

THE METROPOLITAN TRIBUNAL & OFFICE OF CANONICAL AFFAIRS

ADVOCATE TRAINING PROGRAM



2014-2015

LESSON 4

The most common grounds of nullity
THE JURIDICAL CAPACITY AND SIMULATION
cc. 1095 & 1101

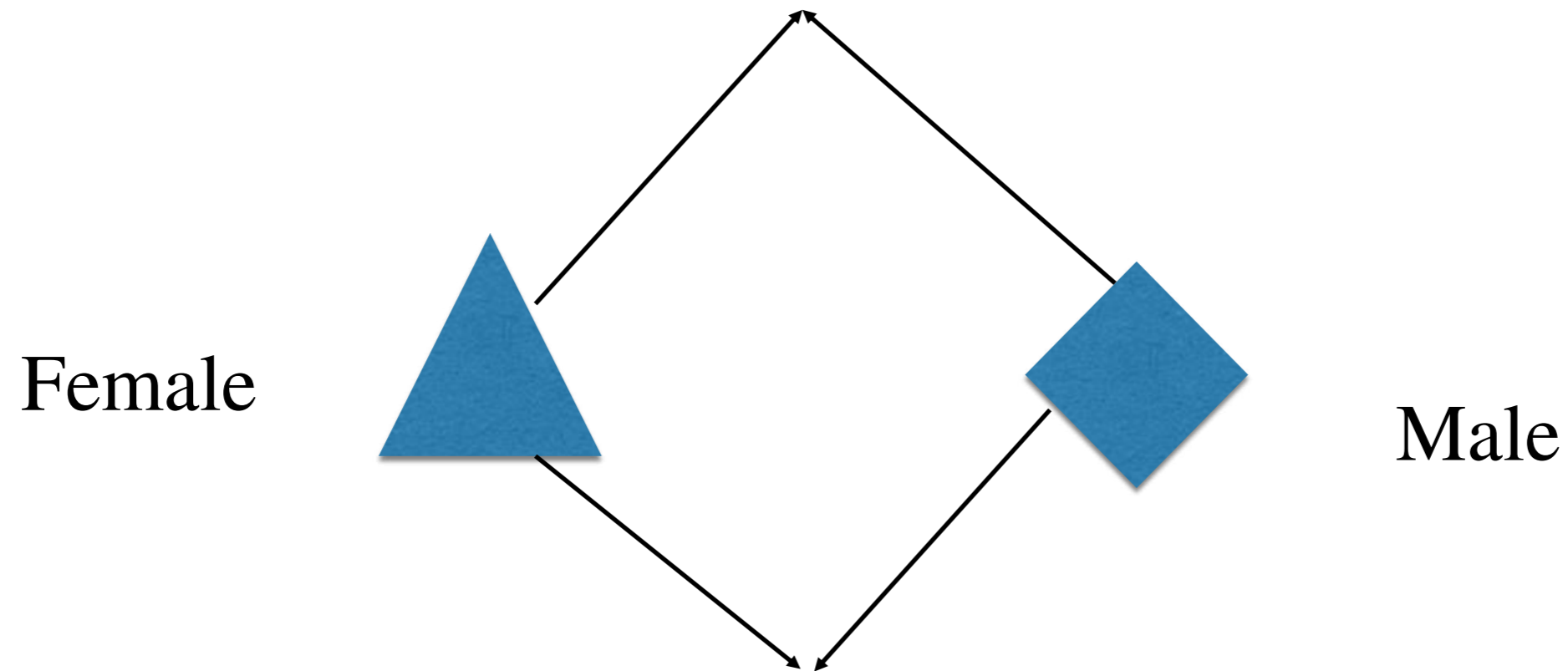
I. The marital covenant c. 1055 1-2

- ✿ Can. 1055 §1. "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".
- ✿ §2. "For this reason, a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament".

I.1. Consent makes marriage: c. 1057

- ✿ C. 1057 §1: “The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent”.
- ✿ §2. “Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage”.

Marriage is not an abstract idea external to the human person



It is not simply the object of a contract

Marriage is two persons united (*matrimonio in facto esse*) **in what they are by an act of consent** (*matrimonio in fieri*),
which is an act of total and reciprocal donation of what one is (unity - fidelity - openness to life and to the other)
to the other one (intellect - will - love), **forever** (totality in time).

THE GENESIAC *UNA*
CARO

The essential elements of marriage

UNA CARO

Una

Juridical
Capable
subject

UNITY &
FIDELITY

Juridical Capable
subject

Bonum Fidei

INDISSOLUBILITY

Bonum Sacramenti

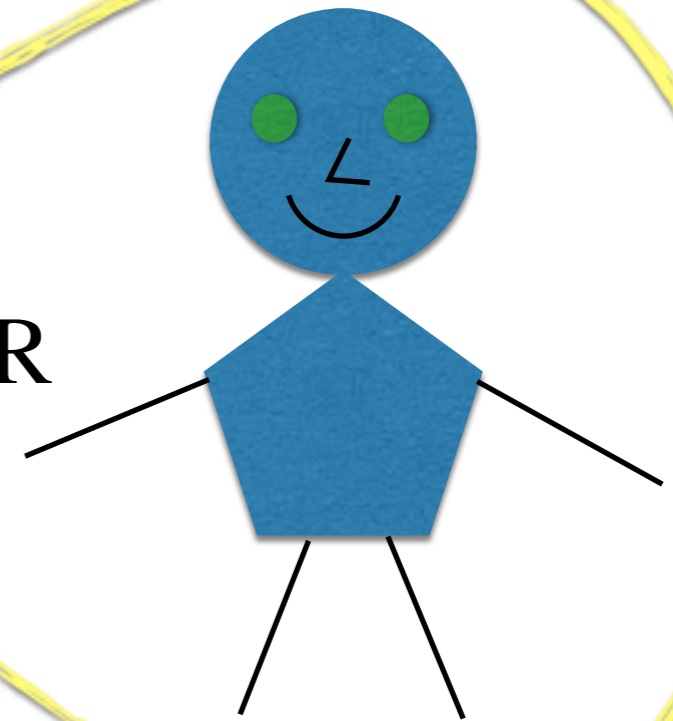
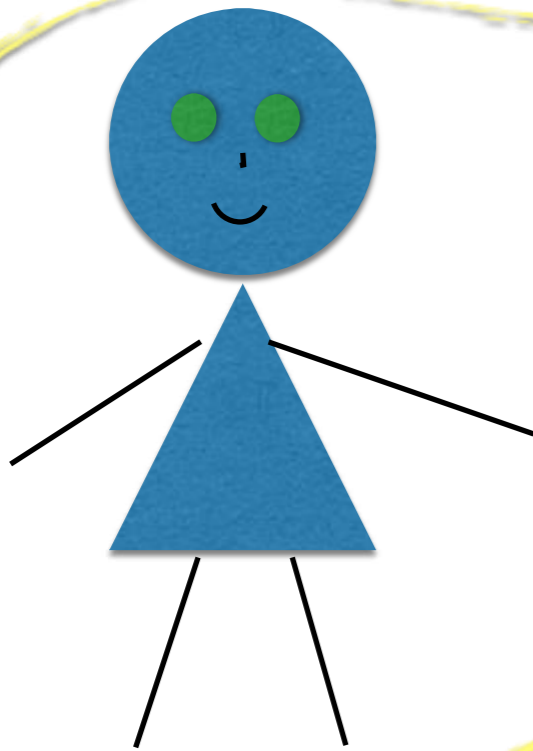
GOOD OF THE OTHER

