The Exclusion of Children and Defective Consent

By Dorothea Ludwig-Wang, 24 October 2019

The proposition *matrimonium facit consensus*—that consent makes marriage—has been upheld by the Church since antiquity. Canon 1057 §1 of the current 1983 Code of Canon Law establishes that "the consent of the parties, legitimately manifested between persons qualified by law, makes marriage." In giving consent, thereby establishing the marriage contract, the intention of the man and woman entering into marriage is presumed to align with the words and signs used during the wedding ceremony (c. 1101 §1). However, if one or both parties exclude marriage itself or one of its essential elements or properties by a "positive act of the will," matrimonial consent is defective, rendering the marriage invalid (c. 1101 §2).

From this comes the question of whether a marriage is rendered invalid by defective consent if, at the time of exchanging vows, one or both parties did not want to have children. Because marriage possesses the favor of the law, one must be cautious before coming to the conclusion that a marriage is not valid, and the onus is on the one alleging invalidity to prove it. The exclusion of children could indicate grounds for a declaration of nullity, but in itself, a lack of desire to have children is not sufficient to render matrimonial consent defective. There must be a "positive act of the will" involved, and a distinction must be made between "not wanting" children and "wanting not" one of the essential elements or properties of marriage. As "not wanting" is by definition no act of the will, it is not sufficient to demonstrate defective consent.

Furthermore, it must be shown that it is the obligation of procreation through paying the marital debt that is being refused, and not simply the *fulfillment* of this obligation.[1] Acceptance of the obligation to procreate consists of (to use the traditional terminology) the spouses exchanging the exclusive and perpetual right over the body for the act suitable for the generation of offspring (1917 CIC, c. 1081).[2] If they have reserved that right to themselves, then they have not accepted their marital obligation and have excluded it from their consent, rendering it defective and therefore invalid. This is distinct from simply refusing to fulfill the obligation; a person can accept a duty as part of a contract that he has freely entered into with no intention of actually fulfilling the obligation, and this would not render the contract null and non-binding upon the contracting party.

To give a non-canonical analogy, say a man borrows a large sum of money and signs a contract agreeing to pay back all the money within a certain period of time. His signature constitutes legal proof that he accepted the obligation laid out in the contract. Even if he had no intention of actually paying back the money, it is indisputable that he did accept the obligation by signing; his dishonesty does not nullify the contract. Similarly, the consummation of the marriage—which is likewise a contract—constitutes concrete proof in the external forum that the man exchanged with his wife the right over the body, as consummation is a singular act suitable for the generation of offspring (c. 1061 §1). Even if he had no intention of actually having children, he demonstrated his acceptance of the obligation

1 Bouscaren, *Canon Law Digest I,* pp. 532-533.

2 In fact, the tradition of Josephite marriages, in which the spouses exchange the right over the body but choose not to exercise it for the duration of their marriage, illustrates most clearly that simply not wanting to have children is not sufficient to invalidate matrimonial consent.

to procreate through his performance of the conjugal act, so his consent would not be defective, despite his dishonesty.

If a couple is living together after marriage, it is presumed that consummation has occurred until the contrary is proven (c. 1061 §2). Given the favor of the law which applies to all marriages celebrated according to the proper form (cc. 124 §2, 1060) as well as this additional presumption of consummation, it would be difficult to prove that one or both parties had excluded an essential element of marriage by simply not wanting to have children. In such a case, it is presumed that they simply refused to fulfill their marital duties, and not that they excluded the obligation itself from their consent, unless the latter can otherwise be definitively proven in the external forum.

Therefore, not wanting children is not in itself an invalidating factor; though it could prompt further investigation as part of the nullity process, it cannot be the reason for the declaration of nullity if an affirmative decision is given. Deliberately excluding children from one's marriage is a dereliction of duty and displeasing to God, but the validity of matrimonial consent cannot be vitiated solely on that account.