

Error and Deceit or Fraud as Sources of Nullity

1. *Introduction*

1.1. The matrimonial consent as the creative element of marriage is very clearly stated in c. 1057. It states: "A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power." When two persons mutually exchange consent in a marriage whereby they give and accept each other for the purpose of establishing a community of life and love for their mutual well-being and for the procreation and education of children, such a community of life and love starts to exist at the moment that these two persons emit their consent. But this consent is not just a product of a sudden inspiration nor a spur of a moment decision. It is the result of a long and complicated psychological process that involves the healthy functioning of the intellect and will of an equally healthy personality, endowed with traits of "unity, and identity, vitality, self-awareness and a sound relationship with the milieu, and a normal state of mental health comprising a capacity for adaptation, an aptitude for happiness and an acceptance of sexual instincts."¹ The very seriousness of marriage and of its rights and obligations demand such a thorough reflection and deliberation of those who enter into it.

¹ *Handbook II for Marriage Nullity Cases*, compiled by J. Edward Hudson, St. Paul University, Ottawa: 1980, p. 83.

1.1.1. Without going into the intricate process of decision-making, which is not the purpose of this study, nor utilizing the different technical terms used by psychologists and philosophers, it will suffice to give here a brief but clear picture of the interaction between the intellect and the will in the process of what is generally known as the human act (*actus humanus*) which is what matrimonial consent is. The intellect addresses itself to the object (*intentio*) and takes possession of it (*apprehensio*). It then evaluates the object (*iudicium*), and after making some correlations (*rationcinium*), it presents the object to the will which, being blind by nature, then proceeds to decide on what course of action to take (*volitum*).

1.1.2. This, in simple terms, is how matrimonial consent is formed. From the foregoing, we can readily see that there are three elements of matrimonial consent: the *cognitive element* or the part being played by the intellect whose function is the apprehension of truth; the *volitive element* or the part being played by the will in a process called deliberation; and finally, the *psychosomatic element* or the degree of maturity of the subject-agent of consent. It is likewise clear that where one or more of these elements are lacking or deficient, then matrimonial consent is also lacking or deficient. When matrimonial consent is vitiated or defective, then it is because of a defect on one of these elements. Thus, we have a defective consent because of a defect in the intellect, a defect in the will, or a defect in the person in general.

1.1.3. This study is concerned with the cognitive element of matrimonial consent. The knowledge necessary for consent must cover a number of elements: knowledge of the contract, of the person, and of the bond of marriage itself. A deficiency of this knowledge or of a correct intellect apprehension about the actual reality of these elements will result in a defect of consent and may invalidate the marriage. Such a deficiency results from a false or an insufficient grasp of reality or what is generally called error, and this can arise from two main sources: ignorance, i.e., a lack of personal information that causes the false apprehension of reality and leads one to err.

1.2. Error consists in a false judgment or apprehension of a thing or about some elements of any juridical act. The person

in error is not devoid of knowledge but possesses erroneous knowledge about a person or a thing. The person then makes a judgment or forms an opinion based on what is erroneously perceived. Thus, error differs from ignorance in that the latter, which is defined as *privatio scientiae* or *carentia scientiae debitae* presupposes an absolute absence. In other words, in error there is something, i.e., knowledge or judgment, even if this knowledge or judgment does not correspond to the truth or reality, whereas in ignorance, there is nothing, i.e., an absence of knowledge.

1.2.1. Error can fall on the abstract consideration of the marriage institution itself or on its properties and then we have *error iuris* or error of law; or it can fall on the person with whom the marriage is contracted or on his qualities, and we have *error facti* or error of fact. This latter error can either refer to the physical identity of the person or to his qualities, and, further still, error on his qualities may either be provoked fraudulently or otherwise.

1.2.2. Error, inasmuch as it is a defect of the intellect, excludes the knowledge of the elements, whether substantial or accidental, necessary to a greater or lesser degree, for the act to be truly voluntary, and hence, indirectly and negatively affects the will. Since the will tends towards the object as it is apprehended by the intellect, error has some influence on the will.

