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**THE NATURE AND APPLICATION OF JURIDICAL ACTS
ACCORDING TO CANON 124 OF THE CODE OF CANON LAW**

by
© John Masiye KUZIONA

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ABSTRACT OF THE THESIS

Juridical acts certainly play a very fundamental role in the organizational and functional aspects of the Church. They affect the juridical condition and status of persons, whether physical or juridical. Aware of their importance, the Church has attempted to provide some guidelines or general principles concerning them.

The focus of this dissertation is a *comprehensive and systematic analysis* of the nature and application of juridical acts according to canon 124 of the Code of Canon Law. This canon has determined that for a juridical act to be valid, it must be placed by a person who is capable, and also it must contain those elements which essentially constitute the act itself, as well as the formalities and requisites imposed by the law for the validity of the act. It has further established that a juridical act properly placed, as far as its external elements are concerned, is presumed to be valid.

In chapter one, an analysis of the concepts and principles on juridical acts as provided by the 1917 Code is presented. This analysis concentrates on four areas: (1) the notion of a juridical act, (2) its essential elements, (3) impediments to, and (4) efficacy of juridical acts.

The Second Vatican Council and the revision of the Code of Canon Law introduced certain theologico-juridical principles which were to have significant impact on the entire juridical system of the Church, including the very notion and applicability of juridical acts. This is the focus of chapter two.

As a consequence of their importance in the Church's life, the principles and norms governing juridical acts enjoy special consideration in the 1983 Code. They are presented in a systematic manner in the context of General Norms which have universal application. A comprehensive analysis of the elements mentioned in canon 124 is contained in chapter three. This analysis of the canon identifies some important conclusions on the nature of a juridical act and its applicability.

There are certain factors which may impede a person from validly placing a juridical act. The Code has identified these in canons 125-126. They are: force, fear, deceit, error, and ignorance. In chapter four, these factors are subjected to a brief examination in order to demonstrate how they may affect juridical acts.

The method employed in this study is historical and analytical. The historical perspective traces the origin and development of canon 124, while the analytical method is directed more toward a systematic analysis of canon 124 within the context of the general norms and its applicability to all canons of the 1983 Code of Canon Law.

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ABBREVIATIONS

<i>AAS</i>	<i>Acta Apostolicae Sedis</i>
<i>ASS</i>	<i>Acta Sanctae Sedis</i>
<i>CLD</i>	<i>Canon Law Digest</i>
<i>EIC</i>	<i>Ephemerides iuris canonici</i>
<i>DE</i>	<i>Il diritto ecclesiastico</i>
<i>IC</i>	<i>Ius canonicum</i>
<i>IE</i>	<i>Ius ecclesiae</i>
<i>ME</i>	<i>Monitor ecclesiasticus</i>
<i>SRR Dec</i>	<i>Sacrae Romanae Rotae Decisiones seu sententiae</i> (1 [1909]-40 [1948])
	TRIBUNAL APOSTOLICUM SACRAE ROMANAE ROTAE, <i>Decisiones seu sententiae</i> (41 [1949]-66 [1974])
	APOSTOLICUM ROTAE ROMANAE TRIBUNAL, <i>Decisiones seu sententiae</i> (67 [1975]-)

INTRODUCTION

The notion of a juridical act is very fundamental to any legal system. It impacts on all acts which are likely to have consequences before the law. The Church is by its very nature a juridical entity and, hence, the acts placed within its legal system by persons, whether physical or juridical, are likely to have juridic consequences. Aware of this importance, the Church has not failed to provide at least some guidelines or general principles to govern juridical acts. Even though the 1917 Code did not present a systematic treatise on the principles regulating juridical acts within the context of the general norms, it nevertheless contained relevant concepts and basic principles in its treatment of procedural norms. However, in revising the 1917 Code, the legislator deemed it necessary to deal with this issue in a systematic way within the context of the general norms so that the relevant concepts and principles might be applicable not only to procedural acts but also to all acts which are likely to have legal effects. Therefore, in the 1983 Code, juridical acts enjoy special consideration. The principles and rules concerning them are presented under a title of their own.

The extent of the effects of juridical acts within the canonical system is immense. It impacts on the juridical condition and status of persons in the Church, it affects the validity of the sacraments, the appointment to offices, the procedural acts, etc. Therefore, one cannot underestimate the importance of an in-depth study of the concept and principles related to juridical acts.

Following the promulgation of the 1917 Code, commentaries on the norms governing juridical acts were abundant. However, there has never been a major comprehensive study specifically on the different aspects of a juridical act. A few canonists who dealt with the subject concentrated primarily on the concept and efficacy of a juridical act. Foremost among the commentators was G. Michiels who wrote extensively on the different aspects of juridical facts and juridical acts.¹ O. Robleda also made significant contribution to the understanding of a juridical act by providing a clear definition of it and by explaining the difference between a juridical act and other acts, the role of the will in a juridical act and its efficacy.² There were also other canonists who provided further clarification of the concept of a juridic act.³

There is no doubt that the promulgation of the 1983 Code has aroused among canonists fresh enthusiasm and interest in ecclesial law in general including the question of juridical act. Even though no major study has appeared in print so far specifically on juridical acts, several articles and commentaries⁴ have touched upon the topic. J.

¹See G. MICHIELS, *Principia generalia de personis in ecclesia: commentarius libri II Codicis iuris canonici, canones praeliminares 87-106*, ed. altera, Tornaci, Desclée, 1955, pp. 565-680.

²See O. ROBLEDA, *Quaestiones disputatae iuridico-canonicae*, Romae, Libreria editrice Università Gregoriana, 1969, pp. 9-84.

³See S. ROMANI, "De factis, actibus negotiisque iuridicis," in *Jus pontificium*, 18 (1938), pp. 192-197; M. HUGHES, "A New Title in the Code: On Juridical Acts," in *Studia canonica*, 14 (1980), pp. 396-401.

⁴See, for example, E. CAPARROS, M. THÉRIAULT, and J. THORN (eds.), *The Code of Canon Law Annotated*, Latin-English edition of the *Code of Canon Law* and English translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martin de Azpilcueta, Montréal, Wilson & Lafleur, 1993 (= *Code of Canon Law*

Fornes has attempted to formulate a general theory concerning a juridical act;⁵ M. Thériault has discussed briefly the impact of the violation of the principles of canon 124 on procedural acts.⁶ And R. Palombi has written particularly on the different invalidating effects, such as non-existence, inefficacy, revocability, etc., of a juridical act. He illustrates each of these concepts with references to specific norms of the Code.⁷

The scope of our study is a *comprehensive systematic analysis* of the nature and application of a juridical act in light of canon 124 of the 1983 Code of canon law. Our study is divided into four chapters. Chapter One analyzes the provisions of the 1917 Code vis-à-vis the juridical act. Four specific areas constitute the focus of our investigation in this chapter, namely: the notion, the essential elements, the impediments, and the efficacy of a juridical act. The principal question to be answered in this chapter

Annotated), pp. 141-144; J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHELL (eds.), *The Code of Canon Law: A Text and Commentary*, New York/Mahwah, Paulist Press, 1985 (=CLSA Commentary), pp. 89-90; G. SHEEHY et al. (eds.), *The Canon Law Letter & Spirit: A Practical Guide to the Code of Canon Law*, Collegeville, The Liturgical Press, 1995 (=Letter & Spirit), pp. 71-75; L. DE ECHEVERRIA et al. (eds.), *Código de derecho canónico*, edición bilingüe comentada por los profesores de la facultad de derecho canónico de la Universidad Pontificia de Salamanca, 7th ed. rev., Madrid, Editorial catolica, 1986 (=Código de derecho canónico), p. 100; F. D'OSTILIO, *Prontuario del Codice di diritto canonico*, seconda edizione riveduta e aggiornata, Libreria editrice Vaticana, 1996, p. 101.

⁵See J. FORNES, "El acto jurídico-canónico: (sugerencias para una teoría general)," in *IC*, 25 (1985), pp. 57-89.

⁶See M. THÉRIAULT, "The Nullity of Some Processual Acts in Light of Canon 124," in *Forum*, 5 (1994) 1, pp. 29-42.

⁷See R. PALOMBI, "Aspetti dell 'invalidità' dell atto giuridico nella vigente legislazione canonica," in *Apollinaris*, 66 (1993), pp. 220-250.

concerns the contribution of the 1917 Code and of the subsequent legislative, doctrinal and jurisprudential developments to the notion of a juridical act.

The Second Vatican Council was called for reforming and revitalizing the Church. One concrete aspect of this reformation was to concern the revision of the Code of Canon Law. Therefore, it would be natural to expect the conciliar deliberations to have some influence also on the nature and scope of juridical acts in the Church. Although the Council did not concern itself directly with the question of juridical acts, the 16 documents of the Council seem to have provided some foundational principles to guide the formulation of the norms governing the notion and scope of juridical acts in the Church's legal system. Because the Council itself was linked to the revision of the 1917 Code, it is necessary to investigate the developments related to the law on juridical acts that occurred during the revision process. This investigation will include an analysis of the principles of revision connected in some way to norms governing juridical acts and the subsequent schemata which formed the basis for the formulation of the relevant canons. This should enable us to identify and differentiate the content of the 1983 Code from that of the 1917. Chapter Two will deal with all these issues.

Chapter Three will focus on the contents of canon 124. It will first consider the nature and the context of the canon itself followed by a comprehensive analysis of its elements, starting with: the person capable (*persona habilis*), the elements which constitute the essence of the act (*elementa quae constituunt essentiam actus*), the requisites (*requisita*), and the solemnities (*sollemnia*). A proper understanding of these elements will be the objective of this analysis. The aim of such an analysis is to identify

clearly the intrinsic and extrinsic elements of every juridical act, and to determine how they may affect the existence or validity of a juridical act. Furthermore, the practical applicability of the norms of canon 124 governing juridical acts will be examined in light of the jurisprudence of the Roman Rota and the Apostolic Signatura.

The validity of a juridical act may be affected by several subjective and objective factors. The Code itself has expressly identified some of these factors, namely: force, fear, deceit, error, and ignorance. In order to complete our study of the juridical act, we will briefly examine these factors in Chapter Four.

The subject matter of this dissertation is approached from two perspectives: historical and analytical. From a historical perspective, we attempt to trace the origin and development of the norm of canon 124 within the Church's legal system. From an analytical perspective, we subject canon 124 to a systematic canonical analysis. The ultimate goal of this study is to provide a comprehensive analysis of the concept of a juridical act and of those elements which the law requires for its validity.

CHAPTER ONE

THE NOTION OF A JURIDICAL ACT IN THE 1917 CODE

Law as a rule does not define concepts. This task is left to doctrine and jurisprudence. Such an approach allows for an evolutionary and creative interpretation and application of law to concrete situations. Therefore, the 1917 Code did not provide a definition of a juridical act. Nevertheless, its basic elements were implicit in canon 1680, and other related canons of the Code. From a doctrinal and practical point of view this *lacuna* provided ample scope for determining in a scientific way the nature and elements of a juridical act which plays a very important role in the exercise of authority, rights, and obligations in the Church. The main goal of this chapter is to analyze the provisions of the 1917 Code *vis-à-vis* a juridical act. This analysis will concentrate on four areas: (1) the notion of a juridical act, (2) its essential elements, (3) impediments to, and (4) efficacy of juridical acts.

1.1 - THE NOTION OF A JURIDICAL ACT

During the period preceding the First Vatican Council, the need for the renewal of Canon Law had been expressed by several groups of bishops and members of the Roman Curia.¹ At the First Vatican Council itself, which took place from December 8, 1869 to September 1, 1870, there was a call for a renewal of Canon Law. It was even suggested that Canon Law should be codified. S. Kuttner writes:

¹See S. KUTTNER, "The Code of Canon Law in Historical Perspective," in *The Jurist*, 28 (1968), p. 132.

Perhaps it was even more significant that various groups of the Council fathers - the Neapolitan bishops, various groups of French, German, Belgian, and Canadian bishops, as well as bishops from Central Italy - had submitted to the secretariat of the Council requests for a *novum corpus*, a *revisio* or *recognitio*, a new *collectio* or *codificatio* of the laws of the Church.²

After the abrupt end of Vatican Council I, the call for renewal of Canon Law continued. Pope Pius X responded to it. On March 17, 1904, he issued the *Motu proprio, Arduum sane munus*, in which he announced the plan to collect all the laws of the Church into one.³ This arduous task was completed on the feast of Pentecost, May 27, 1917, when Pope Benedict XV promulgated the first Code of Canon Law for the Catholic Church of the Latin Rite. It was to come into force on the feast of Pentecost, May 19, 1918.⁴ The Code was to be a principal guide for discipline and life in the Church as R. Austin writes:

From that day onwards the Code of Canon Law replaced the enormous amount of canonical legislation which had accumulated down through the centuries. In the Code of Canon Law were to be found the concrete practical details of the way in which the Church would organize itself and live its life as a society in this world. Since 1918 the Code of Canon Law has been a dominant force in the life of the Church.⁵

²Ibid.

³See PIUS X, *Motu proprio, Arduum sane munus*, March 17, 1904, in *Acta Sanctae Sedis*, 36 (1903-1904), pp. 549-551.

⁴See *Codex iuris canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, Romae, Typis polyglottis Vaticanis, 1917 (all references to canons of the 1917 Code will be styled CIC/17 canon[s] followed by the canon number[s]).

⁵R. AUSTIN, "The History of the Revision of the Code of Canon Law," in *The Australasian Catholic Record*, 60 (January 1983), p. 344.

The notion of a juridical act was found in the 1917 Code.⁶ The Code, however, never addressed completely the nature of juridical acts. R. Hill notes that the Code did not speak of juridical acts as such,⁷ and G. Michiels states that in the 1917 Code, juridical acts were simply called *acts*.⁸ The Code, however, provided general principles of the canonical discipline on juridical acts. It did this in canons 103-104 and 1680. The former two canons were in the Book on Persons and the latter was in the Book on Procedures. Thus, the Code did not present a systematic treatment of the general principles of the discipline on juridical acts. Moreover, the principles it presented in the above mentioned canons dealt with juridical acts from a negative point of view. In canons 103 and 104 it identified the defects which could impede or influence juridical

⁶The concept of a juridical act in canon law was borrowed from the civil law tradition. It was developed in Germany by the German jurists, the Pandectists, of the XIXth Century. The Pandectists were so called because they studied the pandects, that is, Justinian's *Digest*, known as the *Digesta* in latin. And *Pandectae* was the latin translation of the Greek title of the Digest. The Digest or the Roman Law did not provide a definition or theory of a juridical act. However, implicit in the Roman sources were some elements of the rules and concepts of a juridical act. Therefore, the roman sources have provided the basic materials for the doctrine of a juridical acts. For examples of these, see A. GAUTHIER, *Roman Law and Its Contribution to the Development of Canon Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 1996, p. 75; J.A.C. THOMAS, *Textbook of Roman Law*, Amsterdam, North-Holland Publishing Company, 1976, pp. 225-232; W.W. BUCKLAND, *A Text-Book of Roman Law from Augustus to Justinian*, Homes Beach, Florida, Wm.W. Gaunt & Sons, Inc., 1990, pp. 712-715; ROBLEDA, *Quaestiones disputatae*, pp. 9-10. In fact, even though the concept of a juridical act is new in canon law, some of the rules and concepts of its doctrine were found in canon law before the concept was developed. For examples of these see GAUTHIER, *Roman Law*, pp. 78-81. For a summary of the development of the concept of a juridical act, see HUGHES, "A New Title in the Code," pp. 396-401; ROBLEDA, *Quaestiones disputate*, pp. 10-11.

⁷See *CLSA Commentary*, p. 89.

⁸See MICHIELS, *Principia generalia*, p. 571.

acts and established the consequences for such acts.⁹ In 1680.1 it determined the causes of the nullity of a juridical act. And, in canon 1680.2, it declared that the nullity of an act does not invalidate the acts which precede or follow, and which do not depend on the invalid act.

After the promulgation of the Code, literature specifically on juridical acts was very limited. Commenting on this fact, M. Hughes writes:

When one considers the central place held by the doctrine of the juridical act in the Civil Law tradition, and when one remembers too the leading role played in Canon Law by canonists who are of that tradition, it is a matter of some surprise to see how little is the impact that the doctrine has had in the field of Canon Law. Some major works ignore it completely, such as R. Naz, both in his *Dictionnaire* and in his textbook. Some devote a few lines to it, or a few pages. One can name only a few authors who have used the notion thematically in their writings: Baccari, Michiels, Robleda, Bertrams and Milano.¹⁰

Hughes suggests that the reason for this omission was the predominance of the Code commentary as a form of canonical writing.¹¹ This was particularly true with regard to the defects of juridical acts. Despite this, several canonists provided useful insights into the nature of a juridical act. Some of these concern the difference between juridical acts and other acts, the definition, and distinctions of juridical acts.

⁹The 1917 Code established force, fear, deceit, error, as defects of juridical acts. These will be treated in this chapter under the section dealing with impediments to juridical acts.

¹⁰HUGHES, "A New Title in the Code," pp. 399-400.

¹¹*Ibid.*, p. 400.

1.1.1 - Juridical acts and other acts

After the promulgation of the 1917 Code canonists observed that juridical acts are different from other acts. This difference was variously explained by them:¹² However, they generally differentiated juridical acts from juridical facts.¹³

Facts which when they happen bear juridical consequences were called *juridical facts*. R. Romani describes a juridical fact as follows: "a juridical fact is any event, to which the law attaches a juridical effect or from which the law deduces certain juridical effects [...]"¹⁴ Thus, when juridical facts happen, they give rise to rights and obligations, according to the norms of law, or they modify or suppress them. The juridical facts themselves differ from the rights and obligations and their exercise. They act only as a basis for the beginning or the modification, or the suppression of these rights and obligations.¹⁵

¹²See, for example, ROMANI, "De factis, actibus negotiisque iuridicis," p. 193; MICHIELS, *Principia generalia*, pp. 568-571; ROBLEDA, *Quaestiones disputatae*, pp. 14-18.

¹³See, for example, ROMANI, "De factis, actibus negotiisque iuridicis," p. 193; MICHIELS, *Principia generalia*, pp. 568-571; ROBLEDA, *Quaestiones disputatae*, pp. 14-18.

¹⁴"Est igitur *factum iuridicum* eventus quilibet, adiunctum quodlibet cui adiecti sint iuridici effectus, seu ex quo norma iuris quosdam deducit effectus iuridicos [...]" (ibid). For other descriptions of juridical facts, see MICHIELS, *Principia generalia*, p. 568; ROBLEDA, *Quaestiones disputatae*, p. 14.

¹⁵See MICHIELS, *Principia generalia*, pp. 568-571; ROMANI, "De factis, actibus negotiisque iuridicis," p. 193; ROBLEDA *Quaestiones disputatae*, pp. 14-18.

There was agreement among canonists that juridical facts can be distinguished by many factors.¹⁶ R. Romani, for example, writes:

[...] and it [juridical fact] is not distinguished by one factor only but by many, namely by its proximate origin, by its intimate nature, by its constitutive elements, by the reason for which it is elicited, by the effects which the act produces, and by other similar factors.¹⁷

One of the main distinctions that canonists made in regard to juridical facts was between non-voluntary and voluntary juridical facts. This distinction is based on their source. The non-voluntary juridical facts do not depend on the will of the agent. They are non-intentional events to which the law has attached juridical consequences.¹⁸ Some of these occur as a result of unavoidable course of nature, for instance, birth, consanguinity, and physical condition, such as, impotence or the measure of the use of reason.¹⁹ Others originate only from the lapse of time, for instance, attainment of the canonical age of majority, acquisition of a domicile, and the extinction of a juridical

¹⁶For instance, juridical facts can be distinguished by reason of their constitution and completion. By reason of their constitution juridical facts can be distinguished between simple and complex. A simple juridical fact consists in a single element, for instance, completion of a particular age. A complex juridical fact consists in several elements, for instance, a contract. By reason of their completion, they can be further distinguished between complete and incomplete. A simple juridical fact is complete in itself whereas in a complex juridical fact elements successively follow, and, therefore, it is complete only when all its constitutive elements are present. A contract, for instance, occurs only when consent has been given by all the parties concerned.

¹⁷"[...] et non uno ex capite distinctionem recepit sed e pluribus, utputa ex origine proxima, ex intima natura, ex elementis quibus constat, ex ratione qua perficitur, ex effectibus quos gignit, aliisque id genus" (ROMANI, "De factis, actibus negotiisque iuridicis," p. 194).

¹⁸Some canonists called non-voluntary juridical facts also natural facts. See ROMANI, "De factis, actibus negotiisque iuridicis," p. 194; ROBLED A, *Quaestiones disputatae*, p. 14.

¹⁹For instance, in the 1917 Code, impotence that was perpetual by its nature, rendered a marriage invalid. See CIC/17 canon 1068.1.

person.²⁰ Again, others occur as a result of change of place, such as, the obligation to observe a territorial law.²¹ Still, other non-voluntary juridical facts result from a mere presumption or disposition of the law, for instance, the use of reason is presumed at the completion of the seventh year; and consummation of marriage is presumed after the parties have lived together following the celebration of the marriage. The non-voluntary juridical facts can also occur because of the fiction of law. For instance, effects of marriage are considered retroactive when a *sanatio in radice* is given. Thus, it was observed by canonists, that when non-voluntary juridical facts occur, there are inevitable juridical effects, such as acquisition, change or extinction of rights of a physical or moral person.²²

Voluntary juridical facts depend on the will of the agent. They have their beginning in a person's will. They are placed freely by the agent according to the law. Because of this they are truly human acts. Their juridical effects arise only when they are voluntary, that is, when they are truly human acts.²³ According to Michiels, voluntary juridical facts are properly called *juridical acts*.²⁴ Michiels writes:

²⁰See CIC/17 canons 92, 102.2.

²¹See CIC/17 canon 14.1.

²²See, for example, ROBLEDA, *Quaestiones disputatae*, p. 14.

²³See ROMANI, "De factis, actibus negotiisque iuridicis," pp. 193-194; MICHIELS, *Principia generalia*, pp. 569-571; ROBLEDA, *Quaestiones disputatae*, p. 14.

²⁴See ROMANI, "De factis, actibus negotiisque iuridicis," p. 196; MICHIELS, *Principia generalia*, p. 571.

Voluntary juridical facts, which proceed from any human person, that is to say, from his or her free will, according to the norm of law, only in so far as they are truly human or free, produce juridical effects, [and] are called by the proper term *juridical acts* or simply *acts*, as in our Code (Can. 103, 104).²⁵

O. Robleda wrote extensively on juridical acts. In addition to the difference between a juridical act and non-voluntary juridical fact, Robleda also made a distinction between an illicit act and a juridical act, and a voluntary juridical fact and a juridical act.

Robleda states that an illicit act is not an event or a fact independent of the will, but proceeds from the will, and juridical effects result from it. He states:

It [a juridical act] is distinguished also from an *illicit act*, which is certainly not an event or a fact independent from the will, but a voluntary act, from which juridical effects follow, namely, a penalty when it is a question of a crime or simple repair of damages in other cases; [...].²⁶

However, these effects which arise are not intended by the agent. They are therefore, not produced by the will of the agent but by the law. Because of this, an illicit act, says Robleda, may actually be considered a juridical fact.²⁷

Robleda says that a voluntary juridical fact has effects which are neither opposed to the will nor sought by the will. He explains this as follows:

²⁵"Facta juridica voluntaria, quae ab homine qua tali seu ex libera ejus voluntate procedunt ideoque, ad normam legis, solummodo in quantum vere humana seu voluntaria sunt, effectus juridicos operantur, termino proprio *actus juridici* vocantur seu simpliciter *actus*, ut in Codice nostro (Can. 103, 104)" (MICHIELS, *Principia generalia*, p. 571).

²⁶"Distinguitur etiam ab *actu illicito*, qui est, non iam, certe, eventus seu factum independens a voluntate, sed actus voluntarius, quem consequuntur effectus iuridici, poena, scilicet, si agitur de delictis, vel simplex resarcitio damnorum, in aliis casibus; [...]" (ROBLEDA, *Quaestiones disputatae*, p. 14).

²⁷Ibid.

In these [voluntary juridical facts] the fact depends on the human person, not on nature, and it has a juridical effect, certainly not contrary to the will, but not sought by it, whence, not produced with any agreement by the same, but by positive law.²⁸

Robleda states that in a voluntary juridical fact, the agent may not seek the juridical effects but merely practical effects. In some instances, the agent may not even know the juridical effects. An example of this would be a person who establishes a residence in some parish and intends to stay there permanently, and yet does not know that by that very fact, he or she has acquired a canonical domicile.²⁹

1.1.2 - Definition of a juridical act

As stated above, the Code itself did not provide a definition of a juridical act. Nevertheless, canonists like O. Robleda and G. Michiels attempted to formulate definitions of a juridical act.³⁰

Robleda defined a juridical act as “an externally manifested act of the will by which a certain juridical effect is intended.”³¹

²⁸“In his factum pendet ab homine, non natura, habetque effectum iuridicum, certe, non contrarium voluntati, at nec quaesitum ab ea; unde nec ab eadem ullo pacto productum, sed a lege positiva” (ibid., p. 15).

²⁹Ibid., pp. 14-19.

³⁰The following terms may be considered as equivalent in *English*: “juridic act”, “juristic act”, “juridical act”, “legal transaction”, “act in canon Law” or “act of the party”; in *Latin*: “actus iuridicus” or “negotium iuridicum”; in *Italian*: “negozio giuridico”; in *French*: “acte juridique”; in *Spanish*: “negocio jurídico” or “acto jurídico”; in *German*: “Rechtsgeschäft”. See ibid., p. 13.

³¹“[...] voluntatis actum externe manifestatum quo certus effectus iuridicus intenditur” (ibid., p. 13). For the analysis of the definition, see HUGHES, “A New Title in the Code,” pp. 392-396.

Michiels gave a broad and a strict definition of a juridical act. The broad definition amounts to stating that a juridical act is any act which produces juridical consequences, whether they be intended or not. He observes:

In a broad sense [...] a juridical act is any external fact, freely placed by the human person, to which the law attributes a determined juridical effect, independently from both the intrinsic object of the act, and from the purpose directly intended by the agent.³²

In a strict sense, Michiels defined a juridical act as:

[...] a social human act which is legitimately placed and declared, and for which a determined juridical effect is recognized in law, because and in so far as it is intended by the agent.³³

This definition of a juridical act provided by Michiels gives the following as its main components: a juridical act is a *human act*; it is *social act*; it is a *legitimately placed and declared*; the juridical effect is *determined by the law*, and the juridical effect is *recognized by the law in so far as it is intended by the agent*. We will briefly comment on these elements.³⁴

³²"Sensu lato [...] actus juridicus dicitur quodcumque factum externe voluntarium, ab homine libere positum, cui qua tali lex de facto tribuit effectum juridicum determinatum, independenter tum ab intrinseco actus objecto, tum a fine ab agente directe intento" (MICHIELS, *Principia generalia*, p. 572).

³³"[...] actus juridicus est 'actus humanus socialis legitime positus et declaratus, cui a lege ideo et eatenus effectus juridicus determinatus agnoscitur, quia et quantus effectus ille ab agente intenditur'" (ibid., p. 572).

³⁴The fourth element in the definition, that is, "juridical effect is determined by the law," will be commented upon in this chapter under the section dealing with the source of juridical efficacy.

During the regime of the 1917 Code, canonists considered a juridical act as a *human act*.³⁵ Because of this, in a juridical act, the human person, the agent, was said to be the master of the act. The human person was considered its master because of the involvement of the faculties of the intellect and the will.³⁶ These two faculties were necessary because a human act is the result of their continuous mutual interaction.³⁷ D.E. Fellhauer explains this interrelation in this way: "[...] the will seeks as its object the good in so far as this is perceived and presented by the intellect."³⁸

Although in the formation of a human act, the intellect and the will are so intimately interdependent, nobody can absolutely say when the action of the intellect finishes and when the will continues the activity. Nevertheless, in any human act, these two faculties are in continuous interrelated activity.

A truly human act must also have the deliberation of the intellect and the inner freedom of the will. The intellect must have sufficient knowledge of the nature of the

³⁵See ROMANI, "De factis, actibus negotiisque iuridicis," p. 196; MICHIELS, *Principia generalia*, p. 571; ROBLEDA, *Quaestiones disputatae*, p. 13; HUGHES, "A New Title in the Code," p. 392; T.L. BOUSCAREN, A.C. ELLIS, and F.N. KORTH, *Canon Law: A Text and Commentary*, 4th rev. ed., Milwaukee, The Bruce Publishing Company, 1966 (=BOUSCAREN, *Canon Law*), p. 88; C. AUGUSTINE, *A Commentary on the New Code of Canon Law*, 6th rev. ed., St. Louis, B. Herder Book Co., 1936, vol. II, p. 30.

³⁶See MICHIELS, *Principia generalia*, pp. 586-588.

³⁷For a clear and succinct explanation of the interrelated activity of the intellect and the will in a human act, see D.E. FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence," in *Studia canonica*, 9 (1975), p. 109; J. OESTERLE, art., "Human Act," in *New Catholic Encyclopedia*, vol. VII, New York, McGraw-Hill Book Co., 1967, p. 208.

³⁸FELLHAUER, "The Exclusion of Indissolubility," p. 108.

act, that is, the agent must understand the implications of the act, and the will must have a free determination.³⁹

In short, a juridical act was considered a human act because it was an act of the free will of the agent. It was considered to be a deliberately and freely elicited act of a free human person.⁴⁰ And, as Gomez says, the common opinion of canonists was that a juridical act is an act that is placed *knowingly* and *willingly*.⁴¹

During the same period, a juridical act was regarded as a *social act*. It was considered to be directed to the ordering of social relationships. According to this view, therefore, it was necessarily an external act.⁴²

Furthermore, the juridical effect of an act in canon law was *recognized by the law in so far as it was intended by the agent*. In other words, the juridical efficacy of an act depended on the will of the agent that sought a determinate effect and of the law that recognized that effect.

A juridical act was also considered a *legitimately placed and declared act*. In canon law, a juridical act had to be realized and declared in accordance with the

³⁹In jurisprudence, much was said about the necessity of the unity of the activity of the intellect and the will in a human act, especially regarding matrimonial consent. Cf. decisions *coram* HEARD, July 19, 1941, in *SRR Dec.*, 33 (1941), p. 653; *coram* WYNEN, April 13, 1943, in *ibid.*, 35 (1943), p. 273; *coram* FILIPIAK, June 15, 1956, in *ibid.*, 48 (1956), p. 555; *coram* DE JORIO, December 19, 1961, in *ibid.*, 53 (1961), p. 613.

⁴⁰See MICHIELS, *Principia generalia*, pp. 572, 586.

⁴¹See P. GOMEZ, *De actionibus et exceptionibus (canonnes 1667-1705)*, Romae, Copisteria Coscia, 1951, p. 72.

⁴²See HUGHES, "A New Title in the Code," p. 394.

conditions and the formalities that the law demanded for the juridical efficacy of the act.⁴³ In fact canon 1680.1 of the Code demanded this.

1.1.3 - Distinction of juridical acts

In the period of the former Code, there was also agreement among canonists that juridical acts can be distinguished by many factors. For instance, they can be distinguished by reason of their purpose, agent(s), the manner by which they are placed, form, object, and the time of their efficacy.

A juridical act may be one that gives rise to a right, modifies a right, or suppresses a right, within the limits determined by the law.⁴⁴

Both physical persons and juridical persons are capable of being agents of juridical acts in accordance with the law. Mostly, physical persons place juridical acts which are more easily seen as private acts, such as, contracts of sale or testaments. However, when physical persons are elected or given an office, they can also place juridical acts by reason of office, that is, in virtue of their public authority, for instance, a legislative act, provision for an office, and pronouncement of a judicial sentence.⁴⁵

Also, some juridical acts are unilateral which are completed by the declaration of the will of one person. Some of these are made by a single person but involve other people who have an interest in them, for instance, the will, and renunciation of an office.

⁴³See MICHIELS, *Principia generalia*, p. 572; HUGHES, "A New Title in the Code," p. 394; E. ROELKER, *Invalidating Laws*, Paterson, St. Anthony Guild Press, 1955, pp. 160-161.

⁴⁴MICHIELS, *Principia generalia*, p. 575.

⁴⁵*Ibid.*

For some other acts a permission or approval of a competent authority is required before placing the act, for instance, alienation of ecclesiastical goods. Again, some juridical acts are bilateral, they are placed by the meeting of the wills, declared by two or more human persons, such as, marriage. Also some juridical acts are gratuitous acts, for instance, a donation.⁴⁶

Distinguished by the manner in which they are placed, juridical acts can be collegiate or non-collegiate. A collegiate act may be described as a collective act, that is, an act collectively placed by a group of persons, such as a collegiate moral person. Collegiate acts result from a group acting in a collegiate manner, that is, the members of the group act together but as equals.

Furthermore, the validity of some juridical acts, for instance, sacraments, depends on the observation of determined forms or solemnities.⁴⁷

Juridical acts also differ among themselves by reason of their object, as M. Hughes points out:

We have seen what juridical acts have in common. In addition, we must note that they differ *inter se* by the differences in their formal objects. The juridical acts of contract, gift, judicial sentence, etc., are specifically different because of the different formal objects upon which the commitment falls.⁴⁸

⁴⁶Ibid.

⁴⁷See MICHIELS, *Principia generalia*, p. 576.

⁴⁸See HUGHES, "A New Title in the Code," p. 393.

Juridical acts normally operate between living human persons. However, some juridical acts take effect only after and by reason of death of the agent, for instance, a will.⁴⁹

In conclusion to this section of the chapter, it can be said that the notion of a juridical act was found in the 1917 Code. The Code, however, did not completely deal with the nature of a juridical act. It merely provided in canons 103-104 and 1680 general principles governing juridical acts. Following the promulgation of the Code several canonists offered useful insights into the nature of a juridical act. Some of these concerned the difference between juridical acts and other acts, definition, and distinctions of juridical acts.

There was a general agreement among canonists that a juridical act is different from other acts. However, they often explained this distinction in different ways. But the main difference in their opinions concerned the distinction between a juridical act and a juridical fact. The common opinion identified non-voluntary juridical facts as juridical facts in the strict sense. Some canonists identified voluntary juridical facts with juridical acts. Furthermore, a juridical act was defined in different ways by different authors. Because of this, there was no one descriptive definition acceptable to everyone. Moreover, canonists also indicated that juridical acts can be distinguished by several factors.

⁴⁹See MICHIELS, *Principia generalia*, p. 576.

1.2 - ESSENTIAL ELEMENTS OF A JURIDICAL ACT

In canon 1680.1, the 1917 Code determined that one of the causes of nullity of a juridical act is lack of its essential elements.⁵⁰ The Code did not provide any definition or identification of these elements. This task was left to doctrine and jurisprudence.

Several canonists expressed the view that the essential elements, required by natural or positive law, for a juridical act are not easily determined.⁵¹ However, the common opinion was that, in general, the essential elements of a juridical act are those without which the act itself would be of a different nature, or the act would be rendered unsuitable to produce its intended effects. Thus, for example, F. Roberti says: “Generally, the essential elements are those without which the nature of the act itself changes or is made unsuitable for the end to which it is ordained [...]”⁵² P. Gomez and G. Michiels give a similar explanation of the essential elements of an act.⁵³ The essential elements in a sale, for instance, are the thing itself, a price, and mutual consent

⁵⁰The other cause was lack of the solemnities or conditions required by law under pain of nullity. See CIC/17 canon 1680.1.

⁵¹See GOMEZ, *De actionibus et exceptionibus*, p. 71; F. ROBERTI, *De processibus*, vol. I, in Civitate Vaticana, Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1956, p. 620.

⁵²“Generaliter dicendi sunt essentialia elementa illa sine quibus actus suam naturam mutat, vel ineptus efficitur ad finem cui ordinatur [...]” (ROBERTI, *De processibus*, vol. I, p. 620).

⁵³See GOMEZ, *De actionibus et exceptionibus*, pp. 71-72; MICHIELS, *Principia generalia*, p. 583.

to the same thing. Because of this, if the parties in a sale agree that the price for the thing is not to be paid, then the act is not a sale but a gift.⁵⁴

Attempts were made by some authors to identify and explain the *essential elements* of a juridical act in the strict sense. Naturally the opinions were not uniform.

O. Robleda identified the following as the essential elements of an act: the subject, the material cause, and the formal cause;⁵⁵ F.M. Cappello and G. Cocchi require consent, capacity, and object, as examples of essential elements of an act;⁵⁶ J. Brys gives the capacity of the subject, existence of the object, and the will as examples of the essential elements of an act;⁵⁷ and for F.C. Bouuaert and G. Simenon essential elements of an act are the capacity of the subject, the object itself, the cause, and the will.⁵⁸

According to P. Gomez, however, the common opinion of noted canonists was that, in the strict sense, the essential elements of an act are: the capacity of the subject, a suitable and certain object, the cause, and the will. He writes:

⁵⁴See MICHIELS, *Principia generalia*, p. 583.

⁵⁵See ROBLEDA, *Quaestiones disputatae*, p. 54.

⁵⁶See F.M. CAPPELLO, *Summa iuris canonici in usum scholarum concinnata*, editio emendata et aucta, vol. III, Romae, Apud Universitatis Gregoriana, 1940, p. 93; G. COCCHI, *Commentarium in Codicem iuris canonici ad usum scholarum*, editio III, vol. VII, Taurinorum Augustae, Marietti, 1940, p. 161.

⁵⁷See J. BRYs, *Iuris canonici compendium*, Brugis, Desclée de Brouwer, 1949, vol. II, p. 339.

⁵⁸See F.C. BOUUAERT and G. SIMENON, *Manuale iuris canonici ad usum seminariorum*, vol. 3, ed. quinta, Gaudae et Leodii, prostat apud auctores in seminariis Gandavensi et Leodiensi, 1943, p. 235.

In particular, according to the common opinion of learned [authors], the essential elements of any act are: [...] a competent active or passive *subject*, [...] *a suitable and certain thing or object* [...] *an intrinsic cause* or purpose to which the act is ordained [...] *the will*, that is, the act should be placed knowingly and willingly.⁵⁹

It is evident from the above statement of Gomez that among canonists it was understood that for an act to have juridical efficacy certain elements were required on the part of the agent (subject), the act, the object, the intrinsic cause, and the will.

1.2.1 - On the part of the agent (subject)

The principle was that the agent must be *habilis*, that is, he or she must have the *capacity* to act.⁶⁰ This capacity could be *natural* and *juridical*.

1.2.1.1 - Natural capacity

The common opinion among canonists was that in order for the agent to place a juridical act in the canonical order, he or she must first have the the natural ability of placing the act, that is, the agent must have the natural capacity proportionate to the act.⁶¹

Some juridical acts are by nature more demanding than others. The capacity necessary to place an act of selling an object, for instance, will be different from that required for contracting marriage or for making religious profession. Hence, it was

⁵⁹"In specie, iuxta communem sententiam doctorum elementa essentialia cuiusvis actus sunt: [...] *Subiectum* activum vel passivum *capax*, [...] *Obiectum seu res apta et certa* [...] *Causa seu finis intrinsecus* ad quem actus ordinatur [...] *Voluntas*, seu ut actus ponatur sciens et volens" (GOMEZ, *De actionibus et exceptionibus*, p. 72).

⁶⁰See GOMEZ, *De actionibus et exceptionibus*, p. 72; MICHIELS, *Principia generalia*, p. 577; HUGHES, "A New Title in the Code," p. 393-394.

⁶¹See GOMEZ, *De actionibus et exceptionibus*, p. 72.

understood that canon law does not speak of a general natural capacity for juridical acts.⁶² The required natural capacity was considered essential for placing a juridical act. It was held that without it the act simply did not exist. It lacked a real juridical intention from the part of the agent.⁶³

1.2.1.2 - Juridical capacity

Besides natural capacity, the agent was required to have the basic juridical capacity to act.⁶⁴

One received the basic juridical capacity to act by becoming a *person* in the Church.⁶⁵ The 1917 Code used the term "person" in its ordinary and juridical sense. In the ordinary sense it referred to those who are considered persons by natural fact of birth. Juridically, a *person* was a subject capable of rights and obligations.⁶⁶ This implied a twofold capacity: a juridical capacity for becoming a subject of juridical rights and obligations; and a juridical capacity to act, which is the capacity to place juridical acts according to the norms of law. The Code recognized two types of persons: *physical and moral persons*.

⁶²See HUGHES, "A New Title in the Code," pp. 393-394.

⁶³See *ibid*, p. 394.

⁶⁴See MICHIELS, *Principia generalia*, pp. 577-578.

⁶⁵See *Ibid.*, p. 577.

⁶⁶See J.F. KINNEY, *The Juridic Condition of the People of God: Their Fundamental Rights and Obligations in the Church*, Roma, Officium Libri Catholici, 1972, p. 16.

1.2.1.2.1 - Physical person

C. Augustine describes a person physically as a being endowed with life, intelligence, free will, and individual existence.⁶⁷ J.A. Abbo and J.D. Hannan note that modern philosophers consider the person rather from the psychological point of view, and that they define the person as an individual who possesses a clear consciousness of himself and acts accordingly.⁶⁸ After the promulgation of the Code, the juridical capacity of the baptized, the doubtfully baptized, and the non-baptized was considered by canonists.

