

«LACK OF DUE DISCRETION»: INCAPACITY OR ERROR?

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SUMARIO. 1. Defining the «Caput nullitatis». 2. «Lack of Due Discretion». 3. Moral Development and Formation of values. 4. Ignorance and Error. 5. Error Pervicax. 6. Error Concerning the Formal Object of Consent. 7. Error concerning sacramentality. 8. Proof of Error Determining the Will.

1. *Defining the «Caput nullitatis»*

By way of introduction, it may be useful to recall the central role which the *caput nullitatis* plays in the initiation, development, and decision of marriage nullity cases, even to the point of determining in some cases the type of process to be followed¹. This is so because the *caput nullitatis* is the «source» of the alleged nullity of marriage consent and the goal of the entire process animating it from start to finish. It is therefore very important to define each «source» of nullity clearly and without ambiguities, for the certitude to be derived from the process depends on it. It is possible, of course, to hear a case under more than one *caput nullitatis*², for the sources of nullity may overlap, but then greater care should be taken to define each *caput* clearly, so that the evidence may be

1. Cfr. cc. 1686, 1690.

2. Cfr. c. 1677, § 4.

gathered and presented in an orderly and logical fashion, and a coherent argument may be made.

In order to define the *caput nullitatis* clearly and without ambiguity, canonical notions and terms should be used, and not those of other specialized sciences, because the issue to be ultimately judged is marriage consent, a juridic act which, endowed with its own juridic elements, produces a canonically valid marriage, the juridic effect. If, for instance, the *caput nullitatis* we are considering is impotence, we are interested not so much in those clinical notions which brought about this condition, but in impotence *canonically defined*, for the facts defining impotence in canonical terms are the «sources» through which the nullity of consent is to be proved³.

The *capita nullitatis* or «sources» of marriage nullity can be classified, according to canonical doctrine and the systematic arrangement of the Code, as: a) Diriment impediments; b) Lack of canonical form; c) Lack of valid consent. Since marriage consent is an act of the will formed by proper discernment of the object to be willed, those «sources» of nullity classified under «lack of valid consent» may be subdivided into: 1) Incapacity to consent (c. 1095); 2) Defects of knowledge (cc. 1096-1099); 3) Defects of the will (cc. 1101-1104).

The *incapacity* formulated by canon 1095 is not to be equated with that deriving from the impediments⁴. Impediments are prohibitions rendering the person legally incapable of contracting marriage, while the incapacity of canon 1095 is something more radical: it is the canonical formulation of a factual incapacity to elicit an act of valid marriage consent. Hence, the title given to this *caput nullitatis* is *consensual incapacity* which, implying a *dysfunction* of the rational faculties, is also known as *psychological or psychic incapacity*. While one may say that the actual cause of the incapacity is a pathological condition, the «canonical sources» of the nullity of consent is not the pathological

3. This is not to say that only those *capita nullitatis* defined by positive law and included in the Code are to be considered, but that each source of nullity must be defined in terms that are juridically meaningful.

4. There continues to be a school of thought holding that the «inability to assume the essential obligations» of c. 1095, § 3 has the character of impediment: cfr. GULLO, C. in *L'incapacitas (can. 1095) nelle «sententiae selectae coram Pinto»*, Città del Vaticano, 1988, pp. 40-41. The author cites the sentence *Portlandens.*, c. Pinto, 18, March, 1971.

condition, whatever its clinical denomination and description, but the three-fold consensual incapacity canonically defined by canon 1095 as «lack of sufficient use of reason», «grave defect of discretion of judgement», and «inability to assume the essential obligations». These are the *capita nullitatis* or sources of nullity which ought to be proved, while the clinical conditions are the facts, or series of facts, supporting the alleged incapacity to consent and to contract marriage.

When canon 1057, § 2 defines marriage consent as «an act of the will», these terms mean that this juridic act ought to be a free human act endowed with proper discernment of the object to be willed. As a human act, it must be one elicited by the spiritual powers of the soul and in this sense, then, it is not only an act of the will but also an act of the intellect. And since the rational powers of the soul depend for their operations on the physical senses, marriage consent, as any other human act, is an operation of all the psychophysical systems working in unison. When this integration is gravely defective, the external act of consent is no longer a free human act endowed with proper discernment of the object and able to produce its juridic effect.

The lack of integration may be due to a psychic dysfunction, to a defect in the actual knowledge of the object, or to a defect in the free choice of the object. For this reason, then, those «sources» of nullity classified under «Lack of Valid Consent» are further subdivided into «Consensual Incapacity», «Defects of Knowledge» and «Defects of the Will». «Consensual Incapacity» can be of three types, as already explained; the Defects of Knowledge» are ignorance, error, and fraud; and the «Defects of the Will» are fear, force, condition, and simulation.

While the three types of *consensual incapacity* describe in canonical terms a *de facto* psychological incapacity to elicit a valid act of marriage consent, those *capita* classified under «Defects of Knowledge» and «Defects of the Will» describe a defective *exercise* of a person's psychological capacity for marriage consent⁵.

5. A more accurate classification of the «anomalies» of marriage consent would be this: 1. *Consensual Incapacity*; 2. *Lack of Consent* subdivided into A) Ignorance; B) Error: a) *de facto*; b) *de iure*; C) Simulation; D) Condition; E) Force; 3. *Vitiated Consent* subdivided into A) Fear; B) Fraud. Cfr. FORNÉS, J., *Derecho Matrimonial Canonico*, Madrid, 1990, pp. 103-138.

2. «Lack of Due Discretion»

Many marriage nullity cases are tried, as we know, under the formula of «lack of due discretion», an abbreviated translation of *gravi defectu discretionis iudicii* of canon 1095, § 2. Because of its widespread use, the question has been raised as to whether or not this *caput nullitatis* is properly understood in the actual practice of many tribunals. The question is, of course, of great importance, because the entire outcome of the canonical process depends on the clear definition and understanding of the *caput nullitatis* which animates it from start to finish.

The term «discretion of judgement», of long scholastic tradition, came into canonical language for the purpose of determining the degree of discernment required for valid marriage consent, for it has always been evident that besides the power for speculative knowledge concerning the object of marriage consent, an added discernment is needed consisting of the power to assess and evaluate the goods implied in a particular choice of marriage, and which is naturally acquired with a person's development into adulthood.

