

**EXCLUSION OF THE *BONUM CONIUGUM*:
SOME REFLECTIONS ON EMERGING
ROTAL JURISPRUDENCE
FROM A FIRST AND SECOND INSTANCE
PERSPECTIVE**

In his annual address to the Roman Rota on 25th January 2008, Pope Benedict XVI spoke of the relationship between local tribunals and the Roman Rota, saying that «it would [...] be improper to admit to any opposition between rotal jurisprudence and the decisions of local tribunals that are called to play an indispensable role in rendering the administration of justice immediately accessible, and in being able to investigate and resolve practical cases at times linked to people's culture and mentality»¹. This is a clear reference to the role of the Apostolic Tribunals of providing resolutions for situations where there is a *lacuna iuris*: by means of its sentences and decrees, the Rota «fosters unity of jurisprudence and, by virtue of its decisions, provides assistance to lower tribunals»². When such

¹ Pope BENEDICT XVI, Address to the Roman Rota, 26th January 2008, *L'Osservatore Romano* (English Weekly Edition), n. 6, 6th February 2008, 3.

² Cf. Can. 19; Pope John Paul II, Apostolic Constitution *Pastor Bonus*, 28th June 1988, n. 126. Pope Benedict makes it clear that these legal measures that recognise the normative

jurisprudence is constant and well developed over the course of several decades, it is not difficult to see how such assistance can be given. But what if a trend emerges in that jurisprudence that is not yet constant or even uniformly shared among the Auditors of the Roman Rota? Such a question is not purely academic.

In recent years, a few decisions have been issued by that Apostolic Tribunal concerning nullity of marriage by reason of an exclusion of the *bonum coniugum*³. By implication, this means that petitions for nullity are being introduced, accepted, investigated and judged on this heading of nullity in local tribunals. Indeed, it has been noted that in some English-speaking Tribunals, this heading of nullity – alone or in combination with others – now constitutes the basis for up to 65% of the cases judged in a year. The same heading for nullity is to be found with regularity – but much less frequently – in several Italian Tribunals⁴.

value of Rotal Jurisprudence do not create the value, but rather simply declare it. Pope BENEDICT XVI, Address to the Roman Rota (cf. nt. 1), 3.

³ Decision CORAM PINTO, 9th June 2000, in *RRD* 92, 460-468; translated by A. Mendonça, *Studia Canonica* 39 (2005) 271-288; Decision CORAM CIVILI, 8th November 2000, in *RRD* 92, 609-620; translated by A. Mendonça, *Studia Canonica* 39 (2005) 309-330; Decision CORAM TURNATURI, 13th May 2004, *Periodica* 96 (2007) 65-92; translated by A. Mendonça, *Canon Law Society of Great Britain and Ireland: Newsletter* 152 (December 2007) 51-66; Decision CORAM MCKAY, 19th May 2005, *Periodica* 95 (2006) 675-695.

⁴ J. KOWAL, «Breve Annotazione sul *Bonum Coniugum* come capo di nullità», *Periodica* 96 (2007) 59; in footnote 1,

So far, four Rotal sentences have been published in which the ground of an exclusion of the *bonum coniugum* is considered: of these, three concluded in favour of nullity and one resulted in a negative decision. The publication of these sentences has been accompanied by some thoughtful presentations and commentaries, put forward in an effort to help all canonists and judges understand the doctrinal and jurisprudential points involved⁵. As is clear from the emerging literature, some judges of first and second instance tribunals are looking to this development, conscious of their responsibility to be alert to the reality of the cases coming before them and of the need to treat each case with the utmost care and attention.

After some preliminary considerations, this study will consider briefly the contents of the Rotal sentences issued so far in relation to this ground of nullity and reflect on the implications of this emerging jurisprudence for first and second instance tribunals, by responding to four fundamental questions:

Kowal cites a figure of 4,65% of cases judged in the Regional Ecclesiastical Tribunal of Lombardy (a total of 8) in 2004, and between 1,8% - 6,13% in the Regional Ecclesiastical Tribunal of Sicily between the years 2000-2004.

⁵ Cf. A. MENDONÇA, «Recent developments in Rotal Jurisprudence on Exclusion of the *Bonum Coniugum*», *The Jurist* 62 (2002) 378-420; A. MENDONÇA, «Exclusion of the *Bonum Coniugum*: a Case Study», *Studia Canonica* 40 (2006) 43-70; L. ROBITAILLE, «Exclusion of the *Bonum Coniugum*: interpreting and assessing evidence», *CLSA Proceedings* 68 (2006) 149-168; W. VARVARO, «Some recent Rotal Jurisprudence on *Bonum Coniugum*», *The Jurist* 67 (2007) 245-263; J. KOWAL, «Breve Annotazione sul *Bonum Coniugum* come capo di nullità», *Periodica* 96 (2007) 59-64.

- In what does the *bonum coniugum* consist?
- Can the *bonum coniugum* be excluded from matrimonial consent?
- How can such an exclusion be considered proven?
- What practical conclusions may be drawn from the recent jurisprudence?

1. Some preliminary considerations

At the outset, it is important to bear in mind some fundamental principles arising out of the doctrinal canons on marriage:

- marriage is understood to be a partnership between a man and a woman, a partnership of their whole life (can. 1055 §1);
- the husband and wife have an equal obligation and right to what pertains to that partnership (can. 1135);
- the partnership is indissoluble and exclusive (cann. 1056; 1134);
- it has been raised to the dignity of a sacrament which strengthens the spouses (cann. 1055 §1; 1134);
- marriage is a partnership ordered to the good of the spouses and to the generation and education of children (cann. 1055 §1; 1136);
- it is a partnership «brought into being by the lawfully manifested consent of persons who are legally capable» (can. 1057 §1).

These elements of the juridical description of marriage are elaborated in countless judgements of ecclesiastical tribunals dealing with nullity of mar-

riage. The vast majority of cases of nullity are heard under the headings of nullity found in canons 1095-1103, concerning defects of consent. In the jurisprudence of the Roman Rota, one can find sentences dealing with simulation of consent (partial and total), error, deceit, condition, grave fear and ignorance (the so-called 'traditional grounds'); in the past few decades a very extensive and rich vein of jurisprudence has developed dealing with those headings of nullity grounded in can. 1095 (the so-called "psychological grounds")⁶. Among other things, this jurisprudence has helped judges to achieve a deeper understanding of the nature of the act of the consent and of the content of the act of consent, as described in the canons indicated.

This doctrinal content, rooted firmly in the teaching of Vatican II, stands in marked contrast to the doctrine that had prevailed in the decades prior to the 1983 Code. The contrast emerges perhaps most clearly in the description of the purpose or ends of

⁶ Since the promulgation of the Code in 1983, a vast and varied canonical literature has grown up on the basis of these three grounds of nullity. It has been noted that the grounds of nullity contained in this Canon occupy the time and energy of the judges in ecclesiastical tribunals to an overwhelming degree, if not exclusively. Cf. A. STANKIEWICZ, «Il contributo della giurisprudenza rotale al "*defectus usus rationis et discretionis iudicii*": gli ultimi sviluppi e le prospettive nuove», in *L'incapacità di intendere e di volere nel diritto matrimoniale Canonico (can. 1095, nn. 1-2)*, Città del Vaticano 2000, 271. At the Roman Rota, the number of cases based on these grounds has grown steadily from 38 out of 199 in 1983, to 101 out of 141 in 1998, and 93 out of 155 in 1999. *Ibid.*, 271-272.

marriage. According to canon 1013 §1 of the 1917 Code:

The primary end of marriage is the procreation and education of children; its secondary end is mutual help and the allaying of concupiscence⁷.

This twofold schema of a primary and secondary end shaped the jurisprudence of the Church's tribunals for many decades⁸.

The jurisprudence and literature arising out of the 1917 Code saw marriage very much in terms of a contract whose object was the exchange of the «perpetual and exclusive right over the body, for acts which are of themselves suitable for the generation of children». From a juridical perspective, this approach to marriage was very clear and very easily

⁷ 1917 Code, can. 1013 §1. The English translation of the canons of the 1917 Code is taken from T.L. BOUSCAREN – A.C. ELLIS, *Canon Law: A Text and Commentary*, The Bruce Publishing Company, Milwaukee 1946.

⁸ The ordering of marriage towards procreation was further emphasised in the 1917 Code in two fundamental canons concerning consent: «Matrimonial consent is an act of the will by which each party gives and accepts a perpetual and exclusive right over the body, for acts which are of themselves suitable for the generation of children» (can. 1081 §2). «In order that matrimonial consent may be possible it is necessary that the contracting parties be at least not ignorant that marriage is a permanent society between man and woman for the procreation of children» (can. 1082 §1). The original schema of the Code did not introduce a hierarchy of ends; it would seem that the inclusion of procreation as the «primary» end of marriage was the work of Cardinal Gasparri, reflecting the concerns of society at the time. Cf. R.J. BARRETT, «Reflection on the *bonum coniugum*», *Monitor Ecclesiasticus* 124 (1999) 519.

determined. Over the decades that followed the promulgation of the 1917 Code, the jurisprudence of the Rota concerning simulation of consent, especially in relation to the primary end of marriage – referred to in jurisprudence as the *bonum prolis* – became well developed⁹. The sentences stressed that, unlike the so-called “secondary end”, the “primary end”¹⁰ could never be excluded from the act of

⁹ The phrase *bonum prolis* is taken from the traditional three-fold schema of St Augustine in which he identified three “goods” that justified and excused marriage: the *bonum fidei*, the *bonum prolis* and the *bonum sacramenti*: «Augustine’s claim for marriage against the Manichees was that it good a priori because it is God’s creation, and a posteriori because three observable goods are found in it [...] The goods he had in mind are three: fidelity (*fides*), offspring (*proles*), and the sacrament (*sacramentum*)». T. MACKIN, *What is marriage?*, Paulist Press, New York – Ramsey 1982, 129. Mackin quotes three explanations offered by St Augustine. One will suffice: «This good is threefold: fidelity, offspring, sacrament. Fidelity means that one avoids all sexual activity apart from one’s marriage. Offspring means that a child is accepted in love, is nurtured in affection, is brought up in religion. Sacrament means that the marriage is not severed nor the spouse abandoned [...]». *Ibid.*, 129.

¹⁰ In the jurisprudence of the Roman Rota after the promulgation of the 1917 Code, the *bonum prolis* came to be identified with the primary end of marriage described in canon 1013 §1, while the other *bona* were identified with the essential properties of marriage outlined in canon 1013 §2: «The essential properties of marriage are unity and indissolubility, which acquire a peculiar firmness in Christian marriage by reason of its sacramental character». All three *bona matrimonii* featured in the sentences in which nullity was being considered by reason of simulation, based on canon 1086 §2: «[...] if either party or both parties by a positive act of the will exclude marriage itself, or all right to the conjugal act, or any essential property of marriage, the marriage contract is invalid».

consent, without rendering the marriage in question invalid¹¹. This emphasis on the primary end of marriage was not received uncritically: some writers of the late 1920s and 1930s had argued that

Procreation [...] which is beyond the control of the parties and at times beyond their capacity, should not be described as the *finis primarius* or primary end of their human act in contracting marriage. [...] A different line of criticism considered the indignity of subordinating two human beings, two persons and their love-relationship – the highest possible relationship between human beings – to the good of the species. The two-in-oneness (*Zweieinigkeit*) of the love-community which the partners formed should be described as at least equal and independent, if not a superior, end to that of procreation¹².

These comments seemed to find support in the encyclical *Casti Connubii* of Pope Pius XI:

This mutual interior conformation of husband and wife, this persevering endeavour to bring each other

¹¹ Cf. H. FRANCESCHI, «Exclusion of Children in Recent Rotal Jurisprudence», in W.H. WOESTMAN (ed.), *Simulation of Marriage Consent: Doctrine, Jurisprudence, Questionnaires*, Saint Paul University, Ottawa 2000, 212-242.

¹² E. McDONAGH, «Source of Life», in E. McDONAGH (ed.), *The Meaning of Christian Marriage*, Gill and Son, Dublin 1963, 79. Much of the writing of these critics arose out of the controversy dealing with impotence due to a lack of *verum semen*. Cf. C. VIGLINO, «Fondamento dell'indissolubilità del matrimonio è il valore morale dell'unione sessuale?», *Il Diritto Ecclesiastico* 39 (1928) 319; L. CORNAGGIA-MEDICI, «Dell'essenza del matrimonio e di due recenti scritti sull'impedimento di impotenza», *Il Diritto Ecclesiastico* 39 (1928) 398; H. DOMS, *Du sens et de la fin du mariage*, Paris 1935, 14.

to the state of perfection, may in a true sense be called, as the Roman Catechism calls it, the primary cause and reason of matrimony, so long as marriage is considered, not in its stricter sense as the institution destined for the procreation and education of children, but in the wider sense as a complete and intimate life-partnership and association¹³.