Bonum coniugum

PROCREATION &

EDUCATION

Bonum Prolis



I.2. Subjective Elements

- Intellect - reason and the capacity to understand reality
- Will - it is what moves the subject - love (*amor coniugalis/benevolentiae*)
- juridical capacity - that sufficient human and natural capacity to place into being a juridical act defined by the law (natural and positive law)

I.3. The objective elements

- Essential properties:
 - unity/fidelity and indissolubility
 - sacramentality (for two baptized persons)
- The essential ends or finalities:
 - the good of the other
 - procreation and Christian education

II. The Juridic Anthropology

- 1. The human being as a **personal being**: the subjectivity of man as the ultimate responsible of the human action, characterized by the rational and the volitional nature. The whole complexity of the human experience is unified in the personal “I”.
- 2. The human being as an “incarnate spirit”. We are a BODY, meaning that the personal being is given and manifested in a body and the body is constitutive of the personal being. Unity between spirit and body.

- The corporeity of man is primordial even to the sexual distinction in male and female.
- To be aware of the unity of body and soul gives to the human being an ontological specificity, there is an ontological solitude which distinguishes the human person from all the other living beings (Genesis)

- 3. Sexuality as a characterization of the human nature
 - In what sense does sexuality characterizes the human person? How is constitutive of the human identity? Are there two species of human beings?
 - Sexuality modalizes the personal “I”. We do everything through a sexualized body.
 - Therefore, the sexual distinction can be considered as a constitutive modalization of the human person

- The body is the manifestation of the person, and therefore any type of communication is also modalized by the sexual distinction and complementarity
- Moreover, the body, is MY BODY, in as much the human person is a personal body characterized by the sexual distinction
- Therefore, there is an intimacy which is personal, unique and exclusive to the human person, which makes each one of us, ONE, intimate unto ourselves and EXCLUSIVE of others IN TIME

- **THIS UNITY IN TIME IS THE ANTRHOPOLOGICAL PRESUPPOSITION OF UNITY- FIDELITY AND INDISSOLUBILITY in the conjugal relationship**

II.1. The *sponsalità* “*sponsality*” and conjugality of the human person

- The constitutive **relational dimension** of the personal being: to the absolute and to the other
- The sponsality of the human person alludes to the fact that the “embodiment of the spirit” or the “incarnated body” is also **the primordial principle of communication** of between personal beings
- In this context **the sexual duality constitutes the natural basis of the interpersonal communion**
- Sexuality can be seen **as the primordial call to love** as a gift of oneself to the other: it is a call to love and to be loved.

- The sexual distinction seems to be a reorganization of the personal being to suit himself/herself to the primordial necessity to enter into a relationship with another personal being.
- Conjugalility is a more specific category than sponsality, for it refers to that specific power embedded in the sexual distinction which leads two personal bodies to belong to each other

- Marriage is, therefore, the natural confluence of the unitive power embedded in the human sexuality
- Through the sexual distinction a man donates what he is in his unity of spirit and soul to the woman, who accepts this man in his unity and who donates herself to him, in her unity
- It is not just a material donation of one's sexuality to the other, but it is a donation of what one IS as a PERSONAL BEING

- It is the union of two subjects through their objective sexual distinction

II.2. The juridic formality of conjugality

- What makes reality a juridic reality is the dimension of justice: *Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iurisprudencia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia: “Justice is the constant and perpetual will to give to each one what is its own”*.
- The donative gift of oneself to the other and vice-versa through conjugality has an embedded juridic dimension, for MY BODY is given as a gift to another SUBJECT who in turn gives HER BODY to the same subject IN JUSTICE
- The marital bond is a juridic bond established in justice, where the two personal beings become one co-being united by a juridic bond which is the fact that one subjects belongs to another, not as an object, but as a personal being, and vice versa.

III. The juridic relevance of conjugal love

- Is the reality of love a juridic or a meta-juridic reality?
- what is the place of conjugal love in the marital reality? is love a constitutive part of what makes marriage, or an side reality which accompanies the conjugal relationship?
- is Love the essence of the conjugal bond?

- The Romans spoke of the *affectio maritalis*
- The II Vatican Council (GS 48) defined marriage as *communitas vitae et amoris* and related the conjugal reality to the *tria bona* of marriage: *bonum prolis, bonum sacramenti, and bonum fidei*.

- In the canonical post-conciliar debate some scholars opted for a meta-juridical conception of conjugal love.
 - marriage is a particular contract which does not admit to consider love as having anything to do with marriage at an essential level.
 - love is a psychological, meta-juridical reality which accompanies marriage, but does not determine its validity or perdurance in time.
 - today's society disagrees with this statement. Without love there is not marriage, as soon as love is over, marriage is over.

- the point seems to be on the very concept of love.
What is love?

