

Recent Developments in Rotal Jurisprudence on Error of Fact

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Introduction

The 1993 papal allocution to the Roman Rota made specific reference to c. 1097 within the context of correct interpretation and application of the canons of the Codes. In this allocution, pope John Paul II, as Supreme Legislator of the Church, urged all those involved in tribunal ministry to interpret the law in accord with accepted *hermeneutical principles* and canonical tradition. He said that ecclesiastical laws are to be interpreted “in accord with their text and context” (cf. c. 17; *CCEO* c. 1499). Therefore, “it would, as a result, be totally arbitrary, even patently illegitimate and gravely culpable, to attribute to the words used by the Legislator, not their ‘proper’ meaning, but one suggested by disciplines different from the canonical one.”¹

The Holy Father also said that the laws of the Church bear a continuity of tradition, particularly where canons refer to the old law (c. 6, §2).² Therefore, the innovations introduced into the new Code do not mean that one can attribute unusual meanings to the

¹ JOHN PAUL II, Allocution to the Roman Rota, 29 July 1993, in *L'Osservatore romano*, English language edition, 3 February 1993, p. 3.

² *CCEO* does not have an exact equivalent of this norm: However, what *CCEO* c. 2 states may be considered in substance as an equivalent principle. This canon reads: “The canons of this Code, in which for the most part the ancient law of the Eastern Churches is received or adapted, are to be assessed mainly according to that law.”

language in which the canons are formulated. In other words, "the constant concern of the interpreter and of anyone applying canon law must be to understand the words used by the Legislator in accord with the meaning that long-standing tradition attributes to them in the Church's juridical system, using well established doctrine and jurisprudence. Each term, then, must be considered in the text and context of the norm, in a vision of canonical legislation which allows for its uniform evaluation."³ Then, speaking specifically to the matter under consideration, the Holy Father said:

However, in the matter of *error facti* too, specifically when it is a question of *error in persona* (cf. can. 1097, §1), one may not attribute to the terms used by the Legislator a meaning alien to canonical tradition; even as *error in qualitate personae*, it can impugn the consent only when a quality, neither *frivolous* nor *trivial*, was "directly and principally intended" (cf. can. 1097, §2), that is, as *rotal* jurisprudence has effectively asserted, "*quando qualitas prae persona intendatur*."⁴

In this allocution, the Holy Father is admonishing jurists and judges to take into consideration canonical tradition and established jurisprudence while interpreting the terms and principles stated in law. Two important principles may be highlighted in the allocution: First, the legislator seems to be alluding to the fact that the term "person" mentioned in c. 1097, §1 (*CCEO* c. 820, §1) has a well-defined meaning rooted in tradition and it has achieved a definite significance which is not to be subjected to capricious interpretation. He certainly does not say what that meaning is, which is left to canonical doctrine and jurisprudence to determine. Second, the principle of "error of quality" stated in c. 1097, §2 (*CCEO* c. 820, §2) is to be interpreted in accord with the established jurisprudence.

Toward the end of his allocution, the pontiff says that he wanted to draw the attention of the officials of the Rota to these issues "in the certainty of this tribunal's constant fidelity to what is demanded by the serious and the authentic study of canon law, in the specific area proper to it."⁵ This hope of "constant fidelity"

³ JOHN PAUL II, Allocution to the Roman Rota, 29 January 1993, p. 3.

⁴ Ibid.

⁵ Ibid.

expressed by the Holy Father is not restricted solely to rotal officials but necessarily extended to all those who are involved in serious research in canonical science as well as to those who minister to the Christian faithful within the context of local tribunals which are entrusted with the task of interpreting and applying canonical principles to concrete cases.

The very tenor of the allocution gives one the impression that the Supreme Legislator had some serious concerns in regard to the interpretation of c. 1097 (*CCEO* c. 820). Apparently these concerns were related to the new interpretations of the term "person" promoted especially within the context of European civil law systems as well as in some canonical writings and rotal decisions since the famous sentence of 21 April 1970 by Canals,⁶ which contained one of the most radical and innovative interpretations of "*error redundans*" of c. 1083, §2,1° of the 1917 Code.

Since the 1983 Code came into effect, over **sixty** rotal sentences dealing with the ground of "*error of fact*," but more particularly with "*error of quality directly and principally intended*," have been published.⁷ Some of the rotal sentences that have appeared more recently seem to indicate that the controversy concerning the notion

⁶ See decision c. CANALS, 21 April 1970 (Niterói, Brazil), in *SRR Dec.*, 62 (1970), pp. 370-375; also published in *Ephemerides iuris canonici* (=EIC), 26 (1970), pp. 442-445; *Il diritto ecclesiastico* (=DE), 81-II (1970), pp. 2-22, with a commentary by O. DI JORIO; *CLD*, 8 (1973-1977), pp. 796-801.

⁷ There were 3 sentences in 1984, in *Apostolicum Rotae Romanae Tribunal, Decisiones seu sententiae* (=SRR Dec.), vol. 76, pp. 44-52, 442-461, 642-646; 5 in 1985, vol. 77, pp. 166-179, 364-372, 395-403, 495-503, 629-643; 1 in 1986, vol. 78, pp. 305-317; 4 in 1987, vol. 79, pp. 152-159, 393-397, 421-432, 650-663; 6 in 1988, vol. 80, pp. 40-45, 139-156, 221-226, 275-285, 599-603, 636-651; 5 in 1989, vol. 81, pp. 333-347, 379-388, 423-435, 775-778, *Monitor ecclesiasticus* (=ME), 116 (1991), 379-389; 5 in 1990, vol. 82, pp. 464-475, 702-714, 734-744, 811-822, 847-855; 4 in 1991, vol. 83, pp. 76-81, 314-330, 672-681, 831-843; 2 in 1992, vol. 84, pp. 49-62, ME, 118 (1993), 529-539; 6 in 1993, *SRR Dec.*, vol. 85, pp. 42-46, 131-143, 288-306, 361-367, 534-545, 590-600; 10 in 1994, vol. 86, pp. 56-76, 77-87, 125-133, 134-143, 164-172, 173-177, 300-312, 337-344, 614-618, ME, 121 (1996), 214-224; and 3 in 1995, *SRR Dec.*, vol. 87, pp. 135-148, 190-199, 403-412; 8 in 1996, vol. 88, 256-270, 297-308, 468-479, 507-519, 532-543, 649-656, 671-679 (also in ME, 122 [1997], 176-187), 697-715; 1997, *Periodica*, 88 (1999), 391-434 (also in ME, 125 [2000], 16-79); 1998; DE, 110 (1999), 19-36 (also in ME, 125 [2000], pp. 470-521).

of “person” is far from being settled by the allocution of the Supreme Legislator.

The primary focus of this study is the meaning of “person” mentioned in c. 1097, §1 (*CCEO* c. 820, §1) and of “error of quality” stated in c. 1097, §2 (*CCEO* c. 820, §2) in light of recent rotal jurisprudence. The analysis will include only some of the more important sentences which, we believe, have made some contribution to the clarification of both concepts especially in years following the promulgation of the 1983 Code.

1 - Error of Person

Canon 1097, §1 (*CCEO* c. 820, §1) deals with error of person, understood in his or her concretely identifiable individuality. The classical example of such an error frequently cited in literature is found in the marriage of Jacob with Leah who was substituted for Rachel (Gen. 29: 6-31). Except in cultures where the arranged marriage system still exists, or in case of a proxy marriage, or when a marriage involves a blind person(s), one may not be able to find cases of error of person in our world of instant audio-visual communication. There is only one case reported in rotal jurisprudence which involved error concerning specifically the physical identity of the person.⁸ But recent rotal sentences seem to be moving towards recognizing the principle that the notion of “person” as stated in c. 1097, §1 (*CCEO* c. 820, §1) should not be restricted solely to physical qualities which identify and individuate an individual but also all qualities that may be considered *substantial*, whether they be juridical, moral, social or ethical.

Two distinctly dominant approaches to the notion of “person” have emerged in canonical doctrine and jurisprudence in recent years. For example, U. Navarrete has concluded his systematic analysis of the notion of “person” within the canonical tradition saying that the teaching of the Second Vatican Council, the magisterial teaching as well as the canonical legislation clearly affirm the notion of “person” as an individual identified or individuated solely by one’s physical attributes and not by moral, juridical or

⁸ See decision c. HEINER, 16 April 1913, in AAS, 5 (1913), pp. 372-378.

social qualities. Substantial qualities, which individuate a human being, are those which are inherent to the person and not those determined by the society or by the individual. Qualities considered objectively substantial can determine a person in his/her physical identity and thus invalidate consent by virtue of it becoming a constitutive aspect of the substance of the act. On the other hand, an accidental quality, contradistinguished from a substantial quality, can invalidate a juridical act only by virtue of the intention of the agent which renders that quality substantial to the object (i.e., person) of the act. This constitutes what is known as "implicit condition." In other words, an accidental quality enters into the substance of the act through the intention (explicit or implicit) of the agent. In this situation it is the intention of the agent that is most important and not the quality per se.⁹ In a more recent article, S. Villeggiante argues that the way we understand the "person" today cannot be restricted to the physical identity of an individual. An individual who is entering upon a permanent state in life is not identified or individuated solely by his/her physical attributes. There are qualities like, baptism, priesthood, religious state, married state, virginity, procreative capacity, etc., which are certainly not merely physical characteristics, and yet without doubt they can define the objective identity of the person especially if an individual with those specific qualities is intended as the object of marital consent. In essence, Villeggiante maintains that the notion of "person" is not to be restricted to the merely physical identity of a concrete individual but it must be extended to the social, moral, juridical qualities.¹⁰ These opposing or complementary views are gaining their adherents even among rotal Auditors as clearly revealed in the following Rotal sentences.

1.1 - Decision c. HEINER, 16 April 1913

The only case judged by the Rota involving error of the physical identity of the person originated in China. The petitioner was

⁹ See Urbano NAVARRETE, "Error in persona (c. 1097, §1)," in *Periodica*, 87 (1998), pp. 351-404.

¹⁰ See Sebastiano VILLEGGIANTE, "L'error in persona," in *ME*, 125 (2000), pp. 524-549.

a widower, who agreed to marry a certain widow proposed by his son from his previous wife. He had never met this widow, and yet from the description provided to him by his son he accepted the proposal. But when the widow rejected the proposal, another widow was replaced by the agent employed by the son. The petitioner was not informed of this substitution. The two saw each other only after the wedding ceremony in the church. The man found the woman so ugly that he rejected her from the beginning of their marriage.

Shortly after the marriage, the man petitioned the local ecclesiastical tribunal for a declaration of nullity of his marriage on the ground of "substantial error of the person." The first instance decision was affirmative, and the Rota confirmed that decision. The rotal sentence affirmed that the ground of "substantial error of the person" is of natural law: "Error of fact about a person is verified when a person wants to contract marriage with a certain and determined individual, for example, Mary, whom he falsely thinks is present, with whom he contracts marriage."¹¹ This sentence predated the 1917 Code, and yet the matter of "error of person" is no different from the principle stated in c. 1083, §1 CIC/17 and c. 1097, §1 (*CCEO* c. 820, §1). For example, the sentence states:

Substantial error of person, whether antecedent or concomitant, vincible or invincible, caused by deceit or without fraud, inculpable or culpable, whether due to some defect in the party in error or in the party not in error, by the law of nature and not by mere disposition of the Church, constitutes a diriment impediment of marriage. For the validity of marriage, mutual consent of two persons, sufficiently determined in their individuality, is essentially required; but through substantial error about the person of the other spouse the mutual consent is totally impeded in the spouse who is in error; therefore, the consent of the spouse in error is directed toward a third person completely different from the other contracting party. Therefore, such an error totally impedes the validity of marriage by natural law.¹²

¹¹ See *Ibid.*, p. 374.

¹² *Ibid.*

1.2 – Decision *coram* FUNGHINI, 15 April 1997¹³

In a recent case judged on 15 April of 1997 *coram* Funghini, three grounds of invalidity were determined: on the part of the petitioner (woman) error concerning the person and error of quality directly and principally intended (c. 1097), and on the respondent's part exclusion of *bonum prolis*.¹⁴

The first instance court pronounced an *affirmative* decision only on the ground of error concerning the person of the respondent on the petitioner's part. The second instance tribunal declared *negatively* on grounds of error concerning the person and error of quality, but *affirmatively* on the ground of exclusion of *bonum prolis* on the respondent's part. Thus the ground of error of quality was dismissed with two conforming *negative* decisions. By an appeal from the petitioner the case arrived at the Rota to be judged on the two remaining grounds, namely (a) exclusion of *bonum prolis* (c. 1101, §2) on the respondent's part and error concerning the person (c. 1097, §1) on the part of the petitioner. The decision of the *turnus coram* Funghini was affirmative on exclusion of *bonum prolis*, because the evidence clearly proved that the respondent, due to the traumatic experiences of his own early childhood, did not want to bring children into this world. But the decision was negative on error concerning the person.

The petitioner claimed that she had intended to marry a man endowed with certain qualities. After the marriage, however, it became evident that the person she married was totally different from the one she had intended as her spouse. She stated that during the engagement period she thought that the respondent was "excellent in every respect," but during married life she found him to be quite different. She said:

I was looking for in my future husband [...] a mature person, serious and responsible with a desire to have children, and I

¹³ See *Periodica*, 88 (1999), pp. 391-434; also published with an English translation in *ME*, 125 (2000), pp. 16-79. The references to this sentence are from *Periodica*. This case originated in Trivento-Gorizia (Italy). The rotal *turnus* consisted of FUNGHINI, BURKE and BOCCAFOLA.

