G.R. No. 196359 – *Rosanna L. Tan-Andal v. Mario Victor M. Andal*

Promulgated:
May 11, 2021

x----------x

SEPARATE CONCURRING OPINION

HERNANDO, *J.*:

I respectfully vote in the result, that is, grant the petition due to the psychological incapacity of respondent Mario Victor M. Andal. I believe, however, in the soundness still of *Molina* guidelines, as clarified in *Ngo Te v. Te*,[1] a *ponencia* of the now retired Mr. Justice Antonio Eduardo B. Nachura

I. Some Philosophical Premises

Concluding a lengthy essay entitled "*The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observation*", John Finnis, the recognized legal philosopher who has advocated a "natural law" approach, writes:

> "Marriage is the coherent, stable category of relationships, activities, satisfactions and responsibilities which can be intelligently and reasonably chosen by a man together with a woman, and adopted as their demanding mutual commitment and common good, because its components respond and correspond fully reasonably to that complex of interlocking, complementary good reasons."[2]

Is this an unwarranted assumption of Finnis? An unjustified a priorism? One thing is certain: It is what Finnis describes that people expect (better, hope!) when they enter into marriage. It is the very reason that marriage exists and, despite the twists and turns it has taken in human history, remains one of society's most reliable institutions. It is good phenomenology in the sense that it clarifies and reduces to the clarity of concepts the common experience of marriage. It is good philosophy because it takes the good of the individual and the common good in conjunction.

For purposes of the present discussion, two concepts invite closer attention: "coherent, stable" and "chosen". If marriage did not enjoy the coherence that makes of it a stable union – and demands that it be so – there would utterly be no need for it, absolutely no sense to it. Transient alliances and partnerships need no name, need no special treatment from the law, but

---

[1] 598 Phil. 666 (2009).

[2] John Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations", *American Journal of Jurisprudence,* 42 (1998) 97-134.

marriage has always received particular attention. The rites and rituals of various cultures and religions, the laws and taboos collectively attest to the fact that there has persisted the social expectation that marriage is meant "to last a lifetime".

Society does have a stake in the promises that people make – and often, these promises are lent stability by the institution of law. The promise of a witness to be truthful, of a public servant to uphold and defend the Constitution, of ethnic groups to avoid the ways of violence – these are some examples of promises that society has every right to expect will be kept. And if the State Policy that announces that "the State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution"[3] is to be more than lofty rhetoric, then the State indeed has a stake in the promises of marriage and married life without which families, as conceived by our Constitution, would not exist!

The thrust of the esteemed Mr. Marvic Mario Victor F. Leonen's well-reasoned *ponencia* is towards liberalizing what he takes to be an unduly restrictive jurisprudential reading of Article 36 on psychological incapacity. Before anything else, should we be going in that direction – making it easier for spouses to be free of their marriage vows? I respectfully take that to be the orientation of the *ponencia* considering that he prefaces his argument with an interesting account of divorce law in the Philippines. What worries me particularly is that in the desire to be pragmatic about dysfunctional unions, we trade off our moral convictions about marriage – moral convictions that lie behind our legal provisions. Carl Schneider, in a very interesting article, makes what I consider a salutary reminder:

> "For one thing the law cannot easily escape the need to adopt and apply a moral theory of marriage...The law therefore needs principles for resolving those conflicts, and such principles ultimately must rest in part on some understanding of the moral nature of marriage...If the law is to operate predictably and fairly, it needs to stay in some kind of contact with assumptions on which people base their beliefs."[4]

All marriage rites with which I am familiar – and the earliest rites were of course religious rites, followed only by so-called civil marriages – whether expressly or tacitly left no doubt that marriage was a lasting union ending in death. This sentiment is summed up almost lyrically in the Catholic rite of marriage where the spouses recite the words:

> "Grant us O Lord to be one heart and one soul from this day forward, for better or for worse, for richer or for poorer, in sickness and in health until death do us part."[5]

---

[3] 1987 Constitution of the Philippines, Art. II, Sec. 12.

[4] Carl E. Schneider, "Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse", *University of Michigan Law School Scholarship Repository*, 1994, 503 - 585.