III.1. Love as an essentially unifying movement

- St. Thomas defined love as *prima immutatio appetitus*, meaning that LOVE is the first act of the will and of the passions, in as much as one desires always what is GOOD
- The object of LOVE IS WHAT IS GOOD
- Love, therefore, is a movement which stems from both the emotional and the rational faculties of a person

- Love in general is a radical and personal openness and communication with the other
- The object of love in its highest meaning is the other person as a subject and never as an object of desire (possession) or means to an end (utilitarian approach), but as a good in himself/herself

III.2. The conjugal love

- There are different types of love:
 - Love as friendship
 - Love as *érōs*
 - Love as affection
 - Conjugal love

- The specific good which identifies conjugal love is the love for the other one in as much as it is sexually different and complementary

- Love is a personal love, not just an attraction, but it is also characterized by a rational dimension
- In Conjugal love we need to distinguish the instinctive level (senses and feelings) and the rational level (intellect and will)
- Love implies reciprocity: it is a love FOR not BETWEEN two personal beings
- Love implies freedom
- Love implies totality

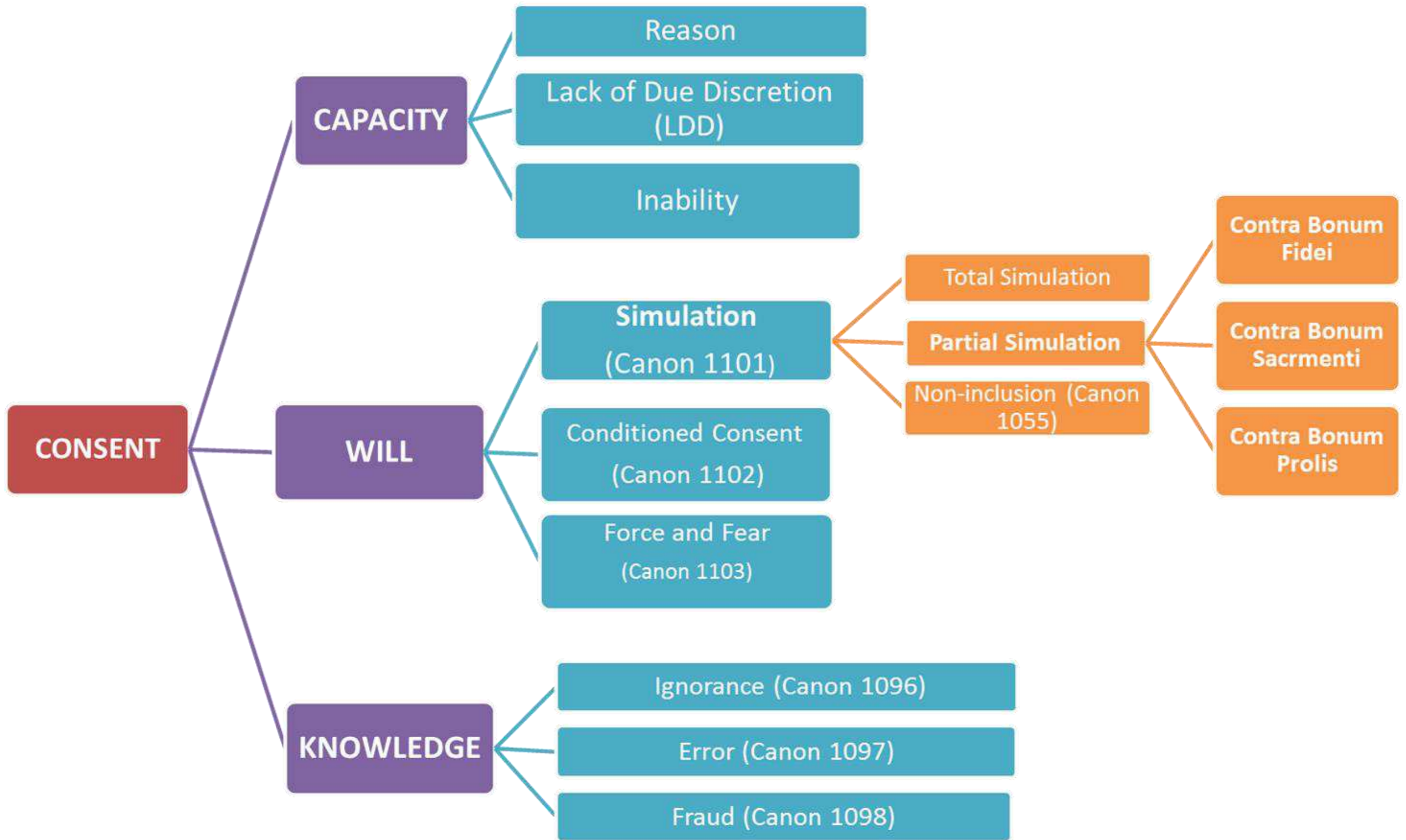
III.3. Conjugal Love as a potency of biographic union: the three unitive phases of love

- There must be a love for oneself: if I do not love myself, I cannot love another self.
 - This love for oneself can be either an ordering love, or a disordered love.
- In Revelation it is God who loved us first, and this love, when accepted, gives order and allows for the love of oneself
- From the love of concupiscence (*concupiscentia*) to the love of benevolence (*benevolentia*)

- 1st phase: falling in love: it is situated in the sensual dimension of the personal “I”:
- Flesh attracts flesh: the communicative process begins in the body in five dynamics, the primordial elements:
 - 1. to be united (to be one, unity)
 - 2. exclusively ours (to be faithful)
 - 3. to be the best for the other (to seek the good of the other)
 - 4. the impulse to life (openness to life)
 - 5. to be forever united (indissolubility)

- 2nd phase: the nuptial metamorphosis of the human love
 - This is the union of the rational will of the human person which transforms something that happens in something that I want
 - The human consent is an act of love, which brings to fulfillment what my embodied person already is asking me
 - I take what I am and I donate it to the other in juridic bond

- 3rd phase is the conjugal life itself where the love for oneself has to be transformed into the love for the other
- I love MYSLEF through the other one.
- I can re-posses myself through the freedom of the other one.
- **CONSENT IS AN ACT OF BENEVOLENT LOVE**



IV. c. 1095 the juridical capacity

- Can. 1095 The following are incapable of contracting marriage:
 - § 1 those who lack the sufficient use of **reason**;
 - § 2 those who suffer from a grave defect of **discretion** of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted;
 - § 3 those who are not able to **assume** the essential obligations of marriage for causes of a **psychic nature**

This canon, deals with mental illnesses and psychological disturbances, and aims at determining which factual situations (such as specific mental conditions, pathologies, and immaturity) MAY possibly constitute the juridical incapacity to place a valid act of consent, thus determining the juridical cause of the nullity of marriage.

