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## ***GRAVIS DEFECTUS DISCRETIONIS IUDICII* – IS THIS GROUND FOR INVALIDITY OF MARRIAGE RAISED BY ECCLESIASTICAL TRIBUNALS FREQUENTLY ENOUGH?**

As shown in practice, a grave lack of discretionary judgement concerning the essential matrimonial rights and obligations as one the autonomous grounds for invalidity of marriage (can. 1095, 2° CIC/83)<sup>1</sup> is not often addressed by canonical tribunals. Many tribunals tend to decide nullity of marriage based on cases of inability to assume essential obligations of marriage (can. 1095, 3° CIC/83) while many cases should be actually qualified as *gravis defectus discretionis iudicii*, as is the case in the Roman Rota.<sup>2</sup> A question, therefore, is justified: Is the norm under can. 1095, 2° CIC/83 referred to by canonical tribunals sufficiently often?

### **1. The concept of discretionary judgement**

The concept of *discretio iudicii* is explained both in the doctrine of canon law and in case-law. In the two areas, attention is generally paid to a close link between this concept and matrimonial consent (as the act of will that constitutes marriage) and its objective dimension, i.e. essential matrimonial rights and obligations [Franceschi 2010, 135].

Discretionary judgement in relation to marriage is, as A. D’Auria puts it, a critical and evaluative power that manifests itself through an act of reason

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<sup>1</sup> *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

<sup>2</sup> In 2005, out of 127 decisions of the Roman Rota, as many as 55 concerned a grave lack of discretionary judgement recognized exclusively or along with other titles, mostly with *incapacitas assumendi*.

which leads to a practical judgement of action; the basic functions of this judgement are to inquire and search, but above all, to balance the “for” and “against” various options, which, in the case of matrimonial consent, are relevant to a specific nuptial relationship with a specific person with whom the whole life is to be shared in marriage [D’Auria 2007, 154]. This critical assessment much depends on the maturity of a person who is able to consider what marriage involves in his or her specific situation, while taking into account the entire psychological and existential reality of the individual, with all the wealth of experience gained throughout life; it also assumes total freedom from any internal and external conditions [ibid., 154-55; Doyle 1985, 776].

Given the dynamic process of development of the free act of matrimonial consensus, it can be assumed, as D’Auria seems to suggest, that a practical judgement can be formed on two levels. Level one: practical and speculative, whereby the reason submits to the will a general imperative accepted by the will, e.g. that it is good to contract marriage. However, there is no direct action following: it occurs when, on level two, the reason submits to the will a more definite imperative, e.g. “I am getting married,” in a way that leads to an action. Matrimonial consent is a level two practical judgement, also referred to as a practical-practical judgement [D’Auria 2007, 156; Burke 1991, 148-49].

J.I. Bañares approaches discretionary judgement from the anthropological perspective. By finding that marriage, for the existence of the marriage bond, implies close cooperation and co-possession of masculinity and femininity, the canonist assumes that capacity to marry covers the relationship between the subject and his or her act which is always the act of “possessing” and managing yourself, your personal “self,” therefore, being an act related to sexuality. Entering into the act of matrimonial consent means both possessing and giving yourself, given that this is the act of free will through which the subject disposes of his or her “self” and his or her own personal biography [Bañares 2013, 153-54].

When asked what is behind the concept of *discretio iudicii*, an experienced judicial vicar from Milan and author of numerous works on marriage law, P. Bianchi, points out two items. Thus, first of all, it should be noted that the act of matrimonial consent should be based not only on

the abstract and conceptual understanding of matrimonial rights and obligations but also on critical judgement, i.e. at least on their minimum practical assessment, relative to its binding content. It is not exhausted at the time of contracting marriage but evolves in future married life. Certainly, matrimonial rights and obligations cannot be required to be assessed in all their secondary aspects and “measured” in all their possible variations in all possible life circumstances; however, you cannot be satisfied with a judgement which, in terms of the critical judgement of the obligations to be assumed, remains below the minimum standards. In addition, Bianchi finds that discretionary judgement leaves at least some room for internal freedom, thus enabling self-determination in relation to the choice of matrimonial rights and obligations [Bianchi 1998, 185-86].

The Roman Rota’s case-law, based on the interpretation aimed at solving individual cases, would put more emphasis on the content of *discretio iudicii* and its serious lack and, in particular, on its constituent elements, individualised in the psychic, volitional and affective functions of a person and maintaining a link with matrimonial rights and obligations mutually given and accepted [Stankiewicz 2000, 284-85].

