

The Late Roman Laws
on Consanguinity and Affinity
and their Patristic Background

by

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ABSTRACT

The purpose of this thesis is not to propose and defend an argument, but to study the subject of the title page. There are not too many publications on this subject and it seems useful to organize the material. We have concentrated mainly on laws concerning first cousins and wife's sisters.

We tried to give the conciliar and patristic background to these laws. And finally we give an example of similar laws in the seventeenth century.

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CHAPTER 1

The Secular Laws in Chronological Order

The institute of matrimony has roots that hail back thousands of years. The laws of Moses (notably in Lev. ch. 18) have been taken as a starting point also by Christians in the early centuries of the Christian era. Christian emperors of the IVth and Vth centuries laid the groundwork for marital laws. Their decrees have influence up to the present day. So for instance in many states of the U.S.A. it is still illegal for first cousins to marry each other.¹

The Laws

We will deal with the laws concerning consanguinity and affinity in chronological order. They

1. J. Coriden; T. Green; D. Heintschel; eds., *The Code of Canon Law* (New York: Paulist Press, 1985), p.772, note 87.

are found in the *Codex Theodosianus* (from now on CT), which was compiled by order of Theodosius II (A.D. 408-450), and became effective on January 1, 439 A.D.²; and the *Codex Iustinianus* (CI). The latter was commissioned by Iustinianus on February 13, 528 A.D., and is based on the *Codices Gregorianus, Hermogenianus, and Theodosianus*, as well as later imperial constitutions.³ This codification was made because of the scarcity of all law-books in practically all cities, as well as the controversial issues that arose from the bulky material available in Rome and Constantinople.⁴ The CT was prepared *ad similitudinem Gregoriani atque Hermogeniani codicis*.⁵

². A.C. Oltmans, *De Instituten van Justinianus* (Haarlem: H.D. Tjeenk Willink & Zoon N.V., 1946), p. XVIII.

³. Ibid.

⁴. Ibid, p. XVII.

⁵. Biondo Biondi, *Il Diritto Romano Cristiano* (Milano: Dott. A.

The CT includes laws from Constantine onwards, because:

. . . Teodosio, avvertendo il distacco fra la legislazione che incomincia da Costantino e quella anteriore, volle presentare un codice di pura marca cristiana . . .⁶

The first law that concerns us is CI 5.4.17, decreed by the emperors Diocletianus and Maximianus in A.D. 295:

Imp. Diocletianus et Maximianus AA. et CC.
Nemini liceat contrahere matrimonium cum filia nepte pronepte, itemque matre avia proavia et ex latere amita ac matertera, sorore sororis filia et ex ea nepte, praeterea fratris filia et ex ea nepte, itemque ex adfinibus privigna noverca nuru socru cetrisque, quae iure antiquo prohibentur: a quibus cunctos volumus abstinere.⁷

Giuffrè-Editore, 1952), p. 4.

6. Ibid, p. 5.

7. Paulus Krueger, ed.,
Corpus Iuris Civilis, (Berolini: Apud

In translation:⁸

Niemandem soll es freistehen, eine Ehe abzuschliessen mit seiner Tochter, Enkelin oder Urenkelin, desgleichen mit seiner Mutter, Grossmutter oder Urgrossmutter und in der Seitenlinie mit seines Vaters oder seiner Mutter Schwester, seiner

Weidmannos, 1877), Vol.II, p. 196. The phrase *praeterea nepte* is absent from the *Codex Gregorianus*, according to Contius. See A. Contius, *Codicis Sacratissimi Iustiniani Principis, Libri XII* (Lugduni: Sumptibus Typographicae Societatis, 1612), sub hoc titulo.

8. Coleman-Norton *Roman State and Christian Church* has translated many laws of the CI and CT, but none of those that concern us. This is not the only translation of the CI we could find. There is also a very good translation by D. Godefroy, *Code et Nouvelles de Justinien* (Paris: Rondonneau, 1806). There is an English translation as well by S.P. Scott, *The Civil Law*, (Cincinnati: The Central Trust Company, 1973).

Schwester, der Tochter seiner Schwester, und der von dieser gebornen Enkelin (seiner Schwester), ferner mit der Tochter seines Bruders und der von dieser gebornen Enkelin (seines Bruders); desgleichen von den verschwägerten mit seiner Stieftochter, Stiefmutter, Schwiegertochter und den übrigen (Affinen), die nach dem alten Rechte verboten sind und welcher nach Unserer Willensmeinung Alle sich enthalten sollen.⁹

Excellent as this translation is, it strangely enough leaves out the word *socrus*, which means 'mother-in-law.'

In this law we encounter the two key elements of our thesis--consanguinity and affinity. The concept of consanguinity is based on two kinds of relationships--the direct line and the collateral line. The former refers for instance to mother and son, the latter to brother and sister. In this law we also find

9. C.D. Otto; B. Schilling; C.F.F. Sintenis; eds., *Das Corpus_Iuris Civilis*, (Leipzig: Verlag von Carl Focke, 1832), pp. 703,4.

degrees of consanguinity, one degree representing one generation in the direct line; for instance a grandfather and his granddaughter represent two degrees. In the collateral line there are as many degrees as there are persons, excluding the common ancestor; for example an uncle and his niece represent three degrees.¹⁰ In the direct line, both ascending and descending, marriage was impeded to the infinite degree.¹¹

It is interesting to know that the emperor Claudius made marriages between uncles and nieces (only on the brother's side) legal. This was because Claudius himself wanted to marry his niece Agrippina. Marriages between uncles and nieces were, and still are, considered sound among the Jewish people,

¹⁰. Coriden, *op. cit.* pp. 76, 7.

¹¹. O. Robleda, *El Matrimonio en Derecho Romano* (Roma: Libreria Editrice Universita' Gregoriana, 1970), p.183.

according to Joyce.¹² He seems to be mistaken, however, in asserting that there was no commandment against this, for Leviticus 18:14 specifically forbids this. (See appendix II on this).

The concept of affinity is explained as follows:

Affinity arises from a valid marriage, even if not consummated, and exists between a man and the blood relatives of the woman and between the woman and the blood relatives of the man.¹³

There is also a Roman definition of affinity:

Adfines sunt viri et uxores cognati, dicti ab eo, quod duae cognationes, quae diversae inter se sunt,

12. G.H. Joyce, *Die Christliche Ehe* (Leipzig: Verlag von Jakob Hegner, 1934), p. 447.

13. Coriden, *op. cit.*, p.77.

per nuptias copulantur et altera ad alterius cognationis finem accedit.¹⁴

Affinity, as an impediment to marriage, is exactly shown in the next law that concerns us, namely CT 3.12.2 (A.D. 355, Rome):

Etsi licitum veteres crediderunt nubtiis fratris solutis ducere fratris uxorem, licitum etiam post mortem mulieris aut divortium contrahere cum eiusdem sorore coniugium, abstineant huiusmodi nubtiis universi nec aestiment posse legitimos liberos ex hoc consortio procreari: nam spurios esse convenit qui nascentur.¹⁵

¹⁴. Digesta Iustiniani, 38,10,4,3.

¹⁵. Th. Mommsen and P. Meyer, eds., *Theodosiani Libri XVI cum Constitutionibus Sirmondianis* (Berolini: Apud Weidmannos, 1905), p.150.

In translation:

Although the ancients believed it lawful for a man to marry his brother's wife after the marriage of his brother had been dissolved, and lawful for a man, after the death or divorce of his wife, to contract a marriage with a sister of the said wife, all men shall abstain from such marriages, and they shall not suppose that legitimate children may be begotten from such a union. For it is established that children so born are spurious.¹⁶

In the original 'shall abstain' and 'shall not suppose' are in the conjunctive mood, and could therefore be translated as 'let abstain' and 'let not suppose.' However, 'suppose' is a weak word. Better would be 'judge' or 'think.' 'It is proper' renders the original *convenit* better than 'it is established,' 'spurious' is

16. Clyde Pharr, *The Theodosian Code and Novels and the Sirmundian Constitutions* (New York: Greenwood Press, Publishers, 1969), p.74.

'illegitimate.' *Nascentur* means literally 'they will be born.' Other than that the translation is correct.¹⁷

The following law, CI 5.5.5. (A.D. 393, Constantinople), has a similar content:

Fratris uxorem ducendi vel duabus sororibus coniugendi penitus licentiam submovemus, nec dissoluto quocumque modo coniugio.¹⁸

In translation:

Die Erlaubnis, die Frau des Bruders zur Ehe zu nehmen oder sich (nach einander) mit zwei Schwestern (ehelich) zu verbinden, heben Wir durchaus auf, es mag die frühere Eheverbindung auf diese oder jene Weise aufgelöst sein.¹⁹

17. Probably because of the sheer volume of the task Pharr undertook, weaknesses like these crept into his translation.

18. Krueger, op. cit., p. 199.

19. Sintenis, op. cit., pp. 715, 6.

I could in no way improve this translation. Notice how the parenthetical words in the translation clarify the original meaning.

Gothofredus, in his commentary on CT 3.12.2, comments that this law is the only one decreed in the West (by Constans), while Liberius was bishop at Rome. The other five laws on this subject were decreed in the East. They had to be enacted so many times there, because such marriages occurred so often. St. Basil made great efforts to discredit this kind of marriage.²⁰

According to Gothofredus there was no universal agreement in these matters (*non omnium tum temporis eundem hac parte sensum fuisse*). Constantius himself claimed that according to the old traditions these marriages were legitimate. Therefore

20. Jacobus Gothofredus, *Codex Theodosianus Cum Perpetuis Commentariis* (Lugduni: Ioanne-Antonius Huguetan & Marcus-Antonius Rauaud, 1665), p.338.

the Fathers (of the church) and the emperors, at the prompting of the bishops (*Episcoporum proculdubio instinctu*), considered it necessary to condemn them by law. The levirate, so writes Gothofredus, was probably widely observed because of the Jewry spread throughout the Roman empire. After St. Basil, however, this practice was forbidden by both Theodosius the Great and his descendant (*Theodosius iunior*), all the more after the notorious example of the emperor Honorius, who married the two daughters of Stilicho in succession.²¹

21. Ibid, p.339. See F. Paschoud, *Zosime, Histoire Nouvelle* (Paris: Société d'Édition "Les Belles Lettres," 1986), Tome III, pp. 19, 41, 208-10, for the historical details. Stilicho was set by Theodosius as tutor over Honorius. (Idem, Tome II, p.328). See also Wilhelm Kroll and Karl Mittelhaus, eds., *Paulys Real-Encyclopaedie der Classischen Altertumswissenschaft* (Stuttgart: J.B. Metzlersche Verlagsbuchhandlung, 1934), *Thermantia* § 3. *Thermantia* was one

The following law, CT 3.12.3 (A.D. 396, Constantinople), is rather lengthy. Therefore we will give only the relevant points:

... si quis incestis posthac consobrinae suae vel sororis aut fratris filiae uxorisve eius . . . sese nubtiis funestavit, designato quidem lege supplicio,²² hoc est ignium et proscriptionis, careat, proprias etiam, quam diu vixerit, teneat facultates: sed neque uxorem neque filios ex ea editos habere credatur, nihil prorsus praedictis ne per interpositam quidem personam vel donet superstes vel mortuus derelinquat.²³

In translation:

. . .But hereafter, if any person should defile himself by an incestuous marriage with his own first cousin, the daughter of his sister or brother . . . he shall indeed be exempt from the punishment designated by the law, that is, the punishment of fire and proscription, and he shall have the right to hold his own property as long as he lives. But he shall not be

of Honorius' wives.

²². This law is not extant.

²³. Mommsen, op. cit., p.151.
This is CI 5.5.6.

considered as having a wife, or having children born from her. Absolutely nothing shall be given by him during his lifetime or left by him at his death to the aforesaid wife, even through an interposed person.²⁴

'Should defile' might be better translated by the literal 'may (or when will) have defiled.' 'The aforesaid wife' should be 'the aforesaid (or above mentioned) person(s).' *Uxorisve* refers to one's deceased or divorced brother's wife. Pharr has this right in his footnote, but not in the text, where he has 'any man's wife.' Gothofredus, strangely enough, adds *vel* here. This reading seems not to be attested by any manuscript. In the *original* both *eius* and *cuius* refer back to *fratris*.²⁵

²⁴. Pharr, *op. cit.*, p.74.

²⁵. Gothofredus says the following in connection with this law. The quotation speaks for itself, ". . . Item, quod unum exemplum hic

This law was enacted A.D. 396. It must be realized that from A.D. 395 to the enactment of the Theodosian Code, western laws were only valid in the West and eastern ones in the East. For the empire was divided between Arcadius and Honorius (East and West respectively). It was customary to connect the names of both emperors to a law, even though they reigned over their own territories.

What is new in this law, is that first cousins are included in the concept of consanguinity as an impediment to marriage. This is not so in the following law, CI 5.4.19 (A.D. 405 Constantinople):

Celebrandis inter consobrinos matrimoniis licentia legis huius salubritate indulta est, ut revocata prisci iuris auctoritate restrictisque calumniarum

apponitur, cum Consobrinae: Quas quidem nuptias Theodosii M. patris sui constitutione prohibitae fuisse Honorius *hac leg.* ait & tamen eundem eas impetrari non vetuisse addit." See Goth. op. cit. sub titulo 3.12.3., edition A.D. 1736, p.339.

fomentis matrimonium inter consobrinos habeatur legitimum, sive ex duobus fratribus, sive ex fratre et sorore nati sunt, et ex eo matrimonio editi legitimi et suis patribus successores habeantur.²⁶

In translation:

Zur Vollziehung von Ehen zwischen Geschwisterkindern ist durch gegenwärtiges heilsames Gesetz die Erlaubnis bewilliget, dergestalt, dass unter Wiederherstellung des Ansehens des alten Rechts und Unterdrückung des Stoffs hinterlistiger Anklagen, eine Ehe zwischen Geschwisterkindern für rechtmässig zu erachten ist, es mögen dieselben von zwei Brüdern oder von zwei Schwestern oder von einem Bruder und einer Schwester entsprossen sein, und dass die aus einer solchen Ehe Gebornen für rechtmässige Kinder und Erben ihrer Väter erachtet werden sollen.²⁷

The Latin word 'fomentis' here translated by 'Stoff' is dubious. The problem is that also the French and English translations struggle with this word. They have

²⁶. Krueger, op. cit., p.196.

²⁷. Sintenis, op. cit., pp. 704, 5.

respectively 'levains' (even the plural is grammatically incorrect!) and 'temptation.' The Oxford Latin Dictionary gives two translations for 'fomentum,' namely 'soothing application (hot or cold),' 'compress,' or simply 'remedy,' 'solace.'²⁸ Heumann translates 'Zunder', 'Nahrung', 'Beförderungsmittel', i.e. 'wood for kindling' or 'nourishment' or 'means of transport'.²⁹ The figurative meaning--'nourishment'--must be the correct one. What the law seems to be saying is that since this kind of marriage is now legal, calumnies are not kindled anymore.

