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Roberto Rosas

St. Mary's University School of Law, rrosas@stmarytx.edu

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ROBERTO ROSAS

St. Mary's University School of Law
San Antonio, Texas, USA

The Law of the Church in the Nullity of Marriage due to Causes of Psychic Nature*

The Law of the Church in the Nullity of Marriage due to Causes of Psychic Nature

Introduction. – I. The principles of marriage, matrimonial consent and nullity of marriage in Canon Law. – II. The ordinary process of a declaration of nullity of marriage. The enhancement to the Code of Canon Law by the Instruction *Dignitas connubii*. – 1. Summary of the principal functions of the *Dignitas connubii*. – 2. Connections of *Dignitas connubii* to can. 1095 of the Code. – III. Recent Rotal Jurisprudence and the *Dignitas connubii*. – 1. Doctrine and case law. – a. Grave defect of discretion of judgment. – b. Incapacity to assume the essential obligations of marriage. – 2. Recent Rotal Jurisprudence. – a. Lack of discretion of judgment. – b. Incapacity to assume the essential obligations. – Conclusion.

As seen through the eyes of religious poetry, marriage is the greatest symbol of mystical life. Marriage, alongside night and flame, is one of three dominant symbols in the works of St. John of the Cross, a fourteenth century mystic and poet. These three symbols together provide the tone and atmosphere of the mystical world: night representing significance, marriage meaning the communion of love and flame meaning change and life. In other words: “the symbol of the flame is the *brooch* and the culmination of the fervor of the consummated love in marriage and is the perfect gradual illumination of the dark night”¹.

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¹ S. JUAN DE LA CRUZ, *Obra poética completa*, ed. Miguel de Santiago, Barcelona 1977, 23.

The existence of a valid marriage is due to the foundational power of a sole efficient cause², which is consent. Can. 1057 §1 clearly and resolutely indicates “[t]he consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent”³.

According to can. 1057 §2: “[m]atrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage”, it is understood that the consent of each party consists of a voluntary act through which each gives and accepts of each other. With its goal being to create a marriage, the act of consent should be considered as human, intelligent, and free. It is not limited to a present commitment but serves as a promise for the future for life.

This leads us to take up again the commentaries made regarding the text of *The Contemplation for Obtaining Love* by St. Ignatius Loyola in his celebrated *Spiritual Exercises*: “First lets draw our attention to the fact that love has «two parts», which are «the person giving love and the person receiving love». Two parts means two individuals, who tend to have only one love: *duo in corde uno* (two in one heart)”⁴.

These bases, briefly described, will serve to develop throughout this article the following points: (1) the essential elements of marriage, matrimonial consent and its nullity in canon law; (2) Canon Law and the Instructions *Dignitas connubii*; and (3) recent jurisprudence concerning matrimonial nullity. On this intellectual journey readers are invited to discover, through the study of the above-mentioned points, the *terra incognita*, as described by Daniel Boorstin, “[t]he most promising words ever written on the maps of human knowledge”⁵. This unknown territory is the complete understanding of canonical matrimonial consent.

Although this work is aimed at all those interested in the study of matrimonial canon law (academics, lawyers, and/or students), its focus is essentially for those with various roles in the Tribunals of the Church, working with the matrimonial causes in favor of the people of God. It aims to shed light on

² Aristotle argued that, in order to understand an object, especially changes that the object might undergo, one has to understand its four causes. According to Aristotle, the *efficient cause* of an object is “the source of the first beginning of change or rest” (ARISTOTLE, *Metaphysics*, book 5, section 1013a, trans. H. Tredennick, London 1989).

³ All Code citations in this article are from: CANON LAW SOCIETY OF AMERICA, *Code of Canon Law*, Latin-English Edition, New English Translation, Libreria Editrice Vaticana 1998.

⁴ I. CASANOVAS, *Comentario y explicación de los Ejercicios Espirituales de San Ignacio de Loyola*, t. VI, *Explicación de las meditaciones de 4ª semana*, Barcelona 1948, 210-211.

⁵ D.J. BOORSTIN, *The Discoverers. A History of Man's search to know his World and himself*, New York 1983, p. XVI.

and clarify can. 1095, 2^o and 3^o by making clear how the causes of defect of discretion of judgment and the inability to assume the essential obligations due to psychic disorder affect the validity of marriage. Additionally, it show the role of the Instruction *Dignitas connubii* as a tool intended to help judges and other tribunal ministers of the Church who are entrusted with hearing causes of nullity of marriage.

It is also for those who hope, with illusion and anxiety, that the tribunals alleviate their suffering and finally allow them to rebuild their broken lives. The latter should remember what Francesco Carnelutti said should be present in all Tribunals: "Justice with Peace", so that the conflicting parties may leave with justice and peace⁶, the judges at all times applying canonical equity and thinking about the *salus animarum* (salvation of souls) as the supreme law of the Church, indicated in the final can. 1752 of the Code of Canon Law.

I. THE PRINCIPLES OF MARRIAGE, MATRIMONIAL CONSENT AND NULLITY OF MARRIAGE IN CANON LAW

The legal canonical definition of marriage, obtained through a slight style modification of can. 1055, describes it as: "A partnership of the whole life established between a male and a female through the matrimonial partnership (alliance), order, by its own nature, for the good of the spouses and for the procreation and education of the offspring"⁷.

God, the Creator of nature, established the natural matrimonial institution which consists in: (1) its personal structures (man and woman become intimately complete in the biological and spiritual order); (2) the essence and the essential properties: the total union or unity of life for a lifetime, destined to last as long as one of the spouses does not die and thus exclusive and indissoluble; (3) the essential ends or purposes; (4) the reciprocal rights and obligations; (5) the ethical and religious principles, which along with the positive legislative norms, specify the partnership in its totality and the content of each of the rights and obligations of its members⁸.

As for the purposes, understood as that ends for which an action is carried out⁹, juridical relevance is given to the essential and objective purposes

⁶ Cf. F. CARNELUTTI, *Sistema di diritto processuale civile*, I, *Funzione e composizione del processo*, Padova 1936, 247.

⁷ A. BERNÁRDEZ CANTÓN, *Compendio de derecho matrimonial canonico*, Madrid 2006⁹, 23.

⁸ Cf. J.J. GARCÍA FAÍLDE, *Nuevo estudio sobre trastornos psíquicos y nulidad del matrimonio*, Salamanca 2003, 81-82.

⁹ Cf. C. WARNHOLTZ BUSTILLOS, *Manual de derecho matrimonial canónico*, Ciudad de México 1996, 28.

of marriage, now identified in the good of the spouses and the procreation and education of the offspring: the first one grounded in conjugal love and distinguished from the other three goods identified by St. Augustine (*bonum sacramenti, bonum fidei* and *bonum prolis*)¹⁰. Those three goods are taking part of the essence of marriage and keeps intrinsic connection with its properties, namely the unity and the indissoluble character of marriage¹¹.

