

Due Discretion in Marriage Cases

Pope John Paul II, on the occasion of the inauguration of the judicial year on 26 January 1984, delivered an allocution to the members of the Roman Rota, touching among other things on new legislations regarding marriage consent: "But there still remain canons of great importance in matrimonial law which have been formulated in a generic way and which await further determination, to which especially the qualified jurisprudence of the Rota could make a valuable contribution, I think for example, with the determination of the '*grave discretionary judgment*' (and) of the '*essential matrimonial rights and obligations*' mentioned in canon 1095...."¹ This particular canon of the 1983 Code stipulates that among those incapable of contracting marriage are the persons "who suffer from a grave lack of discretionary judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted."²

The former Code of 1917 left a lacuna on mental incapacity when speaking directly of matrimonial consent. However canon 1081 (1917 CIC), when speaking of "persons capable according to the law" (#1), and of the consent as such (#2), could be cons-

¹ *L'Osservatore Romano*, 13 February 1984, p. 11; emphasis supplied.

² Can. 1095, no. 2.

trued to presuppose that the parties entering into marriage are of normal health and stability. However, decades after the promulgation of the 1917 Code, matrimonial tribunals, particularly the Roman Rota, have been flooded with cases for adjudication regarding marriages broken because of apparent immaturity of the contractants and of deficient appreciation of the essential elements and properties of marriage. Matrimonial jurisprudence has explored the ground of "lack of due discretion" in its efforts to resolve these matrimonial disputes.

1. *The Dynamics of Matrimonial Consent*

Well enshrined in law and jurisprudence is the fundamental principle that matrimonial consent lawfully manifested by persons legally capable (*jure habiles*) is the efficient, intrinsic and essential cause of marriage.³ The Code gives expression to this postulate in canon 1057, #1: "A marriage is brought into being by lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power."

Matrimonial consent has been defined as "an act of the will by which a man and a woman by an irrevocable covenant give and accept one another for the purpose of establishing a marriage."⁴ Already Pius XI enunciated this doctrine in his encyclical: "Yet although matrimony is of its nature a divine institution, the *human will*, too, enters into it and performs a most valuable 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 these rights* proper to the state of marriage, is so necessary to constitute true marriage that it can-

³ Cf. 1917 CIC, can. 1081; St. Thomas. *Summa Theol.* III, Suppl., q. 45, a. 1, q. 51, a. 1; Paul VI. "Allocution to the Officials of the Sacred Roman Rota", Jan. 28, 1978, in *The Pope Speaks*, 23 (1978), p. 161; *Sacrae Romanae Rotae Decisiones* (hereinafter referred to as *S.R.R.D.*) coram Pinto, Oct. 28, 1976, n. 3 in *Ephemerides Juris Canonici* (hereinafter referred to as *E.I.C.*) 33 (1977), pp. 331-336; P. Gasparri, *Juris Canonici Fontes*, I. p. 76; and V. Bertrams, "De Effectu Consensus Matrimonialis Naturaliter Validi," in *Appollinaris*. 33 (1960), p. 120 and *passim*.

⁴ Can. 1057, #2.

not be supplied by any human power."⁵ In contemporary articulation, Vatican II affirmed once again this basic tenet in marital contract: "The intimate partnership of life and love which constitutes the married state... is rooted in the *contract of its partners*, that is in their *irrevocable personal consent*."⁶

For the consent to be causative of marital contract, which for baptized persons is also a sacrament (cf. can. 1055, #2), it must in its basic form attain at least to the category of a *human act*, i.e., elicited by free will with previous deliberation by the intellect.⁷

The Angelic Doctor referred to the *human act* as one performed by a person who is master of his actions: "Man however is master of his actions through his reason and will, hence, the free will is defined as the faculty of will and reason. Therefore, those actions are properly called human which proceed from a deliberate will."⁸

While matrimonial consent is basically a "human act", it is not merely a "simple human act", but a "qualified" one by which conjugal obligations are specifically assumed for the entire duration of married life. The mere presence of the capacity to elicit the basic "human act" does not by necessity postulate the capacity to give valid matrimonial consent. With the decision *coram* Prior of November 14, 1919 leading the way, matrimonial jurisprudence has advanced into the direction of thought from which evolved the principle that despite a person's capacity to form a "simple human act" his matrimonial consent which is a "qualified human act" could still be afflicted with juridical infirmity if he lacks

⁵ *Casti Connubii*, Dec. 31, 1930; emphasis supplied.

