

# CANON 1095: CANONICAL DOCTRINE AND JURISPRUDENCE

## PART I: CANON 1095, 1° AND 2°

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### INTRODUCTION

Before discussing the canonical doctrine which underlies canon 1095, 1° and 2°, and the canonical jurisprudence which applies the same numbers of canon 1095 to daily life, it is necessary to state why numbers one and two of the canon in question are distinguished from number three of the same canon. All three numbers of canon 1095 deal with the psychological development requisite for valid marriage consent. However, they deal with marriage consent under two distinct aspects. Numbers one and two deal with the psychological development required for *sufficient* marriage consent, i.e., the minimal development of intellect and will necessary to form the practical judgment to marry another. Number three deals with the psychological development required for *effective* marriage consent, i.e., the minimal development of intellect and will necessary to fulfill what is promised in the act of marriage consent. Mario Pompedda, Rotal auditor, distinguishes the three numbers of canon 1095 in the following manner:

In reality, canon 1095, establishing a triple incapacity of contracting marriage, in the first two cases (numbers one and two) considers the subject as productive of an inadequate psychological act, and in the third case (number three) still formally the subject but placed in relationship with the object to which he is unequal, because his attempt to consent falls on a matter removed from his capacities, which, that is, he is not able to have at his disposal for psychological reasons.<sup>1</sup>

Numbers one and two, therefore, deal with the invalidity of marriage because of the impossibility, for psychological reasons, of forming consent at

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<sup>1</sup> “In realtà, il can. 1095, stabilendo una triplice incapacità di contrarre matrimonio, nelle prime due fattispecie (nn. 1° e 2°) riguarda direttamente *soggetto* in quanto produttivo di un atto psicologico inadeguato, e nella terza (n. 3°) ancora formalmente soggetto ma posto in relazione con *l'oggetto* cui egli è impari, in quanto suo conato di consentire cade su materia sottratta alle sue forze, di cui egli, cioè, per cause psichiche non è in grado di disporre.” Mario F. Pompedda, “Incapacità di natura psichica,” in *Il Codice del*

all. Number three deals with the invalidity of marriage because of the impossibility, again for psychological reasons, of making good on what is presumed to have been a sufficient act of consent.

Having established in a preliminary manner the distinction between numbers one and two, and number three of canon 1095, it is necessary, by way of introduction, to clarify the method of investigation employed here. First, the origin of numbers one and two in canonical doctrine will be examined. Since the incapacity in question flows from the nature of the act itself of giving marriage consent, it is necessary to uncover the roots of the incapacity as described in philosophical psychology and theological anthropology. As has been observed rightly, it is important to employ methodological purity in canonical research and practice.<sup>2</sup> In other words, the canonist must be certain that he employs concepts and terminology proper to a theological discipline, and that he understands accurately the canonical import of the individual concepts and terms employed.

The tendency to transpose directly psychiatric terminology into canonical discourse should be noted with special caution. If the canonical import of the psychological development of a person is to be described, the psychological description of the person will require always a translation into canonical terms. In making the translation, the difficulty of classification in psychiatry, in general, will have to be kept in mind.<sup>3</sup>

Once the canonical doctrine underlying numbers one and two of canon 1095 have been studied, the way will be prepared to discuss the jurisprudence which applies the canonical doctrine to daily life. The principles of jurisprudence only can be understood in the light of the canonical doctrine which underlies the heading of nullity.

### CANONICAL DOCTRINE

The categories, use of reason and discretion of judgment, enter the language of Canon Law by way of metaphysical psychology. The classical texts, to which canonists refer when employing these categories, belong to Saint Thomas Aquinas and Thomas Sanchez.

For Saint Thomas Aquinas, use of reason and discretion of judgment are synonymous. In the same text in which Aquinas explains at length the development of the use of reason in the individual, he interchanges freely the category, use of discretion, with the category, use of reason.<sup>4</sup> The category,

*Vaticano II: Matrimonio canonico fra tradizione et rinnovamento* (Bologna: Edizioni Dehoniane, 1985), p. 134.

<sup>2</sup> Ombretta Fumagalli Carulli, *Il matrimonio dopo Concilio* (Milano: Giuffrè, 1978), pp. 142-143, 198-199.

