LACK OF 'DUE DISCRETION' FOR MARRIAGE

By

Fr. Florencio Testera, O.P.

Essentially the matrimonial covenant is effected by the contracting parties' mutual consent, externally manifested, to enter into a conjugal life (c. 1081). This consent, to be valid, must be elicited with sufficient knowledge and in full freedom.

Existing laws require that the parties should at least know that matrimony is a lasting union between a man and a woman for the purpose of procreating children (c. 1082).

Knowledge of matrimony as a permanent conjugal society or community of life does not demand a clear and distinct understanding of the nature and essential properties of marriage and their concomitant implications. It suffices that the parties should not positively exclude the essential properties of matrimony, which are unity and indissolubility; and that they therefore do not consider matrimony as merely a friendly and temporary companionship —, trial marriage — or just an experimental scheme on sexual carousal.

Neither is it necessary for either contracting party to have an exact knowledge of the various techniques of sexual intercourse for the marriage to be valid. It suffices that either should know that procreation is achieved by some sort of bodily contact between the spouses, and not merely by external agents or artificial processes.

Such has been the constant tradition of the Catholic Church.[1] However, existentially speaking, this minimum of awareness required by ecclesiastical law has proved to be inadequate. Countless inmature couples have ventured into invalid marital unions for want of **due discretion** or of maturity of judgment regarding rights and duties that arise from the union itself.

This sad plight has brought into sharp focus the thomistic doctrine of due discretion required for marriage. Aquinas had already taught that a greater degree of discretion — maturitas iudicii, rationis discretio, vigor mentis — is needed for assuming an obligation **de futuro**, such as marrage, than that required and sufficient for committing a mortal sin.

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[1] *S. Romanae Rotae Decisiones seu Sententiae*, V, p. 564; XIV, p. 210; XVI, p. 372...

DUE DISCRETION OF JUDGMENT

The notion of **due discretion** has gone through a gradual but significant evolution during the last few decades. Today it is held that due discretion or maturity of judgment necessary for a valid marriage is not a mere conceptual knowledge of the marital structure. The simple use of reason or conceptual knowledge is not sufficient for eliciting a human act.[2] Over and above the conceptual awareness required by law (c. 1082,2), the person must be able to appreciate and ponder the social, ethical, juridical and religious aspects of the matrimonial covenant. The existence of that evaluative knowledge — **discretio iudicii** — is a necessary prerequisite or condition for a valid contract which gives birth to the conjugal society.[3]

Indeed it is one thing to **know and will** the structure of the matrimonial institution — **capacitas ad matrimonium intelligendum et volendum** — and quite another thing **to be radically fit** to assume **sub gravi** the obligations — **capacitas ad ses obligandum** — and then **to honor** the commitments resulting therefrom — **capacitas ad obligationes adimplendas.**[4]

A person that fails to understand the structure of matrimony can in no way elicit a true consent. The fact, however, that he pacts validly by means of a naturally sufficient consent does not necessarily argue in favor of the validity of the matrimonial union.[5] It is a well established principle in law that the essential rights and obligations of the marriage contract should be assumed **sub gravi**. This fact in turn demands that either contractant should intend, bind self and be fit to honor such commitments.

The above distinction is not merely conceptual but also real as can be illustrated with the case of a person afflicted with incurable impotency. He may give his consent to the marriage with clear mind and full deliberation. He may be even willing to assume **sub gravi** the fundamental rights and duties of the marital society, and yet, on account of his liability

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[2] CONNELL, F. CSSR. *Conceptual and Evaluative Cognition. The Amer. Ecc. Rev.*, 1962, pp. 422-425.

[3] C. ANNÉ, jul. 22, 1969: "Haec judicii discretio quae sinit peculiarem naturam et vim contractus matrimonialis percipere, saltem quoad eius substantiam substantialemque valorem, implicat non tantum exercitium facultatis cognoscitivae, quae sistit in simplici apprehensione veri, sed etiam facultatis criticae, quae est vis iudicandi et ratiotinandi et iudicia una componendi, ut novum iudiciium inde deducatur..." Cfr. *Jus Canonicum*, XV (1975), p. 287. — *S.R.R. Dec.*, XXXIII, pp. 144 ss; XLIX, p. 788.

[4] KEATING, J. R., *The Bearing of Mental Impairment on the Validity of Marriage*. Gregorian University Press, Roma. 1973, pp. 155-156, 180-181.

[5] C. HEARD, may 17, 1958: "...non necessario sequitur eius (matrimonii) validitas ex eo, quod contrahens habet perfectam notionem contractus, nam haec notio potest esse pure conceptualis". Cfr. KEATING, o.c., p. 120.

to perform the conjugal act, he can not enter into a valid contract.[6] This applies to both the physically impotent and the psychically incompetent.

