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MATRIMONIAL CONSENT IN CANON LAW JURIDICAL ASPECTS

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I. **Introduction**

A valid marriage emerges to existence thanks to the founding power of one sole efficient cause - consent.

With clarity and determination, Canon 1057 Section 1 indicates: "*The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply consent.*" [1]

The title of this article "Matrimonial Consent in Canon Law", is one of great interest and significance in the judicial praxis, jurisprudence and in the marriage doctrine.

To initiate, lets us remember the principle of common sense and experience: "One can only give that which is owned", which is applied to introduce us to consent.

In effect, according to Canon 1057 Section 2: "*Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through*

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[1] Canon Law Society of America, *Code of Canon Law* 335 (Latin-English Edition, New English Translation, Libreria Editirice Vaticana 1998).

A special note of appreciation is due Monsignor Juan José García Failde for his express permission for the use of the materials in his books for this article.

an irrevocable covenant in order to establish marriage."[2] We understand that the consent of each contracting party consists of an act of will through which both "give and accept" each other.

And having to consider consent as a human, intelligent and free act, which also, has as its object the establishment of a marriage and which does not limit itself to a present obligation, but rather, serves to establish a commitment for a future life.

This leads us to take up again the commentaries made regarding the text of St. Ignatius Loyola in his celebrated Spiritual Exercises: "First let's draw our attention to the fact that love has "two parts", which are "the person giving love and the person receiving love". (With "two parts" referring to two individuals, who tend to have only one love: *duo in corde uno* (two in one heart)."[3]

In consent, utilizing as our starting point the freedom of will, man makes use of what is exclusively his: conscience and reflexion. Teilhard de Chardin, pointing out that conscience is co-applicable to life,[4] asserts that reflection is a "psychological characteristic of a being, that not only knows, but knows that he knows."[5]

These briefly explained fundamentals will serve to explain, throughout this essay, the following sections:

1. The concept of marriage, starting from its historical definitions in order to finally arrive at what is established in the current Code of Canon Law.
2. The contractual and non-contractual theories of marriage.
3. The basic principle of matrimonial consent.
4. The nature of consent.
5. Acts that lead to the formation of consent
6. Reflections on the nullity of marriage centered on Canons 1057 and 1095.

As a way of specifying the content of this essay, we need to consider that within the common Canon Law there exist two regulations to the discipline of marriage; one applicable to the Latin Church and found, in its essential rules, in the Code of Canon Law enacted on January 25, 1983 (Canons 1055-1165), and the second existing in the Church of Eastern rite, whose discipline is found in the *Codex canonum Ecclesiarum orientalim* enacted on October 18, 1990 (Canons 776-866). The purpose of this work, for obvious reasons, is limited to the study of the Law, in force, in the Latin Church without excluding the possibility of making reference, of some kind, to the Eastern regime if it be necessary.

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[2] *Id.*

[3] Ignasio Casanovas, *Segunda Nota: "De las obras de amor"*, Ejercicios de San Ignacio, Tomos V-VI, Comentario y explicación de los ejericios espirituales de San Ignacio de Loyola (S.I., Editorial Balmes 1948).

[4] Claude Tresmontant, *Introducción al pensamiento de Teilhard de Chardin (El fenomeno humano)* 36 (Taurus Ediciones 1968).

[5] Pierre Teilhard de Chardin, *La Réflexión De L'Energie* 483.

I would like to invite you to join me, through this intellectual expedition, in discovering, along a path of study of the previously mentioned sections, the road towards the ***terra incognita*** - the most promising words that have ever been written in plotting the maps of human knowledge -, as Daniel Boorstin mentions in his work *The Discoverers*.[6] And this unknown territory is the complete understanding of matrimonial canonical consent.

Now, if we look at marriage through the eyes of the religious poetry, marriage is the great symbol of the mystic life. Marriage (along with the night and the flame) is one the three dominant symbols in the works of Saint Juan de la Cruz, the mystical doctor, one of the poets who resorts to the symbol and the allegory. The three symbols together provide the tone and the atmosphere of the mystical world: night represents significance; marriage, communion of love; and the flame, change and life. In other words, "the symbol of the flame is the brooch and the culmination of the fervor of the consummated love in marriage and is the perfect gradual illumination of the dark night."[7]

Even though this work is aimed at all those interested in the study of matrimonial canon law (scholars, lawyers, students), its focus is primarily aimed at those who spend their lives in the Church tribunals dedicated to working with the matrimonial causes to aid God's people.; as well as for those who wait, with hope and anxiety, for these tribunals to alleviate their suffering, allowing them to mend their broken lives. For the benefit of the latter, let us remember what Carnelutti said should appear in every tribunal: Justice and Peace, so that the conflicting parties can leave with a feeling of justice and peace, the judges applying at every moment the canonical equity and the "*salus animarum*" as the supreme law of the Church. And with the salvation of the souls, Canon 1752, as the last canon, ends with dignity the Code of Canon Law.

This article is the fruit of 20 continuous years of updated study of matrimonial Canon Law, with years of collaboration in ecclesiastical tribunals on the development of the matrimonial processes in causes of matrimonial nullity, as well as giving lectures on Canon Law. This article combines my own reflections with research, especially the works of distinguished canonist. Obviously, the works of the great minds of the Catholic Church have influenced my view on the topic, I alone remain accountable for the material I have written.

I. Marriage

A. Etimologies

Earlier writers derived the word marriage from the word "mater" (mother) and "munium" (occupation) formulating the word "Matrismunus" which was translated

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[6] Daniel J. Boorstin, *The Discoverer* 12 (Random House 1983).

[7] San Juan de la Cruz, *Obra Poética* 23 (Miguel de Santiago Ediciones 29 1977).

into "the occupation of the mother".[8] The use of the word "mater" stemmed from the belief that the infant depended more on the mother than on the father; the latter having as his occupation to acquire and preserve those goods necessary for the support of the family.[9] The word wedding comes from the Latin verb *núbere* which means to cover with a veil; thus, the tradition that a woman covers herself in a veil during a wedding.[10] The Latin word *conubium* (marriage) represent the sharing of the same veil by both spouses; thus, symbolizing the union that is to last for a lifetime.[11] The Latin word *coniungo,* which means yoke, represents the mutual sharing of the yoke by both male and female.[12] Finally, the Latin word *consortium*, which means participation, represents the participation or the sharing of the same luck, of a common destiny by both male and female.[13]

B. Roman Law

Under Roman Law, marriage was given two distinct definitions both of which became universally accepted and remain in existence today. The first definition, found in the Justinian Code, defined marriage as the union between a male and a female, creating an inseparable bond for life.[14] Note the incorporation of the word "bond" prior to "for life" in the definition obtained from Justinian Code. It is interesting to note how at such an early time in civilization, marriage was already seen as a bond that tied the man and the woman together for life. As many theologians have stated, the word bond (*consuetudinem* in Latin) is at the core of marital life given that this element is what separates this type of relationship from others and is what allows both man and woman to mutually surrender their friendship, trust and love by way of an earthly union.[15]

The second definition is that of Modestino, which is found in the Digest and was received by the Eastern Churches.[16] The translation of the definition is as follows: A wedding is the union of man and woman and an agreement that is to last for a lifetime, the communication of the divine and the human law.[17] Some commentators believe that the last phrase of the definition refers to the communication of the intimate and the temporary things.[18]

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[8] Carlos Warnholtz Bustillos, *Manual de Derecho Matrimonial Canónico* 23 (Universidad Pontificia de México 1996).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 24.
[16] *Id.*
[17] *Id.*
[18] *Id.*

B. Early Christian Formulations

i. St. Augustine and the Three Goods of Marriage

St. Augustine argued that there exist three goods in a marriage: procreation (proles), chastity (fides) and the bond of union (sacramentum).[19] For St. Augustine, human beings were created in order to be bound together by some kind of bond of friendship, by which the highest expression of this relationship was marriage.[20] Thus, Augustine felt that marriage and the sexual joining of man and woman was something good because it created a union by which man and women would walk on a similar path planning and cooperating together.[21]

The second good that St. Augustine identified in marriage was fides or the loyalty of one spouse toward the other.[22] As St. Augustine reasoned, woman and man do not have power over their bodies individually, but rather each has power over the body of the other.[23] And it was this power that Augustine felt was clear evidence of the extreme loyalty that married individuals must show for each other.[24] A loyalty so strong, that the betrayal of such was considered, by St. Augustine, as the disowning of one's body.[25]

The third good identified by St. Augustine was the bond of union.[26] For St. Augustine, marriage was a lifelong unity that was not to be undone by the personal judgments of the individual.[27] It was a sacramental bond that represented the source and symbol of a permanent union among Christians.[28] Thus, even if a married couple were unable to procreate, because of sterility, it would be unlawful for them to separate and unite with someone else for the sake of having children.[29] By arguing so, St. Augustine furthered his argument that the purpose of marriage dealt with more than just procreation given that it also represented a natural companionship between the individuals.

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[19] John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1030 (2001) (*citing* St. Augustine, *The Good Of Marriage*, Translated in *St. Augustine: Treatises on Marriage and Other Subject* 3, 17 (Roy J. Deferrar ed. 1955)).
[20] Charles Reid, *Symposium: The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. Pub. L. 449, 452 (2004) (*citing* St. Augustine, *De Bono Coniugali*, *De Sancta Virginitate* 2 (P.G. Walsh, ed., 2001)).
[21] *Id.*
[22] Charles Reid, *supra* n. 20.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] John Witte, *supra* n. 19.
[27] Charles Reid, *supra* n. 20.
[28] John Witte, *supra* n. 19 (*citing* Augustine, *On Marriage and Concupiscence*, translated in A Select Library of Nicene and Post-Nicene Fathers of the Christian Church at 263, 268).
[29] *Id.* (*citing* Augustine, *The Good of Marriage*, translated in *St. Augustine: Treatise on Marriage and Other Subjects* 3, 31-32 (Roy J. Deferrari ed., 1955)).

ii. The Roman Catholic Church and St. Thomas Aquinas

The Papal Revolution (1075-1300) brought about an enormous transformation and important changes within the society, culture and politics of the Western Hemisphere. It was also during this time that St. Thomas Aquinas defended and elaborated on the three goods of marriage first set out by St. Augustine.[30] In elaborating on the three marital goods, St. Aquinas brought about a greater clarification as to the priority of each one and also effectively argued that marriage was a three dimensional institution with each of the marital goods anchored to one of the three dimensions.[31] Furthermore, in his work *Summa Theologieae*, St. Aquinas discussed the virtuousness of marital sex and how sexual behavior was not necessarily a sin.[32] In doing so, St. Aquinas expanded on the definition of marriage by addressing a topic that had long been revered as immoral and sinful, even within a marriage.[33]

St. Aquinas argued that if marriage was seen as a natural institution, procreation was its primary purpose.[34] While sharing the perspective of St. Augustine, that man and woman have a natural inclination to come together for the purpose of having children; St. Aquinas argued that procreation meant more than just the act of conceiving children.[35] Procreation also meant the rearing and educating of children in the spiritual and temporal life.[36] And it was this latter component of procreation that St. Aquinas argued could not be achieved simply through the licit union of husband and wife and their engagement in sexual intercourse.[37] Husband and wife, Thomas argued, had the requirement of maintain a faithful, permanent and stable union if the children were to be reared and educated accordingly.[38] By elaborating the marital good of proles, to include the rearing and educating of children, St. Aquinas placed top priority on the primary marital good of procreation; placing the secondary goods as faith and sacramental stability.[39]

On the other hand, if marriage was seen as a contractual association, then faith (fides) was to be considered the primary good of marriage.[40] For St. Aquinas, marital faith was a faith of justice and not a spiritual faith.[41] What this meant was maintaining

[30] John Witte, *supra* n. 19, at 1035.
[31] *Id.*
[32] *See* St. Thomas Aquinas, *Summa Theologiae: A Concise Translation* (Timothy McDermott ed., Ave Maria Press 1989).
[33] *Id.* at 561.
[34] John Witte, *supra* n. 19, at 35.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* (*citing Summa Theologica* 2724, 2725-2729 (Fathers of the Eng. Dominican Province trans.1948)).
[40] *Id.*
[41] *Id.* (*citing Summa Theologica* 2724, 2725-2729 (Fathers of the Eng. Dominican Province trans., 1948)).

faith in the promises made in the contractual marriage as well as remaining faithful.[42] Furthermore, marital faith not only required one to abstain from engaging in sexual intercourse with another, but also involved a commitment to be indissolubly united, both in body and mind, with one's spouse willing to remain best friends and share fully in the property, lineage and reputation.[43] Marital faith, in this broader sense, was a good in itself that extended the contractual association between husband and wife in youth and old age, in prosperity and adversity and in sickness and in health.[44] Thus, St. Aquinas argued, if marriage was seen as a contractual association then the procreation of children was not necessarily expected or intended.[45] Furthermore, if a promise to marry was consummated faithfully, sexual intercourse was a good act in itself, including those instances where procreation was a natural impossibility.[46] By viewing marriage in a contractual sense, St. Aquinas categorized the marital good of faith (fides) as the primary good of marriage, with sacrament and procreation as the secondary goods of marriage.[47]

Finally, St. Aquinas argued that if marriage was seen as a spiritual institution, the primary marital good was sacramentum.[48] A properly contracted sacramental marriage, between Christians, fell within the laws of the Church and nature, was an indissoluble union and a channel of grace.[49] Thomas furthered argued that through the sacrament, a grace was conferred upon those marrying and through this grace they were brought in union with Christ and the Church.[50] By way of this grace, husband and wife were to remain united with Christ and the Church during their mortal existence.[51] Given that the union of husband and wife is representative of the union of Christ and the Church, St. Aquinas argued that the union was to last into perpetuity and that it was a union of one to the other.[52] Unlike St. Augustine, St. Aquinas did not considered marriage a sacrament only to demonstrate its symbolic stability, but rather to demonstrate its spiritual efficacy.[53] Thus, St. Aquinas considered marriage to be indissoluble because it was a sacrament which elevated the goods of faith and procreation.[54] It is important to understand that out of the seven sacraments of the church, St. Aquinas believed the sacrament of the Eucharist to be the most

