A QUESTION OF INTERPRETATION: THE ROMAN ROTA AND THE THEOLOGY OF MARRIAGE

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Judges need guidance if they are to apply the law in particular circumstances with an even hand. For Roman Catholics, Canon 19 of the 1983 Code of Canon Law provides this guidance by reference to the practice of the Roman Curia and by the constant opinion of learned authors. Useful as these supplementary sources are, they mean that judges have to trust that those responsible for making decisions in the Roman Curia and the learned authors have drawn their conclusions on a sound basis. This study considers what happened when a specific document was misunderstood in the Roman Catholic Church for almost four hundred years. The document, a letter from Pope Sixtus V to his Nuncio in Spain in 1587, responded to a specific query concerning the capacity for marriage of men who had been castrated. The interpretation of the letter defined the Roman Catholic Church's concept of marriage in general and its understanding of the impediment of impotence for four centuries. In the twentieth century, several Roman Catholic judges and canonists refused to take at face value the conclusions offered by other judges and learned authors, and decided to carry out their own analysis of the document in question. This resulted in a complete reversal of the way in which marriage cases were considered by the Apostolic Tribunal of the Roman Rota, and contributed to the emergence of a much richer and more integrated theology of marriage.

THE ROLE OF THE CANONIST

Of their very nature, laws are meant to provide for a general situation. They cannot provide for every possible set of circumstances. One of the most important roles exercised in the Church by those who study or practise Canon Law is that of interpreting laws and other documents connected with them. Judges working in Roman Catholic ecclesiastical tribunals are often faced with a set of facts and circumstances where there is no specific provision of law to help them resolve the controversy, so they must make use of the supplementary sources mentioned in Canon 19 of the 1983 Code

of Canon Law.[1] In particular, judges must make use of the jurisprudence[2] and practice of the Roman Curia.[3]

According to Pope John Paul II,

> the influence of the Roman Rota on the activity of regional and diocesan ecclesiastical tribunals should be valued in particular. The jurisprudence of the Rota has always been and must continue to be a sure point of reference for them.[4]

A solution to a particular case of alleged nullity of marriage may be found by taking account of how the judges of the Roman Rota applied the general principles found in the Code to cases of a similar nature, especially when the application of the law by the Apostolic Tribunal is constant and well-established. But it is not uncommon to find a variety of views expressed on a given subject within the sentences of the Roman Rota. This has occurred when the Tribunal sought to deal with some new phenomenon, for example the development of a clearer understanding of human psychology led to the emergence of a jurisprudence concerning a grave lack of discretion of judgment and an inability to assume the essential obligations of marriage based on Canon 1081 of the 1917 Code of Canon Law. When doubts arise, judges seek the assistance of 'the common and constant opinion of learned authors'. But they must have confidence in the accuracy with which these authors have read the documents on which they base their conclusions.

AN EVENT OF NO LITTLE SIGNIFICANCE

The far-reaching consequences of reading documents inaccurately was highlighted particularly for Roman Catholic canonists in a decision of the Roman Rota on 27 January 1986 concerning alleged nullity of marriage due to male impotence. The case began in Rome in May 1974 when the wife submitted a petition seeking a declaration of nullity on the sole ground of her husband's impotence. The claim was based on medical evidence that the man could not produce living sperm. On 4 May 1978, a negative decision was given at first instance. An appeal was made to the Roman

[1] Canon 19 states: 'If on a particular matter there is not an express provision of either universal or particular law, nor a custom, then, provided it is not a penal matter, the question is to be decided by taking into account laws enacted in similar matters, the general principles of law observed with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned authors'.

[2] In Roman Catholic Canon Law, the term 'jurisprudence' refers to the understanding of law based on actual judicial decisions.

[3] This point was stressed before the promulgation of the 1983 Code in a Rotal decision before Egan, 9 December 1982: *Apostolici Rotae Romanae Tribunalis Decisiones*, vol LXXIV, pp 612-618.

[4] Pope John Paul II, Address to the Roman Rota, 30 January 1986, in W Woestmann (ed) *Papal Allocutions to the Roman Rota 1939-2002*, (Saint Paul University Ottawa, 2002), p 190.

