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## Canon 1095 and the Dignitas Connubii: The Role of Consent, Incapacity, and Psychic Anomalies in Cases of Matrimonial Nullity

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# Canon 1095 and the *Dignitas Connubii*: The Role of Consent, Incapacity, and Psychic Anomalies in Cases of Matrimonial Nullity

Roberto Rosas\*

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## I. INTRODUCTION

As seen through the eyes of religious poetry, marriage is the greatest symbol of mystical life. Marriage, alongside night and flame, is one of three dominant symbols in the works of St. John of the Cross, a 14th Century mystic and poet.<sup>1</sup> These three symbols together provide the tone and atmosphere of the mystical world: night representing significance; marriage meaning the communion of love; and flame meaning change and life.<sup>2</sup> In other words, “the symbol of the flame is the *brooch* and the culmination of the fervor of the consummated love in marriage and is the perfect gradual illumination of the dark night.”<sup>3</sup>

The existence of a valid marriage is due to the foundational power of a sole efficient cause,<sup>4</sup> which is consent. Section 1 of Canon 1057 of the 1983

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1. Justin Avanooparambil, *Marking the Birth of St. John of the Cross: 24 June*, available at <http://www.ewtn.com/library/SPIRIT/bdjohncross.HTM> (last accessed Mar. 31, 2014).

2. *Id.*

3. SAN JUAN DE LA CRUZ, *OBRA POÉTICA* 23 (1977) (emphasis supplied).

4. Aristotle argued that, in order to understand an object, especially changes that the object might undergo, one has to understand its four causes. According to Aristotle, the efficient cause of an object is equivalent to that which causes change and motion to start or stop. See *Stanford Encyclopedia of Philosophy, Aristotle's Natural Philosophy*, available at <http://plato.stanford.edu/entries/aristotle-natphil/> (last accessed Mar. 31, 2014).

Code of Canon Law (Code) clearly and resolutely indicates that “[t]he consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent.”<sup>5</sup>

Section 2 of Canon 1057 of the Code states that “[m]atrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage.”<sup>6</sup> It is understood that the consent of each party consists of a voluntary act through which each gives and accepts each other. With its goal being to create a marriage, the act of consent should be considered as human, intelligent, and free. It is not limited to a present commitment but serves as a promise for the future for life. Moreover, having to consider consent as a human, intelligent, and free act also has, as its object, the establishment of a marriage and does not limit itself to a present obligation for a future life.

This leads us to take up again the commentaries made regarding the text of St. Ignatius of Loyola in his celebrated Spiritual Exercises — “First[,] let [us] draw our attention to the fact that love has two parts, which are the person giving love and the person receiving love.”<sup>7</sup>

These bases, briefly described, will serve to develop throughout this Article the following points: (1) the essential elements of marriage; (2) the basic principle of matrimonial consent; (3) the nature of consent; (4) acts through which consent is formed; (5) matrimonial nullity in Canon Law; (6) Canon Law and the *Dignitas Connubii* (*Dignitas*); and (7) recent jurisprudence concerning matrimonial nullity. On this intellectual journey, readers are invited to discover, through the study of the above-mentioned points, the *terra incognita*, described by Daniel Boorstin as the “[t]he most promising words ever written on the maps of human knowledge.”<sup>8</sup> This unknown territory is the complete understanding of canonical matrimonial consent.

Although this work is aimed at all those interested in the study of matrimonial canon law such as academics, lawyers, and students, its focus is essentially for those with various roles in the tribunals of the Church,

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5. CANON LAW SOCIETY OF AMERICA, CODE OF CANON LAW, LATIN-ENGLISH EDITION: NEW ENGLISH TRANSLATION 335 (1998) (citing 1983 CODE OF CANON LAW, canon 1057, § 1).

6. 1983 CODE OF CANON LAW, canon 1057, § 2.

7. Two parts means two individuals, who tend to have only one love: *duo in corde uno* (two in one heart). See Ignacio Casanovas, *Segunda Nota: De las Obras de Amor*, in EJERCICIOS DE SAN IGNACIO, TOMOS V-VI, COMENTARIO Y EXPLANACIÓN DE LOS EJERCICIOS ESPIRITUALES DE SAN IGNACIO DE LOYOLA (1948).

8. DANIEL J. BOORSTIN, THE DISCOVERERS: A HISTORY OF MAN'S SEARCH TO KNOW HIS WORLD AND HIMSELF xvi (1983).

knowing the matrimonial causes in favor of the people of God. It aims to shed light and clarify paragraphs 2 and 3 of Canon 1095 of the Code by making clear how the causes of defect of discretion of judgment and the inability to assume the essential obligations due to some sort of psychic disorder or anomaly, affect either an affirmative or negative declaration of matrimonial nullity.<sup>9</sup> Additionally, it discusses the role of the *Dignitas*<sup>10</sup> as a tool intended to help judges and other tribunal ministers of the Church who are entrusted with hearing the causes of nullity of marriage. Its provisions support the juridical structure of the marriage nullity process and encourage adherence to that same structure. The purpose of the *Dignitas* is to clarify the provisions of the universal law and detail the way in which they are to be observed.<sup>11</sup> Essentially, the law is contained in the Code while the *Dignitas* serves as a guide for the implementation of that law.

It is also for those who hope, with illusion and anxiety, that the tribunals alleviate their suffering and finally allow them to rebuild their broken lives. The latter should remember what Francesco Carnelutti said should be present in all tribunals: “Justice and Peace, so that the conflicting parties may leave with justice and peace, the judges at all times applying canonical equity and the *salus animarum* (salvation of souls) as the supreme law of the Church.”<sup>12</sup> In its final canon — Canon 1752 — the Code fittingly ends with the salvation of souls.<sup>13</sup>

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9. See 1983 CODE OF CANON LAW, canon 1095, ¶¶ 2–3. This Section provides — Can. 1095. The following are incapable of contracting marriage:

- (1) Those who lack the sufficient use of reason;
- (2) Those who suffer from a grave defect of discretion of judgment regarding essential matrimonial rights and duties mutually to be handed over and accepted;
- (3) Those who are not able to assume the essential obligations of marriage for causes of psychic nature.

*Id.*

10. *Dignitas Connubii* or the Dignity of Marriage demands that the Church “with the greatest pastoral solicitude promote marriage and family founded on marriage, and protect and defend them with all means available.” See Vatican: The Holy See, Instruction to be Observed by Diocesan and Interdiocesan Tribunals in Handling Cases of Nullity of Marriage: *Dignitas Connubii*, available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/intrptxt/documents/rc\\_pc\\_intrptxt\\_doc\\_20050125\\_dignitas-connubii\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html) (last accessed Mar. 31, 2014) [hereinafter *DIGNITAS CONNUBII*].

11. See generally *DIGNITAS CONNUBII*.

12. Roberto Rosas, *Matrimonial Consent in Canon Law Juridical Aspects*, 43 *REVISTA JURÍDICA U.I.P.R.* 419, 421 (2009).

13. 1983 CODE OF CANON LAW, canon 1752.

## II. MARRIAGE

## A. Canon Law and Marriage

## 1. Essential Elements of Marriage

It is argued by many of the classical theologians that it is in Genesis 2:24<sup>14</sup> where one can verify that God, the creator of nature, established the natural matrimonial institution.<sup>15</sup> Thus, it has been said, “*cio che e sicuro e che Gen 2, 24 si refersice all’istituzione matrimonial, non all’attrazione sessuale,*”<sup>16</sup> which translates into “that which is certain is that Genesis 2:24 refers to the institution of marriage[,] and not the sexual attraction.” Having identified the origins of the natural institution of marriage, one must turn to the task of determining how God established said natural institution of marriage.<sup>17</sup> In order to determine such thing, theologians usually turn to the teachings of the Church and the Canonists.<sup>18</sup> A closer look at these teachings reveals that God created the natural institution of marriage through the following essential elements:

- (1) The personal structures, which state that man and woman, as a married couple, become intimately complete in the biological and spiritual order, and by doing so become the other;
- (2) The essence and the essential properties, which state that the union for a lifetime is destined to last as long as one of the spouses does not die[,]thus it is considered exclusive and indissoluble;
- (3) The essential purposes;
- (4) The reciprocal rights and obligations; and
- (5) The ethical and religious principles, which along with the positive legislative norms, specify the agreement in its totality and the content of each of the rights and obligations of its members.<sup>19</sup>

## 2. Definitions

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14. Genesis 2:24 provides — “[t]herefore a man shall leave his mother and father and be joined to his wife, and they shall become one flesh.” See *Genesis* 2:24 (King James).

15. JUAN JOSÉ GARCÍA FAILDE, NUEVO ESTUDIO SOBRE TRASTORNOS PSÍQUICOS Y NULIDAD DEL MATRIMONIO 81 (2003).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 82.

In everyday language, marriage has adopted many different meanings including: (1) those definitions making reference to the wedding;<sup>20</sup> (2) marriage as a matrimonial society;<sup>21</sup> and (3) marriage as reference to the living together of the spouses.<sup>22</sup> It is important to note that out of all of these definitions, marriage as a status, marriage as a matrimonial society, or marriage as a partnership that is to last for a lifetime, should be considered as providing a “true” definition of marriage.<sup>23</sup> The legal canonical definition of marriage can be obtained through a slight style modification of Canon 1055 of the Code and formulated as follows — “[a] partnership of the whole life established between a male and a female, through the matrimonial partnership (alliance), order, by its own nature, for the good of the spouses and for the procreation and education of the offspring.”<sup>24</sup>

### 3. Purpose

The use of the word purpose is understood as that end for which an action is carried out.<sup>25</sup> When talking about marriage, two types of purposes have been identified.<sup>26</sup> First, there is the essential, objective, and natural purpose — that for which an action is ordered or carried out.<sup>27</sup> Second, there is the accidental, subjective, extrinsic purpose — that end or goal for which the person carries out the action.<sup>28</sup> During the Middle Ages, there was only one essential purpose considered — the education and procreation of children.<sup>29</sup> Beginning in the 11th Century, there was a move towards identifying three purposes for marriage: the procreation and education of children, mutual help, and the remedy for the hunger and desire of earthly

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20. A marriage is a culturally sanctioned union between two or more people that establishes certain rights and obligations. See WILLIAM A. HAVILAND, ET AL., *CULTURAL ANTHROPOLOGY THE HUMAN CHALLENGE* 202 (2013).

21. See Anthony Esolen, *Healthy Societies Need Successful Marriages*, available at <http://www.crisismagazine.com/2012/healthy-societies-require-successful-marriages> (last accessed Mar. 31, 2014).

22. National Conference of State Legislatures, *Common-Law Marriage*, available at <http://www.ncsl.org/research/human-services/common-law-marriage.aspx> (last accessed Mar. 31, 2014).

23. FAILDE, *supra* note 15, at 81.

24. ALBERTO BERNANDEZ CANTÓN, *COMPENDIO DE DERECHO MATRIMONIAL CANÓNICO* 23 (1991).

25. WARNHOLTZ CARLOS BUSTILLOS, *MANUAL DE DERECHO MATRIMONIAL CANÓNICO* 28 (1996).

26. *Id.*

27. *Id.*

28. *Id.* at 29.

29. BUSTILLOS, *supra* note 25, at 29.

goods and uncontrollable pleasures.<sup>30</sup> It is important to note that, during this time, the previously identified purposes were not categorized or given any priority.<sup>31</sup>

Nevertheless, with the writing of the 1917 Code of Canon Law,<sup>32</sup> the three purposes were categorized, with procreation and education of the children deemed as the primary purpose, and mutual help and the remedy for the hunger and desire of earthly goods and uncontrollable pleasures as the secondary purposes of marriage.<sup>33</sup> According to the Traditional Canon Law doctrine, the two secondary purposes are essentially subordinated to the primary purpose.<sup>34</sup> In other words, the secondary purposes are considered also a purpose because of their subordination to the primary purpose.<sup>35</sup> It must be considered that mutual help is not an intrinsic purpose of marriage since such help can exist in any relationship outside of marriage.<sup>36</sup> As for the remedy for the hunger and desire of earthly goods and uncontrollable pleasures, it is obtained through the action of marriage; thus, it is not a substantial part of marriage.<sup>37</sup>

#### 4. Goods

It is interesting to consider how the three goods of marriage — *bonum sacramenti*, *bonum fidei*, and *bonum prolis* — identified by St. Augustine, not only became an important part of the jurisprudence of the Church, but also

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30. *Id.*

31. *Id.*

32. The enactment of the 1917 Code of Canon Law or the Pio-Benedictine Code of Canon Law was considered as the first time in the Roman Catholic Church's history that it was governed by a single code of Canon Law. Prior to its enactment, Canon Law was just a vast and confusing collection of canonical materials. Today, the 1979 Code of Canon Law is no longer the law of the Roman Catholic Church, having been replaced by the 1983 Code of Canon law promulgated by Pope John Paul II. See DR. EDWARD N. PETERS, *THE 1917 PIO-BENEDICTINE CODE OF CANON LAW IN ENGLISH TRANSLATION WITH EXTENSIVE SCHOLARLY APPARATUS* xxiii-xxv (2001).

33. BUSTILLOS, *supra* note 25, at 29.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*



became a vehicle through which the substantial elements of marriage were shown.<sup>38</sup>

The *bonum sacramenti* represents the inability to dissolve the marriage to such an extent that theologians have argued — without this good, there cannot exist a true marriage.<sup>39</sup> This is so because *bonum sacramenti* is part of marriage itself and not a good that is derived from the use of marriage, given that the inability to dissolve a marriage represents the unbreakable union between Christ and the Church.<sup>40</sup>

The *bonum fidei* represents the right to fidelity, and the obligation to maintain said fidelity in accordance with the bond of unity for a lifetime.<sup>41</sup> It is, as theologians have argued, the exclusive right to share in the married life and to raise children, and not the exclusive right to fidelity itself.<sup>42</sup>

Finally, *bonum prolis* represents the right to procreation and to educate the progeny, along with the right to paternity and maternity.<sup>43</sup> It is important to note that progeny is not an essential part of marriage, while on the contrary, any marriage without children would be considered null.

A sector of theologians have argued the existence of a fourth good of marriage, which has been identified as *bonum coniugum*, and this represents a complement to the previously discussed essential purposes of marriage, and with which a true partnership of litem could not be understood.<sup>44</sup> This fourth good also represents a right and an obligation to the good of the union.<sup>45</sup> The good of the union requires all of the necessary elements for a healthy interpersonal relationship including good will, companionship, friendship, and the duty and right to married love.<sup>46</sup>

## 5. Properties

The essential properties of marriage, identified in Canon 1056 of the Code,<sup>47</sup> are unity and the indissoluble character of marriage, which have reached a

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38. BUSTILLOS, *supra* note 25, at 31.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. BUSTILLOS, *supra* note 25, at 32.

45. *Id.*

46. *Id.*

47. 1983 CODE OF CANON LAW, canon 1056.

particular level of strength and stability by way of the Sacrament.<sup>48</sup> It is important to establish that the term *essential property* talks about a scholastic metaphysical concept, which is not similar to the legal concept of property.<sup>49</sup>

In the Scholastic Philosophy, an essential property of a being or entity is understood as that which even when not a part of its essence, characterizes or identifies the being or entity in such a manner that, without said property, it would not be able to exist.<sup>50</sup> Thus, in a similar manner, unity and the indissoluble character of marriage characterize and identify marriage to such an extent that without these two essential properties, a marriage could not be considered a marriage.<sup>51</sup> Unity is the strength of the married union and of the mutual surrender between a man and a woman.<sup>52</sup> It is what makes the union between a man and a woman exclusive. The indissolubility of marriage is what makes the union of marriage and the mutual surrender perpetual until the death of one of the spouses.

