

“So-Called” New Grounds of Nullity

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I would like to now, in the half hour that remains to address the question of new grounds of nullity introduced by some tribunals and I will just take up three today. One is called, the ground, the Intention against the Good of the Spouses, against the *bónum cónjugum*. The second one is called Error of Law and the third one is Invalid Convalidation.

And the background of which I take up the question of three so-called new grounds of nullity is my presentation yesterday regarding the collaboration of the Apostolic Tribunals, Roman Rota and the Supreme Tribunal of the Apostolic Signatura in the care for the correct administration of justice in the Church.

With regard to the grounds of nullity of marriage, the rule which guides absolutely the Apostolic Signatura is the discipline of the Universal Church articulated in the Code of Canon Law for the Latin Church and the Code of canons for the Eastern Churches as those grounds are interpreted in Rotal jurisprudence or maybe a more accurate word are “applied” in Rotal jurisprudence.

It must be clear from the start that the only grounds of nullity of marriage are those established by Universal Church discipline—that is those named in the Code of Canon Law.

The formula of doubt and here I am citing canon 1677 in the third section and referring also to the third section of Art. 135 in *Dignitas Connubii*, the formula of the doubt not only is to ask whether the nullity of marriage is established in the case, but also must determine on what ground or grounds the validity of the marriage is to be challenged.

The Intention against the Good of the Spouses. On June 16, 2004, the Apostolic Signatura wrote to the moderator of a metropolitan tribunal to request some sentences based on the ground of intention *cóntra bónum cónjugum*. On the following August 16th, the Judicial Vicar sent three sentences to the Signatura which the Signatura submitted to the study of an expert who offered pertinent observations. On February 2, 2008, the Supreme Tribunal responded to the moderator, enclosing a copy of the observations of the expert.

In its letter, the Signatura indicated that a correct understanding of the ground of intention *cóntra bónum cónjugum* is that of an exclusion by a positive act of the will of the ordering of the marriage to the *bónum cónjugum*. Such an exclusion must be proven by the same means used in proving other kinds of exclusion, that is, and we reviewed these yesterday, the confession of the simulating party corroborated by testimony, the reason why the marriage was nonetheless celebrated, the reason for the simulation, and the circumstances preceding, accompanying and following the marriage which support the presumed exclusion.

The Apostolic Signatura further noted that the correct use of such a ground necessarily requires the specific identification of the *bónum cónjugum* as an essential element of marriage. And the Signatura further observed on the one hand the *bónum cónjugum* in this context has to be distinguished from the *bónum sacraménti*, indissolubility of marriage, the *bónum fídea*, the unity of marriage, fidelity and the *bónum prólis*, the good of offspring. On the other hand, the *bónum cónjugum* understood as *mútu magitorium* can only refer in this context to the minimum and essential requirements of the same; that the mutual assistance of the spouses.

The exclusion of the *bónum cónjugum* as a ground of nullity of marriage would therefore indicate the decision existing at the moment of the celebration of the marriage not to foster in any way the well-being of the spouse. This could be the only meaning which this ground has. It cannot be used as a kind of net in which is placed any kind of difficulty in the marriage that is then construed as being against the good of the spouses.

In its response to the Most Reverend Moderator of another diocesan tribunal, the Signatura continued its observation by adding, in other words, a distinction between the central element and other supplementary elements must be made. The essence of the *bónum cónjugum* is the intention to promote the good of the spouse and the *exclúsió bónum cónjugum* is a positive intention to exclude the good of the spouse. The fact is that it would appear to be very rare that someone enters marriage with the intention not to promote in any way the good of the spouse. End of citation.

What should be evident is that there is not an established Rotal jurisprudence regarding this so-called new ground of nullity which represents a development at lower tribunals without respect for the rule of Rotal jurisprudence.

The expert consulted regarding the sentences from the Metropolitan tribunal offers the following helpful observations:

First, the *bónum cónjugum* understood as one of the ends towards which the *consórtium totíus vítae*, the community of the whole of life is ordered and now explicitly mentioned in the 1983 Code, that's in Canon 1055 in the first section, has been considered up to now in the jurisprudence of the Roman Rota almost exclusively in the context of the incapacity to assume the essential obligations of marriage. Here obviously referring to Canon 1095 number three.

As a result of the consideration of the *bónum cónjugum* in the framework of simulation of consent at the lower tribunals, the Roman Rota has now begun to examine the matter and it will obviously as causes are appealed in second or third instance to the Roman Rota.

