

The Importance of Considering Cultural Contexts in Adjudicating Marriage Nullity Cases, with Special Reference to South East Asian Countries

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In his post-synodal Apostolic Exhortation, *Familiaris consortio* no. 4, Pope John Paul II emphasized the need to understand marriage and family within the concrete social and cultural contexts in order to effectively serve the people of God. He said: "Since God's plan for marriage and the family touches men and women in the concreteness of their daily existence in specific social and cultural situations, the Church ought to apply herself to understanding the situations within which marriage and family are lived today, in order to fulfil her task of serving."¹

There are two important points in the above statement relevant to our reflections on the subject matter of this study: first, marriage is a natural reality and it exists, is perceived, chosen and lived within a concrete socio-cultural milieu; and second, for this reason effective pastoral care of marriage and family is not possible without understanding their concrete situations. That the pastoral care which the Pope had in mind included also tribunal ministry is evident from the fact that he returned to the same theme in his Rotal allocution of 1991 where he said: "Precisely because it is a reality that is deeply rooted in human nature itself, marriage is affected by the cultural and historical conditions of every people. They have left their mark upon the institution of marriage. The Church, therefore, cannot prescind from

¹ JOHN PAUL II, Apostolic Exhortation, *Familiaris consortio*, 22 November 1981, in Austin FLANNERY (Gen. ed.), *Vatican Council II: More Postconciliar Documents*, vol. II, Grand Rapids, MI, Wm.B. Eerdmans Publishing Co., 1982, p. 817.

the cultural milieu."² Applied to our tribunal ministry, this statement should naturally lead us to conclude that in examining marriage cases for possible declaration of nullity, judges cannot prescind from the cultural milieu of a concrete marriage before them.

Needless to say, a judge is the product of his/her own culture. This should be evident to us when we reflect on the important decisions we make in our own life, how those decisions are coloured by our personal history and culture. Any decision a judge has to make will bear the stamp characteristic of that historical and cultural background. The moral certitude derived from the evidence, which is invariably tinged with the cultural peculiarities of the place and persons, can never be absolutely free from influences of one's own subjective perception and disposition. What Emilio Colagiovanni says in this regard seems to make good sense. According to him, a sentence literally denotes "feeling", and "*to feel*" means that the judges' certitude is not derived from some mechanical and mathematical calculation, but it is something that pervades their total personality including their culture, education, capacity for *insight* and for comparing certain facts with other facts, events, and circumstances.³ In other words, the total personality of judges enters into their decision-making process. This implies that a judge must have a genuine *sense* of the socio-cultural milieu within which the particular marriage was contracted and lived, and the decision eventually rendered must be based on the objective evidence secured from and weighed in light of concrete circumstances of the case. These two aspects of a judicial decision are intimately connected.

The hypothesis underlying this essay is that a judge must have a genuine understanding and appreciation of all relevant socio-cultural aspects of a particular marriage case actually being judged, in order to render a just and equitable decision, because those aspects do impact the process and content of matrimonial consent. The objective basis of

² JOHN PAUL II, Allocution to Rotal officials, 28 January 1991, "Marriage and Culture," in William H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota, 1939-1994*, Ottawa, ON, Faculty of Canon Law, Saint Paul University, 1994, pp. 214-215.

³ Emilio COLAGIOVANNI, "The Role of *peritus* and the Judicial Evaluation of the *peritia*," in *Forum*, vol. 1, no. 1 (1990), p. 89; also see Mario F. POMPEDDA, "Decision-Sentence in Marriage Trials: Of the Concept and Principles for Rendering an Ecclesiastical Sentence," in *Quaderni Studio rotale*, 5 (1990), pp. 84-85.

this hypothesis will be explored in this essay on three interrelated areas: first, the necessity of interpreting and applying canon law, especially marriage law, in light of particular cultures; second, specific cultural factors prevalent in some Asian countries which are likely to impinge on the process of eliciting valid matrimonial consent; third, influences of culture on matrimonial consent identified in recent Rotal decisions involving cases from South East Asia.

I. CULTURE AND ECCLESIAL LAW

Culture is an integral and intricate part of human life and experience. Because human life expresses itself in different ways within different concrete socio-cultural contexts, conceptualizations of culture vary not only over time but also in space.⁴ Thus there are widely disparate conceptualizations of culture. The Second Vatican Council clearly acknowledged this problem when it said that "culture necessarily has historical and social overtones, and the word 'culture' often carries with it sociological and ethnological connotations; in this sense one can speak about a plurality of cultures."⁵ Despite this problem, there is no lack of conceptualizations of culture in scientific literature.

Etymologically the term 'culture' derives from the Latin 'cultura', which in turn comes from the past participle 'cultus' of the verb 'colere',⁶ which means 'to till', 'cultivate', as in agriculture, even though Cicero used it in a figurative sense when he said the "culture of the human mind is philosophy."⁷ In recent times, however, the term

⁴ See Gustav JAHODA, "The Colour of a Chameleon: Perspectives on Concepts of 'Culture'," in *Cultural Dynamics*, 6, 3 (1993), p. 277.

⁵ SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* (= GS), 53, 7 December 1965, in Austin FLANNERY (Gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, Collegeville, MN, Liturgical Press, 1975, p. 958.

⁶ See Charlton T. LEWIS, *A Latin Dictionary*, founded on Andrews' edition of Freund's Latin Dictionary, rev. enl. and in great part rewritten by Charlton T. LEWIS and Charles SHORT, Oxford, Clarendon Press, 1969, p. 488.

⁷ *Disputationes Tuscul.* I, v, 13: "Cultura autem animi philosophia est." See Marcus T. CICERO, *Tusculan Disputations/Cicero*, with an English translation by J.E. KING, Cambridge, MA, Harvard University Press, 1989, pp. 158-159.

began to acquire the sense of training or improvement of the human mind or taste and eventually its meaning extended to include qualities of an educated person.⁸

In standard dictionaries, *culture* is described in its *static* and *dynamic* sense. Considered in its static aspects, it is "the body of customary beliefs, social forms, and material traits constituting a distinct complex of tradition of a racial, religious, or social group (a nation with many cultures)", or "that complex whole that includes knowledge, belief, morals, law, customs, opinions, religion, superstition, and art preserved." In a wider sense, it could stand for "a complex of typical behavior or standardized social characteristics peculiar to a specific group, occupation or profession, sex, age, or social class."⁹

The classical definition formulated by Edward B. Tylor a century ago more clearly expresses the static view of culture. He says that culture or civilization "is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."¹⁰ Or in A.L. Kroeber's words, "the mass of learned and transmitted motor reactions, habits, techniques, ideas, and values — and the behavior they induce — is what constitutes *culture*. Culture is the special and exclusive product of men, and is their distinctive quality in the cosmos."¹¹ These are general concepts of culture and they essentially identify the content of culture.

⁸ See JAHODA, "The Colour of a Chameleon," p. 277.

⁹ See *Webster's Third New International Dictionary of the English Language*, unabridged, ed. by Philip Babcock GOVE, and Merriam-Webster editorial staff, Springfield, MA, G. & C. Merriam, 1981, p. 552; *Funk & Wagnalls New Standard Dictionary of the English Language*, Isaac K. FUNK [editor-in-chief], New York, Funk and Wagnalls, 1923, p. 629.

¹⁰ See Edward B. TYLOR, *The Origins of Culture*, with an introduction by Paul RADIN, Gloucester, MA, Peter Smith, 1970, p. 1. This definition of culture was in fact formulated by Tylor in 1871. See his *Primitive Culture*, London, John Murray & Co., 1871, vol. 1, p. 1. The definition of culture by Tylor was a reformulation of the German author Gustav Kemm's view of culture provided in his famous book *General Science of Culture* (1843) with a broader sense to include levels of civilization.

¹¹ A.L. KROEBER, *Anthropology: Culture Patterns & Processes*, New York, Harcourt, Brace & World, Inc., 1963, p. 8.

In its dynamic sense, culture constitutes a lived experience of a particular community, it acts and is acted upon. It changes and is capable of change. In other words, it is not only a unique human phenomenon but it exerts a large degree of influence on human behaviour — both individual and social behaviour. Therefore, considered in its dynamic aspect, culture can be described as “the sum total of the attainments and learned behavior patterns of any specific period, race, or people, regarded as expressing traditional way of life subject to gradual but continuous modification by succeeding generations.” It is “the act of developing by education, discipline, social experience; the training or refining of the moral and intellectual faculties.” Or, it is “the training, development, or strengthening of the powers, mental or physical, or the condition thus produced; improvement or refinement of mind, morals and tastes; enlightenment or civilization.”¹²

In the Church’s own teaching, culture in a general sense “refers to all those things which go to refining and developing of diverse mental and physical endowments of the human person.”¹³ Clifford Geertz offers the following definition of culture. It is “an ordered system of meaning and of symbols in terms of which social interaction takes place”; it is “the fabric of meaning in terms of which human beings interpret their experience and guide their action.”¹⁴

Referring specifically to culture’s dynamic interaction in mental health, psychiatrists see culture as “a complex pattern of learned behavior, values, and belief systems shared by a member of a designated group. These patterns are generally transmitted through generations, creating a blueprint not only for thought and action but also for physical illness and its presentations, for psychopathology, and for models of treatment.”¹⁵ Culture therefore is not merely a static reality but a dynamic force that influences different aspects of people’s life.

¹² See Webster’s *Third New International Dictionary of the English Language*, p. 552; Funk & Wagnalls *New Standard Dictionary of the English Language*, p. 629.

¹³ GS, 53.

¹⁴ See Clifford GEERTZ, *The Interpretation of Cultures*, New York, Basic Books, 1973, pp. 144-145.

¹⁵ Vernon M. NEPPE and Garry J. TUCKER, “Atypical, Unusual, and Cultural Psychoses,” in *Comprehensive Textbook of Psychiatry/V*, 5th ed., Harold I. KAPLAN and Benjamin J. SADOCK (eds.), Baltimore, Williams & Wilkins, 1989, vol. 1, p. 843.

In analyzing culture's relationship to marital consent consideration of both of its aspects is very important. Each culture has its own content and at the same time that content is dynamic, it communicates, it conveys information and knowledge to those who live and participate in the life of the cultural group through the use of tools, symbols, language, as well as systems of abstract thought. In a sense, the human personality is formed by the social interactions within the context of a cultural group.¹⁶

As far as the influence of culture on human mind and personality is concerned, psychological studies indicate that one's perception, cognition, emotion, motivation and socialization certainly bear its unique stamp. Cross-cultural studies show that the manner in which people of different cultures perceive subjective and objective events are learned, therefore ecologically (culturally) determined.¹⁷

Perception leads to development of concepts and ideas. And these in turn certainly influence people's decisions and actions. Even though the laws of mental operations are the same for all people, cognitive styles and the manifestations of the mind depend on varied environmental demands and individual experiences within a particular culture. People tend to focus their attention on what is most important in their way of life, and different cultures associate things in different ways, give different meaning to concepts, and memorize what is more familiar to them. In other words, whereas persons in all cultures have equal potential for cognitive capacity, the differences in cognitive preferences are explained in terms of the needs, interests, and values of the particular culture.¹⁸

While affective meaning of emotions holds across cultures and their nonverbal, facial expressions seem to be universally similar, the degree and form in which emotions are expressed are different. People of certain cultures are very subdued in expressing their emotions while members of some other cultural group show no inhibition in manifesting their feelings.

¹⁶ See JAHODA, "The Colour of a Chameleon," p. 281.

¹⁷ D. MOTET, "Cross-Cultural Psychology," in *Baker Encyclopedia of Psychology*, ed. by David G. BENNER, Grand Rapids, MI, Baker Book House, 1985, p. 265.

¹⁸ See J.E. PLUEDDEMANN, "Culture and Cognition," in *Baker Encyclopedia of Psychology*, pp. 273-274; MOTET, "Cross-Cultural Psychology," p. 265.

Motives such as dependency, aggression, and even achievement are universal, yet their strength and expression differ with culture.¹⁹

One of the interesting observations derived by cultural anthropologists from their cross-cultural research is the difference in socialization. Studies seem to indicate that most cultures are more ethnocentric with stronger emphasis on "interpersonal relationships" than does the more heterogeneous American culture, which is probably the most individualistic among all presently studied societies.²⁰ Furthermore, while people in the western culture tend to stress self-reliance and individualism to the point of considering them an index of mental health, almost all other cultures value relationships more highly, with corresponding valuing of reliance upon others, whether family, friends, organizations, or institutions.

Similarly, while the tendency in the western culture is to be equalitarian and frequently antagonistic to authority, many other societies are hierarchically organized on the basis of status, rank, or age.²¹ In group-oriented societies, culture seems to persist through generations especially when their members immigrate into culturally different groups. Culture tends to change slowly. Therefore, it will be unrealistic on the part of nationals to expect immigrants to absorb quickly the local culture. The old culture is needed for it protects identity and maintains continuity.²²

One of the important issues which is of much significance to our consideration is the relationship between culture and health/illness. Like all other behavioral sciences, psychiatry also is concerned with the effects of culture on mental illness. Even though major psychological disorders, such as psychoses and neuroses, are comparable across cultures, their incidence and expression seem to be variable. The socio-culture often dictates particular symptoms. For example, among African and some other societies absence of a specific word for depression makes impossible the complaint of depression although certain

¹⁹ Ibid.

²⁰ Ibid., p. 266.

²¹ Ibid., pp. 266 and 268.

²² See MOTET, "Cross-Cultural Therapy," p. 267.

behaviours manifesting as depression may be present.²³ Scientists have identified certain "culture-bound" syndromes which are restricted to particular socio-cultural settings.²⁴

Because of the difference in incidence and expression of psychiatric syndromes in diverse cultures, psychiatrists, even psychologists and psychotherapists, are reminded that in diagnosing and treating mental disorders, they must have the appropriate knowledge of the culture, including its norms, conceptions of illness, factors that predispose to illness, and expectations of illness. These factors determine the kind of treatment to be planned and administered in a particular case.²⁵ This advice is of no less importance to canonists who have to understand and interpret the effects of such disorders on personality and mental faculties of persons afflicted by them.

Briefly, in evaluating the ramifications of the influence of culture on human mind and personality, it is important to consider carefully a variety of its dimensions: ways of perceiving reality (views); ways of thinking (cognitive processes); ways of expressing ideas, concepts and experiences; ways of acting (behavioural patterns); ways of interacting (social structures), ways of channelling the message (communication, media influence), and ways of deciding (motivational resources), etc.²⁶

One of the unique characteristics of ecclesial law applicable to matrimonial consent is its universality. It is applicable to all the Christian faithful around the world. But this law is a norm of reason,

²³ See NEPPE and TUCKER, "Atypical, Unusual, and Cultural Psychoses," p. 843; I. AL-ISSA, "Culture and Psychopathology," in *Baker Encyclopedia of Psychology*, 276.

²⁴ For example, the *Windigo psychosis* among the Algonquin-speaking Indians in north-eastern Canada and the Ojibwa Indians of the United States, the *Koro* in Chinese and Malayan culture of South and South East Asia, and the *Wawas*, an obsessive-compulsive behaviour that is associated with the Islamic rituals of cleansing and prayer. These are typically *culture-bound* syndromes. They demonstrate how myths, thoughts, wishes, and fears of normal members of society are expressed in psychiatric symptoms by the disturbed individual. See AL-ISSA, "Culture and Psychopathology," p. 278.

²⁵ See NEPPE and TUCKER, "Atypical, Unusual, and Cultural Psychoses," p. 843; also see *Diagnostic and Statistical Manual of Mental Disorders (DSM IV)*, 4th ed., Washington, DC, American Psychiatric Association, 1994, pp. xxiii-xxiv.

²⁶ See MOTET, "Cross-Cultural Psychology," p. 267.

and hence, it is essentially reasonable. Because it is reasonable, the principle of equity is central to its application to concrete situations.

Ecclesial law is also a norm which has "the salvation of souls" (c. 1752) as its supreme goal. In an address of 17 October 1953, Pius XII said the following on this point: "Canon Law, like everything in the Church, is wholly geared towards the care of souls ... It must give account, whether it administers ecclesiastical matters or passes judgment or offers advice to sacred administrators and the Christian faithful, the salvation of souls should be its deepest concern."²⁷ In the 3rd fundamental principle which guided the revision of the Code of Canon Law, the Synod of Bishops emphasized in clear terms that the juridic character of the Church and all its institutions should foster supernatural life, and consequently, all laws and precepts, rights and duties are to be in harmony with their intrinsic supernatural purpose. Accordingly, the Code shall strive to instill in pastors and judges discretion and knowledge in exercising their ministry in a spirit of equity which is the fruit of kindness and charity.²⁸

The universal nature of ecclesial law and its supreme purpose rooted in the very nature and mission of the Church necessarily implies that it must be interpreted and applied²⁹ in a spirit of equity to diverse and variable conditions where the life of the faithful is grounded and nurtured. In other words, concrete situations within the believing community qualify the interpretation and application of ecclesial law. As J. Coriden says, "whether that community is a nation, province, region, diocese, vicariate or a religious community, its texture and the

²⁷ See *Acta Apostolicae Sedis* (= AAS), 45 (1953), p. 688. This statement of Pius XII was quoted by Paul VI in his rotal allocution of 8 February 1973 in which he emphasized the pastoral nature of church law and canonical equity. See WOESTMAN (ed.), *Papal Allocutions to the Rota, 1939-1994*, p. 121.

²⁸ See SYNOD OF BISHOPS, "Principia quae Codicis iuris canonici recognitionem dirigant a Synodo Episcoporum probata", 7 October 1967, in *Communicationes*, 1, (1969), p. 79.

²⁹ Canonists seem to argue whether or not "interpretation" and "application" of law are distinct, while one school of thought maintains the distinction between the two, the other uses them interchangeably. For a brief discussion of this issue, see Myriam WJLENS, "Salus animarum suprema lex: Mercy as a Legal Principle in the Application of Canon Law," in *The Jurist*, 54 (1994), pp. 569-573. In my opinion, these two acts are distinct, but each one may include the other in certain instances.

nature of its members weigh on the judgments involved in interpreting the law. Wise and considerate leaders evaluate such factors, at least implicitly or informally, but it is a step which should never be omitted."³⁰ The cultural conditions and pastoral needs of particular local churches and of individual faithful are so diverse that the interpretation and application of the universal law must take into consideration the cultural heritage and social situations of the people concerned.³¹

Ecclesial law is not a compendium of strictly legal statutes. There are in the Code, canons which declare certain dogmatic truths, and these are certainly non-negotiable in any interpretation, because they constitute the foundation of our faith community as a whole. Most canonical norms however are disciplinary in nature and, consequently, are adaptable to particular circumstances. This implies that before everything else, the main hermeneutical task for practitioners of canon law is to discover the values behind the law and determine whether they are really essential and universally applicable or whether, as is more likely in most cases, they are not so important and should not be allowed to hamper the growth of the Christian faith or the spiritual well-being of Christian faithful in certain cultures.³²

Good interpretation presupposes good interpreters. Good interpreters bear three indispensable characteristics: first, a good interpreter knows one's own cultural heritage before attempting to interpret the law; second, a good interpreter knows well the law and the value it is meant to uphold; third, a good interpreter knows well the cultural context in which the law is interpreted and applied. The first characteristic could be considered what Ladislav Örsy calls the vertical or *subjective* horizon (the manner of operations on the part of the person of interpreter), while the other two constitute the horizontal or *objective* horizon (the content of the interpreter's vision).³³

³⁰ James A. CORIDEN, "Rules for Interpreters," in *The Jurist*, 42 (1982), p. 287.

³¹ See Richard A. HILL, "Reflections on the Interpretation of the Revised Code," in *The Jurist*, 42 (1982), p. 311.

³² See John M. HUELS, "Interpreting Canon Law in Diverse Cultures," in *The Jurist*, 47 (1987), p. 289.

³³ See Ladislav ÖRSY, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, Collegeville, MN, Liturgical Press, 1992, pp. 26-27.