[42] *Id.*
[43] *Id.* at 1036 (*citing* John Finnis, *Aquinas: Moral, Political, and Legal Theory* 143-54 (1998)).
[44] *Id.*
[45] *Id.*
[46] *Id.* (*citing Summa Theologica* 2724, 2703-06 (Fathers of the Eng. Dominican Province trans., 1948)).
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1037 (2001) (*citing* St. Thomas Aquinas, *Summa Contra Gentiles*, 295-96 (Vernon Bourke et al. trans., 1975)).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1038

important of all given that "it contains the substance of Christ himself whereas the others contain a sort of instrumental power deriving from him".[55] Furthermore, St. Aquinas argued that all of the other six remaining sacraments prepared an individual for the sacrament of the Eucharist.[56] Thus, when looking at marriage as a spiritual institution, St. Aquinas reconciled his view that the sacrament of the Eucharist was the most important one and that of the sacrament of marriage by arguing that marriage was symbolically related to the Eucharist as a sign of the union, expressed by the Eucharist that existed between Christ and the church.[57] St. Aquinas believed that through the sacrament of marriage, parties consented to be bound to each other, to the Church and to God; thereby, accepting the sacramental grace of God and the spiritual nurture of the Church.[58]

Continuing in the expansion of the definition of marriage and particularly addressing the topic of sex, St. Aquinas presented the distinction between virginity (moral integrity) and how virginity seeks the soul's good through a life of contemplation attentive of the things of God while marriage seeks the body's good or the multiplying of the human race through an active life where husband and wife are attentive of the things of the world.[59] Moreover, St. Aquinas believed that sex, carried out in an orderly fashion and for its purpose of procreation, was not a sin.[60] For St. Aquinas, the high degree of pleasure attached to an orderly sexual behavior did not detach such act from its virtuous characteristic.[61] Similarly, the possibility that sexual behavior could distract one from their spiritual matters, St. Aquinas argued, did not make the act unvirtuous.[62] In other words, "it is not unvirtuous to suspend reason for a time for a good reason, otherwise sleeping would be a vice."[63] For St. Aquinas, sexual sin existed when there was a breakdown in the proper reasonable order when exercising a sexual act such as when one had sex outside of marriage.[64] St. Aquinas further defended the act of sex in marriage by making reference to natural law when he established that commitment to a particular woman was defined as marriage and such was dictated by natural law.[65] Furthermore, given that natural law was enacted for the general good of society and intercourse served the general good of society, it followed that the union of the husband and the wife through marriage served the good of society and mankind. [66]

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[55] St. Thomas Aquinas, *supra* n. 32, at 561.
[56] *Id.*
[57] *Id.*
[58] John Witte, *supra* n. 38..
[59] St. Thomas Aquinas, *supra* n. 32, at 430.
[60] *Id.* at 431.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 432.
[66] *Id.*

In *Summa Theologiae* St. Aquinas engages in a distinction between reproduction in the state of innocence (the immortal state of a human being) and reproduction in the present state (the mortal state of a human being).[67] According to St. Aquinas, among corruptible substances the main aim of nature is reproduction and the good of the species.[68] Among incorruptible substances the main aim of nature is the individual; thus, in the state of innocence, the act of reproduction was needed for multiplication of the individual and not for conservation of the specie.[69] Furthermore, if in the state of innocence the aim of nature was to multiply, in regards to the soul of man, St. Aquinas argues that the author of nature needed to be interested in the multiplication of individuals for their sake. [70]

St. Aquinas believed that the argument of earlier theologians, that reproduction in the state of innocence took place without intercourse, was unreasonable.[71] In his view, reproduction, both before and after sin, took place through intercourse given that human beings have been provided with the organs needed for such purpose.[72] What makes intercourse sinful, in the present state, is that such "natural mating of male and female is somewhat disfigured by unbalanced desire, but this would not have happened in the state of innocence where the lower powers obeyed reason."[73] This unbalance desire leads to the inability of reason to balance the heat and pleasure of desire, but when in the state of innocence nothing would have escaped reason like that.[74] As for the pleasure, St. Aquinas felt that the pleasure would not have been to a lesser degree but would have been greater "given the greater purity of nature and sensitivity of body men then had." [75] To rule by reason does not require that the pleasure be less, but that the desire for pleasure be within reasonable bounds.[76] Finally, St. Aquinas addresses the topic of sexual abstinence and argues that there would not have been great esteem for such in the state of innocence given that sexual abstinence, in the present state, is esteem because it tempers lust and not because it reduces fruitfulness.[77]

iii. Early Judicial Interventions of the Church

The first judicial interventions of the Church tended to underline the monogamist and indissoluble character of marriage; importance was placed, in the Middle Ages, in the initial consent of the formative moment of the matrimonial judicial business,

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[67] *Id.* at 148.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 148.
[76] *Id.*
[77] *Id.*

insisting that this consent is an irrevocable judicial act from which an indissoluble bond is born; the beginning of the sacramental nature of the matrimonial contract, of those baptized, was approved; the doctrine was not immediately concerned with the different ways of manifesting said exchange of consent considering that it followed Roman Law which did not ask for certain formalities. [78]

C. Canon Law and Marriage

i. Essential Elements of Marriage

It is argued by many of the classical theologians that it is in Genesis 2.24 where one can verify that God, the creator of nature, established the natural matrimonial institution.[79] Thus, it has been said that - *Cio che e sicuro e che Gen 2, 24 si refersice all'istituzione matrimonial, non all' attrazione sessuale*[80]– which translates into "That which is certain is that Genesis 2, 24 refers to the institution of marriage and not the sexual attraction". Having identified the origins of the natural institution of marriage, one must turn to the task of determining how God established said natural institution of marriage.[81] An in order to determine such thing, theologians usually turn to the teachings of the Church and Canonist.[82] A closer look at these teachings will reveal that God created the natural institution of marriage by way of the following essential elements: 1) the personal structures – which states that man and woman, as a married couple, become intimately complete in the biological and spiritual order, and by doing so become one, to that point that anything which is proper to one in each of these orders is proper to the other; 2) the essence and the essential properties – which states that the union for a lifetime is destined to last as long as one of the spouses does not die; thus, it is considered exclusive and indissoluble; 3) the essential purposes; 4) the reciprocal rights and obligations; and 5) the ethical and religious principles, which along with the positive legislative norms, specify the agreement in its totality and the content of each of the rights/obligations of its members. [83]

ii. Definitions

In everyday language, marriage has adopted many different meanings including: 1) those definitions making reference to the wedding; 2) marriage as a matrimonial

[78] Juan José García Failde, *Nuevo estudio sobre trastornos psíquicos y nulidad del matrimonio* 86 (Universidad Pontificia de Salamanca 2003).
[79] *Id.* at 81 (*citing* P. Gasparri, *Tractatus Canonicus de matrimonio,* vol. 1 Typis Polyglottis Vaticanis, Romae 1932, 16).
[80] *Id.* (*citing* B. Ognibeni, *Il matrimonio nell'antico Testamento. Note a uso provato degli studenti*, p. 19).
[81] *Id.*
[82] *Id.*
[83] *Id.* at 82.

society and 3) marriage as reference to the living together of the spouses. It is important to note that out of all of these definitions, marriage as a status, marriage as a matrimonial society or marriage as a partnership that is to last for a lifetime should be considered as providing a "true" definition of marriage.[84] The legal canonical definition of marriage can be obtain through a slight style modification of Canon 1055 and formulated as follows: "A partnership of the whole life established between a male and a female, through the matrimonial partnership (alliance), order, by its own nature, for the good of the spouses and for the procreation and education of the offspring." [85]

iii. Purposes

The use of the word purpose is understood as that end for which an action is ordered or for which an action is carried out. [86] When talking about marriage, two types of purposes have been identified. [87] First, there is the essential, objective, natural purpose: that for which an action is ordered or carried out.[88] Second, there is the accidental, subjective extrinsic purpose: that end or goal for which the person carries out the action.[89] During the middle ages, there was only one essential purpose considered – the education and procreation of children.[90] Beginning in the 11th Century, we see a move towards identifying three purposes for marriage – the procreation and education of children, mutual help and the remedy for the hunger and desire of earthly goods and uncontrollable pleasures.[91] It is important to note that, during this time; the previously identified purposes were not categorized or given any priority.[92] Nevertheless, with the writing of the Canon Code of 1917, we see the three purposes categorized with procreation and education of the children as the primary purpose and mutual help and the remedy for the hunger and desire of earthly goods and uncontrollable pleasures as the secondary purpose of marriage.[93] According to the Traditional Canon Law doctrine, the 2 secondary purposes are essentially subordinated to the primary purpose.[94] In other words, the secondary purposes are considered purposes because of their subordination to the primary purpose.[95] Consider that mutual help is not an intrinsic purpose of marriage given

[84] *Id.* at 81.
[85] Alberto Bernandez Cantón, *Compendio de Derecho Matrimonial Canónico* 23 (Tecnos 1991).
[86] Carlos Warnholtz, *supra* n. 8 at 28.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 29.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

that such help can exist in any relationship outside of marriage.[96] As for the remedy for the hunger and desire of earthly goods and uncontrollable pleasures, it is obtained through the action of marriage; thus, it is not a substantial part of marriage.[97]

iv. Goods

It is interesting to consider how the three goods of marriage (*bonum sacramenti, bonum fidei and bonum prolis)* identified by St. Augustine not only became an important part of the Jurisprudence of the church but also became a vehicle through which the substantial elements of marriage were shown.[98] The *bonum sacramenti* represents the inability to dissolve the marriage enrto such an extent that, theologians have argued, without this good there cannot exist a true marriage.[99] This is so because *bonum sacramenti* is part of marriage itself and not a good that is derived from the use of marriage given that the inability to dissolve a marriage represents the unbreakable union between Christ and the Church.[100] The *bonum fidei* represents the right to fidelity and the obligation to maintain said fidelity in accordance with the bond of unity for a lifetime.[101] It is, as theologians have argued, the exclusive right to share in the married life and to raise children not the exclusive right to fidelity itself.[102] Finally *bonum prolis* represents the right to procreation and to educate the progeny along with the right to paternity and maternity.[103] It is important to note that progeny is not an essential part of marriage given that in the contrary any marriage without children would be considered null. A sector of theologians have argued the existence of a fourth good of marriage which has been identified as *bonum coniugum* and represents a complement to the previously discussed essential purposes of marriage and with which a true partnership of a lifetime could not be understood.[104] This fourth good also represents a right and an obligation to the good of the union.[105] A good of the union that requires all of the necessary elements for a healthy interpersonal relationships including good will, companionship, friendship and the duty and right to married love.[106]

v. Properties

The essential properties of marriage, identified in Canon 1056, are unity and the indissoluble character of marriage which have reached a particular level of strength

[96] *Id.*
[97] *Id.*
[98] Carlos Warnholtz, *supra* n. 8, at 31.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 32.
[105] *Id.*
[106] *Id.*

and stability by way of the sacrament.[107] It is important to establish that the term essential property talks about a scholastic metaphysical concept, which is not similar to the legal concept of property.[108] In the Scholastic Philosophy an essential property, of a being or entity, is understood as that, which even when not a part of its essence, it characterizes or identifies the being or entity in such a manner that without said property it would not be able to exist.[109] Thus, in a similar manner unity and the indissoluble character of marriage characterize and identify marriage to such an extent that without these two essential properties a marriage could not be considered a marriage.[110] Unity is the strength of the married union and of the mutual surrender between men and women.[111] It is what makes the union between a man and a woman exclusive. The indissolubility of marriage is what makes the union of marriage and the mutual surrender perpetual until the death of one of the spouses. It is important to distinguish between an intimate (essential) unbreakable character and an external (non essential) unbreakable character of marriage. The first deals with the impossibility of dissolving the union using the same purpose for which it was form in the first place, in other words, by way of the private will and initiative of the parties.[112] The second type deals with the impossibility of dissolving the union by way of a public authority (ecclesiastical or civil).[113] Unity and the indissoluble character of marriage come from the same natural condition of marriage, in other words, they are essential to it.[114] The agreement to be together for a lifetime implies a personal and complete surrender and acceptance, by each of the spouses, to the other.[115] And if it is considered personal and complete it must be Exclusive and Perpetual. Hence, unity and the indissoluble character of marriage make up, each in its own right but mutually complementing each other as well, the monogamous marriage; thereby, excluding any type of polygamy.[116]

vi. Marriage as Sacrament

The Sacraments are ordered for the sanctity of men, for the edification of the Body of Christ and for the praise of God; but they also have a pedagogical end.[117] The sacraments not only entail faith they also feed, strengthen and express faith by way of words and things.[118] This is why the sacraments are called sacraments of the faith.

