

Contrasts between the Cleveland Tribunal's First Step Program and Authoritative Roman Catholic Position

SUMMARY

When information taught by Diocesan Personnel leads the faithful to hold positions contrary to the Magisterium, there is reason for concern.

The Cleveland Diocesan Tribunal's First Step Program (FSP) has a history of providing widely publicized educational workshops targeted to the faithful at large, and to those who believe they may not be in valid marriages. Those not in valid marriages include couples in "second" [*sic*] civil marriages. At these workshops, the presenter gives a description of requirements for a valid marriage. Presenter describes grounds for annulment and gives overview of annulment process. All attendees are provided handouts including fill-in-the-blank forms and questionnaire. They are invited to return in several weeks with completed documentation to start their annulment case, that is, submit their petitions for invalidity of their marriages.

From published Diocesan figures, it appears that for every four couples who get married, there is about one whose marriage is declared invalid using the formal process for annulment. The Cleveland Tribunal's website states that they investigate 650 formal declarations of invalidity per year. In the FSP, every petition seems to be accepted and 85%-90% result in decrees of invalidity. In the 2011 reporting year, there were 2357 weddings in the Diocese.

Of critical note is the contrast between the First Step Program and the authoritative Roman Catholic position.

In 2009, Pope Benedict XVI acknowledged that there has been a continuous scandal of marriage being devalued by the exaggerated and almost automatic multiplication of annulments due to supposed immaturity or psychic incapacity.

The FSP elevates the requirements for a valid marriage so high such that every marriage could be assumed to be invalid.

FSP confuses the description of a comfortable, ideal marriage with the requirements for a valid marriage.

FSP routinely refers to the separated or divorced spouse as the "ex-spouse" or "former" spouse, though canon law 1060 requires that all marriages should be assumed as valid until proven otherwise.

FSP makes no mention that those in "second" civil marriages are in adulterous marriages because they are truly already married to someone else (c. 1085).

FSP never mentions that people who are separated or divorced from their spouse may have a moral obligation to restore common conjugal life because they may never have had a morally

legitimate reason to be separated or divorced. They may be in obstinate perseverance of grave manifest sin.

FSP requires all petitioners to have a procurator: Though canon law makes no such requirement. A procurator can act on behalf of the party, and the party can't rescind the act.

FSP makes no mention of the party's 'advocate' that is supposed to be made available for free according to canon law. The advocate defends the marriage for any respondent who chooses to uphold his marriage. Each party's advocate also writes a brief for judge after the collection of proofs is complete.

Before a case is accepted, FSP has petitioners provide answers to a standardized questionnaire, called testimony and evidence. Questions inquire about parties' background, courtship, marriage, and breakup. Answers are not sent to respondents when they are advised of the case, even though canon law requires that the respondent be sent a copy of the petition; and, that the petition must include the facts and proofs in a general way that the Petitioner is using to prove the case.

FTP requires submission of written testimony prior to the case even starting, but law requires that proofs not be collected until after the following: 1) properly worded petition is submitted to the Tribunal, 2) petition is accepted, 3) a copy of petition is sent to the respondent, 4) respondent has the chance to reply to the petition, 5) respondent has a chance to mandate that an advocate be allowed to assist in the defense, 6) respondent has a chance to argue that there is no basis whatsoever for the case to proceed, 7) respondent has the chance to request a session for the joinder of the issue in which both parties and their advocates meet with judge, 8) Tribunal sets by decree the grounds for annulment for the particular marriage (called formulation of the doubt), 9) respondent and petitioner have a chance to argue that the doubt should be changed, 10) and, the doubt is set and the instruction of the cause is begun and announced by a decree.

FSP accepts petitions assisting the petitioner to allege that there was some incapacity to consent to marriage (c. 1095), but the petition does not specify the serious psychic anomaly present in the party lacking capacity. Authoritative sources from the Holy See teach that it is an abuse to admit such cases for hearings.

FSP uses questionnaires to collect evidence from both parties and witnesses, though canon law says that this should not be done because the judicial examinations are supposed to occur with the person being asked questions in person, with a notary present. The person being questioned is not supposed to see the questions in advance. The judicial examinations are supposed to be conducted live so that the judge can ask follow-up questions, and each party has the right to have his or her advocate present.

FSP uses standardized questionnaires for all petitioners in collecting testimony, even though canon law says that the questions should be specific for the particular ground for invalidity relevant to the parties' marriage. FSP also uses standardized questionnaires for all respondents and witnesses.

By Macfarlane, 21 January 2012

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By Bai Macfarlane, 21 January 2012

FULL ANALYSIS

Introduction

This analysis shows the contrast between the information from Cleveland Diocese Tribunal's First Step Program in comparison to sources at the Holy See, including the following:

Caparros, Ernest, Michel Theriault, Jean Thorn, and Helene Aube. 2004. *Code of Canon Law Annotated: Prepared Under the Responsibility of the Instituto Martin De Azpilcueta*. Second Edition, Woodridge: Midwest Theological Forum.

Pontifical Council for Legislative Texts. *Dignitas Connubii: Instruction to be Observed By Diocesan and Interdiocesan Tribunals In Handling Causes of the Nullity of Marriage*. 2005. http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html

Annual Papal Address to the Tribunal of the Roman Rota. Multiple.

Egan, Cardinal Edward. Multiple published works. [A member of six-man team working with Pope John Paul II in drafting the 1983 Revision of the Code of Canon Law.]

Tribunal of the Roman Rota. Multiple Sentences.

Need for Analysis

Marriage is the building block upon which families and society is built. Marriage is also a sign to the world of Christ's love for humanity, including His faithfulness despite rejection and persecution. If pro-annulment disinformation is spread about procedures and grounds for annulments, everyone who wants to enter second marriages with the approval of the Catholic Church will be satisfied. Further, everyone who wants the approval of the Church after abandoning his or her marriage will also be appeased.

However, disinformation about procedures to defend marriage or the reasons to grant annulments causes problems. The public will conclude that marriages are invalid which are in fact valid. These conclusions will sometimes be drawn even before one spouse

abandons the marital life. Priests will erroneously counsel those experiencing marital difficulty that their marriages are likely invalid.

Spreading information describing divorce as sinless and as neutral ignores the devastating effects being imposed upon the family's children, and, possibly upon an innocent spouse. Once divorce or separation occurs, re-establishing conjugal unity and family unity becomes dramatically more difficult.

Children of separated or divorced parents often come to resent a Church that condones the break-up of their family and/or condones a parent's "second marriage." Many children, by nature, can sense there is something that is out of order when tribunals decide their parents' marriages are invalid.

The Cleveland Diocesan Tribunal's First Step Program

Purpose includes:

To educate individuals regarding the Catholic teaching on marriage and requirements for a valid marriage as recognized by the Catholic Church. To educate individuals regarding the annulment process, including the various situations under which this may be necessary.¹

Salvation of Souls, Opening Emphasis

The Program's first speaker, a Defender of the Bond, emphasizes that the supreme goal of canon law is the salvation of souls (Transcript, October 04, 2011, p. 2, lines 24-26; time 00:03:35).

Overall Attitude

The Program equates success with the granting of an annulment. While illustrating with an example, the Program shows that said case is successfully resolved when an annulment is granted; attendees are encouraged that nothing is impossible, even when it seems difficult to prove invalidity (Ibid., p. 12, lines 18-19; 00:35:46).

¹ "Detailed First Step flyer," Diocese of Cleveland, accessed January 20, 2012, <http://dioceseofcleveland.org/tribunal/forms/First%20Step%20Detailed%20flyer.pdf>.

Throughout the Program, the respondent is referred to as an ex-spouse or former spouse. Whether the petitioner has a boyfriend or girlfriend is discussed neutrally. In this Tribunal, 85%-90% of petitioners receive an annulment (Ibid., p. 16, line 15). Sometimes cases receive a negative decision; and, for other reasons cases are stopped. Reasons cited are: People withdraw a petition; there is not enough testimony; or, a case is moved to another diocese. (Ibid., p. 16, lines 8-19; 00:46:43).

