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

Promulgated:

May 11, 2021

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CONCURRING OPINION

LAZARO-JAVIER, *J.*:

When Martin Luther King Jr. said that "judicial decrees may not change the heart, but they can restrain the heartless," he could have been referring as well to judicial decrees restraining judicial decrees. This reflection is apt for the present case where the *ponencia* has insightfully re-examined the concept of psychological incapacity under Article 36 of the Family Code.

The *ponencia* brings heart back to the discussion of psychological incapacity when it contextualizes its reasoning with how this concept has evolved to disempower families from regaining back their lives, instead of empowering them to have the capacity to start anew. But what I thought was the *ponencia's* ideological pursuit did not come to pass; otherwise, the *ponencia* would have provided the opportunity to deconstruct psychological incapacity as a remedy and determine its efficacy for individuals and families who have pinned their hopes correctly or wrongly upon it.

Hence, I wholeheartedly and heartily agreed to the initial and developing iterations of the *ponencia*, only to realize that the Court's role in introducing incremental changes to our laws will strictly be that – incremental.

Nonetheless, I concur in the *ponencia*'s reasoned outcome. I also express my deepest admiration and respect for Justice Marvic Mario Victor Famorca Leonen and his unquestionable commitment to collegiality to accept the collective genius that the other Justices have offered to what eventually has evolved to be the present *ponencia*. This shows how we, as members of this Court, have become accommodating without necessarily surrendering our convictions and tenaciously discerning without being disagreeable and losing the good vibes of courteousness.

The prototypical conception of psychological incapacity

Article 36 of the Family Code, as amended, recognizes the psychological incapacity of a spouse or both spouses as a ground to void a marriage. This provision, however, does not define what being psychologically incapacitated means. It barely states:

> Art. 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to

> comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.

Therefore, the prototypical conception of psychological incapacity has depended on decisions of the Supreme Court.

The Supreme Court has explained Article 36 by consistently reiterating over the years the binding rule that "psychological incapacity" has been intended by law to be confined to the "most serious cases of personality disorders" clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage. As defined, the most serious personality disorder so as to constitute psychological incapacity must be characterized by (a) gravity, *i.e.*, it must be serious such that the party would be incapable of carrying out the ordinary duties required in a marriage, (b) juridical antecedence, *i.e.*, it must be rooted in the history of the party antedating the marriage though the overt manifestations may emerge only after the marriage, and (c) incurability, i.e., it must be not be susceptible to any cure, or even if it were otherwise, the cure would be beyond the means of the party involved. These characteristics make up the elements of the cause of action of psychological incapacity and represent a summary of the binding rules in ***Republic v. Molina***:[1]

> (1) The burden of proof to show the nullity of the marriage belongs to the plaintiff. Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity....
>
> (2) The root cause of the psychological incapacity must be (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts and (d) clearly explained in the decision....
>
> (3) The incapacity must be proven to be existing at "the time of the celebration" of the marriage....
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> (4) Such incapacity must also be shown to be medically or clinically permanent or incurable. Such incurability may be absolute or even relative only in regard to the other spouse, not necessarily absolutely against everyone of the same sex....
>
> (5) Such illness must be grave enough to bring about the disability of the party to assume the essential obligations of marriage.... In other words, there is a natal or supervening disabling factor in the person, an adverse integral element in the personality structure that effectively incapacitates the person

[1] 335 Phil. 664, 676-679 (1997).

> from really accepting and thereby complying with the obligations essential to marriage.
>
> (6) The essential marital obligations must be those embraced by Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children.....
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> (7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts....
>
> (8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the state.....

The standard of proof in a case under Article 36 is preponderance of evidence or balance of probabilities. The burden of proof is discharged by the Petitioner if he or she is able to prove his or her cause of action more likely than not.

Taking account of the applicable rules on the elements of psychological incapacity and burden of proof, the issues to be resolved in a case invoking Article 36 are:

> On the basis of the evidence on record, is it more likely or probable than not that:
>
> a. the essential marital obligations embraced in Articles 68 up to 71 of the Family Code have not been performed?
>
> b. the individual responsible for the non-performance of the essential marital obligations embraced in Articles 68 up to 71 of the Family Code was the Respondent or the Petitioner or both of them?
>
> c. the Respondent or the Petitioner or both of them are suffering from a personality disorder or personality disorders that have been medically or clinically identified?
>
> d. the personality disorders of the Respondent or the Petitioner or both of them are grave, that is, the essential marital obligations under Articles 68 up to 71 of the Family Code have not been performed by the Respondent or the Petitioner or both of them on account of or due to his or her or their personality disorders, and that these duties have not been performed in a manner that is "clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage"?

