

Matrimonial Consent

Matrimonial Consent is the topic of our study. It is a topic so extensive that it could be the subject matter of the whole Seminar. It is at the same time a very difficult topic. To elaborate on it a lot of concentration is needed as well as propriety in the expression to explain its manifold facets and intricacies. With reason it is called the *efficient cause of marriage*. No marriage can exist where consent is wanting.

By taking a look on the program of this Seminar, you can notice that there are some topics dealing with consent. It will show you how important the topic of consent is everytime marriage is under discussion. It is really an essential requirement for the validity of marriage. Other topics become only secondary compared with consent.

Nature

Canon 1081 of the 1917 Codex, which headed all norms on consent, is found in the new Codex among the preliminary canons on marriage. It has also two paragraphs with some changes, the first paragraph defines consent by saying it is *the efficient cause of marriage*. "Consent is therefore not only an intrinsic and essential element of marriage, but its efficient cause"¹. Without consent the union of a man and a woman will not constitute marriage. It is only their consent which brings about their marital bond with all the effects and consequences implied in the married state.

¹ Aznar Gil. *El Nuevo Derecho Matrimonial Canónico*, 1983, page 251.

Canon 1057 reads as follows: "A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power.

Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage."

Of course, the parties' consent presupposes, as a requisite, their capacity to get married. That is why canon 1057, § 1, says that the persons who give the mutual consent are to be *legally capable*, i.e. they are free from impediments which might render their consent ineffective. Besides, the consent is to be given in the way established by law: *legitimately manifested*. These two conditions having been accomplished, mutual consent constitutes a real juridical act producing the validity of marriage; otherwise marriage would be deprived of an essential component, i.e. of the contractual element, which causes the fusion of both contracting parties' will, forging an irrevocable agreement for their undivided partnership of life.

Contractual consent, in general, is defined as the meeting of the will of the contracting parties on the specific object of the contract. In other words, it is the conformity or agreement of the parties on the essential elements of the object of the contract.

The definition of matrimonial consent is given in the second paragraph of canon 1057. It reads as follows: "Matrimonial consent is an act of the will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage." This definition is heavily loaded with important concepts concerning the nature of marriage. We shall concentrate our attention only on two things, namely, that consent is an act of *the will*, and that this act of the will is to be directed specially on a concrete object, i.e. in *establishing marriage* between the two contracting parties. This means that the act of the will of both contracting parties will not be a matrimonial consent if it is not elicited with the purpose of creating the marital bond between them.

The existence of any consensual contract is determined by the meeting of the will of the contracting parties, i.e. by their

agreement in mutually giving and accepting some rights and obligations that characterize the marital partnership.

Pius XI commented on the matrimonial consent, saying: "Yet although matrimony is of its nature of divine institution, the human will, too, enters into it and performs a most noble part. For each individual marriage, inasmuch as it is a conjugal union of a particular man and woman, arises only from the free consent of each of the spouses; and this free act of the will, by which each party hands over and accepts those rights proper to the state of marriage, is so necessary to constitute true marriage that it cannot be supplied by any other human power. It is certain that this freedom regards only the question whether the contracting parties really wish to enter upon matrimony or marry this particular person; but the nature of matrimony is entirely independent of the free will of man so that if one has once contracted matrimony, he is thereby subject to its divinely made laws and its essential properties"².

The marital consent has to be an *individual act* of the will. It cannot be made up of various consecutive acts. The necessity of determining when marriage is juridically brought about makes untenable the opinion of some holding that matrimonial consent can grow and be developed through various stages of relationship between a man and a woman. Marriage is a juridical act and it is imperative to determine beyond any doubt when it starts to exist, as it happens in all juridical acts. From this perspective it is easy to understand why, during the process of revising the Codex, a proposal was rejected according to which the matrimonial consent could be considered as a progressive event or affair taking place between the two contracting parties and their families³.

The act of the will of the contracting parties is to be effectively directed to their marriage. They are to be so disposed as

² Pius XI, Enc. *Casti Connubii*: AAS, 1930, p. 541.

