A Historical Approach to the Question of Psychic Incapacity

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1. *Status quaestionis*

Is canon 1095 of the 1983 Latin Code a novelty in Church Law? From a formal viewpoint, the canon, which derives from canonical jurisprudence, certainly represents an innovation, since the former Code presupposed but did not explicitly treat the types of incapacity of the spouses with regards to marriage. Yet, from a substantial perspective, it is interesting to note that classical canon law already tackled the issue of psychical infirmity as a cause of incapacity to contract marriage, even though this was not said in a technical and precise way. For this reason, a brief analysis of certain historical sources, without pretending to be exhaustive, will make it clear that the canon in question is not a radical originality, but a technical precision of a clear awareness present in the marriage system of law since its beginnings. Besides, it will help us to understand the significance and the motives of the incumbent legislation.

The three distinct and at the same time connected[1] grounds of nullity of canon 1095 regard a consensual incapacity to marriage which the Code does not establish but just recognises.[2] It is a question of shortages and defects that of themselves vitiate consent, by altering the natural capacity of the person, who would not be able to intend and will any more,[3] thus falling in that situation called by certain authors "moral impotence".[4]

1. Cf. Coram Fiore, 30.5.1987, in *Quaderni Studio Rotale*, II, Roma 1987, 18-19. Yet others (e.g. C. Trincerri) retain the three figures of incapacity, considered by can. 1095, as constituting a unique nullity ground.
2. L. Chiappetta, *Il matrimonio nella nuova legislazione canonica e concordataria. Manuale giuridico-pastorale*, Roma 1990, 198-199.
3. "A true incapacity can be only hypothesised if there is a serious form of anomaly that, however one defines it, must substantially impair the contracting party's capacity to understand and/or to will", John Paul II, *Allocution to the Roman Rota*, 5.2.1987, no. 7.
4. Cf. *Communicationes*, 7 (1975) 44.

In the present study, we will examine how the insight of canon 1095, which was already present in the Church at least since the Middle Ages, developed slowly but surely in canon law until the *recognitio codicialis* led to the promulgation of the legislative norm in question. An appraisal of the incremental development of this canon, that is of its legislative history, will bring this article to an end. This is a technique used in modern legal systems, which sheds important light on how the legal text came about, what alternatives were considered and why certain formulations were accepted while others were discarded. In canon law, legislative history is a great help in applying the basic interpretative principles enclosed in canon 17, especially in coming to understand the mind of the legislator.

2. *Classical canon law*

The insight of the present canon 1095 is somehow present in the *Concordia discordatium canonum* of Gratian of Bologna, later called the *Decretum*, as well as in the decretals,[5] when the question of the frenzied (*furiosi*) is treated. There we encounter the general principle according to which such persons are unable to celebrate marriage. Let us see concisely what was understood in the *Corpus Iuris Canonici* by the famous expression: "Neque furiosus neque furiosa contrahere possunt matrimonium".

(a) *The* Decretum *of Gratian*

The *Decretum* contains a reference to the so-called *furiosi* in relation to marriage. Gratian presents an *auctoritas* maintaining that the *furiosi* cannot contract marriage. Yet, it does not seem to have been an absolute prohibition, given that after mentioning the ban, he adds that if the parties however had contracted marriage, they should not separate.

> "The frenzied man and woman cannot contract marriage. The same Pope Fabianus. Neither the frenzied man or man can contract marriage; but if there will have been the contract, they should not be separated".[6]

5. The decretals are papal letters that were often rescripts, that is, responses to requests made to the pope about problems of ecclesiastical doctrine, discipline, and governance. In the 4th century, bishops in the Western church began to turn to Rome for answers to questions about discipline and doctrine.
6. "Furiosus et furiosa matrimonium contrahere non possunt. Idem Fabianus Papa. Neque furiosus, neque furiosa matrimonium contrahere possunt; sed si contractum fuerit non separentur" (Causa 32,

He concludes with a dictum:

> "As is therefore inferred from the premises, it is not lawful for this person to take another wife after having sent away his own wife. In fact there remains among them a certain conjugal bond, which is not dissolved by the separation itself".[7]

This formulation gave rise to contrary positions about the capacity of the mentally sick with regards to marriage. Though it is certain that the text states, "if there will have been the contract, they should not be separated", we must keep in mind the entire matrimonial system of Gratian in order to interpret this source accurately.

As one can observe from an analysis of the texts, the *Decretum* affirms in various instances that the personal marriage consent, sufficient and free, is not substitutable as the efficient cause of the conjugal bond, which is perfected by the consummation. For Gratian, "it is a sequenced combination of consent and intercourse that creates a complete marriage. [...] What Gratian did also in proposing this answer to the question was to advance the theory, first sprung up in his time, that the object of marital consent, that to which the spouses commit themselves specifically as spouses, is sexual intercourse".[8] For Gratian, there is no doubt that the copula without consent does not found the bond.

With this premise, we can overcome the apparent contradiction between this *auctoritas* and the rest of Gratian's matrimonial system: if the *furiosus* is such that he cannot even give the consent, he will not be able to celebrate the marriage, because without consent the copula does not found any bond. If, on the contrary, one contracts marriage, because one was capable at least of giving a sufficient consent, he/she is not to be separated, because there will be a real marriage, and hence indissoluble. This is the interpretation which prevailed up to our days in doctrine, which made a great effort to determine the various degrees and types of mental infirmity and its incidence upon the marriage consent.

quaestio 7, c. 26). Commenting the maxim, "Neque furiosus neque furiosa matrimonium contrahere possunt", O. Fumagalli Carulli wrote: "Questa massima, attribuita da Burcardo di Worms al pontefice Fabiano (236-250) ma che probabilmente era presa dal giurista romano Paolo, passò con la dubbia attribuzione a papa Fabiano, nel *Decreto* di Graziano", Id., *Matrimonio canonico [capacità]*, in *Enciclopedia del diritto*, XXV, Milano 1975, 902.

7. "Ut ergo ex premissis colligitur, non licet huic dimissa uxore sua aliam ducere. Manet enim inter eos quoddam vinculum coniugale, quod nec ipsa separatione dissolvitur" (Causa 32, quaestio 7, c. 26).

On the whole, the explanation is not easy. In fact, many decretists did not even mention the *furor* while others considered it as a cause of illicit celebration of marriage. Among the decretists, Rufinus, one of the most faithful followers of Gratian's vision of marriage, was the canonist who most clearly spoke of *furor* as an impediment to marriage.[9]

(b) *The Decretals of Gregory IX*

Decretales Gregorii Noni was the name given by canonists to the new codification compiled by Raymond de Pennafort upon the instructions of Gregory IX,[10] so as to replace with one volume all the previous collections of decretals. Pope Gregory IX promulgated the new collection in 1234 and called it a *Compilatio*. Along with Gratian's *Decretum*, it became the most important compilation of papal decretals in the schools and courts of Europe. It was also known as the *Liber Extra*: the book outside Gratian's *Decretum*.

