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**FRAUD AND NULLITY OF MARRIAGE IN CANON LAW  
AND INDIAN CIVIL LAW: A COMPARATIVE ANALYSIS**

by  
Joy Paul KALLIKKATTUKUDY

A dissertation submitted to the Faculty of Canon Law  
Saint Paul University, Ottawa, Canada, in partial  
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# TABLE OF CONTENTS

|                                                                          |           |
|--------------------------------------------------------------------------|-----------|
| <b>ACKNOWLEDGEMENTS</b> .....                                            | <b>V</b>  |
| <b>ABBREVIATIONS</b> .....                                               | <b>VI</b> |
| <b>GENERAL INTRODUCTION</b> .....                                        | <b>1</b>  |
| <b>CHAPTER ONE: THE NATURE AND ELEMENTS OF MATRIMONIAL CONSENT</b> ..... | <b>11</b> |
| INTRODUCTION .....                                                       | 11        |
| 1.1 - THE NATURE OF MARRIAGE ACCORDING TO CANON LAW .....                | 12        |
| 1.1.1 - Marriage as a Covenant-Contract .....                            | 14        |
| 1.1.2 - Marriage as a Partnership Between a Man and a Woman .....        | 16        |
| 1.1.3 - A Partnership of the Whole of Life .....                         | 18        |
| 1.1.4 - Ordered Toward the “Good of the Spouses” .....                   | 20        |
| 1.1.5 - Ordered Toward the “Good of Offspring” .....                     | 23        |
| 1.1.6 - Marriage as a Sacrament .....                                    | 26        |
| 1.1.7 - Essential Properties of Marriage .....                           | 28        |
| 1.2 - THE NATURE OF CONSENT ACCORDING TO CANON LAW .....                 | 30        |
| 1.2.1 - Consent as a Juridic Act .....                                   | 30        |
| 1.2.1.1 - The Notion of a Juridic Act .....                              | 31        |
| 1.2.1.2 - The Elements of a Juridical Act .....                          | 33        |
| 1.2.1.2.1 - <i>Habilitas</i> and <i>competentia</i> of the agent .....   | 34        |
| 1.2.1.2.2 - Elements which essentially constitute a juridic act .....    | 36        |
| 1.2.1.2.3 - Formalities for validity .....                               | 38        |
| 1.2.1.2.4 - Requisites for validity .....                                | 39        |
| 1.2.1.3 - Factors that Invalidate a Juridic Act .....                    | 40        |
| 1.2.1.3.1 - Force .....                                                  | 41        |
| 1.2.1.3.2 - Grave Fear .....                                             | 43        |
| 1.2.1.3.3 - Deceit .....                                                 | 45        |
| 1.2.1.3.4 - Ignorance .....                                              | 46        |
| 1.2.1.3.5 - Error .....                                                  | 47        |
| 1.2.1.3.6 - Simulation .....                                             | 49        |
| 1.2.1.3.7 - Condition .....                                              | 50        |
| 1.3 - THE NATURE OF MARRIAGE ACCORDING TO INDIAN CIVIL LAW .....         | 52        |
| 1.3.1 - Marriage in the Civil Law .....                                  | 55        |
| 1.3.2 - The Nature of Marriage .....                                     | 58        |
| 1.3.3 - Contract in Indian Civil Law .....                               | 61        |
| 1.3.3.1 - Consent in a Contract .....                                    | 62        |

## TABLE OF CONTENTS

ii

|                                                                          |           |
|--------------------------------------------------------------------------|-----------|
| 1.4 - THE NATURE OF CONSENT ACCORDING TO INDIAN CIVIL LAW .....          | 62        |
| 1.4.1 - Marriage as a Contract .....                                     | 63        |
| 1.4.1.1 - Capacity: A requisite for a valid marriage .....               | 66        |
| CONCLUSION .....                                                         | 73        |
| <b>CHAPTER TWO: DECEIT IN THE CANONICAL LEGISLATION ON MARRIAGE.....</b> | <b>77</b> |
| INTRODUCTION.....                                                        | 77        |
| 2.1 - THE NATURE AND ELEMENTS OF DECEIT .....                            | 78        |
| 2.1.1 - The Notion of Deceit .....                                       | 79        |
| 2.1.2 - The Characteristics of Deceit.....                               | 82        |
| 2.2 - THE DEVELOPMENT OF CANON 1098 ( <i>CCEO</i> c. 821) .....          | 83        |
| 2.2.1 - Reasons for a Norm on Deceit in Marriage Legislation .....       | 83        |
| 2.2.2 - The Formulation of Canon 1098.....                               | 89        |
| 2.2.3 - The Content of the Canon.....                                    | 92        |
| 2.3 - INTERPRETATION OF CANON 1098 ( <i>CCEO</i> c. 821).....            | 93        |
| 2.3.1.1 - Deliberate intention .....                                     | 94        |
| 2.3.1.2 - To extract the consent of the other party .....                | 95        |
| 2.3.1.3 - Concerning a quality.....                                      | 97        |
| 2.3.1.4 - The nature of the quality.....                                 | 98        |
| 2.3.2 - Retroactivity of the Norm .....                                  | 104       |
| 2.3.3 - Relationship Between Deceit and Other Defects of Consent .....   | 116       |
| 2.3.3.1 - Deceit and Defect of Discretion of Judgement.....              | 117       |
| 2.3.3.2 - Deceit and Error of Fact.....                                  | 119       |
| 2.3.3.3 - Deceit and Simulation.....                                     | 121       |
| 2.3.3.4 - Deceit and Condition .....                                     | 123       |
| 2.4 - APPLICATION OF CANON 1098 ( <i>CCEO</i> c. 821) .....              | 125       |
| 2.4.1 - Rotal Jurisprudence .....                                        | 125       |
| 2.4.2 - Local Jurisprudence .....                                        | 138       |
| CONCLUSION .....                                                         | 144       |

## TABLE OF CONTENTS

iii

|                                                                                                                                                        |                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <b>CHAPTER THREE: DECEIT IN THE CIVIL LEGISLATION OF INDIA .....</b>                                                                                   | <b>148</b>     |
| INTRODUCTION.....                                                                                                                                      | 148            |
| 3.1 - THE NATURE AND ELEMENTS OF FRAUD ACCORDING TO INDIAN CIVIL LAW .....                                                                             | 149            |
| 3.1.1 - Fraud in General .....                                                                                                                         | 149            |
| 3.1.2 - Misrepresentation and Fraud .....                                                                                                              | 151            |
| 3.1.3 - The Necessity of a Fraudulent Intention for an Action of Deceit.....                                                                           | 154            |
| 3.1.4 - Elements of Fraud.....                                                                                                                         | 155            |
| 3.1.5 - Effect of Contract Induced by Fraud .....                                                                                                      | 156            |
| 3.2 - FRAUD IN INDIAN CONTRACT ACT .....                                                                                                               | 159            |
| 3.2.1 - Consent Obtained by Fraud .....                                                                                                                | 161            |
| 3.3 - FRAUD AND MARRIAGE UNDER INDIAN CIVIL LAW.....                                                                                                   | 164            |
| 3.3.1 - Background to the Indian Divorce Act, 1869 .....                                                                                               | 164            |
| 3.3.2 - Void and Voidable Marriages.....                                                                                                               | 168            |
| 3.3.2.1 - Void Marriage.....                                                                                                                           | 169            |
| 3.3.2.1.1 - Grounds of Void Marriages .....                                                                                                            | 170            |
| 3.3.2.2 - Voidable Marriage .....                                                                                                                      | 172            |
| 3.3.2.2.1 - Grounds of voidable Marriages .....                                                                                                        | 175            |
| 3.3.3 - Lack of Marital Consent Due to Fraud .....                                                                                                     | 175            |
| 3.3.3.1 - Fraud Condoned.....                                                                                                                          | 187            |
| 3.3.3.2 - Time-bar for the Plea of Fraud .....                                                                                                         | 188            |
| 3.4 - INDIAN CIVIL COURT DECISIONS ON CASES INVOLVING FRAUD .....                                                                                      | 189            |
| 3.4.1 - Hindu Marriage Cases .....                                                                                                                     | 189            |
| 3.3.2 - Christian Marriage Cases.....                                                                                                                  | 197            |
| CONCLUSION.....                                                                                                                                        | 206            |
| <br><b>CHAPTER FOUR: WHITHER FROM HERE? A COMPARATIVE SYNTHESIS OF THE<br/>CONVERGENCES AND DIVERGENCES BETWEEN THE TWO SYSTEMS OF LAW ON DECEIT .</b> | <br><b>210</b> |
| INTRODUCTION.....                                                                                                                                      | 210            |
| 4.1 - THE UNDERSTANDING OF MARRIAGE IN ECCLESIASTICAL LAW AND INDIAN CIVIL<br>LAW .....                                                                | 211            |

## TABLE OF CONTENTS

iv

|                                                                                   |         |
|-----------------------------------------------------------------------------------|---------|
| 4.1.1 – Nature of Marriage.....                                                   | 211     |
| 4.1.2 – Marriage as a Partnership.....                                            | 215     |
| 4.1.3 - Marriage as a Sacrament.....                                              | 217     |
| 4.1.4 - Marriage as a Covenant-Contract .....                                     | 219     |
| 4.1.5 - The Requirements of Marriage Consent.....                                 | 222     |
| 4.1.6 – Pertinent Rights of the Spouses.....                                      | 225     |
| 4.2 - DECEIT IN THE MARRIAGE CONTRACT .....                                       | 226     |
| 4.2.1 – Deceit Related to Marriage in Ecclesiastical Law .....                    | 226     |
| 4.2.2 - Deceit Related to the Marriage Contract in Indian Civil Law .....         | 229     |
| 4.3 - PROCEDURES TO BE FOLLOWED IN A MARRIAGE CASE INVOLVING DECEIT.....          | 235     |
| 4.3.1 – Petition for a Decree of Nullity.....                                     | 236     |
| 4.3.2 - Competence/Jurisdiction of the Court to Hear the Case.....                | 238     |
| 4.3.3 - The Right of the Parties to Stand in Court.....                           | 241     |
| 4.3.4 – Subsequent Change of Grounds or of Pleadings.....                         | 242     |
| 4.3.6 - Confirmation of the Decree of Nullity.....                                | 246     |
| 4.4 - THE FOLLOW-UP TO THE COURT DECISIONS OF NULLITY .....                       | 248     |
| 4.4.1 – The Understanding of Nullity .....                                        | 249     |
| 4.4.2 – The Re-Marriage of One or Both Parties .....                              | 251     |
| 4.4.3 – Resolution of Conflicts in Laws.....                                      | 252     |
| 4.5 - TOWARDS THE FUTURE .....                                                    | 255     |
| 4.5.3 - Possibility of the Canonical Recognition of Civil Decree of Nullity ..... | 258     |
| CONCLUSION.....                                                                   | 262     |
| <br>GENERAL CONCLUSION.....                                                       | <br>264 |
| <br>SELECT BIBIOGRAPHY.....                                                       | <br>276 |

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## ABBREVIATIONS

|             |                                                |
|-------------|------------------------------------------------|
| <i>AAS</i>  | <i>Acta Apostolica Sedis</i>                   |
| A.C.        | Law Reports, Appeal Cases                      |
| A.I.R.      | All India Reports                              |
| <i>ASS</i>  | <i>Acta Sanctae Sedis</i>                      |
| All.E.R.    | All England Reports                            |
| All.L.J.    | Allahabad Law Journal                          |
| Ap.L.J.     | Andra Pradesh Law Journal                      |
| <i>CCEO</i> | <i>Codex canonum Ecclesiarum orientalium</i>   |
| <i>CIC</i>  | <i>Codex iuris canoici</i>                     |
| <i>CLD</i>  | <i>Canon Law Digest</i>                        |
| CLSBI       | Canon Law Society of Great Britain and Ireland |
| D.L.T.      | Delhi Law Times                                |
| Del.L.J.    | Delhi Law Journal                              |
| <i>EIC</i>  | <i>Ephemerides iuris canonici</i>              |
| <i>GS</i>   | <i>Gaudium et spes</i>                         |
| Guj.L.R.    | Gujarat Law Reports                            |
| Hin.L.R.    | Hindu Law Reports                              |
| <i>IC</i>   | <i>Ius canonicum</i>                           |
| <i>IE</i>   | <i>Ius Ecclesiae</i>                           |
| <i>IDE</i>  | <i>Il diritto ecclesiastico</i>                |
| I.L.R.      | Indian Law Reports                             |
| K.L.T.      | Kerala Law Times                               |

|                         |                                                        |
|-------------------------|--------------------------------------------------------|
| L.J.P.                  | Law Journal; Probate, Divorce and Admiralty Division   |
| L.T.                    | Law Times                                              |
| <i>ME</i>               | <i>Monitor ecclesiasticus</i>                          |
| M.L.J.                  | Madras Law Journal                                     |
| M.P.L.J.                | Madhya Pradesh Law Journal                             |
| M.L.R.                  | Madras Law Reports                                     |
| Mys.Lj                  | Mysore Law Journal                                     |
| Mys.L.R.                | Mysore Law Reports                                     |
| <i>CLSA Proceedings</i> | <i>Proceedings of the Canon Law Society of America</i> |
| <i>PS</i>               | <i>Philippiniana sacra</i>                             |
| Punj.L.R.               | Punjab Law Reports                                     |
| P&H                     | Punjab and Hariyana                                    |
| <i>RDC</i>              | <i>Revue de droit canonique</i>                        |
| S.C.                    | Supreme Court                                          |
| SCDF                    | Sacred Congregation for the Divine Faith               |
| S.C.R.                  | Supreme Court Reports                                  |
| <i>SRR Dec.</i>         | <i>Sacrae Romanae Rotae Decisiones seu sententiae</i>  |
| <i>StC</i>              | <i>Studia canonica</i>                                 |
| T.L.R.                  | Times Law Reports                                      |
| W.L.R.                  | Weekly Law Reports                                     |

## ABSTRACT

The mutual recognition and acceptance of canon law and civil law have generated interesting debates through the centuries. This is particularly true since the Second Vatican Council called for a new way of thinking on matters pertaining to our religious way of life and on our relationship with other peoples and nations. As a result many pastorally important issues have surfaced. One of these is the possibility for the Church of recognizing and accepting a legitimate decision of the nullity of a marriage by a civil court.

India, a secular country by constitution, accommodates many religions. The State recognizes the laws of all religious groups and acknowledges them as Personal Civil Laws, such as Indian Christian Marriage Act of 1872 and the Indian Divorce Act of 1869, governing matters such as marriage, succession, and divorce. Therefore, when carrying out any action which has consequences in civil law, every person is expected to observe his/her applicable personal civil law.

According to the Church's teaching, marriage is indissoluble. However, the Church provides for a declaration of invalidity under strict conditions. A close examination of the ecclesial and civil laws indicates that, in order to protect the sacredness of this institution and to prevent invalid marriages, both systems have established a number of impediments and defects of consent which invalidate marriage *ab initio*.

While Indian civil courts do not recognize the declarations of nullity granted by an ecclesiastical court, the Church does not accept a civil decree of nullity or of divorce. This particular confrontation between the two systems of laws naturally results in undue pain, tension and financial burdens for the persons involved. Therefore, we ask the question: Is it possible for the Church formally to accept a legitimately issued civil decree of nullity and allow the parties to marry in accordance with the norms of canon law without submitting them to a fresh new canonical trial? This question defines the hypothesis of our dissertation.

Our study has demonstrated that there is substantial agreement between canon law and Indian civil law on several substantive aspects of marriage. For example, both hold that the right to marriage is a natural right of every human being. Both have established impediments in order to protect the social institution of marriage from being contracted invalidly. Both systems also recognize the invalidating effect of deceit. Once it is proven with moral certainty, or beyond reasonable doubt, that one party was deceitful in obtaining the consent of the other, both systems of law consider the marriage null and void. Therefore, at least in the case scenario discussed in our study, the Church can formally recognize and accept a civil declaration of invalidity of a marriage and declare the parties involved free to enter upon a new canonical marriage according to the norms of canon law. We maintain that this conclusion, *mutatis mutandis*, can be applied also to other similar hypotheses.



## GENERAL INTRODUCTION

India is the native land of many world religions, such as Hinduism, Buddhism, Jainism and Sikhism. It is a secular country by constitution and, consequently, accommodates all religions irrespective of their origin. Interestingly, the Constitution of India recognizes and respects the laws of all religious groups and considers them as Personal Civil Laws<sup>1</sup> which govern matters such as marriage, succession, divorce, etc. Therefore, the personal law of an individual is determined on the basis of one's religion. When carrying out any action which has consequences in civil law, every person is expected to observe the applicable personal law.

Christians in India count less than 3% of the total population of over a billion people. They too have the so-called personal laws. However, unlike the personal laws of other religions which are specifically based on their religious laws, the personal civil laws of Christians were enacted during the British rule in India and were based on the then existing British Matrimonial Causes Act, 1857, and the ecclesiastical laws of England.<sup>2</sup> The civil laws related to marriage which are applicable to Christians are

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<sup>1</sup> There is no single common personal law for all Indians because of multitude of religious groups. Therefore, Derrett says: "India is a land of Personal Laws" (J. D. Derrett, *Religion, Law and State in India*, London, Faber and Faber Ltd., 1968, p. 39).

<sup>2</sup> The ecclesiastical laws of England were composed of several strands such as: i) the ecclesiastical common law (or custom) of ancient usage (part of the *lex non scripta*); ii) the pre-Reformation canon law as found in the *Corpus iuris canonici* and provincial legislation; iii) relevant parts of the *Corpus iuris civilis*; iv) parliamentary ecclesiastical statutes from 1533 and so on. See Michael P. Saunders, *The Application of Canon 11 of the Code of Canon Law to Members of the Church of England in Regard to Nullity of Marriage*, JCD diss., Ottawa, Canada, Saint Paul University, 1991, pp. 166-167.

contained in the Indian Christian Marriage Act, 1872 and the Indian Divorce Act, 1869.<sup>3</sup> While the Christian Marriage Act, 1872, governs the celebration of marriage, the Indian Divorce Act deals with various grounds for marriage nullity and divorce. The former recognizes ordained ministers as Marriage Registrars, the Official Witnesses of Christian marriages in their own Church.<sup>4</sup> Both these Acts are equally applicable to all Christians of India without distinction of denomination.

We understand that whether the authority is civil or ecclesiastical, all authority originates from God. There are certain matters which fall solely under the competence of civil authority and there are others over which the authority of the Church prevails. Since the subjects of both these authorities are the same, there can be a third category of matters, namely those which are the object of mixed competence.<sup>5</sup>

Marriage is one such a category. Therefore, an Indian Christian who is a subject of both the Church and the State must follow both laws, especially in matters related to marriage. Canon 1059 of the 1983 Code specifies the competence of the Church and the State with regard to the marriage of Catholics, stating that the State has competence only in regard to the civil effects of marriages of Catholics which include

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<sup>3</sup> *The Indian Divorce Act, 1869*, was a replica of the English Matrimonial Causes Act of 1857. It was enacted by the Governor General of the British India. It was amended in 2001. For more details, see Sebastian Champappilly, "Recent Changes in the Indian Civil Law on Divorce for Christians and their Implications," in *Eastern Legal Thought*, vol. 1, 2002, p. 91.

<sup>4</sup> Cfr. *Indian Christian Marriage Act, 1872*, Section 73.

<sup>5</sup> Pope Leo XIII says: "In as much as each of these two powers has authority over the same subjects, and as it might come to pass that one and the same thing - related differently, but still remaining one and the same thing - might belong to the jurisdiction and determination of both, therefore God, who foresees all things and who is the Author of these two powers, has marked out the course of each in right correlation to the other" (*Acta Leonis XIII, Pontificis Maximi*, vol. 5, Romae, Typographia Vaticana, 1886, p. 127).

such matters as succession, inheritance, name to be used and legitimacy. The Church holds that the State does not have competence over the substance, the essential properties and the canonical form of marriage. The Church also maintains that marriage is a covenant established between a man and a woman, who are legally capable, for the whole of their lives. Furthermore, the ecclesiastical law recognizes that the marital covenant between baptized persons has been raised to the dignity of a sacrament by Christ (c. 1055). Thus, the covenant cannot be broken even though it might be violated through the failure of one or both parties to live up to their promise.

The State, on the other hand, regards marriage as a social institution, a contract between a man and a woman who are not legally prohibited from marrying, to the exclusion of all others. One can find also in the matrimonial contract most of the constitutive elements of a commercial contract. Like the Church, the State also upholds the unity and permanence of marriage. But, for a variety of reasons, it recognizes that a marital contract can be dissolved. Consequently, a marriage, which is a contract according to civil law, can be terminated when it can no longer be sustained due to irresolvable problems. The question of divorce arises here.

The concept of divorce which breaks an existing bond and gives a right to enter a new marriage is irreconcilable with canon law. However, a declaration of invalidity of marriage is possible in the Church in accord with the provisions of canon law. A close examination would reveal that both the Church and the State do care for the protection of the institution of marriage. In order to protect the sacredness of this

institution and to prevent invalid marriages, both have established a number of impediments which invalidate marriage *ab initio*, and both have indicated explicitly those elements which would render the matrimonial consent defective. It should not surprise anyone that several of these impediments and the elements which invalidate marital consent are the same in both legal systems. Both would declare certain marriages null on similar grounds. We can identify some examples - impotency, prohibited degrees of consanguinity and affinity, unsoundness of mind, previous bond, fraud, force and fear, etc. The Indian civil courts do not recognize the declarations of nullity granted by an ecclesiastical court. On the other hand, the Church usually does not accept a civil decree of nullity.<sup>6</sup> In its present form, canon 22<sup>7</sup> of the 1983 Code is not applicable to this situation because it involves the very nature of marriage as established by God. This creates a real problem.

According to Indian civil law, a person, who has obtained a declaration of invalidity of marriage from a church tribunal, cannot marry without violating the civil law of monogamy unless he/she also obtains an annulment of the same marriage from a civil court. A person who, after receiving a declaration of invalidity from an ecclesiastical tribunal, goes ahead with marriage a second time without obtaining an annulment from a civil court, would be charged with the crime of bigamy; likewise, the

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<sup>6</sup> In the language of civil law, the annulment of a marriage by a court does not mean divorce. In fact, divorce means dissolution of a valid marriage. A declaration of nullity of a marriage is based on specific grounds of nullity, i.e., impediments and defective consent.

<sup>7</sup> This canon reads: "When the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, in so far as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law."

priest who assists at such a marriage would be subject to penal sanctions for promoting bigamy since he is the Official Marriage Registrar at civil law. By the same token, the Church does not recognise a civil decree of nullity or the judgment of annulment of a marriage by the civil court, even if granted on the same grounds of invalidity admitted in the 1983 Code. Even if a person's marriage has been declared null by a civil court, he or she cannot contract marriage in the Church unless there is an ecclesiastical declaration of invalidity of that marriage.

This situation naturally causes undue pain and tension, and even financial burden for the persons involved. Therefore, we raise the question: Is it possible for the Church to accept a civil decree of nullity (not divorce) pronounced by a civil court especially on grounds of invalidity, such as of fraud, which are common to both civil and church law?

In answering this question, we consider it important to keep in mind the different scenarios which may require the attention of the Church in this matter. It is possible for a marriage to take place between two non-baptised persons, and also between a non-baptised and a baptised non-Catholic person fully in accord with the civil law of the country. In such instances, the law applicable to them would be either the civil law or, in some cases their personal law (as among the Muslims), unless certain Churches, like the Orthodox Churches or ecclesiastical communities also have their own laws. Persons in such situations may approach the Catholic Church requesting a declaration of invalidity of their marriage. But what if the civil court has already granted a decree of

nullity according to civil law? Is it possible for the Church to accept such civil court decisions? A similar situation may be faced even by Catholics. For example, the marriage of two Catholics celebrated in conformity with the laws of the Church may be affected by an invalidating defect of consent on a ground, such as deceit, common to both legal systems. In this case, if a declaration of invalidity is pronounced only by the Church, the person(s) cannot marry according to civil law. It may be possible to obtain a declaration of nullity from the civil court on the same ground. If the parties go first to the civil court and succeed in obtaining such a pronouncement from it, would it also be necessary to seek a declaration of invalidity from the Church before celebrating marriage in the Church? In other words, couldn't the Church simply recognize the civil decree of nullity and allow the parties to marry in accord with the norms of canon law?

A studied answer to this question is the scope of our dissertation. Consequently, its aim is to provide positive and constructive recommendations which should reflect the fundamental principles underlying both systems of law so that some realistic legal and pastoral solution may be available to those who are affected by the present situation. To realize this goal we intend to traverse the following route: We will first offer a systematic analysis of the nature of marriage from the points of view of ecclesiastical law and civil law. It is only when we can establish a substantial degree of doctrinal compatibility between what the Church teaches and what the civil law determines concerning the nature of marriage can one reach an objective conclusion in respect to the question we have raised above. Then, because the ground of deceit in

Indian civil law and jurisprudence bears substantial similarity with what is prescribed in canon law about it, we will examine deceit as a ground of nullity in light of canonical doctrine and jurisprudence and of the Indian civil courts, to determine the areas of substantial compatibility between the two legal systems on the issue.<sup>8</sup> This we hope will provide us with sufficient data to test the principal hypothesis of our study, namely the Church, under certain conditions, can accept the declaration of invalidity of a marriage on the ground of deceit issued by an Indian civil court without having to submit the same case to a fresh canonical trial.

To date there has been no major canonical study on the question of acceptance of a civil court's declaration of nullity of marriage by the Church, especially ones dealing with the issue within the context of canon law and Indian civil law. There are some substantial studies on deceit from a canonical perspective.<sup>9</sup> There are a few general studies on marriage which have examined certain issues related to marriage from the point of view of canon law and in Indian civil law.<sup>10</sup> There is one study by Michael Saunders which examines the application of canon 11 of the 1983 Code to the members of the Church of England, and briefly deals with the question whether a civil declaration

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<sup>8</sup> This carefully circumscribed scope of our thesis leaves ample room for other future major comparative investigations on other grounds of nullity of marriage, like deceit recognized by canon law and civil law.

<sup>9</sup> K.W. Vann, *Canon 1098 of the Revised Code of Canon Law: History, Development, and Implications*, Romae, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1985.

<sup>10</sup> Joseph Vadakumcherry, *Marriage Laws in Canon Law and Civil Law*, Ernakulam, Cochin, Viani Printings, 1992; L. Tharigopala, *Civil Marriage Laws and Civil Effects of Canonical Marriage Discipline for Catholics in India*, JCD diss., Rome, Urbaniana University, 1994. William E. Pinto, *Law of Marriage and Matrimonial Reliefs for Christians in India*, Bangalore, Theological Publications in India, 2000.

of nullity of marriage in England could be given canonical recognition.<sup>11</sup> Although his study does not provide a definite answer, it certainly offers insightful reflections for our inquiry.

The method we intend to follow in our work will be systematic, analytical and comparative. The study will be divided into four chapters. Chapter one analyzes the nature of marriage, both in canon law and Indian civil law. The specific areas of our investigation in this chapter will be: the covenantal and contractual nature of marriage, the nature and elements of matrimonial consent which brings the contract into existence and the sacramental aspect of marriage. The principal question to be answered in this chapter concerns the importance given by both the Church and the State to this human reality of marriage and how much care they take to preserve it. We will study these factors in the light of canons 1055, 1056, 1057 of the 1983 Code, and the Indian Christian Marriage Act and Indian Divorce Act which have provisions similar to those canons of the 1983 Code.

The 1983 Code has included a new canon on the nullity of marriage arising from deceit. Since it is a new ground which invalidates marital consent, our primary concern will be to examine the context of the canon, followed by a comprehensive analysis of its meaning and elements, and its applicability in concrete cases. Furthermore, the relation between deceit and other grounds such as error, lack of discretion, condition and simulation will be examined in passing. This will provide us

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<sup>11</sup> Saunders, *The Application of Canon 11 of the Code of Canon Law*, pp. 253-263.



with a proper understanding of the elements and their applicability, and of the disputed issue of retroactivity of the canon (1098). In the second chapter, therefore, our aim will be to analyze in depth the canon on deceit (1098) and relevant jurisprudence.

The third chapter will focus on the ground of fraud in Indian civil law. In this chapter, we will first consider the general understanding of deceit in civil law and then narrow it down to Indian civil law, studying the areas where fraud is a more common factor nullifying marriage in civil law. Our investigation will include an analysis of several concrete marriage cases judged by civil courts to determine the principles and criteria followed by the courts in arriving at decisions leading to a decree of nullity. This will enable us to identify and differentiate the concepts and principles that both systems of law use while dealing with nullity cases on the ground of deceit.

In the final chapter, we will provide a synthesis of convergences and divergences between the two systems of law on the judicial inquiry into a possible declaration of nullity of marriage on grounds of defect of consent caused by deceit. This synthesis will include also a review of the procedural laws applicable to marriage nullity cases. This method is intended to answer our main question whether a civil decree of nullity of marriage issued by an Indian court could be recognized and accepted by the Catholic Church.

In brief, our comparative study will be limited to the ground of defective consent arising from fraud, which is recognized by both ecclesiastical and civil legislations. We will analyze carefully the principles and criteria used by the civil law

and jurisprudence and see to what extent they are compatible with the principles and criteria followed by canon law when judging the nullity of a marriage on grounds of fraud, and respond to the question whether it is doctrinally and juridically possible or feasible for the Catholic Church to accept such a civil decree of nullity and not submit such a case to a fresh trial in an ecclesiastical court.

# **CHAPTER ONE**

## **THE NATURE AND ELEMENTS OF MATRIMONIAL CONSENT**

### **INTRODUCTION**

The theology of Christian marriage is rather complex because marriage between two baptized Christians is both a secular and sacred, that is, a grace-filled reality. This sacred reality precisely is the object of matrimonial consent, which can be substantially vitiated by fraud or deceit (*dolus*), the central theme of our present inquiry. Although it is beyond the scope of this study to explain the manifold facets of marriage, a brief description of the nature of marriage should provide a logical theological foundation to our arguments. In this chapter, therefore, we shall examine briefly the covenantal and sacramental nature of marriage, its essential elements and properties, and the nature and elements of consent which brings a marriage into existence.

Civil law systems in general view marriage as an institution of great importance for human beings both individually and socially. In India, where many world religions co-exist, civil law, though it considers marriage as a contract, acknowledges the sacredness of marriage while dealing with marriages of various religious groups. Several sets of laws, known as personal laws, have been enacted in India to regulate marriage and divorce among people of different religions. Therefore, we propose to explore in this chapter also the nature of marriage and of matrimonial consent according to Indian civil law.

### 1.1 - THE NATURE OF MARRIAGE ACCORDING TO CANON LAW

Christian marriage is both a human reality and a saving mystery in which a man and a woman seek to become one flesh in a communion of life and conjugal love. As they become one flesh in love, they provide through their intimate union a prophetic symbol of the oneness that exists between Christ and the Church.<sup>1</sup> Our current theological understanding of marriage has been strongly inspired by the teaching of Second Vatican Council. This Council described marriage as: “An intimate community of life and conjugal love, founded by the Creator and endowed by him with its own laws, is established by the covenant of marriage, that is, by a personal irrevocable consent. Thus, from a human act, through which the spouses mutually give and accept each other, arises this institution which is confirmed by divine design and even in the eyes of society; in view of the good both of the spouses and offspring and of society, this sacred bond no longer depends on human action alone.”<sup>2</sup> The basic principles derived from the conciliar teachings on marriage may be summarized as follows:

- marriage is fundamentally “an intimate communion (*communitas*) of life and conjugal love,” i.e., an intimate interpersonal relationship;

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<sup>1</sup>See M.G. Lawler, *Marriage and Sacrament: A Theology of Christian Marriage*, Collegeville, MN, Liturgical Press, 1993, p. 47.

<sup>2</sup>“Intima communitas vitae et amoris coniugal, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur. Ita actu humano, quo coniuges sese mutuo tradunt atque accipiunt, institutum ordinatione divina firmum oritur, etiam coram societate; hoc vinculum sacrum intuitu boni, tum coniugum et prolis tum societatis, non ex humano arbitrio pendet” (Second Vatican Council, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* [= GS], 7 December 1965, no. 48, in *Acta Apostolicae Sedis* [= AAS], 58 [1966], p. 1067); English translation adapted from: A.P. Flannery (gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents* (= Flannery I), (Study Edition), New York, Costello Publishing Company, 1987, p. 952.

- this intimate interpersonal relationship is the consequence of the “irrevocable personal consent” of the spouses;
- this intimate interpersonal relationship is a permanent union between one man and one woman;
- it is ordered toward the good of the spouses and the procreation and education of the offspring;
- this intimate interpersonal relationship between two baptized persons is endowed with the dignity of a sacrament by Christ the Lord himself.

This conciliar teaching has now received juridical recognition in the new Latin Code of 1983 and in the Eastern Code of 1990, as they describe marriage in terms of a covenant by which a man and a woman establish between themselves a partnership of the whole of life. Thus, c. 1055, §1 of the 1983 Code reads:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.<sup>3</sup>

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<sup>3</sup>Canon 1055, §1: “Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad proles generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est” (*Codex iuris canonici*, auctoritate Ioannis Pauli PP. II promulgatus, Libreria editrice Vaticana, 1983); English translation from: *Code of Canon Law*, Latin-English Edition, New English Translation, Prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1999. For the equivalent of this Latin canon in the Eastern Code, see c. 776, §§1 and 2, in *Codex canonum Ecclesiarum orientalium*, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus, Libreria editrice Vaticana, 1995; English translation: *Code of Canons of the Eastern Churches*, Latin-English Edition, New English Translation, Prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 2001.

### 1.1.1 - Marriage as a Covenant-Contract

The legal or juridic expression used for centuries to describe marriage was “contract.” The Second Vatican Council deliberately chose to replace this term with “covenant” to bring out the biblical and deeply personal nature of marital or spousal relationship. The conciliar description of marriage clearly indicates that the concepts and classifications prevalent at the time were inadequate to convey to the modern world the richness and the complexity of marriage as revealed in the Scriptures.<sup>4</sup> The Council taught that marriage is rooted in the conjugal covenant of irrevocable personal consent. The term “covenant” was not something new in the theology of marriage, but its notion as the basis for canon law is new.<sup>5</sup>

The term “covenant” is the English translation of the Latin term *foedus*, used in *Gaudium et spes* to describe marriage *in fieri*. It expresses the personal character of consent and connotes “a public and legal matter concerning the whole community of believers.”<sup>6</sup> It is generally admitted by scholars that the meaning of “covenant” as applied to marriage in canon law has basis in the Scriptures.<sup>7</sup> In the New Testament St. Paul presents marriage as an image of the relationship between Christ and the Church.

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<sup>4</sup>See A. Mendonça, “Antisocial Personality and Nullity of Marriage,” in *StC*, 16 (1982), p. 78.

<sup>5</sup>See B.A. Siegle, *Marriage According to the New Code of Canon Law*, New York, Alba House, 1986, p. 4.

<sup>6</sup>See W. Kasper, *Theology of Christian Marriage*, London, Burns and Oates, 1980, p. 41.

<sup>7</sup>See A. Tosato, *Il matrimonio israelitico, una teoria generale*, Rome, Biblical Institute Press, 1982, pp. 105-106.

This presentation is considered as one of the main sources in the development of the present Christian view on marital covenant.<sup>8</sup>

In the context of Christian marriage, therefore, a covenant is a sacred marital bond in which the spouses give themselves to each other in loving communion. The term “covenant” expresses the love and fidelity existing in a unique interpersonal relationship. The elements of love and fidelity contained in the covenant between Yahweh and his people, Christ and his Church, distinguish a true marriage from cohabitation, concubinage and less stable relationships.<sup>9</sup>

As a human reality and a saving mystery, marriage cannot be circumscribed by strict theological and juridical paradigms.<sup>10</sup> It is a relationship rooted in a special contract, which creates rights and obligations among the parties who are bound by the marital bond.<sup>11</sup> The bond resulting from the contract of the spouses is the core of marriage. It is something holy and different from other agreements.<sup>12</sup>

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<sup>8</sup>See Lawler, *Marriage and Sacrament*, p. 12.

<sup>9</sup>See P.F. Palmer, “Christian Marriage: Contract or Covenant?” in *Theological Studies*, 33 (1972), p. 640.

<sup>10</sup>See Mendonça, “Antisocial Personality and Nullity of Marriage,” p. 78.

<sup>11</sup>See Pius V, *Catechism of the Council of Trent for Priests*, translated by J. Donovan, Rome, Propaganda Fide Press, 1839, p. 641.

<sup>12</sup>See V.J. Pospishil, *Eastern Catholic Marriage Law According to the Code of Canons of the Eastern Churches*, Brooklyn, NY, Saint Maron Publications, 1991, p. 182.

### 1.1.2 - Marriage as a Partnership Between a Man and a Woman

God created human beings as male and female (Gen. 1: 27-28). Man and woman feel drawn towards each other. They experience their togetherness as an enhancement of their lives, as happiness. They show and affirm their affection and love through many signs and gestures. The love between man and woman is a gift of God; it is that power of attraction between them which leads them to partnership, so that they can live for each other and grow with each other. In giving themselves to each other in marriage, man and woman publicly promise lifelong *consortium* or partnership and love. This union of man and woman is the core of that natural reality, that is marriage, ordered by its very nature to partnership and procreation.<sup>13</sup>

The very first sentence of the canon (c. 1055) affirms that it is the consent of the partners that constitutes marriage by which a man and a woman establish between themselves a partnership that is permanent in nature. A partnership implies a common interest, common aim, common means, mutual assistance, and support between the partners, etc. Canon 1135 (*CCEO* c. 777) states that each spouse has “an equal duty and right to those things which belong to the partnership of conjugal life.” This reflects the conciliar teaching which promoted the concept underlying *consortium totius vitae*. Marriage is a partnership of life in which both partners must contribute to and co-operate for their mutual well-being, their mutual growth which comprises their physical, spiritual,

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<sup>13</sup>See German Catechetical Association, *CREDO, A Catholic Catechism*, English trans., Sr. Benedict Davies, Harper San Francisco, Harper Collins Publishers, 1984, p. 199.



moral and social well-being as persons and as equal partners. This concept of marriage as a “partnership,” therefore, consists in the intimate union of the two spouses at the deepest level of their psychic life.<sup>14</sup> John Paul II speaks of this intimate union as an “interpersonal communion” and teaches that in the “unity of two,” man and woman are called from the beginning to exist mutually, “one for the other.” This is the meaning of the biblical expression: “I will make him a helper fit for him” (Gen. 2:18-20). This help is not one-sided but mutual; the partners help and support each other as equal “human beings.”<sup>15</sup>

It is the notion of “interpersonal communion” that Rotal jurisprudence conveys when it refers to “*communio vitae*” or “interpersonal relationship,” “interpersonal integration,” etc., as an essential element of marriage.<sup>16</sup> The underlying condition to establish the interpersonal communion, which is the essence of marriage, between the spouses is the requirement of honesty, trust and confidence in each other. Absence of these qualities in the spouses may make them incapable of realizing a permanent intimate union in their married life.

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<sup>14</sup>See A. Mendonça, “Exclusion of the Essential Elements of Marriage,” in William H. Woestman (ed.), *Simulation of Marriage Consent*, Ottawa, Saint Paul University, 2000, p. 63.

<sup>15</sup>See John Paul II, Apostolic letter, *Mulieris dignitatem*, on the Dignity and Vocation of Women on the Occasion of the Marian Year, 15 August 1988, in *AAS*, 80 (1988), pp. 1653-1729; English translation, Vatican Polyglot Press, Canadian Conference of Catholic Bishops, 1988, pp. 24-25.

<sup>16</sup>See Mendonça, “Exclusion of the Essential Elements of Marriage,” p. 64.

### 1.1.3 - A Partnership of the Whole of Life

The phrase “a partnership of the whole of life” (*consortium totius vitae*), found in c. 1055, §1 in the Latin Code (*CCEO* c. 776, §1), is undoubtedly rooted in the conciliar teaching on marriage and reflects the intimate nature of the conjugal covenant, its unity, perpetuity as well as the equal dignity of both spouses in respect to the conjugal rights and obligations flowing from their consent.

The expression “the whole of life” connotes two significant aspects which make marriage different from any other partnership. These are the essential properties of marriage, namely unity and indissolubility.

The property of unity comprises two aspects of the marriage bond, namely “unicity of the bond” and “conjugal fidelity.” While the concept “unicity of the bond” signifies “one bond” as opposed to “multiple bonds,” which is violated by polygamy, “conjugal fidelity” connotes the exclusivity of the bond, which is violated by adultery.<sup>17</sup> These two are distinct in canonical doctrine and jurisprudence.<sup>18</sup> In the past, the concept of conjugal fidelity was restricted to the conjugal act. It meant that one who enters marriage with the intention to keep to himself the right to commit adultery or to exclude

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<sup>17</sup>For more on this point, see A. Mendonça, “Exclusion of the Essential Properties of Marriage,” in Woestman (ed.), *Simulation of Marriage Consent*, pp. 90-111.

<sup>18</sup>It is disputed in canonical doctrine and jurisprudence whether the “good of fidelity” belongs to the essential elements or essential properties of marriage. Some jurists hold that it is an essential element while others argue that it is an essential property. Cf. decisions *c. Burke*, 8 February 1990, in *The Jurist*, 51 (1991), pp. 138-154; *c. Bruno*, 17 May 1996, in *SRR Dec.*, 88 (1996), p. 388; *c. Pompedda*, 16 January 1995, in *ibid.*, 87 (1996), p. 5; *c. Turnaturi*, 18 April 1996, in *ibid.*, 88 (1996), pp. 339-340; *c. Civili*, 20 November 1996, in *ibid.*, 88 (1996), p. 726.

the obligation of conjugal fidelity contracts marriage invalidly.<sup>19</sup> But because of the very nature of the conjugal relationship as understood in light of the conciliar teaching and of the new Codes, this concept should include not just the absence of an extramarital relationship but faithfulness and commitment to the totality of interpersonal relationship between the spouses.<sup>20</sup>

Similarly, the notions of indissolubility and perpetuity are not identical. The marital relationship, by its very nature, is lifelong. Therefore, the rights and obligations which constitute the juridical essence of the interpersonal union are exclusive and perpetual.<sup>21</sup> In this sense, the partners have the mutual right and obligation to the perpetuity of the conjugal relationship. Since perpetuity primarily concerns the partnership of the whole of life and the essential rights and obligations it comprises, one who intends to marry should have the capacity to sustain this perpetuity while exchanging the consent.<sup>22</sup> This is essential for the good of the spouses and for the good of the offspring.

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<sup>19</sup>See Urbano Navarrete, "De iure ad vitæ communionem: observationes ad novum schema canonis 1086, §2," in *Periodica*, 66 (1977), p. 250.

<sup>20</sup>See R.E. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum fidei*," in *CLSA Proceedings*, 61 (1999), pp. 183-185. Here describing a case judged by Faltin on 9 November 1990, Jenkins argues that the consent exchanged by a person while reserving his/her right to engage oneself in non-exclusive sexual relations is invalid.

<sup>21</sup>See. E Olivares, "Incapacitas assumendi obligationes essentielles matrimonii: debetne esse 'perpetua'?", in *Periodica*, 75 (1986), pp. 153-169.

<sup>22</sup>See decision c. Serrano, 22 October 1993, in *SRR Dec.*, 85 (1993), pp. 624 and 629; English translation in *Forum*, 7 (1996) 1, p. 158.

#### 1.1.4 - Ordered Toward the “Good of the Spouses”

The 1917 Code, without making any attempt at defining or describing marriage, identified its two ends, namely the primary end: “procreation and education of offspring,” and the secondary end: “mutual help and remedy of concupiscence” (c. 1013, §1). Of these two, only part of the primary end became the formal object of matrimonial consent in the form of “the perpetual and exclusive right to the body for acts *per se* apt for the generation of offspring” (c. 1081, §2). From then on, canonical doctrine and jurisprudence developed solely around the first part of the primary end and object of consent. The second part of the primary end as well as the secondary end, which in fact concerned the mutual good of the spouses in conjugal life, assumed practically no juridical significance. This certainly changed with the conciliar teaching proclaimed in *Gaudium et spes* 48-52 on marriage. Although the council did not explicitly state that the good of the spouses (*bonum coniugum*) is an essential element of marriage, it did provide enough reflection on the nature of marriage so that what the council taught took on legal significance during the evolution of new marriage legislation which was incorporated into the revised Code of Canon Law. The discussions that emerged during the drafting of the present c. 1055 indicate that it was the intention of the Code Commission to incorporate “*bonum coniugum*” not simply as a personalistic end but as an institutional end with juridic consequences. It was precisely for this reason that the Code Commission responded to the objection against the introduction of “*bonum coniugum*” into the description of marriage covenant foreseen in the draft of c. 1055 as follows: “The

expression ‘for the good of the spouses’ should remain. The ordering of marriage to the good of the spouses is indeed an essential element of the matrimonial covenant and not the subjective end of those marrying.”<sup>23</sup> In his sentence of 12 March 1998, Boccacola makes the following summary statement on this whole issue:

Certainly numbered among the essential obligations of the matrimonial covenant are those which are contained in the three traditional goods of marriage, such as the obligation to maintain fidelity, that is, exclusivity (*bonum fidei*) and perpetuity, that is, indissolubility of the matrimonial partnership (*bonum sacramenti*) and the obligation of accepting procreation from the other spouse, and of educating the offspring already born (*bonum prolis*).

Moreover, after the Second Vatican Council, the consolidated doctrine requires not only the capacity to assume these three obligations but also the capacity to establish and sustain a partnership of life ordered to the good of the spouses. And this good is considered by some as if it were a fourth good [...] and by others as an essential element of marriage in accordance with canon 1101 §2 [CCEO c. 824 §2].

Therefore, if someone were radically incapable of placing an oblativ act due to psychological disorders, his/her material consent must be considered invalid, because such a person is totally unfit to offer to his/her partner valid interpersonal relations, to promote the moral, spiritual and social good of the spouses. Interpersonal communication is not reduced to sex only, but presupposes a capacity to love and to gift oneself, by which several personal goods are shared so that the good of the spouses is fostered and the end of marriage is attained. A radical incapacity to establish interpersonal relations impedes the good of the spouses, because it becomes impossible to assume and fulfil the conjugal duties.

One who is found incapable of communicating with his/her spouse, and one who is found incapable of cooperating in and enjoying sexual relationship with the spouse, and one who is found incapable of either

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<sup>23</sup>“Locutio ‘ad bonum coniugum’ manere debet. Ordinatio enim matrimonii ad bonum coniugum est revera elementum essenziale foederis matrimonialis, minime vero finis subiectivus nupturientis” (1981 *Relatio*, p. 244; *Communicationes*, 15 [1983], p. 221).

holding a gainful employment by which he/she contributes to the domestic society or of fulfilling at least the ordinary household duties, such as cooking, cleaning the house, doing the laundry, etc., is certainly judged incapable of establishing and sustaining the good of the spouses.<sup>24</sup>

In another more recent sentence, dated 14 October 1999, after reiterating that the essential obligations of marriage mentioned in canon 1095, 3<sup>o</sup> [CCEO c. 818, 3<sup>o</sup>] are related to the three traditional goods (*bona*) of marriage, Boccafolà clearly acknowledges the juridic status of *bonum coniugum*.<sup>25</sup>

That the ordination of the marriage covenant or *consortium totius vitae* to the good of the spouses (*bonum coniugum*) constitutes one of the objective or institutional elements of matrimonial consent is a juridical principle now beyond dispute in canonical doctrine and jurisprudence. There have been scores of Rotal sentences which have considered *bonum coniugum* as the object of consensual incapacity mentioned in canon 1095, 3<sup>o</sup> (CCEO c. 818, 3<sup>o</sup>).<sup>26</sup> Two more recent Rotal sentences have dealt also with the ground of exclusion of *bonum coniugum*, thus clearly confirming the conciliar teaching that the ordination of the marriage covenant to the good of the spouses is an essential element of marriage and one's incapacity to assume it or a deliberate intention to exclude

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<sup>24</sup>Decision c. Boccafolà, 12 March 1998, in *SRR Dec.*, 90 (1998), p. 218.

<sup>25</sup>See decision c. Boccafolà, 14 October 1999, (Dublin), (unpublished), Prot. No. 17.213.

<sup>26</sup>For references to some of these sentences, see A. Mendonça, "Bonum coniugum from a Socio-Cultural Perspective," in *Many Cultures, Many Faces*, Monsignor W. Onclin Chair 2002, Leuven, Uitgeverij Peeters, 2002, pp. 96-104.

it from or not to include it in one's marital covenant (contract) would constitute invalidity of marriage.<sup>27</sup>

#### 1.1.5 - Ordered Toward the "Good of Offspring"

The concept of "*bonum prolis*" is not a discovery of the Second Vatican Council although it has spoken eloquently on the theme. The very notion of "good of offspring" has roots in the biblical and magisterial teachings on the nature and finality of marriage. It is important, however, to note that the 1917 Code had a very limited conceptualization of this *bonum*. As already stated earlier, the 1917 Code identified two ends of marriage. The primary end included two elements, namely the procreation and education of offspring. Only the first element of this end, that is, "procreation of offspring," expressed in juridical language as the right to "acts *per se* apt for the generation of children," became the sole formal object of the act of consent while the second element, that is, the "education of the offspring," like the secondary ends of marriage, received no juridical recognition in the Code.<sup>28</sup> Even jurisprudence tended to avoid this issue as it became evident that the concept of "education" was too broad to be juridically defined. Education or upbringing in fact includes more than providing for the physical needs of the child. The wholesome upbringing of a child on the parents' part

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<sup>27</sup>See A. Mendonça, "Exclusion of *Bonum coniugum*: A Case Study," in *Eastern Legal Thought*, 2 (April 2003), pp. 25-51, where the author analyzes an unpublished Rotal sentence c. Pinto, 9 June 2000, (Brazil), Prot. No. 17.779, which dealt with the ground of exclusion of *bonum coniugum*. Another sentence c. Civili, 8 November 2000, (Slovakia), Prot. No. 16.907 (unpublished) also involved the same ground. In both instances, the Rotal decisions were affirmative on the stated ground of exclusion of *bonum coniugum*.

<sup>28</sup>Cf. cc. 1013, §1, and 1081, §1 of *CIC* 17.

would certainly involve also the child's emotional, moral and spiritual needs as well. Again these aspects too were viewed as juridically indefinable.

The new Code remains open-ended in respect to this matter. The partnership of the whole of life is ordered to the "procreation and upbringing of offspring." There is no mention of the right to conjugal acts ordered to procreation either in the canon on matrimonial consent (c. 1057, §2; *CCEO* c. 817, §1), or in the canon on partial simulation (canon 1101, §2; *CCEO* c. 824, §2), but Rotal jurisprudence seems unanimous in acknowledging its implicit inclusion in c. 1101, §2 (*CCEO* c. 824, §2) as an essential element.<sup>29</sup> As already explained above, the material object of consent is the very persons of the spouses while the formal object is the "constitution of marriage." Marriage as a partnership is a complex of rights and obligations flowing from or related to the traditional *tria bona*, which include the *bonum prolis*, and the now recognized fourth *bonum*, that is, *bonum coniugum*.<sup>30</sup> As a matter of fact, this complex of rights and obligations is the formal object of matrimonial consent which would necessarily include the right to conjugal acts ordered to procreation and education of offspring.

In light of this implicitly more inclusive juridical approach adopted by the present Code, based on conciliar and papal teaching, the *bonum prolis* could entail a much broader juridical scope beyond its purely physical dimension. In other words, it could be

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<sup>29</sup>See decisions c. Agustoni, 15 October 1985, in *SRR Dec.*, 77 (1985), p. 437; c. Boccafolo, 16 January 1989, in *ibid.*, 81 (1989), p. 10; c. Stankiewicz, 22 February 1986, in *ibid.*, 88 (1996), pp. 119-120.

<sup>30</sup>Cf. *CIC* 83 cc. 1055, §1; 1135; 1136; *CCEO* cc. 776, §1 and 777; there is no equivalent of *CIC* 83 c. 1136 in *CCEO*.



understood as consisting of several elements which have been identified in law and jurisprudence. We can say that at the core of these elements is the right to conjugal acts directed to the achievement of their intrinsic finality, namely their openness to the generation of offspring.<sup>31</sup>

The good of offspring would be meaningless if it does not include protection of the child that is conceived. Therefore, the right to that good would cover the requirement that the child conceived be brought forth into the world, and not be aborted either intentionally or by a pathological inclination.<sup>32</sup>

Again the good of offspring does not stop at the birth of the child. According to c. 1136, "Parents have the most serious duty and the primary right to do all in their power to see to the *physical, social, cultural, moral and religious* upbringing of their children" (emphasis added). This canon reflects the Church's genuine desire for the wholesome upbringing and education of children. Therefore, the right to the good of offspring must comprise also the right to wholesome education of the child. What is of the essence of this "wholesome education" remains to be determined by evolving doctrine and jurisprudence which will have to take into consideration the socio-cultural aspects of this good.<sup>33</sup>

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<sup>31</sup>See T.P. Doyle, "The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse," in *ME*, 109 (1984), pp. 456-459; decisions *c. Stankiewicz*, 13 May 1978, in *SRR Dec.*, 70 (1978), p. 278; *c. Ragni*, 18 December 1984, in *ibid.*, 76 (1984), p. 622.

<sup>32</sup>See John R. KEATING, *The Bearing of Mental Impairment on the Validity of Marriage: An Analysis of Rotal Jurisprudence*, Roma, Gregorian University Press, 1973, p. 189; decision *c. Egan*, 20 January 1978, in *SRR Dec.*, 70 (1978), p. 30.

<sup>33</sup>For more details on this topic, see Mendonça, "Exclusion of the Essential Elements of

### 1.1.6 - Marriage as a Sacrament

In describing the nature of marriage we spoke of the covenantal aspect of marriage. To understand the full meaning of Christian Marriage, however, we need to go further and reflect on marriage as a sacrament.

