

PSYCHOLOGICAL INCAPACITY
AND THE CANON LAW ON MARRIAGE:
AN EXEGESIS ON THE PSYCHOLOGICAL ELEMENT
OF MATRIMONIAL CONSENT

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I. INTRODUCTION

In the case of *Republic v. Court of Appeals and Molina*,¹ the Solicitor General commented that Article 36 of the Family Code² was the “most liberal divorce procedure in the world.”³ In response, the Supreme Court in that case, through Mr. Justice Panganiban, set out strict and clear guidelines in the interpretation and application of Article 36.⁴ While the Court may be lauded for its attempt to put some order and uniformity in the use of psychological incapacity as a ground for the declaration of nullity of marriages and to forestall an imminent “annulment crisis,” the decisions of the Court in this and other cases dealing with psychological incapacity are inadequate because the Court failed to thoroughly examine and analyze the full breadth and depth of the concept of psychological incapacity. Despite the Court’s recognition that Article 36 of the Family Code was adopted by the Family Code Revision Committee from paragraph 3 of Canon 1095 of the Code of Canon Law of 1983 of the Roman Catholic Church⁵ and that it peppered its ruling with citation of Canon Law sources, the Court’s understanding of Art. 36 remained imprecise and incomplete because it failed to contextualize the concept of psychological incapacity in the theoretical and operational system which it is inextricably and inherently a part of – the Canon Law on Marriage. Paragraph 3 of Canon 1095, on which Article 36 was allegedly based, was not an autonomous provision in the Code of Canon Law. It was

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¹ G.R. No. 108763, February 13, 1997.

² Executive Order No. 209 (1987).

³ *Republic v. Court of Appeals and Molina*, G.R. No. 108763, February 13, 1997.

⁴ *Republic v. Court of Appeals and Molina*, G.R. No. 108763, February 13, 1997.

⁵ A. SEMPIO-DY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 36 (1988)

conceptually related to and interdependent on the whole system of substantial principles and rules that constitute the Canon Law. It should be noted that the Court was not entirely oblivious to this idea. It did state that the "interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect"⁶ and "in view of the evident sources and purpose of the Family Code provision, contemporaneous religious interpretation is to be given persuasive effect."⁷ It is evident then that in order to have an accurate and conclusive exegesis of the meaning and the spirit of psychological incapacity in Article 36 of the Family Code, it is necessary to explore and examine the concepts of marriage, matrimonial consent, and the psychological element of consensual capacity within the framework of the Canon Law system of the Roman Catholic Church.

II. EVOLUTION OF THE CONCEPT OF MARRIAGE IN THE CANON LAW

The earliest evidence of a normative regulation of marriage is found in the epistles of St. Paul.⁸ In 1 Corinthians Chapter 7 verses 2 to 5, St. Paul writes:

But because, there is so much immorality, every man should have his own wife and every woman should have her own husband. A man should fulfill his duty as a husband and a woman should fulfill her duty as a wife, and each should satisfy the other's needs. A wife is not the master of her own body, but her husband is; in the same way a husband is not the master of his own body, but his wife is. Do not deny yourself to each other, unless you first agree to do so for a while in order to spend your time in prayer; but then resume normal marital relations. In this way you will be kept from giving in to Satan's temptation because of your lack of self-control.⁹

It may also be noted that verses 12-16 of this chapter serves as the Biblical basis of the so-called Pauline privilege.¹⁰

⁶ Republic v. Court of Appeals and Molina, G.R. No. 108763, February 13, 1997.

⁷ Republic v. Court of Appeals and Molina, G.R. No. 108763, February 13, 1997..

⁸ T.P. DOYLE, O.P., THE CODE OF CANON LAW: A TEXT AND COMMENTARY 737 (1983).

⁹ 1 Cor. 7:2-5.

¹⁰ The Pauline privilege conceives of a situation where a non-Christian is married to another non-Christian, and one of them converts to Christianity and the other party that remained pagan refuses cohabitation with the converted party. When the converted party contracts a second marriage, the first bond is dissolved *ipso facto*. 1Cor. 7:12-16.

In Ephesians 5:21-33, St. Paul writes:

Submit yourselves to one another because of your reverence for Christ.

Wives, submit yourselves to your husband as to the Lord. For a husband has authority over his wife just as Christ has authority over the church; and Christ is himself the Savior of the church, his body. And so wives must submit themselves completely to their husbands just as the church submits itself to Christ.

Husbands love your wives just as Christ loved the Church and gave his life for it. He did this to dedicate the Church to God by his word, after making it clean by washing it in water, in order to present the church himself in all its beauty – pure and faultless, without spot or wrinkle or any other imperfection. Men ought to love their wives just as they love their own bodies. A man who loves his wife loves himself. No one ever hates his own body. (Instead he feeds it and takes care of it, just as Christ does the church; for we are members of his body.) As the scripture says, 'For this reason a man will leave his father and mother and unite with his wife; and the two will become one.'