The Decretals of Gregory IX pick up the affirmation already gathered by the *Decretum* on the impossibility of marriage by the *furiosi*.[11] This tenet comes from Roman Law, in which the *furiosi*, who were called with various names, could not engage in contracts nor contract marriage.[12] As we noted, the *Decretum* has an addition to the romanistic doctrine, which complicates the adequate understanding of the juridical consequences of the *furor* upon the capacity to marriage, because it is asserted that "if there will have been the contract, they should not be separated". According to De León-Carreras,

> "The silence of the works of the decretists about the *furor* or *furia* is a paradox. If one takes the abbreviated list of Rufinus this is omitted even though, as we know, it is indeed implicitly contained under the title of

8. T. Mackin, *What is Marriage?*, New York/Ramsey 1982, 160.
9. Cf. E. De Lehn - J. Carreras, *La glossa "impossibilitas conveniendi" di Ruffino (C.27 pr.)*.
10. R.W. Southern notes that "every notable pope from 1159 to 1303 was a lawyer [...] Every circumstance of twelfth century society favoured the rapid growth of papal law, and this growth was given a steady impulse by the great succession of lawyer popes – Alexander III, Innocent III, Gregory IX, Innocent IV, Boniface VIII", *Western Society and the Church in the Middle Ages*, New York 1990, 131-132.
11. C.32, q.7, c.26.
12. "furiosi autem voluntas nulla est" (Dig. 29, 2, 47: Africanus 4 quaest.); "nam furiosus nullum negotium contrahere potest" (Dig. 50, 17, 5: Paulus 2 ad sab.); "Furiosi [...] nulla voluntas est" (Dig. 50, 17, 40: Pomponius 34 ad sab.).

impossibilitas conveniendi, which is threefold. Conversely, if we take the list of other decretists, either it is not mentioned or, if it is mentioned, it is done as a simple prohibition that does not affect the validity of the bond".[13]

The *Liber Extra*, on the other hand, is more explicit. An important factor that might have considerably contributed to this improvement might have been the centrality of personal consent *de praesenti* as an efficient cause of the marriage bond, around which the entire matrimonial system of the books of the Decretals revolves.

At this point, it is worthwhile opening a short parenthesis about the significance of the concept of 'consent *de praesenti*'. We should note that the *Liber Extra* was written after Peter Lombard's four *Libri Sententiarum*, compiled at the University of Paris during the years 1155-1158.[14] In Book 4, Lombard says that the act creating a marriage is the parties' mutual consent. Thus Lombard made the careful distinction that Gratian had not, between the *consensus de futuro* and the *consensus de praesenti*. Both are consents to marriage, but the consent *de futuro* only establishes the betrothal and not the marriage itself, even when it is made under oath. What creates the marriage is the separate consent *de praesenti*, and it creates it before and separately from intercourse.[15] This consent is essential and, if made freely, suffices by itself to create the marriage. The consent *de futuro* followed by intercourse, with the consent *de praesenti* omitted, cannot create the marriage. The consent *de praesenti* by itself and even without the subsequent intercourse makes any other attempt at marriage invalid. What the consent *de futuro* does is to make fiancés of the man and woman (*sponsus* and *sponsa*), while the consent *de praesenti* makes them spouses (*coniuges*).[16]

13. "Es una paradoja el silencio de la decretística sobre el *furor* o *furia*. Si se toma el elenco abreviado de Rufino ésta es omitida aunque, como sabemos, sí está implícitamente contenida bajo el título de la *impossibilitas conveniendi*, que es triple. En cambio, si tomamos el elenco de otros decretistas, o no es mencionado o, si se menciona, se hace como una simple prohibición que no afecta la validez del vínculo" (E. De Lehn - J. Carreras, *La glossa "impossibilitas conveniendi"*).
14. "In the language of the Scholastics *sententiae* are the statements, the opinions, the positions of notable teachers in the history of the Church beginning with the apostles and coming down to perhaps a generation before the compiler", T. Mackin, *What is Marriage?*, 164.
15. This is also the position of the Angelic Doctor: "ante carnalem copulam post consensum per verba de praesenti expressum, est verum matrimonii sacramentum", S. Thomas Aquinas, *Scriptum super Sententiis*, lib. 4 d. 27 q. 1 a. 3 qc. 2 arg. 1.
16. Peter Lombard, *Libri Sententiarum*, lib. 4, dist. 27, cap. 3; lib. 4, dist. 28, cap. 1.

There is an unique chapter that refers directly to the *furor* in marriage, which picks up the first part of Gratian's text, while omitting the second part – "Furiosus matrimonium contrahere non potest"[17] (Innocent III to the Bishop of Vercelli, 5 January 1205)[18] – that was the cause of the great confusion and which could have led to the impression that the frenzied could marry validly. This is the body of the Decretal:

> "The beloved son R., soldier from Alexandria, related to us, that his daughter Rufina came together in marriage with a certain Opizo of Lancavecla, ignoring that Opizo was a frantic person. Hence he humbly requested us to deign to take provisions both for the latter as well as for his daughter. Since however the same woman could not stay with that man who continuously suffered from madness, and since there will not have occurred a legitimate consent because of the incongruity of furor, we enjoin your brotherhood through apostolic letters, to take care to separate the aforementioned persons from each other, while taking away the diffusion of appeal, if after having inquired the truth more fully, you will know that such is the issue."[19]

This decretal is important both because it clarifies definitively the doubt about the consequence of the *furor* upon the capacity to contract marriage, as well as because it says clearly what is the basis for the invalidating force of the *furor*: "propter alienationem furoris legitimus non potuerit intervenire consensus", that is, the *furiorus* is unable to elicit a real consent. Hence, this decretal contains a specification of an exigency of natural law, rather than a limitation of the *ius connubii*, because consent *de praesenti* among persons who are juridically capable is the unique efficient cause of the indissoluble marriage bond and nobody can supply this consent, neither fathers nor society or the authority.

17. X 4, 1, 24.
18. Cf. *Ibid.*.
19. *Ibid.*: "Dilectus filius R. miles Alexandrinus proposuit coram nobis, quod Rufinam filiam suam cuidam Opizoni Lancaveclae matrimonialiter copulavit, ignorans, quod Opizo fuisset furiosus. Unde humiliter postulavit a nobis, ut tam eidem quam ipsius filiae consulere dignaremur. Quum autem eadem mulier cum ipso viro, qui continuo furore laborat, morari non possit, et propter alienationem furoris legitimus non potuerit intervenire consensus, fraternitati tuae per apostolica scripta mandamus, quatenus, inquisita plenius veritate, si rem noveris ita esse, praefatas personas cures sublato appellationis diffugio ab invicem separare [Dat. Rom. ap. S. Petr. V. Kal. Ian. 1205]".

This was the significance of the norm and it is also the meaning of the current canon 1095. For this reason, one has to comprehend the nature of consent and of marriage to be able to apply correctly canon 1095.

It is not an instrument to solve marriages that broke up or have little hope of success, but a norm, with all the limitations inherent in every human enterprise, stemming from the reflection upon what the same nature of things requires so that there can be a true marriage consent from the standpoint of the minimal necessary capacity for it. With the aim of understanding this adequately, we shall continue our historical overview of the norm.

3. *The benchmark of puberty*

In classical canon law there was a unitary standard for determining the capacity to marriage in general. This was the criterion of puberty understood as that moment in which one reaches the sufficient and necessary bodily and spiritual development to get to know, evaluate, want and assume marriage, whereas incapacity was retained as an exception.

Certain authors maintain that the criterion of puberty was not used as an objective measure for determining the capacity or otherwise during the epoch of classical canon law. Some opine that if it was affirmed that in puberty one acquires the sufficient psychic and affective maturity for contracting marriage, when coming to determine the incapacity of the *furiosus*, the measure of puberty was not considered.[20] I think that in certain classical authors, such as Rufinus, we find this concrete reference to puberty. It is on the strength of these affirmations that we speak of puberty as a benchmark of capacity.

