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“Person” in CIC and CCEO Matrimonial Law. On the Idea of Vetera et Nova Harmonization in the Church Doctrine and Jurisprudence

Abstract: A serious confrontation with the subject: “Person” in the Code of Matrimonial Law (CIC and CCEO), is an—invariably relevant—challenge that the study of canon law and jurisprudence have to face. The argument for the validity of this conclusion is provided by the famous John Paul II’s thesis, proclaimed in the *Familiaris Consortio* exhortation (1981) and the famous 1997 Address to the Roman Rota, which can be summarized in the following words: the foundation and structural principle of interpersonal (ethical and legal!) relationships in marriage is matrimonial love. This axiom—still insufficiently present in the thoughts of canonists and church judges—reflects the deepest truth, of which “prophetically” the author of the monumental works *Love and Responsibility* and *The Acting Person* gave testimony; the truth that not elsewhere, but in the conciliar spiritually person-centric vision of matrimonial community (*communio/consortium*), a hermeneutic key should be sought for an adequate and complete understanding of the structure of marriage, harmoniously integrating its two personal and institutional dimensions.

Karol Wojtyła’s/John Paul II’s brilliant thought deserved to be confronted with the premises that prove the hypothesis that the mere declarative identification in the expressed judgments/concepts with the idea of a personalistic *aggiornamento* (“programmed” especially in numbers 47–52 of the Council’s Constitution *Gaudium et Spes*) does not yet guarantee the adequacy and completeness of the canonistic approaches to the “truth of matrimony.” This is both in the sphere of theological exposure in accordance with the Magisterium (in the light of the “Image of God”) and at the *praxis* level: the interpretation and application of the normative records in the nodal canons of CIC and CCEO. The first part of the study is dedicated to illustrating such a state of affairs – in various proposals of doctrine and jurisprudence: from a concept that is completely misguided and destined to fail in advance; through a concept that, because of its extremely conservative approach to the need for *vetera et nova* harmonisation, has not stood the test of time, to concepts, indeed, universally acknowledged in the study of canon law, whose authors

(or their adherents), after all, should be suggested to implement certain necessary corrections: bigger or smaller. In the second part, the research contemplation focuses on the conclusions of the realization of the conciliar postulate of “harmonization” in presenting a person-centric vision of matrimony. These synthetic remarks constitute an attempt to show the basis for an adequate interpretation of the formula adopted by the two codes announced in the title: “a partnership of the whole of life”.

Keywords: person, Karola Wojtyła’s/ John Paul II’s personalism, legal anthropology of matrimony, the Code Matrimonial Law (CIC and CCEO), personalistic concepts of canonical matrimony, the conciliar postulate of “harmonization”

Introductory Remarks

According to the famous proclamation of the Second Vatican Council, the universal measure of humanism is “a sincere gift of self.”¹ More than half a century after the announcement of this fundamental truth about Man, the question of the degree of its assimilation and cultural influence remains relevant (“civilization of love”²). Therefore, it is possible for us to ask what the results of the Church’s evangelizing effort *ad intra* and *ad extra* in this regard are. Already a preliminary contemplation reveals a radically ambivalent picture of the understanding of the conciliar personalistic thought. In the course of these several decades, the statement that being a person is to go beyond oneself in the direction of communion with others, has grown to the rank of an axiom in the broad public perception. At the same time, the same period—and certainly the “breakthrough of the millennia,” a time of unprecedented cognitive and axiological confusion, or even a new “cultural revolution,” with its “program” of subjective relativization and reduction of the dualistic reduction of the personal structure of humanity³—revealed the urgent need for an anthropological affirmation of the triad: nature—person—freedom,⁴ including, above all, the defence/promotion of the truth about binary diversity in the metaphysical plan *esse et agere* of the human person. It goes without saying how high is the price

¹ Vatican Council II, Pastoral Constitution *Gaudium et Spes* on the Church (December 7, 1965), no. 24.

² John Paul II, Letter to Families *Gratissimam Sane* (February 2, 1994), no. 13.

³ The fact that before our eyes the process of decomposition of axioms concerning the human person is taking place, “adapting” moral and legal norms to the changing socio-cultural conditions cannot be questioned. See: “*Mężczyzną i niewiastą stworzył ich*”. *Afirmacja osoby ludzkiej odpowiedzią nauk teologicznych na ideologiczną uzurpację genderyzmu*, ed. Andrzej Pastwa [Studia Teologiczne i Humanistyczne, vols. 2, 3], (Katowice: Księgarnia św. Jacka, 2012).

⁴ Cf. Czesław St. Bartnik, *Personalizm* (Lublin: Oficyna Wydawnicza “Czas,” 1995), 284–286.

of accepting or rejecting the *integrum* of the Church’s teaching: the *sovereignty of the family*,⁵ based on the marriage of a man and a woman, is at stake. To put it simply, the family is and should remain “the basic cell of society [...] primary place of ‘humanization’ for the person.”⁶

No wonder, therefore, that after Vatican II, invariably at this crucial point—marking the paradigm of a holistic(!) approach⁷ to the achievements of magisterial personalistic thought—there is a focus of scientific interest on the part of theologians and canonists, including representatives of matrimonialistics, who study the substance of marriage. After all, it is only by combining in one discourse on *communio personarum*, whose exemplary (*ex natura*) phenomenon is the matrimonial community of persons, that the conclusions flowing from the logic of “gift” with what is implied by the dynamics of the sexual structure inscribed in the personal existence of a man and a woman—that the very foundation of the canons of the renewed Church matrimonial law is revealed. And this is a remarkable diagnosis, especially for a Church canonist-judge, if one considers that an adequate interpretation of the *ius matrimoniale* nodal provisions is a prerequisite for the reliable performance of judicial service in Church tribunals, which examine the validity of marriages.

It is not without reason that John Paul II, the giver of Church matrimonial law (in two sets of laws: *Codex Iuris Canonici* 1983,⁸ *Codex Canonum Ecclesiarum Orientalium* 1990⁹) and its authentic interpreter, presents with great consistency “a partnership of the whole of life”¹⁰ in the key of the council’s *aggiornamento*, that is, in an arrangement of closely linked: *ordinatio naturalis* of marriage and the ethos of the matrimonial gift.¹¹ Indeed, this original harmonious union between the metaphysics of the person and the authentic sense of freedom¹² is the “trademark” of the first penetrating philosophical ideas in the outstanding work

⁵ See: Pedro-Juan Viladrich, “La famiglia sovrana.” *Ius Ecclesiae* [further: *IusEcc*] 7 (1995): 539–550; Wojciech Góralski and Andrzej Pastwa, *Rodzina suwerenna – Kościół domowy. W nurcie współczesnej myśli prawnej Kościoła powszechnego i Kościoła w Polsce* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2015).

⁶ John Paul II, Apostolic Exhortation *Christifideles Laici* (December 30, 1988), n. 40.

⁷ Helmut Pree, “Die Ehe als Bezugswirklichkeit – Bemerkungen zur Individual- und Sozialdimension des kanonischen Eherechts,” *Österreichisches Archiv für Kirchenrecht* vol. 33 (1982): 386.

⁸ *Code of Canon Law* (promulgated: January 25, 1983) [further: *CIC* 1983], can. 1055–1165.

⁹ *Code of Canons of the Eastern Churches* (promulgated: October 18, 1990) [further: *CCEO*], can. 776–866.

¹⁰ *CIC* 1983, can. 1055 § 1; *CCEO*, can. 776 § 1.

¹¹ See: Jarosław Kupczak, *Gift and Communion: John Paul II’s Theology of the Body* (Washington, D.C.: The Catholic University of America Press, 2014).

¹² See: John Paul II, Encyclical Letter *Veritatis Splendor* (August 6, 1993).

*The Acting Person*¹³ and then the invaluable lecture of personalistic realism¹⁴ in the papal *de matrimonio* teaching.¹⁵

Karol Wojtyła's philosophical "theory of participation" and its theological incarnation, justly called John Paul II's "anthropology of the gift," show the depth of this unique participation in the humanity of the other, which is personal/intermediate matrimonial communion, created on the ontic foundation of the relational dimension of the person (in the sex-determined, dialectic of "I" and "you"). What is important, in both these perspectives, anthropological and anthropological-theological thought is complemented by ethical contemplation. It is not a coincidence that this integral argument, complete in its ideological layer, leads to the proclamation of the personalistic norm: "A person is a good towards which the only proper and adequate attitude is love."¹⁶ After all, since the condition of true love, which defines the ethos of a person's gift, is selflessness (affirmation of the person for oneself: *benevolentia/beneficentia*), the highest form of the communion dimension of *persona humana* is the love of the betrothed. That is how benevolence, which in an anthropological, theological and legal sense constitutes a real—ontically durable—foundation of this personal and interpersonal *sui iuris* reality, reveals its significance.¹⁷

Therefore, first of all, matrimony as an institution of natural law has its foundations in an authentic matrimonial love, and, secondly, precisely this love, which constitutes due in marriage,¹⁸ defines, in the legal-institutional sense,¹⁹ the "basic" interpersonal relationship (*matrimonium in facto esse*), constituted by

¹³ Cardinal Karol Wojtyła, *The Acting Person*, trans. Andrzej Potocki, ed. Anna-Teresa Tymieniecka (Dordrecht: D. Reidel Publishing. Company, 1979).

¹⁴ Andrzej Pastwa, "Realism of Personalist Vision of Marriage: Legal-canonical Cogitations," in *Personalizm v procese humanizácie ľudskej spoločnosti*, ed. Pavol Dancák (Prešov: Prešovská univerzita v Prešove, 2014), 343–355.

¹⁵ See: Andrzej Pastwa, "*Przymierze miłości małżeńskiej*". *Jana Pawła II idea małżeństwa kanonicznego* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2009).

¹⁶ Karol Wojtyła, *Love and Responsibility*, trans. Harry T. Willetts (New York: Farrar, Straus and Giroux, 1981), 41.

¹⁷ See: Andrzej Pastwa, "Responsible Procreation – Co-Responsibility of Spouses. From Adequate Anthropology to the Legal Anthropology of Matrimony," in *Philosophy and Canon Law, [Between the Culture of the Right to Responsible Parenthood and the Culture of the "New" Human Rights: Reproductive and Sexual]*, vol. 6 (2020): 37–55.

¹⁸ John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 3, http://w2.vatican.va/content/john-paul-ii/en/speeches/1997/january/documents/hf_jp-ii_spe_19970127_rota-romana.html, accessed: December 13, 2018.

¹⁹ Cf. Javier Hervada, "Libertad, naturaleza y compromiso en la sexualidad humana," *Persona y Derecho*, vol. 19 (1988): 106–109; Giacomo Bertolini, "Il matrimonio come istituzione: un vincolo di giustizia in quanto verità dell'amore," *Anthropotes*, vol. 31 (2015): 213–252.