> e. the disorder or disorders of the Respondent or the Petitioner or both are medically or clinically permanent or incurable?
>
> f. the grave and incurable personality disorders of the Respondent or the Petitioner or both of them have existed at "the time of the celebration" of their marriage or prior thereto?

In terms of proving the existence of a **clinically** or **medically identified personality disorder**, a party is, in practice, though not in law, required to hire a clinical psychologist or psychiatrist. The same is true when it comes to proving the **gravity**, **incurability** or **permanence**, and **juridical antecedence** of the personality disorder. In practice, a lay person would be hard pressed to prove these elements of psychological incapacity. The lay person would be unable to identify the **personality disorder** involved, much less, **medically** or **clinically identify** as grave, incurable or permanent, and in existent on or before the marriage.

More often than not, there are no two versions of the claims asserted in a case under Article 36. The narrative is solely that of the petitioner and his or her witnesses. This narrative is not disputed by any other version. The State, through either the Office of the Solicitor General or its deputy, the Trial Prosecutor, almost always has no evidence to refute the petitioner's evidence. Hence, without any countervailing submission, whether the petitioner's pieces of evidence, on their own, would be accepted as preponderant would depend on their inherent probability and their independent corroboration by evidence of contemporaneous conduct, documentation or records, and circumstances that tend to support this single account.

The evidence bearing on the clinical or medical identification of a personality disorder is solely the evidence of the Clinical Psychologist or the Psychiatrist. The usual procedure is for this expert to interview and conduct psychological tests upon the petitioner and his or her corroborative informants, and very rarely the respondent or relatives on the latter's behalf. Hence, the problem at trial of the one-sided presentation of facts was preceded by the same underfill procedure of the expert. The State does not even have access to a Clinical Psychologist or Psychiatrist to vet the petitioner's evidence and testify as a witness for the State.

Understandably, thus, the family court judge is left with only one set of facts to work with, a situation that should lead one to question the accuracy, precision, and reliability of the findings of the trial and appellate courts. I therefore find Justice Caguioa's admonition to trial court judges, *viz.*:

> .... [t]he Court therefore calls upon the presiding judges of the trial courts to take up the cudgels and assiduously perform their duty as gatekeepers against potential abuse, ensuring that declarations of absolute nullity of marriage are issued only in

> cases where psychological incapacity as contemplated under Article 36 is judicially determined to exist[,]

to be well meaning, albeit it does **not totally reflect** what is actually taking place in the overwhelming number of Article 36 petitions before our Family Courts.

The **centrality of personality disorder** in the prototypical definition of psychological incapacity calls for a general understanding of this concept.

Some define **personality disorder** as a **type of mental disorder** in which one has a **rigid** and **unhealthy pattern** of **thinking, functioning,** and **behaving.**[2] Others refuse to lump **personality disorders** with **mental disorders** as they equate **mental disorder** with **mental illness.**[3] They conclude:

> It seems clear from this analysis that it is impossible at present to decide whether personality disorders are mental disorders or not, and that this will remain so until there is an agreed definition of mental disorder. It is also apparent that personality disorders are conceptually heterogeneous, that information about them is limited, and that existing knowledge is largely derived from unrepresentative clinical populations. The clinical literature on personality disorders – indeed, the basic concept of personality disorder – has few points of contact with the psychological literature on personality structure and development, and little is known of the cerebral mechanisms underlying personality traits. There is also a glaring need for a better classification of personality disorders and for more long-term follow-up studies of representative samples, derived from community rather than clinical populations, to answer basic questions about the extent, nature and time course of the handicaps associated with different types of personality disorder.
>
> .... Although it is difficult to provide irrefutable arguments that personality disorders are mental disorders, it is equally difficult to argue with conviction that they are not. The fact that they have been included in the two most influential and widely used classifications of mental disorders (the ICD and the DSM) for the past half-century is difficult to disregard, whether or not one accepts the view that mental disorder is an ostensive concept.

