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

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

**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," 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. 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, but principally safeguard, in the procedural context, the substantive

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law. 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. Specifically they are the following:

a) article 56, § 4 on the duties of the defender of the bond in cases 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*

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


8. At the Roman Rota during the year 2005, of the 126 definitive decisions, 57 (45 sentences, 1 decade of ratification) concerned canon 1095 n. 2°, and 49 (39 sentences and 5 decades of ratification) concerned canon 1095, n. 3°.


10. Cf. ACTA COMMISSIONIS. Relatio complectens synthesim animadversionum ab Em.mis utique Exc.mis Patribus Commissionis ad novissimum schema Codices Iuris Canonicorum eخلاير، cum responsionibus a Secretaria et Consultoribus datis, in Communia 15 (1983) 231: “Maneat canon, qui simplicitatem codicis non tam naturalis [...] canon enim quidam statatum limites (gravus anomalia, obligationes essentiales). Tribunata ecclesiastica debent equitatem in singulis casibus judicare, sed egenum norma legali ad viatandum arbitrium et ut detur quaedam uniformitas essentiae in iurisprudentia.”


12. The concern which the new procedural document 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°), 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 “existentiae iuris naturalis,” that is, “exiguitur a lege naturali.” It is therefore *ex lege naturali*, it can be applied also to marriages celebrated before the promulgation of the new Code, as Rotal jurisprudence tranquilly maintains.

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
correctly on the basis of the written law, avoiding "tum inustam rigiditatem tum reprobabillem laxitatum." Certainly in this material one does not encounter the feared jurisprudential rigidity, but rather the lex in the application of the law. This is found in the accustomed reasoning of ecclesiastical sentences which not infrequently 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." On the contrary, those tendencies not only are in contrast with "the principle of indissolubility," but also inflict "a most serious vulnus on that right to marriage which is inalienable and independent of any human power." The Instruction Dignitas coniubii 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." 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, the new Instruction, following the teaching of the Roman Pontiffs, is open also to contributions of the psychological and psychiatric sciences, compatible with Christian anthropology, which offer "a truly complete vision of the person" 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 coniubii 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), 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.

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