The legislator has purposely avoided to give a specific terminology and to provide specific classifications of medical and psychiatric nature

The legislator has only outlined a basic juridical concept (that of the «juridical consensual incapacity») and three juridical types through which this incapacity manifests itself through specific forms or autonomous causes of nullity:

1. some pathologies affect the reason determining its lack thereof
2. some pathologies affect the judgment or grave lack of discretion regarding the rights and duties of marriage
3. some pathologies affect the assumption of obligations (*ad impossibilia nemo tenetur*)

IV.1. The lack of reason: 1095 §1

- This formula is somewhat generic and undetermined. This situation can be determined by either a **grave organic illness**, which affects the **mental condition** of the subject, or by some other **mental illnesses** such as psychosis, schizophrenia, paranoia, depressive maniac psychosis ...; these pathologies have to reach the so called **qualified stage**, i.e., they have to be medically declared illnesses.
- The lack of sufficient use of reason may be caused also by **contingent or temporary state of mental alterations**, so as to provoke the incapacity of the subject to **auto-determine** himself/herself in a **conscious and free way** (for ex. temporary dependence from drugs, alcohol, intoxication ...).
- A sentence of the Roman Rota affirms that "proven the antecedent and subsequent state of mental infirmity, such infirmity has to be presumed at the moment of the exchange of the consent".

IV.2. The Lack of due discretion: 1095 §2

- The expression "discretion of judgment" refers to the degree of personal maturity which allows the party to evaluate the concrete situation so as to be able to responsibly assume the commitments in relation to the essential matrimonial rights and duties.
- The expression "grave defect" refers not so much to the illness itself, but to the actual discretion of judgment. From a juridical point of view, we are not interested in the gravity of the psychic pathology, but in the gravity of the "critical faculty" of the subject in relation to the "essential duties and rights" of any given marriage.
- The reference to the essential rights and duties of marriage is the sole criteria that allows us to define the gravity of the lack of judgment.
- This incapacity can be found in these pathologies: psychopathic personalities, neurosis, psycostenia, hysteria, psychic and affective immaturity, addictions to alcohol, drugs, pornography ...
- Nullity is declared if this state of mind is declared to be present at the moment of the exchange of consent.

IV.3. The inability to assume the obligation of marriage: 1095 §3

- This juridical title of nullity derives its reason of being from those pathologies that present **psychic and character/personality** disorders which determine in the subject an actual **impossibility/inability to assume** the essential duties of marriage.
- By contrast, these subjects have use of reason and they may even not lack the due discretion, nonetheless, **they are incapable of assuming the specific matrimonial duties and responsibilities.**
 - A person may be an intelligent and capable scientist, architect or professionally qualified individual, but he/she is not able to assume the matrimonial duties. In the subject there is an **abstract understanding** of the responsibilities of marriage, however, **due to a psychic cause**, they are not able to carry them out. The psychic cause affects the relational dimension of the subject.
- These causes of psychic nature do not take away the capacity to intend and the freedom to will, however, **these subjects are not suitable to fulfill the basic conjugal duties.** For example: nymphomania, it is a dysfunction which pushes a woman to be unfaithful; certain types of homosexuality; some other grave and severe addictions ...
- The anomaly provokes in the subject an incapacity **to converge the matrimonial consent on its specific object.** The psychic cause is not the cause of nullity, but it is at the origin of the impossibility for the subject to assume the essential duties of marriage.

- Jurisprudence presents some common disturbances:
 - a. sexual disturbances: nymphomania, sadism or sado-masochism, some degree of homosexuality, some situation of transsexualism (such as surgical modifications)...
 - b. disorders at the level of personality: narcissism, antisocial or very violent personalities, very weak personalities which make the person fall into toxic dependence.

c. 1095 fails to list the pathologies and to list the rights and duties of marriage

- Normally one refers to can. 1055 §1 (the constitutive elements) and 1056 (essential properties).
- The means of proof: the judge has to study the history of the person, his clinic history and make use of a scientific *peritia (psychological experts) to be able to establish the factual causes of the juridic incapacity of the subject to contract marriage.*

IV.4. Practical guide for the advocate

- **WE WANT FACTS NOT SUBJECTIVE IMPRESSIONS**
 - it is the duty of the judge to translate the facts in juridical categories.
- **WE WANT CLINICAL/MEDICAL RECORDS**
- **WE ARE MORE INTERESTED IN THE TIME BEFORE THE WEDDING, BOTH REMOTE AND PROXIMATE**

- these points need to be addressed
 - 1. how was the time of the courtship/engagement and what have been the causes for the breaking or rupture of the relationship: ex. eccentric behaviors, anomalies in the behaviors, strange behaviors - no one is an expert, but certain behaviors are easy to catch/red flags.
 - 2. did the alleged incapable person have difficulties in some important areas of their existence?
 - a. the carrying out of basic social life issues, paying the bills, life threatening behaviors, losing jobs and opportunities, incapacity to commit, ...

- 3) one has to look into the "clinical history" of the neuro-psychic sphere of the alleged incapable subject:
 - retrieve old expert reports, old diagnosis, what type of medicaments the person is taking, what documentation do we have?
- 4) how the subject spoke about the future wedding:
eccentrically

- **5) *causa contrahendi*: the reason why a person marries.** Is there an anomaly, pressure, in the reason why the person contracts marriage?
 - pregnant
 - very young age
 - one has to weigh the subjective weight of external situations which may affect the freedom of the person

- 6) any type of addiction: alcohol, drugs (), pornography
 - how frequent
 - how many days during the week
 - how does the subject behaves under the influence

- 7) proximate preparation to the wedding: how was the subject preparing for the wedding

- 8) how the subject carried out his life during the marriage:
 - was he/she faithful?
 - was he/she responsible?
 - was he/she living a very individualistic type of life?

- 9) the "clinical history" after the marriage: depression, psychopathologies ...
- it is fundamental to be able to obtain a release for the doctors of this clinic material
 - psychology evaluations
 - medical records
 - we provide the release letter

IV.5. The psychological immaturity and affective immaturity

“In some cases, unfortunately, one can still perceive the urgent need to which my venerable Predecessor pointed: that of preserving the ecclesial community from the scandal of seeing the value of Christian marriage being destroyed in practice by the exaggerated and almost automatic multiplication of declarations of nullity, in cases of the failure of marriage, on the pretext of some immaturity or psychic weakness on the part of the contracting parties”

(Address to the Roman Rota, 5 February 1987, n. 9). BXV, Allocutio Rota, 2009.

