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APOSTOLIC VISITATION, ACCOUNTABILITY, AND THE RIGHTS OF THE LOCAL CHURCH

*Consensus Statement of the CLSA Committee for the Study of Apostolic Visitation and the Limitation of Powers of a Diocesan Bishop**

At the Forty-eighth Annual Meeting of the Canon Law Society of America on October 15, 1986, a resolution was adopted calling for the CLSA to conduct an interdisciplinary study of the history and recent canonical legislation and practice regarding the human and canonical rights of diocesan bishops and their local churches on the occasion of an apostolic visitation, and that a statement of implications and suggestions be submitted to the Canon Law Society of America for its consideration. Another resolution called for a study of canonical issues raised by a then recent apostolic visitation of the Archdiocese of Seattle.

At the January, 1987 meeting of the Board of Governors the Committee for the Study of Apostolic Visitation and the Limitation of Powers of a Diocesan Bishop was established to carry out these studies. The committee commissioned six studies of issues related to these topics:

1. "The Apostolic Visitation of a Diocese: A Canonico-Historical Investigation," by John P. Beal
2. "The Church Local and Universal: Realization of Communion," by Patrick Granfield
3. "Subsidiarity, Collegiality, Catholic Diversity, and their Relevance to Apostolic Visitations," by John E. Linman, C.S.V.
4. "The Pastoral Governance Role of the Diocesan Bishop: Foundations, Scope, and Limitations," by Thomas J. Green

* This consensus statement was approved by the Board of Governors of the Canon Law Society of America and adopted by vote of the CLSA members present at the Annual Meeting, October 11, 1989. The statement together with the research papers which prepared it are published with the permission of the Canon Law Society of America. Pages 341-567 © Copyright 1989 by the Canon Law Society of America.

THE *BONUM CONTIUGUM*
AND THE *BONUM PROLIS*
ENDS OR PROPERTIES OF MARRIAGE?

Canon 1055 of the new code presents matrimony as being directed to two ends: it is "by its nature ordered toward the good of the spouses and the procreation and education of offspring."

It is interesting to note that while the natural ordering of marriage to procreation is clearly stated by *Gaudium et spes* in two places (*GS* 48 and 50), the conciliar document nowhere says that marriage is ordered to the *bonum coniugum*. The "good of the spouses" is mentioned in *GS* 48 in relation to the indissolubility of the marriage bond, and again (somewhat less directly) in *GS* 50 in the context of responsible parenthood. *Casati commubii*, in 1930, had already made a similar (and equally brief) reference to the connection between indissolubility and the *bonum coniugum*.¹ Neither document, however, enlarged on the term which seldom enough appears in canonical writing until it was taken up in 1977 by the consultants of the Pontifical Commission for the Revision of the Code of Canon Law. Unlike the suggestion to incorporate a *ius ad communionem vitae*, the *bonum coniugum* seems to have provoked no debate, and was immediately and unanimously accepted into the draft for the new canon describing the nature of marriage. The consultants, however, gave no indication of its exact meaning beyond the fact that it was regarded as expressing the "personal end" of marriage.² The term is mentioned rather rarely in total jurisprudence of the following years,³ and very little attempt is made to analyze its juridical content.

The *bonum coniugum* may therefore be regarded as a new term in jurisprudence. A first step in the on-going process of establishing its

¹ Plus XI, encyclical *Casati commubii*, December 31, 1930: *AAS* 22 (1930) 553.
² Cf. *Communicationes* 9 (1977) 123.

³ See, for instance, *coram Pinto*, December 18, 1979; *coram Pinto*, February 12, 1982; *coram Pinto*, November 9, 1984; *coram Giannecchini*, June 22, 1984; *coram Stanekiewicz*, January 28, 1985; *coram Pompedda*, January 29, 1985; *coram Huot*, October 2, 1986.

nature and content could be to try to determine its canonical classification; in other words, how or where does it fit into the traditional scheme which distinguishes the essence, the ends, and the properties of marriage?

