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THE DEVELOPMENT OF "INABILITY" AS A GROUND OF MARRIAGE  
NULLITY IN ANGLO-IRISH JURISPRUDENCE

by  
Rev. Bernard McCumiskey

A dissertation submitted to  
the School of Graduate Studies  
and Research of the University  
of Ottawa in partial fulfilment  
of the requirements for the  
degree of Master of Arts in  
Canon Law.



B. McCumiskey, Ottawa, Canada, 1980

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Titre de la thèse The Development of "Inability" as a Ground of Marriage  
Nullity in Anglo-Irish Jurisprudence

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## I N T R O D U C T I O N

The ground of a "Defect of Consent due to an Inability to Fulfill the Obligations and Responsibilities of Marriage" is by now a well established heading of nullity in the ecclesiastical tribunals of Britain and Ireland, as it is elsewhere. Phrased as such, and in a strict sense, it would seem to have had a relatively short history - as though only a development of the past decade - but in a wider sense it seems to have evolved through the maturing of a number of jurisprudential insights.

The purpose of this study is to determine the sources of this heading, and then trace its gradual development, application, and refinement in the Anglo-Irish Tribunals. A number of other studies in this area have previously considered aspects of this ground but in a more general way. Such works are the studies of Daley, Fellhauer, Hailer, Lesage, Morrissey, Navarrete, Pompedda, Sabattani and Stenson. However, none of these works examine precisely the point at issue in this particular study, and thus this modest beginning might serve to prompt others to undertake further research into the jurisprudential developments of the Anglo-Irish tribunals, and even into similar jurisprudential insights in other countries. A secondary reason for this study is to try to help those who might still feel slightly uncomfortable with a very new and recent ground of nullity. It is hoped that this work may lead to a better understanding of the vitality of Canon Law and

the jurisprudential system of the Church, in that what is being examined has had a long and developed history that draws its original strength and resources from the traditional ground of amentia.

While it is the Church's task to uphold the bond of Christian marriage, the sad situation in life is that there are some who are, for reasons beyond their control, incapable from the very beginning of undertaking and fulfilling the requirements of the marriage relationship. If such a situation is proved to exist, then the Church may declare such a union to be null and void: "Impossibilium nulla est obligatio" (Celsus, 1, 185, D.R.J., 50, 70); "Nemo potest ad impossibile obligari" (R.J., 6).

In evaluating the developing jurisprudence of the tribunals of Britain and Ireland, we will also try to see in what way their jurisprudence corresponds to the developments of the Sacred Roman Rota and, lastly, in what way the ground of Inability can be compared with the formulations for the proposed new Code of Canon Law which may be promulgated in the not too distant future.

## CHAPTER ONE

## THE BEGINNINGS OF JURISPRUDENCE ON "INABILITY"

The development of matrimonial jurisprudence in the tribunals of England in the last half of the 1960's and during the 1970's was a logical outgrowth of similar developments which had taken place some five to ten years earlier in the Sacred Roman Rota.

To understand the significance of such developments, we must first consider their background to see what principles were invoked to justify, as it were, what could be considered to be a major shift in church policy regarding the nullity of marriage. Then, we shall see how these principles were applied in England and became the object of serious study and examination in the annual meetings of the Canon Law Society of Great Britain and Ireland. A certain unanimity in the understanding of the principles eventually led to a unified body of jurisprudence arising from British-Irish court decisions which we shall examine in the subsequent parts of this work.

I) Development of Rotal Thought

The modern ground of nullity, known under the general heading of inability - and which developed from the traditional ground of amentia - has something of a pre-history. The Church's growing appreciation for those unfortunate persons who suffer from various degrees

of incapacity for Christian marriage, has always been subject to the limits of growth in human understanding as well as to the gradual developments of ecclesiastical jurisprudence. Therefore, the first part of this paper aims at tracing the origins of ecclesiastical jurisprudence on inability, so that the growth of the contemporary practice can be better appreciated.

From the time of Justinian (527) until that of Gratian (1159), the legal maxim tended to be that of Ecclesia vivit lege Romana whenever there was no conflict with Church doctrine.<sup>1</sup> Briefly, the situation regarding marriage was that an insane person could not marry, but if for some reason he did, then the insanity could not be considered as a reason to terminate the marriage.<sup>2</sup> Robert of Flamborough (after 1215) considered that the incapacity of the furiosi existed because they were unable to give proper consent.<sup>3</sup> Whereas, while commenting on a previous ruling of Pope Innocent III (1196-1216) to the Bishop of Vercelli, Bernard of Palma (1263) held that the insane could not enter a valid marriage, but the union would be held valid if it was entered into

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1 W. Van Ommeren, Mental Illness Affecting Matrimonial Consent, Washington D.C., Catholic University of America, 1961, C.L.S. No: 415, p. 14.

2 Ibid., p. 17; "Neque furiosus neque furiosa matrimonium contrahere possunt, sed si contractu fuerit non separentur", Fontes Iuris Antejustiniani, II, 345.

3 Ibid., p. 17

during a lucid moment.<sup>4</sup> Under the teachings of Raymond of Pennafort, insanity was considered as one of the twelve impediments to marriage, but "if they arose after the marriage had taken place, they did not affect the consent."<sup>5</sup>

Paulus Zacchia (1584-1659) a doctor of medicine is described in Freedman's contemporary psychiatric work as being "generally regarded as the father of legal medicine,"<sup>6</sup> and it is to him that we must turn for some of the post-Tridentine development. His importance is linked to the fact that he was the medical-legal advisor to the Holy See during the pontificate of Innocent X<sup>7</sup> and seems to have been regarded as the expert of his period. His scientific examination of the psycho-terminology of his time is most interesting, and while the state of dementia has numerous sub-divisions, these tend to fall under three general headings: fatuitas, when the mind is weakened; delirium, when distorted, and mania when destroyed.<sup>8</sup>

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4 Cf. ibid., p. 19.

5 Cf. ibid., pp. 19-20; Sanctus Raymundus de Pennafort, Summa, Lib. IV, Tit. III, § 9.

6 A.M. Freedman, et al., Modern Synopsis of Comprehensive Textbook of Psychiatry II, 2nd ed., Baltimore., Williams and Wilkins, 1976, p. 17.

7 Cf. W. Van Ommeren, op. cit., p. 22.

8 Cf. ibid., pp. 23-24.

His treatment of the condition known as amentia is not without some difficulty, though, for he states, "There is some doubt in the use of the term amentia, because there are some authors who want to give this name to that disturbance which we would prefer to call stolidas."<sup>9</sup> To compound the difficulty, it has been said that Zacchia himself tended to identify "amentia" with "dementia" and also used the terms indiscriminately.<sup>10</sup> In addition, we might note in passing how he listed forty-one disturbances according to origin, fifteen according to effect, and nine according to duration.<sup>11</sup> As well as this, he indicated that a person was responsible for his actions during true lucid intervals, whereas this could not happen if the insanity originated from old-age or if someone has been struck by lightning!<sup>12</sup>

Because of all this, Zacchia stressed the importance of the medical peritus, in that "many things which would not be clear to the layman, can be ascertained from testimony of medical men,"<sup>13</sup> and it was

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9 Ibid., p. 24.

10 Ibid., p. 25.

11 Cf. ibid., pp. 26-27.

12 Cf. ibid., p. 31

13 Ibid., p. 32

for those reasons that the Rota used them.<sup>14</sup> Lastly, it appears as though the influence of Zacchia was long abiding, for we might note how he was still referred to in an amentia decision before the Rota as recently as May 15, 1915.<sup>15</sup>

After the Council of Trent (1563), marriage cases were judged either by the Sacred Congregation of the Council, or by the Sacred Roman Rota whenever there was defect of consent due to mental illness. By 1870, the Rota had ceased to function, and the Congregation of the Council carried on with this work until the Rota was reconstituted by Pius X's Sapienti Consilio of June 29, 1908. The consolidated jurisprudence inherited was, by then, greatly influenced by the teaching of Thomas Sanchez (1550-1610), and his "mortal sin norm" as to the sufficiency of consent for marriage.<sup>16</sup> In short, there was a sort of minimum norm for marriage: if a person could posit a human act, or could commit a mortal sin as understood at that time, then he or she

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14 Ibid.

15 S.R.R. Dec., c. Prior, May 15, 1915, in Acta Apostolicae Sedis, 7 (1915), p. 575; Zacchia reference: Questiones Medicos-legales, lib. 2, tit. I, De Dementia. We might also note the use of the Sanchez norm on p. 574 of the same sentence.

16 Cf. W. Van Ommeren, op. cit., p. 37.



was considered capable of giving sufficient marital consent.<sup>17</sup> The practical application of this can be seen in a Rotal Sentence coram Many in 1913. The ponens indicated that the state of amentia (or dementia) for invalidity must be complete (plena et perfecta), so that the partially insane (semiplena) could still enter into a valid marriage because the required deliberation was present in such people (semifatui). His basis for this was the opinion of Sanchez, which, he said, was admitted by everyone.<sup>18</sup>

However, there was another important consideration in the same sentence, namely, that the condition of amentia had to be continuous; if there was some doubt as to whether or not the marriage took place during a true lucid interval - and full amentia could be shown to have existed before and after the ceremony - then the presumption had to be that the marriage did not take place during a lucid moment.<sup>19</sup> However, by and large, the test that remained as regards a person's capacity for marriage was this: it had to be proven that at the actual time of the wedding there had been an absence of reason preventing the positing of

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17 J.R. Keating, The Bearing of Mental Impairment on the Validity of Marriage. An Analysis of Rotal Jurisprudence, Rome, Gregorian University Press, 1964, p. 110.

18 Ibid., p. 111; cf. S.R.R. Dec., 5(1913), c. Many, August 11, 1913, p. 564.

19 Cf. ibid., p. 563.

a human act.

Nevertheless, some attempt was made in the Rota to modify the minimum "human act norm" with a "due knowledge" theory; this method incorporated Gasparri's notion of debita discretio seu maturitas iudicii, so that there also had to be some degree of rudimentary knowledge.<sup>20</sup> The major "turning point in Rotal jurisprudence"<sup>21</sup> came with a decision coram Prior on November 14, 1919, which rejected the traditional Sanchez theory and turned to St. Thomas for a clearer understanding of what was involved:

[...] Nor certainly can Sanchez's teachings be approved (Lib. I, Disp. VIII, n. 15)[...]. The Doctors require a maturity of judgement for making a contract of marriage; indeed, St. Thomas required this for contracts of betrothals and, a fortiori, for the more serious and unbreakable contract of marriage. As he wrote in IV Dist. 27, qu. 2, art. 2 ad 2: "To sin mortally it is sufficient to consent for the present; but a consent to betrothal involves the future, rather than consenting to one present act"[...].<sup>22</sup>

This "more than a mortal sin test" seems to relate to Gasparri's debita discretio, so that with further jurisprudential refinement the previously favoured "human act" test had given way to the "qualified

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20 Cf. J. Keating, op. cit., p. 112.

21 Ibid., p. 112.

22 Ibid.; S.R.R. Dec., 11 (1919), c. Prior, November 14, 1919, p. 174.

human act" one (capacitas ad matrimonium intelligendum et volendum).<sup>23</sup>

A decision coram Parrillo in 1928 attempted to discern some sort of artificial mean between Sanchez' and St. Thomas' norms by showing that St. Thomas was referring to due knowledge and to those with congenital mental disease, whereas Sanchez meant due deliberation and those mental diseases which afflict adults. Although some traces of this conciliatory theory are also found in a decision coram Wynen in 1930, the concept found little general support.<sup>24</sup> Yet, a further advance was made in a decision coram Grazioli in 1933 which examined the use of reason and questioned how this should be proportionate to marriage; the method used was to call into question the "use of reason" norm, which had tended to be presumed as existing at the age of seven years, and then relocate this at the time of puberty as far as marriage was concerned.

However, as Keating's study indicates, "practically speaking, the legal test of psychic capacity came to be a test of due knowledge,"<sup>25</sup> and it was this point which was under consideration in the "constitutional immorality" case coram Wynen of February 25, 1941. The

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23 J. Keating, op. cit., p. 113.

24 Cf., ibid., p. 114.

25 Ibid., p. 115.

supposition was that, to posit a human act, conceptual knowledge was insufficient; what was needed in addition, was an appreciation of the object of the act. This appreciation should contain "both the cognitive element and the volitional element and would explain together, as a third integrating faculty, the function of the intellect and will."<sup>26</sup> Therefore, as regards marital consent, it is necessary for a person to evaluate and perceive a number of values in the very object of the marital consent (namely, the aesthetic, social, ethical, and the juridical). "Unable to do this, he would be incapable of placing an act of consent naturally sufficient to generate the bond."<sup>27</sup> However, this notion of a sort of "doctrine of values" was considered to be a somewhat nebulous ideal and, at that time at least, was thought to be strewn with difficulties. These were in addition to the fact that the medical periti could not agree among themselves about the implications of the psychopathic condition which was then being called "constitutional immorality".

What has been examined so far is just part of the jurisprudential background in the gradual evolution of court decisions leading to a better comprehension of psychic capacity for marriage, as well as

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<sup>26</sup> Ibid., p. 117.

<sup>27</sup> Ibid.

being a necessary background for the further Rotal developments which were revealed in Keating's study of 1964.<sup>28</sup> Indeed, he describes the importance of this revelation as follows:

The most recent jurisprudence of the Rota contained in the unpublished decisions of the last ten years, commonly includes within the essential notion of 'debita discretio' or 'maturitas iudicii' a certain psychic power that is something more than the sheer power to grasp the elemental notions of canon 1082 and /. . . fully intend them.<sup>29</sup>

The seed of this new development seems to have originated from a sentence coram Quattrocolo of 1943, but the sentences of Felici in 1954, 1955 and 1957, constitute a more important part of this new development, because he was able to distinguish the facultas critica or facultas discretiva from the other faculties.<sup>30</sup> This same approach found support in a 1961 sentence coram Anné, whereas Sabattani on January 24, 1961 indicated that if a person was deprived of this critical faculty through mental illness, his marital consent would be insufficient.<sup>31</sup> Felici's three sentences appear to have brought together a number of previously unfinished jurisprudential strands, for he

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28 Cf. ibid.,

29 Ibid., p. 120.

30 Cf. ibid., p. 121; S.R.R. Dec., 46(1954), c. Felici, April 6, 1954, pp. 282-293; S.R.R. Dec., 47(1955), c. Felici, July 12, 1955, pp. 605-613; S.R.R. Dec., 49(1957), c. Felici, December 3, 1957, pp. 787-796.

31 Cf. J. Keating, op. cit., p. 121.

was able to discern that there is a discretionary faculty beyond the ability to know the marriage contract (cognoscere), which makes it possible to undertake the marital obligations (suscipere). Furthermore, he also indicated that the roots for this re-thinking already existed to some extent in the Code, for the rudimentary knowledge about marriage at puberty is a presumption of the law (C.I.C. 1082.2), whereas there exists a diriment impediment of non-age for reasons which appear to be not unassociated with a lack of the necessary discretion (C.I.C. 1067).<sup>32</sup>

Another important disclosure made by Keating was to indicate six Rotal sentences which considered "the invalidating force of mental illness more as a diriment impediment residing in the person than a defect of sufficient consent."<sup>33</sup> A closer examination shows how near the concept - and not the impediment - is to the present-day Anglo-Irish jurisprudence on the ground of Inability, as Keating's study shows:

Mental disorder or defect is seen as rendering the person incapable of binding himself to the essential obligations [...], regardless of his psychological act of consenting in them. In most of these decisions, the court was so anxious to demonstrate that this personal incapacity to bind oneself is a source of nullity distinct from the ability to elicit sufficient consent, that it granted, either in fact or in hypothesis for the sake of clarity, that the person actually did elicit sufficient consent; nevertheless, the sufficient

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<sup>32</sup> Ibid., pp. 12, 122-123.

<sup>33</sup> Ibid., p. 156.

consent failed to generate the bond because the person was an unfit subject of these rights and obligations.<sup>34</sup>

The first Rotal sentence in this new development was that of Heard in 1954, where the married life of the couple was little else than a repetitious drama of sadistic violence leading to the respondent's eventual confinement in a mental institution because of his psychopathic condition. The point made in the sentence was that even if the respondent was able to posit the necessary consent, his behavioural disorder prevented the living out of the object of this consent.<sup>35</sup>

The second sentence was by Mattioli in 1956: within three years of the marriage, the respondent was committed to a mental hospital because of a general paralysis of the insane caused by congenital syphilis. The jurisprudence revolved around the respondent's previous fitness for marriage, and if it was contested that the marriage took place in a lucid moment, his previous and progressive mental deterioration had already made him incapable of the obligations he wished to assume in his consent.<sup>36</sup>

The third sentence comes from Sabbatani and is dated June 21, 1957. It involved a case of nymphomania: although a negative sentence

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<sup>34</sup> Ibid.

<sup>35</sup> Cf. ibid., p. 157; S.R.R. Dec., 46(1954), c. Heard, January 30, 1954, pp. 82-86.

<sup>36</sup> Cf. J. Keating, op. cit., pp. 157-158; S.R.R. Dec., 48(1956), c. Mattioli, November 6, 1956, pp. 871-878.

was given, the jurisprudential teachings were that grave and incurable nymphomania could invalidate, and the point was made again that the subject's ability to consent to marriage is one thing, whereas her ability to found and establish the exclusivus corpus is another. The latter is a necessary constituent for assuming the bonum fidei.<sup>37</sup>

The illness of schizophrenia was the fourth case to be considered, and this was coram Mattioli in 1957; the case had previously received two negative decisions on the grounds of grave fear. The Rota gave two affirmative decisions on mental infirmity and on the basis of the deteriorating condition which made it impossible to fulfill what had been promised.

The fifth case, coram Lefebvre in 1959, was not really considered along the lines of an incapacity for marriage as such, although nymphomania and psychopathy were involved. The caput was the defective consent of the respondent, and it was held that psychopathy was the motivating force of the simulation whereby indissolubility had been excluded from the consent.<sup>38</sup>

The last case again involved schizophrenia, and this was before De Jorio in 1961. The Apostolica Signatura had first been asked to

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<sup>37</sup> Cf. J. Keating, op. cit., pp. 159-160; S.R. R. Dec., 49(1957), c. Sabattani, June 21, 1957, pp. 500-513.

<sup>38</sup> Cf. J. Keating, op. cit., pp. 161-162; S.R. R. Dec., 51(1959), c. Lefebvre, December 19, 1959, pp. 609-614.



intervene and have the case entirely re-examined on account of the two previous affirmative decisions. The Rota, once again, indicated that intellectual knowledge was not always sufficient - as there also had to be the capacity to establish the marriage itself.<sup>39</sup>

Therefore, it would seem as though the jurisprudential trends of the Rota during the 1950's and 1960's might be summed up as follows:

- 1) Early jurisprudence indicated that there should be enough due discretion by way of the requisites for a proper consent, involving knowledge and volition.
- 2) Then, due discretion was considered more by way of the psychic ability to bind the person and, in so doing, to assume the obligations of marriage.<sup>40</sup>
- 3) Due discretion in later sentences seems to have taken on a sort of additional meaning, whereby it concentrates upon the ability to carry out what was consented to, in the sense of an ability of being able to put into practice what the person consenting

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<sup>39</sup> Cf. J. Keating, op. cit., pp. 162-163; S.R.R. Dec., c. De Jorio, December 19, 1961, pp. 610-620.

<sup>40</sup> Cf. J. Keating, op. cit., p. 164.

wanted to undertake and assume.<sup>41</sup>

The 1960's can be described as a period of a growing appreciation of further areas of marital inability. To try to understand this situation better, we will now consider some of the reflections of a former judge of the Rota, who spoke on marital inability in 1967. This too will provide a background to understanding how the Roman jurisprudential principles were to be applied in the lower courts.

## II. Psychic Incapacity (1967)

An important aspect of the renewed Rotal jurisprudence was underlined in a paper given by the present Secretary of the Apostolic Signatura, Archbishop Aurelio Sabattani, to the Canadian Canon Law Society in September 1967.<sup>42</sup> The importance of this paper derives from the fact that it gives an insight into Rotal development - from the inside so to speak - for Sabattani had just completed his work as a judge of the Roman Rota and been appointed Apostolic Delegate to the Shrine at Loretto.

### A. The dynamic approach in judging marital ability

Sabattani's approach was to examine a number of positions, beginning with Roman Law and leading to the Glossa concerning the

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<sup>41</sup> Ibid.

<sup>42</sup> Aurelio Sabattani, "L'évolution de la jurisprudence dans les causes de nullité de mariage pour incapacité psychique", in Studia Canonica, 1(1967), pp. 143-161.

"lucid interval exception" as regards marital inability. Also considered were the two differing schools of thought: the restrictive interpretation of Sanchez, and the broader one by St. Thomas.<sup>43</sup> Yet, while the Thomistic interpretation was preferred, the growing contemporary influence, which is described as maturitas iudicii quae sit proportionata matrimoniali contractui, was not thought to be free from tautology. In Sabattani's view, it tended to define the same thing' with the same thing - "idem per idem" - while leaving the exact quantum required unresolved.<sup>44</sup>

A more positive alternative, was to move away from what he called this "static position" into a dynamic one.<sup>45</sup> With this method, while a judge may not be able to determine the quantum as such, he can discover something of the quomodo of the consent and determine whether the dynamics of the creation of this marital consent were at an acceptable level.<sup>46</sup> Or, to put it another way, if the judge had no sort of weight unit to determine whether or not the consent was valid, the alternative method would be to evaluate the very forces which brought

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43 Cf. ibid., p. 149. We might note how Sabattani refers to Keating's thesis at this point regarding the differences between St. Thomas' due knowledge and Sanchez's due deliberation. Cf. Keating, op. cit., p. 114.

44 A. Sabattani, loc. cit., p. 149.

45 Ibid.

46 Ibid.

about the consent itself. This method, thought Sabattani, was in the line of what some psychiatrists call the "pathology of the will", and consisted in the evaluation of the critical faculty and not of the consent.<sup>47</sup>

B. Canonical concepts touching the notion of marital inability.

At first sight, an appeal to Canon 2201 might appear to be fruitful for this discussion, for the canon is concerned with various disabilities affecting the mind: amentia habitualis, mentis exturbatio, and mentis debilitas. However this particular canon is concerned with imputability and penal effects, and not with what leads to the inadequacy of a given act. "In contractual matters the only measurement is that of the presence of the discretio iudicii, [...] this is not a question of the imputability of the act but, rather, of the adequacy of the consent."<sup>48</sup>

The previous Rotal use of the concept of amentia semiplena had produced a number of contradictory complications. Basically, the concept is a medical one and not of the juridical order; therefore, its use "now causes problems and should be ignored."<sup>49</sup> On the other hand, a more interesting possibility lies in evaluating a person's ability to

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47 Ibid.

48 Ibid.

49 Ibid.

stand trial; Sabattani states in this regard:

It is a principle in all legislation that people who are psychically incapable and individuals minus firmæ mentis, even if they can and sometimes must be partes in causa, do not have the personal capacity to stand trial because their capacity is limited to their guardians.<sup>50</sup>

However, there is an argument against the incapacity of the ius standi in iudicio: some would say that this is a duty and not a right.

Sabattani firmly rejects this approach, and says: "It is the duty of the respondent to respond to the citation of the tribunal. But he or she has the right to answer the case or the argument of the plaintiff."<sup>51</sup> An additional argument arises from the fact that the bond is being accused and not the parties.<sup>52</sup> Sabattani's response to this is to ask where the bond belongs:

Perhaps to imaginary persons? This bond constitutes the status of the physical persons, the sacramental, the family, the juridical, the social order, together with physical, psychic, juridical and economic effects. The person in question cannot be indifferent to his status.<sup>53</sup>

### C. Psychic Incapacity

The question of considering psychic incapacity as a diriment impediment is likewise raised by Sabattani; nor was he alone in this

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid., p. 158.

<sup>52</sup> Cf. ibid.

<sup>53</sup> Ibid., p. 159.

regard. As we shall see later, Peter Hüizing also raised this question in relation to the revision of the Code of Canon Law.<sup>54</sup> Sabattani's opinion was that a defectus discretionis iudicii is a general incapacity of natural law which might be incorporated into the new law before the impediments as such, or, as he explains:

The whole matter is a question of praerequisitum ad agendum of a posse agere of consent which might be vitiated. De vitiis consensus vix...moveri potest quaestio, nisi supponetur capacitas...contrahentium.