There is a deep secret truth revealed in scripture, which I understand as applying to Christ and the church. But it also applies to you: every husband must love his wife as himself, and every wife must respect her husband.¹¹

While Fathers of the Church like Origen, Tertullian, Jerome, Cyprian and Ambrose wrote works relating to the theological reality of marriage in response to what they perceived as heretical teachings of Christian sects in their time¹², it was St. Augustine who made the greatest and most far reaching contribution with his many treatises and sermons on the nature of Christian marriages.¹³ In St. Augustine's view, marriage is made up of three traditional *bonum matrimonii* or goods/values which are the positive and essential properties which give marriage its innate dignity and goodness. The three are: the *bonum fidei* or the faithful exclusiveness of the marital commitment, the *bonum sacramenti* or its

¹¹ Eph 5:21-33.

¹² T.P. DOYLE, *supra* note 8, at 737.

¹³ *Id.*

permanence, and the *bonum prolis* or its procreative orientation.¹⁴ According to St. Augustine, marriage is good because it is characterized by faithfulness, permanence and openness to having children.¹⁵ It may be observed that, like St. Paul, St. Augustine emphasizes the importance of the procreative aspect of marriage. Both St. Paul and St. Augustine seem to be working with the concept of marriage, which is undoubtedly influenced by Roman law, as an institution that is concretized in the physical union and sexual exclusivity of the spouses that in turn is principally directed towards the bearing of children.¹⁶ This very physical-bodily and procreative formulation of St. Augustine is carried over throughout the centuries in the teachings of the Roman Catholic Church and was at the beginning of the 1900s codified in the 1917 Code of Canon Law. In this Code, marriage was construed as a contract yielding rights, most especially *ius as corpus* or the rights to the body.¹⁷ Under this conceptualization and in accord with the perspective of St. Augustine, Canon 1013 of the 1917 Code declared that the primary ends of marriage are procreation and the education of children, while mutual assistance and the remedying of concupiscence are its secondary ends.¹⁸ This hierarchy of the ends of marriage – with the emphasis on the *ius in corpus* – is in conformity with the idea that a marriage only becomes indissoluble after it is consummated, i.e. physical consummation as an affirmation of the deeper sacramental nature of the marriage bond.¹⁹ While consent alone made the marriage, subsequent consummation added the element of absolute indissolubility to the covenant.²⁰ There is consummation when three requisites are complied with by the male spouse: sustained erection, penetration (even partial), and ejaculation in the vagina.²¹ It is only when a marriage has been consummated (*ratum et consummatum*) that it becomes absolutely indissoluble such that only the death of one of the partners can dissolve the bond; in contradistinction to a non-consummated marriage which is not absolutely indissoluble and may be dissolved by the Pope under very strict conditions.²² The very physical-bodily and procreative-oriented view of marriage in the 1917 Code gave way to the more personalistic understanding of marriage under the 1983 Code of Canon Law

¹⁴ T.P. DOYLE, *supra* note 8, at 740.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ R. GARCIA DE HARO, MARRIAGE AND THE FAMILY IN THE DOCUMENTS OF THE MAGISTERIUM 95 (1993).

¹⁸ T.P. DOYLE *supra* note 8 at 738.

¹⁹ *Id.* at 739.

²⁰ *Id.* at 742.

²¹ A.N. DACANAY, S.J, *General Introduction to the Church Law on Marriage*, in CHRISTIAN VOCATION AND MARRIAGE 159 (1997).

²² *Id.* at 156-157.

which conceived of the marital relationship less as a contract involving the yielding of rights, but more as a partnership of a whole life (*consortium totius vitae*).²³ It is interesting to note that the term “communion of life” is not new and it actually formed the basis for the classical Roman law definition of marriage.²⁴ Canon 1055 par. 1 of the 1983 Code states:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole life, is by its very nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.²⁵

Defined as covenant or *b'rith* in Jewish tradition, marriage is an agreement which formed a relationship which is equal in binding force to a blood relationship – the relationship does not cease even if the consent to the covenant is withdrawn by one or both of the parties.²⁶ In the 1983 Code, the hierarchy of the ends of marriage was replaced by the co-equal, intimately related two-fold ends of marriage: first, the good of the spouses (*bonum coniugium*) and second, the procreation and education of offspring.²⁷ This more personalistic view of marriage was the culmination of more than 70 years of evolution of the Church's understanding of marriage: from the conciliar constitution *Gaudium et Spes* to the decisions of the Roman Rota.²⁸ *Gaudium et Spes* 48 states:

The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is rooted in the conjugal covenant of irrevocable personal consent. Hence, by that human act whereby spouses mutually bestow and accept each other, a relationship arises which by divine will and in the eyes of society too is a lasting one.... Thus a man and a woman, who by the marriage covenant of conjugal love ‘are no longer two, but one flesh’ render mutual help and service to each other through an intimate union of their persons and of their actions. Through this union they experience the meaning of their oneness and attain to it with growing perfection day by day. As a mutual gift of two persons, this intimate union, as well as the good of

²³ *Id.* at 153.