The French and English translations go wrong as well in that they translate *revocata* by respectively 'abrogé' and 'annulled.' But this law does not refer back to the non-extant law of Theodosius, but, in our

²⁸. *Oxford Latin Dictionary* (Oxford: Clarendon Press, 1968).

²⁹. H. Heumann and E. Seckel, *Handlexikon zu den Quellen des römischen Rechts* (Graz: Akademische Druck-U. Verlagsanstalt, 1958), p.218.

opinion, to CI 5.4.17. The German 'Wiederherstellung' is therefore correct here. Esmein mentions in passing that Arcadius' law (CI 5.4.19), "opérait un retour au droit antérieur."³⁰ Brouwer holds this view also.³¹ On the previous page he mentions that marriages between cousins were normal among ancient Romans. This makes it strange that the French and English translations have this wrong. The explanation must be that 'to revoke' has the opposite meaning of the Latin *revocare* in modern languages. Only the German translation does not confuse this.

The next law (CT 3.10.1; A.D. 409, Ravenna) restricts this permission. Since it is again a rather lengthy law, we will give only the relevant points:

³⁰. Esmein-Géneštal, *Le Mariage en Droit Canonique* (Paris: Recueil Sirey, 1929), p.374.

³¹. H. Brouwer, *De Iure Connubiorum* (Amstelodami: Apud Casparum Commelinum, 1665), p.438.

Quidam . . . obreptione precum nubtias, quas se intellegunt non mereri, de nobis aestimant postulandas Qua-propter . . . amissionem bonorum et poenam deportationis subiturum se esse non ambigat et amisso iure matrimonii, quod prohibita usurpatione meruerit, filios se iuste hac ratione susceptos non habiturum . . . exceptis his quos consobrinorum, hoc est quarti gradus, coniunctionem lex triumphalis memoriae patris nostri e x e m p l o indultorum supplicare non vetavit . . . ³²

In translation:

Some men . . . suppose that they may request from Us by surreptitious supplication permission for a marriage to which they know they are not entitled . . . therefore . . . he shall not doubt that he will suffer the forfeiture of his goods and the punishment of deportation. He shall also know that he forfeits the right of marriage which he obtained by such a forbidden usurpation; that he cannot have legally born children in this manner Excepted herefrom are those persons whom the law of Our father of triumphal memory³³ did not forbid to supplicate, after the

³². Mommsen, op. cit., p.73.

³³. This law of Theodosius the Great is not extant. The same law

pattern of the imperial indulgences, for the marriage of cousins, that is, of persons related in the fourth degree.³⁴

'He shall also know,' is covered in the Latin *by non ambigat*, as well as 'he shall not doubt.' The literal translation is 'let him not doubt.'

The point of this law is that one could marry one's cousin of the fourth degree, that is of the

might be meant as under CT 3.12.3.

³⁴. Pharr, *op. cit.*, p.73.

collateral line, meaning first cousins,^{35 36} with the restrictions deemed necessary.

We have, therefore, three laws that cover a time span of thirteen years, all with different, even contrary, views on marriages between cousins. Great jurists like Contius and Brissonius are quoted by Gothofredus,

³⁵. Gothofredus, op. cit., edition A.D. 1736, sub titulo 3.12.3, p.339, does not seem to shed more light on this either. ". . . *Quam coniunctionem quarti gradus vocat, ex latere videl. seu linea transversali: eamque Principis indulgentia legitimam fieri.*" Gothofredus goes on to say that this of course does not hold for the direct (ascending or descending) line.

³⁶. See Jean Dauvillier, Carlo de Clercq, *Le Mariage en Droit Canonique Oriental* (Paris: Recueil Sirey, 1936), p.124; ". . . selon l'ancienne computation romaine quel est générale en Orient: on additionne les générations que sépare les deux parties de l'ancêtre commun."

and rebuffed.³⁷ How could Arcadius and Honorius completely rescind the decision made nine years earlier; and how could Honorius, as if totally unremindful, again four years later, approve the old law of his father by proclaiming a unique law that allowed this kind of marriage for first cousins, and by official rescript only? Contius, with a hesitant mind, thought at first that CI 5.4.19 was written by both Arcadius and Honorius, whose name he always adds erroneously, and that it was falsely put in the CI. But he changed his mind quickly, and claimed that the law indeed has Arcadius and Honorius as authors. But either it was not written in this way by them, or certainly it was revoked by Honorius. Brissonius, however, judged that the law of Theodosius the Great was revoked immediately by both emperors, and that the two laws, by which the old law was confirmed,

³⁷. Gothofredus does not give references to their specific writings.

namely CT 3.12.3 and CT 3.10.1, were not written by them in the way they were later handed down; but that somehow they were transferred there without the clauses that deemed such a marriage illegal: and that therefore these clauses with these two laws were inserted by Gothic morals in the CT against the intention of the authors.³⁸

However, this is all merely speculation, as Gothofredus explains. The entire problem is solved when we are aware that these two jurists neither distinguished the emperors adequately, nor did they have the calculation of the years correct. Arcadius is the author of the first two laws, and Honorius of the third. Thus Arcadius softened his father's law in A.D. 396, but in A.D. 405 he changed his mind by legitimizing marriages between cousins. Honorius legitimized this kind of marriage in A.D. 409, but only for first cousins and by official rescript. So we see that

³⁸. Gothofredus, *op. cit.*,
edition 1665, p.341.

by plain contrary error these laws are destroyed, to explain the problem away. The one jurist, Contius, accuses Tribonianus (Minister of Justice of Justinian, and codifier of different codes of that emperor) as author and designer of the CI. By the other a false suspicion is put on the Goths, as if the two other laws, as it were by insertion of a mosaic, had been corrupted by them. Again, these suspicions are vain. The error lies in the distinction between the emperors and the years. Further it is not strange that Arcadius changed his mind in this.³⁹ And then Gothofredus adduces several examples of his changeable mind.

The trick in all this is simply to see in which place the law was decreed. That decides who was the real author.

The seventeenth century Dutch jurist Brouwer⁴⁰ mentions that certain people considered CI 5.4.19 too

³⁹. Ibid.

⁴⁰. Brouwer, *op. cit.*, pp. 437-9.

much of a contradiction, and they therefore thought that this law was spurious, or that it had been changed. It probably had been indulgent in certain exceptional cases. They further believed that Tribonianus made the special benefit common for all. The former suspicion is confirmed by the fact that this law is neither found in the *Basilica*,⁴¹ nor in the CT. Therefore some thought that Justinian approved Theodosius' first law and that in § 4 *Instit. de Nuptiis*⁴² one must read: "Duorum autem fratrum vel sororum liberi, vel fratris et sororis, conjungi non possunt." Contius and others argued that this negation was

⁴¹ Civil Code of the 9th Century; see G.E. Heimbachius, *Basilicorum Libri LX* (Lipsiae: Sumptibus Joh. Ambrosii Barth, 1843), cf. Liber XXVIII, Tit.V, § 4.

⁴². M. Hulot, *Les Institutes de l'Empereur Justinien* (Paris: Rondonneau, 1806), p.24 reads: "Duorum autem fratrum vel sororum liberi, vel fratris et sororis, conjungi possunt."

extant in the original codices. The entire argument goes beyond this thesis. At any rate Brouwer goes on to say that Contius' argument⁴³ requires too inconsequent an attitude on the part of Justinian. His final conclusion (*non alienus sum ab illorum sententia*)⁴⁴ is that the Goths are to blame. So he sides with Brissonius.⁴⁵ We must pay attention to the fact that Brouwer published his work in the same year

⁴³. Libr. I. c.9. Brouwer does give the references, though vague.

⁴⁴. Brouwer, op. cit., p.439.

⁴⁵. B. Brissonius, *De Iure Conubiorum* (Parisiis: Apud Bartholomaeum Macaeum, 1605), p.69. The passage reads: Sed ego Anianum illis constitutionibus violentas manus adtulisse suspicor, cum ad Gothorum suorum, in quorum gratiam ex Alarici Regis praecepto breviarum codicis conscripsit, usum, constitutiones illas accomodare studeret . . .

as Gothofredus, namely A.D. 1665.⁴⁶ Probably he did not know Gothofredus' argument. Personally we consider Gothofredus' explanation the best one. Like Contius and Brissonius, Brouwer confuses the emperors. More recent scholars agree with Gothofredus as well.⁴⁷

⁴⁶. See Th. Georgus, *Bücherlexicon* (Leipzig: In verlegung Gotthilsst, Theoph. Georg., 1742), p.307.

⁴⁷. G.H. Joyce, *Die Christliche Ehe* (Leipzig: Verlag von Jakob Hegner, 1934), p.448; *New Catholic Encyclopedia* (Palatine, Ill.: Jack Heraty & Associates, Inc., 1981), Vol.IV, p.193; J.Dauvillier, and C. De Clercq, *Le Mariage en Droit Canonique Oriental* (Paris: Recueil Sirey, 1936), p.124; M. Kaser, *Das Römische Privatrecht* (München: C.H. Becksche Verlagsbuchhandlung, 1959), p.113; A. Knecht, *Handbuch des Katholischen Eherechts* (Freiburg im Breisgau: Herder & Co. , 1928), pp.476,7; Esmein, op. cit., p. 374.

Most of Gothofredus' commentary on CT 3.10.1 goes beyond this thesis. Important references to Ambrosius and Augustine we will give in Chapter 3. The main observation as to marriages between cousins that Gothofredus makes here is that the fourth degree of the collateral line is meant.⁴⁸ This rescript was only meant for those first cousins that had married already (*coniunctio praesumptiva copulaverit*), or who had made full arrangements for such a marriage already (*si ante definita non fuerint*), for such a marriage was still considered *infamous (notabile)*.

The following law concerns only affinity, viz. CT 3.12.4 (A.D. 415, Constantinople).

Tamquam incestum commiserit, habeatur, qui post prioris coniugis amissionem sororem eius in matrimonium proprium crediderit sortiendam: pari ac simili ratione etiam, si qua post interitum mariti in

⁴⁸. Goth., op. cit., sub CT 3.10.1.

germani eius nubtias crediderit adspirandum: illo sine dubio insecuturo, quod ex hoc contubernio nec filii legitimi habebuntur nec in sacris patris erunt nec paternam ut sui suscipient hereditatem.⁴⁹

In translation:

A man shall be considered as though he had committed incest, if after the death of a former wife he should presume to select her sister for his marriage. A woman, also, shall be held to an equal and similar accountability if after the death of her husband she should presume to aspire to a marriage with his own brother. It will undoubtedly follow that the children of such a cohabitation will not be considered legitimate, they shall be in the power of their father, and they shall not receive the paternal inheritance as family heirs.⁵⁰

'Shall be considered,' should be 'let be considered,' (literally 'let be held'); 'death' is literally 'loss'

⁴⁹. Mommsen, op. cit., pp.152,3.

⁵⁰. Pharr, op. cit., p. 75.

(*amissionem*): 'should presume' is literally 'will have thought.' 'Follow' should be 'follow immediately' (*insequor*). *Insecuturo*, is the ablative case of the future participle. Participles, generally, can be translated in five ways, viz. 1. adjectival, 2. temporal (when, while), 3. causal (because, since), 4. adversative (although), 5. conditional (in the event that, on the condition that). The word illo presents a problem as well. It can be connected to the participle, or it can be an adverb (in that case, after that event). The latter makes better sense in this context. We suggest the following translation, namely '. . .in that event it will immediately follow that . . .'

For the participle is evidently temporal. *Nec, nec*, should be 'neither,' 'nor.' 'Power' is *sacris* in the original. Legal sources frequently use '*sacra patris*' or '*sacra paterna*' in the sense of '*patria potestas*.'⁵¹ The further contents of the law need no comment.

51. See Heumann, *op. cit.* p. 522 under 'sacer.'

The two following laws have similar contents, except that the second includes the relation between uncle and niece as an impediment. The first one (CI 5.5.8; A.D. 475, Constantinople), runs as follows:

Licet quidam Aegyptiorum idcirco mortuorum fratrum sibi coniuges matrimonio copulaverunt, quo illorum mortem mansisse virgines dicebantur, arbitrati scilicet, quod certis legum conditoribus placuit, cum corpore non convenerint, nuptias re non videri contractas, et huiusmodi conubia tunc temporis celebrata firmata sunt, tamen praesenti lege sancimus, si quae huiusmodi contractae fuerint, earumque contractores et ex his progenitos antiquarum legum tenori subiacere nec ad exemplum Aegyptiorum, de quibus superius dictum est, eas videri fuisse firmatas vel essefirmandas.⁵²

In translation:

Obgleich einige Aegypter mit ihrer verstorbenen Brüder Ehegattinnen deshalb, weil letztere nach dem Ableben jener noch Jungfrauen gewesen sein sollten, sich verheirathet haben, und zwar durch die von

⁵². Krueger, op. cit., p. 199

einigen Gesetzgebern gebilligte Ansicht geleitet, dass, da fleischliche Beiwohnung nicht erfolgt sei, eine wirklich abgeschlossene Ehe nicht vorhanden gewesen, und (obgleich) dergleichen damals feierlich begangene Verbindungen für gültig anerkannt worden sind: so verordnen Wir doch durch gegenwärtigen Gesetz, dass, wenn dergleichen Ehen abgeschlossen worden, diese sowohl als ihre Abschliesser und die daraus entsprossenen Kinder den Bestimmungen der alten Gesetze unterworfen sein und (dergleichen Ehen) nicht nach dem Beispiele der Aegypter, von denen oben gesprochen ist, für gültig gehalten und anerkannt werden sollen.⁵³

This translation leaves out *videri* 'are seen,' or 'considered.' 'Unterworfen sein,' is in the original 'to subject.' in the sense of '(let the proper authorities) subject.' 'Diese sowohl' is not correct. The English translation is better here, viz. 'those who contract them, as well as their children.' 'Bestimmungen,' 'provisions,' and 'dispositions' in the German, English and French translations respectively, is better

⁵³. Sintenis, op. cit.,
p.718.

translated by 'sense,' or 'meaning,' or 'tenor.' Some translate this word by 'contents.'⁵⁴ This is not correct, for this law seems to be stating that certain Egyptian legislators did not understand the *true intent* of the law, which is the meaning of the English word 'tenor.'⁵⁵ Therefore the former laws are mentioned.⁵⁶ All three

⁵⁴. E.g. Lewis and Short Latin Dictionary.

⁵⁵. Oxford Concise Dictionary. Etymologically some derive 'tenor' both from the Latin *tenere* 'to hold,' as well as *tendere* 'to stretch.' (Compare the Dutch 'strekken' and 'strekking'!) If etymologically the primary meaning of the verbal root *ten* (cf. the Greek *τείνω*!) is to stretch, then we can safely translate the Latin *tenor* by 'true intent,' or 'sense,' namely that point, to which the purpose of the law is stretched.'