[107] *Id.* at 34
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 35
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 42
[118] *Id.*

A group of theologians have discussed the Christian marriage, as well as the other sacraments, as a sacramental sign and real symbol that confers grace by way of the act performed by Christ and not just through the faith of those that receive it.[119] In order to further understand such argument it is important to define the words sign and grace. A sign is that which, when seen or known, leads us to the knowledge of that which is unknown or that which we cannot see.[120] A sign can be natural or conventional; it can be a thing, an action, words or even all three things.[121] One example of a natural sign is smoke considering that if an individual were to see smoke he/she would most likely deduce that there was a fire.[122] An example of a conventional sign is the flag of a country which serves as a sign of patriotism.[123] Hence, sacraments, unlike other signs, are effective of the grace, in other words, not only do they lead to knowledge or remind us of the grace, but they themselves give or grant that which they stand for, of course if the person that receives them is one with faith.[124] Grace is the sanctification or justification of men by way of the divine life that God instills in our souls.[125] But it is also the way by which God gives man the assistance necessary so that he can carry out with his duties.[126] Nevertheless, it is important to understand that each sacrament grants the sacramental grace unique to its characteristics; thus, the grace of matrimony is different than the grace of priesthood but they both are divine assistance.[127]

Having provided a concise definition of the elements that make up a sacrament, we now turn our attention to the sacrament of marriage and the struggle of theologians and canonist to identify the different components of this sacrament. Two theories evolved to address this matter – one developed by the earlier theologians and canonist another developed by the modern theologians and canonists.[128] First, the earlier theologians and canonist, who, in looking at the effective cause of marriage as the mutual consent of 2 parties expressed by way of words, tried to incorporate to the marriage contract, the categories of matter and form.[129] The concepts of matter and form were borrowed, by said individuals, from the teachings of the Scholastic metaphysics which holds that every body or material entity is made up of matter and form.[130] Matter was seen as the common and indeterminate element that was determined by the form.[131] Thus, the most common opinion of the earlier theologians

[119] Lawrence G. Wren, *The Invalid Marriage* 222 (Canon Law Society of America 1998).
[120] Carlos Warnholtz, *supra* n. 8, at 42.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 43
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 43.

was that the sacrament was realized in the valid contract, but even more the contract was seen as the sacrament.[132] The consent of husband and wife, which was seen as the essence of the contract and the effective cause of the sacrament, was at the same time the matter and form of the sacrament.[133] The matter, as the indeterminate element, were the words or signs in so much as they expressed the mutual surrender of husband and wife.[134] The form, a determinate element, were the same words or signs in so much as they expressed the mutual acceptance of both male and female as husband and wife.[135] Been the sacrament the same valid contract, and whose essence was consent, the minister of the sacrament was not the priest or deacon but rather those that were getting married.[136] Thus, it was the husband and wife that were getting married before the priest or deacon who, in turn, acted as a witness by assisting in the matrimony.[137] Concluding, the earlier opinion viewed husband and wife as making the contract who then made the sacrament.[138]

Modern theologians and canonist do not place much emphasis on the argument of matter and form. Rather, they reflect more on the mysterious meaning of the union that husband and wife have in relation to the Christ-Church union.[139] A union that is certainly initiated in the contract, but that lasts or should last as long as the bond between husband and wife exists, in other words, until the death of one of them.[140]

In his work *Summa Theologiae*, St. Aquinas addresses the important distinction of those sacraments that existed during the Old Law and those that exists in the New Law.[141] The author begins his argument stating that, in the state of innocence, sacraments were not needed either to achieve knowledge and grace or as remedies for sin.[142] As for marriage, although it existed during the state of innocence it did not do so as a sacrament but rather to serve its natural function.[143] And here is where the author establishes the primary difference of sacraments, primarily marriage, in the Old Law and the New Law. For St. Aquinas, marriage "symbolized the future relationship of Christ and his church, just as everything else that preceded Christ prefigured him."[144] Thus, the Old Law sacraments foretold the Christ to come given that only through Christ, and after Adam's sin, could men be made holy again.[145] St.

[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 46.
[140] *Id.*
[141] St. Thomas Aquinas, *supra* n. 32, at 550..
[142] *Id.* at 459.
[143] *Id.*
[144] *Id.*
[145] *Id.*

Aquinas follows by stating that "before Christ's coming there needed to be certain visible signs that a man could use to attest his faith in the future coming of the saviour.[146] The New Law sacraments were symbolic of that which already took place in Christ while the Old Law sacraments prefigured it as future.[147] Borrowing from the teachings of St. Paul, the author states that Old Law sacraments were weak and needy elements given that they did not contain or cause grace.[148] On the other hand, St. Aquinas states that the New Law sacraments "contain and cause grace, and don't merit the same judgment."[149]

The distinction between the Old Law sacraments and the New Law sacraments was not only relevant to the elements of a sacrament (symbol and grace) given that it led to two distinct views of marriage which were contemporaneous with their time and line of thought.[150] In the early centuries of the Church, marriage was considered as something sacred and religious even when the technical concept of sacrament did not exist.[151] The liturgical celebration of marriage slowly developed throughout the East and West.[152] The Holy Fathers, making reference to the text of St. Paul's Letter to the Ephesians exhort to the Christian husband and wife to love themselves as Christ loved his Church.[153] In this view, the Christ-Church relationship is not only an example or a model to be followed but rather a true communication, a participation of the Christ-Church union to the inferior reality of the union of husband and wife.[154] In his text, St. Paul exhorts the Christian husband and wife to the unbreakable union, to the loyalty and love basing this on 2 main arguments.[155] The first argument is based on the comparison doctrice of the Mystic Body of Christ, set forth in his first letter to the Corinthians, primarily I Corinthians 12, 12-28.[156] His second argument is based on Genesis 2, 23-24 where St. Paul finds in the union of Adam and Eve prior to sin, a union similar to that of Christ and the Church.[157] Prior to sin, and when God introduce the woman to Adam, he responded "At last, here is one of my own kind – Bone taken from my bone, and flesh from my flesh. 'Woman' is her name because she was taken out of man."[158] Thus, it could be infer that Adam saw in the woman someone with whom he could dialogue, someone he could love and that could love him back, some one with whom he could be together.[159] After sin, the

[146] *Id.*
[147] *Id.* at 550
[148] *Id.*
[149] *Id.*
[150] Carlos Warnholtz, *supra* n. 8, at 46.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* at 47.
[157] *Id.*
[158] Holy Bible 3, (American Bible Institute 1992).
[159] Carlos Warnholtz, supra n. 8, at 47.

relationship of man and woman was damage giving rise to the jealousy in both; the love of the woman turned into seduction, selfishness, manipulation; the love of man turned into control.[160] Thus, man and women, as well as marriage, were in need of redemption.[161]

Christ, by way of his death and resurrection, established the "new alliance" with the baptized people (the Church).[162] By way of this alliance, God established that union that existed between Adam and Eve prior to sin, which was a simple archeotype of his union with the Church – mutual surrender and the unbreakable and eternal common union of love.[163] Christian husband and wife, who by way of baptism are members of the body of Christ, participate with Christ in the mission of sanctification, salvation and of the growth of the mystic Body by participating in the bearing and education of the new children of God.[164] It is important to establish that the significance of the new alliance is not purely symbolic, but rather one that must be effective.[165] Both Christian husband and wife must reflect and make effective in their conjugal union, the union of Christ and the Church, all that such union implicates: love, surrender, loyalty, communion and the unbreakable character of the union.[166] In order to accomplish such task, the married couple relies on the grace of Christ, which not only sanctifies, but also helps them in accomplishing their calling as a couple and as parents.[167] The only difference between the conjugal union and the union of Christ with the Church, is that in the conjugal union, husband and wife are in a plan of comparison and at the same time of reciprocity: both of them are members of the Body of Christ, and Christ is the Head of both; the husband needs the love and care of his wife just as much as her.[168]

III. Contractual and Non Contractual Theories

The first asserts that consent in marriage is a contract while the second theory denies it.

Both positions admit the distinction that exists between abstract marriage (matrimonial institution) and specific marriage.

Both are in agreement that without the consent of the contracting parties there is no specific marriage between the two of them.

Both theories coincide that for every specific marriage to be considered a true marriage, it must contain each and every one of the essential constituent elements of

[160] *Id.* at 48.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 49.

the abstract marriage. In other words, both maintain that the abstract marriage (the matrimonial institution) has essential properties, a nature, intrinsic purposes pre-established by the Creator of marriage and, as consequence, must appear in every specific marriage, given that in every specific marriage the abstract matrimony must exist (the matrimonial institution), in such a manner that any specific marriage that is missing any of the previously mentioned elements will not be considered a true marriage.

From the previous, both theories conclude that the ability to determine, to limit or change the previously mentioned elements are not left to the contracting parties' free disposition. The only freedom that the contracting parties have is to desire or not desire to be married, to desire to marry with a specific person.

The contractualists add that for every instance, it is solely the consent of both parts that gives to the concrete marriage between them, while the non contractualists (the institutionalists) reply that that at least in some cases along with that consent, the ecclesiastical authority operates as a factor of the birth of the concrete marriage among the contracting parties.

Besides, the contractualist insist in that the consent (and only the consent) of the parties that creates among them the specific marriage, is a contract, regardless of how much it is "sui generis" contract; rather the non contractualist (institutionalists) deny that such consent participates in the nature of the contracts.

Both theories admit, that as a consequence of the contracting parties having consented to be one for the other, a series of rights and obligations arise among them; but according to the contractualists these set of rights and obligations become the responsibility of the contracting parties exclusively because of the stipulated contract between the two of them as a result of having consented to marriage and the institutionalists will say that such rights and obligations are not established because of an stipulated contract between them once they consented to marriage, but rather these rights and obligations arise at the moment that they consent to be together and such obligations are imposed on them by the fundamental law of the matrimonial institution to which they have desired to have applied to them.

As a consequence, according to the contractualists, those rights and obligations, given that they have their origin in a private contract between the two of them, they are a purely commutative justice, as for the institutionalists, such rights and obligations can arise either from legal justice or social justice given that they come from the fundamental law of the matrimonial institution.

It would be proper to state as follows:

According to the contractualist theory of matrimonial consent, it is only the consent between both parties that should be attributed to establishing both parties as husband and wife. The consent and only the consent, between both parties, creates the matrimonial bond and it is the subjective, efficient, sole and un-substitutable cause of each specific marriage; only to this cause do we owe the fact that the abstract marriage is established among the parties; only this cause creates among the parties

the specific marriage which is the judicial bond and mutual judicial obligation, according to the previous understanding, of the previous Canon Law Code, in other words the *Codex* of 1917, to those acts order for the procreation because of their nature; and if each of the parties has a right to the body of the other, it is only because they have granted such right by way of their consent to one another, granting such right and imposing such obligation by way of a mutual consent, which is a bilateral contract stipulated by both. From the previous, stems that the rights-obligations between husband and wife, in as much as they proceed from the stipulated contract between them at marriage, are rights and obligations of pure commutative justice.

The contractualist continue to indicate that considering that the effect of contracts is the obligation (given that every ultimate purpose of a contract consists of regulating, in other words, produce, modify, terminate obligations and judicial bonds) among the contracting parties, or at least in one of them as is the case of a donation contract; thus, they conclude that the consent-cause of contracts is the authentic contract: for them; the formation of marriage consent-cause is the same as the consent-bilateral contract.

The non-contractualist theory (institutionalist) on the other hand denies that consent can be reduced to a private contract, along with denying that the consent of the contracting parties be the cause, or that it be the cause in all cases, of each specific marriage. For the non-contractualists, the specific marriage consists of a mutual bond of juridical nature; but this bond is not reduce as has been already said, to a mere contractual relation, which necessarily arises out of a contract, but rather a juridical complex reality referred to as "partnership of the whole life", as Canon 1055, Section 1[169] says, or in a more technical manner "institution and juridical system", with a content determined by its own aim, which are rights and obligations that are always common and in part reciprocal, with some inherent to the association and others derived from it.

They also add that there are instances (such as the sanation in light of the marriage, that of the condition once it is fulfilled, etc.) in which the will of the Church is the sole cause (for which the consent of the parties is presupposed) or the factor (along with another cause which is the consent of the contracting parties) which bonds husband and wife in a specific marriage, the one that causes the birth of the specific bond between husband and wife; thus, in these cases the juridical effects (among them the bond) are not due or are not solely due to the consent of both parties and, as consequence, the consent of the contracting parties is not a contract and its limited to its adherence to the matrimonial institution in abstract that, as a result of the free adhesion, it is made present with all of its nature, properties, aims, right and obligations of husband and wife.

The public authority is who creates, among the contracting parties, the specific bond, at least in some cases (and this is sufficient to not say that the consent is always the cause or contract of the concrete marriage). The public authority does so

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[169] Canon Law Society of America, *supra* n. 1.

by applying the matrimonial institution or the abstract marriage. It is true that the public authority does not create the bond between them, the one in which the abstract marriage focuses on, if the parties did not want to be husband and wife; but this want is presupposed or operates as a condition *sin qua non* to allow both parties to establish such bond and not as a cause that leads to such bond, which produces in the contracting parties the specific bond.

And as a result of being husband and wife, one for the other, there arises, between them, a series of rights and mutual juridical obligations of a juridical nature that, because they do not arise from their consent as cause and; thus, as contract, do not belong to the confines of the commutative justice but because they arise from the fundamental law of the matrimonial institution, belong to the legal justice.

What can we conclude from all of the previous? The following:

An in depth study of the two theories in question establishes an extremely interesting field for the canon doctrine; nevertheless, it is outside the realm and objective of this essay, what is clear is that a context such as the current one, in which the understanding of specific marriage as a judicial bond or right has been overcome, one in which a correlative obligation would be involved (consequence of the contracts themselves) to those acts fit for procreation; thus, leading marriage to be conceive as an association of a lifetime order as such by its own nature not only to the procreation but also for the "good of the spouses" (Canon 1055, &1)[170], as a "mutual surrender and acceptance of the spouses" (Canon 1057, &2)[171], in other words as something that hugely transcends the mutual surrender-acceptance of a right-obligation to those acts fit for procreation; in such a context, it much more difficult to accept that it is solely a consequence of a contract between both contracting parties, and as such, that everything be reduced to one simple contractual relation between husband and wife.

There are other questions that have a response, but due to their magnitude it is not possible to include them, for example:

1. In relation to the mutual surrender to a right of the use of their bodies, even when reduced to those acts fit for procreation, one must take into account that, the contracting parties, prior to consent to their union in marriage, neither of them have ownership or control over their respective bodies or over their use in regards to those acts previously mentioned for procreation. This is something that is difficult for some distinguished canonist to conceive.
2. In the examples that are mentioned by the non-contractualist (sanation in root, simple recognition) to demonstrate that it is not the consent of the contracting parties, but rather the public authority the one that creates the specific marriage between them, expert canonists[172] very easily respond that even in those instances it is that consent which produces the concrete marriage.

[170] *Id.*
[171] *Id.*
[172] García Failde, *supra* n. 78, at 16-19.

IV. The Basic Principle of Consent

The consent of the contracting parties is the fundamental element of marriage as can be seen from Canon 1057 § 1, which, faithful to a very old tradition, tells us that the consent of the contracting parties is what achieves marriage, and proclaims this principle as such: "The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent."[173]

This basic principle, established in Canon 1057 § 1, is expressed in the following two assertions:

a) it is necessary;

b) it is sufficient for the concrete marriage to exist

All substantive and adjective or procedural matrimonial canon law revolves around matrimonial consent; the substantive element describes its nature, properties and the essential purposes, the factors that prevent its birth or its juridical efficacy, among other aspects, and the procedural element shows the method through which one can, with certainty, in a process discover if in a concrete case there was consent or if it was judicially ineffective.

V. Nature of Consent

Matrimonial consent is composed of two acts of will, one act corresponding to each contracting party. If this act of will is missing or is judicially ineffective in at least one of the contracting parties, it is sufficient so that consent does not exist, or respectively that it be not judicially effective.