(1) Baptized persons and juridical capacity

The Code determined in canon 87 that valid baptism is the only source of juridical personality in the Church for natural persons.⁶⁹ This is a personality which not every natural person has.⁷⁰ Therefore, in a manner similar to that by which a human being acquires the capacity to place acts in the human natural society in virtue of birth,⁷¹ in

⁶⁷See AUGUSTINE, *A Commentary*, vol. II, p. 1.

⁶⁸See J.A. ABBO and J.D. HANNAN, *The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church*, vol. I, rev. ed., St. Louis, MO, B. Herder Book Co., 1952, p. 123.

⁶⁹CIC/17 canon 87: "Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura."

⁷⁰For a more detailed discussion of the effects of baptism as dealt with by the 1917 Code, see A.A. REED, *The Juridical Aspect of Incorporation into the Church of Christ: Canon 87*, Carthage, Messenger Press, 1960, pp. 2-91; KINNEY, *The Juridic Condition of the People of God*, pp. 9-80.

⁷¹Cf. M. RAMSTEIN, *A Manual of Canon Law*, Hoboken, NJ, Terminal Printing & Publishing Co., 1947, p. 124.

virtue of supernatural birth, which is effected through valid baptism, a human being acquires juridical capacity to place acts in the Church. Baptism, therefore, was considered the foundation of the basic juridical capacity to act in the canonical order. This required baptism was only baptism conferred with water because it is only this baptism that constitutes a human being a *person* in the visible Church.

The juridical capacity which is received in baptism pertained to every and only baptised persons, including heretics and schismatics. Canon 87 made no distinction whether a person was baptized in or outside the Catholic Church. Consequently, it was understood that all those validly baptized, even though the sacrament was not conferred within the Catholic Church were *persons* in the Church of Christ. All these had the basic juridical capacity for placing juridical acts, within the limits determined by the law.

(2) Doubtfully baptized persons and juridical capacity

The doubt about a person's baptism may concern either the *validity* of the baptism itself or the *fact* of its celebration. The validity of baptism could be doubtful for various reasons. For instance, it may be certain that the rite of baptism was done but that there is some doubt whether the proper matter and form were used. Similarly, the very fact of baptism may be doubtful as it may happen when a person has always believed that he or she was baptized, but when an investigation is made, no record may be found of the fact that baptism was actually conferred.

In the practice of law, when the fact of baptism was certain but its validity doubtful, the baptism was presumed to be valid. A person, therefore, for whom the validity of baptism was doubtful, was presumed to have the basic juridical capacity for

placing juridical acts. If the fact of baptism itself was doubted, the presumption was that baptism had never been conferred. Consequently, the person was presumed to lack the basic juridical capacity.

These presumptions, however, were only used as norms for acting in practical difficulties. The actual basic juridical capacity for the person could not be absolutely determined by these presumptions. Whether a person had actually this fundamental juridical capacity or not depended on the reception of valid baptism. These presumptions therefore would yield to contrary proof.⁷²

(3) Non-baptized persons and juridical capacity

The 1917 Code recognized that non-baptized persons could place certain acts which could have juridical effects in the canonical order. A non-baptized person, for instance, could validly administer non-solemn baptism in case of necessity; be permitted to marry a baptized person with the necessary dispensation; and be admitted as a witness in cases of beatification and canonization.⁷³ Because of this, after the promulgation of the Code, several authors offered different opinions concerning the position of the non-baptized in canon law, relative to canon 87, that is concerning whether or not the unbaptized were *persons* in the Church.⁷⁴

⁷²See REED, *The Juridical Aspect of Incorporation*, pp. 39-41.

⁷³See CIC/17 canons 742.1, 1071, 2027.

⁷⁴For different opinions of canonists on the ecclesiastical personality of the non-baptized, see REED, *The Juridical Aspect of Incorporation*, pp. 63-76; H.G. BOWEN, *The Juridic Authority of the Church over the Non-baptized*, Canon Law Studies, no. 431, Washington, DC, The Catholic University of America, 1963, pp. 88-120.

The common and traditional canonical teaching was that the non-baptized persons have no juridical capacity to place juridical acts because they lack the ecclesiastical personality which is required as the basis for the basic juridical capacity.⁷⁵ It was commonly held that in those cases where the Church allowed the non-baptized to place juridical acts, it did so by way of concession or favour. It did not follow from this that the Church granted them juridical personality. The source of the effects of these juridical acts was held to be not the ecclesiastical juridical capacity but the natural juridical capacity which the non-baptized persons have by virtue of being members in the human society.⁷⁶

1.2.1.2.2 - Moral person

Besides physical persons in the Church, the 1917 Code recognized moral persons.⁷⁷ The Code used the terms "moral person" and "juridical person" interchangeably.⁷⁸ There was no definition of a moral person in the Code.⁷⁹ The

⁷⁵See REED, *The Juridical Aspect of Incorporation*, p. 33; BOWEN, *The Juridic Authority of the Church*, p. 107.

⁷⁶See REED, *The Juridical Aspect of Incorporation*, p. 33.

⁷⁷CIC/17 canon 99 reads: "In Ecclesia, praeter personas physicas, sunt etiam personae morales, publica auctoritate constitutae, quae distinguuntur in personas morales collegiales, et non collegiales, ut ecclesiae, seminaria, beneficia etc."

⁷⁸See CIC/17 canons 99, 687, 1409.

⁷⁹For a historical development of the notion of a juridical person, see B. BROWN, *The Canonical Juristic Personality, With Special Reference to Its Status in the United States of America*, Canon Law Studies, no. 39, Washington, DC, The Catholic University of America Press, 1927, pp. 88-91; A. GAUTHIER, "Juridical Persons in the Code of Canon Law," in *Studia canonica*, 25 (1991), pp. 77-92.

term denoted a group of physical persons or material goods endowed with the capacity of acquiring and exercising rights as well as contracting obligations by the means and to the extent determined by the competent authority.⁸⁰ A. Blat says that a moral person is “[..], besides the physical persons, whatever is considered in the sacred canons capable of possessing and exercising rights in the Church.”⁸¹ P. Maroto defines it as a:

[...] juridical entity formally constituted by a public authority, existing independently of individual persons in virtue of the concession of law, and endowed with the capacity of acquiring and exercising rights.⁸²

According to the 1917 Code, the source of juridical capacity for these entities is either God himself or the Church. The Catholic Church and the Apostolic See have juridical capacity from God because these alone have moral personality by divine order. All other ecclesiastical moral persons receive their juridical capacity from the Church, from which they also receive their moral personality either by the law itself or by a special concession of a competent authority through a formal decree.⁸³

⁸⁰ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 144.

⁸¹“[...] quidquid praeter personas physicas in Ecclesia iuris possidendi et capax in ss. canonibus habetur” (A. BLAT, *commentarium textus Codicis iuris canonici*, vol. II, ed. altera, Romae, Libreria del Collegio “Angelico”, 1921, p. 36).

⁸²“[...] ens iuridicum, publica auctoritate formaliter constitutum, independenter a personis singularibus ex iuris concessione subsistens, atque capacitate iuris acquirendi exercendique donatum” (P. MAROTO, *Institutiones iuris canonici ad normam novi Codicis*, Romae, Apud Commentarium pro Religiosis, 1921, vol. I, p. 536). For other definitions of juridical person, see CAPPELLO, *Summa iuris canonici*, pp. 172-173; MICHIELS, *Principia generalia*, p. 347.

⁸³For a summary about the constitution, division, juridical status, acts, duration and extinction of moral persons as dealt with by the 1917 Code, see C. MAGNIN, *Pastors and People: A Summary of Canon Law Affecting Parish Priests, Curates and the Laity*, translated by J. SCANLAN, St. Louis, MO, B. Herder Book Co., 1929, pp. 31-36; E. JOMBART, *Summary of Canon Law for Use of the Clergy, Religious, and the Laity*, translated by F. BEGIN, New York,

The Code gave two categories of moral persons in the Church: collegiate and non-collegiate moral persons. A collegiate moral person was composed of a certain number of physical persons united into one single body or college, such as a religious congregation, a confraternity, etc. It was distinct and independent from the physical persons who composed it. The common interest which united them was different and separate from their interests as individuals. The rights of the moral person were equally different and separate from the rights of each of its members taken singly or even together. Thus, the personality of a collegiate moral person remained distinct from that of its members. A religious order, for example, had rights and duties distinct from the sum of the individual rights and duties of its members.

A non-collegiate moral person was in fact and in law an institution or an aggregate of property, dedicated to a religious or charitable purpose, and in virtue of which it became the subject of legal rights and obligations.⁸⁴ It was completely independent of the physical persons who were essential for its *de facto* existence.

With regard to their capacity to act, the Code allowed moral persons to place juridical acts to the extent determined by the law. A moral person could, for instance,

Benziger, 1960, pp. 23-25.

⁸⁴See A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici cum commentariis ad scholas et usum privatum*, editio septima, Mechliniae, H. Dassain, 1949-1956, vol.I, p. 146.

acquire and administer temporal goods, establish their own statutes, and sue or be sued.⁸⁵

Moral persons however, by nature cannot carry out their activities by themselves.⁸⁶ They act through physical persons either as individuals endowed with authority to act for them or as a group having the same authority.⁸⁷ In the Code, the basic principles governing acts of moral persons were found in canon 101.⁸⁸

Canon 101.1 dealt with acts of collegiate moral persons. The canon provided two types of collegiate acts, namely, those which affect each one individually and those which do not. It also provided different collegiate procedures for placing these acts.

⁸⁵See JOMBART, *A Summary of Canon Law*, p. 24; T. KILCULEN, *The Collegiate Moral Person as a Party Litigant: A Historical Synopsis and Commentary*, Canon Law Studies, no. 251, Washington, DC, The Catholic University of America, 1947, pp. 53-97.

⁸⁶Moral persons, were regarded as equivalent to minors under the law. They were, for instance, represented by agents; and they had the same protection under the law as minors. See BOUSACREN, *Canon Law*, p. 87.

⁸⁷*Ibid.*

⁸⁸CIC/17 canon 101:1: "Circa actum personarum moralium collegialium:

"1° Nisi aliud expresse iure communi aut particulari statutum fuerit, id vim iuris habet, quod, demptis suffragiis nullis, placuerit parti absolute maiori eorum qui suffragium ferunt, aut, post duo inefficacia scrutinia, parti relative maiori in tertio scrutinio; quod si suffragia aequalia fuerint, post tertium scrutinium praeses suo voto paritatem dirimat aut, si agatur de electionibus et praeses suo voto paritatem dirimere nolit, electus habeatur senior ordine, vel prima professione vel aetate;

"2° Quod autem omnes, uti singulos, tangit, ab omnibus probari debet.

"2: Si de actibus personarum moralium non collegialium agatur, servantur particularia statua ac normae iuris communis, quae easdem personas respiciunt."

With regard to collegiate acts not affecting each of the members as individuals, the canon determined that unless the common law or particular statutes prescribed a different course of action, they were to be decided by the vote of the members according to the law.

With regard to collegiate acts in those matters which concerned all as individuals, the canon protected the rights of the individual members by even limiting the power of particular law in these acts.⁸⁹ In such acts, the approval of the matter by every individual member was required.⁹⁰ In order to hold an election by compromise, for example, a unanimous consent of the members was required.⁹¹

The Code did not require that all the acts of the collegiate moral person should be done by the whole moral person. In fact, there were certain juridical acts foreseen by the law, both universal and particular, which could be placed by an individual agent or a group. A physical person designated by common law or particular law could proceed alone in certain matters defined by it.⁹² At times the collegiate moral person could act through a few select persons. In some cases it could be represented by administrators authorized to place juridical acts in its own name and according to their

⁸⁹See S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, vol. I, revised by C. SMITH, New York, J.F. Wagner Inc., 1963, p. 59; AUGUSTINE, *A Commentary*, vol. II, p. 27; ABBO and HANNAN, *The Sacred Canons*, p. 149.

⁹⁰See CIC/17 canon 101.1.

⁹¹See MAGNIN, *Pastors and People*, p. 35.

⁹²In a religious institute, for instance, a single administrator was usually empowered to place juridical acts of ordinary administration while more important acts required an action by the superior and the council or even the chapter. See *ibid*.

own discretion.⁹³ The juridical acts placed by these representatives within the scope of their authority were considered as juridical acts performed by the moral person itself.

In canon 101.2, the Code treated the juridical acts of non-collegiate moral persons. Juridical acts of these were to be governed by their own approved statutes. Where the statutes were silent, the norms of common law regarding such persons were to be consulted.

The canon neither recognized nor denied that acts of non-collegiate moral persons could be of two types; collegiate or non-collegiate. The non-collegiate moral persons, usually acted through the agent designated in their particular law or by universal law. However, in some cases an act of a non-collegiate moral person could be placed by a group of persons or preceded by an act of some group or body.⁹⁴ Moreover the act could be placed in a collegiate way as might be the case where it was placed by a board of trustees with a president, secretary, and treasurer.

For some juridical acts, especially those of importance, or where the rights of other parties were at stake, the Code limited the right of a physical person to act in the name of a moral person by requiring that the act be preceded by some other action. This prior action could be consent or advice. It could be collegiate or non-collegiate act. It could be done by a moral person, or by one or more individuals. In the Code, the

⁹³See RAMSTEIN, *A Manual of Canon Law*, p. 132.

⁹⁴*Ibid.*

general principles for those cases where a superior was required to consult others or obtain their consent before placing an act were found in canon 105.⁹⁵

1.2.1.3 - Specific juridical capacity and competence

In addition to the basic juridical capacity, the agent was required to have the specific capacity relative to the act.⁹⁶ Thus, factors such as state of life, age, domicile, office, rite, censure, etc., could affect one's capacity relative to certain juridical acts. The law, for instance, required that the agent for juridical acts which presuppose the power of order, such as the sacrament of penance, must be a cleric.⁹⁷

Competence may be described as jurisdiction which is commensurate with and limited to certain matters and persons. It is jurisdiction considered in the concrete.

⁹⁵The common opinion of authors was that when consent was required two elements were involved: that the consent had to be sought; and that it had to be obtained. Consequently, the juridical act placed by the superior was invalid if he or she failed to obtain the required consent or placed the act when it was refused. The requiring of advice contained only one element: that the advice had to be sought. While some authors maintained that the obtaining of the required advice was necessary for validity, others did not. The question of whether a superior can act validly if the required advice had not been obtained was proposed to the Commission for the Interpretation of the Code, and no answer was given. As a result, the question remained doubtful for the entire period of the 1917 Code. For a summary of various opinions and lists of commentators on both sides of this question, see C.V. BASTNAGEL, "The Requirement of Consultation for Valid Action," in *The Jurist*, 9 (1949), pp. 465-495; G. NEVILLE, *The Religious Superior's Council in the 1983 Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1988, pp 13-27.

⁹⁶MICHELIS, *Principia generalia*, pp. 577-578.

⁹⁷See CIC/17 canon 118; MICHELIS, *Principia generalia*, p. 578.

Competence was required for some juridical acts,⁹⁸ such as, pronouncement of a judicial sentence and erection of a parish.⁹⁹

1.2.2 - On the part of the act

On the part of the act, elements pertaining to the act itself and those concerning its object were considered.

1.2.2.1 - The act itself

Some canonists, such as Michiels, Roberti etc., maintained that the essential elements of a juridical act are different from its integrative and accidental elements.¹⁰⁰

Integrative elements do not necessarily determine the existence or non-existence of the act by themselves. However, by the force of law or custom, they may become part of the act in such a way that whenever the act is placed, they are considered to have been assumed, unless they are intentionally excluded by the agent. For instance, in marriage, even though the law does not prescribe that spouses must cohabit, it pertains to the nature of the act that cohabitation be assumed.¹⁰¹

Accidental elements do not pertain to the nature of the act. F. Roberti describes them as elements which only furnish the act. When they are lacking, the act remains the

⁹⁸See GOMEZ, *De actionibus et exceptionibus*, p. 72.

⁹⁹See M. CORONATA, *Institutiones iuris canonici ad usum utriusque cleri et scholarum*, Taurini, Marietti, 1933-1939, vol. III, p. 10; VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. III, p. 9; AUGUSTINE, *A Commentary*, vol. VII, p. 14; N. CONNOLLY, *The Canonical Erection of Parishes: A Historical Synopsis and Commentary*, Canon Law Studies, no. 114, Washington, DC, Catholic University of America Press, 1938, pp. 47-50.

¹⁰⁰*Ibid.*, pp. 583-584.

¹⁰¹*Ibid.*, p. 584.

same, but it is rendered less suitable for its purpose.¹⁰² They are not valued as given in an act unless they are intended by a positive act of the will as essential.¹⁰³ For example, in a sale of property, the agent may demand the payment of the price before the buyer begins to make use of it.

1.2.2.2 - The object of the act

The objects of juridical acts are generally corporeal things, mobile or immobile, or spiritual things, or actions or facts, or persons.¹⁰⁴

For the validity of a juridical act, it was required that the object be in *existence*.¹⁰⁵ For instance, if a person sold a house, and such a house did not exist, the act was considered invalid;¹⁰⁶ likewise, objects which were bequeathed had to be in existence at the time of the transfer by testament. If they were destroyed, even though mention was made of them in the testament, the bequest was worthless.¹⁰⁷

Furthermore, for the validity of a juridical act, it was required that the object be *suitable*, that is, the object had to be suitable *vis-à-vis* the juridical act. Roelker, for instance, explains this fact in this way:

¹⁰²See ROBERTI, *De processibus*, vol. I, p. 620.

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*, p. 578.

¹⁰⁵See GOMEZ, *De actionibus et exceptionibus*, p. 72.

¹⁰⁶*Ibid.*

¹⁰⁷See ROELKER, *Invalidating Laws*, p. 160.

The important thing to keep in mind, however, is that the object of the transaction must be clearly in line with the entire act. If for instance, a person is authorized to purchase one thing, similar authorization can not be claimed by the same act of authorization to purchase another or even a better object.¹⁰⁸

Thus, for example, if a procurator was given a mandate to buy a piece of land and he or she bought a house, the buying itself was invalid since the house is not the suitable object for the mandate.¹⁰⁹

Moreover, for the validity of a juridical act, it was required that the object be *certain*.¹¹⁰ For instance, if someone sold a house without determining in some manner, and had many houses, the contract of sale was considered invalid.¹¹¹

The object of a juridical act may be composed of essential elements, integrative and accidental elements. Michiels maintains that for the actual object of the act to be juridically constituted, only the substantial elements of its object may be intended by the agent.¹¹² When these substantial elements are lacking in the object intended by the agent, then the act lacks its necessary object, and consequently, it is juridically inefficacious.¹¹³ The question then becomes, what constitutes the substantial elements of the object of a juridical act?

¹⁰⁸Ibid, p. 161.

¹⁰⁹See GOMEZ, *De actionibus et exceptionibus*, p. 72.

¹¹⁰Ibid.

¹¹¹Ibid.

¹¹²See MICHIELS, *Principia generalia*, p. 579.

¹¹³Ibid.

According to Michiels again, for some juridical acts, their object is defined by nature itself or by the competent authority.¹¹⁴ For these acts, therefore, all the things determined by the nature of the act itself or by the competent authority as substantial, constitute the substantial elements of the object of the act. These substantial elements must be intended by the agent while placing a juridical act. If in fact, these elements are, either totally or partially, wanting in the object intended, or are intentionally excluded by the agent, the act itself will be juridically inefficacious for lack of its object. Within this group are elements which, although accidental to the act, the agent, by a positive act of the will, intends them as substantial. This occurs whenever their existence is primarily bound to the intention of the agent, for instance, a condition *sine qua non* that an agent has placed for an act.¹¹⁵

Michiels further observed that for other juridical acts, the determination of their object is left to the discretionary power of the agent. In these acts, the substantial elements of the object of the act which are necessary and which must be intended for the efficacy of the act are only those elements which are intended and externally expressed by the agent. When the agent does not express these elements, his or her intention is presumed to include all and only those elements which are commonly considered to be substantial for the object of the same act.¹¹⁶

¹¹⁴Canon 1081.2 of CIC/17, for instance, determined the object of marriage by its very nature as the exclusive and perpetual right to the body of the other for acts *per se* apt for the generation of children.

¹¹⁵See MICHIELS, *Principia generalia*, pp. 579-580.

¹¹⁶*Ibid*, p. 582.

1.2.3 - On the part of the intrinsic cause

In canon law, with regard to juridical acts, the expression “intrinsic cause” meant the intrinsic end to which a juridical act is ordained.¹¹⁷ The purpose of a judicial sentence, for instance, is to resolve a controversy.

Michiels observed that the juridical effect of a juridical act depends on the actual conformity between the reason for placing the juridical act and the effect determined or recognized by the law for the particular act.¹¹⁸ For instance, in an act of a sale, the effect determined by the law is a change of ownership of the property from one person to another. For it to be a sale, the one who has the property must exchange ownership with the other person involved.

1.2.4 - On the part of the will (intention)

The principal defining feature of a juridical act was considered to be its voluntary nature: it is a deliberate act of the agent. This was viewed to be at the core of the concept of a juridical act. The intention of the agent, therefore, was considered an element intrinsic to juridical acts.¹¹⁹

Canonists in general held that the external manifestation of the intention is necessary for juridical acts. They held that for the intention of the agent to be capable of producing juridical effects, it has to be expressed at the social level, that is, it is in

¹¹⁷See GOMEZ, *De actionibus et exceptionibus*, p. 72.

¹¹⁸See MICHIELS, *Principia generalia*, p. 585.

¹¹⁹See MICHIELS, *Principia generalia*, p. 576.

some way to be externally manifested: otherwise the act would remain purely internal with no consequences for social relationships.¹²⁰

Moreover, canonists observed that because of its juridical importance, the external manifestation of the intention is often regulated by the law.¹²¹ M. Hughes, for example, writes:

This aspect of juridical acts is so important that it is often regulated by laws: the expression of the most important kinds of juridical acts, such as the sale of land in state law and marriage in Canon Law, is surrounded by legal formalities. But even if the law is silent on this point, the nature of the case demands some form of expression. Without this there is no act.¹²²

Thus, canonists observed that for some of the juridical acts, the law determines a particular form for the external manifestation of the will. Furthermore, it was observed that for some of these acts, the use of a particular form is required by the law for their validity, and that as a result, in the cases where a particular form is required for the

¹²⁰See HUGHES, "A New Title in the Code," p. 394; MICHIELS, *Principia generalia*, p. 573; ROBLEDA, *Quaestiones disputatae*, p. 25. Michiels indicated that in the canonical order, the will can be legitimately manifested by an express, tacit, presumed, or interpretative declaration. Express declaration occurs when the various means naturally suitable for externally manifesting the will are used, for instance, written or oral words, and bodily signs. Tacit declaration occurs when the will of the agent is only negatively or by mere silence externally manifested. Whether or not tacit declaration suffices, depends on the law which regulates the particular act. In an interpretative declaration, the agent does not expressly or tacitly manifest his or her will, but the will is manifested by other people because of some considerations. However, considered from the part of the agent, presumed or interpretative declaration is said to be no declaration at all. Because of this, it is always rejected in practice as insufficient unless the law expressly admits it as sufficient for a determined juridical act.

¹²¹See MICHIELS, *Principia generalia*, pp. 588-592; HUGHES, "A New Title in the Code," p. 394.

¹²²HUGHES, "A New Title in the Code," p. 394.

validity of an act, the will of the agent is considered juridically inefficacious unless it is manifested in the form or solemnities determined by the law.

Generally, the declared will corresponds to the internal will or to an efficacious intention of the agent. Sometimes, however, there is no conformity between what has been declared and what is truly intended.¹²³ The common opinion of canonists was that when there is non-conformity between the internal will and the declaration, the true internal will of the agent prevails.¹²⁴

Furthermore, Michiels noted that in canon law, even though the true and internal will of the agent is considered the decisive element for a juridical act, the external declaration is not viewed as simply a material means for the external manifestation of the internal will. The external declaration together with the internal will is said to be the cause of the juridical efficacy. Michiels says that it is because of this that in canon law the internal will is always presumed to correspond to the words or signs which are employed in the placing of the particular act.¹²⁵

Michiels further states that for this reason, canon law does not require that in every single act, an investigation should be made whether or not the agent has the internal will. Likewise, it is not necessary to prove the conformity between the internal will and the declaration in every case.

¹²³The case of simulation, whether partial or total, is an example of this.

¹²⁴*Ibid.*, p. 593.

¹²⁵The presumption of conformity between the internal will and the external manifestation was, for example, explicitly mentioned in the Code with regard to matrimonial consent. See MICHIELS, *Principia generalia*, p. 594.

Michiels furthermore noted that, in canon law, the presumption concerning conformity between the intention and its external manifestation is simply a presumption of law. Hence, proof of non-conformity between the internal will and the declaration is admitted in canon law. In other words, this presumption can be overturned by contrary proof.

1.2.5 - Elements required by the law for validity

In canon 1680.1, the 1917 Code established that the essential elements of an act do not always suffice for its validity. Sometimes the legislator can determine some elements, even those which for the act are only accidental, as a necessary condition or solemnity for its validity.

These conditions or solemnities were considered required by the legislator in addition to the existence of the essential elements of the act. Roelker writes: "The necessity of these solemnities or conditions has been repeatedly asserted. This necessity is superimposed upon the existence of the essential elements of the act."¹²⁶ Furthermore the solemnities or conditions were understood as only prescriptions of positive law and that they bind for validity only if the law makes this stipulation. Consequently, invalidity of an act because of the lack of solemnities and conditions was not be presumed. Such invalidity had to be demonstrated by a clear and definite prescription of law.¹²⁷

¹²⁶See ROELKER, *Invalidating Laws*, p. 161.

¹²⁷*Ibid.*, p. 161; ROBLEDA, *Quaestiones disputatae*, pp. 54-55.

In conclusion to this section of the chapter, it can be said that the 1917 Code spoke of essential elements of an act in canon 1680.1. This canon determined that an act was null when it also lacked essential elements. Neither the canon nor the Code itself provided a definition or identification of these elements. After the promulgation of the Code, several canonists made attempts to identify these elements. Their opinions were not uniform. In general, however, the common opinion of canonists was that essential elements of a juridical act are those without which the act itself would be of a different nature or the act would be rendered unsuitable to produce its intended effects. Moreover, the common opinion of canonists was that, in the strict sense, essential elements of a juridical act are a subject, an object, a cause, and the will. In fact, for an act to have juridical effects, several things were required on the part of each of these.

1.3 - IMPEDIMENTS AFFECTING A JURIDICAL ACT

In canons 103 and 104, the 1917 Code established the general causes which could negatively affect the validity of a juridical act of physical and juridical persons.¹²⁸ These were: force, fear, deceit, and error.¹²⁹ In the same canons, the Code

¹²⁸For a summarized statement on how canons 103 and 104 of the 1917 Code came about see *Codex iuris canonici cum notis Petri Card. Gasparri*, Romae, Typis polyglottis, 1916, p. 33; FORNES, "El acto jurídico-canónico," pp. 66-68.

¹²⁹These general causes could affect any kind of a juridical act, elections, renunciation from office, religious profession, wills, absolution from censures etc. See MAGNIN, *Pastors and People*, p. 37.

determined the juridical consequences for acts of physical and moral persons which were impeded or influenced by these causes.¹³⁰

1.3.1 - Force

J.A. Abbo and J.D. Hannan describe physical force as "any material force applied from an external source to a person against his will and superior to his power of resistance."¹³¹ According to J.V. Brown, it is "an attack by some overpowering agency greater than can be resisted."¹³²

The Code dealt with the effects of physical force on juridical acts in canon 103.1. Acts placed because of external force which could not be resisted were held to be null by their very nature.¹³³ Such external force was viewed as necessarily to exclude free consent of the will. It was considered not to create *voluntarium* and therefore not to

¹³⁰Michiels, in his comments on these canons, pointed out that the Code had left out certain other causes such as simulation and causes which affect the mind (*restrictio mentalis*) which can also take away the juridical efficacy of a juridical act. See MICHIELS, *Principia generalia*, pp. 606-607.

¹³¹ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150.

¹³²J.V. BROWN, *The Invalidating Effects of Force, Fear, and Fraud Upon the Canonical Novitiate: An Historical Conspectus and Commentary*, Canon Law Studies, no. 311, Washington, DC, The Catholic University of America, 1951, p. 56. For the evolution of the notion of "force" in canon law, see *ibid.*, pp. 55-58; A.E. MCCOY, *Force and Fear in Relation to Delictual Imputability and Penal Responsibility: An Historical Synopsis and Commentary*, Canon Law Studies, no. 200, Washington, DC, The Catholic University of America, 1944, pp. 3-52.

¹³³See RAMSTEIN, *The Manual of Canon Law*, p. 133; JOMBART, *Summary of Canon Law*, p. 25; WOYWOD, *A Practical Commentary*, vol. I, p. 56; BOUSCAREN, *Canon Law*, p. 89; AUGUSTINE, *A Commentary*, vol. II, pp. 29-30.

produce human act.¹³⁴ Moreover, it was immaterial whether the physical force was exercised for a just or unjust cause.¹³⁵

In order for the physical force to render an act null, it had to affect the person placing the act, that is, the agent himself or herself and not other people.¹³⁶ It was considered sufficient that resistance would have been useless even if it might have been attempted. If resistance was possible the act was not considered null.¹³⁷ C. Magnin, for example, writes:

An act extorted by external pressure, which can not be resisted, is null and void. It is sufficient that resistance would have been useless even at the time when it might have been attempted; but a person who has not resisted when he could have done so is held to have consented.¹³⁸

1.3.2 - Fear

According to Abbo and Hannan, fear is "a trepidation of the mind caused by present or future danger."¹³⁹ For Bouscaren, Ellis, and Korth, it is a "trepidation of the mind because of impending evil."¹⁴⁰ Magnin describes it as "a form of mental

¹³⁴See AUGUSTINE, *A Commentary*, vol. II, pp. 30; BOUSCAREN, *Canon Law*, p. 89; MAGNIN, *Pastors and People*, pp. 37-38.

¹³⁵See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 151.

¹³⁶See AUGUSTINE, *A Commentary*, vol. II, p. 30.

¹³⁷See H.A. AYRINHAC, *General Legislation in the New Code of Canon Law*, New York, Benziger, 1923, p. 220.

¹³⁸MAGNIN, *Pastors and People*, p. 37.

¹³⁹ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150.

¹⁴⁰BOUSCAREN, *Canon Law*, p. 89.

disturbance at the prospect of imminent peril or even of future danger."¹⁴¹ H.A. Ayrinhac gives a similar description of fear: "a perturbation of mind arising from present or future danger."¹⁴² Augustine explains it as "an emotion excited by threatening evil or impending pain, accompanied by a desire to escape or avoid it."¹⁴³

In canon 103.2, the Code determined that acts which were placed because of grave and unjust fear were valid unless the law provided otherwise. Such acts, however, could be rescinded in accordance with the norm of law.¹⁴⁴ The general opinion of canonists was that two things are required to constitute grave fear: 1) the threatened evil must exist objectively, not merely in the imagination, and 2) the evil threatened must be important and weighty, for instance, death, mutilation, imprisonment, loss or confiscation of property, etc.¹⁴⁵

The fear concerned could be absolutely or relatively grave.¹⁴⁶ Fear was considered absolutely grave when it was such in itself and for all persons, with few

¹⁴¹MAGNIN, *Pastors and People*, p. 38.

¹⁴²AYRINHAC, *General legislation*, p. 220.

¹⁴³AUGUSTINE, *A Commentary*, vol. II, p. 30.

¹⁴⁴See CIC/17 canon 103. During the period of the 1917 Code, fear was distinguished between "fear from within" (*metus ab intrinseco*) and "fear from without" (*metus ab extrinseco*); just fear and unjust fear; grave and light fear, and antecedent and concomitant fear. For an explanation of these distinctions, see BROWN, *The Invalidating Effects of Force*, pp. 63-66; MCCOY, *Force and Fear*, pp. 79-80.

¹⁴⁵See AUGUSTINE, *A Commentary*, vol. II, p. 30.

¹⁴⁶See AYRINHAC, *General Legislation*, p. 220; BOUSCAREN, *Canon Law*, p. 89.

possible exceptions. It was relatively grave when it was grave for certain persons because of their dispositions or of special circumstances.¹⁴⁷

Fear could be unjust by reason of the evil that is threatened considered in itself. This kind of fear was called unjust *quoad substantiam*.¹⁴⁸ Fear could also be unjust by reason of the circumstances in which it was inflicted. This kind of fear was called unjust *quoad modum*.¹⁴⁹ In fact, fear could be unjust *quoad modum* either by reason of its source or by reason of the means used.¹⁵⁰ Abbo and Hannan, for example, stated: "Moreover by reason of it[s] source, fear can be just or unjust; even when the cause is just, the means may be unjust, with the result that the fear induced is unjust."¹⁵¹

Fear was distinguished between fear *ab intrinseco* and fear *ab extrinseco*. This distinction was variously explained by canonists.¹⁵²

¹⁴⁷See AYRINHAC, *General Legislation*, p. 221; RAMSTEIN, *A Manual of Canon Law*, p. 134; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150.

¹⁴⁸See McCOY, *Force and Fear*, p. 80; BROWN, *The Invalidating Effects of Force*, p. 65.

¹⁴⁹See McCOY, *Force and Fear*, p. 80.

¹⁵⁰By reason of its source, fear was considered unjust if the agent who caused it had no right to do so. It was considered unjust by reason of its means if, for instance, there was no proportion between the greatness of the evil threatened and the reason for which it was threatened. See AYRINHAC, *General Legislation*, p. 221; AUGUSTINE, *A Commentary*, vol. I, p. 31.

¹⁵¹ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150.

¹⁵²See AYRINHAC, *General Legislation*, p. 221.

During the period of the 1917 Code, it was generally held that for fear to affect a juridical act, it had to be caused by an external free agent.¹⁵³ Furthermore, it was held that the connection between the evil threatened and the act which was to extorted by the threat had to be expressed by the disjunctive formula: *either - or*. Augustine writes:

This remark leads to another observation made by canonists. The connection between the evil threatened and the special act which is to be extorted by the threat is expressed by the disjunctive formula: *either - or*; *either death or marriage*; - in other words, the evil must be threatened *ad hoc*, for that very purpose, and no other.¹⁵⁴

As can be seen from the norm established in canon 103.2, the law presumed that the knowledge and intention necessary for performing a human act are compatible with the state of ordinary grave and unjust fear. The presumption was that there is in the intellect the knowledge of the end and that the end was intended along with what is chosen as a necessary means to it; that grave and unjust fear while intimidating never destroys freedom of choice; and that it leaves the agent at least in a certain degree, still responsible for his or her action.¹⁵⁵ In this respect, therefore, juridical acts placed because of grave and unjust fear were presumed by the law to be in themselves truly

¹⁵³See MAGNIN, *Pastors and People*, p. 39; AUGUSTINE, *A Commentary*, vol. II, p. 31; AYRINHAC, *General Legislation*, p. 221; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 151.

¹⁵⁴AUGUSTINE, *A Commentary*, vol. II, p. 31.

¹⁵⁵See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150; MAGNIN, *Pastors and People*, p. 38.

voluntary, that is, they were presumed not to be deprived of their human character.¹⁵⁶ They were therefore considered valid.¹⁵⁷

However, juridical acts placed under grave and unjust fear are in a certain respect involuntary. Such acts are performed against the inclinations of the will and with reluctance.¹⁵⁸ The law, therefore, compensated the agent who placed an act because of fear either by declaring the placed juridical act invalid from the beginning or by granting the possibility for the rescission of the placed act.¹⁵⁹

Rescission of such acts could be done by an ecclesiastical judge in accordance with the norms provided by the Code in canons 1684-1689, either through an action brought by the injured party or *ex officio*, that is, the judge could, of his accord, proceed and rescind the act, if this was in the interest of the common good or some other individual persons.

The 1917 Code itself determined that the following acts were by the law itself invalid if they were done under the influence of grave and unjust fear: marriage,

¹⁵⁶See RAMSTEIN, *A Manual of Canon Law*, p. 134; AUGUSTINE, *A Commentary*, p. 31; BOUSCAREN, *Canon Law*, p. 89.

¹⁵⁷See CIC/17 canon 103.2. Some canonists explicitly noted that an act placed under the influence of fear which affects the mind in such a way as to take away all deliberation and free choice is considered to deprive, by natural law, the act placed of its human character. Consequently, the act performed lacks any juridical value. See AYRINHAC, *General Legislation*, pp. 221-222; BOUSCAREN, *Canon Law*, p. 89; RAMSTEIN, *A Manual of Canon Law*, p. 134.

¹⁵⁸See MAGNIN, *Pastors and People*, p. 38; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 151.

¹⁵⁹See CIC/17 canon 103.

religious profession, vows, voting at an election, resignation from office, and remission of a penalty.¹⁶⁰

1.3.3 - Deceit

Abbo and Hannan describe deceit as “any act of cunning, fraud, or trickery, intended to impose a false opinion on another.”¹⁶¹ For M. Ramstein, it is “the deliberate misrepresentation of some fact in virtue of which another acts through error.”¹⁶² Bouscaren and associates define it as “any artifice to deceive.”¹⁶³ According to Magnin, deceit “occurs when someone induces another by means of fraud or trickery to consent to some act or contract.”¹⁶⁴ Michiels describe it as deception of another, deliberately and fraudulently induced, for the purpose of prevailing upon him or her to perform a certain determined juridical act.¹⁶⁵

In canon 103.2, the Code determined that the juridical effects of an act placed because of deceit were the same as those of an act posed because of grave and unjust fear. Thus, an act placed as a result of deceit was considered valid unless the law stated

¹⁶⁰See CIC/17 canons 1087, 572, 1307, 169, 185, 2238.

¹⁶¹ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150.

¹⁶²RAMSTEIN, *A Manual of Canon Law*, p. 134.

¹⁶³BOUSCAREN, *Canon Law*, p. 89.

¹⁶⁴MAGNIN, *Pastors and People*, p. 40.

¹⁶⁵See MICHIELS, *Principia generalia*, p. 536.

otherwise. Such an act, however, could be rescinded by the ecclesiastical judge in accordance with the law at the request of the injured party or *ex officio*.¹⁶⁶

Acts which the law had determined that if placed because of deceit were invalid included religious profession, resignation from office, etc.¹⁶⁷

1.3.4 - Error

In canon 104, the Code dealt with the effect of error on juridical acts. Ramstein describes error as "a faulty judgment or conclusion, a mistake."¹⁶⁸ Abbo and Hannan give a similar description of error.¹⁶⁹ According to Bousacren and others, error is "a false judgment of the mind."¹⁷⁰ Augustine describes it as "a state of the mind in which one approves falsehood for truth."¹⁷¹ Ayrinhac states that error "implies false judgement or assent of the mind to falsehood."¹⁷²

¹⁶⁶During the period of the 1917 Code, deceit was distinguished between substantial and accidental deceit, antecedent and concomitant deceit. For an explanation of these distinctions, see BROWN, *The Invalidating Effects of Force*, pp. 106-111; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150; BOUSCAREN, *Canon Law*, p. 89; AYRINHAC, *General Legislation*, p. 223; RAMSTEIN, *A Manual of Canon Law*, pp. 134-135.

¹⁶⁷See CIC/17 canons, 572, 185.

¹⁶⁸RAMSTEIN, *A Manual of Canon Law*, p. 135.

¹⁶⁹See ABBO and HANNAN, *The Sacred canons*, vol. I, p. 152.

¹⁷⁰BOUSCAREN, *Canon Law*, p. 93.

¹⁷¹See AUGUSTINE, *A Commentary*, p. 33.

¹⁷²See AYRINHAC, *General Legislation*, p. 223.

otherwise. Such an act, however, could be rescinded by the ecclesiastical judge in accordance with the law at the request of the injured party or *ex officio*.¹⁶⁶

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¹⁶⁷See CIC/17 canons, 572, 185.

¹⁶⁸RAMSTEIN, *A Manual of Canon Law*, p. 135.

¹⁶⁹See ABBO and HANNAN, *The Sacred canons*, vol. I, p. 152.

¹⁷⁰BOUSCAREN, *Canon Law*, p. 93.

¹⁷¹See AUGUSTINE, *A Commentary*, p. 33.

¹⁷²See AYRINHAC, *General Legislation*, p. 223.

Error could be substantial or accidental.¹⁷³ Substantial error was considered present: when it concerned the substance of the act; or when it amounted to a *conditio sine qua non*. The latter error was considered substantial even if objectively speaking it affected only the accidental elements of the act.¹⁷⁴ According to Ramstein, the reason for this is that the *conditio sine qua non* in the mind of the agent, even though it might be an objective accidental quality, becomes subjectively a substantial one.¹⁷⁵ Magnin reiterated the same by stating that the *conditio sine qua non* is of such a nature that the consent of the agent depends on it, and therefore it is a cause of adhesion of the will of the agent.¹⁷⁶

The Code prescribed in canon 104 that substantial error always invalidates an act placed under its influence.¹⁷⁷ It invalidates an act because of the lack of essential

¹⁷³During the period of the 1917 Code, error was distinguished between error of law and error of fact; induced and non-induced error; antecedent and concomitant error; and substantial and accidental error. For an explanation of these distinctions, see AYRINHAC, *General Legislation*, p. 223; BOUSCAREN, *Canon Law*, pp. 89-93; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; AUGUSTINE, *A Commentary*, vol. II, p. 33.

