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## Ecclesiastical Tribunals - Procedures in Marital Cases

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# ECCLESIASTICAL TRIBUNALS— PROCEDURES IN MARITAL CASES

MONSIGNOR MARION J. REINHARDT

In 1980, the Most Reverend Charles Lefebvré, the recently retired dean of the Sacred Roman Rota, wrote an article on the "Defect of Consent in Rotal Jurisprudence."<sup>1</sup> Although his conclusion in the article was that no such defect presently existed, he also recognized that a new terminology was developing within the field of canon law which might be called a "Defect of Judicial Discretion."<sup>2</sup>

Our Code of Canon Law describes marriage as a consensual relationship between two parties who are fit for such a commitment. This consent is an act of the will. Each party gives and accepts a right in the body which is perpetual, exclusive, and necessary to generate children for humanity. Although we would totally agree with Lefebvré, so much has happened in the present world to change our thinking about:

- 1) What is fit for persons—how old must one be?
- 2) What is perpetual?
- 3) What is exclusive?
- 4) What is meant by the phrase "to generate children."

Because the world gives new insights into the definition of these concepts, we must consider them in determining what marriage presently is all about.

The Law of Moses had demanded an eye for an eye, a tooth for a tooth, a life for a life.<sup>3</sup> This probably was taken from the Code of Ham-

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<sup>1</sup> Lefebvré, *De defectu discretionis iudicii in rotali jurisprudentia*, 69 PERIODICA 555 (1980).

<sup>2</sup> Lefebvré emphasized that lack of discretion in marriage cases must be distinguished from defective consent or ignorance. *Id.*

<sup>3</sup> *Exodus* 21:23-24; *Leviticus* 24:20.

murabi—"Lex talionis"—an eye for an eye and a tooth for a tooth.<sup>4</sup> Previously, many crimes brought death. Under "Lex talionis," for an eye, you could only take an eye. At the time of Christ, "Lex talionis" was mitigated to some extent. Punishment was in the form of fines and imprisonment. Under Judeo-Christian principles, more consideration was given to internal malicious intent. Did he intend? Did he act freely? Mortal sin demanded grievous matter, sufficient reflection and the full consent of the will. These principles were used in the civil as well as criminal setting.

In a similar manner, Christianity refined the concept of marriage. In the Decretals of Gregory IX, a soldier of Alexandria appealed to the Pope on behalf of his daughter whom he had given in marriage to a man afflicted with insanity. In January 1205, the Pope answered:

Since this woman is not able to live with this man who suffers from a continuous insanity of rage, and because the man is deprived of reason, the required marital consent was not able to be given. Consequently, if you (the Bishop of Vertelli) find these allegations to be true, we order that the two persons be separated from each other.<sup>5</sup>

Long before Gregory IX, the Church was accustomed to dissolving marriages on the ground of lack of consent.<sup>6</sup> For example, a marriage could be dissolved where a person refused, before the marriage, to have a family because he did not intend to bind himself to a permanent marriage. These principles were clearly established in the old Decretal law which was brought together in 1150.<sup>7</sup> It was like force and fear in the heart of our civil cases today but it was provable to the satisfaction of medieval law.

Until the turn of the century, insanity had been viewed from its external and manifest symptoms. Many people, even in the Church, considered the insane as possessed by the devil. Marriages were considered invalid only if at the time of the marriage there were clear indications of insanity. A marriage could be considered invalid only if the insanity was still evident, or if the marriage was between two fairly close episodes of insanity.

Thereafter, Sigmund Freud, along with many others, began to tell us that there are many internal aspects of insanity.<sup>8</sup> In the early parts of this century, it became clear that a person who appeared quite sane could be seriously unstable. Further, it was recognized that hallucinations and delusions were not the only signs of illness. Little by little, our Roman

<sup>4</sup> CODE OF HAMMURABI, L. 196, in ANCIENT NEAR EASTERN TEXTS 175 (J. Pritchard ed. 1955).

<sup>5</sup> *Corpus Juris Canonici*, IV, *Decretum Gregorii IX*, I, 24.

<sup>6</sup> See Perry, *The Canonical Concept of Marital Consent: Roman Law Influences*, 25 CATH. LAW. 228, 232-33 (1980).