Now then, it is convenient to clarify that from a theoretical perspective, it is not the same thing to say that there is exists no consent and that consent is judicially ineffective. The non-existing consent is evidently judicially ineffective, in other words, it does not produce the judicial effect that is the matrimonial bond. On the other hand, the judicially ineffective consent assumes the existence of consent. The result of one is the result of the other: the null effect on the judicial order; in both instances there is no judicially valid marriage. And with a view to a challenge of marriage by way of an action of nullity, the canonist legislation will put in the same level the non-existent consent and the judicially ineffective consent.[174]

The consent of both parties is what "makes or produces" marriage and in this phase, it can be understood in two senses, both valid, in the sense that it is efficient cause and in the sense that it is a formal cause of marriage.

[173] Canon Law Society of America, *supra* n. 1.
[174] Juan José García Failde, *Apuntes del XXXII curso de actualización canónica* Tomo I, 6 (Asociación Mexicana de Canonistas, 7-11 julio 2008).

When referring to the efficient sense we are talking about when the matrimonial bond of both parties is originated by those acts of will. And in the sense of being a formal cause of marriage, we are referring to how those acts of will, in other words of consent, enter as an essential element, becomes a part of the essence of marriage, given that consent, by way of its union with the matter, which are the contracting parties, determines them or places them in the category of spouses, as well as determining or placing consent in the "matrimonial" category. And having this in mind, it is understood that the canonist legislator, after determining that marriage is fulfilled by the consent of the will, adds that said consent cannot be supplement by no human power.

In order to better understand the previous, it is convenient to explain the distinction between the matrimonial bond and the matrimonial consent. Canonist tradition has always distinguished between the matrimonial bond and the matrimonial consent, the first is the marriage already performed, already established (*"matrimonio in facto esse")* and the second is marriage in its phase of fulfillment (*"matrimonio in fieri*"). Some authors point out that this distinction belongs to the ancient canonists, prior to the Second Vatican Council (1962-1965),[175] but in our current times the concept of marriage has evolved towards a more human and comprehensive dimension, which can be seen by reading some of the texts of the *Gaudium et Spes* Constitution about the church in the modern world, and even though it is not a proper judicial text, it is the source of the new concept of marriage, same which is expressed in the actual Code.[176]

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[175] Carlos Warnholtz, *supra* n. 8, at 26.

[176] *Id.*

> The profound transformations of contemporary society, regardless of the difficulties to which they have given way to (free love, poligamy, divorce, hedonism, sexual abuse in order for mutual use, economic situation, socio-psychological and civil, etc.) very frequently manifest in different ways the true nature, energy, and strenght of the institution of marriage and family.The well being of the person and of human and Christian society is very closely linked to the favorable and prosperious condition of the spousal and familial community. (*citing* Note 47).
>
> Marriage is no longer solely conceived as a <contract> which gives <rights> to the body for the generative acts. Marriage "is the alliance (or covenant) of the spouses…thus, husband and wife surrender themselves and give themselves to each other", from where we see the birth of "the intimate spousal community of life and love…This intimate union, as a mutual surrender of two individuals, as well as the good of the offspring, demands full spousal fidelity and its indissoluble unity. (*citing* Note 48).
>
> The foundation of this intimate union is spousal love: "This love, given that it is essentially human, because it goes from person to person with an affection or feeling born from the will, encompasses the good of people;thus, it is able to enrich, with a special dignity, the expressions of the body and the spirity, and of making them noble as elements and specific signals of spousal friendship…Such love, associating with it the human and the divine, takes husband and wife to the free and mutual gift of each other, proven by feelings and acts of tenderness, and it pervades for their entire life,….thus, it surpasses the purely erotic tendencies which, selfishly cultivated, quickly and regrettably fade away. (*citing* Note 49).

The spousal love is "essentially human" because it goes from "person to person with an affection or a feeling that is born from the understanding and the will", which leads the spouses to a free and mutual gift of each other and it pervades all of their lives.[177] Because of this spousal love they give and accept each other mutually as people and in it "shall be recognized the equal personal dignity of woman and man". And from this personal surrender of the spouses is the "intimate spousal community of live and love" born, (*totius vitae consuetude et communion*) which is marriage.[178]

This allows us to reflect on what was said about love by St. Ignatius Loyola in his Spiritual Exercises. At the commencement of the four week period of the exercises, St. Ignatius Loyola provides a large preparation for them and at the conclusion of such, he provides us, as a crowning moment, an extremely important conclusion in order to guarantee the proposed results. And he titles it "Contemplation for reaching love" which is made up of two notes:

> First Note
> Of the words of love
> Text. First, it is worth to warn in two cases.
> The first is that love should be put more in the acts than in the words.
>
> Second Note
> Of the works of love.
> Text. The second, love consists of communications among the two parties, it is about the party that is giving love to give and to communicate to the party receiving love what he has or what he can, and similarly the same must be done by the party receiving love to the party giving love; thus, if one has science, to provide such science to the one that does not have it, the same if he has honors, the same if he has riches.[179]

> This love is expressed and is individually perfected through the act of marriage itself…(which carried out) truly in a human manner, expresses and favors the reciprical gift, through which they are mutually enriched in an atmosphere of joyful gratitude…The unity of marriage, confirmed by our Lord, clearly appears in the equal personal dignity and of the woman, which needs to be recognized in their mutual and complete love.
>
> Marriage and spousal love are order, through their own nature, to the procreation and education of the offspring. Children, are without a doubt, the most excellent gift of marriage and they contribute to the good of the parents…But marriage has not only been created for procreation. Rather, the nature of the indissoluble covenant between the individuals and the good of the offspring demand that the mutual love of the spouses manifest itself according to the honest order (have its honest manifestations), it is developed and it arrives at maturity. Thus, even if the offspring, in many occassions so fully desired, is missing, marriage survives as total intimacy and community for life (*"ut totious vitae consuetudo et communio") and it maintains its value and indissolubility.*

[177] *Id.*

[178] *Id.*

[179] Ignacio Casanovas, *supra* n. 3, at 199.

All of this content and dimension of marriage, go beyond the judicial categories and it can hardly be expressed in its concepts. For this reason, the Codifying Commission when drafting Canon 1055 and after many discussions, preferred to state "*in recto*" that marriage among the baptized is a sacrament, but describing "*in obliquo*" what natural marriage is, in the actual terms of Canons 1055 and 1057.[180]

In these two canons, the principal elements of the definition of marriage are found:

a) Marriage "*in fieri*" is the irrevocable alliance or covenant (*foedus*), originating in the legitimately manifested consent by both contracting parties qualified by law, which consists of the mutual surrender and acceptance as a person, in their capacity of spouses, and for which they create a partnership for a lifetime.It is convenient to mention that even though canon 1055 uses interchangeably the terms "partnership" and "covenant", the term "partnership" is preferred, given that it is not only judicial but also biblical, given that it is richer than the term "covenant" because it expresses better the "personal" element, in other words the mutual surrender and acceptance, and it invokes the peculiar relationship between God and his chosen people.[181]

b) Marriage "*in facto esse*" is that same partnership for a lifetime already created by the spouses' alliance.

Thus, the expression "partnership for a lifetime" was preferred instead of "intimate spousal community of life and love" used in the Constitution "*Gaudium et Spes*" and from the term "*communio*" (which appears ambiguous) and "*conjunctio*" (impoverished) because the partnership better expresses the intimate co-existence of marriage and has greater judicial tradition, given that it appears in Modestino's definition.[182]

The Jurisprudence from the Roman Rota Tribunal without a doubt had an influence in these changes, which beginning in 1969 evolved towards the personal tendencies of marriage and considered the right to a life of community and love as object of matrimonial consent.

In order to understand the "make up of matrimonial consent" it is necessary to analyze the following points:

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[180] Canon 1055, Section 1. "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.
Section 2. "For this reason, a valid matrimonial contract cannot exist between the baptized withouth it being by that fact a sacrament".
Canon 1057, Section 1. "The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent".
Section 2. "Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage".

[181] Warnholtz Bustillos, *supra* n. 8, at 27.

[182] *Id.* at 28.

a) There is a the habit of vivisectioning human beings into zones or sections, to which different names are given, such as understanding, will and emotion. And in each one of these zones we place different acts, for example, in understanding our thoughts, in will those of free choice, and in the emotion our feelings and emotions.

The previous does not correspond to reality, eventhough it helps us to understand ourselves better. It does not respond to reality because the person is indivisible, in other words, it does not have understanding with which to think with, nor will with which to make free choices, nor emotions with which to feel with, etc.

It is the "entire" person that thinks, the entire person that chooses, the entire person that feels and when we say "entire" it is understood that we are talking about an individual with "everything", everything that makes him who he is with his genes, with his biology, with his physiology, with his brain, with his feelings, with his physic, with his gods and his demons, with his accomplishments and his mysteries; although, as it will be seen, not all of an individual's components will have the same level of participation in these acts.

What must be very clear here is that the "I" that thinks, that chooses and that loves is the same "I" that feels, that sees, that listens, that walks, that nourishes himself/herself, etc. [183]

Because it is an "I" that at the same time is a soma and a spirit, it is not correct to say that man has a spirit and a soma, but rather that man is spirit and soma; man, in its entirety, is a somatized spirit and spiritualized soma.

Referring to that soma as body and to that spirit as "soul", the following can be asserted:

- That the human body needs the human soul to be a human body; that is why when the human soul separates itself from the body at death, the body seizes to be a human body and becomes a cadaver.
- That the human body needs the human soul to "act": no vegetative or sensible activity of that human body would be possible without that human soul. An intense intellectual activity can suspend the carrying out of any of those vegetative or sensible activities, and an intense alteration of the functioning of the will could accelerate or slow down the rhythm of a vegetative or sensible life.
- That the human soul does not need the human body to be or to exist given that it is spiritual. For this reason, the human soul does not die when the human body, to which it was attached to, dies.
- That the human sould needs, in this life, of the human body, and more specifically of its senses and of its brain for its operations of thinking, wanting,

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[183] García Failde, *supra* n. 174, at 5.

etc. Before a though or a volition different parts of the brain are activated.[184] This explains the following:

- o That all spiritual act, regardless of how sublime it is considered, has some material component and that all material act, regardless of how modest it is considered, has some spiritual component. It is here that the difference between a human being and an animal lies: for example a man and an animal can pull a wheel cart and unfold the exact same effort and make the exact same movement, but the work that both of them perform does not have the same value given that the work that the animal does is physical-immaterial and the one that man performs is physical-spiritual.
- o That the term "mental disease" (or of the soul or of the mind) can be accepted if with such term someone is looking to point out that what is truly sick is the material (senses, brain, etc.) and as a consequence of such the mind, the soul cannot operate; thus, in some sense the mind, the soul are sick; but the mind and the soul cannot be sick because they are spiritual.[185]

b) Let us now look at the "exclusive psychological phenomenon of man" under the following considerations:

There are psychological phenomenon that mark the qualitative difference between a human being and an animal, which tells us that the human being is a "separate" being, is "another" distinct being from the animal, and who depend, as a result of a cause, of the vital (soul) spiritual principle of man, even when the brain is a requisite for the vital principle causing such psychological phenomenon. Sure enough, man "thinks", "speaks", "wants freely", "makes history", "loves" and, what is more extraordinary, "is conscious" that he is thinking, that he wants freely, that he loves, and in general of all of his being and of all his doing.

- Man "thinks": "thinking" is a triple act: perception, judgment and reasoning.
- Man "talks": in other words, expresses his thoughts in words; thereby, communicating with other human beings.
- Man "wants freely" in the sense that his will its not necessarily fixed to one particular thing, but rather it is open to many possibilities. And by been free, man can "make history".

[184] *Id.*

Paleontology has verified that the human intelligence appears when encephalization has acquired a high degree in regards to the volume and the organization of the cerebral mass; and it is sufficient, for example, that the brain not be fully develop, as is the case of a newly born, or that it be severely injured, as is the case with intoxication or an automobile accident, so that the understanding cannot think. The same happens with the volitive activity that in order to act needs a strong sensible emotional support which always accompanies an emotional spiritual state.

[185] *Id.* at 6.

- Man "loves", he has the capability of giving his relationships significance and a loving human value.
- But above all, man has a characteristic that has no correspondence to animals: "conscience". Man is capable of "entering" within himself and figuring out who he is and what he does, he is capable of saying "I": "I" am, "I" think, "I" love, "I" must die. To say "I" is the most extraordinary event in the universe.

But man can carry these actions out precisely because he has a vital principle (soul) that causes them, even if they are caused through the use of the brain as an instrument and that is "spiritual": if those acts are spiritual, the cause that produces them must be spiritual.

Let us remember Teilhard de Chardin: "Man knows that he knows. He emerges from his actions. He dominates them in however feeble a way. He can therefore abstract, combine and foresee. He reflects. He thinks. From our empirical point of view, reflection is, as the world indicates, the power acquired by a consciousness to turn in upon itself, to take possession of itself *as of an object* endowed with its own particular consistence and value: no longer merely to know oneself; no longer merely to know, but to know that one knows".[186]

We resume by saying that man thinks, talks, wants freely, makes history, loves, is conscious of all of this "not" through his brain but rather through his spiritual vital principle (soul). Given that the brain is not the "cause" or the "non-cause" of the acts of thinking, of wanting freely, etc. The brain of a human being does not think, the brain of a human being does not want freely, etc. but rather it is man who thinks with his intelligence, man who wants freely through his will, etc. which are faculties of the spiritual vital principle – soul- which man has.[187]

c) Now then, man has a spiritual vital principle (soul) which forms with the material principle (body) a unit:

"Spiritual" is not the same as "ethereal". "Ethereal" simply means a form "superior" to the matter. Matter, because it is a quantity, is divisible, but ethereal means simple without parts, although it is linked to the matter and dependant on the matter for its existence and perishes when the matter perishes.

On the other hand, "spirituality" is far superior to matter not only because it is "ethereal" but, even more so, because it is autonomous and independent in relation to matter and that is why it does not perish when the matter, to which it is attached to and which it uses to perform actions, perishes.

That is why the vital principle of an animal is "ethereal" and the vital principle of man (soul) is "spiritual".

Man a spiritual-material being in which the spiritual principle and the material principle are so intertwined that they form one sole being. Man is not made up of

[186] Pierre Teilhard de Chardin, *Let Me Explain* 34 (Collins Fontana Books 1974).