²⁴ T.P. DOYLE *supra* note 8, at 740.

²⁵ CODE OF CANON LAW (1983).

²⁶ T.P. DOYLE *supra* note 8, at 740.

²⁷ *Id.*

²⁸ *Id.*

the children, imposes total fidelity on the spouses and argues for an unbreakable oneness between them.²⁹

The personalistic thrust of the 1983 Code recognizes the inherent and constitutive importance of the interpersonal relations of the spouses in marriage.³⁰ *Gaudium et Spes* 24, which provides that “man can fully discover his true self only in sincere giving of himself,”³¹ underscores the true meaning of the concept of married personalism in the 1983 Code: it is the selfless giving of oneself for the good of the other person that is the essence of marriage.³² Corollary to this, conjugal love is defined in *Gaudium et Spes* 49 as a “free mutual gift of themselves [the spouses] to each other.”³³

In the 1983 Code, more attention is given to the actual relationship between husband and wife; there is an emphasis on marriage as a community rather than merely as an institution to produce and educate children, a part of the teaching of the Catholic Church for centuries.³⁴ This personal and humanistic approach takes into account the important twin relations involved in marriage: the common conjugal life of the spouses (*convictum coniugale*) and the common family life of the spouses and their children.³⁵ One is intimately related with and interdependent on the other. According to Gramunt, the good of the spouses (*bonum coniugum*) is nothing else but the good of the person, that is to say, the good that is characteristic of the person and fulfills the person.³⁶ It consists of the power to communicate to others the gift of one’s own life through self-giving.³⁷ And since through this self-giving, the person finds his own fulfillment and perfection, self-giving is then for the good of the person and for the good of the spouses.³⁸ The Pope, in his address to the Tribunal of the Roman Rota, gave his approval of the positive aspects of the new family reality which was characterized

²⁹ THE DOCUMENTS OF THE VATICAN II (W.M. Abbot, S.J. ed., 1966).

³⁰ C. Burke, *Marriage Annulments and Married Personalism* at <http://www.catholic.net/rcc/Periodicals/Dossier/JAN-FEB1999/annulment.html> (last visited Nov. 9, 2001).

³¹ T.P. DOYLE *supra* note 8, at 740.

³² I. Gramunt, *The Essence of Marriage is the Bond*, at <http://www.catholic.net/RCC/Periodicals/Homiletic/06-96/2/2.html> (last visited Nov. 9, 2001).

³³ T.P. DOYLE *supra* note 8, at 740.

³⁴ O.Moi, *What is Marriage?*, at <http://home.sol.no/~amoi/odv/artikl/whatmarr.htm>.

³⁵ I. Gramunt, *supra* note 32.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

by a "more live awareness of personal freedom, greater attention to personal relationships within marriage and to the advancement of women's dignity."³⁹

By conceiving of marriage as a mutual self-donation of the spouses in all aspects of their personhood in the pursuit of the two-fold ends of *bonum coniugnum* and the procreation and education of offspring, in contrast to the mere *ius in corpus* of the 1917 Code, the 1983 Code provides for a more human and dynamic foundation of marriage. Seen in this light, marriage can more closely approximate being an actual "communion of life" between the spouses. However, this more personalistic concept has a reverse side. Because the interpersonal relationship between spouses and the *bonum coniugnum* are considered essential to the validity and vitality of a marriage, an inability or incapacity of a spouse to mutually give and accept the other in *consortium totius vitae* (a partnership of the whole life) becomes a ground to declare the marriage null.⁴⁰ Because marriage is no longer seen simply as a physical union of a man and a woman, but a personal union, an inherent incapacity to relate and give oneself to the other spouse becomes a justifiable ground to declare the marriage void because the ontological end of *bonum coniugnum* cannot be assumed or fulfilled.

III. MATRIMONIAL CONSENT

Matrimonial or marital consent is defined in Canon 1057 of the 1983 Code of Canon Law:

Marriage is brought about through the consent of the parties, legitimately manifested between persons who are capable according to law of giving consent; no human power can replace this consent.

Matrimonial consent is an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish marriage.

³⁹ Address of the Holy Father to the Tribunal of the Roman Rota (Jan. 21, 2000), at http://www.vatican.va/holy_father/john_paul_ii/speeches/documents/hf_jp-ii_spe_20000121_rota-romana_en.html (last visited Nov. 9, 2001).

⁴⁰ C. Burke, *Marriage, Annulment, and the Quest for Lasting Commitment*, at <http://www.catholic.net/RCC/Periodicals/Igpress/CWR/CWR0196/essay.html> (last visited Nov. 9, 2001).