Annulment is described as a healing. Participants grow from the experience of going through the annulment process. The Tribunal's purpose is to help people understand their status in the Church (Ibid., p. 4, lines 17-18; 00:10:03). Divorce ministry exists in the Diocese for those who are divorced or separated. Materials for "moving on after divorce" consistently refer to other spouse as the "former [*sic*] spouse" (Ibid., p. 4, lines 21-29; 00:10:24). FSP quotes poet saying we should never be ashamed to own that we have been in the wrong, which is but saying we are wiser today than we were yesterday. When petitioner looks at self and takes ownership of mistakes, this will make the petitioner a better person and a better future [*sic*] spouse (Ibid., pp. 9-10, lines 22-09; 00:26:07).

Civil Marriage and Divorce

Civil marriage is recognized as having existed and the Tribunal will never say that the marriage does not exist. The Tribunal will, however, say that the marriage did not rise to the level required for Catholic Marriage (Ibid., p. 8, lines 7-13; time 21:02).

Divorce is described as a process that party goes through by filling out papers that go through the court and then the party receives the papers from the court and the party is divorced (Ibid., p. 5, lines 23-26; 00:14:02). The Program teaches that there are no civil effects to proceedings of annulment case (Ibid., p. 14, lines 7-9; 00:40:41).

Grounds for Annulment

FSP teaches that a decree of invalidity is a determination through a judicial process that the marriage bond never met the minimal requirements of marriage as understood by the Catholic Church, and therefore never was valid. The Program further defines those minimal requirements with the understanding that marriage is a partnership between a man and a woman and has four aspects: Fidelity, permanence, procreation and education of children, and the good of the spouses (Ibid., p. 8; line 17; 00:22:10). The Program's definitions of the four aspects are used to illustrate why annulments are issued.

Fidelity means faithfulness in mind, body and spirit. It does not only mean sexual fidelity. Spouses must be emotionally present for the other. Fidelity means each party is the other's best friend. Either party must go to the other spouse when they need advice or have a problem (Ibid., p. 8 lines 18-22; 00:22:11).

In discussing infidelity, the Program specifies that it is a sin for which one can be forgiven and that one can move on after adultery. It is implied that "moving on" means getting an annulment (Ibid., p. 10, lines 24-25). Fidelity also requires an emotional attachment such that infidelity is occurring if one spouse goes to someone else besides the other spouse if one has a problem or concern. In marriage, emotional connection must be made with the other spouse. If either spouse has an emotional connection with someone else, that's not a marriage (Ibid., p. 11, lines 16-26; 00:32:07). People in wonderful relationships don't act unfaithful. The Tribunal will find that there was a problem that one or both parties were trying to hide, overlook, or ignore. The problem erupts into infidelity, and it is the hidden problem (not the infidelity) that is the ground for the annulment (Ibid., pp. 10-11, lines 25-03; 00:29:54).

The FSP teaches that the "good of the spouses" means helping each other achieve salvation. It means being equal partners who respect each other and make decisions together. The Program gives examples of a spouse failing to meet the requirements of the "good of the spouses" as understood for Catholic Marriage: If one spouse finds it more important to golf, to work one-hundred hours per week, or to spend time with the guys (or girls) rather than spend time with the other spouse (Ibid., p. 8, line 4-11; 00:23:55).

Descriptions of Marriage's Imperfections will provide proof of invalidity

The Program directs the petitioner read an article by the Cleveland Bishop about good marriage relationships. Next, the petitioner is instructed to describe how their marriage is not like the marriage which the Bishop describes. The contrast from an ideal marriage to the parties' marriage is posited to show why the petitioner's marriage is invalid (Ibid., p. 14, lines 10-21; 00:40:49).

Procedure for Adjudicating Cases

The FSP teaches that the Tribunal does not need the petitioner to specify why their marriage is invalid. The Tribunal only needs a petitioner to tell a story. The Tribunal will take the Law and apply it to the case and see if the Tribunal can find how the marriage is

invalid (Ibid., p. 11, lines 9-15; 00:31:21). It is the Tribunal's job to find the grounds for the Petitioner's doubt of invalidity.

Every petitioner is required to have a procurator. (Ibid., p. 6, lines 19-23; 00:16:28). Later in the case, the parties are offered to read all the testimony. The petitioner party is not allowed to divulge anything about the testimony to anyone except to the procurator. The procurator's role includes helping to improve the testimony of their petitioner by reviewing it prior to submission with the petition. Their role includes asking the petitioner to add more information. (Ibid., p. 20, lines 1-7; 00:57:53). The procurator receives all letters sent from the Tribunal.

All the FSP petitioners provide their testimony by answering identical, abbreviated questionnaires that provide detailed information about the petitioner, the other spouse, the parties' courtship, family backgrounds, and their marriage. The more information the petitioner gives in the testimony, the better job the Tribunal can do in their search for the truth (Ibid., p. 19, lines 23-25; 00:56:51). When the petitioner submits the libellus, the Tribunal (auditor or judge) will read the petitioner's testimony and may have more questions (Ibid., p. 20, lines 6-9; 00:58:24). The Tribunal recognizes that the petitioner may find it emotionally draining to answer the questions and to relive the experience.

All witness questionnaires are identical. Witnesses are told not to answer questions for which they do not know the answer. Phone interviews are an alternative way for witnesses to provide testimony.

The Program teaches that parties are invited to read the materials in the case, affidavits, testimonies, and evidence. Parties must make an appointment during business hours, must go to the Tribunal office to read materials, and parties are not allowed to take notes (Ibid., p. 23, lines 21-31; 01:07:48).

The Program teaches that after the Defender of the Bond submits his observations, the judge takes all the material submitted (generally answers to questionnaires) and argues the case (Ibid., p. 3, lines 10-13; 00:05:56).

The same respondents' questionnaire is mailed to all respondents. They are sent several more questions than are the FSP-attendeo petitioners, but essentially are asked to provide the same information to the Tribunal. Each respondent is asked to describe both parties' backgrounds, the courtship, the engagement, and the marriage (Ibid., pp. 22-23, lines 28-08; 01:06:04). When the respondent receives their letter with their questions, the

respondent will not see the petitioner's answers to their questionnaire (Ibid., p. 23, lines 11-13; 01:06:55). Only one sheet from each petition is sent to each respondent (the cover sheet).

Respondents cannot delay the proceedings. They can choose to give testimony or not. Alternately, they can say they don't want to give testimony but want to be kept informed. They can participate or not. If they do not respond to their letters, the case moves forward to next step without them (Ibid., p. 15, lines 10-22; 00:44:07).

Information from the Holy See

When couples separate or are divorced, they most could fit into one of four categories: those who have valid marriages and have no morally legitimate reason for separation of spouses; those who have valid marriages and have a morally legitimate reason for separation of spouses; those who have invalid marriages who never should have separated but should convalidate their marriage, and those who have invalid marriages and should remain separated.

Salvation of Souls

For separated spouses in valid marriages who have no morally legitimate reason for separation, one or both are violating divine law and canon law. If either one seeks civil divorce, he or she has committed a grave offense against nature, and is living an immoral lifestyle in contradiction to their marital sacrament. People are jeopardizing their immortal soul if they commit grave sins in full knowledge with full intent (mortal sin).

The Introduction of the FSP emphasized that the ultimate goal of canon law is the salvation of souls, but it is a perversion of canon law to ignore the canon laws on the separation of spouses (can. 1692, 1151-1155), laws for preventing scandal and sacrilege (can. 915), and medicinal remedies to admonish the sinner (Sanctions and Penal Process).

Overall Attitude

According to authoritative Church teaching, all marriages are presumed valid until proven otherwise (c. 1060). To refer to the other spouse as an "ex-spouse" or "former" spouse is to pre-judge the parties' marriage as invalid. The requirements for valid

marriage are specified in canon law and the interpretation of canon law is to be in unison with the interpretations provided by the Tribunal of the Roman Rota.

The purpose of the annulment process is to determine whether the parties' marriage is invalid, though the FSP repeatedly emphasizes the healing quality of annulments. For those who are declared to have invalid marriages and who should remain separate, the annulment process might be healing. But for those spouses who have been unjustly abandoned and are respondents on a marital abandoners' petition, the process could be extremely offensive. When the process results in an erroneous decree of invalidity, it is a violence against truth (Pope John Paul II).

The publicity flyer, "Tribunal FIRST STEP Program for Annulments," describes their outreach:

This workshop is offered as a way to reach out to those whose marriages, for whatever reason or circumstances, may not be valid in the Church. Even if it has been many years, all are invited and encouraged to attend and, hopefully, begin the process of re-establishing full communion within the sacramental life of the Church.

