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MARRIAGE CONSENT AND ITS PATHOLOGY

Students of canon 1095 are aware that the difficulties of interpreting this canon hinge on two fundamental questions: the nature of marriage consent and the pathology of consent. These are questions that ought to be studied by different disciplines whith their own conceptual categories, thus challenging the canonist to integrate this varied knowledge into precise juridic concepts. The Roman Pontiff, John Paul II, has addressed this question in his speeches to the Roman Rota on February 5, 1987 and January 26, 1988 (1) and in the process of doing so, he has offered to the canonist not only some procedural guidelines addressed to judges, experts and defenders of the bond, but also an interpretation of the law contained in canon 1095 which he promulgated on his own authority (2).

I. *The Juridic Notion of Marriage Consent.*

1. *Theology, Psychology, and Juridic Categories.* — Any canonical study of Christian marriage is always a theological study, but

(1) Cfr. JOHN PAUL II, *Address to the R. Rota*, Jan. 26, 1988, n. 6.

(2) Cfr. J. MARTÍN DE AGAR, *L'incapacità consensuale nei recenti discorsi del Romano Pontefice alla Rota Romana*, in *Ius Ecclesiae*, 1 (1989), p. 395-422.

fundamentally it ought to be a juridic study, for Christian marriage is a natural reality raised to the order of grace without change in its essential nature (3). In fact, the discipline that can best integrate the diversity of knowledges about marriage is canonical doctrine, because marriage consists of a relationship between two persons made up of certain acts that are due in justice, since these acts are « ordered » towards a common good and « due » by force of the same order, and because it is the subject matter of legal philosophy, or jurisprudence, to understand particular forms of human behavior as they originate rights and obligations among human persons. Juridic categories, or juridic definitions of human acts, do not attempt to give a comprehensive understanding of the acts involved, for no specialized knowledge can attempt to do that, but the juridic categories that define marriage, while not materially comprehensive of the entire reality of marriage, contain in essence all other acts that make up this particular form of human behavior.

Since Christian marriage ought to be studied under the light of Revelation, the canonist is a theologian as well as a jurist, for the law of the Church regards Christian marriage, first *under the aspect of justice* as a natural juridic reality, and then *under the aspect of charity* as a way of union with divine providence. For this reason, contemporary canonists rightly seek enlightment in the theological and pastoral texts of the II Vatican Council. In fact, the revised Code itself seeks to integrate the theological and pastoral teachings of the Council into its juridic formulations (4). After the Council, the rich theological and pastoral teaching of John Paul II on marriage (5) continues to challenge the canonist to integrate the theological and pastoral notions into juridic categories.

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(3) Cfr. c. 1055.

(4) The Council's most important contribution to the understanding of Christian marriage is its teaching that « Christian spouses, in virtue of the sacrament of matrimony, help each other to attain to holiness in their married life », since « all the faithful, whatever their condition or state, are called by the Lord, each in his own way, to the perfect holiness whereby the Father himself is perfect » (*Lumen Gentium*, n. 11). From this theological insight, the other Council declarations on marriage develop the guidelines for the appropriate pastoral care and promotion of Christian marriage and the family (*Gaudium et Spes*, nn. 47-51 and *Apostolicam Actuositatem*, n. 11).

(5) Cfr. JOHN PAUL II, *Apostolic Exhortation Familiaris Consortio*, No. 22; Collected speeches in *Original Unity of Man and Woman, Blessed are the Pure of Heart, Reflections on Humanae Viate, The Theology of Marriage and Celibacy*, St. Paul Editions, Boston, Mass., 1980, 1981, 1984, 1986.

The juridic study of Christian marriage requires, as canon 1095 makes evident, the light of the psychological disciplines. In fact, when canon law has to deal with the psychological integrity of marriage consent, it invades the province of clinical psychology, and this is acknowledged by the law itself when it requires the help of a social dydadic behavior that includes many acts of communicating and psychological expert before the judge can make a judgement about the entire matter (6). Psychology (whether philosophical or empirical) is also a science of human conduct with its own categories and descriptions of behavior. In order to integrate the notions of psychology with the juridic categories of behavior, the canonist must be able to distinguish how the same reality is studied differently by psychology or by the law: the psychologist, for instance, defines marriage consent as a particular « choice » or election and is mainly interested in the dynamics of this choiche, while the jurist defines it as a personal act from which originate certain rights and obligations. While marriage consent is ultimately to be defined in juridic terms, juridic categories concerning marriage presuppose that all acts involved in marriage are rational acts as these are understood by the psychological sciences.

Psychologists also point out the « interpersonal relationship » that is involved in marriage, thus describing the dynamics of a social dydadic behavior that includes many acts of communicating and sharing with another person; reflecting on this human phenomenon, philosophy seeks the metaphysical roots of « this relation between persons » while theology (most notably in the teaching of John Paul II) sheds new light into this « interpersonal relationship ». The jurist, on the other hand, describes the same reality by the particular rights and obligations which constitute the relationship. Without ignoring all these insights, the jurist, then, should distinguish between the definitions and descriptions of the other disciplines and integrate them into juridic categories.

In his two addresses to the Roman Rota, the Holy Father asks for a common ground in the dialogue between the judge and the psychologist to be found « within the horizon of a common anthropology » (7). This common ground, in our opinion, is to be found in the metaphysical notions and dynamics of free choice as explained

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(6) Cfr. c. 1680.

(7) Cfr. JOHN PAUL II, *Addresses to the R. Rota*, Febr. 5, 1987, n. 3 and Jan. 26, 1988, n. 4.

by philosophical psychology. Juridic categories, and in a special way the notion of marriage consent, deal with *responsibility*, which cannot be properly determined without understanding free will and its role in the formation of a choice. Empirical psychology does not ordinarily address the problem of ethical and juridic responsibility, for this is an ethical question beyond the range of the empirical method. In fact, this problem affects not only canon law but civil law as well, for indeed the notions of empirical psychology operate with standards of « normality » or « abnormality » of a behavioristic kind which have little to do with the notions of ethical and juridic responsibility.

Canon 1057, § 2 defines matrimonial consent as « an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to form a marriage ». As an act of the will, consent is a most personal and nontransferable act which « no human power can supply » except the contracting parties (c. 1057, § 1). But in defining matrimonial consent as an « act of the will », the legislator is not describing the psychology of this will act but specifying its juridic nature which consists of the « giving and accepting of each other in order to form a marriage ». In this juridic sense, then, consent is the *essence* of the covenant (or *irrevocabile foedus*), and the *efficient cause* of marriage: *matrimonium facit partium consensus* (c. 1057, § 1). The juridic nature of this will act is completed by the other elements mentioned in § 1 and 2 of the same canon, namely: *a*) it is mutual, *b*) irrevocable, *c*) between a man and a woman, *d*) who are legally able, *e*) lawfully manifested. The « giving and accepting of each other », which is the direct object of consent, is to be understood in terms of « forming a marriage », the end or purpose of the will act. For this reason, then, we have to study now the terms used in canon 1055 in which we find all the elements needed for a definition of marriage.