³ "Suggestio facta est ab aliqua Conferentia Episcopali Africana, secundum quam consensus matrimonialis in cultura africana est eventus progressivus inter ambas partes et familias; difficile aut impossibile est determinare quandomam definitus factus est. Animadvertitur, iuxta investigationes de hac re peractas, quod etsi dentur actus progressivi, si attente tamen res consideretur apparet clare quod in aliquo stadio verus consensus habetur, ita ut omnes actus praecedentes considerari possint tamquam praeparatorii ad matrimonium (*Communicationes*, 10, 1978, 124).

to do what is in their power in order to achieve what they want. It is not enough therefore, the mere complacency in their thinking of marriage or in their desire to get married or in their planning to do so. Of course, the intellectual act is implied in the act of the will, since any determination and execution of volitional acts imply the involvement of both mind and will of the agent, as the axiom says: "nihil volitum quin praecognitum."

Matrimonial consent, therefore, will be the efficient consent of marriage only when it is endowed with all the qualifications required for a human act. Moreover, matrimonial consent is to have the qualities required by the natural law for any bilateral contract. Hence, it is to be true, personal, mutual, deliberate and willful, sufficiently manifested through some kind of external sign, actual, irrevocable, and directed to a concrete and determined person of the opposite sex. All this will assert its irreplaceable character: "Nulla humana potestate suppleri valet"⁴. Its being an exclusively personal act of the contracting parties substracts itself from any alien or strange interference. Hence, the parents or those persons vested with authority may not, through their volition, make a union to be a valid marriage if the personal consent of the contracting parties is wanting.

All the foregoing qualifications of consent being present, make consent to be *naturally sufficient* in itself, which is different from its being *juridically efficient* with regards to the public effects of marriage. We should therefore not confuse the existence of the matrimonial consent with the validity of marriage. A valid marriage requires always the presence of marital consent, but the existence of marital consent does not make always a marriage valid. There are instances when the contracting parties give their consent to the marriage, and nevertheless marriage is not yet valid. This happens when the fulfilling of some legal requirement is wanting, suspending its efficacy. Canon 1107 confirms this assertion by saying: "Even if a marriage has been entered into invalidly by reason of an impediment or defect of form, the consent given is presumed to persist until its withdrawal has been established." For the marital consent to be efficient, it is necessary that it be elicited by persons capable to marry

⁴ Canon 1057, § 1.

and be manifested according to the law. Canon 1057, §1 says: "*inter persona iure habiles*" and "*legitime manifestatus*."

Object of Matrimonial Consent

This is one of the most important problems in the marriage law, since to point out the object of matrimonial consent with precision is to determine the mutual rights and duties mutually given and accepted by the contracting parties at the celebration of marriage.

The 1917 Codex gave us in canon 1081, § 2 the key to determine the essential object of matrimonial consent. It defined consent as the "act of the will by which both parties give and accept the right, perpetual and exclusive, on their bodies with regards to those acts ordained by their nature to generation." The material object, therefore, was the *right on their bodies*, not the *exercise of this right*. Besides, the right on their bodies was not absolute and unlimited, but determined and restricted: "to those acts ordained by their nature to generation." In other words, the right mutually given and accepted was the right to perform the marital act and other acts ordained to the same. Note that it was not the right to procreate, since this is beyond the will of the parties. The right referred only to the acts which by their nature are ordained to procreate and depend on human will, although those acts might fail to produce the desired effect.

Some authors, not satisfied with this biological view of marriage, preferred to present and emphasize the personal values of the contracting parties and go deeper into the real meaning of marriage. This problem was vividly discussed before and during Vatican II, which eventually issued the following statement: "The intimate community of life and conjugal love, founded by the Creator and governed by His own laws, is established by the covenant of the contracting parties, i.e. by their irrevocable personal consent. Thus, this situation, based on the divine law, is brought about before society by the human act through which the spouses mutually give and accept themselves"⁵. The essential object of matrimonial consent is clearly pointed out in the foregoing declaration: it is the persons of both contracting parties in view to establish an intimate community of life, "through which the

⁵ Const. *Gaudium et Spes*, n. 48.

spouses mutually give and accept themselves." The essential object, therefore, of the matrimonial consent is for Vatican II more extensive than the essential object pointed out by the 1917 Codex. The expression "by the human act through which the spouses mutually give and accept themselves" is undoubtedly broader and richer than the "mutual giving and accepting of the right over their bodies."