“irrevocable personal consent”²⁰ *lactus essentialiter amarus*²¹ (*matrimonium in fieri*)—it is worth today, in retrospect, raising the issue announced in the title of this study: What was supposed to guarantee the success of the implementation of the idea of harmonizing marital doctrine in the spirit of the Council’s *aggiornamento* in the Pontifical Commission for the Revision of the Code of Canon Law and experts preparing the reform of the Code *ius matrimoniale*?²²

The Pope, teacher of personalism, John Paul II, took an authoritative stand on this issue. In his famous 1997 speech to the Roman Rota, and later in the doctrinal introduction to *Instruction Dignitas Connubii*, he included the following declaration: “In a vision of authentic personalism, the Church’s teaching implies the affirmation that marriage can be established as an indissoluble bond between the persons of the spouses, a bond essentially ordered to the good of the spouses themselves and of their children.”²³

Obviously, the work on the revision of the canonical matrimonial law was based on a diagnosis of the pre-conciliar model of the “procreative institution,” that is to say, the image of marriage that emerged from the rules of Pius X and Benedict XV’s *Codex Iuris Canonici*,²⁴ an image which, as well-known theologians (especially German)²⁵ have shown, had little to do with the affirmation of the personal order but, on the contrary, sealed the old order: the reification and juridicalization of the whole sacramental reality of matrimony.

The need, established at the beginning of the work of the said Pontifical Commission, for a thorough revision of the formal approaches, which were injected by contractualism (with the ideological background of neo-scholastic dogmatics), opened the way for the reception of the person-centric paradigm in the renewed *ius matrimoniale*. The dominance of ahistorical approaches, characterized by a mixture of abstract and naturalism,²⁶ finished, and their place

²⁰ *Gaudium et Spes*, no. 48.

²¹ Urbano Navarrete, *Structura iuridica matrimonii secundum Concilium Vaticanum II. Momentum iuridicum amoris coniugalis* (Roma: Pontificia Università Gregoriana, 1994), 146.

²² Ombretta Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici con cinque sentenze rotali commentate a cura di Anna Sammassimo* (Milano: Vita e Pensiero, 2008), 103–107; cf. Ombretta Fumagalli Carulli, “Armonizzazione conciliare e tutela della persona nel nuovo codice di diritto canonico,” *Il diritto ecclesiastico* [further: DrE], vol. 98 (1987), no. 2, 500–511.

²³ John Paul II, “Address to the Tribunal of the Roman Rota” (January 27, 1997), n. 4; Pontificium Consilium de Legum Textibus, “Instructio »Dignitas connubii« servanda a tribunalibus dioecesis et interdioecesis in pertractandis causis nullitatis matrimonii (January 25, 2005),” *Communicationes* [further: ComCan], vol. 37 (2005): 12.

²⁴ *Code of Canon Law* (promulgated: May 27, 1917) [further: CIC 1917], can. 1012–1143.

²⁵ Cf. Waldemar Molinski, *Theologie der Ehe in der Geschichte* (Aschaffenburg: Paul Patloch Verlag 1976), 159–229; see also: Urs Baumann, *Die Ehe – ein Sakrament?* (Zürich: Benziger 1988), 73–85, 262–268.

²⁶ Cf. Joseph Ratzinger, “Zur Theologie der Ehe,” *Theologische Quartalschrift*, vol. 149 (1969): 63.

was taken—irreplaceable in the spread of “*the culture of indissolubility*, in the Church and in the world”²⁷—by an anthropological discourse based on the Council’s definition of matrimony: “the intimate partnership of married life and love.”²⁸ In the matrimonial covenant of love, that is, the personal gift of a man and a woman (and accepting this gift at the same time), a hermeneutic key to the knowledge of the full (!) truth about the matrimonial *communio personarum* was identified.

This is where the *clou* of the problem lies, which is worth a methodical thought. The intensive reform of matrimonial law in the 1970s (codification work and discussion in scientific circles around it)²⁹ also clearly shows that the mere declarative identification in the expressed judgments/concepts with the idea of a personalistic *aggiornamento* (“programmed” especially in numbers 47–52 of the Council’s Constitution *Gaudium et Spes*) does not yet guarantee the adequacy and completeness of the canonistic approaches to the “truth of matrimony.”³⁰ This is both in the sphere of theological exposure in accordance with the Magisterium (in the light of the “Image of God”³¹) and at the *praxis* level: the interpretation and application of the normative records in the nodal canons of CIC and CCEO.³²

The first part of this study will be devoted to illustrating such a state of affairs³³ in various proposals of doctrine and jurisprudence: from a concept that is completely misguided and destined to fail in advance (A), through a concept that due to its extremely conservative approach to the need for *vetera et nova* harmonization has not stood the test of time (B), to concepts universally acknowledged in the study of canon law, whose authors, after all, should be suggested to implement certain necessary corrections: bigger (C) or smaller (D). In the second part, the research contemplation will focus on the conclusions of the realization of the conciliar postulate of “harmonization” in presenting a person-centric vi-

²⁷ John Paul II, “Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota” (January 28, 2002), n. 7, http://www.vatican.va/content/john-paul-ii/en/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota.html, accessed: December 13, 2018.

²⁸ *Gaudium et Spes*, no. 48.

²⁹ See Andrzej Pastwa, *Istotne elementy małżeństwa. W nurcie odnowy personalistycznej* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2007), 111–199.

³⁰ See: Benedict XVI, “Address to the Members of the Tribunal of the Roman Rota” (January 27, 2007), http://www.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070127_roman-rota.html, accessed: December 13, 2018.

³¹ Cf. Piero Antonio Bonnet, “Essenza, proprietà essenziali, fini e sacramentalità (cann. 1055–1056),” in *Diritto matrimoniale canonico*, vol. 1, ed. Piero Antonio Bonnet and Carlo Gullo [*Studi Giuridici*, vol. 56], (Città del Vaticano: LEV, 2002): 96–98.

³² Cf. CIC 1983, can. 1055–1057, 1135; CCEO, can. 776–777, 817 § 1.

³³ The barely draft nature of the discussions announced here is imposed by the adopted framework of this paper.

sion of matrimony. These synthetic remarks will attempt to show the basis for an adequate interpretation of the formula adopted by the two codes announced in the title: “a partnership of the whole of life.”

1. “An Indissoluble Bond between the Persons”—In Model Concepts of Matrimonialistics

A. In the first years of the code reform it was not possible to avoid an excessive concentration on seeking a legal formula for the so-called personalistic purpose of matrimony. Unfortunately, often in isolation from “objective criteria drawn from the nature of the human person and of his acts”³⁴ (with a subjective relativization of the sexual experience³⁵) and somehow at the expense of a traditional institutional goal: “the good of offspring” and even, with undermining the very foundation of this natural institution,³⁶ which is the essential propriety of indissolubility.³⁷

Such “reformist” optics—in a bright form!—appeared in Professor Jean Bernhard’s famous “working hypothesis” from 1970,³⁸ which introduced to the discussion on the *ius matrimoniale* reform the postulate of an existential reinterpretation of the existential legal approach to the indissolubility of the matrimonial bond. According to the “doctrinal truth that the Church has always held,”³⁹

³⁴ John Paul II, “Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota” (February 1, 2001), n. 2, http://www.vatican.va/content/john-paul-ii/en/speeches/2001/february/documents/hf_jp-ii_spe_20010201_rota-romana.htm, accessed: December 13, 2018; cf. *Gaudium et Spes*, no. 51.

³⁵ Benedict XVI, “Address to the Members of the Tribunal of the Roman Rota” (January 27, 2007).

³⁶ See the famous rotational allocation: John Paul II, “Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota” (February 1, 2001).

³⁷ CIC 1983, can. 1056; CCEO, can. 776 § 3.

³⁸ Jean Bernhard, “A propos de l’hypothèse concernant la notion de consommation existentielle du mariage,” *Revue de Droit Canonique* [further: RDC], vol. 20 (1970): 184–192.

³⁹ John Paul II, “Address to the Tribunal of the Roman Rota” (January 21, 2000), n. 6, http://www.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000121_rota-romana.html, accessed: December 13, 2018. See also: Janusz Kowal, “L’indissolubilità del matrimonio rato e consumato. Status quaestionis,” *Periodica de re canonica*, vol. 90 (2001): 273–304; Carmen Peña García, “El fundamento de la absoluta indisolubilidad del matrimonio rato y consumado en la teología actual,” *Estudios Eclesiásticos* 79 (2004): 599–647.

marriage is absolutely—intrinsically⁴⁰ and extrinsically⁴¹—indissoluble if it has been validly ratified and consummated by the marriage certificate.⁴² If the Catholic Church reserves the right to dissolve an unfulfilled marriage, then only by the power of the Roman Pontiff and for a just cause.⁴³ This state of affairs did not prevent the mentioned canonist, the author of the famous magazine “Revue de droit canonique” (Strasbourg) from raising a fundamental objection: Is not the current formula of the *matrimonium consummatum* too rigid and formalistic, since it attributes so much importance to a single marriage certificate? The author’s answer proposes a “personalistic” redefinition of the notion of “the completion of matrimony,” which would no longer designate only a physical completion: one sexual act of the spouses. Matrimony should be considered “completed” only when the love communion of spouses achieves a certain degree of integration/perfection in the interpersonal matrimonial bond, and in the marriage of the baptized—in expressing the sign of the perfect covenant of the betrothed. In this way, the biological (bodily) element of the spouses’ union would gain the missing elements: psychological, affective, spiritual, and religious. In proposing an “integral” concept of complementation, the author—contrary to the principle of *solus consensus*—does not hesitate to separate two stages of the constitution of marriage: the first one—the *matrimonium initiatum*: through the exchange of consensus; the second—the *matrimonium consummatum*: through the unity of life and love, after some time, when marital love has already reached a certain human and Christian perfection.⁴⁴

The fact that the theory of the so-called existential complementation can only seemingly be stamped with a personalistic renewal of the marriage does not need to be contemplated upon too much. It is enough to point to the fleeting argumentation,⁴⁵ which is not subject to the rules of law, and also to the

⁴⁰ Cf. International Theological Commission, “Propositions on the Doctrine of Christian Marriage” (1977), n. 4.3, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html, accessed: December 13, 2018.

⁴¹ Cf. *Ibid.*, no. 4.4.

⁴² CIC 1983, can. 1061 § 1, 1141; CCEO, can. 853.

⁴³ CIC 1983, can. 1142; CCEO, can. 862; John Paul II, “Address to the Tribunal of the Roman Rota” (January 21, 2000), no. 7.