Such a capacity takes concrete form in the basic faculty of being able to will and in the possibility of assuming the obligations of marriage.<sup>55</sup>

A practical application of this situation can be seen in Sabattani's sentence of June 21, 1957 which concerned a case of nymphomania. This condition prevented the fulfillment of the obligation of marital fidelity and, as Sabattani says: "I had therefore already allowed incapacity prior to consent, incapacity which prevented the assuming of the obligationes matrimonialium."<sup>56</sup>

This was not without echoes in Britain. In a previously unpublished decision, Sabattani's jurisprudence was used coram Humphreys on April 29, 1964. The case involved the ground of amentia caused by a schizophrenic condition. Interestingly enough, the in iure part

54 Cf. ibid., p. 146.

55 Cf. ibid., reference given: S.R.R. Dec., c. Sabattani, June 22, 1957, in Il Diritto Ecclesiastico, 71(1960), pp. 314-322.

56 A. Sabattani, loc. cit., p. 147.

of the sentence approaches the condition by way of the facultas critica, when the ponens writes:

In the mental condition known as schizophrenia, the critical faculty is impeded because the connection between an act and its reasons or motives is destroyed with the result that what appears as external deliberation is externally devoid of any substance. It is this dissociation in the personality, this split between expression of the faculties of intellect and will, which precludes a person suffering from this illness from making a valid marriage contract.<sup>57</sup>

A point of still further interest to this 1964 sentence is the way in which Sabattani has indicated the progressive nature of the illness; as Humphreys shows:

[Sabattani] distinguishes three phases of the progression of the disease, first a schizoidic condition in which the first, hardly noticeable, indication of the disease appears in an otherwise intelligent individual; second the phase which Sabattani calls "qualificata" in which there are more evident signs of a split in the personality, signs which to an expert indicate mental disturbance but which would not necessarily be perceptible to all; and finally the terminal phase in which the person is quite obviously mentally afflicted.<sup>58</sup>

The British case we have just mentioned, which involved a form of marital inability, was processed on the ground of amentia. However, looking back at such a sentence now, it might be said that we have here some of the very early thinking in the renewed jurisprudence on the

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<sup>57</sup> C. Humphreys (Westminster), April 29, 1964, Prot. No. 2-107, pp. 1-8. Quotation on p. 2.

<sup>58</sup> Ibid., p. 2.

local level - if not some early stepping stones towards the grounds of lack of due discretion and inability. For having talked about the critical faculty and how the illness affected it, the sentence, in quoting from Sabattani again, makes mention of the defective discretio iudicii.<sup>59</sup>

Therefore, having considered this gradual growth in the areas of marital inabilities, we are now able to examine the beginnings of a renewed jurisprudence in England, one that will lead to a most important development: the recognition of a new ground of nullity of marriage.

### III. First Applications in England (1969)

In January 1968, a paper was presented by Ralph Brown to the members of the Canon Law Society of Great Britain and which was subsequently published in The Heythrop Journal.<sup>60</sup> The importance of Keating's previous work on Rotal jurisprudence is acknowledged immediately, in that Brown's article mentions in the first footnote that "it

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<sup>59</sup> Ibid., p. 3. The quotation from the Rotal decision of Sabattani of March 24, 1961, is the following: "Si vero synthematibus morbi qualificati addantur episodica sat aperta haud firmae mentis contrahentis tempore coniugii, tunc non tantum praesumptio sed vera probatio HABETUR DEFICIENTIA DISCRETIONIS IUDICII, plus minusve plena iuxta gravitatem signorum concomitantium eorumque proximitatem ad nuptias" (emphasis added).

<sup>60</sup> Ralph Brown, "A Canonical Problem of Marital Incompetence in Marriage", in The Heythrop Journal, 10(1969), pp. 146-161.



depends largely on the work of John Keating, and especially on his thesis."<sup>61</sup> But the central part of Brown's paper revolves around a change in the jurisprudential understanding of amentia at the Rota, to the extent that there had been almost a cessation of the term in favour of such terms as "defectus mentis; defectus maturitatis iudicii matrimonio proportionatae; defectus debitae discretionis; morbus mentis, etc."<sup>62</sup> Furthermore, he indicated that "the most frequent term used in Rotal decisions is debita discretio, due discretion."<sup>63</sup> The use of this term clarifies a situation:

This is an all inclusive term and covers everything from straightforward insanity downwards. By means of evaluation of the concept of due discretion, the Rota has come across a „really positive subjective test. Indeed this, for the time being, is the unique test: unica mensura sufficientis consensus est discretio iudicii matrimonio proportionata as stated by Sabattani.<sup>64</sup>

It can be appreciated at once that this was an important jurisprudential development, when we consider how another British canonist had previously expressed some reservations about former amentia terminology, and especially when the Sanchez norm was used for the semifatui.

<sup>61</sup> Ibid., p. 146.

<sup>62</sup> Ibid., p. 150; Cf. John Keating, "The Caput Nullitatis in Insanity Cases", in The Jurist, 22(1962), p. 398.

<sup>63</sup> R. Brown, loc. cit., p. 150.

<sup>64</sup> Ibid., p. 150; cf. S.R.R. Dec., c. Sabattani (Januen.), February 24, 1961, in Monitor Ecclesiasticus, 86(1969), p. 633; cf. J. Keating, "The Bearing...", p. 31; cf. Id., The Caput..., p. 430.

The point made then was that it would be difficult to suppose a capacity for mortal sin, in persons "who are literally half-witted, i.e., not more than 50 per cent sane."<sup>65</sup>

The fruition of Brown's study was seen immediately: it brought about the first affirmative decision by way of an entirely new caput in British jurisprudence, or, as it was described in the litis contestatio of the actual case, "The Inability of the Respondent to Assume and Fulfill the Rights and Obligations of Marriage; that is, on the grounds of The Lack of Due Discretion."<sup>66</sup>

The case concerned a marriage which took place on July 16, 1960 and was followed by a final separation in April 1961. This was caused by the respondent's frequent acts of violence and, without going into too much detail, these ranged from his acts of flinging the petitioner across the room by her hair - and breaking down crying when anyone stopped him - to giving her black eyes, pushing her bare foot on a red-hot poker, various acts of sexual perversion including ejaculation into her hair, not to mention a host of other incidents involving smashing up the crockery, spreading butter and sugar all over the floor and trying to flush a chicken down the toilet. As it can be appreciated,

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<sup>65</sup> Laurence McReavy, "Madness and Marriage", in The Clergy Review, 44(1959), p. 624.

<sup>66</sup> C. Brown (Westminster, July 3, 1969, Matrimonial Decisions for England and Wales, 3(1969), London, Canon Law Society of Great Britain, 1970, p. 323. Hereafter abbreviated as MDEW.

these things, together with his involvements with the police and army (which he had deserted), made it impossible to establish anything like a normal married life.<sup>67</sup>

The interpretation of the respondent's behaviour is most interesting, jurisprudentially speaking. No doctor was able to have a formal examination of the respondent as such, but a certain "Dr. A" did have an informal one, after having first examined the Acta. His evaluation of the respondent was that the facts of the case showed him to have a general personality disturbance so that he was "aggressive, impulsive, immature, and both hetero- and homosexual /and that/ these traits in the personality made it impossible to love his wife..."<sup>68</sup> Another well-known consultant psychiatrist was also asked to give a professional opinion on the case, namely "Dr. B." His report was described by the ponens as being "quite admirable in its care and precision".<sup>69</sup> Quite rightly, the second peritus indicated that it would be incorrect for him to deduce only from the behaviour in the evidence that the respondent was immature, and then to use this to explain the respondent's behaviour; rather, it seems that the etiology

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67 Cf. ibid., pp. 330-333.

68 Ibid., p. 334.

69 Ibid.

of the condition must be that of a medical one.<sup>70</sup> The consultant's opinion was that the respondent had a personality disorder, so that

he would continue to function at an immature level where other people would be seen as objects helping or hindering his own satisfactions. Crude manipulation of others as tools, with no understanding of their feelings would be followed by baffled anger when his demands were not immediately gratified, and a characteristic response to denial at this level of immaturity is compulsive aggression followed by 'leaving the field' e.g., desertions, self-pitying threats of suicide and so on. Rules and laws would be seen as denying acts of particular individuals, and would not yet become generalized or internalized, so that a sense of obligation or guilt would be absent.<sup>71</sup>

But when it came to the respondent's ability for the marriage relationship, the peritus had no reservations; his observation here is most explicit:

If my assessment at second hand of the degree of immaturity his personality showed is anywhere near correct, then he was not capable of entering into a long-term obligation of any kind, let alone one that would require him to meet the needs of another person and at times to forego his own satisfaction.<sup>72</sup>

Nevertheless, while the indications of the periti seem clear enough, the Judges of the case showed their cognizance of the procedural cautions of Canon 1804.1 and Provida Mater art. 154, to an extent

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70 Cf. ibid.

71 Ibid., p. 337.

72 Ibid., pp. 327-328.

that might be called classical:

The role of the Sentence is not to make certain events fit into a medical definition, and then to state that since the evidence fits the medical description of a condition, therefore the marriage is invalid. On the contrary, the role of the Judges in an Ecclesiastical Tribunal dealing with the present type of case is to accept the clinical tag that is given by the doctors, as indicating the presence of a complex of features - which themselves should be used as a helpful indication of certain areas for investigation and observation. The medical diagnosis should be used as a helpful indication of certain areas for investigation and observation.

Likewise the Judges will have to accept from the doctors their statements as to the implications of the condition diagnosed; and to observe under the guidance of the doctors the spheres which are rendered useless or incompetent or unfit by the existence of the well-attested condition. But it is not the role of the Judges to accept from the doctors the ultimate decision as to whether the marriage is null and void. This can only be done by the application of the proper canonical principles together with the jurisprudence that exists on the subject; as well as with the help of the other studies and developments that have been made in the area. Thus, the principle that must be before the Judges throughout a case such as this is that a medical diagnosis is not a canonical one.<sup>73</sup>

In another part of the sentence, the ponens was again very firm on this same point when he outlined the purpose of the medical experts:

The canonical use of the periti in the case is not to pronounce on the causation of the diagnosis with a view to treatment. It is merely to observe the various facets of the conduct of the respondent so as to see if the complex of these facets and characteristics point to a condition which is known of an explicable by medical science.<sup>74</sup>

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73 Ibid., p. 334.

74 Ibid., p. 324.

This same careful appraisal of the legal role of the periti, is to be found in the evaluation of the jurisprudential developments of the Rota, upon which the Westminster sentence is given its legal foundation. Firstly, the Rotal decision coram Wynen of 1941 was considered to be instrumental in that it showed a real distinction between conceptual and evaluative knowledge; likewise, another important consideration was a reflection upon the minimum age for marriage, based not upon a factor of physical incapability, but upon the lack of a discretionary vision below that age. This judgemental ability concerns itself not just with the act, but also with the importance of the consequences of the act and, "despite its falling from favour for some time," is a doctrine which is based on St. Thomas (cf. Summa Theologiae - Suppl. 43, 2 ad 2; Suppl. 58, 5 ad 1, 2).<sup>75</sup>

It was this re-evaluation which brought about a greater distinction between the simpler act of getting married - matrimonium in fieri - and the more serious consequences of being married - matrimonium in facto esse, which Felici indicated in his decision of April 6, 1954, and which he later extended in a further decision on October 16, 1956, when he spoke about the peculiares obligationes of marriage. Secondly, if it was contested that these might vary to some degree from marriage to marriage, the ponens outlined some important jurispruden-

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75 Ibid., p. 326.

tial principles which must be considered when evaluating a marriage before an ecclesiastical tribunal.

The social situation of a couple can be an important consideration, to the extent that it would be of little value to compare the domestic situation of a wealthy couple to those of humbler circumstances.

For example, where a couple are so wealthy that servants and money for the upkeep of the matrimonial establishment and the common life is no problem, it would be meaningless to suggest that the ability of the wife to keep house, or the ability of the husband to bring home a pay-packet, are necessary for the community of life that makes marriage.<sup>76</sup>

On the other hand, such things could be crucial in a home less so endowed. But beyond these social considerations, there are more important areas by way of a sort of common denominator in the realm of pecu-  
liares obligationes, some of which the ponens expresses succinctly:

the ability of the contractants to relate to each other; i.e., to form a community, to make the self sacrifice demanded in marriage, to recognize the truth, to have a certain maturity of judgement concerning common matters, ~~to~~ have responsibilities in matters of right and wrong, to be able to give a perpetual and exclusive right to sexual intercourse to his partner. Such factors mentioned here are by ~~no~~ means exhaustive of those required in marriage; but these are certainly all essential.

Hence it is necessary to examine each individual case to see to what extent the absence of such factors might render the marriage invalid.<sup>77</sup>

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76 Ibid.

77 Ibid.

But this evaluation is not that of the Westminster ponens alone. The developing Rotal opinion was that where a person could not "bind or be bound" to the marital rights and obligations, the marriage was to be considered invalid, and such a conclusion can be drawn from the sentences of Bonet in 1955, Sabattani in 1957, and Lefebvre in 1967.<sup>78</sup>

The second instance sentence of the Birmingham Tribunal, issued before the promulgation of Causas Matrimoniales of 1971, confirmed the affirmative decision of Westminster. Here again, in coram Humphreys, there is a re-enforcing of the need of the peculiares obligationes of marriage, in that there has to be a stable partnership with some degree of elementary self-sacrifice. Likewise, another normal obligation was that of a basic sense of responsibility, including an ability to face the consequences of one's actions. A further important marital value is that of sexual fidelity - even if there was a lapse. There must also be knowledge in a man that he has a certain duty to provide for his wife and family, even if in fact he is prevented from doing so, because of a lack of health or skill.<sup>79</sup>

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78 Cf. c. Humphreys (Birmingham) September 30, 1969, MDEW 3(1969), p. 348.

79 Cf. ibid.



An interesting possibility regarding this first case of lack of due discretion in Britain, is that with the hind-sight of present-day Anglo-Irish jurisprudence, the principal caput could well be different. This is said in view of the respondent's crude behavioural patterns in response to the normal needs of the other, and in view of the fact that he suffered from a psychopathic personality disorder; the net sum of which adds up to a lack of capacity, or an inability to fulfill the normal obligations of marriage. However, the heading at the time was perfectly correct, because that was the understanding at the point of time of the two affirmative decisions. What is more important than this present-day academic polemic, is that the effects of the Rotal developments had now reached the stage of a practical application in Britain.

As we have seen thus far, this development of a new ground of marital nullity came about through research and study. It is only when this task is undertaken can there be any credible application. With the new ground of lack of due discretion having been established, it is appropriate to consider some of the early English research on the subject from the viewpoint of canon law.

#### IV. Early Conferences of The Canon Law Society of Great Britain

##### A. Responsibility as seen in developing jurisprudence

While the first British case of lack of due discretion was still being instructed and nearing completion, a carefully researched

paper was presented by Adrian Hailer, one of the advocates on the case, to the Spring Conference of the Canon Law Society of Great Britain in May 1969.<sup>80</sup> Of immediate interest to the canonist is the way in which he drew attention to the fact that there had been a shift of emphasis in the theological expression of marital values resulting from the conciliar document Gaudium et Spes. Interesting too, is the way that Hailer worked his way towards this, by his references to St. Thomas.

In the third part of the Summa, St. Thomas indicated that the prime essence of marriage is the joining together of minds and bodies to a specific end: the procreation and education of children (q. 44, art. 1), so that "domestic life is seen, as it were, as a consequence made necessary by this creative power."<sup>81</sup> Therefore, when there exists a cooperation to an agreed end - the vita domestica - there exists a certain conjunctio (q. 44, art. 1, c.).<sup>82</sup> Hence, it would seem as though "the procreative task could not be fulfilled unless the couple undertake to unite their powers of mind and body. In other words, it is the demands of family life which call for a united couple."<sup>83</sup>

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80 Cf. A. Hailer, "The Development of the Canonical Concept of Responsibility", Second Wood Hall Canon Law Conference, 5th-9th May 1969, London, Canon Law Society of Great Britain, 1969, 19 p. (unpublished).

81 Ibid., p. 2.

82 Cf. ibid.

83 Ibid.

In Gaudium et Spes there has been greater emphasis placed on the idea of the personal relationship - the communitas (art. 48), so that "this love can lead the spouses to God with powerful effect and can aid and strengthen them in the sublime office of being a father or a mother - (art. 48)." Seen in this way, the bond's higher motive is more clearly recognized: because the couple "increasingly advance their own perfection as well as their mutual sanctification - (art. 48)." With this in mind, it can be said that "the marriage relationship exists in its own right, not simply for the sake of offspring."<sup>84</sup> Perhaps all this was not entirely new, since it had already been indirectly referred to in Casti Connubii when there was mention of the totius vitae communio.<sup>85</sup> But the thinking behind Gaudium et Spes was to concentrate less on the matrimonium in fieri, which had been the focal point in many areas of past theology and jurisprudence, and to concentrate on the living out of the relationship - matrimonium in facto esse.<sup>86</sup> It is only when marriage is considered in this clearer theological expression - as a self-giving relationship - that we can "be far more concerned about the capacity of some people to undertake

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<sup>84</sup> Ibid., p. 4.

<sup>85</sup> "...sed latius ut totius vitae communio, consuetudo, societas accipiatur", Pius XI, Encycl. Casti Connubii, in Acta Apostolicae Sedis, 22(1930), p. 549.

<sup>86</sup> Cf. A. Hailer, loc. cit., p. 5.

such a relationship",<sup>87</sup> and thus talk of a measure of responsibility.

Nevertheless, when it came to the canonical examination of the notion of "responsibility" there was a jurisprudential problem, mainly because it tended to be a word which was little used in Rotal decisions of that period.<sup>88</sup> Instead, the focus had been on due discretion, so that "it is as a development of the concept of discretion that we are able to place the concept of responsibility."<sup>89</sup>

From the point of view of jurisprudential development, this began with the greater appreciation of the human act involving both knowledge and freedom, and, some degree of deliberation, to the extent that it can be said that discretion "can mean the ability to deliberate".<sup>90</sup> In early jurisprudence, although the term "discretion" was used, what was really meant was the ability to deliberate: Felici's case involving paranoid schizophrenia was a good example of this (April 6, 1954).<sup>91</sup> However, a decision coram Mattioli - the case involving hereditary syphilis leading to general paralysis of the insane - seems to show that there is another area within the same

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87 Ibid.

88 Cf. ibid., p. 6.

89 Ibid., p. 4.

90 Ibid., p. 7.

91 Cf. ibid.

ground so "that discretion and the idea of personal incapacity are brought into relationship in a new way."<sup>92</sup> In Mattioli's decision, the jurisprudence regarding the pre-existing condition is of obvious importance, in view of traditional jurisprudence. His in iure section considers, among other things, the requirement of Canon 1082 that ignorance is not to be presumed after puberty; yet in saying this, when ignorance exists before that time, then it can also be said that the consent of the impuberes is deficient because of the ignorance of the proper nature of marriage.<sup>93</sup> In the actual case, the respondent was said to be an imbecile, and "even the doctor who upheld the validity of the marriage had to admit that the mental age of the respondent was between 12-14 years."<sup>94</sup> Therefore, the presumption in the case was that the consent was invalid, by reasons of the inability of ignorance.

Mattioli's method was confirmed by Felici on May 5, 1957, whereas Felici on May 22, 1956, made an attempt to study the question under the notion of mental age.<sup>95</sup> The 1967 decision of Felici is of some interest, at least in the way Hailer outlines it:

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92 Ibid.

93 Cf. ibid., p. 8.

94 Ibid.

95 Cf. Ibid.

The train of thought of this sentence is this. Man possesses conceptual knowledge, which is the ability to form an idea on the basis of a particular experience; man also possesses a critical faculty, which is the ability to make judgements. The critical faculty which appears later in a person's development than conceptual knowledge, must necessarily come into operation in order for a person to assume responsibility for his actions.<sup>96</sup>

Nevertheless, the recognition of a lack of due discretion is one thing, whereas an inability by way of capacity is another. For example, in a decision coram Heard on January 1, 1954, it was shown that while the respondent was incapable of a human act, even if he had been, the marriage would still be null,<sup>97</sup> because he was not able to give himself to the normal demands of marriage.<sup>98</sup> In other words, the argument had shifted from the level of consent to that of capacity of the person: "Consensus incapax erat sese obligandi in contractu traditionis sui corporis exclusive et perpetuo in coniugi."<sup>99</sup> This incapacity prevented him from assuming the obligations of marriage: "Post morbum tum nervis tum psyche ipse factus fuerit in suis instinctibus bestia." In short, this man's condition showed him to be defective in the requirements for the object of consent, because of his

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96 Ibid., p. 9.

97 Cf. ibid., p. 10.

98 Cf. ibid.

99 Ibid.

insatiable sexual desires so that,

it was not that he could not consummate the marriage or that he had an intention against the bonum prolis, but that he was incapable for reasons that sexual control was beyond his powers.<sup>100</sup>

It should be noted that this sort of "moral impotence" had already been indicated previously by the same ponens on June 5, 1941, and in many respects it is associated with the thinking of Wynen in the same year.<sup>101</sup> In a similar vein are those cases involving nymphomaniacs; for example, in a decision coram Sabattani of December 6, 1957, the inability was defined as an incapacity to undertake what had been pledged.<sup>102</sup> However, there were some differences of opinion as to whether such a "moral impotence" is really distinguishable from discretion. While Sabattani tended to think that discretion was a natural law requirement, Lefebvre was inclined to divide the two.<sup>103</sup>

However, these different considerations of Lefebvre and Sabattani, have some important practical applications, as Hailer outlines:

It may be asked whether there is any hope of a nullity where the homosexual is not mentally disturbed?

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid., p. 11.

<sup>102</sup> Cf. ibid.

<sup>103</sup> Cf. ibid., p. 13; cf. A. Sabattani, loc. cit., p. 146.

According to the views of Sabattani there would be no hope because there would be no mental distortions capable of sustaining the plea of defect of discretion. According to the views of Lefebvre there would, for the same reason, be no hope on the grounds of discretion, but there would be hope on the grounds of moral impotence.<sup>104</sup>

In addition to psychopathy and homosexuality, Hailer outlined that there had been a number of other incapacities considered by the Rota. The hysterical personality had received attention by Filipiak on April 26, 1967, and Lefebvre on May 5, 1968, where it was said that such people were not masters of their own actions. Epilepsy was another cause examined by Bonet on December 12, 1967 - for reasons that the freedom of choice was removed or diminished - whereas Filipiak on February 17, 1968 examined epileptic automatism. The decision coram Pinna of March 26, 1967, is of some jurisprudential interest because the petitioner had suffered from epilepsy for two years previous to the marriage, but there was no question of an attack at the moment of consent. Instead what was at issue was a question of post-epileptic automatism which can follow attacks, and where "the person does sensible actions without however being able to recall them later."<sup>105</sup>

The conclusions made by Hailer's study are significant for the time, especially when it is remembered that in May 1969, the caput of

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104 Ibid.

105 Ibid., p. 15.



due discretion was still in a fermentation process as far as Anglo-Irish tribunals were concerned. These conclusions are as follows:

1) Due discretion, involving both conceptual and evaluative knowledge, should be understood as the practical judgement by which we assume responsibility for our actions.<sup>106</sup>

2) There are Rotal decisions which give this caput a deeper meaning, and these concern the personal capacity to assume marital responsibilities. "But since it is very difficult to measure the quantum of discretion, the question of proof usually revolves round the deliberation."<sup>107</sup>

3) When discretion is seen as a defect of consent, proof of this is usually to be found in the defect of deliberation, and this can be understood broadly, i.e. when a person lacks responsibility, etc.<sup>108</sup>

4) In the decision coram Mattioli of November 6, 1956, the jurisprudential consideration was that where the mental age of a person gave him the discretion of a child who had not reached puberty, the presumption was in favour of the inability of that person's effective consent. Haller's analogy from this is: "Where the level of responsi-

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106 Cf. ibid.

107 Ibid.

108 Cf. ibid., p. 16.

bility of a person was no greater than that of a child at the age of puberty then there might be a similar presumption of incapacity."<sup>109</sup>

5) The concept of moral impotence refers to a personal incapacity as regards the sexual rights which are to be given in marriage. It is well founded, and capable of proof.<sup>110</sup>

6) The Rota is expanding its jurisprudence into more areas of well-defined illnesses; in so doing, "it does not appear to us, at least as regards the criterion of proof, that the Rota has made use of any very new concept. But it does seem that the idea of deliberation has been deepened."<sup>111</sup>

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109 Ibid., p. 18.