⁶ *Gaudium et Spes*. Art. 48, emphasis supplied.

⁷ Cf. S.R.R.D., 18 (1926), *coram* Grazioli, April 7, 1926, p. 111; *ibid.*, 53 (1961), *coram* Fiore, May 16, 1961, p. 233; *ibid.*, 55 (1963), c. De Jorio, Nov. 7, 1963, p. 742; *ibid.*, 33 (1941), c. Heard, June 5, 1941, p. 489; *ibid.*, 51 (1959), Pinna, Dec. 21, 1959, p. 613; *ibid.*, 48 (1956), 48 (1956), c. Filipiak, June 15, 1956, p. 555; *ibid.*, 60 (1968), c. Bejan, Feb. 7, 1968, p. 66; *ibid.*, 64 (1972), c. Ewers, May 13, 1972, pp. 266-267; *ibid.*, 64 (1972), c. *Id.*, May 27, 1972, pp. 330-331; *ibid.*, c. Masala, May 10, 1978, in *Monitor Ecclesiasticus*, (hereinafter referred to as M.E.).

⁸ *Summa Theol.*, I-II, q. 1, a. 1.

"discretion of judgment or of freedom proportionate to the obligations of marriage."⁹

2. *Consent in Scholastic Philosophy*

Traditional Christian philosophy has presented a somewhat graphic illustration of the interaction of the will and the intellect in the human act of decision making. This theory delving into the dynamics of human consent is comparatively the most thorough of any philosophical systems and has exerted certain influence on the formulation of marriage legislations and jurisprudence in the Church.¹⁰

Inasmuch as the will is a rational appetite, in order to move itself, it needs the judgment and evaluation by the intellect. In this sense the intellect moves the will in the order of specification, as *final* cause. The will however is free in the order of *efficient causality* as it is the one which directs the intellect to consider or not to consider this object, or to consider this aspect rather than the other. Nevertheless it is *not absolutely free*, since after the operation of the intellect, it is this and only this object in its desirability which the will chooses ultimately.¹¹ St. Thomas succinctly described this interaction: "The will in a certain sense moves the reason by commanding its acts, and the reason moves the will by proposing to its object. . . . Hence, it is said that both potencies can in some way be informed by each other."¹²

Because the activities of these two mental capacities are rooted in the very unity of the subject, the mutual causality is

⁹ Cf. S.R.R.D., 11 (1919), c. Prior. Nov. 14, 1919, p. 174; *ibid.* 59 (1967), c. Anne, Jan. 17, 1967, p. 24; *ibid.*, c. Pinto, Feb. 4, 1974, in M.E., 100 (1975), p. 107; *ibid.*, c. Serrano, May 9, 1980, in *Studia Canonica*, 15 (1981), p. 286; Keating, *The Bearing of Mental Impairment*, pp. 13, 112 and *passim*.

¹⁰ Cf. Bourke, *Will in Western Thought: An Historico-Critical Survey*; A.A. Oesterle, "Human Act" in *New Catholic Encyclopedia*.

¹¹ Cf. P. Siwek, *Psychologia Metaphysica*, ed. 7a. Romae, Pontificia Universitas Gregoriana, 1965, pp. 458-459; D. E. Fellhauer, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence," in *Studia Canonica*, 9 (1975), pp. 109-112.