It is important to distinguish between the intimate or essential unbreakable character, and the external or non-essential unbreakable character of marriage. The first deals with the impossibility of dissolving the union using the same purpose for which it was formed — by way of the private will and initiative of the parties.<sup>53</sup> The second type deals with the impossibility of dissolving the union by way of a public authority — which can either be ecclesiastical or civil.<sup>54</sup> Unity and the indissoluble character of marriage come from the same natural condition of marriage. In other words, they are essential to it.<sup>55</sup> The agreement to be together for a lifetime implies a personal and complete surrender and acceptance, by each of the spouses, to the other.<sup>56</sup> And if it is considered personal and complete, then it must be Exclusive and Perpetual. Hence, the unity and the indissoluble character of marriage make up, each in its own right but mutually complementing each other, the monogamous marriage, thereby excluding any type of polygamy.<sup>57</sup>

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48. BUSTILLOS, *supra* note 25, at 34.

49. *Id.* (emphasis supplied).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 35.

54. BUSTILLOS, *supra* note 25, at 34.

55. *Id.*

56. *Id.*

57. *Id.*

## 6. Marriage as Sacrament

The Sacraments are ordered for the sanctity of persons, for the edification of the Body of Christ, and for the praise of God; but they also have a pedagogical end.<sup>58</sup> The Sacraments not only entail faith but they also feed, strengthen, and express faith by way of words and things.<sup>59</sup> This is why the Sacraments are called Sacraments of the Faith.

A group of theologians have discussed the Christian marriage, as well as the other sacraments, as a sacramental sign and real symbol that confers grace by way of the act performed by Christ and not just through the faith of those that receive it.<sup>60</sup> In order to further understand such argument, it is important to define the words sign and grace.

A *sign* is that which, when seen or known, leaves us to the knowledge of that which is unknown or that which cannot be seen.<sup>61</sup> A sign can be natural or conventional; it can be a thing, action, words, or even all three of these.<sup>62</sup> One example of a natural sign is smoke, considering that if an individual were to see smoke, he or she would most likely deduce that there was a fire.<sup>63</sup> An example of a conventional sign is the flag of a country, which serves as a sign of patriotism.<sup>64</sup> Hence, Sacraments, unlike other signs, are effective of the grace. In other words, not only do they lead to knowledge or remind people of the grace, but they themselves give or grant that which they stand for, of course, if the person that receives them is one with faith.<sup>65</sup>

Meanwhile, *grace* is the sanctification or justification of men by way of the divine life that God instills in the human souls.<sup>66</sup> It is also the way by which God gives man the assistance necessary so that he can carry out his duties.<sup>67</sup> Nevertheless, it is important to understand that each sacrament grants the sacramental grace unique to its characteristics; thus, the grace of matrimony is different from the grace of priesthood, but they both are divine assistance.<sup>68</sup>

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58. *Id.* at 42.

59. *Id.*

60. LAWRENCE G. WREN, *THE INVALID MARRIAGE* 222 (1998).

61. BUSTILLOS, *supra* note 25, at 42 (emphasis supplied).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 43.

66. *Id.* (emphasis supplied).

67. BUSTILLOS, *supra* note 25, at 43.

68. BUSTILLOS, *supra* note 25, at 43.

Having provided a concise definition of the elements that make up a sacrament, attention should now be turned to the Sacrament of Marriage and the struggle of theologians and canonists to identify the different components of this Sacrament. Two theories have evolved to address this matter: one developed by the earlier theologians and canonists, and another developed by the modern theologians and canonists.<sup>69</sup>

First, the earlier theologians and canonists, who, in looking at the effective cause of marriage as the mutual consent of two parties expressed by way of words, tried to incorporate to the marriage contract the categories of matter and form.<sup>70</sup> The concepts of matter and form were borrowed, by said individuals from the teachings of the Scholastic Metaphysics, which holds that every body or material entity is made up of matter and form.<sup>71</sup> Matter was seen as the common and indeterminate element that was determined by the form.<sup>72</sup> Thus, the most common opinion of the earlier theologians was that the sacrament was realized in the valid contract, but even more, the contract was seen as the sacrament.<sup>73</sup> The consent of husband and wife, which was seen as the essence of the contract and the effective cause of the Sacrament, was at the same time the matter and form of the Sacrament.<sup>74</sup> The matters, as the indeterminate element, were the words or signs in so much as they expressed the mutual surrender of husband and wife.<sup>75</sup> The form, a determinate element, were the same words or signs insofar as they expressed the mutual acceptance of both male and female as husband and wife.<sup>76</sup> If the Sacrament was the same valid contract, and whose essence was consent, the minister of the Sacrament was not the priest or deacon but rather those that were getting married.<sup>77</sup> Thus, it was the husband and wife who were getting married before the priest or deacon who, in turn, acted as a witness by assisting in the matrimony.<sup>78</sup> In conclusion, the earlier opinion viewed husband and wife as making the contract, which then made the Sacrament.<sup>79</sup>

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. BUSTILLOS, *supra* note 25, at 43.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Modern theologians and canonists do not place much emphasis on the argument of matter and form. Rather, they reflect more on the mysterious meaning of the union that husband and wife have in relation to the Christ-Church union.<sup>80</sup> A union that is certainly initiated in the contract, but that lasts or should last as long as the bond between husband and wife exists, in other words, until the death of one of them.<sup>81</sup>

In his work *Summa Theologiae*, St. Thomas Aquinas addresses the important distinction of those sacraments that existed during the Old Law and those that exist in the New Law.<sup>82</sup> He began his argument by stating that, in the state of innocence, sacraments were not needed either to achieve knowledge and grace, or as remedies for sin.<sup>83</sup> As for marriage, although it existed during the state of innocence, it did not do so as a sacrament, but rather to serve its natural function.<sup>84</sup> And here is where he establishes the primary difference of sacraments, primarily marriage, in the Old Law and the New Law. For St. Thomas, marriage “symbolized the future relationship of Christ and his [C]hurch, just as everything else that preceded Christ prefigured him.”<sup>85</sup> Thus, the Old Law sacraments foretold the Christ and after Adam’s sin, that men could be made holy again.<sup>86</sup> St. Thomas follows by stating that “before Christ’s coming there needed to be certain visible signs that a man could use to attest his faith in the future coming of the [Savior].”<sup>87</sup> The New Law sacraments were symbolic of that which already took place in Christ, while the Old Law sacraments prefigured it as future.<sup>88</sup> Borrowing from the teaching of St. Paul, it was stated therein that Old Law sacraments were weak and needy elements given that do not contain or cause grace.<sup>89</sup> On the other hand, St. Thomas states that the New Law sacraments “contain and cause grace, and [do not] merit the same judgment.”<sup>90</sup>

The distinction between the Old Law sacraments and the New Law sacraments was not only relevant to the elements of a sacrament, which is

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80. BUSTILLOS, *supra* note 25, at 46.

81. *Id.*

82. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE: A CONCISE TRANSLATION* (Timothy McDermott ed., 1989).

83. *Id.* at 559.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. AQUINAS, *supra* note 82, at 550.

89. *Id.*

90. *Id.*

symbol and grace, given that it led to two distinct views of marriage which were contemporaneous with their time and line of thought.<sup>91</sup> In the early centuries of the Church, marriage was considered as something sacred and religious, even when the technical concept of sacrament did not exist.<sup>92</sup> The liturgical celebration of marriage slowly developed throughout the East and the West.<sup>93</sup> The Holy Fathers, making reference to the text of St. Paul's Letter to the Ephesians, exhort to the Christian husband and wife to love each other as Christ loved His Church.<sup>94</sup> In this view, the Christ-Church relationship is not only an example or a model to be followed but rather a true communication, a participation of the Christ-Church union to the inferior reality of the union of husband and wife.<sup>95</sup> In his text, St. Paul exhorts the Christian husband and wife to the unbreakable union, to the loyalty and love, basing this on two main arguments.<sup>96</sup> The first argument is based on the comparison doctrine of the Mystic body of Christ, set forth in his first letter to the Corinthians, primarily 1 Corinthians 12: 12-28.<sup>97</sup> His second argument is based on Genesis 2: 23-24, wherein St. Paul finds in the union of Adam and Eve prior to sin, a union similar to that of Christ and the Church.<sup>98</sup> Prior to sin, and when God introduced the woman to Adam, He responded "this is now bone of my bones, and flesh of my flesh [—] she shall be called [woman], because she was taken out of [man]." <sup>99</sup> Thus, it could be inferred that Adam saw in the woman, someone with whom he could dialogue, someone he could love and that could love him back, someone with whom he could be together.<sup>100</sup> After sin, the relationship of man and woman was damaged, giving rise to the jealousy in both; the love of the woman turned into seduction, selfishness, and manipulation; the love of man turned into control.<sup>101</sup> Thus, man and woman, as well as marriage, were in need of redemption.<sup>102</sup>

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91. BUSTILLOS, *supra* note 25, at 46.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. BUSTILLOS, *supra* note 25, at 83.

98. *Id.*

99. *See* Genesis 2:23 (King James).

100. BUSTILLOS, *supra* note 25, at 46.

101. *Id.* at 48.

102. *Id.*

Christ, by way of His death and resurrection, established the “new alliance” with the baptized people of the Church.<sup>103</sup> By way of this alliance, God established that the union that existed between Adam and Eve prior to sin, was a simple archetype of his union with the Church — mutual surrender, and the unbreakable and eternal common union of love.<sup>104</sup> Christian husband and wife, who by way of baptism are members of the body of Christ, participate with Christ in the mission of sanctification, salvation, and of the growth of the mystic body by participating in the bearing and education of the new children of God.<sup>105</sup> It is important to establish that the significance of the new alliance is not purely symbolic, but rather one that must be effective.<sup>106</sup> Both Christian husband and wife must reflect and make effective in their conjugal union, the union of Christ and the Church, all that such union implicates — love, surrender, loyalty, communion, and the unbreakable character of the union.<sup>107</sup> In order to accomplish such task, the married couple relies on the grace of Christ, which not only sanctifies, but also helps them in accomplishing their calling as a couple and as parents.<sup>108</sup> The only difference between the conjugal union and the union of Christ with the Church, is that in the conjugal union, husband and wife are in a plan of comparison and at the same time of reciprocity — both of them are members of the Body of Christ. It is considered that Christ is the head of both and the husband needs the love and care of his wife just as much as she does.<sup>109</sup>

### III. THE BASIC PRINCIPLE OF CONSENT

The consent of the contracting parties is the fundamental element of marriage as described in Section One of Canon 1057 of the Code, which, faithful to a very old tradition, tells us that the consent of the contracting parties is what creates marriage, and proclaims this principle as follows — “[t]he consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent.”<sup>110</sup>

This basic principle of consent is expressed in the following two assertions: (1) it is necessary, and (2) it is sufficient for the concrete marriage to exist. All substantive, adjective, or procedural matrimonial Canon Law

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103. *Id.*

104. *Id.*

105. *Id.*

106. BUSTILLOS, *supra* note 25, at 48.

107. *Id.*

108. *Id.*

109. *Id.* at 49.

110. 1983 CODE OF CANON LAW, canon 1057, § 1.

revolves around matrimonial consent. The substantive element describes its nature, properties, and the essential purposes — the factors that prevent its birth or its juridical efficacy, among other aspects. The procedural element shows the method through which one can, with certainty, in a process discover if in a concrete marriage there was consent or if it was judicially ineffective.

#### IV. THE NATURE OF CONSENT

Matrimonial consent is made up of two acts of will, corresponding to each spouse.<sup>111</sup> If this act of will is lacking or is judicially ineffective in just one of the spouses, it is sufficient for a finding that marital consent did not exist.<sup>112</sup>

It is the consent of both parties which makes or produces the marriage. This can be understood in two valid ways: that consent is the *efficient cause* and the *formal cause* of the marriage.<sup>113</sup> For the consent of the parties to constitute an efficient cause of a marriage means that the matrimonial bond between the parties originated through acts of will. To be a formal cause of a marriage refers to consent as an act of will that is an essential element and forms part of the essence of the marriage. By virtue of its union with the contracting parties, consent places them in the category of spouses, just as it places consent in a matrimonial category. Taking this into account, it is understood that the canonist legislator, after stating that the marriage is formed through voluntary consent, adds that said consent cannot be replaced by any human power.<sup>114</sup>

This meaning and dimension of marriage overcomes the juridical categories and its difficult expression in its concepts. It is for this reason that the Codifying Commission, upon composing Canon 1055 of the Code after much discussion, preferred to directly say that marriage between those baptized is a sacrament, and indirectly describe what is known as natural marriage in the modern day versions of Canons 1055 and 1057 of the Code.<sup>115</sup>

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111. See Catechism of the Catholic Church, Article Seven — The Sacrament of Matrimony, available at <http://www.christusrex.org/www1/CDHN/matri.html> (last accessed Mar. 31, 2014).

112. *Id.*

113. *Id.*

114. *Id.*

115. See 1983 CODE OF CANON LAW, canons 1055 & 1057.



The principal elements of the definition of marriage are found in these two canons: (1) marriage *in fieri*, and (2) marriage *in facto esse*.<sup>116</sup> Marriage *in fieri*, or a marriage in the process of becoming a marriage, is the alliance or irrevocable covenant, which originates in the legitimately manifested consent of both juridically capable contracting parties.<sup>117</sup> It consists in the mutual surrender and acceptance of a person, in similarly natured spouses, which constitutes a partnership for a lifetime. Marriage *in facto esse* is the same lifetime partnership already created by the alliance of the spouses.<sup>118</sup>

#### A. Will

The term *will* has many accepted meanings, including “power of the soul, which moves an individual to do or not to do something,”<sup>119</sup> and “free self-determination or free determination.”<sup>120</sup> The most accepted definition, however, is as such —

A psychic faculty of carrying out the act of referring to an object of which the intelligence has thought and which presents as something good, as something useful, and the act of taking possession of the object, or the act of rejecting an object that intelligence has thought and presented as bad, as something harmful.<sup>121</sup>

Under this definition, will is identified as a right. Psychological freedom and the act with which it takes possession of an object is an act of choice, an act of will.

The validity of an exercise of will depends on intelligence, emotions, and other factors in such a way that summarize will as a psychic activity of an individual and the end phase of all psychic activity. The act of exercising will is comprised of three successive phases: (1) presentation by understanding, (2) election, and (3) execution.<sup>122</sup>

During the first phase, presentation, the subject examines, analyzes, values, and compares the various motives for which he either makes a decision or rejects something.<sup>123</sup> These motives consist of all things that move the *will* to do something.<sup>124</sup> The second phase, election, is the

116. See THE CANON LAW SOCIETY OF AMERICA, NEW COMMENTARY ON THE CODE OF CANON LAW 1240-41 (John P. Beal, et al. eds., 2000).

117. *Id.*

118. *Id.*

119. DICCIONARIO DE LA LENGUA ESPAÑOLA 1492 (1992).

120. *Id.*

121. FAILDE, *supra* note 15, at 132.

122. ROSAS, *supra* note 12, at 446.

123. *Id.*

124. *Id.*

selection of one of those motives, and consequently determines whether the act of will arises or not.<sup>125</sup> Whether the will wants something or ceases to want something depends on the coloring or tonality of attraction or repulsion of the motive.<sup>126</sup> Execution, the third phase of the act of will, is understood as a motor function derived from the motive that has been selected.<sup>127</sup>

### *B. Freedom*

Given the narrow relationship between freedom and will, it is necessary to mention that the term freedom has three meanings in the Bible: (1) the position of a free man as opposed to that of a slave; (2) the moral freedom of the will; and (3) the Gospel in as much as it is the “perfect law of freedom.”<sup>128</sup>

Considering *freedom* in terms of consent, Section 2 of Canon 1057 of the Code states that “[m]atrimonial consent is an act of the will[,] by which a man and a woman mutually give and accept each other[,] through an irrevocable covenant in order to establish marriage.”<sup>129</sup> As mentioned in the previous section, will is the psychological capacity of wanting, so that the act of will, which makes up marital consent, is the same as an act of wanting.<sup>130</sup> Additionally, the fundamental attribute of will is freedom, which consists of the psychological capacity of doing “free” acts, or acts of election.<sup>131</sup> The wanting of will is an act of election, always considering freedom as an internal capacity of an individual.<sup>132</sup>

The act of will is a human act. It is the individual’s own and specific psychological act of reason and freedom. The act of will differs from non-psychological acts, also referred to as “acts of man,” which are more properly defined as functions than acts, such as digestion or blood circulation.<sup>133</sup> As

125. *Id.*

126. *Id.*

127. *Id.*

128. SERAFÍN DE AUSEJO, *DICCIONARIO DE LA BIBLIA* 1097 (1963).

129. The definition of consent is an act of will that is based on the Doctrine of Scholastic Philosophy. See 1983 CODE OF CANON LAW, canon 1057, § 2; & BUSTILLOS, *supra* note 25, at 141 (emphasis supplied).

