

Void and Voidable Marriages in Church Legislation

A. N. DACANAY, S.J.

This study will have two unequal parts. The first will deal with the concept of voidability: while there is such a thing as a voidable juridical act in canon law, there are no voidable marriages. The second will examine possible options in the matter of void marriages: one option is their validation; another, to have them declared null by a competent ecclesiastical tribunal. In connection with this second option, some introductory comments will be made relative to the canonical origins of Art. 36 of the Philippine Family Code, that is, can.1095 §§2-3, more commonly known as lack of due discretion and inability to assume the essential obligations of marriage, respectively.

I. VOID MARRIAGES

“Voidable” does not mean “void” because otherwise there would be no sense in the distinction between void and voidable marriages in articles 36 and 45 respectively of the Philippine Family Code. Voidable means that it is not void from the very beginning but that it could be made void, *ab initio* and retroactively, not *ex nunc* but *ex tunc*.

So understood, voidability of a juridical act exists in canon law. Two examples are in order to illustrate the point:

(a) Can.125 § 2: A juridical act placed because of grave fear or fraud is valid unless otherwise is provided for by law. The general principle in Church law is that fear and fraud do not have invalidating effects on a juridical act, except if otherwise is provided for by law. Two examples of this “otherwise provided for by law” are marriage and entrance to religious life. Can.1098 is about fraud in marriage;

can.1103 on fear likewise in marriage. In both cases of fear and fraud, marriage is invalid. In a similar manner, can.643 §1.4 determines that a person who enters the novitiate or is accepted into it by reason of fear, force, or deceit is invalidly accepted. These three canons are instances of exception to the general principle enuntiated in can.125 § 2. Outside of these two exceptions, and others specified in the law, a juridical act posited as a result of fear and fraud is valid, although rescindible, that is to say, that such an act could be voided by an act of the judge.

(b) A second example of a voidable juridical act is spelled out in can. 126: an act that is placed because of ignorance or error is valid unless the error is about an element which constitutes its substance or which amounts to a *sine qua non* condition, in which case the error or ignorance would be invalidating. An application of can.126—when the error is about the substance of an act, or about a *sine qua non* condition— is the first and second paragraphs of can.1097.

Voidability then exists in canon law. But are there voidable marriages? Perhaps a good point of departure is the constant tradition in the Church that only sacramental and consummated marriages are absolutely indissoluble (can.1131). Any other kind of marriage could be dissolved under one circumstance or another.¹

We can discern at least three kinds of marriages that can be dissolved and the three mechanisms used in the dissolution of such marriages:

a. *Non-Consummated Marriage*. Can.1142 refers to the *super rato* cases, the dissolution of sacramental but non-consummated marriages. Without going into the theological details of the debate

¹ Cf. Can.1141: A ratified and consummated marriage cannot be dissolved by any human power or for any reason other than death. According to St Albert the Great (*De Matrimonio*, 164) and Bonaventure (*In IV Sententiarum*, L4, D27, A3, Q1), the absolute indissolubility of a sacramental marriage is premised on and derived from the fact it is a sign of an indissoluble reality. On the basis of this, St. Bonaventure takes the further step of distinguishing between the indissolubility proper to a *ratum tantum* and a *ratum et consummatum* marriage. Along similar lines, Aquinas collocates the inseparability of marriage with the *bonum sacramenti* rather than with the *bonum prolis*, although he admits that in the order of nature, inseparability would be ordered more towards the good of the children (*In IV Sententiarum*, L4, D33, Q2, A1). For a fuller presentation of the question, cf, A.N. Dacanay SJ, *Marriage: Contract and/or Sacrament? The Meaning of Matrimonium Ratum*. (Quezon City: Loyola School of Theology, 1991), pp. 180-181.

which could be a real "black hole" from which we may not be able to emerge alive, suffice it to affirm the following points from classical theologians: [a] The reason why consummated sacramental marriages are absolutely indissoluble is because of their significance or sacramental function; they signify the indissoluble union between Christ and the Church, or sometime the union of the divine and human natures in Christ —both images underline the indissolubility. [b] The non-consummated sacramental marriage signify either the union of the just soul with God, a union however that can be ruptured by sin, and therefore the dissolubility of such a union which is a symbol of a dissoluble reality.² [c] A non sacramental marriage is therefore, in principle, dissoluble because, as St Bonaventure says, such marriage does not actually signify this reality but is merely disposed to and capable of being transformed into an explicit sign of this sacred reality.³

b. *Pauline Privilege*. This is treated in cc.1143-1147 and is based on the statement of Paul in 1 Cor 7, 15. By means of this mechanism, a natural marriage, which has been contracted when both parties were still infidels, can be dissolved by the subsequent marriage of the party who converts.⁴

c. *Petrine Privilege*. The so-called "petrine privilege" was used in general to deal with cases that could not be dealt with by the Pauline privilege, namely, the marriage of two unbaptized persons neither of whom converts and the marriage of two persons one of whom is baptized while the other remains unbaptized.⁵ This was originally formulated in a proposed canon for the 1983 Code in the following

² Thomas Aquinas, *In IV Sententiarum*, D.27, Q.1, A.3, *Quaestiones* 3.

³ Bonaventure, *In IV Sententiarum*, D.39, A.1, Q.2.

⁴ The details of the doctrine and practice of the Church as regards the Pauline Privilege is enormous. A basic introduction can be found the following: Navarrete, "Privilegio de la Fe: Constituciones Pastorales del Siglo XVI. Evolución Posterior de la Práctica de la Iglesia es la Disolución del Matrimonio de Infieles" in Barberena (ed), *El Vínculo Matrimonial* (Madrid: BAC, 1973), 239-304; W. Woestman, *Special Marriage Cases* (Ottawa: St Paul University, 1990), 35-54; Arendt, "La Tradizione Cattolica in Favore del Privilegio Paulino nel Coniuge Infidele Battezzato in una Setta Acattolica" *Gregorianum* 4 (1923), 241-354; J. O'Rourke, "The Faith Required for the Privilege of the Faith Dispensations" *The Jurist* 36 (1976), 450ff.

⁵ Pius XII had referred to these in his address to the Roman Rota of 3 Oct 1941, published in *AAS* 33 (1941), 421-426. An English translation can be found in *CLD*

manner: "A marriage entered by parties, at least one of whom was unbaptized, can be dissolved by the Roman Pontiff in favor of the faith, provided the marriage has not been consummated after both parties were baptized." The disappearance of the proposed canons from the Code created something of a stir, raising the question whether it meant that dissolutions in virtue of the petrine privilege were no longer to be granted. The Congregation for the Doctrine of Faith clarified that:

The fact that the canons on the Favor of the Faith, foreseen in the preparatory edition of the Code, are not found in the revised Code, does not mean that the norms of the Sacred Congregation are to be considered lapsed. They maintain their force entirely.⁶

Therefore, the force of the norms issued by the same Congregation in its instruction "*Ut notum est*" dated 6 Dec 1973, remains.⁷ The practice goes on, more or less as it has since 1924 although, as it was since then too, the Code makes no mention of it.

