# SOME THEOLOGICAL AND SOME NON-THEOLOGICAL PERSPECTIVES ON THE LEGAL INSTITUTION OF MONOGAMOUS MARRIAGE

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by

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SUMMARY.

The relationship between the legal institution of monogamous marriage and Christian beliefs is discussed ( Introduction ). The Roman Catholic tradition of sexual morality is considered, along with Christian views which self-consciously reject much within this tradition. Legalism and anti-nomianism are referred to ( Chapters One and Two ). It is argued that no coherent alternative to monogamous marriage has emerged within Western society, and that no competing viewpoint - such as, for example, that of secular-liberalism - provides a value-free basis from which traditional morality can be rejected ( Chapter Three ). The attempt to justify monogamous marriage by pragmatic arguments, based on the history and traditions of Western society, is considered ( Chapter Four ). It is argued, making use of the distinction between a norm and an exception to a norm, that much of the criticism directed against monogamous marriage fails to offer any normative alternative. Such normative alternatives as polygyny, polygamy and plural marriage are critically considered. It is argued that, even without explicit ethical or theological justification, the normative character of monogamous marriage within Western society can be provisionally affirmed, in the absence of any viable alternative norm ( Chapter Five ). The perspective of Agape-ethics, as a significant ethical possibility independent of Christian ontological beliefs, is discussed ( Chapter Six ). It is argued that Agape-ethics is basically consistent with the ethical presuppositions of traditional sexual morality, and that this non-theological perspective points clearly,

if unsystematically, towards the conclusion that monogamous marriage provides the most adequate context for full human flourishing ( Chapter Seven ). Karl Barth's discussion of the male-female relationship, within a distinctive theological context, is considered at some length. This represents a radical reappraisal of the Western tradition of sexual morality, from an uncompromising Christian perspective, without any abandonment of what is central within that tradition ( Chapters Eight and Nine ). The legal dimension of monogamous marriage, in its institutional and social aspects, is considered ( Chapter Ten ). Modern marriage law - particularly Scots and English marriage law - is considered, with reference to the following questions:- consent to marriage ( Chapter Eleven ); the prohibited degrees ( Chapter Twelve ); the formalities of marriage ( Chapter Thirteen ); and sexual intercourse between husband and wife ( Chapter Fourteen ). The attitude of the United Kingdom Courts to foreign marriages, monogamous and polygamous, is discussed ( Chapter Fifteen ). The financial implications of marriage, and the differentiation of roles within marriage, are considered ( Chapter Sixteen ). The dissolution of marriage by divorce is discussed, with reference to recent legislative innovations within the United Kingdom ( Chapter Seventeen ). In conclusion, it is argued that the value and importance of monogamous marriage within Western society can be defended even by persons who lack any ethical or religious appreciation of its intrinsic authoritativeness ( Chapter Eighteen ).

INTRODUCTION.

Modern European marriage law, in its various forms, derives principally from three sources - Roman Law, Teutonic custom, and the Christian religion. In the period since the Enlightenment, there has also been considerable modification of the traditional structure of marriage under "rationalising" influences (1). But it is still true that in Europe marriage involves the union of one man with one woman and that, during the subsistence of this union, marriage to any third person is not legally recognised.

It is proposed to consider the possible justification of monogamous marriage ( in its "fundamental nature", rather than in any particular legally-regulated form ) from, on the one hand, a Christian perspective and, on the other, an ethical perspective which is arguably independent of Christian ontological assumptions. There will be no discussion of Teutonic custom, and no specific discussion of the legacy of Roman civil law. Although the legal structure of monogamous marriage, as of other basic social institutions, has been greatly influenced by Roman legal ideas, the question of its justification appears to be more centrally related to the influence of the Christian religion. Few would deny that monogamous marriage, if accepted as valid on other grounds, could be established and maintained without the perpetuation of Roman law as an authoritative legal system. What is more debateable is whether there are other grounds for the acceptance

(1) cf. L.T.Hobhouse, Morals in Evolution, ( 7th Edition, 1951, edited by M. Ginsberg ), p. 206.

of monogamy than those which presuppose the truth of Christianity, or, at least, the superiority of the "Western" cultural complex of which Christianity has been a significant part. It is often assumed, both by Christians who wish to defend monogamy, and by non-Christians who wish to attack it, or to reserve their judgement, that monogamous marriage cannot ( or need not ) be supported outwith the sphere of the Christian faith (2).

No account will be taken of certain important cultural traditions, basically independent of Christian influence, which have come to adopt monogamous marriage as the legal norm, or which have always done so. Since Jewish, Hindu, Buddhist and other perspectives are certainly no less remote from European secular perspectives than is Christianity, their commitment to monogamy does not seem to have much relevance to the question of what happens, or should happen, to monogamy in a traditionally Christian culture once the Christian spirit has departed from it. Is monogamy obligatory, or valuable, only for those persons who accept the total Christian view of life, or who make a purely personal decision in favour of monogamy? Or is monogamy something so basic to

(2) There is of course no implication that a non-Christian will wish to attack monogamy; serious criticisms of the fundamental nature of monogamy are surprisingly rare. Although there is a stronger presumption that a Christian will not wish to attack it, the presumption is not conclusive. There are few expressions of opinion, however bizarre, which lack an enthusiastic echo from somewhere within the confessedly Christian sphere.

"Western culture" that the latter could not maintain itself without commitment to the former? Is it even something so basic to "genuine human existence" that human development, in so far as it is progressive, must increasingly discard other possibilities in favour of monogamy? It is proposed to support not only the thesis that Western culture is inextricably bound up with monogamy, but also the view that, irrespective of regional variations in culture, monogamy provides the soundest basis for full and responsible human living (3).

But, although it will be argued that the validity of monogamy, and the ethical implications of this validity, are demonstrable on "objective" grounds, and not merely on grounds of some religious or idealist subjectivity, it will not be argued that such a demonstration is, or could be, universally persuasive. Even if it is the case that some forms of religious, and some forms of ethical, insight point clearly in the direction of monogamy, it is not claimed that all persons, as they concretely exist, are endowed with some species of shared religious or ethical discernment (4). Arguments which can only be understood by those who have a particular intellectual, or other, capacity are not, of course, invalidated just because

(3) The ad absurdum view that monogamy is essentially more evil or inauthentic or inhumane than other possibilities does not seem to deserve a direct refutation. The view that sexual behaviour belongs to the purely private realm, and should thus be immune from coercion or criticism on grounds of public interest, will, it is hoped, receive a direct refutation.

(4) Any more than with, e.g., scientific discernment.

there are persons without that capacity.

Those who lack the raw materials for the construction of any responsible attitude in the sphere of sexual behaviour (5) will not be persuaded by any argument, however well constructed. Such people are probably only a tiny minority of the population; if they were a very considerable minority, or a majority, it can be assumed that the others would clearly perceive that every aspect of personal and social life is radically affected by sexual attitudes. It is only when deviations from the official norms of behaviour appear to be socially innocuous, because of their exceptional character, that a society can afford to be permissive and tolerant, and to uphold the sanctity of the "private" sphere (6).

For all the talk about the "sexual revolution" (7), and for all the undoubted increase, in some social circles, of sexual behaviour which is both unorthodox and unconcealed, there is little evidence that there is emerging any coherent alternative to the monogamous marriage as the normative and

(5) i.e., those who do not care, or who could not justify the fact that they do care, whether or not the encounter between the sexes is a matter of unilateral or mutual exploitation and deception, and whether or not children are born, and, if born, whether and by whom they are effectively nurtured.

(6) When the occasional housewife abandons her husband and children to make a future for herself with a more exciting partner, it may be all very well for the spokesmen of enlightenment to applaud her transcendence of petty bourgeois conventionality. It would be another matter if such behaviour threatened to become normative in everyday practice, and not just in theory.

(7) Whether by conservatives or radicals, the debate is often conducted in highly exaggerated terms. Monogamy as such, or traditional sexual morality, or the family, or even morality as such, are sometimes presumed to have vanished from social reality, or at least to be in the process of doing so.

normal setting for sexual encounter and for the nurture of children. There is no reason to presume that such an alternative could not emerge (8). On the other hand, total neutrality as between all possible alternatives could not co-exist with the acceptance of any particular valuational position, even that of "liberalism" (9). A society which purported to uphold such values as individual freedom and equality of the sexes could not, without grave inconsistency, tolerate family structures which gave older persons inordinate power over younger, or male over female ( or vice versa ). Discriminations would have to be made, even by the most tolerant and liberal society (10). One would imagine that, for example, there would be intrinsic liberal objections to polygyny as practised within Islam, because of the injustice, from the liberal perspective, of the treatment of women (11).

(8) Perhaps the form of plural marriage occasionally practised by groups of like-minded dissidents might develop into an institution whose advantages outweighed its obvious disadvantages. More realistically, one could imagine a situation where society allocated equal status and privileges to a number of distinct and legally alternative structures.

(9) It is not an uncommon, though it is a mistaken, belief that the word "liberalism" represents some reality which both exemplifies all that is positively good and rational and is itself immune from the squalors of ideological controversy.

(10) Tolerant and liberal persons are embarrassed to find themselves permitting anything which blatantly is intolerant and illiberal. So, if a man wishes his wife to commit suttee after his death, or wishes his female admirers to opt for the status of perpetual concubinage, he is likely to be frustrated no less effectively by the laws of some hypothetical liberal society than by the laws of a traditionalist society which declares itself bound to implement the claims of Christianity.

(11) This is without prejudice to the fact that such scruples on the part of the infidel would not carry the slightest moral weight for Muslims.

It is therefore doubtful whether Muslim polygyny would be treated as a morally neutral option within the exclusive discretion of individuals, and thus as one of the alternative family structures to which liberalism would accord equal legal status. Liberalism in this sense is, no less than Islam or Marxism, an ideological position which is subject to challenge on counter-ideological grounds.

Alternative family structures are, respectively, more or less consistent with, or antagonistic to, a particular ideological position, be it Muslim, or Marxist, or Roman Catholic, or secular-liberal; and this establishes the point that family structures are not outwith the sphere of moral evaluation and discrimination. Both toleration, and the refusal to tolerate on a particular occasion, are in principle always challengeable (12). It is

(12) It may be that one set of values is, in some ultimate sense, higher and finer, or more deeply rooted in man's "nature", or more in conformity with the "will of God", than any other. The fact that no set of values is accepted as having such unique authority by all, or by all relevantly-equipped, thinkers is immaterial in this connection. The fact that many people fail to observe something does not prove that it is not there; this is not proved even by the fact that everyone has failed to observe it. Everyone recognises that the claims of religious systems are not, at the psychological level, universally authoritative. No non-religious claims are universally authoritative in this sense either. The moral sublimity of the idea of the permissive society is no more psychologically compelling than that of the infallibility of the Papacy or the Koran. This does not establish that one of these possibilities is not ultimately "true", but it does establish that the ultimate truth of one of these possibilities cannot be simply presumed. So, to permit any and every form of sexual experimentation would be, arguably, a denial of liberal values; and these values, whether or not they favour toleration in a particular case, are in any event inconsistent with other values.

no more acceptable, to A, when B does not discriminate against something which A believes to be evil, than when B does discriminate against something which A believes to be good.

A detailed discussion will be offered of one particular Christian interpretation of monogamy ( that of Karl Barth ), after consideration of some other Christian and non-Christian views. It is inevitably misleading to refer baldly to a complex phenomenon by means of a label, such as "the liberal", "the secular-liberal", "the Roman Catholic", "the Christian", or "the traditional" view. Such labels, even when applied without the distortions of passionate commitment, conceal great variations of detail and of principle; but there are no universally accepted definitions. In particular, "legalism" and " anti-nomianism" will be criticised as characteristically Christian aberrations (13); and "secular-liberalism" will be presented as intrinsically a non-Christian position. But, just as a Christian apologist

(13) There will be no defence of those Christian or supposedly Christian views which regard sexuality as something alien to the religious life, a grudging concession to mediocre and disorganised persons for whom the way of celibacy is too hard and too high. Nor is it proposed to attack those supposedly advanced views which regard sexuality as a technological novelty to be exploited, demonstrated, varied, and constantly to be available on call, without any susceptibility to ethical criticism. The "terrible saints of the desert", whose extravagances have proved so productive for the anti-Christian polemicist, represent ( though doubtless in a more impressive way ) the same lack of balance about sexuality as is represented by the purveyors of pornography. Neither position is relevant in a positive sense to the question how sexuality is to be understood, and within which institutional framework it can find its authentic expression. Both serve, however, as gloomy reminders of the distorting power of sexuality when it is detached from the context of responsible personal life.

would be unwise to endorse everything which has some historical connection with Christianity, so he would be unwise to oppose everything which has a similar connection with secular-liberalism.

It would be easy, when discussing something so many-sided as the influence of Christian beliefs upon the legal institution of monogamous marriage, to select either the most or the least favourable aspects; similarly with the influence of secular-liberal beliefs. But to demonstrate that an idealised version of the one has the advantage over a sourly-critical version of the other is to demonstrate nothing. It should, from the outset, be freely conceded that there is much about the traditional Christian understanding which is defective ( especially in its tendency towards joyless "legalism" ), and much about the secular-liberal critique of the empirical institution of monogamous marriage which should be accepted, if it has not been anticipated, from the Christian side.

The secular-liberal position which will be presupposed is that of a person who, however meticulous his sexual behaviour may be from a traditional perspective, regards monogamous marriage with its attendant obligations and inhibitions as no more than a modifiable - perhaps a dispensable - human construction (14). This includes both persons who desire that monogamous marriage should be replaced by some specifiable alternative,

(14) "Both liberal and radical social morality inclines to regard the organic unities of family, race and nation as irrational idiosyncracies which a more perfect rationality will destroy" ( Reinhold Niebuhr, An Introduction to Christian Ethics, ( 1936 ), p. 162 ).

and also those for whom its dispensability is entirely hypothetical (15).

The secular-liberal is taken to be someone who does not in fact anticipate an intolerable degree of disturbance if sexual morality is recast along "rationalist" lines; who regrets, or would regret, any marked disturbance, but whose personal tolerance is greater than that of his more conservative opponent; and who, in any event, is quite satisfied that no fundamental harm to social or personal life is to be anticipated from any foreseeable recasting of sexual morality. He is to be distinguished from the person who, either because of emotional disturbance or ( probably secular, but probably illiberal ) ideological conviction, seeks to undermine the ethical basis of monogamous marriage because he believes that this would lead to the collapse of society as currently constituted (16).

In a wider context, Reinhold Niebuhr once made an interesting distinction between the wise and the foolish children of light, and the wise and the foolish children of darkness (17). The foolish children of light are, typically, those who fail to foresee the undesirable consequences of a course of action or who, although foreseeing,

(15) As in political debate, superficially similar language can conceal, intentionally or unintentionally, wholly irreconcilable viewpoints.

(16) The person, familiar enough in the political context, whose real purpose is to destroy democratic institutions, while pretending to seek their improvement, has his counterpart in the debate about marriage and the family.

(17) The Children of Light and the Children of Darkness, ( 1945 ), passim, especially pp. 1-39.

are ineffective in seeking to avoid them. The foolish children of light are those who desire what is evil, but are ineffective in promoting it. Their wise brethren project their inner malevolence effectively into the external world.

The secular-liberal is to be identified with the children of light, rather than the children of darkness (18).

(18) This is not to say that the latter will not sometimes seek his company. Presumably the unwitting co-operation of the children of light would be one of the most effective means employed by the wise children of darkness.

There are some features of the traditional sexual morality of Western Europe whose connection with Christianity is, from a Christian perspective, unfortunate (1). But the imperfections of popular morality do not conclusively discredit the true or authentic morality of which the popular version is a travesty.

Even in societies which are not religiously dominated by the Roman Catholic Church, it is probably true that for many people the most familiar Christian interpretation of sexual morality is the Roman Catholic interpretation. Whether in a spirit of sympathy or of alienation, many people presuppose that what they understand of the Roman Catholic interpretation is, to all intents and purposes, the authentic Christian interpretation. It will therefore be relevant to supply a summary of the Roman Catholic tradition concerning matters of sexual behaviour, marriage and the family, before more briefly noting other, contrasting, Christian possibilities (2).

(1) One thinks especially of the general androcentricity of popular assumptions; the double standard of morality which allows males liberties which are hypocritically withheld from females; the bourgeois identification of marriage with the legally-valid ceremony; the treatment of women as sexual objects; and the polarisation between a morbid asceticism and a brutish sensuality. When one adds to these the apparent obsession of some conservative churchmen with the defence of legal forms from which the living spirit has long since departed, it is not surprising that many observers, unaware of any more discriminating perspective, fail to distinguish between popular morality and Christian morality; the Christian case is thus likely to be lost by default.

(2) Particularly Christian "situationism", which is a form of ethical discussion claiming to express the basic insights of Christianity, in openness to the secular world, and in independence of the dead weight of tradition.

A significant spokesman for modern Roman Catholic thought in the sphere of marriage and sexuality is Father Bernard Haring (3). The personalist, biblical, humane and contemporary facets of his thought co-exist with what is more typically traditional. He does not endorse everything within the tradition (4), but he remains clearly within its boundaries. Sometimes, perhaps, there is evidence of unresolved tensions (5).

(3) He is one of the principal architects of the present Roman Catholic re-appraisal of sexual morality.

(4) Especially its "biologistic" tendencies, and its excessive narrowness in its attempts to regulate the appropriate forms of marital intercourse.

(5) His treatment of marriage in The Law of Christ, Volume III ( Cork, 1967, translation from German by E.G.Kaiser ) illustrates this ambivalence. Side by side with profound and beautiful remarks about the inter-personal dialogue between husband and wife, there are traces of what an unsympathetic reader might describe as a dread of the sexual, not merely in the contexts of adultery, rape, fornication, homosexuality, masturbation and perversion, but also in the marital context when "impermissible" forms of contraception are utilised. Although Haring must himself regard as grotesque the opinions of those writers who hold that, where the husband uses a condom, the wife should resist as if she were being raped, he contents himself with a mild reference to what is pastorally prudent ( op. cit., p. 359 ). Elsewhere ( ibid., note 105 to Chapter 4 ) he refers to marital intercourse with the use of a condom as "this very evil practice". Even in so sensitive a writer as Haring, one finds some evidence to justify Karl Barth's severe comment on the traditional Roman Catholic doctrine of marriage:-

"It is worth remembering that the men who in the course of centuries devised these theories were celibates who were not personally concerned but succeeded in convincing those who were ... in Roman Catholic teaching, for all the sacramental character attributed to marriage, the whole sphere of the male-female relationship, including marriage, is limited and in some sense menaced by the theory of the higher perfection of the celibate life of monks and priests. And ... it is overshadowed by an attitude of the deepest suspicion towards the unavoidable physical side of the whole relationship ..." ( Church Dogmatics, Volume III, Part 4, ( Edinburgh,1961, Authorised translation from the German ), p. 124.

Christian marriage is a "sacred institution and design of the Redeemer" (6); it is a "sacrament, a grace-bearing sign which signifies the love of Christ for his Church"(7); it is essentially monogamous, its character as fellowship and as the setting for child-nurture so emphatically demanding unity that "every other form of marital contract is excluded by the very law of nature itself" (8).

The marriage which has been ratified and consummated is absolutely indissoluble; not even the Church has authority to break the bond of the sacramental marriage (9). The essential characteristics of marriage are unity ( i.e., monogamy ); indissolubility; the orientation to faithfulness; and the order of love (10). Husband and wife administer the sacrament to each other by the mutual offering and acceptance of the pledge of fidelity in due form (11). Marriage in its essential, sacramental aspect is subject to no law other than that of the Church (12). The State is entitled to legislate for the marriage of non-Catholics, and as to the civil effects of sacramental marriage; but for the State to require that Catholics should conclude a civil contract of marriage is an injustice (13). It is in accord with the nature of sacramental marriage that ceremonies involving a Roman Catholic party are invalid if performed under the direction of a non-Catholic minister (14). Presupposing the official oversight of a

(6) Haring, The Law of Christ, Volume III, p. 313.
(7) ibid., p. 316.
(8) ibid., p. 316.
(9) ibid., p. 318.
(10) ibid., p. 321.
(11) ibid., p. 322.
(12) ibid., p. 324.
(13) ibid., p. 324.
(14) ibid., p. 326.

Roman Catholic priest, marriages between Catholic and non-Catholic but baptised persons are subject to the absolute condition that no obstacle or hazard to the Faith is placed in the way of the Catholic party (15). However, the promises required of the non-Catholic must not be such as to violate his conscience (16).

The sexual element in the marital relationship should always be interpreted within the the total context of the inter-personal encounter, and never as an independent, autonomous value-in-itself (17). Although not all marriages can be love-matches, steeped in affection, it is hazardous to enter marriage without a sufficient basis of physico-spiritual attraction (18). To enter marriage without the fundamental willingness to procreate children, or without the unconditional intention of fidelity (19), is inconsistent with the nature of marriage.

Chastity within marriage means the ordering of the sexual impulses in ways which are consistent with the good of off-spring, the fostering of marital love and fidelity, the solicitude for mutual spiritual health, and the restraint of concupiscence (20). Sexual intercourse between spouses is good, provided that none of the above values is jeopardised, and that at least one of them is directly intended to be realised. There should be a permanent and irreversible willingness to accept off-spring, if such should result from the

(15) ibid., p. 326.
(16) ibid., p. 327.
(17) ibid., p. 333.
(18) ibid., p. 332.
(19) ibid., p. 342, p. 334.
(20) ibid., pp. 341,342.

marital union; abortive means, and the arbitrary destruction of fertility, are both inadmissible.

Every form of human love is subject to the necessity of sacrifice and self-denial; and this applies with particular force to marriage. Sexual satisfaction is not an end-in-itself ( which is not to say that the frustration or withholding of sexual satisfaction is an end-in-itself ). "Self-denial ... does not aim ... to make the married love mute with respect to its typical expressions" (21). The personal dimension in sexuality is strongly to be emphasised; sexual intercourse is not a merely corporeal happening, but should involve an engagement of the whole personality (22).

For persons who are not married, chastity involves, in the opinion of most Roman Catholic writers, the avoidance of "every deliberate sexual gratification" which is "directly intended" (23). Any "inefficacious desire" to commit impure deeds is sinful, if it is frustrated merely by factors extrinsic to the actor's inner intentions (24). "Dangerously close to such a disposition is that of the individual who avoids impurity merely because of a dread of hell-fire without abhorrence of the loss of values inherent in impurity itself" (25).

Purity and impurity are standards correlative to the institution of marriage (26). Whatever is consistent with

(21) ibid., p. 353.
(22) ibid., p. 361.
(23) ibid., p. 291.
(24) ibid., p. 297. For example, continence maintained merely out of fear of social stigma, or pregnancy, or venereal disease.
(25) ibid., p. 297.
(26) ibid., p. 298.

this institution is pure, whatever is inconsistent with it is impure. The prohibition of adultery by the law of Sinai thus prohibits all forms of extra-marital sexual activity (27). Although only culturally-conditioned norms can be indicated in these spheres, anything unduly immodest or suggestive in speech or gesture is incompatible with the spirit of chastity (28). Christians must be helped to realise that many of the social attitudes and practices currently in vogue have their roots in ideological assumptions which constitute the denial of Christianity (29).

Although chastity, whether in the married or the unmarried state, is required of all persons, there is a distinction between the pre-marital chastity of those who expect eventually to marry, and virginity as a deliberately chosen permanent vocation. There will always be some persons who remain essentially open to the possibility of marriage, but for whom marriage will never materialise (30). Virginity can never be imposed by some external law; it is dependent upon the reception of divine grace (31).

For all that the ideal marriage represents an entirely permissible and praiseworthy possibility for those whom God calls into this state, there can be no doubt that Haring follows tradition in believing that virginity constitutes a still higher possibility. This is expressly taught by the

(27) ibid., p. 298.
(28) ibid., pp. 307-310.
(30) "Among Christians there should be no single life except that which is either chosen in full freedom of love or accepted with valiant love of sacrifice in second choice in accordance with the dispositions of providence" ( ibid., p. 395 ).
(31) ibid., p. 392.
(29) ibid., p. 377

Church (32).

There is much that is impressive, even noble, about this comprehensive vision of the ideal contribution of sexuality to human life. Haring clearly transcends the somewhat arid spiritual jurisprudence characteristic of the Roman Catholic moral tradition in its more mediocre representatives. To those who are well grounded within that tradition, his tendencies towards radicalism may appear more noteworthy than his solid traditionalism (33). Both from the more conservative and from the more radical elements within Roman Catholicism, his attempt at synthesis would meet with criticism (34); but it can be claimed that his thought adequately reflects the central insights of the Roman Catholic tradition, both in its commitment to the past heritage, and in its cautious receptivity to new ideas.

(32) The married reader may find Haring's treatment of virginity to be more existentially satisfying than his treatment of marriage. It is hard for those who write about marriage from the outside to avoid the pitfalls of idealistic irrelevance, even if they avoid the pitfalls of subconscious resentment or distaste. Haring of course does not imply that every person living in the state of virginity is morally better than all married persons ( cf. ibid., p. 382 ).

(33) Those completely ignorant of the tradition would not readily perceive the radical implications of Haring's thought, in its most original aspects.

(34) For example, a book written by two lay Roman Catholics ( Mary Perkins Ryan and John Julian Ryan ) presents a positive interpretation of human sexuality which is as far removed from any lingering ascetical distrust of sexuality as from any pagan glorification of sexual satisfaction as an end-in-itself. But this involves departure from the clear formulations of the Canon Law tradition, and not merely over minor points of interpretation. The superiority of the celibate life; the prohibition of various forms of contraception, and of sterilisation; the impermissibility of a marriage which remains voluntarily childless - on all these points, and on others, the authors adopt a position which contradicts official teaching. The book is Love and Sexuality, ( Dublin, 1968 ).

## CHAPTER TWO. LEGALISM, AND CHRISTIAN REACTIONS AGAINST IT.

The charge is often made that the Christian tradition of ethical thinking is vitiated by "legalism"; sometimes the additional innuendo is ventured that legalism is an inherently Roman Catholic, and transcendence of legalism an inherently Protestant, characteristic (1). In so far as the word legalism represents all forms of narrow-mindedness, rigidity or impersonality, it is too wide to be of any use in this context. Moreover, the implication is certainly to be resisted, that moral seriousness, or the willingness to make a clear and penetrating decision, or the acceptance of authoritative rules or principles, are all by definition legalistic in a pejorative sense. But, although it is true that legalism, both in its wider and in its more specific forms, is a universal phenomenon, corresponding to deeply-rooted psychological tendencies (2), the influence of Christian thought is of particular significance.

(1) An innuendo which is gratuitous, at least in its favourable assumptions about Protestantism. Both in the form of biblical fundamentalism, and in the more subtle forms of orthodox or anti-orthodox ( "liberal" ) self-righteousness, Protestantism shares the general heritage of Western Christianity. It will be argued later that self-conscious antagonism to legalism is also to be understood in the context of the continuing power of legalism. It may be that Eastern Orthodox forms of Christianity should be analysed differently.

(2) The ascription of absolute value to any human decision is, it is submitted, the underlying psychological reality which gives rise to the phenomenon of legalism. Clear illustrations of the ascription of absolute value to human decisions, and of the ethical consequences of so doing, can be given from the Nazi and Marxist political movements. What is decreed by the Fuhrer, or Stalin, or any other manifestations of the German people or the forces of proletarian revolution, is to be implemented unquestioningly, whatever the consequences.

Every systematic view of human life makes use of the category of the "ultimately real", even if the actual phrase is avoided. From the perspective of the Christian religion, the ultimately real is to be identified with God as he is in himself (3); but it is also believed that God has made himself known within the sphere of man's creaturely existence, and supremely so in Jesus Christ. Jesus Christ therefore represents God in human terms. In so far as the pattern of life, and the teaching, and the symbolic significance of Jesus Christ can be humanly known, this knowledge constitutes what is ultimately real, and thus ultimately authoritative, relative to the human situation.

Granted that this knowledge, to have any relevance, must be in some way accessible to the processes of human understanding, the question arises whether the human response to God's act of self-disclosure in Jesus Christ is to be thought of as intrinsically perfect and adequate (4). If so, then the human response to God's act of self-disclosure can so to speak be identified with it, and thus claim an authority which is not merely ultimately authoritative, relative to the human situation, but is infallibly authoritative (5).

(3) This is to leave out of account confessedly atheistic versions of Christianity.

(4) If B can always report without distortion what A says, B is an infallible authority on what A has said, and there is no intrinsic need for C, D etc. to have direct access to A.

(5) At least four possibilities exist - the authors of the Bible, the "ecumenical decisions" of the undivided church, those responsible for the ex cathedra decisions of the Roman Catholic Church, and the individual who interprets the Bible, or who has a profound emotional ( religious ) experience. These are not mutually exclusive.

Where the Church, in an appropriate personification, or the pious individual is thought of as infallibly responding to ultimate reality, then the Church's or the pious individual's decisions can be regarded as possessing an unchallengeable authority (6). What the Church teaches - about, for example, the formalities of marriage, the prohibited degrees of relationship, the permitted techniques of marital intercourse - must be obeyed. If the question is asked "Why?", the answer simply runs, "Because the Church so teaches". There is no test of ethical validity which could compete with the decisions of the Church, because there is no possibility of any discrepancy between what the Church teaches and "what God really wills".

Any supposed lack of distance between the "will of God" and the human attempts to grasp and communicate the implications of the will of God is likely to result in an inflated role for human decisions in both the ethical and the legal sphere. It is clearly appropriate, if the propositions of the Bible, or the pious individual's deeply-felt intuitions, or the considered judgements of the Pope (7), represent the will of God without any distortion or impoverishment, that human life should be accordingly ordered and regulated; there is no occasion for apologies, or half-measures, or exceptions. Such assumptions, when implemented, produce the phenomenon which may properly be described as legalism.

By the word legalism, one intends to refer to any identification in principle of a human decision concerning ethical

(6) The problem is more interesting, and plausible, in the ecclesiastical form.

(7) No ex cathedra statement has been made in the ethical sphere.

or legal order with some final, unchallengeable reality which does not participate in the ordinary circumstances of human fallibility. By a decision, one intends to refer to the completed sequence of interpretations ( as to the appropriate principle or rule, as to the factual situation, and as to the application of the principle or rule to the factual situation ). To take an example: the decision not to permit a particular marriage, or not to accept the validity of a purported marriage, depends not only upon the general scope of the prohibition ( e.g., that uncles may not marry their nieces ) but also upon the establishment of the relevant propinquity between the persons involved.

The two principal grounds for opposing legalism are, first, that legalism presupposes a fundamentally false view of human authority, and, second, that it is typically associated with attitudes of punitive self-righteousness, or, alternatively, with cynicism and hypocrisy; the first ground is the more significant, just as it is arguably the less offensive.

The most moderate critics of the Christian tradition of sexual morality ( as usually understood, i.e., broadly in terms of Roman Catholic teaching ) would be content to argue that some of its presuppositions do not correspond to ultimate reality, but rather to particular cultural or sectarian interests. They might point out that the rules invalidating the marriage of a Roman Catholic, if supervised by a non-Catholic minister (8) are apparently in opposition to the theory that the spouses administer the sacrament to each other, and are

(8) cf. Haring, op. cit., p. 326.

insupportable on grounds of principle, whether or not they cause injustice in a particular case (9). It is perhaps regrettable that Haring neither criticises the rules relating to the marriage of Roman Catholic with non-Roman-Catholic partner, nor justifies them, except in so far as he remarks that in a time of hostility between the various Christian denominations, legislation has to be more severe than in a climate of ecumenical good-will (10). In the case of the promises required of the non-Roman-Catholic party to such a marriage, although Haring notes that his conscience should not be violated, he gives no indication as to how the danger of this violation could in practice be guarded against. The official position of the Roman Catholic Church with regard to impermissible forms of birth regulation is widely regarded, not only by outsiders but by Roman Catholics of all levels of sophistication, as being no longer plausible.

From a purely ethical perspective, the most damaging

(9) The English Court of Appeal case Gray v. Formosa [1963] P. 259, was concerned with an attempt by a Maltese court to apply the Roman Catholic doctrine. Even those who do not question the general wisdom and appropriateness of the doctrine might doubt whether its application was calculated to do justice in this particular set of circumstances.

(10) Haring, op. cit., p. 326. A rule or principle can, of course, be pragmatically justified, in spite of its imperfections, without this justification being dependent upon legalistic presuppositions. Where its imperfections are in principle acknowledged, there is however a corresponding obligation not to press its claims as if they possessed an infallible authority. It is fair to say that the rules under discussion caused disquiet within the Roman Catholic Church, that they have subsequently been modified, and that further modifications are predictable.

deficiencies of a legalistic system can be seen when the supposedly absolute nature of its claims is no longer accepted by those who manipulate the system. When this occurs, the largely or entirely human element in communally-binding decisions is an open secret to those, or some of those, who actually announce the decisions, without the secret being betrayed to those who are to implement the decisions in practice. The result is what might be called a collapsed legalistic system, in contrast to an inflated legalistic system. By the latter, one means an ethical or legal system characterised by extreme rigidity, both in the formulation of theoretical principles and in their practical application, without any significant appreciation of the finite nature of the principles or the human decisions whereby the principles are implemented. By the former, one means a system whose externally rigid scheme of regulations is in fact operated so as to be emptied of its original character, without any open acknowledgement of the change which has taken place (11).

(11) Max Rheinstein, Marriage Stability, Divorce and the Law, ( Chicago, 1972 ), documents the situation, described above as a collapsed legalistic system, in the context of some of the jurisdictions in the United States. He distinguishes the strict divorce law of the books from the indulgent law in action; for example, the State of Nevada, in fact notorious for its cynicism and dishonesty in applying its divorce laws, has laws which on the face of it are far from being permissive. In such cases, it might be said, the collapse of the legalistic presuppositions is virtually complete. On the other hand, in a country like Italy which officially does not recognise the permissibility of divorce, the collapse is only partial. The moral ambiguities are therefore greater ( and in Rheinstein's view more reprehensible ). The honourable person will not be able to obtain a divorce, but the person prepared to resort to uxoricide or other more subtle ways of eliminating marital obligation will, in effect, be able to obtain the advantages of divorce.

Although the Reformation challenged the prevailing Western tradition in two important respects - the institutionalised celibacy of the clergy, and the ascription of inferior status to marriage - the basic pattern of Christian thinking on sexual matters was undisturbed until well into the nineteenth century. Then the principal effect of Protestant innovation was to facilitate those legal changes which increasingly were demanded by non-Christian opinion - particularly, easier access to divorce, and the relaxation of penalties for sexual deviation. It is only in the present century that a more fundamental reappraisal has been undertaken.

Most non-Roman-Catholic Christians would probably now agree that much within the Western Christian tradition has been difficult to reconcile with a healthy and balanced attitude towards the sexual life. It is not true that Christians typically regard "sex" as a regrettable and unmentionable necessity, and sexual deviations as the most serious forms of sin; but there is no adequate defence against the charge that Christianity has, historically, exhibited a tragic lack of positive appreciation of sexuality (12).