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[2] Mayo Clinic, Personality Disorders, https://www.mayoclinic.org/diseases-conditions/personality-disorders/diagnosis-treatment/drc-20354468, last accessed on May 17, 2021.

[3] R. E. Kendell, "The distinction between personality disorder and mental illness," The British Journal of Psychiatry, published online by Cambridge University Press: 02 January 2018, at https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/distinction-between-personality-disorder-and-mental-illness/F4FC446AEB38B5704ED132245F86E93B, last accessed on May 19, 2021.

> It could be argued, though, that the crucial issue is not whether personality disorder is embraced by any particular definition or concept of mental illness, but what kinds of considerations lead doctors to change their minds about assignations of illness, and in this context two issues loom large.
>
> .... CLINICAL IMPLICATIONS
>
> • Because the term mental illness has no agreed meaning it is impossible to decide with confidence whether or not personality disorders are mental illnesses.
>
> • The historical reasons for regarding personality disorders as fundamentally different from illnesses are being undermined by both clinical and genetic evidence.
>
> • The introduction of effective treatments would probably have a decisive influence on psychiatrists' attitudes.

In any event, a person with a personality disorder has **trouble perceiving** and **relating to situations** and **people**.[4] This **causes significant problems** and **limitations in relationships, social activities, work**, and **school**.[5]

Types of personality disorders are grouped into **clusters**, based on similar characteristics and symptoms.[6] Many people with one personality disorder **also have signs** and **symptoms** of at least one **additional** personality disorder.[7] It is **not necessary to exhibit all the signs** and **symptoms** listed for a disorder to be diagnosed.[8] But **at least four** or **five of the symptoms** must be present in one's behavioral manifestations to be diagnosed with a personality disorder.

The **existence of the factual bases** for the behavioral manifestations does not **by itself** warrant a finding of a **personality disorder**. The diagnosis of a personality disorder ***also*** requires the factual bases to be **indicative** of a **long-term marked deviation from cultural expectations** that leads to significant distress or impairment in at least two of these areas:

- The way one perceives and interprets oneself, other people, and events;
- The appropriateness of one's emotional responses;
- How well one functions when dealing with other people and in relationships; and
- Whether one can control one's impulses.[9]

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[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] https://www.mayoclinic.org/diseases-conditions/personality-disorders/diagnosis-treatment/drc-20354468, last accessed on May 17, 2021.

Additionally, as held by decisions of the Supreme Court, there **ought to be a link** between the **factual behavioral manifestations** and the **supposed personality disorder.** The link *is* the **symptoms of the personality disorder or personality disorders** clinically and medically identified. There must be a **one-to-one correlation** between the **theoretical** behavioral manifestations of the identified personality disorder and the **actual** behavioral manifestations observed from the spouse concerned. These **actual** behavioral manifestations **must** of course **be proved by preponderant evidence**, that is, **the evidence prove that *they exist more likely than not.*** Generally, the existence of this correlation establishes the **GRAVITY** of the personality disorder.

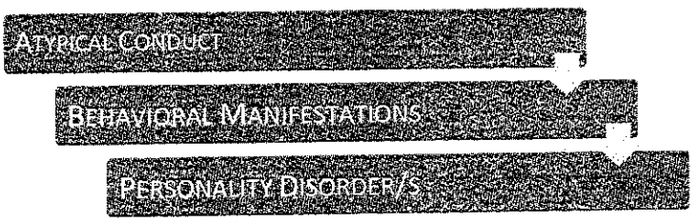
The Supreme Court clarified though that behavioral manifestations that correlate to the symptoms of the **alleged** personality disorder, ***per se* and without more**, are **NOT DETERMINATIVE** of the **existence of psychological incapacity**. This is because:

> **Irreconcilable differences, sexual infidelity or perversion, emotional immaturity and irresponsibility** and the like, **do not by themselves warrant a finding of psychological incapacity** under Article 36, **as the same may only be due to a person's refusal or unwillingness to assume the essential obligations of marriage. In order for sexual infidelity to constitute as psychological incapacity**, the **respondent's unfaithfulness** must be established as **a manifestation of a disordered personality**.... It is **indispensable** that **the evidence must show a link, medical or the like, between the acts that manifest psychological incapacity and the psychological disorder itself.**[10]