Starting from that point, the Roman Rota found, according to contemporary psychology, that the human reason possesses a critical ability (*facultas critica*) as the possibility of reasoning and making practical judgements, often identified with the ability of estimation or assessment (*facultas aestimativa seu ponderativa*) of the significance of the institution of marriage, yet different from the ability of cognition (*facultas cognoscitiva*), which is focused only on understanding the abstract truth and on cognising just such ability or critical potential as an essential component of discretionary judgement to make matrimonial consent valid [ibid., 286].<sup>3</sup>

The insufficiency of matrimonial consent was therefore consistently assessed and accepted only in the event of a total lack of discretionary judgement which was confirmed by the functional absence of the ability to cognise, criticise, judge and select, as confirmed in Dec. c. Stankiewicz of 17 December 1987.<sup>4</sup> However, some later decisions of the Roman Rota,

<sup>3</sup> See also Dec. c. Pinto of 4 February 1974, SRRD 66 (1974), p. 39.

<sup>4</sup> “Hic sane conceptui includi solent tum defectus facultatis intellectivae, scilicet eius functionis cognoscitivae seu apprehensivae et criticae seu aestimativae (cf. c. De

based on can. 1095, 2° CIC/83, pay more attention to the negative aspect *discretio iudicii*, in particular the severity of the lack of proper assessment [Stankiewicz 2000, 286].

The starting point for arguments used by the Rota's judges in determining discretionary judgement is usually the definition of matrimonial consent contained in can. 1057 § 2. The Rota's case-law often highlights that the act of matrimonial consent requires the cooperation of reason and will<sup>5</sup> and other mental elements (emotions) that, when integrated, make the person capable of making a choice, i.e., to perform discretionary judgement which, besides knowledge, means practical judgement (*iudicium practico-practicum*) on a specific matter, in this case contracting marriage.<sup>6</sup> It is emphasised that matrimonial consent, as underpinning the new covenant, is a human act (*actus humanus*), hence, it requires the contracting parties to use their mental faculties and display free operation of will [Góralski 2001, 148; Idem 2018, 55].

The Roman Rota judges tend to refer the notion of *discretio iudicii* (also when absent) both to mental ability (cognitive, critical and evaluative) and

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Lanversin, 18 martii 1987, Fortalexien., n. 4), praepedientes rectam apprehensionem essentialium iurium et officiorum coniugalium, quae bona prolis, coniugum, fidei et sacramenti essentialiter constituunt (cf. can. 1055 § 1, can. 1056 et can. 1101 § 2; c. Pinto, 14 novembris 1986, Baltimore., n. 3), atque eorum sufficientem ponderationem et deliberationem tam de seipsis quam pro nupturiente (c. Pinto, 14 decembris 1984, Medellen., n. 4); tum defectus facultatis volitivae, praepedientes libertatem internam subiecti (c. Pompedda, 21 novembris 1983, Romana, n. 5) in matrimonii et compartis electione; tum demum defectus functionum psycho-affectivarum, praepedientes harmonicam ordinationem et conspirationem inter superiores facultates (c. Colagiovanni, 27 iunii 1986, S. Clodoaldi, n. 8), et consequenter consciam ac liberam determinationem ad matrimonium cum essentialibus iuribus ac officiis mutuo tradendis et acceptandis (c. Huot, 3 aprilis 1986, Januen., n. 4).” Dec. c. Stankiewicz of 17 December 1987, RRD 79 (1987), p. 742.

<sup>5</sup> Oftentimes, references to the following statement of Saint Thomas Aquinas can be found, “Actiones quae ab homine aguntur illae solae propriae dicuntur humanae, quae sunt propriae hominis in quanto est homo [...] Est autem homo dominus suorum actorum per rationem et voluntatem.” *Summa Theologicae*, Ia-II-ae, q. 1, art. 1; see, for example, Dec. c. Sable of 7 July 2005, RRD 97 (2005), p. 365.