But these three kinds of marriages are *dissolved*, not *voided*! In other words, these mechanisms and the theories of which they are applications, say that there did exist a bond which is herewith being dissolved and terminated. The effective act proceed *ex nunc* not *extunc*, from this moment onwards only and not retroacted to the moment of contract. In other words, while certain juridical acts can be voided, as we endeavored to demonstrate supra, the category of voidable marriages does not exist. There is no such a thing as a voidable marriage in canon law. Marriage is either valid or invalid, and this has reference only and exclusively to the moment of contract. If it is invalid, it can either be validated or can be declared to be so. If it is valid, it can be

2, 457-458. The term "petrine privilege" [to distinguish it from the pauline], was controverted. The term was introduced by F. Hurth SJ in a two part article, the first part of which ("*Notae Quaedam ad Privilegium Petrinum*") was published in *Periodica* 45 (1956), 3-22. There are those who object to the use of the terminology [cf. U. Navarrete, "De Termino *Privilegium Petrinum* non Adhibendo", *Periodica* 53 (1964), 336 and ff; H Grenier, "Can We Still Speak of the Petrine Privilege?", *The Jurist* 39 (1979), 158-162]. Lawrence Wrenn recognizes the convenience of the term ("reasonably accurate and extremely useful" he says), cf. L G Wrenn, *Procedures* (Washington DC: Canon Law Society of America, 1987), 114-120.

⁶ The letter of Archbishop Hamer [6 Sept 1983], in L. Wrenn, *Processes* (Washington DC: Canon Law Society of America, 1987), 120.

⁷ An English translation is published in *CLD* 8, 1177-44.

dissolved as in the three cases mentioned, unless it is a sacramental consummated marriage in which case it cannot be dissolved.

II. VOID MARRIAGES

Void marriages are invalid from the very beginning, the matrimonial bond never existed even if there may have been the appearance of a valid marriage. In general, the legislation of the Church and the jurisprudence of her tribunals contemplate three general grounds on which the validity of a marriage can be challenged:

- *The presence of an impediment.* Impediments are conditions or circumstances either of the spouses in themselves [disparity of cult, orders, vows, age, etc] or the spouses relative to each other [consanguinity, affinity, public propriety], defined by law, which render the persons incapable of contracting marriage. Some of these impediments derive from divine or natural law, and they are therefore non-dispensable; or they may derive their origin from positive law in which case they can be dispensed;

- *defect of consent* —when the consent is either non-existent or defective —a point which we will go into in greater detail infra; and

- *defect of form* —when an element of the solemnities required by law is missing.

As a result of these causes, a marriage is invalid but it could either be irremediably or remedially invalid, *insanabile* or *sanabile*. It is on the basis of this distinction that the institution of validation in the Church, particularly the *sanatio in radice* of can.1162ff., is based.

Under this rubric —void marriages— two points should be addressed, which correspond to what one could do with a void marriage, either have it validated or declared null: (1) the validation of void marriages; (2) the declaration of nullity. Both features are familiar to canon law. Regarding the latter, mention will have to be made of the ecclesiastical origins of Art. 36 of the Philippine Family Code.

1. The Validation of Void or Invalid Marriages

Certain authors in the past held the theory that consent is not possible —not only null or invalid but inexistent [*pro infecto habetur*]—

without the proper object of consent.⁸ For example, Sanchez taught that a marriage which was invalid because of a prior bond or orders, could not be validated unless both parties renewed their consent.⁹ His argument was that the prior consent from both parties was nonexistent because it was a consent to an unsuitable matter. In other words, the existence of the consent did not only depend on the intrinsic act of consenting itself but it also depended on the object of the consent. If the object of the consent was not suitable, then the consent was considered not to have been elicited at all. It would seem that the doctrine of Sanchez was that the concept of consent included, as its constitutive element, not only the act of consenting itself, which is an act immanent in a person, but also the object to which the consent was directed.

Let us apply this principle to the convalidation of marriages. With the possible exception of a marriage that is invalid by reason of defective form, the consent in all invalid marriages would have to be considered *inexistent*, because it would be a consent to unsuitable matter. And therefore every validation of marriage would always and in every case require the renewal of consent. That is to say, there can be no *sanatio in radice*, which does not require the renewal of consent since it is predicated on the fact that the consent is presumed to endure. A consent that did not exist cannot be said to endure! In the context of such a theory, validation, as contemplated by the Code, would not be possible, not even in the case where the nullity of the marriage is due to an impediment of ecclesiastical law unknown to the contracting parties. There would be no such a thing as a "naturally valid" consent.

But, as a matter of fact, the practice and the jurisprudence of the Church has indicated two strands of development away from this theory of Sanchez.

As regards the impediments of Church law, this theory was abandoned around the middle of the 18th century, when convalidations *in radice* were granted by the Holy See, with the effect of validating the

⁸ Cf. L. Rodrigo, "De relatione inter matrimonii nullitatem et nullitatem consensus matrimonialis philosophico-juridica relectio", *Miscellanea Commillas* 4 (1946), 64.

⁹ Sanchez, L2, D32, N2; cf. also Russell, *The "Sanatio in Radice" before the Council of Trent* (Rome, 1964), 98-99.

matrimonial bond without renewal of consent. By the time of the codification of the law of the Church in 1917, the doctrine had sufficiently matured and the practice constant that the "*sanatio in radice*" without any renovation of consent, as well as the simple convalidation with the renovation of consent of only one of the pseudo-spouses, could already be legislated in the Code.¹⁰ The practice of the Church, as embodied by the Code, seems to deny Sanchez' theory, according to which the matrimonial consent to inappropriate object is non-existent. What the practice of the Church affirmed in effect was that a consent naturally sufficient to bring about marriage can co-exist with a marriage that is *de facto* invalid due to some obstacle that is extrinsic to the consent itself. Otherwise the Church would not be able to validate such a marriage without renewal of consent, or to permit the validation of a marriage by requiring only the renewal of consent of one of the parties. In other words, a naturally valid consent can exist even if it should be directed towards an inappropriate object, provided the object is inappropriate because of conditions imposed by positive church law.

As regards the impediments of divine law, Sanchez's theory continued to be held even up to the beginning of the 20th century, thus influencing the formulation of can.1139 of the 1917 Code.¹¹ The old Code determined that the Church did not grant *sanatio in radice* to marriages invalidly contracted because of an impediment of divine or natural law, not even after the impediments have ceased.