Before the promulgation of the '83 Code, Rotal jurisprudence sought to establish a measure for the «maturity» of judgement required for valid marriage consent, and took that measure from that degree of discernment or «discretion of judgement» corresponding to a person after the completion of puberty (i.e. middle adolescence)⁶. It followed, then, that in those situations where a person was said to be «psychologically immature», Rotal jurisprudence adopted the formula *defectus discretionis iudicii*⁷ which later found its way into canon 1095, § 2. After its incorporation into the letter of the law, the «grave defect of discretion of judgement» has become a legislated *caput nullitatis* and its precise canonical meaning should be derived not only from the literal meaning of the terms used, but also from its context within canon 1095,

6. GULLO, C. (*ibid.* *L'immaturità psico-affettiva...*, p. 95) bluntly but accurately describes Rotal jurisprudence concerning «immaturity» as «chaotic» and the reason, we may add, is that the term «immaturity» describes an existential human situation but does not define it. Consequently, it is an ambiguous term and an inadequate concept to serve as *caput nullitatis*.

7. Cfr. TEJERO, E., *La discreción de juicio para consentir en matrimonio*, «Ius Canonicum» (1982), pp. 403-534.

as well as from an investigation into the purpose of the law and the intention of the legislator⁸.

The terms «judgement» and «discretion» can be diversely interpreted both in Latin and in their modern languages derivatives. *Iudicium*, or judgement, means the *power* to reason as well as the statement or proposition by which that power is *exercised*. *Discretio* means both the *power* to discern and its *exercise* by means of differentiation and distinction: in both senses it is often used as synonymous with prudence. Discretion can refer to the person's discerning *power*, as in the *defectu discretio iudicii* of canon 1095, § 2, or it can refer to the statement or proposition *exercising* that power, as when we say that a particular act of marriage consent lacked due discretion. In our effort to define clearly and without ambiguity the *caput nullitatis* formulated as «grave defect of discretion of judgement», we should not confuse the *power* or capacity to discern and differentiate with the actual *exercise* of that capacity by means of particular judgements or propositions.

Since «discretion of judgement» means ability or power to discern particular goods and make particular judgements by differentiating and assessing those goods, *gravis defectus discretionis iudicii* means, rather obviously, grave defect of a person's *psychological power* to make that particular judgement which forms the choice of the will. *Gravis defectus discretionis iudicii* does not mean grave error in the act of judging as it is sometimes interpreted.

While a grave defect of the *power* for discrete discernment concerning the essence of marriage will necessarily result in an inadequate *particular judgement* concerning the same object, the two should not be confused. The dysfunction described as a «grave defect of discretion of judgement» is the source of the gravely defective «particular judgement» which, forming the choice of the will, is an integral part of consent itself. But it would be tautological to say that marriage consent, which is an *exercise* of the powers of intellect and will, was substantially defective (i.e. null) because the *exercise* of either intellect or will were substantially defective. Rather, in order to prove that such *exercise* of intellect and will was inadequate in relation to a given object, we ought to show that a certain fact or set of facts caused it to be inadequate and,

8. Cfr. c. 17.

consequently, juridically null. That fact or set of facts is the *caput nullitatis* or source of nullity.

Consequently, the defective particular judgement is not the source of nullity of consent and cannot be treated as a procedural *caput nullitatis* or source of nullity of consent, for this source is to be found in those facts which caused the particular judgement to be defective, namely the grave defect in the power or capacity for discrete judgement («grave defect of discretion of judgement») or one of those conditions listed under «Defects of Knowledge» (ignorance, error, or deceit).

The «defect of discretion» ought to be «grave», as explicitly stated in canon 1095, § 2. In what refers to human acts, «grave» means a departure from the substance of the norm; and if the norm is that a person after middle adolescence is able to *discern* the essentials of marriage, «grave» refers to a discernment devoid of such *normal* power, and this means not mere difficulty, which is within *normal* behavior, but *actual incapacity*, which is abnormal after middle adolescence.

As explained before, canon 1095 formulates three types of *consensual incapacity*, each type being a juridically defined *caput nullitatis*. These three types of incapacity are based on the fact that since every normal person after reaching adulthood is endowed by nature with the mental and emotional capacity to elicit a valid act of marriage consent, the absence of such normal psychological capacity implies a dysfunction of the rational faculties. These three *capita* do not describe a defective *exercise* of a person's normal psychological make-up by which a person's intellect and will are deceived or frustrated by an element external to these faculties, but they describe three types of «psychic incapacity» to consent and therefore to contract⁹

In 1987 and again in 1988, the Roman Pontiff addressed the Rota on the topic of psychological incapacity to contract marriage as regulated by canon 1095¹⁰. Specifically, and for the purpose of this study, the

9. Failure to understand that the *de iure* incapacity of canon 1095 is based on a *de facto* psychological incapacity is shown by the fact that, in some canonical circles, the term «incapacity» is reserved for the «inability to assume the essential obligations», while the «grave defect of discretion of judgement» is thought to describe only a defective exercise.

10. Whether or not these addresses to the Rota constitute an «authentic» interpretation according to the prescriptions of c. 16 and the formalities of the Roman curia is a matter we need not address in this commentary. It is sufficiently clear, however, that, the

Holy Father states that «for the canonist, the principle must remain clear that only incapacity, and not difficulty, in giving consent and in realizing a true community of life and love invalidates a marriage», and he further explains that «the hypothesis of real incapacity is to be considered only when an anomaly of a serious nature is present which, however it may be defined, must substantially vitiate the capacity to understand and/or to consent»¹¹. And in order to prove the existence of an «anomaly of a serious nature» and «the hypothesis of real incapacity» one must define the «concept of normality» which «for the canonist, who is inspired by an integrated vision of the person..., includes moderate forms of psychological difficulty», for «only the most severe forms of psychic illness reach the point of impairing substantially the freedom of the individual»¹².

The definitive formulation of canon 1095, the addresses of the Roman Pontiff to the Rota, and the Rotal sentences issued since then make it very clear that «grave defect of discretion of judgement» means *incapacity* to assess and estimate the values implied in a particular choice of marriage. It does not mean simply a defective *exercise* of an otherwise sufficient capacity amounting to «imprudent judgement» or «poor judgement»¹³.

3. *Moral Development and Formation of values*

While the «grave defect of discretion» is an abnormal condition after adolescence, implying a dysfunction of the rational faculties, a person might act under other conditions which, while not being pathological, might still imply a certain «immaturity», or lack of expected development leading to the exercise of «imprudent judgement» concerning the choice

Roman Pontiff is in fact interpreting this canon as the Supreme Legislator who promulgated it and as the Supreme Judge explicitly instructing his own tribunal on how to apply it (cfr. MARTÍN DE AGAR, J.T., *L'incapacità consensuale nei recenti discorsi del romano Pontefice alla Rota Romana*, «Ius Ecclesiae», 1982-II, pp. 395-422).