(12) The sources of this negative attitude may be essentially non-Christian - Hebrew speculation upon sin and the fall, Greek philosophical asceticism, oriental dualism, primitive taboo - but it has become firmly entrenched within Christian soil. The establishment of the double standard discriminating between the cloister and the home ( and also between the male and the female ); the predominantly legalistic treatment of marriage; the emphasis in the confessional upon the forbidden and sinful; the association between original sin and the physical act of procreation - all these factors conspire to overshadow, for those affected by traditional Christian teaching, the already problematic sphere of sexuality.

Some Christian writers self-consciously seek to repudiate the traditional inheritance, and to present an understanding of ethical questions which is entirely modern, albeit supposedly expressing whatever is fundamental in Christian insights. Since there is no question of a "radical" tradition in any way comparable to the Roman Catholic, or biblical-fundamentalist, or other orthodox traditions of Christian thought, only a few indications will be offered of what seems to be characteristic of Christian radicalism. The examples will largely be taken from Joseph Fletcher (13).

Legalism represents the denial of love (14), by which is meant Agape, the specific form of other-regarding love. Against the possibility of anything prefabricated, anything which might threaten the spontaneous integrity of the loving act, one exclusive norm must be affirmed. "Only one thing is intrinsically good, namely love; nothing else at all" (15).

By legalism Fletcher appears to mean any comprehensive system of principles, if including unbreakable rules, which might claim to pre-judge the question of what is the loving thing to do in a particular situation (16). The so-called rules prohibiting adultery or pre-marital sexual intercourse have no coercive moral authority; the only test of any action which has ethical relevance for the Christian is whether it

(13) Fletcher is one of the best known and most polemical of Christian "situationists". His ( later modified ) position is clearly expressed in Situation Ethics, ( 1966 ).
(14) op. cit., p. 18 et passim.
(15) ibid., p. 68.
(16) The existence of even one such unbreakable rule would destroy the force of Fletcher's argument, though it does not follow that the non-existence of such a rule would suffice to vindicate it.

serves love. One can only say "in the situation" which concrete possibility does so. Therefore any action - including, Fletcher specifically affirms, prostitution for patriotic purposes and impregnation by a man other than the husband (17) - may be what serves love in the situation. To hold otherwise is to be ensnared by legalism, since only a legalist can hold that anything is invariably wrong in every situation (18).

The main reason why sexuality causes moral difficulties is that legalism, through repression, distorts authentic moral perception (19). Love solves every problem. "Whether any form of sex ( hetero, homo, or auto ) is good or evil depends on whether love is fully served" (20). "If people do not believe it is wrong to have sex relations outside marriage, it isn't, unless they hurt themselves, their partners, or others. This is, of course, a very big "unless"...." (21).

(17) It logically follows, if the premise is sound, that rape, seduction of the immature and any imaginable form of sexual sadism, as well as torture, capital punishment, genocide and the use of nuclear weapons may all serve love in the situation.

(18) cf. ibid., p. 83.

(19) ibid., p. 139.

(20) ibid., p. 139.

(21) ibid., p. 140. So big, perhaps, that much of the apparent sensationalism and modernity of Fletcher's approach sinks without trace beneath its weight. He achieves his suggestion that love is both incompatible with rules, and yet able to yield positive guidance, largely through the devices of presenting a caricature of those views he calls legalistic, and of smuggling in discriminatory principles which are not identical with love. He does, for example, claim to be able to distinguish between the claims of a mother of three and a skid-row bum, and between creditors of a rich Indian and the mendicant population ( ibid., pp. 87-98 ). But his suggested solutions do not derive from love alone ( if, indeed, they are consistent with love ). All that is distinctive about his use of subsidiary principles is the unreflective way in which it occurs.

From the point of view of analysis of legal institutions, Fletcher's situationist approach is limited in usefulness because of its concentration upon the exception, to the virtual exclusion of the norm ( except in so far as "the loving thing in the situation" could be said to have a more than rhetorical force ). The notion of love, in this interpretation, hovers over the ethical sphere in a curiously abstract manner, for all that one of the principal merits of situationism is claimed to be its relevance. The very notion of the situation is undefined; but if the obligation to do the loving, the optimific, thing is taken seriously, any arbitrary fixing of the outer boundaries of the situation becomes impossible.

It would seem that, for Fletcher, the denial of "legalism" has become an obligation, an end-in-itself, an inherently positive thing. But to have said "No" to one false possibility is not to have said "Yes" to some true possibility (22).

Not all modern Protestant writers offer a monotonous and vacuous application of love to the situation. As well as the more extreme version of situationism, in which each loving act is so to speak sui generis, there are writers who allow a significant place for generalised guidelines, whether in terms of principles, working rules, or even unbreakable rules

(22) The impression created may have been that Fletcher is unprecedentedly extreme in his approach. But he is relatively austere and rigorous, when compared with some other Christian writers.

to which there are no exceptions. J.A.T.Robinson (23) argues that there is a whole class of actions ( he specifies stealing, lying, killing and committing adultery ) which are so fundamentally destructive of human relationships that no differences of time or place can alter their character. He allows for the possibility that individual acts of stealing or lying could be right (24), but does not consider whether or not there could be exceptions in the case of killing and committing adultery.

This raises the question whether there are any unbreakable rules which derive from, or are at least compatible with, Agape-love. Paul Ramsey has argued that it is in principle an open question whether Agape-love requires or permits any unbreakable rules, and that situationists must not be allowed to dispense with argument by trading upon the emotional assumption that this could not be so (25).

(23) Christian Morals Today, ( 1964 ).
(24) op. cit., p. 16.
(25) In Deeds and Rules in Christian Ethics, (Edinburgh, 1965), Ramsey attacks romantic capitulation to anti-legalistic rhetoric, on the part of well-intentioned Christians. "The Christian concern"... is not to defend "bourgeois respectability or legal paper or church ceremonies and registers" ( p. 7 ). These are not the factors which determine whether or not a relationship is a pre-marital or a conjugal one. The question is to be answered in terms of mutual consent to and responsibility for the reality of the other person. Marriage "as a rule of action embodying everything that Christian responsibility means in sexual life may be defined as the mutual and exclusive exchange of the right to acts that of themselves tend to establish and nourish unity of life between the partners. The fact that Christian ethics knows this to be the truth about sexual responsibility ought not to be withheld from young people, no matter how much sexual behaviour may be in revolution" (p. 11, p. 12 ). It is one thing to trivialise the external legal formalities, another to expound the inner reality which these formalities are intended to symbolise. To do the first without the second is to leave the whole discussion suspended in mid-air (p. 79 ).

It is commonplace that at the present time there is a widespread rejection of orthodox Christianity. But even in its most anti-traditional forms, Western Christianity - and most of the non-Christian possibilities open to Western man - is clearly marked by its tacit acceptance of the traditional dialectic between legalism and anti-legalism. This has the implication that the individual and the community, true freedom and true responsibility, are thought of as mutually delimiting and contradictory realities. To a large extent, Western culture is still dominated by the legalistic misunderstanding of Christianity. This is not less true of those who feel it necessary ( sometimes even sufficient ) to direct a frontal assault on legalism as they understand it.

Even if strenuous opposition to legalism does not derive from an excessive dependence upon legalistic presuppositions, there is a risk that arguments which are intended to transcend legalism may, if they are cast in too narrowly polemical a mould, serve either to vindicate the superior precision and comprehensiveness of the thing attacked, or to stimulate a still more negative development.

Much of supposedly progressive Christian thought on sexuality and other questions is vitiated by the fateful omission of any serious discussion of the normative, except in the imprecise form of the "loving", the "free", the "authentic", or the "mature" action. Much of the energy is devoted to the task of vindicating exceptions to the norm. There is of course some need to vindicate real exceptions, especially where the norm has come to assume a harsh and inflexible character. But the enterprise, for those who attach little importance to the need to dispute a particular norm, is essentially negative and sporadic.

From some Christian perspectives (26), it is legalism, rather than unbalanced reactions against it, which is the more subtle and the more formidable error. Legalism is thus seen as the primary error, and anti-legalism as parasitic upon it. Anti-legalism corresponds to the attack on improper uses, or understandings, of law; anti-nomianism to the attack on any use, or any positive understanding, of law. Although the conceptual distinction between them is workable enough, the distinction in practice is likely to become blurred (27).

Legalism corresponds to deeply-rooted and permanent psychological needs, especially the need of almost everyone for security and of some people to exercise power. Moreover, once the initial step, of locating an infallible authority somewhere within human society, has been taken, a legalistic system can be stable, comprehensive, and internally consistent. By contrast, anti-legalism is inherently temporary; its sole raison d'etre is the existence of legalism. In its perverted forms ( anti-nomianism ) anti-legalism is bound to be self-defeating; where everyone acts in stubborn defiance of whatever seems to inhibit them, the result can only be an anarchic vacuum which will itself inevitably be filled by some system of imposed order. It can therefore be argued that it is a mistake, because anti-legalism appears to be the more blatant distortion of the truth, to react anxiously and violently against it. To do so may be to play into the hands of legalism.

(26) For example, that of Karl Barth, discussed infra, Chapters Eight and Nine.

(27) cf. the view of W.G.Maclagan, The Theological Frontier of Ethics, ( 1961 ), p. 187:-
"Antinomianism is properly a religious phenomenon, and one that is positively corrupt in a way in which the laxity which springs from mere insufficiency of moral seriousness is not."

## CHAPTER THREE. THE RELATIONSHIP BETWEEN RELIGIOUS AND ETHICAL BELIEFS.

In the two previous chapters a sketch has been attempted of the "traditional" Christian view of sexuality ( identified, for practical purposes, with the Roman Catholic tradition ); and "situationism" was briefly referred to as an example of a negative reaction to the tradition from a confessedly Christian perspective. Fuller consideration of another Christian treatment of the subject, that of Karl Barth (1), will be deferred until the implications of Agape-ethics for questions of sexual behaviour, including the institution of monogamous marriage, have been discussed.

It can be assumed that those who accept the authority of the tradition will accept also the institution of monogamous marriage whose basis both in natural law and in divine revelation the tradition specifically affirms. It can be assumed also that Christian critics of the tradition will in virtually all cases be committed to acceptance of the normative character of monogamous marriage, rather than of any alternative structure; and that their opposition to the tradition, however important the questions of principle which it raises, is concerned more with matters of interpretation and emphasis than with any denial of the fundamental evaluation of monogamy made by the tradition.

No such assumption can be made about persons who have rejected the claims of the Christian religion, or who hold

(1) See infra, Chapters Eight and Nine. Barth seeks to avoid the legalism of the tradition, but without surrendering to the opposing tendency of anti-nomianism.

views contradictory of Christian beliefs without any consciousness of what Christian beliefs might be. On the other hand, it is far from being established that monogamous marriage, and other less central features of the traditional view, can be or ought to be valued only by those who hold orthodox Christian beliefs (2).

Few people now doubt that religion is a complex and controversial matter, and that there is no universal or general agreement about such things as prayer, the existence of a personal God, and the possibility of a future life. Probably more people persist in believing that the ethical (3) sphere is something about which fundamental agreement is in principle attainable. Indeed, total ethical scepticism would to many people appear eccentric (4). For those who believe that the propositions of ethics can be securely grounded irrespective of their relationship to religious belief, the question

(2) If it were established, the survival of monogamous marriage, in spite of a widespread abandonment of orthodox Christian beliefs, would have to be described as anachronistic. Of course, even if there were no alternative justification of monogamous marriage than that which depends upon Christian ontological assumptions, the actual survival of the institution, anachronistic or not, might still be stubbornly protracted.

(3) By "ethical", one intends to refer to the more theoretical, by "moral" the more practical dimension of the phenomenon in question. But for many purposes the two words can be regarded as interchangeable.

(4) Unselfconscious certitude about ethical beliefs is more widespread than the corresponding certitude about religious beliefs; and not only in the sense that some people are sure they are right, but in the sense that they are sure most people agree with them. Whether or not they are mistaken, some people therefore believe that the propositions of ethics can command a wider allegiance than the propositions of any religious ( or other ideological ) position.

whether they are compatible with, or are historically derived from, the insights of the Christian religion cannot in itself be the decisive question.

In Western societies it remains true that the ethical beliefs of most people, whatever the state of their religious beliefs, stand in a significant relationship to the Christian religion. Although there are other important factors, this religion more than any other single factor has provided the historical framework within which, or in opposition to which, ethical beliefs typically have developed. It is therefore a crucial question how far the ethical insights which have developed in association with Christian doctrinal assumptions are dependent, logically, upon the truth of those assumptions, and, psychologically, upon the belief in their truth. The psychological aspect will not specifically be considered.

The following views would each receive support from persons of widely differing levels of sophistication:-

1. The ethical perspective characteristic of Christianity is valid, because it is a part of the greater truth which finds expression in Christian doctrine.
2. The ethical perspective characteristic of Christianity is valid, in spite of the fact that the doctrinal claims of Christianity are untrue.
3. The ethical perspective characteristic of Christianity is not valid, because the doctrinal claims of Christianity are untrue.
4. The ethical perspective characteristic of Christianity is not valid, because it is inconsistent with the greater truth which finds expression in Christian doctrine.

All of these views presuppose the possibility of discriminating

between valid and not valid ( or at least between not valid and less not-valid ) ethical perspectives. The view that validity is a concept having no application to ethics, and the view that all viable or operative systems of morality are to be regarded as equally valid, do not appear to yield the possibility of constructive criticism, and will not be further considered.

It seems that what has here been called the ethical perspective characteristic of Christianity can only be rejected, on ethical grounds, if the ethical superiority of some specified alternative perspective is affirmed, or if, contrary to what Christians presumably suppose, this perspective is not in reality relevant to the ethical sphere (5). It is arguable that some elements in the traditional Christian view of sexual morality (6) can be rejected in favour of an articulated alternative view. It is also arguable that some elements are not in reality relevant to the ethical sphere (7). What would be much less easily defended would be the proposition that everything within the traditional view is to be rejected without exception, either because it is insufficiently ethical, or because it is only erroneously supposed to be within the ethical sphere (8).

(5) Such matters as the length of young people's hair, or of women's skirts, are thought by some to raise "moral issues", but this is denied by others.
(6) cf. supra, Chapter One.
(7) Some people might think that the official Roman Catholic teaching on birth regulation is ethically deficient; others that it falsely introduces the ethical note into what is a personal and aesthetic question.
(8) Even the most stringent critics could scarcely suppose that everything having some connection with the Christian religion is ipso facto invalidated. This would be little more sensible than to avoid the use of all words appearing in a particular translation of the Bible.

The traditional Christian view of sexual behaviour, although it is sometimes thought of, both by its supporters and by its opponents, as one monolithic reality, is perhaps more helpfully broken down into distinct areas of concern. Some of these are clearly of more central importance than some of the others.

What appears to be the most basic area of concern is sexual behaviour which is intentionally related to the procreation ( and by implication the nurture ) of children. There is also the possibility of sexual behaviour which is not intentionally related to procreation, but which symbolises and expresses a deep personal fellowship between man and woman. All other forms of sexual behaviour are, with varying degrees of severity, proscribed by this traditional morality. A value which is highly esteemed by the Christian tradition, but not by its more extreme opponents, is that of personal purity, whether in the absolute form of celibacy or in the form of the disciplined restraint and self-control appropriate to other modes of life. A value which is highly esteemed by its extreme opponents, but not by the Christian tradition, is that of mastery of the erotic, both in its pre-coital and its coital aspects, irrespective of any dimension of deep personal fellowship.

Sexual behaviour which is not intentionally related to procreation may prove to be actually procreative. But over and above this consideration, supporters of the Christian tradition might wish to urge that all sexual behaviour belongs irreducibly to the ethical sphere. Against this, their opponents might urge that, if one excludes actually procreative behaviour, sexual behaviour is properly thought of in terms of recreational or aesthetic, rather than ethical, analogies.

The belief that sexual behaviour is intrinsically value-free, except where it is actually procreative, seems to be vulnerable to challenge without the critic needing to go to the lengths of resurrecting the strange thesis of J.C. Unwin (9). The belief, at least in this more moderate form, does not however need to be challenged to refute the allied belief that no changes in sexual behaviour ( such as would predictably result from the complete discrediting of the Christian tradition ) are relevant to the ethical sphere. Whether or not actually non-procreative sexual acts can ever be, or can ever not be, proper objects of ethical concern, the Christian tradition is concerned also with actually procreative sexual acts, and these do, if anything does, "raise a moral issue". Therefore the Christian tradition is not irrelevant to ethics, properly understood, and can only be rejected, on ethical grounds, if the ethical superiority of some specified alternative perspective can be demonstrated.

It is of course a matter of dispute whether there is some valid ( or authentic, or absolute etc. ) ethical perspective, as well as whether and how far a particular morality corresponds to or can be identified with it. The traditional Christian view, or some more or less radical re-assessment of it, is claimed by some people to be "authentic morality"; this claim is denied by others. But precisely the same denial is made of all other such claims. All ethical propositions, if

(9) In Sex and Culture ( 1934 ), Unwin argued that "cultural energy" is displayed in inverse proportion to "sexual opportunity", and that society should be so organised as to reduce sexual opportunity to "a minimum for an extended period, and even for ever" ( op. cit., p. 432 ).

they are not vacuous ( cf. "one's obligation is to do what is right" ) are vulnerable to criticism and rejection.

It should in particular be noted that there is no secular or liberal morality which inevitably fills the vacuum left by the retreat of religious assumptions, and which is itself immune from counter-attack (10). Beliefs of any particular kind ( religious, non-religious, anti-religious ) carry conviction only with some people, but not with all. Whatever the criterion which is applied to the notion of authentic morality - God, nature, objective rationality, spontaneous intuition - it will not, either in its selection or its application, command universal acceptance.

There is no one alternative to the traditional Christian view of sexual morality in Western society. If all that is

(10) Any secular or liberal view which is more than a denial of traditionalism is putting forward positive as well as negative assertions, and cannot be claimed, either in its negative or its positive aspects, to be self-evidently correct. The point can be illustrated by reference to Hans Kelsen, a very distinguished exponent of what has been described as secular-liberalism. The editor of a recent collection of Kelsen's essays ( Ota Weinberger ) writes as follows:-

> "Kelsen may be considered the most important champion of legal positivism. The latter is, as it were, a self-evident consequence of the value-free, purely cognitive science which he has in view ... Kelsen's value-relativism naturally implies no denial of values or making light of value-attitudes; it is simply a matter of regarding them as decisions, as something that cannot be demonstrated in purely cognitive fashion. Kelsen's pure positivism and his relativist theory of value are not unrealistic and neutral in their pragmatic consequences; they lead, rather, to a critique of ideology, to an understanding of value-pluralism, to the postulate of tolerance, to a pluralistic democracy based on the free play of ideas in the self-correcting dialectic of clashing opinions within the field of legal development ... Kelsen's attitude and his work ... seem ... imbued, therefore, with a high moral tone, in keeping with the modern spirit, which is sustained equally by the idea of democratic freedoms and by creative responsibility and the will to betterment" ( Hans Kelsen: Essays in Legal and Moral Philosophy, Selected and introduced by Ota Weinberger, Translated by Peter Heath, ( Dordrecht, 1973 ), pp. xxv-xxvi ).

A Marxist critic would no doubt attack the "bourgeois" presuppositions of Kelsen's thought.

known about a person is that he rejects the traditional teaching about, for example, abstention from extra-marital sexual intercourse, it is quite unclear which forms of behaviour, proscribed by tradition, he regards as permissible (11).

It is arguable that belief in the kind of God affirmed by the monotheistic religions has unavoidable ethical implications (12). But disbelief in such a God has in itself no positive ( and perhaps no negative ) implications at all. The fact ( if it is a fact ) that man is alone in the universe carries with it no necessary implication either of his value or of his disvalue. There is no way in which it can be predicted how an atheist will regard man, if all that is known is that he does not believe in God. He may deny the value of man because he

(11) It is doubtful whether there is any alternative to the traditional view which is widely held throughout all sections of the population ( as distinct from alternatives which may be strongly entrenched within particular socio-economic or ideological groupings ). The moral egoist may regard all behaviour which is beneficial to himself, and the moral nihilist all behaviour without exception, as being permissible. Most persons would reject rape, seduction of the immature, sexual sadism, incest. Some would regard as deficient all forms of sexual relationship which do not express a mutual love ( whatever that is thought to mean ) between the participants. But this criterion, which on the face of it might appear to be an alternative to the traditional view, at least with regard to sexual behaviour which is not actually procreative, is certainly no more able than the traditional view to reconcile the various viewpoints. For some people, who need not be Christian or religious, the criterion is not rigorous enough; for others, it is too rigorous.

(12) If it is believed that God, "the ultimate principle of reality", has loving concerns for his creatures, it seems to follow that they must, in so far as they have knowledge of these loving concerns, attempt to imitate them in their relationships with each other. What in detail these implications are is less clear.

denies the reality of God; he may affirm the value of man because of, or in spite of, his denial of God. Those atheists or agnostics who affirm the value of man are often described as humanists. But a "humanist" view of morality, even if one could identify and accept what was distinctive about it, would be no more entitled than any other view to be regarded as being self-evidently the higher, authentic morality to which other views must submit (13). A fortiori, simply being non-Christian or non-religious is not the same as being humanist.

There is no ethical perspective which can be presumed to have the authority to eliminate and replace the norms of traditional morality (14). Moreover, rejection of some feature of traditional morality, such as the official Roman Catholic attitude towards birth regulation, does not entail rejection of such features as the establishment of monogamous marriage as the appropriate context for the procreation and nurture of children.

This consideration establishes no more than the conditional authoritativeness of the traditional view ( and in its "central" rather than its "peripheral" aspects ). The mere fact that something is traditional is quite consistent with it being palpably and corrigibly defective. But the burden of proof, so to speak, is affected. The deficiencies of a living institution, if they have been demonstrated, call for reform. But only if there is some less deficient living institution which could realistically be substituted for it, is there a presumption that elimination and

(13) Only unreflective opponents of religion suppose that its rejection is intrinsically and self-evidently a positive thing. cf. Erich Fromm, Man for Himself, ( 1947 ), p. 198:-
"..... the current widespread lack
of faith does not have the progressive aspect it had generations ago".

(14) To say that none can be presumed to have this authority is not the same as saying that it can be presumed that none has it .

replacement are both possible and desirable. Monogamous marriage, together with the various obligations and prohibitions which are involved, is a living social reality within Western societies; for all its real or supposed deficiencies, it serves to meet certain basic social needs ( such as the procreation and nurture of children ) which would still need to be met even if monogamous marriage were, hypothetically, to disappear. There is no indication of a theoretical, far less of a practicable, alternative to monogamous marriage which could replace it within Western societies.

It is not merely that people are temperamentally disinclined to make fundamental changes. Change is not justifiable ( except in the kind of intolerable situation where any change seems destined to be for the better ) without some foreseeable expectation of improvement. This general consideration applies with full force to monogamous marriage.

But the absence of a demonstrably superior alternative to this traditional, religiously-influenced institution is at best a conditional justification for its present and continued existence. It is to be accepted as valid, until such time as a demonstrably superior alternative emerges. Not surprisingly, this modest line of argument does less than justice to the convictions of those who believe that monogamy expresses something essential to an authentically moral view of life. But it is at least worth making the point that some of the objections to monogamy are equally valid as objections to any of the conceivable alternatives to monogamy.

The fact that monogamy, in its Western forms, has been

associated with religious beliefs which many people do not share merely illustrates that no belief is universally held. Since this is so, exactly the same consideration applies to all other actual or potential systems for regulating the relations between the sexes. If no norm could be justified in the absence of universal agreement, no norm could ever be justified. Similarly with the fact that monogamous marriage makes certain demands, and fails to make certain other demands - any institution makes certain demands, but not others, and is challengeable in both respects.

It should be noted that rejection of Christian doctrine, or the acceptance of contradictory doctrinal claims without self-conscious rejection of Christian doctrine, is not to be correlated with any particular attitude to the ethical questions to which Christianity claims to be able to supply distinctive solutions. Non-Christians can be scrupulously moral, according to the strictest interpretations of Christian morality (15).

Obviously it cannot be claimed, on behalf of monogamous marriage, that human survival is impossible except upon a basis of monogamy. Polygyny, polyandry, group marriage ( and a bewildering variety of arrangements which are less easily classified ) have proved capable of sustaining a viable social life in particular circumstances. In the case of Muslim polygyny in particular, non-monogamous arrangements have proved

(15) There may be some danger in practice that, because of the conventional association of ethical with religious beliefs, all sense of moral obligation will, for some people, disappear once the "religious illusion" is discarded. But there is certainly no reason in principle why the non-Christian should not adopt Christian ethical teaching. Nor is there any reason why he should accept it ( in so far as it may be ultimately bound up with questions of Christian doctrine ). But it is at least one coherent possibility which has some claim to be considered.

compatible with a prolonged period of remarkable cultural achievement. But, mutatis mutandis, what is true of monogamy is true of all its possible rivals. Although monogamous marriage is not the only system of co-operation between the sexes which has proved capable of sustaining a viable social life in particular circumstances, it has certainly proved itself to be at least as capable of this as has any alternative system. It may, indeed, be that non-monogamous systems are perceptibly on the retreat (16), and that de facto monogamy is often to be discerned as the underlying human reality within a de iure non-monogamous structure (17). If so, the negative defence of monogamous marriage - in the sense of negating its negation - may be the more confidently undertaken. But this negative defence is of limited relevance to those who believe that monogamous marriage is not merely not-demonstrably-worse than some specified alternative system, but demonstrably better than any such alternative.

Before considering the relationship between one particular ethical perspective ( that of Agape-ethics ) and the institution of monogamous marriage - with a view to the possible justification of monogamy without resort to Christian ontological assumptions - it is proposed to discuss the argument that monogamous marriage should be upheld because, irrespective of any more ultimate considerations, it is essential to the maintenance of "Western culture".

(16) Some traditionally Muslim countries ( recently Iran ) have adopted monogamy as the legal norm.

(17) cf. Donald G. MacRae, Appendix E to Putting Asunder: A Divorce Law for Contemporary Society, ( 1966 ), at p. 162:-
"Despite the enormous relativity of the devices for sexual regulation, child-rearing, and kinship-obligations, the nuclear family of biological parents and children is de facto nearly universal."

## CHAPTER FOUR. PRAGMATIC ARGUMENTS IN FAVOUR OF MONOGAMOUS MARRIAGE.

Arguments in favour of monogamous marriage which seek to show that this institution corresponds to the revealed will of God, or nature, or some other criterion for identifying authentic or absolute morality, are less likely to command general acceptance than arguments which rest upon less controversial premises. It may therefore be a more effective strategy to identify monogamous marriage with the "social structure" and its values, without raising the question of any ultimate justification.

This is the approach adopted by Lord Devlin (1). He argues that any society requires, in addition to such fundamental values as safety of life, individual freedom, and protection from deliberate harm, a more specific system of moral principles about which there is general agreement (2). Monogamous marriage, in spite of its connection with Christian ontological assumptions (3), is nevertheless part of the social structure; and the moral principles which presuppose, and are presupposed by, monogamous marriage are necessary to the well-being of society (4). Therefore it is justifiable to sustain and uphold these moral principles - society "cannot live without morals" (5), and the morals it

(1) The Enforcement of Morals, ( 1965 ).
(2) "If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail..." ( op. cit., p. 10 ).
(3) About which, Devlin concedes, there no longer is general agreement.
(4) i bid., pp. 8-12.
(5) i bid., p. 24.

has, in the sphere of sexual behaviour, are those which derive from, and which safeguard, monogamous marriage.

Some arrangements for regulating sexual behaviour and for organising child nurture are necessary to any society (6); and the particular arrangements which a particular society has come to accept are necessary to that society. These considerations are just as relevant in the case of non-monogamous as of monogamous forms of marriage (7); but with Western societies one is not in fact discussing non-monogamous forms of marriage. Devlin clearly doubts, however, whether a morality devoid of all religious associations could provide the necessary social cohesion (8).

(6) "Whether the union should be monogamous or polygamous, whether it should be dissoluble or not, and what obligations the spouses should undertake towards each other are not questions which any society has ever left to individuals to settle for themselves" ( ibid., p. 61 ).

(7) Devlin does not base his case on the intrinsic advantages of monogamy, although it can be presumed that he does consider monogamous marriage to correspond both to natural law and the divine positive law.

(8) "The weakness of the free-thinker's position is that he offers no substitute for religion as a social force" ( ibid., p. 84 ).
"It still needs the divine promise to divert the mass of mankind to higher things. Thousands of men and women who are not church-goers persevere with the obligations of marriage and resist temptation because marriage means more to them than an institution of high social value" ( ibid., p. 84 ).
"A man can make his own philosophy. To make a philosophy for a society is far more difficult; and so far in the Western world only Christianity has succeeded" ( ibid., p. 84 ).
"I do not suppose that any secular society has ever existed which sought to control vice simply by passive resistance and good works" ( ibid., p. 106 ).

Devlin's argument is vulnerable in so far as it appears to over-state the predominance of traditional standards of morality in Western societies. It is not, however, obvious that it over-states the relative insignificance of any one alternative system of norms. The attempt to justify moral principles without bringing in distinctively moral considerations is, on the other hand, a worrying procedure. If the fact that certain principles happen to be authentically moral does not essentially strengthen a line of argument, it is a foreseeable development that their immoral character would not essentially weaken it.

Basil Mitchell, also from the Christian side, attempts to modify and strengthen the case for the legal upholding of traditional moral principles. The opponents of the tradition against whom Devlin constructed his argument are not, it should be noted, extreme radicals challenging the legitimacy of any institution, or even the particular institution of monogamous marriage. The point directly at issue is how far behaviour which is strongly associated with personal evaluation should be subject to legal sanction, in the absence of palpable evidence of "harm" to some individual within society, or to society as such. According to Mitchell, secular-liberals such as H.L.A.Hart ( who accepts the actual existence of monogamous marriage as a legal norm ) regard sexual morality as basically irrelevant to the ultimate structural strength of a society (9).

(9) Basil Mitchell, Law, Morality and Religion in a Secular Society, ( 1967 ), pp. 18-35.

This presumably does not mean that no moral consideration could apply anywhere within the sexual sphere (10); and it presumably rests upon something more positive than the belief that "traditional morality" is not to be identified, as its apologists would claim, with authentic or absolute morality. But it is not clear within which boundaries questions of sexual behaviour can safely be left to individual discretion, according to the view characteristic of enlightened and reasonable secular critics of the tradition. In any event, the question of the justification of monogamous marriage is indirectly raised, even if, in the attack on "moralism" (11), no direct attack is made upon the legal institution.

Devlin regards monogamy as essential to Western society (12), and therefore he regards it as justifiable that the law of Western societies seeks to defend and uphold monogamy. Mitchell points out that "essential" in this context may mean one of three things - either that, in the absence of what is essential, society vanishes altogether; or that society suffers some modification; or that society ceases to possess its characteristic excellences (13). A particular society is

(10) Mention of rape, sexual sadism, exploitation of the immature should suffice to establish that sexual behaviour is not somehow outwith the moral sphere.
(11) H.L.A.Hart, Law, Liberty and Morality, ( 1963 ), uses the term "legal moralism" to express what he regards as illegitimate enforcement of particular moral beliefs.
(12) Patrick Devlin, op. cit., pp. 8-10 et passim.
(13) Mitchell, op. cit., pp. 30-35.

justified in resisting any diminution of its characteristic excellences, and not merely in resisting total collapse (14).

In so far as a society is significantly dependent upon the effective functioning of the monogamous family unit, it will not flourish unless there is a general acceptance of the obligations which are the corollaries of monogamous marriage. It will not even survive, in the most minimal sense, if there is not, on the part of a significant minority of the population, an acceptance of these obligations, or of the obligations which are the corollaries of whatever institution or institutions might supplement or replace monogamous marriage. Naturally, to replace an existing institution, because it is not inwardly accepted by everyone or at least by a majority, could only be justified if the replacement were inwardly accepted by everyone or at least by a majority. To leave it to everyone to work out and live by their own purely personal system of values would be a solution plausible only to the anarchist. To offer a range of alternative institutions, but to exclude from legal recognition all other possibilities, would not satisfy the anarchist, and would be vulnerable to the argument that this would intolerably weaken the forces of social cohesiveness. Although clearly the norms of traditional morality are not universally complied with, it is not clear that any alternative norms are complied with to a significant extent. Nor is it clear that, within the circumstances of any Western society,

(14) It is a sufficient argument, for those who value Welshness, that Wales would no longer be Wales if the Welsh language etc. were abandoned. A Welshman does not need to argue that communication cannot be done except on the basis of the Welsh language; the Welsh language symbolises something distinctively and specifically valuable which would not long survive the decease of the Welsh language. ( cf. Mitchell, on. cit., pp. 34-35 ).

any alternative norm could foreseeably command the same degree of theoretical and practical allegiance as is still commanded by traditional morality (15).

An analogous argument can be constructed to defend the value judgement, characteristic of secular-liberal no less than of Christian thinkers, that the human individual has worth - sometimes this is put in terms of "infinite" worth - merely for his human qualities as such (16), and not in proportion to his adequacy as measured against criteria of intelligence, class, sex, age, creed or religious origin. Societies can exist, and within their own system of reference can flourish, without so much as paying lip service to the notion that persons should be esteemed regardless of their social class and ideological or racial associations. But few of those who make this value-judgement would be content to defend it pragmatically as something which their culture just happens to have developed, without also offering argument to the effect that other cultures would ( in some "objective" sense ) be richer and more complete if they followed suit. Even if it is in some sense a sufficient argument to establish that a society is, descriptively, a "humane" society, and thus that it happens to have humane institutions, it is a curiously restrained argument when it emanates from persons who are deeply convinced of the moral authority of humaneness. Often the argument is in fact carried further; as Mitchell points out (17), those who, from liberal motives,

(15) Even if traditional morality does not always yield an unequivocal answer, and is sometimes hard to live up to, it is at least relatively clear and realistic, compared with some more pretentious specifications - cf. "fulfil your potential", "be who you are" etc.
(16) The word "human" is notoriously unclear in this context.
(17) ibid., pp. 46-47.

desire to restrain manifestations of, for example, race hatred, seldom base their case either on some alleged incompatibility of race hatred with social survival, or on the ( obviously contingent ) fact that their's happens to be a society which disapproves of race hatred. More usually, they insinuate that race hatred is objectively wrong; and that legal discouragement of race hatred, including in principle the usual apparatus of fine and imprisonment, is objectively justifiable and desirable. Some secular-liberals, however, who would regard manifestations of race hatred as clearly raising a "moral issue", do not feel that manifestations of what a traditionalist might call sexual disorder ( such as promiscuity, wife swapping, pornography ) are to be interpreted in the same way.

