

**THE ORIGIN OF DECREES OF
NULLITY - ESCHATOLOGY
EXIGENCY AND EXPEDIENCY**

by

ELLEN GOODMAN*

“What therefore God has joined together let not man put asunder.”

Matthew 19 : 6, Mark 10 : 9

Courts invested with jurisdiction by the (Cth.) *Family Law Act* 1975 have power to grant two forms of principal relief; decrees of dissolution of marriage¹ and decrees of nullity of marriage.² These two forms of relief arise out of and reflect quite disparate and in many senses irreconcilable philosophies regarding the nature and purpose of marriage. The former presupposes a form of marriage which creates, *inter alia*, a marital bond dissoluble at the behest of one or both of the parties thereto; the latter arose in response to a form of marriage which was not so dissoluble. Marriage as understood in Christendom is unique; its historical and political development spanned several centuries. It is only by reference to the historical origins of marriage that the development of decrees of nullity becomes intelligible.

1. CHRISTIAN ESCHATOLOGY —
SIGNIFICANCE FOR MARRIAGE

This article puts forward a proposition which, I believe, has not been previously articulated; the proposition that elucidation of belief in the *parousia* (*i.e.* the second coming of Christ) provides a key to understanding the institution of marriage as developed by Anglo-Australian jurisprudence. Quite unforeseeable and, therefore, unexpected consequences of this phenomenon provoked the emergence and subsequent development of a specific form of marriage designated ‘Christian’ mar-

* LL.M. (*Syd.*). Senior Lecturer in Law, Macquarie University.
All references to the Book of Moses are from *The Torah, the Five Books of Moses*, a new *Translation of the Holy Scripture according to the Masoretic text* (2nd ed.), the Jewish Publication Society of America, Philadelphia, 1977. All other references to the Old and New Testaments are from *The Holy Bible*, Revised Standard Version, Collins, Fontana Books, Great Britain.

1 *Family Law Act* 1975, s. 48 (1): An application under this Act for a decree of dissolution of a marriage shall be based on the ground that the marriage has broken down irretrievably.
2 *Ibid* s. 51: An application under this Act for a decree of nullity of marriage shall be based on the ground that the marriage is void.

riage. That form of marriage arose out of but differed significantly from marriage as understood in ancient Hebrew law.

If, as has been suggested, elucidation of belief in the *parousia* is crucial to understanding the doctrinal basis of our marriage law, why is this so?

For the earliest Christians, implicit in that belief are certain distinct but inter-related presuppositions: one, conviction in Christ's triumphant return; two, conviction that that return was imminent in the sense that it was to come both soon and suddenly; and three, conviction of the eclipse of the extant social and political order.³ Further, those events it was believed presaged a total transformation of life on earth, with the result that the new era would be no mere improvement on the present but perfection itself. It follows, therefore, that the counsels of the early Christian writers were intended to be transitional; transitional because they were predicated upon and sought to prepare the believer for the onset of a unique new order. In contradistinction to the Old Testament, the primary concern of which was enforcement of the divine law of the covenant — a covenant which ordered the extant social and political realm, the focal concern of the Gospels was millenarian prophecy. That prophecy was predicated upon inauguration of the Messianic kingdom; a kingdom in which the powers of evil were to be crushed by the powers of good; death and suffering were to end and the just would be redeemed through salvation.⁴

For the family and marriage two significant consequences materialized out of that prophecy. One, advocacy of allegiance to the sect at the expense of allegiance to the family and two, exaltation of ascetism at the expense of veneration of marriage.

'Be fertile and increase, and fill the earth'⁵ advised the writer of Genesis; 'Honour your father and mother' commanded the Deuteronomist'.⁶ Continuance of the divine creation, therefore, was a fundamental duty of the ancient Hebrews; the locus for realization of that duty was the family.

By contrast, early Christianity was a sweeping religious reformation, in some respects following the lines of the prophetic movement some nine centuries previously. Jesus insisted that he came to fulfil the Torah and the Prophets, not to destroy them. In order to fulfil them, however, he rejected the increasing mass of secondary regulations and restrictions developed by the Jews. To some extent, he followed precedents set by the Samaritans, the Sadducees, and the Essenes and yet he adopted a

3 N. Cohn, *The Pursuit of the Millenium* (1978) at p. 13.

See generally, J. G. Gager *Kingdom and Community: The Social World of Early Christianity* (1975).

4 It is important to bear in mind that the Gospels refer to a period of social and political unrest. The decline of the Roman Empire caused some people to retire from the world to prepare for the end of the era. The best known of these were the Essene sect. There are numerous references to the 'end time' in the New Testament, for example, Matt. 3 : 2 states 'Repent for the Kingdom of Heaven is at hand'; see too Matt. 4 : 17; 10 : 7; John 4 : 22-26; Rev. 1 : 3.