In 1904, the Holy Office ordered an study on the question whether or not a marriage contracted with an impediment of natural law or divine law could be sanated.¹² The result of the consultation was that such a marriage "cannot be given a *sanatio in radice*." The reason adduced was that there can be no matrimonial consent if the marriage is invalid by reason of a diriment impediment of natural or divine law.¹³ As a result of this study lead by Gasparri, can. 1139 §2 of the 1917 Code stated that the Church does not sanate such marriages. There was no distinction made—we can now say with the benefit of hindsight—between the act of consent itself, strictly speaking, and the object of

¹⁰ Cf. Cc. 1133 and 1138.

¹¹ Gasparri, *Tractatus Canonici de Matrimonio*, 2nd ed. (Rome 1932), no. 1217.

¹² For the details, cf Gasparri, *Fontes Juris Canonici*, vol. IV, doc. no. 1270.

¹³ Gasparri, *Tractatus Canonici de Matrimonio*, 2nd ed., Rome, 1932, no. 1217.

consent. With the possible exception of a marriage rendered invalid because of defect of form, any invalidating cause would have the effect, ultimately, of rendering the consent not only juridically ineffective but inexistent. That was the very same reason adduced by canonists and authors of the 18th and 19th centuries why there could be no *sanatio in radice*.¹⁴ We are dealing therefore with a remnant of Sanchez's theory, which is however limited to the impediments of divine and natural law.¹⁵

The 1917 Code did not allow the validation of marriages invalidly contracted because of impediments of natural or divine law, even after the impediments had ceased (cf. can. 1139 §2). From the formulation of the canon, however, it was not that the Church *couldn't* validate such marriages, but simply that the Church *didn't* do it—a description of the praxis rather than an enunciation of doctrine. In fact, even during the effectivity of that Code, the Church granted *sanatio in radice*!¹⁶

This practice of the Church implies for us at least two things:

(1) That the theory of Sanchez had already been abandoned even in the area of impediments of divine law. The Church, by its practice,

¹⁴ This is an observation that was made by R. Quezada in his dissertation, *La Perseverancia del Consentimiento Matrimonial en la "Sanatio in Radice"* (Roma, 1962), p. 34, note 11.

¹⁵ There were already authors who were dissatisfied with the logical consistency of this position even then. In spite of the eminently clear response of the Holy Office of 1904, Wernz for example, in the second edition of his work in 1912 has a note where he openly proposes a contrary opinion without any mention of the response of the Holy Office which he was obviously aware of. "*Aliqui putant ex ipso jure naturali requiri renovationem consensus propter singularem efficaciam quam exercet impedimentum juris divini in ipsum consensum. Nam non obstante ligaminis impedimento consensus naturalis existere potest qui tamdiu manet quamdiu non vere fuit revocatus; remoto igitur impedimento ligaminis ex natura rei nihil amplius obstat, quominus consensus ille etiam fiat efficax sive vim juridicam habeat ad efficiendum vinculum matrimoniale. Quare in suppositione facta, non habetur impedimentum ex defectu consensus velut in impedimento erroris...sed consensus habet in se omnia elementa constitutiva, et sola deestabilitas personarum...*" (*Jus Decretalium* vol. IV/2, no. 650, p. 550, nota 8).

¹⁶ The explanation is that C.1139.2 is not an enunciation of doctrine but an affirmation of a norm of practice. Cf. U. Navarrete, "Ecclesia sanat in radice matrimonium initum cum impedimento juris divini", *Periodica* 52 (1963), 348-349. At least two cases have been reported of a *sanatio in radice* of marriages invalidly contracted because of impediments of divine law. Cf. *The Jurist* 20 (1960), 79; Gasparri, *Tractatus Canonici de Matrimonio* [2nd ed] (Roma, 1932), no. 1219.

accepts the theory that there can be a naturally sufficient consent, even if the validity of the marriage is vitiated by some impediment. From the fact that the Church validates a marriage contracted with an impediment of divine law, after the impediment has ceased, without requiring any renovation of consent, it follows with ineluctable logic that the Church acknowledges that it is possible to posit a naturally sufficient consent, even if the causality of such a consent may be frustrated by an impediment.

(2) A recognition that a naturally sufficient consent can exist even if there is no real "matrimonial object." This is to say that it is entirely conceivable that an act of consent, perfect and naturally sufficient in its essential and constitutive elements, can exist and yet not be able to produce its effect, namely, the matrimonial bond. This is the hypothesis on which the entire insitution of *sanatio in radice* is founded. The reason why a marriage can be sanated, even without the renewal of consent, and even if the parties are unaware, is because there is a perduring consent which alone is the efficient cause of marriage and which no human power can supply. One can hardly say that the consent perduced if it did not exist in the first place!

As regards the conditions for the validation of a marriage cc.1162-1163 enumerate the principal ones:

- the marriage must have been contracted or celebrated in some [public] manner;
- a naturally sufficient consent must have been given and such a consent must perdure;
- the naturally sufficient consent is juridically ineffective on account of an impediment or a defect of form;
- there must be legitimate cause since it involves a dispensation from the general law, although this is not expressly mentioned here.

With regards to the first condition, it was not until the Council of Trent that some canonical form was required for the validity of marriage. True, on the level of principle, it is enough for a marriage validation that a naturally sufficient consent had been given in some way —for after all this is the one efficient cause of marriage. However, given the public character of marriage, validation is not granted unless the consent has been expressed in some public manner, provable in the external forum.

However, the current practice of the Church indicates that, for the purposes of granting sanation, it is not always required that the marriage to be sanated had to have been an "invalid" marriage in the strict technical and juridical sense. The Church has granted *sanatio in radice* to marriages that were only civilly contracted,¹⁷ or were contracted before a non-catholic minister by those who were bound to observe the canonical form. We make our own the following observations of Navarrete:

Although it is not a frequent occurrence, a marriage can be validated even if it was not celebrated at all, if the pseudo-spouses are in possession of the conjugal state, provided they have manifested in some external way a real matrimonial consent. A concubinage can then be sanated, provided the other conditions are present. This practice of the Church indicates that she acknowledges the presence, even in marriages that were civilly contracted by those who were bound to observe the canonical form, of all the elements naturally presupposed in a marriage, and therefore in its convalidation, specifically a consent that is naturally sufficient to give rise to marriage—even if it did not actually produce that juridical effect because of causes extrinsic to the consent itself.¹⁸

On the supposition proposed by Navarrete and for the reasons adduced by him, and based also on the ground that the Church has actually granted validations of such marriages, we dissent, *salvo meliore iudicio*, from the opinion held by some quarters that a *sanatio* cannot be given to civil marriages of Catholics because such marriages were not just invalid but *inexistent* [*pro infecto habetur*], as it were.¹⁹

¹⁷ A case is reported by Ochoa of a civilly contracted marriage that was sanated in the internal forum through the Sacred Penitentiary dated 16 Feb 1951, in *Leges Ecclesiae*, II, document no. 2258, col. 2948.