However, not all kinds of error invalidate consent. According to c. 126, an act which is a result of error is null when the error itself affects the substance of the act or is about something that is set as a "*conditio sine qua non*." Thus, it is necessary to know when does error directly vitiate matrimonial consent.

1.3. The Code of Canon Law lists three canons that establish how error can invalidate matrimonial consent. C. 1097 states that error concerning the person renders marriage invalid while that which concerns a quality of a person does not invalidate matrimony unless this quality was directly and principally intended. C. 1098, on the other hand, states that a person contracts invalidly who enter marriage deceived by fraud perpetrated to obtain consent, concerning some quality of the other party which of its very nature can seriously disturb the partnership of conjugal life. The third canon, c. 1099 deals with error concerning the nature

or the properties of marriage itself. It states that error concerning the unity, indissolubility or sacramental dignity of matrimony does not vitiate matrimonial consent so long as it does not determine the will.

1.3.1. Taking a close look at c. 1083 of the 1917 Code and the corresponding c. 1097 of the present Code, we see that some changes have been effected. While the norm invalidating marriage because of error concerning the person remains, the second paragraph of c. 1083 dealing with the invalidating effects of error concerning the quality of the person amounting to error concerning the person (*error qualitatis redundans in errorem personae*), and error about the person's condition of absolute servitude has been substantially changed.

For a better understanding of the prescriptions of c. 1097, it will be useful to look back into the old c. 1083 and trace briefly the history of its evolution. We focus our attention on *error qualitatis redundans*, because the first paragraph of c. 1083 of the 1917 Code, i.e. the norm dealing with error concerning the person has remained basically unchanged, although perhaps its scope has been a little bit extended as we shall subsequently explain.

The terminology of this concept, *error redundans* is attributed to St. Thomas.² This was interpreted in many different ways before and after the promulgation of the 1917 Code. St. Thomas gave the example of a person who directly intends to marry the son of a king. This phrase was interpreted by many as referring to the son of a king of a particular nation, and not to the son of any king, in general, i.e., a person with royal blood, a quality that is common to all children of kings and is in no way individual and exclusive or just one person. In the example given by St. Thomas,³ he considers a marriage as null wherein a quality, even if it is common to all, is directly desired and wanted in itself in such a way that it is preferred to the person who is erroneously thought to have this quality, when in fact, this is not so; how-

² Francisco Bersini, "De Interpretatione Evolutiva Erroris Qualitatis Redundantis in Errorem Personae," in *Monitor Ecclesiasticus* (ME), Vol. CVI, Series XVI, A. 1981-L, p. 90.

³ St. Thomas, In IV Sent., d. 30 q. 1 a 2; Suppl. q. 51 a 5, cited in F. Bersini, *op. cit.*, p. 88.

ever, in the example given, the person is immediately not known to the other person except through this quality.

Thomas Sanchez interprets *error redundans* in a more restrictive manner. For him, error concerning the quality of a person becomes error concerning the person himself, a) when the error is about a quality that is proper and exclusive or individuating of a person; b) when this person is not known personally by the contracting party, and c) when the intention of the contracting party to marry the person who is presented to him has not been established. Such an error is, therefore, properly speaking, a substantial error. In other words, the quality mentioned in this case is really the determining factor that identifies the person. For example: "I want to marry the eldest daughter of Antonio and Maria."⁴ This strict interpretation has been constantly followed in doctrine and jurisprudence for quite some time.

St. Alphonse Ma. di Liguori, on the other hand, laid down three ways to determine when error concerning the quality is equivalent to error concerning the person. The first is, when such a quality is placed as a condition; the second, which is according to the mind of Sanchez, is when the quality is not common to persons, but is proper and unique to a concrete person; and third is when the consent is directed directly and principally (*directe et principaliter*) towards the quality and less principally towards the person. For example: if one says, "I want to marry Maria who, I think, is a virgin," then the error does not redound in the person and does not invalidate the marriage. However, if he says, "I want to marry a virgin which, I think, Maria is," then the quality of virginity is directly and principally intended, and the person of Mary is only secondary.

