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The Islamic Marriage Contract

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Edited by

Asifa Quraishi
Frank E. Vogel

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THE WESTERN CANON LAW OF MARRIAGE: A DOCTRINAL INTRODUCTION

Charles Donahue, Jr.

I have been handed an impossible brief.[1] I have been asked to summarize the legal doctrine concerning marriage in western canon law, in ten pages. The notion is—and it is a notion with which I heartily agree—that the readers of this book might obtain comparative insights from such a summary. The problem, however, is that although the readers of this book are all interested in marriage in Islam, the range of topics in which they are interested is breathtakingly wide. Some are interested in history, some in a wide variety of contemporary situations. Some are interested in doctrine, be it legal or religious or both; some in praxis. Some are interested in understanding historical or contemporary praxis, some in reforming contemporary praxis. Parallel sets of interests and topics exist in the study of marriage in Christianity and of the canon law of marriage, each one of which might prove fruitful for comparative discussion, but if I attempted to deal with the law as it was, as it is, as it was applied, as it is applied, and as it might be reformed, I would have exhausted my space in this volume before I had covered even half of the first topic.

So I will have to make a leap: My impression is that the most frequently made comparative statement about the Christian law of marriage, on the one hand, and the Islamic (about which I must confess to know very little) or the Jewish (about which I know some, but not much, more), on the other, is that marriage is a sacrament in Christianity but it is not in Islam or Judaism. The statement is usually made by those who want to argue that comparative work of this kind is fruitless, and the statement is made on both sides of the equation. The student of Christian marriage will say that he or she need not look to Islam or Judaism (except perhaps to the latter as a forerunner of Christianity), because marriage is a sacrament in Christianity and not in Islam or Judaism, and the student of marriage in Islam or Judaism will say the same thing only in reverse. I have already said that I disagree with the result of that position; I do not think that the sacramentality of marriage in Christianity means that fruitful comparisons cannot be made between marriage in Christianity and marriage in Islam, but I will not argue that position here. What I will do instead is to try to be a bit more precise about what Christians have meant in the

past (and, to the extent that they still say it, mean today) when they say that marriage is a sacrament and to try to sketch briefly what effect that might have had on the development of the canon law of marriage. It will be for the reader to decide whether these differences make the canon law of marriage an inappropriate topic for comparative study.

Even this topic is too broad. Many Protestants today deny the sacramentality of marriage, and some deny that they have a canon law. I cannot pursue the effect of those denials. The facts, however, that the first seems to have had relatively little effect on the canon law of those Protestant churches which retained a canon law and that neither denial seems to have radically affected the functional equivalent of canon law in those churches that deny that they have a canon law is part of the reason for my belief that the sacramentality of marriage does not mean that it is useless to compare marriage in Christianity with marriage in those religions that do not have the concept of the sacramentality of marriage. Perhaps an even more important exclusion is that I cannot pursue the question of the practical or religious effect of the doctrines that I will be discussing. From all periods in Christian history there is some evidence as to those effects; for the recent periods the amount of evidence is truly massive. Those who are interested in praxis would find much here of comparative interest, but what I cover in this essay is, I believe, an essential prerequisite for making the comparison.

Marriage in the New Testament

So what do Christians mean when they say, to the extent that they do say, that marriage is a sacrament? They have meant different things at different times. There is little doubt, however, that the application of the word "sacrament" to marriage can be traced back to a passage in a letter to the Ephesians attributed to St. Paul that is one of the books in what Christians call the New Testament (Eph 5:21–33). In its general outlines this passage has many parallels, not only in Paul (Col 3:18) but also in the letter ascribed to Peter (1 Pet 3). While Peter and Paul both preached the fundamental freedom and fundamental equality of all Christians, they also preached obedience, of all to civil authority, of slaves to masters, and of wives to husbands. In the case of slavery and of civil authority there are a few hints, but only a few, that the counsel was one of prudence. But there are no such suggestions in the case of husband and wife. What we get instead is a set of parallel but not quite equal obligations: wives be subject to your husbands, husbands love your wives. Only in one place, in Ephesians, does Paul, or one of his disciples, go further. "He who loves his wife," the author of Ephesians tells us, "loves himself. For no one ever hates his own body, but he nourishes it and tenderly cares for it, just as Christ does for the church, because we are members of his body." Here

he ties the obligation of obedience and love into the passage in Genesis (2:24) about the relation of husband and wife: "For this reason a man shall leave his father and mother and be joined to his wife and the two will become one flesh." "This is a great mystery," our writer continues, "and I am applying it to Christ and the church."