However, rather than supporting the view of those authors who had difficulty with the concept of primary and secondary ends, it would appear that the Pope was drawing a distinction between marriage as a strictly juridical enterprise, on the one hand, and marriage as a vocation to a particular way of life, on the other.

Any lack of clarity that might have emerged from the words of the Pope was soon remedied. In 1944, the Congregation of the Holy Office expressly condemned all views that called into question the hierarchy of the ends of marriage¹⁴. This condemna-

¹³ Pope PIUS XI, Encyclical *Casti Connubii* 1930, translated in *The Christian Faith in the Doctrinal Documents of the Catholic Church*, edited by J. Neuner and J. Dupuis, Collins, London 1983, 533.

¹⁴ «In the last few years a number of published writings concerning the ends of marriage and their relation and order have appeared, which assert either that the primary end of marriage is not the generation of children, or that the secondary ends are not subordinate to, but are independent of the primary end. In these discussions the primary end of marriage is variously designated; for example, it is said that it consists in the complement and personal perfection of the spouses by a complete communion of life and action; in their mutual love and union, to be advanced and perfected through the psychical and corporal surrender of their persons; and various things of this sort.

tion was repeated a few years later in a speech by Pope Pius XII¹⁵.

The approach to marriage taken by the Second Vatican Council could not have been more different:

Sometimes in these writings a meaning is attached to words which occur in the teachings of the Church (for example, *end*, *primary*, *secondary*), which is not appropriate to these words according to their common use among theologians. This new departure in thought and speech is liable to occasion errors and uncertainties; and in order to avert such consequences the Eminent and Most Reverend Fathers of this Supreme Sacred Congregation, which is in charge of safeguarding matters of faith and morals, in the plenary session of Wednesday the 29th of March, 1944, considered the question proposed to it as follows:

Question. Whether the opinion of certain modern writers can be admitted, who either deny that the primary end of marriage is the generation and education of children, or teach that the secondary ends are not essentially subordinate to the primary end, but are equally principal and independent.

Reply. In the negative». SUPREME SACRED CONGREGATION OF THE HOLY OFFICE, decree 1st April 1944, AAS 36 (1944) 103; English translation in *Canon Law Digest*, vol. 3, 401-402.

¹⁵ «The truth is that marriage as a natural institution in virtue of the will of the Creator has not as its primary and central purpose the personal perfection of the parties, but the procreation and education of the new living being. The other ends, though also intended by nature, are not on the same level with the first, and much less are they superior to it, but are essentially subordinate to it. [...]

Does this mean that we must deny or depreciate what is good and right in the personal values which result from marriage and its use? Certainly not, because for the generation of the new life the Creator has destined in marriage human beings of flesh and blood, endowed with mind and heart, and they are called as men, not as irrational animals, to be the authors of their progeny. It is to this end that God wills the union of the

The intimate partnership of life and the love which constitutes the married state has been established by the Creator and endowed by him with its own proper laws: it is rooted in the contract of its partners, that is, in their irrevocable personal consent. It is an institution confirmed by the divine law and receiving its stability, even in the eyes of society, from the human act by which the partners mutually surrender themselves to each other; for the good of the partners, of the children, and of society this sacred bond no longer depends on human decision alone. For God himself is the author of marriage and has endowed it with various benefits and with various ends in view [...] (GS 48).

In this document, marriage is said to have several purposes: it is ordered to the good of the spouses (partners), to the good of the children and to the good of society. In the Council's teaching, there is no effort to construct a hierarchy of the ends of marriage, making one or more of the ends essential to the very existence of marriage itself. This teaching has shaped the theological, spiritual and juridical understanding of marriage for the four decades since the end of the Council.

married couple. For the Holy Scripture says of God that He created man according to His image; that He created them male and female, and He wished, as is repeatedly stated in the Sacred Books, that a man should leave father and mother and cling to his wife, and that they should be two in one flesh. All this, therefore, is true and it is the will of God; but it must not be separated from the primary function of marriage, which is to provide for the generation of new life». Pope Pius XII, Allocution to Italian Catholic Midwives, AAS 43 (1951) 835; English translation in *Canon Law Digest*, vol. 3, 403-404.

2. Four Fundamental Questions

2.1. *What is the bonum coniugum?*

2.1.1 The 1983 Code

Not surprisingly, the Council's teaching strongly influenced the preparation of the text of the revised Code of Canon Law. The 1980 Schema introduced the concept of marriage as ordered to «the good of the spouses and to the procreation and education of offspring»¹⁶. This was drawn straight from the conciliar text. The discussion of this draft text clarified several issues. Cardinal Palazzini had serious reservations about the overall text. He had three specific criticisms about the use of the phrase *bonum coniugum*:

- the good of the spouses was not something outside of marriage but belonged to its essence; it could not therefore be presented as an end of marriage;
- there could only be one principal and essential end of marriage;
- a distinction had to be made between the essential end of marriage and other ends that were accidental; there could be several accidental ends of marriage.

He proposed that the term *bonum coniugum* be suppressed and replaced with a phrase that read: «the matrimonial covenant by which a man and a woman establish between themselves a communion

¹⁶ «Matrimoniale foedus [...] indole sua naturali ad bonum coniugum atque prolis procreationem et educationem ordinatam [...]». *Communicationes* 9 (1977) 120.

of life and procure for themselves mutual benefit, is ordered of its very nature to the generation of offspring [...]»¹⁷. Cardinal Siri joined in the request that the hierarchy of ends be retained.

However, the Commission's response to these interventions was decisive:

The expression *ad bonum coniugum* must remain. For the ordering of marriage to the good of the spouses is really an essential element of the marriage covenant, and not at all the subjective intention of the one getting married. Moreover, the Schema did not intend to establish a hierarchy of ends. The Second Vatican Council itself in the Constitution *Gaudium et Spes*, besides the *bonum prolis*, proposes other goods and ends, without calling any of them primary or secondary [...]»¹⁸.

¹⁷ «Matrimoniale foedus quo vir et mulier inter se constituent vitae communionem bonumque sibi mutuo procurant, indole sua naturali ad prolis [...]». PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens synthesim animadversionum ab Em.iss atque Exc.iss Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus data*, Typis Polyglottis Vaticanis 1981, 243. This text is published without reference to the names in *Communicationes* 15 (1983) 220-221.

¹⁸ «Locutio "ad bonum coniugum" manere debet. Ordinatio enim matrimonii ad bonum coniugum est revera elementum essenziale foederis matrimonialis, minime vero finis subiectivus nupturientis. Alia ex parte, Schema nullam vult statuere hierarchiam finium. Ipsum Concilium Vaticanum II in Const. *Gaudium et Spes*, praeter bonum prolis, alia bona et fines proponit, quin tamen nullum vocet primum aut secundarium [...]». *Relatio complectens* (cf. nt. 17), 244.

This part of the text of the canon remained unaltered for the rest of the revision process and was promulgated in 1983. The response of the Commission makes it clear that the ordering to the *bonum coniugum* belongs to the essence of marriage, that there is no hierarchy of ends intended in can. 1055 §1 and that this position rests on the teaching of Vatican II.

This point is well made in some of the earliest English language commentaries which also struggled to offer some explanation for the content of this *bonum coniugum*. Thus, the author in the 1985 Canon Law Society of America commentary states:

Unlike canon 1013 of the 1917 Code, *Gaudium et Spes* avoided setting forth a hierarchy of ends of marriage. This omission does not mean that the purposes of marriage are arbitrarily determined by the spouses. By natural and divine determination marriage is ordered to the good of the spouses (*bonum coniugum*) and the procreation and education of children. The two ends are intimately related. They are what marriage is about. The unselfish giving in the context of the marital community promotes the natural and spiritual good of the spouses. Naturally, one may ask what acts or attitudes are necessary for the community of life. An exhaustive list is not possible since much depends on society, culture and personality. Yet certain basic attributes are to be expected: heterosexual companionship, interpersonal friendship, spiritual and material support. Here we find that mutual assistance, formerly considered a secondary end, is now rightly included in the very essence of marriage¹⁹.

¹⁹ T.P. DOYLE, in J.A. CORIDEN, – T.J. GREEN – D.E. HEINTSCHEL (cd.), *The Code of Canon Law: A Text and Commentary*, Paulist Press, New York – Mahwah 1985, 740-741.

The author in the commentary produced by the Canon Law Society of Great Britain and Ireland writes:

The present law has expanded the object of consent, and it clearly regards as essential certain elements which formerly might have been seen as pertaining to the perfection, rather than the essence, of marriage. The previous law distinguished between the primary (procreation and education of children) and secondary (mutual help and allaying of concupiscence) ends of marriage. The present law, following Vat. II, makes no such hierarchy of distinction. Instead, both are seen as essential and related parts of the total self-giving which is marriage. This has important practical consequences, in that the capacity for this partnership of life and the willingness to commit oneself to it have a direct bearing on the validity of marriage²⁰.

In a footnote, he adds: «This canon does not determine precisely what, in the context of a marriage's validity, constitutes the "well-being of the spouses": this is a matter for the jurisprudence and practice of the Church's marriage tribunals [...]»²¹.

A more considered approach, with the benefit of more than fifteen years of reflection and jurisprudence, is found in the more recent Canon Law Society of America commentary:

Since the promulgation of the 1983 Code, canonical jurisprudence has quietly but steadily gone about the

²⁰ D. KELLY, in G. SHEEHY – R. BROWN – D. KELLY – A. MCGRATH (ed.), *The Canon Law: Letter and Spirit*, Veritas, Dublin 1995, 572.

²¹ D. KELLY, in *The Canon Law: Letter and Spirit* (cf. nt. 20), 572, note 4.

task of elucidating the meaning of the phrase “the good of the spouses” by adjudicating concrete cases in which a spouse’s incapacity for marriage has been alleged. Although mainstream jurisprudence has been reluctant to identify the good of the spouses with the right to a loving relationship, it has been more favourable to the position that the good of the spouses, is an end of marriage whose content is distinct from the three traditional goods than to one that would reduce the good of the spouses to a function of the traditional grounds. In its insistence that the interpersonal dimension is essential to a valid marriage, jurisprudence has left the door ajar for further precision of the nature of the good of the spouses²².

In a footnote the author notes:

As of this writing, no cases have been decided by the Rota on the ground of the exclusion of the “good of the spouses”. Nevertheless, the consensus of canonists is that both the incapacity for the good of the spouses and its exclusion by a positive act of the will result in the nullity of marriage²³.

Using the jurisprudence of the Roman Rota as a solid basis, Beal proceeds to identify something of the content of the *bonum coniugum* in negative and positive terms:

Negatively, the good of the spouses is not to be identified with the spouses’ subjective happiness, sense of fulfilment, or achievement of personal aspirations.

²² J.P. BEAL, in J.P. BEAL – J.A. CORIDEN – T.J. GREEN (ed.), *New Commentary on the Code of Canon Law*, New York – Mahwah 2000, 1245.

²³ J.P. BEAL, in *New Commentary* (cf. nt. 22), 1245, note 77.

Nor is the lack of personal harmony between the spouses as a result of their «differences in character, nature, perspective on life, individual sensitivity, grade of particular love», or other accidental aspects of married life to be equated with incapacity for or exclusion of the good of the spouses. However, the good of the spouses is something more than «a communion of hearth, table and cohabitation».

More positively, the good of the spouses is «the sum of all the goods which flow from the interpersonal relationship of the spouses», which, «at least as to their substance, bring about and promote the spiritual, intellectual, physical, moral and social good of the spouses». If this good of the spouses is to be realised, the spouses themselves must enjoy the minimum psychosexual integration «without which [...] the very communion of conjugal life would become impossible». This psychosexual integration presupposes that the spouses possess at least the minimum affective maturity for marriage. They must also have the capacity for and the willingness to engage in genuine interpersonal communication, to establish a mutually satisfactory sexual relationship, and to establish at least a minimally “tolerable” personal relationship²⁴.

²⁴ J.P. BEAL, in *New Commentary* (cf. nt. 22), 1245-1246. Beal rests his presentation on quotations from or summaries of the following Rotal decisions: una CORAM BRUNO, 17 December 1987, in *RRD* 79, 765; una CORAM COLAGIOVANNI, 2 February 1988, in *RRD* 80, 47-48; 49; una CORAM POMPEDDA, 11 April 1988, in *RRD* 80, 201; una CORAM BRUNO, 16 December 1988, in *RRD* 80, 746-749; una CORAM STANKIEWICZ, 20 April 1989, in *RRD* 81, 289; una CORAM STANKIEWICZ, 28 May 1991, in *RRD* 83, 347-348; una CORAM BRUNO, 19 July 1991, in *RRD* 83, 465; 466; 472.

By identifying the content of the *bonum coniugum* from a negative and a positive perspective, Beal shows up some of the difficulties in dealing with this relatively new concept: on the one hand, it is much easier to define the juridical content in terms of what the *bonum coniugum* is not; on the other, it is not so easy to indicate in a more strictly juridical fashion the multi-dimensional content of the *bonum coniugum* when speaking of the goal towards which married people are striving.