<sup>7</sup> See *id.* See also 4 NEW CATHOLIC ENCYCLOPEDIA *Collections of Decretals* 710 (1967).

<sup>8</sup> See generally S. FREUD, *THE ORIGIN AND DEVELOPMENT OF PSYCHOANALYSIS* (1910).

jurisprudence began to consider many other signs indicative of internal disturbances. It was shown that neuroses, anxieties, phobias and personality disorders could compel men to do what could not, or should not be done.

The "I do," or "I don't," did not always mean what was said. The "I do" of a marriage contract meant a lot more than the idea of buying a house or selling a car. Man had to judge whom he wanted to marry as well as whether he wanted to marry at all. He had to act knowingly and freely. Canon 1081 specifies the necessity of both the capacity (*iure habiles*) of the parties and their consent in order for a real marriage to come into existence.<sup>9</sup> Canon 1081 describes consent as an act of the will, directed to certain specific matters.<sup>10</sup>

Although the Code of Canon Law seems to speak rather rigidly of knowledge and volition in reference to matrimonial consent, in recent years, under the influence of information obtained from the behavioral sciences, canonical jurisprudence is demanding more to establish consent than simply conceptual knowledge and the volitional "I do." The Church has always taught that important decisions in life must be truly human acts, that in these areas man must be master of his fate and the captain of his soul. This applies especially to matrimonial consent which constitutes one of the most important decisions in a person's life.

In a landmark decision in 1941, Wynen taught that matrimonial consent required the ability or capacity to evaluate:

In many judgments there is a double element to acknowledge, the one representative or conceptual, the other evaluative. Both elements must be considered especially in practical judgment. It must be noted that the use of reason which is required for every human act looks both to the conceptual as well as the evaluative knowledge.<sup>11</sup>

This is a landmark decision because for the first time there is a distinction between "I do" and what really takes place within. Other decisions of the Rota express similar sentiments.<sup>12</sup>

All anomalies of the personality causing grave damage to the will potentially are preventive of valid matrimonial consent. If experts agree that before the marriage began the necessary integrity was lacking, such a person must be considered incapable of instituting a permanent existence with another human being. Likewise, that person must be considered incapable of undertaking the responsibility of procreation and education of

<sup>9</sup> CODEX JURIS CANONICI, Can. 1081, § 1. See generally F. DELLA ROCCA, *MANUAL OF CANON LAW* 286-99 (1959).

<sup>10</sup> CODEX JURIS CANONICI, Can. 1081, § 2.

<sup>11</sup> *Coram Wynen*, S.R.R. Dec., vol. XXXIII, p. 149 (1941).

<sup>12</sup> See, e.g., *Coram Jullien*, S.R.R. Dec., vol. XXVII, p. 79 (1935); *Coram Sabbatani*, S.R.R. Dec., vol. LIII, p. 159 (1961).

children. "There would be lacking in such a case that discretion of judgment which would be necessary for a valid judgment about marriage."<sup>13</sup>

For centuries canonical jurisprudence has held that an incapacity to perform the essential physical act of marriage resulted in nullity. This is found in Canon 1068.<sup>14</sup> Based on knowledge supplied by the behavioral sciences, our jurisprudence began to acknowledge basic inabilities arising from psychic causes. For example, Sabattani wrote that a nymphomaniac was incapable of fulfilling the essential property of fidelity.<sup>15</sup>

The Second Vatican Council, in "Gaudium et Spes,"<sup>16</sup> discussing the action by which marriage is entered, clearly teaches that the intimate partnership of married life, established by the Creator, is rooted in the conjugal covenant of irrevocable personal consent.<sup>17</sup> "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 is a lasting one."<sup>18</sup> This statement of the Second Vatican Council has a special significance. It does not consider just the mere fact of the establishment of a partnership of life (*communitas vitae*) but considers the right and obligation of this intimate partnership of life, which has as its most specific element the intimate union by which a man and a woman become one flesh, and toward which the partnership of life tends as to its summit. This proves that marriage is an extremely personal relationship, and that the matrimonial consent is an act of the will by which the spouses "mutually bestow and accept each other," that is, "in regard to certain actions and gestures, but it does not deny that the actions and gestures are extremely vital and affect the totality of the human person in some way."<sup>19</sup>