Few secular-liberals, and few traditionalists, would dispute that race hatred is something, potentially affecting the stability of society, with which the law is properly concerned. No traditionalists, but some secular-liberals, would dispute that sexual behaviour is something, potentially affecting the stability of society, with which the law is properly concerned.

Against the view which justifies the enforcement of morality as such, Hart (18) argues that punishment should be restricted to cases where one person requires to be protected from the infliction of harm by another ( or, occasionally, by himself ). Therefore "immoral" behaviour which does not in fact cause harm to anyone, and which does not weaken society, should not be subject to legal sanctions.

(18) op. cit., pp. 33-34 et passim. cf. p. 82:- "There is no evidence that the preservation of a society requires the enforcement of its morality as such".

The most extreme interpretation of this thesis (19) would be that no action within the sphere of sexual behaviour could harm anyone or weaken society. Granted the existence of monogamous marriage as the legal norm, it seems clear that this extreme interpretation is untenable. Even leaving out of account non-mutual forms of sexual aggression, and ignoring the emotional hurt resulting from social disapproval, people are often harmed by their own or by others' sexual behaviour. The procreation of a child without the intention of providing effectively for its nurture is an act having crucial implications for more persons than the impregnator and the impregnated; it is by no means a purely private matter affecting them alone (20).

The more moderate interpretation would be that sexual behaviour often or characteristically is a purely private matter, and that there is a presumption to this effect when the behaviour in question is between "mature" persons who mutually consent. Even in this form the thesis is vulnerable to the objection that it presupposes a value-free concept of harm, and that harm is not a value-free concept (21).

(19) It can be assumed that Hart would not himself interpret the thesis in this way.

(20) This is only the most basic of the considerations. "Sexual emotions are powerful, and sexual acts committed in private can have important repurcussions outside. The law must in general be prepared to take cognisance of activities in which family life and blood relationships are based, and which characteristically can result in the arrival of a new member of society", J.R.Lucas, The Principles of Politics, ( 1967 ), p. 342.

(21) This point is carefully elaborated by Lucas, op. cit., esp. pp. 342-345. "In its narrowest sense, although fairly definite, harm is far too narrow. Even Mill has to construe it more widely to save himself from absurdity. But if once we start enlarging, there is no limit to its expansion. By invoking moral or spiritual harm the Inquisition could justify their activities within the framework of Hart's paternalism" ( ibid., p. 345 ).

Unless a particular category of act cannot harm anyone, any act within the category is in principle subject to censorship or prohibition. If it cannot cause harm, it should not be censored or prohibited; but if it sometimes causes harm, a decision must be made whether to prohibit the category of act, or at least to punish those acts within the category which are shown to have caused harm. So, unless there is a category of act, now stigmatised as immoral, which in fact cannot harm anyone ( which must mean, cannot harm even the person who commits the act ), society is entitled to "enforce morality" in a particular case. To do so is to protect society (22).

Monogamous marriage, like Trade Unionism and the Welsh language, is an institution whose protection and safeguarding can be justified on pragmatic grounds, in spite of the fact that it is not the only possible way of dealing with human sexuality and child nurture. Some form of marriage structure and some language - though not, perhaps, some form of trade association - is necessary to human survival. Societies which have traditionally adopted monogamous marriage would certainly not be able to reproduce all their distinctive excellences if they abandoned monogamy. This consideration applies also to Trades Unionism and the Welsh language. Those who value the kind of society which these institutions help to shape have no need to be discountenanced by the thought that there are some deviants or

(22) cf. Mitchell, op. cit., p. 68:- "People may dispute about whether we should recognise the traditional Christian concept of marriage or some other, and to what extent the associated morality should be enforced. But the protection of individuals from harm is not a purpose which can be realised independently of the protection of the institutions under which they live."

eccentrics who opt out, or who participate without inner conviction. As long as a society is in continuity with its past, it is entitled - indeed, it is obliged - to protect and safeguard its fundamental institutions. This would be true even in cases where these institutions ( for example, a language without tenses, or a language with a clumsy and inconvenient written form ) were demonstrably inferior to others which might replace them. However, in cases where institutions, as well as being hallowed by tradition, are intrinsically equal to or superior to any alternatives, it is desirable that their apologists should place only provisional and tactical emphasis upon the argument based on tradition.

## CHAPTER FIVE. ALTERNATIVE NORMS.

It is important to distinguish clearly between justifications of breaches of a rule, and proposals for the replacement of the rule by an alternative. Permissible or obligatory lies are not usually thought of as requiring any inference that telling the truth should, in the absence of exceptional circumstances, cease to be morally a duty. Nor does the acceptance of slang or hasty writing, where this is appropriate or excusable, diminish the desirability and necessity of correct syntax and legibility. Barbaric intrusions into the majesty of the French language may, or may not, be tolerated; but even if they are, this is a very different thing from adopting the English language instead of French. Similarly with controversy about sexual behaviour. Much of the discussion which is explicitly hostile to traditional morality is to be interpreted, on analysis, as justifications of exceptions to particular norms, rather than coherent proposals for the establishment of alternative norms.

There is, within Western society, surprisingly little criticism of monogamous marriage which offers alternative proposals for family structure (1). The view that there should be no structure at all, and that effective nurture of children could safely be left to spontaneity and natural instinct, without any need for institutional or social support, does not seem to require further discussion. At the opposite extreme, it may be suggested that the whole enterprise of breeding and conditioning

(1) There is, of course, a large volume of criticism which rebukes monogamous marriage for its "hypocrisy", its inhibitions, its inwardness etc. But the attraction of the alternative consists largely in its avoidance of the kind of responsibilities characteristic of marriage in all its forms, rather than its genuine transcendence of the limitations of monogamy.

should be controlled by official State agencies, so that all decisions about the numbers, the heritable characteristics, and the learning environment of the population are taken by the leading group. Citizens would be given no personal discretion in the matter of whether to procreate children, or with whom, and whether to assist in child-nurture; everything would be unequivocally determined by the appropriate higher authority. Those who find such a view of society unattractive would be well advised to base their opposition to it on specifically ethical grounds.

Whatever more than this may be involved, the institution of marriage, in all of its forms, is concerned with the replacement of the human population. Monogamous marriage is one answer, though not empirically or theoretically the only such answer, to the question how the procreation and nurture of children is to be organised in a stable and effective way. Views of human sexuality which do not provide an answer to this question cannot be regarded as alternative to monogamous marriage; they are exceptions, covering not the same ground in a different way, but different ground in a different way (2).

A prolonged career of prostitution or philandering (3) is not, socially, alternative to monogamous marriage, any more than is a life of celibacy or of homosexual relationships. These

(2) Rose gardens are not alternatives to cattle meadows, although soya bean fields may be.

(3) This is assuming that the erotic activities engaged in are not also procreative. Such deviations from the norm of monogamous marriage may, of course, be thought to present an unacceptable threat to its effective functioning, just as industrial action, so-called, may be thought to present an unacceptable threat to industry. But no one would imagine that industrial action was an alternative to industry.

are exceptions, or deviations, which do not seek to attain the same ends by a different means, but avoid the attainment of ends sought by the majority of the population.

An alternative to monogamous marriage must, if it is to appear plausible, provide an equally secure and effective context for the nurture of children. Human infants in any society are dependent for several years upon the assistance of older persons; the more advanced the technological skills required for full individual viability, the more prolonged the period of economic and emotional dependence will be. Any norm ( ignoring the question of permitted exceptions to it ) must provide economic and emotional security for the requisite period; and it is unlikely that any norm would appear plausible which placed the entire burden of providing this security upon the members of one sex, without institutional co-operation from members of the other (4). "Free love" without any continuing bond between sexual partners is to be understood as the denial of, not as a particular affirmation of, the normative in this sphere.

Co-operation between persons of opposite sex can involve the following elements:- economic partnership; erotic partnership; shared domestic arrangements; procreation of children; pursuit of common recreational goals; and child nurture. According to the norm of monogamous marriage, erotic partnership and the procreation of children are activities between the husband and wife to the exclusion of third persons; child nurture is a joint task of husband and wife, but with significant assistance from others; husband and wife have shared domestic arrangements, not necessarily excluding others; economic and recreation-

(4) If one, then obviously it would be the female sex.

al activities have no necessary connection with the nuclear family. The test which is proposed to distinguish a theoretical alternative to monogamous marriage from something which is not even a theoretical alternative is that a norm for marriage must identify the person or persons by whom the task of child nurture is effectively to be undertaken during the period of dependence (5). There is presumably no need to elaborate the point that, all other things being equal, the biological mother of a human child is more likely to be motivated to undertake the task of nurture than is any other person; nor that, assuming it to be desirable that she is assisted in this task by some person or persons of the opposite sex, the man who supposes himself to be the child's father, or who at least has some sexual or kinship bond with the mother, is more likely to be motivated to give this assistance than is a complete stranger. If paternity is not a matter even of relative certainty, kinship bonds must be matrilineal. Where paternity, rather than kinship bond, is the basis of the obligation to assist in child nurture, the obligation will be ineffective if, in the nature of the case, the ascription of paternity is a dubious matter. One of the reasons for sexual morality ( in a very narrow sense ) is that unless potentially procreative activities are regulated, actual fathers will be under no very clear obligation to assist in child nurture; and unless there are other identifiable male persons, such as the woman's brothers or uncles, present within the vicinity for the next decade or decades, there will be no effective co-operation by male persons. A sexual bond which persists as

(5) This could be anything from half a decade to two and a half decades.

such, or which gives rise to a continuing inter-personal co-operation, for a decade or decades is hardly distinguishable from marriage, polygamous or monogamous. Where this inter-personal co-operation, arising out of a sexual bond, could be socially enforced ( irrespective of questions of paternity ), there would be the presupposition of a higher degree of moral responsibility for sexual behaviour than is proposed by the traditional monogamous view.

In the case of polygynous marriage, there is no doubt ( or at least no more than with any other form of marriage ) about the male person who, as father, is committed to the joint task of child-nurture. With polyandrous marriage, the situation is of course different, and this is one factor which has both, presumably, diminished the past extent of actual polyandrous societies, and also limits the theoretical appeal of this institution. Westermarck's cold dismissal of polyandry is typical:- "... the suggestion that in the future polyandry will be recognised among ourselves as a form of marriage needs no serious consideration. In the countries where it is found it owes its origin to circumstances which cannot be supposed to recur in modern civilisation" (6). Although polygyny deserves to be treated with more respect, it is open to the crucial objection that, not only in its empirical forms but also in its fundamental nature, it presupposes a hierarchical superiority of male over female persons (7). In so far as Western

(6) Edward Westermarck, The Future of Marriage in Western Civilisation, ( 1936 ), p. 199.
(7) cf. supra, pp. 4-5.

societies have rejected the notion of male supremacy, it would seem logically to follow that they have barred the way to any defensible adoption of polygynous marriage; only a madman erects a superstructure while destroying its foundations.

Apart from the particular economic circumstances of Western societies ( with the demands made upon most individuals to develop highly specialised skills, and, having developed them, to be prepared to change their place of residence several times during a career ), the distinctive cultural evaluations of Western societies are hard to reconcile with the presuppositions of polygamy. The emphasis upon the personal dimension, upon the value of individual choice, upon the theoretical equality of male and female are, not surprisingly, consistent with the monogamous, rather than the polygamous, institution (8).

The institutional possibility, other than monogamy, which might seem to do justice to the distinctive cultural evaluations of Western society is that of plural marriage (9). Where a plurality of men and a plurality of women are committed to a thoroughgoing sexual and domestic partnership with each other, the same quality of individual choice and of intimate awareness of the other which characterises monogamous marriage ( at its "best" ) may be exemplified. Moreover, some of the disadvantages of monogamy - the temptation to mutual egoism, and the over-intense emotional atmosphere, for example - may

(8) In their more extreme manifestations, these individualistic evaluations are perhaps inconsistent with any institution, any coherently ordered system of responsibility.

(9) Unlike the polygamous marriage, plural marriage eliminates the notion of the person to whom certain marital obligations are exclusively owed.

be overcome within this context of wider and cooler acceptance.

But the hypothetical transition from monogamy to plural marriage ( excluding some form of social compulsion, which would destroy the supposed advantages of plural marriage ) could not foreseeably be undertaken except by a tiny minority of idealists and visionaries. Even they would, in the first instance, have been shaped by the monogamous institution. It is hard, with the best will in the world, to avoid the impression that actual plural marriages are subject to all the same difficulties as monogamous marriages, and that some of the difficulties are greatly magnified.

It is not an easy matter for one man and one woman to be sure that they love each other, or that they love each other enough to sleep together, or that they love each other enough to live together. Even when they are sure about all these questions, difficulties remain over the precise allocation of roles and responsibilities. But when they are considering these questions not only in relation to each other, but in relation to several other men and women, the difficulties increase, presumably in geometrical progression. Unless the allocation of roles is established by some accepted and intelligible procedure, everyone knows what tension can be generated by doubt over so trivial a question as who is going to make a bed, never mind by the question with whom one is to sleep in it. If plural marriage were to become a general, or a virtually universal, institution ( and thus were normative for all persons, including many who have made no intrinsic choice in favour of this possibility ) there can be little doubt that there would, in very many cases, be intense jealousy and disruption over the allocation of responsibilities and privileges. Human beings simply do not, in the absence of

specific role-responsibilities, respond unsparingly to the call of a particular teething infant or a pile of dirty nappies; and it is upon such mundane obstacles that the vision is ensnared and then perishes. Although plural marriage is theoretically an alternative to monogamous marriage, in practical terms it is more plausible as a permitted deviation than as itself a norm (10).

The normative character of monogamy in Western culture can therefore be vindicated; there is no coherent and plausible alternative to it. It should be noted that the Chinese commune and the Israeli kibbutz appear to be examples of monogamous marriage, within a wider social structure than is familiar in the West, but not to be examples of non-monogamous marriage (11). Young people who "live together" monogamously, without seeking formalised social approval for their union, are merely experimenting with a rather precarious form of monogamy; there is no alternative norm implicit in their arrangements.

The acceptance of the normative status of monogamy is not dependent upon Christian ontological assumptions, or upon ethical analysis which is substantially identical with that of

(10) cf. D.G.MacRae, Putting Asunder, ( 1966 ):-
"... the fragile and exceptional communitarian experiments of Utopian colonies, kibbutzim, and so forth ... despite their pride in their autarky ... depend largely on the ordinary social structure of the societies within which they exist" ( Appendix F, at p. 169 ).

(11) cf. Edmund Leach, A Runaway World, ( 1968 ):-
"I did not say ... that either the kibbutz or the Chinese commune has been proved to be a viable alternative to the monogamous neo-local nuclear family as the normal domestic grouping in a modern industrial economy" (note 1 to p. 45 ). Thus, these arrangements are not proposed by this eminent critic of Western traditional morality as viable alternatives to monogamy. The point made in the text, supra, is that they are monogamous, and thus not theoretically alternatives at all, viable or otherwise.

Christians. Lecky's statement is typical:-

> "... we have ample grounds for maintaining that the life-long union of one man and of one woman should be the normal or dominant type of intercourse between the sexes. We can prove that it is on the whole most conducive to the happiness, and also to the moral elevation, of all parties. But beyond this point it would ... be impossible to advance, except by the assistance of a special revelation. It by no means follows that because this is the dominant type it should be the only one, or that the interests of society demand that all connections should be forced into the same die" (12).

Monogamous marriage is, according to this classic representative of nineteenth-century secular-liberalism, superior as an institution to any viable alternative; and individual happiness, as well as social stability, is most readily attained through loyalty to this institution with its attendant obligations. But this does not cover the infinite variety of human situations, so that exceptions to the norm are in some cases to be tolerated or approved. Similar endorsements of the normative status of monogamy can be found in non-Christian writers clearly unsympathetic (13) as well as sympathetic (14) to the spirit of Christian ethics.

(12) W.E.H.Lecky, History of European Morals from Augustus to Charlemagne, ( reprinted 1913 in two Parts ), Part II, pp. 348-349. This corresponds to the notion of a general rule ( or working principle, middle axiom etc. ), as distinct from a rule or norm to which there are no permitted exceptions.

(13) e.g., E.Westermarck, op. cit., p. 170:-
"... there is every reason to believe that the unity of sensual and spiritual elements in sexual love, leading to a more or less durable community of life in a common home, and the desire for and love of offspring, are factors which will remain lasting obstacles to the extinction of marriage and the collapse of the family, because they are too deeply rooted in human nature to fade away, and can find adequate satisfaction only in some form of marriage and the family founded upon it." Westermarck dismisses the claims of polygamous and plural marriage.

(14) e.g., L.T.Hobhouse, op. cit., p. 231:-
"As an ethical sacrament, marriage is the fruition of perfect love, in which, at its best, men and women pass beyond themselves and become aware ... of a higher order of reality in which self and sense disappear."

Another theoretical possibility is that persons should be permitted to choose from a specified number of marriage institutions ( monogamous, polygamous, plural ), each of which would receive full legal recognition (15). Since other forms of marriage are at least as vulnerable to ethical criticism as is monogamy, it is likely that the impression of liberality created by this pluralism would not overcome grave suspicions from several quarters. One does not merely choose for oneself; if the arrangement involves the procreation of children, one chooses for them as well. Any foreseeable social disadvantages to children ( through being nurtured within a "sexist", or an "authoritarian", or simply an unfamiliar family structure ) is not a matter of indifference to the liberal, any more than to anyone else. Apart from the wider issue of social cohesiveness, it would also, predictably, be difficult for society to give the requisite support to a variety of institutions involving disparate or contradictory obligations (16). It may be that some such development appears to be a logical implication of a "pluralistic society"; but even if it does, the pluralistic society, in so far as the idea appears to have definite implications, cannot claim self-evident and over-riding authority in the moral sphere.

It seems that a very strong case can be made out for the normative status of monogamous marriage within Western societies, without explicitly relying upon the ethical and ontological assumptions which underlie traditional morality. It remains to be seen how far distinctively ethical considerations would support this conclusion.

(15) This was briefly criticised <u>supra</u>, pp. 5-6.
(16) It can be hard enough to restrain the irresponsibility of persons who abuse one system ( e.g., monogamy ), without offering them the chance of selecting which system, at any particular moment, is likely to be the least onerous.

## CHAPTER SIX. THE PERSPECTIVE OF AGAPE-ETHICS.

Though no ethical perspective can claim to have the allegiance of all competent thinkers, still less of all persons, particular interest and authority attaches to the perspective of Agape-ethics ( the ethics of other-regarding love ) (1).

Some of the more extreme situationist forms of Agape-ethics have been referred to (2). An ethical discussion which finds no place for general principles (3) does not seem to be able to offer concrete guidance. Only those forms of Agape-ethics which, as well as repeating the call that one should love the other for his sake, are able to relate this to more general considerations ( "wisdom", middle axioms, working principles, perhaps more inflexible rules ) will be considered.

Those who are committed to this perspective characteristically identify it with the category of authentic or absolute morality (4); for them, Agape is not merely one emphasis or tendency within ethical discussion - it is the supreme criterion.

(1) Agape-ethics is characteristic of Christian thought, but is by no means confined to it.
(2) supra, pp. 25-30.
(3) i.e., pure Act-agapism, as distinct from pure Rule-agapism or mixed Agapism. cf. N.H.G.Robinson, The Groundwork of Christian Ethics, ( 1971 ), p. 251:-
"The crucially critical question for this so-called radical combination of the absolute of love with an otherwise all-pervasive relativism is whether it is ethically viable; and one aspect of that question concerns the truth of the contention that love by itself gives direction."
(4) Those who are otherwise noted for their relativism are equally noted for the absoluteness with which they press the claims of their interpretation of Agape.

The central emphasis of Agape-ethics is that one must love one's neighbour, one's fellow-man, the "other"; and that the obligation to do so is not hypothetical ( "if you adopt an Agapistic view, you will..." ) but categorical, possessing an intrinsic and unchallengeable authority. The two principal ambiguities concern the identification of the "neighbour", and the ascertainment of how his well-being is to be promoted.

Again, it is often unclear, assuming the neighbour to have been correctly identified, what it is about him that calls forth the response of Agape. Is it his own self-awareness ( "Smith as he thinks he is" ) ? Is it the concrete, empirical person in his totality ("Smith, warts and all") ? Is it some deeper, truer part of the empirical person ( "Smith, as he really is" ) ? Or is it something about him which is not empirical at all ( the fact that Smith is a child of God, or a fellow-sufferer, or a cell in the great organism of humanity ) ? One possible elaboration of the basic imperative "Love your neighbour" is that one should effectively meet his deepest need, taking into account the total situation, in which other actual and potential neighbours present their claims upon one's limited resources.

It is admitted that there is no specifiable positive action, giving rise to an "action-rule", which is invariably the loving thing, and thus what Agape commands. It does not follow from this that there is no specifiable action so disordered and destructive that it could never be the loving thing. The question whether Agape can incarnate itself in the form of a rule is an open one for those Agapists who are neither extreme situationists ( "everything is <u>sui generis</u>" )

nor extreme formalists ( "every individual and every situation is an example of a relevant ethical category" ) (5).

Principles, that is ethical propositions which cannot be reduced to definite empirical equivalents, do not yield negative action-rules (6). Some apparent negative action-rules prove, on analysis, to be more intelligible when re-stated in terms of a principle (7). But the fact that "You shall not kill" should not be interpreted as a negative action-rule does not establish any incompatibility between Agape and rules; it may merely be that the obligation to not-kill, or to preserve life, is not universalisable. The obligation always to sustain life cannot be implemented. In order to preserve one life, there are occasions when another life has to be directly or indirectly sacrificed ( places on the life-raft, kidney-machines, abortion, etc. ). Since loss of life cannot always be avoided, the question in border-line cases is which life has the greatest claim to be preserved. Precisely because the obligation is owed to everyone without exception, it cannot be literally fulfilled in all cases. The more potential neighbours to whom a general duty is owed, the more likely it is that there will be a conflict between duties of the same type.

The implication of this line of argument is that, for those who accept the primacy of Agape, a moral principle, prima facie

(5) It is fair to note that there are some writers who would wish to defend the validity of universal moral propositions without disputing the irreducible uniqueness of each individual and of each moral action:- e.g. K.Rahner, "On the possibility of a formal existentialist ethic" ( Theological Investigations, Volume II, Chapter 7, ( 1967, translation from German by K.H.Kruger ) ).

(6) e.g. "Never do this specific thing".

(7) Even when principles are negative in form, it is rarely if ever the case that they are exclusively negative in substance.

valid, must be complied with unless a) it is contradicted by some "higher" principle (8) or b) it simply cannot be universalised (9).

But not all of the subordinate principles of an Agape-dominated ethics are logically similar to the principle about preserving life, precisely because they do not impose a duty potentially owing to all human beings as such. It is not surprising that the more narrow a field within which a duty is owed, the fewer exceptions to it there will be.

If the duty is owed to one person only, some Agapists would claim that it can be expressed in the form of a rule. For example the rule "Do not commit adultery" is not exposed to any internal inconsistency. Faithfulness to one's spouse ( this is not of course merely, though it may involve necessarily, the avoidance of sexual relations with anyone else ) does not permit or command unfaithfulness to one's spouse. In spite of the notorious saying about charity being more important than chastity, it has remained unclear in which circumstances Agape commands persons to be unchaste.

Agapists often urge that the loving person should be prepared, in his open-ness to the call of Agape, to put to one side traditional notions of what is bidden and forbidden. Transcendence of convention is not, however, to be thought of as invariably commanded. As a creative moral being, the loving person must indeed do whatever Agape commands; but this does

(8) As, for example, the obligation to tell the truth by the obligation to preserve life.
(9) One cannot always save all the children from the burning house, always preserve both the mother and her unborn child, always spare the armed madman and protect his intended victim.

not mean that he is free to do anything whatsoever. In fact, the true implication of Agape-ethics appears to be quite the reverse. Agape-ethics is concerned with responsible action towards others; loving action is action which corresponds to the objective needs of others ( so far as these can be ascertained ). The freedom of the loving person is limited and defined by the needs of his "neighbour".

Even in those interpretations of Agape-ethics which stress the real, though subordinate, importance of such principles as "Always preserve human life if possible", and which also regard certain categories of act as definitely prohibited, the life of obedience to the commands of Agape is not presented in terms of some meticulously comprehensive code. Where some theoretically possible acts are known in advance to be morally impossible, it does not follow that any particular act is known in advance to be morally obligatory. The traveller knows that he cannot get through in certain directions; he knows the general direction in which he is going; but he does not know in advance every minutest detail of his route. This is not to concede that he does not know, or does not need to know, which is the right turning to take when he comes to it.

Where Agape is linked to the objective needs of the neighbour, rather than to the subjective disposition of the loving person (10), it follows that Agape is not permissive; one thing, and one thing only, within the total situation, is the loving

(10) This should not be taken to imply that Agape-ethics is in any way indifferent to questions of inner motivation, or even of "virtue" - merely that the question of effective action has an irreducible importance.

and therefore the obligatory thing. It is not a question of being allowed to do any of a number of permitted things, but of doing the one thing which is positively commanded.

How then does the loving person find out what he is to do, assuming that in the last resort propositions, however valid and helpful in themselves, cannot possess concrete, mandatory authority? The ultimate authority is Agape, other-regarding love, and what must be done is, formally, to be obedient to its commands. In elucidation of this point, it has to be said that Agape, while incarnating itself negatively and generally in certain valid propositions, incarnates itself positively and imperatively in the neighbour. It is only in the confrontation with the neighbour that the loving person knows what he must do.

Since Agape-ethics affirms that every human being is potentially, if not actually, the neighbour to whom the loving person must respond, no human being, of whatever race, class, level of intelligence, creed etc., is beyond the scope of Agape. But a distinction must be drawn between those human beings to whom one is bound by the cords of common humanity, and those to whom one is bound by specific covenants and promises. A woman can, so to speak, potentially be a sister to any human neighbour; but she cannot actually be lover, wife or mother to any except a very restricted group of persons (11). Although some duties are owed indiscriminately, others are owed specifically and in some cases

(11) A similar point is made in a confessedly rationalist attempt to construct an ethical approach ( Oliver Johnson, The Moral Life, ( 1969 ), p. 87:-
"We have learned by experience that we do not gain a maximum of happiness in the most efficient way by demanding that everyone whose acts can affect our welfare treat us equally but rather by developing a type of social arrangement in which most individuals limit their major concern to a fairly small circle of those immediately around them."

exclusively. Because of subsisting relationships and legitimate expectations, the call of Agape is certainly not a drab formula of indiscriminate egalitarianism. One owes a different obligation to the person whom one has promised to help, from the obligation one owes to the previously unfamiliar person who unforeseeably turns up in need of help; in such a case, admittedly, the second obligation may in the circumstances be over-riding, but this not destroy, though it may change, the obligation towards the first person. The person who is married to, or engaged to, or in love with one person cannot, according to Agape-ethics, simply marry, or become engaged to, or even fall in love with ( in so far as this is more than a wholly extraneous process ) another; the subsisting relationship does not merely identify certain persons as neighbours - it serves to impose limits upon the response which may lovingly be made to the needs of other neighbours (12). The swimming coach who has committed himself to the task of helping a particular swimmer to win an Olympic Gold Medal cannot be expected to abrogate this responsibility in order to teach a group of club swimmers the butterfly stroke (13).

In the context of sexual behaviour - which, if it has any claim to be Agapistic, involves concern for the neighbour as person - it is clear that the structure of subsisting relationships and commitments rules out any arbitrary surrender to the impulses, or sentiments, or generous sympathies, of the moment.

(12) Even in polygamous societies, the taking of another spouse is perceived as affecting the position of an existing spouse or spouses. In monogamous societies persons are prohibited from marrying during the subsistence of their marriage to someone else; sometimes promises to marry may have important legal consequences; legal systems do not directly attempt to prevent persons from falling in love.

(13) But he may be expected, on his way to the Pool, to pause to rescue a drowning child from the canal.

The suggestion that Agape, in this context, is the ally of lax and self-indulgent behaviour would represent a gross misreading of the implications of Agape. Where the dimension of sensitivity to the personal being of the other is present, as it is in Agape-ethics, the moral agent is exposed to demands which are no less rigorous than those of traditional morality.

## CHAPTER SEVEN. THE IMPLICATIONS OF AGAPE-ETHICS IN THE SPHERE OF SEXUAL BEHAVIOUR.

Agape-ethics is concerned to stress both the infinite scope of the duty to love all potential neighbours and the absolute duty to love the actual neighbour in the concrete situation. It is perhaps this latter emphasis which distinguishes Agape-ethics most clearly from utilitarian approaches; whether or not it is a fair objection that utilitarians do not in theory guard against the possibility of the sacrifice of the few in order to confer a quantitatively greater benefit upon the many, the objection could not meaningfully be made against Agape-ethics. The neighbour who is actually affected by the loving person's action ( or would be affected by his inaction ) can in no way be disregarded or set aside; whatever is lovingly done must take his needs into account.

It seems to follow that the loving person is not free to work out, at any moment, which action in the situation would be the most loving, without giving very serious attention to his subsisting relationships and commitments ( and those of other persons ). Even if it is true that promises should sometimes be broken, or their keeping be postponed, because of some over-riding factor, the existence of a promise is still itself a factor of great importance. In the case of certain kinds of promise (1), the existence of a promise is arguably a factor of conclusive importance.

(1) For example, the promises explicit and implicit in the exchange of marriage vows.

The traditional understanding of sexual morality in the West has been that all overt sexual activity outwith the married relationship, as well as some within it, is intrinsically immoral. Put less negatively, this means that whatever is consistent with the institution of monogamous marriage ( the presupposition of this traditional understanding ) is intrinsically moral. Provided that attention is focussed upon the "inner meaning" of the marriage relationship, rather than upon the external formalities (2), it does not seem that this is saying anything essentially contradictory of the insights of Agape-ethics (3). Even if some or many people may be dispensed from this particular set of obligations, it seems clear that the task of nurturing children demands an intense degree of mutual commitment on the part of those who undertake it, and that the sexual relationship serves both to symbolise and to sustain this commitment (4). At least where such a commitment is in question, it is hard to see how a sexual relationship with a third person can be anything but potentially disruptive and destructive. A sexual relationship which is not an expression of continuing concern for the well-being of the other as a person is by definition not an Agapistic relationship. From a purely

(2) cf. P.Ramsey, Deeds and Rules in Christian Ethics, ( Edinburgh, 1965 ) - referred to supra, p. 28, note 25 - who insists that to concentrate attention upon the legal formalities is to obscure the fact that these are, from an ethical perspective, merely evidence of the appropriate mutual consent to and responsibility for the reality of the other person.

(3) Disregarding the more sensational versions of Agape-ethics.

(4) Normally, of course, it is also the means whereby persons procreate the children whom they subsequently nurture; but this is not invariably so ; it is not, for example, in the cases of adoption and artificial insemination.

pragmatic point of view, any falling away from the promise of sexual fidelity by persons potentially or actually engaged in the joint task of child nurture is undesirable because of its tendency to undermine the continuing willingness to pursue the task. But Agape-ethics, while allowing all due weight to this important consideration, would presumably attach still greater importance to the intrinsic obligation not to betray the underlying mutual trust upon which the task of child nurture is founded (5). A sexual relationship with a second partner is only compatible with Agape if it is an effective expression of concern for both the second and the first partner (6).

Unless no moral question arises within the sphere of sexual behaviour (7), any critic of traditional morality must be prepared to indicate what are the criteria of true morality in this sphere (8). The inescapable fact about sexuality is that it constitutes the means whereby new life is brought into being (9). In the case of the higher mammals and especially of

(5) Agape-ethics is not necessarily committed to the usual sociological thesis that marriage is based upon the family, rather than the family upon marriage.
(6) Thus the conventional excuse "It didn't mean anything personal", if true, is at least an admission that the second partner was merely exploited as an occasion for the release of tension, and not treated as a person having his or her own needs, sensitivities, and vulnerability to hurt.
(7) An untenable view which has no serious advocates, although it finds a place within the mythology of the more naive spokesmen of "liberation".
(8) It would scarcely do to pronounce that (monogamous) marriage is the immoral thing, and that all sexual behaviour which is extra-marital is *per se* moral.
(9) This is to ignore some hypothetical situation where refrigerators and test-tubes will have eliminated the need for any concrete encounter between the sexes.

human beings, there is the further complication that the period of immaturity and dependence is so prolonged. There is no possibility that the human infant will survive unless other more competent beings effectively undertake responsibility for him. The helpless infant is thus the prototypical object of Agape, other-regarding love. Who is going to respond to his inarticulate need? It is certainly not a matter of indifference to any responsible person, whether or not explicitly sympathetic to some version of Agape-ethics, that this response is, or is not, forthcoming.

When a human child is born, there is an extremely strong presumption that the biological mother will undertake the task of nurture, and a strong, but less strong, presumption that she will be assisted by the biological father. Failing this, those closely associated with the mother, or with the father, or some more remote social agency, will step in.

The connection between child-bearing and child-nurture is unlikely to be challenged. A woman ( though she may not strictly be certain that the child she is holding is the one to whom she gave birth ) can be certain that she did give birth to some child. A man, on the other hand, can never be certain that he is the father of the child to which a particular woman has given birth; so the connection between child-begetting and child-nurture is more ambiguous. What role is to be undertaken by the mature male in the sphere of child-nurture? This is obviously a significant moral question (10). The answer, in

(10) Thus it is not a matter of individual taste to which everyone can give an unchallengeable answer.

polygynous no less than in monogamous societies, is that the biological father should, in the absence of special circumstances, assist the biological mother in the task of child nurture. This institutionalising of the duty to undertake responsibility for the well-being of children whom one has procreated appears ethically to be unchallengeable. It may be regrettable that so basic a moral intuition should require to be strengthened by the apparatus of social approval or disapproval; but in the case of men, the necessity of this strengthening can scarcely be denied.

The human infant is therefore not merely the prototypical object of Agape ( the potential neighbour of every other human being ); he is also quite specifically the actual neighbour of his biological father. The same is true of the biological mother. Whatever the circumstances of the impregnation, the father is bound, from the perspective of Agape-ethics, to be concerned for her well-being in a manner which goes altogether beyond the generalised obligation to seek the well-being of all potential neighbours (11). Where it is not possible, because of existing commitments or other foreseeable reasons, for the biological father to respond to the particular needs of the child and its mother, it is clear that ( whatever his motives ) he has not acted effectively in response to the needs of his neighbour (12). In this respect, the analysis of sexual morality from the perspective of Agape-ethics is fully compatible with

(11) It is not of course in all cases possible, even if were in all cases desirable, for fathers to "marry" the mothers of their children. This illustrates the contradictions of non-Agapistic behaviour, not those of Agape.
(12) And thus that he has not acted Agapistically.

traditional morality.