[187] García Failde, *supra* n. 78, at 145-148.

soul and body but rather is a unit of soul-body, is a sole reality, through which the soul gives the body a reality of a human body (when the soul goes away that body stops been a human body and it turns into a cadaver) and the body is the space-temporary performance of the soul, it is the being of the soul in the body. It should not be said, as a result, that man has a soul and a body, but rather that man is soul-body, is fully "soul" and fully "body", is an incorporated soul and an inspired body.[188]

1. Will

The term "will" has various accepted meanings, for example: "Power of the soul, which moves an individual to do or not to do something", "Free self-determination or free determination."[189] But the most accepted definition, for this subject matter, is the following: a psychic faculty of carrying out the act of moving towards an object that intellegince has thought of and which presents as something good, as something useful, and the act of taking possession of the object, or the act of rejecting an object that intelligence has though and presented as bad, as something harmful."[190] Understood this way, will is identified as with its prerogative: the psychological freedom and the act through which it takes possession of an object is an act of "choice", it is a "volition".

The functioning of the will depends on intelligence, affectivity, etc. in such a manner that the will sums up in itself all psychic activity of an individual and it is the end phase of all psychic activity.

The act of will is made up of three successive phases:

- The introduction, by our understanding, of the "causes", in other words all of that which makes the will move to do something, to make a decision or reject a thing, to not make a decision. In other words the "pros" and "cons" which move an individual to act a certain way or another. In this phase, the individual examines, analyzes, values, compares the causes and the non-causes.
- The choice of one of those causes has as a consequence that the act of volition take place or not take place, in other words, that the will want or stop wanting something. And this depends on the "coloring", "tonality" of attraction and repulsion that the cause has.
- The execution, which is a motor function derived from the cause that has been chosen.

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[188] *Id.*
[189] *Diccionario de la Real Academia de la Lengua Española* 1492 (1992).
[190] García Failde, *supra* n. 78, at 132.

2. Freedom

Given the narrow relation between freedom and will, it is convention to mention that the word freedom has three meanings in the Bible: "1. The position of a free man as opposed to that of a slave; 2. The moral freedom of the will; and 3. The Gospel in as much as it is the "perfect law of the freedom" (Sant I, 25 2, 12)."[191]

In as much as the freedom of the will, the Old Testament knows that man is free, in other words responsible for his acts.

Now, let us look at freedom in marriage. Canon 1057, Section 2 states: "Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage". [192]

As it was stated in the previous point, will is the psychological power of "want", so that the "act of will" which makes up the matrimonial consent, is the same as an act "of want". If to that act we add that a fundamental attribute of will is "freedom", which consists of the psychological power of doing "free" acts, or acts of "choice"; then the "want" of the will, is an act of "choice", always considering "freedom" as an "internal" power of the individual.

Act of will is a human act, or what is similar, the psychological and specific act itself of the human being as a human being; thus, a psychological act of the reason and of the freedom of the human being.

The act of will is different, from those non-psychological acts, also referred to as "acts of man", and that properly are more "acts" than "functions", such as digestion, blood circulation. Functions that are carried out, within the individual, without the individual been able to intervene by way of his will so tas to determine if they can be carried out or not carried out.

In so much as that psychological act, as well as those non-psychological acts, proceed from a specific individuality with its own name, but so long as this psychological act proceeds from this individuality which has "rationality" and "freedom", and which distinguishes him from the irrational animal, the non-psychological acts proceed from this individuality in which what he has in "common" with the irrational animal is the vegetative and the sensitive.

3. Freedom, Understanding and Feelings

The act of "choice" is the specific act of the will, but it is not only the fruit of the will, but rather of the will and other capabilities among which understanding stands out.

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[191] Serafín de Ausejo, *Diccionario de la Biblia* 1097 (Editorial Herder 1963).
[192] Canon Law Society of America, *supra* n. 1. This definition that consent "is an act of the will…" is based on the doctrine of the Scholastic Philosophy, created by St. Thomas. Warnholtz Bustillos, *supra* n. 8, at 141.

Our understanding guides, but the will chooses and in this choice is the fundamental point of the act of choice. We say that a person chooses something, when after becoming familiar with it, he desires it, he accepts it and he makes it his.[193]

The act of choice requires the collective and harmonious intervention of various faculties, primarily that of understanding with the will.

And these two faculties can inter-correlate by reason of their formal purposes, as are the "truth" and the "good".

Having to consider that the "truth" is the "good" towards which intelligence tends to move towards with all of its strength; and that the will cannot want anything that is not presented as a "good" for the individual particularly in the specific situation in which the individual finds himself in. Everything that the will wants or desires must be covered in goodness; the good is, consequently, a cause and to be more precise it is a "final" cause (the "end") to which it should be aspired. Thus, every "motive" that "moves" the will to "want" or desire must be a "good", but a contingent good which the will can accept or reject.[194]

What is "truthful" is also a "good" and the "good" is also "truthful"; that is why the will can "move" the intelligence to think, to see better that which the will desires to be seen and, at the same time, what the will has desires to be seen, had to have been previoulsy thought by the intelligence.

But we should not loose sight that under this multiplicity of faculties, dependent on each other, the fundamental ontological unity of the human being should not disappear; it is always the human being, all of the human being, who acts by way of his/her faculties.

It is important to always keep in mind that the intellectual activity of man is closely linked to the activity of his external senses, which include sight, auditory capabilities, etc. as well as internal such as fantasy; keeping in mind that the senses produce the sensations.

Now, we cannot think intellectually without the aid of the sensible representations supplied by the senses and elaborated by the brain; which should not lead us to think that man thinks, for example, with his brain, given that in reality man thinks with his knowledge even if knowledge serves to think from the brain, in other words he uses it.[195]

4. Sensations and Products of Understanding: Ideas or Concepts and Judgments

The essential acts of understanding are the ideas or concepts and judgments, same which "assume", as well as the other acts of understanding such as reasoning.

[193] *Id.* at 25.
[194] García Failde, *supra* n. 78, at 25.
[195] *Id.* at 26

The sensations and the ideas or concepts are qualitatively distinct, given that, as it was mentioned previously, the senses that produce the sensations, can only capture what is material, what is concrete, what is singular. In other words, while with my eyes I see many objects, all of them different from each other, with understanding I form the concept that recognizes the essence and the universal idea of said objects.

And, how does understanding acquire that idea, that concept?: after the eyes have seen many concrete objects, for example trees, understanding make abstraction (this intellectual abstract operation is inherent in all cognitive process) of the particularities of said objects, in the example of those trees (some will be taller, others will be less taller, some will be thicker and others less thick, oak will have some characteristics and the pine tree will have other characteristics, etc., given that the understanding dispense of all of this) and forms the idea, the concept, the "tree", in other words the essence of the applicable object, the "applicable tree"; applicable to all of the objects, to all of the "trees" and not applicable to that which is not a "tree", for example a "rock".

In these instances, the understanding has formed the idea or the particular concept of the material realities, starting from the sensations; but understanding can form ideas or concepts of things, such as justice, beauty and kindness, etc., from which it is not possible to obtain sensations given that they cannot be perceived by the senses. These (universal) ideas are the bases of the remaining operations of understanding (judgments, reasoning, etc.).

With only the idea or the concept of, for example, "a tree", understanding does not affirm or negate anything regarding "the tree". This will be done by our understanding by way of another subsequent act which is called "judgment" and which is the most perfect act of our understanding. "Judgment" can be "practical" or purely "speculative", according to whether it is guiding or whether, respectively, it is not guiding the realization of something in practical life.

Now, how does our understanding proceed in order to arrive at a "judgment" of something?: it departs from two concepts or ideas that it has regarding something, it discovers that between one and the other there is identity (and it affirms that identity); in the first instance it sees that the predicate is convenient or that it corresponds to the subject, in the second it sees that the predicate is not convenient or not corresponding to the subject.

This act of intellect from our "judgment" is entirely "conscious": the subject that creates it not only adapts itself to the objective reality while creating it, but also, "knows" that it is adapting itself to that reality (the mind, only in our judgment, knows that it is adapting to reality); the mind, adapting to reality, carries with it the idea that reality be "the measure" of the mind rather than the mind be the one that measures, in other words, it believes that reality; only by allowing itself to be "measured" by reality, the mind knows what is real.

In this act of "judgment" I also know that I am who asserts or negates, that I am different from the act of asserting or negating; which means that such act of our "judgment" is an act of the "psychological conscience" (or of our understanding) that perceives as its own the psychic phenomenon and the "I". With that act, the psychological conscience, which is a psychological faculty, with that act it shows me that, when thinking I conceive and when judging I affirm, "I conceive", "I think", "I judge", "I affirm"; in this act "I know that I know", "I am aware that I know"; in this act the "I know" converts into " I am aware that I know", in other words, the act of conscious becomes an act of self conscience.

On some instances, things are not always as simple given that the "identity" between the subject and the predicate is not always immediately clear; hence, we need to make use of that comparative identity principle which, applied to finite beings, can be framed simply as follows: two truly identical things to a similar third are truly identical among themselves. For example, if X is identical to Z, and Y is identical to Z, then X is identical to Y (generally in mathematics what in metaphysics is taken in sense, in the sense of optical identity it is taken in a sense of equality: if X is equal to Z, and Y is equal to Z, then X is equal to Y); thus, we do not have three things, but one identical to themselves.

The application of this comparative identity principle is the key to the human "reasoning"; the logical mechanism of the syllogism is in reaching to the knowledge of an unknown truth through its identification, in a third truth, with a truth already known: the soul is spiritual, what is spiritual is immortal; thus the soul is immortal. In looking at the concept of "soul" and at the concept of "immortal", the concept of "spiritual" is identified – truths known – we deduce that the soul is "immortal".

In the previous case, we started from two judgments (the soul is spiritual, what is spiritual is immortal) and, reasoning (on some occasions it will be "deducing" and in other occasions it will be by "inducing"), we obtain another judgment which affirms the identity between the concept of the "soul" and the concept of "immortal".

5. Theoretical Knowledge and Deliberative Knowledge, which resolve the speculative judgment and, respectively, the practical judgment, with special reference to matrimonial consent.

5.1 Theoretical knowledge, speculative judgment, required for matrimonial consent:

5.1.1. The act of choice, which matrimonial consent consists of, is substantially an act of will, as has been stated previously, same which uncovers itself to the light of reason because the diverse objects or the diverse aspects of one similar object, among with which the will must choose, must be previously known by reason, first in a theoretical manner and after in a deliberative manner.

5.1.2. And as for the theoretical knowledge of the matrimonial purpose, chosen by will and required for matrimonial consent to exist, Canon 1096, Section 1 clearly

indicates: "For matrimonial consent to exist, the contracting parties must be at least not ignorant that marriage is a permanent partnership between a man and a woman ordered to the procreation of offspring by means of some sexual cooperation."[196]

We should emphasize the following points:

- That knowledge is required in order for consent to "exists";
- The phrase "do not ignore" needs to be understood as having some knowledge, because "to ignore" is to lack all knowledge pertaining to a particular thing; but to expressly demand that the parties "do not ignore", instead of expressly demanding that the parties "know", indicates that a minimal, vague, imprecise knowledge is sufficient;
- not to ignore that it is an "partnership" is, in some respect, not to ignore that it is some "uniting bond";
- not to ignore that it is "permanent" is less than not to ignore that it is "indissoluble"
- not to ignore that it is between a man and a woman, is not to ignore, at the very least, that it is "heterosexual";
- not to ignore that procreation is produce by way of a "certain sexual cooperation", is not to ignore that it does not come from any corporal contact and it is not to ignore the exact function of the sexual organs.

5.1.3 It is not the same to "lack the minimal knowledge" than to "be incapacitated to have that minimal knowledge: the first does not necessarily carries with it the second, even though the second carries with it the first.

In the referred to Canon 1096, reference is made to the "lack" of this knowledge, while the fact of "being incapacitated", characterized as lacking sufficient use of the reason is referred to in Canon 1095, Section 1 and take note that this canon does not talk about lacking "all" use of reason, but rather lacking "sufficient" use of reason: the first carries with it the second, such as the bigger encloses the smaller, but the second does not carry with it the first for the inverse reason that the bigger is not contained in the smaller. And in this, permanent causes can be influential such as a psychological diseases, as well as temporary causes, such as an ethylic severe intoxication.

5.1.4. The elements of marriage laid out in Canon 1096, Section 1 are less than those pointed out in Canon 1057, Section 2 in formulating what is marriage; which would make it seem that a vague and imprecise theoretical knowledge of those elements, pointed out in Canon 1096 Section 1, is not sufficient for there to be the true matrimonial consent. This objection would be legitimate if, in order for there to be a specific marriage, it would be required for there to be an consent to each and every one of the essential objective elements of marriage in its juridical significance; but that objection has no reason for being when all that is necessary for there to be a

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[196] Canon Law Society of America, *supra* n. 1, at 345.

specific marriage is an implicit consent of those elements and when that implicit knowledge of those elements occurs when starting from the elemental theoretical knowledge of the content referred to in Canon 1096 Section 1, the contracting parties accept marriage as a whole, without excluding with a positive act of will, any of the essential objective elements of marriage. [197]

5.2 Deliberative Knowledge, practical judgment, required for matrimonial consent:

5.2.1 Assuming that the contracting party has the minimal theoretical knowledge, it is necessary, in order for matrimonial consent to arise, that he carry out an act of "deliberative" knowledge prior to the act of election.

This "deliberative" act goes through various phases: the understanding begins to know "reasons" which give advice to the individual to marry with whom the individual is thinking of getting married and "reasons" that do not advice him to marry said person. These "reasons", of ordinary will, have relation not only with the marriage itself but also with both contracting parties. Afterwards, the understanding "compares" some and other reasons, carefully considering the different reasons, to see if some of them neutralize the others or at least prevail over the others; from this comparison the knowledge will arrive to the contracting party of whether said marriage *hic et nunc* is "convenient" or "not convenient", in other words, in the specific situation in which said contracting party finds him/herself. And the conclusion to which the individual arrived to, is formulated by the understanding in a practical judgment, which presents to the will, this marriage "is convenient" or "it is not convenient". Evidently this whole process has been presided not only by the reason of the contracting party, but also by its preferences and tastes, by its needs, by its fantasies; and in this process has been present, not only that which is but also that which marriage carries with it, whether it is desirable or not so desirable, but also how is the individual and how is the other party, etc., it is evident that in said process the contracting party could have suffered mistakes, inappropriate acts, etc.