The source of this extraordinary analogy between the relationship of husband and wife and the relationship of Christ and church is the Hebrew Bible. Israel is the bride of the Lord in much prophetic writing (e.g., Hosea 1:2; Isaiah 62:5). But the author of Ephesians goes quite a bit further: just as the bride is bathed before marriage, so a Christian is baptized to become the bride of Christ. Just as Christ sacrificed himself for the church to make her holy, so the husband should sacrifice himself for his wife. Just as the church obeys Christ, so the wife should obey the husband. Just as Christ loves the church, so the husband should love the wife. The union of husband and wife, our author then tells us, is a great mystery, but he is saying that it applies to Christ and the church. The word that I have translated as "mystery" was translated into Latin as *sacramentum*, "sacrament," something that came to be important when Christians began to define what were the sacraments of the church. (I am not saying that this was a mistranslation. The eastern church, which keeps the word *mystérion* in the original Greek, developed a theology of the mysteries substantially parallel to the theology of the sacraments in the west.)

The New Testament on Divorce

Before we get to the subsequent development, however, we must look at what else the New Testament has to say about marriage. The synoptic gospels, three New Testament books that summarize the life and teachings of Jesus, report a saying (*logion* to use the technical vocabulary) of Jesus about divorce. The saying occurs once in Mark and Luke and twice in Matthew (Mk 10:11–12; Lk 16:18; Mt 5:32; Mt 19:9) in various forms, but the base textual form seems to be "A man who divorces his wife and marries another is guilty of adultery." The first letter of Paul to the Corinthians, which is earlier than any of the Gospel texts, does not quote the *logion* but says something quite close, "A man must not send his wife away," and says that the statement is "from the Lord." (1 Cor 7:11.) Now what can we make of this as historians? This base text is probably as close as we are going to get to what Jesus said. There seem to have been oral and then written collections of "sayings of the Lord" compiled in the very early church. The presence of this saying in all three synoptics and its reflection in First Corinthians make it virtually certain that this was among those early sayings.

If this is the saying, what could it have meant to Jesus's hearers? Nothing less than a prohibition of divorce. In Jewish law, only the man could initiate a divorce, and adultery could only be committed by one who was

married. The saying must mean that the divorce is invalid, for only then could the man's remarrying be adulterous.[2]

What did the early church do with this saying? First, and perhaps most notably, it applied it to women. The application to women is found in all our sources, including Paul, though the way in which it is applied varies: Paul (1 Cor 7:10–11): "A wife must not leave her husband—or if she leaves him, she must either remain unmarried or else make it up with her husband—nor must a husband send his wife away." We are still quite close here to the Jewish context. There is no suggestion here that a woman could give a bill of divorce. There is, however, a suggestion that in certain circumstances, unstated, separation without remarriage is permissible, at least for women. Mark (10:12): "If a woman divorces her husband and marries another she is guilty of adultery too." Mark's is generally thought to be a gospel for non-Jews. In the pagan world women could obtain a divorce and the *logion* is extended to them. Matthew 5 and Luke work the parallelism a bit differently (Mt 5:32; Lk 16:18). Both of them add that a man who marries a divorced woman is guilty of adultery too. Here, it is the man who is doing the divorcing (closer to the Jewish context), but the statement about adultery is applied to both the man who remarries and the man who marries the divorced woman.[3]

