The Catholic Lawyer

Volume 16
Number 2 *Volume 16, Spring 1970, Number 2*

Article 7

January 2017

Essential Incompatibility as Grounds for Nullity of Marriage

Marion Justin Reinhardt

Gerard J. Arella

ESSENTIAL INCOMPATIBILITY AS GROUNDS FOR NULLITY OF MARRIAGE†

MARION JUSTIN REINHARDT*
GERARD J. ARELLA**

IN THE PRESENT PAPER we are suggesting not only that a clinical entity, known as essential incompatibility, can cause a marriage to be null and void, but also that it can be verified factually to meet the requirements of the canonical law of evidence.

We are going to try to demonstrate that there can be fixed personality structures which, relative to each other, make it impossible for two parties to a marriage to enter a valid union. The invalidity is alleged to be present because of incapacities on the part of both, relative to each other, to fulfill one or more of the essential elements or terms of the marriage contract. Invalidity is considered to result not from the personality structure of just one of the parties (or of both of the parties, considered separately) but precisely from the interaction of both parties together—an interaction already basically present at the time of the wedding which prevents them from *being able* to fulfill one or more of the essential elements of the marriage contract.

We wish to emphasize very strongly that we are not examining the area of matrimonial consent. We are not concerned with the ability or lack of ability of either or both parties to place valid human consent to

---

† Presented at the annual convention of the Eastern Regional Conference of the Canon Law Society of America, Niagara Falls, New York, April 16, 1970.

* S.T.B., Gregorian University, Rome, 1939; J.C.D., Catholic University of America, 1949; LL.B., St. John's University, ——. Presiding Judge of the Tribunal of the Diocese of Brooklyn. Admitted to practice before the New York and federal courts, including the Supreme Court of the United States.

** J.C.D., Gregorian University, Rome, 1959. Defender of the Marriage Board of the Tribunal of the Diocese of Brooklyn.

the marriage contract. In our discussion this ability to consent is presumed to be both possible and actual. The insight of the individuals is at least adequate; their freedom of will is sufficient; and the maturity of their judgment (if we wish for the sake of clarity to distinguish it from the combined action of intellect and will) is adequately proportionate to the nature of the marriage contract. In other words, "due discretion" is present. We are not talking about the "lack of due discretion."

We believe that an action based on "essential incompatibility" can be introduced, pleaded, and a judgment issued without the question of matrimonial consent or due discretion ever arising.

THE BASIC PRINCIPLE: "ONE CANNOT OBLIGE HIMSELF TO DO THE IMPOSSIBLE"

This basic principle, *Nemo potest ad impossible obligari,* is not new in the history of law. As a matter of fact, it is Rule 6 of the Rules of Canon Law which are to be found at the end of the Liber Sextus of the Decretals of Boniface VIII. Cicognani claims, although others deny, that the 88 Rules of Law of Boniface had the same force of ecclesiastical law as the Decretals which preceded them.[1] Ioannes Andreae who wrote the *glossa ordinaria* to the Rules demonstrated how this principle, that one cannot bind himself to the impossible, was well established in Roman Law.

In his *glossa* Ioannes Andreae explains the rule to mean that one cannot oblige himself to do something (1) which is morally wrong, (2) which is legally forbidden or (3) which factually cannot be accomplished, *e.g.*, to touch the moon with the finger or to transport a church from Bologna to Paris. At least in regard to the last examples of an impossibility, we wonder if Ioannes Andreae would still be of the same mind.

The Code of Canon Law makes no specific mention of this rule of law. It is, however, implied in various canons. Important for our purposes is Canon 1086, the canon on impotence. This canon has always been interpreted as applying exclusively to an incapacity, generally physical but possibly psychic, to perform the marital act of copulation.

Generally, moralists have agreed that one could not oblige himself to do the impossible. It is particularly in the field of moral theology that we are acquainted with this principle. Moralists also agreed that when something became impossible the obligation ceased. They found no difficulty in applying the principle not only to physical but also to moral impossibility.

We wish to reiterate and to emphasize that one cannot be obliged to do the impossible. He cannot oblige himself to this nor can he be obliged to it by another person. What a person cannot be thus bound or obliged to, neither can he give a right to another person (since, in the hypothesis, it is actually "impossible"). Another way of saying this is, that if a person cannot fulfill a particular thing, then he cannot be bound to it by another nor can he bind himself to it (at least while it is impossible for him). Therefore, if a person cannot fulfill an es-

---

[1] A. CICOGNANI, CANON LAW 311 (1934).

sential element of marriage, then, as a subject, as a person, for the duration of his incapacity, he cannot contract marriage. That is, at that time he is not the proper subject of the marriage contract since he cannot give or fulfill an essential requirement of the contract.