2.1.2 The most recent jurisprudence

The issue of the *bonum coniugum*, as has already been noted, has been addressed directly in some recent sentences at the Roman Rota. Within these sentences, there is a very heavy reliance on the content of earlier sentences where the question of nullity focused more on inability to assume the essential obligations of marriage rather than on the exclusion of the *bonum coniugum*. Many of the sentences cited are the same ones used by Beal in his synthetic remarks.

a. The first sentence: coram Pinto, 9th June 2000

The first of the published sentences – coram Pinto, 9 June 2000 – had been judged at first and second instance on the grounds of exclusion of the *bonum sacramenti* and exclusion of the *bonum coniugum*, both on the part of the Respondent wife. The first instance returned a negative on both grounds, while the second instance returned an affirmative on both grounds. Unfortunately, the law section does not provide any great insight into the nature or content of the *bonum coniugum*. Rather it concentrates

on the nature of the act of consent, and then considers the exclusion of the *bonum coniugum* and the *bonum sacramenti*:

we are compelled to admit that the property of indissolubility and the good of the spouses can be excluded together by the one, who, in contracting marriage, due to lack of a healthy conjugal or courtship love, excludes the total and exclusive gifting of oneself, rejecting the sacrament and gravely offending the dignity of the human person of the partner, thus impeding the interpersonal complementarity essential to marriage²⁵.

The case contained a set of facts and circumstances where no lengthy exposition of the *bonum coniugum* was necessary: the couple in question had a “long distance” courtship, since each lived and worked many miles apart. As the time for the wedding drew near, the Plaintiff noticed a cooling off in the affections of the Respondent, but he did nothing about it. The bride arrived for the wedding almost two hours late; from the outset, she resisted consummation of the marriage, began to cause scenes and make all kinds of accusations against the husband. Within four months of the wedding, she left home.

²⁵ «[...] admittere compellimur indissolubilitatis proprietatem atque bonum coniugum una simul excludi posse ab eo, qui in ineundis nuptiis, ob defectum sani coniugalis vel sponsalicii amoris, plenam exclusivam suipsius donationem excludit, sacramentum detrectans atque graviter offendens dignitatem personae humanae compartis, interpersonale impediens complementum coniugio essenziale». Decision CORAM PINTO, 9th June 2000 (cf. nt. 3), 465, n. 10; translated in *Studia Canonica* 39 (2005) 284.

Commenting on this part of the sentence, Mendonça writes:

There are two concepts [...] which can be significant for further reflection and research on the juridic aspects of *bonum coniugum*. The first concept concerns the “dignity” of the human person. This is a value no one can afford to overlook when dealing with a marriage case. The “dignity” of the human person is so precious and inalienable that its violation in any form or for whatever motive would be unacceptable not only from a moral but also from a juridic point of view. And such a violation can take place either because of one’s psychological incapacity to honour it or because of one’s unwillingness to respect and safeguard it. Therefore, should a person, due to deep-seated error, either fail to include the “dignity” of the other spouse in the object of consent or intend to exclude its realisation in married life, then he/she would contract invalidly because of a positive act of the will to exclude the essential element of *bonum coniugum* from marital consent. The second concept concerns “interpersonal complementarity”. This complementarity could be better expressed through the biblical notion of “one flesh”. The spouses, through the mutual self-gift give rise to an “interpersonal relationship” or *communio vitae* which would blend their two personalities into one. The goal of this blending is the achievement of human and Christian growth of each spouse through their shared conjugal life²⁶.

In the light of Mendonça’s commentary, it appears that the Ponens has made a tentative beginning at identifying the juridical content of the *bonum*

²⁶ A. MENDONÇA, «Recent developments» (cf. nt. 5), 394.

coniugum. Two elements are identified: the dignity of the other person, and the concept of “interpersonal complementarity”. Both the sentence and the comment show that the actual showing of respect for the dignity of the other party and the actual achievement of the human and Christian growth implicit in the concept of “interpersonal complementarity” are not of the essence of a valid marriage. However, in accordance with canon 1055 §1, the ordering of marriage towards these ends is. In this case – and in the commentary – it is clear that, when this ordering is excluded, the marriage is to be considered invalid in accordance with the principle of can. 1101 §2.

b. The second sentence: coram Civili, 8th November 2000

The second sentence is marginally more thorough in its consideration of the *bonum coniugum*. The Ponens sees a close connection between the “mutual assistance” of can. 1013 of the 1917 and the “good of the spouses” of can. 1055 §1 of the 1983 Code. He traces the roots of this notion from the Book of Genesis, through the 1917 Code and the Magisterium of the Church from Pius XI to John Paul II, as well as the jurisprudence of the Roman Rota. He states: «The notion of “mutual assistance” has a deep and profound meaning, namely a complementarity and an integration of the human being in all of his/her dimensions and levels»; he then proceeds to cite *Familiaris Consortio* n. 19: «This conjugal communion sinks its roots in the natural complementarity that exists between man and woman, and is nurtured through the personal decision of the spouses to share their entire life-project, what they

have and what they are: for this reason such communion is the fruit and sign of a profoundly human need»; and ends by quoting a decision from the Roman Rota of 1995: (“mutual assistance”) «[...] signifies not only the help mutually offered through service, but also the complementarity and interpersonal integration meant to attain a much fuller union of the two in the existential plane»²⁷.

In the light of his understanding of the relationship between the “mutual assistance” of the 1917 Code and the “good of the spouses” of the 1983 Code, the Ponens begins to spell out his view of the *bonum coniugum* as an essential element of marriage:

A correct interpretation of the text should not overlook the two affirmations of the canon. The first of these is that only the “ordination” of the partnership

²⁷ «Notio “mutuum adiutorium” habet significationem densam et profundam, nempe complementarietatem et integrationem hominis in omnibus suis dimensionibus et gradibus [...] Docet Ioannes Paulus II: “Haec coniugal communio in complemente ratione naturali radicitus insidet, quae inter virum et mulierem viget atque ipsorum coniugum alitur proposito totum participandi de vita consilium, id videlicet quod habent et quod sunt: haec igitur communio fructus est et signum postulationis penitus humanae” (Adh. Ap. *Familiaris Consortio* n. 19). His textibus ob oculos habitis, Iurisprudentia Nostri Fori notionem “mutuum adiutorium” sic circumscribit: “Locutio haec non solum significat iuvamen ex servitiis mutuo praestitis, sed etiam coniugum complementarietatem et integrationem interpersonalem ad semper pleniorum duorum unitatem in plano existentiali assequendam” (coram Huber, 20 October 1995, in *RRD* 87, 577, n. 3)». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 611, n. 3; translated in *Studia Canonica* 39 (2005) 312.

of the whole of life to the good of the spouses constitutes an essential element of marriage; and the second is that the canon speaks of the good of the “spouses” and not of the good of “marriage”. The interpretation of the legal text must be conveyed within these limits²⁸.

In his quest for a clear presentation of the content of the “good of the spouses”, Civili cites two further Rotal decisions. The first comes from 1988:

According to our opinion, sometimes the question must be phrased in such a way that the good of the spouses – which is treated in the Code, without any further mention of the right to communion of life – is understood and effected through the right (and relative obligation) to such a communion. This, however, must be understood in its wider significance, ideally oriented toward conjugal love about which the Second Vatican Council speaks at length, and juridically expressed through rights and obligations to a special, that is, to a specific behaviour in those interpersonal relationships that are proper to spouses and have juridical value. This communion of life is essentially required and is sufficient by the very nature of marriage itself²⁹.

²⁸ «Recta textus interpretatio duas affirmationes canonis negligere non debet, quarum prima est, quod tantum “ordinatio” totius vitae consortii ad bonum coniugum constituit elementum matrimonii essenziale, altera, quod canon loquitur de bono “coniugum”, non de bono “coniugii”. Intra tales limites interpretatio textus legalis est transmittenda». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 611, n. 4; translated in *Studia Canonica* 39 (2005) 314-315.

²⁹ «Nostra quidem sententia aliquando quaestio converti ita debet, ut bonum coniugum – de quo uno agit Codex, nulla

The second decision is from 1996:

Indeed, the good of the spouses comprises the assumption and fulfilment of all obligations which render real an intimate union and integration of persons whereby they offer to each other mutual help in the spiritual, material and social order. This assures the establishment of a true conjugal life lived in peace and continual growth³⁰.

These quotations contain references to the *bonum coniugum* according to the “positive” perspective identified by Beal in his comments. The descriptions of the content of the *bonum coniugum* must be understood within the proper context: these are the goals towards which marriage must be ordered. However, to insist that the actual achievement of these goals is essential to the validity of marriage

amplius facta mentione de iure ad vitae communionem – intelligatur et efficiatur per ius (et relativam obligationem) ad vitae communionem: istam quidem intellectam in sua latiore significatione, idealiter inspiratam ad amorem coniugalem super quo diu institit Concilium Vaticanum II, et iuridice expressam per iura obligationes ad peculiarem seu specificam agendi rationem, ex ipsa connubii natura essentialiter requisitam et sufficientem, in relationibus interpersonalibus coniugibus propriis et iuridice momentum habentibus». Decision CORAM POMPEDDA, 11 April 1988, in *RRD* 80, 202, n. 9; translated in *Studia Canonica* 39 (2005) 314-315.

³⁰ «Bonum enim coniugum amplectitur susceptionem et adimpletionem omnium obligationum quae realem reddunt intimam coniunctionem ac integrationem personarum in adiutorio sibi mutuo praestando in ordine spirituali, materiali et sociali ut vera vita coniugalitatis instauretur ac pacifice et progressive ducatur». Decision CORAM BRUNO, 17 May 1996, in *RRD* 88, 390, n. 6; translated in *Studia Canonica* 39 (2005) 315-316.

would be a radical misunderstanding of the meaning of can. 1055 §1.

Civili believes that the essential elements of the “good of the spouses” remain an unresolved issue and so he attempts to make a contribution towards its resolution. He begins by pointing out that the Judges believe these essential elements are included in can. 1057 §2: «In this definition marriage is understood as a category of relationship. To have a correct understanding of this relationship, three things must be considered: the person of the man and of the woman, their mutual giving and their acceptance, to constitute marriage»³¹.

Commenting on this part of the sentence, Mendonça expands on each of these three elements:

First, the man and the woman are the subject of the matrimonial relationship. But these two persons, according to the teaching of Pope John Paul II, are distinct and exist “in common humanity” as a masculine and a feminine person [...]

Second, the unity of the two persons constitutes the conjugal communion in marriage. This communion is created when the two distinct persons of spouses “mutually give and accept each other”. This formula of the canon designates the material object of giving and accepting, which cannot be conceived except in relation to certain and determined actions.

³¹ «Hac in definitione matrimonium concipitur in genere relationis. Ad illam recte intelligendam, tria consideranda sunt: personae viri et mulieris, mutua traditio et acceptatio, ad matrimonium contrahendum». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 612, n. 4; translated in *Studia Canonica* 39 (2005) 316.

Third, Civili argues that the actions of “mutual giving” and “accepting” each other on the part of the two distinct persons is not required for the completion of their personhood, but are necessary to constitute marriage and to attain its instrumental (sic) ends³².

Civili concludes his presentation by stating a principle that is very similar to the one enunciated by Pinto in the earlier sentence:

³² A. MENDONÇA, «Recent developments» (cf. nt. 5), 404-405. The Latin text of the relevant parts of the sentence reads as follows: «Nihil est dubii, quin vir et mulier sint subiecta relationis matrimonialis [...] Si igitur sermo est de viro et de muliere, non solum personae physicae designantur, sed etiam personae, quae, quamvis altera ab altera distincta, quoad naturam humanam aequales sunt. Ergo concludendum est pro viro alteram personam esse mulierem et pro muliere alteram personam esse virum. Et intellegi potest complementaritas, quae non solum ad factum generativum, sed etiam ad psychologice sexus differentiam spectat. Vir et mulier ad imaginem et similitudinem Dei personalis creati sunt. Quapropter altera persona non est completio alterius personae, quoniam unaquaeque persona quod attinet ad ea, quae personae rationem constituunt, iam perfecta est ideoque non indiget altera persona ad perfectionem rationis personae. Haec unitas duorum sinit personarum communionem in coniugio perficiendam. Ad talem communionem circumscribendam, canon adhibet expressionem “sese mutuo tradere et accipere”. Formula haec designat obiectum materiale traditionis et acceptationis, quod concipi non potest nisi relate ad certas et determinatas actiones. Praestationes hae non requiruntur ad viri et mulieris personam completam reddendam, sed postulantur, ut matrimonium constituatur eiusque fines attingantur institutionales». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 612, n. 4; translated in *Studia Canonica* 39 (2005) 316-318. At the end of this section, Mendonça translates the final phrase as «to attain its *instrumental* ends» but the Latin text actually says «fines *institutionales*» (cf. *ibid.*, 318, n. 4).

Matrimonial relationship, because it is an interpersonal relationship, can neither be effected nor sustained without recognising the equal personal dignity of both the man and the woman. These are expressed by the Second Vatican Council as follows: «The unity of marriage, ratified by the Lord, is distinctly clear in the equal personal dignity which must be accorded to both the man and the woman in mutual and unreserved affection...» (*GS* 49)³³.