Among the Decretists,[21] Rufinus – who sometime around 1164 finished his *Summa* on the *Decretum* which almost immediately became the most influential commentary on Gratian in Bologna – expresses very clearly the meaning of puberty

20. Cf. A. Stankiewicz, *L'incapacità psichica nel matrimonio: terminologia, criteri*, in *Apollinaris*, 53 (1980) 48-71.
21. The Decretists were the group of canonists who took as their starting point Gratian's work and issued their own commentaries upon its passages, attempting to expound, explain, and perhaps even to transcend, the work of the great master of Bologna.

as a unitary criterion and point of reference of the capacity and thus also of incapacity to marriage. The following are his words in the renown gloss to the decretal *Neque Furiosus*, in which he distinguishes the incapacity of the *furiosi* to elicit consent, the incapacity of the impotent to consume marriage and the incapacity of those who have not reached puberty to give consent and to consume marriage:

> "Likewise [regarding] the impossibility of getting married, [one thing is the impossibility] of coming together with the mind, as in the case of frenzied people; another [is the impossibility] of coming together with the body, as in the case of frigid persons or those hindered by evil deeds; another [is the impossibility of coming together] with mind and body, as in the case of boys and girls."[22]

Undoubtedly, the criterion of puberty, serves to understand the elements of the capacity for marriage, by identifying them in the harmonic development of the person, considering the *inclinatio naturae* for marriage, reached both in the soul as well as in the body at the moment of puberty. Interestingly enough, we read in a Rotal decision coram Pinto, dated 2 May 1977, that for a discretion proportionate to marriage, which is required for the validity of the marriage consent, that mental evolution which is normally found in a person who reaches puberty.[23]

22. "Item impossibilitas conveniendi alia conveniendi animo, ut in furiosis; alia conveniendi corpore, ut in frigidis et maleficiis impeditis; alia animo et corpore, ut in pueris et puellis [...]; De impossibilitate conveniendi animo, inter furiosus, in Cs. XXXII. q. VII. cap. Neque furiosus; de impossibilitate conveniendi corpore, in frigidis et maleficiis impeditis, in Cs. XXXIII. q.I.; de impossibilitate conveniendi utroque modo, in pueris et in puellis, in Cs. XXX. q. II", RUFINUS VON BOLOGNA, *[Magister Rufinus] Summa decretorum*, ed. H. Singer, Paderborn 1902 = Aalen-Paderborn 1963, 433-434.
23. "Ad discretionem matrimonio proportionatam habendam [which is required for a valid marriage] requiritur et sufficit illa mentis evolutio quae in pubere normali invenitur vi cuius, sciens matrimonium esse societatem permanentem inter virum et mulierem ad filios procreandos (can. 1082), deliberatam decisionem determinati matrimonii hic et nunc celebrandi exsecutioni mandat, implicite saltem tradens et acceptans ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem (can. 1081, § 1). Quia haec sufficiunt ius Decretalium puberes ad matrimonium admittebat, et si CIC aetatem auxit, ratio non fuit discretionis defectus (Cfr. Gasparri, *op. cit.* [*De Matrimonio*, 1932], II, p. 292, nota 1). Importat igitur capacitatem ad matrimonium intelligendum et libere eligendum, quae perfectam sanitatem mentalem tamen non exigit" (coram Pinto, 2.5.1977, n. 3).

4. *The rupture of the unitary criterion*

Once puberty is no longer considered as a unitary criterion for determining the capacity to marriage, we will be short of a clear criterion that identifies the elements of that capacity. This was what numerous canonical authors maintained. They reduced puberty to the moment of reaching the bodily development that is sufficient to be able to consume marriage. Meanwhile, from the viewpoint of the spiritual development necessary for eliciting consent, many authors held that the use of reason, attained at the age of seven, is sufficient. Thus, one can celebrate marriage upon reaching puberty, but only for the fact that one of the elements of the capacity for marriage is the sufficient growth of the body in such a way that the person will be able to consume marriage. We have therefore two diverse moments: the seven years for the mental growth; puberty for the development of the body. The discretion of judgement had little relevance.[24]

Surely, this twofold criterion proved to be insufficient both in doctrine as well as in jurisprudence. For this reason, jurisprudence always strived to detect the truth about marriage and about the capacity for contracting it in the concrete cases.

5. *1917 Code:* amentia *and* dementia

The Bio-Benedictine Code does contain any express mention of psychic incapacity to contract marriage neither among the impediments nor among the vices of consent. This is logically explained by the fact that psychic incapacity is not a vice of consent, because it hinders in a radical way the formation of consent itself. Nor does it appear among the impediments because these relate to the *agere* itself, whereas the psychic incapacity concerns the *capacitas ad agendum*, which is a prerequisite to the *agere*. In fact, a person who lacks the psychic capacity to marriage is within the ambit of the so-called *impotentia moralis*.[25]

24. Regarding the discussion about the necessary age for contracting marriage, see the interesting article of E. Tejero, *La discreción de juicio para consentir en matrimonio*, in *Ius Canonicum*, 44 (1982) 403-534, in which he studies the various doctrinal positions of T. Sánchez and Saint Thomas Aquinas, which have been often object of excessive reductionisms.
25. Cf. A. Sabattani, *L'evolution de la jurisprudence dans le causes de nullité de mariage pour incapacité psychique*, in *Studia canonica*, 56 (1967) 146-147; P.A. D'Avack, *Cause di nullità e di divorzio nel diritto matrimoniale canonico*, Firenze 1952, 68-69.

There was no specific canon on the psychic capacity for the marriage consent in the 1917 Code, but only a generic reference to *amentia* and *dementia*. These two situations were considered as conditions in which a person was deprived of the reason in general (*amens*) or in a specific ambit, such as sexuality or the possibility of establishing a conjugal relation (*demens*). Nearly all sort of anomalies were encompassed, in the 1917 Code, within the sphere of amentia-dementia and marriage cases before the ecclesiastical tribunals, which referred to psychic problems, were normally studied under the grounds of amentia and dementia.

However, the former Code contained norms which tended to discipline the consent from the standpoint of natural law, in case the person was deprived of the *usus mentis*. For example, in canon 1089, it stipulated that if before the proxy contracts marriage in the name of the mandator, the latter falls in amentia, marriage is invalid, even if the proxy of the other contracting party would have ignored this. Likewise, canon 1082 enjoined that even in cases of a defect of consent on account of amentia, the vote of experts was required. An analogous reference was made in canon 88 § 3 which established that persons habitually deprived of the use of reason are assimilated to infants. As regards persons of minor age, the Legislator had already pronounced himself for a juridical incapability (can. 1067).

For other persons, affected not by reasons of age but by pathological reasons, certain canonists erroneously referred to canon 2201[26] regarding penal imputation – an issue with principles references that were completely different with respect to contracts and to marriage,[27]

Back to the criterion of amentia-dementia, we should note that in practise it was a too much vast criterion that required a better juridical determination, also in view of the great development of psychology and psychiatry during the 20th century. This made the jurisprudence, especially of the Roman Rota, confront the necessity of clarifying the contents and ambit of the capacity for marriage from the psychic point of view. The fundamental canon referred to by Rotal jurisprudence

26. "§1 Delicti sunt incapaces qui actu carent usu rationis.
§2 Habitualiter amentes, licet quandoque lucida intervalla habeant, vel inc ertis quibusdam ratiocinationibus vel actibus sani videantur, delicti tamen incapaces praesumuntur" (can. 2201).
27. Cf. Coram Sabattani, 14.2.1961, n. 3; coram De Jorio, 19.6.1967, n. 6; coram Augustoni, 3.5.1974, n. 4..

was canon 1081 §§ 1-2.[28] This canon enlisted the substantial elements of consent: the consent of the parties (efficient cause), their juridical ability, the essential object of consent which consisted in the act of the will of receiving and accepting the *ius in corpus*, its ordination to procreation of offspring and the legitimate manifestation of consent. From these presuppositions, one could trace all defects of consent on account of which marriage could be declared null. It suffices to mention the way in which jurisprudence resolved various problems, in particular through the analogy with impotence, which we meet still today at the basis of canon 1095, 3°.