11. Cfr. JOHN PAUL II, *Address to the R. Rota*, Febr. 5, 1987, n.7.

12. Cfr. JOHN PAUL II, *Address to the R. Rota*, Jan. 26, 1988, nn. 5-6.

13. Cfr. Rotal sentence c. FIORE, May 30, 1987 in «Marriage Studies» IV, Washington, D.C., 1990, pp. 14-32; BURKE, R.-GROCHOLEWSKI, Z.-POMPEDDA, M.-VERSALDI, G., in «Incapacity for Marriage. Jurisprudence and Interpretation». II Gregorian Colloquium, Robert M. Sable, Coordinator and Editor, *Pontificia Universitas Gregoriana*, Rome 1987.

of a particular marriage. Obviously, one of the most notable and normal characteristics of youth is the lack of experience and the habit of acting without sufficient reflection concerning some very basic things of life. This situation of «immaturity» can be aggravated in certain respects by a dysfunctional family background and by a culture which promotes self-gratification as a chief human value to be pursued. Under such cultural conditions, a young person will be more inclined to a mistaken discernment or error of judgement concerning the essentials of marriage. But then, this is «error» and not «incapacity»: it is an inadequate *exercise* of an otherwise adequate psychological capacity to judge and assume the essential rights and obligations of marriage. The «source» of nullity for this type of «psychological immaturity» is not «consensual incapacity», as formulated by canon 1095. If indeed it can be proved that, because of those culturally induced conditions, the particular judgement preceding the act of consent was gravely defective, the canonical description of those conditions will be found in those *capita* classified as «Defects of Knowledge».

The human person during normal growth and maturation is motivated to seek a homeostatic level of satisfaction and a sense of self-esteem which comes through the acceptance and recognition of others with whom the person is in contact and actively involved. In the process of maturation of personality, the individual forms a system of values, beliefs, expectations, attitudes uniquely organized in the active pursuit of the self-ideal. The achievement of a reasonably stable self-concept becomes the frame of reference enabling the person to experience a sense of security and self-worth. Those habitual attitudes, then, become the normative frame of reference out of which choices are made¹⁴.

Obviously, the ego-involvements, sentiments, values, and attitudes of the growing and maturing person will be almost totally those of the milieu into which the person is born and raised, namely parents, relatives, friends, schools, the media, church affiliation, socioeconomic

14. William JAMES writes of the «self-regarding sentiment», meaning by «sentiment» a whole complex of thoughts, feelings and desires. This becomes the «North Star» by which one steers one's course in life, a kind of guiding beacon. Hadley Cantril and Muzafar Sherif speak of the psychology of «ego-involvement» referring thereby to the whole host of varied and multiple relationships with and in which the developing person finds himself enmeshed.

status, political affiliation, and so forth. This process is quite normal, healthy and necessary if the person is to function in a secure, comfortable, and predictable fashion. It does not preclude the person's freedom of choice but it sets the conditions under which that freedom will be exercised. For reasons of psychological homeostasis, most people will be very strongly motivated by the surrounding and prevailing social reinforcers/mores.

In the formation of values, we should not underestimate the influence exercised by the visuo-audio media in the individual's desire for conformity, acceptance and recognition by peers. And we should acknowledge that in the materialistic culture of «selfism», so continuously reinforced by the media, the conditions under which the person is to make some very important life choices are often inimical to Christian and authentic human values. This is not to say that our contemporary culture is so corrupted that the individual cannot freely opt for authentic human goods, or that the person cannot retain the freedom of choice even under opposing social influences. It shows, however, the limits or conditions under which human freedom operates in the normal person¹⁵.

In terms of philosophical psychology, from which the notion of «discretion of judgement» is borrowed, the discernment exercised by means of a judgement concerning the value of a particular choice of marriage requires the assessment, evaluation or estimation of «particular reason» (*vis cogitativa* or *aestimativa*)¹⁶ which partially depends for its development and maturation on social and educational factors. A person, then, raised under a set of values inimical to the true nature of marriage will be negatively influenced in that particular judgement which assesses the goods involved in a particular marriage. The divorce and contraceptive «mentalities», for example, will necessarily influence in many cases a person's appreciation of the value of lasting commitments and offspring, and the many facets of the culture of materialism will affect also a person's motivations in the particular choice of marriage¹⁷.

15. Cfr. JOHN PAUL II, *Address to the R. Rota*, Jan. 28, 1991.

16. Cfr. our article *Capacity and Incapacity to Contract Marriage*, «*Studia Canonica*» 22 (1988), pp. 147-168; T.A.R.R., 14-II-84, c. PINTO, and GARCÍA, L.M., *El grave defecto de discreción de juicio*, in «*Ius Canonicum*» (1989), pp. 207-241.

17. Cfr. COLANTONIO, R., in pp. 22-35 of *La Simulazione del Consenso Matrimoniale Canonico*, «*Studi Giuridici*» XXII, Città del Vaticano, 1990.

If those culturally induced conditions and limitations mentioned above were to gravely affect a person's psychological *power* to discern and assess the goods of marriage, the particular nullity of consent ought to be examined under the consensual incapacity formulated in canon 1095, § 2, but if those influences affected only the correct *exercise* of the same power, the alleged nullity should be that of *exclusion* of an essential element of marriage by means of a defective judgement and a defective choice of the object of consent. While clearly distinguishing it from incapacity, the concept of «exclusion» of an essential element has evolved in Rotal jurisprudence and in canonical literature to apply, not only to that explicit «exclusion by a positive act of the will» formulated by canon 1101, § 2, and known as «simulation», but also to the implicit exclusion of an essential element resulting from *pervicax error iuris*¹⁸. In more recent times, and due to the new formulation of *error iuris* by canon 1099 of the revised Code, a distinction can be made between *explicit* error «determining the will» to a «positive act» excluding an essential element in the object of consent (c. 1101, § 2) and *implicit* error «determining the will» to an implicit exclusion of an essential element in the object of marriage consent. Since a positive act of the will, as well as the very notion of simulation, requires knowledge of what is being excluded, «simulation» will be the correct *caput nullitatis* when proof exists that a person *knowingly* excluded an essential element of marriage from the act of consent, but under those conditions we are now studying, a person motivated by a wrong system of values will more

18. Cfr. *ibid.* BONNET ET AL., *La Simulazione del Consenso Matrimoniale Canonico*; JOHNSON, J.G., *Total Simulation in Recent Rotal Jurisprudence*, «*Studia Canonica*» 1990(2), pp.383-425; SANSON, R.B., *Implied Simulation: Grounds for Annulment?*, «*The Jurist*», 48 (1988), pp. 747-770 and *Narcissistic Personality Disorder and Marital Consent*, «*Monitor Eccl.*», 1988-IV & 1989-I, pp. 415-417. R. B. SANSON seems to be searching for the proper *caput nullitatis* to be applied to those situations where a person, showing symptoms of narcissistic personality disorder but not grave enough to make the person incapable of assuming the obligations of marriage (c. 1095, § 3), may have contracted marriage with such an ingrained self-centered and egotistic disregard for the rights of others, that the person may have implicitly excluded the very substance of the *consortium totius vitae*, «ordered by its own nature to the good of the spouses, «or another essential element from the act of consent. The use of the expression «implicit simulation» to describe such implicit exclusion sounds rather peculiar. The excluding positive act of the will not in conformity with the external and explicit act of consent is always an internal and implicit act : simulation, in other words, is always «implicit» by definition . It seems more logical, as we argue in the text, to speak of implicit and explicit exclusion.

often exclude an essential element of marriage *unknowingly*, and therefore *implicitly*, by reason of a deep-rooted error in the particular judgement which forms the choice of the will. The correct *caput nullitatis* in this latter case will be *error determining the will* as we shall now explain¹⁹.