<sup>3</sup> Raymond L. Burke, *Lack of Discretion of Judgment Because of Schizophrenia: Doctrine and Recent Rotal Jurisprudence* (Roma: Editrice Pontificia Università Gregoriana, 1986), pp. 29-44.

<sup>4</sup> *Supplem. III*<sup>ae</sup>, q. 43, a. 2, ad 3.

use of reason, according to some commentators, has a more static sense, while the category, discretion of judgment, has a more dynamic sense.<sup>5</sup> The reality in the human person, which the two categories describe, is, however, one and the same.

What is the aspect of the human person to which use of reason and discretion of judgment refer? For the Angelic Doctor, it is the capacity to form practical judgments. He describes practical judgment in the following manner:

(T)he reason intimates something to a person by moving him to it: and such an intimation is expressed by a verb in the imperative mood, for example, when it is said to someone: *Do this*.<sup>6</sup>

Use of reason and discretion of judgment describe the capacity to act, to resolve practical questions. Like other human capacities, so, too, the capacity to form practical judgments develops gradually in a person. At first, the person makes practical judgments through another, e.g., a parent or an older sibling. As the individual grows older, more and more serious practical judgments are made on his or her own. From common experience, the capacity to form certain kinds of practical judgments is identified with a certain age in life. At a certain age, that is, a person is presumed to be capable of a certain type of judgment, e.g., to accompany another to a social function or to manage one's own finances. Clearly, however, the individual can deviate from the norm established by common experience. Saint Thomas observes:

Because, however, the precepts of the positive law follow that which exists in many, if someone arrives at the required development before the above time, such that the strength of nature and reason *supplies for the lack of age*, the marriage is not dissolved.<sup>7</sup>

The deviation also can be in the other direction, i.e., a person may arrive at the age when a certain development is presumed to have taken place without, in fact, having undergone the presumed development. The use of reason and discretion of judgment, therefore, always must be measured in terms of the individual's personal development.

How does practical reason, i.e., use of reason or discretion of judgment, function, according to Saint Thomas? It is a function of the joint operation of intellect and will, considering a concrete course of action.<sup>8</sup> Sometimes, the course of action considered is not immediate, and the judgment expressed is

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<sup>5</sup> Antonio Stankiewicz, "Incapacità psichica nel matrimonio: Terminologia, Criteri," *Ephemerides Iuris Canonici*, 36 (1980), 241-250.

<sup>6</sup> "ratio intimat aliquid alicui, movendo ipsum ad hoc: et talis intimatio exprimitur per verbum imperativi modi; puta cum alicui dicitur, *Fac hoc*". *ST*, I<sup>a</sup>-II<sup>ae</sup> q. 17, a. 1.

<sup>7</sup> "Quia tamen praecepta iuris positivi sequuntur id quod in pluribus est, si aliquis ad perfectionem debitam ante tempus praedictum perveniat, ita quod vigor naturae et rationis defectum aetatis suppleat, matrimonium non dissolvitur." *Supplem.* III<sup>ae</sup>, q. 58, a. 5.

practical, but in a speculative way, e.g., it is good to marry. The kind of practical judgment employed in giving marriage consent, however, is practical in an immediate way. According to scholastic terminology, it is a practically practical judgment. In other words, the formation of the judgment flows directly into action, e.g., I, John, take you, Jane, to be my wife.

How do the intellect and will collaborate in the practical judgment? The collaboration is perfectly mutual: the intellect proposes a course of action to the will, to which the will has been attracted already and which it has suggested to the intellect; the mutual activity of understanding and desire issues finally in action. So it is that Aquinas also refers to practical judgment as deliberated will or intelligent desire.<sup>9</sup>

What level of discretion of judgment, understood to include use of reason, is required for the decision to marry? First of all, Saint Thomas distinguishes engagement from marriage. Engagement, in the time of Aquinas, was a promise of marriage, made by parents often. It was binding only inasmuch as the parties accepted the proposed marriage when they achieved the level of discretion required for marriage.<sup>10</sup> Only *the capacity to make any promise at all* was required for engagement. *The capacity to make the specific promise of marriage* was required for marriage consent. In other words, the discretion of judgment had to be proportionate to the reality of married life. Generally, the first capacity (the capacity to make any promise at all) was presumed to be present in the individual at the age of seven; the second (the capacity to make the specific promise of marriage) at the age of twelve to fourteen.