First, the *subjective* horizon responds to the question how the interpreter as the subject or author of interpretation is operating. Örsy says that for an interpreter not to be aware of personal horizon is to be in a deceptive situation that is bound to lead to false conclusions. An objective interpretation in the traditional sense is not possible.

In a similar vein, Coriden stresses the importance of the human and historical condition of the interpreter in the task of interpreting. He observes that all law is interpreted and applied by persons. Interposed between the general and abstract norm of law and the community for which it is intended is always a human person. In whatever position of authority or ministry that person may be, the law is understood, interpreted and applied by a human, culturally conditioned person. And the person can make the difference when decisions are made through the interpretation of law to concrete cases. The simple fact that laws are applied by persons leads to the conclusion that an interpreter of law must know him/herself, because individual attitudes, beliefs and values, expectations, styles of work, even moods can affect the way the persons practice law and the results of their legal interpretation.³⁴

Richard Hill also expresses the same view when he suggests that an important element in interpreting and applying the law is our *human* and *historical* condition. "Individually we have a personal history which has shaped and conditioned our vision and our attitudes. We bring this to the interpretation of the law."³⁵

Summarizing the common view of authors on this point, John Huels says that the focus for the hermeneutical question should be as much if not more on the interpreter than on the rules of interpretation. Interpretation is a human act, and embodied in each interpreter are personal modes of perception, cognitive style, skills, limitations, and biases that always influence the interpretative process. Even within the same culture interpretations of law sometimes vary and conflict. This is sometimes evident in the conflicting decisions local tribunals pronounce on the same case. The way to reduce personal bias and limitations and to develop skills in interpreting law lies chiefly in the

³⁴ See CORIDEN, "Rules for Interpreters," p. 279.

³⁵ HILL, "Reflections on the Interpretation of the Revised Code," p. 318.

acquisition of additional knowledge and experience which broadens one's horizons and equips the interpreter with more intelligible categories with which to approach canon law.³⁶

Second, one of the elements of the interpreter's vision is *law* itself. A just and equitable interpretation and application of law cannot be effected without a good knowledge of the law. In his Rotal allocution of 30 January 1993,³⁷ John Paul II presented some important hermeneutical principles which are not to be disregarded by any interpreter of canon law.

(a) The first principle of interpretation is to understand laws "according to the proper meaning of the words in their text and context" (c. 17). Therefore, to attribute to the words used by the legislator not their "proper" meaning, but suggested by disciplines different from the canonical one, would "be totally arbitrary even patently illegitimate and gravely culpable (*gravemente colposo*)."³⁸

(b) The second principle is that in interpreting the revised Code one should not think that with its promulgation there is a complete break from the past as if there had been a leap into a totally new reality. Continuity of canonical tradition has been positively reaffirmed by the legislator in c. 6, §2.

(c) The third principle concerns the necessity of interpreting and applying canon law in light of well-established doctrine and jurisprudence. In other words, an interpreter of law must be well-acquainted with doctrine and jurisprudence concerning the words and expressions newly introduced by the legislator in the Code.

(d) Excessive relativization of canon law on the pretext of *humanizing* it, especially in matrimonial matters, is likely to lead to interpretations and applications of law that would ultimately pervert its characteristic features.

Just and equitable interpretation and application of canon law, the Holy Father insists, "entails the need for a proper knowledge of the

³⁶ See HUELS, "Interpreting Canon Law in Diverse Cultures," pp. 272-273. Also Ladislav ORSY, "The Interpreter and His Art," in *The Jurist*, 40 (1980), p. 50-51.

³⁷ See WOESTMAN, *Papal Allocutions to the Roman Rota 1939-1994*, p.223-226.

³⁸ *Ibid.*, p. 225.

Church's legislation, but without forgetting, in the light of a correct Christian anthropology, the reality of human beings for whom it is intended. Subjecting canon law to capricious or contrived interpretations, in the name of an ambiguous and indefinite *humanitarian principle*, would mean destroying the very dignity of the humans, even before the norm."³⁹

Third, another element of the interpreter's field of vision is the person (or the community) for whom the law is to be interpreted. A good interpreter must know the person (or the community) in question before interpreting the law for that person. But that person (or community) is a product of concrete historical and cultural conditions. Therefore, one cannot sufficiently understand that person without first understanding his/her cultural background.

Since the principal vehicle for communicating culture is language (verbal or symbolic), anthropologists maintain that one cannot understand another person's culture without knowing its language, because so much that comprises culture is transmitted through language. However, one should not be deluded into thinking that once a particular language is learned, one has full appreciation of all peculiarities of the culture. It is almost impossible to fully understand and appreciate a given culture without being a part of the process of socialization and inculturation. Even good translation does not convey the full meaning of the language because there are many words and expressions which cannot be translated exactly from one language to another without losing something of its flavor.⁴⁰ Through learning the language alone it is impossible to understand how people of a particular culture think, how they perceive and conceptualize their world, and what influences their culture and language have on their view of reality. One may acquire a good intellectual grasp of the meanings of culture, but without sharing in the process of socialization and inculturation within the cultural group, one will be devoid of their affective significance.⁴¹

³⁹ Ibid., pp. 225-226.

⁴⁰ See Malcolm CRICK, *Explorations in Language and Meaning: Towards a Semantic Anthropology*, London, Malaby, 1976, p. 160.

⁴¹ See Melford E. SPIRO, "Some Reflections on Cultural Determinism and Relativism with Special Reference to Emotion and Reason," in *Cultural Theory: Essays on Mind, Self, and Emotion*, Richard A. SHWEDER and Robert A. LEVINE (eds.), Cambridge, Cambridge University Press, 1984, p. 326.

Therefore, good interpreters of law, lacking such experience, should at least listen to those who are most intimately acquainted with the culture, the needs of the local church, and the actual situation of God's people, because such persons are usually in the best position to understand the cultural and social context in which the law must be enfolded.⁴² For example, in a marriage case originating from Tokyo (Japan), judged *coram* Agustoni on 9 May 1973,⁴³ the Rotal court sought the assistance of a certain priest in Japan knowledgeable about the local customs and traditions, and he provided a synthesis of the opinions of other experts in *missiology*, *sociology* and *canon law* on the issues under consideration. The judges wanted to know the role parents, or guardians, or the so-called "match-makers" ("*conciliatores*") played in the decisions children made concerning marriage or marriage partners. The sentence by Agustoni has several quotations from the expert testimony confirming the negative impact cultural elements had on the matrimonial consent.

It is true that the Code provides definite rules in cc. 7-22 on different aspects of law, including principles of interpretation. But these alone cannot be relied on for an appropriate, pastorally sensitive interpretation of law in every situation. A narrow, legalistic approach in interpreting and applying the norms which are universal in scope without giving any consideration to particular circumstances of the place and persons is certainly unjust and doomed to failure. A good interpreter will make every effort to know people's language and other ways of communicating meaning, their perceptions of reality, and the social context in which meanings are transmitted.⁴⁴ This is particularly true in marriage cases coming from cultures with which we are probably totally unacquainted.

⁴² See HUELS, "Interpreting Canon Law in Diverse Cultures," p. 271.

⁴³ See decision *c. AGUSTONI*, 9 May 1973, in TRIBUNAL APOSTOLICUM SACRAE ROMANAE ROTAE, *Decisiones seu sententiae* (= *SRR Dec.*), 65 (1973), pp. 409-417. This is the only case I have come across in the collection of published Rotal sentences in which the Rotal court had sought expert advice on the influence of a particular culture on matrimonial consent.

⁴⁴ See HUELS, "Interpreting Canon Law in Diverse Cultures," p. 288.

II. CULTURE AND MARRIAGE

Marriage is an "intimate union" (GS 48), a "partnership of the whole of life" (c. 1055, §1) between a man and a woman, by its nature ordered toward their own wellbeing (good of the spouses) and procreation and upbringing of children (good of offspring). This conjugal union is one, exclusive and lifelong (permanent), and between two validly baptized persons, it is also a gracefilled reality, a sacrament (c. 1055, §2). This, in essence, is the theologico-juridical conceptualization of marriage according to the Church's teaching. Such a conceptualization reflects both the natural and supernatural dimensions of marriage.

Marriage is, first and foremost, a primordial human reality. It neither originates nor derives from something preexisting. Its very existence and purpose are defined by the human nature. As a human reality it is inseparably linked to the evolution of human beings. Since human beings evolve within the context of specific cultures, the inner structure and external manifestation of marriage too are subject to cultural influences.

On the one hand, therefore, the Church cannot be indifferent to its own values derived from the Gospel, while on the other hand, it cannot be blind to those values which are integrated into the culturally influenced conceptual formulations of marriage. In other words, while the essential elements of marriage are universal and remain constant, their perception and conceptualization may differ from culture to culture. For example, while the notions of "rights and duties", "freedom", "equal dignity", "love", etc., are essential to the meaning of marriage, their understanding and importance would certainly be determined by the culture of each society.

In certain cultures, for example, marriage is considered as a "school of love" rather than a "result of love." Similarly, some cultures may consider objective social aspects of marriage to be more important than its subjective aspects. For instance, in explaining the relevance of subjective aspects of marriage within a working community, E. Schillebeeckx observes: "What preserved marriage was not so much the married partners as the entire structure of this working community and of the whole of society. The superior power of objective relationships predominated over personal life. The extended

family was held together by community shared work.”⁴⁵ This did not mean that the prominence attributed by a given culture to certain objective elements completely denied the personal and subjective aspects of marriage. “It was there, but as a silent background, and it was taboo — silent and inconspicuous — therefore, public, social and economic life was to some extent permeated by the family spirit.”⁴⁶

Culture precedes individual’s convictions and choices. It is possible to consider the effects of cultural influences under two aspects of matrimonial consent: first, in the determination of the content of one’s intention, and second, in the very choice of marriage, or of the marriage partner, one makes. The content of a person’s intention is marriage and the marriage partner. Marriage itself and its essential elements must be contained in that intention. Often the content of a person’s intention is already determined by his or her experiences within a specific cultural milieu. Therefore, if the content of a person’s intention is substantially different from or contrary to the essential elements of marriage, the consent would be null. Similarly, the essence of the choice of marriage or marriage partner is internal freedom. If, in the name of culture, a person’s freedom to make a deliberate and free decision is substantially diminished, the consent elicited under such circumstances would be equally null. It is important to consider the following aspects of culture in order to understand how cultural elements may affect a person’s decision to marry.

Social anthropologists distinguish four levels in any given culture which are likely to influence human experience and behaviour. Culture, they say, is “a series of concentric circles” representing a progressive interiority. There are four such “circles” or “levels”. While the two “outer” circles relate to its “practical” or “tangible” aspects, the “inner” circles express the “cognitive” or “symbolic” realm.⁴⁷ At the outermost level of the practical realm are the external rituals related to prewedding preparations, wedding ceremony itself, for example, the use of symbols such as rings or their equivalents, etc. Even though these may be

⁴⁵ Edward SCHILLEBEECKX, *Marriage: Human Reality and Saving Mystery*, London, Sheed and Ward, 1976, p. xvi.

⁴⁶ Ibid.

⁴⁷ See Aylward SHORTER, *Toward a Theology of Inculturation*, Maryknoll, NY, Orbis Books, c1988, pp. 35-36.

considered important to the totality of the celebration, they do not have deep and lasting impact on human beings.⁴⁸ However, at the deeper level of this realm are family traditions, social conventions, gender roles, etc., which affect members of the cultural group more profoundly and are more difficult to change.

The symbolic level comprises values which determine priorities and characteristic choices one makes when confronted with alternatives. Each cultural group cherishes its own values. For example, values such as conjugal love, procreation, family loyalty, family status, prestige, virginity, etc., have a greater degree of importance in one culture than in another. In most cases, such values are instilled into the members of the cultural group through cultural education or enculturation, and they stem from a deeper underlying cultural level. The deepest level of culture relates to the way members of a particular cultural group understand and act toward the world. The "world" is understood here as the whole range of human experiences, physical and religious. Religious faith endows all experience with a new dimension. It imparts conviction and motivation to the view one holds about a particular reality. An understanding of the reality steeped in religious beliefs and sentiments is at the heart of every culture.⁴⁹ This is particularly true in regard to the cultural understanding of marriage. For example, in most cultures the meaning and purpose of marriage are determined by the deeply-rooted beliefs concerning the meaning and purpose of human life itself as lived within the context of a particular cultural group. Such beliefs are certainly not uniform across cultures. In fact they differ from culture to culture. Because people's values and worldview permeate the very core of their being, it is very difficult to change them.⁵⁰

A proper understanding of the juridic implications of these cultural dynamics is important in examining marriage cases.

⁴⁸ Ibid. Also see Randolph R. CALVO, "The Impact of Culture in Marriage Cases," in *CLSA Proceedings*, 55 (1993), p. 112.

⁴⁹ See SHORTER, *Toward a Theology of Inculturation*, p. 36.

⁵⁰ Ibid.

1. Meaning and Purpose of Marriage

As stated above, marriage is a partnership between a man and a woman by its very nature ordered to the good of the spouses and procreation and upbringing of children. But how this partnership and its finality are perceived and consented to depends on the culturally conditioned content of the people's mind. Even intense evangelization may not succeed in obliterating the deeply held conception of a particular reality, related beliefs and attitudes, because culture preexists evangelization. In his study on the *Celebration of Marriages in India*, J. Maliekal rightly observes that "the early Christian community was 'Hindu in social life, Christian in religion and Catholic in worship'."⁵¹ What this statement affirms is the fact that at the deeper level of their life, Christians retain their social and cultural heritage of who they are as a people. The perception of reality and convictions attached to it do not easily disappear or melt away from people's way of life.

In most Asian countries, marriage has a distinct purpose which is essentially linked to the continuation of family or clan lineage and ancestral worship. For example, in his recent study on marriage in Vietnamese culture Nguyễn Thê Viên writes: "The Vietnamese marriage is controlled by a plethora of customs, traditions and laws in which individual's significance, freedom and feelings pale in comparison to the nation's and clan's very existence."⁵² Furthermore he adds, "The purpose of Vietnamese marriage is to serve and worship ancestors, and to bring children into the world in order to continue the species. Therefore, marriage is not a matter between two individuals but that of the whole family, even the whole clan."⁵³ Thê Viên explains further that a distinctive way of showing reverence to ancestors is to

⁵¹ See John MALIEKAL, *Celebration of Catholic Marriages in India*, JCD diss., Ottawa, Saint Paul University, 1983, p. 24.

⁵² See Nguyễn THÊ VIÊN, *The Traditional Role of Parents or Guardians in Vietnamese Marriages and Canonical Freedom of Consent*, JCL diss., Washington, DC, The Catholic University of America, 1994, p. 42.

⁵³ Ibid., p. 43. This social and communal purpose of marriage is deeply ingrained in most African cultures as well. See John S. MBITI, *Introduction to African Religion*, 2nd ed., Portsmouth, Heinemann, 1991, especially pp. 104-114; Belonwu H. OKONKWOR, *The Role of Matrimonial Consent in Igbo Traditional Marriage in the Light of the New Canonical Legislations: A Comparative Study*, JCD diss., Rome, Pontificia Universitas Urbaniana, 1985, especially pp. 32-33.

have a male heir to continue the lineage so that the needs of the dead are properly met. Not having a male heir is being considered as one of the three matters which constitute grave lack of filial piety to ancestors.⁵⁴ Writing about the situation existing prior to communist take-over of China, R. Knopke states that one of the reasons for parental power over the choice of marriage and marriage partner for their children was "the strong desire to perpetuate the family. The father would go to great lengths to protect his reputation in the clan for having obedient children and descendants through them."⁵⁵ A study of South Korean culture has also found that "the major purpose of marriage was to have sons who will perpetuate the lineage and honour the ancestors."⁵⁶ For this reason, it may not be that uncommon to find men, especially non-Catholics, who might divorce the wife solely because she is not capable of bearing a male child.⁵⁷ Similar family or clan oriented expectations in marriage are deeply rooted in other Asian cultures as well.

The canonical importance of considering these cultural elements affecting marriage consists in the fact that they are likely to enter into the act of matrimonial consent either in its subjective or objective aspects. Thus, for example, the meaning and purpose of marriage as determined by each culture may so shape the object of consent that what is exchanged through it may be substantially different from the legally defined content of the intention.

2. Parental Authority

The natural sequel of a family-oriented finality of marriage is the extent of parental authority over the marriages of their children. Practically in all Asian societies parents play a very important role in the decisions their children make concerning their own marriages. In

⁵⁴ THÈ VIÊN, *The Traditional Role of Parents or Guardians*, p. 35.

⁵⁵ See ROCH F. KNOPKE, *Reverential Fear in Matrimonial Cases in Asiatic Countries, Rota Cases: A Historical Synopsis and a Commentary*, Canon Law Studies No. 294, Washington, DC, The Catholic University of America Press, 1949, p. 74.

⁵⁶ See MARGARET ANNE RAMSDEN, *Marital Consent as Understood by Koreans*, Master's Seminar Paper, Ottawa, Saint Paul University, 1992, pp. 38-39.

⁵⁷ See *ibid.*, p. 39.

Vietnamese culture, for example, parents and grandparents are responsible for raising, educating and arranging marriage for their children and grandchildren. In the event of parents' death, paternal uncles and maternal aunts assume these responsibilities. Even the chief of the clan concerned gets into the act. The authority of grandparents, parents and the clan chief is absolute over their children.⁵⁸ The same situation prevailed in China where the entire negotiation of marriages of children depended on the parents alone.⁵⁹ In his study on different aspects of arranged marriages among the Tamils of Jaffna in Sri Lanka, T. Kirupaharan states that traditionally parents, guardians and elders play a very important role in the matrimonial choices and consent of their children. For the Jaffna society, he continues, family comes first, ahead of the country or caste. Family is the most influential social force.⁶⁰ Similar practice is prevalent also within the Sinhalese community of Sri Lanka. According to M. Lusena, who has studied this issue, parents and relatives are the *chief actors* in "proposed" marriages. Children themselves are mostly passive doers of their parents' will.⁶¹ There is no culture in Asia which totally excludes the role of parents in the arrangements of their children's marriages. However, the degree of their influence differs from culture to culture. Even though parents have the natural right and obligation to assist their children in making right choices in life, especially in the choice of their states in life, their authority should not amount to violation of the children's personal freedom in making such choices.

3. Filial Reverence

Filial reverence or filial piety is a universal virtue nurtured in practically all cultures. But in oriental cultures it assumes unique

⁵⁸ See THÈ VIÊN, *The Traditional Role of Parents or Guardians*, pp. 37-38.

⁵⁹ KNOPKE, *Reverential Fear in Matrimonial Cases*, p. 72.

⁶⁰ See T. Jerribel KIRUPAHARAN, *Reverential Fear in Matrimonial Consent: A Study Based on Canon 1103 with Particular Reference to Arranged Marriages Among the Tamils of Jaffna in Sri Lanka*, JCD diss., Romae, Pontificia Universitas Urbaniana, 1993, pp. 17, 25-26.

⁶¹ See M. J. LUSENA, *The Application of Selected Capita of Canonical Jurisprudence to the Practice of "Proposed Marriages" in Sri Lanka*, Canon Law Studies No. 534, Washington, DC, The Catholic University of America, 1990, 28.

significance on account of its rootedness in a system of tightly knit family relationships. In Vietnamese culture, for example, lack of filial reverence is ranked among the ten "heinous" crimes in the *Lê Code*.⁶² This virtue also includes caring for parents' needs and avoiding everything that might shame them even after their death.⁶³

Similarly, Chinese children hold their parents in such high esteem that they consider any unfilial attitude or behaviour a disgrace to their family. It seems the notion of filial piety is drilled into the children incessantly and by word, example and circumstances.⁶⁴

Among the Tamils of Jaffna, the notion of filial reverence is instilled into the children in such a way that in some instances they remain submissive to their parents throughout their life. In such cases, it is quite possible that children fail to develop a sense of personal autonomy necessary to make important decisions. Such persons may not even think of their fundamental right to choose marriage and their life-partners, but leave everything to the discretion of their parents.⁶⁵ In this way, lacking the personal capacity to make their own decisions, they may readily accept and adhere to the choices made for them by their parents. Any challenge to parental authority in these matters is likely to be considered unbecoming of a child, and the child in turn may not be able to thwart such expectations.