The behavioral manifestations of an atypical or wild conduct ***may*** not at all be connected to a personality disorder but to mere difficulty, neglect, refusal, or ill will to perform marital or parental obligations.[11]

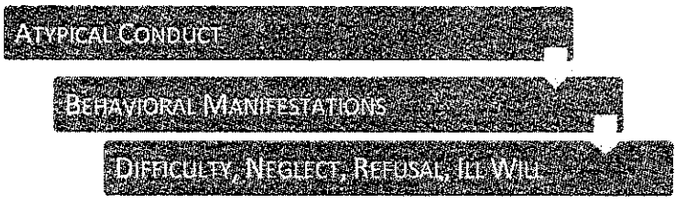
It would appear then that in every claim of personality disorder, there is the **counterpart cause** for the odd and obnoxious behavioral manifestations, which is either a mere difficulty, neglect, refusal, or ill will to discharge marital or parental obligations.[12]

To visualize the logic, the alternatives are either:



Or:

[10] *Garlet v. Garlet*, 815 Phil. 268-305 (2017).
[11] Ibid.
[12] Ibid.



The **behavioral manifestations of an atypical or wild conduct**, *if not at all* connected to *a personality disorder,* **may be linked to a spouse's *mere* difficulty, neglect, refusal or ill will** to deal with the other spouse or to perform the former's marital and familial obligations.

Thus, in determining whether the causative factor is a spouse's personality disorder, the court must ask:

(i) whether there is evidence of conduct of the spouses or one of them probably exhibiting difficulty, neglect, refusal, or ill will to perform marital and familial obligations, and

(ii) whether there is evidence that such conduct showing difficulty, neglect, refusal, or ill will to perform marital or parental obligations is established more likely than not to be the cause of the marital breakdown.

Further, for the personality disorder to be grave, the failure to perform marital and parental duties and obligations must be "clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage."

Under the prototypical definition of psychological incapacity, the standard of proof was preponderance of evidence. A court would be satisfied if an event has occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that **the more serious the allegation, the less likely it is that the event occurred** and, hence, **the stronger should be the evidence** *before the court concludes that* **the allegation is established on the balance of probability**.

For instance, fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.

Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must

be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

As between the existence of a personality disorder as a causative factor and the existence of difficulty, neglect, refusal, or ill will to perform marital and familial obligations, the former is more improbable. Hence, it is incumbent upon a petitioner to present stronger evidence of the existence of a personality disorder as the causative factor.

The **incurability** or **permanence** of a personality disorder is within the purview of the expert to determine. While an expert is not a required witness, the prototypical definition of psychological incapacity requires in practice the testimony of an expert.

As regards **juridical antecedence**, unless the psychologically incapacitated is the petitioner herself or himself, the petitioner would be hard-pressed to obtain first-hand personal and non-hearsay evidence of the root-cause of the personality disorder of the respondent traceable to the respondent's history antedating the marriage, most likely childhood or adolescence.

In practice, this would entail involving or in real terms co-opting the respondent and his or her relatives, those who witnessed him or her grow up, in obtaining such evidence. This would be either costly, impracticable, or impossible, depending on a number of factors beyond the petitioner's control, such as the state and degree of animosity between the spouses, knowledge of the respondent's whereabouts, the access of the petitioner and the expert to the respondent, and the requirement that there should be no actual and appearance of collusion between the spouses.

The conception of psychological incapacity, according to the ponencia

In the *ponencia*'s opening paragraph, the rhythm of the observation that the prototypical definition of psychological incapacity "has proven to be restrictive, rigid, and intrusive of our rights to liberty, autonomy, and human dignity" has given many the hope that this definition would soon give way to a more fluid and realistic conceptualization and operationalization. After all, the right to personal autonomy as an aspect of liberty has been the lynchpin of divorce laws in other jurisdictions. But 56 pages or so later, the reference to liberty and personal autonomy slowly dissipated until finally it disappeared from the face of the *ponencia*, nowhere to be found in its text.