While Canon 1086 of the Code was generally considered to limit the concept of impotence to an incapacity to copulate, it appears that only in recent years was canonical jurisprudence ready to acknowledge as invalidating a more general incapacity to perform any of the other *essentials* of the marriage contract. The first clear statement in reported cases of the more general principle appears to have been made by Sabattani in a case which involved a nymphomaniac.[2] Sabattani stated that if she was incapable of fulfilling the essential property of fidelity the marriage would be invalid. The same principle of the invalidating effect of the incapacity to perform an essential term of the marriage contract was implied as "obiter dicta" by Heard[3] and by Mattioli.[4] Pinna in 1963 seemed to continue to restrict the concept of canonical impotence to an incapacity to perform the marital act.[5] More recent Rotal decisions appear to accept it as established that there can be a wider radical or constitutional incapacity, even of a psychic nature, which causes invalidity. In a decision of December 2, 1967 Lefebre declared that a certain homosexual, the defendant in the action, was incapable of binding himself to the essential obligations of permanency and fidelity in the marriage contract with consequent nullity to the contract itself.[6] In an unpublished review of the same action before the Rota, Pompedda on October 6, 1969 also found that this marriage of the said homosexual was invalid because his condition was opposed to the essential end of the marriage, the procreation of children. In this case there was no question of an incapacity to consummate the marriage physically nor was the case argued because of the lack of consent based on an intention against the interests of children. Pompedda argued that no one is able to oblige himself to do what he cannot do. Although we do not at this time have the "in facto" section of this decision, Pompedda can be understood as saying that this particular homosexual was incapable of giving the real "ius ad prolem." Pompedda in this decision specifically states that there is a more general incapacity to contract marriage than that found in Canon 1086.

Much has already been written about this more general constitutional incapacity to marriage. Among the European authors of special note are A. C. Jemolo and Peter Huizing who are quoted by Lefebre in his decision of December 2, 1967.[7] In our country, special credit must be given to J. Richard Keating who applied the concept to a suggested solution of the case of a sociopath.[8] With regret, it must be admitted that some writers continue to con-

2 49 S.R. Rotae Decisiones 503 (1957).
3 46 S.R. Rotae Decisiones 85 (1954).
4 49 S.R. Rotae Decisiones 774 (1957); 48 S.R. Rotae Decisiones 873 (1956).
5 Monitor Ecclesiasticus 413 (1965).
6 Monitor Ecclesiasticus 473 (1968).
7 *Id.*
8 Keating, *Sociopathic Personality*, 25 THE JURIST 429 (1965).

fuse this broader radical incapacity founded in the personality structure with an inability to use "due discretion" which is necessary to give matrimonial consent. To distinguish the two, one can imagine a man, physically impotent who is totally unaware of his incapacitating condition. On the day of his wedding his consent in all essentials is equal to that of any other man entering marriage. So too we say that there are persons whose personality structures, relative to each other, are such that they cannot fulfill the marriage contract but at the time of the marriage they can be totally unaware of their constitutional defects.

We believe that the axiom that one cannot oblige himself to the impossible is sound and should be accepted as a basic canonical principle of jurisprudence. St. Thomas maintains that it is not fitting (*conveniens*) to hold a person to a contract which he is incapable to perform.[9] Our Anglo-American common law states that a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made and the promisor neither knows nor has reason to know of the impossibility.[10] For the one who knowingly promises the impossible, a breach of contract suit offers a remedy in common law for damages but specific performance remains impossible. The Decretals refused an action of nullity to a plaintiff who knowingly entered marriage with a woman who was impotent, but it regarded the marriage as invalid with the admonition to the parties to live as brother and sister.

Assuming then that one should not be held to a marriage contract when he was incapable of fulfilling one or more of the essential elements of the contract, we say that there are individuals, considered solely as individuals, whose rigid personality problems or defects of the psychological or moral order (in distinction to the purely physical order) prevent them from being able to assume one or more of the essential elements of marriage. Such persons would be considered, at least at that particular time, incapable of contracting marriage with any one because they are incapable, at that particular time of fulfilling the essentials of the contract. (Possibly with extensive care or maybe even with the passage of time which normally brings its own learning experiences and changes in personal growth such an individual might become truly capable of marriage.)