4. *Ignorance and Error*

A. *Ignorance* is lack of knowledge concerning the substance of a given object, and *error* is defective knowledge concerning a particular element which, even if essential to the object, does not totally form its substance. While ignorance makes it impossible to elicit a judgement and consequent act of the will concerning an object which is unknown in its substance, error implies a false judgement concerning a known object which can lead to a false choice. Not every error of judgement, however, leads to a false choice, and in what concerns marriage, consent is vitiated only by that error which, as we shall see later, *determines* the will to choose a marriage deprived of an essential element.

19. Of special interest for this entire topic is the sentence c. ANNÉ dated March 11, 1975 on a case initiated in Toronto. The Rotal Judges set aside the possible grounds of psychological *incapacity* because of the difficulties of proving the nullity of consent through the existence of a *grave* disorder of personality. They preferred to consider the act of consent itself and to argue the case under the subordinated *caput* of *exclusio boni sacramenti* by a positive act of the will (cfr. n.8). According to this sentence, the act of exclusion followed necessarily from lack of due discretion and did not consist of an intent not to fulfill the marital obligations, but of a non-acceptance or disclaiming (*infinitatio*) of the same obligations by the act of consent itself (n.10). The judges argued that such act of consent followed necessarily from an error «permeating the personality» (c. FELICE, 17-XII-57), a «mentality» (c. HUOT, 1-VII-74; c. BEJAN, 23-IV-75), «attitude», «temperament», or «character» (c. FIORE, 14-VII-61; c. ANNÉ, 17-XII-74), (n. 9) affecting the subject of consent. «Because of extreme amorality, egotism, and consummate hedonism, men of this type lack discretion of judgement at the ethical plane (*illa discretio iudicii, sub aspectu axiologico seu valorum ethicorum*: cfr. n. 24) «regarding the marital rights and obligations to be mutually given and accepted» (cfr. n.10). As this sentence precedes the '83 Code, the judges seem to be arguing for a non-pathological moral incapacity described as «lack of discretion of judgement». After the promulgation of c. 1095, «grave lack of discretion of judgement» ought to be limited to describe a «psychic» incapacity, while nonclinical incapacitating conditions ought to be treated for the sake of clarity under a different *caput nullitatis*. Cfr. also T.A.R.R., c. STANKIEWICZ, 23-VII-82 in «Periodica» 72 (1983), pp. 129-140 under the title *De simulatione totali consensus matrimonialis apud iuvenes qui vulgo «hippies» vocantur*.

Ignorance, as a source of nullity of consent, is formulated by canon 1096 which, determining the minimal knowledge needed to form an act of marriage consent, defines the substance of marriage as the *consortium permanens inter virum et mulierem ordinatum ad prolem, cooperatione aliqua sexuali, procreandam*. There can be no act of the will consenting to marriage without the knowledge that marriage consists of: 1) a partnership, or formalized common endeavour; 2) permanent and not transitory; 3) between man and woman; 4) involving some sexual cooperation; 5) for the purpose of procreation.

Ignorance about the very substance of marriage after a person has reached puberty is very rare and, therefore, it should not be presumed, as explicitly stated in canon 1096. One can understand, however, that being raised under certain cultural influences, a person may not be sufficiently aware of the difference between *consortium*, or partnership in which the «partners» are bound to each other by some formal rights and obligations, from concubinage or «common law» marriage in which there is only a *de facto* permanent and sexual union between a man and a woman.

In what refers to the other elements listed above, we ought to acknowledge that, it should be even more unusual for someone raised under the influence of a materialistic and secularized culture to remain ignorant, after adolescence, of the fact that procreation involves sexual intercourse and that marriage consists, therefore, of a permanent sexual relationship between man and woman for the purpose of procreation. But while ignorance about the substance of marriage might be even more unusual under the influence of our contemporary culture, this same culture fosters, as already mentioned, very grave *errors* concerning the essential properties of marriage, and the ends to which marriage is directed by its own nature²⁰, all of which are essential elements to be at least implicitly present in the act of marriage consent.

B. *Error* about the essential elements of marriage is identified by canonical doctrine as *error iuris* to distinguish it from error on the person or on the person's quality. As a *caput nullitatis*, this *error iuris* is regulated by canon 1099 in reference to unity, indissolubility and

20. Cfr. c. 1055.

sacramental dignity with the concise statement that it «does not vitiate consent unless it determines the will», a formula which implicitly contains the doctrinal distinction between *simple error* which does not determine the will, and *practical error* which does determine the will²¹. While canon 1099 formulates *error iuris* only in relation to the essential properties and to sacramental dignity, an error determining the will to exclude the essential ends of marriage, as specified in canon 1055, § 1, or the *bona*, which also belong to the essence of marriage, will also vitiate consent.

In order to better understand the effect of error on the act of the will, we may recall that the *practical judgement* which forms the very act of consent is the conclusion, as it were, of a syllogism. The *major premise* of this syllogism is the speculative *general judgement* of the intellect stating that the permanent union of man and woman for the purpose of raising a family is a good to be desired and pursued. The *minor premise* is the *particular judgement* assessing the convenience, or value to oneself, of pursuing those goods with that particular person. The *conclusion* is then the *practical judgement* directing the will to choose that permanent union with that particular person in order to attain those goods.

If the *general judgement* is in error concerning the substance of a particular object, no judgement can be formed because error in what refers to the substance of an object amounts to ignorance of the same object, and «nothing can be willed if not previously known». That would be the case, for instance, of someone who, not knowing that marriage implies a *permanent* relationship, thinks erroneously that it implies only a sexual relationship between man and woman. Since «permanence» belongs to the substance of marriage, the person ignoring it could not possibly form a judgement concerning a «*permanent partnership*» and the will, therefore, could not be motivated to choose what one does not know.