⁴⁴ Bernhard, A propos de l’hypothèse, 184–192. Jean Bernhard returns to his “hypothesis” in subsequent studies: Jean Bernhard, “Réinterprétation (existentielle et dans la foi) de la législation canonique concernant l’indissolubilité chrétien,” *RDC*, vol. 21 (1971): 243–278; Jean Bernhard, “Perspectives renouvelées sur l’hypothèse de la «consummation existentielle et dans la foi» du mariage chrétien,” *RDC*, vol. 24 (1974): 334–349.

⁴⁵ He sums up well this proposal of ideas (“la reazione pastoralista”). Fernando Puig: “La reazione pastoralista nega che il matrimonio abbia un’essenza giuridica: la distinzione tra realtà matrimoniale essenziale e vita matrimoniale vissuta è inesistente. [...] Il fatto è che la reazione pastoralista non è propriamente una teoria, e moltomeno una teoria giuridica. L’uso di una ter-

radical questioning of the paradigm of the inseparability of legal and pastoral dimensions,⁴⁶ that is, the truth that “marriage remains an indissoluble personal reality, a bond of justice and love.”⁴⁷ One can only wonder that, as the research of experts on the subject shows,⁴⁸ the view presented was not at all isolated. At the same time, as the director of the Institut de Droit Canonique in Strasbourg, not too distant ideological views were presented by the Spanish canonist José María de Lahidalga Aguirre.⁴⁹ In turn, among the theologians, Jean Bernhard’s ideas were still alive in the 1980s.⁵⁰

B. What was generally characteristic of the just discussed ideological proposal was certainly its unorthodox character. Diametrically different was the trend in the study of canon law associated with the name Cormac Burke. Just as the “reformist” hypothesis is an emblematic example of a free approach to the doctrine of the Church,⁵¹ so the author’s reading of the substance of mar-

minologia giuridica in questo contesto, è puramente strumentale, in vista di soluzioni pragmatiche”. Fernando Puig, “Realismo giuridico e dottrina canonistica contemporanea sull’essenza del matrimonio,” *IusEcc*, vol. 16 (2004): 448.

⁴⁶ John Paul II, “Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota (January 18, 1990), n. 4, http://www.vatican.va/content/john-paul-ii/it/speeches/1990/january/documents/hf_jp-ii_spe_19900118_rota-romana.html, accessed: December 13, 2018; Benedict XVI, “Address on the Occasion of the Inauguration of the Judicial Year of the Tribunal of the Roman Rota” (January 22, 2011), http://www.vatican.va/content/benedict-xvi/en/speeches/2011/january/documents/hf_ben-xvi_spe_20110122_rota-romana.html, accessed: December 13, 2018. See Andrzej Pastwa, “L’«alleanza» sistemica del diritto e della pastorale. Osservazioni sull’arte dell’applicazione del diritto nell’intera preparazione canonica alla celebrazione del matrimonio,” *Annuario Iuris Canonici*, vol. 2 (2015): 75–93.

⁴⁷ John Paul II, “Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year” (January 29, 2004), n. 7, http://www.vatican.va/content/john-paul-ii/en/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rot.html, accessed: December 13, 2018.

⁴⁸ Cf. Silvio Botero, *Divorciados vueltos a casar: un problema humano, una tradición eclesial, una perspectiva de futuro* (Bogotá: Editorial San Pablo, 2002), 116; Augusto Sarmiento, *El matrimonio cristiano* (Pamplona: EUNSA, 20073), 328.

⁴⁹ José María de Lahidalga Aguirre, “La indisolubilidad absoluta del matrimonio y el matrimonio en la Iglesia hoy: estado de la question,” *Lumen*, vol. 20 (1971): 289–330.

⁵⁰ Denis J. Doherty, *Divorce and Remarriage. Resolving a Catholic Dilemma* (St. Meinrad, IN: Abbey Press, 1974), 67–84; Günter Gerhartz, “La indisolubilidad del matrimonio y su disolución por la Iglesia en la problemática actual” in *Matrimonio y divorcio*, ed. René Metz and Jean Schick (Salamanca: Sigueme, 1974), 207–243; André Guindon, “Case for a ‘consummated’ sexual bond before a ‘ratified’ marriage,” *Eglise et Théologie*, vol. 8 (1977): 137–182; J. Edward Hudson, “Marital consummation according to ecclesiastical legislation,” *Studia Canonica*, vol. 12 (1978): 93–123; Michael J. Curran, *Conjugal Consummation in the Catholic Church. A Problem for Human and Theological Sciences* (Roma: Pontificia Università Lateranense, 1988), 383–422; Theodore Mackin, *The Marital Sacrament* (Mahwah, NY: Paulist Press, 1989), 647–675.

⁵¹ It can be assumed that the apologists of this ‘hypothesis’ were the recipients of the famous words of Benedict XVI on “the practical effects of [...] ‘the hermeneutic of discontinuity and

riage in the depictions of the aforementioned Irish canonist and judge of Roman Rota are distinguished by the care taken to anchor the analyses in their sources. This is evidenced above all by the “programme” emphasis on the importance of the doctrinal content included in numbers 47–52 of the Constitution *Gaudium et Spes* or the use of the papal magisterium, starting with Pius XI’s encyclical *Casti Connubii*⁵²—both in scientific publications (including the famous 1997 monograph *L’oggetto del consenso matrimoniale. Un’analisi personalistica*⁵³), as well as carefully edited rotal judgments. Furthermore, there are: the original and creative analysis of the biblical sources of *de matrimonio* and the reference to St. John Paul II’s personalistic vision of matrimony (with exposing the legally relevant idea of the pope, expressed by means of the formula “personalistic realism”). In turn, in the context of the paradigmatic “matrimonial” formulas transformed from *Gaudium et Spes* to code norms—a factual emphasizing of the importance⁵⁴ of the phrase defining the object of matrimonial consent: *sese mutuo tradunt et accipiunt*.⁵⁵ All this together constituted the potential for the puzzle of the components of the “personalistic analysis”—if we use the phrase used by the canonist himself,⁵⁶ to form a comprehensive and complete picture *essentia et essentialia in matrimonio*. Already the draft (as it was announced in the introductory remarks) presentation of the theory constructed in such a way—which undoubtedly deserves extensive studies⁵⁷—reveals the reasons for the failure of the whole “project.” It allows us to understand that certain shortcomings/deficits in the scope of the adopted methodology of testing the substance of matrimony had to ultimately translate into incorrect research results.

rupture.” The pope states: “[...] it seems to some that the conciliar teaching on marriage, and, in particular, the description of this institution as *intima communitas vitae et amoris* [the intimate partnership of life and love] (Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, no. 48), must lead to a denial of the existence of an indissoluble conjugal bond because this would be a question of an ‘ideal’ to which ‘normal Christians’ cannot be ‘constrained.’” Benedict XVI, “Address to the Members of the Tribunal of the Roman Rota” (January 27, 2007).

⁵² Pius XI, Encyclical Letter *Casti Connubii* (December 31, 1930).

⁵³ Cormac Burke, *L’oggetto del consenso matrimoniale. Un’analisi personalistica* (Torino: Giappichelli, 1997).

⁵⁴ Cf. Wojciech Góralski, “Przedmiot kanonicznej zgody małżeńskiej,” *Śląskie Studia Historyczno-Teologiczne*, vol. 34 (2001): 173–183.

⁵⁵ CIC 1983, can. 1055 § 1; cf. GS, n. 48.

⁵⁶ As indicated earlier, Cormac Burke gave this monograph a subtitle: *Un’analisi personalistica* (“a personalistic analysis”).

⁵⁷ See the detailed discussion of the ideological position of this famous judge of Roman Rota: Andrzej Pastwa, *Il bene dei coniugi. L’identificazione dell’elemento ad validitatem nella giurisprudenza della Rota Romana* [Biblioteca Teologica, Sezione Canonistica, 7], (Lugano–Siena Eupress FTL–Edizioni Cantagalli, 2018), 129–177.

It is worth starting a brief illustration of this state of affairs by quoting the final passus in the *in iure* section of the famous Cormac Burke’s judgment of 26 November 1992⁵⁸:

The 1983 Code, in c. 1057, gives a renewed and more personalist description of matrimonial consent, by which the spouses “mutually give and accept each other in order to establish a marriage”. One gives oneself as one is; and, in particular, one accepts the other, as he or she is. Therefore, sincere marital commitment implies not only an unreserved spousal gift, but also an unreserved spousal acceptance. This reflects the genuine personalism of Vatican II⁵⁹

Clearly, in his carefully chosen words, Burke draws an authentic picture of the *feri* of matrimony, adequate in the terms of canon law. Whatever one may say, this neat synthesis sheds light on the essential *novum* of the person-centric approach to the matrimonial consent. All the more astonishing must be the fact that immediately afterwards the ponens-apologist of “realism” of the renewed matrimonial doctrine⁶⁰ introduces a passus into the sentence, which, although theologically correct, does not easily fit in with the optics of the canonical approaches, and certainly argues with the logic of marking a “bridge”—from anthropological realism towards juridical realism⁶¹:

Casti connubii insisted that the true purpose of marital love is “that man and wife help each other day by day in forming and perfecting themselves in the interior life, so that through their partnership in life they may advance ever more and more in virtue, and above all that they may grow in true love towards God and their neighbor” (AAS 22 (1930) 547–548). *Gaudium et Spes* teaches that “as spouses fulfil their conjugal and family obligations... they increasingly advance towards their own perfection, as well as towards their mutual sanctification.” (48)⁶²

The author of the sentence concludes this statement by saying: “A key to the actual scope of the ‘bonum coniugum’ is surely to be found in these words.”⁶³

⁵⁸ “Sentence of Nov. 26, 1992 coram Burke (Armagh),” in Apostolicum Rotae Romanae Tribunal, *Decisiones seu sententiae* [further: RRDec.] (Città del Vaticano: LEV, 84/1992), 577–587; [English version: *SCan*, vol. 27 (1993): 496–505].

⁵⁹ *Ibid.*, 585, n. 18.

⁶⁰ Officially, this is Cormac Burke’s stance in another renowned sentence: Sentence of Mar. 26, 1998, coram Burke (*Pelplin*),” in RRDec. 90/1998, p. 276, n. 35.

⁶¹ Cf. Pastwa, *Il bene dei coniugi*, 113–123.

⁶² Sentence of Nov. 26, 1992, coram Burke, p. 581, n. 10.