Rota where an affirmative decision was given on 7 October 1980 in a very lengthy and scholarly sentence in which the whole history of the doctrinal question was examined in some detail.[5] Since there was no conformity of sentence, the case had to be referred to a further college of judges. The Dean saw the treatment of this case as providing an opportunity for giving an unequivocal guide to other tribunals and increased the number of judges to hear the case from three to nine. Monsignor José Serrano Ruiz wrote the sentence.[6] He used the opportunity of the judgment to consider the nature and the history of the jurisprudence of the Rota on the subject. In the end, the decision of the Rota in third instance was negative.

This was the last decision given by the Roman Rota where the central argument had to do with the composition of the substance ejaculated by the man during the act of sexual intercourse. Until 1977, the position of the Roman Rota had been solid and consistent: it held that the ejaculation of 'semen elaborated in the testicles' was an essential element of the act of sexual intercourse. With the decision of 27 January 1986, this conclusion is no longer sustainable: no petitioner can seek to have a marriage declared invalid on the ground of impotence amounting to a lack of 'semen elaborated in the testicles'. The Roman Catholic Church had witnessed a complete reversal in understanding the impediment of impotence. What had been regarded as certain had been directly contradicted. The origins of this situation can be traced to a less than careful study of fundamental documents.

THE BEGINNINGS OF THE DIFFICULTY: A CENTURIES-OLD DEBATE

The earliest decisions of the Roman Rota published in the twentieth century were constant in considering 'semen elaborated in the testicles' as an essential component of the act of sexual intercourse. In support of their view, the judges quoted contemporary canonical authors whose arguments, explicitly or implicitly, rested on the contents of the Apostolic Brief '*Cum frequenter*' issued by Pope Sixtus V on 27 June 1587.[7] This was written in response to two letters sent from the Nuncio in Spain to the Secretariat of State that indicated a controversy in Spain between the mendicant theologians on the one side and the Jesuits on the other concerning the practice of permitting castrated men to marry.[8] The Pope's answer to the problem was simple: the marriages of castrated men were null and such men were declared completely incapable of contracting

[5] Decision before Masala, 7 October 1980, *Apostolici Rotae Romanae Tribunalis Decisiones*, vol LXXII, pp 604-640.
[6] Decision before Serrano, 27 January 1986, *Apostolici Rotae Romanae Tribunalis Decisiones*, vol LXXVIII, pp 49-55.
[7] Sixtus V, '*Cum frequenter*' 27 June 1587 in P Gasparri (ed) *Fontes Codicis Iuris Canonici*, vol I (Typis Polyglottis Vaticanis, 1923), pp 298-299.
[8] Details of the correspondence and contemporary comments by theologians and canonists are found in A McGrath, *A Controversy Concerning Male Impotence* (Editrice Pontificia Università Gregoriana, 1988), pp 14-15.

marriage. Consequently, all future marriages of these men were prohibited and all men who had already married in that physical condition were to separate immediately.

The papal letter was communicated to the Bishops of Spain and its realms. Gradually, commentaries on it began to appear in the works of theologians and canonists. The most significant of these comments is to be found in the work of Thomas Sanchez; he claimed that prior to the Brief there had been three schools of thought concerning the marriage of castrated men:

a. those who believed that such men were suitable for marriage provided they were able to sustain an erection and have intercourse, even though they could not ejaculate anything;
b. those who held that such men were suitable for marriage but provided they were capable of ejaculating something, even though it might be unsuitable for procreation;
c. those who held that eunuchs lacking both testicles were incapable of marriage and that any marriage contracted by such men was invalid, because the truth of marriage required that the man be capable of emitting *true semen* within the woman's organ during the act of sexual intercourse.[9]

According to Sanchez, even before the Brief, this last position was certain and unchallenged and he referred to the works of some thirty-seven authors who were of the same opinion. This conclusion of Sanchez was very quickly adopted by subsequent writers: all men who lacked both testicles were deemed to be incapable of marriage; they suffered from the impediment of impotence; they were unable to produce 'true semen' which was essential for the act of sexual intercourse; as such they were incapable of achieving the primary end of sexual intercourse, since the act could not be described as 'of itself suitable for the procreation of offspring'.