The texts of Thomas Sanchez are consonant with those of Aquinas. Sanchez refers to the spiritual activity of deliberation and intention in practical judgment. For Sanchez, deliberation refers to the action of the intellect in examining a concrete course of action; intention refers to the action of the will in electing a concrete course of action. As a result, Sanchez refers to two norms with regard to the decision to marry: the norm of the intellect (deliberation), which requires that the person know and appreciate the state of married life; and the norm of the will (intention) which requires that the person be capable of serious sin. With regard to any practical judgment, the two norms must be taken together as a single norm, that of discretion. The prior norm came to be called the puberty norm; the latter the mortal-sin norm.<sup>11</sup> For Sanchez, as for Aquinas, the norm of discretion for marriage

<sup>8</sup> Clearly, the distinction of intellect and will is an abstraction, as it was for the Angelic Doctor. What is meant is the spiritual potency/activity of the human person, seen under its intellectual and volitional aspects.

<sup>9</sup> *ST*, I<sup>a</sup>-ae, q. 1, a. 1; q. 14, a. 1; q. 14, a. 1, ad 1.

<sup>10</sup> *Supplem.* III<sup>ae</sup>, q. 43, a. 2, ad 1.

<sup>11</sup> Burke, p. 108

was presumed at around fourteen years of age, and the norm for engagement was presumed at around seven years of age.

Not all have understood the texts of Sanchez in the above manner. Some have said that Sanchez proposed the age when the required power of intention is present, namely, seven years of age, as the age for valid marriage. The texts of Sanchez present, however, a different picture. In one text, Sanchez talks about engagement and marriage together. In talking about engagement, he sets the age of the requisite discretion at seven years. At the end of the discussion he uses the terms engagement and marriage together. From the above, it has been deduced that he held seven years as the requisite age of discretion for marriage, too. Here it is necessary to recall that engagement and marriage are two distinct realities for Sanchez, as they were for Aquinas. While the discretion requisite for committing serious sin may be present at seven years of age, the discretion requisite for choosing marriage is not present. Writing about the matter, Sanchez notes:

Intercourse, much less the attempt at it, does not bring on at all a presumption of the discretion sought for marriage; however, it makes potency to be presumed. On the contrary, however, nearness to puberty permits discretion to be presumed, not, however, potency. The reason is: because at a tender age there is found sometimes the capacity for intercourse, . . . although, however, at that time usually there is not present as much discretion as is desired for the very serious and perpetual bond of marriage.<sup>12</sup>

In other words, what the intellect is not capable of understanding at a certain age, the will is not capable of desiring truly.

The above brief summary of the two classical authors on the question of discretion of judgment shows the harmony of their positions. For both Saint Thomas Aquinas and Thomas Sanchez, the specific practical judgment which is marriage consent requires the joint activity of the intellect and will in identifying marriage correctly and in choosing it in another person.

Among contemporary authors who present the classical canonical doctrine, Piero Antonio Bonnet stands out. Bonnet rightly sets the discussion of discretion of judgment (understood to include use of reason) within the context of the person's spiritual development. He sees the person's spiritual development expressed in the ever fuller response of intellect and will to the good. He calls the response rational desire. With respect to marriage, the aspect of spiritual development which is involved is rational desire in heterosexual

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<sup>12</sup> "Copula nedom nisus ad illam, minime inducit praesumptionem discretionis ad matrim. Petitae, facit tamen praesumi potentiam. E contra autem propinquitias pubertati facit praesumi discretionem, non tamen potentiam. . . . Ratioque est, quia in tenera aetate invenitur aliquando robor ad copulam . . . cum tamen in ea non solet tanta discretio adesse, quanta ad vinculum gravissimum ac perpetuum matrimonii desideratur." Thomas Sanchez, *De sancto matrimonii sacramento* (Venetiis: Apud Nicolaum Pezzana, 1737), Lib. 7, Disp. 104, q. 5, n. 27.