Regarding the contents of the *bónum cónjugum*, there continues to be debate among the authors. The expert observes:

“It goes without saying, that not all elements pertaining to the *bónum cónjugum* can be considered as essential with respect to the *consórtium totius vitæ*. And consequently, the exclusion of the non-essential elements does not bring about the nullity of the marriage.” In other words, while now the *bónum cónjugum* is considered an essential element of the *consórtium totius vitæ*, there is no accepted description of the contents of the *bónum cónjugum* both regarding its essential and non-essential elements. For example, the *bónum cónjugum* is not offended by burning the toast regularly [laughter] nor this kind of situation.

“Regarding the contents of the *bónum cónjugum*,” the expert notes, and this is an important observation, “that the majority of authors are in agreement, that along the lines of the ends of marriage, it certainly includes *mutu magitorium* and *remanium concupiscentia*.” And that’s Canon 1013 section one of the 1917 code which in their generality indicate all the aspects, above all interpersonal, that render the life of the spouses better and happier. That being the case, the expert concludes: “It goes without saying, that when the cause is admitted it is necessary to specify the formulae of the doubt well and the grounds of nullity to be used must follow the causes and facts that allegedly led to the nullity of marriage.” The use of a very generic grounds of nullity may, perhaps, facilitate declarations of nullity, and I suspect this is the reason, why this ground of nullity is appealed to some.

The second observation is important, but do not help at all to discover the truth about the validity or not of the marriage. And, that’s the key point.

He notes that such an exclusion as an autonomous grounds of nullity requires not only the specification and clarification of the essential juridic contents of this bonum, but also the proof of its exclusion as required for all causes of partial simulation. We reviewed those before.

In the causes studied, the argumentation of the sentence also introduces a discussion of the error treated in Canon 1099 which I will treat in just a moment. I simply here refer to a text that the allocution of the Blessed Pope John Paul II in the great Jubilee Year, 2000. His allocution to the Roman Rota:

No one can deny that the current mentality of the society in which we live has difficulty in accepting the indissolubility of the marital bond and the very concept of marriage as the "*foedus, quo vir et mulier inter se totius vitæ consortium constituunt*." This is canon 1055, section 1, whose essential properties

are “*unity and indissolubility which in a Christian marriage by reason of the sacrament, obtain a peculiar firmness.*” But this real difficulty does not amount “*sic et simpliciter*” to a concrete rejection of Christian marriage or its essential properties. Still less does it justify the presumption, as it is unfortunately formulated at times by some tribunals, that the primary intention of the contracting parties, in a secularized society, pervaded by strong divorce currents, is to desire a dissoluble marriage so much that the existence of true consent must instead be proven.

In other words that now it would be presumed that any consent contained an exclusion of indissolubility that you’d have to prove the contrary. This, by the way, also has to do with natural law. Nature teaches just the opposite.

And I recall a situation of a couple that I was preparing for marriage in the late 1980’s and I discovered that the young man who was not Catholic, that his parents were divorced and also three of his siblings and so I felt it necessary during the marriage preparation to address this matter with him with regard to his own intentions and his response to me was this: He said, “I understand that marriage is for life and because of the sad experience that I’ve had with my parents and the sad experience I see my siblings have had, I want a marriage that’s permanent, that’s indissoluble.” The fact that even one would be intensely left in his own personal life experiencing the divorcist mentality does not in any way justify the presumption that that person also therefore in entering marriage intends to exclude indissolubility.

In order to affirm the exclusion of an essential property, or the denial of an essential end of marriage, canonical tradition in Rotal jurisprudence have always required that this exclusion or denial occur through a positive act of the will that goes beyond a habitual generic will, an interpretive wish, a mistaken opinion about the goodness of divorce in some cases or a simple intention not to respect the obligations one has really assumed.

In conformity with the doctrine constantly professed by the Church, therefore, we must conclude that opinions opposed to the principle of indissolubility or attitudes contrary to it, but without the formal refusal to celebrate a sacramental marriage, do not exceed the limits of simple error concerning the indissolubility of marriage, which according to canonical tradition in current legislation, does not vitiate marital consent. And again, the reference is to canon 1095.

Nevertheless, the Pope continues: in virtue of the principle that nothing can replace marital consent; here the reference is to canon 1057, an error concerning indissolubility, by way of exception, can have an invalidating effect on consent if it positively determines the will of the contracting party to decide against the indissolubility of marriage. And we’ll take this up in greater detail in a minute.