The jurisprudence and practice of the Roman Rota have pushed this doctrine to heretofore unknown psychic cases. The inability of the psycopath to wed lies in the area of behaviour, and not in that of perception and volition. The nymphomanias has a compulsion towards sexual acts with several partners, regardless of any existing bond on her or the partner's part, and not toward marital consent. The homoxesual is compelled to indulge in sexual activity with members of the same sex without positively excluding the marital rights of his or her spouse.

It is in this context, observes Keating,[7] that later Rotal jurisprudence defines **due discretion** as the ability to assume, undertake, fulfill, carry out into practice the obligations, rights and burdens of the married life.

ADEQUATE DISCRETION

The cardinal problem concerning psychic aptitude for marriage revolves around the following question: What is the absolute minimum of discretion adequate for a valid marriage?

To date no precise norm has yet been formulated. If and when ever this mythical formula is found, its application on a universsal and scientific level must forcibly be limited in scope. The marriage covenant is such a peculiar one that it can hardly stand an analogy with any other kind of transaction or contract.[8] Two persons of different sexes, either endowed with his or her own character, personality or individual manhood or womanhood are intimately involved in the conjugal undertaking as both contractants and objects of the contract itself through a mutual self-giving and acceptance.[9]

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[6] *Summa Theologica.* III, Suppl., q. 58, a. 1: "Sed in matrimonio homo se obligat ad copulam carnalem, quia ad hoc dat alteri sui corporis potestatem. Ergo frigidus qui non potest carnaliter copulari, non potest matrimonium contrahere..."

[7] KEATING, J., o.c., p. 164.

[8] C. ANNE. jul. 22, 1969: "Quaenam sit specialis illa discretio aequanda matrimonii contractui haud expedite in praxi definitur, eam scilicet coarctando in una aliave formula, comparatione item abstracte instituta cum aliis contractibus. Qui quidem specie, mensura, pondere quam varii sunt". Cfr. *Jus Canonicum*, XV (1975), p. 287.

[9] C. SERRANO, ap. 5, 1973: "In marriage cases most attention should be given to that area of psychic life wherein an interpersonal relationship is established and developed. I refer to that interpersonal relationship, which in every respect is concrete and totally unique, endowed with that individuality which contemporary authors are won't to describe as 'incapable of repetition'. Cfr. *Studia Canonica.* IX (1975), p. 22.

The complexity of the problem has given rise to a variety of theories.[10] Lately matrimonial courts have time and again resorted to the oft-repeated thomistic doctrine which by now may be considered as a standard in canonical jurisprudence.

Obviously a greater degree of discretion is needed to bind oneself to a future undertaking — **ad providendum de futuro** — than to consummate an action that terminates right on the spot and at the moment — **ad consentiendum in unum praesentem actum** — . Thus a greater degree of discretion is required to enter the marriage covenant than to commit a grievious sin.[11]

On the other hand, matrimony is much in accord with the natural propensity of normal human beings. Thus most people in the use of their mental powers enter into it as if "connaturally" and make their marriage work quite satisfactorily even without knowing much about marriage itself,[12] much in the same manner that we usually eat and drink quite enough even without bothering about nutritional values and the process of digestion.

As a consequence of this valid premise, it seems illogical to demand exceptional human qualities or qualifications for a state or mode of life to which the majority of mankind is destined by nature itself. Aquinas will require a lower degree of psychic aptitude to wed than that needed to consummate a juridical transaction with future implications or corollaries.[13] Likewise, the ordinary person will find it more bearable to undertake the burdens of conjugal life than the obligations, however voluntarily self-imposed, of the vow of celibacy.[14] This is so, not because the act itself of making the vow of celibacy is harder than the act of getting married; but rather because the natural tendencies or instincts of most every man or woman coincide with, and thus support, the objectives of

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[10] D'AVACK, P. A., *Corso di Diritto Canonico. Il Matrimonio.* Milano, 1961, pp. 170-179. — RAVÀ, A., *Il defectus discretionis judicii como causa di nullità; del matrimonio nella giurisprudenza rotale.*

[11] *Summa Theologica*, III, Suppl., q. 43, a. 2, ad 2um.: "Et ideo dicendum quod ad peccatum mortale sufficit etiam consensus in praesens; sed in sponsalibus est consensus in futurum. Maior autem rationis discretio requiritur ad providemdum in futurum quam ad consentiendum in unum praesentem actum; et ideo ante potest home peccare mortaliter quam possit se obligari ad aliquid in futurum".

[12] *Studia Canonica*, IX (1975), pp. 24-25.