A wider interpretation of the concept of quality, following the doctrine of Vatican II on the human person as a complex of physical, moral, social and cultural qualities, caused the abandonment of the strict interpretation of Sanchez and was started in a decision, *coram* Canals of April 21, 1970. According to this decision, moral, juridical, social qualities are to be considered so in-

⁴ F. Bersini, *op. cit.*, p. 91.

timately connected with the physical person in such a way that if these qualities are lacking, an entirely different person results.⁵

This development in the concept of *error redundans* has given rise to jurisprudential and doctrinal problems which also affected the work of the revision of the Code. The present Code has ended the controversy by suppressing the terminology of *error redundans*, although it makes use of the different interpretations and arranges them in the following manner: 1) The strict interpretation of Sanchez becomes part of the supposition of *error personae* (c. 1097, § 1); 2) The wider interpretation of St. Alphonse, together with the broader consideration of the notion of quality, falls under the error of quality which is directly and principally intended by the contracting party (c. 1097, § 2); 3) An autonomous ground for nullity is introduced in the form of error caused by deceit or fraud (c. 1098).

Regarding the second exception of the second paragraph of c. 1083, i.e., the error about the freedom of the other party who is, in fact, a slave, it is clear that this has been suppressed because it has become obsolete. However, it is good to remember that the reason behind the law must always be kept in mind because it is timely even now. The purpose behind the law is to forestall an error which falsifies the object of marriage or the other party, in such a way that the person who was thought to be free, is not effectively so because of his situation: his physical situation, e.g. slavery; his juridical or moral situation, e.g. civil marriage; or incapacity of establishing a true community of life since the consort affected cannot consent to the setting up of a common life which should be one and undivided.⁶

1.3.2. The inclusion of fraud as an autonomous ground for the nullity of marriage, or even as a diriment impediment was requested by bishops and by some university faculties in their replies to the Commission for the Preparation for the Second Vatican Council. In the subsequent revision of the Code, and earlier in anticipation of such a needed revision, some would have extended

⁵ SRRD, Vol. LXII, p. 371. For a more exhaustive study on the evolution of the interpretation of *Erroris Qualitatis Redundantis in Errorem Personae*, cf. F. Bersini, *op. cit.*, pp. 88-100.

⁶ Handbook, *op. cit.*, p. 96.

the application of *error qualitatis redundans in errorem personae*; others would have widened the application of conditional consent; still others sought a disposition of positive law to provide for this recognized need. One member saw fraud as a cause of error in which there was no act of consent to marriage, and hence no joining of wills in the same reality, and therefore, no need of a separate canon. Another foresaw difficulty in spelling out the qualities regarded as *natura sua* seriously disturbing to the *consortium vitae coniugalis*.⁷

This new statute of fraud is actually an exception of c. 125, § 2 which states that "an act performed as a result of fear which is grave and unjustly inflicted, or as a result of deceit, is valid, unless the law provides otherwise. However it can be rescinded by a court judgment, either at the instance of the injured party or that party's successors in law or *ex officio*." Thus, fraud does not prejudice the validity of a juridical act in general. In other words, it does not vitiate the juridical act. But the law can provide otherwise. C. 1098 is an example of this provision.⁸

As we have already said, we are dealing with a canon about which there is no unanimity with regards to its convenience. However, this canon certainly gives juridical relevance to an error suffered by one of the parties concerning some quality of the other which is especially transcendent and needed for the preservation of a harmonious conjugal life, if the error is the result of the fraudulent conduct of one of the spouses.

1.3.3. Finally, we come to the third canon which deals with the effects of error concerning the unity or the indissolubility or the sacramental dignity of marriage (c. 1099). This canon corresponds to c. 1084 of the 1917 Code, and comparing the two canons, we note two small modifications. The phrase *etsi det causam contractui* and the word *simplex* have been omitted. Instead the phrase *dummodo non determinet voluntatem* has been added. The text affirms that error concerning the essential properties of marriage does not invalidate the marriage as long as this error does not determine the will.

⁷ "Proposed 'In Jure' Section for the New Statute of Fraud," in *The Jurist* 42 (1982) I, p. 215.

⁸ José F. Castaño, "L'Influsso del Dolo Nel Consenso Matrimoniale" in *Apollinaris*, LVII (1984), p. 573.