Marriage is a natural reality created by God. It is, therefore, a sign that leads a person to the divine realm. This reality of marriage is sacred by its very nature and calls forth the mystery of God. That is why the natural institution of marriage between two baptised persons is regarded as a sacrament. The recognition by the Church that the marriage of the baptised is one of the seven sacraments is the culmination of a long theological development.<sup>34</sup> This traditional teaching has been incorporated in c. 1055, §1 of the 1983 Code (*CCEO* c.776), where the sacramentality of a marriage between two validly baptized persons is especially affirmed. The second paragraph of the same canon reiterates again the traditional teaching that a valid marriage between two baptized persons is *eo ipso* a sacrament.

The theology of the sacramentality of marriage is based on the understanding of marriage as a sign of God's covenant, depicted in Scriptures as a redeeming reality comprising God's free acceptance of human beings.<sup>35</sup> A mere verbal pronouncement of

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Marriage," pp. 81-87.

<sup>34</sup>See Council of Trent, sess. XXIV, *Doctrina de sacramento matrimonii*, c. 1. The council stated that marriage is truly and properly one of the seven sacraments of the evangelical law, instituted by Christ the Lord.

<sup>35</sup>A detailed explanation of the sacramentality of marriage can be found in: D. O'Callahan, "Marriage as Sacrament," in *Concilium*, 5 (1970), pp. 101-110; L. Boff, "The Sacrament of Marriage," in *Concilium*, 7 (1973), pp. 22-33; W. Kasper, *Theology of Christian Marriage*, trans. by D. Smith, New

nuptial vows during the wedding ceremony is not sufficient to prove the sacramental nature of marriage. It is necessary to accept marriage as a reality, fundamentally related to the saving work of Jesus Christ which makes it sacramental.

In the letter of Paul to the Ephesians chapter 5,<sup>36</sup> marriage is seen as a participation in the sanctifying mission of Christ. It consists of two elements: “being taken into the service of God and his work in creation and redemption and being made inwardly capable of carrying out that service by sanctifying grace.”<sup>37</sup> The Second Vatican Council, recalling the teachings of Trent on the sanctifying mission of the married spouses, reiterates in *GS*, 48: “Genuine married love is taken up into the divine love and is directed and endowed by the redeeming power of Christ and the saving action of the Church, so that married couples may be successfully led to God and be helped and strengthened in their noble task as father and mother.”

The sacrament is not something new added to marriage by Christ, but is marriage itself seen from the standpoint of Christian faith. Karl Adam has rightly stated: “The sacrament is not something extraneous, superadded to the natural union, but *the bond itself is the sacrament* permeated with the saving graces of Christ’s humanity [...] Only as baptized persons as members of Christ, can they (Christian spouses) contract that

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York, Seabury Press, 1980, pp. 27-28.

<sup>36</sup>St. Paul says that marriage is a “great mystery” (Eph. 5: 32). It is on this level of mystery that marriage takes on its sacramental character, and also it is in this dimension that marriage can be seen as a source of grace and salvation. See Boff, “The Sacrament of Marriage,” p. 22.

<sup>37</sup>See Kasper, *Theology of Christian Marriage*, p. 37.

union which is essentially the sacrament of Christ's unity with the Church."<sup>38</sup> Baptism is the causative factor which makes the Christian marriage holy and a sacrament.<sup>39</sup> But this Gospel vision of marriage is a great challenge Christians have to face within the context of our modern day scientific and individualistic trends, which conveniently deny the realm of the sacred.

### 1.1.7 - Essential Properties of Marriage

In the new Code, c. 1056 (*CCEO* c. 776 §3) explicitly spells out *unity* and *indissolubility* as the essential properties of marriage. These two properties are also implicit in canons 1055 (*CCEO* c. 776 §1-2) and 1134, where the expressions such as "partnership of the whole of life" and "by its nature perpetual and exclusive" are used respectively. They are qualities flowing from the very essence of marriage as a natural institution. Consequently, they are the properties of all marriages whether Christian or not. However, these properties obtain a special firmness from the sacramental dignity of a Christian marriage.

Unity and indissolubility are now expressed canonically within the context of marriage as a partnership (intimate interpersonal union) *of the whole of life*. This "intimate union" cannot exist unless it is exclusive between the two partners, nor can it exist unless it lasts for the whole life of the partners. The Conciliar teaching on marriage

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<sup>38</sup>See Karl Adam, "Sanctification of Marriage," in *Orate fratres*, 9 (1953), p. 218 (emphasis is added).

<sup>39</sup>See Elliot, *What God Has Joined ... The Sacramentality of Marriage*, New York, Alba House, 1990, p. 132.

stresses that the intimate union of spouses as a mutual self-gift of two persons and the good of the children demands an “unbreakable unity” between them (*GS*, 48).

The property of unity expresses the unicity of the bond between the partners. This means that marriage is an exclusive relationship between one man and one woman. The Council of Trent declared: “If anyone says that Christians may have more than one wife at once and that it is forbidden by no divine law: let that person be anathema.”<sup>40</sup> In other words, a husband can have only one wife and a wife only one husband. In marriage a man and a woman give and accept each other totally, freely and willingly for their entire life. Therefore, the unicity of the bond is violated by polygamy.

Indissolubility has always been recognized by the Church as an essential characteristic of marriage. It is rooted in the intimate communion of life of the partners. A “partnership of whole of life” is impossible without the quality of perpetuity. If it is limited to a certain period of time it cannot be an intimate communion of the whole of life, but rather a passing contract of convenience, and thus devoid of the intrinsic meaning and purpose of marriage. Indissolubility, therefore, is that essential quality of marriage which renders a validly constituted matrimonial bond unbreakable by the will of the spouses. This indissolubility is both intrinsic and extrinsic.<sup>41</sup>

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<sup>40</sup>See Council of Trent, sess. XXIV, *Doctrina de sacramento matrimonii*, c. 2, in N.P. Tanner (ed.), *Decrees of Ecumenical Councils*, London, Sheed and Ward/Washington, DC, Georgetown University Press, 1990, vol. 2, p. 754.

<sup>41</sup>A marriage contract is said to be intrinsically indissoluble when it cannot be dissolved by the will of the partners, and extrinsically indissoluble when it cannot be dissolved by the intervention of an external agent or authority.

## 1.2 - THE NATURE OF CONSENT ACCORDING TO CANON LAW

It is now an indisputable canonical principle, based on natural law, that the mutual consent of the spouses is the *intrinsic* and *efficient* cause of marriage (*CIC* c.1057 §2; *CCEO* c. 817).<sup>42</sup> The result of this spousal consent is the marital bond from which flow all the rights and obligations proper to the marital state. However, marital consent is juridically inefficacious unless it is legitimately exchanged between a man and a woman who are “qualified by law,” and within the context of the canonical form.

The object of consent is twofold: the “person” of each partner, the material object, and constitution of marriage, the formal object (GS 48). The mutual self-giving and acceptance of the spouses is not restricted exclusively to the right to their bodies for acts *per se* apt for the generation of children, but it constitutes “a real symbol of the giving of the whole person.”<sup>43</sup> Therefore, the formal object of matrimonial consent comprises the whole complex of rights and obligations that arise from the conjugal partnership of the whole of life.

### 1.2.1 - Consent as a Juridic Act

The notion of juridical act is fundamental to any legal system. It affects all acts which are likely to have consequences before the law. It impacts on the juridical

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<sup>42</sup>See GS, 48; Paul VI, Allocution to the Roman Rota, 28 January 1978, in *The Pope Speaks*, 23 (1978), p. 161; St. Thomas Aquinas, *Summa theologiae* III, *Suppl.*, q. 51, a. 1; A. Gil, *El nuevo derecho matrimonial canónico*, 2nd ed., Salamanca, Universidad Pontificia de Salamanca, 1985, p. 251.

<sup>43</sup>See John Paul II, Apostolic Exhortation, *Familiaris consortio* (= FC), 22 November 1981, in *The Pope Speaks*, 27 (1982-83), p. 70.

condition and status of persons in the Church. Moreover, it might determine the validity of sacraments, of appointment of persons to different offices, of procedural acts, etc.

Marital consent is fundamentally a “juridic act” by which the spouses express their will to mutually give and accept *each other* to constitute a partnership for the whole of their lives. Such a decision involves all their affective, cognitive and volitive faculties and brings forth juridical effects before the law.

#### 1.2.1.1 - The Notion of a Juridic Act

The notion of a juridic act, although borrowed from the civil law,<sup>44</sup> has been an integral part of the canonical system for centuries. The 1917 Code did not have an explicit and systematic treatment of juridic acts but it had certainly recognized its prominence in canon law.<sup>45</sup> In fact it contained some general principles on juridic acts.<sup>46</sup> After the promulgation of the Code, there was a surge in interest in exploring the nature and concept of juridic act.<sup>47</sup>

The present Code has a systematic treatment of the notion of juridic act. The general principles governing juridic acts are presented in a separate title (Title VII of Book I) with five canons (cc. 124-128). However, the Code does not provide a definition of

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<sup>44</sup>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.M. Kuziona, *The Nature and Application of Juridical Acts According to Canon 124 of the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1998, p. 8.

<sup>45</sup>See G. Michiels, *Principia generalia de personis in Ecclesia: commentarius libri II Codicis iuris canonici, canones praeliminares 87-106*, ed. altera, Tornaci, Desclée, 1955, p. 571.

<sup>46</sup>*CIC* 1917, cc. 103, 104, 1680.

<sup>47</sup>See, for example, S. Romani, “De factis, actibus negotiisque iuridicis,” in *Jus pontificium*, 18 (1938), pp. 192-197; Michiels, *Principia generalia*, pp. 568-571.

juridic act. One of the most accepted definitions is the one given by O. Robleda. He defines a juridical act as “an externally manifested act of the will by which a certain juridic effect is intended.”<sup>48</sup> G. Michiels is another noted canonist who has given two definitions of a juridical act, one in a broad sense and the other in a restricted sense. In a broad sense, “a juridic 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.”<sup>49</sup> In the strict sense, a juridic act is “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.”<sup>50</sup>

The main components found in these definitions are: a juridic act is an act of the will; it is an external act or a social act; it is a legitimately placed or declared act, and its juridic effect is determined by the law.

Consequently, a juridic act encompasses two essential aspects: 1) the person who performs the act has the will to do so; thus it must be a decision in which all the rational faculties are engaged; 2) the intention behind the act should be to produce a legal

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<sup>48</sup> “[...] *voluntatis actum externe manifestatum quo certus effectus iuridicus intenditur*” (O. Robleda, “De conceptu actus iuridici,” in *Quaestiones disputatae juridico-canonicae*, Romæ, Libreria editrice Università Gregoriana, 1969, p. 13); see also M. Hughes, “A New Title in the Code: On Juridical Acts,” in *StC*, 14 (1980), p. 392.

<sup>49</sup> “[...] *actus iuridicus dicitur quodcumque factum externe voluntarium, ab homine libere positum, cui qua tali lex de facto tribuit effectum iuridicum determinatum, independenter tum ab intrinseco actus objecto, tum a fine ab agente directe intento*” (Michiels, *Principia generalia*, p. 572).

<sup>50</sup> “[...] *actus iuridicus est ‘actus humanus’ socialis legitime positus et declaratus, cui a lege ideo et eatenus effectus iuridicus determinatus agnoscitur, quia et quantus effectus ille ab agente intenditur*” (ibid).



effect.<sup>51</sup> In law, both physical persons and juridical persons are capable of being agents of juridical acts. A juridical act may give rise to a right, modify a right, or suppress a right, within the limits approved by the law.<sup>52</sup>

Juridic acts could be either unilateral, bilateral or multilateral. When an act is performed by a single person it is an unilateral juridic act, whereas bilateral or multilateral juridic acts are those in which two or more people are involved, e.g., a contract.<sup>53</sup>

Every juridic act is a human act, an act of the will. For a juridic act to be valid, it must be performed freely and knowingly by a person who is *habilis*, according to the requirements of law.<sup>54</sup> Any factor which substantially curtails or limits the freedom of the person in positing an act can affect the validity of a juridic act.<sup>55</sup>

#### 1.2.1.2 - The Elements of a Juridic Act

Canon 124 outlines the fundamental principles governing juridic acts. It reads as follows:

§1. For the validity of a juridic act it is required that the act is placed by a qualified person and includes those things which essentially constitute the act itself as well as the formalities and requirements imposed by law for the validity of the act.<sup>56</sup>

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<sup>51</sup>See Hughes, "A New Title in the Code: On Juridical Acts," pp. 392-394; also see M. Wijlens, "Juridic Acts," in J.P. Beal, J.A. Coriden, T.J. Green (eds.), *New Commentary on the Code of Canon Law*, New York, NY/Mahwah, NJ, Paulist Press, 2000, p. 177.

<sup>52</sup>See Michiels, *Principia generalia*, p. 575.

<sup>53</sup>*Ibid.*

<sup>54</sup>See P. Gomez, *De actionibus et exceptionibus (canones 1667-1705)*, Romae, Copisteria Coscia, 1951, p. 72.

<sup>55</sup>*Ibid.*, p. 179.

<sup>56</sup>"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

The elements, therefore, involve a) the agent/person capable of placing the act, b) the elements which constitute the act itself, c) the formalities, and d) other requirements expressly demanded by law for the validity of an act.

The agent placing the act can be either a physical person, a juridic person, or a number of people as a group. However, the person placing the act must be *iure habilis* for its validity. It means that the person who acts must be naturally capable and legally competent to place the act.

#### **1.2.1.2.1 - *Habilitas* and *competentia* of the agent**

The agent eliciting a juridic act must know the nature and implications of the decision to be made. The agent, therefore, must have the use of reason, critical capacity and internal freedom proportionate to the object of the act being placed.

The canon identifies “*habilitas*” as the first prerequisite for positing a valid juridic act. The term does not connote a general capacity for juridic acts. The *habilitas* mentioned in canon 124, §1 is always relative. This implies that a person may have needed *habilitas* to place a simple juridic act but may not have the *habilitas* for acts of a more demanding nature.<sup>57</sup> Therefore, canonically speaking “*habilitas*” means the “juridic ability” of a person to place a juridic act. This requirement is the precondition for any juridic act.<sup>58</sup>

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imposita” (CIC c. 124, §1).

<sup>57</sup>See Hughes, “A New Title in the Code: On Juridic Acts,” p. 394.

<sup>58</sup>See M. Thériault, “De actibus iuridicis,” in *Comentario exegético al Código de derecho*

Canon law distinguishes four types of *habilitas* to place a juridic act:

1) *Natural capacity*: it means, the person placing the act is psychologically capable of eliciting a human act.<sup>59</sup>

2) *The basic canonical capacity*: this concerns the fact that the agent of the act is a “person,” either physical or juridic, in the Church.<sup>60</sup>

3) *Specific capacity*: this involves specific capacity for a specific act in question.<sup>61</sup> Thus, those who are in sacred orders, although they may have the natural *habilitas* to marry, lack the specific capacity required for contracting a marriage; a diocesan bishop, although he has the competence to dispense from ecclesiastical disciplinary laws, does not have the specific capacity to dispense from those disciplinary laws reserved to the Apostolic See.<sup>62</sup>

4) *Competence*: this refers to the legal authorization to place acts of a public nature. For example, necessity of delegation for a priest or a deacon to assist at a marriage.<sup>63</sup>

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*canónico (=Comentario exegético)*, 2<sup>nd</sup> ed., A. Marzoa, J. Miras, R. Rodríguez-Ocaña, Pamplona, EUNSA, 1996, vol. I, p. 823.

<sup>59</sup>See M. Thériault, “The Nullity of Some Processual Acts in Light of Canon 124,” in *Forum*, 5 (1994)1, p. 31; F. D’Ostilio, *Prontuario del Codice di diritto canonico*, seconda edizione riveduta e aggiornata, Libreria editrice Vaticana, 1997, p. 101; Kuziona, *The Nature and Application of Juridical Acts*, p. 134.

<sup>60</sup>Kuziona, *The Nature and Application of Juridical Acts*, p. 134.

<sup>61</sup>*Ibid.*

<sup>62</sup>See *CIC* cc. 87, 1087.

<sup>63</sup>See *CIC* c. 1108.

According to J.A. Doyle, the term “*habilis*” mentioned in c. 124 §1 must be understood to contain whatever capacities, whether natural, specific or the basic canonical capacity, are required to validly place a particular act.<sup>64</sup> Today there is consensus among canonists that a person must possess natural capacity, the basic canonical capacity, the specific capacity and competence to validly place a juridic act.<sup>65</sup>

#### 1.2.1.2.2 - Elements which essentially constitute a juridic act

The second aspect of a juridic act specified in c. 124, §1 consists of those elements which essentially constitute the act itself. However, the canon does not identify these essential elements. To the observation that the phrase “elements which essentially constitute the act” is too general, the Code Commission responded that this phrase is found in the juridic tradition and is very clear.<sup>66</sup>

Consequently, the identification of the essential elements remains the task of canonists. F. Roberti in his discussion on this issue writes: “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 [...]”<sup>67</sup> According to Kuziona, the essential elements

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<sup>64</sup>J.A. Doyle, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, JCD diss., Ottawa, Saint Paul University, 1989, p. 89.

<sup>65</sup>See L. Chiappetta, *Il Codice di diritto canonico: commento giuridico-pastorale*, vol. 1, secunda edizione accresciuta et aggiornata, Roma, Edizioni Dehoniane, 1996, p. 158; Thériault, “The Nullity of Some Processual Acts,” p. 31; D’Ostilio, *Prontuario del Codice*, p. 101; Kuziona, *The Nature and Application of Juridical Acts*, p. 136.

<sup>66</sup>See *Communicationes*, 14 (1982), pp. 144-145; Wijlens, “Juridic Acts,” p. 178.

<sup>67</sup>“Generaliter dicendi sunt essentialia elementa illa sine quibus actus suam naturam mutat, vel ineptus efficitur ad finem cui ordinatur [...]” (F. Roberti, *De processibus*, vol. 1, editio quarta, in Civitate Vaticana, Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1956, p. 620).

are those dynamic and structural components which determine the nature of a juridic act.<sup>68</sup> The elements, which pertain to the essence of an act, are those which constitute the nature of the act itself.<sup>69</sup> In the absence of any one of these elements, the act itself will be non-existent,<sup>70</sup> and a non-existing act cannot be sanated by positive law.<sup>71</sup>

The Code Commission explained that the essential elements of a juridic act are distinct from the formalities and requisites that the law may require for the validity of the act. Because the law itself does not define the essential elements, one has to have recourse to doctrine and jurisprudence in order to identify them for each juridic act.<sup>72</sup> We find varied opinions among canonists on this issue.<sup>73</sup>

One of the essential components of a juridic act is its object. There can be no juridic act without a proper object. This may be a corporeal thing, mobile or immobile, or

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<sup>68</sup>See Kuziona, *The Nature and Application of Juridical Acts*, p. 136.

<sup>69</sup>See *Communicationes*, 6 (1974), pp. 101-102; Wijlens, "Juridic Acts," p. 178.

<sup>70</sup>"The validity of a juridical act presupposes, first of all, the presence of those elements which pertain to the essence of the act, which therefore, by the nature of the act itself, are considered its constitutive elements. If these elements are lacking, the act is invalid because of its non-existence" (*Communicationes*, 6 [1974], p. 101.).

<sup>71</sup>"Positiva lege suppleri non valent quae natura sua ad actus essentiam requiruntur, elementa nempe actus, quibus deficientibus actus simpliciter non exsistit" (*Communicationes*, 6 [1974], p. 102).

<sup>72</sup>See *Communicationes*, 6 (1974), pp. 101-103.

<sup>73</sup>Hughes says that ultimately it is in the analysis of the juridical intention of the agent that we find the essential elements of a juridic act. He classifies them as: 1) *intellect* with its deliberation and formulation of the specific formal object; 2) *will* with its free consent or commitment to that specific formal object; 3) external expression of the intention in some appropriate way because it is an intention taking place in the external forum. See Hughes, *Persons in General*, p. 84; according to P. Gomez, the essential elements of a given juridic act are: (a) a competent and active or passive *subject*; (b) a *suitable and certain thing* or object; (c) an *intrinsic cause* or purpose to which the act is ordained; (d) the *will*, that is, the act should be placed knowingly and willingly. See Gomez, *De actionibus et exceptionibus*, p. 72. Chiappetta combines all these elements into one and says: "A generic element is the will manifested appropriately." According to him, some elements are determined by the very nature of the act while some others are determined by divine or ecclesiastical law. See Chiappetta, *Il Codice di diritto canonico*, vol. 1, p. 188.

a spiritual thing, or actions or facts or persons, right/obligation, etc.<sup>74</sup> For a juridic act to be valid its object must *exist*;<sup>75</sup> be *suitable*;<sup>76</sup> and be *certain*.<sup>77</sup>

#### 1.2.1.2.3 - Formalities for validity

A juridic act has an inner and an outer structure. It is the inner structure that brings the act into existence; it consists of the intention of the agent and its object; whereas the outer structure is the externalization of that intention as defined by law. Consequently, the law may determine certain formalities and requirements as part of that outer structure within which a particular act must be externalized for its legal efficacy.<sup>78</sup>

Legal formalities are the specifications and conditions under which the act is to be placed. Canon 124, §1 speaks precisely of those formalities expressly imposed by law for the validity of a juridic act. The term “formality” is to be understood as an “external form” within which a juridic act must be placed. The formalities required by law for the validity of a juridic act must be observed for it to have juridic effect.<sup>79</sup> For example, the law may require that an act be put in writing (c. 1524 §3), be placed before

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<sup>74</sup>See Roberti, *De processibus*, vol. 1, p. 578.

<sup>75</sup>For example, if a person sold a piece of property, and such a piece in fact did not exist, the act was regarded invalid. See Gomez, *De actionibus et exceptionibus*, p. 72; E. Roelker, *Invalidating Laws*, Paterson, NJ, St. Anthony Guild Press, 1955, p. 160.

<sup>76</sup>For concrete examples, see Roelker, *Invalidating Laws*, p. 161; Gomez, *De actionibus et exceptionibus*, p. 72.

<sup>77</sup>See Gomez, *De actionibus et exceptionibus* p. 72.

<sup>78</sup>See Hughes, *Persons in General*, p. 86.

<sup>79</sup>For more details, see Kuziona, *The Nature and Application of Juridical Acts*, p. 144.

witnesses, be signed by the person acting (c. 474), and a marriage be contracted within the context of the canonical form.

Full compliance with the formalities prescribed by law for the validity of a particular juridic act is necessary for the actual validity of a juridic act. Even if the intention (will) of a person placing the juridic act is clearly expressed externally, the act thus placed could still be invalid because of non-compliance with a formality prescribed by law for its validity. For instance, in the case of marriage the law demands that marriage consent be manifested within the *form* stipulated in c. 1108. If this formality is not fully complied with, the law would not recognize the validity of that marriage consent.<sup>80</sup>

#### 1.2.1.2.4 - Requisites for validity

The requisites mentioned in c. 124, §1 are legal stipulations or conditions extrinsic to the act itself or the manner of placing it.<sup>81</sup> These elements must be present before the act is placed. The requisites necessary for the validity of an act must be expressly stated so by the law. They may concern either the capacity or the competence of the person.<sup>82</sup> Therefore, when a canon explicitly imposes a requisite for the validity of a juridic act, its presence is a *conditio sine qua non* for the validity of that act. Therefore, if

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<sup>80</sup>The marital consent, however genuine it may be, manifested only in the presence of two witness, will not be considered valid except in situations mentioned in cc. 144, 1112 §1, 1116, and 1127 §§1-2.

<sup>81</sup>See E. Caparros, M. Thériault, J. Thorn (eds.), *Code of Canon Law Annotated*, Montréal, Wilson & Lafleur, 1993, p. 141.

<sup>82</sup>“Inter eadem habentur quae ipsa lege statuuntur requisita ad capacitatem seu habilitatem personae aut ad competentiam personae” (*Communicationes*, 6 [1974], p. 102).

that requisite is absent, then the act concerned will not produce the intended juridic effect.<sup>83</sup>

### 1.2.1.3 - Factors that Invalidate a Juridic Act

Every juridic act ontologically is a human act which produces legal consequences. Therefore, the elements intrinsic to a human act are constitutive of a juridic act. Canonical doctrine and jurisprudence agree that discretion of judgement proportionate to its proper object and internal freedom sufficient to choose that object are the constitutive elements of a truly human act. Therefore, the same elements are presupposed in every juridic act. In other words, there cannot be a juridic act when there is no integral human act.<sup>84</sup>

Since juridic acts are human acts, they must be placed with knowledge and freedom proportionate to the nature of the act in question. Canon law states that once an act is placed in accord with the formalities prescribed by law, it is presumed valid (124, §2). This, being a simple presumption of law, can be overturned by contrary proof. The mere fulfilment of external formalities prescribed by law for the validity of a juridic act is not a guarantee that the act is valid, because an act can be vitiated by either intrinsic or extrinsic factors. These factors may adversely influence either the intellect or the will of

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<sup>83</sup>For example, c. 1292 §1 states that the diocesan bishop is required to obtain consent of the finance council, of the college of consultors, and of other interested party to alienate goods which belong to the diocese. Here, the canon explicitly imposes a requirement of consent, but it implies that if the this “requisite” is not fulfilled, in accordance with c. 127, the act of the bishop will be invalid.

<sup>84</sup>See Kuziona, *The Nature and the Application of Juridical Acts*, p. 167.



the person placing the act, and are mentioned in cc. 125 and 126, namely force, fear, deceit, error, ignorance, simulation, and condition.

#### 1.2.1.3.1 - Force

Force is generally understood as a pressure exerted on a person in order to influence his/her actions. It can be either physical or moral coercion which signifies the threat of some objective evil. According to S. Woywod, "Force (violence or molestation) is employed to intimidate another and weaken his will so that he may be made to do what he would not otherwise do of his own free choice. While nobody can absolutely force another to make an act of the will, the molestation inflicted for the purpose of overcoming the resistance of a person's will-power, is nevertheless a grave injustice and an interference with a person's natural right to freedom."<sup>85</sup> Consequently the term "force," when referred to a juridical act, means an overpowering physical pressure used to coerce another to place an act which is entirely opposed to his or her will.<sup>86</sup> It is "any force applied from an external source to a person against his or her will and superior to his or her power of resistance."<sup>87</sup>

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<sup>85</sup>See S. Woywod, *A Practical Commentary on the Code of Canon Law*, revised by C. Smith, New York, J.P. Wagner, 1948, vol. I, p. 747.

<sup>86</sup>See J.V. Brown, *The Invalidating Effects of Force, Fear, and Fraud Upon the Canonical Novitiate: A Historical Conspectus and Commentary*, Canon Law Studies, No. 311, Washington, DC, The Catholic University of America, 1951, p. 58.

<sup>87</sup>See J.A. Abbo, J.D. Hannan, *The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church*, rev. ed., St. Louis, MO, B. Herder Book Co., 1957, vol. 2, p. 150.

Canon 125 §1 states that a juridic act is considered non-existent<sup>88</sup> if it is placed because of compulsion by an outside agent, especially if the will of the person performing the act is totally absent because of his or her inability to resist the compulsion. Thus, the canon speaks of physical force inflicted from outside.

According to the law, the force mentioned in c. 125, §1 must proceed from outside the person, the victim; that is, the force must be exercised by someone other than the one performing the act. This excludes internal impulses which may give rise to internal pressure or fear in a person. Sometimes these impulses may either minimize or completely destroy the freedom of action, yet they cannot be listed within the juridical concept of force.<sup>89</sup> Moreover, the force must be so grave that the person who suffers from it becomes incapable of resisting it, so that the force exerted on the victim controls his/her decision-making capacity. In the juridic notion of force, it is the physical force exercised on someone with the intention of obtaining an external act.<sup>90</sup> In an act extracted by force, the agent is not free, nor is he or she the master of the act thus elicited, but merely a tool in the hands of another person.<sup>91</sup> Such an act does not exist in the eyes of the law.

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<sup>88</sup>The corresponding canon in *CCEO* c. 932 §1 speaks of such act not as non-existent but null.

<sup>89</sup>Internal impulses can affect a person placing an act but they should be considered under different factors. See Kuziona, *The Nature and the Application of the Juridical Acts*, p. 169; Brown, *The Invalidating Effects of Force*, p. 58.

<sup>90</sup>Brown, *The Invalidating Effects of Force*, p. 56.

<sup>91</sup>See C. Magnin, *Pastors and People: A Summary of Canon Law Affecting Parish Priests, Curates and the Laity*, trans. by J. Scanlan, St. Louis, MO, B. Herder Book Co., 1929, pp. 37-38.

### 1.2.1.3.2 - Grave Fear

In general, fear is considered as an irascible passion, arising in the mind of a person because of some impending danger or evil, perceived in the imagination as imminent.<sup>92</sup> C. Augustine defines fear as “an emotion excited by threatening evil or impending pain, accompanied by a desire to escape or avoid it.”<sup>93</sup> Rudolph Allers provides a much broader definition of fear as “the emotional response to the awareness of a great danger, the nature of which is known, even if imperfectly, and which is conceived as imminent and, at the same time, as not absolutely unavoidable.”<sup>94</sup>

Juridically speaking fear is considered as a moral force which impacts on the human mind. It causes disturbance or anxiety in the mind of its victim because of the perception of some imminent or future danger.<sup>95</sup> Fear often affects both sensitive and rational faculties.<sup>96</sup> When this fear is prevalent in the sensitive realm, it either reduces or completely deprives its victim of his/her capacity for deliberation and freedom, especially if the fear is aroused abruptly or passionately. If fear is present only in the rational faculty, then the victim might remain free and might try to flee from the imminent danger by

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<sup>92</sup>See 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, p. 77; Brown, *The Invalidating Effects of Force*, p. 61.

<sup>93</sup>See C. Augustine, *A Commentary on the New Code of Canon Law*, St. Louis, B. Herder Book Co., 1925-1936, vol. 2, p. 30.

<sup>94</sup>See R. Allers, “Some Medico-psychological Remarks on Canons 1068, 1081 and 1087,” in *The Jurist*, 4 (1944), p. 372.

<sup>95</sup>See McCoy, *Force and Fear*, p. 78.; Brown, *The Invalidating Effects of Force*, p. 61.

<sup>96</sup>See St. Thomas, *Summa theologiae*, II, q. 25, a. 4; Brown, *The Invalidating Effects of Force*, p. 61; Kuziona, *The Nature and Application of Juridical Acts*, p. 172.

choosing a lesser evil.<sup>97</sup> For this reason, fear *per se* may neither impede the objective and deliberative judgment of reason nor totally destroy one's freedom of choice.<sup>98</sup>

When the fear is caused by an external agent to extract an act or decision from its victim, this mental trepidation specifically takes on the character of moral violence. In other words, "it morally compels the will of its victim to place an act which ordinarily he would be unwilling to place."<sup>99</sup> In ordinary circumstances, such a fear diminishes the spontaneity of an act but may not fully destroy the self-determination of its victim.<sup>100</sup>

Many degrees of fear are possible in an individual.<sup>101</sup> Sometimes fear can be so extreme that it can deprive a person of the use of reason. It induces the will to place an act as the only way of escaping the threatened evil. The law states that an act placed in order to escape from a threatened evil is to be regarded as a free and valid human act, but rescindable, unless the law itself provides otherwise. In order to invalidate a juridic act, fear must be grave, external,<sup>102</sup> unjust,<sup>103</sup> and a cause for placing the act.<sup>104</sup>

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<sup>97</sup>See Michiels, *Principia Generalia*, p. 505; McCoy, *Force and Fear*, p. 77; Kuziona, *The Nature and Application of Juridical Acts*, p. 172.

<sup>98</sup>See Michiels, *Principia Generalia*, p. 505; Brown, *The Invalidating Effects of Force*, p. 62.

<sup>99</sup>See Brown, *The Invalidating Effects of Force*, 62.

<sup>100</sup>See McCoy, *Force and Fear*, p. 78; Brown, *The Invalidating Effects of Force*, p. 62.

<sup>101</sup>See Victor J. Pospishil, *Eastern Catholic Church Law Commentary*, Vadavathoor, Kottayam, Oriental Institute of Religious Studies India, 1994, p. 461.

<sup>102</sup>It is important to note that the cause of fear mentioned here must be from outside, that is to say, from another human agent. The fear that proceeds from within the person, even if its source is external, cannot be considered as externally caused. Consequently, any fear created by person's own state of mind or imagination does not come within the scope of grave fear. See M.J. Lusena, *The Application of Selected Capita of Canonical Jurisprudence to the Practice of "Proposed Marriages" in Sri Lanka*, Canon Law Studies, No. 534, Washington, DC, The Catholic University of America, 1990, p. 47.

<sup>103</sup>It should be noted here that for some instances, like marriage, the law does not demand that the fear must also be unjustly inflicted. The law states that it must be grave and extrinsically caused.

### 1.2.1.3.3 - Deceit

In the juridical sense deceit may be defined as any craft, trick, or malicious contrivance deliberately done to circumvent, dupe, or deceive another.<sup>105</sup> However when deceit involves juridic acts, it is defined as a deliberate and fraudulent misrepresentation induced by an agent, which leads its victims to perform a particular juridic act.<sup>106</sup> Deceit consists of four elements: a) fraudulent means, b) intentionally employed, (c) to cause an error in the mind of the victim, and d) the victim is enticed to place a determined juridic act.

Deceit vitiates a juridic act proximately through the error generated by misrepresentation in the mind of its victim. Thus, the immediate and principal effect of fraudulent misrepresentation is the error it creates in the mind of its victim.<sup>107</sup> This error becomes either the basis or the cause for performing the particular act.<sup>108</sup> Therefore, when deceit causes substantial error, the act placed under its influence is *per se* invalid.<sup>109</sup> This matter will be discussed at length in the following chapter.

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<sup>104</sup>See Wijlens, "Juridic Acts," p. 179; McCoy, *Force and Fear*, p. 82.

<sup>105</sup>See Brown, *The Invalidating Effects of Force*, p. 104.

<sup>106</sup>See decision c. Stankiewicz, 27 January 1994, in *Periodica*, 84 (1994), p. 525, Michiels, *Principia generalia*, p. 535; Kuziona, *The Nature and Application of Juridical Acts*, p. 183.

<sup>107</sup>See Mendonça, "The Importance of Considering Cultural Contexts in Adjudicating Marriage Nullity Cases with Special Reference to South East Asian Countries," in *Forum*, 7 (1996)1, p. 251; Kuziona, *The Nature and Application of Juridic Acts*, p. 187.

<sup>108</sup>See Brown, *The Invalidating Effects of Force*, p. 112.

<sup>109</sup>See *CIC*, c. 126.

#### 1.2.1.3.4 - Ignorance

Ignorance, from the Latin verb *ignorare*, signifies lack of knowledge. It is also said to be a habitual state of the intellect lacking knowledge about a particular object.<sup>110</sup> So ignorance is in the intellect of a person.<sup>111</sup> In a broad sense, it means any absence of knowledge, while in the strict sense, it connotes a lack of knowledge about something that ought to have been possessed by the mind.<sup>112</sup> Therefore, only an intellectual being can be ignorant because it alone is endowed with the capacity for knowing.<sup>113</sup> The elicitation of a juridic act presupposes that the agent has the capacity to acquire due knowledge. Consequently, ignorance may be defined as lack of due knowledge in a person naturally capable of acquiring it.<sup>114</sup>

Since this definition speaks only of a subject capable of acquiring knowledge, an insane person cannot be described as ignorant.<sup>115</sup> The same holds true also for infants and for those who act under the influence of transient intoxication or passion.<sup>116</sup>

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<sup>110</sup>See Michiels, *Principia generalia*, p. 649.

<sup>111</sup>See J.H. Provost, "Error as a Ground in Marriage Nullity Cases," in *CLSA Proceedings*, 57 (1995), p. 310.

<sup>112</sup>See J.J. Paul, art., "Ignorance [Legal Aspect]," in *New Catholic Encyclopedia*, vol. VII, New York, McGraw-Hill Book Co., 1967, p. 357.

<sup>113</sup>See I.R. Swoboda, *Ignorance in Relation to the Imputability of Delicts: An Historical Synopsis and Commentary*, Canon Law Studies, No. 143, Washington, DC, The Catholic University of America, 1941, p. 115.

<sup>114</sup>*Ibid.*; Paul, "Ignorance [Legal Aspect]," p. 357; V.M. Smith, *Ignorance Affecting Matrimonial Consent*, Canon Law Studies, No. 245, Washington, DC, The Catholic University of America, 1950, p. 43; Kuziona, *The Nature and Application of Juridic Acts*, p. 199; some authors with a view to bring out the idea that ignorance is a privation and not a simple negation, define ignorance as the lack of knowledge which a person can and should have. According to Swoboda this definition is not comprehensive enough because it excludes all inculpable ignorance. See Swoboda, *Ignorance in Relation to the Imputability of Delicts*, pp. 115-116.

<sup>115</sup>See Smith, *Ignorance Affecting Matrimonial Consent*, p. 43.

A juridic act is the product of a dynamic interaction between the intellect and the will. The will cannot act without the intellect, and the intellect cannot be motivated to act without the will. Without the due knowledge concerning an object provided by the intellect, the will cannot make an informed decision about it.<sup>117</sup> Therefore, ignorance affects the intellect directly by giving rise to error in its victim's mind and the will indirectly since its decision is based on the erroneous information presented to it by the intellect.

Ignorance concerning the substance of an act affects the very existence of a juridic act.<sup>118</sup> Therefore, c. 126 stipulates that if ignorance concerns the *substance* of a juridic act, that act is invalid.<sup>119</sup> However, if ignorance concerns only an accidental or incidental element only, the act is valid unless the error caused by it amounts to *conditio sine qua non*, or the law provides otherwise (cf. c. 1097, §2). A juridic act caused by ignorance, however, is rescindable in accord with the norm of law (c. 126).

#### 1.2.1.3.5 - Error

Error in general may be defined as a false judgement about something,<sup>120</sup> or a false understanding of a thing.<sup>121</sup> Error is distinct from ignorance. Unlike ignorance, in

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<sup>116</sup>See *ibid.*; Swoboda, *Ignorance in Relation to the Imputability of Delicts*, p. 116; Kuziona, *The Nature and Application of Juridical Acts*, p. 199.

<sup>117</sup>See I. Gramunt, J. Hervada, L.A. Wauck, *Canons and Commentaries on Marriage*, Collegeville, The Liturgical Press, 1987, pp. 40-41.

<sup>118</sup>See Smith, *Ignorance Affecting Matrimonial Consent*, p. 75.

<sup>119</sup>Cf. c. 1096, §1.

<sup>120</sup>See Abbo - Hannan, *The Sacred Canons*, vol. 2, p. 152; Mendonça, "The Importance of Considering Cultural Contexts," p. 232

the case of error there is knowledge in the person, but it is wrong knowledge which leads the intellect to make a wrong judgement.<sup>122</sup> J.H. Provost notes that the people “who are in error know something, and know that they know something; but what they know is not correct, objectively speaking.”<sup>123</sup> Error is a positive judgement which is objectively wrong.<sup>124</sup> According to R. Funghini, error is a positive judgement which is objectively false.<sup>125</sup>

According to c. 126, error may affect the validity of a juridic act under the following conditions: a) if the erroneous judgement concerns the substance of the act itself, the act which flows from it is invalid; for example, the pronouncement of perpetual vows in religious life thinking they are only temporary; 2) if the error pertains to something which amounts to a condition *sine qua non*, that is to say, if the act would not have been performed except for the error, then that act is invalid; for example, consenting to marry a person, who is a divorcee, believing him/her to be free.<sup>126</sup> However, c. 126 further states that an act placed as a result of error is valid unless the law provides

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<sup>121</sup>See 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; Provost, “Error as a Ground in Marriage Nullity Cases,” p. 308; Kuziona, *The Nature and Application of Juridic Acts*, p. 193.

<sup>122</sup>See Rimlinger, *Error Invalidating Matrimonial Consent*, p. 28; Kuziona, *The Nature and Application of Juridical Acts*, p. 194.

<sup>123</sup>See Provost, “Error as a Ground in Marriage Nullity Cases,” p. 308.

<sup>124</sup>See decision, c. Funghini, 15 April 1997, in *ME*, 125 (2000), p. 37.

<sup>125</sup>See Wijlens, “Juridic Acts,” p. 180.

<sup>126</sup>See Wijlens, “Juridic Acts,” p. 180; *Letter & Spirit*, p.73; Kuziona, *The Nature and Application of Juridical Acts*, p. 197.



otherwise. Furthermore, an act caused by error can be rescinded in accord with the norm of law.

#### 1.2.1.3.6 - Simulation

As discussed above, for an act to bear the juridic effect determined by law, the agent who places the act should have the intention to do it.<sup>127</sup> This intention should include all the essential contents of the object of the act. It is possible for someone to intentionally exclude all or some of the essential contents of the juridic act. This deliberate exclusion of the essential juridic content, whether totally or partially, is often motivated by one's personal ends rather than by the ends determined by law. In such cases there is no conformity between what has been externally declared and what is actually intended by the agent.<sup>128</sup>

The traditional Rotal jurisprudence explains simulation as the coexistence of two opposing acts of the will: the declaration of "I will" and the internal act which says "I will not" to the marriage. In other words, the simulator internally rejects marriage itself, or one or more of its essential elements or properties, while externally saying "yes." C. Burke defines simulation as follows: "Simulation, one should note, implies conscious deception: deception of the other party, when it is unilateral (as where one, unknown to the other, excludes a permanent bond), or deception of society (at least of that particular society which is the Church within which the persons choose to marry), when it is bilateral

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<sup>127</sup>See P. Kitchen, "Matrimonial Intention and Simulation," in *StC*, 28 (1994), p. 353; Kuziona, *The Nature and Application of Juridical Acts*, p. 204.

<sup>128</sup>See Kuziona, *The Nature and Application of Juridical Acts*, pp. 204-205.

(as when both by common agreement totally exclude children).”<sup>129</sup> According to Burke, therefore, “Simulation involves two intentions which are not easy to reconcile. The simulator consciously intends at one and the same time: a ) to change state from unmarried to apparently married; b) not to accept the reality of marriage in some essential aspect.”<sup>130</sup> Thus, the exclusion of the essential effect of a juridic act jeopardizes its existence. The exclusion of the effects means that they are not intended and consequently not in the will of the agent who places the act. So simulation is one of the factors that can influence a juridical act negatively.<sup>131</sup>

#### 1.2.1.3.7 - Condition

The term “condition” has diverse connotations. In a strict sense it signifies a future uncertain event upon which the efficacy of a juridical act depends. Furthermore, the very clause itself contains this event.<sup>132</sup> S. D’Angelo defines it as: “That [circumstance] which, by the will of the parties, binds the existence of a juridic relationship to a future and objectively uncertain event.”<sup>133</sup>

A condition is a circumstance which is attached to the act in such a way that the validity of the agreement or contract itself depends on the verification or fulfilment of

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<sup>129</sup>See C. Burke, “Simulation of Consent,” in Woestman (ed.), *Simulation of Marriage Consent*, p. 14.

<sup>130</sup>See *ibid.*, p. 16.

<sup>131</sup>See Kuziona, *The Nature and Application of Juridical Acts*, p. 205.

<sup>132</sup>See B.T. Timlin, *Conditional Matrimonial Consent: An Historical Synopsis and Commentary*, Canon Law Studies, No. 89, Washington, DC, The Catholic University of America, 1934, p. 16.

<sup>133</sup>“Id quod voluntate partium alligat existentiam iuridicae relationis eventui futuro et objective incerto” (S. D’Angelo, *Jus digestorum* ..., Romae, 1927, vol 1, p. 720, as referred in Timlin, *Conditional Matrimonial Consent*, p. 140).

that circumstance. Ordinarily a legal agreement or contract can be dissolved upon the non-fulfilment of the condition or suspended until the condition is fulfilled.<sup>134</sup>

When a condition is actually verified, the suspensive state ceases, and the transaction becomes complete in respect to all of its juridic effects. In general, its effects are acquired only at the moment of verification of the condition. Tacit conditions, that is, those that are implicit in the act, but not expressed, are not considered true conditions and they effect nothing.<sup>135</sup>

A condition, understood as a circumstance added to a contract, is applied in two ways: in the strict sense for a future possible contingent event, and in the wide sense for past or present facts. In both instances a condition is generally indicated by the usual particles “if,” “unless,” and “provided that” (cf. c. 39). A condition *per se* suspends the effect of an act, and therefore, a true condition is that which suspends only the future effect. However, canonical doctrine considers also those conditions which are not really suspensive but make the validity of the act subjectively uncertain. Such conditions concern the past or present events or facts.<sup>136</sup>

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<sup>134</sup>Such was the provision of the 1917 Code regarding marriage (cf. c. 1092). But the present Code has modified this provision.

<sup>135</sup>See Timlin, *Conditional Matrimonial Consent*, pp. 24 and 79.

<sup>136</sup>Canon 1102 signifies that a couple could enter into a marriage contract with a condition concerning the past or present but not with a future condition. However the Eastern Code does not permit condition of any kind to a marriage contract. It states: “*Matrimonium sub condicione celebrari non potest*” (CCEO c. 826).

### 1.3 - THE NATURE OF MARRIAGE ACCORDING TO INDIAN CIVIL LAW

India is a secular country by constitution and, consequently, it is home for several religions such as Hinduism, Buddhism, Jainism, Sikhism, Islam, Christianity and Parsi. The Constitution of India recognizes the laws of all religious groups and considers them as personal civil laws, which govern the matters of marriage, succession, divorce, etc. The personal law differs depending on the religious community to which a person belongs.<sup>137</sup> The personal law governing an individual is generally determined on the basis of one's religion. Every person is expected to observe his/her personal civil law when carrying out any action concerning personal matters such as marriage, divorce, and succession. These laws are based on and drawn from the Holy books, customs, and statutory codification of each religious community.<sup>138</sup>

Personal law concerns the personal status of an individual.<sup>139</sup> It covers: "a). the essential validity of marriage; b). the mutual rights and obligations of husband and wife, parent and child, guardian and ward; c). the effect of marriage on the proprietary rights of husband and wife; d). divorce; e). the annulment of marriage though only to a limited degree; f). legitimation and adoption; g). certain aspects of capacity; h). will of movables and intestate succession to movables."<sup>140</sup>

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<sup>137</sup>See D. Vasudha, *Towards the Uniform Civil Code*, Bombay, Indian Law Institute, Tripathi Private Ltd., 1989, p. 69; *Skinner v. Ford*, (1871) 14 M.I.C. 309.

<sup>138</sup>See P.D. Mathew and P.M. Bakshi, *Hindu Marriage and Divorce*, New Delhi, Indian Social Institute, 1986, p. 1.

<sup>139</sup>See E.D. Devadasan, *Christian Law in India*, Madras, D.S.I. Publications, 1974, p. 236.

<sup>140</sup>See P.M. North and J.J. Fawcett (eds.), *Private International Law*, London, Butterworths

Christians also are governed by their personal civil laws. However, unlike those of other religious communities which are specifically based on their religious beliefs and laws, the personal civil laws of Christians are not principally compatible with their religious beliefs or the canon law.

The solemnization of Christian marriages was conducted according to Christian rituals. The courts did not interfere with this. However, when the East India Company assumed the power in India, it established its own courts, and the Common Law of England was made applicable to marriage and divorce among the Christians on the grounds of the so-called principles of equity, justice and good conscience. The implementation of English law on marriages of Christians in India created much confusion and divergence of opinions among civil court judges when cases were judged in civil courts. In order to eliminate this confusion and any conflict in opinions, the British Parliament passed an Act in 1852 enforcing the solemnization of Christian marriages in the presence of Marriage Registrars appointed by the Government.<sup>141</sup> Later in 1872 *The Indian Christian Marriage Act* was enacted.

Until the promulgation of *The Indian Christian Marriage Act*, 1872,<sup>142</sup> the norms for the solemnization of Christian marriages in India were regulated by two British Acts, together with two Indian Acts, (i.e. Acts V of 1852 and V of 1865). In 1872 the law

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Pub. Ltd., 1992, p. 164.

<sup>141</sup>See B.P. Beri, *Law of Marriage and Divorce in India*, Lucknow, Eastern Book Company, 1989, p. 30.

<sup>142</sup>*The Indian Christian Marriage Act*, 1872, was basically the same as previous regulations of the English Law. The new element in the Act of 1872 was that clergy were authorized to solemnize according to their rituals and this was civilly accepted and recognized.

commission simplified the existing Acts by consolidating the different enactments into one. It also tried to remove certain irregularities in order to bring the Act to the level of other Indian statutes on marriage.<sup>143</sup> Today all personal laws binding on the Christians of India with civil effects are codified as: a) *The Indian Divorce Act, 1869*;<sup>144</sup> b) *The Indian Christian Marriage Act, 1872*. *The Indian Divorce Act, 1869* treats of divorce, nullity and separation of a Christian marriage while *the Indian Christian Marriage Act, 1872* deals with marriage, its formalities, requirements, etc. Therefore, these two Acts should be read together, considering *The Indian Divorce Act, 1869* as a supplement to *The Indian Christian Marriage Act, 1872*. Both Acts are equally applicable to all Christians of India, without any distinction between denominations, including marriages where one of the parties is a Christian.<sup>145</sup>

Besides personal laws, there is also a special legal provision enabling two persons of different religions or of the same religion to contract a valid civil marriage. It is known as *The Special Marriage Act, 1872*, which was re-enacted in 1954. In the revision of the Act, provision was made for marriages of the two persons professing the same faith/religion. It also includes the norms for annulment and dissolution of marriage.

Our study is concerned with the contents of *The Indian Divorce Act* and *The Indian Christian Marriage Act*. *The Indian Divorce Act* contains all the laws pertaining to

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<sup>143</sup>See A. Mookerjee, *Marriage, Separation and Divorce*, Calcutta, S.C. Sarkar & Sons Private Ltd, 1986, p. 4.

<sup>144</sup> This Act, after 132 years, was amended in 2001.

<sup>145</sup>See *Kolandaivelu v. Rev. I. Deguidt*, AIR 1918 Mad. 601.

matrimonial reliefs, which embrace dissolution, declaration of nullity, separation and restitution of conjugal rights, whereas *The Indian Christian Marriage Act* deals with the solemnization of Christian marriage. We also take *The Special Marriage Act* into consideration when treating civil marriages since this act is applicable to all the Indians regardless of caste or creed.

### 1.3.1 - Marriage in the Civil Law

The Hindus, who comprise 80% of the Indian population, from the very beginning of their civilization, considered marriage as a sacrament<sup>146</sup> and as a bond which, once established, could not be broken. J. Derrett explains that, "The intention of the sacrament is to make the husband and wife one, physically and psychically, for secular and spiritual purposes, for this life and for after lives."<sup>147</sup> The husband and wife become one through the matrimonial bond. Manusmriti<sup>148</sup> states that a wife cannot be released from her husband either by sale or by repudiation. A maiden is given in marriage only once.<sup>149</sup> Thus we see that for the Hindus, marriage was not a contract but a sacramental

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<sup>146</sup>The Hindu concept of the sacrament of marriage differs from the Christian notion of this sacrament. The Hindus regard their marriage not only as a sacrosanct and inviolable union, but also as an eternal union, one that subsists not only during this life but in the life to come. Hindus strongly believe in rebirth.

<sup>147</sup>See J.D. Derrett, *A Critique of Modern Hindu Law*, Bombay, Tripathi Private Ltd., 1970, p. 287.

<sup>148</sup>The various laws regulating Hindu marriage were codified in 'Manusmriti' which was written by the great Hindu sage Manu. Among the ancient writers on Dharmasatra (Law), Manu is considered the greatest and is called 'The Law-giver'. Manu does not define marriage, he rather prescribes it as a requirement and treats it in a sacred contractual perspective. The ancient Hindu law makers always insisted on the sacredness and permanence of marriage. According to Manu, the husband receives his wife from the gods. See J. Maliekal, "The Celebration of Catholic Marriages in India," in *StC*, 17 (1983), pp. 389-390.

<sup>149</sup>See J.H. Dave, *Manusmriti*, Bombay, Bharathi Vidya Bhavan, 1975, vol. I, p. 48; also see

union, a holy union, and divorce was unthinkable, a sacrilege, and a sin.<sup>150</sup> Nonetheless, it should be recognized that in certain castes and sub-castes, customary divorces prevailed from an early period and were recognized by Hindu religious laws.<sup>151</sup>

An analysis of the nature of marriage according to the terms of Indian civil law demands a certain amount of historical treatment. As we have already seen, the formation of *The Indian Divorce Act* and *The Indian Christian Marriage Act* were influenced by English Law. The retired Justice V.R. Krishna Iyer, who was one of the greatest supreme court judges of India, says: "Indians, despite independence, have continued under British and American influence, in the field of law and technology and our intellectuals are generally under their ideological spell."<sup>152</sup> The origin, roots, and understanding of marriage, especially with regard to Christian marriage, in Indian civil law, therefore, should be traced back to English law. Precisely because of this, reference will have to be made, from time to time, to English provisions as they affect or describe Indian law.<sup>153</sup>

Marriage has not been defined in any parliamentary statute. It is a mixed reality variously described as a contract, a status and an institution. It is regarded as a

Nilakshi Sengupta, *Evolution of Hindu Marriage*, Bombay, Bombay Popular Prakashan, 1965, pp. 91-94.

<sup>150</sup>See P. Diwan, *Law of Marriage and Divorce*, 3rd ed. reprint with supplement, Delhi, Universal Law Publishing Co. Pvt. Ltd., 2000, p. x.

<sup>151</sup>*Ibid.*, p. 4.