2. *Covenant, Partnership, and Ends of Marriage.* — « The marriage covenant by which a man and a woman establish between themselves a partnership of their entire life, and which of its own nature is ordered to the good of the spouses and to the procreation and upbringing of offspring has, between the baptized, been raised by Christ the Lord to the dignity of a sacrament » (c. 1055, § 1).

a) The marriage *covenant* mentioned at the start of the canon is the binding agreement (pact, alliance, or contract). Canonical doctrine has identified this stage of marriage as *matrimonium in fieri*,

or marriage in the making. The use of the term « covenant » in the new Code adds a theological connotation which seems very appropriate to convey the idea of participating in the salvific plans of God at the same time that it expresses the essentially juridic nature of this agreement. As in the case of God's covenants with his people, a « covenant » is a source of rights and obligations and the sign of the sacrament from which takes origin the Christian family, or « domestic church »: the elementary cell of ecclesial society and leaven of civilized society (8).

b) By means of this covenant, « a man and a woman establish among themselves a *partnership* (*consortium*) of their entire life » which is marriage in fact or *matrimonium in facto esse*. The term « partnership » means, in ordinary language, a joining of efforts on the part of two or more persons who commit some of their acts to the pursuit of a common good. The words « of their entire life » (*totius vitae*) which qualify the « partnership » mean that this is a lifelong, unbreakable « common fate » (for this is the etymological meaning of *con-sors*). One may want to extend this meaning and say that the partnership colors every aspect of the spouses' lives. While a business partnership can be temporary and can always be separated from the other aspects of a partner's life, this lifelong partnership touches every aspect, though in different degrees, of the married partners' lives.

The notion of « partnership », which the contracting parties seek to establish among themselves (*inter se ... consortium constituere*), defines the joining of two persons in juridic terms, that is to say, in terms of rights and obligations. What distinguishes this relationship from any other that may exist between a man and a woman (e.g. concubinage) is the *binding* character of those acts which make up the partnership. The term « partnership », then, means the juridic bond of marriage, or union due in justice. Marriage consists of a relationship between a man and a woman, who enter into an « ordering » of themselves in the pursuit of a common good by means of certain acts which are *due* by force of the « ordering » they have entered into. Since the « right ordering » of one's act in relation to others is the proper good of justice, we can see that marriage is a relation of justice (9).

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(8) Cfr. *Gaudium et Spes*, n. 11; *Familiaris Consortio*, nn. 42 ss.

(9) Cfr. E. MOLANO, *La Naturaleza del Matrimonio en la Doctrina de Santo Tomás*, in *Persona y Derecho*, 1 (1974), p. 166-170.

c) Since the « partnership », or marriage bond, is made up of the acts that are due between the spouses, we ought to define those acts by studying *the ends* to which marriage is « naturally ordered », namely « the good of the spouses and the procreation and education of offspring » (c. 1055, § 1) [10].

We should first recall the elementary notion that the ethical quality of human acts is defined not by the physical end, result, or *terminus* of the operation, but by the *moral good* implied in the end to which the act is directed. To define, then, the nature of that type of human behavior called marriage, we should identify the moral good which is the *ontological end*, or *finis operis* of marriage. This *ontological end* is not to be confused with the *finis operantis*, or intention of the agent, which may or may not coincide with the *finis operis* and is irrelevant in defining marriage as instituted by the Creator.

Traditional teaching, as exemplified in the *Summa Theologiae*, shows that marriage exists in function of the good of the offspring as well as the good of the spouses through their mutual services. Natural reason itself inclines the human person to the attainment of these goods through marriage which exists, then, to fulfill a « role of nature » (*in officium naturae*) [11]. Reiterating and developing the teaching of the Second Vatican Council, John Paul II reflects on the nature of marriage through the prism of the human person's

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[10] Since canon 1013 of the '71 Code distinguished between the primary end (*procreatio et educatio prolis*) and the secondary ends (*mutuum adiutorium et remedium concupiscentiae*), the question has been raised on whether or not the new Code, and the Second Vatican Council before the Code, has changed the ends of marriage. We have already seen that it was not the intention of the Council to treat of the juridic nature of marriage, and for this reason the Council's documents did not include the '71 Code's definition on marriage, but then when the drafters of the '83 Code decided to use the words of *Gaudium et Spes*, n. 48 as a theological/juridic principle in the formulation of canon 1055, they had to leave out the more precise distinctions between primary and secondary ends. Although these distinctions belong more properly to philosophical ethics and are not, strictly speaking, juridic categories, they are not irrelevant to the juridic study of marriage, nor have they been superseded by the new legislation; those distinctions contribute to define marriage in *officium naturae* and to understand the object of consent which we are now investigating. Cfr. JOHN PAUL II, *General Audience*, Oct. 10, 1984, n. 3, in *Reflections on Humanae Vitae*, p. 57, St. Paul Editions, Boston, 1984.

[11] Cfr. ST. THOMAS AQUINAS, *Summa Theologiae*, Suppl., q. 49, a. 3; q. 41, a. 1.

« vocation to love », which includes the human body as the body is made a sharer in spiritual love. As the human person's capacity to love is a participation in God's transcendent love, the human person is called to a fruitful love: to give to another person the goods of one's own life in order to « pro-create » them jointly in other persons. In the covenant of conjugal love (i.e. marriage), the spouses commit themselves to that « total personal self-giving » in order to seek the good of each other and the good of the children born from their conjugal love (12).

Through the marriage covenant, then, the spouses enter into a *consortium* or partnership in which they commit themselves *in justice* to give to each other, through their free acts, those human goods included in their own masculine and feminine humanity. This includes not only sexual acts but also a sharing of those spiritual goods by which they complement each other for, in the plans of the Creator, it is not good for either man or woman to be alone (13). By committing their own masculine and feminine modalities to each other in justice, the spouses seek the good of each other as desired by the Creator. The *good of the spouses*, then, is an ontological end of marriage *in officium naturae*, that is to say, a *finis operis* or end intended by the Creator. For this reason, a person who chooses to marry when procreation is not physically attainable still chooses a true marriage because the good of the spouses is also an ontological end and a moral good that gives to the relationship the ethical entity of marriage (14).

But marriage is also ordered by its own nature to *procreation and upbringing of offspring*. In the language of the Second Vatican Council, procreation and upbringing of offspring is the fulfillment and purpose of marriage and conjugal love (15). As John Paul II explains, the

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(12) Cfr. *Familiaris Consortio*, nn. 11; 28-29. The « total » personal self-giving refers, in the context of this expression, to the giving of both body and soul (cfr. *S. Th.*, Supl. q. 44, art. 2, ad 3); it does not refer to a giving of self in those things not required by the ends of marriage: in fact, Aquinas teaches that a husband does not give to his wife a power over his body in every respect, but only in what is required by marriage (Cfr. *S. Th.*, Suppl., q. 65, art. 1. & q. 64, art. 2.). Much less does the term « total » refer to a « perfect » self-giving which would in fact be beyond human capacity.

(13) Gen. 2:18.

(14) Cfr. *Familiaris Consortio*, n. 14.

(15) Cfr. *Gaudium et Spes*, n. 48 and 50; *Familiaris Consortio*, nn. 11-12 and 14.

« fundamental task » of marriage (and by derivation of the family) is to « actualize in history the original blessing of the Creator: to transmit by means of procreation the divine image from person to person » (16). And since the transmission of human life requires the « personal self-giving » of the spouses, the covenant of conjugal love is ordered to the personal good of the spouses in function of the personal good of the *children* (17).

d) Besides the ontological ends, we ought to mention the two *essential properties* (unity and indissolubility), which further quality the nature of the covenant and of the relationship resulting from it. The integrity of the ontological ends (the good of the spouses and procreation/education of offspring) requires that marriage be one and indissoluble (18): these are properties required by natural law (19), which in Christian marriage acquire a greater firmness by reason of the sacrament (c. 1056). Therefore, if a person were to exclude unity and indissolubility from the relationship at the moment of consent, the person would be choosing something other than marriage (20).