1.4. After going over the three canons on error, if we are to make a Schema on how it affects matrimonial consent according to the Code, we will have the following:

Error facti	{	Error about the identity of the person (c. 1097, § 1)	{	Spontaneous (c. 1097, § 2)
		Error about the quality of the person		Fraudulently (c. 1098)
Error iuris	{	Error about the nature of the marriage (Ignorance) (c. 1096)	{	
		Error about the nature of the marriage (c. 1099)		

This study will not include c. 1096 which deals with the minimum amount of knowledge required for a valid matrimonial consent. This canon does not really belong to the area of error, properly speaking.

There are other divisions of error according to how many authors there are who have written about the subject.⁹ For our purposes, however, the above-mentioned simple classification will be enough.

2. Error as a Source of Nullity

2.1. Error of Person

C. 1097, § 1 states: "Error about a person renders a marriage invalid." This is practically a verbatim retention of the old c. 1083, § 1. The institution of marriage is endowed with a

⁹ Cf. Mariano López Alarcón y Rafael Navarro-Valls, *Curso De Derecho Matrimonial Canónico y Concordado*, Editorial Tecnos, S.A., Madrid: 1984, pp. 183-184; Federico R. Aznar Gil, *El Nuevo Derecho Matrimonial Canónico*, Segunda Edición, Publicaciones Universidad Pontificia de Salamanca 1985, p. 338; Handbook, *op. cit.*, pp. 83-87; José María González del Valle, "Ignorancia, Error y Dolo al Elegir Conyuge y al Celebrar Matrimonio" in *Jus Canonium*, Vol. XXI, N. 41, 1981, pp. 145-149.

special character in that the material object are the very persons of the contracting parties. In other words, marriage is celebrated *intuitu personae* or in consideration of the other person so much so that if the marriage is contracted with the wrong person who is erroneously thought to be the right person, then the marriage is invalid because the consent would fall on an object that is entirely different from the right one.

In the light of the new Code of Canon Law and the doctrinal remnants of the concept of *error redundans* which has been suppressed, error concerning the person may take two forms: direct error and indirect error.¹⁰

2.1.1. There is direct error when the party in question contracts marriage with a different person than the one with whom he intends to do so and whom he knows personally. This is also called error concerning the physical identity of the person. Obviously, this is a very rare case, if at all it happens because in this case there is a real substitution of persons which passes unnoticed by the contracting party. This may happen in marriages that are celebrated by proxy (c. 1105), or if the party in question is blind, or the marriage is celebrated in the dark.

2.1.2. There is indirect error when the other person is not physically known beforehand by the contracting party, but is identifiable through some denomination or some quality that is peculiar and unique to him, such as being the eldest child of so and so, the sole heir, the only son who is a soldier, etc. This is similar to the strict interpretation of *error redundans* of Sanchez and in the normative structure of the Code would properly belong to the supposition of *error personae*.

2.2. Error of Quality

This brings us to the second paragraph of c. 1097 which states: "Error about a quality of the person, even though it be the reason for the contract, does not render a marriage invalid unless this quality is directly and principally intended."

First of all, it should be remembered that the first part of this paragraph is more important than the second part, i.e., an

¹⁰ M. L. Alarcón y R. Navarro Valls, *op. cit.*, p. 188.

error about a quality of the person does not invalidate a marriage even if it is the cause of the contract. When a subject decides to contract marriage with a specific person, it does not affect the validity of the marriage if this person lacks the qualities which he thinks he does not have, because he contracted marriage with this particular person whom he wants to be his partner as he is known and identified by his presence, by his circumstances and by a singular and individuating quality that is properly his. Thus, an error concerning the qualities that are not identifiable with the person does not invalidate the marriage. In cases, for example, when one marries a person who is not honorable but dishonest, not rich but poor, not healthy but sick, not prolific but sterile, the marriage cannot be declared null and void because of error about these qualities because this error is considered as accidental.

The canon makes a distinction, however. If a person makes an error about a quality that he or she directly and principally intends, the consent could be invalid. In this case, the person can distinguish between the person to whom consent is made and the desired quality. Here the person gives consent precisely and only because of a perceived quality. In this exception, the Code makes use of St. Alphonse's doctrinal position with regards to the concept of *error redundans*, as we have earlier mentioned.