¹⁴ *Ibid.*, p. 392.

believed that Mario possessed those qualities [...]. During the time preceding the marriage, I was certain that Mario had those qualities of maturity and responsibility which I expected in my future husband and I considered them to be substantial; but after the marriage, to my surprise, he turned out to be a person different either in the exclusion of children or in his persistent behaviour consisting of disinterest in the family, in the decisions to be made and lack of interest in participating in any aspect of family life.¹⁵

In her first deposition, the petitioner had repeated the same allegations,¹⁶ and most of the witnesses heard in the case confirmed her expectations in regard to the qualities she wanted in her future husband. She had in her mind an *ideal* husband and father.

In the very first statement of the argument section, Funghini states:

The fathers think that it should be noted at the outset that the marriage, whose validity is under consideration, was entered upon during the regime of the pio-benedictine Code and, as we have seen in the law section, according to canonical tradition, common doctrine and current jurisprudence of Our Forum, the invalidity of marriage on the ground of error concerning person can be invoked only when the error involves a determined, individual person, considered physically.¹⁷

In the *in iure* section of his sentence, Funghini presents an excellent and comprehensive analysis of the recent controversy surrounding the notion of “person” incorrectly interpreted by some canonical writers in terms of “personality.” Like Pompedda, Serrano, Stankiewicz, etc., who have expressly spoken about this issue, Funghini argues that the term “person” mentioned in c. 1083, §1 of CIC/17 has always been interpreted both in doctrine and jurispru-

¹⁵ Ibid., p. 430.

¹⁶ See Ibid.

¹⁷ “Praemittendum tenent Patres matrimonium, de cuius validitate disceptatur, initum esse vigente Codice piano-benedictino et, uti vidimus in iure, iuxta canonicam traditionem, communem doctrinam et coevam iurisprudentiam Nostri Fori, nullitatem matrimonii ex errore circa personam invocari posse dumtaxat ubi error inciderit in determinatam, individuum personam, physice consideratam” (Ibid., pp. 429-430).

dence as a "determined physical person" and not in terms of a psychological construct of "personality." The term "persona" and the norm of c. 1083, §1 of CIC/17 have been literally transposed into c. 1097, §1 of the 1983 Code (identical in *CCEO* c. 820, §1) with one minor alteration: the preposition "circa" of c. 1083, §1 of CIC/17 has been changed to "in" (as was in c. 74, §1 of "Crebrae allatae") in the present law. According to the unanimous opinion of rotal Auditors and of most canonical writers, this change in the preposition constitutes only a "stylistic" rather than "substantial" change in the matter of the law itself.¹⁸ Moreover, Funghini argues that Pope John Paul II expressly referred to c. 1097, §1 in his rotal allocution of 1993 where he insisted that the term "persona" mentioned in it must be interpreted in light of canonical tradition.¹⁹ Here the Holy Father clearly implied that any liberal or expansive interpretation of the term "persona" would be contrary to the principles of interpretation of law within the canonical system. Funghini strongly adheres to this view in his sentence and concludes that the term "persona" as found in c. 1097, §1 (*CCEO* c. 820, §1) means a "determined, individual person" considered in his/her physical, and not moral or psychological, identity.²⁰

The *turnus* concluded that what happened before the marriage made it almost impossible to support the allegation of the petitioner about the ground of error on her part concerning the person of the respondent. The petitioner had known the respondent for nearly *five* years before the marriage. There was no interruption of their love-relationship nor any hesitation on her part. During this period she found the respondent to be an "ideal" husband. She never doubted the excellent qualities she found in him. Therefore, there was no reason for her to desire by a positive act of the will an objective quality in her fiancé and future husband. The conjugal life was peaceful at least for the first *two* years and it lasted nearly *seventeen* years. In light of this analysis, the *turnus* concluded that there was no error in the mind of the petitioner concerning

the “physical identity” of the respondent according to the norm of c. 1097, §1.²¹ The decision, therefore, was negative on this ground.

1.3 – Decision *coram* Defilippi, 6 March 1998²²

In his sentence of 6 March 1998, Defilippi presents a different interpretation of c. 1097, §1 of the 1983 Code. Even though Defilippi’s interpretation of “person” mentioned in the said canon may *seem* to contradict the mind of the legislator and the heretofore commonly accepted canonical doctrine and jurisprudence, the legal arguments adduced in the sentence are worth noting. In brief, the facts of the case are as follows:

The marriage between Sonia and Massimo was celebrated on 28 February 1965 within the regime of the 1917 Code. Three months prior to the wedding, Sonia fell for Massimo, who was fourteen years her senior in age, mainly because he was soon going to be a medical doctor. She wanted to marry a doctor for personal reasons even though her parents advised her against it. One girl was born of this union. The conjugal life became almost impossible because of the man’s violent and cruel treatment of his wife. The couple separated after three years and a civil divorce was granted in 1984.

On 21 March 1986, the woman petitioned the Regional Tribunal of Flaminio to declare her marriage invalid on three grounds: a) error on her part concerning a quality of the man amounting to error of person; b) *dolus* perpetrated by the man; c) her own incapacity to consent with sufficient freedom and deliberation. And on 26 November 1986, the tribunal, after setting aside the ground of *dolus*, determined the formula of doubt as follows: “Whether the marriage under consideration must be declared invalid on grounds of: 1) error on the woman’s part concerning the quality of the man which amounted to error of person; 2) incapacity of the woman to elicit a free and deliberate consent.” Then, during the instruction of

²¹ See *ibid.*, pp. 429-434.

²² See decision c. DEFILIPPI, 6 March 1998, in *DE*, 110 (1999) 2, pp. 19-36. The *rotal turnus* in this case consisted of J.B. DEFILIPPI, M.F. POMPEDDA and J.M. SERRANO. This sentence is published also in *ME*, 125 (2000), pp. 470-520 (with an English translation). References to the sentence in our study are from *DE*.

the case the advocate of the petitioner introduced the ground of "total simulation" on the part of man. The decision of 22 March 1990 was negative on all grounds.

Presumably the petitioner did not appeal the first instance negative decision, instead on 12 March 1991, she introduced a new petition in first instance before the same tribunal now contending that her consent was invalid "in accord with c. 1097, §1, that is, due to error on her part concerning the moral identity of the person of her spouse."²³

The tribunal accepted the petition and formulated the doubt as follows: "Whether there is proof of invalidity of this marriage because of error of person on the part of the woman petitioner in the sense of c. 1097, §1." The decision of 17 July 1992 by the tribunal was affirmative on the alleged ground. The case proceeded to the regional appeal tribunal of Trivento, which remitted the case to an ordinary examination in the second grade of jurisdiction. The decision of 9 February 1994 by this appeal tribunal was negative.

At the Rota, the advocate of the petitioner insisted on having the ground of "incapacity to assume the essential obligations of marriage" dealt with as if in first instance. The rotal *turnus* admitted this request on 27 April 1995. Therefore, the Rota had to judge this case on two grounds: "Incapacity to assume the essential obligations of marriage (as if in first instance) and error of person of the man, both grounds on the part of the woman petitioner."

The rotal decision *coram* Defilippi was negative on the first ground, that is, on incapacity to assume the essential obligations of marriage on the part of the woman. The clinical evidence drawn principally from four expert reports supported the alleged incapacity. Three of the four experts agreed that the petitioner suffered from an anxiety disorder of an obsessive-compulsive and phobic nature. Her father was morbidly obsessed with his health and the daughter seems to have somehow inherited the same condition. Therefore, she was excessively worried about her health. Such con-

²³ Ibid., p. 21: "... contendens suum matrimonium nullum esse 'a norma del can. 1097, §1, ovvero per errore (mulieris) sulla identità morale della persona del marito'."

cerns about her health became the primary obsession in her life. For this reason she was attracted to marry someone who would be a guarantor of her health, that is, a medical doctor. The conclusion of the three doctors was that she did not elicit a free and deliberate consent because of her psychological condition.²⁴ But the court dismissed these conclusions of the experts saying that the petitioner had proven herself a responsible person both before and after the marriage, and moreover, the experts had not demonstrated her inability to assume and fulfill any specific essential obligation of marriage.²⁵ Therefore, the *turnus* dismissed this ground of nullity with a negative decision.

The second ground of “error of person” of the man on the part of the woman received an affirmative decision. In essence, the petitioner, due to her obsession over her health, wanted to marry a “medical doctor” and a person endowed with humane qualities, such as someone with sentiments of love, understanding and peace. At the time of the marriage she had the “image” of the respondent as “a soon to be doctor” and “a loving, understanding and peaceful” person. It was this kind of a person she wanted to marry. This claim of the petitioner was fully confirmed by the witnesses. Summarizing their testimonies Defilippi says: “The petitioner not only desired greatly the best social and moral qualities of the man and particularly his status of becoming a medical doctor in the near

²⁴ For example, the rotal expert concluded: “di una personalità ipertimica, caratterizzata da esaltazione dell’umore, imprudenza, mancanza di critica, tendenza al comportamento spontaneo, facile suggestionabilità. Inoltre l’attrice era parassitata dall’idea dominante del matrimonio che occupava buona parte del suo orizzonte esistenziale’. Ideo ‘tale condizione era tale da costituire un ostacolo alla libertà interiore dell’attrice nella formazione del consenso matrimoniale” (ibid., p. 30).

²⁵ Here is Defilippi’s response to the above conclusion of the rotal expert: “Etiam haec peritia a Iudice recipi nequit ob rationes iam allatas de praecedenti peritia. Nam nullo modo ex actis causae evinci potest defectus libertatis ab intrinseco in muliere. Utique admittendae sunt aliquae vitiositates personalitatis et agendi rationis qua d.na S. devenit ad matrimonium cum d.no D.; sed nullibi ducitur defectus substantialis eius libertatis. Immo tempore nuptiarum ipsa iam superadulta erat; saltem binis sponsis iam confisa fuerat; studia etiam superiora peragerat; suam artem quam maxime proficue exercebat; vitam socialem ducebat velut aliae puellae eiusdem temporis et aetatis; numquam ostenderat stigmata verae imbecillitatis psychologicae aut deordinationis personalitatis” (ibid.).

future, but she knew her spouse from those qualities and considered him suitable in respect to their future communion of conjugal life, that is, she identified the very person of her husband.”²⁶ What is the juridic consequence of this mental state of the petitioner? In Defilippi’s words:

Without doubt, according to the jurisprudence of Our Apostolic Tribunal, not only subjectively but also from the common estimation of people, the status of medical doctor and, consequently, the complex of other qualities of the man are of great value for living out the communion of conjugal life. And the woman contends that she had *individuated* the person of her future husband by those qualities.²⁷

Defilippi reiterates this same view prior to presenting the dispositive part of the sentence where he tries to justify, in opposition to the view held by the preceding court, the “ratio” by which a “person” is individuated: “[...] a person as a concrete individual, particularly in interpersonal relationships, is not identified solely by physical criteria, but also by those qualities which are of great value either objectively or especially in accord with the subjective estimation and intention of the other subject.”²⁸

In this case the petitioner discovered soon after the wedding that her spouse had none of the qualities by which she had identified him prior to marriage. He received his medical degree only

²⁶ “Atrix non tantum peroptabat optimas qualitates sociales et morales viri et praesertim eius condicionem futuri medici, sed ex his qualitatibus ipsum sponsum cognovit atque idoneum habuit sub respectu futurae communionis vitae coniugalis seu identificavit ipsam personam mariti” (c. DEFILIPPI, 6 March 1998, pp. 31-32).

²⁷ “Sine dubio, iuxta N.A.T. iurisprudentiam, non tantum subiective, sed etiam ex communi hominum aestimatione magni momenti sunt pro perducenda communione vitae coniugalis condicio medici et consequenter complexus aliarum qualitatium viri, quibus mulier contendit a se *individuatam* esse personam futuri mariti” (ibid., p. 34, emphasis added).

²⁸ “[...] persona tamquam individuum concretum, praesertim in relationibus interpersonalibus, non identificatur criterio tantum physico, sed etiam ex qualitatibus quae magni momenti sint sive obiective sive praesertim iuxta subiectivam aestimationem ac intentionem alterius subiecti” (ibid., p. 36).

four years after they were married, and in fact after they were separated; he was physically and morally abusive toward her. Therefore, she argued that the “qualities” which “individuated” in her mind the person of her intended spouse were in fact lacking in him. This constituted on her part “error concerning the *identity* of the person” mentioned in c. 1097, §1.

Defilippi explains that the very “persons” of the spouses enter into their interpersonal (mutual) marital consent. Therefore, “all those elements pertaining to the person and to the intentional image of the persons of the spouses to be mutually given and accepted, assume greater importance in relation to the conjugal covenant.”²⁹ In harmony with Navarrete’s views on the matter, Defilippi concludes: “Therefore, according to the common meaning and interpretation of all, ‘person’ is something physically defined, or something that is individuated by its physical identity.”³⁰

He then tries to extend this interpretation to the juridical order. Thus, he says that in a juridical sense, this ‘person’ is identified not solely by physical criteria but also by other elements or qualities of great value, for example, whether an individual is baptized, a lay person or cleric, someone under an ecclesiastical censure, etc. In married life each spouse is identified by certain qualities some of which might be considered indispensable to establish the partnership of the whole of life. A person identified by certain specific qualities becomes the content of the consent to be mutually given and accepted. The courtship and engagement periods are precisely meant to enable the spouses to have a specific *image* of that personal identity, which would lead them to consent to a partnership of the whole of life. The central issue Defilippi addresses here is the “*identification*” or “*individuation*” of the person of the spouses through some specific qualities that are objectively, or at least subjectively, important to constitute the conjugal partnership. He quotes from the sentence of 2 March 1994 by Pompedda:

²⁹ This quotation is from a decision c. STANKIEWICZ, 28 May 1982, in *SRR Dec.*, 74 (1982), p. 317, nn. 15-16.