Some descriptive terms that have been used for this ground for invalidity are (with differences and limitations according to various writers) "moral impotence," "radical incapacity," and "personal constitutional incapacity." The expression "psychic impotence" has also been used but this is confusing because this term for years has been used by canonists to signify an incapacity caused by psychic factors to perform properly the specific act of copulation. For our purposes hereafter in this paper we will use the expression *Constitutional Incapacity* to signify this broader inability, based radically in the structure of the personality, which makes it impossible for one to fulfill

---

9 IV SENT., dist. 34, q. I, art. 2.
art. 2.

10 RESTATEMENT OF CONTRACTS § 456 (1932).

one or more of the essential terms of the marriage contract.

PRESENT ESSENTIALS OF MARRIAGE CONTRACT

It is commonly held by canonists that the essential object of the marriage contract is the right to the basic *ius in corpus* to acts suitable for the generation of children. In addition, the law is clear that the essential properties of *ius in corpus* are permanence[11] and exclusiveness.[12] Therefore, if one does not consentually give the full right or eliminates from his consent these properties of permanence and exclusiveness, then he is contracting invalidly.

In accordance with the general principle stated above, if one is unable to fulfill the right to marital copulation, he cannot assume the obligation to it. This is evident from Canon 1086 which accepted the notion that a personal defect, not one affecting the intellect or will (or consent as a human act) does prevent a person from being able to assume the essential obligation of marriage (and thus from being able to give an essential right of marriage). Therefore, says Canon 1086, the man who is permanently (incurably) and absolutely impotent cannot validly marry. Canon 1086 recognizes that invalidity can also arise by nature when a specific couple is so constituted physically or psychically that they are unable to have marital relations with each other, although they would be able to have such relations with other possible spouses. This latter incapacity is known as relative impotence and will be of interest in our main thesis to be expounded.

One essential property of the basic marriage right is permanence. A possible example of the constitutional incapacity to fulfill the essential property of permanence could be the man who is gravely and deeply homosexual. In a recent decision of October 6, 1969, written by Pompedda, the Rota based its judgment of invalidity of the fact that the man in question was incapable of giving and accepting the "ius in corpus" such as is required by natural law. The phraseology of this decision could also be used to explain our approach, namely that the person himself is not the subject of marriage because of a constitutional or radical personal incapacity. This Rota decision says that the object of marriage in the case was lacking, but adds that the reason for this was that the one contracting was "incapable of transferring and accepting." It also states that in this person there was a "deorientation of the whole person" and that in proving this and other such cases one must be able to establish with moral certitude the *incapacity* of the one contracting, his incapacity to enter a valid marriage. Following this reasoning, we could add that should a person's constitution or radical orientation show a permanent inability to stay with any woman in a *continued* social marital relationship, then, at least theoretically, we could state that he had a radical incapacity to fulfill the essential property of *permanence.*

The other essential property of the basic marriage right is fidelity or exclusiveness. Following our general principle that one

---

[11] Canon 1013, § 2.
[12] Canon 1081, § 2.

cannot oblige himself to the impossible, we claim that one who is incapable of fidelity is incapable of marriage. An example of such a case is the decision of Sabattani.[13] Here the Rota stated, "When nymphomania reaches a stage of this kind (its most serious and permanent stage) and there is no way of curing it, it is not to be doubted that the marriage is invalid. For the woman so afflicted ought to be said to be incapable of assuming the obligation of fidelity because of her very constitutional make up."[14]

In this connection, the decision of Mattioli[15] is also interesting. He speaks of persons who because of an illness are at times affected mentally but who at other times are quite well. This decision states that if the specific illness is one which will definitely get worse as time goes on, then the person suffering from it *natura sua*, by his own nature, by nature itself, is unable to fulfill, for example, a permanent contract. This decision also implies that there can be a constitutional incapacity in the individual for a valid marriage apart from that individual's intellectual or volitional ability to contract.[16]

In all of these cases, we have an application of the principle that no one can be obliged to do what is for him impossible. When the constitutional incapacity is in reference to the basic right of marriage or either or both of its essential properties, nullity results.

We are naturally so aware of the fact that a subject for marriage is needed, *i.e.*, persons get married, that we can tend to overlook the fact that the persons attempting marriage must be "marriageable." So, for example, the law need not state in an explicit way that the subjects of marriage must be a man and a woman. We can further say that the Code of Canon Law need not explicitly state that the subject of marriage be a person basically capable, as an individual, of living as a married person. (We are here, for argument, limiting ourselves to the traditionally accepted essentials of marriage.)