[13] *Summa Theologica*, III, Suppl., q. 58, a. 5, ad 1m.: "Ad primum ergo dicendum, quod in illis ad quae natura inclinat, non exigitur tantus vigor rationis ad deliberandum sicut in allis; et ideo ante potest in matrimonium sufficienter deliberans consentire, quam possit in contractibus aliis res suas sine tutore pertractare".

[14] *Ibid.*, III, Suppl., q. 58, a. 5, ad 2um.: "Et similiter est dicendum ad secundum, quia votum religionis is de his quae sunt sine inclinatione naturae, quae maiorem difficultatem habent quam matrimonium".

the marital institution, which can not be said about the celibate life, which is one of self-denial and self-inmolation or even a sort of continual, life-long martyrdom.

In establishing grounds for nullity on account of lack of due discretion, the ecclesiastical judge must consider cautiously whether the psychic capacity of a given person to elicit sufficient consent was seriously impaired before or during the exchange of marital vows. Once matrimony has been duly contracted or performed, it enjoys the favor of the law, and is presumed to be valid, until the contrary is proved.

MARRIAGE, 'A COMMUNITY OF LIFE AND LOVE'.

Current jurisprudence, in effort to set standards in determining the psychic aptitude necessary for a true marriage, has constantly adopted the norm of the **obiectum matrimonii**, according to which the degree of mental discretion required for a valid marriage should be that which is proportionate to the object of matrimonial consent.[15] Without doubt this represents an adequate criterion, since the object of matrimonial consent constitutes the very essence of marriage.

The **ius in corpus** in the traditional teaching of canonists presents a fairly clear picture of the object of matrimonial consent. It is the inability to give the right, not the incapacity to exercise it, which renders the contract null and void. Lately, however, this same object has been expressed in a broadened perspective as to comprise both the right to the copula and the right to the conjugal society which arises from the matrimonial commitment.[16]

Canonists are not yet unanimous as to the nature and applications of this new dimension of married life as a conjugal community. An unpublished decision by the Roman Rota states "that a person seriously lacking intrapersonal and interpersonal integration . . . must be considered incapable of understanding the very nature of that sharing of life, . . . and in consequence must be considered incapable of judging and reasoning correctly concerning the perpetual communion of life to be initiated with another person".[17]

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[15] C. ANNE, oct., 26, 1972, n. 4: "Requiritur exinde sufficiens aequatio inter, hinc, nupturientis liberum arbitrium et iudicii discretionem et, illinc, fidem (impegno) ad suscipiendum et tradendum consortium vitae intimissimum, quod est matrimonium in facto esse". Cf. *Jus canonicum*, XV (1975), p. 280-281).

[16] *Schema Documenti Pontificii quo Disciplina Canonica de Sacramentis recognoscitur*. Vatican, 1975, p. 82: "C. 295,2. Consensus matrimonialis estactus voluntatis quo vir et mulier foedere inter se constituunt consortium vitae coniugalis".

[17] C. ANNE. Jul., 22, 1969, n. 4. Cfr. *Jus Canonicum*, XV (1975), p. 287.

A propos this delicate matter the Matrimonial Tribunal of Montreal, Canada, offers fifteen concrete elements which, in its opinion, are essential to the conjugal life and to which either spouse has a right:

"1. Oblatory love, which is not simply egoistic satisfaction, but which provides for the welfare and happiness of the partner; 2. Respect for conjugal morality and for the partner's conscience in conjugal relations; 3. Respect for the heteroxesual personality or 'sensitivity' of the marriage partner; 4. Respective responsibility of both husband and wife in establishing conjugal friendship; 5. Respective responsibility of both husband and wife in providing for the material welfare of the home: stability of work, budgetary foresight . . .; 6. Moral and psychological responsibility in the generation of children; 7. Parental responsibility, proper to both father and mother, in the care of, love and education of children; 8. Maturity of personal conduct throughout the ordinary events of daily life; 9. Self-control or temperance which is necessary for any reasonable and human form of conduct; 10. Mastery over irrational passions, impulses or instincts that could endanger conjugal life and harmony; 11. Stability of conduct and capability of adapting to circumstances; 12. Gentleness and kindness of character and manners in mutual relationships; 13. Mutual communication or consultation on important aspects of conjugal life; 14. Objectivity and realism in evaluating the events and happenings that are a part of conjugal and family life; 15. Lucidity in the choice or determination of goals or means to be sought jointly".[18]

The absence of either all or some of these elements in a degree held as 'vital', according to the same Tribunal, would deprive the respective partner of an essential right and, therefore, prevent him or her from entering into a valid marriage.