Matthew 5 and 19 also contain except clauses: "except for the case of fornication" (Mt 5:32) and "I am not speaking about fornication" (Mt 19:9). What do these clauses mean? The tendency among Protestants and Orthodox has been to take them literally as meaning that under some circumstances of which adultery is one, divorce and remarriage are permissible. I must be careful because I am committed to a tradition that does not read it this way, but if I think as an historian and not as a Roman Catholic, I can say three things about this: (1) We find the passage in the context of a story (of which more shortly) in which the question is posed: "Is it lawful for a man to divorce his wife for any cause?" (Mt 19:3; cf. Mk 10:2). If the answer to be taken is no, only for adultery, this is certainly an odd way of putting it. (2) *Porneia*, the Greek work translated as fornication, does not mean adultery. It is a general word for sexual immorality. In the Greek Bible it translates the Hebrew *zenût*, which can mean "adultery" but is also a generalized term for sexual immorality. It is at least possible that this clause is to be taken as referring to marriages that are invalid because they are incestuous, or are not marriages because they are concubinages. (3) Whatever the phrase means, the author of Matthew depicts the disciples as being shocked. If this is what the rule is, they say, then it is better not to marry (Mt 19:10). This is then followed by a *logion* in which Jesus says that there are those who make themselves eunuchs for the sake of the kingdom.

In order fully to understand what is going on in this passage about divorce we have to say a bit more about the context. Both Matthew and Mark put the *logion* in the context of a question posed by the Pharisees.

Matthew, a gospel generally thought to have been written for a community that contained large number of Jewish Christians, gives us more of the Jewish context. "Is it lawful for a man to divorce his wife for any cause?" (Mt 19:3). This was not the first time that that question had been posed. The *Mishna*, the collection of rabbinical rulings on the Jewish law, composed around 200 CE, tells us that the school of Shammai and the school of Hillel debated this question,[4] the school of Shammai taking the position that the only grounds for divorce were adultery and the school of Hillel, it would seem, taking the position that a man could give a bill of divorce for any fault that he found in his wife. Matthew is depicting the Pharisees as trying to see which side of the debate Jesus would take. He takes neither side. He says that what God has joined man must not divide, citing Genesis in preference to Deuteronomy, where the bill of divorce is authorized (Dt 24:1). "For this reason a man must leave his father and mother and cleave to his wife, and the two will become one flesh. So then, what God has united, man must not divide." (Mt 19:5–6.) Now if the except clauses in Matthew meant that divorce for adultery were permissible, there would have been nothing particularly notable about Jesus' ruling. He would simply have been taking Shammai's position in the debate. That he did not, but took a much more radical position, seems clear from the passage and its context.

There is one more passage in the New Testament on divorce: "If a brother has a wife who is an unbeliever, and she is content to live with him, he must not send her away [...]. However, if the unbelieving partner does not consent, they may separate; in these circumstances the brother or sister is not tied: God has called you to a life of peace" (1 Cor 7:12, 15). What this shows is that despite the univocal teaching of Jesus on the topic, Paul thought that he could create an exception. Whether the exception involves both divorce and remarriage or simply separation is hard to know. In favor of the former interpretation is the fact that divorce in the ancient world implied the freedom to remarry, so that when Paul means separation without remarriage,[5] he says so. On the other hand, Paul does not specifically say remarriage here, and the context of the passage focuses on whether it is possible for the Christian spouse to live with the pagan or Jewish spouse in peace. To say that Paul is speaking of the inherent dissolubility of non-sacramental marriages in favor of the faith is certainly to be anachronistic, but marriage in the Lord is a Pauline concept, as is the marked contrast between the flesh and the spirit. An interpretation of the *logion* to apply only to Christian marriages is not what Paul offers, but such an interpretation is consistent with Pauline thought.

Marriage in Later Christian Writings

Although one could see how these passages might be used to develop a religious conception of marriage, they are far from giving one a full-scale law of marriage. For the first thousand years of the church's history no one, so far as we know, attempted to do so. Rather, Christian principles, such as indissolubility, at least under most circumstances, and certain religious rituals were grafted onto the secular law and customs of marriage, wherever the church happened to find itself.