<sup>6</sup> Dec. c. Bottone of 15 February 2005, RRD 97 (2005), p. 98; Dec. c. Stankiewicz of 22 July 2005, RRD 97 (2005), p. 439.

volitional power disorders (freedom of choice).<sup>7</sup> Still, in Art. 209 § 2 of the process instruction *Dignitas connubii*, it is recommended (in relation to a serious lack of discretionary judgement) that the impact of mental anomalies be investigated in terms of not only reason-inherent critical ability but also with regard to the ability to make choices, which, by its nature, stems from the volitional dimension.<sup>8</sup>

In Rotary decisions, the judges clarify that *discretio iudicii* is a legal and not a psychological or psychiatric notion and refers not so much to the maturity of the formal activity of reason and will but rather to the maturity of the activity of the entire human personality which operates through reason, will and other psychic elements that make a person capable of making a choice.<sup>9</sup> Therefore, the concept of discretionary judgement adopted in case-law includes not only the element of cognitive ability but also the critical (evaluative) and volitional (making choices) one. This is not a legally abstract concept because the decision-making process (of a psychological nature) is composed of experience, the cognition of reality, a practical sense of dealing with different matters, a critical reflection and a value judgement related to making decisions.<sup>10</sup>

Frequently, the Rotary judicature defines discretionary judgement as a human ability stemming from the harmonious unity of the spiritual power of reason and will, through which a person contracting marriage can assess and undertake matrimonial obligations prudently and after fair consideration. At the same time, it is emphasised that this ability is not a mere theoretical acquaintance with the essence, goals and attributes of marriage but refers to the decision of free will which implies a necessary assessment

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<sup>7</sup> See Dec. c. Stankiewicz of 19 December 1985, RRD 77 (1985), p. 632; Dec. c. Sable of 24 May 1999, RRD 91 (1999), p. 410; Góralski 2001, 153-54.

<sup>8</sup> Pontificium Consilium de Legum Textibus, *Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii Dignitas connubii* (25.01.2005), “Communicationes” 37 (2005), p. 11-92.

<sup>9</sup> Dec. c. Monier of 18 March 2005, RRD 97 (2005), p. 145.

<sup>10</sup> Dec. c. Stankiewicz of 23 February 1990, RRD 82 (1990), p. 75.

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of the motives and practical judgement of the reason regarding marriage that is contracted *hic et nunc*.<sup>11</sup>

As exposed in Dec. c. Caberletti of 28 January 2010, matrimonial consent as *actus humanus* requires, by its very nature, the person's psychic ability to act as a conscious and free "master" of the marriage covenant. "This kind of critical or judgemental ability," the judge says, "is primarily based on the cognitive ability; yet, this is not enough because it is only within the speculative realm; on the other hand, matrimonial consent emerges if the contracting party reaches practical judgement, including one that is *practico-practicum* whether in relation to being aware of the rights of both parties and their own duties to be assumed or to the person to whom the contracting party intends to surrender to establish a community of life."<sup>12</sup>

On the other hand, in Dec. c. Erlebach of 16 October 2008, an outstanding Rotary judge states that the notion of discretionary judgement means not only prudent assessment, but it embraces everything what it takes to make a truly human decision to contract marriage. Behind *discretio iudicii* there is reason and will that, although they should be differentiated in reality and generally differ from each other, remain in a close relationship that makes them inseparable in action, so that the will cannot operate if there is no cognition. Through the ability to harmoniously combine and enable the adapted operation of both intellectual and volitional ability, the person is capable of making discretionary judgements necessary for a valid conjugal covenant.<sup>13</sup>

In Caberletti's opinion expressed in the decision of 21 July 2000, discretionary judgement is an attribute of a rational being that guides a per-

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<sup>11</sup> See Dec. c. De Lanversin of 08 February 1984, RRD 76 (1984), p. 90; Dec. c. Stankiewicz of 22 March 1984, RRD 76 (1984), p. 173; Dec. c. Boccafolo of 20 May 2010, RRD 102 (2010), p. 171.

<sup>12</sup> "Huiusmodi capacitas critica aut aestimativa nititur praeprimis capacitate cognoscitiva, sed ista satis non est, cum in statu solummodo speculativo manet; consensus iugalitatis vero fit si nubens ad iudicium practicum, et immo practico-practicum, pervenit, sive quoad utriusque partis iura agnoscenda necnon quoad suas obligationes assumendas, sive quod personam cui nubens sese tradere intendit ad consortium totius vitae instituendum." Dec. c. Caberletti of 28 January 2010, RRD 102 (2010), p. 31.

<sup>13</sup> Dec. c. Erlebach of 18 March 2009 (unpublished), Prot. N. 19.784, Sent. 38/2009, n. 2.

son, above all, in more significant matters, driven by a certain mental balance between his or her higher order abilities and undetermined by the force of freedom-limiting impulses.<sup>14</sup>

## 2. The elements of discretionary judgement

A fuller understanding of *discretio iudicii* is determined by the knowledge of its constituent elements that address the intellectual, volitional and emotional functions of a person and related to the essential matrimonial rights and obligations.