³⁰ “Ideo ‘persona’ iuxta communem omnium sensum et interpretationem, est quid physice definitum, quod scilicet individuetur ex eius physica identitate” (c. DEFILIPPI, 6 March 1998, p. 25).

Therefore, "the quality of a person, which must be considered generally as something accidental, sometimes can have such great importance in the ethical and social order and such value in the spiritual and religious realm, that, according to the estimation of all, at least in certain places and times, it touches and penetrates the very person and determines his/her identity."³¹

As a consequence, it is possible for someone to consider such an accidental quality and identity of the person as equal, that is, the element which *individuates* and *defines* the person as distinct from others would be equal to the very person. There would be some "ideal" identity between the two, the quality and the person.³²

Defilippi then links this reasoning to the concept of "error." He says that error is a false judgement about a certain object. This error can be *substantial* or *accidental*. Substantial error concerns the substance of the act. In our context this would be the *object* of the juridic act. And if the error concerns this object, the juridic act would be invalid by reason of natural law itself.

Canon 126 of the present Code (cf. *CCEO* c. 933) defines this principle: "An act is invalid when performed as a result of ... error which concerns the substance of the act, or which amounts to a condition *sine qua non*; otherwise it is valid, unless the law provides differently. But an act done as a result of ... error can give rise to a rescinding action in accordance with the law." When this principle is applied to marriage, according to Pompedda, the effect of substantial error can be stated as follows: "...there is no doubt that ... any contract can be invalid by reason of error concerning its object; this principle must be applied to marriage because marriage is born out of the act of consent and error intrinsically affects it. In other words, it vitiates the very constitutive element which is the intellect."³³

³¹ "Ideo, 'qualitas personae, quae in genere aliquid accidentale haberi debet, nonnumquam tamen tam grave pondus in ordine ethico et sociali atque tam magnum valorem in ordine spirituali et religioso attingere valet, iuxta universalissimam, saltem in certis locis et tempore, aestimationem ut tangat et penetret ipsam personam eamque in sua identitate determinet'" (c. POMPEDDA, 2 March 1994, in *SRR Dec.*, 86 [1994], pp. 128-129, n. 9).

³² See c. DEFILIPPI, 6 March 1998, p. 25.

³³ See decision c. POMPEDDA, 3 May 1993, in *SRR Dec.*, 85 (1993), p. 363, n. 5.

We should note that Pompedda here speaks of error concerning the "object" which constitutes the "substance" of the juridic act (consent). From this principle Defilippi correctly argues that since matrimonial consent concerns the very persons of the spouses, they should know their distinct individuality. This has been clearly stated in c. 1083, §1 of the 1917 Code as well as in the present Code: "Error of person renders marriage invalid" (c. 1097, §1; *CCEO* c. 820, §1). From this reasoning, Defilippi concludes:

Therefore, if the error concerns the very physical identity of the person of the other spouse, the invalidity of marriage must be declared without any difficulty. In such a case, there is "substantial error," which certainly refers to the "essence" or the "substance" of the juridic contract, that is, marriage.³⁴

It seems evident from the preceding arguments that Defilippi is trying to distinguish between two modes of "identifying" an individual: the first mode is "individuation of a person" through physical criteria, and the second by "moral, juridical, ethical, social, criteria." In his opinion, both "identities" have equal status before the law, both constitute the "substance" of the juridic act (marriage consent). Hence a juridic act would be invalid when a person placing the act is in error concerning either one of these "identities." This would be in accord with the principle stated in the first part of c. 126 (*CCEO* c. 933) in regard to the juridic effect of error: "An act is invalid when performed as a result of ... error which concerns the substance." Both "identities," being the "substance" of the act, the error concerning them would constitute the invalidity of a juridic act. But is a person individuated or identified by moral, juridical and social qualities? Are such qualities per se substantial or merely accidental?

The common doctrine and jurisprudence have consistently maintained that the error concerning the "physical" identity of a person is certainly implied in c. 1097, §1 (*CCEO* c. 820, §1). But, is it the only "identity" implied in this canon? Is it possible to consider under this canon also the "moral" or "juridical," etc., identity

³⁴ "Ideo sine difficultate declaranda est nullitas matrimonii si error respicit ipsam physicam identitatem alterius nubentis. In casu enim habetur 'error substantialis', qui utique refertur ad 'essentialiam' seu ad 'substantialiam' negotii iuridici seu matrimonii" (c. DEFILIPPI, 6 March 1998, p. 26).

of a person? Defilippi seems to be saying that it is possible to do so, and he is not without his supporters in this dispute.³⁵ According to Defilippi, error concerning a “substantial” moral, juridical, social, ethical element or quality would amount to the error about the “identity” of the person, therefore, it would substantially vitiate the juridic act of consent under c. 1097, §1 (c. 1083, §1 of CIC/17). Such an interpretation would be perfectly in accord with the norm of c. 126 (c. 104 of CIC/17) only if the elements or qualities are “substantial.” Are the qualities identified by Defilippi per se “substantial” or do they become so by the will of the agent? Then where do the principles of “*error redundans*” (of c. 1083, §2, 1 of CIC/17) and “error of quality directly and principally intended” (c. 1097, §2 of CIC/83) stand in relation c. 126 (c. 104 of CIC/17)?

Defilippi certainly attempts to link the principles of c. 126 (CCEO c. 933) with those of c. 1097 (CCEO c. 820). But he does not systematically analyse the second part of c. 126, that is, “error ... which amounts to a condition *since qua non*,” and its relation to c. 1097. Defilippi only states that the principle of “error concerning the quality of a person” per se does not concern the “substance” of a juridic contract, and the provision of “a rescinding action” cannot be applied to marriage. Special provision has been made both in the 1917 Code and in the present Code about the “error concerning a quality of a person.”³⁶

In this statement Defilippi seems to be saying in essence that c. 1083, §2, 1 of the 1917 Code and c. 1097, §2 of the present Code represent one of the exceptions implied in c. 126: “otherwise it is valid, *unless the law provides otherwise*.”³⁷ This would imply that the principle underlying the two canons would have invalidating force only by virtue of a positive ecclesiastical law, which is not correct. Defilippi’s conclusion is the result of not considering the significance of the clause: “error ... which amounts to a condition *sine qua non*” which, as several recent works already cited in this study have demonstrated, has an intrinsic link with some of the defects

³⁵ See, for example, decisions c. MONIER, 22 March 1996, in *SRR Dec.*, 88 (1996), p. 300; c. FUNGHINI, 24 February 1988, in *ibid.*, 80 (1988), p. 145.

³⁶ See c. DEFILIPPI, 6 March 1998, pp. 26-27.

³⁷ We find the same view in Villeggiante’s study cited above. See VILLEGGIANTE, “L’error in persona,” p. 527.

of matrimonial consent, including "error of quality" of c. 1097, §2. Therefore, in light of recent studies on c. 126 (*CCEO* c. 933), it may be more correct to say that the principles of "*error redundans*" and "*error in qualitate directe et principaliter intenta*" are particular applications of the clause "error ... which amounts to condition *sine qua non*" of c. 126 (*CIC/17* c. 104), rather than simply particular applications of the exception mentioned in the same canon, because the principle of c. 1097, §2 (*CCEO* c. 820, §2) derives its invalidating force by natural law itself. This canon, according to several rotal sentences, represents one of the two interpretations of "error redundans" of c. 1083, §2,¹⁰ of the 1917 Code.³⁸ The principle simply means that it is the will of the agent that renders a particular *non-substantial* or common quality *substantial*, and thereby invalidates a juridic act, including matrimonial consent. And this is of natural law.

This is exactly what Defilippi seems to imply when he quotes Pompedda's sentence of 1993: "Therefore, error about this quality (or its absence) can totally change, in its substance, the very object (in marriage)."³⁹ This reasoning gains support from the fact that Defilippi quotes also from a sentence of Stankiewicz where we read: "Among the qualities, which of their very nature and according to the common estimation of people have great impact on the communion of conjugal life, are the 'social and familial condition, the status of the person, the wealth, since they really *define each person* in social life."⁴⁰ Defilippi goes on to argue that the quality intended

³⁸ See decisions c. STANKIEWICZ, 12 July 1996, in *SRR Dec.*, 88 (1996), pp. 512-513; c. HUOT, 24 November 1987, in *ibid.*, 79 (1987), p. 659; c. FALTIN, 26 May 1989, in *ibid.*, 81 (1989), p. 383; c. STANKIEWICZ, 24 January 1984, in *ibid.*, 76 (1984), p. 47; c. AGUSTONI, 10 July 1984, in *ibid.*, 76 (1984), p. 457; c. BRUNO, 18 December 1991, in *ibid.*, 83 (1991), p. 834.

³⁹ "Ideo error de hac qualitate (vel absentia) immutare prorsus valet, quidem in sua substantia, ipsum obiectum (in matrimonio)" (c. POMPEDDA, 3 May 1993, p. 363, n. 4). See c. DEFILIPPI, 6 March 1998, p. 27.

⁴⁰ "Inter qualitates, quae suapte natura et iuxta communem aestimationem hominum magnum pondus habent in communionem vitae coniugalis annumerandae sunt 'condicio socialis, familiaris, status personae, census, cum in vita sociali reapse *singulas personas definiant*'" (decision c. STANKIEWICZ, 24 February 1984, in *SRR Dec.*, 76 [1984], p. 46, n. 5; emphasis added). See c. DEFILIPPI, 6 March 1998, pp. 27-28, n. 14.

by the person must be objectively important or at least important in the estimation of the agent in order for it to become the substance (substantial object) of the act. This is the principle commonly applied in rotal jurisprudence to "error redundans" or "error of quality directly and principally intended." Therefore, from the point of view of law, what Defilippi presents in the "*in iure*" section of his sentence seems to be a clear elucidation of the principles of c. 1083, §2, 1 and not of c. 1083, §1 of CIC/17, nor can it be extended to c. 1097, §1 of the present Code, unless a much broader interpretation of the notion of "person" is accepted as proposed in recent years even in canonical doctrine.⁴¹ There is no doubt however that the entire thrust of Defilippi's sentence seems to advocate the broader interpretation of the notion of "person."

The facts of the case supported the allegation that the petitioner had in fact erred in regard to the qualities of the person of her intended spouse. Prior to marriage she always saw in the respondent "an image of a man fit to be married," that is to say, "rather older in age and a medical doctor as a guarantee of protection." She said: "I considered him as an ideal husband for me."⁴² From her own confession and from the strength of other testimonies, Defilippi's *turnus* concluded that the petitioner not only desired those qualities, but she mentally configured his very person from those qualities. In as sense she "sculpted" in her mind the person of her future spouse from the qualities she found in him before the marriage, and that was the person with whom she wanted to establish the communion of conjugal life.⁴³

It is important to note here that Defilippi makes a transition from the intention of the petitioner to marry a person endowed with certain qualities to the interpretation that she had *individuated* his very person with those qualities. This I would consider more an interpretation than a fact. The fact seems to be that the petitioner intended a person with *certain qualities*, such as being a medical doctor, a loving and understanding and peaceful person, and she

⁴¹ In his above-cited article, Villeggiante argues in favour of this view. See VILLEGGIANTE, "L'error in persona," pp. 529-549.

⁴² See c. DEFILIPPI, 6 March 1998, p. 31.

⁴³ *Ibid.*, pp. 31-32.

thought that the respondent had such qualities. Therefore, there is no doubt that she had erred in regard to the qualities she intended to find in her future husband rather than *individuate* his person by those qualities. If we interpret the relevant legal principles correctly, the petitioner erred in regard to the qualities of the respondent *without which* she would not have married him. Because she married him with such an error in her mind, her consent was substantially vitiated by it. Therefore, the marriage consent was invalid not because of error of person *per se*, but because of “*error redundans*” of c. 1083, §2, 1 of the 1917 Code, which, as Navarrete suggests, can be brought within the ambit of c. 1097, §1 (CCEO c. 820, §1) or because of “error of the quality of the person which she had directly and principally intended,” even if implicitly, in accord with c. 1097, §2 of the present Code (CCEO c. 820, §2). But it is obvious from Defilippi’s arguments that in the mind of the *turnus* the error on the woman’s part was an “error of person” rather than a “redounding error” or “error of quality directly and principally intended.”