130. Rosas, *supra* note 12, at 447.

131. *Id.*

132. *Id.*

133. Catholic Culture Dictionary, Act of Man, available at <https://www.catholicculture.org/culture/library/dictionary/index.cfm?id=31641> (last accessed Mar. 31, 2014).

such, these functions are carried out without the individual ability to intervene with his will, in order to decide whether these functions should be carried out or not.

Psychological acts, as well as those non-psychological “functions” originate from specific individualities within people. Psychological acts originate from the individuality encompassing rationality and freedom, which distinguishes a person from the irrational animal.<sup>134</sup> In contrast, the non-psychological acts come from that part of the individuality that a person has in common with the irrational animal, which are the vegetative and sensory systems.<sup>135</sup>

### *C. Freedom, Understanding, and Feelings*

The act of choice is the specific act of the will, but it is not solely the fruit of the will, but rather of the will and other capabilities, including understanding.<sup>136</sup> Understanding guides a person, but the will decides, and in this decision, one finds the fundamental act of choice. It is said that someone chooses something after becoming familiar with it, he wants it, accepts it, and makes it his.<sup>137</sup> The act of choice requires the connected and harmonious intervention of various capacities, principally that of understanding and will. These two faculties, understanding and will, are complementary to each other through their formal purposes, truth, and good.

Considering that the truth is the good towards which intelligence is inclined with all its strength, the will cannot want anything that is not presented as “good” for the individual in the specific situation in which the individual finds himself. Everything that the will wants or desires has to be redressed as good. The good is then, consequently, the final cause to which it should aspire. Therefore, every motive that moves the will to want or desire must not only be a good, but also a contingent good that the will can then accept or reject.<sup>138</sup>

### *D. Theoretical and Deliberative Understanding*

Theoretical understanding and speculative judgment are required for matrimonial consent.<sup>139</sup> The act of choice, of which matrimonial consent

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134. Rosas, *supra* note 12, at 447.

135. *Id.*

136. *Id.*

137. FAILDE, *supra* note 15, at 25.

138. *Id.*

139. Rosas, *supra* note 12, at 450.

exists, is substantially an act of will, revealed by the light of reason.<sup>140</sup> This is because diverse objects or diverse aspects of the same object, among them are those that the will has to select, have to be previously known by reason, first, theoretically, and later, deliberatively.<sup>141</sup>

Regarding the theoretical understanding of the matrimonial purpose, eligible by the will and required for matrimonial consent to exist, Section One of Canon 1096 of the Code clearly indicates that “[f]or matrimonial consent to exist, the contracting parties must be at least not ignorant that marriage is a permanent partnership between a man and a woman[,] ordered to the procreation of offspring by means of some sexual cooperation.”<sup>142</sup>

It is important to emphasize the following points: (1) that knowledge is required in order for consent to exist; (2) the phrase “not ignorant” should be understood as having some knowledge, because demanding that the parties not be ignorant in place of expressly demanding knowledge indicates that a vague, imprecise, and minimum knowledge is sufficient; (3) to not be ignorant of the fact that it is a partnership is to not be ignorant that there is some uniting bond; (4) to not be ignorant that it is permanent is less than not being ignorant that it is indissoluble; (5) to not be ignorant that it is between a man and a woman is, at the very least, to not be ignorant that it is heterosexual; and (6) to not be ignorant that procreation is achieved through “some sexual cooperation,” that is, not be ignorant that it comes from some kind of bodily contact, and is to not be ignorant of the exact functions of the sexual organs.<sup>143</sup>

It is not the same thing to be lacking the minimum understanding as it is to be incapacitated.<sup>144</sup> In order to possess the minimum understanding, the former does not necessarily imply the latter, although the latter necessarily implies the former.<sup>145</sup> Canon 1096 of the Code<sup>146</sup> refers to the lack of this knowledge, while Section 1 of Canon 1095 of the Code<sup>147</sup> refers to being incapacitated, which is characterized as lacking sufficient use of reason. Section 1 of Canon 1095 of the Code does not refer to a complete lack of the use of reason but rather a sufficient lack of the use of reason.<sup>148</sup> The

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140. *Id.*

141. *Id.*

142. 1983 CODE OF CANON LAW, canon 1096, § 1.

143. Rosas, *supra* note 12, at 451.

144. *Id.*

145. *Id.*

146. *Id.*

147. 1983 CODE OF CANON LAW, canon 1095, § 1.

148. Rosas, *supra* note 12, at 451.

former implies the latter since the broad encompasses the narrow, but the latter does not imply the former for the inverse reason that the broad is not encompassed in the narrow.<sup>149</sup> This can be influenced by either permanent causes, such as a psychic illness, or transitory causes, such as a severe alcoholic intoxication.<sup>150</sup>

Considering the framing of what marriage is, the elements of marriage are set forth in Section One of Canon 1096 of the Code — which are less than those indicated in Section Two of Canon 1057 of the Code.<sup>151</sup> It appears that a vague and imprecise theoretical knowledge of those elements expressed in Section One of Canon 1096 of the Code is not sufficient to produce true marital consent. This objection would be legitimate if, in order to achieve an actual marriage, an explicit consent of all parties and the existence of each one of the essential objective elements of marriage in their juridical significance were required. However, this objection does not make sense when what is enough to create an actual marriage is an implicit consent to those elements. Starting from the elemental theoretical understanding of the content referred to in Section One of Canon 1096 of the Code, when there is implicit consent to those elements, the contracting parties accept the marriage as a whole, without excluding with a positive act of will, some of the essential objective elements of marriage.<sup>152</sup>

In order for the contracting party to carry out this process, it is required that he has sufficient wisdom or discretion of judgment. It is necessary to distinguish between discretion of judgment, which is the psychological capacity to reflect on something, and the actual act of reflection.<sup>153</sup>

Discretion of judgment<sup>154</sup> refers to marriage in general and the act of reflection refers to the marriage in particular. The first is a permanent or common quality that acts as a prior assumption of the second, which is expressed with an actual character and constitutes an intrinsic element of the will. When the first does not exist, neither does the second, but even if the first exists, it is still possible that the second does not. For there to be marital

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149. *Id.*

150. *Id.*

151. 1983 CODE OF CANON LAW, canon 1057, § 2.

152. FAILDE, *supra* note 15, at 29–30.

153. *Id.* at 31.

154. A decision to marry requires an appreciation of the commitment to a lifelong total and exclusive sharing of oneself. The application of sufficient time and effort to make this decision requires considerable maturity. The Roman Catholic Church expresses this reality by saying that the decision to marry must be made with due discretion of judgment. See John L. Young & Ezra E. H. Griffith, *Understanding Due Discretion of Judgment in Catholic Marriage Courts*, 19 BULL. AM. ACAD. OF PSYCHIATRY & L. 109, 112 (1991).

consent, it is not enough to have discretion of judgment alone because one has to give in to the act of reflection.

Neither complete nor even insignificant discretion of judgment is required. What is required is discretion of judgment capable of producing the act of reflection proportionate to the object on which one needs to reflect. This object is the essential object of marital consent, with the contemplated extension of Section 2 of Canon 1057 and Section 1 of Canon 1055 of the Code and the establishment of a partnership for a lifetime with multiple rights and essential obligations that flow: (1) from those that owe that partnership of a lifetime<sup>155</sup> to the substance, within which one must place the essential properties;<sup>156</sup> and (2) up to the rights-obligations that are derived from the fact that this fellowship of conjugal life is institutionally ordered to objective determinative ends.<sup>157</sup>

Normally the grave defect of discretion of judgment arises from a serious psychic anomaly, but what makes the marriage null is the gravity of the defect of discretion of judgment and not the gravity from which the defect originates. If the cause from which the defect arises is serious, it can be assumed that the defect is also serious. The premise cannot be ruled out; however, despite the cause being serious, the defect may not be. The gravity of the defect is measured by the inability of the discretion of judgment to produce the reflection proportionate to the stated object of marital consent.

Discretion of judgment is only the capacity to reflect.<sup>158</sup> However, if the required faculty to reflect is lacking, then it follows that the sufficient faculty to choose is also absent, just as if the proper reflection is not present, neither is the choice. It can be said that the lack of the required freedom and choice is a necessary consequence of the profound defect of discretion of judgment, but it is not a component of this serious defect of prudent judgment.<sup>159</sup> In this case, it is usual to contend the nullity of the marriage because of a serious defect of discretion of judgment, but not for a lack of required freedom.<sup>160</sup>

#### *E. Lack of Freedom*

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155. 1983 CODE OF CANON LAW, canon 1055, § 1.

156. Canon 1056 of the Code states that the essential properties of marriage are unity and indissolubility. See 1983 CODE OF CANON LAW, canon 1056.

157. Section 1 of Canon 1055 of the Code states that the matrimonial covenant has been raised to a dignity of a sacrament between the baptized. See 1983 CODE OF CANON LAW, canon 1055, § 1.

158. See Young & Griffith, *supra* note 154, at 115-16.

159. Rosas, *supra* note 12, at 454.

160. *Id.*

Today, it is well known that there are psychic anomalies that, while leaving intact the capacity of the intelligence to reflect as is appropriate, affect the will. These anomalies cause the will to be unable to perform the act of choice, giving rise to a lack of capacity to choose, and also producing in said will, the lack of proper freedom.<sup>161</sup>

The distinguished canonist, Juan José García Failde, mentions that psychic disorders of this nature are or can be neurosis, psychopathies, affective imbalances, incoercible internal propulsions, and obsessive ideas.<sup>162</sup> As a result of some of these psychic disorders that directly interest the will, there have been Roman *Rota*<sup>163</sup> sentences that have declared marriages null for lack of internal freedom.<sup>164</sup> It is widely known, however, that according to classic doctrine, it was inconceivable that the will would fail because of an illness or an irresistible impulse, while not affecting the understanding.<sup>165</sup> The thesis of *ubi intellectus sibi et voluntas*, which was sustained by Scholastic Philosophy, was used as a starting point to argue that only one disorder in the act of understanding can bring about a defect of will and specifically of freedom.<sup>166</sup>

The oldest jurisprudence from the Roman *Rota* followed this conclusion and declared marriages null for a lack of internal freedom, only when it appeared that the psychic disturbance had hindered the practical judgment, but not because of a lack of internal freedom understood as an autonomous subject or independent of the serious defect of discretion of judgment.<sup>167</sup>

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161. FAILDE, *supra* note 15, at 33.

162. *Id.*

163. The Sacred Roman *Rota* is part of the great system of government in Rome, by means of which the Pope discharges the duties which devolve on him as the Supreme Ruler of the Catholic Church. The Sacred Roman *Rota* is the Roman Catholic Church's highest judicial court. Its function is to secure the observance of laws, the proper supervision of dioceses, and ecclesiastical affairs, the appointment of officers, and such matters. See Rev. M. J. Browne, The Sacred Roman *Rota* and the Judicial System of the Catholic Church (An Unpublished Paper the Sacred Roman *Rota*), available at <http://www.catholicpamphlets.net/pamphlets/The%20Sacred%20Roman%20Rota.pdf> (last accessed Mar. 31, 2014).

164. FAILDE, *supra* note 15, at 33. (citing c. de Jorio, 20 December 1967, SSRD 59 (1967) 870).

165. *Id.* (citing Gommar Michiels, De Delictis et Poenis II (1961)).

166. *Id.* (citing José Geraldo Caiby Crescenti, Falta de Liberdade Interna e Nulidade de Consentimento Matrimonial, at 2-344 (1990) (unpublished Ph.D. dissertation, N. Domenici, Roma) (on file with Author)).

167. *Id.* at 34.

On the other hand, one section of the doctrine<sup>168</sup> maintains the conclusion that in the cases in which sufficient reflection and discretion of judgment exist, it produces a lack of required freedom. This subject of lack of sufficient freedom must be individualized as an autonomous subject of marital nullity. This autonomous subject of lack of sufficient freedom will be based not on Section 2 of Canon 1095 of the Code, but rather on Canon 1057.<sup>169</sup> It must be considered as a lack of the voluntary aspects of this act of will, the marital consent, independently of the intellectual aspects of that same act of will.

In reality, internal freedom must be referred to as the human act of consent. It can be interpreted, in a broad sense, as a basic element of that consent in its unity of voluntary and intellectual elements, or it can be interpreted in a strict sense that limits itself to the voluntary aspects, independently of the intellectual aspects, of that same human act, if the intelligence-will dichotomy is valid.<sup>170</sup>

*F. The Act of Choice in the Actual Marriage and Motivations of the Will*

Beginning with the hypothesis that the will has non-pathological conscious rational motives to make the decision in favor of an actual marriage, it is important to remember that decision would not be free if the will has not simultaneously had motives for deciding against that marriage.<sup>171</sup>

These motives, in favor of the will's decision to proceed with said marriage, do not consist of the products of the studied understandings, such as universal ideas, judgments, or reasoning, but rather in the contents of those products that the understanding presents to the will under the appearance of "good." They are fundamentally formed by the essential "goods" that, in general, imply marriage for the people's lives and, in particular, for the person who intends to marry. It has to do with the values of the marriage, such as the rights or natural ordainment for the good of the spouses, and with the values of the party with whom one is thinking of entering into an actual marriage.

In the influence of the rational, conscious, and non-pathological motivations over the will, they play a fundamental role in the affective life of the person, which include feelings, emotions, and passions. If it is possible to

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168. *Id.*

169. *Id.*

170. Juan José García Failde, *La Libertad Psicológica e Il Matrimonio*, in *L'INCAPACITA DI INTENDERE E DI VOLERE NEL DIRITTO MATRIMONIALE CANONICO* (CAN. 1095 NOS. 1-2) 41-50 (Arcisodalizio of the Roman Curia ed., 2000).

171. Rosas, *supra* note 12, at 456.



establish a difference between these states, it can be said that the feelings or affections are states that express the particular emotional-affectionate, as well as subjective resonance, with which the person lives his own psychological processes. Emotions and passions are very intense feelings, but emotions are transitory, and passions, permanent.<sup>172</sup>

Everything that has been mentioned as part of the emotional life is something that is saturated in the contents of the intelligence and the will, giving them coloring or tonalities that are fundamentally either pleasant or unpleasant.<sup>173</sup> From this point of view, the emotional life guides the understanding in one direction or another. If, to a person, an object has an emotional resonance of a pleasant color or tone, he will direct the emotions toward the understanding. Conversely, if, to a person, an object has the emotional resonance of an unpleasant tone, he will distance the emotion from the understanding. The intelligence will intend to discover how much pleasant tone and how much unpleasant tone a product of its own has in order to present it to the will as desirable, in the first case, or as disposable, in the second case. Similarly, the emotional life has great influence over the will because, aside from the fact that the lack or scarcity of emotional resonance deprives the will of one of the most powerful impulses, the will feels attracted to choose between the motivations that the understanding presents to it, those whose tone is pleasant.<sup>174</sup> This is nothing more than a particular case of what generally happens in life — one is inclined to accept the pleasant and refuse the unpleasant, and within the pleasant, one is led to choose the most pleasant over the least pleasant.