It is only in the context of the procreation and nurture of children that the sexual relationships of men and women seem obviously to require institutionalising in the full legal sense. Since most heterosexual intercourse is at least potentially procreative (13), it is natural that social concern to regulate and supervise extends beyond the limits of what is actually procreative (14). In the hypothetical absence of any need to procreate and nurture children, the institution of monogamous marriage would not exist (15). But in so far as it does exist as a legal institution, it can be justified in terms of its contribution to the socially-necessary goals of procreation and nurture (16). One does not need to be a Christian, or a follower of some form of Agape-ethics, to recognise that sexual behaviour which promotes, and sexual behaviour which prejudices, the effective nurture of children is respectively desirable and undesirable. In basic independence, both of the refinements of Christian theology, and of the unquestioning acceptance of social custom, Agape-ethics supports the view that those who procreate children are bound to each other, and to the children they

(13) Except where one or both of the partners cannot procreate because of permanent and irreversible sterility.
(14) When it does so, it becomes exposed to diverse forms of ethical anxiety and rebuke.
(15) Or, if it did exist, it would not need the same degree of legal recognition and support.
(16) The necessity to sustain future human existence by the procreation of new human individuals is recognised by virtually everyone. While it does not constitute the whole, this necessity is basic to the perception, of moral obligation in the sphere of male and female. Not all mature persons directly, but all indirectly, are called upon to contribute to the effective and secure nurture of immature human life.

procreate, by the most compelling of moral obligations.

Further argument is in a sense superfluous. Monogamous marriage identifies the biological parents as the persons primarily responsible for the task of nurturing children; and in this respect is demonstrably more realistic than views which call upon no one, or which call upon persons other than the biological parents, to perform this task. Unlike polygamous and plural forms of marriage, it excludes any other persons from sharing in the potentially procreative activities which lie at the heart of the marital relationship. Again, both in terms of realism and in terms of sensitivity to the personal dimension in the sharing of life, this feature of monogamous marriage needs to fear no comparison with its institutional rivals. The particular ethical perspective which exalts other-regarding love above all alternative criteria does not seem to provide any basis for challenging monogamous marriage in these respects. Theoretical criticisms of monogamous marriage which do not provide any institutional alternative have no relevance to the justification of monogamous marriage as an institution (17).

Whatever may be the case with the "bourgeois" view of marriage, it has been noted (18) that Christians do not

(17) Those who are content to press for the abolition of "marriage", without being ready to face the question of a coherent and superior alternative, are not, from this perspective, to be thought of as criticising monogamy so much as the basic notion of an institution ( or even of moral responsibility ). It can be presumed that they do not really look forward to the time when everyone will live in a fantasy-world of instant sexual satisfaction without responsibility - which would mean among other things that no one would procreate and nurture children.

(18) supra, p. 28, note 25.

identify marriage with the legally valid ceremony. What then, from the perspective of Agape-ethics, establishes the marital relationship? It is not the ceremony, religious or civil, but the mutual undertaking of a shared life. This may anticipate the public ceremony, or dispense with it altogether ( though there is a presumption against especially the latter course being necessary or desirable ). The person who pledges himself to this mutual giving and receiving does not, if he is concerned for the well-being of the other, do so subject to escape clauses, conditions, and limits of time. In this respect also Agape-ethics is entirely consistent with traditional morality.

In so far as there is an inherent contradiction between Christian and responsible secular-liberal views of marriage, it concerns the ultimacy or otherwise of the mutual commitment of the spouses (19). Agape-ethics is not exclusively or invariably the preserve of Christian thinkers. Some Christians would dispute the paramount status of Agape among other ethical principles; others are perhaps so firmly entrenched within a traditionalist position that they could not tolerate any disturbance. But there is for obvious reasons an alliance between Christian ethics and Agape-ethics which is not matched by any equivalent alliance between Agape-ethics and non-Christian views. Agape-ethics,

(19) Some secular-liberals interpret the exchange of mutual promises of fidelity until death as having some symbolic value, but not as creating explicit moral obligations ( and certainly not obligations to be enforced in a heavy, legalistic way ).
cf. E.Westermarck, op. cit., p. 72:-
"Conjugal unfaithfulness is of course formally a breach of troth, but it is an unreasonable claim that the eternal troth which the two lovers once swore to each other should be an irrevocable pledge in all circumstances..."

in so far as it is not merely one tendency within Christian ethics, upholds the absoluteness of the moral obligation arising out of such things as the marriage promises. There is no reason at all why a secular-liberal should not be committed to Agape-ethics, but if he is he is committed also to a rigorous and uncompromising view of the moral life (20).

Although this point is not strictly necessary to the justification of the institution of monogamous marriage, it is submitted that the nature of loving concern for the other in the sexual sphere establishes the incompatibility with Agape of much, if not all, sexual behaviour which, although not actually procreative, would be regarded by traditionalists as intrinsically immoral (21).

(20) A fine defence of the autonomy of ethics ( W.G.Maclagan, The Theological Frontier of Ethics, ( 1961 ) ), illustrates, as powerfully as any theological treatment, the perception of moral obligation as over-riding and absolute. cf. "Our moral freedom thus has a metaphysical depth such that no man can have a living sense of it, as distinct from a mere intellectual acceptance of the proposition that asserts it, without a shuddering like that which marks the presence of the numinous" ( op. cit., p. 102 ). It is not implied that Maclagan is adequately categorised as a secular-liberal, or as an exponent of Agape-ethics. But his Kantian treatment is close spiritual kin to Agape-ethics, and in marked contrast to the rationalism of Westermarck ( cf. supra, p. 78, note 19 ).

(21) Secular-liberals would in general agree with traditionalists about the ethical evaluation of rape, seduction, and other forms of brutal or cynical exploitation of the other. They would in general agree also that "responsible" sexual behaviour must include, and include more than, the efficient use of contraceptive techniques. How much more, for those secular-liberals who are not committed to Agape-ethics, is a very obscure question. Some people would argue that sexual behaviour is authentic, irrespective of its relationship to any thoroughgoing commitment, provided it is not "promiscuous", or, less vaguely, provided that the partners "really love one another". From the perspective of Agape-ethics, it may however be disputed whether there is some degree of relative commitment, short of the total commitment arguably commanded by Agape, which suffices to make a merely sexual transaction into a fully moral one.

Agape-ethics does not represent the ethical insights of all people (22), though a case could perhaps be made to show that Agape-ethics, more than any alternative view, articulates and deepens the "ordinary moral consciousness" of most people in at least Western societies. But for most people, who are apparently unable to achieve the level of "rational, altruistic autonomy" (23), ethical insight, or at least sub-ethical approximations to it, must depend upon social conditioning (24).

(22) Even of those who can be said to have attained ethical insight, cf. the liberal views, discussed in notes 23 and 24 infra, which single out autonomy as the crucial index of ethical insight.

(23) These are the qualities most highly valued by certain writers who attempt to justify a "liberal" view of morality in accordance with psychological research findings - e.g., William Kay, Moral Development: a psychological study of moral growth from childhood to adolescence, ( 1968 ).

(24) It is claimed that moral development, like other forms of development, is sequential - from the amoral, to the expedient and conformist stages; thence to the stage of irrational conscientiousness, and finally, for the minority who attain it, to the stage of rational autonomy. "Clearly the ideal mature moral agent would be one who always did that which his reason assured him was morally desirable" ( Kay, op. cit., p. 209). Although this framework is designedly sympathetic to the assumptions of liberalism ( not necessarily in a secular form ), one would have supposed that its implications would be sobering for liberalism. Most people never achieve more than a contingent relationship with "authentic" morality, defined in terms of rational autonomy, since they remain essentially dependent upon social conditioning. If the group to whose expectations a person conforms ( or the complex pressures which have established his undiscriminating conscientious reactions ) happen to be transparent to the insights of authentic morality, then his behaviour will, to the extent that he is conformist or conscientious, happen also to coincide with the latter. But if the relevant social pressures are in some respect rigid or unenlightened, his behaviour is doomed to be rigid and unenlightened also. One of the most questionable elements in this approach is the implied identity, or at least alliance, between autonomy and altruism. Certainly from the perspective of Agape-ethics, which attaches irreducible importance to the ( in principle objective ) needs of the "neighbour", it would seem that a high degree of autonomy is compatible with a low degree of altruism, and that there is nothing ethically meritorious about non-altruistic autonomy.

To return to the question of monogamous marriage in an officially monogamous culture, it seems reasonable to assume that comparatively few individuals will autonomously arrive at conclusions which reject monogamous marriage, but which are in some sense authentically moral conclusions (25). Most people will either conform to the expectations of some group within society, or they will unreflectively accept the authoritativeness of their own ( socially-moulded ) intuitions (26). Not to accept the moral obligations proposed by one's social group is, prima facie, at least as likely to represent a reduced as to represent an enhanced level of ethical insight and moral performance (27). In the hypothetical absence of social pressure towards responsible sexual behaviour, there can be little reason to be optimistic about the way in which people

(25) "... along the paths that depart from traditional morals, pimps leading the weak astray far outnumber spiritual explorers at the head of the strong" ( Devlin, op. cit., p. 108 ). Not all of those who advocate the reduction of the age of consent to fourteen, or twelve, or whatever, are convincing in the pose of high-minded moral pioneers. Although not all lies are morally evil, the habitual liar is not exemplifying a viable alternative norm to truth-telling. More acts of extra-marital sexual intercourse, it seems reasonable to assume, are performed out of self-indulgence than out of some unorthodox vision of concern for the other.

(26) Immorality can be no less conventional and stereotyped than morality.

(27) The undoubted fact that there can be inadequate grounds for saying "Yes" does not prevent there being equally inadequate grounds for saying "No". Obligations, in whichever sphere of life, are onerous, and men and women are so constituted that they have a tendency to disembarrass themselves of burdens when they can get away with it. But it is also true that one can fail to meet one's obligations ( and, of course, try to rationalise and excuse this failure ) without any real opposition in principle to the norm which one has violated. One should distinguish between propaganda against traditional restraint in the sexual sphere which is rationalisation of ( what is still inwardly perceived to be ) immorality, from that which is the assertion of the duty to be moral in a new and higher way.

would actually behave (28).

Those who perceive the inner authoritativeness, as well as the pragmatic advantages, of all that implies monogamous marriage (29) as the proper context for procreation and nurture of children, and for the sexual fellowship of man and woman, should not be content to refer to tradition and custom. Monogamy, if it is "right" for Western societies, is not right merely because it has been entrenched for many centuries; it is right for Western societies, as it is right for every human society ( including those which are not yet or are no longer monogamous ) because more adequately than any practical or theoretical alternative it provides the context for full human flourishing (30). Agape-ethics, it is believed, points clearly, if unsystematically, towards this conclusion. For a more extensive discussion, it will be necessary to examine theological ethics.

(28) The sexual shambles after the Russian Revolution may not have established an invariable precedent; but it does suffice to cast doubt upon the proposition that man is naturally moral, as upon the proposition that everything important is unaffected by whether he is moral or not.

(29) Rather than polygamy, or plural marriage, or "free love" without continuing bonds between partners.

(30) Tradition and custom, while not providing an ethical justification of monogamous marriage, also fail to provide any guarantee of its continuance.

# CHAPTER EIGHT. THE THEOLOGICAL ETHICS OF KARL BARTH: PERMISSION WHICH IS ALSO COMMAND.

Although there are several lengthy treatments of the man-woman relationship in Karl Barth's Church Dogmatics (1), the ethical elements are not intended to be understood in isolation from the specifically theological affirmations of the work. For Barth, ethics is dogmatics. The inter-personal fellowship of male with female is to be interpreted in the light of the whole revealed structure of human life in its relationship with God; it is not an autonomous or sui generis question which could or should be answered without serious consideration of wider issues. Nevertheless, Barth's discussion of this question is a particularly illuminating aspect of his theological work.

It may be helpful to begin by considering the treatment of Church Law in Church Dogmatics Volume IV, Part 2, Para. 67, 4, "The Order of the Community". In the community of believers, it is the risen and exalted Jesus Christ, the Head of his body, who is the primary acting subject; the human community is secondary. All questions of order, of human decision within the community, must be measured against this basic norm of relationship (2). "This is the axiom which dogmatics has to proclaim to all existing or projected canon law..." (3).

In contrast to any etherealising of the churchly sphere, any polemical denial of institutional structure or order, Barth

(1) In four Volumes ( twelve Parts ). The authorised translation of Die Kirchliche Dogmatik was published in Edinburgh at various dates from 1936, under the Editorship of G.W. Bromiley and T.F.Torrance.
(2) op. cit., ( Edinburgh, 1958 ), pp. 678-679.
(3) ibid., p. 679

declares that the community is essentially concerned with the question of law (4).

(4) "To say community is at once to say law and order" ( ibid. p. 680 ). The basic principle of the community's law is that it must effectuate the provisional representation of humanity as sanctified by Christ; what this means in concrete terms cannot be mechanically read off from this basic principle, but must be dominated by and obedient to it. The fellowship of the community must be ordered by the superior law of Jesus Christ ( ibid. pp. 680,681 ). A community "which does not ask concerning law and order, inevitably abandoning its life to chance and caprice and confusion, will be just as much in contradiction to the Holy Spirit of Jesus Christ as one which sets its answers to this question above or in the place of the Holy Spirit"( ibid. p. 681 ). Sacralisation - that is, the phenomenon which has been described as "legalism" - is not the only distortion; in place of both legalism and lawlessness there should stand a "confessing law" ( ibid. p. 682 ), through which the community continually attempts to express its obedience. Nothing, not even the Bible, can unequivocally be identified with the law of Jesus Christ; the Bible is only to be listened to so that the superior voice of Jesus Christ may effectively be heard ( ibid. p. 683 ). No other form of authority, derived from the State or any other alien source, is to be taken as a model. Only the "brotherly Christocracy" which is attested in the New Testament is valid and normative for the community in every age ( ibid. p. 686 ). The question of the concrete form of obedience must be seriously considered; to dismiss this question is not to ward off legalism, but to leave a vacuum which legalism will gladly fill ( ibid. p. 687 ). The law of the community must be distinguished from the law of the State, and from the State law which delimits the secular competence of the Christian community ( ibid. p. 690 ). The actual law of the different Churches will, in detail, vary according to times and circumstances. "There is no such thing as universal Church law" (ibid. p. 690 ). All that can be indicated are the presuppositions on which this law must be based. It is a law of service - "in the Christian community either all are office-bearers or none; and if all, then only as servants" (ibid. p. 694 ). It is also a liturgical law, reflecting and representing the earthly-historical form of the existence of Jesus Christ ( ibid. p. 696 ), having its centre in worship.

The actual legal decisions which the community makes, though orientated by the liturgical event of confession and based on theological reflection, are juridical in character, establishing the rules of the human shaping of the community's existence. The test of their validity is their faithfulness to the basic norm of the lordship of Jesus Christ (5).

Church law must be constantly open to the dynamic from above, from the Holy Spirit; constantly willing and ready for new answers. These must be clearly formulated and legally precise answers (6). But Church law, like all law, belongs to the human, not to the divine, sphere (7). It must be constantly aware of the distinction between its own formulations and the will of God. Even at its best, Church law is only a provisional work of obedience; it is binding, until it is superseded by some new insight, but it is provisional, because it is always vulnerable to this supersession (8). The work of obedience is therefore not to be regarded as something eternally valid, as necessary to salvation; it is diluted by all kinds of misunderstandings and corrupt desires (9). In its freedom, the Church may and must live by today's decisions; but tomorrow it may receive fresh instructions (10). This means that Church law, as living law, is always subject to the note of humility.

(5) ibid., p. 707.
(6) ibid., p. 711.
(7) ibid., p. 713.
(8) ibid., p. 714.
(9) ibid., p. 715.
(10) This should not be confused with "relativism" ( cf. ibid. p. 718 ). Openness to the dynamic from above is far removed from complacent acceptance of every form of error and perversion.

Church law is, finally, exemplary law (11), which is not to imply that the Church can or should impose its law upon the world (12). In spite of the recognition of the contingent and imperfect character of all human achievements, including church law in its concrete forms, there can still be a confidence that with law there is a real question of better or worse, and that human society is moving towards at least a relatively better, more peaceful, more ordered and freer life (13). The most appropriate way in which church law can display its exemplary character, and thus contribute to the improvement of secular law, is by transcending "the dialectic of fulfilment and claim, of dignity and responsibility, of taking and giving" (14). But it can also, through its living openness both to the past and to the future, and its capacity to witness, stimulate and provoke men into a constant vigilance for justice, for freedom, for order, and for peace.

The above discussion indicates something of the general perception of the place of Church law to be found in Barth's Church Dogmatics. No infallibility or finality is claimed for any of the human decisions about legal order which are made in the name of the community of Jesus Christ; but the necessity of such decisions, and their thoroughly serious ( albeit provisional ) character is emphasised.

The question of Church law, of the order and structure of the community, provides the answer to the framework and context within which the Christian life is to be lived. But

(11) ibid., p. 719.
(12) ibid., p. 719.
(13) ibid., p. 723.
(14) ibid., p. 723.

the generalised permissions and prohibitions which a person accepts as valid do not in themselves wholly illuminate the concrete ethical action. One of the most perceptive statements of the Christian ethical decision, as Barth understands it, is that it is a command, or obligation, which is also a permission. This is distinguished from the legalistic obligation which is not a permission, and from the anti-nomian permission which is not an obligation (15).

The question of ethics, that is, the question as to the rightness of certain modes of human action (16), cannot be identified unequivocally with any psychological, or historico-morphological, or political-juridical, or philosophical question; to make such an identification is to obliterate the ethical element (17). Christian ethics, as obedience to the command of God, must be distinguished from all other systems of ethics, however sympathetic to the Christian religion their exponents may happen to be (18). The Roman Catholic attempts to accomodate natural morality within the structure of a theological system must also, in spite of their undoubted technical mastery, be

(15) Church Dogmatics, Volume II, Part 2 ( Edinburgh, 1957 ), p. 585. As Barth himself well realises, any attempt to transcend the legalism-lawlessness dialectic is hazardous. It can only be ventured, in his view, from the standpoint of Christian faith. Since this dialectic is inwardly so familiar, and since it occupies, so to speak, the greater part of the battle-ground, attempts to transcend it will meet with attacks from each flank. Legalists and their allies will argue that the supposed obligation is not a true obligation; antinomianists and their allies will argue that the supposed permission is not a true permission.

(16) op. cit., p. 513.

(17) ibid., p. 515.

(18) ibid., pp. 515-535.

rejected.

The question of what is right is "determined absolutely in the right conduct of God. It is determined in Jesus Christ" (19). To do what is right is to be obedient to what is revealed of the grace of God, to live as one "to whom grace has come in Jesus Christ" (20).

God claims man's obedience. But this in no way involves the corollary that man, in rendering this obedience, sacrifices his inner integrity in response to the menacing superiority of force which God has at his disposal (21). The external power of God would in itself be compatible with a justifiable reserve or resentment on man's part. But God stands beside man in love; as the one who has drawn close to man, who holds out his hand in forgiveness, God claims man as his own (22).

The man who understands that God is always gracious to him, always compassionate, always ready and willing to come to his aid, knows also that to be available to God is the best possible thing for man (23). To obey God, to be directed and guided by him, is in no sense to be depersonalised, enslaved, coerced. What distinguishes the command of God from all other types of command is that it is the granting of a freedom, a permission (24). Although God's command is always concrete, definite, as

(19) ibid., p. 538.
(20) ibid., p. 539. Although Barth's views on the relationship between theological ethics, in his sense, and other forms of ethics, have caused understandable astonishment, it should be noted that he does not disallow the possibility of valuable ethical contributions from persons whose practical Christian insights may coexist with unapparent or meagre Christian presuppositions ( cf. ibid., p. 542 ).
(21) ibid., p. 554.
(22) ibid., p. 558.
(23) ibid., p. 581.
(24) ibid., p. 585.

other commands are, it "orders man to be free" (25), and is thus quite different from the commands which variously threaten, exhort, discourage and frustrate. God's prohibition safeguards man against the destruction which, in the absence of God's grace, would engulf him. It does not cause him to deny or mutilate what he truly is - on the contrary, it denies him the possibility of such a denial. The essence of man's denial of his true self is to be found in the assertion of his own will as an autonomous and unchallengeable power, the granting to himself of endless permissions which are not obligations, the irresponsibility which, in the last analysis, enmeshes him in a paradoxical form of enslavement (26). God implacably opposes this self-assertion of man, not because God does not wish man to be free and happy, but precisely because self-assertive man is unhappy and unfree (27).

The command of God directs itself to the inner fortress of man. It approaches him not as an intruder from without but as his dearest friend; it thus possesses a radical and inescapable character absent from all other forms of command (28). Man is called to "abide", to "stand", to set aside fear and anxiety, to do what he is bidden cheerfully and with joy. For in all that man does he is u p h e l d, he is made free to do what he must do, in apparently losing himself he finds himself (29). Thus the command of God establishes an obligation which is also a permission; man's true duty is his true joy.

(25) ibid., p. 588.
(26) ibid., p. 594.
(27) ibid., p. 594.
(28) ibid., p. 595.
(29) ibid., pp. 595-602.

The permission which is the inmost form of the divine command is also an obligation. This proposition can only be ventured from the standpoint of Christian faith, apart from which the alternation between legalism and anti-nomianism is inevitable (30). The command of God confronts man as the reality of love which is disclosed in the person of Jesus Christ (31). All permission which does not derive from the lordship of Jesus Christ is futile (32). The decision of obedience which is required involves every part of man, the totality of his life (33). With respect to this decision, there is only the possibility of obedience, or the impossibility of disobedience (34). The response, if made without joy, is not made at all (35). Obedience never becomes a possession at man's disposal; it is a great step which has to be taken again and again in all its difficulty (36).

The command of God, unlike other claims, does not leave man unmoved and unchanged in his innermost self (37); it cannot be satisfied by some appropriate act of obedience, because the man himself is claimed, not merely his actions.

What then does God claim of man? What ought man to do? Every answer that can be given to this question is continually subject to challenge and amendment (38). In the openness to the command of God which is required, it is true both that what is heard must be echoed from within, and that the voice of God

(30) ibid., p. 603.
(31) ibid., p. 606.
(32) ibid., p. 608. "The problem of distinguishing the command of God from other commands narrows down ... to that of distinguishing Jesus Christ from all other lords..."
(33) ibid., p. 610.
(34) ibid., p. 610.
(35) ibid., p. 611.
(36) ibid., p. 624.
(37) ibid., p. 631.
(38) ibid., p. 645.

comes upon man with absolute authority from without (39).

God's command is always given a concrete embodiment, and is not merely an abstract or general principle. The attempt, however, to extract from the Bible any comprehensive justification of particular legal arrangements is precarious. It is characteristic of biblical ethics that the divine command consists of definite instruction, rather than the establishment of rules and principles; sometimes, however, the general validity of a rule or principle is detachable from its original historical context (40). Normally the relevance of biblical passages, such as the Ten Commandments or the Sermon on the Mount, which appear to present universal moral-legal regulations, is to be discerned from the greater whole of which they are a part (41).

The Ten Commandments are to be treated seriously as an expression of the framework and programme of the divine action and its human counterpart; but not as a comprehensive or final expression (42). Similarly the Sermon on the Mount, which presents the general presuppositions of the Christian life (43), is misunderstood if it is taken to be some kind of system of legal norms. This teaching can only be correctly understood in the light of the one who promulgated it, and who exemplified it in his own life. Jesus

(39) ibid., p. 651. Commenting on the story of the eating of the forbidden fruit, Barth comments that this typifies man's tendency, when confronted with an inescapably concrete form of the divine command, to seek to weaken or evade the obligation by complaining of its obscurity.
(40) ibid., p. 679.
(41) ibid., p. 672.
(42) ibid., pp. 683-686.
(43) ibid., p. 688.

Christ is the greater whole, of which this summary of teaching is a part; to select the part for legal emphasis, as the basis of a universal moral code (44), is to confuse partial with total obedience. To be faithful to the Ten Commandments, or the Sermon on the Mount, is "to take up the position which they outline and define, and in this - the only possible - position to wait for the specific commands of God for which the proclamation of the Law prepares us, to be constantly obedient to His call" (45).

The divine command is the sum of all "that is right and friendly and wholesome..." (46). In spite of the diversity of God's claims upon man, because his command is good it always unites rather than disunites (47); it promotes fellowship, and relativises conflict (48); and it unifies the individual man in himself (49).

It is sometimes claimed (50) that Barth's doctrine of God leaves no room for man, that God is everything and man nothing. The claim is, however, unjust. Although in a formal sense subordinated to his doctrine of God, his doctrine of man is materially of great importance. Barth, no less than his critics, is aware that the question "What is man?" - though he can only answer it in terms of its interconnection with the question "What is God?" - is in a sense the great question with which modern man inescapably and urgently is confronted.

(44) ibid., p. 700.
(45) ibid., p. 686.
(46) ibid., p. 711.
(47) ibid., p. 716.
(48) ibid., p. 717.
(49) ibid., p. 726.
(50) Usually by scholars who have not themselves read any of the Church Dogmatics, but who once attended lectures by someone who said he had.

# CHAPTER NINE. THE THEOLOGICAL ETHICS OF KARL BARTH: MALE AND FEMALE.

The fundamental proposition about man is that his humanity is co-humanity, humanity in fellowship (1). Man exists in the basic duality of male and female, this being the only structural differentiation between individuals (2). Each human individual is male or female, but is inescapably orientated towards fellowship with his or her human companions. To be human is to be, concretely, either male or female; but it is also to be male and female - male with female, female with male (3).

Although the interest and difficulty associated with the differentiation of man into male and female affects a wider sphere than that concentrating upon sexual love and the question of marriage, it is true that human fellowship is typified most powerfully in the marital relationship (4). This differentiation points man towards the basic realisation that no individual can be fulfilled, can perfect his or her potentialities, without co-operation from others and with others. The idea, present within some modern forms of thought, that man ideally should live alone in isolation, autonomous and independent, receiving nothing and giving nothing in return,

(1) "Properly and at its deepest level, which is also its highest level, human nature is not isolated but dual. It does not consist in the freedom of a heart closed to the fellow-man, but in that of a heart open to the fellow-man", ( Church Dogmatics, Volume III, Part 2 ( Edinburgh, 1960 ), p. 278 ).
(2) op. cit., p. 286. cf. "In all the common and opposing features of human existence, there is no man in isolation, but only man or woman, man and woman" ( ibid., p. 286 ).
(3) ibid., p. 286.
(4) ibid., p. 288.

is a terrible distortion. The cloister (5) has contributed to the excessive individualism of Western intellectual life; it has proved difficult for philosophical I-speculation in the absence of the Thou to give due weight to the basic duality, the orientation towards fellowship, of human existence (6).

It is not proposed to discuss in any detail Barth's remarkable exegesis of certain key biblical passages, especially Genesis Chapters 1 and 2, the Song of Songs, and Ephesians Chapter 5 (7). A mere summary will be given of some of the main points. Mankind, in the duality of male and female, is made in the image of God (8). Although like other creatures

(5) Barth does not wish to imply that the cloistered life makes a true encounter with the other impossible.

(6) ibid., p. 290.

(7) It should be noted from the outset that Barth does not regard the Genesis narratives and other similar stories as being divinely-guaranteed accounts of historical and scientific transactions. They are, rather, attempts to express the becoming which underlies all being, "intuitive and poetic pictures of a pre-historical reality of history..." ( Church Dogmatics, Volume III, Part 1 ( Edinburgh, 1958 ), p. 81 ). In Barth's view this does not in any way weaken the value or authoritativeness of these stories. To think of a non-historical depiction of history as intrinsically inferior is "only a ridiculous and middle-class habit of the modern Western mind which is supremely phantastic in its chronic lack of imaginative phantasy, and hopes to rid itself of its complexes through repression" (ibid., p. 81). The supposition that the Bible can be the Word of God only if and when it speaks historically derives from, and involves, all the confusions which characterise the conflict between legalism and anti-nomianism. "The biblical creation-histories are not heaven-sent declarations of the truth itself dropped from the sky but human attestations of the revelation which has taken place in the creaturely sphere. It is in this way, and only in this way, that they declare the truth" (ibid., p. 93).

(8) "In God's own being and sphere there is a counterpart; a genuine but harmonious self-encounter and self-discovery; a free co-existence and cooperation; an open confrontation and reciprocity" (ibid., p. 185). The analogy between God and man is "simply the existence of the I and the Thou in confrontation" (ibid., p. 185).

in his finitude, in his existence as an I, confronting and confronted with others who to him are Thous, man does correspond in his being to the being of God. Man is incomplete as solitary male or solitary female. Man, the male, cannot be human without woman; woman cannot be human without man (9). The supremacy of the male is not a question of value, dignity or honour, but of order (10). The story of the eating of the forbidden fruit exemplifies both the essential joy and contentment which should characterise sexuality, and the radical consequences of human disorder in this and other spheres (11).

Although in general the Old Testament, in its references to sexuality, is concerned for posterity, fatherhood and motherhood, the family, the child and especially the son, the perspective of the mutuality between husband and wife is not entirely neglected (12). Barth claims that the true implications of the marriage covenant, behind the dubious concrete phenomenon of human sexuality, can be discerned in the

(9) ibid., p. 299.
(10) ibid., pp. 301-308.
(11) "They were naked ... and not ashamed ... They were blind to every possibility that their existence as man and wife might entail embarrassment and disquietude" (ibid., p. 309). But with the intrusion of disobedience to God's command, this harmony was shattered. "When their relationship to God was disturbed, their mutual relationship was also disturbed; everything that was created in a definite order was thrown into confusion. Humanity became a sexless and therefore an anaemic and finally a soulless ideal hopelessly confronting abstract masculinity on the one hand and abstract feminity on the other, and leading to the conflicts between the blind dominion of man and the jealous movement for feminine emancipation; between an evil eroticism and an evil absence of eroticism; between demonic and bourgeois views of love and marriage; between dissipation and respectability... There can be no doubt that the condition of man as fallen from God is betrayed first and foremost by the fact that it is the condition of secret and open, conscious and unconscious, organised and unorganised shame at the relationship between man and woman ..." (ibid, pp. 310-311).
(12) The main exception is the Song of Songs.

relationship between Yahweh and Israel. The centre of the Old Testament vision is the beauty and compassion of Yahweh's faithfulness. In Yahweh's intention and purpose, he and his people are "one flesh"; this is the inner reality of the covenant between Yahweh and Israel which the marriage covenant between man and woman, however imperfectly, reflects (13).

Although the Old Testament never resolves the contradiction between Yahweh's faithful love and Israel's failure to respond appropriately to it, it can and must be maintained from a Christian perspective that this contradiction is resolved in principle, once the Old Testament is seen to form a single material content with the New Testament. If Jesus Christ is understood to be the fulfilment of all that the Old Testament affirms and prophesies concerning the love of Yahweh, then an entirely new light is shed upon

(13) "Although normally the Old Testament refers to the erotic sphere largely in terms of warnings and threats against adultery, the "vision of the incomprehensible nearness, intimacy and sweetness of the relationship between Yahweh and Israel can ... break through the caution, the care, the legitimate severity and anxiety which otherwise cause them" ( the Old Testament writers ) "to speak so non-erotically of the erotic" (ibid., p. 315). The sexual encounter of male and female is thus as it were upheld and guaranteed by Yahweh's covenant-faithfulness. This constitutes a love incomparably stronger, purer and more profound than anything that can take place between man and wife, but a love which authenticates everything which is at least relatively good and honourable in this sphere. Within the covenant-history recorded in the Old Testament there are two echoes of the "one flesh" idea. The one is the perfect erotic relationship portrayed in the Song of Songs; the other is the relationship between Yahweh and Israel, established and preserved despite the perpetual faithlessness of Israel ( cf. Jeremiah 3: 12; Jeremiah 4: 1; Ezekiel 16: 59 ff.; Hosea 2: 19-20; Isaiah 54: 4-8 ).

the Old Testament passages (14). The dignity which the Old Testament attributes to the sexual relationship between man and wife derives from the primary insight that Yahweh is, in his intention and purpose, one flesh with Israel, rather than from any optimistic evaluation of concrete human sexuality (15). But this prophetical insight into the implications of Yahweh's covenant of love receives its vindication and its consummation in the relationship between Jesus Christ and those whom he calls to himself.

(14) "Instead of being arbitrarily ignored, Ephesians 5:25 can and may and must be taken into account as a commentary on Genesis 2: 18 ff., and therefore on the Song of Songs, and therefore on those passages from the prophets. 'This is a great mystery, but I speak concerning Christ and the church' ( Ephesians 5: 32 ). If this is accepted, it cannot be denied that even the obscure language of the creation saga takes on a wholly different form and colour, acquiring indeed a very concrete meaning ... Why could not man be alone? ... because the man Jesus, the Son of God, whose earthly existence was envisaged at the creation of heaven and earth ... was not to be alone" ( ibid., p. 321 ). He, like the Adam of the saga, was to have his counterpart in the community he was gladly to acknowledge as flesh of his flesh. The deep sleep into which Adam fell symbolises the sleep of Jesus Christ before his resurrection, after which the Community, like Eve, was to stand complete before him. The taking of the rib from Adam's side symbolises the sacrifice of Jesus. Adam's cry 'This is now flesh of my flesh...' symbolises the fact that the Community did not first recognise Jesus but was recognised by him ( cf. ibid., p. 321 ). "And why were man and woman naked and not ashamed? Because between Jesus and His followers there will take place an unreserved - and as such merciful and salutary - disclosure of man; because He will stand and not need to be ashamed before them in absolute poverty, humiliated and rejected by God, and therefore the Bearer of every honour and the Elect of God; and because they too will be seen and discovered in their own poverty, humiliation and rejection, and will not be ashamed or judged, because He will not be ashamed of them, because He will call them His brothers and sisters, and because, as the Elect of God, He will defend them with His riches" ( ibid. p. 322 ).

(15) cf. ibid., p. 322.

It is well known that the Old Testament does not provide any comprehensive prohibition of polygamy; and it would be a mistake to attempt to infer a justification of the institution of monogamy along purely Old Testament lines. Barth argues that Genesis 2 and the Song of Songs, if viewed in the light of the total biblical understanding, do in fact point clearly towards the realisation that monogamy is "the perfect and ultimately the only possible and legitimate form of love and marriage" (16). But this is only so if they are viewed in this light. The perception of the necessity of monogamy derives from the perception of the unity and faithfulness of the love of Christ (17).

The principal discussion of the man-woman relationship is in Church Dogmatics Volume III, Part 4, pp. 116-240, under the general title of "Freedom in Fellowship". God calls man to his fellow-man, just as God calls man to himself. The divine command makes man free to affirm, honour and enjoy the other with himself and himself with the other, whether in the relationship with near or distant neighbours, or that between parents and children, or particularly that between man and woman (18).

The relationship between man and woman is the first and the typical sphere of fellow-humanity (19); and the questions which arise in this sphere are of especial centrality and importance for a correct understanding of life in fellowship (20).