In his recent study of “error of fact and fraudulent error,” Charles J. Scicluna registers his disagreement with the view expressed by Defilippi in his sentence.⁴⁴ Scicluna says that the phenomenological approach adopted by Defilippi in interpreting and applying the principle of “error of person” of c. 1097, §1 (CCEO c. 820, §1) is not without serious difficulties. Such an interpretation seems far removed from the mind of the legislator because a particular aspect identifying the person cannot be considered *per se* identical to the “person” mentioned in the Code. Consequently, the error concerning a particular quality of a person cannot be regarded as the same as the error concerning the person unless that quality itself is somehow made the substantial object of consent. The interpretative approach adopted by Defilippi could amount to denial of the right autonomy of the two grounds of invalidity explicitly provided in c. 1097. Scicluna cites the statement of Funghini in support of his view on this matter: “Canon 1097 contains and proposes a clearly distinguished two-fold figure or species of error capable of invali-

⁴⁴ Charles J. SCICLUNA, “L’errore di fatto (can. 1097) e l’errore doloso (can. 1098),” paper presented as part of “Reunioni Culturali 2000” series organized by the Arcisodalizio della Curia Romana, 13 January 2000 (*pro manuscripto*), pp. 7-8.

dating marriage. Each figure has the capacity [to invalidate marriage] not only distinctly but also autonomously.”⁴⁵ It may not be unreasonable to suggest that if Defilippi’s explanation of the notion of “person” is accepted as correct and legitimate, then the ground of “error of quality directly and principally intended” would be redundant.

This criticism, I believe, has merit because the Supreme Legislator has clearly indicated his mind concerning the controversy over the notion of “person” mentioned in c. 1097, §1 of the present Code (CCEO c. 820, §1). He has said that the term “person” must be understood in light of common doctrine and jurisprudence. And it seems obvious from the above comments of Scicluna and from the recent rotal jurisprudence on the matter that Defilippi’s arguments at least **seem** contrary to the mind of the legislator and contrary to the common understanding of the term “person” mentioned in c. 1097, §1 (CCEO c. 820, §1), unless the *qualities* mentioned by Defilippi are per se substantial and thereby come under the second distinction implied in c. 126 (CCEO c. 933), namely error concerning a quality per se *substantial*.

The more appropriate ground of nullity on which this marriage case should have been judged from the beginning is “redounding error,” as understood in common doctrine and jurisprudence, or “error of quality directly and principally intended,” rather than directly on “error of person” of c. 1083, §1 of the 1917 Code or c. 1097, §1 of the present Code (CCEO c. 820, §1). There is no doubt in my mind that the evidence contained in the acts of the case is quite sufficient to prove the invalidity of this marriage on the ground of “error of quality.” However, it is important for us to note that this affirmative rotal decision came *twelve* years after the case was first introduced at the local level. The rotal court had to deal with the ground of “error of person,” because that was the ground determined by the first instance tribunal. The ground of “error redundans” was already dismissed with a negative decision when the case was presented for the first time before the same tribunal of first

⁴⁵ “Canon 1097 duplicem bene distinctam figuram seu speciem erroris matrimonium irritandi capacem continet et proponit. Unaquaeque figura hac capacitate [matrimonium irritandi] nedum modo distincto sed et plene autonomo gaudet” (ibid.).

instance. Therefore, the case could not have been judged again on the same ground by the same tribunal. The rotal *turnus* seems to have terminated the long *iter* of this case with this a genuine spirit of equity even though the legal principles on which it based its arguments could be considered questionable. Nevertheless, because the evidence of “error of quality” or “redounding error” seems so clear in this case, one may rightly suggest that there was absolutely no reason for the process to last this long.

2 - Error of Quality

The rotal sentences reviewed for this study deal with a wide variety of qualities which had been alleged by petitioners to be of notable importance to them at the time they had exchanged their consent. The judges of the Rota always consider the *objective* and *subjective* value attributed by the persons concerned to the alleged qualities. In more recent sentences frequent reference is made to the 1993 papal allocution to the Rota in which the Holy Father insisted that the qualities directly and principally intended are not to be “frivolous or trivial.” This section will provide a brief presentation of the factual aspects of a few cases involving certain types of qualities frequently considered by the rotal sentences.

2.1 - Marital status

The facts of the case judged on 21 April 1970 *coram* Canals⁴⁶ are as follows:

The marriage in question was celebrated on 19 October 1965 with all civil effects. The woman had no knowledge or suspicion that the man was civilly bound to another woman from whom he had fathered three children. However, she found out this fact two months later when his legal wife charged him with bigamy and was thrown into prison (for two years). Shortly thereafter the woman petitioned the Tribunal of Niterói (Brazil) to declare her marriage null on the ground of error of quality redounding to error or person. This tribunal pronounced an affirmative sentence on the proposed ground. The appeal tribunal overturned this decision,

⁴⁶ *SRR Dec.*, 62 (1970), pp. 370-375.

but ruled affirmatively on the ground of incapacity of the man to hand himself over to his wife in marriage, that is to say, on the ground of exclusion of fidelity.

The main legal argument on which Canal's sentence justifies its affirmative decision is based on the notion of "person." Canals defines the notion of person in light of the teaching of the Second Vatican Council. According to this notion, when a moral, juridical, social quality is so intimately connected with the physical person that, in the absence of that quality, even the physical person turns out to be totally different. Therefore, if a person contracts marriage with another person who is only civilly married, who he or she thinks is free of any bond, contracts invalidly according to this notion, not due to some implicit or interpretative condition, but due to an error of quality redounding to error of person considered in a more complete and integral manner. Therefore, although civil marriage must be rejected as a matter of principle, it cannot be denied that it constitutes as status of the person and, consequently, that an error concerning such a state redounds to error of person.

There was no doubt that the petitioner was in error when she married the respondent. That this error concerned a quality redounding to error of person was likewise beyond doubt in accord with the legal principles stated in the sentence, because the petitioner, although she had known the respondent through an engagement relationship of fourteen months, nevertheless was not aware of his civil union, and therefore, she thought that she was finally marrying a celibate when, in fact, she married a married man. This man already had civilly married another woman and from that marriage he had fathered three children. When he contracted the second marriage, the first civil marriage was still in full existence as it had not been dissolved either by the death of his wife or by a divorce, which was prohibited by civil laws in Brazil. The criminal charge, on which the man, and not the petitioner, was tried, confirmed the error. In fact, this error was the result of deceit on the part of the man who, in order to secure the marriage, simulated the state of his freedom, presented himself under a false name, and by means of this false name, he furnished himself with documents of freedom; but that does not create any problem because the nullity of marriage does not simply flow from deceit, but from the effect of deceit, which was the error concerning the true status of the person.

The petitioner certainly did not place any condition in regard to the civil status of the man; but the error concerning person, or error redounding to error of person, produces an invalidating effect on its own force without the quality having to be reduced to any form of condition. The decision of the rotal *turnus* was, therefore, affirmative only on "redounding error."

In a similar case judged *coram* Di Felice on 16 December 1985,⁴⁷ the quality intended by the woman petitioner was the respondent's status of freedom to marry. The respondent was civilly married before and he fabricated the legal documents to convince the petitioner that he was free to marry. The evidence supported the petitioner's contention and the decision of the court was affirmative on the ground of error of quality. Di Felice reiterates the juridic principles stated in Canals' sentence.

2.2 - Social status

The woman, petitioner in the case from Turin (Italy) judged *coram* Di Felice on 26 March 1977,⁴⁸ wanted to marry a man of the highest social and economic status so that she could live a more comfortable life. For this reason she broke off a courtship relationship with a young man, whose family had in the meantime fallen on hard times. Then she married Carlo, the respondent, whom she had known from childhood, and who professed to be a doctor. Their married life did not turn out to be happy. A daughter was born of this union, but her birth did little to strengthen their mutual love. The man suddenly disappeared without even informing the petitioner of his whereabouts.

When the woman came to know that her husband was not a doctor, she accused her marriage of nullity on grounds of condition *de praesenti* that was not verified. The tribunal accepted this ground but added the ground of error of quality redounding to error of person in accord with the norm of c.1083, §2,1º of CIC/17. The

⁴⁷ See decision c. DI FELICE, 16 November 1985, in *SRR Dec.*, 77 (1985), pp. 495-503.

⁴⁸ *SRR Dec.*, 69 (1977), pp. 147-156; also published in *ME* 103 (1978), pp. 265-272; *EIC*, 34 (1978), pp. 160-164; *CLSGBI Newsletter*, No. 40, March 1979, pp. 38-49; *CLD*, 9 (1978-1981), pp. 634-647.

tribunal pronounced an affirmative decision on the ground of error of quality, but not on condition. The case was appealed directly to the Rota and was judged *coram* Di Felice.

The evidence fully confirmed that the petitioner married the respondent, whom she certainly believed to be a doctor, while in fact he was not a doctor.

It is a fact that the medical profession is held in high esteem among people of our time, and also that the medical doctors enjoy a much more affluent economic status. The person of a medical doctor in human society, and his/her juridic and social status enjoy its own excellence.

Objectively, therefore, the person of a medical doctor is one thing, the person of a bogus doctor is quite another; for this reason, the error of quality in regard to the medical profession of a particular person is error redounding to error in person, because the person of a false doctor is totally different.

Subjectively, however, the error of quality in the case has the greatest importance, since the petitioner intended to marry a medical doctor rather than the person of the respondent. In fact if she had known that he was not a doctor, she would not have contracted marriage. Therefore, the error of quality, taking into consideration also the will of the petitioner in choosing her fiancé for marriage, redounded to error of person, because the respondent was not the same man that the petitioner intended to marry.

Therefore, there is no doubt that the petitioner did not so much marry the respondent, whom she believed to be a doctor, but according to her prevalent will she intended to marry a doctor. The woman was led by grave error concerning a quality of great importance in the present conditions of life. Through the defect of that quality she married a man totally different from the one she intended to marry.

So her consent was invalid due to error of quality redounding to error of person. Therefore, the decision was affirmative. One can see in this argumentation the extent of Di Felice's dependence on Canals' juridic reasoning in regard to "error redundans."

In his sentence of 13 May 1995, Pompedda deals with error about the qualities of "social status," "morality" (honesty) and "legiti-

macy of the respondent's birth."⁴⁹ The marriage in question lasted nine years and two children were born of the union. Almost fifteen years after the separation and subsequent divorce, the man petitioned the regional tribunal of Lazio to declare his marriage null on the ground of error of quality of his wife directly and principally intended on his part. The first instance decision was negative. The petitioner claimed that the "social status" and "legitimate birth" of the respondent were important to his career in the military. The respondent came from a socio-economic background different from his and that the respondent was born of her father's adulterous relationship. If he had known about these qualities of the respondent he would not have married her. His advocate, for example, stated in his brief: "Therefore, we must regard it as certain that in the mind affected by error, those qualities had great importance in view of all the circumstances of the person and place; hence, the contractant had rightly and principally directed his consent towards determined qualities of his spouse; indirectly however towards her person."⁵⁰ Pompedda responds to this statement saying that according to law and rotal jurisprudence, a quality must be directly and principally intended and it must relate to an element whose absence would seriously and directly disturb conjugal life.⁵¹

There was no shred of evidence in the testimonies that the petitioner had directly and principally intended the alleged qualities in the respondent at the time of contracting marriage. Even though the respondent was born of an adulterous union, she was subsequently legitimated by her father. The cause of the marriage breakdown was the violence and infidelity on the petitioner's part and interference in the married life by the respondent's mother. The rotal *turnus* considered the petitioner's intention to be more an interpretative intention rather than an intention vitiated by positive error.⁵² Therefore, the decision was negative.

⁴⁹ See *c. POMPEDDA*, 13 May 1995, in *SRR Dec.*, 87 (1995), pp. 190-199. Also see the sentence *c. IDEM*, 22 July 1985, in *ibid.*, 77 (1985), pp. 395-403, which deals with the qualities of "social and family status."

⁵⁰ See *c. POMPEDDA*, 13 May 1995, p. 195.

⁵¹ *Ibid.*

⁵² See *ibid.*, p. 197.

2.3 - Political affiliation

The respondent in the marriage nullity case judged *coram* Stankiewicz on 22 July 1993⁵³ was an ardent adherent of an organisation of the extreme left, called "Brigadas Obreras." The marriage was celebrated in 1980 in San Salvador (El Salvador). The union did not last beyond a year. On 19 May 1983, the woman petitioned the tribunal of San Salvador to declare her marriage null on several confused grounds, among which was "error of quality of the person." The decision of the first instance court was negative on all grounds. However, the appeal court declared that the marriage was invalid only on the ground of error of quality of the person directly and principally intended on petitioner's part, that is, "on the basis of canon 1097, §2."

In his sentence, Stankiewicz clarifies several juridical principles implied in c. 1097. First, the substantive noun "person" mentioned in c. 1097, §1 must be understood in matrimonial legislation only as "a human person, that is, a physical person," with one and the same meaning, namely considered as the subject of rights and duties in his or her individuality, separated from all additional qualities with which the individual subject is graced in his or her real existence."⁵⁴ It cannot be understood as "personality," which is a psychological construct, rather than a concrete reality implied in c. 1097, §1. For this reason, "in the matter of 'error of fact', specifically when it is a question of error of person (c. 1097, §1), one may not attribute to the terms used by the Legislator a meaning alien to canonical tradition."⁵⁵

Second, error of quality of a person renders marriage null, if the quality is directly and principally intended (c. 1097, §2). However, this quality, since it is not determinative of the physical person, even if serious, that is, "neither frivolous nor trivial,"⁵⁶ by

⁵³ *SRR Dec.*, 85 (1993), pp. 590-600.

⁵⁴ See U. NAVARRETE, "Error circa personam et error circa qualitates communes seu non identificantes personam," in *Periodica*, 82 (1993), p. 664.

⁵⁵ JOHN PAUL II, Allocution to the Roman Rota, 29 February 1993, in *AAS*, 85 (1993), p. 1259, n. 7.