5 Genesis 9 : 1.

6 Deuteronomy 5 : 16; Exodus 20 : 12; 21 : 17; Leviticus 19 : 3.

consistently spiritual attitude to ritual which was foreign to all of these groups. For Jesus suffering was not only the normal divine punishment of sin but a potent requisite for salvation, putting the disoriented soul into a state of receptivity and divine grace.⁷

The success of such a radical movement demanded severance with reactionary establishment institutions such as the family; family allegiance, therefore, was counter-productive. Rather, the quintessential requirement for establishment and propagation of the new ideologies, was allegiance to the body politic, in this instance the early Christian sect, or *Ecclesia* as the disciples called themselves. Support for these propositions is afforded by the following counsels:

Do not think that I come to bring peace on earth; I have not come to bring peace, but a sword. For I have come to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man's foes will be those of his household. He who loves father or mother more than me is not worthy of me; and he who loves son or daughter more than me is not worthy of me; and he who does not take his cross and follow me is not worthy of me. He who finds life will have it; and he who loses his life for my sake will find it.

(Matthew 10 : 34-39)

And every one who has left houses or brothers or sisters or father or mother or children, or lands, for my name's sake, will receive a hundred-fold, and inherit eternal life.

(Matthew 19 : 29)

If any one comes to me and does not hate his own father and mother and wife and children and brothers and sisters, yes, and even his own life, he cannot be my disciple.

Luke 14 : 26)⁸

While he was still speaking to the people, behold, his mother and his brothers stood outside, asking to speak to him. But he replied to the man who told him, 'Who is my mother, and who are my brothers?' And stretching out his hand toward his disciples, he said 'Here are my mother and my brothers! For whoever does the will of my Father in heaven is my brother, and sister, and mother.'

(Matthew 12 : 46-50)

Herein, then, is provided the warrant for allegiance to the sectarian community, and its corollary, denigration of family allegiance.

The most extensive, and what were to become influential writings on sex and marriage were those of Paul. Like the Gospels, the intention of the Epistles was to furnish the Christian sect with interim counsels;

7 P. Johnson, *A History of Christianity* (1976) at p. 31.

8 Aelfric's *Pastoral Letter for Wulfsgige III*, Bishop of Sherborne, c. 995 states that,

(2) Christ himself established Christianity and chastity, and all those who journeyed in his company abandoned all worldly things and the society of women.

(3) For he himself said in one of his Gospels:

"He who does not hate his wife is not a servant worthy of me".

D. Whitelock, M. Brett and C. N. L. Brooke (eds.), *Councils and Synods with other documents relating to the English Church A.D. 871-1204* Part I 871-1066, at pp. 196-7.

counsels that were never intended to be permanent commands.⁹ For the foregoing reasons Paul wrote as follows:

It is well for a man not to touch a woman. But because of the temptation to immorality, each man should have his own wife and each woman her own husband.

(Cor. 7 : 1-3)

But I say, walk with the spirit, and do not gratify the desires of the flesh. For the desires of the flesh are against the spirit, and the desires of the spirit are against the flesh; for these are opposed to each other, to prevent you from doing what you should.

(Galatians 5 : 16-17)

There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.

(Galatians 3 : 28)

Implicit in Paul's counsels are contradictory themes. On the one hand, recognition and preservation of the traditional dichotomy between men and women. According to that theme women defer to the authority of men; only women are counselled to keep their silence in the churches unless engaging in prophecy. On the other hand, Paul hints at the possibility of annulment of the male/female distinction. He believed that polarization of the image of the male and the female or any other social division was disturbing. For Paul, such distinctions disappear and social divisions are transcended on the level of the spirit. His concern is not with individualized social roles, that is the realm of the earthly, but with unity within the realm of the spiritual.¹⁰

Paul counselled at a time when the *parousia* was still thought to be imminent. Towards the end of his life hope that it would soon eventuate was fading. By the 140's Christian eschatology had receded and with it reformist zeal; the Christian sect had become the established Church. A dilemma was posed, therefore, for the early Church; how to reconcile the worldly concerns of a political institution with the ethical stance of writers such as Paul. That ethical stance was influenced by Zoroastrianism with its opposition of good against evil and by Hellenistic philosophy, in particular that of Plato. 'Death,' said Socrates, 'is the separation of soul and body.' For Plato, man's personality is divided: divided between reality and appearance, ideas and sensible objects, reason and perception, soul and body. These pairs are connected: the first in each pair is superior to the second both in reality and in goodness. It follows that spirit has primacy over matter as soul has primacy over body.¹¹ That division of soul and body has a religious origin; from earth comes the body, from heaven the soul. An ascetic morality is a natural consequence of such dualism.