Both the doctrine and case-law of the Roman Rota provide for the following three components of discretionary judgement: 1) the proper ability of intellectual cognition (the object of matrimonial consent); 2) a sufficient judgemental ability (in relation to marriage as such; the motives for entering marriage; marriage contracted with a specific person); 3) sufficient internal freedom (in the assessment of motives, i.e. in their consideration; in overcoming internal impulses)<sup>15</sup> [Aznar Gil 2015, 99; Góralski 2018, 57].

These three elements are further elaborated in Rota's Dec. c. Defilippi of 17 October 2004. The aforementioned judge, by referring to Dec. c. Pompedda of 14 November 1991,<sup>16</sup> says that *discretio iudicii* includes: 1) sufficient cognition; 2) a sufficient judgemental ability in relation to: a) marriage as such (in itself); b) the motives for entering marriage; c) marriage contracted with the contracting party; 3) sufficient internal

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<sup>14</sup> "Integre discretio iudicii definitur: «Discretio iudicii illa profecto qualitas entis rationalis est iuxta quam homo agit, praesertim in gravioribus negotiis, ductus quodam psychico aequilibrio inter suas superiores facultates, quin vi compulsionum a moderamine libertatis alienarum se determinet» (coram Serrano Ruiz, sent. diei 18 decembris 1995, RRDec., vol. LXXXVII, p. 708, n. 4)." Dec. C. Caberletti of 21 July 2000, RRD 92 (2000), p. 557.

<sup>15</sup> Dec. c. Pompedda of 14 November 1991, RRD 83 (1991), p. 728; Dec. c. Sable of 7 July 2005, p. 365.

<sup>16</sup> Dec. c. Pompedda of 14 November 1991, p. 728.

freedom: a) to assess the motives, i.e. to give them careful consideration; b) to contain internal impulses.<sup>17</sup>

## 2.1. Sufficient cognition

As regards the essential component of *discretio iudicii* (being aware of the object of matrimonial consent as an expression of the so-called cognitive intelligence), it includes sufficient knowledge of marriage and essential matrimonial rights and obligations, which the least characteristic item of the legal figure of discretionary judgement. After all, the intellectual cognition of *iura et officia matrimonialia essentialia* seems something obvious both in general terms (an act in law made under the influence of ignorance or error is invalid if it concerns the very substance of the act or comes down to an absolutely required condition – can. 126) and in the matrimonial dimension (the contracting party should have a minimum knowledge of marriage – can. 1096 § 1<sup>18</sup> and use reason sufficiently – can. 1095, 1°), consequently, the act of will to enter marriage implies the fulfilment of certain psychological conditions and requires, in relation to every *actus humanus*, the use of reason [D’Avack 1952, 136-37; Giacchi 1973, 48]. The legal figure of a grave lack of discretionary judgement of the assessing party also covers the criterion of sufficient use of reason, as provided in can. 1095, 1° [Burke 1991, 141].

In Dec. c. Stankiewicz of 14 December 2007,<sup>19</sup> it is emphasised that in anthropological terms it is not possible to speak of numerous abilities in the

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<sup>17</sup> “Discretio iudicii, requisita ut nubens capax sit matrimonii contrahendi, sicut scite acuteque scriptum legimus in una coram Pompedda, haec elementa sumul complectitur: «1) sufficientem cognitionem intellectivam; 2) sufficientem aestimationem criticam: a) sive negotii in seipso; b) sive motivorum ad contrahendum; c) sive negotii ipsius utpote attingentis personam contrahentis; 3) sufficientem libertatem ab intrinseco: a) sive in motivis aestimandis idest in deliberando; b) sive in dominandis interioribus impulsionibus» (sent. diei 14 novembris 1991, *ibid.*, vol. LXXXIII, p. 728, n. 4).” Dec. c. Defilippi of 27 October 2004, RRD 96 (2004), p. 653; see also Dec. c. Boccafola of 20 May 2010, p. 171; Dec. c. Sable of 07 July 2005, p. 365; Dec. c. Faltin of 05 May 1999, RRD 91 (1999), p. 354; Pompedda 1984, 134.

<sup>18</sup> This minimum requirement is knowledge that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation (can. 1096).