Coming back to our line of reasoning, the incapacity to assume and to give is a result of the fact that the person *cannot* fulfill what he wishes to assume and to give. This inability to fulfill, which we call *constitutional incapacity,* is itself the result of the radical constitutional and fairly permanent makeup of the person. Thus, it is this personality, constituted as such, which permanently excludes (morally at least) such fulfillment. Therefore we have no "subject" of marriage, at least at the time in question. This considers nullity from the incapacity of just one of the parties. Our thesis extends this concept by applying it to the interrelationship of two particular persons.

THE CLINICAL FINDINGS OF EXPERTS

Let us first define the terms. According to Dr. Walter J. Coville, a psychologist, "essential incompatibility" is a radical incapacity so deeply rooted in the personality structures of the married couple that it is impossible for them to live a common life together. Dr. Coville explains that this deeply rooted incapacity is manifested by a life long history of periodic or constant maladjustment and/or by psychological test

---

13 49 S.R. Rotae Decisiones 503 (1957).
14 *Id.*
15 48 S.R. Rotae Decisiones 873 (1956).
16 *Id.*

findings and this structural incapacity is resistive to basic change by prolonged therapy even though there might be some improvement on the functioning level by such therapy. This is the scientific definition of psychologists and psychiatrists. We, as canonists, note in particular that essential incompatibility makes a common life impossible. Although some therapy might be used, there is a basic continuance of the maladjustment, making common life impossible at least in a realistic human sense. The parties may continue to live under the same roof, perhaps even in the same bed, but as total strangers. Essential incompatibility could still be found under these circumstances.

To prove that "essential incompatibility" does exist, let us quote from a number of experts who have appeared in the capacity of psychiatric experts before the Tribunal of Brooklyn:

> Dr. C. Joseph Chiarello, psychiatrist: There are couples who have sufficient power of discretion or maturity at the time of contracting marriage but who later in actual living together find themselves essentially incompatible and incapable of leading their married lives together.
>
> Dr. Dominick F. Chirico, psychiatrist: There are couples who possess sufficient power of discretion or maturity of judgment, but who, relative to each other, are so essentially incompatible that they are incapable of leading a married life, incapable of perpetuity, incapable of fidelity. However, they still may be able to accomplish this with someone else.
>
> Dr. Walter J. Coville, psychologist: There are couples who have good discretionary powers and are capable of sane judgment with regard to the marriage contract. However, their basic nature involves psychopathology that contraindicates their ability to maintain harmony, perpetuity or fidelity in marriage.
>
> Dr. William S. Davis, Jr., psychiatrist: In answer to your question [Are there couples where both parties would actually possess sufficient power of discretion or maturity of judgment but who, relative to each other are so essentially incompatible that they would be incapable of leading a married life, incapable of perpetuity, or of fidelity?] I feel that you are absolutely correct. On the other hand, if such a marriage remains, it is because both parties are equally ill (from a psychopathological point of view). Either the personalities complement what is lacking in the other or they play into each other in a sort of double bond parasitic way. For them it is a game. This marriage would never terminate. Unhappy they would be together but equally unhappy they would be apart. An example of this type of situation would be two sado-masochistic characters. If by chance one of the persons is relatively healthy, he or she would not be able to tolerate the other. They would be incompatible.
>
> Dr. Edward F. Falsey, psychiatrist: It would appear that there are instances in which both parties are so essentially incompatible that they are incapable of leading a married life, incapable of perpetuity and of fidelity. It is conceivable that they could marry other persons but could not marry each other.
>
> Dr. Frederic L. Gannon, psychiatrist: I seriously doubt the individual parties possess sufficient power of discretion if it does result in incompatibility . . . the issue of incompatibility or inability to sustain a mature relationship rests on the level of psychological development of the parties involved.
>
> Dr. Pasquale D. Lotesta, psychiatrist: There are personalities that are incompatible in that they are incapable of leading normal

married life but in other areas do possess sufficient power of discretion or maturity of judgment. It is conceivable that they could marry other persons and be compatible.

Dr. Leon Olinger, psychiatrist: Your second question involves the concept of 'essential incompatibility.' Do you mean by this, basic, unchangeable and irrevocable incompatibility? If yes, I am not sure it exists. Theoretically, individuals are capable of modifying and changing this behavior. By means of psychotherapy, adults can learn to free themselves from the shackles of childish, immature behavior patterns and develop mature, more adult forms of functioning. Two people who are "incompatible" at one time largely because they meet each other for immature or unhealthy neurotic reasons, may conceivably, through treatment, learn that they would prefer each other to any other. Similarly, people who are dissatisfied in one relationship because of unfulfilled neurotic needs, are likely to find themselves incompatible in another relationship.