The consent must be a free act of the will of both parties and it must be for marriage, i.e., it is a consent to the covenant between the spouses for the specific purpose/object of creating and sustaining the marital community – in both its conjugal and filial aspects.⁴¹

In Canon 1058 of the 1983 Code, “All persons who are not prohibited by law can contract marriage.” In order to be capable of giving consent, one must be free from the following impediments: age (a man must not be below 16 of age and a woman must not be below 14), impotence, previous bond, sacramental orders, public perpetual vow of chastity, disparity of cult (one of the spouses should be a baptized Catholic), abduction of the woman, conjungicide (either murder of a spouse is perpetrated to make the marriage possible or there is conspiracy to murder the other’s spouse even without the intention of marriage), consanguinity, affinity, public propriety (concubinage or *de facto* cohabitation), and legal relationship.⁴² In addition to these impediments, the Code of Canon Law requires certain intellectual, volitional, and psychological requisites in marital consent.⁴³ The spouses must have a fundamental understanding of the obligations of marriage and freely choose to assume them, and they must possess the emotional stability and spiritual and psychological capacity to establish and nourish a true marital community.⁴⁴ For a person to validly undertake marriage, he or she must not only be not disqualified (freedom from impediments), but he or she must also have the proper consensual capacity at the time the marriage was contracted.

Matrimonial consent is made up of three elements – truth (cognitive), correct intention and freedom (volitive), and maturity (psychosomatic).⁴⁵ With respect to the cognitive element, the person must have a correct intellectual apprehension and knowledge of marriage. Examples of this include: error concerning the person (Canon 1091.1) or certain qualities of the person (Canon 1098) or of the nature and implications of marriage.⁴⁶ As to the volitive element, not only must the consent be based on truth and sufficient knowledge, it must be posited freely and directed towards the proper object.⁴⁷ The consent may be defective due to force and fear (Canon 1103) or because of a positive refusal to

⁴¹ T.P. DOYLE *supra* note 8, at 742-743.

⁴² A.S. DACANAY, *supra* note 21, at 163-166.

⁴³ *Id.*

⁴⁴ T.P. DOYLE *supra* note 8, at 743.

⁴⁵ A. S. Dacanay, S.J., Canon Law on Marriage: Introductory Notes and Comments 74-75 (2000).

⁴⁶ *Id.*

⁴⁷ *Id.*

give consent or simulation (Canon 1101) or by reason of conditions attached to the contract (Canon 1102).⁴⁸ The psychosomatic or psychological element of matrimonial consent is contained in Canon 1095.⁴⁹ The lack of any of these elements, whether cognitive, volitive, or psychosomatic, would make the matrimonial consent non-existent and the marriage deemed void *ab initio*. It is important to note that under the legal regime of the Canon Law, the Church does not annul the marriage, but declares the marriage a nullity. There is a very important distinction between annulment and declaration of nullity because annulment presupposes a valid and existing marriage which is subsequently voided, whereas in declaration of nullity there was no valid marriage to begin with and the action of the Church is a mere recognition of such invalidity.

IV. THE PSYCHOLOGICAL ELEMENT OF MATRIMONIAL CONSENT

The psychological or psychosomatic element of matrimonial consent is described in Canon 1095 of the 1983 Code, which provides:

They are incapable of contracting marriage:

(para. 1) who lack the sufficient use of reason;

(para. 2) who suffer from grave lack of discretion of judgment concerning essential matrimonial rights and duties which are to be mutually given and accepted;

(para. 3) who are not capable of assuming the essential obligations of matrimony due to causes of a psychic nature.

Consensual capacity, as defined by the above provision, subsumes the psychological element of matrimonial consent. Consensual capacity touches on the three capacities of a person which are essential for a valid matrimonial consent.⁵⁰ A person seeking to contract marriage must have the capacity: (1) to make a responsible human act (due reason); (2) to evaluate sufficiently the nature of marriage and, consequently, choose it freely (due discretion); and finally, (3) to

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ A.S. DACANAY, *supra* note 45, at 96.

assume its essential obligations (due competence).⁵¹ The consent of a person who lacks any or all of these capacities is null.

Under paragraph 1 of Canon 1095, a person lacks sufficient use of reason when, due to a mental illness, he or she is precluded from the possibility of performing any responsible human act at the time of consent. This mental affliction is defined in canonical jurisprudence as a permanent or temporary state of mind which may be attributed to a variety of causes such as psychotic disorders, psychopathies, personality or character trait disorders or psychoneuroses, severe mental handicap, a psychotic mental illness or brain damage, or a temporary deprivation of intellectual function caused by drug abuse. Whatever the disturbance, it must be so severe as to impede the use of reason at the time the consent is given.⁵²