¹⁷⁴See BOUSCAREN, *Canon Law*, p. 89; AYRINHAC, *General Legislation*, pp. 223-224; RAMSTEIN, *A Manual of Canon Law*, p. 135; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 151.

¹⁷⁵See RAMSTEIN, *A Manual of Canon Law*, p. 135.

¹⁷⁶See MAGNIN, *Pastors and People*, p. 39.

¹⁷⁷An example of error concerning the substance would be the case if one bought brass for gold, or if one married Ann instead of Mary, whom he had intended to marry, as it may happen in the case of twins or other persons resembling each other very closely; a *sine qua non* condition would be for instance, a quality inherent in a woman by which alone she is known to a man, and on account of which alone he wishes to marry her. See AUGUSTINE, *A Commentary*, vol. II, p. 33.

consent since the object that is consented to by the agent was not actually intended by the agent himself or herself.¹⁷⁸

In the same canon, the Code stipulated that error which does not concern the substance of the act or amounts to a condition *sine qua non*, does not render the act invalid, unless the law provides otherwise. Indeed in certain cases, the law regarded as invalid, acts placed under the influence of error which concerned neither a substantial element nor a condition *sine qua non*. Only in matters of contracts, however, error which would not render the act invalid would render it rescindable according to law. This possibility did not apply to all acts.

1.3.5 - Ignorance

In canons 103 and 104, which dealt with the general causes affecting the validity of a juridical act, the Code did not mention the juridic effect of ignorance. Ignorance was differentiated by canonists from error and inadvertence.¹⁷⁹

Ignorance was understood as the habitual lack of due knowledge.¹⁸⁰ Inadvertence was held to be the actual absence of knowledge verified at the moment when the act is placed.¹⁸¹ It was considered a transitory state of the intellect in which

¹⁷⁸See AUGUSTINE, *A Commentary*, vol. II, p. 35; MAGNIN, *Pastors and People*, p. 39.

¹⁷⁹See RAMSTEIN, *A Manual of Canon Law*, p. 135; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; AUGUSTINE, *A Commentary*, vol. II, p. 33; BOUSCAREN, *Canon Law*, p. 93.

¹⁸⁰See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; MICHIELS, *Principia generalia*, pp. 649-650; AUGUSTINE, *A Commentary*, vol. II, p. 33; RAMSTEIN, *A Manual of Canon Law*, p. 135.

¹⁸¹See AYRINHAC, *General Legislation*, p. 223.

what one knows habitually one fails to consider here and now. It was therefore said to be a momentary lack of knowledge.¹⁸²

In law, as far as juridical effects were concerned, error, ignorance, and inadvertence were governed by the same legal principles.¹⁸³

In conclusion it can be said that canons 103 and 104 of 1917 Code contained provisions for both acts which were null and for those which were rescindable. Acts placed because of external force which could not be resisted and those placed under the influence of error which touched a constitutive element or amounted to a condition *sine qua non* would be null. Some acts influenced by grave and unjust fear or deceit or error, could be null only when the law so stipulated. Other acts affected by these defects were considered valid, but they could be rescinded.

1.4 - CONSEQUENCES OF THE IMPEDIMENTS

A juridical act determines rights and obligations which belong to a physical or moral person in the Church, enabling a more orderly way of life in the Church. During the period of the 1917 Code, juridical acts were recognized in law by their efficacy as valid, rescindable, null (invalid), or non-existent. There was, however, a diversity of opinion among canonists with regard to the source of efficacy of a juridical act in canon law. We will first briefly present this diversity of opinion.

¹⁸²See MICHIELS, *Principia generalia*, pp. 649-650; RAMSTEIN, *A Manual of Canon Law*, p. 135.

¹⁸³See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; BOUSCAREN, *Canon Law*, p. 89; RAMSTEIN, *A Manual of Canon Law*, p. 135.

1.4.1 - The source of efficacy of a juridical act

The question of the source of efficacy of a juridical act was dealt with by canonists. This question has been one of the debated areas concerning juridical acts. The problem stems from the roles played by the intention of the agent and the ecclesiastical law in producing the juridical efficacy of an act. The question is this: Is the intention of the agent the sole source of the juridical effects of a juridical act? Or, is it the law alone which produces those effects?

There have been several theories about the source of juridical efficacy of an act.¹⁸⁴ Predominant among these are the following theories: the first theory maintains that the positive law is the principal source; according to the second theory the will is the source; and the third theory argues that the will and the law together are the source of the efficacy of a juridical act.¹⁸⁵ The main difference among these theories lies in the way in which each defines the relationship between the intention of the agent and the juridical effects. In brief, the main arguments of each of these theories are as follows:

The first theory holds that the law is the source of juridical effects in an act. R. Baccari is its principal proponent.

Baccari's opinion is based on his treatment of the importance of the will in the celebration of the sacraments. For him, the will of the agent is only a pre-condition for placing the act. According to his view, therefore, once the agent has the intention of

¹⁸⁴See HUGHES, "A New Title in the Code," pp. 399-401.

¹⁸⁵Cf. M. HUGHES, *The Act of Membership of the Catholic Church and the Nature of Ecclesial Juridicity*, Thesis, Rome, Pontificia Universitas Gregoriana, 1973, pp. 7-8.

placing the act, and does so, no further ability to will the effects of the act is necessary, because the source of the effects is the law.¹⁸⁶ Speaking about this position of Baccari, M. Hughes states:

Thus, Baccari opts totally for the view that would see the juridical order as the sole font of juridicity and would reduce the contribution of the personal will to the same level as any other juridical *fact*.¹⁸⁷

The proponents of the second theory contend that the source of juridical effects is the will of the agent; and therefore, for the effects to arise, they must be directly intended by the agent.

Robleda, who espouses this theory, makes a distinction between juridical facts and juridical effects. Juridical facts are consequences which the law attaches to an action whether they are intended or not by the agent. Juridical effects are consequences of the act which have been intended by the agent. Robleda says that for the juridical effects to arise, they must be directly intended by the agent. The will of the agent must be positively directed to the juridical effects. The agent therefore, must place the act in order to bring about specific juridical consequences. For Robleda the human positive law is not necessary for the function of producing the juridical effects of an act.

The third theory states that juridical effects of an act do not depend only on the will of the agent, but also on the juridical order or objective law; and that for juridical

¹⁸⁶See R. BACCARI, *La volontà nei sacramenti*, Milano, A. Giuffrè, 1941, pp. 183-186.

¹⁸⁷HUGHES, "A New Title in the Code," p. 400.

effects of an act to arise, there must be a conformity between the will of the agent and the will of the law (legislator). Michiels is the principal exponent of this theory.

According to Michiels, the will of the agent does not have to be immediately directed to the juridical effects themselves. An indirect or mediate intention of the juridical effects suffices. This indirect or mediate intention is implicitly contained in the declared will of placing the act itself according to common valuation by human persons, or it is contained in the intention of the practical purpose to which the law has granted juridical efficacy.¹⁸⁸

1.4.2 - Rescindability of a juridical act

A juridical act was considered rescindable when it was valid in itself, but the competent authority could remove its efficacy in the canonical order.¹⁸⁹ Such an act, therefore, was not lacking the required internal constitutive elements or the external requisites or formalities required by the law for its validity. And, this was its main difference from an invalid act.

The act however, was marked with some defect sufficient to cause injury or damage to the interested party. Hence, the rescission of such an act was not based on its invalidity but on the injustice or damage which might have resulted from it.¹⁹⁰

¹⁸⁸See MICHIELS, *Principia generalia*, p. 589.

¹⁸⁹See ROBERTI, *De processibus*, vol. I, p. 622.

¹⁹⁰See J.B. FERERRES, *Institutiones canonicae iuxta novissimum Codicem Pii X a Benedicto XV promulgatum iuxtaque praescripta Hispaniae disciplinae et Americae Latinae*, vol. II, Barcinone, Eugenius-Subirana, 1920, p. 275.

Furthermore, all the effects produced by such an act before its rescission were valid, and remained so, until they were rescinded by a competent authority.¹⁹¹

1.4.3 - Nullity (invalidity) of a juridical act

Because the 1917 Code regarded a juridical act as valid when it was endowed with all the requisites and essential elements required by its nature or by the law, it produced the juridical effects.¹⁹²

The terms *nullity* and *invalidity* were interchangeably used by canonists.¹⁹³ A juridical act was considered null when one or some substantial elements or requisites necessary for its validity were lacking.¹⁹⁴ Roberti describes a null act as “[...] an act which has the appearance of a valid act, but because of the defect it suffers from, it does not hold up, nor does it produce juridical effects.”¹⁹⁵ Augustine describes it as follows: “An act is called null and void if its essential constituents, or any of the formalities or requisites prescribed by the law under the pain of nullity, are wanting.”¹⁹⁶

¹⁹¹See MICHIELS, *Principia generalia*, pp. 599-603.

¹⁹²See *ibid.*, pp. 576-577.

¹⁹³See, for example, ROELKER, *Invalidating Laws*, p. 160; GOMEZ, *De actionibus et exceptionibus*, p. 71.

¹⁹⁴See CIC/17 canon 1680.1. In some cases, an act could be invalid but existent. This was generally the case when an act had its essential elements, but the solemnities or conditions required by the law were lacking. In such a case, the act was considered to be truly placed but to be juridically inefficacious. Cf. MICHIELS, *Principia generalia*, p. 576; ROELKER, *Invalidating Laws*, p. 160. In principle, such an act could be sanated.

¹⁹⁵“[...] actus qui specie quidem apparet, sed ob vitium quo laborat, non sustinetur, nec parit iuridicos effectus” (ROBERTI, *De processibus*, vol. I, p. 621).

¹⁹⁶AUGUSTINE, *A Commentary*, vol. II, p. 130.

The nullity of an act could be distinguished. By reason of the defect from which the nullity arises, a juridical act could be null by *natural law*, or *positive law*. By reason of its dependence on another null act, nullity could be *original* or *derived*.

Nullity was considered of *natural law* when it arose from the defect of the substantial elements of the act or from the law of nature, such as, from the defect of consent. It was said to be of *positive law* when it arose from what the law prohibited under the pain of nullity, such as marriage between blood relatives.¹⁹⁷

Nullity was considered *original* when it originated in the act itself, such as, nullity of a contract because of a defect of consent, or when it was directly prescribed by the law, for instance, nullity of religious profession because of lack of the required age.¹⁹⁸ It was considered *derived* when it originated from a previous or subsequent act on which the act depended.¹⁹⁹ For instance, if a noviate was null, a religious profession would also be null.

¹⁹⁷See GOMEZ, *De actionibus et exceptionibus*, pp. 72-74.

¹⁹⁸See CIC/17 canon 572.

¹⁹⁹See AUGUSTINE, *A Commentary*, vol. III, p. 130; ROBERTI, *De processibus*, vol. I, p. 620; GOMEZ, *De actionibus et exceptionibus*, pp. 73-74; ROBLEDA, *Quaestiones disputatae*, p. 41; CAPPELLO, *Summa iuris canonici*, vol. III, pp. 93-94; ROELKER, *Invalidating Laws*, p. 161; WOYWOD, *A Practical Commentary*, vol. II, p. 268; D.M. PRUMMER, *Manuale iuris canonici in usum scholarum*, Friburgi Brisgoviae, Herder, 1927, p. 575. From the principle mentioned above, however, one could not argue that when an act was invalid, the acts which preceded or followed were also invalid, unless they depended on it. For instance, if after a valid suspension of a pastor, the bishop forced him during the appeal process to resign his office as pastor, and then appointed another priest as the pastor of the parish, the appointment of the new pastor was invalid, because it depended on an invalid resignation. However, the suspension would hold because it did not depend on an invalid act.

Canonists also spoke of nullity from *public* and *private law*; *absolute* and *relative*, *total* and *partial*, *initial* and *successive* nullity; and nullity which could be sanated and that which could not.²⁰⁰

Nullity of *public law* concerned the common good whereas nullity of *private law* concerned the private good. *Relative* nullity generally could be sanated. *Absolute* nullity was usually provided by the law for the common good, and generally it could not be sanated.

1.4.4 - Non-existence of a juridical act

An act was considered non-existent when it had only an external appearance while it totally lacked any juridical reality due to a lack of those elements which by their very nature are essential to the act or which the law has determined as essential it. Therefore, it was commonly admitted that in every case where there was lack of an essential element of an act, there was no act at all; and that naturally a non-existent act is also by its very nature inefficacious.²⁰¹ This lack of efficacy resulted from the fact that the act itself did not exist.²⁰² Moreover, there could be no sanation of a non-existent act.

Among canonists the question of whether or not the 1917 Code distinguished between non-existence and nullity of juridical acts as different juridical figures received different answers.

²⁰⁰See GOMEZ, *De actionibus et exceptionibus*, p. 74; ROBERTI, *De processibus*, vol. I, pp. 621-622; ROBLEDA, *Quaestiones disputatae*, pp. 40-46; MICHIELS, *Principia generalia*, pp. 601-602.

²⁰¹See CIC/17 canon 1680.1.

²⁰²See ROBLEDA, *Quaestiones disputatae*, p. 55.

According to B. Gangoiti, this distinction is not found in the 1917 Code.²⁰³ For him, the Code recognized only one figure, namely that of nullity or invalidity of juridical acts. This figure has the character of a genus, and it admits of two species of nullity: one that results from a lack of natural essential elements, and another that results from a lack of essential positive elements, that is, from a lack of the elements required by the law for the validity of the act. A juridical act can be null, invalid, or void. A juridical act can be even non-existent, provided that this means the same as invalid, null, or void.²⁰⁴

Robleda held that the 1917 Code had only one specific grade of imperfection for juridical acts: that of nullity. However, basing his arguments on the content of canon 1680.1, he maintained that the Code contained two kinds of nullity of a juridical act. There was nullity which resulted from a lack of the essential elements of the act. For him, in this case, the act is non-existent. He called this non-existence "virtual nullity." And then, there was nullity which resulted from the lack of the prerequisites and solemnities laid down by the law for the validity of the act. He called this nullity "textual nullity." An act which suffers from textual nullity has all its elements which are necessary for it to produce juridical effects. However, the law denies it its effects because of the lack of some requisite which it requires for the validity of the act.

²⁰³See B. GANGOITI, "La problemática de la inexistencia y nulidad de los actos y negocios jurídicos en el Código de derecho canónico," in *Angelicum*, 43 (1966), pp. 225-242.

²⁰⁴*Ibid.*, p. 241.

“Textual nullity” can be sanated according to the law, but “virtual nullity” can not be sanated.²⁰⁵

Michiels maintained that the Code made no distinction between non-existent juridical acts and null juridical acts. However, canon 1680.1 expresses the mind of the legislator that a defect of an act brings about its juridical inefficacy, either when the constitutive element is truly lacking, or when the solemnities or conditions required under pain of nullity by the law are missing. However, there is no difference in the type of inefficacy, for in either case the juridical effects of the act do not arise.²⁰⁶ For some other authors, the distinction between non-existent acts and null acts was not that precise. Consequently, such a distinction was unnecessary. For them, it was enough and necessary for the law to determine what was necessary for the validity of a juridical act either as a constitutive element or as any formalities required for the validity of the act.²⁰⁷

In conclusion, the 1917 Code made a distinction with regard to the legal recognition of the effects of a juridical act. Juridical acts were recognized as valid, rescindable, null (invalid), or non-existent. After the promulgation of the same Code, theories about the source of juridical efficacy were proposed by canonists.

²⁰⁵See ROBLEDA, *Quaestiones disputatae*, pp. 47-74.

²⁰⁶See MICHIELS, *Principia generalia*, pp. 599-600.

²⁰⁷See R. BACCARI, “Dubitationes de inexistencia iuridica actuum in iure canonico,” in *ETC*, 8 (1952), pp. 134-139.

The theory which maintains that positive law is the source of juridical effects seems adequate for some juridical acts in the canonical order, especially those acts *vis-à-vis* the spiritual nature of the Church, such as, sacraments. However, it is difficult to see how this theory can be true for other acts.

Similarly, it is difficult to accept the theory which states that the will of the human person is the sole source of the efficacy of a juridical act. In canon law, it is not easy to consider juridical effects as arising solely from the private intentions of the agent. Some of the juridical acts regulated by canon law concern matters of spiritual nature. Moreover, the precedence given to the legislator in canon law is normative.

Furthermore, if one were to admit the theory which holds that the will is the source of juridical effects, it would be necessary to investigate and identify the intention of the agent in every single case a juridical act is placed. This would be necessary in order to ascertain what juridical effects the act has in law.

Canon law seems to favour the theory which maintains that both the law and the will of the agent are the source of efficacy of a juridical act. In a formal sense, the juridical efficacy of an act comes from the will of the legislator, who defines it in law. Thus, the efficacy of an act is defined in the abstract sense by the legislator through a law. It is therefore determined by the law.

However, the juridical effect determined by the law is recognized only in so far as it is willed by the agent. Consequently, materially or concretely it is the will of the

agent which determines the efficacy of an act.²⁰⁸ Thus, one may reasonably argue that it is in this aspect that the juridical efficacy of an act is dependent on the intention of the agent. In brief, starting with the law one could say that the effects of an act determined or recognized by law are the willed effects. Or starting with the will of the agent, one could say that the juridically effective will of an agent is the will which intends the effects of an act recognized or determined by the law. Therefore, the will and the law interact in producing the efficacy of a juridical act.

CONCLUSION

The notion of a juridical act was found in the 1917 Code. However, the Code itself did not provide a definition of a juridical act. The basic elements of a juridical act and relevant prescriptions were found in canons 103, 104, and 1680.

In canons 103 and 104, the Code established the juridical consequences for acts which were impeded or influenced by force, fear, deceit, or error. Acts placed by a physical or moral person because of external force which could not be resisted were null by the law itself. Acts placed because of grave and unjust fear or because of deceit were considered valid unless the law provided otherwise. However, these latter acts could be rescinded by an ecclesiastical judge in accordance with the norms of law. Error concerning what constituted the substance of the act or amounted to a condition *sine qua non* rendered an act invalid.. Apart from this, an act placed as a result of error was

²⁰⁸See MICHIELS, *Principia generalia*, p. 572.

considered valid unless the law provided otherwise. In matters of contracts however, error could give rise to a law suit for rescission of the act.

In canon 1680.1, the Code gave reasons why any juridical act could lack juridical effects. It determined when a juridical act was to be considered null, and in so doing it established in general, cases where the juridical acts were null by the law itself. According to this canon, a juridical act could be null only either because its essential elements are wanting or because the law denies the effect to the act because the solemnities or conditions which the law requires under pain of nullity are lacking.

In canon 1680.2, the Code established the relationship between an invalid act and other acts involved in the same case. It prescribed that nullity of acts does not make null the acts which precede or follow and which do not depend on the null act.

The Code did not completely deal with the doctrine of juridical acts. Because of this, in the period after its promulgation, several canonists made useful contributions to this doctrine. As a result of this, during the life of the 1917 Code, jurisprudence with regard to juridical acts placed because of force, fear, ignorance, or error was greatly developed. This was especially true with regard to matrimonial consent.

Some questions however, relative to juridical acts were never resolved by either the legislator or canonists during the same period. One of these concerned the definition of a juridical act. During the entire period of the 1917 Code, there was no established or universally accepted definition of a juridical act. There was agreement however, among canonists that a juridical act is a human act; that the internal will required for every juridical act must in some way be externally manifested; that the juridical effects

are recognized by the law only when they are intended by the agent; and that juridical acts are directed to ordering of social relationships. G. Michiels and others also held that the juridical effects of an act are those which are determined by the law. And, as indicated above, this is what seems to be accepted by canon law. It is, therefore, in this respect that with Michiels, one may safely define a juridical act in the strict sense as "a social human act which is legitimately placed and declared, and for which a determined effect is recognized in law, because and in so far as it is intended by the agent."²⁰⁹

Another question which remained unresolved concerned the essential elements of a juridical act in the strict sense. There was no agreement among canonists as to what were essential or constitutive elements of a juridical act. And, the question of the source of juridical efficacy of juridical acts was never resolved. Furthermore, the question of whether or not non-existence and nullity of juridical acts were two different juridical figures in the 1917 Code remained an open one.

With the evolution in the understanding of the whole issue of juridical acts which took place after the promulgation of the 1917 Code, the revision of the Code would be more attentive to the law governing juridical acts. The following chapter will deal with the revision of the law on this matter.

²⁰⁹See MICHIELS, *Principia generalia*, p. 572.

CHAPTER TWO

THE REVISION OF THE LAW ON JURIDICAL ACTS

There is no doubt that Vatican Council II provided a new doctrinal and disciplinary direction for the life of the Church.¹ The revision of the 1917 *Code of Canon Law* was done after the Council and in the light of this new direction.

In fact, Pope John XXIII linked the Council with the revision of the Code in his announcement of the program for his papacy:

They [the Synod of the Diocese of Rome and the Ecumenical Council for the Universal Church] will lead to the desired and long awaited modernization of the Code of Canon Law, which is expected to accompany and crown these two efforts.²

Pope Paul VI often reiterated this connection between the Council and the Code.

For instance, he stated:

Naturally it will be for the Council to suggest what reforms are to be introduced into the new legislation of the Church. The post-conciliar commissions, especially the one instituted for the revision of Canon Law

¹The principal aim of the Council was threefold, namely: a more efficient internal ordering of the Church, fostering unity among Christians, and promotion of peace in the world. Cf. PAUL VI, Address to International Congress of Canonists, January 19, 1970, in *The Pope Speaks*, 15 (1970), p. 72; JOHN XXIII, Apostolic Constitution *Humanae salutis*, December 25, 1961, in *Acta et documenta Concilio oecumenico Vaticano II apparando*, series 2, 1, Vatican City, 1964, pp. 132-139. In several of his subsequent official documents, John XXIII reiterated the same theme. See his Address to the Roman Cardinals, January 25, 1959, in *AAS*, 51 (1959), p. 68; Motu proprio *Superno Dei nutu*, June 5, 1960, in *The Pope Speaks*, 6 (1959-1960), p. 240; Address to the Preparatory Commissions for the Second Vatican Council, November 14, 1960, in *The Pope Speaks*, 6 (1959-1960), p. 381; Address to the Central Preparatory Commission of the Ecumenical Council, June 20, 1961, in *The Pope Speaks*, 7(1961), p. 246; Encyclical Letter *Ad Petri cathedram*, June 29, 1959, in *AAS*, 51 (1959), p. 511.

²JOHN XXIII, Address to the Roman Cardinals, January 25, 1959, in *AAS*, 51 (1959), p. 68, English translation in *The Pope Speaks*, 5 (1959), p. 400.

and already appointed by Us will formulate in concrete terms the deliberations of the ecumenical Synod.³

Pope John Paul II, on a number of occasions, has also restated the relationship of the Council to the revised 1983 *Code of Canon Law*. For example, in his allocution to the Code Commission, he says: "The new Code therefore was thought of [by John XXIII] at one and the same time as the Council, but also very closely bound up with it."⁴ In fact, according to the Holy Father, the revised 1983 Code has the Council as its source;⁵ it was inspired by it;⁶ it represents an authoritative guide for the application of the Council;⁷ and, because of its foundation in the conciliar teaching, it may even be considered the last document of the Second Vatican Council II.⁸

Because of this intrinsic relationship between the revised Code and Vatican Council II, we shall first briefly investigate, in this chapter, how the Council treated the notion of juridical acts. In this investigation, we will examine how the notion was treated in the Council's documents. Then the development of the notion in the process

³PAUL VI, Encyclical Letter *Ecclesiam suam*, August 6, 1964, in *AAS*, 56 (1964), p. 628, English translation in *The Pope Speaks*, 10 (1964), p. 268.

⁴JOHN PAUL II, Allocution to the Commission for the Revision of the Code, October 29, 1981, in *AAS*, 73 (1981), p. 721, English translation in *The Pope Speaks*, 27 (1982), p. 106.

⁵See JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges*, January 25, 1983, in *AAS*, 75 (1983), pp. viii-ix.

⁶See JOHN PAUL II, Allocution to the Roman Rota, January 26, 1984, in *L'Osservatore romano*, English edition, February 13, 1984, p. 11.

⁷*Ibid.*, p. 9.

⁸See JOHN PAUL II, Discourse to Participants in the Course in the New *Code of Canon Law*, in *L'Osservatore romano*, English edition, January 30, 1984, p. 9.

of the revision of the Code will be traced. This will be done first by reviewing the principles of revision and their relevance to the notion; and second by analyzing the revision of the common law governing juridical acts in the schemata before the promulgation of the 1983 Code.

2.1 - CONCILIAR PRINCIPLES UNDERLYING THE NOTION OF JURIDICAL ACTS

The Council certainly did not set aside a particular document that was directly concerned with the doctrine of juridical acts. However, a close analysis of the documents of Vatican Council II, reveals the fact that the Council both explicitly and implicitly dealt with this doctrine.

In its explicit treatment of the doctrine, the Council called for the reform of certain elements pertaining to some juridical acts, in some cases pointing out areas where such reform was needed, but often without specifying precisely what change was necessary. On other occasions, the Council specifically mentioned the changes that were to be made. For instance, Vatican II demanded that in the conferral of the office of a pastor all rights whatsoever of presentation, nomination and reservation should be abrogated, without prejudice however, to the rights of religious.⁹ Especially in the case

⁹See VATICAN COUNCIL II, Decree on the Pastoral Office of the Bishops in the Church *Christus Dominus* (=CD), October 28, 1965, no. 31, in *AAS*, 58 (1966), p. 689, English translation in A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents* (=FLANNERY), new rev. ed., study ed., Northport, New York, Costello Pub. Co., 1992, p. 583.

of juridical acts of a sacramental nature, Vatican II elaborated the Church's teaching to bring out their nature and inner efficacy.¹⁰

A brief analysis of the Council's implicit treatment of the doctrine on juridical acts will be presented here. This will be done in the form of theological-juridical principles, namely: the communion principle; the principle of subsidiarity; the principle of participation; the principle of human dignity and freedom; and the principle of salvation of souls.

2.1.1 - The communion principle

Before Vatican II, the Church viewed itself as a self-sufficient social organization with the resources to control its own destiny, independent from any state intervention in its internal ordering. This was the doctrine concerning the Church as a "perfect society."¹¹

¹⁰See, for example, VATICAN COUNCIL II, The Constitution on the Sacred Liturgy *Sacrosanctum concilium*, December 4, 1963, Chapters II and III, in *AAS*, 56 (1964), pp. 113-120.

¹¹See F. WULF, "The Call of the Whole Church to Holiness," in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican Council II*, vol. I, Freiburg, Herder and Herder, 1967-1969, p. 261. For a history of the development of the "perfect society" model of the Church, see C. GALLAGHER, "Theological Trends: Canon Law and Ecclesiology," in *The Way*, 22 (1982), pp. 51-52; P. GRANFIELD, "The Rise and Fall of *societas perfecta*," in *Concilium*, 157 (1982), pp. 3-6.

In the constitution *Lumen gentium*, the Council Fathers spoke of the Church primarily as a *communio*:¹² as a communion of the faithful, as a hierarchical communion, and as a communion of churches.¹³

According to P.J. Huizing, Vatican II used this concept of communion "to signify the proper character of the Church as the union of the faithful with the Father and the Spirit in Jesus, and therefore with each other in Jesus, arising from their common, though not equal, participation in word and sacrament."¹⁴

The notion of the Church as communion therefore is founded upon the communion existing among its members and that which holds between the individuals and God;¹⁵ that is, the members are in union with the Lord and as well as in union with each other.¹⁶ It "involves a double dimension: the vertical (communion with God) and

¹²See VATICAN COUNCIL II, Dogmatic Constitution on the Church *Lumen gentium* (=LG), November 21, 1964, in *AAS*, 57 (1965), pp. 5-71, English translation in FLANNERY, pp. 350-426.

¹³For comments on the Church as a *communio*, see L. ORSY, *From Vision to Legislation: From the Council to a Code of Laws*, Milwaukee, Marquette University Press, 1985, p. 4; J.H. PROVOST (ed.), *The Church as a Communion*, Washington, DC, Canon Law Society of America, 1984, pp. 4-245; W. AYMANS, "Ecclesiological Implications of the New Legislation," in *Studia canonica*, 17 (1983), pp. 82-88; P.J. HUIZING, "Reflections on the System of Canon Law," in *The Jurist*, 42 (1982), p. 265.

¹⁴HUIZING, "Reflections on the System of Canon Law," p. 265.

¹⁵G.T. JUHASZ, *The Notion of Ecclesial "Communio" as Expressed in the Vatican II Teachings, the Code of Canon Law, and the Catechism of the Catholic Church*, [Unpublished Master's Seminar paper], Ottawa, Saint Paul University, 1995, p. 36.

¹⁶See J.J. McGRATH, "Canon Law for the Church and the Churches," in *The Jurist*, 26 (1966), p. 455; L. ORSY, "Vatican II and the Revision of Canon Law," in *The Clergy Review*, 53 (1968), p. 86; AYMANS, "Ecclesiological Implications of the New Legislation," p. 82.

the horizontal (communion among men)."¹⁷ And this is, as G.T. Juhasz notes, "a newer way for the Church to understand itself."¹⁸

The Council's reformulation of the Church's self-understanding as a *communio* was not just a simple statement. Rather it was a fundamental doctrinal principle which would serve as a basis and reason for profound changes in the life of the Church. It would necessarily have many implications for the practical life of the Church and its members.¹⁹ It would find concrete expression in the internal and external ordering of the Church's life. It would therefore inevitably impact upon the law of the Church.²⁰ This would also include the law which governs juridical acts.

This is true particularly with regard to the way juridical acts are placed, that is, the juridical capacities and competencies of the members of the Church for such acts, and procedures for placing them. In fact, in the light of this new understanding, some canons which dealt with juridical acts in the 1917 Code would be revised or rendered obsolete. This included, for instance, the canons on the juridical act of admitting into the Catholic Church people who have already been baptized; and the canons on mixed marriages.

¹⁷CONGREGATION FOR THE DOCTRINE OF FAITH, "Some Aspects of the Church Understood as Communion," in *Origins*, 22 (1992-1993), p. 108.

¹⁸JUHASZ, *The Notion of Ecclesial "Communio"*, p. 1.

¹⁹For some of the ways the principle of communion may affect the practical life of the Church, see ORSY, "Vatican II and the Revision of Canon Law," p. 88; AYMANS, "Ecclesiological Implications of the New Legislation," pp. 82-88; PROVOST, *The Church as a Communion*, pp. 191-245.

²⁰See F.G. MORRISEY, "The Significance of Particular Law in the Proposed New Code of Canon Law," in *CLSA Proceedings*, 41 (1981), p. 2.

2.1.2 - The principle of subsidiarity

The principle of subsidiarity may be understood in the sense that decisions should be taken at the most appropriate level; that whatever can be usefully, and perhaps more efficaciously, done at lower levels should not be reserved to higher levels.²¹ In effect, this principle calls for respect of the innate rights and capacities of lesser authorities.

Vatican II did not explicitly state that the principle of subsidiarity applies also to the Church. The principle was referred to explicitly on three occasions and each time the context was not the structures of the Church but rather the civil society.²²

Despite the lack of explicit references, the principle of subsidiarity is operative in the documents of Vatican II. This is evident in the Council's attempt at decentralization of power in the Church. Many capacities and competencies for juridical acts passed from the Holy See to smaller and lower authorities or groups. The Holy See however reserved to itself what was considered necessary or useful to ensure unity in the Church. As examples, we will use the following elements.

The Council recognized conferences of bishops and accorded them the capacity and competence for placing certain juridical acts. Article 38 of the decree, *Christus*

²¹See R.E. MULCAHY, art., "Subsidiarity," in *New Catholic Encyclopedia*, vol. 13, New York, McGraw-Hill Book Co., [1967], p. 762; F.G. MORRISEY, "The Revision of the Code of Canon Law," in *Studia canonica*, 12 (1978), pp. 187-188; R.J. CASTILLO LARA, "Some Reflections on the Proper Way to Approach the Code of Canon Law," in *Communicationes*, 17 (1985), p. 283.

²²See VATICAN COUNCIL II, Pastoral Constitution on the Church in the Modern World *Gaudium et spes* (=GS), December 7, 1965, no. 86, in *AAS*, 58 (1966), p. 1109, English translation in FLANNERY, p. 995; ID., Declaration on Christian Education *Gravissimum educationis*, October 28, 1965, nos. 3 and 6, in *AAS*, 58 (1966), pp. 731 and 733, English translation in FLANNERY, pp. 729 and 731.

Dominus, for instance, gave conferences of bishops the competence to make decisions that are legally binding for their whole territory, and competence in those matters assigned to them by law or determined by the special mandate of the Apostolic See.²³

The same decree, *Christus Dominus*, clearly stated that the bishops have by right, in the diocese assigned to them, all ordinary, proper and immediate power which is necessary for the exercise of their pastoral office, except in those matters reserved by the Roman Pontiff to himself or to some other authority. It also empowered the diocesan bishop to dispense from the general laws of the Church within certain limits.²⁴ Thus, the former centralized system of granting bishops the faculties to dispense from the universal laws was radically changed.

With the Council therefore came some form of decentralization with regard to capacities and competencies for juridical acts.²⁵

2.1.3 - The principle of human dignity and freedom

At Vatican II, the emphasis on the dignity and freedom of the human person when placing a juridical act was evident. This was particularly true in the documents *Dignitatis humanae* and *Gaudium et spes*.

²³CD, no. 8, in FLANNERY, p. 567.

²⁴Ibid.

²⁵For an excellent summary of how the Second Vatican Council treated the principle of subsidiarity, see J.A. KOMONCHAK, "Subsidiarity in the Church: The State of the Question," in *The Jurist*, 48 (1988), pp. 309-313.

Dignitatis humanae is a declaration on religious freedom. It is important precisely "because of what it has to say in regard to freedom."²⁶ The fundamental pronouncement of the declaration is that the human person and communities have a right to freedom in religious matters.²⁷ The foundation of this right is the dignity of the human person.²⁸

The content of this right is freedom from external coercion, whether on the part of individuals or on the part public authority. It excludes coercion both in the sense of forcing a person to act contrary to his or her conviction and in the sense of preventing a person from acting according to this conviction. The Council Fathers state:

Freedom of this kind means that all men should be immune from coercion on the part of individuals, social groups and every human power so that, with due limits, nobody is forced to act against his convictions in religious matters in private or public, alone or in associations with others.²⁹

The Council Fathers continue:

Therefore he [man] must not be forced to act contrary to his conscience. Nor must he be prevented from acting according to his conscience, especially in religious matters.³⁰

²⁶M.B. PENNINGTON, *Vatican II: We've Only Just Begun*, New York, Crossroad, 1994, p. 151.

²⁷See VATICAN COUNCIL II, Declaration on Religious Liberty *Dignitatis humanae* (=DH), December 7, 1965, no. 2, in *AAS*, 58 (1966), p. 930, English translation in FLANNERY, p. 800.

²⁸See DH, nos. 2 and 9, in FLANNERY, pp. 800-801, 806.

²⁹DH, no. 2, in FLANNERY, p. 800.

³⁰DH, no. 3, in FLANNERY, pp. 801-802.

According to *Dignitatis humanae*, therefore, in placing acts in religious matters, the human person and communities must always be free to act and be immune from coercion.

What matters are religious may be difficult to determine. However, in speaking about religious freedom for religious communities, the declaration specifically enumerates certain juridical acts such as appointment to and transfer from offices and the acquisition and administration of property.³¹ This list is certainly not taxative.

In *Gaudium et spes*, Vatican II also spoke of these two fundamental aspects of the human person: dignity and freedom. Indeed Chapter I of the Constitution is entitled "The Dignity of the Human Person."³² This conciliar teaching implies that a juridical act placed by a person must be the result of personal decision and freedom, as the human dignity of the person demands.

Man's dignity therefore requires him to act out of conscious and free choice, as moved and drawn in a personal way from within, and not by blind impulses in himself or by mere external constraints.³³

³¹See *DH*, no. 4, in FLANNERY, pp. 802-803.

³²See FLANNERY, pp. 913-932.

³³*GS*, no. 17, in FLANNERY, p. 917.

2.1.4 - The principle of participation

One of the most fruitful consequences of the Council was the realization that all Christ's faithful have a right-duty which springs from the very nature of being a *Christifidelis* to participate in the mission of the Church.

All the faithful participate in the fulfilment of the mission according to their condition and status in the Church. However, this right-duty endows also the laity with the capacity to place juridical acts that can only be placed by reason of ecclesiastical office. In *Lumen gentium*, the Council Fathers explicitly acknowledged the right of the laity to participate in the governance of the Church:

They [the laity] have moreover, the capacity of being appointed by the hierarchy to some ecclesiastical offices with a view to a spiritual end.³⁴

Furthermore, because of this right-duty, the Council enlarged the scope of collaboration in the Church, especially by way of consultation. The Council for instance, issued directives concerning the conferences of bishops, council of priests, and diocesan pastoral councils.³⁵ The consultation which the Council demanded is a very important and practical way of participation in the life and mission of the Church, to the extent that the validity of some juridical acts in the Church depends on this consultation.

³⁴LG, no. 33, in FLANNERY, p. 391.

³⁵See C. GALLAGHER, "Canon Law and the Christian Community II: Current Views on the Role of Law," in *The Heythrop Journal*, 12 (1971), pp. 404-405.

2.1.5 - The principle of salvation of souls

Vatican II stated that the Church is not an end in itself. In the constitution *Lumen gentium*, the Council also spoke of the Church's universal mission. It stated that the Church is the sign and instrument of the union of the human person with God. The ultimate goal of its existence is the salvation of the human person.³⁶ With regard to juridical acts, this implies that, in the Church, juridical acts and the norms governing them are salvific in character, that is, the *salus animarum*, is their supreme purpose. These are meant to assist the faithful in the pursuit of their supernatural end.³⁷

In summary it can be said that the Council did not concern itself directly with the doctrine of juridical acts. As indicated in this section of the chapter, however, Vatican II provided certain general doctrinal principles applicable to juridical acts. The treatment of these principles was based on all the 16 documents of the Council. Although these documents reveal the thinking of the Church with regard to these principles at the time of the Council, far from providing closure, offered rather a point of departure.³⁸ In fact, during the Council and following its conclusion, several documents dealing with different aspects of the life of the Church and Christian living were issued by the Holy See implementing the Council's decisions. Some of these documents contained relaxation

³⁶See K. McNAMARA (ed.), *The Church: A Theological and Pastoral Commentary on the Constitution of the Church*, Dublin, Veritas Publications, 1983, p. 77.

³⁷Cf. W.H. ONCLIN, "Church and Church Law," in *Theological Studies*, 28 (1967), p. 741.

³⁸See L.M. ORSY, "Quantity and Quality of Laws after Vatican II," in *The Jurist*, 27 (1967), p. 398.

of certain norms governing juridical acts, especially the faculties, capacities, competencies, and forms of procedures for placing juridical acts.

2.2 - PRINCIPLES OF REVISION AND THE NOTION OF JURIDICAL ACTS

After the Council, the Code Commission assumed its task in earnest.³⁹ On November 20, 1965, Pope Paul VI formally inaugurated its work. In his address on that day, the Holy Father indicated the need for the revision of the Code:

Now certainly because of the changed conditions of things [...] with prudence, canon law is to be revised: namely, it should be accommodated to the new attitude of mind, proper to the Second Vatican Ecumenical Council, from which, much is attributed to pastoral care, and to the new needs of the people of God.⁴⁰

³⁹On March 28, 1963, Pope John XXIII established the Commission for the Revision of the Code of Canon Law. On November 7, 1963, Pope Paul VI gave the Commission its official title "The Pontifical Commission for the Revision of the Code of Canon Law", a title which was later abbreviated in usage to the "Code Commission". This Commission held its first meeting on November 12 of the same year. At that meeting it was decided that the formal work of the Code Commission would be deferred until after the conclusion of Vatican II. See R.J. AUSTIN, "The History of the Revision of the Code of Canon Law," in *The Australasian Catholic Record*, 60 (1983), p. 345. Pope Paul VI was a guiding force during the work of the revision, overseeing the whole process and pursuing it with zeal, until his death. For a summary of the leadership of Paul VI in the revision process, see F.G. MORRISEY, "The Spirit of Canon Law and the Teachings of Pope Paul VI," in J. HITE and D.J. WARD, *Readings, Cases, Materials in Canon Law: A Text for Ministerial Students*, rev. ed., Collegeville, The Liturgical Press, 1990, pp. 17-29.

⁴⁰"Nunc admodum mutatis rerum conditionibus - cursus enim vitae celerius ferri videtur - ius canonicum, prudentia adhibita, est recognoscendum: scilicet accommodari debet *novo mentis habitui*, Concilii Oecumenici Vaticani Secundi proprio, ex quo curae pastoralis plurimum tribuitur, et novis necessitatibus populi Dei" (PAUL VI, Allocution to the Cardinals and Consultors of the Pontifical Commission for the Revision of the Code of Canon Law, November 20, 1965, in *AAS*, 57 [1965], p. 988).

