

***Forensic Investigation Protocol on Marital Nullity
for Psychologists in the Philippines***¹

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Abstract

The literature on the legal aspect of marital nullity had significantly increased since The Family Code gave birth to the idea of psychological incapacity. And while there appeared to be voluminous cases of petition for the declaration of nullity of marriage that had been filed, the absence of literature on the parameters of responsible psychological practices in the forensic setting, as seen from the lens of forensic psychology, continued.

The present study conducted a thematic analysis of the several court transcripts and judicial affidavits on the accounts that were made by forensic clinical psychologists, as expert witness. Said thematic analyses were then validated by the expert opinion of forensic clinical psychologists and the legal luminaries in family law, and the so-called Daubert and Frye standards.

Using the legal theory on psychological incapacity, the ecclesiastical theory on mental incapacity, the dichotomous theory on personality functioning, and the Cube competency theory on professional competencies in forensic psychology, as the theoretical underpinnings, the researcher-forensic psychologist presented an aspirational forensic investigation protocol on marital nullity for psychologists.

Keywords: nullity, psychological incapacity, forensic clinical psychology, expert opinion, Daubert and Frye, investigation protocol

¹ This article was culled from the earlier dissertation proposal of the author in his doctoral studies at the University of Santo Tomas Graduate School, Manila, Philippines.

Introduction

The biblical decree, “What therefore God hath joined together, let no man put asunder” in Mark 10:9, must have really sealed the sanctity and inviolability of the marital union between a man and a woman. And because there was practically no way out in the said marital union, couples resorted to divorce and remarried just the same. The Roman Catholic Church, meanwhile, excommunicated these individuals who remarried (Wilde, n.d.).

Then as the Roman Catholic Church kept herself busy attempting to wrestle control over the profitable marriage enterprise from the secular authorities (Davidson and Ekelund, 1997), she also gave it a serious thought not to use the term “divorce” following the indissoluble character of this marital union. Hence, the dissolution of the marital union did not actually take place in the church’s marital annulment (Foster, 1999).

Obviously then, the idea of civil nullity of marriage took off from the church’s concept of marital annulment. In the meantime, the notion of psychological incapacity in Philippine civil society resonated quite strongly when this was introduced as basis of petition for the declaration of nullity of marriage in The Family Code (07 July 1987), the country’s family law. In the same law, the idea of civil annulment of marriage was also introduced.

The conceptions of nullity and annulment in Philippine civil society, however, were essentially coming from two different actualities. In civil nullity, the country’s family law spoke of a marriage that never was; hence, the marriage was *void ab initio*. In civil annulment, the law talked about a marriage that actually took place, but was later on invalidated because the essential requisite of consent was not at all voluntarily given.

Couples with tumultuous marriages then took cognizance of the options available to them under the law. This also became the take off point for the practice of clinical psychology in the court setting. In fact, accounts indicated that there were about 10,528 cases of marital nullification record in the Office of the Solicitor General as of 2012 (Calonzo and Cayabyab, 2013).

The aforementioned record of cases filed were then matched with the number of practicing clinical psychologists in the country. It appeared, however, that the practitioners of clinical psychology in the courtroom were already deficient back then and would continue to be deficient in the near future.

But it was not only the number of practitioners that was at issue. Those who got into the practice in the court setting also rarely documented their practice. Worse, most of those who practiced either did little or nothing at all in the area of research on marital nullification, as seen from the lens of forensic psychology.

The researcher-practitioner did not also have to emphasize the essential requirements of the actual court training, the minimum academic credentials, and the observed professional demeanors of clinical psychologists in the forensic setting before and during their actual court appearance. It was observed that there were still those who

appeared unprofessional and unprepared during the trial; and those who actually testified were, in the meantime, also lacking in the more stringent requirement of the peer review of their academic papers on the subject matter of marital nullity; hence an aspirational forensic investigation protocol on marital nullity for psychologists in the Philippines was called for.

Scope and limitations

The nomothetic nature of the discipline of psychology vis-à-vis the ideographic nature of the discipline of law served as a substantial limitation in this study. The empirical nature of the former and the *stare decisis* based nature of the latter served as additional substantial limitation (Costanzo and Krauss, 2010).

The present study was specifically intended to extract an aspirational protocol on marital nullification for clinical psychologists and not for psychiatrists who practiced in the Philippine court setting. In so doing, the study observed the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages (15 March 2003), so that access to the court transcripts of stenographic notes of forensic clinical psychologists, including their judicial affidavits, were made with the highest assurance of confidentiality to the custodian or custodians of these records, and with leave of court, if they were accessed directly from the courts.