As we read in the can. 1055, thereby understood partnership of a man and a women between baptized persons is raised by Christ to the dignity of a sacrament: to a sign and real symbol that confers grace by way of the act performed by Christ and not just through the faith of those that receive it¹². Christ, by way of His death and resurrection, established the *New alliance* with the people, and christian husband and wife, who by way of baptism are members of the body of Christ, participate with Christ in the mission of sanctification, salvation and of the growth of the mystic body. The significance of the *new alliance* is not purely symbolic, but rather one that must be effective: both christian husband and wife must reflect and make effective in their conjugal union the union of Christ and the Church, with all that such union implicates, namely love, surrender, loyalty, communion and the unbreakable character of the union¹³.

As it is confirmed by can. 1057 §1, the founding element of marriage as above described is the act of the will of the parties: “[t]he consent of the parties, legitimately manifested between persons who are capable according to law, makes marriage; no human power can supply this consent”. So, basically, the consent is: (1) necessary, and (2) sufficient for the concrete marriage to exist. Obviously the matrimonial consent is made up of two acts of will, corresponding to each spouse: if this act of will is lacking or is legally ineffective in just one of the spouses, the marriage as covenant doesn’t come to existence¹⁴.

The efficacy of an exercise of will depends on intelligence, emotions, and other factors in such a way that summarize will as psychic activity of an individual and the end phase of all psychic activity. The act of exercising will is comprised of three successive phases: (1) presentation by understanding,

¹⁰ For an extensive presentation of the ends and goods of marriage see: R. ROSAS, *Matrimonial Consent in Canon Law. Juridical Aspects*, Revista Jurídica de la Universidad Interamericana de Puerto Rico 43 (2009) 423-430.

¹¹ Cf. *Ibidem*, 430-431.

¹² Cf. L.G. WRENN, *The Invalid Marriage*, Washington 1998, 222; R. ROSAS, *Matrimonial Consent...*, cit., 431-432.

¹³ Cf. JOHN PAUL II, Ap. Exhort. *Familiaris consortio*, n° 13; C. WARNHOLTZ BUSTILLOS, *Manual de derecho matrimonial...* cit., 46-48; R. ROSAS, *Matrimonial Consent...*, cit., 432-438.

¹⁴ Cf. R. ROSAS, *Matrimonial Consent...*, cit., 439-442.

(2) election, and (3) execution. During the first phase, presentation, the subject examines, analyzes, values and compares the various motives for which he either makes a decision or rejects something. These motives consist of all things that move the will to do something. The second phase, election, is the selection of one of those motives, and consequently determines whether the act of will arises or not. Whether the will wants something or ceases to want something depends on the coloring or tonality of attraction or repulsion of the motive. Execution, the third phase of the act of will, is understood as a motor function derived from the motive that has been selected¹⁵.

Additionally, considering that the fundamental attribute of will is freedom, which consists of the psychological capacity of doing "free" acts, or acts of election. The wanting of will is an act of election, always considering freedom as an internal capacity of an individual. Nevertheless today it is well known that there are psychic anomalies that, while leaving intact the capacity of the intelligence to reflect as is appropriate, affect the will. These anomalies cause the will to be unable to perform the act of choice, giving rise to a lack of capacity to choose and also producing in said will, the lack of proper freedom. García Faílde, for example, mentions that psychic disorders of this nature are or can be neurosis, psychopathies, affective imbalances, incoercible internal propulsions, and obsessive ideas¹⁶. As a result, there have been Roman Rota sentences that have declared marriages null for lack of internal freedom in the case of some of these psychic disorders that directly interest the will¹⁷.

It is widely known, however, that according to classic doctrine, it was inconceivable that the will would fail because of an illness or an irresistible impulse, while not affecting the understanding. The thesis of *ubi intellectus ibi et voluntas*, which was sustained by scholastic philosophy, was used as a starting point to argue that only a disorder in the act of understanding can bring about a defect of will and specifically of freedom. The oldest jurisprudence of the Roman Rota followed this conclusions and declared marriages null for a lack of internal freedom only when it appeared that the psychic disturbance had hindered the practical judgment, but not because of a lack of internal freedom understood as an autonomous subject or independent of the serious defect of discretion of judgment¹⁸.

¹⁵ Cf. J.J. GARCÍA FAÍLDE, *Nuevo estudio...*, cit., 132-133; R. ROSAS, *Matrimonial Consent...*, cit., 446-447.

¹⁶ Cf. J.J. GARCÍA FAÍLDE, *Nuevo estudio...*, cit., 33.

¹⁷ Cf., for example, c. DE JORIO, 20 XII 1967, RRD 59 (1967) 870; c. LEFEBVRE, 28 IV 1972, RRD 64 (1972) 338.

¹⁸ Cf. J.G. CAIUBY CRESCENTI, *Falta de liberdade interna e nulidade de consentimento matrimonial. Reflexões sobre o princípio «ubi intellectus, ibi voluntas» nas decisões da Rota Romana (1977-1986)*, Roma 1990, 305-317; J.J. GARCÍA FAÍLDE, *Nuevo estudio...*, cit., 34.

On the other hand, one part of the doctrine uphold the position that even in the cases in which sufficient deliberation and discretion of judgment exists, it could happened a lack of required freedom, which should be individualized as an autonomous ground of nullity based on can. 1057. It must be considered as a lack of the voluntary aspects of this act of will which is the marital consent; it can be interpreted, in a broad sense, as a basic element of that consent in its agglutinating oneness of volitive and intellective elements, or it can be interpreted in a strict sense, which limits itself to the volitive aspects, independently of the intellective aspects of that same human act¹⁹.

Finally, the great influence over the will has also the emotional life because, aside from the fact that the lack or scarcity of emotional resonance deprives the will of one of the most powerful impulses, the will feels attracted to choose between the motivations that the understanding presents to it, those whose tone is pleasant. This is nothing more than a particular case of what generally happens in life: one is inclined to accept the pleasant and refuse the unpleasant, and within the pleasant, one is led to choose the most pleasant over the least²⁰.

Now, the acts which lead to the creation of marital consent can be summarized in three steps: (1) intellectual, theoretical knowledge of what marriage is and the sufficient use of reason; (2) reflection and discretion of judgment, and (3) the act of free will. And each of these steps should met the requirements indicated in the cann. 1096 and 1095, otherwise the marital bound can not be created. In other words, the process of understanding, including the formation of ideas, of universal concepts, theoretical judgments, reflection, and practical judgments, takes to the act of free will. But when the process of understanding is absent because the individual has been unable to carry it out due to insufficient use of reason or a grave defect of discretion of judgment, than marriage could be consider as null and void²¹.