The new Codex follows closely the teaching of Vatican II. The community of life of the spouses constitutes the essence of the married state and logically it is the object of the matrimonial consent when the spouses take each other as husband and wife at the celebration of their marriage. Canons 1055, § 1 and 1057, § 2 complement each other. The former says: "Through the marriage covenant a man and a woman establish between themselves a *partnership of their whole life*, which of its very nature is ordered to the well-being of the spouse and to the procreation and upbringing of children." The latter reads: "Matrimonial consent is an act of the will by which a man and a woman by an irrevocable covenant *mutually give and accept one another* for the purpose of establishing a marriage."

It is therefore an essential requirement of the matrimonial consent that the contracting parties give and accept through it whatever is substantial to marriage. If marriage is defined as "a partnership of the spouses for life, ordained by its very nature to the good of the spouses themselves and to the procreation and education of children", all duties and rights making up such partnership are to constitute the object of the marital consent.

The "ius in corpus" of the 1917 Codex is only a part, so to say, of the "right to the partnership of spouses' whole life." Likewise, the "vitae consortium" created by matrimonial consent should not also be identified with mere cohabitation, since this is only an aspect of the marital partnership⁶.

The conjugal partnership, object of the marital consent, may be identified with the marital bond created by a valid marriage. It is made up of various rights and duties existing in both spouses

⁶ "Cohabitatio ad *integritatem* individuae vitae, non ad *essentiam* vitae conjugalitatis pertinet" (Werz-Vidal, *Ius Matrimoniale*, Romae, 1925, n. 600).

towards each other and towards the offspring to which marriage is by its nature ordained⁷. Conjugal partnership can be considered in two different aspects, namely, *material* covering their sharing the same dwelling place, board and bed chamber; and *spiritual* meaning the inter-personal relationship created by their being husband and wife. Their material living together plus their marital affection aim by their very nature to achieve their growth and personal maturity in establishing and consolidating the domestic society, foundation of both the civil and ecclesiastical societies. Besides, noteworthy are other significant features of a meaningful partnership of life between married people, namely, the stability of conjugal home in consonance with the testimony of Scriptures: "A man shall leave his father and mother and be joined to his wife⁸; the wife's sharing the status and rights of her husband, the common use of temporal goods, their joined effort in the proper upbringing of the offspring, even their good relations with auxiliary personnel at home according to christian justice⁹.

At this point a question may be raised, namely: has mutual love something to do with the matrimonial consent? There is an axiom saying: "Consent, not love, creates the marriage." It was commonly held, before Vatican II, that the essential requirement for the validity of marriage was the consent of the parties concerned, notwithstanding one's possible displeasure with regards to the other party. Such view was logical with the concept of matrimonial consent held by the 1917 Codex.

During Vatican II, however, conjugal love was often mentioned during the discussions on marriage. "*Gaudium et Spes*" speaks of it several times¹⁰. This made some believe that love should be considered at least as a necessary motivating cause in eliciting the matrimonial consent. However, as Navarette says, conjugal love cannot be regarded as an essential element of marriage nor as marriage end; it is rather a psychological disposition or favorable climate, ordained by God to attain the marriage ends

⁷ De Smet, *De Sponsalibus et Matrimonio*, ed. 4a., Brugis, 1927.

⁸ Matth. XIX, 5.

⁹ M. G. Fernandez, *La Institución Matrimonial*, Madrid, 1943, page 236-237

¹⁰ Const. *Gaudium et Spes*, nn. 47, 48, 49, 50, 52, etc.

in a way more conformable to human nature. However, no juridical effect whatsoever is produced by the conjugal love in the institution of marriage¹¹. Its absence or even exclusion from the matrimonial consent does not affect in any way the marriage validity. As Hellin says, "the text of *Gaudium et Spes* does not imply in any way that a marriage lacking conjugal love may be dissolved"¹². There are two official pronouncements of the Holy See with regards to the role of conjugal love in marriage. The Apostolic Signature has affirmed that love in itself may not be regarded as an essential and constitutive juridical element of marriage¹³. Likewise, Paul VI stated that conjugal love is only a subjective element of marriage, hence it can not be considered as a fact of the juridical order, constituting marriage¹⁴.