[5] Catholic Rite of Marriage.

Aside from the express Constitutional policy that recognizes the sanctity of family life – the latter being impossible without marriage – there is also the fact that no matter how long a couple in the Philippines may have been in cohabitation, they will always seek marriage to lend stability to their union. The moral persuasion of the people is that marriage is not some tentative arrangement or partnership but a life-long union. It is this moral persuasion that should go into our reading of the law, if law is to be the instrument of social cohesion that it should be.

Significantly, even in first-world countries where divorce is readily available, the moral assumptions articulated above on marriage hold. In a scholarly study on French law, it is said: "Despite a widespread increase in cohabitation and other forms of non-marital union in France, marriage remains a valued institution..."[6] Nothing less is true under German law. "The civil marriage, the only legally recognized form of marriage in Germany, is referred to...as a bond for life. The celebration is regulated by the Civil Code. A valid marriage requires that the parties have the capacity to marry and that there is no impediment to the marriage."[7]

The disjunction posed by the *ponencia* between the state protection of marriage on the one hand and personal autonomy and dignity on the other is, with all due respect, specious. It is because of personal autonomy that marriage is entered into and the dignity that the State is duty-bound to uphold is not the dignity of the individual alone but the dignity of the institution of marriage, which is the reason for the definition it receives in the Family Code as a "special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life." Whatever might be our personal persuasions, it is this provision of law that embodies State policy towards marriage, and while this Court, undoubtedly, relies on some policy or other factors to arrive at decisions, policy decisions, as a general rule are non-justiciable!

In sum, the law, as an instrument of social cohesion, reflects moral assumptions on marriage. It will be easily conceded that of all subjects covered by the Civil Code (of which the Family Code is rightly a part), marriage is that aspect of human relations laden with moral concepts and assumptions. **It is the axial concept of family, children and home.**

II. Article 36

Mr. Justice Leonen takes offense at the fact that Article 36 was drawn from Canon 1095, 3. He argues that when *Molina* prescribes that Article 36 of the Family Code be read as it has been read in canon law, there is transgression of the separation of Church and State. Yet, we do not oppose

---

[6] John Bell, et al., *Principles of French Law,* 2d Ed., Oxford University Press, 2008, 244.

[7] J. Zekoll and M. Reimann, *Introduction to German Law,* 2d Ed., Kluwer International, 2005, 254.

Presidential Decree 1083, the Code of Muslim Personal Laws that is in actuality an enactment of Shari'ah within the Philippine Legal system.

In his classic study on the civil law system, John Henry Merryman makes the following observation:

> "The second oldest component of the civil law tradition is the canon law of the Roman Catholic Church. This body of law and procedure was developed by the Church for its own governance and to regulate the rights and obligations of its communicants. Just as Roman civil law was the universal law of the temporal empire, directly associated with the authority of the emperor, so the canon law as the universal law of the spiritual domain, directly associated with the authority of the pope. Each had its own sphere of application and a separate set of courts existed for each: the civil courts for Roman civil law and the ecclesiastical courts for canon law. There was, however, a tendency toward overlapping jurisdiction, and before the Reformation it was common to find ecclesiastical courts exercising civil jurisdiction, particularly in family law and succession matters."[8]

Mr. Justice Leonen remarks: "It is strange that the sensibilities of a particular religion are considered in the creation of state policy and the drafting of our laws."[9] It would be stranger, indeed, if they did not, for as discussed above, laws such as those governing marriage must rest on some moral convictions about marriage and the facts both of history and our culture as a people is that in many ways, our beliefs have been shaped, contoured and orientated by Christianity. And that is not necessarily a bad thing. If anything, our society is what it is today because of those beliefs.