Much early patristic effort was expended in reconciliation of Paul's dualism. Thus, according to Ambrose (340-379) the best course for a

⁹ 1 Cor. 7 : 6.

¹⁰ R. Mortley, *Womanhood: The Feminine in Ancient Hellenism, Gnosticism, Christianity and Islam* (1981) at p. 54.

¹¹ B. Russell, *History of Western Philosophy* (1961) at pp. 148-149.

woman was virginity. 'Marriage,' he said, 'is honourable because of its good end in procreation, even though the means are debasing but celibacy is more honourable.' His younger contemporary, Jerome, was convinced that coitus was evil. 'Marriage is only one degree less sinful than fornication'¹² he said.

The outcome of such clerical effort, nurtured in, and legitimating monasticism, with its exaltation of celibacy, was the concept of 'Christian marriage'; a form of marriage materialized out of ascetic dogma which took it for granted that marriage was second best; a form of marriage which from its inception was a concession to human frailty.¹³ Gibbon put it thus:

Since desire was imputed as a crime, and marriage was tolerated as a defect, it was consistent with the same principle to consider a state of celibacy as the nearest approach to the divine perfection.¹⁴

The logic of Christianity's new conception of marriage was found in the following Pauline passage:

To the unmarried and the widows I say that it is well for them to remain single as I do. But if they cannot exercise self-control, they should marry. For it is better to marry than to be aflame with passion.¹⁵

12 P. Johnson, *supra* n. 7 at pp. 109-111. The early Christians included many who had devoted themselves to perpetual chastity. A few such as Origen '...judged it the most prudent to disarm the tempter' *i.e.* he castrated himself. Gibbon, *The Decline and Fall of the Roman Empire* and other selections from the writings of Edward Gibbon. H. R. Trevor-Roper (ed.) (1963) at p. 114.

13 1 Cor. 7 : 1-6.

Over the centuries canons reflected the 'concessional' nature of marriage by proscribing sexuality within marriage.

D. C. Engdahl, *Medieval Metaphysics and English Marriage Law* at p. 383 fn. 8 lists the following proscriptions: '...abstinence was enforced on Sundays, Confessionale et Poenitentiale Ecgberti nu 21, sent 3, for three nights before taking communion, Poenitential Theodori lib 2, cap 12 nu 1, during all feast-tides and fast-tides, Canons Enacted under King Edgar 25; Institutes of Polity Civil and Ecclesiastical 22, for seven days before Pentecost and for forty days before Easter and Christmas, Confessionale et Poenitentiale Ecgberti nu 21 sent 4 and nu 25 sent 5; Poenitentiale Theodori lib. 2, cap. 12, nu. 2. Abstinence was also enforced during a woman's menses, Confessionale et Poenitentiale Ecgberti nu. 16, sent. 1, and for several months before and forty days after childbirth (for spiritual, not for medical reasons), Confessionale et Poenitentiale Ecgberti nu. 28, sent. 2; Poenitentiale Theodori lib. 2, cap. 12, nu. 3. A man was to purify himself by washing after having intercourse before entering a church, Confessionale et Poenitentiale Ecgberti nu. 20, sent. 1; Poenitentiale Theodori lib. 2, cap. 12, nu. 29. A man was not permitted to see even his own wife naked, Confessionale et Poenitentiale Ecgberti nu. 20, sent. 1, Poenitentiale Theodori Lib. 2, cap. 12, nu. 30. Even positions for intercourse were regulated by the church, Confessionale et Poenitentiale Ecgberti nu. 21, sent 1.'

C. J. Heffele, *A History of the Councils of the Church* Vol; II AD 326, Edinburgh 1876 includes the following: 'A bride and bridegroom shall be presented to the priest by their parents, or those representing them, for benediction. Out of respect to the blessing received, they shall remain the following night in virginity. Fourth Synod of Carthage 398. By paying a fee dispensation could be obtained, p. 421. Canon 86: Newly baptised persons shall abstain from intercourse with their wives: p. 417.'

14 Gibbon, *Ibid* at p. 113.

15 1 Cor. 7 : 8-9. See also 1 Cor. 7 : 32-40.