Necessary Knowledge

"For matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation.

This ignorance is not presumed after puberty" (can. 1096).

If the contracting parties are to give their marital consent in order to get married validly, it is necessary that both parties know the object accepted by them through their mutual consent. Although this knowledge is not to be a full and perfect knowledge, it has to cover at least a minimum of essential elements so as to prevent a blind acceptance of something unknown. Of course, this knowledge cannot be equal in all individuals. It will conform to a person's age, environment, education, maturity, etc. This is the reason why the Code indicates the minimum of knowledge required by stating not what the parties should know, but what they should not be ignorant about. Thus, the legislator is satisfied with a knowledge which is vulgar, ordinary and commonly possessed by the average of people, even by illiterate who lack proper education. With reason, therefore, the Commission rejected a proposal

¹¹ U. Navarette, *Structura Juridica Matrimonii secundum Vaticanum II*, Roma, 1980, nn. 153-154.

¹² F. Gil Hellin, "El lugar propio del amor conjugal en la estructura del Matrimonio, según la *Gaudium et Spes*" — *Anales Valencinos*, 6.

¹³ *Coram Staffa*, Nov. 29, 1975.

¹⁴ Paul VI, *Allocutio*; cfr. AAS, 68, 1976, 204-8.

requesting that this canon should be formulated in a positive way declaring what the parties should know, rather than in a negative manner saying what they should not be ignorant about.

Accordingly, therefore, the parties are supposed not to be ignorant that marriage is a *partnership for life*, i.e. a society implying a bond joining both spouses in pursuing a common goal. The spouses are supposed not to be ignorant that their union must be *permanent*, stable and lasting, without requiring positive and detailed knowledge of its indissolubility. They are also supposed not to be ignorant that marriage is a union of a man and a woman *ordained to procreate children*. And finally they are supposed not to be ignorant that the procreation of children is the outcome and effect of some kind of their *sexual cooperation*. In this respect some proposals presenting marriage as a partnership of life and love were rejected during the revision of the Codex¹⁵.

Based on the silence of the 1917 Codex, authors had been discussing on the minimum knowledge to be required from the parties on the way how the offspring is generated. Most of them held that it was not necessary that the spouses had to know that their intercourse will be needed in order to procreate; they required, however, that the spouses should know that their bodies have to get involved to achieve this goal. A vague knowledge would be enough¹⁶. The new Codex sided with this common opinion by saying: "ordered to the procreation of children through some form of sexual cooperation."

Finally, the new Codex, following that of 1917, sustains that "this ignorance is not presumed after puberty." Note that the age required for marriage is fourteen years for women and sixteen years for men, two years after they have reached puberty.

If, in a particular case, it is sufficiently proven that even this minimum knowledge is wanting and consequently there has been no sufficient consent to marry, the presumption must give way to the truth and the ecclesiastical tribunal should pronounce the nullity of marriage. In this case the following three presumptions stated by law are to be disregarded: 1) in case of doubt the validity of

¹⁵ Cfr. *Communicationes*, 9, 1977, 371; *Relatio*, 1981, 255.

¹⁶ Cfr. S.R.R., vol. 27, dec. 16, n. 6; vol. 30, dec. 17, n. 2; vol. 40, dec. 21, n. 15.

marriage should be sustained¹⁷; 2) after puberty ignorance on the nature of marriage is not presumed¹⁸; 3) internal consent is presumed to conform to the words or signs used in the celebration of marriage¹⁹.

In order to prevent such anomalies, the Church reminds those concerned of their pastoral duty to instruct the faithful in general and the contracting parties in particular on the nature of marriage, its ends and essential properties.