In every instance this process has been only a necessary assumption so that the contracting party can make the decision of accepting or not accepting the marriage, assuming that he is free. Because if truly marriage is free, this contracting party can negate marriage even when his understanding has advice him that he should marry, as well as proceeding with a marriage when the understanding has present such as not convenient to the individual.

5.2.2 In order that the mentioned contracting party can go ahead and carry out this process it is required that the individual have sufficient "maturity of judgment" or the sufficient "discretion of judgment".

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[197] García Failde, *supra* n. 78, at 29-30.

It is necessary to distinguish between "discretion of judgment", which is the psychological capacity to do the act of "deliberation", and the act of "deliberation" itself.[198]

The "discretion of judgment" refers to the marriage in general and the act of "deliberation" refers to the marriage in particular, the first is a permanent or customary quality and acts as a previous assumption of the second, which is manifested with an actual character and it constitutes an intrinsic element of the volition; when the first does not exist the second does not exist, but even when the first one exists the second one may not exist. For there to be matrimonial consent, "discretion of judgment" by itself is not sufficient, rather the act of "deliberation" must be present as well, and for there to be no matrimonial consent it is sufficient that the act of "deliberation" not be present, independently of the fact that there is an absence of the act of "deliberation" because there is an absence in the "discretion of judgment".

5.2.3. A complete discretion of judgment is not required nor is an insignificant discretion of judgment sufficient; what is needed is discretion of judgment capable of producing the act of "deliberation" proportionate to the object over which deliberation must take place.

And this object is the essential object of matrimonial consent along with the contemplated extension in the Canons 1057, Section 2 and 1055, Section 1, in other words:

- the establishment of a partnership for a lifetime with multiple rights and essential obligations that go:
  - from those that are owed to the "substance" of this *totius vitae consortium* (Canon 1055, Section 1)[199], within which the essential properties must be situated (unity, with which the "good of marital fidelity" is related to, and indissolubility) (Canon 1056)[200];
  - to those rights-obligations that are derived from the fact that this partnership for marital life is institutionally "order" to some fixed objectives (good of the procreation, good of the spouses) (Canon 1055, Section 1)[201].

5.2.4. Normally the grave defect of discretion of judgment will arise from a psychological grave anomaly, but what makes the marriage null is the "seriousness of the defect of discretion of judgment" and not "the seriousness from which this defects comes from", such as the psychological anomaly;

If the cause from which the defect comes is "grave", it can be assumed that the defect is also "grave"; but the hypothesis that even if the cause is severe the defect is not severe is not ruled out, in any case, the severity of the defect is measured by the

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[198] García Failde, *supra* n. 78, at 31.
[199] Canon Law Society of America, *supra* n. 1, at 335.
[200] *Id.*
[201] *Id.*

incapacity of the discretion of judgment to produce the "deliberation" in proportion to the exposed object of the matrimonial consent.

5.2.5. The discretion of the judgment is only the capacity to deliberate, as the terms "discretion of judgment" suggest. Nevertheless, if the required power to deliberate is missing the sufficient power to choose is not present, similarly where the proper deliberation is not present then the election is not present.

It can be said that the absence of the required freedom and of choice, in this case, is a necessary consequence of the severe defect of the discretion of judgment, but it is not a component of this severe defect of discretion of judgment; in this case, what is common is to declare that the nullity of marriage consists of the severe defect of discretion of judgment, but not because of the lack of the required freedom.

6. The Lack of Liberty, Autonomous Issue

6.1 But today it is known that there can be psychic anomalies that, leaving the capacity of the intelligence to deliberate as is appropriate, affect the will, producing in her the incapacity to carry out the act of election, in other words, producing in the will the lack of capacity to elect, as well as producing also in said will the lack of the appropriate freedom.

The distinguished author Juan Jose García Failde "mentions that the psychiatric disorders of this nature are or can be neurosis, psychopathic personalities, the emotional disturbances, the un-restricted internal drives, the obsessive ideas. Due to one of these psychiatric disorders, that are directly affect the will, there have been Roman Rota judgments that have declared a marriage null for lack of freedom (internal). [202]

It is commonly known, nevertheless, that according to classical doctrine, it was inconceivable that the will could fail when the understanding was not affected.[203] The thesis of *ubil intellectus ibi et voluntas*, which was sustained by the scholastic philosophy, was used as a starting point to argue that only one disorder, in the act of understanding, can bring about a defect of the will and specifically of the freedom (internal)."[204]

The least recent jurisprudence from the Roman Rota followed this thesis and declared null the marriage for a lack of freedom (internal) only when it was evident that the psychiatric disorder had prevented the practical judgment (today we would say, when it was evident that the severe defect of discretion of judgment had taken place) but not due to a lack of internal freedom understood as an autonomous issue or independent of the severe defect of discretion of judgment."[205]

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[202] García Failde, *supra* n. 78, at 33 (*citing* c. de Jorio, sen. 20 decembris 1967: SRRD, 59, p. 870).
[203] *Id.* (*citing* G. Michiels, De delictis et poenis, II).
[204] *Id.* (*citing* Jose Geraldo Caiby Crescenti, *Falta de liberdade interna e nulidade de consentimento matrimonial* 2-344 (Tesis de doctorado, N. Domenici, Roma1990)).
[205] *Id.* at 34.

6.2. Instead, a sector of the doctrine[206] maintains the thesis that in those instances, in which even where there exists sufficient discretion of judgment and the sufficient deliberation, a lack of the required liberty is produce, this issue of lack of sufficient liberty needs to be individualized as a autonomous issue of matrimonial nullity.

This autonomous issue of a lack of sufficient freedom, points out Monsignor García Failde, has to be supported not by Canon 1095, 2 but by Canon 1057, in other words it must be considered as lack of the volitive aspects of that act of will which is matrimonial consent independently of the intellective aspects of that same act of will.

In actuality, the freedom (internal) must be referred to the human act of consent and once referred to this human act of consent it can be taken in a broad sense, in other words, as a basic component of the consent in its agglutinative unity of volitive and intellectual elements, or it can be taken, as well, in a strict sense which is limited in the volitive aspects, independently of the intellective, of that same human act, if the dichotomy is valid "intelligence-will". [207]

7. The Act of Choice in the Specific Marriage and the Motivations of the Will

7.1 Non-Pathological Conscious and Unconscious Motivations.

7.1.1. Lets begin from the hypothesis in which the will has "non-pathological conscious rational motives" to decide the specific marriage; remembering that such decision would not be free if the will has not had "motives" to decide not to go ahead with the marriage.

Those motives, in favor of the decision of the will to go ahead with marriage, do not consist of the product of the studied understanding (universal ideal, judgment, reasoning, etc.) but rather in the "contents" of those products that the understanding presents to the will under the aspect of "good" and that fundamentally are formed by the essential "goods" that in the lives of individuals are carried, generally, in marriage and for the individual that is looking to get married that marriage, particularly, carries with it. We are talking about the "values" (rights, natural ordainment, for example, to the good of the married couple, etc.) of marriage and the values "values" (qualities that make it possible obtaining those other values) of the party one is seeking to contract specific marriage with.

These motivations are evidently "rational" (because reason has though about them and they have been presented to the reason by the will), "conscious" (because they form part of the field of psychological conscience – understanding- by way of which an individual feels affected by his/her psychic acts), "non-pathological" (because they are not the product of any type of psychopathological anomaly). They

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[206] *Id.*
[207] *See Id.* (*citing* Juan José García Failde, *La Liberta psicologica e Il Matrimonio, in L'incapacita di Intendere e Di Volere nel Diritto Matrimoniale Canonico* 41-50 (Can. 1095, nn 1-2) (Editrice Vaticana, Citta del Vaticano, 2000)).

are not normally determinant "motivations" of the will towards marriage, but rather "motivations" which make it possible and facilitate the will to freely go into a marriage.

7.1.2. And along with these "motivations" there are others that, because of the previously mentioned reasons, are also "rationale, conscious and non-pathological" and that far from being incompatible are more complementary of the others: we are talking about the aims or particular goods which the contracting parties propose to obtain in the marriage.

7.1.3. But we must take something very important into account: that in the influence of the "rational, conscious and non-pathological motivations" on the will, whether it chooses to carry out or not carry out the act of choice, the "emotional life" of an individual plays a fundamental role, in which "feelings or affections", the "emotions", and the "passions" are included.

If there is any difference that must be addressed between one or the other of these states, it can be said that the "feelings or affections" are states that express the particular moving-emotional resonance; thus, subjective through which the individual lives his own psychological processes; the "emotions" and the "passions" are very intense feelings, but the "emotions" are transitory and the "passions" permanent.[208]

Everything that has been mentioned as part of the "emotional life" is something, perhaps, impregnated in the contents of the intelligence and the will, giving them "color" or "tonality" that fundamentally are "pleasant" or "unpleasant".

From this point of view, the "emotional life" directs the understanding in one direction or another: if an object has, on an individual, a "coloring" or "tonality" emotional resonance of his pleasure, he will guide the emotions to the understanding. But if an object has, on an individual, a "coloring" or "tonality" emotional resonance not of his pleasure, he will distance emotions from his understanding; intelligence will try to discover how much of the emotional "coloring" or "tonality" is "pleasurable" (utility, convenience) and how much of the emotional "coloring" and "tonality" is not pleasurable (no utility, inconvenience) an object of equal intelligence has in order to present it to the "will" as appetizing in the first instance and as "disposable" in the second instance.

Similarly, the emotional life has great influence over the will because, besides the fact that a lack of or limited emotional resonance deprive the will of one of the most important impulses, wills feels attracted to choose among the motivations presented by the understanding, those which "coloring" or "tonality" are of its liking. This is nothing more than a particular case which generally happens in life: that we are inclined to accept what we like and disinclined to accept what we do not like, and within what we like we tend to choose what we like the most over that which we like the least.

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[208] *Id.* at 40.

7.1.4 Up to now we have referred to the "non-pathological rational and conscious motivations", let us now explore the "non-pathological non-conscious motivations".

7.1.4.1 The human being is frequently guided in his actions by a complicated group of "motivations" in which the "conscious", the "unconscious", the "semi-unconscious" and the "sub-conscious" intertwine with each other without the human being, in actuality and in many occasions, realizing with certainty where one of those phenomenon ends and where the other one begins.

In order to explain the previous phenomenon, next is a reproduction of the concepts of García Failde:

> The "unconscious" is made up of all of those psychic contents that were never in the conscience or that one day disappeared and are unable to return to the conscious unless technical methods are used such as psychotherapy.
>
> The "subconscious" is made up of the entire psychic experience that is not present in the actual conscience and at the same time is made up of the "pre-conscious", in other words by those psychic contents that can make themselves present in the conscience by way of ordinary rational procedures such as a reflection or a deep introspection exercise, etc.
>
> The "semi-unconscious", which for some authors replaces the "unconscious", which to them does not really exist, is made up of all that which exists in the conscience, but it is dark.[209]

7.1.4.2. Let us look now at the "unconscious motivations" that "move" the will towards marriage. Immediately, the following question arises: how can it influence will if it is not in the conscience, which as power and psychological faculty, it is the same as understanding; if nothing can "move" the will without first having our understanding "know" such act as "good" and introduce such act as "good" by our understanding to the will?

This last part is true: the motivation behind the want of our will is the known good; even the undeliberate act (such as feelings, affection, etc.), which "attracts" the will, and are mediums used by the true rational "motives" to "move" the will, do not emerge in the will regardless of how necessary it is, except for when our understanding introduces to the will "a good purpose". Then, and only then, and necessarily then does the will feel "attracted" to do the decided and elective act "moved" by the mentioned rational motives.

It can be said that in order for any "motive" to influence the will it must be present, it must be felt, it must be lived, under the appearance of good, by the will, and it can be added that this does not appear to be anything more than the "unconscious" motive becoming "conscious". But in order for a "motive" to be

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[209] *Id.* at 42.

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[209] *Id.* at 42.

considered "unconscious" it is sufficient that the source from which it stems be "unconscious".

There are some individuals that consciously feel moved towards marriage by the conscious, rational, non-pathological motives previously exposed. It can be said that consciously they feel "moved" to contract a concrete marriage because of the "ideal" of marriage and also because of the "ideal" of the part with whom they are contracting this marriage; but at the same time they are persuaded to marry by the unconscious "motives", that can be in harmony or not in harmony with this "ideal"; for example, in order to satisfy some of the unconscious necessities, such as the unconscious necessity to "depend" on another, to be "helped" by another, that, after, in the marriage, will lead the individual to constantly seek the support and the company of the other party.

In this case the acceptance of this marriage, by the other party, has not only been the result of a matrimonial ideal freely elected, but also the result of an unconscious necessity; nevertheless, the undeniable sincerity and the apparent generosity of the other person.

7.1.4.3 It is undeniable that these "unconscious motivations" tarnish the purity of the other "motivations" which are based on the matrimonial "ideal" and the personal "ideal" of the other. And it is also undeniable that those "unconscious motivations" can create difficulties while living together if tomorrow the parties do not find, in marriage, adequate satisfaction, also searched for by the carrier of the same.

But in normal individuals, said "unconscious motivations" do not eliminate those others "unconscious motivations" based on the mentioned "ideals" and do not impede that those normal individuals accept marriage with the required "deliberation" and with the required "act of choice".

7.2 Pathological Conscious and Unconscious Motivations

7.2.1 The same that has been said for the non-pathological unconscious motivations can be said of the pathological unconscious motivations: that the pathological motivations can be considered "unconscious" in so much as their origin is them is unknown, but that the pathological motivations can influence the human psychic in so much as they make themselves present and are felt as being present, in other words, as soon as they are recognized by the person that suffers them.

7.2.2. A motivation can be pathological even though its contents are not pathological, but in such a way that the manner in which it is present to an individual is pathological; and a motivation is presented to an individual as pathological when it has a tendency, sort of in a predetermined manner, to repeat itself in a way more or less automatic.

In order to better understand the previous, it is convenient to cite García Failde: "Let us look, for example, in the fixed ideas that characterize an obsessive neurosis; these ideas frequently do not have, in their content, a morbid character (let us think, for example, in the fixed obsessive idea, of eating or washing your hands), but they acquire this morbid character due to persistence and the ability to not be coerced

with which they present themselves, polarizing all of the attention of the neurotic and on certain occasions guiding its conduct against its will.