He sees that this principle finds reinforcement in a decision given in 1988: «[...] the capacity to establish an interpersonal relationship, that is to say, the ability to transcend one's ego so that the other spouse may be described as a person of equal dignity, that is, as a companion in an exclusive, stable and lasting union»³⁴. Civili notes: «Harmony between the spouses and within society depends on how the equal dignity of the man and woman is respected and safeguarded in common life»³⁵.

³³ «Relatio matrimonialis, cum sit relatio interpersonalis, neque efficitur neque sustinetur nisi par personalis dignitas viri et mulieris agnoscatur. Haec sunt apud Concilium Vaticanum II: "Aequali etiam dignitate personali cum mulieris tum viri agnoscenda in mutua atque plena dilectione unitas matrimonii a Domino confirmata luculenter apparet" (Const. past. *Gaudium et Spes* n. 49)». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 612-613, n. 5; translated in *Studia Canonica* 39 (2005) 318.

³⁴ «Requiritur etiam capacitas relationis interpersonalis constabiliendi, seuabilitas proprium "ego" transeundi ut alter coniux recognoscatur ut persona dignitatis aequalis seu tamquam socius in unione exclusiva, stabili ac duratura». Decision CORAM BOCCAFOLA, 23 June 1988, in *RRD* 80, 431, n. 13; translated in *Studia Canonica* 39 (2005) 318-319.

³⁵ «Utriusque coniugis et societatis harmonia dependet e modo, quo par dignitas viri et mulieris in vita communi

After his analysis of doctrine and jurisprudence, Civili concludes: «These two essential elements intrinsic to the good of the spouses can be deduced both from doctrine and jurisprudence: diversity based on person and an equal personal dignity of both the woman and the man»³⁶.

Both of these elements emerge as matters of concern from a study of the facts of this particular case: after a two year courtship, during which the man was already violent towards the woman, the married life – from the very beginning – was marked by violence. The couple married in August 1969; they separated before the end of the year on account of his violence; he sought a divorce in February 1970, but she would have none of it. Madly in love with him, she resumed a marital relationship in July 1970 but reluctantly had to quit the family home again in September. The violence of the man before and during the marriage already raises the question of his respect for the person and equal dignity of the woman. The relevance of the *bonum coniugum* to the case under consideration is quite obvious from the facts; however, the Ponens has not provided any more general principle that might be applied to other cases.

observatur et defenditur». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 613, n. 5; translated in *Studia Canonica* 39 (2005) 319.

³⁶ «Ex doctrina et iurisprudentia haec duo elementa essentialia bono coniugum inhaerentia desumi possunt: diversitas ratione personae et aequalis dignitas personalis cum mulieris tum viri». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 613, n. 5; translated in *Studia Canonica* 39 (2005) 319.

- c. The third sentence: coram Turnaturi, 13th May 2004

The Ponens addresses the doctrinal development concerning the ends of marriage. Basing himself on Chiappetta's work *Il matrimonio nella nuova legislazione canonica e concordataria*, and recent Rotal decisions, he makes it clear that the ends of marriage expressed in can. 1055 §1 do not contain any hierarchy, making one more important or more essential than the other. In support of this conclusion, he cites at length from a decision coram Funghini:

From the fact that the good of the spouses is mentioned first in the definition of conjugal covenant, one is not to conclude that it now enjoys a pre-eminent right in comparison to procreation and education of offspring. The expression of the canon, while it avoids the terms and distinctions of the preceding Code, rather wants to signify and point out that the two goods are co-essential, proper to and inseparable from marriage as a task and work of nature itself. The expression also means that these goods are not yet in a perfected state but rather are on their way toward perfection, and indicates the order by which they are worked out and realised through the mutual interpersonal handing over and acceptance of the spouses. The spouses, indeed, are first husband and wife and then father and mother³⁷.

³⁷ «Ex eo autem quod in relata coniugalis foederis definitione primum locum teneat bonum coniugum haud deducendum est illud praecipuo iure gaudere quam generationem et educationem prolis. Dictio canonis, dum vitat praecedentis Codicis locutiones et distinctiones, potius significare et indigere vult duo bona esse matrimonio co-essentialia, propria et

A similar quotation is used from a decision coram Bruno:

The new Code, on the other hand [...] omits the distinction and, by proposing first the good of the spouses and by making it equal to procreation and education of offspring, seems to unify in them all primary and secondary ends.

As an end and essential element of the nuptial covenant, the good of the spouses is the sum of all goods which flow out of the interpersonal relationships of the spouses themselves. Indeed, if they do not suffer from any psychological anomaly of personality, they enrich each other as individual persons and their total conjugal life, through appropriate interpersonal relationships³⁸.

Useful as these citations are, Turnaturi has to admit: «There is not a single sentence which deals with the nature or juridic meaning of such a good

inseparabilia utpote officium naturae et opus nedum attingentia, sed inchoantia et perficientia, ordinemque quo haec perficiuntur ac consequuntur per mutuam interpersonalem coniugum donationem et acceptationem exprimere et illustrare. Coniuges enim prius sunt maritus et uxor, deinde pater et mater». Decision coram Funghini, 14th October 1992, in *RRD* 84, 453, n. 6, translated in *Canon Law Society Newsletter* 152, 53.

³⁸ «Novus Codex, e contra, distinctionem supprimit, et bonum coniugum primo proponens illudque aequans cum procreatione et educatione prolis, videtur in iisdem omnes fines primarios et secundarios unificare. Bonum coniugum, uti finis et elementum essenziale nuptialis foederis, est veluti omnium bonorum summa, quae promanant ex relationibus interpersonalibus eorundem coniugum. Ipsi enim, si nulla personalitatis psychica anomalia laborent, per adaequatas relationes interpersonales, insimul seipsos ditant, uti singulas personas, et totam vitam coniugalem». Decision CORAM BRUNO, 19th July 1991, in *RRD* 83, 466, n. 5, translated in *Canon Law Society Newsletter* 152, 53.

which flows out of the teaching of the Second Vatican Council»³⁹. In an effort to make a contribution to identifying this juridical nature, Turnaturi quotes in turn from a series of judgements, beginning with the same one cited earlier by Civili⁴⁰:

But only those matrimonial obligations can be considered inherent to the good of the spouses which contribute substantially to the establishment and perpetual sustenance of conjugal communion through mutual psychosexual integration⁴¹.

[...] the good of the spouses consists of those obligations without which it is at least morally impossible to have the intimate union of persons and tasks by which the spouses offer to each other mutual assistance and service, and to which marriage is also ordered by its nature [...] When this integration of persons and tasks is seriously lacking, it is impossible to have the communion of life, that is, the partnership of conjugal life in which marriage essentially consists⁴².

³⁹ «Non una tamen exstat sententia circa naturam vel qualificationem iuridicam talis boni, quod a doctrina Concilii Vaticani II descendit [...]». Decision CORAM TURNATURI, 13th May 2004 (cf. nt. 3), 70, n. 6, translated in *Canon Law Society Newsletter* 152, 53.

⁴⁰ Cf. Decision CORAM POMPEDDA, 11th April 1988, in *RRD* 80, 202, n. 9, translated in *Canon Law Society Newsletter* 152, 54, cited above in note 30.

⁴¹ «Sed obligationes matrimoniales bono coniugum inhaerentes eae tantum essentiales haberi possunt, quae ad instaurandam ac perpetuam sustinendam communionem coniugalem per mutuam integrationem psychosexualem substantialiter conferunt». Decision CORAM STANKIEWICZ, 20th April 1989, in *RRD* 81, 283, n. 5; translated in *Canon Law Society Newsletter* 152, 54.

⁴² «[...] bonum coniugum complectitur obligationes illas sine quibus est saltem moraliter impossibilis intima personarum

Therefore, conjugal communion, although it is distinct from the essential elements of the three goods of marriage, that is to say, unity, indissolubility and openness to the transmission of new human life, consists in its substantial nucleus of the rights and duties which concern the communion of conjugal life and love⁴³.

These are indeed the rights and obligations pertaining to the peculiar or specific behaviour of the spouses, which consist in the right to an intimate union of persons and tasks, by which the spouses mutually perfect each other, or in the right to a specifically conjugal interpersonal relationship, or in the right to a manner of living proper to the partnership by which a spouse can attain his or her psychological complement that is specifically and genuinely spousal⁴⁴.

atque operum coniunctio, qua coniuges adiutorium et servitium mutuo sibi praestant, et ad quam coniugium ex natura sua ordinatur (cf. Const. *Gaudium et Spes*, n. 48). Hac personarum operumque integratione graviter deficiente, impossibilis fit vitae communio seu consortio vitae coniugalis in quo matrimonium essentialiter consistit». Decision CORAM PINTO, 30th May 1986, *Monitor Ecclesiasticus* 111 (1986) 390, n. 3, translated in *Canon Law Society Newsletter* 152, 54. This sentence is translated (unofficially) in its entirety in *Matrimonial Decisions of Great Britain and Ireland*, vol. 25, 46-49; it follows the decisions in first and second instance (43-46).

⁴³ «Quare coniugalis communio quamvis essentialibus elementis trium matrimonii bonorum distinguatur, id est unitate, indissolubilitate, et apertione ad transmissionem novae vitae humanae, in suo tamen nucleo substantiali iuribus et officiis constituitur, quae ad ipsam communionem coniugalis vitae et amoris spectant». Decision CORAM STANKIEWICZ, 20th April 1989, in *RRD* 81, 283, n. 6, translated in *Canon Law Society Newsletter* 152, 54-55.

⁴⁴ «Haec sunt enim iura-obligationes ad peculiarem seu specificam coniugum agendi rationem, quae, consistunt in ius

All of these Rotal sentences sought to express the essence of the *bonum coniugum* in terms of fundamental rights and obligations. To that degree, they are more solidly juridical in their expression. But there remains a danger of misinterpretation: these rights and obligations are those that are essential to the creation and sustaining of a “communion of life”, “conjugal communion”, “intimate union of persons”, “communion of conjugal life and love”. In the context in which they are used, these terms are clearly understood; however, in the context of an effort to exclude the *bonum coniugum* from the act of consent, there is the danger of requiring from those entering marriage much more than the juridical minimum necessary.

The Ponens considers contributions to the debate by three well-known authors⁴⁵. Although these begin

ad intimam personarum atque operum coniunctionem, qua se invicem coniuges perficiunt vel in ius ad relationem interpersonalem specificè coniugalem vel in ius ad consortis agendi modum quo coniux suum complementum psychosexuale veri coniugis peculiare obtinere possit». Decision CORAM TURNATURI, 13th May 2004 (cf. nt. 3), 72, n. 8, translated in *Canon Law Society Newsletter* 152, 55. There is a reference in the original to the Decision CORAM DEFILIPPI, 27th July 1994, in *RRD* 86, 417, n. 10; however, it is clear from that sentence that the Ponens was quoting from I.M. PINTO GOMEZ, «Incapacitas assumendi matrimonii onera in novo CIC», in *Dilexit Iustitiam: Studia in honorem Aurelii Card. Sabattani*, Città del Vaticano 1984, 36-37.

⁴⁵ «Trattasi della piena realizzazione intra- e interpersonale, realizzata nella reciproca dedizione, voluta nella donazione d'amore, che fa il bene dell'altro (oltre che il proprio), nella comunione delle persone e comunanza di attività, orientata, nel mutuo aiuto, al perfezionamento personale e, specialmente,

to tease out the juridical content of the *bonum coniugum*, there is no universal acceptance of the content of the concept among canonists, as Mendonça observes: «[...] in all these statements the good of

alla santificazione e quasi consacrazione dei coniugi, nel ministero ecclesiale della famiglia». R. BERTOLINO, «Gli elementi costitutivi del “bonum coniugum”», *Monitor Ecclesiasticus* 120 (1995) 583.

«Il vincolo coniugale, come principio unitivo per il quale un uomo e una donna sono *una caro*, configura uno specifico modo di amare e di vivere, che si esprime in una intima comunità di vita, in un peculiare destino in comune. Gli atti, le condotte e le prestazioni personali dei coniugi dirette ad instaurare, conservare, sviluppare e restaurare questa intima convivenza, consorzio o unità di destino nella vita e nell'amore umano, sono un diritto e dovere reciproci che sorge dal vincolo che li unisce ed è espressione del suo dinamismo. Si tratta del diritto-dovere che riceve il suo contenuto dal fine del bene dei coniugi. Mentre l'oggetto del diritto-dovere all'atto coniugale apporta all'unione personale dei coniugi la comunicazione propria della natura corporea sessuata; l'oggetto del diritto-dovere alla comunità di vita apporta, da parte sua, all'unione sessuale corporea la comunicazione propria della natura personale dei coniugi». P. VILADRICH, *Il consenso matrimoniale*, Milano 2001, 370.