¹⁸ "Ut notum est, ecclesia... sanat in radice matrimonia quae dicuntur civilia si nullum impedimentum juris divini momento celebrationis obstat eorum validitati. Nunc etiam cognoscitur casus sanationis in radice matrimonii civilis initi cum impedimento juris divini. Haec praxis supponit ecclesiam agnoscere in matrimonio civiliter inito omnia praesupposita naturaliter necessaria ad matrimonium sanandum, signanter consensum naturaliter sufficientem ad matrimonium causandum." U. Navarrete, "Ecclesia sanat in radice matrimonia inita cum impedimento juris divini", *Periodica* 52 (1963), 375.

¹⁹ Cf. for example the position of Excelso García OP, "Civil Marriages of Catholics," *Boletín Ecclesiástico de Filipinas* 68 (1991), 87-94.

2. The Declaration of Nullity

We had mentioned previously that an invalid marriage can either be validated, or have it declared null. Let us turn our attention on this second alternative.

Today, the most common ground on which the validity of a marriage is challenged is what is called psychological incapacity in Art. 36 of the Philippine Family Code, a ground that actually encroaches upon and embraces two autonomous grounds in canon law, namely: the lack of due discretion and the incapacity to assume the essential obligations of marriage, the hypotheses contemplated by the second and third paragraphs of can.1095.

(a) The Lack of Due Discretion (can. 1095 §2)

Under this rubric four general headings can be addressed, though only in a summary fashion, namely: (1) the meaning of due discretion; (2) the object of this discretion; (3) the "sources" of the lack of due discretion; and (4) some behavioral symptoms.

1. The Meaning of Due Discretion

Due discretion can be described as poor judgement, when one is unable to see realistically the implications and the trail of consequences of one's action or decision. The lack of due discretion must be collocated in the context of the psychological process of decision-making. Within this process, it refers to the practical judgement component, and in this sense it is therefore "intellective," which is however not to be understood simply as theoretical knowledge or some kind of an academic exercise. In contradistinction, for example, with the other common ground of incapacity to assume the obligations of marriage, the latter ground involves no difficulty in the decision making process; the problem lies elsewhere, namely, in the capacity to carry out the obligations.

The lack of due discretion is not so much the lack of capacity to contract marriage, as the incapacity to bind oneself to the rights and obligations of marriage. The situation contemplated therefore is one in which human acts in general are possible but the special human act of binding oneself "maritally" is not possible because of some distortion of judgement or diminution of freedom relative to the particular act of

marital consent. There was a time when the due discretion required by marital consent was somehow linked to the level of maturity required for moral culpability, the so-called "mortal sin" criterion. The argument run that when one is old enough to commit a mortal sin—at least as "mortal sin" was then understood—he/she should also be old enough to give consent to marriage.²⁰ While, admittedly, moral imputability is linked with a degree of responsibility, the projection into the future which marriage demands calls for a much higher degree of responsibility or maturity. In any case, no further reference to the "mortal sin" criterion has been made after that of *coram Parillo* [16 February 1928].

The first approaches towards this jurisprudence on the extent and gravity of various psychiatric/psychological conditions which may affect a person's capacity to give marital consent appeared in 1941 in a decision *coram Wynen*, an approach that received encouragement from Pius XII, in his address that same year to the auditors of the Rota. He noted that progress in the sciences of psychiatry and psychology should not be overlooked, and that the mere fact of novelty was no reason for rejecting the findings and insights which these sciences provide. From an essentially juridical bond geared towards the procreation and education of children, jurisprudence and doctrine began to look at marriage also as a lifelong partnership and association with other important, if "secondary"—in the terms in vogue then—obligations. This development would be enshrined in the document *Gaudium et Spes* of Vatican II, which described marriage as an intimate partnership of life and love rooted in the conjugal covenant. A decision *coram Anne* [25 Feb 1969] specifically referred to this statement as having juridical force. The 1983 Code describes the marriage covenant as one by which a man and a woman establish between themselves a partnership of their whole life, and which of its very nature is ordered to the well-being of the spouses and to the procreation and education of children.

Fundamental to this development of rotal jurisprudence is the thesis that any psychic defect redounds to a defect of the will. It is not immediately clear what this modality of the defect of the will is. One can discern in rotal jurisprudence two streams, as it were. A first stream,

²⁰ It is not unusual to trace this norm to Sanchez, although there is no solid evidence to support this view. Lawrence Wrenn, *Decisions* (Washington DC: Canon Law Society of America, 1980), p. 37.

evident in the Wynen judgement referred to *supra*, concentrated on the intellectual/cognitive element in the consent and on the defects which, because they disturb the harmonious ordering and cooperation of the higher faculties, deprive the consent of the due and mature discretion proportionate to the contract.²¹ He makes it clear though that he is not dealing with the question of mere speculative ignorance which is properly the province of can. 1096, but with the capacity to understand and will marriage, both *in fieri* and *in facto esse*. But this intellectual approach, while it may be adequate to meet some psychiatric conditions, e.g. schizophrenia and paranoid states, could not adequately deal with psychopathic cases. Filipiak [14 Feb 1958] noted that the psychopath always retains a sufficient, and sometimes superior, intellectual capacity.²² This view has been endorsed by Bejan [30 Nov 1963],²³ and in various decisions by Pinto.

²¹ "In non paucis judiciis revera duplex functio cognoscitiva distingui potest et debet: altera repraesentativa mere seu conceptualis, altera ponderativa seu aestimativa; quae duplex functio maxime attenditur in judiciis quae versantur circa agibilia, seu in judiciis practicis. Cognitio mere conceptualis offert quid sit objectum cognitionis cognition aestimativa quanti momenti vel valoris illud sit, seu quid valeant. . . etenim prater cognitionem conceptualem quam etiam puer quinque annorum habere potest vel sanus homo adultus in somno, necessarium esse affirmant cognitionem aestimativum ut volitum etiam ratione valoris cum objecto inseparabiliter juncti et necessario per voluntatem amplectendi revera sit praecognitum . . . sed insuper requiri discretionem et maturitatem iudicii contractui matrimoniali ineundo proportionata sit." (*coram Wynen in SRRD 32*, 144-168).

²² "A psychopaticis ratio repetenda eorumque juridica capacitas confundi nec debet nec potest cum vitiosa capacitate eorum, quorum mentis defectus a vero provocantur morbu. Dum enim horum tota personalitas defectu afficitur, illorum una vel alia tantum facultas. Nam etsi praecipua psychopatie nota est voluntatis vel affectuum vitium, servatur tamen semper saltem sufficiens, saepe saepius autem eminens intellectus facultas. Itaque sunt qui laborant cogitationum occupatione seu ut aiunt ideis coactivis vel obsessionibus, vel impulsibus, vel sexus perversitatibus, aliisque statibus abnormalibus, ex quibus varii efformantur psychopatiarum. Unde matrimonium psychopaticorum, etsi saepissime infelix, declarari invalidum non potest ex capite defectus consensum propter amentiam, nam ejusmodi psychopatiarum consensus matrimonialis pathologicis impulsibus per se non afficitur." (*coram Filipiak [14 Feb 1958] in SRRD 50*, 79).