<sup>19</sup> Dec. c. Stankiewicz of 14 December 2007, “Ius Ecclesiae” 22 (2010), p. 106-34.

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intellectual sense. Intellect is a single and indivisible ability that branches into many activities, such as ordinary cognition, judgement, reasoning, intellectual awareness, intellectual memory, theoretical and practical understanding, or, to briefly speaking, abstraction, i.e. the formation of ideas, judgement, and reasoning. Thus, having in mind, the judge continues, the significance of many possibilities of human reason, according to the relevant case law, a grave lack of discretionary judgement may come from changes, inter alia, to the cognitive ability (*facultatis cognitivae*) that make it impossible to understand the essential rights and obligations of marriage and close the way to the necessary consideration of those essential rights and obligations by using practical judgement.<sup>20</sup>

He or she who lacks sufficient use of reason, as emphasized in Dec. c. Caberletti of 15 July 2004, is deprived of the ability of discretionary judgement to the greatest extent. For sufficient use of reason is the minimum criterion for *discretio iudicii*. In fact, the Rotary case-law recognises cases of more serious diseases, such as psychosis, when it comes to the lack of discretionary judgement without referring to the lack of sufficient use of reason [Stankiewicz 1980, 47-71]. Both forms of consensual inability (can. 1095, 1<sup>o</sup>-2<sup>o</sup>) concern the very act of psychological matrimonial consensus, which is impossible either because of a serious lack of use of higher abilities (reason and will), as provided in 1<sup>o</sup> of this canon or because of a serious lack of *discretio iudicii*, as provided in 2<sup>o</sup> therein.<sup>21</sup>

Intellectual cognition of the object of matrimonial consent implies sufficient use of reason in accordance with can. 1095, 1<sup>o</sup>, the minimum knowledge of marriage in accordance with can. 1096 § 1 and theoretical knowledge of essential matrimonial rights and obligations as matrimonial rights and obligations (as the object of matrimonial consent).<sup>22</sup>

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<sup>20</sup> Ibid., p. 118-19; See also "Communicationes" 7 (1975), p. 47; 33 (2001), p. 232.

<sup>21</sup> Dec. c. Caberletti of 15 July 2004, RRD 96 (2004), p. 508; see also Dec. c. Erlebach of 1 April 1998, RRD 90 (1998), p. 303.

<sup>22</sup> See Dec. c. Defilippi of 27 October 2004, RRD 96 (2004), p. 654.

## 2.2. Judgemental ability

As for the other component of discretionary judgement, it is emphasised, both in the doctrine and Rotary case-law, that to conclude marriage it is not enough to possess a purely speculative knowledge of marriage and the object of matrimonial consent (essential matrimonial rights and obligations), but it is also necessary to be able to perform a practical, or critical (judgemental) estimation of these realities. The judgement should cover the meaning of the essential matrimonial rights and obligations as such but also their meaning for the contracting party and his or her ethical, religious, social, legal and other dimensions.<sup>23</sup> It is required that the contracting party be able to estimate and judge the essential matrimonial rights and obligations to be mutually given and accepted not only in relation to marriage *in fieri* (giving matrimonial consent) but also to marriage *in facto esse* (permanent communion in which these rights and obligations will have to be implemented)<sup>24</sup>. Thus, abstract action, i.e. knowing the truth, should be accompanied by the ability to consider and assess and, ultimately, to correlate judgements in order to make new ones [Martinelli 2017, 18-19].

The essence of the person's judgemental ability to build a matrimonial consensus can thus be seen as embedded in the psychological and legal criterion.<sup>25</sup>

This practical judgement of the contracting party leading to the marital decision should be synthetic and comprehensive, yet it is not required to be analytical, detailed and exhaustive [Stankiewicz 2000, 293]. Therefore, it is not necessary to consider and judge all and individual consequences of the diverse nature or to anticipate all difficulties that could arise in a conjugal

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<sup>23</sup> Dec. c. Stankiewicz z 10.12.1986, "Monitor Ecclesiasticus" 113 (1988), p. 457; Dec. c. Defilippi of 26 July 2005, RRD 97 (2005), p. 462.

<sup>24</sup> See Dec. c. Defilippi of 26 July 2005, p. 462; Dec. c. Boccafola of 20 April 1980, RRD 81 (1989), p. 296; Dec. c. Pompedda of 14 November 1991, p. 728; Góralski 2018, 159-60.