relationships, the correct identification of the good of marriage and the choice of marriage specified in the spouse. The sexual act symbolizes the practical judgment made. The person grows in understanding the meaning of the sexual act, proper to marriage alone, namely, its symbolic expression of the communication of exclusive, perpetual, and life-giving love, which is marriage.<sup>13</sup> In today's society, Bonnet identifies the late teen years as the presumed age at which such discretion begins to be achieved.<sup>14</sup>

Before concluding the treatment of Bonnet, it is necessary to stress that the practical judgment to marry must be identified with a concrete individual; marriage itself and the attraction to it are identified in a particular person through the practical judgment to marry. The judgment is practically practical; it leads immediately to the marriage of the two parties.

Canonical doctrine provides us the sound basis on which to found canonical legislation and jurisprudence. What needs to be articulated more fully is the psychology of Christian vocation underlying the notion of use of reason or discretion of judgment. If the Christian grows in his or her baptismal vocation until he or she is ready to accept an adult vocation in the Church, then the development to that point must be able to be described from a theological perspective which integrates the valid findings of psychology and psychiatry. Also, since the failure to develop the requisite practical judgment to enter marriage is necessarily associated with the lack of personal development, with pathology, at least, as regards the consent to marry, it is important that the psychological terms used to describe the deficient or pathological state are founded on a solid theological anthropology.<sup>15</sup>

## CANONICAL JURISPRUDENCE

Canon 1095, 1° and 2° is new in canonical legislation. While use of reason or discretion of judgment always was held to be required for marriage consent, the requirement was not codified in the 1917 Code. As a result, there was some debate about both whether the matter should be codified in the revision of the Code and with what terminology. Canon 296 of the 1975 Draft of the actual Code read:

They are incapable of contracting marriage:

- 1) Who are affected by a mental illness or serious disturbance of the mind such that they, as lacking the use of reason, are unable to give matrimonial consent;

<sup>13</sup> Piero Antonio Bonnet, *L'essenza del matrimonio canonico: Contributo allo studio del l'amore coniugale. I, II momento costitutivo del matrimonio* (Padova: CEDAM, 1976), p. 238.

<sup>14</sup> Bonnet, p. 252.

<sup>15</sup> Guiseppa Versaldi, "Via et ratio introducendi integram notionem christianam sexualitatis humanae in categorias canonicas," *Periodica*, 75 (1986), 409-421.

2) Who suffer the serious lack of discretion of judgment regarding the matrimonial rights and duties to be handed over and accepted mutually.<sup>16</sup>

In the discussion of the text, it was suggested that the words, "as lacking the use of reason" in number one, be removed. The response was that the words were necessary in order to show the distinction between numbers one and two. In other words, the lack of use of reason was understood to be the lowest grade of discretion of judgment, the discretion of one who had not reached yet his or her seventh year of age.<sup>17</sup> Monsignor Antoni Stankiewicz, Rotal auditor, makes the same clear in his discussion of the text:

The criterion of *use of reason* is implicit in the criterion of "discretion of judgment proportionate to marriage" as its minimal essential element.<sup>18</sup>

The same distinction passed over into the final text. The discussion of the prior text makes clear the understanding of the editors of the text, an understanding coherent with canonical doctrine, as discussed above.

With regard to the text of the actual legislation, two questions emerge. The first asks the distinction between "lack of sufficient use of reason" and "serious lack of discretion of judgment." The response is clear. Both refer to a defect in the development of practical judgment in the person, particularly with respect to the decision to marry. The difference between the two is of degree: lack of sufficient use of reason is the lowest degree of lack of discretion of judgment.

The second asks the meaning of the phrase, "essential rights and duties to be handed over and accepted mutually."<sup>19</sup> The point of the phrase is to indicate the particular discretion involved, namely the discretion proper to the act of giving marriage consent, the discretion proportionate to the married state. The particular discretion in question, therefore, is identified by the essential rights and duties involved in the practical judgment of marrying. The essential rights and duties are described in canons 1055, §1; 1056; and 1057 §2, and can be summarized as the right to receive *and* the duty to give love which is exclusive or faithful, indissoluble or permanent, and procreative or life-giving. Any further specification must be related directly to the three essential rights and duties described above, for they identify the qualities proper to the love of marriage.