As it is well known, a marriage is null when, at the time of its celebration, there was a diriment impediment, a defect or lack of consent, or a defect of legitimate form. It is obvious from the text of can. 1057 §1²², which for its part is specific application of general norm brought by can. 124 §2 that "[f]or the validity of a juridic act it is required that it be placed by a person who is

¹⁹ Cf. J.J. GARCÍA FAILDE, *Nuevo estudio...*, cit., 34; ID., *La libertà psicologica e il matrimonio*, in *L'incapacità di intendere e di volere nel Diritto matrimoniale canonico (can. 1095, nn. 1-2)*, Città del Vaticano 2000, 41-50.

²⁰ Cf. R. ROSAS, *Matrimonial Consent...*, cit., 455-459.

²¹ Cf. R. ROSAS, *Matrimonial Consent...*, cit., 460-464.

²² Can. 1057 §1: "A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power".

legally capable, and it must contain those elements which constitute the essence of the act, as well as the formalities and requirements which the law prescribes for the validity of the act". Both canons explicitly mention legal ability of the persons ("a persona habili", "inter personas iure habiles"), which mainly means lack of any diriment impediment²³, and both of them presume the consensual capacity of involved persons. For the purpose of this study we need to take a close look only to the last source of nullity of marriage, and could over fly others, explicitly mentioned in the above cited norms.

Alongside the situations or causes, which results in the defect of consent (such as ignorance, various kind of error, simulation, condition or force and fear) and consequently invalidity of marriage, the first group of causes of the defect of consent (or better the inexistence or lack of valid consent) is exactly the treated until now the incapacity to give consent. The Code of Canon Law, in the just mentioned can. 1095, n° 1-3, declares that they are incapable to contracting marriage "those who lack the sufficient use of reason", "those who suffer from grave lack of discretion of judgment concerning essential matrimonial rights and duties, mutually to be handed over and accepted", and "those who are not capable of assuming the essential obligations of marriage due to causes of a psychic nature". So, the canonical norm distinguishes between these three causes of incapacity to consent that "could refer to the psychological process of the human act: to know, to decide, and to realize. All of the phases of the process are interrelated by the unity of the act and of the operating subject, so that with all likeliness all the process is to be treated as unique course of action only"²⁴.

II. THE ORDINARY PROCESS OF A DECLARATION OF NULLITY OF MARRIAGE. THE ENHANCEMENT TO THE CODE OF CANON LAW BY THE INSTRUCTION *DIGNITAS CONNUBII*

The declaration of nullity of a marriage by a tribunal implies a finding that there never existed a juridical marital bond, and as such the spouses will return to their civil states prior to the celebration. So the judicial pronouncement is limited to confirming the nullity in a solely declarative manner, but on the other side the nullity of a marriage is only effective if it has been de-

²³ Impediments intended as prohibitions or restrictions, which "renders a person incapable of validly contracting a marriage" (can. 1073).

²⁴ I. PÉREZ DE HEREDIA Y VALLE, *Commentary of can. 1095*, in A. BENLLOCH POVEDA (ed.), *Código de derecho canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, Valencia 1993², 493.

clared so judicially, without confusing its effects with those of the dissolution of a marriage, as the latter supposes a formal act by which the breaking of a presumably valid marital bond is produced²⁵. The nullity of a marriage does not exempt the parents from their obligations to their children, since those duties are a result of the parental relationship, regardless of whether the parents are married or not²⁶.

The canonical process could be defined as “a series or succession of legal-formal acts, celebrated before a tribunal of justice, by virtue of a claim – understood as an act of complaint – made in the form, with *fumus boni iuris*, by a person against another, and whose acts are directed towards obtaining a binding declaration or recognition, the legal statement or the imposition of conduct, in relation to matters and persons subject to the jurisdictional power of the Church”²⁷.

The ordinary process is regulated in the Code of Canon Law by the norms of the trial in general, of the ordinary contentious processes, and by a series of norms for special processes, among which the matrimonial processes are found, and among them, the cases to declare nullity of marriage²⁸, that are divided between those, which derive their regulation from the ordinary processes (these cases do not cease being the same ordinary processes with some modifications), and those, which have an independent and proper regulation.

²⁵ Cf. C.M. MORÁN BUSTOS, C. PEÑA GARCÍA, *Nulidad de matrimonio y proceso canónico. Comentario adaptado a la “Instrucción Dignitas connubii”*, Madrid 2007, 42-43.

²⁶ Cf. for example, *Texas Family Code*, Chapter 151: Rights and duties in Parent-Child Relationship, Sec. 151.001, (b): “The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in a secondary school...” (<http://www.statutes.legis.state.tx.us/Docs/FA/pdf/FA.151.pdf>). Cf. also: M. PONS GONZÁLEZ, M.A. DEL ARCO TORRES, *Separación, divorcio y nulidad matrimonial: régimen jurídico. Teoría, praxis judicial y formularios*, Granada 2002⁵, 241; F. PÉREZ TORTOSA, *Proceso y nulidad matrimonial canónica*, Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche 6 (2010) 164.

²⁷ C. DE DIEGO-LORA, *Capítulo XIII. La tutela de los derechos en la Iglesia*, §2. *El Proceso*, in INSTITUTO MARTÍN DE AZPILCUETA (ed.), *Manual de Derecho Canónico*, Pamplona 1991², 785. While can. 1400 uses the word “trial”, it seems more appropriate to use the term “process” since it extends to the entire legal institution and not solely to the act of the trial. In this sense, neither “trial”, “cause”, nor “procedure” can be confused with the word “process”, although the Code, in his Book VII, uses them indiscriminately. Cf. F. PÉREZ TORTOSA, *Proceso y nulidad...* cit., 165, nt. 85.

²⁸ The Code uses the term “cases” or “causes” for the marital processes in compliance with the “great tradition in the forensic use and practice, but which at the end has the same meaning and reach as the words *process* and *trial* also used by the Code with the term “case”; applying this one to the process seems to be understood, more than the whole of the processal activity, or of the judgment that the judge issues in the sentence, as the juridical matter subject to the process and that is the cause of the same” (C. DE DIEGO-LORA, *Capítulo XIII...*, cit., 788). Cf. F. PÉREZ TORTOSA, *Proceso y nulidad...* cit., 165, nt. 86.

So according to the present regulations, the ordinary process of nullity is governed by the processal norms of judgment in general, of the ordinary contentious process and by the special processal norms for this process (can. 1691). Given this dispersion of this regulation along the Code, is particularly relevant legislative developments made through the Instruction *Dignitas connubii*, promulgated in 2005. The Instruction reorders, clarifies, and completes the norms of the Code of Canon Law referring to the steps of the canonical processes for the declaration of nullity of marriage, and additionally attempts to favor the legal security and fair application of the processal norms²⁹.