The Filipino culture also highly values this virtue. Children grow up with a deep feeling of indebtedness or "deep-seated debt of gratitude which has no end" toward their parents for caring for them. This intense sense of indebtedness is further reinforced by a feeling of shame when a child does not display evidence of this deep-seated debt of gratitude.⁶⁶ Thus, when cultural demands based on filial reverence go counter to a person's freedom to choose, there can be no true choice. This is one of the important aspects of consent which may be seriously

⁶² THÈ VIÊN, *The Traditional Role of Parents or Guardians*, p. 35.

⁶³ Ibid.

⁶⁴ KNOPKE, *Reverential Fear in Matrimonial Cases*, p. 81.

⁶⁵ KIRUPAHARAN, *Reverential Fear in Matrimonial Cases*, p. 45; G.M. MUTTUKUMARU, *Reverential Fear in Marriage with Special Reference to Ceylon*, JCD diss. (Unpublished), Rome, Pontificia Universitas Urbaniana, 1954, p. 256.

⁶⁶ See CALVO, "The Impact of Culture in Marriage Cases," p. 113.

compromised in case of filial reverence, and this is certainly a frequent occurrence in arranged marriages.⁶⁷

4. System of Arranged/Proposed Marriages

Marriage being primarily a family affair, "an institution creating new alliances or strengthening old ones",⁶⁸ most marriages in Asian countries are either arranged or proposed.⁶⁹ According to this system, parents or guardians⁷⁰ initiate and negotiate all aspects of their children's marriage. Thus, for example, in India even today, children generally leave the choice of their marriage partners to the mature and careful decision of their parents who know their children better and have their wellbeing at heart.⁷¹ This practice is also

⁶⁷ As early as 1917, in a marriage case originating in China, the Rotal court considered reprobated the custom of forcing children against their will by parents to marry: "If among the Chinese it is the custom for children to follow the will of their parents in entering marriage, this can be tolerated only in so far as the children do not manifest a contrary will, in which case that custom is to be reprobated as unjust" (c. SEBASTIANELLI, 10 February 1917, in *Sacrae Romanae Rotae Decisiones seu sententiae* (= *SRR Dec.*), 9 (1917), p. 29; English translation in KNOPKE, *Reverential Fear in Matrimonial Cases*, p. 81). This statement was literally repeated in another decision c. GUGLIELMUS, 20 April 1926, in *SRR Dec.*, 18 (1926), p. 158.

⁶⁸ B. COUTINHO, "Marriage and Divorce in Hindu Society," in *Jeevadhara*, 5 (1975), p. 438.

⁶⁹ According to Lusena, "proposed marriages" are those "proposed by the parents to their sons and daughters, who are considered to be free to accept or to reject the proposal." He distinguishes these from "arranged marriages" as follows: "Thus 'proposed marriages' differ significantly from 'arranged marriages' which may be found in India and China and in some other Asian countries. It is to be noted that arranged marriages are negotiated and decided upon by the parents or guardians of the parties" (LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, p. 25). The author does not seem to acknowledge the fact that among the Tamils of Jaffna in his own country the custom of "arranged marriages" is most prevalent. Moreover, even in India today, the system of arranged marriages does not totally exclude the participation of the parties in the arrangements of their marriages.

⁷⁰ Guardians may include not only those legally appointed but also those who are acknowledged as such by custom. For example, in Japan, even "marriage counsellors" or so-called "match-makers", officially functioning within parish structures, also seem to enjoy such esteem. See c. AGUSTONI, 9 May 1973, pp. 410-411.

⁷¹ See MALIEKAL, *Celebration of Catholic Marriages in India*, p. 29.

prevalent among the Tamils of Jaffna.⁷² The Vietnamese custom involves a wider circle of persons in this system. Marriage is normally decided by parents, grandparents or guardians with the approval of the clan chief. Although some parents may take into consideration their children's choice of spouse, most do not.⁷³ A proper Vietnamese marriage must be proposed by the parents or guardians of the bride. When this happens without any involvement of the parties themselves, it is possible to presume parental pressure on them to marry. If the parties had no courtship at all and should one or both claim at least moral coercion to marry, the claim should be presumed founded.⁷⁴

Marriages are arranged by parents either directly or through a professional broker,⁷⁵ agencies,⁷⁶ or through newspaper advertisements.⁷⁷ The main function of a marriage-broker is to gather informa-

⁷² See KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, p. 33.

⁷³ THÉ VIÊN, *The Traditional Role of Parents or Guardians*, pp. 43-44.

⁷⁴ *Ibid.*, p. 52.

⁷⁵ Professional marriage brokers also go by the name of "middle-man", "go-between", or "match-maker." See KNOPKE, *Reverential Fear in Matrimonial Cases*, p. 79; KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, p. 56.

⁷⁶ In recent years, marriage broker agencies have mushroomed all over India, and these may be found in some parishes as well.

⁷⁷ Here are some examples of this: (a) "Proposals are invited from Syrian Catholic women for a 32 yr old Syrian Catholic Engineer, Ph.D., raised in Bangalore, currently working on H1-visa, getting GC [Green Card] soon. Please send biodata and returnable photograph" (*India Abroad*, International weekly, vol. XI, No. 48 [Toronto edition], Friday, 1 September 1995, p. 34).

(b) "Affluent cultured Catholic parents invite correspondence from Catholic Doctors/professionals (30-35) for their only daughter - pretty, professional in the medical field. Please send your photograph with biodata" (*ibid.*, p. 35).

(c) "Telugu Christian parents invite correspondence for attractive, homely, green card [holder], professional daughter; from suitable, good, successful, professional Christian 32+. Please reply with returnable photograph and biodata" (*ibid.*, vol. XI, No. 51, Friday, 22 September 1995, p. 39).

(d) "Roman Catholic parents invite correspondence from Catholic bachelors for their Daughter aged 34 and 5'5" tall, qualified and residing in London. One of the parents is presently visiting Mangalore. All replies will be treated in the strictest confidence. Reply with full details" (*Rakno*, Konkany weekly, vol. 57, No. 37, 21 September 1995, p. 16).

(e) "Mangalorean Roman Catholic Bachelor, Height 5'9"; Age 30 years, Marine Engineer, working as a IInd Engineer in Foreign Ship, seeks alliance from beautiful

tion about the person sought after and about his/her family. Such information usually includes particulars about that person's caste, employment status, family's social and economic condition, religion, age, character (any indication of intimate friendship), dowry, etc.⁷⁸ As Lusena notes, "It is the nature of the marriage broker to describe at length the virtues of the other party, the excellence of his or her family status, and the wealth that could devolve upon the union."⁷⁹ This kind of third party involvement in a person's marriage is not without risks, especially of misrepresentation and deception both in regard to the status of the families and the qualities of the party concerned. Not infrequently the person described by the broker may in fact be different from the real one.⁸⁰

In some ethnic communities in Asia, there is also a subcategory of arranged marriages called "cousin" or "cross-cousin" marriages. In India this type is prevalent among certain subcastes of Hindus. According to Kirupaharan, the practice of "cousin marriages" is found even among the Tamil Catholics of Jaffna. Within this system, the son and daughter of a brother and sister respectively marry. Such marriages are at times planned from birth. The child of a brother can marry the child of his sister. But children of two brothers or of two sisters cannot marry. This system is designed to preserve wealth and property within their own ethnic group, and to safeguard the class and caste distinctions.⁸¹

It is true that the system of arranged/proposed marriages has its origin in antiquity; it is derived from ancestral traditions and customs.

Christian Spinsters, fair & slim. Age below 25 years, preferably Electronic Engineer, B.Sc., B.Ed.; B.Sc. Nursing, Bank or LIC Employee" (*Rakno*, vol. 57, No. 35, 7 September 1995, p. 19).

⁷⁸ See KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, p. 56; LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, pp. 39-40; RAMSDEN, *Marital Consent as Understood by Koreans*, p. 30; KNOPKE, *Reverential Fear in Matrimonial Cases*, p. 79.

⁷⁹ LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, p. 40.

⁸⁰ See *ibid.*

⁸¹ See KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, p. 36; also see Irawati KARVE, *Kinship Organization in India*, Poona, Deccan College Postgraduate and Research Institute, 1953, pp. 219-220.

In itself this system can be considered practical in given cultural contexts. But it can and does have the potential for serious negative consequences as far as matrimonial consent is concerned when a person's freedom of choice is substantially restricted, when the consent of the parties is overridden by that of the parents, when the essential elements of its object are replaced by non-essential ones, and when the personal/interpersonal nature of the marital partnership is rendered practically impossible under the pretext of family's or clan's survival.

5. Significant Values

In practically all oriental cultures, certain values are highly esteemed as being essential within the context of arranged marriages. For particular cultural groups some of these values are so important that the validity of a marriage itself may hinge on their presence or absence. Family status or prestige, caste, age, virginity, fertility, dowry, etc., are some of those values cherished by oriental cultures.

a) *Family status or prestige*

When feelers are sent out through a marriage-broker for a prospective bride or groom, one of the characteristics of the person being carefully investigated is his or her family's social and economic status. Freedom from social stigma, criminal background and moral behaviour of the family members, history of any contagious disease, alcoholism, etc., become the focus of this inquiry. This process is common in India among all ethnic and religious groups. Parents desire to see their child become a member of a reputable and morally upright family. Lusena, for example, says that among the Sinhalese the fundamental concern of the woman's parents is the acquisition of a husband with high personal and familial prestige for their daughter, while the main goal of the man's parents is the dowry to be acquired, although the family status is also quite important.⁸² Tamils of Jaffna also have a similar practice, namely parents choose a partner for their child in keeping with their rank and family status.⁸³ In Vietnamese

⁸² LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, pp. 31-32.

⁸³ KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, pp. 33, 43, 68.

culture, the choice of marriage partners depends primarily on the similarity of the status between the two families and the personality and background of each prospective spouse. One of the elements looked for in the prospective spouse is the type of family he or she hails from.⁸⁴ What is to be noted in the requirement of family's social and/or economic status is the importance attached to it by the parents. The actual status of a family is likely to enter into the consent of the parents, and consequently, into the consent of the parties as well. One should not be surprised to see, in some instances, this value emerge as the principal reason for seeking a declaration of nullity of a marriage.

b) *Caste*

Caste⁸⁵ is another important social factor which has significant influence on arranged marriages. Distinction of people on the basis of caste is prevalent in all countries of the Indian subcontinent. Even though the Constitution of India makes no distinction between Indians on the basis of caste, the caste system is very much an integral part of Hindu life and belief. And as a universal phenomenon, it has permeated also all levels of Indian society irrespective of religious persuasions. It prevails even among Catholics in its subtle forms. The caste-consciousness is so pervasive among Indians that it enters naturally into the choice of marriage partners.

Because of its intrinsic importance to each cultural group, people take all measures to preserve caste endogamy. The system of arranged marriages seems to be one of the surest ways to secure the "pristine

⁸⁴ THÊ VIÊN, *The Traditional Role of Parents or Guardians*, p. 44.

⁸⁵ The word "caste" derives from the Portuguese term "casta", which is the equivalent of breed, race, kind. See J.H. HUTTON, *Caste in India: Its Nature, Function, and Origins*, London, Cambridge University Press, 1946, p. 42. In Sanskrit, "caste" is expressed in the word "varna", which signifies colour. The connotation of colour in reference to the caste system seems to support the theory that the main castes were originally distinguished on the basis of complexion. Another Sanskrit word for caste is "jāta" which means race. According to one theory, the caste system is racial or tribal in origin. See James D'MELLO, *The Dual Religious Marriage Celebration in India*, JCD diss., Ottawa, Saint Paul University, 1985, pp. 6-7. There are about 3,000 castes in India, and over 25,000 subcastes. All these castes fall into four main categories: *Brahmins*, *Kshatriyas*, *Vaishyas*, and *Sudras*. See B. WALKER, *Hindu World*, London, G. Allen and Unwin, 1968, vol. 1, p. 201.

purity" of the institution of caste.⁸⁶ Usually the marriage-broker or relatives verify the caste identity of the parties. The system of arranged marriages excludes the possibility of intercaste marriages, even though exceptions do occur. In other words, people ordinarily marry within their own caste. As Lusena rightly says, "Fear of caste mixture is perhaps the strongest of all supports for the proposed marriage' system and a source of the greatest intolerance for romantic unions generally."⁸⁷ As a matter of fact intercaste unions are frowned upon and, if entered into, they would invite immediate ostracism.⁸⁸

Vietnamese tradition seems to have a similar, though not identical, system. In Vietnam, persons are expected to marry within their own clan or village-based ethnic group. Inter marriages are strongly discouraged through sayings like, "it is better to marry a poor husband in one's own village than to marry a rich husband elsewhere."⁸⁹ In this culture also the system of arranged marriages safeguards this value.

In caste-restricted marriages personal choice of a marriage partner has very little scope. Parents make sure that their child has a partner who belongs to the same caste. In other words, the decision of the parents, which children are expected to respect, is already determined and conditioned by the element of caste. Therefore, even if a man and a woman belonging to different castes were to fall in love, their parents generally would not consent to their marriage. This situation is likely to affect the eventual consent children proffer.

c) Age

Another significant value which enters into the choice of marriage partners is *age*. As a rule, the proposed bride must be younger than the prospective groom. This requirement is universally adhered to in arranged marriages among all communities in India.⁹⁰ The

⁸⁶ Bennett CONSTANTINE, *The Problem of Consent in the Arranged Marriage of Tamils of Jaffna*, JCD diss., Rome, Pontificia Universitas Urbaniana, 1977, p. 134.

⁸⁷ LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, p. 33.

⁸⁸ See D'MELLO, *The Dual Religious Marriage Celebration in India*, p. 6.

⁸⁹ THÈ VIÊN, *The Traditional Role of Parents or Guardians*, p. 44.

⁹⁰ For a recent Rotal sentence on this issue, see c. STANKIEWICZ, 30 January 1992, in *Monitor ecclesiasticus* (= ME), 118 (1993), p. 535.

rationale underlying this requirement seems to imply that in cultures which demand this disparity in age husband assumes the responsibilities for his wife who is transferred from her father's authority to his care. This responsibility presupposes sufficient maturity on husband's part and greater age seems to be an assurance of it. Referring particularly to Sinhalese custom in this regard, Lusena says: "It is of consequence that a marriage of a young man to a young woman older in age is not in any way to be contemplated."⁹¹ Thus, it is certainly realistic to state that the requirement of disparity in age between the prospective groom and bride is rooted in Asian cultures.

There is another element of age which has a bearing on arranged marriages. It becomes very difficult, particularly for a woman, to find a suitable match after certain age. For example, in Japanese society unmarried women are not highly esteemed by people in general, and those women who are advanced in age (*superadulthood*) are compelled by the customs of the place to marry in order to avoid shame and public insult.⁹² Similarly, among the Vietnamese an unmarried woman in her late twenties is considered by people to be on the verge of "old maidenhood." Therefore, she could be compelled by her parents or by those who stand in their place to agree to a marriage with anyone who would be willing to marry her. Pressure is even stronger if she is the oldest of several daughters because according to the local custom it is not proper for the younger sisters to marry before the oldest. The same holds good also for the man. It is considered late for a man to be unmarried in his thirties. Parents and relatives are likely to put pressure on such a person to marry. If he is the firstborn, the pressure will be more forceful because he is responsible for the continuation of the family lineage. Therefore, he may give in to pressure and marry anyone proposed by his parents or guardians.⁹³ A similar tradition is also in vogue in the Tamil society of Jaffna. When a girl attains the marriageable age (usually 20 to 25 years), parents make every effort to find a suitable partner for her. Kirupaharan says that once a girl reaches thirty years of age it is difficult to find a suitable partner from her own community. In such a situation, parents may have to pay a

⁹¹ LUSENA, *The Application of Selected...*, p. 35.

⁹² See c. AGUSTONI, 9 May 1973, p. 410.

⁹³ See THÈ VIÊN, *The Traditional Role of Parents or Guardians*, p. 52.

higher dowry, or they may have to accept any person who may not meet their expectations. Naturally, the girl may be compelled out of deference to her parents or guardians to accept the man proposed by them.⁹⁴ The age requirement is considered so important that parents or marriage-brokers often resort to fraud in order to misrepresent or conceal the real age of the girl, and this certainly has serious juridic consequences for matrimonial consent.

d) *Virginity*

In a case from Dinajpur, India, judged at the Rota on 21 June 1941 *coram* Heard, the petitioner, a recent convert to the Catholic faith at the time of marriage, claimed that his prevalent intention was to marry according to the local customs, that is, he intended to marry a *virgin*. The girl was in fact pregnant for someone else at the time of marriage, and the evidence supported his claim. The court pronounced an affirmative decision on grounds of error of quality redounding to error of person.⁹⁵

The above case is not an exception. The cultural expectation of a bride being a virgin at the time of marriage is deeply rooted in the psyche of every ethnic or tribal group in India. In other words, *virginity* of the bride is a cultural requirement, and consequently, it invariably enters into the matrimonial consent of the parties. The Sinhalese culture also attests to this fact. Lusena, for example, reports: "Among the values in 'proposed marriages' one which is considered as of greatest importance is the virginity of the bride. With proper assurance of caste and age there must come also assurance of this virtue." And furthermore, "[...] in a popular village proverb it is said that even a dowry of a hundred thousand rupees would not make a non-virgin welcome among the kindred."⁹⁶ This sentiment is deepseated in all cultures of the East. Even though there are no prenuptial tests of this requirement, among the Sinhalese there is a method to confirm it. This method consists in carefully scanning the

⁹⁴ See KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, p. 44.

⁹⁵ See decision c. HEARD, 21 June 1941, in *SRR Dec.*, 33 (1941), pp. 530-531.

⁹⁶ LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, pp. 35-36; also see pp. 181-182.

postnuptial evidence. According to the local custom, the groom's family (particularly the mother in-law) has the right to inspect the white sheet used on the marital bed on the first night for proof of virginity. The bedsheet is inspected for blood stains. The presupposition is that if the sheet is stained with blood, the bride was a virgin, otherwise she was not.⁹⁷ If the bride was a virgin she would be immediately welcomed into her new home, otherwise conjugal life is likely to face serious problems including its immediate termination. Because of such importance attributed to this virtue, people generally seek information about the girl's past friendships particularly with boys. Even *rumours* of sexual misconduct are likely to make it extremely difficult for a girl to find a suitable partner within her community. And such a situation is certainly not without serious consequences for matrimonial consent.

e) Offspring

As explained above, in most oriental cultures the significance and purpose of marriage is defined by its intrinsic orientation towards perpetuation of the family or clan lineage. And this is possible only if the spouses are capable of generating offspring. Therefore, the offspring constitutes the supreme value of marriage within the context of oriental cultures. The expectation of children in marriage is so deeprooted in the culture itself that sterility or infertility is considered grounds for divorce or dissolution of the union. For example, Thê Viên says that "not having a male heir" constitutes grave lack of filial piety towards ancestors,⁹⁸ and a person "without heir is deemed poisonous and comparable to a withered tree. According to vietnamese tradition and ancient law, there are several reasons a man must repudiate his wife. The first of these is *infertility*."⁹⁹ This conviction in the belief that an heir is necessary for the continuation of the lineage is so deeply ingrained in the people's minds that "an heirless man is normally compelled by the parents, the custom and the law to either abandon the first wife or keep her while marrying others until a son is born to

⁹⁷ See Bryce F. RYAN, *Sinhalese Village*, Miami, FL, University of Miami Press, 1958, p. 88.

⁹⁸ See THÊ VIÊN, *The Traditional Role of Parents or Guardians*, p. 35.