Lack of due discretion, under paragraph 2 of Canon 1095, is not so much the lack of capacity to contract, but rather the lack of capacity to bind oneself to the rights and obligations of marriage.⁵³ The situation contemplated is one in which human acts in general are possible, but the special human act of binding oneself "maritally" is not possible because of some distortion of judgment or diminution of freedom relative to the particular act of marital consent.⁵⁴ A person may give the appearance of enjoying the full use of his faculties, but it is entirely conceivable that by reason of some psychic defect he may not be capable of assuming the obligations of marriage, even if he may have a notational and conceptual understanding of them.⁵⁵ The act of consenting to marriage must proceed by sufficient deliberation or critical judgment about the implications of such act.⁵⁶ The person must realize that he does not only consent to a wedding, but more importantly makes a decision about his or her life and the life of the marriage partner.⁵⁷ If there is a serious inability to evaluate critically the decision to marry in light of the consequent obligations and responsibilities, then the consent may well be invalid.⁵⁸ This evaluation is governed by the person's "critical faculty" which is different from the mere intellectual apprehension of the situation.⁵⁹ The critical faculty depends first on the mature ability to grasp what

⁵¹ *Id.*

⁵² T.P. DOYLE *supra* note 8, at 775.

⁵³ A.S. DACANAY, *supra* note 45, at 98.

⁵⁴ *Id.*

⁵⁵ *Id.*, at 107.

⁵⁶ T.P. DOYLE *supra* note 8, at 776.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

the marital relationship entails.⁶⁰ The person must be able to relate marriage as an abstract reality, i.e., what it theoretically involves, to his or her concrete situation.⁶¹ The critical faculty involves existential judgments.⁶² It depends on a person's emotional and psychological state and an appreciation of the lessons learned from life experiences.⁶³ It also presupposes freedom from mental confusion, undue pressure, or fear in contemplating marriage.⁶⁴ Matrimonial consent is derived from a combined action of cognitive, deliberative or critical and volitional faculties.⁶⁵ One must know what is at stake; one must be capable of considering and evaluating the elements, properties, rights, and obligations of marriage as well as one's own capacity to fulfill these obligations; and one must be free to want and choose this way of life with this or that particular person.⁶⁶ Lack of due discretion of judgment does not deal too much with the cognitive powers of a person, but with his evaluative faculty, with his faculty to deliberate and judge.⁶⁷ Discretion means "maturity" and judgment means "decision."⁶⁸ Decisions of Rotal judges have isolated some elements of this ability to make mature decisions: (1) adequate knowledge of the subjects and objects of marriage - a knowledge which is not merely speculative and cognitive but critical and evaluative; (2) the ability for critical reflection which consists in putting judgment together in order to arrive at a new judgment or decision; and (3) internal freedom, not only for critical reflection but also for making the final decision concerning the object - which is the creation of a community of the whole life with another person.⁶⁹ The causes of lack of due discretion or "poor judgment" is often rooted in youthful immaturity or in emotional or psychological problems.⁷⁰ There are four general sources of emotional immaturity which may be the cause for lack of due discretion. The first kind of immaturity is connected with adolescence and is understood as a lack of experience or exposure rather than as a personality defect.⁷¹ The second kind of immaturity is found in adults, manifested in various immature traits - such as lack of stability and constancy in holding options, weakness of will, infantile attitudes in certain situations, and lack of control over

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ A.S. DACANAY, *supra* note 45, at 100.

⁶⁶ *Id.*

⁶⁷ *Id.* at 101.

⁶⁸ *Id.*,

⁶⁹ *Id.*

⁷⁰ *Id.* at 104.

⁷¹ *Id.*

emotions - which have endured despite age and experience.⁷² A third immaturity is symptomatic of a personality disorder, e.g. hysteria or paranoia.⁷³ This immaturity is frequently characterized by emotional instability, exaggerated sensitivity, and lack of responsibility. The fourth kind of immaturity is connected with mental retardation.⁷⁴ This is characterized by an exaggerated fixation on the parental image, the excessive need for protection, lack of independence, narcissism, and egoism among others. Drug addiction and alcoholism may also serve as indicators of a person's lack of due discretion.⁷⁵ It must be remembered that it is not the addiction itself which is the cause of the immaturity, but rather a personality deficiency that predisposes a person to drug-use or alcoholism.⁷⁶ Usually the serious lack of discretionary ability is due to some form of psychopathy or personality disorder which has a great effect on the intellect.⁷⁷ However, the mere fact of a personality or nervous disorder in itself does not necessarily lead to the conclusion of a lack of due discretion; rather, what must be determined is the gravity of the condition and its actual effect on the intellectual capacity to evaluate the decision or the ability of the will to choose freely.⁷⁸

Lack of due competence, under paragraph 3 of Canon 1095, means the incapacity to assume the essential obligations of marriage. It is, however, important to note the sharp conceptual distinction between lack of due discretion (paragraph 2) and lack of due competence (paragraph 3).⁷⁹ Paragraph 3 does not deal with the psychological process of giving consent; instead it deals with the object of the consent/contract which does not exist.⁸⁰ The marriage is invalid because of a lack of a formal object.⁸¹ The consent as a psychological act is both valid and sufficient, however the psychological act is directed towards an object which is not available.⁸² While lack of due reason (paragraph 1) and lack of due discretion (paragraph 2) are concerned with the positing of the matrimonial consent, lack of due competence (paragraph 3) deals with the positing of the object of the consent.⁸³ The person may be capable of positing the free act of

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 105.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ T.P. DOYLE *supra* note 8, at 776.