The Bonum Coniugum: An End, not a Property, of Matrimony

It has been suggested⁴ that the *bonum coniugum* should be regarded as a fourth *bonum* (i.e., "good" or value) of marriage, to be added to the traditional three *bona* distinguished by St. Augustine: the *bonum fidei*, the *bonum sacramenti*, and the *bonum prolis*. This suggestion, as I see it, would clearly place the *bonum coniugum* among the properties of marriage.⁵

This analysis does not seem acceptable, as I think emerges from a consideration of St. Augustine's doctrine of the *bona matrimonalia*. In the augustinian view, the three matrimonial *bona* refer to "goods" of the married state: they are positive features or values of matrimony that give it dignity. Marriage is good because it is characterized by faithfulness, permanence and fruitfulness. "The goodness of matrimony," says St. Augustine, "has a three fold expression: exclusiveness, offspring, permanence."⁶ In another passage he writes, "these are the good qualities that make marriage good: offspring, exclusiveness, permanence."⁷ Each *bonum* is predicated of or attributed to marriage. Offspring is a *bonum matrimonii* and so is exclusiveness or permanence. Thus one sees clearly that St. Augustine is speaking not of ends or finalities of marriage, but of its values: its essential properties.

⁴ See *coram Pinto*, May 27, 1983: *Monitor Ecclesiasticus* 110 (1983) 329-330. See also Lawrence G. Wrenn, "Refining the Essence of marriage," *The Jurist* 46 (1986) 536.

⁵ The new code did not resolve an inconsistency which exists between legislation and jurisprudence. Legislation has continued to present a scheme of two essential properties of matrimony (c. 1056), while jurisprudence has preferred to analyze matrimony from the viewpoint of the three augustinian *bona*. However, as we will see, jurisprudential practice came to treat exclusion of fecundity or indissolubility as the exclusion of an essential property, and the exclusion of offspring as the exclusion of an *end*. The present situation is a not too satisfactory blending of scholastic and augustinian analyses. To my mind, Augustine speaks of the *bona* as the scholastics speak of properties. In this article I take a *bonum* to be in effect an essential property. How I consider this to apply to the *bonum prolis* will, I trust, become clear in the second part of this study.

⁶ *De Genesis ad litteram*, lib. IX, cap. 7, n. 12.

⁷ *De bono coniug.*, cap. 24, n. 32.

Now it is evident that the term *bonum coniugum* does not express a value or property of marriage in any parallel sense.⁸ The *bonum* of this new term is referred not to marriage (as if it were a value that makes marriage good), but to the spouses (as involving something that is good for them). It denotes not a property of marriage (a *bonum matrimonii*), but something—the “good” or welfare of the spouses—which marriage should cause or lead to. It seems obvious, then, that the *bonum coniugum* is in the line not of property but of finality. Canon 1055, after all, indicates this clearly: “the matrimonial covenant . . . is by its nature ordered toward the good of the spouses. . . .”

As we remarked earlier, jurisprudence is only beginning to tackle the question of the juridic content of the *bonum coniugum*. It is not my purpose to enter in depth into this question here, and what follow are simply a few preliminary and tentative reflections on the subject.

The sentence *coram* Pinto of December 18, 1979, suggested that the rights-obligations which make up the “good of the spouse . . .” go under the heading of ‘mutual help’ and ‘remedy for concupiscence’ in the (1917) code; or, in the draft of the marriage law of the new code, under that of the ‘right to communion of life’ which embraces those rights that pertain to the essential interpersonal relations between the spouses.” Since the proposed “*ius ad vitae communionem*” was not in fact accepted into the new code,¹⁰ it is not clear how far one can build an analysis of the *bonum coniugum* on this basis. Nevertheless, insofar as the *communio conjugalis vitae* is equivalent to matrimony itself, this *communio* is clearly ordered to the *bonum coniugum*.¹¹ One can reasonably assume that, in the legislator’s intention, the *bonum coniugum* is meant to embrace the former secondary ends of matrimony,¹² the *mutuum adiutorium* and the *remedium concupiscentiae*, which are not

mentioned in the new code.¹³ However, as regards the essence of the *bonum coniugum*, I am inclined to think that it is rather to be found in the line of the “mutual interior formation” of the spouses, their “constant concern to help each other toward perfection,” which *Casit conubii* described as a main reason for marriage understood in the sense of a life-communion (*totius vitae communio*) or partnership.¹⁴

