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The application of selected capita of canonical jurisprudence to the practice of "proposed marriages" in Sri Lanka

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THE APPLICATION OF SELECTED CAPITA OF CANONICAL JURISPRUDENCE TO THE PRACTICE OF "PROPOSED MARRIAGES" IN SRI LANKA

A DISSERTATION

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Doctor of Canon Law

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This dissertation was approved by Reverend James H. Provost, J.C.D., Chairman of the Department of Canon Law, as Director, and by Reverend Thomas J. Green, J.C.D. and Reverend Robert J. Sanson, Ph.D., J.C.D., as Readers.

James H. Provost
Director

Thomas J. Green
Reader

Robert J. Sanson
Reader

DEDICATION

TO

JOSEPH

THE SILENT SAINT OF NAZARETH

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CHAPTER II. REVERENTIAL FEAR

ACKNOWLEDGEMENTS

I would like to express my deep gratitude to Dr. James H. Provost, the Director, Dr. Thomas J. Green and Dr. Robert J. Sanson, the Readers, for their help and insights in the research and composition of this work. I would also like to thank my bishop Most Reverend Frank Marcus Fernando, Bishop of Chilaw, for giving me this opportunity of completing the Doctorate in Canon Law at the Catholic University of America in Washington, D. C. I am much obliged and thankful to the Roman Rota for the prompt assistance rendered as well as to the Archdiocesan Tribunal of Colombo and the Diocesan Tribunal of Chilaw. Let me also express my indebtedness to Dr. W. L. A. Don Peter, Rector, Aquinas University College, Colombo and to the Department of Sociology of the University of Peradeniya, Sri Lanka. Finally, my sincere thanks go to my friends and colleagues at Caldwell Hall, whose love and assistance supported me in this work.

INTRODUCTION

Reform and renewal are key words in the modern day vocabulary, not only in ecclesiastical circles but also in the secular world. It does not take long to realize that the days when law and society seldom varied are no more. Today's context is one of rapid change. Law as we know it is subject to external pressures of time and place. The existence of many cultures and the fact that many of our values are relative to a given time and culture are other known factors. Accordingly, what is highly valued as good in one part of the world could quite possibly be considered imperfect elsewhere; what is good law at a given time may likewise be imperfect legislation at another. Good legislation must therefore, in these circumstances, take the individual and society as well into consideration. No doubt, the Church must also be attuned to contemporary social changes today.

Our study is mainly prompted by the fact that marriage legislation has undergone significant development in recent years. It has gained a position of great importance because of the increasing number of cases heard by tribunals. Another phenomenon we have witnessed is the growth of a new spirit in the application of the law. The new spirit to be applied in the adjudication of cases is derived clearly from the teachings of Vatican II on marriage as well as on human

dignity and freedom of conscience. It is in this context that there emerges the question of the validity of "proposed marriages" in Sri Lanka. The circumstances in "proposed marriages" seem to indicate that the personal freedom of choice is secondary to objective social relationships. The study here intends to examine the application of the grounds of reverential fear, error concerning a quality of the person and deceit in determining the validity of a "proposed marriage."

The dissertation is intentionally limited to the three grounds stated, and will not attempt an encyclopedic review of all possible grounds in the practice of modern day jurisprudence. The purpose is to focus on grounds which could be more commonly used in tribunals in Sri Lanka, besides providing reasonable parameters to the study.

The study will proceed in the following manner:

Chapter one provides an overview of "proposed marriages" in Sri Lanka, as described in available studies of the practice, determining significant elements from a canonical point of view.

Chapters two, three and four survey the jurisprudence applicable to the canonically significant elements identified in the first chapter. This includes the jurisprudence applied by the Roman Rota to Sri Lankan cases of "proposed marriages" and a study of developments in recent years on three grounds of nullity, namely reverential fear (c. 1103);

error concerning a quality of the person (c. 1097.2); and dolus or deceit (c. 1098).

An evaluation of "proposed marriages" in light of the above review of canonical jurisprudence on the three grounds of nullity is dealt with in the final conclusions to the dissertation. At the outset, however, a brief elucidation of the concept of jurisprudence is deemed necessary in order to appreciate the extent of development in the present legislation.

1. Jurisprudence

a. Notion

Jurisprudence is an art and a science. In the traditional concept of ecclesiastical jurisprudence, it is described as the art of applying, interpreting and supplying for the codified law by rescript and by judicial sentence.[1] Jurisprudence is defined as "constant uniformity of sentences which are decided in tribunals around a certain category of cases, or a constant and uniform mode of deciding cases or of issuing judicial sentences in a certain category of cases."[2]

Jurisprudence is an art because the law permits the

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[1] Lawrence G. Wrenn, Annulments (Washington: CLSA, 5th ed. 1988), p. 1.

[2] "Constans uniformitas sententiarum quae in tribunalibus feruntur circa genus aliquod causarum, seu constans et uniformis ratio decidendi causas vel edendi sententias judiciales in aliquo causarum genere.... "Carolus Holboeck, Tractatus de jurisprudentia Sacrae Romanae Rotae (Graz: Styria, 1957), p.13.

local judge a degree of autonomy, which lifts the judge above the level of a mere law-enforcement officer who usually applies judicial principles determined by higher courts. On the contrary, the local judge acts as the vicar or delegate of the bishop and his decision affects the parties in question. When interpreting a law he should look first to the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse is to be had to other similar laws, and also to the purpose and circumstances of the law and the mind of the legislator behind it (c.17).[3] Besides, there must be moral certainty in the mind of the judge regarding the matter to be settled by the sentence. Moral certainty exists between two extremes of absolute certainty on the one hand and quasi-certainty or probability on the other, as Pope Pius XII pointed out in an allocution to the auditors of the Roman Rota. "The certainty of which we are now speaking, is necessary and sufficient for the rendering of a judgment."[4]

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[3] Can. 17 - "Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum."

[4] "Tra la certezza assoluta e la quasi-certezza o probabilità sta, come tra due estremi, quella **certezza morale**, della quale d'ordinario si tratta nelle questioni sottoposte al vostro foro.... La certezza, di cui ora parliamo, è necessaria e sufficiente per pronunziare una sentenza." AAS 34 (1942) 339-340.

Jurisprudence is concerned with questions such as what is the essence of marriage? What are the indispensable qualities that must exist in the parties in order for them to be suitable subjects for marriage? What actions are required by the two people in order to enter marriage?

The name "jurisprudence" reflects the fact that judgments are made in a judicial setting by jurists or judges who have been called upon to determine whether all the essentials are present in a given marriage. They are to determine, in other words, whether a particular marriage is valid or not.

Just as any other science, jurisprudence is dynamic and is in a state of constant evolution: it develops new principles and restores old principles after a period of dormancy; it utilizes existing principles which were previously ignored and expands or contracts prevailing principles; it also explicitates what had been implicit or gives a new emphasis to a principle, and where there is a change in circumstances it effects a new application of an old principle.[5]

b. Sources of Jurisprudence

The Roman Rota is considered the highest ecclesiastical tribunal as regards the judging of marriage cases and its sentences are to be held in great esteem. The auditors are doctors in the law. Rotal decisions therefore have an

[5] Wrenn, p. 3.

authority as safe and universal norms to be followed. The Rota as a matter of course is the chief source of canonical jurisprudence. In fact canon 19 gives direction to those with judicial power to advert to the decisions of the courts of the Holy See as sources and resources.[6] The decisions of the Roman Rota are published in the volumes of the Sacrae Romanae Rotae Decisiones seu Sententiae. Excerpts are published in reviews such as Monitor Ecclesiasticus and Ephemerides Juris Canonici.

A second source of jurisprudence are local tribunals. Their decisions have a certain importance, depending on the motives adduced in the decisions.

Other sources of jurisprudence include authentic interpretations of the law by the Pope, usually through the Pontifical Council for the Interpretation of Legal Texts, the praxis of the Roman dicasteries and the common and constant opinion of experts in law and ancillary sciences such as psychiatry and psychology .

2. Focus of This Dissertation: Reverential Fear, Error, and Fraud

As will be discussed in the first chapter, "proposed marriages" are part of the cultural heritage of Sri Lanka.

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[6] Can. 19 - Si certa de re desit expressum legis sive universalis sive particularis praescriptum aut consuetudo, causa, nisi sit poenalis, dirimenda est attentis legibus latis in similibus, generalibus iuris principiis cum aequitate canonica servatis, iurisprudentia et praxi Curiae Romanae, communi constantique doctorum sententia.

These are not "arranged marriages" in the strict sense of the word when there is no choice by the parties, but rather are marriages proposed by the parents to their sons and daughters who are considered to be free to accept or reject the proposal. However, various factors such as dowry, health, and reputation enter in, and even the services of marriage brokers and such factors may qualify such freedom.

The question of the validity of "proposed marriages" has arisen in practice, especially under the heading of reverential fear. This ground of nullity has undergone development in the jurisprudence of the Roman Rota and other church courts since Vatican II and in the revision of the code. Moreover, the 1983 Code of Canon Law contains provisions with regard to error in a quality of a person and with regard to deceit or fraud which could also be applied to "proposed marriages." We will examine the application of the grounds of reverential fear, error in a quality of a person, and deceit or fraud vis-à-vis "proposed marriages," after dealing with the jurisprudential development of these three grounds. This examination will proceed in four stages: (a) standard jurisprudence before the revision; (b) developments during the revision process; (c) changes in the 1983 code; (d) specific application in cases from Sri Lanka.

The author is aware from personal experience in marriage tribunal work in Sri Lanka that there is a need to

clarify the meaning and scope of the pertinent canons of the new code and their application in jurisprudence to the custom of "proposed marriages." It is his hope and desire that this study will provide tribunal officials and others with canonical insights that will enable them to deal with cases involving such "proposed marriages."

CHAPTER I

AN OVERVIEW OF "PROPOSED MARRIAGES"

SRI LANKA, formerly called Ceylon, an island of 25,332 square miles, although a tiny dot in the vast Indian Ocean, has been for centuries the cynosure of many a nation and of renowned scholars.

> "There is no island in the world Great Britain not excepted, that has attracted the attention of authors in so many distant ages and so many different countries, as Ceylon. There is no nation in the ancient or modern times possessed of a language and a literature, the writers of which have not at some time made it their theme. Its aspect, its religion, its antiquities and productions, have been described as well by classic Greeks as by those of the Lower Empire; by the Romans; by the writers of China, Burma, India and Kashmir; by the geographers of Arabia and Persia; by the medieval voyagers of Italy and France, by the annalists of Portugal and Spain; by the merchant adventurers of Holland, and by the topographers and travellers of Great Britain." So wrote Sir Emerson Tennent in the introduction to his famous work on Ceylon.[1]

With its multi-racial, multi-religious, multi-linguistic and multi-cultural inhabitants Sri Lanka has had a chequered history. Successive waves of settlers migrated to this island for many centuries from the neighboring

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[1] Emerson Tennent, Ceylon, I (London, 1860), p.xxiii, as cited by Edmund Peiris in Studies Historical and Cultural (Colombo: Colombo Catholic Press, 1978), p.1.

subcontinent. It is not the scope of this thesis to deal exhaustively with the history of Sri Lanka or to enter into controversies. Since our study is concerned only with those elements in local customs which can directly influence matrimonial consent, it is evidently sufficient to focus attention on marriage customs and traditions in the culture of Sri Lanka.

A. Background for Sri Lankan Customs

1. First Sinhalese Settlers[2]

In Sri Lanka the major racial and cultural group consists of the Sinhalese who came to the island in the sixth century before Christ bringing with them the language, the culture and the religion of their home in North India. Three centuries after their arrival they came under the dominating influence of Buddhism, which modified not only their outlook on life but also their manners and customs. Still later, fresh cultural streams from the East and the West brought about further changes.

From about the beginning of the sixteenth century Ceylon lost its independence. The country was under foreign rule for four hundred and thirty years. In 1517 the Portuguese arrived in Ceylon and landed in the Maritime Provinces. The vulnerability of the sea coast compelled the

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[2] To trace the origins of the first Sinhalese settlers in Sri Lanka see H. W. Tambiah, Sinhala Laws and Customs, (Colombo: Lake House Investments Limited, 1968), p. 2.

peace-loving Sinhalese who had settled in these areas to move into the interior and to seek the protection of their leaders.

2. The Kandyan Kingdom

At this time there were three kingdoms in Sri Lanka: the kingdom of Kotte on the southwest wet zone; the kingdom of Jaffna in the north; and the kingdom of Kandy, which comprised mainly the central highlands with a broad suzerainty over the chieftains of the Eastern coasts and of the north central areas.[3] When the Portuguese landed in Sri Lanka they established themselves in the coastal belt of Colombo.[4] Subsequently there was a treaty signed between the king of Kotte and the Portuguese. This was not strictly a submission by the king.[5] At first trade was their chief concern, but the civil strife in the land led to the frequent presence of Portuguese troops. The country was already in considerable civil conflict as the kings and princes of the three kingdoms vied with one another to wrest sovereignty. The intrigues of the Portuguese strategy and mobilization also caused much unrest among the people.[6]

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[3] Tambiah, p. 18.

[4] S. D. S., "Introduction," in John D'Oyly, A Sketch of the Constitution of the Kandyan Kingdom, 2nd ed. (Dehiwala: Tisara Prakasakayo Ltd., 1975), p. ii.

[5] Edmund Peiris, p. 48.

[6] Tambiah, p. 18.

In the three hundred and forty years of its existence the Kandyan Kingdom played a significant role in Sri Lanka's history. Circumstances soon brought it to be the sole surviving indigenous kingdom against the Portuguese.

The seventeenth century thus opened with only two states in Sri Lanka. The maritime provinces of the Western sea coast from Jaffna to Tangalle were under the power and authority of the Portuguese. The rest of the island was the Kandyan kingdom, ruled by the king of Kandy. This situation continued from the beginning of the seventeenth century for about three and a half centuries, with the Portuguese being substituted by the Dutch in 1658 and subsequently the Dutch by the British in 1796. In 1815 the Kandyan kingdom was eventually extinguished.[7]

With the exodus of the Sinhalese from the littoral to the interior of the land, the littoral became thinly populated and the Muslims who came over to Ceylon from the Tamil districts of South India made it their habitat. These Muslims were called "Moors" by the Portuguese. Even before the advent of the Portuguese, there were Muslim settlements in the island, dating back to the tenth century A.D. or even earlier. The Portuguese continued to apply the customary laws to the Sinhalese people who maintained their indigenous ways of life, enacting nevertheless certain important changes.

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[7] S.D.S., "Introduction", p. iv.

> In spite of the hostile atmosphere for the growth of Sinhalese customary laws, the Portuguese applied them in other matters such as personal relations, especially family relations, rules governing caste, cultivation, land tenures and also the general laws applicable to movables.[8]

In 1638 the Maritime Povinces of the country were occupied by the Dutch, who followed the practice of the Portuguese for some time. But they offered many inducements to convert the indigenous people to their version of Christianity. A large number of maritime Sinhalese were converted to the new religion, attracted mainly by secular benefits. Customary laws did not apply to these new Christian converts if such laws were deemed to be inconsistent with the teachings and precepts of the new religion. The Dutch were adamant in their refusal to recognize indigenous customs if, in their view, they conflicted with Christian ideas. Gradually indigenous customs and customary laws disappeared.

In 1796 the British became the rulers of the Maritime Provinces. One of the earliest tasks of the new administrators was to collect the customary laws of the people of Ceylon. Although they were successful in their efforts with regard to other communities in Ceylon, they were unable to collect the customary laws of the low country Sinhalese who had settled in the littoral. The customary laws of the Maritime Provinces did not differ from the

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[8] Tambiah, p. 27.

Kandyan law, but due to political and social changes they had gradually disappeared. Vestiges of the true customary laws of the Sinhalese are still found in the principles of Kandyan law. This law was modified by judicial decisions since the Kandyan kingdom survived intact until it was extinguished by the British conquest.[9]

So far in this chapter we have considered customs and customary laws in general. We shall now consider customs of the Sinhalese in relation to marriage.

B. Importance of Marriage Customs

1. Marriage and Family

Marriage distinctly marks the origin of the first human society, the family; it is the most ancient institution of humanity. One must therefore expect that around the family will grow certain customs, ideals and traditions of a racial or cultural group. Social life centers on the family. Thus customs form a part and parcel of the pattern of life of a people.

> Custom, it is said, is an ordinary or usual manner of doing and acting whether of a person or a body of persons; especially the habitual practice of a community or people. It is common usage arising out of the cultural patterns, religious ideas and social environment. Customs begin, grow, change, disappear and reappear.[10]

The essential core of culture consists in traditional

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[9] Tambiah, p. 30.

[10] Edmund Peiris, p. 28.

ideas and especially their attached values. These values are very often directly intended in customary marriages which these people might enter. National customs may form a social heritage; even Christians as a group would not wish to part with them. Customs influence the way people behave and they are connected with certain periods of life, and hence it is important to dwell on various customs of people rather than just those of Christians.

2. The Sources

The student of jurisprudence has to rely on the works of anthropologists, sociologists, historians and others to present the traditional marriage customs of the people in Sri Lanka. Our present knowledge of the conventional marriage customs of the Sinhalese is based principally on the collections and records made during the early British regime. Apart from the works of the early institutional writers, information on marriage customs can also be obtained from the works of contemporary scholars. The following sources will be used in the present dissertation.

a. In An Historical Relation of the Island Ceylon, written by the Englishman Robert Knox in 1681,[11] the administrative structure of the Kandyan Kingdom as well as its economic, social and cultural organization are well described.

Robert Knox was born in London on February 8, 1641.

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[11] Robert Knox, An Historical Relation of the Island Ceylon in the East Indies (London, 1681; reprinted, New Delhi: Navrang Publishers, 1984).

When he was fourteen years of age he went to sea for the first time on his father's new ship, the Ann, sailing along the Indian coast. He returned to London in 1657. His mother had died the previous year. Despite his father's early protestations, he had already taken a fancy to sailing and the refitted Ann under the colors of the British East India Company sailed on January 21, 1658. At the conclusion of this trading venture in India, which lasted over a year, while preparing to return the Ann was severely damaged and demasted in a cyclone off the coast of South India on November 19, 1659. Repairs could only be effected on the tree-studded East Coast of Sri Lanka in Kottiyar Bay. During the three to four months stay there, Knox, his father and sixteen members of the crew were taken prisoner by the king's men and removed to Kandy, the hill capital, in April 1660. Ten months later his father died and Knox, then only twenty, remained for another eighteen years, living in four different villages close to the capital city, Kandy. He escaped from the last hamlet on September 22, 1679 and into the hands of the Dutch on October 18, 1679 at the coastal fort of Arippu. He was taken from Colombo to Djakarta, where he arrived on January 15, 1680. His voyage home started almost immediately from Bantam on the Caesar and he arrived in England in September 1680, twenty-three years after leaving on the expedition with his father. He began to write his book on the voyage home from Bantam, publishing

it the following year.[12] Knox died at the age of eighty on June 19, 1720.

As Knox had been kept a prisoner of the king in the Kandyan kingdom for twenty years, his lengthy book can be considered a first hand account of the kingdom. Though Knox wrote in the latter half of the seventeenth century, authors admit that his description applies generally to the structure of the Kandyan Kingdom almost during the entire three hundred and forty years of its existence. His accounts are also corroborated in detail by many other European and indigenous sources in the seventeenth and eighteenth centuries.[13]

b. In A Treatise on the Laws and Customs of the Sinhalese,[14] Frederic Austin Hayley has "attempted to combine an examination of the legal customs of the Sinhalese with a statement of the Kandyan law as it was administered"[15] at that time in courts. He gives an account of a body of laws which due to its antiquity may be of interest to students of sociology and jurisprudence in general, and at the same time can be studied for its modern development.

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[12] H. A. I. Goonetileke, former Librarian, University of Peradeniya, Sri Lanka, "Introduction," in An Historical Relation of the Island Ceylon (1984).

[13] S.D.S., "Introduction," in A Sketch of the Constitution of The Kandyan Kingdom, p. vi.

[14] Frederic Austin Hayley, A Treatise on the Laws and Customs of the Sinhalese (Colombo: H. W. Cave and Co., 1923).

[15] Hayley, p. i.

Frederic Austin Hayley, M.A.; B.C.L.,(Oxon), Of the Middle Temple, Barrister-at-Law, Advocate of the Supreme Court of the Island of Ceylon was an Englishman who contributed much to the development of law in the land. Living among Kandyans and in continual touch with the customs which formed a part of the life around them, Hayley and others appear to have assimilated to a remarkable extent, the spirit of the laws which they were called upon to enforce. He is considered an authority in Kandyan Law and customary law, and later writers often have recourse to his publications.

The book deals with law and social customs, an understanding of which is necessary for the proper appreciation of the law. As the Kandyan law is the surviving portion of what was at one time the common law of the island, the term is restricted to those branches which are in force in the Kandyan districts today; Sinhalese law is a wider term.[16]

c. A Sketch of the Constitution of the Kandyan Kingdom, by John D'Oyly,[17] derives its importance not only from the subject matter of the work but also from the circumstances of its author. John D'Oyly was born on June 11, 1774 and had a distinguished career at Cambridge. After graduating in 1796 D'Oyly secured a cadetship in the Ceylon Civil

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[16] cf. Hayley, pp. i-xi.

[17] John D'Oyly, A Sketch of the Constitution of the Kandyan Kingdom, 2nd ed. (Dehiwala: Tisara Prakasakayo, Ltd., 1975).

Service. He arrived in Ceylon in September 1801 and his first appointment was in 1802 as a member of the provincial court of Colombo. In course of time he was promoted to be Agent of Revenue and Commerce in a southern district. This was a position of considerable importance for a man of thirty years.

Intensely interested in everything he undertook, D'Oyly began studying Sinhala, and after a few years acquired such a mastery over the language that Governor Maitland appointed him chief official translator to the government in 1805. In his capacity as translator he was entrusted with all the negotiations with the court and the chiefs of Kandy.

D'Oyly, however, soon exceeded his original responsibilities. Instead of attending to negotiations directly with the court he set himself up as a super espionage agent for the British over the Kingdom of Kandy. He did this so successfully in fact that he was able within a decade to bring about the conquest of the kingdom, a feat which had eluded the military powers of the Portuguese, the Dutch and the British for over three centuries. After 1834 the British set up a unified administration for the whole island of Ceylon.

A Sketch of the Constitution of the Kandyan Kingdom is the first detailed account of the constitutional and administrative organization of the Kandyan Kingdom and deals with many subjects which had not been touched upon by

previous writers. It deals with the Kandyan Constitution in its entirety; the administration of justice; crime and punishment; the provincial organization; laws of inheritance, lands and land tenure, deeds and transfers of lands, taxes, personal law, the different castes and their duties, court ceremonial, and the different officers of the court.

The value of the book rises largely out of the unparalleled opportunities D'Oyly had to obtain first-hand material for its preparation. He dealt with all Kandyan affairs from 1805 until the conquest of the kingdom in 1815, and from 1815 to 1824 served as Resident and First Commissioner of the Board of Commissioners. The Board had judicial power and heard cases on appeal, and this gave him a chance to know Kandyan law intimately.[18]

d. Sinhalese Social Organization[19] by Ralph Peiris

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[18] S.D.S., "Introduction," in A Sketch of the Constitution of the Kandyan Kingdom, pp. vi-xii.

[19] Ralph Peiris, Sinhalese Social Organization (Colombo: Ceylon University Press Board, 1956). The author Ralph Peiris, born February 14, 1924 is a national of Sri Lanka. Professor Peiris (Ph.D. from the University of London) began his career as Assistant Lecturer in Sociology in 1951 at the University of Ceylon where he later became Professor and Head of the Department. In 1958 he was appointed associate Research Officer to the UNESCO Research Center for Social and Economic Development in Asia in Bangkok, Thailand. In 1967, he was made UNESCO's Regional Social Science Research Adviser, based at the Institute of Economic Growth, Delhi. For a brief period, he acted as Senior Specialist at the East-West Center of the University of Hawaii.

In 1970-1971 he was Special Adviser, Ministry of Planning, Sri Lanka, and also the founder and editor of The

presents a model of the complex social relations which constitute the structure of a functioning social system.

The unit of investigation deals with the social life of a specific region. From a sociological point of view the concrete reality of that social life consists in a multitude of actions by relations between persons and groups of persons. The sociologist is concerned not with relations which are fleeting and transitory, but with those which are repeated and persisting. Some of these social relations become relatively "fixed" and petrified, and these established modes of conduct are known as institutions.

Marriage is an institutionalized relationship, defined and regulated by custom, law and sentiment. A study of these multifarious social relations reveals a pattern of inter-related actions which may be described as social organization.[20]

Ceylon Journal of Historical and Social Studies.

Research Professor of Sociology, University of Colombo in 1978-1979, Peiris has published five books titled Sinhalese Social Organization (Colombo,1956), Faridabad Township (New Delhi, 1961), Studies in the Sociology of Development (Rotterdam University Press, 1969), Social Developmment and Planning in Asia (New Delhi, 1976) and Asian Development Styles (New Delhi, 1977). He has also authored several articles in international journals and Reviews. (Ralph Peiris, Curriculum Vitae, Department of Sociology, University of Peradeniya, Sri Lanka.)

[20] Ralph Peiris, in "Introduction" to Sinhalese Social Organization.

e. Sinhalese Village by Bryce F. Ryan,[21] is a study that represents one part of a research program initiated by the author, while serving as the first professor of sociology at the University of Ceylon.

During those years abroad, an exploratory research program was developed in which basic understanding and documentation was sought of Ceylon's rural society and culture. The village study program had been designed to gain elemental knowledge of Ceylon society and cultures and also as a means of bringing Ceylon University students into close objective understanding of their rural countrymen.[22]

f. In Kandyan Law and Buddhist Ecclesiastical Law, T. B. Dissanayake and A. B. Colin de Soysa,[23] have mainly drawn on D'Oyly and Hayley, among others. The work consists largely of examining manuscripts found in temples and other

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[21] Bryce Ryan, Sinhalese Village (Miami: University of Miami Press, 1958).
Bryce F. Ryan, Ph.D.,(Harvard University) was Professor and Chairman of the Department of Sociology and Anthropology at the University of Miami. He has also taught at Rutgers and Iowa State University. He served as the first Professor of Sociology at the University of Ceylon from 1948 to 1952.
Among his other works is Social and Cultural change (Miami: University of Miami Press, 1969).

[22] Ryan, from book jacket.

[23] T. B. Dissanayake and A. B. Colin de Soysa, Kandyan Law and Buddhist Ecclesiastical Law (Colombo: Dharmasamaya Press, 1963).
T. B. Dissanayake, B.A. (London), Advocate of the Supreme Court of Ceylon and A. B. Colin de Soysa, Proctor of the Supreme Court of Ceylon, are both lawyers of eminence.
They have also co-authored commentaries on the Civil Procedure Code-Ordinance No. 2 of 1889,(1970) and on the Law of Evidence - Evidence Ordinance No. 14 of 1895 (1971).

libraries. They include many documents of sociological interest.

g. Sinhala Laws and Customs, by H. W. Tambiah,[24] is a study which is of great value not only to the students of the law, but also to those interested in the origins, history, and culture of the Sinhala people. This book is written from the point of view of the social anthropologist, sociologist, the student of jurisprudence, and the lawyer. The historical introduction consists of the origins of the Sinhala race. The Sinhalese customary law during the Portuguese, Dutch and British regimes, the sources of Kandyan law and the applicability of the Kandyan law are all dealt with in detail.

Kandyan law is the true Sinhalese customary law. "Customary laws of a place truly reflect the genius of the people to whom they apply. They develop imperceptibly, and therefore contain the true reflection of the aims and aspirations of a people." So says the author in the Preface to his book.

"The book fulfills the important purpose of providing

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[24] Henry Wijayakone Tambiah, Sinhala Laws and Customs (Colombo: Lake House Investments, Ltd., 1968).

The author, Henry Wijayakone Tambiah, B.Sc.(Hons.), LL.B.(Hons), Ph.D.(Lond), of the Middle Temple Barrister-at-Law, was a judge of the Supreme Court of Ceylon. He has authored several other works on Constitutions, Laws and Customs of people. He was a lecturer and examiner of the Council of Legal Education at the University of Ceylon. He was also the national reporter to the Encyclopaedia of Comparative Law. (Adapted from book jacket)

a complete and up-to-date substitute for Dr. Hayley's Laws and Customs of the Sinhalese (Colombo, 1923)."[25]

h. Studies Historical and Cultural by Edmund Peiris[26] is a collection of published lectures and articles which touch upon the culture and customs of the people of Sri Lanka in their historical setting during the past centuries. Some of the articles are reproductions from the journals of the Royal Asiatic Society (Sri Lanka Branch), The Classical Association of Ceylon, and The Ceylon Historical Journal-centenary volume part I of the Education Department.[27]

Studies Historical and Cultural contains part of the research and writings which are fairly representative of the subjects which engaged the attention of the author. He treats of marriage customs and ceremonies, especially those that have an impact on Christian life and conduct, in the context of the country and the people.

The evidence gathered from the above examination of the

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[25] H. N. G. Fernando, Chief Justice of Ceylon in his foreword to the book.

[26] See above p. 9, note 1.

[27] Edmund Peiris, Preface, in Studies Historical and Cultural. The author is the Bishop Emeritus of Chilaw, Sri Lanka. Known among the native scholars as "Patriot in Purple," Bishop Peiris has demonstrated great interest in the history of his country and the cultural heritage of its people. For thirty-two years (1940-1972) he was in charge of a pioneer diocese; yet he wielded remarkable influence among the Buddhist clergy and persons of high erudition by his literary activity and scholarship as a historian and a man of literature.

sources reveals that certain forms of marriage were in vogue among the ancient Sinhalese. For the purpose of our study, we prefer to concentrate on the customary proposed marriage in terms of the individual, which, as we shall see later on, retained its basic formation up to modern times.

C. Proposed Marriages

1. Difference from Arranged Marriages

Marriage is rightly recognized in customary law as an important institution in society.[28] The family is traditionally the core of the social structure and the pivot of the value system. In Sri Lankan society, the authority of elders and of males dominates. Marriages were and continue to be usually "proposed marriages." These are marriages proposed by the parents to their sons and daughters, who are considered to be free to accept or to reject the proposal.

If one of the partners expresses dislike and aversion to the proposed marriage, the parents will reason out with the child; if no agreement is reached, they usually give in and search for another suitable candidate.[29]The process is repeated until accord is reached on a good match.

Thus "proposed marriages" differ significantly from "arranged marriages" which may be found in India and China

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[28] Tambiah, p. 56.

[29] Ryan, p. 73.

and in some other Asian countries.[30] It is to be noted that arranged marriages are negotiated and decided upon by the parents or guardians of the parties. "In India most marriages are still arranged regardless of caste or creed."[31]

The understanding of the concept of marriage in "arranged marriages" seems to be that it is "a family affair, an institution creating new alliances"[32] and extending family influences; an occasion to strengthen old kinships and affinities and improve human relations.

2. Difference from "Romantic Marriages"

"Proposed marriages" obviously differ from romantic marriages, where the partners act on their own, idealizing the qualities they discover in each other. Their attraction to each other is the basic reason for their movement toward marriage. Although romantic love exists as an ideal to the young and as a theme of much popular literature in the country, it is noteworthy that in reality this type of romance might incur community disfavor if one fails to employ great circumspection. In university circles where young people of diverse backgrounds mingle relatively

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[30] Roch F. Knopke, Reverential Fear in Matrimonial Cases in Asiatic Countries: Rota Cases, Canon Law Studies, 294 (Washington: The Catholic University of America, 1949), p. 72.

[31] John Maliekal, "The Celebration of Catholic Marriages in India," Studia Canonica 17 (1983) 396.

[32] Ibid.

freely, romantic love of the Western type appears occasionally. Nevertheless as regards the marriage itself the final decision in "proposed marriages" has to be made by the parents. In certain circumstances, however, the preferences of the young people might be taken into account, as when there is the likelihood of a severe breakdown in relationships with family members arising from personal assertiveness of the parties.[33] Nevertheless, marriage is permissible only within the limits of a specified and circumscribed group called the caste. Family interests are the overriding consideration.[34]

When the "proposed marriage" is between families that are strangers to each other, the arrangements are extremely formal. The initiative is usually taken by the family of the prospective groom who may employ a marriage broker, since the family has to go much further afield than its immediate circle of kith and kin.[35]

Some people also resort to advertisements in newspapers. The advertisements tend to emphasize caste standing, professional prospects, dowry and religion, which dominate matrimonial arrangements.[36]

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[33] Ryan, p. 62.

[34] Ralph Peiris, p. 202.

[35] Ryan, p. 74.

[36] Hayley, pp. 165-166.; Ryan, pp. 64-71.

D. Specific Elements in "Proposed Marriages"

1. Parental Authority

The power of parents over the children in their choice of a marriage partner is very significant in a proposed marriage. It is the parents who take the initiative in bringing the marriage proposal. They expect the children to leave the choice of a partner to their mature judgment. They involve themselves in the negotiations in such a manner as finally to reach the happy conclusion of seeing their son or daughter married to a partner according to their own wishes. The parents and relations are the chief actors; the parties are mostly passive doers of their parents' will.

"The parents commonly make the match, and in their choice regard more the quality and descent than beauty. If they are agreed all is done."[37]

For a legal marriage "the approval of parents and relations is ordinarily stated to have been one of the essential conditions."[38] Nevertheless in theory, the consent of the parties is an essential factor, since it is accepted that the will or the consent of the parties is the very essence of this contract.

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[37] Knox, p.93.

[38] Hayley, p. 175.; cf. also Ralph Peiris, p. 203., Tambiah, p. 122.

> The validity of a marriage depends on the will and capacity of the parties to make it, and on its being made in the manner and with the solemnities required by law.
>
> The requisites of a legal marriage are:
> a. That the parties who are about to enter into the state of wedlock are capable to enter into this state generally or with each other
> b. Consent of parents
> c. Consent of parties
> d. The observance of formalities required by law.[39]

The importance of consent differs somewhat in the case of a woman from that of a man. The woman is entirely dependent upon her parents; after their death her nearest male relations have the obligation and the right to see that she is settled in marriage. Greater freedom is allowed to men, particularly when they have attained to some age with economic independence. After the death of his parents, a man might lawfully marry a woman without the consent of his kinfolk. Ordinarily in village families, both for males and females, it is the parents who bring the proposal. This they consider as the natural exercise of their parental authority.