The intended audience of the *Dignitas connubii* are diocesan and inter-diocesan tribunals of the Latin Catholic Church, exclusively in order to treat and resolve the causes of nullity of marriage³⁰, and as “a help to judges and other ministers of the tribunals of the Church, to whom the sacred ministry of hearing the causes of the nullity of marriage has been entrusted”³¹. So, as a kind of “a help to judges” the Instruction cannot be incompatible with the Code of Canon Law: its *Preamble* clarifies already the superiority of the last one saying that “the procedural laws of the Code of Canon Law for the declaration of the nullity of marriage remain in their full force and reference is always to be made to them in interpreting the Instruction”. And immediately adds very important statement, that “keeping in mind the proper nature of this kind of process, it is especially important to avoid both a juridical formalism, which is entirely foreign to the spirit of the laws of the Church, and a way of acting that indulges in too great a subjectivism in interpreting and applying both the substantive and the procedural norms”³².

1. Summary of the principal functions of the *Dignitas connubii*

Can. 1691 of the Code states that the general norms on the contentious trial are to be used for the marriage nullity process unless the nature of the case demands otherwise³³. Therefore, as it was said already, the *Dignitas connubii* assumes the responsibility of harmonizing the general norms of the

²⁹ Cf. F. PÉREZ TORTOSA, *Proceso y nulidad...* cit., 165-166; C.M. MORÁN BUSTOS, C. PEÑA GARCÍA, *Nulidad de matrimonio...*, cit., 29-31.

³⁰ Cf. J.J. GARCÍA FAILDE, *La instrucción 'Dignitas connubii' a examen. Texto castellano y comentario de sus artículos*, Salamanca 2006, 16.

³¹ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Instruction Dignitas connubii*, Vatican City 2005, 17.

³² *Ibidem*.

³³ Can. 1691: “In other procedural matters, the canons on trials in general and on the ordinary contentious trial must be applied unless the nature of the matter precludes it; the special norms for cases concerning the status of persons and cases pertaining to the public good are to be observed”.

Code on the contentious trial with the marriage nullity process. So, beside the mentioned "superiority of the Code", the fundamental interpretive key of the *Instruction* aspires that the norms of the Code on the marriage nullity processes be read and implemented in light of the provisions of the *Instruction* itself.

The function of the marriage nullity process is significant. It serves to promote the good of marriage in general and in particular, to protect its indissoluble character. The presumption of the law is in favor of the validity of each marriage (cf. can. 1060). So the first goal of the *Instruction* is to facilitate the application of the procedural law of the Church, making it easier for the marriage nullity process to recognize the truth regarding the marriage bond.

Nevertheless the process of nullity of marriage can be overwhelming for many spouses. It might be taken as the invalidation of a period of their lives that to them constituted a real marriage, even though, according to the Church's law, it could be declared null. As such, the parties to the process may find it unfamiliar and unsettling. One of the purposes of the *Dignitas connubii* is to recognize the feelings of the spouses and to remind the tribunals to not only address the legal aspects of the particular cause, but also to be cognizant of personal *concerns* the parties might confront along the way.

In a more juridical nature, the provisions of the *Dignitas connubii* reaffirm the juridic structure of the marriage nullity process and encourage adherence to that same structure. It serves to clarify the provisions of the universal law and elaborate on the manner in which they are to be observed. Simply put, the law is contained in the Code, while the *Instruction* serves as a guide for the implementation of that law.

2. Connections of *Dignitas connubii* to can. 1095 of the Code

While the *Instruction Dignitas connubii* does not specifically speak about can. 1057, which deals with the consent as a sole efficient cause of a marriage, it certainly has an explicit and significant application of can. 1095, which speaks about consensual incapacity of contracting marriage³⁴.

The first application to can. 1095 in the *Dignitas connubii* is found in art. 56, which deals with the duties of the Defender of the Bond, whose presence is required in causes of the nullity of marriage. This person, with qualifications mentioned in art. 54 DC, assists the judge by directing his or her own efforts to discover the truth regarding the alleged nullity of marriage. His or her duty is to protect the marriage, to the extent that it is reasonable, by intervening on behalf of the marital bond.

³⁴ For all this section see: P. BIANCHI, *L'istruzione Dignitas connubii e il can. 1095*, *Periodica* 94 (2005) 509-542.

Section 4 of art. 56 DC, relates directly to can. 1095 and pertains to the duty of the defender of the bond with regard to experts who may possibly participate in the marriage nullity process, in trials based on psychic causes. Already Pope John Paul II spoke of the importance of the defender's role in psychic incapacity causes in his discourse to the Roman Rota in 1988³⁵. Accordingly, the *Instruction* gives the defender of the bond specific powers when participating in trials based on psychic causes, while still remaining within the general framework of his or her duties as elaborated by the Code. As indicated by art. 56 DC, the obligations of the defender of the bond in causes of marriage nullity are follows: (1) to assure that any questions posed to the expert are clear, that they address the matter at hand, and to assure that the expert is not asked to respond to something that is outside his area of competence; (2) most importantly, to make sure the expert is not asked for his opinion regarding the nullity of the marriage in question; (3) to assure the expert's conceptual foundations are grounded in principles of Christian anthropology and inquire as to the scientific method used by the expert; and (4) to emphasize any aspects of the expert's report that speak against a declaration of nullity³⁶.

Later on, can. 1095 is implicitly mentioned again in art. 97 DC, which regards the question of representation for those incapable of standing trial. Art. 97 §1 DC states that "[t]hose who are deprived of the use of reason can stand trial only through a guardian (cf. can. 1478 §1)". Regarding, therefore, the appointment of guardians, it is important to give attention to marriage nullity trials to causes that are based on the ground of nullity of can. 1095. In case of the assertion that the party was incapable of marriage due to *the lack of reason* (can. 1095, 1), and that party remains not in control of himself, the court should presume that the appointment of a guardian is necessary to protect the rights of the party in question. This, however, is a rebuttable presumption. It should not be easily assumed that because a party habitually lacked the use of reason at the time of consent, that he or she continues to lack it years later at the time of the marriage nullity trial³⁷.

If the assertion is that the party was incapable of marriage due to a defect of discretion of judgment (*defectus discretionis iudicii*), directed in can. 1095, 2, there should be even less of a presumption that the party is currently incapable to stand trial. It is possible that any lack of due discretion at the time of consent has since vanished. There is also the possibility that this lack of due discretion was of such a nature, that it would not conflict with the procedural

³⁵ Cf. K. LÜDICKE, R.E. JENKINS, *Dignitas connubii. Norms and commentary*, Alexandria (VA) 2006, 112.

³⁶ Cf. *Ibidem*, 112-113.

³⁷ Cf. J.J. GARCÍA FAILDE, *La instrucción...*, cit., 99.

representation even if still present. Consequently the court should reach the conclusion regarding the necessity of a guardian only if one of the parties alleges as much, and a psychological or medical investigation establishes the need to appoint a guardian. However, in all cases, the lack of due discretion for consent to marriage does not automatically imply a lack of discretion with regard to the party's participation in ecclesiastical trials³⁸.