(16) ibid., p. 328.
(17) ibid., p. 328.
(18) Church Dogmatics, Volume III, Part 4, ( Edinburgh, 1961 ), p.116.
(19) op. cit., p. 117.
(20) ibid., p. 117.

In their sexual being, as in all other aspects of their being, men and women are confronted by the gracious command of God (21). They are not left to themselves in this sphere, either in clouds of superhuman ecstasy or depths of subhuman degradation. Man does not transcend his nature through the expression of his sexual powers; neither does he debase or betray it - he merely expresses his nature, and he may and must do so in a responsible freedom (22).

Man is called to freedom in this sphere, and it is his whole being, not merely or primarily the use he makes of his sexual organs, which is in question (23). Coitus is neither something automatically evil, nor something automatically good, nor something which is neutral as between good and evil. "Marriage is 'chaste', honourable and truly sexual when it is encompassed by the fellowship of the spirit and of love, but also of work and of the whole of life with all its sorrows and joys ... If it does not take place in this context, it is neither chaste, right nor salutary ... coitus without co-existence is demonic. And ... this is true even when it is supported by the apparent sanctification of a formal and legitimate marriage bond" (24).

(21) It would be wrong to concentrate so much attention and anxiety upon the moral implications of the male-female relationship in all its forms that other aspects of morality are neglected or obscured. Still less adequate would be a restriction of interest to sexual intercourse as such ( cf. ibid.,p. 118 ).
(22) ibid., pp. 119-121.
(23) ibid., pp. 131-132.
(24) ibid., p. 133.

Marriage is not the whole of the sphere of sexual life, though it is its "telos, goal and centre" (25). Marriage is "that form of the encounter between male and female in which the free, mutual, harmonious choice of love on the part of a particular man and woman leads to a responsibly undertaken life-union which is lasting, complete and exclusive" (26). The test of what is good or evil between male and female is the compatibility, or otherwise, of an action with marriage.

The command of God is directed to man in his whole being, and to all men in their sexual being, whether or not marriage is a present actuality for them. There is no universal obligation to enter into marriage, any more than there is an obligation for all especially devout persons to abstain from marriage. Whether or not to enter into marriage is always, for each individual, in principle an open question (27).

The unmarried, no less than the married, person is essentially in relationship with persons of the other sex, even though these do not come into question as partners in love or marriage (28). Men and women are always confronted by fellow-humanity in its male and female modes. They cannot pretend to live without co-operation and respect towards each other. No person is complete or self-sufficient in masculine or feminine isolation (29).

(25) ibid., p. 140.
(26) ibid., p. 140.
(27) ibid., pp. 140-150.
(28) ibid., p. 165.
(29) ibid., p. 164 ff.

The many New Testament passages which speak of a difference of order between male and female (30), should not be interpreted so as to obscure the fundamental truth that in Christ the distinction between male and female has no fundamental or final importance.

Neither by natural necessity nor by universal divine command is every man required to take a wife, or every woman a husband (31). To enter into marriage is a question of vocation, of grace; it is not an automatic step which anyone can take as a matter of untroubled conventionality (32). Barth comments severely on the tendency within Christianity to concentrate upon the need to preserve marriages once they have come into being, while remaining largely indifferent to the no less urgent question of their true foundation (33).

(30) Especially 1 Corinthians 14: 34; Colossians 3: 18; Ephesians 5: 22; 1 Timothy 2: 11; Titus 2: 5; 1 Peter 3: 1. The order which establishes a relative superordination of the male is entirely a matter of responsibility and of initiative, not of privilege or dignity. Nothing is more false to this true order than the male tyrant, whether brutal or amiable - not even that figure of ridicule, the hen-pecked and obsequious man. The mature woman is not the fluffy or prickly sex kitten, any more than the strident opponent of male pretensions; she is the patient, consistent woman who stands beside man in full responsibility for the work which they jointly undertake ( cf. ibid., p. 167 ff. ).

(31) ibid., p. 183.

(32) ibid., p. 184.

(33) "The fundamental weakness is that the concept of marriage is at once and very one-sidedly identified with that of its bourgeois and ecclesiastical form, with the institution of marriage, so that in every respect it is decisively thought of in juridical rather than theological categories ... It has been all this which has made Christian thought and speech very largely remote and alien because legalistic rather than realistic, thus depriving it of the distinctive rigour and credibility which would certainly prevail if the matter were seriously considered in relation to the divine command" ( ibid., p. 186 ).

Vocation to marriage is vocation to life-partnership, in which the Yes of love is repeated in all seriousness, and in which the full human reality - with all its deficiencies, all its vulnerability - of each person is mutually offered and accepted (34). The success of this life-partnership is not guaranteed, not even by genuine love, let alone in its absence (35). The life-partnership of man and woman preserves its own dignity and viability; it is not a means to, nor a by-product of, some other aim or ideal, not even that of the procreation and nurture of children. "Marriage is not subordinate to the family, but the family ... to marriage" (36).

Although the "I" and the "Thou" become "We" in marriage, it remains true that the distinctiveness of each partner is always preserved (37).

Within the perspective of the divine command, marriage is clearly an exclusive life-partnership. "Marriage is essentially monogamy" (38). But outwith this perspective, no guarantee can be offered that the concrete legal institution of marriage will take this form. The choice of a marriage partner is only a human work; the true basis of a marriage is its grounding in the divine command. From this it follows that the question about the ultimate legitimacy and appropriateness of a particular marriage is relatively, though not absolutely, independent of the question of love (39). There is therefore

(34) ibid., p. 187.
(35) ibid., p. 187.
(36) ibid., p. 189.
(37) "That two should become one flesh is as indispensable to a right understanding of marriage as that they should become one" ( ibid., p. 190 ).
(38) ibid., p. 195.
(39) ibid., pp. 195-196.

in principle a question-mark hanging over every marriage. Within a marriage, full life-partnership may in fact fail to develop. The question may then be put, in what sense can it be affirmed that marriage for this man and woman is the content of the divine command? The answer, to be considered later, which Barth gives to the question of dissolubility of marriage, in no way weakens the force of his affirmation about the superiority of monogamy over all other possible forms of sexual fellowship (40).

In the New Testament, the polygyny which featured prominently in the earlier Old Testament narratives, and which in no part of the Old Testament was explicitly criticised or prohibited, has disappeared from view (41). This is not to say that even in the New Testament it is explicitly prohibited. Those who wish to interpret the Bible legalistically must admit that monogamy is not presented as an unconditional divine law. Only when the legalistic distortion of the Bible is corrected does it become clear that monogamy as the essential form of marriage is the presupposition of the biblical witness (42).

(40) "... marriage shows itself to be the ideal and archetypal form of human fellowship in the fact that the light of the very different fellowship between God and man falls almost directly upon it from the closest possible proximity, thus making it its special reflector, image and likeness. Not only in marriage ... but primarily and supremely in marriage, God manifests Himself in His unity as Creator-God and God of the covenant, who as such is the God of free, electing grace. When this is realised and we see marriage, and not only marriage but its foundation in love, in the light of the command of this God, then it is not difficult to appreciate that the divine command in respect of marriage is inflexibly monogamy" ( ibid., pp. 197-198 ).

(41) ibid., p. 199.

(42) ibid., p. 199.

The encounter with polygamous and other non-monogamous forms of marriage, whether in the "mission field" or elsewhere, presents the Christian community with both theological and pastoral problems. There is no occasion for playing off European or bourgeois custom and law against non-European or non-bourgeois alternatives. But, for all the imperfections of Western monogamy, and the nobility that is present in some polygamous unions, the content of the divine command in respect of monogamy must not be suppressed or weakened (43).

Monogamy, within the context of the divine command, is clearly intended to occupy the whole of the time in common which husband and wife have before them. This marital fidelity and constancy mirrors the covenant-faithfulness of God, and is majestically expressed in the saying "What therefore God hath joined together, let not man put asunder" (44). This saying should not, however, be interpreted as though it were a text of canon law (45). It does not express some remote and alien prohibition, but rather the nature of love and marriage itself - it is permission, freedom, grace (46). A love which is capricious, experimental, non-binding is a flabby and perverse shadow of love, not its substance (47).

But what is spoken of is a union which rests upon the permission and command of God. If there has been no real

(43) The Christian community must promote institutional monogamy, though not in a heavy, insensitive way ( such as, for example, demanding the dismissal of all but the first of a man's existing wives ). "The decision of theological ethics in favour of monogamy as against polygamy calls for a clear recognition of matter and purpose, but not for brutality of form or method" ( ibid., p. 203 ).
(44) Mark 10; 11 and parallels. cf. ibid., p. 204.
(45) ibid., p. 205.
(46) ibid., pp. 205-206.
(47) ibid., p. 206.

union in the sight of God, the partnership is radically dissoluble (48). This admission is very far from being a capitulation to the secular pressures for "consensual divorce", interpreted in a more and more cynical and flippant manner. It is a question of "an intrinsically extraordinary application of the extraordinary principle" (49), which in a particular case appears unavoidable. The fact that no absolute prohibition can be made, even with regard to the believer, reveals the whole weakness of marriage as an institution (50).

(48) "... we cannot sufficiently seriously realise that by no means every human striving, coming and being together of two partners in love and marriage automatically implies and indicates that God has joined them together and that permanence and indissolubility attach to their union. It would be wanton to apply that saying of Jesus to every such couple merely because it has actually discovered itself as such and spoken its human Yes before the civil authorities or the priestly altar and perhaps lived long in conjugal fellowship" ( ibid., p. 208 ). Of course, to decide that a particular partnership is in fact dissoluble presupposes the greatest possible caution and humility. In reality, the requisite knowledge belongs to God alone. But, although the question of marriage is a crucial one, it is not the only question, not itself the question of salvation. All marriages, even the richest and most stable, to some extent stand under the shadow of the question whether after all they lack the divine joining together and thus genuine permanence ( ibid., p. 210 ). Nevertheless the decision, as an ultima ratio, as possessing an exceptional and very grave character, must in some cases be ventured that a marriage is dissoluble, because it was built without a true basis ( ibid., p. 211 ).

(49) ibid., p. 212.

(50) What has the formal and external appearance of marriage can really be no marriage ( ibid., pp. 212-213 ). In such genuinely border-line cases, when the human decision must be ventured that the relationship between a man and woman lacks a foundation in the divine command, then the legal implications of the apparent marriage may be set aside. One of the most distinctive features of Barth's theological ethics is his insistence on the exceptional character of the exceptional. Such is the strength of the legalistic tradition, and of the typical reactions against it, that the exceptional can often only be understood as being itself normative.

Since ultimately the foundation of a marriage is God's calling and gift, the question about the mutuality of love which draws the couple together is not the only or the greatest question. But it is a necessary question (51). The question of love should never have been neglected as it has been, both in the Roman Catholic and the Reformed (52) traditions (53).

To enter into marriage without the heartfelt choice of the other as life-partner is merely to approach the reality of marriage, however harmless or worthy the alternative motives may be (54). Genuine love between man and woman is a reasonable and controlled love (55). It must also be mutual - unilateral love to which there is no corresponding answer cannot in any sense be a basis for marriage (56).

Although the pietistic refusal to reckon with the question of love must be rejected, genuine love always occurs within a wider social context than the exclusive relationship between the two; it must therefore essentially be a responsible

(51) "Where do we ever see the timely reproof and advice of the Church concerning the innumerable and sometimes quite shameless inhuman marriages for money, position and advantage, and the innumerable equally inhuman marriages of wantonness which it has seen contracted under its authority and which it has unthinkingly blessed and accepted as Christian marriages, only then ( when it is too late ) to be excited and enraged that they cannot be carried through as Christian marriages? Why has it been so lax at first and then so stern?" ( ibid., p. 214 )

(52) "Reformed" is sometimes used more narrowly to designate the Calvinistic tradition of Christianity; sometimes, as here, more widely to designate those forms of Western Christianity which accept in some significant measure the spiritual authority of the Reformation.

(53) Barth laments that Protestant ethics, in its excessive emphasis upon matrimony, has little to say on the burning issue of love, apart from some feeble attacks on eroticism and Romanticism ( ibid., p. 216 ).

(54) ibid., p. 219.

(55) ibid., p. 220.

(56) ibid., p. 222.

love (57). Marriage is not simply a more subtle form of isolation from the fellow-man, a mutual egoism or Narcissism from which the fellow-man is effectively excluded (58). As well as being an event within the experience of the two persons most intimately concerned, it is also an event within the wider community (59). The various socially-approved formalities are declaratory of marriage; they do not constitute it. It is at this point that the traditional views of marriage make their fundamental mistake, by equating marriage with the marriage ceremony (60).

The social dimension, which the ceremony symbolises, does however possess a relative validity and importance. Apart from the man and the woman themselves, no human agency can validate or invalidate the inner reality of a marriage, in terms of their mutual acceptance of each other. But the public character of the undertaking is the only way in which the members of the wider society can be invited to approve and support the new commitment. To seek to begin married life without the approval and support of others, especially of

(57) This consideration casts a deep shadow over "mixed" marriages, between believer and unbeliever, or between believers of different confessions, which must inevitably threaten the sense of common responsibility before God ( ibid., p. 323 ). "... is a common responsibility before God possible between one who is really indifferent and a true believer, between a sincere Christian and a sincere Jew, between an Evangelical Christian and a Roman Catholic ( when the Roman Catholic Church considers it a betrayal of the faith to surrender certain conditions which the Evangelical party can accept and approve only by a betrayal and to the detriment of his faith?" ( ibid., p. 224 ). Barth does not, of course, imply an unequivocal "No".

(58) ibid., pp. 224,225.

(59) "This outward responsibility of marriage is symbolised in its external form..." ( ibid., p. 225 ).

(60) ibid., p. 225.

parents, is unwise - though of course the role of parents and others is a limited one (61).

It is quite understandable and proper that the State should lay down certain formal pre-requisites of the legal recognition of a marriage (62). The marriage ceremony of believers is an event which affects the Christian community, whether or not it is marked by some ceremony in church. In those States where the church ceremony does not in itself receive recognition as satisfying the legal formalities, it should be divested of the character of being a religious doublet to the civil ceremony (63). It is uncertain what is the appropriate form for the church ceremony in such cases. It should, however, effectively express the loving interest of the community in an event which, if it is what it should be, will honour, promote and edify the community ( or alternatively will dishonour, disturb and scandalise it ) (64).

(61) "... even the most well-meaning of parents can neither give nor take away from their children what constitutes marriage as marriage" ( ibid., p. 227 ) - that is, in terms of the gift and task of married life-fellowship, of the love which lies at the basis of marriage, and its responsibility before God. "The way in which positively and negatively parents always used to dispose of daughters especially, and even to a large extent of sons ( and always under the eyes and with the approval of the Christian Church ) was a clear and unequivocal and inexcusable evil which has rightly been corrected" ( ibid., p. 227 ). But the general loosening of family ties characteristic of the present age does not warrant any abandonment of this responsibility to society which the wedding ceremony symbolises ( ibid., p. 227 ).

(62) "Those who desire marriage must also desire its legal conditions and consequences and therefore its official enactment" ( ibid., p. 227 ).

(63) ibid., p. 228.

(64) ibid., pp. 228-229.

The whole institutional dimension of marriage belongs to its bene esse, rather than to its esse. Failure, or inability, or even conscious refusal, to comply with the socially-required formalities does not always deprive marriage of its inner validity (65).

Who then truly lives in the "divinely-commanded freedom" which is given to man in the sphere of male and female? Who has clean hands and a pure heart when he considers the whole complex of problems which arise in this connection? (66) No legalistic protestations of absolute or relative blamelessness are relevant at this point. What is required, and what is freely offered, is repentance. "... the keeping of the command means that man allows himself to be led by God's goodness to repentance and to a position of remoteness from his transgression and vigilance against it. More than this is not required of him. Absolute purity, an ideal masculinity or femininity, a heavenly love, a perfect marriage ... is not required of him..." (67).

(65) Barth specifies the racial laws of the Third Reich as being of such a nature that evasion of the legal ceremony of marriage was not only permitted but in some cases clearly demanded ( ibid., p. 229 ).

(66) In the light of the unity of the divine command, it is clear that every man is strictly a transgressor and adulterer. Adultery is all "thinking and speaking, action and conduct, which is inconsistent with and destructive of marriage, and beyond this all perversion, depletion, falsification and corruption, all unreason, laziness and wickedness in the life and relation of the sexes generally, whether within or outside marriage and either way in evil thoughts, words and works ... if this is so, who is not affected by this command, and unmasked and challenged by it as a transgressor?" ( ibid., p. 233 )

(67) ibid., p. 237.

Finally, although every human action is as such questionable, subject to the divine judgement, perpetually in need of forgiveness and renewal, there are in the sphere of male and female abundant indications of the rightness, the friendliness and wholesomeness, which correspond to God's grace. There is no perfect marriage, but there are marriages which for all their imperfection are not without promise and joyfulness, undertaken in sincerity as the work of free life-fellowship (68). Also, "there is genuine, strong and whole-hearted love even in relationships which cannot flower in regular marriage, but which in all their fragmentariness are not mere sin and shame, and do not wholly lack the character of marriage" (69). Above all, the God who commands does not only judge and forgive; he also helps and heals. "This is the best which can be said about man and woman in relation to this aeon in which ethics and the ethics of sex are a necessity. Anything more is reserved for the resurrection of the dead. But then they will neither marry nor be given in marriage" (70).

Barth departs from the general Christian tradition in regarding the question of the fruitfulness of a marriage as in principle distinct from the question of the procreation of children (71). "Parenthood may be a consequence of marriage which is both joyful and rich in duties, but from a Christian point of view the true meaning and the primary aim of marriage is not to

(68) ibid., p. 239.
(69) ibid., p. 239.
(70) ibid., p. 240.
(71) The lack of those married persons who have no children, and of the unmarried, cannot be a final lack, "for the Child who alone matters has been born for them too" ( ibid., p. 267 ).

be an institution for the upbringing of children..." (72).

The restriction of human fertility in sexual intercourse, by whatever technique or procedure, is a questionable matter; but it is in no way to be thought of as absolutely prohibited by God's command (73). Whichever course is chosen is to some extent laboured and artificial (74); but artificiality in this context merely illustrates the contingent and problematical nature of human sexuality - it is not synonymous with evil, or the absolutely forbidden (75).

Harsh discrimination against the unmarried mother, or the child born to an unmarried mother, and the lenient indulgence accorded to the impregnator, are elements in earlier ecclesiastical ethics and practice which reflected the Church's accomodation to pagan standards, but not its Christian basis. Such distortions cannot too radically be discarded (76).

This summary of the thought of a distinguished theologian has been intended to demonstrate that the contribution of Christianity to an understanding of human sexuality is not tied either to "the tradition" (77) or to the defiant rejection of the tradition (78). Profound reflection upon the implications of the Christian faith need ally itself neither with the generalised conservative tradition, with its aura of religiosity, nor with the generalised liberal tradition, with its aura of anarchism. Whether Barth succeeds in transcending the dialectic between legalism and anti-nomianism - whether indeed it is possible to transcend it - is perhaps another question.

(72) ibid., p. 267.
(73) ibid., p. 268 ff.
(74) ibid., p. 276. This is especially true of abstinence within marriage.
(75) ibid., p. 276.
(76) ibid., p. 276.
(77) See supra, Chapter One, Christian Traditionalism.
(78) See supra, Chapter Two, the remarks on Christian situationism.

This concentration upon the thought of one particular theologian should not be taken to imply either that Barth somehow speaks for the majority of Christians or that he stands alone in his understanding of human sexuality. Although he is a highly original thinker, especially in his ability to remain essentially loyal to the spirit of earlier formulations of the Christian faith, while departing radically from them at many points, much that he says would be endorsed by a variety of other Christian thinkers. Indeed, for all the emphatic theocentricity which characterises his writings, the vigour and passion, the depth and the humanity, whose spirit enlivens the massive volumes of the Church Dogmatics, would command the respect of many who would not in principle be sympathetic to his distinctively theological affirmations.

## CHAPTER TEN. MONOGAMOUS MARRIAGE AS A LEGAL INSTITUTION.

The attempt has been made to justify monogamous marriage, as a fundamental socio-ethical phenomenon, from pragmatic as well as from specific ethical and theological perspectives. To justify monogamy as a fundamental socio-ethical phenomenon is not to be committed to acceptance of the legal machinery whereby monogamous marriage is permitted to exist, or is priveleged and defended, within a particular legal system. But the existence of a legal dimension as such - in addition to other non-legal dimensions - does not seem to call for explanation. The family is perhaps the most basic of human groupings, and it is inevitable that family structures will fall within the scope of legal regulation.

Even in the circumstances of the most perfect of possible worlds, where persons invariably perceived and fulfilled their obligations ( for example, the mutual obligations of spouses, and of parents and children ), it would by no means be true that there would be no more obligations; all that would be different from the actual situation would be that obligations would require no external backing (1). Because the mutual obligations of spouses are so intensely personal- compared, say, with those of road-users - it may be objected that legal reinforcement in this case is inappropriate. True love between man and woman may appear to require no supervision or support; and the problems of the

(1) In the context of the use of the roads, even if every road-user, as well as being concerned for the well-being of others, exercised complete technical mastery, it would still be necessary for principles of behaviour, some of them very specific, to be devised. Otherwise road-users, however great their concern and their expertise, would not know what others expected them to do.

unhappily married seem unlikely to respond to any purely legal therapy. But a positive role for legal regulations is more easily defended when one considers the typical marital situation. For most people, the existence of legally-enforceable obligations in the marital sphere is not wholly superfluous; nor are such obligations unrealistically difficult to fulfil. It may be true of the best men and women that they would always behave appropriately towards spouse and children without the incentive of praise, or blame, or advice, or threats from the wider community. But it is not true of all; nor, probably, is it true of most.

As with road-use ( although the scope for creative innovation may appear greater in the case of marriage than in the case of driving a motor vehicle ), participation in marriage is not an activity which is worked out as if ex nihilo by each person; both species of activity are largely established by communal experience and agreement. Those who marry, or who refrain from marrying, or who adopt some real or apparent alternative to marriage, are acting within the cultural possibilities open to them in a particular society; only rarely do they succeed in devising some unfamiliar variation on the existing themes (2).

Marriage, in whichever form or forms it is legally recognised by a particular society, presents the most widely-publicised, as well as the most socially-approved, of all patterns of explicit sexual behaviour. Whatever is compatible with marriage is not only

(2) Even extra-legal, or illegal, activities ( like keeping a mistress, or being a male homosexual prostitute ) are regulated by social conventions which, for those who are conscious of them, presumably establish the outer limits and, to some extent, the inner pattern of the activities in question.

permitted by law, but is also approved ( except by self-conscious critics of society ). Whatever is perceived as being incompatible with marriage is, by the same token, disapproved, even if it is technically permitted (3).

Even in the most apparently uninhibited of human societies, it appears that there are certain prohibitions which serve to define, even if very widely, the limits within which sexual behaviour may be engaged in without risk of disapproval or punishment. The most severe of viable prohibitions occurs when every overt form of sexual behaviour is proscribed except heterosexual intercourse between validly married spouses. This, indeed, is the norm which Europe inherited from the rigoristic tradition of Christianity; and, in so far as any ethical norm is known to and authoritative for a significant minority of the European population, it retains its pre-eminent position. But few people would now aspire to punish all knowable deviations from the norm. Deviations are in many cases tolerated; sometimes there is no more than a technical vulnerability to punishment; only rarely is legal punishment a likely consequence of

(3) Sexual deviations are by definition looked on with disapproval by those who claim to represent the official or the majority view. But there are different degrees of disapproval, ranging from the raised eyebrow to the instruments of torture or execution. Different groups within society evaluate the same forms of behaviour in very different ways. The devout Roman Catholic may consider celibacy to be the most admirable of all patterns of sexuality, whereas the radical with Freudian leanings may, without affectation, regard celibacy as the only pattern of sexuality to which the word "immoral" might reasonably be applied. The radical may regard promiscuous behaviour as entirely healthy and positive, particularly if no unwanted pregnancy occurs as a result, whereas the Roman Catholic may regard the latter consideration as presumptive evidence of compounded wickedness.

detection (4).

It seems no more likely than it would be desirable that such activities as rape and sexual exploitation of the "young" or "immature" should come to be absolutely permitted, in the sense that no legal sanction could be applied against those who behave in this way. But in Western societies the negatively punitive aspects of the legal regulation of sexual behaviour are of secondary importance compared with the didactic and positive aspects.

Although the mere absence of technical unlawfulness is not equivalent to moral rightness, moral judgements in the sphere of sexual behaviour are significantly related to the legal concept of validity. What occurs between validly-married spouses is by no means always morally right, even if one accepts the rigoristic norm referred to above. But if one does accept it, great importance attaches to validity, and this is definable in legal terms. It is, perhaps, no more than a strong but rebuttable presumption that the boundaries of what may be morally right coincide with the boundaries of what is legally valid. Even so, the presumption is of considerable importance for an understanding of morality in this sphere.

It is for most people in a particular society morally as well as legally conclusive that marriage is not permitted to take place between parent and child, or between two siblings. The importance of legal regulation in its positive aspect is that it

(4) "Adultery is no longer a crime and presumably the civil courts would not interdict a spouse from committing adultery", E.M.Clive and J.G.Wilson, Husband and Wife, (Edinburgh, 1974), at p. 177. There is a clear tendency in the more technologically advanced countries to reduce the scope of legal sanction in the case of the least "grave" sexual deviations from the traditional norm. Such exceptions as survive are sometimes assumed to be anachronistic.

establishes the pattern of sexual behaviour which receives unreserved social approval. The outer boundaries of this sphere of unreserved social approval correspond to the valid marriage. Any form of overt sexual behaviour which takes place outwith the context of the valid marriage is to some extent put in question, even when there is no vulnerability to penal sanction. It must be justified, either by reference to some norm alternative to that embodied in the official attitudes of society, or by the demonstration that, whatever its external imperfection, it is inwardly quite consistent with the official norm.

The following series of questions illuminates the reasons for legal systems intervening in the regulation of sexual behaviour (5):-

> "What then are the kinds of problem that arise at all times and for all people? One can state some of them rather simply. Should it be easy or hard to marry? Should there be age limitations? Who should be permitted to marry, or who should be debarred from marrying, and to what extent should one have regard to health and religious disabilities, and to what extent should one recognise prohibitions imposed by foreign laws when such prohibitions do not exist in one's own country? To what extent should one recognise polygamy and polyandry, and what adjustment should be made for immigrants and others whose personal or religious laws do not accord with the way of life of the majority? To what extent should the absence of sexual intercourse after marriage govern the formation of the marriage that has already been "celebrated"? How does one "prove" that the marriage has taken place, and to what extent should one recognise a marriage that has allegedly been celebrated abroad, or has taken place without the "usual" formalities? To what extent should one recognise foreign nullity decrees? When a marriage is null for any reason, to what extent should the conduct of the parties preclude them from obtaining a decree, and is it ever possible for a marriage that is void, that is, a marriage that is notionally of no effect at any time, to be "validated"? And there is the ultimate question in a sense, what is a man and what is a woman? These are a few of the problems that arise. They are not just lawyers' problems. Politics, philosophy, medicine, sociology, religion, sexual habits and financial considerations all play their part. The cases reflect the endless computations of human behaviour..."

(5) Joseph Jackson, The Formation and Annulment of Marriage, (1969), at p. viii.

It has been argued that monogamous marriage is basic to the values of Western societies, and that from the perspectives of Agape-ethics and Christian theological ethics ( in the first case unsystematically, in the second explicitly and comprehensively ) this form of marriage is seen to possess an intrinsic ethical superiority over other possible arrangements for regulating the sexual relationships of male and female and for ensuring child nurture. To say this is not to deny that societies may exist and flourish which adopt very lax versions of monogamous marriage, or which adopt some wholly non-monogamous set of arrangements.

The number of "viable" arrangements is not, however, infinite. Although no society which failed to ensure a general commitment to some viable set of arrangements could survive as such, the mere fact that a society, in its particular circumstances, has survived does not establish that its marriage system is qualitatively equal to alternative systems - survival is of course necessary, but it is insufficient.

The legal systems of Western culture are all committed to the recognition of monogamous marriage as the preferred context for sexuality and child nurture, greatly though they may differ on such questions as the formalities prerequisite to the creation of married status, and the circumstances in which a marriage may be legally dissolved. For all the moral confusion characteristic of technologically advanced societies, there appears to be little likelihood of monogamous marriage being replaced by any coherent alternative.

The upholders of the traditional virtues are sometimes asked to take comfort from the fact that most of those persons whose marriages are legally dissolved affirm their basic commitment to monogamous marriage by entering into it for the second,

or third, or fourth time. But the conservative of pessimistic inclination is perhaps more likely to be anxious about the moral deterioration within the institution of monogamous marriage than by the possibility of its formal abandonment or replacement.

Out of the great mass of legal rules which affect the status and mutual obligations of married persons, attention will principally be paid to those which determine the validity of a purported marital union. Questions about the dissolution of marriages, about the economic implications of marriage, and about the conflict of laws, will be considered briefly. The intention is to throw some light on the "fundamental nature" of monogamous marriage, irrespective of variations in detail between different legal systems which uphold some form of monogamous marriage. The Scots and English systems will be the ones most frequently referred to. It will be presupposed that the concept of legal validity can only externally represent, without doing full justice to, the personal dimensions of marital union. Since the distinction between "fundamental nature" and contingent qualities is being presupposed, it is presupposed also that changes ( for example in the rules regulating legal dissolution ) may be so far-reaching that the institution resulting from the changes may in substantial terms no longer be monogamous marriage.

## CHAPTER ELEVEN. CONSENT TO MARRIAGE.

Marriage as a legally-regulated institution involves a specific relationship between persons of opposite sex; it is not known if any legal system has given equivalent recognition to unions between persons of the same sex, but the analogies do not seem sufficiently close to warrant such an extension. Monogamous marriage involves one person of each sex, and is therefore incompatible with subsisting marital unions involving a third party. Both parties to a marriage must have consented to the creation of the union in question; but consent, though necessary, is not in all cases sufficient. A man is not allowed to marry his mother, however much he and she might have consented; this particular incapacity is thought to be common to all human societies. A person contracting marriage must have both the general capacity to marry someone, and the specific capacity to marry the person in question.

In Scots law, provided the parties, having the general and the specific capacity to do so, have consented to marriage in accordance with the prescribed forms, marriage is contracted merely by the exchange of consent - *consensus non concubitus facit matrimonium* (1). There is no additional requirement of "consummation" by an act of sexual intercourse between the parties, though it is "an implied condition in marriage that both parties are sexually potent, *capaces copulandi* " (2). Where one of the

(1) Viscount Stair, *The Institutions of the Law of Scotland*, 5th edn., by J.S.More, 2 vols., (Edinburgh, 1832), I.4.6.
(2) E.M.Clive and J.G.Wilson, *op. cit.*, p. 41.

Where one of the parties is sexually impotent at the time of the exchange of consent, the union is voidable at the instance of either party during the lifetime of both (3). Failure to engage in sexual intercourse which stems from unwillingness, rather than from incapacity, may be construed as cruelty for purposes of dissolution.

Consent must be sincerely and freely given. It must be directed towards marriage, not some other relationship or transaction, and with the person in question, not with someone else. Apparent consent obtained by force and fear, or by certain kinds of fraud, will be regarded as no consent. In Scott v. Sebright (4), where an unsophisticated girl of twenty-two had gone through a ceremony of marriage after being reduced to a state of bodily and mental prostration by the respondent's lies and threats, Butt J. pointed out that the appropriate test was a subjective one. "To such a person, writs and bankruptcy summonses may well appear endued with unknown terrors" (5). The relevant question in such a case is not whether the petitioner affected by the force and fear should have been so affected, or would have been had she been a person of average obstinacy, but whether in fact she was so affected.

It appears that for Scots law, a marriage induced by threats is void (6). For England, the Matrimonial Causes Act

(3) See E.M.Clive, "Void and Voidable Marriages in Scots Law", 1968 Juridical Review 209.
(4) (1886) 12 P.D. 21.
(5) ibid., at p. 25.
(6) "The question was settled by the canon law in favour of the absolute nullity of the marriage and the Scottish text-writers are mostly in agreement with this view. This seems in accordance with principle" ( E.M.Clive and J.G.Wilson, op. cit., p. 67 ).

1973, s. 12, provides that such marriages shall be voidable. Scots law provides no relief in the case of a man who enters marriage unaware that his bride is pregnant by another man: Lang v. Lang (7). Though the right to be discreet about one's past failings can hardly be taken away altogether, this is a situation where it should perhaps not be permitted to be exercised without qualification. English law provides that pregnancy per alium shall be a cause for avoiding a marriage (8).

In the nature of things the external indications of consent are not always matched by the appropriate state of mind; people sometimes do not intend the apparent implications of their externally observable behaviour (9). But in a matter of such social importance as marriage, it is no less important that persons who have consented should be held to their commitment ( even when they allege that the apparent consent was not genuine ) than that persons who have not consented should be released from commitments which in fact they have not made (10).

(7) 1921 S.C. 24.
(8) Matrimonial Causes Act 1973, s. 12.
(9) "These cases raise an acute juristic dilemma: if the apparent consent was not real there should be no marriage; yet it produces uncertainty if an apparently valid marriage can be avoided by proving the existence of a state of mind or belief which was in no way evident at the time of the ceremony. The law therefore refuses to allow private reservations or motives to vitiate an ostensibly valid marriage; yet there may be cases in which it holds that there has been no consent at all", S.M.Cretney, Principles of Family Law, (1974), at p. 22.
(10) The more bizarre the circumstances in which the alleged exchange of consents took place, the weaker the presumption that consent has been given: Jolly v. M'Gregor, (1828) 3 W. and S. 85. This is especially so where the improbable story stated by the one litigant is not half so improbable as the story stated by the other:- cf. the remarks of Lord Eldon at p. 197. The House of Lords speeches illustrate English distaste for the Scots "irregular marriage".

The requirement of the free and sincere consent of the parties belongs to the fundamental nature of monogamous marriage as a socio-ethical phenomenon, at least in Western societies. To be coerced into marriage (11) is incompatible with the values which monogamous marriage is concerned to promote.

But even if absence of consent can often be established as an absolute fact, consent, when it is present, is a matter of degree. States of mind change, even if external circumstances do not change. The establishment of consent for legal purposes is concerned with the state of mind at one particular moment - the moment of the exchange of consent - and not with subsequent changes of heart. It is possible to know the general implications of the legally-regulated relationship one is about to inaugurate with another person; but it cannot be known what are to be the particular trials and compensations of the relationship as it will develop (12). But these later trials are relevant to the question of the dissolution, not the formation, of marriage.

(11) Whether by an outraged father, an unscrupulous adventurer, or the agents of some hypothetical eugenic programme.