These thousand years, of course, saw Christian writing about marriage. One author, in particular, St. Augustine of Hippo (d. 430), was to prove particularly influential on this topic, as on so many others. Perhaps Augustine's most important contribution to the theology of marriage (for he was not a lawyer in the modern sense and influenced the law only indirectly) was his development of the notion of the three "goods," as he called them, of marriage: *fides, proles*, and *sacramentum*, fidelity, offspring, and sacrament.[6] None of these goods is easy to define, but we probably would not be too wide of the mark if we associated the first both with monogamy and the prohibition of adultery, which by this time had been made gender-neutral in Christian thought; the second with the duty of parents to be open to children and to care for them if they came; and the third with the prohibition of divorce. The "sacrament" of marriage in Augustine's thought is associated with the indissoluble bond between husband and wife, at least if the husband and wife were baptized Christians. It is also clear in Augustine's thought that one could have one of the goods of marriage without the other two. In particular, the sacrament remained in a childless marriage in which the spouses were not faithful to each other.

A full-scale Christian law of marriage was developed in the twelfth century, when the church courts acquired exclusive jurisdiction over issues of the formation and dissolution of marriage. How this came about is a complicated story that I cannot tell here. It is to be connected with the reform movement of the eleventh century, with the revival of the study of Roman law and of canon law in Bologna at the beginning of the twelfth century, and with the fact that the church developed an up-to-date and, for its time, efficient set of tribunals. The result was an outpouring of legal literature and rulings on legal issues by the popes, particularly Alexander III (1159–1181) and Innocent III (1198–1215). In particular, Alexander III, after some hesitancy, issued a series of rulings on the topic of the formation of marriage that may be distilled into the following three rules.

First, present consent, freely given between parties capable of marriage, made a valid marriage. This marriage was indissoluble so long as the parties lived. This rule applied even if the marriage was unconsummated. While Alexander seems to have recognized a number of exceptions to the rule for unconsummated marriages, there ultimately came to be only one: An unconsummated present consent marriage was dissoluble if one of

the parties to such a marriage wished to enter the religious life. Although theologians throughout the middle ages suggested that the Church had the power to dissolve unconsummated present consent marriages, it was not until the fifteenth century that the pope, hesitantly, began to grant dispensations from such marriages, and such dispensations were not at all common until after the council of Trent in the mid-sixteenth century.[7]

Second, future consent, freely given between parties capable of marriage, made an absolutely indissoluble marriage, if that consent was followed by sexual intercourse between the parties. The two ways of forming a valid marriage were combined, at least in doctrine, by the notion that intercourse following future consent raised a *de jure* presumption of present consent.

Third, with minor exceptions, any Christian man was capable of marrying any Christian woman provided: (1) that they both were over the age of puberty,[8] (2) that they were not too closely related to each other,[9] and (3) that neither had taken a solemn vow of chastity and that the man was not in major orders.[10] The rules about relationship were complicated, extending as they did to blood relatives, affines and spiritual relatives, but recent research would suggest that they were not so important practically as had once been thought.[11]

The most important thing about these rules is not what they require but what they do not require. Although couples were strongly encouraged to have their marriages solemnized, no solemnity or ceremony was necessary for the validity of marriage at any time between Alexander III in the late twelfth century and the council of Trent in 1563. Further, in an age characterized by arranged marriages and by requirements in the secular law that lords consent to the marriages of their vassals and serfs, classical canon law required the consent of no one other than the parties themselves for the validity of a marriage. Finally, in an age of class-consciousness, classical canon law imposed no barrier of status to marriages across classes.[12]

Impact of Sacramentality on the Development of Canon Law

Now what, if anything, does all of this have to do with the sacramentality of marriage? Students of the history of canon law debate that question even today. The range of answers given varies from "virtually everything" to "virtually nothing." I cannot rehearse the debate here. Rather, I would like to give you the strongest form of the argument that I think is warranted by the evidence for the proposition that the development by Alexander's contemporaries and immediate predecessors of the idea of the sacramentality of marriage was a necessary, if not a sufficient condition, for the legal doctrine to have developed in the way that it did.