Afterward art. 120 of the *Dignitas connubii* also relates implicitly to can. 1095. The norm indicates that the presiding judge may begin a preliminary investigation prior to accepting or rejecting the petition. The purpose of the investigation, a procedure not provided for in the Code, is to verify that the requirements of the law have been met for the acceptance of the petition: competence, procedural capacity, and the presence of a sufficient legal basis.

Procedural capacity, mentioned in the *Instruction*, refers to a person's ability to act in a trial on his or her own behalf as a petitioner or respondent. Those who lack procedural capacity are those who lack the use of reason³⁹. The procedural capacity of the parties should only be investigated if circumstances suggest that one or both might lack the capacity to act in the process. This can occur if the cause of the nullity of the marriage is alleged to be one of the psychic grounds of can. 1095 and, simultaneously, the facts surrounding the parties suggest that the psychic disorder currently interferes with the parties, removing or excessively weakening their capacity to stand before the court⁴⁰.

The next section of the *Dignitas connubii* which could be relate to can. 1095 is the Chapter II of Titles V about *The Citation and the Communication of Judicial Acts*. Art. 126 §1, regarding the *Decree of Citation*, states: "In the decree by which the *libellus* of the petitioner is admitted, the *praeses* must summon or cite to the trial the respondent party, stating whether he must respond in writing or, at the request of the petitioner, appear before the tribunal for the concordance of the doubt(s)"⁴¹.

Communication of the acceptance of the petition should be differentiated from the judge's requirement that the parties express their view regarding the object of the trial. It is in the latter procedure that can. 1095 has relevance. The parties can be required to appear before the tribunal *in order to formulate the doubt*. A summons is typically issued if the court expects the parties to disagree as to the grounds proposed. This can occur if the proposed ground is

³⁸ Cf. K. LÜDICKE, R.E. JENKINS, *Dignitas connubii...*, cit. 176,

³⁹ Cf. art. 97 §1 DC; can 1478 §1 CIC.

⁴⁰ Cf. K. LÜDICKE, R.E. JENKINS, *Dignitas connubii...*, cit., 213-214.

⁴¹ Corresponding, and invoked by the art. 126 §1 DC, can. 1677 §2 reads: "When fifteen days have passed from the communication and unless either party has requested a session for the joinder of the issue, the presiding judge or the ponens is to establish the formula of the doubt or doubts within ten days by ex officio decree and is to notify the parties".

that of a psychic incapacity to consent to the marriage (can. 1095). In those cases, it may be necessary to limit the *formulation of the doubt* further⁴².

Explicitly, instead, the can. 1095 is invoked in art. 203 DC, which deals with necessity of experts, and this one is especially important regarding the same can. 1095. Paragraph 1 of this article states that: "In causes concerning impotence or a defect of consent because of a *mentis morbum* or because of the incapacities described in can. 1095, the judge is to employ the assistance of one or more experts, unless from the circumstances this would appear evidentially useless (cf. can. 1680)" (art. 203 §1 DC).

Consequently, in marriage nullity trials, in causes of mental illness, the use of experts is required. In the 1917 Code, canons 1976 and 1982 required the use of experts in causes of impotence, non-consummation and *amentia*. Art. 203 §1 of the *Dignitas connubii* qualifies the question of when the use of an expert is mandatory. The use of experts in causes based on mental illness is still required because the judge is not expected to have the expertise necessary in this matter. The assistance of an expert should be utilized to determine the actual presence of a mental illness, its specific diagnosis, and its impact on the person. As a further light on the necessity and on the task of experts, art. 203 DC indicates in the accompanying footnote allocutions of Pope John Paul II to the Roman Rota: from 1987, which address the relationship between the psychological and psychiatric sciences and Christian anthropology, and from 1988, about the duty of the defender of the bond in trials involving psychic incapacity⁴³.

Always in the section dedicated to topic of experts, art. 205 §2 DC, dealing with suitability of experts, states that: "In order that the assistance of experts in cases concerning incapacities mentioned in can. 1095 may be truly useful, special care is to be taken that experts are chosen who adhere to the principles of Christian anthropology". In the context of Christian theology, theological anthropology refers to the study of the human as it relates to God, with proper dignity as created in God's image. It differs from another kinds of anthropology, for example the social science of anthropology, which primarily deals with the comparative study of the physical and social characteristics of humanity across times and places⁴⁴.

In marriage nullity trials based on the causes of psychic incapacity of can. 1095, the expert should presuppose the same understanding of the human person and his psyche as that which underlies the Church's anthropological

⁴² Cf. K. LÜDICKE, R.E. JENKINS, *Dignitas connubii...*, cit., 224.

⁴³ Cf. *Ibidem*, 346-347.

⁴⁴ Cf. J.R. SACHS, *The Christian Vision of Humanity. Basic Christian Anthropology*, Collegeville 1991, 9-10.

teaching. The following is an example of an unacceptable expert: a judge should not utilize "an expert in the field of behavioral psychology (at least in its classical presentation) since that branch of science takes a dim view of free will as understood by the Church"⁴⁵.

However, the most relevant article of the *Instruction* in relation to can. 1095 is, by far, art. 209 DC, which deals directly with questions in can. 1095 causes. The text of §§ 1 & 2, of art. 209 reads as follows:

§ 1. In causes of incapacity, according to the understanding of can. 1095, the judge is not to omit asking the expert whether one or both parties suffered from a particular habitual or transitory anomaly at the time of the wedding; what was its seriousness; and when, from what cause and in what circumstances it originated and manifested itself.

§ 2. Specifically:

1° in causes of *defectus usus rationis*, he is to ask whether the anomaly seriously disturbed the use of reason at the time of the celebration of the marriage; and with what intensity and by what symptoms it manifested itself;

2° in causes of *defectus discretionis iudicii*, he is to ask what was the effect of the anomaly on the critical and elective faculty for making serious decisions, particularly in freely choosing a state in life;

3° finally, in causes of incapacity to assume the essential obligations of marriage, he is to ask what was the nature and gravity of the psychic cause on account of which the party would labor not only under a serious difficulty but even the impossibility of sustaining actions inherent in the obligations of marriage.

As it is obvious from the text of the norm, art. 209 DC primarily concerns the work of the expert in marriage nullity trials based on grounds in can. 1095. It considers the work of the expert in two ways: (1) his or her observations on substantive marriage law in relation to can. 1095, and (2) the limitations of the competence of the expert. Art. 209 §1 presents the general elements that the expert must investigate, and §2 refers to each incapacity ground mentioned in can. 1095. It is important that a judge not come to the conclusion that a marriage is valid simply because the expert cannot verify the presence of an anomaly. The job of the expert is not to determine the validity of the marriage, as remembers §3 of art. 209; this task belongs solely to the judge. The role of the expert in a marriage nullity trial is only to clarify certain matters that constitute prerequisites to the ultimate determination of the court⁴⁶.