(12) A serious question about the legal institution of monogamous marriage concerns the ethical or religious obligation to take the partner in sickness and in health, in good fortune and in ill fortune. Is this something which exists only in the ethical or religious, but not in the legal, dimension? Or is it implicit in the civil form of marriage also? If the consent which is legally enforceable is so to speak subject to the condition that the partner continues to be sufficiently successful, attractive etc., it is submitted that the legal institution would cease to be viable. If one is taken to have consented only to the partner in his or her present state of "profitability", marriage is based upon a homeless foundation. From the perspective of Agape-ethics, it seems clear that the spouse is loved for his or her own sake, and not for any incidental advantages which he or she may bestow upon the loving subject. There are of course cases where the changes in circumstances are so grave that the initial act of consent may be said to have become irrelevant. But, as always in such matters, it is difficult to avoid the dialectic between uncompromising rigorism and complete irresponsibility to others.

Questions of mistake, or error, are closely associated with the question of the genuineness of consent. In Scots marriage law, error seems to play a very limited part. Provided there is no incapacity to marry the person whom one does, ostensibly, marry, it is of no legal significance that one is then disappointed in one's expectations, however reasonable they may have been. Of course, error as to one's capacity to marry the person in question - where, for example, there is a question of a subsisting marriage, or of the prohibited degrees - is another matter.

In the paradigm case, there is no serious doubt that two persons are married to each other - there were no impediments to their union, and the requisite formalities were observed. Most people know that they are of a certain age, that they have never previously been involved in a marriage ceremony, that they are not members of related families, and so on. But many cases present difficulties, especially when one of the parties has been fraudulent in some particular, or where the place where the marriage is celebrated, or a previous marriage was dissolved, is not the place where the parties are domiciled.

A subsisting marriage prevents the partners from marrying any other person, until the first marriage is dissolved by death or divorce. Although death and divorce have factual as well as legal aspects, the factual aspects of death are more unequivocal than those of divorce. One may suppose, in good faith, that a living person is dead, or a dead person still alive; or that a divorced person is still validly married, or that a validly married person has been divorced. With the last two examples, a person can make the mistake about himself. Or again, one may

be uncertain whether or not a death or a divorce has occurred. During the subsistence of a marriage, any supposed second marriage is void, irrespective of good faith. But the incapacity to marry is dependent upon, and limited to, the subsistence of the first marriage. It may therefore happen that persons, whether in honest error or in blatant disregard of the legal position, go through the motions of a legal ceremony which at the time is invalid, and continue to cohabit with each other after the time when the previous marriage has ceased to exist. Conversely, it may happen that by the operation of a legal presumption about the death of a spouse, a person becomes legally free to marry again, and does so, and that some time later the supposedly dead spouse turns up alive and well.

In the first case, where the impediment has ceased, even in the absence of proof of a valid ceremony, continued cohabitation as spouses may suffice to establish the exchange of mutual consent to marry. In Campbell v. Campbell (13), where eloping lovers continued to live as husband and wife for many years, both before and after the death of the woman's first husband, the House of Lords upheld the legitimacy of the eldest son of this union. Lord Cranworth said

> "Where a man and woman have lived together as man and wife at a time when they could not be man and wife, and they continue to live together in the same manner after it has become possible for them to become man and wife, the question whether they have become man and wife is a question not of law but of fact" (14).

(13) (1886) 4 M. 867; (1867) 5 M. (H.L.) 115.

(14) Campbell v. Campbell 39 Scottish Jurist at 585. Cohabitation, in accordance with English law, is evidence of some appropriate marriage ceremony having taken place; it is not, as it is in Scots law, itself constitutive of marital status.

The implication of the facts was that the man and woman could be presumed to have transformed an adulterous into a marital relationship. Similarly, where a marriage ceremony is invalid because one of the parties is under the age when consent to marry may be given, cohabitation after the attainment of that age may enable exchange of consent to be inferred: A.B. v. C.D. (15).

The reappearance of a spouse whose marriage has been dissolved on the ground of his presumed death (16), gives rise to problems, if the "surviving" spouse has contracted a second marriage in the mean time, which cannot satisfactorily be resolved.

It seems reasonable to suggest (17) that cohabitation for even a short time after the removal of an impediment should suffice to validate marriages where the initial ceremony was void. The example given is of a person, temporarily unable to consent to marriage because of intoxication or other transitory cause, who is quite happy to find himself married when he comes round (18). The date at which the marriage should be presumed to have commenced should be the date at which the impediment, if known, was known to have been removed, or, if not known, was removed. For example, if the girl in A.B. v. C.D. (15) had known that she was not capable of contracting a valid marriage, the time when "validation" could be presumed would be the time

(15) 1957 S.C. 415.
(16) e.g., under the provisions of the Divorce (Scotland) Act 1938.
(17) So, E.M.Clive, "Void and Voidable Marriages in Scots Law", 1968 Judicial Review 209.
(18) E.M.Clive, op. cit., p. 226.

when she knew that she was capable of contracting a valid marriage; in fact, she did not realise the position until nine years after the ceremony.

In all cases, the rights of persons affected by a void or voidable marriage should be taken into account. "There is every reason to deal with the rights of the parties, and their children, on the basis of social reality rather than legal theory" (19).

No person who is under the age of sixteen (20), or who is insane, or otherwise incapable of giving consent, may marry while the incapacity exists. In the case of the person under age, it is of course no more than a presumption that, as a matter of fact, he or she will be incapable of consenting to marriage; but the legal presumption is conclusive. The question, "How old is he?" can be given a definite and uncontroversial answer, unlike the question "Does he possess some quality or combination of qualities?" But, although the fixing of any line, such as sixteen or eighteen or twenty-one years, is in certain respects arbitrary ( because the variations between human individuals do not correspond with any precision to such divisions ), it is clearly right that immaturity, however defined, should constitute a bar to marriage.

Where a particular legal system should fix the line is in principle an arguable question. But it is indisputable that there must be some workable method of discriminating between persons who are presumed to be, and persons who are presumed not to be,

(19) E.M.Clive, ibid., p. 219.
(20) Age of Marriage Act 1929, s.1 (1).

sufficiently mature to enter into marriage. In Pugh v. Pugh (21), Pearce J. held that the effect of the Age of Marriage Act was extra-territorial, so that the purported marriage of a domiciled Englishman to a Hungarian girl in Austria was void because she was under sixteen, although the marriage would have been valid by Austrian law, and voidable by Hungarian law. In so far as the decision turns on something wider than the interpretation of the Act, it can be criticised; but there is no entirely satisfactory way of resolving such a dilemma.

(21) [1951] P. 482.

## CHAPTER TWELVE. THE PROHIBITED DEGREES.

In Scots law, as in the legal or social arrangements of all known societies, there are restrictions upon the freedom to marry which are distinct from questions of consent or general capacity (1). The variation in the ways of computing the "forbidden degrees" exemplifies the contingent nature of some of the detailed regulations affecting monogamous marriage. But it is submitted that, as with the question of the age of marriageability, a crucial insight is involved.

There are two alternative ( though usually coincident ) grounds for opposing the marriage of persons who genetically or in some other way are closely associated with each other. The one, and apparently the more rational and demonstrable, is that there is a greater risk that certain genetic deficiencies will be transmitted to the children of such unions. This consideration is relevant only where children are actually procreated ( or where they foreseeably may be procreated ); and only where the risk of genetic deficiency is in fact demonstrably higher than in other cases. A genetic deficiency which could not, in the state of scientific knowledge at the material time, have been predicted, is clearly irrelevant to the question of the capacity of the parents to marry each other. There can be no guarantee that any two persons will not procreate a child who is genetically defective; and only rarely can it be predicted with reasonable

(1 ) E.M.Clive and J.G.Wilson, op. cit., at p. 87:-
"In almost all countries and societies known to us, if not in all, rules have been prescribed which limit, either positively or negatively, the class or group within which a person may marry."

certainty that two persons will do so.

In some cases it can be predicted that the likelihood of this happening is "unacceptably" high; but even where this is so, there is no legal power reposing in anyone to prevent the procreation of a child in such circumstances. The implications of such a power, if it existed, would be very considerable. So, although some of the prohibited degrees can be justified on the ground of "eugenic precaution", the principle of eugenic precaution does not justify all of the prohibited degrees, nor is it applied more widely to prevent persons from contracting valid marriages outwith the sphere of the traditional prohibitions.

This principle was not known to those early men and women who devised the various prohibitions; nor does it figure prominently in the thoughts of the great majority of persons in all societies who accept their moral authoritativeness. Women do not abstain from seducing, or purporting to marry, their sons, or men their granddaughters, merely because they believe that any children resulting from such unions would be likely to inherit some genetical defect. Moreover, there are many cases where a close genetical relationship could be proved not to be associated with an unacceptably high likelihood of this happening, as well as cases where the lack of capacity to marry affects persons ( for example, those related by adoption ) who are not genetically related at all.

In Philp's Trustees v. Beaton (2), the leading case in Scots law, the Lord President referred to the double purpose

(2) 1938 S.C. 733.

of the rules preventing marriage between persons within certain relationships, one being to prevent the corruption of the stock, the other to preserve the purity of the family (3). Two persons may in fact be brought up within the intimacy of the family who are not genetically related to each other; conversely, two persons may be genetically related to each other without having any subjective awareness of their relationship.

When the two factors of genetical relationship and shared upbringing are dissociated from each other, the presumptions against the "moral legitimacy" of marriage are correspondingly weakened, even though, in the most usual cases, either is a sufficient legal ground for specific incapacity to marry. Since the marriage of first cousins is not prohibited by Scots law, it was held in Philp's Trustees v. Beaton (2) that the prohibition of inter-marriage where the propinquity of blood was more distant than that of first cousins must, consistently, be based upon "purity of family". The case turned on the distinction between a blood relationship arising from an illegitimate birth and a blood relationship arising from a legitimate birth. "A bastard is neither in law nor according to the customs of most civilised countries a member of the family the purity and sanctity of which are intended to be protected by the extended prohibition. The reason for the fiction does not extend to bastards, and the prohibition therefore does not extend to them" (4).

Although the relationship between great uncle and grand

(3) Ibid., at 745.
(4) Ibid., per Lord President Normand at 746.

niece would be, within the lawfully constituted family, subject to the presumption that he acts, or might be expected to act, in loco parentis towards her - and thus they would lack the capacity to marry each other - the presumption does not extend to the relationship between a man and his niece's illegitimate child. Therefore a marriage between a man and his niece's illegitimate daughter was held to be outwith the scope of the prohibited degrees. The genetic objections, if any, to such a union, are however unaffected by the fact the blood streams were mingled by the left hand, rather than by the right (5).

The ratio decidendi of the case is probably narrow; it does, however, serve to illustrate the fact that the area of prohibition is defined by two partially overlapping circles, rather than by one clear principle. In cases where the degree of consanguineity is closer, there is no reason to distinguish between legitimate and illegitimate relationships ( assuming that the latter are known ). Few people would wish to uphold the right of a man to marry his illegitimate daughter, or of a woman to marry the natural son of either of her parents.

Purely in terms of genetic precaution, it could be argued that there is a case for prohibiting first cousin marriages, unless some form of genetic screening could be devised (6). If twins married their twin first cousins, and if the same species of marriage occurred in the next generation ( a process which could be

(5) Ibid., cf. the remarks of Lord Moncrieff at 749.
(6) So, S.M.Cretney, op. cit., at p. 13.

repeated ad infinitum ), the genetic contra-indications would presumably be considerable.

It seems that there is a basic difference between the principle of eugenic precaution, which is, so to speak, a matter of prudence rather than of morality, and the deeper, less easily articulated principle that the "purity of the family" requires to be legally safeguarded. The family in this sense cannot adequately be defined in existing legal categories. In the paradigm cases, no doubt arises. But often a person treats another person as if he or she were a parent, or a descendant, or a sibling, when as a matter of biological fact this is not so. In such cases, the moral perception may become obscured, even if the legal analysis is clear. But the legal analysis cannot, in all cases, dispose of the moral implications of a particular relationship.

It is understandable that statutory protection should be accorded to the adoptive child vis-a-vis his parents by adoption (7), though it is dubious whether the same prohibitions should not properly be extended to cover the case of siblings by adoption. In the same way, persons may be brought up substantially as if they were members of the same family, even where no legal presumption of relatedness applies.

It is submitted that the underlying moral justification for the prohibition, which is too wide to be given a satisfactory legal equivalent, is as follows. Persons other than spouses who are living within the intimacy of the same family, or who could be expected to do so in the absence of special circumstances, require to be protected against the intrusion of any overt sexual interest, which would amount to the violation of the mutual

(7) Adoption Act 1958, s. 13 (3).

trust upon which family life must be based. It is precisely within the family context that, in the absence of stringent inhibitions, persons are most vulnerable to exploitation. A girl should not, for example, be expected to cope with the emotional strain of fearing, or knowing, that she has become the object of her father's or brother's sexual desires. Without at all knowing why they do so, or even that they do so, practically all parents condition their children to direct their sexual desires outwith this "forbidden" zone. So strong is the effect of this conditioning that it is readily applied to cases where, e.g., a known sibling is brought up elsewhere, or a person known not to be a sibling is brought up within the same family.

Those apparent siblings or ascendants who are unaware of the biological situation will presumably be affected by the usual emotional inhibitions; but in cases where the biological situation is known, these inhibitions are likely to occur in a less intense form. The need for protection is however no less in the case of a child brought up within a family, but not related to its members by consanguineity, than in the case of other children. Conversely, where a brother and sister only meet in late adolescence, the emotional need for protection scarcely exists at all, although they will lack the legal capacity to marry each other. ( This may occur, for example, when one sibling was adopted or fostered in early infancy ).

The Freudian account of the working-out of the Oedipus complex may well help to explain how the emotional inhibition comes to be effective, at least in the case of the repression of overt sexual desire directed towards the parent of the opposite sex. But it is less helpful in explaining the repression of overt sexual desire directed towards siblings or descendants,

and it would be these forms of sexual desire, emanating from physically mature persons, which, if not effectively repressed, would destroy the possibility of mutual trust within the family.

In modern legal systems, there is a clear difference in principle between the civil incapacity to marry, and the liability to criminal sanctions for the crime of incest. But underlying both the civil incapacity and the criminal sanction is the more basic moral revulsion against any form of sexual encounter between the persons affected. The validity of this restriction upon the freedom to marry or to form sexual relationships is most clearly perceptible in the context of the young child, whose need for emotional protection is paramount. But since persons cannot lawfully engage in sexual intercourse, any more than they can lawfully marry, below the "age of consent", which is, presumptively, the age of sufficient maturity, it is clear that the prohibited degrees are not merely designed to protect the immature person as such. The additional dimension is concerned with the opportunities for non-sexual intimacy which are entrusted to persons within the area of the prohibited degrees ( but not to persons less closely connected ), and which could, if abused, lead to very damaging consequences. The presupposition appears to be that this non-sexual form of intimacy establishes a form of relationship which would be violated by the intrusion of a specifically sexual element even after the attainment of the age of consent.

In the mediaeval period, the rules of affinity were interpreted no less strictly than those of consanguineity; and the prohibited degrees were widened still further by the creation of a "spiritual" affinity between god-parents of the same

child; the result was that it was scarcely ever possible to know whether two persons were validly married to each other (8). Within a stable, predominantly rural population, affinity and even spiritual affinity are likely often to coincide with a genuinely parental or fraternal type of relationship, and it cannot be said that such rigid regulation is without any moral justification. Nevertheless, even in times past, the rules proved excessively impractical and inconvenient.

Where there is neither close consanguineity nor an actual status in loco parentis affecting the two persons, it would perhaps be wise for the law to impose no absolute prohibition, but to establish a kind of twilight zone within which marriage would be permissible, subject to some preliminary investigation of the actual relationship between the parties during the period of immaturity of either one of them. Sometimes a person may de facto, even if not de iure , have a parental relationship with a distant relative ( or with a person not connected to him by pre-existing family ties at all ); and it would seem undesirable that possible attitudes of emotional dependence and subordination, arising during a period of socially-approved non-sexual intimacy, should later be exploited in a specifically sexual way.

The Kilbrandon Report ( 9 ) recommended that the rule prohibiting marriage between great aunt and great nephew, and great uncle and grand niece, be abolished (10). It also recommended that marriages should be prohibited between a person adopted and

(8) cf. L.T.Hobhouse, op. cit., p. 144.
(9) Report of the Kilbrandon Committee on the Marriage Law of Scotland (1969), Cmnd. 4011.
(10) cf. E.M.Clive in 1969 Scots Law Times (News) 181: this would remove an anomaly, without provoking a rush to the altar.

and adoptive siblings, as well as adoptive parents or descendants; but that this prohibition should not extend between any other members of the adoptive family and of the original family. In cases where persons, not related by consanguineity, are nevertheless substantially nurtured within the same family, it does not seem that, in the absence of a clear legal relationship, any absolute incapacity to marry could be workable ( or just ). In borderline cases, where in any event there is no legal category to be violated, the law should be content to leave the matter to the moral discretion of the parties.

It should, in conclusion, be said that commitment to the Christian religion does not entail accepting that any particular version of the prohibited degrees ( Levitical or canonical ) can claim to be more than a finite and fallible attempt to solve a question which, however clear and certain at its core, is bound to be blurred around the edges.

There is no reason why genuine consent to anything, including marital union, must externalise itself in a particular form. But there are reasons why something to which two persons have secretly consented should have only very limited public consequences, in the absence of some act of a public nature. Therefore a consent to marriage, although it may be entirely efficacious from some ethical or religious perspective, will not have full legal effect unless it conforms to the requirements of the appropriate legal system. The Tametsi decree of the Council of Trent, while affirming that the old rule had been one of marriage without forms, laid down that for the future the presence of a priest, and of at least two witnesses, was to be an essential prerequisite of a valid ceremony of marriage (1). In modern European systems, the principle of publicity is universally applied, though with differences of detail, to the formation of valid marriages.

"The form of a marriage, the mode or the ceremony by which it is constituted, is governed by the law of the place at which it is concluded" (2). In both Scots and English law, marriages which do not sufficiently comply with the requirements of the law of the place of celebration are void (3). The implications of the married relationship are, in general, "read in". Agreements by the parties which purport to change these implications are liable to be struck out, as being contrary to public policy.

(1) cf. Joseph Jackson, op. cit., p. 16.
(2) ibid., p. 210.
(3) ibid., p. 165; E.M.Clive and J.G.Wilson, op. cit., p. 107.

If they are held to negative the apparent consent to the marriage, the marriage will be void. For example, jurisdictions heavily influenced by canon law might hold that a mutual agreement not to procreate children would cancel out the apparent consent to marriage externalised in the ceremony (4). On the other hand, particular circumstances might justify an arrangement in which the usual corollaries of marriage would not be required to be present (5). But an agreement, before the ceremony, that the parties should not live together, might well be struck out on the ground that it is against public policy (6).

In Scots law, marriages are either regular ( "ecclesiastical" marriages, including Quaker and Jewish marriages; and marriages before the Registrar ) or irregular. Since July 1st,

(4) "Parties who are cautious, competently advised, and not bothered by conscience for being sinners in the contemplation of the church deposit with the notary a carefully worded document expressing a condition incompatible with the sacramental character of marriage and making it clear that this mental reservation exists at the very time in which they would express their apparently unconditional vows. If at some time later a party wishes to free himself of the bond of the apparent marriage, he is likely to obtain an ecclesiastical decree which, under the Italian Concordat, also eradicates the civil effects. In the contemplation of the church the relationship never was a marriage ... The most famous case of this kind was that of Guilelmo Marconi, the inventor of wireless communication, whose marriage of thirty-three years was declared invalid when he proved that at the time of the marriage he and his bride had agreed to obtain a divorce if aversion should develop between them. Another prominent case is that of Caroline Lee Radziwill, the sister of Jacqueline Kennedy, and of the Italian movie star Renato Rascel. The latter's eleven-year-old marriage was declared invalid when he convinced the tribunal that he and his bride had agreed never to procreate children."
( M. Rheinstein, op. cit., p. 175.

(5) In Scott v. Scott [1959] P. 103, it was held that a husband should be deemed to have acquiesced in a marital relationship without sexual intercourse, and that in the circumstances the marriage thus entered into was valid.

(6) cf. Joseph Jackson, op. cit., pp. 78-79.

1940 (7), the irregular forms of marriage per verba de praesenti, and per verba de futuro subsequente copula have been abolished, though not with retrospective effect. There are now three categories to be considered - regular marriages without any defect of form; regular marriages with some defect; and marriages by cohabitation with habit and repute.

A defect of form, although it may be fatal to the validity of a marriage, is clearly distinguishable from the absence of capacity to marry, whether this is permanent or temporary, absolute or relative to a particular person. What one legal system may consider to be a defect of form, another may consider to be a question of incapacity. In Bliersbach v. MacEwan (8), the Lord President ruled that the absence of parental consent ( required by the law of the domicile ) was by Scots law a merely prohibitive impediment, so that there was no reason why the couple should not be validly married in Scotland, in spite of the objections of the girl's father.

It can however be argued that the question of capacity to marry should be determined in accordance with the personal law of the parties. Although Scots law, for example, does not require parental consent, and English law probably does not regard its requirement of parental consent as having extra-territorial effect, the situation is different in some other jurisdictions. "In systems like the French, where the rule as to parental consents is clearly personal in its application, there is a prima facie case for considering its relevance in Scotland" (9). The fact that

(7) The date when the Marriage (Scotland) Act 1939 came into force.
(8) 1959 S.C. 43.
(9) A.E.Anton and Ph. Francescakis, "Modern Scots 'Runaway Marriages' ", 1958 Juridical Review, at pp. 270-271.

persons subject to Scots law are capable of entering into a valid marriage without the consent of their parents casts no light on the question whether persons subject to Dutch law, because of their domicile in Holland, are also capable of doing so. There is no way of determining, on some absolute ground, which elements in a particular concept of capacity are dispensable and which are not. It is not obviously desirable that Scotland should dispatch to all corners of the earth couples clad in the matrimonial clothing appropriate to Scottish, but perhaps not to all, conditions.

Another view as to the proper law for determining the capacity to marry is that it should be the "matrimonial domicil of the parties, the law of the place where the parties intend at the time of their marriage to set up their matrimonial home" (10).

Provided that the requirements as to publicity and the appropriate supervising official have been met, Scots law does not specify any particular verbal or ritual element in the ceremony. When it was possible to contract marriage by declaration de praesenti, formal deficiencies - as, for example, the omission to proclaim the banns, or the unqualified status of the person who purported to officiate - could in effect be disregarded provided the exchange of consent was genuine. But the matter is now more complex. The courts would not be rigidly scrupulous in affirming the need for the law of formalities to be complied with down to the last detail; nevertheless, it is far from being true

(10) Joseph Jackson, op. cit., p. 164. But the parties' statement of intention may not be genuine; or if genuine may be frustrated by external circumstances. The proposed test is certainly harder to apply than that of existing domicile.

that the formalities can be disregarded. A modern textbook suggests that in the case of an ecclesiastical marriage the following formalities are essential to its validity - the presence of the parties, the presence of someone purporting to act as the officiating minister, and the exchange of present consent to marry (11). The statutory formalities in the case of marriage before the Registrar must presumably be complied with.

It cannot be said that the law relating to formalities is fully understood, or capable of being fully understood, by the general public for whose benefit it is designed. Although much of the impatience with legal requirements springs from crude ignorance, some of it is perhaps more soundly based. Moreover, although the inconvenience to the parties ( in such matters as the proclamation of banns ) is justifiable, it is not the case that the present procedures are effective in eliminating fraud. The formalities can easily be manipulated so as to frustrate the interests of persons ( for example, existing spouses ) who have legitimate reasons for objecting to the proposed marriage.

A more effective system of registration appears to be needed. Persons should not be entitled to enlist the support of the Registrar or other supervising official without having first supplied documentary proof of their capacity to marry - at least in respect of the absence of any subsisting marriage. "What is really needed is a National Register of Civil Status, although this idea is "anathema to many". Anything less is an unsatisfactory compromise" (12).

(11) E.M.Clive and J.G.Wilson, op. cit., p. 107.
(12) S.M.Cretney, op. cit., pp. 48-49.

Consent, and acts presumptive of consent, are essentially distinct. Some persons, perhaps supposing themselves to be acting in heroic defiance of the moral tradition, live together in a monogamous relationship without having sought any official recognition of their union. But, assuming the genuineness of their mutual consent to this union, it is not the moral tradition which they have rejected; they have merely rejected the right of the wider society to impose legal regulations upon them in a matter which they, no doubt mistakenly, suppose to be purely private and personal. It is possible both that consent may exist in the absence of any publicly-observed externalisation, and that a publicly-observed externalisation may exist in the absence of consent. ( Consent cannot, however, exist in the absence of some externalisation which is in principle publicly-observable; even if marriage may be dissolved, it certainly may not be contracted, by unilateral act ). The Australian case of Quick v. Quick (13) dramatically illustrates the consequences of legal formalism ( though in this situation the court perhaps reached the only decision open to it.) "... the parties had exchanged the marriage promises but as the man was putting the ring on the woman's finger ( and thus before the priest had joined their hands or pronounced them man and wife ) she pulled it off, hurled it to the ground, and with the words "I will not marry you" ran out. The court held that they were validly married" (14). Clearly it

(13) [1953] V.R. 224.
(14) S.M.Cretney, op. cit., p. 47.

is the mutual consent of the parties, and not the pronouncement of the supervising official, which is crucial; and in this case the parties had expressed mutual consent, albeit the woman very rapidly and unequivocally changed her mind.

It is sometimes suggested that, both for Scotland and for England, a mandatory system of civil marriage should be adopted (15). However much merit there is in the proposal as such, a unified system would do nothing to overcome the aversion felt by many people to any form of external regulation. Moreover, the justification of some public ceremony is likely to be more apparent to those persons who now choose to be married in accordance with the rites of some religious body than to those who now choose to be married before the Registrar. It is quite predictable that some persons who perceive the supra-personal implications of marriage in a religious context would perceive no moral authority in the requirement that they should enlist the services of a secular official. To the numbers who already object to a ceremony of whatever kind, might be added a not inconsiderable number of those who would specifically object to a secular ceremony.

Although the State has a moral right, as well as an indisputable legal power, to supervise and regulate the celebration of marriage, it is by no means obvious that its functions in this respect could claim to be exclusive (16).

Where the absence of the required formalities causes a purported marriage to be void, there is in English law no device,

(15) So, T.B.Smith, 1969 Scots Law Times (News) 189, at 193; and S.M.Cretney, op. cit., p. 49.

(16) "The real offence here would be to force into the registrar's-office-mould those for whom marriage is essentially religious and sacramental in character", A.Herron, 1970 Scots Law Times 1, at 3.

except a subsequent valid ceremony, whereby the deficiency may be corrected. By contrast the Scots law category of marriage by cohabitation with habit and repute can serve to repair the damage without the necessity of a formal ceremony - if a formal ceremony is thought more onerous than the obtaining of a declarator that one is in fact validly married. The substantial issue may be the vindication of a spouse's status in the face of denials, as in Nicol v. Bell (15). This case concerned a "clandestine intrigue which petered out after a couple of years" (16), although the couple lived in the same house for twenty-two years. The Lord Ordinary ( Blades ) commented:-

> "The setting is stranger still to find a man with his mistress, seventeen years after they had mutually agreed to cease having sexual intercourse, attending the wedding of the illegitimate son born as the result of that intercourse, and allowing his mistress to assume his name for the occasion. If ever there was a clear case of a man holding out a woman as his wife, this is such a case" (17).

The man's version of the facts was rejected, and declarator of marriage by cohabitation with habit and repute was granted.

The Kilbrandon Report (18) recommended that non-Christian religious ceremonies should be recognised as conferring the legal status of marriage, and this recommendation appears to be unexceptionable in principle. On the other hand, the task of deciding which religious ceremonies should count would involve some person or body in an unenviable task of discrimination.

If the recommendations of the Kilbrandon Report were to

(15) 1954 S.L.T. 314.
(16) Per Lord Justice-Clerk Thomson, ibid., at 319-320.
(17) ibid., 316.
(18) op. cit., Cmnd. 4011.

be implemented, it is claimed (19) that in several respects Scots marriage law would be superior to English marriage law. Perhaps the most notable of these respects is the existence of marriage by cohabitation with habit and repute. On the other hand, Scots law has presumably lagged behind English law in respect of the grounds for dissolution of marriage by divorce (20).

(19) e.g., by E.M.Clive, 1969 Scots Law Times (News) 181.
(20) This is to assume that the changes inaugurated by the Divorce Reform Act 1969 were progressive - as was presumably the view of those responsible for the Divorce ( Scotland ) Act 1976.

# CHAPTER FOURTEEN. PROBLEMS RELATING TO SEXUAL INTERCOURSE BETWEEN HUSBAND AND WIFE.

It is not, in modern legal theory, thought to be necessary that the mutual consent to marriage should be consummated by an act of sexual intercourse between the parties. But the capacity to consummate the consent in this way is necessary - where one of the parties lacks this capacity, the marriage is voidable.

The concept of nullity, based on incapacity to consummate, is distinct from the concept of the dissolution of a valid marriage. The distinction is sometimes criticised (1), but it seems justifiable that this defect in the marital union should be treated differently from incapacities due to non-age, subsisting marriage, and relatedness within the prohibited degrees (2). There can be little doubt that, where two persons in good faith consent to marry each other, and where one of them proves to be incapable of sexual intercourse, neither of the parties who wishes to be released from them should be bound by the obligations of the married state. But whether it is appropriate that relief should be granted through the machinery of dissolution, with the implication that a valid marriage has come into being only to be dissolved, or through the recognition that, contrary to appearances, no valid marriage has come into being, is a difficult question.

(1) e.g., by S.M.Cretney, op. cit., who points out that for English law nullity has little practical relevance ( p. 69 ), and argues that nullity is an anachronistic relic from the law's ecclesiastical past ( p. 71 ).

(2) "The distinction between marriages void on the other grounds of nullity and marriages voidable on the ground of impotency is valid and important", E.M.Clive and J.G.Wilson, op. cit., p. 53.

Compared with other possible grounds on which a marriage may be avoided at the instance of one of the parties (3), incapacity to consummate appears to strike at the heart of what is presupposed in the exchange of consents. A marriage without the capacity for sexual intercourse is, in a sense, no marriage at all. The relationship into which the parties have entered lacks the element which more than any other is characteristic of the marital relationship. The parties, although perhaps living together in very considerable intimacy, have not shared the most intense of personal experiences. The situation is quite otherwise when the parties have in fact lived together in the full sense, but where the validity of the marriage is destroyed by the existence of some irritant impediment. In such a case ( assuming the good faith of both parties ) the personal dimension of married life is present; only the operation of a legal fiction declares the marriage to be non-existent.

Such grave problems as the woman's pregnancy per alium, or the mental defect of either party, or the presence of communicable venereal disease, are also distinguishable from non-consummation due to impotence. In these other cases, although the marital relationship is seriously menaced, the normal implications of married life are present.

Voidability is both a difficult concept and also, in some respects, an inconvenient one. A conditionally valid relationship which may be declared void at the initiative of either of the parties is an inelegant hybrid. But legal categories cannot be expected either to rival the infinite variety of human situations, or to achieve the symmetry appropriate to some system of formal logic.

(3) No ground of voidability is recognised in Scots law other than impotence. But other systems recognise such grounds as mental defects ( insufficient to negative consent ); communicable venereal disease; and pregnancy per alium.

From one point of view, it might be argued that, since marriage is made by consent and not by sexual intercourse, questions concerning the sexual relations of the parties are logically posterior to questions concerning the creation of the married status, and that once consent has been duly formalised the only remedies available are those which presuppose the validity of the marriage. If this reasoning is accepted, the impotence of either spouse would constitute a cause for dissolution ( and this would presumably cover the case of supervening impotence ). Or alternatively impotence would ( though not in the case of supervening impotence ) constitute an irritant impediment. This latter consequence would, in effect, make any marriage vulnerable to the claim by any third party, having title to sue, that an apparent marriage ( though acceptable to the principals ) was not in law a marriage, because of the impotence of the man or the woman. Few people would be happy to see marriages attacked in this way, especially so since the motive for wishing to invalidate someone else's marriage would not always be altruistic.

If impotence is to have any relevance to the question of the validity of a marriage, it must either be an irritant impediment, or something less. If it is something less, it must either be a ground for dissolution, or it must cause the marriage to be voidable at the instance of the potent, or of either, party.

The concept of the voidable marriage is in any event not more artificial than that of the void marriage, in cases where the parties have lived together as man and wife, ignorant of the fact that they lacked the legal capacity to marry each other. It is not only from some obscure religious perspective that the distinction between a non-marriage and a dissolved marriage

is both tenable and important. The distinction is to some extent a matter of common sense. Where, for political or other motives, two persons make use of the formalities of marriage to achieve some end, such as the right to leave a country or not to be expelled from it, to which the appearance of married status is a necessary means, the personal dimension of marriage may be, and may clearly be, non-existent. Conversely, where a man goes through a ceremony of marriage with a woman who is, unknown to either of them, his half-sister, no capacity to contract the marriage exists, although in personal terms the two have lived together as husband and wife. No declarator of nullity can eradicate the significance of this living together.

The situation where one of the spouses proves to be impotent is distinguishable from both of the above situations. Although the parties consented to live together as husband and wife, and although they may outwardly have appeared to do so, this appearance has been deceptive in one very material respect. The state of affairs is, arguably, more nearly analogous to the pretended marriage than to the prohibited marriage. Although neither logic nor sentiment is by itself adequate to dispose of the legal point, it is true that the emotional implications of having lived with someone who was unable to sustain an act of sexual intercourse are more like those of having almost married someone than those of having ceased to be married to someone.

The rule in Scots law, that impotence constitutes a ground on which a marriage, otherwise legally valid, can be avoided by one of the parties, seems entirely defensible. Once the initial premise, that such a relationship is valid subject to a resolutive condition, is granted, it follows that the effect

of a declarator of nullity must ( with appropriate modifications, e.g., income tax ) be retroactive.

It is possible, in spite of the permanent and incurable impotence of one of the spouses, for a child to be born to a voidable marriage by fecundatio ab extra. The English case of Clarke v. Clarke (4) illustrates the regrettable consequences of the retroactive decree of nullity. The woman, who was unable, because of frigidity, to engage in full sexual intercourse, bore a child as a result of fecundatio ab extra; seventeen years later, the man was granted a decree of nullity on the grounds of the woman's incapacity to consummate the marriage. At the time, the effect of the decree was to bastardise the child. For both Scotland and England, this particular consequence would now be covered by the Law Reform ( Miscellaneous Provisions ) Act 1949, s. 4, which provides that any child born to a voidable marriage shall be deemed legitimate.