In the same address, the Holy Father stated that in the work of the revision, the 1917 Code was to serve as a guide and the documents of Vatican II were to serve as an inspiration.⁴¹ Writing about this, J.A. Alesandro states:

At that time the pope made it quite clear that the work of the revision would rest on two principal sources: canonical tradition, especially the Original Code of 1917, and the documents of the Second Vatican Council.⁴²

The Code Commission "initiated a study of the decrees of Vatican II and the general principles of law."⁴³ Ten principles were formulated as a result of this study.⁴⁴ These principles were to guide the Code Commission "so that their work of revision would proceed faster and with greater confidence and sureness."⁴⁵

The ten principles were approved by the first Synod of Bishops in 1967. The Bishops at the Synod expressed their desire for not just revising or updating of the canons of the 1917 Code, "but for a profound rethinking and an entirely new Code in harmony

⁴¹See *Communicationes*, 1 (1969), pp. 77-85, English translation, in HITE and WARD, *Readings, Cases, Materials in Canon Law*, p. 85; PAUL VI, Allocution to the Cardinals and Consultors of the Pontifical Commission for the Revision of the Code of Canon Law, November 20, 1965, in *AAS*, 57 (1965), p. 988.

⁴²J. A. ALESANDRO, "Law and Renewal: A Canon Lawyer's Analysis of the Revised Code," in *CLSA Proceedings*, 44 (1982), p. 2.

⁴³R.G. CUNNINGHAM, "The Principles Guiding the Revision of the Code," in *The Jurist*, 30 (1970), p. 447.

⁴⁴See *Communicationes*, 1 (1969), pp. 77-85, English translation in HITE and WARD, *Readings, Cases, Materials in Canon Law*, pp. 84-92.

⁴⁵*Ibid.*, p. 85.

with the principles of Vatican II and modern realities everywhere."⁴⁶ We will now identify, from these ten principles, those principles which, in some way, are related to the doctrine of juridical acts. After this, we will briefly examine how these principles have been applied in the Code in the area of juridical acts.

2.2.1 - Principles related to juridical acts

Four of the principles of revision, namely, principles 1,3,4, and 5, in some way affect the doctrine *vis-à-vis* the juridical acts.

2.2.1.1 - The first principle: Juridical character of the Code

The first principle insisted that "the new Code must retain wholly and entirely its juridical character."⁴⁷

In part, the principle stated this: In addition to having a spirit of its own, the revised Code must retain a juridical character. This is required because of the social nature of the Church. The faithful, in the canons of the Code, must be able to learn what manner of religious life they are to lead if they wish to share in the goods which the Church offers for the attainment of eternal salvation. The principal and essential purpose of canon law is to determine and protect the rights and obligations of each individual person as well as the rights and obligations of others and of the society at large insofar as it pertains to the worship of God and salvation of souls.⁴⁸

⁴⁶CUNNINGHAM "The Principles Guiding the Revision," p. 447.

⁴⁷AYMANS, "Ecclesiological Implications of the New Legislation," p. 64.

⁴⁸See *Communicationes*, 1 (1969), pp. 78-79, English translation in HITE and WARD, *Readings, Cases, Materials in Canon Law*, pp. 85-86.

2.2.1.2 - The third principle: Promotion of pastoral care

The emphasis in the third principle was on the pastoral nature of canon law. Since by its very nature canon law is pastoral,⁴⁹ the new Code was to foster pastoral care as much as possible. Like everything else in the Church, its norms were to be wholly geared toward the care of souls. Salvation of souls, therefore, was to be its deepest concern.⁵⁰ Its norms were to guide the faithful in their spiritual life.⁵¹ As R. Austin states, this principle was a "reminder that the Code was to be an instrument finely adapted to the Church's life and mission."⁵²

In essence this principle stated: The juridical character and all the institutions of the Church exist for the purpose of promoting the supernatural life. Laws and precepts, and the rights and obligations must be directed toward the supernatural end or purpose of the Church. The norms of the Code must be imbued with a spirit of charity, temperance, humaneness, and moderation. The new Code is not *to establish laws which invalidate juridical acts or easily incapacitate a person unless there be a most serious reason required by the public good and the discipline of the Church*. A reasonable amount of discretionary power should be left in the hands of pastors and those having the

⁴⁹See PAUL VI, Address to the International Congress on Canon Law, February 19, 1977, in *The Pope Speaks*, 22 (1977), pp. 169-170.

⁵⁰Cf. PAUL VI, Allocution to the Roman Rota, February 8, 1973, in *The Pope Speaks*, 18 (1973), pp. 81-82; ID., Address to the Second International Congress of Canon Law, September 17, 1973, in *The Pope Speaks*, 18 (1973), p. 279.

⁵¹Cf. PAUL VI, Allocution to the Roman Rota, February 4, 1977, in *The Pope Speaks*, 22 (1977), pp. 173-174.

⁵²AUSTIN, "The History of the Revision of the Code," p. 348.

care of souls to determine the duties of the faithful and strike a balance between the duties of each individual and the conditions and circumstances surrounding his or her life. The norms of the Code must not be too rigid. More freedom should be given to Ordinaries. This will contribute much toward imbuing the Code with a genuine pastoral spirit and character.⁵³

2.2.1.3 - The fourth principle: Incorporation of special faculties in the Code itself

Citing *Christus Dominus* 8a, the fourth principle "advocated that the greatest freedom ought to be given to Diocesan Bishops, especially in determining the circumstances for dispensations so that the pastoral nature of the Code will be evident."⁵⁴

The substance of this may be stated as follows: in order to foster pastoral ministry, there should be a radical revision of the system of extending faculties to ordinaries and other superiors. The new Code should avoid making dispensations from the general laws of the Church depend entirely on the concessions from the Apostolic See. It should define the office of the bishop in a positive way. It should also determine the extent of the bishop's power and authority in accord with the Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, no.8. Furthermore, the Code should

⁵³See *Communicationes*, 2 (1969), pp. 79-80, English translation in HITE and WARD, *Readings, Cases, Materials in Canon Law*, pp. 86-87.

⁵⁴AUSTIN, "The History of the Revision of the Code," p. 348.

indicate clearly which dispensations from the general laws of the Church are reserved to the Holy See or to some other authority.⁵⁵

2.2.1.4 - The fifth principle: Subsidiarity

The fifth principle explicitly dealt with the application of the principle of subsidiarity in the Church. The principle recognized the fact that particular law may provide for certain situations in a better way. It also called for greater pastoral discretion for individual diocesan bishops. The principle, however, also stated that certain decisions should be reserved to the Holy See for the good of the universal Church. Thus, writing about this principles, T.J. Green states:

There was to be a fundamental unity in the basic principles of the Church order and in its fundamental institutions. Yet there was also to be greater latitude for particular law initiatives and a reasonable amount of autonomous executive power for infra-universal authority figures.⁵⁶

This principle in essence stated: the function of the principle of subsidiarity is to strengthen and confirm legislative unity in all the fundamental and major aspects of law while, at the same time, defending the reasonableness or the need on the part of individual institutions to provide for themselves by particular law.⁵⁷

⁵⁵See *Communicationes*, 1 (1969), p. 80, English translation in HITE and WARD, *Readings, Cases, Materials in Canon Law*, p. 87.

⁵⁶See T.J. GREEN, "Subsidiarity During the Code Revision Process: Some Initial Reflections," in *The Jurist*, 48 (1988), p. 771.

⁵⁷See *Communicationes*, 1 (1969), pp. 80-82, English translation in HITE and WARD, *Readings, Cases, Materials in Canon Law*, pp. 87-89.

2.2.2 - Relevance of the principles of revision to the doctrine of juridical acts

The principles established by the Commission were to find in the revised Code their faithful application. Because of this, the relevance of the four principles which we have identified with regard to the doctrine of juridical acts may be seen in some of the ways in which the legislation provides for juridical acts themselves.

The first principle clearly indicates that one of the main functions of the Code is to provide good order, reasonable stability and harmony in the Church. In matters of juridical acts, the Code has achieved this principally by defining and establishing structures in the Church. It has put in place appropriate legislation governing these structures and their roles and competence in matters of juridical acts.⁵⁸ There is clear legislation, for instance, on the competence of the pope, conferences of bishops, the council of priests, diocesan finance councils, etc. The inclusion of this legislation in the Code is meant to ensure order in the Church.⁵⁹

The Code has also provided order and stability by providing reliable procedures for placing juridical acts. For instance, the Code offers the faithful clear and predictable ways in which they make decisions, confer offices, administer sacraments, elect leaders

⁵⁸Cf. C. GALLAGHER, "Canon Law and the Christian Community I: A Classical View," in *The Heythrop Journal*, 12 (1971), pp. 286-287; ID., "Canon Law and the Christian Community II: Current Views on the Role of Law," p. 401.

⁵⁹Cf. J.A. CORIDEN, "Law in the Service of the People of God," in *The Jurist*, 41 (1981), pp. 8-9; R.P. MCBRIEN "A Theologian Looks at the Role of Law in the Church Today," in *CLSA Proceedings*, 41(1981), p. 26.

etc. These precise procedures guide the faithful towards the valid placing of such acts.⁶⁰

The Code has further provided order and stability in the Church by providing remedies for juridical acts affected by certain impediments. There is legislation, for example, on the declaration of nullity of a juridical act, rescission of a juridical act, sanation of a juridical act, etc. Furthermore, the Code has provided order and stability in the Church by providing norms for the imposition or declaration of penalties.

Moreover, the legal protection provided by the Code for certain juridical acts which concern the spiritual and material interests of the Church gives stability and order. For instance, the Code legislates for such acts as, the alienation of ecclesiastical property, the renunciation of office, the valid administration of the sacraments, etc.

In addition to all this, the Code has provided order and stability by providing legitimate protection of the rights of individuals or groups in the Church with regard to certain juridical acts. It has achieved this especially by surrounding these acts with requisites and formalities. For instance, the law will require consultation, consent or permission of individuals or groups with rights before the placing of certain juridical acts.

In the third principle, a desire that the new Code should foster pastoral care as much as possible was expressed. With regard to juridical acts, pastoral care has been fostered in different forms in the Code. Where the Code allows the application of the

⁶⁰Cf. CORIDEN, "Law in the Service of the People of God," pp. 8-9.

principle of the Church's equity, the fostering of pastoral care of people is evident. It is implied in the discretionary power or pastoral discernment left to pastors for certain juridical acts like privileges, dispensations, etc. Fostering of pastoral care is also clearly seen in the capacities that the Code gives to the faithful to be involved in the Church's structures and ministries. The flexibility in the application of the law is another form of fostering pastoral care. Moreover, in several instances, agents of juridical acts are exempt from the observance of a law when certain circumstances intervene which would make the application of the norm either less useful or even harmful. This provision is exemplified in situations of grave necessity, such as danger of death or critical need when the rigorous application of the law may be ill advised.⁶¹

In response to the fourth principle, ordinaries have been accorded by the law with the greatest freedom for determining circumstances for the concession of dispensations. The law has also clearly indicated which dispensations are reserved to the Holy See or to some other authority.

The principle of subsidiarity, so strongly advocated by the fifth principle, has been, to some extent, embodied in the Code. This is evident in the Code where the general law has left the ultimate determination of its application to competent local authorities who know best the circumstance of the place. In this way, the Code has recognized and respected the capacities and competencies of particular legislators.

⁶¹See CASTILLO LARA, "Some Reflections on the Proper Way to Approach the Code of Canon Law," pp. 282-283.

2.3 - THE REVISION OF THE LAW ON JURIDICAL ACTS

As indicated in Chapter One, in the 1917 Code, the norms on juridical acts were found in the Book on Persons and the Book on Procedures.⁶² During the initial stages of the revision of the Code, the norms on juridical acts were treated by the Code Commission, under their own title "On Juridical Acts", together with the norms governing physical and juridical persons. The consultors, however, felt that these laws were completely general and concerned all parts of the Code. Consequently, in the 1977 *Schema on General Norms*, the new title "On Juridical Acts" with relevant canons was inserted, under title VI, into the Book on General Norms.⁶³ This title included six canons exclusively on juridical acts. Three of these were new and the remaining three were taken directly from the 1917 Code.

In the 1980 *Schema*, the title "On Juridical Acts" became title VII of Book I. It contained only five canons. Canon 115 of the 1977 schema which was on the effects of force, deceit, ignorance or error on a collegiate act was dropped.

⁶²See *supra*, p. 8.

⁶³See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO (=PCCICR), *Schema canonum libri I: De normis generalibus* (=1977 *Schema*), Typis polyglottis Vaticanis, 1977, p. 37.

In the *1982 Schema*, the norms on juridical acts remained under title VII "On Juridical Acts" of the Book on General Norms.⁶⁴ With only a few changes these norms are found in the revised 1983 Code.

Therefore, in the *1983 Code of Canon Law*, the norms on juridical acts are treated under a separate title, title VII, of Book I. It is in this title that we find the general juridical principles governing juridical acts. They constitute the basic tools for the interpretation and application of every canon of the 1983 Code which deals with juridical acts, whether the canon concerns legislative, executive, or judicial acts, public or private acts.

The title has five canons: canons 124-128. Canon 124 indicates the elements required for the validity of any juridical act; canon 125 deals with the effects of force or fear, or deceit on juridical acts; canon 126 is concerned with the effect of ignorance or error on juridical acts; canon 127 establishes the legal principles with regard to those cases where the law requires the superior to obtain consent or to seek advice before placing a juridical act; and canon 128 contains legislation on reparation of damages caused by an illegitimate juridical act or any act.⁶⁵

⁶⁴See PCCICR, *Codex iuris canonici: schema novissimum iuxta placita patrum Commissionis emendatum atque Summo Pontifici praesentatum* (=1982 Schema), Typis polyglottis Vaticanis, 1982, pp. 19-20.

⁶⁵See *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus*, Libreria editrice Vaticana, 1983, *The Code of Canon Law* in English translation prepared by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society, London, Collins Liturgical Publications, 1983, (all references to canons of the 1983 Code will be styled CIC/83 canon[s] followed by the canon number[s]), canons 124-128.

2.3.1 - Elements of a juridical act

The elements which are specifically concerned with the nature of a juridical act have been identified in the report on the initial work of the Commission *vis-à-vis* juridical acts.⁶⁶ According to this report, the essential elements of an act are different from the formalities and requisites that the law may require for the validity of the act. The essential elements pertain to the essence of the act. They are elements which are constitutive of the act by the nature itself of the act.⁶⁷ The lack of any of the essential elements of the act results in the non-existence of the act itself.

The validity of a juridical act presupposes, first of all, to be present those elements which pertain *to the essence of the act*, which therefore, by the nature itself of the act are considered its *constitutive elements*. If these elements are lacking the act is invalid because of non-existence.⁶⁸

Moreover, a non-existent act cannot be sanated because "positive law can not supply the elements which are required for the essence of the act by its nature, namely, elements of the act which if lacking, the act simply does not exist."⁶⁹

⁶⁶See *Communicationes*, 6 (1974), pp. 101-103.

⁶⁷*Ibid.*, pp. 101-102.

⁶⁸"Validitas actus iuridici supponit imprimis adesse illa elementa quae *ad actus essentiam* pertinent, quae ipsa natura de quo agitur *elementa constitutiva* eiusdem sunt dicenda. His deficientibus est invalidus quia *inexistens*" (*Communicationes*, 6 [1974], p. 101).

⁶⁹"Positiva lege suppleri non valent quae *natura sua* ad actus essentiam requiruntur, elementa nempe actus, quibus deficientibus actus simpliciter non existit" (*Communicationes*, 6 [1974], p. 102).

According to the same report, among the requisites which the law may require for the validity of an act are those which "are stated by the law itself about either the capacity of the person or the competence of the person."⁷⁰

The absence of the formalities or requisites imposed by the law for validity does not render the act non-existent but only invalid.⁷¹

Moreover, the validity of an act requires that there be present those elements, persons, e.g., [with regard to the person] contracting or providing the object of the act, which are required by the law for the validity of the act, and also that there be present solemnities which are imposed by the law for validity of the act. These requisites or solemnities which are imposed by the law for the validity of the act *are elements not indeed for existence but for validity. If these are lacking, the act is not nonexistent, but it is invalid.*⁷²

Thus, the Code Commission made a clear distinction between an act that is existent but invalid and one that is invalid by reason of being non-existent.

2.3.2 - Requirements for the validity of a juridical act

There was no positive general norm concerning the requisites for the validity of any juridical act in the 1917 Code. The Code Commission introduced one. Some of the principles found in this norm were found in canon 1680.1 of the former Code.

⁷⁰"[Inter eadem habentur quae ipsa lege statuuntur requisita] ad capacitatem seu habilitatem personae aut ad competentiam personae" (*Communicationes*, 6 [1974], p. 102).

⁷¹*Ibid.*, pp. 101-102.

⁷²"Validitas actus praeterea exigit ut adsint illa elementa, personas v.g. contrahentium aut obiectum actus respicientia, quae lege ad validitatem actus requiruntur, itemque ut adsint sollemnia quae lege ad validitatem actus imponuntur. Haec quae lege ad validitatem actus requisita aut sollemnia imponuntur sunt elementa, non quidem exsistentiae, sed validitatis. Hisce deficientibus, actus non est inexistens, sed est *invalidus* [...]" (*Communicationes*, 6 [1974], p. 102).

The Code Commission established the new norm in the section on juridical acts because it felt that "a norm should be established, and in a positive manner, from the beginning concerning the requisites for the validity of juridical acts."⁷³

This new norm established three conditions on which the validity of any juridical act would depend: capacity of the person, essential elements of the act, and the presence of the requisites or solemnities required by the law for its validity. In the initial report of the Code Commission on the revision of the law on juridical acts, the norm was articulated as follows:

A juridical act is valid if placed by a capable or competent person, unless the elements which essentially constitute the act itself, or the solemnities or requisites imposed by the law for the validity of the act, are lacking in it.⁷⁴

As can be seen, the norm made an explicit distinction between *capacity* for private acts which can be determined by the law, and *competence*, which is the capacity for placing public acts and which depends only on the law, that is, it is given by the law itself.⁷⁵ The norm, however, underwent several revisions before its final formulation.

In the 1977 *Schema*, the content of the norm was substantially retained. There was, however, a notable change of the norm with regard to its style. With regard to the

⁷³"[Aptus autem est] ut de requisitis ad validitatem actus iuridici inde ab initio norma tradatur, et quidem modo positivo" (*Communicationes*, 6 [1974], p. 101).

⁷⁴"Validus est actus iuridicus a persona habili aut competenti positus, nisi in eo deficient quae actum ipsum essentialiter constituunt, aut desiderantur sollemnia vel requisita lege ad validitatem actus imposita" (ibid.).

⁷⁵See ibid., p. 102.

agent performing the act, the schema reiterated verbatim the preceding formula, that is, for the validity of a juridical act, its agent must be *capable or competent*:

For a juridical act to be valid, it is required that it be placed by a person capable or competent, and also that it has those elements which essentially constitute the act itself, and also the formalities and requisites imposed by the law for validity of the act.⁷⁶

The 1980 *Schema* had a slightly different formula. The norm required that the person placing the act be *capable and competent*. In addition, the word *lege* was replaced with the word *iure*. The canon was formulated as follows:

For a juridical act to be valid, it is required that it be placed by a person capable and competent, and also that it has those elements which essentially constitute the act itself, and also the formalities and requisites imposed by the law for the validity of the act.⁷⁷

In the final 1982 *Schema* this canon had a different formula. The phrase "*Actus iuridicus ut valeat*" was replaced by the expression "*Ad validitatem actus iuridici*". Moreover the canon simply stated that the person placing the act must be *capable*. The canon was formulated as this:

For the validity of a juridical act it is required that it be placed by a capable person, and also that it has those elements which essentially

⁷⁶"Actus iuridicus ut valeat, requiritur a persona habili aut competenti sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita lege ad validitatem actus imposita" (1977 *Schema*, canon 112.1).

⁷⁷"Actus iuridicus ut valeat, requiritur a persona habili et competenti sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita iure ad validitatem actus imposita" (PCCICR, *Codex iuris canonici: schema patribus Commissionis reservatum* (=1980 *Schema*), Libreria editrice Vaticana, 1980, canon 121).

constitute the act itself, and also the formalities and requisites imposed by the law for the validity of the act.⁷⁸

Thus, the phrase *and competent* was dropped in the final formula. The Code Commission explained that the word "*capacity (habilitas)* in the canon is understood in the broad sense, namely, to have the right which is required to the act."⁷⁹ It would therefore include capacities, whether natural or juridical, necessary to place a particular act.

The canon appeared in the promulgated 1983 Code as canon 124.1. It has the same formula and requirements for the validity of a juridical act as it had in the 1982 *Schema*. For a juridical act to be valid, it must have those elements which pertain to its essence, that is, constitutive of the act; it must be performed by the person capable to place the act; and it must adhere to the formalities and requisites imposed by the law for validity.⁸⁰

In addition to the above canon, the Code Commission established another general norm concerning the requirements for the validity of a juridical act. This was also a new norm since it was not found in the 1917 Code. The norm established the presumption

⁷⁸"Ad validitatem actus iuridici requiritur ut a persona habili sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita iure ad validitatem actus imposita" (1982 *Schema*, canon 124).

⁷⁹"Habilitas in canone intelligitur sensu lato, scil. habere ius ad actum de quo agitur" (*Communicationes*, 14 [1982], p. 145).

⁸⁰"Ad validitatem actus iuridici requiritur ut a persona habili sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita iure ad validitatem actus imposita" (CIC/83 canon 124.1).

of the validity of a juridical act which is rightly placed and determined the extent of this presumption.

According to the norm, "*an external act rightly posited* is to be presumed valid."⁸¹ As a rule, one is to stand by its validity unless the contrary is proved.⁸² In the same norm it was clearly stated that this presumption is only of the law; and that the presumption cannot be invoked to prove those elements which by the its own nature essentially constitute the act, or to judge competence. The norm established that competence must be positively proved.⁸³

The norm appeared as canon 112.2 of the *1977 Schema*. It was formulated as follows:

An external act rightly placed is presumed valid; however, this presumption cannot be invoked to prove those elements which by their nature essentially constitute the act, or in judging competence, which indeed is to be positively proved.⁸⁴

In the *1980 Schema*, the norm was expressed in another formula. It did not speak of *an external act* but of *a juridical act*. Moreover, the part which determined the extent of the presumption was dropped. It was replaced by the phrase *quoad sua elementa*

⁸¹"[Statuitur imprimis] *actum externum rite positum praesumi validum*" (*Communicationes*, 6 [1974], p. 102).

⁸²*Ibid.*

⁸³*Ibid.*

⁸⁴"*Actus externus rite positus praesumitur validus; quae tamen praesumptio invocari nequit ad probanda quae natura sua actum essentialiter constituunt nec in diiudicanda competentia, quae quidem positive est probanda*" (*1977 Schema*, canon 112.2).

externa. With this introduction, the norm declared the same but more precise extent of the presumption as in the preceding schema. Consequently, the canon simply read:

A juridical act which is properly placed, as far as its external elements are concerned, is presumed valid.⁸⁵

This canon appeared unchanged in the *1982 Schema*.⁸⁶ It is found in the promulgated 1983 Code as canon 124.2. It has retained the same form and provides the same legal principle, namely, that a juridical act placed according to the norms of law as far as its external elements are concerned is presumed valid.⁸⁷

2.3.3 - Impediments to a juridical act

The effects of force, fear, deceit, ignorance and error on the existence and validity of a juridical act were also considered by the Code Commission. The stipulations contained in canons 103 and 104 of the 1917 Code concerning the effect of the above mentioned impediments to a juridical act were substantially retained, but they were expressed in much clearer terms. Thus, acts placed under the influence of these factors would be either non-existent or invalid, or valid but rescindable.

⁸⁵“Actus iuridicus quoad sua elementa externa rite positus praesumitur validus” (PCCICR, *1980 Schema*, canon 121.2).

⁸⁶“Actus iuridicus quoad sua elementa externa rite positus praesumitur validus” (PCCICR, *1982 Schema*, canon 124.2).

⁸⁷“Actus iuridicus quoad sua elementa externa rite positus praesumitur validus” (CIC/83 canon 124.2).

2.3.3.1 - Force

In the 1917 Code, the effects of force on a juridical act were established in canon 103.1. Acts which were placed because of an external force, which could not be resisted, were to be considered as though they had not been done at all. The canon was formulated as follows:

Acts placed by either a physical or moral person out of external force, which cannot be resisted, are to be considered not to have been placed.⁸⁸

The *coetus* responsible for the revision of the law on juridical acts made two minor grammatical changes in the formula of this canon. Instead of *actus* in the plural, its singular form was used. Similarly, the phrase *cui resisti non possit* was replaced by the phrase *cui ipsa nequaquam resistere potuit*. Although the revised formulation remained substantially the same as that of canon 103.1 of the 1917 Code, its expression became clearer and more concrete. In the revised norm, therefore, a concrete situation in which a person was unable to resist the force is envisaged. This was certainly different from an *impossibility* considered in an *abstract* and *generic sense* in the canon of the 1917 Code. As reported by the Code Commission, the revised norm appeared in the following formula:

An act placed out of force exerted on a person from without, which could not be resisted *in any way* by that person [and also an act placed out of ignorance or out of error, which concerns that which constitutes its

⁸⁸“Actus, quos persona sive physica sive moralis ponit ex vi extrinseca, cui resisti non possit, pro infectis habentur” (CIC/17 canon 103.1).

substance or is a condition *sine qua non*] are considered not to have been placed.⁸⁹

This norm became canon 113, 1 in the *1977 Schema*. It was formulated as follows:

An act placed out of force exerted on a person from without, which could not be resisted in any way by himself or herself is considered not to have been placed.⁹⁰

This canon was retained without any further change in the *1980 Schema*,⁹¹ and in the 1982 schema.⁹²

There was a suggestion during the revision of this canon for the replacement of the phrase *pro infecto habetur* with *invalidus est* so as to render the formula more precise and clear. But the Code Commission rejected this stating that the phrase *pro infecto habetur* is traditional in law.⁹³

The promulgated text is in canon 125.1 of the 1983 Code. It has retained the same formula and elements found in the 1982 schema, that is, an act placed because of

⁸⁹"Actus positus ex vi ab extrinseco personae illata, cui ipsa *nequaquam* resistere potuit [itemque actus positus ex ignorantia aut ex errore, qui versatur circa id quod eius substantiam constituit aut recidit in condicionem qua non] pro infecto habentur" (*Communicationes*, 6 [1974], p. 103).

⁹⁰"Actus positus ex vi ab extrinseco personae illata, cui ipsa *nequaquam* resistere potuit, pro infecto habetur" (*1977 Schema*, canon 113.1).

⁹¹See *1980 Schema*, canon 122.1.

⁹²See *1982 Schema*, canon 125.1.

⁹³See *Communicationes*, 14 (1982), p. 145.

force exerted from outside which could not be resisted by its victim is considered non-existent by the law, that is, not to have been placed.⁹⁴

2.3.3.2 - Fear

The 1917 Code treated the effects of fear in canon 103. 2. Acts which were placed under the influence of grave and unjustly inflicted fear were to be considered valid, unless the law provided otherwise. They could, however, be rescinded according to law by an ecclesiastical judge either at the instance of the injured party or *ex officio*.

The formula expressing the norm of the canon read as follows:

Acts placed out of grave and unjustly inflicted fear [or out of deceit] are valid, unless the law states otherwise; but they can be rescinded according to can. 1684-1689 by a sentence of a judge, either at the petition of the injured party or *ex officio*.⁹⁵

A revision of this canon was presented in the initial report of the *coetus* involved in revising the law on juridical acts. From this report it can be gathered that the *coetus* had made an attempt to reformulate the canon. In order to explain the effects of "resistible force" on a juridical act the phrase *ex alia vi* was introduced into the canon. Unlike canon 103.2 of the 1917 Code, the revised formula, which appeared in the report, did not require that for a possible rescission of an act, the fear be "grave and unjustly inflicted" (*ex metu gravi et iniuste incusso*), but that it be "unjustly inflicted" (*metu, iniuste incusso*). The report on the revised norm appeared together with the report on

⁹⁴"Actus positus ex vi ab extrinseco personae illata, cui ipsa nequaquam resistere potuit, pro infecto habetur" (CIC/83 canon 125.1).

⁹⁵"Actus positi ex metu gravi et iniuste incusso [ex dolo] valent, nisi aliud iure caveatur; sed possunt ad normam can. 1684-1689 per iudicis sententiam rescindi, sive ad petitionem partis laesae sive ex officio" (CIC/17 canon 103.2).

all the impediments to a juridical act. Thus the revised norm on the effects of fear appeared in this form:

However, an act placed from some other force and fear unjustly inflicted [or out of deceit, and also an act placed from some other ignorance or error] are valid, unless the law states otherwise, but they can give rise to an action for rescission.⁹⁶

In the 1977 schema, the effects of fear on a juridical act were treated in canon 113.2. The preceding formula presented in the initial report underwent some changes in this canon. The adjective *gravi* qualifying *metu* was reinstated, and a new phrase *eiusve ius obtinentium* was inserted into the canon. The last phrase certainly represented a significant change because it allowed those who inherited the right of the injured party to sue for the rescission of an act placed by the party under the influence of resistible force, or grave and unjustly inflicted fear. Thus, as in canon 103.2 of the 1917 Code, the revised norm required *grave and unjustly inflicted* fear for the rescission of an act. The revised formula read:

An act placed out of some other force and grave fear, unjustly inflicted [...] is valid, unless the law states otherwise, but it can be rescinded through the sentence of a judge, according to the norm of the canons (*De processibus*, cann. 122-123), either at the instance of the injured party or of those who inherited his or her right or *ex officio*.⁹⁷

⁹⁶Actus vero positus ex alia vi et metu, iniuste incusso, [aut ex dolo, itemque actus positus ex alia ignorantia vel errore] valent, nisi aliud iure caveatur, sed possunt dare locum actioni rescissoriae" (*Communicationes*, 6 [1974], p. 103).

⁹⁷"Actus positus ex alia vi et metu gravi, iniuste incusso, [...] valet, nisi aliud iure caveatur; sed potest, ad normam cann. (De processibus, cann. 122-123) per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve ius obtinentium sive ex officio" (1977 *Schema*, canon 113.2).

This canon was shortened in the 1980 schema. The words "*ex alia vi*" were dropped from the canon. Likewise specific reference to the canons on the rescission of an act was removed. The canon simply read:

An act placed out of grave fear, unjustly inflicted [...] is valid, unless the law states otherwise, but it can be rescinded through the sentence of a judge, either at the instance of the injured party or of those who inherited his or her right or *ex officio*.⁹⁸

In the 1982 *Schema*, the above formula went through a slight change. The words "*ius obtinentium*" were changed to "*in iure successorum*." Consequently, the canon read:

An act placed out of grave fear, unjustly inflicted [...] is valid, unless the law states otherwise; but it can be rescinded through the sentence of a judge either at the instance of the injured party or of his or her legitimate successors or *ex officio*.⁹⁹

In the revised 1983 Code, this canon appears exactly as it was in the 1982 schema. Moreover, it establishes the same juridical principle, namely, that in general, the law considers any act placed out of fear as valid but subject to rescission according to the norm of law, even if that fear is grave and unjustly inflicted. The canon however does make an exception to this by considering invalid certain acts placed out of fear.¹⁰⁰

⁹⁸"Actus positus ex metu gravi, iniuste incusso [...] valet, nisi aliud iure caveatur; sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve ius obtinentium sive ex officio" (1980 *Schema*, canon 122.2).

⁹⁹"Actus positus ex metu gravi, iniuste incusso [...] valet, nisi aliud iure caveatur, sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve in iure successorum sive ex officio" (1982 *Schema*, canon 125.2).

¹⁰⁰See CIC/83 canon 125.2.

2.3.3.3 - Deceit

In the 1917 Code, the principles on the effects of grave fear, unjustly inflicted, were applicable also to acts performed under deceit. Acts performed under deceit were considered valid unless the law stated otherwise; but they could be rescinded in accordance with the law. In fact the effects of deceit on a juridical act were determined in the very canon that determined the effects of grave fear, unjustly inflicted, canon 103.2. The portion of this canon may be presented as follows:

Acts placed out of [...] deceit are valid, unless the law states otherwise, but can be rescinded according to cann. 1684-1689 by a sentence of a judge, either at the petition of the injured party or *ex officio*.¹⁰¹

In the revision process of the canons on juridical acts, this canon was revised as a whole, that is, the effects of deceit and those of fear were determined in the same canon. During the process, no changes directly related to the effects of deceit were introduced in the canon. But as indicated in the section on the effects of fear, the Code Commission made changes to the canon as such. These changes insofar as they are applicable to deceit can be noted in the initial report of the Commission,¹⁰² the 1977 *Schema*,¹⁰³ 1980 *Schema*,¹⁰⁴ and the 1982 *Schema*.¹⁰⁵

¹⁰¹“Actus positi [...] ex dolo, valent, nisi aliud iure caveatur; sed possunt ad normam cann. 1684-1689 per iudicis sententiam rescindi, sive ad petitionem partis laesae sive ex officio” (CIC/1917 canon 103.2).

¹⁰²“Actus vero [positus ex alia vi et metu, iniuste incusso, aut] ex dolo [itemque actus positus ex ignorantia vel errore] valent, nisi aliud iure caveatur, sed possunt dare locum actioni rescissoriae” (*Communicationes*, 6 (1974), p. 103).

¹⁰³“Actus positus [...] ex dolo, valet, nisi aliud iure caveatur; sed potest, ad normam cann. (De processibus, cann. 122-123) per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve ius obtinentium sive ex officio” (1977 *Schema*, canon 113.2).

In the revised 1983 Code, the effects of deceit on a juridical act have been determined exactly as they appeared in the 1982 *Schema*, that is, although in the eyes of the law acts placed out of deceit are valid unless it states otherwise, such acts can be rescinded by the decision of a judge. An action for such rescission can be initiated by the injured party or his or her successors in law; or it may be introduced *ex officio* by the promoter of justice or by some other authority.¹⁰⁶

2.3.3.4 - Ignorance and error

According to canon 104 of the 1917 Code, error rendered an act invalid if it concerned the substance of the act or amounted to a *conditio sine qua non*, that is, if the act would not have been placed except for the error; otherwise the act was considered valid, unless the law provided otherwise. In matters of contracts, however, a person contracting under error which did not concern the substance of the act or amount to a *conditio sine qua non*, had the right to an action in court for rescinding the contract. The canon was formulated as follows:

Error renders an act invalid, if it concerns that which constitutes the substance of the act or amounts to a condition *sine qua non*; otherwise it is valid, unless the law provides otherwise, but in contracts, error can

¹⁰⁴“Actus positus [...] ex dolo, valet, nisi aliud iure caveatur; sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve ius obtinentium sive ex officio” (1980 *Schema*, canon 122.2).

¹⁰⁵“Actus positus [...] ex dolo, valet, nisi aliud iure caveatur, sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve in iure successorum sive ex officio” (1982 *Schema*, canon 125.2).

¹⁰⁶“Actus positus ex [...] dolo, valet, nisi aliud iure caveatur; sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve in iure successorum sive ex officio” (CIC/83 canon 125.2).

give rise to an action for rescission in accordance with the norm of law.¹⁰⁷

Two notable changes were introduced into this canon during its revision. Within the context of general principles governing juridical acts, there was no specific norm in the 1917 Code concerning the juridical effects of *ignorance*. Therefore, the *coetus* considered it necessary to insert into canon 104 an explicit formula to that effect.

The *coetus* acknowledged from the beginning that *ignorance* has the same effects on a juridical act as does error. Consequently, they included the norm on ignorance in the same canon which spoke of the effects of error.¹⁰⁸

The second change concerned the possibility of rescinding an act placed because of error or ignorance. In canon 104 of the 1917 Code, this provision was available only in case of a contract affected by error. The *coetus* felt that such a possibility should be extended to all situations involving ignorance and error. Therefore, the phrase *sed in contractibus* was dropped from the canon so as to extend the possibility for rescission of acts placed through error or ignorance. The revised formula which appeared in the 1974 report of the *coetus* read as follows:

[...] and also an act placed out of ignorance or out of error, which concerns that which constitutes its substance or amounts to a *conditio [sine] qua non* are considered not to have been placed. [...] and also an

¹⁰⁷"Error actum irritum reddit, si versetur circa id quod constituit substantiam actus vel recidat in conditionem *sine qua non*; secus actus valet, nisi aliud iure caveatur; sed in contractibus error locum dare potest actioni rescissoriae ad normam iuris" (CIC/17 canon 104).

¹⁰⁸See *Communicationes*, 6 (1974), p. 103.

act placed out of some other ignorance or error, are valid, unless the law provides otherwise, but they can give rise to an action of rescission.¹⁰⁹

When the above formula appeared in the *1977 Schema* in canon 114, a few more minor changes could be seen. This canon reads:

An act placed out of ignorance or out of error, which concerns that which essentially constitutes its substance or which amounts to a *conditio sine qua non*, is invalid; otherwise it is valid unless the law provides otherwise, but an act placed out of ignorance or error can give rise to an action of rescission in accordance with the norm of law.¹¹⁰

This formula remained unchanged through the 1980¹¹¹ and 1982¹¹² *Schemata*.

The promulgated text of the Code in canon 126 has the same form and prescribes the same principles. It states that an act placed out of ignorance or out of error concerning that which constitutes the substance of the act or that which amounts to a *conditio sine qua non* is invalid. An act placed out of ignorance or error which does not concern the substance of the act or amount to a *conditio sine qua non* remains valid

¹⁰⁹“[...] itemque actus positus ex ignorantia aut ex errore, qui versatur circa id quod eius substantiam constituit aut recidit in conditionem [sine] qua non, pro infecto habentur. [...] itemque actus positus ex alia ignorantia vel errore, valent, nisi aliud iure caveatur, sed possunt dare locum actioni rescissoriae “ (*Communicationes*, 6 (1974), p. 103.

¹¹⁰“Actus positus ex ignorantia aut ex errore, qui versetur circa id quod eius substantiam constituit aut qui recidit in conditionem *sine qua non*, irritus est; secus valet, nisi aliud iure caveatur, sed actus ex ignorantia aut ex errore initus locum dare potest actioni rescissoriae ad normam iuris” (*1977 Schema*, canon 114).

¹¹¹See *1980 Schema*, canon 123.

¹¹²See *1982 Schema*, canon 126.

unless the law itself determines otherwise. However, it can give rise to an action for its rescission in accordance with the norm of law.¹¹³

2.3.3.5 - Effects of impediments on a collegial act

In addition to the revision of the above canons, the *coetus* introduced a new canon concerning the effect of force, fear, deceit, ignorance or error on the *act of a college*. No particular reason was given for this innovation. It was only stated that this norm was being established because there was nothing in the 1917 Code on the effects of such factors specifically on collegiate acts.¹¹⁴

It was established in the canon that an act of a college is invalid if the majority of its members voted out of force and fear, or out of deceit, or out of ignorance or error. If one or some members voted out of any one of these factors, the act of the college would be valid, but it could be rescinded at the request of the interested parties. The canon was formulated as follows:

An act of a college is considered invalid if the majority of the members of the college voted out of force and fear or out of deceit mentioned in canon 113.2 or out of ignorance or error mentioned in canon 114; if one or some members of the college voted out of such force and fear or deceit, or ignorance or error, it [the act] is valid but it gives rise for rescissory action, by interested parties, according to the norm of law.¹¹⁵

¹¹³See CIC/83 canon 126.

¹¹⁴See *Communicationes*, 6 (1974), p. 103.

¹¹⁵"Invalidus censetur actus collegii si maior pars membrorum collegii ex vi et metu aut ex dolo, de quibus in can. 113.2, aut ex ignorantia vel errore de quibus in can 114, votum protulerint; si unum alterumve collegii membrum talibus ex vi et metu aut ex dolo aut ex ignorantia vel errore votum suum protulerint, validus est, sed locum dat actioni rescissoriae ad normam iuris iis quorum interest" (1977 *Schema*, canon 115).

This canon was dropped from the *1980 Schema*.