⁶³ *Ibid.*

The next part of the *in iure* reasoning reveals why in Cormac Burke's discourse, there is a need to include in the canonistic discourse the ideal image of the purpose of marriage—clearly one that does not fit here: *bonum coniugum*⁶⁴; the purpose that the canonist wants to consistently combine on the legal ground not only with the term “personalistic” but also, and in equal measure, with the term “(legal-)institutional.”⁶⁵ The sentence is:

It follows that any [legal—A.P.] analysis which identifies the *bonum coniugum* with some form of easy or gratifying human relationship between the spouses is fundamentally flawed.⁶⁶

To experts in the subject matter, the intention of the procedure used here appears to be too clear. In view of the tendency, already evident at the turn of the 1980s and 1990s, to grant “the good of the spouses”—a structural element of marriage⁶⁷ (obviously not the same as the purpose of marriage⁶⁸)—autonomy⁶⁹ in the *ius matrimoniale* system, Cormac Burke, who aspired at that time to the role of a promoter (or even an oracle)⁷⁰ in the work of the so-called “personalization” of canonical marriage, deliberately positions himself as a defender of the old order. And just as in numerous articles⁷¹ and rotal judgements which deal with the possibility of making *simulatio* and *incapacitas* hypotheses in the context of *bonum coniugum*,⁷² in the quoted judgment of 26 November 1992, the canonist ends his *in iure* judicial argument with the same “sacramental,” and it must be said clearly, far too easy, point: “[...] the Augustinian bona which

⁶⁴ Cf. CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1.

⁶⁵ Sentence of Nov. 26, 1992, coram Burke, p. 581, n. 10. The elaboration on this thread was included by the author in the article: Cormac Burke, “I fini del matrimonio: visione istituzionale o personalistica?” *Annales Theologici*, vol. 6 (1992): 227–254.

⁶⁶ Sentence of Nov. 26, 1992, coram Burke, p. 582, no. 11.

⁶⁷ Cf. CIC 1983, can. 1101 § 1; CCEO, can. 824 § 2.

⁶⁸ The point of reference here is the well-known recommendation of the Pontifical Commission for the Revision of the Code of Canon Law from the time of work on the *ius matrimoniale* reform: “The ordination of matrimony to the *bonum coniugum* is truly an essential element of the matrimonial covenant.” *ComCan*, vol. 15 (1983): 221. See more: Pastwa, *Istotne elementy małżeństwa*, 142–156.

⁶⁹ See Pastwa, *Il bene dei coniugi*, 236–396.

⁷⁰ See the characteristic (not without an ironic note) statement of the critic of the ideological position of Cormac Burke: *Burke hat in den vergangenen Jahren eine große Zahl an Aufsätzen in den meisten abendländischen Sprachen veröffentlicht. Zum Teil waren es Rechtsausführungen aus seinen Rota-Urteilen. Angesichts des hier zu würdigenden Buches [L'oggetto del consenso matrimoniale...—A.P.] ist festzustellen, daß Burke ein Meister der kleinen Form ist, daß der Raum aber, den ein Buch ihm bietet, sein Gestaltungsvermögen überfordert.* Klaus Lüdicke, “Rez. Burke, Cormac, *L'oggetto del consenso matrimoniale...*,” *De processibus matrimonialibus* [further: DPM] 6 (1999): 267–268.

⁷¹ See bibliography in: Pastwa, *Il bene dei coniugi*, 419–420.

⁷² See *ibid.*, 396.

fundamentally characterize marriage, also provide the basic structure on which the *bonum coniugum* can be built.”⁷³

In conclusion, the creation of the main theses of the author’s “personalistic analysis,” with the complete exclusion (!) of the premises resulting from the renewed interpersonal-finalistic optics of the St. Thomas’s scheme,⁷⁴ and the consequent artificial embedding of “an indissoluble bond between the persons”⁷⁵ in the Augustinian *bona matrimonii* matrix: the offspring, the faith, the sacrament—is a distinguishing feature of the ideological position in matrimonialistics related to the name Cormac Burke. A stringent standing by the opinion⁷⁶ that in the area of *substantia matrimonii*, there is no place for an autonomous “element” of the good of the spouses only confirms the evident lack of courage to go beyond the rigid framework of the scheme of the *tria bona* in the scientific and juridical marking *iura et officia essentialia*.

C. At the basis of the conciliar concept of matrimony, closely related to the theological model of covenant, lies love—a structural principle of the whole matrimonial reality, both in the *feri* dimension and in *facto esse*. Thus, the Council’s magisterium brings to the understanding of marriage—in the spirit of *communio* (*Gestaltungsprinzip konkret wirksam*⁷⁷)—a fundamentally personal line. It is, after all, about entering into the matrimonial covenant in the act of an integrally personal unconditional “yes” of a man and a woman as a gesture of devotion and acceptance of each other, in order to create a community of life and love which is marked by exclusivity, unlimited duration and orientation towards personal partnership and offspring.⁷⁸ What is not insignificant is that the

⁷³ Sentence of Nov. 26, 1992, coram Burke, p. 583, n. 13.

⁷⁴ Cf. Pastwa, *Il bene dei coniugi*, 236–241.

⁷⁵ John Paul II, “Address to the Tribunal of the Roman Rota” (January 27, 1997), n. 4.

⁷⁶ It is worth noting that a decade after the end of his judicial activity in the Court of the Roman Rota, Cormac Burke has maintained his position in all respects. Cormac Burke, “Challenges to Matrimonial Jurisprudence Posed by the 1983 Code,” *The Jurist*, vol. 41 (2007): 445–448.

⁷⁷ Hubert Müller, “Communio als kirchenrechtliches Prinzip im Codex Iuris Canonici von 1983,” in *Im Gespräch mit dem dreieinen Gott. Elemente einer trinitarischen Theologie. Festschrift zum 65. Geburtstag von Wilhelm Breuning*, ed. Michael Böhnke and Hanspeter Heinz (Düsseldorf: Patmos Verlag, 1985), 482.

⁷⁸ *Das konziliare, im Modellbegriff des Bundes notionell gebündelte Eheverständnis ist geprägt von einem sich in der Erfassung der Liebe als Strukturprinzip der gesamten Ehwirklichkeit in Entstehung wie Bestand niederschlagenden fundamental personalen Ansatz, der die Schließung des Ehebundes versteht als das gesamtpersonale bedingungslose konsensuale Ja der Partner zueinander im Blick auf eine primär sittlich-personale Lebens- und Liebesgemeinschaft, die durch die wesentlichen Werthaltungen der Ausschließlichkeit und unbeschränkten Dauer sowie der Hinordnung auf Partnerschaft und Nachkommenschaft gekennzeichnet ist. Norbert Lüdecke, Eheschließung als Bund. Genese und Exegese der Ehelehre der Konzilskonstitution “Gaudium et spes” in kanonistischer Auswertung [Forschungen zur Kirchenrechtswissenschaft, Bd. 7] (Würzburg: Echter, 1989), 912–913. Cf. Ibid., 848.*

aggiornamento of the teachings of Vaticanum II on marriage is the clear idea of overcoming harmful dualisms in the grasping of this phenomenon. This is what the programmatic *clou* of the reform of the old law (in CIC 1917)⁷⁹ should be connected with, namely, the adaptation of the normative description of the institution of matrimony (*Ordnungsgestalt*) to its contemporary perception in the changed socio-cultural conditions (*Erfahrungsgestalt*).⁸⁰ In the face of such assumptions, the *ius matrimoniale* renewal program, focused on the person-entirety of the law,⁸¹ gave a chance to realize the basic criterion of codification: the matrimonial *Canones* (in CIC 1983 and CCEO) “should be in the service of marriage and family as a priority.”⁸² These characteristic conclusions that apart from personalistic provenance also unveil the epistemological-methodological strategy of the author’s research, were included by Norbert Lüdecke in a well-known 1989 monograph entitled *Eheschließung als Bund. Genese und Exegese der Ehelehre der Konzilskonstitution “Gaudium et spes” in canonistischer Auswertung*. The success of this project is proved not only by the popularity of the abovementioned work and the number of quotations, but, above all, by the credible conclusions, precisely showing the inconsistencies in transforming the theological model of the covenant into the language of canons, including the conscious reduction of the religious and sacramental dimension of marriage⁸³ and—proving this deficit—the further maintenance of systemically incoherent legal figures (*fragwürdige Rechtsfiguren*) in 1983 CIC. Here, in particular, the absence of a legislative decision to adopt a fully legitimate CCEO standard in the canon on “condition”⁸⁴: *Matrimonium sub condicione valide celebrari non potest*,⁸⁵ as well as the tacit consent of the legislator to the presence of the figure of the celebration of marriage by proxy in system.⁸⁶

⁷⁹ CIC 1917, can. 1012–1143.

⁸⁰ Lüdecke, *Eheschließung als Bund*, 847, 913.

⁸¹ *Subjekt aller Lebenswirklichkeit ist die durch Individualität, Sozialität und Kreativität ausgezeichnete Person, deren so verstandene Würde mit der neuzeitlichen Auffassung von der freien verantwortlichen Person konvergiert. Als solche ist die Person auch Subjekt des rechtlichen Normierung durchaus zugänglichen Lebenssektors Ehe und mithin auch der eherechtlichen Ordnung*. Ibid., 847–848.

⁸² Ursula Beykirch, *Von der konfessionsverschiedenen zur konfessionsverbindenden Ehe?: Eine kirchenrechtliche Untersuchung zur Entwicklung der gesetzlichen Bestimmungen* [Forschungen zur Kirchenrechtswissenschaft, Bd. 2] (Würzburg: Echter, 1987), 208; Lüdecke, *Eheschließung als Bund*, 913.

⁸³ See Lüdecke, *Eheschließung als Bund*, 870, 892–912.

⁸⁴ CIC 1983, can. 1102.

⁸⁵ CCEO, can. 826; Lüdecke, *Eheschließung als Bund*, 963–974.

⁸⁶ CIC 1983, can. 1105. Lüdecke, *Eheschließung als Bund*, 974–978. Nota bene, pity that the author’s argumentation lacked any mention of the premises resulting from the ecclesiastical tradition of the East: “Marriage cannot be validly celebrated by proxy unless the particular law of one’s own Church sui iuris establishes otherwise, in which case it must provide the conditions under which such a marriage may be celebrated.” CCEO, can. 837 § 2. Cf. Andrzej

To the problem of conceptual inertia and succumbing to the temptation to petrify the old order, namely, the still insufficient affirmation of the “person” in the interpretation and application of the new norms of the matrimonial canon law, the German canonist returns six years later when he publishes an article in the magazine *De processibus matrimonialibus* under the significant title: “Der Ausschluss des ‘bonum coniugum. Ein Ehenichtigkeitsgrund mit Startschwierigkeiten.’”⁸⁷ It is here, which cannot be omitted, that the author reaches for a previously formulated idea, which, repeated with no less emphasis from now on, will turn out to be a “showcase” of his doctrinal stance. The analysis of what is meant by the concept of the “good of the spouses” in the detailed context of the process of applying canon 1101 § 2⁸⁸ norm (with the submission of arguments for the value of the autonomy of the new essential element of marriage) is based on the thesis of a paradigm shift (!) in the adequate treatment of marriage as a personal reality. The structural *specificum*, as this is the case here, which allows juridically to distinguish a marriage from other communities is no longer sexuality but totality.⁸⁹

Norbert Lüdecke has no doubt: such a conclusion is directly dictated by the ethical principle of marriage (marital love).⁹⁰ The question can be asked whether this last conclusion really gives rise to a thesis about the alleged paradigmatic change? Of course, it can be theoretically assumed that more or less purposeful use of the hyperbole was simply to emphasize the importance of the presented research conclusions, and then, instead of sexuality (*Sexualität*), genitality (*Genitalität*) and procreativity (*Prokreativität*) should be inserted by default. This, still acceptable, form of the (hypo)thesis of model change would be suggested by the words of the very canonist:

Pastwa, “Consent and Sacrament in the Orthodox Matrimonial Law. An Ecumenical Perspective,” in *Conclusion of Marriage by Proxy in the Internal Law of Churches and Other Religious Associations*, ed. L. Świto and M. Tomkiewicz [*Studi Giuridici*, vol. 58], (Città del Vaticano: LEV, 2018), 50–51.