<sup>152</sup>See J.S. Hussain, *Marriage Breakdown and Divorce Law Reform in Contemporary Society: A Comparative Study of USA, UK and India*, New Delhi, Concept Publishing Company, 1983, p. 7.

<sup>153</sup>In the case of *Madanlal Sharma v. Smt. Satish Sharma*, the Bombay High Court held that the notion of cruelty under Section 13(i) of *The Hindu Marriage Act, 1955*, must involve the same meaning as is understood in English law (1980, Mh, LJ, 391). This statement supports the view of the retired Justice V.R. Krishna Iyer, mentioned above.



process or event, signifying the assumption of roles of husband and wife in accordance with the regulations prevalent in the society or stratum of society to which the contracting parties belong.<sup>154</sup> The classic definition of marriage in civil law is that it is “the voluntary union for life, of one man and one woman to the exclusion of all others, the man and the woman not being legally prohibited from marrying one another.”<sup>155</sup> A comprehensive definition of marriage which holds true for civil courts around the world is found in the *Corpus iuris secundum*, which defines marriage as “the civil status of one man and one woman, capable of contracting and giving mutual consent for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is found on the distinction of sex.”<sup>156</sup>

In contemporary societies, marriage is considered as a contract which has the legal sanction of the state. In the Indian Civil Code as well, marriage is seen as a contract, an institution, a status or a relationship which has the constitutive elements of a contract. In the case of *Balbir Kaur v. Maghar Singh*, the Judge maintains that marriage is a partnership for the life.<sup>157</sup>

Although Hindus, Catholics and some of the Christian denominations regard marriage as a sacrament, the Indian civil statutes do not recognize the sacramental nature

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<sup>154</sup>See Mookerjee, *Marriage, Separation and Divorce*, p. 1.

<sup>155</sup>See *Hyde v. Hyde* LR, 1866, IP & D, 130, 133; H. Tan Cheng, *Matrimonial Law in Singapore and Malaysia*, Singapore, Butterworths Asia, 1994, p. 2.

<sup>156</sup>See *Corpus iuris secundum*, (95 Vols.), Brooklyn, New York, The American Law Book Co, 1936-1951, vol. 55, *Marriage*, p. 1.

<sup>157</sup>See *Balbir Kaur v. Maghar Singh*, AIR 1984 Pun. & Ha. 417.

of marriage. When marriage is referred to the civil court, the tribunal treats marriage as a civil contract and emphasis is placed on the civil effects.<sup>158</sup>

### 1.3.2 - The Nature of Marriage

In the past some jurists held that the purpose of marriage is twofold: “A lawful indulgence of the passions to prevent licentiousness and the procreation of children under the shield and sanctions of the law.”<sup>159</sup> This view was opposed by some jurists, arguing that evidence indicates that ancient and modern societies clearly regard procreation of children as the primary purpose of marriage.<sup>160</sup> However, present jurists and jurisprudence stress both the partnership of spouses and their happiness, and the generation of children and their upbringing.<sup>161</sup>

The essential elements contained in a legal marriage are:

a) *It should be voluntary.* It is fundamental that the parties enter into marriage freely. In other words, the marriage union should be a free volition and free choice of the parties. Their consent should be free and not obtained as a result of duress or fraud.<sup>162</sup> In

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<sup>158</sup>In a judicial decision of Bombay court (AIR 1952 Bombay 486), it was held that Hindu marriage is a civil contract. See S.C. Jain, *The Law Relating to Marriage and Divorce*, Delhi, Surjeet Book Depot, 1980, p. xviii; S. Clark, *Summary of American Law*, Rochester, Lawyers Co-operative Pub. Co., 1949, p. 140.

<sup>159</sup>See J.P. Bishop, *New Commentaries on Divorce and Separation*, 6th ed., Chicago, Flood & Co., 1891, vol. 1, p. 11.

<sup>160</sup>See R. Powell, *The Concept of Marriage in Ancient and Modern Law, Contained in Current Legal Problems*, ed. by George W. Keeton and George Schwarzenbeger, London, Stevens and Sons Ltd., 1950, vol. 3, pp. 46-64.

<sup>161</sup>See *Mary Soniya v. Union of India*, 1995 (1) KLT 644; *Balbir Kaur v. Mahar Singh*, AIR 1984 P&H 417; *A v. B*, 1996 (1) KLT 275.

<sup>162</sup>See *The Indian Divorce Act, 1869*, Section 19(4).

the absence of free and voluntary consent, observations of rituals, formalities or ceremonies will not make a valid marriage.<sup>163</sup>

b) *It should be for life.* The partnership established through marriage is for life.<sup>164</sup> For most people, at first sight it might seem as if in the civil law of marriage this essential element is missing especially because of the availability of the dissolution of marriage. However, the law does intend the permanence of marriage. But the presence or absence of such intention in the parties, which is so subjective, does not matter much from the legal point of view because the law presumes it in all who enter into marriage. Although civil law works for the protection and preservation of the marriage contract, it does permit the dissolution of a marriage contract on certain established grounds for the betterment of the spouses and society.<sup>165</sup> Of course, in the civil law the idea of permanence of marriage differs from the teachings of the Church. Civil law, first of all does not recognize the principle which the Church holds, that no civil power can dissolve a valid marriage. Civil law does not speak in terms of unity and indissolubility as essential properties of marriage, but rather describes it in terms of exclusiveness and permanence. The validity of any marriage in the Civil Code depends on the capacity of the parties, the voluntary nature of their consent and the efficacy of the ceremony whereby the marriage is performed. The validity of marriage, therefore, is governed by statute.

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<sup>163</sup>See Dr. Thomas Titus v. Mrs. Roha Titus, ILR 1992 (2) Ker. 667.

<sup>164</sup>See Balbir Kaur v. Maghar Singh, AIR 1984, P & H., 417.

<sup>165</sup>See Diwan, *Law of Marriage & Divorce*, pp. 30-40; it is interesting to learn how the theory of divorce crept into the civil law. According to the understanding of the law, marriage is an exclusive union and, therefore, when the marriage ceases to exist as an exclusive union, it ceases to be a marriage. Adultery always destroys this union. That is how adultery became one of the grounds for divorce.

c) *It should be monogamous.* The outstanding character of marriage in Indian civil law, as found in most countries today, is that it is a monogamous union.<sup>166</sup> This concept has been incorporated into the statute in so far as it relates to the celebration of marriage. The law will not recognize a purported marriage by a person where a previous bond exists.<sup>167</sup> Previous to 1955, Hindus were permitted to enter into more than one marriage.<sup>168</sup> With the introduction of *The Hindu Marriage Act 1955*, monogamy became statutory for all Hindus.<sup>169</sup> In Indian civil law today, except for the Muslims, bigamous marriage under civil personal law is void<sup>170</sup> as well as penal offence.<sup>171</sup>

d) *It should be heterosexual.* This means that the marriage relationship is to be established only between a man and a woman and not between persons of the same sex.

Since marriage is seen as a contract we shall analyze the notion of contract to comprehend what marriage is and determine its essential elements in the legal context.

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<sup>166</sup> Among certain tribes of India, even though monogamy is recognized, a concession for a second marriage is granted, by their custom, to those males whose first wife fails to beget a child and also for a male progeny in the case where only female children are born.

<sup>167</sup> See *The Indian Divorce Act, 1869*, Section 19(4).

<sup>168</sup> See Diwan, *Law of Marriage & Divorce*, pp. 84-85. Among the Hindus, polygamy was not practised on a large scale.

<sup>169</sup> See *The Hindu Marriage Act, 1955*, Section 5(i).

<sup>170</sup> See *The Hindu Marriage Act, 1955*, Section 11; *The Parsi Marriage and Divorce Act, 1936*, Section 4(2); *The Special Marriage Act, 1959*, Section 24; *The Indian Divorce Act, 1869*, Section 19(4); see also *Permal Gounder v. Pachayappan*, AIR 1990, Mad. 110. Muslim law permits a Muslim to have more than one wife, but it is limited to a maximum of four wives. This law is based on their holy book 'Koran'. See P. Diwan, *Muslim Law in Modern India*, Allahabad, Wada Co., 1993, p. 42.

<sup>171</sup> See *The Hindu Marriage Act, 1955*, Section 7. Bigamy among Hindus is now punishable with a term of imprisonment up to seven years.

### 1.3.3 - Contract in Indian Civil Law

In civil law, to contract means to bind oneself by promise. According to *The Indian Contract Act, 1872*, a contract is brought into existence when parties agree upon “the same thing in the same sense.”<sup>172</sup> It means that there is consensus *ad idem* whereby there is a meeting of minds. Such an act is effected through human consent. Thus consent is an indispensable element in the creation of a contractual bond. All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void.<sup>173</sup> A contract is to be made either in writing or in the presence of witnesses. Otherwise it will not have the force of law.<sup>174</sup>

To be juridically valid, a contract requires that the consent of the contracting parties be manifested freely with knowledge and without any feeling of restraint.<sup>175</sup> Every person who has attained the age of majority according to the law to which he/she is subject and who has soundness of mind and is not disqualified from contracting, is competent to contract.<sup>176</sup> *The Indian Majority Act* of 1875, Sec. 3 states that the age of majority is 18 years.

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<sup>172</sup>See *The Indian Contract Act, 1872*, Section 14.

<sup>173</sup>See J.L. Kapur, *Indian Contract and Specific Relief Acts*, Bombay, Tripathi Private Limited, 1986, pp. 117-118.

<sup>174</sup>See *The Indian Contract Act, 1872*, Section 25, 1 & 3 and Section 28.

<sup>175</sup>See Kapur, *Indian Contract and Specific Relief Acts*, p. 117.

<sup>176</sup>*Ibid.*

### 1.3.3.1 - Consent in a Contract

As already stated above, the consent of the parties is an essential element of a contract and the consent thus given should be free. Two or more persons are said to consent when they agree upon “the same thing” in the “same sense.”<sup>177</sup> Here “the same thing” denotes the whole content of the agreement of a contract that both the parties should agree to the same thing in the same sense.<sup>178</sup> The consent is said to be free when it is not caused by any of the following factors:<sup>179</sup>

- Coercion (Sec. 15);
- Undue influence (Sec. 16);
- Fraud (Sec. 17);
- Misrepresentation (Sec. 18);
- Mistake (Sec. 20, 21 & 22).

## 1.4 - THE NATURE OF CONSENT ACCORDING TO INDIAN CIVIL LAW

From what we have discussed above it is clear that consent is a significant element in any valid contract. Since civil law recognizes marriage as a contract, a valid consent of the parties is essential to bring a marital contract into existence. The parties should have the capacity and knowledge of the content of the contract before they manifest their consent. This consent should be free. In other words, any kind of fraud, force or coercion exerted on the contracting parties will make the contract void. For the validity of

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<sup>177</sup>See *The Indian Contract Act, 1872*, Section 12.

<sup>178</sup>See Kapur, *Indian Contract and Specific Relief Acts*, p. 117.

<sup>179</sup>See *The Indian Contract Act, 1872*, Section 14.

the marital contract, the consent should be manifested in the prescribed manner according to the prescribed form.

#### 1.4.1 - Marriage as a Contract

Even though Christian marriages are solemnized in the church by a minister, who by the virtue of office or by license is authorized under *The Christian Marriage Act, 1872*, and are regarded as a sacrament, civil law does not hold the same view, but treats them simply as a contract. However, marriages are regarded as a special contract. They are not equated with an ordinary commercial contract. Marriage contracts differ fundamentally from other contracts<sup>180</sup> in respect of the following matters:

- capacity to marry;
- formalities of marriage;
- grounds of void and voidable marriage;
- avoidance of marriage — thus a decree of annulment of marriage is necessary when marriage is voidable;
- dissolution of marriage - a marriage can be in most systems (except Muslim law) dissolved by a decree of the court of law; a contract of marriage cannot be discharged by breach, agreement, frustration or negation, and
- terms of marriage contract - the parties are not free to stipulate any terms in the marriage contract; the spousal rights and obligations are laid down by law, although some flexibility is allowed.<sup>181</sup>

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<sup>180</sup>Diwan quoting the American judge, C.J. Appleton, observes that marriage differs fundamentally from other contracts in the sense that once the marriage is entered into, its consequences are independent of the contract of marriage. See Diwan, *Law of Marriage and Divorce*, p. 54.

<sup>181</sup>Ibid., p. 53.

Civil law regards marriage fundamentally as a social institution, It is emphasised that since marriage is a social institution, there is a social interest in its preservation and protection. There is no doubt that the various constitutive elements of a commercial contract enter into the marriage contract. Yet it differs from a commercial contract; it is a contract “*sui generis*.”<sup>182</sup>

This special nature of the marriage contract is well defined in one of the judgements of Lord Robertson, in which he states:

Marriage is a contract *sui generis* and differing in some respects from all other contracts, so that the rules of law which are applicable to expanding and enforcing other contracts may not apply to this. The marriage contract is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium* and the foundation of it rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations or duties arising from it are not left entirely to be regulated by the agreement of parties, but are to a certain extent matters of municipal regulation, over which the parties have no control by declaration of their will. It confers the status of legitimacy on children born in wedlock, and with all the consequential rights [...]; in short it pervades the whole system of civil society.<sup>183</sup>

Marriage, therefore, is a contract by which a man and woman enter into a legal relationship. This contract, by law, creates a partnership between the parties known as “status”<sup>184</sup> from which flows certain rights and obligations. Since this contract is quite

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<sup>182</sup>Ibid., 54.

<sup>183</sup>See Edmonstone, Levett, Forbes and Ferguson, *Divorce Cases, Court of Session*, Faculty Collection, 1916, No. 54, vol. 19, p. 139, as cited in H.A. Finlay and A.B. Johnson, *Family Law in Australia*, Melbourne, Butterworths, 1972, p. 40.

<sup>184</sup>T.C. Han has well defined what the term “status” means in law. He states “The status of an individual used as legal term, means a legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community which are constituted upon marriage are not imposed or defined by contract or agreement but



different from a commercial contract or agreement, the parties are not free to regulate all their affairs by mutual agreement. The essential elements of the marriage partnership established through a contract fall under the purview of law, as marriage is governed by law and not by the mutual agreement of the parties. This is because the institution of marriage is recognized as the basic unit of human society through which the rights and obligations of spouses and their children are regulated. It is also the primary institution within which the procreation and education of children take place.<sup>185</sup>

In a matrimonial contract, therefore, “unlike ordinary agreements, the spouses are not at liberty to provide for the circumstances upon which the relationship will come to an end. If there is a valid marriage, nothing short of death or a decree of divorce by a court of competent jurisdiction will put an end to the marriage contract.”<sup>186</sup> The grounds on which a marriage contract is declared null and void and the rules relating to capacity to marry are also very different from other contracts.

The law does provide the opportunity for the dissolution of marriage. It can be dissolved, for instance, in those cases where a party to the marriage by his/her act or omission fundamentally undermined the object of the contract. The marriage thus becomes dissoluble in the case of inevitable breakdown due to recurring mischief or atrocious conduct by one party against the other party in the marriage.

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by law” (T.C. Han, *Matrimonial Law in Singapore and Malaysia*, Singapore, Butterworths Asia, 1994, p. 1); also see *Niboyet v. Niboyet*, 1878, 4 PD 1, 11.

<sup>185</sup>See *Mary Sonia v. Union of India*, 1995 (1) KLT 658; Han, *Matrimonial Law in Singapore and Malaysia*, p. 2.

<sup>186</sup>Han, *Matrimonial Law in Singapore and Malaysia*, p. 2.

#### 1.4.1.1 - Capacity: A requisite for a valid marriage

The capacity of the parties who wish to establish a marriage contract is an important element for its validity. Although Indian civil law acknowledges the freedom of all to marry, the parties are expected to have the capacity necessary to enter into a contract enforceable by law. The law simply speaks of conditions to be fulfilled while technically this should be spoken of as the legal capacity to marry. A marriage celebrated in violation of the conditions of marriage laid down by the law will not be valid in its sight.<sup>187</sup> For a matrimonial contract to be valid, the contracting parties should be legally capable. The following are the conditions which must be met in order to consider a person capable:<sup>188</sup>

##### a) Neither party must have a spouse living

Apart from the physical incapacity like impotency or mental illness, the other vitiating factor is illegality which renders a marriage contract unenforceable. This happens typically when one or both parties were already married and the bond still exists. The view of the law is that such a contract, being unenforceable at the time it was made, is contrary to public policy and morality and incompatible with the mutual rights and obligations existing in respect to *consortium* between spouses. The parties must be free to marry. In other words both contracting parties must not be bound by an existing marriage bond at the time of the marriage. In a case where one party was previously married, for

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<sup>187</sup>See *Jude v. Jude*, AIR 1949 Cal. 563; *Saldanha v. Saldanha*, AIR 1930 Bom. 105.

<sup>188</sup>See *The Indian Christian Marriage Act, 1872*, Section 19, Section 88. In the case of *Gunasonudari v. Nalla Thambi*, AIR 1945 Mad. 516, the judge argued that Section 88 of *The Indian Christian Marriage Act* includes prohibitions based on blood relationship as well as on affinity (Section 19(2); *The Special Marriage Act, 1954*, Section 4; *The Hindu Marriage Act, 1955*, Section 5.

the second marriage contract to be valid, the first marriage must have been terminated either by death, annulment or dissolution. A dissolution of marriage is not complete until a decree to this effect is issued by a civil court. Where the spouse of a party to an earlier marriage has disappeared and has not been heard of for seven years, dissolution of that marriage could be obtained on the presumption of death.

**b) The parties should not be within the degrees of prohibited relationship**

The parties must be outside the prohibited degrees of consanguinity and affinity. Indian Civil Law prohibits marriages between persons within the prohibited degrees of relationship.<sup>189</sup> Neither *The Indian Divorce Act* nor *The Indian Christian Marriage Act* define what the prohibited degrees are. Section 10 of *The Indian Divorce Act* simply states that a marriage may be declared null and void where the parties are within the prohibited degree of consanguinity. In a case judged before the Calcutta High Court it was declared that the prohibited degrees for the purpose of marriage are those found in the law of the Church to which the parties belong.<sup>190</sup> It follows that in the absence of a statutory provision on this matter, the person is expected to observe the customary law. A degree, under the method adopted by the Western Church, is computed from the nearest common ancestor of the parties in question. This chain includes all persons related not only by blood (which is known as relation by consanguinity), but also

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<sup>189</sup> See *The Indian Divorce Act*, Section 19, 2.

<sup>190</sup> See *V.H. Lopez v. R.J. Lopez*, ILR 1886, Cal. 706.

by marriage (which is described as relation by affinity).<sup>191</sup> Relationship by consanguinity arises from blood relationship, while affinity evolves from relationship through marriage. However, a marriage contract can be validly entered into where a custom governing at least one of the parties sanctions a marriage between them, notwithstanding the fact that they fall within the degrees of prohibited relationship. The need to protect from incestuous relationships has led to the elaboration of these rules.

**c) The male must have completed 21 years of age and the female 18 years of age<sup>192</sup>**

Both contracting parties must be of marriageable age. Until a person has attained the age of majority, he/she is not of full legal capacity to enter into legal relations (marriage contract) in the same way as a person who has reached that age. This lack of capacity will make itself felt in many areas, especially as regards contracts. The present Indian Civil Code declares that a male is considered capable of entering into a marriage contract when he has completed 21 years of age and a female is considered capable of establishing a marriage contract when she has completed 18 years of age.<sup>193</sup>

**d) A person suffering from unsoundness of mind**

The terms 'insanity' and 'unsoundness of mind' are often used in the Indian Civil Code when it deals with a juridical act. There is a separate Act known as *Indian*

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<sup>191</sup>See A. Dickey, *Family Law*, North Ryde, N.S.W, The Law Book Company Ltd., 1985, p. 106.

<sup>192</sup>See *The Indian Christian Marriage Act*, Section 60(1); *The Special Marriage Act*, Section 4(c); *The Hindu Marriage Act*, Section 5(iii); *The Child Marriage Restraint Act, 1929*, Section 2(a).

<sup>193</sup>However, the court does grant permission for a grave reason to contract marriage at a lower age. For instance in Jamshedpur, in the year 1978, a boy of twenty years of age who impregnated a girl of seventeen was given permission by the Magistrate to get married.

*Lunacy Act of 1912* which specifies the norms related to people who do not have the use of reason. According to Sec. 315 of this Act, lunatics are those who are of unsound mind. Some writers and commentators interpret lunacy as insanity.<sup>194</sup>

Unsoundness of mind means that the degree of mental disturbance is so menacing and so disabling that the person, who is of unsound mind, may be considered, from a legal point of view, incapable of fulfilling certain responsibilities and obligations requiring a degree of competence.<sup>195</sup>

The terms 'mental disorder' and 'insanity' also are used in the Indian Civil Code to denote the state of mind of the person who has lost his/her reason. Therefore, the law declares that the mental incapacity to give consent to marriage, caused either by unsoundness of mind or insanity or mental disorder, undoubtedly renders the marriage invalid, because the consent of the parties is an essential ingredient for a valid marriage.

A person, induced to marry during the time of intoxication, enters into the marriage contract invalidly because he/she does not have the use of reason and he/she will not be able to produce a consenting will.<sup>196</sup>

Section 4(b, i) of *The Special Marriage Act* states that in some cases the party may be capable of producing a valid consent but may not be fit for marriage and the

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<sup>194</sup>William Pinto states that lunacy means insanity interrupted by lucid intervals. See W.E. Pinto, *Law of Marriage and Matrimonial Reliefs for Christians in India*, Bangalore, Theological Publication of India, 1991, p. 120.

<sup>195</sup> See A. Mookerjee, *Marriage, Separation and Divorce*, 2<sup>nd</sup> ed., Calcutta, S.C. Sarkar, 1991, p. 141.

<sup>196</sup>*Ibid.*, p. 50.

procreation of children due to some kind of mental anomaly. Such a person is considered incapable of entering into a valid marriage contract.

There are two ideas which underline the approach of the law towards the capacity to exercise legal powers. First of all, there is the insistence upon the necessity of having a sound state of mind proper to transact the legal act in question. Secondly, there is the proposition that soundness of mind is based upon the ability to manage oneself and one's affairs.<sup>197</sup> In other words, the question here is whether the person, at the time of marriage is capable of understanding the nature of the contract with all the responsibilities and the obligations proper to it, or whether the mental condition is such that he/she is unable to understand and accept them. A contract like marriage requires that both parties be of sound mind. Judged from this point of view, legal capacity should be considered as vital for every marriage.

**e) The parties must belong to the same religion**

Unless the personal law of the party permits otherwise, marriage between two persons of different religions is treated as invalid under *The Christian Marriage Act, 1872*. A marriage between a Catholic female and a Jewish male was declared null and void as the Roman Catholic law forbids such a marriage.<sup>198</sup> The Parsi law prohibits the marriage of a Parsi with a non-Parsi. If a marriage is performed in violation of this condition, such a marriage is invalid under *The Parsi Marriage and Divorce Act, 1936*.

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<sup>197</sup>See *Law Commission of India 59th Report*, March 1974.

<sup>198</sup>See *Saldanha v. Saldanha*, AIR 1930 Bom. 105.

Here it is important to note that inter-religious and inter-communal marriages are valid if they are contracted under *The Special Marriage Act, 1954*.

#### 1.4.1.2 - Requirement of External Form

As discussed above, India does not have a uniform civil code especially with regard to marriage, divorce, annulment and succession. Each religious community has its own personal laws related to those matters, recognized and approved by civil authority. Each individual is to follow his/her personal laws when entering into marriage. Therefore, one must marry in his/her religious rite. Of course, a couple is free to make use of the special provisions of *The Special Marriage Act, 1954*, whereby a couple belonging to two different religious communities can enter into a valid marriage contract. We shall try to analyze the 'forms of marriage' as contemplated in *The Indian Christian Marriage Act, 1872*, since we are mainly dealing with Christian marriage and the 'form of marriage' as provided for in *The Special Marriage Act, 1954* since this form can be used by any Indian citizen despite religious differences.

An analysis of the forms of marriage prescribed in *The Indian Christian Marriage Act, 1872* reveals that these forms can be gathered under three categories: purely religious, purely secular, or mixed.<sup>199</sup> This distinction is made according to the place of solemnization and the categories of persons licensed to solemnize the marriage. For instance, the marriages of Catholics, Anglicans and Protestants are solemnized by their

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<sup>199</sup>See Matthew, and Bakshi, *Christian Marriage Law*, pp. 4-5; T. Tharigopala, *Civil Marriage Laws and Civil Effects of Canonical Marriage Discipline for Catholics in India*, (DCL Thesis extract), Romae, Pontificia Universitas Urbaniana, 1994, p. 19.

respective clergymen in their churches. Such marriages could be regarded as belonging to category of “purely religious marriages.”<sup>200</sup> There are also certain lay persons who are given the faculty by civil authority to solemnize marriages. They act as Marriage Registrars under the Indian Christian Marriage Act. The marriage of Christians solemnized in the presence of these Registrars can be described as a “purely secular marriage.”<sup>201</sup> The third category, i.e., the ‘mixed category’ is a marriage solemnized by a minister or a lay person, specially licensed by the Government, either within or outside the religious ceremony.<sup>202</sup>

#### 1.4.1.3 - Manifestation of Marriage Consent

It is an essential condition in the civil law that the consent of the parties be manifested within the provisions prescribed in the Civil Code for the marriage contract to be valid. This is called “the form of marriage.”

Section 12(2) of *The Special Marriage Act, 1954* has described the form of a marriage contract: “a marriage will not be complete and binding unless the contracting parties, in the presence of the Marriage Registrar<sup>203</sup> and three witnesses, say to each other in the language understood by the parties “I, (name), take you, (name), as my lawful wife/husband.”

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<sup>200</sup>See *The Indian Marriage Act, 1872*, Section 5(1, 2).

<sup>201</sup>*Ibid.*, Section 5(4).

<sup>202</sup>*Ibid.*, Section 5(3, 5).

<sup>203</sup>Marriage Registrars are the Official witnesses appointed by the State Government by notification in the official Gazette for the whole or any part of the state.



After expressing their consent and accepting each other as husband and wife in the prescribed form, the Marriage Registrar enters the details in the marriage certificate book. It should be signed by the couple and the witnesses. This certificate will serve as evidence of their marriage.

Before the actual solemnization of the marriage, the parties are expected to give notice to the Marriage Registrar of the district in which at least one of them has been residing at least for 30 days (Sec. 5). The Marriage Registrar shall publish the notice (Sec. 6) a minimum of one month before the wedding. The purpose of the publication of the notice is to ascertain if there is any objection to the proposed marriage.

Domicile is a mandatory requirement. Where neither party has lived for at least thirty days immediately preceding the date of notice of marriage in the district where the notice is given, any certificate granted by the concerned Marriage Registrar would be declared void.<sup>204</sup>

## CONCLUSION

In juridical language marriage is now understood as a partnership, established through a covenant, between a man and woman for the whole of their life. By its very nature, it is ordered towards the well-being of the spouses and the procreation and education of children. Christ has elevated this partnership, instituted between two validly

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<sup>204</sup>See Mookerjee, *Marriage, Separation and Divorce*, 2<sup>nd</sup> ed., p. 430.

baptized persons, to a sacrament. The sacramental dignity and the natural reality are so united in a Christian marriage that they are inseparable or identical.

The essence of this partnership is identified as the intimate union of the spouses. Unity and indissolubility are the expressly recognized essential properties of this union. The property of unity expresses the two aspect of the bond, that is, its unicity and the exclusivity. Exclusivity of the bond is related to conjugal fidelity (*bonum fidei*). The good of fidelity is a distinct element, intrinsically linked to all the essential elements and properties of marriage.

The ordination of conjugal partnership to the good of the spouses is an essential element of the marriage contract and not merely a subjective desire of parties. This good is comprised of those rights and obligations without which the intimate union of the parties in marriage is morally impossible. The good of the children is another essential element of marriage which encompasses various obligations such as the right to conjugal acts, indissolubility of marriage, education of children, etc.

It is through the exchange of the consent of the parties that the marriage is brought into existence. Consent is an act of the will in which a person agrees to do, accept, or reject something. Consent of the will, which is supposed to be deliberate and voluntary, under certain circumstances may be forced, partial or complete. But only when it is free and complete, the act of the will may be considered as a human act; and such an act will produce the juridic effects attached to the consent.

A juridic act is an externally manifested act of the will with certain determined juridic effects. The new Code has devoted a separate title on juridic acts. It has established five factors which would commonly lead a person to place an invalid juridical act. These factors, such as force, fear, deceit, ignorance, and error are linked to the process and the content related to the formation of a human act. Among these factors force and fear directly affect the process of decision making while the others are centred around the object which forms the content of the process, but eventually affecting the process itself. These factors can affect any person placing a juridical act with effects specific to their nature and what the law prescribes.

Indian civil law too considers marriage as a partnership, between a man and a woman, for life, established through the manifestation of the consent of parties who are capable and not legally prohibited. Although the Indian Civil Code regards marriage as a contract, it treats it as a special contract, *sui generis*, contradistinguished from a purely commercial contract. Care is taken to protect the permanence of this contract; yet for the good of the spouses and the betterment of society, certain grounds are laid down to terminate a partnership which has irretrievably broken down. For the validity of the contract, the consent must be free, i.e., it should not be forced or obtained through fraud and the parties must be mentally sound and have the knowledge of the object of the contract to produce valid consent. This consent must be expressed publicly in the presence of the Marriage Registrar and three other witnesses. The parties are to observe the

prescriptions of their personal law when manifesting consent if the marriage contract is performed within their religious rites.

The focus of our study is the effect of deceit on matrimonial consent according to canon law and civil law of India. In the present chapter we have examined the nature and elements of marriage and marital consent, especially those factors which can substantially vitiate consent, in light of canon law and Indian civil legislation. Therefore, in the following chapter we will analyze the nature of deceit in canonical legislation

## CHAPTER TWO

### DECEIT IN THE CANONICAL LEGISLATION ON MARRIAGE

#### INTRODUCTION

In our first chapter dealing with the nature of marriage we noted that a marriage contract comes into existence through the exchange of consent of the parties whereby they give and accept each other with the intention of establishing a community of life and love until death separates them. The consent which they manifest is an act of the will; it is a human act as well as a juridic one. It is not simply a product of a sudden decision, but the result of a somewhat lengthy and contemplated process which involves both intellect and will. The two faculties, intellect and will, cooperate with each other enabling human beings to function in a truly human way. "Before a person takes a decision the intellect provides a practico-practical judgment which then moves the will to act. Such judgements are formed on the basis of information provided to the intellect and if this information or knowledge should be erroneous then the practical judgment would be erroneous and the will would be directed toward a mistaken end."<sup>1</sup> This decision, therefore, must be made in total freedom as well as with the knowledge of its object, which is the person of the spouse. Any infringement of this norm will substantially diminish the freedom and the knowledge of the person in choosing the partner for life, thereby making the consent defective and the marriage null. Whether they are aware of this fact or not, people tend either to hide or pretend to possess certain qualities of greater

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<sup>1</sup> See K.E. Boccafolo, "Deceit and Induced Error About a Personal Quality," in *ME*, 124 (1999), p. 695.

importance which causes error in another party in order to obtain his or her consent. This reduces the freedom and knowledge of a person and misleads that person into making a wrong decision, thereby possibly choosing a wrong partner.

In order to protect the consent of a party from being extracted through deceit, the 1983 Code has established, in c. 1098, that deception can be a factor which would affect a juridical act rendering the marriage invalid. An identical norm is found also in c. 821 of *CCEO*. Canon 1098 reads:

A person contracts invalidly who enters into a marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner which by its very nature can gravely disturb the partnership of conjugal life.<sup>2</sup>

This canon states that deceit or fraud can cause a defect in the matrimonial consent which, under certain conditions, invalidates marriage. The focal point of our study in the present chapter will be an in-depth examination of the nature of deceit, the development of canon 1098, its interpretation, its application, and the retroactivity of the norm.

## 2.1 - THE NATURE AND ELEMENTS OF DECEIT

Before we discuss the juridical consequences of fraud perpetrated in order to extract the marital consent of a party, we should study first its nature, elements and characteristics. Since the legal theory underlying fraud or deceit as found in the present

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<sup>2</sup>*CIC* c. 1098: “Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit.”

Code of canon law does not substantially differ from the theory prevalent in the pre-1983 Code canonical doctrine and jurisprudence, we consider it necessary here to present a brief review of the development of the notion and characteristics of deceit in relevant canonical sources and contemporary jurisprudence.

### 2.1.1 - The Notion of Deceit

There are several definitions or descriptions of deceit in canonical literature. In our context, the term “deceit” corresponds to the Latin word “*dolus*,” which is translated into two interchangeable terms in English : “deceit” or “fraud.” In its etymological sense, the word “deceit” refers to any trick employed to deceive another.<sup>3</sup> This is the general sense of the term and could be used to imply either something good or evil. In Roman law it was customary to qualify this term with an adjective to express its moral connotation, whether it was used to mean something good or evil. Consequently, the Roman sources made a distinction between legitimate deceit, *dolus bonus*, and illegitimate deceit, *dolus malus*. An act of deceit was considered legitimate when it was employed for a good purpose, for example, deceiving a thief or one’s enemy in war;<sup>4</sup> whereas a deceitful action used to obtain some unfair advantage of another was considered as illegitimate deceit.<sup>5</sup> Because of its common usage, *dolus malus* became so

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<sup>3</sup> See Brown, *The Invalidating Effects of Force, Fear and Fraud*, p. 104.

<sup>4</sup> See *ibid.*; 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; Kuziona, *The Nature and Application of Juridical Acts*, p. 182.

<sup>5</sup> See Brown, *The Invalidating Effects of Force, Fear and Fraud*, p. 104.

identified with the word “deceit” that it assumed the exclusive sense in which it was employed while the expression *dolus bonus* disappeared completely from use.<sup>6</sup>

Black’s Law Dictionary provides a detailed description of fraud. It explains that fraud is “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment,”<sup>7</sup> and deceit is “a tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it.”<sup>8</sup>

The classical definition of “fraud” given by Labeon, the Roman Jurist, is found in the writings of Ulpian who defines it as “any craft, deceit, or malicious contrivance intentionally employed to circumvent, dupe, or deceive another (*omnis calliditas, fallacia, machinatio ad circumveniens, fallendum, decipiendum alterum adhibita*).”<sup>9</sup> St. Thomas Aquinas extended the meaning of fraud to “craft.” According to him, a person who is not truthful and honest may simulate or make use of external phenomena to obtain a goal which may be good or bad. Fraud, therefore, is the employing of craft to attain a goal.<sup>10</sup> Among the definitions of fraud given by scholastic

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<sup>6</sup>See *ibid.*; Kuziona, *The Nature and Application of Juridical Acts*, p. 182.

<sup>7</sup>*Black’s Law Dictionary*, Bryan A. Garner (editor in chief), 7th ed., St. Paul, MN, West Pub. Co., 1999, p. 670.

<sup>8</sup>*Ibid.*, p. 413.

<sup>9</sup>Ulpianus, *De dolo malo*, 1.12, D. IV, 3, as reported in R. Sammut, “Fraud and Canonical Marriage,” in *Forum*, 2 (1991)2, p. 64.

<sup>10</sup>“[...] ad astutiam pertinet assumere vias non veras, sed simulatas et apparentes, ad aliquem finem prosequendum vel bonum vel malum. Assumptio autem harum viarum potest dupliciter considerari: uno quidem modo, in ipsa excogitatione viarum huiusmodi; et hoc proprie pertinet ad astutiam, sicut etiam excogitatio rectorum viarum ad debitum finem pertinet ad prudentiam. Alio modo potest considerari talium viarum assumptio secundum executionem operis; et secundum hoc pertinet ad dolum. Et ideo dolus



philosophers, jurists and commentators of the 1917 Code, Michiels' definition seems to have been recognized as more apt in comparison to that of others. He defines fraud as "deceit of another, done deliberately and fraudulently, by which this other person is induced to place a determined juridical act."<sup>11</sup>

The primary canonical notion of deceit, therefore, corresponds to the Roman notion of *dolus malus*<sup>12</sup> as described by Labeon and Michiels. The one given by Labeon signifies the active aspect of the juridical notion of deceit in so far as it concerns fundamentally the source whence deceit originates and the means used to attain its goal. On the other hand, the definition of Michiels represents the passive aspect of this notion in so far as it concerns the effects it causes in the person towards whom such action is directed.<sup>13</sup> Both aspects are indispensable to the juridic notion of deceit especially when it is regarded as a source of defective consent, because in reality they are correlatives to each other as cause and effect.<sup>14</sup>

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importat quandam exsecutionem astutiae, et secundum hoc ad astutiam pertinet" (*Summa theologica*, II, 55, a 4).

<sup>11</sup>"[...] deceptio alterius deliberate et fraudulenter commissa qua hic inducitur ad ponendum determinatum actum iuridicum" (Michiels, *Principia generalia*, p. 660); also see J.F. Castaño, "L'influsso del dolo nel consenso matrimoniale," in *Apollinaris*, 57 (1984), p. 568; decision c. Defilippi, 4 December 1997, in *SRR Dec.*, 89 (1997), p. 855; also in *ME*, 125 (2000), p. 433.

<sup>12</sup>See decision c. Stankiewicz, 27 January 1994, in *SRR Dec.*, 86 (1994), pp. 56-76, here at p. 61; English translation of this sentence in *Forum*, 8 (1997) 2, pp. 365-408; Michiels, *Principia generalia*, p. 535; G. Sheehy et al. (eds.), *The Canon Law, Letter & Spirit: A Practical Guide to the Code of Canon Law (= Letter & Spirit)*, Collegeville, The Liturgical Press, 1995, p. 73; Kuziona, *The Nature and Application of Juridical Acts*, p. 183.

<sup>13</sup>See G Fransen, *Le dol dans la conclusion des actes juridiques: évolution de doctrine et système du code canonique*, Gembloux, Belgique, J. Duculot, 1946, p. 376; Brown, *The Invalidating Effects of Force, Fear and Fraud*, p. 106.

<sup>14</sup>See Brown, *The Invalidating Effect of Force, Fear and Fraud*, p. 106.

### 2.1.2 - The Characteristics of Deceit

This brief review of the juridic notion of deceit reveals that it consists of “the use of apt means, fraudulently and deliberately set into motion, to create or to sustain an error in the mind of another, whereby that person is enticed to perform or not to perform a certain juridic act.”<sup>15</sup> Consequently, it is possible for us to identify four significant aspects of deceit in the above definitions:

- Deceit directly affects the intellect of the deceived party and indirectly the will. Fraud produces error in the victim. This error arises from an external rather than an internal agent as is the case with ignorance. The deceived person falls into error due to the fraud.
- In deceit the deceiver has the conscious intention of tricking the deceived. Consequently, something evil or unjust is perpetrated toward the other party. Therefore fraud is hostile to good faith.
- Deceit is committed with the objective of influencing the deceived party to place a specific juridic act in accordance with the will of the deceiver. In our context, the juridic act is the matrimonial consent. It signifies that if there had not been fraud there would most likely not have been marital consent.
- The means employed to obtain the determined end must be apt. They must be capable by their very nature to lead the person into error. This implies that it must possess objective aptitude to attain the end result to which they are directed.<sup>16</sup>

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<sup>15</sup>Ibid.

<sup>16</sup>See H. Veralde, “Error and Deceit or Fraud as Sources of Nullity,” in *Philippiniana sacra*, 22 (1987), p. 141; Sammut, “Fraud and Canonical Marriage,” p. 65.

## 2.2 - THE DEVELOPMENT OF CANON 1098 (CCEO c. 821)

There were several canons in the 1917 Code which contained some reference to deceit.<sup>17</sup> Canon 125 of the 1983 Code is substantially identical to c. 103 of the 1917 Code;<sup>18</sup> however, we do not find in the 1917 Code a canon corresponding to c. 1098 of the 1983 Code. Yet, the present canon is not completely new to jurisprudence because many cases, which had all the implications of fraud, had been tried previously in ecclesiastical tribunals. Of course, they were not introduced on the ground of deceit but on fraudulent error concerning the person. Deeper reflection and research on the matter of deceit employed in extracting the consent of the other party gradually led to the recognition of the effect of deceit regarding an important quality of a partner on the validity of marriage.

### 2.2.1 - Reasons for a Norm on Deceit in Marriage Legislation

As noted above, the absence of a norm on the effect of fraud on matrimonial consent constituted a definite *lacuna* in Church law. Although the need for such a norm in canonical legislation on marriage had been felt and disputed by many canonists for centuries, the conciliar teaching on marriage found in *Gaudium et spes* seems to have provoked a new wave of discussion among canonists on the effect of fraud on marital

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<sup>17</sup>See 1917 Code: cc. 48 §2; 52; 103 §2; 169 §1, 1°; 185; 542, 1°; 572 §1, 4; 637; 647 §2, 2; 1321; 1625 §1; 1684; 1685; 1686; 1857 §2; 2049; 2199; 2200; 2387.

<sup>18</sup>Canon 125§ 2: “Actus positus ex metu gravi, iniuste incusso, aut ex dolo valet, nisi aliud iure caveatur, sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve in iure successoribus sive ex officio.” This norm is substantially identical to that in c. 932, §2 of CCEO.

consent. The following reasons were adduced in support of introducing a new canon on deceit within the context of marriage legislation.

1) After Vatican II marriage was no longer considered merely as a contractual partnership, but as an intimate interpersonal relationship, a “communion of life and love.” In other words, marriage is now viewed more in a personalist rather than in a purely biological or institutional sense. This personalistic understanding of marriage proclaimed by Vatican II was, no doubt, one of the major inspirations that prompted the inclusion of deceit as a ground of nullity in the 1983 Code.<sup>19</sup>

On the basis of this new thinking concerning marriage, canonical writers began to argue that the establishment of an intimate interpersonal relationship/communion of life and love, which is the object of consent, demands mutual trust and honesty on the part of the spouses. Honesty about one’s identity and personality is essential in marriage. Fraud is hostile to the honesty and self-revelation which is indispensable to constituting and sustaining the intimate partnership of the whole of life. Fraud, which negates the mutual gift of self and destroys the object of marriage, should be prevented from creeping into the matrimonial contract. Therefore, to protect the

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<sup>19</sup>In his Rotal allocation of 1976, Pope Paul VI clearly emphasized this view when he said: “The tribunal has become aware of its serious obligations and has come to understand the full importance of a *personalist approach* which the Council emphasizes in its teaching and which consists in rightly esteeming conjugal love and the mutual perfection of the spouses” (Paul VI, Allocation to the Roman Rota, 9 February 1976, in *AAS*, 68 [1976], p. 134; English translation in William H. Woestman [ed.], *Papal Allocutions to the Roman Rota, 1939-2002*, Ottawa, Faculty of Canon Law, Saint Paul University, 2002, p. 134).

sacredness of marriage from the vice of fraud, the formulation of a new canon seemed to be a necessity.<sup>20</sup>

2) Even though there was no specific canon on fraud in the 1917 Code as a factor invalidating marital consent, several cases were admitted by tribunals on this ground,<sup>21</sup> but were actually tried as an extension of the ground of error of fact (1083). Canonists before, during and after Vatican II argued that c. 1083 of the 1917 Code, which spoke of error of person and error of quality of the person, was inadequate to protect innocent parties against those who used fraudulent means to establish a marital contract.<sup>22</sup>

3) Another major reason for the formulation of a canon on fraud is the injustice suffered by the person deceived through fraud. Marriage is a covenant established by two persons whereby they give themselves to each other for life. It gives

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<sup>20</sup>See P.T. Sumner, "Dolus as a Ground for Nullity of Marriage," in *StC*, 14 (1980), p. 184; D. Kelly, "Marriage," in *Letter & Spirit*, p. 614; John P. Beal, "Chapter IV: Matrimonial Consent [cc. 1095-1107]," commentary, in *New Commentary*, p. 1307; F.G. Morrissey, "Preparing Ourselves for the Marriage Legislation," in *The Jurist*, 33 (1973), p. 351.

<sup>21</sup>A case of marriage nullity on the ground of fraud can be found in the first issue of *Monitor ecclesiasticus*, January 1876. In this case, the male petitioner accused his marriage of nullity on the ground of fraud because the parents of the respondent had concealed the respondent's illness so as to obtain the consent of the petitioner. The petition was accepted by the judges of the Congregation of the Council as having *fumus boni iuris*. However a negative sentence was rendered because sufficient proof of fraud was not found. The important thing here is not whether the sentence was affirmative or negative but that the case was heard on the ground of fraud.

Another case, which is more significant, is found in *Monitor ecclesiasticus* of 1877. It was a marriage of a prince and a princess. The marriage took place after a brief period of engagement. From the very first day, the petitioner could not tolerate the "rancid" breath of the respondent. She accused the marriage of nullity on the ground of fraud on the part of petitioner. It received an affirmative decision but the defender of the bond appealed. Pope Pius IX appointed a commission of Cardinals to deal with the case which confirmed the earlier decision. See E. Colagiovanni, "New (Hot) Grounds of Nullity in Marriage Cases," in *ME*, 82 (1997), pp. 522-523.

<sup>22</sup>K.W. Vann argues that the motive for a renewed interest in the question of the invalidating effect of fraud in relation to the marriage contract was the inadequacy of c. 1083 of the 1917 Code. See K.W. Vann, "Dolus: Canon 1098 of the Revised Code of Canon Law," in *The Jurist*, 47 (1987), p. 378; J. McAreavey, *The Canon Law of Marriage and the Family*, Dublin, Four Courts Press, 1997, p. 112.

rise to life-long duties and obligations. Because the self-giving is so intimate and complete, the persons and their qualities assume great importance. It is a very grave injustice when something of its very nature that will seriously disturb an interpersonal relationship is intentionally hidden. Fraud strikes at the heart of the object of marital consent. Once known, the fact of deceit will hurt the injured party more than the absence or presence of the quality itself. To be bound for life in wedlock to a person who has fraudulently concealed the absence or presence of a vital quality is unjust and, therefore, such a fraud should be recognized as nullifying the marriage contract.<sup>23</sup>

4) The 1917 Code contained the provision that an error about the quality of the person of the other party would vitiate matrimonial consent. However, this error would invalidate consent only if it redounded to the error of person. The members of the Code Commission who were involved in revising the marriage legislation were unhappy with the complex nature of the error of quality redounding to the error of person. Therefore, they wanted to eliminate the concept of redounding error and replace it with a new canon.<sup>24</sup>

5) In the 1917 Code there were several canons which specified the areas where the effect of fraud was recognized, but there was no canon relating fraud to marriage. The Council of Trent held that marriage was holy and taught that it should be treated as holy. Yet, it was rather ironic that a holy reality like marriage had no

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<sup>23</sup>See J.P. Beal, "Diriment Impediments in General," in *New Commentary*, p. 1307.

<sup>24</sup>See Boccafola, "Deceit and Induced Error About a Personal Quality," p. 608.

protection from deceit, which was available to any commercial contract.<sup>25</sup> The object in a commercial contract is something material, whereas in a marriage contract the parties themselves are its direct object. There is significant difference between the two objects. This difference can be shown in the measure of the injustice suffered in two cases. Therefore, there was a genuine need to protect the sanctity of marriage through a positive norm.

6) Both marriage and religious vows were recognized as spiritual contracts long before the formulation of canons, and it was held that even fraud could not set a person free from the obligations of spiritual contracts. However, the 1917 Code declared that religious profession brought about through fraud was invalid, while a marriage was presumed valid even if it was the result of fraud. If fraud vitiated religious profession, all the more so should it nullify marriage.<sup>26</sup> This argument prompted canonists to suggest a new canon.

7) A comparison with force and error seems to have generated another motive for the drafting a new law. In jurisprudence, it is the injustice caused by force that is given as the reason for the law on the subject.<sup>27</sup> Force and error induced by fraud have the same effect, because both are an unjust influence on another to obtain consent.

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<sup>25</sup>See F. Thaner, *Die Persönlichkeit in der Eheschliessung*, Graz, Akademische Druck- u. Verlagsanstalt, 1965, p. 50, footnote 16.

<sup>26</sup>See A. Szentirmai, "De constituendo vel non 'impedimento deceptionis' in iure matrimoniali canonico," in *Revista española de derecho canónico (=REDC)*, 16 (1961), p. 96.

<sup>27</sup>See decisions *c. Jullien*, 17 October 1940, in *SRR Dec*, 32 (1940), p. 699; *c. Heard*, 20 February 1941, in *ibid.*, 33 (1941), p. 84; *c. Wynen*, 9 March 1943, in *ibid.*, 35 (1943), p. 177; *c. Teodori*, 18 March 1946, in *ibid.*, 38 (1946), p. 152; *c. Caiazza*, 22 January 1949, in *ibid.*, 41 (1949), p. 10; *c. Brennan*, 19 February 1952, in *ibid.*, 44 (1952), p. 106.

People have always been repulsed by the underhanded deeds of cunning, slyness, lying or manipulating. If, therefore, force invalidated a marriage contract, fraud should do so as well.

8) Rotal jurisprudence also wielded its influence on the creation of the new canon. Rotal judges began to recognize error caused by fraud as relevant if it were related to a quality which by its nature seriously disturbed the community of life and love.<sup>28</sup> In the period after the Second Vatican Council, cases on error about a quality of a person which seriously disturbed the community of life and love were becoming more common and in many of those cases error had been caused by fraud. The existing law did not provide any relief for such a situation. Some judges in Germany tried to remedy the situation by attempting to expand the notion of *error redundans*.<sup>29</sup> The new insights provided by jurisprudence on this matter precipitated the introduction of the present law on deceit.

9) The developments in civil law also supported the promotion of a new canon on fraud. There were many countries in which civil statutes permitted issuance of a decree of divorce on the ground of fraud. H. Flatten refers to twenty-eight European countries and states that, with the exception of two, i.e., Italy and Spain, twenty-six

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<sup>28</sup>To mention a few decisions: *c. Canals*, 21 April 1970, in *SRR Dec.*, 62 (1970), p. 370; *c. Di Felice*, 26 March 1977, in *ibid.*, 69 (1977), p. 147; also in *ME*, 103 (1978), pp. 265-272; *c. Di Felice*, 14 January 1978, in *SRR Dec.*, 70 (1978), p. 13; also in *ME*, 103 (1978), pp. 273-279; *c. Serrano*, 28 May 1982, in *ME*, 108 (1983), pp. 11-26.

<sup>29</sup>See Boccafola, "Deceit and Induced Error About A Personal Quality," p. 699.



countries included in their civil law ‘fraud’ either as an impediment to marriage or as a ground for divorce.<sup>30</sup>

### 2.2.2 - The Formulation of Canon 1098

The new canon on “deceit” was the fruit of serious and lengthy discussions and deliberations of the Pontifical Commission for the Revision of the Code. There were several proposals from the members of the hierarchy and other groups. In the years following Vatican II, the Roman Curia organized a series of debates and discussions on the effect of fraud on consent.<sup>31</sup> Almost all proposals pointed to the inevitability of a new canon on defect of consent due to fraud/deceit. However, there were others who did not see the need for a new canon specifically on deceit. They suggested that the addition of a third paragraph to the existing c. 1083 of the 1917 Code should suffice. We shall first briefly analyze the main proposals which forced creation of the new c. 1098.

Those who favoured formulation of a separate canon on fraud in addition to that on error differed among themselves on its arrangement and formulation.<sup>32</sup> J.A. Möhler, while presenting a broad interpretation of the *error redundans*, opted for a new

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<sup>30</sup>See H. Flatten, *Irrtum und Tauschung bei der Eheschliessung nach kanonischem Recht*, Paderborn, F. Schöningh, 1957, pp. 59-77.

<sup>31</sup>See V. Fagiolo et al., *Il dolo nel consenso matrimoniale: annali di dottrina e giurisprudenza canonica*, II, Vatican City, Libreria editrice Vaticana, 1972; Lusena, *The Application of Selected Capita*, p. 196.

<sup>32</sup>H. Flatten, who proposed a modification opting for a third paragraph to the existing c. 1083, §2, stated: a) that this error must be an error of quality and not merely a false hope; b) it must be a grave error (it would be foolish to establish such things as deception regarding hair colour as invalidating); c) it is necessary that the error gives cause to the matrimonial contract; d) it must have been deceitfully caused. See H. Flatten, *Quomodo matrimonium contrahentes iure canonico contra dolum tutandi sint*, Cologne, Editio auctoris, 1961, p. 16; also see Vann, “*Dolus*: Canon 1098 of the Revised Code of Canon Law,” pp. 376-378.

canon.<sup>33</sup> M. Pingaranu proposed elimination of the figure of the *error redundans* of c. 1083 and addition of another paragraph to it.<sup>34</sup>

Several bishops also suggested that the invalidating effect of fraud on marital consent should be included in the new canonical legislation. Their proposals were based on pastoral experience and on concrete cases of marriages destroyed because of fraud. The injury caused by fraud called for a just relief.<sup>35</sup> Catholic universities and faculties of canon law argued before the Code Commission that c. 1083 of the 1917 Code was inadequate and needed to be replaced.<sup>36</sup> The Gregorian University was supportive of introducing the error of quality caused by fraud as an autonomous ground of nullity.<sup>37</sup>

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<sup>33</sup>He also wanted the new canon to include the following error of quality: "Si quis contrahat cum matre prolis etsi nondum natae, quam a se conceptam putet et contra eam non genuerit; si quis contrahat cum persona quam fecundam putat, cum contra sit perpetuo sterilis" (J.A. Möhler, "De errore in qualitate communi ad nuptias quaesita," in *Apollinaris*, 34 [1961], p. 369).

<sup>34</sup>"Invalidum est matrimonium ob gravem errorem qualitatis magni momenti compartis dolose causatum" (M. Pingaranu, *El error de cualidad en el matrimonio ante la reforma del Código de derecho canónico*, Barcelona, Ayma, 1964, p. 74.)