If renunciation, austerity and strictness were to be the new values and yet, marriage was to be tolerated, then the old form of marriage would be replaced by a transcendental concept of marriage; henceforth husband and wife would become 'two in one flesh', not only in the flesh but in the spirit.¹⁶ In the symbolism of the time, this ideology was developed into the doctrine of marriage being a sacrament, *i.e.* 'an outward and visible sign of an inward and spiritual grace'.¹⁷ According to Lacey:

The sacrament of marriage is therefore the natural institution raised to a supernatural potency for the conveyance of divine grace delivering men from the fire of concupiscence and producing chastity of soul and body.¹⁸

That view of marriage was influenced by the teachings of Augustine. The purposes of marriage for Augustine were procreation, remedy for concupiscence and 'symbol of unity'.¹⁹ Thus, he saw in marriage a sacred symbol of the union between Christ and the church instituted by God at the time of man's creation. To that symbolism he attributed the doctrine of indissolubility of marriage. That same symbolism imposed a special obligation to the observance of conjugal chastity. From the essentially physical, therefore, marriage became transmogrified into the essentially spiritual.²⁰

2. ANGLO-SAXON MARRIAGE LAW

The basis of Anglo-Saxon marital law was located in Germanic, not Roman tradition. That tradition perceived *marriage* as an empirical concept; the essential element thereof being the physical union between a man and a woman irrespective of whether the relationship was commenced and continued in accordance with law and custom.²¹ If physical union determines the existence of marriage, a question is posed: in the

16 Matt. 19 : 6; Mark 10 : 8; Eph. 5 : 31.

17 M. Rheinstein, *Marriage Stability, Divorce and the Law* (1972) at p. 12. Marriage appears to have been recognised as a sacrament from the beginning of the thirteenth century when Innocent IV was concerned to refute the contrary view of the Waldensians which disapproved of the Church's involvement in marriage which was carnal, contemptible and a matter for the laity. This view was later espoused by Martin Luther. See fn. 33 *infra*.

18 T. A. Lacey, *Marriage in Church and State* (1912) at p. 54.

19 R. R. Ruether 'Misogynism and Virginal Feminism in the Fathers of the Church' in *Religion and Sexism*, Ruether Ed. (1974) at p. 166.

20 F. R. H. Du Boulay, *An Age of Ambition* (1970) at pp. 81-2.

21 Early Anglo-Saxon law distinguished between the contract that founded the marriage and the legality of the marriage. (See the law of Ine 31). For the full completion of the marital contract in all its effects, two acts were necessary; the bewedding or betrothal and the gifta, the delivery of the woman or nuptials. E. Young, *The Anglo-Saxon Law* (1905) at p. 67. F. L. Attenborough, *The Laws of the Earliest English Kings* (1922) sets out some legal requirements of a marriage. For example, Aethelberht states: 'If a man forcibly carries off a maiden, [he shall pay] 50 shillings to her owner and afterwards buy from her owner his consent' p. 15. The Textus Roffenis (early 11th Century) sets out an extract on the terms of betrothal, be wifmannes beweddinge. This tract reiterates that betrothal should be according to 'God's law' and 'proper secular custom'; the betrothal is based on contract. D. Whitelock *et al supra* n. 8 at pp. 427-31.

event that a man enters into more than one such union sequentially, which is a 'marriage'? The following canon of the Northumbrian Priests' Law addresses that question:

If anyone abandons a living legal wife, and wrongly takes to wife another woman, may he not have God's mercy, until he atones for it.²²

Thus, although it was regarded as wrongful to dismiss a legal wife, a subsequent union with another wife was nonetheless a marriage, albeit an *unriht* marriage. *Unrihtness* of marriage was a matter of degree. Some marriages might be *unriht* only in that there was no priest present at the giving, others less than perfectly *riht* because one or both of the parties were survivors of earlier marriages terminated by death; and others even more improper because one or both of the parties had out-lived two or more previous spouses. Certain marriages could not be made *mid rihte*, hence they were *unriht*, unlawful.²³ The point to be made is that all such unions *riht* or *unriht* were considered to be marriages. Anglo-Saxon law understood marriage existentially, empirically; concepts of validity were not known. It follows, therefore, that as with present day *de facto* relationships, repudiation of the union rested with the parties.

The ancient marital laws of the Germanic tribes were gradually modified over the ensuing five centuries by ecclesiastical law. During these centuries, a campaign against *unriht* marriages was waged. The first detailed decrees are in *VI Aethelred* (for the province of York 1008) repeated in *I Cnut*. Monogamy is enjoined; adultery and unchastity are forbidden for men and for women. Whores are to be banished. Priests are to be celibate.²⁴

The growth of the Church's control can be traced. At first, that control was by counsel and warning; second, by disciplinary action over penitents, and, third, by the jurisdiction which Christian kings conceded to Church courts.²⁵

The culmination of this process occurred after the Norman Conquest, when William I separated the ecclesiastical and secular tribunals. Henceforth, the Church of England came to dominate marital affairs. From the time of Glanvill (d. 1190) the '... marriage law of England was the canon law'.²⁶

3. THE CANON LAW OF ENGLAND

With the ascendancy of Church power, regulation of marriage ceased to arise out of, and reflect the customs of the people. Authority to determine the nature and function of marriage was no longer populist.