⁵⁶. Let the English reader beware that *antiquus* here does not mean 'ancient,' but 'former,' or 'earlier,' or 'old.' Evidently the CT is meant. Because ancient Roman law did allow one to marry one's brother's

translations (the German comes closest) are not quite correct as to the last sentence. It should run, 'are not to be considered as having been valid or made to be valid.'

Contius in his marginal notes seems to miss the point totally. He says that the local Egyptian law refers to verbal contracts with one sister that can be broken to contract a marriage with the other sister.⁵⁷

widow (see Brouwer, p.474). So also the *phrase iure antiquo* (in CT 5.4.17) refers to former, or earlier traditions.

⁵⁷. *Codicis . . . Justiniani*, op. cit., sub hoc titulo.

The note runs as follows: In l. ista dicitur quod in terra Aegypti erat talis lex, quod si contraxeram matrimonium per verba de praesenti cum sorore una: si ante contractum matrimonium volebam contrahere cum alia sorore, poteram hoc facere. Sed haec lex hodie est correcta.

The other and last law that concerns us (CI 5.5.9; A.D. 476-484, East, has the following contents:

Ab incestis nuptiis universi qui nostro reguntur imperio noverint temperandum, nam rescripta quoque omnia vel pragmaticas formas aut constitutiones impias, quae quibusdam personis tyrannidis tempore permiserunt scelesto contubernio matrimonii nomen imponere, ut fratris filiam vel sororis et eam, quae cum fratre quondam nuptiali iure habitaverat, uxorem legitimam turpissimo consortio licerat amplecti, aut ut alia huiusmodi committerentur, viribus carere decernimus, ne dissimulatione culpabili nefanda licentia roboretur.⁵⁸

In translation:

Allen Unsern Unterthanen sei zu wissen, dass sie blutschänderischer Ehen sich enthalten sollen. Denn alle gottlosen Rescripte, Rechtsverordnungen oder Constitutionen, welche zur zeit der Gewaltherrschaft einigen Personen erlaubt haben, einem frevelhaften Zusammenleben den Namen der Ehe beizulegen, so dass es erlaubt war, des Bruders oder der Schwester Tochter oder die

⁵⁸. Krueger, op. cit., p.199.

vormalige gesetzmässige Ehegattin des Bruders als rechtmässige Ehefrau in schändlicher Beiwohnung zu umarmen, oder andere dergleichen Schandthaten zu begehen, heben Wir hierdurch ausdrücklich auf, damit nicht durch sträfliche Verhehlung jene scheussliche Zügellosigkeit bestärkt werde.⁵⁹

This excellent translation needs no comment. The English translation has 'sister' here for (*filiam*) *sororis*, which is a flagrant blunder.

Tyrannidis tempore refers to the period of A.D. 476-477 during which the emperor Zeno was overthrown by Basiliscus.⁶⁰

More on Affinity

According to the canonists affinity does not have degrees by itself, but it is calculated in accordance with consanguinity. Affinity arises from the

⁵⁹. Sintenis, op. cit.,
p.718.

⁶⁰. Ibid.

so-called *copula carnalis*, not from the legal joining of a man and a woman.⁶¹ This means that illegal marriages can also cause affinity; so can fornication. These instances are called *affinitas ex copula illicita*. Then there are the so-called *genera affinitatis*. Examples of the first kind are that one is not allowed to marry one's mother-in-law, or, then, one's sister-in-law, after the passing away of one's wife. This is called *affinitas primi generis*. An example of *affinitas secundi generis* is that the children of one's second wife were not allowed to marry the blood relations of one's first wife. But cases of this kind are not discussed in either the canons, or the secular laws of the IVth and Vth centuries. They are the subject of later

⁶¹. This analysis of the term 'affinity' opposes the one given at the beginning, which stated that affinity ensues from the legal procedure. However that is usually only the case in adoption.

developments.⁶² The degree of affinity that represented the border of affinity as a so-called diriment impediment to marriage, varied according to time. The tendency was towards stricter rules as time went on. A similar phenomenon can be seen in the increasingly tighter measures against pollution. At first the church followed Roman law in this matter, as the ancient Romans had (already in pre-Christian times) made provisions for this. But later the church became more and more ascetic.⁶³

Later on the church developed also concepts like *cognatio spiritualis* (based on spiritual relations),

⁶². Esmein-Généstal, *Le Mariage en Droit Canonique* (Paris: Recueil Sirey, 1929), Vol.I, pp.414-26.

⁶³. G. Phillips, *Lehrbuch des Kirchenrechts*, (Regensburg: Verlag von Georg Joseph Manz, 1862), cans. 1035 sqq.

and *cognatio legalis* (relations based on adoption). But these fall out of the confines of this thesis.⁶⁴

We have then three kinds of impediments to marriage, namely:

1. consanguinity (sister, half-sister, niece, cousin, etc.),
2. affinity (stepmother, sister-in-law, etc.),
3. spiritual relationship (godparent, baptizer, etc.)

The third one is only observed by Roman catholics, not by Protestants.

⁶⁴. Ibid, can. 1032.

CHAPTER 2

Decisions of the Councils

In order to understand the origin and development of Roman legislation in the IVth and Vth centuries, it is essential to study the ecclesiastical councils. But these again must be understood in their historical context. Therefore, we shall highlight certain points of historical development.

After Constantine Christianity was favoured more and more. His sons Constantius (A.D. 337-361) and Constans (A.D. 337-350) ordered the temples closed in A.D. 346. The statue and altar of the goddess Victoria was removed from the Senate hall in A.D. 357. Gratian (A.D. 367-383) rejected the title *Pontifex Maximus* that was part of imperial status up to his time. In A.D. 380 Theodosius the Great (A.D. 379-395) promulgated a religious edict, together with Gratian and Valentinian II (A.D. 375-392), through which the Christian religion of pope Damasus (A.D.

366-384) became practically the religion of the state. In this way the church was officially established.¹

In this context we think it is also important to mention the historical idea of Caesaropapism, according to which the emperor presided over the church as both emperor and (quasi) pope, as if the church were ". . .una branca dell' amministrazione dello stato . . ." ² There are two positions about this issue that we must avoid. One school denies all influence of Christianity on Roman law,³ the other

1. Willibald M. Plöchl, *Geschichte des Kirchenrechts* (München: Verlag Herold, 1960), p.118; cf. I. Zeiger, *Historia Iuris Canonici* (Romae: Apud Aedes Universitatis Gregorianae, 1947), Vol. I, p.20.

². Biondo Biondi, *Il Diritto Romano Cristiano* (Milano: Dott. A. Giuffrè-Editore, 1952), p.16.

³. Melchiorre Roberti, *Cristianesimo e Diritto Romano* (Milano: Societa Editrice "Vita e Pensiero," 1935), p.7; Biondi, op.

rejects the idea of Caesaropapism altogether.⁴ Probably the truth lies somewhere in between. The fact is that this historical phenomenon differed from emperor to emperor. With certain exceptions the emperors did have a great influence on ecclesiastical matters. This culminated under Justinian, on whom the council of Constantinople (A.D.) conferred the honor of the decision that, ". . . contra iussum et voluntatem imperatoris nihil in ecclesia fieri debet."⁵ Biondi does admit, of course, that not all the emperors were equally submissive to the church, and that the term of Caesaropapism may be relevant in the case of

cit., p.16.

⁴. Biondi, op. cit., p.189, claims, ". . . la nostra epoca si conclude con la solenne proclamazione legislativa del primato di Pietro. In questa proclamazione si ha la più recisa negazione del cesaropapismo."

⁵. Plöchl, op. cit., p. 119.

clearly heretical emperors.⁶ Zeiger states that in the East Christians were far less resistant to Caesaropapism than Christians in the West.⁷ Joannou's definition of the term comes from the opposite camp, and so he rejects the idea of Caesaropapism categorically.⁸ Leifer takes the middle ground in agreeing with Biondi that the CI is a great attempt to establish a Christian legal order, but he adds that it embraces certain distortions of Catholic ecclesiastical law, and so Justinian is not free from Caesaropapism.⁹

⁶. Biondi, op. cit., pp. 92, 191.

⁷. Zeiger, op. cit., Vol.II, p.72.

⁸. P. Joannou, *La Législation Impériale et la Christianisation de l'Empire Romain*, Orientalia Christiana Analecta, 192 (Roma, 1972), p.37.

⁹. F. Leifer, *Christentum und römisches Recht seit Konstantin*, Zeitschrift der Savigny-Stiftung, Band

The problem is that this term cannot be given a fixed definition. This is because, we repeat, individual rulers conducted themselves differently. So one of Constantine's sons terrorized the church with his Arian theology, and exiled pope Liberius;¹⁰ whereas another esteemed the imperial laws of second importance to the ecclesiastical ones.¹¹

In the context of our present subject it is required that we agree with Joannou that the civil power and the church
 ". . . se conditionaient mutuellement . . . ," and that therefore the two institutions remained distinct, there being no question of a ". . . monophysisme politico-

58, 1938, p.189.

¹⁰. Jean Gaudemet, *L'Eglise dans l'Empire Romain* (Paris: Sirey, 1989), p.12.

¹¹. Biondi, *op.cit.*, p.39.

religieux . . . une fusion des deux pouvoirs . . ." ¹² The idea of Caesaropapism should not be rejected, nor be given a rigid interpretation. We think the best description is simply that the emperors, as the heads of the state, ratified the civil laws. As such they decided how far the church was to be given moral respect in its bearing on civil law. As such they were both emperors and 'popes' (probably a result of the ancient imperial status of *pontifex maximus*). This loose description of Caesaropapism includes all the various positions of the Christian emperors; both of those who more or less usurped religious authority, and of those that submitted to the church as much as possible. It fits both state-over- church and state-together-with-the-church politics. ¹³

¹². Joannou, op. cit., pp.37, 8.

¹³. This is called 'collaboration' by Gaudemet [J. Gaudemet, *La Formation du Droit Séculier et du Droit de l'Église aux*

In order to understand how the decisions of the ecclesiastical councils influenced the civil laws of marriage, we must have a certain basic understanding of this period of transformation. We will give this as briefly as possible.

In the first three centuries of the church few laws were written down. From the fourth century forward, however, more and more particular and universal synods were held.¹⁴ The early Christians accepted Christ as the second Adam, who constituted a new order of things.¹⁵

IV et V Siècles (Paris: Sirey, 1979), p.195]. Theocracy (church over state) never became a reality in this era. In this thesis we stick to the term Caesaropapism, because it was the emperors (caesars) who decided what marital laws were accepted.

¹⁴. Zeiger, op. cit., Vol.I, p. 35.

¹⁵. Zeiger, op. cit., Vol.II, pp. 23-5; cf. 1 Corinthians 15:22, 45, and Romans

Before Constantine Christians took the Lord's rule of giving to Caesar what is Caesar's and to God what is God's to mean a life of separation from general politics, the divine order being superior to the human one. Earthly life served only the interest of preparing for eternity. But this situation was gradually changed when the impact of Christianity increased. The concept was increasingly affirmed that one could be faithful and, at the same time, live in this world, taking an interest in the problems of life, primarily seeking to resolve them in the light of the gospel.¹⁶ In the second century Christianity penetrated the various classes of society, and they started wondering how to behave as citizens. In the third century they reasoned that divine law and dogma dictated Christian politics.¹⁷

chapter V.

¹⁶. Cf. Biondi, *op. cit.*, pp.59, 67.

¹⁷. Zeiger, *op. cit.*, Vol.II, p.58.

The era of Constantine was profoundly religious. The question of religion surpassed every other one in importance. The general conviction increased that God is truly the supreme factor that governs the destiny of humankind in all its aspects. The idea of imperial power continued as the unifying agent of all peoples, but in complete dependence on God.¹⁸ As paganism receded and Christianity advanced, the emperors, becoming ever more conscious of the demands of the new social order, sought to elaborate Christianity in their laws.¹⁹ The laws of Constantine frequently exalt the *lex christiana, sanctissima lex, sacrosanctae religionis auctoritas*.²⁰ Arcadius wrote to his brother Honorius that God is ". .

¹⁸. Biondi, op. cit. p.46.

¹⁹. Ibid, p.44.

²⁰. See CT 16.2.5, A.D. 323; CT 16.5.1 (same as CI 1.5.1, A.D. 326); Sirm. I, A.D. 333.

. auctor nostri imperi et rei publicae, quam nobis credidit gubernator."²¹

This was a clear confession that the state must be governed by the grace of God. The state, therefore, must confess faith in the only God, and see to it that this faith is protected. The state as such became confessionist. This was openly proclaimed in the famous law *cunctos populos*,²² decreed by Gratian, Valentinian and Theodosius, with the purpose to make all nations accept the Catholic faith, invoking divine vengeance on all heretics *ex coelesti arbitrio*. Successive laws confirmed this, as the following quotations show.

. . . vera ratio divinae religionis. . . consideratio sacratissimae religionis et Christianae legis reverentia . . .ut verae ac Nicenae fidei sacerdotia casta permaneant....²³

²¹. Collect. Avellana, n. 38.

²². CT 16.1.2, A.D. 380.

²³. CT 12.1.112, Grat., Val., Theod., A.D.386; CT 15.7.4, idem,

According to Theodosius and Valentinian the purpose of the state is to maintain the (Christian) religion, ". . . *sit nobis cura diligens per omnia superni Numinis religionem tueri. . .*"²⁴ The divine law is considered as the highest norm to which everyone must conform his conduct. The law *cunctos populos* established the faith in accordance with the Nicene formula. From there numerous laws were enacted by the church.²⁵ The principal dogmas of the Catholic faith were recognized through legislation.²⁶

Once the state had become confessionist, it was a social evil to believe in a different religion, or to

A.D. 380; CT 16.1.3, *idem*, A.D. 381. (See also CT 15.7.9; 15.5.6; etc.).

²⁴. CI 1.8.1, A.D. 427.

²⁵. Biondi, *op. cit.* p.145.

²⁶. *Ibid*, p.152.

entertain unorthodox notions.²⁷ At this point the church was fully autonomous in religious matters. No interference by the state was tolerated here. The right and duty of the state was to assist and furnish temporal authority to the church to have its decisions executed.²⁸ Religious legislation grew increasingly imposing. From Constantine to Theodosius 150 laws were enacted concerning heretics, pagans and Jews. Both church and state pursued the same goal--the propagation of the Catholic faith.²⁹ The church and the state were having mutual difficulties, of course, but not because they tried to subjugate each other. It was a question of *reductio ad unum* of *duae potestates*, both considered as a gift from God.³⁰ The prime objective of the state was the union of and

²⁷. Ibid, p. 254.

²⁸. Ibid, p. 299.

²⁹. Ibid, p. 260.

³⁰. Ibid, p. 189.

peace in the empire (remember *pax romana*); the objective of the church was the same, but then for the church. Both used each other.