In Scots law, wilful refusal to consummate does not constitute a ground for a decree of nullity, though it may be construed as cruelty for purposes of dissolution. Clearly there is a difference between not being able to do something and being too churlish or idle to do it; but the distinction does not seem particularly relevant in this case. The sharing of life to which the marital consents were directed has not in fact come about in the case of wilful refusal, any more than in the case of impotence. A declarator of nullity would perhaps be justifiable in this case also. All other defects which fall short of being irritant impediments should, it is submitted, be cured by means of dissolution. The test should be ( assuming the capacity to marry in terms of age,

(4) [1943] 2 All E.R. 540.

no subsisting marriage, no relationship within the prohibited degrees, etc. ) whether marital intercourse has taken place; and, if it has not, whether this was because of impotence or wilful refusal. The former cause of non-consummation is equivalent to an inability to implement the marriage promises; the latter cause to a culpable refusal to do so. Both are distinct from cases where a marriage is not consummated because of absence of opportunity, without either party having any initial inability or unwillingness to engage in sexual intercourse.

Impotence is legally relevant to questions of the formation of marriage ( or, failing that, to its dissolution ), not because impotent persons should be absolutely prevented from marrying, but because someone who has gone through a marriage ceremony with an impotent person should not be held to be obliged against his or her will to fulfil the continuing duties of a spouse. In this branch of the law, even more than in others, there should be no question of attributing blame or praise, of discriminating between guilty and innocent parties. It is therefore perfectly equitable that a petition for nullity may be received from the party who suffers from the incapacity in question, as well as from the party who does not.

Conversely, it is intelligible on psychological grounds that some persons should be willing to share their lives with their chosen partner, even though there is no possibility of "full" sexual intercourse. Modern medical techniques may enable such persons to procreate children ( cf. A.B. v. C.B. (5) ); or they may adopt a child or children. In such an event, who is to say that

(5) 1961 S.C. 347.

the marriage is less normal than that of, e.g., childless couples? If it can be established that the relationship has been definitively accepted as a marital one, in spite of its inevitable deficiencies, the right to avoid the marriage should be deemed to have been waived. Such acts as the procreation of a child by artificial insemination, or the adoption of a child, would be highly relevant to the question of homologation. But an unsuccessful attempt to perform sexual intercourse ( even an attempt resulting in fecundatio ab extra ) would not in itself be conclusive, or even persuasive, evidence of homologation.

A declarator of nullity is immediately effective; there is no question of a minimum period of time before the parties may proceed in accordance with the legal state of affairs as judicially declared. This is therefore one practical reason for resisting the abandonment of the category of the voidable marriage. But there are other, more substantial grounds for resisting this abandonment. Even those who do not regard dissolution of valid marriages as invariably sinful may well recognise a difference between a marriage which has taken place, but which arguably should be set aside, and a marriage which, contrary to the evidence of a legally appropriate ceremony, has not in personal terms taken place at all. The suggestion (6) that marriages entered into under the influence of force and fear should also be voidable, at the instance of the party coerced, is attractive. But it seems to be more consistent with principle that such marriages should be regarded as void because of the absence of consent, subject of

(6) E.M.Clive, "Void and Voidable Marriages in Scots law", 1968 Judicial Review, 209.

course to the possibility in Scotland that consent may develop even from so inauspicious a beginning (7). Where the "marriage" has been consummated, however reluctantly on the part of the coerced spouse, the situation is nearer to that of an elaborate rape than that of the unconsummated marriage. In the first case, there is intercourse without consent; in the second, there is consent without intercourse.

Where there is both consent and intercourse, but where the consent was induced by some grave misrepresentation ( e.g., to the effect that the woman was pregnant, when she was not; or that she was pregnant by the man, when she was pregnant by someone else ) or by the withholding of material information ( e.g., that the woman - or presumably also the man - was already, or would soon become, a parent independently of the other ) the most equitable solution might be to treat the marriage as valid, but as subject to dissolution without the usual delay.

The recorded cases do not seem to yield a completely consistent definition of sexual intercourse, correlative to the question of impotence. In Russell v. Russell (8), Lord Dunedin expressed the view that if a woman conceived a child by fecundatio ab extra, the husband not being the father, this would be adultery. But, although penetration sufficient to establish rape is distinguishable from an act sufficient to refute the allegation of impotence, it does not seem that the latter is distinguishable from an act sufficient to found an allegation of adultery. If to fecundate a woman ab extra is not to fulfil

(7) If so, a marriage might come into being through cohabitation with habit and repute.
(8) [1924] A.C. 687.

the role of a husband in sexual intercourse, how can it be to usurp the role of a husband in sexual intercourse? Is the "impotent" woman any more capable of being an adulteress than the "impotent" man of being an adulterer? It is not of course disputed that an unsuccessful attempt to engage in sexual intercourse with a person other than one's spouse would be a gross matrimonial wrong.

Sexual intercourse between man and woman involves erectio and intromissio (9); it will usually involve ejaculatio within the vaginal passage; sometimes it leads to impregnatio. Impregnatio is clearly not necessary to a finding of potency; as has been seen, it is not even sufficient for such a finding. In J. v. J. (10), it was held that a man who had had an operation, the effect of which was to prevent the spermatozoa from leaving his body, could not consummate the marriage; the point was raised, but not decided, whether this constituted impotence or wilful refusal. In so far as the ratio decidendi was that marital intercourse only occurs when spermatozoa are deposited in the vaginal passage, the case is inconsistent with such later cases as Baxter v. Baxter (11) and Bravery v. Bravery (12).

As Viscount Jowitt pointed out in Baxter v. Baxter (13), which involved the use of a contraceptive sheath at the wife's insistence, it would be intolerable for the courts to require evidence that semen had been discharged within the vaginal passage. Even if such a principle were applied, the "rupture of a

(9) Presumably something less minimal than would support a conviction for rape.
(10) [1947] P. 158.
(11) [1948] A.C. 274.
(12) [1954] 3 All E.R. 59.
(13) [1948] A.C. 274 at 289.

sheath in the course of the sexual act on a single occasion would involve that the marriage had been consummated, though unwittingly and unintentionally " (13). Seminal fluid may, or may not, contain spermatozoa; it will not if the man is sterile, whether as a result of accident, disease, surgery or genetic defect. A man may also, without being sterile, be relatively infertile, and his fertility may in any event fluctuate from time to time. There is no way, short of a judicially supervised medical experiment, of determining whether or not spermatozoa, or even seminal fluid, have in fact been deposited within the woman's vaginal passage as the result of a sexual act involving intromissio. Bravery v. Bravery (12) established that sterility is not inconsistent with potency, and also that an operation which causes one spouse to become sterile, without the other's consent, is not as such a cruel act, in the absence of proof that the other's health was adversely affected.

There is no satisfactory way of defining sexual intercourse, if one wishes to go beyond intromissio and ejaculatio in corpore mulieris, which can stop short of impregnatio; and impregnatio is by common consent not the appropriate test.

Since impotence, to found a decree of nullity, must exist at the time of the consent to marriage, and be incurable, it follows that if both spouses were potent at the time of the marriage, and one became impotent later ( without marital intercourse having occurred ), no declarator of nullity will be granted. A fortiori this is so when impotence occurs after consummation. In the first case, the marriage is valid, and cannot be impeached on the ground of non-consummation where there is no question of wilful refusal. This is an odd result, since the parties, without having consented to an arrangement which excludes sexual intercourse ( e.g, for

reasons of health or religious scrupulosity ), have not in fact lived together as husband and wife. But it is consistent with the general rationale of the voidable marriage, since in such a case neither party was incapable of marriage at the time of the consent, and neither party has repudiated the obligations of marriage.

A petitioner founding on the impotence of a spouse must establish either impotence at the time of the consent, or wilful refusal to consummate, or cruelty. In Scott v. Scott (14) it was held that failure to consummate was not cruelty where it had not been proved to be the result of a deliberate act. So also in H. v. H. (15) it was held that the frigidity of a wife, after the birth of her third child, did not constitute cruelty.

In MacLennan v. MacLennan (16), Lord Wheatley had to consider a claim by a wife, who had given birth to a child of whom the husband was admittedly not the father, that she had not committed adultery, because the child had been conceived as a result of artificial insemination. He held that artificial insemination, while no doubt constituting a grievous marital offence against a non-consenting husband (17), was nevertheless not adultery. The logical difficulties of holding otherwise would appear to be insuperable. Either a woman must be capable of committing adultery on herself, "aided and abetted only by a syringe containing semen" (18), or a male donor must be capable of committing adultery "subject to defeasance" (19) - perhaps adultery post mortem.

In the event his discussion was not necessary to the decision, since no evidence of the alleged artificial insemination

(14) 1960 S.C. 36.
(15) 1968 S.L.T. (Reports) 40.
(16) 1958 S.C. 105.
(17) ibid., at 114.
(18) ibid., at 108.
(19) ibid., at 114.

was provided by the wife; the husband succeeded in his action for divorce. The case illustrates the distinction between the procreative and erotic aspects of sexual intercourse. Coitus may be intended to achieve only erotic satisfaction, without procreation, although procreation may occur when it is not intended. Less typically, procreation may be sought without coitus, or may occur in the course of an unsuccessful attempt at coitus. According to the insights of traditional morality, both erotic satisfaction and procreation are exclusively to be sought within the marital relationship, which is violated if a spouse engages in erotic ( or non-erotic procreative ) activities with a third party.

But in the absence of penetration of the female by the male organ, adultery has not as such been committed. This is without prejudice to the possibility that non-adulterous breaches of marital fidelity may have important legal consequences, over and above their susceptibility to moral censure. It is submitted that, once penetration has been established, it is not necessary to require evidence of ejaculatio; and, further, that precisely the same evidence as would establish adultery suffices to refute the allegation of impotence against a spouse. The only difference in the two cases is that adultery concerns a question of historical fact, and potency concerns a question of capacity. So precisely the same preliminaries, if terminated by some external cause, might be held to have yielded sufficient evidence of potency ( even though sexual intercourse did not occur on that or any other occasion ), but not, in the case of an alleged adulterer, amounting to adultery.

Although there are significant variations, particularly with regard to formality and dissolution, between the legal regulations of different legal systems which uphold monogamous marriage, it is usually presupposed in the courts that monogamous marriage is substantially the same in spite of the variations in detail.

The presupposition of the substantial identity of different forms of monogamous marriage was strikingly present in the English Court of Appeal case Nachimson v. Nachimson (1), reversing the decision of Hill J. in the lower court. Lord Hanworth M.R. stated that a "marriage will be recognised as valid here, if it is contracted in a non-Christian country in accordance with the law of that country, provided that the parties are during its subsistence precluded by law from marrying any one else ..." (2). Hill J. had held that "marriage", for purposes of English law, entailed indissolubility by act of the parties ( other than an act resulting in death ); and that a marriage dissoluble by the unilateral decision of either party was not a marriage in this sense.

The Court of Appeal stressed that the obligations of the parties were regulated not by themselves, but by the public law of Russia; the parties were given specific rights of repudiation, but these had to be exercised in the prescribed manner, and until such time as this had occurred they were mutually bound to each other as man and wife. Lawrence L.J. noted that the obligations,

(1) [1930] P. 217.
(2) ibid., at 226.

unless terminated, were in principle life-long; it would have been otherwise had the arrangement been for a definite limited term, or if the transaction had been a mere sham, establishing no legal obligations.

A marriage ( albeit technically monogamous so long as it is not repudiated by either party ) which is revocable at will is a far cry from the ecclesiastical indissoluble marriage. The benevolent attitude of the English court to this species of monogamous marriage, diluted by the effect of Communist ideology ( as it then regarded marriage ), contrasts with the intransigence often shown towards polygamous marriages. Although, as Romer L.J. said (3), "It is obvious that a marriage in Russia is a thing of a much more precarious nature than is a marriage contracted in England", the fact that it was slightly or considerably more precarious did not prevent it from being regarded as legally valid. It was not as if dissolution of marriage by divorce was impermissible by English law, and "the difference between a Christian and a non-Christian marriage cannot turn upon the distinction between a judge and a registrar" (4). ( It should be noted that the word "Christian" in such contexts should not be taken as having any necessary connection with explicitly Christian beliefs; it merely means "Western", in a very general cultural sense, or "monogamous". )

It is clearly desirable that wherever possible legal status and obligations should survive the crossing of political frontiers. "What can be more embarrassing than that a person's status should

(3) ibid., at 241.
(4) ibid., at 245.

be involved in uncertainty and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there?" (5). But although even a little monogamy goes a long way, for purposes of judicial recognition, the problems of polygamous unions have been treated in a different spirit.

It seems unexceptionable that a legal system upholding monogamous marriage should not, irrespective of the personal law of the parties, permit the operation of its own regulations to create a second valid marriage, during the subsistence of the first. Moreover, there are genuine difficulties in giving legal recognition to second or subsequent marriages, even when they have been validly celebrated according to the law of the place of celebration. The remedies appropriate to monogamous marriage are often inappropriate to a polygamous marriage. But this does not justify the treatment of all marriages celebrated according to the law of a system permitting polygamy as if they were non-existent, or at least had no extra-territorial implications. This is particularly so in the case of the first marriage, which not infrequently is the only marriage.

In Warrender v. Warrender (6), which was concerned with the differences between the matrimonial laws of Scotland and England, Lord Brougham made some obiter observations on "non-Christian" marriages, which were destined to affect subsequent developments. He said that English judges "clearly never should recognise the

(5) Per Lord Brougham in Warrender v. Warrender (1835) 2 Cl. and Fin. 488.
(6) (1835) 2 Cl. and Fin. 488.

plurality of wives and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere" (7). If for "infidel" one were to substitute the word "non-monogamous", and for "Christian" the word "monogamous", the statement does not appear excessively illiberal; it does not, for example, appear to do more than query the validity of the second or subsequent marriage within a monogamous jurisdiction.

But in later cases a more severe interpretation was placed upon Lord Brougham's words. In Hyde v. Hyde and Woodmansee (8), which concerned a marriage celebrated according to Mormon law, the court refused to make a distinction between the first or only marriage of a person subject to a non-monogamous system of marriage, and his subsequent unions. The effect of such a refusal is, in some cases, to deprive a person ( even a person who is convinced of the moral authoritativeness of monogamy ) of any remedy in the English courts because he has gone through the only form of marriage open to him at the material time (9).

In Re Bethell (10), a domiciled Englishman married the niece of the chief of the Baralong tribe in Bechuanaland; he chose not to be married in a Christian church, and the customs of the Baralong permitted polygamy - although he only took one

(7) ibid., at 532.
(8) (1886) L.R. 1 P. and D. 130.
(9) cf. James Blaikie, "Polygamy - A New Approach", 1970 Judicial Review 135.
(10) (1888) 38 Ch. D. 220.

wife. Ten days after he was killed in a frontier skirmish, the woman gave birth to a daughter. It was held that the woman was not his wife, in the monogamous sense, so the infant was not entitled to inherit under a will in favour of the man, and of his child or children. In Hyde v. Hyde (8) the question of rights of succession had been expressly reserved, so that Stirling J.'s decision went further in penalizing the person rash enough to contract a potentially polygamous union (10). "The judges clearly saw themselves as the upholders of Christian morality; marriage as they saw it was an institution of the Christian faith and no breach in the theory of that institution was to be tolerated" (11). The broadest ratio decidendi of Re Bethell (10) is that English law will recognise no polygamous marriage for any purpose; alternatively, it is that a domiciled Englishman has no capacity by his personal law to contract a polygamous marriage.

It may be that the modern trend, apart from express statutory intervention (12), will be increasingly to limit the effects of the Hyde and Bethell decisions to cases where matrimonial relief is being sought. In Risk v. Risk (13), an Englishwoman domiciled in England married an Egyptian in Egypt under Muslim law. The marriage was de facto monogamous. Barnard J. refused a decree of nullity, claimed on the ground that the woman had no capacity to contract a potentially polygamous marriage. In

(11) James Blaikie, op. cit., at 146.
(12) e.g., the Matrimonial Proceedings ( Polygamous Marriages ) Act 1972; the Matrimonial Causes Act 1973, s. 47.
(13) [1950] P. 50. It is difficult to see why, logically, a decree of nullity should be understood to be a species of matrimonial relief, since the essence of the plea is that the status of marriage does not exist.

any event the Matrimonial Proceedings ( Polygamous Marriages ) Act 1972 has empowered the appropriate courts to grant some matrimonial relief even in cases of actually polygamous marriages. Where there is no question of betraying the position of a spouse who reasonably supposed her marriage to be monogamous, it seems justifiable to provide remedies for persons lawfully married within a polygamous jurisdiction, who are later lawfully present within a monogamous jurisdiction.

This is not to concede that for all purposes, including for example tax concessions, existing polygamous establishments should expect to take root without pruning in monogamous soil. It should be noted that the problem does not exist in the same form when monogamous marriages are transplanted to jurisdictions which permit polygamy. Even if polygamy were required, rather than merely permitted, it would be easier to understand the situation of the one spouse without legal rival than in the converse case, because polygamy presupposes the factual possibility of monogamy, whereas monogamy does not presuppose the factual possibility of polygamy. It can be assumed, moreover, that there are no jurisdictions which require even their own nationals ( of a particular sex and age ) to take a plurality of spouses, so that de facto monogamy is a familiar and entirely respectable phenomenon even in polygamous jurisdictions.

Most cases in the United Kingdom involving persons married within polygamous jurisdictions are not occasions when monogamous marriage as an institution requires to be defended. It is more often a question of trying to provide some legal protection to persons who are the victims of some combination of misfortunes. In Imam Din v. National Assistance Board (14), where the second

(14) [1967] 2 Q.B. 213.

wife of an immigrant from Pakistan ( the first wife having died after the celebration of the second marriage ) was deserted by him, it was held that "wife" within the meaning of the National Assistance Act 1948 included a polygamous wife. The order of the National Assistance Board, that the deserting husband should pay maintenance to the wife, was therefore upheld. Any other result would have seemed like a legalistic connivance at immorality, though the analysis would have been less clear had the first wife been competing for the man's financial favours.

It is hardly satisfactory if a person were able to resist a charge of bigamy by arguing that the previous subsisting marriage was polygamous ( even if only potentially so ) and thus was of no legal consequence within a monogamous jurisdiction. This is however what appears to have happened in R. v. Sarwan Singh (15), though this case has now been over-ruled by R. v. Sagoo (16). In the latter case it was held that a change of domicile or of law could convert a potentially polygamous marriage into a monogamous one. Presumably it would still be the case that an actually polygamous marriage, or a potentially polygamous marriage not converted into a monogamous marriage by change of domicile or of law, would be insufficient to found a charge of bigamy in respect of a subsequent marriage ceremony in the United Kingdom.

It has been suggested (17) that where a person attempts to marry while lacking capacity to do so because of a previous

(15) [1962] 3 All E.R. 612.
(16) [1975] 1 W.L.R. 267.
(17) By R.D.Leslie, "Polygamous Marriages and Bigamy", 1972 Judicial Review 113.

marriage, it should be immaterial whether the previous marriage is polygamous or monogamous; and that the appropriate principle in such cases is that wherever a second marriage is void because of a subsisting marriage, the actus reus of bigamy is committed, even if the first marriage ( or the second marriage ) is polygamous.

The blanket refusal of legal recognition to non-monogamous marriages is strongly criticised by A.E.Anton (18). He argues that in all cases the first marriage should be regarded as valid; to do otherwise is in fact to discourage monogamy, rather than to favour it (19).

Although an actually polygamous marriage is not potentially monogamous, all actually monogamous marriages are potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses (20).

For certain purposes, polygamous marriages had come to be recognised in England even before the Matrimonial Proceedings ( Polygamous Marriages ) Act 1972. So, in Srini Vasan v. Srini Vasan (21) a valid polygamous marriage was held to be a bar to a subsequent marriage in the United Kingdom - a decision inevitable on grounds of public policy, but inconsistent with the view that polygamous unions receive no recognition in English law. In the Sinha Peerage case (22), the House of Lords, on the

(18) "The 'Christian Marriage' Heresy", 1956 S.L.T. (News) 201.
(19) "... it would be better to adopt from the start a rule which makes it clear that a party to a potentially polygamous marriage is married according to our law, that is to say to adopt a rule which favours monogamy rather than polygamy" ( op. cit., at 203 ).
(20) cf. the remarks of Simon P. in Cheni v. Cheni [1965] P. 85.
(21) [1946] P. 67.
(22) (1939) 171 Lords' Journal 350.

advice of the Committee for Privileges, held that the eldest son of an actually monogamous marriage, which at the time of celebration was potentially polygamous, was entitled to succeed to a hereditary honour. Presumably Scots law would achieve the same result. But it was held in 1956 (23) that the Court of Session had no power to dissolve a marriage which is actually or potentially polygamous. It would be both possible and desirable for the courts to adopt a more flexible approach in the case of potentially polygamous marriages.

Many problems, some of them scarcely soluble in a satisfactory way, arise when the parties have different domiciles before the marriage, when the marriage is celebrated in some place other that of the domicile, and when the parties intend to establish a common life in perhaps a succession of different places. In so far as it is a question of the nature of the marriage ( whether monogamous, or polygamous etc. ), the most workable solution is to look to the law of the place of celebration. Once the personal law of the parties, or of the place where it is proposed the marital partnership should be located, is introduced, complication is likely to be compounded.

Probably no marriage celebrated in a monogamous jurisdiction will be polygamous. It is less clear whether persons who retain a domicile in a monogamous jurisdiction are capable of contracting a polygamous marriage. The English case of Radwan v. Radwan (No.2) (24) replaced the law of the existing domicile by the law of the intended matrimonial home. But this test, if

(23) Muhammad v. Suna, 1956 S.C. 366. The decision is strongly criticised by A.E.Anton, op. cit.
(24) [1973] Fam. 35.

widely applied, would be likely to prove even less satisfactory than that of the pre-matrimonial domicile. The Matrimonial Causes Act 1973, s. 11 (d) laid down that a person domiciled in England cannot validly enter into a polygamous marriage abroad, and this is certainly consistent with the general legal tradition.

The assumption, or fiction, that monogamous marriage is substantially the same everywhere has the consequence that a spouse, validly married according to the law of the place of the celebration, cannot be heard to plead that the marriage is invalid because it is so regarded by the customs of the place where the matrimonial home is eventually established: MacDougall v. Chitnavis (25). "Consent to marry must be absolute and not conditional, and the validity of the contract cannot be measured by such a fortuitous circumstance as the determination to live in any particular country" (26). There was some doubt in that case whether the alleged religious disability of the husband to marry a non-Hindu was such that the Indian courts would have declared the marriage void. Even if they would certainly have done so, it is far from clear that this would have affected the validity of the marriage in Scots law. Although the courts of one country will normally recognise the decisions of the courts of another, there is a residual discretion to disregard them when they offend against canons of substantial justice.

In a case where a husband had actually obtained a decree from a Maltese court annulling his marriage celebrated in England, the English Court of Appeal commented that "it ill accords with present-day notions of tolerance and justice that a wife,

(25) 1937 S.C. 390.
(26) Ibid., per Lord Jamieson at 396.

validly married according to our law, should be told by a foreign court that she is a mere concubine and her children bastards, simply on the ground that her husband did not marry her in the church of a particular denomination" (25). The Maltese decree was accordingly disregarded by the English court. Cases such as these both illustrate the complexities of the factual situations with which the law of marriage is concerned, and also serve to explain and justify legal regulation and supervision of marriages (26).

(25) Gray v. Formosa [1963] P. 259, per Donovan L.J. at 270.
(26) Although, of the two unfortunate women in question, Mrs. Chitnavis received cold comfort, and Mrs. Formosa may well in the end have received little more substantial than the expression of chivalrous sentiments from the Bench.

## CHAPTER SIXTEEN. THE FINANCIAL IMPLICATIONS OF MARRIAGE.

The status of marriage creates important obligations in the financial sphere, although these are less dramatic than in the days of the ius mariti, just as they are less obviously unilateral. It is easy to criticise the anachronistic character of the present complex rules relating to aliment and matrimonial property, but less easy to suggest a viable alternative system.

Spouses are under a legal obligation to support ( "aliment" ) each other. The husband is bound to support his wife unless she is unwilling to adhere to him ( without just cause for refusing to do so ); the wife must, in the event of her husband being unable to maintain himself, and of her having a separate estate, or a separate income more than reasonably sufficient for her own maintenance, support him just as he is bound to support her in more ordinary circumstances (1). The notion of praepositura now appears to be little more than a quaint historical reminiscence. Where the obligation to support is not fulfilled, its enforcement presents almost insuperable problems (2).

The period of law when, in effect, men were presumed to be capable, and women to be incapable, of understanding the "bustle and business of the world" (3), however much this presumption was contradicted by the facts (4), must at least

(1) Married Women's Property (Scotland) Act 1920, s. 4. The wife's obligations are notably more restricted than those of the husband.
(2) cf. E.M.Clive and J.G.Wilson, op. cit., p. 209.
(3) Baron Hume, Commentaries on the Law of Scotland respecting Crimes, 4th. edn., by B.R.Bell, 2 vols.,(Edinburgh, 1844), p. 130.
(4) Duncan v. Drum (1705) Mor. 5966 is a striking example.

have had the advantage of relative certainty in some matters. Apart from questions of minority, married status does not now affect the contractual capacity of either spouse. Except in the rare case of responsibility for a wife's ante-nuptial debts, and except for express or implied mandates to contract on behalf of the other spouse, spouses contract for themselves as separate individuals, and are not liable in respect of the contracts made by their married partner.

Property owned by the spouses, unless expressed to be owned in common, is owned separately; the theory, in Scotland, is that marriage has no automatic effect upon the existing property of the spouses (5).

Those who complain about the patriarchal aspects of modern marriage laws, even in societies which pay some attention to the theory of equality between males and females, are not always aware of the complexity of the issues involved (6). It is true that the European cultural tradition has presupposed an economic superordination of the male which could be justified, if at all, by reference to contingent economic circumstances, and not by reference to some inherent superiority of male persons. But where there is some basic differentiation of economic roles - whether or not this corresponds to sexual differences or to some more subtle principle of discrimination - there is always a risk that one spouse will receive a disproportionate share of the advantages, and the other a disproportionate share of the disadvantages, of

(5) But donations between spouses are treated differently from other donations ( Married Women's Property (Scotland) Act 1920, s. 5; savings out of a housekeeping allowance belong to husband and wife in equal shares ( Married Women's Property Act 1964, s. 1 ); and insurance policies as well as marriage settlements sometimes receive special treatment.

(6) Even the most moderate of opponents of sexism are often very naive about the legal implications of their proposals:- cf. Una Kroll, Flesh of my flesh, (1975).

the arrangement.

It need not be taken as established that the traditional arrangements are, in modern circumstances, invariably weighted in favour of the male. Neither objectively nor subjectively is childbearing and domestic supervision always a more arduous or disagreeable round of activities than is undertaken by traditionalist males in the course of their employment. Moreover, the traditional arrangements are now less uniformly adhered to. Even if relatively few men have adopted the traditional feminine role of principal domestic supervisor, many married women temporarily - and some permanently - have adopted the traditional masculine role of a career outwith the home. The injustice most susceptible to legislative improvement is that which derives from the automatic ascription of superordinate status to males as such. But to remove this general injustice is by no means to have achieved general justice in all or in most married relationships.

It is not possible, except in a very mechanical and external manner, to "equalise" different roles. Even the same role performed by different persons can rarely - if ever - be said to be performed with equal skill, dedication, productivity etc. Although it would be theoretically possible to eliminate all inequalities of reward ( in so far as these are measurable in monetary terms ), no one could suppose that it is theoretically possible to eliminate all inequalities of skill, dedication and productivity. If a man chooses to devote his days to the adornment of his person ( in the absence of any duties to neglect ), while his wife serves the community as a surgeon or agricultural engineer, it is obviously unequal for him to receive a less ample reward than she receives. It is not, perhaps, obviously unjust.

Since one of any two persons is almost certain to excel

the other in some material respect, whether it be "natural intelligence", or physical robustness, or dedication to the common good, or moral worthiness according to some measurable criterion, it is almost certain to be the case that equality of treatment - assuming that the concept is meaningful - would appear to one if not both of them to be unjust.

The old rule of law that husband and wife were one (7) produced intolerable financial consequences. These would be no more tolerable if it were the wife, rather than the husband, who substantially was the one in question. If all property owned by either party automatically passed into a fund of common property, the justice of the arrangement would in some cases be very open to question (8). A system of full community of property is either open to abuse, if one of the spouses is given the greater measure of control, or ( where the spouses are given equal powers, with adequate protection against abuse ) is likely to prove excessively elaborate and unworkable (9).

(7) "... and the husband is that one", per Denning M.R. in Gray v. Formosa [1963] P. 259.

(8) To take two extreme but not entirely unrealistic examples:-
i) a husband who is fortunate enough to have married a wealthy, hard-working woman with excellent career prospects, and who himself chooses not to work;
ii) a wife whose husband is not only the sole wage-earner, but also the principal domestic manager.
Assuming that there is no question of incapacity owing to ill health, it does not seem obviously just that the "unproductive" spouse should, by operation of law, acquire a half share in whatever is contributed by the efforts of the other. It makes no difference whether the unproductive spouse is the man or the woman; certainly each sex contributes its share of parasites and layabouts.

(9) Report of the Royal Commission on Marriage and Divorce (1956), Cmnd. 9678, p. 177.

A theoretically more attractive alternative would be to inaugurate a system of partial community of property, to which property acceding after the marriage is allocated, with property belonging to the parties before marriage continuing to be their separate property. Since 1965 such a system has been operative in France. But it is even more subject to complexity than the full community system (10). Another possibility is that the spouses should control their own property during the subsistence of the marriage, but that post-marital accessions - or, as in Scandinavia, the entire property - should be equally shared in the event of a dissolution of the marriage. None of these possibilities is immune from the risk that substantial injustice, whether or not engineered by an unscrupulous spouse, would be done in some cases.

The principal asset of most married couples is the matrimonial home. At present in Scots and English law there is no requirement that the legal rights in respect of the matrimonial home should be distributed equally between the spouses. Some spouses own, or rent, their matrimonial home jointly, but most do not. Spouses who are the sole owners or sole tenants of the matrimonial home are economically more secure, in the event of a matrimonial break-up, than spouses who are not owners or tenants at all. In most cases, to require that the legal rights in respect of the matrimonial home should be distributed equally between the spouses would be to provide a justifiable protection for spouses who are at present especially vulnerable. But, against this obvious advantage, the operation of a universal rule to this

(10) E.M.Clive and J.G.Wilson, op. cit., p. 321. Spouses in France may provide for possibilities other than the standard system, if they expressly contract to do so.

effect would have the disadvantage that, in not a few cases, unscrupulous persons would be given an incentive first to marry, and then to cause the marriage to be dissolved, for the half share of property owned by their spouse.

In most cases, the economic inequalities, actual or potential, between spouses are not such as to jeopardise the general sense of partnership within the particular roles which each undertakes. A woman ( or for that matter a man ) who stays at home to look after the children during the years of their greatest dependency, is unlikely to contribute as much in terms of earned income as the man ( or woman ) who is released from this responsibility in order to be in full-time employment. The person who tends the home fires is not, however, normally thought of as making a negligible contribution to the marital partnership. But there is no way, short of absurdity, whereby this contribution can be related to some scale of measurable value in monetary terms.

If either of the spouses is not in full-time employment, the notion that each spouse should make an equal monetary contribution is inapplicable. This is so, even where both spouses, within their respective roles, are making the best possible contribution to the marital partnership in its particular circumstances. Where, in such cases, the matrimonial home is bought in the name of one of the spouses, and mortgage repayments are made out of his or her earnings, it is clearly unjust that, in the event of the dissolution of the marriage, the matrimonial home should be at his or her disposal, merely because the contribution of the other spouse was made within the context of the marital partnership ( and not in the wider economic sphere). Normally it is the husband who is

released for full-time employment, and who thus becomes the sole owner, or tenant, of the matrimonial property; but the same considerations apply in the converse case.

The problem only arises because within marriage, in its typical forms within an advanced society, there is a fundamental tension between the needs of the children of the marriage, and the expectations of the wider society upon which the economic survival of the family depends. A parent is rarely able to take his or her children to the place of employment, or to carry out work within the home context for which adequate monetary rewards will be forthcoming. The usual consequence is that the children are in one place, and the place of employment is somewhere else. The traditional, and the obvious, solution is that one spouse should remain with the children, and the other should be released to travel to the place of employment.

Traditionally, the man has been the one who has travelled to the place of employment, and thus has been the wage-earner, while the woman has remained at home. Upon that tradition, a whole system of legal rules has been established, some of them just and sensible within their original social context, some of them arguably not so. But where one person, and one person only, is the wage-earner, it is inevitable that he ( or she ) will tend to exercise greater economic power. Where the assumption has been that the man is the wage-earner, the legal protection devised for his wife and children presupposes, and thus reinforces, his economic superordination.

Once the tradition is at all frequently departed from, the system of rules becomes self-evidently inadequate. Rules which are based on the assumption that all wage-earners are men

and all "home-makers" women produce obviously inept results when they are applied to situations where women wage-earners are married to men whose responsibilities are largely confined to the house.

Unless the legal rules are radically altered, the transitional period of development is sure to produce many anomalies, not all of which are to the disadvantage of the "under-privileged" group. Sometimes responsibilities survive from a period of privilege, even after the privilege which justified the allocation of the responsibility has ceased to exist.

The fundamental problem is not caused by the perhaps corrigible deficiencies or men ( or of capitalism, or whatever ). It is caused by the fact that, if human children are to be procreated and nurtured, this must involve some mature persons in a prolonged and demanding period of responsibility for the children's well-being. No one would suggest that men could take over the female role in pregnancy, although some laboratory process might do so. However, until laboratory gestation is technically viable, the only way in which children can be procreated involves female pregnancy. This undoubtedly is a nuisance for females, but the only way in which the nuisance could be avoided would be by abandoning procreation. Consequently, females who become pregnant are placed at an economic disadvantage compared with male persons who cannot, and female persons who do not, become pregnant.

It is also true that, although babies need not be breast-fed, if they are breast-fed this can only be done by females who have been pregnant. There are other factors which make it predictable that biological mothers are well motivated, as well as biologically well-equipped, to nurture their own children, particularly in the early stages of nurture. A female knows that she has given birth; whereas a man does not have the same certainty

about the fact that he is a father.

The immature human being must be sustained during a uniquely prolonged period of dependency, if he is to survive even in a minimal sense. If he is to flourish, an emotional atmosphere of security and affection is necessary. Someone has to supply this security and affection. All things being equal, there is little doubt that the person best equipped and motivated to nurture a particular child is its mother, and that no one is more suitable to assist her in this task than the child's father.

Whether it is the child's mother or someone else, the person who undertakes the principal responsibility for nurturing a child will be, in proportion to the conscientiousness with which the task is performed, placed at a disadvantage with respect to other activities, especially those for which economic rewards are available. There does not seem to be any viable way of arranging child nurture which does not make considerable demands on the time and energy of someone. It is more likely that the mother of a particular child will be willing to volunteer her time and energy than that some other person will do so. There may, or there may not, be some physiological or psychological reasoning, over and above cultural conditioning, which makes males more capable than females of the kind of constructive aggression towards the external environment which is relevant to economic survival. But it is much more arguable that there are physiological and psychological reasons, transcendent of cultural variations, why mothers should be effective child-nurturers. Therefore the economic disadvantages which are associated with child-nurture are more likely to fall upon women than upon men.