This can only occur when the erroneous judgement about the indissolubility of the bond has a determining influence on the will's decision, because it is prompted by an inner

conviction deeply rooted in the contractant's mind and is decisively and stubbornly held by him.

Now I would like to take up the other new ground of nullity, in quotation marks, “Error of Law.”

In July of 2009, the Supreme Tribunal of the Apostolic Signatura wrote to the moderator of a metropolitan tribunal requesting copies of two sentences emitted by the metropolitan tribunal on the ground of total simulation and two sentences admitted on the ground of error of law, *error of juris* which the moderator forwarded to the Supreme Tribunal in due course. In the meantime, the Apostolic Signatura also received copies of two additional causes of nullity of marriage, judged, different ones from the first two, judged on the ground of error of law at the same metropolitan tribunal in the course of its study of decrees of ratification given by the appellate tribunal of the metropolitan tribunal--which you can imagine because we study causes both from courts of first instance and their appellate tribunals sometimes with the providence of God, things come together. *[laughter]* And it is providential...uh...I believe.

In July of 2010, the Apostolic Signatura responded to the moderator regarding the causes judged on the ground of “error of law” with these words:

The Apostolic Signatura asked one expert to make a thorough study of the two decisions on the ground of total simulation and another expert to study the four sentences given on the ground or error of law. Please find enclosed their respective reports, which point out serious flaws and shortcomings.

I will briefly now indicate the observations of the expert regarding the ground of “error of law,” and then give some general doctrinal conclusions regarding “error of law” and what pertains to matrimony.

First of all, the expert indicated that none of the four sentences under study, the two that we got from the first instance court and the two that we got from the, uh... indicated the specific object of the error of the respondent as is required by 1099 and he stated this lack of specificity has its effects on the argumentation of the sentences.

Secondly, in two sentences given before the same single judge, there is a disproportionately long *in jure* section. In discussing error, the judge uselessly includes a presentation on error of person—which didn’t pertain—error about qualities directly and principally intended—doesn’t pertain. After making some further distinctions, the judge himself errs by affirming that canon 1099, we quote him, “reflects a defect of knowledge; reflects a defect of knowledge, rather than an intention contrary to the essence of marriage.”

This is, *this* is error. *[laughter]*

The expert concludes:

“This shift from error about the essential properties, to lack of knowledge of the essence of marriage, has its effect on the argumentation of the sentence on this ground. Strangely, with all of that *in jure*, a good part of it useless, the conclusion is reached in a single paragraph in the *in facto*.”

Thirdly, in one case, the judge, to use his term, “perceives” that the respondent did not have an understanding of marriage as a communion of life apparently based only on the fact that the petitioner and her two witnesses state that he lived his life after the marriage the same as before the marriage.

In another case, the judge considering “the extreme jealousy and infidelity of the man finds that he could not see beyond himself to the nature of marriage as a communion of the whole of life.”

That’s a bit of a jump. The expert concludes: “On the basis of this supposed lack of understanding, in neither case is there a confession by the person in question.”

So in neither case does the party confess that in fact he excluded an essential element of marriage through error. The judge immediately finds for the nullity of the marriage even though for nullity it is required not only to prove error, but also to prove that the error determined the will.

Fourthly, in the two cases judged before another single judge, the *in jure* sections give the (of the) appearance in the end—and these are before a different judge—that the judge did not have a clear and accurate understanding of the ground of nullity which impression is confirmed in the argument *in facto*. In one case, the judge argues that the respondent’s family background, I use his words, “strongly suggest that his incorrect way of behaving during the marriage was due to what he calls substantial error regarding conditions *sine qua non* for a valid union that determined his will and, as it seems, his actions as well.

In the second case, the judge argues, and I quote, “that the combination of a problematic family setting and erroneous behavior during the marriage was proof, once again, of substantial error that determined the will and even the behavior of the respondent,” and I quote, “who would not and could not have acted otherwise.” This is clearly someone who lacks freedom; something else is wrong here, “but it’s not a, he could not have acted otherwise.”

The expert offers the following general conclusion:

The *in jure* section should be limited to the ground of nullity in question emphasizing those points most important for resolving the case at hand. The tribunal should develop a clearer approach to proving the alleged invalidating fact namely that the object of the person’s consent was determined by the person’s error in such a way to choose a deficient marriage. In this, it is helpful to remember that in regard to proof of such a defective intention, there is convergence with the methods for establishing a ground of partial simulation exclusion. Furthermore, the tribunal should be reminded that the formulation of the doubt in cases concerning canon 1099 should indicate the precise object of the error which is alleged to have determined the will of the person.