Proceeding to explore the unconscious non-pathological motivations, the human being is frequently guided in his actions by a complicated collection of motivations. Among these motivations are interwoven the conscious, the unconscious, the semi-conscious, and the subconscious, without realizing with certainty where one of those phenomenons ends and where another begins.

To clarify the previous phenomenon, it is helpful to look to the concepts of Failde —

The *unconscious* includes those psychic contents that were never in the conscious or, that one day disappeared from it, and are unable to return unless technical methods, like psychotherapy, are used. The *subconscious* is comprised of the field of psychic experience that is not present in the actual conscious. At the same time, the subconscious is formed by the preconscious, or rather, by those psychic contents that present themselves in the conscious with ordinary, rational procedures such as reflection or

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172. Failde, *supra* note 170, at 40.

173. Rosas, *supra* note 12, at 456.

174. *Id.*

profound introspection. The *semi-conscious*, which for some authors replaces the *unconscious* and really does not exist, includes the area in which the conscious exists, but it is dark.<sup>175</sup>

Turning now to the unconscious motivations that move the will towards marriage, the following question arises — how can these motivations influence the will if they are not present in the conscious, which like power or psychological faculty, is the same as understanding, and if nothing can move the will without having first been known as good by the understanding and presented as good to the will by the understanding?<sup>176</sup>

The last part is true. The motive of the desire of the will is the known good.<sup>177</sup> Even non-deliberate acts, such as feelings or affection, attract the will and are means by which the true rational motives move the will, for as necessary as they may be, they do not arise in the will, but rather as soon as the understanding presents to the will a “reason for good.”<sup>178</sup>

Shifting the focus to pathological conscious and unconscious motivations, it is said that the pathological motivations can be considered unconscious inasmuch as they are ignorant of their origins. The pathological motivations can be influential in the human psyche in that they make themselves present and their presence is felt as soon as the sufferer is aware of their existence.

A motivation can be pathological, although its content itself may not be, provided that the way it is presented to the person is pathological.<sup>179</sup> The manner in which a motivation is presented to the person is pathological when it has a tendency to repeat itself in a way that is more or less automatic.<sup>180</sup>

To exemplify and better understand the previous idea, it is fitting to textually cite Failde, to wit —

[F]or example, in the fixed ideas that characterize an obsessive neurosis; these ideas frequently do not have, in their content, a morbid character [think, for example, of the fixed, obsessive idea of washing one’s hands], but they acquire this morbid character due to persistence and the ability to not be coerced with which they present themselves, polarizing all of the

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175. Failde, *supra* note 170, at 42 (emphasis supplied).

176. Rosas, *supra* note 12, at 457.

177. See IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* 9 (Thomas Kingsmill Abott trans., 1785).

178. Rosas, *supra* note 12, at 457.

179. *Id.* at 458.

180. *Id.*

attention of the neurotic and, on certain occasions, guiding its conduct against its will.<sup>181</sup>

Pathological motivations can be understood in a strict sense and a broad sense. Seen in the strict sense, these motivations come to consist in specific disturbances of the content of the thoughts, accompanied by abnormal impulses.<sup>182</sup> Delirious, obsessive, and overvalued ideas are understood in these disturbances.<sup>183</sup> Understood in this way, pathological motivations hinder or prevent practical judgment, reflection, and consequently, free choice, or possibly, free choice alone.<sup>184</sup>

Understood in the broad sense, pathological motivations embrace all the processes that produce strong traumas in the psyche.<sup>185</sup> Common characteristics of neurotic people, the states of indecision, uncertainty, doubt, and conflict between wanting and not wanting, factor in here.<sup>186</sup> Also included are the conditions of traumatizing violent emotions, situations of irresistible impulses that call for quick solutions without allowing the necessary interior quietude for the elaboration of motives and counter-motives of the choice.<sup>187</sup> They can, however, arise in violent and passionate situations. These pathological motivations, if severe, can greatly disrupt the ability for reflection and, through it, the capability of choice. They can also directly disrupt the ability to choose.<sup>188</sup>

#### V. ACTS THAT LEAD TO THE CREATION OF MARITAL CONSENT

In the previous Section, upon analyzing those elements that contribute to the creation of marital consent, the custom of dividing the individual into zones or behaviors was discussed. It is clear that the division of the human psyche and its actions, such as thinking or volition, is merely artificial. The focus will now shift to a study of the pedagogical effects of the principal sections of the human act and, consequently, of marital consent. This Section will attempt to explain what should be understood as an insufficient lack of reason, grave discretion of judgment, and the inability to assume or comply with the essential obligations of marriage, all of which are stated in Canon 1095 of the Code.<sup>189</sup> The acts through which marital consent is

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181. Failde, *supra* note 170, at 44-45.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Failde, *supra* note 170, at 44-45.

188. *Id.*

189. 1983 CODE OF CANON LAW, canon 1095.

created can be summarized in the following sections: (1) intellectual, theoretical knowledge of what marriage is and the sufficient use of reason; (2) reflection and discretion of judgment; and (3) the act of free will.

*A. Intellectual and Theoretical Understanding of What Marriage is and the Sufficient Use of Reason*

According to the biblical understanding, knowledge consists of a “personal relation between subject and object, in such a manner that to know is a term that introduces the sphere of what can be experimented with, grasped with, and felt.”<sup>190</sup>

All intellectual and theoretical knowledge begins with sensitive knowledge.<sup>191</sup> Its study begins by understanding that there exists only that which is specific and singular. The specific and singular is something perfectly defined and distinct from other things or beings, even though they may be of the same nature. In the specific and singular, there are essential elements that are discovered only with reason, and accidental elements that are captured with the external senses, such as sight or hearing. From that sensitive knowledge, through intelligence, one arrives at the understanding that it is no longer *this* object, but rather *the* object. For example, it is no longer *this* flower, such as a rose, carnation, or gardenia, but *the* flower.

When trying to shape the idea or concept of marriage, one begins with the specific knowledge of that marriage, of a different marriage, and so on, leaving aside all that makes each marriage distinct from the others. For example, one is rich and another is poor, or one is happy and the other unhappy. The person remains with that which all marriages have, as well as that which differs from what is marriage, and then forms the idea or concept of marriage.

Previously, nothing in this endeavor has been affirmed nor denied about marriage and no judgment has been made about marriage. In order to make this kind of judgment, it is necessary to first possess at least two ideas or concepts and to compare one with another until discovering if one agrees with the other or not. If the individual sees that an idea or concept agrees, then he declares agreement; if he sees it does not, then he declares it in disagreement. For example, a person possesses the ideas of marriage and lifetime partnership. He compares these two ideas and discovers that one agrees with the other. He then makes the following judgment — marriage is a lifetime partnership.

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190. AUSEJO, *supra* note 128, at 365.

191. See Matthew Schumacher, *The Knowableness of God*, at § 2 (1905) (unpublished dissertation, University of Notre Dame) (on file with Author).

It is clear that when shaping ideas, similar to comparing one with another and seeing whether or not they agree, the person can make a mistake, the consequence being that he was also mistaken regarding the affirmative or negative judgment of the agreement between one idea and the other, regardless of how subjectively sure said person is that he is not mistaken. This brings to memory the constant issue of the discord between objective truth<sup>192</sup> and subjective certainty.<sup>193</sup>

Very frequently, individuals do not see reality *with* their own eyes, but rather *through* their eyes. Seeing it *through* one's eyes is to see it as it has remained once it has passed through the filter of all that a person is, all that he feels, and all that he desires. That is to say that, in a certain manner, individuals shape it to their image and likeness and they believe to be seeing the authentic reality when what they are really seeing is their own projection of that reality.

When a person makes the judgment that, "marriage is a lifetime partnership," that person is conscious of having made that judgment. Individuals are in the presence of the self-consciousness by virtue of that person seeing himself as *aware* of that judgment.

Shifting now to the canonist legislation, Canon 1096 of the Code refers to these ideas or concepts and to these theoretical judgments about marriage when it says in Section 1 that "[f]or matrimonial consent to exist, the contracting parties must be at least not ignorant that marriage is a permanent partnership between a man and a woman[,] ordered to the procreation of offspring by means of some sexual cooperation."<sup>194</sup>

To say that without this minimal, vague understanding there cannot be consent is not to say that with this minimal, vague understanding there can be consent, because even from the point of view of the ideas and concepts and of the theoretical judgments, there needs to be decidedly more in order for that consent to exist, as inferred by Sections 1 and 2 of Canon 1055 of the Code.<sup>195</sup> However, to have this minimal, vague understanding of the content of Canons 1096<sup>196</sup> and Sections 1 and 2 of Canon 1055 of the Code,

192. Objective judgments are absolutely true no matter what the circumstances may be. One example of an objective judgment is the observation that people need oxygen to live. See Peter John Mandik, *Objective Subjectivity: Allocentric and Egocentric Representations in Thought and Experience*, at 3 (May 2000) (unpublished dissertation, Washington University) (on file with Author).

193. Subjective judgments are relative to the person making the judgments. See Mandik, *supra* note 192.

194. 1983 CODE OF CANON LAW, canon 1096, § 1.

195. 1983 CODE OF CANON LAW, canon 1055, §§ 1 & 2.

196. *Id.* canon 1096.

having sufficient use of reason is required because it requires a degree of reason proportionate or suitable to the content of those two canons.

For that reason, an individual who, either habitually or actually, in relation to the moment of the celebration of the marriage, for whatever reason lacks that degree of the use of reason, cannot have that minimal, vague understanding. Neither can he have marital consent. When Paragraph 1 of Canon 1095 of the Code addresses this issue of the lack of the sufficient use of reason by stating, “they are incapable of marriage those that: (1) lack sufficient use of reason,”<sup>197</sup> it is understood that this refers to the moment of the celebration of the marriage. It is evidence that if those who lack the sufficient use of reason are unfit, then it follows that those who lack all use of reason, *a fortiori*, are also unfit.

### *B. Reflection and Discretion of Judgment*

The universal ideas or concepts and the theoretical judgments are not by themselves capable of moving the will to want or to reject something. A person who remains in that world of theory will never *decide* to take the step of accepting or refusing to get married. It is necessary that they will feel stimulated by something distinct called practical judgment.<sup>198</sup> It is called “practical” because it is designed to aid the will in deciding to do or not to do something in practice.

This practical judgment is formed by the intelligence in following the way for all of those that are in the process of determining whether it is suitable or not for them to get married. The intelligence reasons the following: (1) this marriage is suitable because of the specific circumstances in which one finds himself; or (2) this marriage is not suitable because of the specific circumstances in which one finds himself.

This practical judgment is the result of a prior meticulous activity of the individual’s intelligence known as *reflection*. The name *reflection* itself indicates that it is trying to *spin* something in order to consider it under different aspects, such as its usefulness, prejudices, risks, advantages, and disadvantages.<sup>199</sup> For those that prevail, they arrive at a decision of whether or not something is suitable.

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197. *Id.* canon 1095, ¶ 1.

198. In practical judgment, the decision rests upon perception. Judgment is an activity of perceiving while simultaneously perfecting the ability to judge actions and choices. Practical judgment is not a spectator sport — when a person judges well and correctly discerns what is, such person is immediately spurred to action. See Daryl Koehn, *What is Practical Judgment?*, in PRAXIOLOGY AND PRAGMATISM 88, 102 (Leo Vincent Ryan et al. eds., 2002).

199. Rosas, *supra* note 12, at 463.

Regardless of how much determination and seriousness is put into that reflection, with the ultimate goal of choosing correctly, the acceptance of marriage will always be problematic because it will always be a sort of jump into emptiness since nothing can completely guarantee the accuracy of the choice. At times, those errors can have the important result of preventing the creation of a valid marriage. Those errors are discussed in Canons 1097, 1098, and 1099 of the Code.<sup>200</sup>

Despite the fact that the will only moves itself towards something that the intelligence presents as good, it can be said that every choice the will makes is selfish. Sometimes an individual has difficulty making a choice, not necessarily because he does not like his options, but because he is aware that his making the choice will require that he give up the possibility of choosing other options.

Returning to the act of reflection, it is necessary to add that someone without the sufficient psychic ability will not have the capability to perform this act. The psychic ability is called discretion of judgment and is *sufficient* when it is proportionate or adequate to the object or content of the reflection. Object or content refers to whether or not to choose a specific marriage, is the nature, and essential purposes and properties of marriage in general; these are also the characteristics that substantially shape the parties to unite in marriage.<sup>201</sup> The lack of this sufficiency, proportionality, or adequacy of the discretion of judgment is expressed in Section 2 of Canon 1095 of the Code.<sup>202</sup> As such, “grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted.”<sup>203</sup>

The object and purpose of marital consent is the same as those of marriage, with its essential rights and obligations. If an individual cannot comply with those obligations which are naturally inherent to marriage, it is not due to a lack of purpose, given that purpose truly exists. It is however, due to a lack of ability in the individual in relation to the purpose. The impossibility of contracting does not have its origin in the purpose, the marriage, but rather in some kind of defect of the person wishing to be married. It is because of the contracting party, not because of the marriage itself, that a marriage fails. Therefore, incapacity is found exclusively in the individual. Canon 1095 of the Code is not concerned with those marriages that cannot be celebrated or created, but rather deals with those individuals that lack the ability to or are incapable of consenting and contracting a valid

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200. See 1983 CODE OF CANON LAW, canons 1097-99.

201. 1983 CODE OF CANON LAW, canons 1097-98.

202. *Id.* canon 1095, § 2.

203. *Id.*

marriage.<sup>204</sup> The grave defect of discretion of judgment that prevents the necessary reflection for marital consent can originate from multiple causes that can be congenital or acquired, permanent or temporary, and can even result from psychopathic disorders or intoxications, among others.<sup>205</sup>

### *C. Free Act of Will*

Without the process of the understanding that has been previously explained, including the formation of ideas, of universal concepts, theoretical judgments, reflection, and practical judgments, it is not even possible to think about the act of free will. It is known that this activity of understanding can be lacking even if the individual has sufficient use of reason and sufficient discretion of judgment in order to develop it.

Majority of the time, however, that this process of understanding is absent because the individual has been unable to carry it out, is due to insufficient use of reason or a grave defect of discretion of judgment. In such a case, it is clear that such absence is the product of insufficient use of reason or serious defect of discretion of judgment, including the absence of the free act in the *causals* or the “lack of insufficient use of reason”<sup>206</sup> or “grave defect of discretion of judgment,”<sup>207</sup> to which Sections 1 and 2 of Canon 1095 of the Code refers to.

Meanwhile, there are other instances in which the individual, despite having developed the activity of understanding and having sufficient use of reason and discretion of judgment, cannot perform this free act. According to experimental and clinical psychology and psychiatry, this is possible because given the interconnectedness that exists between intelligence and will, it has been proven that psychopathological disturbances exist. For example, those involving irresistible impulses, that, without depriving the intelligence of the sufficient use of reason and of the grave defect of discretion of judgment, do not permit the will to perform the free act. In some cases, it will be extremely difficult to determine if this incapacity of the will is present or not without the intelligence having been previously incapacitated by its own acts of the use of reason and discretion of judgment.<sup>208</sup>

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204. JANUSZ KOWAL, APUNTES DEL XXXII CURSO DE ACTUALIZACIÓN CANÓNICA TOMO II 68 (2008).

205. *Id.*

206. 1983 CODE OF CANON LAW, canon 1095, §§ 1 & 2.

207. *Id.*

208. KOWAL, *supra* note 204, at 13.



Still, in the assumption that the required freedom is absent without there being a prior absence of the required reflection and hence, the proportionate discretion of judgment, that absence of the required freedom, can be an autonomous issue of marital nullity. This issue would not be included in the grave defect of discretion of judgment of Section 2 of Canon 1095 of the Code,<sup>209</sup> but rather would be based on Section 2 of Canon 1057<sup>210</sup> which defines marital consent as an act of will. Marital consent highlights its voluntary aspect more than its intellectual aspect, contrary to Sections 1 and 2 of Canon 1095 of the Code that emphasize the intellectual aspect of marriage more than the voluntary aspect of the act of will.