Even then, the provenance of the law should not really matter, and whatever may be our personal inclinations or disinclinations towards borrowing from canon law, the fact remains that Article 36 was lifted from Canon 1095, 3 of the Code of Canon Law, and that therefore, the latter is part of its legislative history. In one case, this Court had the following to say about legislative history:

> When the intent of the law is not apparent as worded, or when the application of the law would lead to absurdity or injustice, legislative history is all important. In such cases, courts may take judicial notice of the origin and history of the law, the deliberations during the enactment, as well as prior laws on the same subject matter to ascertain the true intent or spirit of the law.[10]

Interestingly, a provision akin to Article 36 of our Family Code is found in Article 120 of the Italian Civil Code that makes a marriage susceptible to annulment where one of the parties is unable, even if only transitorily, "to intend or to will" the marriage at the time the marriage is contracted. As interestingly, the comment on this article mentions a "diminution of intellective or volitional capacities that impedes the party from a correct

---

[8] John Henry Merryman, *The Civil Law Tradition*, Stanford University Press, 1985, 10 – 11.

[9] Ponencia, p. 32.

[10] *Commissioner of Internal Revenue v. SM Prime Holdings*, 627 Phil. 581 (2010).

valuation of his own acts and that render him incapable or at least diminish his ability of self-determination."[11]

In reality, Article 36 and its origin, Canon 1095, 3 originate not from theological grounds but from empirical foundations. The provision, whether in the Family Code or in the Code of Canon Law, is a recognition of the fact that a person is a psycho-somatic being, and just as there can be physical impediments such as impotence, there can also be psychological blocks to the fulfillment of the essential obligations of marriage. There is nothing particularly "sectarian" or "Catholic" about this comment on Canon 1095, 3, but a keen observation of what psychological incapacity involves and an admission of the fact that the science is still developing.

> "It is not possible to identify all the possible ways in which a person might be unable to assume the essential obligations. Firstly, this is an area where jurisprudence is still developing, and so there is no definitive list of what obligations are deemed to be essential; secondly, the psychological sciences themselves, on which depend the identification and evaluation of the 'causes of a psychological nature', are also an area of development. Apart from conditions such as nymphomania or satyriasis which are fairly clear-cut in the way in which they affect capacity for particular obligations in marriage, most examples of invalidity under this section will be concerned with the more general capacity for a true conjugal relationship."[12]

It is crucial to remember that in the instant case, the "psychological incapacity" plea entered into the picture only pursuant to Rosanna's position that she should have custody over Samantha. That Rosanna was convinced of the psychological incapacity of her husband, or simply wanted to have a monopoly of custody over Samantha, born out of an aversion for her husband is not settled.

Law deals with phenomena that are explained by science. In respect to such phenomena, the court is not at liberty to "restate" or to "revise". It takes the phenomena as described by science and analyzed by science's practitioners and provides legal norms for dealing with them. An analogy is helpful. Psychiatrists or clinical psychologists will describe for the court the mental capacities or psychological disabilities of a person, and it will be for the court to determine whether the capacities or disabilities, as described, impede such a person from entering into a contract, as the law on contracts requires. It is the same in regard to such a simple thing as a driver's license. The ophthalmologist will suggest the degree of visual impairment of a patient, and the law determines where it draws the line between permitting one to drive and denying one a license.

Whatever the psychiatric or psychological diagnosis may be, the central question is whether the condition described by the psychiatrist or psychologist

---

[11] Rosanna Petrucci, *Codice Civile,* XII Edizione, Edizione Giuridiche Simone, 2008, 190.
[12] Gerard Sheehy, et al., *The Canon Law: Letter and Spirit,* Geoffrey Chapman, 1995, 611 – 612.

is such as to stand in the way of a person's ability to fulfill the essential obligations of marriage. It should be underscored that the experts cannot decide for the court, and courts should not delegate to experts the task of deciding. When a psychiatrist, for instance, declares that the patient she has examined is "incapable of fulfilling the essential obligations of marriage", she has stepped impermissibly into the shoes of the judge. She may venture an opinion, but it is for the judge, evaluating all that he has been told by the psychiatrist or the clinical psychologist, to draw a conclusion about the capacity of a person to fulfill the essential obligations of marriage.

True, indeed, "psychological incapacity" is not a category of mental disorder recognized in the manuals of psychological disorders. But neither is "child abuse" or "habitual delinquency". These are legal characterizations resting on empirical manifestations. As mentioned above, it is for practitioners to observe the manifestations. It is for the court to apply – or to refuse to apply – the characterization. In this respect, the court cannot be arbitrary, for it should be able to draw the nexus between the observations of an expert and the requirement of the law that a party to a marriage be capable of fulfilling the essential obligations of marriage.