The *ponencia* grounds the sole causative factor of the marital breakdown on either or both spouses' **personality structure and psychic causes** to be **proven clearly and convincingly**, but maintains that experts are no longer required since '[o]rdinary witnesses who have been present in the life of the spouses before the latter contracted marriage may testify on

behaviors that they have consistently observed from the supposedly incapacitated spouse." Supposedly "from there, the judge will decide if these behaviors are indicative of a true and serious incapacity to assume the essential marital obligations." But this is **not as straightforward** as it seems – reason: the **cause** of such incapacity **has remained** to be the incapacitated spouse's **personality structure** or **psychic causes**. The evidence is **not simply going to be** a **collection of anecdotes** about the concerned spouse's behaviors to prove **clearly** and **convincingly** his or her **psychological incapacity**. The **collection of anecdotes** must refer back and pinpoint a **personality structure** or **psychic causes** to be acceptable as psychological incapacity.

Questions: (i) Are family court judges equipped or have they been equipped with the requisite expertise to make such conclusion? (ii) Most Article 36 petitions have only a singular point of view. Family courts have no access to experts to call as witnesses. Assuming family court judges are given the expertise to render such conclusion, are judges allowed to introduce as evidence their own expertise to bear upon the resolution of the case **without them and their expertise being disclosed and thereafter subjected to cross-examination**? (iii) In theory, **personality structure** and **psychic causes** seem to be so common place and pedestrian terms. Yet, why does the *ponencia* have to quote from an expert (to be sure, not just an expert but a *primus inter pares* among experts) to explain the entire gamut of psychological incapacity from the perspective or **personality structure** and **psychic causes**?

It would **have been different** if the **incapacity** has been reduced to (i) the incapacitated spouse's **reputation** of being incapacitated – that is, the viewpoint of reasonable members of the spouses' relevant communities, and (ii) the offended spouse's **own experience of neglect, abandonment, unrequited love**, and **infliction of mental distress**. Judges – even family court judges – are already equipped to assess the evidence on these matters. They **do not have** to disclose and be cross-examined **in order for them** to bring their expertise and experience in reading the evidence bearing on them. For this is what judges are by tradition expected to do. But determine **personality structures** and **psychic causes** as the **root cause** of the offending spouse's **incapacity**? The last time I heard about a judge resolving his own disputes using **psychic causes**, he was dismissed from the service.[13]

Too, in elucidating on the elements of **gravity**, **permanence** or **incurability**, and **juridical antecedence**, the *ponencia* has to refer to the opinion of the *primus inter pares* among psychologists. If the Supreme Court were to require an explanation coming from such expert, how could we now conclude that a lay witness could **clearly** and **convincingly** prove psychological incapacity?

[13] *Office of the Court Administrator v. Floro*, (Resolution) A.M. No. RTJ-99-1460, August 11, 2006.

The resolution of the present dispute involving the marriage of the Andals was helped immensely by the expert who testified on the husband's **personality structure**. The *ponencia* references extensively the psychiatrist's report and judicial affidavit. Her expertise was vouched for. The tests she had administered were assessed as reliable. The whole shebang of this case **revolved around** the expert's evidence. I **cannot say therefore** that the *ponencia* has veered from the personality disorder-centric formulation of psychological incapacity and shifted to a **rights-based** (*i.e.*, right to personal autonomy) approach to Article 36. In any case, does this **distinction really make any difference**?

Respondent correctly declared to be psychologically incapacitated and the marriage correctly nullified on this ground – even under the prototypical doctrine on psychological incapacity

I concur with the *ponencia* in declaring respondent-husband psychologically incapacitated and nullifying his marriage with petitioner-wife on this ground. The evidence proves **clearly and convincingly** (a stricter requirement now imposed from the previous more likely than not standard) that respondent fits **even the prototypical** definition of a psychologically incapacitated spouse. The *ponencia* has exhaustively evaluated the evidence on record, and I agree with the *ponencia*'s findings. To some extent, the state of the evidentiary record in the present case is unusually complete because the evidence came from both petitioner and respondent. This is unusual because oftentimes there are no two versions of the claims asserted in an Article 36 case – the narrative is solely that of a petitioner and her or his witnesses, and is for that reason, undisputed by any other version. I submit, hence, that the Court of Appeals erred in reversing the trial court and decreeing that respondent was not psychologically incapacitated.

I further submit that this disposition would have been the same whether under the existing conception or pursuant to the more progressive and **RIGHTS-BASED** view of psychological incapacity that the *ponencia* **had initially** vigorously espoused, which my initial *Reflections* wholly supported.