It is interesting to note that the recent official volume annotating the “sources” of the new code gives as one of the sources of canon 1055 the address of Pius XII of October 29, 1951, where Pius spoke of the “personal perfecting of the spouses” as a secondary end of marriage.¹⁵ *Gaudium et spes* is of course referred to as another source of the canon, as are *Lumen gentium*, nn. 11 and 41, and *Apostolicam Actuositatem*, n. 11. *Gaudium et spes* speaks in terms of the human and supernatural growth of the spouses: “Husband and wife . . . help and serve each other by their married partnership; they become conscious of their unity and experience it more deeply from day to day. . . . Fulfilling their conjugal and family role they increasingly further their own perfection and their mutual sanctification” (GS 48). The supernatural aspect of this is particularly drawn out in the pertinent paragraphs of *Lumen gentium*, especially in n. 11: “Christian spouses help one another to attain holiness in their married life and in the accepting and rearing of their children.” Similarly the decree on the apostolate of lay people insists: “Christian spouses are, for each other . . . cooperators of grace and witnesses of the faith” (AA 11).

To make the *bonum coniugum* consist in the achieving of a comfortable or untroubled life scarcely seems to be in harmony with a Christian understanding of the real good of the spouses. We have already seen how *Gaudium et spes* (following *Casit conubii*) teaches that indissolubility favors the *bonum coniugum*. The point of this surely is that all the effort and sacrifice involved in being faithful to the unbreakable character of the bond—in good times and in bad, etc.—serves to develop and perfect the personalities of the spouses. A similar

⁸ “The *bonum coniugum*,” according to F. Bersini, “has nothing to do with the augustinian *bona*.” *Il Nuovo Diritto Canonico Matrimoniale* (Turin: 1985), p. 10.

⁹ The sentence says “*bonum coniugis*.” The code’s “*bonum coniugum*” avoids the possibly individualistic tone of this third person singular.

¹⁰ See *Communications* 15 (1983) 233-234.

¹¹ Pier Antonio Bonnet holds that the *communio vitae* is the “realizzazione” of the “*ordinatio ad bonum coniugum*,” understood as an essential property of marriage; see “*Communio di vita, ordinatio ad bonum coniugum e honor matrimonii*,” *Il Diritto Ecclesiastico* 93/2 (1982) 550, 552, 558.

¹² Cf. David E. Fellhauer, “*The consortium omnis vitae* as a Juridical Element of Marriage,” *Studia Canonica* 13 (1979) 50-54.

¹³ Bersini, p. 18, observes “the *remedium concupiscentiae* and the *mutuum adiutorium* are now included in the *bonum coniugum*.”

¹⁴ “Haec mutua coniugum interior conformatio, hoc assiduum sese invicem perficendi studium, verissima quadam ratione, ut docet Catechismus Romanus, etiam prima matrimonii causa et ratio dici potest, si tamen matrimonium non pressius ut institutum ad problem rite procedendam educandamque, sed latus ut totius vitae communio, consuetudo, societas accipiatur.” *AAS* 22 (1930) 548.

¹⁵ *AAS* 43 (1951) 848-849.

reading is no doubt to be made of that passage in *Gaudium et spes* which states that "children greatly contribute to the good of their parents" (GS 50). Children enrich their parents' lives in many human ways, and not least in virtue of the generous dedication they tend to evoke in them.

Reference could be made here to the thesis that sees a *ius ad amorem* at the heart of the *bonum coniugum*.¹⁶ This, it seems to me, tends to invert the matter: the point is not that the *bonum coniugum* gives a right to love, but rather that the duty to love tends to the *bonum coniugum*. The *bonum coniugum* does not consist in love, but (if my tentative line of reasoning is correct) in that maturing of the persons and characters of the spouses which comes from fidelity to the married commitment, from living marriage in accordance with its essential properties.

The question of the exclusion of the *bonum coniugum* is obviously of the greatest importance, although the brief remarks I make here are meant to suggest the difficulties it offers rather than to solve them. It is clear enough that the *bonum coniugum* is frustrated by the person who excludes indissolubility, or fidelity, or offspring; the marriage in such cases is null, however, in virtue of the exclusion of the traditional *bona* rather than of the *bonum coniugum*. The exclusion of the end—the *bonum coniugum*—is absorbed into the exclusion of the essential property.