110 Ibid.

111 Ibid. In view of Hailer's reference to certain "well-defined illnesses" at the Rota, in fairness to the Church it has to be said that a number of mental conditions had also experienced something of a dramatic overhaul in the civil law of England and Wales with the Mental Health Act 1959. Among other things, the psychopath was recognized in civil law for the first time, and the history of this legal development can be found in: M. CRAFT, (Ed), Ten Studies in Psychopathic Disorders, - A Report to The Home Office and The Mental Health Research Fund, Bristol, John Wright & Sons, 1965. Likewise, this Act and others brought to an end the legal terms of "idiot," "imbecile," and so forth, and a clear synopsis of all this can be found in JOWITT & WALSH, Jowitt's Dictionary of English Law, Vol. 2, London, Sweet & Maxwell, 1977, p. 1172. In short, as far as England and Wales were concerned, the developments of medical science took some time to find modern expression in the civil law.

B. Marriage as a relationship

The 1970 Spring Conference of The Canon Law Society saw Adrian Hailer present another paper. The basis of this paper was an evaluation of the trends in local jurisprudence in a number of grounds which included the first case of lack of due discretion.<sup>112</sup>

Relevant to this present paper are the attempts to formulate some of the areas of marital responsibility, as expounded by the respective ponentes - Brown of Westminster and Humphreys of Birmingham - which we have previously examined. A noteworthy factor was the way in which the sentences had emphasized the relationship aspect of marriage in that it was a community of life, as expressed by Gaudium et Spes, which Hailer considered "to be a presage of willingness on the part of the canonist to look at marriage as it is understood by people in the world today,"<sup>113</sup> the net result of which was that "there is no doubt these decisions will be influential in cases of personality disorder,"<sup>114</sup> where such people will never attain true marital life. However, the notion of lack of due discretion was still not without its problems for,

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112 Cf. Adrian Hailer, "Important Aspects of Current Local Jurisprudence", paper given at the Third Wood Hall Canon Law Conference, London, Canon Law Society of Great Britain, 1970, 11 p. (unpublished).

113 A. Hailer, ibid., p. 10.

114 Ibid.

if it means capacity for marriage, is there really any other way of measuring that capacity than by the actual performance of that person in the marriage.<sup>115</sup>

In Hailer's previous approach he considered that there was no real way of measuring discretion in the abstract, and therefore the best approach would be the degree of deliberation (i.e. consent). Seen this way, as in the case of a psychopath for example, the deliberation would be insufficient as this personality disorder would make him so fixed on himself that he could not freely choose marriage.<sup>116</sup> On the other hand, if a lack of discretion could only be evaluated according to how a person behaved during the marriage, the situation was coming near to saying that "nullity equals unacceptable performance during the marriage plus breakdown,"<sup>117</sup> and that is why the deliberation approach seemed the more suitable one.

However, the jurisprudential nub of the matter was the way in which the judges handled the first case, or, as Hailer expresses it, "the Judges have bravely gone in another direction."<sup>118</sup> The heart of the matter is that the judges adopted a relationship approach, namely,

the decisions have accepted that marriage should be understood as a relationship and that where the essential

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115 Ibid.

116 Ibid.

117 Ibid.

118 Ibid.

qualities necessary for such a relationship may be argued to have been lacking, the marriage may be declared null. This necessarily places the burden of proof heavily on the conduct of the party during the marriage.<sup>119</sup>

Be this as it may, if the focus is on the relationship aspect of marriage, so too must the normal responsibilities and obligations be considered. Therefore while something of this was considered in the Westminster and Birmingham sentences, they were only a beginning, and it was obvious that there was need for some further study of the whole question.

So far, in this chapter, we have examined the beginnings of a renewed jurisprudence on marital inability. At this stage, it would seem reasonable to ask whether this developing jurisprudence had any influence on the formulation of the proposed marriage legislation in the new code of canon law. Chapter two of this study will attempt to look for the answer. After this, we will examine how this early jurisprudence was refined, and consider many of the factors such a refinement entails.

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119 Ibid.

## CHAPTER TWO

## THE INCORPORATION OF "INABILITY" IN THE PROPOSED CODE OF CANON LAW

The development of a renewed Rotal jurisprudence, and its first applications in Britain and elsewhere, must not be seen in isolation. If this development has the effect of law, then it should also have a place or recognition in any formulation for the new code of canon law. Therefore, before proceeding to see how Rotal and local tribunal jurisprudence was considered by the Code Commission as regards the proposed new law for marital inability, it would be useful to say something about the sources and inspirations of the proposed legislation.

There were five important preliminary stages in the organization of a commission responsible for preparing a new code of canon law:

1) Speaking to a group of Cardinals on January 25, 1959, in the Monastery of St. Paul Outside-the-Walls, Rome, Pope John XXIII announced that, together with the calling of Vatican II and a Roman Synod, the code of canon law was to be revised.<sup>1</sup>

2) On March 28, 1963, Pope John XXIII constituted a Commission of

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<sup>1</sup> Cf. Acta Apostolicae Sedis, 51(1959), pp. 65-69.

Cardinals charged with the revision of the code.<sup>2</sup>

3) During a meeting of November 12, 1963, the Commission decided to postpone this work until the Council was terminated.

4) Shortly before the end of Vatican II, Pope Paul VI solemnly inaugurated the work of the New Code Commission.<sup>3</sup>

5) In January 1966, Pope Paul VI began the consultation process for the choice of consultants who were eventually assigned to various sub-commissions. One of these groups was responsible for the revision of the canons on the sacrament of marriage.

Bearing in mind these historical beginnings, we are in a better position to examine the many processes which this pontifical authorization set in motion. We will begin this study by examining an unofficial work of a member of the Code Commission, published in England in 1966, the year that the Commission began its work in earnest. After this, we shall consider the development of the proposed legislation on marital inability up to and including the latest drafts.

#### I. Preliminary Proposals for the Law (1966)

The possibility of extending the Church's matrimonial impediments for reasons of an eugenic inability is not an entirely new idea,

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<sup>2</sup> Cf. ibid., 57(1965), pp. 985-989.

<sup>3</sup> Cf. ibid.

and the ethics involved here have been the subject of previous studies dating back some fifty years.<sup>4</sup> However, since these discussions took place around the time of Nazi totalitarianism, and since the memories of their malevolent solutions are still vivid, it is understandable that such discussion can still raise a number of emotive responses. Nevertheless, Hüizing's early considerations for the New Code<sup>5</sup> broach such a delicate possibility; nor are they without some canonical foundation. Indeed, the Sacred Congregation of the Sacraments for precisely such reasons, had previously indicated the dangers involved in granting too easily dispensations from consanguinity, where the first degree of the collateral line touches the second.<sup>6</sup>

The idea of an impediment of moral impotence was likewise thought to have some canonical foundation, in the sense that it grew out of Rotal jurisprudence and involved situations where the rights and obligations of marriage are prevented from coming into existence. In cases of physical impotence, or of incapacity for sexual intercourse, the causation can be either organic defect or some type of psychic

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4 Cf. P. Hüizing, "Some Proposals for the formation of Matrimonial Law: Impediments, Consent, Form I", in The Heythrop Journal, 7(1966), pp. 161-181; ibid., II, pp. 269-286. Reference on p. 179: J. Pfatsbacher, Eugénische Ehehindernisse? (Vienna 1933); P. Schmitz, "Eugenische Ehehindernisse", in Schonere Zukunft, 9(1933-34), pp. 145 f.

5 P. Hüizing, loc. cit., p. 179.

6 Ibid., p. 180; cf. Acta Apostolicae Sedis, 23(1931), p. 414.



inability. Building on this, the Rota had examined the canonical effects of nymphomania, and concluded that this illness prevented conjugal fidelity to such an extent that a marriage could be declared invalid; something of this is associated with the issues involved in constitutional amorality. Therefore, Hüizing's proposal in this area was that there was a need for some sort of canon to the effect that "sexual perversion, an incurable need of drugs, and psychopathic personality could be declared diriment impediments."<sup>8</sup> His motivation for such new impediments is founded on the consideration

That such people, even if not incapable of eliciting sufficient consent in the act of contracting marriage in so far as it depends on their knowledge and will in the actual instant, do not fully understand the obligations they assume, and they are incapable of fulfilling them.<sup>9</sup>

The objection to this proposal may be that in doing so, the Church might be beginning to set impossible standards for marriage, so that a person's basic right to marry would be removed. Hüizing's point is that this does not necessarily follow, as there remains the possibility of a dispensation. Perhaps what is most appealing about his proposal, from the present tribunal standpoint, is that it might lend itself to the administrative procedure, and not to the full

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7 Cf. P. Hüizing, ibid., pp. 180-181.

8 Ibid., p. 181.

9 Ibid.

judicial process, as far as invalidity is concerned.

From the pragmatic stance, Hüizing's suggestion is not without serious difficulties. Nor is he unaware of these. Such an impediment, he considers, comes from the natural law; and the formulation of such a canon should merely give an accurate description of the elements, "without trying to enumerate the various defects which cause, or can cause the impediment."<sup>10</sup> However, the pastoral practicality for those who would have the task of preparing couples for marriage is perhaps where the weakness in his suggestion lies, when he continues: "further elaboration and practical application should be left to interpretation and jurisprudence."<sup>11</sup> Thus to implement this mode of legislation, there would need to be some drastic changes in the present mode of marriage preparation.

Perhaps a better line of approaching the problem of marital inability is to be found in his next suggestion which involves the "necessary prudence and discretion."<sup>12</sup> His more appealing proposal is that "a person who lacks the discretion required to contract marriage is incapable of valid marriage: if the incapacity on such a score

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10 Ibid.

11 Ibid., p. 270.

12 Ibid.

be doubtful, it does not impede marriage."<sup>13</sup> The inspiration for this line of approach seems to come from an earlier suggestion of Keating's.<sup>14</sup>

As before, Hüizing considers the formulation should arise from a principle, whereas the elaboration and practical applications should be left to canon law, "aided by psychology, psychiatry and jurisprudence."<sup>15</sup>

Whatever one may think now about his proposals through hindsight, what is important about them - and which is relevant to this present study - is that Hüizing was already talking about a lack of due discretion, and, in addition, was considering the fact that there are individuals who, for various reasons, are unable to form a marital relationship in the sense that they have an inability to assume the necessary rights and obligations of married life. Furthermore, he was already indicating that there was a need to legislate for these situations in the future law.

Be this as it may, when it came to determining what the concrete proposals for the new code might be on the official level, the Anglo-Irish situation seems to have been little different from else-

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13 Ibid.

14 Ibid., J. Keating, "Marriage of the Psychopathic Personality", in Chicago Studies, 3(1964), pp. 19-38.

15 P. Hüizing, loc. cit., p. 270.

where. Indeed, in the same year that the first lack of due discretion case was settled, the previous situation was well summed up in the Canon Law Newsletter as follows:

Apart from the occasional reports that the Canon Law Society has received from Mgr. John Barry and Bishop Moverley and Mgr. McReavey, there is little information available about the work of the Commission for the Revision of the Code. Indeed for some considerable time, unless one made a collection of the back numbers of the Osservatore Romano, the names of those who were members of the Commission were unknown.<sup>16</sup>

However, this complaint of the previous situation is followed by an announcement of its future rectification. Namely, that as a result of a 1968 international meeting of canonists in Rome, this situation had been highlighted to the extent that the Pontifical Commission for the Revision of The Code had agreed to disseminate more information. The outcome of all this was the birth of Communicationes in June 1969,<sup>17</sup> which would indicate not only what was being considered for incorporation in the New Code, but also would show, as far as marriage was concerned, in what way the Commission itself was evaluating the jurisprudential developments by trying to summarize these as proposals for the new canons. Henceforth, we are able to review some of the deliberations of the Code Commission, in the light of the information which is contained in Communicationes and in other sources.

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<sup>16</sup> Canon Law Society of Great Britain Newsletter, No. 2, 1969, p.2.

<sup>17</sup> Ibid.

## II. Deliberations of The Commission (1971)

The year 1971 saw a spelling out of the proposals for the new code in the area of marriage, and, among other things, the traditional distinctions about the primary and secondary ends of marriage were no longer mentioned.<sup>18</sup> Of main interest to this present study are the indications by Huizing, as the Commission's relator regarding marital inability:

- 1) The total incapacity of eliciting consent caused by a mental illness or a disturbance which impedes the use of reason.
- 2) The incapacity originating from a serious defect of judgemental discretion, about the marital rights and obligations to be given and received.
- 3) The incapacity of assuming the essential obligations of marriage, deriving from a serious psycho-sexual anomaly.<sup>19</sup>

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<sup>18</sup> Cf. Canon Law Society of Great Britain Newsletter, No. 10, 1971, p. 3.

<sup>19</sup> 1) Incapacitas totalis eliciendi talem consensum ob mentis morbum vel perturbationem qua usus rationis impeditur; 2) Incapacitas proveniens ex gravi defectu discretionis iudici circa iura et officia matrimonialia mutuo tradenda et acceptanda; 3) Incapacitas assumendi obligationes essentielles matrimonii proveniens ex gravi anomalia psycho-sexuali. Pontificia Commissio Codici Iuris Canonici Recognoscendo, Communications, 3(1971), p. 77; hereafter referred to as Communications.

What will be noticed immediately is that in the first two areas, the person "labours under a substantial defect of consent",<sup>20</sup> whereas in the last or third area the person concerned may well be able to place the actual act of consent, but "is incapable of implementing the object of consent",<sup>21</sup> because he is "incapable of fulfilling those obligations which ought to be assumed."<sup>22</sup> Likewise in this same issue of Communicationes it was mentioned that the idea of calling this third inability "moral impotence" had received some consideration. However, since this might be confused with physical impotence, the matter was taken no further.<sup>23</sup>

Another point of interest is the phrase "psycho-sexual anomaly". Although not much information was given about this in the 1971 issue, the 1975 issue of Communicationes shows there were some difficulties in formulating the canon,<sup>24</sup> when this matter was considered by the Commission in May 1970. Therefore, in view of some of the comments which the phrase "psycho-sexual anomaly" received, the voting and sources of this phrase may be found in the first appendix of

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20 Ibid.

21 Ibid.

22 Ibid.

23 Cf. ibid.

24 Cf. Communicationes, 8(1975), pp. 49-52.

this paper.<sup>25</sup>

In 1972, Navarrete made a study<sup>26</sup> of the third area of the 1971 proposals - the "incapacity to assume" marital obligations - together with the issues these raised. He thought that there was a special difficulty with this heading, and one really had to decide if it did not constitute a diriment impediment of moral impotence.<sup>27</sup> In short, the Commission was faced with two basic questions, namely: first, if the position being considered is said to be an incapacity, then under which area of the diverse headings should it appear? Second, when this supposition is said to be in the affirmative, under what heading in the judicial schemata should it be inserted: with the diriment impediments, or among the defects of consent? Therefore, his study gives a long jurisprudential history of the development of the differences of opinion of the concept, and his conclusion is more or less that there is room for both hypotheses.<sup>28</sup> However, the position of the Commission was to disfavour the diriment impediment approach.

The scope of the phrase "psycho-sexual anomaly", is another part of Navarrete's considerations, and it seems as though Rotal juris-

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25 Cf. Appendix No. 1.

26 Cf. U. Navarrete, "Incapacitas Assumendi Onera Uti Caput Autonomum Nullitatis Matrimonii", in Periodica, 61(1972), pp. 47-80.

27 Cf. ibid., pp. 47-49.

28 Cf. ibid.

prudence indicated that the concept had been attended to in a number of diverse ways. Among sexual anomalies, homosexuals have something in common with those afflicted with satyriasis and nymphomania, namely, that there is an inner impulse to exercise their sexuality with people different from their proper partners.<sup>29</sup> The root of this incapacity lies in the inability to assume the essential elements of the bonum fidei.<sup>30</sup>

As regards the homosexual condition, there has been extensive Rotal jurisprudence on the matter.<sup>31</sup> But there are other sexual anomalies which do not necessarily contain an impulse to exercise sex with people different from their partners; these involve the sadist, the masochist and the fetichist. Such persons are unable to exercise the proper acts of the conjugal life in a normal and natural way and thus an essential element of the object of consent is missing.<sup>32</sup> But generally, these types of abnormal sexual tendencies are part of a number of symptoms involving a more serious psychic inability and therefore fall under the various species of amentia or dementia; this gives rise to an inability in the area of the essential object of

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29 Cf. ibid., pp. 49-64.

30 Ibid., p. 65.

31 Cf. ibid.

32 Ibid.



matrimonial consent.<sup>33</sup>

Nevertheless, the formulations of the Code Commission are in keeping with the progress of jurisprudence, according to Navarrete, and these can be reduced to three headings:

- a) An inability arising from...the lack of the use of reason, or from some mental illness or other actual disturbance.
- b) An incapacity arising from defect of discretion.
- c) An incapacity of assuming the obligations, arising from serious psycho-sexual anomaly.<sup>34</sup>

However, under "c", the use of the phrase "psycho-sexual" seems to be restrictive according to Navarrete: it does not seem to include those other anomalies which do not pertain to the psycho-sexual sphere, and which are not psycho-sexual by nature, or are of a kind which do not gravely disturb the mind.<sup>35/</sup>

In brief, it would seem as though Navarrete had already predicted the weakness of the formulation of this last area - the psycho-sexual anomaly - and we might note how he would be cited in support of rejecting this restrictive clause in at least ten of the sentences

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<sup>33</sup> Ibid., p. 66; Navarrete mentions that there are other incapacities too, among which are: "narcissismus, exhibitionismus, voyerismus, saliromania, zoophilia, paedophilia, gerontophilia, necrophilia".

<sup>34</sup> Ibid., p. 66.

<sup>35</sup> Cf. ibid., p. 67.

which were to appear in forthcoming issues of MDEW.<sup>36</sup> Therefore, Navarrete's solution was to extend the area of inability by suggesting the following amended formula:

This difficulty is obviated, if under "c" that last restrictive clause is omitted: 'proveniens ex gravi anomalia psycho-sexuali', and it is simply said:

"an incapacity of assuming the essential obligations of marriage (coming from whatever cause)."<sup>37</sup>

The 1971 issue of Communicationes not only indicated the general contents of the Schema regarding marital inability, but also opened the door to what might be called the "psycho-sexual controversy" of which more will be said later.

### III. Draft of the Law (1975)

The Praenotanda for the proposed law differ little from the brief considerations first indicated in the 1971 proposals of Communicationes.<sup>38</sup> Therefore, the official proposed law which was sent for the

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36 Cf. Matrimonial Decisions for England and Wales 10(1974); c. Brown, p. 427; 11(1975): c. Ashdowne, p. 67, c. Brown, p. 251; c. Quinlan, p. 267, c. Fogarty, p. 389; 12(1976): c. Ashdowne, p. 22 and p. 29, c. Brown, p. 61, c. Dunderdale, p. 68, c. Ashdowne, p. 107. From 1973 onwards the decisions for the various volumes were selected by an editorial committee - the sentences they examined were previously selected by their various tribunals of origin. Therefore, it could well be that there are really more references than appears when account is taken of this factor.

37 U. Navarrete, loc. cit., p. 70.

38 Cf. Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema Documenti Pontificii quo Disciplina Canonica de Sacramentis Recognoscitur, Romae, Typis Polyglottis Vaticanis, 1975, p. 14, hereafter called "Schema"; cf. also Communicationes, 3(1971), p. 77.

consultation process is drafted as follows:

Canon 296 (New) They are incapable of contracting marriage:

- 1<sup>o</sup> who are so affected by a mental illness or a serious disturbance of the mind, that lacking a sufficient use of reason, are unable to give matrimonial consent.
- 2<sup>o</sup> who labour under a serious defect of discretion of judgement regarding the matrimonial rights and obligations to be mutually given and received.<sup>39</sup>

It is noticeable that in Canon 296, there is a clear separation of two differing situations affecting consent. The first area is concerned with serious types of disorders which affect the mind to such an extent, that it is impossible to give a valid consent (and which is not unlike the traditional amentia), whereas in the second part of the canon what is being considered is a lack of due discretion, or a person's discernment and judgemental inabilities.

These situations are quite separate from the inability which is concerned mainly with a person's personal lack of capacity, or, to put it another way: incapacity to perform that to which consent was given. Thus, there exists an altogether different canon for this last situation:

Canon 297 (New) They are incapable of contracting marriage those who, because of a serious psycho-sexual anomaly, are unable to assume the essential obligations of marriage.<sup>40</sup>

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<sup>39</sup> Schema, p. 82.

<sup>40</sup> Ibid.

As can be seen, the restrictive phrase was still there, and one can only presume that the intention was to see what the thinking would be, not only about this, but also about the entire canon. With these thoughts in mind, we can now examine the reaction of the Bishops of England and Wales as regards the proposed text.

#### IV. Report of the English-Welsh Bishops (1975)

The Schema De Sacramentis which was sent to the Episcopal Conference of England and Wales arrived in February 1975, and it would seem as though the Scottish and Irish Episcopal Conferences received the Schema around the same time. In March 1975, the Bishops' Conference for England and Wales requested the Canon Law Society of Great Britain and Ireland<sup>41</sup> to examine this document and prepare a report for their evaluation. A working committee was set up and held its first meeting in April 1975 while, in the meantime, the Bishops obtained an extension of the requested time for submitting the results of their consultation from September to December 1975.<sup>42</sup> This work would become the basis of the observations of the Episcopal Conference in response to the Commission's request.

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<sup>41</sup> The Canon Law Society had then changed its title from "Great Britain" to "Great Britain and Ireland".

<sup>42</sup> Cf. Report on Schema Documenti Pontificii quo Disciplina Canonica de Sacramentis Recognoscitur, London, Canon Law Society of Great Britain and Ireland, 1975, p. 1; hereafter called "The Report".

The canons relevant to this present study are canon 296 and canon 297. The comment on the first canon is a favourable one or, as the report says:

Reflecting recent developments in jurisprudence, this canon rightly introduces into the law a commendable expression of factors which render a person incapable of matrimonial consent. No. 1 of this paragraph concerns those who are so disturbed as to be, in effect, without the use of reason. No. 2 comprises what has properly been known as the sphere of the defect of due discretion.<sup>43</sup>

The comment on canon 297 is more critical. The first suggestion seems to reflect a use of words which had appeared from time to time in some of the sentences of these countries:

Again reflecting modern jurisprudence, this canon attempts to express a further incapacity in respect of matrimonial consent - the area, namely of inability to fulfill the essential obligations of marriage.

It is recommended that further consideration be given to whether or not it is necessary to add after the word assumere the words et implere, or to substitute the latter for the former.<sup>44</sup>

Nevertheless, this last suggestion is really of minor importance by comparison to the next observation. For the report continues, "it is very firmly and strongly recommended that the phrase ob gravem anomaliam psychosexualem be omitted".<sup>45</sup> The reason for wanting this exclusion stems from the findings of tribunal practice, for the document says

<sup>43</sup> Ibid., p. 63.

<sup>44</sup> Ibid., p. 64.

<sup>45</sup> Ibid.

It is beyond doubt that the jurisprudence of the Church has already arrived at a point where serious personality disorders, be they psychical or otherwise, be they sexual or otherwise, are acknowledged to be incapacitating in respect of marriage.<sup>46</sup>

In re-enforcing this point with the phrase "many serious studies have established this point," there is a suggested re-phrasing for this canon, to read as follows:

Sunt incapaces matrimoni~~z~~ contrahendi qui obligationes matrimonii essentialia~~s~~ assumere nequeunt.<sup>47</sup>

This same suggestion is again re-enforced under the report's section indicating "Major Recommendations"; the wording there reads as follows:

Canon 297 That they be declared incapable of contracting the essential obligations of marriage, for whatever reasons, thus eliminating the restrictive ob gravem anomaliam psychosexualem.<sup>48</sup>

Interestingly enough, this suggested reformulation has many similarities with the proposal made by Navarrete in 1972.<sup>49</sup> Another useful consideration has some connection with C.I.C. 8, in that a law is not ordinarily instituted until promulgated.<sup>50</sup> The significance of

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., p. 77. It might be noted that other Episcopal Conferences, working separately, reached the same conclusion.

<sup>49</sup> Cf. U. Navarrete, loc. cit., p. 70.