This article emphasizes that the expert report not only about the existence, beginning and nature of the habitual or transitory anomaly of the individual,

⁴⁵ K. LÜDICKE, R.E. JENKINS, *Dignitas connubii...*, cit., 349.

⁴⁶ Cf. *Ibidem*, 352-354; J.J. GARCÍA FAILDE, *La instrucción...*, cit., 186-187.

but also about the impact of that anomaly on the personal structures and psychic faculties of the party upon celebration of the marriage. Equally highlighted is the importance that the article places on the necessity that the expert report on the impact that the anomaly had on those structures and faculties, in the precise moment in which the marriage was celebrated, because what truly interests the judge is to know how was the psychic of the party in that moment, since whether or not the marriage is null depends on this fact. The risk can be in that the expert relates back to that moment the psychic state that he or she found during examination of the party; a specific anomaly can incapacitate someone at one moment, but not necessarily at another.

Further, as points out García Faílde, the expert will not always be able to state an opinion with certainty as to what he or she is asked. In such cases, the expert can and should respond that he or she cannot answer with certainty. However, sometimes the expert, even being certain about something, will not use words like "certainty" or "moral certainty", but instead will use terms like "probable" or "possible". It will have to be determined the extent to which the expert uses these terms because sometimes what the expert understands as "probable" or "possible" is really "certain"⁴⁷. Anyway, it seems that an expert will not go beyond the boundaries of his duties if, knowing the meaning and responsibilities of marriage, he or she pronounces that because of his illness the patient was not able to, for example, freely choose marriage or comply with the essential obligations of marriage. This is not a judgment of the kind that, according to §3, is fitting for a judge to issue. In the contrary, it is not the expert's duty to determine that if the party could not freely choose marriage, that marriage is null. This question, being of juridical nature, does not belong to the expert but to the judge⁴⁸.

The final mention of can. 1095 in the *Dignitas connubii* is present in art. 251, which deals with addition of a *vetitum*. The norm orders the addition of a prohibition to sentences that render a judgment for nullity of marriage based on a permanent incapacity for marriage, due to a psychic incapacity in the sense of can. 1095. The article differentiates between a judgment for nullity based on a permanent incapacity and one based on deception or simulation. In the first case, the party is prohibited from entering into a new marriage unless the same tribunal that issued the sentence is consulted, in the latter situation, the prohibition may be lifted after verifying that the person has the right intention to enter the marriage⁴⁹.

⁴⁷ Cf. J.J. GARCÍA FAILDE, *La instrucción...*, cit., 186. García Faílde punctuates also that §2, 3°, in accordance with can. 1095, 3°, speaks of "psychic cause" and not "psychopathological cause".

⁴⁸ Cf. *Ibidem*, 187.

⁴⁹ Cf. K. LÜDICKE, R.E. JENKINS, *Dignitas connubii...*, cit., 407-408.

III. RECENT ROTAL JURISPRUDENCE AND THE *DIGNITAS CONNUBII*⁵⁰

The Apostolic Tribunal of the Roman Rota is a court of higher instance at the Apostolic See and, with respect to judicial trials conducted in the Catholic Church, usually the highest ecclesiastical court at the appellate stage. The Roman Rota adjudicates cases with a panel of three or more auditors depending on the complexity of the case. The Rota's main function is that of an appellate tribunal, ordinarily reviewing decisions of lower courts if the first instance and the second instance do not agree on the outcome of a case. The majority of petitions are those regarding the nullity of marriage, although the Rota has jurisdiction to hear any other type of judicial and non-administrative case. However, as it is stated by John Paul II in the Apostolic Constitution *Pastor Bonus*, the Rota "fosters unity of jurisprudence, and, by virtue of its own decisions, provides assistance to lower tribunals" (art. 126).

Accordingly to this norm, also art. 35 §3 of the *Dignitas connubii* states that it is necessary to "study the jurisprudence of the Roman Rota, since it is responsible for promoting the unity of jurisprudence and, through its own sentences, to be of assistance to lower tribunals". This statement was reiterated by Pope Benedict XVI in his Allocution to the Rota in 2011: "Given the need for the unity of jurisprudence, entrusted to the care of this Tribunal, the other ecclesiastical tribunals must conform to the rotal jurisprudence"⁵¹.

This statements encourage to study closely the rotal jurisprudence, especially in the mater of psychical incapacity to contract a valid marriage.

1. Doctrine and case law

Before going into an analysis of the recent rotal jurisprudence regarding can. 1095, 2 & 3, it is important to briefly summarize the current state of the doctrine and case law related to the grave defect in discretion of judgment and the incapacity to assume the essential obligations of marriage.

a. Grave defect of discretion of judgment

F.R. Aznar Gil, looking at the Rota's jurisprudence regarding the defect of discretion of judgment, places the possible causes of this defect in the following groups: (1) temporary personality crises, which could be episodic (in-

⁵⁰ For all this section see: J. KOWAL, *La reciente jurisprudencia rotal acerca de la nulidad matrimonial por incapacidad de natura psíquica (can. 1095, 2 y 3)*, in *XXXV Curso de Actualización Canónica*, San Juan de Los Lagos, Jalisco, México, 11-15 de julio de 2011.

⁵¹ BENEDICT XVI, Allocution to the Tribunal of the Roman Rota, 22 January 2011, [access 3.03.2014] <http://www.osservatoreromano.va/en/news/how-to-avoid-nullity>

cluding immaturity, senility, adolescence, emotional instability, etc.); and (2) psychic anomalies (including schizophrenia, paranoia, alcoholism and drug dependency, epilepsy and various personality disorders)⁵².

An expert's finding of symptoms of one or more of the above causes does not automatically indicate that a defect of discretion of judgment exists. The determining element is not related to the medical finding of an anomaly, but rather the effect that anomaly has had on the intellect and/or the will, on the party's critical understanding of the rights and obligations, and on his or her will.

The expression "serious defect" does not refer to the anomaly but to the discretion. That which makes a person incapable is not the presence of a psychic anomaly or its seriousness, but the fact that the person suffers from a severe lack of judgment. Therefore, a minor defect in the discretion of judgment does not imply incapacity. A valid marriage does not require a complete and full maturity. In reality, there is a level of maturity that relates to each step in the development of marital life: the maturity of one who decides to enter into marriage, the maturity of first-time parents, or the maturity of parents of adolescents. As to the proofs, then, the issue is to determine to what point this reduction, in the capacity to evaluate and freely decide, implies a serious defect of discretion of judgment. For this, the auditors focus on the essential rights and obligations of marriage and evaluate the seriousness of the defect of discretion of judgment in light of an objective criterion – the essential rights and obligations that are mutually given and accepted. A serious [defect] can be found to exist if there is proof that the party lacks the intellectual and volitive maturity to understand the essential rights and obligations of the marriage that involve the spouse. The law does not contain a list of these rights and obligations. It is the responsibility of the doctrine and jurisprudence to determine them, above all through the study of what a 'real' marriage is and the analysis of a specific case⁵³.

b. Incapacity to assume the essential obligations of marriage

Can. 1095, 3 takes into consideration those persons whose psychic structure makes it impossible for them to bind themselves to the essential rights of marriage, independently of the capacity they may have to understand these obligations.