It is true even for the marriages of Catholics, that the selection of the spouse as well as the arrangements for the marriage are entirely in the hands of the parents. It often happens that parents feel worn out by persistent refusals of their children to consent to any of the

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[39] Dissanayake and de Soysa, p. 60.

proposals brought one after the other, and would insist on them accepting the one which they would decide as final. Obviously, parents who are conscious of their authority may at this point easily be led to grave anger. Due to their incessant pleadings and seeming threats the children may reluctantly agree to this "final" proposal. Personal preferences in marriage are not highly valued by the majority in society. Nearly every marriage match meets the test of a large number of criteria which are considered essential. The most fundamental among these is certainly parental approval.[40] In the majority of these marriages the issue of parental approval becomes irrelevant because the entire process as regards marriage is directed and managed by the parents.[41]

The propriety and prerogative of parental decision is so deeply rooted in society that children who evade it will sooner or later feel considerable hardships and difficulties. A young wife may be made keenly aware of her position as an outsider in the neighborhood. However it is very unlikely that any formal ostracism would take place. There is more latitude for personal choice among boys particularly if the father is deceased, or if the young man is economically well established and independent. The young man will nonetheless carry on his plan usually through the normal

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[40] D'Oyly, p. 124.

[41] Ryan, pp. 63-64.

channels. Women, on the other hand even with both parents deceased, exercise no such personal initiative in the selection of a partner. It is the obligation of her brothers to insure a proper marriage for an orphaned sister. There are instances when the brothers strive to give away their orphaned sister in marriage with the very first proposal, since they are resolute and mindful about fulfilling their obligation as soon as possible.

A marriage arrangement with an "unsuitable" partner is condemned in the abstract, but in the presence of a concrete violation, it is treated leniently. Marriages which have run counter to parental decision place the partners in danger of being set at naught in their relationships with the family members. Yet in the course of time, parents usually forget their grievances and neighbors too accept the couple more readily.

2. Significant Values

a. Social Status and Family Prestige

Agreement over selection of a marriage partner reflects ultimately in the balancing of various assets and liabilities of the two parties, the chief of which are the economic power and status of the family, the achieved prestige-position of the man himself, and the dowry power of the woman's people. The fundamental concern of the woman's parents is the acquisition of a husband with high personal and familial prestige for their daughter. The fundamental

goal of the man's parents is the dowry to be acquired, although the family status is also quite important. The woman's family knows what it can raise and then attempts with that amount to acquire the highest status and most economically secure husband available.

In the traditional social system, high status was inherent rather than earned. But within a given stratum an individual could sometimes further distinguish himself and his family. Government service remains the most prestigious career in modern times and its fascination extends even to the rural population. Many rural parents hope that their sons will have government careers, if not in the highly selective administrative service, at least in the clerical services. The prestige enjoyed by a government clerk especially in a village, is of a magnitude out of all proportion to his earnings or actual power. In a "proposed marriage" preference is more for a government clerk than for one in the private sector or even an independent businessman earning several times as much.

b. Caste

One reason for the exercise of the authority of parents in "proposed marriages" is the strong desire to keep to the caste endogamy. Since people ordinarily marry only within their own caste, the proper functioning of the marriage system ensures that over a period of generations the families of a community remain in a roughly stable status rela-

tionship to one another. The likelihood of anyone outside of one's ethnic origin being a candidate for marriage is extremely remote though there could be exceptions. Thus caste identity becomes usually one of the most fundamental conscious criteria applied to any candidate, as a value.[42] If a proposed candidate is from a distant area and therefore of unknown antecedents, an emissary will surely journey to the particular area to carry on a detective operation. Verbal assurances from the marriage broker will not be sufficient. Fear of caste mixture is perhaps the strongest of all supports for the "proposed marriage" system and a source of the greatest intolerance for romantic unions generally.[43] Even the relatively sophisticated city dwellers who place marriage advertisements in English language newspapers prefer to marry within their caste. They wish to be guided by traditional cultural values rather than go against them. Many who live in cities maintain strong ties to their native villages and are enmeshed in a social network similar to that of rural dwellers. Since family interests prevail over all other considerations, the propriety and fitness of two persons to be joined in conjugal life are judiciously determined by parents of both parties.

In the past there were certain minimal prerequisites for a marriage to be legally binding. A determination of

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[42] Ryan, p. 64.

[43] Ibid.

the legality of a marriage was necessary since the law of inheritance affected the children depending on their condition of being legitimate or illegitimate.[44]

One of the essentials of a valid marriage is that the parties must have had the connubium.[45] This term had a peculiar connotation in Roman law, namely that slaves were incapable of lawful marriage and the resulting legal status of any such union was ignored by the law. Eventually, the marriage between a freedman and a slave was not legally acknowledged.[46] Hayley adopts this convenient Roman law term in order to avoid the usual but perhaps embarrassing statement that the parties must be of the same caste.[47] Generally marriages between persons of different caste were prohibited by law, though there were rare exceptions to the rule.[48]

The British did not endorse or encourage any caste distinctions and were reluctant to enforce stringent caste rules. As a result the requirement of connubium between the parties for marriage was abolished. In practice, however, breaches of the caste regulations were rare as one would

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[44] Ralph Peiris, p. 202.

[45] Hayley, p. 175.

[46] Andrew Cuschieri, "Socio-Juridic Condition of the Individual in Roman Culture," The Jurist 43 (1983) 146.

[47] Tambiah, p. 119.

[48] Ralph Peiris, p. 202.

wish to abide by social custom.[49]

c. Age

Another significant value in customary marriages is the particular age of the partner. The proposed bride must be younger than the prospective groom. Greater age on the part of the husband is viewed very seriously because marriage is considered to transfer the woman from the authority of the father to that of the husband. Since the woman moves away from her father's eye, it is thought necessary and important that her husband have sufficient maturity to look after her. A woman's primary responsibility is believed to be her being a dutiful housewife. It is of consequence that a marriage of a young man to a woman older in age is not in any way to be contemplated.[50]

This is why the father of a girl has less waiting power than the father of a boy, for the longer the girl is kept waiting without any acceptable proposal the less her chances are of getting a suitable husband.[51]

d. Virginity

Among the values in "proposed marriages" one which is considered as of greatest importance is the virginity of the bride. With proper assurance of caste and age there must

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[49] Tambiah, pp. 120-121.

[50] Ryan, pp. 64-65.

[51] Ryan, 74.

come also assurance of this virtue. For in a popular village proverb it is said that even a dowry of a hundred thousand rupees would not make a non-virgin welcome among the kindred. Yet the local culture does not provide any prenuptial tests of chastity, although post-nuptial evidence is systematically scanned. The groom's family has the right to inspect the sheet used on the marital bed on the first night for proof of virginity. It is by this inspection that the relatives determine whether or not the new daughter-in-law was indeed a virgin.[52]

Rumors of sexual misconduct are an effective means of preventing a respectable alliance for any type of girl. It is in the time of marriage planning that an unsuccessful candidate for the particular girl's hand or an envious neighbor of the girl's family may make the most of whatever defects they may have noted during her years of adolescence. The marriage proposal does not proceed with the negotiations unless the other side believes the girl to be virginal. With regard to this requirement any compromise would be unthinkable.

3. Role of the Dowry

Among the chief considerations in a marriage are property or dowry prospects, health, and reputation in respect to the girl. The higher the dowry the greater the demand for perfection in a groom. It is the obligation of the

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[52] Ryan, p. 88.

father to support his daughters until they married and to arrange suitable partners for marriage, and to provide the dowry.[53] The dowry is the fundamental bargaining instrument at any social level. The dowry consists mainly of money, but in addition it is expected that the bride bring with her in marriage clothing, jewelry, and whatever finery her family can furnish. Sometimes jewelry is specified in the dowry arrangements. Well-to-do families may also offer furniture. Often items other than money are included in the dowry, usually land with a coconut or rubber plantation or perhaps a house and property. Thus the amount of dowry proffered varies widely, depending upon the economic position of the family.

The dowry has a specific purpose: that of linking the daughter - hence her family- with a particular desirable son-in-law. If the marriage is not the product of parental intervention and arrangement, the groom could not make a dowry claim.

For the large majority of unions, however, the dowry is an intrinsic part of the arrangement. Money payments may or may not go directly to the groom. It may be deposited in a bank in the name of the bride. Gifts of land are always placed in the name of the bride and nominally at least continue as her property. Dowry is not returnable to the bride's family under any circumstances, although in the rare

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[53] Ralph Peiris, p. 223.

instances of separation some bargaining might occur over a return of dowry, and the husband might acquiesce rather than incur community censure. An adequate dowry symbolizes status for a wife in her new home. Nevertheless there is widespread feeling among women that this is an unfortunate custom. In practice no daughter will go happily into marriage without suitable dowry, for she knows full well that an inadequate dowry might be a source of friction. The difficulty in acquiring dowry resources is a factor in delaying marriage for a girl.

The dowry is significant for the self-respect and psychological security of a wife. In view of this psychological security and the status value it has for the bride, one might expect dowry payments to be made promptly and generously. As a matter of fact they are not; in a number of cases that have been processed in the tribunals of Sri Lanka, allegations of fraud and deception have been brought in respect to dowry transactions. Frequently the bride's parents promise more than they can afford to produce. Part of the dowry is paid sometime before the marriage, the remainder due at the marriage. When the moment arrives they offer excuses instead of the gift. The position of the wife certainly will not be a happy one in these circumstances. She enters her new home perhaps with bitter recollections of unfulfilled expectations.

The well-dowered bride, on the other hand, can enter

her home with confidence and greet her new relatives with warmth and tranquillity. While women almost unanimously oppose the dowry system in principle, they still work wholeheartedly so that their daughters might enter into the married state with no misgivings. The system of dowry is disliked in theory, but as the institution of marriage stands it is a near requisite for an assuredly happy union. Nevertheless it is also considered in some quarters as "one of the greatest social evils of the modern day."[54]

4. The Marriage Broker

Typically a proposal is settled through a marriage broker. In some instances a relative with a wide knowledge of the area may act in this capacity. If the family is to go much further afield than its immediate circle of kin, then a professional marriage broker may be employed. Every region has professional brokers and many marriages are co-ordinated by them. When summoned to the home by parents of a party, the broker will view the candidate, for if it is the prospective bride, he must later speak eloquently of her beauty and charm. He will gather data on the financial position of the family, the condition of the house and property, the intended dowry if a girl, the occupation and wealth if a boy. Once the likelihood of a match begins to emerge from his inquiries, the broker will suggest potential partners who were already in his mind, before the visit is

[54] Tambiah, p. 59.

over. It is the nature of the marriage broker to describe at length the virtues of the other party, the excellence of his or her family status, and the wealth that would devolve upon the union. If the discussions proceed to a favorable conclusion, the boy's side will inform the other, through the broker, that they are interested in the girl. He is then expected to arrange a time for the boy and his party to call at the home of the girl.[55] Subsequently one or the other of the parties may possibly discover that the agreed upon spouse was not the kind of wife or husband he or she had been looking for. One could be in a serious dilemma on account of the discrepancy between the spouse described by the broker and the one in reality.

E. Christian Influence

The secular legal requirements for marriage are fulfilled with its registration, but for most Sri Lankan families the extralegal, the cultural, or the religious ceremonies are great occasions in which kinfolk and friends renew and extend their loyalties. Wedding ceremonies and festivities usually last from one to two days. The first day will be one of feasting; the second will include the solemnizing of the union.

The formalities necessary for marriage to be legal varied in different districts. From the sixteenth century

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[55] Ryan, pp. 74-75.

onwards, Christian ideals and thought influenced the way of life of the people of the coastal belt of Ceylon, particularly their marriage customs due to contacts with the Europeans.[56] Kandyan law was not operative in the littoral of the country. Under Kandyan law if a man and woman lived together as man and wife, even without going through the regular rituals of marriage, after some years it was recognized as a valid marriage in order to enable their children to inherit from them.[57] When the government enacted legislation on marriage, it had to take cognizance of the fact that there was a difference between Kandyan marriages and the marriages of the people of the coastal belt.[58]

Some Catholics rightly continued to adhere to certain cultural aspects of marriage ceremonies. Among the Hindus the tying of the gold necklace on the bride by the bridegroom was the essential part of the marriage ceremony. Among Catholics the necklace was blessed and fastened in the church itself as part of the ceremony.[59] In a Buddhist marriage, a ceremonial wooden structure or a plank (known as magul poruva) is used as the stage for the couple, and as they stand there, the father of the bride pours some water upon the clasped right hands of the betrothed couple, which

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[56] Edmund Peiris, p. 192.

[57] Tambiah, p. 117.

[58] Edmund Peiris, p. 192.

[59] Ibid., pp. 201-202.

is an important customary rite.[60] This custom is adopted by certain Catholics even today when the bride and the bridegroom take each other's hand and pronounce their marriage vows before the priest in the church. "All marriage customs and ceremonies point to one basic idea, namely that matrimony is a community of life between a man and a woman for the establishment of a family."[61]

From the foregoing considerations it can be deduced that "proposed marriages" are recognizable by certain key elements. Parental authority and intervention are considered natural in the circumstances. Family prestige and social status are much sought after values. While caste endogamy plays a significant role, the particular age of the partner and the virginity of the bride are two specific requisites in determining the choice.

The observations of this chapter have been based mainly on the sources which have studied "proposed marriages" and related Sri Lankan customs. The following chapters will review the jurisprudence applicable to the canonically significant elements of a "proposed marriage" identified in the above considerations.

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[60] Ralph Peiris, p. 199.

[61] Edmund Peiris, p. 209.

CHAPTER II

REVERENTIAL FEAR

A. Reverential Fear Before Vatican II

The question of reverential fear with its special considerations comes into play within the canon on force and fear, namely canon 1087 of the 1917 code. Evidently, the concepts of force and fear need to be examined first, in order to establish the meaning and development of reverential fear.

1. Force and Fear in General

a. Notion

Canon 1087 of the 1917 code speaks only of a singular fear invalidating marriage.

> § 1. Likewise invalid is a marriage entered into due to force or grave fear unjustly inspired from without, which is of such a type that the person is compelled to choose matrimony in order to be freed from it.
>
> § 2. No other fear, even if it furnish the cause for the contract, entails the nullity of marriage.[1]

Holboeck summarizes traditional Rotal jurisprudence on the basic elements of force and fear.

> Force is moral coercion which moves the will under the threat of some evil in such a way and to such

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[1] Can. 1087.§ 1. "Invalidum quoque est matrimonium initum ob vim vel metum gravem ab extrinseco et iniuste incussum, a quo ut quis se liberet, eligere cogatur matrimonium.

§ 2. "Nullus alius metus, etiamsi det causam contractui, matrimonii nullitatem secumfert."

> a degree that the will, in order to avoid the threatened evil, consents to an act which it would have ordinarily shunned....Fear, in turn, is the effect in the person who is subjected to force, and it can be called a trepidation of the mind caused by some imminent or future danger or evil.[2]

Force is physical or moral violence; fear is the mental apprehension of that violence. Force thus signifies the threat of some objective evil; fear in turn designates the conscious knowledge of this threatened objective evil in the subject.

b. Analysis of Key Elements

In order that fear invalidate marriage, as canon 1087 of the 1917 code indicates, it must be characterized by the following qualities: it must be grave; it must arise from an external cause; it must be unjustly inflicted; and it must be of such a nature that the subject cannot otherwise escape the threatened evil except by marriage.

1) Grave

A number of things have been determined by jurisprudence in order to weigh the gravity of fear. But the particular question that arises is whether the gravity is to be attributed to the action of the subject inflicting the fear or to the trepidation of the subject enduring the fear. In fact, in order to measure the gravity of fear the nature of

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[2] "Vis...est coactio moralis quae voluntatem movet, sub comminatione mali, adeo ut voluntas alias non consensura consentiat in actum impositum ad malum declinandum....Metus vero est effectus in eo, qui vim patitur, et dicitur trepidatio mentis ob instans vel futurum periculum vel damnum." Holboeck, p. 163.

the one enduring the fear as well as of the one inflicting the fear has to be considered.[3]

"Fear is grave when two conditions are verified: first, the evil or danger threatened is grave, at least for the person threatened; second, the person apprehends the danger as grave and is persuaded to believe that the evil actually threatens."[4]

Fear is generally defined as trepidation of the mind caused by an imminent danger. It can be grave absolutely or relatively. It is absolutely grave if the danger is objectively serious and will intimidate any person. It is relatively grave if caused by an evil which becomes serious in relation to certain individuals, considering their circumstances. "For this reason absolutely and relatively grave fear are considered equivalent whenever there is question of the voluntariness and validity of a human act."[5]

Two conditions are required for fear to be absolutely grave: gravity of evil and certainty of evil. The threatened evil should be grave for anyone and everyone, which

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[3] Joseph Bánk, Connubia Canonica (Rome: Herder, 1959), p. 387. Joseph V. Sangmeister, Force and Fear as Precluding Matrimonial Consent, Canon Law Studies, 80 (Washington: The Catholic University of America, 1932), p.98.

[4] "Gravis censetur metus qui his duabus conditionibus respondet: malum quod imminet sit grave pro illa persona cui imminet, seu quae metum patitur; illa eadem persona illud ut grave apprehendat et persuasum habeat illud sibi imminere." Matthaeus Conte a Coronata, De Sacramentis III, (Rome: Marietti, 1957), p. 632.

[5] Sangmeister, p. 9. See also Knopke, p. 4.

means that the contractant reasonably thinks that a grave evil is imminent. Secondly, there is moral certitude in the person that the threatened evil is inevitable. The person undergoing the fear has no way out except to contract the marriage. When these two conditions are verified there is absolutely grave fear.

When the gravity of fear is considered subjectively, as it is in the mind of the person who is afraid, there is relatively grave fear. In the latter eventuality, the trepidation of the mind is measured by subjective norms. When any of the conditions required for absolutely grave fear is lacking, we may have relatively grave fear.[6]

The evil which is inflicted by an active subject need not necessarily be objectively and absolutely grave for a marriage to be invalidated. It suffices that it be grave in the concrete for a particular person, that the person feels a grave trepidation. The evil is not so much from the objective gravity of fear as from the subjective incapacity to resist.[7] Thus in order to invalidate a marriage, relatively grave fear would suffice in relation to the one enduring the fear.[8]

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[6] Bánk, pp. 385-387.

[7] "Iniuria fit non tam ex gravitate metus obiectiva qui infligitur, quam ex incapacitate subiecti ad resistendum ..." S.R.R. Decisiones, 35 (1943) 62, c. Heard.

[8] Holboeck, p. 169.

2) Extrinsic

Fear must be imposed from outside; in other words, the fear must be induced by someone independent of the person rendered fearful. Some external agency must be the cause of the fear. It is not necessary that this fear be induced by some other person in view of pressuring marriage.

In some instances the situation itself causes the fear or the subject brings the fear on himself. This is not extrinsic. It is important that the cause of the fear be an external human agent. "Fear originates from without if it comes from some external and free cause; it is said to originate from within if it comes from an internal or necessary cause."[9]

That the fear must be inflicted by an extrinsic free cause has been maintained by traditional ecclesiastical jurisprudence both before and after the promulgation of the 1917 Code of Canon Law.[10] "Force and fear" are so coupled in the law because the element of external force gives rise to internal fear in the person concerned. Fear is externally inflicted when it results from force exerted by a free external agent. Fear which proceeds from the person himself, even though the danger which is apprehended and which

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[9] "Metus est vel ab extrinseco, si a causa externa et libera incutitur: vel ab intrinseco, si a causa interna aut necessaria." Felix M. Cappello, Tractatus Canonico-Moralis De Sacramentis, Vol.5, De Matrimonio (Turin: Marietti, 1950), p. 587.

[10] Holboeck, p. 165.

is the cause of the fear is external, cannot be considered as externally caused.[11] It may be that the person's own state of mind or imagination which created such fear. Therefore such fear does not invalidate marriage.

3) Unjust

Fear is called just when the evil which is feared can lawfully be inflicted; otherwise it is called unjust.[12] "Any pressure brought to bear upon a party which results in marriage is unjust if it exceeds the bounds of moderation; hence if gravity is proved, injustice is automatically proved also."[13]

Unjust infliction of fear was one of the elements that was considered required to invalidate marriage. The coercion must be unjustly brought to bear upon the subject thus inflicting injury on him.

Three conditions are required for fear to be considered just: (1) it should be just as regards the one enduring the fear (i.e., he is bound by law to contract the imposed

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[11] "Metus dicitur ab extrinseco si procedat ex causa libera externa; ab intrinseco si a causa interna seu ex ipso metum patiente. Et habetur metus ab intrinseco etiam si apprehensio mali quod timetur sit ab extrinseco; causa autem trepidationis oriatur ab intrinseco seu ab ipso metuente." S.R.R. Decisiones, 45 (1953) 439, c. Pasquazi.

[12] "Metus est iustus quando malum quod timetur, tum quoad substantiam tum quoad modum stricto iure infligi potest, secus est iniustus." Cappello, p. 587.

[13] Josiah G. Chatham, "Force and Fear Invalidating Marriage - Rota Decisions 1940-1946," The Jurist 18 (1958) 52.

marriage as when the promises had been validly made); (2) it should be just as regards the one inflicting the fear by coercion (i.e., the person is in a position of authority and competence to coerce the subject); (3) it should be just as regards the means (i.e., the imminent subjective evil should be morally licit). When one of the above conditions is not realized, fear becomes unjust.[14]

Before the promulgation of the 1917 code some authors such as D'Annibale and Gasparri, "in their efforts to find nicer refinements of doctrine"[15] had introduced a distinction between "fear unjustly inflicted in substance" and "fear unjustly inflicted in manner." Fear unjustly inflicted in substance was present when the threatened punishment was too grave for the committed crime such as threatening a seducer with death,[16] or when the victim did not deserve the threatened punishment.[17]

Fear unjustly inflicted in manner is present when threats are made by a person who does not have the authority or the right to put them into effect,[18] or when the proper legal procedure is not followed,[19] or when the agent of

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[14] Bánk, pp. 401-402.

[15] Chatham, p. 79.

[16] S.R.R. Decisiones, 33 (1941) 518, c. Janasik.

[17] S.R.R. Decisiones, 33 (1941) 838, c. Teodori.

[18] S.R.R. Decisiones, 33 (1941) 518, c. Janasik.

[19] S.R.R. Decisiones, 33 (1941) 838, c. Teodori.

threats employs deceit[20] and when threats are made in an improper manner.[21] Some pre-code authors held that only "fear unjustly inflicted in substance" invalidated marriage. Though there was a controversy over the use of this particular terminology, some canonists maintained that the 1917 Code of Canon Law settled the question, and "fear unjustly inflicted in manner" also invalidated marriage.[22] Others claimed that the phrase in the canon "unjustly inflicted" (iniuste incussum) refers to fear inflicted unjustly whether in substance or in manner, or in both.[23]

The injustice was conceived as a necessary element at a time when parental influence was such as to exercise a direct control over the fortunes of the children. Even at a time when it was considered reasonable for a parent to exercise some influence over the children, it was certainly not regarded as sensible that this influence should give rise to grave fear. Hence it can be said that any unreasonable pressure would be regarded as unjust.

4) Causative

In order to invalidate a marriage the fear must also be causative; it must be the efficient cause of marriage. That is, fear must be such that in order to escape it a person is

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[20] S.R.R. Decisiones, 34 (1942) 326, c. Wynen.

[21] S.R.R. Decisiones, 35 (1943) 196, c. Canestri.

[22] Chatham, p. 81.

[23] Knopke, p. 32.

constrained to accept marriage. It appears as the only remedy that can be used to elude the threatened evil.

Marriage must be the effect of fear, so that if there was no fear marriage would not have taken place. Fear should not be the mere occasion of marriage, so that the one married with fear, but the real cause of marriage, so that one married because of fear.[24]

Marriage contracted solely on account of fear is invalid because the individual assumes that it is necessary to give his consent to a marriage to which he has an aversion, so that he may avoid an imminent grave evil.[25]

c. Proof of Force and Fear

Fear is usually proved in two methods: firstly by indirect argument in ruling that there existed aversion to the marriage, and secondly by direct argument, in demonstrating the existence of coercion and force in contracting the marriage.[26]

1) Aversion

In the indirect argument the focus must be on the aversion of the person. There must be aversion of at least one of the parties to the marriage. From this there arises

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[24] Wrenn, p. 111.

[25] Holboeck, p.171.

[26] "Metus duplici via probari solet: indirecte, seu evincendo extitisse aversionem a nuptiis, et directe, nempe factum coactionis demonstrando." S.R.R. Decisiones, 64-(1972) 657, c. Ewers.

the presumption that this aversion was overcome only by grave fear. It need not be aversion to the partner as such, but may be toward the particular marriage or toward marriage in general.

2) Coercion

In the direct argument the focus must be on the facts that show there is fear. It must be examined whether coercive measures were caused by an external source. The direct method establishes the facts demonstrating the coercive measures used.[27] Harshness and physical beatings, however, and even reprimands are not necessary to constitute coercion; on the other hand mere advice and recommendations are not sufficient to demonstrate that there was coercion.[28]

The fear must be grave and real and not just in the imagination of the person. But it can at the same time be relative. A third element which has to be looked into in the direct argument is that in order to escape the fear there was no other option for the victim but marriage. Although the canon speaks of force or fear it is dealing with one reality; an outside agent which has an effect on a person produces fear in that person who finds that the only way out of the frightening situation is to choose marriage.

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[27] "Indirecte metus probatur per praesumptionem quae oritur ex aversione patientis proposito matrimonio; directe vero per facta expresse coactionem demonstrantia." S.R.R. Decisiones, 34 (1942) 48, c. Janasik.

[28] S.R.R. Decisiones, 53 (1961) 6, c. Fiore.

It is an attitude of fear where one sees no alternative other than marriage in order to free oneself from fear. Marriage may be perceived as the only escape in the mind of the person who is afraid (subjectively), or objectively it may be so.

The words, "one is compelled to choose marriage," do not imply that there is a compulsion to a particular marriage; the compulsion may be to marriage in general, so that when a person experiences genuine compulsion to marry in order to avoid some evil, that marriage is invalid.[29]

3) Duration of Fear

Furthermore, while fear might have been induced at an earlier point in time, it must be shown to have been present at the time of marriage, at least virtually. That is, consent was given when the mind was still distressed and such pressure continued to influence the person's choice.[30]

2. Reverential Fear: A Special Category

a. Notion of "Reverential Fear"

1) In General

Another kind of fear, within the meaning of the canon, is universally recognized by authors and by constant jurisprudence, namely reverential fear. The Church has developed a clear and complete jurisprudential structure which carefully distinguishes reverential fear from so-called common

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[29] Wrenn, p. 112.

[30] S.R.R. Decisiones, 39 (1947) 169, c. Fidecicchi.

fear, whether grave or light. There is no explicit mention of the origin of reverential fear in the sources of law or in the Code of Canon Law. It is primarily founded on canonical doctrine and in the traditional practice of jurisprudence.[31] Cappello says,

> We should add another type of fear, reverential fear, which is had by one who being subordinate, fears offending those to whom reverence and honor is due, such as parents and superiors, whether ecclesiastical or secular.[32]

Holboeck defines reverential fear from the actual jurisprudence of the Rota when he says,

> Reverential fear is the threat of the evil of disobedience by which a person either does or omits something because of the fear of offending a person to whom reverence is due.[33]

The basis for reverential fear is the bond or the relationship that exists between the superior and the subject or the parent and the child. The subject has developed so great a respect and reverence for the superior that he is fearful of offending the superior and thus arousing his

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[31] Bank, p. 416.

[32] "Addi debet metus reverentialis, qui habetur quando quis timet ne offensos et indignatos eos habeat, in quorum potestate est et quos reverentia atque honore prosequi tenetur, uti sunt parentes et superiores quicumque seu ecclesiastici seu seculares." Cappello, p. 588.

[33] "Metus reverentialis est formido mali ex inoboedientia impendentis, qua quis aliquid facit vel omittit ob timorem offendendi personam, cui reverentiam praestare debet." Holboeck, p. 174.

indignation. It is to be noted that while parents are the typical source of the external force, and therefore will be commonly referred to in what follows, they are not the only possible sources of reverential fear. Jurisprudence admits reverential fear even in adults and economically independent individuals, who continue to live according to parental dictates and judgment. Rotal jurisprudence and reputed authors state that,

> Reverential fear is that which is inflicted by those whom we honor by allegiance and reverence; "in whose dominion we are and whom we think are worthy of reverence and honor." This definition is found almost in these same words in esteemed authors such as D'Annibale and Cappello.[34]

Thus it is not legal subordination alone that must be considered, but the relationship that exists in reality.[35]

2) "Qualified" Reverential Fear

Reverential fear may be distinguished into "simple" or "qualified."[36] Simple reverential fear is present when one experiences a natural fear of saddening the parents. This

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[34] "Metus autem reverentialis, de quo hac in causa, ille est qui ab iis incutitur, quos obsequio reverentiaque prosequimur; `in quorum potestate sumus et quos cultu et honore dignamur' (B. Pontius, De Sacramento matrimonii tractatus, Lib. IV, c.V, n.1). Quae definitio penes probatos auctores iisdem fere verbis, invenitur (D'Annibale, Summula Theol. Mor., P.1, 138, 16; Cappello, De Matrimonio, Augustae Taurinorum, 1961, pp. 541sq.)." S.R.R. Decisiones, 69 (1977) 672, c. Parisella.

[35] Bánk, p. 420.

[36] "Qualified" here means that reverential fear though light in itself can become grave by addition of evils to invalidate marriage.

is also called "mere reverential fear" and is not considered grave. "Qualified reverential fear" is present when one fears the protracted indignation of the parents unless he accepted the marriage for which he had an aversion.

Knopke defines qualified reverential fear as "a mere reverential fear to which have been added threats, blows, importunities or other vexations, which can sometimes change that fear into grave fear" that would invalidate marriage.[37] The trepidation of the mind that takes place in the one enduring the fear because of his disobedience towards the parents or because of the indignation of the superior, is generally considered not to provoke any grave evil. It is reckoned as internal fear.[38]

Rotal jurisprudence, however, states that protracted indignation of parents would suffice to arouse qualified reverential fear, as that indignation can break the will of the contractant.[39]

Generally speaking, reverential fear is not to be considered as grave. It can however become grave when it is qualified by persistent quarrels, arguments, pressures, and

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[37] Knopke, p. 7.

[38] Bánk, p. 419.

[39] "Ad metum reverentialem constituendum minae aut verbera non requiruntur, sufficit, ut nostra iurisprudentia docet, gravis ac diuturna parentis indignatio, quae animum nupturientis frangere valeat." S.R.R. Decisiones, 67 (1975) 211, c. Bruno.

importunate pleading.[40]

If in addition to incurring the indignation of the parents and the consequent loss of affection, other evils such as disinheritance or expulsion from home are also feared, then besides reverential fear there is also indicated the presence of common fear or in other words, mixed fear. This confluence of factors renders easier proof of invalidity. Frequently, however, such threats are signs of indignation on the part of a parent and as such, tend to qualify reverential fear and thus render it grave.[41]

Besides arguments and pleading, reverential fear may also be qualified by the intervention of an absolute command from a parent who is domineering and obstinate. In that command a specific act is demanded from a person who is accustomed to observe absolute obedience in everything. If in spite of his repeated protests and unwillingness to the proposed marriage, the parents continue in their obstinate

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[40] "Metus dicitur reverentialis ratione reverentiae debitae illi sub cuius potestate sumus. Talis metus dicendus est levis vel gravis iuxta levitatem vel gravitatem et diuturnitatem indignationis parentis vel superioris ratione quidem habita qualitatem patientis." S.R.R. Decisiones, 43 (1951) 617, c. Staffa.

[41] "Si praeter parentis aut superioris indignationem, alia mala timeantur quae pro omnibus gravia sunt, e.g. exhaeredatio, eiectio e domo, saevitiae etc. praeter metum reverentialem habetur metus quoque communis, seu metus qui vocatur mixtus quique prae caeteris faciliorem reddet probationem nullitatis matrimonii. Pluries tamen minae graviores ...non sunt nisi signa indignationis parentis quibus metus reverentialis...qualificatur, dummodo metum patiens graviter trepidet." S.R.R. Decisiones, 45 (1953) 495, c. Staffa.

demand for that marriage, then the obstinacy of the parents does produce grave fear.[42]

To invalidate marriage, the fear must be efficacious; that is, it must truly extort consent.[43] Reverential fear, like common fear, renders marriage null whenever the qualities mentioned in canon 1087 are verified. Thus one is able to say that reverential fear per se is light but it becomes grave through circumstances.[44] It "can be qualified by the addition of evils which in themselves may not be serious, yet joined to the fear of offending a parent or a superior they constitute a real danger by which a marriage can be invalidated."[45]

The fact of consummation of marriage, of prolonged cohabitation, or of children cannot be alleged directly against the existence of reverential fear which invalidated the marriage from the beginning. Several decisions of the

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[42] "Investigandum est utrum contrahens fuerit ad matrimonium inductus suorum precibus hortationibusve etiam repetitis...an cesserit precibus importunissimis quae vim habuerint vexationis et iniuriae, ita ut consensus processerit revera ex metu gravi." S.R.R. Decisiones, 43 (1951) 596, c. Staffa.

[43] "Metus autem non invalidat matrimonium nisi sit efficax, qui scilicet, consensum vere extorquet." S.R.R. Decisiones, 36 (1944) 732, c. Pecorari.

[44] S.R.R. Decisiones, 51 (1959) 421, c. Heard.

[45] "Metus reverentialis de se levis qualificari potest per additionem malorum quae, etsi gravia non sint, iuncta timori offensae vel indignationis superioris complent summam molestiae magni momenti, qua invalidatur matrimonium." S.R.R. Decisiones, 34 (1942) 604, c. Janasik.

Rota insist on this factor. Many cases have been admitted and decided presumably affirmatively, even after many years of marriage and the begetting of offspring.[46]

In countries of the Orient the children are generally timid as a result of their being brought up in a secluded environment, with a great deal of emphasis on obedience not only toward parents but also toward all elders related to the family. If in the circumstances children do not bow to the wishes of the parents in their marriage proposals, it is to be expected that the latter's severe indignation would probably last for quite a long period of time. Thus even without threats and rebukes of parents simple reverential fear may turn out to be qualified reverential fear, due to protracted parental indignation.