6. *The due discretion entailed to get married*

As we saw, the first and basic discussions of the problem of the capacity to marriage in medieval canon law regarded the more grave hypotheses of psychopathologies (*furiosi*) in which the health of the mind totally lacks. Later on, throughout the history of canon law, further principles were amply elaborated in medieval doctrine about the contents and elements of the *discretio iudicii* to marriage.

Ever since the classical period, authors retained as capable to marriage the person who has the use of reason, but then they did not agree about the contents of this decisive factor. In fact, two great scholars, Saint Thomas Aquinas (c. 1221-1274) and Tomás Sanchez (1550-1610) gave a different interpretation of the issue. Sanchez[29] retained as sufficient the use of reason "which is enough for a mortal fault" ("qui ad culpam lethalem satis est"), with the consequence of affirming that even a seven-year old (considered as having enough use of reason to be able to sin mortally) had the psychic capacity to contract validly. Contrary to this theory there was another conception stemming from the Angelic Doctor who wrote, "A greater discretion of reason is required to provide for something in the future than to consent about one present act; and thus man can sooner sin mortally, than he is able to oblige oneself to something in the future."[30] Thus the ability to marriage is anchored to a discretion of judgement that is greater than that of a seven-year old who is even capable of a mortal sin.

28. Cf. J. Gaudemet, *Il matrimonio in Occidente*, Torino 1987, Italian translation, 353.
29. *De sancto matrimonii sacramento disputationes*, Lugduni 1625, lb. I, disp. VIII, n. 15 & disp. XVI, n. 15-26.
30. "Maior rationis discretio requiritur ad providendum in futurum quam ad consentiendum in unum praesentem actum; et ideo ante potest homo peccare mortaliter, quam possit se obligare ad aliquid futurum" (*S.Th.*, *Supplementum*, q. 58, art. 5, ad 1).

The explanation of St. Thomas helped posterior doctrine to distance the concept of discretionary judgement away from the use of reason and to project it toward the sphere of the marriage duties. More discretion is required for acts generating future obligations than for those which consume their efficacy in the present. The reason is not so much because consent as a psychological act for a present act is more difficult than for a future act. Consent, in fact, for future obligations does not have to be more informed, intense or deliberated, as a human act, than it has to be for present commitments. The real reason is however that *a greater psychic attitude is needed to sustain the duties which bind for the future* than to consent "in actum unum praesentem". For the same reason, St. Thomas says in the same text that the discretion required for marriage consent is less than that necessary to emit the religious votes. Religious life and its obligations are more difficult to undertake because nature does not incline to this type of life as it inclines to marriage. This entails that the *discretio iudicii* – which varies according to the type of act to be performed, depending upon whether it is a religious vote or a marriage contract – is not to be measured only on the basis of the capacity to comprehend the object of the vote or of the contract, but rather it refers exactly to the capacity of undertaking, realising, accomplishing and observing the duties that derive from the vote or from the contract.[31]

Departing from the consideration that marriage is a very important contract, indissoluble and oriented to the future, the major part of doctrine[32] and jurisprudence[33] followed the thomistic approach and required a maturity of judgment which is greater than that entailed for a mortal sin. Along these lines, two criteria were developed in doctrine with the aim of identifying the due discretion required for marriage.

(a) *A static criterion*. Canonists arrived at delineating the criterion of the discretion of judgement proportionate to marriage, by gauging the capacity vis-à-vis the particular nature of marriage, which implies serious commitments for the future.

31. In a comment on the actual Can. 1095, 2°, D. Kelly observed: "*The concept of discretion of judgement is concerned, not so much with intellectual or cognitive ability, as with being able to use such intellectual ability in a practical way*", *The Canon Law. Lteer & Spirit. A practical guide to the Code of Canon Law*, (ed. G. Sheehy - R. Brown - D. Kelly- A. McGrath), London 1996, 611.
32. Cf. F.M. Cappello, *De matrimonio*, Romae 1961, n. 579, p. 506.
33. Cf. Coram Mannucci, 8.8.1931, in *SRRD*, XXIII, 373, about the relation between indissolubility (or *servitus totius vitae*) and *discretio iudicii*.

In due course, Rotal jurisprudence arrived at retaining as incapable of contracting marriage, those who lack gravely of the *discretio iudicii* in such a way that they cannot evaluate sufficiently the essential rights and duties of marriage which have to be mutually given and received. From a formal viewpoint, this is a new cause of incapacity, brought to light for the first time in the Roman Rota by the sentence coram Wynen of 25 February 1941.[34] According to that decision – which was a negative one – who is unable to assess and evaluate the ethical, social and juridical values connected with marriage, cannot marry validly. It is not a question of a conceptual appreciation of the institute of marriage, but of the critical faculty, which enables the person to evaluate duly the consequences of such an act for one's own life. The case considered in the Rotal sentence was not of a *demens* or of a person who had lost temporarily the faculties, nor of somebody with a weak mind. It was the case of a cocaine maniac, presented as affected by a "constitutional immorality", and lacking the critical or evaluative faculty, the discretion of judgement.

In any event, in order to assess the subjective psychological compliance of the person in relation to the nature of marriage and its duties, it is very important to see if one possesses a functioning critical capacity. Yet, it was not easy to identify some general criterion indicating the level of discretionary judgement requested to contract marriage.

(b) *A dynamic criterion*. This situation induced jurisprudence to propose an integrative dynamic criterion: each time the judge cannot measure the *quantum* of the discretionary judgement, he must examine the *quomodo* of consent. According to this position, one is able to consent when the dynamics of the formation of consent are regular, i.e., when the various structures of one's personality are normal. Otherwise, if the *process of formation of the will* to marry is abnormal, there is a *defectus discretionis iudicii* which according to the famous Rotal decision coram Sabattani of 24 February 1961, "has more to do with intimate distortions of the formation and arousal of the deliberation than with inadequate or false apprehension of the object of the contract".[35]

34. Cf. C. Holböck, *Tractatus de jurisprudentia Sacrae Romanae Rotae juxta decisiones quas hoc sacrum tribunal edidit ab anno 1909 usque ad annum 1946 et publicavit in voluminibus I-XXXVIII*, Graetiae-Vindobonae-Coloniae 1957, 103-104.
35. "magis attingit intimas distorsiones efformationis et excitationis deliberationis quam inadequatam vel falsam apprehensionem obiecti contractus" coram Sabattani, 24.2.1961, in *Monitor ecclesiasticus*, [1961] 633.

Obviously both the static criterion, which measures the level of discretionary judgement in relation to the substance of marriage, and the dynamic criterion, which examines the way this discretion is formed and naturally leads the canon lawyer to seek the assistance of psychology, are valuable in their interconnectedness. Thus we read in a decision coram Jullien, dated 16 October 1942 that,

> "those entering marriage must be masters of their own consent through reason and will; that is to say they must enjoy the use of reason in such a way that they can understand what marriage is and what its essential properties are [...] and they must consent to that with full deliberation. The intellect is said to deliberate when, moved by the will, it compares with its opposite that about which it is deliberating and then, though it could have turned to one thing, nevertheless definitely decides on the other. Furthermore because the body and soul are intimately joined and because the soul's faculties, i.e. the intellect and will, depend for their functioning on bodily organs, those faculties can, because of physical diseases that affect the brain or the nervous system, be impeded from performing their operations, with the result that deliberation of the intellect and consent of the will, depending on the seriousness of the various pathologies, are either removed entirely or diminished."[36]

While benefiting from the assistance of the psychological science, the canonist needs a juridical criterion, possibly a general one, to measure the capacity to consent. At present there is a sufficient consensus in doctrine[37] and jurisprudence[38] on the meaning of the discretion of judgement. It essentially embraces two factors, namely, a minimal and sufficient *critical ability* and *internal liberty*.