<sup>35</sup>In the opinion of the bishops, the paragraph in c. 1083 which deals with the *error conditionis servilis* should be replaced by fraud. However, some German bishops proposed to modify c. 1083 taking fraud into consideration. The bishops presented a number of cases where fraud could be involved while entering into marriage contract. They are: a) homicide totally unknown to the other party; b) chronic intoxication due to alcohol; c) contagious disease; d) incurable disease; d) sterility or pregnancy by a third person; e) crime against life, liberty or conjugal chastity punished by an ecclesiastical or civil judge; f) long juridical penalties. See *Acta et documenta Concilio oecumenico Vaticano II apparando* (= *Acta et documenta*), Series 1 (*Anteparaeparatoria*), In Civitate Vaticana, Typis polyglottis Vaticanis, 1960, vol. 2, pars 2, pp. 620-724, 770.

<sup>36</sup>The Faculty of Canon Law at Toulouse regarded fraud not as directed to the physical person but to the person considered in his or her social dimension. The proposal was that the 'error of person' should be interpreted broadly so that marriage could be declared void whenever someone fraudulently adopted a social and exterior personality which is completely different from the true person. See Sammut, "Fraud and Canonical Marriage," p. 69; Sumner, "*Dolus* as a Ground for Nullity of Marriage," p. 196.

<sup>37</sup>An example given was that of one party fraudulently hiding a venereal disease from the other when the innocent party would not have consented to the marriage if he/she had known the truth. *Acta et documenta*, vol. 4, p. 43: "Introducendus autem videretur error dirimens matrimonium, quando ex dolo

The Congregation for the Discipline of the Sacraments had similar input regarding the invalidating effect of fraud.<sup>38</sup>

The Pontifical Commission for the Revision of the Code received the proposals put forward by the bishops, the commentators, the universities and the faculties of canon law which expressed the need to recognize the nullifying effect of fraud in matrimonial contracts.<sup>39</sup> The Commission unanimously agreed that the defect of consent caused by fraud must be introduced, and despite a difference of opinion among Consultors as to whether to have a new canon or to expand the existing one, that is, c. 1083 of *CIC* 17, the Commission finally drafted the text of the present canon, thus providing a new norm on fraud as an autonomous ground of nullity. This proposed canon read: "Whoever enters marriage deceived by fraud, perpetrated to obtain consent, with regard to some quality of the other partner, which of its very nature gravely disturbs the partnership of conjugal life, contracts invalidly."<sup>40</sup>

This draft canon contained three conditions. It had to be determined which of these three conditions would define the presence of fraud. The draft did not make it clear

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altera pars ante matrimonium laborabat, dummodo coniux innocens nullomodo contraxisset, si morbum alterius partis cognovisset."

<sup>38</sup>See *Acta et documenta*, vol. 3, p. 95.

<sup>39</sup>The initial reference to fraud as a ground of nullity is found in *Communicationes*, 3 (1971), p. 76.

<sup>40</sup>"Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae nata est ad consortium vitae coniugalis graviter perturbandum, invalide contrahit (c. 300)" (*Communicationes*, 9 [1977], p. 373).

whether the fraud must be perpetrated solely by one of the contracting parties or whether it could be caused by a third person.

In the final version of the draft, the phrase “which is by nature bound to seriously disturb” (*quae nata est ad graviter perturbandum*) was slightly altered to read “which of its very nature can seriously disturb” (*quae suapte natura graviter perturbare potest*). This change indicates that the absence/presence of the quality itself by its very nature is capable of disrupting the intimate partnership of married life.<sup>41</sup>

### 2.2.3 - The Content of the Canon

Canon 1098 was a breakthrough in the history of canon law on marriage. The 1983 Code recognizes fraud as a distinct ground which invalidates the marital contract. Error induced through fraud could now be a ground for nullity of marriage. It is this legal norm which provides an exception to the legal principle stipulated in c. 125 § 2 that an act performed as a result of deceit is valid, unless the law specifically provides otherwise. The new canon (1098), which “provides this exception,” states:

A person contracts invalidly who enters into marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner which by its very nature can gravely disturb the partnership of conjugal life.<sup>42</sup>

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<sup>41</sup>See Lusena, *The Application of Selected Capita*, p. 199.

<sup>42</sup>CCEO c. 821 is literally identical.

By this canon, the lawgiver articulates the precise juridic connotation of an error of quality caused by fraud. This juridic connotation is subject to certain specific conditions. It is possible to identify five of them, namely:

1. the quality must be real, not imagined
2. it must exist at the time of the marriage
3. the existence of the fraud must not be known to the other party
4. the quality must be such that its presence/absence can seriously disturb the *consortium* of conjugal life
5. it must have been perpetrated in order to obtain consent.

All these conditions are interdependent and each must be treated within its total context, especially when it comes to the nullifying effect of consent. The important factor which should be kept in mind here is that in this canon it is not the person using fraud who marries invalidly, but the one who is duped by it. The cause of invalidity is not fraud *per se* but the error concerning a quality of the person resulting from fraud. Therefore, some call this ground of nullity as “imposed error.”<sup>43</sup>

### 2.3 - INTERPRETATION OF CANON 1098 (CCEO C. 821)

Canon 17 stipulates that “ecclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context.[...].”<sup>44</sup> Consequently, to understand the new canon better it is essential to examine its text,

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<sup>43</sup>See Beal, “Diriment Impediments in General,” p. 1307.

<sup>44</sup>Canon 17: “Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; [...]”

dividing it, for clarity's sake, into various parts according to its structure. In this section, therefore, our focus will be on the interpretation of the text of the c. 1098.

### 2.3.1 - Interpretation of the Text

Canon 1098 contains several textual components. The text of the canon may be divided into four parts: 1) Deliberate intention; 2) To extract the consent of the other party; 3) Concerning a quality; 4) The nature of the quality.

#### 2.3.1.1 - Deliberate intention

One of the main characteristics of deceit is that it is always done with full deliberation. In other words it is "a positive action upon the part of the deceiver, deliberately laying a snare to entrap the victim."<sup>45</sup> Therefore, it presupposes a premeditated and well planned intention on the part of the deceiver to lead the other party into error. In other words, the deceiver perpetrates the fraud deliberately and wilfully.

Canon 1098 requires that in order to have juridic effect, deceit must be perpetrated deliberately with the intention of extracting consent. This is the precise reason for introducing this norm, that is, to give legal relief to those whose consent has been secured through deception. On the part of the deceiver, whether it be one of the contractants or a third party, what is required is the deliberate intention to deceive either by commission, e.g., by the use of misleading words or actions, which leads its victim to error, or by omission, e.g., by being silent about one's undesirable quality or hiding of

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<sup>45</sup>See E. Kneal, "A Proposed *In iure* Section for the New Statute of Fraud," in *The Jurist*, 42 (1982), p. 218.

facts.<sup>46</sup> To establish the fact that deceit was involved in obtaining the consent it is necessary to prove that “a deliberate cunning trick was pulled off to make the party misjudge a quality of the person.”<sup>47</sup> Consequently, the deceiver must execute the act of deception with the foreknowledge, reflection and determination.<sup>48</sup> In other words, the presence of deceit can be proved only in the presence of conclusive evidence that there had been consideration, motivation and execution on the part of the deceiver. Thus we note that in the deceiver there was an intention or purpose to commit an evil or an injustice to the other party. This fact indicates that deliberate intention on the part of the deceiver is of the essence of deceit.

#### **2.3.1.2 - To extract the consent of the other party**

The phrase “perpetrated to obtain consent” of the canon indicates that the goal of fraud is directed to obtain the consent of marriage. The deceiver knows or believes that the other party would not give consent if the presence or absence of a particular quality were known. It follows, therefore, that if there had been no fraud, consent would not have been given.<sup>49</sup> This implies that there must be a connection

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<sup>46</sup> See Velarde, “Error and Deceit or Fraud as Sources of Nullity,” p. 142.

<sup>47</sup>See J. James Cuneo, “Deceit/Error of Person as a *Caput nullitatis*,” in *CLSA Proceedings*, 45 (1983), p. 165.

<sup>48</sup>See Kneal, “A Proposed *In iure* Section,” p. 218.

<sup>49</sup>See Sammut, “Fraud and Canonical Marriage,” p. 76.

between the fraudulent action and the consent. More specifically, there should be a cause-effect relationship between the act of deception and the resulting matrimonial consent.<sup>50</sup>

On the other hand, the clause signifies that fraud perpetrated with the aim of extracting other than marital consent does not fall under the purview of c. 1098 and, therefore, is juridically irrelevant.<sup>51</sup> Consequently, the clause “restricts the scope within which deceit can be admitted as a ground of nullity in the judicial forum.”<sup>52</sup> The precise goal of this clause “*ad obtinendum consensum*” is obviously to ensure that a general intention to deceive is not sufficient to establish the deceit envisioned in this canon. The canon does not determine the quality of motivation of fraud. Therefore, it is not essential that the truth of the existence or absence of quality be hidden through malice. The canon does not differentiate between bad fraud and good fraud. It only demands that fraud be employed to obtain the consent.

Another implication of this clause is that the canon does not specify who must be the perpetrator of fraud. There should be two persons: the deceiver and the deceived. The deceived person must always be one of the contracting parties. However, the deceiver or the agent can be any person. Elucidating the point that fraud can be employed by a third party, E. Kneal states that “parents of a respondent who deliberately

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<sup>50</sup>See Velarde, “Error and Deceit or Fraud as Sources of Nullity,” p. 141.

<sup>51</sup>See decision c. Faltin, 30 October 1996, in *SRR Dec.*, 88 (1996), pp. 671-679, here at p. 675; a Latin-English text of this sentence is in *ME*, 122 (1997), pp. 176-187. The latter source will be used for future references to this sentence.

<sup>52</sup>See U. Navarrete, “Canon 1098 de errore doloso: estne iuris naturalis an iuris positivi Ecclesiae?” in *Periodica*, 76 (1987), pp. 176-177.



and by a concerted plan, of silence or of a web of lies, conceal the presence of a serious defect in their child, are perpetrating ‘fraud’ in the intended sense of the canon.”<sup>53</sup> As discussed above, what is required on the part of the deceiver is the intention to deceive either by misrepresentation, words, action or deliberate omission, thus leading the other party into error. The person thus deceived contracts marriage due to this induced error.

### 2.3.1.3 - Concerning a quality

The canon stipulates that the deception must involve a quality of the partner. It means that the object of fraud should be a quality, and this quality must concern one of the spouses in the marriage and not the marriage itself. “It is not a question of ‘error of law’, but of ‘error of fact’, that is, for example, it is not an essential quality or property of marriage that is in question, but solely a determined personal quality of the party that has relevance to the case. Therefore, the defect of consent is verified when the deceit is caused by an ‘error of fact’. It is obvious that the required quality, be it positive or negative, must exist at the time of the celebration of the wedding.”<sup>54</sup> Nor does it concern the identity of the person, but rather his/her quality. In this sense, it is the same as the quality described in the canon on error of quality (c. 1097, § 2). However, there is a difference between the two qualities. The absence of the quality mentioned in c. 1097 does not necessarily have to be disruptive of the partnership of conjugal life, whereas the

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<sup>53</sup>See Kneal, “A Proposed *In iure* Section,” p. 218; James Cuneo holds the same view when he explains that parents’ concealment of a prison record of their offspring, with the intention of obtaining consent, from the other party is fraud. See Cuneo, “Deceit/Error of Person,” p. 165.

<sup>54</sup>See decision c. Faltin, 30 October 1996, p. 180.

absence of the “quality” referred to in c. 1098 is required by its very nature to disrupt the partnership of conjugal life and does not have to be directly and principally intended to invalidate marital consent.<sup>55</sup>

Another specification of this clause is that the deception does not directly concern a quality of a third party.<sup>56</sup> The act of deception involving a quality of some third person does not have the force of invalidating consent even if that person is very intimately related to the other party. Furthermore, the quality in question must be something true and real and not merely of the realm of hopes, aspirations and motivations. It means that what is at stake here is not one’s hypothetical will or imagination but the actual state of mind regarding a particular quality.<sup>57</sup> It is important to note that the existence or absence of this quality should be fraudulently hidden from the other party. If it is known by the supposedly deceived party, then deceit does not exist. This fact is very clear from the notion of deceit itself.

#### **2.3.1.4 - The nature of the quality**

In accordance with the classical understanding of deceit, it is a quality of the contractant that is the object of deceit in marriage. However, the quality involved in deceit need not be directly and principally intended. The interpretation of this part of the

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<sup>55</sup>See Velarde, “Error and Deceit or Fraud as Sources of Nullity,” p. 142; Lusena, *The Application of Selected Capita*, p. 204.

<sup>56</sup>See Castaño, “L’influsso del dolo nel consenso matrimoniale,” p. 581.

<sup>57</sup>See *Communicationes*, 9 (1977), p. 373; also see Boccafola, “Deceit and Induced Error about a Personal Quality,” p. 705.

canon, therefore, takes into consideration only those situations where deception has taken place with regard to “the presence of a bad quality or the absence of a good quality which is potentially disruptive of the peace and harmony of the conjugal life.”<sup>58</sup> In other words, the norm on deceit stipulates that this quality must, by its very nature (*suapte natura*), be capable of seriously disturbing or destroying the *consortium* of conjugal life. The quality, the object of the fraud, must be of such a nature that it renders normal conjugal life not only difficult but impossible. U. Navarrete writes, “if marriage is considered as an intimate community of life and love, and if there are personal qualities that of their very nature seriously disrupt or even render impossible the establishment of such a community, then error about one of them in the person of one’s prospective spouse ought to be understood as invalidating.”<sup>59</sup>

There could always be a certain variance or relativity with regard to the type of quality and its effect on the marital partnership. Canon 1098 does not specify what the qualities must be. To determine whether a certain quality is serious and has juridical relevance, we must consider several requirements. It entails a certain degree of relativity. Consequently, the gravity should be considered both objectively as well as subjectively. The only objective criterion that is provided in the canon to determine such a quality is its natural tendency to affect the conjugal relationship. This criterion is the measuring rod in

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<sup>58</sup>See L. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, Wilmington, Del., M. Glazier, 1986, p. 139.

<sup>59</sup>See U. Navarrete, “Schema iuris recogniti, ‘De matrimonio’. Textus et observationes,” in *Periodica*, 63 (1974), p. 638.

establishing a quality which has the invalidating potential. However, a spouse cannot determine the importance of the quality merely on the basis of his/her subjective estimation of that quality. The quality must not be something petty or silly or frivolous but grave. It should be “worthy of being considered effective for and over life.” In the absence of such quality, the conjugal relationship of the whole of life would be “not only be difficult but impossible, unliveable and unsupportable.”<sup>60</sup> A quality is said to be objectively grave when the community considers its concealment as a grave injustice to one or other partner.<sup>61</sup> Thus one can determine the objective importance of a quality from the general estimation of the people of a particular cultural group and from the recognition of it as such by jurisprudence.<sup>62</sup>

The partnership of conjugal life (*consortium vitae coniugalis*) is not an abstract concept but a concrete relationship between a particular man and a particular woman who give and accept each other in matrimony. A quality that could gravely disrupt the married life for one person might not do so for another. Therefore, one cannot certainly expect absolute objectivity here. Besides the objective criterion, therefore, it is always important and essential to evaluate the subjective criterion, that is, the importance the deceived party gives to the quality in question.<sup>63</sup> A quality which is estimated by the

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<sup>60</sup>See *c. Faltin*, 30 October 1996, p. 180.

<sup>61</sup>See L.G. Wrenn, *The Invalid Marriage*, Washington, DC, Canon Law Society of America, 1996, p. 108.

<sup>62</sup>See Boccafola, “Deceit and Induced Error about a Personal Quality,” p. 19.

<sup>63</sup>See Sammut, “Fraud and Canonical Marriage,” p. 78.

general population as not essential or grave can be of great subjective significance and very destructive of marital life in a particular case. This fact can neither be overlooked nor ignored. L. Wrenn says that a quality is subjectively grave when the deceived person has an unusual esteem for a particular attribute or personal characteristic, which may be light in itself, but is valued by the person as seriously desirable.<sup>64</sup>

Referring to the objective and subjective seriousness of a quality, Faltin observes that although “a universal/objective criterion can indicate taxatively when and how a quality can seriously disturb the ‘partnership of conjugal life’ it is necessary to take into account, ‘besides the objective seriousness of the quality [...] the subjective estimation of the spouse led into error’ [...]. Therefore, one must consider the personality and disposition of the person in error, his or her character traits and upbringing, conduct and other circumstances.”<sup>65</sup> In the same way, since the spouses usually come from a specific culture and live in a well circumscribed socio-economic and cultural context, certain qualities recognised as very important to the partnership of conjugal life by one particular tribe, cultural group or type of society could be considered as of minor importance by another. One cannot overlook this fact while considering the invalidating effect the presence or absence of a particular quality may have on marital consent.<sup>66</sup>

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<sup>64</sup>See Wrenn, *The Invalid Marriage*, p. 108.

<sup>65</sup>See *c. Faltin*, 30 October 1996, p. 180; however, Burke correctly observes that a purely subjective interpretation or estimation of the importance of the quality is excluded from the norm of *c. 1098*. Cf. decision *c. Burke*, 25 October 1990, *SRR Dec.*, 82 (1990), pp. 725-726.

<sup>66</sup>See Sammut, “Fraud and Canonical Marriage,” p. 78; T.P. Doyle, “Marriage,” commentary, in J.A. Coriden, T.J. Green, D.E. Heintschel (eds.), *The Code of Canon Law: A Text and Commentary*,

In his Rotal allocution of 1996, Pope John Paul II spoke specifically on the importance of taking into account the socio-cultural heritage of persons while dealing with marriage. He said: "I consider it not less important to recall a few points about the need to evaluate and weigh every individual case, taking into account *the individuality of the subject as well as the particular nature of the culture* in which he grew up and lives. Wishing, at the beginning of my Pontificate, to explain the truth about human dignity, I stressed that a man is *one, unique and unrepeatable being*. This unrepeatability concerns the human individual, not taken abstractly, but immersed in the historical, ethnic, social and above all cultural reality that distinguishes him in his individuality."<sup>67</sup>

It is important to discuss briefly here the question of gravity of the disturbance to the marital *consortium* that is required for deceit concerning a quality to invalidate marital consent. Though the law demands gravity, it does not specify its degree. The norm stipulates that the disturbance to the conjugal life must be serious. A disturbance, however grave, relating to accidental aspects of married life bears no juridic consequence. The disruption, to be relevant under c. 1098, must substantially affect the *consortium* of conjugal life, that is, in relation to its essence, properties or ends.<sup>68</sup> It is not the concealment of any quality whatsoever that invalidates consent but of a quality which

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commissioned by the Canon Law Society of America, New York/Mahwah, Paulist Press, 1985, p. 781.

<sup>67</sup>John Paul II, Allocution to the Roman Rota, 22 January 1996, in Woestman (ed.), *Papal Allocutions to the Roman Rota*, p. 239.

<sup>68</sup>See c. Burke, 25 October 1990, in *SRR Dec.*, 82 (1990), pp. 722-733, here at 726; English translation in *StC*, 26 (1992), pp. 235-255, here at 238. The latter source will be used for future references to this sentence.

is essential to the community of conjugal life. Therefore, “a quality objectively serious is expressly singled out, as same degree as the partnership of conjugal life is the determining factor for such gravity, namely, in reference to qualities connected with the essence, properties and ends of marriage.”<sup>69</sup>

We have thus far discussed the criteria that could assist us in interpreting the canon. Now a question can be raised concerning the “quality” mentioned in c. 1098. What kind of quality is implied in this canon? It should be noted that the canon itself neither defines the required quality nor does it identify any specific quality. Canonical doctrine and jurisprudence provide some indications concerning the general characteristics of the qualities which might fit into the requirements of c. 1098. Jurisprudence has identified several qualities such as virginity, health, nobility, wealth, etc.<sup>70</sup> Today it could also include certain physical, intellectual, moral and social attributes of a person. Some authors expand this list of qualities to include age, AIDS, feigned affection for children from a former marriage, homosexuality, lack of mental health, marital status, membership in a subversive group, pregnancy, sterility, and uprightness.<sup>71</sup>

In judging a concrete case, the judge has the discretion to evaluate the evidence found in the acts in order to determine the importance of a quality around which

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<sup>69</sup>See decision *c. Ragni*, 27 April 1993, in *SRR Dec.*, 75 (1993), p. 291.

<sup>70</sup>For more information on this point, see A. Mendonça, “Error of Fact: Doctrine and Jurisprudence on Canon 1097,” in *StC*, 34 (2000), pp. 23-74, particularly pp. 55-74, where several qualities dealt with in Rotal jurisprudence are identified. Also see Colagiovanni, “New (Hot) Grounds of Nullity in Marriage Cases,” pp. 534-536.

<sup>71</sup>See J.G. Johnson, “Fraud and Deceit in the Roman Rota: The First Ten Years,” in *The Jurist*, 56 (1996), p. 577.

there was deceit. The judge should examine carefully both the objective and subjective importance of the quality taking into account the socio-cultural background of the party who claims to be the victim of deceit.

### 2.3.2 - Retroactivity of the Norm

According to c. 9 (*CCEO* c. 1494), a positive law looks to the future and not to the past unless expressly provided otherwise by the legislator, which means that merely human laws are not retroactive. The implication of this principle of non-retroactivity of law for c. 1098 is that, if its norm is of merely human origin, then it cannot be applied to marriages celebrated prior to 27 November 1983, the day the new Code came into effect. But the question is: “Is the norm of c. 1098 a merely human law or has its basis in divine/natural law?” An appropriate answer to this question calls for a critical examination of the foundation of the norm of c. 1098, that is, whether it is merely an expression of positive ecclesial law or it is a derivative of divine/natural law. We will carry this inquiry through an analysis of the Rotal jurisprudence and current canonical doctrine on the issue.<sup>72</sup>

Two diametrically opposed views on this question have emerged in recent years both in Rotal jurisprudence and canonical doctrine. One opinion maintains that the

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<sup>72</sup> It is important to note here that c. 821 of *CCEO* is identical to c. 1098 of *CIC* 83. The Eastern Code was promulgated on 18 October 1990 and it came into effect exactly a year later. Because of the identical nature of both the Latin and Eastern canons (*CIC* c. 1098 and *CCEO* c. 821), we do not intend to discuss here the retroactivity of the Eastern canon, although we are of the opinion that the principles which have emerged in the present debate on the retroactivity of c. 1098 of *CIC* 83 are applicable also to c. 821 of *CCEO*.



norm of c. 1098 is of merely ecclesiastical law while the other holds that it is of natural law derived from the very dignity of the human person. In his allocution of 26 January 1984, Pope John Paul II noted that the jurisprudence of the Roman Rota could provide clear guidance on the interpretation of c. 1098.<sup>73</sup> Article 126 of the apostolic constitution *Pastor bonus* rules that the function of the Roman Rota is to foster unity of jurisprudence and, by virtue of its own decisions, provide assistance to lower tribunals.<sup>74</sup> But Rotal jurisprudence has so far not provided a definitive solution to the problem, because while some Auditors argue against the retroactivity of c. 1098, others support it.

One who has consistently argued against retroactivity of c. 1098 both in his writings and Rotal sentences is Cardinal Pompedda. He maintains that the law of c. 1098 is positive law, and c. 9 should be taken into consideration while applying the norm on the ground of deceit. It is applicable only to those marriages which were celebrated after 27 November 1983, because it was formulated by the ecclesiastical legislator. Except in cases of substantial error caused by deceit, the law had no provision for deceit as a ground of nullity. In the absence of express provision of such a norm, the norm on *dolus* incorporated into the new Codes is a positive ecclesiastical law and, therefore, it is not retroactive. Pompedda has in fact used substantial error (objectively or subjectively substantial) caused by deceit in judging cases and has argued in favour of nullity when

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<sup>73</sup> John Paul II, Allocution to the Roman Rota, 26 January 1984, in *AAS*, 76 (1984), p. 648; English translation in Woestman (ed.), *Papal Allocutions to the Roman Rota*, p. 185.

<sup>74</sup> See John Paul II, Apostolic constitution, *Pastor bonus*, 28 June 1988, in *AAS*, 80 (1988), p. 892; English translation in *Code of Canon Law*, p. 721.

presence of such error had been proved. According to him, when deceit causes substantial error, consent would be null in virtue of natural law, but this does not seem to be the case in respect to error resulting from deceit mentioned c. 1098.<sup>75</sup> U. Navarrete also proposes similar argument against the retroactivity of the present norm on the ground of deceit. He maintains that “whatever the effects of the words in canon 1098 - deceived by fraud, perpetrated to obtain consent - they are to be attributed to the positive law of the Church,” and because of this, “we have no option but to retain that deceitful error, perpetrated with fraud (for example) regarding the sterility of the other partner, in order to obtain consent, renders null the marriage by the will of the human legislator, by means of this norm, which is absolutely concordant with natural equity, protects beyond natural law, the freedom to marry, against the machinations and trickery of the other party.”<sup>76</sup>

The same view has been echoed in several Rotal sentences of other judges.

The respondent woman in a marriage case originating from Mangalore (India) requested the Rota to grant a new hearing to her case after two affirmative decisions were

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<sup>75</sup> See M.F. Pompedda, *Studi di diritto matrimoniale canonico*, Milano, A. Giuffrè Editore, 1993, p. 227; also see decisions c. Pompedda, 6 February 1992, in *SRR Dec.*, 84 (1992), pp. 49-62; c. Id., 26 July 1996, in *ibid.*, 88 (1996), pp. 581-586, especially pp. 582-583; also see c. Stankiewicz, 27 January 1994, in *SRR Dec.*, 86 (1994), pp. 56-76, here p. 64; English translation of this sentence is in *Forum*, 8 (1997) 2, pp. 365-408, here at p. 387.

<sup>76</sup> See U. Navarrete, “Canon 1098 de errore doloso: estne iuris naturalis an iuris positivi Ecclesiae?” pp. 178-179. Also see S. Gherro, *Diritto matrimoniale canonico*, Padova, CEDAM, 1985, pp. 165-168; P.A. Bonnet, *Introduzione al consenso matrimoniale canonico*, Milano, A. Giuffrè Editore, 1985, p. 85; U. Tramma, “De matrimonio ante diem 27 nov. 1983 contracto quod nullum declaratum sit ob dolum a quodam tribunali primi gradus,” in *ME*, 110 (1985), p. 505; L. Notaro, “Brevi note in tema di dolo ed errore,” in *Il diritto ecclesiastico*, 96 (1985), p. 76; L. Chiappetta, *Il matrimonio nella nuova legislazione canonica e concordataria: manuale giuridico-pastorale*, Roma, Edizioni Dehoniane, 1990, p. 222.

pronounced by the local courts on grounds of error of quality directly and principally intended (c. 1097, §2) and *dolus* (c. 1098). One of the motives for her petition for a new hearing was that the norm of c. 1098 applied to her case was not retroactive because her marriage was celebrated long before the new Code came into effect. In his decree of 21 October 1988, Bruno argued that the nullity of marriage in question could not have been argued on grounds of *dolus* because the stated ground is of merely ecclesiastical law and, therefore, not retroactive.<sup>77</sup> Bruno's *turnus* in fact granted a new hearing to the case. And on 25 March 1994, the same *turnus* issued a negative sentence upholding, among other things, the non-retroactivity of the norm of c. 1098.<sup>78</sup> In another marriage case judged *coram* Bruno on 19 November 1993, the same view was reiterated, that is to say, the norm of c. 1098 is of merely positive law. In his sentence Bruno states that it is a matter "regarding a norm of ecclesiastical law, and not of natural law, as certain authors and certain decisions which are rare indeed, have affirmed. It does not seem that this norm can be applied to marriages entered upon before the promulgation of the new Code," because, "the influence of fraud on the marriage consent directly and immediately arises from the motivated error and only indirectly from fraudulent action. Moreover, c. 9 sanctions: 'laws deal with the future and not the past, unless specific provision is made in the laws concerning the past', and in c. 1098 there is no provision made for past

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<sup>77</sup> For a brief discussion on this decree, see A. Mendonça, "Rotal Jurisprudence from a Socio-cultural Perspective," in *StC*, 29 (1995), pp. 342-346.

<sup>78</sup> See Mendonça, "Cultural Context in Adjudicating Marriage Nullity Cases," pp. 122-124.

marriages.”<sup>79</sup> Other Rotal auditors like Parisella, Agustoni, Palestro, Giannecchini, Stankiewicz, De Lanversin, etc., also attribute the principle of non-retroactivity to c. 1098.<sup>80</sup>

In a case judged *coram* Parisella on 24 March 1983, that is, before the 1983 Code came into effect, the *turnus* held that c. 1098 does not have retroactive effect as it is only of positive ecclesiastical law. The decision was negative precisely because of application of this principle to the concrete case in question.<sup>81</sup> Analyzing this case, Mendonça states: “On the one hand, the court clearly admitted that the respondent had perpetrated fraud both in regard to her incapacity to bear children and her age; but on the other hand, it maintained that c. 1098 of the new Code is of positive law, and therefore, it can be applied only to marriages celebrated after 27 November 1983.”<sup>82</sup> Because of disparate decisions, this case went to the superior *turnus*, where the preceding decision was confirmed.<sup>83</sup> This indicates that Jarawan’s *turnus* too held the same view expressed by Parisella on the retroactivity of the law on fraud.

The sentence of Funghini dated 28 November 1990 is another example of the application of the principle of non-retroactivity to the norm on deceit.<sup>84</sup> In his sentence,

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<sup>79</sup> See decision *c. Bruno*, 19 November 1993, in *SRR Dec.*, 85 (1993), p. 674.

<sup>80</sup> For a summary of their view, see Johnson, “Fraud and Deceit in the Roman Rota,” p. 562.

<sup>81</sup> See decision *c. Parisella*, 24 March 1983, in *SRR Dec.*, 75 (1983), pp. 146-153.

<sup>82</sup> See Mendonça, “Cultural Contexts in Adjudicating Marriage Nullity Cases,” p. 120.

<sup>83</sup> See decision *c. Jarawan*, 27 March 1984, in *SRR Dec.*, 76 (1984), pp. 197-202.

<sup>84</sup> See decision *c. Funghini*, 28 November 1990, in *SRR Dec.*, 82 (1990), pp. 813-822.

Funghini reiterates this principle and, although there was clear evidence of fraudulent misrepresentation in this case, the decision was negative precisely because of this principle. Funghini argues: "The marriage arrangement in this case was amazingly strange even if one were to consider it within the context of local customs. What emerges from it is the deception of the man rather than error of quality principally intended."<sup>85</sup>

In his comments on the opinion taken by some of the Rotal judges in respect to the retroactivity of the norm of c. 1098, J. Johnson notes that "since the theorists so consistently ignored the possibility that deceit could invalidate by reason of natural law, it is not surprising that the Rota followed suit."<sup>86</sup>

The view that the norm of c. 1098 is based on natural law and, hence, retroactive is not without its protagonists. The argument put forward by them may be summarized as follows: Deceit in a marriage contract is always a deliberate act of deception which involves pre-meditated actions on the part of the deceiver. It is done purposely to create some kind of error in the other party causing him/her to act in accordance with the will of the deceiver. In such situations the consent of the victim of deceit suffers from lack of freedom, thus making it defective. Therefore, the use of deceit in securing marital consent amounts to denial of freedom of choice in contracting

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<sup>85</sup> Ibid., p. 817; for a critique of this view, see Mendonça, "Cultural Contexts in Adjudicating Marriage Nullity Cases," p. 120.

<sup>86</sup> J.G. Johnson, "On the Retroactive Force of Canon 1098," in *StC*, 23 (1989), p. 72. This view of Johnson has been substantiated in Mendonça, "Cultural Contexts in Adjudicating Marriage Nullity Cases," pp. 62-152.

marriage. This goes against the very nature of marriage which is a free commitment for life. Therefore, the ground of deceit is of natural law. Serrano explains that what is done in deceit is the distortion of the image of the deceiver in the mind of the victim of deceit. A choice based on such an image is wrong, because the correct information necessary to make the right decision is hidden fraudulently from the victim of deceit in order to extract that person's consent.<sup>87</sup>

Serrano offers two reasons why the element of deceit is not compatible with marriage. First, it is incompatible with the sacramental nature of marriage where the intention of the parties itself is the matter and form; second, the mutual exchange of the consent whereby the spouses give and accept each other cannot be realized since there is a lack of conformity with reality.<sup>88</sup> Therefore, "this ground of nullity (*dolus*) appears to be of the natural law, although theologians and canonists may not have perceived this in history."<sup>89</sup>

In a recent decision involving error of quality deceitfully induced, Faltin presents similar arguments favouring the natural law basis of the norm on deceit.<sup>90</sup> Quoting from a decree by Serrano, dated 28 May 1982, Faltin says that deceit is opposed

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<sup>87</sup>See J.M. Serrano, "El dolo en el consentimiento matrimonial," in *REDC*, 29 (1973), pp. 175-185.

<sup>88</sup> See J.M. Serrano, "De consensu matrimoniali," in *Commento al Codice di diritto canonico*, a cura di P.V. Pinto, Roma, Urbaniana University Press, 1985, p. 646.

<sup>89</sup> Decision *c. Serrano*, 1 June 1990, in *SRR Dec.*, 82 (1990), p. 468; also see *c. Id.*, 22 May 1982, in *ibid.*, 74 (1982), p. 319, n. 17.

<sup>90</sup> See decision *c. Faltin*, 3 June 1998, in *SRR Dec.*, 90 (1998), pp. 433-443; also see *c. Id.*, 15 December 1998, in *ibid.*, pp. 843-852, especially pp. 847-849, especially pp. 848-849.

to the very essence of marriage for three reasons: first, because a marriage contracted as a result of an act of deceit lacks truth and sincerity, which pertain to marriage in virtue of natural law and divine design; second, the act of deceit illegitimately deprives its victim of the freedom of choice by creating in the mind of that person a false image of the deceiver, which becomes the principal source of an inappropriate intention on the part of the deceived; third, through the act of deception, the deceiver offers a false image of him/herself, that is, ‘an intentional person’, totally different from the one the other party intends to accept in the act of consent.<sup>91</sup> The crux of this argument is that the norm of c. 1098 on deceit is of natural law. But it is important to note here that, although Faltin argues in favour of the retroactivity of the norm of c. 1098, and deceit was clearly implied in the case his *turnus* was judging, the judges decided not to apply the canon to it because they considered the issue of retroactivity as theoretically still unsettled.

The petitioner in this case alleged that he married his wife with the intention of having children, but his wife was sterile, a fact she knew before the wedding. Therefore, he felt that he was deceived by the woman into marrying her. But because the marriage in question was celebrated before the new Code came into effect, the ground of nullity determined in first instance was error concerning a quality of a person directly and principally intended (c. 1097, §2). The decision of the first instance court was negative, which was overturned by the second instance court. Although the Rota had to deal only with the stated ground, Faltin discusses at length also the different elements of deceit

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<sup>91</sup> See c. Faltin, 3 June 1998, p. 437.

because it also involves error of quality. Although in the law section of the sentence he clearly argues in favour of the retroactivity of the norm on deceit, in the argument section he says: “Yet, since this is neither the place nor the time to deal with the theoretical issue, but rather to resolve the concrete case, the Fathers preferred to remit this question to those who are involved in deepening the study of canon law.”<sup>92</sup> In other words, Faltin’s *turnus* realized that in the presence of *dubium iuris*, the norm on deceit could not be applied to the case under study.

There are other authors who also present similar arguments in favour of retroactivity of c. 1098, because they regard its norm as an expression of natural law. P. Viladrich, for example, notes that the legal prescript of the canon is of natural law, even though it has been concretely expressed by the human legislator in a positive norm as it necessarily happens with all natural laws including the laws on marriage itself.<sup>93</sup> Carlo Gullo argues that fraud is absolutely incompatible with the very essence of Christian marriage, i.e., ‘the communion of life and conjugal love’, as taught by the Second Vatican Council, because it lacks the truth and sincerity which pertains to it by virtue of natural law. He further notes that marriage, being a perpetual bond of mutual love, cannot exist together with fraud which affects the community of life and love, which is the very essence of marriage. In practical terms, he points out, the nullity of marriage on

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<sup>92</sup> “Attamen, cum hinc non est nec locus nec tempus, ut quaestio theórica pertractetur, sed potius ut casus concretus solveretur, Patres quaestionem hanc potius iuris canonici cultoribus studio remittere maluerunt” (ibid., p. 442).

<sup>93</sup> See Pedro-Juan Viladrich, “Canon 1098,” commentary, in *Comentario exegético*, vol. 4, p. 1292.



grounds of fraud pertains to natural law, and the scope of the norm of c. 1098 cannot be restricted only to marriages celebrated after 27 November 1983.<sup>94</sup> James Cuneo also states that c. 1098 could be explained as a written expression of natural law and, therefore, applicable to all marriages regardless of the religion to which the parties belong.<sup>95</sup>

To any keen observer of this discussion it should be quite evident that there is a serious disagreement both in doctrine and Rotal jurisprudence, and this fact constitutes the basis for a doubt of law (*dubium iuris*) concerning the retroactivity of c. 1098. In one of his more recent Rotal decisions, Serrano, who has been a consistent supporter of the natural law foundation of the ground of deceit, implies that in case of “doubt of law,” marriage enjoys the favour of law (c. 1060; *CCEO* c. 779), and hence the norm of c. 1098 has no retroactive effect.<sup>96</sup> It seems that c. 1060 (*CCEO* c. 779) overrides the norm of c. 14 (*CCEO* c. 1496), which states: “Laws even invalidating and disqualifying ones, do not oblige when there is a doubt about the law [*in dubio iuris*].” In fact the case judged *coram* Serrano was presented to the ecclesiastical court and judged under two grounds, namely deceit and error of quality. The first instance court had pronounced an affirmative decision on both grounds, while the appeal court had overturned. The Rotal court also determined the doubt as follows: “*Whether there is proof of invalidity of*

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<sup>94</sup> See Carlo Gullo, “Riflessioni sulla retroattività del Can. 1098,” in *Ius Ecclesiae*, 4 (1992), pp. 225-234.

<sup>95</sup> See Cuneo, “Deceit/Error of Person,” p. 166.

<sup>96</sup> See decision *c. Serrano*, 25 October 1996, in *SRR Dec.*, 88 (1996), pp. 649-656, especially pp. 650-651.

*marriage in the case due to deceit perpetrated by the woman and due to error concerning the quality of a person (cann. 1098 and 1097)."*<sup>97</sup> Although Serrano argues in his sentence that there was sufficient proof of deceit perpetrated by the woman concerning her premarital pregnancy and simulated conversion to the Catholic faith, the affirmative decision was pronounced only on error of quality.<sup>98</sup>

L. Chiappetta correctly says, and Rotal jurisprudence has now conceded, that in the absence of an authentic interpretation, the norm of c. 1098 cannot be retroactively applied to marriages celebrated prior to 27 November 1983. For this reason, therefore, as long as this *dubium iuris* remains unresolved, the judge has no discretion to apply the norm on deceit to marriages celebrated prior to this date, nor can it be applied to marriages of non-Catholics involving fraud.<sup>99</sup>

Some have observed that this question of retroactivity of c. 1098 will be a non-issue because they feel that it would slowly fade away as tribunals will be handling less and less cases involving marriages celebrated prior to 27 November 1983.<sup>100</sup> For example, Gullo says that the Rota has taken a pragmatic approach to make the problem

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<sup>97</sup> "An constet de matrimonii nullitate in casu ob dolum a muliere patratum et ob errorem in qualitate personae (cann. 1098-1097)," *ibid.*, p. 650.

<sup>98</sup> See *ibid.*, pp. 652 and 656.

<sup>99</sup> See Chiappetta, *Il matrimonio nella nuova legislazione*, p. 53, footnote, 66, and p. 222, footnote, 40<sup>bis</sup>; also see Beal, "Chapter IV: Matrimonial Consent [cc. 1095-1107]," pp. 1256-1257 and pp. 1296-1297.

<sup>100</sup> See Vann, "Dolus: Canon 1098 of the Revised Code of Canon Law," p. 392.

die a natural death before addressing its speculative aspect.<sup>101</sup> However, the issue could still have some relevance to our principal hypothesis. Marriages of non-Catholics contracted prior to the above date might still be brought before ecclesiastical tribunals to be judged on the ground of deceit. It is quite possible that even civil courts might declare such marriages null on the basis of deceit. Then, if our hypothesis has any validity, the Church will have to respond to any question which might arise from such a situation. But even in these situations we believe that it is possible for Church tribunals to adopt the pragmatic approach adopted by several Rotal judges. Those marriages, whether of non-Catholics or of Catholics, can still be judged under the ground of substantial/accidental error mentioned in cc. 126 and 1097 (*CCEO* cc. 913 and 820) with all the relevant nuances utilized by Rotal judges. As mentioned above, even those Rotal judges, who do not favour the retroactivity of the norm of c. 1098, have clearly admitted that deceit which gives rise to *substantial error* in marital consent is of natural law and, therefore, marriages which were contracted prior to 27 November 1983 could be judged under the ground of substantial error. The sentences of those judges, who have adopted this approach, provide appropriate guidelines to deal with such cases.

Therefore, we are of the opinion that should the Church decide to recognize the civil court decisions in some instances, the retroactivity of the norm of c. 1098 (*CCEO* c. 821) will not pose a problem if we acknowledge the validity of the arguments used in the sentences which have considered error caused by deceit, not deceit per se, to

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<sup>101</sup> See Gullo, "Riflessioni sulla retroattività del Can. 1098," p. 234.

have nullifying effect in virtue of natural law, and hence applicable retroactively. This view has been privately confirmed also by the Pontifical Commission for the Interpretation of the Code of Canon Law which has essentially said that given the great variety of cases which c. 1098 could embrace, one could not rule out a priori the possibility that some of those cases could involve nullity deriving from the natural law, in which case it would be legitimate to render an affirmative decision.<sup>102</sup>

### **2.3.3 - Relationship Between Deceit and Other Defects of Consent**

Canon 1057, §2 (*CCEO* c. 817, §1) states that consent is an act of the will. This is a very concentrated legal norm. An act of will is not just an act of one single faculty of the human mind. In fact, this act of will represents the culmination of a long and complex psychological or mental process which leads to the decision one makes in choosing marriage itself with all its rights and obligations and one's marriage partner. This process engages all aspects of a person's affective, cognitive and volitive resources. Therefore, whatever substantially impedes the functional or dynamic aspects of this process would affect the decision (marital consent) made at the end. Canons 1095-1103 (*CCEO* cc. 818-825) determine precisely the factors that could substantially vitiate the process involved in eliciting marital consent and thereby invalidate marriage itself. This is the foundational basis for the interconnectedness of all defects of consent. In other words, all defects of consent have a common linkage, although each one is formally distinct. In this section we will briefly look at the relationship between deceit and some

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<sup>102</sup>See Beal, "Chapter IV: Matrimonial Consent [cc. 1095-1107]," pp. 1308-1309.

of the defects of consent so that determination of a ground of nullity suitable for a concrete case might be made with some degree of clarity.

### 2.3.3.1 - Deceit and Defect of Discretion of Judgement

Marriage is a covenant in which the spouses pledge to each other the gift of their whole life. To be valid, such a covenant necessarily requires of the human mind knowledge, deliberation and internal (psychological) freedom more than other contracts.<sup>103</sup> In jurisprudence, the term discretion of judgement has come to be identified with “mature judgement” or “mature decision.”<sup>104</sup> The process in making this decision engages all aspects of the human personality, namely the affective, cognitive and volitive faculties. The intellect receives the information concerning its object and deliberates over it before the will makes the decision on the object presented to it. In order to make a valid decision or choice, the parties must have the critical faculty to evaluate the object which, in our case, is marriage itself with all its essential rights and obligations.<sup>105</sup> If this process of decision-making is seriously flawed due to psychological factors, the person affected by the anomaly may not be able to make the deliberate and free decision to marry. In sum, if a party is unable to use his/her critical faculty to deliberate and to freely choose the essential rights and duties of marriage, he/she is regarded as suffering from serious defect of discretion of judgement. As Pope John Paul II states in his allocution of

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<sup>103</sup> See decision *c. Sabattani*, 24 February 1961, in *SRR Dec.*, 53 (1961), p. 118.

<sup>104</sup> See A. Mendonça, “Consensual Incapacity for Marriage,” in *The Jurist*, 54 (1994), p. 494.

<sup>105</sup> See decision *c. Felici*, 3 December 1957, in *SRR Dec.*, 49 (1957), p. 782; *c. Lamas*, 21 October 1959, in *SRR Dec.*, 51 (1959), p. 455.

1987, a serious defect of discretion of judgement and incapacity to assume the essential obligations of marriage necessarily presuppose a serious psychic anomaly, that is, a serious psychic or psychological disorder.<sup>106</sup>

In the case of deceit there is some sort of distortion of mental process involved in eliciting marital consent. The deceiver, by concealing the presence of a negative quality or by hiding the absence of a desired quality with the intention of extracting the consent of the other, creates an image of him/herself in the victim which becomes the source of information on which that person would be making his/her decision to marry the concrete person thus presented. In deception, therefore, the deceiver in a sense could be said to manipulate the discretionary capacity of the deceived party. The error concerning the quality of the deceiver created in the victim of deceit misleads and seriously undermines that person's deliberation and freedom of choice. In a sense one could say that such deception incapacitates the victim to make a critical evaluation of the victim of such an act. But this understanding of deceit is not compatible with the concept of discretion of judgement dealt with in c. 1095, 2° (*CCEO* c. 818, 2°). The incapacity underlying grave defect of discretion of judgement is substantially and formally different from deceit in two important aspects: First, the incapacity of c. 1095, 2° (*CCEO* c. 818, 2°) must be the result of a psychic anomaly according to common jurisprudence and the allocution of the Holy Father. Whereas in

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<sup>106</sup> See John Paul II, Allocution to the Roman Rota, 5 February 1987, in *AAS*, 79 (1987), p. 1457; English translation in Woestman (ed.), *Papal Allocutions to the Roman Rota*, p. 194.

deceit both parties are presumed to have the psychic capacity to make the necessary decision to marry. Therefore, the two grounds are substantially different in terms of the cause of incapacity. Second, the norm on grave discretion of judgement concerns the essential rights and duties of marriage and not the person of the spouse, while the object of deceit is the quality of the other party. Therefore, there is a substantial difference between the object of the two grounds of nullity. Both grounds are substantially incompatible, and consequently, they can be used only subordinately, that is to say, the ground of deceit should be subordinated to the ground of grave defect of discretion of judgement if both grounds are adduced in a concrete case.<sup>107</sup>

### 2.3.3.2 - Deceit and Error of Fact

Déceit and error, observes K.E. Boccafola, always go together like chicken and egg, because the purpose of deceit is to cause error.<sup>108</sup> Long before c. 1098 was promulgated, P. Fedele had stated that it was ridiculous to treat error and fraud as if they were two distinct defects of consent.<sup>109</sup> These statements affirm that one common factor, namely error, seems to link the two grounds of nullity i.e., deceit and error of fact (c.

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<sup>107</sup> In a recent case judged *coram* Faltin the grounds of lack of discretion of judgement and *dolus* were considered. And this is how the Rota determined the formula of doubt: “‘An constet de nullitate matrimonii, in casu, ob defectum discretionis iudicii ex utraque parte (can. 1095, n. 2°), utpote in tertia instantia’, vel, subordinate quidem, ‘ob dolum a muliere patratum, ad normam can. 1098, tamquam in prima instantia’” (decision *c. Faltin*, 15 December 1998, in *SRR Dec.*, 90 [1998], p. 844).

<sup>108</sup> See Boccafola, “Deceit and Induced Error about a Personal Quality,” p. 14.

<sup>109</sup> See P. Fedele, “Il dolo nel matrimonio canonico: ius vetus et ius condendum,” in *Ephemerides iuris canonici*, 24 (1968), p. 9.

1097; *CCEO* c. 820). Whether it is simple spontaneous error or error induced by fraud, in both cases error is the effective agent vitiating the consent.

Error by definition is a false judgement concerning an object which creates a discrepancy between the object perceived and the reality of that object. In error of fact it is the subject of error who is the source of this discrepancy. This error may concern the substance or a quality of the object of the judgement. In c. 1097, the substance of error is the very person of the other party or one of his/her qualities directly and principally intended by the subject in error.

In deceit also there is error, but this error is created deliberately by one person in the mind of another in order to extract his or her consent in a contract. For this reason, this is called induced error contradistinguished from error of fact. The deceiver creates a misrepresentation of the object of the contract giving rise in the other party to an apparently "true" perception of an object which in reality is false.<sup>110</sup> The will of the victim of deceit makes the decision based on the false information concerning the object. In both situations of error, that is, error of fact and induced error, it is the false representation of the object which is the direct source of defective consent on the part of the person in error and not the deceit per se.

The common element which links induced error (*error dolosus*) and error of fact is the quality of one of the spouses. In error of fact (c. 1097, 2°), the false judgement

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<sup>110</sup> See P.J. Viladrich, "Caput IV: De consensu matrimoniali," in *Code of Canon Law Annotated*, E. Caparros, M. Thériault, J. Thorn (eds.), Montréal, Wilson & Lafleur Limitée, 1993, p. 690.



is based on the perception one spouse has of another, but in the case of induced error the erroneous perception is deliberately created by one of the spouses in the other in order to extract the marital consent of the other party.<sup>111</sup> Therefore, the formal element which distinguishes these two grounds of nullity is the fraudulent inducement of the false perception of a quality of the deceiving party in the mind of the deceived party which is by its nature capable of disturbing the conjugal partnership. In other words, in the ground of deceit the error is induced in the mind of its victim for the purpose of securing his/her marital consent. Because error concerning a quality is common to both grounds of nullity it is possible to integrate the two in a given case as done in several Rotal sentences already cited above.

Error involved in deceit is distinct from ignorance because in error there is knowledge which is wrong while ignorance by definition is absence of due knowledge. In the former, there is a false judgement of the mind, which presupposes some knowledge of the object, while in the latter strictly speaking there can be no judgement because of absence of knowledge. Moreover, the formal objects of the two defective acts of consent totally distinct. Therefore, the grounds of deceit and ignorance are not compatible.

### 2.3.3.3 - Deceit and Simulation

In marital consent there are two elements, namely the external act and the internal intention. When the external act of consenting is not in harmony with the

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<sup>111</sup> See C. Burke, "The Effect of Fraud, Condition and Error in Marital Consent: Some Personalist Considerations," in *ME*, 122 (1997), p. 515.

internal intention, there is exclusion or simulation. This act of exclusion or simulation can have different objects. According to c. 1101, §2 (*CCEO* c. 824, §2), this object of exclusion can be either marriage itself, one of the essential elements of marriage or one of its essential properties. When there is exclusion of any one of these elements the act is invalid. To place an act of simulation or exclusion one must be aware of its object, namely marriage itself, the essential elements or essential properties, and either explicitly or implicitly reject or exclude it.

The object of the act of deceit mentioned in c. 1098 is not marriage itself, nor its essential elements or essential properties; rather it is the quality or qualities of the deceiving party. In this case the other party is supposed to be totally unaware of the deceptive act, otherwise there will be no deceit. The act of deception on the part of deceiver presupposes mental capacity to place a deliberate act and it is deliberately used as a means of securing marriage with a specific person. In other words, the one who uses deceit as a means of securing the consent of the other is as a rule supposed to want marriage with all its essential elements and properties, which is not the case in simulation. Therefore, there is a clear and formal distinction between the two grounds of nullity. It is possible, however, for the deceiver to have a motive for marrying totally opposed to a truly Christian marriage, in which case it is possible to consider two grounds of nullity in a concrete case.

#### 2.3.3.4 - Deceit and Condition

A condition is a circumstance attached to a legal agreement in such a way that the validity of the agreement itself depends on the realization or fulfillment of that condition. Therefore, in legal agreements a contract may be dissolved upon the non-fulfillment of the condition or suspended until the condition is fulfilled. The 1983 Code allows attachment of a condition to a marital contract under certain stipulations. In a situation where a condition is attached to marital consent the validity of marriage will depend on the fulfillment of that condition. In other words, the consent which produces the marriage will be suspended or made uncertain by a condition until that condition is verified or fulfilled.<sup>112</sup> Such were the provisions found in the 1917 Code regarding marriage (c. 1092). The present Code too contains the same provision with some modifications.<sup>113</sup>

A condition is often placed in the form of implicit expectations, e.g., “I marry you if you are a virgin, if you are not an alcoholic, if you are a practising Catholic, etc.” A true condition is a circumstance which directly influences marital consent and conjugal partnership. Since “the nature of a true condition is to suspend the effect of the

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<sup>112</sup> See B.T. Timlin, *Conditional Matrimonial Consent: An Historical Synopsis and Commentary*, Canon Law Studies No. 89, Washington, DC, Catholic University of America, 1934, p. 79.

<sup>113</sup> Both 1917 and 1983 Codes speak of three types of conditions: a) condition regarding the future; b) condition regarding the past; and c) condition regarding the present. While the 1917 Code admitted all the three conditions, the present Code does not allow marriage under condition regarding future. For a comprehensive treatment of the ground of condition, see Lynda Robitaille, *Conditioned Consent: Natural Law and Positive Human Law*, JCD diss., Romae, Pontificia Universitas Gregoriana, Facultas Iuris Canonici, 1990; for a brief synthesis of this work, see Id., “The Ground of Conditioned Consent,” in *Forum*, 8 (1997)1, pp. 95-127.

transaction and its resulting obligations and to make that act exist or not, according to the existence or not of the condition in reality.”<sup>114</sup> When a condition is attached to consent, the will consents to the contractual obligations only dependently, making the efficacy of the consent depend on the fulfillment of that condition.<sup>115</sup> A conditional consent is verified when a spouse places more importance on the fulfillment of the condition than on marriage itself. Thus the commitment to marital community depends on the verification of the condition rather than on the free giving of oneself and acceptance of the other.<sup>116</sup>

In deceit, the victim of false representation believes that a particular quality he/she expects in the deceiver is present or absent and is totally unaware of the presence or absence of that quality in the decision. Although there is no doubt in the victim of deceit concerning the presence or absence of the desired quality, one can argue that there is an *implicit* condition in such a situation. This could be considered as verified when the conjugal partnership is seriously disturbed upon discovery of the trickery perpetrated on the person concerning the expected quality. In the case of condition, because of doubt, the party placing the condition either explicitly or implicitly expresses the requirement of a particular personal quality in the other for the validity of the marriage to be contracted. It seems the element of condition in respect to a personal quality is the common factor

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<sup>114</sup> See Timlin, *Conditional Matrimonial Consent*, p. 84.