“In our meeting today, I wish to draw the attention of those engaged in the practice of law to the need to handle cases with the depth and seriousness required by the ministry of truth and charity proper to the Roman Rota. Indeed, responding to the need for procedural precision, the aforementioned Addresses provide, on the basis of the principles of **Christian anthropology**, fundamental criteria not only for the weighing of expert psychiatric and psychological reports, but also for the judicial settlement of causes. In this regard it is helpful to recall several clear-cut distinctions:

1. The distinction between "the psychic maturity which is seen as the goal of human development" and, on the other hand, "the canonical maturity which is the basic minimum required for establishing the validity of marriage" (Address to the Roman Rota, 5 February 1987, n. 6).
2. The distinction between incapacity and difficulty, inasmuch as "incapacity alone, and not difficulty in giving consent and in realizing a true community of life and love, invalidates a marriage" (ibid., n. 7).
3. The distinction between the canonical approach to normality, which, based on an integral vision of the human person, "also includes moderate forms of psychological difficulty", and the clinical approach, which excludes from the concept of normality every limitation of maturity and "every form of psychic illness" (Address to the Roman Rota, 25 January 1988, n. 5).
4. The distinction between the "minimum capacity sufficient for valid consent" and the ideal capacity "of full maturity in relation to happy married life" (ibid.).

“Furthermore, based on the engagement of the faculties of the intellect and the will in the formation of matrimonial consent, Pope John Paul II, in the aforementioned Address of 5 February 1987, reaffirmed the principle **that true incapacity "is to be considered only when an anomaly of a serious nature is present which, however it may be defined, must substantially vitiate the capacity to understand and/or to will"** (Address to the Roman Rota, 5 February 1987, n. 7)»

"In this regard it seems fitting to recall that the norm of the Code of Canon Law regarding mental incapacity, so far as its application is concerned, was amplified and completed by the recent Instruction [Dignitas Connubii](#) of 25 January 2005. The Instruction requires that, **for such incapacity to be established, at the time of the celebration of marriage there must already have been present a specific mental anomaly** (art. 209 § 1) which seriously impairs the use of reason (art. 209 § 2, n. 1; Can. 1095, n. 1) or the critical and elective faculty with regard to making serious decisions, particularly concerning the free choice of a state of life (art. 209 § 2, n. 2; Can. 1095, n. 2), or which produces in the contracting party not only a serious difficulty but also the impossibility of fulfilling the duties inherent in the obligations of marriage (art. 209 § 2, n. 3; Can. 1095, n. 3)"

On this occasion, however, I would like to reconsider the theme of the incapacity to contract marriage, as treated in Canon 1095, also in the light of **the relationship between the human person and marriage**, and to recall several fundamental principles which must guide those engaged in the practice of law.

First of all, there is a need for a new and positive appreciation of the capacity to marry belonging in principle to every human person **by virtue of his or her very nature as a man or a woman. We tend in fact to risk falling into a kind of anthropological pessimism which, in the light of today's cultural context, would consider marriage as practically impossible.** Apart from the fact that this context is not uniform in the various parts of the world, **genuine incapacity to consent cannot be confused with the real difficulties facing many people, especially the young, which lead them to conclude that marital union is, as a rule, inconceivable and impracticable. Rather, a reaffirmation of the innate human capacity for marriage is itself the starting point for enabling couples to discover the natural reality of marriage and its importance for salvation.** Ultimately, what is at stake is the truth about marriage itself and its intrinsic juridical nature (cf. Benedict XVI, [Address to the Roman Rota](#), 27 January 2007), which is an indispensable premise for the ability to understand and evaluate the capacity required to marry.

Capacity in this sense has to be seen in relation to the essential nature of marriage as "the intimate partnership of life and conjugal love established by the Creator and endowed with its proper laws" (Second Vatican Ecumenical Council, Pastoral Constitution [Gaudium et Spes](#), n. 48), and, in a particular way, with essential and inherent obligations which are to be accepted by the couple (Can. 1095, n. 3). **This capacity is not calculated in relation to a specific degree of existential or actual realization of the conjugal union by the fulfillment of the essential obligations, but rather in relation to the effective will of each of the partners, which makes that realization possible and operative from the very moment that the marriage is contracted.** To speak of capacity or incapacity, therefore, is meaningful to the extent that it concerns the act itself of contracting marriage, since the bond which comes into being by the will of the spouses constitutes the juridical reality of the biblical "one flesh" (Gn 2: 24; Mk 10:8; Eph 5:31; cf. Can. 1061 §1), and its continuing validity does not depend on the subsequent conduct of the couple during their married life. **In a very different way, a reductionist approach which disregards the truth about marriage sees the effective establishment of a genuine communion of life and love, idealized at the level of a purely human well-being, as essentially dependent on purely accidental factors, rather than on the exercise of human freedom sustained by grace.** It is true that this freedom of human nature, "wounded in the natural powers proper to it", and "inclined to sin" ([Catechism of the Catholic Church](#), n. 405), is limited and imperfect, but it is not thereby unauthentic and insufficient for carrying out that act of self-determination by the parties which is the conjugal covenant, which gives rise to marriage and to the family founded on it.

Obviously certain anthropological and "humanistic" currents of thought, aimed at self-realization and egocentric self-transcendence, so idealize the human person and marriage that they end up **denying the psychic capacity** of a great number of people, basing this on elements which do not correspond to the essential requirements of the conjugal bond. Faced with such conceptions, those engaged in the practice of ecclesial law cannot prescind from the healthy realism spoken of by my venerable Predecessor (cf. John Paul II, [Address to the Roman Rota](#), 27 January 1997, n. 4), **since capacity refers to the minimum needed for those marrying to give their being as a male person and a female person in order to establish that bond to which the vast majority of human beings are called. It follows that, as a matter of principle, causes of nullity due to psychic incapacity require the judge to employ the service of experts to ascertain the existence of a genuine incapacity (Can. 1680; art. 203 1), which is always an exception to the natural principle of the capacity needed to understand, decide for and carry out the mutual self-giving from which the conjugal bond arises.**

V. Simulation

Can. 1101 §1. The **internal consent** of the mind is presumed to conform to the **words** and **signs** used in celebrating the marriage.

§2. If, however, either or both of the parties by a **positive act** of the will exclude **marriage itself**, **some essential element** of marriage, or some **essential property** of marriage, the party contracts invalidly.

This canon presents a presumption *iuris tantum* (i.e., presumption of law).

This presumption consists in inducing the existence of an hidden fact from a known fact.

The legislator moves from the conviction that he who contracts marriage manifests **externally** what he/she has **willed internally**.

Nonetheless, **it is possible** that between the internal and the external consent there is discrepancy, therefore this presumption admits the contrary.