In line with some recent Rotal jurisprudence,¹¹ the Code accepts that a quality can not only move one to contract marriage, but it can also make itself part of the specific act of contracting, when the contracting party directly and principally wanting the quality, which he erroneously thinks the other party possesses, actually determines with his will that he is giving his consent only and precisely because of this quality. In this case, the error now, regardless of whether or not it refers to something accidental such as a quality, is no longer a simple anomalous condition of the intellect, but has already become, by actual voluntary determination of the contracting party, part of the consent itself. The determining factor of this figure of error is that the quality has been directly and principally intended, and the person is only

¹¹ c. Canals, 21 April 1970; c. Di Felice, 26 March 1977; c. Di Felice, 14 January 1978.

secondary. This is easier put down in paper, but when confronted with a concrete case, the judge may find that this is more complicated than what it seems. For an easier and correct application c. 1097, § 2, and for want of some other ways to help the judge, a well-known canonist lists down some criteria.¹²

1. The error should be about an important quality of the other party, and this importance is determined by the high regard given to it by the contracting party within the general demands of social conscience, and the lack of which will seriously disturb conjugal relations.

2. This quality has been intended directly and principally by the contracting party;

3. It does not make any difference whether the other person is known or not by the contracting party;

4. The error is real, serious, actual and unjust; and

5. The error may be antecedent and may be the cause of the contract, or it may be concomittant and just incidental; it can be caused by fraud, or it can be spontaneous; it can be vincible or invincible.

2.3. Proofs of Error

It is difficult but not impossible to prove judicially the presence of error. This can be realized by making use of several indirect proofs which, when taken together, can help the judge form the moral certainty that he needs to pass an affirmative sentence on an invalid consent because of error.

Proof of the virtual or actual intention of the contracting party during the celebration of the marriage will be very useful.

In proving internal acts, the confession of the parties and the substantiating testimonies play a very important role. It must be remembered that confession alone does not constitute proof in matrimonial cases. The strength of the proof of the confession will depend on testimonies of credibility, declaration of the wit-

¹² M. L. Alarcón y R. Navarro-Valls, *op. cit.*, p. 195.

nesses and the presence of circumstances before, during and after the wedding that give confirmation to the presence of error.

With regards to a spontaneous error about a quality that is directly and principally intended by the contracting party, further investigation will have to be made on the person's high regard for that quality, his knowledge about marriage in general, his own declarations relative to the particular case, etc.

In general, the judge will have to exhaust all means at his disposal as provided by the Code, let himself be guided by experience and by Rotal Jurisprudence in his task.

3. *Deceit or Fraud as an Autonomous Source of Nullity*

The canon on fraud is stated in c. 1098: "A person contracts invalidly who enter marriage inveigled by deceit, perpetrated in order to secure consent, concerning some quality of the other party, which of its very nature can seriously disrupt the partnership of conjugal life." Thus, through this canon, the figure of fraud remains implanted in matrimonial law. The invalidating effect of fraud on matrimonial consent, something that it did not have before, has been the object of proposals by numerous canonists as the most adequate and logical way to prevent the celebration of marriages which are the result of the fraudulent conduct of one of the parties or of a third party and because of which, the other party suffers seriously from the deception. We refrain from referring to fraud as a new ground for marriage nullity, and instead we say that it is an autonomous source of nullity because the direct cause of the nullity is actually the error concerning the quality of the person, and this error is caused by fraud deliberately on the one who is deceived. Thus, fraud is only the indirect cause of the nullity.

3.1. From the many definitions and descriptions of fraud (*dolus*) given by many canonists, we take the one given by Michiels. Fraud is: *Deceptio alterius deliberate et fraudulenter commissa, qua quis inducitur ad ponendum determinatum actum iuridicum*.¹³ Thus, it is a deception that is deliberately and fraudu-

¹³ G. Michiels, *Principia Generalia de Personis in Ecclesia*, (Rome: 1955), p. 660, cited in J. F. Castaño, *op. cit.*, p. 568.

lently perpetrated on another, which results in a specific juridical act placed by the person who has been deceived. The deceiver does his deception deliberately and with free thought. The effect of the deception is to cause the deceived party to act in accordance with the will of the deceiver. From this definition, we can note three characteristics of fraud:

3.1.1. Fraud, by its nature, directly affects the intellect of the deceived party, and indirectly, his will. Fraud induces its victim to error. However, as different from the other causes of error such as ignorance or inadvertence or negligence, which are *internal* to the person, fraud comes from an *external* cause, i.e., another person. The deceived person, precisely because he was deceived, falls into error and gives his consent precisely because of this error.