⁷⁹ A.S. DACANAY, *supra* note 45, at 110.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

consent, but he is not capable of fulfilling the responsibilities he assumes as a result of the consent he elicits.⁸⁴ The incapacity to assume the essential obligations of marriage issues from the incapacity to posit the object of the consent, rather than the incapacity to posit the consent itself.⁸⁵ A person may be capable of eliciting an intelligent and free consent, but experiences difficulty in another sphere: delivering the object of the consent.⁸⁶ For example, in case of nymphomania, the affliction usually leaves the capacities for knowing (paragraph 1) and understanding and evaluating (paragraph 2) intact; but what it affects is the object of the consent (paragraph 3). The incapacity to assume the essential obligations of marriage (the formal object of the consent) can coexist in the same person with the ability to make an intelligent judgment and a mature evaluation and weighing of things.⁸⁷ The nymphomaniac spouse is incapable of assuming the conjugal obligation of fidelity, although she may have no difficulty in understanding what the obligations of marriage are, nor in the weighing and evaluating of those same obligations. Generally referred to as "moral or psychic impotence" (incapacity rooted in some anomalies and disorders in the personality), these psychological disorders render a person incapable of binding himself or herself in a valid matrimonial pact, to the extent that the anomaly renders that person incapable of fulfilling the essential obligations of marriage.⁸⁸ The term "of a psychic nature" pertains to something in the psyche or the psychic constitution of a person which impedes his capacity to assume three general obligations of marriage: (1) the consortium of the whole life between a man and a woman; (2) a consortium which is directed towards the good of the spouses; and (3) towards the procreation and upbringing of children.⁸⁹ Marital incapacity can result from a psychic disorder or a personality disorder, provided the disorder is a true constitutional impairment which prevents the person from improving his or her situation.⁹⁰ It can even result from an abnormality which is not less an illness, but which is caused by various factors which preclude one's entering into an interpersonal relationship.⁹¹ Usual symptoms or indicators of lack of due competence are self-centeredness, serious sociopathy, constitutional immorality, lack of empathy, unreasonable expectation, interpersonal exploitativeness, immaturity, narcissism, antisocial traits, and psycho-sexual disorders.⁹² While

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, at 113.

⁸⁸ *Id.*, at 113-114.

⁸⁹ *Id.*, at 114 and 119.

⁹⁰ T.P. DOYLE, *supra* note 8, at 778.

⁹¹ *Id.*

⁹² *Id.* at 779.

occasional acts of irresponsibility do not in themselves constitute proof of either incapacity or of the existence of a psychic disorder, yet a pattern of such behavior can and usually does provide evidence of such a disorder.⁹³

V. CRITIQUE OF THE CONCEPT OF PSYCHOLOGICAL INCAPACITY AS FOUND IN PHILIPPINE LAW AND JURISPRUDENCE

From the above exegesis on the key principles and concepts related to the psychological element of matrimonial consent, it is evident that those who took part in creating and interpreting the present doctrine of “psychological incapacity” veered away from the principles enunciated by its source - Canon Law.

The first conceptual error is the belief that “psychological incapacity” as borrowed from the 1983 Code of Canon Law is contained only in paragraph 3 of Canon 1095. According to Alicia Sempio-Dy, who was part of the Family Code Revision Committee, the committee decided to “adopt” paragraph 3 of Canon 1095 of the 1983 Code as a ground for the declaration of nullity of a void marriage. The problem with this facile grafting of paragraph 3 of Canon 1095 as Article 36 of the Family Code is that there is an impression that the psychological element of matrimonial consent is limited to lack of due competence to assume the essential obligations of marriage. Lack of due competence is cut off from the conceptual framework of matrimonial consent and consensual capacity in Canon Law. It must also be pointed out that in the Canon Law the psychological element of consensual capacity (Canon 1095) is composed of both paragraph 3 (lack of due competence) and paragraph 2 (lack of due discretion). The psychological element of matrimonial consent, as it is conceived in the Canon Law, is a much fuller and broader concept that the one apparently or allegedly transmuted into Philippine law as “psychological incapacity.”

The mere fact that one of the drafters of the Family Code says that they only adopted paragraph 3 of Canon 1095 should not be interpreted to mean that only lack of due competence was included in the Family Code. It is evident from the deliberations of the Family Code Revision Committee that it was their intention to incorporate the full concept of “psychological incapacity” and not just lack of due discretion.⁹⁴ The first draft of Art. 36 read:

The following marriages shall be void from the beginning: (paragraph 7)
Those marriages contracted by any party who, at the time of the

⁹³ *Id.*

⁹⁴ Santos v. Court of Appeals, G.R. No. 112019, January 4, 1995.

celebration, was wanting in the sufficient use of reason or judgment to understand the essential nature of marriage or was psychologically or mentally incapacitated to discharge the essential marital obligations, even if such lack or incapacity is made manifest after the celebration.⁹⁵

It is evident that this draft provision is substantially identical to the whole of Canon 1095:

They are incapable of contracting marriage:

(paragraph 1) who lack the sufficient use of reason;

(paragraph 2) who suffer from grave lack of discretion of judgment concerning essential matrimonial rights and duties which are to be mutually given and accepted;

(paragraph 3) who are not capable of assuming the essential obligations of matrimony due to causes of a psychic nature.