Troplong divides this period into three parts. The first leads up to the end of the third century. It is an era of fermentation and battle where the germs of new thought develop and have only an indirect influence. The second period brings us to the middle of the fifth century when the Christian religion becomes official and exerts direct influence. The third follows the CT and witnesses a certain victory of Christianity.³¹ Carusi subdivides this era into four periods with the development of the state on one side, and the development of Christendom on the other side. The first spans a period of apologetics--mainly Greek--and leads to the end of the second century. The second witnesses the elaboration of dogma and ends at the beginning of the fourth century. The third

³¹. E. Carusi, *Diritto Romano e Patristica*, Studi Fadda, 2, p.92.

leads to the middle of the fifth century, when the form of Christianity of the state gives way to the development of philosophical activity. The fourth period is characterized by the evolution of the elements of the preceding time-spans.³² The following quote sums this entire development up.

Le collezioni giustinianee rappresentano, sotto un certo aspetto, il punto terminale di una lotta secolare fra i principi giuridici pagani e cristiani. Lotta che durò per tre lunghi secoli; e che se pure non ebbe a cessare del tutto, si venne attenuando mano mano che i rapporti fra le due autorità supreme divennero più stretti, più intimi. Fra quelle due autorità, delle quali l'una teneva in pugno tutte le forze spirituale e materiali dei popoli sottomessi a Roma e uniti alla città dominante; l'altra sorta da poco, ma sorretta dal tenace proposito, nella foga giovanile della lotta, nell'ebbrezza del contrastato trionfo, di strappare all'Impero l'impero delle anime, di togliere ai dominatori il dominio spirituale del mondo. Le fasi di questa lotta rimangono scolpite in due raccolte che sfidano i secoli:

³². Ibid. For the secular side see *ibidem*.

anzitutto nelle fonti patristiche . . . in secondo luogo nelle collezioni giustiniane . . .³³

So far the historical background as to the relations between church and state. We will now concentrate on the councils, again giving a short historical introduction.

It was the episcopal authority, which was apparent already in the epistle of Clemens to the Corinthians,³⁴ that had the power of ". . . docendi, interpretandi, praeciendi, coercendi."³⁵ Episcopal authority was an important link in the chain that led up to the Fathers. Without it they would never have had such influence. Most of the Fathers were bishops.

³³. Roberti, op. cit. pp. 3, 4.

³⁴. I Clem. ad Cor., 42-4; 63-5.

³⁵. Zeiger, op. cit., Vol.II, p.37.

Synod law and provincial organizations evolved ". . . *ad imitationem Concilii primi Apostolorum.*" And as the number of believers grew it was found necessary to distinguish between lay people and clergy, which expanded into a hierarchy.³⁶ The episcopal synods were held after the pattern of provincial civil councils.³⁷

The causes of the evolution of canon law are two, namely the development of decisions made by the councils, and the social, economic and political developments in society that interact with these decisions. Here too, there are two camps of scholars. One side exaggerates the ecclesiastical rôle, the other side the political rôle.³⁸ Gaudemet³⁹ underestimates

³⁶. Ibid, p.38.

³⁷. Ibid, p.71.

³⁸. Ibid, pp. 17, 20.

³⁹. J. Gaudemet, *Droit romain et principes canoniques en matière de mariage en Bas Empire*, Studi

the influence of the church on Roman law in the fourth and fifth centuries. According to him the church simply followed Roman law, since they did not have their own code of law.⁴⁰ The Fathers 'simply' developed a theology of marriage. He admits, though, that there was a moral influence, particularly in cases of consanguinity and affinity.⁴¹

The Eastern church did not favour acceptance of western canon law as much as the West did from the East.⁴² The West was occupied above all with

Albertario, II (1953), p.180.

⁴⁰. Cf. Biondi, op. cit., pp.4, 189 (quoted earlier).

⁴¹. Gaudemet, *ibid*, pp.180,1; 190,1.

⁴². Zeiger, op. cit., Vol.I, p.35.

practical problems and the East with matters of dogma.⁴³

Civil customs were formed by the people, but Christian customs by the councils. The CT mentions only five councils,⁴⁴ but this does not mean that only these brought their influence to bear upon Roman law. Usually only the substance of the councils was incorporated, without referring to the origin.⁴⁵ Christian customs exerted social pressure on Roman law, the ecclesiastical councils actually produced Christian law.⁴⁶ The numerous references to the councils in

⁴³. Gaudemet, *La Formation du Droit*, op. cit. p.150, 1.

⁴⁴. Nicaea, A.D. 325: 16.1.3; Ephesus, A.D. 431: 16.5.66; Rimini, A.D. 359: 16.1.4; Constantinople, A.D. 360: 16.1.4; Sirmio; 16.5.5.

⁴⁵. F.G. Lardone, *Il Diritto Romano e i Concilii*, Acta Congressus Iuridici Internationalis II (1934), p. 104.

⁴⁶. Ibid, p. 103.

Roman law show that they were recognized as a juridical source. All councils in general were acknowledged as such, with this difference that the ecumenical ones had universal force, and the local ones regional. Moreover, all decisions of the local councils that were recognized by the great ecumenical councils had juridical value for the entire empire.⁴⁷ The church Fathers influenced Roman law both through the councils and through customs.⁴⁸ However, not the Fathers but the councils were the actual producers of Christian law. The Fathers were the interpreters and commentators of Christian law. But the councils imposed it on the Christian community. The councils were related to the Fathers as the old *senatus consulta* were related to the old jurisprudence.⁴⁹

⁴⁷. Ibid, p. 105.

⁴⁸. Ibid, p. 108.

⁴⁹. Ibid, p. 109.

Historically the juridical relation between *leges* and *canones* developed as follows. First both have their autonomous spheres of application. Then the canons are considered as superior ordinances of the divine law. Subsequently they become directives for the laws and consequently they are acknowledged as laws. So the civil laws were accepted by the church and the canons were received by the state.⁵⁰ The following quotation from the CI shows the important impact of the councils on Roman legislation.

Ac quoniam nostrae . . . leges sacros canones non minorem vim quam leges habere volunt, sancimus quod ad illos attinet valere quae sacris canonibus visa sunt ac si et civilibus legibus scripta essent Quod . . . sacri canones prohibent, id etiam nos legibus vetamus.⁵¹

⁵⁰. Biondi, op. cit., p. 240.

⁵¹. CI 3.44.1,4.

In this state of affairs laws were imposed ". . . à un double titre, comme prescriptions religieuses et comme lois de l'Etat. Une double sanction pouvait réprimer leur violation."⁵² In the case of marital laws this is exactly what was going on. At first Christians accepted Roman marital laws generally as sound legislation, then they added new ideas to them, and subsequently these ideas became both imperial as well as ecclesiastical statutes.⁵³ Both ancient Roman juridical ideas as well as purely Christian ones worked in this matter together.⁵⁴ There is no independent development on the side of Christian ideas, but rather a retreat of Roman law. This is corroborated by the fact that no ecclesiastical disposition is founded on an

⁵². Gaudemet, *L'Eglise*, op. cit. p.20.

⁵³. Cf. Gaudemet, op. cit. p.525.

⁵⁴. Leifer, op.cit. p.525.

argument of Roman law after the fourth century.⁵⁵ However, in the case of prohibitions of marriages between close blood relations, one might speak of an independent development. It is also these prohibitions that have the greatest direct influence on Roman law; particularly the idea of marital fidelity is independent of Roman law. Jerome proclaimed, "Aliae sunt leges Caesarum, aliae Christi...."⁵⁶

The Ecclesiastical Decisions in Chronological Order

The first council to deal with affinity is the council of Elvira in A.D. 306, canon 61. Their decision is:

Si quis post obitum uxoris suae sororem eius duxerit et ipsa fuerit fidelis, quinquennium a

⁵⁵. Carusi, op. cit. p.340.

⁵⁶. Ep. 77 ad Oceanum, 5,7.

communione placuit abstineri, nisi forte velocius dari pacem necessitas coëgerit infirmitatis.⁵⁷

In translation:

If, after the death of his wife, someone takes her sister into marriage and she has been faithful, it has been decided that he abstain from communion for five years, unless perhaps the necessity of illness forces (us) to give him the peace earlier.⁵⁸

⁵⁷. Charles J. Hefele, D.D., *A History of the Christian Councils* (Edinburgh: T.&T. Clark, 1894), p.164. See also *Histoire des Conciles* (New York: Georg Olms Verlag, 1973), Vol. I, p.256; Friedrich Lauchert, *Die Kanones der Wichtigsten Altkirchlichen Concilien nebst den Apostolischen Kanones* Leipzig: Akademische Verlagsbuchhandlung von J.C.B. Mohr, 1896), p. 23; and cf. Philo, *De Specialibus Legibus*, III, 27.

⁵⁸ A translation lacking I had to translate it myself. "It has been decided" is literally "it has pleased [us]." "That one give him" is literally "to be given."

Canon 66 of Elvira runs as follows:

Si quis privignam suam duxerit uxorem, eo quod sit incestus, placuit nec in finem dandam esse communionem.⁵⁹

In translation:

If somebody has taken his step-daughter into marriage, because he is incestuous, therefore it has been decided that not even at the end of his life communion will be given to him.⁶⁰

The synod of Neocaesarea (A.D. 314-325) in canon two rules on the opposite case of affinity.

γυνη εαν γημηται δυο αδελφοις, εξωθεισθω μεχρι θανατου, πλην εν τω θανατω, δια την φιλανθρωπιαν, ειπουσα ως υγιανασα λυσει τον γαμον, εξει την

⁵⁹. Hefele, *op.cit.*, p.257.

⁶⁰. Again a translation lacking, I had to give one myself. I translated in accordance with English grammar while staying true to the original.

μετανοϊαν. ἔαν δε τελευτηση ἡ γυνη ἐν τοιουτω γαμω οὔσα ἦτοι ὁ ἄνηρ, δυσχερης τω μειναντι ἡ μετανοι α.⁶¹

In translation:

Si une femme a épousé deux frères, elle sera excommuniée jusqu'à sa mort; si elle est en danger de mort et si elle promet, en cas de guérison, de rompre cette union illégitime, on pourra, par miséricorde, l'admettre à la pénitence. Si la femme ou le mari meurt dans cette union, la pénitence sera rigoureuse pour la partie survivante.⁶²

There is a Latin translation as well, which runs as follows:

Mulier si duobus fratribus nupserit, abicere debere usque ad diem mortis; sed propter humanitatem in extremis suis sacramentis conciliare oportet, ita tamen ut si forte sanitatem recuperavit matrimonio soluto, ad penitentiam admittatur. Quod si defuncta fuerit mulier in huiusmodi consortio constituta

⁶¹. Hefele, op.cit. p.328.

⁶². Ibid.

difficilis erit poenitentia remanenti: quae sententia tam viros quam mulieres tenere debbit.⁶³

The last sentence seems to be a clarification. In case of death the surviving party cannot undo the (sinful) union, so the punishment must be serious.⁶⁴ This is one of the most important texts against marriages that were considered too close. ". . . aparece en todas las colecciones canónicas y la pena que en él aplicaba para los consanguíneos se generaliza para todos los *incestuosos*."⁶⁵

The Roman synod of A.D. 402 decides the same. There are two versions of this canon (nine); the short

⁶³. R.F. Espinar, *Prohibiciones de Contraer Matrimonio entre Parientes en la Epoca Visigoda*, Revista de la Facultad de Derecho de la Universidad de Madrid, 6, 1962, p.390. The last sentence seems to have been added by St. Isidorus; see Hefele, op.cit., Vol.II, p.328.

⁶⁴. Espinar, *ibid*.

⁶⁵. *Ibid*.

one is based on the long original and is just a translation.

Aucun chrétien ne doit épouser sa belle-soeur; il ne doit non plus avoir, en plus de sa femme, une concubine.⁶⁶

The long original states the following:

De eo qui sororem uxoris suae duxerit uxorem in lege veteris testamenti scriptum est, ad suscitandum semen defuncti fratris oportere ducere uxorem, ita tamen si liberos ex eodem minime reliquisset. Inde est enim quod Joannes Baptista contradixit Herodi, quoniam non licebat ei accipere uxorem, quia de fratre reliquerat filios. Tamen propter virilem generationem legis constitutio imperabat hoc fieri a viro: de foeminis nusquam est lectum, sed forte praesumptum. Nam lex dicit: *Maledictus qui cum uxoris suae sorore dormierit*. Numquid duas habuit uxores Jacob uno in tempore sorores causa mysterii, & concubinas, & et omnes qui nati sunt patriarchae sunt appellati? Nunc jam Christianis habere non permittitur. Numquid uxores & concubinas habuerunt? Sed nunc hoc non patitur fieri

⁶⁶. Hefele, op. cit., Vol.II, p.136.

testamentum, ubi amplius de integritate tractatur, & castitas Christo docente laudatur, cum dicit: *Non omnes capiunt verbum Dei, sed quibus datur.*⁶⁷

In translation:

Concerning him that takes his wife's sister into marriage has been written in the law of the O.T. In order to raise offspring for the deceased one had to marry one's brother's wife, provided she had had no children by him. For therefore it is that John the Baptist opposed Herod, saying that it was not allowed to take his brother's wife, since she had children by him. But because of male offspring the law ordered this to happen as to the man: Concerning women it is read nowhere, but it is perhaps presumed. For the law says: *Cursed is the man that sleeps with his wife's sister.* Indeed did not Jacob have two sisters as wives at the same time because of a mystery and concubines, and have not all his sons been called patriarchs? Yet this is not now permitted to Christians.

⁶⁷. Joannes, D. Mansi, *Sacrorum Conciliorum Nova, et Amplissima Collectio* (Florentiae: Expensis Antonii Zatta Veneti, 1759), Vol.III, col. 1137.

But the N.T. does not allow this, since there is a wider sense of integrity, and chastity is praised by Christ who teaches that "Not all understand the word of G o d but to whom it is given."⁶⁸

Commentary

The eighteenth chapter of Leviticus is usually the foundation adduced by the Fathers to prohibit certain relations. From the N.T. Acts 15:19, 20 is sometimes quoted.⁶⁹ The council of Jerusalem decides there that the gentiles must abstain from 'fornication' (πορνεία). This general term includes all forms of sexual intercourse outside marriage.

⁶⁸. Yet again a translation lacking, I had to make one up.

⁶⁹. Espinar, op.cit., p.367, 8.

But in other cases, especially where the Bible cannot be directly quoted, the Fathers invoke 'nature' or 'natural shame' or 'the voice of nature.'⁷⁰ This was probably because Christ answered the Pharisees that from the beginning--meaning Adam and Eve--the institute of marriage was given in creation (read 'nature').⁷¹ Canon 61 is milder than the one dealing with the opposite case of affinity (of the first degree). For a man was not excommunicated, but had to abstain from the 'peace;' while a woman who married her husband's brother was excommunicated till she was in danger of dying. However the Syriac version of

⁷⁰. Ibid.