⁹⁹ *Ibid.*, p. 36.

him."¹⁰⁰ If a person grows up with such a conviction, one can imagine how his consent might be affected by it. Unfortunately, in all oriental cultures women end up being the victims of such beliefs and blatant discrimination!

f) Dowry

Dowry is a settlement of money, goods or property made over by the parents of the prospective bride (or groom) to the parents of the intended groom (or bride).¹⁰¹ The original intent behind this system seems to have been to provide financial assistance to the newlywed couple to begin their life together. According to oriental custom, it is the father's duty to support his daughters until they are settled in marriage, to find suitable marriage partners for them, and to provide adequate dowry in lieu of inheritance which is usually bequeathed to the sons. There is no doubt, therefore, the dowry system has its own logic rooted in the mores of the people. But now this system has certainly turned into, as someone has rightly expressed, "one of the greatest social evils of the modern day."¹⁰²

In India the dowry system has been legally banned, but it prevails with equal force throughout the country under the guise of "gift". The parents' preoccupation is to arrange a marriage for their daughter before it is too late in terms of her age. The amount of dowry of course depends largely on the social and economic status of the groom and his family. Richer and more prestigious the groom and his family, greater is the dowry!

In its positive aspects, dowry is likely to provide self-respect, psychological security and financial support for the wife and children in case of husband's death. But in many instances its disadvantages certainly outweigh its seemingly positive aspects. Normally a girl

¹⁰⁰ Ibid.

¹⁰¹ According to Knopke, in China dowry was paid by the parents of the groom to the parents of the bride mainly to prepare her trousseau. It seems this system amounted to "buying a wife" in pre-communist Chinese society. See KNOPKE, *Reverential Fear in Matrimonial Cases*, pp. 76-77.

¹⁰² Henry W. TAMBIAH, *Sinhala Laws and Customs*, Colombo, Lake House Investments Ltd., 1968, p. 59; also see LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, p. 38.

finds it very difficult to go into marriage without suitable dowry, because she knows well that an inadequate dowry might cause serious friction later within the family. If the dowry demanded by groom's parents cannot be secured, the marriage might be delayed or cancelled. As Kirupaharan rightly observes, if a poor family finds for their daughter a match who is willing to accept low dowry there is always the possibility for them to impose the marriage agreement of their choice. Pressure is even greater if there are many daughters in such a family.¹⁰³ Here again the filial piety toward parents may turn out to be the deciding factor in the choice of the girl's life-partner. To what extent such a choice is free would depend on the concrete circumstances in which it is made.

6. Conversion

In India and other countries of the East, inter-religious marriages are not uncommon. In such marriages, a Catholic is involved with a non-Catholic or an unbaptized person. Usually inter-religious marriages take place outside the normal socio-religious contexts. Families of both parties avoid getting involved in any arrangements. But there are instances in which the non-Catholic party is morally compelled to convert to the Catholic faith prior to the wedding. Even though some unions entered into under such circumstances may survive the intense socio-cultural pressures, not infrequently serious problems surface in married life. In marriages of this kind, many girls who convert are the ones who become victims of familial and social ostracism. Often they are not even aware of the social and legal consequences of their act of conversion. In India, for example, conversion is subject to many consequences, not just on the spiritual life of the convert, but also on the social life and status. It has direct bearing on family life, property matters, inheritance, etc. Even the very law that governs the person will be changed after conversion. For example, a Hindu who becomes a Christian is severed from the coparcenary (joint-family system),¹⁰⁴ and is governed thenceforth by the *Indian*

¹⁰³ KIRUPAHARAN, *Reverential Fear in Matrimonial Consent*, p. 67.

¹⁰⁴ See E.D. DEVADASAN, *Christian Law in India: Law Applicable to Christians in India*, Madras, D.S.I. Publication, 1974, p. 358.

Succession Act, unless the person opts to be governed by Hindu law.¹⁰⁵ Ramsden reports that hurried baptism of persons just prior to celebration of the marriage is not uncommon also in South Korea. She says that often if one party to the engagement is Catholic and the other unbaptized, the latter is expected to become Catholic as a condition for marriage. This person would go through the necessary instruction prior to receiving baptism, and the baptism would normally take place before the marriage. She mentions that not all conversions are sincere or done with proper understanding of the sacrament.¹⁰⁶ Lusena says that such situations occur also in Sri Lanka. He refers to a case from Chilaw involving simulated baptism which was submitted to the Congregation for the Doctrine of the Faith. Meeting in a plenary session, the said Congregation decreed that the marriage was null and void due to the impediment of disparity of worship because the reception of baptism was simulated by the respondent.¹⁰⁷ This and other similar cases involving hurriedly conferred baptisms demonstrate the fact that persons concerned may not have the proper intention for the reception of baptism and adequate discretion concerning the familial, social and legal consequences of the conversion relative to the partnership of the whole of life of the spouses.

III. CULTURE AND MATRIMONIAL CONSENT

The best and most fruitful way to examine the practical consequences of cultural influences on matrimonial consent is to look at some actual cases decided by marriage tribunals. Even though most of these cases are judged and concluded at the local tribunals, which are in a sense better qualified to deal with them because of their socio-cultural proximity,¹⁰⁸ those judged at the Rota present a more

¹⁰⁵ See MALIEKAL, *Celebration of Catholic Marriages in India*, p. 143.

¹⁰⁶ See RAMSDEN, *Marital Consent as Understood by Koreans*, p. 34.

¹⁰⁷ See LUSENA, *The Application of Selected Capita of Canonical Jurisprudence*, p. 222.

¹⁰⁸ A recent doctoral study completed at the Urbaniana University, Rome, examined the ground of lack of discretion of judgement (c. 1095, 2°) with special reference to the Indian context, and came to the following conclusion: "Finally three socio-cultural mentalities that could possibly have an effect on discretion in marriage

panoramic and comprehensive picture of how and in what specific manner cultural influences enter into mental processes involved in the formation and presentation of marital consent. Rotal sentences of recent years deal with different grounds of nullity with different approaches. This should be evident in the following analysis of cases originating in different South East Asian countries.

1. Lack of Discretion of Judgement

A prime example of how culture can negatively influence a person's consent is a case originating in Madras (India) which has already received two decisions at the Rota¹⁰⁹ and still awaits a conforming sentence. Following are the facts of the case.

Sugeetha, a Hindu by religion, met Mark, a Catholic, in 1984, and from then on a love relationship developed between them. The day before the wedding, Mark went to Salem, where Sugeetha was studying (he said at her request, while she claimed against her will),

in India are pin-pointed. They are: *limiting one's personal freedom to choose the partner, discriminating against women and religiously and socially pressuring people into marriage*. The conclusion points out that nullity cases arising from such mentalities can be best treated under the ground of lack of discretion than other grounds." The same study also suggests: "We have indicated with statistics from some of the main Indian tribunals that nullity cases because of sociological problems treated under the ground of lack of discretion are rare. Normally they are placed under force and fear or simulation. It is possible that several such cases do not meet the requirement of these grounds, though the judges are morally certain that they are null. There is either no grave force from external agent that really causes the marriage or in cases taken under simulation, neither of the parties simulates the consent as such; because, he/she is 'convinced' that he/she should follow the system and marry though he/she is not in the marriage with his/her whole self." See Kejus RAYAPPEN, *Discretion in Marriage, Doctrine and Jurisprudence: A Study of Canon 1095, 2° with Special Reference to the Indian Context*, Rome, Pontificia Universitas Urbaniana, 1993, p. 66. Rotal jurisprudence does not seem to support this conclusion because in several cases originating in India with culturally loaded circumstances Rotal judges have adopted a variety of approaches, which I believe, reflect the distinction between the different grounds and the different principles involved in each case.

¹⁰⁹ See decision c. BURKE, 25 October 1990, in APOSTOLICUM ROTAE ROMANAE TRIBUNAL, *Decisiones seu sententiae* (=SRR Dec.), 82 (1990), pp. 722-733; also published in *Ephemerides iuris canonici* (=EIC), 49 (1993), pp. 255-262; *Studia canonica*, 26 (1992), pp. 235-255; c. JARAWAN, 15 March 1994, in ME, 120 (1995), pp. 198-206.

and brought her to Madras, the place of his residence. On the morning of 11 July 1987, Sugeetha was baptized and confirmed by the parish priest of the place and their wedding was celebrated the same day. Parents of both parties were unaware of the wedding. At the time of marriage, Mark was 22 years and Sugeetha was about 20 years of age respectively. Sugeetha was in fact in the middle of her studies when the marriage took place. According to the information provided in the second Rotal sentence by Jarawan, Sugeetha's parents had, according to their custom, already arranged to have her wed her uncle.¹¹⁰

Even though the marriage was consummated, their life together did not last beyond the very first week, when Mark brought Sugeetha to her parental home. Thereafter there was no communication between the two.

In less than a month, Sugeetha presented a petition before the Archbishop of Madras accusing her marriage of nullity without specifying any grounds. On 26 August 1987, the tribunal of Madras-Mylapore formulated the doubt as follows: "Whether the nullity of marriage in this particular case is evident on the grounds of abduction, deceit, force and invalid administration of the Sacrament of Baptism; these causes would bring about the defect of consent in the plaintiff; lastly, lack of jurisdiction in the solemnization of marriage would render the marriage null and void?"¹¹¹ On 12 February 1988, the tribunal pronounced an affirmative decision in the following words: "having moral certitude about *dolus* employed by the Respondent in this case... we declare this marriage null and void resting on can. 1098."¹¹² It seems the tribunal itself appealed to the Rota against its own decision, the reason for the case being judged at the Rota in second instance.

The Rotal *turnus coram* Burke decided to submit the case to an ordinary judicial examination, and through a rescript obtained from

¹¹⁰ See c. JARAWAN, 15 March 1994, p. 205.

¹¹¹ *Ibid.*, p. 198. Whereas in Burke's sentence (p. 723) we find a different version of this formula: "Caput nullitatis huius matrimonii: a) Deceit...; b) Indian Christian Marriage act, 1872...; c) Validity of Petitioner's baptism is doubtful." Whose reporting in this matter represents the actual formula determined by the first instance court?

¹¹² See c. JARAWAN, 15 March 1994, pp. 198-199; c. BURKE, 25 October 1990, p. 723.

the Dean of the Rota, the grounds of lack of dispensation from disparity of worship and lack of discretion of judgement in the woman-petitioner were added to be dealt with as if in first instance, and on 13 February 1990, the doubt was formulated as follows: "Whether there is proof of nullity of marriage in the case: 1) due to invalid dispensation from disparity of worship; 2) due to lack of discretion of judgement in the woman-petitioner, as if in first instance, and insofar as the decision is negative, subordinately, 3) due to fraudulently induced error in the petitioner according to c. 1098 CIC as if in second instance."¹¹³ Without conducting any supplementary instruction of the case the Rotal court pronounced a negative decision on all grounds.

The superior *turnus* determined the doubt as follows: "Whether there is proof of nullity of marriage in the case, 1) due to fraudulently induced error in the woman in the third instance, and 2) due to lack of discretion of judgement on the part of the woman in second instance [...], in other words, 'Whether the Rotal sentence of 25 October 1990 *coram* Burke should be confirmed or overturned in the case'."¹¹⁴ This *turnus* obtained testimonies from two more witnesses and an expertise on petitioner's psychological condition at the time of marriage. As a result the preceding decision *coram* Burke was overturned by an affirmative decision on grounds of lack of discretion of judgement. The *dolus* ground was dismissed with a negative decision.

In order to accurately evaluate Jarawan's affirmative sentence and to appreciate the cultural influences involved in this case, we must first look briefly at Burke's sentence. Burke's *turnus* focused mainly on two grounds; namely *dolus* and lack of discretion of judgement. In treating these grounds, greater emphasis was placed on *fraud* which, in my view, was inappropriate to represent the facts presented in the acts. This *caput* was based on the following information. The first instance court had arrived at an affirmative decision on grounds of fraud because "this marriage was arranged by

¹¹³ This formula is as reported by Jarawan in his sentence (see p. 199). But in the sentence of Burke this formula has a different version: "*An constet de matrimonii nullitate in casu; 1) ob errorem dolose causatum in actrice secundum can. 1098; 2) et, quatenus negative, subordinate tamquam in prima instantia, ob defectum discretionis iudicii in muliere actrice [...].*"

¹¹⁴ c. JARAWAN, 15 March 1994, p. 199

Mark and his sister trapping the Petitioner just to inherit money and property.”¹¹⁵ This mercenary motive for marrying was proved by the fact that within a week after the wedding, the respondent’s relatives had taken possession of the petitioner’s jewels and even had pawned some of them; they had also demanded money from her, and had persuaded her to open a bank account. The respondent admitted that they had retrieved the jewels after making restitution when the police had come in search of them.¹¹⁶ The very nature of the respondent’s behaviour led the Rotal court to conclude: “The presence of some *pre-marriage* mercenary interest is not proved. Even if it were, it would not amount to proof of deceit as contemplated in c. 1098. As we noted in the law section, the *quality* contemplated by c. 1098 cannot be confused with a possible *motive* for marrying.”¹¹⁷ Considering what transpired soon after the wedding, the first instance court could have investigated further the respondent’s behaviour for determining the possibility of *simulation* rather than *deceit* on his part.

The principal claim of the petitioner was that she was not really in love with the respondent; that she wished to break the relationship, but continued only because of pressure from the respondent and his sisters; and that she was finally pressured or deceived into running away with him and into the actual wedding ceremony. Furthermore, she testified that she continued the relationship out of fear that the respondent would commit suicide if she broke it off as reported to her by his sisters. She also claimed that she did not willingly receive baptism.

After having carefully reviewed her love-letters written prior to the wedding, the Rotal court concluded that “the petitioner merits very little credibility.” In other words, the negative decision of the Rota was based on its assessment of the facts which led the judges to

¹¹⁵ c. BURKE, 25 October 1990, p. 732.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* In the law section Burke has briefly discussed the distinction and relationship between *fraud* and *simulation*: “One could note in passing how fraud or deceit relates to simulation. There is deceit in simulation too; towards the other party, or at least towards society. In simulation, the words by which the conjugal gift is expressed do not correspond to what the simulator actually intends. In deceit, the gift promised does not correspond to what the deceiver actually gives.”

believe that the petitioner did indeed love the respondent; that the marriage was freely chosen by her; and finally that her baptism was not forced on her by anyone. Therefore, there was no deception in the case.

The ground of lack of discretion of judgement on petitioner's part was summarily dismissed by the court without any in-depth analysis of the culturally loaded facts. The judges concluded that the "immature reactions" displayed by the petitioner both before and after the marriage were appropriate to her age and her attempts to seek marriage without parental knowledge and consent were proof of "fully conscious" and deliberate acts: "She knew her own mind." In the court's view, those behaviours were signs of the presence of discretion of judgement proportionate to the rights and duties of marriage and not lack of it. Therefore, the decision on this ground also was negative.

There is no doubt in my mind that the Rotal court gave very little consideration to the cultural peculiarities of the people involved in this case. Normally, inter-religious and inter-caste marriages are very precarious to begin with. This is evident in the case before us. Here we have two very young people "presumably" in love with each other. They belong to two culturally, religiously, economically and socially diverse communities. The girl who, after the marriage, claims to be a "staunch Hindu", was still in school being supported by her parents. She falls in love with a Catholic boy, and gets baptized without any prior instruction and marries him the same day without the knowledge of her parents. Just a week after the wedding, she returns to her parents with the determination not to resume conjugal life with the man. Less than a month later she writes to the Archbishop of Madras impugning the validity of her marriage.

A careful analysis of these facts should lead any reader to question this girl's state of mind when she made all those decisions concerning her state in life and marriage partner. Considering her psychological, cultural, religious and social status, was the girl in a state of mind in which she could make a mature decision proportionate to the rights and duties entailed in a Christian marriage? The sentence of the superior *turnus* seems to answer this question to some extent.

In his affirmative sentence Jarawan questions the approach adopted by the preceding *turnus* in regard to the ground of lack of discretion of judgement. Jarawan's sentence points out: "The appealed

sentence said practically nothing in the law section and it concluded the argument section by saying that lack of discretion of judgement cannot be invoked on the basis of lack of seriousness in the reception of baptism, for 'the decision to marry appears to be more free and deliberate', while bypassing all legal and factual arguments which particularly concern freedom 'in choosing one's state in life' (c. 219)."¹¹⁸

"We do not understand", Jarawan's sentence continues, "why an expertise was not sought *ex officio* by the preceding instance in light of the stipulation of c. 1452, namely 'in order to avoid a seriously unjust sentence' (cfr. c. 1452,§2), and similarly to seek supplementary instruction in order to clarify the facts in greater depth."¹¹⁹ There are three statements in Jarawan's sentence which are very important for our consideration.

First, the sentence states: "The appealed sentence says the petitioner 'merits very little credibility' [...] because her depositions clearly contradict her love-letters sent to the respondent prior to marriage. But, as it appears, it is precisely in this, that is, in such a rapid change of the woman's mind, consists her effective (*effectiva*) immaturity, that is to say, defect of discretion of judgement."¹²⁰

Second, the sentence continues: "For, while on the one hand she was pressing for the celebration of marriage as soon as possible, this despite great difficulties in preparing all necessary documents, on the other hand, she changed her mind completely within one week after the celebration of marriage."¹²¹

Third, in regard to her credibility the sentence declares: "But, in the case before the court the question is not whether or not the woman is credible, as the *ex officio* advocate of the woman rightly observes, but rather 'the only question to be answered is about the personality of the woman and her emotional state and maturity at the time of celebrating marriage.'"¹²²

¹¹⁸ c. JARAWAN, 15 March 1994, p. 203.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*, pp. 203-204.

According to Jarawan, this last question was resolved with the help of an *ex officio* expert whose conclusion was that “‘the petitioner was incapable of choosing marriage with Mark insofar as she was acting under impulse...’, that is, the petitioner was incapable of ‘controlling the impulse to contract that marriage, without sufficient reflection and internal freedom to free herself from the impending and coercive influence of her parents, and particularly of her father’.”¹²³ The expert diagnosed, from an analysis of the written form and substance of her letters, the woman’s emotional state at the time of consent as “acute infantilism.” According to the expert’s opinion, it was apparent in those letters that she did not love the man with a truly conjugal love, but rather her attraction to him was merely a *strong infatuation*. And this *infatuation* (*vehementer infatuatam*) had seriously restricted her freedom to choose the state in life, as a result she did not hesitate to run away from home in order to avoid marriage with her uncle selected by her parents.¹²⁴

Jarawan’s sentence considers the following conclusion of the expert legitimate and extremely logical: “According to my considered opinion, at the time of marriage the petitioner (...as she was emotionally labile and unstable) did not have sufficient internal freedom for responsible self-determination, because she was seriously disturbed emotionally, and was incapable of controlling her impulses; this impulsive condition radically limited her capacity to act, in this sense, we can speak without doubt of *psychological incapacity*.”¹²⁵

This conclusion of the expert and the Rotal decision *coram* Jarawan based on it, provide some important clues as to what happens when culture plays an important role in vital decision people sometimes make. What happened to the woman in this case is not uncommon in our cultures of the East. Not all girls freely accede to their parental

¹²³ *Ibid.*, p. 204.

¹²⁴ *Ibid.*, p. 205: “Dicendum est eandem laborasse ‘infantilismo acuto’ uti patet ex earumdem litterarum formula scribendi, seu graphologica, atque etiam ex earum ‘substantia’. Ibi apparet eam virum non adamasse amore revera sponsali, sed potius ipsam in illum vehementer infatuatam fuisse. Quae infatuatio eius libertatem in seligendo statu vitae funditus praepediebat, eo vel magis quod domum effugere non dubitavit ad vitandum matrimonium cum avunculo ab eius parentibus selecto.”