<sup>50</sup> Cf. the proposed canon for the New Code - Canon 8 (C.I.C. 8): Leges instituuntur, cum promulgantur - Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema Canonum Libri I De Normis Generalibus, Rome, Typis Polyglottis Vaticanis, 1977, p. 13.

these canons lies in what they are trying to do. Namely, to summarize what had already been established through the gradual development of jurisprudential law, and this point receives some attention in the report with the remarks that this is

the encapsulation in the law of jurisprudentially established grounds for nullity - amentia, defect of due discretion, incapacity to fulfill essential obligations.<sup>51</sup>

These observations, together with those of other Episcopal Conferences, were then considered by the Code Commission. This eventually led to the publication of a revised version of the proposed canons.

#### V. Alter Textus (1978)

The period before and after the distribution of the 1975 Schema saw a number of jurisprudential developments as far as the Anglo-Irish scene was concerned. Linked to this, and because of the general increase of nullity cases being processed, it was felt that an educative gap had to be filled. This pastoral need brought about a publication which was available to the public at large - both lay and cleric: The Church's Matrimonial Jurisprudence - A Statement on the Current Position.<sup>52</sup> Among other things, this publication indicated

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<sup>51</sup> The Report, p. 83.

<sup>52</sup> Cf. The Church's Matrimonial Jurisprudence - A Statement on The Current Position, London, Canon Law Society Trust, 1975.

something of what the future might be, by way of the three divisions;<sup>53</sup> in the third area the controversial words "psycho-sexual" are there, but with an optimistic qualification - "at least for the present".<sup>54</sup> This same triple division also appears in some other general publications of that time.<sup>55</sup>

In May 1977, the Commission for the Revision of the Code considered the various recommendations which were sent to it.<sup>56</sup> Some slight changes were suggested for Canon 296, but on the whole, the consultants were satisfied with the wording of the Schema. In fact, the only change in Canon 296 would be in the first part, to add the word "sufficienti" between "uptpote" and "rationis". Otherwise the canon remains the same as in 1975.<sup>57</sup>

However, the "psycho-sexual anomaly" phrase of Canon 297 had

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53 Cf. ibid., pp. 34-35.

54 Ibid., p. 35.

55 Cf. R. Brown, Marriage Annulment in The Catholic Church, Leigh-on-Sea, Essex, Mayhew, 1977; Amentia p. 44, Lack of Due Discretion, p. 46, Inability to Assume the Obligations of Marriage, p. 50, Cf. also, Id., "The Grounds of Nullity Explained", in The Universe (Newspaper), Friday, 1st December 1978, p. 17.

56 Cf. Communicationes, 9(1978), pp. 370-371.

57 Cf. ibid., p. 370.



come in for some harsh criticism: "for the inability of assuming the essential obligations of matrimony does not just arise from psycho-sexual anomalies."<sup>58</sup> A number of alternatives were suggested by way of re-phrasing; these can be found in detail together with the results of the voting in appendix II.<sup>59</sup> Without going into details, it could be stated that when the canon was first formulated in 1970, the voting was eight in favour and two otherwise.<sup>60</sup>

The 1977 meeting for the appraisal of the results of the consultations shows that for the removal of the "psycho-sexual" phrase, the voting was four in the affirmative, three in the negative and one abstention.<sup>61</sup> The effect of this was that Canon 297 on inability to assume was re-phrased as follows:

Canon 297(42) (new) They are incapable of contracting marriage those who, because of a serious psychic anomaly, are unable to assume the essential obligations of marriage.<sup>62</sup>

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58 Cf. ibid.

59 Cf. Appendix II.

60 Cf. Communicationes, 8(1975), pp. 49-52.

61 Cf. ibid., 9(1978), pp. 370-371.

62 Z. Grocholewski, Documenta recentiora circa rem matrimoniam et processualem, II, Romae, Pontificia Universitas Gregoriana, 1980, p. 83; cf. also, De Matrimonio (Alter. Textus), Romae, Schemata Canonum Novi Codicis Iuris Canonici, 1978, p. 14 (private edition).

In brief, we have examined the proposed legislation as regards inability for marriage. The existing situation, as seen in the Alter Textus at the time of the writing of this paper, is that the expression for the proposed law on marital inability seems to be a fair representation and summary of present-day Rotal and local tribunal jurisprudence.

Therefore, having considered the Commission's gradual refinement of the ground of Inability, we are now in a position to examine how this ground was both developed and refined in Anglo-Irish Jurisprudence. In addition to this, we will also try to see in what way various studies of the Canon Law Society of Great Britain and Ireland - together with other factors that have been brought to the attention of the membership of this society - have aided the work of this refinement. We will then try to see if there has been any interaction between Rotal and local tribunal sentences and compare these two sources of applied jurisprudence to the proposals for the new code.

## CHAPTER THREE

## TOWARDS A GREATER REFINEMENT OF "INABILITY" IN ANGLO-IRISH JURISPRUDENCE

In chapter one we have seen how the renewed jurisprudence of the Sacred Roman Rota was instrumental in bringing about a new ground of nullity in England in 1969: "lack of due discretion". We now wish to examine some of the ways in which this ground was understood in Anglo-Irish jurisprudence, and see how it would eventually also be considered under a new heading: "the inability to fulfill the obligations and responsibilities of marriage."

I. Developments in the early 1970's.A - 1970

In this first section it may appear that what is being examined is the caput of the "lack of due discretion". But this is not so. Rather, it is part of the continual search for the roots of the contemporary ground of inability to fulfill the rights and obligations of marriage, in the light of the development in local jurisprudence. In one sense, the lack of due discretion is something like an inverted triangle, which once had wide beginnings, whereas now it has narrowed and become more pointed and precise through trimming and refinement.

The jurisprudence of 1970 appears to have four interesting elements: the concept of in iure habilis, the notions of discretion and of ability, and, lastly, the ability to assume. While the lack of due discretion seems to be all-embracing at that time, we can also see

that "inability" seems to exist as a potential heading.

1 In Iure Habilis and the emotional age

Canon 1081.1 states that a person must be capable before the law (inter personas iure habiles); this capacity exists by reason of the required age, mental competence, and "the necessary responsibility and discretion that accompanies a marriage age."<sup>1</sup> As regards age, Canon 1067 states that it is sixteen for a boy and fourteen for a girl. However while emotional and personality development is presumed this probability may be overturned by a careful examination of facts. In a sentence coram Brown, it is shown that there are individuals with "serious defects in the emotions and personality development"<sup>2</sup> to such an extent that these

effectively prevent the person from marrying either at that particular time (if the emotional and personality development can be brought to the necessary level) or at all (if under-development is such as to be impervious to alteration).<sup>3</sup>

In other words, this indicated that there were two possible avenues of marital incapacity in this regards: transitory or an absolute incapacity.

In a case before Brown in September 1970, considered under the

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1 C. Brown (Westminster), September 2, 1980, MDEW 4(1970), p. 422.

2 Ibid.

3 Ibid.

heading of a lack of due discretion, the respondent was stated to be a highly intelligent girl. However, within seven months of the wedding, she was admitted to hospital with a serious schizophrenic condition; eight years before the marriage she had received treatment for what was then described as a schizoid personality. The sentence shows that the judges did not pursue the possibility of there being a progressive mental condition when it states:

There is no view being expressed as to the invalidating effect of Schizophrenia in remission; and moreover, the Court is making no statement concerning the existence [..] of this disease, in remission or otherwise, before the marriage.<sup>4</sup>

Instead, the approach was to concentrate more on the Respondent's lack of development on the emotional level. As a child, this person seems to have experienced a very unsettled formation involving an elderly step-father, twelve changes of schools, and many other factors. Yet, while she was said to be extremely intelligent, her emotional development was greatly neglected.<sup>5</sup> The result was that "she became more and more out of touch with reality and merely existed on the intellectual level."<sup>6</sup> Unlike other normal girls of her age, she showed no interest in clothes, parties or friends. Instead, her hyper-intelligence showed itself only on the personal level by argu-

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<sup>4</sup> Ibid., p. 427.

<sup>5</sup> Ibid., p. 423.

<sup>6</sup> Ibid., p. 424.

ment or intellectual aggression.

The thrust of this sentence relies on the fact that she "was not capable of a natural normal emotional relationship."<sup>7</sup> Furthermore, that the responsibilities and obligations of marriage include the ability to relate to one's partner in a normal way because "such a relationship obviously includes an emotional relationship as well as the other aspects of the relationship."<sup>8</sup>

Without wishing to dwell on the fact that high intelligence is not always equated with a normal critical faculty for marriage, we should note that the sentence said "she was patently lacking the discretion enabling her to accept, undertake and fulfill the normal responsibilities and obligations of marriage."<sup>9</sup> This sentence, then, seems to consider that the inability lay in the area of the respondent's emotional underdevelopment, and this was the incapacitating factor in the case.

## 2 Psychological ability for Marriage

The psychological ability of sustaining a marital relationship - in facto esse - is as important as the ability to consent to the relationship itself - in fieri. Such requires a trust not just in what

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7 Ibid., p. 427.

8 Ibid.

9 Ibid.

a person says but also in what he or she does; where this is forever missing there exists a serious incapacity of a most destructive nature.

In one such case, the respondent seemed to be always going out to evening meetings. When his wife began to wonder about these, he told her that they were about "pigs". One night he came home smelling of perfume and his explanation was that this was a special pig preservative! In addition to this, there were his stories about his conversation with the Duke of Edinburgh, how he fought off an encounter with a dangerous fish, not to forget his dance with Her Majesty the Queen.<sup>10</sup> In what sequence, it is not certain, but there is no such uncertainty in the evidence: everyone considered him to be a "pathological liar".<sup>11</sup> The actual case contains reference to numerous gross acts of marital irresponsibility, and he is said to be a psychopath. The in iure of the sentence indicates that where there existed not even a minimum degree of responsibility; so the obligations called for in marriage were simply incapable of fulfillment.<sup>12</sup>

In another case, involving the necessary psychological competence for marriage, some of the pre-marriage courting was done in a mental hospital, where both parties had received treatment at different times. The respondent had undergone thirteen months treatment

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10 Cf. c. Brown (Westminster), July 3, 1970, MDEW, 4(1970), p. 411.

11 Ibid., p. 410.

12 Ibid., p. 408.

before the marriage, and was only formally discharged from the hospital about four months after the marriage.<sup>13</sup> The medical peritus indicated that the respondent suffered from "a depressive illness with obsessions, the combined effect of which was totally incapacitating in that he had become incapable of work of any kind, and the making of minor decisions."<sup>14</sup> The in iure section of this sentence indicated that the lack of due discretion included the concept of inability by way of an incapacitating personality:

The person can know that marriage involves the ability to establish and sustain a relationship [...], however, the Lack of Due Discretion means that a person, though knowing and willing the state of marriage, is unable to accept and undertake the obligations and special responsibilities.<sup>15</sup>

3 The personal capacity to assume the marital obligations

In an April 1970 decision, the in iure section states that in addition to the object of consent - or what has to be known and willed - there is also the complexity of responsibilities and obligations "that a person must be able to undertake before the marriage can be regarded as "brought into being."<sup>16</sup> The analogy used is the one of impotence in that such a person is unable to bring to the marriage the

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<sup>13</sup> Cf. c. Brown (Westminster), August 2, 1970, MDEW, 4(1970), p. 416.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., p. 415.

<sup>16</sup> C. Brown (Westminster), April 4, 1970, MDEW, 4(1970), p. 380.



necessary physical qualities. In the case in question, the ponens indicates "that a person who cannot bring to marriage certain psychic qualities which enable him to concern himself with the psychological obligations of the marital state, is not regarded as being mentally competent for marriage."<sup>17</sup>

In another decision of May 1970, the case involved a person suffering from a psychopathic condition, and the inability to undertake the marriage obligations is brought out most strongly in the observations of the medical periti. One doctor indicated that the respondent suffered from a personality disorder of a constitutional type, "in essence a type of behaviour disturbance which is likely to remain through his life."<sup>18</sup> A second doctor indicated that he had a psychopathic personality and was a pathological liar,<sup>19</sup> and a third doctor said that

while possessing normal intelligence, he does not have the normal appreciation of the significance and consequence of his actions and his responsibilities in relation to them.<sup>20</sup>

These observations are confirmed by yet another two doctors.<sup>21</sup> But

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17 Ibid., p. 381.

18 C. Brown (Westminster), May 29, 1970, MDEW, 4(1970), p. 393.

19 Ibid.

20 Ibid.

21 Cf. ibid.

seeing that there was little information about the respondent before the marriage, and immediately afterwards, the main interest as far as a tribunal is concerned, rests on the question as to whether or not his consent would be valid. The views of the periti here are valuable - the respondent's acts of gross immaturity are part of his condition, and this could not just come upon him like some illness.<sup>22</sup> The ponens' conclusion of the case is that all the psychiatrists "make the respondent as someone unable to assume the normal burdens and responsibilities of marriage."<sup>23</sup> Therefore, in view of this and the evidence, it is "completely clear to the Judges that whatever relationship may have existed between the petitioner and respondent - this could not be described as a marital relationship in the ordinary sense."<sup>24</sup>

#### 4 Discretion: strictly in the critical faculty

While the heading of a lack of due discretion could be described as broad enough to encompass those people who suffered from different types of constitutional incapacities and disorders, there were, at this time, many decisions on the lack of judgement involving

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22 Cf. ibid., p. 394.

23 Ibid.; cf. also p. 396.

24 Ibid. p. 396. This same type of inability is seen in another case near this time. It involved a constitutional homosexual. The ponens mentions that while the respondent "genuinely thought that he was able to contract marriage", the events show otherwise. C. Dunderdale (Westminster), December 9, 1970, MDEW, p. 434f.

the critical faculty, as there are indeed sentences involving a combination of both. A good example of the deficiency of discernment in the critical faculty, is found in a December 1970 decision coram Brown, where the in iure section states:

It has now become an accepted part of ecclesiastical jurisprudence that for a person to enter marriage, it is not merely sufficient for him to enjoy the use of reason, to be able to formulate an act of the intellect and of the will; it is also necessary for him to be able to know and embrace the 'special obligations of marriage' (cf. S.R.R.D. Vol. 48 (1956), p. 804, coram Felici 16.X.1956). The ability to do this has been described in different terms; but the name in England for this ability is DUE DISCRETION.<sup>25</sup>

#### B - 1971

The jurisprudence of 1971 might be described as belonging to a period of transition. While there are sentences showing lack of due discretion in the sense of absence of the critical faculty, the ground was ambivalent enough to include those persons with constitutional inabilities which, because of their nature, might or might not have affected the critical faculty by way of a secondary effect. An analysis of a May 1971 decision shows how the transition was made:

##### 1) In the first sense:

The term 'discretion' is perhaps less than fortunate in that it ~~seems~~ to indicate an intellectual note, or at least a note which concerns an ability to make a judgement.

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<sup>25</sup> C. Brown (Westminster), December 9, 1970, MDEW, p. 439.

ii) In the second sense:

However, as has already been well established, even in Rotal jurisprudence, discretion here has a WIDER NOTE than this /first sense/, and refers to an inability to undertake and carry out certain obligations which are fundamental to the married state.<sup>26</sup>

We should now consider both these applications.

1. Sentences referring to lack of discretion in the first sense.

One ponens stated that discretion is not to be understood in the way that the Oxford Dictionary might describe it: "the liberty of deciding as one thinks fit."<sup>27</sup> Rather, it is to be understood in the sense used in a 1956 decision coram Felici, in which he says there must be:

such discretion of mind which is sufficient for the person to be able to know and undertake or embrace the special obligations of marriage: [.../ talis mentis sit ad cognoscendas et amplectendas peculiare obligationes contractus matrimonialis.<sup>28</sup>

This notion is also referred to in a Birmingham case where the ponens spoke of the enjoyment of a use of the critical faculty

<sup>26</sup> C. Brown (Westminster, May 12, 1971, MDEW, 5(1971), p. 243 (emphasis added). A part explanation of this duality of approach, might rest in the fact that the Rota may have been doing this too, as Keating's thesis seems to suggest. Cf. Keating, op. cit., p. 156.

<sup>27</sup> C. Brown (Westminster), September 30, 1971, ibid., p. 315.

<sup>28</sup> C. Brown (Westminster), November 26, 1971, ibid., p. 358; c. Felici, S.R.R. 48(1956), p. 804.

sufficient to appreciate the essential obligations,<sup>29</sup> and also in a Southwark decision where St. Thomas is quoted (S.Th., - Suppl. 43, 2.2.)<sup>30</sup> and in a Westminster decision handed down near this time.<sup>31</sup> A Leeds decision of this same period says that "where a person lacks the discretion required to appreciate the obligations of marriage, then his consent will itself be defective."<sup>32</sup>

2. Sentences referring to lack of due discretion in the second sense

The second form is more like that which would be called the ground of "inability" in Anglo-Irish jurisprudence today. In the use of this heading in the second sense - as the functional inability to carry out marital obligations - one ponens was careful to indicate that not all acts of irresponsibility would qualify as evidence in a nullity case:

For example, a person who rides a horse, occasionally, could be the most irresponsible horserider there is; but one could not say that this irresponsibility (unless it is merely characteristic of irresponsibility in other areas as well) would militate against the nullity of marriage.

To the question as to what should be examined the answer must be, therefore, that only those forms of irresponsibility that are contributory to an inability to undertake and carry out the obligations of marriage are to be

29 C. Humphreys (Birmingham), January 1, 1971, MDEW, 5(1971), p. 36.

30 C. Denning (Southwark), December 31, 1971, ibid., p. 216.

31 C. Dunderdale (Westminster), January 27, 1971, ibid., p. 222.

32 C. Sharp (Leeds), December 9, 1971, ibid., p. 379.

considered<sup>33</sup>.

A good example of nullity arising from an incapacity can be found in a Liverpool decision where there was considerable difference of opinion among the advising doctors, and where the solution arose from that independence of the judges' decision. This case also illustrates how there must be discernment in the interpretation of psychiatric reports. One doctor - who lectures in the faculty of psychological medicine at a well-known university - apparently wrote to the petitioner in the case and advised her about the respondent's ability to give consent as follows: "There is no doubt at all in my mind that TOBY [a fictitious name] had complete responsibility for what he was doing when he married you."<sup>34</sup> However, the ponens was able to indicate that there was some very important evidence on file in a psychiatric hospital, dated four years before the marriage, which amounted to a diagnosis of the respondent as schizoid personality.<sup>35</sup> Another psychiatrist had written, within one year of the marriage:

I think that his condition is quite a serious one and there is no doubt that he is being violent towards his wife and indeed might do her serious injury. He has very little insight into his condition.<sup>36</sup>

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33 C. Brown (Westminster), October 25, 1971, ibid., p. 302.

34 C. Mullan (Liverpool), February 19, 1971, ibid., p. 233.

35 Ibid.

36 Ibid.

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Nevertheless in the same year this same psychiatrist also wrote:

Memory good - talks freely, Content: worried about his marriage and the upset this is causing at home. Intelligence average. Insights considerable. No hallucinations - one remission. Personality disorder. Diagnosis - "psychopathic personality" and again, diagnosis: "Schizophrenia".<sup>37</sup>

However, the observations of a consultant psychiatrist at a day hospital are perhaps more realistic: he had treated the respondent five years before the marriage and after the breakdown. In all, there were ten to fifteen personal consultations with him, and about forty to fifty through his registrars. Thus, it is with some authority that this doctor is able to say more clearly: "He is schizophrenic - there is no doubt about it and that has developed over the years. He distorts reality."<sup>38</sup>

The ponens also indicates that this physician was aided in his diagnosis by the presence of symptoms of persistent delusions, a grossly erratic employment record, and a complete loss of control.<sup>39</sup> The effects of these on his marriage are well illustrated:

He is not capable of assuming full responsibility and of acquitting himself adequately as a husband... This is a kind of disability which cannot be compared with say, severe rheumatic diseases or chest illnesses, etc., because it penetrates through the whole person and the whole personality.

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37 Ibid.

38 Ibid.

39 Ibid.

A chronic bronchitis or a person with a severe rheumatoid condition is still capable of love and affection and of being a father to his children even though he cannot work.

A schizophrenic hasn't got the capacity to fulfill this role with love and devotion and to make a happy relationship. He is deprived of this particular personal quality.<sup>40</sup>

Another important aspect of this 1971 sentence is the way in which the psychiatrist responded to the pointed question of the Tribunal, namely:

From your knowledge of this person would you consider him capable of undertaking and fulfilling the life-long obligations of marriage?<sup>41</sup>

The doctor's reply is explicit, for it shows that there are situations in which a person may appear to have the necessary discretion, but not the capacity for the performance of the requirements of marriage in fact esse, as his answer indicates:

No. He was not capable of undertaking and fulfilling the life-long obligations of marriage, and the static position in 1967 was this - if you were to ask him what he was doing, he was capable of making the contract at the time; but he was incapable of recognizing that he was incapable of fulfilling them.<sup>42</sup>

From the jurisprudential point of view, what is interesting about this sentence, is the ponens' evaluation of the first psychiatrist's letter to the petitioner:

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<sup>40</sup> Ibid., pp. 234-235.

<sup>41</sup> Ibid., p. 235.

<sup>42</sup> Ibid.



Dr. 'S' had difficulty in mastering the canonical notion of valid matrimonial consent. He was inclined to regard the diagnosis at the time of the marriage as crucial.<sup>43</sup>

In short, it would seem as though the advances of jurisprudence went beyond this psychiatrist's understanding - which was not unlike the "lucid moment" type of mentality. The second psychiatrist had a different approach: his was to indicate to the tribunal that the respondent did not have the capacity to fulfill what he had promised with his consent.

A similar situation and understanding of the lack of discretion in this second way, can be seen in a 1971 decision coram Dunderdale. In this case, the respondent was said to be a psychopath. The ponens indicated that because the respondent was unable to learn from experience, he was "perverted by the nature of the disease [sic]"<sup>44</sup> and, what is more,

the fact that at the time of the contract there appears to be full ability to undertake and carry out the obligations of marriage, can make no difference if in fact there are influences at work to render the affected party unable, over the course of the marriage, to carry them out.<sup>45</sup>

Again this same situation is highlighted in another Westminster

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43 Ibid., p. 236.

44 C. Dunderdale (Westminster), July 23, 1971, ibid., p. 253.

45 Ibid., p. 257.

decision of that year.<sup>46</sup> Here the respondent seems to have pawned nearly every object in the marital home: because of his excessive gambling, which was often punctuated by his violence towards the petitioner, as well as the understandable frustrations of her having to listen to all his unfulfilled promises of reform. In this case, the ponens mentions that "in spite of his wishes and desires about having an ordinary marriage - he was too immature and irresponsible to be able to sustain what an ordinary relationship calls for."<sup>47</sup>

In another 1971 decision, the court dealt with a psycho-sexual anomaly, similar to one of those situations which Navarrete outlined in his 1972 paper.<sup>48</sup> In this case, the ponens indicated that the respondent's incapacity resided in her horror of the normal sexual act, to such an extent that over a period of five and a half years there were many psychiatric consultations about this psycho-sexual problem, and, "the meagre outcome of all this effort was that intercourse took place on two occasions, when the respondent was heavily drugged."<sup>49</sup>

Lastly, we might note in passing that in this last mentioned case, "moral impotence" was included as a ground in the petition (in

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46 C. Brown (Westminster), July 26, 1971, ibid., p. 273.

47 Ibid., p. 277.

48 Cf. Navarrete, loc. cit., pp. 49-64.

49 C. Dunderdale (Westminster), November 25, 1971, ibid., p. 348.

addition to an intention contra bonum prolis and the lack of due discretion). However, the understanding at that time was to combine "moral impotence" with the second area of the lack of due discretion, and thus, treat the matter as an inability arising from an incapacity to have or want the natural act of intercourse.<sup>50</sup>

#### C - 1972

The 1972 jurisprudence on lack of due discretion entered into a new phase. It was called "inability". Sometimes, a distinction was made between the two aspects; other times it was not. There was also an attempt to consider the situation under an altogether different name. Lastly, we find use of the triple formulation as given in the 1971 issue of Communicationes.

#### 1) Positive Qualities for Marital Ability

In a decision coram Denning, some attempt was made to outline marital ability in a more positive way. These norms, not unlike those found in Lesage's well published study,<sup>51</sup> are as follows:

- a) The parties for marriage must be able properly to appreciate in general terms or outline the constitutive elements of the married state.

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<sup>50</sup> Ibid.

<sup>51</sup> Cf. G. Lesage, "Psychic Impotence, A Defect of Consent", in Studia Canonica, 4(1970); pp. 61-78.