Conditional Consent

The condition, to which the efficacy of matrimonial consent is attached, can be taken in two different ways, namely as "a *circumstance* and as an *attitude*. The former is defined as "a future event or unknown circumstance on whose fulfilment or existence a person makes depend the validity of an affair or the performance of an act"²⁰. *If you study hard, you will pass the exam*. Here the success of one's exam depends on his studying hard, which is a condition for the success. Condition as an *attitude* is a wilful restriction or limitation of full consent, suspending its efficacy until a future event takes place. Arquer defines it as "an additional clause added to the contractual consent, through which the efficacy of a juridical act is subordinated to the fulfilment of an uncertain future event"²¹. In the conditional consent the will is directed to its object as existing in a concrete contemplated situation with exclusion of a different situation. Hence the condition affects the consent in such a way that it becomes a part of the consent itself.

The condition affecting the matrimonial consent is different from the so-called *conditio iuris*, which is a necessary prerequisite established by law for the juridical value of marriage, such as the capacity of the contracting parties and the canonical form for the celebration of marriage.

With regards to matrimonial consent, condition is not to be confused with the term *mode or manner*. A condition suspends the efficacy of the matrimonial consent and consequently the validity

¹⁷ Canon 1060.

¹⁸ Canon 1096, § 2.

¹⁹ Canon 1101, § 1.

²⁰ J. Bank, *Connubia Canonica*, Herder, 1959, p. 428.

²¹ M. Arquer, *Derecho Matrimonial*, Barcelona, 1949, p. 171.

of marriage, while the *mode and manner* indicate how the obligations already assumed in the celebration of marriage are to be fulfilled. In other words, the condition suspends the existence of marriage until it is fulfilled, while *mode* presupposes the existence of marriage and looks at the fulfilment of its obligations.

Condition is also different from the *cause or reason* motivating the celebration of marriage. Condition affects the effectivity of the matrimonial consent by suspending, postponing or preventing marriage, while the *cause* impels the contracting parties to get married without affecting the marriage validity.

Finally, condition is different from the *time-period* fixed by the parties for their marriage to start existing with all its juridical effects. When a condition is affixed to the matrimonial consent the validity of marriage is hanging on the condition's uncertain fulfilment, while the *time-term* agreed upon by the parties does not prevent the marriage validity to take place at the moment previously determined by them.

Three different kinds of condition concerning matrimonial consent are mentioned in the new Codex, namely condition concerning the past, condition concerning the present, and condition concerning the future.

The parties' consent being the efficient cause of marriage and their consent being irreplaceable, it is imperative to assert that there is no marriage without natural consent, although it is possible for the competent authority to hinder or prevent that natural consent may by itself effect the existence of marriage. On the other hand, marriage being a bilateral contract, it is upon the contracting parties to give their consent in an absolute manner or to give it in a restricted way, subordinating its juridical efficacy to an external circumstance or event determined by them. As a consequence of the possibility of a conditional consent there will be a period of time within which the given consent does not have juridical effects. The consent itself may even be revoked by the parties during such a period.

The foregoing principles being taken into consideration, a question may be raised, namely: how can the period of ambiguity which exists in conditional marriages be justified? How reasonable is it to sustain the period of uncertainty concerning the mar-

riage validity, which extends from the moment the conditional consent is elicited until the moment the condition is fulfilled or fails to take effect? The situation is obviously anomalous and canonists try to give different solutions to it. The following are worth mentioning:²²

Some canonists hold that when the condition is fulfilled, the consent is *to be absolutely renewed*. Obviously, they do not solve the problem, they rather eliminate it by requiring a new absolute consent.

There are authors who sustain the so-called *right to wait*. The conditional consent gives hope to a possible marriage only if the condition is fulfilled. A question may be raised: how can a marriage be brought about from a consent creating a simple expectation? The irrelevance of this opinion is higher, when its defenders sustain that the conditional consent can even be revoked before the condition is fulfilled, in which case there will be no marriage.

Others believe that with the conditional consent *marriage is suspended* until the fulfilment of the condition takes place. Again it may be asked: Can the conditional consent be considered as a true consent on which the validity of marriage may be based?

Finally, there are some canonists who say that marriage based on a conditional consent is only a *promise to marry* or *betrothal*. Consequently, they require the renewal of consent once the condition is fulfilled.