When talking about the activity of the will in the fulfillment of marital consent, psychological freedom can be observed through its free act, its act of choice, or self-determination. Undoubtedly, this act of choice is an act of self-determination, inasmuch as the farther an act distances itself from freedom, it distances itself from self-determination.

In many instances, it is not easy to measure the degree of freedom that an individual has in a particular situation, because the human being is never completely free.<sup>211</sup> The human is instead subjected to conditioning that obligates him to carry out certain actions. One's freedom can be crippled by the influence of external coercions, such as other people or certain circumstances, or by internal influence, such as conscious or unconscious psychological causes, as with obsessive, delirious, or dissociative ideas. Many authors, including St. Thomas, Marx, Freud, and Nietzsche, for example, have underlined the energy of diverse forces that upset the heart of man without him always being able to control them.<sup>212</sup>

In all human activity, freedom and necessity are permanently and dialectically associated. Determinism and freedom are mutually related. The idea of one gives rise to the other and vice versa. The union in determinism and freedom is not only juxtaposed and alternated — it is a more intimate union. The self does not externally direct the natural spirit like a horseman guides his horse. With the self, these spirits constitute one sole being. The self does not always surrender, but it also cannot distance itself to the extreme of achieving perfect dominion. For that reason, the authentic field of possibilities is limited.

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209. 1983 CODE OF CANON LAW, canon 1095, § 2.

210. *Id.* canon 1057, § 2.

211. See Dr. B. R. Bhandari, *Existentialist Perception of the Human Condition: With Special Reference to Sartre*, available at <http://www.bu.edu/wcp/Papers/Cont/ContBhan.htm> (last accessed Mar. 31, 2014).

212. KOWAL, *supra* note 204, at 14.

Therefore, the freedom individuals find in themselves is conditioned by many foreign factors, such as heredity, character, complexes shaped from birth, social circumstances, and economic situations, among others. All of the individuals' spiritual activity is conditioned by inclinations and habits. However, it is not always the case that when freedom is conditioned, there is an absence of the necessary freedom to carry out the psychological act of marital consent. In order to perform this act, one does not need a complete or perfect freedom, or a freedom immune from all conditioning, which limits freedom, but rather a task to be performed with determination that is always renewed.

Finally, it is necessary to distinguish between psychological freedom,<sup>213</sup> which is the freedom referred to in this Article, and free acts.<sup>214</sup> The former is the psychological faculty of doing the latter, and the latter is the specific act of the former. If there is an absence of psychological freedom, there will also be an absence of free acts. However, the former can exist without the latter. Psychological freedom does not exist because it is something abstract. Only specific people exist, who either have or do not have psychological freedom. On the other hand, a free act is something specific and, therefore, something that exists.<sup>215</sup>

#### VI. MATRIMONIAL NULLITY IN CANON LAW

A marriage *in fieri* is null when, at the time the marriage is celebrated, there was a decisive impediment, a defect or error of consent, or a defect judicial in nature. Marital nullity, also called a declaration of invalidity of the marriage, refers to the judicial ruling as to the moment of the celebration of the marriage.<sup>216</sup> It is a ruling that the marriage did not exist and that a

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213. Psychological freedom is the harmony between motive and behavior. The idea of psychological freedom requires minimally only the awareness of and the capacity to express the more basic motives. Their actual expression may depend on the perceived appropriateness of social circumstances. See CHRISTIAN BAY, *THE STRUCTURE OF FREEDOM* 83-88 (1970).

214. Free act or Free will is the "term for a particular sort of capacity of rational agents to choose a course of action from among various alternatives." See Stanford Encyclopedia of Philosophy, Free Will, available at <http://plato.stanford.edu/entries/freewill/> (last accessed Mar. 31, 2014).

215. *Id.*

216. See Vatican: The Holy See, *supra* note 10; & Roman Catholic Church in the State of Hawaii Diocese of Honolulu, Marriage Nullity Petition Process, available at <http://www.catholichawaii.org/diocesan-offices/diocesan-tribunal-canonical-affairs/nullity-process.aspx> (last accessed Mar. 31, 2014).

juridical marital bond was never created.<sup>217</sup> As a result, marital nullity acts solely regarding the celebration of the marriage, and is never concerned with issues that refer to the community life of the spouses or the marriage *in facto esse*.

Section 2 of Canon 124 of the Code establishes that “[a] juridical act placed correctly with respect to its external elements is presumed valid.”<sup>218</sup> This means that a marriage celebrated without external defects is seemingly valid and produces the corresponding effects even when one or both of the parties may have acted in bad faith.<sup>219</sup>

#### A. Causes of Matrimonial Nullity

Canon 1058 of the Code states that “[a]ll persons who are not prohibited by law can contract marriage.”<sup>220</sup> The natural inclination of persons toward marital union, in the juridical sense, is translated into a right — the *ius connubii*.<sup>221</sup> This right to marriage is presently understood as a fundamental right of each person to contract marriage and it carries with it two consequences: (1) neither the Catholic Church nor the states can absolutely deprive a person of the possibility of contracting into marriage — except in those freely accepted circumstances;<sup>222</sup> and (2) the restrictions should expressly consist and be interpreted in the strict sense.<sup>223</sup> In Canon Law, these restrictions are regulated by Canons 1073 to 1133 of the Code and are

217. Vatican: The Holy See, *supra* note 10; & Roman Catholic Church in the State of Hawaii Diocese of Honolulu, *supra* note 216.

218. 1983 CODE OF CANON LAW, canon 124, § 2.

219. LÓPEZ ALARCÓN, ET AL., CURSO DE DERECHO MATRIMONIAL CANÓNICO Y CONCORDADO 355 (2001).

220. 1983 CODE OF CANON LAW, canon 1058.

221. PÉREZ DE HEREDIA Y VALLE, ET AL., CÓDIGO DE DERECHO CANÓNICO: EDICIÓN BILINGÜE, FUENTES Y COMENTARIOS DE TODOS LOS CÁNONES 473 (1994).

222. The configuration of the *ius connubii* as a fundamental right gives it the characteristics of universality, inalienability, and perpetuity. In this sense, it is fitting to ask how it is possible to renounce this right that is exercised in the cases of holy order and public vow. The doctrine has indicated it should not be understood as a radical renouncement of the *ius connubii*, but as a voluntary assumption of a situation incompatible with the carrying out of one’s right to marry. *Id.* at 110.

223. ALBERTO BERNÁRDEZ CANTÓN, COMPENDIO DE DERECHO MATRIMONIAL CANÓNICO 54 (2002).

divided, in the classification proposed by Torralba,<sup>224</sup> into impediments, defects of consent, and defects of form.

### *B. Impediments*

Regarding the topic of consent, this Article will not fully discuss impediments, but will simply list them, as their explanation requires a special study.

Impediments have been defined as those prohibitions or restrictions on the right to marriage that determine the validity or nullity of a marriage.<sup>225</sup> The presence of some impediments “renders a person unqualified to validly contract into marriage.”<sup>226</sup>

There are four groups of impediments.<sup>227</sup> The first type of impediment is that which is motivated by physical incapacity — age and impotence.<sup>228</sup> The second type of impediment references juridical incapacity, which is the previous bond, murder of a spouse, and abduction.<sup>229</sup> The impediments that make up the third group are those that originate from religious motives, such as the disparity of worship, the holy order, and the public vow.<sup>230</sup> Finally, the fourth group of impediments is comprised of those arising out of the relationship — relationships by blood and by marriage, common law relationships, and legal relationships.<sup>231</sup>

### *C. Defect of Consent*

The giving of marital consent makes the bond possible, which is what constitutes the “efficient cause of marriage.”<sup>232</sup> The Code determines that marriage is made by “[t]he consent of the parties, legitimately manifested

224. LAZARUS TORRALBA HONRUBIA, *EL PROCESO CANÓNICO DE NULIDAD MATRIMONIAL 1-2* (1994).

225. CANTÓN, *supra* note 223, at 54.

226. 1983 CODE OF CANON LAW, canon 1074.

227. An impediment to marriage is any circumstance that renders the matrimonial contract invalid or illicit. Chapter III of the 1983 Code of Canon Law lists the specific impediments to marriage. See CANON DE SMET, *BETROTHMENT AND MARRIAGE 1-2* (Rev. W. Dobell trans., 1912) & 1983 CODE OF CANON LAW, canons 1083-1094.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. CANTÓN, *supra* note 223, at 109.

between persons qualified by law; no human power is able to supply this consent.”<sup>233</sup>

In this sense, consent is necessary and irreplaceable, and can only be granted by the future spouses, understanding that this granting can be exercised either in person or by proxy.<sup>234</sup>

The incapacity to consent comprises the first group of causes of the defect of consent. The Code declares that “those who suffer the sufficient use of reason,” “those who suffer from a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted,” and “those who are not able to assume the essential obligations of marriage for causes of a psychological nature,”<sup>235</sup> are unable to contract into marriage.

The second type of cause makes reference to the defects of understanding, including ignorance and error. The Code states that in order for the consent to be valid, it is necessary that the spouses “be at least not ignorant that marriage is a permanent partnership between a man and a woman ordered to the procreation of offspring by some means of sexual cooperation.”<sup>236</sup> As a consequence, this defect of consent is only produced when the ignorance refers to the issues described in the canon, and does not consider other points of the marriage that are found in Canons 1055, 1056, and 1057 of the Code.<sup>237</sup>

Lastly, when examining error, a distinction must be made between the following: (1) error of fact, which is manifested in the error in the identity of the person<sup>238</sup> and in the error concerning the quality of the person;<sup>239</sup> and

233. Note that the canon that references consent is located in the preliminary marital canons, only preceded by that which refers to the definition of canonical marriage (Canon 1055) and by that which indicates the essential properties of the same (Canon 1056). This enforces the importance of consent in the celebration of the marital bond. See 1983 CODE OF CANON LAW, canon 1057, § 1.

234. CANTÓN, *supra* note 223, at 109 & 1983 CODE OF CANON LAW, canon 1105, § 1.

235. Canon 1095 of the Code distinguishes between three causes of incapacity to exercise consent that “could refer to the psychological process of the human act: to know, to decide, and to realize. All of the phases of the process are interrelated by the unity of the act and of the operating subject, as such with all likeliness it is about only one problem.” See HEREDIA Y VALLE, ET AL., *supra* note 221, at 473 & 1983 CODE OF CANON LAW, canon 1095, ¶¶ 1-3.

236. 1983 CODE OF CANON LAW, canon 1096, § 1.

237. ALARCÓN, ET AL., *supra* note 219, at 256.

238. 1983 CODE OF CANON LAW, canon 1097, § 1.

239. *Id.* § 2.

(2) error of law, which deals with the error in the identity of the ignorance and the error in the quality of the ignorance.<sup>240</sup> From these presumptions, it is necessary to distinguish between substantive error, which “is not strictly a defect of consent, but rather an absolute and radical defect of the same,”<sup>241</sup> and the defect-error, which “does not nullify the marriage; it does not affect the validity of the marital consent, even if it is supposed that the error was the cause of the same.”<sup>242</sup>

Considering the defects of the will, one looks into the presence of physical violence, fear, and reverential fear. Physical violence consists of “a truly material pressure, exerted on the manner of expression of the subject with the object being to obtain the point of view of consent.”<sup>243</sup> In general, the Code states that “an act placed out of force inflicted on a person from without, which the person was not able to resist in any way, is considered to never have taken place.”<sup>244</sup> Additionally, the marital material considers a marriage “entered into because of force or grave fear from without”<sup>245</sup> to be invalid. Canon 125 of the Code, as evidenced by its reading, operates in the same manner with reference to fear, which “consists in the consternation of the spirit, caused by the foresight of an imminent evil.”<sup>246</sup>

Finally, it is important to discuss reverential fear, because it is emphasized as a type of common fear, “but with the particularity that the *patiens* is found linked to the *incutiens* by a relationship of dependence or subordination that translates into an attitude of respect and reverence.”<sup>247</sup>

The fourth cause of defect of consent is that of consent with simulation. It is understood that simulation exists when the declaration of the will to contract into marriage in the terms essentially configured by Canon Law is in disagreement with the internal and real will of one or both of the spouses. The Code presumes that the internal consent of the will is consistent with “the words and signs used in celebrating the marriage.”<sup>248</sup> This presumption

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240. *Id.* canons 1098-99.

241. HEREDIA Y VALLE, ET AL., *supra* note 221, at 495.

242. *Id.*

243. CANTÓN, *supra* note 223, at 154.

244. 1983 CODE OF CANON LAW, canon 125, § 1.

245. *Id.* § 2.

246. CANTÓN, *supra* note 223, at 155.

247. ALARCÓN, ET AL., *supra* note 219, at 310 (emphasis supplied).

248. 1983 CODE OF CANON LAW, canon 1101, § 1.

“is founded in the normal and expected behavior of a Christian in such a serious matter [—] veracity is presumed, falseness must be proven.”<sup>249</sup>

Condition is the last of the causes included in the defect of consent. It has been defined as a future and uncertain act, by the will of the subject, the validity of the judicial business depends.<sup>250</sup> Consequently, Section 1 of Canon 1102 of the Code establishes that “[a] marriage subject to a condition about the future cannot be contracted validly.”<sup>251</sup> It should be highlighted that the said condition is not a circumstance on which the validity of a juridical business or a decision of will depends because “a mere expectation or desire that relates to a decision is not enough.”<sup>252</sup>

#### *D. Defects of Form*

The topic of consent does not allow for a comprehensive discussion of defects of form and its explanation is not part of this Article.

As previously stated, consent produces the marriage;<sup>253</sup> however, it does not mean that its pure and simple exchange is enough for a valid marriage to arise. It requires, as helpful elements, that there is an exchange between persons with the proper capacity and in a determined form.<sup>254</sup> One must distinguish between liturgical form and canonical form. The former is regulated by the canons, which refer to the liturgical celebration of the sacrament, and the latter understands those juridical elements that directly establish the external consequences or requirements in which the expression of consent, as well as the marital contract, is realized.<sup>255</sup> A defect of form exists when the requirements established by the canonical regulations are not met by ordinary or extraordinary form, and when help is not sought in anticipation in the cases of danger of death, mixed marriages, and radical sanction.

#### *E. Effects of a Declaration of Nullity*

The declaration of nullity of a marriage by a tribunal implies a finding that there never existed a juridical marital bond, and as such the spouses will return to their civil states prior to the annulled celebration. It is declared that there was no contract and the marriage *in fieri* never existed. This does not mean that the marriage is null because the judicial sentence has established as

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249. HEREDIA Y VALLE, ET AL., *supra* note 221, at 497.

250. ALARCÓN, ET AL., *supra* note 219, at 316.

251. 1983 CODE OF CANON LAW, canon 1102, § 1.

252. HEREDIA Y VALLE, ET AL., *supra* note 221, at 498.

253. 1983 CODE OF CANON LAW, canon 1057, § 1.