The Code of Canon Law treats error in a general manner. I’ll now proceed to my little doctrinal part here.

The Code of Canon Law treats error in a general manner in canon 126 which belongs to the general norms. Stating that an act placed out of ignorance or error concerning something which constitutes its substance or which amounts to a condition *sine qua*

non is invalid. This norm clearly distinguishes between error about the substance of the act which always renders it null, and error about anything that is not substantial which renders the act null only when the erring person makes of it a condition *sine qua non*.

In this second hypothesis, one must prove not only the existence of the error, but also its reduction to a condition *sine qua non*. The canon adds that the act is, and I quote, “otherwise valid unless the law provides differently.”

What is affirmed in a general way in canon 126 is made specific to Holy Matrimony in canons 1096 to 1099. Questions about error of *júris* to which we are limiting ourselves this afternoon in matrimonial law must refer to canon 1096 and canon 1099.

Canon 1096 states “for matrimonial consent to exist, the contracting parties must at least not be ignorant that marriage is a permanent partnership between a man and a woman ordered to the procreation of children by means of some sexual cooperation,” end of quote. In the same line therefore canon 1099 states the general principle that an error about the essential properties of marriage, namely unity and indissolubility or the sacramentality of marriage between the baptized does not invalidate the marriage. In fact, for the valid celebration of marriage, its not required that the will of the spouses include the essential properties of marriage or its sacramentality because these do not depend on the will of the spouses.

Whoever wants marriage, per se, wishes also the essential properties of marriage and also its sacramentality because they are inseparable from it.

Indeed, for the invalidity of juridic acts, in general, and of marriage, in particular, there is never required an exhaustive knowledge of the nature of the juridic act to be placed or a detailed knowledge of the concrete object of the specific act to be placed. If one were to require all this, one would render juridic life impossible. In particular, marriage would no longer be available to all persons including those who in the various situations of the contemporary world following a natural inclination to marriage grasp in an intuitive manner its essential and distinguishing nucleus.

In keeping with these principles, canon 1099 denies, per se, an invalidating effect to an error concerning the essential properties of marriage, unity or indissolubility, or its sacramentality. Even so, it can happen that an error if it is stable, diffuse, persistent and deep-seated can have the effect of determining the act of the will to the point that one wills, for example, a dissoluble marriage and therefore an invalid marriage. This is the meaning of the clause “as long as it does not determine the will” in canon 1099. In such a case, however, it is not the error, but really the determination of the will that causes the invalid marriage.

This is something that should always be kept in mind. If there is a valid application of this ground of *error in júris*, it reduces ultimately to an exclusion, that the person because of an error posits an act of the will excluding the good of marriage about which or the property of marriage about which is in error. And that is clear then that this possible determination of the will in any case must be sufficiently and properly proved. It is necessary in such a case that error reach such intensity as to condition the act of the will thus causing the consent to be null.

According to the words of Blessed Pope John Paul II in his allocution to the Roman Rota of the 29th of January, 1993 “or that it have a determining influence on the will’s decision” as the same pontiff underlined in his allocution to the Roman Rota which I quoted before from the Great Jubilee Year of 2000. Blessed Pope John Paul II confirmed in this allocution that an error, even if deep-seated for example, because of the widespread modern divorce mentality does not, in itself, make the consent null unless in a particular case it should determine the act of the will so that the person wills a marriage lacking for example, indissolubility.

In regard to the error about the sacramentality of marriage, one must carefully keep in mind what Blessed Pope John Paul II taught in his allocution to the Roman Rota of January 30, 2003 when he stated one cannot posit “alongside natural marriage another model of Christian marriage with specific supernatural requisites.” It’s always marriage. “This truth should not be forgotten when” delimiting both “exclusion of sacramentality here the reference is to can. 1101 section 2 and determining error about the sacramental dignity of marriage, can. 1095, as possible grounds of nullity.”

“In both instances,” the Pope states, “it is crucial to keep in mind that an attitude on the part of those getting married that does not take into account the supernatural dimension of marriage can render it null...only if it determines its validity on the natural level on which the sacramental sign itself takes place.”

In keeping with what is set out in the Code and with the Papal Magisterium, proof of the invalidating influence of the error in question includes establishing the existence of a will which has led to a matrimonial consent lacking essential elements.