This **situation of discrepancy** is precisely called **simulation**. We have simulation when there is a **willed discrepancy between the internal will and the external declaration of the will**.

In other words one manifests what he does not really want, the subject is positively willing something different.

V.1. types of simulation

There are different types of simulation:

a. **Total simulation:** which is the total exclusion of marriage (*matrimonium ipsum*) Can. 1101 §2

b. **Partial simulation:** exclusion of one of the essential properties (*bonum fidei* = unity/fidelity - and *bonum sacramenti* = indissolubility) or one of the essential elements (*bonum coniugum* = *the good of the spouses* or *bonum prolis et educatio prolis* = *children and their education into the faith*)

V.2. Positive act of the will

The exclusion is invalidating if only done with a positive act of the will, which is an **act of the will specifically and directly aiming at the exclusion of those elements.**

From a psychological point of view:

In total simulation the person has no *animus contrahendi at all (no intention to marry)*, in as much as he knows he is excluding marriage.

In partial simulation the person might have and has an *animus contrahendi*, but he is excluding one or more essential element of marriage.

To determine a **positive act of the will**, it is not sufficient:

- a way of thinking
- an ideology
- a generic will
- an aspiration even if strongly felt.

In one of the spouse there must be present, at the moment of the exchange of the consent, the **firm determination to exclude marriage** or one of the **essential elements/properties**.

V.3. *Causa contrahendi, simulandi,* circumstances

- An advocate needs to be able to distinguish between the *causa contrahendi* and the *simulandi*
 - The *causa contrahendi* is the reason why a person married
 - the *simulandi* is the real object of the union
 - The stronger the *causa simulandi*, the weaker the *contrahendi* and viceversa.

V.3. Total simulation

Internally, one does not want marriage as such, but another kind/type of relationship.

The Spouse at the moment of marriage does not want to put into being the *consortium totius vitae* (GS 48) in its entirety.

He is willing at secondary effects, such as

- citizenship
- the benefit of a testament that would be received only in case of marriage, or to give legitimacy to a son.
- What one wants is, for example, the legal status of a married person, but not marriage itself.

According to a sentence of the 1982 Coram Stankiewwicz, it is possible to say that we are in the presence of total simulation also in the case of persons that are **ideologically contrary** to the institution of marriage, such as a play boy, or a hippy.

V.4. The Bonum Coniugum

The *bonum coniugum* derives from the new formulation expressed by the Council and taken by the can. 1055.

The content of it is not clearly expressed by the legislator.

However, it includes the intimate community of life and conjugal love, the participation in the mutual sentiment and affects of life, the mutual self giving in order to constitute marriage.

We need to see acts contrary to the good of the other one:

- violence > mental, physical, serious neglect of duties ...
- not a common ground in jurisprudence

V.5. The exclusion of unity

This entitles the exclusion of a monogamic union:

- historically it was referred to "poligamic unions"
- Unity encompasses fidelity:
 - the concept of fidelity also includes the one of procreation through another "spouse".
 - So a marriage is null when entered by spouses that want the children through a different partner other than the one they married, or, for example, through artificial methods, such as an "heterologous procreation", which implies the use of the sperm of someone else.
 - In this sense and in similar cases marriage is not what the Church intends.

V.6. The exclusion of indissolubility

In the *animus* of one of the parties, there is the firm will of recurring to divorce in the case that marriage goes bad.

Today we have the case of countries where divorce is a common mentality.

The point here is always to see the specific marriage and see if in the parties there is such a mentality **so as to determine the formation of the will**. There must be a specific will, either explicit or implicit.

V.7. The exclusion of children

Absolute exclusion: we have this exclusion when, since the beginning of the union there is

1) the exclusion of the **ordination** of marriage to procreation

2) it is denied to the spouse the right to the conjugal act or the intrinsic fecundity of that act (through contraceptive means).

Temporal exclusion: the case in which the couple waits to have children for some time. It may become permanent exclusion.

In doctrine and jurisprudence there is a distinction between the **exclusion** of the *ius* (**right itself**) and the exclusion to the *exercitium iuris* (**exercise of the right**) of the acts *per se* proper to procreation

In the case of temporal exclusion, what really the couple excludes is *exercitium iuris* in as much as marriage **remains intrinsically ordained to procreation**, although weakened and impoverished.

Another case is presented by a person whose will is apparently open to the possibility of children, but make a reservation of the mind **on when and if** actually to have children depending upon a **certain condition** that has to happen.

This is not a matrimonial will, because it does not recognize nor accepts the dimension of mutual self-giving open to fecundity, which is an essential element of the conjugal pact (Coram De Lanversin, 1995).

The exclusion of children **under a future condition (temporary exclusion)**, may easily lead to invalidity of marriage for two reasons:

- 1) because the future condition may be always postponed or may never happen;

- 2) it can be demonstrated that during the time with no children what it has been excluded is actually the *ius* at those acts *per se* able to procreate.

V.8. The exclusion of sacramentality

In doctrine there are two positions:

1) one which says that this is like total simulation;

2) others say that it is a partial simulation in as much as it is an essential property of marriage.

It can be found in a will that it is openly, actively against faith and religion.

difficult to prove

V.9. Elements of proof

- 1) What was the lifestyle of the subject:
 - unfaithful during the courtship
 - very individualistic
 - superficial on responsibilities
- 2) What were the ideas/concepts of marriage of the subject

- 3) we need to see if the subject had second ends extrinsic to the marriage
- 4) we need to look at the real motive for marriage
- 5) if the person has honored the matrimonial rights
- 6) is there a prenuptial agreement?
- 7) did the subject formulated in words his/her simulation before the wedding?

VI. THE INITIAL QUESTIONS

A. FAMILY BACKGROUND

1. Briefly describe your family background, including a description of your parents' relationship, your relationship with your parents and your relationship with your brothers and sisters.
2. What is your overall opinion of your childhood and adolescent years in relation to your family, friends and school? Make note of particular events/problems.
3. What is your educational background?
4. Are there any instances of divorce in your family? If so, did they influence your attitude toward marriage and divorce?
5. Are there any instances of physical or sexual abuse occurring during your childhood or adolescent years? If so, please answer the following questions:
 - When did the abuse occur?
 - Over what period? (duration)
 - Where did it occur?
 - What was the nature of the abuse (physical, sexual or emotional)?
 - Who was the perpetrator of the abuse?
 - Is the perpetrator still alive and, if so, where does he or she live?
 - What is the perpetrator's current occupation?
 - Is the perpetrator currently in a position of trust over minors, such as a teacher or other school worker, coach, doctor, parent or guardian of children under the age of 18?
 - Do you have any reason to believe that the perpetrator is currently abusing any minor?
 - Do you have any reason to believe that the perpetrator abused anyone else?
 - Have you previously reported the abuse to civil authorities? If so, when and where did you make that report?
6. Have you had a homosexual experience during your adolescent years, or at any other time in your life? If so, what effect or bearing did that have on your decision to marry, or on the marriage itself?
7. Please answer all of the above questions (1 - 6), regarding your former spouse and his/her family background.
8. In answering these questions, do you note significant differences in the two families? Please explain.