The Second Vatican Council also stated that in marriage "in *facto esse*," while the communion of life may be absent, the right to the communion of life can never be. Therefore, a more accurate definition of matrimonial consent is the following: the act of the will by which a man and a woman, through the covenant between them, that is, through irrevocable consent, establish the perpetual and the exclusive communion of conjugal life that is aimed by its natural character to the generation of children. The formal object of this consent is not only the right to the body but also the right to the communion of life. This includes living together which is properly called matrimonial, and the related obligations, such as

<sup>13</sup> *Coram Anne*, S.R.R. Dec. (unpublished) (22 Julii 1969).

<sup>14</sup> *CODEX JURIS CANONICI*, Can. 1068, § 1.

<sup>15</sup> *Coram Sabattani*, S.R.R. Dec., vol. II, p. 503 (1957).

<sup>16</sup> *Gaudium et Spes* (The Church in the Modern World), reprinted in W. ABBOTT, *THE DOCUMENTS OF THE VATICAN* 199 (1966).

<sup>17</sup> W. ABBOTT, *supra* note 16, at 250.

<sup>18</sup> *Id.*

<sup>19</sup> U. NAVARRETE, *STRUCTURA JURIDICA MATRIMONII, SECUNDUM CONCILIUM VATICANUM II* 75 (1968).

the right to the intimate partnership of persons and of acts by which "they perfect each other, so that they may cooperate with God in the generation and rearing of new lives."<sup>20</sup> This thinking is also found in decisions rendered by the Roman Rota.<sup>21</sup>

In the past, there has been very little difficulty in matters concerning schizophrenia or even manic-depression psychosis. These have recognizable signs. More significantly, problems have been noticed in cases involving personality disorders which generally arise very early in an individual's life and usually without his or her awareness. The victim develops an abnormal behavior pattern which frustrates him in the process of maturing and the development of normal human relationships. This lack of self-awareness, coupled with the lack of maturity, prevents the individual from being able to make the informed judgment necessary for a valid matrimonial consent. In addition, if his disorder is severe and disruptive of conjugal life, consent is impossible since one cannot consent to something he is unable to do.<sup>22</sup>

What then are we to say of the present dean of the Sacred Roman Rota, Most Monsignor Henrick Ewers, speaking on March 17, 1978 before a conference of Rotal judges, advocates, other officials, and to his Holiness, Pope John Paul II:

Finally at one time juridic relevance was accorded only to such clear mental illnesses as, for example, schizophrenia. Today, it is being ever more generally accepted that mere psychopathies just as much as, and perhaps, even more than psychoses can lead to the nullity of matrimonial consent.

The examples could be multiplied, and in each instance we could discover "dubia iuris" slowly being transformed into certitudes in one direction or another.

Now then, this progress to which we have been referring demonstrates something of great importance, namely, that our illustrious predecessors—and in part, we too—have not been content to analyze, illustrate, and subtly interpret the test of the law but, rather, have been willing to look deeply into things in their development (a development oftentimes chaotic and precipitous), and to take proper advantage of the elasticity of Canon Law (a merit, not a defeat, of the system). Thus, they have freed themselves from a comfortable immobilism, avoided mere abstraction, and often reached appropriate solutions from the point of view both of the law and of common sense.

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<sup>20</sup> *Humanae Vitae*, Encyclical Letter of Pope Paul VI on the Regulation of Birth, § 8, given on July 25, 1968.

<sup>21</sup> See e.g., *Coram Anne*, S.R.R. Dec. (unpublished) (25 Februarii 1969).

<sup>22</sup> See generally AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 305-30 (3d ed. 1980); Salzman, *Other Character-Personality Syndromes: Schizoid, Inadequate, Passive-Aggressive, Paranoid, Dependent*, in 3 AMERICAN HANDBOOK OF PSYCHIATRY 225 (1974).

Can it be said that this is an application in Canon Law of the so-called "evolutionary" method? So be it. However, no one will deny that what has been done has been kept within well defined limits, has been carried forward with careful attention to the Magisterium, and has developed without contradictions not only the individual norms of the law but also the whole complex of the law. Nor could anyone diminish the immense influence of the Second Vatican Council in all of this especially over the past several years.