²³ "Si difficilis est probatio amentiae et dementiae, quatenus impediunt plenam advertentiam mentis quae sit gravibus obligationibus proportionata assumendis in matrimonio, fit gravior probatio quando agitur de defectu rationis non ex se ipso, quia contrahens scit et percipit matrimonii naturam ejusque obligationes, se prout influit in voluntatem ejus per ideas fixas, in qua expressione comprehendi possunt tum

A second stream, concentrating more directly on the will itself, stems from a judgement by Sabattani, who affirmed that an adequate understanding of marriage could coexist with defective discretion, in cases where rather than a false apprehension of the object, there were deeply established distortions in the formation and the exercise of deliberation. This has been elaborated in subsequent judgements of Lefebvre [8 July 1967]²⁴ and Bejan [7 Feb 1968].²⁵ The norm refers to consensual capacity, and concerns the sufficient evaluation of the nature of marriage and the sufficient deliberation on the will in the concrete circumstances of the marriage being entered. The evaluation being referred to is an act of the critical faculty of the mind, which is the power of judging and reasoning, and of combining judgements together so that a new judgement can be logically deduced therefrom.²⁶

It can be said that the exercise of discretion of judgement is intelligence brought to bear on a particular choice to be made, and that this basis of nullity has to do with the harmonious integration of the intellect and will from which proceeds a conscious and free determination directed towards a certain object.²⁷ Marital consent then derives from a combined action of cognitive, deliberative/critical, and volitional faculties. One must know what is at stake; one must be capable of considering and evaluating the elements, properties, rights, and obligations of marriage; and one must be free to want and choose this way of life with this or that particular person.

For a valid act of consent, one must therefore have a rudimentary knowledge of marriage and must freely accept its responsibilities and, in addition he/she must have the judgmental capacity to evaluate what is being consented to, to elicit the act of consent and to fulfill what is involved or demanded by marriage. One must be able, in a sense, to

phobiae tum obsessiones...tum aliae formae neuroaestheniae, ita ut impediunt perfectum voluntatis exercitium." (*Coram Bejan* [30 November 1963], in *SRRD* 55, 853).

²⁴ *Coram Lefebvre* [8 July 1967] in *SRRD* 59, 563.

²⁵ *Coram Bejan* [7 Feb 1968], in *SRRD* 60, 66-67, especially no. 5.

²⁶ "...quae est vis iudicandi et ratiocinandi, seu affirmandi vel negandi aliquid de aliqua re, et iudicia una componendi ut novam iudicium inde logice deducatur. *coram Felici* [3 December 1957] in *SRRD* 49, 788. Cf also *coram Sabattani* [24 Feb 1969] in *SRRD* 53, 118; *coram Anne* [22 July 1969] in *SRRD* 61, 864.

²⁷ *Coram Mattioli* [20 Dec 1962] in *SRRD* 54, 711.

"look to the future" to see and assess the danger signals which are obvious to family and friends and which are being commented on by them.

Such a critical faculty is generally of late development in people and is not usually attributed to persons until their late teens or early twenties at the earliest. There are many in whom it is of much later development, and some indeed in whom it never develops at all. It is a special kind of faculty proportionate to the special type of heterosexual relationship that marriage is. One might conceivably be a good judge in business or be a highly competent researcher, and still be grossly lacking in the required kind of judgement for choosing a partner and entering the married state with that partner.

While it is comparatively easy to determine whether or not a person has the minimum knowledge required at the time of marriage in order to give consent, the lack of discretion of judgement is not so clear cut. We are dealing, not so much with the cognitive powers of the person, as with his evaluative faculty, with his faculty to deliberate and to judge.²⁸

In brief, discretion means "maturity" and judgement means "decision." In other words, discretion of judgement means mature decision which therefore presupposes the presence of adequate knowledge about the essential elements which constitute marriage including the very persons of the contractants, and the internal freedom to deliberate and choose marriage without any interference. Roman jurisprudence has isolated some of the elements of this "decision," i.e., the marriage consent.²⁹ One element is adequate knowledge of the subjects and the object of the marriage consent—a knowledge that is not merely cognitive/speculative but critical and evaluative. A second element is the ability for critical reflection which consists in putting judgements together in order to arrive at a new judgement or decision. A third element is internal freedom, not only for critical reflection but also for making the final decision concerning the object.

²⁸ This discretion of judgement has been described variously as: 'appreciation' or 'aestimation' [*coram Wynen*, in *SRRD* 33, 146]; 'facultas critica' [*coram Felici*, in *SRRD* 49, 789]; 'judicium practicum' [*coram Egan*, cited in *Studia Canonica* 10 (1976), 450-451].

²⁹ A. Mendonca, "The Effects of Personality Disorders on Matrimonial Consent", *Studia Canonica* 21 (1987), 86.

2. *The Object of the Discretion*

The object of the discretion is ultimately marriage and its essential obligations. There was a time when these obligations were understood in extremely minimalist, and perhaps even biological, terms—an understanding that is embodied in the 1917 definition of consent: “an act of the will by which each party gives and accepts the perpetual and exclusive rights to the body for the performance of those acts which of their very nature pertain to the procreation of children” (can.1081 §2 of the 1917 Code).³⁰ According to this model, the requirements for valid consent were clearly minimal: if a person was not insane or ignorant, and was physically potent, and presuming further that no impediments existed, such a person would be capable of eliciting a valid matrimonial consent.

But the understanding of marriage, the object of consent and of the due discretion of the parties, has evolved over the years. Vatican II describes marriage as the intimate partnership of life and love, rooted in the conjugal covenant of irrevocable personal consent. The very language used by the Council clearly indicates the development which has taken place in the understanding by the Church of Christian marriage. It is something that involves the entire life of the partners. It is a communion of life and love—a developing, fruitful and life-long interpersonal relationship, demanding as it does, that the parties give themselves to and accept each other in genuine selfless love. The Council sees marriage then more as a companionship and a community than as an institution brought about and regulated by a legal contract. It has become increasingly recognized and examined in terms of a personal relationship in which mutual needs are fulfilled in the complementarity of the sexes.