Hence, the other component of the ability for a due discretion is a minimal internal freedom. As far as 1928, Rotal jurisprudence upheld that,

36. *SRRD*, 34, n. 2, p. 776.
37. Cf. J. McAreavey, *The Canon Law of Marriage and the Family*, 1997, 258; cf. J.J. García Failde, *Manual de Pisquiatría forense canónica*, Salamanca 1987, 34; M.F. Pompedda, *Studi di diritto matrimoniale canonico*, Milano 1993, 19.
38. Cf. coram Colagiovanni, 20.7.1984, nos. 7-11; coram Doran, 4.12.1987, nos. 6-9; coram Stankiewicz, 26.3.1990, nos. 20-22; coram Pompedda, 14.11.1991, nos. 3-12; coram Burke, 15.10.1992, nos. 2-16.

> "It is clear that there cannot be consent if internal liberty lacks. In fact for a human act, i.e. which proceeds from a deliberate will, it is required that man be the master of the same act through reason and the will. But he would not be master, if he were not immune from intrinsic determination."[39]

Thus we saw that the theme of the discretion of judgement is not exclusive of the 1983 Code. Rotal jurisprudence, in fact, had already elaborated what was going to be contained in canon 1095 of canon 1095 1° and 2°. It treated the contents of the actual number 1 under the title of amentia, "which we leave to the themes of the total lack of the use of reason."[40] Number 2 was treated in Rotal jurisprudence as it is presented in the decision coram Sabattani of 24 February 1961,[41] which draws on the contents of the coram Jullien of 23 February 1935, when it synthesizes the lack of discretion of judgement in the incapacity to evaluate the nature and the value of marriage and the refusal to accept the marital obligations. This doctrine is founded on St. Thomas Aquinas.[42]

7. *Rotal jurisprudence on* incapacitas assumendi

The 1917 Code law proved to be insufficient before certain situations in which, on the one hand, it was clear that a person was unable to contract marriage, while at the same time, it did not seem that there was any doubt about the existence of the sufficient use of reason or on the necessary discretion of judgement – in actual fact – about the marriage one wished to contract.

This gave rise, especially as from the 1960s and by analogy with the *ratio legis* on impotence – "Nemo potest ad impossibile obligari", which is the sixth Rule of the Decretals of Boniface VIII – to the consideration of a new ground of nullity, founded upon the same reality of consent and on marriage, so-called *incapacitas*

39. "Planum est consensum non dari deficiente libertate interna. Ad actum enim humanum, i. e. ex voluntate deliberata procedentem, requiritur ut homo eiusdem actus dominus sit per rationem et voluntatem. Dominus autem non foret, si immunis non esset ab intrinseca determinatione" (coram Massimi, *SRRD*, vol. 20, 1928, p. 318, n. 2; cf. coram Massimi, *SRRD*, vol. 23, 1931, p. 274, n. 2; coram Wynen, *SRRD*, vol. 35, 1943, p. 273, n. 5; coram Pompedda, 21.11.1983, n. 5).
40. C. Lefebvre, *Pauli VI verba de Rotali iurisprudentia*, in *Periodica*, (1976) 129.
41. Cf. Nos. 4-5.
42. Cf. St. Thomas Aquinas, *S.Th.*, I-II, q. 1, art. 2.

assumendi onera coniugalia.[43] Yet, the first Rotal sentence that applied in a case of marriage nullity the principle of the incapacity to assume the essential obligations of marriage, seems to have been the *coram Teodori* of June 1940.[44]

Rotal jurisprudence prior to the 1983 Code treated the subject under the principle of sexual amentia or dementia (*insania in re uxoria*). Afterwards it started to treat such cases for lack of the object of consent, since whoever suffers from such anomalies of psychic nature cannot observe conjugal fidelity nor share the intimate conjugal life in a human way nor establish the community of life and love.[45]

Very important for its juridical contents is the sentence coram Anné of 25 February 1969, hailed in legal language as a landmark decision.[46] It treated the case of a man whose presumed wife at seventeen years of age had started a pattern of homosexual conduct with her lesbian lover. Then, she interrupted this during the first years after the wedding, but resumed after their first child was born. The issue was whether her deeply rooted sexual inversion had rendered her unable to perform

43. "Dobbiamo anche ricordare il posto importante assunto dalla nullità per '*incapacità di assumere gli obblighi essenziali del matrimonio*' anzitutto quelli della fedeltà e della perennità. Si tratta molto spesso di turbe psichiche gravi, specialmente della ninfomania e dell'omosessualità. Questi capi di nullità sono stati ammessi dalla Rota a partire dal 1957", J. GAUDEMET, *Il matrimonio in Occidente*, 352.
44. Cf. No. 16.
45. Cf. J. R. MONTAÑÉS RINCHN, *El consentimento matrimonial y el canon 1095* (10.8.2004) in www.tribunaleclesiasticomedellin.org.co. See coram Serrano, 5.4.1973, which includes the *communitas vitae* within the object of marital consent. Yet, the "communion of life" concept of marriage was articulated at least as far back as Pius XI's encyclical *Casti connubii*, 31.12.1930: "This mutual inward moulding of husband and wife, this determined effort to perfect each other, can in a very real sense [...] be said to be the chief reason and purpose of matrimony, provided matrimony be looked at not in the restricted sense as instituted for the proper conception and education of the child, but more widely as the blending of life as a whole and the mutual interchange and sharing thereof" (n. 84).
46. Cf. coram Serrano, 5.4.1973; coram Raad, 14.4.1975; coram Lefebvre, 31.1.1976; L.G. WRENN, *Annulments*, Washington D.C. 19874, 82; W.J. LADUE wrote that this Rotal decision "is not particularly significant for its resolution of the case, but [...] because of its explanation of marriage as a *consortium totius vitae* and of the juridical implications which flow therefrom" (*Conjugal Love and the Juridical Structure of Christian Marriage*, in *The Jurist*, 34 [1974] 43-44).

the marriage consent because it had made her incapable of willing effectively the object of this consent.[47]

However, the import of Anné's Rotal decision is not to be exploited by practicing a "pick-and-choose Rota jurisprudence"[48] in order to make it easier for tribunals to hand down declarations of marriage nullity. This peril would arise if the canon lawyer tries to complicate the matter by claiming that for marriage to be valid the parties must also be able to exchange a right to a marriage relationship which is understood to mean a successful marriage,[49] even if this is never said out loud. Conversely, for the purposes of contracting a valid marriage, the parties' capacity for the fulfilment of the object of consent needs only be minimal and only really grave anomalies invalidate marriage. In point of fact, Lucien Anné noted that there are two fundamental psychic deficiencies that render persons incapable of marital consent. One of these deficiencies is a paranoid disorder of affectivity preventing a person's giving himself into union with another in any sense. The other is a serious deflection or perversion of the sexual instinct. He wrote:

> "The abnormal conditions of the spouses-to-be that radically obstruct the establishment of any type of community of conjugal life – so that the elements for establishing it are lacking – are either the most grave deflection or perversion of the sexual instinct as, for instance, in cases of full-blown homosexuality if and inasmuch as it extinguishes the activity

47. Anné noted that, "fieri potest ut consensus matrimonialis invalidus sit ob defectum obiecti formalis, quo fit ut consensus sit vere matrimonialis. Nam contingere potest ut contrahens sit inhabilis, idque insanabiliter, ad tradendum acceptandumque ipsius consensus obiectum. Tunc [...] defectus obiecti, cum nupturiens incapax sit tradere id quo consensus fit nuptialis, uti iam exposuimus in una Aquen. diei 17 ianuarii a. 1967, in qua retulimus quasdam sententias rotales praecedentes" (no. 3).
48. R.H. Vasoli, *What God has joined together. The Annulment Crisis in American Catholicism*, New York-Oxford 1998, 55.
49. "There exists no canonical jurisprudence in the precise and proper sense [...] according to which valid marriage consent requires the exchange of a right to a successful, conjugal, interpersonal relationship, an exchange of the spouses in whole or in part, or any other exchange which is in fact, even if not in expression, the same as one of these. For, no matter whether one holds that in a sufficient number of decisions of a tribunal of the Roman Curia it has been affirmed that any or all of these exchanges are required for a valid marriage, and affirmed over a sufficiently long period of time, it nevertheless remains an 'existential' reality that such affirmations have always been and still are under challenge by other decisions of the same tribunal", E.M. Egan, *The Nullity of Marriage for Reason of Incapacity to Fulfill the Essential Obligation of Marriage*, in *Ephemerides juris canonici*, 40 [1984] 28-29.