- b) They must be able to understand and evaluate the obligations arising from that state.
- c) They must have the capacity to apply those obligations to themselves as part of the new relationship, which will be created by marriage.
- d) They must be able at the time of the marriage celebration itself to accept and fulfill these obligations.<sup>52</sup>

Realistically, too, the same ponens indicated that at the time of the marriage these qualities may seem to be there, in potentia so as to speak, but in some cases it is "only after the event, usually in the actual physical and psychological encounter of the parties as married, does doubt arise."<sup>53</sup>

This more positive approach is also to be seen in a decision coram Brown, where some of the required qualities are outlined as follows:

- 1) At the time of contracting marriage, a person should have:
  - a degree of independence,
  - self reliance,
  - deliberation.
- 2) The person must also be, to some extent:
  - a self contained person,
  - able with free choice to give his or her love

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<sup>52</sup> C. Denning (Southwark), June 6, 1972, MDEW 7(1972 - Second Part), p. 193.

<sup>53</sup> Ibid., p. 194.

to the other, so that there can be a fusion of the two loves into one.<sup>54</sup>

The point made in this same sentence was that when these very normal properties of maturity are missing, there can exist a state of almost child-like dependence, which many would hold to be immaturity. Therefore, "total dependence on parents involves a transference of the total dependence on to the married partner (probably therefore being regarded as a substitute parent)."<sup>55</sup>

## 2. The extending range of lack of due discretion

As we have seen before, the ground of "lack of due discretion" appears to have had at least two facets. In a decision coram Sharp in 1972, mention is made that in the first area, the focus is centered on the maturity of judgement enabling a person to evaluate marital obligations, while in the second area, a person may well be able to do all this, but is unable to fulfill the obligations. A parallel to this second area may be found in the impotent person: he may be fully qualified in as much as the first part of this ground is concerned, but lacks the capacity to consummate the marriage because of an incapacity which exists in the second area.<sup>56</sup>

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<sup>54</sup> Cf. c. Brown (Westminster), September 27, 1972, ibid., p. 304.

<sup>55</sup> Ibid.

<sup>56</sup> Cf. c. Sharp (Leeds), January 19, 1972, ibid., p. 7.

However, these seemingly clear distinctions may not reflect the situation of all tribunals, or, as Mullan indicated, because the caput was still in the process of developing "one must not be surprised if its formulations differ from place to place."<sup>57</sup> Something of this same point is made by Lloyd of Birmingham, in that the caput is described as a convenient, but misleading "umbrella under which a whole host of nullifying circumstances can be gathered ranging from near amentia to an inability to cope with the financial and material pressures of married life."<sup>58</sup>

### 3. Incapacity - when evident only in married life

It can well happen that there are situations in which persons are aware, to some extent, of their own marital incapacities; for instance, the homosexual or someone with psycho-sexual inhibitions who wishes marriage in the true sense and with it some hope of a remedial effect. There are other situations in which the incapacity becomes apparent "only after the marriage - not in the sense that marriage was necessary in order to reveal the incapacity."<sup>59</sup> These situations call for a careful reconsideration of present modes of marital preparation, so that the possibilities of remedies or not are known about before marriage is attempted.

57 C. Mullan (Liverpool), October 2, 1972, ibid., p. 321.

58 C. Lloyd (Birmingham), October 25, 1972, ibid., p. 362.

59 C. Dunderdale (Westminster), March 28, 1972, ibid., p. 97.

#### 4. Attempts to find a new name

In a Southampton decision, coram O'Ryan, the ponens wondered whether a clearer description of the caput might be that of a "lack of capacity for canonical consent".<sup>60</sup> Dunderdale observed that the heading of lack of due discretion was being used of a variety of reasons, to the extent that "inability" was coming to be the term used for the ground itself. However, he had some reservation with this general use of the word "inability", or as he says:

The term is too wide in its application for the reasons that it can connote, in addition to the inner inability, an inability arising where there is indeed inability, but not one deriving solely from a constitutional defect in the person.<sup>61</sup>

Dunderdale resolved the dilemma by stating that when a case involved some inability arising from a constitutional defect or incapacity, a more fitting alternative title would be "lack of competence", which he explained in the following way:

The lack of competence has nothing to do with an intellectual inability to know the nature of marriage. In fact, it assumes that such knowledge is present, as also the will and intention of entering into the contract of marriage. What the person fails to realize - and probably this is true of both parties - is that he or she is just not competent to undertake and carry out the obligations and responsibilities.<sup>62</sup>

60 C. O'Ryan (Portsmouth), May 11, 1972, ibid., p. 83.

61 C. Dunderdale (Westminster), March 28, 1972, ibid., p. 83.

62 Ibid.

5. The caput is mistakenly called lack of due discretion!

Whatever one may think of the last suggestion, there seems to have been a growing trend near this time to describe lack of due discretion merely as "inability". For example, in a decision coram Brown we find:

The 'inability to undertake and carry out the obligations of marriage' (or lack of due discretion as it is mistakenly called) refers to a range of abilities which are necessary for marriage.<sup>63</sup>

However, the content of the rest of the in iure section makes it clear that what is being considered is a person's incapacity for marriage. We witness at this point a movement towards the establishment of the second separate caput, in the style of its existence today.

This same ponens would insist on this distinction in a good number of other decisions of that year,<sup>64</sup> while in August he states that when lack of due discretion is considered as an inability, this ground can mean:

- 1) Some psychological condition such as to make them unable to form or sustain a marital relationship,
- or,
- 2) A person so immature and irresponsible that he can hardly be regarded as being fit at the time of the marriage.<sup>65</sup>

<sup>63</sup> C. Brown (Westminster), June 22, 1972, ibid., p. 170.

<sup>64</sup> Cf. in the same volume: c. Brown, November 29, 1972, p. 430; c. Brown, November 29, 1972, p. 449; c. Brown, December 12, 1972, p. 461.

<sup>65</sup> C. Brown (Westminster), August 24, 1972, ibid., p. 254.



Another approach is that of O'Connor of Liverpool, where the affirmative grounds were lack of due discretion and "error in the quality of the person". The latter heading rests on the fact that the respondent was able to conceal the fact that he had received pre-marital psychiatric treatment for his psychopathic condition, whereas the impression he was giving his partner was that he was a normal - if not "charming" - young man.<sup>66</sup>

6. The Triple Distinction of Communicationes.

One of the first actual uses of the considerations of Communicationes is to be found in a decision by Davey of Portsmouth.<sup>67</sup> After evaluating CIC canon, 1081.2, he then mentions that the present theology was being formulated in the proposed law as follows:

Matrimonial consent is an act of the will through which a man and woman, by means of a covenant (foedus), establish a community (consortium) of conjugal life which is exclusive, perpetual, and by which its nature is ordained to procreation - Communicationes, Vol. III, n.1, p. 75.<sup>68</sup>

Hence what was being considered was marriage as a relationship, part of which encompassed the traditional triple Scholastic bona.<sup>69</sup>

<sup>66</sup> C. O'Connor (Liverpool), February 18, 1972, ibid., p. 37.

<sup>67</sup> Cf. c. Davey (Portsmouth), November 10, 1972; ibid., p. 378f.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

Davey's evaluation of the jurisprudential situation was well expressed in his observation that:

Experts in the field of jurisprudence have some time now been pointing out the unhappy connotation that the term 'Due Discretion' has, and the word preferred is Ability,

So when we talk about Due Discretion, in conformity with Rotal and local jurisprudence, what we mean really is 'ability to undertake and carry out certain obligations which are fundamental to the married state.' Primarily here is the ability to establish and sustain a relationship.<sup>70</sup>

In observing that "jurisprudence has reached three generic types of inability to enter and sustain a marriage relationship,"<sup>71</sup> Davey indicates how those were being seen in the New Code proposals by way of an explanation and clarification of the manner in which a lack of consent invalidates marriage:

- a) The first type of inability arises from lack of the use of reason because of some habitual mental illness or because of some actual mental disturbance.
- b) The second kind of inability is that arising from grave psycho-sexual anomalies.
- c) The third is what we have become used to calling 'Lack of Due Discretion.'<sup>72</sup>

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70 Ibid., p. 379.

71 Ibid.

72 Ibid.

D - 1973

The "Forward" to Volume Eight of MDEW - containing the 1973 nullity decisions - shows that the jurisprudential situation was still in a state of fermentation, as it was the previous year. But there is a clearer indication of a new trend: the introduction of a separate ground in its own right: "The inability to fulfill the obligations of marriage."<sup>73</sup> Nevertheless, the "Forward" indicates that:

It will be seen that the major portion of the cases have again been on the principal grounds of the Lack of Due Discretion.<sup>74</sup>

However, when it comes to describing exactly how this ground was being understood by way of practical application and jurisprudential extension, the "Forward" continues:

This general heading would, at the moment, cover all three of the headings listed in Communicationes. In due course, naturally, these three sub-headings will no doubt be divided into three separate capita nullitatis.<sup>75</sup>

This then, more or less, represents the state of the jurisprudential flux between the late 1960's and the early 1970's, and thus leads the way to the next stage of Anglo-Irish refinement of the ground of Inability.

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73 MDEW, 8(1973), p. II.

74 Ibid., p. I.

75 Ibid.

## II. Middle to the Late 1970's

Volume Ten of MDEW (1974) introduces for the first time some of the Irish and Scottish Sentences.<sup>76</sup> The "Forward" also mentions that the ground of "inability to fulfill the obligations of marriage" is described as being a formulation which derives in principle from the formulation of the "Schema for the Canons on Marriage in the New Code".<sup>77</sup> This ground and "the lack of due discretion" are distinguished from the "inability to fulfill, etc. deriving from a psycho-sexual anomaly."<sup>78</sup> Yet, a further point mentioned is the value of MDEW itself: for it is really through circulation of the volumes and through tribunal interchange that we witness a "general advance in a more scientific approach" to the many jurisprudential considerations involved in nullity cases.<sup>79</sup>

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<sup>76</sup> In doing so, it would seem as though the title of this volume should have been changed; for MDEW is the abbreviated form for "Matrimonial Decisions of England and Wales." At the time of writing, 1980, this has yet to be done.

<sup>77</sup> Forward, MDEW, 10 (1974), p. I. The "Forward" of course was written in 1975 and after the issue of the Schema; therefore, the use of the triple division of these 1974 sentences reflects the influence of Communicationes, and what is found in canonical journals.

<sup>78</sup> Ibid., p. II.

<sup>79</sup> Ibid.

Lastly, the 1974 decisions involving the ground of inability mark something of a clearer development in local jurisprudence; in one sense, they might be called the cross-roads. What had been previously dealt with under various mutations of one multi-purpose heading (the lack of due discretion) will, henceforth, through the proposals for the new law, be effectively handled under three distinct grounds. The result is that inability can now be described more accurately, as it tends to fall into the third area of the Code Commission's proposals.

A. Inability as seen under the second area of the Schema formulations.

In a decision coram Sheehy of Dublin, inability is shown to stem from an incurable condition existing at the time of the marriage.<sup>80</sup> Therefore, what is being considered is the person's capacity or ability, because this capacity determines the quality of the consent.<sup>81</sup> Theodore Davey of Portsmouth examines the defensive tactics of the paranoid personality: such an aggressive, suspicious or hyper-sensitive personality forms a barrier to the openness and trust needed for undertaking of an interpersonal relationship.<sup>82</sup> In a Westminster decision, reference is made to the "later" Rotal jurisprudence

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80 Cf. c. Sheehy (Dublin), February 11, 1974, MDEW, 10(1974), p. 181.

81 Cf. ibid.

82 Cf. c. Davey (Portsmouth), July 17, 1974, ibid., p. 282.

mentioned in Keating's thesis in the sense that what was consented to has to be assumed, fulfilled, and put into practice.<sup>83</sup>

Another sentence within this grouping is one referring to a homosexual; it was issued by the Dublin tribunal, coram O'Kane; and reference was made to Tobin's recent study on the subject.<sup>84</sup> In such cases it is important to distinguish the genuine or constitutional homosexual from the situational or pseudo-homosexual who, under normal circumstances and choice, would be heterosexual. The true homosexual, on the other hand, really has a revulsion for women, but may wish to enter marriage for a number of other reasons, such as a desire for children, to prevent gossip, to hope for a cure and so forth.<sup>85</sup> Nevertheless, such a person - depending on the evidence of course - has a trait within him which made him incapable of interpersonal relationships with a member of the opposite sex. O'Kane points out that this is a basic incapacity, and uses some North American jurisprudence on this very point:

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83 Cf. c. Ashdowne (Westminster), July 26, 1974, ibid., p. 301.

84 Cf. c. O'Kane (Dublin), December 11, 1974, ibid., p. 407; cf. also William Tobin, Homosexuality and Marriage, Rome, Catholic Book Agency, 1964.

85 c. O'Kane, ibid., p. 407.

In a pertinent Montreal case of the 16th March 1966, one of the psychiatrists who gave evidence argued that the marriage was valid because 'if a homosexual is capable of heterosexual relations, he can marry validly.'

The Judges commented: 'We feel that this limits unduly the ability to contract heterosexual capacity. Marriage in fact requires much more than this in its essential obligations. Not only should the spouses understand and want the essential obligations of marriage, but they must also be psychologically capable of fulfilling them. To state therefore that the simple physical capacity to perform the heterosexual conjugal act is sufficient to contract marriage validly seems to us to be below realities, that is the very finality of marriage and its essential requirements.'<sup>86</sup>

B. Inability as seen under the third area of the Schema formulations.

In 1974, Brown outlined again the triple proposals found in the 1971 issue of Communicationes.<sup>87</sup> However, he also stated that since this original formulation was proposed, Rotal jurisprudence shows that the inability of the third area

is not just something arising only and merely from a psychosexual disturbance; the latter is merely one of the reasons for which a person is unable to assume the ordinarily understood obligations of marriage.<sup>88</sup>

A marriage of a Catholic "hippie" which took place in a Regis-

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<sup>86</sup> Ibid., p. 408; citation given: "The Tribunal Reporter", Vol. 1, p. 473.

<sup>87</sup> Cf. c. Brown (Westminster), October 31, 1974, ibid., p. 312; citing Communicationes, 3(1971), p. 77.

<sup>88</sup> Ibid.

ter Office in August 1968 is considered in a case coram Ashdowne.<sup>89</sup>

Following this, and in the midst of what is described as an intense religious experience which made him search for God (but while under the influence of L.S.D.), he went to confession and was advised either to leave his wife or to have the marriage convalidated. The latter course was chosen, and the convalidation took place in June 1969; but shortly afterwards, a final separation resulted. The in iure approach, as regards the petitioner's inability is via the three areas suggested by the Code Commission, together with the support of appropriate Rotal sentences.<sup>90</sup> In another decision by the same ponens, the triple structure for the Schema is again referred to,<sup>91</sup> and, because of this the ponens points out that the view of the Commission is that "an inability to carry out the obligations assented to, indicates an inability to assume such obligations."<sup>92</sup> Furthermore, the importance of all this

lies in the fact that no longer is 'consent' being regarded purely from the 'notional' and volitional point of view - the intellectual capacity to know and will, and so

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89 Cf. c. Ashdowne (Westminster), August 29, 1974, ibid., p. 326f.

90 Cf. Ibid., pp. 326-327; S.R.R. c. Ewers, May 2, 1959; S.R.R. coram Fagiolo, November 27, 1970.

91 C. Ashdowne (Westminster), October 31, 1974, ibid., p. 343f.

92 Ibid., p. 344.



consent - but also from what may be termed the functional point of view - the power to fulfill or carry out the object known, willed and consented to.<sup>93</sup>

The case in question concerned a homosexual's functional inability, which the ponens described as a classic case where an attempt had been made to submerge the tendencies and enter marriage in the hope that this would show him to be completely normal.<sup>94</sup> What had to be weighed most carefully in such cases, the ponens outlined, was that the illness or condition must not be seen as the ground for nullity, but rather as the cause, to the degree in which it incapacitated the spouse and affected the forming of the marriage relationship.<sup>95</sup>

C. Inability becomes a separate section amidst the MDEW Decisions

Strictly speaking, it is not until page 417 of the 1974 volume of MDEW that inability appears as a separate heading. However, it should be remembered, for reasons already explained, that the concept had been included under the previous multi-general capita during the interim period (1970-1975) and, indeed, had already existed for some

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<sup>93</sup> Ibid.; cf. also, Canon Law Society of Great Britain and Ireland Newsletter, 23(1974), Appendix IX, p. 16. Hereafter abbreviated as: C.L.S.G.B. & I. Newsletter.

<sup>94</sup> Cf. ibid., p. 346.

<sup>95</sup> Ibid.

considerable time in Anglo-Irish tribunals.

It is also clear, even at this stage of the transition, that the restrictive psycho-sexual phrase found little favour in local jurisprudence and, this led the Episcopal Conference of England and Wales to recommend its removal as part of their suggestions to the Code Commission.<sup>96</sup>

Less than one year before the submission of this Episcopal report, the restrictive phrase was already being evaluated in practice. Indeed, in one particular instance, the case was instructed along the lines of the respondent's psycho-sexual anomaly involving her alleged impotence. However, the advocate, in the light of the evidence received, advised the petitioner to extend the grounds to include his own inability; this eventually led to an affirmative decision, on account of the petitioner's psychopathic condition.<sup>97</sup> The in iure section of the sentence indicates that the psycho-sexual restriction has as its only purpose to crystallize jurisprudence at one point in time, and does not take cognizance of further developments:

The earlier writings (in the 1970's and 1971's) indicated that this would arise from some form of psycho-sexual difficulty

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96 Cf. The Report, p. 64.

97 Cf. c. Brown (Westminster), November 28, 1974, MDEW 10 (1974), p. 418f.

or condition such as lesbianism or homosexuality, etc. However, subsequent decisions (of Rotal and local jurisprudence) have indicated that there would be a wider cause for this inability; for example, the inability arising from some other personality disorder (other than those mentioned above), as for example psychopathy or hysterical personality. 98

In another sentence coram Brown, November 1974,<sup>99</sup> the same point is made again, together with a long reference to Navarrete: the core of the argument revolving around the three-fold distinction: sive ex anomalia psycho-sexuali sive ex anomaliis simpliciter sexuali, sive ex quaecumque alia anomalia personalitatis.<sup>100</sup>

#### D. The synthesis

The "Forward" to Volume Eleven (1975) of MDEW describes the state of jurisprudential refinement with the following remarks:

It is now well established (as a result of the Schema de Sacramentis) that the lack of due discretion and inability to fulfill/assume the obligations of marriage are two separate grounds.

However, in spite of a general acceptance of this point towards the end of 1975, this was by no means a standard approach at the beginning of the year. This means that there are a number of decisions for 1975 in which these two grounds are run together as indistinguishable.<sup>101</sup>

98 Ibid., p. 420.

99 Cf. c. Brown (Westminster), November 28, 1974, ibid., p. 425f.

100 Ibid., pp. 426-427; U. Navarrete, "Incapacitas assumendi onera uti caput autonomum "nullitatis" matrimonii", in Periodica, 61(1972), pp. 67-72.

101 MDEW, 11(1975), p. I.

The "Forward" for MDEW (1976), Volume Twelve, makes no further references to a quality existing within any one ground, other than to state that the lack of due discretion and the inability to fulfill the obligations of marriage cover "two quite separate grounds in accordance with the Schema de Sacramentis."<sup>102</sup>

Therefore, in view of what has been examined so far, it can be seen that there has been a steady refinement leading to the establishment within Anglo-Irish jurisprudence as a ground of nullity in its own right.

It might be asked whether the ground is merely an abstraction from the Schema - and not law. The answer would appear to be in the negative. The concept itself can always be found within the previous multipurpose ground of the lack of due discretion, and was used in local jurisprudence in accord with Rotal stylus et praxis long before the formulations for the Schema were prepared. However, it must be noted that the Schema helped give the law a better shape, with the exception of the psycho-sexual restriction. This phrase has been rejected on a number of authoritative levels, and likewise in Anglo-Irish jurisprudence. With the removal of this restrictive phrase and reformulation of canon 297, it would seem correct to say that canon 42 of the Alter Textus of 1978 corresponds, with few exceptions, to the Anglo-Irish practice of the past decade.

<sup>102</sup> MDEW, 12(1976), p. I.

## CHAPTER FOUR

## FURTHER STUDIES ON "INABILITY"

The Anglo-Irish jurisprudential development of the concept of inability was influenced and, to some extent, guided by two sources: 1) Rotal jurisprudence on similar cases, and 2) the contribution of the professional society of Canonists in Great Britain and Ireland.

We will begin our study of these influences by examining some of the papers presented to the Canon Law Society of Great Britain and Ireland on the subject, and conclude by seeing how Rotal jurisprudence was assumed by these courts.

I. Studies of the Canon Law Society of Great Britain and Ireland

At this juncture, we are primarily concerned with the ground of inability, as outlined in canon 42 of the Alter Textus (previously canon 197) of the Schema. We will view this ground from a number of perspectives ranging from the incapacity to fulfill the obligations, to the inability for the donatio, and to assume the obligation of heterosexual friendship, and so forth. We shall also see - in view of the previous bonding of the two grounds into lack of due discretion - whether inability and lack of due discretion can co-exist.

## A - The Capacity for Marriage

### 1. Discretion

Both capacity and discretion for marriage are, to some extent, already conditioned by physical and psychological developments in the parties prior to the time of exchange of consent. At each stage of human development there are areas of expectation, mostly based on what is considered to be "normal" or "average". Hence, one can indicate the average time for learning to walk, to talk, for the mastery of the skills of reading and writing, enumeration, and so forth. Linked to this is physiological growth, normal sexual development, abstract thinking, discernment and insight. But there are exceptions to this average - both above or below - so that in popular parlance it can be said that someone has a special gift or aptitude or is lacking in some quality, whereas the professional might add that the role performance is inappropriate for the gender, or whatever. This becomes relevant whenever the Church legislates for what might be called the minimum requirements associated with a juridical act.

O'Neill's study shows that the 1917 Code of Canon Law tended to use the word discretion as being "synonymous with the use of reason".<sup>1</sup> For example, in canon 906, confession is a requirement for

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<sup>1</sup> James O'Neill, "A Basic Look at Lack of Due Discretion", in C.L.S.G.B. & I. Newsletter, No. 33, 1977, p. 40.

those who have attained the age of discretion (cf. also canon 859.1). But at what exact age does the use of reason begin? Part of the answer may come from Justinian's Code which was incorporated into canon 88.3, where the use of reason is said to reside in the seven year old. The etymology of discretion is helpful too: dis, means asunder or apart, while cernere means to distinguish. Thus we have discernment or discretion, meaning the power of insight.<sup>2</sup> When discernment and consent are present, it is normal to say that there is a human act. O'Neill's study outlines the significance of this:

Discernment is one of the essential elements of the human act, the act for which the doer has to account or answer, that is to say a responsible act. The other element is the consent, the one that properly constitutes the human act. A free willed human act must be preceded by discernment. The act of the will, the consent, follows the recognition of value: that is to say, the discernment or the knowledge and reflection by which the value of an object is assessed, or weighed up by the mind with respect to its desirable and undesirable aspects so that the will can exercise its freedom of choice.<sup>3</sup>

Therefore this discernment, this discretion, is necessary for a freely willed act; when missing there is an instinctive assent, but it cannot be said that it is a proper consent.<sup>4</sup>

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2 Cf. ibid.

3 Ibid., pp. 40-41.

4 Cf. ibid., p. 41.

A distinction must be made between theoretical or speculative knowledge on the one hand, and practical reasons, on the other; for reason is impersonal and detached, it is both conceptual and speculative, without really willing or doing the thing in question.<sup>5</sup> Self-extension of reason is brought about by various acts of knowledge and will; there must also be an awareness that an act can be performed, and a judgement whether to perform it or not:

All this demands discernment, understanding, insight, which must precede the consent, the act of the will, which when it is properly informed, as it were, creates the human act.<sup>6</sup>

The capacity to discern, to know and select, is given to every person from birth; by trial and error and experience, the person is slowly educated from potentia to a normal level, and is regarded as such in differing cultures and societies.<sup>7</sup> It can be appreciated that such a capacity is conditioned by a number of other factors: i.e. the person's own material nature, age, and outside influences. Nevertheless, through a defect "of a material, psychological, social or spiritual nature",<sup>8</sup> this maturation process can become stunted at some particular level or indeed at a number of levels, so that the mental and chronological ages are inproportionately balanced, and this can

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5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.



create special difficulties when the level is low or below whatever is the norm of expectation.

This has some very practical applications, for the Code's ruling of a minimum age for marriage - 16 for the male and 14 for the female - "seems to be acting on the assumption that before this age, [there is] a lack of experience in mutual relationships and proper understanding of human sexuality."<sup>9</sup> Such people are, on the average, so lacking in discretionary insight as to the nature of marriage and its obligations that their consent for marriage is rendered ineffective.