The Program does acknowledge that Holy Communion shall be denied for those who enter second marriages by marrying outside the Church. But there is not even a hint that some of these people are in adulterous relationships and are—in fact—validly married to someone else. Pope Benedict XVI counsels against pseudo-pastoral claims:

One must avoid pseudo-pastoral claims that would situate questions on a purely horizontal plane, in which what matters is to satisfy subjective requests to arrive at a declaration of nullity at any cost, so that the parties may be able to overcome, among other things, obstacles to receiving the Sacraments of Penance and the Eucharist. The supreme good of readmission to Eucharistic Communion after sacramental Reconciliation demands, instead, that due consideration be given to the authentic good of the individuals, inseparable from the truth of their canonical situation. It would be a false "good" and a grave lack of justice and love to pave the way for them to receive the sacraments nevertheless, and would risk causing them to live in objective contradiction to the truth of their own personal condition (2010 Address to the Roman Rota).

Civil Marriage and Divorce

Church annulments can be relevant to civil law, though the Program teaches otherwise and remains silent about canon law for separation of spouses. Canon law recognizes that

many civil forums have divorce laws contrary to divine law. Thereby, for those spouses who exchanged vows using the Catholic marriage rite, neither party can approach the civil court for dissolution of marriage or divorce without undergoing an ecclesiastical separation first (can. 1151-1155, 1692).

In civil law, termination of marriage can occur in three ways: dissolution, divorce, or annulment. In dissolutions, both parties want to terminate the marriage and they agree to split in two their property and children. Some arrangement for financial support is part of their agreement. In divorce, one party (Plaintiff) files a divorce case against the other (Defendant). Due to the no-fault divorce practice, after court hearings, there is nothing a Defendant can do to stop the court from issuing the divorce.

If the parties have an invalid marriage because of simulation (can. 1101), the innocent party would be eligible for a civil annulment based upon fraud. The fraudulent party could be held responsible to make restitution to the innocent party for damages [done to the innocent party who was tricked into thinking he or she was married (i.e., Ohio Revised Code 3103.01, 3105.31(D)).]

Grounds for Annulment

The FSP states that one of its purposes is “To educate individuals regarding the Catholic teaching on marriage and requirements for a valid marriage as recognized by the Catholic Church.” However, the FSP does not correctly describe the requirements for a valid marriage as portrayed by the authoritative Catholic Church.

Juridic terminology associates particular meanings to words and every aspect of marriage does not have juridic relevance. In an annulment case, juridic relevance refers to characteristics of marriage that would be relevant to whether a marriage is invalid. A common basis for alleging invalidity of marriage is using c. 1095 or c. 1101. The only characteristics of marriage that have juridic relevance in these popular grounds for invalidity are limited: essential matrimonial rights, essential matrimonial duties, essential obligations of marriage, essential elements of marriage, and essential properties of marriage (can. 1095 2^o, 3^o 2, 1101 §2). The section from c. 1095 applies to those who have a grave lack of discretion of judgment. C. 1101 applies to those who simulated (faked) their marriage vows. One must understand which rights, duties, obligations, elements, and properties of marriage are relevant to understand the requirements for valid marriage.

The essential duties and elements of marriage are permanence, conjugal exclusivity, and procreativity. Conjugal exclusivity means that one will not have sexual intercourse with anyone besides one's spouse. There is no requirement to be the other spouse's best friend and primary confidant for a marriage to be valid, as discussed in the FSP. "The good of the spouses" is not an essential right, duty, obligation, element, or property of marriage. It is an "end" of marriage that is achieved to various levels of satisfaction in different marriages. The FSP appears to confuse the description of a comfortable, ideal marriage with the requirements for a valid marriage.

The Holy See provides the correct meaning of juridic terms in various ways, such as the Pope's Annual Address to the Roman Rota, which is the appellate tribunal for the world. The decisions (Sentences) of the Roman Rota are called its Jurisprudence. The Holy See promulgated the reorganized Code of Canon Law in 1983. In 2005, a standardized guide was published relating to Canon Law and marital investigations: *Dignitas Connubii, Instruction To Be Observed By Diocesan And Interdiocesan Tribunals In Handling Causes Of The Nullity Of Marriage* (D.C.).

Tribunal judges throughout the world are "not to make presumptions which are contrary to those developed in the jurisprudence of the Roman Rota" (D.C. Art. 218 §2). It is necessary for all who make up the tribunal or assist it to "study the jurisprudence of the Roman Rota, since [the Rota] is responsible to promote the unity of jurisprudence and, through its own sentences, to be of assistance to lower tribunals" (D.C. Art 35 §3, citing *Pastor bonus*, art.126).

If people contrive their own definitions of juridic terms, such as essential duties and obligations of marriage, they will not correctly understand the Church teaching about annulments. For example, one could propose that a couple's marriage is invalid (in accord with can. 1095 2^o) by alleging the bride "suffered from a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted." However, if the bride was exercising poor discretion of judgment concerning some aspect of marriage that was not an essential right or duty, that would not constitute any reason for invalidating the marriage. Suppose at the time of exchanging her vows, she thought that she should continue to go out with her girlfriends much more than her future husband actually wanted. This is proposed in the FSP as a situation relevant to invalidating a marriage. But, in actuality, any judgment on the bride's part could only show invalidity of the marriage if she erred regarding some essential duty or right of marriage. Her ideas about "going out with the girls" have

nothing to do with invalidity of marriage. The essential rights of marriage do not include the right to go out with one's girlfriends, nor do the essential duties include staying home with one's husband when he doesn't want one to "go out with the girls."

Incapacity to consent to marriage only occurs when a party suffers a serious mental problem. The FSP states that the Cleveland Tribunal has results wherein 85% to 90% of the petitioners are getting annulments. The Program never says that for cases involving incapacity to consent, the evidence has to be proven that a serious mental problem existed.

Retired Rotal Judge Cormac Burke has published many Sentences from the Roman Rota and many articles about the capacity to consent to marriage. In excerpts from two Sentences quoted here, the Roman Rota explains canon 1095:

[...] Under the canon a first main requirement that a marriage be declared null due to "psychic incapacity" for consent is the gravity of the underlying anomaly from which the incapacity derives. The correspondence of this requirement with natural law is obvious. It is because marriage is so particularly in consonance with human nature that a human right to marry exists (c. 1058). It follows — also as a matter of natural law — that only some grave defect in a person's natural psychic faculties can induce the loss of this right. To suggest that this right could be forfeited because of some mild or moderate defect in one's psychic faculties (such as about everyone at times undergoes) would violate both common sense and the tenets of Christian anthropology.

That only a condition which is gravely anomalous can provoke consensual incapacity is expressly stated by c. 1095, 2 regarding a possible defect of discretion of judgment. If any doubt initially existed that the requirement of gravity also applies to the "causes of a psychic nature", mentioned in no. 3 of the canon, this was definitively dispelled by the authoritative interpretation of the canon given by Pope John Paul II in his Addresses to the Roman Rota in 1987 and 1988: "An argument for real incapacity can be entertained only in the presence of a serious form of anomaly which, however one chooses to define it, must substantially undermine the capacity of understanding and/or of willing of the contracting party" (AAS 79 (1987) 1457); "... only the more serious forms of psychopathology are capable of undermining the substantial freedom of the person" (AAS 80 (1988) 1182)"

11. The second main requirement for a declaration of nullity due to consensual incapacity is explicitly stated in both nos. 2 and 3 of the canon: i.e. that the incapacity (whether in the estimative or in the executive order) should relate to the essential

rights/obligations of marriage, and not just to its incidental duties, rights, or expectations.

Therefore, it is not enough to prove that the person consenting suffered from some form of grave psychic anomaly, nor even to demonstrate that the anomaly in question affected some matrimonial right or duty with an incapacitating effect. One must further and absolutely show the essentiality — regarding the institution of marriage — of the right or obligation in question. An anomaly, however grave, that affects a person regarding the understanding, choice or assumption of unessential rights or obligations of matrimony, is inadequate to provoke consensual incapacity: This is constantly held in Rotal jurisprudence.