This interpretation continued right into the twentieth century: for the greater part of the century writers accepted that: castrated men (that is, those who lacked both testicles, for whatever reason) were utterly incapable of marriage. As the century progressed, authors made reference to the matter when they considered the fitness for marriage of men who had undergone a vasectomy or found themselves in a similar physical condition due to the effects of various illnesses. These men were considered impotent because the authors saw them as unable to produce 'true semen'; the writers insisted that this was to be identified with 'semen elaborated in the testicles'.[10] If, for whatever reason, they argued, the man was not able in the

[9] T Sanchez, *De sancto matrimonii sacramento disputationes,* tome 2 (Apud Nicolaum Pezzana, 1754), lib 7, disp 92, nn 15-17, pp 256-257.
[10] The first explicit mention of this formula is found in P Gasparri, *Tractatus Canonicus de matrimonio*, (Gabriel Beauchesne et Socii Parisiis, 1904), vol 1, p 390. However, it has been claimed that the origins of the identification can be traced to the work of Franciscus Schmier in 1716 (cf C Gullo, 'Interpretazione autentica o abrogazione della legge?', *Il Diritto Ecclesiastico* 90 (1979) II, p 212).

act of sexual intercourse to ejaculate what was produced in the testicles, he was to be considered as equivalent to a castrated man, that is, impotent and incapable of marriage.[11]

This understanding of the letter of Sixtus V was accepted by the Roman Rota. More often than not, it was taken for granted and cited as something certain; in support of their conclusion, judges usually cited the works of older authors like Sanchez, and more recent writers like Gasparri and Wernz. The following is a brief summary of what judges considered to be the essential elements of the act of sexual intercourse:

1. emission of semen: thus penetration without ejaculation was not sufficient;
2. semen must be 'true' and not just any secretion produced during the act;
3. ejaculation must take place naturally, that is, from the erect male organ in the woman during the act of intercourse: artificial insemination was thus excluded;
4. semen must be ejaculated in the woman's organ and not outside.[12]

For a man to be considered potent, he had to have a penis capable of erection, at least one testicle that could produce 'true semen', and unobstructed ducts by which this semen could be ejaculated.[13] In their sentences, the judges of the Rota gave a great deal of attention to distinguishing what belonged to the 'action of nature' and what belonged to the 'human action' in sexual intercourse,[14] as well as providing information concerning certain conditions which resulted in the impossibility of the emission of whatever is produced in the testicles.[15] So clear was this principle considered to be that some authors and even some judges considered it to be the infallible teaching of the Church.[16]

DIVERGING OPINIONS AND PRACTICE

By the 1930s, however, a few writers were beginning to question the traditional interpretation of '*Cum frequenter*': thus, for example, G Arend examined the internal structure of the Brief and insisted that Sixtus V did not declare the eunuchs in Spain impotent because of a lack of 'true semen', but because they were incapable of achieving the ends of marriage;[17] other writers undertook a critique of the identification of 'true

[11] Cf for example F Wernz, P Vidal, P Aguirre, *Ius Matrimoniale* (Romae apud Aedes Universitatis Gregorianae, 1946), pp 288-293.
[12] C Holböck, *Tractatus de Jurisprudentia Sacrae Romanae Rotae* (Officina Libraria Styria, 1957), p 55.
[13] Ibid.
[14] Ibid 56-57.
[15] Eg Decision before Sabattani, 10 April 1959, *Monitor Ecclesiasticus* 84 (1959), pp 616-634.
[16] Eg F M Cappello, *De Matrimonio* (Domus Editorialis Marietti, 1947), p 352.
[17] G Arend, 'De genuina ratione impedimenti impotentiae', *Ephemerides Theologicae Lovanienses* 9 (1932), pp 36-43.

semen' with 'semen elaborated in the testicles', claiming that whatever Sixtus V understood by the term, he could not have intended it to refer to what modern science knows the testicles produce.[18] On the actual question of vasectomy, as early as 1911, B Ojetti had raised doubts about the certainty of the impotence of those men who underwent the operation.[19] Perhaps more radical was the critique offered by those authors who did not accept the traditional explanation of the distinction between 'the action of nature' and 'the human action' involved in the act of sexual intercourse. They argued that what belonged to nature was not under the dominion of the person placing the act; consequently, anything that was a matter of nature (for example unobstructed spermatic ducts) could not in any way be considered as essential for the human act of intercourse;[20] in fact, all that could be required by law was the performance of the act in its essential external features. By the end of the 1950s, a growing school of thought found the traditional interpretation and application of '*Cum frequenter*' increasingly problematic.