Dr. John B. Scanlan, psychiatrist: It is conceivable that parties to an incompatible marriage could validly marry other persons.

Dr. John Deuel Sullivan, psychiatrist: On the whole, I have some pessimism about the usefulness of the incompatibility thesis as a basis for annulment. At the present time it seems to me that it would have to be more or less a post hoc argument. . . . Now we'll make some effort to be responsive to your questions. The first has to do with people who have good discretion but may actually be essentially incompatible to each other in permanence and exclusivity. It is conceivable that such people could validly marry other persons but cannot get along with each other. . . . It may very well be that one or both lacked due discretion and capacity for permanency, exclusivity and prolixity, but it can still be that people with individual psychopathology can make satisfactory marriages. I agree that psychological testing and psychiatric evaluation has established incompatibility in at least a few cases.

Dr. Francis C. Bauer, psychiatrist: There is absolutely no doubt that the married state permits a considerable amount of neurotic interaction. In many instances, states of adjustment, which could have been reached in the single state, are not possible because of the limits imposed by the contract regarding personal freedom. Accordingly, neurotic traits may impinge upon one another, establishing an entirely new dynamic. . . . If the neurotic traits of the partners feed each other in the marriage, they may continue to be sick but compatible and, indeed, may find mutual assistance. If the traits are not congruent however, the marriage is doomed to failure.

OUR THESIS: ESSENTIAL INCOMPATIBILITY CAN CAUSE NULLITY

From the above we believe that one can justifiably conclude that essential incompatibility does exist, that there are couples who are incapable of living a common life together, at least as psychiatrists consider essential incompatibility and as they understand common life. We need not hold absolutely that our experts' use of "essential" means precisely what we, as canonists, mean by "essential" in the canonical sense nor that their understanding of "common life" is the same as our notion of "common life." At least for the purpose of this paper, we are going to restrict our canonical definition of "common life" to *basic common conjugal* or *marital* life, *i.e.*, the actual use of marital intercourse. Nevertheless, the statements of the experts, including their principles and their examples of possible cases of "essential incompatibility" show that they are convinced that there are cases

of such basic, deep and broad incompatibility that we are certainly justified in saying that at least in some of these psychiatric cases there would be present inability to fulfill the canonically essential elements of a valid marriage.

There is one exception to the conclusion drawn above. This is the opinion of Dr. Leon Olinger who states that he is not certain that "basic, unchangeable and irrevocable incompatibility exists." He believes that two people who are incompatible at one time may conceivably, *through therapy*, come to the conclusion that they prefer to remain with each other. However, the question still remains as to how much therapy would be required in such a case. Could the condition be considered "curable" and therefore not perpetual if it required extensive therapy over a number of years? In some cases reported to our Tribunal psychotherapy was unsuccessful even after periods of 10 and 20 years. Even accepting Dr. Olinger's example, we might still find that the marriage is invalid.

Our thesis is that if essential incompatibility exists because of relative constitutional incapacity to lead a "common life," and if this relative constitutional incapacity exists at the time of the marriage and is incurable with a reasonable amount of therapy, the marriage is invalid. For canonical purposes, a definition with which all might agree at the present time, "common life" is *at least* the ability to lead a conjugal life, *i.e.*, to engage in marital intercourse in a human fashion. Experience shows that when two people are essentially incompatible in the sense understood by psychologists and psychiatrists, there frequently arises between them such a strong aversion to each other that marital intercourse between them becomes impossible, again in a human fashion, *i.e.*, with due regard for the dignity of the two persons as human beings. Relative constitutional incapacity, as we have described it, excludes any further possibility of the proper exercise of the *ius in corpus* when the open antagonism eventually becomes evident to both parties.