7.2.3. The pathological motivations can be understood in an strict sense and an ample sense, to which García Failde tells us:

a) understood in a strict sense, they consist in specific alterations of the content of the thought accompanied by abnormal impulses; among them let us fit in the delirious ideas, the obsessive ideas and the overvalued ideas; the pathological motivations understood like this tend to make the practical judgment, the deliberation difficult or impossible, and consequently, the free choice or simply the free choice.

b) understood in an ample sense, the pathological motivations include all of the processes that produce strong traumas in the psychic; thus, for example, the states of hesitation, fluctuation or doubt, conflicts between wanting, and at the same time, not wanting, characteristics of neurotic individuals; the violent traumatizing emotional states; those situations of irresistible impulses, that ask for a quick solution without leaving the interior stillness for the elaboration of the motives and counter-motivations of the election (which can occur during violent passionate situations); these pathological motivations, if they are severe, can greatly disturb the deliberative capacity; thus, the elective capacity or directly the elective capacity."[210]

VI. Acts That Lead to the Creation of Matrimonial Consent

In the previous chapter, while analyzing the elements that intervene in the makeup of matrimonial consent, we mentioned the habit of vivisectioning human beings into zones or sections, and once the division into zones of the human psychic and the acts of that human psychic, such as thoughts and volition, is understood, as purely artificial, we now go on to study, for pedagogic purposes, and separately, the principal sections of the human act and consequently of matrimonial consent. And as we study these sections, an explanation will be given of what should be understood in Canon 1095 as "lack of sufficient use of reason", "grave defect of discretion of judgment" and the inability "to assume the essential obligations of marriage." [211] As an introduction, the acts through which an individual arrives to matrimonial consent can be synthesized in the following sections.

Theoretical Intellectual Knowledge of what is marriage and sufficient use of the reason;

Deliberation and discretion of judgment.

The act of free will.

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[210] García Failde, *supra* n. 78, 44-45.

[211] Canon Law Society of America, *supra* n. 1, at 345.

1. Theoretical Intellectual Knowledge of what is Marriage and Sufficient use of Reason

Knowledge, according to the biblical understanding, consists of "a personal relation between subject and object, in such a manner that to know (recognize) is a term that introduces us to the sphere of what can be experimented with, grasp with, felt."[212]

1.1 All Theoretical Intellectual Knowledge begins with a sensitive knowledge. And its study begins by seen that there only exists that which is specific and singular. The specific and singular is something perfectly defined and distinct from other things or beings even though they are of the same nature as him/her.

In the specific and singular, there are essential elements that only through reason do we discover them; and accidental elements that we capture with our external senses (hearing, sight, etc.). From this understanding of these sensitive concepts we can arrive at the knowledge, through our intelligence, not so much of "this "object but rather "the" object, for example not so much "this" flower (rose, gardenia) but rather "the" flower.

And the question arises – how?

First, making abstraction or doing without the sensible characteristics of "this" flower and of "this" other flower, which can be distinct from other flowers of similar specie or which can be distinct flowers of different species; and then entering into the essence, that is common to all flowers, because they make the flower different from those other objects that do not have this common essence (for example that a rose be a flower and not a book) and then expressing it in a universal concept or idea in the following manner: "the" flower.

It is called "concept" because the mind "conceives" it and "universal" because it can be applied to all beings of a similar nature, for example, the concept of "flower" to all that is a "flower" regardless of its specie (rose, carnation, etc) and, within one specie, regardless of these or those characteristics (a big rose or a small rose, a red rose or a yellow rose).

When trying to shape the "idea" or the "concept" of *marriage* one must begin from the specific knowledge of this marriage, of this other marriage, etc., then all that makes this marriage and that marriage distinct is set aside (for example, that one person is rich and the other is poor, that one is happy and the other unhappy, etc.) and the individual is left with that which all marriages have and also that which differs from what is marriage; thus, forming the idea or the concept of "the marriage".

Up to now, nothing has been asserted or denied about "marriage", it has not been asserted, for example "that marriage is this…", "that marriage is not this", in

[212] Serafín de Ausejo, *Diccionario de la Biblia* 365 (Editorial Herder 1963).

other words some type of judgment, has not been framed regarding "the marriage". In order to make this kind of judgment it is necessary to previously possess at least two ideas or concepts, and to compare one with the other until the individual finds out if one is suitable or not suitable to the other, and if it is evident that it is suitable, then the individual asserts that it is suitable, and if it is evident that it is not suitable, then the individual asserts that it is not suitable. For example, an individual has an idea of "marriage" and an idea of a "partnership for a life time"; the individual compares both of these ideas and discovers that one is suitable to the other; thus, making the following judgment: "marriage is a partnership for a life time".

It is clear that when shaping an idea and another, just like when comparing one with the other and realizing that one is suitable or not suitable to the other, an individual can make a mistake with the consequence that he also made a mistake when making an affirmative or negative judgment regarding the suitability between one idea and the other regardless of how subjectively said individual is that they did not make a mistake. This makes us remember the constant issue of no coincidence between the objective truth and the subjective certainty.

On many occasions we do not see reality "with" our eyes but rather "through" our eyes. And when looking at reality "through" our eyes, is seeing reality as it has emerged once it has passed through the filter of all that we are, of all that we feel, of all that we desire, in other words, once we have, in some way, shaped to our own image and resemblance; we think we are looking at reality truthfully when what we are looking at is our projection in that reality.

When an individual makes the judgment: "marriage is a partnership of a lifetime", said individual is conscious of making that judgment. We are in the presence of the self-conscience by which that individual sees himself as "aware" of that judgment.

This knowledge of been aware of knowing is exclusive to human beings and constitutes an unsurpassable barrier which separates the human from the animal. It not only consists of the reality that the human being is more than the animal (more conscious, more free, more intelligent), but also that between one and the other there exists a radical break through which the human being is other than the animal, is of a different nature than the animal. This emergence of the "I" as a self-conscious I is to go from the absence to the presence of one self, it is an emergence from the darkness to the light.

The ideas or the concepts, along with the judgments previously mentioned, are purely theoretical in so much that they remain in the theoretical world, without having a direct bearing in the world of action. But it is important to note that they are indispensible to making the *practical* judgments that are directly guided to carrying out actions in practical life. In conclusion, without those ideas or concepts and without those theoretical judgments, regarding "marriage", it is impossible to have matrimonial consent.[213]

[213] García Failde, *supra* n. 174, at 10.

Let us now look at the Canonist Legislature of such. Canon 1096 makes reference to these ideas or concepts and to these theoretical judgments regarding "marriage" when it says: Section 1 "For matrimonial consent to exist, the contracting parties must be at least not ignorant that marriage is a permanent partnership between a man and a woman order to the procreation of offspring by means of some sexual cooperation."[214]

To say thawithout this minimal vague knowledge there cannot be consent is not to say that with this minimal vague knowledge there can be consent, because even from the point of view of ideas and concepts and of the theoretical judgments, much more is needed in order for there to be consent as can be inferred from Canon 1055 Section 1 and 2.

But in order to have that minimal vague knowledge of the contents of Canons 1096 and 1055 Section 1 and 2 a "sufficient use of reason" is necessary, in other words, a degree of reason "proportionate" or "adequate" to the contents of those two canons.

That is why an individual who, habitually or actually, in relation to the moment of the celebration of marriage, lacks, for whatever reason, of that degree of use of reason cannot have that minimal vague knowledge; thus, cannot have matrimonial consent.

Canon 1095 takes care of that lack of sufficient use of reason by pointing out: "They are incapable of marriage those that : 1 lack sufficient use of reason"[215], it is understood that this takes place at the moment that marriage is celebrated. And it is evident that, if those that lack sufficient use of reason are incapable, then those that lack all use of reason are incapable "a fortiori" as well.

2. Deliberation and Discretion of Judgment

The ideas or universal concepts and the theoretical judgments are not capable, by themselves, to move the will to want or reject something, given that someone that remains in that theoretical world, will not commit themselves to that next step of accepting or rejecting marriage, which is the same as consent or not consenting to marry a given person. It is necessary that the will feel stimulated by something distinct and this distinct thing is called "practical judgment"; and it is called "practical" because it is design to aid the will in deciding to do or not to do something in practice.

This practical judgment is framed, by intelligence, in the following matter to all of those that are in the process of figuring out if it is suitable or not suitable for them to marry with a given person: "this marriage is suitable to you in the specific circumstances that you find yourself in" or "this marriage is not suitable to you because it is not good in the specific circumstances that you find yourself in."

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[214] Canon Law Society of America, *supra* n. 1, at 345.
[215] *Id.*

But this practical judgment is the outcome of some prior meticulous activity of the individual's intelligence called "deliberation". The name "deliberation" itself tells us that we are dealing with something that is considered through different aspects, for example, its utility, its prejudices, risks, benefits/disadvantages comparison and for those that prevail, be able to come to the decision of whether something is convenient or not.

When talking about something of great significance to life as is marriage, all individuals will proceed meticulously in making such deliberation. The individual will try to obtain as much information on what is marriage, of its rights and obligations derived from the marriage, of its purposes, etc. And if the individual decides to get married, he must be aware that he is not marrying an abstract marriage but rather a specific person. The individual will try to see if he can blend in or not with the person, for which he will examine how he is and how the other person is, their characters, their health, among other aspects.

And he will have to conduct a comparison of what is convenient and not convenient, to him, in that possible marriage, and whatever the outcome of that comparison, the individual will judge whether to marry or not marry the other person.

It is appropriate to emphasize that this usually will happen, given that not always is the decision taken in a context of conflict of motives and counter motives, although there exists instances where the decision is made without hesitation.

Regardless of how much effort is put into that deliberation for the purpose of choosing correctly, acceptance of marriage will always be problematic because it will be a sort of jump into the abyss, given that nothing can guarantee, one hundred percent, that the choice was the proper one. In some instances those errors can serve to prevent the birth of a valid marriage, this in reference to the errors discussed in Canons 1097, 1098 and 1099.

No matter how much is said about the will only moving as a result of something that the intelligence has presented as good under some aspect, it can be said that all choices, by the will, are also of interest. Let's remember how on certain occasions it is difficult for us to make a choice but not so much because we do not like that which we must make a choice from but rather because we know that upon making our choice we will have to give up choosing other things that we like.

Returning to the act of "deliberation", it is necessary to add that said act will not be carried out by someone who does not have the sufficient psychic capacity to do the act. This psychic capacity receives the name of "discretion of judgment" and the same is "sufficient" when it is "proportionate" or "adequate" to the object or content of deliberation; object or content, that when dealing with whether to choose or not choose a specific marriage, is, as has been shown, the nature, purposes and essential properties of marriage in general, the characteristics that substantially make up the candidates to unite in marriage (Canons 1097 and 1098); the lack of this sufficient or proportionate or adaptation of the discretion of judgment is expressed in Canon 1095 Section 2 with these words: "grave defect of discretion of judgment

concerning the essential matrimonial rights and duties mutually to be handed over and accepted".[216]

It is clear that in these "essential matrimonial rights and duties" are included, along with the nature of marriage, from which those rights and duties come from, the essential purposes of marriage (the good of the offspring and the good of the spouses) and other essential elements (such as spousal fidelity) for which those rights and duties are ordered, and other essential properties of marriage (unity and indissolubility) that qualify those rights and duties.

Let us not confuse "deliberation" with "discretion of judgment" given that the first is a result of the second. If "deliberation" is present it is because "discretion of judgment" is present, but it could be possible that the former is not present even though the latter is present, for example, a person that has the psychic capacity to do an act of deliberation does not do so because they do not want to do it.

Just as in marriage, where neither discretion of judgment or "full or complete" deliberation are needed to establish matrimonial consent it is not required, for there to not be any matrimonial consent, that there be a "full or complete" absence of that discretion of judgment and of that deliberation, but rather all that is needed is for there to be a decrease in that discretion of judgment and that deliberation which entails that neither one of them is proportionate or adequate to the exposed object or content.

Let us remember that the object and purpose of matrimonial consent is the same as that of marriage, with its essential rights and obligations. If a person cannot comply with those obligations naturally inherent to marriage, this is not due to a lack of purpose – given that purpose truly exists -; moreover it is due to a lack of capacity in the individual, in relation to the purpose. The impossibility of contracting does not have its origin in the purpose (the marriage), but rather in some kind of defect from the person wishing to be married. It is because of the contracting party, not because of marriage itself, that a marriage fails. Thus, incapacity is found exclusively in the individual. Canon 1095 is not concerned with those marriages that cannot be celebrated, but rather deals with those individuals that lack or are incapable of consenting and contracting a valid marriage.[217]

Very well now, the grave defect of discretion of judgment, which prevents the necessary deliberation for matrimonial consent, can come from various causes that can be congenital or acquired, permanent or transitory, and can consist in psychopathological disorders or intoxications, among others.[218]

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[216] *Id.*
[217] Janusz Kowal, *Apuntes del XXXII Curso de Actualización Canónica*, Tomo II, 68 (Asociación Mexicana de Canonistas 2008).
[218] García Failde, *supra* n. 174, at 12.

3. Free Act of Will

Without the previously explained activity of understanding previously explained (creation of ideas or universal concepts and theoretical judgments, deliberation and practical judgments) the act of free will is not even thinkable.

It is known that said activity of understanding can be lacking even when the individual has sufficient use of reason and sufficient discretion of judgment to develop it.

But the majority of times, that activity of understanding is absent because the individual has not been able to carry it out due to a suffering of insufficient use of reason and grave defect of discretion of judgment. In this case, it is clear that such absence is the product of insufficient use of reason or grave defect of discretion of judgment; thus, needing to include the absence of this free act in the causation elements of the "lack of sufficient use of reason"[219] or "grave defect of discretion of judgment"[220] referred to in Canon 1095 Section 1 and 2.

There are other instances where the individual, regardless of having developed that activity of understanding and having sufficient use of reason and sufficient discretion of judgment, cannot carry out that free act.