The views of these writers found some support in the practice of the Holy See. While the Roman Rota was prepared to declare marriages invalid on the basis of an inability to produce or emit 'true semen' (that is, semen elaborated in the testicles), the Supreme Sacred Congregation of the Holy Office was issuing declarations permitting the marriage of men who found themselves in precisely the same circumstances. In 1935, the Congregation permitted the marriage of men who had suffered a vasectomy as a result of the Nazi law of enforced sterilisation.[21] Similar responses were given by the Holy Office and the Congregation for the Sacraments to individual queries during the next three decades.[22] Early in 1964, the assistance of the Holy Office was sought in resolving a case where a man had undergone a vasectomy prior to marriage and the decision was that this marriage could not be declared invalid on the ground of male impotence. When pressed further, the Congregation stated that the decision was based on the response given in 1935, but declined to answer more detailed questions, saying that it was inopportune to do so since there was no single opinion on the matter among moralists and canonists.[23]

In other cases, where the problem placed before the Holy Office involved men who lacked testicles, the Congregation declared that marriage was not

[18] Eg E H Nowlan, 'Double vasectomy and marital impotence', *Theological Studies* 6 (1945), pp 402-405.
[19] B Ojetti, *Synopsis Rerum Moralium et Iuris Pontificii*, vol 2 (Officina polygraphica editrice, 1911), col 2277.
[20] Cf J McCarthy, 'The impediment of impotence in the present day Canon Law', *Ephemerides Iuris Canonici* 3 (1947), pp 112-123.
[21] Cf A Silvestrelli, 'Circa l'impotenza e l'inconsumazione nella giurisprudenza canonica anche del S Uffizio', *Monitor Ecclesiasticus* 98 (1973), pp 114-115.
[22] Cf J Haring, 'Eine interessante Ehesanation', *Theologisch-praktische Quartalschrift* 93 (1940), p 145; JP King, 'Procedure to be followed in obtaining permission for marriage by the doubly vasectomised', *The Jurist* 23 (1963), pp 454-455.
[23] The text of the correspondence and responses are to be found in *Canon Law Digest*, vol 6, pp 616-618.

to be impeded since there was a doubt about the presence of the impediment of impotence.[24] What had been interpreted uniformly for almost four centuries as constituting male impotence appeared to have been set aside by the Holy Office. In fact, in its response of 4 June 1965, the Congregation referred explicitly to the fact that authors disagreed about whether there was impotence or not in these cases; consequently, there was a doubt of law: the actual physical defects were not regarded as certain proof of the impediment of impotence. Signs of dissatisfaction with the traditional reading of the Brief of Sixtus V also emerged in the discussions of the experts preparing the new Code of Canon Law.[25] When Paul VI approved a decision to validate the marriage of men who had undergone vasectomies, he ordered that the whole question should be studied carefully by the Holy Office and all other interested departments of the Roman Curia so that a uniform and obligatory conclusion might be found.[26]

All these developments had no immediate effect on the practice of the Roman Rota. Indeed, some sentences can be found where the judges make explicit reference to the practice of the Holy Office, explaining it in such a way that the constant jurisprudence of the Rota was left intact. But that position was to change radically.

THE DECREE OF THE SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH OF 13 MAY 1977

The Decree of the Congregation for the Doctrine of the Faith issued on 13 May 1977[27] is intended to be the uniform and obligatory conclusion sought by Paul VI. It resolved the dispute about the identification of the 'true

[24] Cf *Canon Law Digest*, vol 6, pp 618-620.
[25] Pontificia Commissio Codici Iuris Canonici Recognoscendo, Coetus Studiorum de matrimonio, Conventus diei 16 februarii 1970, 'De impotentia matrimonium dirimenti',*Communicationes* 6 (1974), pp 178-191.
[26] J R Cardinal Knox, 'De copula coniugali inconsummativa matrimonii iuxta doctrinam et praxim S Congregationis pro Sacramentis et Cultu Divino', in B Marchetta, *Scioglimento del matrimonio canonico per inconsumazion*, (CEDAM Padova, 1981), p 396.
[27] The text of the Decree is as follows:

> 'The Sacred Congregation for the Doctrine of the Faith has always held that persons who have undergone vasectomy and other persons in similar conditions must not be prohibited from marriage because there is no certain proof of impotency on their part. And now, having examined that practice, and after repeated studies carried out by this Sacred Congregation, as well as by the Commission for the Revision of the Code of Canon Law, the Fathers of this Sacred Congregation, in the plenary assembly held on Wednesday, 11th May, 1977, decided that the questions proposed to them must be answered as follows:
>
> 1. whether the impotence which invalidates marriage consists in the incapacity to complete conjugal intercourse which is antecedent and perpetual, either absolute or relative?
> 2. inasmuch as the reply is affirmative, whether for conjugal intercourse the ejaculation of semen elaborated in the testicles, is necessarily required?

semen' of '*Cum frequenter*' with 'semen elaborated in the testicles'. The constant jurisprudence of the Roman Rota on this question was overturned and the practice of the Holy Office since 1935 was vindicated.

No sooner had it appeared than the Decree itself became the focus of attention. Authors and judges sought to understand how the constant jurisprudence of the Roman Rota and the prevalent opinion of respected canonists had been set aside or even reversed; they sought to harmonise what had happened in 1977 with all that had gone before; they found themselves dealing with new questions: for example, what was to be done with a marriage celebrated before 13 May 1977 if a petition for nullity was introduced on the ground of impotence as understood according to the former Rotal jurisprudence? what was to be done in the case of men whose marriages had been declared invalid in the past on this basis—were they now to be considered potent, and so still married to their former spouses? or were they still to be regarded as impotent and thus prohibited from entering a further marriage?

Basically, their opinions fall into three schools of thought:

a. the Decree is an act of the teaching authority of the Church; it is a statement of the natural law pure and simple;
b. the Decree is an act of positive ecclesiastical legislation; as such, it must be interpreted and applied in accordance with the norms of the Code of Canon Law;
c. the Decree is a statement of natural law but with elements of positive ecclesiastical law; those elements are to be interpreted and applied in accordance with the norms of the Code.[28]

In the sentence of January 1986, Serrano examines the nature of the Decree in some detail and concludes that it is not a juridical norm in the strict sense: it is neither a norm founded on natural law nor one derived from it: it is a declaration of the objective order of things; it does nothing other than make clear a concept that was hitherto obscure. As such, it is not appropriate to speak of the retroactivity or non-retroactivity of its effects; what the Decree states is the case and always was the case according to the law of nature. He rejects the arguments of those who suggest that the Decree is a derogation of any positive law norm imposed by '*Cum frequenter*'; and he repudiates the idea that the Decree is subject to the

> To the first question: in the affirmative; to the second question in the negative. And in the Audience granted to the undersigned Prefect of this Sacred Congregation on Friday, the 13th day of the said month and year, the Supreme Pontiff, Paul VI, approved the above decree and ordered that it be published. Given at Rome from the offices of the Sacred Congregation for the Doctrine of the Faith, 13th May 1977:

Acta Apostolicae Sedis 69 (1977), p 426. The English translation is a modified version of that found in *Canon Law Digest*, vol 8, pp 676-677.

[28] Details of the variety of views on the Decree are to be found in A McGrath, *A Controversy Concerning Male Impotence*, pp 264-273.

norms concerning the promulgation of law. In Serrano's view, the Decree resolved a very complex situation where totally contrasting views and practices existed simultaneously. The natural law itself was not doubtful; the human understanding of it was. Henceforth all cases of nullity based on claims of male impotence are to be resolved in the light of the certainty achieved by the Decree.[29]

This view is supported by those who have argued that the Decree is an act of the Pope and not simply an act of the Congregation, on the basis that Paul VI made explicit reference to it in his address to the Roman Rota on 28 January 1978:

> The most important quality ... continues to be your constantly reaffirmed readiness to follow the guidance of the *magisterium*. In this respect, the decree issued last May by the Sacred Congregation for the Doctrine of the Faith and expressly approved by us is a particularly significant test. You are well aware of the origin, value, and reasons of that decree, which was preceded by lengthy and careful studies—as noted in the short introduction to the decree—and corroborated by the authoritative opinion of the Pontifical Commission for the Revision of the Code of Canon Law. The decree is articulated in two important replies which will find frequent application in the work you do. We have no doubt that these doctrinal principles will provide direction and guidance, when you pass judgments and that we will, thus, have a further proof of the scrupulous adherence to the *magisterium* which this renowned tribunal of the Holy See has always professed throughout its centuries-old life.[30]