¹² *De Veritate*, 24, 6, ad 5; S.R.R.D., 61 (1969), c. Pinto, June 26, 1969, p. 655.

simultaneous in every human act.¹³ Consequently on account of the underlying unity between the intellect and the will in one and the same person, whatever disturbs their mutual causality, also disturbs the process of deliberation and volition in the forming of the basic human act.

3. *Maturity of Judgment in Matrimonial Consent*

The term "discretion", used oftentimes with the word "judgment" relates to the concept of "psychic maturity", i.e., functional maturity of the intellect and the will. Prior identified "major rationis discretio" of St. Thomas with "maturitas iudicii".¹⁴

This maturity of judgment however must not be confused with the simple use of reason or the mere psychic capacity to discern right from wrong presumed to be possessed by a seven year old child. This so-called "mortal sin norm" supposedly espoused by Thomas Sanchez, S.J.,¹⁵ which for a time enjoyed a notable following, has long since been repudiated and abandoned as untenable by many canonists and Rotal judges.¹⁶ This norm stipulates that he who is capable of committing a mortal sin is also capable of eliciting matrimonial consent.

In 1979, Stankiewics clearly drew the dividing line between the concept of discretion of judgment and that of simple use of reason:

Discretion of judgment implies more than simple use of reason. A boy, seven years old, is only just presumed to have use of reason. He must not however be said to have sufficient discretion of judgment to enter marriage,

¹³ *De Veritate*, q. 22, a. 10; S.R.R.D., 53 (1961). c. De Jorio, Dec. 19, 1961, p. 613; *ibid.*, 57 (1965) c. Anne, June 28, 1965, p. 503; *ibid.*, 59 (1969), c. De Jorio, Dec. 20, 1967, p. 871.

¹⁴ S.R.R.D., 11 (1919), c. Prior, Nov. 14, 1919, p. 174.

¹⁵ *De Sancto Matrimonii Sacramento*, Lib. I. Disp. VIII, nn. 17, 18, *passim*.

¹⁶ Cf. Gasparri, *De Matrimonio*, II, n. 783; Wernz-Vidal, *Ius Canonicum*, V (3. ed., 1946), "Ius Matrimoniale," nn. 456-457; Capello, *De Matrimonio*, nn. 579, 582; Doheny, *Canonical Procedure in Matrimonial Cases*, I, p. 512; Oesterle, "Amentia," in *E.I.C.*, 11 (1955), p. 292; S.R.R.D., 11 (1919), c. Prior, Nov. 14, 1919, p. 174; *Ibid.*, c. Lamas Oct. 21 (1959), *in iure*; *ibid.*, Dec. 10, 1956, *in iure*; *ibid.*, c. Fiore, May 16, 1961, *in iure*.

because in so young an age, sufficient discretion of judgment for the perpetual bond of conjugal consent cannot be found.¹⁷

In line with the Thomistic principle which has found its way into the "in iure" section of many Rotal and local decisions, matrimonial consent, because of the peculiar nature of the marital union, must be considered to necessitate greater freedom and deliberation than in committing a mortal sin or in entering other contracts:

Consequently it must be said that for a mortal sin it is sufficient to give consent to something present, whereas in a betrothal the consent is to something future; and greater discretion of reason is required for looking to the future than to consenting to one present act. Wherefore a man can sin mortally before he can bind himself to a future obligation.¹⁸

Neither is this discretion of judgment to be presumed as attained upon reaching puberty. Keating, after an extensive commentary on marriage legislations, Rotal jurisprudence and canonical tradition, debunked the "puberty norm" as a valid yardstick for matrimonial consent and went on to conclude:

In fact, it seems that common human estimation, canonical legislations, Rotal jurisprudence, and Cardinal Gasparri are all clearly contrary to the puberty norm. Finally, even if the puberty norm were soundly conceived in theory, it would not be useful judicial norm in insanity cases for almost all, if not all, marriage cases that come to the ecclesiastical tribunal for adjudication on the plea of mental incompetence involve mentally ill persons who, however, at the time of their marriage, had at least the mentality of a *fourteen-year-old boy* or a *twelve-year-old girl*.¹⁹

¹⁷ S.R.R.D., c. Stakiewics, April 5, 1979, P.N. 11.979. n. 4.