This, according to clinical and experimental psychology as well as psychiatry, is possible because, given the inter-correlation existing between intelligence and will where if one is affected the other is necessarily affected as well, the existence of psychopathological diseases (such as those that entail irresistible impulses) have been proven that even if they do not deprive intelligence of sufficient use of reason and of the grave defect of discretion of judgment, they do not allow the will to carry out the free act; in some cases it will be extremely difficult to see if this incapacity of will is present or not present without intelligence been previously incapacitated for its own acts of use of reason and of discretion of judgment.[221]

But in the assumption that there is an absence of the required freedom without their been a prior absence of the required deliberation and hence the proportionate discretion of judgment, that absence of the required freedom can be an issue of "autonomous" matrimonial nullity which would not be included in the grave defect of discretion of judgment of Canon 1095 Section 2, but rather it would be based on Canon 1057 Section 2 which defines matrimonial consent as an "act of will", in other words, that in the matrimonial consent its volitive aspect stands out more than its intellectual aspect; contrary to Canon 1095 Sections 1 and 2 which emphasize more the intellectual aspect rather than the volitive aspect of the act of will.

When talking about the activity of the will in the realization of matrimonial consent we are talking about the psychological freedom seen in its actions through the specific act which is the "free" act or for that matter, of its act of "choice", its act of "self-determination".

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[219] Canon Law Society of America, *supra* n. 1.
[220] *Id.*
[221] García Failde, *supra* n. 174, at 13.

The act of choice is undoubtedly an act of self-determination, in as much as an act distances itself from self-determination the farther it distances itself from freedom.

To self-determine oneself is to go through an act of indecision and indetermination to an act of decision and determination. Self-determination is present when the individual pawns his freedom choosing those means he believes adequate to obtain his proposed objective.

We can self-determine ourselves so long as nothing, either internal or external to us, comes in our way, acts to prevent us from doing what we want or compel us to do something that we do not want to do, in such a way that in the first case we do not do what we wanted to do and in the second case we do what we did not want to do.

Thus, there is no freedom where the insurmountable constriction, which comes either from the exterior or the interior, prevails.

In most instances, it is not easy to measure the degree of freedom that an individual has in a determined situation, given that the human being is never "fully" free; rather, he is always subjected to influences which force him to carry out certain actions.

Our freedom can be influenced by external coercive influences from other people or determined circumstances or by conscious or unconscious influential internal psychological causes (as is the case with obsessive ideas, delirious and disassociated ideas).

Many authors (Saint Thomas, Marx, Freud, Nietzsche, etc.) have underlined the energy of several forces that shake the heart of a human being without him been able to always control them.[222]

In all human activity, "freedom and necessity" are in permanent dialectical correlation: "determinism and freedom" are correlative. The idea of one arouses the idea of the other and vice versa. The union in us of the "determinism and of the freedom" is not only juxtaposition and alternation, it is a more intimate union. The "I" does not steer the natural dynamism in the same manner that a horseman steers a horse. These dynamisms establish with the "I" one human being. The "I" does not always surrender but it cannot either distance itself to the extreme of achieving perfect dominion.

That is why at every moment, our real field of possibilities is always limited.

Thus, the freedom within us is conditioned by many strange factors, such as heredity, character, complexes developed during our childhood, social circumstances, economic situations, among other things. All of our spiritual activity is influenced by inclinations, habits, etc.

It can be said that we are not given to ourselves, we owe to ourselves. The vocation of a human being is to free the freedom of all that which prevents him from been free; that is why it can be said that freedom is not at the beginning but at the end, because the "capability to be", which is a characteristic of freedom is not in the

[222] *Id.* at 14.

beginning but in the end. Because the "capability to be", which is a characteristic of freedom, it is not so much a complete fact but rather a task to be performed with determination that is always renewed.

But it is not always the case that when freedom is conditioned there is an "absence" of the necessary freedom to carry out the psychological act of matrimonial consent, given that to carry out this act a "full" or "total" or "perfect" or "immune of all influence" freedom that limits the freedom.

Finally, it is necessary to distinguish between psychological "freedom", which is the freedom we have been referring to and "free act". The first is the psychological faculty to carry out the second and the second is the specific act of the first. If the first is missing, the "psychological freedom", then the second one is missing, the "free act", but the first can occur without the second one taking place: the first does not exist because it is something abstract (there only exist concrete individuals who have or not have psychological freedom), on the other hand the second one is something concrete; hence, something that exists.[223]

VII. Reflections on the Nullity of Marriage Centered on Canons 1057 and 1095

Canon 1095 Section 1 and 2, after establishing that those who "lacks sufficient use of reason"[224] and "who suffer from a grave defect of discretion of judgment"[225] are incapable of contracting marriage adds, in Section 3, that those that "are not able to assume the essential obligations of marriage for causes of psychic nature"[226] are incapable of contracting marriage as well.

In order to be able to contract for marriage, it is necessary to be able to assume "all" of the essential obligations of marriage. That is why someone that cannot assume "any" of the obligations is incapable of contracting marriage in the same manner as someone who cannot assume even "one" of those obligations. Assume carries the same meaning as contracting an essential obligation or to compelled one self to something certain.

An obligation is "assumed", is "contracted" by way of a psychological act of the will by which a person desires to assume or contract the obligation; thus, whomever is unable to carry out the psychological act of matrimonial consent cannot assume or contract the essential obligations of marriage and consequently those who lack the sufficient use of reason or suffer from a grave defect of discretion of judgment cannot assume or contract the essential obligations of marriage. This incapacity to assume, based on the incapacity of matrimonial consent by way of

[223] Let us remember that the psychological freedom is something internal to the human person, refer to section entitled FREEDOM in the chapter THE NATURE OF CONSENT.
[224] Canon Law Society of America, *supra* n. 1.
[225] *Id.*
[226] *Id.*

insufficient use of reason or because they suffer from a grave defect of discretion of judgment, is directly referred to as what is called marriage *"in fieri"* matrimonial consent and it is found within the incapacities of Canon 1095 Section 1 and 2.

But an individual, even if they have the psychic capacity to carry out the psychological act of will with which an obligation can be contracted or assumed, said individual can be incapable to contract or assume said obligation if he is not capable of "complying" with the obligation. In this instance, the obligation, to the individual, is "impossible" because compliance with such is "impossible" and an "impossible" obligation is not a true obligation. In this instance, the inability discussed in Section 3 of Canon 1095 directly affects marriage "*in fieri*", in other words matrimonial consent (given that if the obligation cannot be complied with, this consent lacks the necessary object) and the marriage "*in facto esse*" (given that during the development of the marriage "*in facto esse*" is where, in fact, the obligation cannot be complied with); thus, this hypothesis is different from the previous two hypothesis of Canon 1095 Sections 1 and 2.

The effect of the three hypothesis of Canon 1095 is the same, in other words: the nullity of the marriage because anything that pretends to consent must have the psychic capacity to "assume" the essential obligations of that consent, but an individual cannot assume an obligation when he is unable to consent to assuming that obligation and is unable to comply with the obligation. In all three cases, the underlying reason for considering a marriage void *is the same: The lack of matrimonial consent.*

In the first two instances, Sections 1 and 2 of Canon 1095, it is easy to understand that "consent" is lacking because the individual has not been able to psychologically do it.

In the third case, Section 3 of Canon 1095, which discusses the incapacity to assume the essential obligations of marriage, the contracting party has been able to psychologically perform and perhaps has done, a psychological act of will geared towards contracting marriage, but that psychological act has not been a truthful matrimonial consent because it lacks the essential matrimonial object of all matrimonial consent. In effect, that psychological act of will is different prior to been aimed at a certain object; when it is aimed at a certain object is when it is specified, given that the object specifies the act. It is only a psychological matrimonial act (matrimonial consent) when it is aimed at the entire essential matrimonial object, but it cannot be aimed entirely to the essential matrimonial object, if the author of such cannot accept it due to his inability to comply with it. In this case, the matrimonial consent exists, (given that it is impossible for it not to), but if the individual is incapable of complying with that object, the consent of said individual cannot end in said object.

We reiterate that it is not that the essential matrimonial obligation, in itself, is "impossible" of been complied with, but that said obligation cannot be complied with by the particular individual more so than because of the condition of the same obligation, but for the condition of said person. It is thus that the axiom "*nemo ad impossible tenetur*" should be understood and which is applicable to our case.

Here we are talking about an inability to comply with the obligation and it is considered that an individual who has a extreme or major difficulty complying with it has such inability. If an individual has such inability to comply with the obligation, said individual will not comply with the obligation. But it can also happen that the individual does not want to comply with the obligation because, for example, he may not want to comply with it or because he might have some difficulty complying with it but not because he cannot comply with it. Nevertheless, the fact that he does not comply with the obligation, can in some instances, be a illustrative argument of his inability to comply with it.

When we are talking about the incapacity to give and accept the essential object of marriage, at the moment of its celebration, it is sufficient that such incapacity be present at that moment for the marriage to be considered void even though once the marriage is celebrated the individual's incapacity disappears.

The previous means that it is not necessary that the incapacity, at the time of marriage, be "constant" or "incurable"; thus, it can be said that an individual is incapable if at such time they cannot comply with the obligation even though they can comply with it afterwards.

Very well, what happens if at that time an individual is not incapable, but he has something during that time which will make his compliance with the obligation impossible from a given time prior to the moment of the celebration of the marriage?

This situation can happen, for example, when the reason that is going to cause the incapacity is present at the moment of the celebration of the marriage, in an embryonic state which progressively is deteriorating, or is present in a state of strong inclination that, little by little, will be translated into acts.

The answer to the previous question is given to us by the distinguished author García Failde:

> I believe that in those acts, the contracting party is incapable of complying with the obligation because, even if at the time of the celebration of the marriage he has the capacity to comply for some time, at the time of the celebration he has everything that, once that time has passed, will continue to make compliance with said obligation impossible when the obligation must be complied with.
>
> This is clearly evident if we are talking about the obligation of maintaining spousal fidelity which orders "*semper et pro semper*": someone, who for whatever reason, at the time of the celebration of marriage is faithful at the beginning of the spousal life but in the future , it not capable of been faithful every time that he must be faithful, which is every time and at every moment during the marriage.[227]

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[227] García Failde, *supra* n. 174, at 17.

> I say the same about someone who, upon celebration of the marriage, is capable of been monogamous during the early stages of the spousal life, but not continue to be monogamous in the following stages.[228]
>
> If we are talking about those obligations whose compliances compels "semper sed non pro semper", in other words always but not in every ocassion, such as the obligation to have intimate sexual relations or any other right made up of in the so called "good of the spouses", I state the same as in the previous cases, because, just as in the other hypothesis, the contracting party is already, at the moment of celebration of the marriage, incapacitated to comply with the obligation during those times in which the obligation must be complied with.[229]

Canon 1095 Section 3 specifically deals with the incapacity to assume the essential obligations of marriage due to "natural psychic causes". Some others authors, among them García Failde, do not like that the code talked about the "cause" of the incapacity because, among other things, to talk about that cause, they say, lends itself to many misunderstandings and the cause is not part of the incapacity no matter how much, during the procedural order, it is an element that helps know if incapacity exists or not.

Once again we turn to the author García Failde, who regarding this topic, states the following:

> A cause of a psychic nature is not the same as a cause of a psychopathological nature; for example, an earned education (just as having lived in a matriarchal or patriarchal family environment) can create a mentality or a way of acting in relation to the spousal co-existence which can prevent the good of the spouses and nevertheless neither that mentality nor that way of thinking are, in and of themselves, psychopathological in any of the multiple ways in which the psychopathological is considered, but they can be considered as something psychic.[230]

VIII. Conclusion

Marriage precedes the Law; at least, the constructive Law, given that it is an inherent reality to the personal and social nature of the human being. The essence and characteristics of its makeup are determined by natural Law. From here, Canon Law made an extraordinary effort, unknown by the other judicial codes, to investigate the natural demands of marriage, just as they are demanded by the dignity of the human being.

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[228] *Id.*
[229] *Id.*
[230] *Id.*

Marriage is a complex human reality: it has dimensions that are extremely varied and broad. As such, marriage encompasses physio-biological, psychological, personal, social, religious, moral and judicial aspects.

Consent is the only efficient cause of the matrimonial bond. It is generally accepted that the mutual consent of both of the contracting parties is what "makes" each marriage specific, not only in an "efficient" sense but also in a "formal" sense, using the scholastic terminology.

Throughout this essay, with matrimonial consent as its fundamental point, all of the interceding elements have been explained, starting from the historical definitions of marriage, the contractual and non-contractual theories of marriage, the basic principle of consent, its nature and those acts which make up its formative process. It ends with some reflections pertaining to the nullity of marriage, in light of the fact that the celebration of marriage can have no judicial effects if consent is lacking, which in summary, is the efficient, sole and irreplaceable cause of marriage, and therefore presupposes and demands natural, personal and inter-personal, absolute and relative capacity of both of the contracting parties (Canon 1057, Section 1 and 2).

The important role played by the factual human sciences in the judicial study of marriage stands out, among them psychology and psychiatry; but we should be conscious that these sciences, just like the human conditions with which they deal, are subject to change because its making is more subjected to the freedom of man. Science is intrinsically changing, almost all of the scientists today accept the idea that scientific knowledge is not "definitive" or "fixed" given that scientific truths are solely "provisional", as well as philosophically probable.

One must also consider the cultural factor: culture, today, is not uniform, but rather heterogeneous and unyielding to unity. From our cultural standpoint, it can appear that indissolubility is part of the matrimonial institution which, in and of itself, is based on natural law. But the acceptance of indissolubility outside of marriage is rare outside of the Christian culture. From our cultural standpoint, it can appear as if marriage should be based on the couple's personal commitment and should be the product of love, but at the same time we know of cultures in which marriage is based on paternal consent or in the contribution of the dowry., If we do not want to negate the value of marriage on these other cultural levels, perhaps we should accept that our understanding is not absolute and universal. Immediately doubt can arise as to whether our principles respond to universal and absolute values or if they primarily depend on our cultural situation and evolution.[231]

It is convenient to reflect on a basic requirement: the essential task for the Catholic lawyer to know the Canonical law, at leastthe material pertaining to marriage and its judicial ecclesiastical framework.

Let us hope that this work is useful in creating awareness and in encouraging individuals to act in this necessity of additional education and that in some manner,

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[231] García Failde, *supra* n. 78, at 100.

the present subject, can be included in the curriculum of our Catholic Law Schools, illuminating these topics which, despite their importance and seriousness, regretfully remain distant from most of us.

In conclusion, and for all the readers of this article, I want to conclude this article with a beautiful blessing by Sor Juana Ines de la Cruz:

"May the Lord shower you not only with abundance of days but also with His blessings".

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