In the first place, it is an undeniable fact that we owe the notion that marriage is one of the seven sacraments of the church to Peter Lombard,

a theologian who wrote about a decade before Alexander III became pope. Peter may not have been the first to state this doctrine, but he incorporated it in his *Sentences*, a basic textbook of theology that was used throughout the middle ages and into the early modern period. Peter also espoused the doctrine that marriages are made by present consent alone.[13] We cannot prove that Alexander knew Peter's work, but he certainly could have known it, and his espousal of a present consent doctrine in his marriage rulings is more likely to have been derived from Peter rather than to have arisen coincidentally.[14]

The question is what does this doctrine of the formation of marriage by present consent have to do with the sacramentality of marriage? To answer this question we should look at the work of Hugh of St. Victor, who wrote about a decade before Peter and whose work was known to Peter and perhaps to Alexander. Hugh writes:

> "Let a man leave his father and mother and cleave to his wife," [quoting Genesis 2:24] so that putting aside the old for the new that follows, he may come from the beginning through love and may rest in the end through love. You see now what sort and how great a sacrament conjugal love is, that in it the rational soul may learn to choose without end the consort of its end and cleave to that undivided bond of mutual love and that equality of individual love. This was the first cause of marriage, on account of which God instituted that leaving his father and mother, a man might choose to become sole and singular partner with his wife in an everlasting and undivided love. Afterwards he enjoined a duty on this partnership by reason of a sure and reasonable sacrament for the sake of multiplying future generations, not that marriage might consist of this, but so that from this, marriage might grow in worth and appear more fruitful in abundance of offspring. Rightly therefore is it said: "Let a man leave his father and mother and cleave to his wife and the two will be one flesh," so that as he cleaves to his wife there might be a sacrament of the invisible partnership that is to be made in the spirit between God and the soul, but so that as the two will be one flesh there might be a sacrament of the invisible communion that is made in the flesh between Christ and the Church. This therefore is a great sacrament, "the two will be one flesh," the sacrament of Christ and the Church, but this is a greater sacrament, "he two will be one heart, one love," the sacrament of God and the soul.[15]

What is Hugh's notion of a sacrament? Clearly, he is taking his definition from the false etymology that was current in his time. A sacrament is a *sacrum signum*, a holy sign. Hugh is less interested than were later theologians in what the effect of this sign was. (The council of Trent's definition of

a sacrament, summing up theology from the thirteenth to the sixteenth century is that a sacrament is "a visible sign instituted by Christ to give grace.")[16] What Hugh is interested in is what marriage is a sign of. It is, of course, a sign of the union of Christ and the church. He has to say that: St. Paul had said it in the letter to the Ephesians. But quite daringly Hugh assumes that it is possible to add to the sacrament of Christ and the church proclaimed by St. Paul, another sacrament, one that is in some sense greater. Marriage is also the sign of the mutual love of God and soul. Hence, Hugh expounds an idea of the double sacramentality of marriage. That idea was to have considerable influence in the Middle Ages, and it finds striking echoes in some recent Christian theological writing on marriage.

What is the effect of this doctrine on the law? Here we must enter the realm of the speculative, but it seems relatively clear that a theology that sees in marriage a sign of the mutual yearning of the soul for God and of God for the soul would tend to emphasize, as Hugh does, the element of choice in marriage, and would tend to exclude the choice of anyone else as being relevant to the question of the formation of marriage. We can also see how if one divides, as Hugh does, the two phrases in the Genesis chapter into two sacraments, one might argue that leaving one's father and mother and joining with one's wife (particularly if one took the latter verb as not being a euphemism for sexual intercourse) might have one set of legal consequences, and that becoming one flesh might have another set of legal consequences. Finally, Hugh is speaking of a sacrament of the church. While he recognizes that the institution of marriage long antedates Christianity, it is relatively easy to see how those who followed his views could say that only those who had been baptized could be signs either of the yearning of God for the soul or the union of Christ and the church.

Theological thought on marriage went off in other directions in the succeeding centuries, and the law developed quite independently of it. But at this crucial moment in the mid-twelfth century, the theologians and the lawyers were still talking to one another. The consequences are with us to this day. The Code of Canon Law of the Roman Catholic Church of 1983 holds that a marriage exists between a couple capable of marriage if they presently consent to each other (though if they are Catholics, they normally have to do this in the presence of a priest and two witnesses). The consent of no one else is required. (Alexander's second way of forming a marriage—future consent plus intercourse—was abolished by the council of Trent.) Today, a marriage between baptized Christians is a "ratified marriage," but that marriage may be dissolved if it is not consummated. A marriage between the non-baptized which has been consummated is not a ratified marriage and may be dissolved, at least in some circumstances.

