

EXCLUSION OF FIDELITY

Introduction

Marriage is a social institution which has existed from the beginning of the world. Not only society, but the religion also upholds this institution in high esteem. In marriage a man and a woman enter into a contract in a public ceremony to live life-long as husband and wife. Each custom has its own way of celebrating this marital union. It is marriage that gives the right for the man and the woman to indulge in sexual act and bring forth offspring. This marital bond gives stability and security to the children as well. St Thomas Aquinas held that marriage belongs to natural law (Aquinas, Summa Theol., 49, Art 3).

In the Church, marriage is not a mere social contract, but a covenant raised to the level of Sacrament. Church upholds the stability of this union. Thus, marriage is ordained by Nature, sanctified by Religion and recognized by the State.

Though the Church is the champion in defending the indissolubility of marriage and condemns the divorce, she recognizes possible flaws or defects which makes a marriage invalid from its origin. Church law speaks about impediments, defective consent and lack of form which may lead to the invalidity of marriage bond. Therefore, Church does not grant divorce to the married people, but tries to prove that there was no marriage at all from the beginning, due to some defects.

Here below we are going to discuss in detail one such defect which the Church considers as an element which renders a marriage invalid. That is, exclusion of fidelity in marriage while giving the consent for marriage.

Christian Perspective of Marriage

In the Christian perspective, marriage is not merely a contract, but a covenant where the spouses manifest their love for each other and give mutually themselves for the other. Holy Bible speaks about the covenantal relationship between God and the people of Israel. Thus, the Church invites the husband and wife to love each other unconditionally and sacrificially, as God expressed his

love towards mankind. Further this marriage is raised to the level of sacrament, one of the seven means of God's special grace in the Church.

In the beginning, when God saw that Adam was alone, he gave Eve as his companion, so that they may live happily mutually helping each other. He blessed this permanent partnership of life, and in this way instituted Marriage (Gen.1:21,22; 2:21-24). Along this line, the Fathers of the second Vatican council declared that "God himself is the author of marriage and has endowed it with various benefits and with various ends in view" (*Gaudium et Spes* 48).

According to the 1983 Code of Canon Law, "Christian marriage is a 'covenant', by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children" (Can.1055§1). The phrases: Partnership of their whole life and wellbeing of the spouses define the essence of Christian marriage and distinguish it from other forms of life companionships. A good understanding of these two phrases is necessary especially today when, the dignity of marriage is overshadowed by polygamy, the plague of divorce, the so called 'free love', and similar blemishes; and furthermore, when married love is too often dishonoured by selfishness, hedonism, and unlawful contraceptive practices (*Gaudium et Spes*, 47). As an abomination today, many Governments has legalized same sex marriage.

Holy Matrimony has its origin in God and is modeled on the union between Christ and his Church (Eph.5:32). "Authentic married love is caught up in divine love and is directed and enriched by the redemptive power of Christ and the salvific action of the Church, with the result that the spouses are effectively led to God and are helped and strengthened in their lofty roles as fathers and mothers" holds Vat. II (*Gaudium et Spes*, 48).

So, for the Church, marriage is not just of ecclesiastical and civil law, but principally of natural and divine positive law (Woestman, 2003, 68).

The Importance of Consent in Marriage

This marital union is brought into being by the lawfully manifested consent of the persons who are legally capable; this consent cannot be supplied by any human power (c.1057). So, the consent is the constitutive element in any marriage. It is a free and conscious choice of two persons, man and a woman to mutually give and accept each other in the marriage bond. This consent is the act

of the will. Hence it is internal, and is invisible to sensory perception. The law presumes that the internal consent of the will corresponds with the words or signs employed in the external expression during the marriage ceremony (1101§1). In other words, what is manifested externally (through words and signs) is presumed to be what is intended.

The word “consent” can be traced to the word “consensus” which means conformity of the will of at least two persons on one and the same object. (Listl et al. 1999, 927). The word can also be traced to the Latin word ‘consentire’ which stems from the two words ‘con’ - together and “sentire” - ‘to feel’. That means, feeling together. It ordinarily means to give permission for something to happen or to agree to do something. (Oxford Dictionaries, 2010, 1090)

Matrimonial consent is not only the indispensable condition of marriage, but also its efficient cause and includes two things: the inner desire to contract marriage, and the legitimate manifestation of will between legally competent persons. (Woestman, 2003, 173). Consent in marriage gives each of the partner exclusive rights to demand total fidelity from his or her partner.