Christian Theology from the time of St. Augustine has described Christian marriage with the three *bona* of offspring, fidelity and the sacrament. These concepts describe the blessings or gifts that accrue to marriage and are not to be confused with the notions of ontological ends which define the essence of marriage. However, if one were to exclude with a positive act any of these *bona* from the marriage contract, one would be excluding the

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(16) Cfr. *Ibid.*, n. 28.

(17) In this sense, there is a *gradation of ends* in marriage because procreation and education of offspring, as a unitary end, is the final cause or *finis operis* of conjugal love and marriage, and the moral good ordering and giving meaning to all other acts within the marriage relationship. The good of the spouses is implied in, and is inseparable from, the procreative/educative end, for the work of procreation and education requires that the spouses give each other those goods needed to fulfill their role as parents. Traditional theology has included the *remedium concupiscientiae* among the ends of marriage in order to emphasize both the goodness of sexual acts within marriage and the evil of those acts outside marriage or contrary to it, but since it is not an end that defines marriage *in officium naturae* and the new Code does not include it among the ends of marriage, we need not discuss the matter here.

(18) Cfr. *Gaudium et Spes*, n. 48.

(19) Cfr. Mt. 19:6.

(20) Cfr. E. Molano, *op. cit.*, p. 175-181.

ontological ends implied in the *bona*. Specifically, if one were to exclude offspring from the marriage relationship, one would obviously be excluding the procreative/educational end of the relationship, for the ontological end of offspring is implied in the *bonum* that is offspring; if fidelity were to be excluded, one would also be excluding that loyal, life-long, exclusive, and complementary companionship by which the spouses seek the good of each other; if the good of the sacrament were to be excluded, one would be excluding the irrevocable covenant and all that is signified by this sacramental covenant (21), for among Christians, sacrament and covenant are inseparable (22).

3. *The Object of Consent.* — At this point we should address the matter concerning the canonical formulation of the object of consent. While in the '17 Code, the object of consent, or that which is given and accepted, was formulated as *ius in corpus ad actus per se aptos ad prolis generationem*, in the '83 Code the object of consent is formulated as *sese mutuo tradunt et accipiunt*. If the former formulation may have given rise to a reductionist understanding of the object of consent, the present formulation has given rise to ambiguous interpretations. Strictly speaking, what a man and a woman can and do give each other are their acts or, more precisely *their will* over their acts, and in the giving and accepting of their voluntary acts, as rights and obligations, they give themselves. And this is so, not metaphorically but in a real sense, for free will means also possession of self and *by giving our free will over certain acts we give our self*.

As said before, the covenant or marriage *in fieri* is the efficient cause of marriage *in facto esse*, which is juridically defined as a « partnership » made up of certain acts due in justice; these acts are those defined by the ontological ends of marriage. Consequently, with the act of consent, the spouses mutually give and accept the right over those acts and bind themselves by the corresponding obligations. The object of marriage consent, then, is the right to those acts needed to seek the ends of marriage (*ius in operationes coniugales*), and it is through the mutual, exclusive, perpetual and

(21) Cfr. *S. Th.*, Suppl. q. 42, a. 2 ad 4 & 7.
(22) Cfr. c. 1055, § 2.

irrenounceable right (23) to those very personal acts that the spouses « mutually give and accept each other to form a marriage » (c. 1057, § 2).

As the *ius in operationes coniugales* is given and accepted in a « partnership » that is one and indissoluble (24), we ought to conclude that the *essential rights and obligations* are the *mutual, exclusive, perpetual, and irrevocable* rights and obligations to: *a*) a complementary and permanent *relationship* between man and woman for the good to the spouses; *b*) a *sexual relationship* which, specifying the nature of that relationship, refers to sexual acts that are human and open to procreation; *c*) *receiving offspring* within the same relationship, which further specifies and directs the relationship to the upbringing of the children. These are the rights and obligations that are *essential* to establish marriage, and without the mutual handing over of those rights and obligations, even implicitly, no marriage partnership is formed but another sort of union.

In the life-long relationship of marriage, there exists a wide net-work of rights and obligations between the spouses which express juridically the bond or partnership and the giving of each other in many different ways. Now, however, we are concerned about the rights and obligations that are given and accepted at the moment of consent: at this moment, the spouses give each other only *the right* to those acts over which they have possession or mastery and are essential to the partnership and sufficient. Since these rights and corresponding obligations are of the essence of the partnership or bond that is formed, they are identified as the « essential rights and obligations ». The juridic bond or partnership is made up of many other rights and obligations, but it is sufficiently constituted by the exchange of those rights and obligations that are essential to it. As said before, at the moment of consent, the spouses can only give an accept the right to those personal acts over which they have possession or mastery; offspring, a life in common, and the many other goods which make up a marriage, as we know it existentially and as intended by the parties as *finis operantis*, cannot be given and accepted as rights and obligations because the parties do not have possession of them, since they are effects which may (or may not) follow from the acts over

(23) Cfr. cc. 1134, 1135, 1056.
(24) Cfr. c. 1056.

which the right is given and accepted. One acquires the right to acts that lead to procreation, but should procreation not occur, the bond remains, for this bond is sufficiently constituted by the essential rights and obligations; and one acquires a right to mutual help which is best rendered in common life, but common life may be interrupted or suspended for a variety of just reasons without invalidating the bond [25].

It is therefore incorrect to interpret the present formulation of the object of consent (« the giving and accepting of each other ») to mean the entire network of relations also described as « a community of life and love » (*Gaudium et Spes*, n. 48). As we have shown, the object of consent consists of those essential rights and obligations exchanged at the moment of consenting (*matrimonium in fieri*) which form the *basic juridic minimum* [26] that measures the validity of consent, thus originating the juridic bond or « partnership » which defines the marriage relationship (*matrimonium in facto esse*).

The basic « juridic minimum » does not attempt to describe the entire reality of marriage since it is only a « measure » concerning the ethical/juridic entity of a marital consent, and a measure is always a « minimum ». Specifically, the basic juridic minimum by which we can measure the act of marriage consent, and declare it to be either true marriage consent or a choice of a different kind is made up of the essential rights and obligations to be given and accepted at the moment of consenting to marriage. This « measure » contains the *essential* acts which define the marital union and it potentially contains, therefore, the entire substance of marriage. It is important to keep this in mind when we speak about the psychological capacity for marriage consent, because it is obvious then that the person who has sufficient capacity for consenting to a valid marriage covenant (*matrimonium in fieri*) has sufficient capacity for married life (*matrimonium in facto esse*).

Concerning the necessary psychological capacity for a valid act of consent, it has been noted that marriage is rightly described as

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[25] In the new terminology of the Code, life in common is identified as *convictum coniugale* (cfr. c. 1151) to distinguish it from that *communitas vitae et amore* of *Gaudium et Spes*, n. 48 which refers to the bond: cfr. J. HERVADA, in *Código de Derecho Canónico, Edición Anotada*, p. 696, EUNSA, Pamplona, 1984.

[26] Cfr. JOHN PAUL II, *Address to the R. Rota*, Febr. 5, 1987, n. 6.

« a community of life and love » requiring that psychological capacity for « interpersonal relationship » which is at the basis of any love relationship. In order to define this capacity and avoid the ambiguities inherent in the concept of love, we should note that the general notion of love stands in relation with marital love, as genus and species. Love describes something of the essence of marital love (the union or joining of two persons, the giving of oneself to another), but it describes it incompletely, for it does not include, among other things, its juridically binding character; and marital love, being a special kind of love between a man and a woman does not include all that can be implied in the general notion of love. In marriage, a man and a woman give each other the right to very personal acts (sexual acts and acts of mutual help) thereby they « mutually give and accept each other », thus transcending themselves in the pursuit of the ends of marriage, all of which is rightly called love. In this latter sense, then, love is of the essence of marriage consent. But the general notion of love includes many other acts which can perfect the marriage relationship but are not *essential* to it and need not be included within the object of consent in order to form a marriage (27).