But if the *general* and speculative judgement is in error about an element which does not define the object's substance, the same error can remain at the speculative level and not affect the *particular judgement* in

21. Cfr. STANKIEWICZ, A., *Errore circa le proprietà e la dignità sacramentale nel matrimonio*, «Monitor Ecclesiasticus», 1984-III, pp. 470-486.

its assessment of the particular object to be chosen. A person, for instance, who knows that marriage involves a permanent, non-transitory, relation but who does not know that marriage is always indissoluble can still form a particular judgement about the desirability of marrying a certain person forever; the speculative error about indissolubility having played no part in the formation of the particular judgement preceding consent. And this is so because the *practical* judgement forming the choice of the will is itself directly formed by the *particular* judgement assessing the value here and now of the object to be chosen, and only an error in this *particular* judgement will become an error which determines the will.

When consent remains unaffected by the speculative error of the intellect, canonical doctrine calls this error «simple». «Simple error» exists in the case of the so-called «interpretative error» in which the person chooses rightly in spite and because of the person's wrong interpretation of an essential element of marriage. Titius, for example, married Caia with the clear intention of being her spouse forever. At that time, Titius did not know that he could never divorce. He is now certain that, had he known this at the time, he would not have married. Coming from an interpretation of past motives, that certainty is hypothetical because the fact remains that in spite of the error, and because of it, he rightly chose a true marriage: the error did not affect his actual will to marry that particular person forever and with no intention to divorce her. How can one choose both «unknowingly» and freely at the same time? Because the person, while mistaken about an essential element of marriage, had sufficient knowledge of its substance and was able to form a practical judgement unaffected by an error which remained at the speculative level.

5. *Error Pervicax*

But this also means that if the error at the speculative level enters into the *practical* judgement directing the will to choose, it becomes a practical error that determines the will. This occurs when the error first articulated in the *general* judgement of the intellect is so stubborn (*pervicax*) or deeply rooted (*radicatus*) that makes its way into the *particular* judgement which, assessing the value of the particular marriage to

be contracted, goes on to form the *practical* judgement which determines the choice of the will²². Caius, for example, erroneously and stubbornly thinks that, under certain circumstances, a person always retains the right to divorce -an error which, at this stage, remains at the speculative level of judgement. He wishes to marry Titia and is sincere in his desire of marrying her forever, even though he has had *positive* and serious doubts about the viability of the marriage: while he wishes to marry forever and thinks that the marriage will be successful, he is assessing the value of the impending marriage with the erroneous assumption that should the doubts materialize, he does retain the right to divorce. At this stage, the error has entered into the particular judgement which, assessing the convenience of his marriage with Titia, includes the right to divorce under certain circumstances. If it can be shown that this error played the role of a decisive argument in favor of contracting marriage, then it can be said that the practical judgment following the assessment includes a practical error directing the will to consent to a marriage deprived of indissolubility. Caius consented to a marriage dissoluble under certain circumstances -*si casus ferat*²³.

Notice that the *pervicax* error which determines the will is not the error concerning an hypothetical situation, but the error which i) is actually present in the particular judgement assessing the real situation of a marriage to be contracted, and ii) plays a decisive role in the favorable assessment of the same marriage. Only this error can be said to have entered the practical judgement which determines the will .

Canonical doctrine is unanimous in upholding that a *pervicax* error determining the will to exclude an essential element of the object of consent might be explicit or implicit²⁴. Briefly this can be explained as follows: a) Error which determines the will is «explicit» when the person is aware of his or her error. Titius, for instance, holds that regardless of what the law of the Church requires, he still retains, under certain circumstances, a right to divorce. When this erroneous opinion is so stub-

22. Cfr. STANKIEWICZ, *ibid.* pp. 484; FELLHAUER, D., *The Exclusion of Indissolubility: Old Principles and New Jurisprudence*, «*Studia Canonica*», Vol. 9, No. 1 (1975), pp. 105-133.

23. Cfr. VILLEGIANTE, S. in *La Simulazione...*, *ibid.*, pp.212-217.

24. Cfr. VILADRICH, P.J., *commentary to canon 1096* in «*Código de Derecho Canónico*», Edición Anotada, Pamplona, 1983.

born that it determines the will in its choice of the object, it necessarily takes the form of a «positive act of the will» *excluding* an essential element of marriage from the act of consent. If this error is both *explicit* and so *stubborn* that it persists at the moment of giving consent, it becomes simulation as described by canon 1101, § 2. b) Error is «implicit» when the person is not aware of his or her error concerning an essential element of marriage: Caius, for instance, holds that he has a right to divorce Titia if she is not faithful, but he is not aware that this is an error. Laboring under such «implicit» error, Caius cannot elicit a «positive act of the will» toward that which he does not know. But if the error, while being only *implicit* in Caius' mind, is so *stubborn* as to constitute a firm and pervasive attitude leading him to marry Titia *because* he would not be bound if she were to be unfaithful, then Caius consent would be vitiated by a «non-acceptance» or «disclaimer» (*infirmitas*) of indissolubility²⁵.

Pervicax error vitiates the act of marriage consent when, due to its «stubbornness», it determines the will to choose a marriage deprived of one of its essential elements. But «stubbornness» will be differently proved depending on whether the *error pervicax* is explicit or implicit, thus determining the *caput nullitatis* and type of proof to be followed. As we have pointed out, when the error is explicit and the person is aware of what he or she is excluding from the act of consent, the main proof of the nullity of consent will consist of those explicit statements showing the person's will to exclude marriage or one of its essential elements, in which case the appropriate *caput nullitatis* will be either total or partial «simulation». But if the error is implicit, the proof of nullity will have to be drawn from the person's deeds rather than the person's words, and the proper *caput nullitatis* should be *error determinans* which, being implicit but deeply rooted, «determines the will» to «disclaim» one of the essential elements in the act of marriage consent.

6. *Error Concerning the Formal Object of Consent*

While canons 1096 and 1099 help us distinguish between *ignorance* and *error*, the object of consent is more precisely determined from a

25. Cfr. STANKIEWICZ, *ibid.* p. 485; c. ANNÉ, March 11, 1975 in footnote # 20.

careful reading of canons 1057, § 2, 1055, and 1056. Canon 1057, § 2 explicitly states that the object of consent consists of the «giving and accepting of each other in order to form a marriage» which means, as interpreted by canonical doctrine and jurisprudence, the mutual giving of *the right over* those very personal acts which we may call «spousal acts»²⁶.