When qualified reverential fear has been established, the presumption is in favor of the nullity of marriage.[47]

b. Object of Reverential Fear

The object of reverential fear, or what is feared, is the long lasting indignation of the parents if the marriage proposal is rejected by the contractant. This parental indignation may be conspicuous right away in the present; or it may manifest itself in the future. The disobedience of

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[46] "Tot causae etiam post plures annos et post prolem generatam, admissae et decisae sunt..." S.R.R. Decisiones, 34 (1942) 367, c. Canestri; Ibid. 36 (1944) 452, c. Grazioli

[47] Holboeck, p. 181.

the dependents may provoke parental indignation, the basis for reverential fear, and generally it will be grave if the parents are authoritative and inflexible.[48]

c. Means of Inflicting Reverential Fear

According to Rotal jurisprudence reverential fear may be inflicted by parents for the sole purpose of influencing the marriage to be contracted by their children. One means that is considered unjust and grave, which the parents sometimes use to impose a marriage, is their absolute authority. In such a situation the freedom of the individual is certainly violated,[49] for absolute parental authority moves the will of the individual to such a degree that he may not be the master of his own deliberation and consequently is made incapable of offering any resistance to a loathsome marriage.

Rotal jurisprudence also stresses that parents are able to inflict grave fear without any explicit threats. Their "persuasions and pleading replace compulsion and coercion and they inflict fear even in a resolute person particularly when they originate from the father." Such persuasions and

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[48] "Itaque inoboedientia provocabit indignationem parentum, in qua causa metus reverentialis consistit, et quidem hic erit plerumque gravis si parentes imperiosi atque obstinati sint." S.R.R. Decisiones, 61 (1969) 71, c. De Jorio.

[49] "Medium certo iniustum et grave est absolutum imperium, quo quandoque utuntur parentes ad imponendum filiis coniugium invisum. Quod praeceptum ... non est dubium libertatem filiorum violare." S.R.R. Decisiones, 55 (1963) 972, c. Sabattani.

pleading can arouse a justified suspicion of fear, and this suspicion suffices for fear because "in marriage the will must be free not only from compulsion, but even from the fear of compulsion."[50]

Authors in the past have conceded that parents' actions are just when they exercise mild coercion and moderate rebukes on their children with regard to marriage, although there is no obligation on the part of children to obey.[51]

d. Special Factors in Proving Reverential Fear

Though reverential fear must be distinguished from common fear, nevertheless it must have the same qualities as common fear in order to invalidate marriage; namely it must be grave, extrinsic, unjustly incurred, and avoidable only by marriage. By its very nature reverential fear is caused by human beings other than the one affected. Besides, for its existence there must be a relationship of subjection. In practice it is necessary to demonstrate only that the reverential fear was grave and not light. One may consider as grave the fear which the victim can eliminate only in contracting the marriage which is forced upon him, taking into

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[50] "Nam 'suasiones et preces habentur loco compulsionis et coactionis, et ingerunt metum cadentem in virum constantem maxime quando veniant a patre'. Eae enim ingerunt iustam metus suspicionem, quae pro metu sufficit"ex eo quod in matrimoniis animus debet esse liber non solum a compulsione, sed etiam a timore compulsionis." S.R.R. Decisiones, 4 (1912) 297, c. Lega.

[51] Sangmeister, p. 151. See also Bank, p. 423, Knopke, p. 6.

account his character, age, and all other circumstances.[52] "In reverential fear the gravity of the fear is more readily proven than in common fear,"[53]because in reverential fear, the parents are able to demand respect and reverence due to them besides coercing the person to contract the marriage proposed by them.

The manner of proof in cases involving reverential fear is of paramount importance. Fear is purely an interior state of the mind. It is "the effect in a person who is the victim of force."[54] What can be directly proved is the existence of coercive measures employed by someone to impose marriage on another. Where the subject is fearful of arousing longlasting indignation of the superior, there could easily be serious coercion resulting in grave invalidating fear.[55]

Finally only two points in canon 1087 need to be developed explicitly, namely, the gravity of the fear and its causative nature.

Sangmeister is of the opinion that when the person apprehends no other evil than the mere indignation of the

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[52] S.R.R. Decisiones, 49 (1957) 414, c. Felici.

[53] "In metu reverentiali gravitas metus facilius verificatur quam in metu communi,...." Holboeck, p. 180.

[54] "Metus est effectus in eo,qui vim patitur." Cappello, p. 586.

[55] Wrenn, p. 113.

parents he cannot be said to suffer fear inspired by a grave evil. The reason seems to be that the ill treatment will not endure as the parents can be easily placated.[56] Nevertheless rotal decisions appear to hold a contrary position.[57]

Bánk seems to say that two factors have to be proved in the case of reverential fear, namely, first coercion and then aversion. Where there was no aversion against the partner, in his opinion, it is not possible to assert that marriage was contracted lest the parents be offended.[58]

According to Rotal jurisprudence if it is proved that there was aversion either to the marriage, or to any marriage, or to the proposed person, it is presumed that there was reverential fear. The two types of argument, namely direct argument by the presence of coercion on the part of parents or indirect argument by the presence of aversion on the part of the victim, are both independently probative, yet complement each other.[59]

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[56] Sangmeister, p. 142.

[57] "... fundata metus suspicio pro metu sufficit, cum nupturiens liber esse debeat non solum a compulsione, sed etiam a timore compulsionis." S.R.R. Decisiones, 39 (1947) 168, c. Fidecicchi.

[58] Bánk, p. 424.

[59] S.R.R. Decisiones, 61 (1969) 1065, c. Ewers.

B. Developments Preceding the Revision of the Code

1. Extrinsic and Intrinsic Fear

In this part of our exposition of the canonical concept of fear (metus), its nature and invalidating force, we will draw substantially on an article of the canonist Urbano Navarrete, Professor of the Gregorian University in Rome.[60] We refer especially to his interpretation of the phrase "metus ab extrinseco et iniuste incussus."

Navarrete remarks that "fear inflicted from without" is generally understood as fear which proceeds from a free human cause distinct from the victim. He also shows how canonists such as Michiels, Gasparri and Giacchi, in estimating the gravity of fear, have moved from the objective criterion to the subjective criterion. Gasparri for example wrote that "certain evils can be more grave for some persons than for others. A prudent judge will have to see in each case, considering all the circumstances, whether that evil is grave or light for that person."[61]

Navarrete notably reduces the importance of the distinction between "fear from without" (metus ab extrinseco)

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[60] Urbano Navarrete, "Oportetne ut supprimantur verba 'ab extrinseco et iniuste incussum' in can. 1087, circa metum irritantem matrimonium?" in Quaedam Problemata Actualia De Matrimonio (Rome: Pontificia Universitas Gregoriana, 1980), pp. 273-293.

[61] Petrus Gasparri, De Matrimonio II, (Typis Polyglottis Vaticanis, 1932), p. 56.

and "fear from within" (metus ab intrinseco). He says,

> The decisive element is always something subjective, intrinsic to the subject enduring the fear; the concrete psychological complex reacts to the external stimulus that causes in him a grave "confusion of the mind" and in this consists the grave fear invalidating marriage. Jurisprudence insists on the stimulus being external and of some gravity. But...in the end what is decisive is not the objective and absolute gravity of the evil element, but the subjective reaction of that particular person.[62]

The subjective element is of particular relevance when dealing with reverential fear. Here it is not a matter of threats; it arises rather from a relationship of dominance and respect between the parties. Navarrete puts it concisely when he says,

> The subject experiences coercion, but objectively, is really coerced by no one.[63]

He finds support for his contention in Rotal jurisprudence. Augusto Fidecicchi clearly states that according to Rotal jurisprudence suspicion of fear suffices for fear, since the party entering into marriage must be free not only

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[62] "Elementum enim decisivum est semper aliquid subiectivum, intrinsecum subiecto metum patienti, scilicet eius concreta complexio psychologica, quae reagit stimulo externo qui causat in ipso illam gravem 'animi perturbationem' in qua consistit metus gravis invalidans matrimonium. Certo iurisprudentia insistit in eo quod hic stimulus debet esse externus et in se consideratus alicuius gravitatis. Nam tandem aliquando id quod decisivum est in singulis casibus non est gravitas obiectiva et absoluta mali - elementum obiectivum - sed reactio subiectiva illius personae determinatae...." Navarrete, p. 276.

[63] "Subiectum quidem experitur se coactum, at obiective a nemine reapse cogitur." Navarrete, p. 277.

from compulsion but even unreasonable fear of compulsion. Threats are virtually hidden in the very actions of the person inflicting the fear. Moreover, once a person is threatened with fear, it is presumed to persevere, so that when the consent is given, it is given by a vacillating mind still under the influence of threats. This means that although there may not be anyone threatening, the fear perseveres in the act of consent.[64]

Rotal judge Salvatore Canals says that many principles have been determined by jurisprudence to assess the gravity of fear. But the particular question with which we are dealing here is whether gravity should be attributed to the violent action of the subject inflicting the fear or to the trepidation of the subject enduring the fear. He states that the evil which is inflicted by the active subject need not necessarily be grave in itself objectively and absolutely. It suffices if it is grave in the concrete for a definite person or if the person feels a grave trepidation.[65]

Another Rotal judge William Heard in his sentence on January 21, 1943 states that the gravity of fear has to be assessed from the incapacity of the subject to resist the fear.

> The injury is not so much from the objective gravity of fear that is inflicted, as from the incapacity of the subject to resist; if he could

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[64] S.R.R. Decisiones, 39 (1947) 168, c. Fidecicchi.

[65] S.R.R. Decisiones, 56 (1964) 593, c. Canals.

> have resisted and did not resist he was not unwilling, and there was no injury, even if fear would have some gravity in itself; on the contrary, if he was morally incapable of resisting due to his nature or other circumstances, although the fear would have been light for others, for him it was grave and unjust, as long as there was nevertheless some objective gravity.[66]

The safe criterion in solving the question of the gravity of the fear seems to lie in the fact of fear being the cause of the marriage. Reverential fear is essentially a disturbance of the mind which is a subjective experience, and the gravity of this fear is to be measured from the degree of sensitivity of the victim to the pressure of parents or other authority figures. Therefore in Rotal jurisprudence, as we have already pointed out, even suspicion of fear is equated with fear, as long as it is a reasonable suspicion founded on evidence.[67]

It is clear therefore that while the importance of the subjective element of fear is augmented in a few selected sentences, the importance of the objectivity of fear is minimized. Thus in practice the importance of the distinc-

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[66] "Iniuria fit non tam ex gravitate metus obiectiva qui infligitur, quam ex incapacitate subiecti ad resistendum; si resistere potuisset et non restitit, invitus non fuit, neque ulla iniuria, etiamsi metus in se aliquam haberet gravitatem; e contra, si ad resistendum moraliter incapax fuit ob indolem vel alia adiuncta, etiamsi metus forsan pro aliis levis fuisset, pro ipso fuit metus gravis iniustus, dummodo tamen aliqua fuit gravitas obiectiva" S.R.R. Decisiones, 35 (1943) 62, c. Heard.

[67] "Probabilis suspicio de metu incurrendo aequiparatur illato" S.R.R. Decisiones, 17 (1925) 184, c. Jullien. Also, 39 (1947) 169, c. Fidecicchi., 56 (1964) 594, c. Canals.

tion between fear from within and fear from without at times disappears.

Reverential fear exists in the person who fears offending those to whom reverence and honor is due. Since it is founded on such reverence and honor, it would not normally depend on the extrinsic element.

> Pure reverential fear presupposes that there are no intimidations or threats of grave evil on the part of the one inflicting the fear; otherwise it would become common fear. The subject experiences that he is being forced, but objectively he is forced by no one. The limits therefore between fear from within and fear from without almost disappear in this case. If the question is examined with the objective criterion, without preconceived notions, it must be recognized that the influence of the extrinsic element is reduced almost to nothing. Nearly everything depends on the disposition of the subject, and therefore objectively it does not differ much from the fear from within.[68a]

Fear is normally defined as trepidation of the mind because of an impending evil. Of its very nature it entails a confusion of the mind, wavering and hesitating to make a judgment against one's will. Finally the will yields to pressure, and marriage is entered as the only way of freeing oneself from a complex situation perhaps created without any

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[68a] "Metus enim reverentialis purus supponit non intercedere minas vel comminationem alicuius mali gravis, ex parte metum incutientis, secus deveniret metus communis ....Subiectum quidem experitur se coactum, at obiective a nemine reapse cogitur. Limites ideo inter metus ab intrinseco et metum ab extrinseco in casu fere disparent. Si res examinatur criterio obiectivo, absque praeconceptibus, debet agnosci influxum elementi extrinseci ad nihilum fere reduci. Totum fere pendet a constitutione subiecti, ideoque non multum obiective differt a metu ab intrinseco." Navarrete, pp. 277-278.

intent to force marriage. Thus, for instance, in the case coram Mattioli on March 24, 1956 the girl did not see any other effective means of avoiding the danger except by marrying another person for whom she had no love, but an aversion.

> Marriage thus contracted is null because of fear which one inflicts not directly to elicit consent, but in such a manner that the girl, objectively and with some reason, feels that she is not able to free herself except by marrying.[69]

Navarrete points to certain specific cases when fear is inflicted by threats of suicide, or by an insane person, or fear of supernatural evil. If marriage was entered into with the sole purpose of freeing oneself from fear, this marriage would be invalid and would be declared null. However, if the genuine technical notion of "fear from without" is considered, it would not be easy to find in the above types of cases signs of the extrinsic character of fear. For those dealing with law the reasons for nullity do not always appear convincing, and therefore they consider some cases as "fear from within" and others as "fear from without." Navarrete argues that the distinction between the two fears, namely "fear from without" and "fear from within" should not be maintained, and the general tendency to

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[69] " Matrimonium ita contractum nullum est ex metu, quem quis incutit non directe ad extorquendum consensum, sed tali modo, ut puella, obiective, et cum solido fundamento in re, persuasum habeat se ab eo liberare non posse, nisi matrimonium contrahat." S.R.R. Decisiones, 48 (1956) 287, c. Mattioli.

broaden the interpretation of "fear from without" must be encouraged so that cases are solved in favor of freedom.[70] The reason is that one is dealing with a right so fundamental as the right to marry, and therefore cases which hardly differ objectively in an essential element such as the freedom to marry, must have the identical solution.

Navarrete articulates four cogent reasons for dropping the notion of "extrinsic" from the canon:

> a. If the law demands that the fear should be unjustly inflicted, it is superfluous explicitly to require that it be "from without."
>
> b. It is clear that in its historical evolution the extrinsic element of fear gradually lost its juridical importance.
>
> c. If the exigency for the extrinsic element of fear were to be eliminated from the law, the problems that have surfaced concerning fear would be simplified.
>
> d. As it will be very clear from what has been said above, the critical time seems to have arrived now to attribute the invalidating effect of marriage even to "fear from within," provided it is seen as the only option of liberating oneself from that fear.[71]

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[70] Navarrete, p. 279.

[71] "1) Si ius exigit ut metus sit iniuste incussus, superfluum est exigere explicitus ut metus sit ab extrinseco.

"2) Ex dictis patet notam extrinsecitatis paulatim in evolutione historica, amisisse momentum iuridicum.

"3) Si necessitas extrinsecitatis metus eliminaretur a lege, simplificarentur problemata quae circa metum agitantur.

"4) Uti ex statim dicendis magis patebit,pervenisse iam videtur momentum ut etiam metui ab intrinseco agnoscatur efficacia invalidans matrimonium, dummodo sit talis ut quis

2. Fear Unjustly Inflicted

It was due to the influence of the contractualist theory of marriage that canonical doctrine and jurisprudence considered injustice as the radical reason why fear had the effect of invalidating marriage. Since marriage was thought to be only a contract, the same principle applied as for other contracts, where the radical reason for the legal protection against fear was the threat of injustice.[72]

Within the ambit of canon law in the past, there could have been justly inflicted fear in relation to marriage. There were instances when the law of the Decretals imposed penalties unless marriage was entered into, as in cases of a non-fulfillment of a promise of marriage, or seduction and rape. A consideration of one's obligation to marry the person with whom the espousals were contracted was one of the factors which served as a basis for jurisprudence on the injustice of coercion in marriage.

In light of the understanding today of the nature of marriage as an intimate partnership of life and of love, and of the dignity of the human person, it is now commonly accepted that injustice is not the ultimate legal reason

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eligere cogatur matrimonium ut ab eo se liberet." Navarrete, p. 280

[72] "Cum enim matrimonium consideratum sit ut contractus quidam ... facile explicari potest cur in hac re applicatum sit idem principium ac aliis contractibus, in quibus certo ratio radicalis ob quam lex illos peculiaribus remediis protegit contra metum, est iniustitia." Navarrete, p. 281.

why fear invalidates marriage. Moreover, one is led to the conclusion that whatever fear is inflicted as regards marriage is unjustly inflicted fear. On the one hand, a profound sense of true justice demands that the freedom of marriage be protected as much as possible against any sort of coercion; on the other hand the clause "unjustly inflicted" necessarily requires a limited determination of certain circumstances within which fear can be said to be unjustly inflicted. As it is, different judges seem to interpret "injustice" differently in various cases. Thus differing jurisprudential approaches cannot but arouse confusion. The new respect for human dignity and the new understanding of the nature of marriage as a partnership of the whole of life rather than a contract, demanded that the clause "unjustly inflicted" be suppressed in the revision of the law. Even in the 1917 code as it seems "one cannot find any law which gives a foundation to fear justly inflicted."[73] It can be concluded, then, that whatever fear is inflicted for the purpose of marriage can be considered unjustly inflicted fear. Navarrete comes to the following conclusions:

> a. The legal reason why the invalidating effect of fear ought to be recognized is not protection against injustice, but protection of freedom which the nature of marriage as well as the dignity of the human person demand.

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[73] "In iure Codicis...non enim habetur lex ulla quae fundamentum det metui iuste incusso." Navarrete, p. 285.

b. In today's canonical discipline, there is no law which determines disjunctively that there must be either marriage or a penalty for specified criminal offenses. Therefore all fear inflicted to extort consent is unjustly inflicted.

c. Civil laws which still retain this alternative cannot be considered just in respect to canonical effects. Therefore fear originating in such laws in relation to marriage should be treated as unjustly inflicted fear.

d. Fear inflicted for the very purpose of marriage by means of a threat of some punishment determined in canon law or civil law, which is intended to punish offenses without any relationship with marriage, is unjustly inflicted and is now considered as such in jurisprudence.

e. Therefore the clause in canon 1087 "and unjustly inflicted" (et iniuste incussum) must be removed as superfluous.[74]

The real issue in the law concerning force and fear is the inability to establish a genuine partnership of the

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[74] "1) Ratio legis cur metui efficacia invalidans debeat agnosci non est protectio contra iniustitiam, sed protectio libertatis, quam exigunt sive natura matrimonii sive dignitas personae humanae.

"2) Intra ambitum iuris canonici, in iure hodierno, nulla est lex quae statuat disiunctive aut matrimonium aut subire poenas ob determinata delicta. Omnis ergo metus illatus ad extorquendum consensum est iniuste incussus.

"3) Oportet ut leges civiles quae adhuc hanc disiunctionem retinent, non praesumantur iustae ad effectus canonicos quod attinet. Oportet ergo ut metus ex eis ortus in ordine ad matrimonium habeatur uti metus iniuste incussus.

"4) Metus illatus in ordine ad matrimonium ex comminatione alicuius poenae, sive in iure canonico sive in iure civili statutae, quae finem habet punire delicta sine relatione cum matrimonio, est iniuste incussus et ut talis reputatur iam in iurisprudentia.

"5) Clausula ergo c. 1087 'et iniuste incussum' delenda est utpote superflua...." Ibid., p. 289.

whole of life. During the process of revision of the code several commentators recommended that in the new law, the extrinsic and unjust aspects of fear be less emphasized and the gravity of the freedom impairing situation be stressed more as "ultimately...the pressure destroys the possibility of establishing an authentic consortium vitae."[75]

3. Fear Indirectly Inflicted

A controversy that continued for quite a lengthy period was about the necessity of directly inflicted fear to invalidate marriage. The question was, for fear to have the invalidating effect, was it required that fear be inflicted for the precise purpose of causing marriage, or would fear inflicted for some other purpose suffice? For centuries canonists taught that fear did not invalidate marriage unless it was grave and unjust and caused by a free agent to extort matrimonial consent.

Francisco López Illana cites a number of reputed canonists such as Sanchez, Wernz, Schmalzgruber, and Lugo who had taken a prominent role in this controversy. Their positions seem to have differed significantly. Sanchez taught that marriage was not invalidated by fear unless it was grave and unjustly inflicted by a free agent in order to extort matrimonial consent. Wernz maintained that marriage was not invalidated by fear. However, the contrary opinion

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[75] Thomas J. Green, "The Revision of Marriage Law: An Exposition and Critique," Studia Canonica 10 (1976) 394.

was proposed by Lugo whom other reputed authors like Schmalzgrueber followed.[76]

Before the 1917 code the law demanded that the threat must be directed to obtain matrimonial consent if, fear was to be considered as invalidating the marrige. However, Canon 1087 of the 1917 code does not explicitly require this. It seems to be concerned more about the condition of the victim following the threats. The canon explicitly says "that in order to escape from it a person is compelled to choose marriage."[77]

But Rotal jurisprudence apparently seems to have continued to reflect the pre-code position of the necessity of direct fear, although the classical phrase "in order to extort the matrimonial consent" (in ordine ad extorquendum consensum matrimonialem) that had been in usage previous to the code and was also in the draft, had been replaced by the phrase "in order to escape from it a person is compelled to choose marriage" (a quo ut quis se liberet, eligere cogatur matrimonium).[78] The necessity of direct fear to invalidate marriage is articulated expressly or equivalently in sixty-

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[76] Francisco López Illana, "Iurisprudentia Rotalis de Nullitate Matrimonii ob Vim et Metum," Periodica 60 (1971) 653.

[77] "a quo ut quis se liberet, eligere cogatur matrimonium." Valerio Tozzi, "Se possa il 'metus' indiretto essere causa di invalidità del Matrimonio canonico," Angelicum 50 (1973) 431.

[78] Knopke, pp. 36-37.

two Rotal sentences before the 1917 code.[79] Most often it is the classical phrase,"in order to extort the matrimonial consent" (ad extorquendum consensum matrimonialem) that is employed in the sentence.

Gasparri, who was first the secretary and then the president of the commission for the preparation of the code, affirms that there was a difference of opinion in the commission itself because some wanted to protect an individual against indirect fear also.[80]

The Rota maintained that it was not the intention of the one undergoing the fear that should be considered but the intention of the one inflicting the fear.[81]

Certain decisions of the Rota, however, affirmed the principle that even marriages contracted because of threats which are not directed to this end, can be considered invalid by defect of consent.

The first such case in which the necessity of directly inflicted fear is excluded explicitly is found in a Rotal

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[79] López Illana, "Iurisprudentia Rotalis de Nullitate Matrimonii ob Vim et Metum," Periodica 60 (1971) 653-688; 61 (1972) 487-524; 62 (1973) 233-312. In this three part study of Rotal sentences from 1910 to 1940 on force and fear, Illana examines the development of the jurisprudence on directly inflicted and indirectly inflicted fear.

[80] Gasparri, p. 61, n. 856.

[81] "Praevalens tamen vel communior opinio... et in praesens adhuc est, ad matrimonium irritandum requiri metum consultum, ideoque non metum patientis esse considerandam, sed intentionem metum inferentis.... Huic autem opinioni hactenus saltem nostrum adhaesit Tribunal." S.R.R. Decisiones, 23 (1931) 103, c. Grazioli.

decision of January 9, 1922 coram Florczak.[82] But Dino Staffa reports that the same judge followed the contrary opinion later.[83] Therefore it can be cited as an exception to the rule. Moreover, even after the promulgation of the 1917 code the necessity of directly inflicted fear for invalidating marriage continued in Rotal jurisprudence up until 1933.

In the first decisions there was only the affirmation of the principle of indirect fear. They can be referred to as the beginnings of a change in approach. No reason or justification was recorded. It was affirmed that the new legislation of the code intended to extend the protection of the law to other situations which were not protected previously. As a result, cases of nullity of marriages were on the increase.[84]

In ecclesiastical jurisprudence, however, there was no unanimity on this interpretation and in consequence doctrinal disputes made their appearance in the exposition of canon 1087.

The reasons that were brought against any recognition of indirect fear as invalidating marriage were that it generates only an "intrinsic fear" and therefore it cannot be maintained that marriage itself was caused by threats.

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[82] S.R.R. Decisiones, 14 (1922) 2, c. Florczak.

[83] S.R.R. Decisiones, 48 (1956) 372, c. Staffa.

[84] Tozzi, p. 432.

Fedele, who marshalled the opinion against the recognition of indirect fear as invalidating marriage, affirms that

> the fear is not extrinsic if it is not directly and unjustly inflicted; in fact when the threats do not have the direct purpose of extorting the consent, the motive of the fear is merely intrinsic; besides the injustice cannot but come from without, because "no one suffers injury from himself."[85]

Against this objection that indirect fear generates only intrinsic fear, Staffa states that fear is extrinsic every time the threat of an evil results from a deliberate intention of a third party to harm the victim, whatever the motive may be. From the victim's position the fear is extrinsic.[86]

Another argument of those holding on to the restrictive opinion highlighting direct fear was that recognition of indirectly inflicted fear as invalidating marriage, would be a violation of the juridic principle which required that the the threats be directed to extort marriage consent.

Roberti answers the objection when he states that canon 1087 does not expressly demand this requirement. He demonstrates how in the hypothesis of indirectly inflicted fear the

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[85] "Il metus non è estrinseco se non 'consulto illatus et iniuste incussum',infatti quando non si ha la diretta finalizzazione della minaccia alla estorsione del consenso, il motivo del timore è meramente intrinseco, inoltre la ingiustizia non può venire che dallo esterno, poiche: 'nemo a se ipso iniuriam patiatur'." Pio Fedele, "Metus ab extrinseco et iniuste incussus consulto illatus," Il Diritto Ecclesiastico 46 (1935) 152-160.

[86] S.R.R. Decisiones, 48 (1936) 375, c.Staffa.

requirements of threats to obtain the matrimonial consent are embodied. The marriage contracted is the result of threats. Roberti supports his view with the 1917 code's formulation "in order that one may free himself," where he finds the interest of the legislator shifting from the person of the threatener to that of the victim of the threats. The ancient norm in fact said: "in order to extort the matrimonial consent" which focused attention on the activity of the threatener rather than on the position of the victim of the threats.[87]

Toward the end of 1933 the Rota began to argue that directly inflicted fear was not necessary. When dealing with cases of qualified reverential fear, however, the necessity of directly inflicted fear was still demanded because the author of fear should intend to extort the matrimonial consent of the subject.[88] If the parents and superiors in their arguments and quarrels with the subject do not intend to force a marriage, there cannot be qualified reverential fear in the subject.[89] Those in defense of the invalidating effect of indirectly inflicted fear lean heavily on a doctrinal explanation for the defect of consent.

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[87] Franciscus Roberti, "De metu indirecto quoad negotia iuridica praesertim matrimonium," Apollinaris 11 (1938) 558-561.

[88] S.R.R. Decisiones, 25 (1933) 608, c. Wynen.

[89] Illana, "Iurisprudentia Rotalis..." Periodica 62 (1973) 247.

One such Rotal decision is by Staffa on April 20, 1956, where he says that in indirect fear the defect of consent is verifiable, and is such as to render marriage itself invalid. The threats do not influence the activity of the victim directly, but mediately or indirectly. In the event of marriage contracted through indirectly inflicted fear, the victim consents to the marriage directly to escape the evil contained in the threats, but indirectly due to the action of the threatener who has deprived him of his freedom to act.

If one distinguishes between absolute violence and moral violence, it can be seen that while the former eliminates the freedom of the will the latter makes it defective by vitiating it. By canon 1087 matrimonial consent thus given is shown to be invalid because it is defective.

Staffa goes on to state that "jurisprudence of the Rota now jointly excludes the necessity of direct fear, although Wynen claims its necessity whenever dealing with qualified reverential fear."[90] Thus further development in Rotal jurisprudence over the years finally settled for the recognition of indirectly inflicted fear as also invalidating

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[90] "Iurisprudentia NST nunc communiter necessitatem excludit metus directi, etsi Wynen vindicat necessitatem quoties agatur de metu reverentiali qualificato." S.R.R. Decisiones, 48 (1956) 375, c. Staffa.

marriage.[91]

The broader interpretation affirms that canon 1087 maintains the connection of causality between fear and matrimonial consent that was posited, and not between the will of the one who provokes the fear and the consent itself. Thus besides directly inflicted fear, indirectly inflicted fear also renders marriage null. The victim of threats sees the act of marrying as the only escape from the threats in connection with the marriage.

The Rota pointed out that the victim of the threats had a greater right to his personal freedom than the person that threatens.[92] The one enduring the fear in such circumstances finds no other means to flee the perceived imminent grave evil except marriage, which he in fact chooses in order to free himself from that fear. Therefore it is necessary to presume that whenever marriage becomes the only escape from the threatened evil, that the threats are directed to this purpose.

According to Navarrete the reason for this disposition was to protect the freedom for marriage. Whether the one who inflicts the fear acts justly or unjustly seems to be something absolutely indifferent. Since the act by which

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[91] S.R.R. Decisiones, 30 (1938) 650, c. Pecorari. 31 (1939) 565, c. Caiazzo., 32 (1940) 344, c. Jullien., 32 (1940) 728, c. Heard., 32 (1940) 790, c. Canestri.

[92] S.R.R. Decisiones, 48 (1956) 374-375, c. Staffa.; 49 (1957) 300, c. Doheny.; 52 (1960) 133-136, c. Mattioli.

the fear is inflicted may have no relationship with marriage, it is an altogether irrelevant element. What is important is the fact that one celebrates a marriage which he does not want to, in order to avoid the evil which he thinks is imminent.[93]

Navarrete sees a certain inconsistency here which he attributes to a number of elements from the law both previous to the 1917 code and after its promulgation. It was from the pre-code law that the element of injustice of fear was retained; the invalidating effect of indirectly inflicted fear was recognized after the promulgation of the 1917 code. The legislator did not foresee all the consequences of this admixture of elements. Hence after the promulgation of the 1917 code problems related to the accommodation of these elements began to surface. His contention is:

> The law must see to it that the same juridical solution is presented to all objectively similar situations lest justice and equity be violated.... In this regard, problems can be avoided if prescinding from the element of injustice of fear, one stresses more its gravity, which seems to be required by the evolving doctrine of the Church.[94]

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[93] Navarrete, pp. 289-290.

[94] "...lex quam maxime curare debet ut omnibus situationibus obiective similibus eadem solutione iuridica occurratur, ne laedantur iustitia et aequitas.
"... Haec incommoda vitarentur si praescinderetur ab elemento iniustitiae metus, et tantummodo attenderetur ad eius gravitatem quod praeterea exigi videtur ab evoluta doctrina Ecclesiae...." Navarrete, p. 290.

In the interpretation of canon 1087 reputed canonists desired a definite intervention of the legislator in giving greater relevance to the claim of the victim of the threat.[95]

Navarrete argues that the desired simplification of canon 1087 by removing from it the words "from without and unjustly inflicted" would (a) give the law greater clarity; (b) give it greater efficacy; (c) conform more to the exigencies of the nature of marriage, which is a "communion of life and of love"; (d) result in a law which is fairer and regulated by the same juridical norm.

> Therefore in the revision of the code it would be necessary to revise canon 1087 so that gravity may be the only distinctive mark qualifying fear invalidating marriage. For this it suffices that the words "from without and unjustly inflicted" be expunged from the text of the current canon.[96]

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[95] Tozzi, p. 447.

[96] "Simplificatio c.1087, auferendo ex eo verba 'ab extrinseco et iniuste incussum,'

"a) daret legi maiorem claritatem ...

"b) daret ei etiam maiorem efficaciam...

"c) norma proposita esset quoque magis conformis exigentiis naturae matrimonii, quod est, iuxta Concilium Vat.II, 'communio vitae et amoris' ...

"d) esset praeterea lex magis aequa... regularetur eadem norma iuridica...

." Ideo putamus oportere ut in recognitione Codicis ita redigatur c. 1087 ut unica nota qualificans metum invalidantem matrimonium sit eius gravitas. Ad quod sufficit ut e textu canonis actualis expungantur verba 'ab extrinseco et iniuste incussum.'" Navarrete, p. 293.

C. Changes in the 1983 Code

1. Discussion in the Revision Coetus

Although a number of changes were proposed during the course of the revision of the code, not all of them have been included in the final text of the law. Let us just mention here the principal innovations introduced by the 1983 code in the area of force and fear including reverential fear.

At the meeting of the coetus de matrimonio of the Pontifical Commission for the Revision of the Code of Canon Law held in May 1971, it was accepted that even unintentionally inflicted fear, with the rest of the conditions in canon 1087 §1 being fulfilled, would render matrimonial consent invalid.

The reason is that the defect of freedom in the contractant who undergoes fear is the same whether the fear is inflicted in view of the marriage that is to be contracted or for some other reason. At the same meeting it was also proposed that the second paragraph of the canon should be suppressed. The second paragraph states that no other fear, produces nullity even if it gives reason for the contract. For if it is understood as fear which proceeds from the force that removes the freedom altogether, the paragraph is false. If it is not about this fear the paragraph is super-

fluous and unnecessary.[97]

At the meeting of the coetus de matrimonio on May 20, 1977 it was suggested by many that the word "unjustly" (iniuste) be expunged from the text. The proposition was unanimously accepted. It was also proposed that the word "from without" (ab extrinseco) be deleted. Two consultors felt it should be so; but other consultors were against it because many internal agitations of the mind could otherwise be cited as having the appearance of force and fear, which would open the way to many abuses. The result of the vote on whether to suppress the words "from without" (ab extrinseco) was: two supported it; five were against; one abstained. Some proposed the suppression of the words "even when inflicted unintentionally" (etiam inconsulto incusso). The conclusion of the voting resulted in a tie: four supported, four were against, and therefore the text as it stood prevailed.[98]

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[97] Communicationes 3 (1971) 76. "Placuit ut metus etiam inconsulto incussus reliquis utique conditionibus canonis 1087.1 impletis invalidum reddat consensum matrimonialem. Ratio est quod defectus libertatis in contrahente, qui metum patitur, idem est, sive metus incutitur intuitu matrimonii contrahendi sive cum alia intentione. Supprimenda proponitur paragraphus altera eiusdem canonis, iuxta quam nullus alius metus etiamsi det causam contractui, matrimonii nullitatem secumfert. Si enim intelligitur de metu, qui provenit ex vi quae libertatem omnino tollit, falsa est; si neque de hoc metu, superflua."