O'Neill, who is a Defender of the Bond in the Dublin Regional Tribunal, makes another useful and important point:

To give a decree of nullity, then, on the grounds of lack of discretion, it would be necessary, I think, to discover signs of arrested mental development before and during the marriage, especially in the area of human relationships. In other words, it would be necessary to prove that the party was habitually in, or had lapsed back into, the mental age of a pre-adolescent in relation to marriage.<sup>10</sup>

The studies of the Swiss psychologist Jean Piaget are of some further help here, mainly because of his 40-year study of child development.<sup>11</sup> In his view, a child on the average does not reach the full

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9 Ibid., p. 42.

10 Ibid.

11 Cf. passim; O'Neill cites: "NEIL-DONOVAN, Sexuality and Moral Responsibility, 1968, Ch. 1."

and perfect use of reason below the age of 11 or 12, and prior to this age "children's thought processes are generally egocentric, syncretic, non-logical, concrete and non-relational."<sup>12</sup> On the other hand, mature thinking results from overcoming or growing out of the normal stages of childhood - or from a child's tendency to be egocentric and concrete - into such concepts of reciprocity and insight involving the future. Such a gradual progression is something beyond just intelligence alone.

Thus, it would seem essential for marital consent that a person's maturation have three necessary ingredients:

- a) Conceptual or abstract thinking - This concerns the ability to grasp such concepts as right and duty, permanence, and exclusive sexual partnership in its unitive and procreative aspects: in a word, all that pertains to the essence of marriage [...].
- b) Relational Thinking - The ability to overcome the immaturity of egocentricity, to have a sensitivity for the rights and needs of others; the ability to adjust one's life and behaviour to meet these needs; the basic ability to see things from the other's point of view and not exclusively from one's own angle, from the angle of one's own self-improvement or perfection; the ability to think in terms of 'we' and not in terms of 'I': the ability that is essential for forming and sustaining mature personal relationships; the ability that has to be developed by education and experience. No amount of mere academic success can replace this for forming mature personal heterosexual relationships.

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12 Ibid.

C) Critical or Evaluated Thinking - The ability to come down from mere speculative thinking about marriage and its ideals to the field of reality, to one's own field of willing and doing; the ability to direct one's knowledge towards an entirely personal act that has to be performed here and now; the ability to criticize (in the original sense, that is, to "judge") what one is about to do and see that one is now at a crisis or turning-point to bind oneself to a husband or a wife for better or for worse [...]; it is the ability, therefore, to measure oneself properly against the obligations that one is about to assume [...].<sup>13</sup>

2. Positive Qualities

A brief presentation was made to the Canon Law Society of Great Britain and Ireland at its Conference (1973), by the Canadian canonist Francis Morrisey: this presentation is based on the studies of another Canadian canonist, Germain Lesage, of the Montreal Tribunal.<sup>14</sup> What is so useful in this study is its positive approach, and it is said to be one of the first attempts "to determine more precisely what rights are truly involved in a Christian marriage."<sup>15</sup>

Using here the points specifically contributed by Lesage, five areas are outlined which contribute to the formation of the Consortium

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<sup>13</sup> Ibid., These points of O'Neill are used in the in iure section on a decision involving an hysterical personality. Cf. c. Ashdowne, (Westminster), March 3, 1977, p. 216.

<sup>14</sup> Cf. C.L.S.G.B. & I. Newsletter, No. 17, 1973, p. 4; G. Lesage, "The Consortium Vitae Conjugalis Nature and Applications", ...1972, pp. 99-104. The purpose of this brief study was to make Fr. Lesage's opinions known in Britain and Ireland.

<sup>15</sup> Ibid., p. 1.

a) Balance and maturity required for a truly human conduct requires a maturity of conduct on the relationship level, together with self-mastery and the ability to adapt to circumstances.<sup>16</sup>

b) The relationship of interpersonal and heterosexual friendship necessitates oblation love, which goes beyond self-satisfaction into that of promoting the happiness of the other. It requires a sensitivity for the partner on both the affective and sexual levels, together with kindness and gentleness of character.<sup>17</sup>

c) The aptitude to cooperate sufficiently for conjugal assistance involves an appreciation and respect for Christian morality as regards sexual and conjugal relationship in accord with the partner's conscience, responsibility in conjugal friendship, and a mastery of irrational passions and impulses.<sup>18</sup>

d) Mental balance and the sense of responsibility required for the material welfare of the family includes the respective responsibility of providing for the material well-being of the marital home, together with an ability to budget, to have foresight and steady employment. Likewise, there should be a "mutual sharing and consultation on

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16 Cf. ibid., pp. 1-2.

17 Cf. ibid.

18 Cf. ibid.

important points of conjugal and family life"<sup>19</sup> as well as objective and realistic evaluations of the matters of the conjugal life, together with a clearness of choice and a determination of the means for various attainments.<sup>20</sup>

e) Psychic Capacity to participate, each in his own way, in promoting the welfare of the children. The constituent elements are "moral and psychological responsibility in the generation of children,"<sup>21</sup> together with a responsibility in the parental care, love, and education of these children.<sup>22</sup>

It is obvious from this study that if the positive elements just outlined are turned into the negative, so that many of these elements are missing because of an incapacity, some form of inability could be present, the degree and extent of which would have to be determined by the evidence presented for judgement. In such cases of inability, canon law and jurisprudence would divide the data under any of the three grounds: amentia, lack of due discretion, or an inability to fulfill the marital rights and obligations.

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19 Ibid.

20 Cf. ibid.

21 Ibid.

22. Cf. ibid., p. 3.

B - Distinctions to be made regarding the three Headings

1) Amentia - The Incapacity of Personal Responsibility

It is most important to distinguish amentia from the inability to fulfill, which is the subject of this paper. Yet another paper presented to the Canon Law Society by Morrisey assists us in this area.<sup>23</sup> Before the formulation of the Schema, he indicated that the stress was placed on the total incapacitating situation which brings this ground into being, namely, on the total incapacity to elicit matrimonial consent because of a mental illness whereby the use of reason is impeded.<sup>24</sup>

A study by Daley in 1975 is likewise helpful.<sup>25</sup> Basically, he showed that amentia is the incapacity to perform the human act using the mind and will, or, again, the impossibility of giving the normal object of consent because of a distortion of reason. Such a debility is usually associated with some form of mental illness, as was summed up in Mattioli's decision of 1956:

Whenever an adult, either from sickness or congenital psychic condition (imbecility, fatuity, etc.) is identified by medical science regarding discernment /and also control, mastery/ of judgement, as a seven year old child or an

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<sup>23</sup> Cf. Francis G. Morrisey, "The Incapacity of Entering Into Marriage", in Studia Canonica, 8(1974), pp. 5-21.

<sup>24</sup> Ibid., p. 12; Cf. Communicationes 3(1971), p. 77.

<sup>25</sup> Cf. R. Daley, "The distinction between the lack of due discretion and the inability to fulfill the obligations of marriage", Eighth Spring Canon Law Conference of C.L.S.G.B. & I. 1976, 16 p. Conference paper references in this paper, but also published in Studio Canonica 9(1975), pp. 153-166.

adolescent who has just reached puberty, he usually can and even must be presumed incapable and unable to give a valid consent, unless there is cogent evidence to the contrary.<sup>26</sup>

An additional observation at this point, would be Morrisey's remark, which might almost be regarded as a sort of rule of thumb for cases of amentia: "The person often lacks the capacity to judge, let alone judge with sufficient maturity."<sup>27</sup>

The influence of Rotal jurisprudence is of obvious importance in these cases, and the more common psychic conditions usually found have been grouped as follows:

- a) IMMATURE PERSONALITY - Involving affective infantilism, affective retardation, the constitutional immature personality, and the motional unstable personality /Lefebvre 1966/.<sup>28</sup>
- b) MENTAL DEBILITY OR PHRENASTHENIA - This also can involve some degree of mental retardation /Lefebvre 1961, Fiore 1961/.<sup>29</sup>
- c) PARANOIA - Constitutional or of the paranoid variety /Sabattani 1959, Felici 1954/.<sup>30</sup>

<sup>26</sup> Ibid., p. 14; S.R.R. Dec., 48(1956), c. Mattioli, November 6, 1956, pp. 872-873.

<sup>27</sup> R. Daley, ibid., p. 14.

<sup>28</sup> F. Morrisey, loc. cit., p. 15; cf. S.R.R. Dec., c. Lefebvre, October 20, 1966, in Apollinaris, 42(1969), pp. 209-210.

<sup>29</sup> Ibid.; cf. ibid., c. Lefebvre, 53(1961), c. Fiore, May 16, 1961, pp. 234-235.

<sup>30</sup> Ibid. cf. ibid., 51(1959), c. Sabattani, March 14, 1959, pp. 143-144, 46(1954), c. Felici, April 6, 1954, pp. 283-285. We might notice too, how it was used in c. Anné, July 22, 1969. Cf. C.L.S.G. B. & I. Newsletter, No. 23, 1974, p. 16 and Appendix X, pp. 1-4.

- d) SCHIZOPHRENIA - Whereby the sufferer seems to be incapable of regarding and treating "another person as a person" /Pinto 1969/.<sup>31</sup>

Although many judges no longer classify the psychopatic personality under "amentia", there is at least one recent instance where the Rota did use this approach; it is found in a 1973 decision coram Parisella.<sup>32</sup> However, in the jurisprudence of Anglo-Irish circles "there has been an avoidance of the ground of amentia in favour of discretion or inability".<sup>33</sup> The explanation of this rests on two factors - one involving evidence, the other involving civil law and the possibility of misunderstood publicity in the event of civil law litigation.<sup>34</sup> With something of this in mind, the caution of the following statement will be clearer:

The reason for this has perhaps been to some extent the view that amentia as a ground calls for the evidence of some totally incapacitating mental disorder; and the evidence for this is only to be found often in cases in which the person has been committed to a mental institution. /Another reason is/

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<sup>31</sup> Ibid., cf. ibid., c. Pinto, November 20, 1969, in Ephemerides Iuris Canonici, 26(1970), pp. 181-184.

<sup>32</sup> Cf. C.L.S.G.B. & I. Newsletter, 27(1975), p. 11; quoting SRR, Dec., c. Parisella, December 13, 1973, in Ephemerides Iuris Canonici..., p. 315.

<sup>33</sup> C.L.S.G.B. & I. Newsletter, No. 23 (1974), p. 16.

<sup>34</sup> Cf., ibid. On this last point, we might note the advice of some English Barristers: Catholic Church Tribunals enjoy no immunity or special privileges in English Civil Law. Cf. C.L.S.G.B. Newsletter, No. 6, 1970, pp. 5-6; ibid., No. 8, 1971, pp. 20-21; and also, Appendix V, No. 10, 1971, pp. 1-6.



because of the possibility of civil actions being taken by the person concerned who (perhaps sometimes quite reasonably) objects to being branded as insane, which is the frequent mistranslation of amentia.<sup>35</sup>

## 2. Lack of Due Discretion - the Critical Faculty

Basically, lack of due discretion results from the psychiatric incapacity of the consensual or contractual act, and can normally be associated with any one - or indeed a combination - of the following:

- a) deficiency in discernment of judgement,
- b) defect of freedom of choice,
- c) mental immaturity.<sup>36</sup>

This incapacity at the time of the consent, can result from one or more of the following reasons:

- a) the disharmony which exists among the various structures of the personality,
- b) difficulties relating to sexual relationship,
- c) inadequate perception of the object of the contract,
- d) lack of free deliberation,<sup>37</sup>
- e) defect of internal freedom.<sup>38</sup>

The idea of judgemental discretion was clearly expressed by Felici in 1957, where he indicated that besides the cognoscitive faculty there ought to be the critical faculty - the mentis

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35 C.L.S.G.B. & I. Newsletter, No. 23(1974), p. 16.

36 Morrisey, loc. cit., p. 13.

37 Ibid., p. 16; Cf. S.R. R. Dec., c. Ewers, May 27, 1972, in Monitor Ecclesiasticus, 98(1973), p. 211.

38 F. Morrisey, loc. cit., p. 16.

discretio,<sup>39</sup> showing the necessity of an adequate "aestimatio".<sup>40</sup>

Hence, there must be a perception about the marital rights and duties, not just for a day but for the future.<sup>41</sup> This insight must also be proportionate to the object, involving a new way and style of life, so that a person cannot continue as before, as though still a single person.<sup>42</sup>

To sum up, it may be said then that for the ground of lack of due discretion, sickness is not essential - although it could be a contributory factor. More often than not, gross immaturity or a lack of free deliberation can be traced as being the source of the ground. Nevertheless, although somewhat rarely, physical disease could be a cause too; for example, there is a case involving typhoid fever, where the secondary part of this infection left the person in a very confused condition, during which time a marriage took place.<sup>43</sup>

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39 Cf. R. Daley, loc. cit., p. 8; cf. S.R.R. Dec., c. Felici, December 3, 1957, 49(1957), p. 788.

40 Cf. Ibid., loc. cit., p. 9; cf. c. Felici, June 9, 1973, in Monitor Ecclesiasticus, 99(1974), p. 198.

41 Cf. Ibid.

42 Cf. ibid., loc. cit., p. 7; cf. c. Dunderdale (Westminster), November 28, 1974, Prot. No. 1-108/72; ibid.; January 30, 1975, Prot. No. 1-027/73.

43 Ibid., loc. cit., p. 14.

### 3. Inability

This third heading will be considered from a number of points of view which cover the numerous facets of marital inability.

#### a) Incapacity to fulfill the obligations

As regards the incapacity to fulfill the obligations of marriage, Morrisey's paper of 1974<sup>44</sup> indicates that before Vatican II, inability as a ground would have been somewhat limited, as the juridical consideration tended to be focused on the state of the person at the moment of consent. However, with the teaching of Gaudium et Spes, whereby marriage is "defined as a covenant of life and love, we must take into consideration the elements of long-range commitment."<sup>45</sup> Therefore, when viewing marriage this way - as a covenant for a community of life and love - some account must be taken of those who, because of a psychic incapacity, are unable to fulfill the obligations regarding the ius ad

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44 Cf. F. Morrisey, loc. cit.

45 Ibid., p. 18. Cf. R. Daley, loc. cit., p. 10. This theme of "life and love" has been consistently proclaimed in papal teaching since Vatican II, especially in the encyclical Humanae Vitae. Again, in a visit to a Roman parish in January 1980, we might note how Pope John-Paul II stressed this: "[...] Marriage even if it is as ancient as mankind, always means, every time, a new beginning. This is above all the beginning of a new human community, that community which bears the name 'family'. The family is the community of love and life. [...] Marriage is the beginning of a new community of love and life, on which men's future on earth depends," in L'Osservatore Romano, February 4, 1980 (No. 5, 618), p. 11.

corpus,<sup>46</sup> and the ius ad consortium vitae.<sup>47</sup>

Some of these marital inabilities have been outlined in a number of Anglo-Irish sentences and studies; according to these sources, this ground involves some of the following negative elements:

- i) Lack of passage from the notional to the functional, in the sense that the incapacity "to carry out the obligations assented to, indicates an inability to assume such obligations."<sup>48</sup>
- ii) Presence of various acts of gross immaturity involving marital irresponsibility.<sup>49</sup>
- iii) Absence of capacity on the part of the couple to assume the primary obligations of marriage, such as self dedication, permanence, and fidelity.<sup>50</sup>
- iv) The following positive points could also be mentioned: this ability is concerned with the possibility of parenthood, and what follows from this.<sup>51</sup>

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46 F. Morrisey, loc. cit., p. 13

47 Ibid.

48 R. Daley, loc. cit., p. 9, quoting c. Brown (Westminster), October 31, 1974, Prot. No. 1-131/73.

49 Cf. brief references to Lesage's paper to the Canadian Canon Law Society Conference in Quebec, October 1973, in C.L.S.G.B. & I. Newsletter, No. 18, 1973, p. 3.

50 R. Daley, loc. cit., p. 9, quoting c. Brown (Westminster), October 31, 1974, Prot. No. 1-007/74.

51 Cf. F. Morrisey, loc. cit., p. 13.

Some elemental ability to cope with children, or a child is necessary for the upbringing of the family - which itself is directly related to the openness to children. It could not be maintained that mere openness to children was essential without there being the fundamental element of the care and upbringing of the same children.<sup>52</sup>

- ii) There must be a certain ability to cope in a mature way with various crises or stress situations. This may call for a certain self-denial, as a result of family sickness, disease, sadness or bereavement.<sup>53</sup> Likewise this same self-denial may call for forgiveness in order to rebuild a damaged relationship: or "to cope sensibly with the situation in which one of the partners is attracted momentarily to an outsider."<sup>54</sup>
- iii) To assume the normal obligations associated with the financial responsibilities of marriage.<sup>55</sup>

Another important consideration, in addition to these elements, concerns the person who cannot cope with the everyday ups and downs of married life which, at first sight, may be thought to be caused by immaturity, but which may result from some more serious personality defect.<sup>56</sup>

<sup>52</sup> R. Daley, loc. cit., p. 10, quoting c. Brown (Westminster) October 31, 1974, Prot. No. 1-007/74.

<sup>53</sup> Ibid., p. 11, cf. c. Brown (Westminster), November 28, 1974.

<sup>54</sup> Ibid., p. 10.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., p. 11.

b) Inability for the donatio

In a Welsh decision coram Chidgey on December 24, 1969, inability is considered as leading to a lack of the donatio.<sup>57</sup> In such situations, the persons concerned "are unable to establish or carry through the covenantal consent articulated in the wedding ceremony":<sup>58</sup>

This defect in the donatio impairs the communio vitae and impedes the construction of a consortium vitae conjugalis which both Gaudium et Spes and the new code require for validity.<sup>59</sup>

c) The obligation of heterosexual friendship

Pope Paul VI's Encyclical Humanae Vitae, July 1968, indicates that married love should be human, total, faithful and exclusive and that "it is not exhausted by the communion between husband and wife, but destined to continue, raising up new lives."<sup>60</sup> In Morrisey's 1974 study, attention is drawn to the fact that an important area to be considered in inability cases concerns

the matrimonial obligations of conjugal love, in the sense of heterosexual friendship and charity which is also of the supernatural order, and the consequent rights and duties: the right to sexual intercourse which is a total ultimate expression of love, and the right to the community of life, which is something perceptive and provable, and, consequently, can be verified

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<sup>57</sup> Cf. g. Chidgey (Cardiff), December 24, 1969, in C.L.S.G.B. & I. Newsletter, Appendix V, No. 33, 1977, p. 61.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Paul VI, Encyl. Humanae Vitae, July 25, 1968; English translation in Humanae Vitae, Dublin, Catholic Truth Society of Ireland, 1968, pp. 8-9.

either by the court or by the psychiatrist.<sup>61</sup>

On the other hand, a severe perversion of sexuality, or perhaps some paranoid disorder which blunts affectivity, or again some debility of the psychic powers<sup>62</sup> could be instrumental in disturbing all that is important for establishing the unity of a heterosexual friendship.

d) The incapacity for interpersonal conjugal consent

The decision coram Serrano of April 3, 1973, stresses the importance of the interpersonal dimension of marriage, especially the handing over (traditio) and the receiving (acceptatio) of the marital rights and obligations, these being foundational for a normal relationship.<sup>63</sup> This decision - involving a paranoid personality - draws on a number of authoritative sources, especially Gaudium et Spes (No. 48) and Humanae Vitae (No. 8). Serrano illustrates how a decision coram Anné emphasized the importance of being able to bring to the marriage a primary relationship ability as a foundation for a new relationship on a more intimate level:

If the history of the one about to marry convinces experts that, even before the wedding, he was seriously lacking in intrapersonal and interpersonal integration, he must then be considered incapable of the correct understanding of the very nature of that sharing of life which is directed towards the

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61 F. Morrisey, loc. cit., p. 19.

62 Ibid., p. 19; cf. U. Navarrete, loc. cit., p. 72.

63 Cf. C.L.S.G.B. & I. Newsletter, No. 25, 1975, Appendix III.

procreation and formation of children, that sharing which is called marriage. Hence, he should be judged equally incapable of correctly judging and reasoning concerning entrance into this perpetual sharing of life with another person.<sup>64</sup>

The juridical evaluation of this is shown by Serrano, quoting from Anné, in the light of the teachings of Vatican II. What is to be considered is not just the beginning of a shared life, but the right and obligation to an intimate sharing of life, which means that

marriage is a most personal relationship and that the marriage consent is an act of the will by which the spouses "mutually give and accept each other"....Thus, the state of marriage, in its essential elements, at least implicitly and mediately, must be intended as the substantial formal object of the act of marriage.<sup>65</sup>

Serrano indicates that the finesse of Anné's argument concerns the juridical matter, as he continues with his quotation from Anné's in iure section:

For in every juridical matter, it depends on the formal object, whether, through the mediation of an act of the will this or any other juridical action can be verified. It is on the object concerning which the wills of the contracting parties give and receive promises that depends the truth of whether such a consent constitutes one juridical matter and not another. Surely, the sharing of life can be lacking from the state of marriage, but the right to such sharing can never be lacking.<sup>66</sup>

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64 C.L.S.G.B. & I. Newsletter, ibid., citation given: "Quebec decision before Anné, P.N. 8971, July 22, 1969, n. 4."

65 C.L.S.G.B. & I Newsletter, ibid., citation given: "C. Anné, Montreal, P.N. 9325 - Cf. Il Diritto Ecclesiastico, pp. 226-227, n.13".

66 C.L.S.G.B. & I. Newsletter, ibid.



In the actual case before Serrano, the opinion of one of the medical periti demonstrates the existence of this inability for interpersonal communication, which was caused by a severe paranoid personality:

Such a person has an abnormal isolation within himself that he judges the thinking of others according to his own and allows no chance for the affirmations of another. They start with the principle that everybody is aware of what they are thinking, even though, on the part of the sick person, there is no communication of private thoughts. Hence, the reactions of this kind of individual are based, not on what others can think or know, but rather on what these sick people are waiting for others to know.<sup>67</sup>

e) The community of life may not be possible immediately

The possibility of not establishing a community of life immediately is considered in a Shrewsbury case of April 7, 1976, coram Hurley.<sup>68</sup> The case involved a homosexual, and was given an affirmative decision on the ground of inability. Among other things, the ponens mentioned the difficulties of establishing a minimum and normal interpersonal relationship in such cases in the sense of the teaching of Gaudium et Spes and Humanae Vitae.<sup>69</sup> However, what is of main interest to this paper, is the attempt to establish another heading: "The

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<sup>67</sup> Ibid.

<sup>68</sup> Cf. C.L.S.G.B. & I. Newsletter, Appendix V, No. 31, 1976, pp. 52-56.

<sup>69</sup> Ibid., p. 52.

unwillingness to enter into a true marital community of life".<sup>70</sup> While this ground received a negative decision, the points made indicate some caution lest unwillingness and inability should be confused, for as the sentence states:

There is no ground for nullity in the mere non-use or abuse of the rights which are the object of the marriage contract and covenant. If the right to marital intercourse is never used, the Holy Father may dispense from the marriage, but the marriage is certainly valid, even if dispensable, as long as the right to intercourse has been given, and can be fulfilled.<sup>71</sup>

This sentence is thought-provoking in the sense that one can envisage a number of situations where an obstacle is placed to the interpersonal relationship by a number of circumstances both intrinsic and extrinsic to the parties; secret concentration-camp marriages, or those that were allowed to take place in penal institutions or in the intensive care units of hospitals might fall within this category:

In a similar way, the non-existence of a marital community of life in itself proves nothing; indeed, in many valid marriages the apparent community of life cannot, for one reason or another, come into existence for some time - the most obvious example being of course where the marriage has taken place by proxy.<sup>72</sup>

On the other hand, the ponens also points to those occasions where the situation is abnormal; it might be that the union is invalid:

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<sup>70</sup> Ibid., p. 53.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

Where there is no reason so obvious as physical separation for the non-existence of the community of life, there is good reason for enquiring into the reason. There must be a reason, because nobody of sound mind is going to bind himself to the shackles of marriage which lacks the thing which is the prime motive of most marriages in our present culture, unless he has a compelling reason.<sup>73</sup>

It would seem, then, that some caution is needed in such cases, as one cannot draw immediate conclusions of a negative nature. Rather, what must be said about those cases where the consortium vitae cannot be established immediately - or where there is a time suspension between the marriage in fieri and some of the essential properties of the marriage in facto esse - is that there must exist no reservation or inability in the area of the donatio and acceptatio. All other things being equal, the intention must be to establish the community of life when normal circumstances permit the same. Indeed, one might say that the communio has even begun - although in a very limited sense - for such situations can be both supportive and remedial while the potentia remains motivated towards the full act.

f) Choice of grounds

Some cases of nullity have what might be called a duality of grounds, so that both are present in the same subject. On the other hand, there are cases where there are strong arguments for only one ground, and where two tribunals hold that their differing position is

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<sup>73</sup> Ibid.

the correct one. This can be seen in a Rotal decision coram Anné of March 11, 1975.<sup>74</sup> The solution to this type of situation involves the canonical doctrine of conformity of sentences, as can be shown as follows:

- 1) The first instance Court gave an affirmative decision on the ground of "incapacity of a party to assume the obligations of marriage".<sup>75</sup>
- 2) The second instance Court gave a negative decision because it considered the proof to be insufficient of the fact that "at the time of the marriage, the party suffered from a psychic incapacity which rendered him unable to assume the responsibilities of conjugal life."<sup>76</sup>
- 3) The third instance Court did not consider there was enough moral certainty to uphold the ground of inability. "On the other hand, the judges found sufficient evidence to indicate that, at the time of the marriage, the party lacked due discretion to make it possible for him to make a true marital consent."<sup>77</sup>

The canonical approval for this method appears to rest upon the

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74 C.L.S.G.B. & I. Newsletter, Appendix VII, No. 27, 1975, pp. 78-80, which cites: Charles Lefebvre, "L'Évolution actuelle de la jurisprudence matrimoniale", in Revue de droit canonique, 24(1974), p. 374; J. Denis, "Chronique de jurisprudence", in L'Année canonique, 19(1975), p. 224.