Rotal jurisprudence in causes formulated under the heading, lack of sufficient use of reason or lack of discretion of judgment, offers several practical helps to the ecclesiastical judge. The first practical help is the stress on *the importance of the instruction of the cause* in terms of the signs of the incapacity.<sup>20</sup> If, as has been demonstrated, lack of sufficient use of reason or lack of discretion of judgment refers to a defective development of practical judgment in a person, it will be necessary to discover the signs which indicate the defect. The instruction of the cause, therefore, should direct itself to discovering the development of practical judgment in the person said to lack sufficient use of reason or discretion of judgment.

Actually, the case of lack of sufficient use of reason is quite rare. One of the truly rare examples is a cause from Malta, heard in the second instance at the Roman Rota in 1981.<sup>21</sup> The respondent in the cause was in the qualified stage of epileptic psychosis at the time of the marriage, such that he could neither speak for himself nor do anything apart from his mother. The signs of the defect of sufficient use of reason, as might be suspected, were demonstrated quite easily. The same would be true in any cause in which a true lack of sufficient use of reason would be alleged.

Causes introduced under the heading, lack of discretion of judgment, must show the signs before the marriage, at the time of the marriage, and after the marriage which uncover the development of practical judgment in the person. The following statement from a Rotal decision demonstrates the importance of the instruction of the cause in terms of signs of the lack of discretion of judgment:

Whatever regarding the nature or species of psychic illness of the woman, the respondent, it remains certain that, whether from the treatments of great importance used at the time of the increase of the serious signs of the psychic disturbance of the woman before and after the marriage, whether from her labile nature and from the disposition of the person, described by the witnesses as regards the time before the marriage, the woman was disturbed in mind so constantly and seriously that she lacked truly the discretion of judgment proportionate to marriage.<sup>22</sup>

<sup>16</sup> "Supt incapaces matrimonii contrahendi: 1) qui mentis morbo aut gravi perturbatione animi ita afficiuntur ut matrimoniales [sic] consensum, utpote rationis usu carentes, elicere nequeant; 2) qui laborant gravi defectu discretionis iudicii circa iura et officia matrimonialia mutuo tradenda et acceptanda." *Communicationes*, 9 (1977), 369.

<sup>17</sup> *Communicationes*, 9 (1977), 370.

<sup>18</sup> cc "Il criterio dell'usus *rationis* è insito nel criterio della 'discretio iudicii matrimonio proportionata' come il suo minimo elemento essenziale." Stankiewicz, 256.

<sup>19</sup> "iura et officia matrimonialia essentialia mutuo tradenda et acceptanda" (Can. 1095,2°).

<sup>20</sup> C. Rogers, Oct. 24, 1972, *Decisiones seu Sententiae Sacrae Romanae Rotae*, Vol. 64, pp. 594-600, Nos. 12-21; C. Raad, Apr. 10, 1973, *Decisiones seu Sententiae Sacrae Romanae Rotae*, Vol. 65, pp. 367-378, Nos. 12-29; C. Pinto, May 2, 1977, *Ius Canonicum*, 8 (1978), 147-152, Nos. 9-12.

<sup>21</sup> C. Egan, April 2, 1981, *Il Diritto Ecclesiastico*, 92 (1982), 11, 100-101.

<sup>22</sup> "Quid quid est de natura ac specie morbi psychici mulieris conventae, certum manet sive ex curationibus magni momenti adhibitis temporibus incrementi gravium signorum perturbationum psychicharum (sic) mulieris ante et post matrimonium sive ex eius labili indoli ac ex habitu eius personae a testibus quoad tempus antenuptiale

It can happen that a judge is unable to discover with precision the cause of the lack of discretion of judgment in a person, even with the use of experts in psychology and psychiatry. It is not required that he discover the cause, but that he demonstrate the signs of the alleged lack. What must be avoided is the false equation of the signs of difficulties in the marriage with the signs of the invalidity of marriage consent.<sup>23</sup>

A brief word should be said here about the temporary lack of discretion of judgment, suffered by those who, for instance, are intoxicated at the moment of consent. Clearly, it will not be possible to show a development which logically indicates the temporary lack of discretion of judgment; under question is a temporary condition which has covered over the otherwise healthy spiritual development of the individual. In such cases, however, the signs of the temporary lack will be so patent as to remove all reasonable doubt.