The Catechism of the Catholic Church also teaches: “The Church holds the exchange of consent between the spouses to be the indispensable element that ‘makes the marriage.’ If consent is lacking, there is no marriage” (CCC 1626). Any individual who gives a consent for marriage must have the correct knowledge and freedom to act. When one speaks about the act of will, it refers to the deliberation, that is making a definitive judgement or arriving a decision after taking into consideration the pros and cons of the matter. Hence consent is the constitutive, juridical and essential element in any marriage.

Defective Consent

When there is any lack of knowledge regarding the ends and properties of marriage or lack of free will in making a proper decision, then the consent will be a defective one, affecting the validity of marriage. Also, when there is a discrepancy between the external manifestation and the internal will, the consent becomes defective.

This consent could be vitiated by many ways: the lack of minimum knowledge of what marriage is all about, fraud, the defects in the will, conditional marriage, the marriage under absolute or relative compulsion or constraint, mental disorder and total/partial simulation. Such defective consent makes a marriage invalid. Hence, simulation also makes the consent defective.

Simulation

It means feigning, falsifying, deceiving etc. Simulation is something that represents something else, in other words it is not the real thing.

The code does not use the words *simulare* or *simulatio* when speaking about marriage, but uses the word 'exclusion'. In the ecclesiastical jurisprudence, exclusion is known as simulation. Following the canonical tradition rooted in Roman Law, the Roman Rota uses the term '*simulatio*'. Simulation implies a conscious deception. "In simulation mind and will are out of agreement with the external manifestation," says Ewers. (*Coram Ewers* 5 May 1979)

It is the conflict between the presumption of law (that the external manifestation of the contracting parties is in conformity with the will) and the authentic will of the parties.

Simulation is an act of the will, in which there is a contradiction between the external act and the internal disposition. The canon 1101 states that the internal consent of the mind is presumed to be in agreement with words or signs employed in celebrating matrimony. But if either or both the parties by a positive act of the will excluded marriage itself or some essential element of marriage or some essential property, the marriage is invalid.

Till XIIIth Century, the intention of the will was considered to be in conformity with what is manifested outside in an external forum. In 1212 a Papal decree '*Tua nos*' issued by Pope Innocent III (1198-1216), declared a marriage invalid on the ground of simulation. It is the first time that the Church spoke about simulation in marriage.

Traditional jurisprudence speaks of the coexistence of two acts of the will in stimulation, the external act says "I will", while the internal will says, "I won't". Jurisprudence of Roman Rota firmly holds that invalidating simulation requires a positive act of the will which excludes marriage itself or one of the essential elements or properties of marriage.

Simulation occurs when a person desires to contract marriage or at least to go through a marriage ceremony to enjoy certain benefits of marriage, but intends marriage in such a truncated form that the object of consent is substantially defective. Simulation is said to be total when a person totally

excludes marriage; it is said to be partial, when one excludes one of the essential elements or properties of marriage. Usually we presume that what is manifested confirms the internal intention. The opposite must be proved

Fidelity in Marriage

Fidelity is one of the important properties of marriage. The second Vatican council fathers maintain that the Christian family springs from true love which exists only in marriage, which is an image and a sharing in the partnership of love between Christ and the Church (Eph 5: 32); it will show forth to all men, Christ's living presence in the world and the authentic nature of the Church by the love and generous fruitfulness of the spouses by their unity and fidelity, and by the loving way in which all members of the family cooperate with each other (Woestman, 2003, 68).

Canon 1056 clearly speaks of unity as an essential property of marriage that excludes any extra-marital relationship. Marriage is always a one-to-one relationship that demands total fidelity on the part of those who enter into the marital contract. If anyone excludes this essential property of marriage, while giving the consent, then that marriage is invalid.

Christian marriage demands of the couple a commitment to themselves to an indissoluble union and to mutual fidelity (Coriden et al. 1999, 737-738). One of the essential elements of marriage, namely the procreation and education of children calls for an undivided marital union between the spouses. When the couples stay together their whole life long, they create a conducive atmosphere for the proper up-bringing and training of their children. Hence fidelity is held to be an essential property of marriage.

Further, the marriage covenant is in the first place ordered to the well-being of the spouses and then to the procreation and upbringing of children (Can.1055§1). Both contracting parties to matrimony receive by the fact of this canon and by the fact of their exchange of matrimonial consent the exclusive right and obligation to give and receive the conjugal debt of their partner. Holy Scripture holds that the creator has created them male and female and because of this, 'it is not good that man should be alone' (Gen.21:18). It further holds that "the man shall leave his mother and father and will become one flesh with his wife" (Gen. 2.24). Conjugal love involves the community of soul, mind, heart and body (Listl et al. 1999, 886). Married love is a mutual self-giving of the spouse to each other. The fathers of the second Vatican council in '*Gaudium et Spes*'

spoke extensively on the nature of married love with special emphasis on the intimate love which should exist between them. This intimate partnership is rooted in their exchange of their irrevocable personal consents: “I... take you...to be my lawful wedded husband/wife. I promise to be true to you in prosperity and in adversity; in sickness and in health till death do us part”. So, declare the couples while exchanging consent

In short, by its very nature conjugal love requires the inviolable fidelity of the spouses. This is the consequence of the gift of themselves which they make to each other (CCC 1646).