3.1.2. Fraud presupposes in the deceiver, the deliberate intention to deceive. Thus, there is always in the deceiver the purpose to do evil and an injustice to the other party. In this sense, fraud is opposed to good faith.

3.1.3. Fraud is perpetrated for the purpose of causing the deceived party to place a specific juridical act. There is a connection of cause and effect between the fraud and the act, in our case, matrimonial consent. Such a connection implies that there would not have been matrimonial consent had there not been fraud.

3.2. Taking the legal text of c. 1098, we can divide it into three parts: 1) A person who enters marriage inveigled by deceit perpetrated in order to secure consent; 2) concerning some quality of the other party; 3) which of its very nature can seriously disrupt the partnership of conjugal life.

3.2.1. A person who enters marriage inveigled by deceit perpetrated in order to secure consent.

In this first part, the text requires that the fraud be deliberately perpetrated in order to obtain consent. This is the *ratio legis*—the reason for this canon: to give juridical help to those who contract marriage because they have been deceived. Thus, on the part of the deceiver, who may either be the other

party or a third one, what is required is the deliberate intention to deceive (*animus decipiendi*) either by commission, such as misleading words or actions, behavior that leads to error, etc. On the part of the deceived party, what is required is that he has been effectively induced into error and because of this error, he contracted marriage. The deceiver believes that if the other party knew the truth regarding the object of the deceit, he would not give consent.

3.2.2. Concerning some quality of the other party

The sense of this second part of the text is quite clear. It refers to a quality and this quality should be that of the other party, not the person of the other party nor a quality of a third party. It is therefore a quality of a person, a *qualitas personae*—the same quality referred to in c. 1097, § 2. There is, however, a difference between them. In the “quality” which is the object of the error of c. 1097, § 2, it is not necessary that the quality should “by its nature disrupt the partnership of conjugal life” as required by c. 1098. On the other hand, the “quality” which is the object of fraud, need not be directly and principally intended. Thus, this quality, in the statue of fraud, is considered in itself, i.e., in its nature as a quality, more defined and more limited than that which is the object of error.

Another specification of this quality is that it should be unknown to the other party. This is very clear from the concept of fraud itself. If the quality is known to the party who is supposed to be the deceived party, then there is no deception because there is no error on his part.

3.2.3. Which of its very nature can seriously disrupt the partnership of conjugal life.

In order to determine if the quality is serious and has juridical relevance in this sense, we have to consider several requirements. First, the seriousness should be considered subjectively and objectively: subjectively, in the sense that the *consortium vitae conjugal*is is not an abstract thing, but a concrete relationship between a man and a woman; a quality that is for one person not enough to disrupt seriously the partnership of conjugal life,

may be sufficient for another; and objectively, in the sense that the norm uses the phrase, "of its very nature." Secondly, we are talking about a concrete and real quality, that is present or absent at the time of the marriage, and is not an isolated past incident, not a transient situation, or something that happened during the marriage that makes it intolerable. It should be a concrete quality that has been fraudulently concealed and in a concrete marriage that results there is an assurance that once the fraud is discovered, a serious disruption of the conjugal life will result.

