
Some Indications About
Canon 1095 in the Instruction
Dignitas Connubii

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Some Indications About Canon 1095 in the Instruction *Dignitas Connubii*

SUMMARY: I. Introduction. – II. Duties of the defender of the bond. – III. The assistance of experts and the criteria for their designation. – IV. The object of the questions for the expert. – V. The consequences of the established incapacity for consent by a party.

I. Introduction

1.1. The connection between substantive norms, which in juridic and logical categories are not infrequently understood as "primary," and procedural norms, understood as "secondary,"¹ is due to the very nature of procedural norms. In fact, according to the traditional framework proper to the canonical judicial system, the norms on the carrying out of the judicial process, that is, procedural norms, regulate the realization of the contents of the substantive norms in the process.² Procedural norms, therefore, do not determine only the form, the value and the timing of the procedural acts and the order in which they are carried out,³ but principally safeguard, in the procedural context, the substantive

1. E. T. LIEBMAN, *Manuale di diritto processuale civile*, t. I, 4th ed., Milano 1984, p. 30. Cf. G. CARCATERRA, *Lezioni di filosofia del diritto. Teoria del diritto positivo. Fondazione dei valori etici*, Roma, 1994, p. 83.

2. Cf. G. CHIOVENDA, *Principii di diritto processuale civile. Le azioni. Il processo di cognizione*, Napoli, 1980 (reprint of the 1923 edition), p. 100; F. CARNELUTTI, *Diritto e processo*, Napoli, 1958, p. 20.

3. Cf. A. LUGO, *Manuale di diritto processuale civile*, 15th ed., Milano 2005, p. 36.

law.⁴ In that sense, through the procedural norms the normative substantive law is activated, carried out and becomes the concrete and real case.

In the light of these premises one can discover the existence of a particular pertinence of the procedural norms of the Instruction *Dignitas connubii* to the substantive matrimonial norm on incapacity for consent, described in canon 1095, nn. 1°–3° of the Latin Code. In fact, given the importance and the difficulty of its interpretation and, consequently, of its procedural application, five preceptive norms are dedicated to it, giving rules for its proper application.⁵ Specifically they are the following:

a) article 56, § 4 on the duties of the defender of the bond in causes which have as their object the incapacities (*incapacitates*) with which canon 1095 is concerned;

b) article 203, § 1 on the need to employ in these causes the assistance of one or more experts, unless from the circumstances that would appear obviously useless;

c) article 205, § 2 on choosing experts who adhere to the principles of Christian anthropology;

d) article 209, §§ 1–3 on the object of the expert investigation that must be outlined by the questions or articles to be proposed to the expert by the judge, with precise reference to the three forms or types of incapacity for consent treated in canon 1095, nn. 1°–3°;

e) article 251 which, without specifically referring to canon 1095, requires the imposition on a party (in the cause) of a *vetitum*

4. F. ROBERTI, *De processibus*, vol. I, *De actione. De prae-suppositis processus et sententiae de merito*, In Civitate Vaticana 4th ed., 1956, p. 88: "Leges processuales dicuntur quae tutelam iuris substantivi seu materialis ordinant per processum." Cf. F. DELLA ROCCA, *Istituzioni di diritto processuale canonico*, Torino 1946, p. 6; C. DE DIEGO-LORA and R. RODRÍGUEZ-OCANA, *Lecciones de Derecho Procesal canónico. Parte general*, Pamplona 2003, p. 39.

It is quite properly observed, "resulta muy difícil, y muchas veces imposible, la eventual pretensión de querer encontrar los principios teológicos y eclesiológicos en la mayoría de los cánones procesales, sobre todo en los de la parte dinámica del proceso." J. L. ACEBAL LUJÁN, "Principios inspiradores del derecho procesal canónico," in AA.VV., *Cuestiones básicas de derecho procesal canónico*, Salamanca, 1993, p. 18.

5. In the Instruction of the S. Congregation for the Discipline of the Sacraments *Provida Mater* of 15 August 1936, only two articles made reference to *defectus consensus ob amen-tiam*, namely, 139 and 143 on experts.