¹²⁵ *Ibid.*, p. 204.”

choices. Not infrequently, children try to defy their parents' choices but they cannot easily unchain themselves from their filial piety and respect for them. The girl in this case already had a prospective husband, her uncle, chosen by her parents according to their hindu tradition. It seems evident from Jarawan's sentence that she did not want to marry the person selected by her parents. Her impulsive behaviour manifested particularly in her love-letters, before the marriage, and her abandonment of conjugal life within a week after the marriage was rightly interpreted by the expert as an indication of serious intrapsychic conflict which deprived her of the freedom to choose deliberately the state in life. Her personal psychic condition (personality) and the pressure put on her by her parents in their choice of her future marriage partner, whom she presumably did not want to wed, were factors which caused the incapacity to elicit valid matrimonial consent. Even though, in my opinion, an affirmative decision could have been arrived at by critically evaluating the personal psychic condition of the petitioner and its interaction with the cultural factors at the time of exchanging consent, without an expert report and psychiatric diagnosis, Jarawan's court seems to have taken legitimate precaution against any possible attack on the approach it had taken in answering the doubt. Unfortunately, the resolution of the case awaits one more decision before it can be considered *quasi res iudicata*.

2. Error of Quality

One of the grounds more frequently encountered in Rotal sentences dealing with marriage cases originating in Asian countries is "error of quality" dealt with in c. 1097, §2. In his classic sentence of 26 May 1989,¹²⁶ Daniel Faltin, speaking specifically about this ground says that "in judging cases coming from distant countries, the Rota is wont to proceed according to the principle of 'equitable interpretation' lest great injustice be caused from the application of most serious laws."¹²⁷ He explains that no canonist can afford to ignore the fact that

¹²⁶ See *SRR Dec.*, 81 (1989), pp. 379-388; also published in *Ius Ecclesiae*, 2 (1990), pp. 177-190; *Il diritto ecclesiastico* (=DE), 102 (1991), pp. 77-86; *ME*, 116 (1991), pp. 379-389.

¹²⁷ "[...] meminisse iuvat, quod Hoc Apostolicum Tribunal in diiudicandis causis ex longinquis provenientibus regionibus, 'sub aequitativa interpretationis

in pronouncing ecclesiastical decisions justice must be administered *with the moderation of equity*. According to canonical doctrine and jurisprudence, "stronger should be the motive of equity than strict law [...] especially in marriage cases which concern *error* mentioned in c. 1097, §2 of 1983 *CIC*."¹²⁸ This principle found its concrete application in the case Faltin was dealing with because it came to the Rota from the distant land of Sri Lanka, and his legal arguments favouring the use of the stated principles in the interpretation of the "mindset" or "cultural appreciation" of the quality of "virginity", particularly in a girl of marriageable age, reflect his prudent and equitable approach to the application of law to a concrete case. Since I have already discussed in detail this case elsewhere,¹²⁹ I would like to focus my analysis on a more recent Rotal sentence whose main thrust is on "error of quality." Other sentences involving this ground will be discussed in the following section because of its connection with the ground of fraud.

On 13 December 1990, a case from Ernakulam, Kerala (India) was judged at the Rota *coram* Stankiewicz¹³⁰ specifically on "error of quality directly and principally intended."¹³¹ The marriage in this case was celebrated on 11 November 1973 according to the Syro-Malabar rite. Married life was peaceful for a brief period following the wedding. But when it was found out that the woman could not become

luce procedere licet [...] prae mente habito can. 19 *CIC*, ne ex summo iure summa iniustitia oriatur" (*SRR Dec.*, 81, p. 382). This principle is to be applied not only at the Rota but also at the local level by judges who are more in tune with the cultural pulse of the people they serve.

¹²⁸ "Immo, iuxta Nostri Fori doctrinam ac iurisprudentiam, 'potior debet esse ratio aequitatis stricto iuri' [...] praesertim in causis matrimonialibus, quae provinciam erroris spectant, de quo in can. 1097, §2 vigentis *CIC* [...] 'ampliori sensu applicari posse' ..." (*ibid.*, pp. 382-383).

¹²⁹ See *Studia canonica*, 29 (1995), pp. 55-56.

¹³⁰ See *SRR Dec.*, 82 (1990), pp. 847-855.

¹³¹ This marriage was celebrated in 1973, long before the new oriental Code (CCEO) was promulgated. In c. 74, §2, 1° of the *motu proprio Crebrae allatae* (22 February 1949), the norm was expressed as: "the error of quality redounding to error of person", which Stankiewicz identifies with "error of quality directly and principally intended" of c. 820, §2 of CCEO. The principle implied here is of natural law and both expressions developed in jurisprudence are regarded now as identical.

pregnant serious problems began to disturb conjugal life because the man had a great desire to have children. Consultations with several doctors and different kinds of treatments at great expense proved futile, and finally the woman agreed to terminate common life provided that she was given sufficient means for her daily sustenance. A separation was effected after giving the woman the financial assistance that was asked for, and then the man presented his petition for declaration of nullity of marriage to the tribunal of Ernakulam on 5 April 1986 stating: "First and foremost I expected in my wife, at the *time of marriage, a woman with the capability to give birth to children*. Now, I am convinced that my wish will not be fulfilled. Therefore, I request the Venerable Tribunal to declare (this) marriage as null and void on the basis of error and to permit me to marry again."¹³²

The decision of 25 March 1987 by the tribunal of Ernakulam was affirmative on grounds of "error of quality" and a prohibition was imposed on the respondent "unless and until permission is obtained from this Tribunal."¹³³ The appeal tribunal of Trichur overturned this decision on 9 July 1987. With an appeal by the petitioner against this negative decision, the case arrived at the Rota where the promotor of justice raised exception against the validity of the second instance sentence because the appellate court had rendered its negative decision without submitting the case to an ordinary judicial examination, which could have violated the right of defence of the parties. The Rotal court decided to examine two issues, namely whether the second instance decision was null, and if it was null, whether there was proof of nullity of marriage in the case on grounds of "error of quality directly and principally intended." In its decision of 13 December 1990, the Rotal court declared the second instance sentence irremediably null on the basis of denial of the right of defence,¹³⁴ and went on to confirm by decree the first instance affirmative decision.

¹³² c. STANKIEWICZ, 13 December 1990, p. 848.

¹³³ *Ibid.*

¹³⁴ For a brief discussion of this issue in Stankiewicz's sentence, see Augustine MENDONÇA, "Recent Rotal Jurisprudence from a Sociocultural Perspective," in *Studia canonica*, 29 (1995), pp. 331-335. The Rotal court concluded in this case that in view of omission of the entire judicial process at the appellate level, there was substantial violation of the right of defence of both parties. This constituted irremediable nullity of the sentence of second instance tribunal.

The legal principles both procedural and substantive applied to this case are derived from the oriental legislation, especially those on error of quality (c. 820 and c. 821 of *CCEO*). To elicit a valid act of matrimonial consent, the parties must be free from all *substantial error* of person of the partner or of a quality redounding to error of person (c. 74, §§1-2, 1° of M.P. *Crebrae allatae*), that is to say, of a quality *directly* and *principally* intended (c. 820, §§1-2 of *CCEO*). Such an error empties the act of consent and renders marriage invalid. Error by definition is a false judgement of the mind concerning an object. Such a distorted or false judgement, when combined with a conviction concerning a quality of another person identifying the very person, that is, determines the person, is incompatible with the truth of one's intention to establish the partnership of the whole of life by its nature ordered toward the good of the spouses and the generation and education of the offspring (c. 776, §1, *CCEO*).¹³⁵

According to established jurisprudence, Stankiewicz explains, error of quality redounds to error of person when a quality not only becomes the sole characteristic identifying a concrete physical person but also is intended before the person or it is so intimately connected with the person considered more completely and integrally, that in its absence the person appears completely different.¹³⁶ In this case, the person is substantially, and not accidentally, determined by the quality which is principally intended. In the absence of that quality, the object of the consent is *substantially* different, and consequently such an act of consent is invalid.¹³⁷

How is one to determine an object (quality) of error which redounds to error of person? Stankiewicz proposes the following criterion: an object of error redounding to error of person can comprise several qualities and a twofold estimation can be used to identify their importance, namely *subjective* and *objective*. In *subjective* estimation, the value of a required quality depends solely on the mental disposition

¹³⁵ c. STANKIEWICZ, 13 December 1990, p. 851.

¹³⁶ *Ibid.* Cited here by Stankiewicz are the sentences of 21 April 1970 by Canals, in *SRR Dec.*, 62 (1970), p. 371 and of 14 January 1978 by DI FELICE, in *ibid.*, 70 (1978), p. 17.

¹³⁷ See decision c. POMPEDDA, 23 July 1980, in *ibid.*, 72 (1980), p. 524; c., STANKIEWICZ, 24 February 1983, in *ibid.*, 75 (1983), p. 48.

of the party who is in error, while in *objective* estimation, the value of the same quality is determined by a social, moral, juridic criterion and by the demands of conjugal partnership.¹³⁸ What Stankiewicz says in the following statement bears much significance to the case judged before his court:

Whatever one may say of the objective gravity of the quality, particularly operative in fraudulent deception (cfr. c. 821 CCEO), whose lack can disturb by its very nature the partnership of conjugal life, as for example sterility of the partner which is unknown, especially if generation of offspring is *greatly desired by the other party* or if the *mores and customs of the place regard fertility as one of the conditions for valid marriage*,¹³⁹ it is certain that in the realm of error which invalidates consent, the quality must be of such weight and importance in the *subjective estimation of the person in error* that the presence of that quality in the partner is directly and principally intended (c. 820, §2 CCEO), that is to say, before the very person. Indeed, then the quality required in the partner, determinative of the person, enters into the object of consent, which is the mutual giving and accepting of the contractants for the purpose of establishing marriage.¹⁴⁰

¹³⁸ C. STANKIEWICZ, 13 December 1990, p. 852: "Obiectum erroris redundantis plures complecti potest qualitates, quarum pondus duplicem admittit aestimationem, videlicet *subiectivam*, in qua valor expostulatae qualitatis unice pendet a forma mentis partis errantis, et *obiectivam*, in qua eiusdem qualitatis momentum criterio sociali, morali, iuridico necnon exigentia consortii coniugalis determinatur" (emphasis added).

¹³⁹ Here Stankiewicz refers to his sentence of 24 February 1983 on a case from Kigali (Rwanda) in which the respondent had denied before marriage that she was sterile. The petitioner wanted children in marriage. See *SRR Dec.*, 75 (1983), pp. 42-53; in another case from Münster (Germany) judged *coram* Serrano on 28 May 1982 the same quality (sterility) was considered, but it was on man's past. It seems he suffered from a disease during the time he spent in the army which rendered him sterile. The woman learned of this fact ten years after the marriage. One of the grounds on which this case was judged was "error of quality" induced by deception which amounted to "error of person." The Rotal decision was affirmative on this ground. See *ibid.*, 74 (1982), pp. 308-325; also published in *ME*, 108 (1983), pp. 11-26; *DE*, 93¹¹ (1982), pp. 501-516.

¹⁴⁰ "Quidquid tamen dici potest de obiectiva qualitatis gravitate, potissimum in deceptione dolosa operant (Cf. can. 821 CCEO), cuius nempe defectus suapte natura perturbare valet consortium vitae coniugalis, prout compartis ignota sterilitas, praesertim si prolis procreatio ab altera parte magnopere quaeritur aut si locorum

According to c. 801, §3 *CCEO*, “sterility neither prohibits nor invalidates marriage, with due regard for can. 821.” This norm implies that “sterility” is not impotence as defined in law, and therefore, in itself it cannot be an invalidating factor, but if it enters into the object of error mentioned in c. 821 its presence in one of the partners can turn into an invalidating element. This can happen in two ways: first, if the generation of offspring in marriage is greatly desired by one of the spouses, sterility can amount to “error of quality directly and principally intended” (c. 820, §2) or “error of quality fraudulently induced” (c. 821). Second, the mores and customs of a certain place may consider fertility as one of the conditions for valid celebration of marriage. In such a situation, people who are influenced by the cultural expectation may expect that quality in the partner. Presumption could favour such an expectation, and consequently, the absence of the desired quality may amount to error of quality directly and principally intended. This, however, should be proved in each concrete case. Of course it is not just enough to prove the absence of the quality (sterility) in the partner, but it is necessary to prove the person’s positive will in directly and principally intending it as well as that person’s ignorance of the lack of the quality in the act of eliciting consent. A judge can ascertain this ignorance from the reaction of the person as soon as he/she discovered the lack of the quality (sterility).¹⁴¹

In this case all evidence confirmed that at the time of the wedding the petitioner wanted to establish a family with children and he thought that his wife had procreative capacity. He confirmed his intention in his statement: “First and foremost I expected in my wife, Mary, at the time of marriage, a woman with capability to give birth to children. Now, I am convinced that my wish will not be fulfilled.”¹⁴²

mores consuetudinesque fertilitatem ponant inter conditiones validi coniugii [...], certum est in ambitu erroris consensum invalidantis qualitatem tanti ponderis ac momenti esse debere in subiectiva errantis aestimatione, ut eiusdem qualitatis existentia in comparte directe et principaliter intendatur (can. 820, §2 CCEO), videlicet prae ipsa persona. Tunc sane requisita in comparte qualitas, eius personam integrans, obiectum consensus ingreditur, in quod contrahentium mutua traditio et acceptatio cadit in ordine ad constituendum matrimonium” (c. STANKIEWICZ, 3 December 1990, p. 852; emphasis added).

¹⁴¹ *Ibid.*, pp. 852-853.

¹⁴² *Ibid.*, p. 853.

Therefore, the Rotal court rejected the suggestions from the defender of the bond to the effect that this could be a simple error or merely an interpretative will. The court found in the statements of parties and witnesses as well as in the petitioner's reaction when the truth was determined sufficient evidence to confirm his intention. For example, the respondent herself stated: "From the beginning itself Varghese was very much insisting on having children. That is the reason why he took all those troubles and spent so much money for my treatment."¹⁴³ The court admitted that there was no deception on the respondent's part, because she herself did not know that she could not conceive. Therefore, the court ruled that the *vetitum* placed on the woman by the first instance tribunal could not be sustained. The conclusion of the Rotal court was: "This quality, therefore, considered either *subjectively* or *objectively*, constituted the object of substantial error on the petitioner's part, that is, 'quality of the person of Mary as a wife capable of giving birth to children'."¹⁴⁴ The error was proved not only by his ignorance of the absence of the quality at the time of marriage but also by his reaction when he learned of the fact that his wife definitively lacked the required quality. For, all clearly testified that the only reason for separation was the respondent's "infertility."¹⁴⁵

This sentence by Stankiewicz certainly confirms the view that determination of the weight or value of a quality in relation to "error of quality" depends not only on its subjective estimation but also by its objective estimation within a particular culture.¹⁴⁶ The case under consideration illustrates how within the culture the specific marriage was lived, the quality of fertility was regarded as important for married life. Its value was in fact intensified by the personal (subjective) expectation of the quality in the respondent on the petitioner's part. An interplay between subjective (personal) and objective (cultural) estimations seem evident in this case.

¹⁴³ *Ibid.*, p. 854.

¹⁴⁴ *Ibid.* Emphasis added.

¹⁴⁵ *Ibid.*

¹⁴⁶ In his allocution of 30 January 1993, John Paul II cautioned judges about the risks of broadly interpreting the norms of c. 1097. He said: "However, in the matter of *error of fact* (*error facti*) too, specifically when it is a question of 'error of person' (*error in persona*, c. 1097, §1), one may not attribute to the terms used by the

3. Fraud and Error of Quality

One of the direct consequences of the system of arranged marriages affecting matrimonial consent is the potential for deception concerning qualities desired in the person of a marriage partner. As explained above, there are certain values which every society and family cherish and expect in persons considered for marriage. The system of arranged marriages provides very little time for persons involved to know each other well enough to make a mature choice. Moreover, not all intermediaries or marriage-brokers are honest and truthful in seeking and providing required information about persons involved. Therefore, the ground of deceit is frequently encountered in marriage cases coming to the Rota from Asian countries.

Even though the ground of *deceit* (c. 1098) is now definitively incorporated as a legitimate cause of nullity of matrimonial consent, the retroactivity of its efficacy is still being disputed in canonical doctrine and jurisprudence. Following Rotal sentences dealing with certain specific cultural values illustrate also the difficulties engendered by the lack of consensus on the retroactivity of the legal norm.

A case from Goa-Daman was judged *coram* Parisella on 24 March 1983,¹⁴⁷ a couple of months after the promulgation of the revised Code of 1983. The marriage in question was celebrated on 16 May 1976. The woman was 47 years and the man was 52 years of age respectively at the time of marriage. The match was arranged through a marriage-broker according to the longstanding Indian custom. This broker had told the man that the woman was 35 years of age when in

legislator a meaning alien to canonical tradition; even as 'error about a quality of the person' can impugn the consent only when a quality, neither frivolous nor trivial, was 'directly and principally intended' (c. 1097, §2), that is, as Rotal jurisprudence has effectively asserted: 'when the quality is intended before the person' (*quando qualitas prae persona intendatur*). See WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-1994*, p. 226. The quality under discussion in this case certainly cannot be considered "frivolous" or "trivial" both from a *subjective* and from an *objective* point of view. In two of his recent sentences, Stankiewicz attempts to interpret the norm of c. 1097, §2 in light of the above papal allocation. See c. STANKIEWICZ, 22 July 1993, in *Ius Ecclesiae*, 6 (1994), pp. 615-616, 618; also in *ME*, 120 (1995), pp. 174-175, 177; and c. STANKIEWICZ, 27 January 1994, in *Periodica*, 84 (1995), p. 522. This last case will be discussed in the following section.

¹⁴⁷ See *SRR Dec.*, 75 (1983), pp. 146-153.

fact she was 47 years old. Furthermore, four days after the wedding the man discovered that the woman had a total hysterectomy and bilateral salpingophorectomy (surgical removal of both fallopian tubes). This surgery had in effect rendered the woman incapable of bearing children. The man was totally unaware of this fact at the time of marriage. The conjugal relationship was terminated within five days after the wedding and final separation took place in five months thereafter. The man petitioned the tribunal of Goa-Daman for a declaration of nullity of his marriage on the basis of respondent's *impotence* (c. 1068, §1 of CIC/17) and *fraud* on his part. The decision of 7 July 1977 by the Goa-Daman tribunal was affirmative on *impotence* but negative on *fraud*. On appeal, the Rotal court submitted the case to an ordinary judicial examination. The decision of the Rota was negative on both grounds. Since the ground of impotence had received two disparate decisions (one affirmative and one negative) from the two courts, the case went on to the superior *turnus* which pronounced a negative decision.¹⁴⁸ What is important for our discussion is the approach Parisella's *turnus* took toward the ground of *dolus*.

The main argument underlying the negative decision was the *non-retroactivity* of the law on *dolus*. On the one hand, the court clearly admitted that the respondent had perpetrated fraud both in regard to her incapacity to bear children and her age; but on the other hand, it maintained that c. 1098 of the new Code is of positive law, and therefore, it can be applied only to marriages celebrated after 27 November 1983.

What we have in this case is "fraudulently induced error." The error concerns two qualities which are considered very important by the culture wherein the marriage was celebrated. These qualities were expressly, even if implicitly, desired by the petitioner. Was it possible for the Rotal court to look at this issue with a different approach? In my opinion, it could have, but it did not. The following case seems more perplexing than this one.

On 28 November 1990,¹⁴⁹ the Rotal court *coram* Funghini dealt with a case from Bangalore (India) in which the principal ground was

¹⁴⁸ See decision c. JARAWAN, 27 March 1984, in *ibid.*, 76 (1984), pp. 197-202.

¹⁴⁹ See decision c. FUNGHINI, 28 November 1990, in *ibid.*, 82 (1990), pp. 813-822; also published in *EIC*, 49 (1993), pp. 262-266.

"error of quality redounding to error of person." In May of 1978, the tribunal of Bangalore gave an affirmative decision in the case, but the appeal tribunal of Madras-Mylapore, without conducting any further inquiry, overturned that decision on 30 October 1978. The Rotal decision was *negative* as well. In order to appreciate any critique of Funghini's sentence, one must first look at the facts as found in it.

First of all, in Funghini's sentence we read: "The marriage arrangement in this case was amazingly strange even if one were to consider it within the context of local customs. What emerges from it is the deception of the man rather than error of quality principally intended."¹⁵⁰ In other words, deceit was certainly present in this case and it is obvious from the following facts.