¹⁸ *Summa Theol.* III, Suppl. q. 43, a. 2, ad o; *ibid.*, Sent. d. 27, q. 2, a. 2 ad 2; Wernz-Vidal, *op. cit.*, p. 41; S.R.R.D., c. Grazioli, April 7, 1926, p. 111; *ibid.*, 27 (1935). c. Jullien, Feb. 24, 1935, p. 79; *ibid.*, 35 (1943); Manila Metropolitan Tribunal, c. Oscar Cruz, Feb. 16, 1977, P.N. 3/75, pp. 8-10.

¹⁹ Keating. *op. cit.*, p. 154.

This position finds confirmation in the imposition by the Code of the impediment of non-age,²⁰ in setting the minimum age requirement to contract marriage not at the onset of puberty but at the ages of sixteen and fourteen years for the boy and girl respectively. Even then, the critical faculty of those marrying must be evaluated not so much as to age, but with respect to psychological maturity.²¹

Most recent Rotal decisions attribute to the notion of "*debita discretio*" the element of "*facultas critica*" or "*facultas discretiva*" which is conceived as a certain psychic power, something more than the sheer capacity to comprehend the elemental requirement of canon 1096. In a celebrated decision frequently cited and further elaborated in subsequent cases, Felici wrote that in the intellect of man, one has to distinguish correctly between the *cognoscitive faculty* which consists in the abstractive operation of the universal from the particular, or in simple apprehension of the truth; and the *critical faculty* which is the power of judging and reasoning, or affirming or denying something about something and gathering together judgments that a new judgment may then be deduced logically. This critical faculty appears later in man than the cognoscitive faculty.²²

Anne in 1965 synthesized the different decisions till then made on *critical faculty* and identified it as *the essence of the discretion of judgment*.²³

This discretion of judgment, "which must pertain to the nature and force of the marriage contract"²⁴ at least in relation to its substance and its substantial value, must be perceived in the order of contracting marriage — without requiring that this be done reflexively; it implies the exercise not only of the truth, but also

²⁰ Can. 1083, #1; cf. also 1917 CIC, can. 1067.

²¹ Cf. S.R.R.D., c. Di Felice, March 8, 1975, in E.I.C., 31 (1975), p. 177.

²² Cf. S.R.R.D., 49 (1957) c. Felici, Dec. 3, 1957, p. 788; *ibid.*, c. Lamas, Oct. 21, 1959; *ibid.*, c. Sabattani, Feb. 24, 1961; c. *Id.*, March 24, 1961; *ibid.*, c. Anne, Nov. 25, 1961.

²³ S.R.R.D., 57 (1965), c. Anne June 28, 1965, p. 502-503.

²⁴ *Ibid.*, c. Bejan, May 16, 1963.

of the critical faculty, "which is the force of judging and reasoning and gathering judgments together, that a new judgment may then be deduced.²⁵ For that reason, "then *only is marriage valid, when through critical faculty, man can form deliberation and freely elicit the act.*²⁶

He therefore who does not enjoy sufficient critical faculty to form the intimate community of life and conjugal love, or who is unable to comprehend rightly the duties and goods of marriage, is impeded from giving and receiving matrimonial consent.²⁷ The discretion thereby formed must be "due" or proportionate to the obligations of marriage.²⁸

Summing it up, canonical jurisprudence appears to indicate three basic capacities in the formation of matrimonial consent with that "maturity of judgment" proportionate to the basic marital obligations (two on the part of the intellect and one in the area of the will): 1) *capacity to know*, with which one apprehends (understand the object of the act in itself; 2) *capacity for critical evaluation*, (practical judgment), which is the capacity to judge and reason; and 3) *capacity to will* (with free choice) the object.²⁹