II. *The Psychology of Marriage Consent.*

After examining the juridic nature of marital consent, we should discuss the psychological dynamics of this « act of the will... to form a marriage » (c. 1057, § 2). Consent is indeed an act of the will confirming a choice, and choice, to use Aristotle's definition, is « a desire proceeding from counsel » (28); that is to say, an act of the will that results from the deliberation of the intellect concerning the value of an object or situation.

1. *The Formation of Free Choice.* — As the scholastic axiom reminds us, *nihil volitum nisi precognitum* (29). The appetitive powers

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(27) Cfr. E. MOLANO, *op. cit.*, p. 159-166; R. LLANO CIFUENTES, *A relevancia juridica do amor conjugal*, in *Ius Canonicum*, 30 (1990), p. 244-286.

(28) Cfr. *S. Th.*, I, q. 83, a. 3.

(29) This axiom presupposes another more fundamental principle of self-determination: while rational beings act for a known motive, the will is not however *determined* by the motive but by their own free will. The root of the person's worth, Aquines notes, is to be found in his capacity to move himself toward the good ra-

depend on the cognitive powers and *nothing can be willed if it is not previously known*. In fact, in every rational act, intellect and will work jointly with each other and with the sensory powers, for both intellect and will depend for their proper operations on the information supplied by the external senses and processed by the internal senses (perception, imagination, memory, cogitative power). The senses, at the same time, receive their cognitive and appetitive force from being united to the rational powers of the soul, the underlying principle of all human operations.

In order to investigate the pathology of marital consent, we should understand the normal dynamics of *choice* which philosophical psychology has developed in rather great detail. In the language of psychology, a choice is a *practical judgement* formed by an act of the will leading the intellect to consider the motives of the choice, while the will is itself determined by the intellect to choose, here and now, in accordance with the perceived motives. In the formation of this *practical judgement*, the *vis cogitativa* or particular reason plays a crucial role, for it is the particular function of this internal sense to perceive the usefulness or harmfulness of a particular object. This assessment does not determine the rational faculties but it serves them in presenting to them a particular object under the aspect of suitability or convenience to one's needs. In this joint and harmonic cooperation of the rational and sensory powers, the choice on the part of the will consummates the psychological activity of the soul in its quest to capture reality and to be united with it ([30]).

Apart from the arguments of philosophy and our own common sense experience concerning free will, the studies of empirical psychology demonstrate that when a person chooses freely, the person chooses for a motive which is conscious ([31]). However, a person's motivations are not always « clean »: many decisions of a person include aspects and elements of which the person is not

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ther than being moved by another. Cfr. *Super Espist. S. Pauli ad Rom.*, cap. III, lect. III.

([30]) Cfr. E. TEJERO, *La discreción de juicio para consentir en matrimonio*, in *Ius Canonicum*, 22 (1982), p. 403-534. Tejero's perceptive emphasis on the role of the *vis cogitativa* clarifies many questions concerning the maturity of marriage consent and its pathology.

([31]) Cfr. H. GRUENDER, *Experimental Psychology*, Chapt. XVII, Bruce Publ. Co., Milwaukee, Wis., 1932.

focally aware; but then, these are not motives in the strict sense but influences or motivating factors. And all this is part of the *normal* dynamics of choice. This is of great importance to our purpose, for failure to include these sort of « imperfections » in the dynamics of a normal choice leads to the mistaken presumption that any diminution or defect in full awareness of all the elements involved in the choice necessarily vitiates the capacity for a free choice.

The formation of a choice requires the joint and harmonious cooperation of a person's cognitive and appetitive powers. It requires, in other words, the normal and mature development of « personality », a term which in the language of empirical psychology means « the dynamic organization of the psychophysical systems ». The development of « personality » and its integrating capacity starts long before the emergence of the use of reason and comes to maturity with the end of adolescence. In this entire process which is first instinctive and affective, and gradually becomes conscious and under the person's rational control, the individual begins to perceive certain objects as suitable to one's needs and is affectively motivated by them, thus starting certain traits which form the basis for the more conscious stage of formation of values. At the same time and gradually, the individual develops the sense of relationship between himself and the environment, mainly that formed by other persons and by the social environment. While integrating himself with the social environment, the individual develops also his own unique individuality. This is the process of becoming socialized and acquiring the capacity for « interpersonal relationships », which is a rudimentary aspect of normal human rationality. The development of personality with its ability to integrate and make responsible choices enters its last stage with adolescence and when this stage is completed, a person is said to have reached maturity. In truth, the development of personality and the process of maturity never ends, but after the time of adolescence, the development of personality is inner-directed; the « locus of control » has been internalized.

The development of personality, and the capacity to integrate that is at its core, may sometimes be defective, in which case, an object perceived at the sensory level may motivate the sensory appetite while remaining hidden to the intellect, and thus preventing the formation of a practical judgement or free choice concerning that object. In addition, the cognitive powers and the consciousness of certain aspects of reality can also be affected by a deficit in

hormonal and/or neurological growth or by other alterations of the person's sensory system. In these *abnormal* situations, the person cannot be motivated to act by a conscious motive and in that particular aspect of reality in which the cognitive powers are affected, he cannot act with freedom.

2. *The Decision to Marry.* — In marriage, free consent requires, in the first place, the speculative knowledge that marriage is ordered to the achievement of those ends which constitute marriage. It requires, in the second place, the ability to estimate, by means of *particular reason* (or *vis cogitativa*) whether or not a particular person is desirable here and now for the purpose of attaining the same ends. From the intellectual knowledge of these essential ends, and from the assessment of particular reason concerning the same ends to be pursued as rights and obligations, here and now with this person, a practical judgement and a choice follows concerning this particular marriage. The capacity to form this syllogism is the ability to *deliberate*, which is necessary to achieve valid consent with respect to a given marriage.

The *deliberation* that forms this practical judgement requires a speculative judgement about the essential elements and properties of marriage, but a speculative judgement by itself has no efficacious power to move the will to make a *specific* choice or determination. Unless the will moves the intellect to a judgement of desirability towards an object perceived as desirable by *particular reason* there cannot be a genuine choice on the part of the will. Matrimonial consent, therefore, can take place only when the sensory and rational powers intervene to form a particular judgement of the intellect concerning the good of a particular marriage.

Terms such as « deliberation », « assessment », or « estimation » should not lead us to think that marital consent requires an ability to deliberate in a scientific fashion, for the speculative knowledge of what marriage is and requires is accessible even to the inarticulate knowledge of a child: the speculative judgement about the essential rights and obligations of marriage requires only the simple, ordinary use of reason. Deliberation, on the other hand, requires more than speculative knowledge, for it consists of the assessment done by particular reason, though this deliberation is nothing more than an assessment about the desira-

bility of this particular marriage spontaneously done by the *vis cogitativa* at the time that a person has reached adulthood.

Among the canonists, G. Versaldi has approached the problem of unconscious motivations or tendencies in the act of marriage consent within a total anthropological view of the human person. Analyzing the decision process, he points out that in the assessment that precedes a choice or decision, many persons are affected by subconscious inconsistencies between the « self ideal » and the actual self concept. He further explains that some intuitive assessments which never reach a reflective level may tend to become habitual, while the person remains unaware of their influence at the reflective and conscious level. These inconsistences, as he calls them, may cause great difficulties in married life the more the person remains unaware of them, but they do not constitute a pathology or departure from normality sufficient to vitiate the freedom of the act of consent (32). And this is so, we may add, because despite these unconscious influences or motivating factors the person retains the capacity to assess and deliberate about the desirability of this particular marriage and retains, therefore, the freedom of choice.