This theological development obviously has juridical implications. Rotal jurisprudence has already enshrined this progress. Anne's

³⁰At its face value, C.1081.2 means that the parties give their consent to marriage by entering into a contract concerning the right to the sexual use of their bodies. Indirectly, this can only mean that if we wish to describe what marriage is in itself ... we must say that marriage is a state in which this marital right to sex perdures perpetually and exclusively. It would certainly be difficult for the canonist to refute that charge that for him, marriage is merely a license for sex. It is almost the case of sex around which everything else revolves, and to which other things are secondary. John Humphreys, “Lack of Commitment in Consent”, *Studia Canonica* 10 (1976), 345-346.

decision of 25 Feb 1969 may be taken as typical expression of this, asserting as it does that the development in the understanding of marriage by the Council has a legal sense.³¹ He then goes on to say that marriage *in facto esse* [the *consortium totius vitae*] must at least be implicitly intended as the substantial formal object in the marriage *in fieri*. Every juridical act is brought into being through an act of the will, and this act is specified by the substantial formal object of that will. This being so, marital consent may therefore be understood as an act of the will whereby a man and a woman establish between themselves a community of life and love which is perpetual and exclusive, ordained by its very nature to the procreation and upbringing of children.³²

It is clear then that the community of life and love constitutes the formal object of matrimonial consent. While the principle is clear, it is not as easy to determine with precision the meaning of "community of life and love." It must be affirmed however that we are dealing here not with a provision of positive church law for the Council reminds us that the intimate partnership of life and love has been established by the Creator and qualified by his laws.

In the context of due discretion, and indeed in the context of the psychic capacity for marriage, while it is true that there is no specific and taxative listing of the essential obligations available, there are a number of canons which, taken in conjunction with accepted rotal jurisprudence, give quite a clear outline of what is demanded of married partners in the line of essential obligations. Can.1055, for example, describes marriage as a *partnership of a whole life* which is ordered

³¹ "Propositio haec Concilii Vaticani II sensum iudicium habet. Non respicit enim merum factum instaurationis communitatis vitae sed ius et obligationem in hanc communitatem intimam vitae quae uti elementum maxime specificum habet intimam personarum conjunctionem qua vir et mulier finit una caro, ad quam uti culmen tendit illae vitae communitas. Id denotat matrimonialem esse relationem maxime personalem con-sensumque matrimonialem esse actum voluntatis quo conjuges sese mutuo tradunt atque accipiunt, ie relate ad actiones determinatas...quod duidem non impedit quominus hae actiones...sint maxime vitales aac totalem personam humanam quodammodo afficientes." *Ephemerides Iuris Canonici* 26 (1970), 429.

³² "Objectum exinde substantiale formale istius consensus est non tantum ius in corpus...sed amplectitur etiam ius ad vitae consortium vel communitatem vitae quae proprie dicitur matrimonialis necnon correlativas obligationes seu ius ad intimam personarum atque operum conjunctionem qua invicem perficiunt ut ad novorum viventium procreationem et educationem cum Deo operam sociant." *Ephemerides Iuris Canonici* 26 (1970), 430-431.

towards the well-being of the spouses, and the procreation and upbringing of the children. The clear implication here is that one must realize that to make one partner happy and content is a basic obligation in marriage and one must be capable of doing so. Can.1056 speaks of marital unity as an essential property and this would clearly indicate the essential obligation of preserving an exclusive heterosexual relationship with the partner. Can.1134 emphasizes this element of permanent exclusivity and can.1135 focuses on the equal rights and obligations of each spouse to whatever pertains to the partnership in conjugal life. The Constitution *Gaudium et Spes* (n.48) has understood this to include mutual respect, mutual support, peaceful and happy cohabitation, and a concerned and loving interpersonal relationship. It can likewise be argued from can.1136, which implies that educational dimension cannot be separated from the procreative, that the conduct of the spouses towards each other, their unselfish love, and their practice of faith are fundamental to the basic obligations of the upbringing of the children.

By way of negation, it must be pointed out, as the Commission for the Revision of Canon Law had done, that the community of life and love is more than the physical cohabitation, though one would suppose that this must be considered as the material base of the *communitas vitae et amoris*.³³ There must be communion of minds and wills between the spouses. There must be a true giving of each to the other, and acceptance of each by the other if a genuine community of life and love is to be formed. Since the Vatican II Council, it has been maintained that the most characteristic element in the "*consortium vitae conjugalis*" is the interpersonal relationship, distinguishing it from all other forms of moral or juridical transactions.³⁴

Finally, it is not suggested here that marriage is beyond the reach of most people, as though it were some kind of a rarified state of life. What is in question here is the basic minimum maturity or discretion

³³ In the preface to the *Schema de Sacramentis*, the Commission had clarified: "Porro communio vitae conjugii proprie non confundenda est cum cohabitatione." *Schema Documenti Pontificii quo Disciplina Canonica de Sacramentis Recognoscitur* (Roma: Typis Polyglottis Vaticanis, 1975), 14.

³⁴ Serrano, for example, describes it as the element in which marriage consists, upon which its perpetuity and exclusivity depend and from which they take its origin. *coram Serrano* [5 April 1973].

which makes a person capable of grasping what this particular marriage is going to involve for him. This capacity is presumed to exist in normal people, but this presumption can be overturned in the face of convincing proof. Particular individuals may lack this capacity to evaluate the rights and obligations specific to marriage —such a lack may be due to a host of factors. The issue that a tribunal must resolve is whether or not, at the time of the contracting of the marriage, the person was capable of evaluating the rights and obligations involved. The judges do not have to determined why the person lacked the required discretion.

3. *The "Sources" of the Lack of Due Discretion*

According to Stankiewicz, this condition can be traced to three main causes.³⁵ First, adolescence or the lack of experience or exposure; second, immaturity that is a symptom of a personality disorder; third, an immaturity that is found in adults manifested in various immature traits, eg. lack of stability and constancy in holding one's options, weakness of will, infantile attitudes in certain conditions and lack of control over emotions.

4. *Some Indicative / behavioral Symptoms*

These are not meant to be an exhaustive listing, or in any case guarantee that because the following conditions are present, therefore the parties lacked due discretion when they contracted marriage:

- premarital or unexpected pregnancy, youth of the parties and their dependence on their parents; neither of them have finished schooling, neither are gainfully employed; there is some pressure from the parents;
- substance abuse, generally drugs, but no reason why alcohol should be excluded. And here, addiction in the strict clinical sense is not necessarily required. As regards this, two things need to be said;
- some indications during married life: inability or unwillingness to work, or to hold on to a permanent job, waiting for the proverbial big-

³⁵ *Coram Stankiewicz* [11 June 1985] in *Monitor Ecclesiasticus* 111 (1986), 195-196; cf also, J. McAreavey, "Emotional Immaturity and Diocesan Pre-Marriage Policies", *Studia Canonica*, 16 (1982), 283-330.

break to make his millions; physical violence; promiscuous infidelity. I must be quick to point out however that these are not infallible indications of lack of due discretion. Rather these are symptoms that, if taken together with other symptoms, can generate a picture of a highly immature personality.