22 D. Whitelock *et al supra* n. 8 at p. 466.

23 D. Engdahl at pp. 383-389.

24 F. Barlow, *The English Church 1000-1066 — A Constitutional History*, 1963 at p. 260.

25 W. G. F. Phillimore: Review: *Le Mariage en Droit Canonique* par A. Esmein (1982) 31 L.Q.R. 245.

26 F. Pollock and F. Maitland, *The History of English Law* Vol II (2nd ed. 1968) at p. 369.

Henceforth, there was to be '... no power but the power of God'.²⁷ Just as the soul ruled the body, so the clergy ruled the laity. The clergy were superior; the laity inferior: 'Since faith in Christ was the cementing bond of the Church and the exposition of the faith the concern of the clergy, the law itself as the external regulator of society was to be based on Christian dogma'.²⁸ That dogma reflected the Pauline duality: the purposes of this society, such as marriage, were not to be realized on this earth. Its regulation, therefore, was related both to the functioning of marital relations on earth as well as with a view to the other world. It was the eventual end or *telos* which explains in the last resort marital regulation.²⁹

By the mid-twelfth century, it was firmly established that the law of property and succession was within the secular jurisdiction; the key to the law of succession, however, viz. the marriage law, was within the ecclesiastical jurisdiction. Thus the Pope was increasingly confronted with the question: what makes a marriage legally binding?³⁰ As yet there was no formal requirement such as a public ceremony necessary to render a marriage valid; contemporary methods of entering a marriage were informal.

The first step taken by the Church to answer the above question sought to distinguish between a legal marriage and a mere espousal (*desponsatio*). Two competing theories existed at the time. One view, that of Gratian (*circa* 1140) maintained that marriage was initiated by the consent of the parties; it was rendered indissoluble, however, by subsequent sexual union. Marriage is begun by *desponsatio*; it is perfected by *commixtio sexuum*.³¹ The other view, that of Lombard, held that the essence of the marital bonds was in the words uttered by the partners to one another. He distinguished between two kinds of *desponsatio*; one by words of present consent (*verba de presenti*), the other by words of future consent (*verba de futuro*). Consent alone and not coitus made a marriage valid, at least in terms of its present form. With future consent an indissoluble bond was created only by consummation. Ultimately, the consensual view was favoured by the then Pope, Alexander III. (*consensus facit nuptias*). Several consequences flowed from adoption of this view; — marriages, such as marriages arranged by parents for dynastic purposes could be invalidated on the ground that the consent of the parties was not free of coercion; or that consent had been induced by fraud. Adoption of the consensual view was expedient; it meant that most of the marriages extant in Christendom were valid;³²

27 W. Ullman, *Medieval Political Thought* (1975) at p. 13.

28 *Ibid* at p. 101.

29 W. Ullman, *Jurisprudence in the Middle Ages: Collected Studies. The Papacy and the Faithful VIII Variorum* (Reprint, 1980) at pp. 21-13.

30 C. N. L. Brooke, *Marriage in Christian History — An Inaugural Lecture*, at p. 22.

31 R. M. Helmholz, *Marriage Litigation in Medieval England* (1974) at p. 26. J. Jackson, *The Formation and Annulment of Marriage* (2nd ed., 1969) at pp. 10-13.

32 C. N. L. Brooke, *supra* n. 30 at p. 23.

it also meant that 'the one contract which should certainly be formal became the most formless of contracts'.³³

Once the ecclesiastical jurisdiction became invested with marital causes, the forms and substance constitutive of valid marriage were increasingly determined by Papal decrees. Thus, from about the time of Alexander III (d. 1181) marriage, according to the Roman Church was a sacrament,³⁴ and a consequence thereof was to render marriage indissoluble. For the new dogma of indissolubility justification was found in several purported sayings of Jesus as reported in the Gospels.³⁵ Acceptance of that dogma meant that divorce, in the proper sense of the term, as a complete termination of the marital bond, was no longer possible. The marriage bond thus required the consent of the parties thereto at inception but not necessarily thereafter. The domestic domain had been effectively penetrated by the Church; control of the populace descended from the divinely instituted governmental organ of all Christians *i.e.* the office of the Papacy.