12. There is then united agreement in Rotal jurisprudence that an incapacity regarding a marital right or obligation invalidates consent, only if the right or obligation in question merits the juridic status of essential. It would be premature to say that equal agreement exists about which obligations of marriage are in fact to be considered juridically essential. This latter question is still a matter of ongoing reflection in rotal jurisprudence, in furtherance of the directive given by Pope John Paul II shortly after the entrance into vigor of the new Code:

13. Since these essential or constitutional rights and obligations have their juridic roots in the object of matrimonial consent, it would seem that investigation of this aspect of c. 1095 must go hand in hand with the analysis made of c. 1057, § 2, which itself describes matrimonial consent in terms that are quite new in canonical parlance: "an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish a marriage". The exact juridic content — the nature, extent and limits — of what is implied in the "sese mutuo tradunt et accipiunt", demands careful study, and poses no small problems.

14. The "sese mutuo tradere et accipere", ordered to the constitution of marriage, certainly entails a mutual, free and binding commitment of the persons of the spouses: a bond or covenant uniting them and, for the purposes of canon law, giving rise to rights and obligations that are juridically measurable. It is however questionable whether one can require an integration of the persons of the spouses, as an essential juridic element of the "sese mutuo tradere et accipere". An "integration of persons" — more properly expressed as an "integration of personalities" — is a psychological concept, at the same time as, applied to the conjugal union, it no doubt expresses a spiritual ideal. However it resists any juridic measurement, and does not appear to qualify as a working concept for elaborating a judicial decision. Judges can decide questions in their own field, only if it is possible to weigh the concrete issues before them in juridic terms and to apply juridic measurements to them. Psychological, anthropological or spiritual parameters do not in themselves provide any basis for judicial practice, unless they can be appraised in proper juridic terms which give a notion

of legal rights or obligations sufficiently precise and determined that a court of law, in fulfilment of its mission, can pronounce on them. (Sentence of the Tribunal of the Roman Rota. Dec. 12, 1996. Rome. www.cormacburke.or.ke/node/431.)

[...] In weighing cases of consensual incapacity, ecclesiastical jurisprudence needs to establish and hold to juridic terms of reference, without unnecessary or inattentive use of medical or psychiatric terms. This is all the more important when, as seems to be the case in modern psychiatry, even leading psychiatrists themselves are not in universal agreement about diagnostic terms (cf. *American Journal of Psychiatry*, vol. 141 (1984), pp. 542-545; 548-551; vol. 150 (1993), pp. 399-410).

3. This can be pertinent in considering a statement made in one of the Briefs presented before the Court in the present case. According to the Petitioner's Advocate, Rotal jurisprudence accepts that an incapacitating defect of discretion "does not require the existence of a real psychopathology" (Brief, 7). Whatever positions on this may have been maintained in the 1970s, c. 1095, 2 of the 1983 Code lays it down that incapacity for marital consent can arise only where there is a grave defect of discretion: only, that is, when the judgmental faculty of the human "psyché" is gravely disordered. If any possible doubt remained on the point, it was dispelled by an authoritative interpretation (for the whole of c. 1095) given by the chief legislator himself. In his 1987 Address to the Rota, Pope John Paul II declared that "an argument for real incapacity can be entertained only in the presence of a serious form of anomaly which, however one chooses to define it, must substantially undermine the capacity of understanding and/or of willing of the contracting party" (AAS, vol. 79 (1987) 1457). From the viewpoint of Christian anthropology and canonical jurisprudence, such an "anomaly" — however it may be defined by other sciences — certainly represents a true pathology of the *psyche*; a disorder or illness ("*morbus*") of mind and/or of will (and some would also say of affectivity), such as to incapacitate for consent.

4. The progress of modern science has shown that psychological disorders are much more frequent than was supposed or at least admitted in the past. It does not follow from this, however, that such disorders are always serious. "Formerly the presence of some form of psychic anomaly tended to be regarded as something quite exceptional, and also as a fact to be ashamed of. Contemporary society readily accepts that psychic ailments are almost as common as physical, and that, like physical sicknesses, they can be present in mild, moderate or severe degrees. This new realization is not really new to Christian anthropology which holds, as a fundamental view of man flowing necessarily from the doctrine of Original Sin, that each person suffers from some disturbance or lack of integration in personality. From the Christian view, therefore, there is no one who is perfectly "normal", in the sense of never

deviating from the norm of "ideal" or perfect harmony or inter-working between the different psychic faculties" (Sentence coram undersigned Ponens, Jan. 17, 1991, n. 3).

Certainly, a simple diagnosis of a "Personality Disorder," with little specification of its effects and no clear indication of its gravity, is totally inadequate to prove consensual incapacity. Personality Disorders are frequent. DSM-III-R, listing many types, states that "Borderline Personality Disorder is apparently common" (p. 347), and affirms the same of Histrionic Personality Disorder (349), of Avoidant Personality Disorder (352), of Dependent Personality Disorder (354), and of Obsessive Compulsive Personality Disorder (355).

5. Moreover, the ecclesiastical judge must always consider whether the symptoms — the indications invoked to diagnose an alleged "disorder" — are sufficient to establish the existence of a truly incapacitating disorder, within acceptable anthropological terms of reference. Particular care is called for in considering how a "Dependent Personality Disorder" might render a person incapable of marital consent. After all, given the fact that matrimony was instituted to provide mutual support, a certain disposition towards and desire for dependence would seem to make a person apt for consent, rather than unfitted for it.

According to the current criteria of the American Psychiatric Association, a diagnosis of "Dependent Personality Disorder" is appropriate when a person shows the following five "symptoms": (a) "volunteers to do things that are unpleasant or demeaning in order to get other people to like him or her"; (b) "feels uncomfortable or helpless when alone, or goes to great lengths to avoid being alone"; (c) "feels devastated or helpless when close relationships end"; (d) "is frequently preoccupied with fears of being abandoned"; (e) "is easily hurt by criticism or disapproval" (DSM-III-R, p. 354). The last of these "symptoms" no doubt indicates a degree of moral defect, though hardly a grave one. It is arguable however that the other four are compatible with true marital love and fidelity, and even that they could be regarded as a sign of such love and a good basis for it.

The petitioner in the present case claims that grave immaturity was shown in the fact that he and the Respondent were "codependent": something he clearly regards as a defect. Marriage however is essentially a codependent affair. To be a support to one another, so as to grow together, is part of the design of marriage, aimed precisely at fostering the "good of the spouses". Modern psychologists tend to consider "excessive dependence on one's married partner" as a character defect (British Journal of Psychiatry (1991) vol. 158, p. 598); perhaps; but if it is not excessive, it is a virtue. (Sentence of the Roman Rota, Sent April 29, 1993, <http://www.cormacburke.or.ke/node/407>.)

In aforementioned sources from the Holy See, the faithful are cautioned against assuming that marriages are invalid just because the parties are divorced. It is circular and incorrect logic to presume that for virtually all divorced couples there was some hidden problem at the time of marriage, which is the basis for annulment. Pope John Paul II, in *Familiaris Consortio* explains “Various reasons can unfortunately lead to the often irreparable breakdown of valid marriages” (§83).

In his 1990 Address to the Tribunal of the Roman Rota, Pope John Paul II warned against “false compassion” that gives annulments to those with valid and difficult marriages. This has only the appearance of being pastoral, but it is actually a violence against truth:

It is necessary to try to understand better the harmony between justice and mercy, a theme very dear to both the theological and canonical traditions. “One judging justly serves mercy with justice” [...]

Convinced of that, ecclesiastical authority is attentive that its actions conform to the principles of justice and mercy, even when it treats cases concerning the validity of a matrimonial bond. It thus takes note, on the one hand of the great difficulties facing persons and families involved in unhappy conjugal living situations and recognizes their right to be objects of special pastoral concern. But it does not forget, on the other hand, that these people also have the right not to be deceived by a judgment of nullity which is in conflict with the existence of a true marriage. Such an unjust declaration of nullity would find no legitimate support in appealing to love or mercy. Love and mercy cannot put aside the demands of truth. A valid marriage, even one marked by serious difficulties, could not be considered invalid without doing violence to the truth and undermining thereby the only solid foundation which can support personal, marital, and social life. A judge, therefore, must always be on guard against the risk of false compassion that would degenerate into sentimentality, and would be pastoral appearance alone. The roads leading away from justice and truth end up in serving to distance people from God, thus yielding the opposite result from that which was sought in good faith.

Pope John Paul II’s “Address to the Roman Rota, 1987” clarifies that the breakdown of a marriage is never proof of an invalid marriage. Canon 1095 (incapacity to consent to marriage) only is relevant if the incapable party has a serious pathology with particular effects.