It could be argued that the *bonum coniugum* is excluded by whoever hides from his or her partner some personal circumstance (some grave illness, for instance) that is bound to undermine their conjugal relation. But there we are once more in an area more properly covered under a different heading: that of *dolus* (c. 1098). An incapacity for accepting the demands involved in the *bonum coniugum* would seem to coincide with the incapacity for undertaking the essential rights and obligations of matrimony (c. 1095, 2° and 3°).

Cases where marriage consent is invalid due to the exclusion of the *bonum coniugum*, considered as an autonomous ground of nullity, may very well be rare from the nature of things. Be that as it may, it seems evident that the *bonum coniugum* would be excluded by the person who marries with the intention of perverting his or her partner: getting him or her to apostatize from the faith, to take up an immoral life, etc. It would no doubt also be held excluded if a person intended

¹⁶ Wrenn, pp. 545ff.

to deprive the other party of other aspects of fundamental human dignity, such as his or her physical or moral freedom. Further instances can probably be adduced without having to posit far-fetched hypotheses such as the famous "Jemolo case."

I think one should utter here a caution about the use of the expression "*ius ad bonum coniugum*."¹⁷ No one can claim—as something due to him from another—what is not properly or fully within the power of that other to grant. Therefore, while each party has the right that the other accept marriage in its essential integrity (with its essential properties), neither can claim the end(s) of marriage as a right. That is why just as one cannot correctly speak of a *ius ad prolem*, a right to children,¹⁸ it seems to me that one cannot correctly speak of a right to the *bonum coniugum*. What each party can claim, as a matter of right, is that the other does not exclude from his or her consent the natural ordering of marriage to the good of the spouses.

This brief consideration of the *bonum coniugum* should not be ended without referring the reader to Question 49 of the *Supplementum* where, to my mind, we find the real roots of the dual finality of matrimony expressed in canon 1055. St. Thomas says there that marriage is entered by men and women not only for the procreation and upbringing of children, but also for the life-partnership shared by the spouses, with the mutual interchange that this involves.¹⁹ He ponders whether the "communicatio operum" should be regarded as a *bonum matrimonii*, and answers negatively, insisting that this "communicatio" is not a property but an end of marriage (secondary, in his view, to procreation which he presents as the principal end).²⁰

Having tried to show that the *bonum coniugum* is an end and not a property of marriage, I would now like to turn to the *bonum prolis*, arguing the inverse thesis, i.e., that if terms are to be used correctly, the *bonum prolis* expresses a property, and not an end, of matrimony.

The Bonum Proles: A Property, not an End

The fact that the scheme of the three matrimonial *bona* has not been abandoned during 1500 years shows the depth and accuracy of St. Augustine's analysis. The subsequent development and use of his anal-

¹⁷ Antonio M. Abate, "Il Consenso Matrimoniale," *Apollinaris* 59 (1986) 475-476.

¹⁸ See below, note 32.

¹⁹ "Matrimonium non solum fit in hominibus ad prolem procreandam et nutriendam, sed ad consortium communis vitae, propter operum communicationem." Art. 2, 1.

²⁰ *Ibid.*, ad 1.

ysis, however, has at times given rise to confusion, especially with regard to the *bonum proles*.

St. Augustine, as we have noted, uses the expression *bonum proles* in the sense of an essential property of marriage: matrimony is good not only because of exclusiveness or permanence, but also because of the *bonum proles*: the goodness accruing to it from the fact (or rather from the hope) of offspring. Now it is important to bear in mind that the expression *bonum proles* can be used in a quite different sense. One in fact changes the whole meaning of the expression if one uses the word "bonum" in the sense in which it is used precisely in that other expression, *bonum coniugum*, which we have been examining. It is possible, in other words, to use *bonum proles* in order to express not a value of marriage, but the "good" (the welfare or interest) of the offspring itself. *Gaudium et spes* expresses itself in this way on several occasions. It says (in a passage we have already seen) that it is for "the good of the children," as well as of the spouses and society, that the bond of marriage no longer depends on human decision (GS 48); and again that "the nature of marriage as an indissoluble covenant and the good of the children demand that the mutual love of the spouses . . . grow and mature."²¹ Even St. Thomas, on one occasion at least, uses *bonum proles* so, when he argues that slavery is an impediment to marriage also from the viewpoint of the *bonum proles*, of the "good" of the offspring, who will be worse off because of the slavery of their parents.²²