4. 'INDISSOLUBLE' MARRIAGE: STRATEGIES OF AVOIDANCE

The Church recognised two legal processes which were popularly called 'divorces', although the effect of such a 'divorce' did not permit the partner to re-marry. One of these, the divorce from the bond of marriage (*a vinculo matrimonii*) was a declaration that the marriage had been invalid *ab initio*. The other kind of 'divorce' called from 'board and bed' (*a mensa et thoro*) allowed husband and wife to live apart, but did not breach the bond between them. They could not therefore remarry.³⁶ Invalidity of a marriage could be invoked by reason of some impediment. Such impediments were usually, though perhaps not wholly accurately, said either to arise from the defect of the party (*impedimentum dirimens*) or to be intended for the prevention of sin (*impedimentum impediens*).³⁷

Paradoxically, it was by the creation of a wide and comprehensive range of prohibitions on marriage that grounds for declaring a marriage invalid increased as well. From around 300 A.D., Councils of the Church became preoccupied with circumscribing the possibility of contracting a valid marriage. For example, prohibitions were created which distinguished between kin; some kin could marry other kin; other kin could not. Distinctions between classes were created whereby members of some classes were prohibited from inter-marrying with members of other

33 *Supra* n. 26 at p. 369.

34 The Catholic doctrine of indissolubility of marriage was challenged by Martin Luther. 'Marriage,' he said, 'is not a sacrament but a "worldly thing". Its regulation belongs to the sphere of Caesar rather than that of God.' Quoted in M. Rheinstein, *supra* n. 17 at p. 22.

35 Matt. 5 : 31; Mark 10 : 2-12; Luke 15 : 18.

36 R. M. Helmholz, *supra* n. 31 at p. 100. J. Jackson, *supra* n. 31 at p. 29.

37 J. L. Barton, *Nullity of Marriage and Illegitimacy in the England of the Middle Ages in Legal History Studies* (D. Jenkins ed., 1975) at p. 29.

classes; other classes were not permitted to marry at all. Differentiation between such classes was based on spiritual status. That differentiation served two purposes, one, to create a class whose devotion to spiritual matters was to be paramount and whose sole 'marriage' was to Christ (*i.e.* the clergy). Two, it created a class of outcasts not deemed worthy of inter-marriage with a Christian, such as heretics.

Specifically, Canon 61 of the Spanish Provincial Council of Elvira in 305, followed by several others around 314, as well as the first general council of Nicaea in 325, prohibited the marriage of a widower with the sister of his first wife. The same council prohibited marriages and intercourse with Jews, pagans and heretics.³⁸ In 402, marriage was prohibited in the case of first cousins as well as unions with the wife of a dead brother and the sister of a dead wife.³⁹ Not content with these prohibitions, the ban was then extended to increase the span of consanguinity, variously described as *cognato carnalis*, *parentela*, *progenies*, *proximatos*. That ban included, '... the union which exists between two or more persons and which derives from their common blood, from their common origin'. In the Sixth century, the ban was further extended: this time to the third canonical degree, that is, to second cousins, the off-spring of a common grand-parent. Later these prohibitions were extended to the fourth degree. And in 1059, Pope Nicholas II called a grand council which issued an encyclical decree extending the prohibitions to the seventh canonical degree. Not only were these enormously extended prohibitions attached to blood or consanguineal ties, but they were assigned to affinal and spiritual kinship as well.⁴⁰ The extent of the impediments was vast. Indeed, the prohibitions on marriage to affines applied not only to kin of one's spouse but to any one with whom one had had sexual intercourse.⁴¹

Spiritual kinship proliferated in mediaeval times. Thus, two forms of parenthood, 'blood' and 'spiritual' emerged. In 813, the Council of Mainz gave formal recognition to these two parallel systems of kinship. That Council decreed, *inter alia*, that parents could not act as god-

38 J. Goody, *The Development of the Family and Marriage in Europe* (1983) at pp. 60-1.

The Synod of Elvira Canon-6 reiterates Canon 10 Synod of Laodicea — members of the Church shall not indiscriminately give their children in marriage to heretics. See too Canon 31 — Christians shall not marry heretics. This situation gave rise to the Pauline privilege whereby if a pagan married a Christian and left the Christian, then the latter was free to remarry. 1 Cor. 1 : 10-15.

39 Canon 9 of the Roman Synod under Pope Innocent 1 states that no Christian may marry his deceased wife's sister, nor besides his wife have a concubine.

40 J. Goody, *supra* n. 38 at p. 135. The methods of reckoning kinship varied. For the early German method see Young, *ibid* at p. 127 and p. 147. For the Roman system see Goody, *supra* n. 38 at pp. 136-146. See too Pollock and Maitland, *supra* n. 26 at pp. 388-9.