Contra Bonum Fidei

Exclusion of fidelity is very closely tied to the themes: simulation and consent. Canon 1101 §2 elucidated that: “if either or both of the parties should by a positive act of will exclude marriage itself or any essential element of marriage or essential property, such party contracts invalidly”. And canon 1056 says: “The essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament.” Unity is an essential property, therefore inseparable from the bond. When the exclusivity of the bond is excepted by reserving the right to have intercourse with a person other than the spouse or the right to marry another person while maintaining the first bond, one simulates against the unity in marriage. However, the abuse of the good of the fidelity, that is committing adultery is different from the exclusion of that good.

Doctrine and jurisprudence have always held that the substance of marriage is marked by the three ‘bona’ - essential characteristics or properties, proposed by St. Augustin. And this was later on developed by St. Thomas Aquinas. They are: ‘*bonum fidei*’. ‘*bonum sacramenti*’ and ‘*bonum prolis*’. In our study we are dealing with ‘*bonum fidei*’. When a person while marrying reserves the right to have the sexual relations with the third party is understood to have the intention *contra bonum fidei*; a party who marries while reserving the right to dissolve the marriage should difficulties arise, is said to have an intention *contra bonum sacramenti*; a man or a woman who excludes the possibility in marriage of procreative intercourse is said in technical terms, to have an intention *contra bonum prolis*. And according to the canon 1055, the essential elements or the ends of marriage include ‘the good of the spouses (*Bonum Coniugum*) as well as the procreation and education of offspring’.

These essential properties and essential elements of marriage are intended towards the unity of the couples and exclude every form of plurality as in the case of polygamy and polyandry as seen in some cultures. “The community of life is based on and needs total human fidelity for its existence and growth. This is not simply the absence of extra-marital sexual involvement but fidelity to the interpersonal relationship. When we talk of the community of life, we are talking of the total gift of self which cannot be divided. It must be given and continuously expressed to one person. Fidelity is not possible without unity; that is, one partner with whom to share one’s life” (Coriden, 1999, 742). The issue of the exclusion of fidelity here does not treat of the question whether adultery is a ground for Annulment of marriage or not. Such question still borders some minds but “contemporary biblical scholarship seems to hold that *pomeia* used in the gospel according to Matthew (19:9) referred not to adultery, but to marriages within forbidden degrees of blood relationship” (Coriden, 1999, 742).

“The intimate union of marriage as a mutual giving of two persons, and the good of the children demand total fidelity from the spouses and requires an unbreakable unity between them” (*Gaudium et Spes* 48). The second Vatican council fathers declared further that married love is uniquely expressed and perfected by the exercise of the acts proper to marriage. Hence, the acts in marriage by which the intimate chaste union of the spouses takes place are noble and honourable: the truly human performance of these acts fosters the self-giving they signify, and enriches the spouses in joy and gratitude. Endorsed by mutual fidelity and, above all, consecrated by Christ's sacrament, this love abides faithfully in mind and body, in prosperity and adversity and hence excludes both adultery and divorce (*Gaudium et Spes*, 49). A question could here be asked why does it happen that some people after giving their consent to their partner go ahead to be unfaithful. The situation is further worsened when one intentionally excludes fidelity in his mind while at the same time pronouncing to his or her partner: "I will be faithful to you in prosperity as well as in adversity”.

The exclusion of fidelity is a form of partial simulation, because the simulator does not exclude the idea of Marriage entirely, but excludes one of its essential properties, that is the good of fidelity (*bonum fidei*). In other words, while pronouncing fidelity to his intended wife, a man intends to retain an extra-marital relationship. It is one of the traditional grounds of nullity. Those going into

marriage in today's contemporary world are influenced in their choice of their partners by a whole lot of socio-economic, cultural and religious diversities. Since the sexual revolution that engulfed the world in modern times, the actual Christian understanding of marriage is misunderstood and wrongly accepted by many modern minds. So, in their selfish tendencies, these modern people try to exclude some of the essential properties of marriage.