The audio recording of these court transcripts of stenographic notes, meanwhile, were no longer retrieved considering that these transcripts were in themselves faithful reproduction of the clinical psychologists' actual human experiences in the courtroom itself and were also subscribed to as faithful reproduction of the said experiences therein by the duly assigned court stenographer.

In the conceptual framework, the resolution of the petition for the judicial declaration of the nullity was no longer covered. The study then limited itself up to that part where the transcripts were already available. The clogged docket of cases in our courts made it administratively untenable for these nullity cases to be resolved in a matter of year or two. The confidential nature of these cases further made their tracking highly improbable, if not impossible.

This study then included five major areas of concern that would be broad enough to allow the researcher to present his arguments. They included the topics on marriage and marital relations, psychological incapacity, personality disorder as the crux of the incapacity, forensic mental health assessment, and the expert witness as the "hired gun."

Marriage and marital relations

In the Second Vatican Council, marriage was viewed as a "covenant" between a man and a woman, which covenant was characterized by fidelity, permanence and sacramentality (Vere and Rapp, 2009). The Family Code, meanwhile, defined marriage 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."

As an inviolable social institution, marriage transcended beyond its contractual nature because the State actually impinged into the personal affairs of the hearts of the spouses. Rosas (2014), who placed so much emphasis on the Canon 1095 and the *Dignitas Connubii*, supported the position that the marital union was actually imbued with both an inherent personal interest and a complex social nature. In turn, The Family Code similarly recognized this union with public interest as it mandated the State “to take steps to prevent collusion” or “to take care that the evidence is not fabricated or suppressed.”

Psychological incapacity

The researcher in trying to contextualize the very concept of psychological incapacity cited Article 36 of The Family Code which stated that “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.”

Gesmundo (2014) and Carcereny and Soliman (2010), citing the Santos doctrine, pointed out that the basis marital nullity was psychological incapacity, which should in turn be mental and not physical in nature. The incapacity should similarly be to that extent where either or both of the contracting parties would be truly incognizant to assume and discharge his or her essential obligations to the marital union. Santos further laid down that the incapacity should be grave, incurable and with juridical antecedents.

Canlas (30 April 2007), citing the case of Navarro, Jr. v. Cecilio-Navarro, stressed that the incapacity should be more than the mere neglect or refusal of the spouse to have sexual intercourse. Canlas (21 May 2007) added that the acts of infidelity did not automatically lead to psychological incapacity, unless they became numerous and complex enough to turn into a disordered personality.

Notwithstanding the tenets that were already laid down in the Santos case, the Supreme Court in Republic of the Philippines v. Court of Appeals and Roridel Olaviano Molina (13 February 1997) appeared to have laid down stricter guidelines in nullity cases for the family courts to adhere. In Molina, the High Court stressed that the crux of the incapacity must either be clinically or medically identified, alleged in the petition, proven by the experts, and clearly illuminated in the decision of the court *a quo*.

But in Brenda B. Marcos v. Wilson G. Marcos (19 October 2000), the Supreme Court seemed to have contradicted itself by stressing the point that the personal medical or psychological examination of the respondent spouse was not a *conditio sine qua non* for the validity of the marital nullification. The High Court claimed that the nullity could still be established by the entirety of the evidences presented.

Personality disorder as the crux of the incapacity

In most of the petitions for the declaration of nullity of marriage based on psychological incapacity, the cruxes had been anchored on disorder personalities. Keulen-de-Vos, et al. (February 2011) claimed that the affliction of personality

disorders was the most common form of psychological aberration in the forensic setting. Malibiran (2007) validated this claim by citing the cases of Dedel, Villalon, and Navarro where either or both of the spouses' psychological incapacity was traceable on their disordered personalities.

The case of Leonilo Antonio v. Marie Ivonne Reyes (10 March 2006), however, took a slightly different path when it highlighted the pathological lying that was concocted by the respondent-wife, as asseverated by the expert opinion of Dr. Arnulfo Lopez, although it also mentioned in passing the respondent's Paranoid Personality Disorder. The Court gave credence to the expert testimony of Dr. Lopez on respondent's "fantastic ability to invent and fabricate stories and personalities."