The respondent was residing at her married sister's house in Bangalore while she was looking for a job in the city. During this time her brother in-law enticed her into sexual intimacy and she became pregnant. Through a marriage-broker, who was known also to the petitioner's parents, the brother in-law arranged for the marriage on behalf of the respondent. The petitioner agreed to marry the respondent, but he could not do so immediately because of financial reasons. The brother in-law was quick to offer him all the help he needed so that the marriage could be celebrated within one month. He saw the respondent only on the engagement day, that was 15 days before the wedding.

The petitioner had absolutely no knowledge of what had transpired between the respondent and her brother in-law. One month after the wedding, the respondent informed the petitioner's mother that she was pregnant. At this time the petitioner had not noticed any external sign of pregnancy. Four months and twenty days after the wedding, the respondent gave birth to a baby girl of normal development. Immediately thereafter, she and the baby were taken to her sister's place never to return to the petitioner again.

The evidence clearly indicated that the petitioner was deceived by both the respondent's brother in-law and the marriage broker. According to the respondent's own testimony, she did not want to

¹⁵⁰ *SRR Dec.*, 82 (1990) p. 817: "Prorsus mira matrimonii conciliatio in casu fuit, etiam prae oculis habitis loci moribus. Ex ea tamen potius viri deceptio emergit, quam error circa qualitatem principaliter intentam."

marry, but in a culture where girls in her situation find it almost impossible to marry, she cooperated with her brother-in-law's plans. But the courts never followed up on this claim of the respondent.

In his sentence, Funghini repeatedly returns to his argument that the petitioner never expressly stated that he wanted to marry a virgin or directly and principally intended the quality of virginity before the person of the respondent. Even though Funghini says: "Error therefore must concern a quality, which truly influences in determining a certain person, i.e., about qualities 'which of themselves, that is to say, in the society we live in, are highly valued and define persons'",¹⁵¹ in his evaluation of the facts there is little consideration given to this aspect. In a sense, it is also strange that the Rotal court does not seem to make the distinction between a "non-virgin" and a "pregnant" person. These two are substantially distinct qualities. The latter in fact changes even the physical identity of the person. Since the culture in which "virginity" in a marriageable girl is highly valued, there is a human presumption that every young man preparing to marry intends to wed a virgin, and more so a non-pregnant virgin! The Rotal court does not refer to these cultural aspects of the situation and fails to examine carefully the culturally influenced mental disposition of the petitioner in regard to "non-virgin" and "pregnant" conditions of the respondent. In my opinion, the judges should have studied more in-depth the cultural aspects of this case as well as the mental disposition of the petitioner both before and after the wedding to determine to what extent his intention to marry a "non-pregnant" girl was implicit in that disposition. Furthermore, this case could have been judged also on grounds of "force and fear" on the respondent's part who had clearly admitted in her deposition that she did not want to marry the petitioner for reasons of her own personal condition.

Another case which recently received similar treatment at the Rota was judged *coram* Bruno on 25 March 1994.¹⁵² The case originated

¹⁵¹ *Ibid.*, p. 816: "Error ideo versari debet circa qualitatem, quae vere influat in determinanda quadam persona, i.e., circa qualitates, 'quae ex se, seu in societate qua vivimus, valde aestimantur et definiunt personas'." Here the reference is to *c. DI FELICE*, 26 March 1977, in *ibid.*, 69 (1977), p. 151.

¹⁵² Decision *c. BRUNO*, 25 March 1994, Prot. No. 15. 018 (unpublished). This sentence has been made available to me for this study through the kind favour of Rev. Aloysius P. D'Souza, the judicial vicar of the Mangalore Diocesan Tribunal.

in Mangalore (India). The marriage in question was celebrated on 28 December 1967. Because of the man's overseas employment, the common life was very brief. It lasted only three weeks. In six months, all communication between the parties ceased and all efforts on the respondent's part to re-establish common life turned futile. In March of 1985, that is, nearly 18 years after the wedding, the man petitioned the tribunal of Mangalore to declare his marriage null on grounds of fraud (*dolus*) and error of quality. These grounds were based on his claim that the respondent had leprosy which she fraudulently concealed from him before the marriage. The first instance decision was affirmative on both grounds, which the appeal court of Bangalore confirmed by decree.

The respondent placed recourse before the Rota for a new hearing of the case claiming that the preceding courts had erred in identifying her skin-condition as leprosy as well as in illegitimately applying the norm of c. 1098 of the new Code to a marriage which was celebrated long before it came into effect. On 21 October 1988,¹⁵³ the Rotal court *coram* Bruno granted a new hearing to the case as requested by the respondent. This decision was based on three legal and factual grounds.

First, the first instance tribunal of Mangalore and, subsequently, the appeal tribunal of Bangalore, erred in the application of c. 1098 to a marriage which was celebrated long before the promulgation of the 1983 Code. This implied that the *caput* of deceit is of merely ecclesiastical law and, hence, not retroactive.

Second, the court found no factual basis of deception on the respondent's part because "the woman was calm when she learnt from the medical report that she could proceed with the marriage despite the fact that she suffered from the skin disease, which she still has [...]. It is probably an incurable disease whose cause is still unknown [...]." ¹⁵⁴ In other words, the court admitted that the respondent certainly suffered from a *serious* skin disease, but it was not leprosy. If she had this serious skin disease, why didn't she disclose it to the

¹⁵³ A brief analysis of this decree has been presented in *Studia canonica*, 29 (1995), pp. 342-346.

¹⁵⁴ *Ibid.*, p. 344.

petitioner since leprosy is not only a physical ailment but also a serious social stigma within the community where this marriage took place? Bruno's court said: "[...] considering all circumstances of the celebration of marriage, among which is the custom of proposing and celebrating marriages among the Indian people in a special way, and after examining the declarations of the petitioner and witnesses, it seems evident that there was not sufficient time and opportunity to discuss the disease of the respondent."¹⁵⁵ In other words, it is assumed here that the respondent did not have time to disclose to the petitioner the presence of the skin disease she was afflicted with because of the arranged marriage situation. Therefore, there was no deception on her part.

Third, in regard to "error of quality" the court argued that there was no evidence that the petitioner "directly and principally intended" the quality of being immune from leprosy or integrity of the skin, as required by c. 1097, §2. The possibility of a culturally determined *implicit* intention about the quality under consideration seems to have received no consideration whatsoever in this decision.

Nearly six years after the above decree was issued granting the new hearing, the Rotal court proceeded to pronounce its decision only on "error of quality" ground while declaring the norm of c. 1098 to be of merely ecclesiastical law and not applicable to the marriage case in question. The court found the petitioner non-credible. In its estimation, the evidence, both testimonial and medical, confirmed that the skin disease afflicting the respondent certainly was not leprosy. Furthermore, the alleged intention of the petitioner to marry a person free from leprosy was considered by the judges as merely *interpretative*, that is, superimposed on the consent after the marriage. In other words, there was no evidence in support of his claim that he *directly* and *principally* intended the quality of being immune from leprosy. All the evidence analyzed in the sentence by Bruno is in support of the decision drawn therefrom.

It is certainly not legitimate to question the merit of the decision the judges have made after securing moral certitude in their minds from the proofs they found in the acts of the case. Nevertheless, it would have been just and equitable on the part of the judges in

¹⁵⁵ *Ibid.*

forming their decision to consider the socio-cultural aspects of the disease of leprosy. In Indian culture, not only leprosy, but even the appearance of leprosy is commonly dreaded. Despite notable medical advances in understanding its nature, etiology and treatment, fear still persists. It is a universal feeling rooted in the very soul of the people's culture. Therefore, a person, who is the product of this culture, is likely to implicitly intend to marry a person who is free from this still dreaded disease. The judges of first and second instances ruled affirmatively on the case, maybe because their cultural affinity to the parties concerned enabled them to understand better the mind of the petitioner on this matter. But the Rotal judges seem to have felt differently! The case awaits another decision to become again a *quasi res iudicata*. The sentence¹⁵⁶ which follows offers a more equitable approach to a similar case involving "error of quality" and *fraud* grounds.

The marriage in this case was celebrated between two Syro-Malabar catholics within the territory of the latin rite diocese of Calicut (Kerala) on 19 June 1983. Within a few months after the wedding, the woman presented to the bishop of Calicut a petition for declaration of nullity of her marriage alleging that she had been deceived in regard to the person of her spouse.

After resolving the dispute over its competency, the tribunal of Calicut pronounced on 18 July 1985 an affirmative decision on grounds of "deceit" (in the woman) in regard to an important quality, namely the age of the respondent.¹⁵⁷ The appeal tribunal of Verapoly overturned this decision.

At the Rota, the advocate of the petitioner challenged the validity of the second instance decision, but this was rejected by the Rotal *turnus*. Against this Rotal decision, the advocate demanded from the Signatura reinstatement of the case (*restitutio in integrum*). The Signatura declared such a request baseless. With the resignation of the advocate, a substitute was appointed to continue the petitioner's representation at the court.

¹⁵⁶ See decision c. POMPEDDA, 6 February 1992, in *Ius Ecclesiae*, 6 (1994), 573-608.

¹⁵⁷ *Ibid.*, p. 575.

The formula of the doubt determined by the Rotal court read: "Whether there is proof of nullity of marriage in the case on grounds of *fraud* or error of quality."¹⁵⁸ The decision of the *turnus* was affirmative. Even though two distinct grounds were included in the formula of doubt, and the law section explained the juridic principles related to *fraud* (c. 1098) and "error of quality" (c. 1097, §2),¹⁵⁹ the dispositive part of the sentence read: "After having weighed everything stated both in law and in facts, we the undersigned Auditors [...], responding to the proposed doubt[...], definitive sentence: 'Affirmatively', that is to say, *there is proof of nullity of marriage* in the case on the alleged ground of error concerning a quality of the person directly and principally intended by the woman petitioner."¹⁶⁰ Without directly

¹⁵⁸ "An constet de matrimonii nullitate, in casu, ob dolum *vel* ob errorem qualitatis" (*ibid.*, p. 576). In using *vel* (= or) in this formula, the Rotal court seems to have in mind a definite direction toward an equitable decision in the case. Since *dolus* of c. 1098 had already received one affirmative decision and another negative at the local level, if the Rotal court were to pronounce a negative decision purely on the theoretical position held by a particular *turnus* while the facts clearly sustained the allegation of nullity, such a decision, in my view, would have been certainly unjust.

¹⁵⁹ It is important to note that Pompedda presents an excellent systematic analysis of the content of c. 1097 on *factual error*. He argues that c. 1083 of the 1917 Code and the present c. 1097 clearly speak of two distinct hypotheses, namely "error concerning person" in paragraph 1, meaning "physical person", and "error of quality" in paragraph 2. According to Pompedda, the opinion of those who maintain that the phrase "quality redounding to error of person" amounts to "physical person", cannot be sustained. In the present Code, Pompedda explains, the distinction between the *person* and *quality* is quite clear. In interpreting "error of quality redounding to error of person" one must understand this distinction implied in the phrase. What redounds to "error of person" is not the "quality", but the "error" of quality. This implies that when there is such an *error*, the subject who is in error *intends a person* endowed with that unique quality, which makes that person totally different from the one actually marrying. According to this interpretation of the phrase, what "redounds to error of person" is not the "quality itself" but the "error" of quality. When this error becomes the object of one's *intention*, it vitiates consent.

In explaining the principles governing the *caput* of fraud, Pompedda skips the issue of its retroactivity since the marriage was celebrated before c. 1098 came into effect. He merely outlines the juridic principles related to *dolus* applicable to matrimonial consent.

¹⁶⁰ "Quibus omnibus sive in iure sive in facto perpensis, Nos infrascripti Patres Auditores[...], declaramus, pronuntiamus et definitive sententiamus, ad dubium propositum respondentes: 'Affirmative' seu 'constare de matrimonii nullitate, in casu, ex adducto capite erroris in qualitate personae directe et principaliter intenta ex parte mulieris actricis" (*ibid.*, p. 591).

addressing the ground of *fraud*, the Rotal court seems to have integrated the norms of "error of quality" of c. 1097, §2 and "induced error" of c. 1098 into one principle, for we read in the sentence: "Lack of qualities in the respondent within the context of peculiar circumstances in which the petitioner was living, was, without doubt, able to disturb and in fact seriously disturbed the partnership of conjugal life. As a matter of fact, as soon as the woman discovered the error, she terminated conjugal communion. The error induced by the respondent, into which the petitioner was trapped, and which caused the celebration of marriage, rendered it invalid because the qualities required by the woman, as if pertaining to the substance of matrimonial pact, were totally lacking in the man."¹⁶¹ The following are the facts of the case on which the affirmative decision was based.

At the time of marriage, the woman was 25 years of age and wanted to marry a man about 30 years old, endowed with qualities of integrity and honesty, otherwise she would not marry. Her deposition reads: "I was born on 11 January 1959 and wanted to marry someone who was not more than four or five years older to me. I was made to believe that the respondent had all the qualities of an ideal husband — character, education, health and enough money. And I married this man who was supposed to have been 30 years of age, for I was led to believe that he was born on 21 May 1953."¹⁶² From all the evidence

¹⁶¹ "Defectus qualitatum in viro convento in peculiaribus rerum adiunctis, in quibus actrix versabatur, consortium vitae coniugalis haud dubie graviter perturbare valuit et revera graviter perturbavit. De facto actrix, detecto errore, statim communionem coniugalem abrupit.

"Error a convento inductus, in quem actrix prolapsa est et qui causam dedit nuptiali contractui, matrimonium irritum reddit, quia qualitates a muliere postulas, tamquam ad substantiam pacti matrimonialis pertinentes, omnino in viro defuerunt.

"Actrix directe et principaliter suum consensum in qualitates morales viri dirigere intendebat et indirecte et subordinate in personam. In casu obiectum contractus, in quo voluntas mulieris serio et principaliter directa fuerat, desideratur et ideo ipsum matrimonium, ob consensus defectum, irritum evasit." (*ibid.*). All the elements of c. 1097, §2 and c. 1098 are integrated in these three paragraphs. The consent is declared invalid because the *object* or the *substance* of petitioner's intention was totally different from the *object* that was presented at the time of consent. In other words, the very substance (*object*) of the contract was lacking in the exchange of consent. And *deception* was one of the principal factors involved in the error on petitioner's part.

¹⁶² *Ibid.*, p. 587.

presented to the court, it was certain that the petitioner had clearly demanded, prior to completion of all arrangements for the marriage, that the man must be 30 or at the most 31 years of age. The respondent, his parents and two of his uncles were informed of this stipulation. To this effect a baptismal certificate with the date of 21 May 1953 was produced.

Petitioner's father testified that they had demanded the presence in the respondent of the qualities of education, age, health, etc. One of the respondent's aunts assured them that "he was 29-30 years of age; had completed pre-university studies, had a property of 5 acres... as well as business..." Even the priest who officiated at the wedding confirmed that the said age was a requirement of the petitioner and her family.¹⁶³

It was clear to the court that the petitioner had agreed to marry the man only because he was in fact endowed with the particular qualities. In other words, she consented to marry him believing he had all the qualities she desired to find in him.

Soon after the celebration of marriage, the truth about the man began to unravel. Within two months, the petitioner found in a diary of the respondent that the actual date of his birth was 21 May 1945. This date made him actually 13½ years older than the petitioner. In order to hide this actual age difference, respondent's people had bribed the Notary to falsify the date on the certificate which the parish priest had signed without checking its details. It seems after the marriage, the falsified certificate was retrieved by one of respondent's uncles from the priest who officiated at the wedding and was destroyed. Both the respondent and his uncle seem to have admitted this fact before the petitioner and her parents. The priest who celebrated the wedding confirmed this: "It has been taken away by a relative of the bridegroom promising to return it the following day. But they never returned it. I do not think it is an authentic certificate. Probably the parish priest did not check it up. But I cannot vouch for it... I should think so because they did not bring back the certificate."¹⁶⁴

¹⁶³ *Ibid.*, pp. 587-588.

¹⁶⁴ *Ibid.*, p. 588.

The Rotal court fully agreed with the observation of the appealed sentence: "So it is clear the certificate the Defendant produced was a false one and the Plaintiff says she married on the strength of that certificate and would not have married if the correct date of birth was known... There are not many witnesses in this case. The Defendant and his people have not appeared in the court. But the points are definitively proved even though the false certificate is not available. The sworn testimony of the Vicar of Kanhagad and the certificate he has given are enough to prove it."¹⁶⁵

It also became evident to the petitioner that the respondent had not completed even high school level education while he had assured her before the wedding that he had pre-university education.

Eventually it was also discovered that even before the wedding the respondent suffered from serious mental depression, and during the episodes of disturbance he would cry like a baby and throw himself on the bed like a block of wood.¹⁶⁶ Besides mental illness he was also suffering from unspecified physical ailments.

In the face of this evidence, the Rotal court concluded: "From the acts of the case it has been clearly established that the respondent man is different as far as the character, morality and civil status is concerned, from the one whom the woman had known and intended to marry. The petitioner was therefore led into serious error and it was only after the wedding that the respondent was found to lack the qualities which she had directly and principally required in her future spouse in order to establish a dignified and peaceful married life. For this reason she was convinced that she could not live with the respondent. Certainly she would not have married the respondent if she had known his personality."¹⁶⁷

¹⁶⁵ *Ibid.*, p. 591.

¹⁶⁶ *Ibid.*, p. 590. The description provided by the petitioner of respondent's behaviour during episodes of his illness seem to indicate a very serious mental disorder. If there was more evidence to corroborate petitioner's report of respondent's disorder, the case could have been examined also on grounds of c. 1095.

¹⁶⁷ "Ex tabulis processualibus incunctanter deprehenditur virum conventum esse virum valde diversum quoad indolem, moralitatem et statum civilem, a sponso quem mulier noverat et ducere intenderat. "Actrix ideo in gravem errorem incidit et tantum post nuptias detegit conventum prorsus carere qualitatibus quas ipsa ante

This case certainly involves important cultural factors which have entered into the matrimonial consent of the parties. Even though age, health, education and economic status may not bear much influence on consent within Western culture, this case highlights the fact that the nature and importance attributed to certain qualities by persons marrying are culture-bound, and often such qualities are explicitly, as in this case, or implicitly desired by the parties and their families. In cases of this kind, one must make genuine efforts to understand the nature and importance attached to qualities of the kind identified in this case within particular cultural context and also carefully evaluate the actual intention of the person and of his or her family in regard to these qualities.

It is quite possible that such qualities may not be considered important in particular instances. For example, in a case from Verapoly, Karala (India) judged at the Rota on 30 January 1992 *coram* Stankiewicz,¹⁶⁸ one of the alleged grounds of nullity was "error of quality concerning the age of the woman respondent" induced by fraud. The petitioner in this case was a man who wanted to marry a woman who was "at least three years younger to him." This marriage was arranged through a lady marriage-broker. This lady had known of the requirement of age stipulated by the man, therefore she in fact told the family of the respondent that the man would not marry her if he found out that the bride was not younger to him at least by three years. In light of this information, the family of the respondent altered her baptismal certificate in order to make her appear to have been born in 1956 while in fact she was born in 1953. In its negative decision, the first instance tribunal of Verapoly did not consider this factor to be a serious or quasi-essential matter. Therefore, the said tribunal concluded: "The fact of the wife being older than her husband does not in any way affect the well-being of the partners."¹⁶⁹ But the Rotal court reasoned differently by saying, "In the society in which these spouses live, the situation of the wife being older than the

matrimonium directe et principaliter in futuro coniuge invenire exigebat, ut dignam ac sernam collocationem acquireret, atque pro certo habuit se vitam cum Domino T. ducere non potuisse. Certo certius A., T non nupsisset, si eius personalitatem cognovisset" (*ibid.*, p. 590).

¹⁶⁸ See *ME*, 118 (1993), pp. 529-537.

¹⁶⁹ *Ibid.*, p. 536.

husband is considered an undesirable thing.”¹⁷⁰ Nevertheless, the court ruled that there was no evidence to the effect that the petitioner had directly and principally intended this quality, or its absence had seriously affected conjugal life, because the petitioner himself said: “If she was mentally normal, I would not have pressed the question of age.” In other words, the quality of age was not of much importance to the person concerned.¹⁷¹ Therefore, it is very important to determine the relevance of age factor in each marriage case even though the value attached to it by the culture may render it desirable for the people influenced by it.