When we give to another person a right over our actions, we give our free will over those actions, and since free will entails possession or mastery of self, by giving the right over those free acts we do, in fact, give ourselves. This is especially true when the rights given refer to those very personal acts directed to the ends or purpose of marriage which, as formulated by canon 1055, are «the good of the spouses» and «the procreation and upbringing of off spring». As these ends are to be pursued, as explicitly reiterated by canon 1056, in a partnership endowed by the essential properties of *unity* and *indissolubility*, the rights exchanged at the moment of consent, through which the spouses «give and accept each other», are the *mutual, exclusive, perpetual, and irrevocable*²⁷ rights to: i) a «communion of life» or personal and complementary *relationship* between man and woman from which derive many acts of mutual help in the pursuit of the good of the spouses²⁸; ii) a *sexual relationship* which, specifying the nature of that complementary relationship, refers to sexual acts that are human and open to procreation; iii) demand from one's spouse the *acceptance of offspring* within the same

26. Canonical doctrine and forensic practice have traditionally used the *bona* as synthetic formulations comprising all essential elements of the object of consent and as practical standards or measures of the validity or invalidity of marriage consent. More recently, the «good of the spouse» or the notion of *communio vitae* has been added as a fourth standard. While acknowledging the practical value of this approach, we prefer to measure the validity of consent through the «error» concerning the essential rights and obligations forming the formal object of marriage consent. Some authors (e. g. J.M. SERRANO in *La simulazione...*, *ibid.*, pp. 95-124) speak of a *ius ad consortium totius vitae* which, principally and directly seeking «the good of the spouses», describes also the entire formal object of consent. On our part we think it more helpful to reserve the term *consortium* (partnership) to identify the totality of marriage *in facto esse* as a juridic relationship and speak rather of a *communio vitae* to refer to that fourth standard or of a *ius ad communionem vitae* to indicate the specific right which principally and directly refers to the «good of the spouses».

27. Cfr. also C.I.C. canons 1134, 1135.

28. *Ius ad communionem vitae*: cfr. VILADRICH, P.J. in «Código de Derecho Canónico». Edición Anotada, *commentary to c. 1095*; FORNÉS, J., *Derecho Matrimonial Canónico*, Madrid 1990, pp. 173-174.

relationship -a right which, completing the specification of the same relationship, is exercised by the many acts of raising the children to their human development²⁹. The right to demand the acceptance of off spring within the *communio vitae* potentially contains the many acts of raising the children, for by actually «receiving» offspring within their dynamic «communion of life and love»³⁰, the spouses share with the children the gifts of their own life thus fulfilling the educational end of marriage.

In defining the essential rights and obligations, it is very important to keep in mind that the *exchange* of the right is essential for the validity of marriage *in fieri*, while the *exercise* of the right belongs to the practice of marriage *in facto esse*. The essential rights and obligations *exchanged* at the moment of consent are those stated before; the acts of mutual help, the human sexual acts open to procreation, and the many and diverse acts of raising the children to their human maturity belong to the practice of marriage.

One can see that the «divorce mentality», the «contraceptive mentality», and the more general «mentality of selfism» which characterize our popular «culture» can bring about some very serious errors of judgement concerning the rights and obligations which ought to be given and accepted at the moment of consent. When we speak of a «mentality» we refer to a set of notions directing a person's behavior, a complex of habitual «practical judgements», as it were, received from the socio/cultural environment, generally accepted by the individual without much reflection, but directing a person's conduct even in some very fundamental things of life³¹.

In our days, and under the influence of the so-called «dissent mentality», some Catholics are quick to ignore the teaching authority of the Church on moral matters in favour of a morality shaped by the culture of secularism. While the marriage they wish to embrace might be in conflict with the teaching of the Church, they are not totally aware of their error

29. For some specific essential rights and obligations identified by Rotal jurisprudence, cfr. MENDONÇA, A., *Antisocial Personality and Nullity of Marriage*, «*Studia Canonica*» 1982 (1), pp. 101-102.

30. Cfr. JOHN PAUL II, *Familiaris Consortio*, n. 11 and Vatican II, *Gaudium et Spes*, n. 48.

31. POMPEDDA, M., uses the expression «pervasive error» to refer to such mentalities: cfr. *Faith and the Sacrament of Marriage*, «*Marriage Studies*» IV, *ibid.*, p.51.

because there is no question in their mind that they have a right to choose a marriage designed by their own ideas³².

A. - Influenced, then, by these «mentalities», it is possible, at least theoretically, for someone to marry with the conviction that whatever rights one may acquire at marriage, *these are not necessarily mutual*. Under this error of judgement brought about by a strong «anti-commitment mentality», a person may not include the very notion of *consortium* in the intended relationship³³. Such a situation would represent a case of ignorance, or lack of knowledge of the very substance of marriage since, as explained before, the minimal knowledge of the substance of marriage should include the knowledge that marriage is a *consortium permanens*. More likely, however, a person of such radical mentality would be aware of what he or she is excluding from the exchange of rights and corresponding obligations and would either choose concubinage or the simulation of marriage; in other words, a marriage contracted under *error determinans* would not be a likely outcome of such mentality³⁴.

B. - Under the influence of the «contraceptive mentality», a person may easily be in error about the fact that marriage consent implies the giving of the right to sexual acts that are human and «open to procreation». While most people know, even if not articulately, that with marriage one acquires a *right* to sexual acts with one's spouse, many people may in fact not know that this is a right to *non-contraceptive* sexual acts. Where the use of contraception has become prevalent and even condoned, if not encouraged, by some marriage preparation courses, the spouses may have entered into a marriage in which the use of non-contraceptive sexual acts is left to their future mutual agreement and is not implicitly exchanged as a «right» at the moment of consent.

The pretended «right to contraception», then, can constitute a *per-vicax* error determining the will to a marriage consent devoid of an essential right and corresponding obligation. Canonical doctrine and

32. Cfr. S.R.R.D., c. ANNÉ, *ibid.* n.10.

33. Cfr. MONETA, P., *La simulazione totale*, in «La simulazione»..., *ibid.*, p. 51; STANKIEWICZ, A., *De simulatione totali consensus matrimonialis...*, «Periodica» 72 (1983), pp. 129-140.

34. Cfr. MONETA, P., *La simulazione totale*, in «La simulazione»..., *ibid.*, pp. 51-53; DE LUCA, L., *L'esclusione del «bonum coniugum»*, *ibid.*, pp. 132-137.

Rotal jurisprudence unanimously agree that if the *right* to «sexual acts that are human and open to procreation» is excluded or in any way limited at the moment of consent, the marriage covenant is null. If only the *use* of the right is limited, it does not nullify marriage consent. In determining whether the *right* or the *use* has been affected, the following ought to be observed³⁵:

a) If the facts of the case prove that offspring were excluded completely, absolutely and permanently, one can presume that the *right* to non-contraceptive acts was excluded or not exchanged with the act of consent.

b) If procreation was temporarily excluded or only the number of children was limited, it ought to be presumed that only the *use* of non-contraceptive acts was limited at the moment of consent.