⁷¹. Mat.19:4 ff. Cf. also R. Orestano, *Alcune Considerazioni sui Rapporti fra Matrimonio Cristiano e Matrimonio Romano nell'Età Postclassica*, Scritti Ferrini, Pavia, 1946, pp.346, 360.

the canon is equally firm with the man.⁷² But also the Syrians gave the opportunity of penance (μετανοια, *poenitentia*) promised *in articulo mortis*. In the case of marriage with one's stepdaughter the punishment is more severe than in the case of marriage with one's sister-in-law. Not even on the death-bed will communion be given. This is understandable seeing that one's step-daughter is the flesh and blood of one's very own though former wife. In Leviticus 18 it is specifically forbidden to take a woman and her daughter. Canon 9 of the Roman synod refers to Lev. 18:18, condemning the marriage with one's deceased wife's sister. But all the arguments against such marriages forget to mention that in the original it says דְּחַיָּהּ, meaning "during her life." The levirate is implied to be an O.T. institute that does not conform with the

⁷². This version says: *Mulier, si duos fratres, et vir, si duas sorores duxerit, eiiciantur usque ad mortem . . .* (Hefele, op.cit., Vol.I, p.328).

higher spirituality of the N.T. The quotation from Matthew 19:11 shows that asceticism became the new morality. This is confirmed by the analysis of John the Baptist's condemnation of Herod. It is concluded that Herod was wrong because his brother's wife had had children, and so the levirate was not applicable; not because Herod's brother was still alive (a possibility that went beyond the ascetic conscience of the time). This new morality was first imposed on the clergy and later on the laity as well, except for celibacy. So canon 18 of the "Apostles" forbids:

ὁ δυο ἀδελφας ἀγαγομενος ἢ ἀδελφιδην οὐ
δυναται εἶναι κληρικός⁷³

⁷³. H.Th.Bruns, *Canones Apostolorum et Conciliorum Saeculorum IV,V,VI,VII*, (Berolini: Typis et Sumptibus G. Reimeri, 1839), p.3.

In translation:

He who has married two sisters (in succession) or a niece (brother's or sister's daughter) cannot be a clergyman.

The councils, however, base their new morality on the tradition of the church, they do not intend to establish something altogether new. So there are almost no councils in the IVth and Vth centuries that deal with marriages between cousins. But this subject is treated by several Fathers, and later is settled by canon law,⁷⁴ which shows that one tradition leads to another, usually stronger one. Remarriages are

⁷⁴. The sixth ecumenical council of A.D. 680 deals with this subject after it has become tradition. See Mansi, op. cit., Vol.XI, col.967. This canon (54) says that St. Basil spoke in general terms of affinity and consanguinity. The details are given here, e.g. *pater & filius, qui cum matre & et filia . . . vel fratres duo cum duabus sororibus*, etc.

frowned upon (see canon 3, Neocaesarea), especially when family is involved. This is because the church wanted to be on the safe side. The more ascetic one was, the safer. St. Basil was more ascetic than any of the Western Fathers. In general the Eastern Fathers are more influential *and* more ascetic.

The church borrowed from classical Roman jurisprudence the most important definitions and concepts, but gave them new interpretations according to contemporary insights.⁷⁵ Because of these interpretations marital laws were made stricter. Before Constantine Roman law did allow marriages between cousins and in-laws, after him this was changed. Therefore it bespeaks practically total ignorance to claim that Christendom had no influence on Roman marital law.⁷⁶ In fact, in matters of marriage between

⁷⁵. Urbano Navarrete, S.J., *Influsso del Diritto Romano sul Diritto Matrimoniale Canonico*, Apollinaris, 51, 1978, p.642.

⁷⁶. Leifer, op.cit. p.194.

family members there is a close parallelism between civil law and canon law.⁷⁷ This harmony culminates in the Visigothic era. Theodosian legislation in this matter was a decisive step towards the institute of matrimony as seen in the middle ages.⁷⁸ Biondi, on the other hand, goes too far and seems to romanticize this period in claiming that Roman law, under the Christian emperors, realized catholic law.⁷⁹ The time of Theodosius I was fertile for Christendom,⁸⁰ but Roman law became never as ascetic as the councils prescribed. The following sentence is therefore less impressive than it appears at first sight:

⁷⁷. G. Stanghellini, *Il Diritto Matrimoniale nelle Opere dei Padri della Chiesa*, Archivio Giuridico, 84, 1910, pp. 78,9.

⁷⁸. Espinar, op.cit. p.361.
See also Orestano, op.cit.p.346.

⁷⁹. Leifer, loc. cit.

⁸⁰. Ibid, p.195.

... De tal suerte los Emperadores se mostraron propicios a adaptar su legislación a los cánones eclesiásticos, en materia matrimonial, que no es raro que algunos eclesiásticos pidan al Emperador la publicación de alguna ley concreta, expresamente preparada par ello.⁸¹

So Arcadius wrote a law that was against the dominant stance of the church (CI 5.4.19), and Honorius' own marriages to two sisters were against CT 3.12.2.

If we compare pre-, and post-Constantine legislation on affinity and consanguinity, it is clear that civil legislation was influenced by the ecclesiastical councils. For before Constantine one was allowed to marry one's brother- or sister-in-law, as well as one's cousin; afterwards this was changed.⁸²

There is no reason to deny any influence of Christendom in this matter, nor to reject the idea of

⁸¹. Espinar, op. cit.
pp.358,9.

⁸². H. Brouwer, *De Iure Connubiorum* (Amstelodami: Apud Casparum Commelinum, 1665), pp.437, 474.

Caesaropapism. It should be evident that Christian theology left its stamp on the civil law-books. However, civil law did not follow the ecclesiastical morality all the way. We conclude, therefore, that the emperors, notwithstanding their individual differences, steered a middle course when it came to marital laws.

CHAPTER 3

Opinions of the Fathers

Patristics is little studied as a preparation for the study of imperial law.¹ We hope to have made it clear that the Fathers did influence late Roman law. Before Christian customs were legislated, they were practised by Christians generally through the influence of the Fathers.² "La patristica continua, come importanza e funzione sociale, la tradizione della giurisprudenza classica, quando i confini tra diritto e religione diventano sempre più sbiaditi e le due sfere tendono a coincidere."³

¹. B. Biondi, *Il Diritto Romano Cristiano* (Milano: Dott. A. Giuffrè-Editore, 1952), Vol.I, p. 89.

². M. Roberti, *Cristianesimo e Diritto Romano* (Milano: Societa Editrice "Vita e Pensiero," 1935), pp.32 sqq.

³. Biondi, op. cit. p. 90.

The effect of priests and bishops was considerable. For just as the ancient pagan rulers were fond of consulting famous jurists, so the ministers of the church stood in close relationship to the emperors to advise them in legal matters. Towards the end of the fourth century the figure of Ambrose becomes the most representative churchman of the entire empire. As a friend as well as a consultant of four or five emperors, Ambrose steered imperial legislation towards Christian legislation. The consequences of Ambrose's influence were so formidable that this period, both for the church and the state, could be called Ambrosian.⁴ Gaudemet seems to be wrong in arguing that the Fathers did not play a rôle in

4. Ibid, pp. 92 ff. This is also clear from a letter by Gratian to Ambrose: "Absent, vous vivez dans mon souvenir.. Hâtez-vous donc de venir vers moi. . .[From M.A. de Broglie, *L'Église et l'Empire Romain au IV Siècle* (Paris: Libraire Académique, 1869), Vol.II, p.5].

legislation. He bases this assertion on the fact that the constitutions never refer to the Fathers as their source.⁵ It should be clear from the earlier chapters that *patres ecclesiae* did play a rôle. Violardo states it as follows:

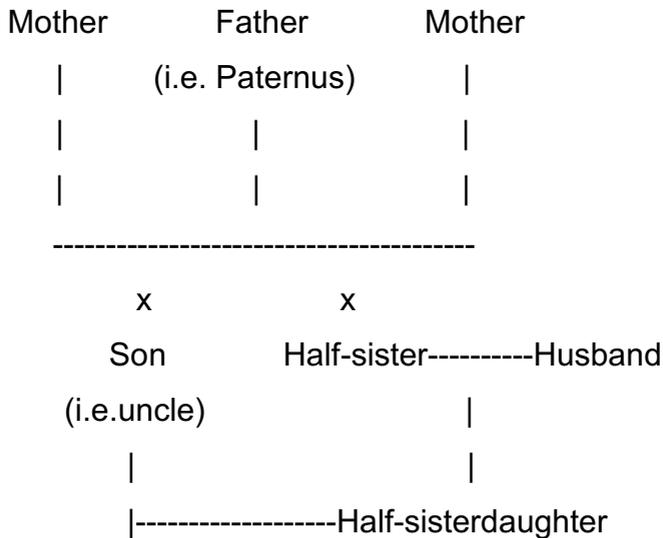
Ognun sa, infatti, che la materia del matrimonio ebbe a subire, nelle mani del legislatore romano, continue e gravissime mutazioni e che, specialmente gli elementi costituenti l'essenza del matrimonio, furono variamente valutati ed elaborati nelle diverse epoche dello svolgimento del diritto romano; così è anche chiaramente ammesso che il principale fattore e, per alcuni elementi, l'unico fattore di tale profonda evoluzione fu il Cristianesimo.⁶

5. J. Gaudemet, *La Formation du Droit Séculier et du Droit de l'Église aux IV et V Siècles* (Paris: Sirey, 1979), p.206.

6. G. Violardo, *Appunti sul Diritto Matrimoniale in S. Ambrogio in Sant'Ambrogio nel XIV Centenario della Nascita*, 1940, p. 487.

Consanguinity

Here follows the schema of Ambrose's letter to Paternus.⁷



7. Paternus was probably an important man as may be inferred from Ambrose's words '*. . . imperatorum, a quibus amplissimum accepisti honorem. . .*' Some think that he was the same person to whom Theodosius addressed CT 10, 19, 14. Ibid. p. 488.

Quid enim est quod dubitari queat; cum lex divina etiam patruales fratres prohibeat convenire in conjugalem copulam, qui sibi quarto sociantur gradu? Hic autem gradus tertius est qui etiam civili iure a consortio coniugii exceptus videtur . . . cum leviora interdicta sint de patruelibus fratribus, multo magis hoc quod arctioris est plenum necessitudinis, interdictum arbitror ...Quanta huiusmodi invenies non esse interdicta lege per Moysen edita, et tamen interdicta sunt quadam voce naturae.⁸

In translation:

For what is it that can be doubted; since the divine law also prohibits children from two brothers to marry each other, who are relatives in the fourth degree.⁹ Here, however, we have the third degree of kinship, which is excluded from union in marriage by civil law as well... As there is a prohibition in the less serious case of first cousins, I think all the more there is a prohibition in the present case, where we have a much closer relation of kinship . . .How many things of this

8. P.L. 16. 1184.

9. In the Latin this is called a marriage four degrees apart.

sort you can find, that are not forbidden by the law of Moses, and nevetheless they are forbidden by a certain voice of nature.¹⁰

This kind of marriage was not forbidden by the laws of Constantius and Constans.¹¹ Ambrose does not seem to be quite right in stating that this marriage is one of the third degree. For the sister of Paternus' son was a half-sister. However, it must be said that Ambrose was perfectly correct in following the Roman way of computing degrees, thus setting an example for the church.¹² That this marriage is not exactly one of

10. My own translation.

11. G.H. Joyce, *Die Christliche Ehe* (Leipzig: Verlag von Jakob Hegner, 1934), pp. 449, 624.

12. A. Knecht, *Handbuch des Katholischen Eherechts* (Freiburg im Breisgau: Herder & Co. GMBH, erlagsbuchhandlung, 1928), pp.473 ff.; J. Freisen, *Geschichte des Kanonischen Eherechts* (Paderborn: Scientia Verlag, 1893), pp.407 ff.

the third degree may be evident from the fact that there is a half-sister involved. But Roman law did not have a method of computation for that. Considering that the proposed marriage was indeed one of the third degree, when one reckons only Paternus as the common stock, it is quite understandable that Ambrose recoiled, particularly seeing that cousins are one degree further apart. We do not understand why Ambrose mentions that the 'divine law' forbids first cousins to marry. He seems to contradict himself here, for he implies that God as the Creator of nature is stricter than as the Legislator in the Bible. This is odd when one reads the next citation.

The following quotation is from Augustine.

Experti autem sumus in connubiis consobrinarum etiam nostris temporibus propter gradum propinquitatis fraterno gradui proximum, quam raro per mores fiebat, quod fieri per leges licebat; quia id nec divina prohibuit, et nondum prohibuerat lex humana. . . et quod fiebat cum consobrina, paene cum sorore fieri videbatur. . .

Verum quis dubitet honestius hoc tempore etiam consobrinorum prohibita esse conjugia? . . . sed etiam quia nescio quomodo inest humanae verecundiae quiddam naturale atque laudabile. . .¹³

In translation:

And we have observed that the marriage of first cousins, because of the degree it holds next unto brother and sister, has been very rare in these later times of ours: and this because of good custom to the contrary, though the laws allowed it, for the law of God has not forbidden it, nor as yet had the law of man. . . and that which one does with his cousin, he almost thinks that he does with his sister . . . But without any question the prohibition of the marriages of first cousins is very proper . . . and partly because there is a certain laudable natural instinct in a man's shamefacedness . . .¹⁴

Notice how both Ambrose and Augustine have recourse to 'nature' and a certain 'natural shrinking' or

13. De Civitate Dei, 15. 16.

14. *The City of God*,
(Londodn: J.M. Dent & Sons Ltd., 1947),
p.81.

'shame.' This is undoubtedly a result of their ascetic attitudes. Augustine actually considers marriages between cousins almost as close as marriages between brothers and sisters. Totally opposite to this kind of feeling is the Dutch saying that "Neef en nicht vrijt licht," that is "Cousins are quickly sexually attracted to each other."

In the same chapter Augustine uses the term *ratio rectissima caritatis*. This expression means the same as *seminarium civitatis* and *seminarium caritatis*. The last one is an interpolation according to Gaudemet.¹⁵ The idea behind these terms is that marriage should be exogamous. We quote:

C'est lui qui, dans son *de civitate Dei*, expose cette thèse, que le mariage doit être une semence

15. J. Gaudemet, *L'Apport de la Patristique Latine au Décret de Gratien en Matière de Mariage* in *Studia Gratiana*, II, pp. 59, 60.

d'amour, *seminarium charitatis*; qu'il doit, par l'alliance, unir des personnes jusque-là étrangères les unes aux autres; qu'il serait donc contraire au but de l'institution d'unir par le mariage des personnes déjà unies par la parenté.¹⁶

This idea became increasingly popular as the ascetic attitude of Christians grew. To the modern mind this may all seem legalistic, and it is, but we have been affected by levity and a dangerously careless sexuality. Who will establish the *aurea mediocritas*!