III. The Molina Doctrine

It may not have been necessary to accompany the statement of the *Molina* doctrine with reference to the "cadence" of Philippine law and canon law. But in the main, I most respectfully submit that the doctrine, relaxed but fortified by the "no straitjacket" on non-restricting approach in the case of *Ngo Te v. Te,* remains good jurisprudence. To me, due to the latter's refinement of the doctrine, it should be denominated properly already as the "*Molina – Ngo Te Doctrine.*"

The doctrine, as thus far enunciated, rests on the law, and this Court is helpless in regard to the formulation of the law. It is noticeable that the *ponencia* bemoans not only the jurisprudence but the law itself.

The complaint about juridical antecedence, for one, is, in my respectful submission, misplaced. The law requires it because Article 36 qualities "psychologically incapacitated to comply with the essential marital obligations of marriage" with "at the time of celebration". The *ponencia* criticizes this and argues that this is wrong because the psychological incapacity may come about as a result of the particular circumstances of the marriage entered into. If this is the case, then it is not a question of being void *ab initio,* because the incapacity is *post factum.* The remedy for this lacuna is not with the court, but with the legislature, but it should be clear that the clear intendment of the law is that the incapacity should be such as to afflict the person at the time of the celebration of the marriage.

The *Tani-De la Fuente* case cited does not argue against the *Molina* jurisprudence but supports it, for if a person is suffering from paranoid personality disorder during marriage, the presumption is that this existed at the time of the marriage, since such a personality disorder does not develop overnight.

The requirement of juridical antecedence is necessary – and is certainly not wrong – because what is contemplated by the law is the inability of a party, for psychological reasons (though covert at the time of the marriage and manifest only after) to contract marriage.

If the requirements of the *Molina* seem stringent, it is because they should be so. Were the requirements for obtaining a declaration of an absolutely void marriage under this title relaxed, in effect, allowing for "de facto divorce", that would be a subversion of enunciated state policy. When spouses have an easy way out of marriage, no effort will be expended to reconcile and to make the marriage work when disagreements and quarrels afflict the union, as they are bound to do when two people are to live together for life. Which is why the law requires that only those psychologically capable of essentially fulfilling the obligations of marriage enter into such a demanding contract.

If, in this case, Mario is indeed suffering from narcissistic-antisocial personality, then certainly, this is a condition incompatible with the essential obligations of marriage and, unless there is clear and convincing evidence to the contrary, it should be presumed that this disorder existed at the time the marriage was contracted.

Mr. Justice Caguioa is right about pointing out to lower courts that the *Molina* guidelines are "guidelines" and are not meant to be some kind of a taxonomic check-list. Since, however, they distill the thought of the High Court on the matter, they should not be set aside in cavalier fashion. When a lower court departs from them, therefore, it must explain why it had to deviate, less the evil of discordant and irreconcilable applications of Article 36 that *Molina* was meant to eliminate re-emerge.

What follows might be considered a proposed re-statement of the *Molina* doctrine:

1. The burden of proof is with the petitioner.
2. Psychological incapacity must be a conclusion based on a clinically or satisfactorily evidenced psychological disorder preponderantly established by a court-appointed clinical psychologist or psychiatrist, or indubitably established by competent evidence.
3. There should be no evidence that puts into question the presumption that the condition existed at the time of the marriage and was, as such, juridically antecedent.

4. The disorder must be such as to prevent the afflicted party from discharging the essential obligations of marriage, and the petition must clearly allege the essential obligations that the respondent has failed to perform.

Mr. Justice Caguioa does raise many concerns about situations for which the present law and jurisprudence do not provide adequate remedies or relief to couples who have reached beyond repair the limits of living together. In light of the foregoing, I vote merely in the result. But the Court is always cognizant of the limits of judicial power, for awesome though these might be, they must be confined lest they disturb the careful calibration of the great powers of government distributed between coordinate, co-equal branches.

RAMON PAUL L. HERNANDO
Associate Justice