It is also important to note the method through which Pompedda’s *turnus* arrived at the affirmative decision. It appears from Pompedda’s sentence that the first instance court declared the marriage null on the basis of “deceit” (“*dolus*”) (c. 1098) related to the age of the respondent. Whereas, the Rotal court integrated the principles of both grounds ‘fraud’ and “error of quality”, and pronounced an affirmative decision on “error of quality” induced by fraud. According to Pompedda’s opinion, the norm of c. 1098 on the invalidating effect of *dolus* on matrimonial consent is of positive law, and therefore, according to c. 9, it is applicable only to marriages celebrated after 27 November 1983 when the revised Code came into effect.¹⁷² This marriage was

¹⁷⁰ *Ibid.*

¹⁷¹ On the other hand, however, the respondent had suffered from serious mental illness before the marriage and manifested clear symptoms of it immediately after the marriage. Since this factor was deliberately concealed from the petitioner by the respondent’s family, and the man working in the Middle East, far away from his immediate family, wanted to marry a healthy person, the Rotal court ruled affirmatively on grounds of “error of quality directly and principally intended” (c. 1097, §2).

¹⁷² See Mario F. POMPEDDA, *Studi di diritto matrimoniale canonico*, Milano, A Guiffre Editore, 1993, p. 227: “Diciamo innanzi tutto che il capo di nullità stabilito nel canone in oggetto è applicabile soltanto a quei matrimoni che saranno celebrati dopo l’entrata in vigore del nuovo Codice, cioè dal 27 novembre 1983, primo giorno dell’Avvento romano. “Si tratta infatti di una norma di diritto positiva ecclesiastico, anche se congruente ed in qualche modo derivato dai principi de equità naturale; se così non fosse, dovremmo ritenere nulli tantissimi matrimoni celebrati nel passato in condizioni identiche alla fattispecie del canone.

“Del resto ‘leges respiciunt futura, non praeterita’, e sarebbe un assurdo perché contrario alla legge naturale-divina, ritenere che una legge canonica posteriore rende nulli matrimoni già contratti.”

celebrated on 19 June 1983, that is, several months prior to the above date. Therefore, the canon on *dolus* could not be applied to the case judged by the *turnus*. But Pompedda's conclusion identifies the petitioner's error concerning the respondent's age and other qualities being deliberately induced by the respondent and his family in order to effect the marriage, but at the same time the "qualities" were already directly and principally intended by the petitioner. As I understand Pompedda's sentence, the *turnus* seems to have made a most reasonable decision by applying the juridic principles that are intrinsically related. In view of his position on the nature and non-retroactivity of c. 1098, Pompedda could not have argued in favour of nullity of the marriage solely on the basis of "fraud." Through his integrated method, he has certainly rendered his sentence most equitable.

The facts as presented in this case could have easily justified admission of four grounds of nullity, namely error of quality (c. 1097, §2), fraud (c. 1098) and condition (c. 1102) on petitioner's part, and incapacity to consent (c. 1095) on respondent's part. But it seems that the only ground originally determined and judged through the process was "fraud" which, the Rotal court *coram* Pompedda felt, could not be sustained on its own because of the problem of its "retroactivity." Nor could the court introduce the incapacity ground for lack of cooperation from the respondent. As I said above, the decision of the court was "most equitable" because there was proof of nullity of marriage but the difficulty centred mainly around the most appropriate *caput* to fit the facts. And then Pompedda's *turnus* considered integrating the principal elements of c. 1097, §2 and 1098. This Rotal decision exemplifies genuine application of the principle of equity to cases in which the faithful may suffer serious injustice if tribunals indulge in quibbling over titles or mere words of the grounds while neglecting the facts.

On 27 January 1994 another case,¹⁷³ probably¹⁷⁴ originating in

¹⁷³ See decision c. STANKIEWICZ, 27 January 1994, in *Periodica*, 84 (1995), pp. 515-552.

¹⁷⁴ "Probably", because the two local tribunals of first and second instance are not identified in the sentence; but there are indications of the Indian origin of the case. For example, on p. 515, it is expressly stated that the marriage was celebrated "*iuxta ritum Ecclesiae Latinae*", which seems to imply the presence of other ritual

India, was judged at the Rota on grounds of "error of quality" (c. 1097, §2) and "fraud" (1098). In brief, following are the facts of the case. The marriage in question was celebrated on 27 January 1985. According to local custom, it was a "proposed marriage." At the time the man was 30 years and the woman was 29 years of age respectively. The man was working in the Gulf at the time. The parties met for the first time on 7 June 1984. Two months after this meeting they communicated with each other through correspondence. There was no courtship as such. On 24 January 1985, the man returned from the Gulf to his native place and the marriage was celebrated on the 27th of the same month. Within three months after the wedding the woman had to be admitted to a psychiatric hospital. The man could not accept this because his intention was to marry a person of sound mental health, and he had in fact made inquiries about it before the marriage. But after hearing from the woman's brother that she had been under psychiatric care prior to marriage, he definitively terminated conjugal life. On 19 March 1986, the man petitioned the ecclesiastical tribunal to declare his marriage null on two grounds, namely "error of quality of the respondent's person" and "fraud perpetrated on him by the respondent". The first instance decision of 16 July 1987 was negative on both grounds, but the appeal tribunal overturned that decision on 10 November 1988. The Rotal decision was affirmative only on "error of quality" ground.

The law section of Stankiewicz's sentence contains an excellent synthesis of doctrine and jurisprudence on most juridic aspects of "error of person" and "error of quality" (c. 1097), and "fraud" (c. 1098). Stankiewicz maintains that the "person" implied in c. 1097, §1 is a concrete human individual "physical" person and not an "ideal" or "abstract" "personality". If it were not, the prescriptions of cc. 1097, §2 and 1098, which speak specifically of a "quality" of a person, would be redundant.¹⁷⁶

Churches in the area. On the same page, we also read that it was a "proposed marriage" agreed upon by the parents. On p. 542, the petitioner says, "I came down from the Gulf" for the marriage; again on p. 544 and p. 547, the names of two Indian cities, namely "Bangalore" and "Cochin" are mentioned.

¹⁷⁶ Ibid., p. 521. Stankiewicz had argued the same point in his sentence of 22 July 1993 in a case from San Salvador (El Salvador). See *Ius Ecclesiae*, 6 (1994), p. 614.

Stankiewicz states that ecclesiastical law acknowledges the juridic efficacy of error of quality of a person only under certain conditions, and these are:

- a) the person in error must *intend* and will (either explicitly or implicitly) the desired quality of the other party;
- b) then the person in error must *directly* intend by an act of the will the desired quality of the person of the other party;
- c) finally, the person in error must *principally* ("prae ipsa persona"), and not in an accessory or incidental way, *intend* by an act of the will the quality of the person of the other party.¹⁷⁶

Fraud or deceit can affect a juridic act in two ways: either as a cause or as an effect of deception. As a cause, fraud is "a deliberately and fraudulently induced deception of another person by which that person is led into placing a determined juridic act".¹⁷⁷ The direct and principal effect of *dolus* is error. This error can be *substantial*, if it concerns the substance of the act involved, or *accidental*, which would involve only the accidental aspects of the object.¹⁷⁸

Fraud is *positive* if a person is led into error by some action; and it is *negative* when an existing error is confirmed by simulation or concealment of something in order to use the error to induce the person concerned into placing a determined act.¹⁷⁹

An act placed because of "substantial error" is invalid by virtue of natural law itself. On the other hand, an act which is the effect of merely "accidental" error, is valid but rescindable, unless the law provides otherwise. In case of marriage, no rescissory action is possible. Therefore, ecclesiastical law provides in c. 1098 for the nullity of marriage consent extracted through *dolus*.¹⁸⁰

Within the realm of the prescription of c. 1098, there can also be, besides cases of *accidental dolus*, instances of *substantial dolus* causing

¹⁷⁶ c. STANKIEWICZ, 27 January 1994, pp. 524-525.

¹⁷⁷ Ibid., p. 525.

¹⁷⁸ Ibid., p. 526.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid., pp. 527-528.

substantial error which invalidates consent by reason of "substantial error" itself, and it cannot be reduced to merely positive law.¹⁸¹ Citing U. Navarrete's view on this point, Stankiewicz states the following principle on this matter:

Hence we can with authority ascribe to the weighty opinion which maintains that 'there can be error, whether fraudulent or non-fraudulent, about the quality of another person which of its very nature can so seriously disturb the partnership of conjugal life that it directly renders the marriage null by virtue of natural law, even if that quality had not been *'directly and principally intended'* (c. 1097, §2), indeed even if the person in error had never explicitly paid any attention to it. Since such a nullity is of natural law itself, it is produced independently of c. 1098, and consequently, it may affect marriages celebrated prior to 27 November 1983'.¹⁸²

In regard to the application of c. 1098 to concrete cases, Stankiewicz proposes the following principles:

- a) the person must present consent in a *state of deception*;
- b) there must be a deliberate intention *to extract* matrimonial consent;
- c) fraud must be perpetrated by the contracting party *or* by a third party;
- d) the deception may be *positive* or *negative*;
- e) the quality must be essential to conjugal life itself;
- f) the quality concerned is of the other spouse, and not of a third party (e.g., quality of the family);

¹⁸¹ Ibid., p. 533. On pp. 529-534, Stankiewicz explains at length the different opinions and the private response of 12 December 1986 from the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law about the nature of the norm of c. 1098, whether it is of natural law or of merely positive ecclesiastical law.

¹⁸² "Inde sociari potest auctoritate gravi opinioni 'posse dari errorem, sive dolosum sive non dolosum, circa alterius partis qualitatem quae adeo graviter suapte natura perturbare possit consortium vitae coniugalis, ut directe ex iure naturali reddat irritum matrimonium, quamvis illa qualitas non fuerit *'directe et principaliter intenta'* (c. 1097, §2), immo quamvis errans ad illam modo explicito numquam attenderit. Huiusmodi nullitates, cum sint iuris naturalis, producuntur independenter a c. 1098, ac proinde iam locum habebant in matrimoniis celebratis ante diem 27 novembris 1983" (ibid., p. 534).

g) the quality must be *actual*, certain, and present at the time of celebrating marriage;

h) the quality must be such that it can seriously disturb the partnership of conjugal life;

i) the quality must be objectively serious, excepting sterility mentioned in c. 1084, §3. The objectivity must be determined by the common estimation of the community or society confirmed by jurisprudence, and related to the very essence, properties or ends of conjugal partnership.¹⁸³

As Rotal jurisprudence has constantly held, Stankiewicz does not preclude the importance of subjective estimation of the quality desired in the other person. For Stankiewicz says:

Nevertheless, the importance subjectively attributed to a quality by the person deceived, in view of the particular mentality and customs of the society in which he or she lives, cannot be dissociated from the nature of the quality, and it should carry by its very nature the potential to seriously disturb the partnership of conjugal life.¹⁸⁴

According to the evidence presented in this case, the respondent had suffered from typhoid fever in 1976 while she was still in college, and she was hospitalized for six weeks. It seems that the medication administered to her during this illness had affected her physically and mentally. Medical records indicated that she was treated by a psychiatrist for depression and hallucinations. In fact, she was treated for "schizophrenia" or "schizophreniform psychosis".¹⁸⁵ On the basis of this evidence, the Rotal court concluded that the respondent certainly suffered from mental illness and was subject to psychiatric care prior to marriage. However, the court could not ascertain if there was any recurrence of psychotic episodes between 1976 and 1985. It was certain, however, that she had to be admitted to the psychiatric hospital 3 months after the marriage.

¹⁸³ See *ibid.*, pp. 535-539.

¹⁸⁴ "Attamen momentum ipsum quod pars decepta subiective tribuit qualitati, attentis peculiari mente vel moribus societatis in qua degit, discedi nequit ab indole qualitatis, quae ex natura sua gestare debet potentiam graviter perturbandi consortium vitae coniugalis" (*ibid.*, p. 539).

¹⁸⁵ *Ibid.*, p. 548.

The Rotal court also concluded that for the petitioner the mental health of the respondent was very important. When he heard, prior to marriage, of respondent's mental illness, he initiated investigation about the matter, but did not receive sufficient information about it either from the respondent or from her family. In other words, he went into marriage believing that the respondent enjoyed sound mental health. Therefore, as soon as he heard from respondent's brother that she had suffered from mental illness prior to marriage, the petitioner terminated conjugal life. The court considered this fact as evidence of petitioner's intention to marry a person of sound mental health.¹⁸⁶

But the court's conclusion in regard to the ground of *dolus* was negative. While the second instance judges were of the opinion that the family members of the respondent "feared that the proposed marriage might be cancelled if he [the petitioner] knew about her [respondent's] psychiatric treatment [...]; therefore, it was a case of positive and deliberate concealing of the truth [...]. it was a kind of fraud and E. was deceived,"¹⁸⁷ the first instance court, which had dismissed the case with a negative decision on both grounds, had stated that it could not be positively concluded that there was "fraud in concealing the quality of the person B". In support of this conclusion, Rotal judges recall that "more than six months were given from the proposal to the actual celebration of marriage. Even after the rumour, there remained three months to inquire about."¹⁸⁸ To this they add: "Indeed either the respondent or her relatives thought that it was necessary to disclose to the petitioner the typhoid attack, while they considered the symptoms of psychic pathology to be only secondary and transitory, and therefore, of little importance."¹⁸⁹ If the Rotal court were to carefully investigate the cultural importance of mental health, especially in a bride-to-be girl, in arranged or proposed marriages in India, it might have discovered that the conclusion of the second instance court was closer to the truth than that of the first instance about the possibility of cancellation of the marriage. In other

¹⁸⁶ Ibid., p. 550.

¹⁸⁷ Ibid., p. 551.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

words, if either the respondent or her family were to reveal the fact of her psychiatric treatment, the proposed marriage would have been certainly cancelled as stated by the second instance judges. Mental health is a quality which is highly valued in Indian culture. Because of its cultural importance, concealment of the fact of mental illness is not that uncommon in India. This case could have been examined under consensual incapacity grounds of c. 1095, 2° and 3°, but the Rotal court deliberately bypassed this possibility mainly because these grounds had not been initially proposed.¹⁹⁰

4. Reverential Fear

One of the most important human values upheld by the teaching of the Second Vatican Council is a person's freedom to choose personal state in life. The Council stated that every human being ought to have ready access to all that is necessary for living a genuinely human life which includes "the right to freely choose personal state in life and set up a family."¹⁹¹ In the same document, the Council went on to admonish parents and teachers about their obligation to assist young people in their choice of marital status. It taught: "It is the duty of parents and teachers to guide young people with prudent advice in the establishment of a family; their interest should make young people listen to them eagerly; and they should beware of exercising any *undue influence, directly and indirectly, to force them into marriage or compel them in their choice of partner.*"¹⁹²

¹⁹⁰ See *ibid.*, p. 549, where Statnkiewicz states: "Infitiandum non est quin qualitas sanitatis psychicae compartis maximi momenti sit pro consortio vitae coniugalis eiusque defectus, praetermissa iam quaestione influxus morbi psychici in gravem defectum disrectionis iudicii (c. 1095, n. 2) vel in defectum capacitatis assumendi essentialis matrimonii obligationes (c. 1095, n. 3), natura sua consortium coniugale graviter quoque perturbare valet, ideoque a contrahente directe et principaliter intendi potest."

¹⁹¹ GS, 26.

¹⁹² *Ibid.*, p. 1073: "Liberi ita educatione instruantur ut ad aetatem adultam proventi *pleno responsabilitatis sensu* vocationem etiam sacram sequi ac *vitae statum eligere queant*, in quo, si nuptiis iungantur, familiam propriam, in condicionibus moralibus, socialibus et oeconomicis eidem propitiis, condere possint. Parentum vel tutorum est se iunioribus, in fundanda familia, prudenti consilio, ab eis libenter audiendo, duces praebere, caventes tamen *ne eos coactione directa vel indirecta ad matrimonium ineundum aut ad electionem compartis adigant*" (English

In essence, this teaching emphasizes two elements: first, the duty of parents to assist their children in making mature decisions, particularly in their choice of state in life; and second, the inviolable right of children to be the ultimate arbiters of their own decisions.

In c. 219, the ecclesiastical legislator responds to the above conciliar teaching by attributing to it juridic force. For the said canon reads: "All the Christian faithful have the right to be free from any kind of coercion in choosing a state in life." In c. 1103, this general principle has been particularized by the same legislator in the choice of marital state: "A marriage is invalid which was entered into by reason of force or of grave fear imposed from without, even if not purposely, from which the person has no escape other than by choosing marriage."

While upholding one's freedom to choose one's state in life, its very notion and parameters are to be understood within one's concrete socio-cultural context. Most Asian cultures, in which parents play an important role in the choice of life-partners of their children, present particularly difficult situations which involve parental or third party interventions in such choices. A marriage case originating from Chilaw, Sri Lanka, judged at the *Rota coram* Burke on 20 January 1994¹⁹³ typifies such a situation.

The marriage in question took place on 15 June 1972. It was a "traditional" marriage "arranged" through a "marriage-broker" by the parents of both parties. There were only four weeks between the engagement and the wedding, and the parties were able to see one another only twice during that period! One child was born of this union, but due to problems between the parties, and infidelity on the part of the woman, they definitively separated in May 1978. On 9 May 1983, the man petitioned the tribunal of Chilaw to declare the marriage null on grounds of *force and fear* on woman's part. The single judge court pronounced an affirmative decision on 23 July 1985. The appeal tribunal of Colombo overturned that decision without formally submitting the case to an ordinary judicial examination.

translation from FLANNERY, *Vatican Council II*, p. 956; emphasis added). Here the adjectives *directa* vel *indirecta* are very important for our consideration.

¹⁹³ See *Studia canonica*, 29 (1995), pp. 253-260.

When the case arrived at the Rota upon appeal, the promotor of justice and defender of the bond requested the Rotal court to look into the possible nullity of the second instance decision on the basis of serious procedural violations. The Rotal court, therefore, had to deal with two issues, namely nullity of the second instance decision, and if the response is affirmative, ratification by decree of the first instance sentence. The Rotal court in fact found for nullity of the second instance decision of Colombo tribunal,¹⁹⁴ and went on to confirm by decree the first instance affirmative decision.

In his affirmative sentence, Burke reiterates the basic juridic principles governing the effects of force and fear on a person's matrimonial consent. First, the impediment of force and fear is of natural law itself, and hence it affects all persons baptized or non-baptized, both Catholics and non-Catholics.¹⁹⁵ Personal freedom in choosing marriage itself and the marriage partner is inviolable. The principle of force and fear includes also "reverential fear" which consists in the fear of offending or saddening one's parents, guardians or significant others who play an important role in one's life. The nullifying effects of reverential fear has been commonly acknowledged in canonical doctrine and jurisprudence. Even though marriage cases involving this *caput* are in fact treated infrequently in the West, the very nature of most Asian cultures which nurture tight-knit family relationships, parental role in decision-making on matters affecting the family

¹⁹⁴ In declaring the nullity of the sentence Burke writes: "Regarding the first question before us, that is concerning the nullity of the decision of the Colombo Tribunal of 18 February 1987, there can be no doubt. When the affirmative first instance sentence of Chilaw was appealed to Colombo, the Appeal Court, omitting the decree indicated in c. 1682, §2, and without any further process, reversed the decision on 18 February 1987. Against what is prescribed in the canons, the cause was never admitted to ordinary examination; and there is total absence of everything which the law requires for the judicial process: citation of the parties, joinder of the issue, publication of the acts, the conclusion and the discussion of the case. As a result of these omissions, not only is the proper procedural order subverted, but the right of defence of the parties is gravely violated. The sentence of the Appeal Court is therefore evidently null" (*ibid.*, p. 258).