There once was a law, not extant now, promulgated by Theodosius the Great, which forbade marriages between cousins "*tantum pudori et continentiae tribuens. . . ut sorores et consobrinas pari aequabilique iure censeret.*" Brouwer says that this law was passed at the advice of Ambrose.¹⁷ Since

16. A. Esmein and R. Génestal, *Le Mariage en Droit Canonique* (Paris: Recueil Sirey, 1929), p. 373.

17. H. Brouwer, *De Iure Connubiorum* (Amstelodami: Apud Casparum Commelinum, 1665), p. 437.

there are no conciliar decisions from the IVth and Vth centuries against marriages between cousins, we must conclude that the laws that forbade these marriages were decreed at the instigation of the Fathers. The first council to condemn this kind of marriage officially was the council in Trullo in 692 A.D. In canon 54 this is restricted to the daughter of one's father's brother.¹⁸ It may seem strange that Brouwer claims that all first cousins were forbidden to marry.¹⁹ But it is not when one takes into account that the participants of the council mention *patruus* as an inclusive rather than exclusive example. In other words, it implies all the other first cousins. Perhaps the early councils did not bother to deal with the subject because Christians in general were ascetic enough. They needed not to be told again through ecclesiastical law. The Fathers had

18. J.D. Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, Vol.XI, column 967.

19. Brouwer, *op. cit.* p.439.

long since dealt with it. There is one canon, however, to be placed just before or after A.D. 400, that forbade the marriage with the son of one's uncle. This prohibition was based on the idea that exogamous bonds "purge" us, whereas such a marriage would be fornication and a violation and questionable return into the father's or mother's bosom.²⁰

Biondi apparently believes that Arcadius changed his father's law due to divergent points of view

20. The passage runs: *Avunculi filium ducere non licet, quoniam similis causa generando per gradus patris extranei separatur atque purgatur, retro autem redire fas non est; nam qui torum patris vel matris violare praesumpserit, non hoc conjugium sed fornicatio nominatur.* H. Th. Bruns, *Canones Apostolorum et Conciliorum Saeculorum IV, V, VI, VII*, (Berolini: Typis et Sumptibus G. Reimeri, 1839), p. 280; see also C. J. Hefele, *Histoire des Conciles* (Paris: Letouzey et Ané, 1908), Vol. II, p. 137, and Esmein-Généstal, *op. cit.* p. 374, n. 1.

between Eastern and Western Christians.²¹ This looks like a mistake since the East was overall more ascetic than the West, however this is not a mistake when one bears in mind that it was the Eastern Fathers that were generally more ascetic than the Western Fathers. In fact Arcadius acted according to the will of the people.²² So Arcadius did not act on his own like his brother Honorius, who married two sisters in succession. These marriages were against the preponderant outlook. (It must be added that Honorius was very young and under the influence of his tutor Stilicho, as is plain from the *Annales* of *Zonaras*, book XIII, 21).

21. Biondi, op.cit., Vol.III, p.95.

22. A. Esmein and R. Génestal, op. cit. p. 374.

Affinity

The term *affinitas* does not have a fixed meaning in ecclesiastical use. It can mean 'propinquity' and even 'consanguinity'!²³ In our thesis it has of course the meaning of *affinitas legitima*, that is 'legal affinity on the basis of marriage.'

The early church was against marriages with one's in-laws after one's wife or husband had died. Basil, archbishop of Caesarea, wrote a famous letter²⁴ to a certain Diodorus, informing him that a spurious letter circulated, bearing Diodorus' name. Basil's letter, along with the one addressed to Amphilochius,²⁵

23. Freisen, *op.cit.* p.439.

24. R.J. Deferrari, trans., *Saint Basil, the Letters* (New York: G.P. Putnam's Sons, 1928), Vol.II, pp.398 ff; #90 (160).

25. The arguments used in the letter to Amphilochius have even become canons!

became very influential in forbidding this kind of marriage. The following quotations from it sum up Basil's arguments.

Πρῶτον μὲν οὖν, ὃ ἔχομεν προβάλλειν νόμου δύναμιν ἔχον διὰ τὸ ὑφ' ἁγίων ἀνδρῶν τοὺς θεσμοὺς ἡμῖν παραδοθῆναι.

Οὐ γὰρ ἔτι εἶσι δύο, ἀλλὰ σὰρξ μία. Ὡστε διὰ τῆς γυναικὸς ἢ ἀδελφῆ πρὸς τὴν τοῦ ἀνδρος οἰκειότητα μεταβαίνει.

Τὸ γὰρ Οὐκ εἰσελεύση πρὸς πάντα οἰκεῖον σαρκὸς σου, ἀποκαλύψαι ἀσχημοσύνην αὐτῶν ἐμπεριεκτικόν ἔστι καὶ τούτου τοῦ εἶδους τῆς οἰκειότητος.

Ἐκ ποίας συγγενείας τοὺς γεννηθέντας προσαγορεύουσιν; Ἀδελφοὺς αὐτοὺς ἀλλήλων ἢ ἀνεψιοὺς προσεροῦσιν; Ἀμφότερα γὰρ αὐτοῖς προσαρμόσει διὰ τὴν σύγχυσιν.²⁶

In translation:

In the first place--a consideration that is very important in such matters--there is the custom observed among us, which we can cite in defence of our position, a custom having the force of a law, because

26. Deferrari, loc. cit.

our ordinances have been handed down to us by holy men.

For "they are not two, but one flesh." Therefore, through the wife the sister passes into relationship with the husband.

That passage: "*No man shall approach to her that is near of kin to him, to uncover her nakedness,*" also includes this form of relationship.

Under what heading of relationship will those who marry sisters name their sons? Will they call them brothers or cousins of one another? For both names will be appropriate on account of the confusion.²⁷

These are the four arguments quoted, more briefly, by Gothofredus.²⁸ The third citation precedes the second one in the original letter.

27. Ibid.

28. Jacobus Gothofredus, *Codex Theodosianus cum Perpetuis Commentariis* (Lugduni: Ioanne-Antonius Huguetan & Marcus-Antonius Rauaud, 1665), p.338.

One could cite two more arguments however.

Οἱ δὲ οὐδὲ πρὸς τὴν φύσιν ἀποβλέπουσιν, οἱ τὴν ψυχὴν λημῶντες τῷ πάθει τῆς ἀτιμίας, πάλαι διακρίνασαν τὰς τοῦ γένους προσηγορίας.

Μόνον γὰρ τὸ μῖσος τῶν μητριῶν καὶ μετὰ θάνατον ἐλαύνει τὴν ἐχθραν. Μᾶλλον δὲ οἱ μὲν ἄλλως πολέμιοι τοῖς τεθνηκόσι σπένδονται, αἱ δὲ μητρυαὶ τοῦ μίσους μετὰ τὸν θάνατον ἀρχονται.

In translation:

But those whose souls are blinded by their infamous passion do not look even at nature, which long ago distinguished the several titles of kinship.

For it is the race of stepmothers alone which carries its hatred even after death; or rather, those who are in any other manner hostile to the dead make their peace with them, but stepmothers begin their hatred after death.

The fifth argument is different from the fourth in that it argues that nature is the cause that we distinguish between cousins and brothers and sisters. The sixth quotation, besides stating that stepmothers

experience great difficulty accepting their step-children, seems to imply that all second marriages are wrong. And indeed, particularly by the Eastern Church, these were regarded as a sign of incontinence, and a penalty in the form of penance was imposed on the contracting parties.²⁹ That the letter is pregnant with indignity and emotion can be shown from the following list of terms.

'lovers of flesh'

'pleasure-lovers'

'passion'

'diabolical filth'

'iniquitous passion'

'impudent desire'

'impure passion'

'such a great evil'

29. Deferrari, *op. cit.*,
Vol.III, p.25.

Basil states that intuition (ἡ παρ᾽εκάστου πρόληψις) is stronger than reason. Also he ranks the subject of his letter among 'the very obvious things.' To theologians before and in the time of Henry VIIIth this was not a problem with an obvious solution. However most Christians in Basil's time would have considered this a very clear question.

The first quotation speaks for itself (tradition is against). The second argues that through marriage the in-laws come into a consanguineous bond with marital partners. The third citation elevates the in-laws, even after the death of one's partner, to the level of one's very own family. Just as one cannot marry one's sister so not the sister of one's deceased wife. The fourth argument could easily be countered with the answer that the parties are not cousins of one another, but stepbrothers. To the argument that Leviticus 18:18 holds only as long as one's partner lives, Basil answers as follows (in the same letter).

1. Πρὸς δὴ τοῦτο πρῶτον μὲν ἐκεῖνο ἔρω· ὅτι, ὅσα ὁ νόμος λέγει, τοῖς ἐν τῷ νόμῳ λαλεῖ· ἐπεὶ οὕτω γε καὶ περιτομῇ, καὶ Σαββάτῳ, καὶ ἀποχῇ βρωμάτων ὑποκεισόμεθα. οὐ γὰρ δὴ, ἐὰν μὲν τι εὐρωμεν συντρέχον ἡμῶν ταῖς ἡδοναῖς, τῷ ζυγῷ τῆς δουλείας τοῦ νόμου ἑαυτοὺς ὑποθήσομεν, ἐὰν δέ τι φανῇ βαρὺ τῶν νομίμων, τότε πρὸς τὴν ἐν Χριστῷ ἐλευθερίαν ἀποδραμούμεθα. ἠρωτήθημεν εἰ γέγραπται λαμβάνειν γυναικὰ ἐπάδελφῆ. εἶπομεν, ὅπερ ἀσφαλὲς ἡμῖν καὶ ἀληθές, ὅτι οὐ γέγραπται. τὸ δὲκ τῆς τοῦ ἀκολουθοῦ ἐπιφορᾶς τὸ σιωπηθὲν συλλογίζεσθαι νομοθετοῦντος ἔστιν, οὐ τὰ τοῦ νόμου λέγοντες· ἐπεὶ οὕτω ἔξεσται τῷ βουλομένῳ κατατολμῆσαι καὶ ἔτι ζώσης τῆς γυναικὸς λαμβάνειν τὴν ἀδελφὴν. τὸ γὰρ αὐτὸ τοῦτο σόφισμα καὶ ἡκεῖνου ἀρμόζει. γέγραπται γάρ, φησὶν· οὐ λήψη ἀντίζηλον, ὡς τὴν γε ἔξω τοῦ ζήλου λαβεῖν οὐκ ἐκώλυσεν.

2. Ἐοικε γὰρ οὐ πᾶν εἶδος ἁμαρτημάτων περιλαμβάνειν ὁ νομοθέτης, ἀλλιδίως ἀπογαρεύειν τὰ τῶν Αἰγυπτίων, ὅθεν ἀπῆρεν ὁ Ἰσραήλ, καὶ τὰ τῶν Χανααίων, πρὸς οὓς μεθίσταται. ἔχει γὰρ οὕτως ἡ λέξις. κατὰ τὰ ἐπιτηδεύματα γῆς Αἰγύπτου, ἐν ἧ παραγκήσατε ἐπαυτῆς, οὐ ποιήσετε· καὶ κατὰ τὰ ἐπιτηδεύματα γῆς Χαναάν, εἰς ἣν ἐγὼ εἰσάξω ὑμας ἐκεῖ, οὐ ποιήσετε, καὶ ἐν τοῖς νομίμοις αὐτῶν οὐ πορεύσεσθε. . . πῶς οὖν, τὸ μεῖζον ἀπαγορεύσας, τὸ ἔλαττον ἐσιώπησεν; ὅτι ἐδόκει πολλοὺς τῶν φιλοσάρκων, πρὸς τὸ ἔτι ζώσαις ἀδελφαῖς συνοικεῖν, τὸ ὑπόδειγμα βλάπτειν τοῦ πατριάρχου.

In translation:

1. In reply I have this to say in the first place: that whatever the law says, it says to those who are within the law; since, if the law is interpreted in this way, we shall be subject to circumcision also, to the observance of the Sabbath, and to abstinence from meats. For surely it cannot be that, if we find anything in the law which fits in with our pleasures, we can subject ourselves to the yoke of servility to the law, but if any of the provisions of the law appears harsh, we can have recourse to the freedom which is in Christ! We were asked whether it is written that a man may take a woman as a wife after her sister. We said what in our opinion is incontestable and true--that it is not so written. But to reason out by the application of logical inference a point which has been passed over in silence in the law is a matter for the lawgiver and not for him who recites the provisions of the law; for in the latter event it will be possible for anyone who so wishes to presume to take the sister even while the wife is still living. For he applies this same sophism in the following argument also. For it is written, he says, "*Thou shalt not take thy wife's sister for a harlot to rival her,*" so that the law did not prohibit taking the woman who is outside of rivalry.

2. For the lawgiver does not seem to be covering all sorts of sin, but to be forbidding particularly the sins

of the Egyptians, from whom Israel had gone forth, and those of the Canaanites, to whom Israel was migrating. The words read as follows: "You shall not do according to the custom of the land of Egypt, in which you dwelt:neither shall you act according to the manner of the country of Canaan, into which I will bring you, nor shall you walk in their ordinances. . . How was it, then, that while forbidding the greater, he kept silent about the less? It was because the example of the patriarch seemed to harm many of those who were given over to the flesh, inducing them to cohabit with sisters still living.

These two quotations can be subdivided into five sections.

1. Everything the law says, is said to those under it.
2. Since we are not under the law, we do not practise circumcision, or keep the Sabbath.
3. But we do not have the freedom to reject or accept anything in the law at will.

4. Leviticus 18:18 does not imply that one can marry one's deceased wife's sister. Inferences can only be drawn by the legislator, i.e. God. For else one might conclude that one can marry the second sister, while the first one is still alive; because one could argue that the two sisters are not jealous of one another.

5. The legislator does not mention every kind of sin, but only those of the Egyptians and Canaanites. The lesser sin is passed over in silence because it follows from the greater one, which is mentioned because many Jews followed the example of the patriarch (likely Jacob).

Between the first and third statements there seems to be a *contradictio in terminis*. It would take too much space to harmonize the two. An adequate response to this problem would have to discuss the differences between law and grace, and would show us what morals are still binding on us. Section four is rather

poor. If one is not allowed to draw inferences from the law, then one is confined to very restricted, if not impossible, interpretations. And what about allegorical and prophetic exegeses? One would be confined to the literal level. The fifth assertion is also weak. To the argument that in the Old Testament the levirate marriage was actually obligatory, Basil would have replied that under the new covenant, the New Testament, things were different. The new covenant, according to the Fathers, exacts a stricter morality. This means that things such as polygamy were allowed before, but not now. Apparently Basil did not consider it necessary to advance a hermeneutics that explains which things under the old covenant are still to be observed and which not. This was not necessary as most of his readers would consider it a foregone conclusion. It goes beyond the scope of this thesis to answer a question as why Basil might have employed the same law (Lev.18:18) as was used in the days of the Old Testament to come to a conclusion that

condemns the levirate (arguing of course that just as a man should not marry his deceased wife's sister, so a woman cannot contract a marriage with her deceased husband's brother). Naturally this would mean a contradiction, as both the Jews and the Christians of Basil's time, would place the same verse in opposing contexts. The answer would involve a complete Christian theology over against Judaism.³⁰ To be sure, for the reason mentioned in chapter two, this verse cannot really be used against the levirate, but Basil very well may have used it. A Jew in his time would have answered that the verse only condemns the

30. In our opinion the difference between O.T. Judaism and N.T. Christianity is summed up adequately by the following verses, viz. Deut.28:1 ff. and Eph.1:3. The former promises *earthly* blessings, and the latter states that the position of the Christian is *heavenly*. The levirate took an important place in the former; in the latter there was no place for it, certainly not when it led to polygamy.

levirate in the case where it would mean that one had to take a sister into marriage while married at the same time to another sister of the same person.