It is really difficult to see a reasonable ground for a conditional consent. The Oriental Catholic Church rejected in 1949 the possibility of contracting conditional marriages: "matrimonium sub conditione contrahi nequit"²³. Our new Codex has introduced two fundamental changes concerning conditional marriages, namely:

1) It is categorically stated that all marriages contracted with a condition concerning the future are null and void. No distinction between honest and dishonest condition, possible and impossible, necessary and contingent is given. Moreover there is no mention

²² Aznar Gil, *El Nuevo Derecho Matrimonial Canónico*, Salamanca, 1983, p. 310.

²³ Motu proprio "*Crebrae allatae*", c. 83.

of conditions against the substance of marriage, as in the 1917 Codex.

2) The second change introduced in the new Codex is the requirement to ask the license of the local Ordinary when the parties want to put a condition concerning the present or past.

The Codex does not admit marriages with a condition concerning the future which are in fact the only true conditional marriages: "Matrimonium sub conditione de futuro valide contrahi nequit" (canon 1102, § 1). A proposal modifying this norm was rejected by the Commission. That proposal said: "however, if there is a condition, it should be presumed as if it is not existing"²⁴. In the new Codex, therefore, no condition of any kind concerning the future is admitted. Marriages contracted with this condition are simply null and void.

Only two kinds of condition are accepted in the new legislation, namely condition concerning the past and condition concerning the present, which cannot really be called conditions, since the event or circumstance, on which the efficacy of the consent is based, exists already in reality or it does not exist. It is only unknown to the contracting parties. Due to the already existing reality of the event or its non-fulfilment, the existence of the marriage is never suspended: it exists if the event has taken place, otherwise it does not exist.

Mention has been made before that the new Codex has introduced an important innovation with regards to a condition concerning the present or the past, admitted by law. This innovation reads as follows: "However, a condition as mentioned in § 2 may not lawfully be attached except with the written permission of the local Ordinary"²⁵.

It has always been the opinion of some canonists that it is illicit in itself to put a condition to the matrimonial consent. On the other hand, in the Church's law the real will of the contracting parties prevails over the will which has been declared by them. In other words, if they have secretly agreed in a conditional consent,

²⁴ "Conditio si nihilominus appositā sit, pro non adjecta habeatur (*Relatio*, 1981, 258).

²⁵ Canon 1102, § 3.

although they have declared their consent without any condition, the conditional consent prevails over the absolute consent. Consequently the validity of marriage will depend on the fulfilment of the condition.

The celebration of marriage under a condition is not evil in itself. However, the dangers and inconveniences that might ensue from conditional marriage, make the Church frown on the uncertainties that accompany these unions. This is the reason for paragraph 3 of canon 1102. In our humble opinion this requirement will not be practical. Those interested in subjecting the validity of their marriage to a condition will act on their own initiative and in a secret manner. Conditional marriages will be known only when their validity is questioned before the ecclesiastical tribunal. The Instruction of the S. Congregation for the Sacraments issued on July 29, 1941 (AAS, XXII, 539) requests the parish priests to dissuade and discourage the contracting parties from putting any condition to their marriage.

Manifestation of Consent

In the Codex of the Catholic Oriental Church the norms on the manifestation of matrimonial consent through a proxy and on the celebration of marriage through an interpreter, are treated in the chapter dealing with the canonical form. During the revision of our Codex there was a proposal to do the same, "since the manner in manifesting the consent seems to belong to the canonical form"²⁶. It was noted, however, that "the chapter on canonical form contains the prescriptions on elements which are external to the consent, while canons 1104-1107 deal with the manner in manifesting the consent itself, hence they should be treated under the title on consent."²⁷.

The consent of both contracting parties is so essential for the validity of marriage that its defect cannot be supplied by any human power. It is the efficient cause of marriage. The internal consent of the will alone, however, is not enough to create any human contract, marriage included. Its external manifestation which is its faithful expression, is absolutely necessary. The internal act of the will has no effect in the juridical order. As the old axiom says "Intention alone has no efficacy in human con-

²⁶ *Communicationes*, 9, 1977, 376.

²⁷ *Ibid.*

tracts"²⁸. The external manifestation of the mutual consent is necessary in marriage, not only as a contract but also as a sacrament, due to its being an external sign.