We need to keep this equivocal nature of the term *bonum proles* in mind; otherwise we will run into confusion. Now it so happens that canonical usage has made the term *bonum proles* equivocal in another and even more important way. We can see this if we turn from a consideration of the properties of marriage to a consideration of its ends.

One can say that marriage is qualified by its properties of faithfulness or permanence, but one cannot properly say that it is ordered to fidelity or permanence.²³ Nevertheless one can say that it is ordered to fruit-

²¹ GS 50; cf. GS 51: "Ubi intima vita coniugalis abrumpiatur, bonum fidei non raro in discrimen vocari et bonum proles pessumdari possunt."

²² *Supplementum*, q. 52, art. 1, ad 1.

²³ Metel is characterized by hardness, it is not ordered to hardness. It is ordered to, e.g., hammering or cutting, and its hardness fits it for its purpose. So the properties of marriage fit marriage to achieve its ends: the good of the spouses and the procreation and education of children.

fulness. What appears to be confusing here (and what can easily lead to actual confusion) is the fact that offspring can be considered not just as a matrimonial good or value, but also as an *end* of marriage.

St. Augustine's main concern was to defend the goodness of matrimony. His presentation of the ends of marriage, however, is not as full or as systematic as that of St. Thomas.²⁴ In Question 65 of the *Supplementum*, St. Thomas says, "matrimony has the procreation and education of offspring as its principal end."²⁵ With his characteristic precision and clarity, he goes on in the same article to relate this and the other ends of marriage to the triple *bona*. Elsewhere in the Supplement, however, it seems to me that St. Thomas expresses the same idea in a less precise fashion. So in Question 41 he says, "matrimony is natural, in the first place because of its main end which is the *bonum proles*,"²⁶ and later on, he repeats this idea in much the same terms: "matrimony is ordered to its principal end, which is the *bonum proles*."²⁷

With all due respects to St. Thomas I think that he nodded in his use of *bonum proles* in these two passages. He takes a term which St. Augustine used to describe a property of marriage and uses it to describe an end. St. Thomas' example, in any case, was catching, with the result that the term *bonum proles* has ever since been pre-empted in canonical usage so as to express an end of marriage, its connotation as a matrimonial property being lost.

It should be noted that canon 1055 avoids any inexactness on this point. It does not say that marriage is ordered to the *bonum proles*, to the "good" or value of offspring; it properly says (in full accord with St. Thomas in Question 65) that marriage is ordered to the "procreation and education of offspring."²⁸

The term *bonum proles*, therefore, is used correctly to describe a property of matrimony, but is not used in all exactness to describe that end of matrimony which is procreation. Precision of terminology, in

²⁴ B. Alves Pereira, *La doctrine du mariage selon saint Augustin* (Paris: Beauchesne, 1930), pp. 41-50.

²⁵ *Supplementum*, q. 65, art. 1; cf. q. 49, art. 3: "Proles est matrimonii finis."

²⁶ *Ibid.*, q. 41, art. 1.

²⁷ *Ibid.*, q. 65, art. 5.

²⁸ One can evidently say that the "bonum" of the "proles" is a part of the end of marriage, if by "bonum" one refers to the life, education, happiness, etc., of the children. But then, as we saw above, we are using the term *bonum proles* in its more modern sense of the welfare of the children and not in the augustinian sense of a good or value of marriage.

other words, asks that we distinguish "proles" as finality from "proles" as property; or, better still, that we distinguish procreation (end) from procreativity (property).²⁹