4. Consent Viewed from the Findings of Empirical Psychology

Pope Pius XII in an allocution to the members of the Rota on 3 October 1941, commented on the use of psychiatric and psychological findings by ecclesiastical courts:

The Sacred Roman Rota has recently considered the matter of mental illness which is rooted in a certain pathological defect; on this occasion, in judicial sentence, it was necessary to expound certain theories adduced as the very

²⁵ *Ibid.*, c. Felici, Dec. 20, 1957.

²⁶ *Ibid.*, c. Sabattani, Feb. 24, 1961.

²⁷ Cf. *ibid.*, c. Di Felice, Dec. 11, 1975, in E.I.C., 32 (1976), p. 279.

²⁸ Cf. footnote no. 9.

²⁹ Cf. R. Brown, "Inadequate Consent or Lack of Commitment: Authentic Grounds for Nullity", in *Studia Canonica*, 9 (1975), p. 263; also cf. S.R.R.D., 49 (1957) c. Felici, Dec. 3, 1957, p. 788; *ibid.*, 48 (1954) c. *Id.*, April 6, 1954, p. 1954. p. 285; *ibid.*, 35 (1943), c. Quattrocolo, June 16, 1943.

latest proposed by modern psychiatrists and psychologists... Ecclesiastical jurisprudence cannot and should not neglect the genuine progress of sciences which affect moral and juridical matters; it is not permitted nor is it desirable to reject these sciences for the sole reason that they are new.³⁰

This was echoed by Pope John Paul II in his allocution to the members of the Roman Rota on 26, 1984 on the occasion of the inauguration of the judicial year:

But the concern to safeguard the dignity and indissolubility of marriage... cannot prescind from the real and desirable progress of the biological, psychological, psychiatric and social sciences; otherwise one would contradict the very value which it is desired to safeguard, namely, a truly existing marriage, not one which has only the appearance of such, since it is null and void from the outset.³¹

The findings of empirical psychology offer some revealing insights into the evaluation of due discretion in the act of marital consent as elicited by a person. There seems to be four main stages, psychologically not always distinct but logically different, in the process of voluntary choice: motivation, deliberation, decision and execution.³²

In consonance with the accepted dictum: "Nil volitum nisi praecognitum" (nothing is willed unless first known), let us focus our attention on the element of "motivation" in its role as a determinant in decision-making.

"Motivation" comprises those factors that precede the decision and which influence and limit that decision. Broadly taken "motive" means "the sum total of all processes which prepare the

³⁰ AAS, XXXIII, (1941). pp. 421-426.

³¹ L'Osservatore Romano, 13 February 1984, p. 11.

³² Roberto Zavalloni, *Self-Determination: The Psychology of Personal Freedom*, Chicago, Forum Books, pp. 74-75; Vernon Bourke, *Will in Western Thought: An Historico-Critical Survey*. N.Y., Sheed and Ward, 1964, p. 235.

act" of decision.³³ Behaviour however, is not determined by motives but is conditioned by them. This is so because of the will, the volitional factor possessed by man.

Although ultimately the motives are not the ones which produce the decision, they nevertheless shape the decision in the sense that they provide the elements upon which the will acts and fashions the selection and decision. The dependence of the act of consent upon the previous factors implies that there exists "an element of rigidity and predetermination" in volition and that "the cognitive attitude, as well as the behavioral response are, so to speak 'prefigured' to a variable degree." Perceptions, beliefs, even a pathological condition, everything that might enter the decision by a way of motivation can rightly be called "elements of internal determination" of the moment of consent.³⁴ This notion must not however detract from the integrity of the freedom of the will, but such freedom is to be conceived in a manner that it admits limitations. Man's choice can often be anticipated or predicted based on the analysis of the mental and emotional states which preceded the decision itself.