What in concrete are these qualities? The Code has refrained from enumerating them one by one. Jurisprudence will eventually indicate what these qualities are. Doctrine, however, has given at least some indicative criteria as to the general characteristics of these qualities. One author suggests all those qualities that are opposed to c. 1055, § 1, which describes in what does the marriage state consist. Thus, serious qualities which render the procreation and education of children difficult or impossible, such as sterility, or the realization of the mutual well-being of the spouses, such as undesirable spiritual or social qualities.¹⁴ Based on a decision *coram* Anne of February 25, 1969, a group proposes that a personal quality which gravely disturbs the fulfillment of the rights and obligations of the intimate sharing of life or the close union of persons by which a man and a woman become sexually one flesh, or the opportunity to procreate or educate children, or the fidelity and permanence needed to carry out these purposes, is the kind of quality which, if fraudulently concealed in the deceiver, would cause the marriage to be invalid.¹⁵

If we are to list some of these qualities, at most we can come up with the following: a) impossibility to realize the good of the spouses, whether spiritual, psychological, social, etc., b) incapacity relative to the procreation and education of children; c) sterility; d) pregnancy by another person; e) some other physical or moral qualities; f) serious sickness, especially if it is incurable or contagious; g) a licentious and profligate life-style; h) serious criminal or penal record, etc.¹⁶

¹⁴ F. Aznar Gil, *op. cit.*, p. 349.

¹⁵ Proposed "*In Jure*" Section. *op. cit.*, pp. 215-222.

¹⁶ J. F. Castaño, *op. cit.*, pp. 584-585.

3.3. The route of proof to demonstrate the presence of fraud will be practically the same as that of error. Hence, confession of the parties, and testimonies that will explain and confirm fraud will be very useful. Confirmation of the weight of the alleged fraud by the petitioner would be crucial, particularly as to the seriousness of the quality concealed as disruptive of that particular marriage. When the deceived person discovers the error, it significantly alters the relationship to the extent that he or she realizes that there actually is no community of life. The breakdown of the marriage must be directly related to the discovery of the absence or presence of the quality. Finally, it is to be remembered that the conjugal partnership includes both the physical and the spiritual and this should be taken into consideration in making judgment about the seriousness of the quality and the resulting disruption of the partnership.

4. *Error Concerning the Properties of Marriage as a Source of Nullity*

C. 1099 regulates the effects of marriage that has been celebrated under an error of law (*error iuris*), i.e., an error about the structural elements of marriage. The canon states: "Provided it does not determine the will, error concerning the unity or indissolubility or the sacramental dignity of marriage does not vitiate matrimonial consent. We can divide the legal text into two parts: 1) Error concerning the unity or the indissolubility or the sacramental dignity of marriage does not vitiate matrimonial consent; 2) provided it does not determine the will.

4.1. Error concerning the unity or the indissolubility or the sacramental dignity of marriage does not vitiate matrimonial consent.

The canon here maintains the juridical irrelevance of error of law about the essential properties of marriage to the validity of consent. This means that a person who erroneously believes that marriage is not exclusive or is indissoluble or is devoid of any sacramentality, when he contracts marriage with another, can

still give a valid matrimonial consent. In line with the canonical doctrine of the 1917 Code, where c. 1084 states that simple error about the properties of marriage even if it is the cause of the contract, does not invalidate the marriage, this first part of the legal text holds that simple error, or the error that remains in the intellect and does not influence the will, and valid consent can coexist. Another argument given in favor of the irrelevance of this kind of error is indicated by St. Thomas in the phrase: *dummodo intendat facere vel recipere quod Ecclesia dat* which in subsequent development of doctrine has been transformed into a presumption of a general and prevalent intention to contract marriage in accordance to its divine institution. In this way, mere private or particular error cannot have any juridical relevance because it is absorbed into a presumed general intention to celebrate marriage validly according to the will of Christ.¹⁷

In c. 1099 of the present Code, the irrelevance of error of law which does not determine the will is still upheld, and is based on two principal reasons:

1) A false apprehension by the intellect of the matrimonial concept and consequently a false judgment concerning the properties and the sacramentality of marriage still does not prejudice that minimum of knowledge required by c. 1096, § 1 states: "For matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered for the procreation of children through some form of sexual cooperation." For this reason, such an error even if it refers to the essential elements of marriage, does not exclude the knowledge of the significance of the act that is being undertaken, which is, consent to a conjugal partnership.