«Chi vuole il matrimonio, ma vuole soltanto strumentalizzare la persona del coniuge al fine esclusivo di godersene i beni e la dote, per se non esclude o non può escludere gli altri beni, ma certamente non fa nascere una relazione interpersonale, duale-paritaria ordinata al bene comune del perfezionamento di sé nella qualità di coniugi: il *bonum coniugum* non si realizza nella sua globalità se avulso dagli altri beni, perché è l'istituzione matrimoniale in se stessa che fin dalla creazione è innanzi tutto ordinata al bene dei coniugi: un bene che preesiste agli altri e che gode di una autonomia sua propria, nonostante ogni sua connessione, morale e giuridica, con gli altri beni». S. VILLEGGIANTE, «Il “bonum coniugum” e l'oggetto del consenso matrimoniale in Diritto Canonico», *Monitor Ecclesiasticus* 120 (1995) 307.

the spouses is clearly affirmed as a good that pertains to the very essence of marriage. The authors affirm that it consists in the perfection of the spouses precisely as spouses. They do not, however, indicate the precise nature and content of *bonum coniugum* itself»⁴⁶.

d. The fourth sentence: coram McKay, 19th May 2005

The fourth Rotal sentence in which exclusion of the *bonum coniugum* has been dealt with explicitly is rather different from the others: this case originated in California and received an affirmative decision at first instance on the sole ground of the Plaintiff's grave lack of discretion of judgement; the Respondent appealed the case directly to the Rota, where, in addition to considering the Plaintiff's grave lack of discretion at second instance, the Judges were asked to examine – as at first instance – the Respondent's inability to assume the essential obligations of marriage and his exclusion of the *bonum coniugum*. The consideration of the *bonum coniugum* and its exclusion receive attention only peripherally. In the event, the Judges returned a negative decision on all three grounds.

In the law section, the Ponens considers the *bonum coniugum* the context of the two grounds alleged in the Respondent. He recalls the fundamental distinction between the essence of marriage and

⁴⁶ A. MENDONÇA, «Exclusion of the *Bonum Coniugum*» (cf. nt. 5), 55.

the ends of marriage and examines how this has been applied in doctrine and jurisprudence to the issue of procreation as an end of marriage. The natural ordering of the institution of marriage to procreation, he says, is what makes the relationship specifically marital; however, a marriage remains valid, even if in fact no child is conceived or born of the marriage⁴⁷. This distinction is easily transferred to a consideration of the ordering of marriage to the good of the spouses: while it might be ordered to the good of the spouses, a marriage remains valid even if, in fact, this end of marriage is not attained in a particular case⁴⁸.

⁴⁷ «Accurate enim distinguenda est essentia matrimonii consensu partium facti a finibus coniugii: matrimonium enim naturaliter, ut docet canon 1055 CIC, tendit saltem cum ad generationem educationemque prolis tum ad ipsorum coniugum bonum. Liquet itaque naturalem ordinationem instituti coniugalibus ad procreationem prolis radicaliter specificare societatem matrimonialem. [...] Coniugium autem ab aliis omnibus societatibus voluntariis penitus distinguitur, quia ab aliis quibusvis societatibus specificatur recta intentione cooperationis sexualis. Vero, actus coniugalibus suapte natura est intentionaliter procreativa [...] Essentiae ergo matrimonii est ut partes inter se concedant ius ad actus coniugales; at institutum coniugale optime exstare potest perfectum etiam sine editione prolis [...] In casu tamen ad validitatem coniugii sufficit ipsa essentia quin itaque de facto attingatur finis, etiam procreativus ille, seu primarius matrimonii». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 682; 683; 684, n. 8.

⁴⁸ «Distinctio ita exposita inter essentiam et fines matrimonii certe non est sine momento etiam pro validitate aliarum factispecierum nuptiarum, verbi gratia, cum de bono coniugum agitur. Abs dubio matrimonium ad bonum ordinatur etiam coniugum, atqui, simili ratione ac pro alio fine qui est generatio prolis, concludere debemus matrimonium in sua essentia exsistere posse etiam sine fine boni coniugum, quidquid sit, attacto vel impleto». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 684, n. 9.

As other Rotal Judges have done, the Ponens points out that the question of the meaning of *bonum coniugum* is very complex. He states that this phrase was introduced into the 1983 Code in place of the secondary ends identified in can. 1013 of the 1917 Code, and then asks if this “good of the spouses” contains anything other than the traditional secondary ends of marriage; he asks if this is really of the essence of marriage; and finally, he asks if this “good of the spouses” is the sum of all the “goods” which St Augustine taught⁴⁹. He then presents a brief review of the Magisterium concerning the ends of marriage from Leo XIII to Pius XI. It is clear that for the Ponens, the “good of the spouses” – which he accepts has not yet been exactly identified and outlined by Rotal jurisprudence – is attained within marriage when fidelity and indissolubility are observed, and where children are born; it is also verified when the spouses are of mutual assistance to one another, leading one another to human and Christian perfection⁵⁰. He draws his reflections on

⁴⁹ «At in nova locutione de bono coniugum proponiturne quid ultra fines secundarios traditionales? Et hoc ut revera essenziale matrimonio? Estne forsan bonum coniugum potius summa dumtaxat illorum bonorum de quibus docebat S. Augustinus?». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 684, n. 9.

⁵⁰ «Bonum itaque coniugum, quod nondum autem a iurisprudencia Rotali exacte identificatum ac delineatum est, utique attingitur iam cum servantur fides necnon sacramentum, cum editur proles. Habetur quoque atque ad effectum adducitur cum coniuges mutuo sunt auxilio, cum alter alterum ad perfectionem humanam atque apprime christianam stimulat ducitque [...]». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), n. 10.

this point to a conclusion by recalling the distinction between the rights and obligations of marriage and the ends of marriage: the rights exchanged in marriage cannot be identified with the ends of marriage – the rights and obligations are inviolable, but the ends of marriage are not always achieved⁵¹.

2.1.3 Some emerging elements of the *bonum coniugum*

From this review of the most recent jurisprudence, the following features of the *bonum coniugum* as an end of marriage can be identified:

- it involves a man and a woman, i.e. within a diversity of persons, sexually distinct;
- it has to do with the parties as spouses, i.e. within an interpersonal relationship that of its nature is intimate and sexual;
- it has to do with each party complementing the other – as spouses;
- it is based on acceptance of and respect for the fundamental equality of dignity of the two parties;
- it is expressed and attained through the gift of self and the acceptance of the other;
- it requires a capacity for basic communication between the two spouses;

⁵¹ «[...] nos effugere non potest momentum distinctionis inter finem et ius. Consentiens enim in nubendo coniugi confert iura, sibi ipsi erga coniugem assumit obligationes. Ceterum, iura matrimonialia in se sic et simpliciter identificare non licet cum finibus coniugii; etenim, ius obligationesve inviolabiles sunt, finis e contra, ut iam diximus, non semper attingitur». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 686, n. 11.

- it requires a capacity for self-giving;
- it implies the possibility of growth towards human and Christian perfection.

These features cannot be considered in isolation, but must always be understood only in the context of marriage which is also ordered to the procreation and education of children, and which is exclusive and lifelong.

Many of these features are highlight the so-called “personalist” dimension of marriage. This stands in some degree of contrast with the more “institutionalist” view that preceded the teaching of Vatican II, in which the act of consent to marriage was equated with an exchange between the parties of the *ius in corpus*, or the right to acts “of their nature apt for the procreation of children”. Based on canon 1057 §1 of the 1983 Code, matrimonial consent is now understood as that act by which a man and a woman mutually give and receive one another on all levels (cf. can. 1057 §1). The emphasis in the doctrine on marriage is now firmly on the persons of the spouses.

This shift of emphasis, however, is fraught with danger: there is a risk of over-interpretation; there is a risk of understanding as objective (and inalienable) rights things that are little more than subjective or personal aspirations or expectations. Aware of the possible dangers, Pope John Paul II pointed out that this “personalist” view of marriage cannot be permitted to degenerate into pure subjectivism, where everything is perceived solely from the point of view of each individual:

[...] there still exist symptoms which show a tendency to oppose the personalist aspects to those more properly juridical, without the possibility of a harmo-

nious synthesis. Thus, on the one hand, the concept of marriage as a reciprocal gift of the persons would seem to justify a vague doctrinal and jurisprudential tendency to broaden the requirements for capacity or psychological maturity and for the freedom and awareness necessary to contract marriage validly; on the other hand, certain applications of this tendency, by bringing out its inherent ambiguities, are rightly perceived as conflicting with the principle of indissolubility, no less firmly stressed by the magisterium⁵².

The review of the four sentences issued so far by the Roman Rota has highlighted the lack of clarity and definition surrounding the concept of the *bonum coniugum*, at least in what pertains to its strictly juridical elements. While the phrase allows for an expanded and rich theological and spiritual understanding of marriage, this cannot be equated with what is essential for the establishment of a valid marriage. Again, the words of Pope John Paul serve as a timely reminder:

Marriage certainly has an essential nature, described in canon 1055, which pervades the whole marital discipline as can be seen in the concepts of essential property, essential element, essential rights and duties of marriage, etc. This essential reality is a possibility open in principle to every man and woman; indeed, it represents a true vocation for the great majority of the human race⁵³.

⁵² Allocation to the Roman Rota, 27th January 1997, *Origins* (1997) 598. Cf. N. SCHÖCH, «Gli interventi del magistero pontificio in materia di difetto della discrezione del giudizio», in *L'incapacità di intendere e di volere* (cf. nt. 6), 66.

⁵³ Pope JOHN PAUL II, Allocation to the Roman Rota, 27th January 1997 (cf. nt. 52), 598.

Any understanding of the *bonum coniugum* has to take account of this fundamental fact: its minimal juridical content cannot exclude the majority of human beings from the possibility of entering marriage. The content of the *bonum coniugum*, as mentioned in can. 1055 §1, will vary depending on the context in which it is explained: this will be to the fullest extent possible, on all planes, when preparing couples for marriage (can. 1063, 1°), stimulating them to enter into their vocation with the highest aspirations; it will also be to the fullest extent possible in the circumstances, when providing support and encouragement to those already married (can. 1063, 4°), urging them to deepen their relationship, for example, during a retreat, or giving couples confidence and reassurance when they encounter difficulties in their relationship; however, when the question of the validity of the marriage arises, the content of the *bonum coniugum* can only be considered from the perspective of the juridical minimum necessary.

2.2 *Can the bonum coniugum be excluded from matrimonial consent?*

In keeping with the tradition of the Church and the jurisprudence of the Tribunals, there can be no doubt that anyone entering marriage must intend marriage as it is understood in its essence, including its ordering to the good of the spouses and to the procreation and education of children. Indeed, can. 1101 §1 states: «the internal consent of the mind is presumed to conform to the words or the signs used in the celebration of a marriage». It is inconceivable that anyone could validly enter marriage while not intending the good of the spouses. Yet, if, according

to can. 1101 §2, «[...] either or both of the parties should by a positive act of will exclude marriage itself or any essential element of marriage or any essential property, such party contracts invalidly».

The ordering of marriage to the good of the spouses certainly belongs to the essence of marriage. That much is abundantly clear from the text of can. 1055 §1; and from the clarification made during the preparing the text of the canon by the Pontifical Commission, as has been noted already⁵⁴. From a jurisprudential point of view, then, the *bonum coniugum* can be seen to occupy a position not dissimilar to that occupied by the *bonum prolis*: while the actual procreation of children is not required for a valid marriage, the parties entering marriage must not exclude it by a positive act, and must be capable

⁵⁴ This does not appear to be accepted by McKay: «In actu simulationis excluditur itaque vel ipsum matrimonium vel proprietates vel elementum essenziale: canon vero 1056 CIC praefatas definit proprietates esse unitatem et indissolubilitatem, implicite indicans sacramentalitatem, ut docet canon 1055 §2 CIC, in matrimonio inter baptizatos contracto esse elementum essenziale. At, definitis proprietatibus ac elemento essentialibus, memoratus canon bonum coniugum non tractat: hoc enim, ut recordatur canon 1055 §1 CIC, inter fines matrimonii potius est ponendum, ab essentia igitur instituti coniugalibus bene distinctum». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 687-688, n. 12. While McKay is correct in stating that the *bonum coniugum* does not belong to the essence of marriage as an essential element, he is not correct in implying that it has nothing to do with the essence of marriage. The Commission for the revision of the Code made it clear explicitly that the ordering of marriage to the “good of the spouses” most certainly was an essential element of marriage. Cf. *Relatio complectens* (cf. nt. 17), 244.

of those acts which of their nature are suitable for procreation; thus, even though a couple might not achieve the *bonum coniugum* in their marriage at all, or to its full potential, at the time they enter marriage, they must not exclude it by a positive act, and they must be capable of assuming those obligations and rights that are necessary for its achievement.

The three Rotal judges who have written affirmative sentences on the basis of the ground of an exclusion of the "good of the spouses" have provided some insight into how the ordering of marriage to this end might be excluded.