An attempt was made to reintroduce the substance of this canon because the distinction made by it was considered useful. But the Code Commission indicated that there had been sufficient discussion on the matter. Moreover, it pointed out that the canons on collegiate acts found in the section on elections had adequate provisions for such situations. Furthermore, the response of the Commission stated that such "a canon could be dangerous because of the subjective conditions existing within the person which are difficult to prove."¹¹⁶

2.3.4 - Consent or advice required for a juridical act

In the 1917 Code, the juridical principles concerning those instances where a superior needs consent or advice of some persons to place acts were established in canon 105. The canon was formulated as follows:

When the law prescribes that, in order to act, a Superior requires the consent or advice of some persons:

1° If consent is required, the Superior acts invalidly contrary to their vote; if only advice is required, by the words, for example, *with the advice of consultors*, or *after hearing the Chapter, the parish priest*, etc., in order for the Superior to act validly, it suffices that he or she hears those persons, although he or she is in no way bound to accept their vote even if it is unanimous; nevertheless, the Superior should give serious consideration to an unanimous vote where several persons are consulted, nor should the Superior, without what is, in his or her judgement, an overriding reason, act against such a vote;

2° If the consent or advice is required not only of one or two persons, but of several persons together, these persons must be legitimately

¹¹⁶"Canon esset periculosus propter condiciones subiectivas quae subentrarent et quae difficillimae sunt probationis" (*Communicationes*, 14 [1982], p. 145).

convened, without prejudice to the provision of c. 162.4, and they should express their minds; the Superior can, if the seriousness of the matter requires it, insist on them to take an oath carefully to maintain secrecy;

3° All persons who are required to give consent or advice must give the same with due respect, trust and sincerity.¹¹⁷

During the regime of the 1917 Code, some aspects of this canon had remained unclear. As indicated in the first chapter, this lack of clarity had generated discussion among canonists, and one of the disputed issues was whether the seeking of the required advice was necessary for the validity of the superior's act in all cases. It is no surprise, therefore, that of all the canons on juridical acts from the 1917 Code, this canon underwent most extensive revision.

Already in the 1977 *Schema* on general norms, the Code Commission made several changes to canon 105 of the 1917 Code. The Commission established that in matters where consent or advice of several persons was required by the law, for validity of the superior's act, it was necessary that all those persons be called together *or be given an occasion to express their minds*.

¹¹⁷"Cum ius statuit Superiorem ad agendum indigere consensu vel consilio aliquarum personarum:

1° Si consensus exigatur, Superior contra earundem votum invalide agit; si consilium tantum, per verba, ex. gr. : *de consilio consultorum*, vel audito Capitulo, parcho, etc., satis est ad valide agendum ut Superior illas personas audiat, quamvis autem nulla obligatione teneatur ad eorum votum etsi concors, accedendi, multum tamen, si plures audiendae sint personae, concordibus earundem suffragiis deferat, nec ab eisdem, sine praevalenti ratione, suo iudicio aestimanda, discedat;

2° Si requiritur consensus vel consilium non unius tantum vel alterius personae, sed plurium simul, eae personae legitime convocentur, salvo praescriptio can 162.4, et mentem suam manifestent; Superior autem pro sua prudentia ac negotiorum gravitate potest eas adigere ad iusiurandum de secreto servando praestandum;

3° Omnes de consensu vel consilio requisiti debent ea qua par est reverentia, fide ac sinceritate sententiam suam aperire" (CIC/17 canon 105).

Furthermore, the requirement of an oath stipulated in canon 105, 2° was dropped. It was replaced with a simple statement about the obligation of secrecy if, in the judgement of the superior, the importance of the matter in question deserved it. Thus, the statement "*Superior autem pro sua prudentia ac negotiorum gravitate potest eas adigere ad iusiurandum de secreto servando praestandum*" was replaced by "*atque si negotiorum gravitas, iudicio superioris, id suadeat secretum sedulo servandi.*"¹¹⁸

In the 1980 Schema, this norm appeared in a more detailed form and its formula was also changed. For the first time it was established that when the law requires a superior to obtain consent or to seek advice of a college or of a group of persons, for the validity of the act the consent obtained or advice sought was to be of the *absolute majority* of those present. The norm "*atque ut actus valeat requiritur ut obtineatur consensus aut exquiratur consilium partis absolute maioris eorum qui sunt praesentes*" was introduced into the canon.

The 1977 Schema had indicated that if consent or advice of several persons was required, the act of the superior was invalid if all were not called together, or if no occasion was given to them to manifest their minds. In the 1980 Schema, this latter phrase was dropped from the canon.

Some structural changes were also made to canon 124 of the 1980 Schema to reflect logic in the organization of its matter. Moreover, it was established for the first time that in those cases where the law determined that a superior needs consent of some

¹¹⁸See 1977 Schema, canon 116.

persons individually, his or her act is invalid if the consent of those persons is not obtained individually or the act is placed against their vote or against the vote of any of them. The words *alicuius votum agentis* were added to the canon.¹¹⁹

In the 1982 schema, further changes could be seen in canon 124 of the 1980 *Schema*. Up to this point, when the consent or advice of several persons was required, the superior had to *convoke* them according to a specific norm mentioned in the canon. But a notable change occurred in the norm governing convocation of the college or group concerned. The revised norm retained the requirement that when the “*consent*” of a college or of a group was necessary for the superior to act validly, all persons constituting the college or the group must be convoked according to the norm of canon 166 (which provided for the convocation of a group in case of an election for an office). But the canon allowed for *particular law* or *proper law* to establish an alternate method of *convocation* of a college or group when it was a matter of seeking only “*advice*.”¹²⁰

¹¹⁹See 1980 *Schema*, canon 124.

¹²⁰“1. Cum iure statuatur ad actus ponendos Superiorem indigere consensu aut consilio alicuius collegii vel personarum coetus, convocari debet collegium vel coetus ad normam can. 166, nisi, cum agatur de consilio tantum exquirendo, aliter iure particulari aut proprio cautum sit, atque ut actus valeat requiritur ut obtineatur consensus aut exquiratur consilium partis absolute maioris eorum qui sunt praesentes.

2. Cum iure statuatur ad actus ponendos Superiorem indigere consensu aut consilio aliquarum personarum, uti singularum:

1° si consensus exigatur, invalidus est actus Superioris consensum earum personarum non exquirentis aut contra earum vel alicuius votum agentis;

2° si consilium exigatur, invalidus est actus Superioris easdem personas non audientis; Superior, licet nulla obligatione teneatur ad earundem votum, etsi concors, accedendi, tamen sine praevalenti ratione, suo iudicio aestimanda, ab earundem voto, praesertim concordi, ne discedat.

This formula underwent further revision before its promulgation. Whereas canon 127 of the *1982 Schema* required for the validity of a superior's act "an absolute majority vote" of those present in both situations, namely when consent or advice were necessary, the promulgated text in canon 127 requires "an absolute majority vote" of those present only in the case of "consent" of a college or of a group. However, when it is a question of "advice" of a college or of a group, for the validity of his or her act, the superior must seek the advice of "*all*" concerned. With these changes, the promulgated text of canon 127 reads as follows:

1. When the law prescribes that, in order to perform a juridical act, a Superior requires the consent or the advice of some college or group of persons, the college or group must be convened in accordance with can. 166, unless, if there is question of seeking advice only, particular or proper law provides otherwise. For the validity of the act, it is required that the consent be obtained of an absolute majority of those present, or that the advice of all be sought.

2. When the law prescribes that, in order to perform a juridical act, a Superior requires the consent or advice of certain persons as individuals:

- 1° if consent is required, the Superior's act is invalid if the Superior does not seek the consent of those persons, or acts against the vote of all or of any of them;

- 2° if advice is required, the Superior's act is invalid if the Superior does not hear those persons. The Superior is not in any way bound to accept their vote, even if it is unanimous; nevertheless, without what is, in his or her judgement, an overriding reason, the Superior is not to act against their vote, especially if it is a unanimous one.

3. Omnes quorum consensus aut consilium requiritur, obligatione tenentur sententiam suam sincere proferendi, atque si negotiorum gravitas id postulat, secretum sedulo servandi, quae quidem obligatio a Superiore urgeri potest (*1982 Schema*, cannon 127).

3. All whose consent or advice is required are obliged to give their opinions sincerely. If the seriousness of the matter requires it, they are obliged carefully to maintain secrecy, and the superior can insist on this obligation.¹²¹

It can be said, therefore, that the substance of canon 105 of the 1917 Code has been retained in the revised canon. However, a conscious effort has been made to clarify the norms of the canon and to answer some of the questions that arose during the regime of the former Code.

A clear distinction has been made between those acts for which the consent or advice of a college or of a group is required and those acts for which the consent or advice of *individual persons* is necessary. Moreover, it has also been made more clear that when consent or advice of a college or group of person is required, the members must be convoked according to law, and this is necessary for the validity of the superior's act. In regard to the method of convocation, an exception is made for those cases where the law requires of the superior to seek only the *advice* of a college or of

¹²¹“1. Cum iure statuatur ad actus ponendos Superiorem indigere consensu aut consilio alicuius collegii vel personarum coetus, convocari debet collegium vel coetus ad normam can. 166, nisi, cum agatur de consilio tantum exquirendo, aliter iure particulari aut proprio cautum sit; ut autem actus valeant requiratur ut obtineatur consensus partis absolute maioris eorum qui sunt praesentes aut omnium exquiratur consilium.

2. Cum iure statuatur ad actus ponendos Superiorem indigere consensu aut consilio aliquarum personarum, uti singularum:

1° si consensus exigatur, invalidus est actus Superioris sensuum earum personarum non exquirentis aut contra earum vel alicuius votum agentis;

2° si consilium exigatur, invalidus est actus Superioris easdem personas non audientis; Superior, licet nulla obligatione teneatur accedendi, ad earundem votum, etsi concors, tamen sine praevalenti ratione, suo iudicio aestimanda, ab earundem voto, praesertim concordi, ne discedat.

3. Omnes quorum consensus aut consilium requiritur, obligatione tenentur sententiam suam sincere proferendi atque, si negotiorum gravitas id postulat, secretum sedulo servandi; quae quidem obligatio a Superiore urgeri potest” (CIC/83 canon 127).

a group of persons. For such cases only, particular law or proper law may establish an alternate method. Furthermore, the revised law has now clearly stated that if advice of certain person(s) is required, the act of the Superior is invalid if he or she fails to hear them. The revision of canon 105 of the 1917 Code, therefore, has rendered the principles contained therein much clearer.

2.3.5 - Reparation of damages caused by an act

In the 1917 Code, the canons on juridical acts (canons 103-104 and 1680) did not have any provision for the reparation of damages caused by one's actions or omissions. During the revision process, the consultors found it necessary to introduce a norm concerning this matter. Indeed, as early as in 1974, W. Onclin had stated:

The obligation of making amends for the infliction of damage caused by a juridical act or indeed by any other act is affirmed in the proposed revised law. Such a prescription is lacking in the law of the Code on juridical acts, and it seemed to the consultors to be definitely necessary.¹²²

In canon 117 of the *1977 Schema* on General Norms, it was explicitly stated that the causing of the damage must be by an act *freely* placed. The text of the canon read as follows:

Whoever unlawfully causes harm to another by a juridical act, indeed by any other act freely placed, is obliged to repair the damage done.¹²³

¹²²See *Communicationes*, 6 (1974), p. 103.

¹²³"Quicumque illegitime actu iuridico, immo quovis alio actu libere posito, alteri damnum inferat, obligatione tenetur ad damnum illatum reparandum" (*1977 Schema*, canon 117).

This was revised in the *1980 Schema* of the Code. The revised canon stated that for an act to be a cause of repair of the damage it has caused, it must have been placed with *malice or culpability*. There must be in the agent deliberation before placing the act, and foresight of the damage, or the act must be a result of lack of due diligence, that is, culpable negligence. The canon was formulated as follows:

Whoever, unlawfully causes harm to another by a juridical act, indeed by any other act placed with malice or culpability, is obliged to repair the damage done.¹²⁴

The word *libere*, therefore, was replaced by *dolo vel culpa*.

In *1982 Schema* the norm remained the same as in the previous schema. And it appeared in the revised 1983 Code in the same form.¹²⁵

CONCLUSION

Vatican II was essentially a pastoral council. Its aim was reform and renewal in the Church. Even though the Council did not issue any particular statement on juridical acts, nevertheless it explicitly dealt with the *doctrine* of juridical acts in some of its documents. It explicitly suggested some reforms on matters related to juridical acts. For the most part however, the Council's treatment of juridical acts was more in the form of general principles, namely: principles of communion, subsidiarity, human dignity and freedom, participation, and the salvation of souls.

¹²⁴"Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum inferat, obligatione tenetur ad damnum illatum reparandum" (*1980 Schema*, canon 125).

¹²⁵See CIC/83 canon 128.

The Council's impact on the doctrine of juridical acts is not to be underestimated. Because of its teaching, the juridical capacity for the involvement on the part of the faithful in the governance of the Church has been expanded; procedures for placing certain juridical acts have undergone substantial revision; and the doctrinal principles related to certain acts have become much clearer.

The principles related to the notion, elements and impediments of a juridical act undoubtedly received particular attention in the revision of the Code. The Code Commission indicated that there are two types of nullity: one resulting from lack of the essential elements of an act, and the other from lack of solemnities or requisites required by the law for validity. Similarly, an important distinction was introduced between the essential elements of an act and the formalities or requisites imposed by the law for validity.

Furthermore, because, the canons on juridical acts were seen as applicable to the entire Code, the Code Commission decided to place them in Book I on General Norms under their own title: "On juridical acts."

In addition to this, new norms on juridical acts were added to the ones already present in the 1917 Code. These are found in canon 124, 127, and 128 of the revised 1983 Code.

By way of comparison therefore, the law on juridical acts appears in a better and clearer formulae in the revised 1983 Code than it was in the 1917 Code. This could be interpreted as real progress in the understanding of the concept of a juridical act and its correct application.

It is interesting to note that after 65 years of discussing the concept of a juridical act under the regime of the 1917 Code, the revised 1983 Code does not venture into providing a definition of a juridical act. Indeed, not even in the schemata of the revision of the law on juridical acts is a definition of the same given.

Having examined, in the first chapter, the notion of a juridical act in the 1917 Code, and in this chapter, the revision of the law on juridical acts, we will now turn our attention to the present understanding of canon 124 of the revised 1983 Code, the main focus of our study. We will try to explain, in light of current doctrine and jurisprudence, the intrinsic and extrinsic aspects of a juridical act.

CHAPTER THREE

INTERPRETATION AND APPLICATION OF CANON 124

Canon 124.1 of the 1983 Code presents the general requirements for a valid juridical act: the legal capacity of the agent of the act, the elements which essentially constitute the act, and the formalities or requisites prescribed by the law for validity. Canon 124.2 establishes a presumption for the validity of a juridical act properly placed, as far as its external elements are concerned.

As indicated in Chapter Two, canon 124 is new in the Code of Canon Law.¹ Furthermore, the commentaries on this canon to date are scant.² The object of our study in this Chapter is to analyze the elements of canon 124.1 in light of current doctrine and jurisprudence, and to determine the value and extent of the presumption established in the second paragraph of the canon. It is our hope that this analysis will result in a clear identification of the elements which are intrinsic and extrinsic to every juridical act. Before analyzing the elements of canon 124, however, we will first determine the nature and context of the canon.

¹See *supra*, p. 91.

²See, for example, *CLSA Commentary*, pp. 89-90; *Code of Canon Law Annotated*, p. 141; *Letter & Spirit*, pp. 71-72; L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, Napoli, Edizioni Dehoniane, 1988, vol. I, pp. 156-159; *Código de derecho canónico*, p. 100; D'OSTILIO, *Prontuario del Codice di diritto canónico*, p. 101; M. THÉRIAULT, "De actibus iuridicis," in *Commentario exegético al Código de derecho canónico*, Pamplona, EUNSA, 1996, pp. 823-825; ID., "The Nullity of Some Processual Acts," in *Forum*, 5 (1994) 1, pp. 31-32.

3.1 - NATURE OF CANON 124

Canon 124 lays down a norm governing specifically the validity of a juridical act.

It reads:

1. For validity of a juridical act, it is required that it be placed by a person capable and also it must contain those elements which essentially constitute the act itself, as well as the formalities and requisites imposed by the law for the validity of the act.
2. A juridical act properly placed, as far as its external elements are concerned, is presumed to be valid.³

Neither the canon nor the revised 1983 Code itself establishes what a juridical act is. Moreover, there is no agreement among canonists on a precise definition of a juridical act. Some commentators still adopt the definition provided by O. Robleda which simply states that a juridical act is an externally manifested act of the will by which a certain effect is intended.⁴ Others provide definitions similar to the one given by G. Michiels.⁵ And, as indicated in the first chapter, the definition of Michiels seems to be more complete. According to this definition, a juridical act is a social human act

³Canon 124. "1. Ad validitatem actus iuridici requiritur ut a persona habili sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita iure ad validitatem actus imposita.

2. Actus iuridicus quoad sua elementa externa rite positus praesumitur validus."

⁴See supra, p. 14; *Letter & Spirit*, p. 72; P.J. COGAN, *The Understanding of Defection in the 1983 Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1990, p. 136.

⁵See GAUTHIER, *Roman Law*, p. 75; P.V. PINTO, *Commento al Codice di diritto canonico*, Roma, Urbaniana University Press, 1985, p. 74; *Código de derecho canónico*, p. 100; D'OSTILIO, *Prontuario de Codice di diritto canonico*, p. 101.

legitimately placed and declared to which the law attributes a determined effect and recognizes that effect insofar as it is intended by the agent.⁶

Canon 124.1 opens with the words *ad validitatem*, thus establishing the requirements necessary for a juridical act to have juridical effects in the Church. In so doing, the canon declares null a juridical act which lacks the elements it has prescribed. In this respect, the canon may be considered to be an invalidating law, and consequently, as an application of the general norm of canon 10, on invalidating and incapacitating laws.

An invalidating law is one which renders an act null, and thus, deprives it of all its juridical value.⁷ Its direct concern is the act itself regardless of the person who has placed it.⁸ For example, the provision of an office which in law is not vacant is by that very fact invalid.⁹

An incapacitating law is a disqualifying law. It concerns directly the person acting.¹⁰ It renders a person juridically incapable of placing an act validly;¹¹ and

⁶See *supra*, p. 15, for reasons why the definition of Michiels is more complete, see *supra*, p. 15.

⁷See *Letter & Spirit*, p. 9.

⁸See *CLSA Commentary*, p. 31.

⁹See CIC/83 canon 153.1.

¹⁰See *CLSA Commentary*, p. 31.

¹¹See *Letter & Spirit*, p. 9.

thus, only indirectly concerns the act. A man, for instance, cannot validly enter marriage before the completion of his sixteenth year of age.¹²

According to canon 10, a law is invalidating or incapacitating only when it *expressly* prescribes that an act is invalid or that a person is incapable.¹³ Therefore, the term “expressly”, which has been traditionally understood in canonical doctrine and jurisprudence to mean “explicitly” or “implicitly”,¹⁴ indicates the manner in which a law institutes invalidity or incapacity.¹⁵

Explicit institution occurs when the invalidating or incapacitating factor is explicitly stated in a canon, that is, when a law, with a word or words, such as *irritus est, invalide* etc., explicitly declares a particular act invalid or a certain person incapable. Thus, for example, canon 126 states explicitly that an act placed as a result of ignorance or error concerning an element which constitutes its substance or which amounts to a condition *sine qua non*, is invalid.¹⁶

¹²See CIC/83 canon 1083.1.

¹³Canon 10 corresponds to canon 11 of the 1917 Code, in which, in addition to the term “expressly” the phrase “*vel aequivalenter*” was added. This phrase does not appear in canon 10 of the present Code. According to the Code Commission, the phrase was suppressed because of its uncertain meaning. See *Communicationes*, 16 (1984), p. 146.

¹⁴See *Letter & Spirit*, p. 9.

¹⁵See J.E. CONNELL, *Invalidating and Incapacitating Laws in the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1994, p. 81.

¹⁶It must be noted that invalidating and incapacitating laws are different from laws which contain prohibiting words. An act placed against a law with merely prohibiting words may be valid but illicit. See J. KOURY, “From Prohibited to Permitted: Transitions in the Code of Canon Law,” in *Studia canonica*, 24 (1990), pp. 147-192.

The term “expressly” means implicitly when the law establishes that certain requirements are necessary for an act to be valid or certain qualifications are required of a person to be able to act validly. For example, canon 1292.1 states that the diocesan Bishop needs the consent of the finance committee, of the college of consultors and of any interested parties to alienate goods which belong to the diocese itself. While what is explicitly stated in this canon is the requirement of consent for the diocesan Bishop’s act to be valid in the circumstances determined therein, what is expressly but implicitly stated is that in the absence of the required consent, in accordance with the norm of canon 127, the diocesan Bishop’s act is invalid.

In virtue of an invalidating or incapacitating law, therefore, an act which otherwise might have been valid is rendered invalid and a person who otherwise might have been capable is declared incapable.¹⁷ Thus, acts placed against both invalidating and incapacitating laws lack juridical efficacy.¹⁸

¹⁷See CONNELL, *Invalidating and Incapacitating Laws*, p. 83.

¹⁸Among the elements prescribed for the validity of a juridical act, canon 124.1 requires also that it be performed by a person *capable*. Therefore, a person who is not *capable* in the sense of canon 124.1, is *incapable* of validly placing a juridical act. Consequently, when the individual elements of canon 124.1 are considered, it may be said to contain both invalidating and incapacitating factors.

3.2 - THE CONTEXT OF CANON 124

Juridical acts can be private or public.¹⁹ The latter category includes juridical acts of legislative nature (legislative acts), juridical acts of administrative nature (administrative acts), and juridical acts of judicial nature (judicial acts). Since canon 124 is general, it establishes a general principle with regard to the validity of every juridical act. Thus, the norm of canon 124 governs every canon in the revised Code which deals with juridical act(s).²⁰

The first and most important step in the correct interpretation of canon 124 is to understand it correctly. In this regard, canon 17 has particular relevance because it provides rules for correct interpretation of a law.²¹ In fact, canon 17 establishes that ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context.²² While the proper meaning of the words, text, and context are distinct, they all have an implication for the interpretation of canon 124.²³

¹⁹See THÉRIAULT, "The Nullity of Some Processual Acts," p. 30.

²⁰It must be noted that even if a canon mentions only one or several elements of canon 124.1, the validity of the juridical act(s) in question will depend on the presence of all the other elements prescribed by the canon.

²¹The rules of interpretation found in canon 17 enable those interpreting a law to make it state nothing else, nothing more and nothing less, than what was intended by the legislator. Cf. ABBO and HANNAN, *The Sacred Canons*, vol. 1, p. 35.

²²Canon 17 reads: "Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos parallellos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum."

²³Canon 17 of the revised Code derives almost verbatim from canon 18 of the 1917 Code. In speaking of "parallel places" the latter canon spoke of "parallel places in the Code." Canon

3.2.1 - The proper meaning of words

The words to which canon 17 refers are all the words which compose the law, including nouns, pronouns, verbs, conjunctions, etc.²⁴

Proper meaning according to which the words of a law are to be understood may be juridical,²⁵ ordinary,²⁶ or etymological.²⁷ Most important of these is juridical meaning, followed by ordinary, because the legislator is not expected to use words in a law in an arbitrary or casual sense but according to the common juridical or ordinary usage.

Thus, in the interpretation of canon 124, the juridical (canonical) meaning of the words it contains, such as, "*validitatem*" (validity), "*persona*" (person), "*habili*" (capable), "*imposita*" (prescribed), must be sought first, and if one is found, it must be followed, even if the ordinary meaning differs from it. Those words of the canon which

17 does not limit parallel places to those found in the Code. Thus, it seems, the legislator intends to indicate, with this omission, that words of the canons of the Code may have a meaning which is found outside the Code.

²⁴Cf. ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 35.

²⁵The Code has, for instance, defined some terms, such as diocese, parish, etc., and other terms have a well established meaning accepted in canon law, for instance, person, minor, etc.

²⁶Ordinary meaning of the words in a law refers to that which was in use when the law was promulgated. See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 36.

²⁷Proper meaning according to which words of a law are to be understood may also be etymological. Generally speaking, etymological meaning of any of the words of a law is to be disregarded in its interpretation because philological meaning of a word is often historically conditioned, that is, in the course of time the word may have lost its original philological meaning or the meaning itself may have been modified. See ABBO and HANNAN, *The Sacred Canons*, vol. I, pp. 35-36.

have no special juridical meaning must be understood according to their ordinary meaning.²⁸

3.2.2 - The text

A text refers to the actual use of words in a phrase, clause, sentence, and paragraph with the necessary capitalization and punctuation.²⁹ Thus, the verbal exposition of canon 124, that is, its actual verbal composition, constitutes its text.³⁰

3.2.3 - The context

Context refers to the broader setting of the words, that is, the article, section or book of the Code, or the subject area of legislation.³¹ The meaning of the words, therefore, is found not only in the text of a law but also in the context in which the words of the law appear.³² The meaning of the words of canon 124, for instance, are those defined or accepted in canon law.

²⁸Ibid., p. 36.

²⁹Cf. J.A. CORIDEN, "Rules for Interpreters," in *The Art of Interpretation: Selected Studies on the Interpretation of Canon Law*, Washington, DC, Canon Law Society of America, 1982, p. 21.

³⁰Cf. CONNELL, *Invalidating and Incapacitating Laws*, p. 97; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 36.

³¹See CORIDEN, "Rules for Interpreters," p. 20.

³²See R.A. HILL, "Reflections on Interpretation of the Revised Code," in *The Art of Interpretation: Selected Studies on the Interpretation of Canon Law*, Washington, DC, Canon Law Society of America, 1982, p. 39.

The context can also imply other disciplines such as theology, philosophy, empirical sciences, history, etc.³³ In this regard, however, it must be noted that the Holy Father, in his allocution to the Roman Rota on 30 January 1993, stated that it would be totally wrong to attribute to the words used by the legislator, not their “proper” meaning, but one suggested by disciplines different from the canonical one.³⁴

3.3 - THE ELEMENTS OF CANON 124

Even though canon 124.1 speaks of three conditions necessary for the validity of a juridical act,³⁵ it has four main elements: 1) person capable (*persona habilis*); 2) elements which constitute the essence of the act (*elementa quae constituunt essentiam actus*); 3) requisites (*requisita*); and 4) solemnities (*sollemnia*).

3.3.1 - Person capable (“*persona habilis*”)

The term “person” mentioned in canon 124 refers to a subject of rights and obligations.³⁶ The exercise of one’s rights and obligations in a particular juridical order, presupposes one’s juridical personality in that order. This is true also in the

³³See *CLSA Commentary*, p. 36.

³⁴See W.H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-1994*, Ottawa, Faculty of Canon Law, Saint Paul University, 1994, p. 225.

³⁵According to canon 124.1, the validity of a juridical act depends on: 1) the capacity of the person placing the act; 2) the presence of all the essential elements of the act itself; 3) and the observance of the requisites or formalities imposed by the law for the validity of the act.

³⁶See KINNEY, *The Juridical Condition of the People of God*, p. 16.

canonical order.³⁷ For, the exercise of one's rights and obligations in the canonical order presupposes one's ecclesiastical personality. Such a person may be either physical or juridical.

3.3.1.1 - Physical person

Canon 96 of the revised Code states that by baptism, which is a juridical act, a human being is incorporated into the Church of Christ and is constituted a person in it with duties and rights which, in accordance with one's condition, are proper to Christians, to the extent that they are in ecclesiastical communion and unless a legitimately issued sanction stands in the way.³⁸ The term *physical person*, therefore, refers to a validly baptized human being.³⁹

³⁷See THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; CHIAPPETTA, *Il Codice di diritto canonico*, p. 158; D'OSTILIO, *Prontuario del Codice di diritto canonico*, p. 101; *CLSA Commentary*, p. 89; *Letter & Spirit*, p. 72.

³⁸Canon 96 reads: "Baptismo homo Ecclesiae Christi incorporatur et in eadem constituitur persona, cum officiis et iuribus quae christianis, attenta quidem eorum conditione, sunt propria, quatenus in ecclesiastica sunt communione et nisi obstet lata legitime sanctio." This canon is substantially the same as canon 87 of the 1917 Code. It contains, however, two changes. It has added: "incorporated into the Church of Christ," and "in keeping with their condition" in relation to rights and duties. Moreover, it has changed "unless, with regard to rights, there exists an obstacle which impedes the bond of ecclesiastical union or a censure imposed by the Church" into "to the extent that they are in ecclesiastical communion..." See F.J. URRUTIA, *De normis generalibus: adnotationes in Codicem, Liber I*, Romae, PUG, 1983, p. 60. For a commentary on canon 96, see *CLSA Commentary*, pp. 70-71; *Code of Canon Law Annotated*, p. 123; *Letter & Spirit*, p. 55.

³⁹In some cases, in which physical persons are juridically incapable of placing a juridical act, the Code has provided for others to place juridical acts on their behalf. For example, with some exceptions provided in law, a minor or one who lacks the use of reason can stand before the court only through his or her parents, guardians, or curators. See CIC/83 canon 1478.1.

Having said this, it is important then to clearly establish the situation of baptized non-Catholics and the non-baptized with regard to placing juridical acts in the canonical order.

3.3.1.1.1 - Baptized Non-Catholics

Since baptism is the means for a human being to become a person in the Church of Christ, those validly baptized outside the Catholic Church, that is, in other Christian Churches and ecclesial communities, are also canonically "persons."⁴⁰ In this regard, the meaning of the juridical term "person" used in canon 124.1 extends, in accordance with the principles enunciated in canon 96, also to them.

3.3.1.1.2 - Non-Baptized persons

Non-baptized persons are not "persons" in canon law because they lack baptism, the basis of ecclesiastical personality. The term "person" mentioned in canon 124, therefore, cannot be extended to them in the strict sense of the word.⁴¹

⁴⁰For a doctrinal statement concerning those who are properly baptized outside the Catholic Church, see VATICAN COUNCIL II, Decree on Ecumenism *Unitatis redintegratio*, no. 3, November 21, 1964, in *AAS*, 57 (1965), p. 93, English translation in FLANNERY, p. 455.

⁴¹The problem of whether or not non-baptized persons are "persons" in canon law was discussed by the consultors of the Code Commission who were involved in formulating canon 96. Their opinions were not uniform on this issue. Some consultors expressed the view that the revised Code ought to give at least some element of juridical personality to catechumens although, as was evident, such a capacity could not be identified with that full capacity for rights and duties which canon 87 of the 1917 Code spoke about. But the Secretary pointed out that the non-baptized cannot be subjects of juridical obligations before the Church, and that, at least in the strict sense, neither can they be the subjects of rights. He further stated that, at most some juridical capacities may be *conceded* to the non-baptized. In fact, the view expressed by the Secretary was the opinion of most canonists at that time. At the proposal of the same Secretary, because of its exceptional importance, the Commission decided to submit the question to the Coordinating Committee. See *Communicationes*, 17 (1985), pp. 166-167. The final decision on the issue was that subjectivity of non-baptized persons was not to be addressed in canon law. See *Communicationes*, 12 (1980), pp. 56-58. In spite of this, one cannot deny the fact that the revised

In spite of this, it is to be noted that, like the 1917 Code, the revised Code allows non-baptized persons to place certain juridical acts in the canonical order. For example, a non-baptized person can introduce a law suit in an ecclesiastical court, confer baptism in case of necessity, etc.⁴²

3.3.1.2 - Juridical person

A juridical person is an aggregate of persons or of things constituted as such either by the provision of the law itself or by a special concession given in the form of a decree by the competent ecclesiastical authority.⁴³ The 1983 Code provides norms in canons 113-123 that specifically concern juridical persons. Its treatment of juridical persons is more detailed than that of the 1917 Code.⁴⁴

Code has several canons which concern directly or indirectly the non-baptized as subjects of rights and duties.

⁴²See CIC/83 canons 1476, 861.1.

⁴³Canon 114.1 reads: "Personae iuridicae constituuntur aut ex ipso iuris praescripto aut ex speciali competentis auctoritatis concessione per decretum data, universitates sive personarum sive rerum in finem missionis Ecclesiae congruentem, qui singulorum finem transcendit, ordinatae."

⁴⁴In the 1917 Code, the terms "moral person" and "juridical person" were used equivalently. Cf. supra p. 28. The 1983 Code has changed the terminology and speaks of "juridical person." For the reasons behind such a change in terminology, see *Communicationes*, 9 (1977), pp. 240-241; GAUTHIER, "Juridical Persons," p. 81. Actually, during the early stages of the revision process the *coetus* decided not to mention in law "moral personality" and to use only "juridical personality." Thus, no mention of "moral personality" was made in the proposed schemata. See *Communicationes*, 9 (1977), p. 240. In spite of this, the term "moral person" appears in the revised Code, but only in canon 113.1, the first canon in the section on juridical persons, in which it refers to the "Catholic Church" and "Apostolic See." See *Index to the Code of Canon Law*, in English translation, prepared by The Canon Law Society of Great Britain and Ireland, London, Collins, 1984, p. 71. For reasons why the term "moral person" has been retained in the Code, see GAUTHIER, "Juridical Persons," p. 82.

According to the revised Code, four things are required for a juridical person to be lawfully constituted: 1) an aggregate of persons or things; 2) a useful purpose which transcends that of the individuals, such as works of piety, of apostolate, or of charity, whether spiritual or temporal; 3) sufficient resources to achieve the purpose it has in view; 4) competent authority, that is, the constitution of the juridical person must be done either by the law itself or by a formal decree of the competent authority in accordance with the norms of law.

With regard to juridical persons themselves, the revised Code makes several distinctions. It distinguishes between juridical persons that are aggregates of persons and those that are aggregates of things, a distinction based on the constitutive elements of the personality.⁴⁵

The Code further distinguishes between collegial and non-collegial juridical persons on the basis of how decisions are made on behalf of the juridical person. In a collegial juridical person, its members make decisions through participation, whether by equal right or not, in accordance with the norms of law and its own statutes.⁴⁶ In a non-collegial juridical person, its actions are determined by the person or persons who are competent according to the norms of law and its statutes.

In addition to the above, the 1983 Code distinguishes between public and private juridical persons. Public juridical persons are established by the competent ecclesiastical

⁴⁵See *Code of Canon Law Annotated*, p. 135.

⁴⁶In some cases, all the members of a collegial juridical person have equal rights, for instance, in a cathedral chapter; in other cases, some members have restricted rights, for example, in a conference of bishops.

authority, and within the area of their competence, function in the name of the Church as its formal instruments. Private juridical persons, however, act in their own name.⁴⁷

Certainly, a juridical person cannot place juridical acts by itself. For this purpose it needs physical persons. These physical persons represent the juridical person and act on its behalf either as individuals or as a college.

Canon 118 of the 1983 Code determines those who are legally capable of acting on behalf of a juridical person. Only those acknowledged as competent either by the universal or particular law, or by its own statutes, can represent a public juridical person and place juridical acts in its name. Thus, for example, the universal law has determined that in all juridical transactions of a diocese, the one who represents and acts in the name of the diocese is the diocesan bishop;⁴⁸ and in all juridical matters, the parish priest is the one who represents and acts in the name of the parish.⁴⁹

In the case of a private juridical person, only those represent it and place juridical acts in its name who have been determined in the statutes.⁵⁰ Thus, legitimate representatives of a juridical person are determined either by the law or by its own statutes.

Juridical acts placed by legitimate representatives on behalf of a juridical person are considered to have been performed by the juridical person. Thus, through a

⁴⁷See GAUTHIER, "Juridical Persons," p. 91.

⁴⁸See CIC/83 canon 393.

⁴⁹See CIC/83 canon 532.

⁵⁰See CIC/83 canon 118.

legitimate representative, a juridical person can place juridical acts, such as buying or selling property,⁵¹ bringing a lawsuit against a physical person or another juridical person,⁵² in accordance with the law. If the Archbishop of Blantyre in Malawi, legitimately sells some property of the Archdiocese, he does so as the representative of the Archdiocese that sells. Consequently, the Archdiocese will be considered to have placed the juridical act of sale.

With regard to a juridical person, public or private, in which only one member is still surviving and the juridical person itself has not ceased to exist according to its statutes or in any other legitimate way, that surviving single physical person may place juridical acts on behalf of the juridical person such as admitting new members, etc.⁵³

According to the 1983 Code, aggregates of persons and aggregates of things can act collegially or non-collegially. The revised Code does not provide a general norm on the procedure for placing non-collegial acts. It seems, therefore, that these are to be placed in accordance with the law, universal and particular, and with the statutes of the juridical person.

⁵¹See CIC/83 canons 1255, 634.1.

⁵²See CIC/83 canon 1480.

⁵³Cf. CIC/83 canon 120.2. The legislator has in fact rendered more clear the meaning of this canon in canon 925 of the Oriental Code. See V.J. POSPISHIL, *Eastern Catholic Church Law*, Revised and Augmented Edition, New York, Saint Maron Publications, 1996, p. 675.

The procedure for placing collegial acts is provided in canon 119, which in effect, outlines the procedure for establishing the collegial will.⁵⁴ The canon speaks of three types of collegial acts: acts which concern elections; acts which concern other matters; and acts which affect every member as individuals.⁵⁵ The norms of the canon, however, apply to collegial acts only when the universal law or particular law, or statutes of the juridical person in question have not legislated differently for collegial acts.

3.3.1.3 - Group of persons

Apart from physical and juridical persons, canon law allows certain *de facto* aggregates of persons that have been recognized but not constituted as juridical persons to place juridical acts.⁵⁶ It seems, however, that these do not have the capacity to place juridical acts as a right, but rather as a result of the capacity conceded to them by the law.

On the other hand, canon law does not recognize a group of persons which has not been recognized or constituted as a juridical person as having the right to place acts in the canonical order. Precisely on this issue, the Pontifical Commission for the

⁵⁴See *Code of Canon Law Annotated*, p. 137. Interpretation of canon 119 must take into consideration the authentic interpretation given by the Pontifical Council for the Interpretation of Legislative Texts, in which the Council declared that in the case of elections, an absolute majority is required only in the first two ballots. If there is lack of absolute majority in the first two ballots, the third ballot is decisive and, a relative majority would be sufficient. See PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, "Responsio ad propositum dubium," in *AAS*, 82 (1990), p. 845; *Code of Canon Law Annotated*, p. 137; L.G. WRENN, *Authentic Interpretations of the 1983 Code*, Washington, DC, Canon Law Society of America, 1993, p. 59.

⁵⁵See CIC/83 canon 119.

⁵⁶Cf. *Code of Canon Law Annotated*, p. 134.

Interpretation of Legislative Texts has stated that a group of the faithful which does not have juridical personality or the recognition mentioned in canon 299.2, does not have the right to place recourse as a group, but the Christian faithful of such a group have the right to do so as individuals and could use that right either singly or together (*coniunctim*), if they have in fact suffered any damage by the act of an ecclesiastical authority.⁵⁷ The Apostolic Signatura has, in fact, on occasion rejected recourses from groups of the faithful which were without recognition or juridical personality. The reason underlying such rejection was that such groups lack the capacity which enables them to place recourse as a group.⁵⁸

3.3.2 - Capacity ("habilitas") of a person to place a juridical act

According to the first element of canon 124.1, in order to place a juridical act validly, the person must have the capacity. "Capacity" in the sense of canon 124.1, is

⁵⁷See AAS, 80 (1989), p. 1818; *Communicationes*, 20 (1988), p. 76; *L'Osservatore romano*, November 25, 1988, p. 5; W.A. SCHUMACHER and L. JARRELL (eds.), *Roman Replies and CLSA Advisory Opinions 1990*, Washington, DC, CLSA, 1990, p. 111; GAUTHIER, "Juridical Persons," pp. 83-84.

⁵⁸See, for example, decision *coram* AGUSTONI, May 4, 1996, in *Forum*, 7 (1996) 2, pp. 347-352; also decision *coram* AGUSTONI, May 4, 1996, in *ibid.*, pp. 359-371.

the "juridical ability" to place an act.⁵⁹ It is a precondition necessary for any juridical act.⁶⁰

Four types of capacity to place juridical acts may be distinguished in canon law: 1) the natural capacity (*ex iure naturae habilitas*); 2) the basic canonical capacity; 3) specific capacity; and 4) competence.

Natural capacity to place a juridical act means that the person placing the act is psychologically capable of eliciting a human act.⁶¹

The basic canonical capacity refers to the fact that the agent of the act is a "person" (physical or juridical) in the Church.⁶²

Specific capacity concerns a specific act in question.⁶³ For example, those who are in sacred orders lack the specific capacity necessary for marriage; only a priest can

⁵⁹The revised Code uses the term "capacity" in both passive and active sense. Passive capacity is the capacity to *receive* a juridical determination. For example, only clerics can *receive* offices, the exercise of which requires the power of orders or the power of ecclesiastical governance. See CIC/83 canon 274.1. Active capacity is the capacity to place an act. For instance, a diocesan bishop makes an appointment of a parochial administrator. Canon 124.1 uses the term in the latter sense.

⁶⁰See THÉRIAULT, "De actibus iuridicis," p. 823; *Code of Canon Law Annotated*, p. 141; *CLSA Commentary*, p. 89.

⁶¹See THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; ID., "De actibus iuridicis," p. 823; D'OSTILLO, *Prontuario del Codice di diritto canonico*, p. 101. For an explanation of how a human act is formed, see J. OESTERLE, art., "Human Act," in *New Catholic Encyclopedia*, vol. VII, p. 208; A. MENDONÇA, "The Nature of Matrimonial Consent," in *Studia canonica*, 16 (1982), pp. 90-98; FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence," pp. 108-110.

⁶²See THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; D'OSTILLO, *Prontuario del Codice di diritto canonico*, p. 101.