75 C.L.S.G.B. & I. Newsletter, ibid., p. 79.

76 Ibid., pp. 79-80.

77 Ibid., p. 80.

facts of the case and not so much on the dispute of the exact juridical qualification, as the study of J. Denis seems to show:

In other words, the facts that the parties bring forward in support of the plea must be considered and not the juridical qualification that they attribute to the facts. So it follows that there is a conformity of two sentences which are based on the same facts.<sup>78</sup>

It would also seem that the dividing line between some cases is a very thin one, and much would depend upon how the court evaluates the facts from the canonical point of view. Nevertheless, above all, the conviction must be that the marriage is invalid. On the other hand, some would see the canonical container of the conformity of sentences as not being completely water-tight: the weakness of this method lies in the fact that there can be appeal against affirmative decisions, and it is asked on what precise ground would such an appeal be lodged?

g) A duality of debilities

Another way in which lack of due discretion and inability can co-exist is by way of a duality of debilities. In a decision coram Ashdowne, November 28, 1974, a severe psychopathic condition was considered: it was such that there co-existed both a lack of the critical faculty and a constitutional incapacity to fulfill the marital obliga-

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<sup>78</sup> Ibid., 79; cf. J. Denis, loc. cit., p. 224.

tions.<sup>79</sup> Likewise, in a decision coram Brown, October 31, 1974, it was said that the matter presented could fall under both headings.<sup>80</sup>

However, the tendency to accept the existence of this duality usually finds its source in the area of some recognized medical condition:

such an illness may provide a reason for declaring a marriage null and void on the grounds of both lack of due discretion and inability to fulfill.<sup>81</sup>

h) Basic distinctions between Lack of Due Discretion and Inability

i) Lack of Due Discretion

The ground of a lack of due discretion is "primarily concerned with the facultas critica."<sup>82</sup> Yet, while the facultas cognoscitiva refers to the necessary knowledge for the formulation of matrimonial consent, the importance of the facultas critica lies in the maturity of judgment - the deliberation - "which is proportionate to marriage and renders a person capable of really understanding its rights and obligations."<sup>83</sup> In the strict sense, a constitutional impairment is not really necessary; instead, what is being considered is the person's

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<sup>79</sup> R. Daley, loc. cit., p. 6; c. Ashdowne (Westminster), November 28, 1974, Prot. No. 1-020/74.

<sup>80</sup> R. Daley, ibid., p. 6, c. Brown (Westminster), October 31, 1974, Prot. No. 1-007/74.

<sup>81</sup> R. Daley, ibid., p. 15.

<sup>82</sup> Ibid., p. 13.

<sup>83</sup> Ibid.

inadequate perception of the object of consent or his perception of what will be required of "me" in marriage,<sup>84</sup> and of the way he will have to apply himself to this new way of life.

ii) Inability to Fulfill the Rights and Obligations of Marriage

The ground of inability to fulfill the obligations of marriage, "considers matrimonial consent simply from the functional point of view."<sup>85</sup> Although not absolutely necessary for this ground, the trend is that "it is common tribunal practice to require that a person be suffering from a specific, medically recognized illness."<sup>86</sup> Some of the conditions which can be shown to fall within the ambit of this ground may include: homosexuality,<sup>87</sup> psychopathy,<sup>88</sup> hysterical personality,<sup>89</sup> obsessional personality,<sup>90</sup> schizophrenia,<sup>91</sup> manic-depressive

<sup>84</sup> Ibid., p. 14.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid., p. 15. Something of this same point is also found in Morrisey's study of 1974: cf. F. Morrisey, Loc. cit., p. 19.

<sup>87</sup> R. Daley, loc. cit., p. 12; cf. c. Brown (Westminster) October 31, 1974, Prot. No.

<sup>88</sup> R. Daley, ibid.; cf. c. Ashdowne (Westminster) November 28, 1974, Prot. No. 1-020/74.

<sup>89</sup> Loc. cit., p. 12-13; cf. c. Brown (Westminster) October 31, 1974, Prot. No. 1-019/74.

<sup>90</sup> R. Daley, loc. cit., p. 13; cf. c. Ashdowne (Westminster), October 31, 1974, Prot. No. 1-026/74.

<sup>91</sup> R. Daley, ibid.; cf. c. Dunderdale (Westminster), November 28, 1974, Prot. No. 1-025/70.

states,<sup>92</sup> alcoholism, lesbianism, nymphomania and satyriasis.<sup>93</sup>

However, it must be remembered that none of these conditions in themselves is a ground of nullity of marriage; they are causes giving rise to the grounds a tribunal examines in the marriage.<sup>94</sup> The disruptive condition of itself has no value, except in so far as it prevents the formation of a normal marital union.

It is well worth recalling another important principle in local jurisprudence, which has been consistently stated in many of the Anglo-Irish sentences:

It is now a general opinion that inability to undertake the obligations of marriage can arise not only from a serious psycho-sexual condition, but from any condition which prevents a person successfully entering into a life-long interpersonal relationship involving fidelity and the ability to give oneself completely to another.<sup>95</sup>

To conclude this section of the study and to sum up the differences between the two grounds, it might be said that lack of due discretion is a lack of the workings of the critical faculty, whereas inability concerns a person's lack of personal capacity. To put it another way, lack of due discretion is concerned with the deliberation, whereas

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<sup>92</sup> R. Daley, ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid., p. 6; cf. c. Walker (Westminster), January 30, 1975, Prot. No. 1-079/72.

<sup>95</sup> R. Daley, ibid., p. 14; citation given: "Cf. Sixth Spring Canon Law Conference, 1973, Rev. Alex Stenson (Dublin)."



inability is on the behavioural level.

Having examined some of the juridical aspects of inability, we will now try to discern how Rotal jurisprudence has influenced Anglo-Irish jurisprudence; we shall also see if there exists any specific families of Rotal jurisprudence which have exerted a profound effect upon the local courts in Britain and Ireland, and whether the formulations for the new code can be compared with existing jurisprudence.

## II. Families of Jurisprudence and their Influence

At the beginning of this paper, we traced some of the modern developments of Rotal jurisprudence on marital ability, and saw how these eventually found their way into local jurisprudence in England in 1969. We have also traced how the ground of inability to fulfill came into being through gradual jurisprudential development and refinement. We shall now try to gather together some of the Rotal sentences that have exerted most influence on Anglo-Irish jurisprudence; in the process of doing so, it might be possible to discover what might be called "families of jurisprudence". Lastly, we will examine in what way the Schema on marital inability is relevant to both Rotal and local jurisprudence, so that if the present proposals were promulgated we would know whether the jurisprudence of the Rota and the Anglo-Irish tribunals would be in accordance with the new Code of Canon Law.

In the Report of the Rotal activities for the year 1975 to 1976,<sup>96</sup> we find a clear outline as regards the Rota's role of guidance for other tribunals; as the report says:

The Rota not merely gives judgements ("ius dicit") but, as a superior and universal tribunal, it teaches law ("ius docet") to the territorial tribunals.<sup>97</sup>

Therefore, these tribunals, although they may in theory dissent from the Rota, cannot however withdraw their own judgements from the possibility of Rotal supervision - hence a concern that they preserve uniformity with Rotal jurisprudence.<sup>98</sup>

The report also mentions that there ought not to be a diversity of jurisprudence within the Church, if such existed, there would be an

incongruity of a jurisprudence which is more or less regional or national in the Church. [..] There follows also the necessity and obligation of not departing from Rotal jurisprudence in order to avoid multiplicity and repetition of processes (the principle of processual economy) in order to ensure the same treatment for the same factual situation (principle of unity of law).<sup>99</sup>

With this notion of the Rota's dual task of ius dicit and ius docet, we will see in what way the jurisprudence of Britain and Ireland

96 "Report of The Sacred Roman Rota's Judicial Year, October 1975 - September 1976", in C.L.S.G.B. & I. Newsletter, No. 35, 1977, pp. 1-26, translated by Maurice Dooley and Michael Manning, from L'attività della Santa Sede, 1976, pp. 544-553.

97 C.L.S.G.B. & I. Newsletter, No. 35, p. 15.

98 Ibid.

99 Ibid.

was accepted by the Rota or influenced by it.

A - Rotal Decisions from 1956 to 1965

The decisions to be referred to in this period could be considered the foundation stones for development in the 1970's. They seem to have acquired ready acceptance in the Anglo-Irish courts. In their order of development, we could consider five major sources.

1) Felici

Seven of Felici's important decisions are often found cited within the various volumes of MDEW which contain much of the Anglo-Irish jurisprudence. The principal decisions referred to are those of April 6, 1954,<sup>100</sup> June 6, 1954,<sup>101</sup> February 12, 1955,<sup>102</sup> October 10,

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<sup>100</sup> The decision of April 6, 1954, is used as a source in the following decisions: MDEW 3(1969): c. Denning (Southwark), July 24, 1969, p. 307. c. Brown (Westminster), July 3, 1969, p. 323. MDEW, 4 (1970); c. Brown (Westminster), February 26, 1970, p. 370. MDEW, 11 (1975): c. Mullan (Liverpool), September 24, 1975, p. 301. MDEW, 12 (1976), c. Murtagh (Portsmouth), April 14, 1976, p. 100. c. Walker (Nottingham), March 9, 1976, p. 117.

<sup>101</sup> The June 6, 1954, decisions are in MDEW, 13(1977), c. Quinlan (Salford), October 4, 1977, p. 156. c. Sheehy (Dublin), October 26, 1976, p. 300.

<sup>102</sup> February 12, 1955 decision is in: MDEW, 11(1975); c. Walker (Westminster), June 12, 1975, p. 278.

1956,<sup>103</sup> December 3, 1957,<sup>104</sup> December 16, 1970,<sup>105</sup> and June 9,  
1973.<sup>106</sup>

While Felici's decisions are noted for the distinction to be made between the facultas cognoscitiva and the facultas critica, the Anglo-Irish decisions also refer regularly to his treatment of the rights and obligations of marriage that go beyond the moment of matrimonium in fieri and pass into the living out matrimonium in facto esse;

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103 October 16, 1956, decision used in MDEW, 3(1969): c. Brown (Westminster), July 3, 1969, p. 325, MDEW, 4(1970) c. Brown (Westminster), December 9, 1976, p. 439. MDEW, 5(1971), c. Brown (Westminster), November 26, 1971, p. 358, c. Sharp (Leeds), December 9, 1971, p. 378. MDEW, 7 (1972 - Second Part): c. Denning (Southwark), January 4, 1972, p. 2. c. Daley (Southwark), March 16, 1972, p. 62. c. Mullan (Liverpool), June 8, 1972, p. 134, c. Hetherington (Portsmouth), November 10, 1972, p. 370. c. Mullan (Liverpool), November 27, 1972, p. 390, c. Brown (Westminster), February 29, 1972, p. 430.

104 December 3, 1957 decision used in; MDEW, 1(1967): c. Mullan (Liverpool), April 8, 1967, p. 228, MDEW, 3(1969): c. Brown (Westminster), July 3, 1969, p. 323, c. Mullan (Liverpool), January 31, 1969, p. 392. MDEW, 5(1971): c. Mullan (Liverpool), February 19, 1971, p. 230. MDEW, 11(1975): c. Brown (Westminster), January 30, 1975, p. 215. MDEW, 12(1976): c. Koenig (Westminster), October 28, 1976, p. 53. c. Ashdowne (Westminster), December 25, 1976, p. 95. MDEW, 13(1977), c. Quinlan (Salford), October 4, 1977, p. 165.

105 March 27, 1973 decision as found in: MDEW, 9(1973): c. O'Ryan (Portsmouth), March 27, 1973, p. 507.

106 June 9, 1973, decision referred to in: MDEW, 11(1975): c. Gasche (Southwark), November 25, 1975, p. 163. c. Brown (Westminster), January 30, 1975, p. 215. MDEW, 12(1976): c. Brown (Westminster), September 30, 1976, p. 143.

this determines the ability: "Non enim velle potest actu humano positivo, quod facultate critica recte judicare incapax est."<sup>107</sup>

## 2) Sabattani

There are five decisions of Sabattani which were used regularly within some of the Anglo-Irish sentences, and these are: a 1955 decision,<sup>108</sup> June 21, 1957,<sup>109</sup> February 25, 1961,<sup>110</sup> April 24, 1961,<sup>111</sup> and February 22, 1963.<sup>112</sup>

A 1975 decision of Ashdowne illustrates that inability has something of an interrelationship with a series of other Rotal sentences:

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<sup>107</sup> C. Brown (Westminster), July 30, 1976, in MDEW, 12(1976), p. 143; cf. Felici June 9, 1973, Monitor Ecclesiasticus, 99(1974), p. 199.

<sup>108</sup> March 14, 1955, decision mentioned in: MDEW, 11(1975): c. Brown (Westminster), August 28, 1975, p. 294, MDEW, 13(1977), c. Sheehy (Dublin), March 26, 1976, p. 301.

<sup>109</sup> June 21, 1957, decision used in: MDEW, 3(1969): c. Brown (Westminster), July 3, 1969, p. 326. MDEW, 11(1975): c. Ashdowne (Westminster), October 6, 1975, p. 197.

<sup>110</sup> February 25, 1961 decision used in MDEW, 13(1977): c. Quinlan (Salford), p. 155.

<sup>111</sup> April 24, 1961 decision referred to in: MDEW, 1(1967): c. Mullan (Liverpool), April 8, 1967, p. 228. MDEW, 2(1968): c. Denning (Southwark), July 25, 1968, p. 229. MDEW, 13(1977): c. Quinlan (Salford), October 4, 1977, p. 156.

<sup>112</sup> February 22, 1963 decision used in MDEW, 2(1968): c. Dunderdale (Westminster), June 28, 1968, p. 248. c. Humphreys (Birmingham), December 19, 1968, p. 103. MDEW, 10(1974): c. Ashdowne (Westminster), October 31, 1974, p. 343. c. Brown (Westminster), October 28, 1974, p. 419.

It is based on the principle of Roman Law that no one can be held to the impossible: which is written into the Decretals "Nemo potest ad impossibile obligari (Sexti Decri. Lib. V, Tit. XII) and in a series of Rotal decisions from at least 1954 this principle was used (coram Heard: 30.1.54; coram Sabattani: 21.6.57; coram Mattioli: 28.11.57; coram Lefebvre: 2.12.67), to show the invalidity of matrimonial consent.<sup>113</sup>

### 3) Lefebvre

The decisions of Lefebvre which have been referred to in MDEW amount to five in number, and these are his sentences of December 12, 1957,<sup>114</sup> October 10, 1966,<sup>115</sup> July 6, 1967,<sup>116</sup> July 8, 1967,<sup>117</sup> and December 2, 1967.<sup>118</sup>

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<sup>113</sup> C. Ashdowne (Westminster), October 6, 1975, MDEW, 11(1975), p. 199.

<sup>114</sup> December 12, 1957 decision used in: MDEW 3(1969): c. Brown (Westminster), July 3, 1969, p. 323. MDEW 12(1976): c. Brown (Westminster), March 26, 1976, p. 123.

<sup>115</sup> October 10, 1966 decision referred to in: MDEW, 11(1975): c. Quinlan (Salford), May 9, 1975, p. 267.

<sup>116</sup> July 6, 1967 decision used in: MDEW 11(1975): c. Quinlan (Salford), May 9, 1975, p. 267. MDEW 13(1977): c. Quinlan (Salford), March 13, 1976, p. 274.

<sup>117</sup> July 8, 1967 used in: c. Quinlan (Salford), March 9, 1975, MDEW 11(1957), p. 267.

<sup>118</sup> December 2, 1967 decision used in: MDEW 9(1973), c. Brown (Westminster), February 31, 1973, p. 16, MDEW, 10(1974), c. Ashdowne (Westminster), October 13, 1974, p. 346. MDEW, 11(1975), c. Ashdowne (Westminster), October 6, 1975, p. 197. c. Ashdowne (Westminster), October 30, 1975, p. 332.

Lefebvre's decisions are used in conjunction with other sentences, as we can see from this passage by Brown in 1976:

The fundamental obligation involved in marriage, that which essentially makes the consent, is the mutual traditio and acceptatio of the parties (Cf. De Jorio: Il dolo nel consensu matrimoniale, p. 184.) [...] The formal object (as now understood by Rotal jurisprudence) is not the ius in corpus but extends also to what is described as the consortium vitae: "[...] ad vitae consortium seu communitatem vitae quae propria dicitur matrimonialis." [...] Cf. Decis. coram Anné of 25 February 1969: Ephemerides Iuris Canonici, Vol. 26, 1970, p. 430.) [...] Ianvero patet neminem posse contrahere obligationes quas incapax sit dotibus ipsis suis etsi acquisitis adimplere. (Cf. Decis., coram Lefebvre on 2 December 1967: Monitor Ecclesiasticus, Vol. 93, 1968, p. 472).<sup>119</sup>

#### 4. Mattioli

Some of the decisions of Mattioli to be found in the Anglo-Irish decisions in MDEW are his decisions of November 6, 1956,<sup>120</sup> November 28, 1957,<sup>121</sup> November 20, 1958,<sup>122</sup> December 20, 1962,<sup>123</sup> January 14, 1965,<sup>124</sup> and April 4, 1966.<sup>125</sup>

<sup>119</sup> C. Brown (Westminster), March 23, 1976, MDEW, 12(1976), p. 123.

<sup>120</sup> November 6, 1956 decision referred to in: MDEW 11(1975): c. Quinlan (Salford), May 9, 1975, p. 267.

<sup>121</sup> November 28, 1957 used in: MDEW 11(1975): c. Ashdowne (Westminster), October 6, 1975, p. 199.

<sup>122</sup> November 20, 1958 decision referred to in: MDEW 4(1970): c. Denning (Southwark), February 12, 1970, p. 348.

<sup>123</sup> December 20, 1962 decision found in MDEW 3(1969): c. Brown (Westminster), July 3, 1969, p. 323.

<sup>124</sup> January 14, 1965 referred to in: MDEW 12(1976): c. Koenig (Westminster), October 28, 1976, p. 53.

<sup>125</sup> April 4, 1966 decision referred to in: MDEW 12(1976): c. Koenig (Westminster), October 28, 1976, p. 53.

5) Anné

During this time, only two of Anné's decisions are referred to in the MDEW collections: those of November 25, 1961,<sup>126</sup> and April 7, 1965.<sup>127</sup> However, further use of Anné's sentences is found in the later Anglo-Irish decisions.

An interesting reference to Anné is to be found in one of Koenig's decisions from the Northampton diocese.<sup>128</sup> Koenig outlines that:

It is noted immediately that, though psychiatrists may differ in the extreme, both the psychiatrists appointed by the court and the two hospitals which offered diagnosis [...]/ indicated insidious schizophrenia. [...]/ Cf. Anné, April 7, 1965, S.R. Rota, Vol. LVII, pp. 349-350, where he mentions the problems of differing diagnoses, especially in relation to schizophrenia in certain insidious forms but goes on to indicate that the judge's task is to be morally certain as to the actual defect of the proper critical faculty.<sup>129</sup>

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<sup>126</sup> November 25, 1961 decision referred to in: MDEW 4(1970): c. Brown (Westminster), February 26, 1970, p. 370. MDEW 5(1971) c. Sharp (Leeds), December 9, 1971, p. 378..

<sup>127</sup> April 7, 1965 decision used in: MDEW 12(1976): c. Koenig (Westminster), October 28, 1976, p. 54.

<sup>128</sup> Throughout this paper, frequent reference is made to Westminster decisions. Not all these cases may have come from the Archdiocese of Westminster. The explanation is in the part that the Westminster tribunal was processing cases from Brentwood, Plymouth, Northampton and Her Majesty's Armed Forces. In addition, the Westminster Tribunal is the Court of Second Instance for Portsmouth, Liverpool, Nottingham, Southwark and Oslo, Norway. It is only in the last few years that the Dioceses of Brentwood and Northampton have returned to the practice of operating their own tribunals.

<sup>129</sup> C. Koenig (Westminster), October 28, 1976, MDEW, 12(1976), p. 54.



B - Rotal Decisions 1966 Onwards

Having seen in the previous section that a number of Rotal decisions were instantly used in the early period, we can now examine their use in the period of greater development.

1) Anné

Three decisions of Anné carried considerable weight, those of February 25, 1969,<sup>130</sup> July 22, 1969,<sup>131</sup> and March 11, 1975.<sup>132</sup>

A use of an Anné decision can be seen in a case coram Brown in 1975, who states:

It is not the perception, the evaluation, the critical judgement as to the obligations to be undertaken in marriage (Whether these obligations are perceived or not) it is the case of the person being unable to assume them /.../ Tunc deficit in suis principiis et hoc in casu deest ipsum obiectum consensus matrimonialis....Abnormes nupturientis

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130 February 25, 1969 decision used in: MDEW 8(1971): c. O'Ryan (Portsmouth), August 30, 1973, p. 121. MDEW 9(1973 - II part): c. Hetherington (Portsmouth), March 27, 1973, p. 157. c. Brown (Westminster), December 20, 1972, p. 466. c. O'Ryan (Portsmouth), March 27, 1973, p. 512. MDEW 10(1974): c. Dunderdale (Westminster), October 31, 1974, p. 14. c. Sheehy (Dublin), October 17, 1974, p. 381. MDEW 11 (1975): c. Quinlan (Salford), March 25, 1975, p. 243. c. Quinlan (Salford), May 9, 1975, p. 267. c. Brown (Westminster), August 28, 1975, p. 398. MDEW 12(1976): c. Brown (Westminster), March 26, 1976, p. 123.

131 July 22, 1969 decision is used in: MDEW 12(1976): c. Brown (Westminster), February 26, 1976, p. 61. MDEW 13(1977): c. Brown (Westminster), June 30, 1977, p. 149.

132 March 11, 1975 is referred to in: MDEW 11(1975): c. Murtagh (Portsmouth), December 12, 1975, p. 432. MDEW 12(1976) c. Murtagh (Portsmouth), April 14, 1976, p. 65. MDEW 13(1977): c. Murtagh (Portsmouth), October 26, 1977, p. 212.

conditiones quae funditus obstant instaurationi cuiuslibet communitatis vitae coniugalibus - ita ut principia illud instaurandi deficient - sunt vel sexualis instinctus gravissima deflexio vel perversio v.g. ut in casibus conclamatae homosexualitatis, si et quatenus haec naturalem vel affectionis abnormis perturbatio paranoica aut aequalis.<sup>133</sup>

2) Ewers

The decisions of the present Dean of the Rota are also found in the Anglo-Irish decisions of June 6, 1968,<sup>134</sup> and May 27, 1972.<sup>135</sup>

3) Fagiolo

Another rotal judge who found favour was Fagiolo. Four of his decisions are referred to regularly: March 15, 1968,<sup>136</sup> January 23,

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133 C. Brown (Westminster), September 28, 1975, MDEW, 11(1975), p. 400.