<sup>115</sup> See D.J. Burns, *Matrimonial Indissolubility Contrary to Conditions*, Canon Law Studies No. 377, Washington, DC, Catholic University of America, 1963, p. 84.

<sup>116</sup> See Doyle, “Marriage,” p. 787.

which links both grounds. Therefore, L.G. Wrenn observes that these two grounds are closely related. He illustrates this through an example of a man who marries a woman who is an alcoholic and then alleges either that he was tricked into or that he had placed a condition against marrying an alcoholic woman.<sup>117</sup>

## 2.4 - APPLICATION OF CANON 1098 (CCEO c. 821)

In our analysis of the application of c. 1098 we have chosen only a few cases judged either at the Rotal level or by local tribunals. All cases judged at the local level are from Kerala, India. The choice of this State was motivated by the system of arranged marriages which are prevalent in it. In other words, the scope for deceit seems quite wide in this State.

### 2.4.1 - Rotal Jurisprudence

There have been very few Rotal cases so far judged on this new ground of “fraud.” As Cormac Burke states, at this stage this ground remains a rather unexplored territory.<sup>118</sup> The application of the canon is explicitly limited to qualities which “of their very nature” tend to disturb seriously the conjugal life.

**A) Decision *coram* Burke, 25 October 1990:**<sup>119</sup> The sentence by Burke in this case contains a good analysis of fraud. The case was from Madras Archdiocese,

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<sup>117</sup> See Wrenn, *The Invalid Marriage*, p. 109.

<sup>118</sup> See Burke, “The Effect of Fraud, Condition and Error in Marital Consent: Some Personalist Considerations,” in *ME*, 122 (1997), p. 296.

<sup>119</sup> See *c. Burke*, 25 October 1990, in *SRR Dec.*, 82 (1990), pp. 722-733; English translation in *StC*, 26 (1992), pp. 235-255.

India. In the case the petitioner was a Hindu until the day of her marriage on 11 July 1987 when she was baptized and confirmed. The same day she entered into marriage with the respondent. The marriage was contracted without the approval of her parents. Their conjugal life did not last long since she returned to her parental home one week after their wedding. Three weeks later, she wrote to the Archbishop of Madras seeking a declaration of nullity of her marriage. The case finally went to the Apostolic Tribunal. The circumstances under which the marriage took place remained unclear even to the Roman Rota. Yet in his sentence Burke has given a very comprehensive law section on grounds of error fraudulently perpetrated on the petitioner in accordance with c. 1098.

In this sentence, Burke points out that fraud affects the consent of both parties. The deceiving party does not consent with a real act of self-bestowal, while the deceived is manipulated into giving a consent which cannot really be called a true acceptance of the other person. In c. 1098, nullity is caused not primarily by the party deceived, but mainly by the other party, "whether he is in fact the actual deceiver or whether the deceit about some quality of his has been perpetrated by someone else. In either case, one can say that he offers an apparent conjugal self which however is substantially different from his real self. The object of his consent, therefore, is vitiated; and so his consent fails, causing the invalidity of the consent of the other party as well. In this analysis, therefore, the '*ratio invaliditatis*' lies in the inadequate and vitiated consent

of the person possessing the quality deceitfully concealed.”<sup>120</sup> According to Burke’s analysis, the deceived party is making only an abortive attempt to marry because he is attempting to marry someone who does not exist. The reason is that the deceiver is not offering the deceived his or her true conjugal self, which is the direct object of consent, but only a falsified self as a consequence of fraud.

Burke further states that this canon does not prohibit the concealment of just any quality whatsoever but of one which is very significant to the conjugal self-gift. Although the ideal relationship between spouses is one of total mutual openness, one cannot absolutize the right of the spouse to knowledge of one’s partner, nor the mutual obligation of self revelation. Therefore, the failure to disclose everything about oneself does not necessarily violate the other party’s right to spousal knowledge or one’s own obligation to self revelation. Reticence corresponds to a personal right and nobody is bound to betray oneself.<sup>121</sup>

Another point he stresses in his sentence about the application of this canon is that this norm applies only where there has been fraudulent concealment of a quality of some objective importance and not of subjective importance. He explains that the legislator has specifically excluded any subjective interpretation of the importance of the quality. “It must be a quality which according to some objective criterion (and there seems to be none other than common estimation, confirmed by jurisprudence), is both

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<sup>120</sup> Ibid., p. 236.

<sup>121</sup> Ibid., pp. 236-237.

important in itself and capable, if the object of deceit, of seriously disturbing conjugal life, e.g., some gravely infectious disease, being pregnant by a third party, membership in the Catholic Church, etc. [...] There are aspects to conjugal life that may be subjectively important to one or other of the spouses, yet marriage is not invalidated even if something that will inevitably affect them is deceitfully concealed.”<sup>122</sup> An objective criterion, therefore, must be employed in measuring the gravity of the disturbance in one's conjugal life.

He also notes that the nullifying effect of c. 1098 does not flow from the negative quality considered in itself, nor even from its gravity, but from the deceit concerning the quality by means of which consent of the other party was extracted. Two years later, in another decision pronounced on 26 November 1992, Burke states that the juridical reason for the invalidating effect of the canon is based on the fact that no party has a right to an undisturbed married life, yet every person has a right not to be deceived into marriage by concealment of some important negative trait of the other.<sup>123</sup>

**B) Decision *coram* Stankiewicz, 27 January 1994:**<sup>124</sup> This marriage case originated in Cochin, India, and the marriage in question was blessed on January 27, 1985. It was an “arranged marriage,” that is, it was arranged with the help of the parents

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<sup>122</sup> Ibid., p. 238.

<sup>123</sup> See decision c. Burke, 26 November 1992, in *SRR Dec.*, 84 (1992), pp. 577-587, here at p. 585.

<sup>124</sup> See decision c. Stankiewicz, 27 January 1994, in *SRR Dec.*, 86 (1994), pp. 56-76; English translation in *Forum*, 8 (1997)2, pp. 365-408. The latter source will be used for future references to this sentence.



according to the local custom. The man, who was 30 years of age and an employee in the Middle East, met the girl, 29 years of age, for the first time on 27 June 1984. Soon after their meeting, the man returned to the Gulf but communicated with the girl through correspondence. On 24 January 1985, he returned to India and the marriage took place three days later. Just three months into their married life, that is, on April 19th, the respondent had to be admitted to a mental hospital. The husband could not accept this because he had intended to marry a woman of sane mind and with this goal in mind he had already carried out an investigation before the marriage. He was not informed of any mental illness. However, when he was definitively informed by the respondent's brother that prior to the wedding the respondent had undergone treatment for mental illness, the petitioner terminated the conjugal life. A few months later, the man presented a petition to the ecclesiastical court accusing his marriage of nullity on the grounds of "error of quality of the respondent" and "fraud perpetrated by the respondent." The first instance decision was negative on both grounds, but the appeal tribunal overturned the negative decision of the first instance. Then the case was referred to the Roman Rota where a supplementary instruction was carried out and the case was tried on grounds of "error of quality of the person" (c. 1097 §2) and "fraud" (c. 1098).

Stankiewicz has given an extensive law section which contains the doctrine and jurisprudence on most juridic aspects of "error of quality of a person" as well as "fraud." Since our focus is on fraud we shall deal only with the application of c. 1098 (fraud).

Stankiewicz points out that, in the case of fraud, a juridic act can be affected either as a cause or as an effect of fraud. As a cause, fraud is said to be “a deception of another person, which was deliberately and dishonestly committed, by which this person is induced to perform a determined juridical act.”<sup>125</sup> The effect of fraud is error which is either accidental or substantial. It is accidental if it involves only the accidental aspect of the object. It is substantial when it concerns the substance of the act involved.<sup>126</sup> Likewise fraud can be either positive or negative. It is positive when a person is induced into error by doing or saying something. It is negative when a fortuitous error of the other person is confirmed and made use of for one’s own purpose, which is to induce the deceived to place a determined act, either by simulating or by remaining silent.<sup>127</sup>

Discussing the issue whether it is of natural law or purely a positive law, Stankiewicz makes a distinction between “substantial error” and “accidental error” caused by fraud. According to him, a juridical act placed on account of “substantial error” caused by fraud is null by virtue of natural law; but if the effect is only an “accidental error” caused by fraud, then the juridic act is valid but rescindable, unless the law provides otherwise.<sup>128</sup>

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<sup>125</sup> See c. Stankiewicz, 27 January 1994, p. 378; here the reference is to Michiels, *Principia generalia*, p. 660; also see A. Mendonça, “Cultural Contexts in Adjudicating Marriage Nullity Cases,” in *Forum*, 7 (1996)1, p. 134.

<sup>126</sup> See c. Stankiewicz, 27 January 1994, p. 378.

<sup>127</sup> Ibid., p. 379.

<sup>128</sup> Ibid., p. 380.

Stankiewicz identifies some specific principles with regard to the application of the c. 1098 in concrete marriage cases. They are the following:<sup>129</sup>

1. the person who is deceived must place the consent in a state of fraudulent deception which contains fraudulent error;
2. to vitiate the consent it is not sufficient to have a merely incidental fraud, which has no influence on the determination of the party who places the juridical act;
3. the deceiver must have a deliberate intention of obtaining matrimonial consent, because only direct fraud has a vitiating force on the marital consent and not indirect fraud. Any fraud perpetrated with the purpose of obtaining anything else, for instance, to safeguard one's own honour or that of one's family, will not have influence on the consent and, therefore, the marriage remains valid;
4. The fraud need not be committed by the contracting party; it may also be perpetrated by a third party;
5. the fraud can be either positive or negative;
6. the quality in question must be significant to conjugal partnership of life itself;
7. the quality concerned must be of the other partner, and not of a third party such as father-in-law or mother-in-law or of the family; in other words, deception regarding some quality of a third party has no invalidating effect on the matrimonial consent;
8. the quality should not be merely a wish for the future but an actual, certain, and present quality of the person of the partner at the time of the solemnization of marriage;
9. the quality must be of such nature that it can gravely disrupt the community of conjugal life;
10. the quality must be objectively serious. The objective importance must be determined by the general estimation made by the community or society confirmed by jurisprudence. This quality must pertain to an essential element of the partnership of conjugal life; for

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<sup>129</sup> Ibid., pp. 390-395; also see Mendonça, "Cultural Contexts in Adjudicating Marriage Nullity Cases," pp. 135-136.

example, a disease which is extremely contagious, a pregnancy brought about by a third person, etc.

Although Stankiewicz gives more importance to the objective criterion, he does not exclude the importance of subjective evaluation of a quality described in the other person. He says:

However, the importance itself which the deceived party subjectively attributes to the quality, keeping in mind one's own peculiar mentality or the customs of the society in which one lives, cannot be separated from the character of the quality, which of its very nature ought to foster the potential of seriously disrupting the partnership of conjugal life.<sup>130</sup>

Another point highlighted by Stankiewicz in this sentence is that even if the "act of fraud itself," exercised on the other party, is of its very nature capable of disturbing seriously the partnership of conjugal life then the "error caused by deception," it will not invalidate the marital consent because the law demands that the object of the fraud should be a quality whose presence or absence is capable of gravely disrupting conjugal life.<sup>131</sup>

**C) Decision *coram* Faltin, 30 October 1996:**<sup>132</sup> This case involved a clear situation where the respondent deliberately deceived the petitioner with the intention of obtaining consent. The case in question came from Prague. The plaintiff and the respondent first met in a night club and became attracted to each other physically. They

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<sup>130</sup> See *c. Stankiewicz*, 27 January 1994, p. 396.

<sup>131</sup> *Ibid.*, p. 395.

<sup>132</sup> See decision *c. Faltin*, 30 October 1996, in *SRR Dec.*, 88 (1996), pp. 671-679; a Latin-English text of this sentence is in *ME*, 122 (1997), pp. 176-187. The latter source will be used for future references to this sentence.

began to visit each other and from the very outset indulged in sexual intimacy, at least once a week. After about four months into their relationship, the respondent one day announced to the plaintiff that she was pregnant. A convincing necessity to marry the respondent was present. So without even seeking any kind of explanation, trusting in the words of the respondent, the petitioner admitted in good faith the possibility of pregnancy. The petitioner did not have any suspicion of fraud employed on him. Precisely because of the stated pregnancy, the petitioner, owning his responsibility, told the respondent that he was ready to marry her. Thus their marriage was celebrated on 19 September 1975. However, after the marriage, when the respondent confessed the truth to the petitioner that prior to the marriage she never had been pregnant, the petitioner immediately left her and obtained a civil divorce.

He petitioned to the inter-diocesan Tribunal of Prague seeking a declaration of nullity of his marriage. His petition was rejected by a decree. A second libellus was presented to the same Tribunal. The decision of the first instance tribunal was negative. The petitioner appealed against that sentence to the Apostolic Tribunal which, by a decree of the Dean, decided to proceed by way of an ordinary examination with the doubt being formulated as: "Whether the nullity of the marriage has been proved, in the case, because of an error concerning a quality of the person caused by deceit." Faltin gives a detailed description of the effect of fraud on marital consent and states that error concerning a quality of a person caused by fraud nullifies marriage; but it requires:

a) that the deceit be the cause of the error. The manner by which the deceitful action is effectively perpetrated by a third person, or by one party on the other, does not seem to be important; if the deceitful action is carried out with trickery or ruse, tacitly or explicitly, because that which renders the consent invalid is not the deceit understood for and in itself, but the error caused by the deceit: “because of a defect in the object of consent”;

b) that the object of the deceit be a quality of the other marriage partner. Actually, “this is not about ‘an error of law’ but ‘an error of fact, because, for example, a quality or essential property of marriage is not in question, but a determined personal quality of the other party is uniquely designated in the case. Therefore, the defect of consent is verified when the deceit is caused by an ‘error of fact’. It is obvious that the required quality, whether it be positive or negative, must exist at the moment of the celebration of the wedding”;

c) that the deceitful action be perpetrated with the intention of obtaining consent. In other words, a connection must exist between the deceitful action and matrimonial consent. Because, as is clear, it does not apply in a case in which the deceit is perpetrated to obtain another goal, because the norm speaks of deceit “for securing consent”;

d) that the quality intended in the other marriage partner can by its very nature gravely disrupt the partnership of conjugal life.<sup>133</sup>

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<sup>133</sup> Ibid., 181.

Faltin also adds that the quality must not be “frivolous and trivial” but it should be such that its absence or presence makes the partnership of conjugal life impossible. In estimating the seriousness of a quality that disturbs the conjugal life it is required that one should not be tied down to an objective criterion but could go beyond it, taking into account the subjective evaluation of the party who is induced to error.

Furthermore, Faltin argues that fraud, in grave matters, contradicts the essence of marriage on at least the following three accounts:

a) because it separates the former (i.e., marriage) from that truth and sincerity which are appropriate for marriage by the natural law itself and divine design;

b) because it unlawfully deprives the other spouse of freedom by inserting into his/her choice the prerequisite false idea from which the unsuited intention is formed;

c) and finally, because by deceit the one misleading about a quality in the person holds out a false image or an intentional person concerning himself/herself on which the matrimonial consent rests. Here the deceiver hands over someone different from the one whom the other intends to accept.<sup>134</sup>

The facts demonstrated that the petitioner pursued the respondent not with a true love but rather with an erotic attraction. He wanted to break off totally the love relationship with the respondent on three occasions. The respondent was unwilling to lose the beloved man to whom she was attracted. She focussed complete attention on saving

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<sup>134</sup> Ibid.

the relationship; consequently she declared to the unsuspecting petitioner that she was pregnant, contrary to the truth. Thus the respondent deliberately induced the man into error with the intention of winning his hand. The petitioner accepted the alleged pregnancy without any suspicion of fraud. The objective truth was hidden from the petitioner until the marriage was over. Accordingly, the court concluded that in this case there was an error concerning a quality of the person of the respondent on the part of the petitioner induced by fraud deliberately perpetrated by the respondent to obtain consent.

**D) Decision coram Defilippi, 4 December 1997:**<sup>135</sup> In this sentence we find a detailed description of c. 1098 and its application to concrete cases. The marriage in question was celebrated on 7 January 1989. Defilippi explains that deceit, on the part of the deceiver, is seen as a cunning device, trick and artifice with an intention to deceive the other. It is called “positive deception” where one does something or says something by which the other party is led into error; whereas it is a “negative deception” where one simulates something or keeps quiet about something in order that the inadvertent error of the other contractant might be confirmed and used to meet one’s own purpose. However, on the part of the one deceived, fraud is said to be the result of deception, consisting in a deceptive or fraudulent error.

Defilippi outlines four conditions required by law for consent to be invalid on the ground of deceit according to c. 1098:

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<sup>135</sup> Decision *c. Defilippi*, 4 December 1997, in *SRR Dec.*, 89 (1997), pp. 853-865; a Latin-English text of this sentence is in *ME*, 125 (2000), pp. 430-469. The latter source will be used for future references to this sentence.



1) First of all it is required that the person who enters the marriage must be deceived by fraud; to put it differently, the person deceived must manifest his/her consent as a consequence of the deception or because of the error into which that person fell as a result of the deceit of the other party.

2) On the part of the deceiver, the fraud must not only be brought about with the purpose of cheating, tricking and deceiving the other contractant, but also with the intention of extracting the marital consent of the other party. Therefore, to invalidate consent, the object of the deceit must be the marital consent of the other contractant. Deceit directed towards any other purposes, for example, to protect one's own honour or the reputation of the family, will not affect the consent and the marriage would be treated as valid.

Whoever lacks an essential quality which is required for setting up a matrimonial community of life and love must not simply remain silent about it but must disclose to the other party; because silence in such a situation would be deceitful and would make the consent invalid.

3) It is clear from the precept of the law that the fraud must always concern some quality of the other contractant and not a quality of some third person, even though that person might be very closely related to the other party.

4) For fraud to invalidate consent, it must be centred not just on any quality, but on that quality "which by its very nature can gravely disturb the partnership of the whole life." To measure the gravity of the quality which disturbs the conjugal life,

Defilippi notes that the law seems to hold up a criterion that is mainly objective. However, he too does speak of the need to take into consideration subjective criteria.<sup>136</sup>

#### 2.4.2 - Local Jurisprudence

In this section, we shall analyze very briefly only a few selected sentences pronounced within the tribunals of the Syro-Malabar Major Archiepiscopal Church in Kerala, India, to see how c. 821 of *CCEO* (*CIC* c. 1098) has been applied in concrete cases.

A case was judged *coram* Thazhath on 16 July 1998 on the ground of deception.<sup>137</sup> The marriage in question was celebrated on 23 October 1995 after completing the customary formalities of an arranged marriage. The couple were apparently happy during the first few days of their married life; but the husband and other family members observed the respondent getting physically weaker and becoming moody. During the third month, the respondent developed severe abdominal pains and was taken to the hospital where the doctor declared that she had been pregnant for 5 months. This news shocked the petitioner. Immediately he returned the respondent to her parental home for good. On inquiry she admitted that prior to marriage she had an illicit relationship. The marriage was declared null on 16 July 1998 on the ground of fraud.

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<sup>136</sup> C. Defilippi, 4 December 1997, pp. 441-447; also see c. Faltin, 15 December 1998, in *SRR Dec.*, 90 (1998), pp. 843-852.

<sup>137</sup> See Major Archiepiscopal Tribunal, decision c. Thazhath, 16 July 1998, Prot. No. MAT 121/98, pp. 1-5. All sentences studied in this section are unpublished and are used here with due permission. The pages cited refer to the original unpublished sentences.

Describing the application of the c. 821 of *CCEO* (*CIC* c. 1098) to marriage cases, Thazhath, the *ponens*, presents the following principles in his sentence:

- a) the quality must be a true quality, i.e., an inherent feature or property of the person as opposed to some isolated past action;
- b) the quality must be present at the time of marriage, as opposed to a hoped for, future quality;
- c) the quality must be unknown to the other party;
- d) the quality must be one which, by its very nature, has a potential for being seriously disruptive. It must be considered objectively grave when society would regard its concealment or misrepresentation as a grave injustice to the other party. It can also be subjectively grave when the deceived person has such an extraordinary, perhaps, excessive, esteem for that attribute, that though light in itself, it is nevertheless valued by the person as seriously desirable;
- e) the quality must be fraudulently concealed in order to obtain consent.<sup>138</sup>

On 30 December 1997, another case was judged *coram* Irimpan at the Major Archiepiscopal Tribunal, Kochi, on the ground of “fraudulent error of quality.”<sup>139</sup> In this case, the marriage was celebrated after completing the customary formalities of an “arranged/proposed marriage.” Just one week after their marriage, the respondent left for Saudi Arabia. During the short span of their common life, the marriage was not consummated. The respondent said that she was in her “menstrual periods.” During their short life together at the insistence of the petitioner the respondent revealed certain things which shocked the petitioner. She admitted that she had suffered from multiple

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<sup>138</sup> Ibid., p. 3.

<sup>139</sup> See decision *c. Irimpan*, 30 December 1997, Prot. No. MAT 38/96, pp.1-6.

polio/arthritis and as a result she was affected by ovulatory failure. Though she knew it, she concealed it from the man for the purpose of entering into a marriage.

In his analysis of the law on fraud applied to the case in question, Irimpan reiterates the same principles already established in jurisprudence in order for fraud to invalidate marriage consent: a) there should be an error resulting from deception; b) this error must refer to a quality present or absent at the time of marriage; c) this quality should be grave; d) the error produced by fraud must actually have influenced the exchange of marital consent; e) the quality in question should be inherent in the person as a personal feature and not as a passing phenomenon; f) it should be important objectively or subjectively; g) it should be unknown to the marriage partner at the time of marriage; h) its discovery after the marriage should precipitate a crisis in the married life.<sup>140</sup>

Another marriage case was judged *coram* Pathiamoola at the Major Archiepiscopal Tribunal, on 28 September 2000, on the ground of “fraud.”<sup>141</sup> The marriage was solemnized on 16 June 1980 following the formalities of a “proposed/arranged marriage.” In the beginning of their married life, the petitioner had doubt about the physical integrity of the woman respondent. When asked about it, the woman denied outright. The conjugal life lasted five years and two children were born from their union. However, one day the petitioner came to know of the love affair his wife had with a Muslim man prior to marriage and of the abortion that followed as a

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<sup>140</sup> Ibid., p. 3.

<sup>141</sup> See decision *c.* Pathiamoola, 28 September 2000, Prot. No. MAT 221/2000, pp. 1-5.

consequence of that relationship, and he could not accept the fact that he had been cheated. The petitioner left home for good with his two children and established permanent domicile in another State in India.

Pathiamoola maintains that the law entitles each partner, in entering marriage, to expect that certain qualities, essential in a marital relationship such as heterosexuality, fertility, possibility to practice one's religion, etc., are present in the other, or certain negative qualities like alcoholism, drug addiction, sexual dysfunction, previous marriage, etc., are absent in the other, and if this is not the case then he/she should be made aware of this prior to the wedding.<sup>142</sup>

Pathiamoola argues that, in the light of the teaching of Vatican II, the concept of person includes, besides physical identity, many other qualities whose absence or presence would, in effect, produce a substantially different person. An error concerning certain qualitative elements can become equivalent to error concerning the person. That is, deception in respect to certain qualitative factors would affect the substance or the object of matrimonial consent. For instance, one's notorious criminal record, previous civil or attempted marriage, immoral life, etc., can come under the category of qualitative elements which can affect the very substance of the marriage contract.<sup>143</sup>

On 15 February 2000, a marriage case was judged *coram* Mundakkathil at the Metropolitan Tribunal of Chenganacherry on grounds of "simulation" (*CCEO* c. 824;

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<sup>142</sup> Ibid., p. 2.

<sup>143</sup> Ibid., p. 3.

*CIC* c. 1101) and “fraud” (*CCEO* c. 821; *CIC* c. 1098). The case involved a “proposed marriage” according to the local custom. It was solemnized on 24 April 1997. At the time of marriage, the man was working in another state (Andhrapradesh, M.P.), while the woman worked in her home town (Chengannoor, Kerala). One month after the marriage, the husband returned to his job. They did not have a honeymoon nor did they consummate the marriage. Under the pretext of body pain the respondent always kept the petitioner away from her. In June she left home without telling her husband where she was going. She telephoned the petitioner without disclosing her whereabouts. However, the petitioner received an anonymous call saying that his wife had left for Bangalore for some training in “Tata Institute.” The petitioner went to Bangalore. But the woman was not there. Two months later she returned from New Delhi. On enquiry it was revealed that she had been involved with a man before the marriage and was carrying his baby at the time of the wedding celebration, and that she made the dramatic disappearance for the purpose of delivering the baby. All efforts to bring about a reconciliation between the parties proved futile.

In the law section, after presenting an extensive description of the doctrine on deceit and its juridic aspects in marriage contract, Mundakkathil states that deception is an act which is perpetrated through the use of concrete means which are illicit in themselves and which harm the deceived person. This act is intentionally posited for the purpose of extracting a juridic act of another person. Therefore, a link between the fraudulent action and the juridic act extracted therefrom is always necessary in marriage

cases involving deceit. Mundakkthil says that, in order properly to apply the norm on deceit to a marriage case, the court should ascertain:<sup>144</sup>

- a) whether one of the parties was led into error concerning a quality;
- b) whether the error arose from deception or misrepresentation;
- c) whether the deception was the result of deliberate and calculated fraud;
- d) whether the person (not necessarily the other party) guilty of the fraud intended to induce the other party to consent to the marriage;
- e) whether the quality was so serious such as to threaten the union of the parties in marriage.<sup>145</sup>

On June 12 1998 another marriage case was judged *coram* Varanath at the Metropolitan Tribunal of Tellicherry on the ground of fraud. The marriage took place on 12 April 1982 after completing the customary legal formalities governing an “arranged marriage.” Six months into their married life, the respondent gave birth to a normal fully developed baby girl. When asked she admitted that she was pregnant from a relationship she had with her brother-in-law prior to the wedding. It disturbed their relationship in such a way that on third day after the delivery, the man returned his wife to her parental home together with the new born child.

Varanath presents a lengthy description of fraud and its juridic aspects in the law section of his sentence.<sup>146</sup> From the juridic principles identified in the sentence, Varanath concludes that there can be no such thing as an accidental deception. Fraud is always a calculated and deliberate act. Hence it is fraud that is directly envisaged as a

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<sup>144</sup> See decision *c. Mundakkathil*, 15 February 2000, Prot. No. MAT 210/2000, pp. 1-9.

<sup>145</sup> *Ibid.*, pp. 5.

<sup>146</sup> See decision *c. Varanath*, 12 June 1998, Prot. No. MAT 232/2000, pp. 1-12.

cause of nullity in the canon. Hence, according to Varanath, the points to be taken into consideration while applying the law are:

- a) the deceit must be deliberately perpetrated in order to obtain consent;
- b) the quality must be real, grave, and present at the time of consent;
- c) the presence/absence of the quality must be unknown to the other party;
- d) the discovery of the absence/presence of the quality must precipitate a crisis that leads to the end of the marriage.<sup>147</sup>

The law presumes that the parties to a marriage are willing and capable of accepting in each other certain defects, which are not serious, as well as unpleasant traits in each other's personality.

Although the marriage in question was celebrated prior to the coming into effect of the present Code, Varanath makes no mention of the issue of retroactivity of c. 1098. However, the affirmative decision pronounced in the case on the ground of deceit indicates that the court's opinion was that c. 821 of *CCEO* (*CIC* c. 1098) is retroactive in its effect.

## CONCLUSION

The canon on fraud as a ground of nullity of marriage is new canonical legislation. It has no parallel in the 1917 Code. The inclusion of c. 1098 in the new Code is the sign of a greater openness to the human reality, understood well today through deeper discoveries of theological and canonical traditions.

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<sup>147</sup> Ibid., p. 7.



Canon 1098, as understood in its totality, concerns a deliberate act of deception on the part of one contractant or a third party with the intention of extracting marital consent of the other contractant. The norm of the canon indicates that the deception perpetrated must be the cause of placing the determined juridic act of marital consent and it should occur prior to the marriage. This necessarily implies that a general intention to dupe is not sufficient to establish the fraud contemplated in c. 1098. The fraud mentioned in c. 1098 takes away all significance of the consent of at least one of the spouses.

Deceit is committed in order to create an erroneous image of the deceiver in the one deceived. The direct source of the invalidity of consent as contemplated in the canon, therefore, is induced or fraudulent error. It is not *per se* the fraud, nor just the error alone, that vitiates the consent but the combination of both elements, that is, the error induced by fraud concerning a specific quality. Hence, to have a nullifying effect on marital consent fraud must create a real error in the mind of one of the spouses, and the error thus caused must be objectively or subjectively substantial in order to be capable of disrupting conjugal life.

The main purpose of this canon is to safeguard justice in the covenant of marriage and to guarantee freedom of consent of the deceived party,<sup>148</sup> because deception curtails the freedom of the other party and causes harm through injustice; if the person

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<sup>148</sup> At the consultation stage some of the consultants suggested that it was precisely because of a person's right to freedom of consent that a law should be established to protect this right from fraud. See *Communicationes*, 3 (1971), p. 77.

had not been deceived, the decision to marry a particular person would probably have been quite different.

The gravity of the fraud is determined not by the action of deception itself but by the object of the deceitful action, that is, the extraction of the consent. Also the gravity of the means used to obtain consent is of no juridical relevance to the issue. Rather the focus is on the quality of the person of the deceiving party. The quality in question must be a personal quality related to the core of the marital relationship. It must be objectively grave, in the sense that the quality is highly esteemed by society, or subjectively grave, in the sense that for the particular person who is deceived the quality is of such importance that its presence/absence of its nature is capable of seriously disrupting the partnership of community of life and love. The disturbance caused by the absence or presence of the quality to the partnership of conjugal life must also be serious. Deception involving a personal quality of a third person, however closely related the person may be, will not vitiate the consent. In the same way, merely generic qualities or ordinary and universal qualities do not have invalidating effect, but only a quality that substantially touches the essential aspects of marriage.

The retroactivity of this canon is currently debated in canonical circles, and there is no conclusive answer to the question. The Rota has clearly admitted that there is no consensus on the matter. The Pontifical Council for the Interpretation of Legislative Texts, rather than giving a definitive response, has opted for now to let doctrine mature in respect to this issue. In our considered opinion, the definitive resolution of the matter

will have to come through an authentic interpretation from the Supreme Legislator (that is, through the Pontifical Council for the Interpretation of Legislative Texts). As a result of the controversy, however, today we have two camps with two diametrically opposed views concerning the retroactivity of the norm of c. 1098. While some authors maintain that norm of c. 1098 is merely a positive ecclesiastical law, others argue that it is founded on natural law, and therefore, it is retroactive. In law the difference of well-founded opinions on the same issue gives rise to a doubt of law (*dubium iuris*), and in our case this doubt concerns the retroactivity of the norm on deceit to the extent it deals with an accidental error. It could be argued, therefore, that in virtue of c. 1060 (*CCEO* c. 779), unless and until there is an authentic interpretation from the supreme authority of the Church, c. 1098 cannot be applied to marriages celebrated before the 1983 Code of Canon came into effect nor to marriages of non-Catholics. But we believe that such cases could still be adjudicated legitimately under the principles of c. 126 and c. 1097, §2, when an act of deceit involves a quality that is objectively or subjectively substantial, an approach adopted by most Rotal judges in recent years.

# **CHAPTER THREE**

## **DECEIT IN THE CIVIL LEGISLATION OF INDIA**

### **INTRODUCTION**

Under Indian civil law free consent is a pre-requisite for entering into a valid contract. This implies that in the absence of a free consent there can be no valid contract. In any legally binding contract in civil law, consent obtained by fraud, misrepresentation or deceit is neither qualified nor recognized as free consent. Essentially then, if the consent of one of the parties to the contract is extracted through fraud, such contract is considered invalid.

Indian civil jurisdictions, which respect personal laws of different religious communities, treat Christian marriage both as a sacrament and as a contract. Elements specific to contracts in general are attributed also to marriage contract. Therefore, lack of consent by either party in a marriage renders the marriage contract null and void. Fraud used in contracting marriage is one of the main factors that vitiate marriage consent.

Indian personal civil laws, designed for various religious communities, make a clear distinction between mental incapacity for contract and insanity, and deal with them as two distinct categories affecting valid consent in a contract. This distinction is applicable to the marriage contract as well. In the present chapter, our principal concern is with fraud in marriage under Indian civil law with special reference to Christian marriage. The main goal of this chapter, therefore, is to analyze the nature and elements of fraud and its application to matrimonial cases according to Indian civil law.

The laws enacted by the Legislature for different religious communities in the country clearly state that fraud in marriage makes the marital consent defective. However, it neither provides a clear definition of what fraud is nor does it determine the essential components of fraud. But jurisprudence has developed several principles applicable to fraud. Therefore, what is lacking in law is, to some extent, complemented by jurisprudence. Therefore, it is important to review and analyze the present jurisprudence on fraud in order to understand its real meaning and elements. Numerous marriage cases involving fraud are presented to civil courts each year. For the purpose of our study we will restrict our review to only a few cases. Two of these cases fall under the Hindu Marriage Act while the rest pertain to Indian Divorce Act.

### **3.1 - THE NATURE OF FRAUD ACCORDING TO INDIAN CIVIL LAW**

How does Indian civil law define fraud? What are its essential components? What approach do Indian civil courts take with regard to fraud in a contract? These are the main questions that we will try to answer in this section.

#### **3.1.1 - Fraud in General**

It is important to note that neither the Indian civil law nor the civil courts have provided a definition of fraud that can be uniformly applied to all situations involving fraud. In practice most courts refrain from articulating too limited a definition. That does not mean that the courts have not attempted to delineate conditions and elements that could constitute

fraud. We find a number of definitions in sentences of civil courts. According to these definitions, fraud would include:

- a) All acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another.
- b) All surprise, trick, cunning dissembling and other unfair way that is used to cheat any one is considered as fraud.
- c) Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to.<sup>1</sup>

Another prevailing definition is that fraud consists in one person's endeavouring by deception or by circumvention to alter the general rights or the particular rights of another person.<sup>2</sup> Civil courts recognize fraud as a kind of misrepresentation. This particular element of fraud is reflected by the presence of a dishonest intention on the part of the one who makes the representation. In a case where such misrepresentation is made, there is an error or mistake of one party caused by the misrepresentation of the other. This misrepresentation may be made either by deliberate words or conduct with the intention of procuring consent to the contract.<sup>3</sup>

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<sup>1</sup> See W.W., Kerr, *Kerr on the Law of Fraud and Mistake: Including Misrepresentation Generally, Undue Influence, Fiduciary Relationship, Constructive and Imputed Notice etc.*, (= *Kerr on the Law of Fraud and Mistake*), 7th ed., by D.L. McDonnell, J.G. Monroe, London, Sweet & Maxwell Limited, 1986, p. 1.

<sup>2</sup> Ibid., pp. 1-2; As we know, under Roman law fraud was defined as *omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita*. See O.F. Bump, *A Treatise on the Law of Fraud and Mistake*, New York, Baker, Voorhis & Co. Publishers, 1872, p. 42.

<sup>3</sup> See F.S. Dickson, *Pollock's Principles of Contract*, 4th ed., Philadelphia, The Blackstone Publishing Co., 1888, p. 548.

Lord Herschell in one of his decisions has described what amounts to fraud. He states:

[F]raud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and the third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under each circumstance can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief.<sup>4</sup>

Lord Herschell further explains that to determine whether or not an action is deceitful, there must be fraud and such action of deceit originates from a person with a wicked mind. By wicked mind he means that if a man tells a willful falsehood with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently.<sup>5</sup>

In brief, fraud is a false representation made with the intention to mislead the other party for the benefit of the person who makes the misrepresentation. Therefore, it is a wilful act of deception performed with the purpose of making a person to do something which that person would not have done if the fact was known to the person.

### 3.1.2 - Misrepresentation and Fraud

Many marriage cases which come before civil courts for relief against fraud involve misrepresentation. The concept of misrepresentation and its legal consequences may

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<sup>4</sup> See *Derry v. Peek*, 1889, 14 App. Cas. 337, 374, as in *Kerr on the Law of Fraud and Mistake*, p. 10.

<sup>5</sup> *Ibid.*, p. 15.

be explained briefly as follows: A person represents, as true, that which he/she knows to be false, and makes the representation in such a way, or under such circumstances, as to induce a reasonable person to believe that it is true, and is meant to be acted on. By so acting, the person misled sustains damage. In such situation, supporting an action of deceit at law is fraud and a ground for rescinding the contract. It is not necessary, in order to constitute fraud, that a person who makes a false representation knows it to be false. It is enough that the representation is false, that it is made without an honest belief in its truth, that it is perpetrated deliberately and in such a way that it gives the person to whom it is made reasonable ground for supposing that it is meant to be acted on and is acted upon accordingly by that person. In other words, in law, any person who wilfully makes an assertion on a matter of which he/she has no factual knowledge utters a wilful falsehood that constitutes an act of misrepresentation.<sup>6</sup>

A misrepresentation does not amount to a fraud at law, unless it is made with a fraudulent intent. An intention to deceive is an essential element of fraud. A fraudulent intent is present when a person misleads another either for personal gain or to induce another into acting in such a manner that turns out to be harmful. The legal interpretation of an intention to deceive or a fraudulent intent depends on the knowledge or belief the perpetrator has concerning the falsehood of the statement and on the actual dishonesty of purpose in making the statement. This is the basis for the distinction between legal fraud

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<sup>6</sup> See Bump, *A Treatise on the Law of Fraud and Mistake*, pp. 53-54.



and moral fraud. Misrepresentation without a corrupt motive or purpose is called legal fraud, whereas misrepresentation with a corrupt intent is deemed to constitute moral fraud.<sup>7</sup>

In the language of Roman law, misrepresentation must be *dolus dans locum contractui*. There should be the assertion of a fact upon which the person entering into contract relies, and in its absence it is reasonable to conclude that the person would not have signed the contract or, even if entered upon, it would not have been on the same terms. Therefore, besides the element of fraudulent intent, two more conditions must be met, i.e., there must be false and material representation and the other party to the contract should have acted upon the faith and credit of such representation.<sup>8</sup>

A fraudulent misrepresentation or deceit, therefore, consists in leading a person into damage by wilfully causing that person to believe and act on a falsehood. In order to be fraudulent, a representation must be one:

- a) which is untrue in fact;
- b) which the defendant knows to be untrue or is indifferent as to its truth;
- c) which was intended or calculated to induce the plaintiff to act upon it; and
- d) which the plaintiff acts upon and suffers damage.<sup>9</sup>

However, it is not necessary that a misrepresentation is made in express terms to sustain an action of deceit; it is sufficient that the words used are intended to convey a false inference.

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<sup>7</sup> Ibid., pp. 55-56.

<sup>8</sup> Ibid., pp. 73-74.

<sup>9</sup> See W.W. Kerr, *Kerr on Fraud and Mistake: Including Misrepresentation Generally, Undue Influence, Fiduciary Relations, Constructive Notice, Specific Performance, etc.*, (= *Kerr on Fraud and Mistake*), 6th ed., by S.E. Williams, London, Sweet & Maxwell Limited, 1929, pp. 20-21.

### 3.1.3 - The Necessity of a Fraudulent Intention for an Action of Deceit

Negligence is the doing of something from carelessness and want of thought or attention. A fraudulent intention, however, is a design to commit some fraud and to lead a person to do or omit doing a thing for a purpose. S.E. Williams argues that negligence is not fraud, but negligence may be evidence of fraud if it is so gross as to be incompatible with the idea of honesty.<sup>10</sup>

In the case of *Deniz v. Deniz*,<sup>11</sup> a young girl from a Lebanese family in Australia was induced by a Turkish visitor to marry him. The man deserted the girl soon after the marriage ceremony. He married solely to secure permanent residence in Australia. The girl in distress attempted suicide. The judge in this case had no hesitation in holding the marriage to be void on the ground of fraud in that the girl's consent to the marriage was induced by trick. Moreover the court concluded that the conduct of the man amounted to a total rejection of the institution of marriage and what it stands for, with the result that there was "a total failure of consideration."

Fraudulent intention is a necessary component of misrepresentation. In one case, it was argued that holding out or lying or acquiescence cannot, unless fraud be proved, be a ground for an action of deceit.<sup>12</sup>

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<sup>10</sup> See *Kerr on the Law of Fraud and Mistake*, p. 5.

<sup>11</sup> *Deniz v. Deniz* (1977) 31 F.L.R. 114.

<sup>12</sup> *Kerr on the Law of Fraud and Mistake*, p. 5.

The general rule is that the persons involved in contracts and other acts shall not only transact *bona fide* between themselves, but also shall not transact *mala fide* in respect to persons who are the other party, as to be affected by the contract or by its consequences.<sup>13</sup> Therefore, fraud could be understood as a criminal behaviour, because in fraud there is always a betrayal of a sacred trust or a violation of an ethical canon. Criminal codes all over the world define fraud as “the receipt of something of value under false pretences.”<sup>14</sup>

### 3.1.4 - Elements of Fraud

Although one may not find a clear definition of fraud in sentences of the civil courts, it is possible to identify some of its essential elements which must necessarily be verified in a given case before a party can be said to have been defrauded. The following could be said to be the main elements of fraud in law:

- a) First of all, it is important that the fraudulent means have been used successfully in deceiving the other contracting party.
- b) The false and dishonest trickery, by which a person may attempt to influence another person to contract, may be very strong. Yet if the other party knows the truth and sees through the tricks, then that does not amount to fraud.
- c) There can be no fraud without an intention to deceive; the motive of deception is immaterial.
- d) There must be damage done to the person deceived, even where there is a wilful false representation, before a cause of action can arise. Fraud without damage or damage without fraud provides no cause of action.

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<sup>13</sup>See Bump, *A Treatise on the Law of Fraud and Mistake*, p. 195.

<sup>14</sup>See N.J. Pallone, J.J. Hennessy (eds.), *Fraud and Fallible Judgement*, New Brunswick, U.S.A., Transaction Publishers, 1995, p. 12.

e) A false representation amounts to a fraud at law only when it is made with a fraudulent intent. If a person with a view to mislead another into a course of action which may be injurious to that person, makes a representation which he/she knows to be false, or which he/she does not believe to be true, then fraudulent intent exists.

f) An honest blunder in the use of language is not dishonest.

g) Fraud gives cause of action which leads to some sort of damage.<sup>15</sup>

It is important to bear in mind here that an action of deception differs significantly from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. For a declaration of rescission, one must prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it may be, the contract, having been obtained by misrepresentation, cannot stand. In an action induced by fraud, on the contrary, it is not enough to establish misrepresentation alone, for without proof of fraud no action of deceit is maintainable.<sup>16</sup>

### **3.1.5 - Effect of Contract Induced by Fraud**

No person is bound by a contract into which he/she has been induced by fraud to enter. Because consent is indispensable to enter into a valid contract, there can be no contract in the absence of a real consent. When a consent is extracted through fraudulent means, that is, by controlling a person's will through deceit, there can be no contract.

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<sup>15</sup> Ibid., pp. 2-3.

<sup>16</sup> Ibid., p. 3.

However, a different approach is being adopted by civil law when it is a question of a commercial contract. Civil law considers a contract entered into through fraud is not void, but voidable at the choice of the defrauded party. The defrauded party has the right to have the contract avoided unless that person by his/her own acts affirms the contract. Until it is avoided, therefore, the transactions executed under the contract would be considered valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the defrauded party.<sup>17</sup> This is clearly explained in the case of *Clough v. London and North Western Railway*:

The fact that the contract has been induced by fraud does not make the contract void or prevent the property passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that the party defrauded has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election is determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract. The question always is, has the person on whom the fraud has been practiced, having notice of the fraud, elected not to avoid the contract? or, has he elected to avoid it? or, has he made no election? As long as he has made no election he retains the right to determine it either way, subject to this- that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the party, or if in consequence of his delay the position even of the wrongdoer is affected, he will lose his right to rescind.<sup>18</sup>

Consequently, avoidance of a contract on the ground of fraud places the contracting parties in the same position as if the contract had never taken place; all rights

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<sup>17</sup> See *Kerr on Fraud and Mistake*, p. 10.

<sup>18</sup> See *Clough v. London and North Western Ry.* (1871), L. R. Ex. 34, cited in *Kerr on Fraud and Mistake*, pp. 10-11.

which were exchanged, transferred or created by the contract are re-vested and discharged by the avoidance. There can be no avoidance of a contract unless rescission is made, i.e., the parties restored to their original condition. The condition for rescission is that there must be a *restitutio in integrum*. It is the general rule of a court of equity. The court has full power to make all just allowances, and in practice it always grants such relief whenever it can do what is practically just, although it may not be able to restore the parties exactly to the former state in which they were before they entered into the contract.<sup>19</sup>

A contract can also come into existence through the exercise of fraud by a third party, i.e., independent of the contracting parties. Fraud by a third party, even when it produces on the mind of one of the contracting parties a mistake as to the nature of the contract, cannot be invoked by that party to set aside the contract. There is no remedy except against the author of the fraud for damages.<sup>20</sup> This is to say that the third person who laboured to bring about the contract between two parties using deception cannot avoid the contract, on the basis of the principle that no individual shall be permitted to take advantage of a deed by which the said individual has fraudulently induced another to execute.

Lapse of time does not protect fraud. In the court of justice no length of time will run to protect or screen one from fraud. The right of the party defrauded to have the transaction set aside is not affected by lapse of time, so long as he/she remains, without any personal fault, in ignorance of the fraud which has been committed. The statute only runs

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<sup>19</sup> See *Kerr on the Law of Fraud and Mistake*, p. 512.

<sup>20</sup> See *Kerr on Fraud and Mistake*, p. 18.

from the time when the fraud was, or with due diligence might have been, discovered. S. Hastings, for example, says: "Fraud being in its nature a secret thing, and the injured party being by the imposition practiced upon him prevented from discovering and prosecuting his rights, such cases do not in the contemplation of equity come within the principle of the statute."<sup>21</sup>

It may be stated here that when once fraud is established the rights of the party defrauded are not affected so long as the person remains in ignorance of the fraud. It is not necessary for the person to prove that the wrongdoer actively concealed the fraud, but it is sufficient that the fraud had not in fact been discovered by the defrauded party. But if such a person delays his/her claim for rescission for more than the time provided by the law, after the discovery of fraud, the court will refuse to grant relief. Moreover, the discovery of concealed fraud only gives a new cause of action when the fraud is the action of the defendant or of some one for whom he/she is directly responsible.<sup>22</sup>

### 3.2 - FRAUD IN INDIAN CONTRACT ACT

Like in any other legal system, in India too contracts are governed by the norms prescribed by Indian civil law. As discussed in the first chapter, in a contract one binds oneself by a promise. Therefore, any agreement made by the free consent of the parties, who are legally competent, for a lawful consideration and with a lawful object is considered a

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<sup>21</sup> See S. Hastings, *Fraud and Misrepresentation*, London, William Clowes and Sons Limited, 1893, p. 2.

<sup>22</sup> See *Kerr on Fraud and Mistake*, pp. 16-17.

valid contract. However, if either of the parties has manipulated this agreement using fraudulent means, then the contract may not be binding.

The Indian Contract Act, 1872, Section 17, explains the notion of fraud in following terms:

‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

1. the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;
2. the active concealment of a fact by one having knowledge or belief of the fact;
3. a promise made without any intention of performing it;
4. any other act fitted to deceive;
5. any such act or omission as the law specially declares to be fraudulent.

*Explanation* - Mere silence as to facts is likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

The rule that the courts refuse to recognize contracts, to which the consent of either party has been obtained by fraud, as binding applies also to a marriage contract, and, therefore, a marriage so entered into may be annulled. But a marriage cannot be held void merely upon proof that it was contracted through false representations unless the party imposed upon was deceived as to the material facts or nature of the ceremonies or



circumstances concerning the party. A marriage may similarly be void for mistake as to the person being married or as to the nature of the ceremony but not for other types of mistake.<sup>23</sup>

### 3.2.1 - Consent Obtained by Fraud

As discussed in the first chapter, under Indian civil law, marriage is a contract and it comes into existence by the consent of the parties. Logically speaking, therefore, if there is no consent, there is no marriage. This raises a conceptual problem that in some marriages there may be an apparent consent, while the real consent may be missing. One may say that if the parties did not want to give their consent, they would not have participated in the required ceremonies and formalities of a marriage. Therefore, if they have gone through the required formalities of a marriage, then the consent must be implied or presumed. But such participation would not rule out the possibility of a feigned consent, because the apparent consent may not be a real consent or it may be a defective one. This can result from various causes, such as mental illness, where the party is not aware of what he/she is doing when going through a marriage ceremony; or fear, when a party may undergo all the formalities of a marriage without the intention to marry the particular individual. This is, according to experts in civil law, the conceptual problem and the juristic dilemma.<sup>24</sup>

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<sup>23</sup> Anurag Anand v. Sunita Anand, AIR, 1997 Delhi 102; Muthusami v. Masilmni, ILR (1910) 33 Mad. 342; Also see *Kerr on the Law of Fraud and Mistake*, pp. 470-471.

<sup>24</sup> See Diwan, *Law of Marriage and Divorce*, p. 326.

If, therefore, an apparent consent is not real or is a defective one, then no marriage contract comes into legal existence merely by performing some rituals ascribed to marriage no matter how solemn they might be. This leads to some uncertainty which the law always seeks to eliminate or avoid. This is evident in the following statement: “Whether an apparently valid marriage should be permitted to be avoided by proving the existence of a state of mind or belief which was not evident at the time of the performance of the formalities of marriage. The law has sought to resolve this problem by, on the one hand, refusing to allow private reservations or motives to vitiate an ostensibly valid marriage, and, on the other, the law accepts that there may be cases where there has been no real consent at all.”<sup>25</sup>

There emerges another conceptual problem precipitated by the invocation of the notion of law of contract as a “meeting of minds *consensus ad idem*.” If there is no consent, then there is no meeting of minds; therefore the contract is void. This doctrine of law of contract was not fully adopted in the matrimonial law. Because of the sacredness of marriage the trend was to save the marriages and reduce void marriages to the minimum. This ideal promoted the view that defective consent or vitiated consent should render a marriage voidable rather than void. The lack of consent or no consent was equated with vitiated consent.<sup>26</sup>

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<sup>25</sup> See *ibid*.

<sup>26</sup> See Diwan, *Law of Marriage and Divorce*, p. 326.

Under contract law, therefore, if the consent of marriage is obtained by fraud, undue influence, force or fear, or misrepresentation, the marriage is considered null. However, in all these instances a commercial contract is considered only voidable while in the case of mistaken identity the contract is void.

The principal English case where a court ruling set a precedent on fraud as a ground of nullity of marriage was *Moses v. Moses*.<sup>27</sup> The case was decided by Sir Francis P. Jeune in 1897. In his sentence, a clear distinction was made between the fraud which induces marital consent and the fraud which procures the appearance without the reality of consent. Only the latter, he says, can invalidate a marriage. In particular, he said, "I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent."<sup>28</sup> There is a distinct possibility here of a problem in recognizing fraud as a ground of nullity due to the difficulty in visualizing a situation where fraud can in fact procure the appearance without the reality of consent. In this regard Sir Francis continues:

Fraud, spoken of as a ground for avoiding a marriage, does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation [...]. And tho' there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore, I shall here consider what kind of error it is, according to the canon law,

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<sup>27</sup> *Moses v. Moses*, (1867) pp. 263-279, cited in A. Dickey, *Family Law*, Waterloo Road, N.S.W., The Law Book Company Limited, 1985, p. 131.

<sup>28</sup> *Moses v. Moses*, (1867) p. 269.

that hinders and impeaches a matrimonial consent and renders it null and void *ab initio*.<sup>29</sup>

Most examples of fraud in marriage contracts are found in, what the contract lawyers would call, fraudulent misrepresentation. The case, just referred to above, clearly indicates that this is not sufficient to nullify a marriage. Sir Francis states “when there is consent no fraud inducing that consent is material.”<sup>30</sup> Further he cites two examples where fraud may vitiate a marriage, namely personation and the deliberate inducement of a feeble-minded person to marry.<sup>31</sup>

### 3.3 - FRAUD AND MARRIAGE UNDER INDIAN CIVIL LAW

Fraud is one of the grounds for the annulment of a marriage recognized under Indian civil law. This ground is found in the Hindu Marriage Act, 1955, the Indian Divorce Act, 1869, as well as the Special Marriage Act, 1954. Here we are mainly concerned with fraud as a ground for annulment in relation to Christian marriage. This is found under the Indian Divorce Act, 1869.

#### 3.3.1 - Background to the Indian Divorce Act, 1869

Until 1861 the Supreme Court in Bombay, India, exercised the jurisdiction which the ecclesiastical courts exercised in England. When the High Court of Bombay was established in 1861, it inherited the jurisdiction of the Supreme Court at Bombay in such

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<sup>29</sup> Ibid., p. 263.

<sup>30</sup> Ibid., p. 269.

<sup>31</sup> Ibid., p. 263.

matters. Later when the British Parliament passed an Act for establishing High Courts at different centers in India, such jurisdiction was passed on to those High Courts also in accordance with the territorial limits. The Indian Divorce Act, 1869, was passed “to amend the law relating to the divorce and annulment of marriages of persons professing Christian religion and to confer upon certain courts jurisdiction in matrimonial matters.”