For the canonist the principle must remain clear that only incapacity and not difficulty in giving consent and in realizing a true community of life and love invalidates a marriage. Moreover, the breakdown of a marriage union is never in itself proof

of such incapacity on the part of the contracting parties. They may have neglected or used badly the means, both natural and supernatural, at their disposal; or they may have failed to accept the inevitable limitations and burdens of married life, either because of blocks of an unconscious nature or because of slight pathological disturbances which leave substantially intact human freedom, or finally because of failures of a moral order. The hypothesis of real incapacity is to be considered only when an anomaly of a serious nature is present, which, however it may be defined, must substantially vitiate the capacity of the individual to understand and/or to will.

Irreconcilable and infantile aspects can easily be found in many spouses, but this is no basis for invalidity of marriage, according to Pope John Paul II's "Address to the Roman Rota, 1988." He cautions against using psychological-based reasoning to erroneously conclude that everyone has some infant or adolescent trauma that made them incapable of marriage consent. Psychological-based reasoning concluding that marriages are invalid is also mistaken when the standard that parties are expected to achieve is too high.

It frequently happens that the psychological and psychiatric analyses carried out on the contracting parties, instead of considering "the nature and degree of psychic processes which impinge upon matrimonial consent and the ability of the person to assume the essential obligations of marriage" (February 23, 1987, *supra* p. 192, no. 2) are limited to a description of the behavior of the contracting parties in the different stages of their life. From that the abnormal symptoms are collected and classified according to a diagnostic label. It must be said candidly that such an exercise, while it has its value, is totally incapable of supplying the clarification which the ecclesiastical judge expects of the expert. The judge should, therefore, request the expert to go further and extend the analysis to an evaluation of the underlying causes and dynamic processes without stopping with the symptoms which spring from them. Only such a complete analysis of the subject, of the individual's psychic capacities, and freedom to strive for values that are in themselves self-fulfilling can be translated into canonical categories by the judge.

All possible explanations for the failure of a marriage for which a declaration of nullity is sought will have to be considered and not just the hypothesis of it being due to psychopathology. If nothing more is done than a descriptive analysis of the different ways of behaving, without seeking their dynamic explanation and without attempting a comprehensive evaluation of the elements which make up the personality of the subject, the analysis of the experts leads to one single predetermined conclusion. In fact it is not difficult to see within the contracting parties infantile and irreconcilable aspects, which in such a situation become inevitably the proof of their abnormality. It may, in fact, be a case of people who are substantially normal but who have difficult-

ties which could be overcome, were it not for their refusal to struggle and make sacrifices.

The error becomes all the more easy if one considers that often the expert presupposes that a person's past not only helps to understand the present but inevitably determines it in such a manner as to eliminate all possibility of free choice. Here again the conclusion is predetermined and the consequences are serious when it is considered how easy it is to find in everyone's infancy and adolescence traumatizing and inhibiting elements.

There is another and not infrequent source of misunderstanding in the evaluation of psychopathological symptoms. It arises not from an exaggeration of the extent of the illness but, on the contrary, from an unjustified exaggeration of the concept of capacity to contract marriage. As I noted last year (*supra* p. 192, no. 6), the misunderstanding can arise from the fact that the expert declares that a party is incapable of contracting marriage, while referring not to the minimum capacity sufficient for valid consent, but rather to the ideal of full maturity in relation to happy married life.

If the Cleveland Diocese's FSP is all about "the salvation of souls", why is there no hint at admonishing the sinner who is wrongfully separated from his or her true spouse? Sin can lead to separation of spouse and divorce. Pope John Paul II, in his "Address to the Roman Rota, 2004" warned against concluding that failed conjugal life implies the invalidity of the marriage.

Then what can one say to the argument which holds that the failure of conjugal life implies the invalidity of the marriage? Unfortunately, this erroneous assertion is sometimes so forceful as to become a generalized prejudice that leads people to seek grounds for nullity as a merely formal justification of a pronouncement that is actually based on the empirical factor of matrimonial failure. This unjust formalism of those who are opposed to the traditional *favor matrimonii* can lead them to forget that, in accordance with human experience marked by sin, a valid marriage can fail because of the spouses' own misuse of freedom.

[...] The tendency to instrumentally broaden the causes for nullity, losing sight of the bounds of objective truth, involves a structural distortion of the entire process. In this perspective the preliminary investigation would lose its effectiveness since its outcome would be preordained. The search itself for the truth, to which the judge is seriously bound *ex officio* (CIC, can. 1452; CCEO, can. 1110) and for the attainment of which he seeks the help of the defender of the bond and of the advocate, would result in a series of empty formalities. The constitutive aspiration to the truth of the sentence would be lost or seriously minimized were it to be subjected to a series of preordained responses, as these would undermine its critical power of inquiry and

analysis. Key concepts such as moral certitude and the free examination of the proofs would be left without their necessary reference point in objective truth (cf. *CIC*, can. 1608; CCEO, can. 1291), the search for which would be abandoned or considered unattainable.

When attendees submit their petition for annulment, according to the FSP, the Tribunal's goal, first and foremost, is the help the Petitioner heal (Transcript, October 04, 2011, p. 5, lines 19-20; time 00:13:21). The Defender of the Bond, in his opening remarks, said the staff canon lawyers have the *pastoral sense* to work with people after their civil divorce (Ibid. p. 2, lines 26-31; 00:04:11). None-the-less, Pope John Paul II cautions that it is not a pastorally valid solution to give annulments to practically everyone who is divorced. It is immoral for a Tribunal to make it look like they are conducting thorough, lawful, and fair proceedings, when, in fact, they are only simulating a verdict that appears authentic. It is a grave error for Tribunals to grant annulments based on reasons that are unfounded according to the most elemental principles of the norms of the Magisterium. Pope John Paul II described these risks in his 2005 Address to the Roman Rota:

However, in the current circumstances there is also the threat of another risk. In the name of what they claim to be pastoral requirements, some voices have been raised proposing to *declare marriages that have totally failed null and void*. These persons propose that in order to obtain this result, recourse should be made to the expedient of retaining the substantial features of the proceedings, simulating the existence of an authentic judicial verdict. Such persons have been tempted to provide reasons for nullity and to prove them in comparison with the most elementary principles of the body of norms and of the Church's Magisterium.

The *objective juridical and moral gravity of such conduct*, which in no way constitutes a pastorally valid solution to the problems posed by matrimonial crises, is obvious.

In 2009, Pope Benedict XVI acknowledged that there has been a continuous scandal of marriage being devalued by the exaggerated and almost automatic multiplication of annulments due to supposed immaturity or psychic incapacity.

There are any number of topics which we might discuss on this occasion, but now, some twenty years after the Addresses of Pope John Paul II regarding psychic incapacity in the causes of matrimonial nullity (5 February 1987, *L'Osservatore Romano*, English edition, 23 February 1987, p. 6 and 25 January 1988, *ibid.*, 15

February 1988, p. 7), it seems fitting to question the extent to which these interventions have had an adequate reception in ecclesiastical tribunals.

This is not the moment to draw up a balance sheet, but no one can fail to see that there continues to be a concrete and pressing problem in this regard. In some cases, unfortunately, one can still perceive the urgent need to which my venerable Predecessor pointed: that of preserving the ecclesial community "from the scandal of seeing the value of Christian marriage being destroyed in practice by the exaggerated and almost automatic multiplication of declarations of nullity, in cases of the failure of marriage, on the pretext of some immaturity or psychic weakness on the part of the contracting parties" (Address to the Roman Rota, 5 February 1987, n. 9). (Address to the Roman Rota, 2009)

There is no basis to determine a marriage is invalid just because a person decided rashly to get married, or to decide a marriage is invalid because a person excluded the *bonum coniugum* (good of spouses). In his "Address to the Roman Rota, 2011" Pope Benedict XVI reiterated that these practices are incorrect.

This question continues to be very timely. Unfortunately incorrect positions still endure, such as that of identifying the discretion of judgement required for the marriage (cf. CIC, can. 1095, n. 2) with the hoped-for prudence in the decision to get married, thus confusing an issue of capacity with another which does not undermine the validity since it concerns the level of practical wisdom with which a decision is taken which is, in any case, truly matrimonial. The misunderstanding would be yet more serious were there a wish to assign an invalidating effect to rash decisions made in married life.