When there is no identity between the external declaration and the internal consent, no marriage exists. No determined manner of external expression is required by natural law, hence any way to externally manifest what is willed, according to the custom, is to be considered as an apt means to make the consent known to others. Acceptable means of external expression are the *words* both oral and written, as well as *signs* or *gestures*, which at times may be the only way to express what is internally willed. The internal consent, therefore, can be externally made known by words, signs, facts, letter, messenger, proxy, interpreter, telegraph, telephone, radio or television. Although by natural law any of the foregoing means would be sufficient to show the will to marry, the human law, however, does not admit all these means as sufficiently apt and appropriate to manifest the internal consent of the contracting parties. The present Church law states in this respect: "The spouses are to express their matrimonial consent in words; if, however, they cannot speak, then by equivalent signs"²⁹.

Human positive law may determine what the natural law leaves undetermined in order to avoid uncertainties in affairs of such importance as marriage, as well as to impress upon the parties on the transcendence of the step they take when they get married. If this is true with regards to civil legislation, it is more relevant in the Church law, which considers marriage not only as a contract but also as a sacrament.

We all know that the Church is quite particular in surrounding the manifestation of the marital consent with great solemnity in order to make the parties concerned aware of the important step they take in their life. Thus, she prescribes a determined canonical form for the celebration of marriage as a requisite for its validity³⁰, and requires with utmost diligence and accuracy the register of the celebration of marriage even when the ordinary form has not been observed³¹.

²⁸ 1.6 Dig. *Locati et conducti*, XIX, 2.

²⁹ Canon 1104, § 2.

³⁰ Canon 1108.

³¹ Canons 1121-1122.

Canon 1104 states: "to contract marriage validly it is necessary that the contracting parties be present together, either personally or by proxy. The spouses are to express their matrimonial consent in words; if, however, they cannot speak, then by equivalent signs."

In the old discipline the presence of the contracting parties was not required for the marriage validity. The 1917 Codex, however, required simultaneous physical presence of the contracting parties for the validity of marriage. The new Codex retains this requirement of their presence, so much so that if the contracting parties, personally or by proxy, are not simultaneously present at the celebration, their union will be invalid. Marriages, therefore, contracted by mail, telegraph, telephone, radio, or television are null and void.

During the revision of the Codex some canonists made known their displeasure for the possibility of contracting marriage through a proxy, "since the sacramental character seems to disappear or at least the dignity of the sacrament seems to be impaired"³². The Commission sustained the possibility of contracting marriage through a proxy not only because marriage is a contract, but in consideration of the pastoral value of the celebration itself, taking into account the frequent transmigration of people in our times. Given therefore this possibility, canon 1105 establishes what is to be done in order that the celebration of marriage through a proxy be valid. Canon 1105 states that:

"For a marriage by proxy to be valid, it is required:

- 1° that there be a special mandate to contract with a specific person;
- 2° that the proxy be designated by the mandator and personally discharge this function.

For the mandate to be valid, it is to be signed by the mandator, and also by the parish priest or local Ordinary of the place in which the mandate is given or by a priest delegated by either of them or by at least two witnesses, or it is to be drawn up in a document which is authentic according to the civil law.

If the mandator cannot write, this is to be recorded in the mandate and another witness added who is also to sign the document; otherwise the mandate is invalid.

³² *Communicationes*, 9, 1977, 377.

If the mandator revokes the mandate, or becomes insane, before the proxy contracts in his or her name, the marriage is invalid, even though the proxy or the other contracting party is unaware of the fact."

Some Civil Codes recognize the validity of marriage by proxy. Under Article 55 of the Civil Code of the Philippines, however, marriage by proxy is not legally possible, because the parties themselves are required to declare that they take each other as husband and wife, in the presence of the solemnizing minister or officer and two witnesses. This consent must be personally and solemnly manifested; hence the marriage cannot be entered into through proxy or representative³³. The parish priests, therefore, should bear this in mind. They cannot proceed to solemnize this kind of marriages without the previous permission of the local Ordinary³⁴.

EXCELSO GARCIA, O.P.
University of Santo Tomas

³³ Arturo Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines*, Manila, 1953, vol. I, p. 217.

³⁴ Canon 1071, § 1, n. 7.