⁶³See THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; *Letter & Spirit*, p. 72.

validly administer the sacrament of penance; and a diocesan bishop, although he has the capacity to dispense from ecclesiastical disciplinary laws, cannot dispense from those laws whose dispensation is specially reserved to the Apostolic See or to another authority.⁶⁴

Competence signifies the capacity to place public acts.⁶⁵ For instance, for a deacon to assist a marriage, he must be validly delegated to do so; and for a person to render a judicial sentence in an ecclesiastical court, he or she must first be appointed a judge of that court.⁶⁶

As already noted in Chapter Two, during the revision of the Code, the text of what is now canon 124.1 distinguished competence from other forms of capacity. This distinction was eliminated before the promulgation of the revised Code. The Code Commission explained that the word *capable (habilis)* in the canon is understood in a broad sense, to mean having the right to place the act which is being considered.⁶⁷ Thus, as J.A. Doyle states, the word *capable (habilis)* in canon 124.1, must be understood to include whatever capacities, whether natural or juridical, are necessary to

⁶⁴See CIC/83 canons 1087, 965, 87. For reasons, such as the presence of an impediment, a person may lack specific capacity for a juridical act. A person, however, who lacks specific capacity under certain circumstance, may have it under a different circumstance. For instance, a person who, on account of an impediment, cannot marry has specific capacity for marriage when the impediment ceases either through a dispensation or through some other legitimate cause.

⁶⁵See *Communicationes*, 6 (1974), p. 102; *Letter & Spirit*, p. 72.

⁶⁶See CIC/83 canons 1108, 1421, 1620, 1°.

⁶⁷The Code Commission stated this: "*Habilitas in canone intellegitur sensu lato, scil. habere ius ad actum de quo agitur*" (*Communicationes*, 14 [1982], p. 145).

place a particular juridical act.⁶⁸ According to the common teaching of canonists, in order to validly place an act, a person must have the natural capacity, the basic canonical capacity, the specific capacity, and, for public acts, also competence.⁶⁹

3.3.3 - Constitutive elements of a juridical act

The second element required by canon 124.1 for the validity of a juridical act is that it has those elements which essentially constitute it.⁷⁰ In fact, essential elements of a juridical act are always required for its validity.⁷¹

Neither canon 124.1 nor the Code itself has established what elements "essentially constitute" a juridical act. It may be said, however, that elements which essentially constitute a juridical act are the dynamic and structural components which determine its nature, that is, those which coalesce to give rise to a specific act.⁷²

⁶⁸See J.A. DOYLE, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, JCD diss., Ottawa, Saint Paul University, 1989, p. 89.

⁶⁹See THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; ID., "De actibus iuridicis," p. 823; CHIAPPETTA, *Il Codice di diritto canonico*, p. 158; D'OSTILIO, *Prontuario del Codice di diritto canonico*, p. 101; *CLSA Commentary*, p. 89; *Letter & Spirit*, p. 72. For ways in which the Code has used the terms *habilis*, *inhabilis*; *competens*, *incompetens*; and *capax* and *incapax*, see J. OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, ed. secunda et completa, Città del Vaticano, Libreria editrice Lateranense, 1984, pp. 210, 225, 90, 221, 62, 220; H. ZAPP, *Codex iuris canonici: Lemmata Stichwortverzeichnis*, Freiburg, Verlag Rombach, 1986, pp. 292, 310, 136, 304, 93-94, 303.

⁷⁰In regard to the act itself, a distinction has been maintained in canon law between those elements which essentially constitute the act and those which are required by the law for its validity. See *Communicationes*, 6 (1974), pp. 101-102.

⁷¹See THÉRIAULT, "De actibus iuridicis," p. 823; *CLSA Commentary*, p. 89.

⁷²Some essential elements of a juridical act are determined by the very nature of the act. In a sale, for example, the goods being sold and the price are essential elements. See CHIAPPETTA, *Il Codice di diritto canonico*, p. 158; THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; *Letter & Spirit*, p. 72. Other essential elements of an act are determined

The *coetus* responsible for revising the law on juridical acts spoke of the essential elements of an act in these terms: "[elements] which essentially constitute the act [...]";⁷³ "[...] those elements which pertain to its essence, its nature [...]";⁷⁴ "[...] those elements which pertain to the essence of the act, which by the nature of the act itself, are considered its constitutive elements."⁷⁵

R. Hill explains the essential elements of an act in these words:

With respect to the presence of all the elements essential to a specific act, it can be said here only that it must consist of all the components that its nature and canonical doctrine or tradition require for this kind of an act.⁷⁶

by divine or ecclesiastical law. Water, for instance, has been determined by divine law as an essential element of baptism; on the other hand, ecclesiastical law has determined the essential elements for the conferral of an office. See CHIAPPETTA, *Il Codice di diritto canonico*, p. 158; THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; *Letter & Spirit*, p. 72; URRUTIA, *De normis generalibus*, p. 84; D'OSTILIO, *Prontuario del Codice di diritto canonico*, p. 101. The common essential element in all juridical acts, however, is the *will* of the person placing the juridical act. See *Letter & Spirit*, p. 72; CHIAPPETTA, *Il Codice di diritto canonico*, p. 158; THÉRIAULT, "The Nullity of Some Processual Acts," p. 31.

⁷³"[...] quae actum ipsum essentialiter constituunt [...]" (*Communicationes*, 6 [1974], p. 101).

⁷⁴"[...] illa quae actum de quo agitur essentialiter constituunt seu quae ad eius essentiam, eius natura pertinent [...]" (ibid).

⁷⁵"[...] illa elementa quae *ad actus essentiam* pertinent, quae ipsa natura actus de quo agitur *elementa constitutiva eiusdem sunt dicenda*" (ibid).

⁷⁶*CLSA Commentary*, p. 89.

M. Thériault, following some commentators of the 1917 Code, such as F. Roberti, P. Gomez, G. Michiels, defines an essential element of an act as "that without which an act in question does not exist."⁷⁷

Thus, whenever any of the essential elements is lacking, the act itself is not merely invalid, but is simply non-existent.⁷⁸

Elements which "essentially constitute" a juridical act, may, in the strict sense, be considered from two aspects: subjective and objective.

3.3.3.1 - Subjective elements

A juridical act is a social human act legitimately placed and declared to which the law attributes a determined effect and recognizes the effect in so far as it is intended by the agent.⁷⁹ For the existence of a juridical act, therefore, the person placing the act must be able to elicit a human act. In the formation of a human act, two distinct faculties of the human person are involved: the intellect and the will.⁸⁰ Whenever a

⁷⁷"[...] a quello sino cual el acto en cuestión no existe" (THÉRIAULT, "De actibus iuridicis," p. 824). F. Roberti defines essential elements of an act in these words: "Generaliter dicendi sunt essentialia elementa illa sine quibus actus suam mutat, vel ineptus efficitur ad finem cui ordinatur [...]" See ROBERTI, *De processibus*, vol. I, p. 620. For the definition given by Gomez, see GOMEZ, *De actionibus et exceptionibus*, pp. 71-72. And, for Michiels' definition, see MICHIELS, *Principia generalia*, p. 583.

⁷⁸See *Communicationes*, 6 (1974), pp. 101-102; *Code of Canon Law Annotated*, p. 141; CONNELL, *Invalidating and Incapacitating Laws*, p. 117; DOYLE, *Civil Incorporation*, p. 89.

⁷⁹See *supra*, p. 15.

⁸⁰The intellect is a cognoscitive faculty. It is the principle of all intellectual acts of knowing. The *will* is the rational appetite, that is, the faculty of inclining towards or striving after some object intellectually presented as good. See FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence," p. 108.

human act is elicited, there is a close interaction between these two capacities. The intellect perceives a good and presents it to the will, and the will directs the intellect to consider or not that good, or to consider one object rather than another.⁸¹ Because of the close connection between these two capacities, whatever cause disturbs their mutual interaction, disturbs the process of the formation of a human act.⁸²

In this regard, it must be noted that simple use of reason, which even infants may enjoy, is not sufficient. According to canonical doctrine, for the formation of a juridical act as a human act, "discretion of judgement" is always necessary.⁸³ Canonical jurisprudence has identified the components of "discretion of judgment" as being: 1) knowledge: the person placing the act must have the intellectual understanding of the object of the act, that is, he or she must understand what the act is (its nature); 2) deliberation: the person placing the act must also have proportionate critical evaluation of the object of the act, that is, he or she must be able to weigh the implications of the act (its effect); 3) internal freedom: the person placing the act must be capable of choosing the object of the act free from both external and internal limitations, that is, the

⁸¹For a clear explanation of how the intellect and the will interact in the formation of a human act, see FELLHAUER, "The Exclusion of Indissolubility: Old Principles and New Jurisprudence," pp. 108-111; MENDONÇA, "The Nature of Matrimonial Consent," pp. 88-92; OESTERLE, "Human Act," p. 208.

⁸²See MENDONÇA, "The Nature of Matrimonial Consent," p. 90.

⁸³See *Code of Canon Law Annotated*, p. 141. The *coetus* dealing with the norms governing juridical acts stated this: "ad actus privatos ponendos persona, discretionem iudicii gaudens, capax dicenda est, nisi lege incapax facta sit" (*Communicationes*, 6 [1974], p. 102). Thus, just because a person has the use of reason does not necessarily mean that he or she has the discretion of judgement required for an act.

person must have sufficient internal freedom to evaluate the motives, or to control impulses or internal limitations. In the absence of any or all of these three elements, a juridical act cannot be regarded as a human act.⁸⁴ And, since a juridical act is first and foremost a human act, in the absence of a human act, a juridical act is non-existent. For instance, a vote by a person who lacks the use of reason is not a human act, and hence, it is non-existent.⁸⁵

The discretion of judgement necessary for a juridical act varies according to the nature or the object of the act. For example, the discretion of judgement necessary to place simple juridical acts, such as drawing up a will or sale, or purchase of goods, is not the same as that necessary for juridical acts of a more demanding nature, such as religious profession or marriage. In canon law, therefore, a person may be able to perform a human act of one nature while being unable to place a human act of a different nature. In other words, the ability of a person to perform a human act is dependent on the discretion of the person, which in itself must be proportionate to the act performed.

The discretion of judgement of a person may be impeded either by a transitory or habitual impairment. Situations in which a temporary lack of discretion of judgement

⁸⁴For an excellent explanation of the notion of discretion of judgment, see R.L. BURKE, "Lack of Discretion of Judgment: Canonical Doctrine and Legislation," in *The Jurist*, 46 (1984), pp. 171-209. To understand the three areas of discretion of judgment, see decisions *coram* COLAGIOVANNI, December 11, 1985, in *ME*, 111 (1986), pp. 173-186; *coram* BRUNO, December 16, 1988, English translation in L.G. WRENN, *Law Sections*, Washington, DC, Canon Law Society of America, 1994, pp. 30-32; *coram* FALTIN, May 26, 1989, in *IE*, 2 (1990), pp. 177-190; L.A. ROBITAILLE, "Simulation, Error Determining the Will, or Lack of Due Discretion? A Case Study," in *Studia canonica*, 29 (1995), pp. 420-422.

⁸⁵See CIC/83 canons 171.1, 1°.

may be present at the time of placing an act include intoxication, traumatic experience, etc. A habitual lack of discretion of judgement is often due to mental illness of psychotic or neurotic nature or mental retardation.⁸⁶

3.3.3.2 - Objective elements

In its objective dimension, a human act necessarily has an object. There cannot be such an act without an object. Objects of juridical acts are corporeal things, mobile or immobile, or spiritual things, or actions or facts or persons.⁸⁷ These become objects of juridical acts, however, only when they are recognized or determined as such by the law.

For something to become an object of a juridical act it must be *real*, that is, it must be in existence. The object of a juridical act must also be *possible*. For instance, there cannot exist a contract of sale of a house if the presumed seller is not the owner of the house and has no legitimate authority to sell it.⁸⁸

On its part, the object of a juridical act may be composed of constitutive or substantial elements, integrative and accidental elements. It is very important to determine these elements of the object of a particular juridical act. Ordinarily, in the absence of even one essential element of the object, there cannot be that particular object,

⁸⁶See MENDONÇA, "The Nature of Matrimonial Consent," p. 97. For some of the psychological causes which impede discretion of judgment, see R. KENYON, "The Nature and Nullity of Matrimonial Consent: Arguments Based Upon Primary Sources," in *Studia canonica*, 14 (1980), p. 117.

⁸⁷See *supra*, p. 36; MICHIELS, *Principia generalia*, p. 578.

⁸⁸Cf. THÉRIAULT, "De actibus iuridicis," p. 823.

and consequently, there cannot be a valid juridical act. Thus, when an essential element of the object is lacking, the act itself is non-existent.⁸⁹

For some juridical acts, their object is determined either by the nature of the act itself or by the competent authority. For these acts, all the elements determined by the nature of the act itself or by the competent authority as substantial, constitute the substantial elements of the object of an act. In fact, if these elements are either totally or partially lacking in the object, the act itself is non-existent for lack of its object.⁹⁰ If, for instance, a person expresses consent during the wedding ceremony, but does not intend to assume one or several obligations of marriage, the marriage consent is non-existent.⁹¹ Integrative and accidental elements of an object *per se* do not enter into its constitution. But they may assume substantial importance in the mind of the person placing the act. In such a situation, even integrative and accidental elements of the object may enter into the constitution of a human act. For example, such an element can become in the intention of the agent a condition *sine qua non* for placing a juridical act.⁹²

⁸⁹See supra, p. 37; MICHIELS, *Principia generalia*, p. 579.

⁹⁰See supra, p. 38; MICHIELS, *Principia generalia*, pp. 579-580.

⁹¹See CIC/83 canon 1101.

⁹²See MICHIELS, *Principia generalia*, pp 579-580.

3.3.4 - Solemnities and requisites ("sollemnia" et "requisita")

For certain juridical acts, the law imposes solemnities (formalities) or requisites. These are imposed over and above the legal capacity and the essential elements proper to the nature of the act; therefore, these requirements of law are extrinsic to the act.⁹³ In fact, some solemnities and requisites are imposed by the law under pain of nullity of an act in order to protect the rights of persons or groups of persons, or the rights of the Church or public order in the Church.⁹⁴

3.3.4.1 - Solemnities ("sollemnia")

In the ordinary dictionary sense, the term "solemnity" means the following: "the formality needed to validate an act, contract, etc.", "a rite or celebration; a piece of ceremony", "a solemn rite."⁹⁵

The term "*sollemnia*" as used in canon 124.1 has been translated into English as "formalities." The Code has, in some places, used the term "formalities" to mean every form of requirement that the law may demand for an act.⁹⁶ But this term "formalities"

⁹³See *Communicationes*, 6 (1974), p. 102; THÉRIAULT, "The Nullity of Some Processual Acts," p. 32.

⁹⁴Cf. THÉRIAULT, "The Nullity of Some Processual Acts," p. 32. The *coetus* responsible for the revision of the law on juridical acts clearly stated that requirements imposed by the law for validity of an act are not for its existence. See *Communicationes*, 6 (1974), pp. 101-102. Thus, they can never be intrinsic to the act in question.

⁹⁵See "solemnity" in *Webster's New World Dictionary of the American Language*, Second College Edition, D. B. GURALNIK (ed.), New York, NY, Simon and Schuster, 1984, p. 1355; *The Oxford Encyclopedic English Dictionary*, Oxford, Clarendon Press, 1991, p. 1380; *New Webster's Dictionary and Thesaurus of the English Language*, New York, Lexicon Publications, Inc., 1991 edition, p. 944.

⁹⁶See, for example, canons 1296, 1299.2, 1715.2.

as used in canon 124.1 seems to have a specific meaning.⁹⁷ This may be seen by the fact that the canon seems to distinguish clearly between “formalities” and “requisites” as requirements necessary for validity of a juridical act.⁹⁸ Thus, it seems that canonically, the term “formalities” in the sense of canon 124.1 may be understood as the “external form” established by the law in which a juridical act must be placed.⁹⁹

Formalities, however, are prescriptions of positive law and bind for validity only if the law expressly makes this stipulation.¹⁰⁰ This implies that in law there are some formalities which may not be necessary for the validity of a juridical act. When a formality is prescribed, whether for validity or not, the law expects compliance from the agent of the act. If the agent of the act does not comply with the formalities which are not expressly required by the law for the validity of an act, he or she acts illicitly but not invalidly.

Canon 124.1, however, speaks precisely of those formalities which the law has imposed for the validity of a juridical act. According to the canon, when the law requires observance of such formalities, to act validly one must comply with them. For instance, apart from the exceptions made in the Code, for a marriage between two

⁹⁷In fact, the latin term “*sollemnia*” used in canon 124.1 appears also in canon 1010 to mean liturgical solemnities. It is also used in canon 13 which states that *peregrini* are bound by the laws of the territory in which they are present which determine the formalities of legal acts.

⁹⁸Some canonists, however, have used the terms “formalities” and “requisites” in canon 124.1 as if they mean the same thing. See THÉRIAULT, “De actibus iuridicis,” p. 824; *Letter & Spirit*, p. 72.

⁹⁹Cf. *CLSA Commentary*, p. 89; *Code of Canon Law Annotated*, p. 141.

¹⁰⁰Cf. CIC/83 canon 10.

Roman Catholics, or between a Roman Catholic and a non-Catholic, to be valid, the canonical form must be observed.¹⁰¹

The compliance with the formalities prescribed by law for the validity of an act must be complete. It should be noted that a formality may be *simple* or *complex*. A simple formality consists of just one element, for example, a decree must be issued in *writing*. A *complex* formality is composed of several *components*, for example, the canonical form for marriage which consists of a qualified witness and two other witnesses. Whether the law prescribes a simple or complex formality, the compliance must be complete. The lack or absence of the entire formality or of one of its components will result in the invalidity of the act. In this case, the act of the will of the person placing it may be present, but it could be invalid due to non-compliance with the prescribed formality. The invalidity of the act is in no way linked to the reason for the omission of the required formality.¹⁰²

The requirement of formalities for the validity of a juridical act may be either explicit or implicit. For example, canon 474 explicitly states that, for validity, the acts of the diocesan curia which of their nature are designed to have a juridical effect must be signed by the ordinary from whom they emanate. In other cases, however, the prescription of a formality for the validity may be only implicit. For example, canon 51

¹⁰¹See CIC/83 canon 1108.1.

¹⁰²The law certainly does not impose formalities for every single juridical act. It seems, therefore, that in the absence of canonical provisions requiring formalities in which a juridical act must be performed, the presence of the essential elements and the necessary requisites is sufficient for validity of a juridical act.

states that a decree is to be issued in writing. While what is explicitly stated in the canon is that the act in question be placed in writing, the law may demand it for the validity of a particular juridical act, as for example, the general delegation to assist at marriage.¹⁰³

3.3.4.2 - Requisites ("requisita")

The ordinary dictionary meaning of the term "requisite" is the following: "required by circumstances; necessary to succeed; a thing needed for some purpose", "to place an obligation on someone; to need", "something stipulated or demanded on (someone); something needed; thing required or necessary", to call for as necessary or appropriate; to demand by virtue of law, regulation, etc."¹⁰⁴

Canonically, requisites may be described as elements prescribed by the law extrinsic to the act itself or to the manner of placing it.¹⁰⁵ These elements must be in place before the act is placed. While some requisites may be stipulated by the law only for the liceity of an act, others may be necessary for the validity of an act.

Requisites for liceity are those which when omitted do not invalidate the act. For instance, in order lawfully to confer orders of priesthood or diaconate it is required that,

¹⁰³See CIC/83 canon 1111.2.

¹⁰⁴See *Webster's New World Dictionary of the American Language*, "require", "requirement", "requisite" p. 1208; *The Oxford Encyclopedic English Dictionary*, "requisite", etc., pp. 1227-1228; *New Webster's Dictionary and Thesaurus of the English Language*, "requisite", p. 944.

¹⁰⁵Cf. *CLSA Commentary*, p. 89; *Code of Canon Law Annotated*, p. 141.

in the judgement of the proper Bishop or competent major superior, the candidate is considered beneficial to the ministry of the Church.¹⁰⁶

Canon 124.1 concerns requisites which the law has expressly imposed for validity. Where the law expressly prescribes a requisite for the validity of an act, the existence of such a requisite is a *conditio sine qua non* for its validity. When it is absent, the act lacks juridical effect.¹⁰⁷ For example, for the validity of a juridical act, the law may require consent or advice of certain individuals or groups of persons before it is actually placed; and, a marriage cannot be validly contracted subject to a condition concerning the future.¹⁰⁸

¹⁰⁶See CIC/83 canon 1025.2. Other examples may be given here. In order lawfully to confer the orders of priesthood or diaconate, it must have been established, in accordance with the law, that in the judgement of the proper Bishop or competent major superior, the candidate is free of any irregularity or impediment (canon 1025.1); the conferral of an ecclesiastical office on a person who lacks the requisite qualities is invalid only if the qualities are expressly required for validity by universal or particular law or by the law of the foundation; otherwise it is valid, but it can be rescinded by a decree of the competent authority or by a judgement of an administrative tribunal (canon 149.2).

¹⁰⁷The law does not impose requisites for every act. It seems that for those acts for which the law has not imposed requisites, the presence of their essential elements and the necessary formalities is enough for their liceity and validity.

¹⁰⁸See CIC/ 83 canons 127, 1102.1. As a way of further illustration, the following examples may be given: For valid establishment of an association in a diocese in virtue of an apostolic privilege, the written consent of the diocesan Bishop is required (canon 312.2); for a religious to transfer from one autonomous monastery to another monastery of the same institute, federation or confederation, the consent of the major superior of both monasteries and of the chapter of the receiving monastery is required (canon 684.3); for one to be deemed elected, he or she must have received the requisite number of votes in accordance with the law (canon 176); the diocesan Bishop cannot establish, suppress or notably alter parishes unless he has consulted the council of priests (canon 515.2); juridical personality can be bestowed on an entity seeking it only after its statutes have been approved by the competent authority (canon 117); for a house of a religious institute to be established, prior written consent of the diocesan Bishop is required (canon 609.1); for a diocesan Bishop to establish an institute of consecrated life in his diocese, consultation with the Holy See is required (canon 579); and for decrees of the Ecumenical Council to have juridical

In some cases the law explicitly imposes a requisite for validity. For example, canon 1292.2 of the revised Code explicitly states that the permission of the Holy See is required for the valid alienation of goods which are precious by reason of their artistic or historical value. In other cases, however, requisites for validity are implicit in the law. For instance, canon 1292.1 states that the diocesan Bishop needs the consent of the finance committee, the college of consultors and the interested parties to alienate goods which belong to the diocese itself. While what is explicitly expressed in the canon is the requisite of consent, what is implicitly expressed is that if the prescription of this “requisite” is not observed, in virtue of canon 127, the act of the diocesan Bishop will be invalid.

3.3.5 - Required by the law (“iure”)

The term “*iure*” in canon 124.1 must be understood to include not only canon law but also civil law. This is true only for cases which the law of the Church defers to civil law. In such cases, the formalities and requisites prescribed by civil law must be observed unless they are contrary to divine law or canon law has stipulated otherwise.¹⁰⁹

effect, they must be approved by the Roman Pontiff as well as by the Fathers of the Council, confirmed by the Roman Pontiff and promulgated by his direction (canon 455.2).

¹⁰⁹Cf. CIC/83 canons 22, 1290.

3.3.6 - Presumption of validity of a juridical act

In the second paragraph of canon 124, the revised Code strives to safeguard juridical certainty and stability in the Church order by establishing a practical norm which states that when an act has been properly placed with respect to its external elements, one must presume its validity. The canon reads:

A juridical act which, as far as its external elements are concerned is properly performed, is presumed to be valid.¹¹⁰

Canon 1584.1 of the revised Code, following canon 1825.1 of the 1917 Code defines a presumption as "a probable conjecture about something that is uncertain."¹¹¹ In canon law a presumption is distinguished between a presumption of law (*praesumptio iuris*) and a presumption of a person (*praesumptio hominis*).¹¹²

Canon 1584.1 defines a presumption of law as one which is established by the law itself. Canon 1825.2 of the 1917 Code mentioned two types of presumption of law.

¹¹⁰"*Actus iuridicus quoad sua elementa externa rite positus praesumitur validus*" (CIC/83 canon 124.2). As indicated in Chapter Two, the earlier texts of this canon included an exclusionary clause which stated that the presumption could not be invoked for establishing the existence of essential elements of the act or for determining the competence. See *Communicationes*, 6 (1974), p. 102; 1977 *Schema*, canon 112.2. These exclusions were deleted from the text in the 1980 and 1982 *Schemata*, and in the final text. J.A. Doyle suggests that this was done in order to avoid confusion. This can be seen with regard to canon 1101.1 of the revised Code which says that in the act of giving matrimonial consent, the internal consent of the mind, which is an essential element, is presumed to conform to the words or signs used in the celebration of a marriage. Doyle also says that since the distinction between capacity and competence, which existed in the earlier texts of canon 124.1, was dropped, the presumption should apply to the general right to place the act which is expressed in the canon by the word "*habilis*". See DOYLE, *Civil Incorporations of Ecclesiastical Institutions*, p. 90.

¹¹¹"[*Praesumptio*] est rei incertae probabilis coniectura" (CIC/83 canon 1584).

¹¹²See C.J. SCICLUNA, "The Use of 'Lists of Presumptions of Fact' in Marriage Nullity Cases," in *Forum* 7 (1996) 1, p. 45. This distinction was present in canon 1825.1 of the 1917 Code and has been retained in canon 1584 of the 1983 Code.

First, the "*iuris simpliciter*" known also as "*iuris tantum*."¹¹³ This was a presumption established by the law itself; and it could be overturned by both direct and indirect contrary proof.¹¹⁴ Second, the "*praesumptio iuris et de iure*" which was a presumption established by the law and on which the law itself was based.¹¹⁵ This presumption was considered to have full probatory value to the extent that only indirect proof to the contrary was admitted.¹¹⁶ The 1983 Code does not explicitly distinguish between the two types of presumption of law, thus reflecting the tendency to simplify the legislation.¹¹⁷

¹¹³Cf. AUGUSTINE, *A Commentary*, vol. VII, p. 269; SCICLUNA, "The Use of 'Lists of Presumptions of Fact' in Marriage Nullity Cases," p. 46.

¹¹⁴See CIC/17 canon 1826. Examples of *praesumptio iuris tantum* included the following: Canon 1015.2 of the 1917 Code presumed the consummation of marriage if the parties lived together after the celebration of marriage. In fact, the canon had an added clause which stated this: "until the contrary is proved." This canon is repeated verbatim in the 1983 Code in canon 1061.2. Canon 1086 of the former Code presumed that the internal consent of the will corresponds to the words or signs used in the celebration of marriage. This canon is almost identical to canon 1101 of the revised Code.

¹¹⁵See AUGUSTINE, *A Commentary*, vol. VII, p. 269. An example of *praesumptio iuris et de iure* was the one established in canon 1904.1 of the 1917 Code which stated that a *res iudicata* creates a true and just *praesumptio iuris et de iure*. This presumption is expressed verbatim in canon 1642.1 of the revised Code.

¹¹⁶See CIC/17 canon 1826; SCICLUNA "The Use of 'Lists of Presumptions of Fact' in Marriage Nullity Cases," p. 46.

¹¹⁷See U. NAVARRETE, "*Commentario al decreto della Signatura Apostolica sulle cosiddette 'Presumptions of Fact'*," in *Periodica*, 85 (1996), p. 540.

Presumption of a person (*praesumptio hominis*) is a presumption which is not established by the law but which is formulated by the judge in reference to the subject matter and various circumstances of the case.¹¹⁸

The presumption mentioned in canon 124.2 is *of the law only (iuris tantum)*.¹¹⁹ Because of this it can be overturned by contrary proof,¹²⁰ direct or indirect.¹²¹ But until the contrary is proved, the placed act must be considered valid.¹²² For example, a marriage between two Roman Catholics celebrated according to the required canonical form¹²³ is presumed valid.¹²⁴ Proofs to the contrary, however, can be presented

¹¹⁸See SCICLUNA, "The Use of 'Lists of Presumptions of Fact' in Marriage Nullity Cases," p. 46; AUGUSTINE, *A Commentary*, vol. VII, p. 269.

¹¹⁹See *Communicationes*, 6(1974), p. 102; THÉRIAULT, "De actibus iuridicis," p. 32; CHIAPPETTA, *Il Codice di diritto canonico*, p. 159; URRUTIA, *De normis generalibus*, p. 84; *Código de derecho canónico*, p. 100; *Code of Canon Law Annotated*, p. 141.

¹²⁰See *Communicationes*, 6 (1974), p. 102; CCCB, *Draft Document: Response of the Canadian Conference of Catholic Bishops to the Pontifical Commission for the Revision of the Code of Canon Law, on Schema canonum Libri I, De normis generalibus*, Ottawa, June 27, 1978, p. 8; THÉRIAULT, "The Nullity of Some Processual Acts," p. 32; *Letter & Spirit*, p. 72.

¹²¹See CHIAPPETTA, *Il Codice di diritto canonico*, p. 159. Cf. CIC/17 canon 1826. According to D. Whalen, in canon law "direct proof" concerns positive facts. It means that a given fact is proved either by its actual production, or by admissible declaration (*confessio*) or by the testimony of a person who has perceived it. It is also called "testimonial evidence." On the other hand, "indirect proof" means that there are other facts proved by direct evidence from which the existence of a given fact is logically inferred. It is also known as "circumstantial evidence." See D. WHALEN, *The Value of Testimonial Evidence in Matrimonial Procedure: An Historical Synopsis and Commentary*, Washington, DC, The Catholic University of America, 1935, pp. 60-63. C.J. Scicluna, however, in pointing out the kind of proof needed to overturn a "*praesumptio iuris et de iure*", describes "indirect proof" as proof against the fact upon which the presumption is based. See SCICLUNA, "The Use of 'Lists of Presumptions of Fact' in Marriage Nullity Cases," p. 46.

¹²²See *CLSA Commentary*, p. 33.

¹²³See CIC/83 canon 1108.1.

to the competent ecclesiastical court for a declaration of its nullity. And only when the evidence overturns the presumption of the law, can the competent court make such a declaration.¹²⁵

In fact, when the validity of an act is challenged, the obligation befalls the one challenging to prove its invalidity, that is, to prove, for instance, that the person who placed the act lacked capacity to act or that the essential elements of the act were lacking, or that the formalities or requisites imposed by the law for validity were not observed.¹²⁶

3.4 - APPLICATION OF CANON 124

It seems that since the promulgation of the 1983 Code, no case has been reported on which a decision was based on canon 124 as a whole. Consequently, in order to see how the elements of this canon have been applied to concrete cases, we will briefly examine some of the most recent cases judged at the Roman Rota and the Apostolic Signatura.

¹²⁴See CIC/83 canon 1060.

¹²⁵A judge can overturn the presumption of law mentioned in canon 124.2 only when he has moral certainty about the matter in question. See CIC/83 canon 1608. Moral certainty necessary and sufficient for rendering a judgement excludes in the mind of a judge all "well-founded or reasonable doubt" and yet allows for the "absolute possibility of the contrary." See PIUS XII, Allocution to the Roman Rota, October 1, 1942, in *CLD*, 3, p. 609.

¹²⁶See THÉRIAULT, "De actibus iuridicis," p. 825.

3.4.1- Capacity

For both the existence and validity of a juridical act, natural capacity, which is the ability to elicit a human act,¹²⁷ is absolutely necessary. Because the human act results from the interaction between the intellect and the will, jurisprudence has maintained that if there is something seriously wrong in the operation of the intellect or *will* or in their mutual interaction, the placed act will be invalid.¹²⁸ If, for instance, freedom of choice is substantially vitiated, then there is simply no human act. And where there is no human act there is no juridical act.

In this regard, a marriage case from Singapore judged on 11 November 1988 by the Rota may serve as an example. The case was judged *coram* Faltin. In this case, the respondent was pregnant at the time of celebrating marriage, and the marriage was rushed because of it.

From the beginning, the married life was not a happy one. Not long after the wedding, the man fell in love with another woman and three years later separated from his wife. After some time, the man petitioned the tribunal of Singapore to declare his marriage null on the basis of "defect of true consent on the part of both spouses."

¹²⁷See THÉRIAULT, "The Nullity of Some Processual Acts," p. 31; ID. "De actibus iuridicis," p. 823; D'OSTILIO, *Prontuario del Codice di diritto canonico*, p. 101.

¹²⁸Jurisprudence with regard to natural capacity necessary for a juridical act is abundant. This is particularly true in regard to the natural capacity necessary to elicit matrimonial consent. Cf. decisions *coram* HUOT, April 3, 1986, in *ME*, 112 (1987), pp. 435-448; *coram* DI FELICE, October 19, 1985, in *ibid.*, 111 (1986), pp. 152-162; ID., November 8, 1986, in *ibid.*, 112 (1987), pp. 283-290.

The first instance tribunal gave an affirmative decision to this case. According to this court, at the time of contracting marriage in the Church both parties effectively lacked necessary discretion of judgment; in contracting marriage they were influenced by grave fear which they could not resist unless they chose marriage.

The case was appealed by the defender of the bond to the Rota, and the Rota decided to submit it to an ordinary hearing. The conclusion of the Rota in regard to the capacity of both spouses to consent was that both parties, but the woman in particular, were incapable of eliciting a true human act because of lack of internal freedom and critical faculty, provoked by the constitutional immaturity in the woman and by a panic state on the part of both spouses which caused in them an "acting out" in their rational and decisional capacity.¹²⁹

In fact, the sentence on the case by Faltin contains several important juridical principles which indicate the necessity of natural capacity for one to place the juridical act of matrimonial consent. Faltin notes that one of the fundamental rights of all Christian faithful in the Church is the right to immunity from any kind of coercion in choosing a state of life.¹³⁰ He states that from this legal provision, two important principles emerge: 1) since all Christian faithful have the right to be free from any kind

¹²⁹The psychological profile of the respondent, compiled by the expert, revealed that she had a fragile and immature personality described as "radical psychopathic immaturity," which was easily prone to "acting out". It further revealed that when she came to know about the pregnancy, there was a chain reaction which was linked not so much to the pregnancy as such but to her personality disposition. The result of this was "emotional confusion" and panic. See decision, *coram* FALTIN, November 11, 1988, in *SRR Dec*, 80 (1988), p. 634.

¹³⁰See CIC/83 canon 219.

of coercion, they should be free not only from external but also from internal coercion to pursue personal freedom, otherwise there cannot be true human act; and 2) since Christian faithful should be free from any coercion in choosing a state of life, they should be free also in choosing or not choosing the state of marriage with this determined person or with someone else.¹³¹

In the sentence, Faltin notes that internal freedom to choose marriage or one's marriage partner is one of the essential requisites of a valid matrimonial consent. Lack of a true human act in eliciting consent can happen not only in cases in which force and fear are induced by an external agent, but also when it is experienced from within, as can happen when a person marries in order to avoid harm to one's reputation or to that of one's family members. According to Faltin, recent jurisprudence maintains that the violation of personal freedom can also happen when, even in the absence of any compulsion from anyone in particular, a person marries according to well established mores and social customs, but only to avoid injuring the reputation of the family insofar as the injury to the reputation of one's relatives, directly offends that person's honour and dignity. In an act placed in such situations, the element of freedom necessary to place a human act would be lacking.¹³²

¹³¹See decision, *coram* FALTIN, November 11, 1988, in *SRR Dec*, 80 (1988), p. 625.

¹³²In the same sentence Faltin explicitly states that for one to contract marriage validly, simple use of reason is not sufficient. One must have discretion of judgement concerning the duties of marriage which are to be known, as well as fulfilled. At the same time discretion of judgment excludes coercion of any kind be it external or internal. An internal factor which can affect discretion of judgment is the psychological condition which renders a person placing the juridical act of marriage incapable of assuming the essential obligations of marriage either by taking away or diminishing the freedom necessary to make a free and deliberate decision. With

The necessity of the basic juridical capacity to place an act has also been acknowledged in jurisprudence. For example, as already indicated, in order for an aggregate of persons to place acts in the Church, it needs the juridical capacity to act as an aggregate and not as individuals. In this regard, a decree from the Apostolic Signatura issued *coram* Agustoni on 4 May 1996, may serve as an example. The decree was on a case which had come before the Apostolic Signatura concerning suppression of a parish and reduction of the parish church to profane but not sordid use.

By the decree of July 24, 1992, of the Bishop of the diocese concerned, the parish was suppressed and, by the decree of October 27, 1992, its church was reduced to profane but not sordid use. Notice about the suppression and reduction of the church to the aforementioned use was given to the faithful of the parish by way of letters of the Bishop which were read at Mass.

Some of the faithful of the parish formally petitioned the Bishop for the revocation of the decrees on 12 February, 1993. In the name of the Bishop, the Episcopal Vicar competent in the matter rejected the petition on 10 March, 1993 on account of the expiration of the peremptory time period.

regard to the cause for such a condition, Faltin states that this can easily happen especially in the case of those who had not spoken of marriage before pregnancy and the girl, because of her character and/or age manifests a condition of subjection to her overly strict father and fears him. Such a condition of subjection and fear can provoke serious anxiety neurosis, that is, "panic attack, fear and intense terror" not only in a girl who is still a minor, but even in a young and strong person, at least when she cannot easily face her father's anger. Faltin states that this situation impedes freedom of consent without which there cannot be a true human act. See *SRR Dec*, 80 (1988), pp. 626-627.

The same plaintiffs, acting as “representatives” of the faithful of the parish, then appealed against this rejection to the Congregation for the Clergy. On 29 August 1994, the same Congregation rejected the recourse due to the expiration of the peremptory time period.

The plaintiffs then requested the benefit of a new hearing. As a result of the new hearing, the Congregation for the Clergy, on 26 October 1994, confirmed its previous decision.

On 26 September 1994, while the petition for the new hearing was still pending, the plaintiffs made a recourse to the Apostolic Signatura. The Apostolic Signatura in its *Congresso* of 12 October 1995 rejected the recourse due at least to the fact that the challenge of the decisions of the Congregation for the Clergy of 29 August 1994 and of 26 October 1994 clearly lacked a foundation.

The plaintiffs then appealed against this decision to the college of the judges of the Apostolic Signatura. The college of the judges confirmed the decree of the *congresso* on two grounds: 1) the recourse lacked any foundation; and 2) it lacked a necessary requisite. The judges admitted that the plaintiffs acted legitimately before the Apostolic Signatura since they acted as individuals (although together). They noted, however, that before the Bishop of the diocese and before the Congregation of the Clergy, the plaintiffs signed in the name of a group of the faithful, in spite of the well known authentic interpretation issued by the Pontifical Commission for the Interpretation of Legislative Texts. According to the same college of judges, in this case, the recourse was made to the Congregation on the part of a group, and not on the part of individual members of

the faithful. Because of this a necessary prerequisite for recourse to the Apostolic Signatura was absent, since the plaintiffs did not previously place recourse to the Congregation as individual members of the faithful.¹³³

With regard to juridical capacity in the sense of competence, a sentence by Stankiewicz may be used as an example. The case involved a Catholic marriage which was celebrated in the Maronite rite on 23 March 1980 in Lebanon. After some time the married life began to experience difficulties due to serious arguments between the spouses. They, therefore, separated.

In order to regain his free status before the Church, the man petitioned the Maronite Ecclesiastical Tribunal of first instance on 17 January 1983 to declare his marriage null on several grounds. On 22 November 1986, the case received a negative decision on all grounds.

The petitioner appealed that decision to the Maronite Appeal Tribunal asking the court to consider the case on a new ground which he proposed or on one of the already proposed grounds which he mentioned. On 11 May 1987, the appeal tribunal pronounced an affirmative decision on the newly proposed ground.

Upon receiving a notification of the sentence on 18 May 1987, the respondent appealed to the Roman Rota on 22 May 1987, thus, within the time stipulated by the law. When the petitioner received notification of the sentence on 15 May 1987, he appealed

¹³³See decree, *coram* AGUSTONI, May 4, 1996, in *Forum*, 7 (1996) 2, pp. 347-357. For a similar case, see *coram* CASTILLO LARA, November 21, 1987, in *IE*, 1 (1989), pp. 197-203.

to the Beirut Appeal Tribunal for Maronites in the third grade jurisdiction, also within the time allowed by the law.

On 25 May 1987, the joinder of issues was done by the Beirut Appeal Tribunal for Maronites in the absence of the respondent, and in it the tribunal of third instance declared its competence to prosecute this case. On 27 May 1987, the respondent interposed recourse before the Roman Rota against the declaration of competence by the Tribunal for the Maronites to judge the case in the third instance.

On 19 June 1987, the respondent again interposed recourse to the Roman Rota demanding that a decree be issued declaring the cessation of the Maronite Tribunal in the case for incompetence and a referral of the case to the Rota.

The Appeal Tribunal of the Maronites, however, did not withdraw from its involvement in the process in the third grade of jurisdiction. In fact, on 28 July 1987, it pronounced an affirmative decision on the newly proposed ground.

On 31 July 1987, however, the respondent proposed before the Rota a complaint of nullity against the above sentence; she also requested, if and to the extent necessary, *restitutio in integrum*.

The Rotal *turnus* admitted the complaint of nullity together with the principal cause for the ordinary course of law. On 20 November 1990, it pronounced an interlocutory sentence by which it decided that the sentence of 28 July 1987 by the Beirut appeal Tribunal for Maronites of the third degree was irremediably null, and deferred to a future time the decision on the merit of the case.