<sup>25</sup> "Quae tamen talis maioritas discretionis esse debeat, considerationibus tam psicologicis quam praesertim iuridicis statuendum est." Dec. c. Felici of 3 December 1957, SRRD 49 (1957), p. 788.

life, but only such critical knowledge is needed that allows a specific person to assess the significance of marriage in ordinary life circumstances.<sup>26</sup>

As M.F. Pompedda points out, sufficient judgement covers three items: 1) the contracting of marriage as such; 2) the motives behind this act; 3) the effects and significance of this act for either contracting party [Pompedda 1999, 35; Idem 1976, 57].

The judgement regarding marriage is made in specific circumstances and in relation to a specific person (the other contracting party). However, this is not about prudence in making a choice (this is a completely different matter) but about sufficient consideration and proper judgement as to matrimonial consent *hic et nunc*.<sup>27</sup>

An important moment in relation to the discussed element of *discretio iudicii* is the ability of a person to become the author of his or her own choices, first by the autonomous assessment of what is good in subjective terms and, second, by freely engaging towards that good rather than other goods, and by conscious commitment to achieving that goal [Martinelli 2017, 14].<sup>28</sup>

In Dec. c. Caberletti of 28 January 2010, the judge explains that the critical or judgemental ability is primarily based on the cognitive ability, but this one does not suffice because it remains only speculative; on the other hand, matrimonial consent materialises if the contracting party reaches a practical judgement, and that judgement is *practico-practicum*, either on the rights of both parties and obligations to be assumed, that he or

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<sup>26</sup> Dec. c. Bottone of 15 February 2005, p. 98; by stressing that the contracting party is not expected to anticipate various difficulties in a conjugal life, the Rotary judges sometimes refer to the following fragment of the allocation of John Paul II made to the Roman Rota on 27 January 1997, “Non si può esigere ciò che non è possibile richiedere alla generalia delle persone. Non si tratta di minimalista pragmatico e di comodo, ma di una visione realistica della persona umana, quale realtà sempre in crescita, chiamata a operare scelte responsabili con le sue potenzialità iniziali, arricchendole sempre di più con il proprio impegno e l’aiuto della grazia.” Giovanni Paolo II, *Allocutio ad Rotam Romanam diei 27 ianuarii 1997*, AAS 89 (1997), p. 489; see Dec. c. Defilippi of 27 October 2004, RRD 96 (2004), p. 655.

<sup>27</sup> See Dec. c. Pinto of 07 October 2005, RRD 97 (2005), p. 496.

<sup>28</sup> See also Dec. c. Caberletti of 26 February 1999, RRD 91 (1999), p. 83.

she should be aware of, or on the person whom the contracting party intends to surrender to in order to establish a community of life.<sup>29</sup>

The essence of the discussed element of *discretio iudicii* is well captured in brief Dec. c. Defilippi of 7 July 2006, “In the judgemental aspect, practical consideration is required of the vital importance of marriage, that is, the essential rights and obligations of this partnership, as well as the assessment of the motives that support the conclusion of marriage and which impede its conclusion.”<sup>30</sup>

### 2.3. Internal freedom

The third element of discretionary judgement, i.e. one regarding internal freedom and often referred to as psychological freedom, is rested upon the undeniable relationship between the psychological structure of the person and the free will in making choices.

Internal freedom requires that all internal impulses originating in other human abilities (beyond reason and will), including instincts and emotions affecting free will, were not so intense as to determine the person’s will. The point is to exclude any previous internal determination which a person cannot resist due to his or her improper condition and, therefore, make

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<sup>29</sup> “Huiusmodi capacitas critica aut aestimativa nititur praeprimis capacitate cognoscitiva, sed ista satis non est, cum in statu solummodo speculativo maneat; consensus iugalis vero fit si nubens ad iudicium practicum, et immo practico-practicum, pervenit, sive quoad utriusque partis iura agnoscenda necnon quoad suas obligationes assumendas, sive quoad personam cui nubens sese tradere intendit ad consortium totius vitae instituendum.” Dec. c. Caberletti of 28 January 2010, p. 31; the same judge, in his decision of 15 July 2004, states that in the decision-making process a transition from the speculative to *practico-practicum* judgement is necessary, i.e. from the intellectual to practical knowledge, to lead to a judgement on what is good. There is a difference between a speculative-practical and practical-practical judgement. The former concerns judgements on good in general (“marriage with this person is good”) but in order for the person to be able to want it, it should be seen by the contracting party as a specific existing or realisable thing (“marriage with this person is good now or will soon be good for me”), only then a practical and practical judgement occurs. Dec. c. Caberletti of 15 July 2004, p. 510-11; see also Aznar Gil 1990, 261.