However, there was confusion among the members of the Commission as to the nature of psychological incapacity.⁹⁶ Some members felt that psychological incapacity should not be deemed a mental illness, because mental illness only vitiates consent and is a ground only for annulling the marriage - not declaring it void *ab initio*. The provision was thereafter revised to read:

That contracted by any party who, at the time of the celebration, was psychologically incapacitated to discharge the essential marital obligations, even if such lack or incapacity becomes manifest after the celebration.⁹⁷

According to Justice Romero, the revised provision dropped the phrases "wanting in the sufficient use of reason or judgment to understand the essential nature of marriage" and "mentally incapacitated."⁹⁸ The phrases were allegedly removed because they referred to defects in the mental faculties vitiating consent. The idea, however, was to point to the lack of appreciation of one's marital

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Concurring Opinion, Republic v. Court of Appeals and Molina, G.R. No. 108763, February 13, 1997.

obligations.⁹⁹ It was on the basis of this revised provision that the present Article 36 was drafted.

The mistake of the Committee in their casual dropping of the above phrases was that the concepts attached to paragraph 2 (lack of due competence) and with paragraph 1 (lack of sufficient use of reason) were completely disregarded. The Committee failed to discern the distinction between lack of due reason and lack of due discretion - the former pertains to the cognitive element of matrimonial capacity, while the latter is part and parcel of the psychological element. The dropping of the concept of lack of due discretion was unintentional because it was continually reaffirmed in the deliberations that psychological incapacity "was not a defect in the mind but in the understanding of the consequences of marriage."¹⁰⁰ Justice Caguioa, who was also a member of the Committee, explained that psychological incapacity refers to the lack of understanding of the essential obligations of marriage.¹⁰¹ It is therefore clear that the Committee intended to include not only lack of due competence, but also lack of due discretion in the concept of psychological incapacity. In fact, it can be seen from the discussion of the Committee¹⁰² that their understanding of psychological incapacity was closer to the concept of lack of due discretion (paragraph 2) rather than lack of due competence (paragraph 3). While Sempio-Dy states that the Committee adopted paragraph 3 of Canon 1095 only, it is clear that it was the Committee's intention to adopt the whole concept of the psychological element of matrimonial consent as contained in both paragraph 2 and paragraph 3 of Canon 1095. The dropping of the concept of lack of due discretion in Article 36 was inadvertent. How can it be said that paragraph 2 was intentionally taken out when what the Committee understood as the meaning of psychological incapacity included the concept of lack of due discretion? Therefore, the statement of Justice Vitug in the *Santos* case that, "the use of the phrase psychological incapacity under Art. 36 of the Code has not been meant to comprehend all such possible cases of psychoses as, likewise mentioned by some ecclesiastical authorities, extremely low intelligences, immaturity, and like circumstances,"¹⁰³ is not precise. As Dacanay explains, lack of due discretion, which includes immaturity, is a sufficient ground to declare the psychological element of matrimonial consent non-existent, thereby rendering the marriage void *ab initio*.¹⁰⁴

⁹⁹ *Id.*

¹⁰⁰ DOYLE, *supra* note 8, at 779.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ A.S. DACANAY, *supra* note 45, at 100-101 and 104.

A second conceptual error is found in the same *Santos* ruling. The Court ruled that, "psychological incapacity should refer to *no less than mental (not physical) incapacity* that causes a party to truly be *incognitive* of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage."¹⁰⁵ The Court must be referring to lack of due reason (paragraph 1 of Canon 1095) which was intentionally removed from Article 36 by the Committee because it was already a ground for making a marriage voidable. Only paragraphs 2 and 3 of Canon 1095 make up the psychological element of matrimonial consent. Also, by using the word "incognitive," the Court gives the wrong impression that psychological incapacity is part of the cognitive element of matrimonial consent.