The Indian Divorce Act, 1869, and the Indian Christian Marriage Act, 1872, should be read together because the former in a sense supplements the latter. Both Acts are applicable to all Christian marriages including where only one of the parties is a Christian.

The Legislature had intended, under the Indian Divorce Act, 1869, the Indian Courts to ‘act and give relief’ in conformity with the ‘principles and rules’ followed by the courts for Divorce and Matrimonial Causes in England.<sup>32</sup> The English Matrimonial Causes Act since then have been amended a number of times. The laws presently followed in English Courts cannot be fitted in with the antiquated statutory laws of India, and this sometimes gives rise to awkward situations.<sup>33</sup> The Indian Legislature has at last heard the cry of the Christians in India and has amended the Indian Divorce Act and the Indian Christian Marriage Act in 2001.

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<sup>32</sup>*The Indian Divorce Act, 1869*, Section 7. See also *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati AIR, 1965 SC 365: (1964) 7 SCR 267: 66 Bom LR 681*. In this case, Mudholkar (Judge) giving his judgement notes that while dealing with a case under the The Hindu Marriage Act, 1955, one should bear in mind that “The law of divorce in India is, broadly speaking, modelled on the law of England.”

<sup>33</sup> See A. Mookerjee, *Marriage, Separation and Divorce*, 2nd ed., Calcutta, S.C. Sarkar & Sons, Pvt. Ltd., 1991, p. 76; *R. Hemlatha v. R. Satyanandam, AIR 1979 AP 1*, where, while the district court of Warangal granted divorce basing on the modern grounds, the Special Bench of the High Court overruled the district court saying that the grounds mentioned in the given case were not in the Indian Divorce Act.

The Indian Divorce Act, 1869, Hindu Marriage Act (amended, 2001) 1976, and Special Marriage Act, 1954 contain specific clauses on the matter. Clause (iii) of Section 25 of the Special Marriage Act 1954 states that if the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872, such marriage shall be voidable and may be annulled by court decree.

Under the Indian Divorce Act, 1869, Section 19 provides that when marital consent has been obtained either by force or fraud, marriage may be declared null. The law says: "Nothing in this Section shall affect the jurisdiction of the District Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud."<sup>34</sup> In other words, the District Court has been empowered to issue a decree of nullity of marriage on the ground that the consent to marriage was obtained by force or fraud.<sup>35</sup>

The Hindu Marriage Act, 1955, which was amended in 1976, has the provision to avoid a marriage brought into existence through fraudulent means. Under Section 12(1)(c) of this Act, where a marriage is solemnized, whether before or after the commencement of the Act, it shall be avoidable if the consent of the petitioner (or where the consent of the guardian of the petitioner is required under Section 5, the consent of such guardian) was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent. However the amendment of 1976

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<sup>34</sup> *The Indian Divorce Act, 1869*, Section 19.

<sup>35</sup> See S.C. Jain, *The Law Relating to Marriage and Divorce*, Delhi, Nai Sarak, Surjeet Book Depot, 1980, p. 365.

on fraud under the Hindu Marriage Act, Section 12(1) (c) is extended neither to the Indian Divorce Act nor to the Indian Contract Act. The explanation and application of fraud also is not the same as given in the Special Marriage Act.<sup>36</sup>

Fraud has always been considered as a ground for the annulment of marriage but not treated as a ground for divorce.<sup>37</sup>

In his observations on the Indian Divorce Act, especially on the grounds of nullity of marriage, Rattigan states:

Generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits temper, reputation, bodily health and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves by acquaintance and satisfactory enquiry before entering into a contract of the first importance to themselves and to society in general.

Concealment of a loathsome and incurable venereal disease from the other party is generally recognized as a fraud sufficient to warrant annulment, especially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate.

As a general rule prenuptial unchastity of the wife though unknown to the husband at the time of the marriage is not ground for a decree of nullity. Nor is express misrepresentation by a woman as to her chastity of itself

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<sup>36</sup> See A.N. Saha, *Marriage and Divorce*, Calcutta, Eastern Law House, 1976, p. 96. Fraud has been given a wider interpretation under the Marriage Laws (Amendment) Act, 1976. This has widened the scope of the ground 'fraud' by adding the following words to the clause: "or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent." Kumud Desai observes: "What would amount to fraud in relation to obtaining consent to marriage is expressly set out and defined in the Section. The fraud could be as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent. Though previously fraud had not been expressly limited to deception in relation to marriage ceremonies or to the identity of the party marrying in many juridical decisions that view had been taken" (Kumud Desai, *Indian Law of Marriage and Divorce*, 4th ed., Bombay, N.M. Tripathi Pvt. Ltd., 1981, pp. 81-82).

<sup>37</sup> See *Jagannath v. Yallubai*, 1 DMC 31 (DB), 1984, Kant, HLR 136

ground for avoidance of the marriage, though, of course, it may be taken into consideration together with other circumstances indicative of fraud.

Chastity, it is said, is a mere personal quality, and its non-existence at the time of the marriage does not amount to absence of an essential condition of the marriage relation. Moreover, it is declared, prenuptial unchastity does not necessarily prevent the woman from becoming a faithful wife or from performing her part in the bearing of offspring, and to consider misrepresentation in regard thereto, a ground for decreeing nullity of marriage would be inconsistent with reason and sound policy. *A fortiori*, a man cannot complain of his wife's prenuptial unchastity where he was aware of it at the time of marriage.<sup>38</sup>

Indian civil law does consider consent to marriage obtained by fraud as invalid; but treats it as a void or voidable marriage. Under the Indian Divorce Act, consent to marriage extorted through fraud constitutes a void marriage, whereas under the Hindu Marriage Act and Special Marriage Act it is voidable.

### 3.3.2 - Void and Voidable Marriages

The words 'void' and 'voidable' are defined in the Indian Contract Act in the context of a contract or an agreement. A contract or an agreement, when not enforceable by law, is said to be void. In the case of a voidable contract or agreement, it can be enforced by the law at the option of one or both of the parties thereto but not at the option of a third person or an outsider. A contract which is void has no legal effect at all whereas the voidable one is considered valid so long as it is not avoided by the party who has the right to do so.<sup>39</sup>

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<sup>38</sup> Rattigan, *The Indian Divorce Act*, 2 ed., Calcutta, Eastern Law House, 1938, p. 308, cited in B.P. Beri, *Law of Marriage & Divorce in India*, Lucknow, Eastern Book Company, 1989, pp. 84-85.

<sup>39</sup> A. Mookerjee, *Marriage, Separation and Divorce*, 1st ed., Calcutta, S.C. Sarkar & Sons, Pvt. Ltd.,



### 3.3.2.1 - Void Marriage

The notion of a void marriage remains today what it always has been in civil law, namely that of an apparent marriage which is legally no marriage at all because of the non-existence of one of the essential elements of a valid marriage. Although the parties might have gone through all the formalities of a marriage, a void marriage is no marriage at all. A void marriage is one which is absolutely null and does not have the force of a marriage from the moment of the contract.<sup>40</sup> Therefore, neither the wishes of the parties to the marriage nor their living together will change the status of the nullity of marriage. Thus a void marriage for all practical purposes will be considered as having not taken place. No legal consequences will flow from a void marriage. It does not give rise to any mutual rights and obligations.

Lord Green has explained a void marriage as follows: "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage in issue as never having taken place and can be so treated by both the parties to it without the necessity of any decree annulling it."<sup>41</sup> Because it is not the decree which renders such a marriage void but the existing fact that marriage is void, the court only makes a judicial

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1986, p. 50.

<sup>40</sup> See J. Long, *A Treatise on the Law of Domestic Relations*, 3rd ed., Indianapolis, Bobbs-Merrill Co., 1948, p. 16.

<sup>41</sup> *De Reneville v. De Reneville*, (1948) 100, cited in Dickey, *Family Law*, pp. 97-98. The same explanation is found also in *Rabindra Prasad v. Sita Devi*, AIR (1986) Pat. 128; also see Diwan, *Law of Marriage and Divorce*, p. 290.

declaration of that fact.<sup>42</sup> A decree is always advisable and the social order and public decency demand it. It is obtained, also, in order to regularize the position of the parties, or to establish the facts.<sup>43</sup>

At this situation, where marriage is void, neither the parties in marriage nor the court have any control. A void marriage, being no marriage, the court cannot use discretion to withhold the decree even if it is established that the petitioner knew while going through the marriage ceremony that the marriage was a void one.<sup>44</sup> This is what happened in the case of *Andrew v. Rose*; the marriage entered into within the prohibited degree and the petitioner knew that it was illegal. The court was anxious to withhold the decree because of the petitioner's conduct, but had to issue the decree.<sup>45</sup> A petition for the decree of nullity of marriage on any ground of void marriage has to be moved only by one of the parties to the contract.

### 3.3.2.1.1 - Grounds of Void Marriages

The grounds for declaring a marriage void are based usually upon some incapacity of the parties to contract marriage, owing either to relationship, or to their mental

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<sup>42</sup> *De Renville v. De Renville*, (1949) p. 100; also see *Diwan, Law of Marriage and Divorce*, p. 291.

<sup>43</sup> See E.L. Johnson, *Family Law*, London, Sweet and Maxwell, 1958, p. 68.

<sup>44</sup> Civil law does not allow the petitioner to enjoy the benefit of the law for the mistake he/she has knowingly committed. For instance, in the case of fraud only the deceived party's petition will be accepted and not of the deceiver. The court would not permit a person to enter into a marriage for some time to be enjoyed or benefited from it and thereafter to reprobate the same marriage on the claim that it is void upon the ground of fraud through which the person extracted the consent of the other party. See *Nash v. Nash*, (1940), p. 60.

<sup>45</sup> *Andrew v. Rose* (1888) 14 P.D. 15.

or physical capacity, or to some other express prohibition. A marriage contract is void when celebrated under the following circumstances:

- a) The former husband or wife of either party was living. At the time of the solemnization of a marriage, excepting an Islamic marriage, if either party has a living spouse even if the husband and wife may be living separately, such marriage is void. This signifies that the previous marriage bond still exists though the partners live separately. In all the marriage enactments of India there are specific provisions prohibiting marriage of a person whose former spouse is living unless legal divorce or annulment is obtained.<sup>46</sup>
- b) The parties are within the prohibited degrees of consanguinity or affinity. If the contracting parties are within the prohibited degrees of relationship the marriage is void unless the existing custom governing the parties sanctions them for such marriages.<sup>47</sup>
- c) Either party was a lunatic or an idiot at the time of marriage.<sup>48</sup>
- d) The respondent was impotent at the time of the marriage and at the time of the institution for suit.<sup>49</sup>
- e) The consent of either party was obtained by force or fraud.<sup>50</sup>

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<sup>46</sup> See *The Foreign Marriage Act, 1969*, Section, 4(a); *The Hindu Marriage Act, 1955*, Section, 5(1); *The Indian Christian Marriage Act, 1872*, Section, 60(2); *The Indian Divorce Act, 1869*, Section, 19; *The Parsi Marriage & Divorce Act, 1936*, Section, 4; *The Special Marriage Act, 1954*, Section, 4(a).

<sup>47</sup> See *The Foreign Marriage Act, 1969*, Section, 4(d); *The Hindu Marriage Act, 1955*, Section, 5(iv) and (v); *The Indian Christian Marriage Act, 1872*, Section, 88; *The Parsi Marriage & Divorce Act, 1936*, Section, 3(a); *The Special Marriage Act, 1954*, Section, 4(d) read with 24(1) (i).

<sup>48</sup> See *The Special Marriage Act, 1954*, Section, 24(1)(i) read with 4(b); *The Foreign Marriage Act, 1969*, Section, 4(b); *Indian Divorce Act, 1869*, Section, 19(3).

<sup>49</sup> See *The Special Marriage Act, 1954*, Section, 24(1)(iii); *The Indian Divorce Act, 1869*, Section, 19(1).

<sup>50</sup> See *The Indian Divorce Act, 1869*, Section, 19 (4). Only under *The Indian Divorce Act, 1869*, 'force and fraud' make a marriage void; it states, "Nothing in this section shall affect the jurisdiction of the District Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud."

Marriage of a person who has not attained the specified age shall be void under the Foreign Marriage Act, the Parsi Marriage & Divorce Act and the Special Marriage Act; but it is not a ground for void marriages under the Indian Divorce Act and the Hindu Marriage Act.

According to the Indian Christian Marriage Act, Sec. 3, a marriage which is not performed in accordance with the provisions of the Act shall be void. The Hindu Marriage Act, Sec. 7, requires a Hindu marriage to be solemnized in accordance with the customary rites for its validity. This indicates that non-performance of requisite formalities of marriage sanctioned by custom of the community to which the parties belong is also one of the grounds for void marriages.<sup>51</sup>

### 3.3.2.2 - Voidable Marriage

The commonly accepted description of a voidable marriage reads as follows: "A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction."<sup>52</sup> The Nullity Marriage Act, 1971, Sec. 5 states: "A decree of nullity granted after the commencement of this Act on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time."

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<sup>51</sup> For example, in the case of *Santhi v. P. Venkates*, the marriage was regarded as void because of the non-performance of requisite ceremonies. See AIR 1996 Mad. 150.

<sup>52</sup> *Laxshamma v. Thayamma*, AIR 1974 AP 255; *Kusum Kumari v. Kusam*, JT (1991) 11 SC 278; *De Reneville v. De Reneville*, (1948) 111.

Upon the annulment of a voidable marriage, the marriage will be regarded in law as void *ab initio*.

A voidable marriage, therefore, is regarded as a valid marriage so long as it is not avoided. This means that it can be avoided by a court action. Whether such a marriage is to be ratified or terminated may depend on the interests and wishes of the injured party and on a ruling of the court. If either of the parties to the marriage does not move the court for its annulment, the marriage will remain valid. The law presumes until the court pronounces its verdict of nullity, a voidable marriage will remain legally binding for all civil purposes<sup>53</sup> and all the legal consequences of a valid marriage will flow from it. It gives rise to mutual rights and obligations of a valid union. All legal effects obtained during the time of the marriage, presumed valid, cease with the decree of annulment.

According to civil law, a voidable marriage could be annulled, and an annulment is distinct from divorce. Civil law describes that divorce is the lawful dissolution of a legal bond established at marriage. In other words, it is the legal dissolution of the marriage bond in a manner other than through the death of either of the spouses so that the parties are rendered free to remarry either immediately or after a prescribed period of time.<sup>54</sup> Whereas in annulment there is no dissolution of an existing marriage because there was no

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<sup>53</sup> See Mookerjee, *Marriage, Separation and Divorce*, 2<sup>nd</sup> ed., p. 50.

<sup>54</sup> *Ibid.*, p. 73.

bond to begin with. Therefore, a decree of annulment declares a marriage void from the time of its celebration.<sup>55</sup>

A voidable marriage, once annulled, has the retroactive effect. The decree is always given with the retroactive effect, i.e., from the date of the marriage. The marriage is believed to have been null for all purposes from the moment of its inception and the parties never have been husband and wife. "This rule has its origin in the doctrine of Church that either a marriage exists forever or never. It was a logical consequence of the concept of indissolubility of marriage. The ecclesiastical law could not hold that a marriage was valid up to certain period after its solemnization, but it was not valid after that period; to hold that would have meant recognizing the principle of dissolubility of marriage. [...] We have copied this provision in our law almost verbatim together with its statutory modification from English matrimonial law."<sup>56</sup>

The question whether a marriage is void or voidable is decided upon by taking into consideration the over-all interest of the society. For instance, bigamy (except in Islamic marriage) or incestuous marriages are not permitted by Indian society. If such marriages are permitted the interest of the society would be at stake. Therefore, these types of marriage cannot be validated by anybody.<sup>57</sup> On the other hand, marriages involving

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<sup>55</sup> Ibid.

<sup>56</sup> See Diwan, *Law of Marriage and Divorce*, p. 293.

<sup>57</sup> However, it should be mentioned here that a case was judged against this norm in Calcutta High Court under the Indian Divorce Act. In the case, the wife, petitioner, wanted her marriage declared null on the ground that the husband concealed from her the fact of his marriage to her older sister. Manjula Bose, the *Judge* in the case, by using the non-mandatory word "may" in Section 19 of the Act, denied the desired relief to the woman on the ground that the case was an exceptional one. See *Rose Simpson v. Binimoy Biswas*,

fraud, force, fear and so on, do not only threaten the interest of the entire society but also go against the natural law. In such cases, the parties can choose to overlook these lapses. Consequently, the legal extensibility was developed in the case of voidable marriages.<sup>58</sup>

### 3.3.2.2.1 - Grounds of voidable Marriages

The Indian Divorce Act does not distinguish between the notion of void and voidable marriage, rather it indicates the grounds which make a marriage null and void.<sup>59</sup>

The grounds for voidable marriages under the Special Marriage Act, Sec. 24, are: a) Non-consummation of marriage; b) Pre-marriage pregnancy of the woman; c) Consent obtained by force or fraud.

It should be noted here that under the Special Marriage Act 'fraud' is a ground for voidable marriage while in the Indian Divorce Act, which is applicable to Christians, 'fraud' is a ground for a void marriage.

### 3.3.3 - Lack of Marital Consent Due to Fraud

It is an elementary principle of the law of contracts that, where a party to a contract was induced to enter into the contract by false representations or concealments of the other party, the contract is voidable at the option of the party defrauded, regardless of the particular fact or circumstance misrepresented or concealed, provided that it constituted a material inducement to the defrauded party to enter into the contract.

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AIR, 1980, Cal. 214.

<sup>58</sup> See Mookerjee, *Marriage, Separation and Divorce*, 2<sup>nd</sup> ed., p. 51.

<sup>59</sup> See Indian Divorce Act, Section, 18. There is nothing comparable to a voidable marriage under the Indian Divorce Act and Parsi Marriage and Divorce Act. See Diwan, *Law of Marriage and Divorce*, p. 303.

This general principle is modified in the case of the marriage contract in keeping with the social necessity of making the marriage relationship as permanent as possible. Consequently, it is generally held that fraud, which would in normal circumstances render an ordinary commercial contract voidable, will not necessarily serve as a sufficient ground for annulling a marriage contract.

It may be that because of the difference in cultures in a certain community, the marital consent of the parties may not be expressly asked for or expressly given. Yet a marriage may not be liable to be annulled merely on the ground that a party to it had not expressly manifested the consent. However, if it can be proven that the facts and circumstances about one of the parties are such that the other party could not have readily consented to this particular marriage if the facts were known and there was an element of deception or fraudulent misrepresentation in bringing about the marriage, then the marriage would be voidable.

According to the Special Marriage Act, fraud in matrimonial law corresponds to fraud in Section 17 of Indian Contract Act. The essential elements of fraud as found in the Special Marriage Act are the following:

- There must be a misrepresentation or active concealment by a person of his/her agent.
- It must relate to a fact and not an opinion.
- It must have been made with the knowledge of its falsehood, or without belief in its truth or recklessly or carelessly not caring whether it be true or false.
- It must have been made with a view to induce the other party to act upon such a representation.



- The other party must have acted upon that representation and entered into the contract.

Neither a fraudulent misrepresentation nor a concealment will by itself affect the validity of a marriage unless the misrepresentation induces an operative error, such as in respect of ceremony of marriage or identity of a party.<sup>60</sup> In *Nandkishore v. Munnibai*<sup>61</sup> the court observed that fraud should be such that it procures the appearance without the reality of consent and thereby becomes an act fitted to deceive.

A marriage induced by fraud, as already seen, is void in the Indian Divorce Act whereas in the Special Marriage Act, it is merely voidable. However, if a marriage is either void or voidable, it is void *ab initio*.<sup>62</sup> It should be noted that in the case of a voidable marriage, only when it is avoided by the injured party it becomes void *ab initio*. The catch here is that not all fraudulent marriages are null. Fraud must be of such a nature as to be inconsistent with the idea of there having been a real consent by one of the parties. Fraud must be such that it procures the form without the substance of the agreement. In such cases the marriage will be annulled, not because of the presence of fraud, but because of the absence of true consent. It only needs to be proved that the marriage consent was induced by fraud and the amount of fraud exercised to obtain it would be immaterial.<sup>63</sup>

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<sup>60</sup> *Moss v. Moss* (1897) p. 263.

<sup>61</sup> See Paras Diwan, *Family Law*, New Delhi, Sterling Publications Pvt. Ltd., 1983, p. 134.

<sup>62</sup> See McDonnell, Monroe, *Kerr on the Law of Fraud and Mistake*, p. 471.

<sup>63</sup> See Mookerjee, *Marriage, Separation and Divorce*, 2nd ed., p. 48.

Sankaran Nair, the judge in *Leelama v. Dilip Kumar* case, explains that fraud according to Section 19 of the Indian Divorce Act must include an error concerning the quality of a person. For instance even a misrepresentation that a party is a Christian would amount to fraud if that party was not a Christian by faith.<sup>64</sup> Yet, mere silence is not considered as fraud. In certain circumstances, however, it may become the duty of the person keeping silence to speak. In such circumstances if the party does not speak, then, even the silence may amount to fraud.<sup>65</sup> Nonetheless, a misstatement or over-statement about one's quality or qualification would not amount to fraud as envisaged in the Indian Divorce Act unless it is in respect of a factor which is vital to marriage and marriage alliance itself.<sup>66</sup>

In matrimonial law any and every misrepresentation or concealment may not amount to fraud. It is quite natural that during the courtship or negotiation the parties or the relatives of the parties may try to project themselves or their candidates in the best possible ways. Therefore, a certain amount of exaggeration in representation to make the candidate acceptable or attractive to the other is a common factor and is often experienced. Practically in every arranged marriage a variety of qualities and qualifications are ascribed to the girl or to the boy. Matrimonial columns of the newspapers are filled with illustrations of this type. Often the illustrations given about a girl or a boy in the newspapers are exaggerated. Does it amount to fraud and make a marriage voidable? The Indian civil law says not all cases can

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<sup>64</sup> *Leelama v. Dilip Kumar*, 1992 (1) KLT 651.

<sup>65</sup> See Indian Contract Act, Section 17, explanation.

<sup>66</sup> *Renold Rajaman v. Union of India*, AIR, 1982 S.C. 1261.

be avoided but only those cases in which misrepresentation is made about things related to material fact of marriage.<sup>67</sup> Any fraudulent misrepresentation of material fact, like marital status, in newspaper advertisements will amount to fraud.<sup>68</sup> Therefore, the mere statement that the misrepresentation or concealment of certain minor facts which, if known to the other party, might have prevented from entering into a marriage contract does not invalidate a marriage. In the case of *Moore v. Valsa* it was observed that “at the same time the primitive view that the application of fraud in matrimonial law has only a narrow radius need not rigidly be adhered to in modern times.”<sup>69</sup>

The position of the law, therefore, is that the innocent party who was led into contracting marriage by deception amounts to no consent in reality.<sup>70</sup> In the *Madhusudan v. Chandrika* case, the judge noted that in the context of annulment of a marriage, fraud means an act which procures appearance of consent without its reality, i.e., there is no consent at all. In matrimonial laws, interpretation of the term ‘fraud’ should convey the same meaning attributed to it in English law.<sup>71</sup>

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<sup>67</sup> In *Purbi v. Basudev* case, the wife alleged that her husband had induced her into marrying him with the assurance of his high prospects in life. The court held that this did not amount to fraud and the marriage could not be avoided. If it were not so, numerous marriages would be voidable. See also AIR ,1969 Cal 293.

<sup>68</sup> *Brigender v. Vinod*, AIR 1995 P&H 42.

<sup>69</sup> *Moore v. Valsa* 1991 (2) KLT 504.

<sup>70</sup> *Mookerjee, Marriage, Separation and Divorce*, 2<sup>nd</sup> ed., pp. 48-49.

<sup>71</sup> AIR (1975) MP 174 (DB): 1975 MPLJ 381.

In a marriage case, general statements on fraud in the pleadings are not sufficient, rather it is necessary to provide particulars of the fraud.<sup>72</sup> The act of misrepresentation or concealment of a material fact should affect the marriage fundamentally in order to constitute fraud.<sup>73</sup>

For 'fraud', therefore, to serve as a ground for annulling a marriage, the following elements must be present:

- One of the parties must have been led into marriage by a false representation or fraudulent concealment of a quality of the other party.
- The false representation or fraudulent concealment must have been of a serious nature and such as to affect the marriage relationship fundamentally.
- The alleged fraud must have been the inducing or motivating cause of the marriage to the extent that, if the fraud had not been perpetrated, the marriage would not have taken place.

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The cases that often come before the courts on this particular ground of nullity

may be classified as follows:

- Fraud on the nature of ceremony.
- Fraud as to identity of a party to marriage.
- Concealment of disease.
- Concealment of religion or caste.
- Concealment of unchastity.
- Concealment of illegitimate birth.
- Concealment of sterility.

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<sup>72</sup> Kartik v. Manju Rant, AIR 1973 Cal 545.

<sup>73</sup> Purbi v. Basudev AIR 1969 Cal 293.

- Concealment of pre-marital pregnancy.
- Concealment of pre-marriage status.
- Fraud of third person.

**a) Fraud on the nature of ceremony**

Where there is an error as to the nature of ceremony in the mind of one of the parties to marriage or fraud is played on the ceremony of marriage, marriage is voidable.<sup>74</sup> In *Metha v. Metha*, the ceremony was conducted in *Hindustani* (Hindi), a language which the petitioner did not understand. She was kept under the impression that the ritual performed was for the purpose of her conversion to Hinduism to which she had agreed. But in reality she was made to undergo the ceremonies of marriage. She requested the court to have her marriage declared null. The court held that the ceremony of marriage the parties went through was a fraud perpetrated upon the petitioner and it invalidated the consent and, therefore, the marriage was null and void.<sup>75</sup> In *Shajit v. Gopi Nath*<sup>76</sup> the respondent made the petitioner believe (represented to the petitioner) that he would take her with him to the United States and got the Marriage Registration done without having undergone a proper ceremony of marriage. Later when he claimed the marital rights from her, she realized her folly and moved the court which held that the Registration was void.

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<sup>74</sup> See Diwan, *Family Law*, p. 134.

<sup>75</sup> (1945) 2 All ER 690.

<sup>76</sup> AIR 1995 Mad 161.

**b) Fraud as to identity of the party**

Indian law discusses mistaken identity under “fraud.” Fraudulent deception as to the identity of the other party amounts to fraud. It means that in Indian law it would be necessary to prove that the petitioner was led to believe in the identity of the other by some kind of misrepresentation to deceive the petitioner. In a case, the father of the bridegroom presented the boy as his real son while in reality he was his illegitimate son. This fraudulent misrepresentation led to the arrangements of marriage and thus inducing the consent of the petitioner. It was held to be a case of fraud and annulment was granted to the petitioner.<sup>77</sup> This case indicates, therefore, that concealment of one’s illegitimacy amounts to fraud.<sup>78</sup>

**c) Concealment of disease**

Indian civil law considers concealment of a serious disease to be fraud, and such fraud would make the consent defective. If the disease which is concealed is of ordinary nature, marital consent will remain sound and the marriage valid. Concealment of venereal disease, in a communicable/contagious form, was held to amount to fraud, making the marriage null.<sup>79</sup>

Similarly, the consent obtained without disclosing a deformity must be considered to have been induced by fraud. A person may not want to enter into a marital relationship with someone who may be suffering from some sort of physical deformity or

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<sup>77</sup> Vimala Bai v. Shankar and others, AIR 1959 M.P. 8.

<sup>78</sup> Babi v. Ram AIR 1968 Pat 190.

<sup>79</sup> Amarnath v. Layabati, AIR 1959 Cal 779. Concealment of communicable disease in marriage is a specific ground for voidable marriage under *the Matrimonial Cases Act, 1973*, Section 12 (c).

disability. This may be due to several factors which may differ from person to person depending on the society and culture in which one lives. Consequently, when this quality of disability or deformity is withheld from the other, it would amount to fraud. In the case of *Balbir Kaur v. Maghar Singh*, the deformity suffered by the bride was withheld from the bridegroom during the arrangement of marriage. When he discovered the deformity of his wife he refused to live with her. He petitioned for the annulment of his marriage. It was held that such type of deformity of limbs would constitute material fact and, therefore, the consent was obtained through fraud and the marriage was null.<sup>80</sup> In the same way, in another case concealment of incurable schizophrenia was held as exercise of fraud in obtaining the consent of other party, and the marriage was declared null.<sup>81</sup>

**d) Concealment of religion or caste**

In a case judged under the Indian Divorce Act, a Christian woman entered into marriage with a person on his assurance that he was a Christian whereas it was subsequently discovered that in reality at the time of marriage he was a Muslim. The marriage was annulled on the ground of fraud.<sup>82</sup> In another case, a Syrian Catholic woman married a man on his representation that he was a Christian born of Christian parents while in fact he was a low caste Ezhava born of Ezhava parents but was converted to Christianity just prior to their marriage. The High Court of Kerala held that the false representation by the man amounted

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<sup>80</sup> AIR 1984 Pun 417.

<sup>81</sup> *Asha Srivastava v. R.K. Srivastava*, AIR 1981 Delhi 253.

<sup>82</sup> *Aykat v. Aykat*, AIR 1940 Cal 75 : ILR (1930) 2 Cal 60.

to fraud perpetrated against the woman in order to obtain her consent and, therefore, the marriage was declared null.<sup>83</sup>

**e) Concealment of unchastity**

Concealment of pre-marriage unchastity does not amount to fraud in Indian law. As a general rule, pre-nuptial unchastity of the wife, even when not disclosed before marriage and unknown to the husband at the time of marriage, is not a ground for nullity.<sup>84</sup> In the case of *Surjit Kumar Harichand v. Raj Kumari*, it was observed that merely keeping quiet about the unchastity of one's past life would not amount to extortion of consent by fraud.<sup>85</sup> In *Harbhajan v. Brij Balao*, the petitioner married the respondent on the assurance of the respondent's father that she was a virgin. But after the marriage it was discovered that she was not a virgin. The court did not accept that it amounted to fraud.<sup>86</sup> However, such concealment can be treated under fraud especially when it is perpetrated by a third party. The assurance of the father about his daughter's virginity to obtain the consent of the boy would amount to misrepresentation, making it a fraud by a third person.

**f) Concealment of sterility**

Non-disclosure of any form of sterility either by the man or by the woman amounts to fraud making marriage devoid of consent. In *Smt. Best Morning*

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<sup>83</sup> *Leelama v. Dilipkumar*, AIR 1992

<sup>84</sup> *Raghunath v. Vijai*, AIR 1972 Bom 132; *Nandkishore v. Munnibai*, AIR 1979 MP 45.

<sup>85</sup> AIR 1967 Punj 172.

<sup>86</sup> AIR 1964 Punj 359.



*Khongthrohrem v. Nirmalendu Deb*,<sup>87</sup> the respondent hid from the bride and her relatives the fact that he had undergone vasectomy before the marriage. The court observed that the husband's non-disclosure of the fact of vasectomy to the wife amounted to consent obtained by fraud and a decree of nullity of marriage was passed.

**g) Concealment of pre-marital pregnancy**

Within the meaning of Section 19 of the Indian Divorce Act, the fact of respondent's pregnancy induced by a person other than the petitioner when concealed at the time of marriage from the petitioner amounts to fraud and the petitioner is entitled to have a decree of nullity.<sup>88</sup> However, the petitioner must prove that he was ignorant of the existence of pregnancy at the time of marriage; he must also institute the proceedings within the period stipulated by statute.<sup>89</sup>

**h) Concealment of pre-marriage status**

Civil courts have clearly stated that concealment of one's pre-marital status amounts to fraud. In *Rajinder Singh v. Pomila*, the respondent did not disclose to the petitioner that he was already married. The judge in the case declared that such a non-disclosure amounted to fraud in respect of a material fact pertinent to the respondent.<sup>90</sup>

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<sup>87</sup> AIR 1987 Gau 63.

<sup>88</sup> *George v. Jaya*, (1965) 1 Mys Lj 383; *D.M. Raju v. S. Janaki*, AIR 1974 Mys 61: (1973) 1 Mys Lj 414.

<sup>89</sup> *Savalram v. Yeshoda*, AIR 1962 Bom 190; *Namikarem v. Dhrupadiben*, AIR 1974 Guj 111; *Baldev Raj v. Urmila Kumari*, AIR 1979 S.C. 364.

<sup>90</sup> (1978) Hindu LR 521; the same explanation is found in *Briginder v. Vinod*, AIR 1995 P&H 42.

**i) Fraud by a third person**

Ordinarily it is the fraud, perpetrated by the respondent, which becomes a material circumstance for the annulment of marriage but in some circumstances fraud exercised by a third person may vitiate consent. In the case of *Babui Pammato v. Ram Agya Singh*,<sup>91</sup> the facts were as follows: The girl heard her father telling her mother that he had fixed her marriage with a wealthy man who was of 25 to 30 years of age. The girl did not protest against the arrangement because she was agreeable to the details and the information given to her mother by her father. During the marriage ceremony, because of the thick veil she wore, she could not see the husband. But when she went to her husband's house, to her dismay she discovered that the man was over 60 years of age and was of very ordinary means. When she protested his sexual advances towards her, he physically assaulted her. She ran away from her husband, but through court order she was returned to his house. But she escaped once again and approached the court with a petition for a declaration of nullity of her marriage on the ground of fraud. The Judge held that there was in the case fraudulent misrepresentation by the father. The misrepresentation concerning the age of the man was in fact made to the mother who acted as an agent, and the daughter consented to the marriage believing the statement of her to be true, and therefore, her consent was vitiated by fraud. In this case, the court observed that the father who misrepresented by actively concealing a material fact of the respondent's age, which he knew, indirectly deceived the petitioner.

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<sup>91</sup> *Babui Panmato v. Ram Agya Singh*, AIR 1968 Pat 190.

In this case, the judge applied Section 17 of the Indian Contract Act, 1872, where fraud is defined and held that the consent of the daughter to the marriage was obtained by the father exercising fraudulent misrepresentation and a decree of annulment of marriage was issued.

### 3.3.3.1 - Fraud Condoned

Condonation is forgiveness of any type of conjugal offence with full knowledge of all the circumstances. Sir Creswell has defined condonation as follows: “It must amount to such a blotting out of her offence as will restore her to her former position.”<sup>92</sup> Two elements are essential to establish condonation, i.e., forgiveness and restoration. The proof for the forgiveness and restoration may vary depending on the facts of each case. However mere forgiveness is not condonation. Condonation, therefore, implies complete restoration with the offending party followed by cohabitation. It is believed that having a normal life and sexual relationship with the consent of both the parties is the clear evidence of condonation.<sup>93</sup> In *Moreno v. Moreno*, the judge observed that unless and until conjugal cohabitation is resumed there is no condonation.<sup>94</sup>

After the discovery of the fraud any type of sexual relationship with the free consent of the parties would be considered as fraud condoned. In *Mohinder v. Bikkar Singh*, soon after marriage the petitioner and his parents discovered that fraud was perpetrated on

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<sup>92</sup> *Keats v. Keats*, 28 LJ P&M 57: 32 LT OS 321.

<sup>93</sup> *Minakshi Dhar v. Biresw Ranjan Dhar*, AIR 1987 Gau 90.

<sup>94</sup> AIR 1920 Cal 439.

them, because the bride was not the same girl who was shown to them prior to marriage. The girl who was shown was beautiful and educated, but the actual bride present at the wedding was neither good looking nor literate. He immediately knew that he had been duped in regard to the age, beauty and education of the intended bride. But, despite this knowledge he had sexual relations with the girl he married. The judge ruled that in this case the fraud was condoned by the petitioner, and therefore, the requested relief was denied.<sup>95</sup>

### 3.3.3.2 - Time-bar for the Plea of Fraud

When we discussed fraud in general, we noted that no length of time will protect fraud so long as its victim remains ignorant of the fraud he/she had suffered. But law demands that once fraud is discovered in marriage, a petition to avoid the marriage should be filed within a year.<sup>96</sup> Failure to do that will strip the party of his/her privilege to avoid the marriage. In a case where the parties were married in November, 1980, the petitioner discovered in February 1981 that the respondent had suffered from mental disorder prior to marriage. However, he filed a petition only in October, 1982, i.e., one year and eight months after acquiring the knowledge of the fraud involved in bringing about the marriage. The plea was rejected because of the time lapse.<sup>97</sup> It is primarily due to the assumption that the longer one waits to file a suit lessens the seriousness of the fraud.

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<sup>95</sup> AIR 1979 P&H 248: 1979 MLR 391: 81 Punj LR 686.

<sup>96</sup> See *The Special Marriage Act, 1954*, Section 25 (iii), (b).

<sup>97</sup> *Prabhat Bhusan Bhatnagar v. Mridula*, (1984) 2 DMC 358 Del: 1985 (1) HLR 480.

### 3.4 - INDIAN CIVIL COURT DECISIONS ON CASES INVOLVING FRAUD

Unlike in the western countries, in India most marriages are still arranged by parents for their children. Although utmost care is exercised by parents while choosing a partner for their child, cases of fraud are not a rare occurrence. Numerous marriage cases on fraud come to the court every year. Cases of fraud in marriage are a common phenomenon among all the religious groups. We will examine a couple of marriage cases on fraud among the Hindus to show how the vast majority of Indian population, i.e., 85%, view fraud in matrimony. Consent obtained through fraud in Christian marriages will also be discussed.

#### 3.4.1 - Hindu Marriage Cases

**A) Anurag Anand v. Sunita Anand:**<sup>98</sup> The judgment of 11 October 1996, by A.K. Srivastava in the case of Anurag Anand v. Sunita Anand on the ground of fraud is very enlightening. This judgment was given for the appeal filed by the husband, the appellant, against the decision and order given for the petition of the wife, the respondent, by S.M. Chopra, Additional District Judge in the Lower Court. By this impugned order, the marriage between the parties was annulled on the grounds that the consent of the respondent was obtained by fraud as to the material facts and circumstances concerning the husband.

The facts of the case are as follows: The appellant, a sales manager, and the respondent, an Air Hostess, married in New Delhi on 24 July 1994, according to the Hindu rites. It was an arranged marriage. The proposal to this marriage was initiated by mailing a

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<sup>98</sup> Anurag Anand v. Sunita Anand, AIR, 1997, Delhi 94.

bio-data of the appellant by his father in response to an advertisement placed by the respondent's father in the matrimonial column of one of the leading daily newspapers. The bio-data carried the petitioner's date of birth, educational qualification, job, salary, property status, and the status of the parents. Finding the bio data of the boy acceptable to his daughter, the respondent's father gave to the boy's family the particulars of the girl, which included their family background. Thereafter meetings took place between the parties. The marriage negotiations proceeded with precipitous speed and the marriage was settled.

The parties lived together happily for a couple of months, but then differences arose between them leading even to lodging of a complaint in court. But through the mediation of Women's Cell, they agreed to live in peace. Then the respondent became suspicious of the background of the petitioner and, therefore, requested the Women's Cell to verify the particulars provided in the petitioner's bio-data. The respondent also made enquiries through her own sources and found out that her father was given false information during the arrangements of the marriage by misrepresenting the age, salary, and property status of the petitioner. Therefore, she contended before the court that her marriage consent was in fact extracted by the appellant and his family through fraud.

The alleged fraud concerned three issues, namely the age, education and salary of the appellant. Therefore, it was necessary for the court to address all these three issues before pronouncing its judgment. The controversy over the date of birth of the man, and consequently his age, lost its significance when the respondent agreed that she was prepared to marry someone who was older to her by six years. From the date of birth of the man, it

was clear that he was exactly six years one month and twenty days older than the respondent. Therefore, the court ruled that, if the difference of six years was acceptable to the respondent, then the balance of merely one month and twenty days could not be considered significant. As to the salary of the appellant, it was found that he did not provide sufficient evidence to prove before the court that his actual salary did correspond to the figure shown in the bio-data. In fact the salary indicated in the bio-data, given to the respondent's parents during the arrangements of marriage, was inflated and false. Therefore, the appellant was found guilty of declaring false salary. It was also established in court in regard to the property status of the appellant and his family that there had been misrepresentations by the appellant and his family.

Now the crucial question the court had to answer was whether the inflated and false representations amounted to fraud in regard to the material facts and circumstances concerning the appellant so as to entitle the respondent to a decree of nullity on the ground of fraud. The Judge begins his judgment by explaining the term "fraud" used in Clause (c) of Section 12 of the Hindu Marriage Act. He says that the expression "fraud" used in Clause (c) refers particularly to the nature of the ceremonies or the material facts or circumstances concerning the party. In this context, therefore, the term does not speak of fraud in any general way or include every form of misrepresentation or concealment as fraudulent under Section 17 of the Indian Contract Act. A marriage, under the Hindu marriage law, is not purely a contract but a sacrament and a contract at the same time. The term "fraud" in this clause connotes deception or misrepresentation. What is a

misrepresentation or concealment will depend upon the facts and circumstances of each case. And the “material facts and circumstances are those vital and important facts and circumstances which would induce or influence the mind of a party to give or withhold the consent to marry. This would appear to be the intention of the Legislature while enacting Section 12 of the Hindu Marriage Act.”<sup>99</sup>

In his discussion of material facts and circumstances involved in a marriage, Srivastava states that marriage is a union between a man and a woman. Therefore, while accepting any person as a husband or a wife there are certain vital considerations which need seriously to be looked into before the parties or their parents give their consent for the marriage. These considerations could include age, educational qualifications, income, caste, marital status, family status coupled with financial status, religion or nationality of the other party. This list of material facts and circumstances is not exhaustive, because there can be other factors which may be of interest to the parties involved in each case. In a marriage proposal, a girl’s consent may very well be tied to the financial status of the other party, unless it is a love marriage. Every person would like to have a comfortable living. For this reason, a certain amount of monthly salary and a level of property status of the other party might be considered necessary for family life. These factors would definitely differ from case to case depending on the status of the girl’s family. Furthermore, if the girl is herself employed, she may aspire to marry a boy who draws a higher monthly salary than she does.

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<sup>99</sup> Anurag Anand v. Sunita Anand, AIR, 1997, Delhi 102.



A girl might also prefer to marry a boy from a wealthy family background. A girl may not accept a marriage proposal if the above requirements are not met by the prospective spouse.

The facts related to monthly income and the property status would in this case constitute the material facts and circumstances of the appellant in accord with the requirements of the law.

The next question, therefore, is whether the declaration vis-à-vis the material facts and circumstances made in the appellant's bio-data would amount to fraud if they are found to be false. In answering this question, Srivastava makes the following observation:

[...] marriages are to a large extent being settled through advertisements and exchange of bio data. Joint family living is dissipating and individual units have emerged. The result is that it is rather difficult to ascertain correct facts and the parties are largely dependent upon the bio data exchanged. Therefore, it becomes very necessary for the parties to issue correct bio data and to see that the bio data do not contain any inflated or false information. [...] Therefore, [when] the representations are inflated or false and the difference or falsity is significant, I see no reason why they cannot be called fraud [...]. However, where the difference or falsity is only trivial, a different view may be taken. It will depend upon case to case.<sup>100</sup>

In this case, Srivastava adds, the facts indicate that the marriage was settled and the consent was exchanged on the basis of what was stated in the bio data of the parties, and there was no time for them to ascertain the correctness of the information contained therein as the marriage was solemnised within a very short time following the proposal. If the material facts and circumstances presented in the bio data were proven to be false and the falsity was striking, then the very foundation of the marriage would be affected. Mutual

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<sup>100</sup> Ibid., p. 103.

trust would be destroyed. Then the very purpose of married life would disappear unless the erring party is forgiven. In this marriage case the falsity on the part of the appellant was found to be significant, disturbing their marital relationship and it was regarded by the court as deception.<sup>101</sup>

**B) Asha Srivastava v. R. K. Srivastava:**<sup>102</sup> This case was judged by G.C. Jain on 1 May 1981. This judgement was rendered on an appeal filed against the decision of B.B. Gupta, Additional District Judge, Delhi, pronounced on 23 January 1978. In the trial court, the decree of annulment of the marriage was based on the ground of fraud perpetrated on the husband in order to obtain his consent to the marriage.

The facts of this case are as follows: The appellant, Asha Srivastava, married the respondent, R.K. Srivastava, on 2 May 1976, according to the Hindu rites. On 24 August 1976, the respondent filed a petition for an annulment of the marriage. According to his allegations, after the marriage the appellant was taken to the respondent's house where her behaviour was found to be abnormal, not expected of a sane person. She did not respond to the greetings of the family members or relatives who came to visit her; instead she kept on gazing at them. Her behaviour and actions gave indications of a person who was not mentally normal. After a couple of days of the marriage, she broke all the crockery and tore up her clothes. The respondent also alleged that the marriage was not consummated because of the appellant's cold attitude towards sex. The respondent further stated that the

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<sup>101</sup> Ibid.

<sup>102</sup> Asha Srivastava v. R.K. Srivastava, AIR, 1981, Delhi 253.

appellant was impotent, and his own consent to marriage had been obtained through fraud and misrepresentation. Though the appellant denied all the allegations against her, the trial court found sufficient evidence to make the decision in favour of the respondent and consequently the marriage was annulled by a decree of nullity under the ground of fraud. The appellant filed the present appeal requesting dissolution of the marriage by a decree of divorce on two grounds: (1) that the respondent-husband had extra marital affairs with an unmarried girl; and (2) that the respondent treated the petitioner, Asha Srivastava, with cruelty after the solemnization of the marriage. The respondent, on the other hand, sought annulment of the marriage on two grounds: (1) that the marriage had not been consummated because of the petitioner's impotency; and (2) that the consent was obtained through fraud concerning the petitioner's mental health.

The first plea of the respondent man was dismissed with a negative judgment. With regard to the second plea, it was proved from a psychiatric report that the appellant was under psychiatric treatment before the marriage and that her disease was incurable. It was also proved that the respondent was not informed of the sickness prior to the marriage.

The most important question before the court, therefore, was whether the concealment of the fact that the appellant was suffering from an incurable disease came under fraud, the provision contained in Section 12 (1) (c) of the Hindu Marriage Act, which prescribes that a marriage is voidable and may be annulled if the consent of the petitioner (or the consent of the petitioner's guardian in marriage, where it is required by the law), was

obtained by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.

Speaking of fraud G.C. Jain, the Judge, explained that the term “fraud” has not been defined under the Hindu Marriage Act. But he added that the definition of fraud in Section 17 of the Indian Contract Act was not applicable to the word “fraud” used in Hindu Marriage Act for the simple reason that the marriage for the Hindus is not only a civil contract but also a sacrament. The judge stated that the Legislature in its wisdom has stipulated that in case there is deception as to any material fact or circumstance concerning the respondent, the marriage would be null and void. Therefore, he declared that the case under consideration would be covered by this provision. But he stressed the point that a marriage cannot be annulled on the basis of any and every concealment or misrepresentation. Nevertheless, if there is misrepresentation or concealment regarding a material fact (which means an important fact capable of inducing or influencing the mind of a party to give or withhold the consent to marry) concerning the respondent, then the provisions contained in Section 12 (1) (c) would be definitely applicable. He further stated that concealment of a sickness like schizophrenia, which is a serious and incurable mental illness, would certainly amount to obtaining consent of the respondent through fraud. Therefore, the judge dismissed the appeal of the appellant woman.

### 3.3.2 - Christian Marriage Cases

**A) Peter v. Molly:**<sup>103</sup> This case was judged by Abdul Gafoor on 28 February 1997, and it involved fraudulent deception by the respondent in order to obtain the consent of the petitioner. The parties in the case were both Roman Catholics. They married on 29 April 1990, at Elanjupara Church as per the norms of the Church. Thereafter they lived together till 10 November 1990, when the respondent was taken back to her parental home by her father.

During the six months of their common life, the petitioner discovered that the respondent had been mentally ill long before their marriage. The respondent began to display abnormal behaviour soon after they established conjugal life. She did not bathe regularly. She would get up suddenly from bed during night and leave the bedroom. She became physically violent toward her husband. When he enquired about this behaviour from her parents, they advised him to consider it as his fate. He took her to a mental hospital where doctors informed him that the illness she suffered from was not curable. Moreover, the respondent told the petitioner that she never had menstrual periods. She was unable to conceive due to some gynaecological problem. The respondent also disclosed to the petitioner that doctors had advised her not to marry because of her inability to conceive.

The petitioner felt that he was duped. Therefore, he filed a petition under Sections 18 and 19 of the Indian Divorce Act. Following a brief outline of the case, Gafoor states:

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<sup>103</sup> Peter v. Molly, 1997 (2) KLT 897.

The mental illness of the respondent had not been disclosed to the petitioner or his relatives before marriage. Thus, it had been withheld from the petitioner for obtaining consent for marriage. [...] To procreate children is one among the holy aims of marriage. If this procreation is not possible, naturally, the very purpose of marriage is not served. If it had been disclosed to the petitioner that the respondent was unable to have a married life and to procreate children and she had not menstruated [...] then the petitioner would not have consented for the marriage. Withholding that information from the petitioner to obtain consent for marriage amounts to fraud.<sup>104</sup>

According to Gafoor's statement, concealment of facts of a grave nature, like serious mental illness or sterility of either party, is a deliberate deception with the intention of obtaining consent of the other. This fraudulent deception, therefore, makes the consent defective, thus making the marriage null.

**B) Domnic Cardoza v. Gladys Cardoza:**<sup>105</sup> This case was judged on the ground of fraud under the Indian Divorce Act. The marriage under consideration was solemnized as per the Christian rites on 3 April 1983. Fifteen days after the marriage, the petitioner left India for the Persian Gulf on an employment. When he returned to India four years later, he learnt that his wife had undergone an operation for excision of her fallopian tubes in December 1976. This operation rendered her infertile and she could no longer conceive. The petitioner filed a petition requesting the court to decree nullity of his marriage on the ground of fraud.

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<sup>104</sup> Peter v. Molly, 1997 (2) KLT 900-901.

<sup>105</sup> Benjamin Domnic Cardoza v. Mrs Gladys Cardoza, AIR, 1997 Bom 175.

From the evidence of witnesses and documentary proof it was established that the respondent's fallopian tubes had been surgically removed in 1976, and consequently, she was incapable of conceiving any child. This fact had not been disclosed either to the petitioner or to his family members prior to marriage. The court held that if the petitioner had been informed of this fact, he would not have married the respondent. It was only because of concealment of the aforesaid fact that the marriage was agreed upon. Under Section 19 of the Indian Divorce Act, the petitioner was defrauded by the respondent through concealing the fact that her fallopian tubes had been surgically removed and she was incapable of bearing any children. The consent of the petitioner to the marriage, therefore, was extracted through fraud, thus rendering the marriage null.

**C) P.V. Sabu v. Mariakutty:**<sup>106</sup> The marriage in question was solemnized on 3 September 1992, in Kerala in accordance with Christian rites. It was an arranged marriage. The woman was employed in a hospital in Bombay. After two weeks' common life, the woman returned to Bombay to resume her duties in the hospital. Four months later, the man found a job in the Middle East. On 25 March 1993, the petitioner received a telephone message informing him that his wife had given birth to a full term baby. Being suspicious of the whole affair, the petitioner made discrete enquiries and found out that the respondent was already in the third month of pregnancy when the marriage was celebrated. After ascertaining the facts, the petitioner filed for an annulment of his marriage with the respondent.

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<sup>106</sup> P.V. Sabu v. Mariakutty, AIR, 1998 Ker 86-95.

The sentence of Judge C.S. Rajan tries to respond to the five following questions relevant to this case:<sup>107</sup>

1. Whether the respondent was pregnant at the time of marriage?
2. Did the respondent commit fraud by concealing the fact of pregnancy from the petitioner at the time of marriage?
3. Was the consent of the petitioner to marry the respondent extracted by fraud?
4. Whether the petitioner had access to the respondent prior to marriage which could have led to her pregnancy?
5. Is the petitioner entitled to a decree of nullity of his marriage?

In this case, the court made no effort to explain the nature of fraud, but rather it went on to establish whether any fraud was instrumental in obtaining the consent of the petitioner.

The court questioned the Deputy Medical Superintendent of the hospital where the respondent worked and delivered the baby. From the information provided by this medical officer and from other evidence, the court concluded that the respondent was already pregnant at the time of marriage. After cross-examining the respondent and in the absence of any proof to the contrary, the court ruled out the possibility of the parties meeting each other before the marriage.

The court declared that “concealment of pregnancy at the time of marriage clearly amounts to fraud. Where consent to a contract of marriage has been obtained by force or fraud, such a marriage is invalid unless ratified after the coercion has ceased, or the duress has been removed, or when the consenting party, being undeceived, has continued

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<sup>107</sup> Ibid., p. 87.



the assent, when the fraud became known to the husband, he ceased to be a consenting party to the marriage. Hence, there is no valid marriage [...] under Section 112 of the Evidence Act.”<sup>108</sup> Under this Section, if it is established that “at the time of marriage, the bride was pregnant, it *ipso facto* vitiates the marriage unless the opposite party proves that this fact was within the knowledge of the bridegroom at the time of marriage. That means, the burden is on the wife, if she was pregnant at the time of the marriage to establish that the factum of pregnancy was known to the husband.”<sup>109</sup>

The court concluded on the basis of available evidence that the respondent was pregnant at the time of marriage and that the petitioner had no access to the respondent before the marriage. The petitioner was not aware of this fact prior to the marriage. If he had known the fact, he would not have consented to the marriage. Therefore, it was clear that the respondent had concealed from the petitioner the fact of her pre-marital pregnancy at the time of marriage. This concealment constituted fraud perpetrated on the petitioner for the purpose of obtaining his marital consent.

**D) Saly Joseph v. Baby Thomas:**<sup>110</sup> One of the most recent and very significant judgments on the ground of fraud was rendered by Judge D. Sreedevi on 16 November 1998. This judgment was a response to the appeal made against the sentence and decree by which the appellant’s petition for a decree of nullity of marriage was dismissed. In this case, both parties were Catholics. The marriage was solemnized according to Catholic

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<sup>108</sup> Ibid., p. 91.