254. ALARCÓN, ET AL., *supra* note 219, at 327.

255. HEREDIA Y VALLE, ET AL., *supra* note 221, at 502-03.

such, but rather because it was already null from its apparent creation, with the judicial pronouncement limited to confirming the nullity in a solely declarative manner.<sup>256</sup>

The nullity of a marriage is only effective if it has been declared so judicially. It is necessary to exercise the act of nullity and after a process, arrive at the same,<sup>257</sup> without confusing its effects with those of the dissolution of a marriage, as the latter supposes a formal act by which the breaking of a presumably valid marital bond is produced.<sup>258</sup> The nullity of a marriage does not exempt the parents from their obligations to their children, since those duties are a result of the parental relationship,<sup>259</sup> regardless of whether the parents are married or not.<sup>260</sup>

#### VII. THE ORDINARY PROCESS OF DECLARING A MARRIAGE NULL: HOW THE INSTRUCTION *DIGNITAS CONNUBII* ENHANCES THE CODE OF CANON LAW

The canonical process has been defined “as a series or succession of formal juridical acts, celebrated before a tribunal of justice, by virtue of a claim, understood as an act of complaint, made in the form, with *fumus boni iuris*, by one subject opposite another, and whose acts are directed towards obtaining a binding declaration or recognition, the juridical statement or the imposition of conduct, in relation to matters and persons subject to the jurisdictional power of the Church.”<sup>261</sup> While Canon 1400 of the Code uses the word “trial,”<sup>262</sup> it seems more appropriate to use the term “process” since it extends to the entire juridical institution and not solely to the act of the trial.<sup>263</sup>

256. ALARCÓN, ET AL., *supra* note 219, at 355.

257. MANUEL PONS GONZÁLEZ & MIGUEL A. DEL ARCO TORRES, *SEPARACIÓN, DIVORCIO Y NULIDAD MATRIMONIAL: RÉGIMEN JURÍDICO, TEORÍA, PRAXIS JUDICIAL Y FORMULARIOS* 205 (2002).

258. CARLOS MORÁN BUSTOS & CARMEN PEÑA GARCÍA, *NULIDAD DE MATRIMONIO Y PROCESO CANÓNICO, COMENTARIO ADAPTADO A LA INSTRUCCIÓN DIGNITAS CONNUBII* 42 (2007).

259. Tex. Fam. Code Ann. § 151.0001 (b) (West).

260. GONZÁLEZ & TORRES, *supra* note 257, at 241.

261. CARMELO DE DIEGO LORA & E. LABANDEIRA, *CAPÍTULO XIII. LA TUTELA DE LOS DERECHOS EN LA IGLESIA* 785 (1991) (citing *CÓDIGO DE DERECHO CANÓNICO* (1987)).

262. *See* 1983 CODE OF CANON LAW, canon 1400.

263. In this sense, neither “trial,” “cause,” nor “procedure” can be confused with the word “process,” although the CIC, in his book VII, uses them indiscriminately. *See* Carmelo de Diego Lora, *Proceso y Derecho procesal canónico*, in FR. AZNAR



The purpose of this Section is to briefly study the ordinary process and specifically, the ordinary dispute, that is the written dispute, knowing that the Code also regulates a series of special processes, among which the marital processes are found, and among them, the causes to declare the marriage null,<sup>264</sup> that are divided between those that derive their regulation from the ordinary processes and those that have an independent regulation, with a suitable processing.

The ordinary process is regulated by the procedural standards of the trial in general, of the ordinary contentious processes, and by the special procedural standards for this process.<sup>265</sup>

Before the diffusion of the regulation throughout the Code, the legislative development effectuated through the *Dignitas* meaning “for the dignity of marriage,” in effect since 2005, acquires special relevance. The *Dignitas* reorders, clarifies, and completes the standards of the Code referring to the steps of the canonical processes for the declaration of marital nullity, and additionally attempts to favor the judicial security and fair application of the procedural standards.<sup>266</sup>

The intended audience of the *Dignitas* are the diocesan and inter-diocesan tribunals of the Latin Catholic Church, exclusively ordered to the treatment and resolution of the causes of marital nullity.<sup>267</sup>

The *Dignitas* cannot be at all incompatible with the Code. The preamble of the *Dignitas* clarifies that the Code is superior to it.<sup>268</sup> Definitively, the

GIL ESTUDIOS DE DERECHO MATRIMONIAL Y PROCESAL EN HOMENAJE AL PROF. DR. D. JUAN L. ACEBAL LUJÁN 153 (Fr. Gil Aznar ed., 1999).

264. The *Codex Iuris Canonici* uses “causes” for the marital processes in compliance with the

great tradition in the forensic use and practice, but that definitively has the same meaning and reach as the words *process* and *trial* also used by the Code with the word *cause*; applying this one to the process seems to be understood, more than the whole of the procedural activity, or of the opinion that the judge issues in the sentence, of the juridical matter subject to the process and that is the cause of the same.

*Id.*

265. See 1983 CODE OF CANON LAW, canons 1501-1716.

266. BUSTOS & GARCÍA, *supra* note 258, at 30-31.

267. JUAN JOSÉ GARCÍA FAILDE, LA INSTRUCCIÓN DIGNITAS CONNUBII A EXAMEN 16 (2006).

268. MANUEL JESUS ARROBA CONDE, LA PRIMERA INSTANCIA EN LA INSTRUCCIÓN DIGNITAS CONNUBII 51 (2008) & R. RODRÍGUEZ CHACÓN & L. RUANO ESPINA, LOS PROCESOS DE NULIDAD DE MATRIMONIO CANÓNICO HOY (ACTAS DE LA JORNADA ESPECIAL HABIDA EN MADRID EL DÍA 23 DE

*Dignitas* is an ordinance of application of the procedural law, an application in which a balance is sought between “the weight of the institutional and personalistic factors; avoiding the excesses of juridical formalism and pleasant subjectivism [—] both excesses are abuses and are foreign to the spirit of the ecclesiastic law.”<sup>269</sup>

According to Section 1 of Canon 34 of the Code, “the [*Dignitas* clarifies] precepts of laws and elaborate[s] on and determine guidelines to be observed in fulfilling them. They are given for the use of those whose duty it is to see that the laws are executed and oblige them in the execution of the laws.”<sup>270</sup> The *Dignitas*, the instruction to the Code, was published in 2005 and was intended to help judges and other tribunal ministers of the Church who are entrusted with hearing cases of nullity of marriage.<sup>271</sup>

The *Dignitas* replaced the previous Instruction to the 1917 Code of Canon Law, the *Provida mater*, published in 1936.<sup>272</sup> Its intent was to provide for causes to be decided more quickly and to organize the material in the Code more effectively. After the new Code, it soon became clear that there was a need for an instruction on the new Code similar to that of the *Provida mater*. There had been an increase in the number of causes of nullity of marriage brought before the tribunals and a decrease in the number of judges and tribunal ministers. In 1996, Pope John Paul II created a Commission whose purpose was to prepare an instruction for the Code, and the *Dignitas Connubii* was subsequently published in 2005.<sup>273</sup>

SEPTIEMBRE DE 2005 PARA EL ESTUDIO DE LA INSTRUCCIÓN DIGNITAS CONNUBII) (2006).

269. SANTIAGO PANIZO ORALLO, LA SEGUNDA INSTANCIA Y LOS DEMÁS RECURSOS O REMEDIOS PROCESALES EN LA INSTRUCCIÓN DIGNITAS CONNUBII. NOVEDADES, CONCRECIONES E INNOVACIONES 83 (2006) & R. RODRÍGUEZ CHACÓN & L. RUANO ESPINA, LOS PROCESOS DE NULIDAD DE MATRIMONIO CANÓNICO HOY (ACTAS DE LA JORNADA ESPECIAL HABIDA EN MADRID EL DÍA 23 DE SEPTIEMBRE DE 2005 PARA EL ESTUDIO DE LA INSTRUCCIÓN DIGNITAS CONNUBII) (2006).

270. 1983 CODE OF CANON LAW canon 34, § 1.

271. Vatican: The Holy See, *supra* note 10.

272. See Apostolic Constitution of Pope Pius XII Concerning Secular Institutes, *Provida Mater Ecclesia*, available at [http://www.vatican.va/holy\\_father/pius\\_xii/apost\\_constitutions/documents/hf\\_p-xii\\_apc\\_19470202\\_provida-mater-ecclesia\\_en.html](http://www.vatican.va/holy_father/pius_xii/apost_constitutions/documents/hf_p-xii_apc_19470202_provida-mater-ecclesia_en.html) (last accessed Mar. 31, 2014).

273. EWTN Global Catholic Network, EWTN Document Library, available at [http://www.ewtn.com/vlibrary/search2.asp?pgnu=2&version=TEXT&fldlibrary=AllLibraries&afterdate=&author=john+paul+II&keyword=&code=&search\\_type=contains&recentadd=](http://www.ewtn.com/vlibrary/search2.asp?pgnu=2&version=TEXT&fldlibrary=AllLibraries&afterdate=&author=john+paul+II&keyword=&code=&search_type=contains&recentadd=) (last accessed Mar. 31, 2014).

*A. Summary of the Principal Functions of the Dignitas Connubii*

The function of the marriage nullity process is significant. It serves to promote the good of marriage in general and in particular, to protect its indissoluble character. The presumption of the law is in favor of the validity of each marriage.<sup>274</sup> The goal of the instruction is the application of the procedural law of the church, making it easier for the marriage nullity process to recognize the truth regarding the marriage bond.

The process of marriage nullity can be overwhelming for many spouses. It might result in the invalidation of a period of their lives that to them constituted a real marriage, even though, according to the Church's law, it might be found to be null. As such, the parties to the process may find it unfamiliar and unsettling. One of the purposes of the *Dignitas* is to recognize the feelings of the spouses and to remind the tribunals to not only address the legal aspects of the particular cause, but also to be cognizant of *personal concerns* the parties might confront along the way.

In a more juridical nature, the provisions of the *Dignitas* reaffirm the juridical structure of the marriage nullity process and encourage adherence to that same structure. It serves to clarify the provisions of the universal law and elaborate on the manner in which they are to be observed. Simply put, the law is contained in the Code while the *Dignitas*, serves as a guide for the implementation of that law.

Finally, Canon 1691 of the Code states that the general norms on the contentious trial are to be used for the marriage nullity process, unless the nature of the case demands otherwise.<sup>275</sup> Therefore, the *Dignitas* assumes the responsibility of harmonizing the general norms of the Code on the contentious trial with the marriage nullity process. The fundamental interpretive key of the *Dignitas* aspires that the norms of the Code on the marriage nullity processes be read and implemented in light of the provisions of the *Dignitas* itself.

*B. Connections to Canons 1057 and 1095*

While the *Dignitas* does not specifically speak to Canon 1057 of the Code, it certainly has a significant application to Canon 1095 of such, which speaks to those people who are incapable of contracting marriage.

The first application to Canon 1095 of the Code in the *Dignitas Connubii* is found in Article 56.<sup>276</sup> A defender of the bond is required to be present in causes of the nullity of marriage. This person, whose qualifications are

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274. THE CANON LAW SOCIETY OF AMERICA, *supra* note 116, at 1256.

275. 1983 CODE OF CANON LAW, canon 1691.

276. *DIGNITAS CONNUBII*, art. 56.

discussed in Article 55 of *Dignitas*,<sup>277</sup> assists the judge by directing his or her own efforts to discover the truth regarding the alleged nullity of marriage. His or her duty is to protect the bond of marriage, to the extent that it is reasonable, by intervening on behalf of the bond.

Section 4 of Article 56 of *Dignitas* relates directly to Canon 1095 of the Code and pertains to the duty of the defender of the bond with regard to experts who may possibly participate in the marriage nullity process. Pope John Paul II spoke of the importance of the defender's role in psychic incapacity causes in a speech to the Roman *Rota* in 1988.<sup>278</sup>

The *Dignitas* gives the defender of the bond specific powers when participating in trials based on psychic causes, while still remaining within the general framework of his or her duties as elaborated by the Code. According to Article 56 of *Dignitas* the obligations of the defender of the bond in causes of marriage nullity as are follows: (1) to assure that any questions posed to the expert are clear, that they address the matter at hand, and to assure that the expert is not asked to respond to something that is outside his area of competence; (2) most importantly, to make sure the expert is not asked for his opinion regarding the nullity of the marriage in question; (3) to assure the expert's conceptual foundations are grounded in principles of Christian anthropology and inquire as to the scientific method used by the expert; and (4) to emphasize any aspects of the expert's report that speak against a declaration of nullity.<sup>279</sup>

Canon 1095 of the Code is mentioned again in Article 97 of *Dignitas*.<sup>280</sup> Section One of Article 97 of *Dignitas* states "[t]hose who are deprived of the use of reason can stand trial only through a guardian."<sup>281</sup> Regarding the appointment of guardians, it is important to give attention to marriage nullity trials to cases that are based on the ground of nullity of Canon 1095 of the Code.<sup>282</sup>

If the assertion is that the party was incapable of marriage *ob amentiam*, and that party remains not in control of himself, the Roman *Rota* should presume that the appointment of a guardian is necessary to protect the rights of the party in question. This, however, is a rebuttable presumption. It

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277. *Id.* art. 55.

278. KLAUS LUDICKE & RONNY JENKINS, *DIGNITAS CONNUBII: NORMS & COMMENTARY* 112 (2006) (citing AAS 80: 1178-85; English in *Origins*, Feb. 15, 1988: 6-7)).

279. *Id.* at 112.

280. *DIGNITAS CONNUBII*, art. 97.

281. *Id.* § 1.

282. 1983 CODE OF CANON LAW, canon 1095.

should not be easily assumed that because a party habitually lacked the use of reason at the time of consent, that he or she continues to lack it years later at the time of the marriage nullity trial.

If the assertion is that the party was incapable of marriage due to a defect of discretion of judgment or *defectus discretionis iudicii*, as discussed in Section 2 of Canon 1095 of the Code,<sup>283</sup> there should be even less of a presumption that the party is currently incapable to stand trial. It is possible that any lack of due discretion at the time of consent has since vanished. There is also the possibility that this lack of due discretion was of such a nature that it would not conflict with the procedural representation, even if still present.

The Roman *Rota* should reach the conclusion regarding the necessity of a guardian only if one of the parties alleges as much, and a psychological or medical investigation establishes the need to appoint a guardian. However, in all cases, the lack of due discretion for consent to marriage does not automatically imply a lack of discretion with regard to the party's participation in ecclesiastical trials.

Article 120 of the *Dignitas* also relates to Canon 1095 of the Code.<sup>284</sup> Said article indicates that the presiding judge may commence a preliminary investigation prior to accepting or rejecting the petition.<sup>285</sup> The purpose of the investigation, a procedure not provided for in the Code, is to verify that the requirements of the law have been met for the acceptance of the petition: competence, procedural capacity, and the presence of a sufficient legal basis.

Procedural capacity, as used in *Dignitas*, refers to a person's ability to act in a trial on his or her own behalf as a petitioner or respondent.<sup>286</sup> Those who lack procedural capacity are those who lack the use of reason.<sup>287</sup> The procedural capacity of the parties should only be investigated if circumstances suggest that one or both might lack the capacity to act in the process. This can occur if the cause of the nullity of the marriage is alleged to be one of the psychic grounds of Canon 1095 of the Code and, simultaneously, the facts surrounding the parties suggest that the psychic disorder currently interferes with the parties, removing or excessively weakening their capacity to stand before the court.

The next section of the *Dignitas* which relates to Canon 1095 of the Code is Article 126.<sup>288</sup> The article primarily has to do with Section 1 of

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283. *Id.* canon 1095, § 2.

284. *DIGNITAS CONNUBII*, art. 120.

285. *Id.*

286. LUDICKE & JENKINS, *supra* note 278, at 212.

287. *DIGNITAS CONNUBII*, art. 97, § 1.

288. *DIGNITAS CONNUBII*, art. 126.