The formation of a free choice presupposes the normal development of personality, and the consequent integration of all psychological systems, which includes as is obvious the normal development of the body and of the sensory systems. In what concerns marriage, a free choice cannot take place before the psychosomatic development of adolescence is completed, and this is so because *particular reason* belongs to the order of the physical senses and cannot properly fulfill its « estimative » function without its proper neuro-physical development. The assessment of *particular reason*, therefore, is dependent upon the psychological and physiological development that takes place during that transitional period in a person's life which modern psychology identifies as early and middle adolescence (33).

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(32) Cfr. G. Versaldi, *Elementa Psychologica Matrimonialis Consensus*, in *Periodica*, 71 (1982), p. 179-253.

(33) Aquinas observes that, since man acquires the use of reason gradually, different stages of discretion can be distinguished: the first stage covers those years before a person reaches the 7th year of age approximately. At that age, another stage begins to unfold at the end of which (approximately towards 14 years of age) a rapid development takes place and a person becomes able to judge and dispose of those things which pertain to his or her own person. However, in what refers to

During these years, and parallel to the physiological development of sexuality, a person begins to acquire a growing consciousness of self with relation with the outside world: the adolescent begins to ponder about himself and about other persons and social institutions as they relate to himself. This pondering consists of a critical assessment of the world around, which shows the rise of a new and more comprehensive perception of reality. Under this new perception, a person comes to think in a reflective and more self-conscious fashion about another person of the opposite sex as a possible partner in one's life-plan and a desirable complement to help fulfill one's needs (34). The development of adolescence, therefore, is the *conditio sine qua non* for the discernment that should precede the practical judgement which is marriage consent, the crowning point of all the psychological operations involved in that mutual attraction of the sexes by which nature inclines a person to marriage (35).

Contemporary psychologists speak of a late adolescence which can go as far as the 25th year for males. But at this stage of psychological development, all elements needed for mature discernment are already present and a person, having sufficient capacity to deal with most ordinary life situations, begins to put this capacity into operation when confronted by these new situations for the first time.

In the normal course of events, a person after middle adolescence reaches that stage of psychological and physical development in which one is naturally prepared to seek a partner in life among persons of the opposite sex in order to raise a family, and this partnership is sought as one, exclusive and unbreakable. Nature itself inclines a person to this object for which no other psychosomatic capacity is required than that which is attained after the development of adolescence is completed. When this normal development is not attained or when the sensory system of a person is impeded in such a way that the essential elements of marriage are

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things external, a person acquires that capacity at a later stage of discretion or by the 21st year of age approximately (cfr. *S. Th.*, Suppl. q. 43, resp.).

(34) Cfr. E. TEJERO, *op. cit.*, p. 479-490 and 510-514. R. ALLERS, *The General Psychology of Adolescence*, in *Character Education in Adolescence*, Joseph Wagner, Inc., New York, 1940.

(35) Cfr. *S. Th.*, Suppl., q. 41, a. 1.

not sufficiently perceived, the practical judgement implied in the choice of marriage is defective. We have then an abnormality, an « illness » or pathology which can be described as grave since the capacity for marriage consent is part of human, rational, and free nature.

3. *Normality and Abnormality.* — In his two addresses to the Roman Rota, John Paul II urges the judges and court experts to work with the notions of contemporary psychiatry and psychology integrated within a concept of normality that is in accord with a complete and correct view of human life (36). In order to do this, both judge and expert ought to have a good grasp of the methods and scope the psychological sciences and of the metaphysical and ethical foundations of the law. On a practical level, they should avoid what we may call two « prejudices » which easily affect the practice of the ecclesiastical tribunals. The first we may call the « clinical prejudice » of seeing in every difficulty and the resulting suffering an abnormality and a cause of psychological incapacity for marriage (37). This « prejudice » is explicitly and forcefully addressed by the Holy Father in his two talks to the Roman Rota (38). To this

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(36) Cfr. JOHN PAUL II, *Address to the Roman Rota*, Jan. 26, 1988, n. 5.

(37) Discussing the sources utilized by the ecclesiastical courts, A. MENDONÇA writes: « According to Schneider (K. SCHNEIDER, *Psychopathic Personalities*, p. 3), the concept of abnormality as such does not constitute a disorder unless it causes personal suffering or suffering of others. The basic notion implied in this understanding of personality disorders is now integrated into the description of personality disorders in DSM-III » (Cfr. *The Effects of Personality Disorders on Matrimonial Consent*, in *Studia Canonica*, 21 (1987), p. 78.

(38) The Holy Father rejects both the « pessimistic view (that) holds that man could not conceive any other aspiration than that imposed on him by his impulses and environment... and the exaggerated optimistic view that man has within himself his fulfillment which he can achieve on his own ». Both extremes reduce marriage to « a means of gratification or of self-fulfillment or of psychological release » and « every obstacle that requires effort, commitment or renunciation, and still more, every failure of a marriage union easily becomes proof of inability » to contract marriage (cfr. *Address to the S.R. Rota*, February 5, 1987, n. 5). These views amount to a reductionist view of « normality », since the human person, wounded by the effects of sin, is called to « a suffering that involves a redemptive meaning (Rom 8:17-18). In this struggle, "the Spirit too comes to help us in our weaknesses" (Rom. 8:26) ». Consequently, « moderate forms of psychological difficulty, tribulations, renunciation and sacrifice are *normal.* Normality, then is not a myth which

we may add that while the real inability to elicit an act of deliberate and free consent is, as we said, a grave abnormality, « illness » or pathology, the opposite is not true, and canonical doctrine has been unanimous in pointing out that not every psychopathology renders a person incapable of marriage but only that one which affects the integrity of consent. A person, then, may be subject to psychological difficulties entailing even great suffering to oneself or to others and be perfectly capable of entering into a valid and indissoluble marriage, and this is so because not every dysfunction renders the *person* abnormal but only that dysfunction that affects the normal rational behavior of which marriage is an elementary form.

Parallel to this, there is what we may call the « idalistic prejudice » which idealizes « man as such » (*homo ut sic*) to the detriment of « man as he exists », here and now (*homo ut hic*) ([39]), with all of his/her warts and wrinkles, and imperfections. « If normality is not to become a myth » (in the expression of John Paul II) we ought to understand the human person not in such idealized « essentialistic » terms but as incarnated, or made operative in this or that particular, individual, human nature. To the idealized mode of thinking, the ideal is the norm and any deviation from it is seen as a serious defect in judgement/control. Emphasis on the social-development model, and the corresponding de-emphasis on the medical-disease model of deviant behavior, may easily incline the judge, in the absence of specific identifiable criteria of serious, antecedent, psychological causes, to fall back upon the grounds of « lack of due discretion » which then becomes a rubber band of almost infinite elasticity.

If we are to deal with existential man, we must look for an *operational* definition of normality as opposed to some abstract ideal of normality. Normality in itself, with reference to man's essence, is always an ideal, whereas normality as it is lived is always an approximation, which means that it will not be a point, but rather a very broad path encompassing the majority of humankind. If one were to consider man from a purely essentialist standpoint, the normal man/woman would be the state of Adam and Eve before the Fall,

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would deny to the majority of persons the possibility of giving valid consent » (Address to the S.R. Rota, January 26, 1988, n. 5).