Both presumptions admit, of course, contrary proof: one may be able to prove from the facts of the case that the stubborn error concerning a pretended «right» to contraception did not in fact imply a denial of the spouses' lawful *right* to procreative acts; or one may be able to prove that the limitations on procreation concerning times and number of children did in fact represent a limitation of the *right* to non-contraceptive acts at the moment of consent. While not excluding an eventual agreement to noncontraceptive sexual acts leading to procreation, a person may still fail to give to the other, at the moment of consent, the *right* to those acts.

The same «contraceptive mentality» can bring about a marriage consent deprived of the giving to the other spouse the right to receive and raise offspring within the *communio vitae* between the spouses. This would be specially evident in the case of the woman who holds the mistaken belief that she has a «right to abortion». If she were to consent to marriage with such *pervicax* error, the validity of her consent would be gravely compromised, for it could involve an implicit but real denial of her spouse's right to receive offspring within the *consortium* or partnership³⁶.

35. Cfr. RICCIARDI, G., *Procreazione responsabile ed esclusione del «bonum fidei»*, in «La simulazione»..., *ibid.*, pp. 183-187.

36. Cfr. STANKIEWICZ, A., *L'esclusione della procreazione ed educatione della prole*, in «La Simulazione»..., *ibid.*, p. 162.

The fact that an induced abortion might have occurred is not proof that the erroneous belief in a «right to abortion» necessarily determined the will against the exchange of the right to receive children within the partnership. But if the facts of the case prove that procreation had totally been excluded or even limited, and that abortion had been used to totally avoid or limit procreation, one can draw a *presumptio hominis* that the *right* to receive children within the marital *consortium* was not included within the act of marriage consent, thus rendering consent null. Once again we should distinguish between the «right» exchanged at the moment of consent and the «exercise» of the right, for exclusion, whether explicitly or implicitly, of the *right* renders consent invalid, while actual failure to exercise the right is not in itself sufficient cause of nullity.

C. - Under certain cultural influences, although perhaps not those that are predominant in the Western world, a person may enter marriage with a deeply held error against *unity* by not knowing that the rights and obligations acquired with marriage consent are exclusive. That would be the case, for instance, of the man who contracts marriage not knowing that he does not have the *right* to have a concubine. While this error may be rare in our contemporary Western culture³⁷, it may be more common for someone, who is aware of the exclusive character of the rights exchanged, to knowingly *exclude* unity, in which case we would be dealing with explicit error and exclusion through «a positive act of the will» (i.e. simulation) but not with implicit error «determining the will»³⁸.

D. - The «divorce mentality» may also bring about an invalidating error concerning the *indissolubility* of marriage and the perpetual and irrevocable character of the rights and obligations exchanged with marriage consent. A person who stubbornly holds a «right to divorce under certain circumstances» may be repudiating the property of indissolubility or the perpetual and irrevocable character of the rights given, in which case, marriage consent would be invalid. As already explained, a deeply

37. A Rotal decision of 23-IV-75 c. BEJAN, found that nullity had been proved, *tum singulari forma mentis...tum praesertim pluribus factis*, in the marriage of a Moslem who consented to a bond deprived of unity and indissolubility (cited in ANNE'S, *ibid.*, n. 9).

38. Cfr. FUNGHINI, R., *L'esclusione del «bonum fidei»* in «La simulatione»..., *ibid.*, p. 146.

rooted error determining the will against indissolubility should be present in the particular judgement assessing the marriage to be contracted as a *ratio contrahendi*, or determining factor for contracting the same marriage.

7. *Error concerning sacramentality*

As we read in canon 1055, § 2, between two baptized persons there can be no valid marriage which is not at the same time a sacrament. In recent times, under the influence of a secularized culture and for a great variety of personal reasons, some baptized non-believers may still contract marriage according to the rite of the Church. Their lack of faith, however, raises important questions concerning the validity of their marriage which are the topic of recent canonical studies and of some Rotal decisions³⁹. Lack of faith in the sacrament is not an impediment for its valid reception and it is not a source of nullity of marriage because the sacramentality of marriage depends on the person's baptismal character, a supernatural reality not subject to the changes of human will⁴⁰, and on the integrity of the natural reality which is the sign of the sacrament: given the integrity of the sign, marriage between two baptized persons is raised by the Lord to the dignity of sacrament⁴¹.

The Church teaches that marriage, which is different from all the other sacraments because it is «part of the very economy of Creation», is the sacrament of the «conjugal covenant» instituted by the Creator «from the beginning». «Therefore, the decision of man and woman... to commit by their irrevocable consent their whole lives in indissoluble love an unconditional fidelity» implies an attitude of profound obedience to the will of God «which cannot exist without God's grace». And since marriage «is also a social matter, committing the couple being married in the eyes of society», even when a couple's motives for marrying in church are more social than religious, they still «implicitly consent to

39. Cfr. POMPEDDA, M., *Faith and the Sacrament of Marriage - Lack of Faith and Matrimonial Consent: Juridical Aspects*, in «Marriage Studies» IV, CLSA, Washington, 1990, pp. 51-64; MONETA, P., *La simulazione totale*, *ibid.*, pp. 45-56.

40. JOHN PAUL II explains that those «engaged couples are already sharers, by virtue of their baptism, in Christ's marriage covenant with the Church»: cfr. *Familiaris Consortio*, n. 68.

41. Cfr. c. 1055, § 1.

what the Church intends to do». In preparing the couple to be married, the pastor's mission is to make this attitude explicit and more perfect ⁴². The doctrinal principles implied in this teaching apply also to non-Catholic Christians who, not subject to the canonical form, have validly married in a civil or religious ceremony⁴³.

A person, then, whose consent is formed by a mistaken judgement concerning the sacramentality of marriage between two baptized persons, or whose particular judgement concerning marriage does not even include a vague notion of its natural sacredness will choose, in most cases, to enter into an exclusive and permanent partnership for the good of the spouses and the raising of children. But if the error is such that it determines the will to exclude not just marriage's supernatural signification, but one of the natural elements which make up the sign, then that error nullifies consent. This can happen with those whose «mentality» is so radicalized that their intention «not to do what the Church does» goes beyond the Church's sacramental teaching to reject also its teaching about the natural elements which form the essence of the sacramental sign, and they thus wish a marriage devoid of a juridic bond, or of the essential rights and obligations which make up this bond, or of its unity and indissolubility ⁴⁴. As we have been explaining all along, this rejection of the essential elements which make up the natural sign can be explicit or implicit. If explicit, we would have a case of «simulation»; if implicit, a case of *error determinans*.