41 Goody, *supra* n. 26 at p. 144. Thus, for example, the marriage of Roger Donnington was declared null because before its celebration he had had intercourse with a third cousin of his future wife. Jackson, *supra* n. 31 at p. 22.

parents.⁴² Spiritual kinship also derived from baptism, confirmation and confession. Further, the number of sponsors involved in baptism and confirmation increased with time and they too were included within the range of prohibited degrees.⁴³ As a consequence, the salience of consanguineal kinship ties diminished and spiritual ties expanded. That shift constituted another means whereby allegiance to the spiritual community was strengthened and consolidated at the expense of allegiance to the family.

Canon lawyers, not only created new categories of prohibited degrees but developed other impediments to marriage as well. These included, error of person, error of condition, solemn religious vows, disparity of cult, the taking of major holy orders⁴⁴ and marriage of a child under seven. Any such impediment could subject a marriage to dissolution by divorce. A further impediment was that of crime. Thus, it was once a rule of canon law that no man might marry a woman he had 'polluted' through adultery. It may even have been true that an adulteress disqualified herself entirely from subsequent marriage.⁴⁵ Although canon law held that consent, not coitus, made a marriage valid, that principle was not applied where either of the parties was incapable of consummating the union. A divorce *a vinculo*, because of the impediment of impotence, was available. It was possible, although uncommon because of the evidentiary burden, to dissolve a marriage on the basis of pre-existing marriage contract.⁴⁶ Even mere espousals *per verba de futuro* created quasi-affinity with resultant prohibitions as to marriage between quasi-affines. In all, at least fourteen impediments were recognized by the canonists.⁴⁷

Canonical disability (*impedimenta*) had the effect of rendering the reputed marriages to which they attached void *ipso jure*; once their existence was established there was no examinable valid marriage and never had there been one. Moreover, the validity of a marriage could be negated even after the death of one or of both the parties to it.⁴⁸ The ramifications for questions of legitimacy of heirs and therefore rights to succession are self-evident. Prohibitions on marriage enabled the Church both to control the congregants and at the same time profit from their transgressions by offering dispensations. As Goody puts it, 'Gratitude to the Church for providing both the definition and treat-

42 See, too, Selections from the Laws of Cnut C.1026. [7] '...no Christian man may marry in his own kin within six degrees of relationship, nor with the widow of a kinsman who was so nearly related to him, nor with a near relation of the wife to whom he was previously married.' [7 : 1] 'Nor is any Christian man ever to marry his Godmother or a woman dedicated to God or a deserted woman.' Whitelock *supra* n. 8 at p. 474.

43 Goody, *supra* n. 38 at pp. 197-200.

44 Helmholz *ibid* at pp. 98-100.

45 *Ibid* at p. 94.

46 *Ibid* at p. 76.

47 Jackson, *supra* n. 31 at p. 56, fn. 3.

48 *Ibid* at p. 57.

ment of sin was expressed in the benefactions through which salvation could be achieved'.⁴⁹

Thus, prior to the Reformation, dispensations granted on the basis of *impedimenta* furnished the Pope, or those who acted under his authority, with powerful means of both social and political control.⁵⁰ The granting of dispensations was also a considerable source of wealth. For the powerful, who sought to arrange marriages between members of the same family for dynastic purposes, papal dispensation was frequently necessary. For the princes of Europe therefore it paid 'to keep on good terms with the court of Rome'.⁵¹ Not only the aristocratic class was subjected to the political ambitions and control of Rome, but the peasantry as well. By assuming control over marriage and heirship the Church gained considerable control over the domestic domain at all levels of the social order.⁵² It is not surprising, therefore, that exercise of the discretionary power of the Church became subjected to trenchant criticism. As Bryce says:

... the rules regarding impediments were so numerous and so intricate that it was easy, given a sufficient motive, whether political or pecuniary, to discover some ground for declaring almost any marriage invalid. The practice of granting divorces of this class, ... was constantly made a means of obliging the great ones of the earth and augmenting papal revenues ...⁵³

So much, then, for the development of decrees of nullity to ameliorate the restrictions of medieval marriage; developments constitutive of only one aspect of medieval marital laws. Although not central to analysis of the origins of and necessity for, decrees of nullity, locating that development within the wider framework of medieval marital law is instructive. That law underwent significant changes which not only affected the family and marriage, but the accumulation, distribution

49 Goody, *supra* n. 38 at p. 134.

50 G. M. Trevelyan, *A Shortened History of England* (1959) at pp. 220-1. The most celebrated example is probably the divorce of Catherine of Aragon from Henry VIII. Clement VII's refusal to liberate Henry was not due to religious conviction; he had previously divorced Henry's sister Margaret, Queen of Scotland and his predecessors had released monarchs like Louis XII of France when they desired divorce for reasons of state. For a detailed analysis of Henry VIII's divorce, see J. A. Froude, *The Divorce of Catherine of Aragon* (2nd Ed.) 1970, Ch. 1.