[98] Communicationes 9 (1977) 376. "Suggestum est a pluribus ut deleatur verbum 'iniuste'. Propositio omnibus placet. Suggestum est etiam ut deleatur verbum 'ab extrinseco'. Duo consultores idem sentiunt; sed alii consultores sunt contrarii quia secus plura motiva interna animi adduci

Navarrete observes that nothing really was changed, although the clause "even inflicted unintentionally" (etiam inconsulto incussum) was added, since jurisprudence maintains that even unintentional fear invalidates marriage in the existing law. The importance of the distinctions of fear from without or from within (ab extrinseco et ab intrinseco), justly or unjustly (iuste et iniuste) inflicted, has been weakened greatly in the course of time, especially under the influence of jurisprudence after the promulgation of the 1917 code in which fear directly inflicted (metus directe incussus) to extort consent is no longer required, but fear "from without and unjustly inflicted" (ab extrinseco et iniuste incussus) suffices, so that in order to escape from this situation one is compelled to choose marriage.[99]

Navarrete advocated that in the revision of canon 1087 "gravity" must be the only distinctive mark qualifying fear

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possent tamquam speciem vis et metus habentia, quod viam aperiret pluribus abusibus.

"Fit suffragatio an placeat supprimere verba 'ab extrinseco': placet 2, non placet 5, se abstinet 1.

"Nonnulli proposuerunt suppressionem verborum 'etiam inconsulte incusso'. Exitus suffragationis est paritas;(placet 4, non placet 4), ideo praevalet textus prouti est."

[99] "Nihil mutat, etsi addita est clausula 'etiam inconsulte incussum'...Meo iudicio oportet ut in c. 1087 exigatur uti unica nota qualificans metum invalidantem matrimonium gravitas, scilicet ut metus talis gravitatis sit, 'a quo ut quis se liberet eligere cogatur matrimonium.'" Urbano Navarrete, "Observationes in Schema 'De Matrimonio,'" Periodica 63 (1974) 639-640.

as invalidating marriage: that fear was of such gravity that in order to escape from it one is compelled to choose marriage. The principle difficulty with this approach was that the majority of the members of the coetus were apprehensive of possible abuses of the law if such a change were introduced.

2. Text of the 1983 Code

a. Canon 1103 of 1983 code says,

> A marriage is invalid if it is entered into due to force or grave fear inflicted from outside the person, even when inflicted unintentionally, which is of such a type that the person is compelled to choose matrimony in order to be freed from it.[100]

Two significant changes from the original schema are that (fear) "unjustly inflicted" (iniuste incussum) has been dropped and "even when inflicted unintentionally" (etiam haud consulto incussum) has been added to the text. By including the phrase "even when inflicted unintentionally" the law appears to have attempted to eliminate as much as possible the force-fear relationship in respect to the one who is inflicting the fear. Instead it concentrates all its attention on the figure of the one who endures the fear and the manner in which he acts because of the force.

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[100] Can. 1103 - "Invalidum est matrimonium initum ob vim vel metum gravem ab extrinseco, etiam haud consulto incussum, a quo ut quis se liberet, eligere cogatur matrimonium."
English translations of the canons are from Code of Canon Law, Latin-English Edition (Washington, D.C.: Canon Law Society of America, 1983).

The interest of the legislator has shifted to the person of the victim of force. The rest of the characteristics of invalidating fear are the same as in the earlier discipline which is restated in the new code.

b. Contrast with 1917 code: canon 1087

In analyzing the 1917 code which required injustice as a requisite for fear to be invalidating marriage, one could discuss whether the legislator had intended more to punish the injury that had been done by the one inflicting the fear, rather than to take into account the trepidation of the mind produced in the one enduring the fear. The new legislation undoubtedly intends to emphasize the fact that the legislation regarding force and fear has, as its particular purpose, the protection of the full freedom of the individual allegedly subject to such pressure.

If this freedom is impeded by fear or by the suspicion of fear caused by an evil that could befall the one enduring the fear and which he avoids by marrying, then it renders that marriage invalid.

Once the legislator no longer required that fear be intentionally caused for it to be invalidating, then it was logical that the requirement of fear "unjustly inflicted" also be eliminated. It is interesting also to note the suppression of the second paragraph of canon 1087 of the 1917 code. This reaffirms the protection of freedom in marriage, freedom which is compatible with the human dignity

of the individual.

c. Significant Comments from Commentators

The new legislation in the 1983 Code of Canon Law has taken a personalist approach to matrimonial law in respect to the legislation in the preceding code. Commentators view the development in different aspects of this canon on fear (c. 1103). The removal of the words "unjustly inflicted" (iniuste incussum) from the corresponding canon of the 1917 code and the inclusion of the words "even when inflicted unintentionally" (etiam haud consulto incussum) in the canon of the 1983 code, are seen as the most significant reforms in this canon. We shall now consider the observations of some of those commentators.

1) Thomas P. Doyle

Doyle mentions that the 1917 code demanded that fear also had to be unjust in addition to being grave and extrinsic, in order to have the invalidating effect. This requirement that fear be unjustly inflicted has been dropped in the present law. Whether fear is justly inflicted or unjustly inspired "is of secondary importance if it is so strong that the person sees marriage as the sole and undesirable way of escaping the pressure."[101]

2) José M. Serrano Ruiz

Serrano Ruiz emphasizes a twofold change in the canon.

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[101] Thomas P. Doyle, in The Code of Canon Law, A Text and Commentary, ed. James A. Coriden et al.(New York/ Mahwah: Paulist Press, 1985), p. 789.

In relation to the corresponding canon of the preceding code he finds in the new canon a twofold alteration with a twofold meaning. On the one hand "injustice" disappears as a distinguishing mark of coercion. On the other hand it is purposely stated that the deliberate intention of imposing marriage is not necessary on the part of the one inflicting the fear because there is a privation of freedom of choice for the person marrying. The former canon quite rightly brought into focus the grave external interference in the individual's freedom of choice for marriage when there was injustice.

The new canon clarifies another point which has taken firm roots in jurisprudence for a considerable period of time: that "fear directly inflicted" (metus consulte incussus) is not required for fear to have the invalidating effect. Serrano Ruiz makes certain jurisprudential precisions regarding the distinction between common fear and reverential fear, absolute and relative gravity of coercion, coercion towards marriage, and threats that accompany a hasty marriage. The commentator also writes about the two methods of proof: indirect proof from aversion and the direct proof from the existence of threats.[102]

3) Julio Manzanares

Manzanares lists "indirect fear" along with "grave"

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[102] José Marie Serrano Ruiz, in Commento al Codice di Diritto Canonico, ed. Pio Vito Pinto (Rome: Urbaniana University Press, 1985), pp. 649-650.

and "extrinsic" as key elements in the proof of fear. It is not necessary that fear be directly inflicted to extort matrimonial consent; it is sufficient that the person chooses marriage to free himself from the threatened evil although in the mind of the threatener there was no such direct intention. It must, in a word, decisively influence the matrimonial consent. The requirement that the fear must be unjust on the part of the person who threatens has disappeared in the current code, following the orientations of modern jurisprudence.[103]

4) Francesco Bersini

Bersini enumerates the principal factors of fear which should concur simultaneously in order to invalidate marriage. Fear must be grave and extrinsic even if indirect (haud consulto incussum), with marriage being viewed as the necessary and almost always the only option to free oneself from fear. The fear may be inflicted without any intention of extorting the consent for marriage, but in order to free oneself from the fear the person feels
constrained to marry. The canon deals with the so-called "indirect fear." By attaching the words "even when inflicted unintentionally" (haud consulto incussum) to canon 1087 §1 of the preceding code, this canon puts an end to a lengthy discussion in the past in doctrine and jurisprudence

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[103] Julio Manzanares, in Código de Derecho Canónico, ed. Lamberto De Echeverria (Madrid: Biblioteca de Autores Cristianos, 1986), p. 536.

which the 1917 legislator purposely left undecided. The attached phrase in substance attributes invalidating force also to so-called indirect fear, that is, a grave fear inflicted without the intention of compelling a person to enter marriage, yet one which is contracted as the only way of escaping the threatened evil. The motive for the addition is the fact that the lack of freedom in the person who undergoes fear is the same whether the fear is inflicted to compel the person to marry or whether it is inflicted with some other intention.

The code does not consider the intention of the one who inflicts the fear, but rather the subjective will of the person who experiences fear and marries as a way of escaping the threat prompting such fear.[104]

5) Ladislas Orsy

Ladislas Orsy seems to agree with the interpretation of Bersini when he translates the new phrase (haud consulto incussum) as "inadvertently." "The person inflicting the fear did not realize that the words used, the attitudes shown amounted to such forceful 'persuasion' that in fact fear was generated in the victim; also, not in view of marriage."[105] Nonetheless, force and fear were in fact in-

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[104] Francesco Bersini, Il Nuovo Diritto Canonico Matrimoniale, Commento Giuridico-Teologico-Pastorale (Leumann/-Torino: Editrice Elle Di Ci, 1985),pp. 126 & 129.

[105] Ladislas Orsy, Marriage in Canon Law, Text and Comments Reflections and Questions (Wilmington,Delaware: Michael Glazier, 1988), p. 147.

flicted. They were not imposed with the intention of compelling the victim to marry. Yet to escape the situation he married.

6) Mario F. Pompedda

Commenting on "indirect fear," Pompedda says that in doctrine and jurisprudence it was disputed for a long time whether indirect fear was sufficient to invalidate marriage. He emphatically affirms that at least for about thirty years Rotal jurisprudence has given a positive response to this question. According to Pompedda, the first thing the legislator intended to reform in the discipline regarding fear invalidating matrimonial consent was to give invalidating effect also to indirect fear since in this case too there is a lack of freedom in the contractant who undergoes fear.

As regards reverential fear itself, Pompedda asserts, that this is already in the doctrine and is largely applied in the jurisprudential practice since it is well known that even such fear, when characterized by the features of common fear, can induce a vitiated consent and consequently lead to the nullity of the marriage. It is to be noted that the distinction between the two species of fear lies only in the difference of the object of fear, which in the case of reverential fear is the grave indignation of the parents.

Finally, Pompedda states that canon 1103 substantially reproduces the old discipline. Now since being admitted explicitly into the canon, indirect fear (haud consulto

incussus) also invalidates matrimonial consent. It simply means that we have now adopted and canonized a doctrine which has become common and which has been applied without reserve in our jurisprudence.[106]

3. Implications for Jurisprudence

In judging the invalidating effect of force and fear, and especially of reverential fear, the important element is not the intention of the external agent or the one who threatens to compel a person to marry. What is really significant is the psychological effect of fear caused in the mind of the victim; as a result of that fear the person feels compelled to follow a line of action which he would not otherwise have followed. The gravity of the fear needs to be viewed from the point of view of the victim not the coercer.

Present legislation on force and fear, or reverential fear, does not demand that a person's freedom of choice be impeded by another who explicitly places the threat either to choose marriage or to accept the consequences. What should be demonstrated is that a person's freedom was impeded by fear or by the suspicion of fear, caused by the threat of some evil that could happen, and which he avoids by marrying.

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[106] Mario Francesco Pompedda, in Il Matrimonio nel Nuovo Codice di Diritto Canonico, ed. Zenon Grocholewski et al. (Padova: Libreria Gregoriana Editrice, 1984), pp. 90-92.

D. Specific Application in Cases from Sri Lanka

In this part of the chapter, the norms for reverential fear as set forth in the previous section will be applied to "proposed marriages" in Sri Lanka in light of social customs and traditions. The chief sources of material will be cases from the Roman Rota originating in Sri Lanka and cases from the tribunals in Sri Lanka. The cases cited here serve to point out how freedom to marry is interfered with in actual cases and specifically how some of the traditions and customs are responsible for this interference.

Six recent Rotal cases of reverential fear originating from Sri Lanka will be studied in this chapter. Of these six, two decisions have been published in the S.R.R. Decisiones seu Sententiae. The other four have only been listed. However, through the good offices of the auditors of the Roman Rota the author was able to obtain the unpublished decisions for the purpose of the present study. Four of the Rotal cases originated from the tribunal of the archdiocese of Colombo, one from the diocesan tribunal of Jaffna, and the other from the diocesan tribunal of Chilaw.[107]

The study will also inquire into six recent decisions on reverential fear obtained from the local tribunals of the

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[107] S.R.R. Decisiones, 50 (1958) 464, c. Brennan.; ibid., 55 (1963) N.P., c. Mattioli.; ibid., 57 (1965) 898, c. Ewers.; ibid., 65 (1973) N.P., c. Ewers.; ibid., 66 (1974) N.P., c. Raad.; ibid., 72 (1980) N.P., c. Fiore.

archdiocese of Colombo and the diocese of Chilaw in Sri Lanka.

1. Description of the Cases

a. Cases from Roman Rota

1) coram Brennan, July 15, 1958

The Rotal judge Francesco Brennan points out that not even a zealous longing for the "conversion" of a whole family is reason enough to force a marriage on a subservient and unassertive girl.

a) Outline of the Case

N. a girl born to Catholic parents, when twenty-four years old contracted marriage with J., who was also twenty-four years old, born and brought up as a Buddhist, but baptized a few days before marriage. In the proposal of this marriage the more important role was played by Rev. J., the priest-uncle of the girl, who was motivated to a great degree by the hope of obtaining the conversion of the prospective groom's whole household and subsequently of other inhabitants of the town. It was he along with the parents of the girl who brought up the marriage proposal.

However, for the girl it was not a happy choice of marriage. She entered the marriage unwillingly due both to the man's unpleasant personality and her own apprehensions about the sincerity of his conversion to the Catholic faith. She was compelled to give in to the excessive and demanding pressure on the part of the parents.

b) The Law

The judge uses standard jurisprudence as studied in the first part of the chapter.[108]

In light of the "proposed marriage" situation of this specific case the judge makes a significant observation when he says that according to "an age old custom existing for centuries in the Orient, daughters need to depend on their parents for contracting marriage."[109] He goes on to say that it is not possible for them to oppose the parents, although they may disagree with the proposed marriage. If a girl were to resist the will of her parents, she would hardly succeed and sooner or later she would have to accept the marriage. The case becomes more serious when the girl is opposed to the proposal not only because the partner looks unpleasant and unattractive, but also because she fears that she would lose the freedom of practicing her religion. Moreover, if any children were to be born they would be brought up as non-Christians, in spite of the promises given by the partner or his own conversion, which she guessed was opportunistic and superficial. This situation was created not from mere imagination or from a vain fear, but from a real grave danger which could hardly be

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[108] See above pp. 51-59.

[109] S.R.R. Decisiones, 50 (1958) 465, c. Brennan. "...est mos in Oriente per saecula vigens, iuxta quem filiae in contrahendo matrimonio a parentibus passim dependere debent...."

avoided. In such circumstances, the freedom of the one entering marriage must be protected at all costs.

c) The Argument

The decision specifies that no sooner had the mother proposed this marriage than N. revealed to her the aversion she had towards the man. She did not like the marriage proposal brought by Rev. J. and the parents. The young man had paid only one visit and she did not find in him a pleasant or agreeable personality. Yet every time she expressed her aversion to this proposal the parents threatened her and forced her to give her consent. It was certain that N. nurtured a repugnance to the marriage. Considering the customs of the region in which daughters find it almost impossible to resist the will of the parents, it is proved with moral certainty that there was grave fear in this case.

2) coram Mattioli, February 14, 1963

Petro Mattioli in a definitive sentence on February 14, 1963 takes up a case of parents coercing their daughter to marry a person of their choice rather than one of her own choice. Proposed marriages tend to interfere with the freedom of choice in marriage.

a) Outline of the Case

Jayam and Gn. were cousins; they had been in love with each other from their youth. They promised marriage to each other and eventually engaged in sexual relations. The parents, especially the mother, compelled their daughter

Jayam to renounce Gn. and marry another cousin Sam, who was proposed to her by them. The marriage took place at the cathedral church, on the decided day in 1950 with the necessary dispensation from the impediment of second degree of consanguinity, between Jayam who was nineteen years old and her cousin Sam who was older by about three years. Hardly two months had elapsed in their conjugal life when Sam discovered that the woman was pregnant by Gn. Moreover, considering her obvious aversion and the refusal of conjugal rights, he renounced her and brought her back to her parents. Jayam now took up her former lover Gn. who had been living in her paternal home for years.

b) The Law

The judge states that it is reverential fear that is dealt with in this situation.[110] It is coercion that is employed by parents on a daughter who is still a minor. Decretal law as well as the existing law and also Rotal jurisprudence presumes it to be light. But in certain circumstances it can be grave and it has to be recognized as such, especially when there is aversion both before and after marriage. There is no doubt that the parents overstepped their bounds and persisted in their determination of seeing the conclusion of their daughter's proposed marriage. Consequently the consent of the victim is given invalidly.

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[110] See above pp. 53-63.

c) The Argument

The girl's parents according to the customs of the place chose a husband for her and proposed not her cousin Gn. but another cousin Sam.

Jayam resisted the proposal of the parents. Her father knew that his daughter was sad from the day she was asked to marry Sam. The mother, however, insisted in having her way although she knew that Jayam did not like the marriage. The judges of the second instance, who had overturned the first instance affirmative decision, seem to doubt the gravity in this case since according to traditional customs girls ultimately agree to the marriage proposed by parents. It is common that whenever a marriage is proposed by parents, it is almost imposed by their persistent persuasion. It cannot be disregarded that Jayam was greatly in love with the other person chosen by herself and they had grown in that exclusive love for each other. The grave presumption therefore arises that her matrimonial consent was vitiated by fear.

3) coram Ewers, December 4, 1965

Henrico Ewers in a sentence on December 4, 1965 insists on a careful investigation where the nullity of marriage is asserted on the grounds of reverential fear, whether the parents used their legitimate authority to impose the marriage or in fact did abuse their power.

a) Outline of the Case

This was a marriage proposed by a neighbor. The mother of the girl accepted the neighbor's advice to give the second daughter R., who was twenty-two years old, in marriage to the twenty-nine year old M. who was very rich. The girl was in love with a young man of her own choice. On the very first occasion of meeting M. who was proposed to her, she expressed her mind in no uncertain terms that she was against the proposal and continued to resist the wishes of the mother as far as possible. The mother on her part was insisting, using persistent persuasions and harassment, and even resorting to threats. Finally, after two months, although they had met rarely, R. and M. were married on September 20, 1958.

b) The Law

The juridic principles of force and fear are used by the judge, stating that where reverential fear is asserted, one must investigate whether parents used their legitimate authority to impose the marriage or rather acted wrongly by transgressing the limits of that authority.[111] The judge also remarks that it is moral certitude that is required in the mind of the judge in order to pronounce the sentence; absolute certitude is not necessary.

c) The Argument

Usually the indirect argument of aversion is employed

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[111] See above pp. 55-59.

in cases of this nature. What has to be demonstrated is that there existed aversion to the marriage proposed by the person exerting coercion.[112] A nervous daughter was subjected to an unyielding mother, who took control of the whole family after the death of her husband. In this case there is no doubt that the girl's mother asserted her authority to an excessive degree. Therefore one must consider with what sort of will R. accepted the marriage proposal. The libellus broadly narrates the events regarding the marriage. It asserts clearly that she entered into this marriage neither spontaneously nor cheerfully nor freely.

It is also stated that the girl proved her aversion every time she met M., even in the presence of her mother as well as her brothers. From the very beginning she manifested her aversion to this marriage, which was a "proposed marriage" according to the customs of the place.

The mother on her part resorted to threats of expelling her from home several times. Such events render her efforts at coercion still more serious. She had certainly overstepped the limits of her parental authority in this proposed marriage. "He who contracts unwillingly, does not contract freely."[113]

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[112] See above p. 51.

[113] "Sane, qui invitus contrahit, libere non contrahit" S.R.R. Decisiones, 41 (1949) 113, c. Wynen; as cited in Ewers, p. 903.

4) coram Ewers, April 14, 1973

The fourth and fifth cases reported from the Rota also concern a couple who were from the two main ethnic groups in Sri Lanka. There was also a vast disparity in age between the two. The case was tried in subsequent turna coram Henrico Ewers on April 14, 1973 and coram Ignatio Raad on May 2, 1974.

a) Outline of the Case

Monica, a Sinhalese Catholic girl of sixteen years and Philips, a Tamil aged thirty-three years, also a Catholic, were married in church in 1934.

Philips, a friend of Monica's father, was residing in the same house as Monica's parents. On account of this friendship, Monica knew him from her childhood days. She was still studying in the school run by the Sisters of the Holy Family in Wennappuwa when her father ordered her to return home. Quite unexpectedly he promised to give her in marriage to the above-mentioned young man and after three months the marriage took place.

The couple resided first in the same parental home and subsequently in their own for three years. One child was born, a daughter who died in her eighth year. On account of her continuous frigidity toward her husband and also because of his infidelity, Monica ended her cohabitation in March 1937 and returned home to her father. Thus ended three years of married life which was full of dissension, discord

and accusations of mutual infidelity, until the inevitable occured and the final separation was followed by divorce in 1942.

In 1965 Monica accused her marriage of nullity on the grounds of fear inflicted by her father. The case took the normal course of procedure and in the first instance the decision of the archdiocesan tribunal of Colombo was that the nullity of the marriage had not been proven. The petitioner appealed to the Roman Rota against this decision in 1972.

b) The Law

The Rotal judge cites standard jurisprudence on reverential fear, distinguishing it from common fear by its object, namely the danger of indignation of the parents or superiors.[114] He also adds the following considerations in light of the "proposed marriage" situation.

Certainly "it is the duty of parents to advise children and to direct them in rather serious matters such as marriage, as long as they do not transgress the just limits of such authority nor damage the natural freedom of the children in assuming a state of life."[115] Accordingly not every intervention of parents can be taken as undue or

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[114] See above p. 55.

[115] "Officium parentum est filios monere ac dirigere in negotiis gravioribus, ut est matrimonium, dummodo iustos limites non praetergrediantur, nec naturalem libertatem filiorum in statu assumendo laedant." S.R.R. Decisiones, 48 (1956) 322, c. Lamas; as cited in Ewers, p. 5.

oppressive.

However, it must be acknowledged that by undue pressure exerted with the threat of long-lasting indignation parents cannot offer any objective advantages to the proposed marriage without doing some damage to the individual.

Above all, grave fear can be inflicted through an order to enter into marriage. It can be so decisive that the subject comes to the conclusion that any possible resistance is foreclosed.[116]

Rotal jurisprudence has already taught that "by the very fact that reverential fear is grave it becomes unjust; granted that parents have the right to urge children with moderate coercion to contract marriage, yet they have absolutely no right of inflicting grave fear: whence injustice."[117]

The judge adds certain specific points. There may exist a custom in certain places according to which the girls depend on the parents for their marriage. Though they oppose the proposed marriage they may not be in a position to resist the wishes of their parents. This situation can hinder due freedom of the parties and easily lead to nullity

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[116] S.R.R. Decisiones, 47 (1955) 423, c. Felici; as cited in Ewers, p. 6.

[117] "Si metus reverentialis est gravis illico fit iniustus: quia etsi facile conceditur ius parentibus modica coactione urgendi in filios pro matrimonio ineundo, nullum profecto ius ii habent inferendi metum gravem: unde iniustitia." S.R.R. Decisiones, 52 (1960) 223, c. Felici; as cited in Ewers, p. 6.

of the marriage.[118]

As a matter of fact, particular customs of people with regard to the choice of marriage imposed on children by their parents, cannot be invoked to violate natural law or canon law concerning the freedom required in the parties to contract marriage validly.[119]

c) The Argument

In the libellus the petitioner states that her marriage partner was chosen by the father, and when she demonstrated her aversion to the proposed marriage she was intimidated by severe threats. Besides she was only sixteen years old when the marriage was celebrated.

It is certain that the marriage partners were brought together by the father of the petitioner; the question is whether the father acted against the will of the daughter and overcame her resistance by inflicting grave fear. The petitioner asserts her aversion to the marriage with the respondent, and this is confirmed by all the witnesses. When grave aversion is proved, fear is presumed.[120] Consent of the petitioner was vitiated on account of grave reveren-

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[118] S.R.R. Decisiones, 50 (1958) 465, c. Brennan; as cited in Ewers, p. 7.

[119] "Nimia videtur affirmatio de iudicio ferendo 'secundum mores orientales.' Nam pronum est iudices ecclesiasticos in hac re iudicare debere secundum ius naturale et canonicum...." S.R.R. Decisiones, 55 (1963) 972, c. Sabattani; as cited in Ewers, p. 7.

[120] See above p. 50.

tial fear inflicted on her by the father who in spite of her evident aversion, coerced her to marry the respondent. He used his absolute authority and projected a view of his future indignation, had she not accepted the proposed marriage. She therefore entered the marriage altogether unwillingly.

5) coram Raad, May 2, 1974

a) Outline of the Case

As already mentioned, the fifth rotal case in our exposition is the third instance decision of the Roman Rota in respect of the preceding case, namely that of Monica and Philips. The defender of the bond appealed to this turnus in which the ponens was Ignatio Raad.

b) The Law

The judge makes use of standard jurisprudence in the law section.[121] He gives special consideration to proposed marriages. In reverential fear cases, situations should be respected; however when there is coercion on the part of the father, even if it were according to local custom, it does not thereby cease to be unjust.

The Rotal judge quotes a decision coram Bejan dated October 16, 1969:

> If local customs and words which are used by parents towards their children in a given region are such that they truly damage their will, it is not to be taken for granted that they should not be considered as injurious, lest the validity of

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[121] See above p. 55.

> many marriages be placed in jeopardy: but rather it follows that those customs must altogether be reformed and words which are so injurious are to be suppressed completely.[122]

The girl who marries unwillingly because she is unable to escape the tyranny of her father does not demonstrate any filial piety. The stubborn domination of the father is sufficient for qualified reverential fear. She is unable to withdraw from his control in spite of her strong opposition to contracting the marriage.[123]

The natural freedom to choose a marriage partner must be preserved, otherwise the use of parental power would be an abuse and would become unjust coercion. Nothing could be more serious. The judge then cites a decision by Mattioli, who says that one cannot object saying that the reasons for the parental threats are just; i.e., that they are concerned about the true welfare of the children and they wish to attain other laudable objectives. One may justify their action as being in accordance with their conscience; nevertheless it remains a violation of objective law. Wherefore

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[122] "Si loci mores et verba, quae a genitoribus erga filios adhibentur, talia sint in regione illa quae istorum voluntatem reapse vulnerent, non quidem sequitur illa tamquam iniuriosa haberi non debere, ne in discrimen ponatur multorum matrimoniorum valor: sed potius sequitur quod mores illi omnino reformari debent, verbaque quae iniuriam continent, omnino supprimi." S.R.R. Decisiones, 61 (1969) 373, c. Bejan; as cited in Raad, p. 5.

[123] "Ita ad metum reverentialem qualificandum satis est pertinacis violentisque patris imperium vel agendi ratio cui filius se subtrahere non valeat quamvis protestetur se nolle eas nuptias inire." S.R.R. Decisiones, 27 (1935) 403, c. Massimi; as cited in Raad, p. 5.

the consent of the victim is invalid according to the norm of law (canon 1087).[124]

c) The Argument

Some of the causes of aversion indicated by the petitioner are of special significance in proving reverential fear in this proposed marriage: disparity in age, the girl being sixteen years old and the proposed husband thirty-three years old; dissimilarity in ethnic origin, the girl being Sinhalese and the proposed husband a Jaffna Tamil; a third factor was the fact that he was her father's close friend.

The father threatened to abandon the family or to commit suicide if the girl did not marry the man in question. The judge remarks that forty years ago, girls were greatly subjected to parental power in Sri Lanka.

Special reasons compelled the father to impose this marriage. The respondent was a wealthy friend staying at his house. The father had borrowed money from him and was unable to pay the debt. The respondent calls the father "a very cunning person" who owed him seven thousand five hundred rupees. Rev. A, the pastor, states that the father

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[124] "Nec valet obicere parentes ex iustis causis institisse, i.e. verum bonum filiorum attendentes, et alios etiam fines rectissimos consequi volentes; id, enim, eorum opus in foro conscientiae attenuare vel iustificare poterit, sed nihil adimit obiectivae iuris laesioni per quam annullatur patientis consensus ad normam legis (can.1087)" S.R.R. Decisiones, 52 (1960) 133, c. Mattioli; as cited in Raad, p. 6.

appeared to be a self-opinionated character.

The judge concludes that the existence of reverential fear is most often not known beyond the four walls of a home.

6) coram Fiore, March 15, 1980

a) Outline of the Case

Rotal judge Ernesto Fiore in a decision given on March 15, 1980 states that this particular marriage was proposed by the parents of the parties. It was done either to salvage the young man from perversity which was the groom's parents' motivation, or to see to the well-being of the only daughter in the family, Maria who was seventeen years old, and this was the bride's parents' motivation. Both partners seemed to be against the proposed marriage, but at the insistence of the parents, especially of Maria's mother, they could not avoid the absurd union.

The young man, a convert from Buddhism, insisted that the union should be only civil and this took place on September 6, 1971. However, later on he reverted to his old and perverse habits frequently leaving the wife and continuing his illicit relations. Nevertheless, the inflexible mother pleaded with the daughter and pressured her and her spouse to marry in church on November 10, 1971.

What had been reasonably foreseen was immediately verified. After a few days the man deserted his wife; reinstated in conjugal habitation almost by force on the

following day by the assiduous mother, the man H. definitively deserted the woman not long after. Now H. lives with another woman as husband and wife and they already have a child. A divorce has already been obtained.

b) The Law

The judge uses standard jurisprudence. Reverential fear has to be considered relative to the person enduring the fear, namely her character, age, and all other circumstances.[125]

c) The Argument

The judge makes reference to the deposition of the petitioner who states that she decided not to get married in the Church so that the marriage proposed by her mother might not be a permanent union, since the respondent's behavior was highly suspicious. The girl's father attests that the daughter was absolutely against the proposed marriage. The mother admits coercion and regrets very much forcing the marriage on her only daughter.

The judge remarks that when marriages are entered into not because of love but because of fear, conjugal life is often disturbed by disagreements and frequent quarrels. The unfortunate termination of the marriage partnership would be the result.

The petitioner was against the proposed marriage from the beginning. Otherwise, the judge observes, the urgent

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[125] See above p. 55.

action of the mother in seeking the validation of the civil union cannot be explained. The parents of both families, perhaps to cover up the misdeeds of the young man, devised the marriage without the knowledge of the parties, who were not ready and did not want to get married. The respondent accepted only the "civil" union and the victim of all the machinations was the unfortunate girl who became the butt of ridicule even with the blessing of the priest. This tragic comedy lasted only ten days after the religious rite; but it created a stigma on the rest of the life of an unfortunate girl.

b. Cases from Local Tribunals in Sri Lanka

In the system of proposed marriages in Sri Lanka, it is not only the parents who exercise the power of persuasion prevailing upon a child to enter a particular marriage, but also relatives and family friends who take the place of parents or speak on their behalf. Often in villages, even recognized leaders in society, be it civil or religious, enjoy similar authority. There is even a danger that this kind of prestige, devolving as it does upon lay leaders in the Church, may be misused on certain occasions.

1) Colombo, coram Gunaratne, May 10, 1983 [126]

a) Outline of the Case

In a case of nullity decided in the archdiocesan

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[126] Affirmative decision has been ratified by decree of the appeal court (Jaffna) on November 3, 1983.

Tribunal of Colombo on May 10, 1983, the victim of force yielded unwillingly to the strong arguments of the leaders of the village, and the marriage proposed by them ultimately took place. The girl J. had been associating with LZ. for some years with a view to marriage, but due to opposition from his mother LZ. refrained from his frequent visits to her residence. In the meantime HG. proposed his desire to marry J., but both J. and her mother rejected the proposal. Angered by this refusal HG. threatened to take the law into his own hands and actually kidnapped J. One evening he forcibly dragged her away into his sister's house amidst her cries and resistence. From there she was taken by his sister to the residence of an aunt of J. On hearing of the incident the leaders of the village gathered together along with the prayer-leader of the village church. They discussed the tragic incident with her parents and persuaded them and the girl to accept the "situation" that HG. be the marriage partner of J., as the public disgrace and humiliation that abduction had brought about would prevent any other marriage proposal in the future for J. A few weeks later J. and HG. were married in church.

J. spent four days of married life with HG. resisting every conjugal approach of her husband, as she did not love him or want marriage with him. She was suddenly taken ill and was hospitalized for over a month. The husband never paid any visits to her sick bed and so from the hospital J.

returned home to her parents. Later a civil divorce occurred.

b) The Law

For demonstration of "qualified reverential fear" invalidating matrimonial consent, the judge uses standard jurisprudence underlining the two arguments: indirect and direct.[127]

"The fact is that the one who enters into a 'perpetual partnership of life' with someone in spite of aversion or hate was coerced by simple grave fear or qualified reverential fear, unless the contrary is proved."[128]

c) The Argument

Local customs and public opinion in the village brought pressure on J. so that she was impelled to marry given the decision of the elders of the village. "No man would come forward to take the hand of a woman who had been abducted."[129] This is the philosophy they brought into the discussion with the parents. In jurisprudence external circumstances caused by free agents can morally coerce a person in relation to a marriage to which he is averse.

It is evident that the consent of J. was the result of

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[127] See above pp. 51-53.

[128] "Factum enim quod quis vitae consortium perpetuum ineat cum eo quem vera aversione vel odio persequitur, recte metu simpliciter gravi vel metu reverentiali qualificato coactum fuisse, nisi contrarium probetur." S.R.R. Decisiones, 55 (1963) 879, c. Lefebvre; as cited in Gunaratne, p. 3.

[129] coram Gunaratne, p. 5.

both physical and moral force exerted on her. All the decisions were taken and arrangements for the marriage were made by the elders against her will. Furthermore, she was a victim of circumstances; the cultural situation and the attitude of the people of the village was such that she had to give in to the decision of the elders. In the situation nothing better could have been done than accept the marriage.

2) Colombo, coram Gunaratne, June 20, 1983[130]

a) Outline of the Case

This decision was given on June 20, 1983 in a marriage contracted in 1963. The marriage between P. (the husband) and A. (the wife) was expedited even before two months had elapsed after the proposal, without any previous courtship or association between the two parties. After the celebration of the marriage P. came with A. to his parental home, left her there and suddenly made his exit with his friends. No opportunity was afforded to A. by her husband even to converse together as husband and wife. The parents of P. who were responsible for the marriage tried their utmost to bring the new couple together, with no success. A. stayed a few days in the parental home of P., and whenever he came home on brief occasions, she used to hide herself through fear of a beating. In order to remedy the situation she

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[130] Affirmative decision has been ratified by decree of the appeal court (Jaffna) on January 8, 1984.

left for the nearby house of her husband's sister for a couple of days. When P. saw her at his sister's, he rushed in there in a fury. In her predicament the woman escaped from that house. When the husband's mother learnt what had occured, she took A. to her parental home. That was the tragic end of this "proposed marriage."

b) The Law

The judge applies traditional jurisprudence on reverential fear so often accepted as relatively and subjectively grave, according to the peculiar situation in which the intimidated person is placed.[131]

"Parents overstep totally the boundaries of their authority and violate justice by imposing the celebration of some loathsome marriage on their reluctant children."[132] The chief sign that distinguishes a marriage entered through fear from a marriage resulting from parental counsel is the preexistent aversion to the proposed marriage or to the partner. "For when opposition and grave aversion of the mind exist, grave fear is presumed."[133]

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[131] See above pp. 61-62.