⁵⁶ *Ibid.*, p. 1260, n. 7.

its very nature does not pertain to the substance of marriage, and therefore, it ought to be “directly” intended by the contractants. And this happens when the quality constitutes the immediate object of the act of the will. In other words, a quality “enters into the object of consent through the prevalent will of the contractant, so that the consent itself depends on the existence or not of that quality.”⁵⁷ The quality must be intended “directly,” that is, it is the direct object of the will, and “principally,” that is, in preference to the actual person of the other spouse: “consent is directly and principally brought to bear on the quality, and less principally on the person.”⁵⁸

The testimonial evidence confirmed that the respondent apparently displayed qualities of kindness, seriousness, respect for others, responsibility, etc. As the *ex officio* advocate concluded, by a cunning way of acting the respondent led not only the respondent into error, but also all the witnesses from her family.

The respondent’s behaviour and his opinions *a fortiori* convinced the petitioner, who was in love with him, that he really was a fervent Catholic christian, an upright man and a peaceful citizen of the republic.

Therefore, the *rotal turnus* concluded with certainty that, before the wedding, the petitioner was in error about the personal qualities of the respondent, qualities which she reckoned very highly in a future husband and which she erroneously believed to be present in him. He had cunningly passed himself for a diligent member of the ecclesial community, an honest man and a dutiful citizen. Whereas, he was in fact a guerilla in a subversive faction commonly called “Brigadas Obreras” and held responsible position in it. In view of such clear evidence, Stankiewicz reports the following conclusion of the *turnus* on the case:

It is certain, therefore, that the petitioner’s error before the marriage regarding the husband’s membership in a seditious faction, was the reason for the contract – as she herself says – “I would not have married him if I had known about it.”

⁵⁷ See NAVARRETE, “Error circa personam,” p. 667.

⁵⁸ See decision c. STANKIEWICZ, 24 October 1991, in *SRR Dec.*, 83 (1991), p. 676, n. 11.

Moreover, the respondent's qualities, especially his sincerity and uprightness towards the civil order and assumption of "responsibilities of the home" were, as the petitioner says "what I was looking for directly and principally." But the respondent, according to the petitioner's declaration: "was in agreement that he had those qualities and that he said he was very sincere and the he loved me."

But if the quality is directly and principally intended, error about it brings about the nullity of marriage.⁵⁹

The decision, therefore, was affirmative on the ground of error of quality in accord with the norm of c. 1097, §2. The case in fact demonstrates how any number of personal qualities, as long as they are not "frivolous or trivial," can become the object of a person's matrimonial will.

2.4 - Age

Within a few months after the wedding, which was celebrated on 19 June 1983, the woman petitioned for a declaration of nullity of her marriage alleging that she had been deceived in regard to the person of her spouse.

The first instance decision was affirmative on grounds of "deceit" in regard to an important quality, namely the age of the respondent. The appeal tribunal overturned this decision. Then the case was judged at the Rota on 6 February 1992 *coram* Pompedda.⁶⁰

At the time of marriage, the woman was 25 years of age and wanted to marry a man about 30 years old, endowed with the qualities of an ideal husband — character, education, health and enough money.

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 believ-

⁵⁹ c. STANKIEWICZ, 22 July 1993, p. 600.

⁶⁰ See decision c. POMPEDDA, 6 February 1992, in *SRR Dec.*, 84 (1992), pp. 49-62; also published in *IE*, 6 (1994), pp. 573-608. The references to this sentence are from *Decisiones*. Also see the sentence c. STANKIEWICZ, 30 January 1992, in *ME*, 118 (1993), pp. 529-537, which deals with the quality of age.

ing he had all the qualities she desired to find in him. However, soon after the wedding it was discovered that the respondent was in fact 13+ years older than the petitioner. In order to hide this actual age difference, respondent's people had bribed the Notary to falsify the date of birth on the baptismal certificate which the parish priest had signed without checking its details.

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.⁶¹ 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."⁶²

It is 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" of 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

⁶¹ c. POMPEDDA, 6 February 1992, p. 61. 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.

⁶² Ibid.

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 (CCEO c. 1494), it is applicable only to marriages celebrated after 27 November 1983 when the revised Code came into effect.⁶³ This marriage was 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. 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.

2.5 - Physical health⁶⁴

The case judged *coram* Bruno on 25 March 1994 involved the quality of physical health (leprosy). It originated in Mangalore (India). The marriage in question was celebrated on 28 December 1967. The common life lasted only three weeks. Nearly 18 years after the wedding, the man petitioned for a declaration of nullity of his marriage 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

⁶³ See M.F. POMPEDDA, *Studi di diritto matrimoniale canonico*, Milano, A Guiffre Editore, 1993, p. 227.

⁶⁴ Three sentences consider the quality of physical health: c. STANKIEWICZ, 24 January 1984, *SRR Dec.*, 76 (1984), pp. 44-52 (*epilepsy*); c. DI FELICE, 13 July 1985, in *ibid.*, 77 (1985), pp. 364-372 (*freedom from heart disease*); c. BRUNO, 25 March 1994, in *ibid.*, 86 (1994), pp. 164-172 (*leprosy*).

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, the rotal court *coram* Bruno granted a new hearing to the case as requested by the respondent.⁶⁵

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 his spouse to be immune from leprosy. The decision of the *turnus* was negative.

2.6 - Mental health⁶⁶

On 30 January 1992, the *turnus coram* Stankiewicz judged a marriage case involving the qualities of "mental health" and "age." It was an "arranged marriage." The parties did not have any direct knowledge of each other before the celebration of marriage. The marriage was celebrated on 4 May 1980, that is, prior to the promulgation of the revised Code. Shortly after the wedding conjugal

⁶⁵ A brief analysis of this decree is in *Studia canonica*, 29 (1995), pp. 342-346.

⁶⁶ The following sentences deal with the quality of mental health: c. AGUSTONI, 10 July 1984, in *SRR Dec.*, 76 (1984), pp. 442-461 (*hereditary mental illness and mental illness of the respondent*); c. DE LANVERSIN, 20 March 1985, in *ibid.*, 77 (1985), pp. 166-179 (*mental illness*); c. GIANNECCHINI, 25 April 1986, in *ibid.*, 78 (1986), pp. 305-317 (*drug addiction*); c. FUNGHINI, 23 November 1988, in *ibid.*, 80 (1988), pp. 636-651 (*drug addiction*); c. STANKIEWICZ, 30 January 1992, in *ME*, 118 (1993), pp. 529-537 (*mental illness*); c. POMPEDDA, 6 February 1992, in *SRR Dec.*, 84 (1992), pp. 49-62 (*mental illness*); c. STANKIEWICZ, 27 January 1994, in *ibid.*, 86 (1994), pp. 56-76 (*mental illness*); c. POMPEDDA, 2 March 1994, in *ibid.*, 86 (1994), pp. 125-133 (*mental illness*).

life turned unhappy because the petitioner came to know that the respondent (woman) was three years his senior and was also suffering from some mental disorder. The petitioner claimed that he wanted to marry a woman who was his junior and one who enjoyed good mental health because of his employment in a foreign country. Within two years after the celebration of marriage, the couple separated.

The man petitioned for a declaration of nullity of his marriage on following grounds: a) error of person caused in the petitioner by fraud concerning the age of the respondent; and b) lack of proper discretion and inability to assume the responsibilities of married life on the part of respondent. The first instance decision was negative on all grounds. A new ground, namely "error of quality caused by fraud concerning the mental health of the respondent" was added to be dealt with "as if in first instance." The decision of the appeal court was affirmative on all proposed grounds including the one newly introduced.

Testimonial evidence in this case revealed the following: The appeal tribunal had argued that the petitioner wanted to marry a woman who was "at least three years younger to him." When the family of the respondent was informed of this requirement, they had her baptismal certificate altered in order to make her appear about thirty years of age. Even the first instance tribunal had acknowledged this fact, but did not consider it to be a serious or quasi-essential matter. In fact the first instance tribunal concluded: "The fact of the wife being older than her husband does not, in any way, affect the well-being of the partners." 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 husband is considered an undesirable thing." In this case, however, the court ruled that there was no evidence to the effect that the petitioner had directly and principally intended this quality, or the absence of the quality had seriously affected conjugal life, because the petitioner himself said: "If she was mentally normal, I would not have pressed the question of age."⁶⁷

⁶⁷ See c. STANKIEWICZ, 30 January 1992, p. 535.

The rotal court, however, agreed with the appeal tribunal that the absence of the quality of mental health did seriously affect the partnership of the whole of life: "J. wanted to marry in a particular situation. There was sufficient proof of mental illness in the respondent. Expert testimony confirmed "that she had symptoms of major mental disease, namely psychosis, before, during and after marriage," and it was "psychotic illness with secondary depression." Therefore, the rotal court concluded: "But the quality of mental health of the respondent intended by the petitioner can be considered without doubt to be determinative of the person in view of the fact that the petitioner did not know the respondent directly. Therefore, petitioner's error concerning the quality of the respondent, which was fraudulently induced, redounded to error of person, more so that he intended this quality in preference to the person of the respondent."⁶⁸

Also the sentence of 27 January 1994 by Stankiewicz⁶⁹ deals with the quality of mental health as a cultural prerequisite for marriage. The case was judged at the Rota on grounds of "error of quality" (c. 1097, §2) and "fraud" (1098). The marriage in question was celebrated on 27 January 1985. It was a "proposed marriage." 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

⁶⁸ "Sed qualitas sanitatis psychicae partis conventae, ab actore exoptata, haud dubie aestimari potest tamquam determinativa personae, attento quod actor ante nuptias partem conventam directe non cognoscebat. Exinde error actoris circa errorem personae redundavit, eo vel magis quod hanc qualitatem prae persona conventae intendit" (*ibid.*, p. 537).

⁶⁹ See decision c. STANKIEWICZ, 27 January 1994, in *SRR Dec.*, 86 (1994), pp. 56-76; also published in *Periodica*, 84 (1995), pp. 515-552. The references to this sentence are from *Periodica*.

decision was negative on both grounds, but the appeal tribunal overturned that decision.

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. Medical records indicated that she was treated by a psychiatrist for depression and hallucinations. In fact, she was treated for "schizophrenia" or "schizophreniform psychosis."⁷⁰ 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.

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.⁷¹ The decision, therefore, was affirmative on the ground of "error of quality" (mental health), but negative on *dolus*.

2.7 - Virginit⁷²

In a case from Dinajpur (India), judged at the Rota on 21 June 1941 *coram* Heard,⁷³ the petitioner, a recent convert to the Catholic faith at the time of marriage, claimed that his prevalent intention

⁷⁰ Ibid., p. 548.

⁷¹ Ibid., p. 550.

⁷² The following sentences consider this quality: c. DAVINO, 26 March 1987, in *SRR Dec.*, 79 (1987), pp. 152-159; c. MASALA, 12 April 1988, in *ibid.*, 80 (1988), pp. 221-226; c. FALTIN, 26 May 1989, in *ibid.*, 81 (1989), pp. 379-388; c. BOCCAFOLA, 9 November 1989, in *ME*, 116 (1991), pp. 379-389; c. FUNGHINI, 28 November 1990, in *SRR Dec.*, 82 (1990), pp. 811-822.

⁷³ See *SRR Dec.*, 33 (1941), pp. 528-533.

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.

Another case involving the quality of virginity was judged *coram* Faltin on 26 May 1989,⁷⁴ The marriage in question took place on 15 October 1980 according to the laws of the Catholic Church after about two months' acquaintance. Problems in married life emerged right after the wedding night because, contrary to petitioner's and cultural expectations, the respondent was found not to be a virgin at the time of contracting marriage. In reaction to this situation, the petitioner refused to cohabit with his wife. After the definitive separation and subsequent divorce, the man requested the tribunal of Chilaw (Sri Lanka) to declare his marriage null on grounds of "lack of discretion of judgement" on the part of both and "incapacity to assume conjugal obligations" on the part of respondent. The decision of the first instance court was affirmative on all proposed grounds, but it was overturned by the appeal court of Colombo. The rotal advocate requested the court to add a new ground, namely "error of quality of the person" (c. 1083, §2 of 1917/CIC and c. 1097, §2 of 1983/CIC) to be treated "as if in first instance." This was admitted by the rotal court.

In regard to "error of quality redounding to error of person," Faltin says that in judging cases coming from distant countries, the Rota has always proceeded in accord with the principle of "equitable interpretation" keeping in mind the norm of c. 19 of 1983/CIC lest there arise great injustice from the application of most serious laws.⁷⁵

⁷⁴ See *SRR Dec.*, 81 (1989), pp. 379-388; also published in *IE*, 2 (1990), pp. 177-190; *DE*, 102 (1991), pp. 77-86; *ME*, 116 (1991), pp. 379-389. The references to this sentence are from *Decisiones*.

⁷⁵ *SRR Dec.*, p. 382-383: "Certo nemo est qui ignoret, in iudiciis ecclesiasticis, iustitiam administrandam esse *cum moderamine aequitatis*. 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, 2º vigentis CIC."