<sup>109</sup> Ibid.

<sup>110</sup> Saly Joseph v. Baby Thomas, 1999 (1) KLT 74-83.

customs and ceremonies on 9 February 1994, at St. Thomas Church, Retnagiri, Kerala. Their common life lasted less than a month as they separated on 3 March 1994 because of the facts described below.

The appellant, Saly Joseph, was a staff nurse in a government hospital in the Persian Gulf. During the process of marriage proposal, the respondent, Baby Thomas, and his relatives convinced the appellant and her family that he had a diploma in Air Conditioning and was employed as an Air Condition mechanic in the government service of one of the Gulf countries and was drawing a handsome salary including free boarding and lodging and a two months' annual leave with free air ticket to visit home. Believing what the respondent and his relatives had told, the appellant and her people agreed to the proposal without any suspicion of fraud. Since the respondent convinced the appellant and her people that he had to leave on 22 February 1994 for the Gulf, the marriage was solemnized hurriedly on 9 February 1994. But to her utter surprise, the respondent did not leave for the Gulf on February 22<sup>nd</sup> as he had told the appellant. On enquiry, he confessed that he neither held a diploma in Air Conditioning nor had a job as Air-Condition mechanic in the Gulf, but was only a salesman in a supermarket. He also confessed that he no longer held that job. The appellant realized that she was cheated and terminated the relationship as she no longer had the intention to remain in it. She petitioned for a decree of nullity of marriage on the ground that her consent was obtained by fraud.

The respondent denied all the allegations and stated that all relevant facts were communicated to the appellant and her people through the broker. He also informed the court that their married life was cordial until the appellant left for the Gulf.

In the judgment of 23 January 1998, the single judge dismissed the petitioner's application for a decree of nullity of marriage on the ground that the appellant had not adduced sufficient evidence to establish that the respondent and his relatives exercised fraud upon the petitioner and her relations.

The appellant filed an appeal against this judgment. The appeal court instructed the case anew. The appellant and the witnesses were re-examined. On a closer scrutiny of the evidence and of the questions of law, the court concluded that the appellant's matrimonial consent was extracted through fraudulent deception by the respondent.

Judge Sreedevi's sentence provides a detailed description of law on fraud based on the explanation of fraud according to canon law. She begins by clarifying the notion of fraud in matrimonial causes. The term 'fraud' is not defined in the Indian Divorce Act. Hence, she argues, it must be given a liberal interpretation. In this connection, Sreedevi traces the origin and development of matrimonial law pertinent to Christians in Indian law. Quoting the *Lopez v. Lopez* case,<sup>111</sup> she holds that where the parties to the matrimonial proceedings are Roman Catholics, it is not the law of England, but the canon law of the Church of Rome must be applied in this country. The personal law for Roman Catholics is the canon law of their Church. In the absence of statutory law, therefore, canon law governs

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<sup>111</sup> 1855 ILR XII Cal 706; AIR 1930 Bom 105.

the members of the Catholic community.<sup>112</sup> The principles relating to marital obligations embodied in the canon law apply to all Catholics,<sup>113</sup> and therefore, a case for nullity of marriage ought to stand or fall by the rules of canon law, and the petitioner must show that fraud deprived him/her of the power of exercising the free will.

The Courts in India have laid down in clear terms that the validity of a marriage between Catholics would have to be decided in accord with the provisions of canon law in the absence of statutory law. Therefore, the marriage in question must be determined in accordance with the personal law applicable to the parties.<sup>114</sup> However, Indian civil courts deny civil effects to any ecclesiastical pronouncement on the nullity of a marriage.

Thus, Judge Sreedevi takes both civil law and personal law into consideration in establishing the notion of fraud in matrimonial matters. The Indian Divorce Act explains fraud as concealment of a fact, which is grave, from either of the parties, with the intention of obtaining consent to marriage. After examining the notion of fraud in canon law, Sreedevi states that a marriage contracted through deceit or fraud is invalid according to canon 1098. Fraud is a deliberate act of cheating by which one person hides a significant fact from another. Consequently, the person deceived is led into an erroneous judgment. Therefore, fraud is exercised to effect an error in the other party so that the person will act

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<sup>112</sup> *Leelamma v. Dilipkumar*, 1992 (1) KLT 652; AIR, 1993 Ker 57; in *Yamuna Bai Anantrao v. Ananthrao Shivram Adhav*, 1988 (1) SCC 530, the apex court held that for determination of the validity of a Hindu Marriage and to establish the marital status, the personal law is to be relied upon. Logically the same should be applicable to the Catholics.

<sup>113</sup> *Cheriya Varkey v. Ouseph Thresia*, AIR, 1955 TC 225.

<sup>114</sup> *Saly Joseph v. Baby Thomas*, 1999 (1) KLT 79.

according to the will of the deceiver. The root of error can be fraud although not every error necessarily has its origin in fraud. Error can occur without fraud, but true fraud cannot exist unless it gives rise to error in the mind of its victim.<sup>115</sup>

Sreedevi further states that if there is fraud about a significant quality of the person, there is no true joining of wills; rather one party manipulates the will of the other, and as a result, the marriage fails. For fraud to be an invalidating factor, four necessary elements should be proved:

1. Deceit must be a deliberate act perpetrated in order to obtain the matrimonial consent of its victim.
2. The error produced must concern some quality or lack of it in one or both the parties.
3. The quality must be unknown to the other party and deceit must have led directly to the decision to marry.
4. The discovery of the absence or presence of the quality must precipitate the end of the marriage.<sup>116</sup>

Sreedevi concludes that in the given case the respondent concealed the reality of what he was and produced an error in the petitioner's mind, which led her to consent to the marriage with the respondent. On learning the fact that the respondent did not possess the qualifications, which the petitioner was made to believe he had, the petitioner realized the trick played on her and decided to terminate cohabitation with him. From the evidence gathered during the trial, the Judge concluded that the petitioner was very particular about the quality of the person, which was deliberately concealed from her in order to obtain her consent for the marriage.

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<sup>115</sup> Saly Joseph v. Baby Thomas, 1999 (1) KLT 81-82.

<sup>116</sup> Ibid., p. 82.

### **CONCLUSION**

Indian Civil Law on matrimonial matters is not uniform. As peculiar to any system of positive law, it also does not provide a universally applicable notion or theory of fraud. However, one can find some elements and principles in Indian Civil Law which offer valuable clues for the development of jurisprudence in the absence of statutory law on a particular matter.

Indian Civil law describes fraud in different terms like deception, concealment and misrepresentation. Whether it is a commercial contract or a marriage contract, free consent of the contracting parties is required for its validity. If the consent of a party to the contract is obtained through concealment or misrepresentation of a fact, which seriously affects the contract or is being used as a means either to induce, influence or withhold the consent of one of the contractants, there is fraud which nullifies the consent.

An invalid marriage contract caused by defective consent is either void or voidable in Indian Civil Law. A contract is said to be void when it is not enforceable by the law, whereas a voidable contract can be enforced by the law and is considered valid until it is avoided at the option of the party who has the right to do so.

Indian Civil Law recognizes fraud as one of the grounds for the annulment of marriage. The civil personal laws of different religious communities, while accepting the general definition of fraud, explain its application to a marriage contract with slight variation. The Indian Contract Act defines the term “fraud,” while the Hindu Marriage Act

and the Indian Divorce Act do not give a specific definition of fraud. Since a marriage is regarded as both a sacrament and a contract by Hindus and Christians, jurisprudence has made it clear that the definition of fraud given in the Indian Contract Act cannot be applied to a marriage case. Therefore, courts have to rely on the personal laws of the party or parties while making court decisions on marriage nullity cases involving the ground of fraud.

The Hindu Marriage Act, 1955, which was amended in 1976, has laid down specific guidelines concerning the notion of fraud and the circumstances in which it could vitiate marriage consent. The provision indicates that a marriage consent obtained through fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent could be annulled by a decree of the court. Deception in regard to a material fact in marriage contract will depend on the circumstances of each case. The material fact is one which leads the party to decide either to marry or not to marry a particular person. Therefore hiding a fact which exists and projecting a fact which does not exist is regarded as fraud played on the other party to obtain his/her consent to the marriage. Jurisprudence acknowledges the fact that fraud strikes at the very foundation of marriage and it destroys mutual trust which is absolutely necessary to sustain and nurture a marital relationship that is designed to be perpetual by its very nature.

The Special Marriage Act, which views marriage purely as a contract, adopts the definition of fraud provided in the Indian Contract Act and applies it to all marriages performed according to the regulations of the Special Marriage Act.

The Indian Divorce Act which deals with Christian marriages has fraud as a ground for the annulment of marriage. This Act too does not contain a definition of the term “fraud.” The latest trend in civil jurisprudence clearly acknowledges the fact that in the absence of statutory law on particular matters related to marriage, the personal law of the parties is to be applied. Thus, for example, the Catholics have canon law as their personal law. According to developing jurisprudence, therefore, in the absence of any clear definition of fraud in the statutory law of the country, the provisions of canon law must be applied by the civil courts.

This new trend in making decisions based on canonical principles governing fraud is a welcome innovation in civil law and it offers hope for Catholics in India who might want to have access to declarations of nullity of their marriage in order to enter upon a new marriage in accord with the civil law of the country. The decision of 16 November 1998 by Sridevi is a clear example of this bold new approach which incorporates into civil law the definition and elements of fraud and the relevant principles explained in canon law and applies them to the concrete case in establishing the nullity of the marriage consent obtained through fraud.

It is important to add a note here in regard to the retroactivity of the Indian civil law on fraud. The decisions or decrees of Indian civil courts are based on existing civil laws on this matter. Because of the existence of statutory laws on the effect of fraud on marital contract, the retroactivity was not and is not going to be an issue for the civil courts if they choose to apply canon law in the absence of statutory law on certain matters. But this will be



a problem the Church will have to consider if it is going to recognize decisions of civil courts declaring marriage null on the grounds of defect of consent, especially on the caput of deceit. In the following chapter we will attempt to provide a critical synthesis of the convergences and divergences between the two systems of law in order to ascertain the validity of our principal hypothesis that the Church in certain instances can recognize the decrees of nullity of marriage issued by civil courts.

## **CHAPTER FOUR**

### **WHITHER FROM HERE? A COMPARATIVE SYNTHESIS OF THE CONVERGENCES AND DIVERGENCES BETWEEN THE TWO SYSTEMS OF LAW ON DECEIT**

#### **INTRODUCTION**

Since the marital relationship is founded on human nature, the institution of marriage in its essential characteristics is preordained by God and is not subject to human legislation, whether ecclesiastical or civil. This does not mean that legitimate authority may not enact certain rules and regulations concerning the circumstances and conditions under which marriage may be validly and lawfully contracted, or invalid and null. However, both laws, ecclesiastical and civil, consider and treat "marriage" - a sacred institution - with utmost care and have their own regulations regarding marriage.

In the present chapter, our primary concern is to make a comparative synthesis of the convergent and divergent elements on the nature of marriage, the elements which render the marriage null and void when deceit is involved while entering into a marriage contract, the understanding of nullity and some important procedural aspects as found in both systems of law. This comparative analysis should help us in answering the question whether the Indian civil decrees of nullity of marriage on the ground of deceit are compatible with the Church law and whether they could eventually be recognized and accepted by the ecclesiastical courts.

## 4.1 - THE UNDERSTANDING OF MARRIAGE IN ECCLESIASTICAL LAW AND INDIAN CIVIL LAW

Marriage as a complex, human reality existed always in one form or another with social, cultural and religious dimensions. From the beginning, marriages were governed by the existing local customs and laws. Christian marriages also were conducted according to the rules and regulations of society.<sup>1</sup> However, gradually abuses and practices incompatible with the teaching of Christ and Christian morality began to creep in. In order to bring order and stability, the Church elaborated the doctrine on Christian marriage, in particular, on the developing understanding of the sacramentality of marriage and the causes leading to nullity of marriage.<sup>2</sup> The Church and the State have developed their own laws on marriage. A comparative analysis of the legislation on marriage in these two systems will enable us to understand the implications of differences between them for practical and pastoral approaches to marriage nullity cases. We will begin by examining the substantive aspects of marriage.

### 4.1.1 – Nature of Marriage

For ecclesiastical law (*CIC* c. 1055; *CCEO* c. 776), marriage is a divinely instituted human reality which comes into existence through a covenant-contract between a

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<sup>1</sup> It is said that during the first millennium of the Christian era, the bishops recognized and accepted the jurisdictional power of the state governments in matrimonial affairs. See H. Crouzel, "Divorce et remariage dans l'Église primitive," in *Nouvelle revue théologique*, 98 (1976), pp. 912-913. See also Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, p. 272.

<sup>2</sup> Historians of Canon Law differ in their view as to when the Church assumed control over marriage cases. It seems that it was only by the end of the pontificate of Alexander III, in 1181, that the Church had claimed "exclusive authority" over marriage and matrimonial causes. See P. Delhaye, "The Development of the Medieval Church's Teaching on Marriage," in *Concilium*, 6 (1970), p. 84.

woman and a man who are legally capable. By its very nature, this covenant is aimed at creating a permanent and exclusive relationship between the spouses; it is brought about by their free mutual consent, and is ordered toward the good of spouses and the procreation and rearing of children. If both contracting parties are baptized, by that very fact their marriage is also a sacrament.

Canon law requires that the mutual consent of the spouses be expressed within the prescribed form for validity, unless the law has provided otherwise. The contracting parties themselves, therefore, cannot establish its terms and conditions, nor can they by mutual agreement alter the nature of the marital status resulting from the marital covenant. Therefore, in the marriage contract, the only choice left to the parties is whether to marry or not to marry; or to marry this person or that person.

Indian civil law too describes marriage as a human reality, a social institution, a status and a contract. The marriage contract is brought into existence between a man and a woman<sup>3</sup> who are legally capable, through the exchange of free mutual consent with the purpose of establishing a partnership for a permanent conjugal and family life. Its nature, consequences and incidents are governed by law and not subject to stipulation. It is the requirement of the civil law that the consent of the parties must be exchanged in public within the given form. The marriage contract gives rise to a status,<sup>4</sup> conferring on the

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<sup>3</sup> Anurag Anand v. Sunita Anand, AIR 1997 Delhi 102: "The marriage is a union between a man and a woman [...]."

<sup>4</sup> See George Sebastian v. Molly Joseph, 1994 (2) KLT 308: "[...] from the practical point of view, a marriage brings new status to the parties as husband and wife and the new status stands recognised to all concerned."

contracting parties the status of husband and wife.<sup>5</sup> It also confers a status of legitimacy on the children. From the marriage contract spring forth certain mutual rights and obligations.<sup>6</sup>

The ecclesiastical understanding of marriage is not totally alien to its civil understanding except that the former has a religious connotation while the latter remains in the realm of secular reality. Otherwise, canon lawyers can see a parallel between the ecclesiastical and civil description of marriage. The Church and the State admit that marriage, by its very nature, is a contract which gives rise to a status. This contract can be brought into existence in no other way than through the free mutual consent of the contracting parties. Consequently, both laws agree that consent of the parties is essential to the establishment of the marital bond.

The Church and the State claim that the marriage contract established through the exchange of consent is permanent in nature.<sup>7</sup> However, unlike the Church, the State when it advocates the permanence of marriage is not a strict disciplinarian on this particular issue but speaks only of the ideal and of the objective nature of marriage. Indian civil law recognizes that marriage is made for life and promotes life-long commitment. The parties to the marriage cannot stipulate to live together for a fixed period of time only and then contract a new marriage. It means the parties themselves cannot dissolve their marriage.

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<sup>5</sup> Ibid.; *Jean Emeline v. Joseph Taylor*, AIR 1966 Madras 155: "The Jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly [...]."

<sup>6</sup> See *George Sebastian v. Molly Joseph*, 1994 (2) KLT 308: "As adjunct to it mutual rights and obligations sprout therefore..."; Diwan, *Law of Marriage and Divorce*, p. 53.

<sup>7</sup> *CIC* c. 1056; *CCEO* c. 776 §3.

The rationale is that marriage creates a civil status and bond which is not subject to dissolution by mere agreement of the parties. However, the State is somewhat adaptable towards those citizens whose marriage is on the rocks and has made provisions to obtain relief from a marital bond when the conjugal life between the two can no longer be carried out smoothly.

The church law claims that marriage by its nature is intended to be exclusive, in the sense that one person cannot be bound to more than one person, either simultaneously or successively. A total commitment for life can be made only to one person. Therefore, a Christian marriage is constituted by the union of a man with a woman. This law has its foundation in the Scripture, i.e., on God's creating human beings male and female whom He blessed to increase, multiply, fill the earth and conquer it.<sup>8</sup> Consequently, the procreative end of marriage is considered as a duty of nature (*officium naturae*) to continue the human species. Once a marriage is contracted validly, there exists a bond which cannot be dissolved by the parties themselves nor by any human authority whether civil or ecclesiastical.<sup>9</sup>

Heterosexual marriage is upheld in Indian civil law too. Two males cannot marry each other; neither may two females.<sup>10</sup> This norm has its foundation in nature. One of

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<sup>8</sup> See Gen. 1, 27-28.

<sup>9</sup> See Mt 19: 3-6; Mk 10: 6-9.

<sup>10</sup> *Corbett v. Corbett*, (1970) 2 All ER 33: The court held that the parties to the marriage have to be male and female respectively. There cannot be a valid marriage between two persons belonging to the same sex.

the primary aims of marriage is procreation and education of children.<sup>11</sup> The legislator perceives that a union between the persons of the same sex will invalidate the purpose of marriage. Such a union is considered to go against nature. Furthermore, in general, Indian civil law demands monogamy,<sup>12</sup> and violation of this norm is liable to prosecution. Neither polygamy nor polyandry is approved by the law.<sup>13</sup>

#### 4.1.2 – Marriage as a Partnership

Ecclesiastical law states that marriage establishes a *consortium*, an intimate partnership of life and love (c. 1055). The concept underlying ‘*consortium*’<sup>14</sup> stands for marriage itself and for the totality of rights and duties of marriage. It has much wider implications than it looks, for it includes both communion of bodies and of souls. This partnership is for the good of the spouses, the *bonum coniugum*, which consists of

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<sup>11</sup> See Peter v. Moly, 1997 (2) KLT 897: “To procreate children is one among the holy aims of marriage.” In his decision of 24 February 1995, T.V. Ramakrishnan gives us a vivid explanation of the purpose of marriage: “Besides the procreation and education of children, marriage has for its object the mutual society, help and comforts, that one ought to have of the order both in prosperity and adversity. [...] It is a contract formed with a view not only to the benefit of the parties themselves but to the benefit of the third parties, to the benefit of the common offspring and to the moral order of the civilised society.” See Mary Sonia v. Union of India, 1995 (1) KLT 644 (FB) no. 22.

<sup>12</sup> One should keep in mind here that although Indian civil law demands monogamy, it does respect the personal law of the Muslims which permits more than one wife. In the same way, it also recognizes the culture and the customary rules of certain tribal groups which allow a man to marry a second woman to have a male progeny. However, this does not apply to Christians.

<sup>13</sup> Prakash Chander v. Parmeshwari, AIR 1987 P&H 37.

<sup>14</sup> “*Totius vitae consortium*” is the Latin expression used in the canon. The word *consortium* literally means a close association, partnership, connection, company of persons sharing the same fortune, fate and destiny. See Antony Pinheiro, *Marriage Law in The Latin Code & in The Eastern Code*, Alwaye, Kerala, Pontifical Institute Publications, 1995, p. 32; Örsy, *Marriage in Canon Law*, p. 51. Canon law has not defined marital *consortium*. Once law gives the definition, it will lose its flexibility. According to Mendonça, since marriage is a natural, social, human institution, *consortium* must be understood and interpreted according to the culture and customs of the people. It will help to find wider implications to the concept of *consortium*. See Mendonça, “The Theological and Juridical Aspects of Marriage,” p. 274.

"obligativity, mutuality, inseparable intimacy of life, cohabitation and conjugal love."<sup>15</sup> Therefore, the good of the spouses is one of the essential elements of marriage.<sup>16</sup> Canon law has defined and elaborated the meaning of partnership and stressed its importance. Indian civil law, although it explains marriage as a partnership, has not defined what elements are included in this marital partnership. However, we can derive from the Indian jurisprudence some insights into what is meant by partnership, i.e., mutual support, comfort and cohabitation.

The purpose of marriage in canon law is the welfare or good of the spouses and of children, that is, procreation and education of children. A person who is sterile can contract a valid marriage although he or she is aware of the fact of being unable to achieve fully the purpose of marriage, provided this person remains open to procreation. However, someone who positively excludes any element contained in the purpose of marriage contracts invalidly. As explained above, in the Indian civil law, the purpose of marriage seems to be mutual support, procreation and rearing of children. Yet, the civil law considers mutual support and companionship as the primary aim of marriage, because there may be marriages entered into by parties who are beyond their reproductive years.<sup>17</sup> Both laws aim at the same goal and purpose when they speak of marriage. The difference is that,

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<sup>15</sup> See Roger A. Kenyon, "Nature and Nullity of Matrimonial Consent," in *StC*, 14 (1980), p. 110.

<sup>16</sup> See Lawrence G. Wrenn, "Redefining the Essence of Marriage," in *The Jurist*, 46 (1986), p. 535. The author further explains that partnership, benevolence, companionship, friendship, caring and love are the essential qualities that constitute the essence of the good of the spouses (pp. 537-547).

<sup>17</sup> See James A. Ballentine, *Law Dictionary with Pronunciations*, Rochester, NY, Lawyers' Cooperative Publishing, 1948, p. 797.



unlike the canon law, civil law does not have any explicit norm stating the invalidity of a marriage contracted while positively excluding one of the elements contained in the purposes of marriage. This is primarily because civil law treats marriage as a contract and, therefore, stresses the elements of a contract.

#### **4.1.3 - Marriage as a Sacrament**

In ecclesiastical law every valid marriage contracted between two validly baptised persons is not merely a social institution with its civil effects but also a sacrament reflecting the union of Christ with the Church. The matrimonial contract, which comes into effect through the mutual consent of spouses, is elevated to the supernatural order by Christ, who with His divine authority raised the natural institution of marriage to its pristine purity as regards its unity and indissolubility. "For this reason a matrimonial contract cannot validly exist between baptized persons unless it is also a sacrament by that fact" (c. 1055, §2). The Church, therefore, claims control of the marriage contract, even when it is a non-sacramental one, provided one of the parties to the marriage is Catholic.<sup>18</sup>

In the Latin Church, the ministers of this sacrament are the contracting parties themselves. The officiating minister merely acts as an official witness and does not administer the sacrament of marriage.<sup>19</sup> If only one of the parties is baptised, the marriage is not a sacrament, but it is valid.

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<sup>18</sup> See *CIC* c. 1671: "Marriage cases of the baptized belong to the ecclesiastical judge by their proper right."

<sup>19</sup> The common opinion is that in the Eastern Churches the minister of the sacrament is the officiating minister and not the contracting parties.

Indian civil law recognizes a Christian marriage performed according to the set regulations of the canon law as valid and binding for all its legal purposes. It does not consider marriage as a sacrament but as a social institution, a contract. However, some of the jurisprudence acknowledges the sacredness of marriage and respects the concept of the Christians and the Hindus that a marriage performed according to their religious rites and custom is both a sacrament and a contract.<sup>20</sup> But in court proceedings related to a marriage contract, no divine or spiritual connotation is attributed to it. It remains a human, secular reality and a contract, but not like a commercial one. It is the parties themselves who bring about this human reality and cause its existence through the exchange of their consent before a Marriage Officer appointed by the state government.

Canon law as well as Indian civil law acknowledge the fact that marriage is a human reality and is sacred. It can come into existence only through the agreement of the parties involved in the contract. Ecclesiastical law adds divine intervention in the human reality of marriage between two baptized persons, raising it to a state of sacrament. Civil law does not deny this; rather it respects the religious view of the Hindus and the Christians that marriage is a sacrament especially when the marriage is performed according to their religious rules and regulations, but it treats it as a contract for civil effects.

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<sup>20</sup> See Anurag Anand v. Sunita Anand, AIR 1997 Delhi 94: "It is a sacrament because certain customary rights and ceremonies are performed for the completion of marriage. It is a contract as the law speaks of the capacity of the spouses to enter into an alliance for a marriage. [...] Marriage has both religious as well as secular aspects. Therefore, the marriage has to be treated both as sacrament and as a contract."

#### 4.1.4 - Marriage as a Covenant-Contract

In ecclesiastical perspective marriage is a covenant of love and fidelity between a man and a woman.<sup>21</sup> Covenant (*foedus*) is a biblical expression. God's relationship with humanity is expressed in terms of a covenant, a solemn treaty of love and fidelity. A covenant of marriage is contractual in nature. Therefore, it is also a form of contract which consists in the exchange of mutual consent of the contracting parties who are legally capable.

However, in a covenant the details are not fixed at once; the rights and duties are not carefully outlined. It is an agreement which forms a relationship which is equal in binding force to a blood relationship. Consequently, such a relationship does not cease to exist even when the consent to the covenant is withdrawn voluntarily or involuntarily by one or both of the parties.<sup>22</sup> Thus, a covenant embodies a much more personalistic approach.

Indian civil law regards marriage as a contract in the sense that it is brought into existence through the exchange of mutual consent of the contracting parties. This law provides that this contract is not merely a commercial one but a contract *sui generis*. For marriage consent to be valid, the parties to the contract must be legally competent. The exchange of consent must be performed in the presence of a Marriage Registrar and three

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<sup>21</sup> Cf. John Paul II, Apostolic Exhortation, *Familiaris consortio*, Rome, 22 November 1981 n. 13; English translation, *Apostolic Exhortation Familiaris consortio of His Holiness Pope John Paul II*, Ottawa, Canadian Conference of Catholic Bishops, 1981, n.13, pp. 22-23.

<sup>22</sup> See Vadukumcherry, *Marriage Laws in Canon Law and Civil Law*, p. 16.

witnesses.<sup>23</sup> Marriage Registrars are the official witnesses appointed by the state Government. In Indian civil law, an episcopally ordained minister is recognized as an authorized official at marriage. Therefore, the Christian parties are not bound to present themselves to a public official; they need only observe the required form of the Church.

It is a fact that personalistic elements are not part of an ordinary contract. However, the marriage contract in Indian civil law cannot be reduced to a merely commercial contract, and the personal elements in the marriage contract cannot be denied. A marital contract deals with the relationship between two human beings through which a partnership is established. Civil law is aware of this fact and promotes a healthy, lasting partnership.<sup>24</sup>

In a "covenant," fundamentally there are no formal legal terms. Legalistic prescriptions of rights and duties are secondary; the basic commitment of persons to fidelity and spontaneity is the essence of a covenant. Consequently, it is primarily a personal relationship and mutual commitment. However, from a human point of view, the commitment must be specified by legal terms and prescriptions together with warnings of what will happen if the covenant is violated. Thus, in the covenant the aspects of a legal contract are present, but they do not exhaust it.<sup>25</sup> The perception of marriage in canon law emphasizes the legal and contractual reality as being automatically coupled with the

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<sup>23</sup> See *The Special Marriage Act, 1954*, Section 12 (2).

<sup>24</sup> See *Mary Sonia v. Union of India*, 1995 (1) KLT 644.

<sup>25</sup> See Pinheiro, *Marriage Law*, pp. 30-31.

sacramental reality when a valid marriage contract is concluded between two baptized persons.

Canon law demands that in order to establish a marriage covenant validly it is necessary and sufficient that the contracting parties be present together, either personally or by proxy (*CIC* c. 1104). The legislator provides for marriage by proxy in the context of marriage taken as a contract. In making a contract, a “representative,” a proxy by *mandatum*, is permitted and documents are signed by the proxy as well as the witnesses.

From this analysis we observe that canon law views marriage as a contract in its formation entered into by the free consent of the parties but considers it a sacrament in its consequence/effect/result. Civil law, on the other hand, recognizes the sacredness of marriage performed within religious rites but for legal purposes treats marriage as a contract with its contractual elements. A marriage covenant has a more personalistic and sacred connotation than a juridical content. A civil marriage contract is more juridical than personalistic in its content.<sup>26</sup> Indian civil law does not provide any provision to enter into a marriage contract through proxy because it regards the marriage contract more than a commercial contract. A marriage through proxy emphasizes the contractual nature of marriage.

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<sup>26</sup> See L. Örsy, “Christian Marriage: Doctrine and Law: *Glossae* on Canons 1012-1015,” in *The Jurist*, 40 (1980), pp. 291-292.

#### 4.1.5 - The Requirements of Marriage Consent

The mutual consent of the spouses is the efficient cause of the marriage covenant, which, were it to be deficient, cannot be supplied by any human authority since it is a personal act. Therefore, this consent should be true and real for the validity of a marriage. It must be a human act. It must be a personal act, in the sense that the act of consent should be elicited by a person who is qualified before the law<sup>27</sup> to have juridical effect. It must be deliberate and free. Otherwise, it cannot be a human act. It should not be induced or extorted by force or fraud. We must recognize, however, that the externally declared consent can be a coerced one and not necessarily conform to the interior assent of the mind. Causes which would render the declared consent defective or invalid would also thereby account for the nullity of the marriage.

A contractant who suffers from a grave lack of discretionary judgement is not regarded as capable of giving a valid consent (*CIC* c. 1095; *CCEO* c. 818). Mental capacity of the contracting parties, therefore, is a prime requirement for eliciting a valid marriage consent. The due mental discretion embraces all the powers of the mind and soul, namely, the cognitive, deliberative, and volitional faculties, and the freedom of choice, which make up the deliberate, mature and free human act of marriage consent.<sup>28</sup>

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<sup>27</sup> Person qualified in law means that he/she should be free from impediments and be capable of performing a human act.

<sup>28</sup> See Vadukkumcherry, *Marriage Laws in Canon Law and Civil Law*, p. 49.

In Indian civil law too, a marriage contract is established through the exchange of mutual consent of the contracting parties. Without a personal consent, there is no marriage. Consequently, consent is the indispensable, internal constitutive element in the making of a marriage contract. Matrimonial consent must be an act made with free will and with full knowledge within a prescribed form.<sup>29</sup> A person who does not have requisite use of reason, or someone under the influence of alcohol is not considered capable of making a valid consent.<sup>30</sup> Indian civil law does not recognize as valid a marriage consent obtained through fraudulent means since it is the result of error caused by deceit. Likewise, consent given as a result of force or fear is not considered to be a valid matrimonial consent.<sup>31</sup> For, such an act is carried out against one's personal decision and will, although performed with some knowledge and co-operation. Matrimonial consent in civil law must be understood in this perspective and should not be forced or done without the intervention of intellect and free will.

Marriage is also a personal act, which can be performed only by a person who is legally capable.<sup>32</sup> An idiot or a lunatic is not considered as legally capable of giving valid consent to marriage.<sup>33</sup> The contracting parties alone can give consent to their marriage. It

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<sup>29</sup> See *Dr. Thomas Titus v. Mrs Roha Titus*, ILR 1992 (2) Ker. 667: "in the absence of free and voluntary consent, observations of rituals, formalities or other ceremonies will not make a valid marriage."

<sup>30</sup> See *The Indian Divorce Act, 1869*, Section 19 (3); *The Special Marriage Act, 1954*, Section 4 (b [i]).

<sup>31</sup> *The Indian Divorce Act, 1869*, Section 19 (4).

<sup>32</sup> *Ibid.*, Section 19 (1); *The Special Marriage Act, 1954*, Section 24 (ii).

<sup>33</sup> See *The Indian Divorce Act, 1869*, Section 19 (3).

cannot be supplied by another person. The parents cannot give the matrimonial consent on behalf of their children.

For canon law and civil law the free and deliberate consent of the spouses is an absolute necessity to enter into a valid marriage contract. It cannot be supplied by anyone other than the contracting parties. However, there exists a slight difference between the two legal systems. In canon law this matrimonial consent can be manifested through a representative (proxy)<sup>34</sup> of the absentee party (*CIC* cc. 1104, 1105; *CCEO* c. 837 §2), whereas in civil law the marital consent must be exchanged only by the spouses themselves.

According to canon law, once a proper and valid consent is given, it cannot be revoked. It is permanent and irrevocable. By consent, an irrevocable covenant is established in which the contracting parties give and accept each other for life. Civil law does admit that the matrimonial consent is permanent and stable. However, in the case of irretrievable breakdown of marriage, it offers provisions to free oneself from the marriage bond which came into existence through the manifestation of mutual consent.

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<sup>34</sup> We should note here that marriage by proxy is a complex issue. On the one hand the law is clear in stating that the consent of each party is the efficient cause of marriage and the law also states that no human power can supply that consent. In a marriage by proxy, the consent exchanged during the wedding ceremony is that of the party, but expressed by the proxy. However, a problem could arise when the validity of a marriage by proxy is challenged on the ground of defective consent. For example, the proxy might have been intoxicated when the consent was expressed, or the one who gave the mandate to the proxy might be intoxicated at the time of exchanging consent. Now the question is: whose consent should be considered defective in such a case?



#### 4.1.6 – Pertinent Rights of the Spouses

A valid marriage contract, whether canonical or civil, gives rise to many rights and obligations for the contracting parties. These are to be accepted and respected by the spouses for a better, lasting relationship. If they are neglected or violated, the marriage contract can be at stake.

In canon law, from a valid marriage contract there arise equal rights and obligations between the contracting parties with regard to those things which pertain to the partnership of conjugal life (*CIC* c. 1135; *CCEO* c. 777). In spite of social and cultural inequalities observed in different parts of the world, canon law imposes equal rights and obligations on the spouses towards one another. Although it is almost impossible to compile an inclusive list of the essential rights and duties of marriage, their implications have been clarified to a certain extent through the jurisprudence of the Church tribunals. Various tribunal decisions have pointed out, among other things, that the spouses are entitled to mutual respect and support, caring and sharing, cohabitation and interpersonal relationship.<sup>35</sup>

Indian civil law has not specified the rights and duties of the married couples.<sup>36</sup> Nevertheless, mutual support, caring, cohabitation and rearing children are some of the rights and duties of spouses found in Indian jurisprudence.

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<sup>35</sup> See Vadakumcherry, *Marriage Laws in Canon Law and Civil Law*, p. 13.

<sup>36</sup> Speaking of the rights of the spouses, the law only states that those who have entered into the marriage contract will have the same rights. See *The Special Marriage Act, 1954*, Section 20.

## 4.2 - DECEIT IN THE MARRIAGE CONTRACT

Though marriage is recognized as a sacred, human reality and the parties are expected to be honest in establishing an intimate partnership of life and love, there are marriage cases in which deceit has played a large role. Since in India, unlike in Western countries, most marriages are still arranged by the parents of the parties, deceit cases are much higher in number than in Western countries where marriages are usually contracted after a prolonged period of dating and courtship.

### 4.2.1 – Deceit Related to Marriage in Ecclesiastical Law

Ecclesiastical law defines deceit as a deliberate deception perpetrated by one party upon the other by deliberate concealment or wilfully misrepresenting real facts regarding certain matters, with the intention of obtaining the consent of the other party to the contract. In general, a contract entered under the influence of deceit is valid, but rescindable through the sentence of a judge.<sup>37</sup> The reasoning behind this principle is that the person consenting to such a contract is presumed to enjoy sufficient knowledge and will to place a human act. However, the law now provides an exception to this general rule in cases such as a marriage contract where deceit is employed to bring about the act of consenting; in such instances, the consent is not treated as valid (*CIC* c. 1098, *CCEO* c. 821).

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<sup>37</sup> See *CIC* c. 125 §2; *CCEO* c. 932.

Deceit often leads a person to error and affects that person's deliberation inducing him/her to place an act which in normal circumstances he/she would not have placed. Therefore, in case of a marriage it is the deceitfully induced error that would vitiate the juridic act of marital consent.

In marriage cases, deception would normally concern qualities of the parties which are expected to be either present or absent in all marriages. When entering into a marriage contract, the contractants are entitled to expect in the other partner the presence of certain positive qualities, which are normal and essential for a sound relationship or the absence of certain negative qualities, which are not desirable.<sup>38</sup> Where qualities opposed to the common expectation are present in one of the parties, he/she should make the other party aware of them prior to the marriage.

In the case of fraud in a marital contract, although the contractants may possess knowledge and will in eliciting their consent, their knowledge is considered to be erroneous. The party who attempts to obtain marital consent through fraud creates an error in the mind of the other party regarding a given quality. In other words, the agent of the deceit presents a totally or partially distorted image of self to the other, either by deliberately concealing certain undesired qualities or pretending to have the qualities desired by the other. As a result, on the basis of the erroneous knowledge, the victim of the

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<sup>38</sup> If the absence of positive qualities such as heterosexuality, fertility, sound mind, etc., are deliberately hidden, or the existence of negative qualities such as homosexuality, alcoholism, drug addiction, sexual dysfunction, previous marriage, criminal past, mental illness, contagious sickness, pregnancy etc., are concealed, it will amount to deliberate deception perpetrated to obtain the consent of the other party. See Pospishil, *Eastern Catholic Marriage Law*, p. 343.

deceit makes a decision which would not have been made if the reality were known. Although an error about a quality of a person does not invalidate marriage unless it is directly and principally intended, nevertheless, such an error can invalidate marriage if it is the result of deceit.<sup>39</sup>

The act of deceit can also be perpetrated by someone other than the contracting parties. Thus, for example, the parents or relations of one of the parties may lead the other to error by wilfully providing erroneous information with the intention of obtaining his/her consent.

Whether deceit is perpetrated by one of the spouses or by a third party, the victim of the deceit is deprived of the knowledge needed for a correct decision. Therefore, what is given and accepted in the exchange of consent is not real and makes the material object of consent defective.<sup>40</sup>

Ecclesiastical law requires that the following elements must be present for a marriage to be declared null on the ground of deceit.

- Deceit must be employed with the intention to secure the consent of the other party to marriage.
- The deceit must be related to a quality of the contractant and it must, by its very nature, be such that it can gravely disturb the partnership of conjugal life.
- The quality in question must be either present (or absent) at the time of exchanging consent.

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<sup>39</sup> See Beal, "Diriment Impediments in General," p. 1307.

<sup>40</sup> Ibid.

- The person who is deceived must be unaware of fact that the quality which is the object of the deceit is (or is not) present in the other person.

#### 4.2.2 - Deceit Related to the Marriage Contract in Indian Civil Law

In the Indian Contract Act, active concealment of a fact with the intent to induce another person to enter into a contract constitutes fraud.<sup>41</sup> It is the general principle of the law on contracts that where one of the contracting parties was induced into the contract either by false representations or by fraudulent concealments of the other party, the contract is voidable at the option of the party defrauded, whatever be the particular fact or circumstance misrepresented or concealed, provided that it induced the defrauded party to enter into the contract.

In the civil courts of India, this general principle is modified in the case of the marriage contract in keeping with the sacredness, importance and the social necessity of making the marriage contract as permanent as possible.<sup>42</sup> Therefore, it is generally held that deceit/fraud which would render an ordinary commercial contract voidable will not fundamentally serve as a sufficient ground for annulling a marriage contract.<sup>43</sup> A general understanding of the rule is that the deceit relied upon to annul a marriage must affect the

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<sup>41</sup> See *The Indian Contract Act, 1872*, Section 17; the same is found in ecclesiastical law: *CIC* c. 125 §2; *CCEO* c. 932.

<sup>42</sup> See *Mary Sonia v. Union of India*, 1995 (1) KLT 661 (F.B.): “Marriage is indisputably an institution of great importance for human beings both individually and socially. [...] its continued existence in a peaceful and healthy atmosphere is a matter of great concern for the individuals directly involved and the society as a whole.” It is ideal “to continue the marital relationship as a life long one as far as possible.”

<sup>43</sup> See *Anurag Anand v. Sunita Anand*, AIR 1997 Delhi 102.

essentials of the marriage relation. In *Dastane v. Dastane*<sup>44</sup> it was held that in matrimonial cases fraud must be proved beyond reasonable doubt to establish the nullity of a marriage contract. Other civil courts, outside India, where deceit is also recognized as a ground to annul a marriage, hold the same view that the deceit in a marriage contract should be related to facts which are essential to the existence of a marriage relation.<sup>45</sup>

It is argued that the marital community depends on the honesty of the spouses. Honesty about one's identity and total personality is essential for community of life. Therefore, deceit about an essential quality of a spouse prevents the true joining of wills; rather, one party is manipulating the will of the other. It also makes the consent defective as a result of error caused by deceit in the party who is being deceived. Every deceit forms a false concept of an object, creating error in the mind of the person who is deceived. However, every error does not have its origin in deceit.<sup>46</sup>

It is generally held that deceit employed in bringing about the marriage contract must be extremely serious in order to serve as a ground for annulling a marriage. Of course some judges have been stricter than others in applying this rule. Although the law has not specified the elements which make a deceit serious enough to nullify a marriage, one can draw the essential or significant elements from jurisprudence and decisions given by various judges.

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<sup>44</sup> *Dastane v. Dastane*, AIR, 1975 SC 1534.

<sup>45</sup> For example, one could quote jurisprudence from the United States where in *Safford v. Safford*, 224 Mass. 392, 113 N.E. 181 (1916) we read: "In order to avoid the contract and justify a decree of nullity, the fraud and deception must relate to facts essential to the very existence of the marriage relation."

<sup>46</sup> See *Saly Joseph v. Baby Thomas*, 1999 (1) KLT 82.

Thus, in the Indian Civil Code, for deceit to serve as a ground for the annulment of a marriage the following elements must be present:<sup>47</sup>

- The marital consent of one of the contracting parties must have been obtained through fraudulently concealing some quality (or absence of it) of the other party.<sup>48</sup>
- The object of the deceit must be unknown to the other party and deceit must have led directly to the decision to marry.<sup>49</sup>
- The deliberate concealment must have been of a serious nature and such as to disturb the essentials of the marital union.<sup>50</sup>
- The deceit employed must have been the inducing or motivating cause of the marriage to the extent that, if the deceit had not been practiced, the marriage would not have taken place.<sup>51</sup>

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<sup>47</sup> In the decision of *Saly Joseph v. Baby Thomas* the honourable judge Sreedevi states that for deceit to be an invalidating factor, four necessary elements must be proved: “(1) Deceit must be deliberately perpetrated in order to obtain consent to marriage; (2) The error produced must be related to some quality or lack of it in one or both of the parties; (3) The quality must be unknown to the other party and deceit must have led directly to the decision to marry; and (4) The discovery of the absence or presence of the quality must precipitate the end of the marriage.” See *Saly Joseph v. Baby Thomas*, 1999 (1) KLT 74.

<sup>48</sup> See *Joy v. Shilly*, 1995 (2) KLT 546: “concealing the fact that one of the parties was insane at the time of marriage amounts to fraud.”

<sup>49</sup> See *Bindu Sharma v. Ram Prakash Sharma*, AIR 1997 Allahabad 431: a misrepresentation or false statement or concealment “must be something vital touching [...] and such as it definitely induced or influenced consent”; *Benjamin Doming Cardoza v. Mrs Gladys Benjamin Cardoza*, AIR 1997 Bombay 175: “[...] that the marriage solemnised between the petitioner and the respondent according to Christian rites on 3-4-1983 was performed by the petitioner without having knowledge about the operation (*removal of fallopian tubes*) which the respondent underwent in Dec. 1976 [...] and further that had this information been given by the respondent-wife to the petitioner-husband, the petitioner would not have given consent to the said marriage. [...] since his consent was obtained by *suppressio veri*, he, the petitioner is entitled to get a decree of nullity of his marriage”; *Saly Joseph v. Baby Thomas*, 1999 (1) KLT 82: “[...] if she was aware of the qualification of the respondent that he has not passed Pre-degree and A.C. Mechanism Diploma and that he had worked only for some time in Baharin as a Salesman she would not have given her consent for the marriage as she wanted a man having a decent job in the Gulf.”

<sup>50</sup> See *Anurag Anand v. Sunita Anand*, AIR 1997 Delhi 103: “when a marriage is arranged through the exchange of biographical data, the parties act “on the basis of the bio data issued, for giving his/her consent for marriage with the other party. If material facts and circumstances declared in the bio data are found to be false and the falsity is striking the very foundation of the marriage becomes shaky. Mutual confidence is gone.” It leads to the failure of the purpose of marriage.

<sup>51</sup> See *Saly Joseph v. Baby Thomas*, 1999 (1) KLT 74: “for deceit to nullify a marriage contract

- The discovery of the deception must cause the breakdown of the marriage.<sup>52</sup>

Courts, however, refuse to annul a marriage on the ground that the defendant made a mis-statement or an over-statement regarding one's quality or qualification, since this will not amount to fraud unless it is in respect of a factor vital to the marriage alliance itself.<sup>53</sup> For, in an arranged marriage, a certain amount of exaggeration in representation is often experienced to make an impression on the other party.<sup>54</sup> Likewise, chastity is not a requisite for the validity of a marriage, and hence the concealment of previous unchastity by a woman is not in itself a ground for annulment. The law does not consider it an obligation to disclose about chastity, unless the woman's chastity is an implied condition.<sup>55</sup> However, concealment of the fact that one had been previously married, given birth, or divorced or had previously been insane amounts to fraud nullifying a marriage contract.<sup>56</sup>

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deceit must have directly led to the decision to marry.”; *Peter v. Moly*, 1997 (2) KLT 901: “If it had been disclosed to the petitioner that the respondent was unable to have a married life and to procreate children and that she had not menstruated at the time of marriage then the petitioner would not have consented for the marriage”; *Bindu Sharma v. Ram Prakash Sharma*, AIR 1997 Allahabad 431: “The petitioner must show that but for such false representation or statement or concealment she would not have married the respondent.”

<sup>52</sup> See *Saly Joseph v. Baby Thomas*, 1999 (1) KLT 82.

<sup>53</sup> See *George Sebastian v. Molly Joseph*, 1994 (2) KLJ 303.

<sup>54</sup> See *Moore v. Valsa*, 1991 (2) KLT 504.

<sup>55</sup> See *Dickson*, *Pallock's Principle of Contract*, p. 548.

<sup>56</sup> See *Rama Kanta v. Mohinder Laxmidas Bhandula*, AIR 1996 Punjab and Haryana 98: In this case the woman, the respondent, was married first to Ashok Kumar Kalra, and she gave birth to a son by undergoing a caesarean operation. Later she divorced Kumar Kalra and got married to Kusum Jhanji who obtained a decree of divorce against her after a while. Then she married Mohinder, the petitioner in the present case, without disclosing the facts of her previous marriages. Court judged it as a fraud practised on him and decree of nullity was issued.



The premarital pregnancy of the wife by a third party at the time of marriage, concealed from the husband, will serve as a ground for annulment.<sup>57</sup> However, such relief may be denied by the courts where the husband himself had sexual intercourse with his wife before marriage unless proven otherwise. Such a case is distinguished from that of mere previous unchastity in the wife.

Vasectomy does not make a person impotent nor does it make a marriage null. However, concealing the fact from the other partner prior to the marriage that the person underwent a vasectomy amounts to deceit, and such a marriage is invalid.<sup>58</sup> Concealment of the fact that one of the parties to the marriage contract was insane at the time of marriage amounts to fraud.<sup>59</sup>

The civil jurisprudence also states that a third party, other than the contractants themselves, can perpetrate deceit in a marriage contract by providing wrong information to either of the parties with the intention of obtaining his/her consent to the contract.

In making decisions based on the ground of *fraud*, the courts will take into account all of the circumstances of the individual case. Thus, fraud which under ordinary conditions or circumstances would be insufficient to constitute a ground for nullifying a marriage may have synergistic effect when combined with other circumstances based on

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<sup>57</sup> See *George v. Jaya*, 1965 (2) MLJ 383: "Concealment by a woman of the fact that she was pregnant by another man at the time of her marriage with the petitioner constitutes such fraud as to entitle the petitioner to seek a decree for nullity of marriage"; see also *D. Michael Raju v. Sarah Janaki*, 1973 (1) MLJ 414; *Mathew v. Lizza*, 2000 (1) KLT 132.

<sup>58</sup> See *Moore v. Valsa*, 1991 (2) KLT 504.

<sup>59</sup> See *Joy v. Shilly*, 1995 (2) KLT 546; *Joy v. Shilly*, 1995 (2) KLJ 377.

the importance or emphasis given to a particular quality or absence of it by the party defrauded.

Our analysis shows that both canon law and civil law converge on the following aspects:

- Both laws argue that deceit creates an error in the person deceived.
- Both laws maintain that error caused by deceit leads a person to make a wrong decision.
- Both laws maintain that deceit should not be an ordinary inducement to marriage; rather, it should affect the essential nature of the marital contract or its presence or absence must gravely disturb the marital relationship.
- Canon law and civil law hold that deceit must be of such nature as to deceive an ordinary person to such a degree that had the deceit not been perpetrated, the deceived party would not have consented to the particular marriage.
- Both laws stress the point that the intention which is proper to an act of fraud implies the deliberate will to lead another into error through the use of improper means.
- Both laws admit that no matter how the deceit is exercised, by hiding the truth or telling a lie or misrepresenting a fact, it invalidates the marriage contract provided it was the cause of one's consenting to the marriage contract.

The divergence of both laws is seen only on the degree of explanation of how the deceit makes a marriage invalid. In fact, ecclesiastical law has a clear and detailed explanation on how deceit makes a marriage invalid. For example, for a marriage contract to be invalid, canon law demands that the deceit must by its very nature gravely disturb the partnership of conjugal life, whereas civil law says the deceit must be of a

serious nature and such as to affect the essentials of the marriage relationship. In substance, however, both laws seem to agree on this point as well.

#### **4.3 - PROCEDURES TO BE FOLLOWED IN A MARRIAGE CASE INVOLVING DECEIT**

In a marriage contract the injured party can always approach the tribunal for justice. The courts, whether secular or ecclesiastical, have their own well defined and systematic procedures to be followed in cases of marriage nullity.

In the Church, marriage legislation has gained a position of great importance because of the increasing number of cases processed by tribunals. Today, the Catholic Church has a legal system which, while safeguarding the Church's ethical code, can be said to be first in terms of clarity, certainty and protection of legitimate interests and of Christian rights in the area of marriage. Book VII of the Code of Canon Law deals with the court proceedings on marriage cases within the context of judicial trials. The tribunals are entrusted with the task of dealing with these cases through a judicial process subject to strict regulations regarding evidence presented in respect to the grounds of nullity. It should be noted here that there is no question of dissolving the bond of a valid marriage<sup>60</sup> or of granting divorce by an ecclesiastical court. The ultimate purpose or goal of all judicial trials

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<sup>60</sup> Canon 1141 (*CCEO* c. 853) states that no human power or any cause other than death can dissolve a marriage which is ratified and consummated. However, the Church grants dissolution of a valid marriage bond under special circumstances. Canon 1142 (*CCEO* c. 862) stipulates that a non-consummated marriage between the baptised can be dissolved by the Roman Pontiff for a just reason at the request of both parties or of either party even if the other is unwilling. There are also cases relating to the Pauline Privilege (*CIC* c. 1143; *CCEO* c. 854) and the Privilege of Faith (*CIC* c. 1150; *CCEO* c. 861) where a marital bond is dissolved.

in ecclesiastical courts is to discover the truth in order to do justice. Therefore, the procedural norms must be seen and understood in that light.

The various Indian matrimonial statutes<sup>61</sup> have laid down some procedural and jurisdictional regulations. The laws are supplemented by the Code of Civil Procedure made applicable to matrimonial proceedings. Consequently, under the Indian Divorce Act all proceedings between the parties are regulated by the Code of Civil Procedure, 1908, and subsequent revisions.

Our principal focus in this section will be on certain common elements found in the procedural laws of both systems.

#### **4.3.1 – Petition for a Decree of Nullity**

A legitimately written petition by one of the parties to the marriage is necessary to begin a contentious trial (c. 1501). It must be presented to the competent tribunal. However, if the petitioner wishes to present the petition orally, in a situation where the petitioner is impeded from submitting a *libellus* for reasons of illiteracy, the judge may accept it but must require the notary to put the act into writing, which is to be read and approved by the petitioner (c. 1503).

The petition must contain the object of the controversy and it must request the services of the judge to declare the nullity of marriage (c. 1502). Canon 1504 specifies the essential elements the petition should contain, such as before which judge (court), what is

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<sup>61</sup> In India, religious groups like Hindus, Christians, Sikhs, etc. have their own civilly recognized personal laws on marriage.

being petitioned, by whom, etc. It is to enable the court to determine whether there is a genuine claim, and if there is, whether the court has jurisdiction to adjudicate that claim. In the absence of the specified elements and required formalities, the petition may be rejected. Nevertheless, the petition can be amended and filed again. If the petition is accepted, the tribunal is to issue an official citation to the respondent and to the other parties whose involvement in the case is required, for instance, the defender of the bond or the promoter of justice.

Indian matrimonial procedural law prescribes that in a matrimonial cause, a petition could be presented to the District Court by one of the parties praying that his or her marriage may be declared null and void.<sup>62</sup> Every petition filed must state the facts, using the form prescribed in the Act (Form No. 4), on which the decree of nullity is sought, as distinctly as the nature of the case permits.<sup>63</sup> Every petition under this Act must state absence of collusion or connivance between the petitioner and the other party to the marriage. The law also requires that the statement contained in every petition be verified by the petitioner. The petition may be referred to as evidence at the time of hearing.<sup>64</sup> Unlike the ecclesiastical law, civil procedural law does not entertain any oral petition. There will not be a trial without having received a written petition.

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<sup>62</sup> See *Indian Divorce Act, 1869*, Section 18.

<sup>63</sup> See *Anu Sarkar v. Anil Sarkar*, AIR 1989 Gau 44.