Some judges adopted the view that this reference to the Decree meant that it had been approved '*in forma specifica*' and that the nature of the document had changed;[31] others were not so easily convinced: while not disputing the contents of the Decree, they drew a neat distinction between confirmation and approval, arguing that the Pope's words added nothing new to the force of the Decree.[32] The fact that Serrano makes passing reference to what Paul VI did and did not do by virtue of this Decree shows that by now it is commonly understood that the Decree was indeed an act of the Pope. It is not a law, but an intervention of the Roman Pontiff as teacher; it is an act of the Church's teaching authority. When placed alongside '*Cum frequenter*', it is clear that there is no contradiction between the two documents. They are complementary: when it is read correctly in its text and historical, scientific and theological context, the letter of Sixtus V does nothing but state the Church's teaching concerning sexual potency

[29] Decision before Serrano, 27 January 1986, *Apostolici Rotae Romanae Tribunalis Decisiones*, vol LXXVIII, pp 56-59, 63, 66-70.
[30] Paul VI, address to the Roman Rota, 28 January 1978, in W Woestman (ed) *Papal Allocutions to the Roman Rota 1939-2002*, pp 146-147.
[31] Eg Decision before Raad, 9 March 1978, *Ephemerides Iuris Canonici* 34 (1978), pp 363-365.
[32] Eg Decision before Pinto, 17 November 1978, *Monitor Ecclesiasticus* 104 (1979), p 417.

for marriage based on the law of nature itself, that is, anyone incapable of the act of sexual intercourse is prohibited from entering marriage. The Decree of 1977 reiterates this principle and clarifies the non-necessity of an element that had come to be understood as essential to that act.

CONCLUSION

The Decree of 1977 brought an end to a long debate over the precise interpretation to be given to '*Cum frequenter*' and to the differing practice of the Congregation for the Doctrine of the Faith and the jurisprudence of the Roman Rota. It serves to highlight a problem that affects canonists not only in the Roman Catholic Church but everywhere: there is no substitute for careful, thorough and accurate study of documents, historical and contemporary, seeking to discover what they say in the particular historical circumstances in which they are produced and in the context of the particular question to which they are addressed. In this particular case, the origins of the problem lie in the way in which Roman Catholic canonists over four centuries read and interpreted one document, the letter '*Cum frequenter*'.

The first writers to comment on the document, especially T Sanchez, concluded that the Pope had declared castrated men impotent because of their inability to produce 'true semen'. As Sanchez's book became the standard text in all matters to do with the canon law of marriage, his reading of the letter was repeated almost verbatim by subsequent canonists. In addition, Sanchez claimed that his interpretation was the common and constant opinion among the learned canonists even before the appearance of the Brief and he cited a list of some thirty-seven authors in support of this argument, something that is a regular feature of his impressive work. At face value, therefore, his position seemed unassailable.

However, an examination reveals that all is not as it should be: of the authors quoted by Sanchez, seven wrote after the appearance of '*Cum frequenter*' and can hardly be said to corroborate the claim that a certain opinion was prevalent beforehand; of the others, not one can be found who unequivocally indicated that a man could be declared impotent on the basis of some defect in the substance emitted during the act of sexual intercourse. In fact, when all the authors referred to by Sanchez are examined, the common and constant opinion of the vast majority appears to be the very opposite to what Sanchez claimed.[33]

A good canonist ought always to take the document in hand and make his or her own analysis of the text. When this was done in the first half of the twentieth century, questions emerged about the reasoning of the Pope as presented by the prevalent interpretation of the Brief: for example, it was pointed out the reference to 'true semen' appears not in the dispositive part

[33] Details of these authors and their various views can be found in A McGrath, *A Controversy Concerning Male Impotence*, pp 57-111.

of the document, but in the expositive part, that is, that part which contains a summary of the problem as presented to the Holy See by the Nuncio. In the dispositive part of the document, where the Pope actually outlines his decision, he makes no such references, but relies instead on references to the teaching that those who marry must be capable of achieving the ends of marriage. The Pope makes clear that, given the facts before him, in the light of the principles of law and Church teaching, the men in question are to be considered impotent.

It is surprising that canonists of the calibre of Sanchez did not undertake a more thorough analysis of the document itself but chose instead to focus their attention on something mentioned in its opening lines. Only when canonists, perhaps under the influence of the development of textual analysis and criticism associated with biblical studies, began to read the text carefully before seeking to apply it to any concrete cases did the predominant interpretation and jurisprudence come into question. The work of these canonists stands in marked contrast with that of others who chose simply to repeat what Sanchez had written.