But, as canon 1141 says, "a ratified and consummated marriage cannot be dissolved by any human power or for any reason other than by death."

Conclusion

The doctrine of the sacramentality of marriage probably did affect the development of the canon law of marriage. It can be seen in the emphasis that that law places on the consent of the couple, in the distinctions drawn between consummated and unconsummated marriages and between ratified and unratified marriages, and in the doctrine of the indissolubility of marriage. All of these doctrines, however, have other possible explanations, and I think it would unwise to conclude that the sacramentality of marriage provides a full explanation for them. For comparative purposes, the major doctrinal differences between the canon law of marriage and the Islamic would seem to be (to put it in terms of the canonic doctrines) monogamy, the prohibition of divorce, and the relative unimportance of the marriage contract (as opposed to the marriage itself), the family, and anything concerning property. Whether these major doctrinal differences make comparative study a fruitless exercise, or whether they make the possibility of comparative study even more interesting, is, as I suggested at the start, for readers to decide. I would hope that at least some of them will take a crack at it.

NOTES

[1] Although I have provided some references and made some stylistic changes, I have tried not to alter the tentative and exploratory nature of the lecture that was given at the conference. Hence, the references should be taken more as "suggestions for further reading" rather than exhaustive documentation. Support for much of what is said here (and disagreement with it) with substantial references will be found in Brundage 1987; Witte 1997; and Schillebeeckx 1965. Exploration of the modern Roman Catholic understanding of marriage is best begun with chapter 1 of part 2 of the dogmatic consitution on the church in the modern world (*Gaudium et spes*) of the Second Vatican Council (7 Dec. 1965), available in a number of translations (e.g., *Vatican Council II: The Conciliar and Post Conciliar Documents*, in Flannery 1975, 949–957). For the modern Roman Catholic canon law on the topic, see Beal, Coriden, and Green 2000, 1234–1399 (giving both the text and commentary). Support for most of what I say about the Bible can be found in Brown, Fitzmyer, and Murphy 1990. Translations from the Bible are based on the *New Jerusalem Bible* 1990, with occasional minor changes to make the language more familiar.

[2] Note that even here the notion of adultery is extended, since in Jewish law intercourse between a married man and an unmarried woman is not adultery.

[3] Matthew and Luke are generally thought not to be dependent on each other. That raises the possibility that the primitive form of the *logion* contained this statement about the man marrying the divorced woman.

[4] Hillel and Shammai feature prominently in the Mishna. They probably lived about a generation before Jesus. I explore the Jewish context of this passage in a bit more depth in "Genesis in Western Canon Law," in *Jewish Law Annual* 16 (2006), 164–167.

[5] As he clearly does in 1 Cor 7:12.

[6] Augustine's ideas are most easily explored in his *De bono coniugali*, edited and translated, most conveniently, in Walsh 2001.

[7] See Donahue 1976, 252 and n2.

[8] Now sixteen and fourteen under the Code of Canon Law (1983), canon 1083, with considerable discouraging in canons 1071 and 1072.

[9] Today, canons 1091–1092 prohibit the marriages of consanguines and affines in the direct line, siblings, and first cousins. Dispensations may be obtained for such marriages, except for those of consanguines in the direct line and siblings. Spiritual affinity (the relationship between godparent and godchild) has been abolished as an impediment to marriage.

[10] This is essentially the same today under canons 1087–1088.

[11] See, e.g., Helmholz 1974, 77–78.

[12] The closest that the developed classical law came was the impediment of error of person: If one married a serf thinking that he or she was free, the marriage could be annulled. See Donahue 1976, 274 and n82.

[13] Lombard 1971–1981, 421–435.

[14] On the difficult problem of the dating of Alexander's decretals, see Donahue 1982, 70–124, with references.

[15] *De beatae Mariae virginitate* c. 1, in Migne 1880, 176.862–864.

[16] This is a catechism definition that summarizes Council of Trent, sess. 7 (1547), *Canones de sacramentis in genere*, canons 1–12, in, e.g., Alberigo 1982, 684–685.

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