Other practical helps can be offered in terms of the individual proofs in causes heard on the grounds of lack of sufficient use of reason or lack of discretion of judgment. First of all, *the declarations of the parties* in such causes can have the force of quasi-full proof as described in canon 1536 §2, namely, given witnesses of their credibility and, at least, some concordant proof(s). The reason why canonical jurisprudence places so much weight on the declarations of the parties is that many times the signs of the incapacity are known most of all to them. Others may not observe the signs or their seriousness. And the parties themselves, out of a certain modesty, may not have spoken about the signs of the incapacity.

The verisimilitude of the declarations of the parties can be established through *the use of experts*. Normally, the signs of the lack of discretion of judgment are such that they do not admit of fabrication easily. An expert in treating psychological difficulties will detect the ring of truth in the declarations or not. An interesting cause, heard in three instances at the Roman Rota, finally was judged affirmatively chiefly on the basis of the declarations of the petitioner, a person of undisputed integrity whose declaration was judged to be consistent with psychological and psychiatric science by experts.<sup>24</sup>

It is important to establish through the declarations of the parties the degree of knowledge of each other before marriage, and the duration of the courtship and engagement. Oftentimes, a decision to marry a person who clearly lacks the requisite self-possession for the married life becomes more understandable in the light of superficial knowledge of one another before marriage, or a brief courtship and engagement. Also, it sometimes happens that parents of a person who lacks discretion of judgment will be anxious to have his or her friends

overlook the signs of the defect. The commentary on a cause heard before the Rota notes:

The petitioner noted no signs of illness before the marriage, but two important facts regarding the premarital relationship are significant. First, the engagement only lasted three months during which the parties saw very little of each other. Second, the parents of the respondent urged forcefully the marriage, apparently because of Anna's age and of their recognition of her mental difficulties.<sup>25</sup>

In the case of lack of discretion of judgment, a cause which relies almost exclusively on the declarations of the parties should not be viewed as unlikely, although it may require the employment of the judge's most refined insight and prudence.

*Documents* can play a significant role in the resolution of such causes. One public document which should be requested always is the prenuptial form establishing the freedom of the parties to marry. It may be that the priest or other person helping the parties prepare for marriage will have noted peculiar or disturbing behavior in one or both parties. Also, there may be noted previous emotional difficulties which are not recalled in the parties' declarations or in the testimony of witnesses.

The public documents which would be of greatest interest are often inaccessible, namely, the records of physicians and of hospitals. If the party treated will grant release of the documents to the ecclesiastical tribunal, they should be sought in order to insure the deepest possible insight into the personal development of the party in question. Another public document can be the results of psychological testing done on the party or parties at the time of the cause, e.g., the M. M.P.I.<sup>26</sup>

Private documents which have a bearing include letters written *tempore non suspecto*, that is, at a time when the parties had no idea of introducing a matrimonial cause. Letters written by the parties, or by others who know the parties can be helpful in understanding other testimony. A letter quoted in a cause, judged affirmatively at the Roman Rota, provides a good example:

No one more than I can understand the trials of your spirit, above all, because, in the light of the reality which is taking control, so many episodes prior to, concurrent with, and after your marriage, which we all held to be chance and without importance, have unfortunately an unambiguous source and one explanation.<sup>27</sup>

<sup>25</sup> Burke, p. 144.

<sup>26</sup> C. Egan, July 11, 1977, P.N. 11.408, No. 6.

<sup>27</sup> "Nessuno più di me può comprendere le vicissitudini del tuo spirito, soprattutto perchè, al lume della realtà che si impone, tanti episodi anteriori, concomitanti e successivi al tuo matrimonio, che tutti ritenemmo occasionali e senza importanza,

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descriptis, mulierem ita constanter et graviter exturbatam mente fuisse, ut sufficienti discretionem iudicii matrimonii proportionata revera caruerit." C. Di F elice, November 13, 1976, No. 9.

<sup>23</sup> Giuseppe Versaldi, "Elementa psychologica matrimonialis consensus," *Periodica*, 71 (1982), 200.