> of the natural heterosexual instinct, or the abnormal paranoic perturbation of the mental faculties or an equal perturbation."[50]

Anné further recognises the difficulty of declaring a marriage null in other cases which lack such gravity.

> "With regards to other cases, the incapability of the spouse-to-be to assume the substantial conjugal burdens – except in a case of true amentia or dementia because of which consent itself is already to be regarded invalid – exceeds the ability of judges to define the nullity of a marriage with moral certainty since only God searches hearts and minds. Indeed, the judicial investigation about the intentions of the spouses-to-be, as in cases of the exclusion of some property of marriage, already turns out to be very hard. How far more difficult or even impossible would be the judicial investigation of the disharmony of frames of mind and characters because of which one might contend that the spouses-to-be were unable to establishing a communion of life. The handling of this kind of marriage cases would present the picture of the rescission of a marriage rather than the declaration of its nullity."[51]

In other words, in this Rotal decision, which was a negative one, Anné insisted that only serious disorders preclude the capacity for the minimal level of 'community of life' required for marital validity. It would be mistaken to shunt aside Anné's cautions.

The presuppositions that gave rise to this "new" ground of nullity refer especially to the psycho-sexual anomalies, in which the capacity for intending and assuming marriage in a minimal way were gravely compromised (homosexuality, nymphomania, etc.). It was precisely for this reason that psycho-sexual anomalies were mentioned as cause of incapacity. In the 1970s, the *incapacitas assumendi onera* was mentioned in doctrine and in Rotal jurisprudence, and this same jurisprudence is the principal source of canon 1095 of the 1983 Code of Canon Law. According to the Latin edition of the 1983 Code of Canon Law, edited by the

50. No. 19.
51. *Ibid.*

Pontifical Commission for the Authentic Interpretation of the Code,[52] the sources of canon 1095 are:

Canon 1095, 1°: coram Jullien, 30.7.1932; coram Grazioli, 1.7.1933; coram Wynen, 25.2.1943; coram Heard, 4.12.1943; coram Felici, 22.5.1956; coram Felici, 3.12.1957; coram Sabattani, 24.2.1961; coram De Jorio, 19.12.1961; coram Canestri, 16.7.1963; coram Mattioli, 4.4.1966; coram Pompedda, 3.7.1979.

Canon 1095, 2°: coram Wynen, 25.2.1941; coram Wynen, 25.2.1943; coram Felici, 3.12.1957; coram Sabattani, 24.2.1961; coram Pinto, 4.1.1974.

Canon 1095, 3°: coram Sabattani, 21.6.1957; coram Pinna, 4.4.1963; coram Anné, 17.1.1967; coram Lefebvre, 2.12.1967; coram De Jorio, 20.12.1967; coram Anné, 25.2.1969; coram Serrano, 5.4.1973; coram Raad, 14.4.1975; coram Pinto, 14.4.1975; coram Staffa, 29.11.1975; coram Anné, 4.12.1975; coram Lefebvre, 31.1.1976; coram Serrano, 9.7.1976; coram Pinto, 15.7.1977; coram Masala, 10.5.1978; coram Huot, 7.6.1979; coram Ferraro, 6.2.1979.

8. *Genesis of canon 1095*

The salient points in the course of the drafting of canon 1095 will prove to be very useful for a deep interpretation, understanding and distinction of its three cases in point.[53] In fact, the juridical contents of the notions enclosed in canon 1095 is clearly inferred from a study of the various redactions of the canons in the schemes realised during the redaction of the present Code.[54]

The first problem faced by the reviewers of the Code regarding the psychic incapacity to marriage was whether it was opportune to establish a positive norm that explicates natural law, given that the marriage consent has to be first of all a human act. Up to that time, doctrine and jurisprudence, despite the absence of a specific canon, did not encounter great difficulties to recall the pertinent general principles. But, to avoid any ambiguity, the Consultors were inclined to codify

52 Pontificia Commissio Codici Iuris Canonici Authentice Interperetando, *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus fontium annotatione et indice analytico-alphabetico auctus*, Vatican City 1989.

53 Cf. F. Finocchiaro, *Il matrimonio nel diritto canonico*, Bologna 1989, 77.

54 Cf. *Communicationes*, 3 (1971) 77; 7 (1975) 41-54; 9 (1977) 369-371.

the psychic incapacity, so as to give it a more precise determination and shun the occasion for any arbitrary interpretation.[55]

On 11 May 1970 two distinct canons on incapacity were presented, which followed the canon that defined the object of consent.[56]

> Canon 1081 *bis*:
> 1. "Those who cannot elicit matrimonial consent due to an illness on account of a defect of discretion are incapable of contracting marriage."
> 2. "Those who are actually impeded from the use of reason due to some perturbation of the mind, are incapable of contracting marriage, while the perturbation lasts."
>
> Canon 1081 *ter*:
> "Those who cannot assume the rights or fulfil the essential duties of marriage, are incapable of contracting."[57]
>
> During the examination of this draft, it was preferred to distinguish, apropos the defect of the use of reason, between the habitual and the actual lack of the use of reason on the part of the spouse. So the following formula was approved by the consultative organs:
>
> "They are incapable of contracting marriage:
> 1. Who are affected by an illness of the mind or by a grave perturbation of the mind in such a way that they cannot elicit matrimonial consent, inasmuch as they are deprived."[58]

55. Cf. "Etsi principia de incapacitate consensum matrimonialem validum eliciendi implicite in iure vigenti continendum, visum fuit expedire eadem distinctius et clarius in novo iure exprimenda esse", PONT. COMM. CIC., COETUS STUDIORUM DE IURE MATRIMONIALI, in *Communicationes*, 3 [1971] 77.
56. PONT. COMM. CIC., COETUS STUDIORUM DE IURE MATRIMONIALI, in *Communicationes*, 7 (1975) 41-44.
57. Canon 1081 bis: 1. "Qui ob morbum vel ob defectum discretionis consensum matrimoniale elicere non valent, incapaces sunt matrimonii contrahendi." 2. "Qui ob aliquam mentis perturbationem ab usu rationis actu impediuntur incapaces sunt, dum perturbatio perdurat, matrimonii contrahendi." Canon 1081 ter: "Qui non valent assumere iura aut implere officia matrimonii essentialia, incapaces sunt contrahendi."
58. "Sunt incapaces matrimonii contrahendi: 1. Qui mentis morbo aut gravi perturbatione animi afficiuntur ita ut matrimonialem consensum, utpote carentes, elicere nequeant."