In judicial practice, in order to prove the invalidating effect of an *error jùris*, that is concerning unity, indissolubility or sacramentality, it is not enough to verify the presence of the error, to prove that the party was prone to share the contemporary divorce mentality, and three, for the judge to perceive that the party had an understanding of marriage far different from the Church’s understanding or could not intend marriage as a communion of life.

Besides proving the existence of an error, one must prove that the erring person, in one way or another, willed his or her own concrete marriage to be without an essential property, unity or indissolubility or sacramentality. Therefore, it must always be proved that the erroneous opinions in question had in the concrete case, a determining influence on the will of the party. In this context, one must not forget that the will is not determined by understanding alone.

In the case of marriage, the state of being in love, for example, by its very nature, moves the parties toward a total relationship including perpetuity and exclusivity. Consequently, even if it is possible that two young people who love each other can have a divorce mentality, this can hardly affect their concrete relationship which they, per se, will want to endure and one must presume that this intention is present at the moment of the celebration of the marriage.

With regard to the *error jùris*, canon 1099 lists only three possible objects, namely and I repeated it now several times, indissolubility, unity and sacramentality. One can not

admit an extensive interpretation of the object of such error which would apply it, for example, to the marriage itself, to the good of offspring or to the good of the spouses.

In the formulation of the doubt, the judge must indicate the object of the alleged error determining the will. For example, the doubt should be formed this way: "whether the nullity of the marriage has been established because of error determining the will regarding indissolubility on the part of the petitioner." The error has to, one has to specify in the formulation, in the formula of the doubt what error regarding what property, essential property determined the will of one or another of the parties.

The use of generic formulations of grounds of nullity such as *error júrís* without any further specification about the object of such error is not a correct judicial procedure, practice and does not help at all in reaching moral certitude about the nullity of marriage in question.

Likewise, too, in filling out the annual report, if there are causes that are heard under error according to the norm of canon 1099, it should specify. So many causes were heard under error regarding indissolubility, error regarding unity, etc.

Thus, ignorance and consequently error which concerns this essential content of the act always invalidates consent. Every other *error júrís* does not concern the essential content of the act enunciated in canon 126 and according to the principle enunciated in canon 126 is that unless it is a question of a substantial error, error does not render the acts null.

And then this quickly, and I realize the time is up, on the question of defective convalidation. I think that many of you are familiar with this already. This was developed at the level of the lower tribunals and on the basis of canonical doctrine and the jurisprudence of the Roman Rota, the Apostolic Signatura has responded to various tribunals in the matter.

The first point which the Apostolic Signatura has made, with regard to this supposed ground of nullity, is to recall the presumption of the law which governs every marriage. Namely, that a marriage is presumed to be valid until the contrary is proven. And the internal consent is presumed to be in conformity with the signs or words used in the celebration of the marriage.

When these two presumptions are applied to a marriage celebrated according to the canonical form, the consent expressed according to the canonical form must be presumed valid until the contrary is proven. And the proof of a defective consent in view of the declaration of nullity of marriage must therefore follow the usual criteria taking into account the established Rotal jurisprudence that has developed secure models of proof regarding defects or flaws of consent.

Next, it is noted that canon 1060 refers to the convalidation of a marriage contracted invalidly because of a defect in the canonical form.

Received doctrine does not consider the canon in question to refer to an attempted civil marriage or a marriage in a non-Catholic rite by a party who is bound to the canonical form.

Regarding the marriage contracted without the canonical form, the Apostolic Signatura reminded the moderators of the tribunals which were using this grounds that no judicial process is required for the declaration of nullity of such an attempted marriage.

Thirdly, canon 1157 refers to the convalidation of a marriage which is invalid because of a diriment impediment and not to the convalidation of a marriage which is null because of a defect in the canonical form. The Signatura also then goes on to clarify the erroneous application of this canon to a case of a lack of canonical form.

I don't want to, I know you have, I need to conclude.

I apologize that I wasn't able to finish that last section, but I think that might be something that's already more familiar to you. But, I hope that these observations with regard to these three so-called new grounds of nullity will be helpful to those of you who are working in the matrimonial tribunals especially and for all of us, I hope that it will draw our attention once again to the very delicate nature of the process for the declaration of nullity of marriage and in particular, to the objective reality which we are touching with every matrimonial nullity procedure. A reality which is, in fact, the first cell of the life of the Church and of society, in general, and therefore demands our greatest possible attention both to that universal law of the Church developed down the centuries and at the same time the proven jurisprudence of the Roman Rota.

Thank you very much for your patience.