Concerning the appointment of a guardian, both article 77 of the Instruction *Provida Mater* and article 97, §§ 1–2 of the present Instruction, use the expressions "rationis usu destitutus" and "minus firmæ mentis."

to contract a new marriage, whenever that person's permanent incapacity for marriage has been established in the course of the process.⁶

1.2. The concern which the new procedural document⁷ shows in relation to the substantive contents of the incapacity for consent described by canon 1095, is dictated not only by the quantitative increase in the causes of marriage nullity before ecclesiastical tribunals based on discretionary incapacity (c. 1095, n. 2°) and incapacity for assuming the essential obligations of marriage (c. 1095, n. 3°),⁸ but above all by the objective complexity of the norm in question. In fact, according to the authoritative opinion of the Pontifical Commission, expressed already during the period of the revision of the Pio-Benedictine Code of 1917, the substantive norm in question responds to the "exigentiae iuris naturalis," that is, "exigitur a lege naturali."⁹ Being therefore *ex lege naturali*,¹⁰ it can be applied also to marriages celebrated before the promulgation of the new Code, as Rotal jurisprudence tranquilly maintains.¹¹

On the other hand, however, the same Pontifical Commission observed that the grounds of nullity arising from the natural law were set out in the proposed new law in a systematic fashion, in order that ecclesiastical judges could apply the natural law

6. The implicit reference is to the introductory expression in canon 1095: "Sunt incapaces matrimonii celebrandi."

7. On the canonical-juridical nature of the Instruction, cf. G. P. MONTINI, "L'Istruzione «Dignitas connubii» nella gerarchia delle fonti," *Periodica de re canonica* 94 [2005] 417–476. On the relation of the new Instruction to incapacity for consent, cf. P. BIANCHI, "L'Istruzione «Dignitas connubii» e il c. 1095," *Periodica de re canonica* 94 [2005] 509–542.

8. At the Roman Rota during the year 2005, of the 126 definitive decisions, 57 (50 sentences, 7 decrees of ratification) concerned canon 1095 n. 2°, and 44 (39 sentences and 5 decrees of ratification) concerned canon 1095, n. 3°.

9. EX ACTIS PONTIFICIÆ COMMISSIONIS CODICI IURIS CANONICI RECOGNOSCENDO. *Cæus studiorum «De Matrimonio»* (Sessio X), in *Communicationes* 33 [2001] 236–237. Cf. also *Communicationes* 3 [1971] 77; 7 [1975] 39.

10. Cf. ACTA COMMISSIONIS. *Relatio complectens synthesim animadversionum ab Em. mis atque Exc. mis Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis*, in *Communicationes* 15 [1983] 231: "Maneat canon, qui simpliciter codificat normam iuris naturalis. [...] canon enim quosdam statuit limites (gravis anomalia, obligationes essentielles). Tribunalia ecclesiastica debent utique in singulis casibus iudicare, sed egent norma legali ad vitandum arbitrium et ut detur quædam uniformitas essentialis in iurisprudencia."

11. Cf. c. Stankiewicz, dec. 22 October 1998, RRDc., vol. XC, p. 613, n. 5; c. Defilippi, dec. 26 February 1999, RRDc., vol. XCI, p. 135, n. 5; c. Pinto, dec. 25 June 1999, RRDc., vol. XCI, p. 510, n. 6.

correctly on the basis of the written law, avoiding "tum iniustam rigiditatem tum reprobabilem laxitudinem."¹² Certainly in this material one does not encounter the feared jurisprudential rigidity, but rather the laxism in the application of the law. This is found in the accustomed reasoning of ecclesiastical sentences which not unfrequently identify a minimal preparation for sacramental marriage, insufficient human maturity understood in a general way or imprudence in behavior, with the lack of the necessary discretion of judgment or of the desired fitness for the essential obligations of marriage.

In this regard John Paul II pointed out to ecclesiastical judges that the personalistic aspects of marriage and the conception of marriage as a "mutual gift of persons" (c. 1057, § 2) can in no way justify the tendency in canonical literature and in jurisprudence "to broaden the requirements for capacity or psychological maturity and for the freedom or awareness necessary to contract marriage validly."¹³ On the contrary, those tendencies not only are in contrast with "the principle of indissolubility"¹⁴; but also inflict "a most serious *vulnus* on that right to marriage which is inalienable and independent of any human power."¹⁵ The Instruction *Dignitas connubii* therefore adopts the words of John Paul II on the real possibility of celebrating a valid sacramental marriage also "in a perspective of authentic personalism," inasmuch as "the Church's teaching implies the affirmation that marriage can be established as an indissoluble bond between the persons of the spouses, a bond essentially ordered to the good of the spouses themselves and of their children."¹⁶