B. COURTSHIP

1. How old were the two of you when you started dating each other?
2. How old were the two of you when you were married?
3. How did you and your former spouse meet and start dating?
4. While you were dating, were there any particular problems or interruptions? How did you deal with these problems and/or interruptions?
5. How long did you date before you became engaged? How long were you engaged before you were married?
6. Describe the level/quality of communication at the time you decided to get married. Was it honest and open, for example?
7. Prior to contracting marriage, did you and your former spouse cohabit? If so, for how long? How did this impact your decision to marry, or did it?
8. How responsible were you for your own lives at the time of marriage? Do you feel you had the freedom and sense of responsibility for a foundation for marriage?
9. Had you completed the things you wanted to do as a single person (e.g. education, travel, job experience, etc.)?
10. Did either of you have any serious doubts or reservations about getting married and/or the future success of the marriage? If so, please describe them and how they were handled.
11. Describe the quality of love between the two of you. What kind of love did you have for each other? Were you in love or was it infatuation?
12. Was there any opposition to the marriage from family or friends? If so, why were they opposed?
13. Did common and mutually understood goals for the marriage exist?
14. How well did you know each other (e.g. attitudes, personality traits, etc.)?
15. Did the two of you have the capacity to accept and follow through with the responsibilities of marriage?
16. Did you have a basic and realistic understanding of the seriousness of marriage and its responsibilities?
17. What was the real motive(s) for the marriage?

C. PREMARITAL INSTRUCTIONS

NOTE: If there were no instructions, proceed with Section D, PRESSURE TO ENTER THE MARRIAGE.

1. Were there any instructions before the marriage? If so, of what did they consist?
2. Did these instructions bring about any difference of opinion or attitude in regard to the marriage?
3. If there were differences that you became aware of as a result of the premarital instruction, did these problems eventually affect the marriage?

D. PRESSURE TO ENTER INTO MARRIAGE

1. Was pregnancy involved before the marriage?
2. If pregnancy was involved, what was your reaction to it? Your former spouse's reaction? What was the reaction from your families?
3. Did you see any choice other than marriage?
4. If pregnancy was involved and you had not married, would this have seriously influenced your relationship with your respective families? If so, how?

E. OTHER PRESSURE TO ENTER THE MARRIAGE

1. Do you feel you were pressured into the marriage? If so, what form did the pressure take? For example, were you the last of a close knit group of friends to be married? Did you feel that you were getting "too old" to be single? Were you the last person in your family to marry? Was it your expectation, or that of your family or friends, to be married by a certain age? Was another type of pressure present?
2. Did this pressure leave you with a viable choice other than marriage?
3. Would you have married, either at the time or at all, if the pressure had not been present? Explain fully.
4. Did any significant plans for the future have to be changed because of the pressure to marry? Did this change in plans cause any resentment or tension in the marriage?
5. Did the pressure to marry push aside any doubts that existed, thinking you would resolve them later?
6. Did the pressure prevent you from considering the real implication of married life and its responsibilities? Please explain in detail.

F. MARRIED LIFE

1. From the beginning of the marriage, were you both happy with the choice of marriage? Explain in detail.
2. Do you feel that both of you were working together to make the necessary adjustment to married life or were you letting married life develop on its own?
3. Was the initial adjustment to married life delayed for any reason (military, school, etc)?
4. Did you discover anything about each other soon after the marriage that you think you should have known about before you entered marriage? If so, do you feel that it was covered up intentionally? Explain in detail.
5. Were there any areas of married life which were particularly difficult for either of you? If so, what were they and how were they handled? Please explain in detail.
6. Did both of you understand your various responsibilities in the marriage? Were they fulfilled?
7. Did you and your former spouse attempt to deepen your marriage through communication and mutual decision making?
8. When did the first serious problems begin to appear in the marriage? What form did these take? (When answering, try to give specific times. For example: The first really serious problems appeared in the first few months or the first year of the marriage and the problem consisted of...).
9. Were there mutual attempts to try to deal with and resolve these problems, or did you simply let them go away by themselves? Explain in detail.
10. Were there any separations during the course of the marriage? When did they occur (first year, last, etc.)? What caused them? How were they resolved? Please explain in detail.
11. Why did the marriage last as long as it did? Please explain in detail.

G. PERMANENCE OF MARRIAGE

1. Did both of you go into the marriage with at least the intellectual understanding that marriage was meant to be a permanent, life-long commitment?
2. Do you feel that this was actually the type of commitment which you made to each other as opposed to simply hoping that it would become a life-long commitment?
3. During the marriage, did you have close friends who influenced your decision for a divorce? If so, were these people also divorced? Please explain in detail.
4. Were both of you settled enough in your own lives and strong enough in your own relationship to take on such a commitment with a hope for success? Please explain in detail.
5. Did either of you go into the marriage setting any conditions which would have to be met in the marriage if the marriage was to continue? For example, entrance into the Church, completion of education, etc. Please explain in detail.
6. Did either party appear to be living like a single person, despite the fact of being married? Please explain in detail.
7. Did either party spend an excessive amount of time away from home other than time at work or reasonable recreation?

H. SEXUAL ASPECT OF MARRIAGE

1. Did both of you see sex as an integral part of the marriage and also as a way of showing true love for each other as opposed to just using each other?
2. Did either party show any sexual attitudes or ask for practices which were unacceptable to the other party?
3. Were there problems of a sexual nature in the marriage? If so, what were they and how were they handled? For example, if there were problems, did you attempt to resolve them through open and honest discussion or counseling?
4. Was there a problem with impotence?
5. If impotence was a problem, was it functional or psychological? What do you think caused it? Was anything done to correct it? What were the results?
6. Was there ever any surgery which may have affected the sexual aspect of the marriage? For example, tubal ligation, vasectomy, hysterectomy, etc. If there was surgery, what was done and why? How did it affect the sexual aspect of your marriage?
7. Are you homosexual or heterosexual in your sexual orientation? If you are homosexual in your sexual orientation, when do you believe you first began to be attracted to those of your sex? How did this affect your view of yourself? How did this affect your relationship with your former spouse, either before or after the marriage? How did this affect your decision to marry?
8. Please answer question #7 in regard to your former spouse.