The *ex officio* advocate of the petitioner appealed this decision to the higher *turnus*. This higher *turnus* was to judge whether the interlocutory sentence of the Rota dated 20 November 1990 was to be confirmed or overturned in the case. The higher *turnus* confirmed the interlocutory sentence of 20 November 1990, that is, it stated that there was proof of irremediable nullity of the third instance sentence of the Beirut Appeal Tribunal for Maronites pronounced on 28 July 1987. The sentence states that the competence of the Beirut Tribunal for Maronites of the third grade was suspended vis-à-vis the judging of the case at the moment of the respondent's appeal lodged before the Roman Rota. Therefore, the Beirut Appeal Tribunal proceeded further invalidly and pronounced an irremediably null sentence on 28 July 1987 since it lacked the competence to perform this act. The judges lacked competence to decide this case because it was absolutely withdrawn from their jurisdiction by the appeal lodged by the respondent to the Rota.¹³⁴

In the sentence on this case, Stankiewicz provides several juridical principles on the competence of a judge in a situation involving a case of this particular nature. Incompetence of a judge has been distinguished between absolute and relative incompetence. Absolute and relative incompetence have different effects on a placed act.

Absolute incompetence means a judge has absolutely no power to judge in a particular matter (*certa materia*) or in a determined cause (*determinata causa*) with due

¹³⁴See decision *coram* STANKIEWICZ, February 27, 1992, in *DE*, 103 (1992), pp. 177-185, English translation in A. MENDONÇA, *Special Issues*, (Unpublished Class Notes), Ottawa, Faculty of Canon Law, Saint Paul University, 1997, pp. 44-53, here at p. 52.

consideration given to the provisions of the law.¹³⁵ Those cases in which a judge is absolutely incompetent are entirely excluded from his or her jurisdiction, and as a consequence, the judge can never validly judge them. Should a judge presume to claim jurisdiction over those cases and judge them, the decisions made by such a judge are irremediably null and cannot be sanated.¹³⁶ An example of absolute incompetence is one which results from the limits of functional competence. An inferior judge, for instance, cannot accept a case to be judged at his or her tribunal when an appeal is lodged, within the peremptory time period set for appeal, by the other party before a competent tribunal of the higher grade, such as a tribunal of the Apostolic See.¹³⁷

Relative incompetence occurs when, for example, a judge who is not competent to judge a particular case, accepts and judges it but no one has challenged his or her competence or when the competence is challenged, he or she, even if erroneously, has confirmed his or her own competence, which has not been further impugned through a plaint of nullity. Relative incompetence does not render a judge absolutely without power to judge.¹³⁸ Consequently, a judge with relative incompetence pronounces a

¹³⁵See MENDONÇA, *Special Issues*, p. 46.

¹³⁶See *ibid.*, p. 46.

¹³⁷An appeal of this kind suspends the competence of the inferior judge vis-à-vis the case. The case is deferred exclusively to the higher tribunal with absolute exclusion of the inferior judge. See *ibid.*, pp. 47-48.

¹³⁸See *ibid.*, p. 48.

valid sentence. This is so because of the prorogation of the relative competence through the tacit consent of the parties and the admission of the sentence by the law.¹³⁹

3.4.2 - Essential elements

Importance of essential elements of an act for its existence and validity has been confirmed in canonical jurisprudence. In matrimonial jurisprudence, for instance, jurisprudence on the necessity of essential elements of consent and on the necessity of essential elements of the object of consent is available. And whenever consent is absent at the time marriage is contracted, that is, at the time of the wedding, the marriage is invalid (non-existent).¹⁴⁰

3.4.3 - Formalities

Jurisprudence on the formalities required by the law for validity is also available in canon law.¹⁴¹ For instance, for validity of a marriage between two Roman Catholics, it must be contracted in the presence of the local ordinary or parish priest or of the priest or deacon delegated by either of them, who, in the presence of two witnesses, assists in accordance with the norms of law.¹⁴² If this form is lacking or

¹³⁹See *ibid.*

¹⁴⁰Cf. decisions, *coram* DI FELICE, May 14, 1984, in *ME*, 109 (1984), pp. 426-431; *coram* DI FELICE, October 19, 1985, in *ibid.*, 111 (1986), pp. 153-162.

¹⁴¹For examples of these, see A. MENDONÇA, *Rotal Anthology, An Annotated Index of Rotal Decisions from 1971-1988*, Washington, DC, Canon Law Society of America, 1992, pp. 376-384.

¹⁴²See CIC/83 canon 1108.1.

is defective the marriage will be invalid. A marriage case judged at the Rota *coram* Palestro on 19 February 1986, may serve as an example.

The marriage in question took place in Saratov (Russia) on 17 January, 1937. During the War between Germany and the Soviet Union the petitioner (man) defected to Germany. From that time on he remained as a German citizen, and never went back to Russia. In order to marry again, he applied for a declaration of nullity of his previous marriage on the basis of lack of two witnesses at the celebration of the marriage. The Rota ascertained that the marriage had indeed taken place before a priest without witnesses. The case received an affirmative decision on account of defect of form.¹⁴³

3.4.4 - Requisites

In regard to requisites, jurisprudence has maintained that, for the validity of a juridical act, it is sufficient that only those requisites that the law has imposed for validity be present. This may be demonstrated with a decree issued by the Apostolic Signatura on 11 April 1987 *coram* Sabbatani.

The case in question concerned a religious who was dismissed for embezzling a large sum of money from the parents at his school. He appealed the decision on five grounds, one of them being that the provincial's counsellors had not signed the decree of dismissal. The Apostolic Signatura rejected the appeal of the accused religious. In its

¹⁴³See decision *coram* PALESTRO, February 19, 1986, in *ME*, 111 (1986), pp. 427-441.

decree it stated that what is required for dismissal is indeed the consent of the counsellors, but not their signatures.¹⁴⁴

CONCLUSION

It seems evident from the foregoing analysis that canon 124 of the revised Code contains several elements which are necessary for a proper understanding of a juridical act and its application.

Since the canon prescribes a norm for the validity of a juridical act, it concerns all juridical acts that can be placed within the canonical order. Every juridical act must meet the conditions prescribed by the canon in order to have juridical efficacy in canon law.

One of the elements the canon requires for the validity of a juridical act is that it be placed by a "person capable." In canon law, the person capable of placing a juridical act can be physical or juridical. Therefore, the juridical principles presented in canon 124 are applicable equally to the acts of a physical person as well as to those of a juridical person. In the latter case, the principles of canon 124 apply to their legitimate representatives, who must ensure that the principles are followed in placing juridical acts on behalf of the juridical person whom they represent. In fact, since juridical persons place juridical acts through physical persons, when examining their acts,

¹⁴⁴See decree *coram* SABATTANI, April 11, 1987, in *ME*, 113 (1988), pp. 175-180.

the requirements for the validity must be examined from both perspectives.¹⁴⁵ Thus, for instance, a juridical person may be the suitable person for a particular act, but the physical person who places the act may not be competent to do so.¹⁴⁶

The term "*habilis*" of canon 124 refers to four types of capacity, namely, the natural capacity, basic canonical capacity, specific capacity, and for public acts, also competence.

The elements which essentially constitute a juridical act may be considered from the subjective and objective points of view. From the subjective viewpoint, the agent of the act must have the natural capacity, that is, he or she must be able to elicit a human act. This capacity is rooted in the faculties of the intellect and the will. Through the dynamic interaction between these faculties, the agent of the act must reason, deliberate and freely place the act. If a person seriously lacks the capacity for this threefold function of the intellect and the will, he or she cannot place the act. Therefore, the use of reason and the discretion of judgement are of the essence of this natural capacity. This is a requirement of natural law.

Every human act has its own object. This object may be unitary or composed of several essential elements. An object must be real, possible and integral. The person placing the act must be capable of this object. Thus, without the existence of this object, the act itself is non-existent.

¹⁴⁵See DOYLE, *Civil Incorporation*, p. 106.

¹⁴⁶For example, while a parish, as a juridical person has the right to place a lawsuit against some other person, this cannot be done by the secretary of the parish since in all juridical matters only the parish priest is empowered to act on behalf of the parish. See CIC/83 canon 532.

Furthermore, the positive law imposes for validity of a juridical act certain formalities and requisites over and above the essential elements proper to the nature of the act, and because of this, they are not required for the existence of the act. These are extrinsic to the act, and therefore do not affect the formation of a human act. This distinction introduces the difference between an invalid act and a non-existent act. An act which lacks the elements which essentially constitute it is non-existent, while an act which lacks the formalities or requisites prescribed by law, is only invalid. This distinction is certainly of great practical importance.¹⁴⁷ An act placed in accord with the norms of law, as far as its external elements are concerned is presumed valid until the contrary is proved with moral certainty.

A human act, and consequently a juridical act, can be vitiated by several intrinsic and extrinsic factors. The following Chapter will focus on these factors.

¹⁴⁷This distinction, for instance, clearly indicates what may be subject to dispensation and sanation.

CHAPTER FOUR

IMPEDIMENTS TO JURIDICAL ACTS

One of the most important presuppositions underlying the concept of a juridical act is that ontologically it is a human act which has consequences in law. The elements which constitute a human act, therefore, are the very foundation of a juridical act as well. Thus, for example, it has been clearly admitted both in canonical doctrine and jurisprudence that the constitutive elements of a truly human act are discretion of judgement proportionate to its proper object and internal freedom sufficient to choose that object. Every juridical act presupposes these elements. A juridical act therefore is inconcievable in the absence of an integral human act, an act of the will, which is its efficient cause.

The integrity of a human act, and consequently that of a juridical act, may be violated by several factors either intrinsic or extrinsic to the subject. Just like the 1917 Code, the 1983 Code has identified some of these factors in canons 125 and 126, and these are: force, fear, deceit, error and ignorance.¹ As explained in Chapter Two, these canons essentially repeat the canons 103 and 104 of the 1917 Code. Because these factors concern the very foundation of a juridical act, we will very briefly examine the nature, division and their juridical effects. It is beyond the scope of this study to provide an indepth analysis of the developments that have taken place in doctrine and

¹For a concise but comprehensive treatment of these factors insofar as they are related to matrimonial consent, see M.F. POMPEDDA, *Studi di diritto matrimoniale canonico*, Monografie giuridiche 6, Ateneo Romano della Santa Croce, Milano, Giuffrè Editore, 1993, pp. 163-356.

jurisprudence on these factors since the promulgation of the revised Code, for each of them certainly deserves one or more major studies in order to fully fathom all the concepts and principles related to their proper understanding and appropriate application. Therefore, the object of our study in this Chapter is limited to a brief analysis of each of these factors as understood in current doctrine and jurisprudence.

4.1 - FORCE

In canon 125.1, the 1983 Code recognizes force as a factor that can affect juridical acts. It is important, therefore, to examine how force impacts on juridical acts.

4.1.1 - The nature of force

“Force”, in the ordinary sense, signifies either strength or might as it exists in itself or as it is actively exerted upon another.² In juridical terms it has been described as “physical coercion,”³ or as any material force exerted from an external source on a person against his or her will and superior to that person’s power of resistance,⁴ or as an attack by some overpowering agency greater than can be resisted.⁵ In fact, according to J.V. Brown, the term “force” when referring to a juridical act means an overpowering

²See McCOY, *Force and Fear*, pp. 75-76; BROWN, *The Invalidating Effects of Force*, p. 55.

³*Letter & Spirit*, p. 73.

⁴See ABBO and HANNAN, *The Sacred Canons*, p. 53.

⁵See BROWN, *The Invalidating Effects of Force*, pp. 55-56. For the evolution of the notion of “force” in canon law, see *ibid.*, pp. 55-58; McCOY, *Force and Fear*, pp. 3-52.

physical impetus used to compel another to perform an act which is totally opposed to his or her will.⁶

4.1.2 - The effects of force on juridical acts

According to canon 125.1, any act would be non-existent if performed as a result of force imposed from outside on a person who was incapable of resisting it.⁷ Three things may be noted about the force which negatively affects juridical acts. First, the force concerned must originate from an extrinsic source, that is, it must proceed from outside its victim.⁸ For this reason, it does not include internal impulses which may give rise to fear in a person. Even though these impulses may minimize the voluntariness of an act or totally destroy it, they certainly cannot be considered under the juridical notion of force. However, internal impulses may be considered under other types of factors affecting a person placing an act.⁹

Second, the force must be such that its victim is incapable of resisting it. Thus, the force which can seriously affect juridical acts is that which controls the decision-making capacity of its victim. It must be noted, however, that the internal will of a human person cannot be forced to will something by applying to it extrinsic force.¹⁰

⁶See BROWN, *The Invalidating Effects of Force*, p. 58.

⁷See CIC/83 canon 125.1; *Letter & Spirit*, p. 73.

⁸See *Letter & Spirit*, p. 73. Cf. BOUSCAREN, *Canon Law*, p. 88.

⁹Cf. BROWN, *The Invalidating Effects of Force*, p. 58.

¹⁰See *Code of Canon Law Annotated*, p. 142; BROWN, *The Invalidating Effects of Force*, p. 56.

Consequently, the only type of force envisioned under its juridical notion is corporal compulsion directed to the obtaining of a purely external act.¹¹

Third, the juridical concept of force supposes that the resultant external act is placed without any volitional concurrence on the part of the victim of the force. Since the force which affects juridical acts dominates its victim, the person placing the act is not master of his or her own act, but rather acts as a mere instrument of an exterior agent.¹² In other words, the victim of the force is compelled to do something against his or her will.¹³

The principal effect of force on a juridical act is the deprivation of personal freedom to choose the act that is extracted by it.¹⁴ The victim affected by it lacks free will (*voluntarium*), and therefore produces no human act.¹⁵ Because a juridical act is first and foremost a human act, the law regards an act placed as a result of such force as non-existent, that is, it is considered not to have been placed.¹⁶ For example,

¹¹Cf. BROWN, *The Invalidating Effects of Force*, p. 56.

¹²See MAGNIN, *Pastors and People*, pp. 37-38.

¹³In fact, the force which affects juridical acts presupposes that the will does not remain merely negatively indifferent, but that a positive act of dissent is placed. For if the will is only passive in placing the act, internally at least, it may be considered as being in agreement by showing itself willing to suffer the violent performance of the act. See BROWN, *The Invalidating Effects of Force*, p. 57.

¹⁴See AUGUSTINE, *A Commentary*, p. 29.

¹⁵See *CLSA Commentary*, p. 90; BOUSCAREN, *Canon Law*, p. 88; AUGUSTINE, *A Commentary*, p. 30.

¹⁶See CIC/83 canon 125.1; *Letter & Spirit*, p. 73; *Code of Canon Law Annotated*, p. 142; *CLSA Commentary*, p. 90.

matrimonial consent obtained through physical force is non-existent because the person is deprived of any freedom of choice.¹⁷ This is a positive reaffirmation of the natural law principle which requires inner freedom to elicit a responsible human act.

The force will have no effect on a juridical act unless it affects the person placing the act, that is, the very subject of the act and not other people.¹⁸ Moreover, it is the common opinion among canonists that if a person could have resisted the force but chose not to, the act placed under such circumstances would be valid. The reason for this is that the person's freedom is not effectively destroyed by the force.¹⁹

4.2 - FEAR

The revised Code also considers fear as one of the factors which negatively affects juridical acts. This has been clearly stated in canon 125.2. Because of the prevalence of cases in jurisprudence involving fear, it is important to determine its nature, division, and effects on juridical acts.

4.2.1 - The nature of fear

The term "fear" generally refers to an irascible passion which arises in the sensitive appetency because of the perception of some evil²⁰ represented in the

¹⁷See CIC/83 canon 1103.

¹⁸See AUGUSTINE, *A Commentary*, p. 30.

¹⁹See *Letter & Spirit*, p. 73.

²⁰See McCOY, *Force and Fear*, p. 77.

imagination as imminent.²¹ It is experienced predominantly in the sensitive faculties of the person and is more properly called *passio timoris*.²² It directly affects the activity of the sensitive organisms especially the memory and the imagination, and only indirectly, through these, the intellect and the use of reason.²³ When it is vehement, and particularly when it is aroused suddenly, fear may either diminish or even totally destroy the mental capacity of its victim.²⁴

From a juridical point of view, fear is considered as a moral force contradistinguished from physical force.²⁵ It is defined as a confusion or disturbance of the mind caused by an impending present or future danger.²⁶ This juridical notion considers fear only as an irascible affection of the will, as distinguished from purely sensible concept of fear. It is a kind of fear which is considered to be prevalent in the rational faculties.²⁷

²¹See BROWN, *The Invalidating Effects of Force*, p. 61.

²²*Ibid.*

²³*Ibid.*

²⁴See McCOY, *Force and Fear*, p. 77; BROWN, *The Invalidating Effects of Force*, p. 61.

²⁵Cf. *Code of Canon Law Annotated*, p. 142; McCOY, *Force and Fear*, p. 78; BROWN, *The Invalidating Effects of Force*, p. 61.

²⁶See BOUSCAREN, *Canon Law*, p. 88; AYRINHAC, *General Legislation*, p. 220; *Letter & Spirit*, p. 73. For the evolution of the juridical notion of "fear", see McCOY, *Force and Fear*, pp. 3-52.

²⁷See BROWN, *The Invalidating Effects of Force*, pp. 61-62.

The internal fear caused by an external agent in order to extract a decision from its victim is considered as moral force "in the sense that it morally compels the will of its victim to place an act which ordinarily he would be unwilling to place."²⁸ Some even consider it as a form of conditional force (*coactio conditionalis*).²⁹ Thus, Brown writes:

It may likewise be referred to as a form of conditioned violence, *coactio conditionalis*, under these same circumstance, since the adverse agent, by threatening the evil which gives rise to fear, places the victim under a conditioned necessity either of complying with his demand on the one hand, or of bearing the threatened harm from which he recoils on the other.³⁰

Fear of this kind ordinarily does not destroy the human character of the act placed under its influence, but only reduces its spontaneity.³¹

The juridical definition of fear presented above, that is, disturbance effected in the mind by apprehended danger, is of great concern for canonists "since it is under this guise that fear proximately affects the will."³²

Although the juridical definition of fear considers only the disturbance effected in the mental faculties through moral force, without explicit reference to the sensitive appetite, it does not mean that juridically fear is something totally abstracted from its

²⁸Ibid., p. 62.

²⁹See McCOY, *Force and Fear*, p. 78; BROWN, *The Invalidating Effects of Force*, p. 62.

³⁰BROWN, *The Invalidating Effects of Force*, p. 62.

³¹Ibid.

³²Ibid.

physiological concomitants. Because of the composite of the human person, any disturbance of the mental faculties will also result in the disturbance of sensory faculties depending upon the physiological and psychological condition of the victim of fear and the nature of the threatened evil.³³ Therefore, juridically understood, fear directly affects the intellectual faculties and indirectly the sensory faculties of the human person who is subjected to it.³⁴ In this sense, fear is an emotional state which affects the whole human person.³⁵

4.2.2 - The division of fear

Fear may be considered under different aspects, namely, in relation to its origin, to the manner in which it is inflicted, to the degree of its intensity, and to the act itself.³⁶

By reason of its origin, fear is distinguished between "fear from within" (*metus ab intrinseco*) and "fear from without" (*metus ab extrinseco*). Canonists give various explanations to this distinction.³⁷

³³Ibid., p. 63.

³⁴See MICHIELS, *Principia generalia*, p. 505.

³⁵See BROWN, *The Invalidating Effects of Force*, p. 63.

³⁶Ibid., pp. 64 and 66.

³⁷For examples of different explanations of this distinction, see BROWN, *The Invalidating Effects of Force*, p. 64; MCCOY, *Force and Fear*, pp. 79-80.

By the manner in which it is inflicted, fear may be divided into that which is *justly* and that which is *unjustly* caused.³⁸ Fear is considered justly inflicted when there is a legitimate reason for doing so in accordance with the norms of law.³⁹ It is unjustly inflicted when the threatened evil is in some way unjust.⁴⁰ This evil can be unjust considered in itself. As indicated in Chapter One, the fear resulting from the threat of such an evil is called unjust *quoad substantiam*.⁴¹ McCoy explains this type of unjust fear in this way:

Such is the case when the threatened evil is an injury to the right of the agent or some one closely connected with him, when such an injury is in no wise deserved, or when it is inflicted without a just cause.⁴²

Fear may be unjust also by reason of the concrete circumstances in which it is inflicted. As explained in Chapter One, this kind of fear is called unjust *quoad modum*.⁴³ McCoy again explains this kind of unjust fear in this manner: "Such can be the case even though the evil which is threatened or inflicted is in itself just."⁴⁴ A person, for instance, has the right to threaten an offender with legal proceedings unless proper

³⁸See supra, p. 47; BROWN, *The Invalidating Effects of Force*, p. 64.

³⁹See BROWN, *The Invalidating Effects of Force*, p. 64. Cf. CIC/83 canons 1319.1, 221.1, 1400; *CLSA Commentary*, p. 90.

⁴⁰See McCOY, *Force and Fear*, p. 80.

⁴¹See supra, p. 47; McCOY, *Force and Fear*, p. 80; BROWN, *The Invalidating Effects of Force*, p. 65. Cf. *Code of Canon Law Annotated*, p. 142.

⁴²McCOY, *Force and Fear*, p. 80.

⁴³See supra, p. 47; Cf. *Code of Canon Law Annotated*, p. 142.

⁴⁴McCOY, *Force and Fear*, p. 80.

reparation is made but without violence against his or her person or property. If the threats of court proceedings were to be accompanied with violence, the fear caused thereby in the offender would be substantially just since it has for its object legitimate reparation,⁴⁵ but it would be unjust because of the manner.⁴⁶

Another instance of fear that is unjust *quoad modum* concerns the purpose for which it is employed. This can occur when the person inflicting the fear has the right to do so for a particular purpose, but in reality exercises this right to achieve a purpose different from that for which the use of fear can be justified.⁴⁷

By reason of the degree of its intensity, fear is divided into *grave* and *light*. "It is grave when the threatening evil is both imminent and serious."⁴⁸ Grave fear may be either absolutely or relatively so.

Fear is absolutely grave when the evil threatened is "absolutely grave" in itself so that it would effectively influence any person of ordinary strength.⁴⁹ This type of evil is presumed to cause grave fear always. Death, exile, mutilation, etc., are examples of such evil.⁵⁰ According to A.E. McCoy, this presumption stands also if the evil is

⁴⁵See *CLSA Commentary*, p. 90.

⁴⁶See AYARINHAC, *General Legislation*, p. 221.

⁴⁷See BROWN, *The Invalidating Effects of Force*, p. 65.

⁴⁸AYRINHAC, *General Legislation*, p. 220.

⁴⁹*Ibid.*; BROWN, *The Invalidating Effects of Force*, p. 66.

⁵⁰See AYRINHAC, *General Legislation*, p. 220; AUGUSTINE, *A Commentary*, pp. 30-31; MCCOY, *Force and Fear*, pp. 82-83.

threatened to persons who are closely connected with the victim of the fear, such as parents, spouse, children, etc.⁵¹ Fear is relatively grave when a certain individual cannot resist it because of subjective capacity or because of the circumstances surrounding the infliction of the fear.⁵² Thus, as McCoy writes,

[...], authors commonly teach that the same standard or measure cannot always be used in judging the degree of the fear, but the various circumstances must be considered in each instance.⁵³

Two things are required to constitute grave fear. First, the threatened evil must exist objectively and not merely in the imagination.⁵⁴ Second, the evil which is feared must be grave in itself or objectively, at least in respect to the one suffering the fear.⁵⁵

In relation to the act, fear may be distinguished between *antecedent* and *concomitant* fear. In the former case, the fear is the cause of the act, that is, the act is performed because of the fear. In the latter case, the act is performed merely with fear.⁵⁶

⁵¹See McCOY, *Force and Fear*, p. 83.

⁵²An example of fear that may be relatively grave is reverential fear. See *supra*, p. 46; ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 150. Reverential fear is the fear of offending or saddening one's parents, guardians, or significant others who play an important role in one's life. See A. MENDONÇA, "The Importance of Considering Cultural Contexts in Adjudicating Marriage Nullity Cases With Special Reference to South East Asian Countries," in *Philippiniana sacra*, 31 (1996), p. 257.

⁵³McCOY, *Force and Fear*, p. 82.

⁵⁴See *supra*, p. 46; AUGUSTINE, *A Commentary*, vol. II, pp. 30-31.

⁵⁵See McCOY, *Force and Fear*, p. 83.

⁵⁶See BROWN, *The Invalidating Effects of Force*, p. 66.

4.2.3 - The effects of fear on juridical acts

As indicated above, sometimes fear can be so vehement that it paralyzes its victim's faculties and destroys his or her deliberation and freedom of choice. This kind of fear, however, cannot be considered as fear in the juridical sense. It rather amounts to a temporary incapacity. In fact, an act placed under the influence of such kind of fear is non-existent by the natural law.⁵⁷ Fear in the juridical sense, that is, fear considered as a moral force, essentially supposes both judgement and freedom of choice.⁵⁸

Thus, apart from those cases where the mental faculties are completely incapacitated by fear, the internal freedom necessary to place an act is not *destroyed* through fear.⁵⁹ The person placing the act chooses that which to him or her appears to be the lesser of the two evils, although he or she would not choose to submit to it except to avoid the greater evil that is feared.⁶⁰

Fear, however, *diminishes* the voluntariness of an act. This is evident in the influence it has on the intellect and the will. For when a person is threatened by an impending irresistible evil, the mind vacillates between various options it must consider.⁶¹ In such a situation, the mind presents to the will what appears to be the lesser evil in order to avoid the greater evil. In turn, the will, though naturally inclined

⁵⁷See BOUSACREN, *Canon Law*, p. 88; AYRINHAC, *General Legislation*, p. 222.

⁵⁸See BROWN, *The Invalidating Effects of Force*, p. 66.

⁵⁹Cf. *Code of Canon Law Annotated*, p. 142.

⁶⁰See McCOY, *Force and Fear*, p. 78.

⁶¹BROWN, *The Invalidating Effects of Force*, p. 67.

to desire good and avoid evil, presently chooses the lesser evil presented to it by the intellect, merely as a means of escaping a greater evil.⁶² Thus, the voluntariness of an act placed under the influence of fear is greatly modified. It assumes a mixed form, partly voluntary, partly involuntary. Eliciting an act under any form of coercion is repugnant to the will. Presented in the circumstances of fear, however, the act of the will becomes voluntary since it is the more preferable of the two evils. However, although this act is freely chosen, it is not spontaneously desired.⁶³ In canonical language such an act is called voluntary *simpliciter* but involuntary *secundum quid*, that is, involuntary under a certain aspect.⁶⁴

As discussed in Chapter Two, with regard to the effect of "fear" on juridical acts, the legislator has established a general principle in canon 125.2. According to this canon, acts placed because of grave and unjust fear are considered valid, unless the law clearly decrees otherwise. However, such acts may be rescinded by a court judgement, either at the instance of the injured party or that party's successors in law, or *ex officio*.⁶⁵ The effect of fear established in the canon is merely of positive law.⁶⁶

From the general principle established by the legislator in canon 125.2, it seems clear that in order to launch an action against the validity or for the rescission of an act

⁶²See McCOY, *Force and Fear*, p. 77; BROWN, *The Invalidating Effects of Force*, p. 67.

⁶³Cf. McCOY, *Force and Fear*, p. 78.

⁶⁴See BROWN, *The Invalidating Effects of Force*, pp. 67-68.

⁶⁵See CIC/83 canon 125.2.

⁶⁶Cf. BOUSCAREN, *Canon Law*, p. 88; AYRINHAC, *General Legislation*, p. 222.

performed because of fear, certain juridical requirements must be present: 1) the fear must be extrinsically caused by another free human agent;⁶⁷ 2) the fear must be grave, absolutely or relatively;⁶⁸ and 3) the fear must be unjustly inflicted, whether by reason of its substance or by reason of the manner it is inflicted.⁶⁹ Having said this, it is to be noted that for some juridical acts, like marriage, the law does not demand that, in addition to being grave, the fear must also be *unjustly* inflicted.⁷⁰

Canon 125.2 in a sense is a summary of the canonical doctrine concerning these three requirements, which must be fulfilled before fear can cause the effects specified by the law. Even though the canon explicitly mentions only the elements of gravity and injustice vis-à-vis the fear, this canon seems to demand, at least implicitly, that for fear, to produce a juridical effect, it must arise from a free extrinsic cause. For, it is impossible for the element of injustice to be present unless through the intervention of another human agent.⁷¹ In fact, it is a common opinion of canonists that for fear to

⁶⁷Cf. MENDONÇA, *Rotal Anthology*, Case no. 84-085, p. 336.

⁶⁸See *Code of Canon Law Annotated*, p. 142.

⁶⁹*Ibid.*; *CLSA Commentary*, p. 90. In fact, in addition to the three legal requirements mentioned above, jurisprudence seems to maintain a principle that for one to invoke the juridical remedies established by the law for acts placed out of fear, the fear must be such that its victim places the act in order to free himself or herself from that fear. Cf. MENDONÇA, *Rotal Anthology*, Cases nos. 71-040, p. 307; 71-044, *ibid.*; 71-123, p. 308; 72-196, p. 310; 72-256, p. 311; 73-044, p. 313; 73-055, pp. 313-314; 74-062, p. 316; 74-190, pp. 318-319; 75-098, p. 320; 75-133, p. 320; 78-035, p. 325; 84-069, p. 335; 84-085, p. 336.

⁷⁰See CIC/83 canon 1103.

⁷¹Cf. BROWN, *The Invalidating Effects of Force*, p. 70.

affect a juridical act it must be caused by a free agent existing outside the one who suffers the fear.⁷²

As canon 125.2 indicates, by way of exception to the general principle that acts performed under grave and unjust fear are merely rescindable, the law may provide that certain acts are invalid when placed under grave and unjust fear. Such acts are found in various places in the Code. For example, a resignation from office which is made as a result of grave fear *unjustly* inflicted is invalid by virtue of the law itself; and, a vow made as a result of grave and unjust fear is by virtue of the law itself invalid.⁷³

4.3 - DECEIT

The revised Code has also established deceit as an element which may affect a juridical act. We must therefore consider this legal element in itself, that is, its nature, divisions, and effects on juridical acts.

4.3.1 - The nature of deceit

In its etymological sense, the word "deceit" (*dolus*) refers to any ruse or artifice used to deceive another.⁷⁴ In this general sense, the term could be used to signify either something good or evil. Because of this, it was generally customary in early times to qualify the term with an adjective in order to establish whether it was used to signify

⁷²See MENDONÇA, *Rotal Anthology*, Case no. 84-085, p. 336; AUGUSTINE, *A Commentary*, p. 31; MAGNIN, *Pastors and People*, p. 39; AYRINHAC, *General Legislation*, p. 221; ABBO and HANNAN, *The Sacred Canons*, p. 151.

⁷³See CIC/83 canons 188, 1191.3.

⁷⁴See BROWN, *The Invalidating Force of Fear*, p. 104.

something good or something evil. As a result of this, the Roman sources made a distinction between legitimate deceit (*dolus bonus*) and illegitimate deceit (*dolus malus*). The former was a trick employed for a good purpose, such as deceiving a thief or one's enemy in war.⁷⁵ The latter was a deceitful action employed to obtain some unfair advantage of another.⁷⁶ It was understood as any kind of cunning, trickery or contrivance practised in order to cheat, trick or deceive another.⁷⁷ Through common usage, illegitimate deceit (*dolus malus*) became so identified with the term "deceit" to the effect that it became the exclusive sense in which it was used.⁷⁸

The fundamental canonical notion of deceit corresponds to the ancient Roman notion of illegitimate deceit (*dolus malus*). Thus, in the juridical sense, deceit may be defined as any craft, trick, or malicious contrivance intentionally employed to circumvent, dupe, or deceive another.⁷⁹ In fact, when deceit is especially referred to juridical acts, it may be defined as a deliberately and fraudulently induced deception of

⁷⁵See K.W. VANN, "Canon 1098 of the Revised Code of Canon Law: Key Points and Questions in Its Historical Development and Interpretation," in *CLSA Proceedings*, 49 (1987), p. 122; BROWN, *The Invalidating Effects of Force*, p. 104.

⁷⁶See BROWN, *The Invalidating Effects of Force*, p. 104.

⁷⁷See GAUTHIER, *Roman Law*, p. 79; VANN, "Canon 1098 of the Revised Code of Canon Law," p. 116.

⁷⁸See BROWN, *The Invalidating Effects of Force*, p. 104.

⁷⁹*Ibid.*, pp. 105-106. For similar juridical definitions of "deceit" as given by Abbo and Hannan, Ramstein, Bouscaren, and Magnin, see *supra*, p. 50. Some canonists continue to refer to the distinction between *dolus malus* and *dolus bonus*. It seems, however, that they do so for the sole purpose of demonstrating that the notion of *dolus malus*, essentially contains an element of injustice. See, for example, VANN, "Canon 1098 of the Revised Code of Canon Law," p. 122.

another person by which that person is led into placing a determined juridical act.⁸⁰

Thus, deceit⁸¹ stems from someone outside its victim.⁸²

The juridical notion of deceit presented above, shows that it is made up of four constituent elements: it consists of the use of 1) *fraudulent means*, 2) *deliberately employed*, 3) *to create an error in the mind of another*, 4) *whereby he or she is enticed to perform a certain juridical act*. We will briefly discuss these four elements in order to obtain a more clear presentation of the concept of deceit in canon law.

The first element concerns the means used. These must be such that by their very nature, they are inclined to lead into error the one upon whom they are wrought.⁸³ Thus, means employed must be fraudulent by their nature.

The actual means used to deceive another may be either positive or negative in character. The means used are positive when a person leads another into error by some action,⁸⁴ as when one while pretending to be giving good counsel, deliberately misrepresents those facts which, as he knows or suspects, will influence the consent of

⁸⁰See *CLSA Commentary*, p. 90; *Letter & Spirit*, p. 73; decision *coram* STANKIEWICZ, January 27, 1994, in *Periodica*, 84 (1994), p. 525; MICHIELS, *Principia generalia*, p. 535.

⁸¹The term "deceit" is used in canon law with two distinct meanings. It is used either in the sense of deliberate manipulation of another by telling lies or hiding the truth so that the other is persuaded to perform a juridical act or in the sense of ill-will by which a person commits an offence. See *Letter & Spirit*, p. 73. The definitions of "deceit" given above refer to "deceit" in the former sense.

⁸²See *Code of Canon Law Annotated*, p. 142.

⁸³See BROWN, *The Invalidating Effects of Force*, p. 106.

⁸⁴See MENDONÇA, "The Importance of Considering Cultural Contexts," p. 251.

another. The means employed are negative when one simulates or keeps silent concerning certain facts in order to sustain an error which is already known to exist in the mind of another⁸⁵ so that he or she can use the error to induce the person concerned into placing a determined juridical act.⁸⁶

The second element in the juridical notion of deceit is that the means used must be *deliberately* employed. The deceiver must *deliberately* (intentionally) use the fraudulent means for the precise purpose of deceiving another so as to obtain some unfair advantage of him or her.⁸⁷ Deceit violates the rights of a person only when the action from which it proceeds is illicit.⁸⁸ Thus, in deceit, juridically understood, there is an outside malicious intervention. In fact, it is precisely this ill-will which changes a material act of deception into a formal act of deceit.⁸⁹ The specific malice proper to deceit is the very will to deceive.⁹⁰

The bad will of the one who employs fraudulent means in order to deceive, however, does not necessarily have to extend to the harmful effects which may result

⁸⁵See ROBERTI, *De processibus*, vol. I, p. 691; B. OJETTI, *Commentarium in Codicem iuris canonici: liber secundus, de personis (can. 145-214)*, Romae, Apud aedes Universitatis Gregoriana, 1931 (=OJETTI, *Commentarium*, vol. II), p. 154; BROWN, *The Invalidating Effects of Force*, p. 107.

⁸⁶See MENDONÇA, "The Importance of Considering Cultural Contexts," p. 251.

⁸⁷See MICHIELS, *Principia generalia*, p. 536; BROWN, *The Invalidating Effects of Force*, p. 109.

⁸⁸See BROWN, *The Invalidating Effects of Force*, p. 109.

⁸⁹*Ibid.*

⁹⁰*Ibid.*

from an act placed as a result of deceit. What is essential and sufficient is that the agent who employs fraudulent means merely intends to lead another into error and thereby dispose the person to place an act.⁹¹

Since malice is an essential requisite for the true notion of juridical deceit, it follows that whenever a person deceives another person without any malicious intention, his or her action cannot be considered as a deceit in the juridical sense.⁹² This would be the case, for example, if one were to lead another into error when advising him or her for the reason that one is in error oneself.⁹³

In addition to this, it is to be noted that the objective and intentional use of fraudulent means, even though illicit in itself, does not constitute an act of deceit in the juridical sense unless it succeeds in inducing into error the person against whom it is directed.⁹⁴ Thus, two aspects are essential to the juridical notion of deceit when it is considered as an element which affects a juridical act: 1) there must be an intentional use of fraudulent means, 2) the use of these means must succeed in inducing into error the person against whom it is directed. According to J.V. Brown, because of this, authors generally present these two aspects of the juridical notion of deceit as correlatives since

⁹¹See OJETTI, *Commentarium*, vol. II, p. 154; BROWN, *The Invalidating Effects of Force*, p. 109.

⁹²See BROWN, *The Invalidating Effects of Force*, pp. 106, 109.

⁹³*Ibid.*, pp. 106, 109.

⁹⁴*Ibid.*, pp. 109-110. Cf. *Letter & Spirit*, pp. 614-615.

in reality they stand as cause to effect.⁹⁵ Fraudulent actions of a person, therefore, cannot be considered as an act of juridical deceit when error is not in fact created in the person against whom such actions are done.⁹⁶

4.3.2 - The division of deceit

In canon law, deceit may be divided by reason of the error it induces or by reason of the role which that error plays in influencing consent to a juridical act.⁹⁷ By reason of the error it induces, deceit is divided into substantial deceit and accidental deceit. Deceit is considered substantial when it successfully misrepresents an object or the nature of an act in such a way that its essential elements are concealed. Thus, deceit is substantial when it creates a false notion concerning the very essence of an act or its object.⁹⁸ Deceit is accidental when it obscures only some of the accidental qualities of the object or the act while the knowledge of the substantial or essential elements is not affected by it.⁹⁹

In relation to the influence deceit exerts upon the will in placing a juridical act, it is distinguished between *antecedent* and *concomitant*. Deceit is antecedent when what is obscured or misrepresented by it is the cause because of which a juridical act is placed. It is the case in which if the truth had been known concerning it, the act

⁹⁵Ibid., p. 106.

⁹⁶Ibid., p. 110.

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹Ibid.

certainly would not have been placed.¹⁰⁰ In this regard it must be noted that one may have a case of antecedent deceit in which what is obscured is not substantial either by nature or by stipulation. Deceit is concomitant when it exerts no significant influence on the determination of the will, in the sense that the one acting under its influence is so disposed that, even if the deceit had not been present, he or she would still have desired the object or placed the act.¹⁰¹

4.3.3 - The effects of deceit on juridical acts

As indicated above, deceit exerts its vitiating effect on a person proximately through the medium of error which it creates in his or her mind. Because of this, the immediate, principal, proper and indispensable effect of deceit is the error which it creates in the mind.¹⁰² and which serves either as the basis or the inspiring cause for placing an act.¹⁰³

In fact, the manner in which the element of deceit succeeds in influencing its victim is evident from the very nature of the intimate relationship that is present between the intellect and the will. For, the will is wholly dependent on the judgment of the intellect to assist and guide it in its action.¹⁰⁴ The acts of the will are considered

¹⁰⁰Ibid.

¹⁰¹Ibid., p. 111.

¹⁰²See MENDONÇA, "The Importance of Considering Cultural Contexts," p. 251.

¹⁰³See BROWN, *The Invalidating Effects of Force*, p. 112.

¹⁰⁴Ibid.

voluntary only when they are a product of a free choice which is guided by true intellectual knowledge of the object towards which it tends.¹⁰⁵

Deceit hampers the will in its choice in an indirect manner, by vitiating or corrupting the intellectual foundation on which this choice depends.¹⁰⁶ Where there is deceit, the object proposed to the will is different from what ought to be willed or it is presented to the will other than it is in reality.¹⁰⁷ Thus, deceit tends to interfere directly with the intellectual judgment and indirectly, through it, with the consent of the will.¹⁰⁸

Since it is proximately through the medium of error which it creates that deceit influences its victim, its juridical effects may first be viewed from the standpoint of the nature of the error it creates. In this regard, since error arising from substantial deceit is in turn, always substantial, the act placed under such error is governed by the norm of canon 126 which deals with the question of error. Thus, when deceit causes substantial error, the placed act is *per se* invalid.¹⁰⁹ For, when deceit successfully misrepresents an object or an act as to cause substantial error, the will of the person placing the act is rendered incapable of presenting a true act of consent towards the

¹⁰⁵Ibid.

¹⁰⁶See E.F. REGATILLO, *Institutiones iuris canonici*, vol. I, Santander, Sal Terrae, 1941, p. 136.