The following two quotations are from Basil's letter to Amphilochius, namely canons twenty-three and seventy-eight.

Περὶ δὲ τῶν δύο ἀδελφᾶς γαμούντων, ἢ ἀδελφοῖς δυσὶ γαμουμένων, ἐπιστολίδιον ἡμῖν ἐκπεφώνηται, οὐ τὸ ἀντίγραφον ἀπεστείλαμεν σου τῇ εὐλαβείᾳ. ὁ δὲ ἀδελφοῦ ἰδίου γυναῖκα λαβὼν οὐ πρότερον δεχθήσεται πρὶν ἀποστῆναι αὐτῆς.³¹

Ἄλλο δὲ αὐτὸς τύπος κρατεῖτω καὶ ἐπὶ τῶν τὰς δύο ἀδελφᾶς λαμβανόντων εἰς συνοικέσιον, εἰ καὶ κατὰ διαφόρους χρόνους.³²

In translation:

Concerning those who marry two sisters, or are married to two brothers, a letter has been published by

31. Deferrari, *op.cit.*, Vol.III, p.115.

32. *Ibid*, p.259.

us, a copy of which we sent to your Piety. But he who takes the wife of his own brother shall not be received until he depart from her.

Let the same regulation obtain also respecting those who take two sisters in marriage, even though at different times.³³

Elaborations

From the foregoing the attentive reader can enumerate the reasons for marital law as being five, namely:

1. natural law,
2. divine law,
3. tradition,
4. Roman law,
5. ecclesiastical law.

Ecclesiastical law accepted Roman law insofar as the two agree. But where Roman law is considered

33. Ibid.

incompetent or unjust, the church became activist.³⁴ This may be gathered from Ambrose as quoted by Violardo at length,³⁵ for instance, "Ea quae sunt divina imperatoriae potestati non esse subiecta," and "Noli te gravare, imperator, ut putes te in ea quae divina sunt imperiali aliquod jus abere," and so on. In the preceding chapter we gave already the relation between Roman and ecclesiastical law. We repeat it here, quoting Violardo:

Pertanto, il diritto romano che, senza abbandonare l'architettura data dai giureconsulti al matrimonio, ne interpretava tuttavia i testi con un senso nuovo al fine di fare aderire la legislazione alla realtà nuova creata dal Cristianesimo, doveva dare alle definizioni classiche una diversa interpretazione che della nuova realtà sociale accettasse la sostanza.³⁶

34. Cf. J. Palanque, *S. Ambroise et l'Empire Romain* (Paris: n.n., 1933), pp. 355 ff.

35. Violardo, op. cit. p. 491.

36. Ibid. p. 497.

For example the definition of Modestinus³⁷ "*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio,*" was applied to pagan cults as far as *communicatio divini juris* was concerned. But under Justinian this was applied to the Christian faith, and here the so-called *paritas cultus*, according to which both spouses had to maintain the purity of the faith in deciding whom they married, played a role.^{38 39}

37. One of the five jurists, among whom were Paulus and Ulpian, named by the Western emperor Valentinian III to define doctrines to be followed by judges in deciding cases.

38. Mixed marriages were forbidden, cf. CT VIII 7. 5. and III 7. 2.

39. Violardo, op. cit. p. 497 (see also n. 1. p. 494).

According to ancient Roman marital law the two constituting elements of marriage were a factual living together and marital "affection." Ambrose and Augustine accentuated the latter element, not to say that they absolutized it, in arguing that "*non enim defloratio virginitatis facit coniugium, sed pactio coniugalis.*"⁴⁰ According to ecclesiastical law consensus made marriage, according to Roman law "*deductio in domum mariti.*" Justinian law was in less contrast with this in exacting only "*affectio maritalis.*" For Christianity marriage was insoluble. Justinian law never went so far, however Justinian did make the marriage bond firmer by accentuating *affectio maritalis*. In fact, the first element of the Roman marriage, a factual living together, became neglected in postclassical and Justinian marital law.⁴¹ It goes beyond the scope of this thesis to prove this and to substantiate the claim

40. P.L. 16. 330-31.

41. Violardo, *op. cit.* pp. 498-506.

that this came about through the influence of the Fathers.

CHAPTER 4

Consanguinity and Affinity in the XVIIth Century

We have already quoted from the Dutch jurist Brouwer. In this chapter we will see what he has to say on early civil and canon law in connection with the subject of this thesis.

Brouwer is a good example of what happened after the Reformation. Early discussions often took for granted that Scripture alone would convince anyone of good will. But the second generation concluded that problems were not solved so easily, and thus they looked for arguments from Antiquity, Rabbinic, Roman, and Catholic. The motto *sola scriptura* became a universal principle that served as a guide in many particulars. Thus entire tomes were written on the matter of marital laws. Catholics drew up extensive elaborations on their casuistry; Protestants were in reality more restrictive in their laws than the Catholics, who by way of dispensations allowed marital bonds

between closer affines and consanguines. Where the Catholics tended to back away from their early rigorism, the Protestants actually embraced it, as can be seen in the famous example of Henry VIII.

Thy Brother's Wife

As to the levirate, Brouwer has much to say, adducing accounts like the ones about the Biblical figures of Ruth and Tamar, and quoting various scholars.¹ One savant claimed that Lev.18:16 is a 'political' statement on the part of God, exacted by necessity or expediency, not by nature. Another argued that one is permitted to marry one's brother's wife after his death and that Herod would not have been condemned by John the Baptist had this been the case. Otherwise the levirate would imply a

1. H. Brouwer, *De Iure Connubiorum* (Amstelodami: Apud Casparum Commelinum, 1665), pp.465 sqq.

contradiction on God's side, according to him. Calvin and others attempted to overcome this alleged difficulty by assuming that the levirate as demanded by the divine law in Deuteronomy 25 refers to more remote consanguines than brothers. The custom as witnessed in the family of Tamar clearly pronounces against this view. Also the question posed to Christ by the Sadducees about a woman and her six brothers-in-law is evidence to the contrary. Again others reasoned that ancient Israel was not only divided into tribes, but also into families with their respective firstborns.

Brouwer concludes with his own opinion that what is shameless (*inhonestum*) to us can be demanded by God, in the case of the levirate, as honourable (*honestum*), since He is above the law and above human reasoning. Justifiably he lashes out against the opinion that Leviticus 18 solely prohibits adultery and fornication. For else one could marry

one's own mother upon the death of one's father, one's mother, who is one's father's nakedness.²

Brouwer admits that the divine law has not expressly forbidden a marriage between a man and his

2. The question may arise why one should be allowed to marry one's deceased wife's sister, but not one's deceased son's wife (Lev.18:15), or one's step-daughter (Lev. 18:17).

The answer lies in the word **שֶׁטֶף** (v. 17 'relations'), which means literally 'her flesh;' the same word as in the verses 12 and 13. One's very own flesh, ranging from father and mother to step-daughters and sons, are consanguines. One's pure affines, a brother-in-law on the husband's side being a consanguineous affine, are never called one's own flesh, and that is why one is allowed to marry them. Legions of jurists, theologians, and other scholars have mixed them up, which causes confusion, transferring just shame for one's consanguines and projecting it onto one's affines. See appendix II and III for more.

deceased wife's sister.³ But he argues that one must draw inferences from what is explicitly forbidden to what is implicitly forbidden. For reasons that have been discussed already his entire ratiocination fails. In this passage he devotes much space to countering the assertion that Scripture asserts that the nudity or shame of a woman is her husband's, but not vice versa. According to this theory one could marry one's wife's sister while the former is still alive. Apparently this argument was used for a relationship ensuing the death of the former. Brouwer replies that a woman has equal 'power' 'authority' (*potestas*) over the husband⁴, otherwise one could reason that there is nothing against contracting a marriage with one's stepdaughter,

3. Op. cit. pp 468,9.

4. Perhaps he has 1 Cor.7:4 in mind, where Paul clearly states that the wife has equal 'power,' or authority (*potestas*) over her husband's body.

seeing that her 'nakedness' is not one's wife's, in whose case there is a categorical defence.

Brouwer quotes Plutarch and Apuleius when he mentions that Marcus Crassus married his brother's widow, and Pudentilla her deceased husband's brother. He states that ancient Roman opinion fluctuated in this matter, and for the better when better educated (*melius edocti*) emperors forbade this kind of union. He adds that Honorius married the two daughters of Stilicho in succession when he was still very young, and that he changed the law at a more mature age, in CT 3.10.11.

Brouwer's argument against such marriages is that husband and wife become one flesh or person. This precludes polygamy, and, according to Brouwer, also relations with one's direct in-laws after the death of one's partner. However, here he goes beyond the divine law. For one's sister-in-law is to be regarded as one's very own sister as long as one's wife lives. This is the difference between consanguinity and affinity. Unfortunately we are prone to confuse them.

Cousins

Cousins, in Latin *consobrini*, *patruales*, or *amitini*⁵, were allowed to marry each other in ancient times as we have seen in the preceding chapter. Theodosius the Great was the first to alter this. Brouwer affirms that nature does not preclude marriages between cousins, for they are not one blood in their grandfather (. . . *in avo unus sanguis est.* . .) like a brother's son and his uncle (. . . *filius ex fratre cum patruo.* . .)⁶, and therefore natural turpitude is altogether taken away (. . . *per consequens nuptiarum naturalem foeditatem prorsus tollit.* . .).

5. Respectively born from two brothers, brother and sister (also called *matruales*), and two sisters.

6. Brouwer, op. cit. pp 436 ff. Compare the marriage between Claudius and Agrippina, which was condemned by various Roman writers as incestuous (see Brouwer p. 431).

Brouwer continues, saying that the divine law is congruent with nature, considering that Biblical figures like Jacob and Rachel married each other. He mentions that canon law⁷ forbade such marriages at least up to the fourth degree inclusive, that is first cousins, because there are supposedly four fluids in the human body that are made up out of the four elements. However, in his time one could obtain a dispensation from the government, except in Transsylvania. In the Netherlands such a dispensation was not necessary.⁸

7. Unfortunately Brouwer alludes to canon law very sporadically indeed. This is the only instance I found related to the thesis.

8. *Illustriss. Ordines nostri juris naturae simplicitati inhaerentes, divinae legis premunt vestigia, nec ut foedas, nec illicitas damnunt nuptias, quas auctor naturae & omnium perfectissimus legislator foeditatis non accusavit.*

According to Brouwer's own opinion--and here he quotes Augustine--it is better to abstain from such a marriage, seeing that ". . .*hoc ab Ecclesia tempore Augustini observatum fuit. . .*"⁹

Affinity

We have already given a definition of affinity. Here we will give a few more as found in Brouwer.

Definitur nobis affinitas, ex conjunctione viri & foeminae profluens amica necessitudo inter maritum & uxoris suae, inter uxorem & mariti sui cognatos.

Definitur affinitas, propinquitas personarum ex carnali copula proveniens, omni carens parentela.

9. Augustine, *De Civitate Dei* Libr.V, caput 16. The passage runs as follows: ". . .*raro per mores fiebat, quod per leges licebat. Sed factum licitum horrebatur propter vicinitatem illiciti. . .*"

In translation:

Affinity is defined for us as follows: It is the friendly relation that flows from the bond between a man and a woman, and that exists between a man and the blood relatives of his wife, and between a woman and the blood relatives of her husband.

Affinity is defined as follows: It is the closeness between persons that follows out of sexual intercourse, and that is not based on blood relations.

Brouwer describes it as follows:

Affinitas, sive si mavis, adfinitas, a fine dicta est, quia una familia ad finem alterius accedit, atque is, qui finem repraesentat, tanquam novus surculus alienae inseritur cognatione, cum affinitas oritur; ideoque dicimus eam necessitudinem esse inter maritum & uxoris suae cognatos, & cum maritus enim consideratur tanquam finis suae familiae, & inseritur familiae uxoris, & vice versa, uxor consideratur tanquam finis suae familiae, & inseritur familiae mariti sui.

In translation:

Affinity derives its name from a boundary, for a family arrives at the border of another family, and that which represents the border is inserted as a new graft into a foreign circle of blood relations when affinity arises.

Therefore we call affinity the friendly relation between a man and the blood relatives of his wife, since the husband is considered to be as it were the border of his family, and he is inserted into the family of his wife. And the other way around, a woman is considered as it were the border of her family and is inserted into the family of her husband.¹⁰

Brouwer comments that the above named *necessitudo* is called 'friendly', because it prompts one to regard one's spouse's family more or less as one's own.¹¹ It is called a 'necessity' for affinity necessitates the various impediments to marriage upon the death of one's spouse. It causes different persons to be

10. Translations are my own.

11. Brouwer, *op.cit.* pp. 444
sqq.

esteemed as if they were very close consanguines. Legal affinity is caused by a valid marriage, and natural affinity by rape, incest, concubinage, and harlotry.¹² Today we may add things like artificial insemination, *in vitro* fertilization, et hoc genu omne.

There has been, and still is, much confusion as to which forms of affinity are to be considered as impediments to marriage. We hope to shed more light on this in appendix II.

A married couple is one flesh¹³ (*...vir vero cum uxore in unam coalescens carnem unus homo reputatur. . .*), so that they are the cause of affinity. A man and his wife are not in affinity to each other.

The idea of so-called degrees of affinity, after the pattern of consanguinity, must be rejected. They

12. Maimonides and other Rabbis tended to take this lightly. See Brouwer, *op. cit.* p. 455.

13. A Biblical term originating from Gen. 2:24.

simply do not exist, according to Brouwer's own opinion.

In the opinion of some affinity only arises at the consummation of marriage. One could quote Paul here, who states that a fornicator is one flesh with a prostitute.¹⁴ Brouwer's quote of Augustine can be a little misleading here, ". . .*non esse dubium illam mulierem non pertinere ad matrimonium, cum qua commixtio sexus non docetur fuisse. . .*" However, Brouwer believes that it is safer and more Christian to state with Thomas that marriage arises not through consummation only, but in the first place through mutual consensus; otherwise, we would almost be like animals. According to Lombardus, cited by Brouwer, Joseph and Mary were married also without having intercourse. If we understand Brouwer correctly, then he thinks that both the marriage vow **and** consummation make up marriage, so that an adulterer

14. 1 Cor. 6:16.

or fornicator does not contract a marriage through the sexual act *ipso facto*.