⁸⁷ Norbert Lüdecke, “Der Ausschluss des *bonum coniugum*. Ein Ehenichtigkeitsgrund mit Startschwierigkeiten,” *DPM*, vol. 2 (1995): 117–192.

⁸⁸ Cf. CCEO, can. 824 § 2.

⁸⁹ *Sexualität ist nicht mehr Inhalt des Ehekonsenses und keineswegs Spezifikum der Ehe [...] nicht die Sexualität, sondern die Totalität [...]*. Lüdecke, *Eheschließung als Bund*, 960. It should be added that this idea has a protoplast in canonistics. In 1970, Luigi De Luca addressed the following Pontifical Commission for the Revision of the Code of Canon Law desideratum to take into account in the new matrimonial law that it is no longer the sexual aspect but conjugal love (*multiformis dilectio*) that characterizes the conjugal community, distinguishing it from other types of community (*societas*). Luigi De Luca, “La Chiesa e la società coniugale,” *DrE*, vol. 81 (1970), no. 1, 269–271, 274.

⁹⁰ *Dasjenige, was eheliche Liebe als ehelich qualifiziert, ist nicht (mehr) die Sexualität, sondern die Totalität dieser Liebe*. Lüdecke, *Der Ausschluss des bonum coniugum*, 143.

The traditional definition of the essence of marriage was determined by an inadequate, because abbreviated, procreative understanding of sexuality. First, the primary purpose of marriage was closely related to the function of the genital apparatus (*Funktion des Genitalapparates*), and then marriage was designed as the most appropriate form to achieve this purpose. Sexuality in the form of *ius in corpus* filled the content of the concept of marriage and the concept of marriage consent.⁹¹

The problem is that immediately afterwards the author categorically states: “The conciliar science on matrimony sees the *specificum* of matrimonial love not in its sexual dimension, but in its totality. This distinguishes it from other forms of love.”⁹²

As it turns out, the dualistic peculiarities of this discourse, which weaken the power of personalistic argumentation—as the one that go “against the current” of the idea of harmonization discussed here—do not only concern the arbitrary disconnection of the equally (!) “matrimonial” paradigms: sexuality and totality. A similar display of Norbert Lüdecke’s attachment to the method of “separation” can be seen both in the reflections of the results of the Pontifical Commission for the Revision of the CIC⁹³ and in the author’s plan of structuring: *essentia matrimonii—elementa essentialia matrimonii*. In order to give more examples, it is enough to point to the characteristic subtitle in the study under discussion: *Die Hinordnung der umfassenden Lebensgemeinschaft auf Grund ihrer natürlichen Eigenart (auf zwei Wesenssektoren)*.⁹⁴ This is, of course, a conceptual construction in parentheses (which refers to two *sectors* of the essence of marriage), which can and should be questionable. The canonist explains: the Pontifical Commission has not taken the view at any stage of the reform that there is only one *sector* of the essence of a marriage with two profiles, and has already strongly contested any hierarchical subordination.⁹⁵ It is worth wondering whether the attachment to the concept of “sector” in these terms carries the risk of at least partial distortion of the research results? It is clear with the naked eye that the “sector” vision of the essence of marriage—a concept of completely separate, autonomous sectors—is not an adequate tool in the explanation of *essentialia in matrimonio*. Indeed, the fundamental shortcoming of using here the method of “separation” is ignoring the truth that the natural orientation of

⁹¹ Ibid. Cf. Lüdecke, *Eheschließung als Bund*, 59–64, 101–102.

⁹² Lüdecke, *Der Ausschluss des bonum coniugum*, 143.

⁹³ Indeed, in a way, it is understandable. From the beginning, the codification work was accompanied by the assumption that in the “area” of the *essentia matrimonii*—until now (in CIC 1917), which referred exclusively to procreation—the “area” corresponding to the personal partnership (*relatio personalis coniugum*) should be distinguished (in other words: separated, detached). Cf. *ComCan*, vol. 3 (1971): 70; *ComCan*, vol. 7 (1975): 37.

⁹⁴ Lüdecke, *Der Ausschluss des bonum coniugum*, 152.

⁹⁵ Ibid., 159.

marriage (cf. CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1) is in fact a unitary *ordinatio ad famialiam*.⁹⁶ He rightly points out ponens in the not yet published rotal judgment: “Matrimonial aims are so interconnected and synchronized with one another that they cannot be separated.”⁹⁷

D. The program connecting of *vetera et nova*⁹⁸ is one of the determinants of the ideological trend in matrimonialistics associated with the name of Javier Hervada, carried out as part of a broad project of the Pamplona School entitled “Juridical Realism.”⁹⁹ What needs to be noted at the beginning of this brief description¹⁰⁰—this prominent canonist finds an optimal, “personalistic” foundation for his concepts. He emphasizes the importance of matrimonial love in decoding and describing the legal structure of canonical marriage.¹⁰¹

⁹⁶ Cf. John Paul II, “Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota” (February 1, 2001), n. 5. cf. Joan Carreras, “La dimensione giuridica del matrimonio e della famiglia,” in *Il concetto di diritto canonico. Storia e prospettive*, ed. Carlos J. Errázuriz and Luis Navarro (Milano: Giuffrè, 2000), 191–205.

⁹⁷ “Hoc est significatum quod Codex, recolens terminologiam Concilii Vaticani II, exprimit cum asserit quod consortium totius vitae quod constituunt coniuges per foedus matrimoniale est “Indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum” (c. 1055 § 1), fines qui sunt inter se connexi et coordinati quin separari possint. Unusquisque finis alterum exigit, et ad suam realizationem collaborat. Haud agitur veluti de duobus partibus separatis vel superpositis, sed de una tantum realitate – consortio ab utroque coniuge constituto – quae ex natura sua illam duplicem dimensionem progressus vitalis continet: relatio propria coniugum, bonum integrale alterius quaerens, exigit donationem et acceptationem integram dimensionis “sexuatae” uniuscuiusque consortis, et consequenter potentialem paternitatem et maternitatem eius. Quaerere bonum coniugum (mutuum adiutorium, compenetratio affectiva et solidalis inter eos) haud est possibile sine ordinatione ad prolem, id est, sine apertura ad generationem (et educationem) filiorum. Immo, bonum coniugum secum fert ordinationem ad prolem. Secus, haud datur bonum coniugum, secundum ordinationem naturalem matrimonii. Itemque, haud possibile erit quaerere bonum prolis, veluti praescindendo a persona coniugis seu a suo bono; aut intentio filium generandi simpliciter ad sibi providendum haeredem vel aliquem qui suis ipsius continuitatem repraesentet, omnino sine consideratione personae alterius coniugis, qui hoc modo uti merum instrumentum vel medium ad talem finem obtinendum tractatus esset. Breviter, fines, omnes, matrimonii inter se connexi et harmonice coordinati et complementares sunt in unitate matrimonii, ac non est possibilis exclusio alicuius.” Sentence of Oct. 29, 2012 coram Heredia Esteban (*Paulopolitana et Minneapolitana*), n. 7. Prot. N. 20.428.

⁹⁸ This symbolic title was given by the Canonist to the famous, two-volume-long issue of his works: Javier Hervada, *Vetera et Nova. Cuestiones de Derecho Canónico y afines (1958–1991)* (Pamplona: Servicio de Publicaciones de la Universidad Navarra, 1991).

⁹⁹ See: Javier Hervada, *Qué es el derecho? La moderna respuesta del realismo jurídico* (Pamplona: EUNSA, 20082).

¹⁰⁰ More on this leading trend in matrimonialistics: Pastwa, *Istotne elementy małżeństwa*, 275–312.

¹⁰¹ Javier Hervada, *Diálogos sobre el amor y el matrimonio* (Pamplona: EUNSA, 19873); Javier Hervada and Pedro Lombardía: *El Derecho del Pueblo de Dios. Hacia un sistema de Derecho canónico*, vol. 3/1: *Derecho Matrimonial* (Pamplona: Universidad de Navarra, 1973), 93–105.

And because in his scientific contemplation he distances himself from any innovative ideas of breaking with the tradition or, even more so, undertaking “Copernican Revolutions”—he defends the importance of the natural directing of marriage towards the “good of offspring” (*bonum proliis*) and consistently devotes a lot of space to emphasizing the parental dimension of *amor coniugal*.¹⁰²

In such a formal and substantive context, the key¹⁰³ to the entire *de matrimonio* theory of the Spanish canonist is situated. This is about a famous formula, the influence of which on the direction of research of both the Pamplona master himself and the followers of his thoughts cannot be overestimated today—it is the defining of marriage as “unity in nature” (*unidad en la naturaleza; possibly unidad en las naturalezas*). What is important is that, according to Javier Hervada, this central matrimonial concept (and at the same time a paradigmatic starting point for analyses in the area of *essentia matrimonii*) cannot be by any means treated as an axis of abstract speculative considerations. On the contrary, its “personalistic” realism,¹⁰⁴ which by its very nature refers to the immanence of the right to a concrete interpersonal matrimonial reality, goes hand in hand with the methodical, well thought-out source embedding of the research contemplation. Here, the canonist sends out a strong signal: as it is true that in the face of contemporary subjective and libertarian relativization of the person’s sexual sphere,¹⁰⁵ the whole (!) “Church’s tradition affirms the natural juridical character of marriage.”¹⁰⁶ It is also true that “unity in nature” is invariably (!) a metaphysical and legal incarnation of the biblical *una caro*,¹⁰⁷ as proven by the brilliant thought of, among others, St. Thomas Aquinas.

Indeed, the above idea acquires a convincing force when the personalistic profile of the reconstructed structure of marriage is—following Aquinas—

¹⁰² Hervada, Lombardía, *El Derecho del Pueblo de Dios*, 96.