I think we can find clear support for this argument in that very important passage of the *Supplementum* where St. Thomas himself speaks of "proles" in two senses: offspring "in its principles" (*proles in suis principiis*) and offspring "in itself" (*proles in seipso*).³⁰ We follow his thought when we distinguish between procreativity (*proles in suis principiis*),³¹ and actual procreation (*proles in seipso*). Procreativity—"intention of offspring," or at least "openness to offspring"—can never be absent from marital consent, since marriage cannot exist without its essential properties; however, actual procreation, although an end of marriage, is not essential to marriage for marriage does not always necessarily achieve its end.³²

The distinction between procreativity and procreation may seem fine, but it is quite clear. In particular, it is neither artificial nor unimportant. The use of *bonum proles* to describe an end rather than a property of marriage led to the unsatisfactory and strongly controverted question of the nature and scope of invalidating exclusion under the heading of *bonum proles*. The more common view (also in rotal jurisprudence) identified the *bonum proles* with the physical *copula* considered in isolation: it therefore identified the exclusion of the *bonum proles* with the exclusion of the "omne ius ad coniugalem actum" of the former canon 1081, §2.³³ As long as the conjugal act itself was

²⁹ If one does not observe this terminological exactness, one can be led into saying that marriage is ordered to one of its properties, or has one of its properties as an end. One cannot properly say that the *bonum sacramenti* or the *bonum fidei* is an end of marriage. It is equally improper to say that the *bonum proles* is one of its ends.

³⁰ *Supplementum*, q. 49, art. 3.

³¹ It seems evident that the "principles" of offspring, to which St. Thomas refers, are the two principles of masculinity and femininity, proper to the spouses. The *bonum proles* which each spouse confers on the other is the potential for fatherhood or for motherhood, as the case may be.

³² So there exists a "ius ad procreativitatem"—to what the other can give—because the willingness to procreate lies within the other party's power; but there is no "ius ad prolem" because actual procreation does not lie fully within the power of the other party; it always remains a gift of God.

³³ O. Giacchi, for instance, insists that the identification of the *bonum proles* with the *ius ad coniugalem actum*, considered in itself, is "the only way of understanding it from the juridical point of view." See *Il Consenso nel Matrimonio Canonico* (Milan, 1950), p. 190.

properly performed, this view declined to regard a permanent intention to frustrate that act's natural result as being contrary to the *bonum proles*.³⁴ Many rightly felt that this view could not correspond to justice; but they had difficulties under the old code in finding juridic support for their thesis that the permanent intention to frustrate the conjugal act's natural effects implied an exclusion of the *bonum proles* and so invalidated.³⁵

The answer to these difficulties, it seems to me, is that the *bonum proles* is essentially integrated into marriage, but as a property, not as an end. In other words, procreativity enters the essence of marriage as one of its integral elements; actual procreation does not.

To my mind, the reinstatement of the *bonum proles* within the category of an essential matrimonial property would not only mark a greater terminological precision, but would also contribute to a better understanding of the delicate balance between the essential elements integrating matrimony. With regard to canon 1056, it should be observed that there is nothing in the Latin text to indicate that the enumeration of essential properties is meant to be exhaustive. Vernacular translations, however, do tend to give this impression. It might eventually prove opportune to rephrase the Latin so as to avoid any impression that the third augustinian *bonum* is not to be ranked among the essential properties of matrimony. Thus legislation would be brought more in line with theological thinking. For its part, jurisprudence, which is already at home with the scheme of the triple *bona*, may well wish to tighten its understanding of the *bonum proles*.

With regard to the phenomenon of exclusion, the view I have put forward suggests an analysis which in broad outline would be: (1) the exclusion of faithfulness or permanence invalidates because an essential property is excluded; (2) the exclusion of offspring invalidates on a double ground: as exclusion of an essential property (*bonum proles*) and as exclusion of an end (procreation).

Roman Roia

CORMAC BURKE

³⁴ The *ius in corpus* being regarded as the essential object of matrimonial consent, it was felt that to take cognizance of the possible effects of the conjugal act was equivalent to making the end of marriage enter into its essence; cf. Omoberto Fumagalli Carulli, *Il Matrimonio Canonico dopo il Concilio* (Milan: Dr. A. Giuffrè, 1978), pp. 74ff.

³⁵ Cf. Fumagalli Carulli, pp. 76ff.