In the context of nullity because of the exclusion of an essential property of marriage (cf. *ibid.*, can. 1101 § 2), a serious commitment is likewise necessary so that the judiciary pronouncements reflect the truth about marriage, the same truth that must illumine the moment of admission to marriage. I am thinking in particular of the question of the exclusion of the *bonum coniugum*. In relation to this exclusion the same danger that threatens the correct application of the norms on incapacity seems to be repeated, and that is, the search for causes of nullity in behaviour that do not concern the constitution of the conjugal bond but rather its realization in life. It is necessary to resist the temptation to transform the simple shortcomings of the spouses in their conjugal existence into defects of consent.

When the 1983 Code of Canon Law was published, there was a team of six editors who worked with Pope John Paul II. Edward M. Egan was one of those editors. He was also a judge at the Tribunal of the Roman Rota and taught canon law in Rome. At that time, his

articles in the scholarly journal of the Roman Rota made these straightforward statements:

The vast majority of adults are capable of a valid marriage, and the vast majority of marriages are therefore valid. (Egan, Edward M. "Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgement." *Ephemerides Iuris Canonici*, Vol. 39. No. 1-2 (1983): p 9-54. Page 36).

One consents to marriage by giving to and receiving from another of the opposite sex not the right to marriage nor even the right to a marriage relationship, but rather the exclusive right to conjugal acts, as long, as both parties are alive ["..."] Nor does marriage consent consist in or require the giving of oneself to one's partner or the receiving of one's partner for oneself. (Egan, Edward M. "The Nullity of Marriage for Reason of Incapacity to Fulfill the Essential Obligations of Marriage." *Ephemerides Iuris Canonici*, Vol. 40. No. 1-4 (1984): p 9-34. page 11, 20)

Decisions from the Roman Rota are sometimes published on the Internet, with the parties' identifying information omitted. This sentence given on November 26, 1992, reiterates that difficulties in marriage and difficulties in achieving some form of easy gratifying "*bonum coniugum*" are not a basis for invalidating a marriage, but are normal parts of marriage.

It follows that any analysis which identifies the "*bonum coniugum*" with some form of easy or gratifying human relationship between the spouses is fundamentally flawed. Only passing and superficial personal contacts can be smooth and without any strains. Difficulties always make their appearance in every close interpersonal relation that is extended over a period of time. Since marriage involves man and woman in a unique relationship and commitment to be maintained over the whole of their lifetime, it is bound to be marked by difficulties between the spouses, sometimes of a grave nature. Many happy married unions are between two persons of quite different characters who have clearly had to struggle hard to get on. One can rightly say that these marriages are the most "successful", for they have matured the spouses most.

The married commitment is by nature something demanding. The words by which the spouses express their mutual acceptance of one another, through "irrevocable personal consent" (GS, 48), bring this out. Each pledges to accept the other "for better or for worse, for richer or for poorer, in sickness and in health... all the days of my life" (*Ordo Celebrandi Matrimonium*, no. 25; cf. GS, ib.).

It is through dedication, effort and sacrifice, especially when made for the sake of others, that people grow and mature most; that way each one comes out of himself or herself and rises above self. Loyalty to the commitment of married life — to be mutually faithful, to persevere in this fidelity until death, and to have and rear children — contributes more than anything else to the true good of the spouses, so powerfully realized in facing up to this freely accepted commitment and duty: a duty, as John Paul II describes it, "of a conscious effort on the part of the spouses to overcome, even at the cost of sacrifices and renunciations, the obstacles that hinder the fulfilment of their marriage" (Address to the Roman Rota, Feb. 5, 1987: AAS 79 (1987) 1456). (Sentence Given in the Tribunal of the Roman Rota, Appeal from Armagh [English version: *Studia canonica* 27 (1993), 496-505])

The FSP described aspects of marriage that must be present according to their version of valid marriages, such as being each other's best friend and confidant. Incompatibility of the spouses is not a basis for invalidity of marriage. The Roman Rotal Sentence issued on April 17, 1997, overturned a decision from the Diocese of Davenport that made loose statements about the rights and obligations of marriage: rights and duties of self-revelation, understanding, and sharing. The correct understanding of the essential and non-essential matrimonial rights and duties is included in the Rotal Sentence:

5. From the express terms of c. 1095, nos 2 and 3, it is clear that a grave lack of discretion regarding non-essential marital rights or duties, or an incapacity to assume such non-essential elements, does not render a person consensually incapable. The handing down of sound and just decisions under c. 1095 necessarily depends therefore on the determination of which in fact — from the juridic point of view — are the essential rights and duties of marriage. At the present moment, it must be said that doctrine and jurisprudence are still far from having resolved this primary question.

It is in fact no easy task to determine "which among so many obligations inherent to marriage are essential, and which, even if important, are not essential" (*U. Navarrete, Iustus Iudex, AA.VV. Münster* 1990, p. 272). "Once one has defined the several obligations that derive from the conjugal alliance, one must distinguish among them those that pertain to the substance from others which are added to the substance... [hence] it seems that the essential obligations and the substance of these obligations can be defined only in reference to the possibility or otherwise of living the conjugal "consortium", in its essential properties (cf. c. 1056) and in its double natural ordination (cf. can. 1055, § 1)" (c. Pompedda, Jan. 15, 1987: vol. 79, p. 12). "It is difficult to simply, clearly, and exhaustively indicate, declare and circumscribe the essential obligations of matrimony. But there must without doubt be included among them those deriving from the essential properties of marriage, unity and indis-

solubility (c. 1056), and belonging to the natural ordering of the matrimonial institution, that is, to the good of the spouses and the procreation and education of children (c. 1055, § 1)..." (c. Funghini, June 23, 1993: vol. 85, p. 472). (cf. also Pavanello, P.: *Il requisito della perpetuità nell'incapacità di assumere le obbligazioni essenziali del matrimonio*, Roma, 1994, p. 108).

6. Careless or loose statements in this field do not help the development of sound juridic principles. The sentence before us today invokes, as relevant under c. 1095, the conjugal "rights and duties of self-revelation, understanding, and sharing" (Acts, 212); and says that a "radical failure to appreciate" such rights and duties causes consensual incapacity (ib.).

7. A double difficulty would have to be faced and resolved, before courts of law could treat general and unspecified rights and duties, of the type just mentioned, as pertinent for the purposes of c. 1095, nos. 2 or 3. The first is to determine their nature and meaning more precisely (it is not at all clear, for instance, what a "right of understanding" involves in practice); until this is done, they escape the possibility of proper judicial analysis. The second is to establish not only their concrete juridic nature, but also the fact that they are truly essential marital rights or duties, for only such - we repeat - are relevant to a plea under c. 1095. Without denying that the rights and duties mentioned in the sentence under review are endowed with notable moral importance, we find it hard to see how they can be made subject to legal measurement, and thus be the object of a juridic claim.

To hand down a judicial decision of consensual incapacity, it is not enough to conclude (if this emerges as really proved) that, for instance, the husband was "arrogant" or "tyrannical", etc. The fact that one of the parties did not fulfil his or her matrimonial duties or respect the rights of the other party, in itself, at the most, proved bad will, but not any constitutional incapacity.

8. Incompatibility. The judges whose decision we must review today found strong corroboration of their opinion that the marriage in question was null, in that the parties' "marital problems were the natural outcome of their incompatibility which they failed to heed during the courtship" (212). "Incompatibility" is a psychological concept, intended to denote the impossibility of any close interpersonal relationship being established or maintained between two particular personalities. From the viewpoint of Christian anthropology, given the basic commandment of loving everyone without exception, it seems questionable that one can ever speak of absolute incompatibility. Psychologists themselves at times express scepticism about the validity of the concept of basic incompatibility. In a Rotal case *coram* Raad of April 14, 1975, we read the reply of a 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" (vol. 67, p. 258).

9. Whoever alleges "incompatibility" as a grounds for incapacity under c. 1095, would have to prove not only that the condition of incompatibility between the parties was already present (although no doubt hidden, at least to them) at the moment of consent, but also that at that time it was bound eventually to emerge between them. Here Christian and secular psychology may well part company. It smacks of determinism to hold that two persons, in love at the time of their wedding, were unavoidably destined to end up ten or twenty years later hating each other. It is extremely hard to see (and impossible, we suggest, to prove) that such a radical change can have been inevitable from the start. If it actually takes place, it is far more likely to have been an avoidable process that, through lack of effort, self-sacrifice, humility and prayer, was simply not avoided.