Regarding the lack of discretionary judgement, it appeared necessary to link up the defect to something that minimally determines the object of the intellect and the will. Hence the defect of discretion was referred directly to the rights and duties of marriage and the following formula was approved:

> 2. "Those who suffer from a grave defect of discretion of judgement about the rights and duties of marriage to be handed over and accepted."[59]

As regards the defect concerning the assumption of the essential obligations of marriage, the Consultors attempted to individuate the causes of the incapacity so as to determine in some way the precincts of this invalidating situation. They retraced these causes to psychosexual anomalies: "incapacitas [...] non provenit ex defectu scientiae vel discretionis vel ex morbo mentis sed ex anomaliis quae pertinent ad spheram psycho-sexualem quaeque gignunt quaedam moralem impossibilitatem assumendi onera perpetua."[60] It is interesting to note how at an initial stage during the works of revision of the Code, the incapacity that now figures in canon 1095, 3° was envisioned as *impotentia moralis*.[61] Anyhow, the defect stemming from grave sexual anomalies was configured as an autonomous case from that of the *scientia minima*. It was remarked that sexual anomaly, as an impediment to marriage, could be retraced to the canon about impotence, whereas here they only wanted to examine its psychic origin. The following formulation came out:

> "They are incapable of contracting marriage who due to grave psychosexual anomaly cannot assume the essential obligations of marriage."[62]

59. 2. "Qui laborant gravi defectu discretionis iudicii iura et officia matrimonialia mutuo tradenda et acceptanda."
60. Pont. Comm. CIC., Coetus Studiorum de Iure Matrimoniali, in *Communicationes*, 7 (1975) 98.
61. This gave rise to the question of the characteristics that must qualify it, a question that was tackled by way of analogy with the copulative impotence of the present Canon. 1084 §1. However, it does not make sense to require antecedence and perpetuity, because what really counts is the real presence of the incapacity at the moment of consent. As regards relativity, the majority of Rotal auditors reject it (cf. P. Bianchi, comment on Can. 1095, in *Codice di diritto canonico commentato*, a cura della Redazione di *Quaderni di diritto ecclesiale*, Milano 2001, 884-885), in such a way that "in merito c'è per lo meno un dubbio di diritto (‡can. 14) e che quindi non può utilizzarsi il riferimento alla relatività quale qualifica dell'incapacità psichica al m. =[matrimonio]" (*Ibid.*, 885).
62. "Sunt incapaces matrimonii contrahendi qui ob gravem anomaliam psychosexualem obligationes matrimonii essentiales assumere nequeunt".

After the examination of the Consultative Organs (Episcopal Conferences, Dicasteris of the Roman Curia, Pontifical Universities), canon 1081 *bis* and *ter* became canon 296 and this became canon 297.

There was certain confusion between the subject and the object, between the incapacity and its effect. It was therefore hoped that in the definitive formulation of the legal text, the three hypotheses be grouped in a single paragraph, whose direct juridical reference was "not so much the psychic cause of incapacity, as much as its effect that impedes the formation of a real marriage consent, given that the spouse is unable to intend and/or to will the marriage duties."[63]

It was right to differentiate the lack of discretionary judgement from the *inabilitas assumendi* because as Pompedda observed, "it is one thing to foresee the consequences of a certain act, and yet another thing to evaluate objectively one's own aptness regarding the consequences of that same act."[64] In the former case, we must speak of *discretio iudicii*, in the latter case the validity of the act might be obstructed by the lack of an object about which one might be mistaken. What is important, according to Pompedda, is that the juridical act of consent is considered from two different aspects: that of its sufficiency and that of its efficacy. By the first we mean that there are present in the act all the intrinsic psychological elements that render it apt for the matter to be accomplished. By the second, once this sufficiency is presupposed, we mean that consent is expressed in the modality of circumstances and conditions that are such that make it efficacious. Consent might be vitiated intrinsically due to external and objective circumstances, and thus it is born frustrated.[65]

Stankiewicz observed that the problem regarding the autonomy of this incapacity (to assume) with respect to the *defectus discretionis iudicii*, ought to be resolved in the light of its cause. If the *incapacitas assumendi onera* stems from a psychic state that takes away the use of reason or provokes a grave defect of discretionary

63 "non tanto la causa psichica dell'incapacità, quanto l'effetto di essa di impedire la formazione di un vero consenso matrimoniale, atteso che il nubente è incapace di intendere e/o volere gli obblighi matrimoniali", O. Fumagalli Carulli, *L'incapacità psichica nella riforma del matrimonio canonico*, in *Ephemerides juris canonici*, 32 [1976] 107.

64 "altro è prevedere le conseguenze di un determinato atto, ed altro è invece valutare oggettivamente la propria idoneità alle conseguenze di tale medesimo atto", M.F. Pompedda, *Borderline, Nevrosi e Psicopatie in riferimento al consenso matrimoniale nel diritto canonico*, Roma 1981, 60.

65 Cf. *Ibid.*, 63.

judgement, it cannot be configured as an autonomous ground, but it remains inserted in its original matrix. If however a psychic anomaly does not impinge gravely on the original matrix, while affecting the object of consent, then there can be an autonomous figure. In this case in point, therefore, there must rather be the inability to fulfil the essential duties of marriage, that is, the impossibility to dispose of the formal object.[66]

Among the various commentators, Navarrete, though inclining toward an autonomy of this incapacity, retained that by this expression, one might cluster so many diverse and autonomous grounds of nullity as there are essential conjugal duties.[67]

The Consultors embarked upon the formulation of a norm about the incapacity to assume the obligations of marriage, which has its roots in the lack of the object of marriage consent, even if this situation involves a condition that incapacitates the person. Already in the relation to the Commission, Peter Huizing had specified how the lack of the use of reason and the defect of discretion of judgment regard the same subjective act of psychological consent, while the inability to assume the duties of marriage only touches the object of consent.[68]

Yet certain canonists showed some evident perplexities about the formulated text, which was too much restricted to the individuation of the cause, as this was confined uniquely to the psychosexual sphere, whereas in fact there are a wide variety of cases of inability to assume the essential conjugal duties. It was the strict competence of the expert to bring to light the various causes of this incapacity based on psychiatric, psychosomatic and psychological elements.[69]

In 1977, the Commission proceeded in a restricted group to examine the observation of the Consultative Organs. After the re-examination by the Consultors,

66 Cf. A. Stankiewicz, *L'incapacità psichica nel matrimonio: terminologia e criteri*, in *Ephemerides juris canonici*, 36 (1980) 258-259.

67 Cf. U. Navarrete, *Perturbazioni psichiche e consenso matrimoniale nel Diritto Canonico*, Roma 1976 , 130.

68 Cf. *Communicationes*, 3 (1971) 69-81.

69 Cf. C. Gullo, *Spunti critici in tema di incapacità ad assumere gli oneri coniugali*, in *Il diritto di famiglia e delle persone*, 4 (1975) 1478-1498; Id., *Capacità e maturità come elementi costitutivi del consenso matrimoniale canonico*, in *Il diritto di famiglia e delle persone*, 7 (1978) 823.

the formula of canon 296 was refined by adding the qualifying adjective "sufficient"[70] – a highly relevant element from a substantial viewpoint. Therefore, it is not a matter of just a lack of the use of reason but of the lack of the sufficient use of reason. So, "to induce the incapacity to contract marriage, it is not necessary that one or both spouses be totally deprived of the use of reason, but that they are, or at least one of them is deprived in such a degree to render consent itself inadequate to the gravity of the specific matter in question, that is, marriage."[71] This safeguards the right to marriage even of the so-called *fatui*, while enhancing the relation between the use of reason of the spouse and the juridical affair in question.