In pointing out certain disordered personalities, Sison (28 July 2009) referred to the case of Halili v. Halili and Republic, which cited the case of Dependent Personality Disorder as an enduring and inflexible type of mental disorder that impaired all the areas of the individual's functioning, and which could have had its onset during the individual's childhood or adolescent years, but which might not also be so severe as a mental disorder since it could just be a dysfunctional lifestyle.

The earlier case of Marieta C. Azcueta v. Republic of the Philippines and the Court of Appeals (26 May 2009) similarly cited respondent spouse's Dependent Personality Disorder as basis for psychological incapacity, which incapacity, however, was characterized as rather severe, to the point that it rendered this spouse unable to assume his or her essential marital obligations to the marital union.

The likelihood that the individual could readily be assessed with personality disorder was probably attributable to the dichotomous theory of personality functioning. Being criteria-based, the constructs of these various disorders did not actually fit into well-delineated categories. Further, there was excessive comorbidity and heterogeneity in the constructs, as well as poor convergent and poor discriminant validity within the various categories of these disorders (Sellbom, Smid, De Saeger, Smit, & Kamphuis, 2014).

Forensic mental health assessment

Forensic mental health assessment referred to the combination of a variety of assessment activities which was designed to help the court in resolving a forensic issue, a legal question it faced in the legal proceedings (Heilbrun, Grisso, & Goldstein (2009). Nicholson and Norwood (2000) described forensic assessment to include the psychological assessment tools and procedures that actually lacked the strongest evidence of reliability and validity. Accordingly, even the level of practice in forensic assessment fell short of the required professional aspirations.

The Minnesota Multiphasic Personality Inventory-2 or MMPI-2, the latest version of which was the Minnesota Multiphasic Personality Inventory-2-Restructured Form (MMPI-2-RF), appeared to be the most widely used and researched measure of personality and psychopathology in the world (van der Heijden, Egger, Rossi, Grundel, & Derksen, 2015). Together with the MMPI-2-RF, the Millon Clinical Multi-axial Inventory-III or MCMI-III could also readily detect faking good or faking

bad in the clinical population with the use of its three modifying indices, although at a moderate level of effectiveness (Daubert and Metzler, 2000).

The use of the projective techniques, meanwhile, would have to be the most controversial topic in the assessment of personality and psychopathology. Lilienfeld, Wood, and Garb (2000) opted to recommend to forensic clinical psychologists that they refrained from using them in the forensic setting; but just the same, these projective techniques continued to be admitted by the trial courts.

Practitioners similarly relied on collateral information, especially from the accounts of individuals who had personal knowledge of either or both of the spouses. In the case of the Republic of the Philippines v. Nestor Galang (06 June 2011), the Supreme Court declared that the independent collateral accounts from those who personally knew the respondent gave credibility to the psychological evaluation. The inclusion of the locally normed Psychological Incapacity Rating Scale or PIRS (Ng and Apruebo, 2006) would even make the entire psychological assessment very credible.

The expert witness as the “hired gun”

Although the opinion of a witness would generally be inadmissible in evidence (Section 48, Rule 128 of the Revised Rules of Evidence), the opinion of an expert witness would nonetheless be admitted when this expert opined on “a matter requiring special knowledge, skill, experience or training which he is shown to possess” (Section 49, Rule 128).

Since the trial courts lacked the special knowledge to deal with the legal issues (Yuille, 1989), forensic clinical psychologists were then hired, although they would later be labelled and accused of being “hired guns” (Otto, 1989). But even before all these accusations, it all started with the judiciary’s concern on the use of “junk science” in the courts (Welch, 2006).

In Daubert, the role of the trial court judge as the “gate keeper” in the admissibility or inadmissibility of the evidences was emphasized (Neufeld, 2005). The Daubert came about because the general acceptance rule by the scientific community was practically abused. Expert testimonies were then merely generated based on the pure opinion or *ipse dixit* of the supposed expert (Mahle, February 2012).

The forensic clinical psychologist, who testified as an expert witness in the forensic setting, must also possess the required professional competencies. Under the Cube competency, the required professional competencies included the following: the foundational competency domain, which served as the building blocks of the profession; the functional competency domain, which encompassed the required professional activities; and the professional competency domain, which included the training activities, such as enrolling in doctoral or postdoctoral studies and/or continuing competencies (Varela and Conroy, 2012).

Research questions

In response to the identified theoretical and practical gaps in this study, the researcher asked this general and encompassing, but very important query, as follows:

How should forensic clinical psychologists in marital nullity adhere to responsible forensic psychological practices in the court setting?