An example of the exclusion of fidelity would be; if a man had a girlfriend prior to his marriage and used to have a sexual relationship with her and later decided to enter into marriage but with the intention of continuing his relationship with his former girlfriend; he contracts marriage invalidly. This is because, although he had verbally exchanged a marriage vow with his wife at the altar, the external pronouncement was not followed by an internal commitment. This case is an example of simulation which invalidates marriage. By his action, he excludes the right of his partner to an exclusive sexual conjugal relationship that is to his fidelity which is fundamental to Christian marriage. This situation is not to be confused with an extra-marital affair or what some authors call 'Mid-life crises' (Tierney, 1993, 85).

Some hold that one simulates consent and excludes the '*Bonum Fidei*' not only by giving to some third persons a certain right to one's own body, but also when one intends to give to the spouse a right but not an exclusive right or when one intends to give the right to no one, neither to the Spouse, nor to the third person nor to anyone else (Wrenn, 2002, 56).

The exclusion of the right to fidelity can be through many ways:

1. Through the direct exclusion of the right
2. Through the attachment to consent of a condition contrary to the fidelity
3. Through the concession of the right to a third party
4. Through the limitation of the right to definite or indefinite period of time
5. Through an intention, even an implicit one, of excluding the obligation by manifesting a firm plan of having sexual relations with others, even those of his or her own sex.
6. Having a stubborn conviction about the impossibility of the frail human nature to observe the good of the fidelity.
7. Having an intention to commit adultery which prevails over the intention of giving and accepting the obligation of fidelity,

This internal act of simulation against fidelity is usually manifested in the aversion for the partner and indulging in extra martial relationship. That is the sure sign that the party concerned has not made a free consent

Since the act of exclusion of fidelity or simulation involves an internal act, its external proof is always difficult, but is not impossible. However, the repeated adultery on the part of the alleged simulator both before and after marriage is often the principal argument of the exclusion of fidelity. There are five possible ways, by which one could prove the fact of exclusion of fidelity.

- i. The key to discerning the intention of the suspected simulation is his or her pattern of behaviour. The one who investigates this case must take into consideration the circumstances before and after the wedding, the behaviours of the persons and the way they lived their conjugal life after the celebration of marriage. This is more important than the judicial and extra-judicial confessions (*coram* Alwan, 9 July 2010).
- ii. The confession of the simulator. If during the trial process the simulator makes statements that give the clue that he had been in the act before marriage and had continued it after marriage, it is a strong proof of exclusion of fidelity.
- iii. The valid testimonies in the form of tapes, videos, or other documents that prove the same point, these are still valid proofs.
- iv. The grave and proportionate motive of the Simulator. For example, if the simulator's reason for contracting the marriage with his partner was just to please his parents and avoid some family squabbles, then after the marriage, he will surely continue to have sexual contact with his ex-girlfriend.
- v. The circumstances that are antecedents to, concomitant with and subsequent to the Marriage, which show that Simulation is not only possible but morally certain (Wrenn, 2002, 56).

Conclusion

Marriage is a holy union modelled in the fashion of love of Jesus and the Church. Jesus also claimed that it is God who unites the couple and no human power should ever try to separate them. “What therefore God has joined together, let no man put asunder” (Mt.19:6). So, the church never grants divorce, nor recognize the civil divorce. However, Church considers a marriage null and void, when there are some flaws or defects in the marriage from the

beginning. In our above study, we have clearly discussed how marriage could be invalid due to exclusion of fidelity in marriage while giving the consent.

SOURCES

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3. The Canon Law Letter & Spirit, (Ed.) Gerard Sheehy et al, , Geoffrey Chapman, London, 1995, 616-617.
4. Code of Canon Law Annotated, (Ed.) Ernest Capporos et al, Wilson Lafleur Limitee, Montreal, 2004, 851-853.
5. Catechism of the Catholic Church, Pope John Paul II
6. Vatican Council II, (Ed.) Austin Flannery, St.Pauls Mumbai, Vol.I, p.835-837.

For Discussion

Fidelity violated during the marriage does not render the marriage invalid. Can we say that one had the intention in the subconscious, which influenced the positive act of the will.

There is a possibility to commit a mistake in making a proper judgement between the simulation of fidelity and the abuse of fidelity.

Documents can be a good proof in this case. – How much can we rely on it, since there is a possibility of forgery or foul play

Email and WhatsApp also could be used for proof. How to find out the genuineness of it. Today modern technology – graphics, morphing etc.

Positive active of the will – what about simple people ?

Fr. Martin

Tuticorin

The canon 1101§2 clearly speaks of the exclusion of essential element or essential property of marriage, which may lead to an invalid marriage.

The essential properties of marriage are 'unity and indissolubility',

One could exclude fidelity in marriage while promising same publicly in a marriage ceremony.

But this is a very difficult situation to determine. Let us examine more closely what the 'Exclusion of fidelity' means.

while