2) Thus, this error which does not determine the will can coexist with matrimonial consent. However, in the evaluation of the subjective position of the one who is in error, it is recom-

¹⁷ For a complete "*excursus historicus*" of the irrelevance of this error of law, see: Antonio Stankiewicz, "Errore Circa Le Proprieta e la Dignita Sacramentale del Matrimonio" in *Monitor Ecclesiasticus*, Vol. CVIII, Series XVIII, A. 1983-II, pp. 471-475.

mended, as per recent Rotal jurisprudence,¹⁸ to abstain from having recourse to the presumption of *faciendi quod facit Ecclesia*, which, in reality, may not be the case at all. Rather what is to be considered is the juridical presumption about the conformity of the internal will with the external signs that are being manifested during the celebration of marriage.

Thus, this non-relevance of the error remains as long as it does not result into a divergence between the intention of the subject conditioned by the error, and the actual declaration of the will, i.e., "provided it does not determine the will," which brings us to the second part of the text.

4.2. Provided it does not determine the will.

There are two kinds of error that can determine the will: a) the motivating error, or error-motive, which is also called the *error dans causam contractui* (as opposed to *simplex error* of c. 1084), and b) the *error pervicax*.

4.2.1. The motivating error.

An error can vitiate the will inasmuch as it influences the motives for the action. In other words, this error intervenes in the causal process which brings one to perform a certain act. In the interaction between motive and decision, this error provides the ratio—the significant direction for the decision, and it becomes the sole determinative motive. In this way, the error determines the volitive process by directly joining with it. The erroneous notions enter the process of consent since they become the determining factors in what the intellect presents to the will. The choice of marriage with a specific person is then based on what is erroneously understood to be marriage.

¹⁸ The probability that erroneous notions will determine the will is recognized by the Church to be much higher today than ever before. The Rota has studied changing social conditions and attitudes toward marriage and rendered a series of recent decisions which indicate that the presumption that all marry as Christ intends is increasingly questionable. One decision (c. Ewers, May 16, 1968) stated that it is impossible to distinguish between erroneous notions of marriage and a positive rejection of an essential property by the will. (from *The Code of Canon Law: A Text and Commentary*, Coriden, Green, Heintschel, eds., Paulist Press, N. J. 1985), p. 783.

In fact, in cases of this kind, there is a certain limitation of the will, similar to the limitation placed by a condition. For example, one says: "I want to marry since for me marriage is dissoluble (error)" or "because marriages are dissoluble I would not want it (*causam dans contractui*)" this is the same as saying, "I want to marry provided marriage is dissoluble."

4.2.2. *Error pervicax*

This is another figure of error developed by jurisprudence and it refers to the intensity of one's adhesion to the error. It has been referred to as *error qualificatus, pervicax, in contrahentis mente radicans, inveteratus, funditus, inditus, tenacius, insidens, invincibilis, error operativus*.¹⁹ The intensity of the error demonstrates the existence of an ideology that is contrary to the teaching of the Church or a lifestyle and a set of values that are morally depraved. When one is so deeply rooted in this kind of error, it is easy to understand that all his decisions and his actions will be conditioned by the error. This kind of obstinate error can easily be the motive or the cause by which the party in error enters into a marriage precisely because it is dissoluble or polygamous, or non-sacramental, as he firmly believes it is.

4.3 Like the other cases of error mentioned in the preceding pages, the route of proof to be followed will again be the same. Confession of the party in error, while in itself, is not a strong source of conclusive proof, can be corroborated by documents and testimonies of reliable witnesses. As examination of his background, his education, his values and orientation, and his lifestyle will provide sufficient explanation for the presence of this error and its strong influence in him. The way he conducted himself after the wedding will likewise confirm how deeply rooted the error is and how he is conditioned by his erroneous convictions.

5. *Conclusion*

The changes that the present Code introduces regarding the three canons on error, slight though they may be, point to one

¹⁹ A. Stankiewicz, *op. cit.*, p. 478.

very significant fact: a greater openness to the human reality, better understood today through contributions of the human sciences on the knowledge about the human person, the complex motivational processes, and also through a valid rediscovery of theologico-canonical tradition. For sure, there are still problems and questions that have to be answered. There are valid questions that are brought up by eminent canonists and jurists. Tribunal jurisprudence has its part to play in providing solution to some of these problems and this is a challenge for all Tribunal personnel to face and take up.

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