8. *Proof of Error Determining the Will*

In these pages we have been trying to show the difference between the «grave defect of discretion of judgement» and «*error iuris*» for, as we explained, the truthful and just outcome of the canonical process depends on the clear definition of the *caput nullitatis*. We have also distinguished between explicit and implicit error. When the error is *explicit* in

42. Cfr. JOHN PAUL II, *ibid.*

43. The Pope warns that the attempt to lay down further criteria for the level of faith required for the celebration of baptism can lead, among other risks, to questioning the sacramental nature of many marriages of baptized nonCatholics, which would be contrary to ecclesial tradition: cfr. *ibid.*

44. Cfr. HERVADA, J., *Esencia del matrimonio y consentimiento Matrimonial*, in «Persona y Derecho», 9 (1982), pp. 149-179.

the sense that the person is aware of what he or she is excluding from the act of consent, the main body of evidence will come from those verbal statements which show a person's positive act of the will excluding an essential element of marriage. In this case, then, the appropriate *caput nullitatis* will be either total or partial «simulation» as formulated in canon 1101. But if the error is *implicit*, the proof of invalid consent will have to be drawn from those deeds (rather than words) which show a deeply rooted error determining the will to choose a marriage deprived of one of its essential elements. The proper *caput nullitatis* will then be «error determining the will».

This «determining error» will have to be proven by:

a) A consistent pattern of behavior showing a «mentality» not in conformity with those goods or values implied in the essential elements of marriage. If this consistent pattern of behavior can be proved and then shown to be the logical outcome of the person's background, education, or prevalent influences in his or her environment, one may begin to presume that the error is *deeply rooted*.

b) *Verbal statements* showing some of the practical consequences of a mentality contrary to the values implied in the essential elements allegedly absent from the act of consent. The provative value of these statements will have to be weighed by the particular circumstances of each case. If, for example, a couple express their mutual and exclusive love for each other with a threat that, should they be unfaithful they would divorce, these words, with all their negative and mistaken notions, may not express an intention against indissolubility but a will to be forever faithful to each other. But if the threat is such that it originates from a *positive* doubt concerning the truth of their commitment (because during the time of their engagement one or the other had, in fact, been unfaithful), then the threat is, more likely, an expression of a consent deprived of indissolubility.

c) The *report of a psychological expert* showing the stubbornness and pervasiveness of the error by the ingrained traits and other psychological influences in the person under investigation. Since *error iuris* becomes *error determinans* when it is so deeply rooted or stubborn as to constitute «a second nature», as jurisprudence has diversely identified it⁴⁵, this re-

45. Cfr. S.R.R.D. 26-III-56, c. FILIPIAK; 17-III-59, c. FELICI; 8-VI-68, c. FAGGIOLO.

port can be very helpful in establishing the proof. When the stubbornness of the error has been sufficiently established, then it can be presumed with moral certainty that the error entered into the practical judgement thus determining the will to choose a marriage deprived of an essential element.

The importance of defining the *caput nullitatis* as clearly as possible is underlined by the notion of «autonomous» *caput nullitatis*. Since all *capita nullitatis* refer to the «act of the will to form a marriage», they are related, at least indirectly, to one another making it possible for different allegations of invalid consent to be proven by the same set of facts. At the same time, a ground of nullity is said to be «autonomous» when it requires its own type of evidence and its own line of investigation, a thing that ought to be determined at that early stage of the canonical process known as the «determination of the doubt». At the moment when the judges agree that the alleged nullity may be proved through one or several *capita nullitatis*, it is especially important to know in what sense the grounds chosen are «autonomous» and to what extent they may be mutually incompatible.

In these pages we have dealt with three autonomous *capita*: «grave defect of discretion of judgement», «implicit error determining the will», and «simulation» which are related to each other as follows:

a) «Grave defect of discretion of judgement» and «error determining the will» are autonomous grounds of nullity but not mutually exclusive. They can be proposed as alternative grounds: should «incapacity» (c. 1095, § 2) not be proved by the available evidence, «determining error» (c. 1099) may be proved by the same evidence.

It may be of interest to note that the testimony of the psychological expert will be of different value in the case of incapacity and in the case of error. In the latter case, as already explained, a psychological profile of the person involved can serve to show the «stubbornness» of the error and only indirectly and secondarily, the inadequacy of the judgement which forms the act of consent. In cases of «consensual incapacity», however, the testimony of the psychological expert will serve to prove directly and principally the factual incapacity to elicit that discriminating and discerning particular judgement needed for valid consent.

b) «Grave defect of discretion of judgement» (c. 1095, § 2) is not compatible, however, with «simulation» (c. 1101). The very concept of

simulation requires awareness of what the person is excluding with a «positive act of the will». Since one cannot simulate what one cannot discern, it would be contradictory to attempt to prove either one of these two *capita* with the same evidence.

c) It may also be said that «error determining the will» (c. 1099) and «simulation» (c. 1101) are not compatible, for one cannot simulate what one does not know because of error. But as we have shown, the use of one or the other *caput nullitatis* may depend on whether the error is implicit, thus determining the will to implicitly «disclaim» or «non-accept», or explicit, thus originating a «positive act» of exclusion. The latter will be best proved by explicit expressions of the person's intentions to exclude; the former will be proved by deeds, rather than by words, showing a deeply-rooted «mentality» and a will implicitly but firmly set to «non-accept» or «disclaim». One can see then that in actual practice, a set of facts which may not directly prove a positive act of the will to exclude may indirectly prove an implicit but stubborn error determining the will to disclaim or repudiate⁴⁶. These two *capita*, then, can be proposed subordinately: if simulation is not proved, error determinans may be proved.

By way of conclusion, we may add that as nature itself inclines the human person to marriage⁴⁷, the hypothesis of real incapacity to consent to marriage is to be considered only when, in words of John Paul II, «an anomaly of a serious nature is present which, however it may be defined, must substantially vitiate the capacity to understand and/or to consent»⁴⁸. Similarly, the hypothesis of implicit repudiation of an essential element in the act of marriage consent, is to be considered only when the person's behavior has been gravely and consistently contrary to any of those values contained in the essential elements of marriage. And for such hypothesis to become moral certainty, the evidence ought to be arrayed to prove that consent was pre-determined by a grave and deeply rooted error to choose something other than marriage.

46. Cfr. DEL AMO, L., *Commentary to c. 1525* in «Código de Derecho Canónico», Pamplona 1983, p. 919.

47. Cfr. S.Th., Supl. q. 41, art. 1.

48. Cfr. JOHN PAUL II, *Address to the Rota*, Febr. 5, 1987, n.7.