Under the conditions specified, because two specific incompatible persons might be incapable of *maritally* living together in a *permanent* manner, they would be incapable at the time of the marriage of exchanging *permanent* rights to acts suitable for the generation of children. Permanence or indissolubility is rendered impossible because of the relative constitutional incapacity existing at the time of the marriage. At the time of the marriage contract, the "two incompatibles" were incapable of giving to each other and accepting from each other *permanent* rights to marital acts because already at the time of the contract they had a relative constitutional incapacity to fulfill those rights in a permanent manner. They could not oblige themselves to do what they were *then* and *there* incapable of doing—of living a *permanent* conjugal life together—"until death do us part." *Nemo potest ad impossibile obligari.*

Constituents of Proof

By analogy with the elements of proof required to establish relative impotence according to Canon 1086, we state the following are required for proof:

1) Both parties to the marriage have a radical constitutional personality defect. The radical personality defect of each party,

although often serious, need not be as serious as when the alleged nullity is to be based on the personality of only one party.

2) The defects must have been present at the time of the marriage. Most frequently proof of this is not difficult because personalities do not readily change, especially without therapy.

3) The defects—or better the resulting personalities—in both parties, must be permanent (at least incurable with reasonable means).

4) The two defective personality structures must interact or clash in such a way that conjugal life (the required *ius in corpus*) becomes humanly impossible. If eventually it is established that the ability to love and to give mutual help and assistance are essential parts of the marriage contract, it would be sufficient to establish that the personalities clash in such a manner as to render love and mutual assistance impossible.[17]

The Proof

All of the experts who have advised us are of one mind that if essential incompatibility exists, sufficient external criteria should be available to satisfy the reasonable demands of the laws of evidence. They do not agree in all details as to what these external criteria should be. All agree that psychological testing in depth of both parties by a competent psychologist is most helpful; some say that such testing is necessary and should never be omitted; others say that a thorough clinical evaluation of both parties by a competent psychiatrist would be sufficient in many cases. In this regard an interesting question arises. Would the clinical findings from the psychological testing be considered sufficient proof? If these give sufficient objective criteria, should not the qualified psychologist be considered an expert? We think he should be. However, we also think that a psychiatrist, making use of the psychologist's findings and conclusions and integrating them with facts supplied by witnesses and perhaps other documents, may at times be of added assistance, especially in proving that the condition antedated the marriage.

The fact that two parties to a marriage have separated within a short time of their marriage after much arguing, bickering, etc., should be a sign for the canonical attorney that he *might* be dealing with a case of essential incompatibility and that a further study in depth by professional men might be helpful. Our experts have advised us that there are no "easy" criteria to recognize essential incompatibility, but that early sexual incompatibility, withdrawal of the parties into themselves with the avoidance of social contacts, neglect of important family responsibilities might suggest to the inexperienced that essential incompatibility might be present.

Examples of Essential Incompatibility

Certainly there are many cases of essential incompatibility where common life becomes impossible because of the very serious personality defect of only one of the parties, *e.g.*, schizophrenia, sociopathy, nymphomania, satyriasis, chronic alcoholism, severe neuroses, etc. While all of these, at least in their fully developed stages, are

[17] *See infra* p. 183.

themselves considered grounds for nullity, it might be (at least in some cases) that the nullity is present precisely because these conditions make common life impossible. It might also be that in some cases essential incompatibility might be easier to prove than the "lack of due discretion." Objective criteria for due discretion are not always easy to establish. In addition, some individuals might cooperate in an "incompatibility" action more readily than in an action where their own "due discretion" was being questioned.

We have been advised by our experts that generally two mature people are able to adapt themselves to the minor differences which arise between them. Incompatibility results when one or both suffer from personality defects, especially immaturity. Thus, it has been pointed out that opposing trends, as an overly dependent person with an overly aggressive person, or an overly detached person with an overly aggressive person, can result in incompatibility. Similar trends can also cause incompatibility as in the case of two aggressive persons who compete and fight against each other. In this case, the possession of the same trait may antagonize the other. In such cases, the differences between the two people may be so great that there cannot be any bridging of the gap between them.

Relation Between Essential Incompatibility and the Lack of Due Discretion

Where essential incompatibility is caused primarily by such severe personality defects as schizophrenia, manic-depressive psychosis, chronic alcoholism, severe neuroses, etc., it is evident that the "lack of due discretion" might also be present and be provable. In the present paper, we have eliminated these grounds from our discussion, deliberately restricting ourselves to a consideration of such marriages where the two parties find themselves essentially incompatible but possibly could enter compatible marriages with other spouses. Does the very fact that two incompatible parties marry necessarily indicate that one or both of them lacked the necessary "due discretion" for a marriage? This remains a disputed question. Some experts claim that two incompatible partners, both enjoying due discretion, can make an honest mistake in the choice of a partner. Others state that in the case of essential incompatibility the parties because of their immaturity have a marked lack of understanding—blind spots —with the result that neither can see the other's position. Such lack of understanding is also present and affects the choice of a mate. Does this eliminate the usefulness of an action based on essential incompatibility? We think not. The standards of "due discretion" used by the psychiatrist might differ from those required by canonical jurisprudence. Secondly, essential incompatibility might be more easy to prove than "lack of due discretion." In recent months "lack of due discretion" cases have met increased disfavor in jurisprudence at the Rota. There is always the possibility that a case might have to face such an appeal.