¹⁹⁵ On 25 November 1986, the Pontifical Council for the Interpretation of Legislative Texts responded to the doubt: "Whether the defect of consent referred to in c. 1103 can be applied to marriages of non-Catholics? *Affirmative.*" This response was promulgated on 6 August 1987. See AAS, 79 (1987), p. 1132.

unity, and strong parent-children interdependence, binds itself to situations in which personal freedom of children is often unduly restricted. This happens in so-called "arranged marriages" in which generally parental rights and choices predominate those of children. In his sentence Burke rightly states:

The question of "arranged marriages" requires a more nuanced judgement. Such marriages have been frequent almost everywhere in the past, and are still common in many parts of Africa and Asia. They do not necessarily violate human rights and dignity, since one cannot a priori exclude the possibility that those marrying may freely make their own their parents' or relatives' choice of a spouse. However, this seems less likely in modern times;¹⁹⁶ and if it can be shown that the marriage partner was imposed in violation of the person's rightful free choice, then the marriage can certainly be declared null. "A marriage arranged by parents for their children is not invalid, if the children ratify the engagement entered on and so contract marriage. If however they do not wish to ratify the engagement and are therefore compelled by fear to wed, the marriage is null."¹⁹⁷

Even though the principle enunciated in this statement is clear and simple, its applicability to concrete cases may not be that easy when judges themselves at the local level do not have a proper appreciation of it. For example, as reported in Burke's sentence, the defender of the bond of the appeal tribunal, in this case argued that there had been no coercion, since "in the actual life situation of a village girl, this sort of persuasion is quite normal and accepted."¹⁹⁸ The judges of the appeal tribunal agreed with this argument saying: "This is an arranged marriage, a phenomenon quite common in our culture. Usually such marriages are accepted by the children in obedience and out of respect to their parents, since the children firmly

¹⁹⁶ What Burke says here may be true in Western societies, but, as explained in the previous section, it is certainly not true in cultures of the East. Even today the system of "arranged marriages" is predominant in countries like India, Pakistan, Sri Lanka, etc., and the so-called love-marriages are only exceptions even though these may be more frequent today than they were two decades ago.

¹⁹⁷ c. BURKE, 20 January 1994, p. 257. Quoted here by Burke is the sentence of Sabattani of 20 December 1963 (*SRR Dec.*, 53 [1963], p. 973).

¹⁹⁸ c. BURKE, 20 January 1994, p. 259.

believe that the parents know and propose what is best for them. This does not amount to reverential fear.”¹⁹⁹ The judges go on to say that simple insistence by a parent that a child marry cannot produce fear of a grave evil, unless it is accompanied by actual “threats of disinheritance, expulsion from the home, loss of support and the like, or even threats of physical restraint or violence.”²⁰⁰ This statement of the judges could certainly be disconcerting to its reader who knows and appreciates the juridic principles related to the *caput* of reverential fear and the socio-cultural reasons underlying the system of arranged marriages. What Burke states in this regards goes to the heart of the issue: “Tribunals cannot let themselves be guided by what may have been normal or common in the past, if the evidence in a concrete case shows that natural and ecclesial rights have been violated. The juridical question to be determined is whether a person in the end freely acquiesced in the proposed marriage, out of motives of love, of respect for greater experience, etc., or whether the ‘acceptance’ of the marriage was against his or her own will, and motivated simply by fear of consequences of not doing so.”²⁰¹ This principle has been more forcefully stated by Mattioli in his sentence of 29 February 1960, where he says: “Nor is it right to object that the parents had good cause for their insistence; in other words, that they were looking to the good of their children, or wished to attain other very upright ends. This could attenuate or justify their action in the forum of their own conscience, but it takes nothing from the objective violation of justice which, according to the norm of law, nullifies the consent of the person suffering their pressures.”²⁰²

The evidence in this case proved that the respondent did not love the petitioner. She married him because of threats from her mother, whom she described as “a domineering character.” She was afraid that her mother would ignore her completely. Both her parents confirmed the force put on her. Her father testified that the mother insisted on the marriage because the marriage-broker assured them that the petitioner was a very good person, and his daughter agreed

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, p. 257.

²⁰² See decision c. MATTIOLI, 29 February 1960, in *SRR Dec.*, 52 (1960), p. 133.

because of insistence on the part of her mother. Her mother admitted that her daughter married the petitioner because of her insistence: "I was the one who insisted that she should marry Aeldred [...]. Every day I was telling her over and over again to agree to this marriage [...]. Now of course I know that it was wrong. At that time I had no idea that it was wrong to do."²⁰³ Asked by the judge why she remained with the petitioner for six years, she replied: "I stayed with him, of course all the time quarrelling [...], because of the shame that I would have to face. I had no courage to break away earlier."²⁰⁴ The first instance judge who seems to have assessed the evidence more objectively had concluded:

The evil which threatened the respondent was not, it seems, the threat of physical violence, or deprivation of life sustenance. Such threats would well place this litigation in the area of common fear. Rather, the respondent's fear was of the certain and serious rupture in her life-long relationship of love and respect for her parents, a relationship which had existed from her earliest days. The threat to this relationship and the certain serious distress and indignation which an act of disobedience would cause her beloved parents was for this respondent a very grave evil. The respondent must be believed in testifying that the circumstances resulted in a state of grave reverential fear.²⁰⁵

This conclusion of the Chilaw tribunal judge reflects the consequences of a culturally sanctioned "arranged marriage" on the consent of person(s) who agree to marry at the insistence or even moral persuasion of parents. Therefore, while rejecting the arguments adduced by the appeal court of Colombo in support of its negative decision in the case, the Rotal court rightly concluded: "We consider that the first instance single judge's analysis of the case was more accurate from the viewpoint of established jurisprudential principles, and that he perceived better where traditional practice did in fact involve a violation of basic human and ecclesial rights."²⁰⁶

²⁰³ c. BURKE, 20 January 1994, p. 258.

²⁰⁴ *Ibid.*, p. 259.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, p. 260.

In another affirmative sentence dated 21 February 1991,²⁰⁷ the Rotal court deals with a case from Madras (India) in which the alleged ground was reverential fear on the part of man petitioner and simulation on respondent's part. In brief, the facts of the case are as follows.

Francis, a Catholic petitioner in this case, and Ganapati, a Hindu, fell in love during their college studies. Their friendship eventually led to sexual intimacy. Within a few months, Francis learned of Ganapati's love relationship with another young man and of their mutual proposal to marry, but the young man's parents had prohibited such a union for reasons of unfavourable astrological signs. At this point Ganapati's mother announced to Francis that Ganapati was pregnant by him and that he should propose marriage in reparation. However, Francis rejected such a proposal. Ganapati's mother denounced Francis to College authorities. As soon as they came to know of the sexual relationship between Francis and Ganapati, without even looking into the relationship between Ganapati and the other young man, the Superiors of the College insisted on the celebration of marriage with a threat of expulsion from the college if he did not agree. The bishop of the place, Francis' two uncles priests and his whole family were informed of the girl's pregnancy and of the impending marriage. On 30 April 1954, Ganapati was baptized assuming the name Stella Mary and the marriage was celebrated that day. On 17 September 1954 a male child was born. Conjugal life lasted about a year when Ganapati left conjugal home and the infant to complete her college degree and then moved on to Calcutta where she reconverted to her native Hindu religion. She rejected all efforts at reconciliation and finally obtained civil divorce in 1977.

After the civil divorce, Francis entered into a civil marriage with Susheela, whom he had hired as nanny to take care of his son. Five children were born of this union, two of whom became cloistered nuns. It was only after living 28 years in a civil marriage that he was able to present his petition for a declaration of nullity because, in his own words: "I did not make any attempt because I was not aware of the fact that any such declaration would be available. That there is an

²⁰⁷ See decision c. BOCCAFOLA, 21 February 1991, in *SRR Dec.*, 83 (1991), pp. 101-111.

ecclesiastical court and that there may be a way out of this problem, I learnt from a news item in the New Leader."²⁰⁸

In his petition of 23 December 1983 to the Madras tribunal, he accused the marriage of nullity on grounds of reverential fear on his part and simulation on respondent's part. The first instance decision was negative on fear with no mention made of the ground of simulation. The appeal court of Coimbatore pronounced affirmatively on both grounds. The Rotal decision of 21 February 1991 *coram* Boccafolo was affirmative on grounds of grave fear.

In their sentence, the judges of first instance tribunal did not dispute petitioner's claim about reverential fear, but maintained that the fear was only light. Their conclusion was: "Although this marriage could be nullified by virtue of can. 1101 [simulation] if real circumstantial evidences are proved, here we have only the testimony of the petitioner. Enough evidence has not been presented to declare this marriage null and void with a safe conscience."²⁰⁹ The defender of the bond also expressed the same opinion: "It is likely that there was external force (moral) in this case, which alone compelled Mr. F. and or G. to enter this marriage. But enough evidence has not been presented to declare this marriage null and void with a safe conscience."²¹⁰ One could legitimately question the knowledge of the judges and the defender about the juridic principles as well as their appreciation of the cultural factors involved in this case.

On the other hand, the judges of second instance tribunal weighed very critically the same facts and documents and arrived at a different conclusion.

Though the cause for pregnancy was not certain, [Francis] is made to accept and to marry her by force and grave fear by the Jesuit Fathers on the plea of perhaps dismissal from the college or failure in the exams... Reverential fear here deserves special attention since the displeasure of parents or persons in authority can easily diminish the voluntariness of the act. The pressure applied externally may seem light, but due to the relationship in

²⁰⁸ *Ibid.*, p. 111.

²⁰⁹ *Ibid.*, p. 106.

²¹⁰ *Ibid.*

fact it may leave the person no liberty of choice. [Francis] had this sort of fear before the marriage as he declared in his answers to the questionnaire... Considering the circumstances in which [Francis] was before the marriage, as per canon 1103 as stated above and the way [Ganapati] behaved before and after the marriage, as per canons 1101, §2 and 1055, §1, as noted above force and grave fear on the part of [Francis], simulation, total and partial, regarding the very nature and the essential element of marriage on the part of [Ganapati] are the factors that make this marriage null and void.²¹¹

The Rotal court considered this decision to be in conformity with canonical principles and with the facts reported in the acts.

In his petition for the declaration of nullity of his marriage, the petitioner confirmed, "This (can. 1103) can be applied in my case with reference to pregnancy of the girl whom I was compelled to marry under force and grave fear and reverential fear... Thus a situation was created wherein I could not escape unless I conceded for the marriage to the said girl. I was not able to write my BA degree examination also, because of this disturbance I could neither go back to my parents and relations nor face the society with marriage... The reverential fear for parents, relations, society and Jesuit Fathers of St. Joseph's College and the two priests of my family to safeguard their prestige, I had to give my consent for the marriage."²¹²

In his deposition before the tribunal he reiterated the same fact: "Shanta's mother came to me and informed that [Ganapati] was carrying (pregnant). I was responsible for it. When I refused to accept the responsibility for the pregnancy, she reported the matter to Fr. Fournier who was our French professor as well as a successful social worker in Srirangam Tiruchi. He took it seriously, believed their version completely and brought pressure on me to marry her... Fr. Sequeira told me that I would have to leave the Hostel unless I found a solution for this. The Rector of the College, Fr. Kalathil, also severely warned me to find a solution to this. The entire campus was

²¹¹ *Ibid.* The court did not specify what essential element of the marriage was excluded by the respondent. They probably had exculsion of indissolubility or sacramentality in mind.

²¹² *Ibid.*, pp. 106-107.

charged with the news and agitation against me, particularly among the Brahmin students."²¹³

One of the witnesses admitted that as a consequence of this marriage celebrated in such circumstances: "Mr. F. was not welcome to his parents' home because after the marriage for the whole village folks were laughing about this marriage based on 'pregnancy'."²¹⁴ The Rotal court found in the testimonies of other credible witnesses sufficient evidence in support of petitioner's story. Even the respondent confirmed this in her response to her citation by the Archbishop of Madras. In her letter of 12 September 1984, she wrote: "I hereby affirm and state the following voluntarily and on my own free will... This marriage took place under compelled circumstances and defective in consent for the Christian Baptism and Catholic form of marriage. Consequently I was reconverted to Hinduism in 1958... As a hindu I do not want to be questioned by any Christian authority on my personal life and matters and that I do not stand in the way of granting annulment of Catholic marriage dated 1 May 1954 of Mr. F. by Christian religious authorities."²¹⁵ The Rotal court considered this statement to carry weight *not only* in relation to force and fear, but also to simulation on respondent's part, even though she seems to have reversed her statement in a later letter.²¹⁶

The overall conclusion of the Rota was that there was proof of force and grave reverential fear inflicted on the petitioner which deprived him of the benefit of internal freedom in choosing marriage and his marriage partner.

There are several socio-cultural factors clearly identifiable in this case. First, the family and religious backgrounds of the parties,

²¹³ *Ibid.*

²¹⁴ *Ibid.*, p. 110.

²¹⁵ *Ibid.*, p. 108.

²¹⁶ *Ibid.* This letter was written during the initial stages of the process at the Rota, dated 22 August 1989 and it read: "You may pass the information to Vatican City properly translated with a copy to me. There was no fear or coercion brought upon either party except for the fact that he erred in producing illegitimate children without granting me a divorce." The Rotal court did not accord any credibility to this letter because of the underlying motive (desire to squeeze out of the petitioner pecuniary assistance to provide dowry for her daughter).

one belonging to a conspicuously prominent Catholic family, while the other presumably a person belonging to a high-caste hindu (Brahmin) family. As explained earlier in this study, *ordinarily* marital liaisons between these communities do not take place. As in this case, such unions are exceptions and if and when they occur, the circumstances themselves are usually exceptional. Second, children's lives are filled with deep respect and filial devotion towards their parents and superiors, especially religious superiors, in Indian culture. In most cases, therefore, children abide by parental decisions. Even though the cultural context might be conducive to peaceful acceptance of parental decisions generally, instances are not that infrequent where such decisions are forced upon children against their personal wishes. This is not an uncommon phenomenon in most cultures of Asia. Third, within the religious cultural context of India, for example, when there is a question of a love-marriage between a Catholic and a non-Catholic usually there is moral pressure on the non-Catholic party to convert to Catholicism. Therefore, in such situations baptisms are celebrated at the last minute with little experiential preparation for an adequate understanding of the sacrament. One is not to be surprised at the kind of behaviour displayed soon after the baptism and wedding by the respondent in this case. It was a rushed baptism and a rushed marriage without any appreciation of the faith element which should always be at the core of one's conversion experience. Fourth, in general inter-caste marriages are taboo in Indian and other Asian countries. And if such marriages are precipitated by pre-marital pregnancy, the presumption, in my view, certainly weighs in favour of lack of sufficient internal freedom to choose marriage and the marriage partner unless there is evidence to the contrary. Several grounds of nullity may fit such a situation and these will have to be identified in each concrete case.

A marriage case from Surat Thani, Thailand, was judged principally on the basis of reverential fear *coram* Pompedda on 17 June 1985.²¹⁷ The woman petitioner in this case claimed that she lacked necessary internal freedom in giving consent because of family pressure. Pompedda's review of the facts is very brief and to the point. In essence, the court found that the petitioner certainly disliked the

²¹⁷ See decision *c.* POMPEDDA, 17 June 1985, in *SRR Dec.*, 77 (1985), pp. 288-294.

respondent. She related to him only as a friend and never thought of marrying him. She had disclosed her feelings to her parents, sisters and brother, but nobody seems to have taken her seriously, rather they put pressure on her to marry. According to her deposition, she went along with the engagement "but without any intention whatsoever of going any further."²¹⁸ Therefore, she immediately left home and stayed away for over a month; she returned only because of her father's ill-health. The family hoped that her marriage would make her father happy before his death. She disclosed to the parish priest her aversion toward the respondent, but he did not pay much attention to her complaint. At the same time, her sisters wrote letters urging her to submit to their father's will. Therefore, the petitioner felt that all were in collusion against her and thought she had no other option. Her aversion toward the respondent was so intense that the marriage was not consummated for a week, and when it was finally consummated she felt it was "a kind of rape." Because of this aversion, she left her husband and stayed with a friend for a month and returned again when she heard that her father was seriously ill. The marital relationship never became peaceful, and therefore, she finally persuaded her husband to seek civil divorce. Witnesses heard in the case confirmed the statements of the petitioner. Her brother, for example, confirmed her aversion toward marriage with the respondent and added: "it happened with my own marriage, that is, under pressure, though much greater than mine."²¹⁹ Her sister testified that she married "in order to please my father's last desire."²²⁰ The Rotal court concluded that "the woman married because of reverential fear compelled by her father with support from other members of the family so that she had no other option than to marry."²²¹

Conclusion

Culture is a part of human life, human life evolves in culture. As a complex of traditions, customs, beliefs, values, institutions, rituals,

²¹⁸ *Ibid.*, p. 292.

²¹⁹ *Ibid.*, p. 293. This admission indicates the fact that even male children may not be immune from parental pressures in the choice of their marriage partners.

²²⁰ *Ibid.*

²²¹ *Ibid.*

etc., formed from the collective human experience of a particular community, it invariably influences the way people perceive and conceptualize reality, and behave. Culture is not only a vehicle for action and interaction, it is also a dynamic reality with capacity for change, and in this process it also affects human behaviour.

Law is a human tool used in ordering human relations in order to foster and promote the good of a community from and for which it is legitimately enacted. Because of its transcendent finality, ecclesial law is unique in its nature and purpose. The universal scope of this law and its redemptive role, necessitate an equitable approach towards its interpretation and application. In other words, ecclesial law must be interpreted and applied by taking into consideration all relevant circumstances of the place, persons and time.²²² This means that personal and cultural contexts necessarily enter into the hermeneutics of canonical interpretation.

A good interpreter knows first his/her own culture before attempting to interpret and implement the law. Without such reflective knowledge of one's own culture it is almost impossible to personalize the meaning of law as well as to understand someone else's culture. Furthermore, a good interpreter not only knows personal culture, but also has a good grasp of the law and is equipped with scientific skills of interpretation. There is no circumventing the principal hermeneutical principle that ecclesiastical laws "are to be understood in accord with the proper meaning of the words considered in their text and context" (c. 17). Moreover, if an interpreter and/or a practitioner of law were to

²²² See decision c. TURNATURI, 15 November 1994, in *ME*, 120 (1995), pp. 232-248. The case came to the Rota from Nakuru (Kenya) and it was judged on grounds of force and fear. The marriage in question was precipitated by premarital pregnancy of the respondent, but the factors considered important for the judicial decision were cultural in nature. Even though there was no evidence of any pressure from any particular person, the cultural expectations and importance of familial bonds were considered to underly the decision to marry without sufficient internal freedom. The first instance affirmative sentence had stated: "... this is precisely what happened to Grace in marrying Joseph", she was afraid "of losing her reputation, her position in her church and in society, her family peace, etc., was the efficient cause of her decision to marry", and this "played an important role in her decision, overpowering the negative attitude of other members of her family" (*ibid.*, p. 237, also see p. 247). The Rotal court accepted this assessment by the first instance tribunal of respondent's mental condition as the basis for its own affirmative decision.

interpret and apply the law for others, it is extremely important for that person to know their culture, either by personally learning their language and way of life, or by being sufficiently informed of all relevant aspects of the culture from someone truly knowledgeable about it. Without this knowledge any attempt at applying the law to particular cases will not be just and equitable.

Matrimonial consent is a human act, an act of a human person, who is a product of particular sociocultural environment. It is an undeniable fact that cultural factors impinge on this human act. Its effects are certainly variable depending on the nature of the particular variable involved and the strength of its influence on the person concerned. Each concrete case presents itself as unique and demands of the interpreter a unique response. Hence, even in determining appropriate grounds of nullity to fit the facts, and finally to derive moral certitude from those facts, a judge must take into careful consideration the cultural context of the case in question.

As long as the non-negotiables, the elements which constitute the foundation of our Catholic faith and heritage declared in ecclesial law are diligently respected, upheld, and promoted, a mature cultural approach to the application of law is the only just and equitable approach, and it is more likely to enhance the splendor and meaning of law than a purely scientific, legalistic, and juridic approach.