A cursory reading of this quotation, however, evinces that, were the above elements **in toto** or **in parte** integral conditions of the validity of marriage, few existing matrimonies in this wide, vast world could stand such a test of validity; and that a great majority of people will not qualify to embrace a state of life to which mankind is destined. Thus, not withstanding the above opinion, we are coerced to assert that, in the case of marriage, being a duty and function of nature, it must be taken for granted, unless the contrary be proved, that the contractual aspects are sufficiently present in every bridegroom and bride of marriageable age, and thus the validity of the pact is sufficiently assured.

The application of the norm set by the Montreal Tribunal leads also to the absurd conclusion that every broken marriage should be a null and void marriage, what is totally incorrect. Neither the break-up of of common life or any serious problems or failures in interpersonal rela-

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[18] LESAGE G., *The Consortium Vitae Coniugalis: Nature and Applications*. *Studia Canonica*. VI (1972), p. 103-104.

tionship between the partners are sufficient to prove nullity of the union, since the rupture could have been caused by a number of factors, some or even all of which are extrinsic to the partner; or by a psychic incapacity which is not sufficiently serious to threaten the marital life and bond.[19]

Matrimony as a state of life must count with all the elements that enter into its very essence, or constitute the essential properties thereof.[20] The essentials of the conjugal community should have been established as existent before or during the marriage ceremony by a thorough examination of either spouse from several aspects, namely, as an individual, as a social being, as an about-to-be husband or wife, and finally as a prospective father or mother. If the person is wanting in the fundamental elements of rational maturity to the extent of affecting his or her ability to give primary emphasis on the shared aspect of living with another human being, then that person, as an individual, can not be regarded as capable of assuming the basic commitments of matrimony.[21]

This same principle applies to a person who proves to be unfit in a serious degree to establish interpersonal relationship with other people, including those of his or her own sex.[22]

The spouse must likewise be capable of the kind of 'oblative love' which seeks primarily the good and happiness of the partner. In the final analysis conjugal love must be directed towards procreation, which constitutes the ultimate expression of human heteroxesual love. This includes the ability of caring for, loving and educating one's own childen.[23]

To regard as fundamental for a valid marriage elements which are not of the very essence of matrimony, as the Montreal Tribunal would like us to do, makes matrimony a state of life reserved for a privileged few, not an institution of nature intended for the vast majority of human beings on the face of this earth.

In similar fashion one can affirm that, as in the **unio corporalis** it is the right to the copula, and not its exercise, what is essential for a valid contract; so in the case of **communio vitae, unio personarum**, the exclusion of the right to personal integration, and not the absence of its exercise, is

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[19] C. SERRANO. Ap. 5, 1973. Cfr. *Studia Canonica.* IX (1975), p. 27.

[20] HERVADA. J-P. LOMBARDIA., *El Derecho del Pueblo de Dios.* III. *Derecho Matrimonial.* Pamplona 1973., pp. 241-249.

[21] C. LEFEVRE, jul. 8, 1967. Cfr. *Monitor Ecclesiasticus,* LXXXXIV (1968), pp. 54 ss.

[22] C. SERRANO. Apr. 5, 1973. Cfr. *Revista Española de Derecho Canónico,* XXX (1974), p. 108.

[23] C. DI FELICI. May 13, 1969. Cfr. *Monitor Ecclesiasticus,* LXXXXV (1969), pp. 433 ss.

what constitutes the ground for annulment. This is the meaning of the Rotal decision: "In actuality the sharing of life can be missing from the state of marriage, but the right to such sharing can never be lacking".[24]

To consider as void and null a union on the mere reason "that the person was not master over what he promised to give for the rest of his common life", becomes totally unacceptable. Otherwise, in this world few indeed out of the countless millions of existing marriages could survive the test if this were the real norm of validity.

The search for a suitable formula to determine exactly the minimum degree of due discretion for a true marriage must start from a clear understanding of matrimony as a conjugal society. However, the ability required of either partner to share a living with the other has not yet been established clearly by the behavioral sciences, and neither by canonical jurisprudence.

While this situation of irresolution persists, it might be wise to consider as valid in principle the existing legislation fixing the minimum degree of knowledge required for a valid union. What both parties are required to know in a vague manner is that matrimony is a lasting community of life and love between a man and a woman "for keeps" for the purpose of bearing and rearing children (c. 1082). This minimum of awareness is considered sufficient for an efficacious and valid consent.

With this simple norm we can safely say that a person is sufficiently "mature" to take up marital vows when he or she is able and fit to understand, evaluate and undertake, in a manner the majority of run-of-the-mill persons in their sound mind do, the commitments of that permanent community of life and love leading to the procreation of off-spring.

Perhaps the application of this norm will not always result in an ideal or "dream" marriage, but it will certainly suffice to establish a lasting union of two normal persons "heads-over-heels" in love before and during the exchange of marriage vows.

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[24] C. SERRANO. Apr. 5, 1973. Cfr. *Studia Canonica*. IX (1975), p. 20.