Specifically, the researcher wanted to find out the answers to the following:

(1) What were the psychological practices of forensic clinical psychologists in the Philippines in marital nullification insofar as the in-take of their clients were concerned; in what way were these psychological practices in the Philippines different from the so-called responsible forensic psychological practices; how could these psychological practices guide the forensic clinical psychologists to act responsibly in their dealings with their clients and with the courts;

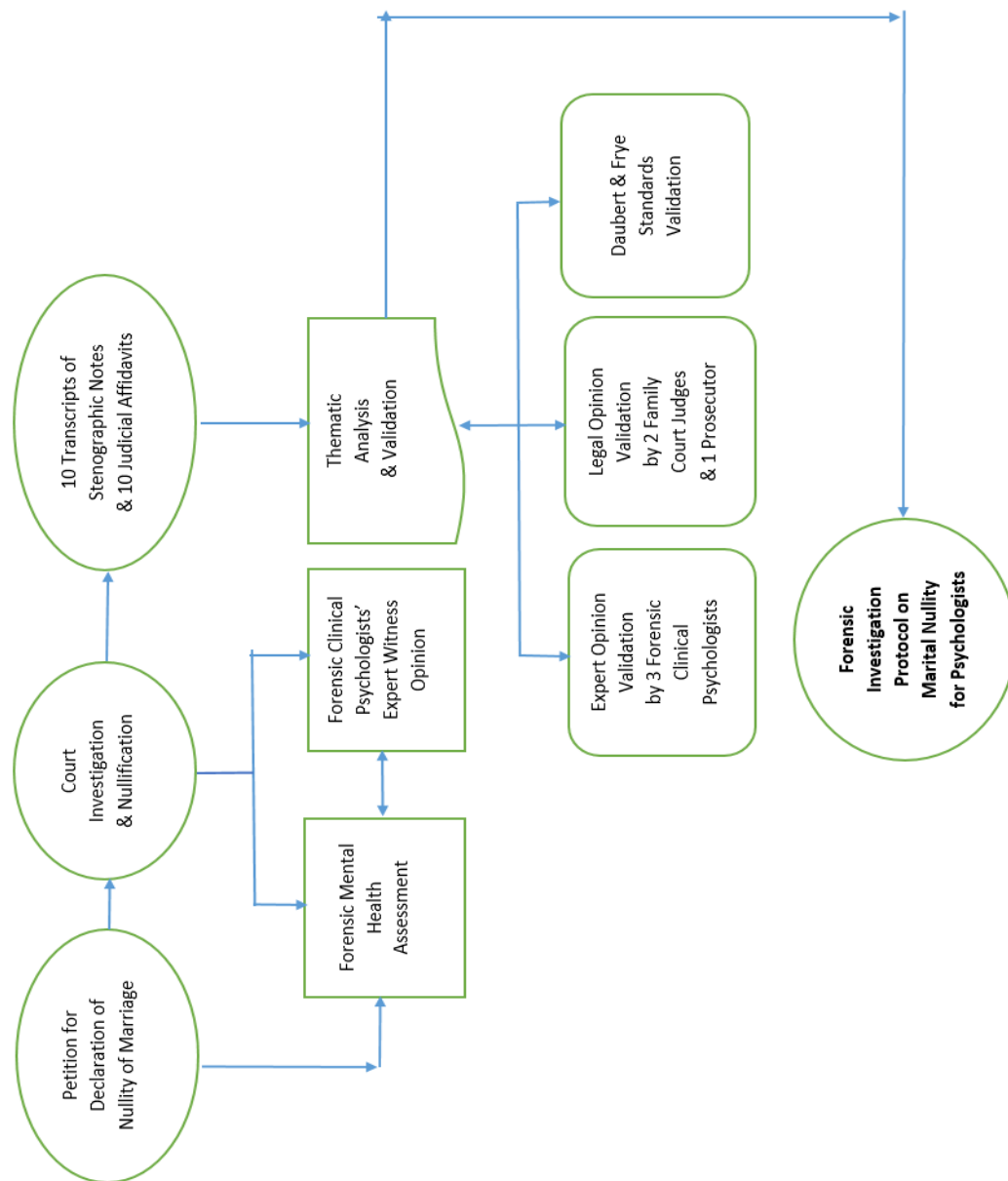
(2) What were the psychological practices of forensic clinical psychologists in the Philippines in marital nullification insofar as the forensic mental health assessment of their clients were concerned; in what way were these psychological practices in the Philippines different from the so-called responsible forensic practices; how could these practices guide the forensic clinical psychologists to act responsibly in their dealings with their clients and with the courts; and,

(3) What were the psychological practices of forensic clinical psychologists in the Philippines in marital nullification when they rendered their expert opinion in the courtroom; in what way were these psychological practices in the Philippines different from the so-called responsible forensic practices; how could these practices guide the forensic clinical psychologists to act responsibly when they rendered their expert opinion in the courtroom?