[132] "Tamen fines suae potestatis omnino transgrediuntur et iustitiam laedunt, si filiis invitis et reluctantibus imponant celebrationem alicuius matrimonii invisi et odiosi." S.R.R. Decisiones, 34 (1942) 453, c. Wynen; as cited in Gunaratne, p. 3.

[133] "Nam existente repugnantia et gravi animae aversione metus gravis praesumitur." S.R.R. Decisiones, 54 (1962) 603, c. Anné; as cited in Gunaratne, p. 3.

c) The Argument

The judge makes two specific points with regard to the "proposed marriage" situation in this particular case.

1. If a person is strongly averse to the "proposed marriage" with a certain girl, he cannot give a free and adequate consent to marry her. P. had a very strong aversion toward marriage with A.

2. If a man is quite unwilling to marry a particular girl proposed to him, there must be some external factor that drives him to the ceremony to give his matrimonial consent. P. was unwilling to marry A. It was the inescapable force exerted by a parent that became the external factor.

3) Colombo, coram Jayakody, May 8, 1986 [134]

a) Outline of the Case

The third case from the archdiocesan tribunal of Colombo is quite significant not only because of the fourteen year disparity in age between the parties, the girl being seventeen years and the man being thirty-one at the time of the union, but also because the father's position in society contributed principally to the privation of freedom of choice in marriage for the girl. The decision was given on May 8, 1986.

The girl's father, who was the chief of the Village Headmen in the district, maintained strong ties of friend-

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[134] Affirmative decision has been ratified by decree of the appeal court (Jaffna) on August 21, 1986.

ship with the young man's father, who was also a Village Headman. On the basis of this friendship the marriage was proposed. Although the girl was against the proposal her father's word was law for her and therefore she could not openly express her opposition to the marriage. After thirteen years of conjugal life the parties separated, never to cohabit again. Before long the girl found her former lover from her school days and started common life with him after a civil union.

b) The Law

The judge uses standard jurisprudence with the usual arguments in a case of reverential fear, namely aversion on the part of the passive party and coercion on the part of the active party. He also adds that even without threats and rebukes of parents, simple reverential fear may become qualified reverential fear under certain circumstances.[135]

c) The Argument

The judge describes the type of "proposed marriage" in the argument. This marriage took place in 1941. At that time, marriages were contracted strictly according to the wishes of the parents and elders. Partners were proposed and subsequently the marriage took place without much courtship, and quite often with no courtship at all. Partners came to know each other only after marriage. The intervention of parents was seen as natural in such circumstances.

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[135] See above pp. 55-56.

However, there was also a greater possibility than today of parents forcing their will on the children, and children on their part submitting themselves out of reverential fear. In this case the authoritative and dominating father proposed the thirty-one year old M. in marriage to his seventeen year old daughter S., who had no other choice but to accept the proposal and go through the marriage much against her will.

4) Chilaw, coram Lusena, October 14, 1983 [136]

a) Outline of the Case

The petitioner P., born on December 20, 1943 presented her libellus to the Chilaw diocesan tribunal requesting the annulment of her marriage to R., a Catholic of the neighboring village. This was a "proposed marriage" and one of the relatives of the petitioner played the role of the marriage broker in bringing this proposal. From the time of the proposal up until the marriage, the respondent paid three or four visits to the petitioner. In such meetings, the petitioner always spoke to him in the presence of her parents and never alone.

A few days before the marriage the petitioner came to know that the respondent had dealings with other women in addition to being a notorious gambler. She felt compelled to express her doubts to her parents as to the wisdom of marrying R. The father responded that they would be put to

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[136] Affirmative decision has been ratified by decree of the appeal court (Colombo) on July 16, 1984.

great shame if the girl refused to comply with their request. "You have nothing else to do but to consent to this marriage, as otherwise you will have to face public embarrassment."[137] The mother and the neighbors also told her "it would be a great shame to break it off."[138] The unwillingness of the petitioner to marry the respondent was persistent. From the very first day of her marriage it was an unhappy experience for the petitioner.

Three months later the respondent left her for good, taking with him all her jewelry.

b) The Law

The judge uses standard jurisprudence on reverential fear. The law emphasizes the situation of the victim under the circumstances, rather than the intention of the one who exerts pressure.

c) The Argument

The judge states that the degree of aversion which is a requisite in cases of this nature, is amply verified in this proposed marriage.[139] The petitioner, who had an aversion toward marriage with a notorious person such as the respondent, did however accept the reasons offered by her parents as well as the neighbors as representing the best solution

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[137] coram Lusena, p. 3.

[138] Ibid. p. 4.

[139] See above p. 55.

to her dilemma in this particular instance.[140]

5) Chilaw, coram Lusena, May 24, 1984 [141]

a) Outline of the Case

In a proposed marriage in which the teen-age daughter showed no interest, pressure was brought to bear on her by her mother to agree to the marriage. In fact, ever since she attained the age of puberty, her mother was at pains to give her in marriage promptly. She threatened to disown the daughter and often did beat her when she expressed her refusal to agree to the marriage. Finally the daughter, A., decided to go through the form of marriage as she saw no other way out of the situation.

b) The Law

The judge citing standard jurisprudence on reverential fear makes reference to the obstinate demands of the parents which can give rise to grave fear.[142]

c) The Argument

The gravity of reverential fear can best be evaluated by considering the character and personality of each of the parents or the dominant parent, where only one intervenes, the forcefulness or weakness of the personality of the child in question, and the relationship which exists between the

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[140] See above pp. 50-51.

[141] Affirmative decision has been ratified by decree of the appeal court (Colombo) on February 14, 1985.

[142] See above pp. 55-56.

child and the parent.

From the testimony one gathers the impression that the mother of the petitioner was responsible for the running of the day-to-day affairs of the family. She was not only domineering and obstinate, but even assumed the decision-making and planning for the family. The petitioner had no thoughts of marriage and no plans for marriage because of her youthful age. She protested that she did not wish to enter into the proposed marriage with the respondent not only by word of mouth, but even by her actions, such as running away from home, which speak louder than words.

6) Chilaw, coram Lusena, July 23, 1985 [143]

a) Outline of the Case

This was a marriage proposed by a relative of Jag who knew both parties. After the initial visits to each other by both families as is customary in the country, Jag made three formal visits to his future bride prior to marriage. He was somewhat confused since he had the impression that Tres had not clearly made up her mind to marry him. After the marriage he learned that some time prior to and all through the period of engagement, a great deal of pressure had been brought on her by her mother to marry him despite her unwillingness to do so.

After three weeks there was no happiness shared between

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[143] Affirmative decision was overturned by appeal court (Colombo) on July 18, 1986, as "the nullity of the marriage had not been proven." The case is pending at the Roman Rota.

them; instead Tres had complained about everyone and everything around her. Frequent quarrels and heated arguments between the two were a common occurrence. On certain occasions she would not even talk to her husband, thus demonstrating a great aversion toward him.

An acquaintance of Jag sympathized with Tres and developed an unhealthy relationship with her which finally brought about a situation that aggravated the rift between the husband and the wife, resulting in Tres leaving Jag for good.

b) The Law

The judge uses standard jurisprudence adding that the facts of consummation of marriage, of prolonged cohabitation, or of children cannot be alleged directly against the existence of grave reverential fear which invalidated the marriage from the beginning.[144]

c) The Argument

The evil which threatened Tres was not the threat of physical violence or deprivation of life sustenance. Such threats could well place this litigation in the arena of common fear. Rather, her fear was about the serious rupture in her relationship of love and respect toward her parents, a relationship which she had experienced from her childhood. The threat to this relationship and the inevitable serious distress and indignation which an act of disobedience would

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[144] See above p. 58.

cause her beloved parents was for this person a very grave evil. Circumstances resulted in a state of grave reverential fear, and for that reason she consented to the proposed marriage.

In what then does grave coercion consist where there is a question of reverential fear? Radically it seems to consist in the threat of punishment or sanction, not by the infliction of positive evil (for this would constitute common fear) but by the privation of love and affection of the parents. Hence reverential fear is virtually inconceivable in a person who does not love the persons coercing her, and the greater her love, the more gravely will she fear the privation of that love.

2. Common Elements: "Proposed Marriages" and Reverential Fear

The notion of reverential fear involves a person being pressured into a marriage union against his own wishes. One may not perceive any positive evil in being pressured into marriage, but the probable threat of deprivation of parental affection itself may result in yielding to pressure. "Proposed marriages" more easily fall into this situation and in our exposition we wish to illustrate five common elements "proposed marriage" situations share with any reverential fear case, drawing on the Rotal and other cases we have reviewed above.

a) Aversion[145]

A necessary presupposition of compulsion in marriage is the presence of aversion. No one would have to be compelled to marry unless he had a natural aversion to it. The condition denotes a contrary attitude of the mind toward marriage. The Rotal cases cited above bear ample proof of this feature in "proposed marriages."

b) Coercion[146]

Coercion supposes two wills opposed to each other, one of which, namely, the parental will becomes stronger in imposing marriage. The other gives in exteriorly although there is internal resistance. The logical step in the proof of coercion is to establish the presence of aversion in marriage whether "proposed" or otherwise.

c) Parental Indignation[147]

Parents and superiors sometimes confuse the mind of the subject so severely by persistent pleading, incessant nagging, and looming threats that the subject perceives the detested marriage as a lesser evil than enduring a prolonged parental indignation. The subject is constantly tormented in that situation, especially when privation of love and esteem of parents and their constant alienation is seen as a possibility. A person may be forced to choose marriage as a

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[145] See above p. 51.

[146] See above p. 52.

[147] See above p. 57.

lesser evil than the probable future indignation of parents.

d) Parental Domination[148]

When considering the character and disposition of the persons who inflicted the fear in the above-mentioned Rotal cases, it can be observed that the victim had reason to believe that the parents were capable of carrying out the looming threats. Parental figures may be an indispensable help in the formation and development of the personality of an individual. However, when it concerns marriage, they are not to posit any unwarranted obstacle to the free choice of a marriage partner. A domineering parent can wield unlimited authority over a mild-mannered daughter who may reach the conclusion that resistance would be of no avail. The mother may reveal a strong will and single-minded severity while the father may explode in altercations with a timid daughter. Such parental domination compels the subject to enter a loathsome marriage.

e) Lack of Freedom[149]

Lack of freedom in establishing a life-long partnership is another element common to both proposed marriages as well as non-proposed marriages in relation to reverential fear. In these cases marriage becomes a business of the family when parents appropriate to themselves the right and obligation of choosing a suitable partner for their son or daugh-

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[148] See above p. 57.

[149] See above p. 67.

ter subordinating everything to the convenience of the family. From the cases dealt with in this exposition it can be assessed that generally children are robbed of the necessary freedom for a partnership of life and love. It is not permitted for parents to coerce an unwilling child to enter marriage for any reason at all.[150] A person entering marriage due to parental coercion "does not enjoy the freedom which the law of the Church, consistent with natural law, requires in marriage partners in order that marriage may be validly celebrated."[151]

3. Special Issues: "Proposed Marriages" and Reverential Fear

Two issues of special interest to this dissertation in relation to "proposed marriages" and reverential fear are (a) the traditional dependence of children, especially female, on their parents as regards the marriage partner;
(b) local customs, which can diminish individual freedom.

a. Dependence on Parents

Parents expect their children, particularly the daughters, to depend on them for the choice of marriage partner. All the arrangements for the marriage are expected to be in

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[150] "Nullam ob rationem patri licebat puellulam ad invisum matrimonium cogere." S.R.R. Decisiones, 66 (1974) N.P., c. Raad., May 2, 1974, p.13.

[151] "Ergo actrix in contrahendo gavisa non est libertate, quam Ecclesiae lex, iuri naturali congruens, exigit in nupturientibus ut valide matrimonium celebretur." S.R.R. Decisiones, 57 (1965) 904, c. Ewers.

the hands of the parents, who give the greatest importance to economic and social status of the individual in the choice of a spouse for the daughter. For example Mattioli, remarks that the appeal court judges seem to doubt that the girl would go against her parents' choice, in keeping with the customs of the place even though she had chosen her marriage partner.[152]

It happens quite often that in "proposed marriages" the parents exceed the limits of proper parental authority and eventually violate the rights of their children. Ewers states that in order to arrive at a correct decision in a case, many circumstances have to be considered. One has to pay attention to the age of the girl, and above all to her complete dependence on her parents.[153]

b. Freedom Subverted by Circumstances

It may happen sometimes that circumstances brought about by others create a peculiar situation that has a bearing on a person's good name and reputation, often due to the attitudes and customs of the place. Such a situation

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[152] "Praeclari appellati Judices ex eo de adversionis gravitate, in casu, dubitare videntur, quod puellae illius loci, attentis vigentibus moribus, etsi iuvenem sibi placentem aliquando colant, solent tamen in matrimonium a genitoribus propositum consentire, quodcumque illud sit..." S.R.R. Decisiones, 55 (1963) N.P., c. Mattioli, February 14, 1963, p. 14.

[153] "Re quidem vera ut recte iudicium proferatur, plures sunt in casu inspiciendae circumstantiae. Atque imprimis attendi debet ad teneram mulieris aetatem necnon ad ipsius omnimodam a patre dependentiam." S.R.R. Decisiones, 65 (1973) N.P., c. Ewers, April 14, 1973, P. 18.

deprives the person of his choice to refuse a marriage that is imposed on him. The circumstances take away the full freedom which the matrimonial covenent requires, so that the consent cannot be considered free.

In the decision coram Gunaratne[154] the judge states that it was persuasion and pressure of public opinion and local customs that compelled J. to comply with the decision of the elders of the village.

Considering the circumstances, J. was unable to free herself from the predicament except by agreeing to the marriage. The cultural situation and the attitude of the people was such that she had to give in to the decision of the elders. This is a clear instance when one's own freedom of choice of the partner for marriage is subverted by circumstances. One such circumstance may be public opinion based on local customs that cannot be disregarded. Besides, one may not be able to challenge a certain set of values accepted by the people in the locality.[155]

Furthermore, when a girl is to be married into a family of equal position in civil society, her parents usually look for the highest status husband available to them. This is particularly true for the well-to-do villagers where there

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[154] See above p. 112.

[155] Colombo, C. Gunaratne May 10, 1983.

is a strong urge for status beyond that of mere wealth.[156] It is fundamentally an exaggerated fear of insecurity, social, psychological and economic, that usually compels a person to follow parental dictates which deprive him of his freedom to refuse a marriage in the circumstances.

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[156] Colombo, C. Jayakody May 8, 1986. The marriage was proposed on the basis of the friendship of the two Village Headmen who were men of authority.

CHAPTER III

ERROR INVALIDATING MATRIMONIAL CONSENT

A. Developments Before Vatican II

The present chapter will examine canonical legislation concerning the interpretation and application of canon 1097 on error. The main concern of the study will be to determine its significant development in recent years and address ourselves to the provisions contained in the 1983 Code of Canon Law with regard to error in a quality of a person and its jurisprudential practice.

In the 1917 Code of Canon Law legislation on error is contained in canon 1083 which reads thus:

> §1. Error about the person renders marriage invalid.
>
> §2. Error about a quality of the person, even if such error is the cause of the contract, renders marriage invalid only if:
>
> 1°- error of quality redounds to error of the person;
>
> 2°- a free person marries a person who is thought to be free, but in fact is a slave in the strict sense of slavery.[1]

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[1] Can. 1083. §1. "Error circa personam invalidum reddit matrimonium.

§2. "Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum:

1°-"Si error qualitatis redundet in errorem personae;

2°-"Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta."

1. Some Basic Concepts

"Error in general is a false apprehension of a thing or a false judgment of the mind that exists between the objective truth and its subjective apprehension."[2] Unlike ignorance where there is absence of knowledge, in error there is knowledge about something but it is wrong knowledge.

Error is related to ignorance and condition since all three concepts are basically connected with knowledge or lack of knowledge.

a. Ignorance

Ignorance is the privation or lack of knowledge in a person who is capable of such knowledge.

b. Condition

Condition is an attitude of a given person contracting marriage prompted by an uncertain circumstance that directly influences the marital consent. It is a circumstantial clause attached to the agreement, so that the agreement does not produce immediate binding juridical effects until the condition is fulfilled. In other words, the validity of the consent depends on the fulfillment of the condition.

c. Error

"Error is a false judgment about something or some one." A person in error possesses erroneous knowledge about

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[2] "Error est falsa rei apprehensio, falsum iudicium mentis, quod inter veritatem obiectivam atque apprehensionem eiusdem subiectivam existit." Bank, p. 355.

something or someone.[3]

Gasparri defines error as "a false apprehension of an object."[4] Error is opposed to the truth that consists in the intellect being in conformity with the object. Cappello similarly defines error as "a false judgment of the mind."[5]

2. Division of Error

a. Error can be about the Substance of Marriage

Gasparri distinguishes error of law from error of fact in marriage.[6] Error of law is present when the error is with regard to the object of marriage or its essential properties. It is also called a substantial error where one has false ideas about living out the conjugal life. Such error may lead to a situation where an individual posits a positive act of the will excluding one of the essential properties of marriage. Such an exclusion is usually dealt with under the heading of simulation.

b. Error can be about the Partner in Marriage

Error of fact involves error about the marriage partner. Here we encounter error concerning the person and error concerning a quality of a person. This is the focus of our study in this chapter.

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[3] Doyle, p. 780.

[4] Gasparri, p. 17, n. 788. "Definitur autem error falsa rei apprehensio, cum opponatur veritati logicae, quae consistit in conformitate intellectus cum re."

[5] Cappello, p. 554. n. 584.

[6] Gasparri, p. 17, n. 789.

1) Error of Person

"Error about a person is present, if someone intends to contract marriage with a particular person whom he falsely thinks is truly present and with whom in fact he contracts marriage."[7] The two people giving their marital consent to each other form the substance of marriage, and therefore any error of person would be also error of the substance of marriage. Error of person has been called substantial precisely because it affects the substance of marriage.[8] This error renders marriage invalid because the very nature of marriage demands that the two definite persons give consent to each other at the moment of marriage.[9] One of the parties does not give a true matrimonial consent at the time of marriage when error of person exists. Thus J. wishing to marry V., gives consent at the ceremony to S. who is present and whom J. believes to be V. There is no exchange of mutual consent here. Error of person invalidates marriage by lack of consent because instead of giving consent to the person who is present here and now, it is given to a third

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[7] Bank, p. 355. "Error in persona adest, si quis cum aliqua persona certa et determinata contrahere intendit, quam tamen falso putat revera hanc praesentem esse, quacum de facto init matrimonium."

[8] Cappello, p. 555, n. 585. "Error est substantialis, quia consensus fertur in aliam personam ab illa cum qua contrahitur omnino diversam."

[9] Gasparri, p. 17, n.790. "Error facti circa personam verificatur quando quis vult contrahere cum persona certa et determinata."

party who is absent.

The above situation of mistaken identity in marriage, would be an extremely rare occurrence in modern day society. Nevertheless it can be considered a possibility in a "proposed marriage."

2) Error of Quality

The second paragraph of canon 1083 of the 1917 code states that error about a quality, even if such error is the cause of the contract, does not invalidate the matrimonial contract. The common opinion among canonists in the case of error of quality is that there is no substantial error as such but merely accidental error. The consent of the erring party had been given absolutely to the person and although error is present in this particular contract, it is only in reference to a quality and not to the substance of the contract. Therefore error of quality would not invalidate marriage.[10]

3) Error of Quality Redounding to Error of Person

After stating that error of quality generally does not render marriage invalid, two notable exceptions are stated in the canon. The first is that when error of quality redounds to error of person, the marriage is null. Some classical commentators indicate that if a specific quality

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[10] Cappello, p. 555."...quia adest voluntatis consensus. Substantia enim contractus i.e. persona non deficit. Siquidem voluntas fertur in obiectum prout ipsum ab intellectu proponitur."

is expressly intended prior to or at the time of marriage, the marriage may be invalid if the quality is absent in the partner.[11]

The second exception is the error of servile condition. This error may have no relevance or any significance today since slavery in the proper sense does not exist any more in the world.

3. History of Error of Quality of Person

In the development of the concept of error about a quality of the person we shall refer briefly to the teachings of Gratian, Thomas Aquinas, Sanchez, and Alphonsus Liguori. In the twelfth century canon law rose to a status of a science in its own right, especially with the work of Gratian. It is in Gratian's work that one discovers the first comprehensive treatment of error of person in marriage.

a. Gratian's Position[12]

Gratian says that those who err do not consent, but at the same time he points out that not all error excludes

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[11] For a study of five classical commentators on this canon see Edmund F. Daly, "Substantial Error: A Synopsis of the Recent Debate," JCL Dissertation, The Catholic University of America, Washington, 1980) pp. 12-20. The writer examines the interpretations of Gasparri, Cappello, Regatillo, Sipos and Vermeersch-Creusen.

[12] For a detailed study of the teaching of Gratian on error in marriage concerning the person see: Patrick Hennessy, A Canonico-Historical Study of Error of Person in Marriage (Rome: University of St. Thomas Aquinas, 1978), pp. 50-60.

consent. He distinguished four types of error:

1) Error of person: when a person for example, is thought to be Virgil, and he is in fact Plato.

2) Error of condition : When a person is thought to be free and he is in fact a slave.

3) Error of fortune: when a person is thought to be rich, and he is in fact poor.

4) Error of quality: When a person is thought to be good and he in fact is evil.

Of the aforementioned errors only error of person and error of condition excluded matrimonial consent, and therefore these alone were considered to invalidate marriage; error of fortune and error of quality were not.[13]

Reinhardt is of the opinion that "Gratian was much affected by the then prevailing definition of a person. One who wanted to marry a particular person was especially interested in the person. Qualities were only accidentals. It was the person who was important."[14] Gratian's argument appears to be based on the distinction between substance and accidents which greatly influenced the teaching on the legal consequences of error vis-à-vis the validity of marriage. He admits error of person as to the physical person, but does not admit error of quality. He speaks of error of condition

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[13] Decretum Gratiani, C. XXIX, q. 1. The Decretum or Concordia Discordantium Canonum was published c. 1140.

[14] Marion J. Reinhardt, "Error Qualitatis in Errorem Personae Redundans," CLSA Proceedings 35 (1973) 56.

equating it to the condition of slavery.[15]

b. St. Thomas' Position

1) St. Thomas Aquinas (13th century) accepts Gratian's classification of error. He gives a definition of error distinguishing it from ignorance. "Ignorance does not of its very nature imply an act of knowledge, while error supposes a wrong judgment of reason about something."[16]

Discussing what kinds of error invalidate marriage, St. Thomas says that for error to invalidate marriage, it must be about the essentials of marriage: the two persons who are joined together and their ability to commit themselves to each other,i.e. exchange the ius in corpus. The former is error concerning the person and the latter is error concerning the condition of slavery, since a slave cannot give power over his body to another without the master's consent. These two errors, namely error of person and error of condition are an impediment to marriage.[17]

Error of fortune and error of quality, the other

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[15] Patrick Hennessy, "Canon 1097: A Requiem For Error Redundans?" The Jurist 49 (1989) 149.

[16] Sancti Thomae Aquinatis Opera Omnia, Tom. 12, Supplementum Tertiae Partis Summae Theologiae, q. 51, a. 1, ad. 1. (Rome, Typographia Polyglotta, 1906), p. 98.
"Ignorantia differt, simpliciter loquendo ab errore: quia ignorantia de sui ratione non importat aliquem cognitionis actum; sed error ponit iudicium rationis perversum de aliquo."
English version: The Summa Theologica of St. Thomas Aquinas, Volume III Supplement (New York, Benziger Brothers, Inc. 1948), p. 2745.

[17] Ibid., q. 51, a. 2, in corp.

categories of error of Gratian, do not invalidate a marriage because they make no difference to the essentials of marriage as the condition of slavery does.[18]

2) Dealing with error of quality St. Thomas introduces the term error redundans in errorem personae: "error redounding into error of person" :

> error about a person's rank as such does not void a marriage, for the same reason that neither does error about a personal quality. If, however, the error about a person's rank or position amounts to an error about the person, it is an impediment to marriage. Hence if the woman consents directly to this particular person, her error about his rank does not void the marriage; but if she intend directly to marry the king's son, whoever he may be, then, if another man than the king's son be brought to her, there is error about the person, and the marriage will be void.[19]

What St. Thomas says is that if there is error about a quality that is directly intended the marriage is invalid. St. Thomas originated the concept of error of a quality which redounds into error of the person.[20] The quality is

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[18] Ibid., q. 51, a. 2, ad 4.

[19] Ibid., q. 51, a. 2, ad 5. "Error nobilitatis, in quantum huiusmodi, non evacuat matrimonium: eadem ratione qua nec error qualitatis. Sed si error nobilitatis vel dignitatis redundat in errorem personae, tunc impedit matrimonium. Unde si consensus mulieris feratur in istam personam directe, error nobilitatis ipsius non impedit matrimonium. Si autem directe intendit consentire in filium regis, quicumque sit ille, tunc si alius praesentetur ei quam filius regis, est error personae, et impedietur matrimonium."

English Version: Benziger Brothers, Inc. p. 2745.

[20] Hennessy, "A Requiem for Error Redundans?" p. 156. See also Reinhardt, p. 57.

what one primarily intends in the particular marriage.

The quality about which error exists and which redounds into an error of the person may be common to many persons; the quality need not be possessed by one single person. Reinhardt says that "the particular quality of being 'the son of a king' could have been predicated of a number of persons in Thomas' time."[21]

Mostaza states the same when he says that there is no reason to think that Thomas is not dealing here with the son of a king in general, but more particularly only about the son of a king of such a nation.[22]

St. Thomas clearly distinguishes between a "person directly intended" and a "quality directly intended." It is a quality intended for itself, as for instance, a son of a king whoever he is: a quality which is borne by a physical person.[23] The error of the person "can come from some specified quality such as the 'son of a king.'"[24]

In the teaching of St. Thomas the influence of Gratian is undoubtedly pervasive. What is really new is the

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[21] Reinhardt, p. 58.

[22] Antonio Mostaza Rodríguez, "'De Errore Redundante' in Doctrina et Iurisprudentia Canonicis," Periodica 65 (1976) 388.

[23] Justinus A. Mohler, "De errore in qualitate communi ad nuptias quaesita," Apollinaris 34 (1961) 376-377.

[24] James H. Provost, "Some Remarks Concerning Error About the Quality of a Person," Canon Law Society of Great Britain and Ireland Newsletter 42 (1979) 17.

former's teaching on the error of a quality which redounds into error of the person: the "Error Redundans." St. Thomas is considered the originator of this expression. The subsequent authors use this concept and each try to interpret it and give rules to determine when exactly it occurs.[25]

c. Sanchez's Approach

1) Thomas Sanchez (early 17th century) also deals extensively with error redundans and his influence on later canonists as well as subsequent jurisprudence has been truly enormous, especially in the area of error of quality redounding into error of person. Sanchez's opinion "was repeated almost universally by canonists" till recent times.[26] He agrees with what Gratian and St. Thomas stated as to error of person and then goes on to interpret Aquinas regarding error redundans.

2) Sanchez gives us the following rules in order to determine when the error of quality bears directly in the quality itself and thus is only error of quality, and when it bears in the person and thus is an error of person invalidating marriage.

Rule One: When the quality in which there is error does not determine an individual person, it is not error of person but error of quality. For instance, someone says that

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[25] Hennessy, A Canonico-Historical Study, p. 155.

[26] Reinhardt, p. 58.

he is the firstborn son of a king; he does not say of which king he is son. If a woman married him, led on by that error, the error is solely in the quality and the marriage is valid. The reason Sanchez gives is that error of person ought to be about what designates an individual because a person is an individual substance of a rational nature, according to Boetius who is referred to and followed by Thomas.

Rule Two: The contracting party should not have previous knowledge of the individual except by fame or hearing so that he or she errs by sight in contracting marriage with this person.

Rule Three: The contracting party does not have the intention of marrying the person presented, whoever it might be.[27]

In this interpretation the quality becomes the distinguishing factor identifying the other party to the contractant. "The only difference between error of person and error redundans lies in the manner in which the contractant knows the other party."[28] Error of person may occur if he knows her directly. If he knows her only through some individuating quality, a distinguishing factor

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[27] Mostaza, p. 396.

[28] William Dalton, "Error Redundans: A look at some recent jurisprudence," Canon Law Society of Great Britain and Ireland Newsletter 50 (1981) 15.

identifying her, then error redundans may occur.[29]

Accordingly it was Sanchez's view then that error relative to qualities such as virginity and wealth did not invalidate a marriage because they "do not determine and individualize the person who possesses them, since there are many in the world who possess these qualities."[30]

Sanchez gives a narrow interpretation of Aquinas' error redundans when he says that it is present only when the quality designates a specific individual, and this interpretation has held sway among canonists until recently.[31]

d. St. Alphonsus' Approach

Alphonsus Liguori (late 18th century) who influenced theologians by his major work on moral theology teaches that error of quality redounds into error of person in three sets of circumstances. He states that it is correct to say that error about a quality of a person invalidates marriage if the quality redounds into the substance of marriage. But for him there exists a great difficulty in recognizing when error of quality does really redound into error of substance or error of person. To solve the difficulty, in his judgment, the following three rules must be considered:

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[29] Ibid.

[30] Herbert Theodore Rimlinger, Error Invalidating Matrimonial Consent An Historical Synopsis and Commentary, Canon Law Studies, 82 (Washington, D.C.: The Catholic University of America, 1932), p. 41.

[31] Provost, p. 17.

> 1) The quality redounds in the substance when a person actually intends to contract under a condition of this quality. When the condition is deficient, the consent also is deficient. If the contractant before marriage had an explicit intention, and did not revoke it, an intention of not contracting except under such a condition, then that consent, if not actually, at least virtually is conditioned.[32]

The quality is equivalent to a condition sine qua non. Error and condition can be easily distinguished. Error is a defect of the cognitive act of a person possessing erroneous knowledge as certain. It is the result of deficiency in the requisite knowledge. Condition on the other hand, is related to the volitive act of a person. Prompted by uncertain circumstances the person intends to subject the validity of the agreement to the realization of the condition. If the condition is not fulfilled, then the agreement can be rescinded. We have already referred to these concepts briefly earlier.[33]

> 2) When the quality is not common to others but is proper and individual to some determined person; for example if one mistakenly believes that he is contracting marriage with the firstborn daughter

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[32] Alphonsus Liguori, Theologia Moralis, Editio Nova, Tomus IV (Romae: Typis Polyglottis Vaticanis, 1912) Lib. VI, Tract VI, De matrimonio, Cap. III, Dub. II, n. 1014, p. 178. "Tunc qualitas redundat in substantiam, cum quis actualiter intendit contrahere sub conditione talis qualitatis: tunc enim verificatur quod, deficiente conditione, omnino deficit consensus...Si contrahens ante matrimonium expressam habuerit intentionem, et eam non retractavit, non contrahendi nisi sub tali conditione; quia tunc consensus ille, si non actualiter, est saltem virtualiter conditionatus."

[33] See above p. 132.

> of the King of Spain, there would be error of quality redounding in the person. To err in the quality would be to err in the person, and then the marriage would be null, even if he had not the explicit intention of not contracting.[34]

In this rule St. Alphonsus concentrates on the doctrine of Sanchez on error redundans; he says that he does not agree with Sanchez and others in the application of the same doctrine. He claims that Sanchez and his followers, do not admit that there can be error redundans about a quality that is common; for instance when someone thinks that he is contracting marriage with the daughter of the king of Spain, because the quality of the daughter is common to other daughters of the same king and is not individual. Sanchez and others in interpreting error redundans restricted such a quality to a quality that specifies the individual.

> According to St. Alphonsus, these authors do not interpret St. Thomas correctly, since in his view, the Angelic Doctor does not speak here about the person who in contracting marriage believes that the partner is the daughter of the king; but in fact he speaks about the person who before the marriage directly and principally intended the quality of the partner, namely of contracting marriage with the daughter of the king, and therefore he says the marriage contracted with the

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[34] Alphonsus Liguori, Theol. Moral., p. 178, n. 1015. "Quando qualitas non est communis aliis, sed propria et individualis alicuius determinatae personae, puta si quis crederet contrahere cum primogenita regis Hispaniae: tunc qualitas redundat in personam; unde errando in qualitate, erratur in personam, et proinde nullum est matrimonium, etiamsi ille non habuerit expressam intentionem non contrahendi."

other is null.[35]

3) St. Alphonsus attributes his third rule to Thomas Aquinas. He says:

> If consent is made directly and principally in the quality, and less principally in the person, then error concerning a quality redounds to the substance; if the consent is principally directed to the person, and secondarily to the quality it is otherwise. For example: if someone said, I wish to marry Titia who I think is noble, then error does not redound in substance, and therefore does not invalidate marriage. On the other hand, if he had said, I wish to marry a noble girl, who I think Titia is, then however error redounds in substance, because directly and principally the quality is intended, and less principally the person.[36]

In this instance the consent has to be considered as being directly and principally related to the quality, rather than the individual. The error as to the quality is considered to redound into error as to the person.

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[35] Mostaza, p. 409. "Pro S. Alphonso non bene interpretantur hi autores locum D. Thomae (Suppl. q. 51, a.2 ad 5),quia, suo iudicio, ibi Doctor Angelicus non loquitur de eo qui in contrahendo credit illam esse filiam regis; sed de eo qui antea directe et principaliter intendit qualitatem personae, nempe contrahendi cum filia regis, et ideo nullum dicit esse matrimonium cum alio celebratum."

[36] Alphonsus Liguori, Theol. Moral., p. 179, n. 1016. "Si consensus fertur directe et principaliter in qualitatem et minus principaliter in personam, tunc error in qualitate redundat in substantiam. Secus, si consensus principaliter fertur in personam, et secundario in qualitatem.- V. gr.,si quis dixerit: Volo ducere Titiam, quam puto esse nobilem: tunc error non redundat in substantiam, et ideo non invalidat matrimonium. Secus, si dixerit: Volo ducere nobilem, qualem puto esse Titiam: tunc enim error redundat in substantiam; quia directe et principaliter intenditur qualitas, et minus principaliter persona."