It is therefore with sentiments of deep gratitude that we wish on this solemn occasion to recall so many worthy priests—among them, Your Holiness, a son of your own noble nation—who over the past seventy years have been and continue to be our guides, and who in fact have opened secure channels towards the unfolding of justice.<sup>23</sup>

On January 25, 1981 Pope John Paul II spoke to the same conference of rotal judges, advocates and officials, and mentioned that a negative influence would result from sentences when granted with too much facility. The words of Pope John Paul II were not intended to limit or to diminish the work of the Rota in Rome. Instead, his words were intended to limit local tribunals throughout the world. He praised the Rota for its vigilance in safeguarding the lower tribunals of the world by ensuring that the law and the procedural norms are properly observed. Although judicial indiscretions are bound to occur, we must see to it that they are kept to a minimum. Certainly, the Church in America has done much to make canon law a more liveable forum. We must remember, however, that to avoid abuses the Constitution *Dei Miseratione* of Benedict XIV<sup>24</sup> made it necessary to have a defender of the bond, a three-judge panel, and a necessary appeal from a first court.<sup>25</sup>

There is no difficulty with the presence of an active, vivacious defender of the marriage bond, but we might ask ourselves whether justice can be afforded in today's world by requiring that the case be heard in the place of contact or in the domicile or quasi-domicile by a three-judge panel with a necessary appeal from a trial court. I think that justice demands that most people, who are forcibly separated, have a right to be heard in a place where they can be easily heard. The rights involved are so complex and intimate that "rogatory commissions" are of no value. To fly from one place to another is also a great disadvantage. If we are going back to an age when cases took, at a minimum, 2 to 5 years to be heard, that is well and good; our people of today, however, are not willing to

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<sup>23</sup> Address by Most Monsignor Ewers, Conference of Rotal Judges (Mar. 17, 1978).

<sup>24</sup> Constitution, *Dei Miseratione* of Benedict XIV of November 3, 1741.

<sup>25</sup> *Id.* See generally J. KING, *THE CANONICAL PROCEDURE IN SEPARATION CASES* 42-43 (1952). Canons 1960-89 govern the procedure for marriage trials. See *CODEX JURIS CANONICI*, Cans. 1960-89. See generally S. WOYWOOD, *A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW* 364-84 (1952).

return to such an era.

We might ask ourselves "Why does the Roman Rota handle so few cases a year—from two to three hundred"? The cases at the Rota are handled from the standpoint of facts as well as from law, even though the original court might have been justified in thinking otherwise. Should not the trial court be in a better position to judge the facts? Second, so few cases are brought to the Rota on questions of psychological importance. Most cases before the Rota concern questions of not wanting children, of getting a divorce, and of force and fear. Many of the cases could be handled on such ordinary grounds, but psychological proofs are easier. Third, when the Rota gets a case on psychological grounds, most of the important facts are not mentioned since the record is not complete. A recent local psychiatrist at the Rota mentioned that if they could only see the people, the findings would be different. Fourth, the Rota only has reference cases from other tribunals throughout the world; they only get what others send them.

In most cases involving common psychological grounds, there is a need for deeply ingrained psychological and psychiatric men and women who have a canonical background. There generally is no need for parties to go back entirely to their childhood. For the most part, they are that way because of the nature of their personalities. Indeed, with training and assistance another marriage might prove quite ideal.

The ultimate question that must be addressed in light of our discussion is: "Can a tribunal such as the local court system and the Roman Rota continue to exist in present day society"? One of my reasons for believing that it cannot is that, in many cases, the system only results in fear and frustration. It is different in countries such as Italy and Spain where civil effects are involved. For the rest of us, it can lead only to unnecessary difficulties. Where it is going to lead only to years of endless litigation—because of paranoid ideas—would it not be better to institute an administrative procedure which could solve the particular matter? The ecclesiastical court system must be changed. We must try to find all the facts of each case and try to render our decisions accordingly. We agree with Monsignor Lefebvre that no new jurisprudence exists in the Church. Our judgments, however, must come from all of the facts, even the most intimate and confidentially established. We must work to achieve a greater justice for all involved.