Because of the essential unity of the mental faculties of the person, a fundamental flaw in the intellectual process that prompts the will to act, renders the resultant consent defective and at worst invalid. As the maturity of judgment by the critical faculty depends in part on the correctness of the data presented to it for evaluation, it could be said that because of inadequate perception, the practical judgment elicited by the person is lacking in due discretion.

5. *Juridical Gravity of the Lack of Discretionary Judgment*

Although can. 1095, no. 2 does not contain the word "due" or "proportionate" as has been frequently used in Rotal decisions, it mentions of "grave lack" which may be interpreted to refer to the lack of that discretion relative to the *gravity* of the obligations

³³ Zavalloni, *op. cit.*, p. 208.

³⁴ *Ibid.*, pp. 258-259.

to be given and assumed in married life. Actually there exists no substantial difference between the two terms. "Grave lack" refers to the defect of discretionary judgment in the *juridical* sphere, which is not proportionate or "due" to the gravity of the marital contract. Hence it should *not* be construed to mean necessarily the *diagnostic gravity* of the psychical infirmity which is in the area of medical and psychological sciences, but rather it should be taken to indicate in the *juridical sense* the gravity of the flaw in discretionary judgment, which is causative of the contractual incapacity and the nullity of the act.

Regarding acts which require different degrees of discretion, St. Thomas already drew a fundamental distinction between acts by which a person binds himself to an abiding obligation (*ad providendum in futurum*) and acts which do not generate obligations for the future (*actus praesens*). A greater degree of discretion is demanded that a person binds himself for the future (*ut possit sese obligare ad aliquid in futurum*) and in our case the marital contract, than that he simply consents in "*actum unum praesentem*", being capable thereby of mortal sin only.

For that matter, therefore, the degree of psychological immaturity to be considered as an invalidating element in matrimonial consent *need not* reach serious psychopathological proportion to be considered an illness. It suffices that it is disruptive of the community of conjugal life.³⁵

The gravity of the defect of discretionary judgment may be evaluated in accordance to an objective criterion provided by can. 1095, par. 2, i.e., the "*traditio*" and the "*acceptatio*" of the essential matrimonial rights and obligations. Hence grave defect of discretionary judgment is verified once it is proven that the contracting party lacks the intellectual maturity or the volitional capacity for discerning the essential matrimonial rights and obligations

³⁵ Cf. S.R.R.D., c. Serrano, 3 April 1973 in M.E., 101 (1976), pp. 107-127, n. 12; also *ibid.*, c. Lefebvre, 31 January 1976. in E.I.C., 32, pp. 285-287).

in view of committing oneself irrevocably to this particular person in a contract *sui generis*, into a community of life and love intended for the good of the couple and the procreation and education of the children.³⁶

Conclusion

The number of marriage cases adjudicated under the ground of "lack of due discretion" or other related headings bearing on psychopathological causes has increased considerably, more so after the promulgation of the 1983 Code. In point of fact in many local tribunals, particularly in the Philippines, most of the cases in recent years have been decided under this nullity chapter.

The Holy Father had admitted that the application of the new code can entail the risk of innovative interpretations, at times imprecise or inconsistent. However the risk has to be confronted and overcome with composure by means of the profound study both of the real significance of canonical norms and of all the concrete circumstances attendant to the case. The influence of the Roman Rota on the activities of the lower ecclesiastical courts is significant. Rotal jurisprudence has been and will continue to be considered as a reliable guide to judges and other tribunal personnel in the evaluation of the marriage cases brought to their judicial attention.³⁷

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³⁶ Cf. *Código de Derecho Canónico*, Edición Anotada, Ediciones Universidad de Navarra, S.A., Pamplona. 1983, p. 656.

³⁷ Cf. Pope John Paul II, *Address to the Roman Rota*, 30 January 1986. published in *Newsletter of the Canon Law Society of Great Britain and Ireland*, no. 69, pp. 6-7.