According to this third rule of Alphonsus, "the quality about which there is error does not have to specify a certain definite individual for it to be considered as redounding into error of person."[37] To the partner the quality is more important than the person. It is the primary consideration.

e. Rotal Developments

The jurisprudence of the Roman Rota has begun to follow the interpretation of Alphonsus Liguori on the error of quality redounding to error of person: error redundans. One well known example in which the Rota came to an affirmative decision, is the famous Dinajpur case coram Heard on June 21, 1941.[38] It was the first time in the history of the modern Rota that a marrige entered into because of an error about a common quality such as virginity, was declared invalid.

This celebrated Rotal sentence leans heavily on the third rule of St. Alphonsus. One can find in it a certain model of error redundans, a prototype to follow in cases of this nature in declaring the nullity of a marriage. The petitioner, as was demanded by the local customs at the time, had paid a higher price in order to marry a virgin as his wife. He found out later that she was no virgin. The judge declared the marriage null, because of an error in a

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[37] Reinhardt, p. 59.

[38] S.R.R. Decisiones, 33 (1941) 528, c. Heard.

quality which was directly and principally intended. According to the third rule of St. Alphonsus, marriage is invalid if the intention directly and principally concerns the quality about which the party errs.

B. Developments after Vatican II

1. Rotal Examples of Error

a. Re-examination of Error Redundans

The Rotal rethinking of error redundans continued in the wake of the Second Vatican Council. The Dinajpur case clearly had demonstrated that it was not just a "person" that was directly and principally intended but rather a quality.

Around 1966 a new point of view began to manifest itself in the field of canonical jurisprudence. The point of departure was a case decided affirmatively in the first instance by the Tribunal of Moulins in May 1966, confirmed on appeal by the Tribunal of Sens in April 1968, and subsequently decided affirmatively also at the Roman Rota.[39] In this particular case, it was not a question of an error which could be thought of as simply involving physical identity. The man posed as an unmarried doctor of excellent morals, enjoying high status in society. In fact, he was just the opposite of what he claimed himself to be. He had been previously married and never was a doctor. He was

[39] Il Diritto Ecclesiastico 81/2 (1970) 31.

found to be a libidinous rake with a history of political and sexual crimes. It was the decision of the courts of first and second instance that as far as the girl was concerned, he was a totally different person, certainly a different kind of person from the man she had agreed to marry. The court applied canon 1083 §2 1° and consequently the marriage was declared invalid. The defender of the bond at second instance appealed pro sua conscientia to the Roman Rota. But the defender of the bond at the Rota refused to proceed in the appeal and this refusal was accepted by the Rotal judges, declaring that the decision at second instance be definitive and effective.

b. Decision coram Canals: 1970

On April 21, 1970 Rotal judge Canals introduced a new interpretation of the concept of error redundans in a declaration of nullity granted on the ground of error of quality redounding into error of person. The nullity was granted precisely because the petitioner thought that the respondent was a free person, whereas he had been civilly married earlier and three children were born of this marriage. He had fraudulently concealed knowledge of his prior civil marriage from the petitioner.

The Rotal decision outlines certain areas of jurisprudence concerning this ground, and applies this to the growing social understanding of the person. Canals points to three ways of understanding the person.

First he cites the traditional strict opinion, namely, that the quality about which one is in error must be the only possible means of establishing the identity of an otherwise unknown person.

Second, he recognizes the opinion of Thomas and Alphonsus that an error as to a quality which was directly and principally intended causes nullity. In other words, the contracting party primarily intends a given quality and secondarily the person embodying this quality; for example, a virgin, a noble person, a musician, a diplomat.

Third, when a moral, juridical and social quality is so intimately connected with a physical person that, in the absence of this quality, a completely different person is the result. For example in ordinary human understanding, if some one enters marriage with a person believing him to be free from all ties, but he is already civilly married, he is an entirely different person, understood in a more complete and integral manner. According to this third interpretation the contract would be invalid.

Canals points out that civil marriage cannot be considered in the same way as concubinage. Civil marriage is recognized by the Church as valid for non-Christians and for baptized non-Catholics. Because of the defect of form, a merely civil marriage is not so recognzed when entered into by Catholics or by a Catholic and a non-Catholic. Nevertheless, even in these cases canon law accepts the fact that

a civil union produces certain juridic effects such as, for example, establishing the basis for a sanation or the impediments of public honesty or crime, or for the infliction of certain penalties.

Canals then argues that in places where a complete separation exists between the civil and religious marriage, the Church usually encourages and indeed instructs the faithful to contract the civil marriage first, thereby indirectly protecting the religious marriage with civil laws of indissolubility, legitimacy of children, and protection of property. Therefore, he says, we must admit that although civil marriage is rejected in principle, it does establish a status of the person, and consequently an error about such a status amounts to an error of the person.[40]

Canals' decision is historic and very significant for subsequent jurisprudence for the following reasons:

> 1) The requirement, that error be concerned about a quality which distinguishes the person from every other person or which would be the only possible way of establishing the identity of the person, is eliminated.
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> 2) Eliminated also is the rigid distinction between substance and accidents in relation to the person and quality, with the result that any error about an accidental quality would not pertain to the person who is considered the substance.
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> 3) The decision recognizes that there are qualities in persons which may be accidental, but are so very important as to be means of identifying the person even though there may be other persons having the same qualities.

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[40] S.R.R. Decisiones, 62 (1970) 442-445, c. Canals.

> 4) For a marriage to be invalid because of error the substitution of one physical person for another physical person is not required. Such substitution was demanded in the understanding of error in Gratian and in the commentators following the code.[41]
>
> 5) The decision "broadens the understanding of 'person' from the union of body and soul, so that the 'person' can now be considered in terms of 'personality' which includes moral, juridical and social qualities as well as the union of body and soul."[42]

2. Further Developments regarding error redundans

The new thinking gaining recognition with the Rotal decision of Canals in 1970, was acknowledged in a number of local tribunals.[43] In a sentence at the Westminster Metropolitan Tribunal, the judge E. G. Dunderdale goes on to say:

> Up to now it has been said, if a person turns out not to be noble he is a different person; if he turns out to be a slave he is a different person; if it is discovered that he has been civilly married or has taken part in reprehensible activities abhorrent to society at large he is a different person. What it all seems to amount to is this. A person is thought to be acceptable as a spouse, but when the truth is discovered about the kind of person he is and this renders him unacceptable as a spouse by the common consent of the community, the marriage will then be invalid because he will be looked on as a different person.[44]

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[41] Reinhardt, p. 63.

[42] Provost, p. 18.

[43] Westminster, c. Dunderdale, in Studia Canonica 7 (1973) 129-132; Ottawa, c. Charland, in Studia Canonica 7 (1973) 309-312; Toronto, c. Cushieri, in Studia Canonica 11 (1977) 403-415.

[44] Studia Canonica 7 (1973) 130.

However, two subsequent Rotal decisions took exception to the new interpretation of error redundans in Canals' approach.[45] Rotal judge Ferraro follows the traditional interpretation of the canon, stating that Canals' interpretation cannot be legally substantiated. However, he acknowledges that Canals does have a point in saying that moral, juridical and social qualities can be intimately connected with the physical person and if such a quality is absent the person may turn out to be completely a different person. But Ferraro disagrees in the manner of application of c. 1083 §2 1° to the case. In his view, if there is to be substantial error of the person, the qualities intended must be specifically expressed by one of the contracting parties. He also supports his position by having recourse to the opinion of Gasparri as well as to the first rule of Saint Alphonsus which says that error redounds in substance if the quality is intended as a condition sine qua non.

In another decision coram Pinto the Rotal judge takes the position that in the interpretation of c. 1083 §2 1° a marriage can be invalid when a condition sine qua non is posited either prior to or at the time of marriage. It is of interest that in the discussion of the evolution of jurisprudence he states that before Vatican II there was no such evolution of jurisprudence, but after Vatican II

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[45] S.R.R. Decisiones, 64 (1972) 469, c. Ferraro.; 65 (1973) 734, c. Pinto.

jurisprudence shows signs of evolving. In his opinion the traditional interpretation of c. 1083 §2 1° is clear enough and it does not permit any broader interpretation. Some interpretations of c. 1083 §2 1° he says, have gone far beyond traditional jurisprudence.

However, two other decisions followed the approach of Canals and they are well supported by the teaching of Vatican Council II.[46] In a decision on March 26, 1977 Rotal judge Di Felice examines the legal relevance of present and past conditions and error of quality.

Di Felice takes the position that error redundans can be interpreted either narrowly, as an individual and unique quality which determines the physical person, or broadly as a moral, juridical or social quality which though common to many, designates the prospective spouse in a particular manner. He discusses the traditional interpretations of c. 1083 §2 1° and demonstrates how they apply. Then he discusses Rotal precedents for a broader interpretation including Canals, followed by the decisions of Ferraro and Pinto which kept to the narrow interpretation.

Di Felice defends the evolutive interpretation of canon 1083 §2 1°. He bases his approach on papal exhortations and allocutions to the Rota. He adds that the dignity of the human person must be recognized. According to the teachings

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[46] S.R.R. Decisiones, 69 (1977) 147, c. Di Felice.; 70 (1978) 13, c. Di Felice.

of Vatican II the well being of the individual person is closely linked with the healthy condition of the conjugal community. The social, ethical and juridical aspects of the human person have been extolled in the doctrine of the Church.[47] The arguments of Canals and Di Felice were acknowledged as of great importance by the Rotal judges other than Pinto and Ferraro.[48]

It is evident that most judges of the Roman Rota accepted and followed Alphonsus Liguori in the interpretation of error of quality redounding into error of person, while the Pontifical Commission for the Revision of the Code of Canon Law followed a similar approach.[49]

C. Changes in the 1983 Code

1. Discussions in the Revision Coetus

The coetus or the study group revising the canons on marriage at its first session held in 1966, examined the invalidating effect of error in marriage. At the end of the session they came to the conclusion that the invalidity of

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[47] S.R.R. Decisiones, 69 (1977) 151, c. Di Felice.

[48] S.R.R. Decisiones, 70 (1978) 516, c. Pompedda. "Patrum infrascriptorum iudicio, argumenta quae exposita sunt in Rotalibus sententiis: coram Canals diei 21 aprilis 1970; coram Di Felice diei 26 martii 1977 (coram quinque); et adhuc coram Di Felice diei 14 ianuarii 1978: non videntur esse parvi momenti." This decision carries the signatures of five Rotal judges.

[49] Communicationes 15 (1983) 232.

marriage due to error of person about the condition of slavery sanctioned by canon 1083 must be suppressed, because it is not relevant to modern times when slavery is abolished at least in law, in all countries of the world.[50]

Further substantial modifications of this canon were not contemplated until the ultimate phase of the revision process. The first revision of the canon contained in the original draft on the sacraments, sent to the episcopate and other organs of consultation in 1975, read as follows:

> §1. Error concerning the person renders marriage invalid.
>
> §2. Error concerning a quality of the person, even if such error is the cause of the contract does not invalidate matrimony, unless this quality redounds into error of person.[51]

After the period of consultation at its next meeting on May 18, 1977 the coetus considered the canon again. Some consultors proposed that deceit should not be considered as a criterion to discern the invalidating influence of error. On the contrary, if an error about a quality of one's spouse by its very nature does gravely disturb the partnership of conjugal life, marriage would then be null whether or not error was introduced by some deceit.

One consultor said that only deceitful error has an

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[50] Communicationes 3 (1971) 76.

[51] Communicationes 9 (1977) 371. Can. 299 - §1."Error in persona invalidum reddit matrimonium.
§2. "Error in qualitate personae, etsi det causam contractui, matrimonium non dirimit nisi redundet in errorem personae."

invalidating effect because in the case of deceit there is no union of wills in the act of consent whereas in the case of simple error union of wills in the act of consent is truly present. Another consultor once again felt that error and deceit cannot be separated, and if the invalidity is to be based upon the nature of the quality alone about which there is error, those qualities must be indicated more clearly. His reason was that the terminology used in the proposed canon 300 on dolus does not exclude altogether qualities of minor importance which may be subjectively considered as qualities of major importance.

A third consultor, however, favored separating error from fraud, provided suitable precautionary measures are taken to prevent qualities of minor importance from becoming qualities of major importance.

Still another consultor suggested that canon 299 be retained without any change. After a serious and lengthy discussion the text referred to earlier was kept unchanged.[52]

It is after the 1980 schema was issued that there has been a further modification of canon 299. The Secretary of the Pontifical Commission on July 16, 1981 sent to all members of the commission a report which contained a synthesis of the observations received on the 1980 draft and the related responses from the Secretary and a restricted

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[52] Communicationes 9 (1977) 371-372.

circle of consultors.[53]

From the report it can be concluded that canon 299 on error was kept officially for further study by the group of consultors and they proposed a new version for the second paragraph recalling the doctrine of Saint Alphonsus and appealing to the modern day jurisprudence of the Roman Rota.[54]

In the plenary session held in October, 1981 the Code Commission confirmed the new version for the second paragraph as the definitive revision of the canon but with some modification, and this was included in the text of the 1983 code.

2. Text of the 1983 Code

a. Canon 1097 of the 1983 code reads as follows:

> §1. Error concerning the person renders marriage invalid.
>
> §2. Error concerning a quality of a person, even if such error is the cause of the contract, does not invalidate matrimony unless this quality was directly and principally intended.[55]

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[53] Communicationes 14 (1982) 116-230; 15 (1983) 57-109 and 170-253; 16 (1984) 26-90.

[54] Communicationes 15 (1983) 232. "Ad can. 1051,§2. Ex officio: Norma haec ulteriori studio submissa est et a Coetu Consultorum proponitur ut ita utetur: 'Error in qualitate personae, etsi det causam contractui, matrimonium non dirimit, nisi haec qualitas directe et principaliter intendatur.' Correspondet doctrinae S. Alphonsi (Theologia Moralis, Lib. VI, Tractatus VI, cap. III, dubium II, n.1016) et iurisprudentiae hodiernae S.R.Rotae."

[55] Can. 1097 - §1. "Error in persona invalidum reddit matrimonium.
§2. "Error in qualitate personae, etsi det causam con-

The two propositions in the canon are quite distinct. The first proposition basically deals with error concerning the physical identity of the other party. The second proposition regarding error concerning a quality of a person conveys the innovation of the canonical discipline of the 1983 code.

b. Contrast with Canon 1083 of 1917 Code

Canon 1097 of the 1983 code significantly modifies canon 1083 of the 1917 code. The principal dissimilarity in the two canons is the second paragraph, which is about error concerning a quality of a person.

Canon 1083 of the 1917 code, after affirming the irrelevance of error concerning a quality of a person in the second paragraph, mentions two exceptions: error about a quality redounding to an error about the person, and error about the condition of slavery proper.

However, the 1983 code sets forth two other exceptions. Two types of error concerning a quality of a person would invalidate marriage: error about a quality directly and principally intended (c. 1097) and error caused by fraud about a quality which of its very nature can seriously disturb the partnership of conjugal life (c. 1098).

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tractui matrimonium irritum non reddit, nisi haec qualitas directe et principaliter intendatur."

c. Significant Comments from Commentators

From the prominent commentaries published after the promulgation of the 1983 code one is able to conclude that it is no longer necessary to prove that the error of quality is equivalent to error of person; what is necessary to be proved is that the quality was principally and directly intended by the person in error.

1) Francesco Bersini

Bersini remarks that "when a quality is directly and principally intended, one is dealing with error true and proper, that is about a false judgment."[56] It is different from simple ignorance, because in ignorance there is no judgment as such, nor a quality directly and principally intended. In invalidating the consent the canon takes into consideration the objective nature of the quality as much as the subjective disposition of the will: the quality must be directly and principally intended.[57]

2) Thomas P. Doyle

The question may be raised as to what is meant by a quality. Thomas Doyle has a very apt definition when he says "a quality is some aspect of the person that contributes to the shaping of the overall personality."[58]

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[56] "Quando la qualità è directe et principaliter intenta si tratta di un vero e proprio errore, cioè di un giudizio falso...." Bersini, p. 103.

[57] Ibid.

[58] Doyle, 780.

These qualities can be moral, physical, social, religious or legal. Some examples given by Doyle are honesty, freedom from disease, social status, appearance, marital status, education and religion. Error about a quality as such, does not invalidate marriage, unless it is directly and principally intended. Since the matrimonial consent is exchanged with a person and not with a quality of the person the essence of consent would remain. However, if a person makes an error about a quality that he directly and principally intends, the consent could be invalid. "The person gives consent precisely and only because of a perceived quality."[59]

"St. Alphonsus taught that the quality need not be unique to one person only; it might be common to many, yet it is the primary interest of the person exchanging consent."[60] Doyle remarks that a recent trend in jurisprudence has applied this interpretation.

> This trend was based on an approach to defining a person which is not restricted to the "substance and accidents" model. The person is also a composite of social, physical, cultural, and civil qualities. In recent jurisprudence, nullity was based on the fact of that quality, even though common to many, was truly grave, discovered after the marriage, and when discovered resulted in a serious disruption of marital life.[61]

The quality must be of such subjective magnitude in the

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[59] Ibid.

[60] Ibid.

[61] Ibid.

thought of the person marrying that it cannot but overshadow the person of the other party.[62]

3) José M. Serrano Ruiz

Serrano Ruiz states that the formulation of the canon reflects the famous third rule of Saint Alphonsus for the celebrated error of quality redounding to the identity of the person. In this situation the quality is present in the intention of the marriage partner, so as to make it "a circumstance absolutely necessary in the conjugal pact. The proximity to the notion of condition is evident."[63] In fact it seems to say that when a quality is principally and directly intended, conjugal consent is subordinated to it.[64]

4) Julio Manzanares

Manzanares reflects on the evolution of canonical doctrine and jurisprudence in relation to the former canon 1083 of the previous code on error and matrimonial consent. He also says that

> canonical jurisprudence abandoned the restrictive interpretation of error about a quality and had recourse to the famous rule of Saint Alphonsus Liguori. Error about a quality redounding into error of person invalidates marriage when consent is directed, directly and principally toward a quality or a complex of qualities and less principally towards the person. This interpretation

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[62] Ibid., p.781.

[63] Serrano Ruiz, p. 645. "La qualità è in tal modo presente nell'intenzione del nubente, che costui lo fa una circostanza assolutamente necessaria nel patto coniugale. La prossimità alla nozione di condizione è evidente."

[64] Ibid.

made a resurgence from the time of the decision coram Canals on April 21, 1970 and was affirmed in the codification of the new law.[65]

5) Ladislas Orsy

Orsy says that the quality must be the motivating force for the person to contract marriage. "'Directly' must mean that it is not intended by any intermediary," as when a person wants to marry and is glad that the prospective partner enjoys good health. "Health would then be a quality indirectly intended." "'Principally' must mean 'above all,' as when a person wants good health so much in the other, that unless it is there he is not willing to marry her."[66]

In discussing the distinction between a quality which is the cause of the contract and a quality directly and principally intended Orsy affirms that as the legislator sees a difference there must be a difference.

In his opinion, when the quality is the cause of the contract, the partner would be willing to contract the marriage even if the quality was proved to be non-existent because the intention of the partner is assumed to center so

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[65] Manzanares, p. 532. "La jurisprudencia canónica abandonó esta interpretación restrictiva y se acogió a una famosa regla de San Alfonso M. de Ligorio: el error sobre la cualidad redunda en la persona y, en consecuencia, invalida el matrimonio quando el consentimiento se dirige directe et principaliter hacia una cualidad o conjunto de cualidades et minus principaliter hacia la persona. Esta interpretación, resurgida a partir de una c. Canals de 21 de abril de 1970, es la que ha quedado plasmada en la nueva codificación canónica."

[66] Orsy, p. 137.

much on marriage itself. In the other case, when the quality is directly and principally intended, "his intention is presumed to focus so much on the quality that he would not marry but for that quality."[67]

6) Mario F. Pompedda

Pompedda reminds his reader that in the original draft, the old canon was practically repeated, that error of quality leads to nullity of marriage only if it redounds to error of person. On the contrary the new code avoids equating an error of quality with an error of person. The new canon does not speak about the quality of slavery. It does state that error is still irrelevant even if it is the cause of the contract, but invalidates marriage if the quality was directly and principally intended.

It may be observed that the legislator did not wish to abandon the theory of error of quality invalidating marriage but has given it a precise meaning and limitation, with the very same words used by Saint Alphonsus in his third rule.

Pompedda goes on to say that error of quality invalidating marriage is present when the partner "wishes to get married as if to the highly valued quality: an abstract form of personality who is constituted by the abstraction of this quality."[68] In that procedure the will of the proper

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[67] Ibid.

[68] Pompedda, p. 60. "Quindi possiamo dire che si ha errore sulla qualità invalidante il matrimonio quando il nubente vuole sposare, per così dire, la qualità considerata

subject does not become necessarily referred to a particular physical person, since it is directed to the quality. It rather substitutes the value and the esteem of one characteristic quality, instead of considering the physical personality which is in the background.[69]

3. Implications for Jurisprudence

a. Rotal Rethinking of Error Redundans

The jurisprudence of the Rota, especially from around 1970 onwards, rejected the traditional interpretation of the concept of the error of quality amounting to an error of person, and acknowledged the possibility of a social, juridical, or moral quality as equivalent to the person.

The following errors have been considered relevent in producing nullity of the bond: error about the virginity of the spouse (taking into consideration the particular social environment);[70] error about a previous civil marriage; error about one's professional status;[71] error about the fact that the other spouse was married civilly and had children;[72]

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e cioè, a dir meglio, un astratto tipo di persona che è costituita dall'astrazione di quella qualità."

[69] Ibid.

[70] S.R.R. Decisiones, 33 (1941) 528-533, c. Heard.

[71] Tribunal Appellationis Senonen., c. Guinot, April 22 1968, in Il Diritto Ecclesiastico, 81/2 (1970) 31-35.

[72] S.R.R. Decisiones, 62 (1970) 442-445, c. Canals.

error about the spouse being industrious, honest and pious; error about the partner having a doctorate, or being really a hero;[73] error about the woman being pregnant or not; error about the quality of one's public prestige[74] or about the state of one's health.[75]

b. Jurisprudential Considerations

Two fundamental points emerge in jurisprudence with regard to error of quality.

1) In the 1917 code canon 1083 §2 states that

> Error about a quality of the person, even if such error is the cause of the contract, renders marriage invalid only if:
>
> 1°- error of quality redounds to error of the person;
>
> 2°- a free person marries a person who is thought to be free, but in fact is a slave in the strict sense of slavery.[76]

The term error redundans is legitimate and frequent in jurisprudence from 1917. It refers to a kind of error distinct from error of person, which means that the code affirms the necessity of precision and clarification of the

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[73] S.R.R. Decisiones, 70 (1978) 13, c. Di Felice.

[74] S.R.R. Decisiones, 69 (1977) 147, c. Di Felice.

[75] Westminster, c. Dunderdale, March 29, 1973, in Studia Canonica 7 (1973) 129-132.

[76] Can. 1083. §2. "Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum:
1°-"Si error qualitatis redundet in errorem personae;
2°-"Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta."

scope of such a term.[77] The 1983 code, however, does not specify this type of error. The fundamental change in the canon on error concerning a quality of the person in the 1983 code lies in the term error redundans making way for the third rule of St. Alphonsus regarding error of a quality directly and principally intended. Canon 1097 of the 1983 code seems to say that even if an error about a quality redounds to an error of the person, it would not invalidate marriage unless that quality was directly and principally intended.

2) Jurisprudence considered characterizing the terms in error redundans in order that fraud or deceit may be recognized as grounds of marriage nullity.[78] Thus the number

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[77] Orlando Di Jorio, "Errore di qualità redondante in errore di persona nel consenso matrimoniale," Il Diritto Ecclesiastico 81 (1970) 4: "...Ci si domanda innanzitutto come sia possibile stabilire un'egualianza tra i due errori, se uno di essi redonda e si risolve nella persona, e perciò in base al significato ovvio della parola dovrebbe essere concepito entitativamente diverso dall'errore di persona. Non si può fare a meno di riscontrare l'inutilita di una nozione, come l'error redundans, qualora la sua genesi essenza ed effetti giuridici coincidano in tutto e per tutto con l'errore di persona".

[78] Communicationes 3 (1971) 76-77. "Diu deliberatum est utrum introducendus esset defectus consensus ex dolo proveniens. Tandem unanimi consensu coetus pervenit ad conclusionem defectum consensus ex dolo provenientem in novo iure esse admittendum. Attamen graves statuendae sunt condiciones, scilicet ut dolus patratus fuerit ad obtinendum consensum matrimoniale; ut dolus versetur circa qualitatem alterius partis et quidem circa talem qualitatem compartis, quae nata est ad consortium vitae coniugalis graviter perturbandum. Nihil refert utrum talis dolus patratus sit a parte contrahenda an ab alia persona. Inter consultores aliquantisper disceptatum est de motivo nullitatis matrimonii ex dolo contracti, aliis tuentibus id iniustitiae

of qualities which could apply to canon 1083 of the 1917 code gradually expanded in jurisprudence. Shortly after Vatican II in the Roman Rota and other Church courts the third rule of St. Alphonsus regarding the error of quality became the jurisprudential norm for the interpretation of the canon. Such developments in jurisprudence helped the process of legislation toward the second paragraph of canon 1097 of the 1983 code.

D. Specific Application in Cases from Sri Lanka

In the tribunals of Sri Lanka error regarding a quality of a person does not seem to have been an often applied grounds in cases of "proposed marriages." No Rotal cases of error originating from Sri Lanka are listed in the Decisiones seu Sententiae Sacrae Romanae Rotae.

This part of the dissertation will focus on two cases of "proposed marriages" from Sri Lanka. One was processed in the archdiocesan tribunal of Colombo on the grounds of error of quality redounding into error of person, while the other processed initially in the diocesan tribunal of Chilaw on lack of due discretion but eventually reconsidered by the Rota on error concerning a quality of a person.

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doli tribuendum esse, aliis vero vitio libertatis consensus ex dolo derivanti."

1. Description of the Cases

a. Colombo, coram Fernando M., November 11, 1982 [79]

1) Outline of the Case

Nathan the petitioner, a Sri Lankan resident in Canada, contracted marriage with Chan in Colombo on January 13, 1975. This was a "proposed marriage." He had indicated to his parents the kind of girl he wanted, a wife of the traditional mould who could at the same time adapt herself to Canadian conditions. On his arrival in Sri Lanka in December 1974 he met with several proposals among which was that of the respondent. Though he had certain misgivings about the suitability of the girl he reluctantly agreed to marry her, hoping that everything would turn out well. But from the first day of the honeymoon he began to realize that this was not the kind of wife he had been looking for. By the time he left Sri Lanka to return to Canada on January 21, 1975 he was in a serious dilemma on account of the notable discrepancy he saw between the kind of wife he wanted and the one he had married. His instant desire to terminate the marriage subsequently crystallized into a clear decision.

2) The Law

The judge has recourse to standard jurisprudence on

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[79] The affirmative decision has been ratified by decree of the appeal court (Jaffna) on June 2, 1983.

error of quality redounding into error of person.[80] He cites post-Vatican II Rotal jurisprudence on the necessity of the mutual gift of persons in marriage.[81] When error of quality redounds into error of person, the consent given is unilateral and there is no mutual gift of self.[82]

3) The Argument

The judge develops the argument specifically in relation to the proposed marriage situation. He remarks that in this case, two facts stand out unmistakably:

a) the hastiness with which the marriage was entered,

b) the almost "instant" post-marriage disillusionment of the petitioner.

The petitioner had in mind a certain type of woman to be his wife. He had in fact written to his mother about the kind of wife he wanted. Besides the abilities of serving and cooking which practically every Sri Lankan husband

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[80] See above pp. 154 and 155.

[81] "Persona hominis non dumtaxat nomine vel mensura et pondere corporis, sicut externe cognoscitur, reapse determinatur, summopere in negotio maximi momenti, prout est matrimonium in quo plene et complete se tradere debet alteri coniugi in sua vera natura praesertim spirituali." S.R.R. Decisiones, 70 (1978) 13, c. Di Felice; as cited in Fernando M., p. 2.

[82] "The immediate and primary cause of nullity (in cases of error personae, error qualitatis redundans in errorem personae, unverified implicit condition de praeterito vel praesenti) lies in the fact that the consent given by each party will be unilateral and not mutual." Maurice B. Ahern, "Error and Deception as Grounds for Nullity," Studia Canonica 11 (1977) 227; as cited in Fernando M., p. 2.

expects of his wife, he also wanted her to be flexible and able to adapt to living in Canada and communicative, with particular reference to the English language.

As in most of these cases of marriages proposed by the home-folk to their children abroad who come home to get married and take their partner back to the resident country, the children abroad have to depend on the people back home for the verification of the "conditions" regarding the partners they want. In this case the petitioner depended almost entirely on his mother and her judgment about the prospective bride. This dependence seems to have some particular features in this case; an extraordinary confidence in his mother on the part of the petitioner and a corresponding "domination" by his mother about the choice of a partner for her son. It was the mother's judgment regarding the suitability of the respondent, despite his own misgivings, that prevailed on him to consent to this girl. After the formal introductory meeting the petitioner had already said that she was not the type of woman for him. So for the above mentioned reason, right from the beginning he felt a dislike for marriage with Chan. More than anything else he felt really no communication was possible with the girl.

The most unusual and striking phenomenon about this marriage is the "instant" post-marriage disillusionment of the petitioner. His first attempts at in-depth communica-

tion with his wife on the honeymoon brought home to him the discrepancy between his expectations and the reality he in fact experienced.[83] It made him conclude that it was all a big mistake and he thought of talking to the priest and getting the marriage nullified right away. All this leaves no doubt that the consent of the petitioner was radically vitiated and that there was an error of quality redounding to error of person in this proposed marriage.

b. Chilaw, coram Lusena M. April 12, 1989 [84]

1) Outline of the Case

The petitioner Jonas, who is from the village of Dankot, married Dona at the Cathedral in Chilaw on October 15, 1980. At the time of marriage the petitioner was twenty-seven years old and the respondent twenty-two. This was a "proposed marriage" and two months after the initial visits and introductory meetings of the parties, they were married. The respondent had a somewhat unsettled childhood, having lost both parents early in life. Her brothers who were responsible for her education and upbringing rushed her into the very first marriage proposal.

Both parties claim that the short period of two months was insufficient time for them to get to know each other. During this period they met only six occasions. The married

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[83] See above p. 135.

[84] This is a case that is pending. Its resolution is proposed here in a hypothetical manner.

life was far from the happy experience both the petitioner and the respondent expected. The petitioner claims that the respondent had lost her virginity long before her marriage. The respondent, while denying the accusation, admits that there was no evident proof of her virginity when the marriage was consummated.

2) The Law

The judge could observe that Rotal jurisprudence in recent years has indicated that error which is dealt with in c. 1097 §2 of the 1983 code and c. 1083 §2 1° of the 1917 code, can be interpreted "in a broader sense" to include the social, ethical and juridical aspects of the human person in dispensing justice.[85] Thus the interpretation of error redundans which was the substance of c. 1083 §2 1° of the 1917 code seems to have been taken into c. 1097 §2 of the 1983 code which states

> Error concerning a quality of a person, even if such error is the cause of the contract, does not invalidate matrimony unless this quality was directly and principally intended.[86]

A quality can be directly and principally intended by the partner subjectively, or by the society objectively and

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[85] "...ratio aequitatis stricto iuri, praesertim in causis matrimonialibus,quae provinciam erroris spectant, de quo in can. 1097 § 2 vigentis CIC ampliori sensu applicari posse..." Innocentius Parisella, "De aequitatis doctrina et praxi in iurisprudentia Rotali," Periodica 69 (1980) 240-248.

[86] Can. 1097. 2. "Error in qualitate personae, etsi det causam contractui, matrimonium irritum non reddit, nisi haec qualitas directe et principaliter intendatur."

the partner subjectively. It may be implicit yet directly and principally intended. When a quality that is physical, juridical, social or moral is directly and principally intended, that quality subjectively identifies the partner.[87]

When a quality is indicated by society as objectively identifying a person in a specific manner, and the same quality is subjectively and implicitly indicated as important by the partner in keeping with the traditional culture of that society, then that quality is directly and principally intended.

In "proposed marriages" of Sri Lankan society, the bride's virginity is preeminent among the qualities which objectively identify the person. In every case of this nature the subjective appreciation of the identifying quality by the other partner has to be given due consideration.

In order to declare a marriage invalid it is not sufficient to prove that there existed a defect of a quality directly and principally intended; it is also necessary to prove that there was ignorance of the defect of this quality in the act of consent.

3) The Argument

The petitioner was in error with regard to a quality, which in his particular circumstances, is very much valued

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[87] See above pp. 145-146.

as essential in the partner. The main consideration in this unsuccessful marriage is the defect of virginity in the bride which was discovered by the petitioner during their very first sexual engagement as husband and wife after the celebration of their marriage. According to traditional custom and culture of the people, the girl has to be a virgin at the moment of marriage. The respondent herself plainly states that virginity of the bride is the proof of her untarnished moral character. The quality of virginity, then, in its social and cultural aspect is objectively an essential element for the identification of a person of good moral character. As a consequence this quality must be considered as directly and principally intended, though implicitly among the people of Sri Lanka. In the case at hand, there is moral certitude that the objective quality was also subjectively and explicitly intended by the petitioner in entering this marriage union. When it was discovered that there was no proof of virginity, his immediate reaction and that of his family members was grave disappointment.

The quality of virginity in a bride is not a condition placed by the partner, but in keeping with the culture and custom of the people, it is a necessary prerequisite. In a condition the quality is exclusively demanded. As a necessary prerequisite, the quality is directly and principally intended. What is of interest is the subjective

appreciation of the quality in the petitioner, hence his strong reaction when it was discovered that there was no proof of the virginity of his bride.

2. Common Elements: "Proposed Marriages" and Error of Quality

In any case of error about a quality of a person, whether it be a "proposed marriage" or otherwise, the judge must draw his attention to two fundamental factors: the subject or the contractant, and the object or the intended quality. In choosing a partner, someone has a certain person in mind, a definite individual. A person possesses his individuality not only from physical identity, but from all those psychic, moral, social qualities which make the individuality of each person distinct from others.

a. Quality Intended Before Person

A contractant may direct his marital intention towards a quality or a complex of qualities rather than towards the physical person of the other party: in this the quality is directly and principally intended and consequently error concerning a quality of a person exists if the contractant makes a false judgment about it.