In interpreting c. 1097, §2 of 1983/CIC Faltin distinguishes two hypotheses implicit in the norm, namely: a) that the quality be directly and principally intended *subjectively*; and b) that the quality be directly and principally intended *objectively by the society and subjectively by the contractant*, but *implicitly* very vehemently directly and principally intended.⁷⁶

Faltin expresses the court's view that culture and traditions of a particular society can influence its members in such a way that their thinking and acting can be determined by its expectations. Therefore, he says that a quality *implicitly* but directly and principally intended should not be confused with a quality *presumptively* directly and principally intended. In every case attention should be paid to the *subjective* estimation of the contractant *in whom the quality of the partner identifying his/her person is so rooted and as if incarnate*, that it is very difficult to distinguish the defect of consent from moral or psychological impossibility to think, act and behave differently on the part of the person in error who pursues with all vigour this quality so that he/she cannot will or act differently.⁷⁷ In this statement Faltin provides an important principle applicable to the mental and personality disposition created in people by the culture and traditions of the society in which they

⁷⁶ *Ibid.*, p. 383: "Certo certius, in citato canone duo hypostheses includendae sunt, scilicet: a) quatenus qualitas expresse, directe et principaliter *subiective* intendatur; et b) quatenus qualitas directe et principaliter *obiective a societate et a contrahente subiective*, sed *implicite* vehementer directe et principaliter intendatur."

⁷⁷ *Ibid.*, p. 383-384: "Notetur quoque, confundendum non esse – uti iam supra innuimus – qualitatem *implicite*, sed directe et principaliter intentam cum qualitate *praesumptive* directe et principaliter intentam. Utcumque et in omni casu attendi debet ad aestimationem subiectivam contrahentis, *in quo qualitas compartis identificans personam tam radicatam adesse et veluti incarnatam*, adeo ut defectus consensus difficillime distingui possit ab incapacitate morali seu psychologica aliter cogitandi, agendi seseque gerendi ipsius errantis, qui hanc qualitatem omnibus viribus prosequi voluit, ut aliter velle atque agere nequeat" (emphasis added). The emphasis placed on the principle expressed in this statement concerning the psychological relationship between incapacity to consent and radical error is an important contribution of Faltin's sentence to jurisprudence. The relationship implied here has been identified also in other recent rotal sentences. But here it has been clearly linked to the cultural impact on people's choices, particularly on the choices involved in marriage.

live in relation to the decisions they make which include also the decision to marry.

In regard to the particular quality discussed in this case, Faltin says that among the qualities which objectively identify a person *in Indian society virginity of a woman is preeminent*.⁷⁸

In his analysis of the facts of the case, Faltin finds objective basis for the importance of virginity in Sri Lankan culture. For example, he says: "According to the native mores, deep-rooted traditions and the perennial culture of the people of Sri Lanka, as it can be deduced from the confessions of the parties and from the declarations of witnesses, 'a girl must be a virgin at the moment of celebrating marriage.' The respondent herself candidly confessed: 'According to our culture, the good character of a girl is proved by her virginity.' This quality of virginity is such an objectively essential element for the identification of a woman within the socio-cultural context that it must be considered *implicitly* directly and principally intended among the people of Sri Lanka who adhere to indo-pakistani culture."⁷⁹

In essence the sentence is implying that a culturally determined prerequisite in a person marrying may be so willed by persons influenced by it that they may be incapable of eliciting the act of consent with deliberation and freedom proportionate to the rights and duties of conjugal partnership. In other words, the culturally induced error can be considered a legitimate cause of lack of discretion of judgement. The decision of the court was affirmative on grounds of error of quality directly and principally intended.

⁷⁸ *Ibid.*, p. 383: "Attendatur oportet, quod inter qualitates, quae personam obiective identificant *in societate indiana praeeminet mulieris virginitas*" (emphasis added).

⁷⁹ *Ibid.*, pp. 385-386: "Etenim, iuxta innatos mores, radicatae traditiones atque perennem culturam populi ceylonensis, uti deduci potest ex confessione partium in causa atque ex declarationibus omnium testium, 'la ragazza deve essere vergine al momento del matrimonio'. Immo, ipsa conventa candide confessa est: 'secondo la nostra cultura, il buon carattere della ragazza è provato dalla sua verginità'. Quae virginitatis qualitas, sub adspectu sociali atque culturali, est ideo obiective elementum essenziale pro identificatione mulieris, ut qualitas illa considerari debeat *implicite* directe et principaliter intenta apud populum cingalensem, qui culutrae indo-pakistanae inhaeret" (emphasis added).

This decision *coram* Faltin was ratified by decree on 9 November 1989 by the higher *turnus*.⁸⁰ The decree by Doran substantially repeats the law and facts reported in Faltin's sentence. It concludes that the petitioner had never doubted that the respondent was not a virgin. When he learned after the wedding night that the white sheet, used to trace the virginity of the newlywed girl, did not have any blood stain he believed that he had married a non-virgin, and in so judging he erred in regard to the quality of the person directly and principally, even if *implicitly*, intended, which of its very nature seriously disrupted the conjugal partnership within days after the wedding. Therefore, the decision of the court was affirmative.

On 28 November 1990,⁸¹ the rotal court *coram* Funghini dealt with a case from Bangalore (India) in which the principal ground was "error of quality redounding to error of person." The first instance decision was affirmative, which was overturned by the appeal tribunal.

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."⁸² In other words, deceit was certainly present in this case and it is obvious from the following facts.

The respondent woman, while residing at her married sister's house, became pregnant for her brother in-law. Through a marriage-broker, the brother in-law arranged for the marriage on behalf of

⁸⁰ Decision *c.* DORAN, 9 November 1989, in *ME*, 116 (1991), pp. 379-389; also published in *DE*, 102 (1991), pp. 68-77; English translation in *Forum*, 3 (1992) 1, pp. 114-134.

⁸¹ See decision *c.* FUNGHINI, 28 November 1990, in *SRR Dec.*, 82 (1990), pp. 813-822; also published in *EIC*, 49 (1993), pp. 262-266. The references to this sentence are from *Decisiones*.

⁸² *Ibid.*, 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."

the respondent. The petitioner saw the respondent only on the engagement day, that was 15 days before the wedding.

The petitioner had absolutely no knowledge of the respondent's pregnancy. One month after the wedding, the respondent informed the petitioner's mother that she was pregnant. 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 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'," ⁸³ in his evaluation of the facts there is little consideration given to this aspect. 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. The rotal decision was negative.

⁸³ *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.

2.8 - Procreative capacity⁸⁴

The marriage case judged *coram* Stankiewicz on 13 December 1990,⁸⁵ was celebrated on 11 November 1973 according to the Syro-Malabar rite.⁸⁶ The married life was peaceful for a brief period following the wedding. But when it was found out that the woman could not become 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 on the basis of error of quality.⁸⁷

The first instance decision 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."⁸⁸ The appeal tribunal overturned this decision.

⁸⁴ There have been several rotal sentences on this issue: c. POMPEDDA, 28 October 1988, in *SRR Dec.*, 80 (1988), pp. 599-603; c. DE LANVERSIN, 15 June 1989, in *ibid.*, 81 (1989), pp. 423-435; c. COLAGIOVANNI, 23 October 1990, in *ibid.*, 82 (1990), pp. 702-714; c. STANKIEWICZ, 13 December 1990, in *ibid.*, 82 (1990), pp. 847-855; c. PALESTRO, 22 May 1991, in *ibid.*, 83 (1991), pp. 314-330; c. RAGNI, 27 April 1993, in *ibid.*, 85 (1993), pp. 288-306; c. POMPEDDA, 3 May 1993, in *ibid.*, 85 (1993), pp. 361-367; c. DE LANVERSIN, 7 July 1993, in *ibid.*, 85 (1991), pp. 534-545; c. GIANNECCHINI, 4 March 1994, in *ibid.*, 86 (1994), pp. 134-143; c. BRUNO, 17 June 1994, in *ibid.*, 86 (1994), pp. 337-344 (*normal sexual life and procreative capacity*); c. COLAGIOVANNI, 12 July 1994, in *ME*, 121 (1996), pp. 214-224; c. DEFILIPPI, 17 February 1995, in *SRR Dec.*, 87 (1995), pp. 135-148.

⁸⁵ See *SRR Dec.*, 82 (1990), pp. 847-855.

⁸⁶ This marriage was celebrated in 1973, long before the new oriental Code (CCEO) was promulgated. In c. 74, §2, 1^o 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.

⁸⁷ c. STANKIEWICZ, 13 December 1990, p. 848.

⁸⁸ *Ibid.*

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, because it had overturned the preceding sentence without submitting the case to an ordinary examination.⁸⁹ The rotal *turnus* went on to confirm by decree the first instance affirmative decision.

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."⁹⁰ 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.

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'.⁹¹ 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."⁹²

⁸⁹ For a brief discussion of this issue in Stankiewicz's sentence, see A. MENDONÇA, "Recent Rotal Jurisprudence from a Sociocultural Perspective," in *Studia canonica*, 29 (1995), pp. 331-335.

⁹⁰ *Ibid.*, p. 853.

⁹¹ *Ibid.* (emphasis added).

⁹² *Ibid.*

2.9 - Religious Belief⁹³

On 25 October 1996 a marriage case from Prague (Ceská Republika) was judged *coram* Serrano in third instance. The first instance court of Prague pronounced an affirmative decision on both grounds of invalidity proposed by the petitioner, namely deceit (*dolus*) perpetrated on him by the respondent woman and error of quality on his part. The petitioner alleged that the respondent tricked him into marrying her by "simulating pregnancy" and that he had directly and principally intended to marry a woman who had "religious [catholic] belief." The appeal tribunal of Olomouc overturned that decision *in toto*.

In his sentence, Serrano first addresses the question concerning the nature of c. 1098 of CIC/83 (CCEO c. 821) and its retroactivity. He candidly admits: "Insofar as *dolus* is concerned, in view of the divergence of opinions still raging, it will not be easy to offer a response without serious discussion on the matter."⁹⁴ He correctly states that the opinions of authors are divided on this issue, while some argue in favour of its natural law origin because it concerns the very substance of marriage and freedom of choice, others contend that because the effect of *dolus* on matrimonial consent is only indirect, c. 1098 (CCEO c. 821) is only of positive ecclesiastical law.⁹⁵ His own opinion,⁹⁶ which he has expressed more than once before,⁹⁷ supports the position that the principle of c. 1098 (CCEO c. 821) is of natural law, and therefore, it is retroactive.⁹⁸ But he agrees with Pompedda's argument that, because of the serious difference of opinion on this issue, there is *dubium iuris*, which implies that until the doubt is resolved one must uphold the validity of marriage in a concrete case (cf. c. 1060; CCEO c. 779). Serrano cites the

⁹³ See decision c. SERRANO, 25 October 1996, in *SRR Dec.*, 88 (1996), pp. 649-656.

⁹⁴ "Ad dolum quod attinet, fervente adhuc opinionum divergentia, non facile erit de re indiscussum responsum dare" (*ibid.*, p. 650).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, p. 651.

⁹⁷ See his sentence of 28 May 1982, in *SRR Dec.*, 74 (1982), pp. 308-325, especially pp. 314, 319.

⁹⁸ See c. SERRANO, 25 October 1996, p. 651.

following statement of Pompedda expressed in his decree of 26 July 1996:

The prevalent opinion existing in Our Tribunal, which supports the non-retroactive nature of the prescript of the canon, although not without merit, and in view of a deeper review of the matter and a more appropriate assessment of the philosophical doctrine concerning consent, some maintained that the precept of the canon pertains to natural law and, therefore, it must be applied even to marriages celebrated before the promulgation of the Code. But if *dolus* is considered together with error, which is the presupposition and foundation of deceit, there is no doubt that deceit involving substantial error invalidates consent by the very nature of the thing.⁹⁹

Two distinct principles are contained in this statement: First, according to Pompedda, the prevalent rotal jurisprudence seems to favour the opinion that the ground of *dolus* as stated in c. 1098 (CCEO c. 821) is of positive ecclesiastical law. But he admits that the opposing view is not without merit, and this implies that there is *dubium iuris* concerning this matter. Second, the principle of substantial error mentioned in c. 126 (CCEO c. 933), which is applied to marriage consent in c. 1097, §2 (CCEO c. 820, §2), is of natural law and invalidates consent by virtue of natural law itself. In this case, the juridic effect is the same whether the substantial error is induced by deceit or by some other factor. As long as the presence of substantial error is proved with moral certainty to have been involved in a particular marriage consent, its source is of no juridic concern, although it could probably strengthen the argument.

In this case, there was clear evidence of simulated pregnancy on the respondent's part. But because the marriage was celebrated on 26 April 1973, long before the 1983 Code came into effect, the

⁹⁹ "Praevalens quidem exstitit opinio apud Norstrum Forum de non antecessione praescripti canonis, etsi non immerito, re altius spectata et in dogmate consensus aptius perpensa, quidam tenuerunt canonis praeceptum spectare ad ius naturale atque ideo attrahendum esse et ad connubia celebrata iam ante novum Codicem promulgatum. Si etenim una cum dolo inspiciatur error, qui est doli praesuppositum atque fundamentum, nemo est qui non videat dolum secumferentem errorem substantialem ipsa rei natura inficere consensu" (c. POMPEDDA, 26 July 1996, in *SRR Dec.*, 88 [1996], p. 583).

turnus coram Serrano concluded that, even though all available proofs supported the fact of deceit, the principle of c. 1098 (CCEO c. 821) could not be applied to the case because of the *dubium iuris* and in virtue of c. 1060 (CCEO c. 779). But the *turnus* unequivocally stated that the substantial error caused by deceit could be considered under c. 1097, §2 (CCEO c. 820, §2).