⁵² Cf. F.R. AZNAR GIL, *Derecho Matrimonial Canónico*, II, *Cánones 1057; 1095-1107*, Salamanca 2002, 73.

⁵³ Cf. Cf. F.R. AZNAR GIL, *Derecho Matrimonial...*, cit., 74; J. KOWAL, *La reciente jurisprudencia...*, cit., 5.

In the jurisprudence of the Rota, one finds many sentences that underline that the cause of the incapacity should be such that it impedes marital consent. The Roman Pontiffs, either Blessed John Paul II in 1987 and 1988, and Benedict XVI in 2009, insisted that slight defects, bad will, personality disorders that make interpersonal relations difficult, being necessary at the least a moral impossibility, are not sufficient to declare incapacity. The cause of the incapacity should be always a serious psychic cause⁵⁴.

Rotal jurisprudence has much discussed about the grade of *gravity* of the incapacity, and while there have been diverse opinions, there is above all an agreement about the necessity of the *gravity* of the cause that begins the incapacity in a legal sense. One of the frequent reasons for the rejection of a petition to declare null a marriage is the difficulty of reaching a moral certainty about the existence of a true incapacity in the cases alleging a supposed relative incapacity; these allegations of incapacity do not refer to the capacity to contract the marriage, but rather the capacity to establish a marital relationship with the specific person with whom they contracted the marriage. This is the sense, in which the expression *grave cause* refers to the incapacity to assume the essential obligations. The existence of an anomaly or a defect that are surmountable by ordinary means, including for example some effort and a sacrifice, is not enough. That serious anomaly could bring to an improvement, or it could bring to a failure, but ultimately – from a legal point view – is irrelevant as for the capacity in the moment of contracting marriage⁵⁵.

Since the concept of incapacity is a juridical concept and not a medical one, it is not possible to make a list of the psychic causes that would render someone incapable. It is not decisive that it is established that a person suffers from a psychic disorder. Rather, it is necessary to place said disorder in relation with capacity as a juridical requirement in order to determine, in a specific case, that the disorder, illness, or anomaly was in fact the cause of the incapacity to assume⁵⁶.

The causes that are said to be the reason for the incapacity are normally grouped in three categories: (1) mental illnesses, which include psychosis and its variations; (2) psychosexual anomalies, which impede the normal exercise of sexuality; and (3) personality disorders, such as serious forms of narcissism and antisocial or violent personalities⁵⁷.

⁵⁴ Cf. BENEDICT XVI, Allocution to the Tribunal of the Roman Rota, 29 January 2009, L'Osservatore Romano, weekly edition in English, n° 5/2009, 5.

⁵⁵ Cf. J. KOWAL, *La reciente jurisprudencia...*, cit., 7.

⁵⁶ Cf. H. FRANCESCHI, *La incapacidad consensual (c. 1095)*, in *Id.*, *Curso de Actualización en Derecho Matrimonial y Procesal*, Caracas 2001 (<http://bibliotecanonica.net/docsab/btcabx.pdf>), 43.

⁵⁷ *Ibidem*, 43-44, nt. 71.

2. Recent Rotal Jurisprudence

Since either the Code, and even more the *Dignitas connubii*, insist about the value of unity of jurisprudence, it is important to look at recent Rotal Jurisprudence in order to imply correctly the canonical norms in the causes of nullity of marriages, especially in those on psichical incapacity.

Among the cases brought before the Rota in the recent years, those regarding the incapacity to consent, involving can. 1095, 2 and 3, continue to represent major part of all causes. However, a majority of the decisions in these cases are negative (sometimes, in the cases of both grounds, the decision is affirmative for one of them, and negative for another)⁵⁸.

a. Lack of discretion of judgment

Regarding can. 1095, 2°, the psychic anomalies recognized by *affirmative sentences* as sources of the lack of discretion are, for example, concealed depression, dependent personality disorder, psycho-affective immaturity and immaturity associated with a narcissistic personality disorder, schizophrenia or paranoid schizophrenia, abnormalities of personality and character, with marked passivity and dependence and pathological gambling, organic personality syndrome⁵⁹.

They are numerous sentences considered in terms of the lack of internal freedom; they confirms the principle that, although various psycho-affective factors, arising from the peculiar psychic anomalies, can exercise a disturbing influence, not any alteration of the elective faculty causes the incapacity of free election, but only one that touches the inner freedom and forces it or severely restricts. It is confirmed that the limitation or injury of internal freedom produces a legal effect of invalidating marriage under discretionary incapacity of can. 1095, 2, only if it comes from a severe or grave mental disturbance, which represses or severely limits the autonomy of the same freedom. So it is negatively sentenced in cases where there is not confirmed a psychic anomaly⁶⁰.

Negative sentences, which reject the ground of nullity concerning can. 1095, 2°, are often founded on the lack of proof of the existence and/or of the gravity of the adducted mental disorders. In some instances, the Rota recog-

⁵⁸ Cf. *L'attività della Santa Sede nel 2012*, Città del Vaticano 2013, 640; *L'attività della Santa Sede nel 2011*, Città del Vaticano 2012, 613.

⁵⁹ Cf. *L'attività della Santa Sede nel 2012*, cit., 640-642; *L'attività della Santa Sede nel 2011*, cit., 613-614.

⁶⁰ Cf. c. YAACOU, 10 III 2010, Sent. 39/2010, n° 25; c. YAACOU, 17 II 2012, Sent. 31/2012, n° 21.

nizes solely the mere presence of characteristics of a personality disorder, physiologic immaturity of youth, or voluntary distortion of conduct⁶¹.