Could the Concept of the "Essential Elements" of Marriage Be Broadened?

Before going into this particular question, we believe that, at least theoretically, invalidity could result from relative consti-

tutional incapacity because the persons would not be capable of fulfilling an essential element of marriage—an element, that is, which is *recognized by all* to be essential to marriage. In other words, to have such grounds for invalidity, we do not feel that the essential object of marriage necessarily must be enlarged. However, in analyzing possible cases of this nature (relative constitutional incapacity) we do observe that often it is evident that what are termed the "secondary ends" of marriage are certainly not being fulfilled. Consequently, a real question arises as to whether the individuals taken together are even able to fulfill these secondary ends. Therefore, it seems appropriate to touch on this point in considering the legal aspects of our present discussion.

A question then could be, is that list of "essential" elements which limits itself to the *ius in corpus*, to permanence and to exclusiveness actually too limited? Should one consider the "mutual help" of Canon 1013 as also essential to a real marriage? Certainly this "end" of marriage is more than of simply "great value" to marriage. It is an end of marriage as marriage is constituted by God and nature.

It seems that one of the reasons for our problem is that we do not have in the Code a precise definition of marriage. The Code does, however, give some elements of a definition.[18] Yet, traditionally canonical jurisprudence before the Code did have something of a definition—one accepted from Roman Law. Justinian's definition of marriage was: *"Nuptiae autem, sive matrimonium, est viri et mulieries coninuctio, individuam vitae consuetudinem continens."*[19] In other words, marriage is a union of a man and a woman that contains within it an indivisable intimacy or way of life. This was accepted by Gratian[20] and by Pope Gregory IX.[21] The definition implies that more than the *ius in corpus* is part of the essential object of marriage. In discussing the formal object of marriage, there is an interesting sentence in one of the Rota decisions previous to the Code *"objectum vero formale* et essentiale *huius contractus,* praeter *mutuum vitae adiutorium, est potestas, seu ius . . . in corpus ad coeundum."*[22] The formal and essential object of this contract, besides mutual help for life, is the power or right to normal sexual acts.

When the Code speaks of the secondary ends of marriage, it is not by calling them "secondary" certainly and clearly saying that they are not essential to marriage. Therefore, one is led to ask whether if the secondary ends, absolutely and permanently cannot be fulfilled by the parties, would we have a real marriage? Is not mutual help something of a reflection of God's judgment that "it is not good for man to be alone." This was the reason for creating

[18] *See* Canons 1012, 1013, 1081, 1082 (especially Canon 1013 which deals with the ends and properties of marriage).

[19] THE INSTITUTES OF JUSTINIAN, bk. 1, tit. 9, line 1 (5th ed., J. Moyle transl. 1949).

[20] Decretum in Gratiani, dictum ante c.1, C.XXVII, q. 2.

[21] Decretales Greg. IX, c.11, X, de presumpt., II, 23.

[22] 6 S.R. Rotae Decisiones 208 (1914).

woman to be man's "helpmate." But by also giving woman to man as man's "wife," certainly did not mean that she would be less his helpmate—rather she would be totally, more intimately and permanently such a "helpmate." Whatever might be said on this point by Scriptures scholars, certainly in the factual order—in the order of present human nature, the order which marriage is now to take care of—mutual help is undoubtedly more than of "additional" value.