¹⁰³ Zob. Carlos Juan Errázuriz, “La capacità matrimoniale vista alla luce dell’essenza del matrimonio,” *IusEcc*, vol. 14 (2002): 634–637.

¹⁰⁴ Here it should be noted that Javier Hervada’s general vision of the law as “what is right or just” is complemented by the programmatic reduction of the right to specificity: *La legge naturale è sempre un giudizio deontologico che nasce in relazione ad una situazione concreta*. Javier Hervada, *Introduzione critica al diritto naturale* (Milano: Giuffrè, 1990), 158. See in-depth studies on this concept of (marital) law: Carlos Juan Errázuriz, *Il diritto e la giustizia nella Chiesa. Verso una Teoria Fondamentale del diritto canonico* (Milano: Giuffrè, 2000); Fernando Puig, *La esencia del matrimonio a la luz del realismo jurídico* (Pamplona: Navarra Gráfica Ediciones, 2004).

¹⁰⁵ Cf. Francis, Apostolic Exhortation *Amoris Laetitia* (April 8, 2016), nn. 41–42.

¹⁰⁶ Benedict XVI, “Address to the Members of the Tribunal of the Roman Rota” (January 27, 2007).

¹⁰⁷ Hervada and Lombardía, *El Derecho del Pueblo de Dios*, 23–31. On the convergence of this concept with the papal magisterium of John Paul II, see: Juan Carreras, “Commento al discorso di Giovanni Paolo II al Tribunale della Rota Romana in occasione dell’apertura dell’anno giudiziario,” *IusEcc*, vol. 9 (1997): 774–782.

nas—based on the analyses of the legal value of *dilectio* (love of choice). Javier Hervada rightly states that it is only in the context of the “covenant of love” that it is possible to see, in a proper and full light, not so much the separated objectives but the purposefulness of the institutional “unity of two.” Purposefulness—which appears to belong to the spouses’: man (husband) and woman (wife), potentiality.¹⁰⁸ It is rooted in their personal nature *vis unitiva et operativa*,¹⁰⁹ with a unique dynamic and historical profile.¹¹⁰ “No different is a man’s understanding of the dimension of potential paternity and a woman’s understanding of potential motherhood. Indeed, opening up to children is about loving another person in terms of a potential father or mother.”¹¹¹

However, there is a certain scratch on such a carefully drawn Pamplona concept of canonical matrimony. Paradoxically, the discovery and promotion of this incisive idea (*unidad en la naturaleza*) has translated into a clear domination of the optics of *esse*—a focus on the “static” matrimonial node and, at the same time, a noticeable deficiency of *feri* optics—omitting some of the rationale dictated by the dynamics of the personal covenant.¹¹² And is it not so that the biblical *una caro* (“matrimonial” archetype in the research of the Spanish canonist), read through the prism of the “personalistic principle,”¹¹³ in terms of content, goes beyond what the concept of the “unity in nature” implies? In fact, this kind of objection is directly triggered by the problem of the “person” in matrimonial law, which is reflected here. It is therefore worth asking in more detail about the conformity of the nodal thesis of the founder of the Pamplona School: the subject of matrimonial consent are the betrothed, the man and the

¹⁰⁸ “Given that man and woman have a natural ontological structure whose dynamism is subordinated to natural goals, true conjugal love consists in loving the other according to this natural structure and according to these goals. In this way, authentic conjugal love extends to the purposes”. Javier Hervada, “Obligaciones esenciales del matrimonio,” *Ius Canonicum*, vol. 31 (1991): 72.

¹⁰⁹ St. Thomas Aquinas, *Summa theologiae*, I, q. 20, a. 1.

¹¹⁰ Cf. Hervada, *Libertad, naturaleza y compromiso*, 100–103.

¹¹¹ *Ibid.*, 73.

¹¹² The almost exclusive presence of the *facto esse* perspective in Javier Hervada’s theory of marriage naturally raises doubts as to whether the program attention to the continuity of the doctrinal tradition allows the canonist to actually distance himself from the ideological ‘baggage’ of CIC 1917 and fully reject the neo-scholastic treatment of the person in the utilitarian and instrumental sense—as subordinated to *ordinatio ad fines*.

¹¹³ It is perfectly legitimate for José María Serrano Ruiz to point out that the ‘body’ in Biblical (Hebrew) language has a deep meaning: it embraces the whole life and human condition. And that is why it is a good conclusion: *Mi sono permesso di esprimere „tout court” il vero senso della locuzione biblica „una sola carne” per „una sola vita umana.”* José María Serrano Ruiz, “L’esclusione del consortium totius vitae,” in *La simulazione del consenso matrimoniale canonico* [Studi Giuridici, vol. 22] (Città del Vaticano: LEV 1990), 113, n. 54.

woman in their “matrimoniality”¹¹⁴—with the implications of the magisterial, John Paul II’s hermeneutics of the “gift of a person.”¹¹⁵

The suggestions of certain corrections made by the research trail—precisely by reference to the authority of the CIC 1983 and CCEO Code Giver—do not seem unreasonable. In short, the two substantive issues in Javier Hervada’s excellent output require clarification, or perhaps reevaluation. The first one is connected with the demonstrative caution when it comes to the results of the work of the Pontifical Commission for the Revision of the Code of Canon Law; to put it bluntly, the famous canonist was not eager to rush to modify his already widespread theory of marriage under their influence. That is the only explanation for the total omission (!) of “the good of the spouses” (*bonum coniugum*) in the commentary to can. 1055 § 1 (CIC 1983), issued in 1987.¹¹⁶

While in the abovementioned subject it was only a matter of time before the state of full compatibility¹¹⁷ with official doctrine was reached (yes, the fact is that the canonist’s position has evolved), the second issue is already more serious, because it is systemic. In Javier Hervada’s presentations of matrimonial obligations (and rights)—also when their listing is announced by the title of the study¹¹⁸—it is useless to look for an essential obligation of the betrothed: equality of matrimonial rights, with the content of can. 1135, CIC 1983. It can be said that the omission of this hermeneutical context is detrimental to the authenticity of the “program” formula: “marriage is a unity in nature, which means a community of life and love.”¹¹⁹ There is no important link in the chain of *de substantia matrimonii*: marriage is a community of persons with equal dignity and equal rights, modified by sexual diversity. Needless to say, this missing link affects the truthfulness (and “personalistic” realism!) of every specific project of a marriage covenant, in which the betrothed: man and woman, enjoy the same right of co-design, co-determination and cooperation¹²⁰ “to those things which belong to the partnership of conjugal life.”¹²¹

Thus, there is one remarkable conclusion: the appropriateness of the research on *essentialia* in marriage—and its location in the very center of the personalis-

¹¹⁴ Javier Hervada, *Studi sull’essenza del matrimonio* (Milano: Giuffrè, 2000), 288.

¹¹⁵ Podobnie stawia kwestię: Juan Carreras, “L’antropologia e le norme di capacità per celebrare il matrimonio (I precedenti remoti del canone 1095 CIC ’83),” *IusEcc*, vol. 4 (1992): 134–135.

¹¹⁶ Javier Hervada, “Il matrimonio /cc. 1055–1062/,” in *Codice di Diritto Canonico. Edizione bilinqu commentata*, vol. 2, ed. Pedro Lombardía and Juan Ignacio Arrieta (Roma: Logos, 1987), 749.

¹¹⁷ See the change of standpoint of the canonist: Hervada, *Studi sull’essenza*, 335–340.

¹¹⁸ Hervada, “Obligaciones esenciales del matrimonio,” 59–83.

¹¹⁹ Hervada, *Studi sull’essenza*, 271.

¹²⁰ Cf. Klaus Lüdicke, “Matrimonial Consent in Light of a Personalist Concept of Marriage: On the Council’s New Way of Thinking about Marriage,” *Scan*, vol. 33 (1999): 489–492.

¹²¹ CIC 1983, can. 1135; cf. CCEO, can. 777.

tic current of Vaticanum II’s renewal—can only guarantee a harmonious agreement between the two planes of the canonical matrimony: *feri* and *facto esse*.¹²²

2. “An Indissoluble Bond between the Persons”—The Relevance of the “Harmonisation” Postulate

The scientific exploration of the original concepts of canonical matrimony in the broad stream of the personalistic renewal, in terms of the quality of communication of the *esse et agere* of the people-authors of the matrimonial covenant event (depicted in the canons of CIC 1983 and CCEO), brings—one might think—relevant conclusions. The analysis shows, above all, that before doctrine and jurisprudence, there is still an unfulfilled (!) task of full adaptation of the conciliar image of “the intimate partnership of married life and love,”¹²³ a picture that harmoniously integrates two dimensions of marriage: personal and institutional. What needs to be made clear at the same time is that it is neither an exaggerated nor an isolated assessment. The deficit of this all-embracing, coherent vision in the interpretation/application of the norms of the code of matrimonial law was very bluntly revealed in 1997 by the outstanding canonist of the Pontifical Gregorian University, a great authority in the field of canonical matrimonial law, Urbano Navarrete:

In the last thirty years since the Council, the opposition between the personal and institutional dimension of marriage has been a thorn in matrimonial doctrine and Church judicial decisions. Until now [...] neither doctrine nor jurisprudence has been able to produce a “harmonious synthesis” of all the structural elements [matrimonium canonicum—A.P.]. The consequences of this should be considered as highly negative.¹²⁴

In the famous monograph *Il matrimonio canonico tra principi astratti e casi pratici*,¹²⁵ published a decade ago, the famous Italian canonist Ombretta

¹²² Cf. Andrzej Pastwa, “Il matrimonio: comprensione personalistica e istituzionale,” *IusEcc*, vol. 25 (2013): 394–396.

¹²³ *Gaudium et Spes*, no. 48.

¹²⁴ Urbano Navarrete, “Commentarium ad allocutionem Ioannis Pauli II ad praelatos et officiales Rotae Romanae, die 27 ianuarii 1997 habitam,” *Periodica de re canonica*, vol. 86 (1997): 375.

¹²⁵ Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*.