It is submitted that it is only within the context of procreation and child-nurture, actual or potential, that

the different economic roles within marriage have any legal relevance. Children, although desired, may in fact not be born; but even so, it is quite probable that the wife will regard her role as being more bound up with the home than is that of her husband. She may not seek employment, or full-time employment, because of the expectation that her energies will soon be absorbed by motherhood.

A purely separate system of property does not, in such a case, ( assuming the continued absence of some viable way of assessing the monetary value of the wife's domestic contribution ), make allowance for the fact that her role as potential mother and child-nurturer, even though not actualised, has placed her at an economic disadvantage. A fortiori this is so in the more usual case where the wife actually devotes herself to the nurture of the young children of the marriage. Even in the case of the couple who never intend, or who know that they will be unable, to procreate children, the pressure of convention may cause the wife to gravitate to the role of home-maker.

Legal regulation should provide some protection for the spouse whose contribution to the marriage is made largely or entirely within the home. The presumption that a qualitatively equal contribution is being made by the stay-at-home spouse becomes weaker if there are no children ( or other dependants requiring constant supervision ), and weaker still if it is clear that no children were at any stage anticipated. Nevertheless, it should still be a presumption not without some force ( in the absence of clear contrary indications ) that the post-marital economic assets of the marriage have been acquired by the joint and equal efforts of both spouses.

The traditional rules in Scotland about aliment, pledging of credit etc., not only presupposed the economic superordination of one of the spouses, but presupposed that this one was the husband. This largely corresponded to social reality in past generations, and to some extend still does correspond to social reality. If one of the parties, only, is empowered to act in a particular matter, it is certainly a clearer ( and perhaps a less invidious ) principle of discrimination to confer the power upon the one having a quality like maleness, or femaleness, rather than upon the one who is the principal wage-earner, or who is personally dominant within the marriage.

Spouses who adopt unorthodox arrangements - for example, where the husband largely runs the home, so that his wife may be released to pursue her career - are unfairly penalized because the legal regulations have been devised to cover only the traditional situation. Clearly the economic relevance of home-making has in practice tended to be under-valued, although the idea that it could be measured in accordance with some universal scale of monetary worth ( or in accordance with the actual economic contribution of the other spouse ) is unconvincing. But where there is a basic differentiation of roles within a marriage - and it is scarcely conceivable that this will cease to be so, whether or not the roles are predetermined by society's "sexist" assumptions - the allocation of legal obligations between the spouses must attempt to take this factor into account. The more individual and flexible the arrangements actually entered by spouses, the more sophisticated and the more searching legal analysis of these arrangements will need to be. Naturally, people are tempted to seek the best of both worlds: the wife of a work-shy drunk may wish

to argue, on the one hand, that by reason of the usual assumption about men being wage-earners she is her husband's dependant, and, on the other, that she is in reality the dominant economic partner. But she cannot have it both ways.

No very confident suggestions can be made as to the most theoretically satisfactory way of regulating the respective obligations of the spouses within marriage ( in so far as these obligations have legal implications ). Existing legal systems are still largely committed to obsolescent assumptions about the economic superordination of males. The Scots and the English (11) systems are arguably less satisfactory than some Continental systems. But in any event the problems which arise in this financial sphere - although sometimes exacerbated, sometimes even created by legal ineptitude - cannot be wholly solved by legal regulation.

(11) cf. John Eekelaar, Family Security and Family Breakdown, ( 1971 ):-
"Throughout the complexities of the law of matrimonial property in England as it stands today there runs a basic and very questionable philosophy. This can be described as an attitude of commercialism towards the determination of domestic rights .... It must be obvious that there are grave defects in a system under which the duties of the spouses to each other can only be ascertained in the context of hostile proceedings between them. Substantial duties which, in most people's minds, the spouses owe morally to each other, become confused in a mesh of procedural niceties" ( at p. 97 and p. 109 ).

# CHAPTER SEVENTEEN. THE DISSOLUTION OF MARRIAGE BY DIVORCE.

The factual breakdown of a marriage, and its legal dissolution, are distinct things. There may be societies where factual breakdown is rare; there are societies where dissolution ( other than through the death of one of the spouses ) is legally impossible. But the impossibility of legal dissolution does not guarantee the non-existence of factual breakdown. Nor, of course, does the possibility of legal dissolution guarantee a higher proportion of factual breakdowns than would occur in a legally less permissive system. The relationship between the availability of legal dissolution of marriage by divorce, and the incidence of factual breakdown, is a complex and a controversial matter. There is no presumption that, because the two things are conceptually distinct, there is no causal relationship between them (1).

The Divorce Reform Act 1969, applying only to England and Wales, introduced a fundamental change of approach to questions of dissolution of marriage by divorce. Although to do so is not to endorse everything within the new legislation, it is now commonplace to assume that what has been superseded was in most respects indefensible (2).

(1) cf. John Eekelaar, op. cit., pp. 45-46:-
"It is often claimed that, if the legislature were to proclaim the principle of divorce by consent obtained by simple registration, this would lessen the respect with which marriage is held in the eyes of the marriage as a whole. It is probable that this is true, largely as a result of the overwhelming publicity given to matters of this kind in the press and other communications media. It is of interest to note that the Race Relations Board believes that the mere passing of the Race Relations Act 1968 has had an educative effect."

(2) "The time has passed to add to the literature condemning the pre-1971 divorce law" ( ibid., p. 232 ).

The apparent radicalism of United Kingdom legislative changes, in purporting to introduce irretrievable breadown as the sole ground for divorce, is in fact much watered down by the way in which it is required that breakdown should be established (3).

(3) The Divorce ( Scotland ) Act 1976 basically follows the 1969 Act in establishing irretrievable breakdown of marriage as the sole ground of divorce in the law of Scotland. But irretrievable breakdown is to be taken to be established if

(a) since the date of the marriage the defender has committed adultery; or

(b) since the date of the marriage the defender has at any time behaved ( whether or not as a result of mental abnormality and whether such behaviour has been active or passive ) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or

(c) the defender has wilfully and without reasonable cause deserted the pursuer; and during a continuous period of two years immediately succeeding the defender's desertion -

(i) there has been no cohabitation between the parties, and

(ii) the pursuer has not refused a genuine and reasonable offer by the defender to adhere; or

(d) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or

(e) there has been no cohabitation between the parties at any time during a continuous period of five years after the date of the marriage and immediately preceding the bringing of the action ( Divorce ( Scotland ) Act 1976 s.1 (2).

Perhaps the most remarkable feature of this Scottish legislation is the way in which intolerable behaviour is defined so as to include even passive behaviour which is the result of mental abnormality on the part of the defender. It is not easy to imagine an act or omission to act, or an innate or acquired personal characteristic ( or absence of such characteristic ) which would not fall within the scope of this definition. Nor is it easy to accept the implied equivalence, in substantial terms, of irretrievable breakdown, and the proof of, for example, adultery by the defender. It is just as possible for a marriage not to have broken down irretrievably where there has been an act of adultery as it is possible for a marriage to have broken down irretrievably where has been no act of adultery.

The provision which has been most severely criticised is that which enables a spouse to obtain a divorce when his or her own misconduct has been the substantial cause of the breakdown, even against the wishes of the "innocent" spouse.

Where dissolution of a valid marriage is permitted at all ( and of course the canon law did not permit dissolution ), the basis of dissolution can either be the culpable misbehaviour of one of the parties, or some factor not essentially connected with culpability. Culpability, in the form of the matrimonial offence, is admittedly capable of yielding a clear, justiciable issue; but it is artificial to seek a solution which presupposes that one of the parties is "guilty" ( especially if it presupposes that the other is correspondingly "innocent" ).

If the principle of culpability is, at least formally, abandoned, the basic question is whether the legal regulations grant complete freedom to the parties to dissolve their marriage by mutual consent, or to either party to dissolve the marriage by repudiation, or whether the power to dissolve a marriage may be exercised only by an appropriate court.

Consent to dissolution is subject to at least the same difficulties of proof as is consent to marriage. If it were to be made the sole or a sufficient test of dissolubility, it would logically be vulnerable to any evidence actually negativing consent. If the consent to dissolution were required to be externalised with the same degree of solemnity as consent to marriage, there would be some basis for the observation that divorce, rather than marriage, is the sacramental act which expresses the spirit of the modern, or the secular, age. But, since it would be strange if consent were deemed to possess a more self-evident

character in its negative than in its positive aspects, a similar degree of solemnity seems to be demanded in both cases.

The absolute right of either party to repudiate the marriage, if conceded, would constitute a metabasis eis allo genos. Even in its most lax and degenerate forms, monogamous marriage is not something whose obligatory character can be extinguished according to the whim of the parties. The fact that the right to repudiate the marriage is conditional upon some prescribed formula of registration being complied with (6) has no substantial relevance unless there is some official or body empowered to substitute for the obligations of marriage some financial or other obligation. Where this is the case, the correct analysis is not that the spouse has the power to extinguish the obligations of marriage, but that he or she has the right to request the substitution of some alternative obligation - the actual making of the substitution being within the power only of some official agency.

The English legislative changes (7) do not go so far as to confer upon the spouse this right to call for substitution. Where a decree, based only on five years of separation, would result in grave hardship to the respondent, it will not be granted. Nor will it be granted if the court is not satisfied with the proposed arrangements for the care and upbringing of the children of the marriage, or with the petitioner's proposed financial

(6) cf. the situation considered by the English Court of Appeal in Nachimson v. Nachimson [1930] P. 217.

(7) The Divorce ( Scotland ) Act 1976 s.1 (5) gives the court discretion not to grant decree of divorce where the action is based upon five years absence of cohabitation, and would, if successful, result in grave financial hardship to the defender.

provision for the respondent (8). Moreover, "any covenant by (the wife) which purports to oust the jurisdiction of the court to make financial provision for her in a matrimonial cause is void as being contrary to public policy" (9).

The power, residing in the joint act of the parties, to cause a marriage to be dissolved by mutual consent, is distinct from the power, residing in either spouse, to dissolve the marriage by unilateral repudiation. Perhaps the major ( repudiation ) presupposes the minor ( consent ); but the converse does not hold.

The United Kingdom legislation (10) does not explicitly embrace either of these possible rationales for the law of dissolution of marriage by divorce, although it advances some considerable distance towards the principle of consent, and does not altogether eschew the principle of repudiation. The result is the kind of compromise for which the British, especially the English, are sometimes said to possess a peculiar talent.

The changes do not escape trenchant criticism. "The addition of breakdown to the existing grounds of divorce makes a mockery of marriage without improving by one iota the integrity of the law of divorce ... the effect of the combination thus constituted being to reduce marriage to a consensual contract terminable on breach or at will" (11).

(8) The Divorce ( Scotland ) Act 1976, Sections 5-8, confers wide financial powers upon the courts.
(9) B. Bassingham, The Divorce Reform Act 1969, ( 1970 ), p. 30.
(10) The Divorce Reform Act 1969, and the Divorce ( Scotland ) Act 1976. The latter comes into operation on 1st January 1977.
(11) Alistair M. Johnston, (1968) Journal of Law Society of Scotland, 92 at 98.

The writer of the article cited (12) argued that the Scottish Law Commission was right to reject the judicial discretion to refuse divorce in certain cases where irretrievable breakdown had been established; and suggested that the two-year period of separation should, in effect, be made the sole criterion of irretrievable breakdown (13). Divorce on the ground of incurable insanity would, however, need to be retained as an exception in its own right.

The article itself provoked a critical reply (14), expressly based upon the assumption that reform must mean liberalization, and, in the context of divorce, greater permissiveness (15). The difference of approach is typical. On the one hand there are persons for whom reform is particularly directed towards the restriction of thoughtless or irresponsible exercises of the right to seek divorce. On the other there are persons for whom reform entails the effective relaxation of legal control.

There is no way of reconciling the perspectives of hedonistic individualism and of traditionalistic communalism, which represent the poles between which most people's attitudes towards marriage and divorce are located. The former, if pressed to its

(12) Alistair M.Johnston ( now Lord Dunpark ).

(13) "If the principle of divorce, whether opposed or not, on the ground of a continuous period of separation for two years as evidence of breakdown is accepted, it can be substituted in toto for divorce on the ground of a matrimonial offence" ( op. cit., pp. 96-97 ).

(14) From E.M.Clive, (1968) Journal of the Law Society of Scotland 188.

(15) "The general impression which emerges from Mr. Johnston's article is that he is keenly aware of the defects of the present law but is sincerely opposed to a more liberal or permissive divorce law" ( op. cit., p. 188 ). The result, according to Clive, is that breakdown is interpreted in an unreasonably rigid way.

logical conclusion, leaves no place for any species of moral obligation upon which a legal institution could be based. The latter, in its most intransigent forms, will as a matter of principle sacrifice individual happiness to institutional integrity. Most persons reject the extremes, but are nevertheless subject to the pressures of irreconcilable viewpoints. It is small wonder that people are morally confused, and also that legal systems adopt logically inelegant compromises.

If a legal system were to adopt a form of monogamous marriage in which the mutual obligations could be extinguished by the unchallengeable act of either spouse, it could not meaningfully be said to have maintained substantial identity with the socio-ethical phenomenon of monogamous marriage as this has developed in Western culture. The socio-ethical phenomenon might still survive as a matter of social reality, but it would have the same kind of ambiguous relationship to the legal institution as such currently extra-legal phenomena as concubinage, adultery and fornication. These ( admittedly in the form of exceptions to the norm, rather than of alternative norms ) survive in social reality even when they receive only a limited degree of legal recognition and approval.

However loosely the lines of the definition are drawn, monogamous marriage must entail the subsistence of mutual obligations between the spouses which are in principle enforceable by the wider society, and thus not legally contingent upon the subjective willingness of the parties to honour their obligations. When spouses cannot in fact live together without resorting to dispute-solving agencies, the role of these agencies is not merely the passive one of recording the decisions of both spouses -

still less the decision of only one of them - but the active one of making an authoritative judgement which may supersede any assessment by the parties of their own obligations.

Even this minimal intrusion of communal authority is inconsistent with the view that no one should ever be required to do something which he does not personally believe to be in his own interests. But this view is itself inconsistent with any legally-organised form of social life, and perhaps with any form of social life. It is obvious to anyone who is not an extreme hedonistic individualist that the fact that A would like ( or has agreed with B ) to do something - irrespective of the effects this may have upon C, D, E etc. - constitutes no moral justification of the action in question, and should constitute no legal justification either.

This consideration applies not only to the action which one spouse would like to take in respect of his marriage, but also to the action which both spouses would like to take. Even in cases where there are no children of the marriage, but a fortiori in cases where there are children, a marriage is not something which can only affect, and thus which is at the unchallengeable disposal of, the two spouses. Recognition of this is basic to the maintenance of monogamous marriage as a legal institution.

Provided therefore that society, through its family courts or other appropriate agencies, exercises a careful control over the dissolution of marriage by divorce, and safeguards the interests of those persons who may be adversely affected by the decree of dissolution, it cannot be said that monogamous marriage has been abandoned, merely because such decrees are obtainable, and frequently obtained. Whether the recognition of freely available

grounds for dissolution is compatible with Christian or other positive perspectives on monogamous marriage is another question.

Even before the change in policy inaugurated by the Divorce Reform Act 1969, the principle that a marriage could not be dissolved unless a matrimonial offence had been proved was not consistently applied. The courts wavered between an objective and a subjective test of what constituted "cruelty", but increasingly abandoned any requirement of intentionally damaging conduct. So in Jamieson v. Jamieson (16) it was held that cruelty for the purposes of the divorce law covered the case where a spouse persisted in a deliberate course of conduct, after the time when he became aware that it was in fact injurious to his wife's health; it was not necessary to prove that he had desired injury to his wife's health. It was stated that in this respect the law was the same in Scotland as in England. Lord Reid in Gollins v. Gollins (17) stressed that in matrimonial cases the courts are not, as they are in cases of negligence, concerned with the "reasonable" man. "We are dealing with this man and this woman, and the fewer a priori assumptions we make about them the better" (18).

In Williams v. Williams (19) it was admitted that the test of culpability had broken down; cruelty, for purposes of the law of divorce, means only that one spouse has behaved in a manner which genuinely imperils the other. "There are many cases of husbands and wives not insane but either sick in mind or body or

(16) 1952 S.C. (H.L.) 44.
(17) [1964] A.C. 644.
(18) [1964] A.C. 644 at 660.
(19) [1964] A.C. 698.

so stupid, selfish or spoilt that they plainly do not appreciate or foresee the harm they are doing to the other spouse, and perhaps they are now so self-centred that nothing would ever get the truth into their heads. Certainly allowances have to be made, particularly when their condition is due to misfortune. But I suppose that no one would now maintain that cruelty cannot be proved against such a person if his acts are sufficiently grave and really imperil the other spouse" (20).

The behaviour of the husband defenders in White v. White (21) and Kerr v. Kerr (22) was not, perhaps, calculated to excite much sympathy, although in both cases, especially the former, the damage to the spouse seems to have been unintended. The full implications of the abandonment of the culpability principle can be seen in Thurlow v. Thurlow (23), an English case involving interpretation of the "unendurable behaviour" test of irretrievable breakdown. The husband of an epileptic wife whose condition worsened to the point where she would probably have to spend the rest of her life in hospital petitioned for divorce on grounds of her "behaviour". Rees J. held that, although no blame attached to the wife, her behaviour was nevertheless unendurable.

"This result must surely give rise to some anxiety. Voluntary omissions no doubt constitute behaviour, and so do involuntary acts. One can therefore accept that the lazy husband in

(20) [1964] A.C. 698, per Lord Reid at 722.
(21) 1966 S.C. 187.
(22) 1967 S.L.T. (Notes) 77.
(23) [1975] 3 W.L.R. 161.

Gollins ... and the mentally ill husband in Williams ... had both treated their wives with cruelty. But to say that an omission, as distinct from an act, which is quite involunatary, can also constitute behaviour is to take one further step, and it is suggested that the line might well be drawn short of it" (24).

The judge in such a case, presuming that the weight of precedent is not coercive, has an unenviable task. Whatever sense of moral obligation might persist towards the afflicted spouse, a judicial decision, in such circumstances, that a decree of divorce was unobtainable would scarcely enhance it. On the other hand, the tough traditional prescription that spouses take each other in sickness and in health enshrines a basic insight which few people would wish to see abandoned altogether.

(24) J.C.Hall in 1975 Cambridge Law Journal, at 208.

The relationship between legal regulations and moral behaviour is an especially complex and deceptive one. Almost every logically possible view, from that which upholds the essential identity of law and morality, to that which presumes their mutual irrelevance, could claim some support in legal, as in non-legal, literature.

Sometimes judges pose as the guardians of society's moral integrity; sometimes they prefer to adopt an attitude of cool scepticism in the face of conflicting evaluations (1). They do not carry total conviction in either case. Neither the theory of identity nor that of mutual irrelevance does justice to the actual relationship between law and morality. The viability of a legal system, if it is not successfully dedicated to oppression, depends on the general acceptance, by those subject to it, of its compatibility with their moral beliefs.

This proposition would not, perhaps, often be seriously disputed. What is more debatable is the proposition that the moral beliefs and the moral behaviour of a society are, in more subtle ways, dependent upon the didactic and symbolic function of legal regulations and institutions. Only the very unsophisticated person would regard the existence or absence of a legal rule as conclusive evidence of the existence or absence of a corresponding moral obligation. But for most people the existence of a legal rule constitutes prima facie evidence of the existence of a corresponding

(1) Some of the speeches in the House of Lords case Gilmour v. Coats [1949] A.C. 426 reflect a not wholly plausible confidence in the ability of law courts to avoid contamination by what is scientifically immeasurable.

moral obligation. For some people, it is the only evidence which carries any weight.

Legal reinforcement is not, in principle, necessary for those persons who have an inner religious or ethical conviction about matters of sexual, or other, behaviour. It is also not sufficient to guarantee morally responsible behaviour from those who lack such conviction. But it is not unnecessary in the latter case. Law, especially in its inflated or its collapsed legalistic forms (2), may have the capacity to cause good people to be less good, and bad people to be worse, than they would otherwise be. And it cannot, by itself, cause bad people to become good. But the hypothetical absence of law would, predictably, cause bad people to be worse, and good people to be less good, to a very dramatic extent.

Angels, by definition, do not need law; devils, by definition, cannot be curbed by it (3). But for the average person, who is not actually very bad or very good but who is potentially both worse and better than he now is, the existence of legal restraints is a principal factor in the attainment of moral insight. Although it may be naive to attach great importance to the existence of legal imperatives and prohibitions, it is at least equally naive to attach no importance to them.

Any general arguments in favour of the legal regulation of behaviour apply also to the legal regulation of sexual

(2) cf. supra, p. 23.
(3) cf. the argument of J.R.Lucas in The Principles of Politics, (1966), pp. 1-9. Since people are vulnerable to ill-intentioned interference from others, coercion is necessary. Since they are vulnerable to well-intentioned interference from others, coercion is practicable.

behaviour in particular. If it were not possible for sexual behaviour directly or indirectly to harm any person, there would be no need for it to be regulated. If it were not possible for sexual behaviour to be modified by social pressures, regulation would be wholly ineffective. The fact, if it is a fact, that regulation of sexual behaviour cannot be wholly effective does not weaken the thesis that it should be as effective as possible. Nor, of course, does it establish that sexual behaviour which is not susceptible to modification by social pressures is intrinsically harmless (4).

Although liberal opinion may affect an attitude of neutrality over such questions as pre-marital sexuality and consensual divorce, it would be no less illiberal than it would be irrational to affect an attitude of universal neutrality over all questions of sexual behaviour (5). Some species of sexual behaviour, although offensive to persons of conservative temper or traditional belief, may in fact do no "harm" to anyone, and thus be entitled to social tolerance or acceptance. But to establish "harmlessness" in principle - rather than in the particular case - would be a formidable task. And some species of sexual behaviour have a clearly-observable tendency to cause harm to persons, whether in the more tangible form of undesired pregnancy or emotional trauma, or the less tangible form of social disapproval or inner guilt, without taking into account the implications of such behaviour

(4) cf. W.E.H.Lecky, op. cit., Part 2, p. 282:-
"It is an undoubted truth that, however much moralists may enforce the obligation of extra-matrimonial purity, this obligation has never been even approximately regarded; and in all nations, ages and religions a vast mass of irregular indulgence has appeared, which has probably contributed more than any other single cause to the misery and degradation of man".

(5) Mention of rape or unilateral sadism should suffice to establish this point.

for the general perception of social responsibility.

Unless society believes certain forms of sexual behaviour to be potentially or actually damaging to its own interests ( whether these are primarily thought of as individual or communal ), society cannot without inconsistency prohibit or disapprove of any form of sexual behaviour (6). The values which a society will wish to uphold and promote will include both "personal" and "institutional" dimensions - indeed these can rarely, if ever, be wholly separated from each other.

Analysis of the ways in which a society prohibits and disapproves of certain forms of sexual behaviour will, it is submitted, support the view that society seeks to protect both persons in their individual integrity, and also the institutional framework within which personal life is set. The strength of the impetus towards social disapproval will be proportionate to the sense of threat to individual integrity, and/or to society's fundamental institutions.

An offence such as rape is clearly perceived as an intolerable threat to personal integrity, as would be any other non-consensual exploitation of another's sexual being. The protection afforded to those persons who are deemed to be incapable of consenting to sexual intercourse ( or other sexual acts ) could be said to derive from the same basic insight. But sexual acts without the element of mutuality are no less inconsistent with

(6) cf. Patrick Devlin, op. cit., p. 8 :-
"If society is not prepared to say that homosexuality is morally wrong, there would be no basis for a law protecting youth from 'corruption' or punishing a man for living on the 'immoral' earnings of a homosexual prostitute, as the ( Wolfenden ) Report recommends."

with the institutional framework ( of the "valid marriage" ) than with personal integrity, considered in detachment from institutional forms. The more heavily a society is conditioned towards the acceptance of "individualism", the more likely it is to be sensitive to the personal rather than to the institutional dimension. But any imbalance of sensitivity is undesirable, whether it is the personal or the communal pole which is favoured. In so-called liberal societies there is little danger of a self-conscious sacrifice of personal values, though it is also true that the most uncompromising route towards the attainment of personal values ( as of liberty or happiness ) is not invariably the most productive route.

It is arguable that ( for all the theoretical distinction between the two concepts ) personal integrity is in reality both inseparable from institutional integrity, and dependent upon it. Even if the latter is not thought to be a higher value than the former, it is both a more basic and a stronger value (7). "Authentic personal being" can only emerge if individual survival and flourishing are sufficiently assured; and individual survival and flourishing can only be achieved through the co-operation of those who have already survived, and thus through inchoate or elaborate institutional forms.

Not only is it undeniable that the human infant cannot survive, and a fortiori cannot flourish, through his unassisted efforts, but it cannot in any way be taken for granted that adequate assistance will invariably be forthcoming, in the absence of

(7) The distinction between "strong" and "high" values is elaborated by N.Hartmann, Ethics, (1932), English translation by Stanton Coit ), especially at pp. 128-129.

determined social support for the institutional context for child nurture. Is it a matter of indifference, to the person concerned for personal values, whether or not human children are procreated, and if so whether and by whom they are effectively nurtured? To ask the question is also to answer it; and to answer it is to concede the crucial importance of the institutional dimension.

It is possible to imagine social attitudes which attached no intrinsic value to personal integrity, so that, for example, an act of rape directed against a female person outwith the protection of the family would be regarded as having no ethical significance. No doubt such insensitivity would be denounced even by some of those who generally find moral discriminations to be offensive. But a society which only accorded value to individuals in so far as they were perceived to be contributing to the strength of approved social institutions would be perfectly viable in terms of survival, however defective it might seem from some alternative ethical perspective. From most perspectives, it would seem more attractive to regard institutions as being instrumental to the well-being of individuals ( "institutions were made for the individual" ) rather than individuals as being instrumental to the well-being of institutions. Nevertheless, individual well-being is more clearly dependent upon the well-being of institutions than is institutional well-being dependent upon the well-being of individuals.

The family appears to be the most basic and the least dispensable of human institutions. It is through the activities of the family ( or of agencies analogous to the family which are established as substitutes for particular families which are

unequal to their task ) that immature human beings are enabled to survive. The form of family structure approved within Western societies ( and also those committed to Marxist ideas according to which the family would be eliminated, were it pragmatically possible for it be eliminated ) is monogamous. The traditional prohibitions and disapprovals in the sexual sphere are essentially related to the institutional structure of the monogamous family, even more than they are related to the value of personal integrity. Those for whom the ethical validity of the monogamous family structure is dubious are therefore likely to doubt the validity of some or all of the traditional prohibitions and disapprovals.

In so far as the institution of monogamous marriage is identified with any particular expression of it - for example, one which presupposes male economic or personal superordination, or a general legalism in the approach to marital questions - these doubts are intelligible. But, even for persons who attach no intrinsic value to monogamous marriage, this institution must logically possess value in proportion to its instrumental contribution to intrinsic values ( however these are conceived ).

Those who wish themselves and others to be able to use the road network conveniently and safely must attach some value to the principles of road-use currently operative, even if they believe themselves to have devised a theoretically superior set of principles. Until the latter are approved and implemented, the former, however imperfect they may be, constitute the basis of people's actual behaviour and expectations. Merely to act in defiance of them, or to encourage others to act in this way, would be incompatible with the basic wish that persons should be enabled to travel on the roads in reasonable safety.

In relation to monogamous marriage in Western society, such

theoretically superior alternatives have seldom, if ever, been worked out in a persuasive manner. Criticisms are typically directed against accidental features of the system of legal regulations, rather than upon the fundamental aspects of monogamy. Or they are based upon a merely emotional horror of the kind of coherent and persisting obligation which is represented by the mutual commitment in marriage.

It is in no way irrational to uphold a system, the functioning of which enables intrinsic values to be realised, even if one does not attribute intrinsic value to the system as such. Only a very tiny minority in any monogamous society could have any serious reservations about the aims of personal survival and flourishing which are effectuated through, _inter alia_, the institution of the monogamous family. This institution should therefore be upheld, even if only on the pragmatic ground that it happens to be a means to a desirable end, and that it is at least indispensable until some viable alternative has been substituted for it.

But the individualism characteristic of modern Western thought makes it difficult for some people to attach ethical significance to any phenomenon which is not blatantly and directly "personal". Anything institutional, such as monogamous marriage, is accordingly liable to be degraded, even though a more reflective analysis would reveal its crucial contribution to personal values.

A stable context for child nurture is the indispensable basis of any more elaborate cultural achievement. The _reductio ad absurdum_ of individualistic disgruntlement with the institutional sphere would imply the destruction of any stable context for child nurture. Those who would cheerfully endorse the permissibility of such a destruction are, presumably, unaware of its

suicidal implications.

Forms of behaviour which actually or potentially threaten the integrity of the monogamous family in western societies are subject, on rationally justifiable grounds, to legal prohibition or discrimination. Such behaviour clearly is incompatible with the interests of society; the communal values at stake, even in cases where they are not directly personal, are indirectly the presupposition and the guarantor of personal values.

How severely the prohibitions or discriminations are enforced will depend upon, among other things, the seriousness of the threat, and the practicability of the action directed against it. Harmful behaviour should only be allowed to pass unchallenged when overt opposition to it is impossible, or would be counter-productive, or is substantially unnecessary. The two principal considerations are, on the one hand, the general sense of outrage at a particular form of behaviour, and, on the other, its illicit attractions ( when these are not outweighed by any vulnerability to punishment or disapproval ). Those who exploit the immature are treated with more consistent severity than those who lead astray persons of full age and capacity. The bigamist, who actually carries out, as far as he is able, his promise to marry the second woman, is accorded less sympathy than the man who, although promising marriage, obtains what he is after without carrying out the promise. This is because the threat to the institution of marriage, if not also the moral outrage, is greater in the former case.

The threat to the institution of marriage is greater also, assuming that procreation is a possibility, when a wife commits adultery than when her husband does so. An unscrupulous husband

cannot, whereas his wife can, pass off the child procreated in adultery as if it had been procreated legitimately. Even in cases where she initially succeeds in concealing the true facts, there is always the risk that the truth will out, or that the continued effort to suppress it will have undesirable side-effects. This consideration has, regrettably, served to obscure the fact that the moral blameworthiness of adultery ( leaving out of account any possible further deception ) is in principle the same in both cases. But adultery, even when concealed, or overlooked, is clearly something which threatens the integrity of the institution of monogamous marriage, just as it also violates the personal relationship of the spouses. It is something evil, not something good or indifferent.

The tendency to commit adultery may, however, be too deeply entrenched in human nature for heavy-handed attempts at coercive prohibition to have much chance of being practicable in the circumstances of a modern society. Granted that adultery is committed by grown persons who are not themselves the objects of special protection, the disadvantages of constant snooping and interference would perhaps be thought to outweigh the evil of the adultery itself. Wise physicians presumably do not resort to elixirs which are wholly inefficacious, or which produce symptoms more alarming than those of the original disease. But to dispute the usefulness of therapy is not to confuse disease with health. Whatever is not consistent with the harmonious functioning of the monogamous family, within a monogamous society, is a species of disease or disorder; and this applies to such legally supervised possibilities as divorce, no less than to promiscuity, whether or not organised on a commercial basis.

Sometimes, as with divorce, a choice has to be made between two evils; and to choose what is clearly the lesser evil is to do what in the circumstances is the right thing. A deviation from a norm, even a deviation which is tolerated without reservation, must nevertheless be seen to possess an exceptional character, in the absence of which toleration should not be expected to continue. For example, it is not only permitted in most, but in some societies is thought especially meritorious, that a minority of persons should abstain altogether from any overt sexual relationship. But celibacy would cease to be thought meritorious, if the willingness to procreate children diminished sufficiently sharply among the population.

A distinction which no doubt is sometimes made intuitively, but which would be highly invidious if it were in any systematic way institutionalised, may be made between those persons who are both willing and able to undertake the task of procreation and nurture of children, and those persons who are not willing or not able to do so. From a narrowly rationalistic perspective, it might appear that the latter group could be dispensed from the normal requirements of moral sexual behaviour, provided always that the mutual obligations of those actually nurturing children were respected. Homosexuals, as well as heterosexuals who are unwilling or unable to become parents, might therefore be permitted to opt out of the more rigorous inter-personal obligations accepted by married persons. But even within this artificially diminished context of responsibility, the obligation towards any person affected by one's sexual behaviour would be, even from a narrowly rationalistic perspective, at least rigorous enough to exclude all exploitation, all deception, and all merely irresponsible self-indulgence.

To some observers, the present cultural situation represents the virtual abandonment of monogamous marriage in favour of non-institutionalised erotic encounter. This is no doubt an exaggeration; but it is true that the moral obligations implicit in the institution of monogamous marriage are given less public support than in the past, whether or not it is true that they are more often neglected in practice.

If a sufficient majority of a population is not able to perceive and to fulfil the moral obligations implicit within the approved marriage structure - which in the case of monogamy in modern societies entails acceptance of the shared task of child-nurture for a period which is usually not less than two decades - the society will not survive even in a minimal sense. The less adequately these obligations are perceived and fulfilled, even by a numerically sufficient majority to ensure survival, the poorer will be the inner quality of society's life.

Monogamous marriage is a strong institution, strong enough to have resisted a century or more of unprecedented social upheaval. It is nearly as strong, perhaps, as the basic human will to survive. But the will to survive does not guarantee survival. The viability of monogamous marriage is not guaranteed by any supposed uniformities of human "nature"; it is dependent upon the existence within society of a sufficient reservoir of shared moral insight. Within Western society, the monogamous family is the basic - it might almost be said that it is the sole - source of shared moral insight. No other institution ( certainly not the State school system (8) ) has yet replaced it in this respect,

(8) cf. the optimistic views of M.Rheinstein, op. cit., p. 443.

or could be expected to do so in the foreseeable future.

Where this reservoir of shared moral insight is diminished, for whatever cause or causes, the capacity for inter-personal co-operation is diminished also; and where the capacity for inter-personal co-operation is diminished, more people will fail to perceive, or if they perceive will fail to fulfil, the moral obligations arising out of marriage. The circle, once entered into, is inevitably a vicious one. Pessimism about either the reservoir of shared moral insight, or about the state of marriage, within a monogamous society, should involve pessimism about both. Those who recognise not the instrumental but the intrinsic value of monogamous marriage - believing that it represents the will of the Creator for his human creation, or that it corresponds to the irreducible insights of Agape-ethics, or whatever - will no doubt persist, even in the event of a hypothetical further social degeneration, in regarding monogamous marriage as securely based in "reality". But they will make a radical distinction between "reality" and "social reality".