A propos canon 297, after receiving various suggestions ("anomaliam psychicam, anomaliam psycho-sexualem, ob gravem anomaliam praesertim psycho-sexualem, ob gravem anomaliam psychicam") and after examining the various observations, the Consultors selected a formulation that regards only the cause incapacitating the person. In this way, they arrived at an ampler norm: from the psycho-sexual anomaly to the anomaly of a psychic nature,[72] thus accepting all the reserves mentioned regarding the previous one:

> "They are unable of contracting marriage who cannot assume the essential obligations of marriage due to a grave psychic anomaly."[73]

In the definitive formulation, decided during the ultimate revision of the entire Schema of the Code, done by the restricted Commission presided by John Paul II, the expression "gravis anomalia psichica" was substituted by another that is more generic and less exigent, and at the same time more suitable to evaluate the entire personality of the spouse:

70. Cf. PONT. COMM. CIC., COETUS STUDIORUM DE IURE MATRIMONIALI, sessio 20.10.1977, "De matrimonii effectibus", in *Communicationes*, 10 (1978) 104-105.
71. "non è necessario ad indurre l'incapacità a contrarre matrimonio che uno o entrambi i coniugi siano privi totalmente dell'uso di ragione, ma che ne siano, o ne sia almeno uno, privi in grado tale, da rendere il consenso stesso inadeguato alla gravità del negozio specifico, cioè il matrimonio", M.F. POMPEDDA, *Annotazioni sul diritto matrimoniale nel nuovo diritto canonico*, in *Il matrimonio nel nuovo Codice di diritto canonico: annotazioni di diritto sostanziale e processuale*, (ed. Z. Grocholewski - M.F. Pompedda - C. Zaggia), Padova 1984, 40.
72. Cf. PONT. COMM. CIC., COETUS STUDIORUM DE IURE MATRIMONIALI, sessio 18.5.1977, "De consensus matrimoniali", *in Communicationes*, 9 (1977) 369-371.
73. "Sunt incapaces matrimonii contrahendi qui ob gravem anomaliam psichicam obligationes matrimonii essentiales assumere nequeunt", *Ibid.*, 370-371.

> "They are unable of contracting marriage [...] who due to causes of a psychic nature cannot assume the essential obligations of marriage."[74]

In this manner, in the first drafting of what later became canon 1095, the expression "psychosexual anomaly" was used. Later on, considering that there are anomalies that are not psychosexual and which can render the person unable to assume, the expression was substituted by "psychic anomaly". This expression still presented a grave inconvenient: it displaced the problem of incapacity from the juridical to the medical ambit, thus confusing the incapacity as a juridical notion with the factual cause of incapacity, which pertains to the medical sphere. Psychic incapacity, in all its manifestations, is a juridical notion, independently of the cause of its origin.[75] Hence, the Legislator considered it opportune to employ a more generic term: "cause of psychic nature", which is what remained in the final redaction of the third number of canon 1095.

At a distance of more than two decades from the promulgation of this canon, we are familiar with the criticism that this canon has led to a wholesale production of decrees of nullity, which could hardly have been intended by its framers.[76] Obviously, the caveats of the supreme magisterium about the right interpretation and application of the canon in question in cases of marriage nullity[77] are indispensable for a correct administration of justice in the Church. All in all, however, this canon "without precedent in the old Code, is the single canon which most directly allows tribunals to address the canonical impact of mental, emotional, personal, psychological, psychiatric, and even chemical traumas suffered by persons attempting marriage."[78] In practice, it is still the best tool for addressing certain cases of drug, alcohol, physical and sexual abuse and a variety of other anomalous conditions.[79] As Cormac

74. "Sunt incapaces matrimonii contrahendi [...] qui ob causas naturae psychicae obligationes matrimonii essentiales assumere non valent".
75. Cf. P.-J. Viladrich, Il consenso matrimoniale. Techniche di qualificazione e di esegesi delle cause canoniche di nullità (cc. 1095-1107 CIC), Milano 2001, Chapter One, I, II (1-3),VII (2+3).
76. Cf. R.H. Vasoli, *What God Has Joined Together*, 73.
77. Cf. John Paul II, *Allocutions to the Roman Rota*, 5.2.1987, nos. 2-9; 25.1.1988, nos. 2-13; 1.2.2001, no. 6.
78. E.N. Peters, *Annulments in America: Keeping Bad News in Context*, in *mywebpages.comcast.net/enpeters/canonlaw.htm.*

Burke noted, "the real underlying problem, [...] is not the number of declarations of nullity but the number of failed marriages."[80]

9 *An endnote*

The final drafting of canon 1095, enshrined in the actual Code endeavours to take into account the scientific progress regarding the deficiencies of the will and of reason. Besides, the legal text of the canon does not disregard the paths opened by jurisprudence in the last thirty years, while avoiding extensive formulas that would have led to abuses of laxism.[81]

In this article, we examined the historical roots of this 'new' norm on marriage consent, namely canon 1095 of the Latin Code.[82] Its roots ultimately stem from natural law itself, were recognised by Roman Law and were successively received in Church law and theology during that age, which as its name indicates (i.e. the 'medieval' age), functioned as a 'medium' that conveyed the richness of classical antiquity to our modern and contemporary times. As every productive source of law, canon 1095 only represents the ultimate and external stage of a creative process of law: it represents the arrival, the epilogue of a historical process, the moment in which the concept of productive source coincides with that of cognitive source of law.[83]

79. "the fundamental insight of Canon 1095 is crucial in helping the Church confront accurately the modern crises in marriage: Canon 1095, for all its flaws, is still the best tool for addressing cases in which drug and alcohol abuse, physical or sexual abuse, psychological and psychiatric anomalies, and a variety of other mental and emotional conditions have seriously impacted parties prior to marriage" (*Ibid.*).
80. A certain anonymous tribunal critic "seems to limit his concern to one point: there are too many declarations of nullity, and the number must be reduced. To my mind, he is missing the real underlying problem, which is not the number of declarations of nullity but the number of failed marriages. Not all failed marriages are entitled to be declared null; but it is fairly evident that if we can reduce the number of marital failures, we are going to have fewer petitions for nullity. I wish [the critic] had sought to investigate the roots of these failures, instead of putting the blame for the problem he sees on the new Code of Canon Law", C. Burke, *Marriage, Annulment, and the Quest for Lasting Commitment*, in *Catholic World Report*, January 1996, 54.
81. J. Gaudemet, *Il matrimonio in Occidente*, 357.
82. Cf. Can. 818 of the *Codex Canonum Ecclesiarum Orientalium*.
83. Cf. F. C. Savigny, *Sistema del diritto romano attuale*, I, Italian translation, Torino 1886, chap. II, § 6.

Yet, the promulgation of canon 1095 did not signal the ending of all the previous progress that led to its textual legislative formulation. Since law is a dynamic reality, now that the mentioned canon pertains to the *ius conditum*,[84] there is still room for further 'development'[85] as to how the principles sanctioned by the legislative text ought to be applied to the great number of concrete situations emerging in everyday life.

2, Pjazza S. Salvatur,
Ghasri,
Gozo, Malta.

84. "Dopo il Codice del 1983 disponiamo di una legge universale della Chiesa, che contiene una norma esplicita sull'incapacità consensuale, il celebre canone 1095. Dalla situazione precedente *de lege ferenda* siamo passati al possesso di una *lex condita*, da interpretare ed applicare. Ciò facilita certamente il lavoro della dottrina e della giurisprudenza", C.J. Errázuriz, *La capacità matrimoniale vista alla luce dell'essenza del matrimonio*, in *sociebrasicanon.vilabol.uol.com.br/errazuriz.htm*.

85. "Ma rimangono ancora canoni, di rilevante importanza nel diritto matrimoniale, che sono stati necessariamente formulati in modo generico e che attendono una ulteriore determinazione, alla quale potrebbe validamente contribuire innanzitutto la qualificata giurisprudenza rotale. Penso, ad esempio, alla determinazione del 'defectus gravis discretionis iudicii', agli 'officia matrimonialia essentialia', alle 'obligationes matrimonii essentiales', di cui al can. 1095 [...]", John Paul II, *Allocution to the Roman Rota*, 26.1.1984, no. 7.