([39]) Cfr. PIUS XII, *Address to the International Congress for Psychotherapists and Clinical Psychologists*, in *Catholic Mind*, July, 1953, p. 428-435.

possessed of full self-knowledge, self-control, and free from suffering.

By leaving the realm of the ideal, we are not necessarily committed to any form of cultural relativism or to the use of a statistical « nose counting » in order to determine what is normal. We are simply looking into that broad path of normality travelled by most human beings in their individual lives and in marital relations as a useful, operational criterion of normal capacity to consent to marriage. Any definition of normality concerning psychological capacity for marriage ought to begin with the fact that after adolescence, the vast majority of persons possess the psychological capacity to perceive and consequently exchange, at the moment of consent, the essential rights and obligations of marriage (the basic minimum). This is then the norm and what defines normality. And this implies also that imperfect motivations at the moment of consent are normal, as explained before, and that marital difficulties arising after the exchange of consent are not by themselves proof of abnormality.

With all this in mind, then, one definition proposed by E. Glover seems to be singularly useful to our purpose: a normal person is one who is « free of adverse symptoms, unhampered by mental conflict, able to maintain a satisfactory working capacity, and able to love someone other than oneself » (40). As a working definition of normality we should note the following: *a*) a normal person is one who functions and relates to others free from *effectively adverse* symptoms. We are not saying that a normal person is *free* of symptoms but free of those *adverse* symptoms which would *effectively* impede one's functioning and relating to others; *b*) the normal individual is *unhampered* by mental conflicts while not totally free from these conflicts. The normal person is able to deal with these conflicts even though not always successfully; *c*) the normal person is able to maintain a satisfactory working capacity. This is a pragmatic, operational criteria which implies a good deal in terms of harmony of impulses, desires, values, as well as one's basic relational capacity. A person's daily work adjustments and occupational history is a good working criterion of basic normality; *d*) the normal person is able to love someone other than oneself. Without need of delving

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(40) Cfr. E. GLOVER, *Medico-Psychological Aspects of Normality*, in *British Journal of Psychology*, 23 (1932), p. 152-166.

into matters of a more profoundly theological and philosophical nature implied in this criterion, this operational rule tells us that only a person who is grossly immature, egocentric, and narcissitic is in fact not capable of apprehending and freely choosing the object of marriage and, therefore, of contracting marriage validly.

A further gloss concerning normal behavior would include the following: 1) orientation toward future goals, i.e. an average regard and concern for the future: by implication this would seem to rule out excessively driven, obsessive behavior; 2) reasonable satisfaction from daily activities; 3) exterior conduct substantially conforming to the standards of the group; 4) the ability to recognize and correct mistaken ideas and attitudes: this would seem to rule out pathological rigidity/paranoia; 5) a well-balanced emotional life free from morbid mood disorders; 6) the ability to adjust to environmental changes. It is clear that some of these may overlap and intertwine, and no one of them, taken by itself can define normality but they provide, one may say, circumstantial evidence of presumptive normality.

In summary, then a normal person is one whose good contact with reality and appropriate emotional and volitional control is manifested by his/her conforming to the average human being in the methods of thinking, feeling, and acting, is reasonably happy, emotionally well-balanced, adjusted, and oriented toward future goals. This « operational » description of normality allows for variations in specific ways of behaving within a given culture or subculture but it is sufficient in our opinion to show the context and framework of that other « normal » act which matrimonial consent is: marriage is for all people and all normal people, as described above, are capable of giving valid consent.

The fact that unconscious elements enter into any conscious, rational decision or that a person does not have a perfect self-possession of his acts is a simple truism in dynamic psychology. We should start with that as a given in any act of marital consent. This does not constitute an « illness » even though it may cause certain amount of difficulties and suffering, nor do these unconscious elements render the decision not free. Every human decision is only « moderately » or « relatively » free and in every marital relationship there will always be a variety of unconscious, unarticulated, factors in motivation. Human behavior and motivation are so complex that there will always be elements of indiscretion, even serious

indiscretion, in the best of marriages. Both parties come to the marriage with so many « hidden agendas » that it would take a lifetime, and beyond, to sort them all out. Clinically, this cannot be a source of consternation but a challenge to learn to cope more effectively and rise to new levels of rational/volitional functioning. Ethically, and juridically, this is a normal situation providing no grounds for a declaration of nullity. Rather, the person is normally free as long as his or her behavior is not « hampered » by mental conflicts and « adverse » symptoms which *effectively* impact directly on the consensual process.

III. *The Rule of Consensual Incapacity in Canon 1095.*

1. *The Juridic Formulation of this Rule.* — Marriage consent consists of a free choice in which, as we have seen, all the psychological faculties of a person play a role. Since a free choice is specified and defined by its object, the psychological integrity of this particular choice as well as the psychological capacity to make it are measured by the object. The measure, then, of sufficient capacity for marriage consent is made up by the essential rights and obligations by which the spouses mutually give and accept each other, for this is the object of consent: if these rights and obligations are included within the act of consent, this consent produces marriage; if not, consent is defective and fails to produce marriage.

When psychological capacity or incapacity for valid marital consent has to be determined by law, we need a norm of *identifiable behavior* from which it can be known whether a person has or does not have that capacity (41). While capacity to elicit an act of

(41) In what refers to psychological *capacity* for matrimonial consent, the legal rule is the rule of puberty implicit in canon 1083 which forbids a woman before age 14 and a man before age 16 to enter a valid marriage, for puberty, understood in the wider meaning that includes early and middle adolescence, is the natural stage of a person's development culminating in the capacity for marriage consent. This has been universally recognized in both civil and canon law, although the determination of this fact by a well-defined legal rule is not free of some difficulties since it is not possible to establish sharply defined limits to a physiological and psycho-social development which is gradual and different in each individual person. The fact remains, however, that in the normal course of events, a person is psychologically capable of arriving at that practical judgement that constitutes consent by middle adolescence,

marriage consent is ordinarily recognizable by the natural fact that a person has completed the adolescent stage, the exception may not always be evident and may require the help of an expert for its identification (42). Canon 1095 formulates this norm for the benefit of the ecclesiastical courts which have to declare the incapacity for marriage consent and the nullity of marriage. Since marriage consent is made up of a *subjective* element (the integrity of a person's rational faculties) and an *objective* element (the object to be included in the choice) the rule of incapacity will have to describe certain forms of erratic behavior consisting of a *subjective* defect of the rational faculties to include the *object* of marriage consent within the choice.

The norm contained in canon 1095 is a three-fold rule of identifiable abnormal behavior that should allow the judge, with the help of an expert, to declare a person's incapacity for valid consent. As a juridic rule guiding the investigation of the courts, canon 1095 points out to the judges that consensual incapacity can be recognized by three types of disordered behavior: the first type specifies the subjective defect as « lack of use of reason » and only implicitly refers to the object of consent by the term « sufficient »; the second type specifies the subjective defect as « grave defect of discretion of judgement » and describes the entire object of consent (« the essential rights and obligations to be given and accepted »); the third type describes the subjective defect (« inability to assume because of psychic causes ») by specifying the object not included in the act of consent (« the essential obligations »). If it can be proved that any of these types of abnormal behavior existed at the moment of consent the court can declare the existence of a psychological incapacity for marital consent and the consequent nullity of the marriage contracted (43).

The essential rights and obligations which ought to be sufficiently known, assessed and deliberately assumed within the act of consent are, as we have seen, the *mutual, exclusive, perpetual, and*

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and since adolescence is a fact of nature easily recognized, it is also the legal rule of sufficient psychological *capacity* to contract marriage.

(42) Cfr. c. 1679.