The petitioner alleged that, besides simulation of pregnancy on the respondent's part, he wanted to marry a person who shared his faith. It was precisely for this reason that the respondent received baptism prior to marriage. Although the respondent went to church and prayed with the petitioner for a while at the beginning, she stopped all that shortly thereafter. As the sentence concludes, she remained "an atheist at heart."¹⁰⁰ Therefore, the decision of the court was affirmative on grounds of error of quality of the person of the woman respondent.

2.10 - Pregnancy¹⁰¹

Another marriage case also from Prague judged *coram* Faltin on 30 October 1996 presents a legal scenario similar to the one discussed above. Just prior to the wedding, the respondent woman unexpectedly announced to the petitioner that she was pregnant, but without furnishing any explanation of the fact, or any report from a gynaecologist about the fact of her pregnancy.

Moved by a sense of responsibility, the petitioner promised to marry her. But two weeks before the wedding, when in fact everything had been prepared for the wedding, the mother of the respondent suddenly announced to the petitioner that the respondent had a miscarriage.

The wedding was celebrated on 19 September 1975. In the course of their brief common life, the woman admitted to the man that she had never been pregnant before the marriage, and there-

¹⁰⁰ Ibid., p. 654.

¹⁰¹ See c. FALTIN, 30 October 1996, in *SRR Dec.*, pp. 671-679, also published in *ME*, 122 (1997), pp. 176-187.

fore, she did not have an abortion then. The marriage eventually ended in civil divorce.

On 7 February 1979, the petitioner submitted a petition to the Interdiocesan Tribunal of Prague, requesting a declaration of nullity of his marriage on the ground of error of quality amounting to error of the person. By its decree of 14 January 1980, the tribunal rejected that petition. The Appeal Tribunal of Olomouc confirmed this rejection by its decree of 11 April 1980.

On 19 September 1990, the petitioner presented a second petition to the Interdiocesan Tribunal of Prague, which the tribunal accepted. And the ground of nullity was "error of quality of the respondent which amounted to error of person." And the decision of the first instance court was affirmative on the stated ground, but the appeal court of Olomouc overturned that decision.

At the Rota the *turnus coram* Faltin formulated the doubt as follows: "Whether there is proof of the nullity of marriage in the case on the ground of error about the quality of the person caused by deceit."

In his sentence, Faltin deals at length with several principles related to canons 1097 (CCEO c. 820) and 1098 (CCEO c. 821).

First, Faltin says that c. 1097, §2 of the 1983 Code is a clearer application of the doctrine and jurisprudence already elaborated under c. 1083, §2, 1^o of the 1917 Code. Therefore, the norm of c. 1097, §2 of the present Code can be applied also to marriages contracted under the former law.

Second, the principle of invalidating error of quality of a person is now universally accepted in rotal jurisprudence. However, one must take note that, according to the allocution of Pope John Paul II to the Roman Rota, 29 January 1993, the quality should not be "frivolous or trivial," when the quality is intended before the person.¹⁰²

¹⁰² Ibid., p. 673.

Third, according to the principles enunciated in law, doctrine and more recent rotal jurisprudence, "substantial error concerning the person whether antecedent or concomitant, vincible or invincible, caused by deceit or without deceit, culpable or inculpable in conformity with the law nature, and not merely according to the disposition of the Church, vitiates consent and renders marriage invalid, and likewise error about a quality of the person ... because it is indeed substantial error about the very person, due to a defect in the mutual consent, invalidates the marriage by law of nature."¹⁰³

Fourth, Faltin agrees with Serrano in regard to the natural law origin of the principle contained in c. 1098 (*CCEO* c. 821). Deceit is a serious matter which is opposed to the very essence of marriage in three ways: "[...] because it strips marriage of truth and sincerity which pertain to it by natural law itself and by divine ordinance; because it illegitimately deprives one of the contractants of freedom by injecting into his or her choice a false prerequisite from which an inappropriate intention is formed; and finally, ... because by deceit the person deceiving, in the exchange of persons in which the matrimonial consent consists, presents a false image of him/herself, that is to say, "an intentional person," who alone can be handed over, totally different from the one, the other party intends to accept."¹⁰⁴

Fifth, Faltin admits that we are dealing with a very difficult case, because there certainly is the causality between the deceitful action on the respondent's part in order to secure the petitioner's consent for marriage as well as the quality directly and principally, although implicitly, intended by the petitioner. Therefore, Faltin

¹⁰³ This is a very important principle stated in a sentence c. PALESTRO, in *SRR Dec.*, 79 (1987), p. 424.

¹⁰⁴ "[...] quia illud destituit veritate illa ac sinceritate, quae eidem competunt ex ipsa lege naturali et ordinatione divina; quia libertate illegitime privat alterutrum ex nubentibus in huiusce electionem immittendo falsum cognitionis praerequisitum ex quo inepta efformatur intentio; et tandem ... quia dolo decipiens in commutatione personarum in quo consensus matrimonialis consistit de se offert fallacem imaginem seu 'personam intentionalem', quae una tradi potest, omnino alienam ab illa, quam alter accipere intendit" (c. SERRANO, 28 May 1982, in *SRR Dec.*, 74 [1982], p. 319).

argues that the legal issue in this case is not deceit *in se* but error of quality induced by deceit:

Moreover, to remove all prudent and reasonable doubt from the centre, the Fathers immediately noted that here we are not dealing with deceit considered in and of itself in accordance with the norm of c. 1098, and not simply with error giving rise to the contract, or with ignorance, and much less with condition, but with error which was caused by deceit.¹⁰⁵

All the evidence in this clearly indicated that, at the time of marriage, the petitioner intended, at least implicitly, to marry the woman who was pregnant. The evidence also confirmed that the respondent certainly was not pregnant at the time of marriage. She only made the petitioner believe that she was really pregnant in order to induce him into marrying her. Her mother also contributed to this deceitful scheme by informing the petitioner that her daughter had a miscarriage just a few days before the wedding. From the available factual evidence, the court concluded that at the time of marriage the petitioner was intending to marry a woman whom he believed to have impregnated, when in fact she never was pregnant. It was all a hoax to trick him into agreeing to marry her. The (implicit) intention on the petitioner's part to marry the woman whom he believed to have impregnated was beyond any reasonable doubt, and the deceitful action on the respondent's part also was equally clear. The judges were convinced that the petitioner was a victim of fraudulently induced error concerning a quality which he had directly and principally intended. He would not have married the respondent if he had known the truth of her non-pregnancy before marriage. This was clearly substantiated not only by the testimonial evidence but also from the way he behaved when he came to know the truth. Therefore, the marriage was declared invalid on the ground of error of quality directly and principally intended by the petitioner.

¹⁰⁵ "Insuper, ad quodcumque prudens ac rationabile dubium de medio tollendum, Patres statim adnotaverunt, hinc non agi de dolo in se et per se considerato, ad normam can. 1098, neque simpliciter de errore dante causam contractui aut ignorantia, eoque minus de condicione, sed de errore dolo causato" (c. FALTIN, 30 October 1996, p. 676).

2.11 – Moral qualities¹⁰⁶

In the marriage case judged *coram* Jarawan on 10 February 1993,¹⁰⁷ the woman petitioner left her husband because “she became certain that Michael [the respondent] was a different man as far as feelings and morality was concerned, from the fiancé she had known and had intended to marry ...”¹⁰⁸ Therefore, she attacked the validity of her marriage on error of quality ground. The first

¹⁰⁶ For sentences on *moral character (qualities)*, see c. JARAWAN, 18 December 1984, in *SRR Dec.*, 76 (1984), pp. 642-646 (*good moral character*); c. DI FELICE, 13 July 1985, in *ibid.*, 77 (1985), pp. 364-372 (*doubtful character, immaturity, inefficient, insecure, etc.*); c. STANKIEWICZ, 19 December 1985, in *ibid.*, 77 (1985), pp. 629-643 (*authentic christian and family life*); c. DAVINO, 26 March 1987, in *ibid.*, 79 (1987), pp. 152-159 (*honesty*); c. BURKE, 23 June 1987, in *ibid.*, pp. 393-397 (*Catholic faith*); c. PALESTRO, 24 June 1987, in *ibid.*, pp. 421-432 (*good character and practising Catholic*); c. HUOT, 24 November 1987, in *ibid.*, pp. 650-663 (*good character and family-oriented*); c. JARAWAN, 30 January 1988, in *ibid.*, 80 (1988), pp. 40-45 (*moral qualities*); c. FUNGHINI, 24 February 1988, in *ibid.*, pp. 139-156 (*moral character, mental stability, honest and religious*); c. DAVINO, 28 April 1988, in *ibid.*, pp. 275-285 (*moral character*); c. FALTIN, 9 May 1989, in *ibid.*, 81 (1989), pp. 333-347 (*maternal support and authority from wife*); c. FUNGHINI, 20 December 1989, in *ibid.*, pp. 775-788 (*profound respect for family and love of children*); c. SERRANO, 1 June 1990, in *ibid.*, 82 (1990), pp. 464-475 (*stable job, moral character, free from alcohol, free from dissolute life, etc.*); c. BRUNO, 26 October 1990, in *ibid.*, pp. 737-744 (*good moral qualities*); c. JARAWAN, 6 February 1991, in *ibid.*, 83 (1991), pp. 76-81 (*good life-companion*); c. STANKIEWICZ, 24 October 1991, in *ibid.*, pp. 670-690 (*human, moral and religious qualities*); c. BRUNO, 18 December 1991, in *ibid.*, 831-843 (*a good mother, good wife, moral and spiritual qualities*); c. JARAWAN, 10 February 1993, in *ibid.*, 85 (1993), pp. 42-46 (*moral character*); c. BOCCAFOLA, 11 March 1993, in *ibid.*, pp. 131-143 (*moral character*); c. STANKIEWICZ, 22 July 1993, in *ibid.*, pp. 590-600 (*moral character*); c. BOCCAFOLA, 27 January 1994, in *ibid.*, 86 (1994), pp. 77-87 (*moral character*); c. CIVILI, 25 March 1994, in *ibid.*, pp. 173-177 (*Catholic faith*); c. FALTIN, 15 June 1994, in *ibid.*, pp. 300-312 (*moral qualities*); c. CIVILI, 7 December 1994, in *ibid.*, pp. 605-618 (*moral character*); c. POMPEDDA, 13 March 1995, in *ibid.*, 87 (1995), pp. 190-199 (*honesty*); c. DE LANVERSIN, 21 June 1995, in *ibid.*, pp. 403-412 (*religious sense, maturity, responsibility towards family, disposition to engage seriously for a foreseeable future*); c. GIANNECCHINI, 15 March 1996, in *ibid.*, 88 (1996), pp. 256-270 (*moral, social and economic qualities*); c. MONIER, 22 March 1996, in *ibid.*, pp. 296-308 (*sincerity, morality, love, desire to establish a true christian family*); c. BURKE, 18 July 1996, in *ibid.*, pp. 532-543 (*honesty, sincerity, fidelity, good character, etc.*); c. POMPEDDA, 15 November 1996, in *ibid.*, pp. 697-715 (*perfect chastity, sincerity, honesty, good fellowship, etc.*).

¹⁰⁷ See *SRR Dec.*, 85 (1993), pp. 42-46.

¹⁰⁸ *Ibid.*, p. 42.

instance decision was affirmative, which was overturned by the appeal court.

The petitioner claimed that she intended to marry someone with excellent and singular “moral qualities,” and she thought that the respondent was endowed with them: “From childhood I had always desired to establish a family like mine, where there would be children, and I was hoping to meet a suitable young man ... The principal qualities which I desired in my future husband were: an affectionate character, gentle, good and above all sincere ... Michael was the one I was searching for: he was very sweet, sincere and affectionate.” She concludes: “If I had not witnessed those qualities, I certainly would not have married him.”¹⁰⁹ The respondent admitted this and the witnesses agreed with it.

The *turnus coram* Jarawan considered the first instance affirmative sentence “too kind and greatly acritical,” while the sentence of the appeal court more conforming with the acts and more critical. The second instance court found the quality intended by the petitioner “very generic,” while c. 1097, §2 demands a precise quality. The rotal *turnus* agreed with this assessment. It argued that the petitioner had known the respondent well enough not to be aware of his qualities. He had forced her to terminate two pre-marital pregnancies and offered marriage, but to be celebrated only through a civil ceremony. The *turnus* wondered how manifest was the honesty, affectionate attention and total attraction of the man toward the girl prior to marriage. Moreover, the petitioner’s behaviour did not confirm her genuine desire for the quality of the respondent, because immediately after discovering the alleged error, she did not terminate the relationship, but rather she tried hard to maintain the relationship.¹¹⁰ In view of these factors, the rotal decision was negative.

3 - Jurisprudence on Proof of Error of Quality

In all probability our tribunals will never be inundated with situations of error of person (c. 1097, §1; *CCEO* c. 820, §1). However,

¹⁰⁹ Ibid., p. 44.

¹¹⁰ Ibid., pp. 45-46.

cases involving error of quality directly and principally intended continue to be judged with relative frequency not only at the Rota but also in local tribunals.

Error is a false judgement, it is a state of a person's mind. Therefore, it is not easily amenable to direct proof. It does not invalidate an act unless it determines the will. For this reason, mere ignorance of the absence of some quality does not suffice, because ignorance presupposes no false knowledge of such an absence.¹¹¹

The proof of error of quality is just as complex and difficult as it is in other defects of consent. The locus of investigation happens to be the mind of the person where the error resides. The judge has to unravel the internal workings of the human mind in order to determine the presence of error at the moment of exchanging consent. This is not an easy task, and the difficulty is compounded by the fact that the quality which is the object of error must have been directly and principally intended in order for it to have invalidating efficacy. The judge has to somehow enter into the mind of the person in error in order to verify these aspects of error of quality.