The prototypical definition of psychological incapacity as inadequate to address dynamics of troubled and troubling marriages

I eagerly concurred with Justice Leonen on his **initial** reasoning in this case to accord a sensible and sensitive understanding and application of the remedy of psychological incapacity. I agree with his then analogy of the Article 36 remedy to a "strait-jacket," a fossilized description that does not account for the real-life dynamics inside the abode and within the relationship of couples in troubled and troubling marriages. For a marriage that is no

longer what it is supposed to be, is a silence that paradoxically screams of poison and violence.[14]

Remedy of psychological incapacity as actually practiced in trial courts

As a remedy, psychological incapacity has not just been out-of-touch with the subject-matter it ought to deal with, its operationalization, in actual practice, has been unwieldy and precariously inaccurate and inadequate. For these reasons, this remedy has often appeared to be farcical. Let me refer to what usually happens in the proceedings before the family or designated-family court hearing a petition for psychological incapacity.

As noted, it is often the case that only the petitioner and her or his witnesses are heard. The respondent could not be located, his or her whereabouts is unknown, and he or she is summoned by publication. Examining the pleadings, one would immediately notice the histrionic epithets and exaggerated accounts of a spouse's qualities, the objective of this form of pleading being to "strait-jacket" one's case within the prototypical doctrine of psychological incapacity.

Practitioners also learn from precedents dismissing Article 36 petitions. To address concerns that a clinical psychologist or psychiatrist was able to obtain information from and personally assess only the petitioner, yet, declare the other spouse (*i.e.*, respondent) as being psychologically incapacitated, an Article 36 petition would instead allege that both petitioner and respondent are psychologically incapacitated. This way, even if the expert was not able to examine the respondent in person, and the expert opinion that the respondent is psychologically incapacitated would have been based only upon the petitioner's second-hand information, the expert has the alternative of having gotten information and administered tests and interviews from the petitioner personally. In the latter case, the petitioner has first-hand and personal knowledge of himself or herself and the facts upon which the expert opinion of the petitioner's psychological incapacity would be based; this manner of pleading and proof would obviate the type of objections that the Court of Appeals applied in the present case of Spouses Rosanna and Mario.

It is also the case that the trial prosecutor, who appears as deputy of the Office of the Solicitor General as counsel for the State, has no access to evidence that would impeach or contradict the petitioner's evidence. The trial prosecutor has no clinical psychologist or psychiatrist to call as witness or even to consult for purposes of an informed cross-examination of the petitioner's evidence. As is often the case, the trial ends and the case is submitted for decision with only the petitioner and his or her witnesses providing the evidence.

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[14] Inspired by the lyrics of the song "100% or Nothing" by Primal Scream.

The evidentiary record is therefore often incomplete. The result is the inability to articulate in terms required by our rules of procedure and establish the screaming silence, the violence and poison, the anger, the resentments, and the mental disease.[15]

An inadequate and incomplete evidentiary record, as mentioned, is the consequence of the desire of the petitioner to adhere slavishly to the restrictive strictures of the prototypical and prevailing conceptualization of psychological incapacity, to the detriment of the context of family dynamics that already renders the marriage unbearable, hostile, and unsafe. In turn, an incomplete evidentiary record impacts negatively on the burden and standard of proof required of the petitioner, which results in the Article 36 remedy as being ineffectual and unresponsive against the needs and mischief it is supposed to address. Also, an inadequate and incomplete evidentiary record encourages, on one hand, trial judges to rely obsequiously upon the expert opinion of the clinical psychologist or psychiatrist, and on the other, petitioner to insist that such expert opinion must be dispositive of the case.

One may ask for the reasons giving rise to this state of affairs in an Article 36 petition. I venture to say that the petitioner, as much as possible, would like to take advantage of proceeding as if ex parte, that is, except for the trial prosecutor's cross-examination, with only his or her version of the facts on record. Costs of staging an honest-to-goodness case build-up and presentation could be staggering. Emotions may also be running high. The respondent may not wish to get involved in a case, the outcome of which, he or she has no interest or stakes. It may also be true that the respondent's whereabouts is sincerely unknown to the petitioner.