(43) For a comprehensive study of canon 1095, cfr. R. BURKE, Z. GROCHOLEWSKI, M. POMPEDDA, G. VERSALDI, in *Incapacity for Marriage. Jurisprudence and Interpretation*, in *II Gregorian Colloquium*, Robert M. Sable, Coordinator and Editor, Pontificia Universitas Gregoriana, Rome, 1987.

irrevocable rights and obligations to: *a*) a complementary and permanent *relationship*; *b*) a *sexual relationship* that is human and open to procreation; *c*) *receiving offspring* within the same relationship. The person who would not bind the relationship of man and woman by these rights and obligations would not be contracting marriage. By the same token, the person who is not psychologically able to include those rights and obligations within the choice or consent could not be contracting marriage.

As a juridic norm guiding the investigation of the courts, canon 1095 points out to the judge that consensual incapacity can be investigated in three ways. These three forms of disordered behavior form the *capita nullitatis* which direct of canonical process: the investigation, the proofs and the arguments are to be addressed to one of these *capita*. What ultimately needs to be proved is the inability of the subject to include the object of marriage consent within the choice, but this is to be done by identifying the three types of behavior given in the juridic rule contained in canon 1095 and for this purpose each *capita* is to be treated procedurally as independent of the other.

2. *The Pathology Described by the Juridic Rule.* — Since the normal development of personality includes, as we have seen, the psychological capacity for marriage consent, the inability to form that act of consent is an abnormality — a pathology. However, it is not the role of the law, as we explained, to describe the psychology nor the pathology of marriage consent using psychological or psychiatric terms for, apart from the difficulties inherent in these terms and in the classification of psychological abnormalities, the legislator ought to define the aberrant behavior in question in terms of its impact on the integrity of consent, the juridic act from which the marriage contract derives. Formulated, then in juridic terms, the canon however, describes in fact a dysfunction in a person's psychic faculties and a grave one, as the Supreme Legislator himself has explicitly interpreted this canon (44). And this is so not just because of a determination of positive law but because the capacity to marry is an elementary form of human rationality and consequently the corresponding incapacity is a grave abnormality.

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(44) Cfr. JOHN PAUL II, *Addresses to the S. Rota*, Febr. 5, 1987, n. 7 and Jan. 26, 1988, n. 6.

Since the abnormality or psychopathology described in juridic terms in c. 1095 consists of the inability to elicit an integral act of marriage consent, it is evident that not every psychological defect incapacitates a person for marriage but only that defect or disorder which affects the integrity of marriage consent. But since it is true that the capacity for marriage *in officium naturae* is an elementary form of human rationality, this psychological incapacity will « spill over » into other areas of life and it will be recognized, in actual practice, as a psychopathology.

The psychopathology may have to be identified by an expert, but incapacity will not be proved, as the Holy Father points out, by general descriptions of behavior or exposition of symptoms showing the existence of some psychological difficulties or abnormalities; proof of incapacity requires the evaluation of causes and dynamic processes as these actually affect reason, discretion, and the ability to assume the essential rights and obligations of marriage ([45]). The final determination concerning this consensual incapacity belongs to the judge because capacity and incapacity are measured by the object to be included within the act of consent and this object is a juridic reality, namely the essential rights and obligations that make up the bond of marriage. Here we see again that, although c. 1095 describes a true abnormality, the rule of incapacity is a juridic rule.

In order to determine the existence of consensual incapacity, the following must be established: *a*) A true pathology must be proved: *mere difficulties* which should be overcome by ordinary effort, *do not constitute incapacity* ([46]); *b*) The psychological incapacity should refer to the *essential* rights and obligations of marriage and not to other circumstances of married life. Some psychopathologies can be great obstacles to the attainment of those conditions which contribute to a reasonably happy or successful marriage, as a human relationship, but happiness or success is often beyond the power of human beings and, consequently, cannot be the object of juridic rights and obligations. However, since it is within normal psychological capacity to include the essential rights and obligations of marriage within a binding consent, only the absence of this minimal and sufficient capacity renders consent invalid; *c*) The disorder cannot have been a later development but must in fact

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([45]) Cfr. JOHN PAUL II, *Address to the R. Rota*, Jan. 26, 1988, n. 7.
([46]) Cfr. *Ibid.*, n. 6.

have existed at the time of the external manifestation of consent thus vitiating its integrity (47).

3. *Lack of Sufficient Use of Reason.* — Use of reason means the ability to make judgements corresponding to reality. Obviously, a person who is not capable of such judgements even at the speculative level can hardly arrive at a practical judgement which is the basis of consent. Since sufficient use of reason is normally acquired by the seventh year of age (the first stage of dicretion), not only are infants affected by this deficiency but also those adults who are afflicted by a disorder that prevents them from knowing what they are doing, even though they may retain some elementary perceptions.

The lack of sufficient use of reason may exist in a case of psychosis such as in schizophrenia in its symptomatic stage (48), or in those conditions such as hypnotic states, and toxic conditions, whether endogenous or exogenous, brought on by a metabolic disorder, or by various mind and/or mood altering agents such as alcohol and other drugs. In all these cases, it is necessary to determine the lack of sufficient reason *at the time of giving consent*, for this is what truly invalidates the matrimonial contract, not just the fact that the disorder exists or has existed at some point in time.

4. *Grave Defect of « discretio iudicii ».* — Discretion of judgement consists of the ability to assess particular goods as suitable for one's needs. In what concerns the assessment of those goods contained in the essential right and obligations of marriage, this capacity is acquired, as we have explained, by the time a person completes puberty (the second stage of discretion). A person who suffers from some disorder which prevents him or her from making an evaluation concerning the desirability of this particular marriage (with its essential rights and obligations), cannot arrive at that

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(47) Cfr. F. GIL DE LAS HERAS, *La incapacidad para asumir las obligaciones esenciales del matrimonio*, in *Ius Canonicum*, 27 (1987), p. 253-290; M. POMPEDDA, *Il canone 1095 del nuovo Codice di Diritto Canonico*, in *Ius Canonicum*, 27 (1987), p. 535-555; V.J. SUBIRÁ, *La incapacidad para asumir los deberes del matrimonio*, in *Ius Canonicum*, 27 (1987), p. 233-251.

(48) Cfr. R.L. BURKE, *op. cit.*, p. 141-211; A. MENDONÇA, *Schizophrenia and Nullity of Marriage*, in *Studia Canonica*, 16 (1984), p. 197-238.

practical judgement which is an integral part of the very act of matrimonial consent. This, however, is *not to be confused* with imprudence or « indiscretion », or with actual error of judgement or « poor judgement », since a *mistake* in judgement concerning the various aspects of the spouse's character or the circumstances surrounding the marriage does not mean incapacity ([49]). The grave defect contemplated here is a defect of discretion concerning those rights and obligations which are basic goods to which one is inclined by nature after puberty.

This grave defect may be due to what has been called simply « immaturity », a retardation of that psychological development expected by the age of puberty. It should be noted, however, that such retardation cannot remain for long without constituting in fact an abnormality that is easily identifiable by clinical psychology as a « fixation ». A person might have been truly « immature » at the moment of contracting marriage but had grown into maturity with time and with marriage itself, in which case the marriage can be convalidated by a new act of consent which can be given even privately and in secret ([50]). But if the psychological development has not taken place after some reasonable time, the marriage remains null for lack of sufficient consent.

The grave defect of discretion is more clearly identifiable in cases of advanced *psychosis* ([51]). The end, or chronic, stage of a psychosis would amount to « lack of sufficient use of reason », while an advanced though not terminal stage, would involve a grave defect of due judgement. Though a person might have contracted marriage under a qualified state of psychosis while appearing to be more or less in control, it may be possible to prove that the affliction was actually present and functioning so as to cause a distortion of that *ratio particularis* needed to reach sufficient consent.