Pinto considers the nature of the act of matrimonial consent in the context of a reflection of the influence of contemporary errors about marriage, especially error concerning the indissolubility of marriage, which was the other ground of nullity involved in this case. While the principle of presuming the conformity between internal consent and the external words or signs remains valid, he notes that, for many people marrying in contemporary society, there is evidence of a split within them, i.e. that they can intend to do one thing and simultaneously intend to do something utterly contrary.

Addressing more explicitly the question of exclusion of the *bonum sacramenti*, the Ponens states:

Indeed, it happens that a person marrying could foster two coexisting wills. On the one hand, such a person chooses the partner, adheres to him/her with a sincere heart throughout the engagement period, strengthens the choice already made and moreover confirms it during the pre-nuptial inquiry by responses made under oath, and finally seals it solemnly during the nuptial rite by the consent expressed in accord with the norm of law. On the other hand, by manifesting or

even sometimes concealing at length the absurd inclinations of the mind, the contractant, by an invincible error tenaciously held by the mind concerning the indissolubility of the bond in accord with the prevalent and, indeed, dominant secular mind, forms a clear and unequivocal will to reject marriage, [which should be entered into] according to the principles required by nature and law⁵⁵.

It comes as no surprise, then, to find him affirming a longstanding Rotal principle:

No one can doubt that the positive act of the will required by canon 1101 to invalidate marriage can be either explicit or implicit. The implicit will does not signify a generic or interpretative will of the contractant, but an intention that is at least virtual, of excluding marriage itself or one of the properties or an essential element of marriage, rooted in the habitual behaviour of the one excluding or in the combination of circumstances of life of the same person. For, in both figures of an act of simulating will, that is, explicit or implicit, essentially the same thing hap-

⁵⁵ «Accidit enim ut nupturiens duas possit colere coexistentes voluntates. Ex una parte ille eligit compartem, eique sincero animo adhaeret, progredientibus sponsaliis electionem factam corroborat, quam praeterea per responsiones in processu praenuptiali iureiurando latas firmat, quam demum in ritu nuptiali consensu ad normam iuris praestito sollemniter signat. Ex altera vero parte absonas animi inclinationes patefaciens vel tandem aliquando occultans, contrahens, invincibili errore mente retenta quoad vinculi non recusabilem solubilitatem secundum praevalem et immo dominantem saeculi mentem, claram et inaequivocam voluntatem perficit matrimonium respuendi iuxta principia a natura iureque requisita». Decision CORAM PINTO, 9th June 2000 (cf. nt. 3), 464, n. 8; translated in *Studia Canonica* 39 (2005) 280-281.

pens, that is, in the first the will simply excludes, namely there is an explicit act, manifested in expressed words, while in the second, that is, in the implicit act, it is deduced from the circumstances and the way of life of the contractant, since it is in some way hidden in them, and nevertheless efficacious⁵⁶.

He finds support for this position in a sentence written by Cardinal Staffa:

A positive act can be either explicit or implicit: it is explicit if it intends exclusion of the essence or of an essential property of marriage as the direct and immediate object; it is implicit if it has something as the direct and immediate object in which the exclusion of marriage or its essential property is included⁵⁷.

⁵⁶ «Non est qui dubitare queat actum positivum voluntatis a can. 1101 §2 requisitum ut matrimonium irritetur, posse sive explicitum sive etiam implicitum esse; dummodo implicitum voluntarium non genericam vel interpretativam voluntatem contrahentis significet, sed intentionem saltem virtuale elementum coniugii, excludendi, in agendi habituali ratione excludentis vel in circumstantiarum eiusdem vitae coacervo innixam. Nam in utraque figura actus voluntatis simulantis, nempe expliciti et impliciti, unum idemque essentialiter fit seu voluntas simpliciter excludens, quae autem in uno, nempe explicito actu, ab expressis verbis signisque palam exprimitur, in altero, idest implicito, e circumstantiis rationeque vivendi contrahentis eruenda est, cum sit in illis quodammodo occulta-tam, et tamen efficacem». Decision CORAM PINTO, 9th June 2000 (cf. nt. 3), 465, n. 9; translated in *Studia Canonica* 39 (2005) 282.

⁵⁷ «Actus positivus potest esse sive explicitus sive implicitus: est explicitus si tamquam obiectum directum et immediatum intendit exclusionem essentiae vel proprietatis essentialis matrimonii; est implicitus si tamquam obiectum directum et immediatum aliquid habet, in quo exclusio matrimonii vel eius

Pinto then highlights that, while the act of exclusion must always be direct, it does not always need to be explicit:

In order to have the consent declared fictitious or null, a will that directly excludes is always required; but the mode in which the same will is manifested can be either direct, that is, explicit or indirect, that is, implicit, because the circumstances and the behaviour of the one marrying are not the cause which determines his/her will, but are only the signs that reveal and openly express this will [...]⁵⁸.

In relation to both grounds of nullity under investigation in this particular case, he concludes:

[...] we are compelled to admit that the property of indissolubility and the good of the spouses can be excluded together by the one, who, in contracting marriage, due to lack of a healthy conjugal or courtship love, excludes the total and exclusive gifting of oneself, rejecting the sacrament and gravely offending the dignity of the human person of the part-

proprietas essentialis continetur». Decision CORAM STAFFA, 21st May 1948, in *RRD* 40, 186, n. 2; translated in *Studia Canonica* 39 (2005) 282-283.

⁵⁸ «Ut fictus seu nullus consensus habeatur voluntas requiritur semper directe excludens, modus vero quo eadem voluntas manifestatur potest esse sive directus seu explicitus, sive indirectus seu implicitus, cum non sint circumstantiae vel modus agendi nubentis causa determinans eiusdem voluntatem sed tantum signa hanc voluntatem revelantia et in aperto exprimentia». Decision CORAM PINTO, 9th June 2000 (cf. nt. 3), 465, n. 9; translated in *Studia Canonica* 39 (2005) 283.

ner, thus impeding the interpersonal complementarity essential to marriage⁵⁹.

A similar argument, more succinctly stated, is found in the sentence written by Civili:

A positive act of the will against the ordination of marriage toward the good of the spouses is verified when the will of those who marry is directed contrary to both the human and Christian commitment for a continued growth in communion toward a more fruitful unity of bodies, hearts, minds and wills. This daily growth cannot occur unless one, by respecting the dignity of the other, gives him/herself to the other with total love that is unique and exclusive. Human dignity is based on fundamental human rights. Therefore, one who intends by a positive act of the will not to recognise the fundamental rights of the other, excludes the good of the spouses⁶⁰.

⁵⁹ «[...] admittere compellimur indissolubilitatis proprietatem atque bonum coniugum una simul excludi posse ab eo, qui in ineundis nuptiis, ob defectum sani coniugalis vel sponsalicii amoris, plenam et exclusivam suipsius donationem excludit, sacramentum detrectans atque graviter offendens dignitatem personae humanae compartis, interpersonale impediens complementum coniugio essenziale». Decision CORAM PINTO, 9th June 2000 (cf. nt. 3), 465, n. 10; translated in *Studia Canonica* 39 (2005) 284.

⁶⁰ «Positivus voluntatis actus adversus ordinationem matrimonii ad bonum coniugum tunc habetur, cum nupturientis volitio directa est contra postulationem tum humanam tum christianam crescendi continenter in communione ad uberiores usque unitatem corporum, cordium, mentium et voluntatum. Haec quotidiana progressio fieri nequit nisi alter, alterius dignitatem agnoscens, alteri se det amore integro, scilicet ex se unico et exclusorio. Dignitas vero humana iuribus hominis fundamentalibus innititur. Qui ergo positivo voluntatis actu intendit iura

From this excerpt, it is clear that Civili also upholds the sufficiency of an implicit positive act of the will in the matter of simulation of consent by exclusion of the *bonum coniugum*.

The issue of how the “good of the spouses” can be excluded is made at greater length in his sentence by Turnaturi who reflects first of all on what the “ordination/ordering” of marriage to the *bonum coniugum* means, and then looks at the question of proof:

It is of the essence of the sacred covenant that a contractant wills something that is ordered to good and not to evil: should a contractant want to order something to evil which, of its very nature is ordered to good, then he or she simulates and excludes the ordination to the good of the spouses, and by excluding it, he or she destroys the essence of the conjugal covenant. It is clear that the “*esse*” of a thing should be distinguished from its “*melius esse*”, because the ordination to the good of the spouses touches only the “*esse*”. Indeed, just as the internal consent of the mind can be manifested through words or signs [...], the ordination to the good of the spouses can also be excluded through words or equivalent signs, because «words said and unsaid have the same power» (Pothier, Tit. De R. J. note to n. 46). Therefore, because in the absence of any supervening cause of alienation of minds of the spouses through which the end of conjugal partnership is attained, it is quite difficult to conceive of “*melius esse*” out of what is from the beginning contrary “*esse*” towards which the “*melius*”

fundamentalialia alterius non agnoscere, bonum coniugum excludit!». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 613, n. 6; translated in *Studia Canonica* 39 (2005) 319-320.

should tend by its nature, so the alienated mode of relating on the part of one spouse to another which remains unchanged from the beginning, constitutes equivalently a proof in favour of admitting, except in case of incapacity, the exclusion of the natural ordination of the partnership to the good of the spouses⁶¹.

Turnaturi emphasises that, just as the internal consent of the mind can be manifested through external words or signs, so, too, what is essential to marriage can be excluded from the act of consent by means of words and equivalent signs. This is exclusion by an implicit positive act of the will. In support of his position, he cites two earlier Rotal decisions in

⁶¹ «Et in primis de ipsa essentia sacri foederis est quod nupturiens velit quid ordinatum ad bonum, non ad malum: quodsi velit ordinare ad malum quod suapte natura est ordinatum ad bonum, tunc simulat et ordinationem ad bonum coniugum excludit eamque excludens essentiam foederis coniugalitatis corrumpit. Patet distinguendum est “esse a melius esse”, cum ordinatio ad bonum coniugum “esse” tantum tangat. Atqui, sicut internus animi consensus manifestari potest verbis vel signis (can. 1101 §1), ita et ordinatio ad bonum coniugum verbis vel signis equipollentibus excludi potest quia “expressi tacitique vim eandem ac potestatem est” (Pothier., Tit. De R.J. nota ad Num. 46), et proinde, cum sat difficile sit concipere “melius esse” inde ab initio contrarium “esse” ad quod “melius” suapte natura tendere debet, nulla superveniente causa abalienationibus animorum coniugum ex qua finis consortii coniugalitatis sequatur, ita abalienatus et inde ab initio immutatus perseverans modus sese gerendi unius coniugis erga alterum, equipollenter probationem constituit pro admittenda, salva hypothese incapacitatis, exclusione naturalis ordinationis consortii ad bonum coniugum». Decision CORAM TURNATURI, 13th May 2004 (cf. nt. 3), 70, n. 9, translated in *Canon Law Society Newsletter* 152, 56.

which a distinction is drawn between the *finis operis* (the purpose of marriage) and the *finis operantis* (the purpose of the one entering marriage). Writing in 1992, Funghini says:

[...] because we are dealing here with the objective and intrinsic ends of marriage, an explicit intention to admit or to acknowledge them is not necessary, nor does it follow that the intention and the will to attain other ends through marriage automatically destroy or empty marriage of all its natural ordination. Because the *finis operis* is objective and intrinsic, and marriage is by its nature ordered to its attainment, it is not necessary that those who marry expressly intend it. In order to contract marriage validly it is sufficient that it is not excluded by a positive act of the will. [...] Sometimes a *finis operantis* can not only be different from but even be opposed to *finis operis* when a contractant primarily and *per se* intends an end that is against and opposed to *finis operis*, that is, the institution of marriage [...]

One who intends by a primary and prevalent will to achieve an end that is not only different from but even contrary and opposed to the natural and essential ordination of marriage, renders marriage invalid⁶².

⁶² «Cum finis operis sit finis obiectivus et intrinsecus, ad quem obtinendum natura sua matrimonium ordinatur, non requiritur ut nubentes expresse illum intendant: ad validum constituendum matrimonium sufficit ut ipsum positiva voluntate non excludant. Finem operantis concurrere et convenire posse cum fine operis evidentissimum est. Non semper autem iidem conveniunt cum finis operantis omnino extraneus esse possit fini operis, ut v.g. cum quis per nuptias contrahendas sibi proponit divitias acquirere, nobiliare titulum consequi, pacem inter familias restituere, bonam famam servare, aerumnosae

Over thirty years earlier, Lefebvre had stated: «A *finis operis*, indeed, cannot be excluded by a *finis operantis* without destroying by that very fact the essence of the contract, if the will of the contractant does not intend at all the *finis operis* but only the *finis operantis*, thus implicitly excluding the first»⁶³.