<sup>24</sup> Burke, pp. 162-169.

It is important to seek out such letters, for often the parties may have forgotten about their existence.

Another type of private document is the affidavit obtained from persons who cannot give testimony personally before an auditor or judge of the tribunal. It is preferable always to receive formal testimony from persons who know the parties well. The affidavit may be of some assistance, but often the affirmations made in affidavits do not correspond well to the questions in which the tribunal is bound to be most interested.

With respect to documents, the canons regarding the quality of documents and their production in the cause should be kept in mind (canons 1543-1546).

If the chief task of the instruction of the cause is to uncover the signs of the lack of discretion of judgment, then witnesses have an important part to play in the resolution of the cause. The witnesses should be those who have known the parties at different times in their lives and can supply the picture of the parties sufficient to reconstruct their level of discretion of judgment at the time of marriage. Witnesses sometimes will be willing to speak about facts which are difficult for members of the family to relate, or they will remember facts forgotten or suppressed in the memory of the parties and family-members. It is important always to establish clearly the time of knowledge of the parties on the part of the witness.

The *questionnaire* prepared for the reception of the testimony of the witnesses is the key to obtaining useful information. The questionnaire must stimulate the memory of the witnesses and help them to focus on the central issue under consideration. While standard questionnaires are very attractive from the point of view of efficiency, they may slow down the progress of the cause because they are not well-suited to the particulars of the case in question.

What questions should be included in the questionnaire? Precisely, the questions which will uncover the development of discretion in the person. There should be questions about his or her manner of acting with others, especially parents, family, and friends; there should be questions about his or her management of personal affairs and goods; there should be questions about his or her conduct in the sexual sphere; there should be questions about any possible history of psychopathology in the party or in his or her family. Questions should be directed to all the areas of life, in which practical judgment is required.

*Family members* constitute a particular category of witness. Although it is not always true, it is natural for family members to hesitate about affirming what might seem to cast a shadow on the family itself or one of its members.<sup>28</sup>

The sensitivity of the judge to the emotions of family members and the assurance about the meaning of the procedure employed in causes of nullity of marriage should do much to avoid the resulting contradictions.

*Qualified witnesses* give what is called quasi-expert testimony. Often, the party said to have lacked discretion of judgment will give release to his or her psychiatrist(s) or psychologist(s) to answer questions proposed by the tribunal. The psychiatrist or psychologist will need to know the importance of his or her honest and accurate statement. Sometimes professional persons desire to make statements which will be of the greatest assistance to the cause of the parties. They will need to be assured that the best possible help they can offer is the truthful description of the individual as they knew him or her. The questions posed to the psychiatrist or psychologist will have to center on the possible signs of a lack of discretion of judgment, noted by the expert.

*Expert testimony* is, for the most part, required in causes heard under the heading of lack of sufficient use of reason or lack of discretion of judgment, in accord with the norm of canon 1680. Since the cause alleges the lack of the development in the person, which would be expected at his or her age, the expert helps the judge to understand the presence or not of a cause (or explanation) of the lack. The expert may not be able to name exactly the cause, usually some form of psychopathology, but he or she will be able to state that the development of the person as regards the decision to marry has not proceeded in the usual manner. Otherwise, signs of the everyday trials and challenges in living faithfully the vocation to marriage, validly accepted, falsely might be interpreted as signs of the absence of valid marriage consent because of lack of discretion of judgment.

The expert may render his or her judgment either by examining the party alleged to lack discretion of judgment and by examining the acts of the cause, or by the examination of the acts of the cause alone. A well-instructed cause can provide sufficient material for the expert to render a judgment. Also, the examination of the party may be pointless if the alleged lack of discretion of judgment is said to have been evident at a much earlier time in the person's life.