Incest

In Brouwer's view natural law speaks to us in two ways, through observing the physical behaviour of animals, and through listening to the mind. The mental application is in turn twofold, whether it belongs to the intellect or to reason. The intellect, according to Brouwer, perceives whether something is just, and reason weighs whether something is honourable or dishonourable at first consideration.¹⁵ He quotes the apostle Paul in referring to Rom. 1:18-20 and 1 Cor. 5:1, where it is written that man is inexcusable because of natural reason and, respectively, that among the Corinthians there was a kind of fornication not even heard of among the gentiles in that someone had taken

15. Brouwer, *op. cit.* pp. 415
sqq.

his stepmother (wife of his father). Of course he mentions this to show that the heathen had morality without the laws of Moses and that this fact must be based on obeying natural law.¹⁶

Natural law, as far as derived from animal life, does not teach that incest is wrong. For there are animals that do not have instincts that turn away from 'incest.'¹⁷ As far as reason (*ratiocinatio*) is concerned, there are two causes that witness against incest, namely the utter confusion of names¹⁸ and the very idea that we would embrace the womb that had borne us. Natural law is also against incest, seeing that incest confuses paternal authority and filial 'reverence',

16. Apparently he does not reckon here with Noachian tradition.

17. There are animals, however, that are even monogamous.

18. Someone could be at the same time the son-in-law of his grandfather, the husband of his mother, the father of his brothers, and the uncle of the grandchildren.

respect, while marriage is supposed to be an arrangement between a man and a woman on an equal footing.

Natural law, as based on the intellect,¹⁹ is opposed to incest, since parents are one blood with their children. Now marriage is supposed to be a new union between two people that become one flesh. But how can this be brought about when they are already flesh and bones of one another?²⁰

19. Brouwer does not make this Aristotelean distinction between intellect and reason clear. He only employs it here.

20. Without going into too much detail about Scholasticism, which is obviously underlying here, we would like to explain that it was believed that (eternal) ideas--here the idea of marriage--are formed in the intellect, and derived from reason, which works through thinking (*ratiocinatio*). The latter is arrived at through observing the created things with one's senses and forming opinions about them. The difference between the intellect (*intellectus*) and reason (*ratio*) was

As to incest between a brother and a sister Brouwer argues that the intellect cannot find fault with it, but reason can. However, here he contradicts himself, for he states that brothers and sister have equal respect ('reverence' *reverentia*) for each other, and that this would make for an optimal (*optime*) companionship. Yet elsewhere he uses this argument not in the case of the intellect, but in the case of reason. Still, however that be, he continues that natural reason indicates us that brothers and sisters are one flesh in their common descent, so that they cannot again become one flesh; and that the respect due to each other, follows after that for their parents and because of it. Grotius, as quoted by Brouwer, wrote that the argument given by the Jew Maimonides is 'political' rather than based on natural reason, to the effect that the daily and unobserved association

considered traceable when one forms a sentence. Before one utters it orderly it has been formed already in an (indivisible) moment by the intellect.

between brothers and sisters would lead to fornication and adultery if they were allowed to marry each other. For Adam and Eve's children it was both necessary and demanded by God (just like the levirate). Brouwer alleges that Abram did not marry his half sister but a relative on his brother's side, in which he concurs with Augustine. He goes also into the account of Tamar and Amnon, and infers from it that Tamar was simply ignorant when she admonished her half brother that she would be granted to him.

According to Brouwer the Romans did not--in the first place--use reason but the law of the nations (*ius gentium*) to legislate against such hypothetical marriages. It was against common morality, they reasoned.

Adoption

Adoption is an impediment to marriage.²¹ However, if and when the adoption is annulled, one can

21. Brouwer, *op. cit.* p. 399.

marry even one's ex-adoptive sister, niece and so on. However, this is not permitted, according to Brouwer, in the ascending and descending line, only in the transversal line. His reasons, however, seem to be based on feeling rather than strict logic: "*In directa vero linea durat [viz. prohibitio] quia cum matrimonium cum filia jure gentium incestum sit, consentaneum videtur, propter illius nominis sanctitatem ab emancipatae nuptiis abstinere.*"

Affinity is not contracted through adoption, since it is a concept of civil law, and affinity is based on natural law.

Conclusion

From the foregoing it may be concluded that there is obviously a very serious taboo on the sexuality of the male in the Bible, particularly in the O.T. So polygamy was connived at, and in Leviticus 18:18 permission was given to marry one's deceased wife's sister, but not one's deceased husband's brother (v.

16). This taboo is still prevalent today in films, advertising, and on public beaches, where for most part the male sexuality is still considered as something not to be trifled with. Many moderns would tend to interpret this negatively along with the biblical idea of the headship of the man, to mention one thing. But in fact it is sound and wholesome.

APPENDIX I

Laws Discussed in this Thesis

Codex	AD Number	Place	Author	Brief Description of Contents.
CI	295	5.4.17	Rome(?) Diocletian & Maximian	& Consanguines & affines as impediments to marriage.
CT	355	III 12,2	Rome Constantinus & Constans	One is not allowed to marry one's wife's sister, or brother's wife.
CT	393	5.5.5	Const. Theodosius I	Idem
CT	396	III 12, 3	Const. Arcadius	First cousins not permitted to marry.
CI	405	5.4.19	Const. Arcadius	First cousins allowed to contract marriage.
CT	409	III 10, 1	Ravenna Honorius	First cousins only permitted to marry by imperial permission.
CT	415	III 12, 4	Const. Honorius Theodosius II	Prohibition to marry deceased wife's sister

- | | | | | |
|----|------------------|---------------|------|--|
| CI | 475 | 5.5.8. Const. | Zeno | One is not permitted to marry one's brother's wife even if the marriage was never consummated. |
| CI | 476
to
484 | 5.5.9. East | Zeno | One is not allowed to marry one's niece or brother's wife. |

APPENDIX II

The Difference between Consanguinity and Affinity

We have seen the essential difference between consanguinity and affinity. To sum up, consanguinity defines blood relations and affinity defines relatives through marriage(s), and both cause impediments to marriage. Most people would agree with this, but a problem arises when one tries to decide which consanguines and which affines are not allowed to marry.

It seems that one cannot establish a rule of thumb in this question. However, based on Leviticus 18 one could say that the closest consanguines one is allowed to marry are first cousins. These are blood relations on the collateral line. On the ascending and descending line one is not permitted to marry anyone, including uncles and aunts that have come into one's family through marrying direct uncles and aunts. Lev. 18:14 forbids one to marry the wife of one's father's brother.

That verse however does not forbid one to marry one's uncle by marriage, that is one's father's or mother's sister's husband. It is probably this that Joyce is referring to (or perhaps confusing) as discussed in chapter one of our thesis. therefore a woman may not marry her uncle by marriage. But taking Lev. 18 strictly a niece is allowed to marry her uncle by marriage; however a man is not allowed to marry his aunt by marriage. Further it is specifically forbidden to marry one's stepdaughter or stepmother, as well as their children.

As to affines, it explicitly forbidden to marry one's mother-in-law and daughter-in-law. Other than that no marriages with affines after the death of one's spouse are interdicted. This means one is allowed to marry one's brother-in-law on the sister's side or, vice versa, one's sister-in-law. The question remains whether it is prohibited to marry one's spouse's uncle or aunt. We would answer negatively, for it is not forbidden. If one is permitted to marry one's brother-in-law why not one's 'uncle-in-law?' Even the term sounds meaningless.

One reason for the Mosaic marital laws seems to be biological. Bad genes are multiplied through inbreeding. However, this is not all there is to be said. In Genesis one was allowed to marry one's sister or half-sister (Abram and Sarai), but certainly not one's mother. So the reason for impediments to marriage is not simply biological. There is more to it. And indeed, already before the Fall, God instituted marriage. "Therefore shall a man leave his father and his mother, and cleave to his wife; and they shall become one flesh. (Gen.2:24)." Sexually one can be one flesh with one's mother, but not maritally--or theologically. In that case the image of Christ and the Church would be destroyed. And indeed, without the revelation of this mystery (Eph.5:22-33), there is no reason but the biological one against incest! One might reason that there are sociological, psychological and other arguments against incest, and that is true. But these all actually are caused by the theological one, which was hidden in the times of the Old Testament. As to incest with a brother or sister the theological reason

must prevail as well. Brothers and sisters are too close to fulfill the picture of Christ and the Church. The same holds for uncles and aunts. They stand in the way of it.

A husband should love his wife like Christ loved the Church in giving Himself on the cross (See Eph.5). This means that a husband is bound to his wife till death do them part, even in the case that his wife becomes a prostitute or marries someone else. For what kind of love is it that repudiates a wife because of the act of infidelity? If we are to die for our wives, then certainly we do not have the right to divorce them (but see Matt.ch.5 and 19). Divorce is a sin that should not be committed by Christians (except under extreme circumstances).

APPENDIX III

Consanguinity and Affinity in Nineteenth Century England

According to Blair¹, and many theologians with him, the law of Moses can be divided into three main parts, viz. 1.the moral law, 2. the ceremonial law, and 3. the judicial or forensic law. He calls chapter eighteen of Leviticus ". . .a scholium or an appendix attached to the seventh commandment. . ." He states that the ceremonies were an addition to the first table of the law, and that the juridical arrangements were an addition to the second table.

He affirms adamantly that the moral law is still binding on us ". . .because it is founded in the law of nature common to all men. . ." He does not elaborate upon nature, but reasons that Sodom and Gomorrah

1. D.B. Blair, *A Dissertation on the Degrees of Kindred which bar Marriage* (Halifax: Nova Scotia Printing Co., 1873).

were judged because natural morality is older than the law of Moses. Their judgment is positive proof that there is a universal moral obligation binding on all nations.

As to Herod's marriage to his brother's wife, Blair comments that his brother was still alive and that John the Baptist condemned this marriage accordingly, the institution of the levirate not at all being applicable. Herodias not only committed adultery, but also incest, seeing that it was forbidden to marry one's brother's wife, except if she were a childless widow. In that case the levirate was even mandatory.

The man that married his step mother in 1 Cor. 5, also transgressed the moral law, for even among the gentiles this was called a sin.² Blair explains that the

2. Some deny that Paul uses the word *πορνεία* here in the sense of "forbidden degrees." See J.H. Thayer, *Greek-English Lexicon of the New Testament* (Grand Rapids, Michigan: Zondervan Publishing House, 1976), p. 532.

step son was said by Paul to have committed iniquity or injustice, because he had wronged his late father. Paul uses the word πορνεία instead of μοιχεία, which shows that the father had already died, so that it was not a question of adultery. According to Blair it is unthinkable that the Corinthians would have allowed incest with one's own natural mother.

Blair affirms the rule that ". . .A man may not marry any of his wife's kindred nearer in blood than he may of his own. . . ." This means that one is not permitted to marry one's wife's sister, or even her aunt or niece. In the reverse ". . .a man is not allowed to marry his nephew's wife, nor a woman her niece's husband. . . ."

This train of thought is all based on the idea that Leviticus is applicable in all cases not only as to degrees of consanguinity, but also of affinity. This is an exaggeration. Leviticus has something to say to us as to affinity on the wife's side only in forbidding marriage with one's mother or father-in-law, a stepson or stepdaughter not being an affine, but consanguine. One's mother or father-in-law, as well as one's brother-

in-law on the husband's side, are therefore best called consanguineous affines, one's sister-in-law on the wife's side, as well as all other relations, are simply affines and it is nowhere forbidden in the Bible to marry any simple affine upon the death of one's spouse. Blair argues that what is forbidden for the man in Leviticus 18, is also forbidden for the woman. This goes without saying, for how could God interdict a man to marry his mother, but not a woman to marry her son? All the commandments in Lev. 18 and 20 are written in the masculine form of the imperative, but this does not imply that women were therefore excluded from obeying them.

Blair states, rightly in our opinion, that the phrase "Thou shalt not approach to uncover nakedness," is synonymous with our words "It is not permitted to commit incest," the word 'incest' coming from the Latin *incastus* and meaning 'unchaste.'

In the matter of Lev. 18:18, Blair states correctly that the polygamous marriage to two sisters is incest,

but he is wrong in maintaining this also after the death of the first sister.

Appendix IV

Background Chronology³

- 303 three edicts of persecution of Diocletian
- 304 general edict of persecution
- 306 Constantine and Maximian establish peace
for Christians in their territories
- 313 the Milan Edict of Toleration (complete
freedom and equality for Christians, return of
church property, elimination of the cults of
the state
- 313 synod of Rome
- 318-81 the Arian controversy (homoiousianism)
- 324 Constantine defeats Licinius at Adraniople
and Chrysopolis, becomes sole ruler

1. I used several sources, notably H.Kinder and W.Hilgemann, *Atlas of World History* (New York: Penguin Books, 1977); G. Dumeige, S.J., ed., *Histoire des Conciles Oecuméniques* (Paris: Éditions de l'Orante, 1963), Vol.I, pp. 290 sqq., Vol.II, pp. 236 sqq. (In the original thesis these dates are lacking as supposed to be known by scholars).

- 325 Christianity endorsed as the official religion of the state
- 325 council of Nicaea, called by Constantine (homoousianism)
- 337 death of Constantine
- 337-61 Constantius II (Arianism made binding on the entire church)
- 340-97 Ambrose, bishop of Milan
- 345-420 Jerome (translates Bible)
- 350 Constantius II sole ruler
- 354-430 Augustine, bishop of Hippo
- 361-3 Julian the Apostate
- 363-4 Jovian rules for several months
- 364-75 Valentinian I, chosen as emperor by the court, and he chooses his brother Valens as Augustus and co-ruler in the East
- 370 Basil bishop of Caesarea
- 375 destruction of the Ostrogothic Kingdom in southern Russia by the Huns, beginning of the Barbarian migration

- 375-8 Valens succeeds Valentinian, Gratian so in the East (till 383)
- 376 Visigoths permitted to settle in the Empire
- 378 Valens dies in the battle of Adrianople (Hadrianopolis)
- 379 Theodosius I named co-emperor in the East by Gratian
- 380 edict of Thessalonica prohibits Arianism in the East, Athanasianism (Catholicism) becomes the religion of the state
- 381 2nd ecumenical council of Constantinople, Nicene creed confirmed
- 384 Gratian dies in a struggle with usurper Magnus Maximus
- 388 Theodosius defeats the usurper
- 391 Christianity becomes the religion of the state, prohibition of all heathen cults
- 392 Valentinian II murdered
- 392-4 Eugenius appointed emperor in the West, reintroduction of heathen cults

- 394 defeat and death of Eugenius, Theodosius
 the Great sole ruler
- 395 the empire partitioned between his sons
 Arcadius in the East, Honorius in the West
- 378 Visigoths defeat the Romans at Adrianople
- 401-3 Visigoths attack Italy
- 408-50 Theodosius II
- 476 demise of Western Empire

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