<sup>64</sup> See *Indian Divorce Act, 1869*, Section 47. The petitioner must also add the "Form of Verification" to his/her petition. Form of Verification states as follows: "I, ....., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief." See Section 18.

#### 4.3.2 - Competence/Jurisdiction of the Court to Hear the Case

In canon law, the notion of competency is of great importance because, in many cases, the validity of the whole trial, and of the decision, depends on it. According to the norm, in cases pertaining to the nullity of marriage, there are four sources of competence. The following are the competent tribunals in a marriage case not reserved to Holy See:<sup>65</sup>

- the tribunal of the place where the marriage is celebrated;
- the tribunal of the place of Respondent's domicile or quasi-domicile;
- the tribunal of the place of Petitioner's domicile provided:
  - a) both live in the territory of the same Episcopal Conference (the same notion according to *CCEO*),
  - b) the *officialis* of the Respondent's domicile agrees after hearing the Respondent;
- the tribunal of the place where *de facto* most of the proofs are to be collected, provided the *Officialis* of the Respondent's domicile consents after asking Respondent if he/she has any objections.<sup>66</sup>

Although there are four sources of competence, all four tribunals are not always involved. Very often the four sources of competence fall within the same diocese. However, whenever more than one tribunal is competent, the petitioner is free to choose a tribunal to introduce his/her case under the conditions stipulated in law.

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<sup>65</sup> See *CIC* c. 1673; *CCEO* c. 1359.

<sup>66</sup> When the place of residence of the respondent is unknown, there is no obligation to receive the consent of the respondent or that of the Ordinary or of the Holy See before beginning the instruction of the case. See J.H. Provost, "Competent Tribunal When Respondent's Address Unknown," in *The Jurist*, 44 (1984), pp. 244-246.

Here it should be noted that cases related to the non-consummation of marriage are addressed to the Congregation for Divine Worship and the Discipline of the Sacraments.<sup>67</sup> while cases regarding the Privilege of the faith are addressed to the Congregation for the Doctrine of the Faith.<sup>68</sup> However, the competence to prepare the case for dissolution of marriage in Favour of the Faith is to be determined in accordance with the norms of canon 1673 (*CCEO* c. 1359) as explained above.<sup>69</sup>

Under the Indian Divorce Act, 1869, a petition requesting a decree of nullity of marriage could be presented either to the District Court<sup>70</sup> or to the High Court<sup>71</sup> by a party to the marriage. The ordinary jurisdiction of a party is: (a) the place (district) of residence<sup>72</sup> where the husband and wife reside, or (b) where the husband and wife resided together.

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<sup>67</sup> See *CIC* c. 1698; PB, art. 67.

<sup>68</sup> See Congregation for the Doctrine of the Faith, *Normae de conficiendo processu pro solutione vinculi matrimonialis in favorem fidei*, E Civitate Vaticana, 2001; English translation in *Canon Law Society of Great Britain & Ireland News Letter*, no. 127 (September 2001), pp. 53-63.

<sup>69</sup> See A. Mendonça, "The Question of Competence and Appropriate Procedure in a Marriage Case Involving Two Non-Baptized Persons," in *Roman Replies and CLSA Advisory Options*, 1999, p. 113.

<sup>70</sup> See Diwan, *The Law of Marriage and Divorce*, p. 862: "the District Court within whose jurisdiction the marriage has been solemnized will have jurisdiction."

<sup>71</sup> "High Court" applies to the High Court for a particular State (Section 3 [a]). "District Court" means, in the case of a petition under this Act, the court of the District judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the marriage was solemnised or the husband and wife reside or last resided together (Section 3 [3]).

<sup>72</sup> "Residence" of both parties, that is, residence of the respondent or residence of the petitioner gives the court competence to take up a matrimonial suit or petition. The term "residence" has been variously defined. Ordinarily, "residence" means the permanent abode or home or permanent place where a person lives, and does not include a temporary residence. See *Dennis v. Dennis*, (1955) 2 All ER 51; *Robe v. Robe*, AIR 1931 Cal 121; *Joshleph v. Leila*, AIR 1991 Bom 156. A petition for nullity under the Indian Divorce Act is not maintainable if it is shown that the parties neither are residing nor last resided together within the jurisdiction of the court; also see Diwan, *Law of Marriage and Divorce*, p. 862.

Consequently, the following courts have the jurisdiction to deal with a marriage nullity case:

- the court of the place in which marriage was solemnized;
- the court of the place in which the petitioner and respondent reside (this does not include a temporary residence) or last lived together;
- the court of the place in which the petitioner has residence;
- the court of the place in which the respondent has residence.

In addition to these jurisdictional regulations, compliance with the following is also necessary:

- one of the parties to the marriage must be Christian (under the Christian Marriage Act);<sup>73</sup>
- a petition for nullity can be filed only if the marriage had been solemnized in India and the petitioner is resident in India at the time of presentation of the petition.<sup>74</sup>

Section 2 of the Christian Marriage Act confers the jurisdiction:

Nothing hereinafter contained shall authorise any court to grant any relief under this Act except where the petitioner or the respondent professes the Christian religion ...,

or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition ....

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<sup>73</sup> See *Shri Sasivaranaim v. Gunnoboundari*, AIR 1954 Mad 1018.

<sup>74</sup> See *Ishrani v. Victor*, AIR 1926 Cal 871.



It should be noted here that the High Court has been awarded an extraordinary jurisdiction to remove any suit or proceedings from the District Court and try it or to transfer it to another court for trial. The section 8 of the same Act states:

The High Court may, whenever it thinks fit, remove and try and determine as a court of original jurisdiction any suit or proceeding instituted under this Act in the court of any District Judge within the limits of its jurisdiction under this Act.

The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

Canon law and the Indian procedural law speak of the different courts having competence to accept a petition for trial, but the choice to select a tribunal is left to the petitioner; however, in canon law certain conditions have to be verified for all the courts to have the competence. In Indian civil law there is no reservation of particular cases to a specified court as found in ecclesiastical law where cases of non-consummation and privilege of faith are reserved.

#### **4.3.3 - The Right of the Parties to Stand in Court**

Canon 1674 has laid down specific guidelines regarding who can impugn a marriage. According to the norm of this canon, the following persons are capable of impugning a marriage:

- the spouse;
- the promoter of justice when the nullity of marriage has become public and if the marriage cannot be convalidated or this is not expedient.

- In a case where one or both the parties are deprived of the use of reason, the legally appointed guardian or curator could apply on their behalf.

A marriage which has not been impugned during the lifetime of both spouses cannot be impugned after the death of either one or both spouses unless the question of validity is prejudicial to the resolution of another controversy (c. 1675).

In Indian procedural law, the right to make a petition for a decree of nullity of marriage is granted only to the husband or the wife. The parents of the either spouse or a third person has no *locus-standi* to file the petition for nullity of marriage. It is only in cases where either the wife or husband is mentally disturbed or is a minor (Sec. 48 and 49), that the petition can be filed by a third person on his/her behalf. The matrimonial jurisdiction is a special one which is controlled by the statute under which petitions are made. Disposal of a petition on the basis of contentions of the parents of either the respondent or the petitioner is not possible in law.<sup>75</sup>

The only difference one notices here is that the ecclesiastical law has provisions to empower the promoter of justice to impugn a marriage where the nullity of marriage has become public and there is no chance for convalidation (c. 1674).

#### 4.3.4 – Subsequent Change of Grounds or of Pleadings

Canon law has provided ample opportunity to the parties either to add an additional ground or amend the pleadings even after the joinder of issues (c. 1514).

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<sup>75</sup> Puneet Chander v. Sunita, AIR 1990 Del 320; see also Diwan, *Law of Marriage and Divorce*, p. 842; Jain, *The Law Relating To Marriage and Divorce*, p. 364.

However, the adding of a new ground or the amendment of pleadings can be done only under four conditions:<sup>76</sup> a) at the request of one of the parties (including the defender of the bond or promoter of justice when they are involved); b) a grave reason for the change must be evident; c) the other parties must be consulted about the proposed change and their arguments must be carefully considered; d) the judge must issue a decree showing that change/amendment has been made and also the reasons leading to the admission of the change. From this prescription it is clear that the terms of controversy or a determined ground of nullity can be changed or added at the request of one of the parties. But now a question is being discussed among the canonists and authors concerning the possibility of an *ex officio* change of grounds of nullity by the judge for a serious reason. Opinions of authors are divided on this issue. Some remain firm in the literal explanation of the canon. But the more probable opinion seems to be the one espoused by Pompedda, Colantonio, Wrenn, etc., who hold that for a serious reason even without the request of the party, the judge can *ex officio* validly change the grounds of nullity provided that the parties concerned are duly communicated of it and are given ample opportunity to offer their observations about it.<sup>77</sup>

Civil law also has provisions to amend the petition or the pleadings any time during the process. The law states that the plaint as well as pleadings in a matrimonial

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<sup>76</sup> Non fulfillment of these conditions will invalidate the act and the subsequent decision will be null but remediable. See Craig A. Cox, "The Contentious Trial," in *New Commentary on the Code of Canon Law*, p. 1664.

<sup>77</sup> For more information on this discussion, see A. Mendonça, "Practical Aspects of Using Multiple Grounds in Formal Marriage Nullity Cases," in *StC* 30 (1996), pp. 87-116, here at pp. 101-102.

cause can be amended in several situations which arise after the commencement of the proceedings.<sup>78</sup>

#### 4.3.5 – Witnesses and Evidence

In canonical proceedings, after the statements of the parties themselves, documentary proofs are given precedence. Yet, one of the most important sources of evidence is the testimony given by the witnesses. Consequently, testimonial proof by witnesses is always recognized as the means of proof in all cases and it is admitted in every type of procedure. The witnesses must take an "oath" to tell the whole truth and only the truth (c. 1562, §1, §2).<sup>79</sup> Accordingly, c. 1547 states that proof by means of witnesses is admitted in every kind of case under the direction of the judge.

The judge is empowered with the right to allow certain people to testify (c. 1550, § 1), to set a time limit for a witness (c. 1552, §2), to limit the number of witnesses (c. 1553), to exclude certain witnesses (c. 1555), or to examine a witness in secret (1559).

In cases concerning the "nullity of marriage," the parties are not admitted during the interview of the witnesses (c. 1678, §2). However, the legal representatives of the parties retain the right to be present at the examination of the parties, witnesses and the experts (c. 1678) unless the judge believes that the process must be carried out in secret (c. 1559).

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<sup>78</sup> See *Lalit Lazarus v. Lavina Lazarus*, AIR 1970 MP 70; *Udai Narain Bajpat v. Kusum Bajpat*, AIR 1961 AP 122.

<sup>79</sup> However, if any one of the witnesses refuses to take an oath, he/she is to be heard without the oath.

According to the Indian procedural law, in general, the burden of proof to establish a ground lies with the petitioner. Generally, in matrimonial proceedings the provisions of the Indian Evidence Act, 1872 are applied. However, for Christians the Indian Divorce Act, 1869 contains the provision of evidence in its Sections 51 and 52. Section 52 speaks solely of the evidence in a suit where relief is sought on the ground of adultery or cruelty by the husband. Since we deal here with nullity cases, we need to examine mainly Section 51 which states:

The witnesses in all proceedings before the court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross examined and re-examined, like any other witness.

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

According to this norm, besides other witnesses, either party can be a witness in the case and may be cross examined and re-examined. There is also provision for the parties to verify their case by an affidavit, provided that the party is ready to be open to oral cross examination at the request of the opposite party or the direction of the court.

Confidentiality of proceedings, especially in regard to matrimonial matters, is desirable. Therefore, in marriage cases witnesses are often heard in camera. However, the discretion rests with the court and not the parties. Consequently, Section 53 of the Indian

Divorce Act, 1869 lays down: "The whole or any part of any proceedings under this Act may be heard, if the court thinks fit, within closed doors."<sup>80</sup>

#### 4.3.6 - Confirmation of the Decree of Nullity

In canon law, a judgment on the nullity of a marriage made in the first instance<sup>81</sup> becomes final only when a confirming decision is obtained from the Appellate Tribunal which is the court of second instance. In the instances where the Appellate Court reverses the sentence passed by the court of first instance, the appeal is directed to the Court of third instance which usually is the Apostolic Tribunal of the Roman Rota.

Confirmation of Judgement by the Appellate Tribunal was a novel feature incorporated in the Indian Divorce Act, 1869, Sec. 17 and 20. It had required that every decree of nullity of marriage made by a District Judge be subject to confirmation by a bench of the High Court.<sup>82</sup> Before confirming the decree, the High Court could order further enquiry or take additional evidence if found necessary. But this particular Section (Sec. 20) was omitted from the Act when it was amended in 2001.<sup>83</sup>

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<sup>80</sup>Under *The Special Marriage Act, 1954*, Section 33, and *The Hindu Marriage Act, 1955*, Section 22, it is mandatory to have all the matrimonial proceedings done in camera. It states that every matrimonial proceeding must be conducted in camera and it is unlawful for any person to print or publish any matter in relation to any such proceeding except with previous permission of the court.

<sup>81</sup>The diocesan Tribunal, after conducting a judicial trial, passes a sentence in the first instance on a given case. Generally speaking, the Archdiocesan Tribunal is the court of appeal for the tribunals of suffragan dioceses. Appeal of the cases judged by the Archdiocesan Tribunal in the first instance must be made to the diocesan tribunal opted and designated permanently as the Appellate tribunal with the approval of the Holy See. See Vadakumcherry, *Marriage Laws in Canon Law and Civil Law*, p. 48.

<sup>82</sup>See *Robert v. Linet*, AIR 1992 Ker 412; *Maria Soosai v. Clara Mary*, AIR 1995 Mad 35.

<sup>83</sup>The reason for omitting this section from *the Indian Divorce Act, 1869*, is that this provision was discriminatory requiring the Christian couple to wait unnecessarily for confirmation, while Hindu and Parsi couples need not. In *Neena v. John Parmar*, a full bench of the Madhya Pradesh High Court strongly

This Section has been replaced now by a new norm which is applicable to marriage nullity process after obtaining a decree of nullity. From Section 57 of this Act it is clear that a decree of nullity of marriage can lawfully become effective or final only when either the time for appeal has expired without an appeal having been presented to any court,<sup>84</sup> or an appeal has been presented but has been dismissed and the decree or dismissal has become final.

The analysis of both systems of law indicates that both courts, ecclesiastical and civil, follow well defined procedural norms which are rather similar especially in marriage nullity cases. Nonetheless, there are a few divergences between the two which are not essentially contradictory. The following are the elements which are common to both systems:

- The procedural laws specify the need of a petition made by either of the spouses unless they are suffering from mental illness, in which case a third party can petition for a decree of nullity on behalf of a party.
- Both systems of law demand that the petition contain a request for a declaration of nullity as well as an indication of ground for the nullity.
- Jurisdiction of the court is a prerequisite in both, the ecclesiastical and civil, procedural laws for the acceptance and the validity of the trial of a case.
- Both courts admit documentary proofs and testimonies of witnesses and maintain confidentiality of the proceedings.
- Testimonial evidence is collected behind closed doors, especially when the judge thinks it is necessary.

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recommended its deletion based on the same reason. See *Neena v. John Parmar*, AIR 1985 MP 85.

<sup>84</sup> Appeals from the orders and decrees of the matrimonial court have to be made to a higher court. For example, a decree of nullity from a district court could be appealed to the High Court.

There are also some diverging elements in the procedural laws of the two systems. These can be noted as follows:

- Church law accepts both written and oral petitions while civil law demands a written one.
- In church law, the promoter of justice retains the right to impugn a nullity of marriage while civil law does not allow such an action.
- In civil law it is required that the petitioner show in the petition that there is no collusion or connivance between the parties. Church law does not require such a statement in the petition.
- In civil law the witnesses are examined, cross examined and re-examined, whereas in church law there generally is no cross examination.
- In church law a decree of nullity of marriage becomes final only when a concurrent decision is obtained from a higher court, whereas civil law states that the decree of nullity becomes absolute either when the prescribed time for appeal is elapsed or the appeal is dismissed or the appeal court confirms the decree or dismissal.
- After the discovery of fraud, civil law has set a time limit within which the injured party could apply for the decree of nullity, but in canon law there is no such time limit.

#### **4.4 - THE FOLLOW-UP TO THE COURT DECISIONS OF NULLITY**

Certain marriages are considered null and void either because the marriage contract was concluded by someone who was forbidden/impeded by the law to do so, and yet he/she did it or the given marital consent was defective for various reasons. A null and void marriage is equal to no marriage. Therefore, the decree of nullity empowers the parties to contract a new marriage. We direct our inquiry here to a proper understanding of the two



systems regarding the nullity of marriage and when the party becomes legally capable of entering into a subsequent marriage.

#### 4.4.1 – The Understanding of Nullity

In canon law there are some marriages which are rendered *ipso facto* invalid by reason of diriment impediments existing at the time of the wedding. The invalidating impediments are based on either divine law, natural law, or positive law. The diriment impediments which create "void marriages" are lack of age, impotency, previous marital bond, holy orders, public and perpetual vow of chastity, abduction, crime committed against the spouse of either party, consanguinity, affinity, public propriety, and adoption.<sup>85</sup> A marriage can also be null for lack of canonical form.

There are also certain marriages which are declared null and void *ab initio* on the grounds of defective consent after a judicial trial on the merit of the case. The causes which could render the declared consent defective, making the marriage null are: lack of sufficient use of reason, lack of due discretion, inability to assume the essential marital obligations, ignorance, error of person or error of a quality of the person directly and principally intended, deceit, error of law, simulation, condition, force or fear.<sup>86</sup> Whether a marriage is rendered null *ipso facto*, that is, *ab initio*, the law specifies when there is no marriage from the beginning and the parties to the marriage can contract a new one.

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<sup>85</sup> See *CIC* cc. 1083-1094; *CCEO* cc. 800-812; *CCEO* has included spiritual relationship (c. 811) as one of the diriment impediments which is not found in *CIC*.

<sup>86</sup> See *CIC* cc. 1095, 1096, 1097, 1098, 1101, 1103; *CCEO* cc. 818, 819, 820, 821, 824, 825.

The civil law of India also declares nullity of Christian marriages. The declaration of nullity is made in the case of a "void marriage." For, in civil law a void marriage is no marriage at all and as such does not call for a decree of nullity. When the court passes a decree of nullity in the case of a marriage contract, it merely makes a judicial declaration of an existing fact, i.e., there existed no marriage between the spouses.<sup>87</sup> The Indian Divorce Act provides various grounds to obtain a decree of nullity of marriage. The most common grounds are: impotency, lack of age, fraud, force, mental illness, former marital bond, and prohibited degree of relationship.<sup>88</sup> A judicial declaration of nullity of marriage would in fact mean that, although the parties concerned underwent the ceremonies of a marriage, it did not have the effect of a marriage and they are free to enter a new union.

Civil law also has "voidable marriages" which are annulled by the decree of the court. A voidable marriage will remain a valid marriage until one of the parties challenges its validity and a decree annulling it is passed. Non-consummation of marriage is a ground for voiding a marriage.

Canon law and civil law define and treat a void marriage as one which did not have any existence from the beginning. Both the laws state that in such cases the parties are free to enter upon a new marriage as if it were their first one.

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<sup>87</sup> As to the effect of a decree of nullity of marriage, it was observed by the Supreme Court of India in the case of *Lila Gupta v. Laxminarayan* that if a marriage is annulled by a decree of nullity, the legal consequence would be that in the eyes of law there was no marriage at all even though the parties might have gone through some form of wedding ceremony. See *Lila Gupta v. Laxminarayan*, AIR 1978 SC 1351.

<sup>88</sup> See *The Indian Divorce Act, 1869*, Section 19; *The Special Marriage Act, 1954*, secs 24 and 25.

Canon law has more grounds of nullity than civil law. Canon law has divided the grounds based on impediments and defective consent, whereas civil law speaks in terms of "void" and "voidable" marriages.

#### 4.4.2 – The Re-Marriage of One or Both Parties

The law of the Church for re-marriage is laid down in c. 1684. According to this canon, only after two conforming decisions in favour of nullity of marriage can the parties legally enter into a new one. A judgement on the nullity of a marriage given in the first instance becomes final only when a concurrent decision is obtained from the Appellate court. In general, prior to the second conforming sentence, the parties are still legally impeded by their previous bond from contracting a new marriage.<sup>89</sup> Therefore, once the parties are informed of the declaration of nullity of marriage, they are free to marry, provided no prohibition (*vetitum*) is attached to the sentence.

In Indian civil law, the parties who have obtained permanent relief in marriage through a declaration of nullity can contract a new marriage. However, it shall be lawful for the respective parties to enter into a marital union only after fulfilling the following conditions:<sup>90</sup>

- a decree of nullity of marriage has been passed by a civil court;

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<sup>89</sup> The guidelines issued by the Apostolic Signatura demand that even in the case of non-Catholics concurrent judgement from the appeal tribunal is required for the decision on the nullity of their marriage to be final. See *Supremum Signaturae Apostolicae Tribunal*, 1 February 1990, *AAS*, 84 (1992) pp. 549-550; also see Cox, "Certain Special Processes," in *New Commentary on the Code of Canon Law*, p. 1777.

<sup>90</sup> See *The Indian Divorce Act, 1869*, Section 57.

- either no appeal has been presented against such decree within the prescribed time,
- or an appeal has been dismissed,
- or the marriage itself has been declared null in appeal.

It is to be noted that both canon law and civil law admit that a marriage which is null is no marriage and is void *ab initio*. In such a case, even though the parties undergo all the ceremonies of marriage, there is no contract; their status is not altered - they do not become husband and wife. Therefore, the parties can marry again as if it were their first marriage, provided no prohibition has been attached to the decree. Canon law stresses the importance of the confirmation of the decision of the first instance by the appeal tribunal before the party can marry again, while civil law does not seek confirmation of a sentence but a set time limit has to elapse for a decree of nullity to become absolute and thereby give freedom to marry.

Both systems of law agree on one point, that is, a marriage which is null is no marriage at all and the parties are free to enter into a new marriage. However, neither system has any provision to accept or recognize each other's decree of nullity. This situation often creates serious difficulties.

#### **4.4.3 – Resolution of Conflicts in Laws**

One of the fundamental points of divergence between canon law and civil law is with regard to the authority of the Church and of the state in declaring the nullity of marriage or dissolving an existing bond of marriage. The divergence arises mainly because

the Indian civil law for Christians asserts that only the state has the power to declare a marriage null and void and thus, only it has the power to enact laws governing the nullity grounds. The Church, on the other hand, acts in matrimonial affairs solely on the basis of its divine mandate; because it believes that marriage is a sacrament, a sacred entity which comes under the care of the *ecclesia Christi*. However, the matrimonial relief provided by the ecclesiastical tribunals is not recognized before the civil law and vice versa. This means that, if a marriage is declared null according to Indian civil law and the parties want to enter into a new catholic marriage, they will be denied a sacramental marriage unless the party also receives a Church's declaration of nullity. The same way, if a marriage is declared null according to canon law and the parties remarry in the Church as allowed by its laws, it would be considered as bigamy in the eyes of the civil law, since it does not recognize the competence of the ecclesiastical law over such matters. This same rule is applied in the cases of canonical dissolution of marriage.

The claim of the state government as the sole authority to declare null or dissolve a bond of marriage leaves Christians in trouble, if they obtain canonical declaration of nullity and remarry in the Church. This dichotomy forces the Christians to go through two tribunal procedures which would involve money, time, energy, anxiety, and worry. This also means a delay in justice. It should be recalled here that in India a civil divorce cannot be obtained as easily as in western countries. It takes at least two years for one to get a civil divorce. To add salt to the wound, a divorcee is always looked down upon in the community. As a result it is hard to find an alternative to divorce. This

conflicting situation should be rectified so that the pain and suffering of the Christians may be alleviated and the course of justice expedited. Is there a possibility for such a solution within the purview of ecclesiastical law?

Divine law as well as ecclesiastical law include the principles of extrinsic and intrinsic indissolubility of marriage. The Church, as the guardian and defender of these laws, does not admit the claim of any State to declare a marriage null or to dissolve any validly solemnized marriage. The Church has constantly claimed exclusive jurisdiction over matters which are spiritual or linked with the spiritual (c. 1401 §1). Sacramental marriage is a spiritual matter. The Church considers that it has the authority to declare what invalidates marriage, and any civil alteration to marriage concerning anything other than merely civil effects is, therefore, deemed without meaning and, consequently, illegitimate (cc. 1671, 1672).

The dissolution of a valid marriage bond, therefore, goes against the teachings of the Church.<sup>91</sup> No human power on earth has the right to dissolve a marital bond by which God has made a husband and wife one.<sup>92</sup> The civil law of India, however, grants nullity of Christian marriages. The declaration of nullity is made in the case of a “void marriage.” This is common in both canon law and civil law. For, as already discussed above, a void marriage is no marriage at all from a legal or juridic point of view and as such does not call

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<sup>91</sup> Of course as we have already seen the Church has a few exceptions in cases of non-consummation and Privilege of Faith, etc.

<sup>92</sup> See Mt. 19: 3-6; Mk. 10: 6-9: “From the beginning of creation God made them male and female. This is why a man must leave father and mother, and the two become one body. They are no longer two, therefore, but one body. So then, what God had united, man must not divide.”

for a decree of nullity. When the civil court passes a decree of nullity in the case of a void marriage, it merely makes a judicial declaration of an existing fact, i.e., there existed no marriage bond between the spouses and this is true also in ecclesiastical law. When we deal with nullity of marriage, therefore, we are not dealing with a juridically existing bond. In both systems, a declaration of nullity states only the fact that there was no marriage from the beginning. Both systems of law, when declaring a marriage null on the ground of fraud, do the same thing, i.e., they state the existing fact that since the consent to the marriage was obtained through deception, the consent was not free and, therefore, there was no marriage contract; consequently, the parties are free to enter into a new marriage. The question here, therefore, is, can the Church make some allowance to accommodate a civil decree of nullity into its own legal system?

#### **4.5 - TOWARDS THE FUTURE**

The issues discussed above call for reconsideration of the existing reality and a certain flexibility of mind and courage to adapt our systems to the needs of the time without compromising what is of divine law. Jurisprudence is not a static but a dynamic discipline; for example, the adaptation of the canonical principles to incorporate the progress made by behavioural sciences as to the notion of consent. This realization helps us to look towards future progress; and with progress comes change. In the following section we shall discuss the teachings of the Church on civil decrees of nullity and dissolution and to see if there is any possibility whereby we could accommodate them to the ecclesiastical legal system.

#### 4.5.1 - Church Pronouncements on Decrees of Nullity and Dissolution by the Secular Courts

For pragmatic and equitable reasons, the Church has on occasion allowed ecclesiastical tribunals to make use of the evidence produced for obtaining civil decrees of divorce and nullity in order to expedite matrimonial trials. For instance, on 28 August 1794 Pope Pius VI granted an indult, (then "faculties") to the Bishop of Agria in a decree permitting him to use the findings of a civil tribunal as extra-judicial proofs in nullity cases.<sup>93</sup> Although the sentences of the civil authority on marriage nullity cases were not endorsed in any way and those sentences did not carry any weight in the eyes of the Church, the ecclesiastical courts were allowed to weigh the evidence used in each civil decree of nullity to facilitate the process. This permission was later extended by the Holy See to many European dioceses.<sup>94</sup>

In the year 1946, Pope Pius XII made a remarkable statement in his allocution to the Roman Rota. It was a milestone in the history of the relation between the civil courts and ecclesiastical courts. He stated, "Another object which brings out clearly the difference between the ecclesiastical and civil judicial systems is matrimony. Marriage is, by the will of the Creator, a *sacred thing*. Hence, if there is question of a union between baptized

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<sup>93</sup> See A. Roskovany, *Matrimonium in Ecclesia catholica potestati ecclesiasticae subiectum*, Pestini, Typis Athenaei, 1870, vol. I, pp. 609-634; Saunders, *The Application of Canon 11 of the Code of Canon Law*, p. 261.

<sup>94</sup> On 5 September 1888 the diocese of Angoulême, France, was given the faculty permitting the use of summary process for cases where a civil decree of divorce was available especially when the nullity was evident. See "Procédure à suivre dans les causes matrimoniales: sa nécessité; indults," in *Nouvelle revue théologique*, 20 (1888), p. 633; Saunders, *The Application of Canon 11 of the Code of Canon Law*, p. 120, footnote 65.



persons, it remains by its nature outside the competency of the civil authority. But even between non-baptized persons, marriages legitimately contracted are in the order of nature a sacred thing, so that civil tribunals have not the power to dissolve them, and the Church in such cases has never recognized the validity of decrees of divorce. Nevertheless, simple declarations of nullity of these same marriages - relatively rare in comparison with decrees of divorce - can in certain circumstances be justly pronounced by civil tribunals, and hence can be recognized by the Church.”<sup>95</sup>

One can observe here a clear recognition on the Church's part of the civil decree of nullity. By granting an indult to the bishops of Europe permitting them to use the evidence gathered during the process for granting civil decrees of divorce and nullity in ecclesiastical trials, the popes in the 18<sup>th</sup> century opened the door for later canonical recognition of civil declarations of nullity. It also accorded credibility to civil matrimonial procedures. Pope Pius XII, while reiterating the sacredness of all marriages, moved one step further, allowing official recognition by the Church of certain civil decrees of nullity.

Half a century has gone by, yet no one seems to have pursued further Pius XII's view and teaching. Now the time is ripe to take this papal teaching into consideration

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<sup>95</sup>“Un altro oggetto, che fa risaltare chiaramente la differenza fra l'ordinamento giudiziario ecclesiastico ed il civile, è il matrimonio. Questo è, secondo la volontà del Creatore, una *res sacra*. Perciò, quando si tratta della unione fra battezzati, esso rimane per natura sua fuori della competenza dell'autorità civile. Ma anche fra i non battezzati i matrimoni legittimamente contratti sono nell'ordine naturale una cosa sacra, di guisa che i tribunali civili non hanno il potere di scioglierli, nè la Chiesa in simili casi ha mai riconosciuto la validità delle sentenze di divorzio. Ciò non toglie che le semplici dichiarazioni di nullità dei matrimoni medesimi – relativamente rare in paragone dei giudizi di divorzio – possano in determinate circostanze essere giustamente pronunciate dai tribunali civili, e quindi riconosciute dalla Chiesa” (Pius XII, Allocution to the Roman Rota, 6 October 1946, in *AAS*, 38 [1946], p. 395). For the English translation, see Pius XII, Papal Allocution to the Roman Rota, 6 October 1946, in Woestman (ed.), *Papal Allocutions*, p. 42.

and give it due credibility and thereby work towards a possible recognition of civil decrees of nullity.

#### **4.5.3 - Possibility of the Canonical Recognition of Civil Decree of Nullity**

In India, the law of nullity of marriage for Christians is based on the Indian Divorce Act of 1869. Many aspects of the Christian Marriage Act of India belong to areas of canon law. For instance, the need of Christians to follow the form prescribed by the Church, officiated by an ordained minister; existing marital bond, prohibited degrees of relationship,<sup>96</sup> impotency, unsoundness of mind, etc., as impediments to entering into marriage. Consideration of non-age and proper consent for contracting a marriage also have areas of similarity and harmony between the two systems. The area of greatest concern to the canonist is tribunal practice itself.

Even though the Indian civil nullity process does not incorporate all canonical principles, as discussed above, there are more fundamental points of agreement than divergence between them. However, in marriage cases of Christians involving fraud, the courts recognize the need to look into canon law, especially in the absence of statutory civil law. As already discussed in detail in the previous chapter, a Full Bench of the Calcutta High Court held that where parties to the matrimonial proceedings are Roman Catholics,

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<sup>96</sup> See *The Indian Divorce Act, 1869*, Section 19 (2). The law states that if a man and a woman, who are within the prohibited degree of consanguinity or affinity, marry, it will not be considered a valid marriage but as null and void. If a person whose former spouse is still living and yet marries without a decree of divorce or annulment, the marriage contract is null and void (Section 19 [4]).

the Canon Law of the Church of Rome must be applied.<sup>97</sup> In *Saldanha v. Saldanha*<sup>98</sup> the court argued that personal law for Roman Catholics is the Canon Law of the Church of Rome. In *Eappen Punnoose v. Koruthu Maria*, the court stated that in the case of nullity of marriage, the judge has the obligation to follow the norms of Canon Law, and in the case of fraud the petitioner must prove that he/she was deprived of the power of exercising his/her free will.<sup>99</sup> In another case, *Lakshmy Sanyal v. Schit Dhar*, where the parties were within the prohibited degrees of consanguinity, the marriage was blessed after obtaining dispensation from the Bishop as per Canon Law. However, the groom later filed a petition challenging the validity of the marriage under Sec. 19 of the Indian Divorce Act, 1869, on the ground that the parties to the marriage were within the prohibited degree of consanguinity. The Court held: "The question of capacity to marry and the impediments in the way of marriage would have to be resolved by referring to their personal law. That, for the purpose of deciding the validity of the marriage, would be the law of the Roman Catholic Church, namely the Canon Law of that Church."<sup>100</sup> The marriage, therefore, was not declared null since it was solemnized after obtaining dispensation, as prescribed by Canon Law, from the prohibited degree of consanguinity.

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<sup>97</sup> See *Lopez v. Lopez*, 1855 ILR XII Cal 706.

<sup>98</sup> See *Saldanha v. Saldanha*, ILR 1954 Bom. 288.

<sup>99</sup> See *Eappen Punnoose v. Koruthu Maria*, X TLR 95.

<sup>100</sup> See *Lakshmy Sanyal v. Schit Dhar*, AIR 1972 SC. 2667.

The case of Saly Joseph v. Baby Thomas, as analysed in the third chapter, is a significant example where the canonical description of fraud was fully integrated into the civil matrimonial process to declare the nullity of marriage.

Thus, it is important to note that in most of the Indian Christian marriage nullity processes, the civil courts have relied on Canon Law which is the personal law of the Catholics. A matrimonial cause related to fraud is always judged based on the principles laid down by the church regulations. The meaning of fraud and the criteria followed by the Indian civil courts in nullity cases related to fraud are almost the same as in the ecclesiastical court except in its detailed explanation. Therefore, *the certain cases* which Pope Pius XII spoke about could be applied here.

The Catechism of Catholic Church teaches that every Christian is obliged to disobey any civil laws or directives which “are contrary to the demands of moral order, to the fundamental rights of persons or the teachings of the Gospel.”<sup>101</sup> Accordingly, a civil divorce is against the teachings of the Gospel as it is breaking a valid sacred marriage bond and the Church does not and should not recognize it. Yet it requires a divorce from the civil court before allowing a new marriage. In the case of a decree of nullity, both the Church and the state are on the same footing while stating no juridic or legal bond existed from the beginning. This does not go against the divine law. Furthermore, in a marriage which is null there exists no juridical bond between the man and the woman and, therefore, there is no sacrament. A marriage can become a sacrament only if the bond is created by the

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<sup>101</sup> See *Catechism of the Catholic Church*, Popular and definitive ed., Ottawa, CCCB, 2000, nos. 2238-2242, p. 483.

spouses through the exchange of free mutual consent. In other words unless there is a valid contract there cannot be a valid sacrament. Consequently, when we deal with a decree of nullity of marriage on grounds of deceit (fraud), we are not dealing with a sacramental marriage. Therefore, it is reasonable to suggest that the civil decree of nullity based on the ground of fraud can be accepted by the Church.

Besides the situation we are presently dealing with, many unique situations in the Church today call urgently for new forms of exercising co-responsibility. The Church is the guardian of the sacraments and it should legislate laws to preserve the means of grace. However, it must adapt to the changing circumstances of time, of place, of persons, in order to constitute efficacious means to obtain the best possible realization of the common good. Legislation adapts itself to the changing conditions of society through the intervention of the legislator, by the creation and adaptation of custom, culture and need. The needs of the time call for more openness on the part of the Church; the instruction of Pope Pius XII, and in the context of this study, the Church itself could recognize the civil decrees of nullity on fraud which are comparatively many in India.

In a declaration of nullity of marriage, we found that the ecclesiastical court as well as the civil court are stating only an existing fact. Since the Church accepts civil public documents as authentic if issued according to the laws of the respective country (c. 1540 §2), an ecclesiastical tribunal could accept documents that establish the presence or absence of a fact. Accordingly, the Church could accept and recognize the nullity of marriage decreed by an Indian civil court on the ground of fraud.

In view of the above argumentation, the supreme legislator could allow acceptance or recognition of civil court's declarations of nullity of marriage on the ground of fraud. He could also empower individual conferences of bishops to allow individual tribunals to review civil decrees of nullity and determine its canonical recognition. At least in some instances, justice could be expedited by this kind of equitable approach.

### **CONCLUSION**

The Church and the State hold the same view that all human beings have a natural right to marry. It is not a creation of either the Church or the State. Consequently, every human person may exercise this inherent right unless he/she is forbidden to do so. However, in view of the common good, both the State and the Church have sought to regulate the exercise of a person's right to marry. They have established certain regulations governing the validity of the contract of marriage. The Church and the State base their regulations on the natural right of the person to marry. It is the divine law for all human beings. However, the baptized Catholics are bound by the ecclesiastical law while others are expected to follow their own laws.

Marriage is a public act regulated by ecclesiastical and civil norms. In India, the civil law acknowledges and accepts canonical marriage as a marriage contract with its own value. However, there arise certain conflicts between canon law and civil law. Conflict is over the authority to dissolve or declare the nullity of a marriage. The Church holds that marriage is something sacred and when it is contracted between two baptized persons it is a

sacrament. Therefore, the power to regulate a Christian sacramental marriage belongs to the Church and not to the State.

There are many grounds recognized by both systems of law which nullify a marriage contract. One of the common grounds found in both systems is *fraud/deceit*. In the context of marriage, both laws agree that fraud/deceit deprives the defrauded party of the free will to make the right choice. Consequently, the consent obtained through fraudulent means/deception does not create a valid marriage and, therefore, there is no marriage before the law.

We uphold the view of the Church that secular courts have no power to dissolve a valid sacramental marriage. Anything that is linked to the spiritual comes under the purview of the Church. However, in cases involving marriage nullity, especially due to fraud, the canon law and civil law argue on the same notion and understanding of fraud. Civil courts have incorporated the canonical aspects of fraud into civil law jurisprudence. Hence the civil decree of nullity by a civil court on the ground of deceit could be accepted by the ecclesiastical court. This is so because when we are dealing with the nullity of marriage, we are not dealing solely with its sacramentality because a sacramental marriage presupposes a valid contract.

## GENERAL CONCLUSION

The mutual recognition and acceptance of canon law and civil law by each other has been the subject of interesting debates through the centuries. The changes that have taken place in society and in the Church in recent years have rekindled this interest in the matter. This is particularly true after the Second Vatican Council which called for a new way of thinking (*novus habitus mentis*) not only in matters pertaining to our religious way of life but also in our relationship with other peoples and nations. Because of this spiritual and moral awakening within the Church, many pastorally important issues have surfaced to the fore. One of such issues we consider as of real pastoral importance is the possibility of recognizing and accepting by the Church a decision of nullity of a marriage legitimately issued by a civil court. The principal hypothesis of our thesis is that in certain instances, for example, in a case of deceit, the Church can recognize and accept such a decree of nullity. This, we contend, would not compromise the Church's fundamental teachings on the exclusive and indissoluble nature of marriage.

The approach we adopted in substantiating our hypothesis was systematic and comparative analysis of the relevant laws found in the two systems of law on marriage and deceit. We examined the convergences and divergences in the two systems in order to determine whether it is possible for the Church to accept a declaration of nullity of a marriage by a civil court. Our study identified several substantial convergences as well as divergences in the two systems of law on marriage, but we



believe that the divergences are not of such gravity as to render it impossible for the Church to accept such a decree. In brief, the following are the convergences and divergences we were able to identify in the two systems of law:

First, for ecclesiastical law derived from biblical and conciliar teachings marriage is a community of life and conjugal love, an intimate partnership of the whole of life, and a mutual gift of two persons. It is a reflection of the loving and abiding covenant between Christ and the Church. A marriage is established through the exchange of free mutual consent of two legally capable persons, a woman and a man. It is a covenant-contract effected within the context of a canonically determined form. When contracted between two baptized persons, it is a sacrament. A valid sacramental marriage is permanent and exclusive. Indian civil law, on the other hand, considers marriage solely as a social institution and a partnership between two legally capable persons, a woman and a man. It is established through the exchange of free mutual consent manifested within the context of a form prescribed by law. The Indian civil law, in a certain sense, acknowledges the sacredness or sacramentality of marriage when the wedding is performed according to religious rituals, but for legal purposes it is regarded as only a contract.

Second, although the law explicitly declares unity and indissolubility as the essential properties of marriage, it does not do so in regard to the essential elements of marriage. However, doctrine and jurisprudence have identified a number of essential elements of marriage, such as: a) marriage is a partnership of the whole of life; b) this

partnership is the communion, especially of hearts and minds, of the spouses; c) it is sealed by mutual love between the spouses; d) this partnership is heterosexual in nature; e) the conjugal relationship is manifested through sexual acts performed in a human manner and in a natural way; f) it is intrinsically ordered toward the good of the spouses, and the procreation and education of children; g) it is exclusive and perpetual. In the same way, Indian civil law has not spelled out the essential elements of marriage. Nevertheless, a careful analysis of Indian jurisprudence and other writings have confirmed that the State too upholds the same elements of marriage as found in canon law. However, there is no hardcore research done in this area. Indian civil law speaks of the properties of exclusiveness and permanence of marriage, but the concepts underlying these properties is different from those of canon law. It seems the property of unity mentioned by canon law is identical to the civil law concept of exclusivity. However, this cannot be said of indissolubility. In canon law indissolubility means that a valid sacramental and consummated marriage cannot be put asunder by any human power. Whereas, civil law speaks of permanence, but this quality is terminable for a variety of reasons. That is why civil law has the provision for divorce, which in essence is the termination of a valid contract. For the Church, marriage is a divine institution; therefore, a valid marriage cannot be dissolved by the will of the parties.

Third, both systems declare that it is consent that brings marriage into existence. Consent is a human act, an act of the will elicited with sufficient knowledge of the object and internal freedom. The direct object (material) of this consent is the mutual

“self-giving,” the gift of self and acceptance of the other, which creates matrimony, which consists of all essential rights and obligations proper to married and family life. There is no explicit statement in Indian civil law concerning the object of consent as found in canon law. However, Indian civil law jurisprudence refers to marriage itself as the object of consent. This object certainly consists of the mutual self-giving and accepting of each other, the well-being of the spouses and the generation and education of children.

Fourth, according to canon law, marital consent is a juridical act because it generates juridical effects. A juridical act, as a human act, presupposes a healthy interaction between the intellect and will for its production. Sufficient knowledge, deliberation and internal freedom to make the choice are constitutive elements of a human act. Consequently, to have a juridical effect, one’s consent must be sufficiently free. In the case of marriage, the juridical act is bilateral because it occurs through the meeting of two wills, expressed by two persons. This juridical act can be affected by either intrinsic or extrinsic factors which can nullify the act. The law identifies these factors, namely psychic incapacity, physical or moral force (fear), deceit (fraud), ignorance, error (factual and legal), simulation, condition, etc.

Fifth, in both systems the prerequisite for establishing a valid marriage is the freedom to manifest one’s consent without any internal or external coercion within the context of a form prescribed by law. Therefore, any factor that deprives one of the freedom necessary to elicit consent can render it substantially defective, making the

marriage contract invalid. Both systems of law are in agreement that deceit is one such factor which can force one to make a choice without true internal freedom.

Sixth, both canon law and Indian civil law describe deceit as a deliberate act of deception by which a person is led into placing a determined juridical act which otherwise would not have been done. Deceit, therefore, is an intentional and malicious act of the will of the person who deceives and it creates an error in its victim. The will of a person depends on the intellect to assist and guide it in its choice. An act of the will can be considered as voluntary only when it is a product of a free choice, based on true 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 which is willed, or a false image of the object is presented to the will. In this process, therefore, it is the intellect which is the direct victim of fraud while the will is affected only indirectly in making the choice of a distorted object presented to it by the intellect. As a general principle, acts placed by a person who was influenced by deceit are considered valid but rescindable by a judge in accordance with the norms of law (c. 125 §2). In certain cases, however, deceit has been regarded by law as an invalidating factor in particular instances. In canon law, marriage is one such instance in which a marital consent extracted through deceit is regarded as invalid (c. 1098).

Seventh, according to some authors, when deceit is perpetrated on a person within the context of marital consent, it strips the marriage of its truth, honesty and sincerity, qualities which pertain to the natural law. It illegitimately deprives one party to

the contract of the freedom necessary to make a genuine choice of the other. The person who is deceived lacks the freedom necessary to choose a partner because of false representation of self by the deceiver. Therefore, they argue that the law on deceit related to marital consent is of natural law and, therefore, it is retroactive. But, others distinguish between substantial error and accidental error created by the deceptive act. If it creates substantial error in the mind of its victim, deception would invalidate a juridic act (marital consent) by virtue of natural law itself. Whereas, if the object of deception is an accidental quality of a person, then the juridic act is invalid only by force of positive law, and hence the prescript of canon 1098 is not retroactive. Rotal jurisprudence has explicitly acknowledged this diversity in opinion and has declared that there is a doubt of law in this matter. As a result the prescript of canon 1098 is not applicable to cases in which marriage was celebrated before the 1983 Code came into effect (i.e., 27 November 1983). There is no evidence of any discussion on this issue in Indian civil law jurisprudence.

*The Indian Divorce Act, 1869*, which contains legislation on the dissolution and nullity of marriage of Christians, speaks of fraud as a ground of nullity but does not elaborate on when and how fraud invalidates marital consent. However, civil courts have resorted to canon law in their attempt at determining the meaning of fraud while judging marriage cases involving Catholics. In fact when there is no statutory law on a particular matter, civil courts have turned to the personal civil law of the parties in resolving contentious issues like marriage nullity. This approach seems to legitimize the use by

civil courts of the personal law of the parties in the absence of civil statutory law on a particular matter. Several marriage cases mentioned in our study demonstrate how jurists have been seeking in canon law answers to their questions on deceit.

Eighth, both canonical and civil law jurisprudence on nullity of Christian marriages arising from deceit has established the following criteria for deceit to invalidate marital consent: a) the object of deceit must be a quality of the person but not the person (this would be error in the person); b) the quality must be fraudulently concealed with the intention of obtaining consent; c) it must be an objectively and subjectively significant quality, i.e., an important characteristic of the person as distinct from some frivolous quality or an isolated past action; d) the presence or absence of the quality which is desired or undesired must be unknown to the deceived party; e) the presence or absence of the quality must have, by its very nature, the potential seriously to disturb the marital partnership; f) if the presence of an undesired quality or the absence of a desired quality was known, consent would not have been given.

Ninth, the processes used by both systems in judging marriage nullity cases are also substantially similar, especially with regard to competence, evaluation of evidence from the parties, witnesses, documents, etc. As a general principle, a marriage nullity case becomes *quasi res iudicata* when two conforming sentences are pronounced on the same case and on the same ground of nullity. Unless there is a prohibition, the parties will be free to marry again when two conforming affirmative sentences are pronounced on the case. The Indian civil law has recently repealed this feature from the

Indian Divorce Act in its latest Amendment (2001). In the place of conformity of affirmative sentences, time limits are now set for the judgment or decree to become absolute.

Tenth, both systems of law understand that when a marriage is declared null there was no legal marriage from the beginning and the parties are now free to marry as if it were their first marriage. It is quite clear, however, that in the case of divorce, civil courts terminate the existing bond in virtue of civil law. This is contrary to the Church's fundamental teaching on the nature of marriage, and therefore, it is unacceptable to the Church.

As is obvious from the foregoing, there are several substantial agreements between Indian civil law and the canon law. Both systems are similar in their understanding of marriage, its celebration, impediments and defects of consent. On the other hand, we cannot close our eyes on the significant difference between the two systems concerning the principle of indissolubility of marriage. And this divergence has consequences for civil law. Accordingly, civil law has provision for dissolving an irretrievably broken marriage. Canon law cannot accept this provision as it is diametrically opposed to the fundamental teaching of the Church on the indissolubility of marriage. For this reason, the Church maintains that the State has no authority to adjudicate anything which is related to spiritual matters. But can the Church accept a civil court's declaration of nullity on a ground recognized by the Church?

We know from history that Pope Pius VI (1794) granted indulgences to bishops permitting the use, in canonical trials, of evidence collected during civil trials in the course of issuing a decree of nullity or divorce. In his 1946 allocution to the Rota, Pope Pius XII indicated that the Church could recognize a civil decree of nullity in certain circumstances in the case of two non-Christians. This declaration was somewhat revolutionary at the time, but it was not followed up in practice.

Our study has demonstrated that there is agreement between canon law and Indian civil law on some of the substantive aspects of marriage. Both hold that the right to marriage is a natural right of every human being. Both require the observance of a certain form for a valid celebration of marriage. Both have established impediments in order to protect this social institution of marriage from being contracted invalidly. Several of these impediments are identical. Both systems also recognize the invalidating effect of deceit. Once it is proven with moral certainty or beyond reasonable doubt that deceit had been used by one party in obtaining the consent of the other, both canon law and Indian civil law consider the marriage null and void. Likewise the criteria and principles used by both systems of law in establishing the presence and the invalidating effect of deceit in marital consent are similar. Again, both laws agree that a null and void marriage means that there was no legal marriage from the beginning. If there was no legal marriage, then there was no contract. If there was no contract, there was no sacrament, and consequently, the non-existing union naturally does not fall under the purview of spiritual matters. For this reason, we maintain that the acceptance, by the



Church, of a civil decree of nullity based on the ground of deceit would not be contrary to the teachings of the Church on the nature of marriage.

The fundamental principle which guides every ecclesial law is the salvation of the faithful (c. 1752). Therefore, we believe that those who have been victimized by deceit should not be subjected to further injustice by forcing them to go through two processes which, as we have demonstrated in our study, are substantially compatible. For this reason, we would like to propose the following suggestions for consideration in order to resolve the present situation faced by Catholics in India:

a) The Catholic Bishops Conference of India should request the Holy Father to grant it the power to provide appropriate guidelines for all ecclesiastical tribunals in India to review civil court decrees of nullity based on the ground of deceit and decree its acceptance for canonical purposes. Such a review should be conducted with the same seriousness of a judicial decision of an ecclesiastical court. The review should take into consideration all substantive and procedural aspects of a given case judged by the civil court. Should the review convince the judge that all requirements of law have been met by the civil decree of nullity, the tribunal should decree the freedom of the parties to contract a new marriage without initiating a formal canonical trial.

b) We also suggest that it is permissible for an ecclesiastical tribunal in India to introduce into the *Acta* the evidence collected for a civil trial and the decree of nullity as documentary proofs, which could at least expedite the process if the first alternative is found to be inadmissible.

We also propose the following recommendations for future consideration:

a) In India, one of the most common factors that lead to fraudulently contracted marriages is the system of arranged marriages. Therefore, it is necessary to raise the awareness of the people regarding the canonical implications of fraud and its impact on marital consent. Since most marriages are arranged by the parents or guardians, they should be properly educated with respect to their responsibility to enable their children to make free decision concerning the choice of their marriage partner. This certainly is a pastoral issue which the Church in India cannot afford to overlook.

b) In most dioceses of India marriage preparation courses are now obligatory. During these courses, the prospective candidates should be properly instructed on impediments and other aspects of marital consent which could render a marriage invalid. Most parents and would-be spouses are totally ignorant of these matters. Proper catechesis and formation of prospective candidates for marriage is a burning need of the day.

c) There is also another possibility in this scenario. The civil courts also can recognize the declarations of nullity pronounced by the ecclesiastical courts as they do with Muslim marriage cases. As stated in the introduction, India is a place of many religions and of a plurality of cultures. Therefore, civil courts should respect the personal law of Catholics and allow freedom to follow not only those laws which govern the celebration of marriage but also those used in adjudicating the nullity of marriages. The

Catholic Bishops' Conference of India could work toward achieving this goal through open and constructive dialogue with government officials and law makers of the country.

It is important to note here that our study has focused only on one ground of nullity which has been recognized by both systems of law, namely Canon Law and Indian civil law. The scientific data we had been able to gather on the chosen topic led us to the conclusion proposed above. This emboldens us to suggest that our study could inspire many other similar scientific endeavours which could, where feasible, compare Canon Law with other systems of law on different grounds of nullity of marriage. Therefore, it is our hope that this dissertation will be only the beginning of many more similar future studies on the subject matter!

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## **BIOGRAPHICAL NOTE**

Joy Paul Kallikkattukudy was born on 30 July 1957 at Asamannoor, Kerala, India. In 1975, he joined St. Joseph's Minor seminary, Bhagalpur, Bihar, to pursue studies for priesthood for the diocese of Jamshedpur, Jharkhand State. During his seminary formation, he obtained a B.A. degree in 1982 from Ranchi University. At the completion of his theological studies, he was awarded a B.Th. degree (1987). He was ordained a priest on 29 April 1987. He continued his studies in the field of theology and obtained an M.A. degree in Religion and an M.Th. in Contextual Theology (1988) from St. Albert's College, Ranchi. At the completion of these studies he was appointed the diocesan Director of St. Joseph Welfare Centre, Golmuri, and Associate Pastor of St. Joseph's Cathedral, Golmuri. This two-fold ministry lasted six years when his bishop sent him to undertake graduate studies in canon law at St. Peter's Pontifical Institute, Bangalore, India. He was awarded an M.C.L. degree in 1996 by the Pontifical Urbaniana University, Rome.

After these studies in canon law, he returned to the diocese and worked as the Pastor of Jisu Marshal Parish, Chandil, for three years. At the same time he was also a judge of the Interdiocesan Tribunal of Ranchi (1996-1999). In 1999 Bishop Felix Toppo of Jamshedpur Diocese sent him to pursue doctoral studies in canon law at Saint Paul University, Ottawa, Canada.