For many years now the general need for cohabitation and a community of bed and board have been viewed to be only required for the "integrity and perfection" of conjugal life. The *ius in corpus*, was the "essential" object of the contract. But is the *ius in corpus* the only essential object? When persons enter marriage they contract for *a life* together—a marital life. They intend to give and to accept an affection of life that is called marital—the *affectio maritalis* of Roman Law. This *affectio maritalis* is a distinct thing—very different from, for example, *affectio concubinaria* which in some basic way pertains to the same material acts. It has a more total aspect to it. Marital life, precisely as marital, means a community or a society that will in a continued and exclusive way assist the two persons to fulfill their basic human needs and to develop themselves as persons. Marriage then, considered as a state of life, requires from the viewpoint of subject, a person capable of living in this society of marriage. As was said before, if a person cannot give consent (because of serious mental illness) then he contracts invalidly because the marriage, considered in its act of celebration (*matrimonium in fieri*) is defective. But if a person *cannot live* out the society that real marriage demands, then he is incapable of "being married," of being able to "create" the society of marriage, of being one of the "necessary constituents" of a factual marriage (*matrimonium in facto esse*). People marry to help themselves live a certain kind of good life. Through marriage they should find assistance in bearing their problems, in developing their good points, in being able to use their talents, assistance in facing difficulties that will normally arise in life, and help in fulfilling their part in the raising of children that might be born. If instead of such assistance and help, constant and across the board opposition is the normal experience, then one of the real God-given ends of marriage is impossible and whether that end is secondary or primary (or whether the two ends are equally important) it is still an end of marriage as nature of God instituted marriage. A person does not intend to enter what might be considered half a marriage contract. They are accepting marriage as it is *in toto*, as it is supposed to be in the practical order. Therefore, these persons, before anything else, should be able to so accept and fulfill marriage.

Using other terms, marriage as classical Roman Law considered it, is a domestic union of a man and a woman. Specifically as "domestic" it demands in a person at least the capability of being such, namely that one can function in such a way that he can form, build up, establish a home, "a domus" in its general and basic human

aspects. If one *deliberately* does not do this, that of course is an entirely different question. Still he would be *able* to do it. We feel that this idea is more than implied by Canon 1082, which states that the necessary "knowledge" for marriage is that it is a permanent "society" between man and woman.[23] Just as after puberty such "knowledge" is presumed to be present,[24] so too, we might say it is presumed that the individual after puberty is *able* basically to live out such a "society" as well.

Clearly this would broaden our possible areas of invalidity. Going back for a moment, we see that as the *ius in corpus* is essential (as are also the essential properties of that *ius*, namely perpetuity and exclusiveness), then a person who is incapable of fulfilling some or all of these aspects cannot contract validly. But what if mutual help were also essential? Would it not also follow that this essential element would have its own essential "properties" of individuality and permanence? In this hypothesis the inability to fulfill this end and/or the properties related to it would also invalidate a marriage. Why?

Well, it appears to us that first it would have to be shown that the secondary end was also essential. For the moment, we will accept the traditional distinction between primary and secondary ends since the matter in question can be argued we believe in that context and should the distinction be changed in the future, our argument would be just as valid. There is a statement in a 1938 Rotal decision coram Jullien that holds just this. *"Finis vero primarius et secundarius uterque est finis operis, seu finis matrimonii debitus, essentialis, matrimonio intrinsecus."*[25] In other words, the secondary end of marriage is also an end of marriage itself (*finis operis*) in distinction to an additional end of the one entering marriage (*finis operantis*) and this end is not only intrinsic to marriage but essential. It would appear justifiable then to say that as there is an essential object related to the primary and essential end of marriage, so too there is an essential object related to the secondary and essential end. The primary end of marriage is children and the essential object of the contract related to that end is the "ius in corpus". If a person cannot (*e.g.*, because of impotence) fulfill this essential object then he is not a proper subject of marriage. The secondary end of marriage is mutal help and we could say that the essential object of the contract related to that end is the "right to a shared life" (common life, in *that* sense) or the "right to a sharing of each others lives." Likewise, then if a person cannot (*e.g.*, because of radical personality incapacity) fulfill this other essential object, he would not be a proper subject of marriage.

Admittedly it would be very difficult—at least at first—to decide and to define what are the essential constituents of "mutual help" or of a "shared life," but that does not deny the value of trying to determine the constituents of these things as

[23] Canon 1082, § 1.
[24] Canon 1082, § 2.
[25] 30 S.R. Rotae Decisiones 344 (1938).

well as the precise relationship of mutual help to "essential object" of marriage.

Some statements in section 50 of the Constitution, *Gaudium et Spes* of the Second Vatican Council seem to imply that the marriage contract essentially obliges the parties to mutual help and assistance and to a common life. It will be noticed that in the new rite for the sacrament of marriage the parties explicitly promise to love and honor each other. Should not such an explicit promise be considered part of the essence of the contract?[26]

[26] For a lengthy discussion by one who believes that the essence of the marriage contract has not been changed by *Gaudium et Spes* we refer to Pio Fedele, the director of Ephemerides Iuris Canonici. *See* 23 Ephemerides Iuris Canonici 50-134 (1967).