I. CHILDREN

1. Prior to the marriage in question, had you and your former spouse discussed the possibility of having children once married? Did you discuss the size of the family and when to start having children? What did you decide?
2. Do you feel that both of you were comfortable enough with the responsibility of married life to consider taking on the added responsibility of children from the marriage? Explain your response.
3. Were the two of you strong enough in your own relationship to provide a healthy environment in which to bring up a child or children?
4. How many children were born from this marriage? Please provide their names and dates of birth.
5. Did both of you want children from the marriage? If not, who did not and why? Please explain in detail.
6. Were contraceptives used? What was used, and with what consistency?

NOTE: If no children were born from the marriage, continue with section J, NO CHILDREN. If children were born from the marriage, finish this section and continue with section K, FIDELITY.

7. Were you and your former spouse actually united in the way you felt that the child(ren) would be raised? (For example, religion, education, discipline and other values, etc.)
8. Did either party show any jealousy or seem to be in competition with the child(ren)?
7. Did either of you set any conditions which had to be met before children were considered? If so, when were they set? Were they met? Please explain in detail.
7. Who was given primary physical custody of the minor child(ren), if any?
8. If the court ordered child support and/or alimony, are these obligations being met? If not, please explain in detail.
9. Are you and your former spouse presently involved in civil litigation concerning the custody of your child or children? If so, please explain.
10. If there was a child (or children) from this marriage, were either of you accused by anyone of child abuse or neglect in any way? Please explain the circumstances. Were either of you ever arrested or convicted of abuse or neglect? If so, please explain the circumstances.

J. NO CHILDREN

1. If one party to the marriage wanted children and the other did not, what were the reasons given for this? When did you find out that children were being excluded from the marriage? Please explain in detail.
2. If one party wanted a child, was he/she refused? Why?
3. Was anything used to ensure that there would be no children from the marriage? What was used and with what consistency?
4. Was this to be a temporary or permanent exclusion of children?
5. Did either or both of you set any conditions which had to be met before children would be born of the marriage? When were these conditions set? Were the conditions met?

K. FIDELITY

1. Did both of you regard fidelity as an essential part of your commitment to each other in the marriage? If not, please explain in detail.
2. Did either party reserve the right to associate with others to whatever degree of intimacy he/she desired, despite the fact of being married?
3. Were there any problems with fidelity in the marriage? If so, when did you become aware of these? Please explain in detail.
4. Do you feel the infidelity may have been a symptom of deeper problems or lack of feeling in regard to the marriage in general?
5. If there were actually problems with fidelity in the course of the marriage, were there any serious attempts to re-establish a relationship of which fidelity was a part?
6. Were there any cultural factors which may have influenced the attitude toward fidelity? For example, was it acceptable for one party to be unfaithful while demanding fidelity of the other party?

L. PSYCHOLOGICAL/PHYSICAL PROBLEMS

1. Was there any serious physical or emotional imbalance (e.g. date or spousal abuse or rape, substance abuse, addiction, depression, anxiety attacks, etc.) either prior to or during the course of the marriage on either part? If so, what form did this take? Please explain in detail. What effect did this have on your decision to marry and/or that of your former spouse?
2. What treatment was sought for this and what were the results? For instance, did either of you receive in-patient or out-patient treatment at a clinic or other institution for this? If so, how long did this last? Please explain the circumstances. Also, please include the therapist, clinic or agency on the LIST OF WITNESSES under "EXPERTS".
3. If this occurred before the marriage, were you aware of it or was it concealed from you? If it was concealed from you, would you have gone through with the marriage if you had known about it?
4. Was any professional diagnosis ever offered in regard to this particular situation? By whom, when, and what was the actual diagnosis?

M. VALIDATION IN THE CATHOLIC CHURCH

NOTE: If you or your former spouse are Catholic and the two of you were first married civilly, by a Judge, or by a non-Catholic minister and later had your marriage validated (blessed) in the Catholic Church, you must complete this section. Otherwise, skip to Section N, END OF THE MARRIAGE.

1. Why was the marriage not celebrated in the Catholic Church from the beginning? Please explain in detail.
2. Did either of you miss being able to receive the Sacraments during the course of the marriage?
3. When did the first serious discussion of marriage in the Church arise? Please explain in detail.
4. Did either party to the marriage feel that having the marriage validated in the Church was unnecessary, i.e., that you were already married, etc.? Please explain in detail.
5. Please describe the quality of your married life at the time the marriage in question was validated in the Church.
6. Was anyone, such as parents, pushing to have the marriage validated? If so, explain in detail.
7. Did the priest who worked with you in preparing the validation explain that this was THE marriage as far as the Church was concerned and that it required a true renewal of marital consent with all the qualities, such as permanence, fidelity and openness to children, which the Church considers essential? If not, please give an account of your understanding of what this "validation" meant to you and to your former spouse.
8. Was a new act of consent given by each of you or do you feel that only one of you gave a new act of consent? Please explain.
9. What was the actual motive for having the marriage blessed in the Church? For example, was the motive to solve problems in the marriage, to return to the Sacraments, to have a baby baptized, to restore a relationship with a particular family member, or was some other motive involved? Please explain in detail.
10. Were both of you happy and enthusiastic about having the marriage blessed in the Church? If not, explain in detail.
11. Do you think that following the validation of the marriage in the Church, you and your former spouse had a greater sense of the value of the sacramentality of marriage and worked harder at improving the marriage?
12. If there was pressure present, how much did this influence having the marriage validated? Would you have done this if the pressure had not been present? Why? Please explain in detail.

N. END OF THE MARRIAGE

1. Please describe in detail the events which led up to the final separation and civil process of ending the marriage.
2. Were there any efforts at counseling to try to bring about reconciliation? If counseling was sought, from whom was this sought and with what results?

O. ADDITIONS

1. Why have you petitioned the Tribunal at this time? Are you involved in an RCIA program or anticipating a new marriage? Please explain.
2. What do you know about the Respondent's present circumstances, i.e., single, remarried, etc.?
3. Do you have anything to add which has not been covered, but which would enable the Metropolitan Tribunal of the Archdiocese of Denver to have as complete an initial picture of the marital situation as possible?