To sum up, according to the three Rotal Judges who wrote affirmative sentences on this ground, it seems clear that the *bonum coniugum* can indeed be excluded from the act of matrimonial consent, with radically negative consequences for the validity of the marriage. Among the three sentences, there appears to be unanimity about how this might be done:

condicioni subvenire, paternam deserere domum, etc. Nedum diversus sed et fini operis contrarius quandoque esse potest finis operantis cum contrahens primario et per se intendere finem possit, qui fini operis, i.e. instituto matrimonii adversetur et opponatur. Qui mere diversum fini operis finem consequendum sibi proponit consensum non vitiat, ideoque matrimonium irritum non reddit, nisi simul positiva intentione finem operis absolute excludat. Legitimi sunt enim fines operantis diversi a fine operis dummodo huic non adversentur. Qui nedum diversum, sed et contrarium ac naturali et essentiali ordinationi matrimonii adversum finem primario ac praevalenti intentione consequendum sibi proponit, matrimonium irritum reddit». Decision CORAM FUNGHINI, 14th October 1992 (cf. nt. 37), 84, 454, n. 7, translated in *Canon Law Society Newsletter* 152, 57-58.

⁶³ «Etenim finis operis – legitur in una coram Lefebvre – nequit excludi fine operantis quin corruat eo ipso contractus essentia, siquidem contrahentis voluntas non intendit omnino finem operis, sed tantummodo finem operantis, primum implicite excludens». Decision CORAM LEFEBVRE, 12th March 1960, in *RRD* 52, 171, n. 2, translated in *Canon Law Society Newsletter* 152, 58.

- it requires a positive act of the will (cf. can. 1101 §2);
- this can be either explicit or implicit;
- the existence of an implicit act can be deduced from facts that are established as certain in the Acts of the case;
- an implicit act of the will can be deduced from a clearly established contrary intention, or from an intention that is ordered not to something good but to something evil;
- in considering cases of implicit exclusion, a distinction must be borne in mind between the *finis operis* (i.e. the end towards which marriage is ordered) and the *finis operantis* (i.e. the real intention of the person entering marriage).

2.3 *How can such an exclusion be considered proven?*

Given the particular arguments put forward by the Rotal judges concerning the sufficiency of an implicit positive act of the will in the exclusion of the *bonum coniugum*, care must be taken to obtain proof that is accurate and relevant. In his judgement, Civili outlines the sources of evidence he sees as essential in the case under investigation; in doing so, he offers a useful compendium of the principal elements and sources of proof in these cases:

First, the petitioner should be heard, and she should accurately report to the Judge why she is accusing the marriage of nullity on the grounds of exclusion of the good of the spouses on the husband's part. Then the Respondent should be cited. If the Respondent does not appear in court, the allegation then becomes difficult although not impossible to prove.

Following this, the witnesses should be interviewed, who shall inform the judge of those matters which they might have learned directly from the one simulating or might have heard from others about his simulation. The witnesses should also report on any circumstances determined by the time, place and persons involved.

The judge should carefully inquire about the causes both for contracting and for simulating, as well as all circumstances antecedent, concomitant and subsequent to marriage.

It often happens that witnesses, who might have known about the intention of the one simulating, are few. In such a case, one should see whether the positive act of exclusion is evident from certain juridically proven facts. In fact, the will "speaks" many languages. Among other circumstances that can be regarded as efficacious proof of simulated consent are: when one, immediately after the wedding, and without restraint, discloses his/her mind that she/he had given a fictitious consent, or, as the first instance sentence writes about the exclusion of the good of the spouses: «when there are so many and so significant signs and facts of brutality, atrocity, beating and threats against the good of the spouse before and after the wedding». Indeed, we cannot forget that facts, provided they are many, certain, univocal and concurrent, are more eloquent than words⁶⁴.

⁶⁴ «Ad probationem exclusionis boni coniugum, haec animadvertenda veniunt. Primo audiat pars actrix, quae iudici accurate referat, cur matrimonium nullitatis accusaverit ob bonum coniugum a viro exclusum. Deinde citetur pars conventa. Si illa non comparuerit, probatio fit difficilior, sed non impossibilis. Postea interrogentur testes, qui iudicem certiores faciant de iis, quae a persona simulante directe didicerint vel ab

In this particular case, the Judges of the Rota, after analysing the proven facts of the case, concluded:

The antecedent, concomitant and subsequent circumstances demonstrate that in contracting marriage the Respondent was unwilling to establish with the Petitioner a dual interpersonal relationship and one founded on equal dignity of the spouses. He certainly did not respect the fundamental rights of the woman, which are derived from her intrinsic human dignity⁶⁵.

aliis de illius simulatione acceperint. Referant testes etiam adiuncta ex tempore, loco et personis determinata. Attente inquireat iudex causas sive contrahendi sive simulandi et universas circumstantias matrimonium antecedentes, concomitantes et subsequentes. Saepe accidit, ut testes pauca sciant de voluntate simulantis. Hoc in casu videndum est, an actus positivus exclusionis factis certis et iuridice probatis manifestetur. Voluntas enim plures linguas loquitur. Inter ceteras circumstantias simulatum consensum efficaciter demonstrantes recenseri possunt, quando quis illico et incontinenti post nuptias contractas mentem aperit se fecte consensisse, vel, ut prima sententia quoad exclusionem boni coniugum scribit "quando tot et tanta signa et facta brutalitatis, atrocitatis, verberum et minarum contra bonum coniugis ante et post nuptias militant". Haud enim oblivisci licet facta, dummodo sint plura, certa, univoca et concurrentia, verbis esse eloquentiora». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 613-614, n. 7; translated in *Studia Canonica* 39 (2005) 320-321.

⁶⁵ «Circumstantiae antecedentes, concomitantes et subsequentes manifestant Conventum in contrahendo noluisse instaurare cum Actrice relationem interpersonalem dualem et in pari coniugum dignitate fundatam. Ille enim non observavit iura mulieris fundamentalia, quae ex eius intrinseca dignitate derivantur». Decision CORAM CIVILI, 8th November 2000 (cf. nt. 3), 619, n. 15; translated in *Studia Canonica* 39 (2005) 330.

In his earlier sentence, Pinto did not present an outline of the sources of proof, but his method of reaching a decision is remarkably similar. First of all, he acknowledges a difficult reality:

It is true that there is no confession of the Respondent in the acts. Nevertheless, the true intention of the woman to enter upon an invalid marriage is clear with even stronger evidence derived from the combination of indications, supporting factors, episodes, semi-admissions, and even silence, reported during the trial by persons who are trustworthy and beyond all suspicion [...] ⁶⁶.

After considering the content of the deposition of the Plaintiff and the witnesses, the Ponens acknowledges that there are certain discrepancies but he demonstrates that the differences contained are only apparent and that, in fact, they reinforce the fundamental claim. He concludes:

Finally, there is no longer any doubt that in this case there are several proofs which, although individually may not be sufficient, yet when properly pooled together, or better when mutually integrated with the indications and supporting elements of great value [...], usually converge to constitute full proof, according to the accepted jurisprudence of Our Tribunal ⁶⁷.

⁶⁶ «Verum est deesse in actis Conventae confessionem, ast vera mulieris intentio invalidum instituendi coniugium maiore adhuc evidentia scatet a caterva indiciorum, adminiculorum, episodiorum, semi-admissionum, et etiam silentiorum, in iudicio relatorum a personis fidedignis et omni suspicione exceptis, [...]». Decision *CORAM PINTO*, 9th June 2000 (cf. nt. 3), 466, n. 12; translated in *Studia Canonica* 39 (2005) 285.

⁶⁷ «Tandem nullum superest dubium adesse in causa per plurimas probationes, quae, quamvis uti singulae sufficientes

The sentences *coram Pinto* and *coram Civili* are noteworthy since they both involve cases in which the Respondent was absent from the process. Even though the ground of nullity under investigation was the Respondent's defective consent due *inter alia* to exclusion of the *bonum coniugum*, the Rotal Judges felt that there was sufficient evidence from other sources to permit them to conclude in favour of nullity with the required moral certainty.

In the decision *coram Turnaturi*, the Judges were faced with another serious dilemma: although both parties participated in the process, they disagreed almost completely on every detail of the evidence; so the Judges had to make a decision concerning which of them was telling the truth. After a careful consideration of all the evidence, the Rotal Judges came to the conclusion that the Plaintiff was worthy of credence, especially because the statement of the Respondent was riddled with internal contradictions. In line with the principle of analysis he had outlined in the law section, *Turnaturi* demonstrated that the evidence showed that the Respondent's overriding intention at marriage was financial gain: the serious rows and disagreements that had preceded the marriage and took place during the married life all

non sint, probe tamen cumulatae vel melius ad invicem integratae cum magni ponderis indiciis et adminiculis (cf. can. 1679), in plenam confluere solent probationem, iuxta receptam iurisprudentiam Nostri Ordinis [...]». Decision *CORAM PINTO*, 9th June 2000 (cf. nt. 3), 468, n. 17; translated in *Studia Canonica* 39 (2005) 288. To reinforce the argument about converging proofs he gives a reference to a decision *coram Ewers*, 28th November 1964, in *RRD* 56, 893, n. 3.

focused on financial matters. The “flash-point” of these rows was her persistence at having her name added to the title deeds of a small property, of relatively little value. The Ponens concluded:

if the woman quarrels with the Petitioner, until separation, for economic reasons of not so great a value, then we must conclude that she looked not for the good of the spouses but for economic advantage, particularly if we keep before our eyes that it was she who ended the uncertain and ambiguous relationships with several men⁶⁸.

In this particular case, the Ponens argued that it is clear from the evidence that the Respondent’s *finis operantis*, i.e. her quest for financial gain alone, excluded from her consent the intention to enter a lifelong, exclusive relationship with the Respondent ordered to the good of the spouses (*finis operis*).

In the sentence coram McKay, the question of proof is dealt with in a summary fashion: in the law section, the Ponens states briefly what is required by Rotal jurisprudence for proof of simulation, namely a confession by the simulating party, especially if this exists in an extrajudicial form, attested to by witnesses who confirm what they heard before the judge, and a careful consideration of all the attendant

⁶⁸ «Utique agebatur de parvo bono [...] sed si mulier iurgio contendit cum actore usque ad separationem oeconomicas ob rationes parvi ponderis dicendum non ad bonum coniugum sed ad oeconomica bona spectasse, praesertim si prae oculis habeatur illam provenisse ex incertis ambiguisque unionibus pluribus com hominibus». Decision CORAM TURNATURI, 13th May 2004 (cf. nt. 3), 91, n. 27, translated in *Canon Law Society Newsletter* 152, 67.

circumstances. He is clear that these are all necessary to demonstrate that the *causa simulandi* really did prevail over the *causa nubendi* in the will of the party entering marriage⁶⁹. When he comes to consider the actual ground of nullity in the sentence itself – apart altogether from his dismissal of the issue of the *bonum coniugum* – the Ponens emphasises that the necessary elements of proof of simulation are not to be found in the acts of the case; thus, the case is devoid of any foundation and must receive a negative decision⁷⁰.

2.4 *What practical lessons can be drawn from the recent jurisprudence?*

From all that has been said concerning the nature of the *bonum coniugum* and the possibility of its being excluded from the act of matrimonial consent,

⁶⁹ «[...] iurisprudencia Rotalis caput simulationis tenet probatum cum habetur confessio partis simulantis, apprime extraiudicialis, testibus fidedignis tempore non suspecto patefacta et ab eisdem testibus coram iudice dein confirmata, insuper perpensis adiunctis matrimonium antecedentibus, concomitantibus et subsequentibus, omnia haec necessaria quae demonstrare possint causam simulandi ab illa nubendi bene distinctam in voluntate contrahentis re vera praevaluisse». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 687, n. 12.

⁷⁰ «In actis tamen haud inveniuntur elementa probatoria: vel confessio partis, vel corroboratio testificalis, vel causa saltem proxima simulandi et haec potior causa contrahendi, vel ad argumentum apta adiuncta matrimonialia. Cum ergo concludere cogamur praefatum caput ab omni fundamento penitus destitui, infrascriptis bene visum est iterum negative respondere ad dubium ita propositum at nullatenus oratum». Decisio CORAM MCKAY, 19 maii 2005 (cf. nt. 3), 694-695, n. 20.

it would appear that Instructors, Advocates, Defendants and Judges at first and second instance have a serious challenge facing them.

In gathering evidence, preparing arguments for nullity, defending the bond, and making definitive judgements, they must be very clear about the substantial, evidentiary and procedural difficulties highlighted concerning this ground of nullity. Thus, should a case be introduced and investigated under the heading of an exclusion of the *bonum coniugum*, the Acts of the case must contain clear and unequivocal statements of fact. Such information can only be obtained by careful questioning of the parties and witnesses such as that highlighted in the sentence *coram Civili*. This information should include the following:

- Data concerning the religious, social, and cultural background and formation of the Plaintiff and Respondent.

- The history of the meeting and courtship of the Plaintiff and Respondent.

- A description of precisely how the Plaintiff and Respondent related to one another during the courtship.

- A description of how the Plaintiff and Respondent behaved in their relationships with their parents, with their siblings, with other members of the family and with friends.

- A description of how the Plaintiff and Respondent related to previous boyfriends or girlfriends.