Fumagalli Carulli, in a way meeting the abovementioned postulate (“harmonious synthesis”), announces a program of consolidation of the theory and practice of the renewal of canonical matrimonial law around the project of “an indissoluble bond between the persons”¹²⁶—with a precisely defined methodological strategy: a radical appreciation of the “person” in marriage, in accordance with the parameters of a renewed theological anthropology (*tutela della persona*) in the broader context of harmonizing the personal description of marriage with the criteria of the canonistic tradition according to the paradigm of the *aggiornamento* of the Second Vatican Council (*armonizzazione conciliare*).¹²⁷ This program approach, concentrated on an adequate and comprehensive illumination of the truth about *essentialia in matrimonio*, is in practice a testimony: on the one hand, of highlighting/concentrating on the importance of historical sources, the legal anthropology of marriage and the rules of juridical hermeneutics (with the key requirement to reconcile the letter of the law with the spirit of the Council’s magisterium), on the other hand, of being very consistent in harmonizing current statements with traditional ones and, above all, ensuring harmony within the *substantia matrimonio* between *ordo procreationis* and *ordo caritatis*.¹²⁸

From what has been presented so far, it is clear that it is still reasonable to ask how the study of canon law and Church judicature relates to the passages of the Council’s magisterium, which adapts the long tradition of Catholic teaching on matrimony to the present day¹²⁹? More precisely, what meaning is attached in this context to the paradigmatic idea of “harmonization,”¹³⁰ which, after all, has been taken up and affirmed by the authors of the CIC and CCEO reforms themselves? The importance of such an approach is best demonstrated by the fact that only a correct reading of the “irrevocable personal consent”¹³¹ (of a strictly “personalistic” profile, as opposed to the overly institutionalized “contractualistic” version) makes it possible to harmoniously integrate in the covenant—on

¹²⁶ John Paul II, “Address to the Tribunal of the Roman Rota” (January 27, 1997), n. 4.

¹²⁷ This strategy is heralded by the title of a study announced by the author 20 years earlier: “Armonizzazione conciliare e tutela della persona nel nuovo codice di diritto canonico.”

¹²⁸ Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*, 95; cf. Fumagalli Carulli, *Il governo universale della Chiesa e i diritti della persona. Con cinque Lezioni magisteriali di: Giovanni Battista Re, Crescenzo Sepe, Mario Francesco Pompedda, Jean-Louis Tauran, Julián Herranz* (Milano: Vita e Pensiero, 20083), 173–189.

¹²⁹ Andrzej Pastwa, “Kanonické paradigma nerozlučiteľnosti. O vzťahu prirodzenosti a kultúry v katolíckom chápaní manželstvá,” *Studia Theologica*, vol. 22, no. 2 (2020): 91–97.

¹³⁰ Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*, 103–104; Fumagalli Carulli, “Il Concilio Vaticano II e il matrimonio canonico: capacità e consenso nella convergenza tra pastorale e diritto,” *Jus*, vol. 60, no. 2 (2013): 211–229.

¹³¹ *Gaudium et Spes*, n. 48; see José María Serrano Ruiz, “Visione personale del matrimonio nel CCEO: aspetti sostanziali e di diritto procedurale,” *Iura Orientalia*, vol. 7 (2011): 121–139; Andrzej Pastwa, “*Irrevocabilis consensus personalis*. Antropologické předpoklady systému manželského práva v CCEO,” *Studia Theologica*, vol. 18, no. 2 (2016): 75–89.

the basis of the axio-normative order: the rationality and purposefulness of *persona humana* nature—of the “matrimonial” project with the “family” project.

Therefore, valuable in matrimonialistics are programs of consolidation¹³² of theory and practice, like the one of the aforementioned Italian canonist. In her opinion, the “idea of harmonization” of the matrimonial doctrine in the spirit of the Council, an idea which the Pontifical Commission for the Renewal of the CIC had before its eyes, both then and nowadays, finds its concrete shape in the weave of seven key doctrinal threads which are like links in a single chain in relation to one other. These are: (a) a personalistic reconstruction of the subject of consensus, invoking the *totalitas* of the personal dedication of the spouses, (b) the identification of marital *communio-consortium* as constituted in the covenant of inter-personal communion/communication of the spouses, (c) the clarification of the legal value of marital love, (d) the full adaptation of the formula *una caro*—in the meaning: “unity of heart” and not only “unity of body” in the definition of the completion of marriage, (e) the deepening of the relationship between consensus and faith in the context of the inviolability of the principle *eo ipso sacramentum*, (f) the application of the conciliar inspirations relating implicitly to *bonum coniugum* in the Church jurisprudence.¹³³

At this point, the matter should be made clear: a canonist (theoretician) and a Church judge (practitioner) cannot dispense from answering the nodal questions in contemporary matrimonialistics: how to effectively implement the “program” of levelling the opposition between the personal and institutional dimension of marriage if we refer to the negative Urbano Navarrete’s desideratum; and, following in the footsteps of Ombretta Fumagalli Carulli’s program thought, how to positively present a harmonized picture of matrimonial doctrine? Indeed, these questions are unavoidable and their contents cannot be ignored if one takes seriously the appeal/testament of Pope John Paul II from his last speech to the Roman Rota (2005) about “the duty to conform to the truth about marriage as the Church teaches it.”¹³⁴ It is not difficult to see what is the quintessence of the message formulated by unparalleled promoter of personalism—the Pope of the Family. How could it be otherwise—fidelity towards the assumptions of the conciliar idea of “harmonization,” that is, looking at marriage through the prism of a coherent personal and institutional perspective. Consequently, acceptance

¹³² An example of this is the scientific activity of the eminent Swiss canonist Eugenio Co-recco, who strongly argued in particular for overcoming the dualism between the natural dimension of the institution of matrimony and the spiritual reality of the sacrament. See: Eugenio Co-recco, “Il matrimonio nel nuovo Codex Iuris Canonici. Osservazioni critiche,” in *Studi sulle fonti del diritto matrimoniale canonico* (Padova: Cedam, 1988), 105–130.

¹³³ Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici*, 105–120.

¹³⁴ John Paul II, “Address to Members of the Tribunal of the Roman Rota” (January 29, 2005), n. 1, http://www.vatican.va/content/john-paul-ii/en/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota.html, accessed: December 13, 2018.

of this idea means, no more no less, a confirmation of a simple relationship: the full/integral truth about the “unity of two” flows, as from the spring, from the full/integral truth about the human person. Such and only (!) such reading of the “signs of the times” (and their response in the form of a methodical turn towards an “adequate” anthropology) can place an effective stop to the permeating the Church anthropological and legal thought of “an individualistic culture, which is antithetical to a true personalism,”¹³⁵ with accompanying negative phenomena: “unjust formalism”¹³⁶ and “pragmatic or convenient minimalism”¹³⁷—as John Paul II repeatedly appealed to the dignified body of judges of the Roman Rota and the church judiciary. Today, it is no longer necessary to convince anyone that the lack of an adequate response, decisive and synchronized reaction in both areas of matrimonialism (the theory of doctrine and praxis of ministry) is *de facto* a consent to the spread of “culture of the ephemeral.”¹³⁸ The far-reaching consequences are easy to predict. To paraphrase Benedict XVI, the interpersonal reality of life and conjugal love will remain in the consciousness of Christians extrinsic to the “juridical” institution of marriage.¹³⁹

It is, therefore, clear that the thought of the interpreter (and the one applying the law) of the normative description of marriage in CIC 1983 should invariably be accompanied by a renewed reading of the anthropological paradigm (“they are no longer two, but become one”),¹⁴⁰ taking into account the contemporary socio-cultural context.¹⁴¹ In other words, if one follows the “true legal anthropology of marriage,”¹⁴² recommended in the papal teaching, then an adequate interpretation of the canons of matrimonial law asks to take into account the *integrum* of the human person in all its metaphysical richness (as a sexually diverse personal structure of man and woman). What should be borne in mind here—the existential realization of the matrimonial-family covenant project means, as a matter of fact, the fulfilment of the content of a love commitment (*consensus essentialiter amorusus*)—according to the rule: the personal

¹³⁵ John Paul II, “Address to the Tribunal of the Roman Rota” (January 27, 1997), n. 4.

¹³⁶ John Paul II, “Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year” (January 29, 2004), n. 5.

¹³⁷ John Paul II, “Address to the Tribunal of the Roman Rota” (January 27, 1997), n. 4.

¹³⁸ Francis, Apostolic Exhortation *Amoris Laetitia* (April 8, 2016), n. 39.

¹³⁹ Cf. Benedict XVI, “Address to the Members of the Tribunal of the Roman Rota” (January 27, 2007).

¹⁴⁰ See: Andrzej Pastwa, “‘Już nie są dwoje, lecz stają się jednością’. Paradygmat antropologiczny wyznacznikiem prawno-kanonicznego ujęcia natury węzła małżeńskiego,” in *“Mężczyzną i niewiastą stworzył ich”. Afirmacja osoby ludzkiej odpowiedzi nauk teologicznych na ideologiczną uzurpację genderyzmu*, ed. Andrzej Pastwa (Katowice: Księgarnia św. Jacka, 2012), 134–152.

¹⁴¹ Pastwa, *Kanoniczne paradigmy nierozłączności*, 85–86.

¹⁴² Benedict XVI, “Address to the Members of the Tribunal of the Roman Rota” (January 27, 2007).

good of each spouse becomes the good of his or her children.¹⁴³ Does the essence of the matrimonial-family bond not express itself in the fact that each of the mentioned persons “asserts his personal dignity by living in accordance with the profound truth of his being”¹⁴⁴? Hence the importance of the proclamation of Pope John Paul II: “An authentically juridical consideration of marriage requires a metaphysical vision of the human person and of the conjugal relationship.”¹⁴⁵

The assumptions formulated in such a way are encountered by a “personalistic” reading of the important *locus theologicus* from the Book of Genesis,¹⁴⁶ which goes far beyond simply confirming the importance of human sexuality in the constitution and realization of the conjugal community of destiny (*consortium*). Suffice it to say that the objective (rooted in nature) binarism of the sexes is manifested *in concreto* in the “unity of the two” which is brought to life according to the rules of structural union of the person with his sexuality.¹⁴⁷ Indeed, the value of the latter in the act of consensus taken up by the betrothed should be considered as a personal and communion-forming dynamism integrated in oblation love. Thus, sexuality defines the overall dynamics of mutual giving of oneself and acceptance of persons in a concrete “partnership of the whole of life,”¹⁴⁸ and thus equally “stigmatizes” the profile of its complementary aims: the personal well-being of spouses and the personal well-being of their children.¹⁴⁹

The proclamation of the anthropological paradigm in the contemporary magisterium *de matrimonio* reaches a specific climax in the truth about the covenant of matrimonial love. It is in the love of the spouses that this totality (*totalitas*) has its source, which is revealed by the essential qualities of marriage: unity and indissolubility. The true personal gift that underlies the matrimonial *consortium/communion* is undivided and definitive (because the essence of the loving gift of persons is its integrity and irrevocability). Only on such foundation can a “unity of two” emerge: a faithful and inseparable communion of persons with a “programmed” transformational dynamism of a personal and interpersonal nature of

¹⁴³ John Paul II, Letter to Families *Gratissimam Sane* (February 2, 1994), n. 10.

¹⁴⁴ John Paul II, Encyclical Letter *Veritatis Splendor* (August 6, 1993), n. 53.

¹⁴⁵ John Paul II, “Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year” (January 29, 2004), n. 7.

¹⁴⁶ Gen 2, 24; cf. Mt 19, 6.

