE, 177-200. Vol. 2, Mahwah, NJ: Paulist Press, 1989.
- DOYLE Thomas P., “Title VII: Marriage [cc. 1055-1165].” In *The Code of Canon Law: A Text and Commentary*, ed. James A. CORIDEN et al., 737-829. New York and Mahwah, NJ: Paulist Press, 1985.
- Fagiolo Vincenzo, “Essenza e fini del matrimonio secondo la Costituzione Pastorale *Gaudium et spes* del Vaticano II. In *Ephemerides Iuris Canonici* 23 (1967) 135-186.
- FLANNERY Austin, ed., *Vatican II: The Conciliar and Post Conciliar Documents*. 2nd ed. Northport, NY: Costello Publishing, 1996.
- GRAMUNT Ignatius – HERVADA Javier – LEROY A. Wauck, *Canons and Commentaries on Marriage*. Collegeville, Minnesota: The Liturgical Press, 1987.
- GROCHOLEWSKI Zenon – POMPEDDA Mario Francesco – ZAGGIA Cesare, *Il Matrimonio nel Nuovo Codice di Diritto Canonico Annotazioni di Diritto Sostanziale e Processuale*. Padua: Libreria Gregoriana Editrice, 1984.
- HASTINGS Adrian, *Modern Catholicism: Vatican II and After*. ed. Adrian HASTINGS. London: SPCK and New York: Oxford University Press, 1991.
- KASPER Walter, *Theology of Marriage*. New York: Abington, 1980.
- MACKIN Theodore, *Divorce and Remarriage*. New York: Paulist Press, 1984.
- , *The Marital Sacrament*. New York: Paulist Press, 1989.
- , *What is Marriage?* New York: Paulist Press, 1982.
- , *The Church as Sacrament*. Vol. 5. London: Sheed & Ward, 1975.
- SCICLUNA Charles J., *The Essential Definition of Marriage according to the 1917 and 1983 Codes of Canon Law*. Lanham, Md.: University Press of America, 1995.
- STANKIEWICZ Antoni, “The Canonical Significance of Marital Communion,” In *Vatican II Assessment and Perspectives: Twenty-five Years After (1962-1987)*, ed. René LATOURELLE, 201-216. Vol. 2, Mahwah, NJ: Paulist Press, 1989.
- TANNER NORMAN P., ed., *Decrees of the Ecumenical Councils*. London and Washington: Shed & Ward and Georgetown University Press, 1990.
- , *Rediscovering Vatican II: The Church and the World; Gaudium et Spes, Inter Mirifica*. New York: Paulist Press, 2005.
- VORGRIMLER Herbert, *Commentary on the Documents of Vatican II*. Vol. 5, New York: Herder & Herder, 1969.