10. Strongly contrasting characters between husband and wife are not an impediment to marriage, nor a cause of consensual incapacity.
(<http://www.cormacburke.or.ke/node/432>.)

Roman Rotal Judge, Msgr. Cormac Burke, explains how absence of a loving marriage is not a basis for invalidating a marriage. This attitude was popular in the 1970's among certain writers, but it was never adopted by the authoritative Church.

A considerable effort to give juridical relevance to love characterized the position of not a few writers of the immediate postconciliar years. The argument put forward was simple and not without apparent force: whoever does not give his love in marriage is not giving himself in an essential aspect of his person, and is therefore not effecting a true "*traditio suiipsius coniugalis*".

I have the impression that the ensuing debate was not always conducted according to proper debating rules, above all that of adequately defining the terms and the scope of the discussion. There was a constant appeal to the "intimate community of conjugal life and love" (GS 48), but without any serious effort to establish whether this expressive phrase can be applied without further qualification to the juridic sphere; and particularly without thoroughly examining the central question of what sort of love one wished to endow with juridic effect: love in its broadest sense, i.e. also in its affective-psychological dimension; or love restricted rather to the sphere of the will.

Some suggestions put forward during the 1970s seemed to reach the point of making the very validity of the marriage bond depend on love, even (and perhaps particularly) in its psychological-sentimental sense. It was maintained that if there was no love from the beginning, no marriage was constituted, because of the lack of an essential juridical element. Some went further and held that if love fails (even

though it was present at the start), the marriage lapses with it, also in its juridical entity.

Nevertheless, despite the fact that they aroused a certain initial interest and even provoked some lively debates, these suggestions found no acceptance in the work of preparing the new Code ([Roman Rotal Judge, retired.] Burke, Msgr. Cormac, *The Object of Matrimonial Consent: A Personalist Analysis*. *Forum* 9 (1998) 1: pp. 39-117. <http://www.cormacburke.or.ke/node/1181>. Citing Decisions from the Roman Rota, *Acta Apostolicae Sedis - A.A.S.*)

Whether or not both spouses act lovingly toward each other should not be the basis for determining that some hidden problem existed at the time of exchanging marital vows. However, the FSP uses these occurrences of unloving behavior as the basis to show that some undiscovered problem existed at the time of the marriage. The now-discovered problem [by the Cleveland Tribunal] will be used as the ground for invalidating the marriage.

Jurisprudence from the Roman Rota states, “The validity of marital consent cannot depend on the intensity of feelings of love then present, or on the capacity to have and maintain such feelings later on, for there is no essential marital right or duty to feelings of love. The incapacities contemplated by c. 1095, 3 do not include the inability to have feelings, or to make one's partner have them” (April 29, 1993. <http://www.cormacburke.or.ke/node/407>).

Describing how one did not experience the “good of the spouses” to one’s satisfaction in comparison to teaching about ideal marriages is not a basis for determining the invalidity of marriage. The FSP instructs petitioners to compose their evidence for the Tribunal by writing such a comparison.

According to Roman Rota judge, Msgr. Cormac Burke, when a spouse reneges on marital promises and abandons the marriage, as is the case in many divorces, the “good of the spouses” can be continued by the faithful spouse.

What can one say of the really shipwrecked marriage where for instance one of the spouses reneges on his or her conjugal commitment and walks out on the other? Is it possible to continue to speak of the "good of the spouses" in such a context? Or must one conclude, as would appear, that it also has been totally wrecked?

As regards the reneging spouse, certainly the marriage would scarcely seem capable of working any longer toward his or her "good". Yet it can still work power-

fully for the good of the other, if he or she remains true to the marriage bond. If that fidelity is maintained, moreover, it may in God's providence act as a call to repentance, as a force of salvation, for the unfaithful spouse, perhaps in his or her very last moment on earth — when one's definitive "*bonum*" is about to be decided.

That the positive potential of such situations can be grasped only in the light of the Christian challenge of the Cross, does not in any way weaken the analysis. If it is true that the positive potential may never be actually realized, this simply reflects the risk and mystery of human freedom (The Object of Matrimonial Consent: A Personalist Analysis. Forum 9 (1998) 1: pp. 39-117. <http://www.cormacburke.or.ke/node/1181>).

Procedure for Adjudicating Cases

For those who seek to be educated about the annulment process, there are two Documents from the Holy See that specify how the procedure must be executed: “The Code of Canon Law,” and “*Dignitas Connubii*, Instruction To Be Observed By Diocesan And Interdiocesan Tribunals In Handling Causes Of The Nullity Of Marriage” ©2005.

One should recognize that married couples that have separated do not all have invalid marriages. Couples with valid marriages could be separated because one or both spouses reneged on their marital obligations when there was no morally legitimate reason for separation of spouses. In other cases, there could be a morally legitimate reason for separation of spouses, such as the innocent party separating from an adulterer or from a dangerously-abusive spouse. Procedural requirements should not be disregarded, leading people in these situations to either believe incorrectly that they have invalid marriages, or that they have no option to personally defend their marriage if they are respondents in annulment cases.

Annulment cases begin when the petitioner submits his *libellus* to the Tribunal. “*Libellus*” is a Latin term, literally meaning “little book,” and it is regularly also called the “petition.” It must be presented to the tribunal by the petitioner and must specify, *in a general way*, the facts and proofs that the petitioner is planning to use to prove his allegations. The *libellus* must also specify the ground of nullity on which the marriage is being challenged (D.C., Art. 116, c. 1502).

It is not the judge’s job to collect evidence or proofs when the petition is first submitted. The collection of proofs cannot begin until after several other steps are completed (D.C., Art. 160). When the proper time for collection of the proofs occurs (sometimes called

“collecting evidence”), an auditor can assist the judge. Collecting proofs includes conducting judicial examinations of the parties and witnesses. The examinations are supposed to occur at the tribunal, in person, and the person giving testimony is not supposed to see the questions in advance (D.C., Art. 162, 170).

The persons being questioned are to respond orally and are not to read anything written, unless it is a matter of explaining an expert report; in such case, the expert can consult the notes which he has brought with him. (D.C., Art. 171)

Mailing questionnaires to respondents and witnesses defeats the purpose of these requirements, though that is the routine related in the FSP by the Cleveland Diocese. The commentary on Article 171 in "*Dignitas Connubii: Norms and Commentary*" shows why questionnaires are inappropriate:

It is quite obvious from the care the Instruction takes to indicate the manner of questioning parties and witnesses, that it does not foresee the practice whereby witnesses are sent written questionnaires, or affidavits, that they then fill out and return to the court. The Roman Rota has long held this matter of collecting testimony to be illegitimate and suspect. There are many reasons to maintain this negative view of the practice. The use of affidavits offers no assurance that the persons who answers the questions have done so on their own, based on their own knowledge, and without influence from others to provide favorable answers. Nor do the written questionnaires permit the judge to note the demeanor of the witnesses in the face of the questions. Finally, the use of affidavits precludes tailoring the examination to the specific party or witness as the examination progresses. To provide only two examples, the judge will not know if the person misunderstood the question, necessitating a rephrasing of it, or whether it would have been appropriate to ask a follow up question. (Translation by CLSA, ©2006, of an original German work).

Before the collection of testimony occurs (judicial examinations), a proper petition must be submitted to the tribunal. When the petition is first submitted, the Judge is required to evaluate each petition and determine, by decree, whether it is to be accepted or rejected. If the petition does not contain the required elements, such as *the facts and proofs in a general way which are going to prove allegations of invalidity*, the petition must be rejected (D.C., Art. 119, can. 1505 §1). In the FSP, all petitions are apparently accepted. Jurisprudence from the Roman Rota says it is an abuse to admit cases that are certainly groundless, specifically those that neglect to specify the serious psychic anomaly of the spouse who had incapacity to consent to marriage (for cases based on can. 1095).