The quality is intended before the person; i.e., the contracting subject intends to enter into marriage with a person determined by a certain quality, so that he does not wish to contract marriage just with any person, but only

with a person having that quality or those qualities. When the canon on error was under examination by the coetus, it was positively decided that an accidental error concerning a quality of the person is not sufficient as the cause of the contract;[88] the quality in the canonical sense should be the motive determined by the contractant for his consent. For error of quality to be invalidating then, the intention of the contractant should point itself toward the quality in a way not only direct, but principally, putting the person almost in the second place. The consent given by the contractant focuses on the quality as something essential, the person that is undoubtedly essential being placed after the quality.

It is not to be wondered that people in choosing a partnership of the whole of life in modern civilization, primarily look for certain qualities of the person, especially for those that have gained public esteem and recognition in the society where one lives. So too in "proposed marriages" certain prerequisites do obtain, upon which the suitability of a spouse is determined. These may be absolute such as the virginity of the bride or social status, or relative such as one's complexion and educational accomplishments.

b. Quality Intimately Connected with Person

Qualities cannot be regarded as mere accidentals of a

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[88] Communicationes 9 (1977) 372.

person; neither can it be said that they do not identify the person. It is only through qualities that a person is recognized in his individual existence.

An error in this respect amounts to an error concerning a quality of the person because the consent is directly and principally directed to the quality, and less principally to the person who happens to possess the quality. "Proposed marriage" situations may share this element with other cases of error of quality as is demonstrated in the two cases reviewed above.

The quality or attribute about which the petitioner errs can be subjectively or objectively grave, which means the quality is considered serious by him. In the first case reviewed in this chapter, the petitioner had in fact written to his mother about the kind of wife he wanted.[89]

In the second case the quality of virginity identifying the partner in the culture and tradition of the people was so strongly rooted in the mind of the petitioner, that he was morally and psychologically incapable of thinking and willing otherwise. This is demonstrated by the actions of the petitioner himself when he found that she was no virgin. The petitioner considers the respondent to have lost her virginity long before marriage.[90]

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[89] See above p. 169.

[90] See above p. 172.

c. Reaction to Substantial Mistake

There is a real crisis when the one in error learns about the absence of the quality after marriage. The discovery of the truth gives rise to serious consideration of terminating the marriage there and then. "The person reacts with surprise and bewilderment."[91] In the first case the "instant" post-marriage disillusionment of the petitioner made him realize that "it was all a big mistake," and he thought of talking to the priest about an immediate annulment.[92] In the second case there was a devastating effect when the petitioner discovered that the respondent was not the type of wife that he was looking for. He was perplexed and as a result he made life miserable for the partner. The fact that the wife was not the woman the man had anticipated, seriously disrupted the community of life.

d. Error Not Necessarily Linked with Deception

A person can be in error without it being based on deceit or fraud. "Fraud does not really seem necessary. But if the tribunal can show there was fraud, it does help to explain more immediately and directly how error occured in the first place."[93] The two cases reviewed in this chapter are cases of pure error and there is no evidence of deceit whatsoever.

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[91] Wrenn, p. 79.

[92] See above pp. 171-172.

[93] Provost, pp. 20-21.

3. Special Issues: "Proposed Marriages" and Error of Quality

In connection with "proposed marriages" and error of quality two special issues are considered important in this dissertation: a denial of personal preferences for the parties, and the virginity of the bride.

a. Denial of Personal Preferences

In many "proposed marriages" personal preferences are not highly valued. Not only is parental approval fundamental, but sanctions would also be imposed upon the couple by the community if the marriage were entered into without the parental blessing. Some of the criteria upon which parents judge the suitablity of a spouse for their son or daughter are fixed while others are subject to compromising and balancing. Often it is the parent that has the final say in these matters. In our first case in this chapter the petitioner, when confronted with several proposals, reluctantly agreed to marry the respondent under pressure from his mother. The petitioner depended almost entirely on his mother and her judgment about the prospective bride. This dependence seems to have some particular features in this case: an extraordinary confidence in his mother on the part of the petitioner and a corresponding domination on the part of his mother in the choice of a partner for her son. It was the mother's judgment regarding the suitability of the bride against his own misgivings that prevailed on him

to consent to marry this girl. The petitioner was very emotionally attached to his mother and therefore feared to displease her.

"In reality it is clear that some kinds of consent already contain within themselves the seeds of disruption,"[94] states the judge. He goes on to say that all the circumstances taken together made the consent of the petitioner a poorly motivated and weak one which the petitioner describes as "reluctant." Unfortunately, the law does not make distinctions regarding kinds of consent. "Should such kinds of consent, though difficult to 'measure,' be considered sufficient and valid? questions the judge.[95]

b. Virginity in the bride

Among the important Sri Lankan cultural values, virginity is a highly desirable quality in a bride. With proper assurance of other factors such as age and sometimes caste, there must also be an assurance of the virginity of the bride. No pre-nuptial tests of chastity are provided for in Sri Lankan culture although post-nuptial evidence is carefully scanned, especially among the village folk. Proof of virginity is a sign of good moral character.[96]

The absence of virginity, when discovered after

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[94] coram Fernando M., p. 4.

[95] Ibid.

[96] See above pp. 35-36.

marriage, is bound to bring about a grievous disruption of the conjugal partnership. Though it may not be expressed in words and explicitly formulated, virginity nevertheless forms a major factor in a "proposed marriage." The quality decisively affects the consent. One marries with the presumption that the bride is a virgin. A contrary situation is certain to create grave disappointment and lasting displeasure and even eventual disruption of the conjugal partnership. In the second case studied in this chapter the reason for the breakdown of the marriage was stated to be the lack of virginity of the girl.[97]

As noted earlier, error is also caused by deceit or fraud. The understanding of the relationship of these realities has a complex history. The next chapter in this dissertation will be devoted to a study and analysis of deceit or fraud.

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[97] See above p. 171.

CHAPTER IV

DOLUS: GROUNDS FOR NULLITY IN PROPOSED MARRIAGES

The object of our study in this chapter will be dolus, which is rendered as "deceit" or "fraud," in marriage. Canon 1098 of the revised Code of Canon Law states that dolus can lead to a defect of matrimonial consent and thus invalidate marriage.

The text of the canon reads thus:

> Can. 1098 - A person contracts invalidly who enters marriage deceived by fraud, perpetrated to obtain consent, concerning some quality of the other party which of its very nature can seriously disturb the partnership of conjugal life.[1]

A. Basic Notions Concerning Dolus

1. Translations of Dolus

Dolus may be translated as "deceit" or "fraud." The two terms in English seem to be interchangeable, although "fraud" has its original in Latin as fraus.[2] The Code of Canon Law in English translation prepared by The Canon Law

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[1] Can. 1098 - "Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit."

[2] Kevin W. Vann gives a short history of the two terms in his article "Dolus : Canon 1098 of the Revised Code of Canon Law," The Jurist 47 (1987) 371-393.

Society of Great Britain and Ireland uses "deceit" as the word of choice while the corresponding translation prepared under the auspices of the Canon Law Society of America renders it as "fraud." No doubt the two terms have had a complex history and it may be the reason why they are considered interchangeable. The New Catholic Encyclopedia states that deceit "is an attempt by word or deed, to have the falsification accepted as true."[3] The same source affirms that "Any act which brought harm to another regardless of the intention of the agent"[4] was considered fraud in early Roman law. Later law, however, also took into account the intention of the agent as a required element for the damaging action to be considered fraudulent.[5] The New College Latin and English Dictionary[6] giving the meaning of dolus as deceit, adds also "intentional deceit" and "wilful wrong"; fraus is rendered as "harm" and "damage" in addition to fraud.[7] The word "deceit" therefore seems to emphasize the intentional and willful element in the doer; "fraud" seems to stress the harm and the damage done to the victim. Both a deceiver and a victim are necessary for dolus.

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[3] New Catholic Encyclopedia, vol. 4 (Palatine, Illinois: Jack Heraty & Associates, Inc. 1981), p. 700.

[4] Ibid., vol. 6 (1981), p. 82.

[5] Ibid.

[6] John C. Traupman, The New College Latin & English Dictionary (New York: Bantam Books, 1981), p. 91.

[7] Ibid., p. 120.

Dolus has two very distinct meanings in law. It may mean malice that qualifies an illegal act committed with an awareness of its illegality when there is bad will. The 1917 Code of Canon Law defined it as "the deliberate will to violate the law."[8] It is in this sense that dolus is used in canon 1321 §1 in the revised code of 1983 where it is applied in penal law. The scope of our dissertation precludes an examination of this meaning of dolus in this chapter.

The second meaning of dolus signifies deceit or fraud perpetrated to induce error for the purpose of eliciting consent to a juridic act.[9] The consent would not be forthcoming if the person knew the truth of the situation. Classically dolus is defined as "every craft, deceit, trick or mechanism employed for the purpose of oppressing, cheating, deceiving another person,"[10] leading him into error. The focus of this chapter will be to analyze the invalidating effect of dolus in this restricted sense on matrimonial consent.

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[8] Canon 2200 "Dolus heic est deliberata voluntas violandi legem,...."

[9] For a fuller treatment of Dolus and juridic acts see Raymond Conrad Backes, "The Effects of Dolus on Juridic Acts in the 1917 Code and the 1983 Code," JCL Dissertation, The Catholic University of America, Washington, 1985.

[10] "Omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita." This definition of dolus by Labeo is reported by Pompedda. See Il Matrimonio nel nuovo Codice di Diritto Canonico, p. 61.

2. New Grounds for Nullity

Dolus is recognized as grounds for nullity of marriage in the 1983 Code of Canon Law. One does not find a corresponding canon in the 1917 code. In the new canon the legislator has come to grips with the personalist character of marital consent and has upheld a greater respect for the person's dignity as well. Thus the 1983 code implies an enlargement of the right to marry, in the sense that the law seeks to protect the marriage partners from unjust distortions in marriage consent and also more amply safeguard freedom of conscience.

Dolus in this context has to be understood as what it signifies in Roman Law: "a cooly calculated act of deception."[11] Dolus "is a deliberate act of deception involving forethought on the part of the deceiver. It is perpetrated to effect an error in another party which will cause that party to act in accordance with the will of the deceiver."[12]

3. Natural Law or Positive Law

An important issue that is relevant here is the current debate whether this ground of nullity has its origin in the natural law or purely in the positive ecclesiastical law. If it arises from natural law, it could be applied retroactively to marriages celebrated before the new law came into

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[11] Orsy, Marriage in Canon Law, p. 139.

[12] Philip T. Sumner, "Dolus As a Ground for Nullity of Marriage," Studia Canonica 14 (1980) 178.

effect, namely November 27, 1983. If on the other hand it is purely positive ecclesiastical law, then it cannot have any retroactive effect. Moreover if it is natural law, it applies also to non-Catholics. If it is positive ecclesiastical law, it is new and applies only to Catholics in virtue of canon 11, which says that "merely ecclesiastical laws bind those baptized in the Catholic Church or received into it...."[13] Opinion among canonists on this issue remains divided. Some argue for a positive law basis[14] while others expound a natural law origin.[15]

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[13] Can. 11 - "Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti ...."

[14] Ahern, p. 253. "Deception in the new canon will be a ground for nullity by positive law only and will therefore be a new ground for nullity."

Bersini, p. 105. "In tutta la tradizione canonistica, il dolo non ebbe mai valore invalidante le nozze. Si tratta quindi di una norma di diritto positivo, senza valore retroattivo (can. 9)."

In a private response to an inquiry sent to the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law dated February 8, 1986 (Prot.N.843/86), Cardinal Castillo-Lara, President of the Commission, stated that this canon was seen to be of positive law, and therefore could not be applied to marriages which occured before November 27, 1983, the date of the promulgation of the code.

[15] Urbano Navarrete, "Schema Iuris Recogniti 'De Matrimonio.' Textus et Observationes," Periodica 63 (1974) 638: "Videtur hoc caput nullitatis esse iuris naturalis, etsi theologi et canonistae in Historia hoc non perceperint."

José F. Castaño, "Il Dolus, Vizio del Consenso Matrimoniale: Commentario al can.300 dello Schema," Apollinaris 55 (1982) 673: "...il matrimonio 'celebrato' 'ex dolo', tale come viene configurato nel nostro canone, sarebbe invalido in forza dello stesso diritto naturale."

A recent Rotal decision coram Parisella affirms that can. 1098 of the new Code of Canon Law is within the realm of positive ecclesiastical law and is to be applied only to marriages entered after November 27, 1983.[16]

Genuine jurisprudence is fashioned and formed by a number of concordant sentences which a particular tribunal issued during a certain period of time or in a certain category of cases. There is very little Rotal material at hand at the moment. It is doubtful, therefore, whether its jurisprudence can be invoked in attempting to resolve this issue. However, unless and until this position becomes the consistent practice and jurisprudence of the Roman Rota and the common consensus of learned authors, opinion will remain divided whether canon 1098 is an interpretation of the natural law or whether it is purely positive law.

4. Distinction from error

Dolus and error are not the same but are distinct from

J. James Cuneo, "Deceit/Error of Person as a Caput Nullitatis," CLSA Proceedings 45 (1983) 166: "... the canon on deceit could be considered a written expression of natural law defined through previously developed ecclesiastical jurisprudence, and would apply to any act of consent. Date of marriage would not be pertinent."

Green, p. 392: "It is a genuinely natural law issue even though often not perceived as such by canonists and theologians."

[16] Monitor Ecclesiasticus 108 (1983) 502: "Iure tamen quo regimur... nullatenus eidem potest recursus ad can. 1098 novi C.I.C., qui cum sit positivi iuris tantummodo applicatur matrimoniis, post diem 27 novembris huius perlabentis anni 1983."

each other. Dolus is always closely linked to error, in the sense that if one has been deceived he will be in error. On the contrary one may be in error without being deceived and thus "error" can stand on its own.[17]

Nevertheless dolus and error are so intimately connected that whenever deception occurs it produces error in the victim, so that the two realities can be perceived as cause and effect.[18] Thus one may recognize deception indirectly in recent local as well as Rotal jurisprudence when instances of error acknowledged by the 1917 code as invalidating marriage resulted from fraud and deceit. In fact a number of cases that were decided by the Roman Rota and local tribunals on grounds of error of quality redounding into error of person could hardly occur without one party deceiving the other with regard to some quality.[19]

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[17] Castaño, "Il Dolus nel nuovo codice," pp. 660-661.

[18] Ibid., p. 660: "Il dolus causa direttamente errore nell'intelletto del paziente."

[19] S.R.R. Decisiones, 62 (1970) 370, c. Canals; 70 (1978) 13, c. Felice; 69 (1977) 147, c. Felice. Westminster, Studia Canonica 7 (1973) 129, c. Dunderdale; Ottawa, ibid., p.309, c. Charland; Toronto, Studia Canonica 11 (1977) 403, c. Cuschieri.

B. Developments Before Vatican II

1. Roman Law

In Roman law, according to the definition of Labeo adopted by Ulpian, dolus was "any craft or deceit employed for the circumvention or entrapping of another person."[20] Dolus is an exclusively juridical term. Classical Roman jurists considered dolus to be any action purporting to deceive a person. A contract under the influence of dolus was valid in Roman law, which means that dolus per se did not render an act null. The contract was binding despite dolus.

The Romans, however, in order to distinguish the juridical dolus from malice in their day-to-day business, added the epithet malus. Dolus malus indicated deliberate bad will in doing something wrong. Buckland says that in later law dolus was considered willful injury and remedies against dolus were created by the Praetor. Whatever damage that was caused had to be made good.[21]

2. Middle Ages

In the Middle Ages there was no unanimity or common consent among canonists concerning the juridical effect of dolus on contracts and marriage. Some Roman Law glossators

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[20] W.W.Buckland, A Text-Book of Roman Law from Augustus to Justinian (London: Cambridge University Press, 1932), p. 594.

[21] Ibid., pp. 594-595.

maintained that contracts entered in good faith were vitiated by dolus malus. Pope Alexander III commenting on marriage wrote about the invalidity of consent when caused by fear or coercion. Years later Sanchez interpreted coercion in this text of Alexander III to include dolus. In his opinion marriage was a contract in good faith. When it was brought about as a result of dolus, it was null by virtue of the law itself.[22]

A theory that was introduced by canonists of the Middle Ages and which was held in high esteem for many centuries concerned a category of contracts which could not be affected by dolus, namely contracts involving spiritual matters. It was argued that dolus did not affect the validity of the contract because it was to the advantage of the person deceived. It was considered to be dolus bonus in opposition to dolus malus. Thus in marriage the deceived party was receiving something good and beneficial to him, the sacrament of matrimony, and therefore deceit was not considered as causing its invalidity. In the Gregorian decretals two affirmations that speak of the irrelevance of dolus in respect of marriage declare that "although dolus intervenes in spiritual matters, the contract is binding;" "in such spiritual matters even the deception of the rival

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[22] Sumner, pp. 172-173.

does not invalidate the contract."[23]

The motivation for such an approach to so-called dolus bonus was this: in such a process one is not induced into evil; on the contrary it enriches and enhances his condition. The one in a better state should have no complaint. Prior to the 1917 code the same line of reasoning had been applied to the act of entering religious life.[24] Yet this theory was evidently abandoned by the 1917 code, for religious profession made under the influence of dolus was considered invalid.[25]

3. Sixteenth Century Canonists

The canonists of the sixteenth century, making much of the distinction between substantial error and accidental error, affirmed that if dolus brought about an error in the substance of a contract then such a contract was invalid. If the dolus was concerning some accidental qualities in a contract, that contract was valid because its substance remained intact.

It was not dolus itself that captivated the canonists' attention in dealing with the possible nullity of the

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[23] "Licet dolus interveniat in spiritualibus, tenet contractus"; "in huiusmodi spiritualibus etiam dolus adversarii non vitiat contractum" (Glossa, Spes, to c. 20, Dudum, X, III, XXXII), cited by Pio Fedele, "Il dolo nel matrimonio canonico: Ius vetus e Ius condendum," Ephemerides Iuris Canonici 24 (1968) 25.

[24] Andreas Bride, "De Errore Doloso in Contractu Matrimoniali," Apollinaris 39 (1966) 258-259.

[25] Canon 572 §1.4°.

contract. It was the error provoked by dolus that they were preoccupied with. Such an error would have to involve the physical person himself in order to bring about an error in the substance of the contract of marriage. Any other errors, such as qualities of a person would be considered accidental, and the marriage contract would remain valid.[26]

4. New Interest in Dolus as a Specific Ground

From the time of the promulgation of the 1917 code, there arose a new interest in the problem of the juridical relevance of dolus in marriage in canonical legislation. Many authors and commentators sought a recognition of dolus as a ground of nullity in marriage. Some canonists were of the opinion that it was necessary to have a new canon on defect of consent arising from dolus; others believed that a third paragraph added to canon 1083 on error would be sufficient.

Heinrich Flatten, a professor of Tubingen University, initiated a genuine campaign in 1957 in favor of introducing this ground of nullity in the canonical legislation with regard to matrimonial consent. He maintained that a marriage entered into by someone who was fraudulently deceived about an important quality of the other partner, should be considered invalid in law. He gave a number of examples of

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[26] Fedele, pp. 41-42.; Vann, pp. 374-375.

marriages contracted under the influence of dolus.[27]

The idea was followed by many canonists in Europe and elsewhere but the decisive thrust came on the eve of Vatican II in a proposal "from the German Bishops to modify canon 1083 to take dolus into consideration."[28] When bishops from all parts of the world were invited to propose to the commission any changes they desired in the law, several of them suggested that the invalidating effect of dolus on matrimonial consent should be included in the canonical legislation.[29]

The universities that were consulted made similar suggestions. The Faculty of Canon Law at Toulouse submitted that in the event of dolus being employed in marriage the existing legislation ordinarily would not admit its nullity. The faculty therefore asked for a broader interpretation of "error of person" in canon 1083 of the code or even a change

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[27] Henricus Flatten, Quomodo matrimonium contrahentes iure canonico contra dolum tutandi sint (Cologne: editio auctoris, 1961), pp. 12-13. Among his examples are deception about the sincerity of the promises in a mixed marriage; about a serious crime committed; about children born due to another relationship; about social status; about a serious illness; about sterility; about pregnancy.

[28] Vann, p. 376.

[29] Acta et Documenta Concilio Oecumenico Vaticano II Apparando: Series 1 (antepreparatoria), vol. 2, pt.1 (Typis Polyglottis Vaticanis, 1960), p. 722.

in the legislation.[30] A similar opinion was found echoed in the response submitted by the Gregorian University in Rome.[31]

The Congregation for the Discipline of the Sacraments responded in the same manner, supporting the invalidating effect of dolus when "the deceived party would not have married had he known the truth." [32]

C. Developments After Vatican II

1. Influence of Conciliar Teaching

The conciliar teaching on marriage found in the Pastoral Constitution on the Church in the Modern World Gaudium et spes seems to have prompted a new wave of speculation on the effect of dolus on matrimonial consent. For example the Roman Curia subjected the question of dolus in relation to matrimonial consent to a series of debates and discussions

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[30] Acta et Documenta, series 1 (antepreparatoria), vol. 4, pt. 2 (1961), p. 595. "Sed querit Facultas nonne verba legis sensu largiore interpretari aut aliquantulum mutari possent, ita ut invalidum diceretur matrimonium in quo persona socialis et externa totaliter aliena a persona vera fraudulenter substituta sit? Tale matrimonium nonne invalidum dicendum sit?"

[31] Ibid., vol. 4, pt. 1 (1961), p.43. "Introducendus autem videretur error dirimens matrimonium, quando ex dolo aut fraude tacetur comparte innocenti morbus venereus quo altera pars ante matrimonium laborabat, dummodo coniux innocens nullomodo contraxisset, si morbum alterius partis cognovisset."

[32] Ibid., vol.3 (1960), p. 95.

in the years following Vatican II.[33] Since marriage involves the emotional and psychological union of partners, honesty about one's identity and personality is essential. The presence or absence of a significant quality in one of the partners may destroy "the intimate partnership of life and the love which constitutes the married state."[34] Deceit about such a quality negates the mutual gift of self.

2. Developments in Rotal Jurisprudence

Rotal jurisprudence began to recognize error caused by fraud as relevant if it involved a quality which by its nature would seriously disturb the partnership of conjugal life. The quality had to be fraudulently concealed for the purpose of obtaining marital consent. It is also evident, however, that Rotal jurisprudence took into account not only the societal attitude regarding desirable qualities in spouses, but also the mind of the contractant, i. e. the value and importance which he attributes to the determined quality in regard to that person with whom he willed to contract marriage.[35]

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[33] Vincenzo Fagiolo et al., Il Dolo nel Consenso Matrimoniale: Annali di Dottrina e Giurisprudenza Canonica, II (Vatican City: Libreria Editrice Vaticana, 1972).

[34] Gaudium et spes, 48.

[35] S.R.R. Decisiones, 62 (1970) 370, c. Canals; 69 (1977) 147, c. Di Felice; 70 (1978) 13, c. Di Felice.

3. Discussions in the Revision Coetus

The Commission for the Revision of the Code of Canon Law seems to have accepted the aforementioned proposals of the bishops and the universities regarding the need to recognize the invalidating effect of dolus in marriage. This fact is evident from the very first draft produced by the Commission in 1971. The consultation process prior to Vatican II revealed a definite need for a specific canon, and accordingly the new ground of nullity was established not as part of the canon concerning error, but as one in its own right. The canon stated:

> A person contracts invalidly who enters marriage deceived by fraud, perpetrated to obtain consent, concerning some quality of the other party which of its very nature gravely disturbs the partnership of conjugal life.[36]

The coetus unanimously concluded that dolus must be admitted in the new legislation as invalidating marriage. Serious conditions, however, had to be determined which would demonstrate the presence of dolus. These conditions were three in number:

> a) that dolus was perpetrated to obtain matrimonial consent;
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> b) that it was concerning some quality of the other partner;

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[36] Communicationes 9 (1977) 373. "Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae nata est ad consortium vitae coniugalis graviter perturbandum, invalide contrahit" (c. 300).

> c) that this quality of the other partner of its very nature seriously disturbs the partnership of conjugal life.

It is not clear from the acts of the commission whether the dolus must be perpetrated solely by the marriage partner or whether it can be by another person.

The consultors differed on the reason for the nullity of marriage induced by dolus. Some held it to be the injustice that the deceit inflicted on the aggrieved party; others maintained that it was a defect of freedom of consent due to deceit.[37]

Although unanimity could not be reached at the May 18, 1977 meeting revising the original 1975 schema, opinions were expressed on "the qualities gravely disturbing the partnership of conjugal life." Deception with regard to a quality of a person would be so serious that it would completely destroy a marriage. Nevertheless, there was no clear definition of such a quality since some felt that a quality of minor importance may sometimes be subjectively considered as of major significance.[38]

Canon 300 of the original (1975) draft which specified dolus as a ground of nullity for marriage became canon 1052 in the 1980 draft, which stated that

> Whoever enters marriage deceived by fraud, perpetrated to obtain consent with regard to some

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[37] Communicationes 3 (1971) 76-77.

[38] Communicationes 9 (1977) 372.

> quality of the other partner which of its very nature gravely disturbs the partnership of conjugal life, contracts invalidly.[39]

In the final version the phrase "which of its very nature gravely disturbs" (quae nata est ad graviter perturbandum) became "which of its very nature can seriously disturb" (quae suapte natura graviter perturbare potest). It appears in the 1983 code as canon 1098.

> Can. 1098 - A person contracts invalidly who enters marriage deceived by fraud, perpetrated to obtain consent, concerning some quality of the other party which of its very nature can seriously disturb the partnership of conjugal life.[40]

The change in the wording seems to indicate that the quality itself by its very nature must be capable of disrupting the conjugal partnership, the consortium.

D. The 1983 Code

1. The Promulgated Text

In canon 1098 of the 1983 Code of Canon Law dolus is considered for the first time as a distinct ground of nul-

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[39] Communicationes 9 (1977) 373. "Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae nata est consortium vitae coniugalis graviter perturbandum, invalide contrahit."

[40] Can. 1098 - "Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit."

lity of marriage because of defective matrimonial consent. The main focus of this section of the chapter is examining that canon.

The canon can be divided into five parts. Yet no single part can be understood on its own without relationship to the rest. Since "ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context,"[41] an analytical study of the canon can clarify its proper interpretation. With this background it will be helpful to examine the text of the canon point by point.

a. "A person who enters marriage deceived by fraud"

This part of the canon appropriately brings into focus the precise concept of dolus: deceit or fraud. Dolus indicates deliberate deception with ill-will and bad faith. It directly affects the intellect of the person deceived; only indirectly, through the intellect, does it affect his will.[42] Dolus causes an error in the intellect of the person deceived and because of that error, the person decides to

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[41] Can. 17 - Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam;....

[42] Benito Gangoiti, "Dolus, vel melius, error constituitne titulum sive causam nullitatis matrimonii?" Angelicum 50 (1973) 389. "...actio dolosa a decipiente elicita terminatur, et quidem cum metaphysica necessitate, in intellectu, in creatione iudicii practici erronei et in sphaera voluntatis nullatenus accessu directo gaudet,sed mediate et indirecte, scilicet per iudicium practicum erroneum."

consent and does consent. Therefore dolus is a direct cause of error, and indirectly it influences the act of matrimonial consent, for the deceived individual would never have consented had he not been inveigled by dolus.

In the event of dolus two persons are involved: the one who deceives and the one who is deceived; there is the deceiver and the victim; one active, the other passive. The former causes the deceit as a free external agent, and therefore in him deceit is an act of the will. On the other hand, the latter is subjected to deception; in his intellect an error has been caused by deceit, and this error is an act of the intellect and not of the will. The consent of the person deceived proceeds directly from error.

In reality, then, the defect of consent addressed in canon 1098 is a defect on the part of the intellect because the consent proceeds directly from error, which is due to deception caused in the intellect of the one deceived. This is the reason why authors often speak of "deceitful error."[43]

The second characteristic feature of dolus is that it is deliberate. It presupposes a premeditated and well planned intention to deceive, in the person who causes the deceit; in other words, "a positive action upon the part of the deceiver, deliberately laying a snare to entrap the vic-

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[43] Vann, p. 384.

tim."[44] In a nullity action, one must be able to demonstrate that "a deliberate cunning trick was pulled off to make the party misjudge a quality of the person,"[45] and that the deceiver acted with definite foreknowledge and determination.[46]

b. "Perpetrated to obtain consent"

The deceit must be perpetrated with the definite purpose of obtaining the consent. The motive which is at the base of the defect of consent in canon 1098 seems to be the deceiver's deliberate intention of obtaining the consent. In fact, as in the classical definition coming down from Labeo, dolus in the canon means "cheating, tricking, deceiving another person."[47] In this context the meaning of dolus is still more precise: it is not sufficient merely to deceive fraudulently, or to deceive for some other purpose. The dolus as required in the canon must be caused with the definite intention of obtaining matrimonial consent. Any other intentions of the deceiver are irrelevant with regard to this canon.

The phrase, "perpetrated to obtain consent," indicates

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[44] Ellsworth Kneal, "A Proposed In Iure Section for the New Statute of Fraud," The Jurist 42 (1982) 218.

[45] Cuneo, p. 165.

[46] Kneal, p. 218.

[47] Pompedda, p. 61. "Gia il diritto romano,secondo la definizione di Labeone, considerava dolo 'omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita',..."

that the finality of the deceit is indeed specific, i.e.the obtaining of consent. "The words 'perpetrated to obtain consent' restrict the scope within which deceit can be admitted as grounds of nullity in the judicial forum."[48]

c. "Of the other party"

Marriage is brought about through the consent of the two parties: the future husband and wife. Dolus in the classical understanding of the term seems to require that one party deceive the other. In other words, only the parties themselves are victims of the deceit. However there is a solid opinion that while the person deceived by dolus is always one of the contracting parties, the one who causes it can very well be a third person. Indeed it is irrelevant that the one causing the deceit be the other contractant. The canon does not exclude a third person who may be anyone having some interest in the prospective marriage.

"There are many ways of deceiving a person," says Ladislas Orsy, "from the telling of an outright lie to the gullible, to the setting up of an elaborate trap to mislead

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[48] Urbano Navarrete, "Canon 1098 De Errore Doloso: Estne Iuris Naturalis an Iuris Positivi Ecclesiae?" Periodica 76 (1987) 176-177. "...concludere posse putamus verba 'dolo ad obtinendum consensum patrato,' c. 1098 functionem exercere restringendi ambitum intra quem in iure Codicis caput nullitatis ex errore circa qualitatem 'quae suapte natura consortium vitae coniugalis graviter perturbare potest' in foro iudiciali admitti potest."

the knowledgeable."[49]

Ultimately what counts is that the resulting matrimonial consent proceeds from deceitful error. The consent of the partner would never have been expressed without the influence of that deceit. Whether it was caused by the other partner or by another person is beside the point.[50]

Parents or guardians who deliberately conceal the presence of a serious illness or any such defect in their son or daughter even by their intended silence, are involved in deceit in the sense of this canon; for their purposeful silence is to obtain consent "of the other party." Protection of the freedom of the individual in respect to marriage is the clear intent of the canon.[51]

d. "Concerning some quality of the other party"

The canon deals with a quality which ought to be in the other partner. It is first and foremost a quality of the person, and in this respect it coincides with the quality of the person in the canon on error. But the quality of the person taken into consideration in the two canons is different. In the case of error, it is not necessary that the quality be capable of seriously disrupting the partnership of conjugal life, whereas when dealing with the quality as

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[49] Ladislas Orsy, "Matrimonial Consent in the New Code: Glossae on Canons 1057, 1095-1103, 1107," The Jurist 43 (1983) 50.

[50] Communicationes 3 (1971) 77.

[51] Kneal, p. 218.

object of dolus it is required that the quality be capable of disturbing the partnership of conjugal life.

Besides, the quality in the canon on error has to be "directly and principally" intended,[52] a thing that is not required in the canon on dolus. On the contrary the quality in this canon must be such that "it is capable of seriously disturbing the consortium of conjugal life," and this by force of the very nature of the quality.

The canon is explicit about the quality of the object of deceit. Such a quality must be in the other partner. A quality therefore which concerns only a person who is closely related to the partner, and which therefore is capable of seriously disturbing the partnership of conjugal life, apparently has to be excluded as the object of deceit, invalidating matrimonial consent. It is debated, however, whether such a closely associated quality could not be admitted as pertinent to the canon.[53]

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[52] "...haec qualitas directe et principaliter intendatur." Can. 1097.2.

[53] Castaño, "Il Dolus nel nuovo codice," p. 674. "C'e ancora un problema a proposito della formula alterius partis nel suo significato specifico di comparte. Non vediamo perché una qualità che non appartiene alla comparte ma ad una terza persona molto vicina ad essa - ad es. alla suocera - non può anche essere gravemente perturbatrice del consorzio della vita coniugale, e quindi rendere invalido tale matrimonio. Il testo però è tassativo: la qualità in questione deve essere della comparte."

Serrano Ruiz, p. 646. "La figura del dolo è tipificata per rapporto ad una qualità dell'altra parte: il che limita le possibilità di applicazione oltre la persona dell'altro coniuge...."

e. "Which of its very nature ..." (suapte natura)

The phrase "a quality which of its very nature gravely disturbs" (nata est graviter perturbandum) contained in the 1980 draft of the canon was changed into "a quality which of its very nature can seriously disturb" (suapte natura graviter perturbare potest) in the promulgated text of the code.

The canon is applicable to the situation when deceit has taken place with regard to "the presence of a bad quality or the absence of a good quality which is potentially disruptive of the peace and harmony of the conjugal life."[54]

As regards the type of quality and its effect in disrupting the conjugal partnership there could be a certain variance or relativity. What might adversely affect the partnership of one couple may have a minimal impact on another relationship.[55] The important phrase in this context is "of its very nature" (suapte natura); that is, in the particular quality there is the potential for the destruction of a marital relationship. The gravity of the quality may be objective or only subjective. A quality is objectively grave when the community considers its concealment a grave injustice to the other party resulting in disastrous consequences. A quality is subjectively grave when the deceived party has an unusual esteem for a particular attribute or personal characteristic, which, while perhaps

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[54] Orsy, Marriage in Canon Law, p. 139.

[55] Orsy, "Matrimonial Consent," p. 51.

light in itself, is nevertheless seriously sought after by that person.[56]

An objectively grave quality would destroy the partnership in any marriage while a subjectively grave quality would destroy it in a particular marriage. However, it will be almost impossible to determine in the concrete an objectively grave quality which, of its very nature (suapte natura), is capable of seriously disrupting the conjugal partnership. Some subjectivity therefore cannot be entirely excluded when considering the implications of the teachings of Vatican II as regards the marital consortium.