The remedy of psychological incapacity, as the prototypical doctrine understands it to be, does not work as well in practice as it is in theory. This is unfortunate because there are real needs and actual mischief that the remedy seeks to address – the dysfunctional marriage and the decaying family that the latter breeds. I agree with the **initial iterations** of the *ponencia* that to make the remedy responsive and relevant, some adjustments have to be written into the prototypical doctrine. **But again, this did not come to pass.**

For one, as Justice Leonen had initially propounded, and **correctly I must add**, the Court could establish presumptions on the basis of facts, the proof of which would already **clearly** and **convincingly** establish psychological incapacity. Justice Leonen **then mentioned** physical, psychological, and emotional violence inflicted upon either spouse by the other. He also mentioned abandonment for five years or more, and the deliberate failure to provide support. Unlike the prototypical doctrine on psychological incapacity, proof by an expert of the existence of a personality disorder **would realistically be only one of the means** of proving the existence of psychological incapacity.

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[15] Ibid.

For another, it is **high-time to abandon** the prototypical insistence on proof of clinically-identified personality disorders (now termed **personality structure** and **psychic causes**) as the **sole** elemental source of psychological incapacity. Rather, as the examples **then** propounded by Justice Leonen would show, it would **also be enough** to prove **mental state** or **state of mind of an inability to fulfil the marital and parental duties** as a trigger to the ascription of psychological incapacity to a spouse.

It is also **apt to abandon** the **requirement of juridical antecedence** so that the **trigger mental state** that **develops post-marriage** can be accounted for. To be sure, it is **not illogical** or **contrary to common experience** that love blinds only for so long, and thereafter, when emotions have subsided and the dynamics of having to interact with another breathes a life of its own, the mind has stopped to function in the marital partnership and duties are no longer being fulfilled, there is no love and respect but screaming silence, violence, and poison. These experiences are relevant to a finding of psychological incapacity and should not be shut off only because they happen post-marriage.

Lastly, **incurability** or **permanence** should now be seen and analyzed in terms of a spouse's **failure to reconcile** with the other **despite *bonafide endeavours*** to do so.

Article 36 petitions are different from ordinary civil cases because they implicate an individual's right to liberty in the most intimate ways. The liberty right I talk about here, as my senior colleagues have said so eloquently so many times before, does not just involve physical bars that restrain. The gravity of the pain that the unwanted detention in a broken marriage brings is one that cannot be measured by simply counting the days; it is a pain that many do not see, it is an incarceration that some of the fortunate ones could not understand and could also be possibly scoffing at. It is a pain that manifests in the cold stares and a death that does not end the pain but only aggravates it. The restraint is not one that he or she can escape from by digging a tunnel, cutting steel bars, or driving a fast car. For there is no hiding from the dying and cold empty look.[16]

As many of my senior colleagues in the Court have observed, the constitutional right to liberty does not simply refer to freedom from physical restraint. This right includes the right to be free to choose to be one's own person. As Justice Jardeleza explained, "[t]his necessarily includes the freedom to choose how a person defines her personhood and how she decides to live her life. Liberty, as a constitutional right, involves not just freedom from unjustified imprisonment. It also pertains to the freedom to make choices that are intimately related to a person's own definition of her humanity. The constitutional protection extended to this right mandates that beyond a certain point, personal choices must not be interfered with or unduly burdened as such interference with or burdening of the right to choose is a breach of the right to

[16] Ibid.

be free." The ability to choose one's intimate partner, **as Justice Leonen spells out in his Twitter messages and not long ago in the past and now abandoned iteration of his *ponencia***, is connected to human autonomy and dignity, and it degrades or demeans an individual when he or she is denied the right to associate or not to associate with an intimate partner, because the choice of one's intimate partner ultimately defines the individual.

Cultural competence in both the practice and understanding of psychological incapacity is a necessity if we are to correct the inequities of the prevailing doctrine on psychological incapacity. Cultural competence is the capacity to communicate and interact effectively, respectfully, and comfortably with people of differing cultures or backgrounds.[17] Social differences include indigeneity, religion, physical and mental ability, class, and education.[18] A judge or a lawyer (a trial prosecutor or a counsel from the Public Atorney's Office or a lawyer from the Office of the Solicitor General), who meets an Article 36 (psychological incapacity) litigant for only their brief appearances in court, invariably shapes and reinforces the judge's or lawyer's values, ways of organizing and understanding information, and norms of social behaviour, which in turn shape or reinforce how the judge or the lawyer assesses credibility, organizes facts, and makes judgments about what the litigant actually does, says, or seeks.[19] Reading and implementing psychological incapacity in ways that incorporate cultural competency helps bridge between the legal profession's duty to promote access to justice and protect public interest and the fact that we simply live in a society where law and legal system are contributors to the privileging of values and cultural practices of some dominant groups therein.[20]