The object of proof in a case of error of quality is twofold: the *prevalent will* of the person in error and the *quality* that is intended.

In order to determine the presence of *prevalent will*, the judge must investigate the intention of the person in error. It is important to know whether the person in error was simply fixed on the other party who has the quality or his/her will was directed primarily to the quality. There are three methods of proof in this case, namely *direct*, *indirect* and *through presumption*.

The *direct* proof concerns the act of the will. An act of the will may be explicit or implicit. Both doctrine and jurisprudence agree that an *implicit* act of the will is sufficient in a case involving the ground of error of quality. An *implicit* act is not the same as a *presumed* act, for an implicit act remains in the positive order, while a presumed act does not. Although the substance of an implicit act does not directly and immediately appear in the way

¹¹¹ See c. STANKIEWICZ, 22 July 1993, p. 596: "Iamvero mera ignorantia defectus alicuius qualitatis non sufficit, quia nullam falsam cognitionem alicuius defectus praesupponit."

the person acts, nevertheless it is intended really, positively, as if in the "folds" (*in plicis*),¹¹² or "in a general and implicit sense."¹¹³ It is an act of will that is *positive* and not interpretative or presumptive.

The presence of the *prevalent* act of will must be corroborated directly by the judicial or extra-judicial confession of the parties (either before or after the celebration of marriage), and by qualified witnesses, by other declarations of the parties and witnesses, by documents and other circumstances. Jurisprudence provides the following important principle to be followed while evaluating proofs: "One must not stick to the superficial meaning of the words of the one who claims to have erred in regard to a quality, but investigate the disposition with which he/she approached the wedding, all the circumstances and also thoroughly examine his/her particular nature and character."¹¹⁴

The *indirect* proof consists in ascertaining the ignorance of the absence of the desired quality at the time of consent on the part of the person in error, as well as in determining the importance given by the person in error to that quality. The latter can be established by examining the extent of disturbance in the conjugal partnership when the person in error discovers the truth about the quality. Therefore, it is very important to look at the behaviour of the person when he/she found out the truth, whether, for example, he/she left the conjugal home, abandoned the other party, became physically and/or emotionally abusive towards the spouse, etc.¹¹⁵

Presumptions also may aid in proving the error of quality. For example, the value of a specific quality may be so strongly esteemed by a particular cultural or ethnic group that its members may be presumed invariably to cherish that value. That in turn may affect

¹¹² See decision c. PALESTRO, 24 June 1987, in *SRR Dec.*, 79 (1987), pp. 425-426.

¹¹³ See decision c. POMPEDDA, 22 July 1985, in *SRR Dec.*, 77 (1985), p. 401; also see *Ius Ecclesiae*, 1 (1989), p. 565.

¹¹⁴ See decision c. JARAWAN, 18 December 1984, in *SRR Dec.*, 76 (1984), p. 644; c. STANKIEWICZ, 22 July 1993, p. 597.

¹¹⁵ See M. HILBERT, "Error in qualitate personae (C. 1097, §2)," in *Periodica*, 87 (1998), pp. 438-439.

their matrimonial consent. But this being a human presumption, it could be overturned by contrary proof. It may also be possible that in a particular case the contractants were so much in love with each other that the intended quality was not a true issue during their pre-marital relationship. Therefore, if the person who now claims to have been in error concerning a quality at the time of marriage, but had known the absence of the quality and went ahead with the wedding blinded by love, one must conclude that the validity of marriage consent was not subordinated to the presence or absence of that quality. The presumption in this case would be that the person did not consider the quality to be important enough to render his/her consent invalid.¹¹⁶ On the contrary, if the quality in question is very highly esteemed by the person who claims to have intended it directly and principally and was in error concerning the same, then the presumption should be in favour of invalidity of the consent.¹¹⁷

The second object of proof is the *quality* directly and principally intended. According to the 1993 allocution of the Holy Father, "error concerning a quality" can "impugn the consent only when a quality, neither *frivolous nor trivial*" was directly and principally intended. The value of a quality may be determined either objectively or subjectively, as explained above. A quality must be *ex natura rei* relevant to the exercise of the essential rights and duties of marriage. It must be objectively important according to the customs of the place. This importance, therefore, may differ from culture to culture. Some qualities, for example, virginity, fertility, mental health, etc., may not have much significance in some cultures while they are very important in others. Therefore, one must always keep in mind the cultural background of a case while assessing this aspect of the ground of error concerning a quality. As Hilbert says, the more esteemed and valued is the quality in social and familial life, the greater is the possibility that such a quality is directly and principally intended.¹¹⁸ Jurisprudence seems almost unanimous in holding that the quality must be both

¹¹⁶ See c. BRUNO, 18 December 1991, in *SRR Dec.*, 83 (1991), p. 837.

¹¹⁷ See HILBERT, "Error in qualitate personae," p. 439.

¹¹⁸ *Ibid.*, p. 440.

objectively and subjectively serious. Stankiewicz, however, argues that it is sufficient that the quality is serious in the intention of the person in error. The logic of his argument is based on the fact that in case of error of quality directly and principally intended, it is the will that attributes to the quality a value that is important, and the quality of the partner enters into the intention of the person in error amounting to the substance.¹¹⁹ This opinion is in accord with the legal principles so long as the intended quality is neither "frivolous nor trivial" as the Holy Father has explicitly stated.

In his sentence of 13 May 1995,¹²⁰ Pompedda outlines the following concerning proof of error of quality:

First, the existence of error in the contractant's mind must be assessed and proved with suitable arguments in order to establish he/she had intended before marriage to direct his/her consent through a positive act of the will to the quality of his/her partner.

Second, the claim of error cannot be sustained if during the engagement the contractant directly or indirectly receives information concerning the absence of the required quality in the partner, but makes no effort to investigate it, or after the celebration of marriage behaves passively when the truth or the absence of the quality is discovered towards which he/she now claims to have directed his/her consent.

Third, similarly the man is not to be trusted, who alleges that he desired in his future wife a special quality, if soon after their initial encounter, driven by passion, engages in intimate sexual relations with the woman and, thinking he has found the ideal spouse, in haste and immediately proposes marriage to her.¹²¹

On his part Stankiewicz, in his sentence of 12 July 1996, states that the proof of invalidating error of quality may be obtained by carefully considering:

¹¹⁹ See decision *c. STANKIEWICZ*, 28 April 1988, in *SRR Dec.*, 80 (1988), p. 281.

¹²⁰ See *SRR Dec.*, 87 (1995), pp. 190-199.

¹²¹ *Ibid.*, p. 194; also see *c. BRUNO*, 18 December 1991, in *SRR Dec.*, 83 (1991), pp. 836-837.

1) if the contractant, through a positive act of will, explicitly or implicitly, had intended, before the wedding, to direct his/her consent prevalently toward the quality of his/her partner, that is, directly and principally toward the quality, indirectly and subordinately toward the person;

2) if the quality considered in itself is objectively serious, or in the common estimation of the society in which the person lives is regarded as very important, or if the person in error considers it to be of very great personal importance;

3) if the absence of the quality renders the person totally different from the one whom the person in error wanted and desired to marry;

4) if the error can be proved with moral certainty through appropriate arguments, that is, from the depositions of the parties and testimonies of trustworthy witnesses, from documents, if any, as well as from circumstances.¹²²

In case a judge cannot derive moral certitude from the acts and proofs concerning the quality being truly intended, and consequently, about the existence of error, and the doubt cannot be dispelled, then the validity of the marriage in question would enjoy the favour of the law, and it must be upheld.¹²³

E. Colagiovanni offers the final caution on this issue. He says that "it often happens that after the celebration of the marriage, with the onset of new and unexpected circumstances, one demands from the other spouse exceptional qualities and virtues, which he had never thought about before the wedding. Indeed, many do make an error at the time of wedding, but the error, unless it is of the person or about a quality directly intended at the moment of giving consent, does not render the marriage invalid."¹²⁴

¹²² See decision *c. STANKIEWICZ*, 12 July 1996, in *SRR Dec.*, 88 (1996), p. 515; also see *c. BRUNO*, 26 October 1990, in *ibid.*, 82 (1990), p. 737.

¹²³ See *c. POMPEDDA*, 13 May 1995, p. 194; *c. BRUNO*, 18 December 1991, in *SRR Dec.*, 83 (1991), pp. 836-837; also see Lawrence G. WRENN, *The Invalid Marriage*, Washington, DC, Canon Law Society of America, 1998, p. 105.

¹²⁴ See Emilio COLAGIOVANNI, "New (*Hot*) Grounds of Nullity in Marriage Cases," in *ME*, 122 (1997), p. 537.

Conclusion

Right now there seems to be a notable movement in the interpretation of c. 1097 of the present Code (and *CCEO* c. 820). The canonical norms contained in c. 1083 of CIC/17, which provided for the juridical figure of “error of fact” in its diverse aspects, was found practically unworkable. Since the famous sentence of 1970 by Canals, canonical doctrine and jurisprudence have given rise to more challenging and even controversial views on this matter, especially in regard to the notion of “person” mentioned in c. 1097, §1. In its present form, c. 1097 (*CCEO* c. 820) contains two distinct and autonomous grounds of nullity and both grounds have deep historical roots.

The first principle deals with the error concerning the substance of the act, that is, the person of the contractant, a physically distinct human being. If one party is in error concerning the physical identity of the other party, marriage is invalid in virtue of the error *per se* without any consideration of the intention of the person in error. It is the error *per se* which invalidates the consent. The traditional doctrine on the principle of “error of person” requires that the contractant in his/her physical identity, e.g., Cicero, Anthony, etc., *be not visually known* to the other contractant in order to invalidate consent. This requirement seems to have been fundamental to the interpretation and application of the figure of “error of person.” It was probably this requirement that had closed the doors to any consideration of the moral, ethical, social and juridical qualities as capable of juridically defining or individuating the person of the contractant under canon 1083, §1 of the 1917 Code. The more recent developments in the thinking of some rotal Auditors seem to have called into question such a restrictive traditional approach to the interpretation of the principle of “error in persona.”

The sentence of Defilippi and those of some other rotal Auditors, which have followed a similar line of thinking,¹²⁵ have raised the possibility as well as the legitimacy of adopting the

¹²⁵ Villeggiante reports some recent rotal sentences purportedly supporting such an approach. See VILLEGGIANTE, “L’error in persona,” pp. 533-536, 542-547.

broader notion of "person" defined or individuated not solely by physical but rather by moral, juridical, ethical, and social qualities, in interpreting the meaning of "error of person" of c. 1097, §1 (*CCEO* c. 820, §1). This would significantly widen the scope of the ground of nullity implied in the said canon. Such an expanded interpretation of the notion of "person," however, raises the serious question whether it is in conformity with the mind of the legislator expressed in the papal allocution of 1993 and with the common doctrine and jurisprudence.

The ground of "error redundans" is no longer expressly stated in the revised Code. The strict sanchesian interpretation of this principle allowed only "personal" and "individuating" qualities to constitute such an error. Because this principle has now been abrogated or integrally reordered in the revised Code, canonical doctrine seems to hold that it could still be operative within the scope of c. 126 (*CCEO* c. 933). Because the error concerning a personal and individuating quality of a contractant would amount to error of substance (person), it would invalidate consent in virtue of the first general principle of c. 126 (*CCEO* c. 933). In this case even if the individual is physically known, he/she could still be unknown to the other person in his/her personal and individuating qualities, which are per se substantial and are intended by the other person. According to Navarrete, therefore, cases which might involve "personal and individuating" qualities may be legitimately judged under the ground of "error of person" of c. 1097, §1 of the present Code (*CCEO* c. 820, §1). Personal and individuating qualities are those which are intrinsic to a person and are contradistinguished from common qualities. And such personally individuating qualities can, in my opinion, include those qualities which can be "objectively" considered "substantial." Then the error concerning such "substantial" qualities can be included within the concept of "substance" (the object with its inherently essential qualities) mentioned in c. 126 (*CCEO* c. 933) and legitimately applied to c. 1097, §1 (*CCEO* c. 820, §1). But if the approach adopted by Defilippi and others is tenable, then "error redundans" understood in its extended meaning would seem totally irrelevant to our discussion.

The second principle concerns a *common* quality which enters into the juridical act as its substantial object through the intention

of the agent. In other words, through an implicit will of the agent, the common quality, which is accidental in nature, assumes a substantial value. This is expressed in terms of “error of quality directly and principally intended.” To have invalidating efficacy, the error must exist in the mind of the agent at the time of manifesting consent, the person must be unaware of the absence of the quality desired, the quality must be objectively and/or subjectively serious, and it must be intended, at least implicitly, directly and principally. Because interpretative and presumed intentions do not exist in the mind of the contractant at the time of exchanging consent, they have no juridical relevance. The principle of “error of quality directly and principally intended,” interpreted in light of c. 126 (*CCEO* c. 933), could be used as a valuable tool in evaluating many of the marriages which might lack juridic efficacy precisely on the basis of this ground. The general principle contained in c. 126 (*CCEO* c. 933), understood in light of new developments in doctrine and jurisprudence, seems to offer a much wider scope for the application of c.1097, §2 (*CCEO* c. 820, §2). However, the same concerns expressed above in regard to the relevance of “error redundans” could be raised also concerning this principle if what the recent rotal sentences propose in respect to the notion of “person” is considered legitimate! □