51 Goody, *supra* n. 38 at p. 45.

52 See Aelfric's, *Pastoral Letter for Wulfsig III* c. 995: '[26] And no priest may be at the marriage anywhere where a man takes another wife of a woman takes another husband nor bless them together; [27] as if one thus indicated to them, that it were better for them if they remained in chastity. [28] Yet the layman may with the Apostle's permission marry a second time if he loses his wife, but the canons forbid the blessings to it and have appointed penance for such men to do.' Whitelock, *supra* n. 8 at p. 201. See Aelfric's *First Old English Letter for Wulfstan* c. 1006: '[28] In the loins, as we learn in books is foul wantonness, and we must firmly bind them and compel ourselves to chastity. Whitelock, *supra* n. 8 at p. 267. '[156] The layman may marry a second time, and a young widow may again take a husband, but yet no one may give them a blessing, unless she is a maiden, but rather they must do penance for their incontinence.' Whitelock, *supra* n. 8 at p. 291.

53 J. Bryce, *Marriage and Divorce under Roman and English Law in Select Essays in Anglo-American Legal History* (Vol. III, 1968) at p. 823.

and retention of property during the medieval era. If accumulation of property and therefore power was intimately linked with changes to the marital law, how did this come about? In his brilliant analysis of the development of the family and marriage, Goody has identified a number of factors which brought about a salient change in the patterns of kinship and marriage in Europe — a change which began towards the end of the Roman Empire. Whereas both ancient Hebrew and Roman marriage patterns were characterized by close-marriage (endogamy), *i.e.* marriages characterized by property relations whereby devolution was intra-familial, after Constantine's conversion to Christianity marriage patterns in Europe underwent a radical change; from 'close' marriage, the predominant pattern of marriage became 'out'-marriage (exogamy). In part this change resulted from creation of prohibitions on marriage based on the impediments of affinity, consanguinity and spiritual kinship, as outlined above. Other departures from Roman and ancient Hebrew law, identified by Goody, were the abolition of adoption⁵⁴ and concubinage; and the discouragement of widow re-marriage,⁵⁵ divorce and re-marriage. By placing restrictions on marriage, absolute for the clergy and partial for the laity, a large percentage of the population was precluded from marrying and therefore of acquiring an heir.⁵⁶

Further, a salient feature of Christianity is the centrality of repentance, redemption, and salvation in preparation for the next world; it was the clergy who had the power to absolve from sin and thus control over the other life. It is not implausible, therefore, to suggest that there is a relationship between the strategies of heirlessness created by restriction of marriage; concern for the after-life and the vast accumulation of property by the Church which characterized the early medieval period. Goody sums the situation up thus:

For the Church to grow and survive it had to accumulate property, which meant acquiring control over the way it was passed from one generation to the next. Since the distribution of property between generations is related to patterns of marriage and the legitimisation of children, the Church had to gain authority over these so that it could influence the strategies of heirship.⁵⁷

To summarize:

- (a) the exigency created by non-fulfilment of the *parousia* necessitated development of a new conceptualization of marriage;
- (b) that concept was inherently contradictory because it sought to reconcile two different purposes of marriage; *i.e.* the other-

54 The occurrence of the phrase *Adoptivo Parenti Meo* in an Anglo-Saxon charter proves that adoption existed in Anglo-Saxon law. Further, the adopted son had rights of succession from his adopted father. Young, *ibid* at p. 126.

55 See *The Four First Carthaginian Synods* 104: 'If a widow, who has dedicated herself to God and taken the religious habit, marries again, she shall be entirely shut out from the communion of Christians'.

56 Goody estimates that these restrictions resulted in 40 per centum of families being left with no immediate male heirs. *Supra* n. 38 at p. 44.

57 Goody, *ibid* at p. 221.

worldly teleological aspect and the earthly sexual purpose. Marriage, therefore, became a concession to human frailty;

- (c) if marriage was to be a concession, then restriction on its availability and ambit is a natural consequence. Hence the development of multiple prohibitions both limiting the availability of and behaviour within marriage;
- (d) prohibitions on re-marriage not only restricted its ambit but spawned strategies of avoidance — hence the development of decrees of nullity.⁵⁸

⁵⁸ Scriptural sources purportedly gave the Pope authority to grant a divorce in the form of dispensation to re-marry. When Jesus said to Peter 'I will give you the keys to the kingdom of heaven, and whatever you loose on earth shall be loosed in heaven', this was interpreted to give the office of the Papacy the authority, in some circumstances, to loosen the bonds of matrimony which were otherwise indissoluble. This authority is referred to as the Petrine privilege. Matt. 5 : 32; 19 : 3-12; Mark 10 : 2-12; Luke 16 : 18.