¹⁰⁷See BROWN, *The Invalidating Effects of Force*, p. 113.

¹⁰⁸See *Code of Canon Law Annotated*, p. 142; VANN, "Canon 1098 of the Revised Code of Canon Law," p. 125; BROWN, *The Invalidating Effects of Force*, p. 113.

¹⁰⁹See CIC/83 canon 126.

object to which it is externally directed.¹¹⁰ The will accepts an object only in the way that the object is presented to it by the intellect. Consequently, when the intellect presents to the will an object which is substantially different from that which is in objective reality, the will then internally consents to something totally different from that to which its external consent is apparently directed.¹¹¹

The principle presented above also holds true in an act placed through error, induced by deceit, which does not in itself affect the substance of a juridical act, but which, by express stipulation of the person concerned is made a condition *sine qua non* to consent.¹¹² In this case, error is substantial to the act not by its nature, but by the express will of the one who places the condition *sine qua non*.¹¹³ An act placed as a result of deceit which succeeds in misrepresenting an object or an act is non-existent by natural law.¹¹⁴

In canon law, when the law considers the element of deceit and prescribes its effects, it presupposes that a substantial error is not involved. For when a substantial error is involved, whether such an error is or is not the result of fraudulent action, the placed act is non-existent.¹¹⁵ Thus, in establishing the juridical effects of an act

¹¹⁰See BROWN, *The Invalidating Effects of Force*, p. 114.

¹¹¹*Ibid.*

¹¹²See OJETTI, *Commentarium*, vol. II, p. 177.

¹¹³See BOUSCAREN, *Canon Law*, p. 90.

¹¹⁴See BROWN, *The Invalidating Effects of Force*, p. 114.

¹¹⁵See CIC/83 canon 126; BROWN, *The Invalidating Effects of Force*, p. 114.

placed through deceit, the law is mainly concerned with a case in which the deceit produces merely accidental error, but which to a certain extent, exerts determining influence upon the consent of the will.¹¹⁶

The revised Code has established the general principle on the effects of deceit on juridical acts in canon 125.2. Juridical acts performed under the influence of deceit are considered valid unless the law provides otherwise. In fact, there are several canons in the Code which expressly declare certain juridical acts induced by deceit as invalid. These include electoral vote, renunciation of an ecclesiastical office, admission to novitiate, religious profession, marriage, etc.¹¹⁷ Acts placed under deceit, which are considered valid, can be rescinded by a court judgement either at the petition of the injured party or that party's successors in law, or even *ex officio*.¹¹⁸

For one to invoke any of the legal benefits granted by the law to acts placed under the influence of deceit, certain legal requirements must be present. These are essentially threefold: 1) the ruse from which the act results must be a true deceit; 2) the error which results from the deceit must exert a determining influence on one's consent to act; 3) and, the presence of both the deceit and the error which it creates must be demonstrated with at least moral certainty.¹¹⁹ We will briefly discuss these three elements here.

¹¹⁶See BROWN, *The Invalidating Effects of Force*, p. 115.

¹¹⁷See CIC/83 canons 172.1, 1°, 188, 643.1, 4°, 656, 4°, 1098.

¹¹⁸See CIC/83 canon 125.2.

¹¹⁹Cf. BROWN, *The Invalidating Effects of Force*, p. 116.

The first legal requirement presented above is that the deceit under which one places an act must constitute a true formal act of deceit, that is, all the constituent elements of deceit discussed above in the analysis of this concept must be present.¹²⁰ Because of this, it is not sufficient that the person placing the act does so because he or she has been led into error through simple fault or through negligence of another. The placed juridical act must represent the effect of fraudulent maneuvers intentionally put to work in order to deceive.¹²¹

The second legal requirement necessary for one to invoke a benefit granted by the law is that the act must be shown to be the result of the deceit. In other words, it must be shown that the act is the result of an antecedent deceit,¹²² since it is this kind of deceit which is considered to have a determining influence on the placing of an act.¹²³

Finally, to justify the rescission of an act on account of deceit, not only must true deceit be present with a determining influence upon the act, but the presence itself must be proved.¹²⁴ It is particularly difficult to prove the presence of deceit because in deceit one is dealing with an element which is based on the internal *intention* of one

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²See AUGUSTINE, *A Commentary*, p. 32; *CLSA Commentary*, p. 90; *Letter & Spirit*, p. 615.

¹²³*Cf.* BROWN, *The Invalidating Effects of Force*, pp. 116, 119.

¹²⁴*Ibid.*

person, and on the internal *effect* which the deceit has on its victim.¹²⁵ Deceit, however, by its very nature presupposes that the deceiver acts through ill will.¹²⁶ One, therefore, cannot presume its presence, which means it must be proved. "The reason for this is evident, since no one is to be presumed evil unless he is proved to be so."¹²⁷

Apart from the case in which the deceiver confesses his or her guilt or in which there is a production of a document, it is impossible to prove the presence of deceit through direct proof.¹²⁸ However, through a careful analysis of the antecedent and concomitant circumstances surrounding an individual case, one may arrive at a judgement with moral certainty on whether or not the act placed under those circumstances was in fact the result of deceit. In other words, one must, for the most part, depend on conjectures and presumptions drawn from the facts of the case in order to come to a conclusion concerning the truth in the matter.¹²⁹

Thus, in order for a juridical act placed as a result of deceit to be considered invalid or liable to rescission, one must conclusively demonstrate either by direct or indirect proof that the act was in fact the result of error which was fundamentally created by the intentional maneuvers of another. If this cannot be demonstrated, then the placed

¹²⁵Ibid.

¹²⁶Ibid.

¹²⁷Ibid.

¹²⁸Ibid.

¹²⁹See MICHIELS, *Principia generalia*, p. 541; REGATILLO, *Institutiones*, vol. I, p. 137.

act must be considered not only valid, but also not liable to rescission.¹³⁰ Thus, the invalidity or rescindability of an act does not come from the mere presence of deceit, but rather from the fact that this deceit has caused error in its victim.

4.4 - ERROR

Error is also listed among the various factors that may vitiate a juridical act. It is important for our study, therefore, to establish its nature, division, and effects on juridical acts.

4.4.1 - The nature of error

Error occurs in the intellect.¹³¹ In general, it may be considered as a false judgment about something,¹³² or a false apprehension of a thing.¹³³ Error is different from ignorance. Where there is ignorance, due knowledge is lacking,¹³⁴ but in the case of error, there is knowledge present but a wrong judgement has been given

¹³⁰Cf. BROWN, *The Invalidating Effects of Force*, p. 123.

¹³¹See J.H. PROVOST, "Error as a Ground in Marriage Nullity Cases," in *CLSA Proceedings*, 57 (1995), p. 310.

¹³²See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; BOUSCAREN, *Canon Law*, p. 93; MENDONÇA, "The Importance of Considering Cultural Contexts," p. 232.

¹³³See H.T. RIMLINGER, *Error Invalidating Matrimonial Consent: An Historical Synopsis and Commentary*, Canon Law Studies no. 82, Washington, DC, The Catholic University of America, 1932, p. 28; AYRINHAC, *General Legislation*, p. 223; PROVOST, "Error as a Ground in Marriage Nullity Cases," p. 308; *Letter & Spirit*, 73.

¹³⁴See AUGUSTINE, *a Commentary*, p. 33; *Letter & Spirit*, p. 73.

by the intellect.¹³⁵ Thus, people “who are in error know something, and know that they know something; but what they know is not correct, objectively speaking.”¹³⁶

A juridical act is a human act. As already indicated, in the psychological formation of a human act, the intellect and the will are strictly bound to and interdependent on each other. In fact, the intellect works on the will, allowing the individual to know the good and to desire it in such a way that there is never really an act of the will which does not depend on the intellect. In the placing of a juridical act, therefore, if the intellect has a false apprehension of a thing or an erroneous judgment, the will may be affected.

4.4.2 - The division of error

In canon law, the following distinctions are made with regard to error: error *of law* and error *of fact*; *induced* and *non-induced* error; *antecedent* and *concomitant* error; and *substantial* and *accidental* error.

Error is *of law* when it concerns the existence, the meaning or the extent of the law. It is *of fact* when it concerns a fact, or an external object and its circumstances.¹³⁷

Induced error occurs when someone outside a person placing an act leads that person into error either intentionally (*dolus*) or unintentionally. *Non-induced* error occurs

¹³⁵See RIMLINGER, *Error Invalidating Matrimonial Consent*, p. 28.

¹³⁶PROVOST, “Error as a Ground in Marriage Nullity Cases,” p. 308.

¹³⁷See AYRINHAC, *General Legislation*, p. 223; BOUSCAREN, *Canon Law*, p. 89.

when a person is in error because of his or her own way of seeing things, without any outside help.¹³⁸

Error is *antecedent* when it is the cause of the juridical act so that the juridical act is placed on account of error. Thus, antecedent error is present when, if the subject were to know the error, he or she would not have placed the act. Error is *concomitant* when it is not the cause of the act so that even if the agent of the act were aware of the error at the time of placing the act, the act would still have been placed.¹³⁹

Substantial error is that error which affects what constitutes the essential elements of the act or of its object.¹⁴⁰ An example of this kind of error would be if one marrying were in error about what marriage is,¹⁴¹ or if one, in a sale, bought brass for gold, or if one, in a marriage, married Anna instead of Mary.¹⁴² *Accidental* error

¹³⁸Cf. PROVOST, "Error as a Ground in Marriage Nullity Cases," pp. 308-309; decisions, *coram* DORAN, November 9, 1989, translated by A. MUSCAT, in *Forum*, 3 (1992) 1, pp. 114-134, here at p. 118; *coram* COLAGIOVANNI, November 22, 1983, in *SRR Dec*, 75 (1983), pp. 653-672, English translation of no. 14 found in S.C. CARDI, "The *error personae vel qualitatis personae* in Rotal Jurisprudence (1983-1990)," footnote 20, in *Forum*, 3 (1992) 1, pp. 80-81.

¹³⁹See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152. See also RIMLINGER, *Error Invalidating Matrimonial Consent*, p. 33.

¹⁴⁰Cf. ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; BOUSCAREN, *Canon Law*, p. 93.

¹⁴¹See *CLSA Commentary*, p. 90; PROVOST, "Error as a Ground in Marriage Nullity Cases," p. 312.

¹⁴²See AUGUSTINE, *A Commentary*, vol. II, p. 33. The marriage of Jacob and Lia is a very good example of substantial error. According to the scriptural narrative, Jacob had requested in marriage and had been promised his cousin Rachel but at the time of the marriage, his father-in-law substituted for Rachel, Lia, who was his first born daughter. Jacob, who did not suspect deceit, gave his consent to Lia whom he believed to be Rachel. Thus the marriage was non-existent. See Genesis 29:16-28; RIMLINGER, *Error Invalidating Matrimonial Consent*, p. 31. In fact, canon 1097 of the revised Code explicitly states that error about a person renders a

is in fact the opposite of substantial error.¹⁴³ Consequently, error is accidental when it does not affect what pertains to the essential elements of the act or of its object.¹⁴⁴ Thus, error is substantial or accidental not in reference to the error itself but rather in reference to the elements of the act and of its object.

Error, however, which in itself is considered accidental can become substantial. This occurs when error affects a quality or circumstance that is *per se* accidental but which is considered by the agent as a condition *sine qua non*.¹⁴⁵ An example of substantial error by reason of a condition *sine qua non* would be the case where a quality inherent in a man by which alone he is known to a woman, and on account of which alone she wants to marry him, for instance, that he is no more than five years older than her;¹⁴⁶ or if a pastor of a parish bought certain liturgical furnishings precisely because he thought or believed that they were designed or constructed by a certain artist when in fact the furnishings do not possess this quality.¹⁴⁷

marriage invalid.

¹⁴³See BOUSCAREN, *Canon Law*, p. 93.

¹⁴⁴Cf. ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152; BOUSCAREN, *Canon Law*, p. 93; *Code of Canon Law annotated*, p. 142.

¹⁴⁵See ABBO and HANNAN, *The Sacred Canons*, vol. I, p. 152. For a recent in-depth study of this issue, see R. SERRES LÓPEZ DE GUERÉNU, "*Error recidens in condicionem sine qua non*" (*Can. 126*): *estudio histórico-jurídico*, JCD diss., Roma, Editrice Pontificia Università Gregoriana, 1997, 230p.

¹⁴⁶Cf. PROVOST, "Error as a Ground in Marriage Nullity Cases," p. 322.

¹⁴⁷See *CLSA Commentary*, p. 90. It is to be noted that "error" when considered in reference to specific juridical acts may be further divided into different types. In marriage, for example, in addition to the above distinctions, other distinctions are made of error with regard to its influence on the validity of matrimonial consent. For a summarized explanation of these, see

4.4.3 - The effects of error on juridical acts

The 1983 Code has determined the effects of error on juridical acts in canon 126. According to the canon, error may result in the invalidity of a juridical act only in two sets of circumstances: 1) if the false apprehension or the false judgment concerned what constitutes the substance of the act itself, for example, the pronouncing of perpetual religious vows thinking or believing them to be only temporary;¹⁴⁸ 2) if the error concerned something which really amounts to a condition *sine qua non*, that is to say, if the act would not have been placed except for the error, for instance, marrying a person who is sterile believing him or her to be fertile.¹⁴⁹

Thus, substantial error, that is, error about what constitutes the substance of an act, or amounts to a condition *sine qua non* always results in the non-existence of the act. This juridical result of substantial error is based on the fact that a false object was presented to which the intention was not directed.¹⁵⁰ Where there is substantial error, the will is directed towards another object which is essentially different from the one presented to it.¹⁵¹ Thus, in substantial error, the will acts so to speak in the dark.

PROVOST, "Error as a Ground in Marriage Nullity Cases," pp. 309-310.

¹⁴⁸See *Letter & Spirit*, p. 73.

¹⁴⁹*Ibid.*, p. 73. In fact, canon 1097.2 of the 1983 Code states that error about a quality of a person renders a marriage invalid when this quality is directly and principally intended, that is, when the quality is intended before the person. See WOESTMAN, *Papal Allocutions to the Roman Rota*, p. 226; PROVOST, "Error as a Ground in Marriage Nullity Cases," p. 307.

¹⁵⁰See AUGUSTINE, *A Commentary*, vol. II, p. 33.

¹⁵¹Cf. RIMLINGER, *Error Invalidating Matrimonial Consent*, pp. 33-34.

It attaches itself to a mere nothing, to a circumstance or quality which does not exist.¹⁵² The deficiency, therefore, lies not in the subjective act of consent but rather in the lack of the object of consent.

Apart from the circumstance in which the act is placed as a result of substantial error as explained above, the same canon 126 establishes that any juridical act performed as a result of error is valid unless the law provides differently. Juridical acts for which the law does indeed provide differently include marriage, etc.¹⁵³ The canon further states that even in those cases where acts performed as a result of error are accepted as valid, such acts can be rescinded in accordance with the law.¹⁵⁴

4.5 - IGNORANCE

As mentioned in Chapters One and Two, "ignorance" as a factor which could affect juridical acts was not mentioned in the 1917 Code.¹⁵⁵ However, Canon 126 of the revised Code specifically lists it among those factors which do affect juridical acts. We will analyse briefly its nature, division, and effects on juridical acts.

¹⁵²See MAGNIN, *Pastors and People*, p. 39.

¹⁵³See CIC/83 canon 1099.

¹⁵⁴As indicated in Chapters One and Two, the 1917 Code limited this juridical remedy to contracts.

¹⁵⁵See *supra*, p. 53.

4.5.1 - The nature of ignorance

Ignorance, just like error, occurs in the intellect.¹⁵⁶ In a broad sense, ignorance means any absence of knowledge.¹⁵⁷ In the strict sense, however, ignorance means the lack of something that ought to be possessed by the mind.¹⁵⁸ Ignorance, therefore, strictly speaking may be defined as lack of knowledge in a subject naturally capable of and constituted for knowledge.¹⁵⁹

Since the definition of ignorance in the strict sense speaks only of a subject capable of acquiring knowledge, insane persons and infants, in view of their intellectual inability may not be considered ignorant in that sense.¹⁶⁰ However, because of the necessity of knowledge in placing a juridical act, such subjects may also be considered as ignorant, since their inability to place validly an act is based on their lack of knowledge, that is, they too are in ignorance.¹⁶¹

¹⁵⁶See PROVOST, "Error as a Ground in Marriage Nullity Cases," p. 310.

¹⁵⁷See J.J. PAUL, art., "Ignorance [Legal Aspect]," in *New Catholic Encyclopedia*, vol. VII, New York, McGraw-Hill Book Co., 1967, p. 357.

¹⁵⁸*Ibid.*

¹⁵⁹*Ibid.*; V.M. SMITH, *Ignorance Affecting Matrimonial Consent*, Canon Law Studies no. 245, Washington, DC, The Catholic University of America, 1950, p. 43.

¹⁶⁰Cf. *CLSA Commentary*, p. 779; SMITH, *Ignorance*, p. 43.

¹⁶¹Cf. SMITH, *Ignorance*, p. 43

4.5.2 - The division of ignorance

In canon law, several divisions of ignorance are made. One of these concerns the influence of ignorance on the will. In this regard, ignorance may be divided into *antecedent* and *concomitant*. *Antecedent* ignorance is that which causes a person to place an act that he or she would not otherwise place. *Concomitant* ignorance is that under which the person would have still placed the act even if he or she were not ignorant.¹⁶²

Another division of ignorance is between *voluntary* and *involuntary* ignorance. Voluntary ignorance is that which can be ascribed to the free choice of the person whereas involuntary ignorance cannot be attributed to the person.¹⁶³

Ignorance is also divided between *vincible* and *invincible* ignorance. Ignorance is considered *vincible* if it is possible to acquire the corresponding knowledge and thereby remove the ignorance. An example of this would be the case in which a priest placing certain juridical acts which pertain to his ministry does not know whether he is within the limits of his diocese or not. It is considered *invincible* if it is not possible to acquire the corresponding knowledge.¹⁶⁴

Ignorance is further divided between *inculpable* and *culpable* ignorance. *Inculpable* ignorance is considered present when the moral obligation of acquiring the

¹⁶²See PAUL, "Ignorance [Legal Aspect]," p. 357.

¹⁶³*Ibid.*

¹⁶⁴*Ibid.*, p. 357; SMITH, *Ignorance*, p. 43.

necessary and possible knowledge is not adverted to. *Culpable* ignorance is morally imputable lack of a knowledge that is both necessary and possible.¹⁶⁵

Culpable ignorance is divided into *affected* and *crass* (*supine*) ignorance. Affected ignorance means a directly voluntary lack of obligatory knowledge. Such is the case when a person prefers to remain in ignorance so as to be free from a sense of obligation.¹⁶⁶ Ignorance is considered *crass* (*supine*) if it results from a total lack of moral diligence which is required to dispel the ignorance. An example of this would be the case in which a priest thinks that he does not need a faculty to hear confession validly.

The foregoing distinctions of ignorance are based on the state of the subject of ignorance. Further distinctions, however, are made in respect to the object, that is, the thing that one is ignorant about. In this regard, ignorance is divided into ignorance *of law* and that *of fact*. Ignorance *of law* occurs when the existence, meaning, or extent of the law is not known. In the ignorance *of fact* one does not know the concrete or physical conditions necessary for the application of the law.¹⁶⁷

¹⁶⁵See PAUL, "Ignorance [Legal Aspect]," p. 357.

¹⁶⁶*Ibid.*

¹⁶⁷*Ibid.*

4.5.3 - Effects of ignorance on juridical acts

A juridical act, as a human act, results from the close cooperation between the intellect and the will. In fact, the will depends on the intellect to provide it some knowledge of the nature of the juridical act. Without this, the will cannot make an informed decision for it lacks the necessary knowledge of the object of the act.¹⁶⁸

Thus, the existence of a juridical act demands some intellectual knowledge of it. The person placing the act must have the intellectual understanding of the object of the act, that is, he or she must understand the nature of the act.¹⁶⁹ Ignorance, therefore, which is an absence of knowledge, affects the intellect directly and the will indirectly.¹⁷⁰ In fact, it usually causes error in the person placing an act.¹⁷¹

Intellectual knowledge of the nature of an act, however, is not necessarily the result of intellectual maturity. For example, as V.M. Smith writes:

A person may have developed his intellectual faculty to such a degree of perfection that he has no difficulty in understanding the general nature of

¹⁶⁸This is certainly true since nothing can be willed if it is not previously known. See I. GRAMUNT, J. HERVADA, and L.A. WAUCK, *Canons and Commentaries on Marriage*, Collegeville, The Liturgical Press, 1987 (=GRAMUNT, *Canons and Commentaries*), pp. 40-41.

¹⁶⁹For instance, for matrimonial consent to exist, the minimum knowledge demanded by the law is that the contracting parties should not be ignorant of any of the following facts: 1) that marriage is a partnership, 2) that this partnership is permanent, 3) that it is heterosexual, that is, between a man and a woman, 4) that it is ordered to the procreation of children, and 5) that this is achieved through some form of sexual cooperation. See CIC/83 canon 1096.1; GRAMUNT, *Canons and Commentaries*, p. 41; *Letter & Spirit*, p. 613.

¹⁷⁰Cf. *Code of Canon Law Annotated*, p. 143.

¹⁷¹*Ibid.*; *CLSA Commentary*, p. 90.

a contract and the notions of right and obligation, but at the same time, he may know nothing of marriage as a contract.¹⁷²

Although previous knowledge of an act is required for its existence, it is wrong to suppose that ignorance of anything without limitation pertaining to an act could affect its existence. It is necessary but also sufficient for the existence of an act that the person placing it know what pertains to the essence of the act. Thus, only that ignorance can be said to affect the existence of a juridical act which is directly related to those elements which are essential to the act,¹⁷³ that is, essential elements of the act itself or those of its object.

In the revised Code, the effects of ignorance on juridical acts are established in canon 126. According to the canon, if ignorance concerned the essential elements of a juridical act, the juridical act is invalid. For example, ignorance of what marriage is or what rights are being transferred by a contract, invalidates the act.¹⁷⁴ If the ignorance concerned something which really amounts to a condition *sine qua non* even though what is not known is not an essential element of the act, the act seems to be invalid.¹⁷⁵

Apart from the two sets of circumstances presented above, the law accepts as valid any act performed as a result of ignorance, unless the law has provided otherwise.

¹⁷²SMITH, *Ignorance*, p. 75.

¹⁷³*Ibid.*, p. 77.

¹⁷⁴See *CLSA Commentary*, p. 90.

¹⁷⁵Canon 126 seems to imply this view.

Indeed, for some juridical acts, the law has done so. These include marriage, etc.¹⁷⁶ It is to be noted, however, that even where the acts placed as a result of ignorance are accepted by the law as valid, such acts can be rescinded in accordance with the norms of law.¹⁷⁷

4.6 - SIMULATION

A juridical act is a social human act legitimately placed and declared to which the law attributes a determined effect and recognizes that effect in so far as it is intended by the agent. The intention of the agent, therefore, must be in some way connected to the juridical effects determined by the law for the act. In other words, we cannot speak of a juridical act without reference to the intention of the agent for the juridical consequences determined by the law.¹⁷⁸

As indicated in Chapter One, canonists have observed that sometimes an agent of an act may deliberately exclude all or some of the juridical effects that the law attaches to the act. The agent replaces personal ends for the ends which the law has determined for the act. In other words, in some cases, there is no conformity between what has been declared by the agent and what is truly intended. As mentioned in the same

¹⁷⁶See CIC/83 canon 1096.

¹⁷⁷See CIC/83 canon 126.

¹⁷⁸Cf. P. KITCHEN, "Matrimonial Intention and Simulation," in *Studia canonica*, 28 (1994), p. 353.

Chapter, the common opinion of canonists has been that when this happens, the internal will always prevails.

The exclusion of the essential effects of a juridical act affects its very existence since their exclusion means that they are not intended by the agent, that is, they are absent in the will of the agent.

Simulation, therefore, is one of the factors which can negatively influence the existence of a juridical act. In fact, in the early stages of the revision of the Code, the *coetus* responsible for the revision of the law on juridical acts introduced a general canon on simulation and its text read as follows:

Simulation concerning some clause expressed in a contract, if made by either party, without the other knowing it, must be considered as if not made; if it has been made by either one, the other knowing it, or both parties, the act is null.¹⁷⁹

The common opinion among the members of the *coetus*, however, was that this canon, since it covers all juridical acts including contracts which might entail civil effects, would cause serious difficulties in civil law which would have its own rules regulating the effects of simulation on contracts. Consequently, the *coetus* abandoned the canon early in its formulation,¹⁸⁰ even though the basic principles related to simulation vis-à-vis matrimonial consent have been reiterated in the revised Code. In fact, the proposed canon on simulation did not appear in the 1974 report or in any of the

¹⁷⁹“Simulatio circa aliquam clausulam in contractu expressam, si facta fuerit ab alterutra parte, altera inscia, non facta censetur; si facta fuerit ab alterutra parte, altera conscia, aut ab utraque parte, contractus est nullus” (*Communicationes*, 21 [1989], p. 157).

¹⁸⁰*Ibid.*, pp. 174-175.

subsequent schemata. It should be noted, therefore, the effects of simulation on juridical acts defined within ecclesiastical legislation will continue to have the same juridical relevance as they had in the regime of the 1917 Code. The omission of a general canon in the Code on the subject matter was meant to obviate any conflict with the laws of different civil jurisdictions which may have their own norms governing juridical acts involving contracts.

CONCLUSION

The 1983 Code has established within the general norms five factors which might interfere with the valid placement of juridical acts: force, fear, deceit, error and ignorance. These factors are related to the process and the content involved in the formation of a human act. Force and fear directly affect the process of decision-making, while the other factors are directly centered on the object which forms the content of the process, ultimately affecting also the process itself. And these factors can affect any person placing a juridical act with effects specific to their nature and in accord with the prescriptions of law.

Force, is juridically understood as physical coercion. It consists of three things: 1) it originates from an extrinsic source, that is, from outside its victim; 2) it dominates the victim who cannot resist it; and 3) the juridical act is placed by the victim against his or her will.

In fact, the principal effect of force with regard to juridical acts is that it *deprives* the person placing the act of personal freedom to choose. And since a juridical act is a

human act, and a person's freedom to choose is a constitutive element of that act, a person victimised by force would lack this element of free will. As a result, there will be no human act. And in the absence of a truly human act there cannot be a juridical act. Thus, in law an act placed as a result of unresistable force is juridically *non-existent*.

Fear is a confusion or disturbance of the mind caused by an impending present or future danger. In a juridical sense, fear does not *destroy* the internal freedom necessary to place an act. The person placing the act chooses that which appears to him or her as the lesser evil in order to avoid the greater evil. Thus, an act placed because of fear is *per se* voluntary. Its voluntariness, however, could be substantially diminished because under the influence of fear a person is morally constrained to place an act that he or she would not otherwise have placed.

In canon law, fear that could affect a juridical act in general must be *grave* and *unjustly* inflicted. As a general principle, acts placed because of *grave* and *unjust* fear are considered valid unless the law has decreed otherwise. Such acts, however, may be rescinded in accordance with the norms of law.

Deceit is a deliberately induced deception of another person by which that person is led into placing a determined juridical act. The will of a person depends on the intellect to assist and guide it in its action. An act of the will is voluntary only when it is a product of a free choice which is based on true intellectual knowledge of the object towards which it tends. Where there is deceit, the object proposed by the intellect to the

will is different from that to be willed or is presented to it other than it is in reality.

Thus, deceit affects directly the intellect and indirectly the will.

The Code has likened the effects of deceit to those of fear. Accordingly, acts which are placed as a result of deceit will fall into one of the two categories: invalid or rescindable. Acts placed out of deceit are, in general, considered as valid but rescindable since they can give rise to an action for their rescission. In some cases, deceit may render an act invalid because of a prescription of the law.

Error is a false judgement about something or a false apprehension of a thing. Thus it occurs in the intellect of the person placing the act. The person who places an act as a result of error knows something, but what is known does not correspond to the reality.

Error may concern the nature of the act itself or the content of the act, that is, its object. Furthermore, one may be in error about an essential element of an act itself or that of an object. It is also possible that the error may concern elements which are not essential to the act or to the object.

In law, an act is non-existent when it is placed out of error about an essential element of an act itself or that of an object, or about an element which amounts to a condition *sine qua non*. When an act results from other types of error, the law generally considers it as valid but it can give rise to a rescissory action. In some cases, however, error may render an act invalid because of a prescription of the law.

Ignorance, that is, absence of knowledge in a subject naturally capable of and constituted for knowledge, occurs in the intellect. Thus, just like error, it affects directly

the intellect of the person placing the act and only indirectly his or her will. Ignorance affects the agent of the act in relation to the element of the act. A person placing a juridical act may be ignorant about an essential element of an act itself or that of an object. On the other hand, he or she may be ignorant about elements which do not constitute the essence of an act or that of an object. Furthermore, one may be ignorant about an element of the act which is accidental in itself but may amount to a condition *sine qua non*.

Acts which are placed out of ignorance concerning any essential elements of an act itself or of an object, or about an element which amounts to a condition *sine qua non* are non-existent. Acts which result from other types of ignorance are generally considered valid but rescindable, in the sense that they can give rise to an action for their rescission. In some cases, ignorance may render a juridical act invalid in virtue of a prescription of the law.

One important principle seems to emerge from this analysis of the factors which can affect a juridical act, that is, one cannot understand the nature and the process involved in the elicitation of a juridical act without first having a proper understanding of a human act. And a human act is incomprehensible without a profound knowledge of the nature and dynamics of human personality. It is a psychological fact that all aspects of the human personality, namely the affective, rational and volitive, interact in the production of every human act, and consequently, every juridical act. The legal principles discussed in this Chapter concerning the factors, which have the potential for violating a juridical act, only confirm that when there is serious disturbance in the

harmony between the affective, rational and volitive bases of the human personality, there is the potential for serious disturbance in the process underlying the formation of a human act. The natural consequence of such a disturbance is the violation of the integrity of the human act itself which is the foundation of every juridical act. Such a violation engenders a variety of juridic effects vis-à-vis the juridical acts specific to each factor. In canons 125 and 126, the legislator attempts to provide the general principles for determining these effects in light of the varied circumstances under which human acts, and consequently, juridical acts, may be placed.

GENERAL CONCLUSION

Canon 124 of the 1983 Code of Canon Law represents an important and significant contribution to canonical legislation. It is true that the principal elements of this canon are not new, because they were present dispersed in the 1917 Code of Canon Law, nevertheless their codification into a distinct norm, as well as its strategic position within the context of the general norms, highlights its juridical value. It is the first canon in title VII, "Juridic Acts" of book I, "General Norms", a position which affirms the unique role it is going to play in the interpretation and application of all canons concerned with juridical acts. In this sense, both the *context* and the *content* of the canon are poised to determine the impact it will have on the canonical norms which deal with juridical acts.

The principal aim of this study, therefore, was to submit canon 124 of the 1983 Code to a systematic analysis because of its unique relationship with the juridical acts placed by the members of the Church, whether in their personal or official capacity. This analysis has yielded some important conclusions vis-à-vis the nature of a juridical act and the principles governing its practical application.

First, the basic concept of a juridical act, a concept which was developed by the pandectists of the last century, and some of the important principles governing its placement, were found in the 1917 Code. But the Code did not adopt a systematic approach to the subject matter. As mentioned above, the concepts and principles were in fact dispersed in different books of the Code. Some of the issues related to juridical acts were studied by canonists during the period following the promulgation of the Code.

As can be expected in matters of this kind, the opinions of authors were not uniform on some of these issues. Nevertheless, there was agreement among experts concerning some of the important aspects of a juridical act: a juridical act is distinct from other acts; the will of the person placing a juridical act is a fundamental constitutive element of that act, etc. Among the issues on which the authors failed to agree were: the very definition of a juridical act; the essential elements of a juridical act; the source of the efficacy of a juridical act; and the real distinction between the concepts of non-existence and nullity of juridical acts.

Second, the decision of the Code Commission to introduce a new title within the General Norms with the leading canon on the content of a juridical act constitutes an innovation which impacts on the entire Code. The canons contained in the new title, "Juridical Acts" are applicable to all juridical acts envisaged either explicitly or implicitly in the Code.

Third, it is evident from our study that the revision of the law on juridical acts did not effect any substantial change intrinsic to the norms already contained in the 1917 Code and to the principles developed through doctrine and jurisprudence. The juridically most significant contribution of the revision process vis-à-vis the juridical acts is the formulation of one canon, that is, canon 124, to lead all other relevant principles.

Fourth, canon 124 is a particularization of the norm of canon 10. This canon lays down the general principle that only those laws are to be considered invalidating or incapacitating which expressly prescribe that an act is null or that a person is incapable. In applying this principle to all juridical acts, canon 124 implicitly declares the invalidity

of a juridical act which fails to meet the requirements stipulated in it. In other words, a juridical act placed by a person who is *inhabilis*, or a juridical act lacking its constitutive element(s), or a juridical act which is placed without the requisites or solemnities (formalities) prescribed by law for the validity of that particular act, is invalid. This norm is, therefore, applicable to every situation when a juridical act is placed. Every practitioner of canon law must be aware of these principles when evaluating the validity/invalidity of a juridical act.

Fifth, canon 124 §1 contains four distinct elements: namely the person capable (*persona habilis*) to place the act, the elements which essentially constitute the act (*quae actum ipsum essentialiter constituunt*), the requisites (*requisita*) and the solemnities (*solemnitates*) stipulated by law as necessary for placing a valid juridical act. Each of these elements has a distinct role to play with effects specific to its nature in the elicitation of a juridical act. According to the Code Commission, two types of nullity could result from the lack of these elements, namely one from the lack of the *elements constitutive* of a juridical act, and the other from the lack of solemnities and requisites required by law for the validity of a juridical act. In the former case, an act would be *non-existent*, while in the latter case the act would exist but would be *invalid*.

Sixth, canon 124 presumes that the subject of a juridical act could be either a physical or a juridical person, and this subject must be capable (*habilis*) of placing the act. Four distinct types of capacity (*habilitas*) are implied in canon law: *natural capacity*, *basic canonical capacity*, *specific capacity*, and for public acts, also *competence*. Lack of each of these capacities will have a distinct effect on a juridical act.

Therefore, any investigation into the validity/invalidity of a juridical act on the basis of *habilitas* must take into account this fundamental distinction.

Seventh, the nature of the essential constitutive elements of a juridical act is such that in case of lack of even one such element the act itself is considered non-existent. These elements are determined either by the very nature of the act in question or by divine or ecclesiastical law. Moreover, these elements can be considered either from a subjective or from an objective point of view. From a subjective viewpoint, certain elements are essential to form the human act which has effects in law, and these elements are sufficient knowledge of the object and internal freedom to choose that object (known in matrimonial jurisprudence as “discretion of judgement”). A person who lacks these elements cannot place a juridical act, and consequently, an act attempted by such a person would be considered non-existent. From an objective point of view, every juridical act has an object. The object of each act is constituted by certain elements without which the object itself would be non-existent. In the absence of the proper object, therefore, an attempted act is also to be considered non-existent. In evaluating the efficacy or validity/invalidity of a certain juridical act, one must carefully examine both these aspects of a juridical act.

Eighth, in the same canon the legislator provides further for juridical certainty and stability within the Church's legal system. In paragraph two, the canon presents the principle that whenever an act is placed properly with respect to its external elements, one must presume its validity, and this presumption is applicable to all juridical acts.

However, this presumption is a presumption of law and, hence, it yields to contrary proof.

Ninth, while placing a juridical act its agent may be affected by certain factors which may concern either the subjective or the objective aspects of the act. Such factors explicitly identified in canons 125-126 are force, fear, deceit, error and ignorance. For reasons explained in this study, “simulation” has not been included as one of the factors which could vitiate a juridical act. But the fact that “simulation” has been explicitly declared in canon 1101 as one of the causes of defective matrimonial consent, seems to confirm the view that simulation could have been included among the factors affecting a juridical act in particular circumstances. Force, fear and deceit always stem from causes extraneous to the subject of the act. Furthermore, deceit, error and ignorance affect the intellect directly and the will indirectly, while in the case of force and fear it is the will of the person that is directly affected.

The Code has provided in canons 124, 125 and 126 general principles whose applicability spans through all canons which concern juridical acts. This is particularly evident in the canons on matrimonial consent and procedures. What we have analysed in this study is the nature of a juridical act in the light of canon 124 without considering its applicability to particular situations. It seems evident from our analysis that appropriate knowledge of the principles governing the placement of a juridical act is absolutely necessary for determining its efficacy and/or its validity. All the principles derived from the analysis of canon 124 can be studied more in-depth relative to those juridical acts which occur more commonly in the Church’s life, such as enactment of

laws, issuance of individual administrative decrees, judicial decisions, appointment to offices, matrimonial consent, etc., as projects for major studies in this area of canon law.

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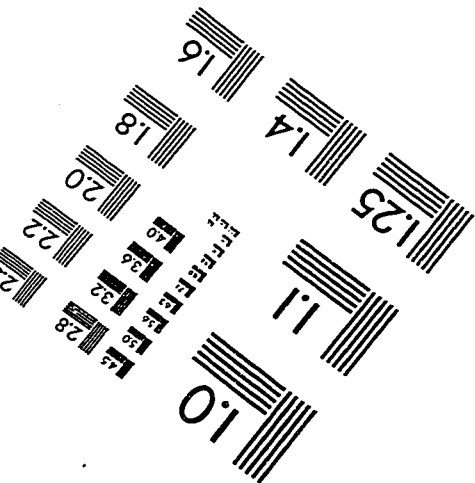
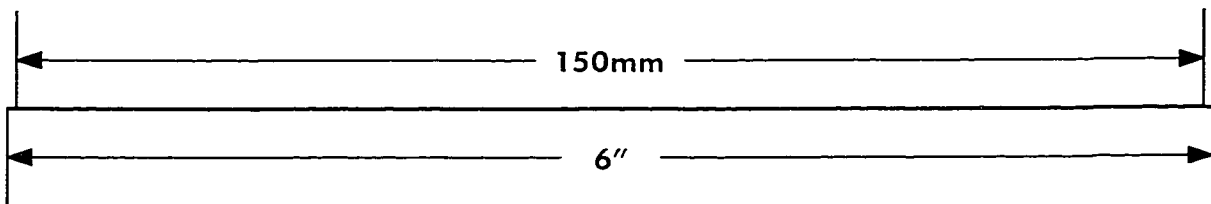
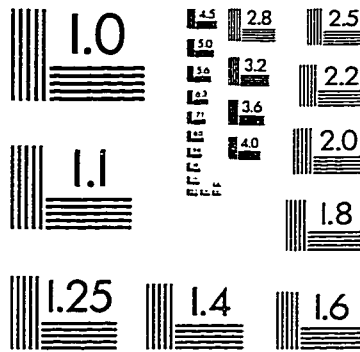
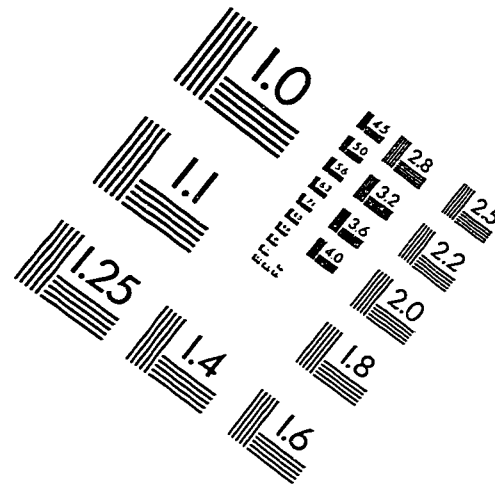
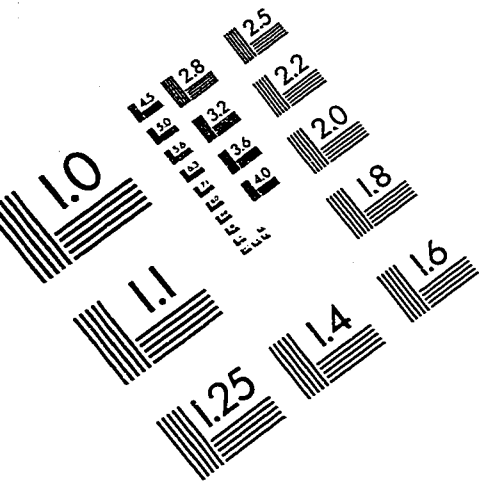
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BIOGRAPHICAL NOTE

John Masiye Kuziona was born on December 24, 1963, in Mwanza, Malawi. He received his secondary school education at Pius XII Minor Seminary from 1978 to 1983. Subsequently, he pursued studies in philosophy and theology at Kachebere Major Seminary, Mchinji, from 1983 to 1986. In 1990 he completed his theological studies at St. Peter's Major Seminary with a Diploma in Theology awarded by the University of Malawi. He was ordained a priest on July 15, 1990.

After two years and a half of priestly ministry in Blantyre Archdiocese as a parochial vicar, the archbishop allowed him to undertake graduate studies in canon law. He began these studies in January 1993 at Saint Paul University, Ottawa, Canada, and obtained JCL (Saint Paul University) and MCL (University of Ottawa) degrees in December 1994.

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