134 June 6, 1968 referred to in: MDEW 10(1974): c. Ashdowne (Westminster), October 31, 1974, p. 343. MDEW 11(1975): c. Quinlan (Salford), March 25, 1975, p. 243. MDEW 12(1976): c. Sharp (Leeds), January 29, 1976, p. 90.

135 May 27, 1972 decision referred to in: MDEW 11(1975); c. Quinlan (Salford), May 9, 1975, p. 267.

136 March 15, 1968 decision referred to in: MDEW 10(1974): c. Sheehy (Dublin), October 17, 1974, p. 381.

1970,<sup>137</sup> and those of November 27, 1970<sup>138</sup> and May 14, 1971.<sup>139</sup>

4) Serrano

Two decisions of Serrano have been referred to in some of the MDEW sentences up to 1977, namely: April 5, 1973,<sup>140</sup> and a further one which appeared in the Canon Law Society Newsletter of June 1975,<sup>141</sup>

A decision of Quinlan of Salford in 1977, outlines Serrano's position regarding the donatio and the acceptatio:

Incapacity to fulfill the Matrimonial Obligations:

The notion of Communitas Vitae introduced by the Second Vatican Council is a concept implying that beyond the essential elements of permanence, fidelity, and openness to children, something more is required, namely the ability on both sides to establish and sustain a marital relationship. This has been clearly enunciated in Rotal jurisprudence, especially in the decision coram SERRANO, April 5, 1973, in Revista Espanola de Derecho Canonico, 30(1974), pp. 107-128. Serrano has highlighted the fact that the characteristic

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<sup>137</sup> January 23, 1970 decision referred to in: MDEW 11(1975): c. Davey (Portsmouth), November 30, 1973, p. 448.

<sup>138</sup> November 27, 1970 decision in: MDEW 9(1973): c. O'Ryan (Portsmouth), March 27, 1973, p. 509. MDEW 10(1974): c. Ashdowne (Westminster), October 17, 1974, p. 381.

<sup>139</sup> May 14, 1971 decision used in: MDEW 10(1974): c. Sheehy (Dublin), October 17, 1974, p. 381.

<sup>140</sup> April 5, 1973 decision used in: MDEW 13(1977): c. Quinlan (Salford), February 22, 1977, p. 139. c. Quinlan (Salford), May 12, 1955, p. 178.

<sup>141</sup> June 1975 decision referred to in: MDEW 11(1975): c. Walker (Nottingham), November 3, 1975, p. 343. MDEW 12(1976): c. Brown (Westminster), February 26, 1976, p. 61. This Serrano decision is also referred to in the C.L.S.G.B. & I. Newsletter, No. 31, 1976, pp. 41-51.

element of the marriage covenant is that it is an interpersonal relationship which "truly is most special to marriage," and has shown that this interpersonal relationship is constituted by what he calls the "two fold formality", namely, the giving of self-donatio and the realistic acceptance of the other - acceptatio. The notion of donatio connotes the fact that what is given in marriage must be more than the ius in corpus of canon 1081, but that it must also include the right to a personal communion of lives. The notion of acceptatio shows that there must be a capacity to accept the other person as he or she really is, the necessity complement to donatio in the covenant.<sup>142</sup>

Having referred to these specific decisions, we might ask whether these references to Rotal usage in Anglo-Irish sentences have any relevance to the proposed new Code of Canon Law. A decision of Quinlan of Salford May 9, 1975, seems to provide the answer and a useful summing up when he says:

These new canons simply constitute the juridical formulation of principles found in Rotal decisions coram Mattioli (November 6, 1965, in S.R.R. Dec. 48(1956), pp. 872-873; Ewers and Lefebvre (May 27, 1972) in Monitor ecclesiasticus, 98(1973), p. 211; July 6, 1967, in Apollinaris, 42(1969), pp. 205-207; and Anné (February 25, 1969, in Ephemerides Iuris canonici, 26(1970), pp. 428-430.<sup>143</sup>

In addition, Quinlan continues:

A severe incapacity that would destroy any possible conjugal life, resulting from a severe deflection or perversion of the sexual instinct (cf. S.R. R. Decis. c. Anné loc. cit.), an abnormal paranoid disorder of the affectivity (cf. ibid.) or a weakening of psychic powers (cf. Navarrete, "Incapacitas assumendi onera uti caput autonomum nullitatis matrimonii", in Periodica, 61(1972), p. 72) would render a

<sup>142</sup> C. Quinlan (Salford), February 22, 1977, MDEW, 13(1977), p. 139.

<sup>143</sup> C. Quinlan (Salford), May 9, 1975, MDEW, 11(1975), p. 267.

marriage null and void.<sup>144</sup>

Having seen how there is an interrelation between Anglo-Irish and Rotal jurisprudence, we will now examine these same sources to discover, whether the proposals for the new Code of Canon Law appear in their decisions.

✓ C - Use of Proposed New Code in Rotal and Anglo-Irish Sentences

Numerous references to the Schema on marital inability can be found in both Rotal and local tribunal sentences. The triple formulation which is given in Communicationes of 1971 found its way into a number of the British and Irish sentences on lack of due discretion and inability to fulfill.<sup>145</sup> Likewise, reference to canons 296 and 297

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144 Ibid.

145 Communicationes, 3(1971), pp. 75-77. MDEW, 7(1972): c. Davey (Portsmouth), p. 378, MDEW, 10(1974): c. Brown (Westminster), p. 163: June 27, 1974, p. 276; October 31, 1974, p. 311; October 31, 1974, p. 372; October 28, 1974, p. 419; October 28, 1974, p. 427. c. Ashdowne (Westminster), August 29, 1974, p. 326; October 21, 1974, p. 343; October 31, 1974, p. 353; October 31, 1974, p. 361; MDEW 11(1975): c. Ashdowne (Westminster), January 30, 1975, p. 77; March 26, 1975, p. 369. c. Rafferty (Dublin), March 31, 1975, p. 374, MDEW 12(1976): c. Brown (Westminster), September 30, 1976, p. 79; August 28, 1976, p. 81.

of the 1975 Schema can also be found in some of these sentences.<sup>146</sup>

However, at the time of writing, it is too early to know whether the amended canon 42 (previously 197) of the 1978 Alter Textus has found its way into the British and Irish sentences. Nevertheless, what should be made very clear when talking about the use of the proposed Schema, is that this use is made by way of a reference and summary of the existing jurisprudence. Like Rotal use, the reference to the Schema is more for succinctness, in that these proposed canons help to summarize the jurisprudential points already made in the rest of the sentence.

While it is evident from a perusal of MDEW that Anglo-Irish decisions make frequent use of the proposed new Schema, it can be asked whether the Sacred Roman Rota itself is using the same procedure. If this Roman court is making use of such proposed canons, there would seem to be little obstacle to their use as a source of interpretation in Anglo-Irish jurisprudence.

Turning to Rotal sentences, an interesting starting point would be to consider Cyril Murtagh's paper that appeared in the Canon Law

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146. Schema 1975: MDEW, 11(1975): c. Quinlan (Salford), May 9, p. 267; c. Walker (Westminster), June 12, 1975, p. 278; c. Brown (Westminster), October 6, 1975, p. 308; c. Ashdowne (Westminster), December 30, 1975, p. 332; c. Sheehy (Dublin), December 4, 1975, p. 419; c. Murtagh (Portsmouth), December 12, 1975, p. 430; MDEW, 12(1976), c. Ashdowne (Westminster), October 30, 1975, p. 29; January 29, 1976, p. 107; c. Brown (Westminster), February 26, 1976, p. 61; c. Murtagh (Portsmouth), April 14, 1976, p. 65; c. Walker (Nottingham), March 9, 1976, p. 115; MDEW, 13(1977): c. Sheehy (Dublin), March 26, 1976, p. 299; c. Quinlan (Salford), December 31, 1976, p. 275; August 4, 1977, p. 340.

Society Newsletter of March 1972.<sup>147</sup> It results from his attendance at the Cursus Renovations of the Gregorian University in 1971, where a former Rotal Auditor, Archbishop Vincent Fagiolo, gave some of the lectures.<sup>148</sup> Murtagh's paper is based on the lectures and notes of this course, and under the heading "Fagiolo's General Treatment", there is a sub-heading: "Three Principal Incapacitating Groups."<sup>149</sup> The structure of this triple grouping corresponds to the Code Commission's preliminary formulations of May 12, 1970, and previously examined in this paper.<sup>150</sup> As we can see in this 1971 course, a Roman Rotal Auditor was already referring to that area of nullity which Anglo-Irish jurisprudence now calls inability to fulfill the obligations and responsibilities of marriage. This seems to be contained in Fagiolo's third area of the triple grouping which this 1971 paper describes as follows:

(3) Incapacitas assumendi onera essentialia matrimonii, ex quacumque radice preveniant i.e. nymphomania, satyriasis, sexual anomalies, e.g. homosexuality, masochism, sadism, etc. The sufferers can perceive, but cannot give the object of matrimonial consent. These defects are not so much diriment impediments to a person per se capax, but incapacity arising from the psychological structure of the person.<sup>151</sup>

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147. Cf. Cyril Murtagh, "Moral Impotence", in C.L.S.G.B. Newsletter, No. 12, 1972, Appendix 5, pp. 1-13.

148 Ibid., p. 2.

149 Ibid.

150 Ibid., cf. above...Cf. Communicationes 8(1975), pp. 49-52.

151 C. Murtagh, loc. cit., p. 2.

Although there are indications here of what one might call the "psycho-sexual" restriction, a number of other conditions are given by Fagiolo in support of his outline that originated from Rotal decisions: schizophrenia,<sup>152</sup> hysteria,<sup>153</sup> drug addition through morphine,<sup>154</sup> maniac-depressive psychoses,<sup>155</sup> paranoia,<sup>156</sup> psychopathy,<sup>157</sup> and homo-sexuality.<sup>158</sup>

Turning from this first reference that pre-dates the 1975 Schema, it is somewhat difficult to know how many references to the proposed new law have been made in Rotal sentences. The difficulty

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152 Ibid., p. 7. c. Bejan, December 6, 1969; c. Fagiolo, March 15, 1968; c. Ewers, February 19, 1967; c. Filipak, April 24, 1967.

153 C. Murtagh, loc. cit., p. 7; c. Bonet, March 23, 1969; c. Filipak, April 24, 1967.

154 C. Murtagh, loc. cit., p. 7. c. Fagiolo, March 21, 1969.

155 C. Murtagh, loc. cit., p. 7. c. Lamas, April 12, 1956; c. Fiore, February 25, 1969; c. Czapla, July 4, 1969; c. Ewers, May 12, 1969; c. Fagiolo, November 27, 1969.

156 C. Murtagh, loc. cit., p. 7. c. Anné, July 22, 1969; c. Bejan, December 3, 1969; c. Pinto, November 20, 1969.

157 C. Murtagh, loc. cit., p. 7. c. Ewers, May 12, 1969; c. De Jorio, December 20, 1969, April 30, 1969; c. Bejan, December 23, 1969; c. Pinto, November 20, 1969.

158 C. Murtagh, loc. cit., p. 7. c. Doheny, December 14, 1953; c. Sabattani, December 7, 1958; June 6, 1960, December 20, 1963; c. Anné, February 25, 1969; c. Ferraro, March 14, 1969; May 12, 1969; c. Ewers, June 22, 1968; c. Pompedda, October 6, 1969; c. Lefehvre, December 2, 1967; c. Ferraro, April 11, 1967; c. De Jorio, April 30, 1969.



arises from the fact that they are not given an official general publication until ten years after the date of appearance. Therefore, unless the sentences are published elsewhere, any references to Communicationes of 1971 would appear at the earliest in 1981, whereas references to the 1975 Schema might appear in 1985, and possible references to the 1978 Alter Textus would not be discovered until 1988. Thus, the only other public sources for this information are those decisions which have appeared in the various canonical journals, or actual third instance sentences returned to the dioceses of origin.

In an attempt to verify this point, we have examined most of the Rotal decisions that have appeared in the canonical journals over the last ten years.

The use of the Schema on marital inability - or formulations for it - can be found in a decision coram Stankiewicz of May 31, 1970; likewise, after having first mentioned the works of Hüizing and Keating, a 1971 decision coram Pinto states that:

Ob psychicam defectum vel perturbationem contrahens incapax redditur assumendi sub gravi unam vel aliud vel omnia iura et officia essentialia matrimonialis contractus [...]. 159

A decision before Lefebvre of January 1, 1972, refers to the third area of the triple formulation and this inability reference is given by the ponens as: "Communicationes, t.3, a 1971, p. 77."<sup>160</sup>

159 S.R.R. Dec., c. Pinto, in Periodica 61(1972), pp. 439-445.

160 S.R.R. Dec., c. Lefebvre, January 1, 1972, in Ephemerides iuris canonici, 28(1972), p. 321.

Di Felici uses this same reference in a decision of March 8, 1973<sup>161</sup> and again in a Birmingham case of May 8, 1973.<sup>162</sup>

A reference to the psycho-sexual anomaly, and its problems, can be found in a decision coram Pinto of February 2, 1974, together with the Communicationes reference of 1971.<sup>163</sup> Hüizing's previous studies are referred to in a decision of Anné of February 25, 1969, when the ponens states:

Nec differt determinans: "Incapax est ad talem contractum ineundum etiam is qui moraliter incapax est ad assumendum in seipsum tale vinculum iuris et relativae obligationis iustitiae perpetuum et exclusivum...cum...agatur de inexistencia oiecti contractus." (Schema de matrimonio Romae, Pontif. Univ. Greg. 1963, p. 346, No. 162.)<sup>164</sup>

Yet another evaluation of the psycho-sexual anomaly can be found in Pinto, February 4, 1975 (Prot. No. 10,455)<sup>165</sup> while the full triple formulation is found in a decision coram Masala of May 10, 1978.<sup>166</sup>

<sup>161</sup> S.R.R. Dec., c. Di Felici, March 8, 1973, in Monitor ecclesiasticus, 101(1976), p. 88.

<sup>162</sup> Cf. S.R.R. Dec., c. Di Felici, May 8, 1973, in Ephemerides iuris canonici, 31(1975), p. 176.

<sup>163</sup> Cf. S.R.R. Dec., c. Pinto, February 4, 1974, in Monitor ecclesiasticus, 100(1974), p. 110.

<sup>164</sup> Cf. S.R.R. Dec., c. Anné, February 25, 1969, in Monitor Ecclesiasticus, 96(1971), p. 23.

<sup>165</sup> Cf. S.R.R. Dec., c. Pinto, February 4, 1975, in C.L.S.G.B. & I. Newsletter, Appendix II, p. 21.

<sup>166</sup> Cf. S.R.R. Dec., c. Masala, May 10, 1978, in Monitor ecclesiasticus, 104(1979), p. 177.

together with the comment that:

Legimus in unam coram Di Felice: "ut constet de vera incapacitate assumendi onera coniugalia, constare debet de gravi defecto psychico vel de gravi psychopathia, quibus nupturiens sit vere inhabilis ad instaurandam communionem vitae conjugalis cum comparte...nam leves indolis vitiositates, quae vel sint emendabiles, minime auferunt capacitatem assumendi onera coniugalia." (Sent. cit. diei 17 ianuarii 1976).<sup>167</sup>

A further reference to the 1970 formulation which is found in Communicationes of 1971, can be seen in a decision of Stankiewicz in June 15, 1978,<sup>168</sup> and this same reference is to be found in Ferraro of May 11, 1979.<sup>169</sup> Stankiewicz refers to proposed canon 296 in a decision of April 4, 1979,<sup>170</sup> and likewise, the Schema formulations can be seen in sentences by Pinto on April 2, 1979 and October 12, 1979; Raad refers to them in his decision of November 13, 1979.<sup>171</sup>

It would seem, then, that these brief references indicate that the Rota and the Anglo-Irish tribunals have adopted the same policy: both appear to be giving some form of an on-going evaluation of the Schema's formulations on marital inability amidst the other areas of

<sup>167</sup> Ibid., pp. 187-188.

<sup>168</sup> Cf. S.R.R. Dec., c. Stankiewicz, June 15, 1978 in Monitor ecclesiasticus, 104(1979), p. 48.

<sup>169</sup> Cf. S.R.R. Dec., c. Ferraro, May 11, 1979, Prot. No. 11.885, pp. 12-13.

<sup>170</sup> Cf. S.R.R. Dec., c. Stankiewicz, April 4, 1979, Prot. No. 11.979: p....

<sup>171</sup> Cf. S.R.R. Dec., c. Raad, November 13, 1979, Prot. No. 12.414, pp. 4-5.

their own jurisprudence.

D - Consequences

The use of Rotal sentences and of the proposals for the new Code of Canon Law in Anglo-Irish sentences, suggests that there is a conformity of approach in both areas. What is more, the pattern of present-day jurisprudence on the local level has a sound basis in that it is a natural outgrowth from Rotal jurisprudence. The use of the proposed new canons on marital ability, by way of reference and summary, can be found in both the sentences of the Rota and the Anglo-Irish tribunals: such a use indicates both a duality of approach, and a uniformity of jurisprudence.

With these thoughts in mind, we are now in a position to come to the conclusion of this present study.

C O N C L U S I O N

At the beginning of this study we explored some of the historical background to the contemporary ground of nullity known in Anglo-Irish jurisprudence as the "inability to fulfill the responsibilities and obligations of marriage": this ground found its roots in the traditional ground of "amentia". We also saw how, during the time of Paulus Zacchia (1584-1695), amentia was recognized as a psycho-medical state.

One might ask why the ground of inability has only been recognized in the past few years. The answer is a complicated one, which involves a number of factors related to developing insights of Medical Science and Canon Law. Indeed, as Canon Law under the leadership of Pius XII, came to recognize the contribution of the behavioural sciences, it was also able to expand its horizons and have available data that was not readily at hand in former times. This also enabled Canon Law to break out of former schemes, such as those based on Sanchez's teaching regarding capacity for sinning mortally.

It was not until a decision coram Prior of November 4, 1919, that the Sanchez norm was set aside in favour of the theology of St. Thomas Aquinas who taught that even a betrothal for marriage requires more deliberation than to sin, because it is concerned with a future state and not a single act. Building upon Thomistic theology, Rotal jurisprudence already had a fairly well-developed notion of

inability by the time Vatican II was convened.

The Conciliar Constitution Gaudium et Spes stressed the relationship aspect of marriage which is said to consist in a community of conjugal life and love. In other words, there had been a movement away from simply considering a person's ability to give a valid consent at the moment of marriage - the Scholastic matrimonium in fieri - towards a consideration of this same person's ability to give himself to the responsibilities and obligations which are part of that consent and which are part of the consortium vitae conjugalis. In other words, there had been a theological shift: in addition to insisting on the matrimonium in fieri, the Scholastic notion of matrimonium in facto esse, or marriage as lived, was also to be taken into consideration.

This forms part of the historical back-cloth against which the local jurisprudence on inability in Britain and Ireland was developed, and which began with the first British affirmative decision on the grounds of lack of due discretion in 1969. In short, this must be seen as a practical application of a renewal already begun in the Rota on the level of the local churches.

We also examined how these early beginnings were subject to further study, development and refinement. For a time, the concept of inability was contained within the ground of lack of due discretion, so that there was a duality of concepts within the one ground: the lack of the critical faculty - the lack of a capacity even to undertake the normal obligations and responsibilities of married life. As a result

of the Code Commission's effort to formulate canons on marital inability, it became clearer that these two concepts constituted, in reality, two separate grounds of nullity. This resulted in the establishment of an additional separate ground of nullity known as the "inability to fulfill the responsibilities and obligations of marriage". We traced the influence of this development and renewal in Anglo-Irish jurisprudence, and saw that the principal source and inspiration for this development came through the Rotal jurisprudence of the 1950's to the present date.

We also saw how the Commission for the revision of the Code of Canon Law had included this refined jurisprudence in proposed canon 42 (formerly canon 297), namely:

They are incapable of contracting marriage who, because of a serious psychic anomaly, are unable to assume the essential obligations of marriage.

One cannot, of course, predict what the final wording of the canon will be. Nevertheless, it is interesting to note that "inability to fulfill the responsibilities and obligations of marriage," as it is known in Anglo-Irish jurisprudence, is in accord with both the teaching of the Sacred Roman Rota and the indications of proposed canon 42 for the New Code.

Therefore, the conclusion of this study points towards a concordance between Rotal jurisprudence and the proposals for the new Code of Canon Law on the one hand, and the jurisprudence of present-day

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Anglo-Irish courts on the other, even though the terminology has differed.



## APPENDIX I

SUMMARY FROM "COMMUNICATIONES"THE CODE COMMISSIONS' PREPARATION FOR 1975 SCHEMA - DE MATRIMONIO

CANON 297 (novus) - The attempts to formulate this new canon during the session on May 12, 1970.

- 1) It was resolved to formulate a new canon for psycho-sexual incapacity as follows:

Qui anomaliam psychosexualem tam gravem patiuntur ut ipsas obligationes matrimonii essentielles assumere non valeant.

- 2) But the voting for this description was: placet 3; non placet 2; placet iuxta modum 5.

3) FURTHER MODIFICATIONS AND VOTING		VOTING			
		(a)	(b)	(c)	(d)
	(a) placet				
	(b) placet iuxta modum				
	(c) non placet				
	(d) abstention				
i)	a) Qui ob gravem anomaliam psychosexualem, ipsas obligationes etc...	2		5	3
	b) Dicatur "Nequeunt" loco "non valeant"	9			1
ii)	Omittatur verbum "ipsas"	8		2	
iii)	a) Dicatur: Qui ob gravem anomaliam psychosexualem obligationes etc...	7		2	
	b) Dicatur: Qui ob talem gravem etc.	Nemini Placet			
iv)	Dicatur "Anomaliam psychosomaticam".	4		5	
4)	<u>Consequentur formula erit:</u> Qui ob gravem anomaliam psychosexualem obligationes matrimonii essentielles assumere nequeunt.	8		2	

Appendix based on: Communicationes 8(1975), pp. 49-52.

SUMMARY FROM "COMMUNICATIONES"

THE CODE COMMISSIONS PREPARATION FOR THE ALTER TEXTUS 1978

Date of the meeting: May 18, 1977

Subject: A reconsideration of canon 296 of 1975 Schema reading:

Sunt incapaces matrimonii contrahendi qui gravem anomaliam psychosexualem obligationes matrimonii essentialia assumere nequeunt.

1) PROBLEM:

"Non provenit tantummodo ex gravibus anomalis psychosexualibus".

2) PROPOSED SOLUTIONS:

"Ad solvendam difficultatem alii proposuerunt ut dicatur:

- anomaliam psychicam
- praesertim psychosexualem
- vel ob indolis gravissimam distorsionem
- anomaliam psychicam aut psychosexualem
- ob gravem anomaliam".

3) AMENDED CANON - New Formulations and voting:

NEW FORMULATION AND VOTING		VOTING			
		(a)	(b)	(c)	(d)
	(a) placet				
	(b) placet iuxta modum				
	(c) non placet				
	(d) abstention				
i)	Anomaliam psychosexualem			8	
ii)	Ob gravem anomaliam praesertim psychosexualem			8	
iii)	Ob gravem anomaliam psychicam	4		3	1

4) NEW FORMULATION: Canon 297 (novus) was changed and renumbered, and appeared in the Alter Textus as follows:

Canon 42 (novus) Sunt incapaces matrimonii contrahendi qui ob gravem anomaliam psychicam obligationes matrimonii essentialia assumere nequeunt.

Appendix based on: Communicationes, 9(1977), pp. 370-371, and De Matrimonio (Alter Textus), Romae, Codicis Iuris Canonici, 1978, p. 14.

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## A B S T R A C T

This thesis is an evaluation of a ground of nullity of marriage used by the Roman Catholic marriage tribunals of Great Britain and Ireland. The ground is entitled "the inability to assume the obligations and responsibilities of marriage". In short, it refers to those unfortunate people who, usually because of serious psychological debilities, are unable to include in their marital consent those normal human qualities necessary to unite and produce a marital relationship.

The thesis examines the pre-history of the ground of inability, and also the principal decisions of this century that enabled the Sacred Roman Rota to develop this ground. It then considers how this Rotal jurisprudence was used and developed within the ecclesiastical tribunals of Great Britain and Ireland.

Another aspect concerns the formulations for a new Code of Canon Law, and asks whether the ground of inability has indeed a place within this revised code.

This study also attempts to bring together the principal Rotal sentences that have influenced Anglo-Irish decisions. These considerations are then reflected upon and appraised.