16. [...] an initial *libellus* is required, setting forth ‘the basis for the petitioner's right and at least in general the facts and proofs which will be used to prove what has been alleged’ (c. 1504, 2°). The court must then consider the *libellus*, to decide if there is in fact a minimum legal basis to the claim, a minimum possibility of its being upheld after formal judicial investigation; if not, the *libellus* is to be rejected (c. 1505 § 2, 4°), for it is an abuse if cases are admitted to hearing which are certainly groundless. Concretely, in cases brought under c. 1095, unless the allegations brought forward give some grounds to consider that one may be dealing with a *grave* defect of discretion regarding some *essential* right/obligation of marriage (c. 1095, 2°), which moreover would point to some *serious* psychic anomaly, present at consent, and not just to slight or moderate pathologies or simple defects of character (cf. Addresses of Pope John Paul II to the Roman Rota, 1987 and 1988: AAS, vol. 79, 1457; vol. 80, 1181), then the *libellus* should not be accepted. (Sentence of Oct. 15, 1992, Dublin, <http://www.cormacburke.or.ke/node/437>. Note: See also Sentence from Tribunal of the Roman Rota, Nov. 14, 1996, <http://www.cormacburke.or.ke/node/430>.)

If the petition is accepted, the case moves to the next step, which is to notify the respondent by sending him a citation. When the respondent receives his citation, he must receive a copy of the petitioner’s petition (*libellus*). The respondent has the right to see what account, in a general way, the petitioner is planning to give to show the marriage is invalid. In the FSP, the respondent is not sent a copy of the petition that shows the facts and proofs in a general way that the petitioner is planning to use to show the marriage is invalid. If the petition (*libellus*) is not sent to the respondent, as required by canon law, the acts of the process are null (D.C., Art 127 §3, 128). Null acts are to be treated as if they did not exist, and it appears that none of the respondents in the FSP are correctly so-notified.

Just after being cited, the respondent can offer his response to the *libellus*, but he should not be expected to give evidence or participate in a judicial examination until the proper stage in the process. If the respondent answers the FSP’s questionnaire and provides his testimony before other steps have occurred, the Tribunal is not following the lawful procedures (cf. D.C.).

The respondent’s right to defend the marriage is mentioned 16 times in *Dignitas Connubii* (Art. 13, 95, 99, 101, 104, 113, 230, 231, 232, 233, 240, 241, 242, 245, 270, 291). This right is never mentioned in the FSP’s educational presentation, nor at the

Tribunal’s website. The respondent has a right to have an advocate, which has a totally different job description than a procurator.

The FSP teaches that everyone is required to have a procurator (00:16:20) who they say is someone who works with parties at the parish level. The Program defines procurator as “a priest, deacon, religious person, or approved lay minister who assists either the petitioner or the respondent in preparing the paperwork needed in the case; more importantly, this person helps the petitioner and respondent seek healing through this emotional journey.” However The Code of Canon Law and *Dignitas Connubii* do not require that each party have a procurator. It does, however, require that the “tribunal is bound by the obligation to provide that each spouse is able to defend his rights with the help of a competent person, most especially when it concerns causes of a special difficulty” (D.C., Art. 101 §1). The procurator has no power to be involved in the defense of marriage; only the advocate can assist the party in defending his marriage

D.C. Art. 104 – § 2. It pertains to the procurator to represent the party, to present the *libellus* or recourses to the tribunal, to receive its notifications, and to inform the party of the state of the cause; but those things pertaining to defense are always reserved to the advocate.

The commentary on Article 101 in *Dignitas Connubii: Norms and Commentary* specifies the role of a procurator:

The procurator acts on behalf of the party before the court in a way similar to the function of a curator for those who are deprived of the use of reason (see Art. 97). The actions of the procurator are taken as if they had been placed personally by the one represented. The person represented need not act in person, although here, as opposed to when a guardian is appointed, the person remains free to do so. However, the party cannot recall or challenge an act once it is placed by a legitimately appointed procurator (Translation by CLSA, ©2006, of original German work).

The role of advocate is never mentioned in the FSP, though in *Dignitas Connubii*, the role of advocate is referenced in over 10% of the Articles. The role of the advocate assisting with the preparation of a party’s defense is so important, that canon law requires the tribunal to notify the party if no defense brief has been submitted by the party’s advocate. The parties must be notified that they need to take care of the matter either themselves or through a new advocate legitimately designated (D.C., Art. 245 §1). Most respondents would have no expertise in defending their marriage in the tribunal forum,

and the diocese is required by law to publish a list of advocates whom are experts in canon law who can assist the parties without charge and provide gratuitous legal assistance (D.C., Art 112).

There is only one situation in which the diocese is not required to have the defense brief submitted for the parties' defense — “if they entrust themselves to the knowledge and conscience of the judge” (D.C., Art. 245 §2). Because the FSP requires everyone to have a procurator, the procurator could act on behalf of the party and inform the Tribunal that the party entrusts himself or herself to the knowledge of the judge, without ever telling the party that this means they are waiving their right to submit a defense brief. If the FSP's form-letter citation to the respondent asks the respondent to “entrust himself to the knowledge and conscience of the judge” without ever telling the respondent that he is waiving his right to submit a defense brief, that seems deceptive.

Before anybody gives testimony (judicial examinations and collection of proofs), the respondent should see the petitioner's *libellus*, have a chance to be assisted by an advocate, have a chance to argue whether the grounds proposed by the petitioner should be dismissed or changed, and have a chance to meet with the petitioner and tribunal for a session of the joinder of the issue (D.C., 135-137).

After receiving the petitioner's *libellus* and the reply from the respondent, the tribunal is supposed to use the information to establish exactly which grounds for invalidity are going to be investigated for the parties' marriage. Then the judge is supposed to define the grounds by decree, that is: Determine the “formulation of the doubt.” Only after this is the tribunal supposed to collect the proofs from parties and witnesses. The things which are to be investigated are supposed to be *limited to the particular ground for invalidity for the specific marriage*.

D.C. Art. 160 – Without prejudice to art. 120, the tribunal is not to proceed to collecting the proofs before the formulation of the doubt has been set in accordance with art. 135, except for a grave reason, since the formulation of the doubt is to delimit those things which are to be investigated (cf. c. 1529).

When collecting evidence (collecting proofs), the tribunal's questions for the parties and witnesses are not supposed to involve several matters at the same time and are supposed to be pertinent to the cause in question.

D.C. Art. 169 – The questions are to be brief, adapted to the capacity of the person being questioned, not involving several matters at the same time, not confusing, not tricky, not suggesting a response, avoiding any offensiveness, and pertinent to the cause in question (c. 1564).

Per the FSP, when judges in the Cleveland Diocese collect evidence, they use the identical questionnaire for all petitioners. All respondents are sent an identical respondent questionnaire. Witnesses are all sent identical witness questionnaire. This practice defeats the intent of aforementioned procedural laws and results in many people providing answers to questions that have nothing to do with the formulation of the doubt.

For example, if petitioner had a properly worded *libellus*, he might allege that the marriage is invalid because the respondent was a seriously disturbed psychopath who was making an extraordinary number of truly absurd decisions shortly before and after the wedding, including practicing prostitution for no identifiable reason. The formulation of the doubt could be that the respondent suffered from a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted (c. 1095 §2).

So the parties, witnesses, and expert should be questioned about those matters, such as the seriousness of the psychopathy at the time of the marriage, the details about the absurd decisions, and the absence of other reasonable decisions during the same period. In the Cleveland Diocese FSP's questionnaire, the specific grounds for annulment for a particular case do not delimit the questions. All the questions involve several matters at the same time. For example, questions one and two ask each petitioner to provide information about their self and the respondent:

[...] about background, siblings, education, any military service, friends etc. Were there any special circumstances or problems in your (former [*sic*] spouse's) family background such as divorce, tensions in the home, difficulty in relating to parents, absence of parents(s), death, illness, alcohol and/or drug abuse, physical and/or sexual abuse, emotional illnesses, financial hardship, etc? How did your (former [*sic*] spouse) relate to your [his/her] family and friends? Please explain.

During everyone's judicial examinations, the respondent has the right for his/her advocate to be present during questioning. The respondent also has the right to submit questions to be asked (D.C., Art. 164, 166). These rights are not mentioned in the FSP.

Considering the Papal Addresses to the Roman Rota and the jurisprudence of the Tribunal of the Roman Rota, it could be argued that the ninth question for the petitioner in the FSP's testimony questionnaire is not relevant to any grounds for invalidity.

Do you feel your former spouse treated you with love and respect during the courtship? During the marriage? Did you treat your former spouse with love and respect during the courtship? During the marriage? If the answer to any of these questions is negative, please give detailed examples of the behavior that prompted your reply.