There is common agreement that in *neuroses* and *personality disorders*, a person is not necessarily deprived of proper discernment concerning those areas which are not directly affected by the obsessions, compulsions, phobias and other such symptoms that

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([49]) Cfr. JOHN PAUL II, *Address to the R. Rota*, Jan. 26, 1988, nn. 4 & 5. L.M. GARCÍA, *El grave defecto de discreción de juicio en el contexto del c. 1095*, in *Ius Canonicum*, 29 (1989), p. 217-241.

([50]) Cfr. c. 1159.

([51]) R.L. BURKE, *op. cit.*

accompany these anomalies. However, a severe neurosis or a severe disorder of personality may be intimately related to the very object of marriage, in which case it may be possible to prove that the marriage was contracted under a grave defect of discretion of judgement. E.M. Egan describes the case of a man afflicted by an urge to proclaim his unusual gifts and importance who, through an unusual set of circumstances including a spiritualist seance, is led to believe that through the son to be conceived by marrying this particular woman, he will obtain that recognition and glory for which he craves (52). What ought to be proved in this or similar cases is that the capacity to evaluate a particular marriage was gravely impaired by a distortion of reality and by a severe emotional turmoil, and that the resulting practical judgement or choice was manifestly inadequate (53).

5. *Inability to Assume the Essential Obligations of Marriage.* — To assume obligations means committing one's will to rendering certain acts to another, and since through marriage consent the spouses do commit their wills to each other over some very personal acts, the person who cannot « assume the essential obligations » of marriage is incapable of contracting marriage. The inability contemplated here is one that results, as the canon explicitly qualifies it, from « causes of a psychological nature » (*ob causas naturae psychicae*) (54).

It could be said that the concrete formulation of this third incapacity is redundant from the point of view of the dynamics of

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(52) Cfr. E.M. EGAN, *Nullity of Marriage by Reason of Insanity...*, in *Ephemerides iuris canonici*, 39 (1983), p. 48-49.

(53) Cfr. T.A.R.R., 14 decembris 1984, c. Pinto, in *Ius Canonicum*, 29 (1989), p. 207-215; 24 octobr. 1987, c. Serrano, in *Monitor Eccl.*, 60 (1989), p. 283-297; 16 decembr. 1988, c. Bruno, in *Monitor Eccl.*, 60 (1989), p. 298-308; 26 maii, 1989, c. Faltin, in *Ius. Ecclesiae*, 2 (1990), p. 177-190.

(54) The expression *ob causas naturae psychicae* has all the marks of a latin neologism constructed to mean « psychopathology ». These *causae naturae psychicae* qualify the nature of the juridic « incapacity to assume » and restrict it to the inability which derives from a defect in the psychological make-up of the subject of consent, not in some obstacle external to the subject's psychological capacity. The drafters of the canon persistently adhered to the different versions of that clause to show that the only « incapacity to assume » contemplated by the canon is that which derives from a defect of the rational faculties. The intent of the entire canon is, very obviously, to regulate the invalidity of consent due to a psychological defect.

consent, because the other two incapacities also involve a lack of integration of the psychological systems in what refers to « assuming » the obligations of marriage at the moment of consent ([55]). It is not, however, redundant from the juridic point of view because, as we have explained, the juridic rule here describes a type of abnormal behavior consisting of the inability *to give* the object of consent or, in other words, of assuming it as a juridic obligation ([56]), while the other formulations of canon 1095, § 1 and § 2 describe different types of behavior.

The essential obligations of marriage which need be assumed and included within the act of consent are those *mutual, exclusive, perpetual, and irrevocable* obligations to: *a*) a complementary and permanent *relationship* between man and woman from which derive many acts of mutual help in the pursuit of the spouses' good; *b*) a *sexual relationship* made up of sexual acts that are human and open to procreation; *c*) *receiving offspring* within the same relationship from which derive many acts of raising the children to their human development. « Assuming the essential obligations of marriage » requires the elementary psychological capacity to enter into a relationship between two persons of the opposite sex with a common mission involving their entire life. While this mission includes in its very essence a sexual relationship, it is not reduced to it, and therefore the real inability to relate to the other spouse as a person and rise above a merely physical relationship would constitute a serious psychological disturbance. A real inability to maintain this relationship as indissoluble and exclusive would also constitute a grave disorder. The true incapacity to give an exclusive and perpetual right to conjugal acts directed to procreation would

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([55]) Since any psychological disorder affects the assessment of particular reason concerning the subjective value of a particular marriage, the three formulations are reduceable to the « grave lack of discretion of judgement ». From the point of view of the psychology of consent, it remains true that *discretio iudicii est unica mensura sufficientis consensus*. Cfr. E. TEJERO, *op. cit.*, p. 515-533.

([56]) Cfr. M. POMPEDDA, *Il canone 1095 del nuovo Codice di Diritto Canonico*, in *Ius Canonicum*, 27 (1987), p. 549. T.A.R.R., 20 decembris 1988, c. Giannecchini, in *Monitor Eccl.*, 24 (1989), p. 439-449; 20 februarii 1987, c. Pinto, in *Ius Ecclesiae*, 1 (1989), p. 569-579; 13 maii 1988, c. Corso, in *Monitor Eccl.*, 25 (1990), p. 239-246; 23 julii 1988, c. Boccafola, in *Ius Ecclesiae*, 2 (1990), p. 139-156; 1° julii 1988, c. Doran, in *Ius Ecclesiae*, 2 (1990), p. 157-176; 1° julii 1988, c. Doran, in *Monitor Eccl.*, 24 (1989), p. 329-346.

constitute a severe psychic disorder. In addition, the real inability to « receiving offspring » would also involve a grave defect in a person's elementary psychological capacity.

The behavior described in canonical terms as « inability to assume the essential obligations » would be classified in psychiatric terms, as a « personality disorder » and, more specifically, as a « sociopathology », a term which designates the psychic inability to sustain rational, socially appropriate, and conforming behavior in certain key areas of interpersonal relationships, to be responsible, or to control impulsive and sometimes even dangerous behavior. Clinical psychology describes the dynamics of such personality disorder as a lack of development of character and conscience, an inability to interiorize social and moral norms and values. In these disorders, the individual remains at a relatively infantile level manifesting extreme narcissim and pathological immaturity and impulsiveness without regard for ordinary social demands or the rights of others. If it can be proved that an individual is not psychologically capable of establishing a personal relationship, that is exclusive and indissoluble, with a person of the opposite sex to help each other in the common mission of raising a family, this individual lacks that minimal psychological capacity needed to enter a valid marriage contract.

As a conclusion to these pages, we wish to add that the dialogue between judge and court expert, or between clinical psychology and canonical doctrine, ought to be a continuous exchange in which one learns from the other in a common « service of truth and charity » ([57]). Based upon a common anthropology, both jurists and psychologists must seek to bridge the methodological differences between the two disciplines. While acknowledging that a great deal has been done to explain the notions of contemporary psychology to canonists, the canonist still bears a special responsibility in this dialogue, first because it is the task of canonical doctrine, to integrate the notions of psychology and theology with the juridic categories concerning marriage, and second because the psychology expert's answer concerning the integrity of the choice under question requires that the canonist specify the nature of the particular choice, and this can be done only by defining clearly and without ambiguity the juridic nature of matrimonial consent.

([57]) Cfr. JOHN PAUL II, *Address to the R. Rota*, Febr. 5, 1987, No. 9.