The relationship of the expert to the ecclesiastical judge is very delicate. There is the tendency of the one to invade the proper territory of the other, the expert rendering canonical judgments regarding whether the lack of discretion of judgment has been established or not, and the ecclesiastical judge making deductions and conclusions proper to the field of the psychologist or psychiatrist. To avoid such a situation, the judge should pose to the expert very clearly stated questions regarding the psychological state of the party at the time of the marriage, especially the effect of any psychopathology on the operation of the intellect and will of the person. Finally, the judge will have to translate into the canonical category of discretion of judgment the expert's judgment. The following excerpt from an expert judgment given at the Roman Rota demonstrates the tendency of experts to invade the area of competence of the canonist:

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hanno purtroppo una univoca origine ed una spiegazione." C. Ewers, March 25, 1972, *Decisiones seu Sententiae Sacrae Romanae Rotae*, Vol. 64, No. 8.

<sup>28</sup> Burke, pp. 144, 197-198.

I cannot have moral certainty that in July, 1947 the respondent was already so psychically ill to be incapable of understanding and willing because of amentia. I am, however, morally certain that the pre-psychotic disturbances of the personality (or the slow organizing of itself of the schizophrenia in the hebephrenic variety) affected seriously the discretion of judgment.<sup>29</sup>

While the expert in question provides a psychological description of the person, his observations go too far in making the translation of his conclusions into canonical categories.

Edward M. Egan, former auditor of the Roman Rota, cautions against three pitfalls in the relationship of the expert to the ecclesiastical judge.<sup>30</sup> The first pitfall is what he calls the customary memo from the expert, which states that the person suffered from some serious psychopathology which would prevent valid marriage consent but gives no explanation concerning how the conclusion was reached. The second pitfall is the expert opinion which contradicts all the other proofs in the cause. If such be the case, then, the expert must give a plausible explanation of why the contradiction is so. The last pitfall is the judgment regarding nullity of marriage, offered by the expert. Once again, what is asked of the expert should be made very clear to him from the start, namely, not a judgment regarding the nullity or not of marriage, but a judgment regarding the psychological state and development of the person at the time of marriage.

The last kind of proof is the presumption. The unique *presumption of the law* in this kind of cause favors the validity of marriage (canon 1060). One *presumption of man*, developed in Rotal jurisprudence, favors the nullity of marriage. It states that if the signs of psychosis in the qualified stage are verified both before and after the marriage, the person is presumed to have suffered from the psychosis at the time of the marriage and to have been incapable of contracting marriage. It further states that the presumption is strengthened or weakened

- according to the more or less exotic quality of the signs of the qualified psychosis,
- according to the proximity of the manifestation of the psychosis to the time of marriage,

- and according to the rapidity with which the terminal stage of the illness was reached, if, in fact, it was ever reached.<sup>31</sup>

Other presumptions of man can be formed "from a certain and determined fact which coheres directly with that which is controverted." In causes of nullity of marriage for reason of lack of discretion of judgment, the formation of presumptions is not unlikely because of the concentration of attention on signs of the alleged lack.

## CONCLUSION

The examination of the canonical doctrine underlying canon 1095, 1° and 2° makes clear the spiritual strength required in giving judgment in causes of nullity of marriage introduced under the heading of lack of sufficient use of reason or lack of discretion of judgment. The judgment will have to be informed by Christian anthropology so that it is a true measure of the Christian act of marriage consent.

The examination of canonical jurisprudence indicates how alert the judge must be to all the proofs in their subtlety.

What must comfort the judge before the difficulties posed by the heading of nullity, lack of sufficient use of reason and lack of discretion of judgment, is his faithful service of the sacramental life of marriage, foundation of the life of society and of the Church. The faithful observance of the procedural law of the Church will assure the judge that those guarantees of justice, developed over the centuries of the Church's jurisprudential experience and embodied in its procedural law, will serve the individual parties and the whole Church in true charity.

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<sup>29</sup> "Non posso avere la certezza [sic] morale che nel luglio 1947 la convenuta fosse già così psicopatica da essere incapace di intendere e di volere ob amentiam. Sono però moralmente certo che i disturbi prepsicotici della personalità (o il lento organizzarsi schizofrenico, nella varietà ebefrenica) incidessero gravemente sulla discretio iudicii ...". C. Pinto, May 2, 1977, *Ius Canonicum*, 8 (1978), 147-152, No. 12.

<sup>30</sup> Edward M. Egan, "The Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgment," *Ephemerides Iuris Canonici*, 39 (1983), 41-42.

<sup>31</sup> Egan, 46.