In his sentence of January 1986, Serrano pointed out that the Decree of 1977 cannot be read, nor can the change in jurisprudence be understood unless one takes into account the contemporary awareness of the radical equality of human beings, the radical nature of the human right to enter marriage, a greater appreciation of the relevance of external matters in the juridical sphere, a greater appreciation of what constitutes a free human act, and finally an ever increasing awareness of the significance of the Church's teaching about marriage as a communion of life and love.[34] The emergence of this new mentality helped to shape the practice of the Holy Office when faced with requests about enforced sterilisation being carried out by totalitarian regimes.

He might have added that the whole affair is a timely lesson about the importance of studying documents carefully. The Brief '*Cum frequenter*' was an important intervention of the Church's teaching authority in the late sixteenth century in response to a very specific problem. In the course of the following four centuries, and particularly during the twentieth century, the text of this document was expected by many jurists to contain the answers to questions that were arising only then. The manner in which many continued to read the Brief until quite recently is a lesson in how not to read and interpret Church documents: although not a law in the strict sense, '*Cum frequenter*' ought to be read in the same way as ecclesiastical laws, that is, in text and in context. Only when proper attention was given to the internal structure, literary form and historical context of the document was its true significance uncovered.

The Brief may have been a letter from the Pope to his Nuncio in Spain,

[34] Decision before Serrano, 27 January 1986, *Apostolici Rotae Romanae Tribunalis Decisiones*, vol LXXVIII, p 62.

but it had a much wider significance and reception. The fact that this document was being quoted widely throughout Europe in the century after its promulgation in Madrid in November 1587 shows that it was never understood to be a simple disciplinary letter dealing with a local problem: rather, it was understood as an intervention by the supreme authority of the Church in a matter of the utmost importance. Even though contemporary commentators did not use the expression, it is clear that they understood it to have consequences for the natural right of some men to marry. The Decree of the Congregation for the Doctrine of the Faith is a similar intervention. Although occasioned by a dispute in doctrine and a divergence in practice, and although it takes the form of a simple response, it is clear that the Decree was not simply a disciplinary or legislative intervention. In fact, Paul VI, by his explicit reference to it, made it abundantly clear that the Decree is to be understood as an act of the teaching authority of the Church. And yet the nature and force of the Decree remained a matter of debate for almost ten years.

But what can be said about the divergent practice? Serrano points out that it must be remembered that both the Rota and the Congregations were using human criteria for applying what was accepted as a principle of the natural law. The Rota was confident that the prevailing interpretation of '*Cum frequenter*' provided the surest guidelines for the cases with which it was presented; this jurisprudence appeared to rely more on the issue of the primary end of marriage, that is, the procreation of children. The Congregations, on the other hand, adopted the norm of the common estimation of things and had recourse to equity. Given the unjust situations that led to the development of their practice, this is not surprising. Serrano makes it clear that both approaches were human ways of deducing and interpreting the same law of nature; both were legitimate. As the true nature of the problem emerged, with the intervention of the teaching authority of the Church, the divergent opinions and practice have now been resolved. This resolution is due not to the unchangeable character of the law of nature but to the Decree of the Congregation by which the truth of the natural law is made known to all. It is in this sense that the document can be said to have been promulgated and to have binding force.

Finally, it should be emphasised that the impact of the change which has taken place and the process by which the change became necessary is not simply an academic issue or a matter of purely historical interest; nor is it something on a practical level which has influenced the lives of a small number of people. The critique of the Brief and the emerging practice of the Roman Congregations helped to contribute towards the development of a broader, more person-centred understanding and theology of marriage that can be found in the teaching of the Second Vatican Council. This is summed up in Canon 1055 §1 of the 1983 Code of Canon Law: there is no longer any mention of 'primary' or 'secondary' ends of marriage. Instead, marriage is described as ordered of its own very nature to the well-being of the spouses and to the procreation and upbringing of children. The Roman Catholic Church's fuller and more rounded understanding

of marriage, as stated in that Canon, owes no small debt to those judges and canonists who had the courage and integrity to question what had been accepted as certain for centuries, and undertook a critical study of a document and its interpretation that had helped to define marriage for almost four centuries.