¹⁴⁷ Tonino Cantelmi and Martina Aiello, “Il modo di essere e farsi persona-uomo e persona-donna nella relazione interpersonale,” in *La centralità della persona nella giurisprudenza coram Serrano*, vol. 3, ed. Maria C. Bresciani [Studi Giuridici, vol. 86], (Città del Vaticano: LEV, 2009), 8–9.

¹⁴⁸ CIC 1983, can. 1055 § 1; CCEO, can. 776 § 1.

¹⁴⁹ Cf. José María Serrano Ruiz, *L'ispirazione conciliare nei principi generali del matrimonio canonico*, in: *Matrimonio canonico fra tradizione e rinnovamento* (Bologna: EDB, 19912), 55–58.

a man (“husband of wife”) and a woman (“wife of husband”).¹⁵⁰ In the present optics, matrimonial consent¹⁵¹ can be described as a matrimonial-family project of personal growth, covering the welfare of spouses, offspring, the Church and human community.

Even in a synthetic study of the subject, it is difficult not to contemplate upon the content of the canon, which is not yet sufficiently exposed in CIC 1983 (see chapter: “The Effects of Marriage”), but already occupies a prominent place in the CCEO, right after the first canon defining marriage. This is a recipe with a simple but important message: “Each spouse has an equal duty and right to those things which belong to the partnership of conjugal life.”¹⁵² The eminent German canonist Klaus Lüdicke is right when he states that the principle of equal rights in marriage, expressed in can. 1135, is the basic structure¹⁵³ of the conjugal community described by the Church legislature as *consortium*. Accepting the spouse (in his or her masculinity/femininity) and making him or her an inseparable companion of the “all-embracing” community of destiny means an axiological confirmation of the person of the married partner as an equal subject and co-creator of the “unity of two.” The personalistic vision of marriage as a community of persons with equal dignity and equal rights, which is fully revealed here, is legally relevant in the practice of married life assumed *in consensu*: co-design, co-deciding, and cooperation in everything.¹⁵⁴

* * *

In conclusion, a serious (in a much broader research) confrontation with the subject, that is, the “Person” in the Code of Matrimonial Law (CIC and CCEO), is an invariably relevant challenge that the study of canon law and jurisprudence have to face. The argument for the validity of this conclusion is provided by the famous John Paul II’s thesis, proclaimed in the Exhortation *Familiaris Consortio* (1981)¹⁵⁵ and the famous 1997 Address to the Roman Rota,¹⁵⁶ which can be summarized in the following words: the foundation and structural principle of

¹⁵⁰ See: Andrzej Pastwa, “Intima personarum et operum coniunctio – personalistyczny profil José Marii Serrano Ruiza idei małżeństwa kanonicznego,” in “*Servabo legem tuam in toto corde meo.*” *Księga pamiątkowa dedykowana Księdzu Profesorowi Józefowi Krzywdzie CM, Dyrektorowi Instytutu Prawa Kanonicznego UPJPII z okazji 70. rocznicy urodzin*, ed. Arkadiusz Zakręta and Andrzej Sosnowski (Kraków: Uniwersytet Papieski Jana Pawła II w Krakowie. Wydawnictwo Naukowe, 2013), 397–410.

¹⁵¹ CIC 1983, can. 1057; CCEO, can. 776 § 1, 817 §§ 1–2.

¹⁵² CIC 1983, can. 1135.

¹⁵³ Klaus Lüdicke, *Die Nichtigerklärung der Ehe. Materielles Recht*, [Beihefte zum Münsterischen Kommentar, Bd. 62], (Essen: Ludgerus Verlag, 2012), 23.

¹⁵⁴ Lüdicke, “Matrimonial Consent,” 489–492.

¹⁵⁵ John Paul II, Apostolic Exhortation *Familiaris Consortio* (November 22, 1981), no. 13, 17.

¹⁵⁶ John Paul II, “Address to the Tribunal of the Roman Rota” (January 27, 1997), no. 3.

interpersonal (ethical and legal!) relationships in marriage is matrimonial love. Indeed, this axiom—still not quite present in the thoughts of canonists and church judges—reflects the deepest truth, of which “prophetically” the author of the monumental works *Love and Responsibility* and *The Acting Person* gave testimony; the truth that not elsewhere, but in the conciliar spiritually person-centric vision of marriage community (*communio/consortium*), a hermeneutic key should be sought for an adequate and complete understanding of the structure of marriage, harmoniously integrating its two personal and institutional dimensions.

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Andrzej Pastwa

La « personne » en droit matrimonial CIC et CCEO Autour de l'idée d'harmonisation *vetera et nova* dans la doctrine ecclésiastique et dans la jurisprudence

Résumé

Aborder sérieusement le sujet de la « Personne » dans le droit matrimonial du Code Canonique (CIC et CCEO) constitue un défi – invariablement actuel – auquel sont confrontés les études canoniques et la jurisprudence. L'argument en faveur de la validité de cette affirmation est fourni par la célèbre thèse de St. Jean-Paul II proclamée dans l'exhortation *Familiaris consortio* (1981) et dans le fameux discours en 1997 ; on peut la résumer ainsi : le fondement et le principe structurel des relations interpersonnelles (éthiques et légales !) dans le mariage est l'amour conjugal. Cet axiome – encore assez peu présent chez des canonistes et des juges d'église – reflète la vérité la plus profonde dont l'auteur des œuvres monumentales « Amour et responsabilité » et « La personne et l'action » a témoigné « prophétiquement » ; il est vrai que ce n'est que dans la vision de la communauté matrimoniale (*communio/consortium*), vision centrée sur la personne et issue de l'esprit conciliaire, il faut chercher une clé herméneutique pour une compréhension adéquate et complète de la structure du mariage, unissant harmonieusement ses deux dimensions personnelle et institutionnelle.

La brillante pensée de Karol Wojtyła / Jean-Paul II est confrontée dans cette étude aux prémisses confirmant l'hypothèse que l'identification déclarative avec l'idée d'*aggiornamento* personaliste (“programmé” en particulier dans les nombres 47–52 de la constitution conciliaire *Gaudium et spes*), présente dans les opinions / concepts exprimés, ne garantit en aucun cas l'adéquation et l'exhaustivité des concepts canoniques de la « vérité du mariage ». Tant dans le domaine de l'exposition théologique conforme au Magistère (à la lumière de « l'image de Dieu ») qu'au niveau de la *praxis* : interprétation et application des dispositions normatives dans les canons fondamentaux du CIC et du CCEO. La première partie de l'étude est consacrée à une illustration d'un tel état de l'art – dans diverses propositions de doctrine et de jurisprudence : en commençant par une conception totalement inexacte et vouée à l'échec ; par une conception qui, en raison d'une approche très conservatrice à la nécessité de l'harmonisation *vetera et nova*, n'a pas résisté à l'épreuve du temps, jusqu'à des conceptions qui sont, en effet, communément reconnues dans les études canoniques, mais aux auteurs desquelles (ou à leurs adhérents) on peut, cependant, proposer des suggestions de corrections nécessaires : plus grandes ou plus petites. Dans la deuxième partie, la réflexion porte sur les conclusions découlant de la mise en œuvre du postulat conciliaire de « l'harmonisation » dans la présentation de la vision du mariage centrée sur la personne. Les remarques synthétiques faites mènent à montrer les fondements d'une

interprétation adéquate de la formule adoptée par les deux codes annoncés dans le titre: «une communauté de vie».

Mots-clés: personne, personalisme de Karol Wojtyła / Jean-Paul II, anthropologie juridique du mariage, code du droit matrimonial (CIC et CCEO), conceptions personalistes du mariage canonique, postulat conciliaire de l'«harmonisation»

Andrzej Pastwa

La “persona” nel diritto matrimoniale CIC e CCEO Intorno all’idea di armonizzazione *Vetera e Nova* nella dottrina ecclesiastica e nella giurisprudenza

Sommario

Affrontare seriamente il tema della “Persona” nel diritto matrimoniale del Codice Canonico (CIC e CCEO) costituisce una sfida – invariabilmente attuale – che si confronta con gli studi canonici e la giurisprudenza. L’argomento della validità di questa affermazione è fornito dalla famosa tesi di san Giovanni Paolo II proclamata nell’esortazione *Familiaris consortio* (1981) e nel famoso discorso del 1997; lo si può riassumere così: il fondamento e il principio strutturale delle relazioni interpersonali (etiche e legali!) nel matrimonio è l’amore coniugale. Questo assioma – ancora poco presente tra canonisti e giudici ecclesiastici – riflette la verità più profonda di cui l’autore delle opere monumentali quali “Amore e responsabilità” e “La persona e l’azione” ha testimoniato “profeticamente”; è vero che solo nella visione della comunità matrimoniale (*communio/consortium*), visione centrata sulla persona e risultante dallo spirito conciliare, si deve ricercare una chiave ermeneutica per una comprensione adeguata e completa della struttura matrimoniale, unendo armoniosamente le sue due dimensioni: personale e istituzionale.

Il brillante pensiero di Karol Wojtyła/Giovanni Paolo II si confronta in questo studio con le premesse confermantanti che l’ipotesi dell’identificazione dichiarativa con l’idea di *aggiornamento* personalista (“programmato” in particolare nei numeri 47–52 della costituzione conciliare *Gaudium et spes*), presente nelle opinioni/concetti espressi, non garantisce in alcun modo l’adeguatezza e l’esautività dei concetti canonici della “verità del matrimonio”. Sia nel campo dell’esposizione teologica conforme al Magistero (alla luce dell’“immagine di Dio”), che a livello della *praxis*: interpretazione e applicazione delle disposizioni normative nei canoni fondamentali del CIC e del CCEO. La prima parte dello studio è dedicata all’illustrazione di tale stato dell’arte – in diverse proposizioni dottrinali e giurisprudenziali: a partire da una concezione totalmente imprecisa e perciò inevitabilmente destinata al fallimento; per un approccio molto conservatore alla necessità di armonizzazione *vetera e nova* che non ha resistito alla prova del tempo, fino a progetti che sono, appunto, comunemente riconosciuti negli studi canonici, ma ai cui autori (o ai loro aderenti) possiamo, tuttavia, offrire suggerimenti per le correzioni necessarie più o meno significative. Nella seconda parte, la riflessione si sofferma sulle conclusioni che scaturiscono dall’attuazione del postulato conciliare di “armonizzazione” nella presentazione della visione del matrimonio centrata sulla persona. Le sintetiche considerazioni fatte portano a mostrare i fondamenti di un’adeguata interpretazione della formula adottata dai due codici annunciati nel titolo: “una comunità di vita.”

Parole chiave: persona, personalismo di Karol Wojtyła / Giovanni Paolo II, antropologia giuridica del matrimonio, codice di diritto matrimoniale (CIC e CCEO), concezioni personaliste del matrimonio canonico, postulato conciliare di “armonizzazione”