<sup>30</sup> “[...] sub aspectu aestimativo, postulantur perpensio practica de substantiali valore matrimonii seu ipsius coniugii essentialium iurium officiorumque, et aestimatio motivorum quae hinc poro matrimonio ineundo suadent et quae illinc matrimonium dissuadent.” Dec. c. Defilippi of 7 July 2006, RRD 98 (2006), p. 247.

freedom prevail over those impulses that would force such determination. In other words, it is all about invoking a certain “indifference” of will in relation to various options to choose (indetermination) and about the freedom of will to make a decision (autodetermination).<sup>31</sup>

As pointed out in Dec. c. Monier of 2 December 2005, “true internal freedom occurs when the determination of will, known as choice, is free from internal determination to something that is one, so that it can act or not act, act in one or in the opposite direction from among multiple option proposed by neutral judgement.”<sup>32</sup> This freedom is not so much based on internal impulses, but rather it requires that the stimuli of other human faculties ordered towards will (including instincts and feelings) were not so intense as to necessarily determine it. This freedom is therefore the contracting party’s autodetermination [Pompedda 1987, 545; D’Auria 2007, 178] that assumes the possibility of choosing among many options [Stankiewicz 2000, 288]. It is the ability to make decisions on your own instead of being under the influence of conditions that determine free will; thus, it rules out any internal inclination that the person cannot oppose [Turnaturi 2000, 259-60]. In other words, internal freedom is the independence of will from the internal necessity to act, that is, from natural determination towards one instead of many.<sup>33</sup>

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<sup>31</sup> Because *actus humanus* originates in the sphere of emotional life, the necessary psychological freedom can coexist with internal impulses. This act only requires that these impulses were not so strong that they would prevent the exercise of volitional ability. See Dec. c. Monier of 18 March 2005, p. 146; Góralski 2018, 60; “Freedom, as the Catechism of the Catholic Church says, is the power, rooted in reason and will, to act or not to act, to do this or that, and so to perform deliberate actions on one’s own responsibility. By free will one shapes one’s own life,” because “freedom makes the person responsible for their acts to the extent that they are voluntary” (no. 1731 and no. 1734).

<sup>32</sup> “Vera habetur libertas interna, cum voluntatis determinatio, quae dicitur electio, libera est ab intrinseca determinatione ad unum, ita ut possit agere vel non agere, agere unum vel oppositum ex extremis, iudicio indifferenti propositis.” Dec. c. Monier of 2 December 2005, RRD 97 (2005), p. 596.

<sup>33</sup> Dec. c. Stankiewicz of 14 December 2007, “Ius Ecclesiae” 22 (2010), no. 1, p. 120; Góralski 2013, 62-63; “[...] «libertas interna,» ossia la capacità deliberandi cum sufficienti motivorum aestimatione et voluntatis autonomia a quolibet impulsu ab interno.” Dec. c. Pompedda of 22 January 1979, RRD 71 (1979), p. 19; see also Dec. c. Funghini of 19 May 1993, RRD 85 (1993), p. 403; Schöch 2000, 71.

As seen in Dec. c. Evers of 19 January 1980, the concept of internal freedom covers two important conditions that should be verified simultaneously: on the one hand, a lack of determination, or indifference and, on the other, the ability to recover from such a state, i.e. to be determined by anything (making a decision). No determination is therefore a condition in which a person having everything necessary to act may act or not act, or act in one way or another [Góralski 2013, 64].

However, as G. Zuanazzi emphasises, the choice made by will is not subordinated to the rational content of the motive, otherwise it would not be a free choice (it would be determined by reason); it would be similar if the choice were “driven” by an affective impulse.<sup>34</sup>

Consequently, the internal freedom of choice is embedded in the structure of *discretio iudicii* while the freedom (will) to dispose of the object of this choice (effective choice), as A. Stankiewicz notes, can be referred to can. 1095, 3<sup>o</sup> CIC/83. In this way, also 3<sup>o</sup> of that canon could fall under the absence of the psychological act of matrimonial consent because in this case “it is about the lack of the contracting party’s volitional ability in relation to his or her future acts; that lack deprives them of the power to resist irresistible impulses of failure to meet the essential matrimonial obligations” [Stankiewicz 2000, 289].