The following observations must be made as regards substance abuse. On the one hand, researches point out that prolonged and sustained dependency on alcohol or drugs can create mental states and symptoms that are difficult to distinguish neurotic and psychotic states.³⁶ The substance induced mental disorder as presented by the *Diagnostic and Statistical Manual on Mental Disorders* classification include disorders in which the behavioral changes are caused by taking substances that affect the central nervous system.³⁷ On the other hand, there have also been findings that suggest that there are already certain deficiencies in the personality of the substance-user, antedating and in some cases far more serious than the actual misuse of drugs as such.

Drug-users are commonly characterized as individuals who are often depressed; they have a low tolerance for frustration; they are deficient in their capacity to delay gratification; they have hardly any meaningful and satisfying relationships. They resort to drugs to maintain their sense of self-regard, to experience exalted states of fusion and merger, to temporarily lessen the intra-psychic conflict or feelings of depression or anxiety.³⁸

Drug-users suffer from impairments in their capacity for personal relationships. They report a profound sense of psychological distance from others which often predate their drug-use. Many users' social contacts appear to be superficial, primarily with individuals who are also users themselves. Drugs provide not only a sense of belonging to a group but also a consensual validation for the alienation that they experience from their family, peers, from themselves, and from society

³⁶ Kaplan and Sadock, *Comprehensive Textbook of Psychiatry* (Baltimore, William and Wilkins, 1983), 607.

³⁷ Laurence Holmes, *Drug-Induced Mentally Disabled and Criminal Disability* (Rome: Lateran University Press, 1988), 18-21.

³⁸ Hamburg and Brodie, eds., *American Handbook of Psychiatry*, 3rd ed (New York: Basic Books, 1975), vol. VI, 579.

as a whole. Their sexual relations are usually infantile. Whether homosexual or heterosexual, they tend to be narcissistic and masturbatory, rather than intimate emotional relationships with specific partners.

Summing up, lack of due discretion is really a defect in the decision-making process; the process resulting in a decision that is not rooted in actual life and actual possibilities.

(b) The Incapacity to Assume the Essential Obligations of Marriage

A second common ground in Church annulments, embraced in the not so elegant lapidary formula enshrined in Art 36, is the incapacity to assume the essential obligations of marriage. This ground is not so much connected with the psychological process of decision-making, but rather with its subsequent phase, the actual carrying out of the decision.

Let us consider an example: The selling of a house. On the assumption that both parties (seller-buyer) have fulfilled all the requirements prescribed by positive law to enter into such a contract, there of course remains the object of the contract, namely, the house. But it happened that prior to the conclusion of the contract, the house was gutted down by fire unbeknown to both of them.

This is something like the hypothesis contemplated in the third paragraph of can. 1095.³⁹ The paragraph does not deal with the psychological process of the decision-making, but rather with the object of the consent—in the example, the house which does not exist. Here the contract would be invalid because it lacks its formal object. But the consent, as a psychological act, is both valid and naturally sufficient, considered in itself. The psychological act, however, is directed towards an object which is not available. Urbano Navarrete summarizes this distinction by saying that “the third paragraph deals not with the positing of consent but with the object of consent.”⁴⁰

³⁹ Unpublished notes of Professor Mario Pompedda in his course on jurisprudence at the Pontifical Gregorian University in Rome.

⁴⁰ Dealing the specific case of nymphomania: “Videtur dari posse casus in quibus hypersexualis possit perfecte intelligere ac ponderare quid sit matrimonium atque ad

Since the address of Pius XII to the auditors of the Roman Rota in 1941 regarding psychic incapacity with respect to marriage arising from pathological conditions,⁴¹ there has been an increasing trend to understand as ground of nullity different from others, the incapacity to assume the essential obligations of marriage, especially the incapacity which arises from sexual anomalies. Nymphomania can be taken as a typical example which ecclesiastical jurisprudence has studied under this rubric.

The problem can be summarized thus: Do sexual anomalies always and in every case imply a grave psychopathological condition which affects the higher faculties of intellect, discernment, and freedom; or are there sexual anomalies that arise simply from certain physiological dysfunction of the hormonal system, affecting only the sexual condition but leaving intact the higher faculties so that these persons are still capable of free human acts? The evidence from the empirical sciences is abundant that there are certain anomalies of a sexual nature which may impel a person towards sexual activities which are not normal, either with respect to its frequency [nymphomania, satyriasis] or to the nature of the activity itself [sadism, masochism, homosexuality]. However, these anomalies notwithstanding, it is quite possible that the higher faculties remain intact, such that a person has an adequate understanding of what marriage is and of the gravity of its implications. The question, however, is whether such a person can assume those responsibilities which he/she cannot fulfill, independently of how able to understand them he/she may be. Here the incapacity to assume the essential obligations of marriage issues from the incapacity to posit the object of consent, rather than from the incapacity to posit consent itself.

Ecclesiastical jurisprudence has been hesitant, if not actually confused, in this regard. The initial steps taken by Church courts were

illud sine necessitate interna sese determinare; sed cujus actus voluntatis sit inefficax iudice ea sola ratione quia objectum consensus, id est exclusivum jus in corpus in ordine ad actus conjugales modo naturali et mensura peragendos, praestare non possit. . . Videtur potius dicendum consensum quidem posse esse liberum, semper vero esse inefficacem iudice eo quod versetur circa objectum quod contrahens praestare non potest." U. Navarrete, "Uncapacitas Assumendi Onera' uti Caput Autonomum Nullitatis Matrimonii," *Periodica* 61 (1972), 55.

⁴¹ *Acta Apostolicae Sedis* 33 (1941), 423.

not too clear whether this incapacity is incapacity to posit consent or incapacity to posit the object of consent. A case decided *coram Pinna*, for example, arrives precisely at the conclusion that the intellect, under such an irresistible impulse, is prevented from properly deliberating and its judgement lacks freedom.⁴² This line of reasoning supposes that the intellect, at the very precise moment that consent is elicited, is under the influence of this irresistible compulsion, with the inevitable conclusion that such a decision, made as it was under these circumstances, lacks the necessary freedom. For it is incontrovertible that a decision made under an irresistible impulse is not be a free act. But this is precisely the question: Would it be possible that the intellect be always and continuously under such an irresistible compulsion? It would seem entirely possible, and certainly more reasonable, to think that there are certain cases in which one who is sexually hyperaesthetic can understand perfectly and evaluate quite maturely what marriage is and what it implies but whose consent would be juridically ineffective for the reason that he cannot posit the object of consent —what in the old jurisprudence was called the exclusive *jus in corpus*. Therefore, it would seem more correct to say that the consent may indeed be free, but is juridically ineffective because the party is consenting to an object that he cannot deliver —in the prosaic illustration of Pompedda, the house he is selling was gutted down by fire.