Conceptual framework

Anchored on the meanings obtained from the aforementioned literature and theoretical grounds, the researcher came up with the position that in order to establish a sound and scientific basis for strengthening the state-of-the-art of forensic investigation practice on marriage nullity to be contained in a reliable, trustworthy and professional protocol, a carefully, dialogically and exhaustively conducted qualitative research undertaking was essential.

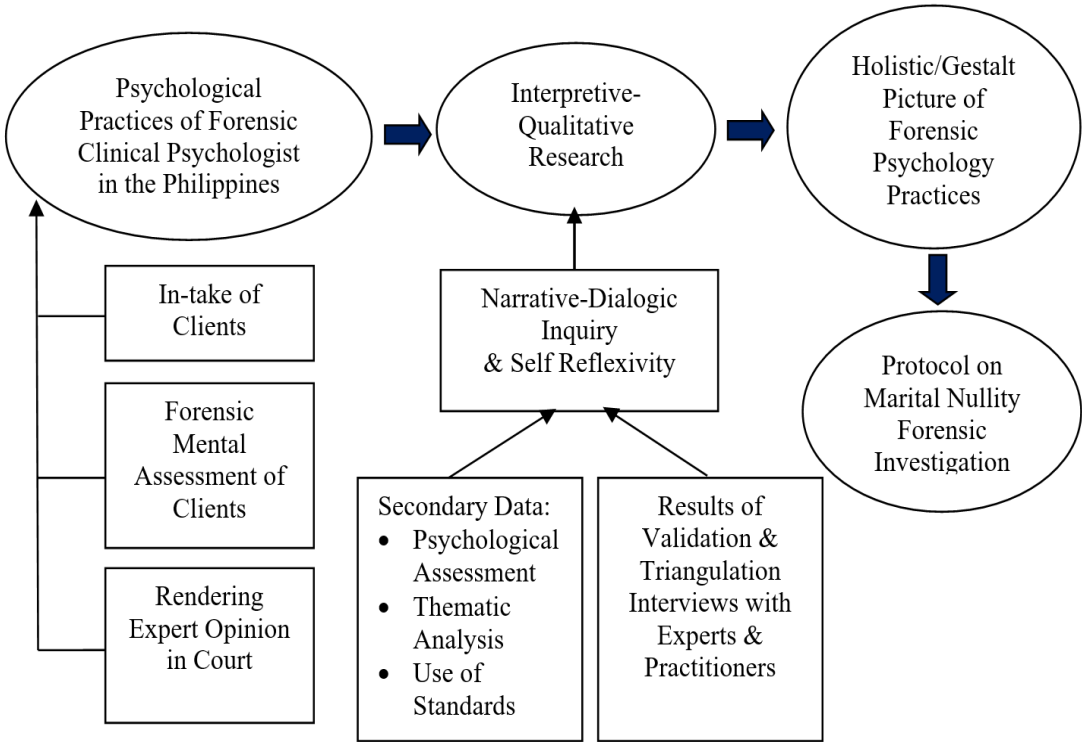
Figure 1 presented the researcher's position on how to strengthen the forensic protocol on marital nullification for psychologists in the Philippines.



Research paradigm

This study used the interpretivist research paradigm utilizing the narrative approach in deepening the meaning and crystalizing the secondary data as their contents were analyzed and critically validated by the experts and the practitioners. The interpretivist paradigm postulated that the researcher's values were integral in all phases of the research process, as this integrated human interest into the study by suggesting a reality (e.g., forensic issues on marriage nullity, the case of this inquiry) that could not be separated from the researcher's knowledge of it (no separation of subject and object).

Figure 2 illustrated the research paradigm.



In the light of the theory-driven (e.g., Daubert and Frye, etc.) and data-driven features of this research, it became obvious that a qualitative strategic inquiry was most appropriate. This being so, the study neither involved the setting of hypothesis nor an experimental research design or collection and analysis of quantitative data.

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