- A description of any behaviour on the part of the Plaintiff or Respondent that caused the other to have second thoughts or misgivings about the relationship before the marriage.

- Clear and unambiguous information about when the question of marriage arose for the parties.
- Clear and unambiguous information about the understanding and expectations of marriage held by the Plaintiff and Respondent.
- Clear and unambiguous information – as far as possible, directly from the parties – of the intentions of the Plaintiff and Respondent when entering marriage.
- Information about the reaction of people to the news of the proposed marriage, e.g. the reaction of friends and families of the parties (i.e. surprise, delight, misgivings, unease, shock, etc.).
- Information about the arrangements made by the Plaintiff and Respondent for the wedding.
- Information about the arrangements made by the Plaintiff and Respondent for married life, e.g. accommodation, domestic responsibilities, employment, handling of finances, etc.
- Information about any violence or aggression or other socially unacceptable behaviour of the Plaintiff or Respondent towards the other, both before and during the married life.
- Information about how long the marriage lasted.
- Clear and unambiguous information about when the married life ended and the reasons why.

Interrogations carried out in these cases must focus attention on these areas. The Judge must be sure that any questions asked are geared towards obtaining factual information. It is neither sufficient nor appropriate to gather data that is little more than second-hand gossip, unsubstantiated rumour, or unsustainable opinion. No matter how credible the

witnesses, such items of evidence have very little probative force, if any. A study of the three cases in which the Rotal Judges returned an affirmative decision shows that they were able to attain the required moral certainty because they were confident that they were in possession of facts, even in two cases where the Respondent did not participate in the process.

From a practical point of view, Advocates and Defenders, when faced with this ground of nullity, must be attuned to the nuances raised in the four Rotal sentences. For Advocates, there can be no reductionist argument such as, «in this marriage, the good of the spouses was not achieved, therefore it must have been excluded». There is a wealth of Rotal jurisprudence concerning the *bonum prolis* to show that such a position is utterly unsustainable. By analogy, this can be applied to cases where nullity is claimed under the heading of exclusion of the *bonum coniugum*. For Defenders, there can be no dismissive arguments, such as «the good of the spouses is a state of perfection towards which those who marry aspire, but which has no juridical content or relevance». The text of can. 1055 §1 and the comments of the Commission that prepared the text show clearly that there is a juridical relevance to this end of marriage. Facile and dismissive arguments do not respect the complexity of the material. Finally, Advocates, Defenders and Judges must always be satisfied, as noted above, that they are in possession of facts.

These four Rotal sentences present a more radical challenge to Tribunals of first and second instance. This challenge is very much in conformity with the twofold responsibility of the Roman Rota to

foster unity of jurisprudence and provide assistance to lower tribunals⁷¹. It concerns the understanding of the content and implications of the concept of the *bonum coniugum*. The challenge is both negative and positive.

Two aspects of the negative challenge are worth noting:

– The language used to describe the content of the *bonum coniugum* is very vague and imprecise. Consequently, it is difficult to deal with it effectively in a juridical manner. The sentences use terminology such as “interpersonal relationship”, “spiritual, intellectual, physical, moral and social good”, “psychosexual integration”, “tolerable personal relationship”, “equal dignity of the other party”, “interpersonal complementarity”, “personal diversity and equal personal dignity”, “the perfection of the spouses precisely as spouses”. Within the context of the Rotal sentences outlined above, these terms are used with great care and great correctness. However, there is a real danger that, in less experienced hands, in some cases, these expressions might be inflated to the extent that they are considered to constitute the minimum necessary for a valid marriage.

– The arguments advanced in the Rotal sentences in favour of an implicit positive act of the will by which something essential is excluded from the act of consent are well presented and utterly logical within those sentences. Nevertheless, taken out of context, they can become the source of a great deal of confu-

⁷¹ Cf. Pope JOHN PAUL II, Apostolic Constitution *Pastor Bonus*, 28th June 1988, n. 126.

sion. The axiom underlying the arguments in these sentences is that «actions speak louder than words». This has been used in the past to great effect in many cases involving simulation of consent. In the correct context, a description of how a person behaves is sometimes a better proof of their actual intention than an oral declaration. However, the principle of «actions speak louder than words» must be applied rationally and logically. In many marriage cases, it will not be difficult to find proven behaviour on the part of the Plaintiff or Respondent that might be described as not contributing to the welfare of the other party as a spouse. But no automatic conclusion can be drawn on that basis that the party in question had excluded the ordering of marriage to the *bonum coniugum* from his or her consent. Proof of bad behaviour in the courtship or in the married life is proof of bad behaviour, pure and simple. A lot of other elements of proof need to be present and to be taken into consideration before arriving at a conclusion as to the juridical significance of that behaviour. One cannot automatically read an intention into a person's manner of behaving.

From a positive perspective, these sentences have helped to focus attention more sharply on the quest for a correct understanding of the essential juridical features of the *bonum coniugum*. Many of the concepts indicated in the preceding paragraphs may contain an inherent risk when considering the juridical minimum for a valid act of consent. However, they are very helpful and useful in other areas of the Church's juridical responsibility for marriage. They identify the ideals and the highest aspirations of marriage towards which young couples entering marriage and those already married can be directed.

The three affirmative sentences present a further positive challenge to first and second instance tribunals by attempting to tease out the content of the *bonum coniugum* in terms of juridical rights and obligations. In doing so, they rely heavily on established Rotal jurisprudence based on canon 1095. Frequently, in lower tribunals, attention in cases heard under the headings of nullity based on this canon tends to be focused on the psychological anomaly involved. Not infrequently, attention is not paid to the latter half of the second and third paragraphs of that canon, i.e. that there must be a grave lack of discretion of judgement concerning *the essential matrimonial rights and obligations to be mutually given and accepted* and/or an inability to assume the *essential obligations of marriage*. There is no doubt that the attention given to the nature of the rights and obligations essential to marriage within the three affirmative sentences will assist Judges in their consideration of those cases where it is claimed that one or other of the parties was incapable of marriage.

By way of conclusion

Having reviewed the four sentences in which exclusion of the good of the spouses was considered, some things are already clear. There is no doubt that the ordering of marriage to the *bonum coniugum* is essential to marriage, from a juridical point of view. However, there is no definitive clarity surrounding the juridical content of the *bonum coniugum* as an end of marriage. It is accepted in the jurisprudence of the Roman Rota that this ordering to the good of

the spouses is relevant in cases where nullity is claimed under the heading of can 1095, 3°, i.e. an inability to assume the essential obligations of marriage; among some Judges of the Roman Rota, it appears that this same ordering is of relevance in cases where nullity is claimed on the basis of an exclusion from the act of consent of this ordering to the good of the spouses. When considering either ground of nullity, the ordering of marriage to the good of the spouses must be clearly distinguished from the fact of failure to achieve the desired end. This simple fact does not prove either inability to assume the essential obligations of marriage or a positive act of the will by one of the parties to exclude that ordering from the act of consent.

The jurisprudence of the Roman Rota is not yet constant or consistent in its approach to the ground of an exclusion of the *bonum coniugum*. It is clear from the sentence coram McKay, that the Judges of that Turnus were not very convinced either by the proofs presented in the particular case, or by the very concept of an exclusion of the *bonum coniugum* as an autonomous ground of nullity, separate from the exclusion of any of the three traditional *bona matrimonii*. A more nuanced and explicit critique of the developing jurisprudence has been offered by at least one other Rotal Judge.

In a paper delivered in 2005, Boccafola asks:

[...] what would be the effect on the validity of the marriage if one should deliberately exclude “ordination to the good of the spouses” from one’s matrimonial consent. From the outset this is quite a difficult question precisely because this “ordination to the good of the spouses” can be determined more readily by what it is not than what it is. What is it that the

person would be excluding? Why would the person be excluding it in the context of ordination to the good of the spouses rather than in regard to some other bonum of marriage?⁷².

He responds:

In my opinion, consolidated Rotal jurisprudence so far has recognised a few elements that would be required to assert the minimum ordination to the good of the spouses. The spouses would have to want to constitute a perpetual and exclusive interpersonal relationship open to the procreation and education of children. They would have to recognise this as a conjugal relationship and the other person as their partner and spouse. Simply speaking they would have to just consent to marriage. Thus it seems that this would only be able to be a very rare ground of nullity. In order to be credible, the one seeking nullity would have to explain quite clearly why he or she specifically excluded an essential obligation connected with ordination to the good of the spouses. As we ourselves, professionals in the subject, have not yet been able to individuate these specific essential obligations, or point out any way that they would differ from those already contained in the traditional Augustinian goods of marriage, it would seem to be unlikely that a spouse would have been able by a positive act of the will to have excluded just such an obligation from his or her marital consent⁷³.

⁷² K. BOCCAFOLA, «Reflections of a Rotal Auditor on the *Bonum Coniugum*», paper given at the CLSA Northwestern Regional Meeting, Vancouver, BC, April 2005, 12-13, cited in L. ROBITAILLE, «Exclusion of the *Bonum Coniugum*: interpreting and assessing evidence», *CLSA Proceedings* 68 (2006) 161.

⁷³ K. BOCCAFOLA, «Reflections of a Rotal Auditor» (cf. nt. 72), 161.

Boccafola appears to believe that whatever is understood by an exclusion of the ordering of marriage to the good of the spouses is effectively included within some other heading of nullity, either an exclusion of some essential property or element of marriage, or an exclusion of marriage itself: «The ordinary types of simulation would seem first to come into consideration rather than an exclusion of “ordination to the good of the spouses”»⁷⁴. He adds:

The only type of case that would seem to possibly fall under such a *caput nullitatis* is that case brought up by C. Jemolo. [...] Even if one accepts the possible nullity based on such grounds, it still would be necessary to prove the fact of nullity using the jurisprudential requirements for simulation cases. There would have to be the judicial confession of the simulator to the precise point at issue, that is, that he did not intend the good of the spouses but rather specifically their harm⁷⁵.

These remarks of Boccafola and the reservations expressed in the sentence coram McKay indicate that some Judges of the Roman Rota at present still have a difficulty in accepting the exclusion of the *bonum coniugum* as an autonomous ground of nullity of marriage. There is agreement among all Rotal Judges that the juridical content of the *bonum coniugum* has not yet been teased out definitively. Nev-

⁷⁴ K. BOCCAFOLA, «Reflections of a Rotal Auditor» (cf. nt. 72), 162.

⁷⁵ K. BOCCAFOLA, «Reflections of a Rotal Auditor» (cf. nt. 72), 162, note 357.

ertheless, some believe that it has been identified sufficiently to permit them to determine some cases presented on appeal under this heading.

Pope Benedict, speaking of the role the Roman Rota has to play, has pointed out:

Any legal system must seek to offer solutions in which, as well as the prudential evaluation of individual cases, the same principles and general norms of justice are applied. Only in this way is a trusting atmosphere created in the tribunals' activity and the arbitrary nature of subjective criteria avoided [...] all rulings must always be based on the principles and common norms of justice.

Yet, he is aware that there are dangers and risks to the unity of jurisprudence: «In the Church, precisely because of her universality and the diversity of the juridical cultures in which she is called to operate, there is always a risk that "local forms of jurisprudence" develop, *sensim sine sensu*, ever more distant of positive law and also from the Church's teaching on matrimony». The existence of this risk highlights the fundamental practical importance of the role of the Rota:

The objective assessment of the facts in the light of the Magisterium and the law of the Church thus constitutes a very important aspect of the Roman Rota's activity and exercises great influence on ministers of justice of the tribunals of local Churches [...] Thanks to this work, the concrete reality in causes of matrimonial nullity is objectively judged in light of criteria that constantly reaffirm the reality of matrimonial indissolubility, open to every man and woman in accordance with the plan of God, Creator and Saviour. Constant effort is needed to attain that unity of the criteria of justice which essentially characterises

the notion of jurisprudence itself and is a fundamental presupposition for its activity⁷⁶.

The few Rotal sentences issued so far on the basis of an exclusion of the *bonum coniugum* may be seen to be an effort on the part of the Apostolic Tribunal to address issues that are arising in tribunals of local Churches. Although the few sentences that have been issued cannot be said to amount to constant or consistent Rotal jurisprudence, they do constitute a help to other tribunals. A careful study of them reveals that the Rotal Judges have taken great care to consider the precise and particular facts and circumstances of each case and have investigated the claim of nullity of marriage in these cases in the light of the fundamental doctrinal and juridical principles involved. The continuing challenge for tribunals of first and second instance is to study the jurisprudence of the Rota, in sentences concerning this ground and others. In this way, it will be possible to avoid selective and distorted interpretations⁷⁷ and thus guarantee to the faithful the highest standards of juridical activity.

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⁷⁶ Pope BENEDICT XVI, Address to the Roman Rota, 26th January 2008 (cf. nt. 1), 3.

⁷⁷ Cf. Pope JOHN PAUL II, Address to the Roman Rota, 29th January 2005, *L'Osservatore Romano* (English Weekly Edition), n. 5, 2nd February 2005, 3.