It may be opportune here to cite the opinion of one consultor of the commission for the revision of the code. According to this consultor, canon 300 of the 1975 schema does not altogether exclude qualities of minor importance, which may be subjectively considered as qualities of major importance.[57] However, qualities which are not strictly connected with conjugal life cannot be considered as pertaining to this context.[58]

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[56] Wrenn, p. 79.

[57] Communicationes 9 (1977) 372. "...locutio quae adhibita est in canone 300 (qualitas quae nata est ad consortium vitae graviter perturbandum) non talis est ut excludat omnino qualitates minoris momenti quae tamen subjective considerantur maximi momenti."

[58] Pompedda, p. 67. "...non può trattarsi di qualità che non siano, per ragioni connaturali, strettamente connesse con la vita coniugale."

In ecclesiastical jurisprudence much would depend on judicial discretion.[59] Rotal judge Lucian Anné indicates a threefold criterion for judges which may be significant in assessing the legal relevance of the quality:
(a) natural law requirements; (b) specific cultural needs and expectations; (c) nature and personality of the two parties to the particular marriage.[60]

A personal quality which gravely disturbs the intimate sharing of life or the fulfillment of the obligations of marriage seems to be the type of quality which, when fraudulently concealed in the deceiver, would invalidate the marriage.[61]

Moreover, the clause "which can seriously disturb" indicates clearly that the canon deals with the possibility of such disturbance. "The law does not even require that the partner should act out of it; its capacity to disrupt the consortium is enough to invalidate marriage."[62]

The last characteristic of this quality is the gravity necessary seriously to destroy the marriage partnership. The legislator, as in canon 1103 on fear, demands gravity but does not determine its degree. Every case that one encounters may be different, and therefore the same reality

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[59] Sumner, p. 193.

[60] S.R.R. Decisiones 61 (1969) 174, c. Anne.

[61] Ibid.

[62] Orsy, "Marriage Consent," p. 51.

can be grave for one and not for another. "Sometimes the gravity can be such that it damages the natural law. It is necessary to evaluate each singular case."[63]

The legislator has left it to canonical doctrine and the discretion of the judge to determine the degree of gravity in concrete cases. The final outcome would be that gravity is to be assessed not only objectively but even subjectively.

f. Summary

Since it has to be understood always in its totality, canon 1098 can be considered as dealing with a deliberate act of deception on the part of either party or even on the part of a third party involved, with the resolute intent of obtaining matrimonial consent. The object of deception is specific: the presence of an undesirable quality or the absence of a desirable quality, a quality which has the capacity by its own nature to destroy the partnership of conjugal life. This quality may be objective, in the sense that it is held in high esteem by the whole community, or subjective, when for the individual party deceived the quality was of particular prestige and value.

There is almost unanimity among authors with regard to the relationship of error and dolus, though there may be various opinions in respect to their invalidating effect.

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[63] Bersini, p. 105. "A volte però l'inganno può assumere una gravità tale da ledere il diritto naturale. Bisognerà valutare i singoli casi."

In the 1917 code deceit did not have the capacity of invalidating marriage. The present canon remedies the situation. However, there are also issues which are still debated with regard to the meaning of the canon.

There is the debate as for the quality which concerns not the partner himself as such, but only a person who is closely related to the partner, and which is capable of seriously disturbing the partnership of conjugal life. The question is raised whether such a closely associated quality could not be admitted as pertinent to the canon.

Another issue that has drawn the attention of the canonists is the type of quality that is capable of seriously disrupting the conjugal partnership. While some would like such qualities to be enumerated, others see that no exhaustive list of such qualities could ever be drawn up.

2. Related Concepts

a. Dolus and Force and Fear

Similar to force and fear, dolus must originate in some exernal agent. Dolus consists in inducing mistaken conclusions on one party for the purpose of deceiving; fear influences consent when circumstances render one of the parties morally incapable of resisting the will of the other. In both instances the consent is not the genuine expression of one's intention. Dolus influences the intellect of the victim in a cunning strategy and induces an error which will be the immediate cause of consent, thus

affecting the will only indirectly; force on the other hand attacks the will directly and not the intellect.

b. Dolus and Error

Dolus is one of the causes from which error originates, but not the only cause, for error also can originate from ignorance, inadvertence, and negligence.[64] Whenever there is dolus, error is also bound to be present. Thus error always accompanies dolus, but not vice versa as error can exist independently of dolus. When in fact dolus exists, it influences the intellect of the one deceived; as a result he is induced into error which finally will be the immediate cause of consent. The perpetrator thus uses entrapment and manipulates the consent of the other. As a consequence, there would not be a mutual gift of self or marriage.[65]

3. Significant Commentators

Canonists for years debated the invalidating effect of deceit and its relationship to the error of quality, which was dealt with in chapter three. As we have explained earlier in this chapter, for dolus to have an invalidating effect it must cause an error, which would be in certain circumstances sufficient in itself to invalidate marriage. We will now examine the way selected authors view the new canon on dolus.

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[64] Castaño, "Il Dolus nel nuovo codice," p. 661.

[65] Sumner, p. 179; Vann, p. 384.

a. José F. Castaño

Commenting on the canon, J. F. Castaño states that for the first time dolus is considered in canonical legislation as invalidating matrimonial consent. The ancient authors spoke of deceitful error (error dolosus), when error was the result of dolus. Many authors have raised the question, why there is a need for another canon different from the canon on error when in reality dolus is nothing other than one of the possible causes of error. Accordingly, when error is caused by dolus the canon on error would have been sufficient to deal with the deceitful error. Castaño responds by stating that, given the restrictions on the object of error in canon 1083, there were two feasible methods of expanding the possibilities of consensual defects: either to extend the scope of the object of error in canon 1083, by omitting the phrase about the quality "which of its very nature gravely disturbs the partnership of conjugal life," or to introduce a new canon on dolus with the above-mentioned quality as the object and leaving the canon on error without any change. The Commission preferred the latter solution.

Dealing with the clause "deceived by fraud" Castaño observes that it matters little whether deceit was employed by the contractant or by another person. The reason is, deceit causes an error in the intellect of the person who consents and thereby the consent is always defective, in-

dependently of the person who employs the deceit.[66]

Castaño also raises the question why a quality, that pertains to a third party closely related to the other partner, when fraudulently concealed, could not be considered capable of seriously disrupting the partnership of conjugal life. Though the quality in question may not pertain to the conjugal life materially, it certainly may affect it emotionally having a decisive repercussion on the course of conjugal partnership.[67]

b. Mario F. Pompedda

Pompedda, commenting on the quality and purpose of deceit in canon 1098, remarks that both parties in a marriage may be at the same time passive subjects of deception; for a third person or persons may act in such a way with cunning intent, as to induce each of the marriage partners reciprocally into error concerning a quality of the other. What is specific here is that deceit is employed in order to obtain consent to marriage. It is intention that is underlined in the canonical text: deceit was precisely employed for the purpose of inducing one to elicit matrimonial consent.[68]

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[66] Castaño, "Il Dolus nel nuovo codice," pp.671-672.

[67] José F. Castaño, "L'influsso del dolo nel consenso matrimoniale," Apollinaris 57 (1984) 581.

[68] Pompedda, p. 65.

c. Julio Manzanares

Manzanares says that dolus influences matrimonial consent directly and immediately through the error it prompts and therefore it is caused only indirectly by dolus itself.

He remarks that the agitation for the present canon on dolus to be included in the new code had its origin in the beginning of the decade of the sixties. Manzanares is of the opinion that the inclusion of dolus among the defects of consent in marriage is a matter of ecclesiastical law.

The canon is prompted by the grave injustices caused to individuals in certain circumstances, in such an important event in life as marriage. He enumerates the following characteristics of dolus:

> 1) The dolus must be premeditated and planned in order to obtain consent.
>
> 2) It must touch upon a quality that is actually present in the person.
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> 3) Such qualities are all those that are in direct opposition to canon 1055 or are able to impede its development.[69]

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[69] J. Manzanares, p.532. "Su inclusi n entre los defectos del consentimiento es de derecho ecclesi stico y viene motivado por las graves consecuencias e injusticias que, en un asunto tan importante cual es el matrimonio, producir a un consentimiento matrimonial prestado en tales circunstancias.

"Los rasgos que configuran este defecto de consentimiento son los siguientes:

"a. el dolo debe ser preparado para conseguir el consentimiento matrimonial;

"b. ...debe versar sobre una cualidad del que asi act a;

"c. Dichas cualidades ser n, ...todas aquellas que se

He goes on to emphasize the importance of recognizing not only the objective gravity but even the subjective gravity of the quality. In this connection the value attributed to the quality by the deceived party should be taken into account and the circumstances in which dolus might have occured should be given due consideration. One must keep in mind that even subjective gravity of the quality has to be given due recognition because "marriage consent ought to be as conscious as possible."[70]

d. Thomas P. Doyle

Doyle seems to find the genesis of dolus in the normal development of jurisprudence on error of quality. Jurisprudence, he says, gradually admitted the invalidating effect of deceit about an important quality. The mutual consent in marriage entails the exchange of persons themselves. Such an exchange in fact involves the emotional and psychological union of parties. It follows, then, that honesty about one's identity and personality is indeed essential if there is to be a genuine joining of wills. Doyle lists four essential elements that must be proved when dolus is admitted as grounds of nullity. It must be

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oponen o pueden impedir el desarrollo o dificultar el cumplimiento del c. 1055...."

[70] Manzanares, p.533. "...atendida la importancia del matrimonio, exige que el consentimiento matrimonial sea lo más consciente posible ...."

demonstrated that:

> 1) dolus was deliberately perpetrated in order to obtain consent;
>
> 2) the quality was real, grave, and present at the time of consent;
>
> 3) the quality was definitely unknown to the other party;
>
> 4) the discovery of the absence or presence of the quality did precipitate the end of the marriage.[71]

e. Francesco Bersini

Bersini remarks that in the past, error provoked by dolus did not invalidate marriage. Taking an example from a Rotal decision coram Canestri on November 22, 1941, he cites a case in which a woman, in order to induce a person who was unwilling to marry her, falsely declared that she was made pregnant by him.[72] The man who was inveigled by the deceit would not be able to obtain a declaration of nullity after the marriage on grounds of dolus. He would have to state that he placed a present condition of her being pregnant if he were to prove the invalidity of the union.

According to Bersini four elements must be present simultaneously in order to declare a marriage invalid on grounds of dolus.

> 1) There should be fraud or deceit, which exists when a person knowingly and willingly feigns a definite quality.

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[71] Doyle, p. 781.

[72] S.R.R. Decisiones, 33 (1941) 869, c. Canestri.

> 2) The deceit should be geared to obtaining consent.
>
> 3) It must be about a quality of the other party, not about circumstances, facts or events that do not pertain to the quality. Such a quality should not concern a third person such as the parent of the spouse, but rather the person contracting marriage.
>
> 4) This quality, of its own nature should be capable of seriously disturbing the consortium of conjugal life.[73]

Bersini seems to differ from Castaño and others when he says that such a quality should not concern a third person such as the parents of the spouse, but only the contractant. He seems to exclude totally any legal relevance of such a quality even if it disturbs the conjugal partnership.

f. José M. Serrano Ruiz

Serrano Ruiz comments on the limits of the possibility of a quality in a person closely related to the other party, being capable of seriously disturbing the partnership of conjugal life. He indicates that the pattern of dolus is such that it is related to a quality of the other party. The possibility of considering a quality of a person beside

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[73] Bersini, p. 104.
"a. Che si tratti di un inganno. L'inganno -o dolo- si ha quando la persona consapevolmente e volutamente finge una determinata qualità.
"b. Che l'inganno sia predisposto per carpire il consenso.
"c. Che l'inganno verta sulla qualità dell'altra parte, non su circostanze, fatti o avvenimenti che non riguardano una qualità. Tale qualità non deve riguardare altre persone, come potrebbero essere i genitori della comparte, ma la persona che deve contrarre matrimonio.
"d. Che l'inganno sia di tale natura da turbare gravemente il consorzio della vita coniugale."

the spouse is excluded, at least in a direct manner by extension to the circumstances of the marriage. In questions of deceit Serrano says, it is useful to consider its relationship to violence and coercion which runs as an undercurrent to the deceit. The latter spurs the will of the other to consent in consequence of a deliberately falsified knowledge.

It is natural that deceit would impair marriage consent when truth and sincerity are recognized as elements that are significant in a personal relationship rooted in the natural law itself. Deceit is incompatible with marriage, he says. In his opinion the entire structure of the conjugal pact is founded on two basic principles: there is the sacramental nature of marriage that requires more than just the matter and form, the very intention of the partners; on the other hand, there is the content of the covenant, which consists in the mutual giving and acceptance of the spouses. In a situation where there is deceit mutual gift of self or acceptance cannot be realized since there is a "lack of conformity with the reality."[74]

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[74] Serrano Ruiz, p. 646. "Una incompatibilità del dolo con il matrimonio si desumerebbe cosi da due principi basilari, sui quali si fonda tutta la struttura del patto coniugale: da una parte, la sua natura sacramentale, nella quale per di più la materia (e anche la forma) è la stessa intenzione dei nubenti; dall'altra il contenuto stesso della alleanza, che consistendo nella mutua donazione e accettazione dei coniugi non sussisterebbe nel caso di una tradizione e accettazione inesistente per mancanza di conformazione con la realtà."

g. Ladislas Orsy

The evident purpose of the canon, says, Ladislas Orsy, is the protection of the innocent from deception in marriage. Some of the concepts in the canon are obviously new and because of this novelty they are hard to define. Clarification of these will go hand in hand with the development of jurisprudence.

In canon 1084 §3 the code mentions sterility neither prohibiting nor invalidating marriage and adds a clause referring to the canon on dolus (c. 1098). The inference is that there could be "fraudulent misrepresentation concerning the fertility of the prospective spouse."[75] Such a marriage would be invalidly contracted, since a party resorts to deception.

Orsy points out that in comparison with the 1917 code there is a greater balance in the 1983 code. The former in fact offered no relief to the victim of dolus, except that of separation. "It was concerned with the protection of the institution of marriage to such a degree that it left no room for the protection of an innocent victim of deception."[76]

4. Conclusion

a. The canon on dolus as grounds of nullity of marriage is absolutely new since it has no parallel in the 1917 code.

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[75] Orsy, Marriage in Canon Law, p. 140.

[76] Ibid.

In the years following Vatican II canonists and theologians have prompted a reconsideration of dolus in relation to matrimonial consent. This influence was exerted by their scholarly discussion of conciliar documents, especially the teaching on marriage found in Gaudium et spes.

Around the same time error caused by fraud was recognized in jurisprudence as relevant, if it involved a quality which by its nature would seriously disturb the conjugal partnership. Rotal jurisprudence took into consideration the gravity of the error that brought the termination of the marriage partnership, with the quality having been fraudulently concealed in order to obtain the marital consent. These two factors, namely conciliar teaching and Rotal jurisprudence, were the main sources of this canon.

b. Canon 1098 speaks of dolus as a deliberate act of deception on the part of either party in a marriage or even on the part of a third party involved, with the intention of obtaining matrimonial consent. The main features of the canon are that there is deception and it is intentional. It is perpetrated to effect an error in the other party which will cause that party to act in accordance with the will of the deceiver, and bring about marriage. The object of deception is specific: a quality which of its own nature is capable of destroying the partnership of conjugal life. This quality may be objectively grave, in the sense that it is held in high esteem by the whole community or subjec-

tively grave which means that for the individual party deceived, the quality was of particular interest and value.

c. Although the text of the canon seems to restrict the quality "which of its very nature can seriously disturb the partnership of conjugal life" to the other party, there is a well respected opinion that such a quality could concern a third person such as the parent of the spouse. The coercion that underlies the deceit, in order to cause the other party to elicit consent, should be given the consideration it deserves in all cases of deceit.

The gravity of the quality is another issue which remains unresolved and is therefore subject to some debate. Authors have already begun to point out some of these qualities which by their nature would gravely disturb the conjugal partnership. Some are of the opinion that the quality should be contrary to the basic values of the conjugal partnership rooted in canon 1055.[77] But then, the threat that dolus poses to such a partnership can vary from one couple to another. Some subjective element is unavoidable.

E. Specific Application of Dolus to "Proposed Marriages"

1. A Hypothetical Case

Dolus is admitted in jurisprudence as a ground of marriage nullity since the promulgation of the 1983 code. At the moment there is hardly any Rotal jurisprudence in this

[77] Manzanares, p. 532.

area. Consequently we do not have any tribunal decisions on dolus originating in Sri Lanka which could have been studied in this dissertation.

However, a case of a non-Christian who received baptism as a matter of convenience and whose marriage was declared null and void by the Sacred Congregation for the Doctrine of the Faith[78] is of interest to us.

The Chancery of the diocese of Chilaw submitted the case with appropriate documentation to the Sacred Congregation for the Doctrine of the Faith. The Sacred Congregation in plenary session decreed that the marriage between Titus and Jane was null and void, due to the impediment of disparity of cult, as baptism was simulated by him.

The same case could be admitted by the tribunal today on grounds of dolus. Here is how such a hypothetical case on dolus could be approached.

a. Outline of the Case

The female petitioner Jane, a Catholic from a wealthy family in the coastal belt of the country was proposed by the marriage broker to a young man Titus professing a non-Christian religion, from a Kandyan family in the interior. Jane's parents and she herself were staunch Catholics. Titus, on the other hand was a fanatical Buddhist. Although his family background and education had been totally non-

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[78] Rescript of the S. C. for the Doctrine of the Faith, May 29, 1968.

Christian, he took instruction and was baptized a Catholic a month before his marriage. He appeared to practice the Catholic religion well after his baptism. Indeed he was very keen on receiving a handsome dowry from the bride. On the day of the marriage, while still on their honeymoon, Titus admitted that he did not want to be a Catholic, neither did he want his wife to practice as a Catholic. He threw away her rosary from the window of the hotel where they were spending their honeymoon. Later he took her to the Buddhist shrine in the vicinity of the city and insisted that she pay homage to the Bo-Tree according to the Buddhist rites. She refused and thus the marital partnership commenced on a sour note.

In spite of feeling shocked and resentful, Jane persevered with the marriage. One child was born, a girl who could not be baptized due to the obstinate attitude of the father. Resentment grew between the couple fairly quickly. He never practiced the Catholic faith nor did he permit her to do so. Life became so intolerable she decided to end the marital partnership and return to her parental home with her child, never to go back to him again.

The petitioner states that the respondent was baptized but he was in bad faith. Since she was from a very happy but strict Catholic background the young man had been told that she would not marry him unless he became a Catholic.

b. The Law

The new Code of Canon Law states that:

> A person contracts invalidly who enters marriage deceived by fraud, perpetrated to obtain consent, concerning some quality of the other party which of its very nature can seriously disturb the partnership of conjugal life (Can. 1098).[79]

c. Argument

1) In this particular case dolus was committed by the young man who had a deliberate intention to deceive by "positively laying a snare to entrap the other,"[80] namely by taking instruction in Christianity in view of baptism and by going through the ceremony of baptism as if all were well. There was an intention to deceive.

2) The deceit was aimed at obtaining the marital consent of the petitioner. If she had known the truth there would never have been a marriage, for her family has been traditionally fervent Catholics loyal to the Church. Besides, since this is a "proposed marriage," the strength of her parents' influence over their daughter is taken for granted.

3) The deceit concerns a quality in the deceiver. Titus remains a professed Buddhist, but pretends to be

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[79] Can. 1098 - "Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit."

[80] See note 46.

Catholic since he had been told that the girl would marry only a Catholic. The quality concerned is that the young man be Catholic.

4) The petitioner in fact had been deceived. She and her parents genuinely believed that Titus would remain a devout Catholic since he practiced his new religion well enough after his baptism for one full month to everyone's satisfaction. The petitioner was in error as a result of the cunning strategy executed by the young man.

5) It is clear that the quality disrupted the partnership of conjugal life. For a girl who had been very much under the influence of devout Catholic parents it was extremely difficult to cope with the sharp religious disparity between herself and her spouse. The deceit perpetrated by the young man to secure the consent of the petitioner was such as to disrupt seriously the marriage partnership.

2. Error and Dolus in a "Proposed Marriage"

This marriage may be invalid on the basis of error of quality if the quality was directly and principally intended. But the fact is that the question never surfaced. The young man only had been told by the marriage broker that the girl's family was so loyally Catholic that they might not agree to the marriage if he wanted to remain a Buddhist. The petitioner was in error provoked by the deceit of the young man.

As has already been mentioned, deceit depends for its

legal relevance upon its effect, the error induced in the other party. A deception that has been attempted, but unsuccessfully, is no deception in the juridical sense. There is no deceit, therefore, unless error is successfully provoked.[81]

In the canon the quality about which there has been dolus plays a major role. What the canon requires is not just an illusory quality, but a quality which would render a normal conjugal life, which the constitution Gaudium et spes calls an intimate community of life and love, impossible or extremely difficult.

The emphasis therefore is on the partnership of conjugal life, which is achieved through equal participation in everything that constitutes the mutual gift of self in the spouses. There cannot be a mutual gift of self when one is led to error through deceit by the other. Marriage and deceit are incompatible.

3. Some Considerations for Tribunals

a. In the investigation for information with regard to dolus in "proposed marriages" the tribunal should reassure itself that the quality was real in the person and not illusory, and was potentially disruptive of the marital relationship.

b. Information as to the perpetrator of the deceit, his purpose, and the reason for doing so are significant in

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[81] Ahern, p. 246.

the proof. In our case the purpose seems to be the large dowry and enormous wealth, besides the social status the girl would bring with her.

c. The witnesses should be able to supply much clarification on the pivotal question whether the marriage would have taken place if the petitioner had been aware of the real situation before the marriage.

d. The person must in fact be deceived at the time of marriage, as is exemplified in our hypothetical case. Shock and disappointment would be natural on discovery of deceit. Marriage becomes intolerable and the end of the partnership is seen as imminent.

CONCLUSIONS

A. Situation of "Proposed Marriages" in Cultural Context

1. Culture and Custom

From the foregoing considerations it can be deduced that "proposed marriages" in Sri Lanka are part and parcel of its people's culture. They are notably distinct from "arranged marriages" of some other countries in the East and "romantic marriages" of the West. Sri Lanka, in spite of being an island, has never been isolated. It has been subjected to foreign invasions and occupations for about four hundred and thirty years. In spite of war and strife which robbed the nation of its independence, both political and economic, its culture survived. This is evident from the history of the Kandyan kingdom which withstood successfully for over three hundred years the full brunt of the military power in turn, of the Portuguese, the Dutch and the British. Fortunately a great deal of historical and cultural information about the Kandyan kingdom is available, and it amply reveals that the cultural institutions were preserved and kept alive among the people.[1]

2. Social Habits and Practice

In the context of Sri Lankan culture the "proposed marriage" situation is a reality even today. A "proposed marriage" has many requisites among which are endogamy and

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[1] See above pp. 9-14.

family background, reputation and character, personality and complexion and so forth. Parental intervention is seen as a natural right, and many marriages take place within the limits of one's own kin group or descent. For various reasons marriages are frequently contracted with other unrelated families. In such an instance the pending marriage becomes a matter of interest to a wide circle of people and is the subject of elaborate negotiations, conducted in particular by the parents. The initial contacts are made through mutual friends or relatives, or a professional marriage broker. Among the conventional considerations in the marriage are property or dowry prospects, age and caste. The chastity of the prospective bride and good reputation of either party are matters of concern to both families. Providing a virgin bride is a major responsibility of the parents and the groom's family has the right to inspect the sheet used on the marital bed on the first night for proof of virginity.

The size of the dowry is up to the discretion and resources of the parents. It is negotiated formally and agreed upon before the marriage and is paid on the day of the marriage. The amount of the dowry is related to the economic standing and prospects of the bridegroom. Members of the more prestigious professions receive larger dowries than others. In order to establish a connection with a particularly influential or important family, parents may

sometimes give the major portion of the inheritance of all their children as a dowry for one.

Catholics in certain parts of the country continue to adhere to traditional cultural elements in marriage customs and ceremonies. Yet it is apparent that Christian ideals have influenced numerous marriage customs in the coastal belt of Sri Lanka.[2]

B. Reverential Fear, Error and Dolus in Proposed Marriages

1. Relationship with each other

Matrimonial consent is an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish marriage.[3] It is an act of the will whose object is marriage: the exchange of conjugal rights and duties between two persons. By consent, therefore, the parties give themselves for marriage; there is a giving (donatio) of self and an acceptance (acceptatio) of the other. The validity of the union depends upon the reality of the consent. Hence the consent is marked by certain characteristics and if these characteristics are deficient, then the reality, namely the consent, is deficient.

a. A few words are called for regarding the relation-

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[2] See above pp. 40-42.

[3] Can.1057 - §2. Consensus matrimonialis est actus voluntatis, quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium.

ship among the three grounds of nullity dealt with in this dissertation. Reverential fear can invalidate marriage because it impairs the freedom of the will. Reverential fear acts directly on the will; dolus or deceit on the other hand coerces the will indirectly through error, through the intellect which has been induced into a mistaken judgment that moves the will to choose marriage. Like reverential fear, deceit is also extrinsic; it is inflicted by an external agent.

In contracting marriage the two parties must be free agents. If freedom is in some way obstructed either from outside or from within, the parties cannot be considered free, and a marriage entered into eventually may be invalid. To be a genuine expression of the will, consent must be true, free and deliberate, externally manifested and mutual. When grave fear is brought to bear on the contractant, his consent is not a free expression of his will. Although consent may exist, it is deprived of the freedom required by law.

Coercion or force exists when the consent of one of the parties has been extorted by threats or violence. As often happens in reverential fear situations, the consent is given when the mind is disturbed and distressed. Parents may force their children who are actually unwilling, into contracting a marriage that was proposed by them. Misuse of parental authority can lead to grave fear which would in-

validate the marriage. If the children, in spite of their real aversion to marriage give into the pleading of the parents and contract the marriage, lest they encounter their anger and indignation or even the loss of parental love, then the children are robbed of the necessary freedom to choose for themselves the intimate partnership of life and of love and therefore, they contract invalidly.

What has to be determined is the manner in which the parents exercise their obligation towards their children and the way the children perceive parental authority and in effect react to it.[4]

b. Error always accompanies deceit, which means that whenever there is deceit invariably there is error; but whenever there is error it does not necessarily mean that there be deceit also. Besides, deceit is deliberate deception and in the process the perpetrator manipulates the consent of the other party causing him to make an erroneous judgment.

In error, the quality must be directly and principally intended; it is not necessarily disruptive of the relationship. In deceit, on the contrary, the quality need not be the direct object of the will; it is not necessarily a principally intended quality, but of its very nature the quality must be potentially disruptive of the relationship.

Error is present when the parties do not have the same

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[4] See above pp. 60-63.

thing in mind; or when one or both, while meaning the same thing, have formed mistaken conclusions. When one of the parties has been led to form such conclusions by statements which were innocently made, or facts innocently withheld by the other, there exists misrepresentation and it may result in error.

Error of quality affects the marriage contract when certain qualities assume the importance of a sine qua non condition, i.e. a pre-requisite in marriage. They are directly intended. Often the quality is highly valued in society and particularly indispensable for the formation of the partnership of the conjugal life.[5]

c. Deceit or fraud (dolus) consists in inducing erroneous conclusions in one party by intentional misrepresentation or active concealment of a given quality by the other party. Marriage is the mutual giving of self to each other. Deceit impedes the act of self bestowal of both the deceiving party and the deceived party. The essential object of the marriage contract, consortium totius vitae is not really established between them if the deceit is regarding some serious quality which has a potential for destruction of the marriage.

Some vital conditions that must be realized for the ground of deceit to invalidate marriage include the following:

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[5] See above pp. 149-155.

1) the deceit was perpetrated for the purpose of obtaining the consent;

2) the deceit was with regard to a quality in the other party, which is unknown to the deceived party;

3) such a quality by its very nature could provoke a serious disturbance of the conjugal life.

It is irrelevant whether the deceit was perpetrated by the contracting party or by some other person. What is of importance is that the deceit was intended to obtain consent.

Opinion is divided as regards the application of the canon on dolus to marriages contracted before the promulgation of the revised code. If dolus is considered a ground of nullity that is completely new and which has its invalidating effect from positive ecclesiastical law, then it is questionable whether this canon applies to any pre-1983 code marriage. If the new canon is regarded as the "written expression of the natural law defined through previously developed ecclesiastical jurisprudence,"[6] then it would apply not only to matrimonial consent exchanged after November 27, 1983 (the effective date of the revised code), but to the act of consent exchanged even before.

2. Possibility of Using the Above Grounds in Tribunals

a. Though a "proposed marriage" differs significantly from an "arranged marriage," still there are instances when

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[6] Cuneo, p.166.

characteristics of an "arranged marriage" are perceived in a "proposed marriage." An "arranged marriage" is decided upon by the parents or guardians of the parties. In a "proposed marriage" such a decision by the parents would be an abuse of parental authority. To make the entire negotiation of marriage depend on the parents alone is to inflict an injury upon their children. Parents do not have such a right, nor do the children have a corresponding obligation.

In view of the customs of the region sometimes it is nearly impossible for girls to oppose the will of their parents. Frequently parents overstep the limits within which they are able to exercise their legitimate authority.[7]

With a view to avoiding any confrontation and consequently incurring parental indignation the daughter goes through the ceremony having demonstrated her aversion to the customary proposed marriage. Rotal judges make reference to parental domination in these proposed marriages. In certain circumstances, as pointed out by local tribunals, parents play a significant role since they are concerned about the age and the virginity of the daughter; these are major factors regarding marriage according to the social customs of the region. The same reasons, remark the Rotal judges, can equally be of significance to demonstrate coercion on the part of the mother, who is constrained by her concern to give away the daughter in marriage in spite

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[7] See above p. 96.

of the strong aversion the daughter maintained towards it.[8]

In a context where marriages are proposed by parents and the children considered free to accept or reject the proposal, the mentality of the parents at times seems to be that consent of the parties has apparently little or no role to play.[9] When the father is alleged to have inflicted the fear, there is every reason to look for parental domination, for a girl is morally incapable of liberating herself from his domination, although she would indeed crave to be free.[10]

Sometimes parents force a marriage on their daughter because of the peculiar circumstances they find themselves in,e.g. Such circumstances may be financial indebtedness or even poverty.[11]

b. Error concerning a quality of a person is a possible ground that may be used in tribunals with regard to "proposed marriages." In the customary proposed marriage situation a quality that is very much desired and presumed is the virginity of the bride. Such is the type of woman a man has in mind as his wife when he enters into a marriage union. It may not be explicitly expressed, but as we have explained in our study, virginity is one of the prerequi-

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[8] See above pp. 96-98.

[9] See above pp. 103-109.

[10] See above pp. 110-112.

[11] See above pp. 171-174.

sites in a proposed marriage. If there is an error about that particular quality, in the common estimation of man it is such as to change the person herself socially. According to the social and cultural conditions of the Sri Lankan society the quality is directly and principally intended.[12]

Moreover, conditions regarding caste and age, health and reputation may arise as qualities principally intended in a proposed marriage. Family prestige and social status as well as a sound education are attributes which are often sought after in a marriage partner.[13]

In most of the marriages, the proposals are brought to a successful conclusion through the intervention and constant involvement of the go-between, the marriage broker. Anyone may act as a marriage broker and there are some who tend to specialize in the occupation. Much depends on his assessment of the suitability of the parties, since there does not exist any period of courtship for the two persons to get to know each other. "Discussion centers around the matter of dowry for the girl, and the economic and occupational position of the boy and his good moral character."[14] In such circumstances error concerning a quality of a person can be possible grounds in a tribunal.

c. The possibility of using deceit (dolus) as grounds

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[12] See above pp. 167-170.

[13] See above pp. 166-169.

[14] Ryan, p. 69.

of nullity in the tribunal, in customary proposed marriage situation is apparently clear. Much depends on whether the quality connected with the deception is conducive to destroying the relationship: the criteria upon which the parents judged the suitability of the partner for their son or daughter,[15] such as a girl's ability to adjust herself to the conditions in a foreign land and being able to be communicative, or her moral character or the particular age and caste which is valued above other considerations."[16] The concern of the canon are qualities which are capable of seriously disrupting the marriage partnership. The likelihood of a third person practicing deceit in the proposed marriage situation is very real, since the marriage broker is usually interested in monetary gain. Besides, in all such negotiations on the part of the marriage broker there would be a demand for urgency in arriving at a decision, which appears to be a deceptive device employed in the trade.

C. Further Studies Needed

Having examined the application of the grounds of reverential fear, error and deceit (dolus) in proposed marriages in this dissertation the author makes the following observations.

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[15] ibid. p. 64.

[16] ibid, p. 69.

1. Life Situations and Law

"A significant weakness in the law of consent," according to Ladislas Orsy, "is in the difficulty of fitting the external evidence into the subtle categories of the law."[17]

It happens quite often in "proposed marriages" that the role of parents apparently is excessive. Marriage becomes a business of the family, where everything is subjected to the convenience of the family: economic gain and family prestige. It has to be noted that the conscience of the subject can be gravely perturbed extrinsically by any intervention of the family. Consequently those who should give expression to their personal and inalienable right to marriage have hardly any opportunity to do so. The question can be raised whether the parties to a "proposed marriage" do enjoy truly the free and proper human exercise of their inalienable right to marry.

2. "Proposed Marriage" and Consortium Vitae

In the 1917 Code of Canon Law the object of matrimonial consent was the right to potentially procreative acts: ius in corpus. Procreation was the primary end of marriage, and mutual help and a remedy for concupiscence were its secondary ends. Marriage was primarily for procreation; everything else was not merely secondary but essentially subordinate.

The revised code of 1983 does not speak of primary and

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[17] Orsy, Marriage in Canon Law, p. 153.

secondary ends of marriage. Instead canon 1055 states that the matrimonial covenant by which a man and a woman establish between themselves a partnership of the whole of life (consortium totius vitae) is by its nature ordered toward the good of the spouses and the procreation and education of offspring.

The right to potentially procreative acts could have been accommodated as the object of matrimonial consent in a "proposed marriage" since the object is more narrowly conceived as ius in corpus. However, when the object of consent is more broadly conceived as consortium totius vitae the question arises whether a "proposed marriage" could adapt it as the object, since the parties having hardly any knowledge of each other may be incapable of the necessary mutual self bestowal. At issue here may be something intrinsic to marriage itself. Indeed mutual and total self bestowal is extremely doubtful when persons are almost complete strangers to each other. In applying the new legislation, the personal dimension of the marital society must be affirmed. It is our conclusion that much further study needs to be done in this area of "proposed marriages" and canonical legislation.

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