One of the negative sentences warns against the adoption in this field of a mechanistic criterion, so that the negative result of married life automatically becomes the proof of incapacity and the facts are interpreted as straightforward evidence of psychological causes⁶².

b. Incapacity to assume the essential obligations

Some of the causes of a psychic nature that the sentences in the last years have been considered for the declaration of nullity, in affirmative decisions, are among others: schizophrenic psychosis; bipolar disorder or manic-depressive psychosis; dissociative personality disorder; generalized anxiety disorders; fantastic *pseudologia* with a hysterical/histrionic base, with traces of bigotry and pseudo-mystical claims; major depressive disorder (also diagnosed by expertise in civil trial); depressive disorder with a tendency to alcoholism; neurotic personality disorder and sexual aversion disorders; sexual desire disorder (*donjuanismo*); homosexuality; drug addiction; lack of psycho-emotional maturity; the antisocial personality disorder; epilepsy and side effects of treatment, with a serious impact in the psychosomatic field; paranoid personality disorder; obsessive-compulsive personality disorder; the personality of type *fanatic* (similar to paranoid disorder personality); dependent personality disorder; *borderline* personality disorder, in some cases related to substance abuse; the mixed perturbations of dependent personality and *borderline* personality disorder; personality disorder not specified: in some cases with hysterical aspects, in another cases with a depressive-hypochondriac state; disorder of personality mixed with histrionic, narcissistic or antisocial traits; narcissistic personality; egocentric personality with traits of narcissism; seriously unstable personality; psychopathy; pathological personality with histrionic traits and sexual aversion (however compromising the capacity to establish sexual intimacy); psychological immaturity, sometimes associated with the dependence to the figure of the mother or/and the abuse of alcohol⁶³.

In contrast, the negative sentences emphasize the lack of proof to demonstrate existence or gravity of a cause of psychic nature of the supposed incapacity at the moment of celebration of the marriage⁶⁴. In some instances, these

⁶¹ Cf. *L'attività della Santa Sede nel 2012*, cit., 642; *L'attività della Santa Sede nel 2011*, cit., 614.

⁶² Cf. c. HUBER, 22 XI 2006, Sent. 153/2006, n° 6.

⁶³ Cf. J. KOWAL, *La reciente jurisprudencia...*, cit., 12-13.

⁶⁴ Cf. *L'attività della Santa Sede nel 2012*, cit., 643; *L'attività della Santa Sede nel 2011*, cit., 615.

sentences note the existence of mere indications and not of true disorders: just a simple imbalance of the structure of temperament and character of the parties and not real disorders⁶⁵.

Some negative sentences are founding its conclusions on the fact, that either judges or experts has found only a form of relative incapacity, which is constantly rejected by the jurisprudence of the Rota⁶⁶.

At the end, it's important to note that since 2005 the Rotal sentences sometimes underline the function of the Instruction *Dignitas connubii*, and especially its norms about the role of experts in cases of incapacity. In some causes to prove the connection between the difficulty, disorder and consent, and to prove incapacity, the judge must have help from psychological and psychiatric experts, a practice "greatly and clearly affirmed most recently in the Instruction *Dignitas connubii*"⁶⁷.

CONCLUSION

Marriage is a reality inherent to the personal and social nature of the human being. The essence and characteristic of its makeup are determined by the natural law. From there, Canon Law has made an extraordinary effort, unknown by other legal systems, to investigate the natural elements of marriage, such as they are demanded by the nature and by the dignity of the human being.

Marriage is also a complex human reality: it has very broad and varied dimensions, encompassing physio-biological, psychological, personal, social, religious, moral and legal aspects. This complexity show (and give) also the important role played by *the factic human sciences* in the juridical study of marriage, including psychology and psychiatry. However, it is important to be conscious of the fact that these sciences, like the knowledge of the human acts to which they relate, are subject to change because their production is connected exactly with the progress of knowing a human person and its acts. Science is *intrinsically* changing; almost all of today's scientists agree that scientific understandings are not definitive or fixed because those same scientific truths are only provisional, as well as philosophically probable.

⁶⁵ Cf. c. PINTO, 13 XI 2009, Sent. 146/2009, n° 9; c. DEFILIPPI, 4 I 2010, Sent. 14/2010, n° 14-15; c. AMENTA, 21 I 2013, Sent. 17/2013, n° 12-14.

⁶⁶ Cf. c. YAACOUB, 10 III 2010, Sent. 39/2010, n° 34; c. BOCCAFOLA, 19 I 2012, Sent. 7/2012, n° 19; c. ERLEBACH, 12 VII 2012, Sent. 114/2012, n° 21-22.

⁶⁷ C. SCIACCA, 16 VI 2005, Sent. 65/2005, n° 22. Cf. c. DEFILIPPI, 11 VII 2012, Sent. 113/2012, n° 9; c. JAEGER, 11 IV 2013, Sent. 115/2013, n° 30; c. SALVATORI, 27 V 2013, Sent. 171/2013, n° 6.

So, as the scientific expert is paramount to those cases of nullity of a marriage on the grounds of incapacity, at the same time, however, it is essential the role of the judge in those cases, and then the constant update of knowledge of the last one about the progress of the science and especially about the progress of the Jurisprudence. Let's hope that this article would be useful at this regard.

ABSTRACT

The paper studies the norms of Canon Law regarding marriage and explores consent as an efficient cause of marriage, specifically the content and implementation of can. 1095 of the present Code, which in its second and third paragraphs refers to the incapacity to marriage of those with a grave defect of discretion of judgment concerning the essential rights and duties of marriage to be mutually given and accepted, as well as those incapable to assume the essential obligations of marriage for causes of psychic nature. The article, after briefly developing the presentation of the essential elements of marriage, matrimonial consent and its nullity in canon law, shows the stance of the Canon Law on nullity of marriage and the Instructions *Dignitas connubii*; in the final section it presents the recent Rotal Jurisprudence concerning nullity of marriage based on can. 1095, 2 & 3.

ASTRATTO

Il presente lavoro studia le norme del Diritto Canonico riguardanti il matrimonio ed esplora il consenso come causa efficiente del matrimonio, con speciale attenzione al contenuto e l'attuazione del can. 1095 del Codice attuale, che nel suo secondo e terzo punto riferisce alla incapacità di sposare con un grave difetto di discrezione di giudizio circa i diritti e i doveri essenziali del matrimonio, così come all'incapacità di assumere gli obblighi essenziali del matrimonio per cause di natura psichica. L'articolo, dopo aver brevemente sviluppato la presentazione degli elementi essenziali del matrimonio, il consenso matrimoniale e la sua nullità in diritto canonico, presenta le norme del Diritto canonico riguardante la nullità del matrimonio e quelle dell'Istruzione *Dignitas connubii*; nella sezione finale viene presentata la recente giurisprudenza in materia di nullità matrimonio per le cause contemplate nel can. 1095, 2 e 3.

Keywords

marriage; matrimonial consent; nullity of marriage; grave defect of discretion of judgment; incapacity to assume the essential obligations of marriage; Rotal Jurisprudence

Parole chiave

matrimonio, consenso matrimoniale, nullità del matrimonio, grave difetto di discrezione del giudizio, incapacità di assumere gli obblighi essenziali del matrimonio, Giurisprudenza Rotale

Roberto Rosas, prof. is Instructor of Law, St. Mary's University School of Law, San Antonio, Texas, USA. Former President of the Commission on Legal Affairs for the Advisory Council of the Institute of Mexicans Abroad, Prof. Rosas is an authorized ecclesiastical advocate, and author of numerous law review articles published all around the World.

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