Canon 1507 and Section Two of Canon 1677 of the Code. Section 1 of Canon 1507 states that —

In the decree which accepts the *libellus* of the petitioner, the judge or the presiding judge must call the other parties to trial, that is, cite them to the joinder of the issue, establishing whether they must respond in writing or present themselves before the judge to come to agreement about the doubts.<sup>289</sup>

Meanwhile, Section 2 of Canon 1677 of the Code states that —

When [15] days have passed from the communication and unless either party has requested a session for the joinder of the issue, the presiding judge or the *ponens* is to establish the formula of the doubt or doubts within [10] days by [*ex officio*] decree and is to notify the parties.<sup>290</sup>

Communication of the acceptance of the petition should be differentiated from the judge's requirement that the parties express their view regarding the subject of the trial. It is in the latter procedure that Canon 1095 of the Code has relevance. The parties can be required to appear before the tribunal *in order to formulate the doubt*. A summons is typically issued if the court expects the parties to disagree as to the grounds proposed. This can occur if the proposed ground is that of a psychic incapacity to consent to the marriage.<sup>291</sup> In those cases, it may be necessary to further limit the *formulation of the doubt*.<sup>292</sup>

Article 203 of *Dignitas*<sup>293</sup> is especially important regarding Canon 1095 of the Code. Section 1 of Article 203 of *Dignitas* states that “[i]n causes concerning impotence or defect of consent because of a *mentis morbum* or because of the incapacities described in Canon 1095 [of the Code], the judge is to employ the assistance of one or more experts, unless from the circumstances this would appear evidentially useless.”<sup>294</sup>

In causes of mental illness, the use of experts is required in marriage nullity trials. In the 1917 Code of Canon Law, Canons 1976 and 1982 required the use of experts in causes of impotence, non-consummation and *amentia*, or mental retardation.<sup>295</sup> Section 1 of Article 203 of *Dignitas* qualifies the question of when the assistance of an expert is required by law. The use

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289. 1983 CODE OF CANON LAW, canon 1507, § 1 (emphasis supplied).

290. *Id.* canon 1677, § 2 (emphasis supplied).

291. *Id.* canon 1095.

292. *See* LUDICKE & JENKINS, *supra* note 278 (emphasis supplied).

293. DIGNITAS CONNUBII, art. 203.

294. *Id.* § 1.

295. *See* 1917 CODE OF CANON LAW, canons 1976 & 1982.

of experts in causes based on mental illness is still required because the judge is not expected to have the expertise necessary in this matter. The assistance of an expert should be utilized to determine the actual presence of a mental illness, its specific diagnosis, and its impact on the person.

Article 203 of *Dignitas* also mentions allocutions to the Roman *Rota* that address the relationship between the psychological and psychiatric sciences and Christian anthropology,<sup>296</sup> and the duty of the defender of the bond in trials involving psychic incapacity.<sup>297</sup>

Continuing with the topic of experts, Article 205 of *Dignitas* is also relevant to Canon 1095 of the Code. Section 2 of Article 205 of *Dignitas* states that “[i]n order that the assistance of experts in cases concerning incapacities mentioned in Canon 1095 [of the Code] may be truly useful, special care is to be taken that experts are chosen who adhere to the principles of Christian *anthropology*.”<sup>298</sup> In the context of Christian theology, theological anthropology refers to the study of the human as it relates to God.<sup>299</sup> It differs from the social science of anthropology, which primarily deals with the comparative study of the physical and social characteristics of humanity across times and places.<sup>300</sup> In marriage nullity trials based on the causes of psychic incapacity of Canon 1095 of the Code, the expert should presuppose the same understanding of the human person and his psyche as that which underlies the Church’s anthropological teaching. The following is an example of an unacceptable expert: A judge should not utilize “an expert in the field of behavioral psychology [or at least in its classical *presentation*] since that branch of science takes a dim view of free will as understood by the Church.”<sup>301</sup>

The most relevant article of the *Dignitas* by far is Article 209. Interestingly, there is no corresponding Canon in the Code to this article. The text of Sections 1 and 2 of Article 209 of *Dignitas* are as follows:

- (1) [Section 1] In causes of incapacity, according to the understanding of [Canon 1095 of the Code], the judge is not to omit asking the expert whether one or both parties suffered from a particular habitual or

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296. John Paul II, *Allocution to the Auditors of the Roman Rota*, 79 ACTA APOSTOLICAE SEDIS 1453-59 (1987).

297. John Paul II, *Allocution to the Auditors of the Roman Rota*, 80 ACTA APOSTOLICAE SEDIS 1178-85 (1988).

298. *DIGNITAS CONNUBII*, art. 205 (emphasis supplied).

299. See MARC CORTEZ, *THEOLOGICAL ANTHROPOLOGY: A GUIDE FOR THE PERPLEXED* 5-6 (2010).

300. American Anthropological Association, *What is Anthropology?*, available at <http://www.aaanet.org/about/whatisanthropology.cfm> (last accessed Mar. 31, 2014).

301. See LUDICKE & JENKINS, *supra* note 278 (emphasis supplied).

transitory anomaly at the time of the wedding; what was its seriousness; and when, from what cause and in what circumstances it originated and manifested itself.

- (2) [Section 2] Specifically: (1) in causes of *defectus usus rationis*, he is to ask whether the anomaly seriously disturbed the use of reason at the time of the celebration of the marriage; and with what intensity and by what symptoms it manifested itself; (2) in causes of *defectus discretionis iudicii*, he is to ask what was the effect of the anomaly on the critical & elective faculty for making serious decisions, particularly in freely choosing a state in life; (3) finally, in causes of incapacity to assume the essential obligations of marriage, he is to ask what was the nature and gravity of the psychic cause on account of which the party would labor not only under a serious difficulty but even the impossibility of sustaining actions inherent in the obligations of marriage.<sup>302</sup>

Article 209 of *Dignitas* primarily concerns the work of the expert in marriage nullity trials based on grounds in Canon 1095 of the Code. It considers the work of the expert in two ways: (1) his or her observations on substantive marriage law in relation to Sections 1 and 2 of Canon 1095 of the Code; and (2) the limitations of the competence of the expert. Section 1 of Article 209 of *Dignitas* presents the general elements that the expert must investigate, while Section 2 of the same article refers to each incapacity ground mentioned in Canon 1095 of the Code. It is important that a judge should not come to the conclusion that a marriage is valid simply because the expert cannot verify the presence of an anomaly. The job of the expert is not to determine the validity of the marriage because this task belongs solely to the judge. The role of the expert in a marriage nullity trial is only to clarify certain matters that constitute prerequisites to the ultimate determination of the court.<sup>303</sup>

The final mention of Canon 1095 of the Code in the *Dignitas* is found in Article 251. This article refers to the addition of a prohibition to sentences that render a judgment for nullity of marriage, based on a permanent incapacity for marriage, due to a psychic incapacity in Canon 1095 of the Code.<sup>304</sup> The article differentiates between a judgment for nullity based on a permanent incapacity, and one based on deception or simulation. In the first case, the party is prohibited from entering into a new marriage unless the same tribunal that issued the sentence is consulted, while in the latter

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302. DIGNITAS CONNUBII, art. 209, §§ 1-2.

303. See LUDICKE & JENKINS, *supra* note 278, at 352-54.

304. DIGNITAS CONNUBII, art. 251.



situation, the prohibition may be lifted after verifying that the person has the intention to enter the marriage.<sup>305</sup>

The quality of the prohibition is different from that of the sentence. The fact that the court has rendered judgment regarding matters pertaining to the time of consent, excludes assigning any meaning to the prohibition similar to that of a given sentence. The bases grounding a marriage nullity decision are distinct — the latter is not immediately an object of judicial decision.<sup>306</sup>

The purpose of the *Dignitas* is to be a guide to judges who implement the provisions of the Code. The Code states that marriage nullity trials should follow the model of the contentious trial, unless otherwise necessary. In those cases, the *Dignitas* serves to assist judges in the procedural aspects of a marriage nullity trial. The norms of the *Dignitas* are taken directly from, or based closely, on the Code itself. It adds nothing new to the Church's legal order on the marriage nullity process.

It is necessary to emphasize the importance of the *Dignitas* in Article 251. Not only is the rational aspect, comprised of estimation, discernment, and valuation, expressly mentioned as an integral part of the defect of discretion of judgment, but the volitional aspect, and the effect that the anomaly produced in the election and act of will, are mentioned as well. The latter aspect is not mentioned in the Canon, but a consistent part of the total jurisprudence has always highlighted its importance and it has been officially included in the *Dignitas*.<sup>307</sup> Although in theory it could be a matter of disagreement, this aspect cannot be excluded from the evaluation of the judge. The discretion of judgment encompasses the *aestimatio*, which includes evaluation, discernment and confrontation, and the *determination*, which includes the freedom of the act.

Article 251 of *Dignitas* emphasizes the expert report not only on the existence, beginning, and nature of the habitual or transitory anomaly of the individual, but also about the impact of that anomaly on the personal structures and psychic faculties of the party upon celebration of the marriage.

Equally highlighted is the importance that Article 251 of *Dignitas*, as it emphasizes the necessity of the expert report on the effect that the anomaly had on those structures and faculties, in the precise moment in which the marriage was celebrated, because what truly interests the judge is to know how the state of mind of the party was in that moment, since the question of whether or not the marriage is null depends on this fact. The risk can be that the expert relates back to that moment the psychic state that he or she found

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305. *Id.*

306. See LUDICKE & JENKINS, *supra* note 278, at v-x.

307. *DIGNITAS CONNUBII*, art. 251.

during examination of the party. A specific anomaly can incapacitate someone at one moment, but not at another.

The distinguished canonist Monsignor García Failde warns that the expert will not always be able to state an opinion with certainty with regard to what he or she is asked. In such cases, the expert can and should respond that he or she cannot answer with certainty. Sometimes, the expert, even when certain about something, will not use words like “certainty” or “moral certainty,” but instead will use terms like “probable” or “possible.” The intention with which the expert uses these terms will have to be determined, because sometimes what the expert understands as “probable” or “possible” is really “certain.”<sup>308</sup>

It is important to mention that Section 2 of Article 209 of *Dignitas*,<sup>309</sup> in accordance with Section 3 of Canon 1095 of the Code, speaks of “psychic cause” and not “psychopathological cause.”<sup>310</sup> This is in relation to Section 1, the text of which specifies that it should be about a “peculiar anomaly,” understanding an anomaly as an “irregularity, abnormality, or lack of suitability to what is habitual.” “Anomaly” differs from “psychosis,” which is the generic term for mental illnesses. Therefore, after the *Dignitas*, the position of jurisprudence and doctrine requires that when dealing with a psychopathy, it should be considered a strict position.

It is considered that an expert need not go beyond the boundaries of his duties if, knowing the meaning and responsibilities of marriage, he or she pronounces that because of his illness the patient was not able to, for example, freely choose marriage,<sup>311</sup> or comply with the essential obligations of marriage. This is not a judgment of the kind that, according to Section 3 of Article 209 of *Dignitas*, is fitting for a judge to issue.<sup>312</sup> This question, being juridical in nature, does not belong to the expert but to the judge.<sup>313</sup>

In summary, Coram Pompedda stated that “when it comes to matrimonial consent, it is ... required that there be a certain projection of the intellect into the future ... to the bond and to the conjugal duties stemming

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308. FAILDE, *supra* note 267, at 186.

309. DIGNITAS CONNUBII, art. 209, § 2, ¶ 3.

310. 1983 CODE OF CANON LAW, canon 1095, § 3.

311. *Dignitas* recognizes that he or she could report about the party's capacity to freely choose a state of life and that he will not be able to make that decision if he is not advised about the state of life in question. See DIGNITAS CONNUBII, art. 209, § 2, ¶ 2.

312. It is not the expert's duty to determine that if the party could not freely choose marriage, that marriage is null. See DIGNITAS CONNUBII, art. 209, § 3.

313. DIGNITAS CONNUBII, art. 209, § 1.

from the bond.”<sup>314</sup> It should be remembered that an incapacity is never the equivalent of a mere difficulty and that, as John Paul II stated in a speech to the Roman *Rota*, “only the *incapacity* and not the *difficulty* of giving consent and of realizing a true community of life and love, renders a marriage invalid.”<sup>315</sup> In addition, it is important to emphasize the great weight that should be given to the experts who participate in marriage nullity trials, in that they are responsible for instructing the judge about not only the existence, but also the nature, origin, and seriousness of the psychic disturbance in the contracting party.

#### VIII. RECENT ROTAL JURISPRUDENCE AND THE *DIGNITAS CONNUBII*

As stated earlier, the Roman *Rota* is the highest appellate tribunal of the Roman Catholic Church, and with respect to judicial trials conducted in the Catholic Church, the highest ecclesiastical court constituted by the Holy See.<sup>316</sup>

The Roman *Rota* adjudicates cases with a panel of three or more auditors, depending on the complexity of the case.<sup>317</sup> The Roman *Rota*'s main function is that of an appellate tribunal, ordinarily reviewing decisions of lower courts, if the first instance and the second instance do not agree on the outcome of a case.<sup>318</sup> Any party, however, has the right to file a second instance appeal directly to the Roman *Rota*. The majority of petitions making up the Roman *Rota*'s docket are seeking the decree of nullity, although it has jurisdiction to hear any other type of judicial and non-administrative case in any area of Canon Law.

According to Sr. Vondenberger, “Code 19 of the Code of Canon Law states that when there is lack of clarity concerning a matter of Church law, ‘the jurisprudence and *praxis* of the Roman Curia’ is to be considered.”<sup>319</sup> Section 3 of Article 35 of *Dignitas* states that it is necessary to “study the jurisprudence of the Roman *Rota*, since it is responsible for promoting the unity of jurisprudence and, through its own sentences, to be of assistance to lower tribunals.”<sup>320</sup> Pope Benedict XVI, addressing the auditors of the Roman *Rota* in 20 January 2011, reiterated that the “unity of jurisprudence

314. THE LAW: LACK OF DUE DISCRETION, ARCHDIOCESE OF SAN ANTONIO 2.

315. John Paul II, *supra* note 296, at 1457 (emphasis supplied).

316. Law Firm of Alessandro Toffaletti, The Roman *Rota*, available at <http://www.rota-lawyer-toffaletti.us/the-roman.rota/> (last accessed Mar. 31, 2014) & 1983 CODE OF CANON LAW, canon 1443.

317. See 1983 CODE OF CANON LAW, canon 1444.

318. *Id.*

319. SR. VICTORA VONDENBERGER, INTRODUCTION TO ROTAL JURISPRUDENCE: SELECTED TRANSLATIONS I (2011) (citing 1983 CODE OF CANON LAW).

320. *DIGNITAS CONNUBII*, art. 35, § 3.

[is] entrusted to the care of [the] tribunal [and] must conform to the [jurisprudence of the Roman *Rota*].”<sup>321</sup>

#### *A. Doctrine and Case Law*

Before going into an analysis of the recent rotal jurisprudence regarding Sections 2 and 3 of Canon 1095 of the Code, it is important to briefly summarize the current state of the doctrine and case law related to the grave defect in discretion of judgment and the incapacity to assume the essential obligations of marriage.

##### 1. Serious Defect of Discretion of Judgment

F.R. Aznar Gil, looking at the Roman *Rota*'s jurisprudence regarding the defect of discretion of judgment, places the possible causes of this defect in the following groups: (1) temporary personality crises, which could be episodic, including immaturity, senility, adolescence, emotional instability, etc.; and (2) psychic anomalies, including schizophrenia, paranoia, alcoholism and drug dependency, epilepsy, mental handicaps, and various personality disorders.<sup>322</sup>

An expert's finding of symptoms of one or more of the above causes does not automatically indicate that a defect of discretion of judgment exists. The determining element is not related to the medical finding of an anomaly, but rather the effect that anomaly has had on the party's critical understanding of his or her rights and obligations, and on his or her will.

The expression “serious defect” does not refer to the anomaly, but rather to the discretion. That which makes a person incapable is not the presence of a psychic anomaly or its seriousness, but the fact that the person suffers from a severe lack of judgment. Therefore, a minor defect in the discretion of judgment does not imply incapacity. A valid marriage does not require a complete and full maturity. In reality, there is a level of maturity that relates to each step in the development of marital life — the maturity of one who decides to enter into marriage, the maturity of first-time parents, or the maturity of parents of adolescents.<sup>323</sup>

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321. VONDENBERGER, *supra* note 319 (citing Pope Benedict XVI, Pope of the Roman Catholic Church, Address of His Holiness Benedict XVI to the Prelate Auditors of the Tribunal of the Roman Rota, Address of Pope Benedict XVI on the occasion of the the judicial year of tribunal of the Roman Rota (Jan. 22, 2011)).

322. S.J. Janusz Kowal, *La reciente jurisprudencia rotal acerca de la nulidad matrimonial por incapacidad de natura psíquica*, 35 CURSO DE ACTUALIZACIÓN CANÓNICA 3 (2011).