In this area, it is still necessary to distinguish between the actual impossibility of resisting internal impulses and difficulties in dealing with them [Grocholewski 1993, 134].<sup>35</sup>

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<sup>34</sup>“The conflict between motives where the strongest ‘prevails’ makes us ‘surrender’ and not exercise free choice. On the other hand, in a free act, a person ‘controls’ motives based on self-perception. It can also be said that the strongest motive ‘wins,’ but this strength is not motive-internal, although it is ‘granted’ by the person who makes a choice. The experience of freedom, Zuanazzi concludes, materialises at the moment that characterises the decision-making process: in the ‘transition’ between the lack of determination and autodetermination where the act of wanting takes place” [Zuanazzi 2000, 303].

<sup>35</sup> See also Dec. c. Stankiewicz of 25 July 2002, RRD 94 (2002), p. 490-91.

### 3. Concluding remarks

The complex problem of *gravis defectus discretionis iudicii* is methodological, i.e. It is rested on the requirement to combine the fixed values of Christian anthropology with a deeper knowledge of the psychological dynamics of the person, i.e. the irreplaceable subject of a matrimonial relationship. This challenge is even more difficult to tackle because we are facing it in an era witnessing an unprecedented progress in sciences. Therefore, theology and canon law should respond to the challenges of methodological and content-related renewal of the approach so strongly recommended by conciliar and post-conciliar events and “forced” by the interface with contemporary culture.

Hence the necessity of adopting the criteria of useful and proper dialogue between ecclesiastical law and the latest developments in the field of mental capacity to contract marriage in order to achieve the required moral certainty as to the validity or invalidity of marriage, however, without blending the necessary interdisciplinarity, which the problem in question seems to demand, with the uncritical dependence of the law on other disciplines and on their definitions and interpretations.

As seen in the practice of many ecclesiastical tribunals of lower jurisdictions, a grave lack of judgement on essential matrimonial rights and obligations still presents many challenges in the application of can. 1095, 2° CIC/83 in specific cases that should be examined in that very context. It would undoubtedly be advisable to have more frequent recourse to the Roman Rota case-law.

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***Gravis defectus discretionis iudicii* – is this Ground for Invalidity  
of Marriage Raised by Ecclesiastical Tribunals Frequently Enough?**

Summary

One of the ground of the invalidity of marriage, sanctioned in can. 1095, 2° of the 1983 Code of Canon Law, that is a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted, is not often used in many tribunals of lower levels of jurisdiction, where there is an unjustified tendency to classify the cases brought to court to the legal figure of *incapacitas assumendi* (can. 1095, 3° of the 1983 Code of Canon Law).

Meanwhile, both the canonical doctrine and the jurisprudence of the Tribunal of the Roman Rota have already made a rich contribution to the proper understanding of both *discretio iudicii* and *gravis defectus discretionis iudicii*. In

reference to this achievement, the author explains the notion of the discretion of judgment and discusses its constitutive elements (sufficient intellectual cognition, critical-appraisal capacity, internal freedom).

**Key words:** discretion of judgment, marriage, invalidity of marriage, Tribunal of the Roman Rota

### ***Gravis defectus discretionis iudicii* – czy tytuł nieważności małżeństwa wystarczająco rozpoznawany?**

#### Streszczenie

Usankcjonowany w kan. 1095, 2° Kodeksu Prawa Kanonicznego z 1983 r. tytuł nieważności małżeństwa w postaci poważnego braku rozeznania oceniającego co do istotnych praw i obowiązków małżeńskich wzajemnie przekazywanych i przyjmowanych nie znajduje zbyt częstego zastosowania w wielu trybunałach niższych stopni jurysdykcji, gdzie panuje nieuzasadniona tendencja do sprowadzania przypadków wnoszonych na forum sądowe do figury prawnej *incapacitas assumendi* (kan. 1095, 3° KPK/83).

Tymczasem zarówno doktryna kanonistyczna, jak i orzecznictwo Trybunału Roty Rzymskiej wniosły już bogaty wkład we właściwe rozumienie zarówno samej *discretio iudicii*, jak i *gravis defectus discretionis iudicii*. W nawiązaniu do tego dorobku, autor przybliży pojęcie rozeznania oceniającego oraz omawia jego elementy konstytutywne (wystarczające poznanie intelektualne; zdolność krytyczno-oceniająca, wolność wewnętrzna).

**Słowa kluczowe:** rozeznanie oceniające, małżeństwo, nieważność małżeństwa, Trybunał Roty Rzymskiej

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