Keeping in mind, then, that the perspective of an authentic personalism and of the interpersonal reality of marriage does not stand in opposition to the canonical-theological value of the institution of marriage and the family,¹⁷ the new Instruction, following the teaching of the Roman Pontiffs, is open also to contributions of

12. ACTA ET DOCUMENTA PONTIFICIAE COMMISSIONIS CODICI IURIS CANONICI RECOGNOSCENTO. *Congregatio Plenaria diebus 20-29 octobris 1981 habita*, Typis Polyglottis Vaticanis 1991, p. 445: "Capita nullitatis ex defectu discretionis et ex anomaliis psychicis non sunt iuris positivi Ecclesiae sed iuris naturalis." Cf. c. Stankiewicz, dec. 9 March 1995, RRDec., vol. LXXXVII, p. 177, n. 6.

13. JOHN PAUL II, *Allocution to the Roman Rota*, 27 January 1997, n. 2, in AAS 89 [1997] 487.

14. *Ibid.*, n. 2, p. 487.

15. JOHN PAUL II, *Allocution to the Roman Rota*, 21 January 1999, n. 7, in AAS 101 [1999] 626.

16. JOHN PAUL II, *Allocution to the Roman Rota*, 27 January 1997, n. 4, p. 488. Cf. Instruction *Dignitas connubii*, Introduction, pp. 8-9 (Latin-English edition).

17. JOHN PAUL II, *Allocution to the Roman Rota*, 27 January 1997, nn. 2-3, p. 487.

the psychological and psychiatric sciences,¹⁸ compatible with Christian anthropology, which offer "a truly complete vision of the person"¹⁹ and are not closed to transcendent values, that is, "to values and meanings which transcend the immanent 'given' and which allow human beings to tend towards the love of God and of their neighbor as their final vocation."²⁰

II. Duties of the defender of the bond

2.1. One can affirm correctly that the Instruction *Dignitas connubii* gives special importance to the office of the defender of the bond in causes of the nullity of marriage (cf. arts. 53-56; 59-60),²¹ fulfilling the wish previously expressed by John Paul II, in order to overcome the tendencies which he described

to redefine the defender's role to the point of confusing it with that of others taking part in the process, or to reduce it to some insignificant formality, rendering practically absent from the procedural dialectic the intervention of the qualified person who really investigates, proposes, and clarifies all that could reasonably be cited against nullity, with serious damage to the impartial administration of justice.²²

The same Pope, furthermore, dedicated also the entire discourse to the Roman Rota of 25 January 1988 "to the role of the defender of the bond in marriage nullity trials under the heading of psychic

18. Cf. G. VERSALDI, "Il contributo della psicologia nel diritto matrimoniale canonico," in AA.VV., *Antropologia interdisciplinare e formazione*, Bologna, 1997, pp. 409-453; A. STANKIEWICZ, "Breve nota sulla legittimità dell'applicazione della scienza psichiatrica e psicologica nelle cause di nullità del matrimonio," *Periodica de re canonica* 85 [1996] 67-81.

19. JOHN PAUL II, *Allocution to the Roman Rota*, 5 February 1987, n. 2, in AAS 79 [1987] 1454.

20. *Ibid.*, n. 4, p. 1455. Cf. Instruction *Dignitas connubii*, Introduction, pp. 8 ff (Latin-English edition): "Progressui doctrinali in cognitione instituti matrimonii et familiae accedit hoc nostro tempore progressus in scientiis humanis, praesertim psychologicis et psychiatricis, quae cum profundiore cognitionem hominis praebent, multum iuvare possunt ad pleniorum cognitionem eorum quae in homine requiruntur ut capax sit ad foedus coniugale ineundum."

21. Cf. P. BIANCHI, "L'istruzione «Dignitas connubii»," *op. cit.*, footnote 7, p. 517.

22. JOHN PAUL II, *Allocution to the Roman Rota*, 25 January 1988, n. 2, in AAS 80 [1988] 1179. Cf. R. RODRÍGUEZ-OCAÑA, "La función del defensor del vínculo (referencia a las causas matrimoniales por incapacidad)," in AA.VV., *Incapacidad consensual para las obligaciones matrimoniales*, Pamplona, 1991, pp. 319-361.