323. *Id.* at 4.

The issue, then, is to determine at what point this reduction, in the capacity to evaluate and freely decide, implies a serious defect of discretion of judgment. For this, the auditors focus on the essential rights and obligations of marriage and evaluate the seriousness of the defect of discretion of judgment in light of an objective criterion — the essential rights and obligations that are mutually given and accepted. A serious defect can be found to exist if there is proof that the party lacks the intellectual and volatile maturity to understand the essential rights and obligations of the marriage that involve the spouse. The law does not contain a list of these rights and obligations because “it is the responsibility of the doctrine and jurisprudence to determine them, above all through the study of what a ‘real’ marriage is and the analysis of a specific case.”<sup>324</sup>

*B. Incapacity to Assume the Essential Obligations of Marriage by Causes of a Psychic Nature*

Section 3 of Canon 1095 of the Code takes into consideration those persons whose psychic structure makes it impossible for them to bind themselves to the essential rights of marriage, independently of the capacity they may have to understand these obligations.<sup>325</sup>

In the jurisprudence of the Roman *Rota*, one finds many options that underline that the cause of the incapacity should be such that it impedes marital consent. Pope John Paul II has stated that slight defects, bad will, or personality disorders that make interpersonal relations difficult, are not sufficient to declare incapacity because “[t]he cause of the incapacity is always a serious psychic cause.”<sup>326</sup>

Rotal case law has seen much discussion of the grade of seriousness of the incapacity. While there have been diverse opinions, there is agreement about the necessity of the seriousness of the cause that begins the incapacity in a juridical sense. One reason for the frequent rejection of a petition to annul a marriage is the difficulty of reaching a moral certainty about the existence of a true incapacity in the cases alleging a supposed relative incapacity. These allegations of incapacity do not refer to the capacity to contract marriage, but rather the capacity to establish a marital relationship with the specific person with whom they contracted the marriage. In this sense, the expression *serious cause* refers to the incapacity to assume the essential obligations.<sup>327</sup>

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324. *Id.* at 5.

325. 1983 CODE OF CANON LAW, canon 1095, § 3.

326. Kowal, *supra* note 322, at 6.

327. *Id.* at 7 (emphasis supplied).

Regarding the seriousness of a psychic cause, the existence of an anomaly or a defect that are surmountable by ordinary means, including effort and sacrifice, is not enough. That serious anomaly could mean improvement, or it could mean failure, but ultimately is irrelevant from a juridical view of capacity in the moment of contracting into marriage.

Since the concept of incapacity is a juridical concept and not a medical one, it is not possible to make a list of the psychic causes that would render someone incapable. It is not decisive that it is established that a person suffers from a psychic disorder. Rather, it is necessary to place said disorder in relation with capacity as a juridical requirement, in order to determine, in a specific case that the disorder, illness, or anomaly was in fact the cause of the incapacity to assume.

Normally, the causes that are said to be the reason for the incapacity are grouped in three categories: (1) mental illnesses, which include psychosis and its variations; (2) psychosexual anomalies, which impede the normal exercise of sexuality; and (3) personality disorders, such as serious forms of narcissism and antisocial or violent personalities.<sup>328</sup> The experts commonly refer to the *Diagnostic and Statistical Manual of Mental Disorders*<sup>329</sup> to aid them in their reports.

The diverse function of the expert and the judge in marriage annulment cases is due to the distinction between the psychic cause and incapacity as a juridical notion. The role of the expert is not to judge the person's incapacity to assume the essential obligations of the marriage because that is the judge's role. Neither is the judge to act as a substitute for the psychiatrist or psychologist. It is best that there be a healthy interdisciplinary dynamic, for it is helpful that the expert has clear ideas about what marriage is and the minimum requirements for it, and that the judge have a minimum understanding that allows him to adequately evaluate the psychological expertise.

### C. Recent Case Law

Since the purpose of the *Dignitas* is to aid the judges in carrying out the provisions in the Code, it is important to look at recent rotal jurisprudence and how the instruction has been utilized in recent marital nullity sentences.

In the cases brought before the Roman *Rota* in the last three to four years, cases regarding the incapacity to give consent, involving Sections 2

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328. *Id.* at 9.

329. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2013).

and 3 of Canon 1095 of the Code, continue to represent an important number of cases.

A majority of the sentences in these cases are found to be negative. The contribution of experts, including those appointed by the Roman *Rota*, continues to be very important. Generally, the decision of the Roman *Rota* is consistent with the experts' conclusions regarding the incapacities in question.<sup>330</sup>

#### 1. Lack of Discretion of Judgment

Regarding Section 2 of Canon 1095 of the Code, on the lack of discretion of judgment, some psychic anomalies recognized by *affirmative sentences* as sources of the lack of discretion are concealed depression, disorders related to the death of a previous spouse, schizophrenia, anti-social, and narcissistic personalities.<sup>331</sup>

In a case of serious immaturity of the party, the rotal expert identified a sexual aversion disorder. In other cases, immaturity has been treated as a lack of internal freedom. In a case resulting in an affirmative decision, the husband had a personality characterized by low intellectual capacity and post-traumatic stress disorder. The man's mother had died and his ex-girlfriend had abandoned him, and he projected onto his wife the feminine figures he had recently lost.<sup>332</sup>

Unfavorable sentences, or negative sentences, concerning Section 2 of Canon 1095 of the Code often reject the idea of nullity if there is a lack of proof of the existence and/or of the seriousness of the mental disorder. In some instances, the Roman *Rota* recognizes solely the mere presence of characteristics of a personality disorder, physiologic immaturity of youth, or voluntary distortion of conduct.<sup>333</sup>

A negative sentence instructs against the adoption of a mechanistic criterion in which the resulting negativity of the marital life is automatically converted into a demonstration of incapacity and in which the facts are interpreted as evidence of the psychic cause. A negative sentence also advises that even an unwanted pregnancy does not cause a lack of interior freedom or suppress the essential exercise of freedom in the marital choice. In fact, the choice made under these circumstances is a clear sign of the exercise of

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330. *Id.* at 10.

331. *Id.* at 11 (emphasis supplied).

332. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 329, at 11.

333. *Id.*

discretion of judgment, by which the party accepts his or her responsibilities towards the other party and towards the child to be born.<sup>334</sup>

## 2. Incapacity to Assume the Essential Obligations

Some of the causes of a “psychic nature that have been recognized by affirmative sentences are, among others, schizophrenia, bi-polar or manic-depressive disorders, anxiety disorders, homosexuality, and drug addiction.<sup>335</sup> In a case with an affirmative sentence, the man was found to have obsessive-compulsive personality disorder and was groomed since birth for the priesthood by his father, who suffered from sort of religious mania.<sup>336</sup>

Another affirmative sentence was based on a disorder of hyperactive sexual desire, related to a situation of psychological stress due to his difficulties in confronting his wife, who suffered from feelings of inadequacy and social inferiority. In this particular case, the auditors found against nullity on the woman’s part because she only had characteristics of immaturity. The same psychopathological cause is found in another affirmative sentence in which evidence was presented of a hidden lack of sexual expression, and in the background there was a basic incapacity of gift and of interpersonal communication with others.<sup>337</sup>

In contrast, the negative sentences emphasize the lack of proof to demonstrate existence or seriousness of a cause of psychic nature of the supposed incapacity at the moment of celebration of the marriage. In some instances, these sentences note the existence of mere traces and not of true disorders, or perhaps just a simple imbalance of the structure of temperament and character of the parties. Additionally, negative sentences tend to indicate the harmony between the decisions of the judges and the opinions of the experts. Of course, there are instances in which an affirmative sentence deviates from the expert’s vote.<sup>338</sup>

One case, translated into English and published in a compilation of other cases heard before the Roman *Rota* regarding the nullity of marriage, discusses the issue of whether the nullity of the marriage had been established due to incapacity to assume the obligations of marriage on part of the woman-respondent.<sup>339</sup>

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334. *Id.* at 11-12.

335. *Id.* at 12-13.

336. *Id.* at 13.

337. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 329, at 13.

338. *Id.* at 14.

339. JOSEPH SCIACCA, *ROTAL JURISPRUDENCE: SELECTED TRANSLATIONS* 139-68 (2011).



Monsignor Joseph Sciacca examines the law of Section 3 of Canon 1095 of the Code and how its language speaks specifically about impossibility, not just difficulty, which has no juridical force. He mentions that there can be “confusion between marriages that are invalid due to the incapacity to establish a minimal personal conjugal relationship[,] and marriages that are unhappy as a result of the incapacity of the contracting party to have a mature, integral, and full interpersonal relationship.”<sup>340</sup>

In this specific case, the engagement between the parties lasted six years. The male petitioner argued that he saw strange attitudes in his wife and that she had a strong dependency on her family.<sup>341</sup> Witnesses for the respondent stated that they never had any reason to believe the wife was psychologically ill.<sup>342</sup> A witness for the petitioner even stated that the wife’s character did not change until after the marriage.<sup>343</sup> The respondent’s experts found nothing that indicated she suffered from any kind of condition that prevented her ability to consent to the marriage at the time of its celebration.<sup>344</sup> The issues of her personality were neither of the kind nor the gravity to result in a psychic incapacity to contract into marriage.<sup>345</sup> Ultimately, the judges found that there were difficulties and defects of character present during the engagement and marriage but that they did not rise to the level of being anomalies or psychic disturbances making the wife incapable of giving consent and assuming or fulfilling the essential obligations of marriage.<sup>346</sup> The final judgment was against finding the marriage null.<sup>347</sup>

Another case discusses the issue of whether a finding of nullity should be upheld on the ground of a grave defect in discretion of judgment and incapacity to assume the essential obligations on the part of the wife, in accordance with Sections 2 and 3 of Canon 1095 of the Code.<sup>348</sup>

In his discussion of the law, Monsignor Sciacca examines the idea of judgment. He quotes Viladrich, saying that —

Judgment implies the power of the intellect, in its practical operation of knowing, deliberating[,] and proposing as a possible option *this* concrete marriage, but it also includes the capacity of the subject to make the choice,

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340. *Id.* at 142.

341. *Id.* at 158–68.

342. *Id.*

343. *Id.*

344. *Id.*

345. SCIACCA, *supra* note 339, at 158–68.

346. *Id.*

347. *Id.*

348. *Id.* at 191–212.

in itself and for itself, of such a marriage in the concrete, and to create it here and now as one's own action.<sup>349</sup>

Furthermore, it is not necessary for the gravity of a defect in discretion of judgment, as stated in Section 2 of Canon 1095 of the Code to exist separately as some psychic anomaly. Monsignor Sciacca goes on to state, "it can happen ... that although, given his or her psychological condition ... someone does not seem incapable of assuming the essential obligations of marriage, he or she may truly not have been sufficiently free to make a choice about marriage."<sup>350</sup>

The case continues, listing narcissism as one of the psychic disorders that are capable of impeding the capacity to give consent. Monsignor Sciacca indicates that —

Only if it is established ... that in this specific person[,] the pathological determination to the one occurred to the extent that the ego was elevated above normal limits and cultivated to the neglect and dismissal of others, then one is to conclude in favor of the vitiation of consent, and indeed on the basis of [Section Two of Canon 1095 of the Code].<sup>351</sup>

Moving to a discussion of the law of Section 3 of Canon 1095 of the Code, Monsignor Sciacca notes that an incapacity to assume the essential conjugal obligations concerns a defect in the ability to carry out, not a defect in the capacity to choose, and that the will lacks the potential to actualize promises made "without which capacity no one is held to their promises."<sup>352</sup> The incapacity to assume conjugal obligations must be serious, and must unquestionably overcome the presumption that matrimonial obligations are consistent with human nature.

This case briefly discusses the role of the *Dignitas*, since it was published in early 2005 and this case was decided in July 2005. The discussion is narrowed to the role of experts in marriage nullity cases. Monsignor Sciacca notes that there is a difference between incapacity, which invalidates consent because of the connection between the disorder and consent, and difficulty, which does not juridically diminish consent.<sup>353</sup> To prove this incapacity, the judge must have help from psychological and psychiatric experts, a practice "greatly and clearly affirmed most recently in the [*Dignitas*]."<sup>354</sup>

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349. *Id.* at 194.

350. *Id.* at 197.

351. SCIACCA, *supra* note 339. at 198-99.

352. *Id.* at 200.

353. *Id.* at 201-02.

354. *Id.* at 202.

Ultimately, the judges concluded that the female petitioner was disturbed by some kind of disorder, and was not free to choose her marriage. The nullity of the marriage was established on the ground of a grave defect of discretion of judgment according to Section Two of Canon 1095 of the Code. The witnesses in the case confirmed the petitioner's own statements about her psychological state of not wanting to get married but feeling like she had to because it was God's will. There were four experts consulted in this case. The expert for the petitioner found four different personality traits and concluded that the petitioner's state did not depict a fatal anomaly, but a serious complex of defects that produced a psychological handicap in the petitioner. The tribunal's expert found the petitioner suffered from a narcissistic personality disorder, and the results of personality tests placed her in an intermediate area of serious psychopathology.<sup>355</sup>

#### IX. CONCLUSION

Marriage is an inherent reality of the personal and social nature of the human being. The essence and characteristic of its makeup are determined by the natural law. From there, Canon Law has made an extraordinary effort, unknown by other juridical codes, to investigate the natural demands of marriage, such as they are demanded by the dignity of the human being.

Marriage is also a complex human reality — it has very broad and varied dimensions. It encompasses physio-biological, psychological, personal, social, religious, moral, and judicial aspects. Particularly emphasized is the important role played by *the factic human sciences* in the juridical study of marriage, including psychology and psychiatry. However, it is important to be conscious of the fact that these sciences, like those human acts to which they relate, are subject to change because their production is subject to the freedom of man. Science is *intrinsically* changing — almost all of today's scientists agree that scientific understandings are not definitive or fixed, because those same scientific truths are only provisional, as well as philosophically probable.

So important is the role of the sciences of psychology and psychiatry that the Church published the *Dignitas* in 2005 to assist judges and others in the tribunals in deciding marriage nullity cases, among others. It emphasizes the critical role of the psychological and/or psychiatric.

The scientific expert is paramount to those cases, considering the possible nullity of a marriage on the grounds of incapacity in Sections Two and Three of Canon 1095 of the Code. At the same time, however, it is essential that there remain a distinction between the roles of the judge and the expert. Certainly, we have seen that there have been rulings of the church that are contrary to the experts' opinions in the particular case.

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355. *Id.* at 203-12.

Finally, one must also consider the fact that culture is not uniform.<sup>356</sup> It is heterogeneous and unyielding to unity. From our cultural perspective, it can seem to us that the indissolubility forms a part of the marital institution, which at the same time, is based on natural law. However, acceptance of the indissolubility of marriage is rare outside of the Christian culture. From society's cultural perspective, it can seem to that a marriage should be based on the personal commitment of the couple and should be the result of love, but at the same time, society is aware of cultures in which marriage is based on the father's consent or the contribution from the dowry. If society does not want to deny the value of marriage on these other cultural levels, society should accept that perhaps its understanding is not absolute, universal, and *immediate*. Doubts can arise that society's principles respond to absolute and universal values, or if society depends principally on its situation and cultural evolution.<sup>357</sup>

It is important to reflect on the following necessity: the indispensable task of a Catholic attorneys to know canonical legislation, at least to the point that it corresponds to marriage and its ecclesiastic juridical setting.

Finally and for all readers of this Article, the Author would like to conclude with a beautiful thought from Sister Juana Ines de la Cruz, "[m]ay the Lord shower you, not only with abundance of days, but also with His blessings."

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356. Ajay Bhatt, What are the Important Characteristics of Culture?, *available at* <http://www.preservearticles.com/201101173455/characteristics-of-culture.html> (last accessed Mar. 31, 2014).

357. FAILDE, *supra* note 15, at 100.