The Court has consistently failed to distinguish between distinct concepts and principles relating to the psychological element of matrimonial consent. As is shown in the ruling of the Supreme Court in the *Molina* case¹⁰⁶, the Court interprets psychological incapacity along the lines of lack of due reason (paragraph 1) instead of paragraph 2 (lack of due discretion) or paragraph 3 (lack of due competence). The Court says, "the evidence must convince the court that the parties or one of them was *mentally or psychically ill* to such an extent that the person *could not have known* the obligation he was *assuming or knowing* them could not have given a valid assumption thereof."¹⁰⁷ From this statement, it may be gleaned that the understanding of the Court of the psychological element of matrimonial consent is not clear. Its understanding is a hodge-podge of concepts contained in the Canon Law. The Court confuses the distinct concepts of lack of due reason (paragraph 1), lack of due discretion (paragraph 2), and lack of due competence (paragraph 3). As was explained above, lack of due reason is a cognitive element and not a psychological element of matrimonial consent. There is a clear distinction between lack of due discretion and lack of due competence. Lack of due discretion relates to an evaluative aspect of the giving of the consent, while lack of due competence concerns the positing of the object of the consent. In both cases, however, the marriage is declared void *ab initio* because the lack of a psychological element renders the consent non-existent.

A third conceptual error is manifested in the guidelines for the implementation and application of Article 36 which the Court pronounced in *Molina* case.¹⁰⁸ The guidelines are oriented too much on the clinical-medical or cognitive-mental aspect of a person. With these guidelines, there is a tendency to

¹⁰⁵ DOYLE, *supra* note 8, at 779.

¹⁰⁶ Republic.v. Court of Appeals and Molina, G.R. No. 108763, February 13, 1997.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

view psychological incapacity as a purely medical or mental illness. According to the Court:

[S]uch *illness* must be grave enough to bring about the disability of the party to assume the essential obligations of marriage.... The illness must be shown as *downright incapacity or inability*, not refusal, neglect or difficulty, much less ill will. In other words, there is a natal or supervening disabling factor in the person, an adverse integral element in the personality structure that effectively incapacitates the person from really accepting and thereby complying with the obligations essential to marriage.¹⁰⁹

By propounding this very technical and medical view, the Court gives the impression that a psychologically-incapacitated person is incapable of any kind of mature act, and that he or she is akin to an insane person. But unlike a person who is not of sound mind, a person who is psychologically-incapacitated appears to be competent in giving consent to marriage or assuming the obligations of marriage. Lack of due discretion or lack of due competence is not so much some incurable illness sought to be discovered inside the head of an individual person, but a psychological barrier to the relational self-giving between husband and wife. It is concerned not so much with personal disabilities, but with the dynamic interpersonal relationship between the spouses. Marital capacity of one spouse is not considered in isolation, but in reference to the fundamental relationship to the other spouse.¹¹⁰ By impliedly reducing Article 36 to a mere ascertainment of a medical fact, the Court have discarded the true and dynamic concept of marriage as contained in the Canon Law. Contrasted with the above discussion on the evolution of the concept of marriage in the Canon Law, the Supreme Court's rulings with respect to Article 36 fail to appreciate the continuously evolving and developing understanding of the ontological reality of marriage and family life. Whereas the conception of marriage in the Canon Law is personalistic and takes into account the interpersonal relationship between the spouses, the Court has opted for a more restrictive and, may it be said, outdated conception of marriage.

VI. CONCLUSION

The confusion with regard the interpretation and application Article 36 may be traced to the use of the term "psychological incapacity" itself. The exact

¹⁰⁹ *Id.*

¹¹⁰ Santos v. Court of Appeals, G.R. No. 112019, January 4, 1995.

term “psychological incapacity” does not appear in the 1983 Code of Canon Law. While paragraph 3 of Canon 1095 contains the phrase “due to causes of a psychic nature”, it does not mean that paragraph 3 is the sole equivalent of Article 36. As was discussed earlier, the psychological element of matrimonial consent subsumes both paragraph 2 and paragraph 3 of Canon 1095, and Article 36 should be construed to embrace both paragraphs. According to Bishop Cruz, the phrase “psychological incapacity” is an invention of some churchmen who are moralists, but not canonist – which explains why it is a weak phrase.¹¹¹ It is suggested that it would better to use the precise words of both paragraphs 2 and 3 of Canon 1095 – meaning both lack of due discretion or lack of due reason. The danger with using the term “psychological incapacity”, as is seen in the rulings of the Supreme Court, is that there is a tendency to associate it with “mental or cognitive incapacity”¹¹². As a practical matter, instead of saying that a person is “psychologically incapacitated”, it would be advisable instead to say that at the time the person gave his or his consent to marriage, the “psychological element of matrimonial consent” (i.e., either or both due discretion and due reason) was lacking or non-existent.

There has been much confusion in the interpretation and application of Article 36 of the Family Code. The bewilderment concerning “psychological incapacity” is rooted in the failure of lawyers, judges, and jurists to properly situate Article 36 in the system from which it was borrowed - the Canon Law. The rulings of the Supreme Court are characterized by a confusion of concepts. The only way to weed out these persistent and substantial errors is to study and analyze the concepts of marriage, matrimonial consent, and the psychological element of consensual capacity within the framework of the Canon Law system of the Roman Catholic Church.

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¹¹¹ *Id.*

¹¹² *Id.*

PHILIPPINE LAW JOURNAL

Published by the College of Law, University of the Philippines
Diliman, Quezon City, Philippines

VOLUME 75

MARCH 2001

NO. 3

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