At a broader systemic level, a culturally competent understanding and practice of any branch of law includes recognizing that the fast-paced directive style of articulating the rule of law in the dominant culture such as how the prototypical doctrine on psychological incapacity has appropriated elements from the tenets of the Catholic faith, may actually impede information exchange and trust in relationships.[21] This is especially true where the spouses' social, religious, or political culture prioritizes all members having a real conversation – a chance to speak, deep listening, and above all, consensus decision-making as regards what is or what is no longer a viable marriage in terms of the spouses' respective mental states towards the marital relations.[22] This means having to shun the monocentric conception of psychological incapacity in favor of a respectful consideration of the social

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[17] Hannah Bahmanpour and Julie MacFarlane, What Court Staff Told Us: A Summary from the National Self-Represented Litigants Study 2011-2012, National Self Represented Litigants Project, 2014 CanLIIDocs 33186, <http://www.canlii.org/t/sjqf>, retrieved on 2019-08-12; see also Rose Voyvodic, Lawyers Meet the Social Context: Understanding Cultural Competence, 2006 84-3 Canadian Bar Review 563, 2006 CanLIIDocs 152, <http://www.canlii.org/t/2cgq>, retrieved on 2019-08-12; Western Centre for Research and Education on Violence Against Women and Children, Make It Our Business," at http://makeitourbusiness.ca/blog/what-does-it-mean-be-culturally-competent, last accessed May 15, 2021.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Ibid.

mores of the different cultures to one of which the litigants belong. To illustrate in a practical sense, and I am sure Justice Leonen is aware of this, the practices of indigenous cultures on marriage and marital breakdown should also inform a more inclusive understanding and application of psychological incapacity in our courts.

Additionally, cultural competence may also require that judges and lawyers alike embrace the reality that experiences of systemic discrimination in law and by actors or institutions within the legal system may affect the parties' choices, actions, and degree of trust in the legal system, especially where the court case as in one involving psychological incapacity affects them deeply personally.[23] For example, a petitioner in a nullity case who has also been a victim of violence by her spouse would not have much appreciation for a disposition of her nullity case on the basis of the strait-jacketed elements our courts have used in resolving claims of psychological incapacity. For one, the costs of securing an expert (a clinical psychologist or psychiatrist) would be one drawback for her. Her cross-examination by the counsel for the State could be another disadvantage that she may not endearingly appreciate. So is the requirement that she prove more likely than not that her husband, who had subjected her already to violence, suffers from a clinically identified personality disorder, that this personal disorder is the more proximate of all the causes of all her troubles, and that this personal disorder has roots in her husband's adolescence or childhood. I do not wish to make this analogy of the trial of psychological incapacity cases to rape, but it is substantially the same – it is like having the petitioner-wife having to go through and re-live the abuse once again, this time through our court processes.

I believe that we have to be aware of the social facts arising from our communities and court processes, in conjunction with our special responsibility by virtue of our collective responsibility as the court of last resort, to ensure that legal services are delivered in a manner that facilitates access to justice and public confidence in the administration of justice.

I propose that Article 36 of the Family Code should be read and implemented generously consistent with, one, the constitutional right to personal liberty and privacy as this is understood by many well-meaning constitutionalists, and two, a culturally competent understanding and practice of the law on psychological incapacity. As the Supreme Court interprets the law, this is the right and decent thing to do. When marriage has reached its end, when *the spouses have lit all the candles, said all the prayers, and the anti-depressants do not anti-depress anymore*, though there may be no more capacity to change hearts, judicial decrees can and must restrain the heartless.

ACCORDINGLY, I concur in the result. On different grounds, I vote to grant the Petition for Review, to set aside and reverse the Decision dated February 25, 2010 of the Court of Appeals in CA-G.R. CV No. 90303, and to

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[23] Ibid.

reinstate the Decision dated May 9, 2007 of the Regional Trial Court, Branch 260, Paranaque City, in Civil Cases Nos. 01-0228 and 03-0384.

AMY C. LAZARO-JAVIER
Associate Justice