Sabattani seems to have seen his way more clearly through this tangled mess, proposing, as he did, a clear conceptual distinction between the inability to give consent on the one hand, and the inability to fulfill the object of consent, on the other. It is his opinion that nymphomaniacs usually understand the meaning of marriage, and that they are usually able to evaluate its implications. They would have no difficulty with positing a free and intelligent consent. However, such persons, capable as they are of eliciting an intelligent and free consent, experience difficulty in another sphere: delivering the object of the consent.⁴³

Anne, another rotal judge, had likewise treated the difference between the act of consenting and the act of positing the object of consent from the point of view of a person afflicted with nymphomania.

⁴² *Coram Pinna* [4 April 1963], in *Monitor Ecclesiasticus* 90 (1965), 409-415.

⁴³ *Coram Sabattani* [21 June 1957], in *SRRD* 49, 500-513.

According to him, such an affliction usually leaves the process of knowing and understanding and evaluating intact. What it affects is the object of consent: the delivering of the goods, as it were.⁴⁴

On the basis of this distinction —that the incapacity to give consent is different from the incapacity to fulfill the object of consent— Sabattani resolved a petition for nullity because of nymphomania.⁴⁵

From these selected rotal jurisprudence, we can therefore see that these are two autonomous grounds of nullity. The incapacity to assume the obligations of marriage can coexist in the same person with the ability to make an intelligent and free decision, an intelligent judgement, and a mature evaluation of options. As Sabattani had observed, a nymphomaniac spouse may have no difficulty making a mature decision, but she certainly will have difficulty in keeping and fulfilling her decision. Prior to the promulgation of the Code in 1983, it was not unusual to refer to this ground as moral impotence, or psychic impotence. These anomalies leave intact the faculties of will and intellect, but they render the subject so-afflicted incapable of entering a valid marriage contract in so far as that anomaly renders the person incapable of fulfilling the essential obligations of the contract.

The juridical implications of *consortium totius vitae*, the lapidary phrase enshrined in *Gaudium et Spes*, were developed fully by the rotal judge Joseph Serrano in his landmark decision of 5 April 1973.⁴⁶ His starting point was the teaching of Vat II on marriage:

A man and a woman who, by the marriage covenant of conjugal love, are no longer two but one flesh, render mutual service to each other through an intimate union of their persons and of their actions. Through this union, they experience the meaning of their oneness and attain to it with growing perfection day to day. As a mutual gift of two persons, this intimate union, as well as the good of the children, imposes total fidelity on the spouses and argues for an unbreakable oneness between them.⁴⁷

⁴⁴ *Coram Anne* (17 Jan 1967), in *Il Diritto Ecclesiastico* 79 (1968), 3-12.

⁴⁵ *Coram Sabattani* [21 June 1957], in *SRRD* 49, 500-513.

⁴⁶ *Coram Serrano* [5 April 1973], reported in *Monitor Ecclesiasticus* 101 (1974), 107-127. An English translation by Cogan and Persich, in *CLD* 8, 692-724.

⁴⁷ *Gaudium et Spes*, 48.

Quoting from a decision by Anne, Serrano continues that this paragraph from *Gaudium et Spes* has juridical import. It contemplates not the mere fact of the beginning of a shared life, but rather the right and the obligation to that intimate sharing of life, the most specific element of which is the close union of the persons by which a man and a woman become the one flesh, towards which the sharing tends as towards its climax. This means that marriage is a most personal relationship, and that the marriage consent is an act of the will by which the spouses mutually give and accept each other.

The *consortium vitae et amoris conjugalis* is to be identified with what is termed an interpersonal relationship which is specifically conjugal. Matrimonial consent is directed primarily and radically towards this relationship, and it is only from this relationship in the concrete that the three traditional *bona matrimonialia* have their source and their reality as truly conjugal objects of consent.⁴⁸ Commentators on this landmark decision have pointed out the principle he enunciated, that is, the declaration of nullity of the marriage on the ground of the incapacity of one party to form and foster a conjugal interpersonal relationship.⁴⁹ This incapacity renders the very matrimonial consent invalid. The formal substantial object of consent is not only the *jus in corpus*, perpetual and exclusive, for those acts which are in themselves apt for the procreation of children. It also includes the *jus ad vitae consortium* or *jus ad vitae communionem*.⁵⁰

There is incapacity when either or both of the contractants are not capable of initiating or maintaining this *consortium*. One immediately thinks of those cases where one of the parties is so self-centered [e.g., a narcissistic personality] that he does not even know how to begin an union with the other. A second incapacity could be due to the fact that the spouses are incapable of beginning or maintaining a heterosexual *consortium*, which goes to the very substance of matrimony. Another

⁴⁸ "...the man was wholly incapable of interpersonal sharing, that he was habitually unable to make his own any of the feelings of the other party..." [The English translation is from the *CLD* 8, 717-718 (no.21).]

⁴⁹ M. Lavin, "The Rotal Decision Before Serrano [5 April 1973]: Some Observations Concerning Jurisprudence, Procedure, and Risk", *The Jurist* 36 (1976), 309.

⁵⁰ *Conam Anne* [25 Feb 1969] in *SRRD* 61 (1969), 183-184. Cf. also: T. Doyle, "A New Look at the Bonum Fidei", *Studia Canonica* 12 (1978), 5-40.

Another incapacity could arise when a spouses is unable to concretize the good of himself or of the other party. The canon speaks, not of the *bonum partium*, but of the *bonum conjugum*. A spouses who is capable only of realizing or contributing to the good of the other party *qua persona* rather than *qua conjunx* would be deem incapable of contracting marriage. Such would be the case of a person who may be quite capable of procuring the economic good and the financial security of the other, but not capable of realizing the *bonum conjugale* of the other. These are general strokes and this is not the place for detailed and individual description.

Summary and Conclusion

First, I tried to clarify the concept of voidability. My conclusion was that there are voidable juridical acts in canon law, but there is no such thing as voidable marriages. A marriage is either valid or invalid. If it is valid, and provided it is not sacramental and consummated, it can be dissolved under some circumstances.

As regards an invalid marriage, it can either be validated or declared null by the competent ecclesiastical authority.

The law of validation in the Church, particularly its practice of granting retroactive validation [*sanatio in radice*], is premised on the theory that there could be a naturally sufficient, although juridically ineffective, consent; and provided this is verified to be perduring, even the civil marriages of those bound by the obligation to observe the form can be sanated, as the Church has sanated some.

An invalid marriage can be declared null by a competent ecclesiastical authority. An initial description was presented of two common grounds for the declaration of nullity, canonical grounds which have been adopted by the Philippine Family Code (Art.36): lack of due discretion of judgement and the incapacity to assume the essential obligations of marriage. The basic difference between these two grounds can be briefly summarized thus: the lack of due discretion of judgement is basically a difficulty in eliciting consent, while the incapacity to assume the obligations of marriage is a difficulty in positing the object of consent. □